UNITED STATES OF AMERICA	)	Prosecution Motion For Appropriate Relief
	)	
	)	
	)	
	)	**Motion for Reconsideration**
v.	)	
	)	
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**8 June 2007**
a/k/a "Ahmed Muhammed Khali"	)	

1. **Timeliness**. This motion is timely filed.

2. **Relief**. Pursuant to Rule for Military Commission ("RMC") 905(f) the Prosecution requests the Military Judge reconsider his 4 June 2007 order dismissing all charges and specifications, without prejudice, in U.S. v. Khadr.[1]

3. **Overview**. The Prosecution believes the dismissal of all charges and specifications was in error and that personal jurisdiction has been sufficiently established over Omar Ahmed Khadr. In addition, in the absence of a prior dispositive administrative determination of military commission jurisdiction, the Military Commissions Act ("MCA") requires that the Prosecution be given the opportunity to establish jurisdiction through the introduction of evidence before the Military Commission.

4. **Burden of proof**. The Prosecution has the burden of proof.

5. **Facts**.

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan and paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses.[2]

[1] Trial counsel indicated on the record that the government requested time to consider an appeal to the Court of Military Commission Review under R.C.M. 908. However, an appeal by the government would be premature if noticed prior to a decision on this motion for reconsideration. Accordingly, the Prosecution will await a decision on this motion and then consider its options regarding appeal, if even necessary. To the extent that it would be required - and out of an abundance of caution – the Prosecution asks that any time period for the filing of a notice of appeal regarding this issue be tolled pending a decision on this motion.

[2] See Criminal Investigative Task Force Report of Investigative Activity ("CITF Form 40"), Subject Interview of accused, 28 October 2002. (Attachment 2)

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy.[3]

c. On 7 February 2002, the President determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.[4]

d. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.[5]

e. Following this training the accused received an additional month of training on landmines and soon thereafter joined a group of al Qaeda operatives and converted landmines into improvised explosive devices (IEDs) capable of remote detonation.

f. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

g. In or about July 2002, Khadr planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

h. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan.[6]

i. Prior to the firefight beginning, U.S. forces approached the compound and asked the accused and the other occupants to surrender.[7]

j. The accused and three other individuals decided not to surrender and "vowed to die fighting."[8]

k. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound.[9]

l. Toward the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer.[10] American forces then shot and wounded the accused, and after his capture, American medics administered life saving medical treatment to the accused.[11]

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[3] *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, pgs. 4-14 (2004).
[4] See White House Memorandum, 7 February 2002.
[5] See attached CITF Form 40, Subject Interview of accused, 4 December 2002. (Attachment 3)
[6] See attached CITF Form 40, Subject Interview of Major _____, 20 April 2004. (Attachment 4) (Protected information withheld).
[7] See attached CITF Form 40, Subject Interview of accused, 3 December 2002. (Attachment 5)
[8] Id.
[9] Id.
[10] Agent's Investigation Report ("AIR"), ROI No. T-157, Interview of accused, 17 September 2002. (Attachment 6)

m. Approximately one month after the accused was captured, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire.[12]

n. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video.[13]

o. When asked on 17 September 2002 why he helped the men construct the explosives the accused responded "to kill U.S. forces."[14]

p. The accused then related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in the building and later deploying of the explosives, and later threw a grenade at the American.[15]

q. During an interrogation on 4 December 2002, the accused agreed his efforts in land mine missions were also of a terrorist nature and that he is a terrorist trained by al Qaeda.[16]

r. The accused further related that he had been told about a $1500 reward being placed on the head of each American killed and when asked how he felt about the reward system he replied "I wanted to kill a lot of American[s] to get lots of money."[17] During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan and if non-believers enter a Muslim country then every Muslim in the world should fight the non-believers.[18]

s. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal (CSRT) conducted on 7 September 2004.[19] The CSRT also found that the accused was a member of, or affiliated with, al Qaeda.[20]

t. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. Importantly, after receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction, those charges were referred for trial by military commission on 24 April 2007. [*See* Pretrial Advice, Allied Papers].

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[11] CITF Form 40, Subject Interview of Major ____, 20 April 2004. (Attachment 4) (Protected information withheld).
[12] See Attachment (1) (Video of accused manufacturing and emplacing Improvised Explosive Devices, seized from site of accused's capture in a compound in the village of Ayub Kheil, near Khowst, Afghanistan) and also AIR Interview of accused, 5 November 2002.
[13] See AIR Interview of accused, 5 November 2002. (Attachment 7)
[14] AIR Interview of accused, 17 September 2002. (Attachment 6)
[15] Id.
[16] CITF Form 40, Subject Interview of accused, 4 December 2002. (Attachment 3)
[17] CITF Form 40, Subject Interview of accused, 6 December 2002. (Attachment 8)
[18] CITF Form 40, Subject Interview of accused, 16 December 2002. (Attachment 9)
[19] See Appellate Exhibit 11. Unclassified Summary of CSRT proceedings.
[20] Id.

6. Discussion.

a. This case presents the first instance of judicial interpretation of the jurisdictional provisions of the Military Commissions Act ("MCA"). Nevertheless, the Military Judge decided this bedrock legal question without inviting briefing from the parties. The Military Judge, in dismissing the charges under section 948d, overlooked relevant provisions in section 948a and in the implementing regulations issued by the Secretary of Defense. These omissions are crucial; when taken into account, the Military Judge's interpretation cannot be reconciled with the statute's text and structure. Accordingly, the Prosecution respectfully requests reconsideration of the ruling dismissing this case for lack of jurisdiction. The Military Judge's interpretation of the Military Commissions Act in his 4 June opinion upends the careful and comprehensive system for military commissions established by Congress and must be corrected.

b. Section 948a of the MCA unambiguously establishes two separate paths for determining "unlawful enemy combatant" status and thereby Military Commission jurisdiction. The June 4 order addresses only one, however. As such, the Military Judge denied the Prosecution the chance to employ one of those methods, which provides for the Military Judge to hear evidence directly on the elements of "unlawful enemy combatant" status under section 948a(1)(A)(i) of the statute based upon the submissions of the parties and to determine whether those elements are met. The Military Judge's ruling cannot be reconciled with the bifurcated structure of the statute, which the June 4 opinion does not address, and that omission requires reconsideration. After the Military Judge determined that the CSRT determination was not sufficient to establish jurisdiction, dismissing the charges without receiving evidence directly on the elements of section 948a(1)(A)(i) was contrary to the statute. Because the Prosecution is ready and able to present evidence in satisfaction of section 948a(1)(A)(i), the Prosecution respectfully requests reconsideration to avoid the unnecessary delay—contrary to the system established by Congress—of requiring the United States to convene another tribunal to make this finding.

c. The Military Judge's ruling that the Prosecution had failed to establish jurisdiction under the second method set out by the MCA—by establishing a prior determination of "unlawful enemy combatant" status by a CSRT or other competent tribunal—is also erroneous and requires reconsideration. The Military Judge held that Khadr's CSRT determination, and by implication any CSRT ever conducted, or that ever would have been conducted under rules in place at the time of the MCA's enactment, was not sufficient for jurisdiction. The basis for this ruling is a difference in the title of the CSRT's ultimate finding—that Khadr was an "enemy combatant" rather than an "*unlawful* enemy combatant." The opinion overlooks, however, the President's determination that Taliban and al Qaeda fighters are unlawful combatants and—crucially—Congress's awareness and ratification of existing CSRT standards and the President's determination in enacting section 948a of the statute. When these features are considered, it is clear that the MCA deemed CSRT determinations under rules in place at the time of the MCA's enactment sufficient to establish Military Commission jurisdiction. The Military Judge's contrary interpretation would render this separate method of establishing jurisdiction under section 948a(1)(A)(i) a nullity. Although clear from the statute's text, structure, and history, the Secretary of Defense also reached the conclusion that CSRT determinations under existing rules

are dispositive of Military Commission jurisdiction. That interpretation of the statute—embodied in implementing regulations promulgated at the behest of Congress—is worthy of the Military Judge's deference, and the Military Judge should grant reconsideration to address that interpretation under the appropriate legal standard.

The Military Commission has authority to determine jurisdiction over the accused.

d. The Military Judge's 4 June 2007 order states that "it is clear that the MCA contemplates a two-part system. First, it anticipates that there shall be an administrative decision by the CSRT which will establish the status of a person for purposes of the MCA." The order further states "Congress provided in the MCA for many scenarios – none of them anticipated that the military commission would make the lawful/unlawful enemy combatant determination for initial jurisdictional purposes." This interpretation is unsupported by any language in the MCA or MMC.

e. The MCA authorizes the Secretary of Defense to try alien "unlawful enemy combatants" for violations of the law of war and other offenses triable under the Act. The statute expressly provides two independent definitions of the term "unlawful enemy combatant." *See* 10 U.S.C.§ 948a(1). First, "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C.§ 948a(1)(i). Second, "a person who, before, on, or after the date of enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense." 10 U.S.C. § 948a(1)(ii).

f. These two alternative definitions are separated in the statutory text by the word "or," thus making clear that they provide separate bases for Military Commission jurisdiction. The Rules for Military Commissions ("RMC") likewise set out these two alternative routes for designating the accused as an "unlawful enemy combatant." *See* RMC 103(a)(24).

g. In other words, Congress unequivocally provided that an accused may be determined to be an unlawful enemy combatant either (i) though a factual showing to the Military Commission that the accused has "engaged in hostilities or purposefully and materially supported hostilities" or, in the current conflict, is part of the Taliban, al Qaeda or associated forces, or (ii) through a showing of the fact of an administrative determination of such status by a CSRT or "other competent tribunal." The statutory word "or" makes sense only if the Military Judge has the ability to make a determination of jurisdiction based on a showing of fact by the Prosecution, in the absence of a determination by an administrative tribunal.

h. The importance of the first method of establishing Military Commission jurisdiction is shown by the fact that the MCA is not limited to the detainees at Guantanamo who have received CSRT hearings. Rather, the Military Commission scheme created by that statute covers all

aliens who meet the definition set out in subsection (i) of 948a(1).[21] The Secretary of Defense recognized this point in the official notes to the Commission Rules, stating that [t]he MCA does not require that an individual receive a status determination by a CSRT or other competent tribunal before the beginning of a military commission proceeding. *See* RMC 202(b). In such cases, if the Commission's jurisdiction is challenged, the Military Judge must render a ruling on whether the accused, as a threshold matter, meets the subsection (i) definition. *Id.*[24]

i. Thus, Military Judges, acting for the Commission, can at the outset render a determination whether the Prosecutor's submissions establish the facts to meet the subsection (i) definition. The dismissal order in this case did not address this point, although the Military Judge did suggest that the Commission could not review such evidence because to do so would be to exercise jurisdiction before jurisdiction has been established. (The Military Judge discussed this point in the context of determining if the Military Commission could serve as a "competent tribunal" under the second subsection of section 948a(1).) As the Commission Rules explain, however, [a] military commission always has jurisdiction to determine whether it has jurisdiction. RMC 201(b)(3).

j. Even if the Military Judge were to conclude he lacks authority to make this determination under the definition in section 948a(1)(A)(i), the Commission clearly is a "competent tribunal" within the meaning of the MCA and thus may make this determination under section 948a(1)(A)(ii)[25] Accordingly, whether or not the CSRT determination sufficed to establish jurisdiction, the Military Judge was not authorized to dismiss the charges without more. Instead, the Military Judge was required by section 948a(1)(A)(i) to hear evidence from the Prosecution either under subsection (i) of that section, or under subsection (ii) as a "competent tribunal."

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[21] During hearings on the MCA Senator Jon Kyl noted that critics argued CSRTs should be required for all future detainees in all future wars. "What is now given as a matter of executive grace, they contend, should be transformed into a legislative mandate," he said. 152 Cong. Rec. S10270, Sep. 27, 2006.

[24] The June 4 opinion did not address fundamental features of the statute's text and structure, and reconsideration should be granted for the Military Judge to do so. The interpretation underlying the dismissal is also squarely inconsistent with that adopted by the Secretary of Defense in the Manual for Military Commissions. As we explain below, because the MCA has been interpreted to permit the Military Judge to determine the Commission's jurisdiction by the agency charged by Congress to implement the statute, this interpretation may be overruled only if it is plainly contrary to the text of the statute or unreasonable. *See infra.*

[25] Hamdan v. Rumsfeld, 415 F.3d 33, 43 (D.C. Cir. 2005), rev'd on other grds, 126 S.Ct. 2749 (2006). "We therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive the judgment of a "competent tribunal" within the meaning of Army Regulation 190-8."

k. In this way, the decision of a Combatant Status Review Tribunal, or of "another competent tribunal," serves as a safe harbor for establishing the jurisdiction of the Commission. That the Commission could directly determine its jurisdiction is crucial to the structure of the Act, which was designed to govern the trial of war criminals not only in the current armed conflict with al Qaeda but also in future armed conflicts in which Combatant Status Review Tribunals might not be held. *See* 152 Cong. Rec. S10354-02, S10403 (Sept. 28, 2006) (statement of Sen. Cornyn) (discussing the premise of the MCA that "we do not want to force the military to hold CSRT hearings forever, or in all future wars");152 Cong. Rec. 10243-01, S10268 (Sept. 27, 2006) (statement of Sen. Kyl) (same).

l. The Military Judge's reason for failing to make the appropriate jurisdictional finding himself – that he would be taking evidence even though jurisdiction had not yet been established – is contrary to accepted legal practice in the American system of law. It is perfectly normal for a court or tribunal to exercise jurisdiction in order first to determine its own jurisdiction. *See Cargill Ferrous Intern. v. SEA PHOENIX MV*, 325 F.3d 695, 704 (5th Cir. 2003) (A bedrock principle of federal courts is that they have jurisdiction to determine jurisdiction); *Nestor v. Hershey*, 425 F.2d 504 (D.C. Cir. 1969) (we always have jurisdiction to determine our jurisdiction). *See also United States v. Mine Workers*, 330 U.S. 258, 291 (1947); *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006); and *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) ("When an accused contests personal jurisdiction on appeal, we review that question of law de novo, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record."). In the federal court system, facts are often critical to establishing or removing jurisdiction. In civil cases, whether examining jurisdiction *sua sponte* or in adjudicating a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a court may rely on the facts as pled by the plaintiff or may consider and weigh evidence outside the pleadings to determine if it has jurisdiction." *Gould Electronics Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). Similarly, courts in civil cases render factual findings to determine whether the facts oust the courts jurisdiction. *See, e.g., Argaw v. Ashcroft*, 395 F.3d 521, 523 (4th Cir.2005) ("We have jurisdiction, however, to determine whether the facts that would deprive us of jurisdiction are present."). Courts in criminal cases similarly examine factual submissions to determine whether the court may exercise criminal jurisdiction over an accused. *See, e.g., United States v. Anderson*, 472 F.3d 662, 666-67 (9th Cir. 2006). Likewise, here, the Military Judge can determine personal jurisdiction over the accused based on the facts set forth by the Prosecution.

m. The facts alleged against the accused as set forth above (and the exhibits supporting those facts attached hereto) are more than sufficient to demonstrate that the accused meets the subsection (1) definition, or alternatively meets the subsection (2) definition if the Military Commission were acting as a competent tribunal. If the Military Judge would prefer, the Prosecution was and remains fully prepared to present evidence that would clearly establish jurisdiction over the accused. Specifically, the Prosecution was ready to play a videotape found at the site of the accused's capture in Afghanistan showing the accused, in civilian attire, constructing and placing improvised explosive devices. Additionally, the Prosecution was prepared to admit numerous statements from the accused admitting his involvement with al Qaeda and his terrorist activities. Specifically the accused has admitted to receiving training

from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. The accused has admitted that following that training, he received an additional month of training on landmines, then joined a group of al Qaeda operatives, and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation. He also has admitted conducting surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan, and planting improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling. Additionally, the accused has admitted throwing a grenade that killed Sergeant First Class Christopher Speer. Finally, a member of the U.S. armed forces provided a first-hand account of the fire fight and capture of the accused. These facts are more than sufficient to allow the Commission sitting together, or the Military Judge sitting alone, to hold that Khadr satisfies the MCA's definition of unlawful enemy combatant and thereby establish jurisdiction over the accused.

The Military Judge should also reconsider the ruling that personal jurisdiction over the accused here is not sufficiently established based upon the CSRT determination that the accused is an enemy combatant.

n. In enacting MCA section 948a(1)(ii), Congress understood that CSRT determinations made "before" the date of enactment of the MCA would satisfy the Act's requirements and would permit a detainee found to be an unlawful enemy combatant to be charged before a military commission, even though the CSRTs did not employ the definition set out in section 948a(1)(i).

o. The CSRT process does not render formal unlawful enemy combatant determinations. Rather, the determination of the CSRT is whether the alien detainee was properly classified as an enemy combatant. The CSRT process allows the detainee to contest his designation as an enemy combatant, which is defined for the purpose of the CSRT process, as:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

p. The definition of enemy combatant employed by the CSRT extends only to individuals who are part of or supporting unlawful military organizations, namely, Taliban or al Qaeda forces, or associated forces. On February 7, 2002, the President determined that members of al Qaeda and the Taliban were not lawful combatants. Congress was well aware of that fact, and recognized in enacting section 948a(1)(ii) that a finding by the CSRT process that an individual is an enemy combatant, given the Presidential determination, is actually a finding that the individual is an unlawful enemy combatant under the law of war. *See* Manual for Military Commissions, Rule for Military Commissions 202 discussion note reference (b). Congress likewise recognized in section 948a(1)(A)(i) that a person who was "part of the Taliban, al Qaeda, or associated forces" was an unlawful enemy combatant. Congress's incorporation of the President's interpretation is not surprising: It is beyond dispute that the terrorist organization

responsible for the deaths of nearly 3000 Americans on September 11th is engaged in hostilities that are unlawful.[26]

q. Moreover, Congress was aware of the CSRT definition when it enacted the MCA and nonetheless expressly provided that the CSRT determination would render a detainee an "unlawful enemy combatant" under section 948a(1)(A)(ii). Under the Detainee Treatment Act of 2005 ("DTA"), the Secretary of Defense was required to and did report the CSRT procedures to Congress, three months before the enactment of the Military Commissions Act. *See* DTA § 1005(a)(1)(A). Nevertheless, Congress deemed those historical CSRT determinations sufficient to establish Military Commission jurisdiction. If the Military Judge's interpretation of the statute were correct, Congress's inclusion of CSRT determinations "before [or] on . . . the date of the enactment of the Military Commissions Act of 2006" would be a nullity. As the Supreme Court has recognized, to "read" a term "out of the statute . . . would violate basic principles of statutory interpretation." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995). To claim that CSRT determinations under the existing and known "enemy combatant" standard—to which a large and essentially closed class of detainees were subject at the time of the MCA's enactment—do not establish Military Commission jurisdiction would be to render section 948a(1)(A)(ii) of the statute wholly inexplicable. There is no evidence that Congress expected the Department of Defense to conduct new CSRTs, or hold new hearings before other tribunals, for each and every member of al Qaeda charged with a war crime. Thus, the CSRT determination that an individual is an "enemy combatant," should constitute a determination that the individual is an unlawful enemy combatant for purposes of 10 U.S.C. § 948a(1)(A)(ii).

r. There is another independent ground for reconsideration. The Manual for Military Commissions—containing rules and procedures governing this Commission issued by the Secretary of Defense—adopted this interpretation of the statute. The Manual analyzed the Combatant Status Review Tribunal standard at the time of the MCA's enactment and provided that, due to the prior determination of the United States "that members of al Qaeda and the Taliban are unlawful combatants," CSRT decisions before the MCA's enactment would suffice to establish jurisdiction. *See* Manual for Military Commissions, Rule for Military Commissions 202 discussion note reference (b).[28] The Manual is an authoritative interpretation of the MCA, by the agency that Congress charged with its implementation, issued in the manner specified by

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[26] The President's 7 February 2002 order, incorporated into the statutory scheme by Congress, provides an explanation for Congress's use of the term "unlawful" in the statute—contrary to any possible claim that the Government's interpretation reads the term "unlawful" out of the statute. Indeed, the reasoning of the 4 June opinion suggests that Khadr could meet the definition of "lawful combatant" in the MCA. *See* 10 U.S.C. § 948(a)(2). The President's order makes clear that he cannot; and no one has suggested to the contrary.

[28] "Military commissions may try any offense under the M.C.A. or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001. 10 U.S.C. § 948d (a); R.M.C. 203. A Combatant Status Review Tribunal determined on September 7, 2004, that Khadr is an enemy combatant and a member of or affiliated with al Qaeda. The M.C.A. defines such persons as unlawful enemy combatants. 10 U.S.C. § 948a(1).

that statute. *See* 10 U.S.C. § 949a(a) (authorizing the Secretary of Defense to issue rules and procedures for military commissions under the MCA). As such, that interpretation is entitled to deference by the Commission; the interpretation may be set aside only if it is plainly contrary to the statute or unreasonable. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *see also See Nat'l Cable & Telecomms. Ass'n v. Brand X*, 545 U.S. 967, 980-81 (2005) (*Chevron* applies where Congress delegated to the agency the authority to "prescribe such rules and regulations as may be necessary" to carry out a certain statute, and where the agency exercised its authority). The Military Judge's opinion, however, did not address the Manual's resolution of this question, and did not evaluate it under the required legal standard. The Commission should grant reconsideration, at a minimum, to apply the correct legal standard.

s. In sum, in the accused's CSRT of 7 September 2004, the tribunal found that he was a member of al Qaeda. There can be no doubt, based on a careful reading of his CSRT record, coupled with the President's determination that all al Qaeda operatives are unlawful enemy combatants, and the Secretary of Defense's determination in the MMC, that the accused is an unlawful enemy combatant and satisfies the jurisdictional requirements of the MCA.

7. **Oral argument**. The Prosecution does not request oral argument; however the Prosecution recognizes that the Military Judge may wish oral argument, given that the foregoing constitutes the first briefing he has received on this important matter.

8. **Witnesses**. None.

9. **Certificate of conference**. Not applicable.

10. **Additional information**. None.

11. **Attachments**.

a. The Prosecution offers the following attachments in support of the Motion to Reconsider:

(1) DVD copy of video of accused manufacturing and emplacing Improvised Explosive Devices, seized from site of accused's capture in a compound in the village of Ayub Kheil, near Khowst, Afghanistan.

(2) CITF Form 40, Subject Interview of the accused, 28 October 2002.

(3) CITF Form 40, Subject Interview of accused, 4 December 2002.

(4) CITF Form 40, Subject Interview of Major ____, 20 April 2004.[29]

(5) CITF Form 40, Subject Interview of accused, 3 December 2002.

[29] The subject of the interview is intentionally withheld. It appears in the attachment. Please note that that document should not be released without redacting protected information.

(6) Agent's Investigation Report ("AIR"), Interview of accused, 17 September 2002.

(7) AIR Interview of accused, 5 November 2002.

(8) CITF Form 40, Interview of the accused on 6 December 2002.

(9) CITF Form 40, Interview of the accused on 16 December 2002.

12. **Submitted by**:

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