No. 09-6108 & 09-6123

In the United States Court of Appeals For the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN DALE GREEN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, No. 5:06-cr-019
The Honorable Thomas B. Russell, *Chief United States District Judge.*

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

Appellant's appeal raises issues of nationwide first impression concerning the constitutionality of an Act of Congress – the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261 *et seq*. – and the validity of the government's exercise of its prosecutorial discretion to charge him under that act in connection with the proceedings that precipitated this appeal. Pursuant to 6th Cir. R. 34(a), the United States respectfully submits, given the novelty and importance of these issues, that oral argument is likely to aid the Court's decisionmaking process.

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BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

This is a direct appeal from the final judgment in a criminal case. Defendant-appellant Steven Dale Green was sentenced on September 4, 2009, and the judgment was docketed that day. (R. 282, Judgment.)[1/] Green filed a notice of appeal from the judgment on September 8, 2009.

[1/] Citations to "R." are to the record entries on the district court's docket sheet.

(RE 283, Notice of Appeal). On September 16, 2009, Green filed an amended (and self-styled superseding) notice of appeal from the district court's pretrial orders denying his motions to dismiss the indictment. (R. 286, Amended Notice of Appeal). Both notices were timely. See Fed. R. App. P. 4(b)(1)(A)(i).

The district court (Russell, *C.J.*) had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

On March 12, 2006, Army Private Steven Dale Green, accompanied by several of his fellow Army soldiers serving in Iraq, shot and killed six-year-old Hadeel Al-Janabi and her parents inside their home. Minutes later, Green joined two of his co-conspirators in raping Hadeel's older sister, Abeer, after which he shot Abeer in the face multiple times, killing her. Green made statements to his team leader implicating himself in these crimes, but those statements were not disclosed; as a result, the Army incorrectly attributed the Al-Janabi murders to Iraqi counterinsurgents.

On May 16, 2006, Green was discharged from the Army after being diagnosed with an anti-social personality disorder.

In June 2006, following Green's discharge, senior military leaders in Iraq first received information suggesting, contrary to the earlier reports, that American soldiers were involved in the Al-Janabi killings. Acting on this information, the Army opened a formal criminal investigation, and later court-martialed Green's co-conspirators. The Army had no ability to court-martial Green, however, because he was no longer a soldier. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955). And civilian prosecutors could not charge Green under the federal statutes proscribing conspiracy, murder and sexual assault because those laws do not apply unless the conduct occurred within the special maritime and territorial jurisdiction of the United States. Indeed, the combined effect of *Quarles* and the lack of extraterritorial reach of federal criminal laws had long been understood to create an enforcement gap that allowed ex-servicemembers to escape prosecution for crimes committed on foreign soil while a member of the Armed Forces.

In 2000, after decades of unsuccessful attempts to address this problem, Congress passed the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, Nov. 22, 2000, 114 Stat. 2488 (2000) (MEJA), for the avowed purpose of "fill[ing] th[e] jurisdictional void" with respect to the prosecution of ex-servicemembers. H.R. Rep. 106-778, part 1, 106th Cong., 2d Sess. 8 (July 20, 2000). The MEJA defines a new federal crime – commission of felonious conduct on foreign soil by a member of the Armed Forces, see 18 U.S.C. § 3261(a)(2) – and permits civilian prosecutions of such persons if they have "cease[d] to be subject to" military authority, see 18 U.S.C. § 3261(d)(1).

In November 2006, a federal grand jury in the Western District of Kentucky indicted Green on charges that his actions on March 12, 2006 violated the MEJA. Following a jury trial, Green was convicted, and he was later sentenced to multiple terms of life imprisonment.

STATEMENT OF THE ISSUES

1. Whether Green, by virtue of his Army discharge, "cease[d] to be subject to" military jurisdiction and prosecution within the meaning of 18 U.S.C. § 3261(d)(1), thus rendering him amenable to civilian prosecution under the MEJA.

2. Whether the MEJA violates the separation of powers or the non-delegation doctrine by vesting the Executive Branch with excessive prosecutorial discretion.

3. Whether the government's decision to charge Green, but not his co-conspirators, under the MEJA amounted to a constitutionally discriminatory exercise of prosecutorial discretion, in light of the fact that, at the time Green's involvement in the charged crimes was discovered, he was a civilian ex-soldier while his co-conspirators were still active-duty soldiers.

STATEMENT OF THE CASE

On November 2, 2006, a federal grand jury in the Western District of Kentucky returned a seventeen-count indictment charging Steven Dale Green with committing crimes in Iraq while a member of the United

States Army, in violation of the Military Extraterritorial Jurisdiction Act of 2000. (R. 36, Indictment.) The indictment alleged that, on or about March 12, 2006, Green was a member of the Armed Forces subject to the Uniform Code of Military Justice (UCMJ); that on or about May 16, 2006, Green was discharged from the Army; that the acts described in the indictment occurred in an around Mahmoudiyah, Iraq, while Green was on active military duty; that those acts would have constituted offenses punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States; and that venue for the trial of these offenses was proper in the Western District of Kentucky pursuant to 18 U.S.C. § 3238. (R. 36, Indictment.)

The indictment charged Green with conspiracy to commit murder, in violation of 18 U.S.C. §§ 1111(a) and 1117, and the MEJA (Count 1); conspiracy to commit aggravated sexual abuse, in violation of 18 U.S.C. §§ 371, 2241(a) and 2241(c), and the MEJA (Count 2); premeditated murder, in violation of 18 U.S.C. § 1111(a), and the MEJA (Counts 3-6); felony murder, in violation of 18 U.S.C. §§ 1111(a) and 2, and the MEJA

(Counts 7-10); aggravated sexual abuse, in violation of 18 U.S.C. §§ 2241(a) and the MEJA (Count 11); aggravated sexual abuse of a child, in violation of 18 U.S.C. § 2241(c) and the MEJA (Count 12); use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(j)(1), and the MEJA (Counts 13-16); and obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1) (Count 17). The indictment also included a notice of special findings as to Counts 3-10 and 13-16 pursuant to 18 U.S.C. §§ 3591 and 3592, which, if proven, would have made Green eligible for the death penalty.

On May 7, 2009, the jury convicted Green on all sixteen remaining counts. (R. 242, Verdict.)[2/] The sentencing hearing ensued, but the jury was unable to reach a unanimous verdict on whether Green should be sentenced to death. (R. 263, Verdict).

On September 4, 2009, the district court sentenced Green to life imprisonment on Counts 1 and Count 3-11; to 60 months of imprisonment on Count 2; and to 240 months of imprisonment on Count 17, all to run concurrently. Green was further sentenced to life imprisonment on

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[2/] The government dismissed Count 12 before the case was submitted to the jury.

Counts 13-16, to run consecutively to each other and to the sentences imposed on all other counts. (R. 282, Judgment). The district court imposed the mandatory $100 special assessment on all sixteen counts of conviction. (*Id.*)[3/]

This appeal ensued.

[3/] Although the jury found that the government proved that Green committed both premeditated murder (Counts 3-6) and felony murder (Counts 7-10) in killing his four victims, the Solicitor General has previously taken the position that premeditated murder and felony murder are alternative means of committing the same offense of first-degree murder under Section 1111(a). See Brief for the United States as Amicus Curiae, *Schad* v. *Arizona*, No. 90-5551 (1990), 1990 WL 10022903, at *1, *7. Under this interpretation, the two murder convictions for each killing should merge, and Green should receive only one $100 special assessment for each of the four merged murder counts. Cf. *Rutledge* v. *United States*, 517 U.S. 292, 297-303 (1996); *Ray* v. *United States*, 481 U.S. 736, 737 (1987) (per curiam). On appeal, Green has not challenged his dual convictions and cumulative special assessments for the eight Section 1111 counts. In the district court, the prosecutors, who were unaware of the Solicitor General's prior contrary position, took the position, in response to a motion by Green, that cumulative punishments could be imposed in this case because premeditated murder and felony murder could be considered two separate crimes. See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

STATEMENT OF THE FACTS

On February 16, 2005, Steven Dale Green enlisted in the United States Army for a period of four years and nineteen weeks. After completing basic training, Green was assigned to the 101st Airborne Division at Ft. Campbell, Kentucky, as an infantryman. On September 24, 2005, Green was deployed to Iraq, where he was in and around Mahmoudiyah, Iraq, just south of Baghded. The events that precipitated Green's prosecution occurred while Green was stationed overseas.

1. *Green Decides To Kill Iraqi Civilians*. On the afternoon of March 12, 2006, Green, and fellow soldiers Paul Edward Cortez, James Paul Barker, Jesse Von-Hess Spielman, and Bryan Lee Howard, were playing cards and drinking whiskey (in violation of Army General Order 1) at an Army traffic checkpoint, known as TCP-2, when Green stated that he wanted to kill some Iraqi civilians. (R. 285, Presentence Investigation Report [PSR], ¶ 23.) After Green persisted, Barker eventually agreed to go along with Green's plan, and he told Green that he knew a nearby house where a man and three females lived. (*Id*.) Barker also suggested that they have sex with one of those females. (*Id*.) Green and Barker

persuaded Cortez and Spielman to accompany them. (*Id.*)

2. *Green Commits Rape And Multiple Murders.* Before leaving, Barker and Cortez changed into black clothing and covered their heads with black ski masks; Green disguised himself by wrapping a brown t-shirt across his face. (*Id.*) As they departed, Green carried a shotgun; the others carried either an M-14 or an M-4 military issued rifle. (*Id.*) Howard remained at TCP-2 and was instructed to alert the others with an ICOM (a walkie-talkie-like device) if he saw American forces approaching TCP-2. (*Id.*) The group left TCP-2 through a gap in the wire fence surrounding it and headed into a field, which led to a chain link fence some 400 meters away. (*Id.*) The group cut a hole in the fence and passed through to the other side. (*Id.*) Once there, Green and his cohorts ran to the house Barker had selected. (*Id.*) Green and Spielman approached a man, Kassem Hamza Rachid Al-Janabi, and his six-year-old daughter, Hadeel Kassem Hamza Al-Janabi, who were standing outside, and forced them inside, where Fakhriya Taha Mohsine Al-Janabi, Kassem's wife, was present, along with fourteen-year-old Abeer Kassem Hamza Al-Janabi. (*Id.*) Green and Spielman then forced Kassem, Fakhriya and Hadeel into

a bedroom. (*Id.*) Spielman closed the door to that room, leaving Green inside the room, while he (Spielman) stood outside. (*Id.*)

Meanwhile, Cortez and Barker pulled Abeer into the living room. Cortez pushed her to the ground, pulled off some of her clothes, including her pantyhose, and pushed her dress up above her waist. (*Id.*) When Abeer resisted, Barker forcibly restrained her by putting her arms under his knees, which allowed Cortez to rape her without resistance. (*Id.*) After Barker raped Abeer, he and Cortez switched positions, at which point Cortez raped Abeer. (*Id.*) During the rape, a flurry of gunshots went off inside the bedroom. Responding to Spielman's knocking, Green opened the door and told Spielman that he (Green) was okay. (*Id.*) Spielman and Green then entered the living room. (R. 285, PSR ¶ 24.) Green placed an AK-47 rifle that he had brought with him from the bedroom in the corner of the living room,[4/] and announced that everyone else was dead and that he had killed them. (*Id.*) Green, who at that point

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[4/] Military policy in this area at this time allowed Iraqis to possess one AK-47 rifle per household, as long as the weapon's existence was disclosed to American security forces during their sweeps of individual homes. (R. 285, PSR, ¶ 24.) It is believed that the Al-Janabi family owned this AK-47 rifle. (*Id.*) That weapon was used to kill three of the four members of the Al-Janabi family. (*Id.*)

was "wigging out, acting all irate, breathing heavy, and pacing a little," (R. 284, PSR ¶ 24), began sexually assaulting Abeer while Cortez held her arms down. (*Id.*) When Green finished assaulting Abeer, he retrieved the AK-47 rifle, covered Abeer's head with a pillow, and shot her several times in the face with the rifle. (*Id.*) A member of the group then suggested that they burn Abeer's body, so Barker poured kerosene from a lamp he had found onto Abeer's body; someone then lit her body on fire. (*Id.*) The group then exited the house after Green stated that he had opened a propane-tank valve in the house in order to set off an explosion. (*Id.*)

The group returned to TCP-2 the same way they had come. (R. 285, PSR, ¶ 25.) When they arrived, some of them removed their clothing and placed it in an exterior burn pit used for refuse. (*Id.*) Cortez ordered Spielman to dispose of the AK-47 rifle, which Green had brought back with him; Spielman took the rifle and threw it into the canal across from TCP-2. (*Id.*) Green was later overheard describing the events of the day as "awesome." (*Id.*)

3. *Green Admits To His Crimes*. Later that afternoon, Iraqi civilians reported to TCP-1, another nearby traffic checkpoint, that a house located behind TCP-2 had been burned, and that several bodies, one of whom was a woman who apparently had been raped and burned, were inside. (R. 285, PSR, ¶ 19). The noncommissioned officer in charge of TCP-1 called TCP-2 and stated that he was sending a patrol to check on the house behind TCP-2 and that he needed additional manpower. (*Id*.) Twenty or so minutes later, Sergeant Anthony Yribe proceeded to TCP-2 with an Iraqi interpreter and several members of the Iraqi army who were also stationed at TCP-1. (*Id*.) They, along with Cortez and Spielman, went to the house to investigate. (*Id*.)

Upon their arrival, the investigation team immediately observed the deceased remains of a woman who had been shot in the face and who had had a substantial portion of her body burned beyond recognition. (R. 285, PSR, ¶ 20). The team also discovered three dead bodies in an adjacent room, each of whom had been shot at close range in the head or the chest. (*Id*.) The investigation team attributed these killings to Iraqi counterinsurgents, and no crime scene investigation was initiated,

although photographs of the victims' bodies were taken. (*Id.*)

When the investigation team returned to TCP-2, Green, in Barker's presence, told Yribe that he killed those people. Yribe met later that day with his superior and with the company commander, Captain John Goodwin, about the investigation, but he did not disclose Green's admission. The next day, March 13, 2006, Yribe, in Barker's presence, asked Green about the events of the prior day, and Green again made incriminating statements; Barker remained silent.

4. *Green Is Discharged For A Personality Disorder*. On March 28, 2006, following an earlier meeting with Combat Stress Team, Green was diagnosed with an anti-social personality disorder and an adjustment disorder with depressed mood. (R. 110, Exhibit 3 in Opposition to Motion to Dismiss.) On April 2, 2006, Brigade Commander Colonel Todd J. Ebel requested Green's early release from the Iraqi theater of operations on grounds of a personality disorder – a permissible basis for the Army to discharge an enlisted soldier, such as Green, prior to his completion of his term of service. See 10 U.S.C. § 1169(1) (authorizing military secretaries to promulgate regulations governing discharges before the end of the

soldier's term of service); Army Regulation 635-200 ¶ 5-13 (Army may discharge a soldier "because of a personality disorder"). (R. 109, Exhibit 4 in Opposition to Motion to Dismiss, at 1.) On April 14, 2006, Green received a written notice from his company commander, Captain John Goodwin, indicating that Goodwin was initiating action pursuant to Army Regulation 635-200 ¶ 5-13 to separate Green from the military on account of his personality disorder based on a determination that it "interferes with [Green's] ability to perform [his] duties and be a productive soldier." (*Id.*) Goodwin recommended that Green receive an honorable discharge. (*Id.*). Green signed the notice on April 16, 2006. (*Id.* at 3.)

On May 3, 2006, Green was released from the Iraqi theater of operations. (R. 285, PSR, ¶ 21.) At no point prior to his release did Green assert that the Army failed to follow its personnel regulations or that his discharge from the Army was invalid.

On May 9, 2006, Green received his separation orders reassigning him to Ft. Campbell, Kentucky for transition processing. (R. 109, Exhibit 5 in Opposition to Motion to Dismiss, at 1.) The separation order stated that, "after processing," Green would be discharged from the component

shown – the 101st Airborne Division – as of May 16, 2006, unless that order was changed or rescinded. (*Id.*)

On May 11, 2006, Green completed and signed a Department of Defense Form 2648, Preseparation Counseling Checklist for Active Component Service Members. (*Id.* Exhibit 6.) Green later received an Installation Final Clearance Memorandum stating that he had completed installation clearance and was eligible for discharge on May 16, 2006. On May 15, 2006, Green's separation order was stamped "Final Installation Clearance." On May 16, 2006, Green received his final pay, and was issued a DD Form 214, Certificate of Release or Discharge From Active Duty, indicating an honorable discharge due to a personality disorder.

5. *The Army Discovers That Its Soldiers Killed The Al-Janabis*. On June 20, 2006, during a debriefing with a combat stress counselor, Private First Class Justin Watt, a member of Green's former unit, stated that American soldiers had raped and killed an Iraqi female and killed three other Iraqis in March 2006. (R. 285, PSR, ¶ 22; see also R. 136, Opinion Denying Motion to Dismiss, at 1-2.) This information, which contradicted the initial investigation team's report blaming those killings on Iraqi

counterinsurgents, was conveyed to senior Army leaders. (*Id.*) On June 24, 2006, the battalion commander interviewed Barker, Cortez, Spielman and Howard, and he then referred the information he had gathered to the United States Army Criminal Investigation Division (CID), which began a formal criminal investigation. (*Id.*)

CID investigators interviewed witnesses, including Barker, Cortez, Spielman and Howard, each of whom provided a written statement admitting to varying degrees of participation in both the sexual assault of Abeer and the ensuing murders. Significantly, Barker, Cortez and Spielman – the only other persons who were present at the crime scene – identified Green as the triggerman for all four murders. Investigators also obtained a written statement from Yribe, in which he (Yribe) revealed the two incriminating statements Green had made to him shortly after the crimes. In addition, investigators met with a friend of Green's and two other soldiers, each of whom stated that Green had admitted that he had

raped an Iraqi girl and killed her and her family.[5/]

6. *The Army Court-Martials Green's Co-Conspirators*. Barker, Cortez, Spielman and Howard were prosecuted by the Army under the UCMJ for their roles in the Al-Janabi massacre. Barker, Cortez, and Spielman were each court-martialed on charges including murder, conspiracy, obstruction of justice, arson, housebreaking, and violating Army General Order 1. In exchange for their pleas of guilty, which entailed their dishonorable discharges, the convening authority agreed to cap their sentences at 90, 100, and 110 years in confinement, respectively, which had the effect of rendering them eligible for parole in 10 years.[6/]

[5/] Investigators also went to the Al-Janabis' house to look for physical evidence, and they observed blood spatter on the floors and walls as well as a burned section of the floor in the living room. An FBI dive team also attempted to locate the AK-47 rifle that Spielman threw in the canal, but they were unable to locate the weapon.

[6/] Howard was court-martialed and convicted of being an accessory after the fact and conspiring to obstruct justice, for which he received a 27-month sentence, reduction in rank to Private, and a dishonorable discharge. Yribe, who was charged with dereliction of duty and making false official statements, requested a discharge in lieu of trial by court-martial, and that request was approved with an Other Than Honorable Discharge, reduction in rank to Private, and the dismissal of the charges against him.

SUMMARY OF ARGUMENT

In this appeal, Green does not dispute that he devised a plot to murder an innocent family of Iraqi civilians or that he carried out his senseless murderous plot in cold blood. Nor does he raise a single assignment of error regarding the fairness of the ensuing criminal trial that sought to hold him criminally accountable for those acts. Instead, Green launches an array of legal challenges to the very legitimacy of the federal government's effort to hold him accountable, assailing the constitutional validity of the MEJA statute itself – a law that Green does not seem to appreciate was specifically enacted to prevent the absurdity of allowing people like him to escape any prosecution solely because they happened to have been discharged from the service before their criminal conduct was uncovered – as well as the prosecution's exercise of its discretion to charge him under that law.

Green's arguments do not withstand scrutiny, and they provide no basis for disturbing his convictions or his resulting life sentences. Indeed, as we will demonstrate, Green's arguments evince a deep-seated and fundamentally flawed view of the source, nature and breadth of the

prosecutorial discretion constitutionally entrusted to the Executive Branch.

I. Green was subject to prosecution under the MEJA.

A. Green's May 2006 discharge from the Army altered his legal status from that of a soldier to that of a civilian. Having reacquired his civilian legal status, Green was simply beyond the reach of military prosecutors. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955) (military prosecutors have no Article I authority to prosecute civilian ex-soldiers who have severed all ties with the military). At the time of his November 2006 indictment, then, Green had "cease[d] to be subject to" the military's prosecutorial authority, thus rendering his indictment proper under Section 3261(d)(1) of the MEJA.

B. Green's discharge complied with the relevant federal laws, regulations and precedents governing military discharges. He was discharged before the expiration of his term of service on account of a recently-diagnosed medical condition pursuant to a valid Army Regulation. Upon his release from Iraq and return to Ft. Campbell in May 2006, he underwent and completed his administrative out-processing,

after which he received his DD-214 certificate of discharge from active duty form and his final accounting of pay. Green's objections – that the Army did not recover his military identification card or provide him with a departure ceremony – do not "invalidate" his discharge or otherwise undo his current legal status as a civilian ex-soldier subject to prosecution under the MEJA.

II. The MEJA fully respects structural constitutional principles.

A. The MEJA is consistent with the separation of powers. In enacting the MEJA, Congress defined a new crime and left it to the Executive Branch to decide, as a matter of its prosecutorial discretion, whether and under what circumstances to prosecute persons for violating that law. Contrary to Green, the MEJA does not give the Executive Branch unfettered discretion to decide whether to prosecute persons like him in a military or a civilian court because, as a civilian ex-soldier, the military was constitutionally disabled from prosecuting him in a court-martial. Thus, the MEJA does not empower the government to choose between a military or a civilian courtroom; instead, it simply permits the government to choose a civilian courtroom over no courtroom at all. The

passage of a law that allows the Executive Branch to make that "choice," as a matter of its Article II prosecutorial discretion, plainly does not render that law facially unconstitutional.

B. Nor does the MEJA implicate, much less offend, the non-delegation doctrine.

In enacting the MEJA, Congress both defined the criminal conduct and fixed the penalties that prosecutors may seek, and judges may impose, on violators. The MEJA is not a delegation from Congress to the Executive of the power to define a crime or to set the penalty, and therefore, it is not subject to "intelligible principle" scrutiny at all (though the MEJA would plainly pass such scrutiny were it applicable).

III. Green's challenges to the government's exercise of its prosecutorial discretion to charge him, but not his confederates, under the MEJA, lacks merit.

A. Green's class-of-one equal protection claim is meritless. First, it is inherently speculative as there is no guarantee that a military prosecution of Green would have resulted in a sentence different than the sentence he received in this case. Beyond this, Green, by virtue of his

military discharge, was not similarly situated to his co-conspirators, who were still in the Army. Accordingly, the government's decision to prosecute Green in a civilian court while court-martialing his co-conspirators was responsible, appropriate, and non-discriminatory.

B. Green's due process challenges are equally meritless. There is nothing conscience-shocking about a decision to prosecute active-duty soldiers in an Article I court-martial but to prosecute a civilian ex-soldier in an Article III court.

ARGUMENT

I. GREEN WAS SUBJECT TO PROSECUTION UNDER THE MEJA BECAUSE HE CEASED TO BE SUBJECT TO A MILITARY PROSECUTION ONCE HE WAS DISCHARGED.

A. Background.

On February 15, 2008, Green filed a motion to dismiss the indictment on the ground that he was not subject to prosecution under the MEJA because he never "cease[d] to be subject to" a military prosecution under the UCMJ, as required by Section 3261(d)(1) of the MEJA. (R. 99, Motion to Dismiss.) According to Green, his discharge was not actually valid, and never served to terminate the military's authority over him,

because the Army, he claims, did not adhere to certain internal personnel regulations in the course of his discharge. (*Id.*) The district court denied the motion. (R. 150, Order.) In an accompanying memorandum opinion, the court concluded that Green's discharge was valid, and it found that any regulatory error that may have occurred did not undermine the validity of that discharge, principally because the regulations in question were not integral to the discharge process. (R. 149, Memorandum Opinion.)

B. Standard of Review.

Whether Green "cease[d]" to be subject to military prosecution under Section 3261(d)(1) presents an issue of statutory construction reviewed de novo. See *United States* v. *Gagnon*, 553 F.3d 1021, 1025 (6th Cir. 2009).

C. Analysis.

Green asserts, almost as an afterthought to his sweeping constitutional assault on the MEJA, see Br. 23-40, that he was not even subject to prosecution under the MEJA in the first place because he never actually "cease[d]" to be subject to a military prosecution under the UCMJ, as required by Section 3261(d)(1). Br. 40-53. That is so, Green

says, because, even though he received his certificate of discharge and even though he received his final accounting of pay, see Br. 44, the Army failed to follow certain personnel regulations in the course of effectuating his discharge – Army personnel did not recover his military identification card or provide him with a departure ceremony or certain forms of preseparation counseling. Br. 44-47. Those regulatory violations, according to Green, "invalid[ate]" his discharge, Br. 44, meaning that he was subject to military prosecution after all, thereby rendering the MEJA inapplicable. Br. 53. Green is wrong.

As a general rule, Article I does not permit military prosecutors to court-martial former servicemembers, like Green, who have severed their ties with the military and been restored to civilian status. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955); see also *United States* v. *MacDonald*, 456 U.S. 1, 5 n.3 (1982) (citing *Quarles* and holding that "MacDonald's [honorable] discharge barred any further military proceedings against him"). Green's discharge in this case had precisely that effect – it severed his ties to the Army and altered his legal status from that of soldier to that of civilian – and, by virtue of his discharge, he

"cease[d] to be subject to" the military's prosecutorial authority under *Quarles*. His prosecution under the MEJA, therefore, was proper.[7/]

1. *As A Result Of His Discharge, Green "Cease[d]" To Be Subject To Military Jurisdiction And Prosecution.*

a. The MEJA was a legislative response to judicial decisions recognizing the existence of a "jurisdictional gap" which, for decades, had the perverse effect of allowing civilian ex-soldiers to escape military or civilian prosecution for criminal conduct committed on foreign soil while a member of the Armed Forces. See *United States* v. *Gatlin*, 216 F.3d 207, 211-223 (2d Cir. 2000) (discussing this problem). The MEJA achieved its avowed goal of "clos[ing] this gap" (*United States* v. *Arnt*, 474 F.3d 1159, 1161 (9th Cir. 2007)) in the following manner.

[7/] Unlike Green, we begin by addressing his statutory claim – that the MEJA does not authorize his prosecution – rather than his constitutional claims; after all, if Green was correct that his prosecution was not authorized by statute, then the Court would have no occasion to reach his constitutional claims. See *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Terrell v. United States*, 564 F.3d 442, 454 (6th Cir. 2009) (no need to reach constitutional claim where statutory claim provided adequate basis for decision). As we will explain, Green's statutory claim is meritless, and therefore, the Court cannot avoid Green's constitutional claims; nonetheless, it should only address his constitutional claims after it addresses (and rejects) his antecedent statutory claim, see *id*. at 449.

The statute provides, in relevant part, "[w]hoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States * * * shall be punished as provided for that offense," if the conduct occurred while the individual was "a member of the Armed Forces subject to chapter 476 of title 10 (the Uniform Code of Military Justice)." 18 U.S.C. § 3261(a)(2).[8/] In deference to the military's paramount interest in prosecuting its own members for their active-duty misconduct, the MEJA generally precludes the commencement of a civilian MEJA prosecution of a servicemember; however, the MEJA is fully applicable to a servicemember who has "cease[d] to be subject to" military prosecution under the UCMJ. See 18 U.S.C. § 3261(d)(1).

[8/] Because the MEJA, by its terms, expressly applies to conduct occurring "outside of the United States," the general presumption that federal laws are only intended to apply domestically does not apply to the MEJA itself. See, *e.g.*, *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949) (presumption against extraterritorial application is a default rule that applies "unless a contrary intent" appears in the statute).

b. Green's prosecution satisfied Section 3261(a)(2) and complied with Section 3261(d)(1).

Section 3261(a)(2). On March 12, 2006, Green engaged in conduct that would have been criminally and feloniously actionable had it been committed in the United States or within the special maritime and territorial jurisdiction of the United States. See, *e.g.*, 18 U.S.C. § 1111(a) (murder); 18 U.S.C. § 1117 (conspiracy to commit murder); 18 U.S.C. § 2241(a) (aggravated sexual abuse); 18 U.S.C. § 924(j) (firearms murder). And, at the time Green committed this conduct, he was a member of the Armed Forces subject to the UCMJ. See, *e.g.*, *In re Grimley*, 137 U.S. 147, 151 (1890) ("By enlistment, the citizen becomes a soldier."); 10 U.S.C. § 802(a)(1) (soldiers are subject to the UCMJ). Therefore, Section 3261(a)(2) was satisfied.

Section 3261(d)(1). Green was indicted for violating the MEJA in November 2006, some six months after he had been discharged from the Army. Just as Green's enlistment altered his legal status from that of civilian to that of soldier, his discharge altered his status, restoring him to a civilian – and that change in status had constitutional significance

because, under *Quarles*, it operated to deprive the military of its Article I power to prosecute him for crimes he committed when he was a soldier. See, *e.g.*, *MacDonald*, 456 U.S. 1, 5 n.3 (1982); *Quarles*, 350 U.S. at 14. By virtue of his discharge, then, Green clearly "cease[d] to be subject to" military prosecution, and therefore, his indictment in November 2006, long after he had been returned to civilian status, accorded with Section 3261(d)(1).[9/]

[9/] Section 3261(d)(1) does not use the word "discharge," but Congress understood the import of *Quarles* and recognized that a discharged soldier would have "cease[d] to be subject to" the UCMJ, and hence have been subject to civilian prosecution under the MEJA. See H.R. Rep. 106-778, part 1, 106th Cong., 2d Sess. 11 (July 20, 2000) ("Persons who commit acts that fall within the scope of the new crime enacted by the bill but who are not tried for their crimes under the UCMJ and who later cease to be subject to the UCMJ (*e.g.*, because the case was not solved before they were discharged from the military, or because the person is no longer on active duty) may be prosecuted under the bill."); see also *id*. at 11 n.25 ("Former military members who have been discharged from the service * * * cannot be tried under the UCMJ, or under Federal law, for acts they commit outside the United States. H.R. 3380 would allow those persons to be tried for a violation of the new title 18 crime created by the bill.") (citing *Quarles*).

2. *Green's Attacks On The Validity Of His Discharge Are Misguided And Meritless.*

Green, while not disputing that the first condition for a MEJA prosecution was met, argues that he never actually ceased to be subject to a military prosecution because his discharge was "invalid" based on the Army's alleged failure to follow certain internal Army personnel regulations in the course of effectuating his discharge. Br. 40-53. His arguments do not withstand scrutiny.

a. *Green's Discharge Was Valid.*

Congress has specified the actions required to effectuate a soldier's discharge from the Armed Forces. The governing statute states that "[a] member of the Armed Forces may not be discharged or released from active duty until [1] his discharge certificate or certificate of release from active duty, respectively, and [2] his final pay or a substantial part of that pay, are ready for delivery to him." 10 U.S.C. § 1168(a). A soldier's final pay, however, is not "ready for delivery to him" until he completes a process informally known as "clearing," which is shorthand for "administrative out-processing" from the service. *United States* v. *Melanson*, 50 M.J. 641, 643 (A. Ct. Crim. App. 1999); see also *id*. at 643 &

n.1 ("transition processing"); *United States* v. *King*, 37 M.J. 520, 522 (A. Ct. Mil. Rev. 1993) ("discharge out-processing"). Congress also has given the Secretaries of the respective branches of the Armed Forces the authority to promulgate regulations to govern when and under what circumstances a soldier may be discharged from the service before his or her term of service expires. See 10 U.S.C. § 1169(1).

Green's discharge complied with these requirements. Green was discharged from the Army prior to the expiration of his term of service on grounds specified within a duly-enacted regulation adopted by the Secretary of the Army, see Army Regulation 635-200 ¶ 5-13 (permitting early discharge "because of a personality disorder"), and he does not argue otherwise. In addition, Green concedes that he received his discharge certificate and that his final pay was delivered to him. See Br. 44 ("Green received a copy of Department of Defense Form 214 (DD 214) which served as his discharge certificate and he received a final accounting of his pay and allowances."). Green then completed his administrative out-processing. (RE 136, Memorandum Opinion, at 1 ("After his arrival at Ft. Campbell, [Green] was administratively out-processed and discharged

from the Army on May 16, 2006.").) Green received orders dated May 9, 2006, "reassign[ing] [him] to the U.S. Army transition point shown" – Ft. Campbell, Kentucky – "for transition processing." The order further indicated that, "[a]fter processing, you are discharged from the Component shown," *i.e.*, the Army. The orders also instructed Green to complete a preseparation counseling checklist, to contact the Army Career and Alumni Program for assistance, and it indicated that he was eligible for certain transition benefits and services. On May 11, 2006, Green received formal counseling on transition benefits and services, and completed the preseparation counseling checklist. That same day, the Chief of Ft. Campbell's In/Out Processing issued a written memorandum titled "Installation Final Clearance" declaring that Green "has completed installation clearance and is eligible to depart as indicated," *i.e.*, on May 16, 2006. On May 15, 2006, Green's May 9, 2006 transition orders were stamped "Final Installation Clearance." Then, on May 16, 2006, Green received his final pay, and was issued a DD Form 214, Certificate of Release or Discharge From Active Duty.

The district court correctly concluded that Green's discharge was valid, and had the effect of restoring him to civilian status. His MEJA prosecution thus was proper.

b. *Green's Regulatory Claims Are Misguided*.

Green nevertheless maintains that the clearing process was flawed because the Army, in his view, violated its own regulations when it failed to (i) retrieve his military identification card, Br. 44-45; (ii) provide him with a departure ceremony, Br. 45-46; (iii) adequately advise him of his right to apply for compensation from the Veterans Administration, Br. 46-47; or (iv) afford adequate mental-health counseling, Br. 47-49. These arguments are ill-conceived, for at least three reasons.

First, as the district court found, while the regulations cited by Green in support of his claims relate generally to the separation process and are intended to aid a soldier in transitioning back to civilian life, Green has cited no authority holding that these specific regulations are part of the clearing process, and hence that strict compliance with these regulations is essential to effectuate a valid discharge. As the district court further noted, Green has not cited a single case where a military

court (or any court for that matter) has considered, let alone held, that the Army's failure to abide by any of the regulations of which he relies invalidated the soldier's discharge.

Second, even if these regulations were part of the clearing process, Green has not explained his failure to present his technical grievances to the Army during the separation process, and thereby provide the Army – "the primary authority for the interpretation of its own regulations," *Seepe* v. *Department of the Navy*, 518 F.2d 760, 764 (6th Cir. 1975) – with the opportunity to consider his claims and, if necessary, to fashion any appropriate corrective measures. Cf. *Schweiker* v. *Hansen*, 450 U.S. 785, 790 n.5 (1981) (per curiam) ("'[T]he Executive Department [has] the primary responsibility for fashioning the appropriate remedy for the violation of its regulations.'") (quoting *United States* v. *Caceres*, 440 U.S. 741, 756 (1979)). For example, there is no reason why the Army, if it agreed with Green's assertions, could not have provided Green with the counseling services he now claims he was denied; nor is there any reason the Army could not have recovered his military identification card, even if belatedly. Green's hypertechnical arguments – *e.g.*, "the burden of

obtaining the ID or verifying its loss rests with the Army," Br. 45; "[t]here is no proof that [he] received a departure ceremony," and "no evidence of compliance," Br. 46; "one can only speculate whether [certain requested] counseling" satisfies a regulation, Br. 47 – ought not to obscure the larger point, which is that Green could have presented these regulatory claims to the Army in a timely and appropriate fashion, but he did not do so.[10/]

[10/] We note that Green's attack on the validity of his discharge is in considerable tension with his previously-expressed view that he had in fact been discharged – a view Green expressed, through counsel, as part of his failed attempt to reenlist in the Army. In a letter dated February 15, 2007, to the 101st Airborne Division's Office of the Staff Judge Advocate in Ft. Campbell, Kentucky, Green's lawyer addressed "the possibility of Mr. Green voluntarily re-enlisting in the Army in order to subject himself to the military justice system." Then, in a letter dated May 10, 2007, addressed to the Secretaries of Defense and the Army reiterating Green's interest in reenlisting, counsel noted, by way of background, that Green "had been discharged from the Army when the allegations in this matter were investigated." At no point did Green maintain, as he does now, that his discharge is tainted by regulatory procedural error. Thus, while the Army subsequently declined Green's offer, the mere fact that he even attempted to reenlist shows that Green, contrary to his current protestations, previously accepted the validity of his military discharge. See, *e.g.*, Rule 202(a), Rules Governing Courts-Martial, Discussion Note 2(B)(ii) (explaining that "a person who reenlists *following a discharge* may be tried for offenses committed during the earlier term of service") (emphasis added).

And if Green had at least presented these alleged procedural deficiencies to the Army but to no avail, he then could have sought judicial review of his discharge under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, on the ground that his discharge was tainted by procedural error. See 5 U.S.C. § 706(2)(D) ("The reviewing court shall * * * hold unlawful and set aside agency action * * * found to be * * * without observance of procedure required by law."). But Green did not present these claims to the Army or seek APA review.

Third, even assuming Green is correct, it still would not necessarily follow, as Green assumes, that the remedy for the Army's alleged noncompliance with these regulations is *invalidation* of his military discharge. Not surprisingly, Green cites no authority for the remarkable assertion that, even though the Army has issued a DD-214 certificate of discharge and provided final pay, its failure to recover his military identification card somehow prevented Green's restoration to civilian status. To the contrary, the Supreme Court has previously rejected the general notion that military regulations can affect a person's legal status as a civilian or a soldier. Cf. *United States* v. *Union Pacific R.R. Co.*, 249

U.S. 354, 359 (1919) ("The fact that under the Army Regulations [an applicant for enlistment] receives the same rations as an enlisted man, and that he is subject to the same medical attention, does not effect a change of status [from civilian to soldier]."). And that conclusion makes sense: while enlistment in the Army is contractual, this type of contract is special because it alters the legal status of the parties to it, and as a result, "no breach of the contract destroys the new status or relieves from the obligations which its existence imposes." *Grimley*, 137 U.S. at 151; see also *id.* (analogizing an enlistment contract to a marital contract, which similarly alters the legal status of the contracting parties, and reasoning that one spouse's breach of that contract, as by way of infidelity, would not automatically "destroy that status or change the relation of the parties to each other").

Analogous administrative-law precedents rendered in the civilian context reinforce the conclusion that the strong medicine of invalidating final agency action for a regulatory violation is not appropriate. As this Court recently explained, while an agency's "fail[ure] to adhere to its own procedures" should not be countenanced, such a failure does not mandate

the setting aside of the agency's final action "unless the claimant has been prejudiced on the merits or deprived of substantial rights because of the agency's procedural lapses." *Rabbers* v. *Commissioner, SSA*, 582 F.3d 647, 654-655 (6th Cir. 2009) (citing *Connor* v. *United States Civil Serv. Comm'n*, 721 F.2d 1054, 1056 (6th Cir. 1983)). That standard has not been met here. Any claimed "procedural lapses" attendant to Green's discharge are minor and tangential, and have not caused any demonstrable prejudice to Green, particularly in view of the fact, conceded by Green, that he was discharged for a legitimate reason, and that his discharge was preceded by his receipt of his DD-214 and his final accounting of pay.

II. THE MEJA FULLY RESPECTS THE CONSTITUTION'S STRUCTURAL SAFEGUARDS REGARDING THE SEPARATION OF LEGISLATIVE AND EXECUTIVE POWERS.

A. Background.

Green filed a pretrial motion to dismiss the indictment, alleging, as relevant here, that the MEJA itself violated the separation-of-powers principle and the non-delegation doctrine. (R. 92, Motion to Dismiss.) The district court denied the motion. (R. 137, Order). In an accompanying

memorandum opinion, the court found that the MEJA did not grant the Executive Branch excessive prosecutorial discretion, and did not run afoul of the non-delegation doctrine. (R. 136, Memorandum Opinion.)

B. Standard of Review.

"Questions concerning the constitutionality of a statute are reviewed de novo." *United States* v. *Sawyers*, 409 F.3d 732, 735 (6th Cir. 2005).

C. Analysis.

Contrary to Green, the MEJA does not offend the constitutionally-mandated separation of powers between the Executive and Legislative branches of government. Nor does the statute implicate, much less violate, the non-delegation doctrine.

1. The MEJA Respects The Separation Of Powers.

a. The Constitution vests "[a]ll legislative Powers herein granted" in "a Congress of the United States." U.S. CONST. art. I, § 1. As there are no federal common-law crimes, see *United States* v. *Hudson,* 11 U.S. (7 Cranch) 32, 34 (1812), it is Congress that bears the responsibility for "defin[ing] a crime and ordain[ing] its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); accord *United States* v.

Lanier, 520 U.S. 259, 265 n.5 (1997). Once Congress enacts a criminal proscription into law, its role is complete; at that point, the responsibility for deciding whether, when and whom to prosecute under that law becomes a matter of prosecutorial discretion for the Attorney General and the United States Attorneys, "the President's delegates [who] help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *United States* v. *Armstrong*, 517 U.S. 456, 464 (1997) (citing U.S. CONST. Art. II, § 3); see also *United States* v. *Russell*, 411 U.S. 423, 435 (1973) ("The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government.").

That is precisely what occurred here. In enacting the MEJA, Congress made it unlawful for a member of the Armed Forces to engage in conduct outside the United States that, if it had been committed within the special maritime and territorial jurisdiction of the United States, would be felonious, and it declared that persons who violate this provision "shall be punished" pursuant to the penalty provisions applicable if the crime had been committed domestically. 18 U.S.C. § 3162(a)(2). The

Executive Branch, in turn, evaluated the facts and circumstances of Green's case and opted to initiate a criminal prosecution. Thus, the MEJA fully respects, rather than offends, the constitutionally-mandated division of legislative and executive power. See *Springer* v. *Phillipine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.").

Green argues that the MEJA unconstitutionally enhances the Executive Branch's power to prosecute in various ways, but his assertions are not well-taken. While the MEJA increases the Executive Branch's power by creating a new law for prosecutors to decide to enforce in order to fill a preexisting void, that expansion was achieved through the constitutionally accepted – indeed, the constitutionally mandated – process of bicameral passage in Congress and presentment to the President. See generally *Clinton* v. *City of New York*, 524 U.S. 417 (1998). Yet Green's position is that a decision by the political branches to enact a new law in the manner prescribed by the Constitution actually violates

the separation-of-powers doctrine. Plainly, that is not correct. Even if the new law increases the universe of conduct now deemed criminal, thereby derivatively increasing the power of the Executive Branch by allowing it to enforce the law, this process assuredly does not implicate separation of powers concern because it does not present "the encroachment or aggrandizement of one branch *at the expense of the other*." *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (emphasis added). The MEJA is no different than any other federal criminal law in that it does not reserve to Congress any control over matters that are subject to exclusive executive control, see *Myers* v. *United States*, 272 U.S. 52 (1926) (Congress cannot condition the President's power to remove Executive Branch officials on senatorial consent), or confer any non-executive power on the Executive Branch, cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982) (Congress cannot confer Article III judicial power on an Article I judge). Rather, the statute simply provides the Executive with a new opportunity to exercise its Article II prosecutorial discretion over a class of conduct not previously subject to prosecution – the same opportunity that exists any time Congress enacts a new federal criminal

law. Simply creating an opportunity for the Executive Branch to exercise its discretion where no such discretion previously existed is the hallmark of permissible inter-branch cooperation, not an affront to our constitutional system of divided powers, because each branch is acting within its constitutionally-defined sphere of competence and authority. See *Loving* v. *United States*, 517 U.S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.").

Nor, as Green asserts, is the MEJA unconstitutional because it gives "the government" the "unfettered discretion to prosecute a member of the Armed Forces under MEJA or the UCMJ," Br. 24, thereby permitting the Executive to take into account the procedural and substantive differences between these two criminal justice systems. As an initial matter, this argument rests on a faulty premise: by virtue of his discharge, a military prosecution was not an available option here, see *Quarles*, 350 U.S. at 14, and therefore, the government had no occasion in Green's case to choose

between the military and civilian justice systems. Rather, the only available "choice" was between prosecuting Green in the civilian criminal justice system under the MEJA or allowing Green to escape prosecution.[11/] As the district court explained, the "MEJA provides no discretion to the Executive in the case of a former member of the armed forces like [Green]; such a person is subject to civilian criminal jurisdiction only." (R. 136, Memorandum Opinion, at 5.) The government subsequently resolved that choice in the only responsible and appropriate manner. Thus, rather than constituting an impermissible expansion of prosecutorial power, the MEJA is more properly viewed as creating, in the precise manner prescribed by the Constitution, a much-needed safety net designed to avoid the absurdity of allowing civilian ex-soldiers to violate the law with

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[11/] Nor could Green have been prosecuted by the Iraqi government. Although a host nation can acquire the right to prosecute foreign soldiers who violate the host nation's own domestic laws, at the time these crimes were committed, members of the Multi-National Force serving in Iraq, including United States soldiers, were subject to the "exclusive jurisdiction of their Sending States." See Coalition Provisional Authority Order Number 17 § 2(3) (June 17, 2004), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. Foreign prosecution thus was not an option here.

impunity.[12/]

At bottom, Congress has the constitutional power to criminalize the conduct at issue. Indeed, if Congress had opted to exercise its power by amending the federal conspiracy, aggravated sexual abuse, murder and firearms laws to provide that they apply to civilian ex-soldiers who commit crimes on foreign soil while on active duty, there is no serious dispute that Green would have been subject to prosecution for violating those laws. The fact that Congress chose to close the gap in the law associated with the prosecution of ex-soldiers in another way – by enacting a new criminal provision in Title 18 that has the exact same effect while at the same time respecting the primacy of the military's prosecutorial prerogatives – surely does not compel a determination that Congress acted unconstitutionally. To the contrary, the Constitution does not disable Congress from deciding how best to criminalize certain previously unreachable criminal conduct. And once Congress makes that legislative determination, separation-of-powers principles do not bar

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[12/] In theory, the government could have permitted Green to re-enlist in the Army in order to prosecute him militarily, but Green has not challenged the validity of the Army's decision to deny his request for re-enlistment.

Executive Branch officials from exercising their constitutional discretion to decide whom to prosecute under that newly-minted law.

b. Even assuming arguendo that the government had the discretion to choose to prosecute Green in either a military or a civilian court,[13/] the statute still would not be unconstitutional simply because it permitted the Executive Branch to make that choice. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). To exercise that discretion in any meaningful way, however, the Executive Branch must necessarily have the discretion to decide *where* any such

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[13/] A servicemember who violates the MEJA "with one or more other defendants, at least one of who is not subject to such chapter"is subject to civilian prosecution even though he has not been discharged. See 18 U.S.C. § 3261(d)(2). This provision grants civilian prosecutors discretion to prosecute servicemembers who commit criminal acts with non-military persons under the MEJA, even though the military would have jurisdiction as well. While this case does not implicate this provision – Green and his confederates were charged with committing crimes when they were all members of the Army subject to the UCMJ – it does show that Congress, in passing the MEJA, contemplated that the Executive Branch could be entrusted with the ability to decide whether a military or civilian prosecution was appropriate.

prosecution should take place. Indeed, federal prosecutors routinely make such choice-of-forum decisions in carrying out their constitutional responsibilities. Any holding that Congress is constitutionally disabled from enacting legislation to criminalize conduct whenever that conduct could be prosecuted in alternative venues because prosecutors would have too much discretion to choose the forum would have a devastating impact on the administration of the federal criminal justice system. Not only would it hamper coordination and cooperation between state and federal prosecutors, but it would also threaten to undermine the government's prosecutorial prerogatives in connection with, among other things, the ongoing war-on-terror. See generally Press Release, Department of Justice and Department of Defense, *Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees* (Nov. 13, 2009) ("The Attorney General, in consultation with the Secretary of Defense, has determined that the United States government will pursue a prosecution in federal court against five detainees who are currently charged in military commissions with conspiring to commit the Sept. 11,

2001 terror attacks, which killed nearly 3,000 individuals.").[14/]

The existence of substantive and procedural differences between the two criminal justice systems – including the absence of parole in the civilian system – does not alter the conclusion that charging decisions are properly within the purview of the Executive Branch. In *United States* v. *Batchelder*, 442 U.S. 114 (1979), the defendant argued that the Constitution prohibited federal prosecutors from basing their decision to charge him under either of two potentially applicable statutes on the fact that one statute carries more serious penalties than the other. The Supreme Court rejected that contention, holding that the prosecutor, not the defendant, has the right to decide which statute should form the basis for the prosecution – and that, in making that decision, the Constitution did not bar the prosecutor from "be[ing] influenced by the penalties available upon conviction." *Id*. at 125; see also *United States* v. *Davis*, 15 F.3d 526, 529 (6th Cir. 1994) ("[A] prosecutor may properly base his decision on the penalties available upon conviction when determining what offense will be charged."). As the Court in *Batchelder* concluded,

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[14/] http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html.

"[j]ust as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced." *Id.* These principles adequately rebut Green's claim that permitting the Executive Branch to prosecute him in the civilian justice system is unfair and unconstitutional simply by virtue of the sentencing differences between those systems.[15/]

The conclusion that prosecutors are constitutionally entitled to choose between two different systems of justice, and to base their decisions at least in part on the applicable penalties, is still further reinforced by the D.C. Circuit's repeated rejection of constitutional challenges to the breadth of the discretion entrusted in the United States

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[15/] Green's discussion of the differences between the military and the civilian justice systems highlights the advantages of the military system, particularly the availability of parole, see Br. 16-20, but his one-sided presentation neglects to mention the important constitutional safeguards and benefits that he received as a result of having been prosecuted in the civilian criminal justice system that he would not have received had he been court-martialed, including the right to a trial before a life-tenured judge, a right to a grand jury indictment, and the right to have a jury of his peers unanimously decide his guilt or innocence and his punishment. See *United States* v. *Weiss*, 510 U.S. 163, 176 (1993); *Quarles*, 350 U.S. at 16-18.

Attorney for the District of Columbia (USAO-DC), who, by virtue of the District's unique status, serves as both a local prosecutor and a federal prosecutor. See *United States* v. *Dockery*, 965 F.2d 1112, 1114 n.2 (D.C. Cir. 1992). In a series of cases, the D.C. Circuit rejected the argument that the USAO-DC's broad discretion to charge a defendant in either local or federal court where the facts support a violation of both local and federal law, was unconstitutional. See *United States* v. *Mills*, 925 F.2d 455, 461-462 (D.C. Cir. 1991) (USAO-DC's decision to transfer drug defendants initially charged in local court to federal court in order to obtain lengthier prison sentences was constitutional), *aff'd in relevant part*, 964 F.2d 1186 (D.C. Cir. 1992) (en banc); see also *Dockery*, 965 F.2d at 1116 (fact that government terminated local prosecution and reinstituted prosecution in federal court to obtain stiffer penalties was not a mitigating circumstance justifying a downward departure); *United States* v. *Clark*, 8 F.3d 839, 843 (D.C. Cir. 1993) (fact that USAO-DC "enjoys free reign in deciding whether to prosecute in federal or [local] court" did not violate the Constitution or justify downward departure). Relying in part on *Batchelder*, these cases recognize that forum-selection

decisions are part and parcel of the executive's charging discretion, and, for that reason, are not inherently unconstitutional. See *Mills*, 925 F.2d at 461. If, as the D.C. Circuit has held, the United States Attorney for the District of Columbia may constitutionally be entrusted with the power to choose whether to prosecute a defendant in local or federal court, notwithstanding the substantive and procedural differences between the two venues, it is difficult to see what principle of law forbids the federal government from deciding whether to prosecute a defendant such as Green in a civilian or a military court (even assuming the latter option was available).

2. *The MEJA Does Not Implicate, Much Less Offend, The Non-Delegation Doctrine.*

Green contends that in enacting the MEJA, "Congress unconstitutionally delegated to the Executive its exclusive power to determine the conduct that is subject to criminal sanctions, fix the sentence for crimes, and set forth procedures for the adjudication of criminal cases." Br. 24, 26-30. Green is mistaken.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST.

art. I, § 1. From this language, the Supreme Court derived the non-delegation doctrine – the notion that "Congress may not constitutionally delegate its legislative power to another branch of Government," *Touby* v. *United States*, 500 U.S. 160, 165 (1991) – as a means of enforcing the separation of powers. As Green concedes (Br. 27), however, the non-delegation doctrine does not forbid Congress from seeking assistance, "within proper limits," from the other branches of government. *Touby*, 500 U.S. at 165; see *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Whether Congress acted "within proper limits" turns on the familiar question of whether Congress has "la[id] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928). If it has done so, the resulting legislation is "not a forbidden delegation of legislative power." *Id.*

Though the non-delegation doctrine is most commonly associated with the rise of the modern administrative state, the doctrine is applicable in the criminal-law context as well. In that setting, Congress is constitutionally entrusted with the responsibility to define crimes and set

the penalties. See *Lanier*, 520 U.S. at 267 n.6. But "[t]here is no absolute rule * * * against Congress' delegation of [its] authority to define criminal punishments" to the Executive Branch, *Loving*, 517 U.S. at 768, so long as any delegation of its law-making or punishment-fixing authority is accompanied by the requisite "intelligible principle." See, *e.g.*, *Touby*, 500 U.S. at 165-167 (rejecting non-delegation challenge to legislation permitting the Attorney General to define criminal conduct by regulation); *Mistretta*, 488 U.S. at 371-379 (rejecting non-delegation challenge to legislation permitting the Sentencing Commission to define criminal penalties).

Green contends (Br. 28) that the MEJA fails to set forth an intelligible principle. That argument founders at the outset, however, because the MEJA does not involve a "delegation" of criminal law-making authority to the Executive in the first place: in enacting the MEJA, Congress *itself* fulfilled the law-defining and punishment-fixing responsibilities entrusted to it by Article I. It was Congress that defined the conduct that is criminalized, see 18 U.S.C. § 3261(a), and it was Congress that selected the applicable penalties that prosecutors may seek

and judges may impose on convicted violators, see *id*. Unlike *Touby*, then, the primary case Green cites (Br. 28-29), the MEJA does not purport to delegate to the Attorney General the power to create a regulatory crime or to determine the range of punishment; instead, the only "power" Congress granted executive officials is the opportunity to enforce a new criminal law – a power that is identical to the power that prosecutors exercise every day in enforcing the criminal code. See *Batchelder*, 442 U.S. at 125. Because Congress "has specifically determined the conduct constituting [the] crime, and has set out definitive sentences * * * the 'intelligible principle' [doctrine] is not relevant to the present case." *United States* v. *Allen*, 160 F.3d 1096, 1108 (6th Cir. 1998) (distinguishing *Touby* on this basis).[16/]

[16/] As the district court found, the MEJA, in any event, easily passes "intelligible principle" scrutiny. The statute clearly delineates the general policy objectives (prosecuting civilian ex-soldiers for foreign-soil criminal conduct), it entrusts the administration of the statute to specific individuals (civilian prosecutors), and it defines the boundaries of exercises of this authority in how it defines the criminal conduct. See *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946).

Contrary to Green (Br. 26, 29), the MEJA is not a de facto delegation of Congress power to "fix" criminal penalties because it delegates to the Executive Branch "the discretion to choose" between initiating a military or a civilian prosecution, each with different penalty schemes. Br. 17-21. The Executive Branch's prerogative to select the forum in which to prosecute an offender is an exercise of its inherent Article II *executive* power to enforce the law; it is not an exercise of Article I penalty-defining power because the MEJA itself fixes the maximum penalty available upon conviction and because the ultimate sentence imposed will be determined by the judge or jury Cf. *Batchelder*, 442 U.S. at 125 (allowing the government to prosecute a defendant under a statute carrying a longer maximum sentence over a second statute carrying a shorter maximum sentence poses no constitutional issue because that decision "does not empower the Government to predetermine ultimate criminal sanctions" but "merely enables the sentencing judge to impose a longer prison sentence").

III. THE GOVERNMENT'S EXERCISE OF ITS PROSECUTORIAL DISCRETION TO CHARGE GREEN UNDER THE MEJA DID NOT VIOLATE GREEN'S CONSTITUTIONAL RIGHTS.

Assuming that the MEJA is constitutional – and it is – Green raises a second set of constitutional challenges, this time to the government's exercise of its prosecutorial discretion to prosecute him, but not his confederates, under that statute. According to Green, the decision to charge him (and only him) in an Article III court was an arbitrary, irrational and constitutionally discriminatory decision to treat "similarly situated defendants * * * differently based on the whim of the Executive." Br. 31. Here again, Green is mistaken.

A. Background.

Green's motion to dismiss the indictment challenging the constitutionality of the MEJA also argued, in the alternative, that even if the statute was constitutional, the government's decision to prosecute him under the MEJA while prosecuting his confederates militarily under the UCMJ unfairly discriminated against him, and deprived him of equal protection and due process of law. (R. 92, Motion to Dismiss). The district court denied the motion. (R. 137, Order). Viewing Green's equal

protection claim as one of selective prosecution, the court denied it, finding that the government's charging decisions were rationally based on the fact that Green, unlike his confederates, had been discharged. (R. 136, Memorandum Opinion, at 6-8). The court likewise found that Green's civilian prosecution did not offend notions of due process. (*Id*. at 9-11).

B. Standard of Review.

Green's constitutional challenges present pure issues of law that this Court reviews de novo. See, *e.g.*, *United States* v. *Allen*, 954 F.2d 1160, 1165 (6th Cir. 1992).

C. Analysis.

Green's constitutional attacks on the government's charging decisions have no substance. As a civilian ex-soldier, the government had no choice but to prosecute Green in an Article III court because of his civilian status. And the decision to prosecute Green in the only available forum was anything but arbitrary and discriminatory.

1. *Green's Class-Of-One Equal Protection Challenge To The Government's Charging Decision Fails As A Matter Of Law*.

Green's equal-protection claim fails as a matter of law because it is inherently speculative; it fails to account for the fact that he was discharged from the Army while his co-conspirators were not; and Green has not showing that the decision to prosecute him in the only forum available to the government was anything but a responsible effort to hold him accountable for his crimes that could not otherwise be prosecuted.

a. *Green's Claim Is Speculative*.

According to Green, the government's decision to single him out for a civilian MEJA prosecution was unfair because of the differences between the military and civilian criminal justice systems, Br. 29, including "differences in * * * [the] ranges and types of punishments" available upon conviction. Br. 23; see also Br. 18-19 (discussing differences). Taken at face value, this claim is puzzling because the most serious crime of which Green was convicted – premeditated murder – is punishable by life imprisonment or death in both justice systems. Compare 10 U.S.C. § 918(1) with 18 U.S.C. § 1111(a). This suggests that Green's real

complaint is, most likely, about the fact that his co-conspirators are eligible for parole while he is not. See *Terrell*, 564 F.3d at 450 n.10 (explaining that "[p]arole has been abolished for federal prisoners"). But contrary to Green's assumption, there is no guarantee that had he been prosecuted militarily, he would have received a sentence including parole eligibility; that decision is a discretionary one for the military judge. See R.C.M. 1003(b)(7) ("When confinement for life is authorized, it *may* be with or without eligibility for parole.") (emphasis added); see also *Jama* v. *ICE*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion."). The fact that Green cannot show that he would have received the same sentence after a court-martial that his co-conspirators received blocks his claim because he cannot show that the charging decision he assails adversely affected him. Cf. *United States* v. *Moore*, 543 F.3d 891, 899-900 (7th Cir. 2008) (defendant raised a class-of-one claim challenging his drug prosecution in federal court because it exposed him to a mandatory minimum sentence, whereas a prosecution in state court would not have resulted in any such sentence because the state did not

have any mandatory minimum sentences).[17/]

b. *Green Has Not Made Out A Prima Facie Case of Class-Of-One Discrimination.*

The Equal Protection Clause is principally concerned with statutory classifications that "affect some groups of citizens differently than others." *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961).[18/] The clause was designed as a bulwark against "disparity in treatment by [state governments] between classes of individuals whose situations are arguably indistinguishable." *Ross* v. *Moffitt*, 417 U.S. 600, 609 (1974). Green is not raising a group-based discrimination claim. Instead, he is asserting an atypical type of equal protection claim, *i.e.*, that he has been arbitrarily singled out by the government and discriminated against as a

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[17/] Given that Green was the most culpable of the co-conspirators – after all, he devised the murderous plot and fired the fatal shots – a military judge reasonably could have concluded in any event that Green was not entitled to parole-eligibility.

[18/] The Equal Protection Clause appears only in the Fourteenth Amendment, and thus applies only to the states and not to the federal government. Nonetheless, the Fifth Amendment's Due Process Clause has an equal protection component to it that applies to the federal government, see *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), in the same manner as it applies to the states, see *Buckley*, 424 U.S. at 93 ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

so-called "class of one" without regard to group affiliation. Br. 24-26. "[T]he Supreme Court has recognized successful equal protection claims brought by 'class[es] of one,'" *Ass'n of Cleveland Firefighters* v. *City of Cleveland, Ohio*, 502 F.3d 545, 549 (6th Cir. 2007), but only if the claimant can prove that he has been "[1] intentionally treated differently from others similarly situated, and [2] that there is no rational basis for the difference in treatment." *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000) (per curiam); accord *Engquist* v. *Oregon Dep't of Agriculture*, — U.S. —, 128 S. Ct. 2146, 2151-2152 (2008). Green has done neither.

Green is not "similarly situated" to his confederates because, as he concedes, he was discharged from the Army while they were not. See Br. 16 ("Cortez, Barker, Spielman and Howard were still in the military when the charges were brought and they were prosecuted under the UCMJ * * * [while he] was honorably discharged."). Although this Court has not yet defined the extent to which individuals must be "similarly situated" to others in order to maintain a class-of-one claim, it has addressed this issue in the employment-discrimination context, explaining that a prima facie case of workplace gender discrimination requires the plaintiff to

"show that 'all relevant aspects' of her employment situation are 'nearly identical' to those of the alleged similarly situated male employees." *Humenny* v. *Genex Corp.*, 390 F.3d 901, 906 (6th Cir. 2004); see *Pierce* v. *Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994) ("similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances"). In Green's case, his civilian legal status as compared to the military status of his co-conspirators is certainly a "relevant aspect[]" bearing on – if not outright determining – the similarity analysis. Green's class-of-one claim thus fails for this reason alone. See, *e.g.*, *Braun* v. *Ann Arbor Charter Township*, 519 F.3d 564, 575 (6th Cir. 2008) (failure "to demonstrate the existence of any similarly situated" persons defeated class-of-one claim as a matter of law).

Nor has Green shown that his differential treatment lacks any conceivable rational basis. Cf. *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (in the equal protection context, "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it"). Under this Court's class-of-one precedents, irrationality may be proven in either of two different

ways: by showing pure arbitrariness (*i.e.*, "negativ[ing] every conceivable basis which might support" the government's charging decision) or by showing an illegitimate motive (*i.e.*, "demonstrat[ing] that the challenged government action was motivated by animus or ill-will"). *Warren* v. *City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005); accord *Tri-Health, Inc.* v. *Board of Commr's, Hamilton County, Ohio*, 430 F.3d 783, 788 (6th Cir. 2005) (following *Warren*'s disjunctive approach).

Green does not claim that the government's decision to prosecute him under the MEJA was motivated by animus or ill-will; instead, he advances a pure-arbitrariness theory, claiming that the charging decision was "based on [a] whim." Br. 31. Far from it. The government's decision to invoke the MEJA in Green's case was based on the absence of any other federal forum in which he could be prosecuted, and the fact that, but-for the MEJA, he would escape criminal prosecution for plotting and carrying out the cold-blooded, execution-style murders of four innocent Iraqi civilians. The decision to prosecute Green pursuant to a newly-enacted law designed specifically to apply to persons like him was both responsible

and appropriate, and not "whim[sical]."[19/]

2. *Green's Due Process Challenges To The Government's Charging Decision Are Misguided.*

Relatedly, Green contends (Br. 34-40) that the government's decision to charge him in a civilian court was so patently unfair that it amounted to a violation of his substantive due process rights. Br. 34-40.

Even assuming that an exercise of prosecutorial discretion can be challenged for arbitrariness under a substantive due process rubric, but see *United States* v. *Smith*, 953 F.2d 1060, 1063 (7th Cir. 1992) ("Arbitrariness * * * is not among the grounds on which to contest an

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[19/] This Court has not previously considered a class-of-one challenge to a prosecutorial charging decision, but the Seventh Circuit has held that any such challenge can only be based on an illegitimate-motive theory because "an exercise of prosecutorial discretion cannot be successfully challenged merely on the ground that it is irrational or arbitrary." *United States* v. *Moore*, 543 F.3d 891, 899-900 (2008). Allowing pure arbitrariness class-of-one claims, *Moore* reasoned, would be inconsistent with Supreme Court precedent restricting equal protection challenges to those exercises of prosecutorial discretion that involve invidious discrimination. See *id*. at 900 ("[I]n the realm of prosecutorial charging decisions, only invidious discrimination is forbidden."). *Moore*'s reasoning is consistent with *United States* v. *Hawkins*, 274 F.3d 420 (6th Cir. 2001), where this Court, following prior circuit precedent, held that a prosecutor's refusal to file a substantial-assistance motion could not be challenged for arbitrariness. *Id*. at 427-429.

exercise of prosecutorial discretion."), Green plainly has not stated a valid claim, as there is nothing even remotely "conscience-shocking" (*County of Sacramento* v. *Lewis*, 523 U.S. 833, 846-847 (1998)), about the decision to prosecute soldiers in military courts and to prosecute civilian ex-soldiers in a civilian court. Cf. *Banks* v. *City of Whitehall*, 344 F.3d 550, 554-555 (6th Cir. 2003) ("There exists no 'fundamental' right in our legal system to violate a municipality's codes and regulations with impunity, and the conduct of [local] officials in enforcing those codes and regulations was neither 'arbitrary' nor 'conscience-shocking' in the constitutional sense.").

Green's arguments to the contrary are misplaced. For example, Green maintains that it is unfair for the government to have, in effect, manufactured MEJA jurisdiction over him in that one arm of the government (the military) discharged him so that another arm (civilian prosecutors) could prosecute him. Br. 36-37. Without conceding that this course of conduct would be unconstitutional, we note simply that it is not presented here: the record shows that Green was discharged by the Army because of a medical diagnosis of a mental-health condition, at a time *before* senior military leaders, including those responsible for his

discharge, knew that Green and his confederates were even involved in the killings. In short, the record does not provide factual support for Green's manufactured-jurisdiction claim.

Similarly unavailing are Green's assertions (Br. 36-37) that the government should have either (i) discharged his confederates and then prosecuted them under the MEJA, or if his confederates were not discharged, (ii) prosecuted them under the MEJA in any event despite their military status, pursuant to the MEJA's piggybacking proviso, 18 U.S.C. § 3261(d)(2).[20/] The possibility that the government could have embarked on these courses of action does not mean that the government was required to exercise its discretion in this manner, much less compel the conclusion that the failure to do so amounted to an arbitrary,

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[20/] Subsection (d) sets out the general rule barring civilian MEJA prosecutions of servicemembers, but provides two exceptions. The first exception applies where the servicemember has ceased to be subject to military authority; the second exception, subsection (d)(2), permits a MEJA prosecution charging a servicemember with "committ[ing] the offense with one or more other defendants, at least one of whom is not subject to" military authority. Green suggests that, if he was subject to civilian prosecution, his codefendants should have been charged with him under this exception, but that assertion is open to question since, at the time the crimes were committed, all of the actors were subject to military authority.

conscience-shocking choice. To the contrary, there is nothing arbitrary about permitting the military to apply its own specialized laws, disciplinary code and authority by court-martialing active-duty soldiers for active-duty misconduct, given the specialized needs of the military society, while at the same time prosecuting a civilian who, through sheer happenstance, could not be prosecuted militarily because of his earlier discharge from the military for medical reasons. Green's due process arguments, like his other arguments, presume that a one-size-fits-all solution is constitutionally compelled when joint actors are charged, but the law is otherwise. The very notion of "discretion" implies a power to draw rational distinctions based on the circumstances of a given case. See *Moore*, 543 F.3d at 901 ("[T]he discretion conferred on prosecutors * * * is flatly inconsistent with a presumption of uniform treatment.").[21/]

[21/] Green's analogy to criminal prosecutions of juveniles who attain the age of majority (Br. 38-40) fails; in the federal system, such persons cannot be prosecuted as adults because Congress has so declared. 18 U.S.C. § 5031. The MEJA, in contrast, provides that an individual whose legal status changes from servicemember to civilian *is* subject to civilian prosecution precisely *because of* that change in status. Thus, while a change in juvenile status may *bar* adult prosecution, a change in military status has the opposite effect by *authorizing* civilian prosecution.

* * * * *

At the end of the day, Green's challenges to the government's exercise of its prosecutorial discretion seek precisely the sort of constitutional "entitle[ment] to choose the penalty scheme under which he will be sentenced" that the Supreme Court rejected in *Batchelder*. Under our system, of course, this choice is entrusted to the prosecutor, whose charging decision is entitled to a "presumption of regularity." *Hartmann* v. *Moore*, 547 U.S. 250, 263 (2006). Green's arguments to the contrary are insufficient to displace this weighty presumption.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing Brief for the United States is set in a proportionally spaced typeface (Century Schoolbook, 14-point type) and that it contains 13,411 countable words, as determined by WordPerfect 12 software.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing Brief for the United States this 25th day of February 2010 with the Clerk of the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system.

I further certify that defendant's counsel – Messrs. Darren C. Wolff, Frank W. Heft, Scott T. Wendelsdorf, and Patrick J. Bouldin – are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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ADDENDUM

Pursuant to 6th Cir. R. 30(b), the United States of America hereby submits the following designation of relevant district court documents:

Record Entry	Description of Document
36	Indictment
109	Government's Exhibits in Opposition to Defendant's Motion to Dismiss For Lack of Jurisdiction
136	Memorandum Opinion on Motion to Dismiss
137	Order Denying Motion to Dismiss
149	Memorandum Opinion on Motion to Dismiss for Lack of Jurisdiction
150	Order Denying Motion to Dismiss for Lack of Jurisdiction
263	Verdict
282	Judgment and Commitment Order
283	Notice of Appeal
284	Presentence Investigation Report (Sealed)
286	Amended Notice of Appeal