UNITED STATES OF AMERICA	)	D-012
	)	
v.	)	**Government Response to Defense Motion to Dismiss Charge I (Conspiracy)**
	)	
IBRAHIM AHMED MAHMOUD AL QOSI a/k/a "Abu Khobaib al Sudani"	)	7 November 2008

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1. **Timeliness**. This Response to the Defense Motion to Dismiss Charge I (Conspiracy) is timely filed.

2. **Relief Requested**. The Government respectfully submits that the Defense Motion to Dismiss Charge I (Conspiracy) should be denied.

3. **Overview**.

a. Contrary to the assertions of the Accused, Conspiracy was a violation of the law of war at the time the accused committed these criminal acts, and unambiguously remains a violation of the law of war after enactment of the MCA. Accordingly, the accused may be tried by military commission for this criminal offense without violating the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, even were it somehow applicable.

b. Further, the Supreme Court has made clear that an alien enemy combatant held outside the sovereign borders of the United States who has no connection to the United States other than his confinement possesses no rights under the Constitution beyond challenging the justification for his confinement. Therefore, the accused cannot claim the constitutional protection offered by the Ex Post Facto Clause. Nor can the accused rely on Common Article 3. Conspiracy was an internationally recognized violation of the law of war at the time the accused committed these criminal acts. Ex post facto analysis simply is not appropriate.

c. The Secretary of Defense's Interpretation of the Punitive Offenses in the MCA is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, the "Enterprise Theory" language of the charge should not be struck.

4. **Burden of Persuasion**. As the moving party, the Defense bears the burden of persuasion. *See* RMC 905 (c)(2)(A); Military Commission Trial Judiciary Rules of Court Rule 3(7)(a). Notwithstanding the Accused's suggestion to the contrary, the current motion is not primarily jurisdictional in nature. Rather, it is primarily an attack on the constitutionality of various provisions of the MCA. Because ex post facto challenges are generally viewed as affirmative defenses, *see e.g., United States v. Philip Morris USA,* 310 F. Supp. 2d 58, 61 (D.D.C. 2004) the burdens of proof and persuasion rest on the Defense.

5. **Facts**.

a. In 1989, while in the Sudan, al Qosi, after learning the nature and purpose of al Qaida, became a member and remained a member of al Qaida until his capture in December 2001.

b. From about June 1989 to about October 1990, in his capacity as an al Qaida member, al Qosi passed information between members of terrorist cells operating within the Sudan and provided logistical support such as food, shelter and clothing for members of these terrorist cells.

c. In or about October 1990, al Qaida member Mohammed Suliman al Nalfi arranged for and paid, using al Qaida funds, al Qosi's travel from the Sudan into Afghanistan.

d. In Afghanistan, around late 1990 to early 1991, al Qosi attended and completed the al Farouq camp, a training camp sponsored by al Qaida. Lasting approximately 45 days, his training included, among other things, physical training, military tactics, and weapons instruction and firing on a variety of individual and crew-served weapons.

e. In or about September 1991, after participating for a period of time in the fighting in Afghanistan, al Qosi assumed a position as an accountant in al Qaida's *Mektabh al Muhassiba* (accounting office) in Peshawar, Pakistan. He assumed the position of deputy chief financial officer, reporting directly to Sheikh Sayeed al Masri, chief financial officer and leader of al Qaida's finance committee. Due to his accounting background, al Qosi was put in charge of managing donated money from non-governmental and charitable organizations and distributing it for salaries, travel, and support of al Qaida members, training camps, operations, and other al Qaida expenses.

f. From about 1992 through about 1995, al Qosi worked in "Taba Investment Company" (Taba) in the Sudan as an accountant and treasurer. Usama bin Laden established Taba around 1989 as one of a series of businesses intended to provide income to al Qaida for its training and operations, and to provide cover for the procurement of explosives, weapons and chemicals. Among other activities, al Qosi signed checks on behalf of Usama bin Laden, exchanged money on the black market from Sudanese currency to U.S. dollars, and couriered money on behalf of al Qaida.

g. From around 1991 to around 1994, al Qosi assisted in loading and transporting explosives, weapons, and ammunition within and outside of the Sudan.

h. In 1994, after a failed assassination attempt of Usama bin Laden in Khartoum, Sudan, Usama bin Laden handpicked al Qosi to serve as a member of his newly formed "bodyguard" force.

i. In 1995, while still in the Sudan, al Qosi requested and received permission from Usama bin Laden to travel to Chechnya to fight alongside other Islamic militants against the Russians. Usama bin Laden financed al Qosi's trip to and from Chechnya.

j. In 1996, al Qosi departed Chechnya and sought out Usama bin Laden. Al Qosi located and rejoined Usama bin Laden in the Tora Bora Mountains, Afghanistan. Along with

Usama bin Laden and his entourage, al Qosi moved to the "Star of Jihad" compound in Jalalabad, Afghanistan, where al Qosi assisted in logistical support of the compound. This compound eventually moved to Qandahar, Afghanistan.

k. From about 1996 until his capture in December 2001, al Qosi served as one of Usama bin Laden's bodyguards and drivers. When Usama bin Laden traveled, Al Qosi and others in the bodyguard detachment accompanied him. Al Qosi remained armed, providing Usama bin Laden with physical protection, and was a driver for the caravan of vehicles used to transport Usama bin Laden, occasionally driving Usama bin Laden himself. Additionally, al Qosi was responsible for the supplies and cooking for the detachment.

l. After being placed on alert by Usama bin Laden in the weeks just before the attacks on the U.S. of September 11, 2001, al Qosi assisted Usama bin Laden and other al Qaida members in mobilizing and evacuating from Qandahar. Al Qosi remained with and assisted Usama bin Laden and other al Qaida leaders before, during, and after the attacks of September 11, 2001.

6. **Discussion**.

A. *Conspiracy Is a Violation Of The Law Of War*

1. Contrary to the assertions of the Accused, the Supreme Court has *never* held that conspiracy is not a violation of the law of war. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court divided over whether the President could, by executive order, establish a military commission to try the offense of conspiracy as a violation of the law of war. Four justices would have held that conspiracy is not so triable. *See id.* at 2780-81 (plurality op.). Three justices would have said it is. *See id.* at 2834 (Thomas, J., dissenting, joined by Scalia and Alito, JJ.). Even Justice Stevens's plurality opinion, however, emphasized that it is for *Congress* to define violations of the law of war, and the plurality's opinion was expressly premised on the absence of congressional action. *See id.* at 2779 (plurality op.) (emphasizing that "there is no suggestion that Congress, in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' U.S. Const., Art. I, § 8, cl. 10, positively identified 'conspiracy' as a war crime.").[1] Likewise, Justice Kennedy, who did not join the plurality on the status of conspiracy as a violation of the law of war, agreed that "Congress, not the Court, is the branch in the better position to undertake the sensitive task" of determining whether conspiracy is a war crime. *Id.* at 2809 (Kennedy, J., concurring) (internal quotation marks omitted).

2. Because Justice Kennedy declined to join the *Hamdan* plurality's reasoning on the status of conspiracy, its conclusion that, in the absence of congressional legislation on military commissions, conspiracy is not a violation of the law of war is not binding on this commission. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) ("[W]e are not bound by [a plurality opinion's] reasoning."); *see also Horton v. California*, 496 U.S. 128, 136 (1990)

[1] *see also id.* at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. *Nothing* prevents the President from returning to Congress to seek the authority he believes necessary.") (emphasis added) (citation omitted).

(reaffirming that a plurality view that does not command a majority is not binding precedent). Further, the plurality's view should not be followed because it is not an accurate description of the law of war.

3. Throughout this Nation's history, individuals have been tried before military commissions for conspiracy to commit war crimes. The Nazi saboteurs in *Ex parte Quirin*, 317 U.S. 1 (1942), for example, were charged with conspiracy, *see id.* at 23, as was another Nazi saboteur whose convictions were subsequently upheld, *see Colepaugh v. Looney*, 235 F.2d 429, 431, 433 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).[2] Learned treatises on the law of war, such as Winthrop's *Military Law and Precedents* and the U.S. Army's FM 27-10, *The Law of Land Warfare*[3] further emphasize that conspiracy has long been established as a violation of the law of war.[4] In addition, the United States has long recognized 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.

Military Commissions, 11 Op. Atty. Gen. 297, 312 (1865).

4. Although international norms are not binding on this Commission, the accused relies heavily on, among other sources, the statutes creating the International Criminal Tribunal for the Former Yugoslavia and Rwanda (ICTY, ICTR respectively). However, the accused fails to point out that in several decisions ICTY has found that joining an enterprise of persons who share a common criminal purpose is and has been an offense under customary international law.[5] It

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[2] According to the accused, the charge of conspiracy was not a pre-existing offense under the law of war. However, the accused fails to mention that the accused in *Quirin*, a case cited elsewhere by the accused for a similar proposition but absent in the present motion, were charged with and convicted before a military commission of conspiracy. Indeed, the Supreme Court in *Quirin* held that President Roosevelt had the authority to convene a Military Commission for purposes of prosecuting a conspiracy charge. *See Quirin* 317 U.S. at 24. The accused also ignores the holding in *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956) which found that conspiracy is a legitimate charge under the law of war. In fact, the Tenth Circuit held that "the charges [including conspiracy] and specifications before us clearly state an offense of an unlawful belligerency, contrary to the established and judicially recognized law of war." 235 F.2d at 432. The accused's Motion to Dismiss fails to address these leading cases, which are sufficient to establish that conspiracy was and has been a violation of the law of war. The fact that the United States has seldom convened military commissions on the charge of conspiracy is no reason to ignore the clear, indisputable precedent that has historically and consistently declared conspiracy to be a law of war violation.

[3] Department of the Army Field Manual, FM 27-10 (July 1956), *The Law of Land Warfare*, ch. 8, Section II, ¶¶ 498-500 ("Conspiracy ... in the commission of ... war crimes are punishable.").

[4] *See generally* Col. William Winthrop, *Military Law and Precedents* 839 & n.5 (1895, 2d ed. 1920) (listing conspiracy offenses prosecuted by military commissions); Charles Roscoe Howland, *Digest of Opinions of the Judge Advocates General of the Army* 1071 (1912) (noting that conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" was an offense against the law of war that was "punished by military commissions" throughout the Civil War).

[5] *See, The Prosecutor v. Tadic*, No. IT-94-1-AR72, (ICTY Appeals Chamber 1995), *reprinted in* 35 I.L.M. 32 (1996); *Prosecutor v. Krnojelac*, No. IT-97-25-A (ICTY Appeals Chamber 2003); *See The Prosecutor v. Mulitonovic et al.*, No. IT-99-37-AR72 (ICTY Appeals Chamber 2003) (Tribunal has jurisdiction over defendant

should be noted that the Accused is accused of joining an enterprise of persons who shared a common criminal purpose that involved the commission of one or more substantive offenses triable by military commission, such as attacking civilians and attacking civilian objects. [6]

5. In fact, "[i]n order to determine the status of customary law in this area, [ICTY] studied ... war crimes cases tried after the Second World War. It also considered relevant provisions of two international Conventions ... [and] referred to national legislation and case-law stating that it was a matter of specifying that the notion of common purpose, established in international criminal law, has foundations in many national systems, while asserting that it was not established that most, if not all of the countries have the same notion of common purpose." *Krnojelac*, No. IT-97-25-A at ¶ 29, n.28. The ICTY prosecutions themselves involved offenses dating to the early 1990s, near the time when the Accused joined al Qaeda. In other words, the Accused is charged with offenses that have been traditionally prosecuted, not only by military commission convened by the United States, but also international tribunals.[7]

6. Therefore, unlawful enemy combatants, such as the accused, historically violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop, *Military Law and Precedents* 784; *see also* 11 Op. Atty. Gen. at 314 ("A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war."). In fact, the charter authorizing the trials at Nuremberg specifically granted the Tribunal jurisdiction over the charge of conspiracy[8] and several members

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who joined a criminal enterprise); *The Prosecutor v. Kristic*, No. IT-98-33 (ICTY Appeals Chamber 2001) (Kristic found to be a co-participant in a joint criminal enterprise).

[6] Under ICTY, criminal liability is attached when there is (1) a plurality of persons; (2) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute and (3) participation of the accused in the common design. In addition ICTY also requires (1) intent to perpetrate a specific crime; or (2) intent to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise, or, in any event, to the commission of a crime by a group. In addition, ICTY criminal responsibility also attached if under the circumstances it was foreseeable that such a crime might be perpetrated by one of the group members and the accused willingly took that risk. The MCA requires proof of virtually the identical elements – (1) Joining an enterprise of persons; (2) those persons share a common criminal purpose to that involves the commission of an offense triable by a military commission; (3) the accused knew about the common criminal purpose of the enterprise and joined willfully and (4) the accused committed an overt act to accomplish some objective or purpose of the enterprise.

[7] It should be noted that civil law nations and common law nations typically differ on their view of the charge of conspiracy. For example, civil law nations hold that a "person cannot be punished for mere criminal intent or for preparatory acts committed." *Prosecutor v. Musema*, No. ICTR-96-13-T, ¶191, 196-198 (comparing civil and common law approach to conspiracy, but ultimately adopting common law approach to conspiracy to commit genocide). In contrast, conspiracy under common law nations such as the United States and Great Britain may involve agreements to commit criminal acts that never transpire. Richard P. Barrett, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals,* 88 Minn. L. Rev. 30 (2003). In any event, it is clear that historically tribunals convened to prosecute war criminals have used both common law and civil approaches. *See* Article 6, London Charter ("Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or *conspiracy* to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.") (emphasis added).

[8] Article 6, London Charter (1945) ("Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or *conspiracy* to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.") (emphasis added).

of the Nazi party were convicted and sentenced to death or imprisonment for mere membership in a criminal organization.[9] In light of these many precedents that demonstrate that conspiracy has been a violation of the law of war for over a hundred years, Congress made clear in the MCA that conspiracy was not a new crime, but rather one that has traditionally been triable by military commission: "The provisions of this subchapter [which include the offense of conspiracy] 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." 10 U.S.C. § 950p(a) (emphasis added). Accordingly, conspiracy is, and was at the time of the accused's offense, a violation of the law of war. Therefore, it may be tried before a military commission. *See Hamdan*, 126 S. Ct. at 2777.

B. *As an Alien Enemy Combatant Held Outside the Sovereign Borders of the United States, the Accused Cannot Rely On The Ex Post Facto Clause*

1. The Supreme Court has made clear that an alien enemy combatant held outside the sovereign borders of the United States who has no connection to the United States other than his confinement possesses no rights under the Constitution beyond challenging the justification for his confinement *Boumediene v. Bush,* 553 U.S. ___ (2008) ("Our decision today holds *only* that the petitioners before us are entitled to seek the writ...The *only* law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. §2241(e)") (emphasis added).

2. With *Boumediene*, the Supreme Court reaffirmed its earlier conclusion that nonresident aliens outside United States sovereign territory do not enjoy the full panoply of constitutional rights enjoyed by citizens and residents of the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) ("[n]ot only are history and case law against [the alien], but ...the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." Similarly, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court confirmed that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* at 693 (citing *Verdugo-Urquidez* and *Eisentrager*); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."). Following these precedents, the U.S. Court of Appeals for the D.C. Circuit consistently has held that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

3. Furthermore, even when an alien is held within United States sovereign territory, the alien's lack of *voluntary* connection to the Nation attenuates his claim to protection under the Constitution. As *Eisentrager* makes clear, an alien is accorded an "ascending scale of rights as

[9] 2 Trials of War Criminals Before the Nuremberg Military Tribunals 180-300 (United States v. Brandt – "Karl Brandt, Karl Gebhardt, Rudolf Brandt, Joachim Mrugowsky, Wolfram Sievers, Viktor Brandt, and Waldemar Hoven, were convicted and sentenced to death for the crime of membership in an organization declared criminal by the [International Military Tribunal]." *Cited by Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2833 (2006) (J. Thomas, Dissenting).

he increases his identity with our society," 339 U.S. at 770, and the privilege of litigation is extended to aliens "only because permitting their presence in the country implied protection." *Id.* at 777-78. Thus, the constitutional protections available to the alien correspond with the circumstances under which he has come within territory over which the United States has sovereignty, as well as the quality of his contacts with the United States.[10] In *Verdugo-Urquidez*, the Supreme Court held that a nonresident alien, who had no previous significant voluntary connection with the United States and was involuntarily transported to the United States and held against his will, had no Fourth Amendment rights with respect to the search of his property abroad by U.S. agents. 494 U.S. at 271. The Court reasoned that "this sort of presence [in the United States]—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country." *Id.* (emphasis added).

4. In light of these principles, the accused cannot reasonably claim protection under the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3. The accused is an alien who has no voluntary connection to the United States. The Supreme Court has clearly, and repeatedly, held that alienage *is* a relevant factor in determining whether constitutional rights should be extended extraterritorially to nonresidents. As the Supreme Court noted in *Eisentrager*, "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." 339 U.S. at 769; *see also Verdugo-Urquidez*, 494 U.S. at 273 (rejecting the contention "that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution"); *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). Moreover, "even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens," *Eisentrager*, 339 U.S. at 769, to say nothing of alien enemies. Indeed, "[a]t common law 'alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war.' [1 Blackstone * 372, 373]." *Id.* at 775 n.6 (second alteration in original) (quoting *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946)) (internal quotation marks omitted).[11]

5. Accordingly, alien enemy combatants, such as the accused, held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no constitutional rights beyond challenging the justification of his confinement. Moreover, even if the U.S. naval base at Guantanamo Bay, Cuba, were deemed to be U.S. territory—contrary to the lease agreement itself—nonresident aliens held there would still lack the full panoply of constitutional rights since they do not have the sort of *voluntary*

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[10] *See Verdugo-Urquidez*, 494 U.S. at 271-72; *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.") (citing cases).

[11] *See also Case of the Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 776 (C.P.) (petitioners were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus"); *Moxon v. The Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793) (courts "will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty").

contacts with the United States required to give rise to rights under the U.S. Constitution. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 271 ("[T]his sort of presence—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country.") (emphasis added); *Jifry*, 370 F.3d at 1182 ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."). As a nonresident alien with no connections to the U.S. other than his mere confinement at Guantanamo Bay, Cuba, the accused therefore has no standing to bring an ex post facto challenge. This Commission need proceed no further to reject the accused's claim that his ex post facto rights have been violated.

6. The accused attempts to avoid the inescapable conclusion that his rights under the Constitution are exhausted by challenging the justification of his confinement by phrasing his claim as a structural one—that the Ex Post Facto Clause represents a substantive limit on Congress's power from which he benefits, regardless of whether he himself possesses constitutional rights. However, *Boumediene* makes clear that the right of an alien enemy combatant detained outside the United States to challenge the justification for his confinement is personal, and subject to restriction by lawful Congressional action. "Petitioners are therefore entitled to the habeas privilege, and if that privilege is to be denied them, Congress must act in accordance with the Suspension Clause's requirements." *Boumediene,* 533 U.S. at ___. Thus, the Supreme Court recognized that Congress can properly curtail even the Great Writ, though it had failed to do so under the MCA. This decision reinforces *Eisentrager's* broader proposition that limitations on Congress set forth in the Constitution do not apply at all *vis-à-vis* nonresident alien enemy combatants detained outside the United States.

7. In any event, any consideration of the accused's claims must take account of the fact that Congress passed and the President signed the MCA precisely because the Supreme Court invited the political accountable branches to do so with respect to the detainees held at Guantanamo Bay facing the prospect of trial before a Military Commission. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774-75 (2006); *see also id.* at 2799 (Breyer, J., concurring) ("*Nothing* prevents the President from returning to Congress to seek the authority he believes necessary [to try Hamdan before a military commission].") (emphasis added). Were the accused to prevail in his argument that a prosecution for conspiracy is barred by the Ex Post Facto Clause, the Supreme Court's invitation to Congress and the President to authorize a system of military commissions for the detainees at Guantanamo Bay would be transformed into a fool's errand.

8. Moreover, the cases cited by the accused for the proposition that Congress is bound by the Ex Post Facto Clause even *vis-à-vis* nonresident alien enemy combatants demonstrate nothing of the sort. For example, the accused cites *Reid v. Covert*, 354 U.S. 1 (1957), for the proposition that "[the United States] can only act in accordance with all the limitations imposed by the Constitution." *Id.* at 6 (plurality op.). The Prosecution agrees with this true, if unremarkable, proposition. However, that Congress is bound by the Constitution says nothing as to whether nonresident alien enemy combatants can assert rights under the Constitution. In *Reid*, of course, the answer was that civilian *citizen* wives of U.S. soldiers were protected by the Bill of Rights. *See id.* at 5-6, 32 (plurality op.). By contrast, in *Boumediene*, the Court only determined that the Constitutional protection enjoyed by nonresident *alien* enemy combatants detained abroad is the right to challenge the justification for their confinement. *See* 533 U.S. at ___ Thus, the statement in *Reid* that "[the United States] can only act in accordance with all the limitations imposed by the

Constitution" is not helpful in determining whether the Constitution applies to alien enemy combatants held abroad. Far more helpful, of course, are the Supreme Court's holding in *Eisentrager*, which makes clear that, in fact, alien enemy combatants such as the accused are not entitled to the full panoply of Constitutional rights enjoyed by United States citizens. [12]

9. Also, after citing the Supreme Court's question in *Ex parte Quirin*, 317 U.S. 1 (1942) "whether the Constitution prohibits the trial [by military commission of the *Quirin*-petitioners]", the accused urges the Commission to dismiss the Conspiracy charge. The Government acknowledges the seminal wisdom that any law repugnant to the Constitution is unenforceable in any court in the United States, *Marbury v Madison,* 5 U.S. 137, 177 (1803). However, in light of a properly authorized and executed law such as the MCA, the Government fails to see any particular benefit to its application in this case. Considering the facts of *Quirin*, however, demonstrates that the Court was scrupulous in its consideration of the legality of military commissions. The Court did not at all imply, as the defense motion would have it, that military commissions were unconstitutional. As an initial matter, it noted that the Constitution clearly is applicable to U.S. citizens, and one of the *Quirin*-petitioners (Herbert Hans Haupt) claimed to be a U.S. citizen, which undoubtedly accounts for the Court's question. *See Quirin,* at 20. As for the rest of the petitioners in *Quirin*, the Court's examination of "whether the Constitution prohibits the[ir] trial" is entirely irrelevant to the accused's situation, since the *Quirin*-petitioners had lived in the United States previously, *see id.* at 20, had traveled to the United States to commit acts of war, *see id.* at 21, and "were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation," *id.* The constitutional rights of Nazi-saboteurs who previously lived in the United States and were captured by domestic law enforcement officers therein is, of course, wholly inapposite to the case of the accused, who was captured abroad and detained by members of the Armed Forces. Moreover, even to the extent *Quirin* might vaguely suggest that alien enemy combatants detained abroad possess constitutional rights or can raise challenges based on Congress's alleged violation of the Constitution, the Supreme Court's later, and far more on-point, decision in *Eisentrager* makes clear that the Constitution's application to nonresident alien enemy combatants, such as the accused, who are detained at the naval base in Guantanamo Bay, Cuba is limited to challenging the justification for their confinement. Accordingly, the motion to dismiss should be denied.

10. The authorities cited by the accused demonstrate that ex post facto principles immanent in international law are for all intents and purposes identical to the Ex Post Facto Clause in the U.S. Constitution, which, as has been discussed above, is not applicable to the accused. However, as discussed above, the later codification of a previously criminal act does not violate the Ex Post Facto Clause. *See, e.g., Landgraf*, 511 U.S. at 269-70. Accordingly,

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[12] Reliance on *Reid* is unpersuasive and wrong – in fact the Supreme Court in *Verdugo-Urquidez* cited the same quote from *Reid* as used by the accused (Mot. to Dismiss, p. 4 "the United States is entirely a creature of the Constitution ... [and] can only act in accordance with all the limitations imposed by the Constitution.") in rejecting the notion that aliens abroad are constitutionally protected against unreasonable searches and seizures. Citing *Eisentrager* as controlling precedent, the Supreme Court correctly distinguished between a constitutionally protected U.S. citizen living abroad (*i.e. Reid)* and an alien. Indeed, the accused's motion never even attempts to reconcile his claim to constitutional protections against the binding precedents of *Verdugo-Urquidez* and *Eisentrager.* Nor does the accused even address the critical fact that these proceedings, unlike *Verdugo-Urquidez* who was prosecuted in a civilian Article III court, are conducted against the backdrop of an armed-conflict involving unlawful enemy combatants.

prosecuting the accused for his pre-MCA act of conspiracy violates neither the Ex Post Facto Clause nor ex post facto principles immanent in the Geneva Conventions and other sources of international law.

11. Furthermore, the provisions of Common Article 3 are not self-executing and thus not judicially enforceable through individual claims, such as those made by the accused in this Motion to Dismiss. Rather, as explained in more detail below, the Congress and the President declared that alien unlawful enemy combatants may not use Common Article 3 to challenge the jurisdiction of this Commission. *See* 10 U.S.C. § 948b(g). The unambiguous intent of the political branches of government, with primary responsibility to "define and punish" violations of the law of war and to defend the United States during a time of war, is to prevent alien unlawful enemy combatants from using Common Article 3 to hinder the proper administration of justice for violations of the law of war.

12. A treaty is "primarily a compact between independent nations" and enforcement of its provisions depends "on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 12 U.S. 580, 598 (1884). It is well settled, that while a treaty may constitute an "international commitment," it is not binding domestic law, unless Congress has enacted statutes implementing it or "the treaty itself conveys an intention that it be 'self-executing' and is ratified' on that basis. *Medellin v. Texas*, 128 S.Ct. 1346, 1356 (2008)(*citing Igartua-De La Rosa v. United States*, 4117 F.3d 145, 150 (1st Cir. 2005)). [13] Traditionally, as the Supreme Court held in the landmark *Head Money Cases*, "[i]f these interests fail, its infraction becomes the subject of international negotiations and reclamations" not the subject of a dispute in the courts. *Head Money Cases*, 12 U.S. at 598. In other words, a non-self-executing treaty has no domestic effect, unless Congress passes legislation implementing its provisions.

13. Even more problematic for the accused is that "even when treaties are self-executing" the legally binding "presumption is that international agreements, even those directly benefiting a private person, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellin*, 128 S.Ct. at 1357, n.3 (*citing 2 Restatement (Third) of Foreign Relations Law of the Untied States*, ¶ 907, Comment *a*, p. 395 (1986). Indeed, unless the treaty expressly grants enforcement of its provisions to individuals, or Congress passes legislation granting a right to judicial enforcement, federal domestic courts in the United States presume as a matter of law that the treaty does not create privately enforceable rights. *See, e.g., United States v. Emuegbunam*, 268 U.S. F.3d 377, 389 (6th Cir. 2001); *United States v. Jiminez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60-61 (1st Cir. 2000); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *Candian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3rd Cir. 1979). [14]

14. It is worth noting that the Supreme Court's *Hamdan* decision is a perfect example of a case where a non-self executing treaty was given effect through domestic law. In *Hamdan,* the

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[13] "A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect f its own force. *Medellin,* 128 S.Ct. at 1369.

[14] *See Medellin*, 128 S.Ct. at 1357 n.8 (Supreme Court agrees with federal circuit courts of appeals that instituted presumption that treaties do not create privately enforceable rights).

Court had held that the military commission authorized by the President to try the accused in that case was *ultra vires* because it was not authorized by any statute and violated Common Article 3. *See* 126 S. Ct. at 2755, 2786-99.

15. Relevant to the present motion, the *Hamdan* Court did *not* hold that Common Article 3 was self-executing on its own terms. Rather, the Court held that Common Article 3 was relevant because a statutory basis for the military commissions that the President had authorized was Article 21 of the Uniform Code of Military Justice, which provides that military commissions may try "offenses that ... by the law of war may be tried by military commissions." The *Hamdan* Court reasoned that the reference to the "law of war" in Article 21 incorporated principles of international law, including the Geneva Conventions and Common Article 3. *See* 126 S. Ct. at 2794. Accordingly, the Court held that Common Article 3 set a floor on the procedural requirements for military commissions authorized under Article 21, and that those procedural requirements had not been complied with. *See id.* at 2796-97. Importantly, the Court in *Hamdan* did not hold that Common Article 3 was self-executing in its own right, and certainly did not hold that Common Article 3 was self-executing in the face of a contrary *statute* or lawfully promulgated regulations.[15] Indeed, even the Supreme Court's plurality opinion indicated that normally detainees held by the United States cannot rely on the Geneva Conventions as a source of rights. For example, Justice Stevens made clear that the assumption was "that . . . [the Geneva Conventions] would, absent some other provision of law, *preclude* [] invocation of the Convention's provisions *as an independent source of law* binding the Government's actions and furnishing [] any enforceable right. *See Hamdan*, 126 S. Ct. at 2794 (emphasis added) (footnote and citations omitted). In other words, Geneva is not a source of judicially enforceable rights, unless it can be tied to a provision of domestic law.

16. In any event, Congress's response to *Hamdan* was swift and decisive. Less than four months after the Court's decision, the Military Commissions Act was signed into law after passing both houses of Congress with strong bipartisan majorities.[16] In the MCA, Congress made crystal clear that (1) the new military commission system complied with the Geneva Conventions in general, and Common Article 3 in particular, and (2) that persons tried before military commissions would not be permitted to hinder their trials for war crimes with appeals to the vague provisions of Common Article 3 in particular, or the Geneva Conventions in general.

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[15] The legal authority for Hamdan's military commission was a Presidential order, rather than a statute. This distinction was highly relevant to the narrow *Hamdan* majority. *See id.* at 2774-75 ("The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the [Authorization for Use of Military Force] or the [Detainee Treatment Act of 2005] specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. . . . *Absent a more specific congressional authorization*, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified.") (emphasis added); *id.* at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. *Nothing* prevents the President from returning to Congress to seek the authority he believes necessary.") (emphasis added) (citation omitted). Thus, it appears that all, or nearly all, of the members of the *Hamdan* Court would have upheld the President's military commissions had they been authorized by statute.

[16] *See* 152 Cong. Rec. H7959-01, H7959 (daily ed. Sept. 29, 2006) (Roll Call Vote No. 508); 152 Cong. Rec. S10354-02, S10420 (daily ed. Sept. 28, 2006) (Roll Call Vote No. 259).

17. Because Congress and the President had jointly determined that the MCA and the military commissions authorized thereby complied with Common Article 3, the MCA included three provisions to ensure that an accused alien unlawful enemy combatant could not bring a challenge to the conduct of the U.S. Government based on Common Article 3. *See* 10 U.S.C. § 948(b)(g); MCA § 4(a)(2); *id.* § 5(a).

a. First, Congress stated in unambiguous terms that the Geneva Conventions were *not* a source of rights for accused alien unlawful enemy combatants: "GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." 10 U.S.C. § 948b(g). There is no reading of this passage other than that persons subject to trial by military commission, such as the accused, cannot point to the Geneva Conventions (of which Common Article 3 is a part) as a source of rights.

b. Second, Congress enacted an entire section of the MCA devoted to ensuring that the Geneva Conventions may not give rise to any rights in any habeas corpus or other civil action or proceeding to which the United States is a party:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

MCA § 5(a).

c. Third, Congress responded directly to *Hamdan*'s holding that Common Article 3 applied to that petitioner's military commission because it was a military commission authorized under Article 21 of the UCMJ, and therefore could try only "offenses that by statute or by the law of war may be tried by military commissions."[17] In response to *Hamdan*, Congress in the MCA amended Article 21 to provide that it would henceforth be *inapplicable* to military commissions authorized under the MCA: "[Articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ] are amended by adding at the end the following new sentence: 'This section does not apply to a military commission established under chapter 47A of this title.'" MCA § 4(a)(2). Thus, the mechanism by which the Court in *Hamdan* applied Common Article 3 to the accused (i.e., via Article 21's use of the term "law of war") was deliberately and intentionally removed by Congress. Accordingly, Common Article 3—because it is not tied to any domestic source of U.S. law—cannot form the legal basis for a motion to dismiss. [18]

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[17] Arguably this amendment was not even necessary, since the MCA is indeed a statute, and therefore is itself sufficient to authorize trial by military commission. *See* 10 U.S.C. § 821 (2000) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that *by statute* or by the law of war may be tried by military commissions . . . .") (emphasis added).

[18] Of course, the accused's trial by military commission for conspiracy is fully consistent with Common Article 3. *See* 10 U.S.C. § 948b(f). Common Article 3 requires that persons subject to it receive "judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Since the accused's acts of conspiracy and providing material support for terrorism were violations of the

18. It is therefore irrelevant whether the MCA and MMC comply with Common Article 3. Because the accused has no right to challenge the jurisdiction of this commission based on an alleged violation of Common Article 3, *see* 10 U.S.C. § 948(b)(g); MCA.[19]

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

1. 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.

2. 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).[20] 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.

3. 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

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law of war at the time they were committed, trying him by military commission for such acts does not violate any ex post facto principles of either domestic or international law.

[19] The accused implies that he has some sort of "vested" rights under Common Article 3 that Congress is powerless to strip. Presumably, of course, most treaties give rise to some rights or privileges on behalf of its beneficiaries. However, the Supreme Court has never held, and the accused cites no authority for the proposition, that Congress is somehow powerless to repeal a treaty that gave a person, nation or other entity rights under that treaty. Rather, as the Court made clear in the *Head Money Cases*, Congress can always repeal a treaty, regardless of whatever rights that treaty might have engendered. *See* 112 U.S. at 599.

[20] *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.] . . . .").

(A. Ct. Crim. App. 2005), *aff'd*, 63 M.J. 438 (C.A.A.F. 2006).[21] 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.

4. 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* 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.[22]

5. 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 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.*

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

6. 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.*

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[21] 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.).

[22] *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.] . . . .").

7. 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).

7. "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.

8. 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.

9. 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.[23] As the Supreme Court recently explained, "Agency

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[23] 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).

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

10. 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*.[24]

11. Although not binding on this Commission, in *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008), 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 through the otherwise meaningless exercise of analyzing whether the Secretary of the Army had received a delegation of authority *vel non*.

12. *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.

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[24] 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.

13. We emphasize that the issue here is not whether the Secretary of Defense receives *Chevron*-deference in *enforcing* a statute, which he does not, 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 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).[25] 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.

14. In sum, the sole authority on which the defense relies (*United States v Hamdan*, 14 August 2008 Ruling) ignores the fact 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.[26] As these precedents

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[25] 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. 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).

[26] *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

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 07).

16. 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 Military Commission. The "enterprise theory" language in the Conspiracy charge should not be struck.

17. Conspiracy was a violation of the law of war at the time the accused committed these criminal acts, and unambiguously remain a violation of the law of war after enactment of the MCA Even if this were not the case, the accused cannot assert protection with respect to the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, since his constitutional rights extend only to his right to challenge the justification for his confinement. Finally, the conspiracy offense in the MCA and MMC are consistent with international law and well within the Secretary of Defense's rule-making authority as granted by Congress under the MCA. As such, the defense motion to dismiss should be denied.

7. **Oral Argument**: This Commission should readily deny the Defense's motion, but the Government will be prepared to argue this motion if this Commission deems it necessary.

8. **Witnesses and Evidence**: All of the evidence and testimony necessary to deny this motion is in the record.

9. **Certificate of Conference**: Not applicable

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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").

10. **Additional Information**: None

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