IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-4788

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

IREK ILGIZ HAMIDULLIN,

Defendant –Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
at Richmond
The Honorable Henry E. Hudson, District Judge

SUPPLEMENTAL BRIEF OF THE UNITED STATES

Dana J. Boente
United States Attorney

Richard D. Cooke
Assistant United States Attorney
United States Attorney's Office
919 East Main Street, Suite 1900
Richmond, Virginia 23219
(804) 819-5400

Dana J. Boente
Acting Assistant Attorney General

Jennifer E. Levy
Joseph Palmer
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-7146

Attorneys for the United States of America

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court's order of June 23, 2017 directed the parties to address the following issue:

> Did the district court possess jurisdiction to decide, in the first instance, whether Hamidullin qualifies as a prisoner of war under the Third Geneva Convention? The briefs should discuss the effect of Army Regulation 190-8 on the court's jurisdiction.

Order at 1.

As explained below, because the United States brought criminal charges against Hamidullin in a United States District Court and Hamidullin asserted that he was a lawful combatant entitled to immunity from those charges, the district court possessed jurisdiction to rule that Hamidullin did not qualify as a prisoner of war (POW) under the Third Geneva Convention (GPW). The district court correctly rejected Hamidullin's claim because the Taliban, a group that has consistently acted in flagrant defiance of the law of armed conflict, did not satisfy the GPW's mandatory criteria that a military organization must meet for its members to qualify for lawful combatant status.[1]

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1 This brief uses the terms "prisoner of war" and "lawful combatant" interchangeably. As relevant here, a member of an organization that satisfies the requirements in Article 4(A)(1)-(3) would be considered both a POW and a lawful combatant.

The district court's ruling was fully consistent with Army Regulation 190-8 (AR 190-8).[2] Section 1-6 of that regulation implements GPW Article 5 by specifying procedures a military tribunal applies for determining the legal status of detainees under the GPW. As a threshold matter, Section 1-6 of AR 190-8 has no application to prisoners like Hamidullin who are captured in non-international armed conflicts. But in any event, the GPW and AR 190-8 do not call for a competent tribunal for every individual captured combatant, but only when there is "doubt" as to an individual's "legal status" under the GPW to receive POW privileges. *See* AR 190-8 ¶ 1-5a(2) (providing that detainees should receive the protections of the GPW "until some other legal status is determined by competent authority"). Hamidullin's legal status has been determined by a "competent authority" within the meaning of the Regulation because the President – the highest "competent authority" on the subject – conclusively determined in 2002 that Taliban detainees such as Hamidullin do not qualify for POW status. Nothing in AR 190-8 suggests that an individualized military adjudication for a particular detainee is required to determine his status when the Executive Branch has already determined that the relevant armed conflict was non-international and that, even

2 U.S. Dep't of the Army et al., Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Nov. 1, 1997).

when the conflict was initially deemed an international armed conflict, the Taliban as a group could not qualify for POW status under the GPW's stringent criteria. In light of these prior determinations, the protections provided to POWs under the GPW and AR 190-8 do not apply to Hamidullin as a matter of law because he has never disputed that he is a part of Taliban forces. Thus, Hamidullin was not entitled to the Executive Branch process outlined in Section 1-6 of AR 190-8, or any other process, until he raised the combatant immunity defense that the district court properly adjudicated, and rejected, on the merits.

Even if a military process under AR 190-8 should have been applied in Hamidullin's case, he would not be entitled to a reversal of his conviction because AR 190-8 does not extend any substantive rights. In addition, the district court's adjudication of Hamidullin's assertion of combatant immunity, pursuant to all the procedural protections in Article III courts, afforded Hamidullin any right to a "competent tribunal" that he may have had.

ARGUMENT

I. The District Court Had Jurisdiction To Determine That Hamidullin Was Not a Lawful Combatant

A federal district court has jurisdiction in a criminal case under 18 U.S.C. § 3231 when the United States charges a defendant with "offenses against the laws of the United States." *See United States v. Cotton*, 535 U.S. 625, 630-31 (2002).

That jurisdiction includes authority to resolve a defendant's assertion of a defense to the charges. *See United States v. Williams*, 341 U.S. 58, 68 (1951) (Where a court has "cognizance of a crime" it also has power to "decide the issues" that arise in the case.). To be sure, in adjudicating a combatant immunity claim, a district court may address issues on which the Executive Branch's determinations are entitled to great deference. *See, e.g.*, *United States v. Al-Hamdi*, 356 F.3d 564, 569-73 (4th Cir. 2004) (deferring to State Department's interpretation of Vienna Convention in rejecting defendant's claim of diplomatic immunity); *cf. Ziglar v. Abbasi*, __ S. Ct. __, 2017 WL 2621317, at *18 (June 19, 2017) ("[C]ourts have shown deference to what the Executive Branch has determined . . . is essential to national security.") (internal quotation marks omitted). Nevertheless, the district court ultimately has jurisdiction to "say what the law is" regarding a defendant's assertion of a defense, including the combatant immunity defense. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

In this case, the district court had jurisdiction to determine whether Hamidullin qualified as a POW under the GPW for the purpose of adjudicating Hamidullin's assertion of combatant immunity. The district court's adjudication of that question is consistent with several other district court decisions that have likewise exercised jurisdiction to decide that a defendant could not assert a

combatant immunity defense because he fought for an organization that did not satisfy the GPW's criteria. *See, e.g.*, *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (rejecting combatant immunity defense raised by defendant who fought with the Taliban against U.S. troops in Afghanistan); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003) (rejecting combatant immunity defense raised by defendant charged with supporting al Qaeda and other insurgent groups); *United States v. Pineda*, 2006 WL 785287, at *3 (D.D.C. Mar. 28, 2006) (rejecting combatant immunity defense raised by defendants who attacked U.S. surveillance aircraft in Colombia on behalf of the FARC); *United States v. Hausa*, 2017 WL 2788574, at *6 & n.6 (E.D.N.Y. Jun. 27, 2017) (holding that lawful combatant immunity defense did not apply to defendant who plotted attacks on U.S. forces in Afghanistan on behalf of al Qaeda); *cf. United States v. Yunis*, 924 F.2d 1086, 1097-99 (D.C. Cir. 1991) (noting that the district court adjudicated whether defendant's militia complied with the GPW's criteria for purposes of defense to criminal charges); *United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1992) (holding that the question of POW status, when properly presented, may be decided by federal courts). There does not appear to have been a prior Executive Branch tribunal convened under the procedures of AR 190-8 in any of those cases, yet none of them suggests that the absence of such process would

prevent the court from adjudicating combatant immunity as a defense to criminal charges.

II. The District Court's Ruling Was Consistent With AR 190-8

Section 1-6 of AR 190-8 is part of the Department of Defense's implementation of GPW Article 5. In general, AR 190-8 provides procedures for determining detainees' legal status under the GPW. Hamidullin contends (Br. 19-20) that, under Article 5 and AR 190-8, all persons claiming POW status must be deemed POWs until a military tribunal determines otherwise pursuant to procedures set forth in the Regulation. Presumptive POW protections apply, however, in international armed conflicts only if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," meet GPW Article 4's definition of POWs. 6 U.S.T. at 3324, 75 U.N.T.S. at 142. Hamidullin's contention ignores the GPW's plain terms, which do not extend POW protection to those detained in non-international armed conflicts or to members of organizations that do not meet the Article 4 standards. *See* Gov't Br. 20-46.

The process and interim status in AR 190-8 are provided "[i]n accordance with Article 5, GPW." AR 190-8, ¶ 1-6(a). Under the GPW, these processes are unavailable when (1) the conflict in which the prisoner was captured is a non-

international armed conflict; or (2) the opposing armed force(s) in the conflict do not satisfy Article 4's criteria. If, on the other hand, a prisoner is captured in an *international* armed conflict and there has been no determination that the opposing force fails to satisfy the Article 4 criteria, then a tribunal described in AR 190-8 may be convened to determine whether an individual detainee is in fact a member of a group covered by Article 4 and whether his individual circumstances entitle him to POW status as a member of that force. But nothing in the Regulation empowers a tribunal of mid-level officers to revisit the Executive Branch's determinations regarding the non-international character of the armed conflict or whether the opposing force satisfies the Article 4 criteria. Those overall determinations are properly made by the Commander-in-Chief or other higher authorities in the Executive Branch, not by the potentially varying opinions of field grade officers in AR 190-8 tribunals.

A. AR 190-8 Does Not Apply to Hamidullin Because He Was Captured in a Non-International Armed Conflict

Under GPW Article 2, POW protections, combatant immunity, and the right to a determination of POW status by a competent tribunal apply only in international armed conflicts. By 2009, when the events of this case occurred, the conflict in Afghanistan was not an international armed conflict. *See* Gov't Br. 27-31. Because Hamidullin was captured during the course of a non-international

armed conflict, there is no "doubt" about his POW status for a tribunal under Article 5 and AR 190-8 to resolve. Indeed, Hamidullin could not possibly benefit from such a tribunal because the Regulation does not authorize a tribunal of three mid-level officers[3] to decide overarching questions, such as the appropriate classification of the conflict, that properly belong to higher authorities within the Executive Branch.

B. AR 190-8 Does Not Apply to Hamidullin Because POW Status Is Only Available to Members of Forces That Satisfy Article 4's Criteria

Even if the conflict in Afghanistan in 2009 had been an international armed conflict, Hamidullin could not qualify as a POW because the Taliban did not meet the Article 4 requirements. The relevant subsection, Article 4(A)(2), provides that members of militias or volunteer corps are eligible for POW status only if *the group in question* displays "a fixed distinctive sign," "carr[ies] arms openly," and "conduct[s] [its] operations in accordance with the laws and customs of war." 6 U.S.T. at 3320, 75 U.N.T.S. at 138. The President, as Commander-in-Chief, has found, *inter alia*, that Taliban fighters systematically failed to follow the laws of war, and hence did not qualify as lawful combatants. *See* White House Press

3 The Regulation refers to field-grade officers. AR 190-8 ¶ 1.6(c). A field-grade officer is an officer above the rank of captain and below the rank of brigadier general – a major, a lieutenant colonel, or a colonel.

Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002) ("President's Determination").[4] The President's Determination satisfies AR 190-8 with respect to all Taliban detainees, because it means that their status has already been "determined by competent authority." *See Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006) ("The President found that [petitioner] was not a prisoner of war under the Convention. Nothing in [Army Regulation 190-8], and nothing [petitioner] argues, suggests that the President is not a 'competent authority' for these purposes.").

Hamidullin contends (Br. 19-20) that AR 190-8 and Article 5 entitle him to an individual consideration of his POW status based on his own battlefield conduct. But neither AR 190-8 nor the GPW requires individual determinations for each Taliban detainee. In the context of the war in Afghanistan, Hamidullin's disqualification from lawful combatant status turns on the overall characteristics of the Taliban, not his individual conduct, as well as on the characterization of the conflict as a non-international armed conflict. *See* DOD Law of War Manual § 4.27.3 (2016) (explaining that "if there was no doubt that the armed group to which a person belongs fails to qualify for POW status, then the GPW would not

4 Available at: https://www.state.gov/s/l/38727.htm

require a tribunal to adjudicate the person's claim to POW status by virtue of membership in that group"). The same is true of past conflicts, in which the United States has made group status determinations of captured enemy combatants. *See, e.g.*, Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Int'l L. Stud. 1, 61 (1977) (Second World War); Adam Roberts, *Counter-terrorism, Armed Force, and the Laws of War*, 44 Survival no. 1, 23-24 (Spring 2002) (Vietnam). And "the accepted view" of Article 4 is that "if the group does not meet the [Article 4] criteria . . . the individual member cannot qualify for privileged status as a POW." W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l L. 39, 62 (1977). Consistent with that "accepted view," the federal courts that have faced combatant immunity claims have focused on the fact that the overall military organization, not the individual defendant or his particular unit, did not satisfy the criteria. *See Lindh*, 212 F. Supp. 2d at 552 n.16, 558 n.39 (noting that "[w]hat matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so"); *Pineda*, 2006 WL 785287, at *3 ("Even if the Geneva Convention did apply, the Court is unpersuaded that the defendant would qualify as a prisoner of war because FARC

fails to meet the Geneva Convention's definition of a lawful combatant"); *Hausa*, 2017 WL 2788574, at *6 & n.6 (holding that lawful combatant immunity defense did not apply to defendant because al Qaeda did not satisfy Article 4's criteria); *Arnaout*, 236 F. Supp. 2d at 917-18 (same). Thus, the procedures specified in AR 190-8, which focus on determining a detainee's "legal status" with respect to the privileges of POWs, do not apply because the relevant legal status of all Taliban detainees has already been determined categorically by a "competent authority" within the meaning of the Regulation.

Hamidullin's argument conflicts with the purposes of the GPW. Article 4's requirements serve important humanitarian purposes by maintaining a clear distinction between civilians and combatants and by providing incentives for compliance with the laws of armed conflict. But accepting Hamidullin's argument would afford the privilege of combatant immunity to Taliban fighters even though the Taliban has consistently defied the laws of war. *See Al-Warafi v. Obama*, 716 F.3d 627, 632 (D.C. Cir. 2013) ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention."); DoD Law of War Manual § 4.3.1 ("States have been reluctant to conclude treaties to afford unprivileged enemy belligerents the distinct privileges of POW status or the full protections afforded civilians.").

Nothing in AR 190-8 supports Hamidullin's attempt to claim immunity for the Taliban by invoking the same rules that they systematically violate.

The determination of whether the Taliban in general satisfy the Article 4 criteria is properly made by the Commander-in-Chief rather than by mid-level officers in individual AR 190-8 tribunals. Neither the Regulation nor the GPW can plausibly be construed to require the government to bring Taliban detainees before a military tribunal empowered to grant POW status when the President has already determined that no such detainee qualifies. And such a construction would be an extraordinary usurpation of the President's authority to direct the armed conflict in which the United States remains engaged.

The fact that Taliban detainees do not merit tribunals under AR 190-8 or Article 5 does not mean that there is no Executive Branch process afforded to individual Taliban fighters detained in the Afghanistan conflict. The Executive Branch has applied in Afghanistan administrative tribunals to examine cases of individual detainees to ensure that their detention remains lawful and appropriate. *See Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 227 (D.D.C. 2009) (noting that the status of detainees in Afghanistan is reviewed periodically by detainee review boards that review "all relevant information reasonably available," including a written statement by the detainee if he chooses to submit one). Because these

tribunals have been conducted in the context of non-international armed conflict where none of the detainees could qualify as POWs, these tribunals do not determine potential POW status but rather determine whether a detainee was in fact a person who joined hostile forces or engaged in hostilities. *Id*. Hamidullin has made no claim that this process was inadequate, nor could he, since he does not dispute that he was a Taliban fighter and could lawfully be detained under the law of war.

The Executive's determinations regarding the character of the conflict, the status of the Taliban, and the proper application of the GPW and AR 190-8 are entitled to great deference by this Court. These determinations constitute a classic exercise of the President's war powers and his authority over foreign affairs that also implicates his exclusive authority to determine whether a foreign government merits recognition. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) ("Recognition is a topic on which the Nation must speak . . . with one voice . . . . That voice must be the President's.") (internal quotation marks and citations omitted); *Water Splash, Inc. v. Menon,* 137 S. Ct. 1504, 1512 (2017) (courts give "'great weight' to 'the Executive Branch's interpretation of a treaty.'") (citation omitted); *Lindh*, 212 F. Supp. 2d at 556 (recognizing that deference was appropriate in considering the application of the GPW to the Taliban).

III. Even if the Government Violated AR 190-8, That Would Not Entitle Hamidullin to Reversal of His Conviction

Even if a military tribunal under AR 190-8 should have been convened in Hamidullin's case, he would not be entitled to a reversal of his conviction. *See United States v. Caceres*, 440 U.S. 741 (1979) (executive department's violation of its own regulation did not warrant an exclusionary remedy in a criminal trial). AR 190-8 does not extend any substantive rights; instead, it merely establishes internal policies. *See* AR 190-8 ¶ 1-1(a); *cf. United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003) (internal Justice Department policies "do not vest defendants with any personal rights"). The Army regulation neither limits the district court's jurisdiction nor creates rights for enemy combatants that can be enforced in civilian courts. *See, e.g.*, DoD Directive 2310.01E, DoD Detainee Program, August 19, 2014, Incorporating Change 1, May 24, 2017, ¶ 1.d. (noting that the Directive "[i]s not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law").[5] Neither the regulation nor any related legislation creates such rights.[6]

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5 available at: http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf

6 Although the D.C. Circuit in *Al-Warafi v. Obama*, 716 F.3d 627 (D.C. Cir. 2013), stated that a habeas petitioner could invoke AR 190-8 "to the extent that the regulation explicitly establishes a detainee's entitlement to release from custody,"

In addition, the district court's adjudication of Hamidullin's assertion of combatant immunity, following extensive briefing and testimony from multiple experts, satisfied any requirement in AR 190-8 for a determination of status by a competent tribunal. The district court can function as a "competent tribunal" under the GPW when such matters arise within its jurisdiction, and Article III courts provide at least as much substantive and procedural protections as the process specified in AR 190-8. *See Hamdan*, 415 F.3d at 43 (holding that a criminal prosecution before a military commission satisfied any entitlement to a "competent tribunal" under AR 190-8). For that reason, even assuming that the failure to adjudicate Hamidullin's POW status before a military tribunal under AR 190-8 amounted to a procedural error, that error was harmless in light of the district court's substantive determination – subject to this Court's review – that Hamidullin did not qualify for that status.

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that statement was limited to the petitioner's entitlement to release as "medical personnel" under the Regulation. *Id.* at 629. Neither the "medical personnel" provisions nor any other provisions that "explicitly establish[] a detainee's entitlement to release from custody" are at issue here. Moreover, the *Warafi* court's ultimate holding supports the government's position here. *See id.* at 632 ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention.").

Respectfully submitted,

Dana J. Boente
Acting Assistant Attorney General
National Security Division

_____/s/_____
Joseph Palmer
Attorney
Jennifer E. Levy
Trial Attorney

Dana J. Boente
United States Attorney

_____/s/_____
Richard D. Cooke
Assistant United States Attorney

Certificate of Service and Compliance

I certify that on July 11, 2017, I filed electronically the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all counsel of record. I also certify that this brief complies with the formatting and length restrictions that this Court ordered.

By: _____/s/_____

Richard D. Cooke
Assistant United States Attorney
Eastern District of Virginia
919 East Main Street, Suite 1900
Richmond, Virginia 23219
(804) 819-5400
richard.cooke@usdoj.gov