No. 18-_____

IN THE

Supreme Court of the United States

IREK ILGIZ HAMIDULLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Geremy C. Kamens
Federal Public Defender
Counsel of Record
Robert J. Wagner
Paul G. Gill
Frances H. Pratt
Assistant Federal Public Defenders
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Geremy_Kamens@fd.org

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QUESTIONS PRESENTED

Enemy soldiers captured by the United States military on a battlefield are subject to combatant detention, *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), and prosecution for war crimes, *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950). Combatants seized in an armed conflict, however, have never been criminally prosecuted in an Article III court simply for fighting against United States soldiers. *Dow v. Johnson*, 100 U.S. 158, 165 (1879); *Coleman v. Tennessee*, 97 U.S. 509, 516 (1879).

The questions presented are:

(1) Whether Army Regulation 190-8 requires, as a necessary prerequisite to criminal prosecution of combatants under domestic law based on battlefield conduct, that a competent tribunal make an individual determination as to the detainee's legal status?

(2) Whether the common law provides a defense against the criminal prosecution of foreign soldiers for otherwise lawful battlefield conduct?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, Treaties, and Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Irek Hamidullin respectfully requests that this Court issue a writ of certiorari to review the judgment by the United States Court of Appeals for the Fourth Circuit, and determine whether and under what circumstances domestic federal criminal laws apply in areas of armed conflict.

OPINIONS BELOW

The opinion of the court of appeals is reported at 888 F.3d 62 (4th Cir. 2018) (Pet. App. 1a-37a).[1] The relevant opinion of the district court for the Eastern District of Virginia is reported at 114 F. Supp. 3d 365 (E.D. Va. 2015).

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. Upon the timely noting of an appeal from the judgment of conviction, the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The court of appeals issued its opinion and judgment on April 18, 2018. The court denied a timely petition for rehearing en banc on June 15, 2018. *See* Pet. App. 38a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY AND REGULATORY PROVISIONS INVOLVED

Article 2 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 (hereinafter the "Third Geneva Convention" or "GPW"), provides:

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[1] "Pet. App." refers to the appendices attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals, Fourth Cir. No. 15-4788.

> In addition to the provisions which shall be implemented in peace time, the present Convention shall 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.
>
> 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.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3 of the GPW provides:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> > (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . .
> >
> > (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. . . .

Article 4(A)(3) of the GPW provides:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> . . .
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

Article 5 of the GPW provides:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) ("AR 190-8"), § 1-5(a)(2),[2] provides:

> All persons taken into custody by U.S. forces will be provided with the protections of the [Geneva Convention Relative to the Treatment of Prisoners of War] until some other legal status is determined by competent authority.

AR 190-8, § 1-6(a) provides:

> In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

AR 190-8, § 1-6(b) provides:

> A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

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[2] Chapter 1 of the regulation and the regulation's glossary are reproduced in Appendix C, Pet. App. 41a-46a.

STATEMENT OF THE CASE

A. The District Court Proceedings.

Irek Hamidullin was a uniformed Taliban soldier captured in 2009 by U.S. soldiers following a firefight on a battlefield in Afghanistan. He was the sole survivor of his unit, and no American soldiers were killed in the battle. The United States detained him at Bagram Air Force Base between 2009 and 2014. Because Mr. Hamidullin was captured in an armed conflict by U.S. military forces, his treatment is governed by both international law to the extent it applies domestically, and by the domestic law of war, including applicable military regulations.

The principle international treaty at issue is 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 (hereinafter the "Third Geneva Convention" or "GPW"). Enacted in the wake of World War II to promote the humanitarian treatment of soldiers in wartime, the Third Geneva Convention bars the prosecution under domestic criminal law of soldiers seized in an international armed conflict and entitled to treatment as prisoners of war (POW). See GPW arts. 84, 87, 99, 6 U.S.T. at 3382, 3384, 3392, 75 U.N.T.S. at 200, 202, 210.[3]

GPW article 4(A)(3) affords POW status to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining power." GPW, art. 4A, 6 U.S.T. at 3320, 75 U.N.T.S. at 138. And GPW article 5 provides that "[s]hould any doubt arise" as to whether a detainee is a POW,

[3] The only exceptions are that prisoners of war may be prosecuted for (1) acts unconnected with the armed conflict; and (2) war crimes. Jean Pictet, Commentary on the Third Geneva Convention 418-22 (1960).

they must be treated as such "until such time as their status has been determined by a competent tribunal." GPW art. 5, 6 U.S.T. at 3322-24, 75 U.N.T.S. at 140-42.

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-6 (Oct. 1, 1997), implements the GPW and, in particular, Article 5's competent tribunal requirement.[4] Moreover, it provides that "a competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists." *Id.* § 1-6(b). The military commonly conducts such tribunals in the combat theater. For example, during the first Persian Gulf War, the military conducted 1,196 tribunals for "detainees whose status was questionable." Final Report to Congress, Conduct of the Persian Gulf War 577-78 (April 1992).

Mr. Hamidullin was seized by U.S. forces on a battlefield in Afghanistan, he asserts entitlement to treatment as a prisoner of war, and he has not received a tribunal as described in AR 190-8 § 1.6. Pursuant to the terms of the regulation, this circumstance requires that he be treated as a POW. AR 190-8 § 1.6(a) ("such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal"); *id.* Glossary, Sec. II Terms, "Other Detainee (OD)" ("Persons in the custody of the U.S. Armed Forces who have not been

[4] A "competent tribunal" is a term of art, requiring three commissioned officers, one of field grade. AR 190-8 § 1-6(c).

classified as an EPW [Enemy Prisoner of War] (article 4, GPW), [Retained Person] (article 33, GPW), or [Civilian Internee] (article 78, [Geneva Convention Relative to the Protection of Civilian Persons in time of War]), shall be treated as EPWs until a legal status is ascertained by competent authority.").

Although no military tribunal determined his legal status, Mr. Hamidullin was brought to the United States in 2014 and charged in federal court with the following offenses:

- 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 while in flight in violation of 18 U.S.C. §§ 32 and 2;
- conspiring and attempting to kill an officer or employee of the United States or person assisting the same in violation of 18 U.S.C. §§ 1114 & 1117;
- conspiring and attempting to murder a U.S. national and engaging in physical violence with intent to cause serious bodily injury to a U.S. national in violation of 18 U.S.C. § 2332(b) & (c);
- conspiring to use a weapon of mass destruction in violation of 18 U.S. C. § 2332a;
- and possessing and conspiring to possess a machine gun in connection with a crime of violence in violation of 18 U.S.C. § 924(c) & (o).

C.A.J.A. 33-54. In essence, the indictment alleged that by 2009, participation in the ongoing armed conflict against the United States and its Afghan partners in Afghanistan was against the law.

Prior to trial, Mr. Hamidullin moved to dismiss the indictment on the ground that his actions were authorized by the law of armed conflict, the common law, and because Congress did not intend for the charged offenses to apply to the battlefield. C.A.J.A. 55-88; *see* C.A.J.A. 98-125, 133-74. Following an evidentiary hearing and

argument, *see* C.A.J.A. 201-575, the district court denied the motion in a published decision, 114 F. Supp. 3d 365 (E.D. Va. 2015). Mr. Hamidullin proceeded to trial, was convicted on all counts, and was sentenced to multiple terms of life imprisonment plus a consecutive term of 30 years. C.A.J.A. 2183, 2322-24.

B. The Fourth Circuit's Decision.

Mr. Hamidullin appealed his convictions to the U.S. Court of Appeals for the Fourth Circuit, and a panel of the court (Judges King, Floyd, and Davis) heard oral argument on December 9, 2016. Judge Davis retired from the court before an opinion was issued. After ordering supplemental briefing on the effect of Army Regulation 190-8 on the district court's jurisdiction, the court scheduled a second oral argument. Mr. Hamidullin argued in the supplemental briefing that the regulation requires, as a prerequisite to criminal prosecution of a battlefield detainee, that a military tribunal determine the detainee's legal status. The second oral argument took place on December 5, 2017.

On April 18, 2018, the panel majority, consisting of Judge Wilkinson and Judge Floyd, affirmed Mr. Hamidullin's convictions over the dissenting opinion of Judge King. *United States v. Hamidullin*, 888 F.3d 62 (4th Cir. 2018) (Pet. App. 1a-37a). The majority first determined that by 2009, the conflict in Afghanistan constituted a non-international armed conflict. 888 F.3d at 69-71. Based upon the conclusion that the conflict was non-international (i.e., not between states) for purposes of the GPW, the panel majority concluded that Mr. Hamidullin was not entitled to combatant immunity under the GPW for his participation in the armed conflict in Afghanistan.

The panel majority also held that: (1) Army Regulation 190-8 "in implementing Article 5, is also restricted by Article 5's applicability[, and] Article 2 of [the GPW] provides that the Article 5 determination of POW status by a competent tribunal is only applicable in cases of international armed conflict between Convention signatories," 888 F.3d at 69; (2) recognizing combatant immunity under AR 190-8 "would allow an internal executive branch regulation to strip Article III courts of their statutorily granted jurisdiction," *id.* at 71-72; and (3) because the GPW "explicitly defines the category of individuals entitled to POW status, and concomitantly, combatant immunity," the self-executing GPW "preempts common law" combatant immunity, *id.* at 76.

Judge King's lengthy dissent challenged numerous aspects of the majority's rationale, 888 F.3d at 78-98, and concluded that an Executive branch determination as to a battlefield detainee's POW status serves as a necessary prerequisite to criminal conviction. "[U]nless and until the Executive resolves his POW claim," Judge King wrote, "Hamidullin should be treated in accordance with the Third Geneva Convention and Army Regulation 190-8." *Id.* at 98.

Mr. Hamidullin filed a timely petition for rehearing en banc, which was denied by order dated June 15, 2018. Pet. App. 38a. He now seeks a writ of certiorari from this Court to review the judgment of the Fourth Circuit sustaining his convictions.

REASONS FOR GRANTING THE PETITION

Petitioner Hamidullin was charged and convicted of ordinary domestic federal crimes based upon conduct that is commonplace and completely lawful under the laws of armed conflict, such as the use of a machine gun and attempts to attack opposing military forces in battle. He now asks this Court to determine the extent to which federal criminal laws apply to the battlefield.

The United States invaded Afghanistan in 2001, and the country "remain[ed] a theater of active military combat" in 2009 at the time of Mr. Hamidullin's capture. *See Al Maqaleh v. Gates*, 605 F.3d 84, 88 (D.C. Cir. 2010); *accord Al-Alwi v. Trump*, ___ F.3d ____, ____, 2018 WL 3893217, at *5 (D.C. Cir. Aug. 7, 2018) (finding that the U.S. "remain[s] in active combat with the Taliban" in Afghanistan). The fundamentally important questions presented in this case turn on the application of federal criminal law to that battlefield. Specifically, this petition asks this Court to determine whether Army Regulation 190-8, the joint military regulation designed to implement the Geneva Conventions, requires that battlefield detainees captured by the U.S. military who claim entitlement to POW status must be treated as prisoners of war – and receive combatant immunity – until their legal status has been determined by a competent military tribunal. Likewise, this Court should determine, as it did in *Dow v. Johnson*, 100 U.S. 158, 165 (1879), whether the common law bars all but liability for war crimes arising from participation in an armed conflict.

As the dissent below recognized, this case poses "difficult questions with great potential repercussions for international relations and the safety and security of our

military personnel abroad." *Hamidullin*, 888 F.3d at 78 (King, J., dissenting). No less than the question addressed by the en banc D.C. Circuit as to the scope of military commission jurisdiction, this case also "implicates an important part of the U.S. Government's war strategy." *Bahlul v. United States*, 840 F.3d 757, 816 n.1 (D.C. Cir. 2016) (en banc) (Kavenaugh, J., concurring) (addressing whether non-international law of war offenses may be defined as war crimes for prosecution by military commission). Because the court of appeals' decision cannot be reconciled with governing military regulations, or with decisions of this Court, or with the common law history and tradition that limits the criminal liability of foreign soldiers on the battlefield, the petition for a writ of certiorari should be granted.[5]

I. This Case Involves Questions of Fundamental Importance That Must Be Resolved by This Court.

This country has never before prosecuted foreign soldiers simply for fighting against our military forces on a battlefield. Indeed, "[w]e did not try enemy soldiers simply because they shot at Union troops in the Civil War, or at American troops in World War I, World War II, or any other war. . . . [T]rial has never been the presumptive disposition of the enemy in war." Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. Rev. 1521, 1546

[5] "Whatever conclusion [the Court would] reach, [its] opinion will help the political branches and the courts discharge their responsibilities over [enemy combatant] detainee cases . . . . That petitioner was convicted in federal court (rather than in a military commission) in criminal proceedings uncomplicated by classified information or issues relating to extraterritorial detention is an additional reason to grant certiorari." *Noriega v. Pastrana*, 130 S. Ct. 1002, 1002-03 (2010) (Thomas, J., dissenting from denial of certiorari).

(2013). As discussed below, "the consistent U.S. history is the consistent U.S. history for a reason." *Bahlul*, 840 F.3d at 772 (Kavenaugh, J., concurring).[6]

A. Army Regulation 190-8.

AR 190-8 is a multi-service military regulation applying to the Army, Navy, Air Force, and Marine Corps that is designed to "implement international law, both customary and codified," relating to persons seized during armed conflict. AR 190-8, § 1 1(b). The regulation implemented Department of Defense Directive 2310.1 (1994), which in turn was issued pursuant to Congress's directive for the President to "prescribe regulations to carry out his functions, powers, and duties" related to the armed forces. 10 U.S.C. § 121. The regulation is part of the "domestic U.S. laws of war," *Al-Bihani v. Obama*, 619 F.3d 1, 12 (D.C. Cir. 2010), and thus is enforceable as "domestic U.S. law," *Al Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013).

The court of appeals refused to apply Army Regulation 190-8 in this case for three reasons: (1) AR 190-8's competent tribunal requirement applies only to international armed conflicts, not non-international conflicts such as the Afghanistan conflict in 2009; (2) the regulation's competent tribunal requirement was satisfied by a categorical determination issued by President George W. Bush in 2002; and (3) if AR

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[6] To be sure, isolated examples exist of Article III prosecutions of American citizens seized on a battlefield. *See United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002). But unlike citizens, "[t]he alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy . . . . Thus the alien enemy status carries important immunities as well as disadvantages. The United States does not ask him to violate his allegiance or to commit treason toward his own country for the sake of ours." *Johnson v. Eisentrager*, 339 U.S. 763, 773 (1950).

190-8's competent tribunal requirement served as a pre-requisite to criminal prosecution, it would violate the separation of powers.

1. Nothing in AR 190-8's text limits its application depending upon the type of conflict. As the dissent below observed, the text of AR 190-8 provides simply that "[a]ll persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority." 888 F.3d at 81-82. (King, J., dissenting) (quoting AR 190-8 § 1-5(a)(2)). Even a "person not appearing to be entitled to prisoner of war status who has committed a belligerent act . . . and who asserts that he or she is entitled to treatment as a prisoner of war" shall be treated as such until a competent tribunal, as defined by the regulation, decides otherwise. AR 190-8 §§ 1-6(a) & (b). The plain language of the regulation thus requires that, until a competent tribunal decides otherwise, battlefield detainees who assert POW status are "entitled to the combatant's privilege of immunity from the municipal law of the capturing state for warlike acts which do not amount to breaches of the law of armed conflict." AR 190-8 Section II, Enemy Prisoner of War.

A Congressional policy statement on the same issue likewise does not distinguish between the type of armed conflict in which a detainee is seized. In 2004, Congress declared that "[i]t is the policy of the United States" that "in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal." Historical and Statutory Notes, 10 U.S.C. § 801. Moreover, the policy statement does not distinguish

between combatants seized in international or non-international armed conflicts, instead stating generally that the "term 'detainee' means a person in the custody or under the physical control of the United States as a result of *armed conflict*." *Id.* (emphasis added). In sum, neither AR 190-8's competent tribunal requirement nor Congress's statement of U.S. policy is limited solely to international armed conflicts.

2. AR 190-8's competent tribunal requirement implements GPW Article 5, which in turn was enacted in the aftermath of World War II, in which German soldiers were prosecuted at Nuremberg for acting under Hitler's categorical order that "irregular combatants," "partisan[s]," and "guerrilla[s]," including Free French forces, should be executed rather than treated as prisoners of war. Trial of Bauer, 8 Law Reports of Trials of War Criminals 15, 16, 20 (1949) (war crimes trial involving German soldiers who executed captured Free French fighters dressed "almost entirely in civilian clothes" who should have been afforded "the treatment of prisoners of war"). Categorical pronouncements of POW status are flatly inconsistent with Article 5, and cannot substitute for AR 190-8 § 1-6's requirement that a competent tribunal determine status individually. *See* George Aldrich, *The Taliban, al Qaida, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891, 897 (2002) ("Without a doubt, the most difficult element to defend of the decisions made by President Bush in February with respect to the status of prisoners taken in Afghanistan is the blanket nature of the decision to deny POW status to the Taliban prisoners."). Accordingly, if an enemy leader were to categorically decree that U.S. soldiers engaged in an armed conflict subject to the GPW were ineligible for POW status, that decision would violate

Article 5's competent tribunal requirement. The reverse is equally true under AR 190-8, § 1.6.

As the dissent below noted, Justice Souter recognized as much in his concurring opinion in *Hamdi v. Rumsfeld* when he observed that a "categorical pronouncement to settle doubt is apparently at odds with the military regulation." *See* 888 F.3d at 96-97 (King, J., dissenting) (citing 542 U.S. 507, 550 (2004) (Souter, J., concurring in judgment)). Even the government's own law-of-war expert acknowledged that the 2002 Presidential pronouncement regarding the application of the Geneva Conventions to the Taliban and al Qaida was "flawed" and "politically based rather than based on law." *Id.* at 96.

3. The Fourth Circuit concluded that it would "upend our system of governance" to require a military tribunal to determine a battlefield detainee's legal status before initiating an Article III prosecution. *Hamidullin*, 888 F.3d at 73. Because it is consistent not only with Congress's delegation to the Executive branch to enact rules governing military matters, but also with other examples in which executive determinations act as conditions precedent to Article III prosecution, AR 190-8 does not infringe upon judicial power.

Just as Congress dictates the jurisdiction of lower Article III courts, *Palmore v. United States*, 411 U.S. 389, 400-01 (1973), Congress likewise is empowered to "make Rules concerning Captures on Land and Water," and "Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 11, 14. The Senate ratified the GPW, and Congress enacted a law directing the President to

"prescribe regulations to carry out his functions, powers, and duties" related to the armed forces. 10 U.S.C. § 121. The Executive branch promulgated AR 190-8 pursuant to the authority conveyed by 10 U.S.C. § 121 and the GPW. Because Congress is the source of both lower federal court jurisdiction and the Executive's authority to issue regulations governing the detention of enemy combatants, the latter does not infringe on the former even if those regulations implicate a material issue in a criminal case.

Violation of the separation of powers also presupposes that one branch of government threatens infringement upon a power that is constitutionally allocated to another. *See, e.g.*, *Hamdi*, 542 U.S. at 536-37 (rejecting government's argument for limited judicial review of combatant detention because "it would turn our system of checks and balances on its head"). In this case, however, the Executive Branch "has exclusive authority and absolute discretion to decide whether to prosecute a case," *United States v. Nixon*, 418 U.S. 683, 693 (1974), and Mr. Hamidullin simply seeks to enforce a restriction that the Executive has imposed upon itself implicating that authority.

Moreover, the Fourth Circuit's separation of powers ruling undermines the validity of Executive determinations in a variety of other contexts that affect matters within Article III jurisdiction. *See, e.g.*, Diplomatic Relations Act, 22 U.S.C. § 254d (diplomatic immunity); 18 U.S.C. § 249(b) (requiring certification of Attorney General as prerequisite to hate crime prosecution); 18 U.S.C. § 5032 (requiring Attorney General certification to prosecute juvenile); 32 C.F.R. § 153.5(b)(8)(iv) (requiring Deputy Attorney General approval before prosecuting persons overseas under Military

Extradition Jurisdiction Act); 32 C.F.R. § 719.112 (authority to grant immunity from prosecution); *cf.* 28 U.S.C. § 2679(d) (conditioning immunity under Federal Tort Claims Act upon Attorney General's certification that employee acted within scope of employment). One cannot complain that AR 190-8 unconstitutionally deprives district courts of jurisdiction without saying the same with respect to these statutory and regulatory prerequisites or bars to prosecution.

In other words, if a military tribunal's determination as to a detainee's legal status "would violate separation of powers principles by [improperly] conferring [a federal court's] responsibility to hear cases properly within [its] jurisdiction," then, for example, so would the State Department's certification as to an individual's diplomatic status. *Cf. In re Baiz*, 135 U.S. 403, 421 (1890) (noting that "the certificate of the Secretary of State . . . is the best evidence to prove the diplomatic character of a person"); *In re Grand Jury Subpoenas Returnable Dec. 16, 2015*, 871 F.3d 141, 150 (2d Cir. 2017) ("Such a certification is generally conclusive where, as here, the State Department's interpretation of when diplomatic immunity applies under the relevant agreements is reasonable."); *United States v. Al-Hamdi*, 356 F.3d 564, 572 (4th Cir. 2004) (same); *Abdulaziz v. Metropolitan Dade Cnty.*, 741 F.2d 1328, 1329, 1331 (11th Cir. 1984) (same).

Likewise, if a regulation requiring a military tribunal's determination as to POW status as a prerequisite to an Article III prosecution implicates the authority of federal courts over "all offenses against the laws of the United States," and "would turn on its head 'the American constitutional tradition' of civilian control over the military,"

888 F.3d at 77 (Wilkinson, J., concurring), the expansion of Article I military commissions to prosecute offenses that ordinarily fall under Article III jurisdiction does far more violence to those same principles. *Cf. Bahlul v. United States*, 840 F.3d 757, 758 (D.C. Cir. 2016) (en banc) (holding that Article III did not prevent Article I military commission from trying inchoate conspiracy offense that ordinarily falls within Article III jurisdiction).

In sum, this Court should grant the petition for certiorari because of the importance of the question as to the application of AR 190-8 to battlefield detainees, as well as the question of whether Executive branch determinations that impact federal criminal cases violate the separation of powers.

B. Common Law Battlefield Immunity.

Apart from whether AR 190-8 applies to battlefield detainees in non-international conflicts, this Court should review the decision below to determine the fundamental question of whether the battlefield, like the death penalty, has a distinct legal significance. This petition presents exceptionally important questions regarding whether foreign soldiers, who are not alleged to have committed war crimes, are subject to domestic federal criminal prosecution merely for fighting against the United States on a battlefield.

These questions are not new. But while our enemies have often characterized captured American soldiers as criminals, the United States has never treated foreign soldiers in a similar manner. Instead, the United States has always abided by the basic principle firmly rooted in the common law that enemy soldiers are not criminals

simply because they fight against us on a battlefield. "[I]t is no 'crime' to be a soldier," Justice Black explained in his dissent in *Johnson v. Eisentrager*, and therefore "legitimate 'acts of warfare,' however murderous, do not justify criminal conviction." 339 U.S. 763, 793 (1950) (Black, J., dissenting) (citing *Dow v. Johnson*, 100 U.S. 158, 169 (1879), and *Ford v. Surget*, 97 U.S. 594, 605-06 (1878)).[7]

In fact, the Fourth Circuit's ruling as to the abrogation of the common law will likely affect U.S. government employees who participate in armed conflict but are not part of the armed forces, such as employees of the CIA. Indeed, the Office of Legal Counsel relied upon common law authorities that, under the Fourth Circuit's opinion, are no longer viable in its memorandum addressing the criminal liability of government employees for the use of drones to attack Americans who support al Qaida. U.S. Office of Legal Counsel, Memorandum Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, at 20 (attached as appendix to *New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 133, 144 n.44 (2d Cir. 2014)).

The fundamental question of whether the law has changed with respect to common law protections afforded to enemy combatants, as well as to civilians who

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[7] In accordance with the limited review historically permitted by civil courts over military commissions, this Court in *Johnson v. Eisentrager* limited its review on habeas to whether military tribunals had lawful authority to try the defendants for the war crimes at issue. 339 U.S. at 786 ("It is not for us to say whether these prisoners were or were not guilty of a war crime . . . . 'We consider here only the lawful power of the commission to try the petitioner for the offense charged.'").

participate in armed conflict, is one that is worthy of this Court's immediate consideration.

II. The Fourth Circuit's Decision Conflicts With Decisions of This Court.

Apart from whether AR 190-8 requires a military tribunal to determine a battlefield detainee's status prior to prosecution, the Fourth Circuit's decision is in direct conflict with decisions of this Court holding that under the common law, combatants are not subject to criminal or civil liability for engaging in battle. Just as boxers are not bound by ordinary prohibitions against assault, armed conflict by definition displaces the prohibitions against acts of violence that prevail in peacetime. *See Orleans v. S.S. Co.*, 87 U.S. (20 Wall.) 387, 394 (1874) ("In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace."); *see also* Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100, Art. 41 (prepared by Francis Lieber, 1863) ("All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.").

In *Dow v. Johnson*, 100 U.S. 158, 165 (1879), this Court relied upon this well-established common law rule to hold that soldiers did not violate domestic law simply by fighting on a battlefield. "There would be something singularly absurd," this Court explained in the wake of the Civil War, "in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. . . . In both [civil and criminal proceedings], *from the very nature of war*, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and

soldiers of the invading army." 100 U.S. at 165 (emphasis added); *accord Coleman v. Tennessee*, 97 U.S. 509, 516 (1879) (stating that "there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded").

As this Court noted in the *Prize Cases*, "'[a] civil war,' says Vattel, 'breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge.'" *The Amy Warwick*, 67 U.S. 635, 667 (1862). Under the common law, therefore, even in the context of an insurrection, "if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability." *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897).[8] In other words, when the existence of armed conflict displaces the law imposed by a "common judge," combatants are no longer subject to the laws that would otherwise prohibit their conduct in battle other than the laws of war.

The decision below, in no uncertain terms, directly conflicts with these decisions. It did so on the ground that common law combatant immunity has been displaced by the Geneva Conventions, which guarantee combatant immunity only in international

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[8] Mr. Hamidullin argued below that the *Dow v. Johnson* line of cases provides a defense to civil and criminal liability rather than an immunity. *Compare Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 216 (4th Cir. 2012) (en banc) (holding that *Dow* provides a defense rather than immunity from suit such that an adverse decision did not authorize interlocutory appeal), *with id.* at 265 (Niemeyer, J., dissenting) (concluding that *Dow* affords an immunity from suit); *cf. Dixon v. United States*, 548 U.S. 1, 14 (2006) (discussing presumption that Congress enacts federal criminal statutes with understanding that federal common law defines defenses).

armed conflicts. 888 F.3d at 75-76. Citing *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981), the majority determined that "a self-executing treaty like the Third Geneva Convention . . . preempt[s] common law" immunity because it "explicitly defines the category of individuals entitled to POW status, and concomitantly, combatant immunity." *Id.*

The problem with this rationale is two-fold. First, the GPW contemplates that parties to a conflict may adhere to "more favourable measures" than those provided in the GPW itself. GPW art. 6. In other words, like many treaties, the GPW "created a floor, not a ceiling, for its signatories." *United States v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010) (discussing Convention Against Torture). Indeed, Common Article 3, the Geneva Convention provision that applies to non-international armed conflicts, explicitly requires that parties are "bound to apply" the protections listed – which admittedly do not include combatant immunity – "as a minimum," not a maximum. GPW art. 3; *accord Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006) (quoting Common Article 3). As such, even in the context of non-international armed conflicts subject to the minimal protections afforded by Common Article 3, the GPW explicitly *does not* abrogate any signatory's more favorable domestic law that affords combatant immunity in such conflicts.

Second, "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993). Simply because a statute or treaty fails to afford an immunity or defense to a defendant, in other words, does not mean that some broader common

law immunity or defense has thereby been abrogated. *See, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (remanding after determination that Foreign Sovereign Immunity Act did not afford immunity for determination whether "petitioner may be entitled to immunity under the common law"); *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (holding that statutory "silence does not suffice; and appellants have identified no provision or feature of the FSIA that bespeaks intent to abrogate that common-law scheme with respect to former officials").

Explicit language in the Geneva Conventions is necessary to displace the common law in this case because the distinction between the law applicable to a battlefield and the law applied during peace runs deep in the history and tradition of this country. In *Ex parte Milligan*, 71 U.S. (Wall.) 2, 131 (1866), this Court vacated a citizen's conviction by military commission because his conduct occurred outside the battlefield. "When peace prevails," the Court explained, the military have no authority to abridge the rights of citizens. *Id.* at 123-24. On the battlefield, however, a different legal paradigm applies. *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 (2004) (noting that Milligan's seizure outside the battlefield "was central to [the Court's] conclusion").

And even though that paradigm authorizes detention of combatants seized in battle, the purpose of that detention is decidedly non-criminal. 542 U.S. at 518 (citing W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920)). With respect to conduct on the battlefield, enemy combatants remain entitled to the defense that conduct "was legitimate as being incidental to a state of war then pending." Winthrop,

supra, at 778 (describing acquittal of Indian chief Plenty Horses in U.S. District Court for South Dakota for murder of U.S. Army officer).

The common law distinction between the law applicable to the battlefield and the law applicable elsewhere is also reflected in English common law decisions addressing the propriety of seizures in war. In *Dow v. Johnson*, 100 U.S. at 168, for example, this Court relied upon the English Privy Council's 1830 decision in *Elphinstone v. Bedreechund*, (1830) 1 Knapp. 316, 360-61 (P.C.), in which that court vacated a damages award that arose from a military seizure that occurred during the course of an insurrection against colonial rule in India. Describing *Elphinstone*'s holding in a subsequent opinion, the Privy Council stated that "[t]he truth is that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the action of military authorities." *Marais v. The General Officer and A.G. of the Colony*, [1902] A.C. 109, 115 (P.C.); *see also Le Caux v. Eden*, (1781) 99 Eng. Rep. 375 (K.B.) (holding that civil claim for false imprisonment would not lie against captor who wrongly seized ship as prize).[9]

[9] This principle is likewise reflected in common law treatises. *See* 4 Blackstone, Commentaries on the Laws of England 198 (1769) (noting that killing an enemy "in time of war" is not murder); 1 Joel P. Bishop, Commentaries on the Criminal Law § 131 p.78 (7th ed. 1882) (noting that "the men who compose the respective armies are not deemed criminal for what they do in the heat and conflict of battle; or, in general, for belligerent acts."); 2 *id.* at § 631 p.352 ("a homicide committed in the actual heat of battle in time of war is not criminal; for the person killed had not, at the moment and in the place, a right to his life, if the other could take it away."); 1 Hale, Pleas of the Crown § 433 (1847) ("If a man kill an alien enemy within this kingdom, yet it is felony, unless it be in the heat of war, and in the actual exercise thereof.").

Finally, the common law distinction between the law applied on the battlefield and the law applied elsewhere is reflected in statutes where Congress has expressly sought to apply law to the battlefield. For example, in the statute prohibiting war crimes, Congress defined a "war crime" as a grave breach of international conventions governing armed conflict such as the Geneva Conventions – including violations of Common Article 3 "when committed in the context of . . . an armed conflict not of an international character." 18 U.S.C. § 2441(c)(1)-(4). Similarly, the statutory prohibition on torture, 18 U.S.C. § 2340A, was enacted to implement the Convention Against Torture, which explicitly applies notwithstanding the existence of armed conflict. *Belfast*, 611 F.3d at 809. In other words, just as "federal laws will be construed to have only domestic application" in the absence of clear expressions of congressional intention, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016), Congress makes its intent clear when it seeks to apply a domestic federal criminal law to the battlefield.

In contrast, none of the statutes of conviction in this case contain text suggesting that Congress intended them to apply to armed conflict. Nor does it make sense to construe them as such. For example, the OLC has concluded that 18 U.S.C. § 32(b) (the companion provision to one of the offenses of conviction here, 18 U.S.C. § 32(a)), should not be construed to apply to armed conflict, because otherwise it would "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 U.S. Op. Off. Legal Counsel 148, 164 (1994).

Although the Geneva Conventions have established certain minimum protections that must be respected by every signatory engaged in armed conflict, such international agreements in no way abrogate federal common law that exceeds those protections. Because the Fourth Circuit discarded domestic federal common law as reflected in the decisions of this Court in favor of the lesser protections afforded by the Geneva Conventions, and because of the significant impact that the lower court's decision will have on U.S. government employees, contractors, and soldiers – by virtue of the elimination of a previously well-established defense for conduct that occurs in the context of armed conflict – this Court should grant the petition for certiorari.

III. Because the Government May Bring All Future Prosecutions of Foreign Soldiers in the Fourth Circuit, This Court Should Not Await the Development of a Circuit Conflict to Review the Issues of Fundamental Importance Presented by This Petition.

This case presents an excellent vehicle by which this Court can resolve fundamentally significant questions regarding the criminal liability of enemy soldiers and the allocation of powers between our branches of government. The underlying facts upon which the legal questions turn are undisputed, namely that Mr. Hamidullin was a Taliban soldier seized on the battlefield in Afghanistan and prosecuted in federal court for committing ordinary federal crimes. Indeed, as the government argued to the jury in its closing argument, Mr. Hamidullin is "is a military commander who planned an attack." C.A.J.A. 2080. Furthermore, the issues in this case have been cleanly

preserved and are the subject of extensive briefing in both the district court and the court of appeals.

Although this case does not arise in the context of a clear split among the lower courts, the absence of such a split is neither "surprising" nor a bar to review, as this Court has "taken cases in this area" without the benefit of diverging opinions among the courts of appeals. *See Noriega v. Pastrana*, 130 S. Ct. 1002, 1009 n.15 (2010) (Thomas, J., dissenting from denial of certiorari).

Nor should this Court wait for the development of a circuit split to consider the fundamentally important issues raised by this petition. Indeed, deferring action now could mean waiting for a split that will never occur. Under the applicable venue statute, the federal government has the ability to bring all future prosecutions of a similar nature in the Fourth Circuit – now that it has secured a decision defining federal criminal law in its favor. *See* 18 U.S.C. § 3238 ("The trial of offense begun or committed . . . out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one or two or more joint offenders, is arrested or is first brought."). Thus, there is little reason to believe any other circuit will be afforded the opportunity to address whether foreign soldiers violate domestic federal criminal law by fighting against United States soldiers in an armed conflict abroad.

As a result, this Court should not await further judicial development of the issues presented herein, both because such development is unlikely, and because the Fourth Circuit's decision represents an extreme deviation from governing military

regulations as well as principles firmly established in the history and tradition of the common law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Geremy C. Kamens
Federal Public Defender
Counsel of Record
Robert J. Wagner
Paul G. Gill
Frances H. Pratt
Assistant Federal Public Defenders
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Geremy_Kamens@fd.org

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