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

RESPONSE OF THE UNITED STATES TO THE PETITION FOR REHEARING EN BANC

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INTRODUCTION

The defendant Irek Ilgiz Hamidullin is a Taliban insurgent who attacked an Afghan Border Police outpost and then tried to shoot down U.S. military aircraft supporting the Afghan police. Hamidullin now seeks en banc review of a panel decision rejecting his claim that he was a lawful combatant entitled to immunity from criminal prosecution. En banc review is not warranted. The panel's decision does not conflict with any decision of the Supreme Court, this Court, or any other court of appeals. The panel's ruling is also consistent with the legal framework, based on the Third Geneva Convention, that the United States has long applied to the conflict in Afghanistan. Under that framework, the Taliban are properly considered a non-State insurgent group whose members are lawfully subject to criminal prosecution for attacking U.S. forces.

STATEMENT

1. The Non-International Armed Conflict Between the United States and Taliban Insurgents

On September 11, 2001, the al Qaeda terrorist organization, harbored in Afghanistan by the Taliban, attacked the United States and killed nearly 3,000 people. Joint Appendix (JA) 265. In response, U.S. and coalition forces invaded Afghanistan, removed the Taliban from the parts of Afghanistan it controlled, and drove its leaders into hiding. *United States v. Hamidullin*, 888 F.3d 62, 69 (4th

Cir. 2018). The only three countries that had ever recognized the Taliban as the government of Afghanistan withdrew that recognition following the September 11 attacks. *Id.* at 70. No country has recognized the Taliban since. *Id.* In 2002, the United Nations (UN) Security Council and the UN General Assembly recognized a new government as the sole, legitimate government of Afghanistan. *Id.* at 69; JA 269-70, 276, 311-14.

The Taliban launched a campaign of violent attacks against the internationally recognized Afghan government and a UN Security Council-authorized international security assistance force supporting it. *Hamidullin*, 888 F.3d at 69; JA 212, 268, 987. During that campaign, the Taliban have deliberately targeted and killed large numbers of civilians. *United States v. Hamidullin*, 114 F. Supp. 3d 365, 387 (E.D. Va. 2015).

In February 2002, the President publicly announced his determination that the Taliban militia were "unlawful combatants" and, accordingly, did not qualify for prisoner of war (POW) status under the Third Geneva Convention (GPW).[1] *Hamidullin*, 888 F.3d at 72. Since that time, the United States has not changed its

[1] *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).

position that Taliban fighters should not be accorded POW status. *Id.* at 77 n.1 (Wilkinson, J., concurring).

2. Hamidullin Attacks U.S. Forces

Hamidullin, a former Russian Army officer, led an attack in 2009 on Afghan Border Police officers on behalf of the Taliban and its terrorist organization ally, the Haqqani Network. *Hamidullin*, 888 F.3d at 65. Hamidullin planned to shoot down U.S. aircraft responding to his attack, but the anti-aircraft weapons malfunctioned. *Hamidullin*, 114 F. Supp. 3d at 368. U.S. and Afghan forces captured Hamidullin. *Id.* Hamidullin was detained in U.S. custody in Afghanistan. *Id.*

3. District Court Proceedings

A grand jury in the Eastern District of Virginia charged Hamidullin in a fifteen-count superseding indictment with, among other charges, providing and conspiring to provide material support to terrorists, in violation of 18 U.S.C. § 2339A; conspiring and attempting to destroy an aircraft of the United States Armed Forces, in violation of 18 U.S.C. § 32; and conspiring and attempting to kill an officer of the United States, in violation of 18 U.S.C. §§ 1114 and 1117. *Hamidullin*, 888 F.3d at 65; JA 33-54.

Hamidullin moved to dismiss the indictment arguing that, under the GPW and the pre-existing common law, he was a lawful combatant entitled to immunity from all criminal charges. *Hamidullin*, 888 F.3d at 65. The government opposed the motion on two grounds. First, members of militia groups, such as the Taliban, are only entitled to POW protections under the GPW, including combatant immunity, in the context of an international armed conflict as described in Article 2, *i.e.* a conflict between States that are parties to the Convention. At the time of Hamidullin's attack, the conflict in Afghanistan was not an international armed conflict because there were no States on the Taliban side of the conflict. In a non-international conflict, Article 3 provides certain minimum protections to captives, but it does not provide combatant immunity.

Second, the government argued that, even if Hamidullin had been captured in an international armed conflict, he would not qualify for combatant immunity because the Taliban and Haqqani Network did not satisfy the requirements in GPW Article 4(A)(1), (2), or (3) that an armed force must meet for its members to be entitled to immunity. The Taliban and Haqqani Network did not satisfy the criteria because, among other things, they did not belong to a State and they systematically and flagrantly violated the laws and customs of war. *See Hamidullin*, 114 F. Supp. 3d at 380-81.

The district court denied Hamidullin's motion following an evidentiary hearing. *Hamidullin*, 114 F. Supp. 3d at 386-87. The district court held that, even assuming the conflict in Afghanistan was international, combatant immunity was categorically unavailable for Taliban fighters because the Taliban did not fall within the Article 4 categories. *Id.* In particular, the district court found that the Taliban violated the laws of war by targeting civilians, summarily executing prisoners, and mutilating Afghan citizens who voted in elections. *Id.* at 387.

The jury convicted Hamidullin, and the district court sentence him to life imprisonment. *Hamidullin*, 888 F.3d at 65.

4. The Panel Opinion

A panel of this Court affirmed. *Hamidullin*, 888 F.3d at 65. As a threshold matter, the Court rejected Hamidullin's argument that the district court lacked jurisdiction because an Army Regulation that implements the GPW, AR 190-8, required a military tribunal to determine in the first instance whether Hamidullin qualified as a POW before he could be charged in federal court. The Court held that the relevant requirements in the GPW and AR 190-8 apply only in an international armed conflict. *Id.* at 69. The Court explained that, although the conflict began in 2001 as a war between the United States and the Taliban-controlled Afghan government, by 2009 a new government had replaced the

Taliban, and the war had become a non-international armed conflict between the new Afghan government and its partners (including the United States) on one side and unlawful Taliban insurgents on the other. Because the conflict was non-international, the Court concluded, there was no need for a competent tribunal to resolve doubt concerning Hamidullin's POW status. *Id.* at 69-71.

In addition, the Court noted that the military tribunal sought by Hamidullin would "necessarily involve a reconsideration" of the President's 2002 determination that Taliban detainees did not qualify as POWs under the GPW. *Hamidullin*, 888 F.3d at 73. The Court accordingly declined to interpret AR 190-8 to require "a panel of three mid-level, non-lawyer military officers" to "make a legal determination that the Commander-in-Chief has already made." *Id.*

The Court then rejected Hamidullin's combatant immunity claim on the merits. 888 F.3d at 74-76. The Court explained that, because the GPW confers POW protections, including immunity from prosecution for lawful combatants, only in international armed conflicts, the court's prior determination that the conflict in Afghanistan in 2009 was non-international foreclosed Hamidullin's combatant immunity claim. *Id.* at 74-75. The Court also rejected Hamidullin's alternative argument that he was entitled to a broader form of combatant immunity under the common law that, Hamidullin contended, sweeps beyond the GPW

standards by applying even to non-State groups involved in non-international conflicts. The Court held that the GPW standards represent an international consensus that preempted previous common law formulations, and that its "definition of lawful and unlawful combatants is conclusive." *Id.* at 76.

Finally, the Court rejected Hamidullin's claim that 18 U.S.C. § 32, which prohibits conspiring and attempting to destroy an aircraft of the United States Armed Forces, did not apply to his conduct. The Court concluded that, since Hamidullin was not a lawful combatant, the plain language of the statute encompassed his attempt to shoot down U.S. military aircraft. *Hamidullin*, 888 F.3d at 76.

Judge Wilkinson wrote separately to "underscore both the folly and the hazard of Hamidullin's jurisdictional challenge." *Hamidullin*, 888 F.3d at 77-78 (Wilkinson, J., concurring). He noted that a remand for a military tribunal to determine Hamidullin's POW status made no sense in light of the President's categorical determination that Taliban fighters are ineligible for such status. *Id.* Hamidullin's argument would "elevate every band of terrorists around the world to near nation-state status" and "extend the protections of the [GPW] to those who . . . flagrantly violate its dictates." *Id.* at 78. "For years, the aim of Taliban fighters was to get into the civilian courts," Judge Wilkinson concluded, and Hamidullin's

insistence on a remand to the military justice system "is a shell game designed to play one part of American governance against another." *Id.*

Judge King dissented. 888 F.3d at 78-98. In his view, AR 190-8 requires a military tribunal to determine Hamidullin's POW status before an Article III prosecution may commence. He accordingly would have held the appeal in abeyance and remanded to a military tribunal to determine Hamidullin's status. *Id.* at 98.

ARGUMENT

En banc review is warranted only when the panel decision conflicts with a decision of the Supreme Court or this Court or where "the proceeding involves a question of exceptional importance," such as "an issue on which the panel decision conflicts with the authoritative decisions of other" courts of appeals. Fed. R. App. P. 35(a) and (b). Neither circumstance exists here.

Hamidullin contends that this Court should grant rehearing en banc to consider three claims. First, Hamidullin argues that Army Regulation 190-8 requires a remand for a military tribunal to determine in the first instance whether Hamidullin was entitled to POW status. Second, Hamidullin claims he was entitled to combatant immunity under a broader, "common law" theory that, unlike the GPW, allows fighters belonging to non-State insurgent groups to assert

combatant immunity even in non-international armed conflicts. Third, Hamidullin argues that 18 U.S.C. § 32(a) does not prohibit attacking aircraft during an armed conflict. The panel correctly rejected those claims, and its decision does not conflict with any decision of the Supreme Court, this Court, or any other court of appeals. Moreover, Hamidullin has not shown that his claims present issues of exceptional importance that are likely to recur. Finally, Hamidullin would not be entitled to relief in any event. As the district court found, even if the Taliban were treated as an armed group belonging to a State engaged in an international armed conflict, Hamidullin's bid for combatant immunity would fail because the Taliban's systematic violations of the law of war disqualify their members from combatant immunity.

1. Hamidullin contends (Pet. 6-13) that, under AR 190-8, a military tribunal must determine his entitlement to POW status before an Article III court may exercise criminal jurisdiction. The panel correctly rejected that novel claim.

a. Army Regulation 190-8 implements Article 5 of the GPW by providing that, where there is doubt as to whether a person detained by the U.S. armed forces qualifies as a POW, such persons should be provided POW protections until their status has been determined by a competent tribunal. *Hamidullin*, 888 F.3d at 69. "Critically, however, [AR 190-8], in implementing Article 5, is also restricted by

Article 5's applicability," and Article 5 is "only applicable in cases of international armed conflict." *Id.* That limitation makes sense. There is no need for a military tribunal to determine whether a prisoner detained by a State in a non-international armed conflict is entitled to POW protections under Article 4 because those protections, including combatant immunity, do not apply. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006) (explaining that Article 3 of the Convention is the only article that applies in non-international armed conflicts). Under Article 3, States may prosecute captured fighters in a "regularly constituted court," and Article III courts meet that standard. *Hamidullin*, 888 F.3d at 71, 75. Because the conflict in Afghanistan was non-international at the time of Hamidullin's conduct, the panel correctly held that AR 190-8 has no application here.

b. The President's determination that Taliban detainees are unlawful combatants who do not qualify as POWs under the GPW also forecloses Hamidullin's entitlement to a tribunal under AR 190-8. Nothing in that regulation requires convening a panel of military officers to make a legal determination that their Commander-in-Chief has already made. *Hamidullin*, 888 F.3d at 72-73. Hamidullin's construction of AR 190-8 would authorize a military tribunal "to displace the [P]resident's interpretation of the Convention," thereby undermining

the Executive Branch's ability to apply a consistent legal framework to the ongoing armed conflict in Afghanistan. *Id.*; *see also id.* at 78 (Wilkinson, J., concurring) ("Empowering different panels of military officers" to "override the determination of the President" would "fly in the face" of the President's "control over the military," result in "disparate treatment of similarly situated detainees," "hamstring our country in its ability to approach armed conflicts in a unified fashion," and "undermine the consistent practice of both the United States and its allies to uniformly treat Taliban fighters as insurgents who lack any claim to the Third Geneva Convention's combatant immunity defense").

c. Hamidullin argues (Pet. 7) that AR 190-8 goes beyond the GPW by affording a presumption of POW status even to members of non-State armed groups in non-international armed conflicts. That claim is inconsistent with the regulation's stated purpose, which is to implement Geneva Convention protections, not to extend them to circumstances where they do not apply. And even if AR 190-8 could plausibly be read to apply to the non-international armed conflict against the Taliban, that reading would be superseded by more recent Defense Department directives issued by higher-level authorities (*e.g.*, the Deputy Secretary of Defense) that govern the current armed conflict. *See*, *e.g.*, DoD Directive 2310.01E, *DoD Detainee Program*, August 19, 2014, Incorporating Change 1,

May 24, 2017.[2] That Directive makes clear that the requirement to provide POW protections in certain cases until a competent tribunal has determined a detainee's status applies only "[d]uring international armed conflict." *See id.* ¶ 3(h).

d. Hamidullin argues (Pet. 7-8) that applying AR 190-8 only to international armed conflicts cannot be squared with a Congressional statement of U.S. policy to provide Article 5 tribunals in any case where there is "doubt" regarding a detainee's POW status. But that statement merely repeats the language of Article 5 and AR 190-8 itself, which require a military tribunal only when there is "doubt" as to an individual's "legal status" under the GPW to receive POW privileges, and not as to each and every captured combatant. *See id.* ¶ 1-5(a)(2) (requiring POW protections "*until some other legal status is determined by competent authority*.") (emphasis added). In Hamidullin's case, there is no such doubt. "Competent authorit[ies]" at the highest levels of the Executive Branch have conclusively determined that Taliban detainees do not "belong to any of the categories enumerated in Article 4" because (1) the conflict against the Taliban in 2009 was not an international armed conflict; and (2) the Taliban flagrantly and systematically violate the Article 4 criteria. *See Hamidullin*, 888 F.3d at 71-72;

[2] Available at http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf.

Hamidullin, 114 F. Supp. 3d at 386-87. Those determinations are sufficient to resolve any "doubt" as to Hamidullin's status, and nothing in AR 190-8 requires convening a tribunal to revisit those determinations in each individual case. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006) (holding that the President's determination barred a military commission defendant's claim of entitlement to an AR 190-8 tribunal because "[n]othing in [AR 190-8] . . . suggests that the President is not a 'competent authority' for these purposes").

e. Hamidullin contends (Pet. 8-9) that denying POW status to Taliban fighters is inconsistent with U.S. practice in earlier conflicts. But the authorities he cites do not establish that the United States has historically afforded POW status in non-international armed conflicts to non-State insurgent groups like the Taliban that defy the laws of war. The prosecution of Taliban fighters as unlawful combatants in civilian courts is entirely consistent with the Geneva Convention framework and the uniform practice of the United States and its partners. *See Hamidullin*, 888 F.3d at 77-78 (Wilkinson, J., concurring).

f. Hamidullin's AR 190-8 argument does not warrant en banc review. There is no conflict with any decision of the Supreme Court, this Court, or any other court of appeals. And the argument arises only in the limited context of

persons captured by the U.S. armed forces and later prosecuted in Article III court. Hamidullin does not claim that this is a frequently recurring pattern, nor has he cited any other case where a defendant in an Article III prosecution has invoked AR 190-8 to seek a remand to a military tribunal.

The remand Hamidullin seeks would serve no purpose except delay. Hamidullin provides no reason to believe that his claim for POW status before a military tribunal would fare any better than it did in district court. Even if the military panel accepted Hamidullin's unsupported contention that combatant immunity is available to fighters for non-State groups in non-international armed conflicts, he would still have to persuade the panel that the Taliban's flagrant violations of the law of war do not foreclose its members from claiming POW status. The district court rejected that contention, and federal courts in other cases have uniformly rejected bids for combatant immunity on behalf of the Taliban and other groups that defy the laws of war. *See, e.g.*, *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (rejecting combatant immunity defense because Taliban do not comply with the laws of war); *United States v. Hausa*, 2017 WL 2788574, at *6 & n.6 (E.D.N.Y. Jun. 27, 2017) (same as to al Qaeda); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003) (same). There is no reason to doubt that a military tribunal would reach the same conclusion.

2. Hamidullin, relying on post-Civil War cases addressing in various contexts the legal consequences of belligerent acts by Confederate forces, contends (Pet. 13-16) he was entitled to combatant immunity under a broader, "common law" theory that, according to Hamidullin, allows fighters belonging to non-State insurgent groups to assert combatant immunity even in non-international armed conflicts. That contention has no merit and does not warrant en banc review.

The panel correctly held that the GPW, not the nineteenth-century common law jurisprudence Hamidullin relies on, provides the modern standard for combatant immunity in U.S. courts. *See Hamidullin*, 888 F.3d at 75-76. As the panel explained, "[t]he principles reflected in the [pre-Geneva Convention] common law decisions" were "refined" and codified in the GPW, which "represents an international consensus" on the scope of combatant immunity. *Id.* For that reason, the panel correctly held that the GPW's "explicit[]" definition "of lawful and unlawful combatants is conclusive." *Id.*

Extending combatant immunity to non-State insurgent groups would undermine the international consensus that the Geneva Conventions reflect. *See Hamidullin*, 888 F.3d at 76. Moreover, affording combatant immunity to armed groups beyond the Geneva Convention framework would inhibit the government's ability to bring terrorists to justice. *See id.* ("Hamidullin's broad framing of

common law combatant immunity would extend immunity far beyond the [GPW] to every person acting on behalf of an organization that claims sovereignty," including "terrorists operating on behalf of the Islamic State"); *see also id.* at 12 (Wilkinson, J., concurring) (Hamidullin's theory "would threaten to elevate every band of terrorists . . . to near nation-state status and, in so doing, to extend the protections of the Geneva Convention to those who both regularly and flagrantly violate its dictates"). Hamidullin's sweeping expansion of combatant immunity would require the United States to treat lawless insurgents, many of whom are responsible to no one but themselves, as if they were members of a State's regular forces. The panel therefore correctly "decline[d] to broaden the scope of combatant immunity beyond the carefully constructed framework of the Geneva Convention." *Id.* at 76.

Hamidullin does not contend that any federal court has applied any other standard for combatant immunity since the adoption of the GPW. As far as the government is aware, every federal court to have considered a combatant immunity defense since U.S. ratification of the 1949 Geneva Conventions has applied the GPW standards.

Hamidullin contends (Pet. 13-14) that the panel's decision is in tension with decisions of this Court and other courts of appeals recognizing the existence of a

"common law of war" based on domestic precedents. However, the fact that domestic precedents may shed light on law-of-war issues in some contexts not explicitly addressed in the Geneva Conventions, such as military commission jurisdiction, *see Bahlul v. United States*, 767 F.3d 1, 23 (D.C. Cir. 2014) (en banc), or civil liability for defense contractors, *see Al Shimari v. CACI International, Inc.*, 679 F.3d 205, 216 (4th Cir. 2012) (en banc), has no bearing on the issue here, where the GPW explicitly provides the governing standard for assessing Hamidullin's combatant immunity claim.

In any event, the post-Civil War cases addressing the lawfulness of Confederate belligerency provide no support for Hamidullin's claims. As those cases recognize, the United States in the Civil War determined as a matter of policy to treat Confederate forces as lawful belligerents, and the courts deferred to that determination. *See The Prize Cases*, 67 U.S. 635, 670 (1862). Here, the United States and its partners have made the opposite determination with respect to the Taliban. Nothing in the common law or the GPW requires extending the protections of combatant immunity to members of non-State insurgent groups such as the Taliban that regularly and flagrantly violate the laws of war.

3. Hamidullin argues (Pet. 16-17) that 18 U.S.C. § 32(a), which prohibits conspiring or attempting to destroy a U.S. military aircraft, does not apply to his

conduct. The panel correctly rejected that argument. As the panel explained, even assuming the statute contains an implied exception for lawful combatants who shoot at U.S. military aircraft during an armed conflict, Hamidullin's "status as an unlawful combatant" takes him outside any such exception. *Hamidullin*, 888 F.3d at 76. Accordingly, Hamidullin's attempt to fire anti-aircraft weapons at U.S. military helicopters "falls under the plain language of 18 U.S.C. § 32(a)." *Id.*

Hamidullin does not contend that the panel's construction of Section 32(a) conflicts with any other federal court decision. Instead, he relies on an Office of Legal Counsel memorandum that, in addressing a different subsection of Section 32, stated that Congress did not intend for that provision to criminalize "actions by military personnel that are lawful under international law." However, as the panel held, Hamidullin's conduct does not satisfy that criterion. Hamidullin and his insurgent group were not "military personnel" who belong to a State, and who, with State authorization, conduct operations in compliance with the laws of war. Hamidullin, as an unlawful combatant fighting on behalf of a non-State insurgent group that systematically violates the laws of war, is not immune from Section 32(a)'s prohibition on attacking U.S. military aircraft.

CONCLUSION

The petition for rehearing en banc should be denied.

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Certificate of Service and Compliance

I certify that on June 12, 2018, I filed electronically the foregoing response 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 in Fed. R. App. P. 35(b)(2)(A) because the body of this response, excluding the case caption, title, and signature blocks, contains 3,881 words.

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