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

MOHAMMED AL QAHTANI,

Petitioner-Appellee,

v.

DONALD J. TRUMP, *et al.*,

Respondents-Appellants.

No. 20-5130

RESPONDENTS-APPELLANTS' PUBLIC REDACTED MOTION FOR STAY PENDING APPEAL AND EXPEDITION

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INTRODUCTION AND SUMMARY OF ARGUMENT

The government respectfully requests a stay pending appeal of the district court's order compelling the government to convene a mixed medical commission to examine petitioner Mohammed al-Qahtani, a member of al-Qaida who is currently detained at Guantanamo Bay as an unprivileged enemy combatant. The court's extraordinary order extends medical-repatriation privileges—which the Geneva Convention Relative to the Treatment of Prisoners at War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention), grants sick and wounded forces of a state engaged in an international armed conflict—to a member of a terrorist group that neither accepts nor applies the Convention. Because the order rests on multiple errors of law, it is likely to be overturned on appeal. In the interim, a stay is essential to protect the government's interest in the continued stability of detention operations at Guantanamo; to prevent interference with the government's efforts to bring other Guantanamo detainees to justice; and to maintain the integrity of Department of Defense regulations issued to implement the law of war.

In district court, petitioner sought an order requiring the government to convene a mixed medical commission under § 3-12 of Army Regulation 190-8. Dep't of the Army, Reg. 190-8 (Oct. 1, 1997) (AR 190-8). That regulation implements the provisions of the Third Geneva Convention that govern the repatriation of sick and

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wounded enemy prisoners of war. *Id.* § 3-12(a). Petitioner argued that his medical condition requires his repatriation under the regulation.

More than two years later, the district court granted petitioner's motion and ordered the government to establish a mixed medical commission to examine petitioner. Dkt. No. 387; *see* Dkt. No. 397 (clarifying initial order). But the medical-repatriation provisions of the Third Geneva Convention do not apply to the United States' non-international armed conflict with al-Qaida. The district court therefore erred by interpreting a regulation that *implements* the Third Geneva Convention's repatriation provisions—which apply only to prisoners of war during an international armed conflict—to *expand* those protections to a terrorist group that is not a party to the Convention and does not comply with its requirements. The court's holding is inconsistent with the regulation's text, structure, and purpose. And it contravenes this Court's admonition that, to determine whether Army Regulation 190-8 "establishes [a Guantanamo] detainee's entitlement to release from custody," a court "must analyze" the corresponding Geneva Convention provisions. *Al Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013) (*Al Warafi II*).

The district court's interpretation of the regulation fails even on its own terms. Under the regulation, only enemy prisoners of war and retained personnel may invoke a mixed medical commission. AR 190-8 § 3-12(h). There is no dispute that petitioner falls into neither category. The court relied on the regulation's definition of "Other

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Detainee," under which such detainees "shall be treated as" enemy prisoners of war until "a legal status is ascertained by a competent authority." AR 190-8, glossary, sec. II. But as both the Department of Defense directive governing detention operations and the Department of Defense Law of War Manual make clear, this treatment provision does not apply to non-international armed conflicts such as the United States' conflict with al-Qaida. And even if the provision did apply to such conflicts, petitioner's "legal status" has long been "ascertained" to be that of an unprivileged enemy combatant. Accordingly, the government is likely to prevail on its appeal to this Court.

The balance of harms also supports a stay pending appeal. The government has never convened a mixed medical commission to examine any individual in petitioner's position. Forcing the government to do so pending appeal would harm detention operations at Guantanamo by encouraging other detainees to refuse appropriate medical treatment; interfere with the government's efforts to bring other Guantanamo detainees to justice; and undermine the integrity of Department of Defense regulations issued to implement the law of war. The impact of a stay on petitioner would not outweigh these harms, particularly if the Court considers the case on the expedited schedule proposed by the government. For these reasons, the Court should preserve the status quo by staying the district court's order while the government pursues its meritorious appeal.

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STATEMENT

A. Treaty and Regulatory Background

The Third Geneva Convention establishes rules for the treatment of prisoners of war. The full protections of the Convention apply to international armed conflicts—that is, to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Third Geneva Convention, art. 2. In such conflicts, the Convention applies even if "one of the Powers in conflict may not be a party to the Convention." *Id.* "[T]he Powers who are parties [to the Convention]" shall "be bound by the Convention in relation to the said [non-party] Power, *if* the latter accepts and applies the provisions thereof." *Id.* (emphasis added).

"In the case of armed conflict not of an international character," by contrast, the full protections of the Convention do not apply. Third Geneva Convention, art. 3. A non-international armed conflict is one that "does not involve a clash between nations." *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006). The parties to such conflicts are only "bound to apply, as a minimum," certain provisions enumerated in Article 3 of the Convention that relate to the humane treatment of detainees. Third Geneva Convention, art. 3; *see generally Hamdan*, 548 U.S. at 629-31.

Because al-Qaida is a terrorist organization, not a State that is a High Contracting Party to the Third Geneva Convention, the United States' conflict with

al-Qaida is a non-international armed conflict. *Hamdan*, 548 U.S. at 630-31. Moreover, al-Qaida neither accepts nor applies the Third Geneva Convention's provisions. The full protections of the Convention thus do not apply to enemy combatants who are part of al-Qaida, since al-Qaida's members are not entitled to prisoner-of-war status under the Convention. *See* White House Press Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002), https://go.usa.gov/xftsF. The Convention only obliges the United States to apply the provisions of Article 3.

This case concerns the United States' application of the Third Geneva Convention's requirement—not enumerated in Article 3—that the parties to an international armed conflict repatriate "seriously wounded and seriously sick prisoners of war." Third Geneva Convention, art. 109. To implement this requirement, the Convention calls for the appointment of mixed medical commissions to "examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them." *Id.* art. 112. Procedures governing the "appointment, duties, and functions of these Commissions" are set forth in Annex II to the Convention. *Id.*

Annex II requires each mixed medical commission to have three members. Third Geneva Convention annex II, art. 1. One member must be appointed by the detaining power. *Id.* The two others "shall belong to a neutral country," *id.*; "shall be appointed by the International Committee of the Red Cross, *id.* annex II, art. 2; and

"shall be approved by the Parties to the conflict," *id.* annex II, art. 3. If the International Committee of the Red Cross cannot arrange for the appointment of neutral members, such appointment "shall be done by the Power protecting the interests of the prisoners of war to be examined." *Id.* annex II, art. 5. The commission's decisions "shall be made by a majority vote," *id.* annex II, art. 10, and must be executed by the detaining power "within three months of the time when it receives due notification of such decisions," *id.* annex II, art. 12.

The United States is a High Contracting Party to the Third Geneva Convention. As part of the government's implementation of those treaty obligations, the Secretaries of the Army, Navy, and Air Force issued Army Regulation 190-8 to give guidance to their personnel. This regulation "implements international law" relating to enemy prisoners of war and other categories of individuals detained by the U.S. armed forces. AR 190-8 § 1-1(b); *see id.* § 1-1(b)(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.").

Section 3-12 of the regulation provides for the establishment of mixed medical commissions "to determine cases eligible for repatriation." *Id.* § 3-12(a)(2). The procedures governing those commissions are based on those specified by Annex II of the Convention. *Id.* Section 3-12 also states that, to be eligible for examination and potential repatriation, an individual must fall into one of two categories: enemy

prisoner of war or retained personnel. AR 190-8 § 3-12(h). The glossary to the regulation defines enemy prisoners of war as "detained person[s] as defined in Articles 4 and 5 of the [Third] Geneva Convention," and in particular, as individuals "who, while engaged in combat under orders of [their] government, [are] captured by the armed forces of the enemy." *Id.*, glossary, sec. II. The glossary defines retained personnel as "medical personnel" meeting certain requirements; "[c]haplains"; and "[s]taff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments." *Id.*; *see id.* § 3-15(b).

The glossary also addresses "Other Detainee[s]." AR 190-8, glossary, sec. II. "Other Detainee[s]" are "[p]ersons in the custody of the U.S. Armed Forces who have not been classified as . . . [enemy prisoners of war] (article 4, [Third Geneva Convention]), [retained personnel] (article 33, [Third Geneva Convention], or [civilian internees] (article 78, [Fourth Geneva Convention])." *Id.*[1] Other Detainees "shall be treated as [enemy prisoners of war] until a legal status is ascertained by competent authority." *Id.*

[1] A civilian internee is a "civilian who is interned during armed conflict or occupation for security reasons or for protection or because [the civilian] has committed an offense against the detaining power." AR 190-8, glossary, sec. II. The regulation does not provide for the examination of civilian internees by a mixed medical commission. *Id.* § 3-12(h).

B. Procedural Background

Petitioner Mohammed al Qahtani is a Saudi Arabian national detained at Guantanamo Bay. In 2005, petitioner filed a habeas petition alleging that his detention was unlawful. The government responded with a factual return explaining that petitioner—a member of al-Qaida who unsuccessfully attempted to enter the United States to participate in the September 11 attacks—is being detained pursuant to the 2001 Authorization for Use of Military Force as informed by the laws of war. Petitioner has not yet filed a traverse challenging the factual basis for his detention. Petitioner's habeas case has been stayed at his request since 2010.

In August 2017, petitioner asked the government to convene a mixed medical commission to examine him pursuant to § 3-12 of Army Regulation 190-8. After the government rejected that request, petitioner filed a motion in his pending habeas case seeking to "compel Respondents to facilitate" such examination. Dkt. No. 369, at 1. Petitioner claimed that he was "entitled" to such relief "pursuant to the All Writs Act or in the form of an injunction." *Id.* at 3.

C. The Challenged Order

The district court granted petitioner's motion in March 2020, over two years after petitioner's motion was filed. Dkt. No. 386. The court acknowledged that the government had previously determined both that petitioner was part of al-Qaida, and that al-Qaida fighters are enemy combatants not entitled to prisoner-of-war status. *Id.*

at 4, 19. But the court concluded that petitioner is an "Other Detainee" who must be treated as an enemy prisoner of war under Army Regulation 190-8, including with respect to the regulation's medical-repatriation provisions. *Id.* at 19-20. The court further concluded that it had authority under the All Writs Act to compel the government to convene a mixed medical commission to provide the Court with the necessary medical facts to reach a legal conclusion in petitioner's habeas case. *Id.* at 21-22. The court stated that, due to its reliance on the All Writs Act, it "need not consider" petitioner's request for injunctive relief. *Id.* at 22. But the court "address[ed] the legal standard governing preliminary injunctions" to "assist review," *id.*, and held that the preliminary-injunction factors favored petitioner, *id.* at 22-25.

The government appealed the district court's order, and sought a stay of that order in district court. The government also moved to clarify that the order had not granted petitioner's demand that his retained medical expert be seated on any mixed medical commission that the government is ordered to convene. On August 12, 2020, the court granted the government's clarification motion but denied the government's request for a stay. Dkt. No. 397, at 3-5.

ARGUMENT

The propriety of a stay pending appeal turns on "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will

substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). This standard is easily satisfied here.

I. The District Court's Interpretation Of Army Regulation 190-8 Rests On Multiple Errors Of Law.

A. Army Regulation 190-8 was issued for the express purpose of "implement[ing] international law . . . relating to [enemy prisoners of war]." AR 190-8 § 1-1(b). The "principal treat[y] relevant to" the regulation's repatriation provisions is the Third Geneva Convention. *Id.* § 1-1(b)(4); *see id.* § 3-12(a)(2). Remarkably, the district court held that petitioner was entitled to a mixed medical commission under the regulation without considering whether its holding was consistent with the Third Geneva Convention provisions that the regulation implements. In doing so, the court ignored this Court's admonition that, when evaluating a habeas petitioner's claim that the "regulation explicitly establishes [the] detainee's entitlement to release from custody," the court "must analyze th[ose] relevant aspects of the Geneva Convention[]" to "determin[e] whether [petitioner] is entitled to release" under the regulation. *Al Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013) (*Al Warafi II*). Had the court undertaken that analysis, it would have denied petitioner's motion.

The United States' conflict with al-Qaida is a non-international armed conflict. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006). In such conflicts, the full protections of the Third Geneva Convention—including the Convention's

repatriation provisions—do not apply to members of the non-State armed group. *See* Third Geneva Convention, art. 3. The United States is only "bound to apply, as a minimum," the provisions in Article 3 relating to the humane treatment of detainees. *Id.* Article 3 does not include the repatriation provisions involving mixed medical commissions that Army Regulation 190-8 implements. *See id.*

The Convention further provides that, in conflicts between two or more High Contracting Parties, the full protections of the Convention will apply to the "mutual relations" of the High Contracting Parties that are participants, even if "one of the [other] Powers in conflict may not be a party to the present Convention." Third Geneva Convention, art. 2. "[T]he Powers who are parties [to the Convention]" shall "be bound by the Convention in relation to the said [non-party] Power, if the latter accepts and applies the provisions thereof." *Id.* But this provision is doubly inapplicable. To begin with, "[n]on-state actors" such as al-Qaida are not "'Power[s]' that would be eligible under Article 2 . . . to secure protection by complying with the Convention's requirements." *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring), *cited approvingly by Hamdan*, 548 U.S. at 630. Moreover, al-Qaida emphatically rejects the Convention's provisions.

In sum, the Third Geneva Convention does not require the United States to convene a mixed medical commission on behalf of al-Qaida fighters in its custody. It

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follows that Army Regulation 190-8, which "implements international law," does not extend medical-repatriation protections to al-Qaida fighters either. AR 190-8 § 1-1(b).

B. The district court reached the contrary conclusion by relying on the regulation's definition of "Other Detainee." Dkt. No. 386, at 19-20. This definition provides that "[p]ersons in the custody of the U.S. Armed Forces who have not been classified as an" Enemy Prisoner of War, Retained Personnel, or Civilian Internee, "shall be treated as [Enemy Prisoners of War] until a legal status is ascertained by competent authority." AR 190-8, glossary, sec. II. But this provisional-treatment requirement only covers conflicts in which prisoner-of-war protections apply. *E.g.*, Office of General Counsel, U.S. Dep't of Defense, Department of Defense Law of War Manual § 4.27.2 (June 2015; updated Dec. 2016), https://go.usa.gov/xftsG; U.S. Dep't of Defense, Directive 2310.01E, ¶ 3(h) (Aug. 2014; updated May 2017), https://go.usa.gov/xf6P7. The United States' non-international armed conflict with al-Qaida is not such a conflict.

Petitioner is not entitled to invoke the regulation's medical-repatriation provisions even accepting the mistaken conclusion that the "Other Detainee" definition's provisional-treatment requirement applies to him. That is because petitioner's "legal status" has already been "ascertained." *See* AR 190-8, glossary, sec. II. In 2002, President George W. Bush concluded that, since al-Qaida is a terrorist organization, al-Qaida's fighters are unprivileged enemy combatants to whom the full

protections of the Geneva Convention do not apply. The White House, *Statement by the Press Secretary on the Geneva Convention* (Feb. 7, 2002), https://go.usa.gov/xdSG7. In 2004, a Combatant Status Review Tribunal determined that petitioner is part of al-Qaida, which is not and cannot be a party to the Third Geneva Convention. Petitioner's legal status does not entitle him to medical-repatriation protections—meaning that the provisional-treatment requirement in the glossary's definition of "Other Detainee" does not extend those protections to him. *See Hamdan*, 415 F.3d at 43 (holding that the President is a competent authority to determine a detainee's legal status for purposes of AR 190-8), *rev'd on other grounds*, 548 U.S. 557 (2006); *United States v. Hamidullin*, 888 F.3d 62, 72-73 (4th Cir. 2018) (same).

The district court rejected this straightforward conclusion on the theory that the "Other Detainee" definition forces the government to treat detainees as enemy prisoners of war so long as they have not been classified as an Enemy Prisoner of War, Retained Person, or a Civilian Internee. Dkt. No. 386, at 20. But this purported requirement does not appear in the definition's text, which does not require a competent authority to classify a particular detainee in one of the three legal statuses enumerated in the definition. *See* AR 190-8, glossary, sec. II. The requirement is also inconsistent with the Department of Defense directive governing detainee operations and the Department of Defense Law of War Manual, which—by establishing that the "Other Detainee" definition applies only to international armed conflicts—make clear

that a detainee in a non-international armed conflict can possess a legal status that is not Enemy Prisoner of War, Retained Personnel, or Civilian Internee.

Finally, even if the "Other Detainee" definition governed petitioner's treatment at any point, Army Regulation 190-8 states that, "[i]n the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence." AR 190-8 § 1-1(b). Under the district court's interpretation, a regulation issued to implement the government's medical-repatriation obligations under the Third Geneva Convention would confer upon petitioner exactly the same protections that the Third Geneva Convention does not grant him. *Cf. Al Warafi II*, 716 F.3d at 632 ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention[s]."). The regulation's conflicts-or-discrepancies provision forecloses that perverse result.

C. The district court also relied on this Court's statement in *Al Warafi II* that, because Army Regulation 190-8 is domestic law, a Guantanamo detainee may invoke the regulation in habeas proceedings "to the extent that the regulation explicitly establishes a detainee's entitlement to release from custody." 716 F.3d at 629 (cited by Dkt. No. 386, at 18-19). But that principle does not support the district court's conclusion that Army Regulation 190-8 entitles petitioner to be examined by a mixed medical commission. To the contrary, the Court instructed habeas tribunals to

"analyze" the "relevant aspects of the Geneva Conventions" to determine whether a particular regulatory provision entitles a petitioner to release. *Id.* The district court disregarded that unambiguous instruction, as explained in detail above.

The facts of *Al Warafi II* underscore the district court's error. Al Warafi was a member of the Taliban who claimed that he was a medic entitled to the protections owed to Retained Personnel under the Geneva Conventions and § 3-15 of Army Regulation 190-8. 716 F.3d at 629. In opposing Al Warafi's habeas petition, the government took no "position . . . with regard to which provisions of the . . . Geneva Conventions directly apply to the ongoing armed conflict against the Taliban." U.S. Gov't Br. 4 n.1, *Al Warafi II*, No. 11-5276, 2012 WL 965971 (D.C. Cir. Mar. 21, 2012). The government urged the Court not to address that question because, "even if" the relevant provisions of the Geneva Conventions and Army Regulation 190-8 "were to apply [to Al Warafi] verbatim, Al Warafi would not fall within th[em]." *Id.* Accordingly, the Court assumed *arguendo* that the relevant Geneva Convention provisions applied, and affirmed the district court's judgment that petitioner had failed to prove his entitlement to Retained Personnel status. *Al Warafi II*, 716 F.3d at 630-31; *accord Al Warafi v. Obama*, 409 F. App'x 360, 361 (D.C. Cir. 2011) (per curiam).

Al Warafi II differs from this case in one critical respect. From the first, the government has strenuously disputed that the Third Geneva Convention's repatriation provisions apply to al-Qaida fighters. And § 3-12 of Army Regulation

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190-8 implements those provisions only when they do apply. Thus, *Al Warafi II* does not control the question whether the regulation covers al-Qaida fighters such as petitioner. Indeed, *Al Warafi II*—which concerned the application of a different Geneva Convention obligation to a Taliban fighter—had no occasion to consider that question at all.

II. The Remaining Factors Strongly Support A Stay.

The remaining stay factors weigh strongly in favor of granting the government's motion for a stay pending appeal.

A. The government will be irreparably injured by the district court's order in at least three respects. First, the order risks jeopardizing the health, safety, and security of other Guantanamo detainees. *See Hatim v. Obama*, 760 F.3d 54, 59 (D.C. Cir. 2014) (holding that such concerns are legitimate government interests). As the declaration of Rear Admiral Timothy C. Kuehlhas (Commander of Joint Task Force Guantanamo) explains, the order increases the likelihood that a detainee will attempt to endanger his own health to benefit from the Geneva Convention's medical-repatriation provisions. Dkt. No. 389, ex. 1 ¶ 9 (Kuehlhas Decl.) (stating that such acts [redacted] that would create an unnecessary risk to the detainees' health and safety," and "jeopardize the safety of the guard force"); *accord* Dkt. No. 395, ex. 1 ¶ 15 (2020 Senior Medical Officer Decl.) (same). Rear Admiral

Kuehhas reached that conclusion based on his day-to-day supervision of Guantanamo detainees, for whose "safe and humane care and custody" he is responsible. Kuehhas Decl. ¶ 1. Unfortunately, his experience confirms that Guantanamo detainees will leverage their control over their health and medical care to obtain alterations to the conditions of their confinement. *Id.* ¶ 6. Given his "special insight into [the detainees'] mindset," his assessment is entitled to significant weight. *Dhiab v. Trump*, 852 F.3d 1087, 1097 (D.C. Cir. 2017) (deferring to Commander of Joint Task Force Guantanamo's assessment of detainees' likely response to court order, and the harm to detention operations that would result).

Second, the order risks interfering with the government's attempts to bring high-value Guantanamo detainees to justice by prosecuting them in military tribunals. A different detainee currently being prosecuted on charges related to planning the September 11 attacks has already requested, "[p]ursuant to the District Court's finding" in this case, that the Department of Defense "expeditiously convene a Mixed Medical Commission to fully evaluate his illnesses and injuries." Dkt. No. 395, ex. 2, at 5. This detainee, like petitioner, asserts that his medical condition "entitle[s] [him] to repatriation or resettlement." *Id.* at 4. Even if such attempts are ultimately unsuccessful, the delay and confusion that they engender will themselves harm the government's ongoing prosecution efforts. Dkt. No. 389, ex. 2 ¶ 6.

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Third, and as the district court itself acknowledged, the challenged order will require the United States to "enter uncharted territory" by convening a mixed medical commission in a conflict against a terrorist group. Dkt. No. 386, at 24. The government has never convened a commission in such circumstances. Unsurprisingly, then, the procedures for establishing such a commission do not apply here. For example, the regulation requires each commission to include two physicians "from a neutral country." AR 190-8 § 3-12(a)(2). But there are no neutral countries in the conflict against al-Qaida, as both the district court and petitioner have recognized. *See* Dkt. No. 386, at 24; Dkt. No. 369, at 2. And the regulation's alternative procedure for selecting these members—namely, reliance on a protecting power—cannot be applied either.[2] The court's order nevertheless requires the United States to begin the "unusual and likely burdensome" process of adapting an inapplicable regulation to a conflict that the regulation was never intended to cover. Dkt. No. 386, at 24.

[2] Under international law, a protecting power is "a third State that is designated by one State to protect its interests vis-à-vis a second State, when the first State lacks normal diplomatic relations with the second State and the second State consents to such a designation." Dkt. No. 389, ex. 2 ¶ 5. No State has been designated as a protecting power to represent al-Qaida's interests. Dkt. No. 389, ex. 2 ¶ 5. The regulation does not contemplate the International Committee of the Red Cross serving as a protecting power in this context, AR 190-8 § 3-12(b) (describing the roles of the International Committee of the Red Cross and the Protecting Power separately and as alternatives to one another).

B. These harms are not outweighed by the impact of a stay on petitioner under the circumstances. Relying on the declarations of his retained expert, petitioner asserts that his "physical and mental condition has deteriorated significantly in the last few years." Dkt. No. 397, at 4. Petitioner also asserts that he is "unable to trust his military doctors" and can only be treated in Saudi Arabia, where his family resides. *Id.* But these assertions are inconsistent with the expert assessments of his treating physicians, as set forth by the declarations of two senior medical officers in the Joint Medical Group at Guantanamo. The Joint Medical Group's healthcare providers "do not participate in detention-related activities or operations for any reason other than to provide health care services." Dkt. No. 372, ex. 2 ¶ 6. Their duty is instead to protect detainees' physical and mental health, and they take that duty "seriously." *Id.* ¶ 7. The healthcare provided to detainees "is comparable to that afforded our active duty service members on island." *Id.*

The government's declarations confirm that, as of 2017 (when petitioner filed his motion to compel his examination by a mixed medical commission), the Joint Medical Group's healthcare providers believed that petitioner's "condition is currently well managed with minimal residual symptoms." Dkt. No. 372, ex. 2 ¶ 21. As of June 14, 2020, petitioner's "psychiatric condition has been and continues to be stable with intact insight and daily functionalities. There has been no deterioration in [petitioner's] physical and mental health condition" since 2017. 2020 Senior Medical

Officer Decl. ¶ 4. The Joint Medical Group remains "fully capable" of "contin[uing] to provide safe, humane[,] and legal medical care to" petitioner. *Id.* ¶ 16.

Furthermore, the government proposes that the briefing and argument of the case be expedited so as to minimize any potential harm to petitioner imposed by a stay pending appeal. The government respectfully requests that this Court adopt the following proposed briefing schedule:

09/21/2020	Appellants' Opening Brief
09/28/2020	Amici for Reversal (if any)
10/21/2020	Appellees' Response Brief
10/28/2020	Amici for Affirmance (if any)
11/04/2020	Appellants' Reply Brief
11/11/2020	Deferred Joint Appendix
11/18/2020	Final Briefs with Joint Appendix Cites

The government further requests that the Court calendar the case for argument at the earliest available date following the conclusion of briefing.

C. Finally, the public interest weighs heavily in favor of a stay. The public has a strong interest in ensuring that the government's detention operations and military-commission prosecutions are not disrupted. The public also has a strong interest in maintaining the integrity of Department of Defense regulations issued to implement the Geneva Conventions. By interpreting those regulations to extend prisoner-of-war protections to members of a terrorist group that is not a party to the Conventions and refuses to apply them, the district court's order seriously undermines the government's implementation of those Conventions—which condition prisoner-

of-war privileges based on the party's acceptance of the laws of war. *See Al Warafi II*, 716 F.3d at 632. Permitting that order to take effect would force the Executive Branch to act inconsistently with interpretations of the Conventions that the United States has held for over six decades, notwithstanding the Executive's constitutional authority over foreign policy and military operations.

D. In denying the government's stay request, the district court ignored all of these considerations. Indeed, the court rejected the government's showing of irreparable injury in just two sentences. Dkt. No. 397, at 5. The court suggested that the government's allegations of harm were based on "speculative domino effects." *Id.* The court then stated that other Guantanamo detainees "will only be eligible for Mixed Medical Commission review if they are actually ill and they complete the prerequisite procedural steps to request review." *Id.* This analysis is plainly unresponsive to the government's concerns. And because the district court "ha[s] no day-to-day experience with the people being detained at Guantanamo and ha[s] no special insight into their mindset," the court should not have dismissed the government's harms as "'speculative.'" *Dhiab*, 852 F.3d at 1097. The court compounded these errors by uncritically accepting petitioner's allegations of "specific and serious health concerns" without discussing—or even referencing—countervailing evidence from petitioner's treating physicians. Dkt. No. 397, at 4-5. And the court entirely failed to address the public interest weighing in favor of a stay.

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The government has conferred with counsel for petitioner. Petitioner opposes the government's stay request, and believes that the government's expedition request is premature while petitioner's opposed motion to dismiss the government's appeal is pending.

CONCLUSION

For these reasons, the district court's order compelling the government to establish a mixed medical commission to examine petitioner should be stayed pending appeal, and the government's request for expedition should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of Fed. R. App. P. 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 5,118 words according to the count of Microsoft Word.

/s/ Michael Shih
MICHAEL SHIH
Counsel for Appellants

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CERTIFICATE OF SERVICE

I hereby certify that, on September 1, 2020, I electronically filed the foregoing document with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and will be served through the CM/ECF system.

/s/ Michael Shih
MICHAEL SHIH
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