	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
	)	
UNITED STATES OF AMERICA	)	BRIEF ON BEHALF OF APPELLEE
	)	
	)	CASE No. 08-003
v.	)	
	)	Hearing held at Guantanamo Bay, Cuba
	)	on 13 August 2008
OMAR AHMED KHADR	)	before a Military Commission
	)	convened by MCCO # 07-02
	)	
	)	Presiding Military Judge
	)	Colonel Patrick A. Parrish
	)	
	)	DATE: 17 September 2008

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

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WHETHER THE REQUEST FOR RECONSIDERATION, AND THE SUBSEQUENT NOTICE OF APPEAL, WERE TIMELY UNDER 10 U.S.C. § 950d(b).

Issue Presented

WHETHER THE MILITARY JUDGE CORRECTLY RULED THAT THE SECRETARY OF DEFENSE'S *ULTRA VIRES* ATTEMPT TO ALTER THE PLAIN AND UNAMBIGUOUS MEANING OF THE TERM "CONSPIRACY" WAS "CONTRARY TO OR INCONSISTENT WITH" THE MCA AND THEREFORE PROPERLY ORDERED SURPLUS LANGUAGE RELATING TO THE JOINING OF A CRIMINAL ENTERPRISE STRICKEN FROM THE CONSPIRACY CHARGE.

Statement of Statutory Jurisdiction

Appellant purports to invoke the jurisdiction of this Court under 10 U.S.C. § 950d(a)(1). For reasons discussed in argument on the specified issue, jurisdiction is lacking because the government's notice of appeal was untimely. *See* 10 U.S.C. § 950d(b). For reasons discussed in Appellee's Motion to Dismiss, filed contemporaneously, jurisdiction is also lacking because the ruling on review did not "terminate[] proceedings of the military commission with respect to a charge or specification" or fall into one of the other two basis for interlocutory appeal. *See* 10 U.S.C. § 950d (a)(2)(A). Appellee files this response brief pursuant to Rule 14 of this Court's Rules of Practice.

Statement of the Case

On 17 October 2006, the President signed into law the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA). The MCA, enacted in the wake of the U.S. Supreme Court decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), authorizes military commissions to try "alien unlawful enemy combatants" for "violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). The MCA, like the Uniform Code of Military Justice (UCMJ), makes a number of offenses punishable by military

commissions, including the offense of "conspiracy" to commit one or more offenses triable by military commission. 10 U.S.C. § 950v(b)(28).

Like the UCMJ, the MCA delegates the authority to prescribe *procedural* rules to a designated official of the Executive branch (in this case, the Secretary of Defense). 10 U.S.C. § 949a(a). Congress, presumably envisioning that the Secretary would issue those procedural rules in the form of a "manual" similar to the Manual for Courts-Martial (MCM), provided authority for the Secretary to prescribe "procedures, including elements and modes of proof," in a fashion similar to that employed by the President in connection with court-martial practice. *See* 10 U.S.C. § 949a(a). In Part IV of the MCM, as a useful, but non-authoritative guide for practitioners, the President sets forth the elements of offenses made punishable by Congress in the UCMJ. *See, e.g.*, Manual for Courts-Martial, United States (2005 ed.) Part IV, ¶ 5b. The MCA's delegation to the Secretary, like the UCMJ's delegation to the President, is subject to the general limitation that any rules and procedures prescribed "may not be contrary to or inconsistent with" the MCA. 10 U.S.C. § 949a(a); 10 U.S.C. § 836(a).

On 18 January 2007, the Secretary of Defense issued the Manual for Military Commissions (MMC). Notwithstanding the plain and unambiguous meaning of the term "conspiracy" as established in case law, as set forth in the terms of the statute, and as understood in common law, Part IV of the MMC (in contrast to the MCM) *inaccurately* sets forth the elements of conspiracy, to include "join[ing] an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission." *See* ¶ 6(28), Part IV, MMC (2007).

On 2 February 2007, the Office of the Chief Prosecutor (OCP) caused charges to be sworn against Mr. Khadr. (*See* Sworn Charges, Appellant's Appx., Ex. K.) Charge III

(conspiracy) includes the allegation that Mr. Khadr "conspired and agreed" with named individuals to commit offenses triable by military commission. (*Id.*) In addition, in apparent reliance on the Secretary's *ultra vires* attempt to enlarge the definition of "conspiracy," the OCP included the allegation that Mr. Khadr did "willfully join an enterprise of persons who shared a common criminal purpose" to commit various offenses triable by military commission. (*Id.*) The sole specification of the charge alleges a number of overt acts in furtherance of the "enterprise and conspiracy." (*Id.*) On 24 April 2007, the Convening Authority referred amended charges (including Charge III) for trial by military commission. (*See* Referred Charges, Appellant's Appx., Ex. J.)

On 11 January 2008, the defense moved to strike the "enterprise" language from Charge III as surplusage. (*See* Def. Mot., Appellant's Appx., Ex. H.)[1] On 4 April 2008, finding that the Secretary had gone "beyond the elements for conspiracy" in purporting to define conspiracy to include joining a criminal enterprise, the Military Judge concluded that the Secretary's effort was "contrary to or inconsistent with" the MCA. The Military Judge therefore correctly ruled in favor of the defense and ordered the surplus "enterprise" language to be stricken from Charge III. (*See* Ruling on Def. Mot., D-019, Appellant's Appx., Ex. F.)

After a lapse of *three months* (and after a change of judges), on 11 July 2008, the government moved to reconsider the Military Judge's ruling of 4 April 2008.[2] In addition to arguing that the previous Military Judge had improperly stricken the enterprise language from Charge III, the government argued that the charge, as amended, failed to allege the actual offense

[1] Due to an oversight on the part of the defense, the original motion failed to encompass the entirety of the surplus language. This was rectified by a defense special request for relief following the Military Judge's ruling on the defense motion. (*See* LCDR Kuebler e-mail of 9 April 2007, Appellant's Appx., Ex. E.)

[2] The statutory period in which to appeal the Military Judge's original ruling, or file a motion for reconsideration rendering the Military Judge's ruling non-final, expired on or about 9 April 2008. *Cf. United States v. Omar A. Khadr*, CMCR Case No. 07-001, Ruling on Mot. to Dismiss, 19 September 2007, at 3-4.

of conspiracy for want of language alleging that Mr. Khadr knew of the unlawful purpose of the agreement, and requested restoration of language sufficient to allege the actual offense of conspiracy. (*See* Gov't Mot. to Reconsider, Appellant's Appx., Ex. B.)

On 14 August 2008, the Military Judge denied, in part, and granted, in part, the government's motion. The Military Judge denied the request to reconsider the deletion of the enterprise language from Charge III, but did grant the government's request to restore language alleging that Mr. Khadr knew of the unlawful purpose of the agreement. (*See* Ruling on Gov't Mot., Appellant's Appx., Ex. A.) The government filed its Notice of Appeal on 19 August 2008.

Military commission proceedings against Mr. Khadr are ongoing, including proceedings with respect to Charge III and its sole specification. The government has at no time claimed that the effect of the Military Judge's order striking the enterprise language from Charge III precludes it from going forward on this charge. Indeed, by seeking to restore language properly alleging the elements of conspiracy, i.e., that Mr. Khadr knew of the unlawful purpose of the agreement, the government appears to have gone out of its way to maintain the viability of Charge III notwithstanding the Military Judge's ruling on enterprise liability. As a result, the government's appeal is now before this Court – untimely filed, lacking a basis on which to invoke the jurisdiction of this Court, and devoid of merit.

Statement of Facts

This appeal presents questions of law. All of the facts necessary to resolve the issues are set forth in the Statement of the Case above.

Specified Issue

WHETHER THE REQUEST FOR RECONSIDERATION, AND THE SUBSEQUENT NOTICE OF APPEAL, WERE TIMELY UNDER 10 U.S.C. § 950d(b).

Assigned Error

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO ACCORD THE SECRETARY OF DEFENSE'S CODIFICATION IN THE M.M.C. OF THE ELEMENTS OF CONSPIRACY SUFFICIENT (OR ANY) DEFERENCE.

Argument on Specified Issue

APPELLANT'S REQUEST FOR RECONSIDERATION, AND SUBSEQUENT NOTICE OF APPEAL, WERE UNTIMELY UNDER 10 U.S.C. § 950d(b).

I. Standard of Review

The issue of whether this appeal was timely filed and therefore whether this Court has jurisdiction is reviewed *de novo*. *United States v. Tamez,* 63 M.J. 201 (C.A.A.F. 2006).

II. Summary of the Argument

The appeal is untimely and must be dismissed. Appellant's appeal was filed well beyond the statutorily-prescribed five-day time period for taking an interlocutory appeal under 10 U.S.C. § 950d(b). A timely motion for reconsideration of the Military Judge's 4 April 2008 ruling striking the enterprise language from Charge III, could have rendered the ruling "nonfinal" for purposes of appeal, thereby justifying a departure from the five-day period. *See United States v. Ibarra*, 502 U.S. 1, 4 (1991). However, the Appellant's untimely motion to reconsider – filed over three months after the date of the original ruling – cannot revive the Appellant's moribund right to an interlocutory appeal. In such circumstances, the Supreme Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), controls and requires dismissal of the appeal.

III. The Appeal is untimely under MCA § 950d(b) and should therefore not be considered.

The Military Commissions Act specifies that the prosecution may file an interlocutory appeal if it files "a notice of appeal with the military judge within five days after the date of such order or ruling." 10 U.S.C. § 950d(b). The military judge issued his ruling striking the enterprise language from Charge III on 4 April 2008. Any appeal of that ruling, or motion for reconsideration sufficient to render it non-final for purposes of appeal, had to be filed no later than 9 April 2008. Appellant's effort to resuscitate its right to appeal by dint of a motion for reconsideration filed three months after the Military Judge's ruling must fail.

As the Supreme Court emphasized last year: "This Court has long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." *Bowles v. Russell*, 127 S. Ct. 2360, 2363 (2007) (internal quotation marks omitted). The Supreme Court also observed that "the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction." *Id.* at 2364. This Court must do the same. In *Bowles*, the Supreme Court emphasized the "jurisdictional significance" of "statutory time limits for taking an appeal." *Id*. Section 950d(b) of the MCA is precisely such a statutory time limit for taking an appeal. The *Bowles* Court also emphasized the constitutional significance of adhering to statutory time limits: "Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Id.* at 2365. Congress has expressly determined when, and under what conditions, this Court can hear an interlocutory appeal. It can do so only if the prosecution files a notice of appeal within five days of the ruling it wishes to appeal.

United States v. Ibarra, 502 U.S. 1 (1991), cited by Appellant (*see* Appellant's Br. At 10), does not compel a contrary result. *Ibarra* held that a *timely* motion for reconsideration renders the underlying order or ruling "nonfinal for purposes of appeal as long as the petition is pending." *Id.* at 4 (citation omitted). Here, the government did *not* file a timely motion for reconsideration of the Military Judge's 4 April 2008 ruling. Instead, it chose to wait over three months to seek reconsideration of the ruling and, when unsuccessful, ultimately filed its notice of appeal – long after the expiration of the five-day period prescribed by the statute and long after the Military Judge's 4 April 2008 ruling had become final. Neither *Ibarra* nor any other authority provides support for the proposition that an *untimely* motion for reconsideration can act to revive a right to appeal previously extinguished by operation of law. Under these circumstances, *Bowles* clearly controls the outcome in this case and requires rejection of the Appellant's appeal.

This conclusion is strengthened by ample precedent holding that "statutes that authorize Government appeals, as well as regulations and appellate court rules implementing them, are strictly construed and enforced." *United States v. Santiago*, 56 M.J. 610, 612-13 (N.M.Ct. Crim.App. 2001). As the same court previously observed in the course of dismissing another government appeal due to an untimely filing of the record, statutes authorizing prosecution of interlocutory appeals "are construed strictly against the right of the prosecution to appeal." *United States v. Pearson*, 33 M.J. 777, 779 (N.M.C.M.R. 1991); *accord United States v. Combs*, 38 M.J. 741, 743 (A.F.C.M.R. 1993). The court explained, "Because these statutes compete with speedy trial and double jeopardy protection as well as judicial impartiality and piecemeal appeal policies, prosecution appeals are not particularly favored in the courts." *Pearson*, 33 M.J. at 779. The Supreme Court has similarly observed that "in the federal jurisprudence, at least, appeals by

the Government in criminal cases are something unusual, exceptional, not favored." *Will v. United States*, 389 U.S. 90, 96 (1967) (quoting *Carroll v. United States*, 354 U.S. 394, 400 (1957)).

As a final matter, this situation is unlike the situation presented in this case when it was the subject of an interlocutory appeal before this Court last year. There, the Appellant filed a timely motion to reconsider the Military Judge's ruling dismissing charges without prejudice, and then filed its notice of appeal after the Military Judge denied the motion for reconsideration, more than five days after the date of the original ruling. Denying Appellee's motion to dismiss, this Court cited *Ibarra* for the proposition, as stated above, that a timely motion to reconsider rendered the Military Judge's order nonfinal for purposes of appeal. *See United States v. Omar A. Khadr*, CMCR 07-001, Ruling on Motion to Dismiss, 19 September 2007, at 3-4. As noted above, here the Appellant failed to preserve its right by filing a timely motion for reconsideration of the Military Judge's 4 April 2008 ruling. Therefore, this Court has no choice but to dismiss the appeal for lack of jurisdiction.

Prayer for Relief

Appellee respectfully requests that this Honorable Court dismiss the Appellant's appeal.

Argument on Assigned Error

THE MILITARY JUDGE CORRECTLY RULED THAT THE SECRETARY OF DEFENSE'S *ULTRA VIRES* ATTEMPT TO ALTER THE PLAIN AND UNAMBIGUOUS MEANING OF THE TERM "CONSPIRACY" WAS "CONTRARY TO OR INCONSISTENT WITH" THE MCA AND THEREFORE PROPERLY ORDERED SURPLUS LANGUAGE RELATING TO THE JOINING OF A CRIMINAL ENTERPRISE STRICKEN FROM THE CONSPIRACY CHARGE.

I. Standard of Review

A military judge's amendment of charges or specifications pursuant to R.M.C. 906(b)(3) is an issue of law reviewed *de novo. United States v. Moreno*, 46 M.J. 216 (C.A.A.F. 1997).

II. Summary of the Argument

The Military Judge did not err in striking the disputed language concerning the Government's "enterprise theory" of conspiracy liability because such language represented an impermissible and *ultra vires* attempt by the Secretary of Defense to broaden the conspiracy offense beyond its unambiguous definition given in MCA § 950v(b)(28). The authority granted in MCA § 949a(a) to prescribe "procedures, including elements and modes of proof," was not intended to empower the Secretary of Defense to legislate crimes. Such a delegation would violate separation of powers principles.

The judicial deference standard articulated in *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is not applicable in this case because *Chevron* deference does not apply in criminal proceedings. Even if *Chevron* deference were to apply, it would not be triggered in this case because, under the circumstances, there is no ambiguity in the meaning of the term "conspires" within MCA §950v(b)(28) in view of the well settled interpretation of that word under U.S. military and federal law, common law and international law.

Were this Court to find ambiguity, the Secretary of Defense's promulgation of MMC Part IV, paragraph (28) did not constitute a reasonable interpretation of Congress' intent even under the most deferential standard. Rather, it was an attempt to broaden the conspiracy offense by adding to it an "enterprise theory" of liability. Because Congress never contemplated such a theory of liability for the offense, the Secretary's action amounted to an *ultra vires* attempt to legislate a new offense from within the Executive Branch and was properly struck down by the military judge.

The Military Judge's striking of the disputed language was necessary to avoid placing Mr. Khadr at risk of being convicted for conspiracy under circumstances where the government has not actually proven the offense. "Conspiracy by enterprise" is neither an offense under the MCA nor one under the Law of War. Accordingly, the Military Commission has no jurisdiction to try Mr. Khadr for this supposed offense. If the disputed language were left in the specification, Mr. Khadr would be at risk of conviction for conspiracy under this bogus theory whether or not the Government's evidence supported his conviction for the actual offense of conspiracy. To prevent this risk of grave injustice to Mr. Khadr, the Military Judge acted properly in striking the disputed language.

III. The Secretary's Authority Under the MCA to Specify Procedures, Including Elements, is not the Power to Legislate Crimes

Appellant seeks to persuade this Court (and sought to persuade the military commission) that Congress effectively delegated its authority to define federal crimes to the Secretary of Defense. In particular, Appellant argues, "The M.C.A. does not define the word 'conspires.' That definition has been supplied by the Secretary of Defense, acting pursuant to an express delegation of authority to promulgate elements of the offenses codified in the Military

Commissions Act."[3] (Appellant's Br. at 13). Appellant's argument leads to the unavoidable conclusion that MCA § 949a(a) violates separation of powers and is therefore unconstitutional. However, consistent with statutory rules of construction requiring courts to construe statutes so as to avoid constitutional problems unless doing so would be "plainly contrary" to Congress' intent, this Court need not construe the statute as Appellant does because Appellant's interpretation is untenable. *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.").

A. Legislative delegation to the Executive of the power to prescribe elements of a crime would violate Constitutional notions of separation of powers.

The power to define the elements of an offense is the power to define the offense itself. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). If Appellant is correct that the MCA delegated to the Secretary of Defense the authority to define crimes, the MCA would have accomplished an historic consolidation of legislative power in the Executive without manifesting an intent to do so in either the text of the Act or its legislative history.[4]

[3] The MCA does not vest in the Secretary the authority to "promulgate" elements as Appellant has stated, (Appellant's Br. at 10, 13, 16), but rather to "prescribe" elements pursuant to his general authority to prescribe procedures in the manner the President has in the Manual for Courts-Martial. 10 U.S.C. § 949a(a) ("Pretrial, trial and post-trial procedures, including elements and modes of proof, . . . may be prescribed by the Secretary of Defense."). This linguistic slight of hand is significant since to "promulgate" implies the delegation of actual law making authority – "To put (a law or decree) into force or effect," Blacks Law Dictionary 1231 (7th ed. 1999). To "prescribe," on the other hand, has the more limited sense of "to lay down as a guide, direction, or rule of action." Merriam-Webster's Online Dictionary *available at http://www.merriam-webster.com/dictionary/prescribe*. (Blacks Law Dictionary does not have an entry for "prescribe").

[4] In the prosecution of enemy combatants, even during moments of national crisis, Congress has never abdicated its legislative function to the Executive. During WWII, Article 15 of the Articles of War gave military commissions broad jurisdiction over "offenders or offenses that … by the law of war may be triable by such military commissions." Even language as expansive as this, however, was not treated as delegating to the Executive the authority to *promulgate* crimes. Rather, this was seen for what it was, an incorporation of the customary laws of war by reference – where the courts, not the Executive, reserved their province "to say what the law is." *Marbury v.*

Even if this is what Congress intended, such a collapsing of the separation of powers would lack any support from either the letter or spirit of the Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 452 (1998) ("That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. . . . Abdication of responsibility is not part of the constitutional design.") (citations omitted). The Supreme Court recently affirmed in the clearest terms that separation of powers principles apply to military commissions at Guantanamo Bay. *Boumediene v. Bush*, --- U.S. ---, 128 S.Ct. 2229, 2246 (2008) ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.").

Article I, Section 1 of the United States Constitution clearly delineates the separation of powers between the Legislative and Executive branches of the federal government: "*All legislative powers* herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1 (emphasis added). It is Congress, and Congress alone, in whom the Constitution vests the power to "define and punish offenses against the laws of nations," U.S. Const. art. I, § 8, cl. 10, and to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id*. at cl. 11.

Madison, 1 Cranch 137, 177 (1803); *see Ex parte Quirin*, 317 U.S. 1, 30 (1942) ("*Congress* has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war … and which may constitutionally be included within that jurisdiction.") (emphasis added); *In re Yamashita*, 327 U.S. 1 , 16 (1946) ("We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.").

Accordingly, it is an axiom of black-letter Constitutional law that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 529 (1935); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity."); *United States v. Kozminski*, 487 U.S. 931, 939-40 (1988) ("Federal crimes are defined by Congress, and so long as Congress acts within its constitutional power in enacting a criminal statute, this Court must give effect to Congress' expressed intention concerning the scope of conduct prohibited … The scope of conduct prohibited by these statutes is therefore a matter of statutory construction."); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); *The Aurora*, 7 Cranch 382, 386 (1812) ("Congress could not transfer the legislative power to the President.").

B. <u>In enacting MCA § 949a(a), Congress did not intend to grant the Executive the power to define crimes, but rather only the power to prescribe procedures for implementing the statute</u>.

MCA § 949a(a) provides as follows:

> *PROCEDURES* AND RULES OF EVIDENCE. – Pretrial, trial, and post-trial *procedures*, including elements and modes of proof, for cases triable by military commission under this chapter may be *prescribed* by the Secretary of Defense, in consultation with the Attorney General. Such *procedures* shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial. Such *procedures* and rules of evidence may not be contrary to or inconsistent with this chapter.

MCA § 949a(a) (emphasis added). This provision is identical to Article 36, UCMJ, except for inclusion of the word "elements." The very title of the provision underscores that the power

granted to the Secretary is limited to that of prescribing *procedures*. Given this language, whatever Congress may have intended by the word "elements," it does not signify a delegation to the Secretary of the power to define crimes.[5]

Such a reading is belied by the structure of the statute itself. The MCA, like the UCMJ, on which it is "based" (10 U.S.C. § 948b(c)), sets forth a comprehensive list of "substantive offenses" that may be tried by military commission. *See* 10 U.S.C. § 950p. By including a list of specific offenses, the MCA sheds any conceivable resemblance to a regulatory statute in which Congress proscribed a broad area of conduct and then empowered a responsible administrative agency to issue regulations governing conduct within the scope of the prohibition. Significantly, nothing in § 950p (the section pertaining to substantive offenses) supports the proposition that Congress intended the sweeping delegation of legislative authority claimed by Appellant.

The only legislative provision to which Appellant points in support of its argument is the authority the MCA grants the Secretary to prescribe "[p]retrial, trial, and post-trial procedures, including elements and modes of proof." MCA § 949a(a). But Appellant has made no showing, from either the text of the MCA or its legislative history, that Congress intended the Secretary to wield greater authority than the President does in specifying the elements of offenses in Part IV of the M.C.M.[6] *Cf. United States v. Czeschin*, 56 M.J. 346, 349 (C.A.A.F. 2002); *United States*

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[5] See note 3, *supra*, for the meaning of "prescribe."

[6] *See* Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 Mil.L.Rev. 96, 115 (1999). Prof. Maggs conducted an extensive review of military case law regarding the deference military courts afford the MCM Prof. Maggs concluded that the only Article of the UCMJ for which the MCM's interpretation received any authoritative weight, either punitive or procedural, was Article 134 because of the President's unique role as Commander-in-Chief in regulating the good order and discipline of the armed forces. *Id*. at 138. With respect to the punitive articles other than Article 134, Prof. Maggs reasoned that "The federal courts generally do not defer to the Department of Justice when it advances interpretations of the United States Criminal Code. Moreover, an inference that Congress intended the military courts to defer seems less likely in the case of the punitive articles other than Article 134. The UCMJ defines the offenses covered by those articles much more specifically. Congress thus appears to have had less of an intent to delegate." *Id*. at 141-42.

v. Mance, 26 M.J. 244, 252 (C.M.A. 1988). Congress anticipated that the Secretary would issue a manual that *accurately* stated the elements of the offenses prescribed by Congress. That the Secretary inaccurately described those elements does not mean that his error becomes law.

Appellant's argument is based entirely on the proposition that Congress' inclusion of the term "elements" (language absent from the analogous provision of the UCMJ, 10 U.S.C. § 836) evinces Congressional intent to delegate its legislative authority to the Secretary. (*See* Appellant's Br. At 11.) But this is belied by the legislative history. Congress explicitly rejected a draft version of the MCA proposed by the White House containing a provision that would have accomplished precisely what Appellant now asks this Court to do through interpretation. *See* Enemy Combatant Military Commissions Act of 2006 [hereinafter Draft MCA] (attached to Appellee's Motion to Attach, filed contemporaneously). The White House draft proposed granting to the Secretary of Defense the power to "by regulation, specify other violations of the laws of war that may be tried by military commission." Draft MCA at § 241(b). Congress, however, rejected such a broad delegation of legislative power and instead specified a limited class of offenses over which military commissions have jurisdiction, in terms that copy Title 18 and the UCMJ almost verbatim.

Congress' explicit rejection of the White House's proposed language serves as powerful evidence that it specifically intended to withhold from the Executive the power to define crimes. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

Additionally, the word "elements" simply cannot bear the weight placed on it by Appellant's argument. As shown herein, the interpretation urged by Appellant is belied by the

text, structure, and history of the MCA, and foreclosed by the canon of statutory construction requiring avoidance of unconstitutional constructions of a statute when any other construction is possible. *See Rust*, 500 U.S. at 190. Here, however, an alternative construction of the statute is not only possible, but constitutes a more accurate understanding of Congressional intent.

In using the term "elements" in connection with the delegation of authority to prescribe procedural rules, Congress presumably foresaw that the Secretary would issue those procedural rules in the form of a "manual" similar to the Manual for Courts-Martial (MCM). Part IV of the MCM contains the President's articulation of the elements of offenses under the UCMJ. But it is well established that the President's view of the "elements" of UCMJ offenses is not authoritative and cannot vary or contradict the provisions of the UCMJ. *See, e.g.*, *Czeschin*, 56 M.J. at 349 (noting the President's interpretations of substantive offenses "are not binding on the judiciary, which has the responsibility to interpret substantive offenses under the Code"); *United States v. Johnson*, 25 M.J. 878, 885 (N.M.C.M.R. 1988) (holding the question of whether overt act is an element of UCMJ conspiracy offense constitutes a "substantive matter" on which President's statements in the MCM are merely "guidelines for practitioners which the Court may reject or accept depending upon its interpretation of the substantive law.").

The law recognizes that interpretive rules, such as agency manuals, enforcement guidelines and agency policy memoranda, do not warrant *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 234 (2000); *see also Reno v. Koray*, 515 U.S. 50, 61 (1995) (internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," are entitled only to "some deference") (internal quotation marks omitted); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991) (interpretative guidelines do not receive *Chevron* deference). Interpretative rules are generally

the internal agency guidelines that are promulgated to assist the agency in the enforcement or administration of a statute, as contrasted with administrative regulations intended by Congress to have "the force of law." *See, e.g.*, *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (citing *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942)). Part IV of the MCM is an example of an interpretive rule. *See Czeschin*, 56 M.J. at 349; *Johnson*, 25 M.J. at 885. In light of the text of the statute (both delegating authority to prescribe procedures and listing conspiracy as an offense), which is discussed in more detail in Part IV.B below, and the legislative history, there is no reason to believe that Congress intended anymore than that the Secretary would issue non-binding interpretive rules as the President does in Part IV of the MCM. Accordingly, Part IV of the MMC is also an interpretive rule, which cannot trump the plain terms of the statute Congress enacted. Congress intended nothing more.

In light of the meager legislative inferences on which Appellant's position rests, this Court should avoid the grave Constitutional doubts that would arise if it were adopted. *See Rust*, 500 U.S. at 190. Congress defined the elements of a finite set of crimes using terms with well-settled meanings in the law. Only with strained statutory construction is the MCA capable of being construed as an express delegation of authority to promulgate the elements of offenses.

IV. *Chevron* Deference does not Apply to Criminal Proceedings. Even if it did, *Chevron* Deference is not Owed Because (1) Congress Unambiguously Defined the Conspiracy Offense and (2) the Secretary's "Interpretation" is Unreasonable and an Impermissible Attempt to Create an Offense not Recognized in the MCA.

Appellant contends that the military judges below erred in not affording the Manual for Military Commissions (MMC) *Chevron* deference with respect to its description of the elements of Conspiracy. But *Chevron* does not apply here. The question of whether deference is warranted under *Chevron* arises in the context of rulemaking by Executive agencies. *Chevron*, 467 U.S. at 843. The promulgation of crimes is not agency rulemaking. *See, e.g.*, *Evans v.*

United States Parole Comm'n, 78 F.3d 262, 265 (7th Cir. 1996). Accordingly, this Court has no occasion to apply *Chevron*.

A party asserting that Executive rulemaking is entitled to *Chevron* deference must address three questions. At the threshold, the party must first show that the *Chevron* framework is triggered at all, i.e. "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Only an affirmative response to this threshold question leads to the "familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). In step one, the party must demonstrate that the provision of the "statute is silent or ambiguous." *Chevron*, 467 U.S. at 843. If silent or ambiguous, step two requires the party to finally demonstrate that the Executive's interpretation is "reasonable in light of the language, policies, and legislative history of the Act." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *see also N.R.D.C. v. E.P.A.*, 822 F.2d 104, 111 (D.C. Cir 1987).

Appellant fails at each step (including the threshold question) to show that the Secretary's description of the elements of conspiracy in the MMC are worthy of *Chevron* deference. These three *Chevron* questions are considered below in further detail.

A. <u>*Chevron* deference does not apply in criminal proceedings.</u>

Appellant does not pass the threshold test triggering analysis under *Chevron* because *Chevron* does not apply in criminal proceedings. "[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."

Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring); *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) ("[T]he Attorney General must as surely evaluate compliance with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference."); *Evans*, 78 F.3d at 265 (7th Cir. 1996) ("Judicial deference owed under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases."); *United States v. McGoff*, 831 F.2d 1071, 1080 n.17 (D.C. Cir. 1987) ("Needless to say, in this criminal context, we owe no deference to the Government's interpretation of the statute.").

Attempting to cast the Secretary's promulgation of the MMC as administrative rulemaking, Appellant argues that *Chevron* applies in this case because the Secretary has interpreted and implemented, rather than enforced, a criminal statute. (Govt. Br. at 16-17.) This distinction is one of semantics and is not supported by case law. In support of its position, Appellant cites *Sash v. Zenk*, 439 F.3d 61, 67 (2d Cir. 2006) and *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995). Reliance on these cases is misplaced.

Sash involved the interpretation of an early-release statute and rules promulgated by the Bureau of Prisons (BOP) prescribing the circumstances of granting convicts administrative credit for good behavior. *Sash*, 428 F.3d at 133-34. The petitioner argued that the rule of lenity trumped agency discretion in formulating good-behavior credit and that *Chevron* deference did not apply because the two steps of *Chevron* were not satisfied. *Sash*, 428 F.3d at 134-37. The rule of lenity is a doctrine requiring courts to construe "the substantive ambit of criminal prohibitions" and "the penalties they impose" in favor of criminal defendants if those statutes are ambiguous. *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

Rejecting the Petitioner's claim, the court found the regulation at issue did not interpret a criminal statute and was instead an administrative regulation regarding sentence reduction. *Id.* at

134. Accordingly, the court determined the rule of lenity did not apply. It then applied *Chevron* deference to the BOP's interpretation of § 3624(b), finding it to be reasonable. *Id.*

The Petitioner filed a petition for reconsideration, leading to the opinion cited by Appellant in this case. Finding no basis to reconsider, the court elaborated on its earlier ruling:

> [T]he Supreme Court has indicated that it is appropriate for the BOP to interpret sentencing-administration statutes like the one at issue here. *We infer that such statutes do not refer to the underlying criminal conduct, because an agency cannot be given discretion to interpret the scope of a criminal law*.

Sash, 439 F.3d 61, 64 (2 nd Circ. 2005) (emphasis added) (citations omitted).

Babbitt was a civil suit concerning whether the Secretary of the Interior had reasonably construed the intent of Congress in a regulation promulgating the Endangered Species Act (ESA) when he defined "harm" under the ESA to include "significant habitat modification or degradation where it actually" killed or injured wildlife. 515 U.S. 687. The Respondents were small landowners, logging companies and families who raised a facial challenge to administrative regulations, claiming that application of the "harm" regulation to the red-cockaded woodpecker and the northern spotted owl had injured them economically. *Id.* at 692. They attempted to avoid a *Chevron* analysis by arguing that the rule of lenity applied because the ESA includes criminal penalties. *Id*. at 704 n.18.

Rejecting this attempt to side-step *Chevron*, the Court noted that "We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id*. Neither criminal conduct nor criminal penalties had anything to do with the facts of this case, the agency interpretation at issue, or the Respondents' broad facial attack.

Neither *Sash* nor *Sweet Home Chapter* support the proposition advanced by the government – that the Executive is entitled to deference when interpreting and implementing criminal statutes. Neither case involved criminal statutes nor criminal consequences. By contrast, the MCA is by its very nature a criminal statute – it establishes jurisdiction for the trial of alien enemy unlawful combatants, specifies the crimes for which such unlawful combatants may be prosecuted, and empowers the Secretary of Defense to prescribe procedures for the conduct of such trials. Moreover, the Secretary's action here directly impacts criminal penalties faced by Appellee and others subject to the Act.

Appellant's discussion of these cases suggests that a finding that the rule of lenity does not apply somehow supports a conclusion that a *Chevron* analysis is triggered in the criminal context. (*See* Appellant's Br. at 17; *see also id.* at 17 n.8.) But these aren't competing doctrines[7] and the absence of lenity considerations does not establish *Chevron's* applicability. Simply put, *Chevron* does not extend to implementation of a criminal statute. *See, e.g.*, *Evans*, 78 F.3d 262.

Another distinction between the cited cases and the case *sub judice* concerns the identity and role of the administering agency. In *Sash*, the administering agency was the Bureau of Prisons, tasked with the orderly administrations of the nation's prison system. In *Sweet Home Chapter*, the administering agency was the Department of the Interior, recognized as expert in overseeing "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Sweet Home Chapter*, 515 U.S. at 698.

By contrast, the agency administering the MCA is the very same agency tasked with criminally prosecuting the crimes the statute enacts. Case law is clear that *Chevron* deference is not accorded to prosecutors concerning their interpretations of the criminal laws they prosecute.

[7] The rule of lenity does not seem to be at issue in this case.

Crandon, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). As such, the Secretary of Defense's interpretation is just the sort of action that the Supreme Court intended to place outside the scope of *Chevron.*

There are good reasons for judicial reluctance to defer to prosecutors' interpretations of their own criminal statutes. The *Crandon* Court summarized the rationale succinctly as follows:[8]

> Besides being unentitled to what might be called ex officio deference under *Chevron*, this expansive administrative interpretation of § 209(a) is not even deserving of any persuasive effect. Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion -- assuming, to be on the safe side, that the statute may cover more than is entirely apparent. That tendency is reinforced when the advice-giver is the Justice Department, which knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought. Thus, to give persuasive effect to the Government's expansive advice-giving interpretation of § 209(a) would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.

Crandon, 494 U.S. at 177-178. In short, granting deference to the Secretary's expansive and unprecedented definition of conspiracy is the legal equivalent to allowing the fox to guard the chicken coop.[9]

[8] In *Crandon*, the Supreme Court considered whether lump-sum early retirement payments made to airline executives on the advent of their transition to federal employment violated a provision of a criminal code prohibiting private parties from paying, and Government employees from receiving, supplemental compensation for the employee's Government service. *Crandon*, 494 U.S. at 154.

[9] A separate reason for declining to grant deference is that, despite his best intentions, the Secretary of Defense has no expertise in defining criminal offenses. By contrast the Secretary of the Interior has obvious expertise in defining harm to an endangered species, as does the Administrator of the Bureau of Prisons in prescribing circumstances warranting the granting of good-time credit within the prison system he oversees.

B. Even if Chevron applies, deference is not owed because the crime of conspiracy is unambiguously defined in the MCA.

Notwithstanding the above, should this Court find that *Chevron* applies to the case *sub judice*, Appellee submits Congress has unambiguously defined the crime of conspiracy within the MCA. Accordingly, deference is not owed.

Appellant rests its entire argument on the striking assertion that the statutory language proscribing the offense of conspiracy is "ambiguous." In support of this claim, Appellant notes that the MCA does not define the word "conspires" and non-legal dictionaries variously define it. (Appellant's Br. at 13-14)

Nothing about the crime of conspiracy is ambiguous. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *Iannelli v. United States*, 420 U.S. 770, 777 (1975). For centuries, the common law has defined conspiracy as an agreement by two or more persons to commit an unlawful act. *United States v. McKenney*, 450 F.3d 39, 42 (1st Cir. 2006); *United States v. Benson*, 70 F. 591, 594 (9th Cir. 1895). The United States Supreme Court has also recognized this well-settled definition. *United States v. Jimenez-Recio,* 537 U.S. 270, 274 (2003) ("The Court has repeatedly said that the essence of a conspiracy is an agreement to commit an unlawful act.").

The government's argument is particularly inapt since the author of the MCA – Congress – has itself demonstrated its understanding that the traditional crime of conspiracy does not include criminal liability for joining, participating in or conducting an "enterprise." It was precisely that lack of ambiguity that required Congress to pass the Racketeer Influenced and Corrupt Organization Act (RICO) when it wanted to criminalize participation in a criminal enterprise. Because the Supreme Court and lower courts have consistently held that the traditional conspiracy crime only reached individuals' actions directed toward particular criminal

goals or objectives and could not be stretched to reach individual actions linked only by an organized criminal "enterprise," Congress was forced to enact new legislation (RICO) to reach enterprise-based crime. *See United States v. Elliott*, 571 F.2d 880, 900-903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (describing history of conspiracy law and the need to enact RICO to reach enterprise conspiracies). Were the "enterprise" interpretation of conspiracy available to prosecutors under the traditional statute, RICO would never have been enacted.

Given the settled meaning of "conspiracy," the absence of an explicit definition of the word in the MCA is no basis for a finding of ambiguity. "Absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *Whitfield v. United States*, 543 U.S. 209, 214 (2005). Additionally, the meaning of a word in a statute, especially a criminal statute, is "a pure question of statutory construction for the courts to decide." *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 446 (1987).

Because the common law crime of conspiracy consists only of an agreement to commit an unlawful act, the Supreme Court has declined to require proof of an overt act to sustain a conspiracy conviction except where an overt act is expressly required by statute. *See, e.g.*, *United States v. Shabani*, 513 U.S. 10, 14 (1994); *Nash v. United States*, 229 U.S. 373, 378 (1913).

In enacting the Military Commissions Act, Congress narrowed the common law crime of conspiracy by requiring an overt act by the accused.[10] 10 U.S.C. § 950v(b)(28). Aside from this explicit deviation, Congress codified the common law crime of conspiracy. Had Congress so intended, it could have explicitly criminalized the joining of an "enterprise" under 10 U.S.C. §

[10] This change is also reflected in the UCMJ, although under the UCMJ the overt act need not be committed by the Accused. Manual for Courts-Martial, United States (2005 ed.), Part IV, ¶ 5(c)(4)(a). Thus, the MCA represents a narrowing of the UCMJ definition.

950v(b)(28). Congress' failure to do so demonstrates its intent "to adopt the common law definition of statutory terms." *Whitfield*, 543 U.S. at 214.

This conclusion is strengthened, not weakened, by the fact that the "enterprise theory" was part of the military commission regime struck down by the Supreme Court in *Hamdan*. Appellant argues that the expanded definition of "conspiracy" articulated by the Department of Defense General Counsel in Military Commission Instruction (MCI) No. 2 supports its claim that Congress contemplated or intended a broader definition of the term conspiracy when enacting the MCA. (*See* Appellant's Br. at 14 (citing 32 C.F.R. § 11.6(c)(6)(i)(A) (2003).) Nothing could be further from the truth. Congress certainly had knowledge of the pre-*Hamdan* military commissions regime. Had it intended to validate the Executive's expansive definition of "conspiracy," it could and would have proscribed the conduct itself. The fact that it chose not to, and to reject a provision that would have given the Executive the authority to redefine crimes by regulation, *see* Draft MCA, undermines any attempt to rely on MCI No. 2 in support of Appellant's position.

Citing only two non-legal dictionaries and no legal authority, Appellant claims the crime of conspiracy is ambiguous and that the Secretary of Defense may "interpret" this offense by inserting wholly separate criminal offenses into the Manual for Military Commissions. (Appellant's Br. at 13-14.) In particular, Appellant argues, "A word that is capable of being understood in two or more senses is, by definition, 'ambiguous.'" (Appellant's Br. at 13.) While this may be a workable definition of "ambiguous" for the lay-person, were that definition used in statutory construction, almost every word would be ambiguous and therefore susceptible to interpretation. For example, in one non-legal dictionary the word "steal" has four definitions and

the word "kill" has fifteen. *See* Webster's Online Dictionary *available at*: www.websters-online-dictionary.org.

What Appellant ignores is that, in the realm of statutory construction, words and concepts are interpreted not in a vacuum but in a context that includes their commonly accepted definitions within the case law. Had Appellant even consulted Black's Law Dictionary, it would have discovered the unambiguous meaning of conspiracy. *See* Black's Law Dictionary 310 (7th ed. 1999) (defining conspiracy as "[a]n *agreement* by two or more persons to commit an unlawful act") (emphasis added).

In drafting the MCA, Congress adopted the crime of conspiracy as found in both the U.S. Code and the Uniform Code of Military Justice. Since the enactment of the UCMJ on 1 May 1950, no military or civilian court has held that the crime of conspiracy defined therein was ambiguous. Appellant's claim that the *identical* language found in the MCA has somehow lost its well-settled meaning is specious.

If Congress' intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). "Absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *Whitfield v. United States*, 543 U.S. 209, 214 (2005). As noted above, nothing in the plain language of 10 U.S.C. § 950v(b)(28) indicates Congress intended to depart from the common law definition of conspiracy. Appellant's argument that Congress implicitly incorporated the separate statutorily-created crime of common criminal enterprise into section 950v(b)(28) by expressly adopting the common law definition of conspiracy, while at the same time failing to even mention enterprise liability, is wholly without merit.

C. MCA § 949a(a) Does not Provide a Basis for Otherwise Deferring to the Secretary's Definition of Conspiracy.

Appellant next argues this Court *must* defer to the Secretary's prescription of the elements of the conspiracy offense because Congress expressly gave the Secretary authority to prescribe such elements in MCA § 949a(a).[11] (Appellant's Brief at 10-11.) Drawing an analogy to the court-martial system, Appellant cites an opinion of the Army Court of Criminal Appeals, which held that "courts must defer to the President's determination" of the maximum punishment for an offense where Congress has expressly delegated such authority to the President under Article 56 of the UCMJ. (Appellant's Br. at 11-12 (citing *United States v. Zachary*, 61 M.J. 813, 819 (A.Ct.Crim.App. 2005) *aff'd*, 63 M.J. 438 (C.A.A.F. 2006)).)

Appellant's argument contains a fundamental flaw. Article 56 does not purport to give the President the power to make certain conduct criminal (i.e., legislate), merely to set limits on the punishments that can be imposed for the commission of offenses enacted by Congress. The distinction is critical. Most of the UCMJ's punitive articles do not contain set punishments for the commission of offenses, rather they provide simply that an accused "shall be punished as a court-martial may direct." *See, e.g.*, 10 U.S.C. § 886. Thus, Congress, with respect to most offenses (excepting those where Congress has specifically authorized death), has placed no limits on the punishment a court-martial can impose. For the President to then place a constraint on the maximum punishment the Executive will seek to impose for the commission of a particular offense is perfectly consistent with the division of responsibility between Congress and the Executive. As in the regulatory context, the Executive is acting within a zone of proscription marked off by Congress. It is not, as it is here, attempting to enlarge the zone of proscribed

[11] Section 949a(a) authorizes the Secretary of Defense to prescribe "[p]retrial, trial and post-trial procedures, including elements and modes of proof, for cases triable by military commissions."

conduct and consequences by purporting to criminalize conduct not reached by any statute. The analogy to Article 56 is therefore misplaced and of no aid to Appellant.

D. Even under a deferential standard, the Secretary's addition of an "enterprise theory" of liability constitutes an impermissible attempt to broaden the well-settled meaning and scope of the conspiracy offense.

For the reasons set forth above, Appellee submits that *Chevron* does not apply or, in any event, that deference is not owed in this case. Moreover, even if this Court should decide that the MCA is akin to an administrative regulatory scheme and that deference is owed, Appellee submits the Secretary's interpretation of MCA § 950v(b)(28) is unreasonable and should not be adopted even under a deferential standard.

1. Criminal enterprise is a wholly separate offense from common law conspiracy and is not appropriately considered a theory of liability for the common law offense.

Appellant argues that the Secretary's decision to read the distinct offense of joining a criminal enterprise into the Conspiracy statute is reasonable in light of "historical precedent for criminalizing the enterprise theory of Conspiracy as a violation of the law of war." (Appellant's Br. at 18.) The problem with this analysis, aside from the absence of historical precedent (see discussion, *infra*), is that there is no such thing as an "enterprise theory" of conspiracy. There is conspiracy and there is racketeering – two distinct crimes, only one of which is incorporated into the MCA. Notably, the RICO statute recognizes notions of both criminal enterprise and conspiracy and codifies them as separate offenses. *See* 18 U.S.C. §§ 1962(c)-(d).

As seen above, criminal enterprise "is a creature different from the conventional conspiracy; its unique nature arises from specific federal legislation independent of the common law of conspiracy." *United States v. Manzella*, 782 F.2d 533, 537 (5th Cir. 1986). Conspiracy and enterprise liability are distinct concepts. *See, e.g.*, *United States v. Neapolitan*, 791 F.2d

489, 499 (7th Cir. 1986) ("[T]he term enterprise is not synonymous with the term conspiracy."). "While the hallmark of conspiracy is agreement, the central element of an enterprise is structure." *Neapolitan*, 791 F.2d at 500; *see also Elliott*, 571 F.2d at 900-03 (describing history of conspiracy law and need to enact RICO to reach enterprise conspiracies).

Indeed, this Court, in the case *sub judice*, has recognized that "[l]imiting criminal responsibility solely to an individual (including a member of al Qaeda or the Taliban, or associated forces) who actually 'engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents' appears to be the clear intent of Congress, and *requires more than mere membership in an organization for criminal responsibility to attach*." *United States v. Khadr*, No. 07-001, at 14 (C.M.C.R. 2007) (emphasis added). "Criminal enterprise" and conspiracy are and always have been separate legal constructs and Congress, in enacting the MCA, chose to incorporate only the conspiracy offense. For these reasons, this Court should decline Appellant's invitation to expand the well-established definition of conspiracy to include conduct long recognized as distinct and punishable under separate statutes simply because Appellant would prefer that Congress had passed the statute Appellant would have liked rather than the one Congress actually passed.

2. The precedents cited by Appellant are unpersuasive.

Appellant claims there is "ample historical precedent for criminalizing the enterprise theory of Conspiracy as a violation of the law of war." (Appellant's Br. at 18.) In support of this claim, Appellant cites the transcript of the judgment of the Military Tribunal at Nuremburg for the proposition that "A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes." 1 Trial of the Major War Criminals Before the International Military Tribunal, Judgment, at 256 (1947).

However, the Military Tribunal at Nuremberg did not recognize an enterprise theory of conspiracy liability. Indeed, the Charter of the International Military Tribunal (hereinafter "the Charter") failed to define as a separate crime *any conspiracy, whatsoever*, except the one set out in Article 6(a) dealing with Crimes Against the Peace. *Id.* at 11. Pointedly, the Charter declined to recognize conspiracy liability under Articles 6(b) and 6(c) for murder in violation of the law of war, inhumane acts against civilians, plunder of public or private property, and other offenses mirroring those of which Mr. Khadr stands accused.[12] *Id.*

Appellant next cites a United Nations War Crimes Commission summary of the trial of Martin Gottfried Weiss, who served as a Commandant of the Dachau Concentration Camp in Germany. (Appellant's Br. at 18 (citing 11 Law Reports of Trials of War Criminals 5 (1949)).) Appellant observes that Weiss and other co-defendants were convicted of "act[ing] in pursuance of a common design to commit" unlawful acts against prisoners. *Id.*

This quotation is slightly misleading. As noted in the UN Commission summary, "the accused were not charged with a common design, but with violations of the laws and usages of war and the manner in which these violations were alleged to have been committed was by participation in a common design to ill-treat and kill the prisoners." 11 Law Reports of Trials of War Criminals at 14.

In the post-World War II war crimes tribunals at Dachau, "common design" was never viewed as a stand-alone offense but rather was a theory of liability for underlying offenses. *See Justice at Dachau*, Joshua M. Greene (Broadway Books, 2003) at. 42-43. By contrast, conspiracy is a separate offense from the crime that is its object. Black's Law Dictionary 205

[12] In at least one case, a charge alleging conspiracy to commit war crimes and crimes against humanity was dismissed for lack of jurisdiction. *See* Opinion and Judgment in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law Mo. 10, Vol 3: *United States of America v. Joseph Altstoettler, et al.* (Case 3: "Justice Case"), Dist. of Columbia: GPO, 1950. pp. 954-956.

(7th ed. 1999). Nonetheless, Appellant, drawing a faulty analogy between "common design" and its own "enterprise theory" of liability, would have this Court broaden the conspiracy offense by criminalizing mere membership in a designated group.

Last, Appellant cites an 1865 opinion of the Attorney General addressing whether those involved in President Lincoln's assassination could be tried by military commission or whether they had to be tried under civil law. (Appellant's Br. at 18.) As Appellant notes, in the opinion, the Attorney General stated that it was an offense "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders . . . ." 11 Op. Atty. Gen. 297 (1865).

At bottom, Appellant's reliance on this reference amounts to the Executive citing itself to justify its own actions. Also, a 143 year-old opinion of the U.S. Attorney General can hardly be considered an authoritative statement on the law of war. The proper sources to consider in determining whether conduct violates the law of war are modern international law sources, and the fact that the prosecution can cite to none is perhaps the strongest evidence of the fundamental weakness of its position.

The Attorney General opinion says next to nothing about whether conspiracy was once a law of war violation because international law sources, not domestic sources, provide the appropriate source for determining whether conduct violates the law of war. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality) (holding that for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally") (quoting *Ex Parte Quirin*, 317 U.S. at 30). And the prosecution's dated source says nothing about whether the conduct (assuming it is susceptible to characterization supplied by Appellant) remains a law of war violation today because the law of war has undergone significant evolution since the early

20th-century. For example, according to Winthrop's treatise, summary execution was once routinely permitted under the laws of war. *See* Winthrop, *Military Law and Precedents* 783 (1895, 2d ed. 1920). But the modern day law of war *clearly* prohibits such inhumane treatment. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3 (entered into force Oct. 21, 1950); *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (noting that a claim under the Alien Tort Claims Act "must be gauged against the *current state of international law*" (emphasis added)).

Even making the extraordinary assumption for the sake of argument that *Chevron* applies here, the sources relied upon by the Appellant do not support the proposition that the Secretary's interpretation of the MCA is "reasonable." Quite the contrary, Appellant can point to no relevant, authoritative source of international law to support the claim that its expansive "enterprise theory" of criminal liability is part of the customary law of armed conflict.

V. The Military Judge's Action in Striking the Disputed Language was Necessary to Avoid Placing the Accused at Risk of Conviction for Conspiracy Without the Government Having Actually Proven the Offense

Based on the Secretary's *ultra vires* definition of "conspiracy" in the sole specification of Charge III, Appellant alleges that in addition to conspiring with named individuals to commit a number of object offenses, Mr. Khadr did the following:

> from at least June 1, 2002 to on or about July 27, 2002 . . . *willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States; said . . . enterprise sharing a common criminal* purpose known to the accused[.]

(Charge Sheet (emphasis added).)

The italicized language is surplusage and was properly stricken under R.M.C. 906(b)(3). The Discussion accompanying that provision states that "[s]urplusage may include irrelevant or

redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the offense." This accurately describes the "enterprise" language in Charge III. However, the stricken language in this case is not merely irrelevant. Its presence increases the likelihood that Mr. Khadr will be erroneously convicted of "conspiracy" without the government having actually established the elements of conspiracy. Proof of a criminal enterprise does not relieve the government of its burden to prove that Mr. Khadr entered into an agreement to commit particular offenses. Yet this is the likely effect of the stricken language.

It is not difficult to see how this might happen. Mr. Khadr is alleged to have both conspired with certain named individuals and joined the "enterprise" in June and July of 2002. It is alleged that the "enterprise" engaged in certain conduct before Mr. Khadr joined. As an initial matter, Mr. Khadr obviously could not have conspired with the named individuals in 2002 to commit offenses in 1998, 2000, and 2001 (i.e., in the past). However, based on nothing more than evidence that the "enterprise" was responsible for those offenses (which generally constitute, according to the MCA, the object offenses of "attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism"), the members could infer that the "enterprise" had a "criminal purpose" to do similar things in the future.

Under the elements created by the Secretary, this would be sufficient to convict Mr. Khadr of conspiracy even if the government failed to offer a shred of evidence to show that Mr. Khadr agreed to commit any particular offense or offenses following his "joining" of the "enterprise." Thus, Mr. Khadr could be convicted of "conspiracy" based exclusively on the past conduct of others, without the government demonstrating that Mr. Khadr participated in any

agreement whatsoever to commit any actual offense after June/July of 2002. In such circumstances, he would not be guilty of conspiracy, only associating with an "enterprise" that had committed certain offenses in the past. Whatever this conduct may be described as, it is not the offense of "conspiracy" to commit a particular offense or offenses under the MCA. And there is no reason to believe that Congress intended to proscribe such conduct in MCA § 950v(b)(28).

VI. Conclusion

The Military Judge acted properly in striking the disputed language concerning the Government's "enterprise theory" of conspiracy liability. The authority granted in MCA §949a(a) to prescribe "procedures, including elements and modes of proof," was not intended to empower the Secretary of Defense to legislate crimes but only to prescribe procedural rules for trials by military commission (as the President does in the context of courts-martial). Appellant's interpretation of that provision requires a result that would violate Constitutional notions of separation of powers. The statute need not be interpreted in such a manner. Therefore, consistent with statutory construction principles directing courts to avoid finding constitutional violations where possible, this Court should reject Appellant's interpretation.

Judicial deference under *Chevron,* does not apply in criminal proceedings. Even if *Chevron* deference were to apply, it would not be triggered in this case – "conspires" contains a well-settled meaning in the common law and under the military law, one that Congress acknowledged when it enacted RICO in order to reach enterprise conspiracies that the traditional law does not criminalize. However, even under a deferential standard, the Secretary of Defense's promulgation of M.M.C. Part IV, para (28) constituted an *ultra vires* attempt to broaden the conspiracy offense by adding to it an unprecedented "enterprise theory" of liability.

The military judge's removal of the disputed language was not only proper but also necessary to avoid placing Mr. Khadr at risk of being convicted of an offense on insufficient evidence. For these reasons, this Court should affirm the military judges' ruling below.

Prayer for Relief

Appellee respectfully requests that this Court affirm the 14 August 2008 order of the military commission below.

Respectfully submitted,

/s/
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Certificate of Compliance with Rule 14 Format Requirements

1. This brief exceeds the 30-page limitation of Rule(f) by five pages. However, Appellee has filed a separate motion with this Court for waiver of such page limitation.

2. This brief complies with the type-volume limitation of Rule 14(g) because:

This brief contains 10,128 words and 813 lines of mono-spaced text.

3. This brief complies with the typeface and type style requirements of Rule 14(e) because:

This brief has been prepared in a double-spaced typeface using Microsoft Word Version 2000 with 12 characters per inch and Times New Roman font.

Dated: 17 September 2008

/s/
Rebecca S. Snyder
Assistant Appellate Defense Counsel
Office of Military Commissions

Certificate of Service

I certify that a copy of the foregoing was sent via e-mail to this Court, Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Mr. Jordan A. Goldstein; and Mr. John F. Murphy on 17 September 2008.

/s/
Rebecca S. Snyder
Assistant Appellate Defense Counsel
Office of Military Commissions

UNITED STATES OF AMERICA	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	
	)	MOTION FOR WAIVER OF PAGE LIMITATION FOR BRIEF ON BEHALF OF APPELLEE
	)	
	)	CASE No. 08-003
v.	)	
	)	Hearing held at Guantanamo Bay, Cuba on 13 August 2008 before a Military Commission convened by MCCO # 07-02
OMAR AHMED KHADR	)	Presiding Military Judge Colonel Patrick A. Parrish
	)	
	)	DATE: 17 September 2008

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

COMES NOW Appellee, pursuant to Rule 14(f) of the Rules of Practice for the Court of Military Commission Review, and respectfully requests this Court to waive the 30-page limitation for Appellee's Response to Appellant's Brief in the captioned case and allow Appellee to file a brief consisting of 35 pages.

Waiver is requested to enable Appellee to address the additional issue specified by this Court in its order of 12 September 2008, as well as to fully address matters raised in Appellant's brief, including critical questions of statutory interpretation, the scope of the powers delegated to the Secretary of Defense by Congress, and the practical impacts of this Court's ruling upon the pending litigation.

Appellee notes that its Brief will complies with the word count and line count limitations of Rule 14(g).

WHEREFORE, Appellee respectfully requests this Court grant the requested waiver of page limitation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to this Court, Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Mr. Jordan A. Goldstein; and Mr. John F. Murphy on 17 September 2008.

/s/
William C. Kuebler
LCDR, JAGC, USN