UNITED STATES OF AMERICA	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	
	)	
	)	BRIEF ON BEHALF OF APPELLANT
	)	
	)	CASE No. 00000001
	)	
v.	)	Tried at Guantanamo Bay, Cuba on 4 June 2007
	)	
	)	Before a Military Commission
OMAR AHMED KHADR	)	Convened by MCCO # 07-02
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	Presiding Military Judge
a/k/a "Ahmed Muhammed Khali"	)	Colonel Peter E. Brownback III

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DISMISSING ALL CHARGES AND SPECIFICATIONS FOR LACK OF PERSONAL JURISDICTION OVER THE ACCUSED AND IN HIS SUBSEQUENT DENIAL OF THE PROSECUTION MOTION TO RECONSIDER HIS RULING.

Statement of Statutory Jurisdiction

This appeal is filed in accordance with 10 U.S.C. Sec. 950d(a)(1) and R.M.C. 908(a)(1) in that the Military Judge's 4 June 2007 order and his 29 June 2007 ruling on the Government's Motion for Reconsideration terminated the proceedings of the *Khadr* military commission with respect to all charges and specifications in the case.[1]

[1] The appeal from the 4 June 2007 ruling is timely; the issue was not ripe for appellate adjudication while the Government's Motion for Reconsideration was pending before the Military Judge. *See* U.S. v. Ibarra, 502 U.S. 1, 112 S. Ct. 4 (1991).

Table of Cited Authorities

c. 10 U.S.C. § 948a(2)

d. 10 U.S.C. § 949a(a)

e. 10 U.S.C. §948d

f. 10 U.S.C. § 950d(a)(2)(A)

20. Federal Rules of Civil Procedure, Rule 12(b)(1)

21. Rules for Military Commission (R.M.C.)

Rules cited:

a. R.M.C. 103(24)

b. R.M.C. 202(b)

c. R.M.C. 802

d. R.M.C. 905

f. R.M.C. 905(c)(l)

g. R.M.C. 905(c)(2)(B)

h. R.M.C. 908(a)(1)

22. Deputy Secretary of Defense Memorandum, Order Establishing Combatant Status Review Tribunal, 7 July 2004

23. *The 9/11 Commission Report*, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, pgs. 4-14 (2004).

24. White House Memorandum, 7 February 2002

25. 152 Cong. Rec. S 10405 (Sept. 28, 2006)

26. 152 Cong. Rec. H7544 (Sept. 27, 2006)

27. 152 Cong. Rec. S10354-02, S10403 (Sept. 28, 2006)

28. 152 Cong. Rec. S10243-01, S10268 (Sept. 27, 2006)

Statement of the Case

a. 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. The charges were referred for trial by military commission on 24 April 2007.

b. On 25 April 2007, the Military Judge notified the parties in the case that an arraignment would be held on 7 May 2007.

c. At the request of the Defense, the Military Judge approved a continuance until 4 June 2007 and scheduled an RMC 802 session for 1800 on 3 June 2007. The RMC 802 was held at approximately 2000 on 3 June 2007.

d. During the RMC 802 session the Military Judge raised concerns over the fact that a Combatant Status Review Tribunal (CSRT) determined that the accused was an "enemy combatant" as opposed to an "unlawful enemy combatant", the language used in the Military Commission Act. The Military Judge then advised the Government that he would like to discuss those concerns with the Prosecution on the record during the session scheduled for the following morning.

e. On 4 June 2007, an RMC 803 session was held where the Government presented argument regarding jurisdiction over the accused. The Court recessed at 1113. Following a 22 minute recess, the Military Judge returned and issued his ruling, dismissing all charges and specifications without prejudice.

f. On 8 June 2007, the Government filed a Motion for Reconsideration.

g. On 29 June 2007, the Military Judge issued P001, entitled Disposition of Prosecution Motion for Reconsideration, denying the Government's request for reconsideration.

Statement of 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]

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.

[2] Criminal Investigative Task Force Report of Investigative Activity ("CITF Form 40"), Subject Interview of accused, 28 October 2002 (AE 017, Attachment 2).
[3] *The 9/11 Commission Report*, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, pgs. 4-14 (2004).
[4] White House Memorandum, 7 February 2002.
[5] CITF Form 40, Subject Interview of accused, 4 December 2002 (AE 017, Attachment 3).

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, U.S. Army.[10] American forces then shot and wounded the accused, and after his capture, American medics administered life saving medical treatment to the accused.[11]

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

[6] CITF Form 40, Subject Interview of Major Watt, 20 April 2004 (AE 017, Attachment 4).
[7] CITF Form 40, Subject Interview of accused, 3 December 2002 (AE 017, Attachment 5).
[8] *Id.*
[9] *Id.*
[10] Agent's Investigation Report ("AIR"), ROI No. T-157, Interview of accused, 17 September 2002 (AE 017, Attachment 6).
[11] CITF Form 40, Subject Interview with Major ____, 20 April 2004 (AE 017, Attachment 4) (Protected information withheld).

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]

[12] *See* AE 017, 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). *See also* AIR Interview of accused, 5 November 2002 (AE 017, Attachment 7).
[13] AIR Interview of accused, 5 November 2002 (AE 017, Attachment 7).
[14] AIR Interview of accused, 17 September 2002 (AE 017, Attachment 6).
[15] *Id.*
[16] CITF Form 40, Subject Interview of accused, 4 December 2002 (AE 017, Attachment 3).
[17] CITF Form 40, Interview of the accused, 6 December 2002 (AE 017, Attachment 8).
[18] CITF Form 40, Interview of the accused, 16 December 2002 (AE 017, Attachment 9).

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.

Error and Argument

WHETHER THE MILITARY JUDGE ERRED IN DISMISSING ALL CHARGES AND SPECIFICATIONS FOR LACK OF PERSONAL JURISDICTION OVER THE ACCUSED AND IN HIS SUBSEQUENT DENIAL OF THE PROSECUTION MOTION TO RECONSIDER HIS RULING.

This case presents the first instance of judicial interpretation of the jurisdictional provisions of the Military Commissions Act ("MCA"). 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. The Military Judge's interpretation of the Military Commissions Act in his 4 June 2007 order and subsequently in his 29 June 2007 denial of the Government's Motion for Reconsideration fundamentally upset the careful and comprehensive system for military commissions established by Congress.

The Military Judge's 4 June 2007 and 29 June 2007 rulings, that the Government failed to establish jurisdiction through a prior determination of "unlawful enemy combatant" status by a CSRT or other competent tribunal, are also erroneous. The Military Judge held that Khadr's

[19] *See* AE 011, Unclassified Summary of CSRT proceedings.
[20] *Id.*

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 and denial of reconsideration overlook, 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. 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—was not given the proper deference by the Military Judge.

Furthermore, Section 948a of the MCA unambiguously establishes two separate paths for determining "unlawful enemy combatant" status and thereby Military Commission jurisdiction. The 4 June 2007 order and the 29 June 2007 ruling on the Government Motion to Reconsider fail to adequately address each of these paths. 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 rulings cannot be reconciled with the bifurcated structure of the statute, which the opinions do not address. After the Military Judge determined

that the CSRT determination was not sufficient to establish jurisdiction, dismissing the charges without receiving evidence on the elements of section 948a(1)(A)(i) was contrary to the statute.

The Government argued during the 4 June 2007 hearing that: (1) the CSRT was sufficient to establish jurisdiction; (2) If the Military Judge disagreed, the Military Commission could make the appropriate finding after the Government presents its case in chief; and (3) In the event the Military Judge did not want to proceed absent a determination, the Military Judge himself could hear evidence in order to determine whether jurisdiction over the accused was sufficient to proceed.

a. Personal jurisdiction over the accused was sufficiently established by the CSRT determination in accused's case.

In enacting MCA section 948a(1)(A)(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)(A)(i).

Admittedly, the CSRT process does not render formal "unlawful enemy combatant" determinations. Rather, the CSRT's determination is whether the alien detainee is 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.[21]

[21] See AE 014, Deputy Secretary of Defense Memorandum establishing CSRT process, 7 July 2004.

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 7 February 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)(A)(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.[22] *See* RMC 202(b) discussion note reference.

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

[22] The legislative history demonstrates that Members of Congress were aware that they were making such a categorical determination. *See, e.g.*, 152 Cong. Rec. S 10405 (Sept. 28,2006) (Sen. Sessions) (quoting testimony of former Attorney General William P. Barr, which the Senator commended as "inform[ing] our understanding of the history, law, and practical reality of the DTA and the MCA," as follows: "The threshold determination in deciding whether the [Geneva] Convention applies is a 'group' decision, not an individualized decision. The question is whether the military formation to which the detainee belonged was covered by the Convention. This requires that the military force be that of a signatory power and that it also comply with the basic requirements of Article 4 of the Treaty, *e.g.*, the militia must wear distinguishing uniforms, retain a military command structure, and so forth. Here, the President determined that neither al-Qaeda nor Taliban forces qualified under the Treaty. "); 152 Cong. Rec. H7544 (Sept. 27,2006) (Rep. Sensenbrenner) ("The bill creates a fair and orderly process to detain and prosecute a1 Qaeda members and other dangerous terrorists captured during the war on terror").

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).

Both Article 4 of the Geneva Convention and the definition of lawful combatant in the MCA make clear that the question of lawful versus unlawful combatancy is a question about the characteristics of the organization of which the accused is a "member," not the accused himself. *See* 10 U.S.C. § 948a(2) (in defining "lawful enemy combatant," asking exclusively whether the person *"is a member"* of certain types of "regular forces" or of a "militia, volunteer corps, or organized resistance movement" that bears certain characteristics) (emphasis added); Third Geneva Convention Art. 4(A)(2) (once determining that a person is a member of an organization, making lawful combatancy, and prisoner of war protection, depend on whether "such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions-including responsible command, wearing uniforms and conducting their operations in accordance with the laws of war").

In any event, the President's determination was that al Qaeda did not remotely meet the requirements of lawful combatancy. As the Government explained in its motion for

reconsideration,[23] the President "accept[ed] the legal conclusion of the Department of Justice" that members of al Qaeda do not qualify for the protections afforded by the Third Geneva Convention because, among other reasons, "al Qaeda members have clearly demonstrated that they will not follow the basic requirements of lawful warfare."[24]

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.[25]

Furthermore, 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 CSRT 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* RMC 202(b) discussion note reference.[26] The Manual is an authoritative interpretation of the MCA, by the agency that Congress charged with its implementation, issued in the manner specified by the MCA. *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*

[23] AE 017, at 7.
[24] Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Assistant Attorney General, Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees at 10 (22 January 2002).
[25] The White House Memorandum of 7 February 2002, 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 June 4 opinion suggests that Khadr could meet the definition of "lawful combatant" in the MCA. *See* 10 U.S.C. § 948(a)(2).
[26] The Manual for Military Commissions was not the only entity to reach this conclusion. The Convening Authority and Legal Adviser also determined that the military commission had jurisdiction over Khadr in this case: [QUOTE Paragraph c from the Pretrial Advice of Legal Adviser].

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 context of the MCA is crucial here. As of the MCA's enactment, hundreds of detainees held at Guantanamo had received CSRT determinations. The fourteen detainees at Guantanamo who had not, those transferred there only one month earlier, were put in line for the same process. The CSRT process had always focused on the degree of an individual's association with a1 Qaeda or the Taliban, made against the background determination that these groups are unlawful and their members are not entitled to prisoner of war protection. Congress had embraced existing CSRT procedures in the Detainee Treatment Act of 2005, and formal CSRT rules were reported to Congress just three months before the MCA's enactment.

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.

b. The Commission is a competent tribunal for purposes of establishing jurisdiction under the MCA.

During the 4 June 2007 hearing, the Government argued that in the event the Military Judge determined that the CSRT was not sufficient to establish jurisdiction, the Military Commission itself could determine jurisdiction during the trial. The Military Judge ruled that "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."[27]

Even assuming the Military Judge lacks authority to make an independent jurisdictional determination under section 948a(1)(A), the Commission clearly is a "competent tribunal" within the meaning of the MCA and thus may make this determination under section 948a(2). Accordingly, whether or not the CSRT determination sufficed to establish jurisdiction, the Military Judge was not authorized to dismiss the charges without more.

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).

The Military Commission scheme created by the MCA also covers all aliens who meet the definition set out in subsection (i) of 948a(1)(A). The Secretary of Defense recognized this point in the official notes to the Commission Rules, stating that "[t]he M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding." *See* RMC 202(b) discussion note reference (emphasis added).

The Military Judge erred by dismissing the charges before allowing the Government to proceed and present evidence to the Military Commission in order for the Commission to make a determination whether the accused is an unlawful enemy combatant.

[27] *See* U.S. v. Khadr, ROT, p. 19.

c. The Military Judge has authority to determine jurisdiction over the accused.

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, or legislative history of the MCA.

The Military Judge's 29 June 2007 ruling similarly fails to address the Government argument that the Military Judge alone can make a determination whether the Military Commission has jurisdiction over the accused. In that ruling the Military Judge focuses his denial to hear evidence on the fact that he is not a "competent tribunal."[28] As the Government Motion to Reconsider stated, the Military Judge need not act as a "competent tribunal" when ruling on a pre-trial jurisdictional challenge. The MCA and MMC clearly provide the Military Judge the authority to hear evidence to decide a jurisdictional challenge and the Military Judge erred in failing to rely upon the authority that is exercised daily in courts throughout the United States.

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 MCA. The MCA 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

[28] *See* AE 023, Disposition of Prosecution Motion to Reconsider, U.S. v. Khadr, 29 June 2007, p. 4.

forces)." 10 U.S.C. § 948a(1)(A)(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." *Id.* § 948a(1)(A)(ii).

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 establishing an accused's "unlawful enemy combatant" status. *See* RMC 103(24).

In other words, Congress unequivocally provided that the accused's status as an unlawful enemy combatant may be determined either as a matter of fact if he has "engaged in hostilities or purposefully and materially supported hostilities," or if he has been determined to be such a person 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 the prior administrative tribunal; in this instance, the CSRT. As stated above, the MCA does not require a CSRT determination in order to establish jurisdiction. *See* RMC 202(b) discussion reference note. 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.[29]

Thus, Military Judges, acting for the Commission, can, pre-trial, determine whether the Prosecutor's evidentiary submissions establish the facts to meet the subsection (i) definition. The

[29] The opinion did not address fundamental features of the statute's text and structure. 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 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.

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)(A)). As the Commission Rules explain, however, "[a] military commission always has jurisdiction to determine whether it has jurisdiction." RMC 201(b)(3).

A Military Judge finding facts that establish military commission jurisdiction is expressly contemplated by RMC 905. Rule 905 provides that the Prosecution will bear "the burden of persuasion" on "a motion to dismiss for lack of jurisdiction" and that "the burden of proof on any factual issue the resolution of which is necessary to decide [such] a motion shall be by a preponderance of the evidence." RMC 905(c)(l), (c)(2)(B). Not a new creation for military commissions, Rule 905 has a long history in general courts martial and, as such, holds a privileged position under the MCA. *See* 10 U.S.C. Sec. 949a(a) (directing the Secretary of Defense to adopt procedures for military commissions that, "so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts martial"). Under this rule, Military Judges in courts martial, for decades, have found jurisdictional facts, in response to motions to dismiss, by a preponderance of the evidence. As a general matter, personal jurisdiction over a criminal accused is a question of law that military judges decide and support with findings of fact.

In the court-martial system, jurisdiction is established through allegations by the Government, and military judges consider challenges to those allegations through motions to dismiss for lack of jurisdiction; they conduct hearings on such motions, take evidence, and make

findings of fact and conclusions of law. *See, e.g., United States v. Ernest*, 32 M.J. 135, 136-37 (C.M.A. 1991) (listing twenty-four findings of fact made by the trial court in determining whether to grant accused's motion to dismiss for lack of personal jurisdiction); *United States v. Cline*, 26 M.J. 1005, 1007 (A.F.C.M.R. 1988) (finding that an analysis of the facts is required to resolve the personal jurisdiction issue), and *United States v. Cline*, 29 M.J. 83 (CMA 1989). In *United States v. Cline*, 1987 C.M.R. LEXIS 8 19 (A.F.C.M.R. 1987), for example, the appellate court made this principle clear, by returning a case to the trial court because the personal jurisdiction issue was "not adequately developed in the record." The court set out a list of questions for the trial judge to answer and directed him to make "specific findings of fact as to jurisdiction over the accused."

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. 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."); *See also United States v. Engle*, 2006 CCA LEXIS 115, at *7-8 (A.F. Ct. Crim. App. 2006) (quoting *Melanson*).

The Military Judge erroneously stated in the 29 June 2007 ruling that he offered the Government the opportunity to present evidence. The record clearly demonstrates otherwise. At the hearing, the Government stated:

> The government will produce a video showing Omar Khadr engaged in unlawful combat activities including wearing civilian attire and making and planting roadside bombs. The government is prepared to call Special Agent Chris Dillard, who will sponsor admissions by the accused and statements taken by others that the accused is an unlawful enemy combatant.[30]

The Military Judge did not consider the Government's offer to introduce evidence, contrary to the Military Judge's ruling of 29 June 2007.[31] At the hearing, the Military Judge asked Government counsel, "Anything else you want to say about that?"[32]

[30] U.S. v. Khadr, ROT p. 12, line 17-22.
[31] Disposition of Prosecution Motion for Reconsideration, U.S. v. Khadr, 29 June 2007, p. 3.

It was clear at the hearing, as it is now, that the Military Judge was asking if the Government had further oral argument on the issue of presenting evidence, not that it was appropriate for counsel to begin introducing evidence. Furthermore, when the Military Judge asked trial counsel, "Anything further before I adjourn trial?" – he was not inviting the Government to introduce evidence.[33] At no point did the Military Judge entertain the Government's request to produce evidence. The order of 4 June 2007 and the 29 June 2007 ruling clearly reflect that the Military Judge had no intention of admitting evidence, as he did not consider himself the proper body before which such evidence could be introduced for purposes of jurisdiction.

The evidence proffered by the Government (and the exhibits supporting those facts attached hereto) are more than sufficient to demonstrate that the accused meets the subsection (i) definition, or alternatively meets the subsection (ii) definition if the Military Commission were acting as a competent tribunal.

The Government was and remains fully prepared to present evidence that would clearly establish jurisdiction over the accused. Specifically, the Government 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 Government 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

[32] U.S. v. Khadr, ROT, p. 15, line 23.
[33] U.S. v. Khadr, ROT, p. 22, line 14.

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, U.S. Army. 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.

Prayer for Relief

The Government respectfully requests this Honorable Court grant this appeal and remand the case to the trial court for hearings consistent with this Court's opinion.

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CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This brief complies with the type-volume limitation of Rule 14(i) because:

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Dated: 4 July 2007

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to Lieutenant Commander William Kuebler on the 4th day of July 2007.

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