IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Major (O-4), **NIDAL M. HASAN** United States Army, Petitioner,	)	**ANSWER TO THE PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS**
v.	)	
UNITED STATES ARMY COURT OF CRIMINAL APPEALS, Respondent	)	**Crim. App. No. 20130781** **USCA Dkt. No. 19-0054/AR**
And	)	
UNITED STATES, Real Party in Interest	)	

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

I.
Preamble

COMES NOW the undersigned appellate government counsel, pursuant to Rule 28(b)(1) of this Honorable Court's Rules of Practice and Procedure and this Court's Order dated December 28, 2018, and respond to the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Brief in Support

(hereinafter Petition). For the reasons stated herein, this Honorable Court should deny the Petition.

II.
History of the Case

On August 23, 3012, a panel of officers sitting as a general court-martial convicted Petitioner of thirteen specifications of premediated murder and thirty-two specifications of attempted murder in violation of Articles 118 and 80, Uniform Code of Military Justice (UMCJ), 10 U.S.C. §§ 918 and 880 (2008). (R. at 3725). The panel sentenced Petitioner to death. (R. at 4013).

On July 11, 2018, Petitioner moved the judges of the Army Court of Criminal Appeals (Army Court) to recuse themselves. (Pet. Appendix B). On 19 July 2018, the government filed a response. (Pet. Appendix C). In response to a joint request by Petitioner and the government, the Army Court issued an order that identified the judges of the Army Court who have recused themselves from the case. (Pet. Appendix D). On July 2018, Petitioner filed a reply to the government's response. (Pet. Appendix E). On August 21, 2018, the Army Court denied Petitioner's motion. (Pet. Appendix A). On September 17, 2018, Petitioner moved the Army Court for reconsideration. (Pet. Appendix H). The government filed a response on September 24, 2018. (Appendix 1). On December 6, 2018, the Army Court denied Petitioner's motion for reconsideration. (Appendix 2). Petitioner filed the instant writ with this Court on November 5, 2018. On

December 28, 2018, this Court ordered the government to show cause as to why Petitioner's requested relief should not be granted. Petitioner's brief raising assignments of error to the Army Court is currently due by February 19, 2019. (Appendix 3).

III.
Relief Sought

Petitioner requests that this court issue a "writ ordering the judges of the Army Court to disqualify themselves." (Petitioner's Br. 3). The government requests that this Court deny the Petition because Petitioner has not satisfied the threshold criteria for a writ of mandamus.

IV.
Issue Presented

WHETHER THE ARMY COURT ERRED WHEN IT DENIED PETITIONER'S RECUSAL MOTION

V.
Statement of Facts

Major General (MG) Stuart Risch served as the Staff Judge Advocate for III Corps and Fort Hood and provided the Article 54, UCMJ, pretrial advice in Petitioner's case. (Petitioner's Appendix N). Major General Risch currently serves as the Deputy Judge Advocate General (DJAG) of the United States Army Judge Advocate General's Corps. In his capacity as DJAG, MG Risch rates the Chief Judge of the Army Court, Brigadier General (BG) Berger, and rates and

senior rates all other Army Court judges. (Appendix 4). The Army Court judges assigned to Petitioner's case are BG Berger, Colonel (COL) Schasberger, and COL Hagler.

VI.
Reasons Why Writ Should Not Issue

This Court should deny Petitioner's writ because Petitioner does not satisfy the preconditions necessary to issue a writ of mandamus.

The All Writs Act, 28 U.S.C. §1651 (2012), authorizes this Court to issue writs in aid of its subject-matter jurisdiction. *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005). This Court has jurisdiction over the Petition pursuant to its mandatory jurisdiction over capital cases under Article 67(a)(1), UCMJ. *Id.* at 245.

In order to issue a writ of mandamus, the court must find that three preconditions exist: (1) the petitioner must establish that they have no other adequate means to attain the relief they seek; (2) the petitioner must show that their entitlement to the writ is "clear and indisputable;" and, (3) the court must determine that the writ is "appropriate under the circumstances." *Cheney v. United States District Court for D.C.*, 542 U.S. 367, 381 (2004). The petitioner has an "extremely heavy burden" to justify the granting of a writ. *Id*. In this case, this Court should not issue a writ of mandamus because: (1) Petitioner has other adequate means to obtain the relief sought; (2) Petitioner's claim to a writ is not

"clear and indisputable" under the law; and (3) a writ of mandamus would not be "appropriate under the circumstances." *Id.*

A. The Petitioner does not establish that Petitioner has no other adequate means to attain the relief sought.

This Court should deny Petitioner's writ because Petitioner does not establish that there are no other adequate means to attain the relief desired and the recusal issue is not yet ripe for this Court to review. In order to ensure that courts issue writs only in extraordinary circumstances, petitioners must demonstrate that they have no other adequate means to attain the relief they desire. *Kerr v. United States Dist. for the Northern Dist. of California, et al.*, 426 U.S. 394, 403 (1976). "The issuance of a writ under the All Writs Act is a 'drastic remedy which should only be invoked in those situations which are truly extraordinary.'" *McKinney v. Powell*, 46 M.J. 870 (Army Ct. Crim. App. 1997) (quoting *Aviz v. Carver*, 36 M.J. 1026, 1028 (Navy-Marine Ct. Mil. Rev. 1993)). Extraordinary writs "cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial, and whatever may be done without the writ may not be done with it." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953) (citations omitted).

Federal courts have found that that "the issue of judicial disqualification presents an extraordinary situation suitable for the exercise of [] mandamus jurisdiction" in certain circumstances. *In re United States*, 666 F.2d 690, 694 (1st

Cir. 1981). Those circumstances are not present in this case. First, Petitioner has not yet raised an assignment of error before the Army Court concerning MG Risch. An examination of the obligation of the Army Court to recuse themselves based upon them acting upon an assignment of error concerning MG Risch is an issue that is not ripe until such assignment of error is raised.

Second, military courts review claims of appellate judicial disqualification as part of their review under Articles 66 and 67, U.C.M.J. *See, e.g.*, *United States v. Mitchell*, 39 M.J. 131, 144 n.7 (C.M.A. 1994); *United States v. Lynn*, 54 M.J. 202 (C.A.A.F. 2000); *United States v. Harris*, 66 M.J. 781 (Navy-Marine Ct. Crim. App. 2008); *United States v. Lane*, 60 M.J. 781 (Air Force Ct. Crim. App. 2004), *set aside by United States v. Lane*, 64 M.J. 1 (C.A.A.F. 2006). Petitioner fails to articulate how the instant allegation of disqualification differs in any meaningful way from allegations of disqualification raised on appeal, or why established appellate remedies would be insufficient in this case. Accordingly, in the absence of any justification for Petitioner's assertion that appellate relief is inadequate, this Court should deny the Petition.

B. Petitioner has not established a "clear and indisputable" right to relief.

As a writ "[confining the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction," "only exceptional circumstances amounting to judicial 'usurpation of power'. . . or a 'clear abuse of discretion'. . .

'will justify the invocation of this extraordinary remedy.'" *Id.* (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *Bankers Life*, 346 U.S. at 383; and *Will v. United States*, 389 U.S. 90, 95 (1967). Ordinarily, military courts review an appellate judge's decision not to recuse himself for abuse of discretion. *Lynn*, 54 M.J. at 202-203. Here, the judges of the Army Court acting on Petitioner's case did not clearly abuse their discretion or "usurp" their power in declining to recuse themselves.

Article 66(h), Uniform Code of Military Justice, 10 U.S.C. § 866(h) (2016) [hereinafter UCMJ], and 28 U.S.C. § 455 serves as the basis for recusal of military appellate judges. See *United States v. Martinez*, 19 M.J. 652 (C.M.A. 1984); *Lane*, 60 M.J. 781. Article 66(h), UCMJ, articulates the basis for mandatory recusal of an appellate judge:

> No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as an investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

UCMJ, art. 66(h). Under 28 U.S.C. § 455, a judge has an independent obligation to recuse himself under specific grounds, such as: having a "personal bias or prejudice against the parties[;]" having previously served as counsel while in private practice on the matter; having participated as "counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits"

of a case while serving in governmental employment; having a financial interest in the controversy before the court; and having a familial relationship with the parties or a witness, or having a family member with an interest that could be "substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(1)-(5).

Most relevant to the instant case, under 28 U.S.C. § 455(a), an appellate judge bears the independent obligation to recuse himself when "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

> The proper test … is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the appellant, but rather in the mind of a reasonable man.

Martinez, 19 M.J. at 652 (citing *Union Independent v. Puerto Rico Legal Services,* 550 F. Supp. 1109, 111 (D. Puerto Rico 1982)); *see also United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994) (noting that the test for determining if recusal is necessary under this section is "whether a reasonable person *who knew all the facts* might question these appellate military judges' impartiality.").

"It is well settled that a judge is presumed to be qualified and that the movant bears a substantial burden of proving otherwise. Furthermore, the Court has a sworn duty not to disqualify itself unless there are proper and reasonable grounds for doing so." *Martinez*, 19 M.J. at 643 (quoting *Idaho v. Freeman*, 478

F. Supp. 33, 35 (D. Idaho 1979)). "[T]he [petitioner] must establish that the alleged bias and prejudice is personal, stemming from an extrajudicial source and *resulting in an opinion on the merits* other than what the judge has learned from his participation in this case." *Id*. (quoting *United States v. Baker*, 441 F. Supp. 612, 616 (M.D. Tenn. 1977)) (emphasis in original). The objective "standard is still one of reasonableness and should not be interpreted to require recusal on spurious or vague charges of partiality." *Id.* at 655 (quoting *Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 525 (S.D. Fla. 1977)).

The appellate judges acting on this case are not required to recuse themselves merely because the DJAG rates them. "An actual or apparent conflict of interest between a military judge's rulings and his or her personal interest in protecting career prospects arises only in extraordinary circumstances." *United States v. Hutchins*, 2018 CCA LEXIS 31 at *111 (Navy-Marine Ct. Crim. App. January 29, 2018). The facts Petitioner presented in the Petition do not amount to such extraordinary circumstances.

In *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994), the Court of Military Appeals held that the preparation of fitness reports for appellate military judges by senior judge advocates does not render appellate judges inherently disqualified or partial. Recently, in *United States v. Hutchins*, the Navy-Marine Court of Criminal Appeals rejected an appellant's assertion that a "military judge

suffered from a conflict of interest with his supervisory judges in his chain of command." *Hutchins*, 2018 CCA LEXIS at *109. The court reached that conclusion because it found "no evidence of supervisory intrusion on subordinate discretion in this case." *Id.* at *111.

In *Mitchell* and *Hutchins*, the rater had no prior professional involvement in the underlying case. Here, although MG Risch provided the pretrial advice to the convening authority, there is no reason to distinguish this case from the precedent in *Mitchell* and *Hutchins*. The underlying legal concern in *Mitchell* and *Hutchins* that appellate judges may be swayed to act in a particular way in their judicial role because of their rater's position is the same that Petitioner attempts to argue disqualifies the appellate judges in this case. This Court should follow *Mitchell* and *Hutchins* because there is no evidence that MG Risch's role in advising the convening authority over seven years ago - a position he no longer holds - prevents the members of the Army Court from acting impartially.

In *United States v. Lane*, the Air Force court rejected an argument that Judge Lindsey Graham, a Member of Congress and a reservist appointed to the Air Force court by the Air Force Judge Advocate General (TJAG), was required to recuse

himself under Article 66(h) and 28 U.S.C. § 455. *Lane*, 60 M.J. at 792.[1] *Lane* appellant alleged that:

> The Judge Advocate General (TJAG), who appointed Lt Col Graham, will rate his performance on the Court. TJAG, on the other hand, will look to the United States Senate in the future to approve his own retirement in the grade of Major General. In addition, it is a matter of public record that Lt Col Graham serves on the Senate Armed Services Committee, which directly impacts the interests of the United States Air Force.

Id. The Air Force court found this allegation was "groundless, speculative, and remote." *Id*. The court also rejected an assertion that "Judge Graham cannot serve because 'he is accountable to his constituents for the decision and opinions he renders as a member of the Court.'" *Id*. The court reasoned that while serving in his capacity as an officer and "appellate military judge, [Judge Graham's] sworn obligation is to uphold the Constitution of the United States. If the appellate defense counsel's argument were valid, no judge could hold membership in any other organization, including civic groups, political parties, or religions." *Id*. In

[1] The Air Force Court also addressed an argument that Judge Graham's appointment to the appellate court was unconstitutional based upon the Incompatibility Clause of the Constitution of the United States, U.S. Const. art. I, § 6, cl. 2. *Lane*, 60 M.J. at 793-794. The Air Force Court found that the appellant in *Lane* lacked standing to object to Judge Graham's appointment as a reserve officer in the Air Force based upon the Incompatibility Clause. *Id*. This Court set aside the decision of the Air Force Court on the basis that the appellant did have standing and the appointment violated the Incompatability Clause. *Lane,* 64 M.J. at 3-4, 7. This Court did not address the Air Force Court's finding that Judge Graham did not have a conflict of interest under Article 66(h) or 28 U.S.C. § 455.

summarizing their rejection of the argument that Judge Graham must recuse himself, the court noted:

> Judge advocates involved in litigation and appellate practice must set aside any possible outside influences to perform their sworn duties in each case. Article 42(a), UCMJ, 10 U.S.C. § 842(a). One need look no further than military defense counsel, who are at once officers of the United States Air Force, sworn to uphold its laws, and also counsel for their clients in litigation against the United States. We presume that the professional attorneys who undertake these important functions discharge their duties competently and diligently. Of course, it is possible that a case may arise that presents a legitimate conflict for Judge Graham. In that event, Judge Graham, like any other judge, will recuse himself. This is not such a case.

Id.

Just as theoretical specter of a quid-pro-quo relationship between the TJAG and Judge Graham in *Lane* amounted to mere conjecture that did not require recusal, Petitioner's claims that the Army Court judges are, or can reasonably be perceived to be biased because MG Risch rates them is equally flawed. Even if MG Risch was unqualified to provide the pretrial advice to the convening authority, Petitioner provides no evidence of supervisory intrusion by MG Risch on this court, nor does he point to any previous decision or order by the Army Court as being indicative of any influence or bias. There is no evidence that MG Risch has either used any inappropriate basis to rate the Army Court judges or threatened retribution upon the Army Court judges for performing their duties.

The UCMJ "provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy[.]" *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). Petitioner's assertion that the court will disregard their judicial obligation to remain neutral and act only to receive a favorable rating from MG Risch flies in the face of their sworn duty to uphold the Constitution and statutory duty to "set aside any possible outside influences to perform their sworn duties in each case." *Id*.

Additionally, the fact that Army Court judges are colleagues with the appellate judges who have recused themselves is also not a basis for recusal. In *United States v. Morgan*, 47 M.J. 27 (C.A.A.F. 1997), the Court of Appeals for the Armed Forces held that an entire Court of Criminal Appeals was not barred from acting on a case merely because one of its members or court staff was barred from reviewing a case. *Id.* at 30. "We are aware of no rule of law or authority anywhere which automatically bars entire appellate courts from reviewing cases which involved their peers, prior to their appointment to the appellate court." *Id.* Petitioner has provided no evidence that the members of the Army Court are tainted or disqualified by virtue of their position in the same court as those who have disqualified themselves.

Accordingly, there are no grounds upon which the Army Court judges acting on this case must recuse themselves. A reasonable person, knowing all of the

facts, would not have reason to question the impartiality of the Army Court judges. There is no evidence that the Army Court judges will base their opinions in this case on anything other than what they have learned during their participation in this case. *See Martinez*, 19 M.J. at 643. Mandamus requires "a case not merely close to the line, but clearly over it." *In re Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997). This is not such a case. Because Petitioner cannot establish his "clear and indisputable" right to a writ of mandamus, this Court should not issue the writ.

C. Petitioner's requested remedy is not "necessary and appropriate."

The issuance of the writ is not "necessary and appropriate" because the Army Court did not abuse its discretion in denying Petitioner's recusal motion and because Petitioner has yet to raise any assignments of error before the Army Court. Additionally, Petitioner's writ should fail because issuing a writ is not "necessary and appropriate" where when he can address disqualification challenges during the regular appeal process. Because this Court and the Courts of Criminal Appeals regularly handle disqualification issues as a part of appellate review and Petitioner supplies no compelling rationale as to why this case should be different, this Court should not determine that a writ of mandamus is either necessary or appropriate.

VII.
Conclusion

Petitioner fails to meet his burden of establishing the threshold criteria for a writ of mandamus. Because Petitioner cannot satisfy these criteria, there is no basis for this Court to find that a writ of mandamus is either necessary or appropriate under the circumstances.

WHEREFORE, the Government respectfully requests that this Honorable Court deny Petitioner's Petitioner for a Writ of Mandamus.

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 21(b) because:

This brief contains 4085 words and 529 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

This brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

ALLISON L. ROWLEY
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January 22, 2019

Certificate of Filing and Service

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 22 day of January, 2019 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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Appendix 1

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Major (O-4) **NIDAL HASAN**, United States Army, Appellant	**GOVERNMENT RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION OF THE DENIAL OF RECUSAL, EXPERT ASSISTANCE FOR A NATIONAL SURVEY, AND PRESERVATION ORDER** **Docket No. ARMY 20130781** Tried at Fort Hood, Texas, on 20 July, 27 October, and 30 November 2011; 2 February, 4 April, 10 April, 8 June, 19 June, 29 June, 6 July, 12 July, 25 July, 3 August, 9 August, 14-15 August, 30 August, 6 September, 18 September, and 18 December 2012; 30 January, 28 February, 20 March, 16 April, 9 May, 29 May, 3-5 June, 11 June, 14 June, 18 June, 27 June, 2 July, 9-10 July, 15-16 July, 18 July, 25 July, 31 July, and 2-28 August 2013; and 29 January 2015 before a general court-martial, convened by the Commander, Headquarters, III Corps and Fort Hood, Colonel Gregory Gross and Colonel Tara Osborn, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COMES NOW the United States, pursuant to Rules 19(c) and 23 of this court's Internal Rules of Practice and Procedure, and respectfully requests that this

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court deny appellant's motion for reconsideration of the denial of recusal, expert assistance for a national survey, and preservation order.

Appellant bases his request for reconsideration of this court's denial of his motion for recusal, expert assistance for a national survey, and preservation order on the basis that this court did not issue a written explanation for its denial of those motions. However, there is no requirement that this court provide an explanation for its approval or denial of a motion.

The Government also relies upon its responses to appellant's motions for recusal and expert assistance for a national survey as the basis for its opposition to appellant's motion for reconsideration. Appellant has not demonstrated the necessity for expert assistance under the three-part test in *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994). Additionally, the judges on this panel are presumed to be qualified and appellant has not met his burden to demonstrate that there is a "reasonable doubt concerning the judge's impartiality . . . in the mind of a reasonable person." *United States v. Martinez*, 19 M.J. 652 (C.M.A. 1984). Because appellant has not met his burden to show that recusal is warranted, this court should deny appellant's motion for reconsideration of the denial of recusal and the preservation order.

WHEREFORE, the United States prays that this Honorable Court deny appellant's motion for reconsideration of the denial of recusal, expert assistance for a national survey, and preservation order.

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Certificate of Service, United States v. Hasan, Docket No. ARMY 20130781

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at usarmy.pentagon.hqda-otjag.mbx.dad-accaservice @mail.mil on the 24th day of September, 2018.

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Appendix 2

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**CONSOLIDATED MOTION FOR RECONSIDERATION OF THE DENIAL OF RECUSAL, EXPERT ASSISTANCE FOR A NATIONAL SURVEY, AND PRESERVATION ORDER**
v.		Docket No. ARMY 20130781
Major (O-4) **NIDAL M. HASAN** United States Army	Appellant	Tried at Fort Hood, Texas on 20 July, 27 October, and 30 November 2011; 2 February, 4 April, 10 April, 8 June, 19 June, 29 June, 6 July, 12 July, 25 July, 3 August, 9 August, 14-15 August, 30 August, 6 September, 18 September, and 18 December 2012; 30 January, 28 February, 20 March, 16 April, 9 May, 29 May, 3-5 June, 11 June, 14 June, 18 June, 27 June, 2 July, 9-10 July, 15-16 July, 18 July, 25 July, 31 July, 2-28 August 2013; and 29 January 2015 before a general court-martial appointed by the Commander, Headquarters, III Corps and Fort Hood, Colonel Gregory Gross and Colonel Tara Osborn, Military Judges, presiding

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW the undersigned appellate defense counsel, pursuant to Rules 19 and 23 of this court's Internal Rules of Practice and Procedure, and move this court

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to reconsider its decision not to recuse itself from this case and its decisions to deny expert assistance for a national survey and a preservation order.

Statement of the Case

On 12 July 2018, the first undersigned filed a Motion to Recuse or Abate with this court due to the fact that an allegation of error pertains to this court's supervisor, Major General (MG) Stuart Risch. The government filed its response on 19 July 2018.

On 27 July 2018, the undersigned counsel filed a reply to the government's response. Additionally, the undersigned counsel contemporaneously filed a motion for expert assistance for funding to conduct a national survey and a motion for a preservation order that would have instructed MG Risch and other named participants to preserve and maintain any and all correspondence pertaining to the prosecution of *United States v. Hasan*. The government subsequently filed a motion responding to the request for expert assistance. The government did not oppose the motion for the preservation order.

On 17 August 2018, this court denied all three motions. This court provided no analysis for any of its decisions.

Grounds for Reconsideration

An independent judiciary is indispensable to the military justice system; "[e]qually important is the confidence of the public in the autonomy, integrity, and

neutrality of [the] military judiciary as an institution." United States Army Judiciary, Code of Judicial Conduct for Army Trial and Appellate Judges [hereinafter Code of Judicial Conduct], Memorandum for Army Judges, Subject: Army Code of Judicial Conduct, para. 2 (16 May 2008). Military appellate judges *will* avoid even the appearance of impropriety and *must* aspire, at all times, to conduct that ensures the *greatest possible* public confidence in their independence, impartiality, integrity, and competence. Code of Judicial Conduct, Preamble, para 2 (emphasis added). Consequently, the Code of Judicial Conduct commands Army judges to take actions that not only safeguard against the erosion of public confidence, but that maximize it.[1]

Under the Code of Judicial Conduct and Rule for Courts-Martial [hereinafter RCM] 902(a), recusal is necessary in this instance. Yet, this court has declined to disqualify itself, and it has done so without explanation. *See United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999) ("[D]espite an objective standard, the judge's statements concerning his intentions and the matters upon which he will

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[1] This language is notably distinguishable from the American Bar Association's Code of Judicial Conduct that applied to Army judges until 2008 when the Army recognized a need to modify the rules to "meet the unique needs of Army practice." Code of Judicial Conduct, Scope, para. 2; *see also* Dep't Army Reg. 27-10, Legal Services: Military Justice [hereinafter AR 27-10], para. 5-8*b* (11 May 2016). Specifically, the Army changed the language from "should" avoid the appearance of impropriety and "should" aspire to conduct that ensures the greatest public confidence to "will" and "must," respectively. This suggests that the Army places a higher standard on its judiciary compared to civilian counterparts.

rely are not irrelevant to [the RCM 902(a)] inquiry."). Additionally, this court contemporaneously denied means that would aid counsel in the investigation and ultimate briefing of this issue, to include a request unopposed by the government.[2] Again, this court did so without explanation. In keeping its reasons in the dark, this court does nothing to dispel the pall that has been cast over this case. *See Jordan v. Dep't of Labor and Econ. Growth*, 480 Mich. 869, 870 (Weaver, J.,

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[2] The government opposed only the request for funding for a national survey, incorrectly asserting that survey results would be "irrelevant." (Gov't Response, pg. 2). With respect to disqualification, RCM 902(a) is designed to promote public confidence in the military judicial system. *United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001); *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001) (the appearance standard is about the "public perceptions of the military justice system, as appreciated the application of RCM 902(a)") (Baker, J., concurring) (emphasis added). Furthermore, as it relates to prejudice, the question, in part, is "the risk of undermining the *public's* confidence in the judicial process." *United States v. Martinez*, 70 M.J. 154, 159 (C.A.A.F. 2011) (citing *Liljeberg v. Health Services Acquisition Corps.*, 486 U.S. 847, 864 (1988) (emphasis added). Consequently, while the legal test may be from the standpoint of a reasonable person, to say that *actual* public perception on this matter holds *no* probative value is misguided. *See e.g., Fuelberg v. State*, 447 S.W.3d 304, 312-13 (Tex. App. Austin 2014) (statistical evidence is related to the issue of recusal and that while not synonymous, the opinion of the average person is related to the opinion of the hypothetical reasonable person). It logically follows that public perception is equally probative of officers in the performance of quasi-judicial functions. With respect to the implied bias of the panel members, *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015), is not on point. *Akbar* dealt with the issue of the panel members' knowledge of the incident before trial. *Id.* at 397-98. The present issue is more visceral in that it deals with potential inherent prejudices of Army panel members against appellant who ostensibly "switched sides" and targeted Army personnel.

concurring) ("in the matter of disqualification, transparency, rather than secrecy, is vital [.]").

For these reasons, the undersigned counsel request reconsideration of the above-referenced rulings. If the court decides once again against appellant, the undersigned counsel respectfully request that this court set forth its reasons.

WHEREFORE, appellate defense counsel respectfully request that this court grant the instant motion.

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MOTION FOR RECONSIDERATION OF THE DENIAL OF RECUSAL:

GRANTED: _____

DENIED: B

DATED: DEC 06 2018

MOTION FOR RECONSIDERATION OF THE DENIAL OF EXPERT ASSISTANCE FOR A NATIONAL SURVEY:

GRANTED: _____

DENIED: B

DATED: DEC 06 2018

BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel,
Defense Appellate Division

JACK D. EINHORN
MAJ, JA
Branch Chief
Defense Appellate Division

MOTION FOR
RECONSIDERATION OF THE
DENIAL OF THE PRESERVATION
ORDER:

GRANTED: _____

DENIED: _____

DEC 06 2018

DATED: _____

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via electronic submission to the Army Court at usarmy.pentagon.hqda-otjag.mbx.clerk-of-court-efiling@mail.mil and the Government Appellate Division at usarmy.pentagon.hqda-otjag.mbx.gad-accaservice@mail.mil on the 17th day of September, 2018.

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Appendix 3

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**MOTION FOR EXTENSION (15), (16), (17)**
v.	Docket No. ARMY 20130781
Major (O-4) **NIDAL M. HASAN** United States Army Appellant	Tried at Fort Hood, Texas on 20 July, 27 October, and 30 November 2011; 2 February, 4 April, 10 April, 8 June, 19 June, 29 June, 6 July, 12 July, 25 July, 3 August, 9 August, 14-15 August, 30 August, 6 September, 18 September, and 18 December 2012; 30 January, 28 February, 20 March, 16 April, 9 May, 29 May, 3-5 June, 11 June, 14 June, 18 June, 27 June, 2 July, 9-10 July, 15-16 July, 18 July, 25 July, 31 July, and 2-28 August 2013; and 29 January 2015 before a general court-martial appointed by the Commander, Headquarters, III Corps and Fort Hood, Colonel Gregory Gross and Colonel Tara Osborn, Military Judges, presiding

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW the undersigned appellate defense counsel, pursuant to Rules 23, 24, and 25 of this court's Rules of Practice and Procedure, and move for an extension of time until ~~18~~ 19 February 2019 to file a Brief on Behalf of Appellant. The current deadline is 21 November 2018.

PANEL NO. 2

The undersigned counsel request at least an additional three months to review, investigate, and research this case to satisfy counsel's ethical obligations to zealously represent appellant. More time is needed to complete the review of this case, which necessarily entails a thorough and comprehensive post-trial investigation.

Moreover, there are several specific reasons that support an extension request here. First, appellant has been recently detailed new counsel, Mr. Jonathon Potter. Mr. Potter has only been assigned to *United States v. Hasan* for the last few weeks and thus needs time to review the record of trial and thoroughly investigate this case. Notably, *United States v. Hasan* is not Mr. Potter's only complex, capital case. He is also detailed to *United States v. Hennis*, currently pending before the Court of Appeals for the Armed Forces (CAAF).

Second, two writs are currently pending before the CAAF in this case. One relates to this court's ruling on access to sealed exhibits; the other relates to the ruling on the disqualification of this court. It is necessary and appropriate that these issues be resolved before a brief is filed.

Third, counsel still do not have access to the complete pre-trial discovery in this case. The undersigned counsel continue to pursue appropriate

avenues of recourse, as access to these materials is necessary to represent appellant on his capital appeal.

Fourth, undersigned counsel have recently become aware that appellant may have consented to the release of several documents germane to this case to a third party, thereby waiving any privilege. The undersigned counsel anticipate filing a motion for appellate discovery on these materials in the imminent future.

Lastly, the government has yet to comply with this court's 31 August 2018 order requiring the government to obtain an affidavit from the Secretary of the Army, or his designee, regarding the denial of appellant's religious accommodation. As this document is relevant to the appeal, undersigned counsel cannot reasonably file a brief without the opportunity to review this document once it is obtained and conduct any necessary follow-up inquiry based on its contents.*

* The undersigned counsel have contemporaneously filed a motion requesting a modification of this order to provide a suspense.

WHEREFORE, appellate defense counsel respectfully request that this court suspend its internal rules under Rule 25 and grant a minimum of a three-month extension of time (in three, thirty-day increments) until 18 February 2019.

PANEL NO. 2

MOTION FOR EXTENSION (15), (16), (17)

GRANTED: ✓

DENIED: _____

DATE: NOV 26 2018

BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel

JACK D. EINHORN
MAJ, JA
Brach Chief
Defense Appellate Division

JONATHAN F. POTTER
Chief, Capital Litigation
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via electronic submission to the Army Court at usarmy.pentagon.hqda-otjag.mbx.clerk-of-court-efiling@mail.mil and the Government Appellate Division at usarmy.pentagon.hqda-otjag.mbx.gad-accaservice@mail.mil on the 15th day of November, 2018.

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Appendix 4

TJAG and DJAG FY 19 Published Rating Scheme

Rank	Name	Org	Position	Rater	Senior Rater
[redacted]					
BG	Chiafullo, Marilyn	USALSA	Ch. Judge (DIMA)	DJAG	DJAG
BG	Berger, Joseph	USALSA	Commander	DJAG	TJAG
COL	Salussolia, Paul	USALSA	App Judge	DJAG	DJAG
COL	Schasberger, Paula	USALSA	App Judge	DJAG	DJAG
COL	Hagler, Jeffrey	USALSA	App Judge	DJAG	DJAG
COL	Febbo, Tony	USALSA	App Judge	DJAG	DJAG
COL	Aldykiewicz, Jan	USALSA	App Judge	DJAG	DJAG
COL	Saladino, Gary	USALSA	App Judge (Reserve)	DJAG	DJAG
[redacted]					
COL	Mulligan, Michael	USALSA	Sr. App Judge	DJAG	DJAG
LTC	Fleming, Deidra	USALSA	App Judge	DJAG	DJAG
LTC	Weis, Richard	USALSA	App Judge (Reserve)	DJAG	DJAG
LTC	Levin, Steven	USALSA	App Judge (Reserve)	DJAG	DJAG
LTC	Burton, Paulette	USALSA	Sr. App Judge	DJAG	DJAG
LTC	Wolfe, Stefan	USALSA	Sr. App Judge	DJAG	DJAG

as of 1/15/2019