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

BRIEF OF THE UNITED STATES

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INTRODUCTION

The defendant led a group of insurgents and attacked an Afghan Border Police compound known as Camp Leyza on November 29, 2009. The defendant and his insurgent band were operating under the auspices of the Haqqani Network, a violent group allied with the Taliban. The defendant and his insurgents correctly expected U.S. military helicopters to respond to the assault on Camp Leyza and tried to shoot down two Apache helicopters. Fortunately, the defendant's attack was thwarted, and the defendant was captured. After an intervening period of detention, this prosecution ensued.

ISSUES PRESENTED

I. Did the defendant carry his burden of proving that he was a lawful combatant entitled to immunity from criminal prosecution and dismissal of the indictment by virtue of his loose association with the Taliban and Haqqani Network?

II. Did the defendant present or proffer sufficient evidence to support all the elements of the affirmative defense of public authority, when the defendant's position was that, as of 2009, members of the Taliban (or perhaps the Haqqani Network) possessed actual authority to authorize violation of U.S. domestic criminal law?

III. Does 18 U.S.C. § 32(a), which, as relevant here, criminalizes attacks on U.S. military aircraft, apply by its plain terms to the defendant's efforts to attack U.S. military helicopters?

STATEMENT OF THE CASE

I. Summary of the Facts

A. The Taliban and Haqqani Network

The facts in this subsection are drawn from the pretrial hearing on the defendant's motion to dismiss based on combatant immunity. As the district court noted, much of the disputed testimony at that hearing was expert testimony on a

legal issue, namely, the appropriate interpretation of relevant provisions of the law of war. But the uncontroverted factual evidence is reviewed first below.

1. Uncontroverted Evidence Relating to the Taliban and Haqqani Network.

Testimony of Barclay Adams. The United States called Barclay Adams, a Senior Intelligence Officer for Afghan political security issues at U.S. Central Command. Joint Appendix (hereinafter "JA") 207. Adams provided an overview of the Taliban and Haqqani Network. The Haqqani Network is a Taliban-affiliated group of militants that operates out of Pakistan and spearheaded insurgent activity in Afghanistan. It has been designated as a Foreign Terrorist Organization under section 219 of the Immigration and Nationality Act since September 19, 2012.

Adams described the Taliban and Haqqani Network as closely aligned. The Haqqani Network was founded by Jalaluddin Haqqani, who pledged loyalty to Mullah Omar, who was at that time the leader of the Taliban. After 2001, the groups receded into Pakistan. The Haqqani Network remains closely aligned with the Taliban and is represented in senior echelons of the core Taliban leadership. JA 211-12.

Adams testified regarding the organization of the Taliban. He described that Mullah Omar was the leader of the Taliban at the time of the events giving rise to this case. Below Omar there was a Shura council of senior Taliban leaders. JA

218-19. He further noted that in southern Afghanistan "[t]here was a much more cohesive command and control network" between senior Taliban leadership and the lower levels of the organization because that is where the Taliban originated. JA 219. However, in the other areas of Afghanistan, "the Taliban leadership did not have good command and control over" the fighters and commanders on the ground. JA 220. The Haqqani Network, Adams testified, maintains better "military structure" than the Taliban. JA 222.

Adams testified regarding various rules promulgated by the Taliban and the degree to which those rules are actually followed in practice. First, the Taliban do not enforce their own rules against the Haqqani Network. JA 222-23 (Taliban do not enforce rules, including rules about protecting civilians, against the Haqqani Network). The Haqqani Network itself "is a much more brutal network than the core Taliban." JA 223. The Haqqani indiscriminately kill civilians, engage in kidnappings and hostage taking, including of foreign journalists, and promote suicide attacks. JA 223-24.

Regarding the treatment of prisoners, the Taliban rules appear to provide for detention and decisions regarding treatment by higher level Taliban members. JA 227-30. But, in practice, Adams testified "what we see most commonly is that if Afghan National Army personnel are captured, they're summarily executed. Either

shot, we've seen beheadings. And we don't see an effort to maintain these prisoners in any form that we would recognize as legal." JA 227-28; JA 229 ("habitually" kill captured Afghan army or police members). The Taliban rules do allow for summary execution of so-called "infidel fighters." JA 228-29.

Adams described various tactics of the Taliban. The Taliban attack and kill civilian construction workers. JA 232. The Taliban utilize children and the mentally handicapped in suicide bombings. JA 233. They employ suicide bombers, who use concealed weapons, against civilian targets: "there have been countless examples, hundreds over the years, of suicide bombings that have occurred in hotels, in restaurants, and in – against buses." JA 234. *See also* JA 235 (describes suicide bombings and use of concealed weapons). Despite what their rules might suggest, the Taliban leadership does not have good control over the suicide bombings. JA 234. And the Taliban threaten and assassinate Afghan civilians who cooperate with coalition forces. JA 237-38.

Adams testified regarding the Taliban's lack of uniforms. The Taliban have implemented a rule that their "uniform" is to be the same attire that local civilians wear. They do this in order to be harder to recognize. JA 238. Sometimes the Taliban wear the opposing forces' uniforms to facilitate infiltration of enemy positions. JA 239 (Taliban "will routinely wear U.S. Army uniforms when they

conduct these attacks [on U.S. bases]. We see them wear Afghan Army uniforms, Afghanistan police uniforms when conducting suicide bombings because it allows them to get into – in and among the population without being identified.”). Otherwise, they wear civilian clothing: “When not wearing our uniforms, they have no other uniform. So they will wear traditional Afghan clothing so it’s really impossible when you go into a village to identify who is Taliban and who is not in a village because they’re all dressed the same.” JA 239. In short, neither Taliban nor Haqqani Network forces display any distinctive mark or insignia. JA 239.

Testimony of John Dempsey. The United States called John Dempsey, who serves as the senior advisor to the United States Special Representative for Afghanistan and Pakistan at the State Department. JA 260. Dempsey testified to the history of the Afghan government from the time preceding the September 11, 2001 terrorist attacks on the United States to the time of the offense. Preceding the September 11 terrorist attacks, only three countries – Pakistan, United Arab Emirates, and Saudi Arabia – gave diplomatic recognition to the government of the Islamic Emirate of Afghanistan, which is what the Taliban called itself. Those countries quickly withdrew their recognition after the September 11 attacks. JA 275-76. In and around October of 2001, the United States and coalition partners drove the Taliban leadership and fighters into hiding. JA 266. In 2002, the United

Nations Security Council and General Assembly recognized the government of Hamid Karzai as the legitimate government of Afghanistan. JA 269-70.

As of today, no country in the world recognizes the Taliban as a legitimate government of Afghanistan. JA 276. The United States never recognized the Taliban as a legitimate government of Afghanistan. JA 278.

2. Disputed Expert Testimony Relating to the Proper Legal Interpretation of Geneva Convention.

U.S. Expert Colonel (Ret.) Hays Parks. The United States called U.S. Marine Corps Colonel (Retired) Hays Parks to testify regarding the law of war and the applicability of the pertinent Geneva Convention (which Convention is described further below) to the Taliban and the Haqqani Network. Colonel Parks had a distinguished career in the U.S. military, culminating in service as a civilian attorney in the Department of Defense General Counsel's Office. JA 284.

Colonel Parks testified that the United States initially characterized the war in Afghanistan as an international armed conflict. JA 314. However, after the Taliban were removed from power, and States, including the United States, recognized the Karzai government as the legitimate government of Afghanistan, the conflict ceased to be an international armed conflict. From that point on, the United States and other coalition partners were present in Afghanistan at the request and invitation of its government, and any ongoing hostilities would fall not under the

terms of Article 2 of the Geneva Convention – relating to international armed conflicts – but under Article 3 – relating to non-international armed conflicts. JA 311-12, 314.

For these reasons, Colonel Parks did not consider the provisions of Article 4 to be relevant to the conflict in Afghanistan in 2009, since Article 4 only applies in the event of an international armed conflict under Article 2. JA 328. But Colonel Parks also testified about the legal interpretation of Article 4. Colonel Parks testified that the four criteria for a lawful force listed in Article 4(A)(2), were understood to characterize the lawful forces listed in Articles 4(A)(1) (armed forces of a Party) and (A)(3) (regular armed forces that profess allegiance to a government not recognized by the Detaining Power) . JA 332, 340-41.

In his opinion, the Taliban and Haqqani Network did not qualify as Article 4(A)(1) forces in 2009 because they were not the regular armed forces of the government of Afghanistan. JA 341-42. The Taliban and Haqqani Network did not qualify as Article 4(A)(2) forces in 2009 because (a) they do not generally have officers who are responsible for their troops, (b) they wear no distinctive mark or insignia,[1] (c) they employ tactics of carrying concealed weapons generally and

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[1] Colonel Parks acknowledged that there was some evidence that the Taliban wore black turbans at the time of the United States' first involvement in the conflict, but he also testified that there was no evidence that the Taliban wore distinctive marks in and around 2009.

specifically employ suicide bombers who carry concealed explosives, and (d) their operations violated the law of war, including through the intentional targeting of civilians. JA 342-44. Nor do the Taliban or Haqqani Network qualify as lawful combatants pursuant to Article 4(A)(3). Neither group fights on behalf of a State, meets the four criteria listed in Article 4(A)(2), nor accepts and applies the Geneva Convention. JA 345.

Defense Expert Professor Jordan Paust. The sole defense witness called at the evidentiary hearing was Professor Jordan Paust. JA 416. Professor Paust is a professor at the University of Houston, and he previously taught international law at the U.S. Army Judge Advocate Generals School. JA 417.

Professor Paust testified that a belligerent force is entitled to the protections of the Geneva Convention. He testified that a group may qualify as a belligerent force if it controls territory, has military units and fields them in sustained or protracted hostilities, and engages in combat missions. JA 436.

On cross-examination, however, Professor Paust was questioned about whether ISIS (an acronym for the Islamic State of Iraq and Syria) would qualify as a belligerent entitled to the protections of the Geneva Convention under his definition. Professor Paust characterized ISIS as an insurgency, and appeared to add to his criteria for a belligerent the following factors: a belligerent must have the semblance

of government, claim to represent a State, and be recognized as a legitimate government by some other State. JA 477-78.

Professor Paust testified that in his opinion the conflict in Afghanistan was an international armed conflict, within the meaning of Article 2 of the Geneva Convention, and that the international nature of the conflict continued up to the date of the offenses charged here. JA 450-52, 456-57. Professor Paust testified that the Taliban qualified as a belligerent. JA 452 (Taliban are a belligerent because they possess the semblance of government, claim to represent Afghanistan, and have military units).

Professor Paust opined that the four criteria appearing in Article 4(A)(2) of the Geneva Convention do not apply to the other Article 4(A) sections. JA 440-41. He further opined that the Taliban fall within the Article 4(A)(1) and 4(A)(3) categories. JA 453-55, 464-65, 481-82, 483-86, 491. Professor Paust conceded that the Taliban do not meet the four criteria enumerated in Article 4(A)(2). JA 481 ("I do not argue that they meet these criteria.").

B. The Attack on Camp Leyza

Hamidullin is a former Russian Army officer who defected to fight for the Taliban and eventually assumed a position of responsibility in association with the Haqqani Network. He planned and led the attack on Camp Leyza, an Afghan

Border Police (ABP) compound in Khost Province, Afghanistan on November 29, 2009. JA 1647-50, 1735, 1744-46, 1755 (Ex. 102)[2], 1740 (Ex. 162), JA 1741 (Ex. 164), JA 1744 (Ex. 166). Although U.S. forces were not present at the time of the attack, the Afghan personnel at the camp were trained by and worked with the United States military and its partners in the International Security Assistance Force (ISAF). During that time period, ISAF forces were working to neutralize insurgent groups operating in the area, including the remnants of the Taliban forces and others who were part of the Haqqani Network. JA 1092-98, 1176-78, 1217-18, 1222, 1470-71.

Hamidullin chose Camp Leyza, which is close to the Afghanistan-Pakistan border, as the target of the attack. JA 1093-94, 1744 (Ex. 166). In preparation, Hamidullin trained his fighters and gathered heavy-duty weaponry, including AK-style assault rifles, hand grenades, a DsHK anti-aircraft machine gun, an 82 millimeter recoilless rifle, a BM1 portable rocket, rocket-propelled grenades (RPGs), and other weapons. JA 1121-23, 1229-31, 1745-46, 1749-52, 1755-56 (Ex. 102), 1756 (Ex. 103a). Hamidullin expected U.S. military helicopters to respond to the assault. JA 1749, 1756 (Ex. 103a). Therefore, his operational plans

[2] Certain JA references are to portions of the trial transcript where an exhibit containing a video clip of the defendant's statement along with a transcript of that statement was played for the jury. The transcript does not contain the text of the statements in that video clip, but the transcripts and video exhibits are in the record.

included arranging personnel and weaponry to ambush responding U.S. aircraft with heavy machine guns, recoilless rifles, and RPGs. JA 1647-50, 1749-52, 1756-58, 1756 (Ex. 168), 1757 (Exs. 170, 172), 1758 (Ex. 204).

During the evening of November 28, 2009, three different insurgent groups positioned themselves around Camp Leyza. JA 1646-48. Around midnight, the insurgents attacked the camp. JA 1745. As anticipated, the U.S. military immediately responded to the attack by sending helicopters from another base located in the Khost Province. JA 1263-67. When the helicopters arrived, Hamidullin's group attempted to utilize their anti-aircraft weapons. Both weapons malfunctioned and did not fire. JA 1658, 1755 (Ex. 102), 1756 (Exs. 103a, 168). Soon thereafter, the coalition forces defeated the attack and killed a number of insurgents. There were no ABP or U.S. casualties in responding to the attack.

The next morning, combined U.S. and Afghan forces began a battle damage assessment of the area. The coalition forces encountered Hamidullin, who was armed with an AK-47 assault rifle. Hamidullin fired shots at the coalition force and was wounded in the hip and leg when the coalition force returned fire. Hamidullin surrendered, and U.S. forces captured him. JA 1186-89, 1421-1424, 1479-81.

C. Hamidullin's Statements to FBI Agents Regarding His Role in the Attack.

Following his capture, Hamidullin was detained at U.S. facilities in

Afghanistan. Hamidullin waived his *Miranda* rights and agreed to speak with FBI agents. JA 1635-36, 1721-23. Each of the ensuing interviews of Hamidullin was either video or audio recorded. JA 1637-39, 1728.

Hamidullin admitted that he planned the attack on Camp Leyza for two months with the permission of Sirajuddin Haqqani, a senior leader of the Haqqani Network, and in cooperation with the Taliban. JA 1735, 1740 (Ex. 162), 1741 (Ex. 164), 1744-46. Although he described planning and resourcing the operation, providing guidance on U.S. response times, issuing tactical instructions during the operation including ordering the retreat, Hamidullin maintained that he was not the overall leader of the force. Instead, he referred to himself as a mere "coordinator." JA 1655, 1735, 1737-38, 1748, 1736 (Ex. 127).

Hamidullin discussed some past dealings with the Taliban. JA 1736 (Ex. 127), 1738 (Ex. 144). He also acknowledged his operational relationship with the Haqqani Network in receiving permission from Sirajuddin Haqqani to conduct the attack on Camp Leyza. JA 1740 (Ex. 162), 1741 (Ex. 164).

II. The Proceedings Below

On October 8, 2014, a federal grand jury in the Richmond Division of the Eastern District of Virginia returned a twelve count indictment against Hamidullin. JA 6. On April 23, 2015, the grand jury returned a fifteen count second superseding

indictment charging Hamidullin with:

- conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A (Count 1);
- providing material support to terrorists in violation of 18 U.S.C. § 2339A (Count 2);
- conspiracy and attempt to destroy an aircraft of the armed forces of the United States in violation of 18 U.S.C. § 32 (Counts 3 and 4);
- conspiracy and attempt to kill an officer or employee of the United States or a person assisting such officer or employee in violation of 18 U.S.C. §§ 1117 and 1114 (Counts 5, 6 and7);
- conspiracy and attempt to murder a national of the United States in violation of 18 U.S.C. § 2332(b) (Counts 8, 9 and 10);
- engaging in physical violence with intent to cause serious bodily injury to a national of the United States in violation of 18 U.S.C. § 2332(c) (Counts 11 and 12);
- conspiracy to use a weapon of mass destruction in violation of 18 U.S.C. § 2332a (Count 13); and
- possession of and conspiracy to possess a firearm in connection with a crime of violence in violation of 18 U.S.C. §§ 924(c) and (o) (Counts 14

and 15).

JA 11, 33-54.

Hamidullin filed various pretrial motions, including a motion to dismiss the indictment on the grounds that the defendant had combatant immunity under the common law doctrine of public authority. JA 55-88. After a two-day hearing on the motions, the district court denied defendant's motion to dismiss in its July 13, 2015 opinion. JA 721-763.

On July 20, 2015, Hamidullin filed a proposed jury instruction regarding the public authority defense. JA 794-800. The government filed a motion to strike the instruction. JA 809-15. After a second hearing on pretrial motions, the district court granted the government's motion to strike the defendant's public authority jury instruction. JA 893-95.

A jury trial commenced on July 30, 2015, and concluded on August 7, 2015, with a verdict of guilty as to all counts in the Second Superseding Indictment. JA 2171-78, 2183-90.

After the jury's verdict, Hamidullin moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, or for a new trial pursuant to Federal Rules of Criminal Procedure 33(a) and (b)(2). Hamidullin presented various grounds for relief, including that the exclusion of all evidence relating to the

public authority defense violated his constitutional right to present a defense at trial. JA 2191-212, 2264-73. A post-trial motions hearing was held on November 6, 2015. JA 2274-309. The district court denied defendant's motions in a memorandum opinion. JA 2310-20, 2321.

After sentencing, Hamidullin timely noticed his appeal from the district court's final judgment. JA 2329-30.

SUMMARY OF ARGUMENT

As the district court noted, the question in this case is whether Hamidullin was a lawful combatant, entitled to immunity from domestic criminal prosecution, or a violent criminal who may be appropriately held to account for his crimes in a court of law. As applicable in this federal criminal prosecution, the affirmative defense of lawful combatant immunity distinguishes between a lawful soldier or militiaman, on the one hand, and an unlawful brigand or insurgent, on the other. War and armed conflict have doubtlessly yielded cases over the years where it was unclear on what side of that line a given fighter ought to fall. This is not one of those cases. As the district court found based on the evidence adduced at the motions hearing, the Taliban and the Haqqani Networks systematically violated the law of war as a matter of calculated policy and bloody practice. JA 761.

The district court's conclusion that Hamidullin is not entitled to combatant immunity by virtue of association with the Taliban and Haqqani Network is supported on two independent grounds. Both parties and the district court agreed that Hamidullin's claim to lawful combatant status is most appropriately assessed in light of the provisions of the *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 1956 WL 54809 (U.S. Treaty 1956) (hereinafter the "GPW"). First, for the relevant portions of the GPW to apply, there must be an international armed conflict within the meaning of Article 2 of the GPW. By 2009, when the events of this case occurred, the conflict in Afghanistan was not an international armed conflict. At that time, the conflict was between, on one side, Afghanistan's internationally recognized government, the United States and other States, and on the other side, the Taliban and other non-State armed groups.

Second, even assuming the conflict in Afghanistan retained its international nature in 2009, Hamidullin and his armed group of insurgent fighters would not qualify as lawful combatants under the terms of Article 4 of the GPW. As the district court recognized, of the various categories of potential lawful combatants listed in Article 4, Hamidullin and his cohorts are most naturally analyzed as potential "militias" or "other volunteer corps" referenced in Article 4(A)(2). Such

forces must meet the four factors listed in Article 4(A)(2)(a) through (d). The evidence adduced at the pretrial hearing on Hamidullin's motion to dismiss the indictment overwhelmingly supported the district court's conclusion that the Taliban and Haqqani Network do not meet any of these criteria. Nor would these groups qualify under any of the other Article 4 categories of lawful combatants.

Hamidullin labels the district court's decision a "radical conceit," in that, he claims, it holds that only one side in the ongoing conflict in Afghanistan is entitled to shoot. Hamidullin Br. at 14. To the contrary, there is nothing "radical" about the district court's holding. The only other U.S. court known to have analyzed whether the Taliban qualify for lawful combatant status under the GPW – U.S. District Judge T.S. Ellis, III in *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) – reached the same conclusion as the court below. Likewise, then-President George W. Bush determined that the Taliban did not qualify for the protections afforded under Article 4 of the GPW. And if there is a "conceit" in this case, it is Hamidullin's claim that organizations such as the Taliban and Haqqani Network, which make it both a policy and a practice to *violate* the laws of war, may nevertheless claim *immunity* from the same laws they flout.

Hamidullin's public authority defense fares no better. The public authority defense is generally available only when a U.S. official has directed the otherwise

illegal conduct, and Hamidullin makes no such claim here. Rather, Hamidullin claims that he was entitled to rely on some higher authority, presumably within the Taliban or Haqqani Network, to legitimize his actions under U.S. law. But in this regard Hamidullin fails to identify how his public authority claim has any distinct existence separate and apart from his combatant immunity claim. Hamidullin adduces no authority holding that an individual can achieve immunity from prosecution (or a defense at trial) merely by claiming that he acted at the behest of some foreign group or government. His lack of authority is perhaps unsurprising, given that acceptance of his argument would open the door for a variety of insurgents and violent extremists to claim they acted on the orders of an entity, perhaps such as the so-called Islamic State, that they believed to be a government.

Finally, Hamidullin's specific challenge to his convictions for violation of Section 32(a) of Title 18, relating to attacks on military aircraft, is meritless. Section 32 applies to Hamidullin's charged conduct by its clear terms; Hamidullin makes no argument to the contrary. Rather, his claim relies on a supposed congressional intent not to apply Section 32*(b)* – relating to civilian aircraft – to lawful acts of war committed by soldiers. Even if true, Congress's intent would not trump the plain language of the statute, and this argument merely presumes Hamidullin's basic claim that he is a lawful combatant, which he is not.

ARGUMENT

I. The District Court Properly Denied Hamidullin's Motion to Dismiss the Indictment Based on Combatant Immunity.

A. Standard of Review

The United States agrees with Hamidullin that the district court's factual findings on this issue are reviewed for clear error and its legal conclusions are reviewed de novo. Hamidullin Br. at 15. Hamidullin's motion to dismiss the indictment was premised on Federal Rule of Criminal Procedure 12(b)(1), which allows a defendant to raise by pretrial motion "any defense . . . that the court can determine without a trial on the merits." FED. R. CRIM. P. 12(b)(1).

B. Hamidullin Is Not a Lawful Combatant Entitled to Immunity From Criminal Prosecution Under International Law.

The United States argued below that Hamidullin's combatant immunity claim failed for two essential reasons. First, at the time of the offenses the continued conflict against the Taliban in Afghanistan was not an international armed conflict under Article 2 of the GPW, and therefore, the provisions of the GPW that reflect the doctrine of combatant immunity do not apply to the Taliban. Second, even if that were not the case, Hamidullin's bid for "lawful combatant" status would fail as members of the Taliban and Taliban-affiliated groups do not qualify for prisoner-of-war status under Article 4 of the GPW.

The district court did not decide the first issue, and it ruled in favor of the United States on the second issue. Hamidullin's arguments fail, however, on both grounds. Moreover, Hamidullin's claim that he ought to have received a more individualized assessment of his combatant circumstances is unavailing both as a matter of law and fact.

1. <u>The law of combatant immunity.</u>

Lawful combatant immunity is a doctrine reflected in international law, including the customary international law of war. It "forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets." *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002)[3]; *see also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942). Belligerent acts committed by lawful combatants in an armed conflict generally "may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict." *Lindh*, 212 F. Supp. 2d at 553.

[3] The United States recognizes that *Lindh* is a decision by a lower court; the Lindh case was resolved by guilty plea and did not result in an appeal. Though not binding precedent, *Lindh* and the decisions below are the only two decisions by courts in the United States applying the combatant immunity doctrine to Taliban or Taliban-affiliated fighters. The *Hamdi* case, which came before this Court and was ultimately decided by the Supreme Court, did involve the Taliban, but that case did not involve a criminal prosecution. The issues centered around the individual's non-punitive detention as an "enemy combatant," and not whether he was a lawful or unlawful combatant.

The concept of lawful combatant immunity has a long history preceding the GPW and is grounded in common law principles, early international conventions, statutes, and treatises. *See Instructions for the Government of the Armies of the United States in the Field,* Headquarters, United States Army, Gen. Order No. 100 (Apr. 24, 1863), *reprinted in The Laws of Armed Conflicts* 3 (3d ed. 1988) ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."); Col. William Winthrop, *Military Law and Precedents*, at 791 (2d ed. 1920) ("[T]he status of war justifies no violence against a prisoner of war as such, and subject him to no penal consequence of the mere fact that he is an enemy."); *Hague Convention Respecting the Laws and Customs of War on Land* ("Hague Convention"), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539;[4] Brussels Declaration of 1874, Article IX, July 27, 1874, *reprinted in The Laws of Armed Conflicts* 25 (3d ed. 1988); *Manual of Military Law* 240 (British War Office 1914).

As noted by *Lindh* – and as agreed by both parties in this case[5] – the combatant immunity doctrine is reflected in the provisions of the GPW. *See Lindh*, 212 F. Supp. 2d at 553. The United States is a party to the GPW and it

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[4] The United States is a party to the Hague Convention.

[5] Hamidullin frames nearly his entire combatant immunity argument on appeal around the terms of the GPW. *See* Hamidullin Br. at 17-27.

therefore has the force of law in this case under the Supremacy Clause. *See* U.S. Const. art. VI, § 2.

The GPW sets forth certain principles with respect to the prosecution of persons entitled to prisoner-of-war status under the GPW:

> Article 87: "Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts."

and

> Article 99: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."

GPW, arts. 87 and 99. Taken together, these Articles "make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war." *Lindh*, 212 F. Supp. 2d at 553.

Although immunity based on lawful combatant status may be available as an affirmative defense to criminal prosecution in appropriate circumstances, this defense is not available to a defendant just because he believes that he has justly taken up arms in a conflict.[6] *Lindh*, 212 F. Supp. 2d at 554. Rather, this defense

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[6] To the extent Hamidullin contends that the GPW, of its own force, provides a defense to the charges (as opposed to his reliance on a common law defense that incorporates the GPW standards for lawful participation in armed conflict), such a contention would lack merit. *See Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (concluding that the predecessor to the current GPW—the Third Geneva

is available only to a defendant who can establish that he is a "lawful combatant" against the United States under the requisite criteria established in international law that is binding upon the United States – that is, "members of a regular or irregular armed force who fight on behalf of a state and comply with the requirements for lawful combatants." *Id.* at 554. *See also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1222 (USCMCR 2007).

Importantly, the burden of establishing the application of the combatant immunity defense is upon the defendant raising an affirmative defense. *See Lindh*, 212 F. Supp. 2d at 557 (holding "it is Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity" by showing that "the Taliban satisfied the four criteria required for lawful combatant status outlined by the GPW"); *id.* at 557 n.36 (noting that defendants bear the burden of proving affirmative defenses and citing in support

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Convention of 1929—conferred rights on alien enemies that could be vindicated "only through protests and intervention of protecting powers," not through the courts).

Mullaney v. Wilbur, 421 U.S. 684, 697-99 (1975), and *Smart v. Leeke*, 873 F.2d 1558, 1565 (4th Cir. 1989)).

On appeal, Hamidullin argues that under the GPW he is presumed to be entitled to prisoner of war (POW)[7] status until he receives an Article 5 hearing from the military, which he asserts he never received. He argues that the United States therefore bore the burden below to prove that he was not entitled to POW status. Hamidullin Br. at 19-20. This argument fails for at least three reasons. First, the primary authority for this argument is Article 5 of the GPW, which provides, in relevant part, that

> [s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GPW art.5, ¶ 2. The condition precedent for Article 5 is "doubt" as to whether a person is entitled to the Article 4 protections. For the reasons described in detail below, when Hamidullin was captured, there really was no appreciable doubt as to whether the Taliban or their associates qualified as lawful combatants.

Second, Article 5 simply says the individual enjoys GPW protections until the person's status is determined by a "competent tribunal." Article 5 does not

[7] In this brief, for ease of reference, the United States generally uses the terms POW and lawful combatant interchangeably.

say which side bears the burden of production or persuasion when that tribunal convenes. Thus, even assuming Article 5 applies to this federal criminal prosecution – a point that is not at all evident and which the United States does not concede – it does not address which side bears the burden of proof, and the normal rules of the United States criminal process, which place the burden of production and persuasion for affirmative defenses on the defendant, would continue to govern.[8]

Third, Hamidullin's position conflicts with deeply entrenched law. "[I]t bears repeating that, at common law, the burden of proving 'affirmative defenses – indeed, 'all . . . circumstances of justification, excuse or alleviation' – rested on the defendant.'" *Dixon v. United States*, 548 U.S. 1, 8 (2006) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977); 4 W. Blackstone, Commentaries *201)). And this common-law rule "accords with the general evidentiary rule that 'the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.'" *Id.* (quoting 2 J. Strong, MCCORMICK ON EVIDENCE § 337, p.415 (5th ed. 1999)). The Supreme Court has

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[8] Certain U.S. military documents cited by Hamidullin, Hamidullin Br. at 20, suggest only that the military, as a matter of policy, may be over-inclusive when it comes to according detained individuals the protections of the GPW, at least until their status is determined. The military is of course free to go above-and-beyond what the law requires as a matter of policy and prudence, but these documents add nothing to the legal issues disputed here.

applied this rule to the defense of duress in federal criminal cases. *Id.* at 13-14. The same should apply here.

2. By 2009, hostilities in Afghanistan were non-international in <u>nature.</u>

The provisions of the GPW that have been interpreted as reflecting the principles of combatant immunity do not apply to the Taliban or the Haqqani Network[9] in this case. Under GPW Article 2, the provisions of the Convention apply to "all cases of declared war or of any other *armed conflict which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them." GPW, art.2, ¶ 1 (emphasis added). In other words, for the GPW Article 4 provisions defining the categories of persons who are entitled to be treated as prisoners of war to be triggered, there must first be an international armed conflict within the meaning of Article 2. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 73 (D.D.C. 2009) (noting that Article 4 does not apply to the non-international armed conflict with al Qaeda). If there is no international armed conflict within the meaning of Article 2, then the provisions of Article 3, which govern conflicts not of an international character, address the treatment of captives.

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[9] Hamidullin presented essentially no evidence at the motions hearing regarding his allegiance to either the Taliban or the Haqqani Network. *See* JA 759 (district court opinion noting that "little was said about the Defendant as an individual military actor" at the motions hearing).

Hamidullin does not claim that Article 3 provides for combatant immunity, nor could he.

Regardless of the nature of the conflict in Afghanistan in 2001, by November 2009 the Taliban had been removed from power in Afghanistan for *eight years* and was not the government for Afghanistan (the GPW "High Contracting Party"). At the time of Hamidullin's attack, there was no international conflict between the United States and Afghanistan. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (noting that the conflict with al Qaeda is a "conflict not of an international character"). Rather, the two powers, along with other States, were working together in a coalition directed at assisting the legitimate Afghan government to stop the Taliban's unlawful attacks within the country's borders. *See supra* at pp.6-7.

The International Committee of the Red Cross ("ICRC"), a non-governmental organization with expertise in interpreting the GPW, came to the same conclusion in 2007:

> This conflict [against the Taliban] is non-international, albeit with an international component in the form of a foreign military presence on one of the sides, because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States. *The ongoing hostilities in Afghanistan are thus governed by the rules applicable to non-international armed conflicts found in both treaty-based and customary IHL* [International Humanitarian Law].

Int'l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 725 (2007) (emphasis added).[10] *See also* Int'l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 10 (2011)[11] ("As the armed conflict does not oppose two or more states, i.e. as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature). The applicable legal framework is Common Article 3 and customary IHL.").

Under the GPW, if a conflict is not international in nature, detainees captured in the course of the conflict are entitled only to the limited humanitarian protections enumerated in Article 3. They are not entitled to the panoply of protections contained in the remaining articles of that Convention. This distinction is important here because the various provisions of the GPW that require a State to afford combatant immunity protections only apply during international armed conflict. *See* Int'l Comm. Red Cross, *International Humanitarian Law and the*

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[10] Available at https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf.

[11] Available at https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

Challenges of Contemporary Armed Conflicts, at 726 (2007) ("*only in international armed conflicts* does IHL [International Humanitarian Law] provide combatant (and prisoner-of-war) status to members of the armed forces. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives.") (emphasis in original)[12]. In contrast, individuals who fight for non-State armed groups non-international armed conflicts and are held under Article 3 are not entitled to combatant immunity. *See id.* at 728 ("Upon capture, civilians detained in non-international armed conflicts do not, as a matter of law, enjoy prisoner-of-war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict . . . .").

Hamidullin below argued that the second paragraph of GPW Article 2 supports his claim to entitlement to its protections. It provides that the "Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." GPW, art. 2, ¶ 2. That provision, however, is not relevant as Afghanistan is not

[12] Available at https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf.

occupied under the laws of war; nor was it occupied at the time of Hamidullin's offenses.[13]

3. Even assuming the conflict in Afghanistan fell within Article 2 of the GPW in 2009, the defendant and his cohorts did not qualify as lawful combatants under Article 4.

Even assuming for the sake of argument that the conflict in Afghanistan was international in nature as of 2009, Hamidullin cannot meet the stringent requirements for claiming POW or lawful combatant status under GPW Article 4. Article 4 lists a number of categories of persons who may qualify for POW status, but only the first three are potentially relevant here. Article 4(A)(1) of the GPW provides POW status to "Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces." Article 4(A)(2) provides POW status to:

> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his

[13] There is a final exception set forth in the last paragraph of Article 2 that applies when one of the "Powers" in a conflict is not a signatory but the other is. In that instance, the signatory nation is bound to adhere to the GPW so long as the opposing Power "accepts and applies the provisions thereof." Even if the Taliban could be considered such a Power, it has not accepted and applied the provisions of the GPW, as the district court found.

subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

Finally, Article 4(A)(3) provides POW status to "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

After hearing the evidence adduced at the pretrial hearing, the district court concluded that the nature of Hamidullin's fighting group was most appropriately analyzed under Article 4(A)(2). As the Court reasoned:

> the Haqqani Network and Taliban fit most compatibly within Article 4(A)(2). These groups are not members of militias or volunteer corps forming part of the armed forces of a party to the conflict [i.e., Article 4(A)(1)]. Furthermore, they are not members of a regular armed force as contemplated by Article 4(A)(3).

JA 760-61. Based on the record established at the hearing, the district court found "that neither the Taliban nor the Haqqani Network fulfills the conditions of Article 4(A)(2)." JA 761 (finding that these groups lack a clearly defined command structure, lack a fixed distinctive sign recognizable at a distance, employ concealed weapons in the form of suicide bombers, and "neither entity conducts their operations in accordance with the laws and customs of war"). The district court also concluded that these groups did not satisfy the criteria for POW status

articulated in "any other provision of the GPW." *Id.* For the reasons detailed below, the district court's conclusion was correct.

It merits note at the outset that perhaps the principal source on which Hamidullin bases his lawful combatant arguments is a draft memorandum from the State Department Legal Advisor. Hamidullin Br. at 22-23, 24, 25, 26-27.[14] This draft memorandum's analysis was based on the circumstances at the time it was composed (in and around 2001), and did not reflect the ultimate view of the Executive Branch. "On February 7, 2002, the White House announced the President's decision, as Commander-in-Chief, that the Taliban militia were unlawful combatants pursuant to the GPW and general principles of international law, and, therefore, they were not entitled to POW status under the Geneva Conventions." *Lindh*, 212 F. Supp. 2d at 554-55. *See* Memorandum of President George W. Bush at 2 (Feb. 7, 2002)[15] ("Based on facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.").

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[14] Hamidullin's other sources appear to be legal commentators and academics. Hamidullin Br. at 22 (citing articles). With due respect to the views expressed in the cited articles, the United States submits that the view of the President, as informed by the Department of Defense, and of two federal judges, Judges Ellis and Hudson, after evidentiary hearings, carry greater weight.

[15] Available at http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.02.07.pdf.

The United States does not argue that the President's determination is dispositive of the issue. Indeed, the United States submitted its evidence to the district court for determination and to this Court for appellate review. But the President's decision is important in at least two respects. First, it reflects the position of the Executive Branch and, as such, supersedes any contrary reasoning in the draft State Department memorandum on which Hamidullin relies so heavily. Second, the President's determination that the Taliban did not qualify for lawful combatant status under the GPW is entitled to a degree of deference as a reasonable interpretation and application of the GPW to the Taliban by the Commander in Chief. *Lindh*, 212 F. Supp. 2d at 556 (noting that "courts have long held that treaty interpretations made by the Executive Branch are entitled to some degree of deference" and that the application of the GPW to the Taliban involves interpretation of the GPW); *id.* at 558 (concluding that the President's interpretation of the GPW as it applies to Lindh as a member of the Taliban was entitled to deference as a reasonable interpretation of the treaty).[16] *See also* A.A.G. Jay S. Bybee, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of*

[16] The United States does not claim that the President specifically concluded that Hamidullin was an unlawful combatant. The relevance of the President's determination is its more general conclusion that members of the Taliban militia even in 2002 did not constitute lawful combatants under Article 4.

1949, Opinions of the Office of Legal Counsel, at 3-9 (2002)[17] (hereinafter "Bybee, *Status of Taliban Forces*") (concluding that Taliban forces were most naturally analyzed as a "militia" under Article 4(A)(2), that the President had reasonable grounds to conclude they did not meet the four criteria of Article 4(A)(2), and that the four Article 4(A)(2) factors were also understood to apply, and did apply, to the armed forces described in Articles 4(A)(1) and (A)(3)).

Though the President's determination was made in 2002, none of the facts adduced at the motions hearing in this case suggest that events in the ensuing years have undermined the reasonableness of the President's determination. If anything, the experience of these years – and summarized in facts adduced at the motions hearing, *see supra* at pp.3-6 – only confirms the Taliban's ineligibility for POW status.

i. The defendant and fellow fighters are most naturally analyzed under Article 4(A)(2), and they fail to meet those criteria.

As the district court concluded, the band of fighters with which Hamidullin was affiliated was, if anything, best understood to be one of the types of "other militias," volunteer corps, or organized resistance movements referenced in Article

[17] Available at http://www.justice.gov/sites/default/files/olc/opinions/2002/02/31/op-olc-v026-p0001_0.pdf.

4(A)(2) of the GPW, as opposed to the types of groups referenced in Articles 4(A)(1) or (A)(3). Article 4(A)(2) appears to cast the broadest and the only net that could include Hamidullin's group. But to qualify for lawful combatant status under Article 4(A)(2), the group must meet all four of the specified criteria in that subparagraph. The United States presented evidence at the pretrial hearing that the Taliban and Haqqani Network essentially failed to meet any of those criteria. As summarized above, *see supra* at p.32, the district court found that these groups lacked a command structure, made tactical decisions not to wear uniforms and to wear civilian clothing to blend into the population, employed suicide bombings and other forms of attack involving concealed weapons, and engaged in systematic violations of the laws of war, including the targeting of civilian populations for attack and retribution and the summary execution of captives.

Hamidullin, for his part, presented no evidence to the contrary. Indeed, Hamidullin's own expert and sole witness at the motions hearing testified that he made no claim that the Taliban satisfied the requirements of Article 4(A)(2). *See* JA 481 (Professor Paust: "I do not argue that they meet these criteria [referring to the Article 4(A)(2) criteria].").

Unsurprisingly, given the overwhelming and uncontroverted evidence that these groups did not comply with any of the criteria, the district court specifically

found that the Taliban and Haqqani Network failed to meet the requirements of Article 4(A)(2). JA 761. *See also Lindh*, 212 F. Supp. 2d at 558 (concluding that the Taliban falls far short when measured against the four GPW criteria for lawful combatant status). Hamidullin identifies no clear error with the district court's factual findings.

ii. The defendant does not qualify as a POW under either Article 4(A)(1) or (A)(3).

As the district court concluded, Hamidullin's fighting band does not fit into either of the categories of armed forces or regular armed forces that Articles 4(A)(1) and (A)(3), respectively, contemplate. Hamidullin nevertheless claims that he meets the criteria of at least the Article 4(A)(3) category because he was affiliated with the Taliban and the Taliban constituted the armed forces of Afghanistan, even in 2009. Hamidullin Br. at 24. For the reasons explained below, even assuming Hamidullin's fighting band is considered to be part of the Taliban itself, the Taliban fail to qualify for lawful combatant status under Articles 4(A)(1) or (A)(3).

Neither Articles 4(A)(1) or (A)(3) specify the four requisite factors of a fighting force that are delineated in Article 4(A)(2). But these Article 4(A)(2) criteria have long been understood to be the *minimum* defining characteristics of any lawful armed force and were well established in customary international law before being codified in the GPW in 1949. As such, they were understood to be

basic criteria also applicable to the armed forces referenced in GPW Articles 4(A)(1) and (A)(3). *See Lindh*, 212 F. Supp. 2d at 557, n. 34; *Hague Convention Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 ("The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war."); *Manual of Military Law* 240 (British War Office 1914) ("It is taken for granted that all members of the army as a matter of course will comply with the four conditions [required for lawful combatant status]; should they, however, fail in this respect . . . they are liable to lose their special privileges of armed forces.").

Hamidullin claims that these requirements, which are specifically enumerated in GPW Article 4(A)(2), do not apply in determining whether a combatant qualifies as a prisoner of war under GPW Article 4(A)(3) as they are not expressly mentioned under that subsection. Hamidullin Br. at 24. *Lindh* considered and rejected that very argument and held that these elements must be met for all the categories of armed forces covered by the GPW. As it explained, the argument:

> ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been

> understood under customary international law to be the defining characteristics of any lawful armed force. Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a "regular armed force." It would indeed be absurd for members of a so-called "regular armed force" to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war.

Lindh, 212 F. Supp. 2d at 557, n.35 (internal cross-reference omitted). *See also United States v. Arnaout*, 236 F. Supp. 2d 916, 917-18 (N.D. Ill. 2003) (quoting favorably *Lindh*'s conclusion that all armed forces and militias must meet the four criteria if their members are to receive combatant immunity); Bybee, *Status of Taliban Forces*, at 4-9 (concluding that the four Article 4(A)(2) factors apply to the forces in Articles 4(A)(1) and (A)(3) based on the history of the GPW and its interpretation by various commentators); JA 332, 340-41 (testimony of Colonel Parks).

This analysis is fully consistent with the interpretation of the ICRC. *See* Int'l Comm. Red Cross, *Commentary - Art. 4. Part I : General provisions*, at 62-63 (1960)[18] (concluding that "These 'regular armed forces' [in Article 4(A)(3)] have

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[18] Available at https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/eca76fa4dae5b32ec12563cd00425040.

all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1) [of Article 4(A)]: they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).").

Because the four criteria listed in Article 4(A)(2) are fully applicable to Articles 4(A)(1) and (A)(3), Hamidullin failed to meet his burden to establish his eligibility for either of these other categories for the same reasons he failed to meet his burden of proving lawful combatant status under Article 4(A)(2). It bears repeating that Article 4(A)(3), on which Hamidullin primarily relies on appeal, refers to "regular armed forces" and there is no sense in which one could accurately describe Hamidullin's makeshift band of militants as regular armed forces.

Hamidullin argues that the rationale for Article 4(A)(3) was to avoid a situation where a party does not apply the GPW solely on political grounds, i.e., does not accord POW status simply by virtue of not recognizing the legitimacy of the government backing the opposing forces. Hamidullin Br. at 25. But the Taliban are distinguishable from the various historical examples Hamidullin

gathers. *See id.* at 25-27. First, while it is true that the United States has never recognized the Taliban as the legitimate government of Afghanistan, that position hardly reflects the unilateral political position of the United States. Of the roughly 200 sovereign nations of the world, only three recognized the Taliban as legitimate before September 11, 2001. For roughly eight years preceding the acts in this case, *no government in the world* recognized the Taliban as the government of Afghanistan, and they were not the *de facto* government of Afghanistan during that time. Second, even putting aside the Taliban's universal lack of recognition at the time of the offense, a government-in-exile continuing the battle (as Hamidullin would characterize the Taliban) must nevertheless field forces that comply with the laws of war, and as discussed above the Taliban fail that test in essentially every respect. It would indeed be an anomalous result if a government-in-exile were free to field forces that violated the four essential criteria of an armed force articulated in Article 4(A)(2), and nevertheless claim the benefits of Article 4 for its forces when they were captured.

4. The defendant's arguments on appeal that he could have established combatant immunity based on an individualized determination are wrong as a matter of law and fact.

Hamidullin argues that the district court failed to make an *individualized* assessment of his POW status. Hamidullin Br. at 19. Hamidullin argues that the

district court's analysis looked too broadly at the Taliban as a whole without focusing sufficiently on his own conduct. A properly individualized assessment was important, he claims, "because the inquiry under article 4(A)(2) focuses on the specific 'militia or volunteer corps' to which Mr. Hamidullin belonged," and, as such "the fact that other members of the Taliban may fail to satisfy the conditions of article 4(a)(2) – and in particular engage in violations of the laws of war – is irrelevant." Hamidullin Br. at 23.

If the district court's analysis did not sufficiently consider Hamidullin's individual circumstances, the blame lies with Hamidullin himself. As noted above, it was Hamidullin's burden to prove his eligibility for combatant immunity: it was his motion to dismiss the indictment, and here combatant immunity is an affirmative defense on which the defendant bears the burden of proving all the elements. Hamidullin's single witness at the motions hearing introduced essentially no evidence regarding his own conduct, and the defense witness conceded that the Taliban did not meet the criteria of Article 4(A)(2). Hamidullin's argument was that he was entitled to combatant immunity *by virtue of his association with the Taliban*, and so naturally the district court analyzed the Taliban's eligibility as an organization. Hamidullin would fault the district court for failing to analyze evidence he never presented. Finally, as discussed further below, *see infra* at

pp.44-47, what evidence was adduced at trial regarding Hamidullin and his band only strengthens the conclusion that Hamidullin was not associated with a lawful combatant group.

Regardless of Hamidullin's failings in this regard, the district court's analysis was appropriately focused on the organizations with which Hamidullin associated. Each of the potentially pertinent Article 4 categories refers to *organizations*. *See* GPW art.4(A)(1) (referring to the "armed forces of a Party to the conflict"); *id.* art.4(A)(2) (referring to "militias" and "other volunteer corps"); *id.* art.4(A)(3) (referring to "regular armed forces"). The four criteria in Article 4(A)(2), which, as noted above, also apply to Articles 4(A)(1) and (A)(3), simply cannot be meaningfully assessed on a solely individual basis. *See id.* art.4(A)(2)(d) (requiring assessment of whether "*their* operations" (emphasis added) are conducted in accordance with laws and customs of war).

If a military force generally follows the criteria in Article 4, the fact that some individual members of that armed force may commit war crimes does not mean that the entire force is stripped of combatant immunity. Conversely, if an armed force consciously and systematically violates the laws of war as a matter of policy and practice, the fact that individual members of that force may not have personally committed a war crime does not mean those individuals are entitled to lawful

combatant immunity. Here, the uncontroverted evidence before the district court was that the Taliban and Haqqani Network do not meet the Article 4 criteria, and therefore Hamidullin cannot claim combatant immunity by virtue of his association with them.

Hamidullin also argues that certain trial evidence supported his eligibility for GPW Article 4(A)(2) status. Perhaps Hamidullin's primary claim in this regard is that trial evidence demonstrated that he and his cohorts wore uniforms, thereby potentially complying with the GPW Article 4(A)(2)'s requirement to wear a distinctive mark. *See* Hamidullin Br. at 13 ("The basic question raised by this appeal, however, is whether a *uniformed* soldier who fought for the Taliban against U.S. military forces in Afghanistan in 2009 thereby violated U.S. criminal law." (emphasis added)); *id.* at 22 (claiming they wore "militarized" clothing).

The United States notes at the outset that Hamidullin's effort to rely on *trial* evidence in support of a pretrial motion to dismiss the indictment on which he bore the burdens of production and persuasion is curious at best. Hamidullin did not advance this evidence at the motions hearing, and in fact his own expert witness testified that he made no claim that the Taliban satisfied Article 4(A)(2). Even if trial evidence were contrary to that position, which, as explained below, it is not, it still would not provide a basis to upset the district court's decision not to dismiss the

indictment on the record established at the motions hearing.

Even examining the trial evidence, the evidence at trial was that Hamidullin and at least some of his associates wore clothing different from a typical Afghan civilian. JA 1123-24 (describing the "insurgents" as wearing shorter tops than normal civilians, laced shoes or boots, and watches); JA 1523 (describing them as wearing footwear that covered their entire foot as opposed to sandals, wearing pants, and having a little bit of winter clothing). Some of Hamidullin's men wore portions of *U.S.* uniforms and at least one wore a North Face jacket. JA 1194-95 (some of the insurgents "had American uniforms whether they be pants or the whole uniform" and boots).

While Hamidullin claims this attire was sufficient to distinguish the band from typical Afghan civilians, it falls well short of the mark set by the GPW of "a fixed distinctive sign recognizable at a distance." GPW art.4(A)(2)(b). There is nothing "fixed" about the come-as-you-are clothing of Hamidullin's band. And Hamidullin does not adduce any authority suggesting a combatant can satisfy the "distinctive sign" requirement by donning portions of the *opposing* forces' uniforms. Ironically, Hamidullin at times tries to rely on sources reporting that around 2001 the Taliban wore distinctive black turbans, and yet the evidence at trial did not establish or suggest that Hamidullin's band wore even that mark. In

any event, as noted above, even if Hamidullin's band adopted its own ad hoc uniform, that would not make him eligible for combatant immunity because the Taliban *as an organization* does not comply with that criterion.

Hamidullin also uses snippets of trial testimony to suggest there was evidence that the Taliban had a sufficient command-and-control structure to satisfy Article 4's requirement of officers responsible for their subordinates. Hamidullin Br. at 21. He relies on such scant trial evidence as one soldier's testimony that "the sheer number of [combatants in this attack] *suggested* a higher level of leadership and, . . . the ability to organize." JA 1230 (emphasis added). And other trial references to the basic fact that the Taliban have a leadership council, or Shura, and then districts of responsibility is not inconsistent with the record established at the motions hearing. Indeed, the government's own motions hearing witnesses described that basic structure. The uncontroverted evidence at the motions hearing – and it remained uncontroverted by the trial evidence – was that the Taliban's leader, Mullah Omar, and the Shura council, did not enforce compliance with its own rules at the district and local level, and that local actors repeatedly operated independently and inconsistently with the Taliban leadership's stated rules. *See supra* at pp.3-5.

II. The District Court Correctly Concluded that Hamidullin Failed to Meet His Burden to Warrant Dismissal of the Indictment Based on a Public Authority Defense and Appropriately Barred the Defense from the Jury Because Hamidullin Could Not Meet All Its Elements.

A. Standard of Review

The defendant appeals two different but related issues related to his public authority defense. First, he appeals the denial of his pretrial motion to dismiss the indictment based on the public authority defense. The district court's legal conclusions on that issue are reviewed de novo and its factual findings are reviewed for clear error.

Second, he appeals the district court's decision to grant the government's motion in limine to preclude introduction of evidence on this defense at trial and to deny the defendant's proffered public authority jury instruction. This court reviews these issues de novo. *United States v. Singh*, 54 F.3d 1182, 1189 (4th Cir. 1995).

B. The District Court Correctly Denied Hamidullin's Pretrial Motion to Dismiss Based on a Public Authority Defense.

For the reasons explained below, Hamidullin's public authority defense was properly rejected by the district court as a basis for dismissing the indictment.

1. Common law combatant immunity does not cover the defendant's band of marauders.

Relying on a patchwork of cases addressing different instances of combatant immunity, Hamidullin first argues that he is eligible for common law immunity as an

enemy soldier. *See, e.g.,* Hamidullin Br. at 33 ("soldiers are immune from criminal liability for acts done under the law of armed conflict"). This common law combatant immunity is, however, simply the historical doctrine that developed into the defense addressed in Part I above.

The "common law" view is articulated by Colonel William Winthrop, who has been referred to as "the Blackstone of Military Law" by the Supreme Court. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006). In his classic treatise, Colonel Winthrop distinguished between the military forces of a sovereign state and "irregular armed bodies" or "guerillas." He observed: "[i]t is the general rule that the operations of war on land can legally be carried on only through the recognized armies or soldiery of the State as duly enlisted or employed in its service." Col. William Winthrop, *Military Law and Precedents*, 782 (2d ed. 1920). In contrast:

> Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished . . .

Id. at 783; *see also* Francis Lieber, *Instructions for the Government of the Armies of the United States in the Field*, General Orders No. 100, Art. 82 (1863) (referred to as the "Lieber Code") ("Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without

commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers - such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.").

These authorities illustrate the common law's recognition – even predating the GPW – that insurgents like Hamidullin who are at best irregular forces not engaging in hostilities on behalf of a belligerent nation are not entitled to combatant immunity or to be treated as POWs. To the extent Hamidullin seeks to rely on common law authorities that predate the GPW, his claim therefore still fails.

Even assuming Hamidullin could make a claim under these older common law authorities, however, the principles reflected in those common law decisions were refined and collected in the 20th century efforts to codify the international law of war that resulted in the GPW. The GPW was ratified by the United States, through the joint constitutional functions of the President and the Senate, which are the two organs of our constitutional government most directly entrusted with foreign affairs. *See* GPW, 6 U.S.T. 3316. The GPW is, therefore, the governing

articulation of lawful combatant status that is applicable to Hamidullin's common law defense. For the reasons explained in the previous Part, the defendant does not qualify for immunity under those agreements.

2. <u>The defendant cannot establish the public authority defense.</u>

The other strand of cases invoked by Hamidullin relates to the public authority defense. The public authority defense has its roots in the common law, beginning with the premise that the otherwise illegal actions of a public official or law enforcement officer acting within the scope of his duties were not crimes. *United States v. Fulcher*, 250 F.3d 244, 254 n. 4 (4th Cir. 2001); *United States v. Sariles*, 645 F.3d 315, 317 (5th Cir. 2011). Consistent with that premise, the defense shields defendants who can establish they were reasonably relying on the *actual authority* of a public or governmental official at the time of the criminal acts in question. *Fulcher*, 250 F.3d at 254; *Sariles*, 645 F.3d at 319. The Fourth Circuit and several sister circuits have squarely held that actual, not apparent, authority is required for this defense. *Fulcher*, 250 F.3d at 254 ("[W]e adopt the unanimous view of our sister circuits that the defense of public authority requires reasonable reliance upon the actual authority of a government official to engage him in covert activity.").

The public authority defense to violations of *U.S.* criminal law necessarily looks to whether the defendant's actions were sanctioned by a *U.S.* official with actual authority. This is because a foreign official has no authority to authorize violation of U.S. criminal law. *See* 1 Torcia, WHARTON'S CRIMINAL LAW § 41 (15th ed. 2015) ("The fact that a crime committed in time of peace was committed under the directions of the authority of a foreign government is no defense."); *United States v. Kashmiri*, 2011 WL 1326373, at *2 (N.D. Ill. April 1, 2011) ("Simply put, Defendant cannot rely on the authority of a foreign government agency or official to authorize his violations of United States federal law."). For example, a defendant accused of transporting illegal narcotics into the U.S. could not obtain immunity by virtue of the claim that his actions were directed by a member of a foreign government.

Perhaps Hamidullin would respond that a foreign sovereign can authorize acts of war, and that is what he was engaged in. His argument appears to envision the application of the public authority defense to every "enemy soldier" – apparently regardless of their qualification for lawful combatant status under the GPW – that fights for an organization with a claim to "sovereign authority." Hamidullin Br. at 34.

Even if, following adoption of the Geneva and Hague Conventions, the defense of "actual authority" survived separately from that of "combatant immunity," defenses based on "entitlement to the rights of war," *Williams v. Bruffy*, 96 U.S. 176, 190-91 (1877), applied only to contending parties possessing the status of "belligerent nations." *Id*. As Professor Oppenheim explained in his treatise, entitlement of an insurgency to recognition as a belligerent power requires that the entity "(1) [be] in possession of a certain part of the territory of the legitimate government; (2) that they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate government according to the laws and usages of war." 2 Lassa Oppenheim, INTERNATIONAL LAW, § 76 at 205 (Hersch Lauterpacht ed., 5th ed. 1935). Moreover, international recognition is, itself, crucial to the transformation of an insurgency to that of a true belligerency. *Id*. § 298 at 524-25. *See also id*. § 59 at 180 (an "armed contention" may "become war through the recognition of the contending parties, or of the insurgents as a belligerent Power"). Here, the Taliban and Haqqqani Network cannot be considered true belligerents entitled to protection of the laws of war because, among other reasons, those entities fail to conduct military operations in conformity with the laws and usages of war, as discussed above. Moreover, as of 2009, neither the Taliban nor the Haqqani Network were sovereign governments. Neither

organization was recognized as sovereign by any other nations including the United States, JA 276, nor did they constitute the *de facto* governments of any nation at that time, JA 752 (the district court agrees that "'[t]he Taliban leadership in 2009 (and today) was not a government recognized by the United States or even a *de facto* government.'").

Hamidullin cites no case suggesting that authorization by a foreign entity can be a defense to U.S. criminal charges outside the context of lawful acts of war committed by a lawful combatant. Unmoored from the terms of the GPW, Hamidullin's sweeping argument would extend immunity from criminal liability to every person who could claim to be acting on behalf of an organization that itself claims sovereignty. It would, for example, supply a claim to immunity to terrorists operating on behalf of the so-called Islamic State, which itself claims sovereignty. And it would effectively eclipse the carefully crafted terms of the GPW, for who would trouble to comply with the GPW if the much broader and more unbounded defense envisioned by Hamidullin were available? The district court correctly declined Hamidullin's invitation to expand the law in this fashion.

C. The District Court Appropriately Barred Evidence and Jury Instruction on the Public Authority Defense at Trial Because Hamidullin Had Not and Could Not Prove Each and Every Element of the Defense.

On the government's motion in limine, the district court precluded the defense from adducing evidence in support of a public authority defense at trial and declined to instruct the jury on that defense. The district court reasoned that the defense had submitted the matter for pretrial determination and had failed to adduce sufficient evidence to support the defense. JA 2319 ("The Defendant opted to pursue its public authority and lawful combatant defenses in the form of a pretrial motion to dismiss, which was thoroughly briefed and argued. The Court heard an entire day of expert testimony. The Defendant has proffered no new evidence or argument that would support his assertion of actual authority on the part of the Taliban or Haqqani Network, which were characterized by experts as terrorists-type organizations. Based on the record at hand, the Court properly concluded, as a matter of law, that actual authority was not a viable defense."). Hamidullin now argues that ruling was in error. He claims the district court improperly credited the government's evidence and refused to view his proffered evidence in the light most favorable to the defense.

"Upon proper request, a criminal defendant is entitled to a jury charge that reflects any defense theory for which there is a foundation in evidence." *United*

States v. Paul, 110 F.3d 869, 871 (2d Cir. 1997). It is well established, however, that "a judge may and generally should, block the introduction of evidence supporting a proposed defense unless all of its elements can be established." *United States v. Haynes,* 143 F.3d 1089, 1090 (7th Cir. 1998); *accord United States v. Bailey,* 444 U.S. 394, 415 (1980); *United States v. Sarno*, 24 F.3d 618, 621 (4th Cir. 1994) ("[W]here there is insufficient evidence, as a matter of law, to support an element of the affirmative defense, the defendant can be precluded from presenting any evidence of duress to the jury or, if some evidence is already presented at trial, the court can refuse to instruct the jury on the duress defense."). If, after conducting a pretrial evidentiary hearing, the court finds that the defendant's evidence is insufficient as a matter of law to establish the proffered defense, it is clear that the court "is under no duty to give the requested jury charge or to allow the defendant to present the evidence to the jury." *Paul,* 110 F.3d at 871.

For the reasons described in the preceding section, *see supra* at pp.50-53, under the circumstances presented in this case, the public authority defense is not available as a matter of law, and the district court therefore correctly excluded it. Hamidullin argues that the district court improperly precluded his defense by crediting the government's evidence rather than viewing the evidence in the light most favorable to the defense. Hamidullin Br. at 31.

The district court did not fail to view the evidence on the defense in the light most favorable to the defendant. There simply was no *factual* evidence – either presented or proffered by the defense – that a person with actual authority authorized Hamidullin's actions. It was undisputed in this case that no U.S. authority authorized Hamidullin's actions. Further, Hamidullin's single witness at the pretrial evidentiary hearing offered expert *legal* opinions regarding the interpretation of relevant provisions of the GPW and law of war. The defense expert did not dispute the government's *factual* evidence regarding the nature of the Taliban and the Haqqani Network and their history of non-compliance with the rules and laws of war.

III. Hamidullin's Argument that Section 32 of Title 18 Does not Reach the Conduct Here Is Inconsistent with Section 32's Text and Finds No Support in Congressional Intent.

A. Standard of Review

Hamidullin does not say specifically which ruling of the district court he is appealing with respect to this issue. It appears by his citation that he is appealing the district court's pretrial denial of his motion to dismiss the indictment. *See* Hamidullin Br. at 46 (citing district court's ruling at JA 746). Hamidullin's argument appears primarily to raise a legal question, which would be subject to de novo review. However, to the extent Hamidullin's argument in this regard

essentially incorporates his combatant immunity arguments, the district court's factual findings from the motions hearing would be subject to clear error review.

B. <u>Section 32 Applies Here By Its Plain Terms.</u>

Hamidullin argues that Congress did not intend Section 32(a) to apply to lawful acts of war committed by soldiers in a war zone. Hamidullin Br. at 46. For the reasons given below, the conduct charged in this case clearly falls within the plain text of Section 32, and Hamidullin's arguments must fail.

Section 32(a)'s text is clear in scope and squarely covers the criminal conduct in this case. The statute expressly covers "*whoever* willfully . . . damages, destroys, disables, or wrecks *any aircraft in the special aircraft jurisdiction of the United States* . . . ." 18 U.S.C. § 32(a) (emphases added). The term "aircraft" is defined as "a civil, *military*, or public contrivance invented, used, or *designed to navigate, fly, or travel in the air*," and a military helicopter meets that description. 18 U.S.C. § 31(a)(1) (emphases added). "Special aircraft jurisdiction of the United States," as defined by Congress includes "an aircraft of the armed forces of the United States" that is in flight, which describes the helicopters in this case. 49 U.S.C. § 46501(2)(B). And, by virtue of scope of the language of Section 32(a) and the definition of "special aircraft jurisdiction of the United States," Congress made evident its desire for Section 32 to apply extraterritorially. *See United States v.*

Yousef, 327 F.3d 56, 86 (2d Cir. 2003) ("The text of the applicable federal statutes makes it clear that Congress intended § 32(a) to apply extraterritorially."). Indeed, Hamidullin does not appear to argue on appeal that his conduct fell outside the terms of Section 32(a).

Hamidullin argues that Congress did not intend to apply Section 32 to military personnel whose attacks on aircraft are lawful under international law and the laws of armed conflict. *See* Hamidullin Br. at 50 ("ordinary acts of war cannot be outlawed by domestic criminal legislation"). His primary authority for this argument appears to be a memorandum from the Office of Legal Counsel that analyzed Section 32*(b)* and reasoned that Congress would not have intended for that provision to "have the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict." *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994). *See also* Hamidullin Br. at 47 (quoting this language). Hamidullin acknowledges that the OLC memorandum focused on a different portion of the statute – Section 32(b) versus 32(a) – than that at issue here, but he argues the same reasoning ought to apply.

There are several fatal flaws to this argument. First, because Section 32(a)'s text is clear in its application to this case, there is no basis to resort to congressional intent. Second, Section 32(b) deals exclusively with conduct related to civil aircraft registered in a country other than the United States. 18 U.S.C. §§ 32(b)(1), (2), (3) & (4). Section 32(a)(1) applies more broadly and includes military aircraft operating overseas (as well as domestically). Third, even if congressional intent could trump the statute's plain text, there is no inconsistency between Section 32's application here and the congressional intent Hamidullin posits. His own claim is that Congress did not intend Section 32 to apply to a soldier's actions that are lawful under international law and the law of war. For the reasons described in the preceding sections, Hamidullin was not a lawful combatant and his attack was not covered by combatant immunity or public authority. In other words, Hamidullin fails to identify any aspect of congressional intent that would sweep more broadly than the defenses of combatant immunity or public authority.

Finally, in a paragraph Hamidullin appears to argue in passing that other statutes of conviction are also limited such that they do not reach conduct that is "supported by legal authority." Hamidullin Br. at 51. The United States does not understand this passing reference to constitute a sufficient argument that the other counts of conviction in this case must be dismissed for reasons identified in

Hamidullin's third claim of error. In Hamidullin's statement of the issue itself, Hamidullin Br. at 2, and in conclusion, *id.* at 52 (seeking "judgment of acquittal as to Counts 3 and 4 of the second superseding indictment"), it is clear this issue is limited to the Section 32 counts of conviction. But, even assuming the passing reference is sufficient to constitute a challenge to the various other counts of conviction, this paragraph only reinforces that the defense's arguments are simply continuations of Hamidullin's primary claim that a lawful act of war conducted by a lawful combatant is not subject to criminal prosecution.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the district court.

Respectfully submitted,

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

The United States respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 28.1(e)(2)(A) because this brief does not exceed 14,000 words (specifically 13,682 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2010 Word in 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of June, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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