

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

**Defense Motion**

Requesting the Military Commission Order  
a New Inquiry Into the Mental Health of  
the Accused

7 July 2009

- 1. Timeliness:** This motion for appropriate relief is filed in a timely manner in accordance with Rule for Military Commission (R.M.C.) 706(b)(2).
- 2. Relief Requested:** Detailed defense counsel for Mr. Mohammed Kamin<sup>1</sup> respectfully request the Military Commission order a new inquiry into the mental health of Mr. Kamin pursuant to R.M.C. 706(b)(2).
- 3. Overview:** The previous Board convened on 30 September through 2 October 2008 was not conducted in accordance with R.M.C. 706 or the 10 September 2008 Commission order. As such, its findings are insufficient and a new board that complies with R.M.C. 706 is required. Principles of fundamental fairness require a new examination.
- 4. Burdens of Proof and Persuasion:** As the moving party, the defense bears the burden of proof on any question of fact. This burden is met by a showing of a preponderance of evidence. *See* R.M.C. 905(c).
- 5. Facts:**

a. On 11 March 2008, charges were sworn against Mr. Kamin. Those charges were referred to a Military Commission on 4 April 2008. Mr. Kamin was arraigned on on the charges on 21 May 2008.

b. On 29 August 2008, detailed counsel for Mr. Kamin filed D-008, a motion requesting an inquiry into the mental health of Mr. Kamin in accordance with R.M.C. 706. In that request, counsel detailed personal observations of Mr. Kamin, court-room

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<sup>1</sup> Detailed defense counsel file this Motion solely under the authority provided by the Commission on 21 May 2008 that detailed defense counsel shall represent the accused in this case and engage in the discovery process. The Commission ordered detailed defense counsel (Lt. Federico) to represent Mr. Kamin because "the statute requires it" and because "discovery issues and all of the information that would be necessary for you to get your defense rolling." *See Transcript of Hearing ICO United States v. Kamin*, May 21, 2008 (Draft), pg. 42. CPT West was detailed to the case on 29 January 2009 and acts under this same authority. Lacking authority from Mr. Kamin to do anything in his defense, detailed defense counsel concur that they can, and will, ethically engage in the discovery process to be prepared if, in the future, Mr. Kamin were to allow detailed defense counsel to fully represent him.

demeanor, refusal to meet with counsel, BSCT records, and confinement history to establish a good faith basis to request a mental health examination. *See* D-008.

c. On 10 September 2008, the Military Commission granted the defense request for an inquiry. (Attachment A).

d. On 30 September and 1 October 2008, a clinical psychologist and a forensic psychiatrist requested to meet with Mr. Kamin. *See Transcript of Hearing ICO United States v. Kamin*, 23 October 2008 (Draft), pg. 185. Mr. Kamin refused those visits, and JTF-GTMO did not allow the doctors to proceed to Mr. Kamin's cell or to directly observe him in some other forum. *Id.* The sources of information the Board considered for their inquiry included certain medical records, [REDACTED] records from 2005-2008, the Commission's 10 September 2008 Order for Inquiry, certain interrogator notes dated May to August 2003, discussions with defense counsel on 30 September 2008 and 1 October 2008, the defense motion for the Inquiry dated 29 August 2008, the Transcript of the Commission hearing dated 21 May 2008, and approximately 60 letters between Mr. Kamin and his family. *See* Redacted Part II Report of the R.M.C. 706 Board, dated October 3, 2008, filed as Appellate Exhibit 23.

e. The R.M.C. 706 Board did not observe Mr. Kamin by video or through the cell block, nor did the Board speak with Mr. Kamin. *See Transcript of Hearing ICO United States v. Kamin*, 23 October 2008 (Draft), pg. 185. The only person interviewed by the Board was detailed defense counsel. *Id.* No review of the medical records from Bagram, where Mr. Kamin was detained for 16 months, was conducted. *Id.* at p. 186. No review of the videotapes of Mr. Kamin's interrogation, movements, recreation, or in his cell was conducted. *Id.* No interviews of the guards, interpreters, or other detainees were conducted. *Id.* at pp. 186-187.

f. On 3 October 2008, the final report was drafted and shortly thereafter was provided to the defense.

## 6. Law and Argument

### **THE INQUIRY INTO THE MENTAL CAPACITY OF MR. KAMIN WAS NOT CONDUCTED IN ACCORDANCE WITH R.M.C. 706 OR THE COMMISSION'S ORDER DATED 10 SEPTEMBER 2008.**

An inquiry into the mental health of an accused is controlled by R.M.C. 706 and the Commission's order dated 10 September 2008. The inquiry actually conducted from 30 September through 2 October 2008 falls far short of the standard enunciated in the Rules and the Commission's order. Both the visitation procedures employed by JTF-GTMO toward the Board, and the limited inquiry of the Board itself, contributed to this inadequate inquiry.

The visitation procedures employed by JTF-GTMO for 706 Board interviews and defense counsel visits are the same: a detainee may refuse the visit, after which a refusal note may be taken back by JTF-GTMO staff. Neither the Board, defense counsel, nor the defense interpreter may accompany JTF-GTMO staff back to the detainee's cell. *See* D-

06, 31 July 2008 Defense Motion to Compel Cellblock Access, denied by the Commission on 6 August 2008. A defense request dated 15 June 2009 to coordinate temporary transfer of Mr. Kamin to [REDACTED] some other meeting area where defense counsel could speak with Mr. Kamin was denied by JTF-GTMO on 29 June 2009 as misleading to Mr. Kamin. (Attachment B) A procedure similar to that proposed in the defense request to JTF-GTMO employed for the R.M.C. 706 Board to view and speak with Mr. Kamin would greatly facilitate the Board's inquiry. An example of a judicial order signed by Judge Sullivan of the U.S. District Court for the District of Columbia requiring such access at JTF-GTMO is enclosed as Attachment C.

The second limitation of the past Board's inquiry involves errors of omission. Admittedly JTF-GTMO rules limited the Board's direct access to Mr. Kamin, but the Board neglected to access videotapes of Mr. Kamin [REDACTED] of his interrogations, [REDACTED]. See *Transcript of Hearing ICO United States v. Kamin*, 23 October 2008 (Draft), pp. 185-187. No guards, interpreters, or other detainees were interviewed. *Id.* In sum, the limited access provided to and sought out by the Board made a clinical psychiatric diagnosis of Mr. Kamin and the Board's findings in Part 1 of the R.M.C. 706 Report dated 3 October 2008 unsupportable.

### **FUNDAMENTAL FAIRNESS REQUIRES A NEW INQUIRY**

An individual may not be tried in a criminal case unless he is competent. *See Pate v. Robinson*, 383 U.S. 375, 378 (1966). Now that the issue of Mr. Kamin's competency has been raised, due process requires that the Military Commission proceed accurately in the evaluation of Mr. Kamin's competence. *Id.* at 385. Failure to do so violates Mr. Kamin's right to a fair trial. *Id.* See generally U.S. CONST. amend, V (protecting due process rights) and R.M.C. 102 and MCRE 102 (providing for the "just determination of every proceeding" and "fairness in administration.")

Ultimately, "proceedings must not only be fair, they must appear fair to all who observe them." *Indiana v. Edwards*, 128 S.Ct. 2379, 2387 (2008); quoting *Wheat v. United States*, 108 S.Ct. 1692 (1988). Failure to provide Mr. Kamin with a mental health evaluation that properly conforms to R.M.C. 706 violates his rights to a fair trial. The Commission's order of a new R.M.C. 706 Board with the access language recommended in the proposed order will meet these constitutional standards.

**7. Oral Argument:** The defense requests oral argument.

**8. Request for Witnesses:** Witnesses are not requested at this time. However, the nature of the possible defense reply could necessitate the addition of witnesses. If that is the case, counsel will provide a request at that time.

**9. Certificate of Conference:** The government does not oppose a new R.M.C. 706 Board. Specifics of the terms of access in the proposed order were not discussed with the government.

**10. Additional Information:** "The Military Judge has the sole authority to determine whether or not any given matter shall be released." See RC 3.9.c; see also R.M.C. 801;

Reg. ¶¶ 19-5, 19-6. The Commission should seek to strike a balance of protecting Mr. Kamin's right to a fair trial, the improper or unwarranted publicity pertaining to the case, and the public understanding of the Military Commissions. *See* Reg. ¶ 19-1. The release of pleadings and rulings is essential for the public, writ large, to be able to assess and evaluate the legitimacy of United States judicial proceedings being held on a military base overseas and in a fortified courtroom. At a minimum, providing the public the opportunity to read and evaluate the pleadings and rulings would contribute to Mr. Kamin being able to have a "public trial." *See* U.S. Constitution, Sixth Amendment. This is especially true of the present motion as the sole basis for the continuance sought by the government is the "interests of justice." The defense hereby respectfully requests that the Military Judge authorize the Assistant Secretary of Defense for Public Affairs (or designee) to release this pleading and any and all responses, replies, and/or rulings under the same designation to the public at the earliest possible date.

## 11. Attachments

- A. Order, Inquiry Into the Mental Capacity of the Accused, dated 10 September 2008.
- B. 29 June 2009 email from [REDACTED], JTF-GTMO, regarding defense request for alternate access to Mr. Kamin.
- C. Mental Inquiry Order signed by Judge Emmet G. Sullivan in *Bin Al-Shibh v. Bush*, 06-CV-1725, dated 16 January 2009, ordering alternate access procedures.
- D. Draft Order for 706 Inquiry.

Respectfully submitted,

By: Richard E.N. Federico

LT RICHARD E.N. FEDERICO, JAGC, USN  
Detailed Defense Counsel for  
Mohammed Kamin Mohammed

By: Clay M. West

CPT CLAY M. WEST, JA, USAR  
Detailed Defense Counsel for  
Kamin

Office of the Chief Defense Counsel  
Office of Military Commissions  
1600 Defense Pentagon,<sup>2</sup> [REDACTED]  
Washington, DC 20301



**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

ORDER

Inquiry Into the Mental Capacity or Mental  
Responsibility of the Accused

10 September 2008

1. The Military Judge orders that an inquiry into the mental capacity of Mohammed Kamin be conducted in accordance with Rule for Military Commission 706 and 909.
2. The Board shall consist of two or more persons who are physicians or clinical psychologists. At least one member of the Board shall be either a psychiatrist or a clinical psychologist. If a Pashto speaking physician or clinical psychologist is reasonably available so that the schedule set forth in paragraph 5 below may be met, he or she will be appointed to the board. Unless a Pashto speaking physician or clinical psychologist is appointed, a Pashto speaking interpreter will be designated by the government to assist the board in its inquiry. Unless ordered by this Commission, this interpreter may not disclose anything learned during the inquiry, except to defense counsel (LT Richard Federico, JAGC, USN). The defense may choose to have its assigned interpreter present when the accused is examined. If the defense assigned interpreter believes an incorrect or incomplete interpretation is made, he may bring this information to the attention of the senior physician at the conclusion of any session of the inquiry. However, the defense assigned interpreter will not participate, in any other manner, in the inquiry.
3. The Board in its evaluation shall make separate and distinct findings as to each of the following questions:
  - (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? If so, what is the clinical diagnosis?
  - (B) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?
  - (C) Is the accused presently suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis?
  - (D) Does the accused have the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well

as a factual understanding of the proceedings against him? If so, does the accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense?

4. The basis for ordering this inquiry is a motion filed by the detailed defense counsel. Examinations and tests shall be conducted, if appropriate and required, to answer the questions set forth in paragraph 3 above. A thorough review of available medical records of the accused shall also be conducted.

5. Compliance with this order shall be as expeditiously as possible consistent with a medically competent and thorough examination to answer the specified questions.


a. Not later than 3 October 2008, the Board shall prepare a summarized report consisting of only the Board's ultimate conclusions as to all questions specified in paragraph 3. This report will be prepared in three copies. The Military Commissions Trial Judiciary Staff, trial counsel and the defense counsel will be telephonically notified when this report is ready for pick-up. At the option of the officer responsible for the summarized report, it may be faxed or e-mailed to the Military Commissions Trial Judiciary Staff, trial counsel, and the defense counsel.

b. Not later than 10 October 2008, the Board shall prepare its full report. This report shall be placed into a sealed envelope and provided only to LT Richard Federico, JAGC, USN. The full report will NOT be faxed or e-mailed unless specifically requested by LT Richard Federico, JAGC, USN.

6. Under no circumstances will the full report, matters considered by the Board during its inquiry, or any statements made by the accused to the board (or evidence derived there from) be disclosed to anyone other than LT Richard Federico, JAGC, USN, without express, written authorization from the military judge or defense counsel.

7. Telephone numbers: Military Commissions Trial Judiciary Staff: [REDACTED] LT Rachel Trest, JAGC, USN, Assistant Trial Counsel: [REDACTED] and LT Richard Federico, JAGC, USN, Defense Counsel: [REDACTED]

Ordered this 10 day of September 2008.



W. Thomas Cumbie  
Colonel, U.S. Air Force  
Military Judge



No Classification Marking in Message Body

West, Clay CPT OSD OMC Defense

From: [REDACTED] USSOUTHCOM JTFGTMO [REDACTED]
Sent: Monday, June 29, 2009 9:31 AM
To: Federico, Richard LT OSD OMC Defense; West, Clay CPT OSD OMC Defense
Cc: [REDACTED] CDR USSOUTHCOM JTFGTMO
Subject: RE: U.S. v. Kamin, Memorandum re: Request for Meeting with SJA and JDG (U)
Signed By: [REDACTED]

LT Federico & CPT West,

I discussed with [REDACTED] your difficulty obtaining your client's agreement to meet [REDACTED] and your suggestion that you be granted access to your client, Kamin (ISN 1045) in any common area other than the actual cell block (e.g. medical visit, holding cell, ICRC visit, [REDACTED] etc.) where you could attempt to gain Kamin's consent to meet with you. I also discussed your similar request relating to a psychologist or 706 Board.

While we have discussed your suggestions and understand your frustrations, JTF-GTMO cannot support your request for access to Kamin (ISN 1045) through means of omission or misinformation. Pursuant to JTF-GTMO policy, any time a detainee leaves his cell, he is informed where he is going, whether it is for a medical appointment, legal visit, phone call, interview, etc., and the detainee is asked if he will go voluntarily. JTF-GTMO cannot accommodate anything other than a detainee's informed decision to meet with counsel, following an express defense request for an attorney-client visit.

Please let me know if you have any questions.

R/ [REDACTED]
[REDACTED] Advocate
JTF-GTMO/SJA
APO AE 09360

[REDACTED]

From: Federico, Richard LT OSD OMC Defense [REDACTED]
Sent: [REDACTED] 15, 2009 4:20 PM
To: [REDACTED] CDR USSOUTHCOM JTFGTMO
[REDACTED] OMC Defense; Avery, [REDACTED] Defense;
[REDACTED] COM JTFGTMO; [REDACTED] USSOUTHCOM
[REDACTED] SMSgt USSOUTH [REDACTED] o [REDACTED] ard E
[REDACTED] lay M CPT USSOUTHCOM JTFGTMO ELC; [REDACTED]
[REDACTED] TSgt USSOUTHCOM JTFGTMO ELC
U.S. v. Kamin, Memorandum re: Request for Meeting with SJA and JDG
(U)

~~UNCLASSIFIED~~

Sir:

No Classification Marking in Message Body

**No Classification Marking in Message Body**

Detailed defense counsel for Mr. Mohammed Kamin (1045) respectfully submits the attached memorandum for your review and consideration. This memorandum is also intended for the Commander of the JDG, however, we were unable to locate the right email POC for delivery. As such, we respectfully request it be forwarded to the JDG by a member of your staff.

Thank you for your consideration of this request. CPT West and I stand by to provide any additional information and/or answer any questions.

Very Respectfully,

Richard E.N. Federico  
Lieutenant, JAG Corps, U.S. Navy  
Defense Counsel

Office of the Chief Defense Counsel  
Office of the Military Commission  
C.





IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<b>RAMZI BIN AL-SHIBH,</b>	:	
<b>Petitioner</b>	:	
<b>v.</b>	:	<b>CIVIL ACTION</b>
	:	<b>(Habeas Corpus)</b>
<b>GEORGE W. BUSH, et al.,</b>	:	<b>NO. 1:06-cv-1725</b>
<b>Respondents.</b>	:	<b>Judge Emmet G. Sullivan</b>
	:	
	:	<b>ORDER</b>

THIS MATTER having come before the Court upon Petitioner Ramzi bin al Shibh's Emergency Motion to Stay for 90 Days the Military Commission From Proceeding with a Competency Hearing on January 19, 2009, and for an Order Permitting an Examination by Dr. Xavier Amador, Ph.D.; and the Court having heard oral argument, and having considered the parties' submissions; and for all the reasons previously alluded to during the oral argument; and for good cause shown;

IT IS on this 16<sup>th</sup> day of January, 2009;

ORDERED that Petitioner's Emergency Motion to Stay for 90 Days the Military Commission From Proceeding with a Competency Hearing on January 19, 2009, is hereby DENIED WITHOUT PREJUDICE; and

FURTHER ORDERED that Petitioner's Motion for an Order Permitting an Examination of Petitioner by Dr. Xavier Amador, Ph.D., is GRANTED in the context of his habeas corpus petition; and

IT IS FURTHER ORDERED that Dr. Xavier Amador, Ph.D., be permitted in the context of his habeas corpus petition to commence a mental health evaluation of Petitioner forthwith, *i.e.*,

Friday, January 16, 2009, and that such evaluation include an opportunity for Dr. Amador to meet and confer with Petitioner<sup>2</sup> [REDACTED] in such other facility where Petitioner may be located.

A handwritten signature in black ink, appearing to read "Emmet G. Sullivan", written over a horizontal line.

EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE



**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

ORDER

Inquiry Into the Mental Capacity or Mental  
Responsibility of the Accused

\_\_ August 2009

1. The Military Judge orders that an inquiry into the mental capacity of Mohammed Kamin be conducted in accordance with Rule for Military Commission 706.
2. The Board shall consist of two or more persons who are physicians or clinical psychologists. At least one member of the Board shall be either a psychiatrist or a clinical psychologist. The Board shall not include COL [REDACTED] U.S. Army, or CAPT [REDACTED] U.S. Navy, who sat on the prior R.M.C. 706 Board. If a Pashto speaking physician or clinical psychologist is reasonably available so that the schedule set forth in paragraph 6 below may be met, he or she will be appointed; a Pashto speaking interpreter will be designated by the government to assist the board in its inquiry. Unless ordered by this Commission, this interpreter may not disclose anything learned during the inquiry, except to defense counsel (LCDR Richard Federico, JAGC, USN; CPT Clay West, JA USAR). The defense may choose to have its assigned interpreter present when the accused is examined, and the government must provide reasonable notice to the defense as to when the inquiry is to be conducted.
3. This evaluation shall include an opportunity for the Board to meet and confer with Mr. Kamin in any Camp at JTF-GTMO or any such other facility or location, where he may reside or be transported to, for purposes of an evaluation by the 706 Board.
4. The Board in its evaluation shall make separate and distinct findings as to each of the following questions:
  - (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? If so, what is the clinical diagnosis?
  - (B) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?
  - (C) Is the accused presently suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis?

- (D) Does the accused have the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well as a factual understanding of the proceedings against him? If so, does the accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense?
5. The basis for ordering this inquiry is a motion filed by the detailed defense counsel. Examinations and tests shall be conducted, if appropriate and required, to answer the questions set forth in paragraph 4 above. A thorough review of available medical records of the accused shall also be conducted.
6. Compliance with this order shall be as expeditiously as possible consistent with a medically competent and thorough examination to answer the specified questions.
- a. Not later than 21 September 2009, the Board shall prepare a summarized report consisting of only the Board's ultimate conclusions as to all questions specified in paragraph 3. This report will be prepared in three copies. The Military Commissions Trial Judiciary Staff, trial counsel and the defense counsel will be telephonically notified when this report is ready for pick-up. At the option of the officer responsible for the summarized report, it may be faxed or e-mailed to the Military Commissions Trial Judiciary Staff, trial counsel, and the defense counsel.
- b. Not later than 28 September 2009, the Board shall prepare its full report. This report shall be placed into a sealed envelope and provided only to LCDR Richard Federico, JAGC, USN and CPT Clay West, JA, USAR. The full report will NOT be faxed or e-mailed unless specifically requested by LCDR Richard Federico, JAGC, USN or CPT Clay West, JA, USAR.
7. Under no circumstances will the full report, matters considered by the Board during its inquiry, or any statements made by the accused to the board (or evidence derived there from) be disclosed to anyone other than LCDR Richard Federico, JAGC, USN, or CPT Clay West, JA, USAR, without express, written authorization from the military judge or defense counsel.
8. The Military Judge also orders Dr. Michael G. Sweda, Ph.D., expert consultant in clinical and forensic psychiatry for the defense, be provided the same terms of access as the R.M.C. 706 Board to conduct an independent mental health examination of Mr. Kamin.
9. The defense team (LCDR Richard Federico, JAGC, USN and CPT Clay West, JA, USAR) shall have the opportunity to meet with Mr. Kamin prior to the examination by the R.M.C. 706 Board, and again prior to the examination by Dr. Sweda, to advise Mr. Kamin regarding the Order and examinations.

10. Telephone numbers: Military Commissions Trial Judiciary Staff: [REDACTED] LT  
Rachel Trest, JAGC, USN, Assistant Trial Counsel: [REDACTED] LCDR  
Richard Federico, JAGC, USN, Defense Counsel: [REDACTED]; CPT Clay West, JA,  
USAR, Defense Counsel [REDACTED]

Ordered this \_\_\_\_ day of August 2009.

W. Thomas Cumbie  
Colonel, U.S. Air Force  
Military Judge

Encl:  
Charge Sheet