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

MOHAMMED AL-QAHTANI,

Petitioner-Appellee,

v.

DONALD J. TRUMP, et al.,

Respondents-Appellants.

Case No. 20-5130

**PETITIONER'S OPPOSITION TO
MOTION FOR STAY PENDING APPEAL AND EXPEDITION**

Petitioner-Appellee Mohammed al-Qahtani has spent the last eighteen years in custody at the U.S. Naval Station in Guantánamo Bay, Cuba. By the time he arrived, he had a long history of severe mental health problems, including a diagnosis of psychosis during an involuntary psychiatric hospitalization in Saudi Arabia less than two years before he was first brought to Guantánamo. While at Guantánamo he was systematically tortured—a fact that the U.S. government has admitted—with the complicity of mental health experts.

In August 2017, Mr. al-Qahtani moved this Court to compel Respondents-Appellants to facilitate his examination by a Mixed Medical Commission, which would establish his entitlement to direct medical repatriation pursuant to a provision of domestic law, Army Regulation 190-8. More than two years later, Judge Rosemary S. Collyer granted his motion pursuant to the All Writs Act. *Al-Qahtani v.*

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Trump, 443 F. Supp. 3d 116 (D.D.C. 2020). The government appealed; Mr. al-Qahtani moved to dismiss the appeal on final judgment rule grounds, and that motion is currently pending before this Court. At the same time, the government unsuccessfully sought a stay from the new district court judge assigned to the case after Judge Collyer's retirement, Senior Judge Ellen S. Huvelle. *See* Opinion & Order, *Al-Qahtani v. Trump*, Case No. 05-cv-1971 (D.D.C. Aug. 12, 2020) (Dkt. 397) (hereinafter "Denial of Stay") (attached as App. A). The government now seeks a stay pending appeal, as well as an expedited merits briefing schedule.

The government's motion should be denied. It has not shown that it would be irreparably harmed without a stay, nor is it likely to succeed on the merits of its appeal. Moreover, delay here carries a more serious consequence: the well-documented and precipitous decline in Mr. al-Qahtani's mental health over the last four years will likely render it more difficult for the psychiatric experts of the Mixed Medical Commission to successfully evaluate him should his condition worsen with the further passage of time.

BACKGROUND

The relevant factual background of this case is set forth in Mr. al-Qahtani's Motion to Dismiss, the Opposition to the government's motion for a stay in the district court, Judge Collyer's opinion, and Judge Huvelle's opinion denying a stay. *See* Motion to Dismiss Appeal, Doc. 1849026 (D.C. Cir. Jun. 25, 2020) ("Mot. to

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Dismiss Appeal”) at 3-7; [Public] Opposition to Motion for Stay, *Al-Qahtani v. Trump*, Case No. 05-cv-1971 (D.D.C. May 29, 2020) (Dkt. 398-2) (“Opp. to Stay”) at 6-15; 443 F. Supp. 3d at 119-21; Denial of Stay at 4-5.

Mr. al-Qahtani has been imprisoned at Guantánamo since February 2002. Within months of his arrival, he was subjected to a systematic and brutal program of physical, sexual, and psychological torture. Officials in Washington, up to and including then-Secretary of Defense Donald Rumsfeld, helped design and approve the plan, with the active participation of psychiatrists. He is the only prisoner at Guantánamo whose torture has been formally admitted by a senior U.S. government official.¹ He was hospitalized twice during his torture at Guantánamo because he was on the brink of heart failure and death.

As early as his first year at Guantánamo, in 2002, and even before the implementation of the worst of the torture plan on him by military interrogators and psychiatrists, the FBI observed behaviors consistent with psychosis, such as “talking to non-existent people, reporting hearing voices” and “crouching in a corner of the cell covered with a sheet for hours on end.”² Mr. al-Qahtani was already severely mentally ill long before he arrived at Guantánamo. Indeed, he was suffering from

¹ See Mot. to Dismiss Appeal at 3 n.1.

² See Letter re: Suspected Mistreatment of Detainees, from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, FBI, to Major General Donald R. Ryder, Criminal Investigation Command, Department of the Army (July 14, 2004).

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psychosis well before the time period when the government accuses him of having associated with specific individuals or traveling to Afghanistan.

Mr. al-Qahtani's history of psychiatric problems began when he was in a car accident at age eight: he was thrown from the car and suffered a traumatic brain injury, after which his academic performance suddenly collapsed. In late adolescence, the classic age for onset of schizophrenia, his family witnessed uncontrolled crying and an inability to deal with basic life functions. At one point the Riyadh police pulled him naked from a garbage dumpster he had thrown himself into. Later, in Mecca, in May 2000, he was arrested by police after throwing himself half-naked into traffic and was involuntarily confined to a psychiatric hospital where he was diagnosed with schizophrenia. *See* Report of Dr. Emily A. Keram (June 5, 2016), ECF No. 369-1, Ex. C (Keram Rep.) at 3-5.

The government does not contest these facts, which are documented in the report and five declarations of Dr. Emily Keram, the only psychiatrist independent of the U.S. government known to have examined Mr. al-Qahtani since his imprisonment, and in records of his hospitalization in Mecca from May 2000.³ After Judge Collyer found that Mr. al-Qahtani was "incompetent and unable to assist effectively in this case," Minute Order (Apr. 20, 2012), she appointed Dr. Keram pursuant to

³ The underlying documents are cited by ECF number in Al-Qahtani's Mot. to Dismiss Appeal at 3 n.2.

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the Criminal Justice Act to conduct a psychiatric evaluation of Mr. al-Qahtani. After evaluation visits spanning three years, Dr. Keram confirmed his longstanding diagnoses of schizophrenia and major depression. Once Dr. Keram's report became public in 2016, Respondents finally acknowledged that Mr. al-Qahtani's symptoms, as observed by the Guantánamo guard force and Joint Medical Group mental health professionals, are consistent with schizophrenia and began efforts to dispense anti-psychotic medications to him, including Aripiprazole, Quetiapine, and Haldol. *See* Sr. Med. Officer Decl. (Aug. 21, 2017), ECF No. 372-2, ¶ 17.

Schizophrenia is a chronic disorder. It is permanent; it may be eventually manageable, but it is not curable. As Dr. Keram put it, “[the g]oals of appropriate treatment are symptom management, not cure.” Keram Fourth Suppl. Decl., ECF No. 377, ¶ 17. It therefore fits squarely within the set of disorders that would mandate repatriation under Army Reg. 190-8 and the laws of war. (Indeed, Annex I to the Third Geneva Convention notes “all obvious psychoses” are “unquestionable cases giving the right to direct repatriation.” Annex I, §§ I.A.3.G, II.2.)

In addition to his pre-existing illnesses, Dr. Keram concluded that Mr. al-Qahtani developed posttraumatic stress disorder (PTSD) from his systematic torture, which was so “inhumane” that, “[e]ven in the absence of pre-existing psychiatric illness,” it unsurprisingly has had “profoundly disruptive and long-lasting effects on [his] sense of identity, selfhood, dignity, perception of reality, mood, cognitive

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functioning, and physiology.” Keram Rep. at 6-7; Mot. to Dismiss Appeal at 4-5. Moreover, this systematic torture left him unable to trust U.S. military doctors: his torture program was planned by psychologists, and one of the psychologists who helped design it has been publicly reported as having been in the room during Mr. al-Qahtani’s interrogations under torture.⁴ Unsurprisingly, Mr. al-Qahtani’s mental condition has been in precipitous decline over the last four years, impeding his continued ability to communicate with counsel, as documented in great detail before the district court. *See* Kassem Decl. (Sept. 4, 2019) (attached as App. C), (public version at Dkt. 398-2, Ex. 1); Mot. to Dismiss Appeal at 6.

* * *

Judge Collyer granted Mr. al-Qahtani’s motion to compel examination by a Mixed Medical Commission on March 6, 2020. *Al-Qahtani v. Trump*, 443 F. Supp. 3d 116 (D.D.C. 2020). After Judge Collyer’s recent retirement from the bench, the case was reassigned to Judge Huvelle. The government initially sought a stay pending appeal from Judge Huvelle, who rejected the motion, as noted above. *See* Denial of Stay, App. A.

ARGUMENT

As the district court correctly noted, “[a] stay pending appeal is extraordinary relief that is only appropriate after consideration of the ... four factors, which also

⁴ *See* Opp. to Stay at 9 & 9 nn.5-6.

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govern preliminary injunctions”: whether the applicant has made a strong showing that it is likely to succeed on the merits, whether it will be irreparably injured absent a stay, whether the other party might be irreparably injured absent a stay, and the public interest. Denial of Stay at 2 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

I. The Government Has Failed to Show Irreparable Harm

The party moving for a stay is required to demonstrate that the injury claimed is “‘both certain and great,’ and ‘actual and not theoretical.’” *Comm. on the Judiciary v. McGahn*, 407 F. Supp. 3d 35, 39 (D.D.C. 2019) (quoting *Citizens for Responsibility & Ethics in Washington (“CREW”) v. Fed. Election Comm’n*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (per curiam)) (internal alterations and quotations omitted). Indeed, “[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.” *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in original). “The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough.” *Id.* (emphasis in original).

The government claims it will be “irreparably injured by the district court’s order in at least three respects.” Mot. for Stay at 17. First, the government claims that “the order risks jeopardizing the health, safety, and security of other

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Guant[á]namo detainees” because a declaration from JTF Commander Kuehhas claims that “the order increases the likelihood that [some other] detainee will attempt to endanger his own health to benefit from” the MMC process. *Id.* The district court properly found these predictions of “speculative domino effects” inadequate, noting that only 40 individuals remain detained at Guantánamo, “and they will only be eligible for Mixed Medical Commission review if they are actually ill and they complete the prerequisite procedural steps to request review, including”—since the government will never provide review voluntarily—“obtaining a court order.” Denial of Stay at 5. While the government seems to complain that the predictions in the Kuehhas Declaration should be treated as beyond travail, it is worth noting that the declaration was executed on April 30, 2020, and by all appearances none of its predictions have come true in the more than five months that have passed since the district court’s order. In any event, those predictions fall wildly short of describing injuries “both certain and great,” “actual and not theoretical,” *CREW*, 904 F.3d at 1019

The government next claims that “the order risks interfering with attempts to bring high-value Guant[á]namo detainees to justice by prosecuting them in military tribunals,” particularly citing a letter filed by counsel for one defendant currently charged as part of the 9/11 conspiracy. Mot. for Stay at 18. The implication that a detainee currently facing active criminal charges could utilize the Mixed Medical

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Commission process to force release through habeas proceedings is utterly disingenuous. The government has previously invoked the *Councilman* abstention doctrine to halt habeas proceedings so that ongoing military commissions could proceed first. *See Schlesinger v. Councilman*, 420 U.S. 738, 756-58 (1975); *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016) (affirming decision granting Respondents’ motion to hold habeas petition in abeyance while military commission trial was pending). It therefore seems unlikely that a similar order would issue in a habeas case on behalf of a commission defendant so as to impede prosecution in any tangible way, much less that the order in this case—for a detainee who the convening authority for the military commissions long ago “determined ... can never be tried by a military commission,” Denial of Stay at 4—might actually generate any of the “delay and confusion” the government seems to concede are its worst-case scenario when a commission defendant attempts to invoke the MMC process.

Finally, the government claims the order will force it to “enter uncharted territory” by convening a Mixed Medical Commission in an unconventional conflict. Mot. for Stay at 19. As the government seems to concede, existing military regulations already provide a framework of procedures and standards for Mixed Medical Commissions. *See* Dep’t of the Army, Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, ch.3, § 12 (Oct. 1, 1997). That scheme flexibly accounts for a variety of situations, including Mr. al-

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Qahtani's. The applicable rules contemplate the ICRC acting as a Protecting Power and participating in the process of convening a Medical Commission (as distinct from a Mixed Medical Commission). *See id.* § 1-5(e) (“A neutral state or an international humanitarian organization, such as the ICRC, may be designated ... as a Protecting Power (PP).”); *id.* § 3-12(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 a Mixed Medical Commission.”). Even were this not the case, it is difficult to see how the need to develop rules to comply with domestic law could meet the high threshold of harm required to constitute irreparable injury. The process costs of moving forward with a Mixed Medical Commission appear no more significant than other typical litigation process costs that, while they obviously carry some burden, are typically held to fall short of irreparable injury in this context—for example, the burden of complying with discovery orders.

None of these claims comes close to meeting the high threshold of certain, concrete harm required to demonstrate irreparable injury. As Mr. al-Qahtani argued in support of his motion to dismiss, all of these issues can be effectively appealed after a final judgment. An *immediate* stay is particularly inappropriate given that the government submitted a declaration from the Director of the Department of Defense's Office of Detainee Policy which claims that the current pandemic prohibits

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any actual in-person examination by a Mixed Medical Commission from taking place for the “foreseeable future.” Decl. of Steven W. Dalbey (May 4, 2020) (Dkt. 398-1, Ex. 2), at ¶ 7. That at minimum limits the government’s burden to preparatory activities that, again, are not so onerous that they rise to the level of irreparable harm.

II. The Countervailing Harm to Mr. Al-Qahtani Resulting from a Stay May Be Severe

In contrast, the potential harm to Mr. al-Qahtani is severe. Further delay here means that he faces the possibility of more time in detention—which is itself irreparable injury in the context of habeas litigation. More significantly, in his current state he is staring into a psychological abyss that threatens his very ability to participate in the Mixed Medical Commission’s evaluation.

For many years, Mr. al-Qahtani could not bring himself to meet with mental health practitioners because clinicians participated in his systematic torture. His resistance to meeting mental health practitioners extended to various experts his habeas counsel attempted to have him meet with over the years; it was only with great difficulty that he agreed to meet with Dr. Keram. *See, e.g.*, Keram Supp. Decl. (July 12, 2016), ECF No. 369-1, Ex. D, ¶ 7.

Since Dr. Keram’s initial evaluations and first report, Mr. al-Qahtani’s mental health has followed a downward spiral, with his worsening symptoms of psychosis leading to further social isolation inside the prison, which in turn increases his inability to distinguish reality from hallucination. During meetings with counsel he

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makes eye contact with and addresses, under his breath, nonexistent persons. *See* Kassem Decl. (Sept. 4, 2019) (App. C), ¶¶ 11, 13-16, 35-38, 54-55. Mr. al-Qahtani’s cognitive capacity seems to be diminishing rapidly, resulting in him missing meetings with counsel and losing track of important pending events. Even more alarmingly, the record before the district court reflects multiple instances of suicidal behavior on Mr. al-Qahtani’s part. *See, e.g., id.* ¶¶ 12, 42.

Given Mr. al-Qahtani’s past difficulties interacting with mental health professionals and the impact of his worsening condition, any delay in implementing the district court’s order to convene a Mixed Medical Commission makes it more likely that the psychiatric evaluations required of the Commission will be more difficult—or outright impossible—to carry out. The government requests a stay pending appeal which may well span more than a year, even if this Court expedited its review. Under present circumstances, Mr. al-Qahtani cannot be made to bear the costs of that additional delay. *Cf. Boumediene*, 553 U.S. at 794-95 (“[T]he costs of delay can no longer be borne by those who are held in custody.”).

The government claims the district court should have accepted “countervailing evidence from [Mr. al-Qahtani’s] treating physicians,” Mot. for Stay at 22, essentially contending that his “condition is currently well managed with minimal residual symptoms.” Mot. for Stay at 20 (quoting three-year-old declaration of Joint Medical Group’s Senior Medical Officer, at ¶ 21). Petitioner’s counsel and Dr.

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Keram vigorously dispute whether that is the case. *See* Supp. Decl. of Dr. Emily Keram (Aug. 12, 2020) (Dkt. 396-2) (attached as App. B). What is not at issue is that Petitioner has shown symptoms of schizophrenia that “were evident to U.S. government officials [since] he was first detained at Guantanamo Bay.” Denial of Stay at 4. Indeed, he has been prescribed various medications for schizophrenia by Joint Medical Group physicians. The fact that both parties agree on the underlying nature of his condition renders the outcome of the Mixed Medical Commission a foregone conclusion—so long as the evaluation actually takes place. Delay creates a serious risk that it will never happen.

III. Respondents Have Not Demonstrated an Actual Likelihood of Success

As the district court noted, “i[t] is particularly important for [the movant] to demonstrate a substantial likelihood of success on the merits.” Denial of Stay at 2. The Supreme Court has suggested that it is a “free-standing requirement” even for a movant who has made a strong showing of irreparable injury. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (interpreting *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). “Moreover, the movant must demonstrate an actual ‘likelihood’ of success, not merely the existence of ‘questions so serious, substantial, difficult and doubtful, as to make them fair ground for litigation.” Denial of Stay at 2 (quoting *Munaf v. Geren*, 553 U.S. 674, 690 (2008))

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Mr. al-Qahtani has moved to dismiss the government's appeal on the ground that the district court's ruling does not fall within the narrow class of interlocutory orders over which appellate jurisdiction may be claimed as of right.⁵ The absence of appellate jurisdiction itself provides ample ground for denying a stay.

Beyond the threshold question whether the Court's Order is immediately reviewable, this Court's decision in *Al Warafi v. Obama* ("*Al Warafi II*"), 716 F.3d 627 (D.C. Cir. 2013), held plainly that "Army Regulation 190-8 is domestic U.S. law, and in a habeas proceeding such as this, a detainee may invoke Army Regulation 190-8." 716 F.3d at 629. The district court correctly recognized Mr. al-Qahtani's status as an "other detainee" who is protected by Army Regulation 190-8. The variety of arguments the government offers in quick succession to demonstrate that Mr. al-Qahtani's status takes him outside of the protection of Army Reg. 190-8 all fail.

A. Mr.al-Qahtani Is an "Other Detainee"

The government claims that the "other detainee" provision only applies to conflicts "in which prisoner-of-war protections apply"; even if this were such a conflict, the government argues, Mr. al-Qahtani's "'legal status' has already been 'ascertained'" when the executive determined him to be an "enemy combatant." Mot. for Stay at 13. To begin with, Mr. al-Qahtani's designation as an "enemy combatant"

⁵ If the motion to dismiss the appeal is granted, the government could only appeal if it sought leave out of time from both the district court and this Court for a permissive interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

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by a Combatant Status Review Tribunal (CSRT) is not dispositive.⁶ But the government's logic is ultimately not that *the CSRT* determined that Mr. al-Qahtani was ineligible for any protections of the Geneva Conventions. Rather, it reasons that in February 2002 President George W. Bush determined that al-Qaida personnel do not qualify for prisoner of war status under the Third Convention. Because a CSRT subsequently found Mr. al-Qahtani to be affiliated with al-Qaida—a determination that he disputes—he is therefore (on the government's logic) not protected by Army Regulation 190-8. The government argues that the key legal determination was actually made upstream of the CSRT, in blanket fashion, by the President himself, when he decided that both al-Qaida and Taliban-affiliated individuals are “unprivileged enemy combatants” who do not qualify for the protections afforded by the Geneva Conventions. Mot. for Stay at 13-14.

⁶ In *Al Warafi II*, “by implication, [this Court] found that mere designation as an ‘enemy combatant’ did not render Army Regulation 190-8 inapplicable. ... If ‘an ‘enemy combatant’ designation removes Guantanamo detainees from the coverage of Army Regulation 190-8, there would have been no need for the *Al Warafi II* court to conduct ... an analysis” of whether Warafi qualified as medical personnel under AR 190-8. *Al-Qahtani*, 443 F.Supp.3d at 130 (quoting *Aamer v. Obama*, 58 F.Supp.3d 16 (D.D.C. 2014)). The term “enemy combatant” is not defined or listed in Army Regulation 190-8 and is not defined by the government in this case. *See id.* at 130 n.8 (“The Supreme Court has previously noted the government’s reluctance to officially define ‘enemy combatant.’”); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (“[T]he Government has never provided any court with the full criteria that it uses in classifying individuals as” enemy combatants).

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The government claims that the President is a competent authority to make this determination, citing this Court's overturned *Hamdan* decision and a Fourth Circuit opinion. Mot. for Stay at 14. In reversing this Court's *Hamdan* decision, the Supreme Court merely noted—without endorsing—a presidential statement regarding the Taliban. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629 n.60 (2006) (“The President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply.”). In fact, far from endorsing the government's position, *Hamdan* rejected the President's February 2002 reasoning that no part of the Geneva Conventions applies. *See id.* at 630 (“The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being ‘international in scope,’ does not qualify as a ‘conflict not of an international character.’ That reasoning is erroneous.”) (internal citations omitted). In relying on the President's 2002 determination, the government attempts again to shift the goalposts to focus on some alleged distinction between al-Qaida and Taliban membership, rather than keeping this Court's focus on what applicable law asks: whether a “competent tribunal” has made a valid status determination regarding Mr. al-Qahtani. *See* 443 F. Supp. 3d at 130.

B. Nothing in AR 190-8 Indicates that the “Other Detainee” Designation Is Limited to International Armed Conflicts

The government also argues that the text of AR 190-8's definition of “other detainee” applies *only* to international armed conflicts, and, in the context of a non-

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international armed conflict, “does not require a competent authority to classify a particular detainee[’s]” status. Mot. for Stay at 14. Remarkably, this very broad assertion is unaccompanied by any specific citation to authority. *Id.* at 14-15. (The absence of authority is especially notable given that this particular conflict is now nearly two decades old, and has been the subject of extensive litigation.) Nothing in the regulation itself suggests a limitation to international armed conflicts. *See* 443 F. Supp. 3d at 129 n.7. The one provision cited earlier in the government’s brief – the Defense Department’s Law of War Manual, section 4.27.2 – says nothing regarding individuals detained in *non*-international armed conflicts.

The government claims that “the conflict with al-Qaida is a non-international armed conflict” to which it is only bound to apply the baseline humane treatment guarantees of Common Article 3 of the Conventions. Mot. for Stay at 11-12. But Mr. al-Qahtani was taken captive during an international armed conflict and retains the protections afforded by the domestic law provisions of Army Regulation 190-8. Mr. al-Qahtani was allegedly taken into U.S. custody in December 2001 and rendered to Guantánamo on February 13, 2002. *See* Reprieve, *The Journey of Death—Over 700 Prisoners Illegally Rendered to Guantanamo Bay with the Help of Portugal* 16 (Jan. 28, 2008), at 16 (noting that Mr. al-Qahtani was rendered on that date by flight to

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Guantánamo from Incirlik, Turkey, and via Portuguese territory).⁷ The government has conceded that the United States still characterized the conflict at that point in time as an international armed conflict. Resp'ts' Opp'n to Pet'r's Mot. to Compel Examination by a Mixed Medical Commission at 29 n.19, ECF No. 372-1; *see also* International Committee of the Red Cross, *News Release: Geneva Convention on Prisoners of War* (Feb. 9, 2002) (welcoming “the United States’ reaffirmation of the applicability of the Third Geneva Convention to the international armed conflict in Afghanistan”).⁸

Irrespective of whether the conflict in Afghanistan remained international in nature after June 2002, Mr. al-Qahtani would retain today the protections he enjoyed pursuant to domestic and international humanitarian law at the time of his capture during an international armed conflict. *See* Third Geneva Convention, Art. 5 (stating that prisoners of war retain that status “until their final release and repatriation”). In Iraq, for example, prisoners in U.S. custody prior to the transfer of sovereignty on June 28, 2004, retained any status and protections that they enjoyed under the Geneva Conventions even after that date and the transformation of that conflict.

⁷ Available at http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimony-of-other-physicians/journey_of_death.pdf.

⁸ Available at <https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/57jrm3.htm>.

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Even accepting for the sake of argument Respondents' characterization of the context of Mr. al-Qahtani's imprisonment as a non-international armed conflict, Mr. al-Qahtani would still not be without legal protection or recourse to release on grounds of illness. Instead he would remain under the protection of Common Article 3 to the Geneva Conventions (as the government concedes in light of *Hamdan*, see Mot. for Stay at 12), and other customary provisions of international humanitarian law, as well as international human rights law. Common Article 3 encompasses the obligation to repatriate ill prisoners like Mr. al-Qahtani.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has held that "Common Article 3 of the Geneva Conventions reflects the same spirit of the duty to protect members of armed forces who have laid down their arms and are detained as the specific protections afforded to prisoners of war in Geneva Convention III as a whole." *Prosecutor v. Mile Mrkšić* (Vukovar Hospital Case), IT-95-13/1-A, Judgment (May 5, 2009), para. 70. A leading scholar concurs, noting that, while "[t]he standards set forth in Common Article 3 and in Protocol I article 75 do not address the issue of repatriating detainees who are sick or severely injured," the requirement for humane treatment in both provisions compel him to view "the standards set forth in Geneva Convention III article 110 as establishing general benchmarks for humane treatment," and to conclude that if "any of the detainees at present or in the future reach such stages of mental or physical fitness, the

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obligation of humane treatment imposed on the United States requires termination of their captivity.” Sean D. Murphy, *Evolving Geneva Convention Paradigms in the War on Terrorism: Applying the Core Rules to the Release of Persons Deemed Unprivileged Combatants*, 75 Geo. Wash. L. Review 1105, 1162–63 (2007).

In any event, to the extent the status of the conflict is unresolved, that uncertainty undercuts the government’s claim that it can show an actual likelihood of success and thus merits a stay pending appeal.

C. *Al Warafi* Cannot Be Distinguished Based on the Status of the Taliban

Finally, the government argues that the protections of the Geneva Conventions do not reach Mr. al-Qahtani because al-Qaida is a non-state actor that does not reciprocate the protections of the conventions. Mot. for Stay at 15, 12. In contrast, the government argues, *Al Warafi II* is distinguishable on its facts because it involved “a member of the Taliban” and the government took no position during the litigation as to whether the Geneva Conventions applied to the Taliban. Mot. for Stay at 16 (citing government’s *Al Warafi* appellate brief). According to the government, this meant that the *Al Warafi II* panel “assumed arguendo that the relevant Geneva Conventions applied” to Warafi. *Id.* But neither assertion is true.

The government’s position has always been that neither Taliban nor al-Qaida affiliated detainees enjoy protection as prisoners of war under the Geneva Conventions. White House Mem., Humane Treatment of Taliban and al Qaeda Detainees 2

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(Feb. 7, 2002).⁹ That did not prevent the court of appeals in *Al Warafi II* from applying domestic law implementing the Conventions to an alleged “enemy combatant” detainee whom the government notably described as “an al-Qaida operative” who traveled to Afghanistan to “fight with the Taliban.” Narrative for Pet’r Makhtar Yahia Naji al Warafi (ISN 117) at 1, *Al Warafi v. Obama*, Case No. 04-CV-1254, 2015 WL 4600420 (D.D.C. July 30, 2015). Indeed, *Al Warafi II* speaks of the Taliban in terms that are all but identical to those the government uses to describe al-Qaida here. *See Al Warafi II*, 716 F.3d at 632 (“Without compliance with the requirements of the Geneva Conventions, the Taliban’s personnel are not entitled to the protection of the Convention.”). And nowhere in *Al Warafi II* does the Court claim it is assuming the status of the Taliban arguendo.

IV. The Public Interest Weighs in Mr. al-Qahtani’s Favor

The government also argues that the district court “entirely failed to address the public interest weighing in favor of a stay,” Mot. for Stay at 22, but advances no argument for why the public interest would be served by a stay. The district court properly addressed the public interest in its initial order. *See Al Qahtani*, 443 F. Supp. 3d at 133.

⁹ Available at <https://www.aclu.org/other/memo-president-bush-white-house-senior-executive-branch-officials-regarding-humane-treatment>.

~~FILED UNDER SEAL~~**CONCLUSION**

Judge Huvelle, in denying the motion for a stay below, found that the government had largely reprised the arguments that Judge Collyer rejected on the merits, and “that Respondents have not demonstrated a likelihood of success on appeal.” Denial of Stay at 3. Both judges also found that the balance of harms inclined strongly in Mr. al-Qahtani’s favor. This Court should come to the same conclusion as the two district judges who have already considered the issue, and accordingly deny the request for a stay pending appeal and the corresponding expedited schedule for merits briefing.¹⁰

Dated: August 31, 2020

Respectfully submitted,

/s/Ramzi Kassem

Ramzi Kassem
(D.C. Cir. Bar No. 51212)
Main Street Legal Services, Inc.
City University of New York School
of Law
2 Court Square
Long Island City, NY 11101
(t) (718) 340-4558
(f) (718) 340-4478
(e) ramzi.kassem@law.cuny.edu

¹⁰ Respondents’ proposal for an expedited merits briefing schedule, Mot. for Stay at 21, is premature while Mr. al-Qahtani’s motion to dismiss the appeal is pending. The parties should consult on an appropriate schedule for any future proceedings if and when that becomes necessary. (The Supreme Court has rescheduled oral argument in *Tanzin v. Tanvir*, No. 19-71, on October 6, 2020. Professor Kassem will argue for the respondents in that case, and Mr. Kadidal is co-counsel.)

~~FILED UNDER SEAL~~

Shayana Kadidal
(D.C. Cir. Bar No. 49512)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(t) (212) 614-6438
(f) (212) 614-6451
(e) kadidal@ccrjustice.org

*Counsel for Petitioner-Appellee*¹¹

¹¹ The offices of both Main Street Legal Services and the Center for Constitutional Rights are physically closed due to the COVID-19 Pandemic.

APPENDIX A

Opinion & Order,
Al-Qahtani v. Trump, Case No. 05-cv-1971 (D.D.C. Aug. 12, 2020) (Dkt. 397)
("Denial of Stay")

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
MOHAMMED AL-QAHTANI,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 05-1971 (ESH)
)	
DONALD J. TRUMP, et al.,)	
)	
Respondents.)	
_____)	

MEMORANDUM OPINION AND ORDER

On March 6, 2020, Judge Rosemary M. Collyer granted Petitioner Mohammed al-Qahtani’s motion for an examination by a Mixed Medical Commission pursuant to Army Regulation 190-8, Section 3-12, which deals with the repatriation of sick and wounded prisoners. Dept. of the Army, Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, ch.3, § 12 (Oct. 1, 1997). Respondents appealed that decision and moved for a stay of Judge Collyer’s Order pending appeal and clarification of the relief granted. *See* Resp’ts’ Mot. for Clarification and Stay Pending Appeal of the Court’s March 6, 2020 Order [Dkt. 389]. The motion is now ripe for review.¹ The case was reassigned to the undersigned after Judge Collyer’s retirement. For the following reasons, the Court will grant Respondents’ motion for clarification and deny the request to stay pending appeal.²

¹ Pet’r’s Opp’n to Resp’ts’ Mot. for Clarification and Stay Pending Appeal of the Ct.’s March 6, 2020 Order (Opp’n) [Dkt. 393]; Reply in Supp. of Resp’ts’ Mot. for Clarification and Stay Pending Appeal of the Ct.’s March 6, 2020 Order [Dkt. 395].

² For a detailed factual background of the case, *see* Judge Collyer’s Memorandum Opinion, al-Qahtani v. Trump, No. 05-cv-1971, 2020 WL 1079176, *1-2 (D.D.C. March 6, 2020).

I. LEGAL STANDARD

“A stay is not a matter of right, even if irreparable injury might otherwise result.” *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926). A stay pending appeal is extraordinary relief that is only appropriate after consideration of the following four factors, which also govern preliminary injunctions: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The movant “bears the burden of persuasion and must demonstrate, ‘by a clear showing,’ that the requested relief is warranted.” *McGinn, Smith & Co., Inc. v. Fin. Indus. Regulatory Auth.*, 786 F. Supp. 2d 139, 144 (D.D.C. 2011) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

While the four factors “have typically been evaluated on a sliding scale,” *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (internal quotation marks and citation omitted), “[i]t is particularly important for [the movant] to demonstrate a substantial likelihood of success on the merits.” *McGinn*, 786 F. Supp. 2d at 144 (quoting *Barton v. Dist. of Columbia*, 131 F. Supp. 2d 236, 242 (D.D.C. 2001)); see *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (“[W]e read *Winter* at least to suggest if not to hold ‘that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.’” (quoting *Davis*, 571 F.3d at 1296 (Kavanaugh, J., concurring))). Moreover, the movant must demonstrate an actual “likelihood” of success, not merely the existence of “questions so serious, substantial, difficult and doubtful, as to make them fair ground for litigation.” *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (internal quotation marks and citation omitted).

II. ANALYSIS

A. Clarification of Order

Respondents ask the Court to clarify that the Order granting Mr. al-Qahtani's motion for a Mixed Medical Commission did not grant the additional specific relief of designating Dr. Emily Keram, Mr. al-Qahtani's retained medical expert, to the Mixed Medical Commission. Mr. al-Qahtani agrees with Respondents' interpretation of the Court's Order and argues that no clarification is necessary because the Order clearly does not require that any specific individual be appointed to the Mixed Medical Commission. Because the parties agree on the interpretation of the Court's Order and clarification will ensure the proceedings continue with the same understanding, the Court will clarify that the Order granted Mr. al-Qahtani's request for review by a Mixed Medical Commission and denied the specific relief of requiring that Dr. Keram be appointed a member of the Mixed Medical Commission.

B. Stay Pending Appeal

Respondents' arguments in support of their likelihood of success on the merits on appeal reprise many of the arguments made to Judge Collyer in opposition to Mr. al-Qahtani's motion for a Mixed Medical Commission, including their argument that the Court misapplied the Circuit's rulings in *Al Warafi I* and *II*. See *Al Warafi v. Obama*, 716 F.3d 627 (D.C. Cir. 2013) (*Al Warafi II*); *Al Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011) (*Al Warafi I*). The Circuit held in *Al Warafi II* that Army Regulation 190-8, which creates the right to review by a Mixed Medical Commission, is domestic law which may be invoked by Guantanamo Bay detainees in habeas proceedings. 716 F.3d at 629. Judge Collyer rejected Respondents' arguments to the contrary and found in favor of Mr. al-Qahtani. This Court accepts Judge Collyer's reasoning and finds that Respondents have not demonstrated a likelihood of success on appeal.

The Court next considers the balance of harms. Mr. al-Qahtani's early life was plagued with health and mental health issues, including a head injury due to a car accident as a child which caused extreme behavioral dyscontrol and auditory hallucinations. He was diagnosed with schizophrenia, major depression, and a possible neurocognitive disorder due to the traumatic brain injury. Mr. al-Qahtani's mental health issues were evident to U.S. government officials when he was first detained at Guantanamo Bay and have been exacerbated by the torture he initially suffered at the hands of the U.S. government and the over 18 years he has spent in detention. Susan J. Crawford, the then-convening authority of the Department of Defense Military Commissions, determined in 2009 that Mr. al-Qahtani can never be tried by a military commission due to the torture he endured at the beginning of his detention. *See* Bob Woodward, *Detainee Tortured, Says U.S. Official*, *The Washington Post* (Jan. 14, 2009), <https://www.humanrightsfirst.org/2009/01/14/detainee-tortured-says-u-s-official> (last visited Aug. 10, 2020) (quoting Susan J. Crawford). According to Mr. al-Qahtani's CJA-appointed expert, Dr. Keram, his physical and mental condition has deteriorated significantly in the last few years and his health continues to decline. Dr. Keram also opines that the systematic torture of Mr. al-Qahtani left him unable to trust his military doctors and that Mr. al-Qahtani needs to be treated in Saudi Arabia by Saudi doctors and where his family lives, not where he was tortured. *See* Opp'n at 9-10. Further, the Saudi Ministry of Interior has indicated that Saudi Arabia would accept Mr. al-Qahtani if he is released from custody and place him in a facility where he will be able to receive the care he needs. *See* Letter from Mohammed A. Al-Muttairi (Aug. 16, 2015) [Dkt. 369-1]. Due to Mr. al-Qahtani's poor health and worsening condition, his repatriation would need to occur soon for him to be able to receive any benefit from the treatment offered by Saudi Arabia.

Compared to Mr. al-Qahtani's specific and serious health concerns, Respondents point to speculative domino effects should other detainees also seek review by a Mixed Medical Commission. About 40 individuals remain in Guantanamo Bay and they will only be eligible for Mixed Medical Commission review if they are actually ill and they complete the prerequisite procedural steps to request review, including obtaining a court order. Further, as Respondents explain, convening a Mixed Medical Commission will take time, and it is highly unlikely that Mr. al-Qahtani or any other detainees would be released before a decision by the Circuit on this appeal. On balance, the harm to Mr. al-Qahtani from further delay far outweighs any hypothetical harms to Respondents.

Respondents have failed to demonstrate either a likelihood of success on the merits or that the balance of harms weighs in their favor. Therefore, the motion to stay will be denied.

III. CONCLUSION

For the reasons discussed above, it is hereby

ORDERED that Respondents' Motion for Clarification and Stay Pending Appeal of the Court's March 6, 2020 Order [Dkt. 389] is **GRANTED** in part and **DENIED** in part; and it is

FURTHER ORDERED that the Court's March 6, 2020 Order does not require any specific individuals be named as members of the Mixed Medical Commission convened to evaluate Mr. al-Qahtani; and it is

FURTHER ORDERED that Respondents' request for a stay is **DENIED**.



Ellen S. Huvelle

ELLEN S. HUVELLE
United States District Judge

Date: August 12, 2020

APPENDIX B

Supplemental Declaration of Dr. Emily Keram (Aug. 12, 2020)

~~FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER~~

SUPPLEMENTAL DECLARATION OF DR. EMILY A. KERAM, M.D.
(August 11, 2020)

Pursuant to 28 U.S.C. § 1746, I declare that the following is true and correct to the best of my knowledge:

1. My name is Dr. Emily Keram. I am a medical doctor, board certified in Psychiatry and Neurology with sub-specialization board certification in Forensic Psychiatry. I have been in practice for over 30 years. I have treated patients with Posttraumatic Stress Disorder (PTSD) secondary to both combat stress and Prisoner of War confinement, at the US Department of Veterans Affairs Community Based Outpatient Clinic in Santa Rosa, CA for 18 years. I also have expertise in treating mood and psychotic disorders, as well as traumatic brain injury. I have worked as a clinician and a forensic evaluator at the Federal Correctional Institution-Butner for the Federal Bureau of Prisons, state prisons. I continue to work as a forensic evaluator in state and federal jurisdictions. I am familiar with accepted standards of conditions of confinement and provision of medical and mental health services to individuals incarcerated in local, state, and federal confinement facilities in the United States. I have evaluated several Guantánamo detainees over the past sixteen years at the request of counsel at the Military Commissions Defense Office, this District Court, and several habeas attorneys. I have also conducted an extensive examination of Mohammed al Qahtani and produced a report and several supplemental declarations regarding his mental illness. I submit this declaration to provide my analysis of the declaration of the Senior Medical Officer (SMO) filed with this Court in May 2020.
2. The SMO stated he based his declaration on discussions he had with Mr. al-Qahtani's Primary Care Manager (PCM), the JMG psychiatric consultants treating Mr. al-Qahtani, and other JMG medical staff involved in Mr. al Qahtani's medical care and treatment; a

review of Mr. al-Qahtani's pertinent medical and mental health records; and his own interactions with Mr. al-Qahtani.

3. The SMO does not state that he reviewed the records from Mr. al-Qahtani's psychiatric hospitalization in Mecca in May 2000, after police brought him to the emergency room during an acute psychotic episode. Neither the SMO nor other JMG staff appear to have interviewed any of Mr. al-Qahtani's family members to obtain his relevant history of psychiatric symptoms and inpatient and outpatient treatment. The SMO does not appear to be aware that Mr. al-Qahtani was tortured while at Guantánamo, which the U.S. Department of Defense's Convening Authority, Susan Crawford, stated was the basis for her decision to not to refer him to trial in the Military Commissions in 2008.
4. The SMO appears to be unaware of the facts of the torture Mr. al-Qahtani was subjected to and the psychiatric symptoms Mr. al-Qahtani developed in response to the torture. The SMO does not discuss Mr. al-Qahtani's symptoms and diagnosis of Posttraumatic Stress Disorder secondary to this torture although previous JMG clinicians treated Mr. al-Qahtani for PTSD and this diagnosis is discussed in my previous declarations to this Court.
5. In preparing my initial report and subsequent declarations for this Court I reviewed records from Mr. al-Qahtani's psychiatric hospitalization in Mecca in 2000 and discussed his psychiatric history with his one of his older brothers. I reviewed government records relating to the conditions of confinement Mr. al-Qahtani was subjected to at Guantánamo beginning in 2002. I interviewed Mr. al-Qahtani over the course of approximately two weeks of daily evaluations at Guantánamo in 2015 and 2017. Additionally, I spoke with him by phone in December of 2017.

6. Based on the information I obtained from the above, I diagnosed Mr. al-Qahtani with Schizophrenia and PTSD. Please refer to my earlier report and declarations for a review of Mr. al-Qahtani's history and symptoms that demonstrates that he meets diagnostic criteria for both of these disorders.
7. As noted in my earlier filings, during my interviews with Mr. al-Qahtani he spoke at length about the participation of JMG clinicians in his interrogation under torture. Due to their involvement in his torture he has remained unable to develop a doctor-patient relationship with JMG clinicians. He cannot trust JMG clinicians to work in his interest because of their dual agency both to him and to the Joint Detention Group. Mr. al-Qahtani explained that this mistrust has led him to largely avoid seeking medical and mental health treatment, to refrain from discussing problematic symptoms lest they be used against him again, and to keep interactions with JMG clinicians on a superficial level as a matter of self-protection.
8. The SMO does not discuss Mr. al-Qahtani's mistrust of JMG clinicians and its impact on the JMG clinicians' ability to accurately evaluate and treat Mr. al-Qahtani's medical and mental health.
9. The SMO states that Mr. al-Qahtani has a "long history of an undiagnosed psychiatric condition." He writes, "The best working diagnosis developed to date has been Unspecified Psychotic Disorder." Had the SMO reviewed the records from Mr. al-Qahtani's May 2000 psychiatric hospitalization during an acute psychotic episode, discussed the history of Mr. al-Qahtani's psychiatric symptoms with his family, and reviewed my report and declarations, he would have had access to facts that show that Mr. al-Qahtani meets diagnostic criteria for Schizophrenia.

10. The SMO doubts Mr. al-Qahtani has a diagnosis of schizophrenia because his symptoms appear stable off psychotropic medication and Mr. al-Qahtani has demonstrated insight that the voices he hears are not real. Setting aside the issue of whether JMG clinicians are aware of Mr. al-Qahtani's actual experience of psychotic symptoms, I note that the SMO does not comment on the fact that in many psychotic illnesses, including schizophrenia, positive psychotic symptoms (delusions and hallucinations) often dampen over the course of the patient's life, while negative symptoms (apathy and social withdrawal) tend to be more persistent. Thus, the SMO's summary of JMG clinicians' observations of Mr. al-Qahtani's psychotic symptoms may actually support a diagnosis of schizophrenia. The SMO also does not comment on the fact that many patients with psychotic disorders can learn that their delusions and hallucinations have a medical basis in disordered brain chemistry. This is the approach taken in Cognitive Behavioral Therapy for psychotic disorders, which has not been provided to Mr. al-Qahtani at Guantánamo. During my interactions with Mr. al-Qahtani, I have frequently discussed with him the fact that the voices he hears are hallucinations, symptomatic of his disease, and his understanding of this fact has advanced over the time that I have known him.
11. Mr. al-Qahtani was systematically tortured at Guantánamo starting in 2002. The SMO does not discuss the life-threatening torture Mr. al-Qahtani was subjected to or mention Mr. al-Qahtani's resultant symptoms of PTSD. Thus it appears that the SMO may be completely unaware that Mr. al-Qahtani was tortured at Guantánamo and has symptoms and a diagnosis of PTSD.
12. As noted, the SMO confines the content of his declaration to his understanding of Mr. al-Qahtani's psychotic symptoms. Totally absent from the SMO's declaration is any discus-

sion of Mr. al-Qahtani's symptoms of PTSD. However, this diagnosis, along with schizophrenia, has substantially contributed to the deterioration in Mr. al-Qahtani's mental health as described by his attorneys, something the SMO appears not to know.

13. Evidence of the deterioration in Mr. al-Qahtani's mental health as observed by his attorneys and as described to them by Mr. al-Qahtani includes increasing frequency and intensity of PTSD symptoms such as low mood, hopelessness, helplessness, numbing, detachment, anergia, anhedonia, and impairment in concentration and memory. These symptoms have, at times, precluded Mr. al-Qahtani's ability to work with his attorneys in the formulation of his defense.
14. This deterioration in Mr. al-Qahtani's mental health is completely expected in the context of his ongoing indefinite detention, with its unavoidable exposure to reminders of the trauma underpinning his PTSD, as well as his lack of access to treatment for PTSD. This second point is sadly and tellingly underscored by the fact that the SMO does not even mention this diagnosis or its antecedents.
15. Finally, as noted in my original report, I disagree with the SMO's statement that the JMG, with existing resources, is able to provide Mr. al-Qahtani with treatment that meets the current standard of mental health care. I have delineated the deficiencies in my previous report and declarations which compared the treatment available to Mr. al-Qahtani at Guantánamo with the practice guidelines for PTSD published jointly by the U.S. Departments of Defense and Veterans Affairs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of August, 2020.



EMILY A. KERAM, M.D.
1200 Coddington Center, #6654
Santa Rosa, CA 95409

APPENDIX C

Declaration of Ramzi Kassem (Sep. 4, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMED AL-QAHTANI,

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

Case No. 05-CV-1971 (ESH)

**PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION FOR CLARIFICATION
AND STAY PENDING APPEAL OF THE COURT'S MARCH 6, 2020 ORDER**

EXHIBIT 1
Declaration of Ramzi Kassem (Sept. 4, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMED AL-QAHTANI,

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

Case No. 05-CV-1971 (RMC)

FILED *EX PARTE* UNDER SEAL

DECLARATION OF RAMZI KASSEM

Pursuant to 28 U.S.C. § 1746, I certify that the following is true and correct to the best of my knowledge:

1. My name is Ramzi Kassem. I am a Professor of Law at the City University of New York (CUNY) School of Law, where I co-direct its Immigrant & Non-Citizen Rights Clinic, and an attorney admitted to practice law in the State of New York. With my clinic students, I serve as pro bono counsel to Petitioner Mohammed al-Qahtani in the above-captioned matter.
2. I submit this declaration to apprise the Court of the serious deterioration in Mr. al-Qahtani's psychiatric condition since the last report to this Court in Dr. Emily Keram's Supplemental Declaration of April 14, 2018, ECF No. 377, which was filed on April 16, 2018, days before the Court heard argument on Mr. al-Qahtani's Motion to Compel Examination by a Mixed Medical Commission on April 19, 2018.
3. In brief, in recent months Mr. al-Qahtani's hallucinations have become more frequent and severe, which has resulted in a withdrawal from social interactions with fellow detainees, as well as his family and counsel. That withdrawal appears to have diminished his ability to distinguish reality from hallucination. The combination of factors has made it nearly impossible for Petitioner's counsel or his psychiatric expert, Dr. Keram, to communicate with him in order to evaluate or try to ameliorate his current condition.
4. As of Dr. Keram's April 2018 declaration, Mr. al-Qahtani was making efforts to interact with psychiatric staff affiliated with Joint Task Force-Guantánamo's (JTF-GTMO) Joint Medical Group (JMG), but those efforts were severely hampered by the frequent turnover among staff attending to him. As Dr. Keram's last declaration filed with this Court stated, Mr. al-Qahtani's "JMG psychiatrists continued to change every 3 to 6 months. He sees them once a week to once a month with the frequency determined by the different

psychiatrists. Each visit lasts approximately one hour.” *Id.* at ¶ 7. All the while he continued to experience symptoms of his psychosis and PTSD, including insomnia, “visions of being chased by ghosts during the day,” and so forth. *Id.* ¶ 11. Mr. al-Qahtani related to me and my co-counsel, Mr. Shayana Kadidal, that the new doctors will often seek to begin treatment from scratch, stopping medication prescribed by departed doctors to observe the effects of their preferred drug regimens against his untreated baseline.

5. Although the government has not provided us his recent medical records, Mr. al-Qahtani’s accounts and the limited records we do have (*e.g.*, the redacted Declaration of Senior Medical Officer, ECF No. 372-2 (Aug. 21, 2017)) indicate that the drugs that have been dispensed to him since late 2016 have been first-generation anti-psychotics, which generally have more severe side effects than the newer products available on the market.
6. According to Mr. al-Qahtani (presumably as related to him by one of his doctors), if a doctor decides to prescribe for him a newer, less-commonplace anti-psychotic drug, a request must be put in through bureaucratic military channels to have the drug approved for delivery to the prison. As a practical matter, this means such requests can take months to be fulfilled and result in him receiving the medication. Although the prison’s Senior Medical Officer indicated JMG’s preference for first-generation drug Haldol was due to the ability to deliver it in (long-acting) intramuscular injection form, thereby ensuring compliance, *see id.* at 5 ¶ 17, Mr. Kadidal and I suspect the difficulty in obtaining drugs not otherwise in routine use among the military population at the base may also have something to do with why the prescribing doctors have not experimented with using many of the lower-side-effect new-generation antipsychotics on Mr. al-Qahtani.
7. I noted a marked decline in Mr. al-Qahtani’s condition during visits on February 6 and April 24, 2018, and a phone call on March 22, 2018. Some of my observations were incorporated into Dr. Keram’s April 2018 declaration: Mr. al-Qahtani was suffering from difficulty sleeping and concentrating, and from an inability to exercise, was feeling like ghosts were chasing him during the day (*i.e.* was experiencing hallucinations), and manifested episodes of screaming in his cell, which he related to me, but were also frequently noted to me and Mr. Kadidal by Mr. al-Qahtani’s fellow detainees. Below are our observations since then.

SUMMER 2018

8. My co-counsel, Mr. Kadidal, saw Mr. al-Qahtani during two separate trips to the base in the summer of 2018: first during a visit in June to prepare for Mr. al-Qahtani’s Periodic Review Board (PRB) hearing, and then in July for last-minute preparation and for the hearing itself.
9. During the first trip, Mr. al-Qahtani came out for both scheduled meetings, although we confined the meetings to half-day sessions (lasting approximately 2.5 hours each) in order to accommodate his fatigue and poor concentration.

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10. During the second trip, Mr. al-Qahtani came to a half-day meeting on Friday, July 20, but according to JTF-GTMO staff refused to emerge from his cell for scheduled meetings that Monday. The Monday meeting had been scheduled as a dry-run for the PRB hearing itself, and we had emphasized its importance during our Friday meeting. Mr. al-Qahtani did emerge from his cell to be transported to the hearing location on the morning of the hearing, Tuesday, July 24, but when Mr. Kadidal and his interpreter sat with him before the hearing, Mr. al-Qahtani was confused about the date and purpose of the meeting.
11. Like me, during the June and July meetings, Mr. Kadidal also observed that Mr. al-Qahtani's affect had deteriorated, to a level where it was as poor as he had seen it since early 2008. At that time, he had been in solitary confinement for the better part of several years. Mr. al-Qahtani was unfocused during the meetings; clearly exhausted from inability to sleep, but also suffering symptoms beyond mere exhaustion. During all of Mr. Kadidal's meetings with him, Mr. al-Qahtani carried on separate lines of conversation under his breath incessantly. He frequently switched his line of eye contact to places in the meeting room no one was sitting, creating the appearance of looking at non-existent conversation partners. When asked directly, he confirmed experiencing auditory hallucinations (i.e., hearing voices) during these meetings. As related in the previous paragraph, he missed appointments even when it had been made crystal-clear to him what the planned meeting schedule was, and he appeared to not understand what day it was even on the day of his actual hearing.
12. During Mr. Kadidal's summer visits, a number of self-harm incidents were related to us by the authorities. A few days before our June meetings with him, Mr. al-Qahtani had been seen with a sheet or t-shirt tied around his neck, which was interpreted by the authorities as a threat or attempt to hang himself. On or around July 19, a few days before the PRB hearing, Mr. al-Qahtani had banged his head against the wall of his cell (in order, he told us, to make the voices in his head stop), leaving a mark that was visible even on the day of the hearing.
13. The decline in his condition at that point in time since the spring of 2018 coincided with his being moved [REDACTED]
14. Mr. al-Qahtani's original cell block in Camp [REDACTED] had [REDACTED] other detainees in it, many of whom he had known for years, and several of whom used to keep watch over his psychological state.
15. But, as his hallucinations continued to worsen, prison authorities began to consider moving Mr. al-Qahtani [REDACTED]. He broached this possibility in his April 24 meeting with me, wondering aloud if he might be able to "quiet" his thoughts in solitary confinement. I tried to discourage the move because Mr. al-Qahtani had survived torture while in solitary confinement at Guantánamo, and a renewed stint was likely to trigger those traumatic memories for him, and also because solitary could widen Mr. al-Qahtani's separation from reality.

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16. Mr. al-Qahtani remained housed in [REDACTED] cell block for some time, spending most of the day inside the confines of his cell. The lack of social interaction with real people who speak his language (Arabic) diminished his ability to distinguish reality from hallucination—real voices from the voices in his head, as it were.

FALL 2018

17. In light of the decline in his condition since the spring of 2018, even prior to the summer 2018 PRB hearing, we began to make arrangements to schedule an unsecure (i.e., over an unclassified medium) telephone call between Mr. al-Qahtani, Dr. Keram and our Arabic-language interpreter, [REDACTED]. Over the past three years, Mr. al-Qahtani has generally responded positively to his interactions with Dr. Keram and has found her advice for coping with the rigors of his detention and his psychological ailments useful. We received approvals from JTF-GTMO to attempt three calls on August 17, October 5, and October 12. According to the base authorities, Mr. al-Qahtani refused to leave his cell for any of them.

18. During that period of time, I managed to see Mr. al-Qahtani in person on September 20 and informed him that a call from Dr. Keram was coming, telling him it was important to come out for it. Mr. al-Qahtani promised to come out for it, making his refusals on October 5 and 12 all the more striking.

19. During that September 2018 trip to Guantánamo, I had two visits scheduled with Mr. al-Qahtani on two different days. Mr. al-Qahtani did not come out for the first day of meetings. On the second day, September 20, when he did meet with me, his condition seemed worse even than the descriptions above in this declaration.

20. Mr. al-Qahtani appeared tired and unkempt, with long hair and fingernails. He had gained weight. He spoke to himself frequently, and had to put his head down on the table to take breaks for long periods of time.

21. He explained to me that he had missed the previous day's meeting because he was not in a good state and was unable to sleep at all the night before that meeting, only falling asleep for a short while after dawn on the day of our meeting.

22. When I asked Mr. al-Qahtani why he had missed the last four calls with his family in Saudi Arabia and shared that they were very worried about him, his only answer was: "I'm not in a good state."

23. Mr. al-Qahtani confirmed to me that he was still hearing voices and seeing things. He had stopped exercising entirely, and was missing meals and prescribed Islamic prayers daily. During this meeting, I had to repeat myself many times at Mr. al-Qahtani's request as he was unable to concentrate. At times during the meeting, Mr. al-Qahtani would abruptly start praying, palms facing upwards.

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24. Subjectively, Mr. al-Qahtani reported: "I feel as though this period I'm in is worse than earlier periods. I spend entire days in my cell most of the time. ... There used to be people here with me who gave me strength. But they left, and I'm still here. It's harder to think about the future now."
25. Although he was already in a cell block with [REDACTED] Mr. al-Qahtani informed me that he had requested to be moved to an even smaller cellblock in Camp [REDACTED]. He said that cellblock "should be more quiet." He also stated: "It bothers me to deal with others, I can't bear their noise." Mr. al-Qahtani asked me to submit a request to prison authorities endorsing his move to the smaller cellblock even as I was trying to convince him that social interaction might be better for him and might help him improve some.
26. In September, Mr. al-Qahtani told me that he was taking five different medications, some daily. But he could not recall the names or purposes of these medications. All he could say was that he was trying to take his medications, in the hope that they might help, but that he did not think that they were helping at all. Because Respondents have not provided Petitioner's counsel and Dr. Keram access to Mr. al-Qahtani's medical records, we have no way of knowing which medications Mr. al-Qahtani has been prescribed, whether he has been taking those medications, and to what effect.
27. Subsequent to my September 2018 visit with Mr. al-Qahtani, my co-counsel, Mr. Kadidal, attempted a visit with our client in Cuba on November 1, 2018. Unfortunately, Mr. al-Qahtani did not come out for that meeting.

WINTER 2018-2019

28. By late December, Mr. al-Qahtani had failed to appear for six out of the last seven monthly ICRC-facilitated audio or video calls with his family (according to members of his family who spoke with me). To our knowledge, it is highly unusual for him to refuse a family call since they became available to detainees around 2009, let alone so many. According to one of his siblings who was on the last call that went through, Mr. al-Qahtani told his family that he was "done." He reportedly added: "I'm tired, I can't anymore, I've reached my limit."
29. I was able to meet with Mr. al-Qahtani in Cuba on February 6, 2019. [REDACTED]
30. Mr. al-Qahtani explained to me that he was now being held in Camp [REDACTED]

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31. Because it was hard to sustain a conversation with Mr. al-Qahtani and he was noticeably struggling to focus, I asked him about any medications he was taking at this point in time and whether he was engaging with JTF-GTMO medical staff. He reported: “Even their meds make you worse. They’re calming agents, they make you sleepy, lazy, numb. You sleep, you wake up, but you’re still tired physically.”
32. I asked Mr. al-Qahtani if he recalled the name of the medications. He told me about the Ambien he had been prescribed: “I take the sleeping pills. I’m addicted to them now. I can’t sleep without them. I can’t sleep with them, either. Not in a regular way, at least. My sleep is erratic even with the pills. I can’t tell you how many hours I sleep daily. I don’t sleep well. I see visions when I try to sleep, nightmares. They wake me up. Once you wake up, the effect of the Ambien wears off.”
33. Mr. al-Qahtani reported to me that he was still taking five or six medications daily, along with some ointments. He believed they were mostly sedatives. Besides the Ambien, he could only name Tylenol and Zyrtec. We have no indication Mr. al-Qahtani is on antipsychotic medications at the current time. Access to Mr. al-Qahtani’s medical records would give us and Dr. Keram some insight into our client’s treatment.
34. As for JTF-GTMO medical personnel, Mr. al-Qahtani said they were not helpful and that he could not bring himself to trust them. “I can’t talk to them. I have nothing to say to their psychologist. They have nothing to offer. And you never know. If I tell him honestly how I’m feeling, he might order me removed to the BHU [Behavioral Health Unit—the psych ward] have me placed under observation. I’m afraid of that.”
35. Mr. al-Qahtani explained to me that some of his behaviors [REDACTED] “Screaming, being angry, throwing things, taking off my clothes [REDACTED]
36. Even though Mr. al-Qahtani wanted to be held with fewer fellow prisoners, he still feared being held alone in solitary confinement: “So I have to hide because I’m under threat. The psychologist is threatening me with isolation so I have to hide. I can’t let him know how I’m really feeling.”
37. I asked Mr. al-Qahtani to shed light on the tension between not wanting to be alone, while struggling to be with others. He said: “I can’t live in a cell block with other people. The noise, it bothers me. Also, with the ghosts that I see, it makes it hard for others to live with me, too. My screams bother the others. I don’t know where the ghosts are coming from. The others complain because of my condition. You know the Americans use sorcery and ghosts, don’t you?”
38. I inquired about the ghosts that Mr. al-Qahtani mentioned. He answered: “Sometimes they look like soldiers. They appear to me when I’m alone, usually in the shape of American

guards. But I know they're ghosts, like djinn, from another world. I know because I'm alone in a locked cell and they're in there with me, speaking to me in Arabic and English."

39. I asked Mr. al-Qahtani if there were any ghosts with us now, in the Camp Echo shack where we were meeting. He said: "No, I'm focusing with you right now."
40. Throughout our meeting, however, Mr. al-Qahtani would bury his head in his folded arms on the table, muttering to himself, mostly unintelligibly, but sometimes in discernible prayer: "God, save me from this place."
41. Mr. al-Qahtani told me that, where he is being held now, he does not go out into the sunlight at all.
42. When I asked him about the previous summer's reported self-harm incidents, Mr. al-Qahtani did not deny wanting and attempting to harm himself: "I find myself unable to control myself or listen to anyone else. Not that I really think this other person is a problem. I'm the one with the problems, I know that. I hear people talk to me when they haven't said a word. I tell them to shut up and they tell me they haven't spoken to me. This makes me cry, scream, it makes me want to kill myself."
43. At one point during our conversation, Mr. al-Qahtani looked across the table, over my left shoulder, staring at a fixed point in mid-air. He then raised his right index finger into the air, as if to quiet someone down. Apologetically, he said: "I have to make them go away so that I can stay focused here, sorry."
44. Mr. al-Qahtani could not recall declining calls or meetings with counsel or with his family.
45. Towards the end of my February 6, 2019 meeting with Mr. al-Qahtani, he asked me if there was any hope.

SPRING & SUMMER 2019

46. I spoke by telephone with Mr. al-Qahtani on June 6, 2019. He did not seem well, reporting the following to me: "I'm really tired. I wish not to remain in this life."
47. He shared that he was totally unable to fast during Ramadan. The previous year, at least, he was able to fast half of the holy Islamic month.
48. Mr. al-Qahtani stated: "I've even forgotten how to pray. I'd like to be a Muslim again."
49. Mr. al-Qahtani also reported that JTF-GTMO prison officials were alarmed because Mr. al-Qahtani often cries from feelings of pain throughout his body and from constant hallucinations. Ten days prior to our telephone call, the officials ordered prison doctors to take Mr. al-Qahtani to the clinic for an examination. The doctors then tried to increase the sleeping medications that Mr. al-Qahtani had been prescribed. He refuses to take those

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additional pills because he is already on such medication and it makes him lethargic. He said: "I'm already taking sleeping pills. I'm a human being, not a beast!"

50. Mr. al-Qahtani's isolation had also increased: "I don't go out to exercise at all. I can't bear the voices and noises from other people. [REDACTED] but now I can't stand to be with more people. [REDACTED] And, if it were up to me, I would live alone, by myself. It's like I live in one world, and everyone else lives in another. I can't read books. Even watching television has become difficult so I only do it rarely."
51. Most recently, I was able to meet with Mr. al-Qahtani in Cuba on June 26, 2019. He looked the worst he has ever looked for as long as I have represented him.
52. Mr. al-Qahtani was disheveled, overweight, and haggard. His eyes were red and tired-looking. His hands and knuckles were bloody because of severely cracked, dry, eczematic skin. Because Dr. Keram had previously explained to me that such rashes were often symptomatic of psychological distress, I asked Mr. al-Qahtani if he was experiencing similar rashes elsewhere on his body. He showed me his feet and legs, which were covered with identical patches of cracked, bloody skin.
53. Mr. al-Qahtani's mental state was also at its worst state, for as long as I have known and observed him. For example, during our legal meeting, he suddenly looked up and to his left, as if he was looking for someone who had called his name. It took Mr. al-Qahtani five seconds to come back to our meeting, even though I called his name. Repeatedly throughout our meeting, for long stretches, he buried his face in his palms, elbows on the table, often muttering to himself unintelligibly or praying. At one point, he crossed his arms on the table and buried his face in it for many minutes, no longer able to follow our conversation.
54. Mr. al-Qahtani reported that his sleep has dwindled to a few hours by day and a few hours by night. When I asked him if he could explain why, he stated: "I see different things in my sleep. Last night, for example, I woke up five or six times. I see scary things in my sleep. Even when I'm awake, I see shapes, I hear voices, djinn speaking to me. I see them now. They're behind you. I hear them now, too."
55. Mr. al-Qahtani's mobility is radically reduced, and his isolation has remained at its nadir. He still does not go out for recreation time at all. He moves slowly, remarking: "I swear if someone saw me moving around, they'd say it's impossible that I'm forty years old. They'd think I was well over seventy because of how I move." He also reported that he had been weighed at 215 pounds a few days before our meeting, when his healthy weight should be between 160 and 170 pounds.
56. At the end of our meeting, Mr. al-Qahtani apologized to me: "I'm so tired. I can barely last an hour in a meeting with you. There is no life for me here." He asked me to cancel the meeting I had scheduled with him on the following morning, which I did.

57. Mr. Kadidal and I are very concerned that our window of opportunity to reach Mr. al-Qahtani is rapidly shrinking.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New York City on this 4th day of September, 2019.

_____/s/_____
RAMZI KASSEM
IMMIGRANT & NON-CITIZEN RIGHTS CLINIC
MAIN STREET LEGAL SERVICES, INC.
CUNY SCHOOL OF LAW
2 COURT SQUARE
LONG ISLAND CITY, NY 11101
(t) (718) 340-4558
(f) (718) 340-4478
(e) ramzi.kassem@law.cuny.edu