
UNITED STATES OF AMERICA,

Appellant,

v.

OMAR AHMED KHADR

a/k/a "Akhbar Farhad"

a/k/a "Akhbar Farnad"

a/k/a "Ahmed Muhammed Khali,"

Appellee.

) **IN THE COURT OF MILITARY**
) **COMMISSION REVIEW**

) **REPLY BRIEF ON BEHALF OF**
) **APPELLANT**

) C.M.C.R. Case No. 08-003

) 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
) Surplus Language from Charge III

) Tried at Guantanamo Bay, Cuba
) on 13 August 2008

) before a Military Commission
) convened by M.C.C.O. #07-02

) Presiding Military Judge
) Colonel Patrick J. Parrish

) DATE: 22 September 2008

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

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SPECIFIED ISSUES

1. WHETHER THE GOVERNMENT'S REQUEST FOR RECONSIDERATION AND THE GOVERNMENT'S SUBSEQUENT NOTICE OF APPEAL TO THE COURT OF MILITARY COMMISSION REVIEW WERE TIMELY UNDER 10 U.S.C. § 950d(b).
2. IF THE GOVERNMENT'S REQUEST FOR RECONSIDERATION OR THE NOTICE OF APPEAL WERE NOT TIMELY, WHETHER THIS COURT HAS JURISDICTION TO DECIDE THE INSTANT APPEAL.

ASSIGNED ERROR

1. IF THIS COURT DOES HAVE JURISDICTION TO DECIDE THE INSTANT APPEAL, 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.) ("Ruling on Government Motion for Reconsideration"), *in* Open. Br., Appx., Ex. A, terminated proceedings of the accused's military commission with respect to a charge or specification against the accused. As explained in Appellant's Response to Appellee's Motion to Dismiss Appellant's Interlocutory Appeal, filed concurrently herewith, 10 U.S.C. § 950d(a)(1)(A) and R.M.C. 908(a)(1) permit appeals of rulings by the military judge that "terminate[] proceedings of the military commission with respect to a charge or specification," i.e., rather than with

respect to *all* charges or specifications. (Emphasis added.) Because the Military Judge's ruling terminated proceedings with respect to the Conspiracy specification against the accused, the ruling was appealable under 10 U.S.C. § 950d(a)(1)(A) and R.M.C. 908(a)(1).

STATEMENT OF THE CASE

The majority of facts relevant to this appeal have already been stated in Appellant's Opening Brief and will not be repeated here. *See* Open. Br. at 1-8. However, in order to clarify the discussion with respect to the Specified Issues, Appellant will restate a limited number of facts.

On 11 January 2008, the Defense filed a motion to dismiss the enterprise theory of Conspiracy from the charges referred against the accused. *See United States v. Khadr*, Defense Motion to Strike Surplus Language from Charge III (11 Jan. 2008), *in* Open. Br., Appx., Ex. H. On 4 April 2008, the Military Judge granted the motion. *See United States v. Khadr*, Ruling on Defense Motion to Strike Surplus Language from Charge III (D-019) (Mil. Comm'n 4 Apr. 2008) (Brownback, J.), *in* Open. Br., Appx., Ex. F. On 9 May 2008, in response to a second motion from the Defense, *see* E-mail from William Kuebler, LCDR, to Peter E. Brownback, COL, et al., *Re: Defense Special Request for Relief* (9 Apr. 2008), *in* Open. Br., Appx., Ex. E, the Military Judge issued a ruling striking from the referred charges the remaining language relating to the enterprise theory, *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 (Mil. Comm'n 9 May 2008) (Brownback, J.), *in* Open. Br., Appx., Ex. C. Prior to

filing a motion for reconsideration on 11 July 2008, the Government filed no response to either the 4 April or the 9 May 2008 rulings of the Military Judge.

On 11 July 2008, the Government moved for reconsideration of the Commission's 4 April and 9 May 2008 rulings. 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), *in* Open. Br., Appx., Ex. B. The motion was granted in part and (with respect to the issue raised in the instant appeal) denied in part on 14 August 2008.¹ Five days later, on 19 August 2008, the Government e-mailed a copy of its Notice of Appeal to the Military Judge and military defense counsel. See Exhibit A (hereto). One minute later, the Government filed its Notice of Appeal with this Court.

STATEMENT OF FACTS

This is a purely legal motion, and any facts necessary to its disposition have been set forth above or in the Government's Opening Brief.

¹ The Government's 11 July 2008 Motion for Reconsideration sought reconsideration with respect to both the dismissal of the enterprise theory portion of the specification as well as the striking of language from the referred charges relevant to the agreement theory of Conspiracy. In his 14 August 2008 ruling, the Military Judge restored that latter language to the referred charges. As discussed below, the Military Judge expressed no concern whatsoever as to the timeliness of the Government's Motion for Reconsideration, and the Defense raised no objection at that time to the motion's timeliness.

ARGUMENT ON SPECIFIED ISSUES

1. THE GOVERNMENT'S MOTION TO THE MILITARY JUDGE SEEKING RECONSIDERATION AND THE GOVERNMENT'S SUBSEQUENT NOTICE OF APPEAL TO THIS COURT WERE TIMELY.
2. EVEN IF THE GOVERNMENT'S REQUEST FOR RECONSIDERATION WERE NOT TIMELY, THIS COURT HAS JURISDICTION TO DECIDE THE INSTANT APPEAL.

Standard of Review

Whether an appeal is timely filed and whether this Court has jurisdiction is reviewed *de novo*. See *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006) (*per curiam*).

Summary of Argument

Under R.M.C. 801(e)(1)(B) and 905(f), a Military Judge may reconsider *any* ruling (other than a finding of not guilty) *at any time* during a trial, so long as the record of trial has not yet been authenticated. On 11 July 2008, when the Government filed its Motion for Reconsideration, the accused's trial had not even begun, let alone had its record authenticated. Accordingly, the Government's Motion for Reconsideration was timely under R.M.C. 905(f).

The Government filed its Notice of Appeal within five days of its Motion for Reconsideration being granted in part and denied in part. See 10 U.S.C. § 950d(b); R.M.C. 908(b)(2), 908(b)(7); Court of Military Commission Review Rule of Practice ("C.M.C.R.R.") 14(c)(1); Regulation for Trial by Military Commissions ("Reg. Mil. Comm'ns") 25-5(f). The Notice of Appeal was timely filed because—as of the date of the Government's 11 July 2008 Motion for Reconsideration—the Military Judge's 4 April and 9 May 2008 rulings were not final, since the record of trial had not yet been

authenticated. *See* R.M.C. 905(f). Unlike in the federal system, where a motion for reconsideration is deemed timely so long as it is filed within the period of time for filing a notice of appeal, *see, e.g., United States v. Vicaria*, 963 F.2d 1412, 1414 (11th Cir. 1992) (per curiam), under the Manual for Military Commissions (“M.M.C.”) a motion for reconsideration is timely so long as it is filed before the authentication of the record of trial. *See* R.M.C. 905(f). As such, the Military Judge’s underlying orders of 4 April and 9 May 2008 (which formed the basis for the Government’s Motion for Reconsideration) were not final as of the date the Motion for Reconsideration was filed. Accordingly, the Motion for Reconsideration was timely filed, and the deadline for appealing the underlying decisions of the Military Judge was five days from the denial of the Government’s Motion for Reconsideration. *See United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (per curiam). Because the Government filed its Notice of Appeal within five days of the partial denial of its Motion for Reconsideration, the Notice of Appeal was timely filed.

The Motion for Reconsideration was timely filed.

Under R.M.C. 905(f), a motion for reconsideration may be filed *at any time* prior to the authentication of the record of trial.² The record of trial for the accused had, at the time of the filing of the Government’s Motion for Reconsideration on 11 July 2008, not yet been authenticated.³ Accordingly, the Motion for Reconsideration was timely filed under R.M.C. 905(f).

² R.M.C. 905(f) provides as follows: “On 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.” (Emphasis added.)

³ In fact, the trial still has yet to begin.

In its 12 September 2008 order specifying this issue for briefing, this Court stated that “[t]he [Government’s opening] brief does not indicate the Government requested reconsideration of the Judge’s order, either within five days of the initial judicial order, dated 4 April 2008, or within five days of the subsequent order, dated 9 May 2008.” As noted above, however, *there is no five-day deadline* associated with filing a motion for reconsideration. Rather, the only five-day deadline that could possibly be relevant in this case relates to the filing of the Government’s Notice of Appeal, *see* 10 U.S.C. § 950d(b); R.M.C. 908(b)(2), and not to the filing of a motion for reconsideration.⁴

Moreover, as discussed further below, R.M.C. 905(f)’s reference to the “authentication of the record of trial” clearly *does* refer to the completion of trial. That is apparent from examining a related rule—R.M.C. 801(e)(1)(B), which provides that “[t]he military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, *at any time during the trial.*” Reading R.M.C. 801(e)(1)(B) and 905(f) together, it is clear that the Military Judge has the authority to reconsider *any ruling* (other than a finding of not guilty) *at any time* prior to the completion of the trial (and the eventual authentication of its record).

Moreover, any potential timeliness objection to the filing of the Government’s 11 July 2008 Motion for Reconsideration has been waived. The Defense neither filed a

⁴ We note that a five-day deadline for filings motions for reconsideration would be far shorter than the 30-day deadline that some federal courts have read into rules governing motions for reconsideration in that system. *See, e.g.,* United States v. Martinez, 681 F.2d 1248, 1252-53 (10th Cir. 1982) (per curiam). In the instant case, despite diligence, neither the Government nor the Military Judge became aware of the acknowledged error relating to the agreement theory in the Commission’s 4 April and 9 May ruling for several weeks. Although the Government has and will continue to be diligent in spotting errors in adverse rulings, a five-day deadline for requesting reconsideration of an adverse ruling will often impose insurmountable hurdles on the Government (and would represent one-sixth the time permitted in federal court), and in effect would have made the Military Judge’s error (both as to the enterprise theory of Conspiracy and the agreement theory) effectively unreviewable.

response to the Government's Motion for Reconsideration nor presented oral argument. *See Khadr*, Ruling on Government Motion for Reconsideration. Having waived any objection to the timeliness of the Government's Motion for Reconsideration, Appellee cannot raise such a claim at this late date.⁵

The Notice of Appeal was timely filed.

The Government filed its Notice of Appeal with this Court within five days of the Military Judge's 14 August 2008 order denying the Government's Motion for Reconsideration. As discussed in the Government's Notice of Appeal, an interlocutory appeal of the dismissal of a charge or specification is timely if filed within five days of the order being appealed. *See* 10 U.S.C. § 950d(b); R.M.C. 908(b)(2), 908(b)(7); C.M.C.R.R. 14(c)(1); Reg. Mil. Comm'ns 25-5(f). The Government's Notice of Appeal was filed on 19 August 2008, that is, within five days of the Military Judge's ruling on the Motion for Reconsideration. Accordingly, the Notice of Appeal was timely filed.

As noted in the Government's Opening Brief, *see* Open. Br. at 10, this Court has previously considered an interlocutory appeal with respect to this very defendant that arose in a similar posture. In *United States v. Khadr*, C.M.C.R. Case No. 07-001, the Military Judge on 4 June 2007 dismissed all charges against Mr. Khadr without prejudice. *See United States v. Khadr*, C.M.C.R. 07-001, Ruling on Motion to Dismiss, at 1 (19 Sept. 2007). Four days later, the Government filed a motion for reconsideration with the Military Judge. *See id.* The Government also requested that the Military Judge

⁵ We also note that the Military Judge did not *sua sponte* raise any timeliness objection to the Government's Motion for Reconsideration; in fact, quite the opposite, since the Military Judge *reached the merits* of the Government's Motion for Reconsideration and *granted* part of the motion. *See id.* Accordingly, any potential objection to the timeliness of the Government's Motion for Reconsideration has been waived by the Defense and cannot be belatedly used to attack the legitimacy of the Military Judge's 14 August 2008 ruling.

toll the deadline for filing an appeal, which request the Military Judge *rejected*. *See id.* On 29 June 2007, the Military Judge denied the Government’s motion for reconsideration and authenticated the record of trial as of that date.⁶ The Government then filed a notice of appeal with this Court four days later. *See id.* at 1-2.

Then, as now, the Government filed a timely motion for reconsideration. Then, as now, the Government filed a timely notice of appeal from the order denying said motion for reconsideration. Then, as now, the Government’s notice of appeal was filed within five days of the Military Judge’s order denying the Government’s motion for reconsideration (but more than five days after the Military Judge’s initial ruling upon which reconsideration had been sought).

In the 2007 *Khadr* appeal, this Court unanimously found the Government’s notice of appeal timely. As this Court explained, “the issue presented by the circumstances of the case *sub judice* is not whether the time period within which to appeal can be extended. The issue here is when that appeal period starts to run if the government has submitted a motion for reconsideration of the underlying order or ruling.” *Id.* at 2-3.

In the 2007 *Khadr* appeal, this Court relied heavily on the Supreme Court’s unanimous opinion in *United States v. Ibarra*, 502 U.S. 1 (1991) (*per curiam*), in which the Supreme Court considered whether a 30-day time period for filing an appeal began to run from the district court’s original suppression order, or from the district court’s denial of the Government’s motion for reconsideration of that order. *See id.* at 2. The Supreme Court held that the 30-day window for filing an appeal began running on the date the motion for reconsideration was denied. *See id.* at 4 n.2. The Court noted that a contrary

⁶ In contrast to the present situation, because of the nature of the Military Judge’s 4 June 2007 order, the trial of Mr. Khadr was effectively over.

holding would force prudent attorneys to file notices of appeal, even while a motion for reconsideration was pending in the district court, to avoid an eventual appeal being deemed untimely. *See id.* at 7.⁷

Relying principally on *Ibarra*, this Court concluded in 2007 that the deadline for appealing a particular legal issue is determined by the date of the denial of a motion for reconsideration on that legal issue, rather than the date of the original ruling. This Court also noted, *see Khadr*, C.M.C.R. 07-001, Ruling on Motion to Dismiss, at 3, that R.M.C. 801(e)(1)(B) permits the Military Judge to “change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, *at any time during the trial.*” (Emphasis added.) In addition, this Court noted that R.M.C. 905(f) permits reconsideration of any ruling, other than one amounting to a finding of not guilty, at any time prior to the authentication of the record of trial. Reading these provisions together with *Ibarra*, this Court correctly concluded that “the judge’s original dismissal order [of June 4, 2007] was not ‘final’ until he ruled on the motion for reconsideration on June 29, 2007, which in turn started the five-day clock for filing a government appeal.” *Khadr*, C.M.C.R. 07-001, Ruling on Motion to Dismiss, at 3-4; *see also United States v. Khadr*, C.M.C.R. 07-001, Opinion of the Court and Action on Appeal by the United States Filed Pursuant to 10 U.S.C. § 950d, at 3 n.3 (24 Sept. 2007) (“The military judge’s ruling became final for purposes of the notice provisions of

⁷ It is also worth noting that the basis for the motion for reconsideration in *Ibarra* was a legal theory the Government had originally raised in litigating its suppression motion and then *abandoned*. *See id.* at 3. Notwithstanding that the basis for the motion for reconsideration to the district court was an abandoned theory, the Supreme Court nevertheless held that the 30-day appellate time window began running only upon denial of the motion for reconsideration, and not upon entry of the district court order denying the Government’s original motion. In the instant appeal, of course, the Government has never abandoned its argument that the enterprise theory of Conspiracy is statutorily authorized, but has in fact vigorously argued it throughout the course of this case.

10 U.S.C. § 950d(a)(2)(b) on June 29, 2007, the day the military judge denied Appellant's Motion for Reconsideration." (citing *Ibarra*, 502 U.S. at 6-7)).

In the 2007 *Khadr* decision, this Court also distinguished *Bowles v. Russell*, 127 S. Ct. 2360 (2007). In *Bowles*, the Supreme Court considered whether the U.S. Court of Appeals had jurisdiction to entertain an appeal filed *after* the statutory period allowed for filing an appeal had elapsed, but where the district court had purported to enlarge the time in which the appeal could be filed. *See id.* at 2362. The Supreme Court held that the time limit for filing a notice of appeal is jurisdictional and therefore could not be extended by the district court. *See id.*⁸

However, as this Court recognized in 2007, *Bowles* is wholly inapposite to the case *sub judice*. *See Khadr*, C.M.C.R. 07-001, Ruling on Motion to Dismiss, at 2-3 (“[T]he issue presented by the circumstances of the case *sub judice* is not whether the time period within which to appeal can be extended. The issue here is when that appeal period starts to run if the government has submitted a motion for reconsideration of the underlying order or ruling.”). As in the earlier *Khadr* appeal, the Government has fully abided by 10 U.S.C. § 950d(b)'s five-day deadline for filing a notice of appeal.⁹

Accordingly, this Court has jurisdiction to decide the instant appeal.

⁸ In *Bowles*, there was a 30-day window in which to file a notice of appeal, which was subject to a 14-day extension by the district court under limited circumstances. Because the district court “inexplicably” extended the filing window by *17 days* (and the appellant in that case filed his appeal on the 17th day in reliance on the district court's order), the appeal was deemed untimely by the Supreme Court, and the Court of Appeals accordingly lacked jurisdiction to entertain it. *See id.* at 2362-63.

⁹ Although this Court noted in its 2007 ruling that the Government had sought reconsideration before the Military Judge within four days of his original ruling, *see Khadr*, C.M.C.R. 07-001, Ruling on Motion to Dismiss, at 3, *nothing* in this Court's 2007 ruling indicated that this fact was dispositive. Rather, the motion for reconsideration (and hence the notice of appeal) were held to be timely because, at the time the motion for reconsideration was filed, the record of trial had not yet been authenticated. *See id.* (“In this case, the government's motion for reconsideration of the military judge's dismissal order was filed on June 8, 2007, only four days after the order was entered *and well before the military judge's authentication of the record on June 29, 2007.*” (emphasis added)).

In its 12 September 2008 order requesting briefing on the above legal issue, this Court cited a number of authorities after first noting that the Government did not indicate in its Opening Brief whether it sought reconsideration of the Military Commission's 4 April and 9 May orders within five days of those rulings. As noted above, there is no requirement in either the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("M.C.A."), or the M.M.C. that reconsideration by a military commission be sought within five days of a ruling. In fact, quite the opposite. *See, e.g.*, R.M.C. 801(e)(1)(B) (military judge may reconsider *any ruling* (other than a finding of not guilty) *at any time* during the trial); R.M.C. 905(f) (military judge may reconsider *any ruling* (other than a finding of not guilty) prior to the authentication of the record of trial).

The other cases cited in this Court's 12 September 2008 order either support the Government's position, *see, e.g., Ibarra*, 502 U.S. at 6-7 (deadline for appealing suppression order is based on the denial of a motion for reconsideration, rather than the denial of the underlying order); or are inapposite, *see, e.g., Bowles*, 127 S. Ct. at 2362. For example, in *United States v. Brewer*, 60 F.3d 1142 (5th Cir. 1995), the Fifth Circuit held that the filing of a timely motion for reconsideration tolls the period of time for filing a notice of appeal of the underlying judgment. *See id.* at 1143-44. There are significant differences between *Brewer* and the present case.

First, *Brewer* appears to have concerned an appeal of the underlying judgment, rather than an appeal of a denial of a motion for reconsideration. As such, the question of tolling the time to appeal the underlying judgment, which appeared to have been the dispositive issue in *Brewer*, is inapposite to the present question of the timing for appealing the denial of a motion for reconsideration.

Second, even if the judgment being appealed in *Brewer* were the denial of the motion for reconsideration, it would be difficult to reconcile the Fifth Circuit's *Brewer* opinion with the Supreme Court's unanimous opinion in *Ibarra*, a case that *Brewer* neither cites nor distinguishes. In *Ibarra*, the Supreme Court *rejected* reliance on principles of equitable tolling in assessing the effect of a motion for reconsideration, and instead held that the relevant date for filing a notice of appeal is the entry of judgment on the motion for reconsideration, rather than the date the original judgment was entered. *See Ibarra*, 502 U.S. at 4 n.2 ("The Court of Appeals' decision discusses the issue as a matter of whether the motion for reconsideration 'tolled' the 30-day period that, by assumption, began to run with the District Court's first decision. We believe the issue is better described as whether the 30-day period began to run on the date of the first order or on the date of the order denying the motion for reconsideration, rather than as a matter of tolling.").

Finally, *Brewer* is inapposite to the present case because the timeliness rules for filing a motion for reconsideration in the federal system differ from that under the M.C.A. That is, under Fifth Circuit caselaw, a defendant's motion for reconsideration was timely if filed within 10 days of the judgment. *See Brewer*, 60 F.3d at 1143-44 (citing Fed. R. App. P. 4(b)). By contrast, a motion for reconsideration under the M.C.A. (other than one relating to a finding of not guilty) is timely if filed *at any time* prior to the authentication of the record of trial. *See R.M.C.* 905(f). To the extent tolling was relevant in *Brewer*, it was relevant only because the federal courts had implied a deadline for filing a motion for reconsideration in the absence of any deadline in the Federal Rules of Appellate Procedure. By contrast, under the M.M.C. there *is* an unambiguous

statement in R.M.C. 801(e)(1)(B) and 905(f) that a motion for reconsideration may be filed *at any time* prior to the end of trial (and the eventual authentication of its record). Moreover, the Supreme Court's precedent in *Ibarra* makes clear that the filing of a timely motion for reconsideration in effect destroys the finality of a given judgment for purpose of determining when a notice of appeal must be filed.

The other cases cited in this Court's 12 September 2008 order are similarly inapposite or unpersuasive. In *United States v. Morillo*, 8 F.3d 864 (1st Cir. 1993), the Court of Appeals held that "under certain circumscribed circumstances, post-judgment motions brought under [Fed. R. Crim. P. 35(c)] can operate to extend the appeal period limned by [Fed. R. App. P. 4(b)]." *Id.* at 866. In so holding, the Court of Appeals cited *Ibarra* approvingly for the proposition that the "government's timely motion for reconsideration restarted the appeal period with respect to the underlying judgment as of the date when the district court denied the motion." *Id.* at 867. In any event, as *Ibarra* demonstrates, the relevant period for appealing an adverse judgment times from the date a timely motion for reconsideration was denied, rather than the date of the original ruling. *See Ibarra*, 502 U.S. at 4 n.2.

Finally, this Court's 12 September 2008 order cites *United States v. Santiago*, 56 M.J. 610 (N.M. Ct. Crim. App. 2001). In *Santiago*, a military court considered whether an interlocutory appeal by the Government was timely under the Uniform Code of Military Justice ("U.C.M.J."). In that case, the Government filed a motion for reconsideration nearly two months after the original ruling. After the motion for reconsideration was denied, the Government in *Santiago* failed to file any notice of appeal. Instead, nearly two months after that, the Government filed an *in limine* motion

that in effect sought reconsideration of the original ruling. Because this latter motion was deemed untimely, the U.S. Navy-Marine Corps Court of Criminal Appeals held that the Government had waived its right to appeal the original ruling. *See id.* at 615-16.

In so holding, the *Santiago* court repeatedly noted that the Government never filed a timely notice of appeal to the denial of its original motion for reconsideration:

After the military judge reconsidered and affirmed his earlier ruling, the Government *arguably* had an opportunity to file a notice of intent to appeal within 72 hours of the issuance of the reconsideration decision on 19 March 2001. *Compare Canale v. United States*, 969 F.2d 13, 14-15 (2nd Cir. 1992) (holding that the time period to file notice of appeal began from date that the request for reconsideration was denied, even though the request was denied as untimely by the trial court) *with Martinez*, 681 F.2d at 1254 (noting that the trial court's acceptance and review of the Government's untimely reconsideration request is not an implicit grant of additional time to appeal the initial ruling). However, the Government did not file a timely appeal after 19 March 2001, and there is no evidence from the record that it could not do so.

Id. at 613; *see also id.* at 615-16 (“Since the Government withdrew its appeal of the military judge’s initial ruling of 10 January 2001 on the evidentiary issues before us and failed to file a timely notice appealing the military judge’s reconsideration decision of 19 March 2001 on those issues, we find no merit in the Government’s belated attempt on 7 June 2001 to rejuvenate an extinguished right of appeal.”). To the extent the Court of Criminal Appeals read a 72-hour requirement into Rule for Courts-Martial 905(f)’s permissive approach to permitting motions for reconsideration, such a reading finds no support in the M.C.A. or M.M.C., which permits reconsideration of *any issue* (other than a finding of not guilty) at *any time* during the trial or prior to the authentication of its record. In any event, a contrary holding by the Court of Criminal Appeals is 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.]”).

Accordingly, as the Supreme Court's unanimous opinion in *Ibarra* makes clear, because the Government filed a timely notice of appeal from the denial of a timely filed motion for reconsideration, this Court has jurisdiction to decide the instant appeal.¹⁰

Even if the Government's Request for Reconsideration were not timely, this Court has jurisdiction to decide the instant appeal.

As discussed above, nothing in the M.C.A. or the M.M.C. imposes any time limit on filing motions for reconsideration prior to the authentication of the record of trial. *See* R.M.C. 801(e)(1)(B), 905(f). Accordingly, the Government's 11 July 2008 Motion for Reconsideration was timely. Moreover, even if there were an implicit five-day time limit for filing a motion for reconsideration whose denial would be appealable, neither the Defense nor the Military Judge raised any objection to the timeliness of the Government's motion. Accordingly, any such objection has been waived, and the Government's Notice of Appeal is timely. *Cf. Canale*, 969 F.2d at 14-15 (holding that

¹⁰ The Government notes that a contrary rule would be largely unworkable. For example, if the Government received an adverse ruling, it might well decide for any number of reasons not to move for reconsideration. However, if there were a subsequent on-point decision from a higher court supporting the Government's original position, the Government might well move for reconsideration on that basis. If the Military Judge were to reconsider his decision but then affirm it on alternative grounds, those alternative grounds might well be more objectionable to the Government than the initial basis for the Military Judge's ruling, and the Government should not be deprived of its right to appeal such a ruling (provided it files a notice of appeal within five days of the Military Judge's order denying reconsideration).

So, too, here, the Military Judge has preserved some parts of his prior ruling, while reversing others. In that situation, where the Military Judge has deemed the Government's motion for reconsideration timely, and has in fact reconsidered part of his earlier ruling, under the rule laid down in *Ibarra*, a notice of appeal filed within five days of the Military Judge's ruling on the motion to reconsider is timely.

Neither the M.C.A. nor the M.M.C. requires that an appealable motion for reconsideration be filed within five days of the original judgment. To the extent this Court wishes to impose such a deadline as a prudential matter, the Court should acknowledge that it is imposing that rule, not as a jurisdictional requirement, but solely because of administrative concerns. If such a rule is to be imposed, it should be prospective only, since the Government was entitled reasonably to rely on the complete absence of any such deadline in either the M.C.A. or the M.M.C.

the Court of Appeals had jurisdiction to consider an appeal from the denial of a motion for reconsideration that was *untimely* under local district court's rules).¹¹

Prayer for Relief

WHEREFORE, the Government respectfully prays that this Court hold the Notice of Appeal timely and exercise jurisdiction over the instant interlocutory appeal.

¹¹ If this Court were to find the Government's 19 August 2008 Notice of Appeal untimely, this Court would be without jurisdiction to decide the instant appeal.

ARGUMENT ON ASSIGNED ERROR

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 IS ENTITLED TO DEFERENCE UNDER *CHEVRON U.S.A. INC. v. NATURAL RESOURCES DEFENSE COUNCIL, INC.*, 467 U.S. 837 (1984).

Standard of Review

In the 2007 *Khadr* appeal, this Court—having found that the appeal of the denial of the motion to reconsider was timely—followed the Supreme Court's decision in *Ibarra* and considered the merits of the underlying motion (i.e., the one that precipitated the Government's motion to reconsider) *de novo*. See *Khadr*, C.M.C.R. 07-001, Opinion of the Court, 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).”). For the same reason, this Court—having received a timely Notice of Appeal of the Military Judge's 14 August 2008 ruling—should consider *de novo* whether the Military Commission erred in striking the enterprise theory of Conspiracy from the referred charges against the accused.

Summary of Argument

In the M.C.A., Congress authorized the Secretary of Defense (“Secretary”) to prescribe elements of offenses triable in military commissions. This delegation, which is broader than the analogous delegation to the President under the U.C.M.J., authorizes the Secretary to prescribe the elements of the Conspiracy offense codified under the M.C.A. See 10 U.S.C. § 950v(b)(28). Because this delegation was pursuant to an “intelligible principle” (namely, to prescribe the elements of offense triable in military commissions),

the Secretary's promulgation of Part IV of the M.M.C. is fully consistent with the constitutional separation of powers.

Moreover, the Secretary's articulation of the elements of the Conspiracy offense in the M.M.C. is a reasonable interpretation of the M.C.A., and because the Secretary is the actor to whom Congress delegated authority to prescribe elements, *see* 10 U.S.C. § 949a(a), the Secretary's articulation of the Conspiracy offense is entitled to deference by this Court. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). In addition, because *Chevron* applies in the criminal context, at least with respect to the deference owed a congressionally authorized regulation specifying the elements of offenses, neither the rule of lenity nor any other canon of statutory interpretation deprives the Secretary of the deference owed to him under *Chevron*.

Congress has authorized the Secretary of Defense to prescribe elements of offenses triable under the M.C.A.

Appellee contends that the Secretary of Defense lacks authority to promulgate a Manual for Military Commissions that prescribes the elements of offenses triable under the M.C.A. As explained below, Congress clearly intended to delegate authority to the Secretary to prescribe elements of offenses, and that delegation fully complies with the Constitution.

The M.C.A. authorizes the Secretary of Defense, in consultation with the Attorney General, 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). This delegation is *broader* than the parallel delegation to

the President under Article 36 of the U.C.M.J., since the U.C.M.J.’s delegation to the President does not expressly authorize him to prescribe elements of offenses. *See* 10 U.S.C. § 836(a) (“Pretrial, 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, may be prescribed by the President . . .”). Congress’s decision in the M.C.A. to give the Secretary of Defense *express authorization* to prescribe elements of offenses triable thereunder was clearly intended to give the Secretary of Defense the authority to set forth the elements of offenses codified in the M.C.A. A contrary interpretation would require reading “elements” in section 949a(a) of the M.C.A. as surplusage. *See Freytag v. Comm’r of Internal Review*, 501 U.S. 868, 877 (1991) (“Our cases consistently have expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.” (internal quotation marks omitted)).

Appellee argues that an early draft of the M.C.A. provided that “[t]he Secretary of Defense may, by regulation, specify other violations of the laws of war that may be tried by military commission, provided that no such offense may be cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.” *See United States v. Khadr*, Appellee Motion to Attach, Att. A, § 241(b) (17 Sept. 2008). The Defense’s point seems to be that the absence of this language in the M.C.A. renders the Secretary’s prescription of elements of the Conspiracy offense *ultra vires*.¹²

¹² The Government notes that this attack upon the validity of Part IV of the Manual for Military Commissions was not raised by the Defense in the Military Commission below in either the Defense’s original motion or subsequently.

Appellee's argument is both a non-sequitur to the assigned error and is incorrect. First, the issue in the present appeal is not whether the Secretary of Defense has authority under the M.C.A. is to prescribe elements for an offense *not* codified in the M.C.A. Rather, the issue is the Secretary's authority to prescribe elements for an offense *codified* in the M.C.A. (i.e., Conspiracy). *See* 10 U.S.C. § 950v(b)(28). The elements of the enterprise theory of Conspiracy set forth at Part IV-6(b)(28) of the M.M.C. are authorized under 10 U.S.C. § 949a(a), which gives the Secretary authority to prescribe elements of offenses for cases triable by military commission. This authority to prescribe elements of offenses codified in the M.C.A. is actually *broader* than the authority the Secretary would have enjoyed under the prior version of the M.C.A. cited by Appellee, since that prior version did not expressly give the Secretary authority to prescribe *elements* of offenses. *See Khadr*, Appellee Motion to Attach, Att. A, § 213(a) ("Pretrial, trial, and post-trial procedures, including modes of proof, for cases triable in military commissions may be prescribed by the Secretary of Defense, but may not be contrary to or inconsistent with this chapter.") Thus, to the extent Appellee's citation of an early version of the M.C.A. demonstrates anything relevant to this case, it demonstrates only that Congress intended to *expand* the Secretary's authority to make crystal clear that he was authorized to prescribe elements of offenses.¹³

¹³ Moreover, contrary to Appellee's assertions, the Secretary of Defense *is* authorized by the M.C.A. to prescribe elements for offenses not codified in the M.C.A., so long as those offenses are violations of the law of war triable by military commission. Section 948d(a) authorizes trial by military commission of "any offense made punishable by this chapter *or the law of war* when committed by an alien unlawful enemy combatant before, on or after September 11, 2001." 10 U.S.C. § 948d(a) (emphasis added). The italicized portion of this subsection makes clear that even violations of the law of war *not codified* in section 950v(b) of the M.C.A. may be tried under the Act.

The Secretary's authority to prescribe elements of offenses extends to all "cases triable by military commission under [the M.C.A.]," 10 U.S.C. § 949a(a), and accordingly includes the authority to prescribe elements even with respect to un-codified violations of the law of war. Thus, even if the enterprise theory

Appellee's facial challenge to the constitutionality of the elements listed in the Manual for Military Commissions is also easily answered. In *Loving v. United States*, 517 U.S. 748 (1996), the Supreme Court rejected a facial challenge to the authority of the President to prescribe aggravating factors that would permit a court-martial to impose the death penalty. *See id.* at 751. The Court held that "[t]here is no absolute rule . . . against Congress' delegation of authority to define criminal punishments," and that "Congress [may] delegate authority to the President to define the aggravating factors that permit imposition of a statutory penalty." *Id.* at 768.

The Court found the delegation in *Loving* constitutional since it was pursuant to an "intelligible principle." *Id.* at 771. "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Id.* As in *Loving*, where Congress had constitutionally delegated the President authority to define aggravating factors permitting imposition of the death penalty, Congress in the M.C.A. delegated the Secretary of Defense authority to prescribe the elements of offenses "for cases triable by military commission under [the M.C.A.]" 10 U.S.C. § 949a(a). Thus, contrary to Appellee's claim, the Secretary has not been given "the power to legislate crimes," *see* Answer Br. at 10; rather, Congress has authorized the Secretary only to define the elements of offenses triable under the M.C.A. This delegation is a limited one, since sections 948d(a) and 950p of the M.C.A. circumscribe

of Conspiracy were not encompassed by the offense codified at 10 U.S.C. § 950v(b)(28), the Secretary is authorized (though not required) to prescribe elements for trying the enterprise theory of Conspiracy in a military commission. In any event, the instant issue concerns the Secretary's authority to prescribe elements with respect to a *codified* violation of the M.C.A.

the jurisdiction of military commissions to offenses *already punishable* under the law of war.

Congress was crystal clear in the M.C.A. that the offenses codified therein were already violations of the law of war. *See* 10 U.S.C. § 950p(a) (“The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.”); *see also id.* § 950p(b) (“Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.”). The jurisdiction of commissions convened under the authority of the M.C.A. is limited to trying offenses that, per 10 U.S.C. § 950p, were already violations of the law of war. *See also id.* § 948d(a) (“A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”). Accordingly, the Secretary has not been empowered to criminalize activities generally, nor to criminalize behavior that was previously innocent; rather, he has received only a limited delegation to prescribe elements with respect to offenses *that were already violations of the law of war*. *See id.* § 950p(a).

As the Supreme Court explained in *Loving*,

[t]here is no absolute rule . . . against Congress’ delegation of authority to define criminal punishments. We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations “confine themselves within the field covered by the statute.”

Loving, 517 U.S. at 768 (alteration in original) (quoting *United States v. Grimaud*, 220 U.S. 506, 518 (1911)); *see also* *United States v. Scheffer*, 523 U.S. 303, 305, 307 & n.2 (1998) (upholding the President’s authority under the U.C.M.J. to prescribe rules of evidence). Moreover, in *Parker v. Levy*, 417 U.S. 733 (1974), the Supreme Court rejected a constitutional challenge to the Manual for Courts-Martial, and held that in promulgating the Manual the President had sufficiently defined the scope of the U.C.M.J. offense of conduct prejudicial to good order and discipline by providing “more than sixty illustrative offenses.” *Id.* at 753-55. These cases illustrate that where Congress has provided sufficient guidance to the exercise of Executive discretion (in the present case, by limiting the jurisdiction of military commissions to conduct already violative of the law of war), such a delegation does not violate the Constitution.

Chevron is applicable to the Secretary’s prescription of elements in the M.M.C.

As discussed in Appellant’s Opening Brief at pages 10-17, the word “conspires” in 10 U.S.C. § 950v(b)(28) is ambiguous, and the Secretary of Defense’s reasonable interpretation of it is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Appellee, however, argues that interpretive rules, such as agency manuals, do not receive *Chevron*-deference because they are not “subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment.” Answer Br. at 16 (alteration in original) (quoting *Reno v. Koray*, 515 U.S. 50, 61 (1995)) (internal quotation marks omitted). However, the Manual for Military Commissions is *not* an internal policy memorandum any more than the Manual for Courts-Martial is; rather, it is an articulation by the Secretary of Defense of rules of

procedure and evidence, as well as the elements and modes of proof, that govern trials under the M.C.A. The reason no public notice and comment was required in promulgating the M.M.C. is not because it lacks the force of law, but rather because the M.M.C. concerns a “military or foreign affairs function of the United States,” and therefore is exempt from the notice and public comment requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553(a)(1).

In addition, although not binding on this Commission, *see* 10 U.S.C. § 948b(c), the U.S. Court of Appeals for the Armed Forces has recently suggested that *Chevron* applies in the court-martial context. In *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008), the C.A.A.F. held that the Secretary of the Army’s interpretation of the U.C.M.J. was not entitled to deference under *Chevron*. *See id.* at 427.¹⁴ In so holding, however, the C.A.A.F. *declined* to find *Chevron* per se inapplicable to regulations interpreting the U.C.M.J.; rather, the court found *Chevron* inapplicable only because it was the *President*, rather than the Secretary of the Army, who had been delegated authority to interpret and implement the U.C.M.J. *See Bartlett*, 66 M.J. at 427-29.

In *Bartlett*, the C.A.A.F. carefully considered exactly who received the relevant delegation under the U.C.M.J.: the Secretary of the Army or the President. Because the court concluded that only the President had received a delegation under the U.C.M.J., the court found *Chevron* inapplicable to a regulation promulgated by the Secretary of the Army. Obviously, had the court considered *Chevron* inapplicable *ab initio* in the court-martial context, it presumably would have grounded its opinion in that, rather than going

¹⁴ The U.S. Army Court of Criminal Appeals had held that the Secretary of the Army’s interpretation of the U.C.M.J. was entitled to deference under *Chevron*. *See United States v. Bartlett*, 64 M.J. 641, 645-46 (A. Ct. Crim. App. 2007).

through the otherwise meaningless exercise of analyzing whether the Secretary of the Army had received a delegation of authority *vel non*.

Bartlett's reasoning is fully applicable to this case. Here, the Secretary has been delegated authority under the M.C.A. to prescribe elements for offenses triable thereunder. This the Secretary has done in Part IV of the M.M.C. Accordingly, *Chevron* is fully applicable to the Secretary's reasonable interpretation of the M.C.A.

Chevron is fully applicable to criminal proceedings.

As noted above, in *Bartlett* the C.A.A.F. could have, but did not, hold *Chevron* inapplicable to criminal proceedings. Rather, the C.A.A.F. held *Chevron* inapplicable because deference was due in courts-martial to the President's interpretations of the U.C.M.J., rather than to the Secretary of the Army's. See *Bartlett*, 66 M.J. at 427-29. As discussed in Appellant's Opening Brief, the cases cited by Appellee for the supposed inapplicability of *Chevron* in the criminal context are inapposite.

As Appellant previously explained, 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)),¹⁵ Congress *can* impose criminal

¹⁵ We note that Appellee quotes selectively from Justice Scalia's concurrence in *Crandon*, but omits that quotation's opening phrase, which makes clear that the inapplicability of *Chevron* in the criminal context, to which Justice Scalia refers, is only with respect to a prosecuting authority's decision to prosecute *vel non*. See *id.* ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." (emphasis added)); cf. *id.* ("The law in question, a criminal statute, is not administered by any agency but by the courts."). *Crandon* is inapposite to the instant case, in that the question of deference here is *vis-à-vis* the Secretary's administrative action in promulgating the Manual for Military Commissions, rather than in terms of the Secretary's or his subordinates' determination to prosecute Mr. Khadr. Moreover, the prosecution-specific role of the Attorney General in the civilian context (which was at issue in Justice Scalia's concurrence) is inapposite to the Secretary of Defense's independent supervisory role over the military commission process. That *Chevron* may be inappropriate in the former case is a non-sequitur to whether it is appropriate here.

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.

In *Grimaud*, the Secretary of Agriculture had been authorized by Congress to make such rules and regulations and establish such service as . . . to regulate [forest reservations'] occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished . . . [by] a fine of not more than \$500 and imprisonment for not more than twelve months, or both, at the discretion of the court.

Id. at 509 (internal quotation marks omitted). Under this authority, the Secretary of Agriculture “promulgated and established certain rules for the purpose of regulating the use and occupancy of the public forest reservations and preserving the forests thereon from destruction.” *Id.* The defendants in *Grimaud* were indicted for violating one of these regulations. *See id.*

On appeal, the *Grimaud* defendants claimed that “the Forest Reserve Act of 1891 was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations, and made a violation thereof a penal offense.” *Id.* at 514. The *Grimaud* Court unanimously rejected these claims, and upheld the indictments, holding 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 517.¹⁶ Here, as in *Grimaud*, Congress expressly delegated to the Secretary of Defense the power to prescribe the elements of the M.C.A.’s substantive offenses, and the Secretary has reasonably done so in the M.M.C.¹⁷

With regard to Appellee’s discussion of *Sash v. Zenk*, 439 F.3d 61 (2d Cir. 2006), and *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), we agree as an abstract matter that “the absence of lenity considerations does not establish *Chevron*’s applicability.” Answer Br. at 21. Here, however, Appellee’s fundamental argument against applying *Chevron* in the context of military commissions appears ultimately to be grounded in some version of the rule of lenity; the argument being basically that “criminal cases are different” from a *Chevron* standpoint. As *Sash* and *Sweet Home Chapter* make clear, however, the rules of statutory interpretation that apply in non-punitive regulatory cases apply with equal force in the criminal context.

The Secretary of Defense is charged with interpreting and implementing the M.C.A. See 10 U.S.C. § 949a(a). In that regard, he stands in the same posture as the Secretary of Agriculture in *Grimaud* and the Bureau of Prisons in *Sash*, and his

¹⁶ Appellant notes that it incorrectly identified this passage in its Opening Brief as being located at 220 U.S. at 511, which part of the Opinion summarizes the argument of the Government in *Grimaud*. In fact, this quotation occurs at page 517 of the Opinion of the Court, and therefore is binding precedent.

¹⁷ In its Answer Brief, Appellee includes the following quotation, purportedly from *Evans v. U.S. Parole Commission*, 78 F.3d 262 (7th Cir. 1996): “Judicial deference owed under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases.” Answer Br. at 19. This quotation appears nowhere in *Evans*. In any event, the issue in *Evans* was whether federal courts owe deference to the Executive Branch’s interpretation of a statute governing the maximum term of imprisonment for an inmate where the governing statute was unambiguous. See *Evans*, 78 F.3d at 265. That question is fundamentally inapposite to the issue in this case—which is whether the Secretary of Defense’s administrative promulgations of regulations is entitled to deference.

United States v. McGoff, 831 F.2d 1071 (D.C. Cir. 1987), is also inapposite, for the same reason Justice Scalia’s concurrence in *Crandon* is. The Court of Appeals’ statement in *McGoff* that “[i]n]eedless to say, in *this criminal context*, we owe no deference to the Government’s interpretation of the statute,” *id.* at 1080 n.17, concerned whether deference was owed to a determination that a particular defendant was guilty, and did not relate to the Executive Branch’s interpretation of a lawful statute *without* regard to a particular defendant.

regulations are entitled to equal deference. As Appellant explained in its Opening Brief, 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. Whatever level of deference may be appropriate with respect to the Prosecution's interpretation of the M.C.A. and 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.¹⁸

The Secretary's interpretation in the M.M.C. of the M.C.A.'s Conspiracy offense is reasonable and entitled to deference under *Chevron*.

As explained in Appellant's Opening Brief, *see* Open. Br. at 13-15, the word "conspires" in 10 U.S.C. § 950v(b)(28) is susceptible of multiple definitions, including combining with others for an illegal purpose. In addition, as previously noted, under the regulations governing military commissions that were in effect at the time of the Supreme Court's *Hamdan* decision, the Department of Defense had reasonably defined the offense of 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" *and* "join[ing] an enterprise of persons who shared a common criminal purpose that involved,

¹⁸ Appellee claims that "the Secretary of Defense has no expertise in defining criminal offenses." Answer Br. at 22 n.8. Clearly Congress disagreed, or it would not have provided him with the authority to do precisely that. *See* 10 U.S.C. § 949a(a). Moreover, the Secretary of Defense surely does have expertise in defining violations of the law of war that Congress has codified, given that military commissions are, as their name suggests, tribunals "born of military necessity." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772-73 (2006).

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).

Congress legislated against this very public backdrop. From 2003-2006, the specific offense of Conspiracy in law of war military commissions encompassed the enterprise theory. After that system of military commissions was held to be *ultra vires* in *Hamdan*, Congress effectively re-authorized the military commission system by enacting the M.C.A. In codifying the offense of Conspiracy in the M.C.A., it was perfectly reasonable for Congress to expect the Secretary to maintain his prior definition of Conspiracy in this updated system of military commissions. At the very least, it is *ambiguous* whether Congress intended for the Secretary of Defense to maintain a consistent definition of the Conspiracy offense in military commissions pre- and post- *Hamdan*, and the Secretary’s reasonable definition of that offense is accordingly entitled to deference.¹⁹

In addition, with respect to Appellee’s citation to this Court’s statement in the 2007 *Khadr* appeal that liability under the M.C.A. requires “more than mere membership in an organization for criminal responsibility to attach,” *Khadr*, C.M.C.R. 07-001, Opinion of the Court, at 14, it must be emphasized that Mr. Khadr *is* being prosecuted for more than mere membership in al Qaeda. Rather, to be convicted under the enterprise theory of Conspiracy, the accused must not only be proved beyond a reasonable doubt to be a member of al Qaeda, he must also be proved to have joined it willfully with knowledge of its criminal purpose, *and* the Government must prove that Mr. Khadr knowingly commit an overt act to accomplish some objective or purpose of the

¹⁹ The Government has discussed at length in its Opening Brief that the enterprise theory of Conspiracy has historically been cognizable in military commissions. *See* Open. Br. at 18-19.

enterprise. *See* M.M.C., Part IV-6(b)(28)(b). That is fully consistent with congressional intent and fully consistent with due process protections, even were they somehow applicable here. *Cf. Scales v. United States*, 367 U.S. 203 (1961).²⁰

Ultimately, Appellee’s claim boils down to asking this Court to second-guess the Secretary of Defense’s reasonable interpretation of the word “conspires” in the M.C.A. That argument is illegitimate under *Chevron*. The Secretary is authorized to prescribe elements with respect to offenses triable under the M.C.A. This the Secretary has done. Because Part IV of the M.M.C. is a *permissible* reading of the statute—even if not the best or the preferred one of this Court—the Secretary’s interpretation is entitled to deference under *Chevron*.

Prayer for Relief

WHEREFORE, the Government respectfully prays that this Court restore to the

²⁰ In *Scales*, the Supreme Court *affirmed* a conviction under the Smith Act for being a member of the Communist Party “with knowledge of the Party’s illegal purpose and a specific intent to accomplish overthrow ‘as speedily as circumstances would permit.’” *Id.* at 206. In so holding, the Court contrasted mere passive membership in a group with the offense of Conspiracy:

It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that “act” alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. It may indeed be argued that such assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise *which is lent, for instance, by a commitment on the part of a conspirator to act in furtherance of that enterprise*. A member, *as distinguished from a conspirator*, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.

Id. at 227-28 (emphasis added). Unlike mere passive membership in an organization (which the *Scales* Court held could not be constitutionally proscribed), Mr. Khadr has, in fact, “commit[ed] himself to further [a criminal enterprise] by an[] act or course of conduct.” *Id.* That is what the “overt act” element of the Conspiracy offense requires, and that is precisely what has been alleged in the referred charges. (As an aside, we note that the accused has no rights under the Due Process Clause since he is an alien unlawful enemy combatant lacking any voluntary connection to the United States. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 782-85 (1950). We cite *Scales* only to illustrate that the M.M.C.’s punitive provisions would be constitutional even with respect to a citizen, and *a fortiori* are permissible *vis-à-vis* the accused.)

referred charges the language deleted by the Military Commission's 4 April 2008, 9 May 2008, and 14 August 2008 rulings.

APPENDIX

An Appendix containing Exhibit A is attached hereto.

Respectfully submitted,



Jordan A. Goldstein
U.S. Department of Justice



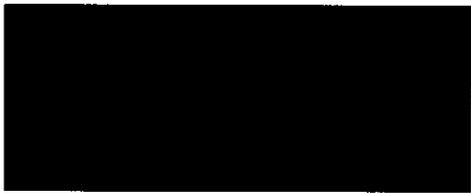
Jeffrey D. Groharing
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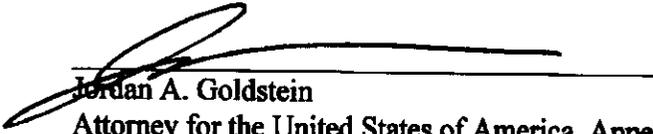


Trial Counsel

CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This brief exceeds the 15-page limitation of C.M.C.R.R. 14(f)(3) by 17 pages. Appellant has concurrently filed a separate motion with this Court to waive such page limitation.
2. This brief exceeds the type-volume limitation of C.M.C.R.R. 14(i) because it exceeds the 7,000 word limit by 739 words and the 650 monospaced line limit by 40 lines. Appellant has concurrently filed a separate motion with this Court to waive such type-volume limitation.
3. This brief complies with the typeface and type style requirements of C.M.C.R.R. 14(e) because:

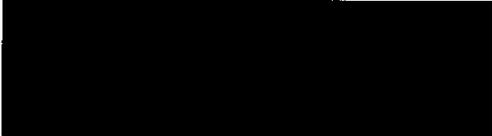
This brief has been prepared in a monospaced typeface using Microsoft Office Word 2003 with 12 characters per inch in Times New Roman font.


Jordan A. Goldstein
Attorney for the United States of America, Appellant
Dated: 22 September 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 22nd day of September 2008.


Jordan A. Goldstein
U.S. Department of Justice

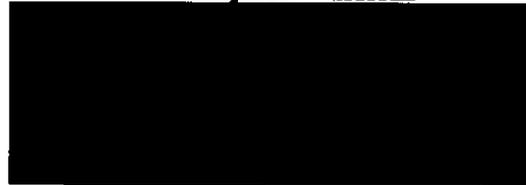




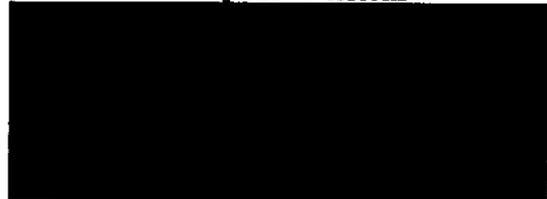
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Trial Counsel

Goldstein, Jordan A

From: Goldstein, Jordan A
Sent: Tuesday, August 19, 2008 12:00 PM
To: Polley, James, Mr, DoD OGC; Sowder, William, LTC, DoD OGC; Poulson, Craig, LCDR, DoD OGC; Kuebler, William, LCDR, DoD OGC; Snyder, Rebecca, Ms, DoD OGC
Cc: 'Parrish, Patrick J COL MIL USA'; [REDACTED] Petty, Keith, CPT, DoD OGC; Murphy, John, Mr, DoD OGC; Edmonds, Matthew, SSG, DoD OGC; David, Steven, COL, DoD OGC; 'Morris, Lawrence, COL, DoD OGC'; Ona, Guadalupe, SSG, DoD OGC; Stuyvesant, Rebekah, SSG, DoD OGC; Lever, Terri, SMSgt, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Pagel, Bruce, COL, DoD OGC
Subject: Notice of Appeal in United States v. Khadr from 14 Aug. 2008 Ruling of the Military Judge on the Government Motion for Reconsideration of Rulings on D019 and D047
Attachments: United States v. Khadr, Notice of Appeal.pdf

Notice is hereby given, per the attached, to the Military Judge and to the accused's military defense counsel that the United States of America appeals to the United States Court of Military Commission Review from the Ruling of the Military Judge denying in part the 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.

V/R,

Jordan A. Goldstein
U.S. Department of Justice
Trial Counsel



United States v.
Khadr, Notice...

UNITED STATES OF AMERICA,
Appellant,

v.

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali,"
Appellee.

**IN THE COURT OF MILITARY COMMISSION
REVIEW**

Case No. _____

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 Surplus Language from Charge III

Presiding Military Judge Col. Patrick A. Parrish

NOTICE OF APPEAL

Notice is hereby given that the UNITED STATES OF AMERICA hereby appeals to the United States Court of Military Commission Review from the Ruling ("Military Commission Ruling") of the Military Judge denying in part the 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. This interlocutory appeal of the dismissal of a charge or specification is taken pursuant to 10 U.S.C. § 950d(a)(1)(A) and Rule for Military Commissions ("R.M.C.") 908(a)(1).

The Military Commission Ruling was entered on 14 August 2008 at 14:58, and this Notice of Appeal is timely filed within the five days specified in Court of Military Commission Review Rule of Practice ("C.M.C.R.R.") 14(c)(1), R.M.C. 908(b)(7) and Regulation for Trial by Military Commissions 25-5(f). This Notice of Appeal is hereby provided to the Military Judge and to detailed military defense counsel for OMAR AHMED KHADR in accordance with the above rules. Trial counsel hereby certifies, in accordance with Regulation for Trial by Military Commissions 25-5(c), that this appeal is not taken for the purpose of delay. To the contrary, the United States asks this Court to expedite consideration of this appeal.

In accordance with C.M.C.R.R. 14(c)(1), the Government will file its brief with the Court of Military Commission Review within 10 days of filing this Notice of Appeal. In accordance with that same rule, the Defense must file any answer within 10 days of receiving the Government brief, and any Government reply brief must be filed within five days of receiving the Defense brief and must be accompanied by a motion for leave to file under C.M.C.R.R. 14(k).

Upon completion of briefing, and in accordance with C.M.C.R.R. 22, the Government respectfully requests that this matter be calendared as soon as possible for oral argument before the Court of Military Commission Review, as a trial date of 8 October 2008 has already been set by the Military Judge.

Submitted by:



**Jordan A. Goldstein
U.S. Department of Justice**

**Jeffrey D. Groharing
Major, U.S. Marine Corps**

**Keith A. Petty
Captain, U.S. Army**

**John F. Murphy
U.S. Department of Justice**

Trial Counsel

	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
)	
UNITED STATES OF AMERICA,	)	MOTION FOR WAIVER OF PAGE
	)	AND TYPE-VOLUME
Appellant,	)	LIMITATION FOR REPLY
	)	BRIEF OF APPELLANT
)	
	)	C.M.C.R. Case No. 08-003
v.)	
	)	Tried at Guantanamo Bay, Cuba
	)	on 13 August 2008
	)	before a Military Commission
OMAR AHMED KHADR	)	convened by M.C.C.O. #07-02
a/k/a "Akhbar Farhad")	
a/k/a "Akhbar Farnad"	)	Presiding Military Judge
a/k/a "Ahmed Muhammed Khali,"	)	Colonel Patrick J. Parrish
)	
Appellee.	)	DATE: 22 September 2008

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

COMES NOW Appellant, respectfully requesting that this Court waive Court of Military Commission Review Rule of Practice ("C.M.C.R.R.") 14(f) and 14(h)'s 15-page limitation for Appellant's Reply Brief in the above-captioned matter and permit Appellant to file a Reply Brief comprising 32 pages. Appellant also respectfully requests that this Court waive C.M.C.R.R. 14(g) and 14(h)'s type-volume limitation and permit Appellant to file a Reply Brief containing 7,739 words and 690 lines of monospaced text.

Waiver is requested to enable Appellant to address fully the Specified Issues in this Court's 12 September 2008 order. Of the 7,739 words and 690 lines contained in the Reply Brief, at least 3,829 of the words (and 310 of the lines) are devoted to responding to the Court's Specified Issues. Appellant also notes that some of the arguments

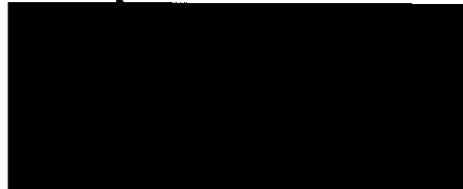
contained in the Reply Brief were not addressed in Appellant's Opening Brief because they had not been previously raised by Appellee.*

WHEREFORE, Appellant respectfully prays that this Court grant the requested waiver of C.M.C.R.R. 14(f), 14(g), and 14(h).

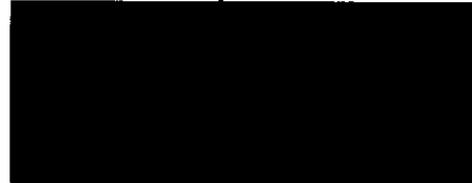
Respectfully submitted,



Jordan A. Goldstein
U.S. Department of Justice



Jeffrey D. Groharing
Major, U.S. Marine Corps
Office of Military Commissions



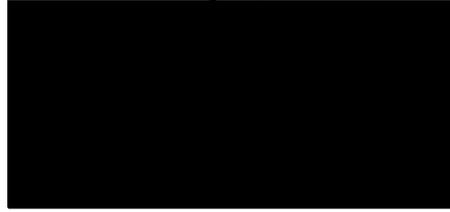
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John F. Murphy
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* For example, Appellee had not previously challenged the facial constitutionality of Part IV of the Manual for Military Commissions. *See Answer Br.* at 11-17.

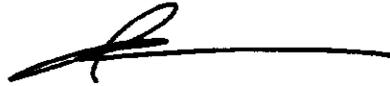
Office of Military Commissions



Trial Counsel

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 22nd day of September 2008.



Jordan A. Goldstein
U.S. Department of Justice



Jeffrey D. Groharing
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Office of Military Commissions



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Trial Counsel