UNITED STATES OF AMERICA	)	**D-055**
	)	
v.	)	
	)	**Defense Reply to Government Response**
	)	
	)	**Defense Motion to Dismiss Charge I**
	)	
KHALID SHEIKH MOHAMMED; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI	)	**4 December 2008**

1. Timeliness: This motion is timely filed.

2. Relief Requested: The defense[1] respectfully requests this Military Commission dismiss Charge I or, in the alternative, strike the previously referenced surplus language from Charge I.

3. Overview: While Congress may have provided the Secretary of Defense the power to implement a statute, it did not and could not have delegated the power to create law. Doing so would violate the Constitution. Further, the judicial deference standard articulated in *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and advanced by the Government, is not applicable because such deference does not apply in criminal proceedings. Even if it were to apply, it would not be triggered because, under the circumstances, there is no ambiguity in the meaning of the term "conspires" in MCA §950v(b)(28) and the mistaken description of its elements in the Manual is not reasonable.

4. Argument:

a. Congress DID NOT and COULD NOT Delegate to the Secretary of Defense the Power to Define Crimes

Legislation is the exclusive power of Congress. U.S.CONST. ART. 1. This is a constitutionally-created power that cannot be delegated. *A.L.A. Schechter Poultry Corporation*

[1] Mr. Mohammed and Mr. Ali reserve their right to join this pleading at a later time after they have had adequate opportunity to consult with counsel.

Mr. Bin 'Attash reserves his right to join this motion at a later time, once he is able to fully consider it in his primary language of Arabic. Due to the inability of the contracted linguists to accomplish the necessary translations, as explained in Defense's Special Request for Relief D-047, Mr. Bin 'Attash is unable to review the material and make an informed decision in a timely fashion such that he can represent himself before this court.

Mr. bin al Shibh joins in this motion provisionally. In so joining, he does not waive any argument or motion relating to the pending question of his competency to stand trial.

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

The power to define the elements of an offense is the power to define the offense itself. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). If the Government is correct that Congress delegated to the Secretary of Defense the authority to define crimes, the MCA would have accomplished an historic consolidation of legislative power in the Executive without manifesting any intent to do so in either the text of the Act or its legislative history. Such a collapsing of the separation of powers would lack any support from either the letter or spirit of the Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 452 (1998) ("That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. … Abdication of responsibility is not part of the constitutional design.") (citations omitted). The Supreme Court recently affirmed in the clearest terms possible that these principles apply in full to proceedings in Guantanamo Bay. *Bouemdiene v. Bush*, --- U.S. ---, 128 S.Ct. 2229, 2246 (2008) ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.").

b. The Argument for Chevron Deference Advanced by the Government cannot Apply to the Criminal Provisions of the MCA

Chevron[2] does not apply in criminal proceedings. "[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring); *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) ("[T]he Attorney General must as surely evaluate compliance with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference."); *Evans v. United States Parole Comm'n*, 78 F.3d 262, 265 (7th Cir. 1996) ("Judicial deference owed under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases."); *United States v. McGoff*, 831 F.2d 1071, 1080 n.17 (D.C. Cir. 1987) ("Needless to say, in this criminal context, we owe no deference to the Government's interpretation of the statute.").

[2] *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)

Most importantly, however, in this case the agency administering the MCA is the same agency tasked with prosecuting the crimes the statute enacts. It is clear that *Chevron* deference is not accorded to prosecutors concerning their interpretations of the criminal laws they prosecute. *Crandon*, 494 U.S. at 177 ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

There are good reasons for judicial reluctance to defer to prosecutors' interpretations of their own criminal statutes, particularly where, as here, the potential sentence is death. The *Crandon* Court summarized the rationale succinctly as follows:[3]

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

Crandon, 494 U.S. at 177-178. In short, granting deference to the Secretary's expansive and unprecedented definition of conspiracy is the legal equivalent to allowing the fox to guard the chicken coop. Deference is accorded where good reason exists for confidence that agency action will be objective and well reasoned. As *Crandon* makes clear, such confidence is not well-founded in the present case.[4]

c. Even if Chevron Applies, Deference is not Owed because the Crime of Conspiracy is Unambiguosuly Defined by the MCA

The government's argument is particularly inapt since the author of the MCA – Congress – has itself demonstrated its understanding that the traditional crime of conspiracy does not

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

[4] *See also* D-001 Joint Defense Motion to Dismiss Charges and Specifications for Defective Referral due to Unlawful Influence and D067 Defense Motion to Dismiss for Unlawful Influence by the President of the United States

include criminal liability for joining, participating in or conducting an "enterprise." It was precisely that lack of ambiguity that required Congress to pass the Racketeer Influenced and Corrupt Organization Act to proscribe criminal enterprises. Because the Supreme Court and lower courts consistently held that traditional conspiracy only reached individuals' actions directed toward particular criminal goals, and could not be stretched to reach individual actions linked only by an organized criminal "enterprise," Congress was forced to enact new legislation (RICO) to reach enterprise-based crime. *See United States v. Elliott*, 571 F.2d 880, 900-903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (describing history of conspiracy law and need to enact RICO to reach enterprise conspiracies). Were the "enterprise" interpretation of conspiracy available to prosecutors under the traditional statute, RICO would never have been enacted.

Where Congress' intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). "Absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *Whitfield v. United States*, 543 U.S. 209, 214 (2005). As noted above, nothing in the plain language of 10 U.S.C. § 950v(b)(28) indicates Congress intended to depart from the common law definition of conspiracy. The Government's argument requires this commission to believe that Congress implicitly incorporated the vast body of RICO enterprise crimes into 950v(b)(28), all the while using the language of common law conspiracy. This argument is wholly without merit.

d. Even if Chevron Applies and the MCA is Ambiguous, the Secretary's Inclusion of Racketeering into the Elements of Conspiracy is not Reasonable

The Government argues that the Secretary's decision to read an "enterprise theory" into the Conspiracy statute is reasonable in light of "historical precedent for criminalizing the enterprise theory of Conspiracy as a violation of the law of war." Government's Response at 5. The problem with this analysis is that there is no such thing as an "enterprise theory" of conspiracy. There is conspiracy and there is racketeering – two distinct crimes, punished under two distinct provisions of Title 18, only one of which is incorporated into the MCA.[5]

The Government claims there is "ample historical precedent for criminalizing the enterprise theory of Conspiracy as a violation of the law of war." Government's Response at 5. In support of this claim, the Government cites the transcript of the judgment of the Military Tribunal at Nuremburg for the proposition that "A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes." 1 Trial of the Major War Criminals Before the International Military Tribunal, Judgment, at 256 (1947).

However, the Military Tribunal at Nuremberg did not recognize an "enterprise theory" of conspiracy liability. Indeed, the Charter of the International Military Tribunal (hereinafter "the Charter") failed to define as a separate crime *any conspiracy, whatsoever*, except the one set out in Article 6(a) dealing with Crimes Against the Peace. *Id*. at 11. Pointedly, the Charter declined

[5] Racketeering offenses are prescribed in 18 U.S.C.A. § 1962. The RICO statute recognizes notions of both conspiracy and criminal enterprise but even under this statute they are codified as separate offenses. *See* 18 U.S.C.A. §§ 1962(c) and (d), respectively.

to recognize conspiracy liability under Articles 6(b) and 6(c) for murder in violation of the law of war, inhumane acts against civilians, plunder of public or private property.[6] *Id.*

The language the Government quotes is lifted from a larger discussion of *individual* liability based upon membership in a criminal organization. Article 9 of the Charter empowered the Tribunal to declare certain groups or organizations as "criminal organizations" and to attach criminal liability to individuals proven to have voluntarily and knowingly joined such organizations. *Id*. at 255. Liability, where established, was premised on the defendant's membership in an organization previously designated as a criminal organization, and had nothing to with conspiracy to commit a separate offense. The MCA, by contrast, does not criminalize "mere membership in an organization for criminal responsibility to attach." *United States v. Khadr*, CMCR 07-001, 14. It criminalizes conspiracies.

Lastly, the Government cites an 1865 opinion of the Attorney General addressing whether those involved in President Lincoln's assassination could be tried by military commission or whether they had to be tried under civil law. Government's Response at 5. At bottom, the Government's reliance on this reference amounts to the Executive citing itself to justify its own actions which is antithetical to *Chevron* deference. *See supra*. Ultimately, none of those defendants were charged with or convicted of joining a criminal enterprise. Instead, the charges and evidence were directed at proving common law conspiracy – an agreement between two or more persons to commit an unlawful act.

e. Conclusion

Accordingly, Charge I should be dismissed or, in the alternative, the surplus language stricken from the charge.

Respectfully submitted,

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

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