



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

July 14, 2017

Mr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: Mohammad Rahim, MC-184-17
Response of the United States to Request for Information

Dear Mr. Abrão:

We appreciate the opportunity to provide observations on the petition forwarded to the United States in the above-referenced matter on behalf of Mohammad Rahim (“Mr. Rahim” or “Petitioner”) date-stamped March 22, 2017, which your office transmitted to the United States via a letter dated May 10, 2017. In that petition, Mr. Rahim asks the Inter-American Commission on Human Rights (“Commission”) to issue precautionary measures and also asks the Commission to examine the petition for determinations of admissibility and merits. We acknowledge a letter posted to the Commission’s Individual Petition System Portal (“Portal”) dated June 14, 2017, in which your office asks Mr. Rahim’s representative for additional information within five days. We do not yet see in the Portal Mr. Rahim’s response to that letter. We nonetheless offer the following observations now, reserving the right to file further observations in the future.

The United States respectfully submits that the Commission should refrain from requesting precautionary measures in this case because the Commission lacks the authority to require such measures. Moreover, such measures are not warranted in any event for the reasons set forth below.

As a preliminary matter, Mr. Rahim is detained under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the law of war, in the ongoing conflict with al-Qaida, the Taliban, and associated forces. The AUMF authorizes the President of the United States to “use all necessary and appropriate force against those ... organizations[] or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” including the authority to detain persons who are part of al-Qaida, the Taliban, or associated forces. Mr. Rahim was reviewed by the Periodic Review Board (PRB or “Board”) on September 19, 2016. The PRB is an administrative process to assess whether continued law of war detention is necessary to protect against a continuing significant threat to the security of the United States. The PRB found that Mr. Rahim merited continued law of war detention, considering that he “was a trusted member of al-Qa’ida who worked directly for senior members of al-Qa’ida, including Usama bin Laden, serving as a translator, courier, facilitator, and operative.”¹ The Board also considered that Mr. Rahim “had advance knowledge of many al-Qa’ida attacks, to include 9/11, and progressed to paying for, planning, and participating in the attacks in Afghanistan against U.S. and Coalition targets.”² Finally, the Board considered Mr. Rahim’s refusal to take responsibility for his involvement with al-Qaida, his consistent and longstanding expressions of support for terrorist attacks against the United States, his indifference to the impact of his prior actions, and that his extensive extremist connections provide him a path to re-engagement.³

Lack of competence

Mr. Rahim alleges that the United States has “violated” certain specific rights recognized in the American Declaration of the Rights and Duties of Man (“American Declaration”). As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).⁴

¹ Unclassified Summary of Final Determination by the Periodic Review Board of Muhammad Rahim, Detainee ISN 10029, Sept. 19, 2016.

² *Id.*

³ *Id.*

⁴ The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the OAS. U.S. courts of appeal have

Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights ("American Convention"), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make nonbinding recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. Moreover, the Commission lacks competence to review U.S. practice on matters arising under any other international instruments, including other international human rights treaties, whether or not the United States is a party, or under customary international law.

Even if the Commission considered the American Declaration to be binding on the United States, it could not apply it to certain claims of Mr. Rahim because during situations of armed conflict, the law of war is the *lex specialis*. As such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.⁵ The Commission has no competence under its Statute and Rules to consider matters arising under the law of war and may not incorporate the law of war into the principles of the American Declaration. The law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. And a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of all international human rights obligations; international human rights treaties, according to their terms, may also be applicable

independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. *See, e.g.,* Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.,* Flores-Nova v. Attorney General of the United States, 652 F.3d 488, 493–94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, "[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states." *Accord* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

⁵ *See* Submission of the United States Concerning IACHR, Draft Report: "Towards the Closure of Guantanamo," OEA/Ser.L/V/II. Doc. 30 (Jan. 2015), Mar. 30, 2015 (attached as Annex 1).

in armed conflict. However, treaties and customary international law may not be applied by the Commission through the nonbinding American Declaration.

Precautionary measures

Lack of authority to issue precautionary measures

Your office's communication dated May 10, 2017 notes that a request has been made for precautionary measures in this case. The United States respectfully reiterates that the Commission does not have the authority to require that States adopt precautionary measures. The reasons for the U.S. position on precautionary measures have been stated in detail in past submissions,⁶ but we will summarize that position briefly here.

The practice of requesting precautionary measures is based on Article 25(1) of the Rules, which states:

[T]he Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.

Importantly, this rule was approved by the Commission and not by the Member States of the OAS themselves. Through this rule, the Commission apparently considers itself to possess not only the power to *request* that a State adopt precautionary measures—which implies that the State may choose to decline the request—but also to *require* the measures, in a manner akin to the Inter-American Court. This is evident from terms used in other subparagraphs of Article 25, which speak of the Commission granting, extending, modifying, and lifting the precautionary measures—as opposed to making, modifying, or withdrawing a *request* for such measures. Communications sent by the Commission over the years also refer to precautionary measures with language evincing the belief that

⁶ See, e.g., Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D, available at <https://www.state.gov/documents/organization/258153.pdf>.

when the Commission requests precautionary measures, it is in effect imposing them and that their implementation is not optional.⁷

It is not within the mandate given to the Commission by the OAS Member States to claim such power. Article 25(1)'s reference to purported sources of a precautionary measures power—Article 106 of the OAS Charter, Article 41(b) of the American Convention, Article 18(b) of the Commission's Statute, and Article XIII of the American Convention on Forced Disappearance of Persons—do not change this reality. Article 106 of the Charter established the Commission to promote the observance and protection of human rights, but makes no further mention of its specific powers. Article 41(b) of the American Convention and Article 18(b) of the Statute empower the Commission to make recommendations to OAS Member States “for the adoption of progressive measures in favor of human rights” and “appropriate measures to further the observance of those rights,” but are silent on precautionary measures, and *a fortiori* on any power to require them. Whatever precautionary measures power may have been sanctioned by States Parties to the American Convention on Forced Disappearance of Persons in that treaty's Article XIII is not applicable to the United States as a nonparty to that Convention.

The Commission's Statute does, in fact, refer to *provisional* measures, but only in the context of States Parties to the American Convention. Even there, it does not give the Commission the power to request or require such measures directly of a Member State. Instead, the Statute merely gives the Commission the power to request the Inter-American Court to take provisional measures in serious and urgent cases involving States Parties to the American Convention that have accepted the jurisdiction of the Inter-American Court, where the case has not yet been submitted to the Inter-American Court.⁸ Article 63(2) of the American Convention, in turn, empowers the Inter-American Court to act on such a request. There is no provision in the Statute or the American Convention that provides authority for the Commission to request the Inter-American Court to issue provisional measures with respect to a nonparty to the American Convention, for

⁷ See, e.g., *Gray v. United States*, PM-844-04, and *Several Other Matters*, Update on Precautionary Measures Granted, July 17, 2013, at 1–2 (with respect to several executed petitioners, Commission referring to precautionary measures previously “granted”; noting “that all the beneficiaries were executed while the precautionary measures were still in effect”; and deciding to “lift” the measures).

⁸ Commission Statute, art. 19(c).

the Inter-American Court to do so, or for the Commission to itself require any OAS Member State—American Convention party or not—to take precautionary measures. For a nonparty to the American Convention the Commission is empowered, at most, to make a nonbinding recommendation that it take precautionary measures.⁹

As such, should the Commission choose to issue a precautionary measures resolution in this matter notwithstanding the United States’ arguments herein, the United States will construe the resolution as a nonbinding recommendation that it take precautionary measures.

Inadmissibility

As noted above, in his petition for precautionary measures Mr. Rahim additionally requests the Commission to undertake admissibility and merits determinations based on the allegations presented in the petition.¹⁰ The Commission should decline this request to proceed to the admissibility stage because Mr. Rahim’s petition is inadmissible for failure to exhaust domestic remedies. Furthermore, the Commission should not request precautionary measures in instances where Petitioner has not exhausted available domestic remedies, where those remedies hold the prospect of providing him or her with effective relief. In this case, Petitioner has filed a petition for a writ of *habeas corpus*, as described below, and as a result should not benefit from the Commission’s intervention at this stage because a successful *habeas* petition would provide certain relief he now seeks from the Commission.

Article 31(1) of the Rules only allows the Commission to consider a petition after it has verified that the “remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” Mr. Rahim filed a petition for a writ of *habeas corpus* on July 27, 2009, in U.S. federal court, and that petition remains pending and voluntarily stayed at Mr. Rahim’s behest. *Habeas* proceedings may be used by Guantanamo detainees both to challenge the lawfulness of their continuing detention, and to

⁹ *Id.*, art. 20(b) (Commission has power “to make recommendations” to nonparties to the American Convention “when it finds this appropriate, in order to bring about more effective observance of fundamental human rights ...”).

¹⁰ Petition at 20–21.

challenge certain “conditions of confinement” where such conditions would render custody unlawful.¹¹

Mr. Rahim argues that he need not exhaust domestic remedies because “this right to review has been ... rendered meaningless”¹² by virtue of the fact that many recent petitions for *habeas corpus* have been unsuccessful. This argument ignores the fact that the federal court has the power to order the release of detainees in appropriate cases and, to date, 32 Guantanamo detainees have been ordered released as a result of *habeas* proceedings in federal court. In each of those cases, the United States relinquished custody of the detainees, and they were repatriated or resettled as appropriate.

The Commission has repeatedly emphasized that the petitioner has the duty to pursue all available domestic remedies,¹³ and that “[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”¹⁴ Petitioner argues that fewer meritorious petitions have been made in recent years, but the Commission is not in a position to judge the prospects for Petitioner’s claims in U.S. domestic court. That is the role of the domestic courts. Deference to those courts in such circumstances is the very purpose of the exhaustion requirement.

Petitioner claims that there is no effective remedy available to him in domestic court. But, as noted above, all of the detainees at Guantanamo who have prevailed in *habeas* proceedings under orders that are no longer subject to appeal have been either repatriated or resettled. Petitioner also alleges that “currently there is no activity in Guantanamo related *habeas* litigation in the United States federal courts.”¹⁵ This is factually inaccurate: today, there are approximately 20 pending *habeas* petitions brought by current Guantanamo detainees in U.S. federal courts, eight of which have active, ongoing proceedings at various stages in federal district

¹¹ Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2014).

¹² Petition at 15.

¹³ See, e.g., Páez García v. Venezuela, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) & Conclusion ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

¹⁴ Sánchez et. al v. United States, Petition 65/99, Report No. 104/05, Oct. 27, 2005, ¶ 67. See also Walker v. United States, Case No.12.049, Report No. 62/03, Inadmissibility, Oct. 10, 2003 (finding inadmissible the petition of a Canadian who asserted that he could not return to the United States to pursue a claim due to the risk of criminal penalties, in light of the availability of alternative actions that would permit him to continue to pursue the claim).

¹⁵ Petition at 5.

courts or courts of appeals (including one that is scheduled for a merits hearing in November¹⁶). Furthermore, Petitioner states that “the United States government has maintained that a detainee at Guantanamo Bay has ‘no right to discovery.’”¹⁷ This is also factually inaccurate: Guantanamo detainees with *habeas* petitions in federal court have the right to seek discovery of information material to their petitions under standards established by the court, and certain discovery has been provided Petitioner in his pending *habeas* case.

Therefore, Commission should decline to recommend precautionary measures in this case because the Petition would be inadmissible anyway for failure to exhaust domestic remedies. The Commission should not permit Petitioner to circumvent the U.S. domestic court system by petitioning for precautionary measures before he has exhausted his domestic remedies.

* * *

As a courtesy, we here provide some general information regarding U.S. law, policy, and practice regarding detention authorities; safeguards against torture and ill-treatment in U.S. custody; and medical treatment in detention, including, where relevant, information specific to Mr. Rahim.

Detention authority, procedural protections during habeas proceedings in Federal court, and Executive Order 13492

As noted above, all Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of *habeas corpus*. Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. Except in rare circumstances required by compelling security interests, all of the evidence relied upon by the government in *habeas* proceedings to justify detention is disclosed to detainees’ counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose *habeas* petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the pendency of proceedings. The U.S. government

¹⁶ This case is *Al-Hela v. Trump, et al.*, 05-CV-1048 (D.D.C.).

¹⁷ Petition at 10.

respects the critical role of detainees' counsel in these proceedings and, more broadly, the fundamental importance of that role in the U.S. system of justice. It will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients.

As holders of a valid U.S. security clearance,¹⁸ detainees' lawyers are obligated to protect classified information acquired in the course of their representation of individuals detained at Guantanamo according to applicable U.S. law, regulations, and signed agreements between the holder of the clearance and the U.S. government. All holders of U.S. security clearances are subject to these same obligations. In accordance with Executive Order 13526, in no case may information be classified in order to "conceal violations of law, inefficiency, or administrative error" or "prevent embarrassment to a person, organization, or agency."

Additionally, in 2009, then-President Barack Obama issued Executive Order 13492,¹⁹ which required a comprehensive review of the status of Guantanamo detainees to determine their appropriate disposition by way of release, transfer, prosecution, or continued detention pursuant to the law of armed conflict. That review was completed on January 22, 2010, and Mr. Rahim was designated for continued law of war detention at that point. Detainees such as Mr. Rahim at Guantanamo are now eligible for review by the PRB, as described above, which continues its work of assessing whether continued law of war detention of certain detainees is necessary to protect against a continuing significant threat to the security of the United States. Since the PRB began its work in October 2013, it has held 78 full hearings, with the results of 77 now made publicly available. Of those 77 determinations, 38 detainees were designated for transfer, 36 of whom have been released from U.S. custody and resettled or repatriated. The pace of hearings increased in 2015 and 2016, with hearings and file reviews as listed on the PRB website.²⁰ The PRB is not designed to assess the lawfulness of a detainee's

¹⁸ According to applicable Counsel Access procedures, detainee counsel must have a valid, current U.S. security clearance at the appropriate level in order to have in-person access to detainees at Guantanamo. These procedures balance the strong interest in counsel access with the need to comply with U.S. law and regulations regarding the protection of classified national security information.

¹⁹ Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Close of Detention Facilities*, 74 FR 4897, Jan. 22, 2009, available at <https://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf>.

²⁰ Available at <http://www.prs.mil/>.

detention. If, however, at any time during the periodic review process, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

Detainees are assisted in proceedings before the PRB by a U.S. government-provided personal representative, and may also be assisted by private counsel at no expense to the U.S. government. Each detainee, aided by his representative, is permitted to participate in the review process by presenting to the PRB a written or oral statement, introducing relevant information, including written declarations, and answering any questions posed by the PRB. Additionally, the detainee may call reasonably available witnesses who are willing to provide information relevant and material to the PRB's determination of whether continued law of war detention of the detainee is necessary to protect against a significant threat to the security of the United States.

A detainee's personal representative receives full access to the information considered by the PRB, except in rare instances where doing so would put national security at risk. Any private counsel also receives such information, provided he or she possesses an appropriate security clearance. In cases where information considered by the PRB is withheld from a detainee's personal representative or private counsel, substitutes or summaries of the withheld information are provided. The PRB ensures that any substitutes or summaries are sufficient to provide the personal representative and private counsel with a meaningful opportunity to assist the detainee during the review process.

Mr. Rahim was represented in his initial PRB hearing by two personal representatives, who were provided with the information considered by the PRB as described above. Mr. Rahim is also represented by private counsel in his efforts before the PRB, but that counsel did not file his paperwork in time to receive the necessary security clearance to participate in Mr. Rahim's PRB proceeding in 2016 or to get access to the information for that proceeding. Mr. Rahim continues to be eligible for review by the PRB. He will automatically receive another full review before the PRB in September 2019, three years after his initial full review. In the interim, he receives a file review every six months to determine whether any new information raises a significant question as to whether his continued detention is

warranted. If such a significant question is raised during a file review, he will promptly receive a full review.

Treatment in detention

Law and policy

The United States reaffirms and continues to uphold the bedrock principle that torture and cruel, inhuman, and degrading treatment or punishment are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity, and the United States has taken steps to strengthen protections against torture and cruel, inhuman, or degrading treatment or punishment.²¹ Torture is contrary to the founding principles of our country and to the universal values to which the United States holds itself and the international community.

All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other applicable international and domestic laws. The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo. Executive Order 13491, *Ensuring Lawful Interrogations*,²² directs that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. policy, and shall not be subjected to violence to life and person (including cruel treatment and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States. It further orders that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized and listed in the Army Field Manual 2-22.3.²³ The Army

²¹ See, e.g., Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2005); Torture Convention Implementation Act, 18 U.S.C. §§ 2340 and 2340A (1994); Exec. Order No. 13491, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4893 (Jan. 22, 2009).

²² Executive Order 13491, *Ensuring Lawful Interrogations*, 74 FR 4893, Jan. 22, 2009, available at <https://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf>.

²³ See <http://www.apd.army.mil/Search/ePubsSearch/ePubsSearchDownloadPage.aspx?docID=0902c85180012142>.

Field Manual explicitly prohibits threats, coercion, and physical abuse, and is publicly available for the Commission’s review.²⁴ The National Defense Authorization Act for Fiscal Year 2016 (“2016 NDAA”)²⁵ codified many of the key interrogation-related reforms required by the Executive Order. It also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

In addition to the Army Field Manual, the U.S. Department of Defense has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations and detention operations. For example, Department of Defense Directive 3115.09²⁶ requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

Additionally, Department of Defense Directive 2310.01E²⁷ requires that “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command,” including “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information.” All reportable incidents must be investigated and, where appropriate, remedied by corrective action.

U.S. law provides several avenues for the domestic prosecution of U.S. government officials and contractors who commit torture and other serious crimes overseas. For example, 18 U.S.C. 2340A makes it a crime to commit torture

²⁴ The requirements of Army Field Manual 2.22-3 are binding on the U.S. military, as well as on all federal government departments and agencies, including the intelligence agencies, with respect to individuals in U.S. custody or under U.S. effective control in any armed conflict, without prejudice to authorized non-coercive techniques of federal law enforcement agencies.

²⁵ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 1223-1224, 129 Stat. 726, 1049 (2015).

²⁶ Department of Defense Directive 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, Nov. 15, 2013, *available at* www.dtic.mil/whs/directives/corres/pdf/311509p.pdf.

²⁷ DoD Directive 2310.01E, DoD Detainee Program, Aug. 19, 2014 (“DoD Directive 2310.01E”), *available at* www.jag.navy.mil/distrib/instructions/DoDD2310.01E_Detainee_Program.pdf.

outside the United States.²⁸ Similarly, under the provisions of the Military Extraterritorial Jurisdiction Act (MEJA), persons employed by or accompanying the Armed Forces outside the United States may be prosecuted domestically if they commit a serious criminal offense overseas.²⁹ In addition, U.S. nationals who are not currently covered by MEJA are still subject to domestic prosecution for certain serious crimes committed overseas if the crime was committed within the special maritime and territorial jurisdiction of the United States—which includes, among others, U.S. diplomatic and military missions overseas and at Guantanamo Bay.

The U.S. government has investigated allegations of torture or cruel treatment. Prior to August 2009, career prosecutors at the Department of Justice carefully reviewed several cases involving alleged detainee abuse. These reviews led to charges in several cases and the conviction of a U.S. Central Intelligence Agency (CIA) contractor and a Department of Defense contractor. In 2009, the U.S. Attorney General directed a preliminary review of the treatment of certain individuals alleged to have been mistreated while in U.S. government custody subsequent to the 9/11 attacks. The inquiry was limited to a determination of whether prosecutable offenses were committed. The review considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecutions under those statutes. That review of the alleged mistreatment of 101 individuals, led by a career Federal prosecutor and now known as the Durham Investigation, generated two criminal investigations. The Department of Justice ultimately declined those cases for prosecution because the admissible evidence would not have been sufficient to obtain and sustain convictions beyond a reasonable doubt.

Beyond the Department of Justice, there are many other accountability mechanisms in place throughout the U.S. government aimed at investigating credible allegations of torture and prosecuting or punishing those responsible. First, the CIA Inspector General conducted more than 25 investigations into misconduct regarding detainees after 9/11. The CIA also convened six high-level accountability proceedings from 2003 to 2012. These reviews evaluated the actions

²⁸ “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.” 18 U.S.C. § 2340A(a).

²⁹ 18 U.S.C. § 212.

of approximately 30 individuals, around half of whom were held accountable through a variety of sanctions.

Second, the U.S. military investigates all credible allegations of misconduct by U.S. forces to determine the facts, including identifying those responsible for any violation of law, policy, or procedures; and multiple accountability mechanisms are in place to ensure that personnel adhere to those laws, policies, and procedures. The Department of Defense has conducted thousands of investigations since 2001 and it has prosecuted or disciplined hundreds of service members for misconduct, including mistreatment of detainees. All court-martial proceedings are a matter of public record. Convictions can result in, among other consequences, punitive confinement, reduction in rank, forfeiture of pay or fines, punitive discharge, or reprimand. Individuals have been held accountable for misconduct related to the abuse of detainees by personnel within their commands. These individuals include senior officers, some of whom have been relieved of command, reduced in rank, or reprimanded.

Beyond these accountability mechanisms, training measures are in place to safeguard against torture and cruel, inhuman, or degrading treatment or punishment in interrogations. For example, Department of Defense intelligence interrogations are conducted only by properly trained and certified personnel. Training includes instruction on applicable law and policy; lawful interrogation methods and techniques; the humane treatment of detainees and how to identify signs of torture or cruel, inhuman or degrading treatment; and the procedures for reporting alleged violations. Routine refresher training is provided on a recurring basis.

International Committee of the Red Cross (ICRC) access

The 2016 NDAA requires that any U.S. government department or agency provide the ICRC with notification of, and prompt access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. government, consistent with existing Department of Defense regulations and policies. The Department of Defense has worked closely with the ICRC to facilitate increased opportunities for Guantanamo detainees to communicate with

their families. The addition of near real-time communication is another step in the Department of Defense's efforts to assess continually and, where practicable and consistent with security requirements, improve conditions of detention for detainees in its custody. Detainees are given the opportunity to send and receive letters, facilitated by the ICRC, and are able to talk to their families periodically via phone or video teleconference.

Medical care at Guantanamo

The Joint Medical Group at Guantanamo (JMG) is committed to providing appropriate and exemplary medical care to all detainees. JMG providers take seriously their duty to protect the physical and mental health of the detainees and approach their interactions with detainees in a manner that encourages provider-patient trust and rapport and that is aimed at encouraging detainee participation in medical treatment and prevention. Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialist physicians. For example, detainees may make a request to guard personnel in the cell blocks or to the medical personnel who make daily rounds on each cell block at any time in order to initiate medical care. In addition to responding to such detainee requests, the medical staff will investigate any medical issues observed by staff. The availability of care through ongoing monitoring and response to detainee-initiated requests has resulted in thousands of outpatient contacts between detainees at Guantanamo and the medical staff, followed by inpatient care as needed.³⁰ The healthcare provided to the detainees at Guantanamo is comparable to that which U.S. service personnel receive while serving at Joint Task Force-Guantanamo.³¹

Military physicians and other healthcare personnel are held to the highest standards of ethical care and at no time have been released from their ethical obligations. Medical care is not provided or withheld based on a detainee's compliance or noncompliance with detention camp rules. The JMG staff includes licensed, board-certified physicians and staff of different specialties, including an

³⁰ See U.S. Department of Defense, Medical Program Support for Detainee Operations, Instruction 2310.08E, June 6, 2006, available at <http://www.dtic.mil/whs/directives/corres/pdf/231008p.pdf>.

³¹ DoD Instruction 2310.08E states: "Health care personnel charged with the medical care of detainees have a duty to protect detainees' physical and mental health and provide appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces."

internist/oncologist, a dentist, a physician's assistant, licensed medical/surgical nurses, corpsmen (formally trained Navy medical personnel akin to a "medic" in the Army), various technicians (laboratory, radiology, pharmacy, operating room, respiratory therapy, physical therapy, and biomedical repair), and administrative staff. The Naval Hospital Guantanamo provides additional consultative services from numerous medical professionals including an anesthesiologist, a general surgeon, an orthopedic surgeon, a licensed dietician, and a physical therapist. Specialists, including medical professionals practicing in the area of dermatology, cardiology, otorhinolaryngology (ear, nose, and throat), gastroenterology, urology, and audiology, are routinely brought in, and JMG has the ability to request specialists from other areas as needed.

The SSCI Report

Beginning in 2007, the U.S. Senate Select Committee on Intelligence (SSCI) conducted a review of the CIA's former detention and interrogation program, culminating in the production of a lengthy report. The SSCI asked then-President Obama to declassify the report's executive summary and findings and conclusions. After these sections were declassified with appropriate redactions necessary to protect national security, the SSCI released them to the public in December 2014. The declassified executive summary and the findings and conclusions of the SSCI report are now available on the Committee's website at <http://www.intelligence.senate.gov/publications/reports>. In the interest of transparency, this public report is nearly 500 pages long and is only lightly redacted—93 percent of the summary report is entirely declassified. It concerns activities that took place under a CIA program that has since ended. The decisions following the attacks of September 11, 2001, relating to this former program are part of our history and are not representative of the way the United States addresses the threat from terrorism it still faces today. This report should be viewed as what it is: a recounting of a period in U.S. history that has since passed.

The declassified summary of the report contains a discussion of Mr. Rahim at pages 143, 163–168, 202, 425, 451, and 461, and in footnotes 56, 762, 2203, 2205, 2214, 2216, 2420, and 2469. For more information about the declassified summary of the SSCI Report, we would refer you to the information the United States provided to the Commission at its thematic hearing on this topic on October 23, 2015. The factual findings and conclusions in the SSCI Report are the views of

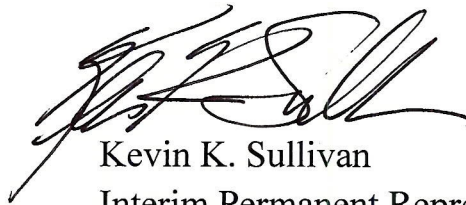
the Committee and do not necessarily reflect the views or positions of the Executive Branch of the U.S. government.

* * *

We hope that this general information is useful to the Commission. The Commission should decline Mr. Rahim's invitation to recommend precautionary measures in this matter, and should the Commission nevertheless do so, the United States will construe such measures as a nonbinding recommendation. The United States reserves the right to submit further observations on this matter should it reach the admissibility or merits phases.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Sullivan', with a stylized flourish at the end.

Kevin K. Sullivan
Interim Permanent Representative