



Justice **DENIED**

No charge, no trial, no exit

Guantánamo's Sham Periodic Review Board
Process under the Trump Administration

11th January 2019

REPRIEVE

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About Reprieve

Reprieve is a non-profit organization that provides free legal and investigative support to some of the world's most vulnerable people: those facing execution, and those victimised by states' abusive counter-terror policies – rendition, torture, extrajudicial imprisonment and extrajudicial killing.

Reprieve led the fight for access to the men held at Guantánamo, and were one of the very first organizations allowed inside. Reprieve's Founder, Clive Stafford Smith, was one of the three lawyers who demanded and successfully sued for access to the prison. Since then, Reprieve has secured freedom for more than 80 men illegally detained without charge or trial.

For more information, please visit www.reprieve.org.uk.

1. Executive Summary

The US government continues to use its Naval Base at Guantánamo Bay for the unlawful detention of 40 men.¹ The majority of these men have been detained at the base for more than 16 years with neither charge nor trial; indeed the US has only levelled charges against nine of the current detainees. Of the remaining 31 who are not under any charge, five have long been cleared for release but remain detained due to inaction by the Trump Administration.

The Periodic Review Board (PRB) is a flawed administrative process originally framed by the Obama Administration to review whether detention is still warranted for the remaining Guantánamo detainees who are known as “forever prisoners.”

The PRB procedure occupies the space that rightfully should belong to the criminal courts. It is premised on replacing proving guilt beyond a reasonable doubt with an arbitrary assessment of “threat-level”. This is the perverse but inevitable outcome of a system of indefinite detention without charge or trial. Without defined charges that can be challenged in court, the government has forced itself to create a host of different non-legal standards on which to judge whether one should be detained forever or released. Unsurprisingly, this alternative system, which hasn’t undergone the centuries of development that defines the US’ criminal judicial system, is arbitrary and inherently flawed.

For an administrative review board to meet the standards of International Humanitarian Law (IHL) it must be fully independent and impartial.² The PRB, as it currently operates, fails to meet any standards of independence and impartiality and instead acts as a conduit for decisions which ultimately lie with the executive branch – a branch currently led by a President who has publically declared that “there should be no further releases from Gitmo.”³ As a result, the PRB is a rigged system which mirrors the politics of the administration which controls it. Not one detainee has been cleared for release in the two years since President Trump took office and no detainee will be released until there is legislative or judicial intervention to ensure that those left in Guantánamo can confront charges in a court of law and access a legitimate administrative body which can assess any need for continued detention as required by the laws of war and effect the release of those the government will not charge with crimes.

International Humanitarian Law dictates that an administrative body overseeing continued law of war detention must be independent and impartial.⁴ The Inter-American Commission on Human Rights has cited the following criteria as necessary for meeting that standard:⁵

1. The body must be **transparent** regarding its procedures and their implementation;
2. The body must exhibit **direct decision-making power**;

¹ ACLU, *Guantánamo by the Numbers*, aclu.org (Last Updated May 2018), <https://www.aclu.org/issues/national-security/detention/Guantánamo-numbers>.

² See Jelena Pejic, *Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence*, 87 Int’l Review of the Red Cross 375, 386-87 (June 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_858_pejic.pdf; See also ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper 9 (Nov. 2014), <https://www.icrc.org/en/download/file/1980/security-detention-position-paper-icrc-11-2014.pdf>.

³ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 3, 2017, 9:20 AM), <https://twitter.com/realDonaldTrump/status/816333480409833472>.

⁴ See Jelena Pejic, *Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence*, 87 Int’l Review of the Red Cross 375, 386-87 (June 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_858_pejic.pdf; See also ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper 9 (Nov. 2014), <https://www.icrc.org/en/download/file/1980/security-detention-position-paper-icrc-11-2014.pdf>.

⁵ Chatham House & ICRC, *Expert meeting on procedural safeguards for security detention in non-international armed conflicts London, 22-23 September 2008*, 91 Int’l Review of the Red Cross 878-79 (Dec. 2009), cited within *Towards the Closure of Guantánamo*, IACHR 106-07 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantánamo.pdf>.

3. The review must be precipitated on **access to all available information**;
4. Members of the review body should be appointed from outside the chain of command or at least be **effectively independent** from the latter's influence;
5. Members of the review body must be **permanent** and internment review should be their only task; and
6. At least one of the body's members should be a **qualified lawyer**

It is impossible to know whether the PRB includes these last two elements, as nothing is publicly known about the members of the Board beyond their organizational origins. The Board unequivocally fails to meet any of the first four elements.

First, there is no transparency in the Board's procedures. The standard for determining a detainee's freedom by the PRB is whether the detainee poses a "significant threat" to national security.⁶ However, there is no clear criteria to distinguish a "significant threat".⁷ With no transparency about what constitutes a significant threat, basic due process is undermined. For example, in one case the Board instructed the detainee not to address historical allegations made against him that he insisted were false on the basis that historical allegations were not relevant to the PRB process; the Board then specifically based its refusal to clear him on those allegations.⁸ Equally, Board members cannot be held accountable for their arbitrary lines of questioning. Instead, Board members are given free range to magnify any of a range of issues into a basis for continued indefinite detention.

Second, the Board has no decision-making power. The stated role of the PRB is only "to assist the Executive Branch" by making recommendations for transfer.⁹ Even before a PRB recommendation is finalized, it must be approved by a Senior Review Committee composed of high-ranking Executive Branch officials. Following that hurdle, the ultimate release still lies with President Trump, the very man who campaigned on a promise keep Guantánamo open and hold detainees there indefinitely.¹⁰ This explains why five detainees were cleared for release under the Obama Administration remain detained today under the Trump Administration with no prospects of freedom.

Third, the Board does not have access to highly relevant information. The Board relies on government evidence, generally using the government's summary of allegations as fact when making its final determinations. However, efforts by the lawyers for detainees to import known classified evidence that refute these allegations have been blocked. This is particularly troubling when considering that many Guantánamo detainees were seized on the basis of so-called "intelligence" obtained by major government pay-outs and the CIA torture program.

Fourth, members of the Board and its Senior Review Committee are not independent, but rather are part of the military and the Executive Branch. Government influence over the entire procedure is structurally inevitable.

The PRB therefore does not meet required standards of independence or impartiality. The PRB system's flaws are compounded by the fact that the majority of Guantánamo detainees are denied the right to plead their innocence in criminal proceedings – even if it were accepted that the Military Commission process is, itself, legally acceptable.

Unfortunately, engagement with the PRB can hinder a detainee's prospects of release due to its coercive nature. Through its lines of questioning and the language in its final determinations, the Board has made it very clear to detainees that their only hope of a positive ruling is to make a confession (which in many instances the detainee

⁶ *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, §2 (Mar. 10, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba> [hereinafter PRB EO 13567]. Emphasis added.

⁷ The PRB Implementing guidelines states that the Board may consider the detainee compendium which includes "baseline threat information" and "Information pertaining to the detainee's potential threat if transferred or released." Deputy Secretary of Defense, *Policy Memorandum: Implementing Guidelines for Periodic Review of Detainees Held at Guantánamo Bay per Executive Order 13567* 7 (Mar. 28, 2017), https://www.prs.mil/Portals/60/Documents/2017_PRB_Policy_Memo_Signed.pdf [hereinafter PRB Implementing Guidelines 2017].

⁸ Interview with Clive Stafford Smith, Private Counsel to Khalid Qasim and Reprieve founder, (Dec. 11, 2018) [by phone].

⁹ *About the PRB*, Periodic Review Secretariat, <http://www.prs.mil/About-the-PRB>.

¹⁰ For example, see David Welna, *Trump Has Vowed To Fill Guantánamo With 'Some Bad Dudes' — But Who?*, NPR (Nov. 14, 2016), <https://www.npr.org/sections/parallels/2016/11/14/502007304/trump-has-vowed-to-fill-guantanamo-with-some-bad-dudes-but-who>.

insists to be false) to prior bad acts, to show “contrition.” The promise of freedom, however ephemeral, is a powerful coercive tool. Involuntary statements may then be used against detainees in all proceedings to mandate continued detention. Additionally, PRB procedures have scrapped the age-old principle of legal privilege, making available to the government any information procured from meetings between a detainee and his representative in preparation for a PRB hearing. Lastly, even though PRB hearings are rife with delays (sometimes of several years), the government often points to the PRB’s function to thwart any legal challenge in an Article III *habeas* court, stating that a regular assessment of a detainee’s threat-level through the PRB process bolsters the legal justifications for continued detainment.

The negative impact the PRB can have on *habeas* proceedings comes in a context where *habeas* proceedings themselves have become increasingly unfair. A detainee’s right to *habeas* has been repeatedly eroded by the D.C. Circuit which has worked to unravel *habeas* protections through a series of decisions since 2009 – such that the court has now effectively ruled that an Article III tribunal does not have the power to order the prisoner’s release.¹¹

The net result of these elements—no charges or trials, a toothless *habeas* process, and a detention review process beholden to an administration that champions indefinite detention—is clear: There is no way out of Guantánamo.

Recommendations

Given the current dysfunctional state of the *habeas* system and the fact that the PRB is not a realistic avenue for securing release, 31 detainees remained locked in Guantánamo Bay in what can only be classified as wholly arbitrary detention at the hands of US authorities. Therefore, the U.S. Government must:

- 1. Immediately facilitate the safe repatriation or resettlement of the 5 men who have long been cleared for release.**
- 2. Establish a functioning administrative review process which can more promptly release detainees whose detention is not warranted by the laws of war.**
- 3. Provide fair trials for those who can be charged, and release the others thereby ending indefinite detention without charge at Guantánamo.**

2. Introduction

The Periodic Review Board (PRB) is a flawed administrative process occupying the space that has traditionally belonged to courts – determining whether a person can be lawfully detained. Instead of aiming to prove guilt or innocence, as a true legal system would, the Board assesses “threat-level.”¹² Since no charges can be challenged in court, the government has created secret, non-legal and varying standards on which to judge whether an individual should be detained forever or released. Meanwhile, the person in charge of the system, Commander-in-Chief and President Donald Trump, has said that nobody should be released,¹³ prejudging the system in much the same way as the Eighteenth Century Bill of Attainder.¹⁴ Unsurprisingly, this alternative system, which has

¹¹ Lyle Denniston, *D.C. Circuit: Last Stop for Detainees?*, SCOTUSblog (Mar. 9, 2012), <http://www.scotusblog.com/2012/03/d-c-circuit-last-stop-for-detainees/>.

¹² *About the PRB*, Periodic Review Secretariat, <http://www.prs.mil/About-the-PRB>.

¹³ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 3, 2017, 9:20 AM), <https://twitter.com/realDonaldTrump/status/816333480409833472>.

¹⁴ The Bill of Attainder is specifically outlawed in the U.S. Constitution, Article I, §9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”). It was a notorious method of oppressing the perceived enemies of the state where a statute or executive order would adjudicate someone guilty and allow their detention without a judicial trial.

not undergone the centuries of development that define the US judicial system, is arbitrary and inherently flawed.

A. Historical and Mechanical Overview

i. Previous Review Processes

Prior to the creation of the PRB in 2011, there were three other major review processes to assess whether detainees should continue to be detained or be transferred. President Bush established the first two of these, the Combatant Status Review Tribunals (CRSTs) in 2004, followed by Administrative Review Boards (ARBs). The aim of the former, in theory, was to determine whether a detainee was an “enemy combatant,”¹⁵ while the latter was tasked with assessing the continued detention of each detainee on an annual basis.¹⁶ These early detention assessments were rife with procedural and substantive flaws, many of which are replicated in the current PRB process. In the CRSTs and ARBs, the detainee’s case was put by a Personal Representative (PR) who was specifically *not* on his side and all statements to the PR could be used as the basis of continued detention. The allegations were, for the most part, classified, and the detainee was not permitted to know what they were or who was making them, absent a cursory summary.

In 2009, President Obama intended that an Inter-Agency Review Task Force (IART) should help to fulfil his first promise in office, which was to close Guantánamo within a year of his inauguration – a commitment that has not been fulfilled. In 2010, the Task Force released a report making recommendations for each of the 240 remaining Guantánamo detainees.¹⁷ These recommendations fell into 3 categories (i) prosecution in the military commissions system, (ii) release and transfer to another country, or (iii) continued detention at Guantánamo without charge.¹⁸ Through this last category, the IART codified the Obama Administration’s position that it is legitimate to hold people without charge nor trial at Guantánamo Bay. It created the category, “forever prisoners.” Since that time, during the Trump administration, officials have stated the official position that a detainee can be held for the duration of the so-called ‘War on Terror’ even if, like the Hundred Years War (1337-1453), it lasts for a century or more.¹⁹

ii. PRB Beginnings: Fits and Starts

According to Charlie Savage of the New York Times, “[b]ecause the war against Al Qaeda may be indefinite, the government decided it needed a process to decide whether it still made sense to keep holding a particular prisoner as the years passed.”²⁰ In May 2011, President Obama created the Periodic Review Board through Executive Order 13567.²¹ This was more than 2 years after President Obama had signed an executive order to close the prison and several months after the completion of the IART review process. When President Obama issued the Executive Order, it required that all initial reviews start “as soon as possible but no later than 1 year

¹⁵ Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004).

¹⁶ Order from Paul Wolfowitz, Deputy Sec’y of Def., Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantánamo Bay Naval Base, Cuba (May 11, 2004).

¹⁷ U.S. Dep’t of Justice *et. al.*, *Final Report: Guantánamo Review Task Force*, JTF-GTMO (Jan. 22, 2010), <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/Guantanamo-review-final-report.pdf>.

¹⁸ *Id.*

¹⁹ “Judge Thomas Hogan asked US Justice Department attorney Ronald Wiltsie whether the Government’s legal justification for detaining the men, based on the Authorization for the Use of Military Force, would allow them to be imprisoned for 116 years – the duration of the Hundred Years’ War between England and France. ‘Yes,’ Wiltsie replied.” *Guantánamo prisoners challenge indefinite detention*, Reprieve (Jul. 11, 2018), <https://reprieve.org.uk/update/guantanamo-prisoners-challenge-indefinite-detention/>; *See also* Daphne Eviatar, “We Could Hold Them for 100 Years If the Conflict Lasts for 100 Years”, Just Security (Jul. 17, 2018), <https://www.justsecurity.org/59491/https-justsecurity-org-59491-we-hold-100-years-conflict-lasts-100-years-the-government-admitted/>.

²⁰ Charlie Savage, *The Fight Over Guantánamo’s Parole Board, Explained*, NY Times (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/us/politics/Guantanamo-bay-parole-periodic-review-board.html>.

²¹ *See* PRB EO 13567.

from the date of this order.”²² However, it took a further 5 years for the government to complete all of the initial hearings.²³

In the public fact sheet released along with the executive order, President Obama argued that that “there are certain Guantánamo detainees who have not been charged, convicted, or designated for transfer, but must continue to be detained because they in effect, remain at war with the United States.”²⁴ In other words, the PRB was uniquely created to deal with “forever prisoners.”

iii. Composition and Mechanics of the PRB

The PRB does not address the legality of a detainee’s law of war detention, but instead purports to make discretionary determinations about whether or not a detainee represents a continuing “significant threat” to the security of the U.S.²⁵ In making this assessment, the Board reviews materials in the detainee’s case file as provided by the Periodic Review Secretariat (PRS), which includes a Classified Detainee Compendium compiled by the U.S. Intelligence Community and the work product of any prior PRB proceeding.²⁶ Section 3(C) of this report details the flawed nature of these compendiums.

The PRB’s official role is only “to assist the executive branch” by making recommendations for transfer.²⁷ They are executive members or other senior representatives of the Departments of State, Defense, Justice, and Homeland Security, the Director of National Intelligence and the Joint Chiefs of Staff.²⁸ The Board operates by consensus, with each department or agency having a veto.²⁹ Then, the “principals”—that is, Executive-appointed cabinet-level officials from the same six departments represented on the PRB—are allotted 30 days to object to the PRB’s disposition of any given detainee.³⁰ Any objection triggers a further review process among these principals.

The process allows for detainee participation “as appropriate.”³¹ What this means in practice is that detainees are provided with an unclassified *one page* written summary of the information the PRB will consider and are permitted to respond with statements written by themselves and by witnesses if they can obtain them and if they are approved (they are often not).³² Detainees do not have Board-appointed counsel, but are allowed private counsel if they can obtain one with the necessary security clearances. Counsel will have the right to review materials in the detainee’s classified compendium “except in the rare instances where doing so would put the national security at risk.”³³ Detainees are also provided with a “personal representative” (PR) for each PRB proceeding. PRs are uniformed military officers who are appointed by the Board to advocate for each detainee,³⁴ but again they have no legal privilege with their detainee.

²² *Id.* At § 3(a).

²³ The first Initial Review was on Nov. 11, 2013. See *Initial Review*, Periodic Review Secretariat, <http://www.prs.mil/Review-Information/Initial-Review/>.

²⁴ Press Office, *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, Obama White House 2 (Mar. 7, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

²⁵ HRF, *Fact Sheet: Guantánamo Periodic Review Board*, humanrightsfirst.org (Apr. 2018), <http://www.humanrightsfirst.org/sites/default/files/guantanamo-prb-fact-sheet.pdf> [hereinafter HRF PRB Fact Sheet]; PRB Implementing Guidelines 2017 at 6.

²⁶ *Id.*

²⁷ PRB Implementing Guidelines 2017 at 17. Emphasis added.

²⁸ HRF PRB Fact Sheet.

²⁹ PRB Implementing Guidelines 2017 at 17; Charlie Savage, *The Fight Over Guantánamo’s Parole Board, Explained*, NY Times (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/us/politics/guantanamo-bay-parole-periodic-review-board.html>.

³⁰ PRB EO 13567 at §3(d).

³¹ *About the PRB*, Periodic Review Secretariat, <http://www.prs.mil/About-the-PRB>.

³² *Id.*

³³ *Id.*

³⁴ PRB Implementing Guidelines 2017 at 10.

Each detainee who had not been cleared for release under the IART was given the option to participate in an “Initial Review” before the PRB.³⁵ If the detainee received a negative determination following their review, a “File Review” (a review on the papers made by the same Board members) is scheduled within six months. Should a detainee receive an affirmative determination based on his File Review, he is granted a “Full Review” (effectively a second hearing, not unlike the initial). Regardless of a detainee’s success at the File Review level, a “Subsequent Full Review” is automatically scheduled three years from the date of the detainee’s Initial Review.³⁶ These automatically scheduled reviews (previously termed “Triennial Reviews”) recently changed to be scheduled once every *two* years.

Every PRB Review hearing takes the following format:

PART ONE: UNCLASSIFIED SESSION [9 AM]	
<p>[1] The Presiding Member explains the purpose of the hearing</p> <p>[2] The Presiding Member reads out the government's unclassified summary of the evidence</p> <p>[3] The PR and Personal Counsel, if present, each read a prepared statement on behalf of the detainee</p> <p>[4] If he so chooses, the detainee reads out a prepared statement</p>	<p><i>NGO observers and press can monitor this session from another location by live video feed that plays on delay.</i></p> <p><i>This session is entirely scripted. All statements are submitted to the government prior to the proceeding and the government redacts any statements it deems to be classified.</i></p> <p><i>Private counsel and detainees are warned that if they deviate from their script, the live feed will be cut.</i></p>
PART TWO: BREAK	
<p>15 minutes</p>	<p><i>Detainees legs are chained together and to the floor, so any movement during this break requires the assistance of 3-5 guards in riot gear to escort the man from the formal conference room to the restroom.</i></p>
PART THREE: CLASSIFIED SESSION	
<p>[1] The Presiding Member will ask the detainee if he wishes to participate in questioning to which the detainee will likely agree</p> <p>[2] The six Board Members take turns asking the detainee questions</p>	<p><i>This session is classified, so the live feed streaming to NGO observers and the press is cut.</i></p> <p><i>Private counsel, if present, may interject if they think a question is inappropriate (e.g., backwards looking), but there is no method by which to preserve these objections, besides their memorialization in the classified transcript.</i></p>

The PRB either recommends continued law of war detention or the detainee’s transfer. Eligibility for transfer is a policy recommendation rather than a legal right.³⁷ As such, a decision by the board to put a detainee on the transfer list does not necessarily mean he will be released.³⁸

³⁵ About the PRB, Periodic Review Secretariat, <http://www.prs.mil/About-the-PRB>.

³⁶ HRF PRB Fact Sheet; *see also* Periodic Review Secretariat, *About the Periodic Review Board*, <http://www.prs.mil/About-the-PRB/>.

³⁷ About the PRB, Periodic Review Secretariat, <http://www.prs.mil/About-the-PRB>.

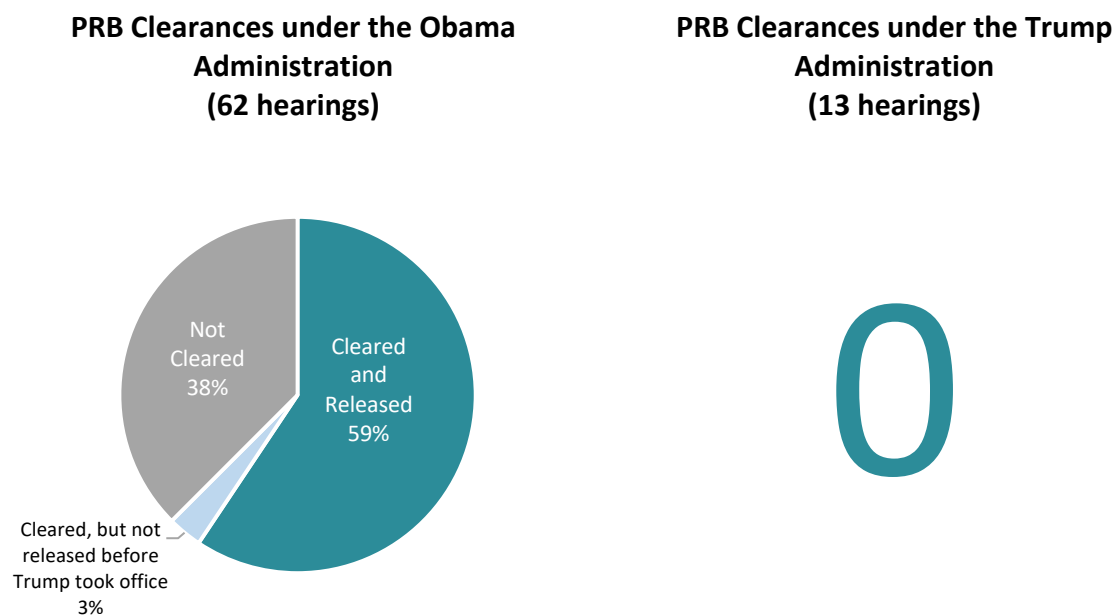
³⁸ *Id.*

B. The Trump Effect

Under the Obama Administration, the PRB process could be remarkably unfair on a most basic level.³⁹ However, the impact of an unfair system is even starker under President Trump.

President Trump campaigned on a promise to keep Guantánamo open, promising to “load it up” with “bad dudes.”⁴⁰ As president-elect, he tweeted: “There should be no further releases from Gitmo. These are extremely dangerous people and should not be allowed back onto the battlefield.”⁴¹ After his election in November 2016, his campaign rhetoric was reflected in policies implemented by his administration: on January 30, 2018, President Trump signed Executive Order 13823 to keep Guantánamo open, explicitly mentioning the possibility of sending new detainees there.⁴² To underscore this campaign promise, the Trump Administration also shuttered the State Department's Office of the Special Envoy for Guantánamo Closure, an office mandated to negotiate the resettlement of Guantánamo detainees cleared for release.⁴³ In sum, the decision to release a cleared detainee has long been a political one, but now that authority has been handed over to a politician with a pronounced interest in keeping individuals detained forever.

The last person to secure their freedom through the PRB process was Mohammad Al-Ansi. Mr. Al-Ansi was cleared six weeks before President Trump assumed office two years ago, and released just five days before inauguration.⁴⁴ Under the Trump Administration, the Period Review Board has continued functioning in name only, as not a single detainee has been cleared for transfer since January 2017. Over 60% of detainees (38 of 62) who received PRBs under the Obama administration were cleared for transfer, and of those cleared through the PRB process, 95% were released to their home countries or transferred to third countries.



³⁹ See Khalid Qasim's case study in § 3(C)(iv).

⁴⁰ Associated Press, *Trump: Load Guantanamo Bay Up with 'Bad Dudes'*, YouTube (Feb. 23, 2016), <https://www.youtube.com/watch?v=j7dmMI3CtKI>.

⁴¹ Zoe Tillman, *A Trump Tweet Is At The Heart Of The Latest Challenge To Guantánamo Bay Detentions*, BuzzFeed News (Jan. 11, 2018), https://www.buzzfeed.com/zoetillman/a-trump-tweet-is-at-the-heart-of-the-latest-challenge-to?utm_term=.qyQJzwRVVvk#.jpQXEpAqq0.

⁴² *Protecting America Through Lawful Detention of Terrorists*, Exec. Order No. 13823, 83 Fed. Reg. 23, 4831 (Jan. 30, 2018), http://www.prs.mil/Portals/60/Documents/Governance/EO13823_signed_30_Jan_2018.pdf (“the United States may transport additional detainees to U.S. Naval Station Guantánamo Bay when lawful and necessary to protect the Nation”).

⁴³ By Charlie Savage, Declan Walsh and Dionne Searcey, *Deported to Libya, ex-Gitmo detainees vanish. Will others meet a similar fate?* N.Y. Times (Apr. 23, 2018), <https://www.nytimes.com/2018/04/23/us/politics/guantanamo-detainees-repatriation-libya.html>.

⁴⁴ *Guantánamo Periodic Review Guide*, Miami Herald (Sept. 21, 2016; updated Feb. 7, 2018), <http://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article68333292.html>.

Proponents of continued indefinite detention at Guantánamo Bay argue that this lack of clearance reflects the fact that until this point, the PRBs have been successful and only hardened terrorists remain at the detention camp.⁴⁵ This does not even pretend to explain why five detainees (representing 16% of those not facing military commissions) who have been cleared for a long time remain in Guantánamo. In reality, the other prisoners include “no value” detainees from Yemen and elsewhere whose sole crime seems to be that they come from a war torn country, along with a septuagenarian Pakistani man and a taxi driver from Karachi. The PRB’s failure to clear a single detainee in nearly three years is far removed from any threat posed by the detainees themselves, but rather reflects the politics of the current administration which has complete control over Board decisions.

In sum, President Trump’s predetermination that no one should be released from Guantánamo dictates the result of the PRB process: men who were cleared for release just prior to Trump’s presidency remain detained at Guantánamo several years later; men who go through the PRB process during his presidency are uniformly denied clearance or release. Putting aside the PRB’s flawed system for making determinations, no one will leave the prison camp unless there is a dramatic shift in the administration’s position, or unless there is congressional or judicial intervention.

3. An Illegitimate Administrative Process: The PRB Fails to Meet All Elements of Independence and Impartiality

The Periodic Review Board Secretariat describes itself as an “administrative interagency process,”⁴⁶ but this label is misleading. The PRB falls short of all international standards for both administrative agencies and law of war tribunals. By deeming itself an *administrative* process, the PRB Secretariat is seeking to shield its arbitrary hearings from any form of judicial review or accountability.

Under IHL and international human rights law (IHRL), the U.S. is required to meet certain standards with regards to a detainee’s right to remedy via the tribunals that are responsible for overseeing detention at Guantánamo.⁴⁷ These two obligations – remedy and tribunal – are interrelated: for any adjudicating body to satisfy this right to remedy, that body must meet the tribunal standards of independence and impartiality. With this legal backdrop in mind, the International Committee of the Red Cross (ICRC) has declared that any review of the lawfulness of administrative detention must be carried out by an independent and impartial body.⁴⁸ The Inter-American

⁴⁵ “And let’s not forget, the individuals still left in Guantánamo are the worst of the worst.” Congressman Bradley Byrne (R-AL), *Press Release: Byrne, House Act to Stop Release of Terrorists*, Byrne.house.gov (Sept. 15, 2018), <https://byrne.house.gov/media-center/press-releases/byrne-house-act-to-stop-release-of-terrorists>; “The remaining detainee population is generally composed of hardened and unrepentant terrorist.” Congressman Ron DeSantis (R-FL), United States. Cong. House. Subcommittee on National Security of the Committee on Oversight and Government Reform. *Guantánamo Bay: The Remaining Detainees. Hearing*, May 24, 2016. 114th Cong. 2nd sess. U.S. Government Publishing Office, <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg23643/html/CHRG-114hhrg23643.htm>. “Republicans have lately adopted a new talking point: that the less risky detainees have been long since transferred, so only the most dangerous prisoners remain.” Charlie Savage & Scott Shane, *G.O.P. Goes Astray on Guantánamo. So Does Obama*, N.Y. Times (Mar. 7, 2018), <https://www.nytimes.com/2016/03/07/us/politics/Guantánamo-bay-political-talk-veers-from-facts.html>.

⁴⁶ Periodic Review Secretariat, *About the Periodic Review Board*, <http://www.prs.mil/About-the-PRB/>.

⁴⁷ See Universal Declaration of Human Rights art. 8, Dec. 10, 1948, GA Res. 217 A (III), A/810 at 71; International Covenant of Civil and Political Rights art. 2, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Mar. 7, 1966, 660 U.N.T.S. 195; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3. See also, Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907; Protocol Additional to the Geneva Conventions 12 August 1949 (I) Relating to the Protection of Victims of International Armed Conflicts art. 91, June 8, 1977, 1125 U.N.T.S. 3; Rome Statute of the International Criminal Court arts. 68 & 75, Jul. 17, 1998; American Convention on Human Rights art. 25, Nov. 21, 1969, 1144 U.N.T.S. 143; American Declaration of the Rights and Duties of Man arts. 18 & 24, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

⁴⁸ Jelena Pejic, *Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence*, 87 Int’l Review of the Red Cross 375, 386 (June 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_858_pejic.pdf.

Commission on Human Rights (IACHR), referring to Guantánamo, states that a review body must exhibit certain characteristics to be fully independent and impartial:⁴⁹

1. **The body must be transparent regarding its procedures and their implementation;**
2. **The body must exhibit direct decision-making power;**
3. **The review must be precipitated on access to all available information;**
4. **Members of the review body should be appointed from outside the chain of command or at least be effectively independent from the latter's influence;**
5. **Members of the review body must be permanent and internment review should be their only task; and**
6. **At least one of the body's members should be a qualified lawyer**

The PRB, as the tribunal-like mechanism responsible for effectuating the right to remedy, and as the tribunal available to the uncharged Guantánamo detainees, fails to meet any of these guidelines, rendering it an illegitimate administrative process under both humanitarian and human rights law.

A. Transparency of the Procedures and their Implementation

There is no transparency in what the Board considers when determining whether a detainee is suitable for release. The only enumerated standard is that the detainee cannot pose a “significant threat,” but what the Board considers in making this determination is unknown. Working in such opacity allows Board members to magnify anything that they deem important, leading to shifting allegations, arbitrary lines of questioning and an unfair emphasis on a detainee’s level of “compliance.”

i. What is a “Significant Threat”? No One Knows

Detainees before the PRB have not been charged with crimes. Therefore, the Board is not tasked with, nor in a position to, judge the legality of their detention. The purported “standard” for determining a detainee’s freedom by the PRB is described in a single sentence in Executive Order 13567: “Continued law of war detention is warranted for a detainee subject to the periodic review...if it is necessary to protect against a *significant threat* to the security of the United States.”⁵⁰

Since the creation of the PRB, only extremely general criteria for determining a “significant threat” have been distinguished. The list of factors which the “may consider” is extremely vague and covers historical allegations summarized in the Detainee Compendium [*see §3(C) for a discussion of the problematic nature of these compendiums*] and “information pertaining to the detainee’s potential threat if transferred or released.”⁵¹ As demonstrated below, The fact that the set of factors the Board can consider are so broadly defined, there is little for detainees and their lawyers to look at for guidance before their hearings. Without any transparency, detainees face moving goalposts at their PRB hearings and Board members are not held accountable for their reliance on shifting government allegations and arbitrary lines of questioning.

ii. Arbitrary Lines of Questioning

Without any guidelines to work from, the Board’s analysis of whether a detainee poses a “significant threat” can amount to an assessment of a detainee’s intangible thoughts, resulting in hearings which are rife with inconsistency, lack of fairness, and confusion.

For example, the Board’s line of questioning is often arbitrary when focused on detainees’ life plans following detention. The Board will often ask detainees highly detailed questions about their plans for work, family, and

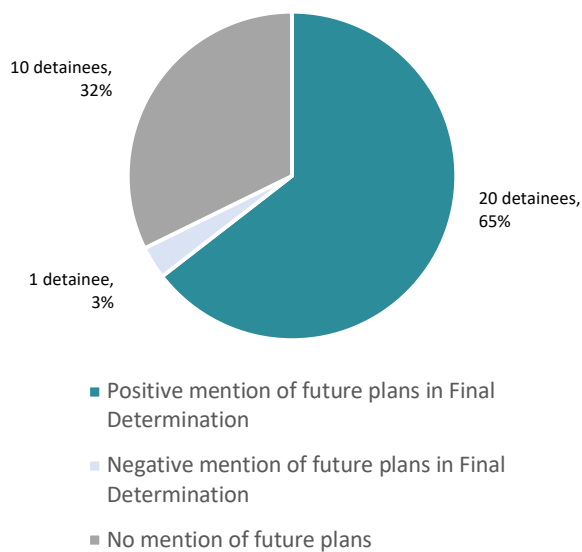
⁴⁹ Chatham House & ICRC, *Expert meeting on procedural safeguards for security detention in non-international armed conflicts* London, 22-23 September 2008, 91 Int’l Review of the Red Cross 878-79 (Dec. 2009), cited within *Towards the Closure of Guantánamo*, IACHR 106-07 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantánamo.pdf>.

⁵⁰ PRB EO 13567 at §2. Emphasis added.

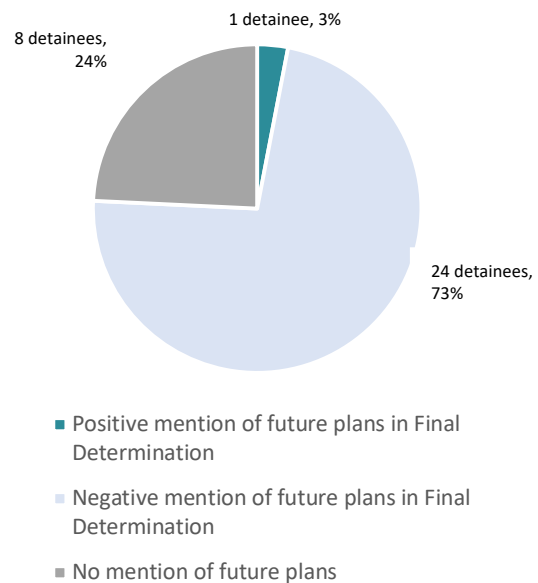
⁵¹ PRB Implementing Guidelines 2017 at 7.

other aspects of their lives upon release without providing any indication of where detainees can expect to resettle. Even within this subject area, inconsistency is pervasive. Some detainees are asked detailed questions about these plans, while others not. For example, during initial reviews, future plans were mentioned by the Board in 46 of 64 hearings (72%). Why they were omitted in the other 18 hearings is unknown. As the pie charts below demonstrate, if the Board does consider future plans in making a final determination, whether the members view those plans positively or negatively seems to have a great effect on their final determinations.⁵² Beyond it being unreasonable to question detainees on a future over which they have no control, the lack of consistency in this line of questioning adds an additional layer of opacity in a system already stacked against them.

31 Detainees Cleared in the Initial Review



33 Detainees Cleared in the Initial Review



Take as an example the PRB hearing for Mahmud Abd Al Aziz Al Mujahid's Initial Review. Al Mujahid was asked detailed questions about how he planned to conduct himself and what work he planned to take up if released.⁵³ However, his prospective transfer locations ranged from his home country of Yemen to "Europe - - or a Western country."⁵⁴ Needless to say, these options are vastly different with respect to security, culture and economy. The options also carry profoundly different circumstances. Al Mujahid's family is in Yemen and would be able to provide support, whereas in Europe he would be starting from scratch. Without knowing whether he should plan to build his life with his family in Yemen or in an unknown European country, Al Mujahid, like many detainees who go before the PRB, was forced to provide detailed responses to an exceptionally wide range of questions.

It does not matter if a detainee's lawyer points out the absurdity of requiring a client to plan a future based on unknown hypotheticals, especially following years of detention and ill-treatment with extremely limited or no contact with the country where he might end up. In his client's Initial Review, Mashur Abdullah Muqbil Ahmed Al-Sabri's Private Counsel assured the Board that Al-Sabri would learn the language of his host country and would

⁵² For example, in response to concerns from his Initial Review where it was determined that he did not have a sufficient plan for the future, Yassim Quasim Mohammed Ismail Quasim prepared two detailed business plans in advance of his latest full review. However, this time around, he was barely asked about his future plans, as the Board decided to focus almost entirely on his time in Afghanistan having told him at his first PRB that his time in Afghanistan was not relevant at all. Transcript from Detainee Session for Yassim Quasim Mohammed Ismail Quasim's Full Review, Periodic Review Secretariat (Nov. 8, 2016), http://www.prs.mil/Portals/60/Documents/ISN552/FullReview/20161108_U_ISN522_TRANSCRIPT_OF_DETAINEE_SESSION_PUBLIC.pdf.

⁵³ Transcript from Detainee Session for Mahmud Abd Al Aziz Al Mujahid's Initial Review, Periodic Review Secretariat 16 (Nov. 20, 2013), http://www.prs.mil/Portals/60/Documents/ISN031/131120_U_Transcriptofdetaineesession.pdf?ver=2014-01-24-151914-657.

⁵⁴ *Id.* at 18.

try to find work as a driver or other suitable occupation. However, he also explained that providing any further detail about his post-detention employment objectives was next to impossible given the lack of indication provided by the Board's about where Al-Sabri would end up.⁵⁵ Nonetheless, in this hearing, the Board continued to press Al-Sabri about the details of his work.⁵⁶

The Board may consider evaluating a detainee's medical and psychological ailments when determining what constitutes a "significant threat."⁵⁷ As a result of the torture the men were forced to endure leading up to their detention at Guantánamo,⁵⁸ and the poor medical conditions⁵⁹ they faced once in the prison, many of the remaining detainees face sequelae of mental and physical ailments. However, despite this context, there is nothing that indicates that any member of the Board is in a position to evaluate existing mental or physical illness, nor is there seemingly any ability to bring in experts. Without the guarantee of medical or psychological expertise the abuse of detainees can be ignored and the effects of such mistreatment misconstrued during the Board's questionings and evaluation.

iii. Arbitrary Emphasis on "Non-Compliant" Behavior Normally Protected by the First Amendment

Another example of the PRB's lack of transparency comes from its focus on a detainee's level of "*compliance*."⁶⁰ Without giving any parameters for what constitutes good behaviour, the Board regularly cites it as a basis for its decisions. The PRB takes into account detainees' behaviour, magnifying anything they disagree with into a basis for continued indefinite detention. Of the 31 detainees cleared in their Initial Review, the Board listed the detainee's behavior while in detention as a positive factor in 28 of these cases.

Infractions that negatively implicate the Board's perception of good behaviour include peaceful protests, such as hunger strikes. Despite the peaceful nature of a hunger strike, in its final determination denying the release of Moath Hamza Ahmed Al-Alwi, the Board explicitly suggested that Alwi end his hunger strike to improve his chances in future reviews.⁶¹ Yet when he, and other detainees have done so, this has not been deemed sufficient in light of their earlier "non-compliance" through precisely such protests. In reality, this has merely underlined, from the not-unreasonable perspective of many detainees, the need for peaceful protest against arbitrary detention – of the type used by everyone from the Suffragettes to Gandhi.

Under the First Amendment, this would be deemed a protected act:

⁵⁵ Transcript from Detainee Session for Mashur Abdullah Muqbil Ahmed Al-Sabri's Initial Review, Periodic Review Secretariat 13 (Mar. 03, 2015), http://www.prs.mil/Portals/60/Documents/ISN324/150303_U_ISN324_PUBLIC_SESSION_PUBLIC.PDF.

⁵⁶ *Id.*

⁵⁷ PRB EO 13567 at §2.

⁵⁸ See § 3.C.iii Risk of Relying on Evidence Procured from Torture.

⁵⁹ See Physicians for Human Rights, *New Report Outlines Violations of Medical Standards at Guantánamo*, PHR (Nov. 4, 2013), <https://phr.org/news/new-report-outlines-violations-of-medical-standards-at-guantnamo/>.

⁶⁰ In its opaque reasoning, the Board commonly cites "non-compliant behaviour" in its final determinations as a basis for denying a detainee's release. For example, see Unclassified Summary of Final Determination for Khalid Ahmed Qasim, Periodic Review Secretariat (Mar. 6, 2015) http://www.prs.mil/Portals/60/Documents/ISN242/150318_U_ISN242_FINAL_DETERMINATION_PUBLIC.pdf?ver=2015-03-18-103215-463; See also Unclassified Summary of Final Determination for Abdullah Al Sharbi, Periodic Review Secretariat (Jul. 25, 2016), http://www.prs.mil/Portals/60/Documents/ISN682/160725_U_ISN682_FINAL_DETERMINATION_PUBLIC.pdf.

⁶⁰Unclassified Summary of Final Determination for Moath Hamza Ahmed Al-Alwi, Periodic Review Secretariat (Dec. 21, 2016), http://www.prs.mil/Portals/60/Documents/ISN028/FullReview/170109_ISN28_FINAL_DETERMINATION%20FORM_PUBLIC_V1.pdf.

⁶¹ Opening Statement of Counsel, Clive Stafford Smith, on behalf of Khaled Qasim, Periodic Review Secretariat 3-5 (Feb. 4, 2015), http://www.prs.mil/portals/60/documents/ISN242/150204_U_ISN242_Opening_Statements_of_Detainees_Representatives_PUBLIC.pdf.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*⁶²

A detainee's list of infractions or participation in peaceful protests are not all the Board considers when assessing behaviour. However, it is nearly impossible to predict or even understand what other aspects of a detainee's personality, actions or routine will be deemed significant. In considering Alwi's release, the Board expressed an unprecedented interest in whether or not Alwi watched television, pressing him on why he did not take advantage of his television watching privileges.⁶³ In its final determination, the Board cited "minimal evidence of a change in the detainee's mindset" as a reason for denying clearance.⁶⁴

Even if a detainee manages to alter his behavior in a manner that falls within the Board's unpredictable understanding of "compliance," the Board may still deny release on the basis that this change in behaviour comes from an improper state of mind. For example, after telling Uthman Abd al-Rahim Muhammad Uthman that he needed to stop his protest in order to be released, he complied and yet the Board announced that they had "[u]nresolved concerns that the detainee is modifying his behaviour and statements in an attempt to obtain transfer eligibility rather than due to a genuine change in mindset."⁶⁵

⁶² U.S. Const. amend. I. Emphasis added. Cf. *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (even espousing the views of the Aryan Brotherhood is protected by the First Amendment and cannot be the basis for punishment).

⁶³ Transcript from Detainee Session for Moath Hamza Ahmed Al-Alwi's Initial Review, Periodic Review Secretariat (Sept. 22, 2015), http://www.prs.mil/Portals/60/Documents/ISN028/150922_U_ISN_28_HEARING_TRANSCRIPT_DETAINEE_SESSION.pdf.

⁶⁴ Unclassified Summary of Final Determination for Moath Hamza Ahmed Al-Awi, Periodic Review Secretariat (Oct. 26 2015), https://www.prs.mil/Portals/60/Documents/ISN028/151026_U_ISN28_FINAL_DETERMINATION_PUBLIC.pdf.

⁶⁵ Unclassified Summary of Final 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.

iv. Shifting Allegations

Despite the fact that there are no enumerated standards for assessing what constitutes a “significant threat,” the language of the Board’s determinations indicates that it applies some sort of metric to discard or downgrade government allegations against the men. Reprieve client, Salman Rabei’i went through two PRB processes which together offer a clear demonstration of how allegations shift. In 2015, the PRB denied his release on the basis of detailed and unchallenged government allegations that he was a high-level Al-Qaeda operative, but by the time of his release nearly 1.5 years later, the Board had substantially lessened the weight of his allegations without explanation.⁶⁶

Guantanamo Detainee Profile 7 April 2015

• *Salman Yahya Hassan Muhammad Rabei'i (YM-508) is an al-Qa'ida recruit who trained with the group and possibly fought at Tora Bora. He came into contact with extremists in Yemen through his brother, Fawaz-an al-Qa'ida operative-in 1999, and traveled to Afghanistan in August 2001. He stayed at al-Qa'ida guesthouses, underwent basic extremist training, and possibly attended advanced training. He was present at Usama Bin Laden's Tora Bora mountain complex in late 2001 and possibly fought against Coalition forces there before the Northern Alliance captured him in December 2001.*

Guantanamo Detainee Profile 26 July 2016

• *Salman Yahya Hassan Muhammad Rabei'i (YM-508) was recruited by his brother Fawaz, an al-Qa'ida operative, and traveled to Afghanistan in August 2001 where he received training from al-Qa'ida and possibly fought in Tora Bora before his capture.*

Final Determination 1 December 2016

• *In making this determination, the Board considered the detainee's low level of involvement with fighting and minimal training before detention.*

⁶⁶ Guantanamo Detainee Profile for Salman Yahya Hassan Muhammad Rabei'l, Periodic Review Secretariat (Apr. 7, 2015), https://www.prs.mil/portals/60/documents/ISN508/150407_U_ISN508_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf; Guantanamo Detainee Profile for Salman Yahya Hassan Muhammad Rabei'l, Periodic Review Secretariat (Jul. 26, 2016), https://www.prs.mil/Portals/60/Documents/ISN508/FullReview/161027_U_ISN508_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf; Unclassified Summary of Final Determination for Salman Yahya Hassan Muhammad Rabei'l, Periodic Review Secretariat (Dec. 1, 2016), https://www.prs.mil/Portals/60/Documents/ISN508/FullReview/161201_U_ISN508_FINAL_DETERMINATION_PUBLIC_v1.pdf.

The process by which the Board downgrades allegations is completely opaque. What is clear is that this process of determining which allegations to stick with and which to discard occurs absent of any challenge from the detainees or their counsel. The allegations which the PRB board holds on to as true versus those it discards as unsubstantiated or discredited seem entirely arbitrary. This is highlighted in the following examples of final determinations handed down by the Board:

- Muhammad Murdi Issa Al-Zahrani (ISN 713): In making this determination, the Board considered **the uncorroborated nature of the information about the detainee's level of involvement with al-Qaeda**.⁶⁷
- Mustafa Abd al-Qawi Abd al-Aziz al-Shamiri (ISN 434): In making this determination, the Board noted that **the most derogatory prior assessments regarding the detainee's activities before detention have been discredited**.⁶⁸
- Abdul Rahman Ahmed (ISN 441): In making this determination, the Board noted that the detainee was **probably** a low-level fighter who was aligned with al-Qaida, **although it is unclear whether he actually joined that group**, and that **he has no known ties to extremism**.⁶⁹
- Ayub Murshid Ali Salih (ISN 836): In making this determination, the Board noted **that the detainee's degree of involvement and significance in extremist activities has been reassessed to be that of a low-level fighter**.⁷⁰
- Shawqi Awad Balzuhair (ISN 838): In making this determination, the Board considered that **the detainee's degree of involvement and significance in extremist activities has been reassessed to be that of a low-level fighter**.⁷¹
- Abdul Sahir (ISN 753): the assessment that **the detainee was probably misidentified** as the individual who had ties to al-Qaeda weapons facilitation.⁷²
- Musab Omar Ali Al-Mudwani (ISN 839): the Board considered the **detainee's degree of involvement and significance in extremist activities has been reassessed to be that of a low level fighter**.⁷³
- Hail Aziz Ahmed Al-Maythali (ISN 840): In making this determination, the Board considered the **detainee's degree of involvement and significance in extremist activities has been reassessed to be that of a low level fighter**.⁷⁴

⁶⁷ Unclassified Summary of Final Determination for Muhammad Murdi Issa Al-Zahrani, Periodic Review Secretariat (Oct. 3 2014), https://www.prs.mil/Portals/60/Documents/ISN713/141003_U_ISN713_FINAL_DETERMINATION_PUBLIC.pdf.

⁶⁸ Unclassified Summary of Final Determination for Mustafa Abd al-Qawi Abd al-Aziz al-Shamiri, Periodic Review Secretariat (Jan 12, 2016), https://www.prs.mil/Portals/60/Documents/ISN434/160112_U_ISN1434_FINAL_DETERMINATION.pdf.

⁶⁹ Unclassified Summary of Final Determination for Abdul Rahman Ahmed, Periodic Review Secretariat (Oct. 28, 2015), https://www.prs.mil/Portals/60/Documents/ISN441/20151028_U_ISN441_FINAL_DETERMINATION_PUBLIC.pdf.

⁷⁰ Unclassified Summary of Final Determination for Ayub Murshid Ali Salih, Periodic Review Secretariat (Mar. 26, 2016), https://www.prs.mil/Portals/60/Documents/ISN836/160323_U_ISN836_FINAL_DETERMINATION_PUBLIC.pdf.

⁷¹ Unclassified Summary of Final Determination for Shawqi Awad Balzuhair, Periodic Review Secretariat (Jul. 11, 2016), https://www.prs.mil/Portals/60/Documents/ISN838/20160711_U_ISN_838_FINAL_DETERMINATION_PUBLIC.pdf.

⁷² Unclassified Summary of Final Determination for Abdul Sahir, Periodic Review Secretariat (Jul. 11, 2016), https://www.prs.mil/Portals/60/Documents/ISN753/160711_U_ISN753_FINAL_DETERMINATION_PUBLIC.pdf.

⁷³ Unclassified Summary of Final Determination for Musab Omar Ali Al-Mudwani, Periodic Review Secretariat (Jul. 28, 2016), https://www.prs.mil/Portals/60/Documents/ISN839/160728_U_ISN839_FINAL_DETERMINATION_PUBLIC.pdf.

⁷⁴ Unclassified Summary of Final Determination for Hail Aziz Ahmed Al-Maythali, Periodic Review Secretariat (Aug. 1, 2016), https://www.prs.mil/Portals/60/Documents/ISN840/160801_U_ISN840_FINAL_DETERMINATION_PUBLIC.pdf.

The Board has also relied on government allegations which, without opportunity for rebuttal, are gravely inadequate to justify continued law of war detention. We have already identified the case of Khalid Qasim [*see case study in § 3(C)(iv)*], where his Reprieve counsel was told that the allegations were not relevant to the PRB process and was denied the right to transfer hundreds of pages of classified material that would disprove them. Despite the fact that Qasim's counsel was instructed not to "look backwards" and was thereby prevented from speaking to the allegations at the hearing, Qasim was subsequently denied release based on the same assertions he had been told were irrelevant.⁷⁵

In a final determination denying release for another Reprieve client, Haroon Gul, in September 2018, the Board reasoned that his detention was necessary due to "continued questions regarding the detainee's current mind-set and ideology as it relates to HIG, leaving the Board with concerns regarding his susceptibility to recruitment."⁷⁶ HIG, or Hezb-e Islami Gulbuddin, is an Afghan organization that signed a peace accord with the Afghan government—facilitated by U.S. actors—in 2016.⁷⁷ Further, by the time the Board issued this determination, the Department of Justice, in his habeas case, had dropped their reliance on Gul's alleged HIG-connection as justifying his continued detention.⁷⁸ This further highlights the arbitrary nature of the Board's reasoning and their lack of accountability in doing so.

B. Direct Decision-Making Power

The PRB does not hold any direct decision-making power. According to its own guidelines, the role of PRB is only "to assist the Executive Branch in making informed decisions as to whether detainees held at Guantánamo Bay *should* remain in law of war detention."⁷⁹ The PRB policy memo clarifies that "the PRB shall *recommend* any conditions that relate to the detainee's transfer,"⁸⁰ meaning the PRB acts as an advisory board that can offer recommendations to the Executive Branch and intelligence community. As a result, a PRB recommendation for release does not guarantee transfer from Guantánamo.

i. Decisions Are Only Made by the Executive

Every PRB recommendation is sent to a Senior Review Committee composed of high-ranking Executive Branch officials ("principals") such as the Secretary of State, Secretary of Defense, Attorney General, Secretary of Homeland Security, Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff.⁸¹ Principals are allotted 30 days to object to the PRB's disposition.⁸² An objection from any one of the principals triggers a full review from the Committee on the papers.⁸³ Should this paper review fail to resolve the issue, the unresolved PRB decision is then added to the agenda for a forthcoming in-person "Principals Committee," where the Review Committee members are to resolve the matter in person.⁸⁴ This level of cabinet oversight has the effect of placing the decision directly in the hands of operational command.

⁷⁵ Interview with Clive Stafford Smith, Private Counsel to Khalid Qasim and Reprieve founder, (Dec. 11, 2018) [by phone].

⁷⁶ Unclassified Summary of Final Determination for Haroon al-Afghani, Periodic Review Secretariat (Oct. 9 2018), https://www.prs.mil/Portals/60/Documents/ISN3148/SubsequentFullReview1/20180809_U_ISN3148_FINAL_DETERMINATION_PUBLIC.pdf.

⁷⁷ *Afghanistan signs deal with militant Hekmatyar*, BBC News (Sept. 22, 2016), <https://www.bbc.co.uk/news/world-asia-37438674>.

⁷⁸ Notice of Withdrawal of Reliance on Certain Exhibits in the Factual Return and on Certain Legal Justification for Detention, Asadullah Haroon 'Al-Afghani' Gul v. Donald Trump et. al., No. 1:16-cv-1462 (APM) (Oct. 04, 2018, D.D.C.); *see also* Status Report Asadullah Haroon 'Al-Afghani' Gul v. Donald Trump et. al., No. 1:16-cv-1462 (APM) (Oct. 04, 2018, D.D.C.).

⁷⁹ *About the PRB*, Periodic Review Secretariat, <http://www.prs.mil/About-the-PRB>.

⁸⁰ Implementing Guidelines 2017 at 17. Emphasis added.

⁸¹ Implementing Guidelines 2017 at 11; PRB EO 13567 at §9(d).

⁸² Implementing Guidelines 2017 at 11; PRB EO 13567 at §3(d).

⁸³ Implementing Guidelines 2017 at 18.

⁸⁴ *Id.*

ii. No Prospects for Release Even for the Cleared

Even when a PRB recommendation for release is unanimously approved by both the PRB and the Review Committee, a detainee is still not guaranteed freedom. According to the National Defense Authorization Act (NDAA), for a detainee to be released on the Board's recommendation, the Secretary of Defense must sign off on that release and submit notice to Congress thirty days in advance.⁸⁵ This requirement appears designed to ensure that one highly visible person within the political system would be publicly held responsible for every detainee release or transfer. Not only does this seriously undermine the ability of the PRB to effect release, it also means that the decision to release a detainee is no longer independent and impartial even in theory.⁸⁶ The Secretary of Defense is susceptible to the political choices of the president—the Commander-in-Chief at the top of the chain of command and the head of the very branch of government responsible for detention at Guantánamo. In other words, PRB decision-making power is far removed from the Board. Instead, decisions effectively lie with President Trump, who has tweeted his belief that "there should be no further releases from Gitmo"⁸⁷ and campaigned on the promise that he will fill up the facility "with some bad dudes."⁸⁸

As a result of these bureaucratic hurdles, there are currently five detainees cleared for release - either through the PRB or one of its administrative predecessors - who continue to be held at Guantánamo. There are no signs that the government has any intention of following through with the "policy recommendation" confirmed by all six government agencies with a stake in their detention.⁸⁹ The Board, therefore, cannot be said to carry out the release or transfer of detainees; it merely decides – in what has essentially become an intellectual exercise – whether a detainee *could* be released. When the Board makes such a recommendation, there is no mechanism for the cleared detainee to enforce that decision. The people with actual decision-making power, namely high level political officials within the Executive Branch, are not subject to the PRB process. Even the courts are powerless to effectuate the Board's decisions.⁹⁰

⁸⁵ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81, § 1028 Stat. 1569 (2011).

⁸⁶ *No substitute for habeas corpus: Six years without judicial review at Guantánamo*, Amnesty International 4 (Nov. 2007), <https://www.amnesty.org/download/Documents/60000/amr511632007en.pdf>.

⁸⁷ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 3, 2017, 9:20 AM), <https://twitter.com/realDonaldTrump/status/816333480409833472>.

⁸⁸ David Welna, *Trump Has Vowed To Fill Guantanamo With 'Some Bad Dudes' — But Who?*, NPR (Nov. 14, 2016), <https://www.npr.org/sections/parallels/2016/11/14/502007304/trump-has-vowed-to-fill-guantanamo-with-some-bad-dudes-but-who>.

⁸⁹ Motion for Order Granting Writ of Habeas Corpus at 26, Tofiq Nasser Awad Al-Bihani et al. v. Donald J. Trump et al., No. 1:09-cv-00745-RCL (D.D.C. Jan 11, 2018).

⁹⁰ *Abdullatif Nasser v. Barack Obama*, et. al., No. 1:05-cv-00764-CKK (Jan. 19, 2017, D.D.C.) (holding that the court cannot order the release of a detainee cleared by the PRB).

According to the ICRC, if continued detention is decided by an administrative body rather than a judicial one, “the important issues is that persons are not arbitrarily interned and that their internment is reviewed by a body that can effectively do so and order release as soon as internment is no longer necessary.”⁹¹ If a person is kept in detention despite a final release order from this body, the ICRC notes that it would be a “clear case of arbitrary detention.”⁹² The five men who are still being detained despite their clearance are being arbitrarily detained by the US government.

Case Study: Towfiq Al-Bihani

The detainee who was left behind



Towfiq is one of the 119 men listed in the US Senate Intelligence Committee’s report on CIA detention. Among those men, he was part of a group subjected to the CIA’s “Enhanced Interrogation Techniques”—a euphemism for torture. During interrogations at various black sites, Towfiq was stripped, had a gun held to his forehead, was strangled, and had a rope tied around his neck. In his cell he was tied to the wall for almost ten days. Following this abuse, Towfiq was transferred to Guantánamo in early 2003.

“During his 15 years at Guantánamo, Towfiq has never been charged him with a crime.”

During his 15 years at Guantánamo, Towfiq has never been charged him with a crime. In fact, in 2010, the IART, the review board immediately preceding the PRB, designated Towfiq and 29 other Yemeni detainees for release. The State Department made diplomatic arrangements for the transfer of these detainees and, by the end of the Obama administration, the U.S. government transferred all of the other 29 Yemeni detainees who were designated for conditional release to third countries. Towfiq’s brother Ghaleb, who was among this group, was released and sent to a new home in Oman during Obama’s last week in office. Everyone who was cleared for release was transferred, except for Towfiq.

Towfiq remains detained *eight years* after the government determined that he could be transferred. In this time, prison authorities prepared him for release twice, going so far as to have him fitted for “release clothing.” To date, the government has not indicated any reason why he remains detained. Towfiq’s counsel has made several attempts to speak to the Trump administration, but there have been no indications of any effort to transfer Towfiq.

⁹¹ Chatham House & ICRC, *Expert meeting on procedural safeguards for security detention in non-international armed conflicts* London, 22-23 September 2008, 91 Int’l Review of the Red Cross 878-79 (Dec. 2009), cited within *Towards the Closure of Guantánamo*, IACHR 106 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantánamo.pdf>.

⁹² Jelena Pejic, *Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence*, 87 Int’l Review of the Red Cross 375, 387 (June 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_858_pejic.pdf.

Case Study: Abdul Latif Nasser

Devastating Injustice for Cleared Detainee



On July 11, 2016, Abdul Latif Nasser received the best news he had heard in a long time: the PRB had cleared him for release; he would be sent home to his family. In their decision, the Board unanimously concluded that Abdul Latif did not represent a threat to the U.S., and recommended he be transferred to his home country of Morocco where he would benefit from “a well-established family with a willingness and ability to provide him with housing, realistic employment opportunities, and economic support.” While the U.S. government initiated negotiations with Morocco, Abdul Latif prepared to leave Guantánamo and see his family for the first time since he was sold for bounty to the U.S. military in 2002.

Much had changed over the 14 years he had been detained. When he had first arrived at Guantánamo, he did not know English; after years of independent study, he could speak fluently. But he had also endured profound trauma and torture at the hands of his captors. In Guantánamo, Abdul Latif was initially held in a block with only seven other detainees so to be isolated from the rest of the Guantánamo population. Lights shone for 24 hours, disorienting his perception of night and day, and no one was allowed to speak as guards would turn on an electric vacuum to drown any conversation out. He was isolated there for two years. This time was particularly hard for Abdul Latif who thrives on being social and around other detainees. He has stated that being around people “helps you stay normal.”

“In their decision, the Board unanimously concluded that Abdul Latif did not represent a threat to the U.S.”

Months passed, however, with no update about when Abdul Latif would leave for Morocco. His lawyers contacted officials at the State Department, only to be reassured that everything was moving forward according to plan. Eventually it became obvious that was not the case. U.S. officials responsible for negotiating with the Moroccan government had received Morocco’s written agreement on December 28, 2016. Unfortunately, this agreement was 8 days too late. The Secretary of Defense is required to notify Congress *30 days* in advance of any decision to release a detainee, but the Moroccan Government gave its necessary security assurances on December 28, 2016, just *22 days* before the Secretary of Defense left office. As a result of this bureaucratic mishap and despite his clearance for release, Nasser is still unable to leave Guantánamo after 16 years of arbitrary detention.

Ever since finding out he would not be transferred, despite being cleared for release, Abdul Latif has struggled to sleep at night. He hates being in his cell as it is a forcible reminder that he has lost 2 years since his clearance. In his words, **“No one can understand this kind of disappointment...why do I have to stay here?”**

C. Access to All Available Information

One of the most startling characteristics of any PRB hearing is that Board relies almost entirely on classified government evidence which is not obtainable by the public or the detainee. There is no mechanism of accountability to guarantee that the PRB is fairly weighing, or even has access to, all available information. The PRB's blind reliance on government evidence is particularly troubling when considering that many Guantánamo detainees were seized based on "intelligence" obtained by major government pay-outs (see section iii below) and the CIA torture program (see section iv below).

i. Access to Information is in the Sole Control of the Government

The PRB relies on information in Classified Detainee Compendiums, files assembled by the U.S. Intelligence Community.⁹³ These compendiums are comprised of any existing "evidence" against detainees,⁹⁴ yet detainees are not given access to them.⁹⁵ While detainees—and indeed the public—are provided with a *one-page* unclassified summary of the factual basis for detention,⁹⁶ the information that the summary is based on is itself kept classified for "national security" reasons. This means that a detainee has no opportunity to confront any intelligence sources and must rely on the government's rephrasing of the evidence.

A detainee's PR is specifically instructed to only rely on information gleaned from meetings with the detainee or information in the government's compendium.⁹⁷ External research is prohibited. While Private Counsel does not have this same restriction, it is an unspoken rule that permeates the process that detainees will likely lose their hearing if private counsel spends time challenging the government's evidence.⁹⁸ By denying any ability to challenge government evidence, which is the only evidence put forth before the Board, the government has total control over what evidence may be weighed during PRB proceedings – an egregious exception to international standards promulgated by the IACHR.⁹⁹

ii. Treating Government Allegations as Fact

While it is not possible here to reveal the contents of any Classified Detainee Compendium, prior experience teaches that it can be fantastically unreliable. For example *Reprieve*, as counsel for one detainee, worked to ensure that there was an unclassified "Amended Factual Return" for one detainee, in order to illustrate what security-cleared counsel have long known: much of the "evidence" against detainees comes either 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 their cooperation. Thus, while the allegations against this one detainee covered a dozen pages, the unclassified material debunking the government's case ran to 1,811 pages, or more than a hundred pages of refutation for each page on offer.¹⁰⁰ The extraordinarily unreliable evidence was impeached with other statements reflecting conceded liars giving

⁹³ Implementing Guidelines 2017 at 6.

⁹⁴ *Id.* at 7-8.

⁹⁵ *Id.* at 14.

⁹⁶ The PRB is mandated to provide the personal representatives or private counsels of detainees with a "substitute and/or summary [of withheld information] sufficient to provide the detainee's personal representative and private counsel with a meaningful opportunity to assist the detainee during the review process." *Id.* at 13.

⁹⁷ *Id.* at 14.

⁹⁸ Interview with Shelby Sullivan-Bennis, Reprieve Attorney, (Dec. 12, 2018) [by phone].

⁹⁹ See IACHR, *Towards the Closure of Guantánamo*, OAS 82 (June 3, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantánamo.pdf>.

¹⁰⁰ See Clive Stafford Smith, *Questionable Intelligence*, Times Literary Supplement (July 17, 2018), <https://www.the-tls.co.uk/articles/public/questionable-intelligence-guantanamo-bay/>.

statements for bizarre reasons including, for example, the following from a serial informant who has been used to justify the detention of many detainees:

“Detainee stated that he had lied to *all previous interrogators* in attempt to make himself appear more important. (*Detainee comment*: I wanted to be a ‘Big Man’.) Detainee stated he felt that if he was important he would have a better chance of receiving political asylum.’ His excuse for telling lies over many years was rather sad. ‘Detainee stated that his family was pressuring him to get married to his cousin. Detainee stated that there was no way he could get married because he has a serious problem. Detainee went on to state that his penis is abnormally small. And he was ashamed that everyone would make fun of him if his future wife told his friends and family members.’ Far from fleeing Iraq for political reasons, to escape Saddam Hussein’s regime, ‘he left Iraq in order to make money so that he could buy penis enlargement pills found in the back of magazines. Detainee then offered to show his penis to a male [Intelligence] member. (*Field comment*: Detainee’s offer was declined).”¹⁰¹

The particular problem here is the failure to permit the basic legal right of confrontation – either in person, or even with evidence from other documents. Much of the “evidence” against the remaining 31 detainees who face a PRB comes from other detainees long since released. However, when counsel sought to use the available plethora of exculpatory material that undermined the case against Khalid Qasim, the client was the victim of two distinct due process violations. First, counsel was not permitted to transfer the *mass* of exculpatory evidence from the Secure Facility located in Washington to the PRB process; and second, after the PRB members had specifically stated that they would not “look backwards” and rely on what Mr Qasim asserted were false allegations made against him, and told him not to spend time challenging them even without this exculpatory evidence, the PRB denied his application based primarily¹⁰² on the very allegations that he had had no opportunity to deny or explain.¹⁰³

Even though a detainee’s counsel or personal representative is given no opportunity within the PRB process to question the credibility of the government’s evidence, the government’s unclassified summary of this evidence is read at the start of every PRB hearing. As demonstrated in the chart below, the Board’s reasoning in its final determinations is often nearly identical to the government’s unclassified summary, meaning that the Board is accustomed to treating any allegations within the Government’s unchallenged summary as fact when making its determinations.

¹⁰¹ See Clive Stafford Smith, *Questionable Intelligence*, Times Literary Supplement (July 17, 2018), <https://www.the-tls.co.uk/articles/public/questionable-intelligence-guantanamo-bay/>.

¹⁰² The other basis for denying him his liberty was the fact that he has peacefully protested by hunger strike, a protected form of expression.

¹⁰³ See, e.g., *Skinner v. South Carolina*, 476 U.S. 1, 5 n.1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) (recognizing “the elemental due process requirement” that nobody should be punished “on the basis of information which he had no opportunity to deny or explain.”); *accord, id.* at 10 (Rehnquist & White, JJ., and Burger, C.J., concurring).

Text from the Government's unchallenged, unclassified summary	Test from the PRB's final determination
<p>"[Detainee] was a facilitator on behalf of al-Qaeda senior leaders and operational planners. He met Osama Bin Ladin...and later worked with external operations chief Khalid Sheikh Mohammad...to facilitate financial transactions and develop media."¹⁰⁴</p>	<p>"In making this determination, the Board considered the detainee's...contacts and activities with Usama Bin Laden, Khalid Shaykh Muhammad and other senior al-Qaeda members, facilitating financial transactions and travel, and developing media for al-Qaeda."¹⁰⁵</p>
<p>"[Detainee] was a Hezb-e-Islami Gulbuddin, or HIG, commander who organized and led attacks on Coalition forces in Afghanistan..."¹⁰⁶</p>	<p>"In making this determination, the Board considered the long-term membership and leadership position in Hezb-e-Islami Gulbuddin (HIG) and his extensive time spent fighting Coalition forces."¹⁰⁷</p>

As discussed below, there are no effective safeguards in place to ensure that the allegations in the government's unclassified summary are not the product of torture or are not credible for any other reason – indeed, concrete steps are taken to ensure that credible challenges to the nature of evidence are forbidden. This means that bogus intelligence can form the sole basis for the continued detention of innocent men at Guantánamo, in direct contravention of the presumption of innocence – a fundamental human rights norm.¹⁰⁸

iii. Risk of Relying on Evidence Procured from Bounties

The PRB's unchallenged reliance on government evidence is unsettling considering what is known about how US government obtained the so-called "intelligence" justifying the detention of men at Guantánamo Bay. The US government relied on bounties to incentivize the seizure of many Guantánamo detainees and then relied on torture techniques to generate evidence against the men it seized.¹⁰⁹

First, it is well-documented that the U.S. government detained many of the men at Guantánamo through bounties of around \$5,000 for those who would aid in "the capture of Taliban or al-Qaida fighters."¹¹⁰ This is a huge sum in Afghanistan and Pakistan, the countries where the bounty fliers were widely distributed. For example, in October 2001, Murat Kurnaz, a former Guantánamo detainee, was arrested at the age of 19 by Pakistani police without explanation and sold for a bounty to U.S. forces.¹¹¹ This trajectory of being sold into

¹⁰⁴ Transcript from Detainee Session for Saifullah Paracha's Full Review, Periodic Review Secretariat (Mar. 8, 2016), http://www.prs.mil/Portals/60/Documents/ISN1094/160308_U_ISN1094_HEARING_TRANSCRIPT_PUBLIC_SESSION_PUBREL.pdf.

¹⁰⁵ Unclassified Summary of Final Determination for Saifullah Paracha, Periodic Review Secretariat (Apr. 7, 2017), http://www.prs.mil/Portals/60/Documents/ISN1094/160407_U_ISN1094_FINAL_DETERMINATION_PUBLIC.pdf.

¹⁰⁶ Transcript from Detainee Session for Haroon Al-Afghani's Full Review, Periodic Review Secretariat (June 14, 2016), http://www.prs.mil/Portals/60/Documents/ISN3148/20160614_U_ISN_3148_HEARING_TRANSCRIPT_PUBLIC_SESSION_PUBREL.pdf.

¹⁰⁷ Unclassified Summary of Final Determination for Haroon Al-Afghani, Periodic Review Secretariat (Jul. 14, 2016), http://www.prs.mil/Portals/60/Documents/ISN3148/160714_U_ISN3148_FINAL_DETERMINATION_PUBLIC.pdf.

¹⁰⁸ See, IACHR, *Towards the Closure of Guantanamo*, OAS 82 (June 3, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf>.

¹⁰⁹ Michelle Faul, *Gitmo Detainees Say Muslims Were Sold*, Associated Press, Freedom Archives.org (June 2, 2005), http://freedomarchives.org/pipermail/news_freedomarchives.org/2005-June/001215.html.

¹¹⁰ *Report on Guantánamo Detainees as a Profile of 517 Detainees Through Analysis of Department of Defense Data*, Seton Hall University School of Law 23 (Feb. 8, 2006), http://law.shu.edu/publications/GuantanamoReports/Guantanamo_report_final_2_08_06.pdf.

¹¹¹ According to Murat, one of his interrogators at Guantánamo confirmed that he'd been "sold" for this bounty, Murat Kurnaz, *Five Years of My Life: An Innocent Man in Guantánamo* 47 (2009).

detention was likely the most common route into Guantánamo Bay. According to a survey of Department of Defence data, 86% of Guantánamo detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody during the time in which the United States offered these bounties.¹¹² President Pervez Musharraf states in his autobiography, *In the Line of Fire*, that Pakistan seized and handed over 369 men (nearly half the number of men held at Guantánamo) to the US in exchange for ‘millions’ of dollars.¹¹³ In fact, only 5% of the detainees were captured by United States authorities.¹¹⁴ The IACHR corroborates this statistic, finding that “only 8% of Guantánamo detainees were characterized as ‘fighters’ for Al-Qaeda or the Taliban; 93% were not captured by U.S. forces; and most were turned over to U.S. custody at a time in which the United States offered bounties for the capture of suspected terrorists.”¹¹⁵

This bounty scheme undermines the credibility of the original “intelligence” given by those who turned men in for pay-outs, and cries out for an effective challenge in the PRB – the kind of challenge that is specifically barred by the system. For example, time after time detainees were said to be on an “Al Qaida” list – which turned out to be nothing more than a list of people in Pakistani media leaked by the Musharraf authorities as those turned over to the U.S. for bounties. This “evidence” was, then, nothing more than proof that they had been sold.



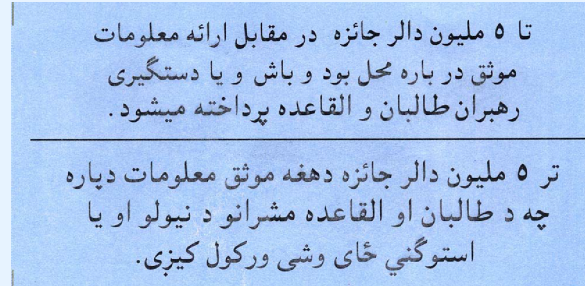
Front: “The reward, 150,000,000 Afghanis [about \$4,285], would be paid to any citizen who aided in the capture of Taliban or al-Qaida fighters.” most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize.”



Back: “Dear countrymen: The al Qaeda terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize.”



Front: “Taliban and Al Qaeda Leadership Award “prize.”



Back: “5 million dollar reward for information leading to the whereabouts or capture of Taliban and Al-Qaeda leadership.”

¹¹² Report on Guantánamo Detainees as a Profile of 517 Detainees Through Analysis of Department of Defense Data, Seton Hall University School of Law 2 (Feb. 8, 2006), http://law.shu.edu/publications/GuantánamoReports/Guantánamo_report_final_2_08_06.pdf.

¹¹³ Clive Stafford Smith, *Bad Men: Guantanamo Bay and the Secret Prisons* 169-70 (2007).

¹¹⁴ Report on Guantánamo Detainees as a Profile of 517 Detainees Through Analysis of Department of Defense Data, Seton Hall University School of Law 2 (Feb. 8, 2006), http://law.shu.edu/publications/GuantánamoReports/Guantánamo_report_final_2_08_06.pdf.

¹¹⁵ See, IACHR, *Towards the Closure of Guantanamo*, OAS 82 (June 3, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantánamo.pdf>.

iv. Risk of Relying on Evidence Procured from Torture

The Senate Intelligence Committee's Study of the CIA's Detention and Interrogation Program details the fact that the US tortured many of the men currently and previously detained in Guantánamo through its CIA detention program.¹¹⁶ Further leaked documents from the ICRC in 2004 detail "an intentional system of cruel, unusual and degrading treatment and a form of torture at Guantánamo."¹¹⁷ The ICRC documented the use of humiliating acts, solitary confinement, temperature extremes, use of forced positions, exposure to loud and persistent noise and music, and regular beatings.¹¹⁸ Further, the Special Rapporteur for Torture has made it clear that indefinite detention in itself amounts to torture.¹¹⁹

Evidence obtained by torture is inherently unreliable – just as the practice is, itself, despicable, demeaning the U.S. and everything the country stands for. The Senate Select Committee on Intelligence found that the "CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees" and that the "CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness."¹²⁰ Guantánamo detainees and detainees of other black sites have admitted to offering false information to stop their own torture or mistreatment. One current detainee stated that he was "tortured into confession and once he made a confession his captors [were] happy and they stopped torturing him."¹²¹ He also stated that he had made up stories during the torture "in order to get it to stop."¹²² Another current detainee told the CSRT that he would "make up stories" about the location of Usama Bin Laden, stating in broken English, "Where is he? I don't know. Then he torture me. Then I said yes, he is in this area." This is the type of false information that torture can produce and, by extension, the type of information which can seep into the PRB's reasoning.

¹¹⁶ See Senate Select Committee on Intelligence, 113th Cong., Committee Study Of The Central Intelligence Agency's Detention And Interrogation Program (2014) [Findings and Conclusions], https://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf [hereinafter Torture Report].

¹¹⁷ Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times (Nov. 30, 2004), <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html>.

¹¹⁸ *Id.*

¹¹⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ¶21, U.N. Doc. A/HRC/37/50 (Feb. 26, 2018), https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf [advanced unedited version].

¹²⁰ Torture Report at 2.

¹²¹ *Al Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 13 (2014), <http://hudoc.echr.coe.int/eng?i=001-146044>.

¹²² *Id.*

Case Study: Ahmed Rabbani

A taxi driver tortured for 545 days



Ahmed Rabbani was a taxi driver in Karachi at the time he was sold to the U.S. for a bounty, the Pakistani authorities telling the U.S. that he was a notorious terrorist called Hassan Ghul. From the beginning, Rabbani denied this. Yet he was taken to the CIA dungeon known as the Dark Prison and other black sites for 545 days. The Dark Prison derives its name from the complete darkness in which the prisoners are kept and tortured. He described many horrors from his time there. For example, he was subjected to the medieval torture called, by the Inquisition, *strappado*:

Then, they took me to a room and hung me by my hand to an iron shackle where my toes hardly touched the ground. They removed the mask away from my face and left me hanging from one hand, naked, thirsty, and hungry.

All my weight was hung from the iron shackle until my hand was about to be cut off and the blood was going down to my feet. All my body parts were shaking because of cut off blood circulation and my pulled and beaten body began hurting all over and my head, nose and mouth started bleeding. Although I was not able to see anything due to the darkness, I was able to smell and taste the blood that was falling down my throat.

Soon enough I felt that the world is closing in on me as I was waiting for them and for their non-existent mercy. Hours and hours will go by and nothing but: pitch-black darkness; loud music; the smell of alcohol and blood; pain from hunger, beating, and thirst.

After they left me the third day, they never returned to me until the seventh day and of course I have used up the water because I was extremely thirsty. Also, because I was not able to move from my spot the first seven days, I was urinating in place until the place was filled with the smell of urine and feces; however, I didn't know where the smell of feces was coming from since I don't think I was able to take care of this need while in this situation.

After the seven days during which I lost consciousness several times, I was sometimes hitting my hand against the wall. The pain became excruciating to a degree that I could no longer take, I think I must have been hoping to break the shackle or break the wall so I can take my hand out or even cut my hand off so I can be relieved from standing like this and get rid of these pains which cannot be described. The blood had rushed in my feet and the lower half of my body was feeling numb and the blood stopped reaching my head and crippled my thinking completely since day one, let alone how I would feel on the seventh day!

As I was suffering, death became all I hoped for, and desperation killed all my thoughts.

When the Senate Report was released, the timeline of his abuse was corroborated – with one extraordinary addition: at one point in his mistreatment, the real Hassan Ghul was brought to the same prison. Ghul was thereafter turned over to the Pakistanis and released, whereupon he went back to his extremist ways, and was finally killed by a U.S. drone strike in 2012. Meanwhile, Ahmed Rabbani the taxi driver remains in Guantánamo Bay a decade and a half later.

He was told not to complain about his torture in the PRB; he complied. He was told to give up his peaceful hunger strike; he did so. His PRB met no success.

While the PRB mandate prohibits using evidence derived from torture, there are no effective procedural mechanisms in place to ensure this or to classify existing evidence as tainted by torture.¹²³ The only safeguard in place is the Screening Team mentioned in the Department of Defense's PRB Policy Memorandum.¹²⁴ The Department of Justice leads the Screening Team, although it is described as an "interagency effort."¹²⁵ It is tasked with reviewing detainees' dossiers for "information that may implicate" torture or cruel and degrading treatment (CIDT) and removing it.¹²⁶ However, it is unclear how the Screening Team is able to separate out and independently flag torture-tainted intelligence from clean intelligence. The taint of torture and CIDT on detainees' testimonies is so strong that Colonel James Pohl, appointed judge for a military tribunal against five of the Guantánamo prisoners, ruled in August 2018 that detainee interrogations conducted by the FBI without torture or CIDT (referred to as the "FBI clean teams" in the media¹²⁷) could not be used as evidence against the defendants because their earlier torture affected subsequent interrogations.¹²⁸ This is a rather obviously conclusion – those who, like Karachi taxi driver Ahmed Rabbani, underwent hundreds of days of torture continue to be held in the custody of the very government that was originally responsible, and have notably been refused independent medical treatment to deal with their inevitable post-traumatic stress disorder (PTSD).¹²⁹ If the military commissions trying the perpetrators of 9/11 throw out 'clean' evidence from the courtroom, the PRB's weaker safeguards for handling both "clean" and "unclean" evidence is indisputably unreliable.

Furthermore, the Detainee Compendiums presented to the Board consist of one-sentence summaries and citations to intelligence reports rather than the actual reports.¹³⁰ These summaries do not identify the source of the intelligence reports, which allows material that is the product of sources who have been tortured to slip through the screening process.

The US Government's partially-documented use of torture, coupled with the PRB's lack of safeguards to exclude such tainted evidence from its proceedings, helps explain why the Center for Constitutional Rights (CCR), an organization which has represented several Guantánamo detainees, has publicly stated, "we know from other cases that the Board routinely relies on evidence obtained by torture, including evidence rejected by the federal courts."¹³¹

In the case of Ahmed Rabbani the PRB did not disclose any evidence of CIDT to the detainee, even though it could have been found in the very public Senate Report – and presumably in scores of documents that underpinned the Senate's findings [see case study above].

Despite the government's documented uses of pay-outs and torture as means to obtain evidence, the PRB does not question the credibility of its sources. Instead, the Board's reliance on classified evidence can lead to vague reasoning and ill-informed decisions. For example, in its Initial Review for Salem Ahmad Hadi Bin Kanad, the Board "considered the detainee's history of fighting on the frontlines in a Taliban unit, including *possibly* serving

¹²³ Also according to the PRS website, the PRB process "will not rely on information that has been obtained as a result of torture or cruel, inhuman, or degrading treatment [T & CIDT] to support a determination that continued law of war detention is warranted for a detainee." Periodic Review Secretariat, *About the Periodic Review Board*, <http://www.prs.mil/About-the-PRB/>.

¹²⁴ Implementing Guidelines 2017 at 12.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Charlie Savage, *Judge Bars Statements Made by Guantánamo Detainees During F.B.I. Interrogations*, N.Y. Times (Aug. 17, 2018), <https://www.nytimes.com/2018/08/17/us/politics/guantanamo-detainees-fbi-interrogations.html>.

¹²⁸ Government Notice of Proposed Protective Order at ¶ f(11), *US v. Khalid Sheikh Mohammed, et al.*, AE 524LL (Military Commissions Aug. 17, 2018).

¹²⁹ For example, the government vigorously and successfully opposed efforts by Mr Rabbani's counsel for him to be allowed access to an independent therapist schooled in the sequelae to torture, despite the fact that it would be done at no cost to the government. Petitioner's Memorandum of Points and Authorities in Support of his Emergency Motion or an Independent Medical Evaluation and Treatment and Medical Records, *Ahmed Ghulam Rabbani v. Donald J. Trump Et al.*, (D.D.C., Oct. 16, 2017).

¹³⁰ Interview with Shayana Kadidal, CCR Attorney, (Jan 9, 2019) [by phone].

¹³¹ *PRB Declines to Approve CCR Client for Transfer from Guantánamo*, CCR (Oct. 25, 2016), <https://ccrjustice.org/home/press-center/press-releases/prb-declines-approve-ccr-client-transfer-Guantánamo>.

in a low-level leadership role and *possibly* receiving extremist training.”¹³² Two years later, the Board found that M. Kanad posed no significant threat “in light of his lack of advanced training and any significant leadership role with the Taliban.” If the bases for his vague allegations were made available for challenge, Mr. Kanad, like many other detainees, may have avoided additional years of arbitrary detention.

Case Study: Khalid Qasim

The detainee who refused the PRB



Khalid Qasim was rendered to Guantánamo at the age of 25 and has been detained there for the last 16 years of his life. Clive Stafford Smith, a Reprieve lawyer who has helped secure the release of more than 80 prisoners from Guantánamo Bay, took on Khalid’s case in 2015 and served as private counsel for Khalid’s Initial PRB Review. Stafford Smith was confident of Khalid’s imminent release, describing Khalid “as a nobody – someone who should have been released a long time ago.” Despite Khalid’s status as a “no value detainee,” his release was denied in his Initial Review and all subsequent PRB reviews on the basis of highly questionable government allegations and “non-compliant” behaviour.

In preparation for Khalid’s first hearing, Stafford Smith sought to transfer large numbers of documents held in the Secure Facility in Washington D.C. that would essentially destroy the credibility of the informants against Khalid – even the names were, of necessity, kept secret from the detainee himself. This request was denied. Nevertheless, Stafford Smith put together a detailed dossier rebutting all government allegations against him as best he could using documents sourced elsewhere. However, prior to the hearing, Stafford Smith was informed that such information would be inadmissible as the Board was solely “forward looking” in its assessment. Stafford Smith checked prior to the hearing itself, confirming on the record that no such allegation would be brought up, and the Board assured him that it was only assessing *future* threat level. Despite this, the Board weighed the government allegations against Khalid heavily when making its final determination that Khalid’s detention was still warranted. In fact, in its final determination, The Board explicitly stated that it “encourages the detainee to provide information to the PRB regarding his *pre-detention* motivations and actions...” The Board’s reasoning was so hypocritical and the system so blatantly unfair, that the PR appointed to Khalid, a major in the military who was initially a proponent of the PRB process, quit his post in response to the final determination.

The only other significant reason for the Board’s decision was Khalid’s “high level of significant noncompliance while in detention”. When discussing Khalid’s Initial Review, Stafford Smith stressed the Board’s inordinate emphasis on Khalid’s history of hunger strikes – a peaceful means of protest “used by suffragettes to Mohandas Gandhi” to challenge unfair conditions. Considering that Khalid has never, and will likely never, face charges in a court of law, hunger strikes are arguably his only means to bring attention to his indefinite detention. In Khalid’s words, **“This hunger strike, as we all know, is not going to help me. I do not do it for me. I do it to breathe life into my sense of justice. I do it to defend myself in a place where I cannot. I do it in the name of fairness and human rights and all the things America stands for but cannot be bothered to enforce in its prisons.”** The Board decided that even a peaceful stance against indefinite detention signifies “non-compliance” and is therefore a justification for continued detention. Given the First Amendment’s right to “petition the Government for redress of grievances,” the law would usually view Khalid’s peaceful protest as protected activity – the use of which against the detainee would be unconstitutional. However, the government insists that U.S. Bill of Rights should not apply to Guantánamo Bay.

Given this frustrating situation where Khalid is unable to challenge the government evidence posed against him and where any peaceful protest against his indefinite detention can be referenced as a further justification for detention, Khalid made the brave, but perhaps inevitable, decision.

¹³² Unclassified Summary of Final Determination for Salem Ahmad Hadi Bin Kanad, Periodic Review Secretariat (May 21, 2014), http://www.prs.mil/Portals/60/Documents/ISN131/140521_U_ISN131_FINAL_DETERMINATION_PUBLIC.pdf. Emphasis added.

D. Members of the Review Body Fall Far Short of the Independence from Government Influence Required by Law

Not only has the Executive Branch established the administrative body that reviews Guantánamo's pre-trial detentions, it staffed the body with members of the military and executive and reviews the body's decisions through officials higher up on the same chain of command. Far from an independent quasi-judicial body that makes its own decisions, conflicts of interest lie at every level of a PRB process.

i. The Biases of the Review Committee

As discussed in Section 3(B), PRB recommendations require the approval of a senior Review Committee composed of high-ranking Executive Branch officials and the signature of the Secretary of Defense. These levels of executive oversight tarnish any notion of independence in PRB proceedings. Today, the Review Committee is comprised of Trump appointees and individuals who have, on record, made biased comments about Guantánamo and its detainees.

Secretary of Defense James Mattis, before his recent resignation, claimed to be "absolutely certain" that indefinite detention at Guantánamo is legally sound, stating "there is not one thing going on down there that would not be in accordance with ...the Geneva protocol."¹³³

President Trump's nominee for Attorney General, William Barr, has been a long proponent of detention at Guantánamo Bay, first for Haitian refugees with HIV during the George H.W. Bush administration, and then for terrorist suspects.¹³⁴ A 2004 New York Times exposé specifically lists William Barr as an integral member of the small group of the Washington elite who secretly devised the detention scheme for terrorist suspects at Guantánamo Bay.¹³⁵

In a similar vein, Secretary of State Mike Pompeo repeatedly criticized President Obama for closing down secret prisons and torture sites, claiming the president did not "take the war on radical Islamic terrorism seriously."¹³⁶ In 2016, he described Guantánamo as "a goldmine of intelligence about radical Islamic terrorism."¹³⁷

Just before he was nominated to the post in 2017, Director of National Intelligence Dan Coats stated that he did not think sending Guantánamo detainees back home "is the solution to the problem."¹³⁸ He also joked about the plight of former Guantánamo detainees, most of whom struggle with psychological and physical impairments following years of torture and imprisonment, asking "[a]re they running Starbucks in Yemen?"¹³⁹

Pompeo, Coats and the future Attorney General – and until February 2019 Mattis, were four of the six members of the Review Committee who oversee the recommendations the PRB makes, and who must agree with any recommendation that a detainee should be cleared for release.

¹³³ Rebecca Kheel, *Mattis offers new criteria for sending inmates to Guantánamo*, The Hill (May 2, 2018), <http://thehill.com/policy/defense/385868-mattis-delivers-Guantánamo-guidance-to-white-house>.

¹³⁴ David Cole, *No Relief: William Barr Is as Bad as Jeff Sessions — if Not Worse*, aclu.org (Dec. 7, 2018), <https://www.aclu.org/blog/criminal-law-reform/no-relief-william-barr-bad-jeff-sessions-if-not-worse>; *US senators debate Guantanamo Bay*, BBC News (June 16, 2005), <http://news.bbc.co.uk/1/hi/world/americas/4097832.stm>.

¹³⁵ Tim Golden, *THREATS AND RESPONSES: TOUGH JUSTICE; After Terror, a Secret Rewriting of Military Law*, N.Y. Times (Oct. 24, 2004), <https://www.nytimes.com/2004/10/24/us/threats-and-responses-tough-justice-after-terror-a-secret-rewriting-of.html?mtrref=www.google.co.uk>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

ii. The Biases of PRB Members Themselves

Apart from the Board's accountability to the Review Committee, its independence is further undermined by the direct influence of chain of command authority on its own members. Some PRB members are appointed from squarely within the chain of operational command, including those Board members from the Departments of Defense, Homeland Security, Justice, and State; the Office of the Director of National Intelligence; and the Joint Chiefs of Staff. Although for the duration of their work on the Board, those members are instructed to operate independently from the influence of their military superiors, it is difficult to imagine remaining entirely objective given career ambition and personal affiliations with the military. These types of concerns explain why the ICRC recommends that a tribunal responsible for reviewing detention, even in the context of armed conflict, operate in a system that is completely independent of government influence, with reviewing members appointed from outside the chain of command entirely.¹⁴⁰

Beyond issues of the Board's membership, the risk of bias is further introduced through the PRB procedures themselves. Since statements from senior administration officials comprise a large part of the "evidence" the Board can consider, members are asked to assess the credibility of statements made by their peers and superiors. In other words, questioning the reliability of evidence may require a Board member to challenge someone who works in their same department, most likely someone who works above them.¹⁴¹ These types of structural deficiencies make it impossible to identify informal government influence on PRB decision-making.

E. The Body is Not Made up of Members with a Guaranteed Term

The memo outlining the PRB process states that the PRB is composed of six different "SES or other senior officer[s] or expert[s] with relevant knowledge and experience" picked from the "Departments of Defense, Homeland Security, Justice, and State" as well as the "Offices of the Chairman of the Joint Chiefs of Staff and the Director of National Intelligence."¹⁴² There are over 2.8 million employees at the Department of Defense alone, so narrowing down members is impossible.¹⁴³ Beyond this vague description about the organisational origins of members, nothing is known about the members of the PRB. It is therefore impossible to verify whether the PRB members are permanent or temporary, and whether they operate part-time or full-time. That said, a lawyer who has served as Private Counsel for several Guantánamo detainees before the PRB observed that Board does not convene with the same members for each process.¹⁴⁴ Thus, it can be presumed that members are not permanent.

F. There Is No Way to Determine Whether One of the Body's Members Is a Qualified Lawyer

Just as it is impossible to determine whether PRB members are permanent, it is impossible to verify if the PRB has at least one qualified lawyer within its membership. The Department of Justice is represented on the Board, however, it is unknown whether that representative is a lawyer. Neither is there any public reassurance that any PRB member who is a lawyer is free of a conflict based to a position in the executive chain of command, previous legal work, or other career-oriented issues.

¹⁴⁰ Chatham House & ICRC, *Expert meeting on procedural safeguards for security detention in non-international armed conflicts* London, 22-23 September 2008, 91 Int'l Review of the Red Cross 879 (Dec. 2009), cited within *Towards the Closure of Guantánamo*, IACHR 106-07 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantánamo.pdf>.

¹⁴¹ "The prejudicial commentary by senior officials in the branch of government that controls the detentions highlight the need for independent judicial review. Instead, the review has been carried out by more junior officials within that very same branch, the executive." *No substitute for habeas corpus: Six years without judicial review at Guantánamo*, Amnesty International 51 (Nov. 2007), <https://www.amnesty.org/download/Documents/60000/amr511632007en.pdf>.

¹⁴² Implementing Guidelines 2017 at 23.

¹⁴³ US Dept. of Defense, *Our Story*, defense.gov, <https://www.defense.gov/our-story/>.

¹⁴⁴ Interview with Shelby Sullivan-Bennis, Reprieve Attorney, (Dec. 12, 2018) [by phone].

Looking at the above factors, the IACHR concluded that the PRB review process “falls short of what is required by the standards developed by the ICRC regarding internment review in the context of armed conflict... Therefore, the existence of the PRB process does not reduce the urgency in addressing continuing arbitrary indefinite detention in Guantánamo.”¹⁴⁵

4. Lack of Alternatives for Release

The Fourth Geneva Convention and its commentaries make it clear that administrative detention is a most severe measure and that it is not an alternative to criminal proceedings.¹⁴⁶ However, for the vast majority of detainees in Guantánamo there is no criminal proceeding to complement the PRB process. Of the 780 men ever detained at Guantánamo, only eight men have been convicted by military commissions (6 by guilty plea)—and four of these convictions were later overturned. Only one detainee has been convicted in federal court.¹⁴⁷

Without the opportunity to prove their innocence in a court of law, the PRB is one of detainees’ only opportunities to end their indefinite detention. However, as described above, the PRB fails all elements of independence and impartiality. Due in part to the highly politicized nature of the PRB and its lack of procedural protections, not a single detainee has been released as a result of the PRB since the Trump Administration took office – and this includes the five who had been cleared before that time.

This section will demonstrate how engagement with the PRB can hinder a detainee’s prospects of a successful *habeas* case. It will then briefly describe how *habeas* proceedings for Guantánamo detainees have become increasingly unfair, tracking the US government’s encroachment on detainees’ right to *habeas*. With a dysfunctional *habeas* system, the argument that *habeas* proceedings are suitable alternatives to the PRB falls moot.

A. How the PRB is Linked to *Habeas* Petitions

Despite being an administrative process far removed from the procedural protections exhibited in a court of law, PRB proceedings has a direct and unacceptable impact on detainees’ *habeas* proceedings. First and foremost, the PRB encourages false confessions which can then be offered against detainees in their *habeas* proceedings. Second, all of the preparation for a PRB is discoverable in a detainee’s *habeas* case as they lack the right to attorney-client privilege. Finally, the PRB is often delayed in presenting its final determinations, thereby stalling further PRB hearings for the detainee concerned. While PRB proceedings can effectively stop functioning due to these delays, the Government points to ongoing PRB proceedings as a justification for detention in *habeas* proceedings.

i. Eliciting False Confessions

The Board presents allegations against detainees as fact, giving detainees no opportunity to challenge their validity. A detainee’s only option is to accept and repent. In conjunction with evidence obtained by torture, this practice creates an increased likelihood of false confession.

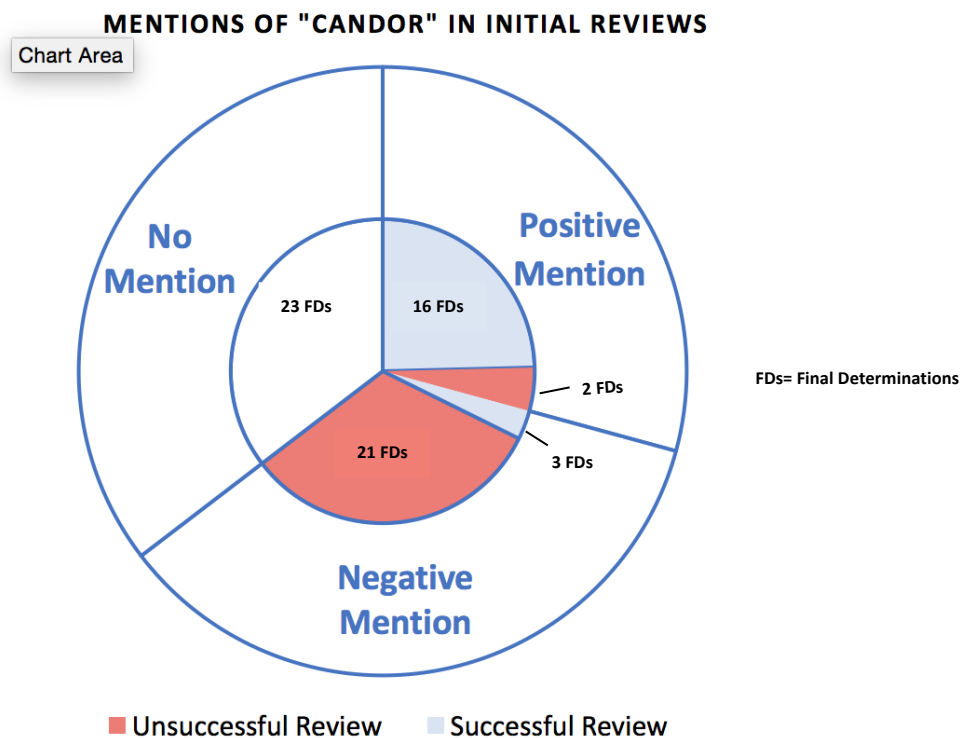
In a typical PRB proceeding, the Board will reach beyond its authorized remit by telling detainees that they cannot assess their current threat level without knowing if the detainee is being honest, in what the Board refers to as “candor.” To assess “candor,” the Board effectively requires a confession to unchallenged allegations put forth by the government. Overall, candor was mentioned in 42 of the 65 initial reviews (65%), which demonstrates its importance to the Board (although the fact that it is not mentioned in the remaining 35% of

¹⁴⁵ See, IACHR, *Towards the Closure of Guantánamo*, OAS 107 (June 3, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantánamo.pdf>.

¹⁴⁶ Jelena Pejic, *Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence*, 87 Int’l Review of the Red Cross 375, 381-2 (June 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_858_pejic.pdf.

¹⁴⁷ ACLU, *Guantánamo by the Numbers*, aclu.org (Last Updated May 2018), <https://www.aclu.org/issues/national-security/detention/Guantánamo-numbers>.

hearings is a further testament to the arbitrary nature of the Board's assessments). For those cleared in their Initial Review, the board indicated the detainee's positive "candor" in 52% of their Final Determinations. However, of 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. In other words, if the Board judges that a detainee is failing to take responsibility for his Government-alleged past, this has proven to be a strong justification for denying clearance. This is, then, just another way of coercing the detainee into repeating the false statements that he made under torture, or that were made by others. This is a process that we associate more with the Stalinist show trials of the 1950s than with the justice system as we know it in the U.S.



An example of this false confession cycle is demonstrated by the case of Abdel Malik Ahmed Wahab Al Rahabi. In his Initial Review, Al Rahabi stated that he had no opinion on jihad, denied any involvement with any terrorist group, denied future involvement with terrorist groups, mentioned he had a brother-in-law who was deemed a terrorist but that Al Rahabi himself had no involvement with him, and denied involvement in extremism or with Osama bin Laden.¹⁴⁸ The Board fixated on his brother-in-law and the accusations against Al Rahabi of being involved with Bin Laden. In the Board's Final Determination on Al Rahabi's Initial Review, it stated vaguely, "although the Board found the detainee credible on certain issues, such as a desire to return to his family, the Board had concerns regarding his credibility on other issues based on the totality of the information before the Board... The Board [] encourages the detainee to be increasingly open in communications with the Board."¹⁴⁹ That the Board was seeking a false confession from Al Rahabi became abundantly clear in his Full Review when, under pressure from his advisors, he went from denying involvement to repenting for past behavior.¹⁵⁰ With a

¹⁴⁸ See generally, Transcript from Detainee Session for Abdel Malik Ahmed Wahab Al Rahabi's Initial Review, Periodic Review Secretariat 3-33 (Jan. 28, 2014), http://www.prs.mil/Portals/60/Documents/ISN037/140128_U_ISN037_HEARING_TRANSCRIPT_DETAINEE_SESSION_PUBLIC.pdf?ver=2014-03-10-154052-040.

¹⁴⁹ Unclassified Summary of Final Determination for Mahmud Abd Al Aziz Al Mujahid, Periodic Review Secretariat (Nov. 20, 2013), http://www.prs.mil/Portals/60/Documents/ISN031/131120_U_ISN031_Unclassified%20Summary%20of%20Final%20Determination.pdf?ver=2014-01-10-191723-493.

¹⁵⁰ Transcript from Detainee Session for Abdel Malik Ahmed Wahab Al Rahabi's Full Review, Periodic Review Secretariat 9 (Nov. 5, 2014), http://www.prs.mil/Portals/60/Documents/ISN037/141105_U_ISN037_TRANSCRIPT_OF_DETAINEE_SESSION_PUBLIC.pdf.

regretful tone which secured his release, Al Rahabi “admitted” to having met his brother-in-law and promised never to contact him in the future.¹⁵¹ He was cleared.

Admitting to allegations was the only chance of release. Al Rahabi’s response to the allegations against him was the fundamental difference between his two hearings. Lying could secure release under President Obama. The same coercion exists today, but the promise of release is false. Nevertheless, the detainees argue long and hard with their lawyers who advise them that the process is futile. They say that the PRB hearings are going to be held anyway, so why not make a false confession just to have some small chance of release? Meanwhile, the PRB hearing transcripts are discoverable during federal cases, meaning they can be relied upon in the Government’s response to a detainee’s *habeas* challenge to deny detainees their freedom. As such, these hearings now do nothing more than jeopardize the chance that an Article III Court might reach a valid decision – even if it, too, cannot order the detainee’s release.

ii. The Effects of the Evisceration of the Legal Privilege

Another illegitimate element of the PRB procedure is that no information a detainee conveys to his government appointed “Personal Representative” is legally privileged, as none are attorneys.¹⁵²

Detainees do not have the right to a lawyer during the PRB proceedings, although they can have one if they can source a willing lawyer themselves.¹⁵³ Detainees are, however, automatically assigned Personal Representatives (PRs).¹⁵⁴ These PRs are uniformed members of the military who—by design—lack any legal background.¹⁵⁵ While many work to get to know the detainees and represent them to the best of their ability, without legal training, they lack a comprehensive understanding of how to best advocate for the detainees on all fronts, not just the PRB. Therefore, PRs risk creating false information in the pursuit of the chimerical promise of a favorable PRB determination that will harm the detainee’s case in other proceedings.

Some detainees do have private counsel who can attend the PRBs and help advise – at their own expense. However, the legal privilege that attorneys rely on to effectively communicate with and counsel their clients does not exist in the presence of a third party who is not a member of the legal team¹⁵⁶—which would include the detainee’s PR. The lawyers are not allowed to discuss PRB materials in non-PRB meetings, so that the legal privilege is itself eviscerated.

iii. Using the Existence of PRBs, and Their False Verdicts, as an Excuse to Deny Relief in Other Forums

The government regularly cites the PRB’s operation as a justification for detention in detainees’ *habeas* proceedings.¹⁵⁷ In its opposition to a mass petition filed by eleven detainees seeking review of the legal bases of their detentions, the government spent pages describing the PRB and referring directly to PRB final determinations to justify the petitioners’ continued detainment.¹⁵⁸ The argument even noted that the President

¹⁵¹ *Id.* At 20.

¹⁵² “The personal representative shall be a military officer of the DoD (other than a judge advocate, chaplain, or public affair officer)...” Implementing Guidelines 2017 at 10.

¹⁵³ PRB EO 1367 §3 (a)(2).

¹⁵⁴ *Id.*

¹⁵⁵ “The personal representative shall be a military officer of the DoD (other than a judge advocate, chaplain, or public affair officer)...” Implementing Guidelines 2017 at 10.

¹⁵⁶ Model Rules of Prof’l Conduct R. 1.6 (2011).

¹⁵⁷ Benjamin R. Farley, *Who Broke Periodic Review at Guantanamo Bay?*, Lawfare (Oct. 15, 2018), <https://www.lawfareblog.com/who-broke-periodic-review-Guantánamo-bay>.

¹⁵⁸ Respondents’ opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus at 4-11, 40, Tofiq Nasser Awad Al-Bihani et al. v. Donald J. Trump et al., No. 1:09-cv-00745-RCL (D.D.C. Feb. 16, 2018).

had recently reaffirmed the viability of the PRB through his Executive Order.¹⁵⁹ At oral argument in the case, the district court seemed to accept that the PRB may negate any need for federal court interference with the government’s determination of whether or when to release Guantánamo detainees.¹⁶⁰

In a similar vein, in its pre-hearing memo for Khalid Qasim’s *habeas* petition, the government used the existence of the administrative review process as an argument for Qasim’s lawful detainment, stating:

“The Government does not have an interest in detaining enemy combatants longer than necessary, which is why it has reviewed, and continues to review, whether individual Guantánamo Bay detainees, including Petitioner, need to remain detained. Petitioner was designated for continued detention in 2009 by the Guantánamo Bay Review Task Force. Since then, he has received regular hearings and reviews before a Periodic Review Board (PRB) to determine whether his continued detention is necessary to protect against a significant threat to the security of the United States.”¹⁶¹

In addition to the structural deficiencies outlined in this report, the cycles of review in the PRB have been seriously delayed to the point where several detainees do not even have the opportunity to be reviewed Board. Following President Trump’s inauguration, the average PRB determination was 268 days overdue as of October 2018.¹⁶² In fact, one detainee, Omar Muhammad Ali al-Rammah, is still awaiting a final determination after his hearing date on 2 September 2017, over 16 months ago. Detainees awaiting their determination are essentially left in PRB purgatory, as they are denied any subsequent file review to which they would otherwise be entitled.

B. The Troubled *Habeas* System

The negative impact the PRB can have on *habeas* proceedings comes in a context where Guantánamo *habeas* proceedings themselves have become increasingly futile. The ICRC states that the right to *habeas* is an especially important right in regards to administrative detention because it helps ensure that any deprivation of liberty cannot be arbitrary and indefinite.¹⁶³ Unfortunately, there is no fair and robust *habeas* process to complement the failings of the PRB.

i. Detainees’ Right to Habeas

In 2008, the Supreme Court expressly held that Guantánamo detainees are constitutionally entitled to pursue habeas relief in federal court in *Boumediene v. Bush*.¹⁶⁴ Finding that the Constitution’s Suspension Clause has full effect at Guantánamo, the court ruled that detainees at Guantánamo Bay are entitled to its habeas protections, which provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended.”¹⁶⁵ The court held that no further delay was warranted and that the Guantánamo detainees “are entitled to a prompt habeas corpus hearing, in which they must receive a meaningful opportunity” to challenge their detentions.¹⁶⁶

¹⁵⁹ *Id.* at 6.

¹⁶⁰ Transcript of Motion Hearing Before the Honorable Richard J. Leon, Abdul Razak Ali v. Donald J. Trump, et al., No. 10-1020-RJL (D.D.C. Mar. 23, 2018).

¹⁶¹ Respondents’ Pre-Hearing Memorandum at FN 1, Khalid Ahmed Qasim v. Donald J. Trump, No. 04-CV-1194 (D.D.C. Feb. 21, 2018).

¹⁶² Benjamin R. Farley, *Who Broke Periodic Review at Guantánamo Bay?*, Lawfare (Oct. 15, 2018), <https://www.lawfareblog.com/who-broke-periodic-review-Guantánamo-bay>.

¹⁶³ Jelena Pejic, *Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence*, 87 Int’l Review of the Red Cross 375, 382 (June 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_858_pejic.pdf.

¹⁶⁴ *Boumediene v. Bush*, 553 U.S. 723, 795 (U.S. 2008).

¹⁶⁵ *Id.* at 743 (U.S. 2008).

¹⁶⁶ *Id.* at 795.

ii. The Quick Decline of the Right to Habeas

In the years immediately following this monumental ruling, decisions from lower courts have eviscerated *Boumediene*'s holding that Guantánamo detainees are entitled to a “meaningful opportunity” to contest the basis for their detentions.

- In 2009, the panel in *Kiyemba* held that, although Guantánamo detainees may have the right to file a habeas petition, they have no constitutionally protected right to due process of law.¹⁶⁷
- In 2010, the panel in *Al-Bihani* ruled that the detainees are entitled to less process in their habeas proceedings than convicted felons seeking to attack their prior convictions after trial in civilian courts.¹⁶⁸
- In 2010, the panels in *Al-Bihani* and *Al-Adahi* ruled that certain government evidence must be treated as conclusive.¹⁶⁹
- In 2012, the panel in *Latif* added that government intelligence reports on the detainees, even if prepared in the fog of war pursuant to a secret process and based on unknown sources, are entitled to a presumption of regularity and accuracy.¹⁷⁰

These panel decisions have created a hollow habeas regime that leaches all substance out of the Supreme Court's governing precedents and effectively shuts down habeas corpus as a remedy for any Guantánamo detainee. The historic record makes this evident. After *Boumediene*, but before entry of the panel decisions, the D.C. district courts heard and decided 53 habeas petitions by detainees. They granted the writ in 38 of those cases—more than 70 percent of the time. By contrast, in the seven years since these decisions, not a single habeas petition contested by the government has been granted, and every previous district court grant of habeas appealed by the government has been reversed.¹⁷¹

Given this bleak backdrop to *habeas* litigation, CCR, Reprieve, and co-counsel have filed a mass challenge to the continued detention of 11 current detainees at Guantánamo Bay on – 11 men who have been held without charge and without an end to their detention in sight for well over a decade.¹⁷²

5. Conclusion and Recommendations

There are 31 prisoners in Guantánamo Bay who cannot expect even the questionable privilege of a military commission. Five of these men have been recommended for release by the PRB or one of its administrative predecessors, yet remain detained with no prospects for release.

The PRB is clearly a defunct administrative procedure that fails all requirements of independence and impartiality. There is little transparency among the Board's procedures, meaning the decision about what determines a “significant threat” is left to the unaccountable whims of the Board members themselves. Even if the Board determines there is no threat posed by a detainee, it holds no actual decision-making power. Only the Executive Branch, led by a President who has explicitly condemned the release of any detainee, can authorize release from Guantánamo. Further, the Board blindly relies on government evidence tainted by the use of bounties and torture. Finally, members of the Board and its Senior Review Committee are not independent, and government influence over the entire procedure is structurally inevitable.

¹⁶⁷ *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009).

¹⁶⁸ *Al-Bihani v. Obama*, 590 F.3d 866, 876 (D.C. Cir. 2010).

¹⁶⁹ *Id.* at 876. *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010).

¹⁷⁰ *Latif v. Obama*, 677 F.3d 115, 1179-82 (D.C. Cir. 2012).

¹⁷¹ Only one habeas petition has been granted since July 2010, with the government's consent, to allow an extremely ill and elderly detainee to be released. The government mooted three appeals by transferring the detainees. Petitioner's Prehearing Brief at 7, *Khalid Ahmed Qassim v. Donald J. Trump et al.*, No. 1:04-cv-01194-UNA (D.D.C. Feb. 22, 2018).

¹⁷² Reprieve, Guantánamo lawyers file mass challenge to Trump's Gitmo policy, [reprieve.org.uk](https://reprieve.org.uk/press/guantanamo-lawyers-file-mass-challenge-trumps-gitmo-policy/) (Jan. 11, 2018), <https://reprieve.org.uk/press/guantanamo-lawyers-file-mass-challenge-trumps-gitmo-policy/>.

Without the opportunity to prove their innocence in a court of law, the PRB was the detainees' primary opportunity to end their indefinite detention. Unfortunately, engagement with the PRB can drastically harm a detainee's prospects of a successful *habeas* case. The negative impact the PRB can have on *habeas* proceedings comes in a context where *habeas* proceedings themselves have become increasingly inadequate. All the while, the first decade of the detainees' detention has moved far into the second.

Given that prolonged detention without meaningful regular review of whether that detention is warranted is prohibited by humanitarian law, at least¹⁷³ 31 men are currently being arbitrarily detained in Guantánamo Bay by the US Government. This requires intervention, either on the congressional or judicial levels, so that the following recommendations can be implemented immediately.

1. Immediately release the 5 men who have been cleared for release.

There are five men held in Guantánamo who have been cleared for release by the PRB or one its administrative predecessors.

Ridah Bin Saleh Al-Yazidi

Detained at Guantánamo for **16 years**

Cleared by the ARB in **November 2007** and again by the IART in **January 2010** Detained for **11 years** following clearance¹⁷⁴

Towfiq Nasir Awad Al-Bihani

Detained at Guantánamo for **15 years**

Cleared by the IART in **January 2010**
Detained for **9 years** following clearance¹⁷⁶

Muieen Adeen al-Sattar

Detained at Guantánamo for **16 years**

Cleared by the IART in **November 2008**
Detained for **10 years** following clearance¹⁷⁵

Abdul Latif Nasser

Detained at Guantánamo for **16 years**

Cleared by the PRB in **July 2016**
Detained for **2 years** following clearance¹⁷⁷

Sufyian Barhoumi

Detained at Guantánamo for **16 years**

Cleared by the PRB in **August 2016**
Detained for **2 years** following clearance¹⁷⁸

Direct-decision making power is a necessary element for independence and impartiality. The continued detention of these cleared men demonstrates that any decision to release a detainee effectively lies within the Executive Branch – it is a political decision that has little to do with a detainee's actual threat-level. According to the ICRC, if continued detention is reviewed by an administrative body rather than a judicial one, this body must hold the power to effectively order release "as soon as internment is no longer necessary."¹⁷⁹ If a person is kept

¹⁷³ Given that the other 9 men facing military commissions have been held in Guantánamo since 2006, and often in dark sites facing torture for years before, it cannot credibly be argued that their position complies with due process either. See James E. Baker and Laura Dickinson, *The Future of the US Military Commissions: Legal and Policy Issues*, Just Security (May 8, 2018), <https://www.justsecurity.org/55865/future-u-s-military-commissions-legal-policy-issues/>; see also HRW, *The Guantanamo Trials*, hrw.org, <https://www.hrw.org/guantanamo-trials>).

¹⁷⁴ *The Cleared Gitmo Detainees: Ridah Bin Saleh Al-Yazidi*, humanrightsfirst.org (June 8, 2017), <https://www.humanrightsfirst.org/blog/cleared-gitmo-detainees-ridah-bin-saleh-al-yazidi>.

¹⁷⁵ *The Cleared Gitmo Detainees: Muieen Adeen al-Sattar*, humanrightsfirst.org (June 16, 2017), <https://www.humanrightsfirst.org/blog/cleared-gitmo-detainees-muieen-adeen-al-sattar>.

¹⁷⁶ *The Cleared Gitmo Detainees: Tawfiq Nasir Awad Al-Bihani*, humanrightsfirst.org (June 28, 2017), <https://www.humanrightsfirst.org/blog/cleared-gitmo-detainees-tawfiq-nasir-awad-al-bihani>.

¹⁷⁷ *The Cleared Gitmo Detainees: Abdul Latif Nasser*, humanrightsfirst.org (June 28, 2017), <https://www.humanrightsfirst.org/blog/cleared-gitmo-detainees-abdul-latif-nasser>; Unclassified Summary of Final Determination for Abdul Latif Nasser, Periodic Review Secretariat (Jul. 11, 2016), https://www.prs.mil/Portals/60/Documents/ISN244/20160711_U_ISN244_FINAL_DETERMINATION_PUBLIC.pdf

¹⁷⁸ *The Cleared Gitmo Detainees: Sufyian Barhoumi*, humanrightsfirst.org (June 28, 2017), <https://www.humanrightsfirst.org/blog/cleared-gitmo-detainees-sufyian-barhoumi>; Unclassified Summary of Final Determination for Sufyian Barhoumi, Periodic Review Secretariat (Aug. 9, 2016), https://www.prs.mil/Portals/60/Documents/ISN694/160809_U_ISN694_FINAL_DETERMINATION_PUBLIC.pdf.)

¹⁷⁹ Chatham House & ICRC, *Expert meeting on procedural safeguards for security detention in non-international armed conflicts London, 22-23 September 2008*, 91 Int'l Review of the Red Cross 878-79 (Dec. 2009), cited within *Towards the Closure of Guantánamo*, IACHR 106-07 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf>.

in detention despite a final release order from this body, this is a “clear case of arbitrary detention.”¹⁸⁰ This means that the five men who are still being detained despite their clearance must be released immediately for the US government to begin complying with humanitarian law.

2. Establish a functioning administrative review process which can promptly release detainees whose detention is no longer warranted by the laws of war.

For a legitimate administrative review body to oversee whether continued detention is warranted for law of war prisoners, that body must meet all elements of independence and impartiality.

First, the Board must immediately set forth a clear set of criteria for what it considers when determining what constitutes a “significant threat.” When forming this criteria, the Board should elicit suggestions from civil society to ensure its decision-making process comports with human rights and civil rights standards. This set of criteria should be detailed and public so that detainees and their counsel have the opportunity to properly prepare for hearings. Such transparency will help prevent members from relying on arbitrary factors, and restrict their subjective decision-making.

Second, the Board must be granted direct decision-making power. The political whims of the executive cannot block any of their decisions. This change must be structural, meaning the very mandate of the PRB itself must change – final determinations must be final decisions, not mere recommendations.

Third, the Board must make all government evidence it relies on in its decisions available to detainees and their representation, and must allow them the right to challenge the credibility of such evidence. Further, the means by which the Board filters out government evidence tainted by torture or other unreliable techniques must be rigorous clearly and publicly elaborated. In order to challenge such evidence, detainees must be appointed legal counsel instead of only being appointed PRs within the military. Any conversation with their counsel must be covered by legal privilege.

Fourth, the members appointed to the Board must meet international standards of independence. That is to say, they should be independent experts, at least one of whom is a qualified lawyer, appointed from outside the chain of command as opposed to anonymous members appointed from within the military and the Executive Branch. Their positions on the Board must be for a definite term and the review of detainees should be their sole task.

Finally, the PRBs must be time-bound so as not to perpetuate indefinite detention. Their purpose should be to expedite release while the government prepares for the prosecution or release of the remaining detainees held at Guantánamo Bay. PRB processes are no replacement for a fair trial.

3. Provide fair trials for those who can be charged, and release the others thereby ending indefinite detention without charge at Guantánamo.

Indefinite detention without charge or trial is anathema to the U.S. Constitution and international law. The vast majority of the detainees at Guantánamo Bay have been held for over 16 years. The U.S. government must either charge them and abide by fair trial standards, or it must release them. Guantánamo, as a symbol of torture and indefinite detention, should be closed as expeditiously as possible.

¹⁸⁰ Jelena Pejic, *Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence*, 87 Int’l Review of the Red Cross 375, 387 (June 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_858_pejic.pdf.