IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONDENTS' MOTION
FOR RECONSIDERATION OF ORDER
GRANTING PETITIONER'S MOTION
TO COMPEL EXAMINATION BY A MIXED MEDICAL COMMISSION

Respondents respectfully move for reconsideration of the Court's Order of March 6, 2020 (Dkt. No. 387), which granted Petitioner's Motion to Compel Examination by a Mixed Medical Commission pursuant to Army Regulation 190-8. Respondents respectfully submit that the Order of March 6, 2020 should be vacated, and Petitioner's Motion to Compel Examination by a Mixed Medical Commission pursuant to Army Regulation 190-8 should be denied.

The grounds for the instant Motion are set forth in the accompanying memorandum of law. A proposed order is also attached.

Under Local Civil Rule 7(m), Respondents conferred via e-mail with counsel for Petitioner regarding the instant Motion. Counsel for Petitioner stated on January 14, 2021 that Petitioner opposes the relief sought in the instant Motion.

Dated: January 15, 2021

Respectfully submitted,

JENNIFER B. DICKEY
Acting Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

TERRY M. HENRY
Assistant Branch Director

/s/ Indraneel Sur
ANDREW I. WARDEN (IN Bar No. 23840-49)
DANIEL M. BARISH (DC Bar No. 448263)
INDRANEEL SUR (DC Bar No. 978017)
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 616-8448
E-mail: Indraneel.Sur@usdoj.gov

Counsel for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION OF ORDER GRANTING PETITIONER'S MOTION TO COMPEL EXAMINATION BY A MIXED MEDICAL COMMISSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Petitioner Mohammed al-Qahtani (ISN 63) previously obtained an order from the Court compelling the Executive Branch to establish a mixed medical commission for review of Petitioner's medical circumstances under Section 3-12 of Army Regulation 190-8 ("AR 190-8"), which implements provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention"). After this Court's March 2020 Order granting Petitioner's motion, the Secretary of the Army, exercising the authority recognized in Army Regulation 190-8 "to approve exceptions to this regulation that are consistent with controlling law and regulation," issued an Exception Memorandum on January 11, 2021 (attached as the Appendix, *infra*) ("Exception Memorandum"). The Exception Memorandum provides expressly that Army Regulation 190-8 is not applicable to any detainees at Guantanamo, including Petitioner.

In light of the Exception Memorandum, this Court should now reconsider its interlocutory March 2020 Order, vacate that prior decision, and deny Petitioner's motion. The Exception Memorandum is an intervening change in the law, which is a traditional basis for reconsideration of interlocutory orders. In particular, through the Exception Memorandum, the Secretary of the Army has exercised the authority, recognized in Army Regulation 190-8, to "approve exceptions to" that regulation that are "consistent with controlling law and regulation." The Exception Memorandum is valid and binding as an authoritative issuance of an exception to Army Regulation 190-8. The March 2020 Order had no effect on the authority to except Petitioner and other detainees from Army Regulation 190-8, which provides, *inter alia*, for mixed medical commissions to examine enemy prisoners of war and "retained personnel," such

as chaplains and medics, who have applied for medical repatriation while hostilities are ongoing. Indeed, the March 2020 Order did not address the exception authority at all.

The March 2020 Order sought to apply the Court of Appeals' description, in *Al Warafi v. Obama* (*Al Warafi II*), 716 F.3d 627 (D.C. Cir. 2013), of Army Regulation 190-8 as "domestic U.S. law," such that "a detainee may invoke Army Regulation 190-8 to the extent that the regulation explicitly establishes a detainee's entitlement to release from custody." *Id.* at 629-30. Now, under the Exception Memorandum, the "domestic U.S. law"—on which the March 2020 Order relied to direct the convening of a mixed medical commission—has changed. Because of the Exception Memorandum, "AR 190-8 is not applicable to any detainees held at JTF-GTMO," including al-Qaida fighters, such as the Petitioner here.

In light of the Exception Memorandum, there is no longer a basis for the Court to infer that Guantanamo detainees, including Petitioner, may invoke Army Regulation 190-8. The Exception Memorandum supplants the ground the March 2020 Order found for inferring that Petitioner was an "Other Detainee" under Army Regulation 190-8 who must be treated as an enemy prisoner of war, including for purposes of the regulation's medical-repatriation provisions, because he has not been "otherwise classified" as either an enemy prisoner of war, a retained person, or a civilian internee. In short, as a result of the Exception Memorandum, the entire legal basis underlying this Court's March 2020 Order has evaporated.

The validity of the Exception Memorandum is confirmed, moreover, by examining its consistency with pre-existing law and regulation. That consistency is evident from the Exception Memorandum's compatibility with the Third Geneva Convention, which does not afford its detailed regime of enemy prisoner of war privileges, such as medical repatriation, to detainees in a non-international armed conflict. The Exception Memorandum is also compatible, moreover,

with Army Regulation 190-8's category of "Other Detainees," and with the rationale and holding in *Al Warafi II*.

In sum, the Exception Memorandum is an authoritative articulation of an exception to Army Regulation 190-8, and because Petitioner (among other detainees now at Guantanamo) fits within that exception, this Court should give effect to the Exception Memorandum here by reconsidering and vacating its March 2020 Order and denying Petitioner's motion for review by a mixed medical commission.

BACKGROUND

I. Treaty and Regulatory Background

The Third Geneva Convention establishes rules for the treatment of prisoners of war. The full protections of the Convention apply to international armed conflicts—that is, to "all cases of declared war or of any other armed conflict which may . . . arise between two or more of the High Contracting Parties." Third Geneva Convention, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. In such conflicts, the Convention applies even if "one of the Powers in conflict may not be a party to the Convention." *Id.* "[T]he Powers who are parties [to the Convention]" shall "be bound by the Convention in relation to the said [non-party] Power, *if* the latter accepts and applies the provisions thereof." *Id.* (emphasis added).

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

Because al-Qaida is a terrorist organization—not a State that is a High Contracting Party to the Third Geneva Convention—the United States' conflict with al-Qaida is a non-international armed conflict. *Hamdan*, 548 U.S. at 630-31. Moreover, al-Qaida neither accepts nor applies the Third Geneva Convention's provisions.[1] The full protections of the Convention thus do not apply to al-Qaida, and its members are not entitled to prisoner-of-war status under the Convention. *See* White House Press Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002), https://2009-2017.state.gov/s/l/38727.htm ("President's Determination"). The Convention only obliges the United States to apply Article 3 to al-Qaida detainees.

This motion concerns administration of the Third Geneva Convention's requirement—not enumerated in Article 3—that the parties to an international armed conflict repatriate "seriously wounded and seriously sick prisoners of war." Third Geneva Convention, art. 109. To help implement this requirement, the Convention calls for the appointment of mixed medical commissions to "examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them." *Id.* art. 112.

As part of the Government's implementation of its treaty obligations, the Secretary of the Army, joined by other military officials, issued Army Regulation 190-8. *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997),

---

[1] It is worth noting that unlike military forces that are entitled to enemy prisoner of war status and that obey the laws of war, al-Qaida "makes no distinction between military and civilian targets." *See The 9/11 Commission Report* xvi (2004). And "[u]nlike enemy soldiers in traditional wars, terrorists do not wear uniforms. Nor do terrorist organizations issue membership cards, publish their rosters on the Internet, or otherwise publicly identify the individuals within their ranks." *Ali v. Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013) (Kavanaugh, J.).

https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r190_8.pdf. The regulation implements Department of Defense Directive 2310.01E, issued by the Deputy Secretary of Defense. *See* U.S. Dep't of Def., Directive 2310.01E (Aug. 19, 2014; updated Sept. 18, 2020), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf. The regulation also "implements international law" relating to enemy prisoners of war and other categories of individuals detained by the U.S. armed forces. AR 190-8 § 1-1(b). "In the event of conflicts or discrepancies between th[e] regulation and the Geneva Conventions," however, "the provisions of the Geneva Conventions take precedence." *See id.* § 1-1(b)(4).

Section 3-12 of the regulation provides for the establishment of mixed medical commissions "to determine cases eligible for repatriation." *Id.* § 3-12(a)(2). The procedures governing those commissions are based on those specified by Annex II of the Convention. *Id.* Section 3-12 also provides that, to be eligible for examination and potential repatriation, an individual must fall into one of two categories: enemy prisoner of war or retained personnel. AR 190-8 § 3-12(h). The glossary to the regulation defines enemy prisoners of war as "detained person[s] as defined in Articles 4 and 5 of the [Third] Geneva Convention," and in particular, as individuals "who, while engaged in combat under orders of [their] government, [are] captured by the armed forces of the enemy." *Id.*, glossary, § II. The glossary defines retained personnel as "medical personnel" meeting certain requirements; "[c]haplains"; and "[s]taff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments." *Id.*; *see id.* § 3-15(b).

The glossary also addresses "Other Detainee[s]." AR 190-8, glossary, § II. "Other Detainee[s]" are "[p]ersons in the custody of the U.S. Armed Forces who have not been classified" as enemy prisoners of war as described in article 4 (Third Geneva Convention),

retained personnel as referred to in article 33 (Third Geneva Convention), or civilian internees as referred to in article 78 (Fourth Geneva Convention). *Id.* Other Detainees "shall be treated" as enemy prisoners of war "until a legal status is ascertained by competent authority." *Id.*[2]

II. Procedural Background

Petitioner is a Saudi Arabian national detained by the Joint Task Force Guantanamo ("JTF-GTMO"). A Combatant Status Review Tribunal ("CSRT") determined in 2004 that Petitioner is an "enemy combatant," which means that the Executive determined that he is in fact an individual who was part of or supporting al-Qaida, Taliban, or associated forces, forces that the President had previously determined do not qualify for prisoner of war status.[3]

Petitioner filed a habeas petition in 2005. Pet. for Writ of Habeas Corpus, Dkt. No. 1. The Government responded with a factual return explaining that Petitioner—a member of al-Qaida who unsuccessfully attempted to enter the United States to participate in the September 11 attacks—is being detained under the 2001 Authorization for Use of Military Force as informed by the laws of war. *See* Am. Factual Return (filed via the CISO); Notice of Filing of Factual Return, Dkt. No. 73. Petitioner has not filed a traverse challenging the factual basis for his detention. At his request, Petitioner's habeas case has been stayed since 2010. *See, e.g.*, Min.

---

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

[3] *See* President's Determination; *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 [AR 190-8], and nothing [petitioner] argues, suggests that the President is not a 'competent authority' for these purposes."); *see also* Order Establishing Combatant Status Review Tribunal (Jul. 7, 2004), https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading Room/Detainne_Related/08-F-1281_Order_Establishing_Combatant_Status_Review_Tribunal_07-07-2004.pdf.

Order (Oct. 12, 2010) (granting initial stay of 90 days); Min. Order (Sept. 30, 2011) (staying case until further order of the Court).

Petitioner asked the Government in August 2017 to convene a mixed medical commission to examine him under § 3-12 of Army Regulation 190-8. After the Government rejected that request, Petitioner filed a motion in his pending habeas case seeking to "compel Respondents to facilitate" such examination. Mot. To Compel Exam., Dkt. No. 369, at 1. Petitioner contended that he was "entitled" to such relief "pursuant to the All Writs Act or in the form of an injunction." *Id.* at 3. The Government opposed the motion. *See* Resp'ts Opp'n, Dkt No. 370 (filed under seal) (Aug. 29, 2017); Notice of Public Filing re Resp'ts Opp'n, Dkt. No. 372 (redacted opposition) (Sept. 26, 2017).

The Court granted Petitioner's motion on March 6, 2020. Dkt. No. 386 ("March 2020 Order"), 443 F. Supp. 3d 116 (D.D.C. 2020). The Court acknowledged that the Government had previously determined both that Petitioner was part of al-Qaida, and that al-Qaida fighters are enemy combatants not entitled to prisoner-of-war status. 443 F. Supp. 3d at 119-21. Despite those acknowledgments, the Court concluded that Petitioner is an "Other Detainee," whom Army Regulation 190-8 requires be treated as an enemy prisoner of war, including with respect to the regulation's medical-repatriation provisions. *Id.* at 130. The Court further concluded that it had authority under the All Writs Act, 28 U.S.C. § 1651, to compel the Government to convene a mixed medical commission to provide the Court with the necessary medical facts to reach a legal conclusion in Petitioner's habeas case. *Id.* at 131-32. (The Court stated that, in light of its reliance on the All Writs Act, it "need not consider" Petitioner's request for injunctive relief. *Id.* at 132. But the Court elected to "briefly address the legal standard governing preliminary

injunctions" solely to "assist review," and held that the preliminary-injunction factors favored Petitioner. *Id.* at 132-33.)

The Government appealed the March 2020 Order, and sought a stay of it from this Court. The Government also moved to clarify that the March 2020 Order had not granted Petitioner's demand that his retained medical expert be seated on any mixed medical commission that the Government is ordered to convene. Resp'ts Mot. for Clarification, Dkt. No. 389. This Court on August 12, 2020, granted the clarification requested by the Government, but denied the stay. Mem. & Order at 3-5, Dkt. No. 397. The Court of Appeals dismissed the appeal, concluding that the March 2020 Order was not immediately appealable, and denied as moot the Government's motion for stay pending appeal and expedition. No. 20-5130 (Doc. 1863980) (D.C. Cir. Sept. 29, 2020).

III. Intervening Legal Change to Army Regulation 190-8

After the D.C. Circuit dismissed the appeal, the Secretary of the Army issued authoritative Department of Defense guidance providing that al-Qaida fighters, such as Petitioner, and all other detainees now at Guantanamo, are not eligible for mixed medical commission review under Section 3-12 of Army Regulation 190-8. *See* Memorandum from Ryan D. McCarthy, Sec'y of the Army, to Commander, U.S. Southern Command, Re: Army Regulation (AR) 190-8 Clarification/Exception (January 11, 2021) (attached as the Appendix, *infra*) ("Exception Memorandum").

In particular, in the Exception Memorandum, the Secretary of the Army, drawing on the authority "to approve exceptions to" Army Regulation 190-8 "that are consistent with controlling law and regulation," AR 190-8 at *i*, "formally and explicitly except[s] the detention operations conducted by JTF-GTMO from AR 190-8," and he also "make[s] clear that AR 190-8 is not applicable to any detainees held at JTF-GTMO." App., ¶ 4. "This exception applies with respect

to any and all claims—including pending claims—by JTF-GTMO detainees premised on AR 190-8. The exception forecloses application of AR 190-8 to JTF-GTMO detainees, including pursuant to any prior . . . order to the contrary, including" the March 2020 Order in this action. *Id.* [4]

The Exception Memorandum specifies that it was issued under the Secretary of the Army's authority "as the promulgating official for AR 190-8 and the DoD Executive Agent under DoD Directive 2310.01E." App., ¶ 4. As published in 1997, the front matter of Army Regulation 190-8 identifies the Secretary of the Army as the lead official on whose authority the regulation issued. *See* AR 190-8 at *i* (leading with signature of the Secretary of Army, indicating issuance by his order, followed by signatures of officials of the other military departments). As reflected in the front matter of Army Regulation 190-8, in its discussion of "Proponent and exception authority," the Secretary of the Army has assigned responsibilities to the Deputy Chief of Staff for Operations and Plans as the regulation's "proponent," who "has the authority to approve exceptions to this regulation that are consistent with controlling law and regulation." *See* AR 190-8 at *i*.[5]

---

[4] The Exception Memorandum cites pertinent portions of *Hamdan*, the President's Determination, the Department of Defense Law of War Manual, and Directive 2310.01E as "higher-level guidance" regarding the application of the law of war to unprivileged belligerents such as those detained in the conflict against al-Qaida. App., ¶ 2. The Exception Memorandum then provides that Army Regulation 190-8 "has not required and does not require that any of the detainees currently held at JTF-GTMO, all of whom are unprivileged belligerents being held in the context of the non-international armed conflict against al-Qaida, the Taliban, and associated forces, be afforded prisoner of war status or treatment, including such treatment or protections on a provisional basis pending a status determination." App., ¶ 3.

[5] The position of Deputy Chief of Staff for Operations and Plans has been redesignated and is currently known as the Deputy Chief of Staff ("DCS"), G-3/5/7. *See* Headquarters Department of the Army ("HQDA") General Order No. 3 (July 9, 2002); HQDA General Order No. 3 (April 1, 2005).

The Secretary of the Army has authority to issue Army Regulation 190-8 and the Exception Memorandum under 10 U.S.C. § 7013, and through the role assigned to the Secretary of the Army as Executive Agent under Directives 2310.01E and 5101.1. The Secretary of the Army is authorized in 10 U.S.C. § 7013 to "prescribe regulations to carry out his functions, powers, and duties under this title," 10 U.S.C. § 7013(g)(3), which include the authority to "conduct . . . all affairs of the Department of the Army," *id.* § 7013(b), and "such other activities as may be prescribed by law or by the President or Secretary of Defense,"*id.* § 7013(d).

Additionally, DoD Directive 2310.01E, DoD Detainee Program, which Army Regulation 190-8 is intended to implement, designates the Secretary of the Army as the Executive Agent ("EA") "for the administration of the DoD Detainee Program," providing the Secretary of the Army a lead role among the secretaries of the military departments in implementing the directive. *See* Directive 2310.01E, ¶ 1(c); *see also id*. at Enclosure 2 ¶ 9, pp. 10-11 (specifying additional responsibilities of the Secretary of the Army "in his or her capacity as DoD EA for DoD Detainee Operations Policy"). As further explained in DoD Directive 5101.1, *DoD Executive Agent* (Sept. 3, 2002, as amended), ¶ 4.4, "[w]ithin the scope of [the Executive Agent's] assigned responsibilities and functions, the DoD Executive Agent's authority takes precedence over the authority of other DoD Component officials performing related or collateral joint or multi-component support responsibilities and functions."

LEGAL STANDARD

The March 2020 Order, a ruling on the motion for a mixed medical commission, "did not dispose of all claims for all parties," so it is interlocutory, and "Rule 54(b) governs" the instant "motion for reconsideration." *In re McCormick & Co. Pepper Prods. Mktg. & Sales Practices Litig.*, 275 F. Supp. 3d 218, 223 (D.D.C. 2017) (citing Fed. R. Civ. P. 54(b), and *Cobell v.*

Jewell, 802 F.3d 12, 19 (D.C. Cir. 2015)).[6] "Interlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment. This is true even when a case is reassigned to a new judge." *Breen v. Chao*, 304 F. Supp. 3d 9, 20-21 (D.D.C. 2018) (quoting *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997)). "To determine whether justice requires reconsideration of an interlocutory decision, courts look to whether the moving party has demonstrated (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *United States v. All Assets Held At Bank Julius, Baer & Co.*, 315 F. Supp. 3d 90, 96 (D.D.C. 2018) (internal quotation marks omitted). Furthermore, "[e]ven where none of these three factors is present, 'the Court may nevertheless elect to grant a motion for reconsideration if there are other good reasons for doing so.'" *Id.* (quoting *Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005)).

---

[6] The power to reconsider interlocutory rulings derives from the common law in criminal and civil cases. *See, e.g.*, *John Simmons Co. v. Grier Bros.*, 258 U.S. 82, 88 (1922) ("If it be only interlocutory, the court at any time before final decree may modify or rescind it."); *see also United States v. Benz*, 282 U.S. 304, 306-07 (1931) (stating common law rule that orders and judgments could be modified by court within the term in which they were entered). That authority rests on the recognition that the trial context is fluid and frequently requires the court to rule without the benefit of extended deliberation, and that the interests of justice therefore would not be served by precluding a court from correcting its interlocutory decisions. "All too often, . . . a trial court could not operate justly if it lacked power to reconsider its own rulings as an action progresses toward judgment." 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.1 (2d ed. 2002).

ARGUMENT

The Exception Memorandum Is An Intervening Change In Law Warranting Reconsideration, And Is Valid And Consistent With Controlling Law And Regulation

The Exception Memorandum formally excepts application of Army Regulation 190-8 to JTF-GTMO detainees such as, and including, Petitioner, and it constitutes an intervening change in law that abrogates key premises behind the March 2020 Order—warranting reconsideration and vacatur of that order.

A. The Exception Memorandum Has Changed The Law By Foreclosing Application Of Army Regulation 190-8 To Petitioner And To Other Guantanamo Detainees, And Is Properly Given Effect Here

To begin with, the Exception Memorandum is an "intervening change in the law" and thus a proper ground for reconsideration of the interlocutory March 2020 Order. *All Assets Held*, 315 F. Supp. 3d at 96; *see* No. 20-5130 (Doc. 1863980) (D.C. Cir. Sept. 29, 2020) (dismissing appeal based on determination that March 2020 Order was interlocutory and not otherwise appealable).

Through the Exception Memorandum, the Secretary of the Army has exercised the authority, recognized in Army Regulation 190-8 itself, to "approve *exceptions* to" that regulation that are "consistent with controlling law and regulation." *See* AR 190-8 at *i* (specifying exception authority) (emphasis added). The Secretary of the Army has now effectuated a change in the law previously addressed in the March 2020 Order, by "formally and explicitly except[ing] the detention operations conducted by JTF-GTMO from AR 190-8," and he also has clearly established "that AR 190-8 is not applicable to any detainees held at JTF-GTMO." App., ¶ 4. This new exception "applies with respect to any and all claims—including pending claims—by JTF-GTMO detainees premised on AR 190-8. The exception forecloses application of AR 190-8

to" Guantanamo detainees. *See id*. There is, accordingly, no question from the text of the Exception Memorandum that the new exception applies to Petitioner's case.

Because the Exception Memorandum is an exercise of the Secretary of the Army's authorities under 10 U.S.C. § 7013, as a Department of Defense Executive Agent under Directives 2310.01E and 5101.1 (as explained above, p. 10), and as recognized in Army Regulation 190-8 itself, the Exception Memorandum is valid and binding as an authoritative issuance of an exception to Army Regulation 190-8. Thus, there is no need to inquire into the deference that would be owed to the Secretary's interpretation that he would have the authority to issue such an exception were the regulation ambiguous about whether such authority existed.

Indeed, giving effect to the Exception Memorandum here would not only correctly adhere to the text of Army Regulation 190-8 and to the text of the Exception Memorandum, but it would also respect other general principles of administrative law (and the Third Geneva Convention, as further explained in Part B. below). The Exception Memorandum is consistent with the longstanding position of the United States, under which unprivileged belligerents such as al-Qaida members have never received mixed medical commission review. *See generally* Redacted Resp'ts Opp'n, Dkt. No. 372.

In this context, it thus "is of no consequence" that the Exception Memorandum issued after this Court's March 2020 Order. *United States v. Morton*, 467 U.S. 822, 835 n.21 (1984). Issuance of an agency position in an authoritative memorandum subsequent to and "in response to" litigation does not supply a "reason . . . to suspect" that the position is anything other than the agency's "fair and considered judgment on the matter in question." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (citation omitted). The Exception Memorandum should be followed according to its terms, including in this action. *See, e.g.*, *id.* at 164-65, 170-71

(agreeing with agency view expressed in advisory memorandum issued after court of appeals below rejected agency position, where Supreme Court vacated first rejection for further consideration "in light of" memorandum). Under circumstances similar to those here, the Supreme Court has frequently granted *certiorari*, vacated the judgment below, and remanded to allow lower courts to re-examine prior decisions in light of "intervening developments." *Greene v. Fisher*, 565 U.S. 34, 41 (2011) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*)); *see Slekis v. Thomas*, 525 U.S. 1098 (1999) (agency interpretative guidance was intervening development); *see also Lawrence*, 516 U.S. at 165-66 (agency re-examination of statutory interpretation); *Schmidt v. Espy*, 513 U.S. 801 (1994) (agency reinterpretation of federal statute); *Chicago v. Envtl. Def. Fund*, 506 U.S. 982 (1992) (agency memorandum).

For its part, of course, the March 2020 Order had no effect on the Secretary of the Army's authority to except Petitioner and all other current JTF-GTMO detainees from Army Regulation 190-8, including for purposes of seeking a mixed medical commission determination under Section 3-12. The March 2020 Order did not address the Secretary's exception authority *at all*. Rather, the March 2020 Order's granting of mixed medical commission review to Petitioner was predicated on the Court's conclusion that Petitioner "meets the criteria for an 'other detainee' in Army Regulation 190-8." 443 F. Supp. 3d 116, 130 (D.D.C. 2020), a conclusion now superseded by the Exception Memorandum.

To be sure, in its March 2020 Order, the Court concluded that the D.C. Circuit's opinion in *Al Warafi v. Obama* (*Al Warafi II*), 716 F.3d 627 (D.C. Cir. 2013), determined "by implication" that "mere designation [of a detainee] as an 'enemy combatant' did not render Army Regulation 190-8 inapplicable." 443 F. Supp. 3d at 130. The Court reasoned that "*Al Warafi II* considered whether an individual detained as an 'enemy combatant' at Guantanamo

qualified as 'medical personnel' under Army Regulation 190-8 and should be repatriated. If [as the Government argued] 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 such an analysis." *Id.* (internal quotation and citation omitted). The Court, thus, applied Army Regulation 190-8 to Petitioner and concluded that he was an "Other Detainee"—to be treated as a prisoner of war under the Regulation—because he "is a person in the custody of the United States and he has *not been otherwise classified* as either an [(1)] enemy prisoner of war, [(2)] retained person, or [(3)] civilian internee," under the Regulation. *Id.* at 130 (emphasis added).

The Exception Memorandum, however, authoritatively supersedes the Court's application of *Al Warafi II* to Petitioner. In *Al Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011) ("*Al Warafi I*"), the Court of Appeals assumed *arguendo* that Section 3-15(b) of Army Regulation 190-8, concerning retained personnel, applied to the petitioner, and remanded for consideration of a "single question" (*Al Warafi II*, 716 F.3d at 629)—whether that petitioner served exclusively as medical personnel within meaning of the regulation. In *Al Warafi II*, the Court then stated: "In Section 5 of the Military Commissions Act of 2006, Congress provided, among other things, that a detainee may not invoke the Geneva Conventions in a habeas proceeding. However, Army Regulation 190-8 expressly incorporates relevant aspects of the Geneva Convention's medical personnel protection." 716 F.3d at 629. Accordingly, the Court of Appeals described Army Regulation 190-8 as "*domestic* U.S. law," such that "a detainee may invoke Army Regulation 190-8 *to the extent* that the regulation explicitly establishes a detainee's entitlement to release from custody." *Id.* at 629-30 (emphases added). The Court of Appeals then analyzed the relevant provisions of the Geneva Convention at issue in that case (the First

Geneva Convention, as incorporated in Army Regulation 190-8) and determined that the Taliban, which the petitioner in that case was part of, did not comply with the Convention, so the petitioner could not invoke those provisions of Army Regulation 190-8 that mirror the provisions of the Convention concerning repatriation of military medical personnel. *See id.* at 632.

Following the issuance of the Exception Memorandum, the "domestic U.S. law" is that "AR 190-8 is not applicable to any detainees held" now by JTF-GTMO, including al Qaida fighters such as the Petitioner here. App., ¶ 4. In other words, the Exception Memorandum, which authoritatively creates an exception to Army Regulation 190-8, now abrogates key premises behind the March 2020 Order. To begin with, by explicitly excepting JTF-GTMO detainees from Army Regulation 190-8, the Exception Memorandum removes the ground the Court found, in attempting to parse *Al Warafi II*, for inferring that Petitioner can rely on provisions of Army Regulation 190-8. (Of course, the Court of Appeals in *Al Warafi II* did not purport to address, let alone purport to limit, the Secretary of Army's authority to craft exceptions to the regulation.)

Moreover, the Exception Memorandum supplants the ground this Court found for its inference that Petitioner is an "Other Detainee" who is to be treated as a prisoner of war (including for purposes of Army Regulation 190-8's medical-repatriation provisions) *because* he has not been "otherwise classified" in one of the three stated categories in the regulation as cited by the Court. "[T]he requirement to treat certain detainees as prisoners of war in cases of doubt pending a status determination," the Exception Memorandum spells out, "applies only during international armed conflicts"; but the conflict with al-Qaida is *not* an "international armed conflict"; and, so, Petitioner and other Guantanamo detainees could not be "enemy prisoners of war" or "'Other Detainees' who are to be treated as Enemy Prisoners of War." *See* App., ¶¶ 2-3.

(The laws and regulations providing the grounds for the Exception Memorandum's conclusion on that point are further described in Part B, below.)

Indeed, the D.C. Circuit admonished in *Al Warafi II* that, when evaluating a habeas petitioner's claim that the "regulation explicitly establishes [the] detainee's entitlement to release from custody," the court "must analyze th[ose] relevant aspects of the Geneva Convention[]" to "determin[e] whether [Petitioner] is entitled to release" under the regulation. *Al Warafi II*, 716 F.3d at 629. That analysis, as the Exception Memorandum provides, defeats Petitioner's claim of entitlement to mixed medical commission review.

Thus, the entire legal basis for this Court's March 2020 Order has evaporated, necessitating reconsideration. Against this background, the March 2020 Order simply reached a non-final determination regarding application of Army Regulation 190-8 to Petitioner, and it cannot have conferred on him any vested property interest in mixed medical commission review. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 432-33 (1982) (where legal claims are pending and have not been reduced to final judgment, no property interested has vested under federal law).[7] Likewise, here: Petitioner's claim has not been reduced to a final judgment, so a

---

[7] Thus, Petitioner does not have any due process right to the mixed medical commission review described in the March 2020 Order, even if Petitioner could assert such a right, which he cannot. The law of the Circuit is that "[u]nder longstanding precedents . . . , the Due Process Clause cannot be invoked by Guantanamo detainees, whether those due process rights are labeled 'substantive' or 'procedural.'" *Al Hela v. Trump*, 972 F.3d 120, 150 (D.C. Cir. 2020). Although a petition for rehearing *en banc* was filed in *Al-Hela* on October 26, 2020, the decision in the case remains the law of the Circuit unless and until further acted upon by the Court of Appeals. *See Bin Lep v. Trump,* No. 20-cv-3344, 2020 WL 7340059, at *5 & n.4 (D.D.C. Dec. 14, 2020) (taking *Al-Hela* as currently binding); *see also Ayuda, Inc. v. Thornburgh*, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring) ("[o]nce [an] opinion [is] released it be[comes] the law of this circuit"); *see also LaShawn A. v. Berry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (panel decision is by statute "the decision of the court" unless otherwise acted upon by the full *en banc* court).

decision to remove Army Regulation 190-8 as a basis for that claim by applying the Exception Memorandum to him is not "without due process," because the procedure through which the Secretary of the Army issued the exception "provides all the process that is due." *See id.*, 455 U.S. at 432-33. In issuing the exception, the Secretary of the Army simply elected to "attach[] new legal consequences to events completed before [the exception's] enactment," and to bar Petitioner's pending claim for medical repatriation under the regulation is a rational way "to give comprehensive effect to a new" exception that the Secretary of the Army "consider[ed] salutary." *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 268, 270 (1994) (so long as a statute is clear, the statute may "attach[] new legal consequences to events completed before [the statute's] enactment," and it may bar pending actions as a rational way "to give comprehensive effect to a new law Congress considers salutary"); *id. at* 269 n.24 ("[A] statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'").

Indeed, the interlocutory nature of the March 2020 Order not only explains why the new exception correctly applies to the Petitioner in this action, but reinforces the need to give effect to the Exception Memorandum at this stage of the proceedings in this Court. Now that the law has changed—through issuance of the Exception Memorandum—this Court should give effect to the law as it currently exists by applying the Exception Memorandum to Petitioner, precisely because the March 2020 Order was not final, and this action is therefore still "progress[ing] toward judgment." 18B *Federal Practice and Procedure* § 4478.1; *see* No. 20-5130 (Doc. 1863980) (D.C. Cir. Sept. 29, 2020).

Substantial practical concerns further counsel against convening mixed medical commissions for Guantanamo detainees under Army Regulation 190-8, and supply "other good reasons" why reconsideration is warranted to give effect to the Exception Memorandum here.

All Assets Held, 315 F. Supp. 3d at 96. Those concerns include the health, safety, and security of other detainees. *See Hatim v. Obama*, 760 F.3d 54, 59 (D.C. Cir. 2014). As explained in the previously-filed declaration of Rear Admiral Timothy C. Kuehhas, the Commander of Joint Task Force Guantanamo, the March 2020 Order increased the likelihood that detainees would leverage their control over their health and medical care and attempt to endanger their own health to claim benefit from the Geneva Convention's medical-repatriation provisions. *See* Kuehhas Decl., Dkt. No. 398-1, Ex. 1 ¶¶ 4, 6, 8, 9 (public version) (*see* Dkt. No. 389 for sealed version); *Dhiab v. Trump*, 852 F.3d 1087, 1097 (D.C. Cir. 2017). Adherence to the Exception Memorandum also would avoid risking further interference with attempts to bring high-value detainees to justice through military commission prosecutions. For example, a different Guantanamo detainee being prosecuted on charges related to planning the September 11 attacks has requested, based in part on the March 2020 Order, the convening of "a Mixed Medical Commission to fully evaluate his illnesses and injuries." Dkt. No. 398-3, Ex. 2, at 3, 4 (*see* Dkt. No. 395 for sealed version). Even if such attempts are ultimately unsuccessful, they could disrupt or complicate ongoing prosecutions. *See* Dalbey Decl. ¶ 6, Dkt. No. 398-1, Ex. 2.

Additionally, adherence to the Exception Memorandum is supported by the Department of Defense's significant practical interest in ensuring the coherent and consistent interpretation and application of its directives, regulations, and other issuances providing guidance for military operations (as further explained in Part B below). The March 2020 Order's conclusion that Army Regulation 190-8 requires unprivileged belligerents to be treated as prisoners of war for purposes of mixed medical commission review is inconsistent with the "higher-level guidance" cited in the Exception Memorandum, and also inconsistent with U.S. military detention

operations that have involved thousands of persons not treated as prisoners of war, but instead detained as unprivileged belligerents (at Guantanamo and at other locations abroad).

The Exception Memorandum is, accordingly, an intervening change in law that should be given effect on reconsideration here.

B. The Exception Memorandum Is Consistent With Controlling Law And Regulation, And Thus Is A Valid Exercise Of The Exception Authority Recognized In Army Regulation 190-8

The Exception Memorandum properly "forecloses application of AR 190-8" to Petitioner and all other Guantanamo detainees, App., ¶ 4, including for purposes of mixed medical commission proceedings, because it is a valid exercise of the Secretary of the Army's authority to craft exceptions to Army Regulation 190-8 that are "*consistent with* controlling law and regulation," AR 190-8 at *i* (emphasis added). In particular, the required "consisten[cy]" is evident from at least three aspects of the content of the Exception Memorandum and the surrounding legal context. That is, the Exception Memorandum is compatible with (1) the Third Geneva Convention, which does not afford prisoner of war privileges, such as medical repatriation, to detainees held in non-international armed conflict; (2) Army Regulation 190-8's category of "Other Detainees"; and (3) the Court of Appeals' rationale and holding in *Al Warafi II*.

First, the Exception Memorandum properly describes the application of international and domestic law to this case. The Exception Memorandum traces the correct relationship between Army Regulation 190-8 and the Third Geneva Convention, drawing further on the President's Determination, Directive 23101.01E, and the Department of Defense Law of War Manual. The express purpose of Army Regulation 190-8 is "implement[ing] international law . . . relating to" enemy prisoners of war." AR 190-8 § 1-l(b). The "principal treat[y] relevant to" the

regulation's medical repatriation provisions is the Third Geneva Convention. *Id.* § 1-1(b)(3); *see id.* § 3-12(a)(2).

As the Exception Memorandum explains: "[T]he provisions of the Third Geneva Convention relating to prisoner of war treatment do not apply" to Guantanamo detainees, such as Petitioner. App., ¶ 2. That is, "unprivileged belligerents"—a term "synonymous with" "unlawful enemy combatants"—are "provided the minimum standards of treatment" set forth in Department of Defense Directive 2310.01E, including the standards in Common Article 3 of the 1949 Geneva Conventions, "but they are not entitled to prisoner of war status." *Id.* The United States' conflict with al-Qaida (among other non-State armed groups), as noted in the Exception Memorandum further notes, is a non-international armed conflict. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006); *see also* App., ¶ 2 (citing *Hamdan*). In such conflicts, the full protections of the Third Geneva Convention—including the Convention's medical repatriation provisions—do not apply to members of non-State armed groups. *See* Third Geneva Convention, art. 3. The United States is only "bound to apply, as a minimum," the provisions in Article 3 relating to the humane treatment of detainees. *Id.* Article 3 does not include the repatriation provisions involving mixed medical commissions that Army Regulation 190-8 implements as to prisoners of war in international armed conflicts.

The Convention also provides that, in conflicts between two or more High Contracting Parties, the full protections of the Convention will apply to the "mutual relations" of the High Contracting Parties that are participants, even if "one of the [other] Powers in conflict may not be a party to the present Convention." Third Geneva Convention, art. 2. "[T]he Powers who are parties" to the Convention shall "be bound by the Convention in relation to the said [non-party] Power, if the latter accepts and applies the provisions thereof." *Id.* But that provision is not

applicable to Petitioner or other detainees excepted under the Exception Memorandum. To begin with, "[n]on-state actors" such as al-Qaida are not "'Power[s]' that would be eligible under Article 2 . . . to secure protection by complying with the Convention's requirements." *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring), *cited approvingly by Hamdan*, 548 U.S. at 630. Nor has al-Qaida accepted and applied the Convention's provisions. *See* p. 4 & n.1, *supra*.

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

Second, the Exception Memorandum explains that the "Other Detainee" definition of Army Regulation 190-8 does not support Petitioner's contention. In particular, the Exception Memorandum points out that al-Qaida detainees (among the other Guantanamo detainees) are not, under the regulation, "afforded prisoner of war status or treatment, including such treatment or protections on a provisional basis pending a status determination. "Under AR 190-8, JTF-GTMO detainees are not 'Enemy Prisoners of War' or 'Other Detainees' who are to be treated as Enemy Prisoners of War." App., ¶ 3.

For its part, the definition of "Other Detainee" provides that "[p]ersons in the custody of the U.S. Armed Forces who have not been classified as an" Enemy Prisoner of War, Retained Personnel, or Civilian Internee, "shall be treated as [Enemy Prisoners of War] until a legal status is ascertained by competent authority." AR 190-8, glossary, § II. The provisional-treatment

requirement only applies in conflicts in which prisoner-of-war protections apply.[8] The United States' non-international armed conflict with al-Qaida is not such a conflict, and the Exception Memorandum is consistent with that conclusion, based on the "higher-level guidance" it cites.

Furthermore, even if the provisional-treatment requirement of the "Other Detainee" definition applied to a detainee such as Petitioner, he still would not be entitled to invoke the regulation's medical-repatriation provisions, because his "legal status" has already been "ascertained." *See* AR 190-8, glossary, § II. As the Exception Memorandum points out (App., ¶ 2), President George W. Bush concluded in 2002, that, since al-Qaida is a terrorist organization, al-Qaida's fighters are unprivileged enemy combatants to whom the full protections of the Geneva Convention do not apply. *See* President's Determination. Indeed, a Combatant Status Review Tribunal determined in 2004 that Petitioner is part of al-Qaida, which is not and cannot be a High Contracting Party to the Third Geneva Convention.

Because Petitioner's legal status has long been ascertained to be that of a person who is not entitled to prisoner of war status, the provisional-treatment requirement in the glossary's

---

[8] *E.g.*, Office of General Counsel, U.S. Dep't of Def., *Department of Defense Law of War Manual* § 4.27.2 (June 2015; updated Dec. 2016) ("*During international armed conflict*, should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 of the GPW, such persons shall enjoy the protection of the GPW until such time as their status has been determined by a competent tribunal") (emphasis added), https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190; U.S. Dep't of Def., Directive 2310.01E, ⁋ 3(h) ("*During international armed conflict*, should any doubt arise as to whether a detainee belongs to any of the categories enumerated in Article 4 of Reference (d) [*i.e.*, the Third Geneva Convention] and as such is entitled to the protections and privileges afforded POWs, such detainees shall enjoy treatment as POWs until a tribunal convened in accordance with Article 5 of Reference (d), determines whether the detainee is entitled to such status or treatment.") (emphasis added).

definition of "Other Detainee" does not extend to him the medical-repatriation privileges of prisoner of war status. *See Hamdan*, 415 F.3d at 43 (holding that the President is a competent authority to determine a detainee's legal status for purposes of AR 190-8), *rev'd on other grounds*, 548 U.S. 557 (2006); *United States v. Hamidullin*, 888 F.3d 62, 72-73 (4th Cir. 2018) (same).

In light of the Exception Memorandum, it is no longer open to conclude (as this Court's March 2020 Order did as to Petitioner in this action) that the "Other Detainee" definition requires the Government to treat Guantanamo detainees as enemy prisoners of war so long as they have not been classified as an Enemy Prisoner of War, Retained Person, or a Civilian Internee. 443 F. Supp. 3d 116, 129-30 (D.D.C. 2020). That purported requirement is not founded in the definition's text, which does not require a competent authority to classify a particular detainee in one of the three legal statuses listed in the definition. *See* AR 190-8, glossary, § II. That purported requirement is also inconsistent with the Department of Defense directive governing detainee operations and the Department of Defense Law of War Manual. In addition to underscoring that the requirement found in the "Other Detainee" definition to treat detainees as enemy prisoners of war on a provisional basis applies only to international armed conflicts, *see* Note 8, *supra*, those authorities make clear that a detainee in a non-international armed conflict can possess a legal status that is not Enemy Prisoner of War, Retained Personnel, or Civilian Internee. *See Department of Defense Law of War Manual*, Chapter IV (discussing a variety of potential legal statuses under the law of war); Directive 2310.01E at p. 14 (defining "unprivileged belligerent" for the purposes of DoD Detainee Program).

The Exception Memorandum's conclusion also properly respects the regulation's conflicts-or-discrepancies provision. That provision states that "[i]n the event of conflicts or

discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence." AR 190-8 § 1-1(b)(4). There are no "conflicts or discrepancies" between the Geneva Conventions and the Exception Memorandum. Rather, the Exception Memorandum's removal of the possibility of affording prisoner of war privileges to al-Qaida detainees through Army Regulation 190-8 is fully consistent with the Third Geneva Convention, which does not afford such privileges to al-Qaida detainees and other members of non-state terrorist groups. *Cf. Al Warafi II*, 716 F.3d at 632 ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention[s].").

Third, the Exception Memorandum is consistent with the holding and rationale of *Al Warafi II*. Indeed, *Al Warafi II* differs from Petitioner's case. Importantly, here, the March 2020 Order interpreted Army Regulation 190-8 to impose requirements not required by the law of war and, unlike in *Al Warafi II*, the Government has disputed whether the pertinent Geneva Convention provisions could apply to the habeas petitioner. Those differences in turn sharply separate the question addressed in the Exception Memorandum from the one the Court of Appeals addressed in *Al Warafi II*.

In particular, Al Warafi was a member of the Taliban who claimed that he was a medic entitled to the protections owed to Retained Personnel under the *First* Geneva Convention and § 3-15 of Army Regulation 190-8. 716 F.3d at 629. In opposing habeas relief, the Government took no "position . . . with regard to which provisions of the . . . Geneva Conventions directly apply to the ongoing armed conflict against the Taliban." U.S. Gov't Br. 4 n.1, *Al Warafi II*, No. 11-5276, 2012 WL 965971 (D.C. Cir. Mar. 21, 2012). Rather, the Government argued that the Taliban had not met the requirements for its personnel to receive retained personnel status under

the First Geneva Convention, even assuming, without deciding, that the Conventions applied to that conflict. The Court of Appeals assumed *arguendo* that the relevant Geneva Convention provisions applied to the conflict with the Taliban, and affirmed the district court's conclusion that Al Warafi had failed to prove entitlement to Retained Personnel status because the Taliban had not complied with the prerequisites for him to receive such status. *See Al Warafi II*, 716 F.3d at 630-31; *see also Al Warafi v. Obama*, 409 F. App'x 360, 361 (D.C. Cir. 2011) (*per curiam*).

But here, even prior to the Exception Memorandum, the Government strenuously disputed that the *Third* Geneva Convention's medical repatriation provisions could apply to al-Qaida fighters. And Section 3-12 of Army Regulation 190-8 implements those provisions of the Third Geneva Convention *only* when those provisions apply. Thus, *Al Warafi II* supplies no basis for affording al-Qaida fighters such as Petitioner the privileges of prisoner of war status: *Al Warafi II* concerned the application of a different Geneva Convention obligation to a Taliban fighter, and had no occasion to consider that question at all. If anything, *Al Warafi II*'s denial of retained personnel status for Taliban fighters claiming to be medics because the Taliban have not "followed the roadmap set forth in the Conventions" suggests that al-Qaida detainees lack entitlement to the privileges of prisoner of war status, such as mixed medical commissions, because al-Qaida also has not "followed the roadmap set forth in" the Third Geneva Convention for its members to receive such privileges. *See Al Warafi II*, 716 F.3d at 631. And, in any event, the Exception Memorandum has authoritatively foreclosed invocation of Army Regulation 190-8 by Guantanamo detainees such as Petitioner seeking mixed medical commission review.

The Exception Memorandum is, accordingly, consistent with pre-existing laws and regulations.

CONCLUSION

For the reasons set forth above, in light of the Exception Memorandum, the Court should reconsider and vacate the March 2020 Order, and deny Petitioner's motion to compel examination by a mixed medical commission.

Dated: January 15, 2021

Respectfully submitted,

JENNIFER B. DICKEY
Acting Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

TERRY M. HENRY
Assistant Branch Director

/s/ Indraneel Sur
ANDREW I. WARDEN (IN Bar No. 23840-49)
DANIEL M. BARISH (DC Bar No. 448263)
INDRANEEL SUR (DC Bar No. 978017)
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 616-8448
E-mail: Indraneel.Sur@usdoj.gov

Counsel for Respondents