ORAL ARGUMENT SCHEDULED SEPTEMBER 30, 2021

No. 19-5079

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABDULSALAM ALI ABDULRAHMAN AL-HELA,

Petitioner-Appellant,

v.

JOSEPH R. BIDEN, JR., *et al*.,

Respondents-Appellees.

ON REHEARING *EN BANC* OF APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE HUMAN RIGHTS FIRST AND REPRIEVE US IN SUPPORT OF PETITIONER-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. ***Parties and Amici***. Except for amici curiae Human Rights First and Reprieve US, all parties, intervenors, and amici appearing before the district court and in this Court of which counsel is aware are listed in the Brief of Petitioner-Appellant.

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

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

RULE 26.1 DISCLOSURE STATEMENT

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

Reprieve US is a not-for-profit organization. It has no parent corporation or company, it does not issue stock, and no publicly held corporation or company owns any portion of Reprieve US.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

AMICI CURIAE'S IDENTITY, STATEMENT OF INTEREST AND AUTHORITY TO FILE

Human Rights First is a non-governmental organization established in 1978 that works to ensure US leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First has been an instrumental voice in advocating for sound, lawful, and humane national security policies, including with respect to the detention, transfer, trial, and treatment of Guantanamo detainees. Human Rights First has served as an independent observer of the Periodic Review Board ("PRB") since 2014, shortly after the PRB first began providing a limited administrative review of the continued detention of detainees at Guantanamo. Human Rights First has tracked and observed the proceedings from the Pentagon firsthand, analyzing trends, raising human rights concerns, and calling for compliance with international law.

Reprieve US is a non-profit charitable organization founded in 2001. Working with its independent sister organization Reprieve, a non-profit human rights organization based in London, Reprieve US often takes a leading role in pursuing litigation in the United States on behalf of victims of human rights abuses and raises awareness of the issues that both organizations work on amongst a US audience, including the US government. Particular areas of focus include the death penalty, indefinite detention without trial, extraordinary rendition, and extrajudicial killing. In furtherance of its mission, attorneys with Reprieve US have represented

and continue to represent several men detained at Guantanamo in proceedings before the Periodic Review Board and in habeas proceedings.

This brief is filed upon the authority of the Board of Directors of Human Rights First and the Board of Directors of Reprieve US.

RULE 29 STATEMENT REGARDING CONSENT TO FILE, AUTHORSHIP AND SEPARATE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29, counsel for *amici curiae* Human Rights First and Reprieve US states as follows:

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

2. Counsel for Human Rights First and Reprieve US authored this Brief in its entirety. No counsel for any party to this appeal has authored this Brief in whole or in part, nor has any party to this appeal or their respective counsel contributed money to fund the preparation or submission of this Brief. No person has contributed funds to cover the costs of the preparation and submission of this Brief other than Human Rights First, Reprieve US, or their counsel.

3. A separate brief is necessary because Human Rights First and Reprieve US have a specialized perspective, and substantial experience and expertise with respect to the Periodic Review Board ("PRB") at Guantanamo. To counsel's knowledge, Human Rights First and Reprieve US are the only Amici focusing on the structural and operational deficiencies of the PRB and the reasons why this Court should not accept the government's representations regarding the PRB process's relevancy to the due process issues in this proceeding.

ARGUMENT

Referring to the periodic review process established by Executive Order 13,567 ("E.O. 13,567"),[1] the government, when this case was first before this Court, asserted that al-Hela's continued detention at Guantanamo does not offend due process because the "Executive has consistently determined through multiple periodic reviews that al-Hela poses a continuing and significant threat to the security of the United States." *See* Brief for Appellees, filed Dec. 5, 2019, at 54-55.[2] On June 8, 2021, the PRB determined that al-Hela's continued detention is not necessary. It is the considered view of Amici that the periodic review process does not resolve the due process issues before this Court and is not entitled to this Court's deference.

More than eleven years after President Obama issued E.O. 13,567, dozens of individuals remain detained at Guantanamo indefinitely. They remain there because significant flaws in the review process established by E.O. 13,567 render it unreliable and incapable of protecting the detainees against *arbitrary detention*– which is indisputably the *minimal* standard of protection to which they are entitled

[1] 76 Fed. Reg. 13277 (Mar. 7, 2011).

[2] The government has relied heavily upon the PRB review process in other habeas cases. *See, e.g.,* Respondents' Opposition to Petitioners' Motion for Order Granting Writ of Habeas Corpus at 4-11, 40, *Mattan v. Obama,* No 1:09-cv-00745 (D.D.C. Feb. 16, 2018) [Doc. 1900] (addressing nine proceedings involving eleven detainees).

under international and domestic law.[3] Since the founding of our republic, courts have held that international law – which prohibits arbitrary detention – is part of, and is used to interpret, US domestic law.[4]

In all events, as discussed below, the PRB process is neither intended nor designed to displace the role of the *judiciary* in determining whether an individual's continued detention at Guantanamo is lawful. Nor does it provide a detainee with a "meaningful opportunity" to challenge the lawfulness of his continued detention, as required by *Boumediene v. Bush*, 553 U.S. 723, 729 (2008).[5] Among other things, the entire process is subject to political influence, detainees are denied access to most of the information upon which the PRB relies, safeguards to protect against the

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[3] *See, e.g.,* LTC Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy,* THE ARMY LAWYER (June 2010), at 9, 42 (hereinafter "Bovarnick") ("[I]t is difficult to dispute two fundamental concepts: (1) that no one should be detained indefinitely without some periodic review process; and (2) that no one should be arbitrarily deprived of their liberty."); International Covenant on Civil and Political Rights, art. 9.1, Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* on Mar. 23, 1976) ("No one shall be subjected to arbitrary arrest or detention.").

[4] *See, e.g., Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (interpreting a statute so as not to violate "the law of nations"); *see also Johnson v. Eisentrager*, 339 U.S. 763 (1950); Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987).

[5] Inter-American Commission on Human Rights, *Towards the Closure of Guantanamo,* OAS/Ser.L/V/II. Doc.20/15 (June 3, 2015), at ¶ 328 ("[C]ontinuing and indefinite detention of individuals in Guantanamo without the right to due process is arbitrary and constitutes a clear violation of international law.")

PRB's reliance upon evidence tainted by torture are demonstrably inadequate, and the factors the PRB considers in making its determinations are applied in an arbitrary manner.

I. Because the PRB Review Process Is Designed Solely to Inform the Executive's Discretion and Is Subject to Political Influence, It Does Not Protect Against Arbitrary Detention.

E.O. 13,567 directed the Secretary of Defense to coordinate a "periodic review" process to determine whether continued law-of-war detention of certain detainees held at Guantanamo "is necessary to protect against a significant threat to the security of the United States."[6] The process applies to detainees who had previously been (i) designated for continued law-of-war detention; or (ii) referred for prosecution (except detainees against whom charges were pending or a judgment of conviction had been entered).[7]

By its terms, however, E.O. 13,567 "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers,

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[6] E.O. 13,567, §§ 1-3.

[7] *Id.* § 1(a). The Guantanamo Review Task Force ("Task Force") made prior designations. Executive Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009) established this process "to effect the appropriate disposition" of each detainee as a prelude to closing the Guantanamo facilities. The Task Force completed its review in January 2010. *See* Final Report of the Guantanamo Review Task Force, January 22, 2010 ("Task Force Report") (http://www.justice.gov/ag/guantanamo-review-final-report.pdf).

employees, or agents, or any other person."[8] This caution obviously applies to the detainees themselves. In fact, the PRB review process was established *solely* "as a discretionary matter" to periodically review the executive branch's "discretionary exercise" of its detention authority in individual cases.[9] The Executive's exercise of discretion remains wholly unconstrained by the PRB process which, by design, is itself subject to political influence.

Consistent with that limited purview, the PRB review process does not address the legality of a detainee's continued detention.[10] E.O. 13,567 instead recognizes that detainees "have the constitutional privilege of the writ of habeas corpus" and states that "nothing in this order is intended to affect the jurisdiction of Federal courts to determine the legality of their detention."[11] Indeed, the National Defense Authorization Act for Fiscal Year 2012,[12] requires the procedures governing the PRB to "clarify that the purpose of the periodic review process is not to determine the legality of any detainee's law-of-war detention, but to make discretionary

[8] E.O. 13,567, § 10(c).

[9] *Id.* § 1(b).

[10] E.O. 13,567, § 8.

[11] *Id.* § 1(b).

[12] Pub. L. No. 112-81, 125 Stat. 1564 (2011).

determinations whether or not a detainee represents a continuing threat to the security of the United States."[13]

The wholly discretionary nature of the PRB process is borne out by its implementation. For example, E.O. 13,567 directed the Secretary of Defense to issue guidelines that would provide each eligible detainee an "initial review," including a hearing before a PRB, "no later than 1 year from the date of this order" (*i.e.*, by March 2012).[14] The guidelines were not issued until May 2012,[15] and another eighteen months passed before the first PRB held its *first* hearing in November 2013.[16] The vast majority of "initial reviews" (43 out of 64) did not take

[13] *Id.* § 1023(b)(1).

[14] E.O. 13,567, § 3(a). The guidelines require subsequent "full review" every three years thereafter, and a "file review" every six months in the intervening years between full reviews. *Id*. at §§ 3(a), 3(b).

[15] DTM 12-005, *Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567* (May 9, 2012) (hereinafter "2012 Implementing Guidelines"). Revised guidelines were issued in 2017 and 2019. *See* Policy Memorandum, *Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567* (Feb. 15, 2019) ("2019 Implementing Guidelines").

[16] *See* Andrea Harrison, *Periodic Review Boards for Law-of-War Detention in Guantanamo: What Next?*, 24 ILSA J. Int'l & Comp. L. 541, 569 (2018) (hereinafter "Harrison") (citing Department of Defense data at http://www.prs.mil/Review-Information/Initial-Review/) (hereinafter "PRS Statistics").

place until 2016.[17] The last "initial review" was conducted in September 2016 – five and one-half years after E.O. 13,567 was issued.[18]

More problematic is the structure of the process itself. A basic protection against arbitrary law-of-war detention is periodic review "by an independent and impartial board with the final say in continued detention or release."[19] Indeed, detention here requires greater scrutiny in the habeas context precisely because the executive's process does not involve a hearing "before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence." *Boumediene*, 553 U.S. at 783.

Here, the impartiality of the PRB is "difficult to assess" since the identity of the PRB members "is generally not common knowledge."[20] Although the PRB is composed of "senior officials" of the Departments of State, Defense, Justice, and Homeland Security, as well as the Offices of the Director of National Intelligence

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[17] *See* PRS Statistics, *supra*.

[18] *Id.* (Detainee ISN SA-1456); Harrison, *supra*, at 569.

[19] Harrison, *supra*, at 545*;* Bovarnick, *supra*, at 43 ("Comparing all of the relevant provisions for security internees and due process the United States considers customary international law, in combination with U.S. laws, regulations, and policies, four general concepts emerge: (1) prompt notice to the detainee of the reasons for the detention; (2) prompt opportunity to be brought before an impartial tribunal; (3) meaningful opportunity to challenge the basis for detention; and (4) assignment of a qualified representative to assist with (1) through (3)."

[20] Harrison, *supra*, at 546.

and the Chairman of the Joint Chiefs of Staff,[21] the appointment process is opaque. Moreover, insofar as the PRB members are supposed to be Senior Executive Service officials (or senior officers of agencies exempt from the SES),[22] the members of the PRB may themselves be political appointees. In all events, because the guidelines do not prevent PRB members from being removed by their superiors, who are political appointees, the PRB is not an independent board.

Even if PRB members act impartially, the PRB, unlike a habeas court, does not have "the power to order the conditional release of an individual unlawfully detained." *Boumediene*, 553 U.S. at 779. To the contrary, the PRB's determination that an individual's continued detention is no longer necessary is advisory at best because any such determination is subject to review by a Review Committee consisting of the Secretaries of State, Defense or Homeland Security; the Attorney General; the Director of National Intelligence; or the Chairman of the Joint Chiefs of Staff,[23] each of whom is a political appointee.

Any member of the Review Committee can object to a PRB determination and require such a review, even though the PRB's determination must itself be

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[21] E.O. 13,567, §§ 3, 9.

[22] *See, e.g.,* 2019 Implementing Guidelines, ¶ 5.a.(1).

[23] E.O. 13,567, §§ 3(d), 9(d).

unanimous.[24] The "fact that the [PRB] cannot order release is a serious threat to its independence, even if the Review Committee uses this power sparingly."[25] The ultimate decision-making authority with respect to the release or transfer of any Guantanamo detainee rests with a single political appointee–the Secretary of Defense.[26] This was a particular problem during the prior Administration, which effectively shut down the PRB process as a viable option for release or transfer out of Guantanamo.[27] The Biden Administration has not tasked an official with negotiating transfers.[28] Several men cleared for release—some cleared years ago—remain at Guantanamo.[29] For example, the release of Abdul Latif Nasir, who was

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[24] *See, e.g.*, 2019 Implementing Guidelines, ¶ 8.h.

[25] Harrison, *supra*, at 572.

[26] *See, e.g.*, 2019 Implementing Guidelines, ¶ 5.a (PRB determinations are "subject to any final decision of the Secretary of Defense ….").

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

[28] Carol Rosenberg, *Two More Guantanamo Detainees Are Cleared for Transfer to Other Nations*, N.Y. TIMES (June 17, 2021) (https://www.nytimes.com/2021/06/17/us/politics/guantanamo-detainees-transfer.html).

[29] Ben Fox, *Lawyer: US approves release of oldest Guantanamo prisoner*, AP NEWS (May 17, 2021) (https://apnews.com/article/politics-donald-trump-prisons-health-coronavirus-pandemic-d9c0309a9445de6bc81326a09af40347).

cleared at the end of the Obama Administration, was thwarted when the Trump Administration took office.[30]

In sum, the PRB does not have "sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Boumediene*, 553 U.S. at 783. And because the Review Committee is comprised of political appointees, "the entire process is politicized."[31]

II. Flaws in the PRB's Hearing Process Further Undermine the Reliability of that Process as a Bulwark Against Arbitrary Detention.

Apart from the political nature of the PRB process, the PRB hearing procedures are insufficient to protect detainees against arbitrary detention. The PRB relies upon classified intelligence to which the detainee is not permitted access. In many instances the information is also withheld from the detainee's advocates. The reliability of the information is highly questionable given the government's documented use of bounties and torture. Safeguards intended to prevent the PRB from relying on information tainted by torture are demonstrably ineffective. And

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[30] Guy Davies, '*May never leave Guantanamo alive': Abdul Latif Nasser's struggle for freedom 3 years after he was cleared for release*, ABC NEWS (Aug. 2, 2019) (https://abcnews.go.com/International/leave-guantanamo-alive-abdul-latif-nassers-struggle-freedom/story?id=64116792).

[31] Harrison, *supra*, at 576; Farley, *supra*, (discussing the evolution of PRB process and how it became "disabled from approving detainee transfers—likely because the consensus views of senior national-security civil servants are being overruled by political appointees.")

because of limitations upon access to information, the detainee has no meaningful ability to challenge the reliability of the information or, as a result, the basis for his continued detention. Moreover, in assessing whether to recommend release or transfer, the PRB relies upon factors that are applied in a wholly arbitrary manner.

A. Because Detainees Are Denied Access to Most of the Information Upon which the PRB Relies, They Have No Meaningful Opportunity to Challenge the Basis for Their Continued Detention.

The PRB is required to conduct a hearing to assess whether the continued detention of an individual is necessary to protect the security of the United States. The detainee must receive advance notice of the hearing, at which the detainee "shall be assisted" by a government-provided personal representative ("PR"), who "shall advocate on behalf of the detainee" and is responsible for "challenging the government's evidence and introducing information on behalf of the detainee."[32] By design, however, the PR is not a lawyer.[33] The detainee also may be assisted by private counsel.[34]

At the hearing the PRB reviews a "detainee compendium" compiled by the US Intelligence Community ("IC"); information considered by any prior PRB

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[32] E.O. 13,567, § 3(a)(2).

[33] PRB procedures require the PR to be "a military officer of the Department of Defense (*other than a judge advocate*, chaplain, or public affairs officer) …." 2019 Implementing Guidelines, ¶ 5.d.(1) (*emphasis added*).

[34] E.O. 13,567, § 3(a)(2).

review; and information submitted by the detainee, the detainee's PR, and private counsel.[35]

The detainee compendium consists of a "presentation of specific facts that includes information about the detainee and notes inconsistent reporting where appropriate" that is drawn from "all-source reporting as well as any prior products created for previous PRB reviews when appropriate."[36] Such "prior products" presumably include information previously collected by the Task Force established pursuant to E.O. 13,492.[37]

The IC actually prepares several versions of the detainee compendium.[38] In "exceptional circumstances where it is necessary to protect national security, including intelligence sources and methods," the version provided to the PR need only contain "a sufficient substitute or summary, rather than the underlying information."[39] The version provided to private counsel may include a substitute or summary if the originating agency deems that appropriate "to protect national

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[35] 2019 Implementing Guidelines, ¶¶ 6.d., 6.j.(1).

[36] *Id.* ¶ 5.e.

[37] The Task Force's initial job was to assemble all government information relevant to determining the proper disposition of each detainee. *See* Task Force Report, *supra*, at 4-5. The Secretary of Defense was subsequently directed to provide the PRB with all relevant information in the Task Force's detainee disposition recommendations. E.O. 13,492, § 3(a)(4).

[38] *See* 2019 Implementing Guidelines, ¶ 6.b.(3).

[39] *Id.*

security, including intelligence sources and methods, or law enforcement or privilege concerns."[40] The PR and private counsel can be denied access to the actual information reviewed by the PRB even though they have appropriate security clearances.[41] The detainee is merely provided an "unclassified summary of the factors and information" the PRB will consider.[42] In practice, the detainee is given a single page,[43] often containing no more than a single paragraph.

In making its determinations, the PRB is supposed to consider the reliability of the information provided,[44] but it is difficult to see how the PRB can effectively do so. Pursuant to PRB procedures implemented in 2012, information from a final Task Force assessment was afforded a rebuttable presumption of validity in PRB

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[40] *Id.* A representative of the Department of Defense Office of Detainee Policy is tasked with determining whether each substitute or summary is sufficient to provide the PR and private counsel a "meaningful opportunity to assist the detainee." *Id.* ¶ 6.c.(1).

[41] *See* 2019 Implementing Guidelines, ¶ 5.d.(1) (the PR shall "possess a security clearance sufficient to review the material before the PRB"); *id.* ¶ 5.f (private counsel shall hold clearance for access to information classified at the "Secret level or higher").

[42] 2019 Implementing Guidelines, ¶ 6.b.(3).

[43] Reprieve, *Justice Denied: No Charge, No Trial, No Exit*, at 19 (Jan. 11, 2019) (https://reprieve.org/uk/2019/01/14/no-charge-no-trial-no-exit/) (hereinafter "Reprieve").

[44] *Id.* ¶ 6.k.(1).

proceedings.[45] The PRB was directed to treat the Task Force assessment as accurate unless it was rebutted by credible and reliable information.[46] Current guidelines effectively continue that approach insofar as the PRB is not required to re-examine the underlying materials that supported the work products of either the Task Force or a prior PRB.[47] This is highly problematic for several reasons.

First, as reported by the Task Force, not only did the material it assembled include "interrogation reports from custodial interviews of the detainees," but "[m]uch of what is known about such detainees comes from their own statements or statements made by other detainees during custodial debriefings."[48] However, insofar as the Task Force collected information from the Department of Defense and the Central Intelligence Agency,[49] many of the so-called "interrogation reports" presumably were the result of torture or other coercion.[50] And while the Task Force was "instructed" to give "careful consideration to the credibility and reliability of

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[45] 2012 Implementing Guidelines, ¶ 6.j.(1).

[46] *Id.*

[47] *See* 2019 Implementing Guidelines, ¶ 3.

[48] Task Force Report at 4-5, 9.

[49] *Id.* at 4-5.

[50] *See* Section II.B, *infra*.

the available information,"[51] how it actually did so is opaque. What is clear is that detainees were not permitted to participate in the process, nor were they represented by a PR or personal counsel.

Second, detainee's PR or personal counsel's ability to rebut the underlying intelligence during the PRB review process is extremely hampered. While E.O. 13,567 allows for summaries of that information only in exceptional circumstances, in practice the compendiums often consist *only* of short summaries of underlying intelligence reports and do not identify the sources of the intelligence.[52] This makes it practically impossible to evaluate or impeach the credibility of a source.[53]

Third, because detainees are only provided unclassified summaries of the factors and information the PRB will consider, they have no meaningful opportunity to confront the underlying intelligence or sources upon which the PRB will be relying. The detainee's ability to participate meaningfully in the proceeding is

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[51] Task Force Report at 9.

[52] *See* Reprieve, *supra*, at 25.

[53] *See Parhat v. Gates*, 532 F.3d 834, 844 (D.C. Cir. 2008) (evidence that "does not disclose from whence it came" does not permit a court to assess its reliability).

further hampered because the PR and private counsel are prohibited from discussing any classified information with the detainee.[54]

A detainee's inability to review classified information "makes it nearly impossible for the detainee to effectively challenge the veracity of the allegations" and "seriously jeopardizes the accuracy and legitimacy of the hearings."[55] The detainee's "lack of a meaningful way to challenge […] classified evidence presented against him" is "a flaw in the system" that "goes to the core of … the obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention."[56]

The credibility of the underlying sources is of special concern in this context not only because the detainee's liberty is at stake, but also because of the

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[54] *See* 2019 Implementing Guidelines, ¶¶ 5.3.(3)(a), 5.f.(4)(c). Nor may the PR discuss with private counsel any information the government determined to withhold from counsel. *Id.* ¶¶ 5.3.(3)(b).

[55] Jonathan Horowitz, *New Detention Rules Show Promise and Problem*, HUFFINGTON POST (Apr. 20, 2010) (http://www.huffingtonpost.com/jonathan-horowitz/new-detention-rules-show_b_544509.html).

[56] Bovarnick, *supra*, at 38-39. Horowitz and Bovarnick were discussing detainee review board procedures at Bagram, but the criticism is equally applicable to Guantanamo.

government's use of pay-outs[57] and torture[58] as a means of obtaining its intelligence. The bounty scheme and the use of torture undermine the credibility of much of the original "intelligence" compiled by the IC. While the PRB is not supposed to rely upon information obtained because of torture or cruel, inhuman or degrading treatment ("CIDT"),[59] as discussed below, there are no effective safeguards to ensure against it.

Insofar as detainees are not permitted access to classified information, they also are not permitted to attend the portion of the PRB hearing at which such information is considered. The varying levels of access to information, multiple

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[57] Eighty-six percent of Guantanamo detainees appear to have been arrested by Pakistan or the Northern Alliance and turned over to the United States when it was offering bounties. *See* Mark Denbeaux, Joshua W. Denbeaux & John Walter Gregorek, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data,* Seton Hall Pub. L. Research Paper No. 46, at 2-3, 15, 23-25 (Feb. 2006) (https://ssrn.com/abstract=885659). Bounty hunters often disappeared soon after handing people over to American or Northern Alliance soldiers, so there was little opportunity to verify the bounty hunter's story. *Id*. at 15; Michelle Faul, *Gitmo Detainees Say Muslims Were Sold,* Associated Press (June 2, 2005) (https://www.nbcnews.com/id/wbna8049868).

[58] *See, e.g.,* S. Report No. 113-288, *Report of the Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (2014); Report of the Sen. Comm. on Armed Services, 110th Cong., *Inquiry into the Treatment of Detainees in U.S. Custody* (Comm. Print 2008); Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. Times (Nov. 30, 2004) (https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html).

[59] *See, e.g.*, 2019 Implementing Guidelines, ¶ 6.k.(1).

versions of the record, and reliance upon classified information to which the detainee has no access, severely limits the detainee's ability to respond to the evidence against him, permits the continued detention of innocent men based on bogus intelligence, and deprives the detainee of a meaningful opportunity to challenge the lawfulness of his continued detention.

B. Safeguards to Protect Against the PRB's Reliance Upon Evidence Tainted by Torture and CIDT Are Demonstrably Inadequate.

Due process prohibits the use of statements obtained through coercion because of the "probable unreliability" of such statements. *Jackson v. Denno*, 378 US 368, 385-86 (1964). In general, "resort to coercive tactics by an interrogator renders the information less likely to be true." *Mohammed v. Obama,* 704 F. Supp. 2d 1, 24 (D.D.C. Dec. 16, 2009) (citing *Linkletter v. Walker,* 381 U.S. 618, 638 (1965)). Courts sitting in habeas review have routinely rejected the reliability of such information.[60]

The effects of torture or other unlawful forms of coercion can be so severe that their use can taint subsequent statements. Whether a subsequent statement is free of the taint of prior unlawful pressures, force or threats "depends on the inferences as to the continuing effect of the coercive practices which may fairly be

[60] *See, e.g.*, *Abdah v. Obama*, 708 F. Supp. 2d 9, 14-15 (D.D.C. 2010), *rev'd on other grounds*, *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Al-Hajj v. Obama*, 800 F. Supp. 2d 19, 26-27 (D.D.C. 2011) (Lamberth, C.J.).

drawn from the surrounding circumstances." *Lyons v. Oklahoma*, 322 U.S. 596, 602 (1944). In Guantanamo habeas cases, courts in this District apply a multi-factor inquiry to determine "whether there has been a 'break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before.'" *Al-Hajj,* 800 F. Supp. 2d at 22-23 (quoting *Clewis v. State of Texas,* 386 U.S. 707, 710 (1967)).[61]

The only safeguard to protect against the PRB's reliance upon information obtained as a result of torture or CIDT is an "Interagency Screening Team Process" led by the Department of Justice.[62] The Screening Team is tasked with reviewing the detainee compendium compiled by the IC for "information that may implicate" torture or CIDT and removing it, except "potentially mitigating" information that may implicate CIDT concerns is to be identified but not removed.[63] There is substantial reason to believe that the Screening Team review process is ineffective.

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[61] The factors include "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators," "the length of detention," "the repeated and prolonged nature of questioning," "the use of physical punishment such as the deprivation of food or sleep," and "the continuing effect of the prior coercive techniques on the voluntariness of any subsequent confession." *Al-Hajj,* 800 F. Supp. 2d at 23 (citations omitted).

[62] *See, e.g.*, 2019 Implementing Guidelines, ¶ 6.b.(2).

[63] *Id.* The 2019 Implementing Guidelines specify that the Screening Team review "is required only for new custodial information that is provided to the PRB that contains CIDT information."

In Guantanamo habeas proceedings in this Circuit, the district court determined on many occasions that the government was seeking to rely upon statements tainted by torture or CIDT as a basis for continued law-of-war detention. *See, e.g., Anam v. Obama,* 696 F. Supp. 2d 1, 6–8 (D.D.C. 2010); *Mohammed,* 704 F. Supp. 2d at 24–30; *Hatim v. Obama,* 677 F. Supp. 2d 1, 12 (D.D.C. 2009); *Al Rabiah v. United States,* 658 F. Supp. 2d 11, 36–37 (D.D.C. 2009). The government still tries to do so.[64] If the government is willing to rely upon tainted evidence in habeas proceedings, there is every reason to believe that it is relying upon such evidence in the PRB review process, as to which it need not justify its actions to an independent tribunal.

Indeed, there is evidence that it does so. For example, in *Abdah,* the government alleged that Uthman served as a bodyguard for Osama bin Laden. Its "most important pieces of evidence" on that issue were intelligence reports indicating that two other detainees (al-Hajj and Kazimi) had so identified Uthman from photographs shown during interrogations while detained in Bagram. 708 F. Supp. 2d at 15-16, Unrefuted evidence indicated each detainee was subjected to severe torture and other coercive conditions prior to their arrival at Bagram, and thereafter. Considering the "abusive circumstances of the detention of these men

[64] *See, e.g.*, Supplement to Joint Status Report at 1-2, *Guled Hassan Duran (ISN 10023) v. Donald J. Trump, et al.*, No. 1:16-cv-02358 [Doc. No. 37-1] (D.D.C. Feb. 8, 2018).

and serious questions about the accuracy of their identifications of Uthman," the court found their statements to be unreliable. *Id.*[65]

The district court further found that the government failed to present reliable evidence demonstrating that Uthman was a bodyguard for bin Laden, a conclusion the government did not challenge on appeal. *See Uthman*, 637 F.3d at 405 n.5. Yet, the detainee profile considered by the PRB during a full review of Uthman's continued detention in late 2016 asserted that Uthman was a bin Laden bodyguard.[66] The PRB determined in that review that his continued detention was necessary in part because of his "role as a bodyguard" for bin Ladin.[67]

Notwithstanding the district court's unchallenged finding in 2010 regarding the unreliability of statements made by al-Hajj as a result of his torture, the detainee

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[65] The evidence indicated that al-Hajj was severely tortured while held in Jordan and eventually "confessed to his interrogators' allegations 'in order to make the torture stop.'" Kazimi also was severely tortured and, after being moved to Bagram, where he was further tortured, he "tried very hard" to tell his new interrogators the same information he had told his previous interrogators "so they would not hurt him." 708 F. Supp. 2d at 15-16.

[66] Guantanamo Detainee Profile, Detainee ISN:027 (Sept. 30, 2016) (https://www.prs.mil/Portals/60/Documents/ISN027/FullReview/170124_U_ISN27_FINAL_DETERMINATION_PUBLIC_V1.pdf.).

[67] PRB Final Determination, Detainee ISN:027 (Jan. 17, 2017) (https://www.prs.mil/Portals/60/Documents/ISN027/FileReview/20160930_U_ISN027_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.). In May 2021, during a subsequent full review, the PRB determined the Uthman's continued detention was no longer necessary.

profile considered by the PRB during its initial review of al-Hajj in 2015–five years later–extolled the "wealth of information on his extremist activities and associations" he provided to his interrogators prior to late 2004–"cooperation he leveraged to improve his living situation."[68] Al-Hajj was transferred to Guantanamo in September 2004. During al-Hajj's habeas proceedings, the district court concluded that statements he gave to interrogators at Bagram and Guantanamo were tainted by his prior torture. *Al-Hajj*, 800 F. Supp. 2d at 21-22, 26-27.

Given the IC's high regard for the information al-Hajj provided, notwithstanding the fact that two district court judges found his statements to be tainted by prior torture, there is no reason to believe that the screening process removed al-Hajj's information–or any other tainted information–from detainee compendiums compiled with respect to other detainees. To the contrary, the PRB determined in 2016 that Mr. Uthman was a bodyguard for bin Laden, when the most significant "evidence" in that regard was tainted by torture, indicates that the screening process is utterly ineffective.[69]

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

[69] Reprieve, *supra,* at 19 ("[M]uch of the 'evidence' against detainees either comes from involuntary statements tortured out of them, or from statements given by other detainees who were either abused themselves or seeking extraordinary benefits for themselves through cooperation.").

Because the Screening Team only reviews the detainee compendium–which, as noted above, is merely a "presentation of specific facts that includes information about the detainee,"[70] the Screening Team itself may be unable to determine whether the compendium contains information that implicates CIDT concerns–especially where the information was provided by a detainee who was not subjected to torture at the time the precise statement was given, but who, like Kazimi, "tried very hard" to repeat the information he previously provided under torture so that his new interrogators at Bagram "would not hurt him." 708 F. Supp. 2d at 15-16. The compendium may not even identify the source.[71]

Similarly, because the PRB is not provided the underlying evidence and intelligence reports upon which the detainee compendium is based, and the detainee has no meaningful opportunity to challenge the reliability of that information, the

[70] 2019 Implementing Guidelines, ¶ 5.e.(2).

[71] *See* Katie Taylor, *The Rigged System That's Keeping Detainees at Guantanamo Indefinitely*, Reprieve (Feb. 15, 2019) (https://reprieve.org/uk/2019/02/15/the-rigged-system-thats-keeping-detainees-at-guantanamo-indefinitely%E2%80%AF-%E2%80%AF/) ("The Board relies … on date-less classified evidence from anonymous sources. The only party able to verify that the source material did not originate from tortured persons is the government that denied its now infamous torture program for over a decade until it was exposed.").

PRB might not know it is relying upon information that was directly procured or otherwise tainted by torture or CIDT.[72]

The lack of effective safeguards to exclude such evidence from PRB proceedings helps explain why one organization that has represented several Guantanamo 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."[73]

C. The Integrity of the PRB Review Process Is Further Undermined by the PRB's Arbitrary Application of the Factors it Considers When Making its Determinations.

The arbitrary nature of the PRB review process is also reflected in factors the PRB cited in its recommendations as to whether a detainee's law-of-war detention remains "necessary to protect against a significant threat to the security of the United States." Although PRB procedures identify various factors that the PRB may consider,[74] the way the PRB considered those factors has varied–even within an individual detainee's hearing.

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[72] The PRB is limited to reviewing only information that is provided to it, although it may request access to the "underlying documents" through the Office of the Director if National Intelligence. 2019 Implementing Guidelines, ¶ 6.j.(1).

[73] *See* Reprieve, *supra*, at 25.

[74] *See*, *e.g.*, 2019 Implementing Guidelines, ¶ 3.a.

For example, in the PRB's initial review of Khalid Qasim's detention, private counsel was prevented from challenging informant credibility underlying the government's allegations against Qasim, the PRB having assured him that the allegations would not be considered because the PRB was only assessing *future* threat level.[75] Yet, the PRB then denied Qasim's release, in part, on the basis of "the significant derogatory information regarding the detainee's past involvement in activities in Afghanistan."[76]

The PRB also noted Qasim's "high level of significant noncompliance while in detention."[77] While the PRB has also indicated that a detainee's compliant behavior in the prison will be looked on favorably, in denying release in 2018 to another detainee, the PRB cited "concerns" that he was modifying his behavior "in an attempt to obtain transfer eligibility rather than due to a genuine change in

[75] Reprieve, *supra*, at 15, 26. Mr. Qasim's private counsel is a Reprieve lawyer.

[76] Unclassified Summary of Final Determination, Khalid Ahmed Qasim, ISN:242 (Mar. 6, 2015) (https://www.prs.mil/portals/60/documents/ISN242/20140618_U_ISN242_GOVERNMENT'S_UNCLASSIFIED_SUMMARY_PUBLIC.pdf).

[77] *Id.*

mindset."[78] This whimsical, Catch-22 reasoning is consistent with the overarchingly arbitrary nature of the PRB process.

The PRB not only repulses detainee efforts to challenge the intelligence underlying the government's baseline threat assessment, but it affirmatively encourages detainee "candor"[79] – which, in practice, means the detainee's willingness to confess to the government's allegations, regardless of their accuracy.[80] For example, in denying release to Mr. Al Rahabi in March 2014, the PRB encouraged him "to be increasingly open in communications with the Board."[81] Nine months later, the PRB recommended his transfer out of Guantanamo, citing his

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

[79] *See* Reprieve, *supra*, at 29-30 ("[C]andor was mentioned in 42 of the 65 initial reviews ….). With respect to detainees cleared for release or transfer, the PRB cited positive "candor" in 52% of its determinations. It cited a lack of "candor" in 64% of its determinations with respect to detainees not so cleared. *Id*. The fact that the PRB did not mention "candor" as a factor either way in 24 of its determinations further demonstrates the arbitrary nature of the process.

[80] *See* Taylor, *supra* ("The Board has made it very clear to detainees that their only hope of a positive ruling is to confess to some portion of the allegations against them – even if … they deny the allegations – and to show remorse for those alleged actions.").

[81] Unclassified Summary of Final Determination, Abdel Malik Ahmed Abdel Wahab Al Rahabi, ISN:37 (Mar. 5, 2014) (https://www.prs.mil/Portals/60/Documents/ISN037/140305_U_ISN37_FINAL_DETERMINATION_PUBLIC.pdf).

"increased candor and credibility with the Board including his acknowledgement of past mistakes."[82]

As one observer noted, "there is a built-in conflict" in the PRB process, "which encourages detainees to 'come clean' and demonstrate why they have changed, but which does not ensure that any statements made will not be used against them in later proceedings, whether criminal or civil in nature."[83] Detainees must navigate political winds when deciding whether, or how, to participate in the PRB process: "When there is a political will to transfer detainees, detainees and their representatives may take the risk to participate in the process."[84] On the other hand, when transfers cease, detainees will likely determine that the "candor" encouraged by the PRB is "not worth imperiling their *habeas* cases or other future processes."[85] Indeed, because the prior Administration had effectively shut down the PRB process

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[82] Unclassified Summary of Final Determination, Abdel Malik Ahmed Abdel Wahab Al Rahabi, ISN:37 (Dec. 5, 2014) (https://www.prs.mil/Portals/60/Documents/ISN037/141205_U_ISN37_FINAL_DETERMINATION_PUBLIC.pdf?ver=YzDy41Gj5aFgfi-Fp23zQg%3d%3d).

[83] Harrison, *supra*, at 574.

[84] *Id.*

[85] *Id.*

as a viable option for release or transfer out of Guantanamo, detainees questioned whether their personal participation in the process was wise.[86]

CONCLUSION

For the reasons stated, Amici urge this Court to disregard any suggestion by the government that the PRB process or the PRB's determinations are at all relevant to the due process issues in this proceeding, and to determine those issues based on the law-of-war, international law, and appropriate standards of due process.

Respectfully submitted,

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[86] *See, e.g.*, Letter to Periodic Review Board from Counsel for Guled Hassad Duran at 2 (Oct. 25, 2018) (https://www.prs.mil/Portals/60/Documents/ISN10023/SubsequentReview1/20181025_U_ISN_10023_OPENING_STATEMENTS_OF_DETAINEES_REPRESENTATIVES_PUBLIC.pdf) (counsel advising the PRB that Mr. Duran would not be answering any questions posed by the PRB).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,415 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: July 2, 2021

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