

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

SHAKER AAMER,

Petitioner,

v.

BARACK H. OBAMA,
President of the United States, et al.,

Respondents.

Civil Action No. 1:04-cv-2215 (RMC)

**RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION
TO COMPEL EXAMINATION BY MIXED MEDICAL COMMISSION**

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INTRODUCTION

Petitioner Shaker Aamer (ISN 239) moves the Court for the extraordinary remedy of a permanent injunction compelling the Executive to establish a Mixed Medical Commission pursuant to one of the military regulations that implements provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (“Third Geneva Convention” or “GC III”), and also to appoint his hired medical expert, Dr. Emily Keram, to that Commission. See Pet. Mot., ECF No. 278. Such an order would necessarily require the Executive to establish such a commission, craft procedures for it, and develop criteria applicable to this non-international armed conflict against al-Qaida, Taliban, and associated forces from principles laid down in the Model Agreement annexed to the Third Geneva Convention for determining the types of disabilities and sicknesses that warrant repatriation. Each of these steps implicates the United States’ interpretation and application of the Third Geneva Convention and the implementing military regulations. Petitioner seeks this relief even though neither the relevant provisions of that military regulation nor of the Third Geneva Convention apply to him.

The Court should deny Petitioner’s motion for two reasons. First, the Court does not have or should not exercise jurisdiction to consider his claim for relief. Pursuant to 28 U.S.C. § 2241(e)(2), the Court lacks jurisdiction to hear any claim that does not sound in habeas. Here, Petitioner’s claim for relief does not sound in habeas, and therefore is barred, because he seeks affirmative injunctive relief that will not lead directly to his release or otherwise affect the duration or form of his detention. Petitioner claims that the Court has authority to order this extraordinary relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a), but the All Writs Act

does not confer or enlarge the Court’s jurisdiction. Moreover, even if Petitioner’s claim could be said to sound in habeas, the Court should refrain from exercising its jurisdiction over this claim as a matter of equity—which it may do pursuant to statutory and common law—because an order requiring the Executive to take an action pursuant to certain provisions of a military regulation implementing its treaty obligations would be contrary to the Executive’s considered interpretation about the scope and applicability of those provisions, which in turn would be inconsistent with the great deference the Court should give the Executive on these matters. It would also place an extraordinary burden on the Executive by, among other things, requiring the Executive to launch a difficult and unprecedented policy process to establish the procedures for a Mixed Medical Commission and the contours of the standards it would apply in this non-international armed conflict.

Second, although framed as a request for a preliminary injunction, Petitioner actually seeks permanent injunctive relief requiring the establishment of a Mixed Medical Commission to decide his case (because he does not seek to preserve the status quo pending further litigation or relief that is “preliminary”), but he has not made the showing required to warrant such an extraordinary remedy. As an initial matter, Petitioner fails to demonstrate that he is entitled to the establishment of, and examination by, a Mixed Medical Commission. Petitioner claims that he should be accorded the privileges of an enemy prisoner of war—which can include access to a Mixed Medical Commission—because, pursuant to Army Regulation 190-8, he qualifies as an “other detainee,” a placeholder status for individuals “who have not been classified as an [enemy

prisoner of war, or EPW], [retained personnel, or RP], or [civilian internee, or CI], [and who] shall be treated as EPWs until a legal status is ascertained by a competent authority.” Army Reg. 190-8, Appendix B, Section II-Terms.¹ But Petitioner’s legal status has been determined. In 2002, the Executive determined that al-Qaida, Taliban, and associated forces did not qualify for prisoner of war status under the Third Geneva Convention. In 2004, a Combatant Status Review Tribunal (“CSRT”) determined that Petitioner is an “enemy combatant,”² which means that the Executive determined that he was in fact an individual who was part of or supporting al-Qaida, Taliban, or associated forces, forces that the President previously determined did not qualify for prisoner of war status. Accordingly, because Petitioner was detained as part of those forces, his

¹ The term “other detainee” in Army Regulation 190-8 confers prisoner of war status as a placeholder status pursuant to Article 5 of the Third Geneva Convention, which states that, “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” See U.S. Dep’t of Defense Law of War Manual (June 2015) § 4.27.2 (POW Protections for Certain Persons Until Status Has Been Determined), available at <http://www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf> (“DoD Law of War Manual”).

² Although the U.S. Government no longer uses the term “enemy combatant” in articulating its detention authority under the Authorization for the Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224 (2001), the legal import of that determination—that Petitioner was, in fact, part of or supporting al-Qaida, Taliban, or associated forces—remains relevant for status under Army Regulation 190-8 and the Third Geneva Convention. Of course, pursuant to the Supreme Court’s decision in Boumediene v. Bush, 553 U.S. 723 (2008), Petitioner may petition for a writ of habeas corpus to challenge the lawfulness of his detention, which requires the Government to demonstrate that he was lawfully detained as part of, or having substantially supported, al-Qaida, Taliban, or associated forces. See, e.g., Ali v. Obama, 736 F.3d 542, 544 (D.C. Cir. 2013).

status has already been determined, and he does not qualify for protections afforded an EPW, either permanently or as a placeholder under the regulation, and he therefore has no basis to seek permanent injunctive relief on those grounds.

Petitioner is also not entitled to such wide-ranging, permanent injunctive relief because he cannot show that the equities tip in his favor. The injunctive relief sought by Petitioner would be improper because it would impose substantial hardships on the Executive and, on the facts presented here, would be wholly unprecedented. For similar reasons, the public interest also tips in favor of Respondents. In contrast, Petitioner's claim that an injunction would remedy his purported irreparable injury is speculative because at best, as he concedes, an order establishing a Mixed Medical Commission would only provide him an *opportunity* to seek release, not actual release. Moreover, in prior briefing, Respondents submitted a declaration of the senior medical officer at Guantanamo responsible for Petitioner's care demonstrating that his medical condition is far different than Dr. Keram claims. Thus, on balance, Petitioner is not entitled to the relief he seeks.

BACKGROUND

Petitioner Shaker Aamer (ISN 239) is a Saudi Arabian national currently detained at Guantanamo Bay. Pet. Mot. at 3. Petitioner challenged his detention by filing his petition for writ of habeas corpus on December 22, 2004. See Petition for Writ of Habeas Corpus, ECF No. 1. On May 14, 2012, Respondents submitted the Amended Factual Return explaining that Petitioner is detained as part of al-Qaida and the Taliban forces pursuant to the AUMF, as

informed by the laws of war. See Amended Factual Return, ECF. No. 203 (classified, filed under seal).³ The parties have engaged in discovery and, after Respondents' last production of information, the Court denied the parties' joint motion to stay discovery. See Minute Order (Nov. 14, 2014).⁴ Petitioner has not yet submitted a Traverse challenging the factual basis for his detention set forth in the Amended Factual Return.

On April 7, 2014, Petitioner filed a motion for judgment. See ECF No. 255. Rather than contend that he was not part of, or substantially supporting, al-Qaida, Taliban, or associated forces, and therefore unlawfully detained, Petitioner's motion for judgment argued that the Executive's exercise of its detention authority over him has now lapsed because of the current state of his health. Petitioner argued that the Court has authority to order his release on those grounds pursuant to Army Regulation 190-8 and certain provisions of the Third Geneva

³ Petitioner states that he has been "cleared for release in 2007 by an Administrative Review Board during the Bush Administration and again in 2009 by the Obama Administration's Guantanamo Review Task Force." Pet. Mot. at 3. That Task Force explicitly noted, however, that "a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold a detainee." Guantanamo Review Task Force, Final Report, at 17 (2010), available at <http://1.usa.gov/IjaULP>. Moreover, "[i]t is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism," but rather, a judgment that the "threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country." Id.

⁴ The Court denied the parties' joint motion to stay discovery and ordered the parties to submit a joint status report on January 31, 2015. See Minute Order (Nov. 14, 2014). On January 27, 2015, pursuant to a joint motion by the parties (ECF No. 273), the Court entered a stipulation and order dismissing this habeas petition without prejudice. ECF No. 274. On May 15, 2015, the Court granted Petitioner's motion to reopen his habeas case. See ECF No. 276 (motion) and 277 (order).

Convention. Id. at 10-15. In support of the motion, Petitioner submitted a report prepared by his retained expert, Dr. Emily Keram, see ECF No. 255-2 (“Keram Report”), which she prepared after meeting with Petitioner over the course of five days, id. at 1.⁵ Based on this report, Petitioner argued that he “has been diagnosed with psychological and physical diseases that have gravely diminished his health and limited his physical mobility.” ECF No. 255 at 14 (citing Keram Report at 15-18). Specifically, Petitioner cites the diagnosis of Post-Traumatic Stress Disorder (“PTSD”) and “other psychological ailments,”⁶ and asserts, “Dr. Keram has unambiguously determined that it would be impossible for Mr. Aamer to recover while in prison.” Id. Dr. Keram explains that, *inter alia*, “PTSD treatment is aimed at restoring effective family and societal functioning, which obviously cannot take place while [Petitioner] is detained.” Keram Report at 18; see also id. at 16 (“[a] primary goal of PTSD treatment is reintegration into family and community”). Although Petitioner’s argument that he is entitled to immediate release alludes to “other serious conditions,” ECF No. 255 at 14, the Keram Report’s diagnosis of PTSD is the sole alleged physical or psychological condition that Petitioner discusses, or even names, in his argument. See Keram Report at 13–15.

⁵ The report accepts as true Petitioner’s account of his conditions of confinement. See Keram Report at 2–9. Respondents contest Petitioner’s extensive allegations regarding the conditions of his confinement, but do not specifically address those allegations herein.

⁶ The report identifies no other diagnosis, but notes, as “current symptoms of depression,” “marked anergia, which is likely also affected by participating in the hunger strike,” and “guilt[] about not parenting his children.” Keram Report at 13. The report also notes symptoms Petitioner previously experienced, “loose associations” which “dissipated” over the course of the first day of Dr. Keram’s interaction him, and “paranoid ideation.” Id. at 13–14.

Respondents opposed Petitioner's motion for judgment on several grounds. See ECF No. 270-1, Resp't Opp. to Pet. Mot. for Judgment. First, Respondents argued that the Court could not order release because determinations about medical repatriation prior to the cessation of hostilities are not the province of the Judiciary. Id. at 13-23. To the extent that Petitioner contended that his medical condition means that he is no longer a threat to U.S. interests if released, the Court of Appeals has held in Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010), that a court may not order release based upon such threat determinations. Id. at 14-15. To the extent that Petitioner sought release based on humanitarian principles reflected in Army Regulation 190-8 and the Third Geneva Convention, the Court must defer to determinations by the Executive because those provisions can only be applied by analogy to the armed conflict in which Petitioner was detained, and, moreover, Petitioner seeks the type of humanitarian release to which the Judiciary has uniformly deferred to the Executive. Id. 15-23. Second, Respondents argued that Army Regulation 190-8 does not and cannot compel Petitioner's release because the provisions of the regulation concerning Mixed Medical Commissions do not apply to Petitioner by their terms, and because the type of classifications under the Army Regulation and Geneva Conventions that the Court of Appeals considered in Al Warafi v. Obama, 716 F.3d 627 (D.C. Cir. 2013)—whether that petitioner qualified as a “retained personnel” who could only be retained in certain, limited circumstances—is distinct from the humanitarian considerations argued by Petitioner. Id. at 23-28, 31-35. Also, even if those provisions of the Army Regulation

did apply to Petitioner, he does not qualify for relief because of his persistent refusal of medical care. Id. at 28-31.

In support of their opposition brief, Respondents submitted a declaration by the Senior Medical Officer (“SMO”) for the Joint Task Force-Guantanamo (“JTF-GTMO”) responsible for Petitioner’s care at Guantanamo. See ECF No. 270-1, Exhibit 1 (“SMO Decl.”). In that report, the JTF-GTMO SMO explained that Petitioner is only known to have “minor long-term impairments with manageable to moderate symptoms” that remain unresolved “because he refuses to consent to diagnostic testing, clinical studies or procedures, and referrals to medical specialists for evaluation.” SMO Decl. ¶ 12. With regard to his mental health, Petitioner “has not met the criteria for any formal psychiatric diagnosis.” Id. ¶ 20. Apart from the Keram Report, “[h]e has never been diagnosed with . . . PTSD and does not meet the clinical criteria for PTSD.” Id.⁷ The SMO also explained that “[Petitioner] has had long-term daily access to medical and mental health care and voluntarily has chosen not to seek or actively engage in treatment from the [Joint Medical Group, “JMG”].” Id. ¶ 10.⁸ “JMG staff members routinely

⁷ “In September, 2006, he was evaluated by a psychologist for completion of a baseline evaluation.” SMO Decl. ¶ 19. “At that time, he had no history of mental health evaluation or treatment, with the exception of routine contact with [Behavioral Health Services (“BHS”)] for past hunger striking or for behavioral management consults.” Id. “No diagnosis resulted from the evaluation, and the provider determined that there was no need for further psychological follow-up.” Id. Petitioner “was seen intermittently from 2006 to 2009 by BHS for acting out behavior, though he most often ignored or refused to interact with BHS staff.” Id.

⁸ “Multiple diagnoses and successful treatments have come out of this intense availability of care for those detainees who choose to engage with the medical department.” SMO Decl. ¶ 8. “There

stop by his cell to discuss any medical concerns or complaints that he might have, but [Petitioner] has demonstrated an ongoing unwillingness to attend medical appointments with his primary care physician (PCM), to allow outpatient care with specialists, or meet with [BHU] staff to discuss his mental status and behavior.” Id.⁹

On June 24, 2014, the Court denied Petitioner’s motion for judgment. See ECF No. 270-3 (“Order”). In reaching that conclusion, however, the Court rejected the arguments of both parties as “not particularly satisfying.” Id. at 15. Instead, drawing from language in the Al-Warafi decision, the Court held that “Petitioner has not established his entitlement to habeas relief under Army Regulation 190-8 and, therefore, cannot invoke the provisions of the Third Geneva Convention that it incorporates.” Order at 5-6. In reaching that conclusion, the Court assumed without deciding that “Petitioner is as ill as he claims to be.” Id. at 5. The Court also assumed without deciding that Army Regulation 190-8 (and thus the relevant provisions of the Third Geneva Convention) applied to Petitioner, id. at 18, even though it noted a source

are many detainees with common medical conditions such as diabetes, hypertension, high cholesterol, and musculoskeletal pains that are under good control with medications, physical therapy and provider counseling.” Id. “Multiple psychiatric diagnoses have been identified and controlled such as depression, anxiety, and schizophrenia, as well as multiple personality disorders of various types.” Id.

⁹ Petitioner “has expressed distrust and suspicion of the JMG medical staff” and “has refused medical appointments and expressed to the medical staff that he feels quality care for his medical conditions can only be given by civilian physicians outside of the detention environment and that his medical concerns are not accurately documented by JMG staff.” SMO Decl. ¶ 17. But he has refused medical care “based on a variety of external factors not related to the quality of medical care he has received.” Id. ¶ 16.

explaining that “shortly after the invasion of Afghanistan, the United States determined that its conflict with al-Qaeda in Afghanistan was not an international armed conflict and that Taliban fighters lacked the indicia necessary to qualify as the armed forces of Afghanistan,” id. at 17 n.8 (citation, alterations, and quotation marks omitted); see also Resp’t Opp. to Pet.’s Mot. for Judgment at 13 n.8, 18, 26-27. The Court ultimately found that, even assuming the foregoing facts, Petitioner “has not ‘explicitly established’ his entitlement to repatriation under [Army Regulation 190-8]” because “[h]e neither has applied for repatriation, nor requested an examination by a Mixed Medical Commission.” Order at 18. Thus, the Court held that Petitioner’s request for release on the status of his health, “at best, is premature.” Id. at 19.

By letter, Petitioner submitted to Respondents a request that he be “repatriate[ed] to the United Kingdom based on Dr. Keram’s diagnosis and prognosis,” and “[a]lternatively, ... that a Mixed Medical Commission evaluate [him] to confirm that his illness and prognosis satisfy the criteria for repatriation.” Pet. Mot., Exh A at 1-2. Respondents responded by letter that “the Executive has not determined that the repatriation of Petitioner for the reasons [] identified is warranted,” and that “Petitioner does not qualify as an ‘enemy prisoner of war’ and, accordingly, is not entitled to the protections afforded by those provisions of the Geneva Convention that call for the appointment of a Mixed Medical Commission.” Id., Exh. B at 2. Petitioner then filed this present motion seeking to compel Respondents to establish a Mixed Medical Commission, to appoint Dr. Keram as a member of that Commission, and to direct the Commission to examine Petitioner. See ECF No. 278.

ARGUMENT

Petitioner moves the Court for an injunction requiring the United States to establish a Mixed Medical Commission in order to, as he describes it, “further establish [his] entitlement to direct repatriation pursuant to the terms of Army Regulation 190-8, Section 3-12.” Pet. Mot. at 1.¹⁰ Petitioner’s claim for relief is inappropriate for two reasons. First, a claim for injunctive relief requiring the Executive to establish an international commission pursuant to the terms of a military regulation implementing a treaty does not sound in habeas because it will not necessarily affect the fact, duration, or form of his confinement. As such, it is barred by 28 U.S.C. § 2241(e)(2). Even if the claim did sound in habeas, the Court should refrain from exercising jurisdiction over such a claim in light of the equitable principles at issue when the Judiciary is asked to compel action pursuant to military regulation implementing a treaty in contravention of the Executive’s interpretation of the regulation and treaty. Second, Petitioner has not made the showing required to warrant a permanent injunction: he is not entitled to the relief he seeks, and the balance of harms tips decisively in favor of Respondents.

¹⁰ Although Petitioner seeks repatriation, see, e.g., Pet. Mot. at 1, 9, the only relief the Court could properly order is release from U.S. custody, not repatriation or transfer to a specific country. See Munaf v. Geren, 553 U.S. 674, 693 (2008) (“Habeas is at its core a remedy for unlawful executive detention . . . [and the] typical remedy for such detention is, of course, release. But here . . . petitioners [do not] want [] simple release.”) (citations omitted); Ahmed v. Obama, 613 F. Supp. 2d 51, 66 (D.D.C. 2009) (granting the writ of habeas corpus, but, in framing the remedy, stating that the court was “[m]indful of the limitations on the scope of the remedy in this situation” and ordered only that “the Government . . . take all necessary and appropriate diplomatic steps to facilitate Petitioner’s release”).

I. The Court Does Not Have Jurisdiction to Hear Petitioner’s Request for Injunctive Relief.

The Court does not have jurisdiction to hear Petitioner’s motion. First, the Court of Appeals has made clear that 28 U.S.C. § 2241(e)(2) deprives courts of jurisdiction to consider non-habeas claims, and a claim for injunctive relief that will not necessarily result in release or a change in conditions of confinement does not sound in habeas. Further, the All Writs Act—the only authority that Petitioner cites in support of his claim that the Court may order the Executive to establish a Mixed Medical Commission—does not enlarge the Court’s habeas jurisdiction or provide it with an independent basis for jurisdiction in the first instance. Second, even if the Court determines that Petitioner’s claim sounds in habeas, the Court should refrain from exercising its habeas jurisdiction over this claim as a matter of equity given it would be inconsistent with the Executive’s interpretation of the relevant treaty and regulation provisions, and would place an extraordinary burden on the Executive to take the series of steps necessary to accomplish such an endeavor.

A. Petitioner’s Claim for Injunctive Relief Is Not Cognizable in Habeas, and Therefore Barred by 28 U.S.C. § 2241(e)(2), Because It Will Not Necessarily Alter the Fact, Duration, or Form of His Detention.

Petitioner’s motion to compel the United States to establish a Mixed Medical Commission seeks relief beyond the scope of the habeas statute and, therefore, is barred.¹¹

¹¹ The only authority that Petitioner cites for his requested relief is the All Writs Act, 28 U.S.C. § 1651(a), which provides that federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions.” See Pet. Mot. at 8-9. The Supreme Court has made clear,

Through the Military Commissions Act of 2006, Congress withdrew the courts' jurisdiction over (1) habeas actions filed by or on behalf of Guantanamo detainees and (2) any other action related to any aspect of the detainees' transfer, treatment, or trial, among other things. See 28 U.S.C. § 2241(e)(1) (withdrawing habeas jurisdiction); id. § 2241(e)(2) (barring claims "relating to any aspect of the [detainees'] detention, transfer, treatment, trial, or conditions of confinement").

While the Supreme Court in Boumediene v. Bush, 553 U.S. 723 (2008), held Section 2241(e)(1) unconstitutional as applied to Guantanamo detainees like Petitioner, Section 2241(e)(2) still serves to divest courts of jurisdiction over any actions that are not "proper claim[s] for habeas relief." Kiyemba v. Obama, 561 F.3d 509, 513 (D.C. Cir. 2009); see also Aamer v. Obama, 742 F.3d 1023, 1030 (D.C. Cir. 2014) ("[I]f petitioners' claims do not sound in habeas, their challenges constitute an action other than habeas corpus barred by § 2241(e)(2).") (citation and internal alterations omitted); Al-Zahrani v. Rodriguez, 669 F.3d 315, 319 (D.C. Cir. 2012) (lawsuit seeking damages is "an action other than habeas corpus").

Petitioner's claim does not sound in habeas, and therefore is barred, because rather than seek an order of release or challenge his conditions of confinement, he instead seeks an order compelling the United States to take a series of actions that only, in the end, may *possibly* result

however, that the All Writs Act "is not an independent grant of [] jurisdiction," Clinton v. Goldsmith, 526 U.S. 529, 535 (1999) (citation omitted), and it "cannot enlarge a court's jurisdiction," id. (citation omitted). See also In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004) (All Writs Act neither conveys nor enlarges the Court's jurisdiction); Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984) (All Writs Act cannot serve as an independent basis for jurisdiction or relief).

in his release. Specifically, Petitioner's motion seeks an order compelling the United States to establish a Mixed Medical Commission (which it does not appear that the United States has ever done under the 1949 Geneva Conventions), to appoint his hired medical expert as a member of the Commission (which is inconsistent with the terms of the treaty and implementing regulation), and to require the Commission to examine his case. But, as explained below, such an order would also require the United States, among other things, to develop standards for determining the disabilities and sicknesses that would warrant repatriation in this non-international armed conflict against al-Qaida, Taliban, and associated forces. Thus, Petitioner's request for injunctive relief that would require this series of events stretches habeas far beyond its traditional remedy of release.

Although the Supreme Court has not directly addressed whether a claim that *may* result in release sounds in habeas, its recent decisions strongly suggest that it would not. In Skinner v. Switzer, 562 U.S. 521 (2011), a case in which a prisoner filed a non-habeas claim seeking to compel access to certain evidence for DNA testing, the Supreme Court rejected the argument that the claim should have been filed as a habeas petition and explained that "when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at 'the core of habeas corpus,' and may be brought, *if at all*, under [42 U.S.C.]§ 1983."¹² Id. at 535 n.13 (quoting

¹² This series of Supreme Court cases addressed the relationship between claims brought under 42 U.S.C. § 1983 and claims brought as habeas petitions. As the Supreme Court explained in one of its later decisions on the issue, "considerations of linguistic specificity, history, and comity led the Court to find an implicit exception from § 1983's otherwise broad scope for

Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)) (emphasis added). The Court further explained that it was not aware of any case “in which the Court has recognized habeas as the sole remedy, *or even an available one*, where the relief would ‘neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody.’” Id. at 534 (quoting Dotson, 544 U.S. at 86 (Scalia, J., concurring)) (emphasis added);¹³ see also Muhammad v. Close, 540 U.S. 749, 754-55 (2004) (per curiam) (holding that a petitioner “raise[s] no claim on which habeas relief could have been granted on any recognized theory” where the administrative determinations he challenged did not “raise any implication about the validity of the underlying conviction” nor “necessarily” “affect[ed] the duration of time to be served”).

Guided by these recent Supreme Court decisions, the D.C. Circuit recently reassessed its related habeas jurisprudence and strongly suggested that claims like Petitioner’s do not sound in habeas. In Davis v. U.S. Sentencing Comm’n, 716 F.3d 660 (D.C. Cir. 2013), the Court of Appeals analyzed Skinner and explained that “habeas might not even be *available* for

actions that lie ‘within the core of habeas corpus.’” Wilkinson v. Dotson, 544 U.S. 74, 79 (2005) (quoting Preiser v. Rodriguez, 411 U.S. 475, 487 (1973)).

¹³ “It is one thing to say that permissible habeas relief ... includes order a quantum of change in the level of custody ... It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody. That is what is sought here: the mandating of a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedure to be followed. A holding that this sort of judicial immersion in the administration of discretionary parole lies at the ‘core of habeas’ would utterly sever the writ from its common-law roots.” Dotson, 544 U.S. at 86 (Scalia, J., concurring) (citations omitted).

‘probabilistic’ claims.” *Id.* at 665 (citing *Skinner*, 562 U.S. at 534). Based in significant part on that reasoning, the Court of Appeals overturned *Razzoli v. Fed. Bureau of Prisons*, 230 F.3d 371 (D.C. Cir. 2000), a decision holding that a claim must be brought in habeas even when it would have merely a probabilistic impact on the duration of custody.¹⁴ *Davis*, 716 F.3d at 666.

Although the Court of Appeals has not yet taken the next step and squarely held that such claims do not sound in habeas, the Court of Appeals for the Ninth Circuit recently did when it held that “a claim challenging prison disciplinary proceedings is cognizable in habeas only if it will ‘necessarily spell speedier release’ from custody, meaning that the relief sought will either terminate custody, accelerate the future date of release from custody, or reduce the level of custody.” *Nettles v. Grounds*, -- F.3d --, 2015 WL 3406160, at *1 (9th Cir. May 28, 2015) (quoting *Skinner*, 562 U.S. at 535 n.13); cf. *Hernandez v. Stephens*, No. 3:13-1391, 2014 WL 667373, at *2 (N.D. Tex. Feb. 20, 2014) (“Petitioner’s constitutional challenge to Texas’ good-

¹⁴ Prior to *Skinner*, in a lawsuit seeking to compel access to a parole eligibility hearing, the Court of Appeals held that such a lawsuit could not be brought under Section 1983 because “a prisoner’s challenge to the determination of his eligibility for parole does indeed attack the ‘fact or duration’ of confinement ... [and] therefore, habeas is the sole remedy available to such a prisoner.” *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 810 n.5 (D.C. Cir. 1988). After two subsequent Supreme Court decisions “cast doubt on [the D.C. Circuit’s] view, expressed in *Chatman-Bey*, that its scope extended beyond claims for immediate release or a definite reduction in the length of imprisonment,” *Davis*, 716 F.3d at 663, a federal prisoner challenging a decision to delay his eligibility for parole contested the validity of the *Chatman-Bey* decision in *Razzoli v. Fed. Bureau Of Prisons*, 230 F.3d 371 (D.C. Cir. 2000). In *Razzoli*, the Court of Appeals found “*Chatman-Bey* alive and at worst only modestly ailing,” 230 F.3d at 376, and held that “habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody,” *id.* at 373. In *Davis*, however, the Court of Appeals overturned *Razzoli*.

time parole eligibility statute and the denial of a presumptive parole date are not cognizable on habeas review” because it “d[id] not allege that Petitioner would be automatically entitled to accelerated release if [relief were granted][.]”).

Petitioner’s claim for relief is even further afield from the types of claims that the Supreme Court and Court of Appeals suggested should not be brought in habeas. See Dotson, 544 U.S. at 82 (“[T]he prisoners’ claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration) are yet more distant from th[e] core [of habeas corpus].”) (citation omitted). In Dotson, state prisoners challenged certain aspects of Ohio’s parole procedures, including a determination about one petitioner’s eligibility for a parole hearing, 544 U.S. at 76-77, and the Supreme Court held that such a “claim does not lie at the core of habeas corpus, and may be brought, *if at all*, under [42 U.S.C.]§ 1983.” Id. at 535 n.13 (emphasis added). Here, Petitioner goes even further than challenging the availability of a parole hearing, and instead asks the Court to issue an order establishing the relevant administrative body in the first instance.

Additionally, while success for the petitioners in Dotson would have meant that they would receive a hearing from a parole board that had the authority to order release, Petitioner’s request involves several intermediate steps before a similar outcome is even possible (if it is possible at all). The Court would have to order the Executive to establish a Mixed Medical Commission, and then the Executive would need to develop procedures and criteria for the Commission to apply, including, the standards for determining the disabilities and sicknesses that

qualify for repatriation in the circumstances of the non-international armed conflict in which Petitioner was detained. See infra at 36-39. Until those standards are developed, it is speculative as to whether they would even apply to the health conditions alleged by Petitioner or whether Petitioner could even qualify for such relief in light of his persistent refusal of medical care. See generally SMO Decl.; see also Resp't Opp. to Pet. Mot. for Judgment at 28-31 (explaining that Section 3-12(l) of Army Regulation 190-8 applies to medical conditions that persist "in spite of treatment," and Article 114 of the Third Geneva Convention excepts relief for self-inflicted injuries). The Court's determination of "whether a claim is the type that sounds in habeas is itself a jurisdictional question," Aamer, 742 F.3d at 1033 (citations omitted), and questions of jurisdiction should not turn on such a speculative chain of events, cf. Turlock Irrigation Dist. v. FERC, 786 F.3d 18, 24 (D.C. Cir. 2015) ("[A] prediction that separate [] proceedings will result in [a particular outcome] hypothesizes as to the outcome of future legal proceedings, and is thus 'too speculative to invoke the jurisdiction of an Art[icle] III Court.'" (citation omitted)). Otherwise, any number of claims that might possibly lead to release would then sound in habeas.

Accordingly, the Court should adhere to the relevant guidance of the Supreme Court and Court of Appeals and determine that Petitioner's claim does not sound in habeas, and therefore is barred by § 2241(e)(2),¹⁵ because it seeks extraordinary relief too far removed from habeas' traditional remedy of release.

¹⁵ The appropriate consideration is whether a claim properly sounds in habeas, not the likelihood of success or actual success of a petitioner in obtaining the relief sought. Cf. Wilkinson, 544

B. Even if Petitioner’s Claim Sounds in Habeas, the Court Should Refrain from Exercising Its Habeas Jurisdiction in Light of the Equitable Principles Implicated by Petitioner’s Request for Injunctive Relief.

As the Supreme Court explained in Munaf v. Geren, 553 U.S. 674 (2008), a case decided the same day as Boumediene, “[h]abeas corpus is governed by equitable principles,” and “prudential concerns . . . may require a federal court to forgo the exercise of its habeas corpus power.” Id. at 693 (internal citations omitted); see also id. (“The habeas statute provides only that a writ of habeas corpus ‘may be granted,’ § 2241(a) (emphasis added), and directs federal courts to ‘dispose of [habeas petitions] as law and justice require, § 2243.”). If the Court finds that it otherwise has jurisdiction to hear Petitioner’s claim as part of his habeas case, the Court should nonetheless refrain from exercising that jurisdiction here because Petitioner’s request for injunctive relief—an order requiring the Executive to take a certain action in conformance with its treaty obligations, as implemented through military regulation,¹⁶ and contrary to the

U.S. at 87 (Scalia, J., concurring) (explaining that the correct focus is “whether the claims [petitioners] pleaded were claims that may be pursued in habeas—not [] whether [petitioners] can be successful in obtaining habeas relief on those claims”); cf. also Mitchell v. United States, 930 F.2d 893, 897 (Fed. Cir. 1991) (appropriate question is whether claim may be brought under Administrative Procedure Act or whether other avenues offer adequate remedies, not whether petitioner is entitled to receive those other remedies); McGregor v. Greer, 748 F. Supp. 881, 884 (D.D.C. 1990) (same).

¹⁶ Although Petitioner couches his claim as seeking relief under domestic law (Army Regulation 190-8), see, e.g., Pet. Mot. at 1, such relief necessarily implicates the Third Geneva Convention because Army Regulation 190-8 is part of the United States’ implementation of the Third Geneva Conventions, Army Reg. 190-8 § 1-1(b), and, in the event of any conflict or discrepancy between the Regulation and the Geneva Conventions, the Conventions take precedence, id. The Court recognized these facts in its order denying Petitioner’s motion for release based on the

Executive’s interpretation of how those obligations apply to Petitioner—would be inconsistent with the Executive’s interpretation of the relevant treaty and regulation provisions, and would place an extraordinary burden on the Executive.

As Boumediene and Munaf outline, limitations to the Court’s “exercise of its habeas power” are appropriate given the historical understanding that habeas actions generally serve as a limited vehicle for challenging the fact or duration of detention. See Boumediene, 553 U.S. at 792; Munaf, 553 U.S. at 693. The Court in Munaf found that jurisdiction existed, but that substantial equitable principles barred the relief sought in that case—avoidance of transfer to a foreign sovereign for criminal prosecution—noting, first, that the petitioners were not seeking an order securing their release from custody, the core equitable remedy of habeas corpus. Munaf, 553 U.S. at 692 (“[T]he relief sought by the habeas petitioners makes clear under our precedents that the power of the writ ought not to be exercised”). Second, the Court found that important equitable concerns, including concerns about the judiciary interfering in the activities of a foreign sovereign and “concerns about unwarranted judicial intrusion into the Executive’s ability to conduct military operations abroad,” counseled against the continuation of the petitioners’ claim. Id. at 700.

status of his health. See Order at 9-10, 16 (citing Army Reg. § 1-1(b)). With regard to the specific provisions relevant to the resolution of this motion, the definition of “enemy prisoner of war” in Army Regulation 190-8 expressly refers to Articles 4 and 5 of the Third Geneva Convention, see Army Reg. 190-8, Appendix B, Section II-Terms, and the provisions for a Mixed Medical Commission refer to Annex II of the Third Geneva Convention, see id. § 3-12(a)(2).

Similar equitable factors weigh against the Court's exercise of its habeas power with regard to Petitioner's claim here. Like the petitioners in Munaf, Petitioner seeks relief that, if it sounds in habeas at all, it is far removed from the core. See Dotson, 544 U.S. at 82 (“[T]he prisoners’ claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration) are yet more distant from th[e] core [of habeas corpus].”) (citation omitted); Davis, 716 F.3d at 665 (“‘[P]robabilistic’ claims may not even lie within the bounds of habeas, much less at its core.”). Petitioner does not ask the Court to order his release, but rather asks the Court to order the Executive to take multiple administrative and policy steps under the Third Geneva Convention and Army Regulation 190-8, which may not even lead to his release. Petitioner asks the Court to establish a Mixed Medical Commission, even though the Executive has already determined that the relevant provisions do not apply to Petitioner as a matter of law. See infra at 27-35.¹⁷ Additionally, any order directing the establishment of a Mixed Medical Commission necessarily requires the Executive to also develop standards for determining the sickness and disabilities that merit repatriation. See infra at 37-39. The

¹⁷ The Department of the Army promulgated Regulation 190-8 in 1997. That regulation implements requirements from Department of Defense Directives, the most recent of which was issued in August 2014. See DoD Directive 2310.01E (Aug. 14, 2014), available at <http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf>. In the 2014 Directive, the Department of Defense makes clear that a detainee may fall outside of the categories of persons set forth in Army Regulation 190-8. Compare id. ¶ 3(a) (“all detainees” must receive a “minimum” standard or protections, including those set forth in Article 3 of the Third Geneva Convention) with id. ¶ 3(g) (“Certain categories of detainees held during international armed conflict ... such as prisoners of war ... enjoy protections and privileges under the law of war beyond the minimum standards of treatment established in this directive.”).

standards for repatriations set forth in the Model Agreement provided as Annex I of the Third Geneva Convention, which were drafted in 1949, would need to be interpreted and adjusted in light of developments in the field of medicine and in light of the nature of the non-international armed conflict against Al-Qaida, Taliban, and associated forces. Such a pronouncement by the United States regarding its interpretation of the terms of the Model Agreement and how they apply by analogy in this non-international armed conflict could have lasting significance. Cf. Adams v. Vance, 570 F.2d 950, 955 (D.C. Cir. 1978) (“This country’s interests in regard to foreign affairs and international agreements may depend on the symbolic significance to other countries of various stances” and “[c]ourts are not in a position to exercise a judgement that is fully sensitive to these matters.”). Finally, Petitioner also asks the Court to appoint his hired expert, Dr. Keram, as a member of the Commission, even though such an appointment would be inconsistent with the relevant provisions of Army Regulation 190-8 and Annex II of the Third Geneva Convention. See infra at 38-39 & n.27. And Petitioner asks the Court to order all of this relief because it *may* eventually lead to his release.

Moreover, as in Munaf, equitable principles concerning the substantial burden that such an order would place on the Executive—requiring the Executive to take the apparently unprecedented step of establishing a Mixed Medical Commission under the terms of the 1949 Third Geneva Convention, and a military regulation that implements it, for a non-international armed conflict—counsel against the Court’s exercise of habeas jurisdiction over Petitioner’s claim for injunctive relief. Petitioner’s request for a court order requiring the Executive to

establish a Mixed Medical Commission in conformance with the Third Geneva Convention, as implemented through Army Regulation 190-8, would go well beyond preserving the status quo. Any such order would contradict the Executive's long-standing interpretation about the applicability of these terms of the regulation and treaty to detainees like Petitioner.¹⁸ See Abbott v. Abbott, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive's interpretation of a treaty is entitled to great weight.") (citation omitted). Moreover, such an order would also inevitably require the Executive to make complex and novel determinations about the proper application of Army Regulation 190-8 and Annex II of the Third Geneva Convention regarding the establishment of Mixed Medical Commissions, and about the development of standards for deciding the disabilities and sicknesses that warrant repatriation in this non-international armed conflict.¹⁹ See infra at 37-39.

¹⁸ Of course, the Military Commissions Act of 2006 also prohibits Guantanamo detainees from directly invoking the protections of the Third Geneva Convention as a source of rights in habeas proceedings. See Military Commissions Act of 2006, Pub. L. No. 109-355, sec. 5, 120 Stat. 2600, 2631 (codified at 28 U.S.C. § 2241 note).

¹⁹ The Court of Appeals has treated the issue of judicial involvement with the Executive's implementation of international treaties as very sensitive matters that warrant circumspection. See, e.g., Adams v. Vance, 570 F.2d 950, 954-55 (D.C. Cir. 1978) ("A request for an order directing action by the Secretary of State in foreign affairs plainly constitutes [a deep intrusion into the core concerns of the Executive]" and "d[oes] not merely preserve the status quo pending further proceedings, but command[s] an unprecedented action irreversibly altering the delicate diplomatic balance in the [international] arena."); Holmes v. Laird, 459 F.2d 1211, 1220 (D.C. Cir. 1972) ("[I]t consistently [has] been held that the courts cannot command the United States to take action assertedly necessary to performance of a treaty[.]").

For the foregoing reasons, the Court should refrain from exercising its habeas jurisdiction with respect to Petitioner's claim for relief.²⁰

II. Petitioner Has Not Made the Showing Required to Warrant a Permanent Injunction.

The relief that Petitioner seeks is extraordinary. Although framed as a request for a preliminary injunction, see Pet. Mot. at 9, Petitioner's motion actually seeks a permanent injunction requiring the United States Government to establish a Mixed Medical Commission pursuant to the relevant terms of Army Regulation 190-8 and the Third Geneva Convention. Such an order would go well beyond the scope of a preliminary injunction, the purpose of which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

Here, Petitioner seeks an injunction not to preserve the status quo so that the merits of his claim can be litigated, but rather seeks a determination of his purported rights that would require the Executive to take an affirmative action under a military regulation implementing certain provisions of the Third Geneva Convention by establishing a commission pursuant to their terms, a position contrary to the Executive's long-standing interpretation about the applicability of those obligations to detainees such as Petitioner. See Abbott, 560 U.S. at 15 ("It is well settled that the Executive's interpretation of a treaty is entitled to great weight.") (quotation omitted). It would also require the Executive to launch a difficult and unprecedented policy process to establish the

²⁰ Petitioner may obtain release from custody by pursuing his habeas case on the merits, demonstrating that he is unlawfully detained and, if appropriate, the Court may order his release.

procedures for a Mixed Medical Commission and to develop the contours of the standards it would apply in this non-international armed conflict to determine the disabilities and sicknesses that merit repatriation. Petitioner is not entitled to such drastic relief based solely upon a purported showing of entitlement to preliminary injunctive relief, which “is customarily granted on the basis of procedures that are far less formal and evidence that is less complete than in a trial on the merits.” Camenisch, 451 U.S. at 395; see also id. at 394 (noting “the significant procedural differences between preliminary and permanent injunctions”); cf. Adams, 570 F.2d at 955 (“[W]hile we do not determine the justiciability of a request for [an injunction requiring a diplomatic objection], we think it clear that if such a request is justiciable, the party seeking this kind of relief would have to make an extraordinarily strong showing to succeed.”).

“An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.” Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010); see also Spadone v. McHugh, 842 F. Supp. 2d, 295, 301 (D.D.C. 2012) (“In this Circuit, the power to issue a preliminary injunction, especially a mandatory one [that would alter the status quo], should be sparingly exercised.”) (citations omitted). “A permanent injunction is only appropriate, however, after a [petitioner] has prevailed on the merits of his claim.” Renoir v. Gov. of Va., 755 F. Supp. 2d 82, 87 (D.D.C. 2010) (citing Hi-Tech Pharmacal Co., Inc. v. U.S. Food and Drug. Admin., 587 F. Supp. 2d 13, 17 (D.D.C. 2008)). Once a petitioner has prevailed and “the right to relief is clearly established,” San Antonio Gen. Maint., Inc. v. Abnor, 691 F. Supp. 1462, 1467 (D.D.C. 1987), he must then satisfy a four-factor test before a court may grant

such relief: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” Monsanto Co., 561 U.S. at 156. “Failing to satisfy any factor is grounds for denying relief.” Morgan Drexen, Inc. v. Consumer Financial Protection Bureau, 785 F.3d 684, 694 (D.C. Cir. 2015) (citation omitted).

Petitioner fails at the first step because he is not entitled to the establishment of or a hearing before a Mixed Medical Commission pursuant to the terms of the Third Geneva Convention or Army Regulation 190-8. Even if Petitioner could demonstrate such an entitlement, however, permanent injunctive relief is nevertheless inappropriate because it would impose substantial hardships upon the Government, Petitioner’s purported injury is not irreparable, and the public has a strong interest in the courts deferring to the Executive’s considered interpretation of the scope and applicability of a treaty and its implementing regulations.

A. Petitioner Has No Right to Relief Because the Relevant Provisions of Neither the Third Geneva Convention Nor Army Regulation 190-8 Provide Him with Status that Entitles Him to Examination by a Mixed Medical Commission.

Petitioner is being detained pursuant to the AUMF, as informed by the laws of war, because he was part of al-Qaida and Taliban forces at the time of his capture. The Executive respects the humanitarian principles embodied in Articles 109 and 110 of the Third Geneva

Convention, which provide for the repatriation of certain prisoners of war based upon their health, and it takes them into account when determining whether it should continue to detain individuals in the circumstances of this non-international armed conflict. But, as a matter of treaty law, Petitioner is not entitled to the establishment of, and an examination by, a Mixed Medical Commission because the United States determined that neither al-Qaida nor Taliban forces were entitled to prisoner of war status. Also, in light of this prior determination, Petitioner cannot be an “other detainee” who enjoys prisoner of war status as a placeholder until the Executive determines his legal status.

The Third Geneva Convention sets forth rules concerning the treatment of prisoners of war. In order to qualify for the full panoply of protections afforded prisoners of war, the Third Geneva Convention sets forth certain criteria that must be met by the forces involved in the armed conflict. In order to determine whether an individual qualifies for prisoner of war status, which in turn ensures access as appropriate to a Mixed Medical Commission under the Conventions or Army Regulation 190-8,²¹ the Third Geneva Convention first looks to determine whether the conflict at issue is an international armed conflict or a non-international armed conflict. Pursuant to Article 2, the full provisions of the Third Geneva Convention apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” GC III, Art.

²¹ Army Regulation 190-8 defines enemy prisoners of war by reference to Articles 4 and 5 of the Third Geneva Convention. See Army Reg. 190-8, Appendix B, Section II-Terms.

2. In such an international armed conflict, prisoner of war status is afforded principally to (1) members of the armed forces of a State that is a Party to the conflict, and to (2) members of other militias or volunteer corps that are commanded by a responsible superior officer, have fixed distinctive insignia, carry arms openly, and conduct their operations in accordance with the laws of war, including by refraining from conducting attacks against civilians. Id. Art. 4(A)(1) & (2). In contrast, Article 3 applies to non-international armed conflicts, and states that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following ... [detained persons] shall in all circumstances be treated humanely.” Id. Art. 3; see also Hamdan v. Rumsfeld, 548 U.S. 557, 629-31 (2006).

In February 2002, President Bush determined that neither al-Qaida nor Taliban forces qualified for prisoner of war status. See White House Press Secretary Announcement of President Bush’s Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002), <http://www.state.gov/s/l/38727.htm> (“President’s Determination”). The United States’ armed conflict against al-Qaida forces is a non-international armed conflict, subject as a matter of the Third Geneva Convention only to the protections afforded in Article 3, because al-Qaida is a terrorist organization and not a State that is a High Contracting Party to the Third Geneva Convention. Id.; see also Hamdan, 548 U.S. at 629-31. The United States initially characterized the armed conflict against Taliban forces as an international armed conflict, but the President determined that Taliban forces did not qualify for prisoner of war status because of their failure

to adhere to the requirements of Article 4 of the Third Geneva Convention. See President’s Determination.²² In light of these prior determinations by the Executive, the full protections provided by the Third Geneva Convention to prisoners of war do not apply to Petitioner as a matter of law because he is part of al-Qaida and Taliban forces. Thus, Petitioner is not entitled to the protections afforded in the relevant provisions of the Geneva Convention, or in the relevant terms of Section 3-12 of Army Regulation 190-8 that are part of the United States’ implementation of the Third Geneva Convention, to require the establishment of a Mixed Medical Commission.

Petitioner, however, insists that he is an “other detainee” under Army Regulation 190-8, see Pet. Mot. at 6-7, which is defined as “persons 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],” and whom “shall be treated as [enemy prisoners of war] until a legal status is ascertained by a competent authority,” Army Reg. 190-8 Appendix B, Section II – Terms. In support of his claim that he is an “other detainee,” Petitioner attempts to rely on the Court’s observation in its prior order that his “logic has some force,” Pet. Mot. at 6 (quoting Order at 13),

²² Specifically, the President determined that the Taliban did not effectively distinguish themselves from the civilian population in Afghanistan, did not conduct their operations in accordance with the laws and customs of war, and knowingly adopted and provided support to the unlawful terrorist objectives of al-Qaida. See President’s Determination. The United States’ armed conflict against the Taliban in Afghanistan is no longer an international armed conflict. See, e.g., ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, at 725 (September 2007), available at <https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf>.

but Petitioner then makes an inexplicable leap to characterize the Court's order as a "ruling" that he accuses Respondents of ignoring, id. at 7. Petitioner's claim misconstrues the Court's prior order and is simply incorrect as a matter of law.

Petitioner's suggestion that the Court decided the issue of his entitlement to treatment as a prisoner of war through the placeholder status of an "other detainee" is belied by the Court's statement, made after its observation of his argument, that "[t]he arguments of the parties are not particularly satisfying." Order at 15. The Court then stated that "[t]he parties [] present the Court with tangled arguments—a seemingly Gordian knot of regulations, detainee jurisprudence, and logic," but far from accepting Petitioner's claim that he qualifies for prisoner of war status as an "other detainee," it concluded that "[u]nraveling the knot does not require the blunt force that the parties presuppose," Order at 17, and ruled on other grounds, namely that Petitioner's claim was not ripe because he had neither applied for repatriation nor requested an examination by a Mixed Medical Commission, id. at 18.²³

²³ Presented with a similar motion seeking an order of release on the basis of his health, another member of this Court denied the motion and held that such relief is foreclosed by the decision of the Court of Appeals in Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010). See Al-Adahi v. Obama, No. 05-280, ECF No. 653 (D.D.C. Aug. 7, 2014) (Kessler, J.). The other member of this Court explained that the Awad court rejected an argument by a Guantanamo petitioner that the district court erred in denying his petition without a specific factual finding that he, with an amputated leg, would be a threat to the United States or its allies if released. Id. at 2. "The Court of Appeals went on to make it clear that '[w]hether a detainee would pose a threat to U.S. interests if released is not the issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF.'" Id. at 3 (quoting Awad, 608 F.3d at 11). The Court, therefore, denied the motion for a health-related release.

Petitioner’s claim is also incorrect as a matter of law. As explained above, the Executive has already made a determination about the status of al-Qaida and Taliban forces, of which Petitioner was previously determined to be a part, when it concluded that those forces do not qualify for prisoner of war status and its attendant privileges as a matter of treaty law. See also Hamdan v. Rumsfeld, 415 F.3d 33, 43 (D.C. Cir. 2005), rev’d on other grounds, 548 U.S. 557 (2006) (“The President found that [petitioner] was not a prisoner of war under the Convention. Nothing in [Army Regulation 190-8], and nothing [petitioner] argues, suggests that the President is not a ‘competent authority’ for these purposes.”). Although perhaps unclear in Respondents’ brief submitted in opposition to Petitioner’s original motion for judgment, a decision by a CSRT that Petitioner was an “enemy combatant” was the military’s finding of fact that Petitioner was part of or supporting al-Qaida, Taliban, or associated forces, forces that the President already determined did not qualify for prisoner of war status.²⁴ See Order Establishing Combatant Status Review Tribunal (Jul. 7, 2004), available at

<http://www.defense.gov/news/Jul2004/d20040707review.pdf>; compare id. at (e) (“A [CSRT]

²⁴ In the United States’ conflict against al-Qaida, Taliban, and associated forces, the CSRTs determined whether an individual was detained properly as a part of those forces. In its Order, the Court stated that the fact that the Executive Branch no longer uses the term “enemy combatant” “raises questions concerning Respondents’ current reliance upon it and the CSRT determination,” Order at 16, but the change does not undermine the individual determination—which was made after the initial, force-level determination in 2002—that Petitioner is part of al-Qaida and Taliban forces. Moreover, Petitioner may challenge in habeas the Executive’s determination that he is lawfully detained as part of, or substantially supporting, al-Qaida, Taliban, or associated forces. Cf. Al-Zahrani, 669 F.3d at 318-19 (Section 2241(e)(2) bars non-habeas claims where a CSRT determined a detainee to be an “enemy combatant”).

shall be composed of three neutral commission officers of the U.S. Armed Forces ... [t]he senior member (in the grade O-5 or above) shall serve as President of the Tribunal”) with Hamdan, 415 F.3d at 43 (military commission qualifies as a “competent tribunal” under Army Regulation 190-8 § 1-6(c) because it includes three commission officers, one of whom is of field grade). See also DoD Law of War Manual § 4.6.1.1 (GC III Art. 4(a)(2) Conditions Required on a Group Basis). Therefore, because the President already determined that al-Qaida, Taliban, and associated forces are not entitled to prisoner of war status, and a CSRT determined that Petitioner was part of those forces, Petitioner is not an “other detainee” under Army Regulation 190-8, a placeholder designation for individuals whose status has not yet been determined.

Petitioner’s suggestion that he must qualify as an “other detainee”—and therefore is entitled to be treated as a prisoner of war pending a status determination—because the term “enemy combatant” does not exist under Army Regulation 190-8 creates a false choice that leaves no room for the detention of individuals fighting for forces that do not adhere to the laws of war. This error is made clear by subsequent Department of Defense regulations. For example, in August 2014, the Department of Defense re-issued Directive 2310.01E pertaining to its detainee program. Department of Defense Directive 2310.01E (Aug. 19, 2014), available at <http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf>. That Directive defines DoD policy for detainee operations, and in doing so, it distinguishes between detainees that must receive a “minimum” standard of protections, including, among others, those set forth in Article 3 of the Third Geneva Convention, id. ¶ 3(a), and detainees who qualify for prisoner of war status and

who “enjoy protections and privileges beyond the minimum standards of treatment established in this directive,” *id.* ¶ 3(g).

Petitioner’s claim that he should qualify for prisoner of war protections as an “other detainee” also rests on strained logic. To accept Petitioner’s argument would be to afford, as a matter of law, prisoner of war status—a *privilege* afforded only to state forces and certain combatants who adhere to the laws and customs of war in the context of international armed conflict—to individuals detained at Guantanamo as part of al-Qaida, Taliban, or associated forces in the context of this non-international armed conflict even though those individuals have been determined by the United States, by the President and through CSRTs, to be members of forces that decidedly do *not* adhere to the laws of war. Such an approach risks undermining the very purpose and function of the Geneva Conventions. *See Al-Warafi*, 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.”); DoD Law of War Manual § 4.3.1 (“States have been reluctant to conclude treaties to afford unprivileged enemy belligerents the distinct privileges of POW status or the full protections afforded civilians.”). Thus, Army Regulation 190-8 does not support Petitioner’s attempt to contort the rules for his benefit.

Finally, the decision of the Court of Appeals in *Al Warafi v. Obama*, 716 F.3d 627 (D.C. Cir. 2013), does not compel a different result. In *Al Warafi*, the Court of Appeals held that a Guantanamo detainee may invoke Army Regulation 190-8 only insofar as it “explicitly establishes a detainee’s entitlement to release.” *Id.* at 629. Here, unlike the provisions of Army

Regulation 190-8 addressed in Al Warafi, the provisions of Section 3-12 that address the establishment of a Mixed Medical Commission do not explicitly establish a detainee's entitlement to release. Rather, the regulation requires the Department of the Army first to establish procedures for operating a Mixed Medical Commission, and once established and provided with governing procedures and criteria, the Commission would then determine which detainees, if any, "are eligible for direct repatriation." Id. § 3-12(l); see also Order at 18 n.9 (noting that "[t]he applicability of Section 3-12 to Petitioner is distinctly unclear" because "Section 3-12(l) speaks only in terms of *eligibility* for repatriation whereas Al Warafi requires an explicit showing of an *entitlement* to release").

Moreover, the provisions at issue in Al Warafi are based on fundamental distinctions throughout the Geneva Conventions about certain categories of persons, such as Prisoners of War or Retained Personnel. Under the terms of the Geneva Conventions, persons in certain categories such as Retained Personnel (the claim in Al Warafi) may only be *retained* under specific and limited circumstances. See, e.g., GC I, Art. 28, para. 1 (medics qualify as Retained Persons). Thus, insofar as those categories are applicable to the conflict against al-Qaida, Taliban, and associated forces, an issue assumed but not decided in Al Warafi, an individual falling into such a category may well be entitled explicitly to release. Release on those grounds stands in stark contrast to Petitioner's claim under Army Regulation 190-8, which seeks the establishment of a Mixed Medical Commission and speculates as to the outcome of that Commission's consideration of his situation that would be based on consideration of his medical

condition or humanitarian need.²⁵ For that reason, the holding of Al-Warafi should be limited to its facts, and it does not support Petitioner's claim of entitlement to release.

B. An Order Requiring the Executive to Establish an Entity Pursuant to Provisions of the Third Geneva Convention and an Implementing Army Regulation Would Be Inconsistent with the Executive's Long-Standing Interpretation about the Applicability of Those Provisions to Detainees Like Petitioner and Would Impose Substantial Hardship on the Executive.

An order compelling the United States to establish a Mixed Medical Commission pursuant to the Third Geneva Convention and Army Regulation 190-8 is contrary to the Executive's considered interpretation of the scope and applicability of the treaty to Petitioner, which, as discussed previously, is entitled to great deference. Article 112 of the Third Geneva Convention states that, "[u]pon the outbreak of hostilities, Mixed Medical Commissions shall be appointed to examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them." GC III, Art. 112. Army Regulation 190-8 requires the Headquarters for the

²⁵ Indeed, even in international armed conflicts to which the full protections of the Third Geneva Convention apply by its terms, prisoners of war do not enjoy any "special immunity" similar to Retained Personnel, either in the form of immunity from detention until the end of hostilities or with regard to release prior to the cessation of hostilities. When prisoners of war are directly repatriated under Article 110 of the Third Geneva Convention, they are not returned because they possess different legal status like that of retained personnel; rather, their repatriation occurs because the Detaining Power determined (as provided for in the Convention or in special agreements between the parties to the conflict, by the Detaining Power or by a Mixed Medical Commission) that they suffer from a medical ailment such that they are "gravely diminished." See GC III, Art. 110 (applies to those "whose mental or physical fitness seems to have been gravely diminished"); see also *id.* (discussing the means "to determine the cases" that qualify under Article 110); *id.* Art. 113 (discussing detainees who, though not identified by the Detaining Power, "present themselves for examination" under Article 110).

Department of the Army to establish procedures for a Mixed Medical Commission pursuant to the regulation and Annex II to the Third Geneva Convention. Army Reg. 190-8 § 3-12(a)(2). Annex II to the Convention, which sets forth regulations concerning Mixed Medical Commissions, further directs that the Commissions “shall begin their work as soon as possible after the neutral members have been approved.” CG III, Annex II, Art. 9. The Executive determined in 2002, however, that al-Qaida and Taliban forces, which included Petitioner, were not entitled to prisoner of war status and the related privileges, such as access to a Mixed Medical Commission. Thus, a decision by this Court that the Executive was required to take these steps would contradict the Executive’s considered interpretation on this issue in a manner inconsistent with the deference that is due to the Executive’s interpretation of its treaty obligations. See Abbott, 560 U.S. at 15.

Additionally, an order requiring the establishment of a Mixed Medical Commission necessarily requires that the United States first establish procedures for operating a Mixed Medical Commission— which it does not appear that the United States has ever done under the 1949 Geneva Conventions—and then determine the contours of the standards the Commission would apply, including what disablements or sickness qualify a detainee for release. See Army Reg. 190-8 § 3-12(a)(2) (“Procedures for a Mixed Medical Commission will be established by [Head Quarters, Department of the Army], according to this regulation and Annex II of the [Third Geneva Convention].”). In international armed conflicts to which the full provisions of the Third Geneva Convention apply, Article 110 provides that, “[i]f no special agreements are

concluded between the Parties to the conflict concerned, to determine the cases of disablement or sickness entailing direct repatriation or accommodation in a neutral country, such cases shall be settled in accordance with the principles laid down in the Model Agreement ... and in the Regulations concerning Mixed Medical Commissions annexed to the present Convention.” GC III, Art. 110. Annex I to the Convention includes “Principles for Direct Repatriation and Accommodation in Neutral Countries” and lists a variety of disablements and sicknesses that, in international armed conflicts, qualify for direct repatriation under the Annex.

But those provisions do not apply as a matter of treaty law to the conflict in which Petitioner is detained, and they are provided as a model agreement, from 1949, that is subject to modification by the Parties to the armed conflict. Thus, if the Court ordered the establishment of a Mixed Medical Commission, before the Commission could examine Petitioner (or any other detainee),²⁶ the United States would need to establish procedures governing the operation of the Commissions and “to determine the cases of disablement or sickness entailing direct repatriation.” An order requiring the United States to take a position on the types of sicknesses and disabilities that qualify a detainee for repatriation under the Third Geneva Convention as implemented by Army Regulation 190-8, and as applied in this asymmetrical non-international

²⁶ If the Court granted the relief sought by Petitioner, there is no limiting principle that would prevent any other detainee at Guantanamo who thought it appropriate from seeking to be examined by the Mixed Medical Commission, *cf.* GC III Art. 113 (“Prisoners of war ... may nevertheless present themselves for examination by the Mixed Medical Commission”), and therefore the United State would very likely need to develop the criteria for a range of disabilities and sicknesses.

armed conflict against al-Qaida and Taliban forces, would raise novel, complex, and difficult issues for the Executive. As suggested by Petitioner’s request that the Court also order the appointment of Dr. Keram to the Mixed Medical Commission,²⁷ these novel, complex, and difficult issues are then likely to be the subject of additional litigation that further entangles the Court in the interpretation and application of the relevant provisions from Army Regulation 190-8 and the Third Geneva Convention. In addition to the immediate effect that such an order would have upon the Executive and the conduct of its ongoing detention operations at Guantanamo, it would also have an effect upon the United States’ interests with regard to the Geneva Conventions and related laws and customs of armed conflict. Cf. Adams, 570 F.2d at 953 (cautioning against judicial intervention “irreversibly altering the delicate diplomatic balance in [a certain international legal] arena”).

²⁷ Petitioner “propose[s] the designation of Dr. Emily Keram, [his] most recent and only independent medical examiner . . . to [] the Mixed Medical Commission” that he asks the Court to establish and to review his case. Pet. Mot. at 1; see also id. at 15 (proposed order). Even though Petitioner is not entitled to an order requiring the Executive to establish a Mixed Medical Commission, see supra 27-35, and even assuming that the Court has authority to dictate the composition of any Mixed Medical Commission that it ordered to be established, such an appointment would be inconsistent with the terms of Army Regulation 190-8 and Annex II of the Third Geneva Convention for several reasons. First, “[t]he neutral members [of a Mixed Medical Commission] [must] be entirely independent of the Parties to the conflict,” GC III, Annex II, Art. 7, but Dr. Keram is Petitioner’s hired expert, Order at 3, and therefore hardly independent or neutral. Second, “[t]he two neutral members shall be appointed by the International Committee of the Red Cross[,]” id. Art. 2, Army Reg. 190-8 § 3-12(a)(2), but the ICRC is not before this Court and any order directed at the ICRC would raise a number of significant issues. Third, “[t]he neutral members shall be approved by the Parties to the conflict[,]” GC III, Annex II, Art. 3, so Respondents would maintain authority to approve or disapprove the appointment of any neutral member to a Mixed Medical Commission, including Dr. Keram.

For these reasons, the relief sought by Petitioner would impose tremendous hardships upon Respondents by requiring a judicial finding inconsistent with the Executive's interpretation of treaty obligations, and force the Executive to develop positions on sensitive law of war issues concerning disabilities and sicknesses that warrant repatriation in a non-international armed conflict to which the relevant provisions of Geneva Conventions do not apply as a matter of treaty law.

C. Petitioner Has Not Established Irreparable Injury.

Petitioner claims that he “faces a great risk of irreparable harm absent an injunction compelling an examination by a Mixed Medical Commission” because, “[w]ithout such an examination, [he] cannot further establish his entitlement to repatriation pursuant to domestic law, and would continue to languish at Guantanamo at grave cost to his health.” Pet. Mot. at 10. But, insofar as Petitioner contends that he is suffering irreparable harm as a result of his continued detention at Guantanamo, Petitioner implicitly concedes that the injunctive relief he seeks is not certain to remedy that harm. See also Pet. Mot. at 11 (“Absent the preliminary injunction sought herein, [Petitioner] will be denied the *opportunity* for direct repatriation ...”) (emphasis added). And the mere possibility of (allegedly) irreparable harm is not a sufficient basis for obtaining a permanent injunction. See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (“[T]he movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.”).

Additionally, Petitioner has not established that his purported harm is irreparable. For the reasons explained more fully in Respondents' brief and the declaration by JTF-GTMO's senior

medical officer submitted in opposition to Petitioner's prior motion for medical release, Petitioner is only known to have "minor long-term impairments with manageable to moderate symptoms," SMO Decl. ¶ 11, and, aside from Dr. Keram's report, "[h]e has never been diagnosed with ... PTSD and does not meet the clinical criteria for PTSD," id. ¶ 20. Moreover, even if Petitioner's claims about his health were accurate, they are so at least in part because he refuses medical treatment. Petitioner's "several known recurrent medical conditions ... are currently unresolved because he refuses to consent to diagnostic testing, clinical studies or procedures, and referrals to medical specialists for evaluation." SMO Decl. ¶ 12; see also id. ¶¶ 12 (refusal of treatment for edema); 14 (refusal of treatment for chronic lower urinary tract symptoms); 18 (refusal of treatment at behavioral health services). Petitioner claims that the physicians at Guantanamo "are unable to assess the totality of [his] exposure to trauma and are vulnerable to misdiagnosis and may understate the extent of [his] illness," Pet. Mot. at 11 (quoting Keram Report at 20), but his refusal of medical care is "based on a variety of external factors not related to the quality of medical care he has received," SMO Decl. ¶ 16. For example, Petitioner has refused medical care because the appointments interrupted his recreational time, he did not like the noise level in his cell, he was protesting that he could not have an appointment at an earlier time, or he was seeking to have non-medical specialty items provided or returned to him. Id. He also has refused medical treatment at times that correlated with visits from his lawyers. Id. Petitioner cannot persistently refuse care that otherwise might alleviate his alleged harms, and then argue that the absence of care constitutes irreparable harm.

Cf. Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 230 F. Supp. 2d 12, 15 (D.D.C. 2002) (“[A party] cannot be permitted to manufacture irreparable harm[.]”).

D. The Public Interest Weighs in Favor of Respondents.

The public interest also tips strongly against the issuance of an injunction requiring the Executive to take certain, affirmative actions purportedly pursuant to Army Regulation 190-8, one of the several military regulations that implements the 1949 Geneva Conventions. Here, the injunction sought by Petitioner would contradict the long-standing position that the Executive has taken on this treaty issue to date, and constitute an unprecedented step that would raise novel, complex, and difficult issues for the Executive. See supra at 36-40.

CONCLUSION

For the reasons set forth above, the Court should deny Petitioner's Motion to Compel Examination by a Mixed Medical Commission.

Date: July 2, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

JOSEPH H. HUNT
Branch Director
Civil Division, Federal Programs Branch

TERRY M. HENRY
Assistant Director
Civil Division, Federal Programs Branch

Joseph C. Folio III
DANIEL M. BARISH (D.C. Bar. No. 448263)
JULIA A. BERMAN (D.C. Bar No. 986228)
JOSEPH C. FOLIO III
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 305-4968
Fax: (202) 616-8470
Email: Joseph.Folio@usdoj.gov

Counsel for Respondents