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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

TARIQ ALI ABDULLAH BA ODAH,

Petitioner,

v.

BARACK H. OBAMA, et al.,

Respondents.

Civil Action No. 06-1668 (TFH)
Filed Under Seal

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO REINSTATE HIS HABEAS PETITION AND FOR JUDGEMENT ON THE RECORD

INTRODUCTION

The United States Government remains committed to securing an appropriate transfer location for Petitioner, who is approved for transfer, consistent with applicable U.S. law and policy, and with the Executive's commitment to reduce the detainee population at Guantanamo Bay and to close the detention facility in a responsible manner that protects national security. This filing is not intended to impede those efforts. In the meantime, with respect to the detainees remaining at Guantanamo Bay, the Geneva Conventions reflect important humanitarian principles of international law, including those for the care of personnel detained during armed conflicts, principles that the United States strongly endorses. Pursuant to those principles, the United States has treated Petitioner humanely. Military medical personnel routinely and extensively have counselled Petitioner about the potentially severe medical consequences of his

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hunger strike, and have attempted over the course of his hunger strike to monitor his physical and mental condition, attempts he has routinely rebuffed. Despite efforts by medical personnel at Guantanamo Bay to preserve Petitioner's life and health by enterally feeding him, his continual refusal to consume regular nutrition over eight years has unfortunately, but predictably, resulted in a significant weight loss. That weight loss and its potential consequences do not alter, however, the lawfulness of Petitioner's detention and, in turn, do not entitle Petitioner to a court order requiring his release.[1]

Petitioner argues that the Government's authority to detain him under the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), is constrained by principles reflected in certain provisions of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"), that address the repatriation of certain seriously ill prisoners of war in armed conflicts among State Parties, also known as international armed conflicts. More particularly, Petitioner argues that section 3-12 of Army Regulation 190-8, which is part of the United States' implementation of these provisions of the Third Geneva Convention, "authorizes

[1] As a preliminary matter, Respondents object to the form of Petitioner's filing because he has not stated an appropriate legal basis to "reinstate" his habeas petition. Over one year ago, the Court granted Petitioner's Unopposed Motion to Dismiss Habeas Petition, (Mar. 3, 2014) (ECF No. 270), albeit without prejudice. See Order (Mar. 11, 2014) (ECF No. 271). Therefore, Petitioner should be required to file a new petition prior to the Court considering his motion for medical release (styled here as a Motion for Judgment on the Record). Requiring a new petition is even more appropriate here, where Petitioner asserts a new claim never raised in his habeas petition as the basis for the requested order of release. See Al-Odah v. United States, 13-cv-1420, Pet. for Writ of Habeas Corpus (D.D.C. Sep. 18, 2013) (ECF No. 2) (second habeas petition filed by Guantanamo detainee after Court had denied the original petition); cf. Gonzalez v. Crosby, 545 U.S. 524, 532 (2005) ("A motion that seeks to add a new ground for relief … will of course qualify [as a new application for habeas corpus].")

the habeas relief" Petitioner seeks and entitles him to an order of release from this Court. See Mot. at 15-16.

To the extent Petitioner grounds his claim for relief in Army Regulation 190-8, the regulation does not apply to Petitioner by its own terms. Petitioner does not fall within any category of detainees to which the relevant provision of the regulation applies. Further, even if the regulation did apply to him, Petitioner could not qualify for repatriation under the regulation because detainees who refuse medical treatment for their condition are ineligible under the relevant standard for direct repatriation, which, by its plain terms, requires a certain prognosis in spite of treatment. Moreover, even in situations where the Geneva Conventions fully apply as a matter of law, under the express terms of the Third Convention, detainees whose injuries are self-inflicted are not entitled to consideration for medical repatriation. Here, Petitioner's voluntary, persistent hunger strike and his refusal to permit treatment remove him from consideration under the principles reflected in the repatriation provisions and disqualify him from eligibility under Army Regulation 190-8. Indeed, his refusal to permit basic medical testing procedures to ascertain his condition only reinforces that conclusion.

And lastly, aside from the terms of Army Regulation 190-8, the claim for medical release Petitioner raises would require the Court to make determinations that are not within the province of the Judiciary. Although the relevant provisions of the Third Geneva Convention governing repatriation of seriously ill detainees apply to only an international armed conflict, they reflect important humanitarian principles of international law; nonetheless, how those principles may operate in a given conflict, including with respect to individual detainees, is not an appropriate matter for judicial review. In this non-traditional, non-international armed conflict, it is even

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more appropriate for the Executive, and not the Courts, to make those decisions. Indeed, even in conflicts to which these provisions of the Third Convention are binding upon State Parties to the conflict, we are not aware of any court ever ordering the release of an otherwise lawfully detained individual under these provisions of the Convention. The Executive Branch respects the humanitarian principles reflected in the provisions of the Third Geneva Convention concerning the repatriation of seriously ill detainees and takes them into account when determining whether it should continue to detain individuals in the circumstances of this non-international armed conflict; the application of these principles, however, is not for the Judiciary to decide, especially with respect to particular detainees.

Accordingly, Petitioner's motion should be denied.

BACKGROUND

Procedural History

Petitioner Tariq Ali Abdullah Ba Odah (ISN 178) is a Yemeni national currently detained at Guantanamo Bay. Resps.' Notice Lifting Protected Info. Desig. of Decs. by Guantanamo Bay Rev. Task Force, Ex. 1, Guantanamo Rev. Dispositions at 10 (July 8, 2013) (ECF No. 261) ("Guantanamo Review Dispositions Chart"). He initially petitioned for a writ of habeas corpus on September 28, 2006. Pet. (ECF No. 1). The government responded by filing its Factual Return (ECF No. 64), justifying Petitioner's detention under the AUMF, as informed by the laws of war, on November 25, 2008. Petitioner, however, never prosecuted his petition, filing no traverse in response to the factual return and seeking no discovery. Instead, on January 12, 2009, Petitioner sought an indefinite stay of this proceeding, Unopposed Mot. to Stay Habeas Procs. (ECF No. 83), which Judge Kennedy granted the next day, Order (Jan. 13, 2009) (ECF No. 85).

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The indefinite stay was renewed by this Court over two years ago. Minute Order (July 23, 2013). Subsequently, sixteen months ago, Petitioner moved to dismiss his petition without prejudice. Unopposed Mot. to Dismiss Habeas Pet. (Mar. 3, 2014) (ECF No. 270). The Government did not oppose, and the Court granted that request. Order (Mar. 11, 2014) (ECF No. 271).

Petitioner's Transfer Status

In January 2009, the President issued Executive Order 13,492, which required the Executive Branch to undertake a prompt and thorough review of each Guantanamo Bay detainee, including "whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice." 74 Fed. Reg. 4897-4899, § 2(d) (Jan. 27, 2009). The Task Force created pursuant to this Executive Order determined that, "given the current security situation in Yemen, [Petitioner warranted] conditional detention pursuant to the Authorization for the Use of Military Force (2001), as informed by principles of the laws of war." Guantanamo Review Dispositions Chart at 10; see also Final Report, Guantanamo Review Task Force (Jan. 22, 2010) ("Task Force Final Report"), available at www.justice.gov/ag/guantanamo-review-final-report.pdf (last visited July 30, 2015).[2] Under that

[2] The Task Force gave "careful consideration to the threat posed by [each] detainee," Task Force Final Report at i, and determined "whether the threat could be mitigated through appropriate security measures," id. at 4. The Task Force examined intelligence concerning the security situation in Yemen, and observed that "the security situation in Yemen had deteriorated," and that "Al-Qaida was gaining strongholds in certain regions of the country, and the government of Yemen was facing a rebellion in other regions." Id. at 18. The Task Force also noted that "[t]he involvement of Al-Qaida in the Arabian Peninsula . . . in the [December 2009] attempted bombing of an airplane headed to Detroit underscored the continued need for a deliberate approach toward any further effort to repatriate Yemeni detainees." Id. The Task Force stated that a decision to approve a detainee for transfer "reflects the best predictive judgment of senior

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designation, Petitioner "may be transferred if the security situation in Yemen improves[] [or if] an appropriate rehabilitation program or third-country resettlement option becomes available[.]" Guantanamo Review Dispositions Chart at 10; see also Task Force Final Report at 12-13.

Petitioner's Medical Condition

Petitioner has ready access to a comprehensive medical care system. Currently, two family physicians, an internist/oncologist, a psychiatrist, a psychologist, and a physician's assistant—all board-certified—are assigned to care solely for Petitioner and 100 of his fellow detainees at Guantanamo Bay. Ex. 1, Decl. of Senior Medical Officer at ¶ 4 ("SMO Decl."). Additionally [redacted] nurses, corpsmen, and medical technicians are also dedicated to care solely for these detainees. Id. To the extent that additional health-care services are required, the detainees have available to them the services of the Naval Hospital Guantanamo, as well as the services of specialists who can be flown to Naval Station Guantanamo as needed. Id. All medical staff who deal with any of the detainees receive in-depth training on how to provide quality medical care in a detention setting. Id. ¶ 5. Of note, health-care personnel do not participate in detention-related activities or operations for any reason other than to provide health-care services in an approved clinical setting, to conduct disease prevention and other approved public-health activities, or to advise proper command authorities regarding the health of detainees. Id. ¶ 6. Medical care is not provided or withheld based on a detainee's compliance

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government officials … that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country." Id. at 17. The Task Force also noted that it was "important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee." Id.

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or noncompliance with detention-camp rules or on his refusal to accept food or drink. Id. ¶ 7. Medical care and treatment are offered based solely on a detainee's need for care. Id.

Detainees may access medical care by simply asking a guard at any time or asking the medical personnel who make daily rounds of the cell blocks. SMO Decl. ¶ 8. Additionally, medical staff will investigate any potential detainee medical issues that are brought to their attention by JTF-GTMO guards or staff. In general, medical care requires the consent of the detainee. Id.

Petitioner is aware of how to access medical care, if he wishes. For example, last November he initiated treatment for a cyst, consenting to its removal and to post-operative wound care until it healed (of note, the wound promptly and properly healed despite Petitioner's low body weight). Id. ¶ 23. He has also requested medical authorization for and received thermal shirts, pants, and blankets due to his low body weight. Id. ¶ 25. He has also requested and received medical approval for a special mattress to alleviate the symptoms of and prevent future pressure ulcers. Id.

When it comes to medical treatment for his low weight due to his hunger strike, however, Petitioner refuses virtually all care. Despite routine counseling concerning the medical consequences of his fast, SMO Decl. at ¶ 12, he continually disregards that advice, instead actively thwarting attempts to treat him. He refuses nearly all medical appointments to discuss his condition: records show that he has attended only 3 of approximately 12 of his most recent health care appointments since the fall of 2014, one of which was for the cyst and one for a dental appointment. Id. ¶¶ 16-18, 22-23. Attempts by the Senior Medical Officers to engage him during either his enteral feedings or by visiting his cell have more often than not been

rejected, sometimes vehemently so. Id. ¶ 18. Of note, he has never consented to meet with or even discuss his medical condition with the current Senior Medical Officer, who also is designated as his primary care manager. Id. ¶¶ 16, 18. Since February 2013, he has refused at least three requests for blood tests needed to assess his condition (tests including complete blood counts, comprehensive metabolic panel, thiamine, and pre-albumin), the last refusal occurring just last month. Id. ¶ 16.

Though Petitioner now complains in his brief of multiple symptoms allegedly stemming from his continued fast, including:

> exhaustion, decreased vision, swollen feet, stiff joints, migraine-like headaches, nervousness, agitation, muscle and nerve shivering, needle-like pain in his heart, racing heartbeat, loss of sensation in his extremities, dizziness, back pain, and decreased ability to mentally focus [Mot. at 7],

he has brought few of these complaints to the attention of Guantanamo medical staff (most notably, he has complained of back pain), though not recently. Id. ¶ 22-23. And even when he did complain of back pain in December, 2014, he subsequently refused to let the staff assess or treat that complaint. Id. ¶ 23.

Most troubling, he appears to be circumventing the protocols put in place to maintain him at a healthy weight and to ensure he receives appropriate nutrition. Based on his declining weight and refusal to eat, a medical determination was made in February 2007 to approve Petitioner for enteral feeding, if necessary. SMO Decl. ¶ 14. That approval continues to this day, with Petitioner approved for twice daily enteral feedings to attempt to provide him with nutrition should he refuse to consume it on his own. Id. ¶ 21. Recently, however, he has

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occasionally purged his enteral feedings, either while still being fed or later in his cell. Id. ¶ 18-19.

Additional circumventions include deceiving Guantanamo personnel to avoid the enteral feedings themselves. Though Petitioner is approved for enteral feeding, protocol provides that a detainee may usually avoid one or both enteral feedings a day either by eating sufficient solid food from the meals that are delivered to his cell three times per day, or by voluntarily drinking the liquid supplement used in his enteral feedings. Id. ¶ 13. Petitioner, however, has recently been detected flushing food (and additional honey and olive oil that he has specially requested) from the delivered meals down the toilet and otherwise hiding food in his cell. Id. 18, 21. Similarly, Petitioner has been actively concealing his failure to drink his nutritional supplements: staff have observed him accepting a full cup, placing it on the ground, but then picking up and drinking from an almost empty cup he had previously placed on the floor, and presenting the substitute for inspection; he has also been detected pretending to drink from an empty cup and pouring the supplement into the toilet. Id. ¶ 21. All of these actions suggest attempts to have Guantanamo personnel credit Petitioner with consuming food he did not eat so that he may bypass the next enteral feeding.[3]

The Guantanamo Senior Medical Officer assesses Petitioner's current health as poor. SMO Decl. ¶ 14. Since beginning his fast in 2007, Petitioner's weight has fluctuated, but

[3] Relatedly, in September 2014, a concern about a sudden weight loss led a former Senior Medical Officer to suspect Petitioner was not actually consuming the food or supplements that he was being credited with. SMO Decl. ¶ 20. Consequently, the former SMO suspended Petitioner's ability to avoid his enteral feedings by otherwise consuming nutrition. Id. Petitioner soon gained back some of the lost weight, and he was subsequently permitted to again bypass enteral feedings by consuming sufficient nutritional supplement. Id.

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consistently has followed a downward trend, falling from 133 pounds to his current weight of approximately 74 pounds. Id. ¶ 14 & n.2. But because Petitioner routinely refuses to allow Guantanamo medical personnel to properly examine him, and refuses to consent to needed blood-chemistry analyses, the assessment of Petitioner's health is based primarily on his weight loss. To gather what information that he could without involuntarily subjecting Petitioner to medical tests, the Senior Medical Officer recently had Petitioner placed on line-of-sight continual observation to monitor his daily activities. Id. ¶ 18. In addition to noting his surreptitious discarding of food, observers noted Petitioner functioning normally in his daily life, conducting activities such as walking in his cell, talking to his neighbors, praying, singing, and regularly sleeping. Id. ¶. Petitioner's energy level appeared normal. Id.

Nevertheless, the Senior Medical Officer remains very concerned about Petitioner's health. SMO Decl. ¶ 26. Should his health worsen, medical personnel are prepared to admit him to the Detainee Hospital and place him on continuous enteral feeding, to allow slower feeding and, so, limit Petitioner's ability to purge the nutrition. Id. Additionally, involuntary medical testing may be considered if his condition worsens. Id.

ARGUMENT

As explained below, Petitioner's motion fails for two reasons. First, Army Regulation 190-8 cannot serve, by its own terms, as a source for this Court to grant a motion for Petitioner's release: Petitioner does not fit within any of the possible designations for detainees to whom the relevant provisions would apply. Even if they did apply, the source of his alleged physical condition disqualifies him from consideration, and he does not meet the necessary prerequisites concerning the need for him to have sought treatment for the condition. And second, the treaty

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framework, historical practice, and relevant case-law analogies all demonstrate that determinations regarding the medical repatriation of law-of-war detainees involve matters in which the Executive is uniquely competent and for which the Executive should be accorded great deference and are not within the province of the Judiciary. In fact, no court has ever ordered the release of a law-of-war detainee under the circumstances presented here.

I. Legal Background

A. The Third Geneva Convention

Generally, in an international armed conflict, Articles 109 through 117 of the Third Geneva Convention address the direct repatriation and accommodation in neutral countries of certain seriously sick and seriously wounded prisoners of war.[4] Specifically, Articles 109 and 110 provide that certain types of sick and wounded prisoners of war—individuals who are "gravely diminished" and incurable; individuals who are "not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished"; and individuals "who have recovered but whose mental or physical fitness

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[4] The Third Geneva Convention sets forth rules concerning the treatment of prisoners of war. 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. To determine whether an individual qualifies for prisoner of war status, 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 of the Convention, the full protections 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. 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.

seems to have been gravely and permanently diminished"—shall be repatriated directly. GC III, Arts. 109, 110. Articles 109 and 110 also provide that other types of sick and wounded prisoners of war—prisoners whose recovery may be expected within one year, or whose mental or physical health is seriously threatened by continued captivity but accommodation in a neutral country might remove that threat—may be accommodated in a neutral country. GC III, Art. 109, 110. Articles 111 through 116 address the internment of certain sick and wounded prisoners of war in neutral countries; logistics regarding the implementation of Articles 109 and 110; and special considerations for implementing Articles 109 and 110, including, as provided in Article 114, that "[p]risoners of war who meet with accidents shall, unless the injury is self-inflicted, have the benefit of the provisions of this Convention as regards repatriation or accommodation in a neutral country." GC III, Arts. 111-116. Finally, Article 117 also independently obligates the receiving state to ensure that "[n]o repatriated person may be employed on active military service." GC III, Art. 117.

In implementing these Convention obligations in international armed conflicts, Article 110 expressly contemplates that parties to the conflict have flexibility to interpret the standards for repatriation set by that Article by concluding special agreements "to determine the cases of disablement or sickness that would entail direct repatriation or accommodation in a neutral country." GC III, Art. 110. In the absence of such an agreement, such determinations are to be made "in accordance with the principles laid down in the Model Agreement," which is Annex I to the Third Geneva Convention. Id. The Convention then requires medical professionals to determine whether sick or wounded prisoners of war suffer from the type of condition or ailment

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determined by the parties to the conflict (or by reference to the Model Agreement) to meet the standards for repatriation set forth in Article 110.

B. Army Regulation 190-8

Army Regulation 190-8 is one of several regulations addressing detainee operations. The general purpose of Army Regulation 190-8 is to "establish[] policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for Enemy Prisoners of War, Civilian Internees, Retained Persons, and Other Detainees." Army Regulation 190-8 at i. By promulgating Army Regulation 190-8, the Secretaries of the Army, Navy, and Air Force[5] exercised their authorities and responsibilities to provide the United States armed forces with guidance regarding the treatment of detainees, including ensuring that the United States military personnel (through military disciplinary mechanisms) act in accordance with international law, in particular the 1949 Geneva Conventions. See Army Regulation 190-8 at i ("This regulation implements Department of Defense Directive 2310.1 [currently, DODD 2310.01E (Aug 19, 2014)] and establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for" detainees); id. at 1 ("This regulation implements international law . . . relating to" the administration, treatment, employment and compensation of detainees).

[5] Army Regulation 190-8 was also issued by the Navy, see OPNAVINST 3461.6; by the Marine Corps, see MCO 3461.1; and by the Air Force, see AFJI 31-304. Because the Army serves as the Executive Agent for detainee operations policy within the Department of Defense, AR 190-8 § 1-4(b), these four instructions will collectively be referred to as Army Regulation 190-8.

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Petitioner's motion relies on section 3-12(l) of Army Regulation 190-8, which reflects one aspect of the United States' implementation of the medical repatriation provisions of the Third Geneva Convention, and provides:

> The following EPW [Enemy Prisoners of War] and RP [Retained Personnel] are eligible for direct repatriation:
>
> > (1) EPW and RP suffering from disabilities as a result of injury, loss of limb, paralysis, or other disabilities, when these disabilities are at least the loss of a hand or foot or the equivalent.
> >
> > (2) Sick or wounded EPW and RP whose conditions have become chronic to the extent that prognosis appears to preclude recovery in spite of treatment within 1 year from inception of disease or date of injury.

Petitioner all but ignores, however, the remaining pertinent provisions of section 3-12,[6] provisions that govern the establishment of a Mixed Medical Commission to evaluate sick and injured individuals potentially subject to the regulation and that address procedures to guide that Commission:

> *a*. Sick and wounded prisoners will be processed and their eligibility determined for repatriation or accommodation in a neutral country during hostilities. Both will be according to the procedures set forth below.
>
> > (1) Sick and wounded prisoners will not be repatriated against their will during hostilities.
> >
> > (2) Procedures for a Mixed Medical Commission will be established by HQDA [Headquarters, Department of the Army], according to this regulation and Annex II of the GPW [Third Geneva Convention]. The purpose of the Commission will be to determine cases eligible for repatriation. The Mixed Medical Commission will be composed of three members. Two of the

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[6] Petitioner relegates a passing reference to the Mixed Medical Commission procedures to a footnote in his brief, suggesting there that his alleged poor physical condition should excuse him from submitting to the requirements of the regulation that he invokes. Mot. at 18 n.5.

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> members, appointed by the ICRC [International Committee of the Red Cross] and approved by the parties to the conflict, will be from a neutral country. As far as possible, one of the neutral members will be a surgeon and the other a physician. The third member will be a medical officer of the U.S. Army selected by HQDA. One of the members from the neutral country will act as chairman.

b. If for any reason the use of neutral doctors cannot be arranged for by the ICRC, the United States, acting in agreement with the Protecting Power concerned, will set up a Medical Commission. This Commission will perform the duties of the Mixed Medical Commission.

c. The Mixed Medical Commission will:

(1) Examine EPW, and RP who have applied for repatriation.

(2) Inspect clinical records pertaining to these EPW.

(3) Determine those cases eligible for repatriation or hospitalization in a neutral country.

d. Decisions made by the Mixed Medical Commission will be a majority vote and cannot be changed to the detriment of the EPW and RP examined, except upon concurrence of the Commission.

. . .

f. The United States will carry out the decisions of the Mixed Medical Commission as soon as possible and within 3 months of the time after it received due notice of the decisions. [AR 190-8 §§ 3-12 a-d, f].

Army Regulation 190-8 also defines Enemy Prisoner of War[7] and Retained Personnel,[8] as used in the regulation. The regulation also provides for a category of "Other Detainee," a

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[7] Army Regulation 190-8 defines "Enemy Prisoner of War" as:

> A detained person as defined in Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949. In particular, one who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy. . . . [AR 190-8, App. B, § II – Terms].

[8] Army Regulation 190-8 defines "Retained Personnel" as:

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temporary category for individuals who are awaiting a determination whether they qualify for any of the other categories of detainees to whom the regulation applies:

> Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI [Civilian Internee] (article 78, GC [Geneva Convention Relative to the Protection of Civilian Persons in Time of War]),[9] [who] shall be treated as EPWs until a legal status is ascertained by competent authority." [AR 190-8, App. B, § II – Terms].

Of note, Army Regulation 190-8 provides 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 at ¶1-1(b)(4).

Enemy personnel who come within any of the categories below are eligible to be certified as retained personnel (RP).

a. Medical personnel who are members of the medical service of their armed forces.

b. Medical personnel exclusively engaged in the—

(1) Search for, collection, transport, or treatment of, the wounded or sick.

(2) Prevention of disease.

(3) Staff administration of medical units and establishments exclusively.

c. Chaplains attached to enemy armed forces.

d. Staff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments. The staffs of such societies must be subject to military laws and regulations. [AR 190-8, App. B, § II – Terms].

[9] A Civilian Internee is a person "who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power." Army Regulation 190-8, Appendix B, Section II – Terms. This category of detainee is not relevant here.

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II. Petitioner Is Not Entitled To A Court Order For Release Under Army Regulation 190-8.

As noted above, section 3-12(l) of Army Regulation 190-8 makes "eligible for direct repatriation" certain "[s]ick or wounded" individuals "whose conditions have become chronic to the extent that prognosis appears to preclude recovery in spite of treatment within 1 year from inception of disease or date of injury." Army Regulation 190-8 § 3-12(l)(2). Petitioner may not invoke Army Regulation 190-8 to win release, however, for at least two reasons. First, he does not belong to one of the three detainee designations to which the repatriation provisions might apply. In particular, contrary to his claim, he is not an "Other Detainee" awaiting a status determination under the regulation. And second, even if the provision could apply to him, because Petitioner has caused his medical condition by his intentional long-term fasting, he is not entitled to consideration for medical repatriation. Moreover, because he refuses to permit treatment, or even basic medical examinations and tests, he would be disqualified for relief under the relevant terms and protections of Army Regulation 190-8.

A. Petitioner Is Not a Detainee to Whom Section 3-12(l) Applies.

Section 3-12(l) of Army Regulation 190-8 does not apply to Petitioner by its very terms. That section applies only to detainees classified as either Enemy Prisoners of War or Retained Personnel. AR 190-8, § 3-12(l) ("The following EPW [Enemy Prisoners of War] and RP [Retained Personnel] are eligible for direct repatriation: ….") The section also applies to Other Detainees insofar as Other Detainees are to be "treated as EPWs until a legal status is ascertained by competent authority." AR 190-8, App. B, § II – Terms. Thus, an Other Detainee, by virtue of his interim treatment as an Enemy Prisoner of War, could temporarily fall within the scope

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section 3-12(l). Therefore, to be eligible for direct repatriation under section 3-12(1), Petitioner must be an Enemy Prisoner of War, a Retained Person, or an Other Detainee pending a status determination.

Here, Petitioner does not claim to be—and, as set out below, in fact is not—a Retained Person or an Enemy Prisoner of War. Nor is he an Other Detainee awaiting a status determination. Consequently, section 3-12(l) does not apply to him and, so, cannot provide the underlying authority for an order of release.

1. Petitioner is not a Retained Person.

Retained Personnel are essentially military medical and religious personnel, and some non-governmental-organizations personnel. See GC III, Art. 33; AR 190-8, Appendix B, Section II – Terms.[10] Petitioner has never asserted—and does not assert here, see Mot. at 17—that he fits any of the categories of individuals who could qualify him as Retained Personnel.

2. Petitioner is not an Enemy Prisoner of War.

Similarly, Petitioner does not claim to be an Enemy Prisoner of War. Nor is he. As defined in Army Regulation 190-8, an Enemy Prisoner of War is a detained person in an international armed conflict who meets the requirements defined in Article 4 of the Third Geneva

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[10] Retained Personnel are afforded "special immunity" in traditional armed conflicts. See Int'l Comm. of the Red Cross, Commentary on First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick In Armed Forces in the Field, at 219 (Pictet, ed. 1952) ("GC I Commentary"); see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T 3217, 7 U.N.T.S. 85 ("GC I"), Art. 24. As pertinent there, Retained Personnel may be "*retained* only in so far as the state of health, the spiritual needs and the number of prisoners of war require." GC I, Art. 28, para. 1 (emphasis added). If retained, they are decidedly not prisoners of war. Id. And if they are not necessary to care for prisoners of war, they must be repatriated as soon as is practicable. Id. Art. 30, para. 1,

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Convention.[11] See AR 190-8, Appendix B, Section II – Terms. Here, the President previously determined that Taliban and al-Qaida forces are not entitled to designation as Enemy Prisoners of War under the Third Geneva Convention,[12] and a Combatant Status Review Tribunal determined

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[11] Article 4 of the Third Geneva Convention defines which detainees in an international armed conflict may qualify for prisoner-of-war status, providing in pertinent part:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war. [GC III, Art. 4]

[12] 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. See White House Press Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002), available at http://www.state.gov/s/l/38727.htm (Al Qaida "is an international terrorist group and cannot be considered a state party to the Geneva Convention[s].") ("President's Determination"). Consequently, al-Qaida's "members . . . are not covered by the Geneva Convention, and are not entitled to POW status under the treaty." Id. As for Taliban forces, the President determined that they would not be entitled to prisoner-of-war status under Article 4 of the Third Geneva Convention because the Taliban forces did not comply with that provision's prerequisite conditions, in particular that they did "not effectively distinguish[] themselves from the civilian population of Afghanistan," did "not conduct their operations in accordance with the laws and customs of war," but rather "knowingly adopted and provided support to the unlawful terrorist

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that Petitioner is detainable under the AUMF because he was a member of or supported Taliban or al-Qaida forces.[13]

Thus, because the Executive, through the Combatant Status Review Tribunal, has determined that Petitioner is properly detainable under the AUMF as member of al-Qaida or Taliban forces, Petitioner is not entitled to the status of an Enemy Prisoner of War. See 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."); see also United States v. Hamidullin, 2015 WL 4241397 (E.D.Va.) at *19-*20 (holding member of Taliban associated force was not entitled to prisoner-of-war status).

3. Petitioner is not an Other Detainee.

Contrary to his assertion, see Mot. at 17, Petitioner also does not qualify for the interim designation of Other Detainee. As explained above, the Executive has already determined that

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objectives of al Qaeda." President's Determination. Nevertheless, pursuant to Common Article 3, the Third Geneva Convention still requires the United States to treat detained Taliban members humanely. GC III Art. 3; see also Hamdan v. Rumsfeld, 548 U.S. 557, 629-31 (2006). The United States' armed conflict against the Taliban in Afghanistan currently is considered a non-international armed conflict. See, e.g., ICRC, International Humanitarian Law & The Challenges of Contemporary Armed Conflicts, at 725 (Sept. 2007), available at https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf.)

[13] Specifically, in 2004, a Combatant Status Review Tribunal ("CSRT") determined that Petitioner was a "member of, or affiliated with, the Taliban and al Qaida and participated in military operations against the United States or its coalition partners." Ex. 2, Excerpts from CSRT Record at 0005, ¶ 3 (CSRT Decision Report Cover Sheet).

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al-Qaida and Taliban forces do not qualify for Enemy Prisoner of War status and has determined that Petitioner was a combatant for Taliban or al-Qaida forces. Accordingly, his status is one of a detainee not entitled to Enemy Prisoner of War status and, consequently, he is not entitled to the protections afforded those entitled to the designation. Rather he is a detained former combatant entitled to the protections of Article 3.

Petitioner cites no case that would compel a different result. At best, Al Warafi and Aamer both stand for the proposition that a Guantanamo Bay detainee may invoke Army Regulation 190-8 in his habeas proceedings if the circumstances warrant. See Al Warafi, 716 F.3d 627, 629 (D.C. Cir. 2013); Aamer v. Obama, 58 F. Supp. 3d 16, 26-27 (D.D.C. 2014). But in neither of those cases was the regulation found to warrant relief. In petitioner Al Warafi's case, the Court of Appeals had initially remanded that case so that the district court could determine whether the petitioner could qualify for repatriation as a Retained Person as, he claimed, permanent and exclusive medical personnel. Al Warafi v. Obama, 409 Fed. App'x 360, 361 (D.C. Cir. 2011). But because the district court subsequently found and Court of Appeals affirmed that the petitioner did not meet the requirements for such personnel, both courts found that Army Regulation 190-8 did not offer relief.[14] 716 F.3d at 629-631. Similarly, in Aamer,

[14] Additionally, 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." 716 F.3d at 629. On the facts presented in that case, the petitioner there might have been explicitly entitled to release had he been found to be full-time, exclusive medical personnel, given that provision of medical care at Guantanamo by the United States arguably may have obviated the need to retain detainee medical personnel, see supra note 10. Here, however, even if Petitioner could be classified as an Other Detainee, then he still would not be able to establish his explicit entitlement to release. Rather, the provisions of Army Regulation 190-8 invoked by Petitioner require the Department of the Army first to establish procedures for a Mixed Medical Commission, and then arrange for appointment of members of the Commission. Once

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Judge Collyer expressly did not decide that the petitioner there was entitled to treatment as a prisoner of war through the placeholder status of Other Detainee. Rather, she ruled that, assuming he could show he should be so designated, Petitioner's claim was not ripe because he had neither applied for repatriation nor requested an examination by a Mixed Medical Commission, 58 F. Supp. 3d at 26-27.[15] Accordingly, at best both al Warafi and Aamer stand

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established and provided with governing procedures and criteria, it would be for the Commission to determine which detainees, if any, "are eligible for direct repatriation." AR 190-8 § 3-12(l); see also Aamer, 58 F. Supp. 3d at 26 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"). In essence, Petitioner asks this Court to make a determination, and order relief (repatriation or resettlement), that the regulation leaves to the operation of a Mixed Medical Commission in appropriate circumstances. Having sought to invoke the protections of Army Regulation 190-8, Petitioner should not be permitted to avoid the procedures and process detailed therein and obtain a release order outright. See Aamer, 58 F. Supp. 3d at 26-27 (denying motion for medical release for failure to have first applied to a Mixed Medical Commission).

[15] One other Judge of this District has been presented with a motion similar to Petitioner's, seeking an order of release based on a Guantanamo detainee's alleged poor health. In Al-Adahi v. Obama, No. 05-280, Mem. & Order, (D.D.C. Aug. 7, 2014) (ECF No. 653), Judge Kessler denied the motion, holding that such relief is foreclosed by the Court of Appeals decision in Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010). See Awad, 608 F.3d at 11 ("Whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF."); see also Anam v. Obama, 696 F. Supp.2d 1, 4 (2010) (noting that the Executive can detain those who are part of al-Qaida "even if that individual does not presently pose a threat to the security of the United States."). Judge Kessler explained that Awad 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. Al-Adahi, Mem. & Order 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). Petitioner here, accordingly, correctly disclaims that his alleged inability to pose a threat were he released provides a basis for his motion for release. See Mot. at 19 n. 6.

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for only the proposition that a detainee may invoke Army Regulation 190-8 if the circumstances warrant, not that every (or even any) Guantanamo detainee necessarily fits within one of the regulation's designations or necessarily is eligible for relief based on the regulation.

Petitioner's argument is further flawed in two other respects. First, seeking to discredit the determination that he is not an Enemy Prisoner of War, he mischaracterizes the status of the Combatant Status Review Tribunal. The Third Geneva Convention provides that, in certain cases of doubt, questions surrounding a detainee's status as a prisoner of war are to be decided by a "competent tribunal." GC III, Art. 5; see AR 190-8 § 1-6. Under Army Regulation 190-8, that tribunal is to consist of a military tribunal, made up of three commissioned officers, at least one of whom holds a field-grade rank. AR 190-8 § 1-6(c). Even under Petitioner's argument, his Combatant Status Review Tribunal was so constituted, and its decision that he was a member of Taliban or al-Qaida forces is a valid determination of Petitioner's status by the Executive. See Ex. 2, at p. 0004 (Appointment of CSRT #18, identifying the members for Petitioner's CSRT as an Air Force Colonel, an Air Force Lieutenant Colonel, and a Navy Lieutenant Commander); see also Mem. for the Sec. of the Navy re Order Establ'g CSRT (Jul. 7, 2004), available at http://www.defense.gov/news/Jul2004/d20040707review.pdf. Compare id. at (e) ("A [CSRT] shall be composed of three neutral commissioned 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 commissioned officers, one of whom is of field grade). Therefore, because the President already had determined that al-Qaida and Taliban forces were not entitled to prisoner-of-war status, and a CSRT then determined that

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Petitioner was part of those forces, Petitioner is not an Other Detainee under Army Regulation 190-8 whose status has not yet been determined.

Second, Petitioner's suggestion that since he has been determined not to be an Enemy Prisoner of War then he must remain qualified as an Other Detainee, Mot. at 17-18, is illogical. Essentially, Petitioner is arguing that having been found not to be an Enemy Prisoner of War, he nevertheless remains entitled to the protections of that designation as an Other Detainee. But that argument creates a false choice, one 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 the recently reissued Department of Defense directive 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 who 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 approach also would undermine a core purpose of the Geneva Conventions, namely to incentivize belligerents to comply with the laws of war by offering increased protections. See 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."); cf. 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

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protection of the Convention."). Distilled to its essence, Petitioner's approach would 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 determined to be members of forces that decidedly do *not* adhere to the laws of war. Army Regulation 190-8 does not support Petitioner's attempt to contort the rules for his benefit.

* * *

In summary, Petitioner does not qualify as a Retained Person, an Enemy Prisoner of War, or an Other Detainee whose status is pending a determination. Absent one of those designations, Army Regulation 190-8 does not require that the military consider him for medical repatriation under Section 3-12(l). Consequently, that section may not provide any basis for this Court to supplant the military and order Petitioner's release.

B. Petitioner Fails to Satisfy the Requirements of Army Regulation 190-8.

Even if the relevant provisions were applicable, both Army Regulation 190-8 and the provisions of the Geneva Conventions that the regulation helps implement do not contemplate Petitioner's condition as providing a basis for medical repatriation. First, Article 114 of the Third Convention specifies that direct repatriation is not available to a detainee whose underlying injury is self-inflicted. GC III, Art. 114; see also GC III Commentary at 534 ("An exception [to entitlement to medical repatriation] is made, for reasons which are easy to understand, in the case of prisoners who willfully inflict injury on their own person . . .. In this way, they will not be encouraged to resort to such practices."). And second, the relevant standards in both the Third Convention and Army Regulation 190-8 (in the very provision

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invoked by Petitioner, see Mot. at 17) require that the detainee accept treatment for his alleged injury. See GC III, Annex I § I(A)(3) (direct repatriation is available to "[a]ll sick prisoners of war whose condition has become chronic to the extent that prognosis seems to exclude recovery—*in spite of treatment*—within one year from the inception of the disease") (emphasis added); AR 190-8 §3-12(l)(2)(providing for eligibility for direct repatriation "[s]ick or wounded EPW and RP whose conditions have become chronic to the extent that prognosis appears to preclude recovery *in spite of treatment* within 1 year from the inception of disease or date of injury.") (emphasis added). Here, Petitioner cannot satisfy either requirement. Accordingly, even if section 3-12(l) could apply to Petitioner as an Other Detainee, that provision still could not serve as a basis for an order requiring Petitioner's release.

First as to the self-inflicted nature of Petitioner's underlying medical condition, Petitioner does not contest, but rather vigorously asserts, that his weight loss and the current possible consequences are all due to his seven-year hunger strike. E.g., Mot. at 2 ("Mr. Ba Odah is on a prolonged hunger strike . . .. Despite being force fed, Mr. Ba Odah is suffering from an array of dangerous symptoms attributable to severe malnutrition."); at 6 ("For years, Mr. Ba Odah has suffered a variety of symptoms of undernourishment—surely not uncommon among other long-term hunger striking Guantanamo prisoners . . .."); at 7 ("Other symptoms of Mr. Ba Odah's undeniable starvation signal that his body is overwhelmed."). And the medical opinions submitted with his motion are all predicated on the fact that the weight loss attributable solely to

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his hunger strike is the primary contributing factor to the possible medical complications he might be suffering.[16]

Any remaining doubt as to the intentional nature of Petitioner's weight loss should be dispelled by his attempts to deceive the guard force into crediting him with eating food or drinking his liquid nutritional supplements. SMO Decl. ¶¶ 18, 22 By flushing solid food down the toilet and switching full cups of liquid supplement for empty cups, id., Petitioner has been observed trying to be seen as consuming sufficient calories to skip needed enteral feedings. Such actions confirm Petitioner's intention to thwart even the basic attempts of Guantanamo Bay medical personnel to ensure that he receives proper nutrition. Any harm resulting from his weight loss being the result of an intentional course of conduct, Petitioner's condition cannot provide a basis for medical repatriation.[17]

[16] Mot. Ex. 2, Decl. of Dr. J. Ghannam ¶ 3 ("Given Mr. Ba Odah's roughly 75-pound body weight, and Mr. Farah's descriptions of his condition, I believe Mr. Ba Odah's mental and physical health is in grave jeopardy"); Ex. 3, Decl. of Dr. M. Bailony at ¶¶ 5-6 ("Nevertheless, there is one dispositive fact that leads me to conclude that Mr. Ba Odah's medical condition is critical: the U.S. government has represented that his weight is 74.5 pounds as of April 20, 2015, and that he is approximately 56% of his ideal body weight. "); Ex. 4, Decl. of Dr. S. Crosby ¶ 5 ("Nevertheless, I am able to make certain diagnostic and prognostic assessments based on information the government has made available that Mr. Ba Odah weighs only 74.5 pounds—approximately 56% of his normal body weight . . . and on reported symptoms from Mr. Ba Dah's [sic] counsel.").

[17] Petitioner argues that his current medical condition entitles him to repatriation even if the condition were self-inflicted. Mot at 22, n. 8. But rather than cite any legal authority for that proposition, provide any legal analysis, or even merely distinguish Article 114, Petitioner simply labels any counter-argument as "cynical." Id. Perhaps, this "resort to . . . rhetoric reveals the weakness of . . . [the] legal argument[]." Glossip v. Gross, No. 14-7955, slip op. at 29 (U.S. June 29, 2015). Granting Petitioner's requested relief could have the unintended consequence of encouraging similar actions by other detainees to effectuate court-ordered release.

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Second, related to the self-inflicted nature of Petitioner's underlying condition, Petitioner's current medical condition cannot serve as a valid basis for medical repatriation because he has refused treatment. Although in his motion he now complains of multiple symptoms—extreme exhaustion, decreased vision, swollen feet, stiff joints, migraine-like headaches, nervousness, agitation, muscle and nerve shivering, needle-like pain in his heart, a racing heartbeat, loss of sensation in his hands and feet, dizziness, back pain, and decreased ability to focus mentally, Mot. at 7—he has brought few of these symptoms to the attention of Guantanamo medical personnel, and he has not permitted them to treat any of them. SMO Decl. ¶ 23. Most fundamentally, he has refused nearly all treatment for what he now claims is the underlying cause of these ailments, his hunger strike. Since his hunger strike began in 2007, Petitioner has been counseled repeatedly concerning the possible medical consequences of his actions, advice he has ignored. Id. ¶ 12. He has been regularly asked to submit to medical examinations and tests necessary to ascertain and treat his physical condition, requests he has almost uniformly been rejected. Id. ¶¶ 16-19, 22-23. And has been repeatedly offered medical appointments to assess his condition, offers he has routinely rebuffed. Id.

Under the relevant provision of Army Regulation 190-8, as well as the provisions of the Third Geneva Convention it implements, Petitioner would not be currently eligible for medical repatriation because he has declined fully to cooperate in the diagnosis and treatment of his ailments. Before any determination regarding medical repatriation could be properly considered, Petitioner would be required to cooperate in his medical treatment. Furthermore, to overlook that requirement in these circumstances would encourage other Guantanamo detainees to refuse

needed medical care or hunger-strike or otherwise attempt self-harm, and thus could significantly affect the ability of the military to operate the detention facility at Guantanamo appropriately.

III. Determinations about the Medical Repatriation of a Detainee Prior to the Cessation of Active Hostilities Are Not within the Province of the Judiciary.

Insofar as Petitioner additionally asserts that the Executive's detention authority under the AUMF is informed by principles of the law of war and, thus, the humanitarian principles underlying Article 110 of the Third Geneva Convention support his claim for release, see Mot. at 14-15, the Court should reject Petitioner's claim. Article 110 of the Third Geneva Convention reflects important humanitarian principles of international law, and the Executive Branch respects those principles and takes them into account when determining whether it should continue to detain individuals in the circumstances of this non-international armed conflict. Assessments about the circumstances warranting the repatriation of detainees for medical reasons, however, are not within the province of the Judiciary. Rather, as contemplated by the Third Geneva Convention itself, it is for the Executive to determine how the principles underlying Article 110 may apply to the medical situation of a particular detainee. Indeed, (1) the Conventions' framework, (2) historical practice, and (3) analogies from domestic detention law in general all establish that the Court must defer to the Executive concerning medical repatriations. Indeed, no United States court has ever ordered the release of an otherwise lawfully detained person during an armed conflict on such grounds.

1. The framework for medical repatriations established by the Conventions requires implementation by the Executive involving matters that would be inappropriate for Judicial

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intervention. As explained above, generally, in an international armed conflict to which nearly[18] all of the terms of the Third Geneva Convention apply, Articles 109 through 117 of the Convention address the direct repatriation and accommodation in neutral countries of certain seriously sick and seriously wounded prisoners of war. The Convention obligates each State Party to an international armed conflict to repatriate those seriously sick or seriously wounded prisoners of war whose medical conditions have been determined to meet the relevant standards. See GC III, Art. 109, 110; cf. Annex I. Articles 109 through 114 provide the framework to make those repatriation decisions. In particular, Article 110 expressly contemplates that parties to the conflict have flexibility to interpret the standards for repatriation set by that Article by concluding special agreements "to determine the cases of disablement or sickness that would entail direct repatriation or accommodation in a neutral country." GC III, Art. 110. In the absence of such an agreement, such determinations are to be made "in accordance with the principles laid down in the Model Agreement," which is Annex I to the Third Geneva Convention. Id. The Convention then requires medical professionals to decide whether sick or wounded prisoners of war suffer from the type of condition or ailment determined by the parties to the conflict (or by reference to the Model Agreement) to meet the standards for repatriation set forth in Article 110.

Thus, even in international armed conflicts, interpretation and application of those standards involve matters in which the Executive is uniquely competent and for which the

[18] For example, Article 3 generally applies to conflicts in which the remaining articles do not.

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Executive should be accorded great deference.[19] Cf. Ludecke v.Watkins, 335 U.S. 160, 173 (1948) (noting that, as "the Commander-in-Chief [and] the guiding organ in the conduct of our foreign affairs," the President has been "entrusted by Congress, almost throughout the whole life of the nation, with the disposition of alien enemies during a state of war"). Accordingly, how the Article 110 standard may operate in a given conflict and, especially, how it may apply to an individual detainee is not an appropriate matter for judicial review.

This judicial deference is even more compelling here in the circumstances of this non-international armed conflict. As the Executive made clear in its March 13, 2009, detention authority brief, Resps.' Mem. re Govt.'s Detention Auth. re Detainees Held at Guantanamo Bay (ECF 117), in the current non-international armed conflict, principles of law-of-war rules governing international armed conflicts are applied by analogy to inform the scope of the Executive's detention authority conferred by the AUMF. As in the case of international armed conflicts, however, determinations as to standards for medical repatriation and determinations as to how those standards are applied to individual detainees are not within the province of the Judiciary. Indeed, as noted above, even in an international armed conflict where Article 110 is a binding obligation upon State Parties to the conflict, the Convention contemplates that the parties be accorded flexibility to determine the specific ailments and conditions that meet the Article 110 standard for repatriation in the context of that specific conflict. That determination is more

[19] 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); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-185 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

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akin to the type of "policy determination of a kind clearly for nonjudicial discretion . . . for which the Judiciary has neither aptitude, facilities nor responsibility. . . ." El-Shifa Pharma. Indus. Co. v. United States, 607 F.3d 836, 845 (D.C. Cir. 2010) (internal citations omitted). Consequently it is even more imperative in this non-international armed conflict that the Executive be accorded deference regarding the standards for medical repatriation, which were established more than sixty years ago in the context of international armed conflict, and in determinations as to whether a given individual would meet these standards as applied in this unique context.

2. Historical practice confirms that, in those armed conflicts to which most provisions of the Geneva Conventions do not apply fully as a matter of treaty law, the repatriation of seriously wounded or sick detainees involves sensitive state-to-state issues. Cf. Ludecke, 335 U.S. at 173. For example, during the Korean War, a conflict to which the Geneva Conventions did not apply as a matter of law,[20] the exchange among the belligerents of sick and wounded prisoners of war—Operation Little Switch—occurred as a result of extensive initiatives and Executive negotiations. See Fact Sheet, Operations Big and Little Switch, available at www.nj.gov/military/korea/factsheets/opswitch.html (last visited August 14, 2015).

As this historical practice demonstrates, in the context of detainee transfers, "the political branches are well situated to consider sensitive foreign policy issues," and "[t]he Judiciary is not

[20] Shortly after the outbreak of hostilities, both sides to the conflict announced that they would abide by the principles of the Geneva Conventions. See CRS Report, Prisoners of War: Repatriation or Internment in Wartime (1971), at 17.

suited to second-guess . . . determinations" related to transfer.[21] Munaf v. Green, 553 U.S. 674, 702 (2008); accord Kiyemba v. Obama, 561 F.3d 509, 520 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("[I]t comes as no surprise that war-related transfers [of wartime alien detainees] traditionally have occurred without judicial oversight.").

3. Finally, in other detention contexts, the Judiciary uniformly defers to the Executive on decisions of humanitarian release. For example, in the immigration context, through a means now codified by statute, the Department of Homeland Security may grant parole to an alien applying for admission to the United States "on a case-by-case basis for urgent humanitarian reasons." 8 U.S.C. § 1182(d)(5)(A);[22] Rodriguez v. Robbins, 715 F.3d 1127, 1144

[21] Further, because the relief requested involves the transfer of a Guantanamo detainee to a foreign country, the politically sensitive nature of that issue further supports a conclusion that the type of assessments related to how repatriation and resettlement of detainees proceeds prior to the cessation of hostilities that are raised in Petitioner's request for relief are not appropriate for the Court. Since 2011, Congress has included provisions in its annual National Defense Authorization Acts ("NDAA") addressing the use of appropriated funds for the transfer of any Guantanamo detainee and requiring various security-related certifications or determinations. See Pub. L. No. 111-383, 124 Stat. 4137; 112 Pub. L. No. 81, 125 Stat. 1298; Pub. L. No. 112-239; Pub. L. No. 113-66. The President has issued signing statements objecting to or expressing reservations about these requirements. See Statement by the President on H.R. 6523, available at: http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523; Statement by the President on H.R. 1540, available at: http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540; Statement of the President on H.R. 4310, available at: http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310 (Jan. 3, 2013); Statement of the President on H.R. 3304, available at http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304 (Dec. 26, 2013).

[22] "To ameliorate a harsh or unjust outcome, the [Immigration and Naturalization Service] may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, … is now designated as deferred action. … Approval of deferred action status means that, for [] humanitarian reasons [], no action will thereafter be taken to proceed against an apparently deportable alien[.]" Reno v. American-Arab Anti-Discrimination Comm.,

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(9th Cir. 2013) ("The parole process is purely discretionary and its results are unreviewable by [the Immigration Judge]. … [R]elease decisions are based on humanitarian considerations and the public interest[.]"); Botezatu v. INS, 195 F.3d 311, 314 (7th Cir. 1999) (holding that the district court lacked jurisdiction to consider a challenge to the Executive's decision not to grant humanitarian parole); cf. Jay v. Boyd, 351 U.S. 345, 354 (1956) ("The statute [then 8 U.S.C. § 1254(a)(5), concerning the discretionary suspension of deportation] says that, as to qualified deportable aliens, the Attorney General 'may, in his discretion' suspend deportation … [which] is in all cases a matter of grace.") (internal citations omitted).

Similarly, in the domestic criminal context, the Judiciary defers to the Executive on humanitarian determinations for decisions of clemency and parole. See Cavazos v. Smith, 132 S. Ct. 2, *7 (2011) ("[C]lemency [is] a prerogative granted to executive authorities to help ensure that justice is tempered by mercy. …. It is not for the Judicial Branch to determine the standards for this discretion. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention.").[23] In both of these contexts, the

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525 U.S. 471, 484 (1999) (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998)).

[23] In extradition proceedings, which admittedly involve a determination of conditions in the receiving country, the Judiciary also defers to the assessments of the Executive with regard to humanitarian considerations. See Martin v. Warden, 993 F.2d 824, 830 n.10 (11th Cir. 1993) ("[J]udicial intervention in extradition proceedings based on humanitarian considerations is inappropriate. Rather, humanitarian considerations are matters properly reviewed by the Department of State.") (citation omitted); accord Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) ("The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. . . . It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.").

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individual seeking release on humanitarian grounds invoked statutory or constitutional claims more firmly established than Petitioner's claim to provisions of the Geneva Conventions, and yet the courts deferred to the decisions of the Executive.

In summary, the provisions of the Geneva Conventions at issue here reflect international humanitarian principles that the United States strongly supports. See, e.g., U.N. General Assembly Res. 2676 (XXV) (Dec. 9, 1970) (urging, in a Resolution co-sponsored by the United States, compliance with article 109 of the Third Geneva Convention, "which requires the repatriation of seriously wounded and seriously sick prisoners of war"). The application of these underlying humanitarian principles in this unique, non-international armed conflict, on the other hand, is properly committed to the Executive. Here, the Executive considers carefully the medical conditions and health of individual detainees on a case-by-case basis as they arise. In any event, the manner by which the Executive interprets its international obligations is due judicial deference.[24] Cf. Pub. L. 109-366 § 6(a)(3)(A), 120 Stat. 2632 (2006), 18 U.S.C. § 2441 note ("[T]he President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.").

[24] To the extent that an analogy to traditional armed conflicts is inapt here, the Court should accord substantial deference to the political branches in construing how the laws of war apply to this asymmetrical and nontraditional conflict. See Resps.' Mem. re Detention Authority (ECF No. 117) at 6 n.2 (noting that "courts should defer to the President's judgment that the AUMF, construed in light of the law-of-war principles that inform its interpretation, entitle him to treat members of irregular forces as state military forces are treated for purposes of detention") (citations omitted); see also AUMF § 2(a) (authorizing the President to use "all necessary and appropriate force" against those that "he determines" planned, authorized, committed, or aided the September 11 terrorist attacks or harbored those organizations).

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Petitioner in essence asks the Court to substitute its judgment for the judgment of the Executive about the criteria used to assess medical repatriation and about which particular detainees satisfy the criteria for medical repatriation on humanitarian grounds. These types of decisions, however, traditionally have been, and should remain, the province of the non-Judicial branches of the government. For these reasons, the Court should deny Petitioner's motion.

CONCLUSION

For all of the reasons set forth above, the Court should deny Petitioner's Motion to Reinstate His Habeas Petition and for Judgement on the Record.

Date: August 14, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 14, 2015, I served the foregoing Opposition to Petitioner's Motion to Reinstate His Habeas Petition and for Judgement on the Record by email to the following counsel of record:

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