
	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
)	
UNITED STATES OF AMERICA,	)	BRIEF ON BEHALF OF
	)	APPELLANT
Appellant,)	
	)	C.M.C.R. Case No. 08-003
)	
v.	)	Interlocutory Appeal from the 14 Aug.
	)	2008 Ruling of the Military Judge on
	)	the Government Motion for
	)	Reconsideration, D019 and D047,
	)	Ruling on Defense Motion to Strike
OMAR AHMED KHADR	)	Surplus Language from Charge III
a/k/a "Akhbar Farhad")	
a/k/a "Akhbar Farnad"	)	Tried at Guantanamo Bay, Cuba
a/k/a "Ahmed Muhammed Khali,"	)	on 13 August 2008
	)	before a Military Commission
Appellee.	)	convened by M.C.C.O. #07-02
)	
	)	Presiding Military Judge
	)	Colonel Patrick A. Parrish
)	
)	DATE: 26 August 2008

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY
COMMISSION REVIEW**

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ISSUE PRESENTED

WHETHER THE SECRETARY OF DEFENSE'S INTERPRETATION IN THE MANUAL FOR MILITARY COMMISSIONS OF THE CONSPIRACY OFFENSE SET FORTH IN THE MILITARY COMMISSIONS ACT IS A PERMISSIBLE INTERPRETATION OF THE ACT, AND CONSEQUENTLY WHETHER IT MUST RECEIVE DEFERENCE UNDER *CHEVRON U.S.A. INC. v. NATURAL RESOURCES DEFENSE COUNCIL, INC.*, 467 U.S. 837 (1984).

STATEMENT OF STATUTORY AUTHORITY

This appeal is filed in accordance with 10 U.S.C. § 950d(a)(1)(A) and Rule for Military Commissions ("R.M.C.") 908(a)(1), in that the Military Judge's 14 August 2008 ruling, *see United States v. Khadr*, Ruling on Government Motion for Reconsideration D019 and D047 Ruling on Defense Motion to Strike Surplus Language from Charge III (Mil. Comm'n 14 Aug. 2008) (Parrish, J.) ("14 Aug. 2008 Ruling"), terminated proceedings of the accused's military commission with respect to part of a charge and specification against the accused.

STATEMENT OF THE CASE

The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("M.C.A.") codifies the offense of Conspiracy as follows:

Any person subject to this chapter who *conspires* to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

10 U.S.C. § 950v(b)(28) (emphasis added). The M.C.A. did not, however, expressly define the word “conspires,” but rather expressly delegated to the Secretary of Defense (“Secretary”) the authority to elaborate the specific elements of the offense:

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.

Id. § 949a(a) (emphasis added); *see also* M.C.A. § 3(b) (requiring the Secretary of Defense to submit the Manual for Military Commissions to Congress).

Pursuant to the above statutory authorization in the M.C.A., the Secretary of Defense, in consultation with the Attorney General, on 18 January 2007 promulgated the Manual for Military Commissions (“M.M.C.” or “the Manual”). In Part IV of the Manual, the Secretary—acting pursuant to his statutory authorization at 10 U.S.C. § 949a(a)—set forth the elements for each offense codified under the M.C.A., including the offense of Conspiracy:

- (1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined 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;
- (2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and
- (3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

M.M.C., Part IV-6(28).

Thus, the M.M.C. codifies two forms of Conspiracy, each of which is a reasonable articulation of the word “conspires” in the M.C.A. *See* 10 U.S.C. § 950v(b)(28). These two potentially overlapping theories for proving the offense of Conspiracy have been referred to as the “agreement theory” and the “enterprise theory.” Under the agreement theory, the accused is guilty of Conspiracy if he enters into an agreement with one or more persons to commit one or more substantive offenses triable by military commission. The accused must also know the unlawful purpose of the agreement, and must knowingly commit at least one overt act in order to accomplish some objective or purpose of the agreement.

Under the enterprise theory, the accused is guilty of Conspiracy if he joins an enterprise of persons sharing a common criminal purpose that involves, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission. The accused must also know the common criminal purpose of the enterprise, and join it willfully, that is, with the intent to further the unlawful purpose. Finally, the accused must knowingly commit at least one overt act in order to accomplish some objective or purpose of the enterprise.

On 2 February 2007, the Office of the Chief Prosecutor, Office of Military Commissions, swore charges, including the enterprise theory of Conspiracy, against the accused. On 24 April 2007, the Convening Authority referred charges against the accused for trial, including the offense of Conspiracy. The referred charge of Conspiracy read as follows:

**CHARGE III: VIOLATION OF 10 U.S.C. § 950v(b)(28),
CONSPIRACY**

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates for the al Qaeda organization, known and unknown, **and 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 on September 11, 2001, and further attacks continuing to date against the United States;** said agreement **and enterprise sharing a common criminal purpose known to the accused** to commit the following offenses triable by military commission: 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.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one private al Qaeda basic training from an al Qaeda member named "Abu Haddi." [sic], consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

United States v. Khadr, Referred Charges, at 1-2 (24 Apr. 2007).

On 11 January 2008, the Defense moved to have the bolded language in the above quoted paragraphs deleted from the specification for Conspiracy.¹ See *United States v. Khadr*, Defense Motion to Strike Surplus Language from Charge III, at 1 (11 Jan. 2008). In its 11 January 2008 motion, the Defense claimed that the bolded language was “surplusage,” since it related to conduct that, according to the Defense, had not been criminalized by Congress in the M.C.A.—notwithstanding that it clearly *is* encompassed by the elements of the Conspiracy offense set forth in Part IV of the M.M.C. See M.M.C., Part IV-6(28). On 9 April 2008, the Defense moved to strike the underlined language as well. See 9 Apr. 2008 Defense Special Request for Relief.

On 4 April 2008, the Military Judge ruled that the accused could be prosecuted in a military commission for Conspiracy with respect to his pre-M.C.A. conduct, because “[t]here was a reasonable basis for Congress, in 2006, to determine that the offense of conspiracy to commit violations of the law of war was part of the common law of war, before, on, and after 11 September 2001.” *United States v. Khadr*, Ruling on Defense Motion to Strike Surplus Language from Charge III (D-019), at 5 (Mil. Comm’n 4 Apr. 2008) (Brownback, J.) (“4 Apr. 2008 Ruling”); see also *United States v. Khadr*, D-010 Ruling on Defense Motion to Dismiss Charge III for Lack of Subject Matter Jurisdiction, at 4-5 (Mil. Comm’n 21 Apr. 2008) (Brownback, J.) (“The commission concludes that

¹ As explained below, the Defense in its 11 January 2008 motion did not reference the underlined or double-underlined language from the charge sheet. The underlined language was, however, the subject of the Defense’s 9 April 2008 D047 motion. See E-mail from William Kuebler, LCDR, to Peter E. Brownback, COL, et al., *Re: Defense Special Request for Relief* (9 Apr. 2008) (“9 Apr. 2008 Defense Special Request for Relief”).

prosecution of Mr. Khadr for the offense of conspiracy to commit violations of the law of war, as defined by [the M.C.A.], does not violate *ex post facto* standards—whether under the Constitution or international law.”).

The Military Judge then determined that the word “conspires” in the M.C.A. *must* have the same meaning as that word in the court-martial context. Based on the fact that the Manual for Courts-Martial (“M.C.M.”) does not expressly include an enterprise theory of Conspiracy, *see* M.C.M., Part IV-5(b); *see also* 10 U.S.C. § 881(a) (codifying the offense of Conspiracy in courts-martial), the Military Judge determined that the elements in the Manual for Military Commissions of the enterprise theory of Conspiracy were “contrary to” the M.C.A. and therefore *ultra vires*. *See* 4 Apr. 2008 Ruling at 6. The Military Judge then granted the Defense’s 11 January 2008 motion to strike the bolded language from the charge sheet. In his 9 May 2008 ruling, *see United States v. Khadr*, Ruling on D-047 Defense Special Request for Relief in Light of the Commission’s Ruling on D-019 to Strike Surplus Language from Charge III, at 1-2 (Mil. Comm’n 9 May 2008) (Brownback, J.) (“9 May 2008 Ruling”), the Military Judge granted the Defense’s 9 April 2008 request to strike the underlined language as well. Neither the Defense nor the Military Judge referenced the double-underlined phrase in the overt acts portion of the specification.

On 11 July 2008, the United States sought reconsideration of the Commission’s 4 April and 9 May 2008 Rulings, *see* R.M.C. 905(f),² and argued that the deleted language was not surplusage and that, even if it were, the Military Judge’s rulings not only

² R.M.C. 905(f) provides that “[o]n request of any party or *sua sponte*, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.”

eliminated the enterprise conspiracy theory from the referred charge sheet, but also rendered defective the charged violation of the agreement theory.³ *See United States v. Khadr*, Government Motion for Reconsideration of D019 Ruling on Defense Motion to Strike Surplus Language from Charge III (Conspiracy) and D047 Ruling on Defense Special Request for Relief in Light of the Commission's Ruling on D019 to Strike Surplus Language from Charge III (11 Jul. 2008) ("Government Motion for Reconsideration"). Specifically, at the time the Government Motion for Reconsideration was filed, the charge of Conspiracy, as revised by the Military Judge, alleged that the accused has entered into an agreement with certain persons to commit certain unlawful acts, and committed an overt act in furtherance thereof. However, as a result of the Military Judge's 4 April and 9 May 2008 Rulings, the charge sheet no longer alleged that the accused *knew* the unlawful purpose of the agreement, which is one of the three elements of Conspiracy. *See M.M.C.*, Part IV-6(28)(b)(2) ("The accused knew the unlawful purpose of the agreement . . .").

On 14 August 2008, the Military Commission granted in part and denied in part the Government's Motion for Reconsideration. The Commission upheld its prior

³ As amended by the Commission's 4 April and 9 May 2008 Rulings, Charge III read, in pertinent part, as follows:

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates for the al Qaeda organization, known and unknown; said agreement to commit the following offenses triable by military commission: 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.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following

9 May 2008 Ruling at 1-2.

determination that the enterprise theory of Conspiracy is not authorized by the M.C.A. However, the Commission granted the Government's motion to restore to the charge sheet the knowledge allegation with respect to the agreement theory. *See* 14 Aug. 2008 Ruling at 1. Charge III against the accused therefore presently reads, in pertinent part, as follows:

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates for the al Qaeda organization, known and unknown; said agreement concerning an unlawful purpose known to the accused to commit the following offenses triable by military commission: 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.

In furtherance of this agreement, Omar Khadr knowingly committed overt acts, including, but not limited to, the following⁴

The Government filed a timely Notice of Appeal of the 14 August 2008 Ruling and the underlying legal determination to the Court of Military Commission Review on 19 August 2008. *See* C.M.C.R.R. 14(c)(1). This brief is timely filed within 10 days of filing said Notice of Appeal. *See id.*

STATEMENT OF FACTS

This is a purely legal motion, and all the facts necessary to its disposition have been set forth above.

⁴ The Military Judge did not include the revised version of Charge III in his 14 August 2008 Ruling. However, the Government assumes that the Military Judge accepted the suggested revision of Charge III set forth in the Government's Motion for Reconsideration, which is reproduced above. *See* Government Motion for Reconsideration at 13 n.6.

ERRORS AND ARGUMENT

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.

Summary of Argument

The Military Judge erroneously concluded that the enterprise theory of the Conspiracy offense—set forth in the Manual for Military Commissions—is ultra vires with respect to the M.C.A. That ruling failed to accord the Secretary's determination that the enterprise theory is, in fact, authorized by the M.C.A. sufficient (or any) deference. The Secretary's interpretation of the word "conspires" in the M.C.A. is entitled to deference under the Supreme Court's well-established decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Because the word "conspires" is ambiguous, and because the Secretary's interpretation of it in the M.M.C. is reasonable and permissible, the 14 August 2008 Ruling of the Military Judge must be reversed.

Standard of Review

This Court reviews the Military Commission's interpretation of a statute de novo. *See, e.g.,* *Judicial Watch, Inc. v. Fed. Bureau of Investigation*, 522 F.3d 364, 367 (D.C. Cir. 2008) (District Court's interpretation of a statute is reviewed de novo); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) ("Because this case presents a pure question of statutory interpretation, we review the district court's decision de novo."). With respect to the underlying motion to strike so-called "surplus language," the

burden of persuasion rested with the Defense, as the moving party. *See* R.M.C. 905(c)(2)(A).

As in the 2007 *Khadr* jurisdictional appeal to the Court of Military Commission Review, the instant appeal addresses the denial of a motion to reconsider. *Cf. United States v. Khadr*, C.M.C.R. 07-001, at 17-18 (24 Sept. 2007). There, as here, the underlying Military Commission ruling being appealed from “became final for purposes of the notice provisions of 10 U.S.C. § 950d(a)(2)(b) on [14 August 2008], the day the military judge denied Appellant’s Motion for Reconsideration.” *Id.* at 3 n.3 (citing *United States v. Ibarra*, 502 U.S. 1, 6-7 (1991) (per curiam)). Accordingly, this appeal of the Military Judge’s 4 April and 9 May 2008 Rulings is timely, and the standard of review is *de novo*. *See id.* at 4 (“Regarding all matters of law, we review the military judge’s findings and conclusions *de novo*. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2001); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000); *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007).”).

The Secretary of Defense’s Interpretation of the Punitive Offenses in the M.C.A. Is Entitled to Deference Under *Chevron*

Section 950v(b)(28) of the M.C.A. codifies as a violation of the law of war the offense of Conspiracy, and provides that “[a]ny person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy” is guilty of Conspiracy. The Secretary of Defense promulgated the elements of Conspiracy set forth in the Manual for Military Commissions pursuant to an express delegation of authority from Congress.

Under section 949a(a) of the M.C.A., the Secretary is authorized to prescribe “[p]retrial, trial, and post-trial procedures, *including elements* and modes of proof, for cases triable by military commission.” 10 U.S.C. § 949a(a) (emphasis added); *see also* M.C.A. § 3(b) (“[T]he Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions [i.e., the M.M.C.] . . .”). This delegation is *broader* than the delegation to the President under Article 36(a) of the Uniform Code of Military Justice (“U.C.M.J.”), which authorizes the President to prescribe only “[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry.” 10 U.S.C. § 836(a). Absent from this delegation to the President in the U.C.M.J. is the authority to prescribe *elements* of substantive offenses, making it significantly narrower than the delegation to the Secretary of Defense in the M.C.A.

This limitation on the President’s authority to prescribe elements of offenses in courts-martial has been recognized by the courts. For example, in *United States v. Davis*, 47 M.J. 484 (C.A.A.F. 1998), the C.A.A.F., per then-Judge Crawford, recognized that “Article 36(a), UCMJ, 10 USC § 836(a), gives the President express authority to promulgate rules under Parts II and III of the Manual. Part IV of the Manual is not expressly governed by Article 36(a).” *Id.* at 486; *accord* *United States v. Czeschin*, 56 M.J. 346, 348 (C.A.A.F. 2002). By contrast, where Congress has expressly delegated to the President authority under Article 56 of the U.C.M.J. to determine the maximum punishment for each offense within the U.C.M.J., “courts must defer to the President’s

determination.” *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).⁵ In any event, whatever limitations may exist on the President’s authority to prescribe elements of offenses under the U.C.M.J. are a result of the more limited delegation to him under Article 36(a) of the U.C.M.J.

By contrast, Congress expressly authorized the Secretary of Defense to prescribe, among other things, “*elements . . . for cases triable by military commission.*” 10 U.S.C. § 949a(a) (emphasis added). Under the Supreme Court’s opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and settled principles of administrative law, *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Secretary’s reasonable interpretation of ambiguous provisions of the M.C.A. is entitled to deference by this Court. *See Mead*, 533 U.S. at 229 (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”); *cf. M.C.A. § 3(b)* (“[T]he Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions [i.e., the M.M.C.] . . .”).

In *Chevron*, the Supreme Court articulated a rule, to which it has adhered ever since, that “[i]f . . . the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” 467 U.S. at 843; *see also id.* at 844 (“We

⁵ We note that, even in light of the above limitation, the C.A.A.F. has recognized that “[a]lthough the President’s interpretation of the elements of an offense is not binding on this Court, absent a contrary intention in the Constitution or a statute, this Court should adhere to the Manual’s elements of proof.” *United States v. Guess*, 48 M.J. 69, 71 (C.A.A.F. 1998) (per Crawford, J.).

have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . ."). As the D.C. Circuit recently explained,

Under step one [of *Chevron*], the court asks “whether Congress has directly spoken to the . . . issue;” 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.” *Id.* at 842-43. However, if the court determines that “Congress has not directly addressed the precise question at issue,” *id.* at 843, then, under step two, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.*

Env'tl. Def., Inc. v. EPA, 509 F.3d 553, 559 (D.C. Cir. 2007) (first alteration added).

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. *See* 10 U.S.C. § 949a(a); M.C.A. § 3(b). The Manual reasonably interprets the word “conspires” as including at least two meanings: First, the M.M.C. interprets “conspires” as including “enter[ing] into an agreement with one or more persons.” M.M.C., Part IV-6(28)(b)(1). Second, the M.M.C. interprets the word “conspires”—as used in the M.C.A.—to include “join[ing] an enterprise of persons who shared a common criminal purpose.” *Id.*

A word that is capable of being understood in two or more senses is, by definition, “ambiguous.” The word “conspires” is ambiguous and is susceptible of multiple definitions. For example, the AMERICAN HERITAGE DICTIONARY lists two definitions for the word “conspire”: (1) “[t]o plan together secretly to commit an illegal or wrongful act or accomplish a legal purpose through illegal action”; and (2) “[t]o join

or act together; combine.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 393 (4th ed. 2006). Similarly, the OXFORD ENGLISH DICTIONARY defines “conspire” both as “to agree together to do something criminal, illegal, or reprehensible,” as well as “[t]o combine privily for an evil or unlawful purpose.” 3 THE OXFORD ENGLISH DICTIONARY 783 (2d ed. 1989).

“In determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning.” *Ingalls Shipbuilding, Inc. v. Dir., Office of Workers’ Comp. Programs*, 519 U.S. 248, 255 (1997) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981), and *Richards v. United States*, 369 U.S. 1, 9 (1962))). The word “conspires” in section 950v(b)(28) of the M.C.A. may reasonably be interpreted as (1) agreeing to do something illegal, (2) joining an enterprise for an illegal purpose, or (3) both. The Secretary of Defense has reasonably interpreted the word “conspires” to cover both forms of conspiring, and that interpretation of an ambiguous provision of the M.C.A. is entitled to deference by this Court. *See Chevron*, 467 U.S. 842-45.

Moreover, within the specific context of the war crime at issue in the present appeal, the Department of Defense in 2003 defined “Conspiracy” as including both “enter[ing] into an agreement with one or more persons to commit one or more substantive offenses triable by military commission,” as well as “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.” 32 C.F.R. § 11.6(c)(6)(i)(A) (2003). Accordingly, the prevailing definition of Conspiracy, in the context of military commissions was, at the time of the

M.C.A.'s enactment in 2006 largely *identical* to the one later adopted by the Secretary of Defense in the M.M.C.

That the President has interpreted differently similar language in Article 81 of the U.C.M.J. is not dispositive with respect to whether the *Secretary's* interpretation of the M.C.A. is reasonable and entitled to deference.⁶ As the Supreme Court recently explained, "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). In *Brand X*, the Federal Communications Commission ("FCC") interpreted an ambiguous statutory term contrary to the Court of Appeals' prior construction of that term. Notwithstanding that the FCC in effect "reversed" a prior judgment of the Court of Appeals, the Supreme Court held that the FCC's recent interpretation of the ambiguous statutory text was entitled to deference under *Chevron*. *See id.* at 982-83. Similarly, the Court noted that an agency's *changed* interpretation of an ambiguous statute it is charged with administering is as entitled to deference as its initial interpretation of that statute. *See id.* at 981-82 ("That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent

⁶ Article 81(a) of the U.C.M.J. provides as follows: "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." 10 U.S.C. § 881(a) (as amended by M.C.A. § 4(b)).

In the Manual for Courts-Martial, the President has promulgated the following elements for the offense of Conspiracy under the U.C.M.J.:

- (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
- (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

M.C.M., Part IV-5(b).

reversal of agency policy.” (citing *Chevron*, 467 U.S. at 857-58)).

So, too, here, the meaning of the word “conspires” in the U.C.M.J. (10 U.S.C. § 881(a)) and the M.C.A. (10 U.S.C. § 950v(b)(28)) is ambiguous. The President has reasonably interpreted it, in the context of courts-martial, to mean “[t]hat the accused entered into an agreement with one or more persons to commit an offense under the code.” M.C.M., Part IV-5(b)(1). The Secretary of Defense has *also* reasonably interpreted the word “conspires,” in accordance with its ordinary meaning, to include both “enter[ing] into an agreement with one or more persons,” as well as “join[ing] an enterprise of persons who shared a common criminal purpose.” M.M.C., Part IV-6(28)(b)(1). Both the President’s and the Secretary of Defense’s interpretations of the word “conspires” are reasonable, and both are entitled to deference under *Chevron*.⁷

We note that the issue here is not whether the Secretary of Defense receives *Chevron*-deference in *enforcing* a statute, but rather whether the Secretary receives *Chevron*-deference in *interpreting and implementing* a statute. The Secretary has been entrusted not merely with enforcing the M.C.A., but with interpreting it. M.C.A. § 3(b) and 10 U.S.C. § 949a(a) authorized the Secretary of Defense to promulgate the M.M.C., which sets forth the elements of the Conspiracy offense. Whatever level of deference may be appropriate with respect to the Prosecution’s interpretation of the M.C.A. and

⁷ Thus, in contrast to the Government’s decision to prosecute (which is not entitled to *Chevron*-deference *vis-à-vis* a defendant’s guilt, *see, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment)), Congress *can* impose criminal punishments upon those who violate rules promulgated by Executive Branch officials, *see, e.g.*, *United States v. Grimaud*, 220 U.S. 506 (1911), and those punitive rules are entitled to deference. The *Grimaud* Court emphasized that “when Congress [has] legislated and indicated its will, it [can] give to those who were to act under such general provisions ‘power to fill up the details’ by the establishment of administrative rules and regulations, the violation of which [can] be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.” *Id.* at 511. Here, Congress expressly delegated to the Secretary the power to promulgate the elements of the M.C.A.’s substantive offenses, and the Secretary has reasonably done so in the Manual.

M.M.C. in a particular case, here, the Secretary has promulgated general regulations implementing the M.C.A., and in doing so has acted in a rulemaking, rather than in an enforcement or adjudicatory, capacity, and he therefore must receive *Chevron*-deference, just as the head of the EPA would when *he* promulgates environmental regulations pursuant to a statute. *See Sash v. Zenk*, 439 F.3d 61, 67 (2d Cir. 2006) (“The Supreme Court has rejected the idea that the rule of lenity should trump the deference we traditionally afford to reasonable administrative regulations.” (citing *Babbitt v. Sweet Home Chapter of Communities for a Greater Ore.*, 515 U.S. 687, 704 (1995))); *see also Sweet Home Chapter*, 515 U.S. at 704 & n.18 (holding that the EPA’s interpretation of a statute was reasonable and deserving of deference even though the statute was criminally enforced).⁸ Accordingly, *Chevron* is fully applicable to the Secretary’s articulation in the M.M.C. of the elements of the M.C.A.’s Conspiracy offense.

⁸ To the extent courts-martial have interpreted the U.C.M.J. in a contrary fashion, such decisions are inapposite—since they rely on a more limited delegation to the President in the U.C.M.J., *see supra* pp. 11-12—and, in any event, have expressly been made not binding on this Court. *See* 10 U.S.C. § 948b(c) (“The judicial construction and application of [the U.C.M.J.] are not binding on military commissions established under [the M.C.A.]”). Moreover, as noted above, numerous U.S. Courts of Appeals have rejected the premise that the rule of lenity trumps traditional *Chevron*-deference. *See, e.g.*, *Mizrahi v. Gonzales*, 492 F.3d 156, 174-75 (2d Cir. 2007) (“The rule of lenity is a doctrine of last resort, and it cannot overcome a reasonable [Board of Immigration Appeals] interpretation entitled to *Chevron* deference.” (citing *Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 198 (2d Cir. 2007))); *Ruiz-Almanzar*, 485 F.3d at 198 (“[T]his doctrine [the rule of lenity] is one of last resort, to be used only after the traditional means of interpreting authoritative texts have failed to dispel any ambiguities. . . . We apply the rule of lenity only when none of the other canons of statutory construction is capable of resolving the statute’s meaning and the BIA has not offered a reasonable interpretation of the statute.”) (internal quotation marks omitted); *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005) (“[T]he rule of lenity does not foreclose deference to an administrative agency’s reasonable interpretation of a statute.” (citing *Sweet Home Chapter*, 515 U.S. at 704 n.18)); *Amador-Palomares v. Ashcroft*, 382 F.3d 864, 868 (8th Cir. 2004) (“[T]he rule [of lenity] is applied only where there still exists an ambiguity after the reviewing court applies traditional methods of statutory construction.” *Shelton v. Consumer Prods. Safety Comm’n*, 277 F.3d 998, 1005 n. 3 (8th Cir.), *cert. denied*, 537 U.S. 1000 (2002). It does not supplant *Chevron* deference merely because a seemingly harsh outcome may result from the Board’s interpretation. *Cf. Ki Se Lee v. Ashcroft*, 368 F.3d 218, 228 n. 13 (3d Cir. 2004) (rejecting petitioner’s invitation to invoke rule of lenity where agency’s interpretation is reasonable); *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1272 (9th Cir. 2001) (recognizing rule of lenity does not apply if court concludes agency reasonably resolved ambiguity in statute.”) (internal quotation marks omitted).

The Secretary's Articulation of the Conspiracy Offense in the M.M.C. Is a Reasonable and Permissible Interpretation of the M.C.A.

The Military Commission's 14 August 2008 Ruling ignores that many offenses triable by military commission may—as a result of the unique international law aspects of violations of the law of war—have a broader scope than similar offenses under the U.C.M.J. For whatever else may be said of the scope of Conspiracy in the domestic sphere, there is ample historical precedent for criminalizing the enterprise theory of Conspiracy as a violation of the law of war. *See, e.g., United States v. Göring, et al.* (1 Oct. 1946), in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, JUDGMENT, at 256 (1947) (“A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose.”); *Trial of Martin Gottfried Weiss and Thirty-Nine Others (The Dachau Concentration Camp Trial)*, United Nations War Crimes Commission, Case No. 60 (15 Nov. - 13 Dec. 1945), in 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS, at 5, 12-15 (1949) (accused were convicted of “act[ing] in pursuance of a common design to commit” unlawful acts against prisoners); *Military Commissions*, 11 Op. Atty. Gen. 297, 298, 312 (1865) (endorsing the prosecution by military commission of the Lincoln assassination conspirators, who were charged with “combining, confederating, and conspiring” to kill President Lincoln, and explaining that “to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; *the offence is complete when the band is organized or joined*. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.”) (emphasis added); *see also* THE ASSASSINATION OF

PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS (Benn Pitman, ed., 1865), *reprinted in* THE TRIAL: THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 18-21 (Edward Steers Jr., ed., 2003) (listing the military commission charges against the Lincoln assassination conspirators, including “combining, confederating, and conspiring”). As these precedents demonstrate, knowingly joining an enterprise that violates the law of war is itself a violation of the law of war, punishable by military commission. *See generally United States v. Khadr*, Government’s Response to the Defense’s Motion to Dismiss Charge III (Conspiracy), at 5-13 (14 Dec. 2007).

Furthermore, within the specific context of the war crime at issue in the present appeal, the Department of Defense in 2003 defined “Conspiracy” as including both “enter[ing] into an agreement with one or more persons to commit one or more substantive offenses triable by military commission,” as well as “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.” 32 C.F.R. § 11.6(c)(6)(i)(A) (2003). Given that Congress legislated in the M.C.A. against the backdrop of this prior definition of Conspiracy (in the very same military conflict), it was certainly reasonable for the Secretary to maintain such an interpretation of the Conspiracy offense, insofar as permitted by the M.C.A. Accordingly, the Secretary’s reasonable articulation of the enterprise theory of Conspiracy in the M.M.C. with respect to violations of the law of war triable by military commission is entitled to deference by this Court and the Military Commission below.

Prayer for Relief

WHEREFORE, the Government respectfully prays that this Court restore to the accused's 24 April 2007 referred charge sheet the language deleted by the Military Commission's 4 April 2008, 9 May 2008, and 14 August 2008 Rulings.

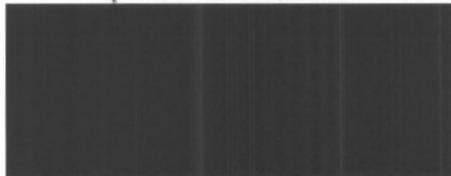
APPENDIX

An Appendix containing Exhibits A through K is attached hereto.

Respectfully submitted,



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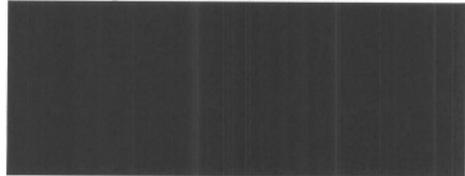
MOTION FOR ORAL ARGUMENT

Pursuant to C.M.C.R.R. 17, the Government respectfully moves for expedited oral argument on the issue presented, that is, whether the Secretary of Defense's interpretation in the Manual for Military Commissions of the Conspiracy offense set forth in the Military Commissions Act is a permissible interpretation of the Act, and consequently whether it must receive deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

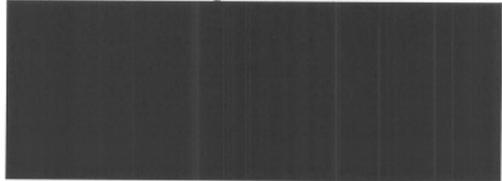
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CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

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

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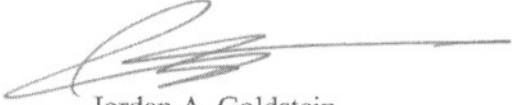
2. This brief complies with the typeface and type style requirements of Rule 14(e) because:

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Dated: 26 August 2008

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-mailed to William C. Kuebler, LCDR, JAGC, USN, Detailed Defense Counsel on this 26th day of August 2008.


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