
NATIONAL SECURITY LAW — ARMY REGULATION 190-8 —
FOURTH CIRCUIT HOLDS TALIBAN MEMBER NOT ENTITLED TO
COMBATANT IMMUNITY. — *United States v. Hamidullin*, 888 F.3d 62
(4th Cir. 2018).

American courts have struggled to apply the laws of war to the detention and trial of individuals since the beginning of the conflict with al Qaeda and the Taliban.¹ One important role of the laws of war is to establish whether a detained individual is a prisoner of war (POW). POWs are entitled to combatant immunity from prosecution for their actions during the conflict, as long as those acts were consistent with the laws of war.² In the United States, POW status is theoretically determined by a procedure set out in Army Regulation 190-8³ (AR 190-8), which provides that a panel of military officers decides whether someone is entitled to POW status if there is any doubt about the individual's status or if the individual raises a claim to POW status.⁴ But the executive branch has not applied this regulation to the current conflict, and courts have not forced it to. Recently, in *United States v. Hamidullin*,⁵ the Fourth Circuit held that a Taliban commander captured in Afghanistan was not a POW and that the district court had jurisdiction to determine the defendant's POW status.⁶ By holding that federal courts — instead of AR 190-8 tribunals — can make POW determinations in the first instance, the Fourth Circuit ruled out the possibility of providing an important incentive to encourage the Executive to follow its own administrative procedures in non-international armed conflicts. That did a disservice to detainees and the courts themselves.

Under the Third Geneva Convention,⁷ two conditions must be satisfied to entitle an individual to POW status, and thus combatant immunity. First, as Article 2 specifies, the *conflict* must “arise between two or more of the High Contracting Parties” to the Convention — in other words, it must be an international armed conflict (IAC) between nation-

¹ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 566–67 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004); *United States v. Lindh*, 212 F. Supp. 2d 541, 552–55 (E.D. Va. 2002).

² EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 52–53 (2010).

³ U.S. Dep'ts of the Army, the Navy, the Air Force, and the Marine Corps, Army Regulation 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997) [hereinafter AR 190-8], https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Documentary-Supp-2015_Ch32.pdf [<https://perma.cc/F8UA-5N75>].

⁴ *Id.* § 1-6(a)–(c). AR 190-8 is binding on the executive branch. See *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 302 (1842).

⁵ 888 F.3d 62 (4th Cir. 2018).

⁶ *Id.* at 65.

⁷ Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

states.⁸ Second, as Article 4 specifies, the *individual* must be a member of one of a number of specified groups: armed forces of a party in the conflict, an organized resistance movement, or an army loyal to an unrecognized power, among others.⁹ Article 5 further states that if there is any doubt about whether an individual who has “committed a belligerent act and . . . fallen into the hands of the enemy” is entitled to POW status, the individual is entitled to POW status until his or her status is “determined by a competent tribunal.”¹⁰ The Third Geneva Convention does not define a “competent tribunal.” But AR 190-8, the military regulation that implements the Convention’s protections, does. It states that any person who might be entitled to POW status or who asserts a claim for POW treatment is entitled to a tribunal made up of three commissioned officers, among other requirements.¹¹

Irek Hamidullin, a former officer in the Russian Red Army, was taken into custody in Afghanistan in November 2009, after he prepared and commanded insurgents in an attack on an Afghan Border Police post as part of the Taliban and the Haqqani network.¹² He was not indicted until 2014, in the Eastern District of Virginia.¹³ He was charged on fifteen counts, including providing material support to terrorists and conspiracy to use a weapon of mass destruction, and he pled not guilty to all of them.¹⁴ He was found guilty of all the charges in August 2015 and given multiple life sentences.¹⁵

Hamidullin moved to dismiss the indictment, alleging that he was entitled to POW status — and its concomitant combatant immunity — for committing hostilities as a combatant in an armed conflict.¹⁶ The government countered that combatant immunity did not apply because neither the Article 2 requirements (of the conflict) nor the Article 4 requirements (of the individual) of the Third Geneva Convention were

⁸ *Id.* art. 2. If a conflict is a non-international armed conflict (NIAC), a baseline of protections still applies to detained individuals. *Id.* art. 3(1); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 629–33 (discussing the applicability of Article 3 to the conflict between the United States and Afghanistan).

⁹ Third Geneva Convention, *supra* note 7, art. 4. The other Article 4 categories include “[p]ersons who accompany the armed forces without actually being members thereof,” *id.* art. 4(4); “[m]embers of crews . . . of the merchant marine,” *id.* art. 4(5); and “[i]nhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units,” *id.* art. 4(6).

¹⁰ *Id.* art. 5.

¹¹ AR 190-8, *supra* note 3, § 1-6. The mechanism was used frequently in the Persian Gulf War, when the military conducted 1,196 hearings. U.S. DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS app. L, at 578 (1992).

¹² *Hamidullin*, 888 F.3d at 65.

¹³ *United States v. Hamidullin*, 114 F. Supp. 3d 365, 369 (E.D. Va. 2015).

¹⁴ *Id.* (listing all the charges against Hamidullin).

¹⁵ *Hamidullin*, 888 F.3d at 65.

¹⁶ *Hamidullin*, 114 F. Supp. 3d at 369; *see also* Defendant’s Motion to Dismiss the Indictment at 1–2, *Hamidullin*, 114 F. Supp. 3d 365 (No. 14-CR-140).

satisfied.¹⁷ The district court held evidentiary hearings on the questions,¹⁸ but it did not determine if the conflict in Afghanistan was an IAC under Article 2.¹⁹ Assuming arguendo that the conditions of Article 2 were met, the district court proceeded to the Article 4 analysis and found that the Taliban and Haqqani network did not meet the Convention's requirements for an armed group, so Hamidullin was not entitled to POW status.²⁰ The district court did not consider if AR 190-8 applied.²¹ Hamidullin appealed this holding, claiming that the district court had no jurisdiction to determine POW status, and that his status should be determined under the procedures dictated by AR 190-8.²²

The Fourth Circuit affirmed.²³ Writing for the majority, Judge Floyd²⁴ held that Hamidullin was not entitled to an AR 190-8 tribunal and affirmed both the district court's jurisdiction to decide Hamidullin's POW status and its finding that he did not have it.²⁵ The court explained that Hamidullin was not entitled to POW status because the conflict in Afghanistan when Hamidullin was captured in 2009 was a non-international armed conflict (NIAC): the Taliban had been out of power for eight years, and Hamid Karzai, the leader of the government, had asked the United States and its partners to stay in Afghanistan to assist in its ongoing internal conflict.²⁶ The court observed that the Taliban was not recognized by any other nation-state "as the legitimate government of Afghanistan" by 2009, and that recognition of the states involved was a criterion for an IAC under the Pictet Commentary on the Geneva Conventions.²⁷ The court also cited three reports that described the conflict as a NIAC.²⁸ As a result, the court found that AR 190-8 did not apply because Article 5, which it implements, applies only to IACs.²⁹

¹⁷ Government's Response to Defendant's Motion to Dismiss Indictment at 9-11, *Hamidullin*, 114 F. Supp. 3d 365 (No. 14-CR-140). Hamidullin also "argue[d] that his actions had an insufficient nexus to the United States and that he had inadequate notice that he would be prosecuted for [his] conduct in the field of battle," *Hamidullin*, 114 F. Supp. 3d at 369, and the court found that he was not entitled to relief on those grounds, *id.* at 388.

¹⁸ See *Hamidullin*, 114 F. Supp. 3d at 370-79 (recounting the analysis of the experts called to testify).

¹⁹ *Id.* at 387 (noting that the question "may elude a definitive answer").

²⁰ *Id.*

²¹ *Hamidullin*, 888 F.3d at 86 (King, J., dissenting).

²² *Id.* at 65-66 (majority opinion).

²³ *Id.* at 65.

²⁴ Judge Floyd was joined by Judge Wilkinson.

²⁵ *Hamidullin*, 888 F.3d at 71.

²⁶ *Id.* at 69-70.

²⁷ *Id.* at 70 (citing INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 62 (Jean S. Pictet ed., A.P. de Henry trans., 1960)).

²⁸ *Id.*

²⁹ *Id.* at 69.

The court then addressed Hamidullin's argument that the language of AR 190-8 — which extends to “*any* person not appearing to be entitled to [POW] status . . . who asserts that he or she is entitled to [POW] treatment”³⁰ — entitled him to a tribunal, regardless of the nature of the conflict.³¹ The court held that Hamidullin was not entitled to a tribunal during a NIAC for two reasons, one based in judicial authority and one in executive authority. First, the court held that Hamidullin was not entitled to a tribunal because a military regulation could not “preclude” jurisdiction that Congress had granted to federal courts.³² The court stated that “it is the role of the judiciary, not the Executive, to interpret treaties” like the Geneva Conventions, so courts can make POW determinations themselves.³³ Second, in this case, the Executive had already decided, in a 2002 memorandum, that Taliban detainees could not be POWs.³⁴ Because executive interpretations of treaties are “entitled to great weight,”³⁵ the court would not allow a tribunal “to displace the president’s interpretation of the Convention.”³⁶

Judge Wilkinson concurred. He argued that AR 190-8 “cannot overcome,” first, the federal courts’ statutory authority to try Hamidullin on criminal charges; second, the Executive’s 2002 determination that Taliban detainees were not entitled to POW status; and third, the legal framework that facilitates prosecuting Taliban fighters in civilian courts.³⁷ Finding that Hamidullin was entitled to an AR 190-8 tribunal, Judge Wilkinson explained, would affect the criminal prosecutions of other unlawful combatants; the relationship among the courts, Congress, and the military; and American policy in conflicts abroad.³⁸

Judge King dissented, arguing that the matter should be remanded to the Executive to determine whether Hamidullin was entitled to POW status.³⁹ First, he stated that while the court could “interpret” the Third Geneva Convention, it could not “determine whether the Convention applies to particular hostilities and a particular detainee,” an Executive responsibility.⁴⁰ Judge King also contested the majority’s finding, on

³⁰ *Id.* at 71 (second alteration in original) (emphasis added) (quoting AR 190-8, *supra* note 3, § 1-6(b)).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 72.

³⁴ *Id.*

³⁵ *Id.* (quoting *Abbott v. Abbott*, 560 U.S. 1, 15 (2010)).

³⁶ *Id.* at 73. The court also dismissed Hamidullin’s argument that he was eligible for common law combatant immunity and held that 18 U.S.C. § 32 — which criminalizes attacks on U.S. aircraft — applied to Hamidullin because he “was not a lawful combatant and his conduct was not lawful under” international law. *Id.* at 76.

³⁷ *Id.* at 77 (Wilkinson, J., concurring).

³⁸ *Id.* at 78.

³⁹ *Id.* at 79 (King, J., dissenting).

⁴⁰ *Id.* at 90.

which its POW determination rested, that the conflict in Afghanistan was a NIAC. He pointed out that the appellate court should not have made independent factual findings that the district court had not about the nature of the conflict, and that the findings that the appellate court had made were based in disputed, nonbinding authorities that could lead to the opposite conclusion.⁴¹ Second, he observed that the Executive may choose to exceed the protections required by the Third Geneva Convention, as the United States has frequently done to ensure reciprocity, and noted that the majority did not entertain that possibility.⁴² He emphasized that remanding the matter to the Executive would not necessarily force the Executive to convene an AR 190-8 tribunal.⁴³ But Judge King criticized the majority's reasons for rejecting Hamidullin's assertions that his status should be determined by an AR 190-8 tribunal, stating that "the majority's view defies . . . the United States' chosen scheme for making Article 4 POW determinations."⁴⁴

The Fourth Circuit's refusal to require the executive branch to proceed under AR 190-8 eliminates an important incentive for the Executive to follow its own administrative procedures. The Executive chose not to apply AR 190-8 at the beginning of its conflict with al Qaeda and the Taliban, and courts did not insist that it do so. Still, despite AR 190-8's language, which applies to *any* person who asserts POW status, the Fourth Circuit's decision in *Hamidullin* explicitly supported abandoning the use of AR 190-8 — and, by extension, other Executive procedures — to an extent that no court of appeals had before. There are still good functional reasons for using the tribunals, particularly if they are used soon after an individual has been captured, and *Hamidullin*'s reasoning goes beyond AR 190-8 to undermine the Executive's incentive to use alternative detainee proceedings of any kind in the future.

The Executive's failure to implement AR 190-8 tribunals began soon after the September 11 attacks. President Bush issued a memorandum stating that Taliban detainees were not entitled to POW protections under Article 4 of the Third Geneva Convention and that al Qaeda detainees were not entitled to POW protections because the conflict with al Qaeda was not an IAC.⁴⁵ In *Hamidullin*, the majority and concurrence

⁴¹ *Id.* at 92–93.

⁴² *Id.* at 93.

⁴³ *Id.* at 79 (noting that instead, the Executive could simply consider and explain Hamidullin's POW status, decide if the conflict with the Taliban was an IAC or a NIAC, endorse the 2002 memorandum, or bestow POW protections beyond the requirements of the Geneva Conventions).

⁴⁴ *Id.* at 96; *see also id.* at 94 ("[P]ursuant to [AR] 190-8, the United States has placed the responsibility for . . . Article 5 proceedings in the hands of military tribunals — not the federal courts.").

⁴⁵ Memorandum from George W. Bush, President, to the Vice President et al. 2 (Feb. 7, 2002), https://www.aclu.org/sites/default/files/field_document/20100615_dos_release_1_doc_-_already_released.pdf [https://perma.cc/QW2G-WHRE]; *see also* Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949, 26 Op. O.L.C. 1, 9 (2002).

cited the Bush memorandum in their assessment of the defendant's status.⁴⁶ But as Judge King pointed out in dissent, serious questions have been raised about that memorandum, at least since it was issued.⁴⁷

Instead of accepting this collective determination of detainee status, courts could have insisted that AR 190-8 be applied. The D.C. District Court, in *Hamdan v. Rumsfeld*,⁴⁸ held that the government had to present the case that Hamdan, a driver for Osama bin Laden, was not a POW in front of an AR 190-8 panel.⁴⁹ But that case was an exception. District courts have repeatedly ignored AR 190-8 and instead themselves determined whether a detainee was entitled to POW status. In *United States v. Lindh*,⁵⁰ the court did not remand the case to an AR 190-8 tribunal, instead finding that the defendant, a member of the Taliban, was not eligible for POW status.⁵¹ Other cases followed; in *United States v. Arnaout*⁵² and, several years later, in *United States v. Hausa*,⁵³ the district courts in each case found that al Qaeda did not meet the Article 4 requirements.⁵⁴ Like these predecessors, the district court in *Hamidullin* did not even consider if AR 190-8 applied.⁵⁵

The Supreme Court did not specifically insist that the Executive implement AR 190-8 tribunals in *Hamdi v. Rumsfeld*,⁵⁶ which held that Guantanamo detainees had due process rights.⁵⁷ But Justice O'Connor, writing for the plurality, explicitly recognized the usefulness of AR 190-8.⁵⁸

⁴⁶ *Hamidullin*, 888 F.3d at 72–73; *id.* at 77 (Wilkinson, J., concurring).

⁴⁷ *Id.* at 96–97 (King, J., dissenting) (inquiring why part of the 2002 Bush memorandum — that the conflict with the Taliban was an IAC — was “implicitly abrogated,” while the statement that Taliban fighters are nevertheless not entitled to POW protections remained valid, *id.* at 97).

⁴⁸ 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd and remanded*, 548 U.S. 557 (2006).

⁴⁹ *Id.* at 161–62. The court did not accept the Executive's collective determination, noting that “the President is not a ‘tribunal.’” *Id.* Ultimately, the Supreme Court reserved the question. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 & n.61 (2006). In one other case, *Al Warafi v. Obama*, 716 F.3d 627 (D.C. Cir. 2013), the D.C. Circuit noted that AR 190-8 “is domestic U.S. law, and in a habeas proceeding such as this, a detainee may invoke [AR] 190-8 to the extent that the regulation explicitly establishes a detainee's entitlement to release from custody.” *Id.* at 629. That defendant, however, was petitioning for his rights as medical personnel under the First Geneva Convention, not the Third, and was not entitled to a separate proceeding. *See id.*

⁵⁰ 212 F. Supp. 2d 541 (E.D. Va. 2002).

⁵¹ *Id.* at 558 (concluding that, first, the President's recent statement that the Taliban was not eligible for POW status applied to the defendant and was worthy of deference and, second, the defendant failed to show that the Taliban satisfied any of the conditions of Article 4).

⁵² 236 F. Supp. 2d 916 (N.D. Ill. 2003).

⁵³ 258 F. Supp. 3d 265 (E.D.N.Y. 2017).

⁵⁴ *Id.* at 273 n.6; *Arnaout*, 236 F. Supp. 2d at 917.

⁵⁵ *Hamidullin*, 888 F.3d at 86 (King, J., dissenting).

⁵⁶ 542 U.S. 507 (2004).

⁵⁷ *Id.* at 509.

⁵⁸ *See id.* at 538 (“[M]ilitary regulations already provide for such [appropriately authorized and properly constituted] process . . . dictating that tribunals be made available to determine the status of enemy detainees who assert [POW] status . . .”). Professors Robert Chesney and Jack Goldsmith argue that this “approving reference to AR 190-8” is “in tension” with the Court's desire to avoid

In *Boumediene v. Bush*,⁵⁹ the Court suggested changes to the alternative detainee procedures that the Executive had developed to serve some of the functions of AR 190-8 tribunals.⁶⁰ But *Hamidullin*, by contrast, explicitly supported abandoning AR 190-8 — and, by extension, other Executive processes — in a way that no court of appeals had before, concluding that Hamidullin’s claim was inconsistent with Congress’s grant of jurisdiction to federal district courts to hear criminal cases.

To hold that Hamidullin was not entitled to an AR 190-8 tribunal, the Fourth Circuit had to confront AR 190-8’s text, which applies to *any* person who asserts POW status. But instead of issuing a narrow holding that AR 190-8 was created to implement Article 5 of the Third Geneva Convention and would never apply in a NIAC, the Fourth Circuit made a much broader holding about the relationship between the Executive and the courts, stating that requiring the government to invoke an AR 190-8 tribunal would “strip Article III courts of their statutorily granted jurisdiction.”⁶¹ But, as the dissent notes, the AR 190-8 process “simply serves as a legal prerequisite to criminal prosecution.”⁶² Just as hate crimes and juvenile offenses require certification before prosecution, AR 190-8 tribunals are necessary to determine whether an individual is entitled to the combatant immunity of a POW prior to prosecution.⁶³ Requiring the executive branch to follow an administrative procedure does not “strip” the court of jurisdiction; at most, it could delay its exercise of jurisdiction, or affect the decision the court ultimately reaches.⁶⁴

There are good functional reasons for the Executive to use administrative proceedings like AR 190-8 tribunals. First, and most importantly, AR 190-8 tribunals can be used to address individuals’ claims of wrongful detention because the regulation empowers a panel to determine whether an individual is an “[i]nnocent civilian who should be immediately returned . . . or released.”⁶⁵ If the tribunals had been implemented in the early 2000s, they could potentially have been used to

the use of ex parte evidence. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1109 n.140 (2008).

⁵⁹ 553 U.S. 723 (2008).

⁶⁰ See *id.* at 767.

⁶¹ *Hamidullin*, 888 F.3d at 71–72; see also *id.* at 77 (Wilkinson, J., concurring).

⁶² *Id.* at 94 (King, J., dissenting).

⁶³ *Id.*; Supplemental Opening Brief of the Appellant at 12, *Hamidullin*, 888 F.3d 62 (No. 15-4788).

⁶⁴ In this case, at least, it was unlikely to cause any delay. Hamidullin was captured in 2009 and not indicted until 2014, and the prosecution “acknowledged that nothing in the record explains how or why Hamidullin was transferred from military to civilian custody, or how he ended up in Virginia.” *Hamidullin*, 888 F.3d at 97 (King, J., dissenting).

⁶⁵ AR 190-8, *supra* note 3, § 1-6(e)(10)(c); see also John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 222–23 (2011) (discussing Article 5’s textual requirement that the use of the tribunals be limited to those who have committed a belligerent act, the “spirit of Article 5,” *id.* at 222, and the explicit provisions of AR 190-8).

avoid the years-long detention of “apparently uninvolved civilians” by ascertaining relatively quickly and easily if the individuals were combatants who had committed belligerent acts or if they were detained by mistake.⁶⁶ Second, AR 190-8 tribunals instituted soon after an individual is captured can gather and preserve evidence for future criminal prosecutions or habeas proceedings, and in that way, far from undermining the courts, tribunals can help them reach more sound decisions. Finally, if the Executive adopts a reciprocity policy that bestows POW status by exceeding the requirements of international law, the tribunals could ensure its implementation.

Hamidullin also undermines the Executive’s incentive to use non-AR 190-8 procedures. After *Hamdi*, the Bush Administration established “Combatant Status Review Tribunals (CSRTs) that were patterned on the procedures of AR 190-8,”⁶⁷ and similarly composed of “three neutral commissioned officers.”⁶⁸ But in *Hamidullin*, the Fourth Circuit stated that it could not “authorize a panel of three mid-level, non-lawyer military officers to usurp [the court’s] authority and responsibility” by determining POW status.⁶⁹ The Fourth Circuit’s decision, then, does more than remove pressure on the Executive to undertake AR 190-8 proceedings as a prerequisite to prosecution of an individual involved in a NIAC. The Executive could also reasonably read the decision to require no detention proceedings in a NIAC at all.

The Fourth Circuit’s decision removed whatever minimal pressure remained on the executive branch to implement AR 190-8 tribunals in a NIAC, even though they could serve an important role, by ruling that the tribunals conflicted with the courts’ jurisdiction. This reasoning could reduce the Executive’s incentives to follow any other administrative procedures that, like AR 190-8 tribunals, are established by the Executive’s own regulations. Having said that, the court might well have been justified in denying relief to Hamidullin himself. It is unlikely that he could establish his innocence in an administrative proceeding, where he would have had fewer protections than in the federal court that convicted him.⁷⁰ It is also implausible that Hamidullin would have been able to marshal new evidence about the conflict in Afghanistan that neither the district nor the circuit court considered to prove that he was entitled to POW status. But instead of narrowly holding that it would serve no purpose to let Hamidullin have access to an AR 190-8 tribunal, the court effectively endorsed the Executive’s decision to ignore the regulation. In so doing, it curtailed a potentially valuable remedy for individuals detained in NIACs.

⁶⁶ Bellinger & Padmanabhan, *supra* note 65, at 223.

⁶⁷ *Id.*

⁶⁸ Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 429 (2009).

⁶⁹ *Hamidullin*, 888 F.3d at 73.

⁷⁰ See Chesney & Goldsmith, *supra* note 58, app. A, at 1133.