IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Preamble

The petitioner prays for an order from this Court ordering the judges of the Army Court to recuse themselves.

I.

History of the Case

On August 23, 2013, a panel of officers sitting as a general court-martial convicted Major Nidal Hasan (petitioner) of thirteen specifications of premeditated murder and thirty-two specifications of attempted murder in violation of Articles 118 and 80, Uniformed Code of Military Justice (UCMJ), 10 U.S.C. §§ 918 and

880 (2008), respectively. (Appendix A, R. at 3725). The panel sentenced petitioner to be put to death. (Appendix A, R. at 4013).

On July 11, 2018, appellate defense counsel moved for recusal of the Army Court because of an allegation of error committed by Major General (MG) Stuart Risch, the Army's Deputy Judge Advocate General (DJAG), when he served as the staff judge advocate (SJA) for the convening authority during petitioner's capital trial. (Appendix B). The basis for the recusal is that a reasonable member of the public would question whether the Army Court could impartially rule on issues pertaining to MG Risch since he currently serves as the rater for the Chief Judge of the Army Court and both rater and senior rater for every other Army appellate judge. (Appendix B).

On July 19, 2018, one day after the government filed its response, (Appendix C), the Army Court issued a ruling indicating that eight judges had since disqualified themselves. (Appendix D). On July 27, 2018, appellate defense counsel filed a reply to the government's response. (Appendix E). Contemporaneous with its reply, appellate defense counsel moved for funding for a national survey through the University of New Hampshire to obtain public opinion data as to whether the public would question the impartiality of the Army Court and MG Risch. (Appendix F). Appellate defense counsel further moved for a preservation order directing MG Risch, Colonel (COL) Michael Mulligan (lead

trial counsel), and Lieutenant Colonel (LTC) Anthony Febbo (the former III Corps Deputy SJA) to maintain any and all correspondence relating to *United States v. Hasan*. (Appendix G).

On August 21, 2018, the Army Court summarily denied all three motions. (Appendix B, F, G). On September 17, 2018, appellate defense counsel moved for reconsideration. (Appendix H). Since then, the Army Court has not explicitly acted on appellate counsel's motion for reconsideration. However, on October 16, 2018, the Army Court ruled on other motions in this case, including issuing an order denying appellate defense counsel access to the complete record.[1] (Appendix I). In so ruling, the Army Court implicitly denied the reconsideration motion.

II.

Relief Sought

This Court should issue the writ ordering the judges of the Army Court to disqualify themselves. The Army Court erred when it denied petitioner's recusal motion. Under Rule for Courts-Martial [hereinafter RCM] 902(a) and other applicable law, petitioner has a right to impartial judges on appeal. The Army Court's ruling deprives petitioner of this right.

[1] A petition for writ on mandamus on this order has been contemporaneously filed with this petition.

III.

Issues Presented

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

IV.

Statement of Facts

On November 5, 2009, petitioner reportedly entered the Soldier Readiness Processing (SRP) center on Fort Hood, Texas, shouted "*Allahu akbar*," and fired 214 rounds of ammunition. (Appendix A, R. at 3452, 3698). Chaos immediately erupted. The installation went on "lock-down." (Appendix J). Sirens blared. (Appendix K). All were warned to seek shelter. (Appendix K). And over the next several hours, uncertainty loomed.[2] Ultimately, the attack left thirteen dead and thirty-two more wounded, making Fort Hood the site of the worst terrorist attack since September 11, 2001, and the largest mass murder on a military installation in American history.[3]

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[2] For example, there were accounts of a second shooter was and teams of law enforcement personnel were clearing buildings. (Appendix K).

[3] See Amy Zegart, *Insider Threats and Organizational Root Causes: The 2009 Fort Hood Terrorist Attack*, The United States Army War College Quarterly Parameters, 45 Vol. 35 (2015). http://ssi.armywarcollege.edu/pubs/parameters/issues/summer_2015/7_zegart.pdf (lasted visited 28 June 2018).

The attack shook the community. As the defense stated before trial, "the impact of this incident on … the surrounding community [ran] broad and deep." (Appendix L). The Fort Hood Commander, Lieutenant General (LTG) Robert Cone, acknowledged that "[t]he tragic events of November 5th *profoundly affected each of us personally* and the community as a whole." (Appendix L) (emphasis added). Fort Hood immediately increased its mental health staff by 80 mental health professionals[4] and initiated a three-phrase behavioral health campaign, which identified at least 1,113 individuals as "highly exposed," hundreds more than were present at the SRP that day. (Appendix L).

General Risch, as the SJA for III Corps and Fort Hood, was part of that community. At the time of the attack, MG Risch was on Fort Hood in the Office of the Staff Judge Advocate (OSJA), less than one mile from the attack. (Appendix J). General Risch first called his wife, who lived with him on post, to ensure the safety of his family. (Appendix M). General Risch's next concern became the safety and accountability of OSJA personnel. (Appendix J).

As it turned out, back at the SRP center, one of MG Risch's attorneys, Captain (CPT) Nathan Freeburg, had, in fact, been caught in the attack. (Appendix K).

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[4] "Fort Hood Tightens Security Procedures," CNN (25 Nov. 2009), http://www.cnn.com/2009/US/11/24/fort.hood/index.html (last visited Jun. 28, 2018).

When the attack started, CPT Freeburg had taken cover to dodge the spray of rounds fired in his direction. (Appendix K). Ultimately, CPT Freeburg was mere meters from petitioner and witnessed petitioner shot and taken down in an exchange of gunfire with police. (Appendix K).

Hours later, CPT Freeburg, still covered in blood from the day's tragic events, met with MG Risch and briefed him on what happened. (Appendix K). A few days later, MG Risch confided to CPT Freeburg that on the night of the attack, he visited the SRP center and after seeing its blood-slicked floors, stated "it was a difficult experience that would make it hard to sleep at night," or words to that effect. (Appendix K).

General Risch, as the III Corps and Fort Hood SJA, subsequently provided the pretrial advice in petitioner's case and recommended that the government pursue the death penalty. (Appendix N). General Risch was the only person with whom the convening authority spoke concerning referral of petitioner's case. (Appendix O).

Presently, MG Risch serves as the DJAG. In this capacity, he rates the Chief Judge of the Army Court and rates and senior rates every other Army appellate judge.[5] (Appendix P). This includes Judge Febbo, MG Risch's deputy at Fort

[5] Since August 21, 2018, the first undersigned counsel has made attempts with the Office of The Judge Advocate General and the members of the Government Appellate Division to obtain an updated rating scheme for MG Risch to confirm

Hood at the time of the attack, who had immediately disqualified himself from providing legal advice because petitioner had reported to him shortly before the attack what petitioner perceived to be alleged war crimes – information that he subsequently reported to MG Risch.[6] (Appendix J). This also includes Senior Judge Mulligan, who served as lead prosecutor on petitioner's case during MG Risch's tenure as SJA.

V.

Reasons Why Writ Should Issue

The All Writs Act, 28 U.S.C. §1651 (2012), empowers this Court to issue writs in aid of its subject-matter jurisdiction. This Court has jurisdiction over this matter pursuant to its mandatory review of capital cases under Article 67(a)(1), UCMJ, 10 U.S.C. §867(a)(1). *United States v. Loving*, 62 M.J. 235, 245-46 (C.A.A.F. 2005).

Before a writ may issue, three conditions must be met: (1) there is a clear and indisputable right to issuance of the writ; (2) there are no other adequate means of relief; and the (3) issuance of the writ is appropriate. *Cheney v. U.S. Dist. Court*

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that it has remained unchanged since the summer transition. As of November 5, 2018, the government still has not provided appellate defense counsel with this information. Consequently, appellate defense counsel rely on the previously provided rating scheme in the statement of facts and infer that the rating scheme remains unchanged.

[6] Judge Febbo met with appellate defense counsel to discuss the circumstances surrounding the event. However, Judge Febbo declined to provide an affidavit or declaration until ordered to do so by a court.

for Dist. of Columbia, 542 U.S. 367, 381 (2004) (internal citations omitted). All three prongs are satisfied in this case. While a writ should issue only in extraordinary circumstances, *id.* at 380 (internal citations omitted), these are such circumstances.

A. There is a clear and indisputable right to the issuance of the writ

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (citations omitted). Accordingly, a military judge "*shall* disqualify himself or herself in any proceeding in which that military judge's impartiality *might reasonably be questioned*." Rule for Court-Martial [hereinafter RCM] 902(a) (emphasis added). This rule applies to appellate judges. RCM 902(c)(1); United States Army Judiciary, *Code of Judicial Conduct for Army Trial and Appellate Judges* [hereinafter Code of Judicial Conduct], Rule 2.11 (May 16, 2008). Ultimately, the test under RCM 902(a) is "whether a reasonable person who knows all the facts would reasonably question a military appellate judg[e's] impartiality." *United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994).

In this case, a reasonable person would certainly question this Court's impartiality. There is a credible allegation that the supervisor of the Army Appellate Court, MG Risch, committed error. Consequently, the Army Court *must* rule on its supervisor's impropriety.

Here, there is a credible claim that MG Risch committed error because he was disqualified from advising the convening authority. General Risch was on post during the attack and in its wake – an attack with an impact so "broad and deep" on the community that Fort Hood needed to ask for external resources to provide mental health assistance and initiated a study that ultimately identified almost 1,200 individuals as "highly-exposed" to the attack. But even more than this, the attack initially caused MG Risch to fear for the safety of his family, his very own subordinate was a survivor of the attack, and he confided to that same subordinate that he had been understandably emotionally affected from what he witnessed after he personally visited the horrific scene on the very night after the attack. Given this, a personal interest in the case could be imputed to MG Risch, and he was, therefore, disqualified from providing the advice as an "accuser." *See* Article 1(9), UCMJ, 10 U.S.C. §801(9) (an accuser is anyone with an "other than an official interest" in the case); *see also United States v. Shaffer*, 40 C.M.R. 794, 796 (A.B.R. 1969) ("[W]e entertain no doubt that if a staff were to assume the role of a true accuser and thereafter act in the case as a staff judge advocate, basic concepts of fair play and justice as well as the spirit of the Code would be violated.").[7]

[7] This Court's predecessor has held that pretrial advice under Article 34, UCMJ, 10 U.S.C. §834, is a "prosecutorial codal tool" and "it is the lawfulness of [the] prosecutorial conduct performed in a professional manner which must be tested under Article 34." *United States v. Hardin*, 7 M.J. 399, 403-04 (C.M.A. 1979). A prosecutor is disqualified from a case where he or she is an accuser. RCM

Thus, on appeal, the members of the Army Court will be forced into the unenviable position of determining whether their supervisor and senior officer erred in this case and whether *his* error warrants a reversal of this case. Moreover, petitioner has already asked the Army Court for resources to further investigate MG Risch's disqualification – specifically, a fact investigator, (Appendix J), public survey data, (Appendix E), and a preservation order, (Appendix F), and the Army Court may likely be moved in the near future for additional resources and discovery.[8] As such, there is sufficient cause for disqualification. The issue is ripe. And for the integrity of the military justice system, the members of the Army Court must avoid even the *mere appearance* of impurity. *See United States v. Kincheloe,* 14 M.J. 40, 49 (C.M.A. 1982). They did not.

While this Court's predecessor court decided a similar issue in *United States v. Mitchell*, finding no basis for recusal where The Judge Advocate General (TJAG)

504(d)(4)(A). An accuser is anyone with an "other than an official interest" in the case. *See* Article 1(9), UCMJ. Logically then, under *Hardin*, a SJA is disqualified where he or she has an "other than official interest" in the case. Significantly, however, cases since *Hardin* suggest that following the 1983 amendments to the UCMJ, even an *appearance* of a bias may warrant disqualification in providing pretrial advice. *See United States v. Hayes*, 24 M.J. 796, 780 (A.C.M.R. 1987).

[8] For example, it may become necessary to move the Army Court to compel any and all documents pertaining to MG Risch that was part of Fort Hood's "behavioral health campaign" and any and all emails "to" or "from" MG Risch concerning the prosecution of *United States v. Hasan*.

of the Navy signed fitness reports for appellate judges, 39 M.J. 131, 133 (C.M.A. 1994), this case is vastly different. This is so in three critical ways.

First, the appellant in *Mitchell* challenged fitness reports *en masse*. Here, there is a specific claim based on the unique facts of this case. Furthermore, *Mitchell* left open the possibility for this disqualification. *See id*. at 145, nt. 8 (noting that the decision might have been different where the "*Assistant Judge Advocate General, prior to [his] appointment, acted as a … staff judge advocate in that case."*) (emphasis added).

Second, the issue of MG Risch's disqualification serves as a basis for resources and will likely serve as a basis for appellate discovery. Therefore, unlike in *Mitchell*, the Army Court has been moved to authorize means to investigate its supervisor, and the Army Court will likely be moved to compel the government to disclose documents and other evidence pertaining to MG Risch.[9]

Third, this is a high-profile, capital case where the public's desire for swift-justice is well documented, and the ultimate outcome may draw scrutiny from many quarters. Therefore, the risk to MG Risch's personal reputation is appreciable--to say the least--and matched by the threat to the Army Court's

[9] Additionally, the Army Court may be requested to compel Judge Febbo to produce an affidavit, and ultimately, the court may need to determine whether a *Dubay* hearing is warranted in light of other statements obtained in the course of the post-conviction investigation. *See United States v. Dubay*, 37 C.M.R. 411 (1967).

reputation while sitting in judgment of these matters. Consequently, while *Mitchell* provides a template for consideration of this issue, its holding is ultimately inapt to the present case.

In sum, there is a clear and indisputable right to the issuance of the writ on the extraordinary circumstances of this case.

B. No other adequate remedy exists

Relating to the recusal of a military judge on grounds of RCM 902(a), this Court has held that no other adequate remedy exists for purposes of a writ of mandamus. *Hasan v. Gross*, 71 M.J. 416, 419 (C.A.A.F. 2012). Moreover, "virtually every court of appeals has recognized the necessity and propriety of interlocutory review of disqualification issues on petitions for mandamus to ensure that judges do not adjudicate cases that they have no [authority] to hear." *Alexander v. Primerica Holdings*, 10 F. 3d 155, 163 (3rd Cir. 1993) (internal citations omitted). Although the harm to a litigant can be cured through appeal, the additional, separable harm to the public confidence cannot. *Id*. (internal citations omitted). This is equally true in the military justice system where "public confidence in the autonomy, integrity, and neutrality of [the] military judiciary as an institution" is "indispensable." Memorandum for Army Judges, subj: Army Code of Judicial Conduct, *Code of Judicial Conduct*.

C. The granting of the writ is otherwise appropriate

Granting this writ is appropriate for three reasons. First, it will vindicate petitioner's right to an impartial panel. Second, it will shore-up public confidence in the military judiciary. Lastly, if a consequence of recusal in this instance is to refer this case to a sister court, it will ensure petitioner a real opportunity to have his case decided by an en banc court. *See* United States Army Criminal Court of Appeals, Rules of Practice and Procedure, Rule 17(a)(3) (June 1, 2018) (En banc decisions are appropriate for death penalty cases).

VI.

Conclusion

WHEREFORE, petitioner prays for an order form this Court ordering the remaining judges of the Army Court to recuse themselves.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hasan*, Crim. App. Dkt. No. 20130781, USCA Dkt. No. ____/AR was electronically filed with the Court, Respondent, and Government Appellate Division on November 5, 2018.

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APPENDIX A

A. All of these cartridge cases were fired from Prosecution Exhibit 6, the 5.7 pistol.

Q. Sir, I am now handing you Prosecution Exhibits 503-505, 507-513, 515, 518-535, 537-546, 549, 551-556, 558-568, 570, 572-575, 590, 624-627, and 631; these have been previously admitted into evidence as 68 FN 5.7 cartridge casings seized from the outside crime scene. Sir, have you seen these items before?

A. Yes, I have.

Q. Sir, have you performed the same examination upon these items as you did on Prosecution Exhibit 138?

A. Yes, I did.

Q. Based upon your examinations and your experience in the field of firearm and toolmark examiner -- firearm and toolmarks, do you have an opinion as to whether these 68 items were fired from a particular weapon?

A. Yes, I do.

Q. What is that opinion, sir?

A. All of these cartridge cases were fired from Prosecution Exhibit 6, the 5.7 pistol.

Q. Now, sir, you've previously testified that you received 231 cartridge casings and only 214 were 5.7-by-28-millimeter. What were the other 17 cartridge casings?

A. They were 9-millimeter.

Q. Sir, at this time I am handing you Prosecution Exhibits 576-581, 583, 586, 628-630 and 634(b). Sir, do you recognize these items?

A. Yes, I do.

Answered in America," and "Jihad Fields are Calling." Of course, the article that he looks at and views on 5 November.

That all supports what we already know, where, again, the accused stands up and yells, "Allahu Akbar." He did that to announce to everyone in the room why he was doing what he was doing. Let no confusion remain, if any existed, that that perfectly explains his motive. He did not want to deploy, the Army is not going to make him do something like that; and he came to believe he held that jihad duty to kill soldiers.

The results of that motive resulted in the planning that we discussed at the beginning of my opening statement. The purchase of the weapon, the most high-tech weapon available, with a high magazine capacity; the weapons training, the small arms training he engaged in; he received a tip from the instructor at Stan's Shooting Range about how to do speed reloading, which he obviously had practiced – multiple eyewitnesses talked about the speed at which he was able to reload once the shooting begins on 5 November. His specific target selection – once he goes into Building 42003 and sees Station 13, he realizes that he can turn that into the perfect killing station, because of all the soldiers grouped there, and because of what the soldiers grouped there represent – going to deploy, or returning from deployment. He's seeking out batteries and a second laser sight to make sure everything works as it should.

So, the motive and planning then turn into the crimes that I just discussed – 214 shell casings, all positively match Prosecution Exhibit 6, the 5.7 Herstal – left in Building 42003 and the area immediately outside on 5 November. Thirty-one attempted premeditated murder victims, and one more who was shot at, and 13 people killed – 12 soldiers and Mr. Cahill. All because of the motive and the planning, which came together on 5 November, a date the accused picked with a very specific reason:

[The court-martial was called to order at 1233, 23 August 2013.]

MJ: Court is called to order; all parties are again present as before, to include the court members.

Colonel Keller, has the court reached its findings?

PRES: Yes, ma'am.

MJ: Are the findings reflected on Appellate Exhibit 413a, the findings worksheet?

PRES: Yes, ma'am.

MJ: Please fold the worksheet in two, give it to the bailiff, and hand it to me, bailiff, so that I can examine it and ensure that the findings are in proper form.

[The president and bailiff did as directed.]

[Reviewing AE 413a.] I've reviewed the findings worksheet; the findings are in proper form.

Bailiff, please return the findings worksheet to the president.

[The bailiff did as directed.]

Everyone will remain seated while the president of the panel announces the findings of the court.

PRES: Major Nidal M. Hasan, this court finds you:

Of the Original Charge and its Specifications, by unanimous vote of all members:	**Guilty.**
Of the Additional Charge and its Specifications:	**Guilty.**

MJ: Thank you, Colonel Keller.

[The bailiff retrieved AE 413a from the president and returned it to the court.]

Xiong, PFC Greene, Major Caraveo, PFC Nemelka, Captain Seager, Sergeant Krueger, CW2 (Retired) Cahill, Staff Sergeant Justin Decrow and Specialist Hunt.

Major Nidal Malik Hasan, it is my duty as President of this Court-Martial to inform you that, having considered all of the matters in mitigation and extenuation, and all of the matters in aggravation, this court-martial, in closed session, and upon secret, written ballot, unanimously finds that any extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factor specifically found and listed by the court and listed above.

Major Nidal Malik Hasan, it is my duty as President of this Court-Martial to inform you that the court-martial, in closed session and upon secret written ballot, all of the members concurring, sentences you:

To forfeit all pay and allowances;
To be dismissed from the service; and
To be put to death.

MJ: Thank you, Madame President.

Bailiff, please retrieve the sentence worksheet from the president of the panel.

[The bailiff did as directed.]

Madame President and members, there have been, and there will continue to be, ongoing interest in this case. You may be approached and questioned by various people about the case, and let me now give you some instructions and remind you of the oath that you took at the beginning of these proceedings.

Essentially, that oath precludes you from disclosing what you discussed during your deliberations, unless ordered to do so by a judge. No member of the panel may reveal, in any way,

APPENDIX B

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

United States, Appellee	**MOTION TO RECUSE OR ABATE (EN BANC)**
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

COMES NOW the undersigned appellate defense counsel, pursuant to Rule 23 of this Court's Internal Rules of Practice and Procedure, and requests that all members of this Court recuse themselves from *United States v. Hasan.* Due to the

nature of an assignment of error in this case, the public would question whether any member of the Army Court of Criminal Appeals could remain impartial.

Statement of the Case

On 23 August 2013, a panel of officers sitting as a general court-martial convicted Major Nidal Hasan (appellant) of thirteen specifications of premeditated murder and thirty-two specifications of attempted murder in violation of Articles 118 and 80, UCMJ, 10 U.S.C. §§ 918 and 880 (2008), respectively. (R. at 3275). The panel sentenced appellant to be put to death. (R. at 4013). The convening authority approved the sentence. (Action).

Statement of Facts

The Attack.

On 5 November 2009, appellant entered the Soldier Readiness Processing (SRP) center on Fort Hood, Texas, shouted "*Allahu akbar*," and fired 214 rounds of ammunition. (R. at 146, 692, 2011, 2014-15, 3452). Chaos immediately erupted. The installation went on "lock-down." (Def. App. Ex. V).[1] Sirens blared. (Def. App. Ex. W). Medical evacuation (MEDEVAC) helicopters circled Fort Hood from above. (Def. App. Ex. W). All were warned to seek shelter. (Def.

[1] All defense appellate exhibits referenced in this motion are included in a motion to attach filed contemporaneously with this motion.

App. Ex. W). And over the next several hours, uncertainty loomed.[2] Ultimately, the attack left thirteen dead and thirty-two more wounded, making Fort Hood the site of the worst terrorist attack since 9/11 and the largest mass murder on a military installation in American history.[3]

The attack shook the community. As the defense stated before trial, "the impact of this incident on … the surrounding community [ran] broad and deep." (App. Ex. 48). The Fort Hood Commander, Lieutenant General (LTG) Robert Cone, acknowledged that "[t]he tragic events of November 5th *profoundly affected each of us personally* and the community as a whole." (App. Ex. 48, Encl. 2) (emphasis added). Fort Hood immediately increased its mental health staff by 80 mental health professionals[4] and initiated a three-phrase behavioral health campaign, which identified at least 1,113 individuals as "highly exposed," hundreds more than were present at the SRP that day. (App. Ex. 48, Encl. 2).

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[2] For example, there were accounts that a second shooter was on post and teams of law enforcement personnel were clearing buildings. (Def. App. Ex. W).

[3] See Amy Zegart, *Insider Threats and Organizational Root Causes: The 2009 Fort Hood Terrorist Attack*, The United States Army War College Quarterly Parameters, 45 Vol. 35 (2015). http://ssi.armywarcollege.edu/pubs/parameters/issues/summer_2015/7_zegart.pdf (lasted visited 28 June 2018).

[4] "Fort Hood Tightens Security Procedures," CNN (25 Nov. 2009), http://www.cnn.com/2009/US/11/24/fort.hood/index.html (last visited 28 Jun. 2018).

Major General (MG) Stuart Risch, then-Colonel (COL) Risch, the III Corps Staff Judge Advocate (SJA), was part of that community.[5] At the time of the attack, MG Risch was on Fort Hood in the Office of the Staff Judge Advocate (OSJA), less than one mile from the attack. (Def. App. Ex. V). General Risch first called his wife who was also on post at their home to ensure the safety of his family. (App. Ex. CLXXII, p. 4). General Risch's next concern became the safety and accountability of OSJA personnel. (Def. App. Ex. V).

As it turned out, back at the SRP center, one of MG Risch's attorneys, Captain (CPT) Nathan Freeburg, had, in fact, been caught in the attack. (Def. App. Ex. W). When the attack started, CPT Freeburg had taken cover to dodge the spray of rounds fired in his direction. (Def. App. Ex. W). Ultimately, CPT Freeburg was mere meters from appellant and witnessed appellant taken down in an exchange of gunfire with police. (Def. App. Ex. W).

Hours later, CPT Freeburg, still covered in blood from the tragic day's events, met with MG Risch and briefed him on what happened. (Def. App. Ex. W). A few days later, MG Risch confided to CPT Freeburg that on the night of the attack, he visited the SRP center and after seeing its blood-slicked floors, stated "*it was a difficult experience that would make it hard to sleep at night*," or words to that effect. (Def. App. Ex. W) (emphasis added).

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[5] For clarity, MG Risch is referred to as MG Risch throughout this motion.

General Risch subsequently provided the pretrial advice in appellant's case, notwithstanding the fact that he was present on Fort Hood during the attack, his subordinate was immediately present during the attack, and he himself evidenced emotional trauma from the tragic episode. (Def. App. Ex. X). General Risch recommended that the government pursue the death penalty. (Def. App. Ex. X). General Risch was the only person with whom LTG Donald Campbell, Jr., the convening authority, spoke concerning referral of appellant's case. (Ap. Ex. CCXX).

The Current Composition of the Army Court.

The Army Court of Criminal Appeals (ACCA) is composed of three panels of appellate judges and one chief judge. General Risch, who is now the Deputy Judge Advocate General (DJAG), rates the Chief Judge and serves as both rater and senior rater to the remaining judges on this Court.[6] (Def. App. Ex. Y, Z).[7] Moreover, Judge Anthony Febbo of this Court served as the Deputy Staff Judge Advocate (DSJA) under MG Risch and was also present with MG Risch during the attack. (Def. App. Ex. V). Judge Febbo will not provide an affidavit concerning what he remembers about that day and the days that followed until ordered by this

[6] General Risch also senior rates the Chiefs of the Government and Defense Appellate Divisions. (Def. App. Ex. Y). This rating scheme presumably will continue until MG Risch no longer serves as the DJAG.

[7] This exhibit has been redacted to protect privacy interests.

Court.[8] (Def. App. Ex. V). Additionally, Senior Judge Mulligan served as the trial counsel on this case and was appointed to serve as trial counsel by MG Risch. Issues of prosecutorial misconduct were litigated prior to trial. (R. at 705-715, 1529-1530; App. Ex. CLXXXVI).

Summary of Argument

In this case, a reasonable person would question this Court's impartiality. One issue on appeal will be whether MG Risch should have been disqualified from advising the convening authority. Since MG Risch now rates the Chief Judge and both rates and senior rates every other sitting judge, a reasonable person would question whether this Court could impartially evaluate the actions of its supervisor. Compounding this issue is the fact that at least two members of this Court were significantly involved with this case and that, as a consequence, the decisions or orders of this Court may affect its fellow judges.

Law and Argument

"An accused has a constitutional right to an impartial judge." *United States v. Wright,* 52 M.J. 136, 140 (C.A.A.F. 1999) (citations omitted). Accordingly, a military judge "*shall* disqualify himself or herself in any proceeding in which that military judge's impartiality *might reasonably be questioned.*" Rule for Court-

[8] Judge Febbo was willing to meet with and discuss the episode with the undersigned counsel.

Martial [hereinafter RCM] 902(a) (emphasis added). This rule applies equally to appellate judges. RCM 902(c)(1). The test is "whether a reasonable person who knows all the facts would reasonably question a military appellate judg[e's] impartiality." *United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994).

Here, a reasonable person would question this Court's impartiality. General Risch, through no fault of his own but by virtue of his involvement in the attack, was disqualified from advising the convening authority. He was on post when the attack started, and his first concern was to reasonably fear for his family who were also on post at the time. His own subordinate was directly involved in the attack. And he visited the grisly scene that very night, later confiding to others statements that could reasonably be construed to mean that he was emotionally affected from what he personally witnessed.[9] Thus, on appeal, the members of this Court will be

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[9] Here, MG Risch's intimate involvement with the attack and personal inquest into the scene of the crime manifested an "other than official interest" in this case which disqualified him from providing advice as the Staff Judge Advocate to the convening authority. At a minimum, a SJA is disqualified where he or she has an "other than official interest" in the case. Pretrial advice under Article 34, UCMJ, is a "prosecutorial codal tool" and "it is the lawfulness of [the] prosecutorial conduct performed in a professional manner which must be tested under Article 34." *United States v. Hardin*, 7 M.J. 399, 403-04 (C.M.A. 1979). A prosecutor is disqualified from a case where he or she is an accuser. R.C.M. 504(d)(4)(A). An accuser is anyone with an "other than an official interest" in the case. *See* Article 1(9), UCMJ, 10 U.S.C. 801(9). Logically then, under *Hardin*, a SJA is disqualified where he or she has an "other than official interest" in the case. However, cases since *Hardin* suggest that even an *appearance* of a bias may warrant disqualification. *See United States v. Hayes*, 24 M.J. 796, 780 (A.C.M.R. 1987).

forced into the unenviable and inescapable position of evaluating their supervisor and senior officer to determine whether *he* committed error and whether *his* error warrants a reversal of this case. This supervisory relationship casts a pall upon this Court's impartiality, providing a basis to seek disqualification, and this Court must, for the integrity of the system, avoid even the mere appearance of this impurity. *See United States v. Kincheloe,* 14 M.J. 40, 49 (C.M.A. 1982).

Admittedly, the Court of Military Appeals (COMA) decided a similar issue in *United States v. Mitchell*, where the COMA held that there was no basis for recusal where The Judge Advocate General (TJAG) of the Navy signed fitness reports for appellate judges. 39 M.J. 131, 133 (C.M.A. 1994). *Mitchell*, however, is distinguishable from the present case in three critical ways.

First, the appellant in *Mitchell* challenged fitness reports *en masse*. Here, there is a specific claim based on the unique facts of this case. Even *Mitchell*, itself, left open the possibility for this disqualification. *See id.* at 145, nt. 8 (noting that the decision might have been different where the "*Assistant Judge Advocate General, prior to [his] appointment, acted as a ... staff judge advocate in that case.*") (emphasis added).

Second, the issue of MG Risch's disqualification serves as a basis in the request for investigative services and will likely serve as a basis for appellate discovery. Therefore, unlike in *Mitchell*, this Court has been moved to authorize

resources to investigate its supervisor,[10] and this Court will likely be moved to compel the government to disclose documents and other evidence pertaining to MG Risch.[11] Furthermore, this Court may be requested to compel Judge Febbo, a sitting judge, to produce an affidavit, and ultimately, this Court may need to determine whether a *Dubay* hearing is warranted in light of other statements obtained in the course of the post-conviction investigation. *See United States v. Dubay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

Third, and lastly, this is a high-profile, capital case where the evidence of guilt is overwhelming and society's desire to see justice is indisputable. Therefore, the risk to MG Risch's personal reputation is appreciable to say the least and matched only by the threat to this Court's reputation while sitting in judgment of

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[10] *See* appellant's Consolidated Motion for Learned Counsel, Mitigation Expert, and Fact Investigator, p. 32, n. 35 (indicating that a fact investigator is requested, in part, to assist in the investigation of several issues already identified by the undersigned counsel). General Risch's "other than official interest" in this case is one such issue that requires further investigation by an experienced fact investigator.

[11] For example, it may become necessary to move this Court to compel any and all documents pertaining to MG Risch that was part of Fort Hood's "behavioral health campaign" and any and all emails "to" or "from" MG Risch concerning the prosecution of *United States v. Hasan*.

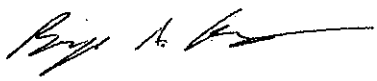
these matters. Consequently, while *Mitchell* provides a template for consideration of this issue, its holding is ultimately inapt to the present case.[12]

Conclusion

A reasonable person might question this Court's impartiality, and for this Court to assess the prior legal determinations of the very same senior official that rates it in a capital case "offends a sense of judicial fairness and undermines the public perception of military judicial proceedings." *See United States v. Siders*, 17 M.J. 986, 987 (A.C.M.R. 1984). Moreover, since this issue casts a shadow over at least one motion pending before this Court, the issue is ripe for resolution. Ultimately, this Court should recuse itself. Alternatively, this Court should abate the proceedings until such time that MG Risch no longer serves in supervisory capacity over this Court.

[12] An added concern, apart from the issue of MG Risch's disqualification, is that this Court may be called upon to decide issues that involve Senior Judge Mulligan, who served as trial counsel in this case. This includes re-litigating the issue of prosecutorial misconduct, (R. at 705-715, 1529-1530; App. Ex. CLXXXVI), and deciding the motion to compel pre-trial discovery which may require examining Judge Mulligan's files. These facts were also not present in *Mitchell*.

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



BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel

En Banc

MOTION TO RECUSE

GRANTED: _____

DENIED: BS

DATE: 17 Aug 18 AUG 17 2018

MOTION TO ABATE

GRANTED: _____

DENIED: BS

DATE: 17 Aug 18 AUG 17 2018

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 11th day of July, 2018.

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APPENDIX C

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee, v. Major (O-4) **NIDAL HASAN**, United States Army, Appellant	) GOVERNMENT RESPONSE TO) APPELLANT'S MOTION TO) RECUSE OR ABATE (EN BANC))) **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 Rule 23 of this Court's Internal Rules of Practice and Procedure, and respectfully requests that this court deny appellant's motion for recusal of the members of this court. The Government also asks that this court deny appellant's motion for abatement of the proceedings.

This case is solely before Panel Two for appellate review, not the entirety of the court. (Gov. Ex. 2). Therefore, the only issue at hand is whether the members of Panel Two – BG Berger, COL Schasberger, and COL Hagler – are disqualified from sitting on this case. This court should find that they are not disqualified because a reasonable person would not question their impartiality.

Appellant relies on Rule for Courts-Martial [hereinafter RCM] 902(a) for the assertion that a military appellate judge "shall disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned." However, RCM 902 does not apply to military appellate judges. *United States v. Hamilton*, 41 M.J. 32, 38-39 (C.A.A.F. 1994). Rather, RCM 902 applies to a "military judge," is defined in Article 1(10), UCMJ, 10 U.S.C. § 801(10) as "an official of a general or special court-martial[.]" Furthermore, RCM 902 appears in Part II, Chapter IX, of the Manual for Courts-Martial, United States, 2016, entitled, "Trial Procedure Through Findings." Therefore, this court should not rely upon RCM 902 for the standard for recusal of appellate judges.

Instead, this court should look to Art. 66(h), Uniform Code of Military Justice, 10 U.S.C. § 866(h) (2016) [hereinafter UCMJ], and 28 U.S.C. 4559 as the basis for recusal of military appellate judges. Art. 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. § 4559, a judge bears the independent obligation to recuse himself only when "his impartiality might reasonably be questioned." 28 U.S.C. § 4559(a). See *United States v. Martinez*, 19 M.J. 652 (C.M.A. 1984) (adopting 28 U.S.C. § 4559 as the standard for disqualification of military appellate judges).

> 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 [appellant] 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)).

Much like how a rating relationship does not *per se* disqualify a panel member from serving on a panel, the appellate judges acting on this case are not required to recuse themselves merely because the Deputy Judge Advocate General (DJAG), Major General (MG) Risch, rates them. *See United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001) (citations omitted). "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. 29 January 2018)[1]. The facts appellant presented in his motion for recusal do not amount to such extraordinary circumstances.

[1] Unreported cases are included in the Appendix.

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 impartial. 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 holding 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 appellant attempts to argue disqualifies the appellate judges in this case. This court should follow the holdings in *Mitchell* and *Hutchins* because there is no evidence that MG Risch's role in advising the convening authority over seven years ago in a position he no longer holds prevents the members of this court from acting impartially.

Appellant fails to show MG Risch's bias in favor of the Government because of his prior professional involvement in appellant's court-martial. Appellant relies on three facts to argue that MG Risch should not have provided pretrial advice to the convening authority: 1) the fact that MG Risch's subordinate, Mr. Freeburg (then CPT Freeburg) and a paralegal were present at the medical SRP building during Appellant's attack in November 2009; 2) Major General Risch's remarks after touring the medical SRP the evening of the attack that "it was a difficult experience that would make it hard to sleep at night," or words to that effect; and 3) Major General Risch's fear for his family on post at the time of the incident. (App. Mot. at p.7). As appellant provides no evidence that MG Risch's "first concern was to reasonably fear for his family," this court should not rely on mere speculation to conclude he was biased. (App. Mot. at p.7). Major General Risch's remarks to Mr. Freeburg and the paralegal are not an indication of personal bias, but are merely an indication of his care and concern for his subordinates because of their involvement in the attack, especially given that he recommended they seek mental health treatment immediately after his comment. (Def. Ex. W). Major General Risch was not directly involved in the attack and did not serve as the accuser or as a witness at appellant's court-martial. Appellant's assertion that MG Risch is biased and concerned only for his "personal reputation"

is not supported by any reasonable interpretation of the evidence appellant offers this court. (App. Mot. at 7-9).

A member of the public knowing all of the above facts would not reasonably conclude that the members of this panel or the court are biased due to MG Risch's prior involvement in this case. Even if MG Risch was unqualified to provide the pretrial advice to the convening authority, appellant provides no evidence of supervisory intrusion by MG Risch on this court, nor does he point to any previous decision or order by this court as being indicative of any influence or bias. Appellant's assertion that the court will disregard their judicial obligation to remain neutral and act only to receive a favorable rating from MG Risch or please the public amounts to "spurious or vague charges of partiality" based solely on speculation. *Martinez,* 19 M.J. at 643.

Additionally, there is no evidence that MG Risch has either used any inappropriate basis to rate the judges on this court or threatened retribution upon members of the court for performing their duties. In *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991), the Court of Military Appeals held that the Judge Advocate General (JAG) or his designee may not base the periodic rating of a military judge upon the rater's opinion of appropriateness of the sentences awarded by the judge. Similarly, in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), the Court of Military Appeals held that the decertification or transfer of a military

judge based upon the JAG's or his designee's opinion of the sentences awarded by the judge would violate Articles 26 and 37, UCMJ, 10 U.S.C. §§ 827 and 837. The Court also noted that the UCMJ "provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy" such as the ability to file an Article 138, UCMJ complaint against "interfering superiors". *Id.* Appellant has not shown that MG Risch has acted in any prohibited manner such as in *Mabe* and *Graf* or that any of the members of this court have evidenced inappropriate influence by MG Risch by pursuing administrative relief such as filing an Article 138, UCMJ complaint. In sum, there is no evidence that BG Berger, COL Schasberger, or COL Hagler 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.

Furthermore, a finding that the members of this court are disqualified from acting on this case merely because of MG Risch's professional involvement in it in his role as a Staff Judge Advocate would create an untenable situation for future appellate review of courts-martial. Such a precedent would lead to the recusal of the entirety of the court for cases where the DJAG or TJAG have had any prior professional involvement. Prior service as a Staff Judge Advocate or in other military justice roles is commonplace for those who fill the role of DJAG and TJAG. A standard where mere prior professional involvement of DJAG at the trial

level of a case, without more, could lead to the inability of this court to review numerous courts-martial.

Appellant provides no evidence that supports a finding that BG Berger, COL Schasberger, or COL Hagler are mandatorily disqualified under Article 66(h), UCMJ, or 28 U.S.C. § 4559(a). Although appellant provided facts detailing COL Mulligan and COL Febbo's prior involvement in this case, COL Mulligan and COL Febbo have recused themselves. Therefore, this court need not consider whether they are disqualified.

The fact that BG Berger, COL Schasberger, and COL Hagler 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.* Appellant has provided no evidence that the members of this 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 appellate 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 BG Berger, COL Schasberger, and COL Hagler.[2]

Conclusion

WHEREFORE, the Government respectfully requests that this court deny appellant's motion.

ALLISON L. ROWLEY
CPT, JA
Appellate Attorney,
Government Appellate Division

CATHARINE M. PARNELL
CPT, JA
Branch Chief,
Government Appellate Division

ERIC K. STAFFORD
LTC, JA
Deputy Chief, Government
Appellate Division

[2] Even if this court were inclined to find that all of its members must be recused, this court should not abate the appellate review in this case. As a remedy short of abatement, appellate review may be conducted by appellate judges from other military branches.

Certificate of Filing and Service

***United States v. Hasan*, Docket No. ARMY 20130781**

I hereby certify that the original of the foregoing was delivered electronically to this Honorable Court and a copy was served upon Appellate Defense Counsel by e-mail on 18th July 2018.

AngelaRiddick
ANGELA R. RIDDICK
Paralegal Specialist
Government Appellate Division
(703) 693-0823

APPENDIX D

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BERGER, HAGLER and SCHASBERGER
Appellate Military Judges

UNITED STATES, Appellee
v.
Major NIDAL M. HASAN
United States Army, Appellant

ARMY 20130781

ORDER

WHEREAS:

On 13 July 2018, appellee and appellant defense counsel submitted a consent motion requesting this Court provide the parties with: 1) the names of the military appellate judges on the Army Court of Criminal Appeals who have recused themselves from this case; 2) the bases for that recusal; and 3) the names of the military appellate judges on Panel 2 participating in the appellate review of this case.

NOW THEREFORE, IT IS ORDERED:

The following appellate judges on the Army Court of Criminal Appeals have recused themselves from this case: COL Jan E. Aldykiewicz, LTC Paulette V. Burton, COL Larss G. Celtnieks, COL Anthony T. Febbo, LTC Deidra J. Fleming, COL Michael E. Mulligan, COL Paul T. Salussolia, LTC Stefan R. Wolfe. *See* American Bar Association Model Code of Judicial Conduct Rule 2.11(C), for the bases for their disqualification.

The appellate judges on Panel 2 participating in the appellate review of this case are Chief Judge Joseph B. Berger III, Judge Hagler, and Judge Schasberger.

DATE: 19 July 2018

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

HASAN–ARMY 20130781

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CCZ
JALS-CR2

APPENDIX E

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

United States, Appellee	**MOTION FOR LEAVE TO FILE REPLY TO GOVERNMENT RESPONSE TO APPELLANT'S MOTION TO RECUSE OR ABATE (EN BANC)**
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 Rule 23 of this Court's Internal Rules of Practice and Procedure, and request leave of court to file a reply to the Government Response to Appellant's Motion to Recuse

or Abate (En Banc) that is appended to this motion. The reply supplements appellant's original motion with additional facts and argument that will assist this Court in determining whether to recuse or abate the proceedings. Therefore, there is good cause to grant this motion.

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

En Banc

MOTION FOR LEAVE TO FILE REPLY TO GOVERNMENT RESPONSE TO APPELLANT'S MOTION TO RECUSE OR ABATE (EN BANC)

GRANTED: BS

DENIED: _____

DATED: 30 July 2018

BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel

JACK D. EINHORN
MAJ, JA
Branch Chief,
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 27th day of July, 2018.

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THE APPENDIX

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

United States, Appellee	**REPLY TO GOVERNMENT RESPONSE TO APPELLANT'S MOTION TO RECUSE OR ABATE (EN BANC)**
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 Rule 23 of this Court's Internal Rules of Practice and Procedure, and file a reply to the Government Response to Appellant's Motion to Recuse or Abate (En Banc).

Statement of the Case

On 11 July 2018, the first undersigned counsel filed a motion for this Court recuse themselves or, in the alternative, to abate the proceedings. On 18 July 2018, the government filed its response. The undersigned counsel herein file a reply.

Statement of Facts

The undersigned counsel adopts the facts in original Motion to Recuse or Abate (En Banc). Additional facts are incorporated where necessary.

Argument

The government's response necessitates three clarifications. First, RCM 902(a) *is* applicable in this case. Although *United States v. Hamilton*, 41 M.J. 33, 38-39 (C.A.A.F. 1994), does indicate that Rule for Courts-Martial [hereinafter RCM] 902(d)(2) does not apply to military appellate judges, the Code of Judicial Conduct for Army Trial and Appellate Judges [hereinafter Code of Judicial Conduct], United States Army Judiciary (16 May 2008), states that disqualification grounds under RCM 902 (i.e., RCM 902(a), (b)) nevertheless apply to military appellate judges. Code of Judicial Conduct, Cannon 2, Rule 2.11. Military appellate judges are required to comply with the Code of Judicial Conduct. *See* Memorandum for Army Judges, Subject: Army Code of Judicial Conduct, para. 1 (16 May 2008); *see also* Dep't Army Reg. 27-10, Legal Services: Military Justice

[hereinafter AR 27-10], para. 5-8*b* (11 May 2016). Consequently, RCM 902(a) is the appropriate standard for disqualification here.[1]

Second, the government misstates appellant's position. According to the government, "[a]ppellant fails to show [Major General] Risch's bias in favor of the [g]overnment because of his prior professional involvement in appellant's court-martial." (Gov't Response at 6). The issue, however, is not whether Major General (MG) Risch presently harbors any bias in favor of the government; rather, the issue is whether there is any *apparent* conflict in this Court assessing its own supervisor's error in this case. Contrary to the government's assertions, based on the facts of this case, the allegation of error is credible. The fact that MG Risch was on Fort Hood for what was the worst terrorist attack since 9/11 and the largest mass murder on a military installation in American history, and remained part of that community during the media maelstrom that followed, (*See* App. Ex. 144),

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[1] The government asks this Court to analyze this issue, in part, under Article 66(h), Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C § 866(h). (Gov't Response, pgs. 2-3). While Article 66(h) does identify *statutory* grounds for disqualification, "imposing the broader circumstances for disqualification under [RCM] 902 upon appellate judges than is required under Article 66(h), UCMJ, *is a matter of sound judicial policy*." Code of Judicial Conduct, Canon 2, Rule 2.7, Comment 2 (emphasis added).

itself gives rise to the issue of disqualification,[2] let alone the additional facts set forth in the Motion to Recuse or Abate (En Banc).[3]

Lastly, because the allegation of error is credible, *United States v. Hutchins*, No. 200800393, 2018 CCA LEXIS 31 (N.M. Ct. Crim. App. 29 Jan. 2018), the

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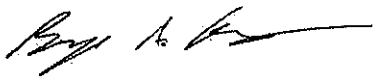
[2] This fact alone is significant, especially if the pre-trial advice is now considered quasi-judicial. *See United States v. Hayes*, 24 M.J. 796, 780 (A.C.M.R. 1987) (indicating that in the wake of the then-recent amendments to Article 34, UCMJ, 10 U.S.C. § 834, the pre-trial advice has become less of a prosecutorial tool and more of a "substantial right of the accused); *see* also, Major Larry Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111. Mil. L. Rev. 49, 97-98 (1986) (as a consequence of the amendments to Article 34, UCMJ, the staff judge advocate no longer acts as a district attorney presenting charges to a grand jury but instead acts more akin to a quasi-judicial magistrate). Underscoring this fact is the Behavioral Health Campaign's identification of hundreds more individuals on Fort Hood "highly exposed" than were even present at the site of the attack. Indeed, such a result comports with multiple studies on the effect on the surrounding community following a terrorist attack. *See* Dep't Veterans Affairs, National Center for PTSD, *Research Findings on the Traumatic Stress Effects of Terrorism*, https://www.ptsd.va.gov/professional/trauma/disaster-terrorism/research-findings-traumatic-stress-terrorism.asp (last visited 27 July 2018).

[3] The government glosses over key facts. Besides MG Risch's presence on Fort Hood, the following facts support disqualification of MG Risch: (1) Lieutenant General (LTG) Robert Cone's acknowledgement that that the attack had *profoundly affected everyone personally*; (2) the Behavioral Health Campaign that identified at least 1,113 individuals as "highly exposed," hundreds more than were present at the exact site of the attack; (3) MG Risch's first call was to his wife for what defense argued was out of reasonable fear for his family; (4) MG Risch's subordinate was directly involved in the attack; (5) MG Risch observed his subordinate that evening covered in blood; (6) MG Risch made a personal inquest into the crime scene the night of the attack; and (7) MG Risch made a comment that what he observed would make it difficult to sleep at night. (Appellant's Motion to Recuse or Abate (En Banc), pgs. 2-5).

case the government cites and urges this Court to follow, actually compels a different result than the one government advocates. In fact, *Hutchins* states, "[a] subordinate military judge should disqualify him or herself from ruling on a credible allegation of impropriety by a supervisory judge. *The desire to spare a superior such an ordeal does create an apparent, if not an actual, conflict of interest.*" *Id.* at *116 (emphasis added). In *Hutchins*, however, the military judge did not need to recuse himself because he could have, and did, resolve contested issues without the need to examine his supervisor's involvement. *Id.* at *116. Such is not the case here. This Court *must* examine MG Risch's conduct to determine whether he should have disqualified himself from providing the pre-trial advice. Moreover, this Court *must* act on pending motions that seek to further support this allegation of error.[4] Because the desire to spare MG Risch such an ordeal creates, at least, an apparent conflict of interest, this Court should recuse itself.

[4] *See* e.g., Motion for Expert Assistance: National Survey and Motion for Preservation Order, both of which are filed contemporaneously with this motion. *See* also, appellant's Consolidated Motion for Learned Counsel, Mitigation Specialist, and Fact Investigator.

WHEREFORE, appellate defense counsel respectfully request that this Court grant the requested relief.



BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel

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

APPENDIX F

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

United States, Appellee	**MOTION FOR EXPERT ASSISTANCE: NATIONAL SURVEY**
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 Rule 23 of this Court's Internal Rules of Practice and Procedure, and under Dep't Army Reg. 27-10 Legal Services: Military Justice [hereinafter AR 27-10], para. 6-5*d* (11 May 2016), and move this Court to authorize funding for expert assistance to

Panel No. 2

conduct a nationwide survey. This survey is reasonably necessary to advance three critical issues in this case: (1) apparent or implied bias with respect to Major General (MG) Risch's pre-trial advice; (2) apparent or implied bias with respect to whether this Court should recuse itself in assessing MG Risch's pre-trial advice; and (3) implied bias of a panel of Army officers in the war on terror against an accused who killed in the name of the enemy.

Statement of the Case

On 23 August 2013, a panel of officers sitting as a general court-martial convicted Major Nidal Hasan (appellant) of thirteen specifications of premeditated murder and thirty-two specifications of attempted murder in violation of Articles 118 and 80, UCMJ, 10 U.S.C. §§ 918 and 880 (2008), respectively. (R. at 3275). The panel sentenced appellant to be put to death. (R. at 4013). The convening authority approved the sentence. (Action).

On 11 July 2018, the first undersigned counsel filed a motion for this Court recuse themselves or, in the alternative, to abate the proceedings. On 18 July 2018, the government filed its response. The undersigned counsel file a reply to the government's response contemporaneously with this motion.

Statement of Facts

The Motion to Recuse or Abate (En Banc) concerned an allegation of error regarding MG Risch's pre-trial advice. Specifically, the following facts were put forth indicating that MG Risch should have been disqualified from providing pre-trial advice in appellant's capital case: (1) MG Risch was on Fort Hood for what was the worst terrorist attack since 9/11 and the largest mass murder on a military installation in American history, and remained part of that community during the media maelstrom that followed; (2) Lieutenant General (LTG) Robert Cone's acknowledgement that the attack had *profoundly affected everyone personally*; (3) the Behavioral Health Campaign that identified at least 1,113 individuals as "highly exposed," hundreds more than were present at the exact site of the attack; (4) MG Risch's first call was to his wife for what defense argued was out of reasonable fear for his family; (5) MG Risch's subordinate was directly involved in the attack; (6) MG Risch observed his subordinate that evening covered in blood; (7) MG Risch made a personal inquest into the crime scene the night of the attack; and (8) MG Risch made a comment that what he observed would make it difficult to sleep at night. (Appellant's Motion to Recuse or Abate (En Banc), pgs. 2-5; Appellant's Reply to the Government Response to Appellant's Motion to Recuse or Abate (En Banc), pgs. 3-4). Because MG Risch rates the Chief Judge of this

Court and both rates and senior rates the remaining sitting judges of this Court, the first undersigned counsel moved this Court to recuse itself.

On 20 July 2018, Mr. Zachary Azem, a research associate from the University of New Hampshire Survey Center (UNHSC), provided a cost estimate to conduct a national survey. (Def. App. Ex. AA).[1] The proposed survey will consist of 1,000 completed questionnaires that contain approximately twenty-three questions. (Def. App. Ex. AA). The purpose of this survey is to assess public opinion on the question of perceived partiality of MG Risch in providing pre-trial advice and perceived partiality of this Court in assessing MG Risch's conduct. Additionally, this survey will be able to assess public opinion about whether a panel of Army officers would be able to fully and fairly consider a sentence less than death for an appellant who killed their fellow servicemembers in the name of the enemy.

Argument

Ake v. Oklahoma, 470 U.S. 68 (1985),[2] established what is appropriate for determining whether experts meet the reasonable necessity standard, which the

[1] Defense Appellate Exhibit AA is included in a motion to attach filed contemporaneously with this motion.

[2] *Ake v. Oklahoma* concerned an appointment of a psychiatrist at trial in a capital case. *Ake,* 470 U.S. at 70. Ultimately, the Court held that where an accused shows that sanity will likely be a significant factor at trial, he is entitled to assistance. *Id.* at 74.

Court of Appeals for the Armed Forces (CAAF) subsequently applied to expert requests on appeal. *United States v. Gray*, 51 M.J. 1, 20 (C.A.A.F. 1999). In *United States v. Gonzalez*, 35 M.J. 459 (C.M.A. 1994), the Court of Military Appeals, the CAAF's predecessor, articulated a three-pronged test for determining necessity for experts at trial under *Ake*. This Court has subsequently indicated that the *Gonzalez* test applies to requests for experts on appeal. *See United States v. Hennis*, Army 20100304 (Army Ct. Crim. App. 9 Oct. 2015) (order). Accordingly, under *Gonzalez,* appellant must demonstrate: (1) why the expert is needed; (2) what the expert would achieve; and (3) why the defense attorney is unable to gather and present the information. *Gonzalez*, 39 M.J. at 461.

Why the expert is needed. Each of the above-identified issues concerns public perception.[3] This survey specifically assesses the public's perception.

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[3] Here, the test for recusal is whether a reasonable person who knows all the facts would reasonably question this Court's impartiality. *See United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994). This rule is intended to promote public confidence in the integrity of the judicial system. *United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001). Implied bias is, at its core, a "consideration of the public's perceptions in the fairness of having a particular member as part of the court-martial process." *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). Lastly, public perception plays a key role in the calculus of the disqualification of the staff judge advocate. While the pre-trial advice has been previously described as a "prosecutorial codal tool," *see United States v. Hardin*, 7 M.J. 399, 403-04 (C.M.A. 1979), this Court subsequently indicated in *United States v. Hayes*, 24 M.J. 796, 780 (A.C.M.R. 1987), that in the wake of the then-recent amendments to Article 34, UCMJ, 10 U.S.C. § 834, the pre-trial advice had become less of a prosecutorial tool and more of a "substantial right of the accused." As a consequence, the staff judge advocate no longer acts as a district attorney

Consequently, this survey will provide data to better resolve the above-identified issues.[4]

What the expert would achieve. As stated in the cost estimate, the services would produce two deliverables: (1) a clean data set of completed interviews and (2) a report of the major findings. (Def. App. Ex. AA).

Why the attorney is unable to gather this information. The undersigned defense counsel do not have the expertise and training necessary to design and execute nationwide survey. Significantly, the undersigned counsel are not trained to test and evaluate the reliability and validity of survey design; the undersigned counsel have minimal experience in interpreting survey data; and the undersigned counsel are not knowledgeable of the extensive survey methodology literature.

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presenting charges to a grand jury but instead acts more akin to a quasi-judicial magistrate. *Id* (citing Major Larry Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111. Mil. L. Rev. 49, 97-98 (1986)). Accordingly, the staff judge advocate would be held to the same standard as a military judge. *See United States v. Reynolds*, 24 M.J. 26, 263 (C.M.A. 1987) (citations omitted) (a quasi-judicial officer is held to the same standard as a military judge).

[4] *See* Susan J. Becker, *Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility*, 70 Or. L. Rev. 463, 467-68 (1991) (discussing that in civil and criminal cases alike, survey evidence enjoys a fairly high degree of success in terms of admissibility and probative value and has been used to determine, in part, inherent bias).

Moreover, and equally as critical, the undersigned counsel do not have the resources necessary to execute a nationwide survey.

Consequently, the *Gonzalez* test is satisfied.

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

Panel No. 2

MOTION FOR EXPERT ASSISTANCE: NATIONAL SURVEY

GRANTED: _____

DENIED: JS

DATED: 17 Aug 2018

AUG 17 2018

BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel

JACK D. EINHORN
MAJ, JA
Branch Chief,
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 27th day of July, 2018.

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APPENDIX G

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

United States, Appellee	**MOTION FOR 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 Rule 23 of this Court's Internal Rules of Practice and Procedure, and move this Court to issue a protective order directing Major General (MG) Stuart Risch, Colonel (COL) Anthony Febbo, COL Michael Mulligan, Lieutenant Colonel (LTC) Steven

Hendricks, and LTC Larry Downend* to preserve and maintain any and all correspondence related to *United States v. Hasan* and any and all correspondence about the attack itself.

On 11 July 2018, the first undersigned counsel filed a motion for this Court recuse themselves or, in the alternative, to abate the proceedings. The motion to Recuse or Abate (En Banc) concerned an allegation of error regarding MG Risch's potential bias in the wake of attack that may have affected the pre-trial advice. The correspondence may reveal further evidence of alleged bias and may be subject to appellate discovery under *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002). As none of the named individual are parties to this litigation, this order will ensure preservation of evidence while the undersigned counsel continues the necessary investigation into this matter.

* COL Mulligan, LTC Hendricks, and LTC Downend were all members of the prosecution team. Additionally, LTC Downend served as Chief of Justice at the time of the attack.

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

Panel No. 2

MOTION FOR PRESERVATION ORDER

GRANTED: _____

DENIED: B

DATED: 17 Aug 18

AUG 17 2018

BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel

JACK D. EINHORN
MAJ, JA
Branch Chief,
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 27th day of July, 2018.

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APPENDIX H

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

Panel No. 2

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

[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.,

[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.

Panel No. 2

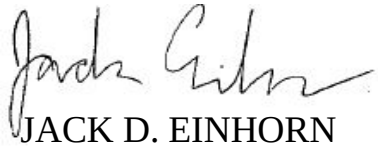
BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel,
Defense Appellate Division

MOTION FOR RECONSIDERATION OF THE DENIAL OF RECUSAL:

GRANTED: _____

DENIED: _____

DATED: _____



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

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

GRANTED: _____

DENIED: _____

DATED: _____

MOTION FOR
RECONSIDERATION OF THE
DENIAL OF THE PRESERVATION
ORDER:

GRANTED: _____

DENIED: _____

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 I

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BERGER, HAGLER and SCHASBERGER
Appellate Military Judges

UNITED STATES, Appellee
v.
Major NIDAL M. HASAN
United States Army, Appellant

ARMY 20130781

ORDER

WHEREAS:

On 23 May 2018, appellate defense counsel submitted a Motion to Examine and Copy Sealed Materials. This Court denied the request in part.

On 6 August 2018, appellate defense counsel submitted a motion for reconsideration requesting to examine and copy appellate exhibits that were sealed at trial because they contain attorney-client privileged information that was submitted to the trial court *ex parte*, or provided orally during a closed *ex parte* Article 39(a), Uniform Code of Military Justice [UCMJ], session under the provisions of Rule for Courts-Martial [R.C.M.] 806.

Specifically, appellate defense counsel seeks to examine and copy the following sealed appellate exhibits: App. Ex. 41; App. Ex. 334; App. Ex. 336; App. Ex. 347 (encls. 1-3); App Ex. 348; App Ex. 389; App Ex. 390; App Ex. 397; App. Ex. 426; and trial transcript pages 2195-2208.

On 27 September 2018, this Court heard oral argument regarding whether appellate defense counsel should be permitted to examine the aforementioned sealed appellate exhibits or refer the matter to a Special Master to review. Pursuant to Military Rule of Evidence [Mil. R. Evid.] 502(c), appellant, as the client, is the holder of the privilege to these sealed appellate exhibits. During the hearing, this Court asked appellate defense counsel if appellant consents to the disclosure of the aforementioned exhibits. Appellate defense counsel declined to respond and has not indicated appellant waives the privilege. Accordingly, this Court finds that appellant has not waived the attorney-client privilege relating to the aforementioned sealed appellate exhibits. *See United States v. Dupas*, 14 M.J. 28 (C.M.A. 1982); *United States v. Dorman*, 58 M.J. 295 (C.A.A.F. 2003).

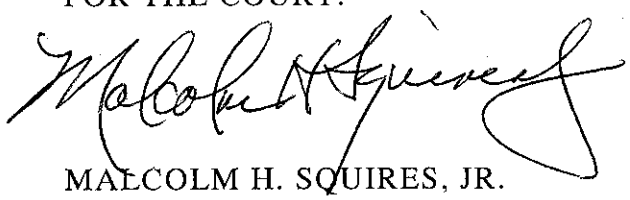
HASAN—ARMY 20130781

NOW THEREFORE, IT IS ORDERED:

Finding no basis in law to pierce the attorney-client privilege under Mil. R. Evid. 502, particularly without appellant's consent, appellate defense counsel's request to examine and copy the aforementioned sealed appellate exhibits is hereby DENIED.

DATE: 16 October 2018

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: Chief, DAD
Chief, GAD
JALS-CRZ
JALS-TJ
JALS-CCO
JALS-CCZ
JALS-CCC

APPENDIX J

AFFIDAVIT

I, CPT Heather M. Martin, on this 11th day of July 2018, declare under penalty of perjury that information contained herein is the truth.

On 20 March 2018, I witnessed an interview of COL Febbo conducted by CPT Osterhage. Below is what I observed from this conversation:

Before the Incident:

Within a week and a half before the incident, COL Febbo spoke to MAJ Hasan verbally and through e-mail about war crimes that MAJ Hasan learned through patient communications. COL Febbo relayed this information to MEDCOM, who conducted an ethics review on whether these communications and allegations could be disclosed. In addition, an AR 15-6 investigation was initiated to determine whether the allegations were credible. COL Febbo informed CPT Osterhage that MG Risch knew about these allegations. At some point, COL Febbo turned over the e-mails to CID and/or the Joint Terrorism Task Force. COL Febbo stated he wrote a statement, as well, that memorialized his conversations with MAJ Hasan.

The Day of the Incident:

When the shootings occurred, the installation went on lock-down until 2100/2200. COL Febbo and MG Risch were located on Fort Hood. They were trying to ascertain the details of what was happening – whether there was one or more shooters, etc. Eventually, COL Febbo learned that the shooter was MAJ Hasan. During the lockdown, the OSJA had two personnel located in the SRP site: a civilian paralegal and CPT Nathan Freeburg. Their duties included wills and other matters to prepare Soldiers for upcoming deployments. When the installation was on lockdown, COL Febbo was trying to contact them to ensure they were alright. Complicating matters, cell phone towers were down because everyone was trying to call people. Everyone at the OSJA was concerned about his and her wellbeing.

After the Incident:

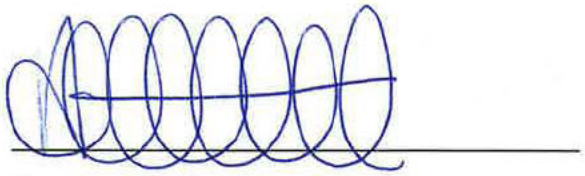
When COL Febbo learned the shooter was MAJ Hasan, COL Febbo recused himself from all military justice actions and investigations involving MAJ Hasan. However, COL Febbo remained in Deputy Staff Judge Advocate functions that involved the incident, to include: court-martial logistics for the Defense Team and Prosecution Team to obtain a trailer/bigger office, staffing matters, and discussions with the Administrative Law Section and Claims Section with regards to gifts.

COL Febbo stated he was not around discussions about the court-martial because the Prosecution Team was located in a different office from the military justice shop.

COL Febbo stated he had difficulty remembering the events as they occurred nine years ago. CPT Osterhage requested COL Febbo to reduce the information he provided into an affidavit, which COL Febbo declined unless ordered to by the Court.

In accordance with 28 U.S. Code § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of July, 2018.



Heather M. Martin
CPT, USA

APPENDIX K

NATHAN FREEBURG

[redacted]

May 21, 2018

[redacted]

Dear Sir/Ma'am:

On 5 November 2009, I was a Judge Advocate in the Fort Hood OSJA and conducting my medical SRP when gunfire began.

Rounds were fired in my direction (whether the shooter was aiming at me I do not know) and I was approximately 25-40 feet away when he went down. After the shooter was neutralized, I secured a downed police officer's weapon and rendered first aid to multiple individuals, both military and civilian. During that process, a significant quantity of blood splattered on my uniform and person, none of it mine own. (I was uninjured.) Also during that time period, the Harker Heights SWAT responded (and fired while clearing a building resulting in numerous first responders taking cover), several medevac helicopters circled but did not land due to the possibility of a second shooter, the SWAT team left to respond to reports of a shooting at the commissary, the Fort Hood alarm system went off advising personnel to take cover and a platoon from the 3rd Armored Cavalry Regiment responded and set up a perimeter.

Later that evening I went to the OSJA. By that time I had washed my face of blood but I was still in the same uniform. I saw the SJA, then COL Stuart Risch. After he inquired into my well-being, I briefed him as to what I had witnessed (which in substance was likely similar to my sworn statement to CID).

Several days later, COL Risch spoke to myself and a 27D who had rendered first aid that day. He mentioned that he had toured the medical SRP building the evening of 5 November, that it was a difficult experience that would make it hard to sleep at night or words to that effect. (From personal observation, on that day the floor of the medical SRP building was slicked with blood and multiple bodies.) He suggested that we seek behavioral health assistance as necessary.

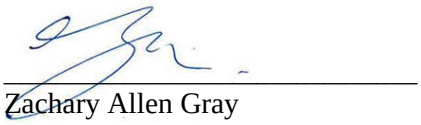
Nathan Freeburg
Nathan Freeburg

DECLARATION

I, Captain Zachary Allen Gray, on this 11th day of July, 2018, duly swear under the penalty of perjury that information contained herein is the truth.

On or about May 21, 2018, I served as a witness to a conversation between Captain Bryan Osterhage and Nathan Freeburg. I have reviewed the statement of Nathan Freeburg dated the same day, and it is an accurate representation of what Nathan Freeburg relayed to CPT Osterhage over the phone.

I, Captain Zachary Allen Gray fully understand the contents of this entire statement. This statement was made freely, without hope of benefit or reward, without threat of punishment and without coercion, unlawful influence, or unlawful inducement. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Zachary Allen Gray

APPENDIX L

UNITED STATES ARMY TRIAL JUDICIARY
THIRD JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
v.	)	
	)	Motion to Compel
NIDAL M. HASAN	)	Appointment and Funding of
Major, U.S. Army	)	Defense-Initiated Victim Outreach
Headquarters and Headquarters Troop	)	
21st Cavalry Brigade	)	19 March 2012
Fort Hood, Texas 76544	)	

RELIEF REQUESTED

The Accused, by and through counsel, moves this Court to compel the Government to appoint the Institute for Restorative Justice and Restorative Dialogue (IRJRD) of the School of Social Work at the University of Texas at Austin, to provide Defense-Initiated Victim Outreach (DIVO) in this case, and to authorize $30,000 for these services. This request is made IAW the Fifth Amendment to the United States Constitution; Article 46, UCMJ; Rule for Courts-Martial (R.C.M.) 703; *United States v. Ford*, 51 M.J. 445 (CAAF 1999); and *United States v. Toledo*, 25 M.J. 270 (CMA 1987). The Defense properly demonstrated the relevance and necessity of this assistance and made a timely request IAW R.C.M. 703.

Oral argument is requested.

BURDEN OF PROOF AND STANDARD OF PROOF

The Defense has the burden of persuasion, and the burden of proof is by a preponderance of the evidence for any factual issues necessary to decide this motion. R.C.M. 905(c).

FACTS

1. On 12 November 2009, MAJ Hasan was charged with 13 specifications of premeditated murder (Article 118, UCMJ) for allegedly shooting multiple individuals at the Fort Hood Soldier Readiness Center on 5 November 2009. On 2 December 2009, MAJ Hasan was charged with 32 specifications of attempted murder (Article 80, UCMJ) arising from the same incident. On 6 July 2011, the Convening Authority referred the charges to a General Court-Martial authorized to impose a capital sentence.

APPELLATE EXHIBIT XLVIII
PAGE REFERENCED: 125
PAGE 1 OF 20 PAGES

2. The impact of this incident on victim-survivors and the surrounding community runs broad and deep. Approximately 748 people were present at the Soldier Readiness Processing site on 5 November (Enclosure 1). In a post-wide email dated 11 January 2010, then-Fort Hood Commander LTG Cone reflected that "The tragic events of November 5th profoundly impacted each of us personally and the community as a whole." (Enclosure 2). Months later, the acting Fort Hood Commander, MG Grimsley, publicly emphasized several measures to address ongoing needs arising from 5 November, including an incentivized Community Needs Survey, focus groups, and integration into the Fort Hood Behavioral Health Campaign (Enclosure 3). The initial phase of the Behavioral Health Campaign identified 1,113 "highly exposed" individuals for follow-up (Enclosure 4).

3. Victim-witness outreach is recognized as so important within the military justice system that federal statute, DoD Directives, and Army Regulation (AR) 27-10 mandate its use. Army Regulation 27-10 outlines the appointment of Victim-Witness Liaisons (VWLs) to facilitate three objectives in a criminal case.

> *a.* To mitigate, within the means of available resources and under applicable law, the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by DA authorities.
> *b.* To foster the full cooperation of victims and witnesses within the military criminal justice system.
> *c.* To ensure that victims of crime and witnesses are advised of and accorded the rights described in this chapter, subject to available resources, operational commitments, and military exigencies.

See AR 27-10, paragraph 17-4 (Enclosure 5). The VWL program as implemented by AR 27-10 is primarily prosecution and law-enforcement oriented: the servicing Staff Judge Advocate appoints VWLs and implements the VWL program. *Id.* at paragraph 17-6c. The stated intent of the VWL portion of AR 27-10 is to provide guidance "for the protection and assistance of victims and witnesses, and for the enhancement of their roles in the military criminal justice process, *without infringing on the constitutional and statutory rights of the accused.*" *Id.* at paragraph 17-2e (emphasis added). The "trial counsel, VWL, or other Government representative" is charged with the duty to consult with victims on major case decisions. *Id.* at paragraph 17-15a.

4. Defense-Initiated Victim Outreach, through the use of specially-qualified Victim Outreach Specialists (VOSs), enables victims and survivors to communicate questions, needs or concerns to the Defense in the same way that VWLs are able to facilitate these concerns as representatives of the Government. DIVO complements but does not replace VWL efforts. DIVO assistance has been authorized and implemented in both state and federal cases, including the 9/11 case of *United States v. Zacarias Moussaoui* (E.D. Va). In the federal system, a full-time DIVO coordinator oversees the implementation of DIVO in federal cases. In Texas, the IRJRD has provided DIVO services in over forty state cases, about 75% of which had court-approved funding. The IRJRD has also provided DIVO services in one military capital case, *U.S. v. Chapman.*

5. Because DIVO is a program centered on victim-survivors, DIVO services are provided in a transparent manner outside of the attorney-client relationship. DIVO staff maintain an "arms length" relationship with the Defense, but unlike VWLs, have an obligation, with permission of the victim-survivor, to relay Defense-oriented questions or concerns to members of the Defense team for appropriate resolution. A Memorandum of Understanding is signed by all parties to clearly delineate the role and functions of DIVO (see Enclosure 6).

6. The Defense submitted DIVO funding requests to the Government on 14 July 2010, as supplemented on 10 August and 13 September 2010. The Defense also asked the Special Court-Martial Convening Authority to recommend DIVO at the time he forwarded court-martial charges. Finally, the Defense requested on 19 February 2012 that the General Court-Martial Convening Authority fund DIVO. The Government denied all of these requests (see Enclosures 8 through 15).

7. The Defense requested and received the assistance of the Government's lead Victim-Witness Liaison, Ms. Mary Jo Speaker, to send out letters to victim-survivors on two occasions (see Enclosure 16). It is unknown to the Defense how much interaction Ms. Speaker or other VWLs have had with victim-survivors. A Defense request to the VWL for such information was denied by the Government, and resulted in a discovery request that was also denied by the Government (see Enclosure 17).

8. Of note, an Offer to Plead Guilty was submitted by MAJ Hasan in January 2012. The Defense mailed informational letters to the victim-survivor contacts provided by Ms. Speaker, but received no responses. The subsequently rejected Offer was accompanied by a list of recommendations on the Offer by thirteen family groups, representing the thirteen deceased in this case (see Enclosure 18). The Defense is not privy, however, to the role of the VWL in presentation of this Offer to families, what information was presented to families, or the tenor in which it was presented.

9. Some victim-survivors have already reached outside the usual VWL channels to seek case-related answers or connections. Ms. Kerry Cahill, sister of the deceased Mr. Cahill, is now a member of the Board of Directors of the Nawal Foundation, an organization founded by the cousin of MAJ Hasan and dedicated to "No Violence in the Name of Islam." (Enclosure 19). Ms. Leila Hunt-Willingham, surviving sister of the deceased SPC Hunt, wrote a letter to the Defense specifically requesting DIVO services (Enclosure 20). On several other occasions, victim-survivors have indicated a desire to speak with the Defense, only to withdraw at the last moment (see Enclosure 21, with redactions out of respect for privacy).

WITNESSES AND EVIDENCE

The defense requests that the following witnesses be produced and present at the motions hearing:

1. Richard Burr, Esquire, 1811 Upper Leggett Rd, Livingston, Texas 77351, phone (713) 628-3391.

2. Stephanie Frogge, MTS, DIVO Coordinator, Institute for Restorative Justice and Restorative Dialogue, School of Social Work, The University of Texas at Austin, phone (512) 471-3197.

3. Marilyn Armour, Ph.D., Executive Director, Institute for Restorative Justice and Restorative Dialogue, School of Social Work, The University of Texas at Austin, phone (512) 471-3197.

The defense offers the following evidence for consideration in this motion:

1. PAO release, 5 November 2009 facts
2. LTG Cone email, 11 January 2010
3. MG Grimsley letter, 17 May 2010
4. FH Sentinel excerpt, 28 Jan 2010
5. Excerpt of AR 27-10, Chapter 17, 3 Oct 2011
6. DIVO Memorandum of Understanding, IRJRD
7. DIVO Work Proposal, IRJRD
8. DIVO Request, 14 July 2010
9. DIVO Supplement, 10 Aug 2010
10. DIVO Supplement, 13 Sep 2010
11. COL Lamb action, 15 Sep 2010
12. SJA memo, 16 Nov 2010
13. COL Lamb memo, 3 Mar 2011
14. DIVO request, 19 Feb 2012
15. LTG Campbell action, 23 Feb 2012
16. Defense outreach letters
17. Exchanges re. VWL discovery request
18. Victim-survivor recommendations, Offer to Plead Guilty
19. Excerpt, Kerry Cahill and the Nawal Foundation
20. DIVO request letter, Leila Willingham
21. Victim-survivor correspondence with Defense
22. DIVO Brochure, IRJRD
23. Web page excerpt, IRJRD
24. DIVO Manual for Prosecutors, IRJRD
25. Dept. of Justice grant to IRJRD
26. CV of Stephanie Frogge
27. CV of Richard Burr
28. Article by Mickell Branham and Richard Burr, 36 HOFSTRA L. REV. 1019 (2008)

LAW

The United States Constitution entitles a service member accused of a crime to expert assistance when necessary for an adequate defense. *See United States v. Robinson*, 39 M.J. 88, 89 (CMA 1994) *citing e.g., Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *Bolling v. Share*, 347 U.S. 497, 499 (1954); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). This right to expert assistance "extends from the investigative stage through the appellate process." *Id.* at 89.

Article 46, UCMJ, and R.C.M. 703 require that the Defense and the Government have an "equal opportunity to obtain witnesses and other evidence." This requirement applies to expert consultants as well as expert witnesses. *United States v. Warner*, 62 M.J. 114, 125 (C.A.A.F. 2005).

An accused is entitled to expert assistance before trial to aid in the preparation of his defense upon a demonstration of necessity. *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001) (*citing United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). Under military law, the accused must show that a reasonable probability exists "both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Id.* The CAAF applies a three-pronged test to determine whether expert assistance is "necessary": First, why the expert assistance is needed; Second, what the expert assistance would accomplish for the accused, and; Third, why the defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop. *United States v. Ford*, 51 M.J. 445, 455 (CAAF 1999) (*citing United States v. Gonzalez*, 39 M.J. 459, 461, *cert. denied*, 513 U.S. 965, 130 L. Ed. 2d 342, 115 S. Ct. 429 (1994)).

ARGUMENT

A. "Death is Different" is the threshold for analysis:

It is firmly rooted as "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; *that death is different.*" *Ford v. Wainwright*, 477 U.S. 399 (1986) (emphasis added). Comprehensive victim-survivor outreach is also important to this case because of the sheer scope of individuals affected by 5 November. In terms of its wide scope, this case is more similar to high-visibility trials such as *United States v. McVeigh* and *United States v. Moussaoui*, both federal cases where DIVO played an important role, than it is to a typical court-martial.

B. First CAAF Prong: Why is Expert Assistance Needed?

1. The Defense has a duty to reach out to victim-survivors:

Under the heightened standard of care in a capital case, it is clear that the Defense's ethical duty to fully investigative its case extends to victim outreach. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (under constitutional standards, counsel must either thoroughly

investigate the facts, or make a reasonable professional judgment that makes the investigation unnecessary). *See also* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 at 1020 (2003) ("Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to... members of the victim's family."). In *United States v. Kreutzer*, 59 M.J. 773 (A.C.C.A. 2004), *aff'd* 61 M.J. 293 (C.A.A.F. 2005), the Army Court found it to be a "tragic flaw" when defense counsel failed to interview the wife of the deceased victim before trial. The Court held that this failure to interview the victim,

> [W]ho would testify against their client about the devastating impact his killing of her husband had on her and her eight children, and to discover her extraordinary feelings of forgiveness and her belief that appellant should not be put to death, rendered their performance grossly ineffective on behalf of their client.

Id. at 784.

In this emotionally charged, highly unusual case, the Defense cannot fulfill its obligation toward victim-survivors through simple "interviews" – some victim-survivors understandably do not feel comfortable speaking with the Defense, and even those that do speak with the Defense are undoubtedly aware that the Defense is involved in an adversarial process with a duty toward our client. Introducing DIVO would allow the Defense to meet its ethical obligation to reach out and make itself available to victim-survivors, while also helping meet a legitimate need of victim-survivors.

The current posture of DIVO in courts-martial is similar to the posture of mitigation specialists in courts-martial a decade or so ago. Under the UCMJ, the Defense and accused have always had the right and obligation to present matters in extenuation and mitigation during the presentencing phase of trial. But not until *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005), did military courts began to openly embrace the current standard of care in capital cases, already widely recognized in federal and state courts, that expert assistance is needed to uncover mitigation. Under existing military law, the right to a mitigation specialist in a capital case is determined on a "case-by-case basis." *Id.* at 298. Likewise, the standard of care, already recognized in multiple state and federal jurisdictions, is that complex cases need specialized assistance in order for the Defense to meet its obligation to conduct victim outreach.

2. *The Defense needs specialized assistance to reach out to, and respectfully interact with, victim-survivors throughout the trial process:*

By virtue of federal statute, DoD Directive, and Army Regulation, the Government has a recognized obligation to reach out to victim-survivors using specialized VWL assistance. Army VWLs are experts in their own right, but instead of employing the procedures of R.C.M. 703(d), the Government is provided these experts by statute and regulation. The fact that Defense victim assistance is not yet codified does not make the need for specialized assistance any less real. The Defense has a clear ethical duty to reach out to victim-survivors, and needs specialized assistance to meaningfully fulfill its obligation.

Defense-Initiated Victim Outreach is a specialized field requiring specializing expertise. The Institute for Restorative Justice and Restorative Dialogue at UT Austin is a nationally-respected provider of DIVO training and services that recently produced, partially with a grant from the U.S. Department of Justice, DIVO manuals specifically for prosecutors and defense attorneys, and a 184-page DIVO "Master Manual" (see, e.g., Enclosures 22-24, with additional materials available at http://www.utexas.edu/research/cswr/rji/divo/training.html). Ms. Stephanie Frogge, DIVO Coordinator at the IRJRD since 2008, has decades of experience with victim services, including as Director of Peer Support Services for the military-focused Tragedy Assistance Program for Survivors (TAPS). She is nationally recognized as an expert on victim services and has published and presented specifically on the topic of DIVO (See her CV, Enclosure 26).

Skilled DIVO specialists are needed because the adversarial process itself inhibits the Defense's interaction with victim-survivors. The Defense is ethically bound to pursue every advantage for its client, whether from the Government, a witness, or a victim-survivor. This duty-bound, client-centered bias is inconsistent with the need to balance "the interests of the defense team and the concerns and needs of the victims." *See* Mickell Branham and Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why it is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019, 1025 (2008) (Enclosure 28). At the same time, "the interests of the defense team and the interests of the victims are far from being mutually exclusive." *Id.* at 1023. DIVO fills a necessary gap between Defense-related concerns of victim-survivors, and the benefits that may flow to the Defense from open engagement with victim-survivors. For the Defense, DIVO helps fulfill an ethical obligation. For victim-survivors, DIVO addresses needs that cannot be addressed through any other means.

DIVO can also help facilitate testimony at trial. The Defense expects that victim-survivors will be important witnesses for the Prosecution, and potentially even for the Defense. But victim-survivors suffer when they are caught in the litigation process itself. As provided for by federal statute and DoD guidance, AR 27-10 recognizes the right of victims "to be treated with fairness, dignity, and a respect for privacy." AR 27-10, paragraph 17-10a. The Defense certainly seeks to uphold fairness, dignity, and respect for victim-survivors. The Defense reaching out through DIVO, not the Defense reaching out in its advocacy role, is the best way to accomplish this. As the Department of Justice recognized in awarding its DIVO grant to IRJRD:

> The purpose of this program is to reduce the harm that criminal justice proceedings may inadvertently and unnecessarily inflict on survivor families or in non-homicide crimes, on the survivors themselves. Access to the defense may help address survivor needs for information, empowerment and control—needs often not met by the criminal justice process. In addition it can serve as a means for the defense to relate to survivors with respect and compassion, a statutory or constitutional mandate in most states. It may also reduce tension levels between the survivor family and defense counsel, a benefit to all parties.

See Enclosure 25. These are noble, important, and ethically required goals that cannot be ignored in this sensitive case.

3. The Army's Victim-Witness Liaison program cannot meet Defense needs:

That the Army's VWL program even exists is an acknowledgment that victim-survivors need access to specialized assistance. By making VWL support available to the Defense, the Government seems to recognize that both sides may need victim-survivor assistance – the Government simply parts ways with the Defense as to whether the VWL program is adequate to meet Defense needs.

The Government's apparent position is that the VWL in this case can impartially meet the needs of both the Government and the Defense. In denying a Defense request for DIVO on 15 September 2010, the SPCMCA relied on his view that "as an impartial actor a VWL is beholden to neither the prosecution nor the defense. As no confidentiality privilege protects statements made to a VWL, the VWL should maintain full and open disclosure with both prosecution and defense without prompting from either side." The Fort Hood Staff Judge Advocate, COL Foster, also referred to the VWL as an "impartial actor" on 16 November 2010.

This ideal of neutrality has not, unfortunately, survived the reality of capital litigation either in theory or in practice. The VWL system as implemented by AR 27-10 is actually *designed* to give the Prosecution increased access to victim-survivors. To list a few specific examples from the regulation:

(1) Staff Judge Advocates (SJAs), who ultimately advise convening authorities on case referral, are responsible for administering the VWL program (paragraphs. 17-6, 17-7). While convening authorities perform a quasi-judicial role in some stages of the court-martial process (such as considering expert funding requests), an SJA typically supervises the Chief of Justice and/or prosecutors, and has a vested interest in the outcome of a case.

(2) Crime victims have the "right to confer with the attorney for the Government in the case," and it is the SJA's role to ensure this right is afforded the victim (paragraph 17-10). Even if a victim wished to do so, there is no recognized or equivalent "right" to confer with a member of the Defense team.

(3) Crime victims have the opportunity to consult with trial counsel about "providing evidence in aggravation." (paragraph 17-14a(8)). Even if a victim wished to consult with the Defense about matters in mitigation (such as support for life versus death in a capital case), there is no mechanism in the regulation to do so, and there is no stated duty for a VWL to relay such information to the Defense. This frustrates the right of the Defense to explore and present matters in mitigation even though the Government has specific tools to explore and present matters in aggravation.

(4) "When appropriate," the trial counsel, VWL, or "other Government representative" should consult with crime victims about decisions such as pretrial agreement negotiations (para. 17-15). There is no equivalent mechanism for victims to consult with the Defense team about pretrial negotiations. If a victim supported a plea to life without parole instead of a capital referral, there is no formal mechanism for the victim to communicate this to the Defense team. Whatever the concerns or desires that victims/survivors have about the case outcome, DIVO can

help identify these concerns and present more fully formed options to the Defense team, and ultimately to the Convening Authority who has decision-making authority in this case.

In the context of ongoing litigation, lopsided access to expertise to reach out to victim-survivors also runs contrary to Article 46, UCMJ. In this case, the Government has actively sought to restrict Defense access to VWL information even though the same information is available to the Government. On 7 October 2011, the Defense submitted a written request to Ms. Speaker for an update on victim outreach services since December 2010, the last time the VWL communicated with the Defense. Ms. Speaker forwarded this request to the Prosecution, which questioned in writing the "propriety" of the Defense request. In turn, Ms. Speaker referred the Defense to the Prosecution to discuss the requested information, rather than meet with the Defense directly. In response, the Defense filed a discovery request with the Prosecution on 20 October 2011, which the Prosecution subsequently denied (see Enclosure 17). This is a far cry from the idea of impartial, equal access that the Government used to justify its earlier denial of DIVO services.

Having a VWL that seeks out and provides information primarily to the Government is akin to the Government providing itself with an expert but denying the Defense the same, which has been frowned upon by military courts. *See, e.g.*, *United States v. Warner*, 62 M.J. 114, 120 (C.A.A.F. 2005) ("Article 46 is a clear statement of congressional intent against Government exploitation of its opportunity to obtain an expert vastly superior to the defense's"); *United States v. Lee*, 64 M.J. 213, 218 (C.A.A.F. 2006) ("[T]he playing field at trial is rendered even more uneven when the Government benefits from scientific evidence and expert testimony while the defense is wholly denied a necessary expert to prepare for and respond to the Government's expert.").

To be clear, the Defense is *not* proposing a "battle of the experts" in regards to access to victim-survivors. All sides would agree that victim-survivors should not be overwhelmed by the adversarial process – which is exactly why having both VWL and DIVO support makes sense. The VWL, even when performing her role fully within the guidelines set forth by AR 27-10, *by design* cannot meet the needs of the Defense, or even the needs of victim-survivors that have Defense-oriented questions. The Defense does not contend that Ms. Speaker or other Government VWL representatives in this case have ever performed their role inappropriately – it is simply a role that is incompatible with the needs of the Defense. To use Army VWLs for Defense outreach would require rewriting Army guidance and restructuring the VWL system in ways that are not envisioned by AR 27-10. Asking VWLs to support the needs of both the Prosecution and Defense would be like asking them to have a split personality. If a victim, for example, asked a question such as "is a deal possible in this case?" or a question about MAJ Hasan himself, the answer could depend on which side was asked. A VWL has no duty to forward such a question to the Defense. Both the VWL and DIVO programs are victim/survivor focused – but if VWLs are victims' only non-adversarial source of information, some questions about the accused or Defense may remain unanswered because there is no comfortable forum in which to ask them.

In an adversarial system, it is simply impossible to have a single source of information that serves the needs of both sides. By analogy, the federal criminal justice system now has a

standing DIVO program, in addition to, and in spite of, the Department of Justice's Office for Victims of Crime (akin to the Army VWL program). The federal system recognizes that both of these parallel programs are necessary.

C. Second CAAF Prong: What Would Expert Assistance Accomplish for the Accused?

First and foremost, DIVO would avail the accused of the opportunity to access victim-survivors (through VSOs) to the same extent available to the Prosecution (through the VWL program). DIVO is a crucial means to build bridges of communication for victim-survivors that have Defense-oriented needs or concerns, but may not feel comfortable directly approaching the Defense during the adversarial court-martial process. The exchange of information and thoughts/questions/concerns may assist with the uncovering and presentation of relevant evidence at trial, or assist in resolution of the case

A Memorandum of Understanding and Work Plan describe the specific work to be performed by the IRJRD (see Enclosures 6, 7). As Director of DIVO outreach for this case, Ms. Frogge will hand-select Victim-Outreach Specialists who will help contact and follow up with victim-survivors by telephone, email, or other desired means. The pace of interaction is decided solely by victim-survivors. By using an arms-length approach, DIVO staff are likely to make headway with survivors who would be unwilling or reluctant to engage with the Defense, and would thereby assist the Defense in meeting its ethical obligation to reach out.

DIVO, like VWL services, are never forced upon victim-survivors; individuals may freely choose to accept or reject DIVO interaction. But the Defense is ethically obligated to at least offer such outreach. DIVO assistance would allow the accused, through his Defense team, to open dialogue and exchange information with survivors that would otherwise be difficult or impossible to achieve.

D. Third CAAF Prong: Why is the Defense Unable to Gather and Present this Evidence?

1. The Defense are ethically bound as advocates, not victim outreach specialists. As explained above, the Defense can have no role under than as advocate for our client. Particularly in post-referral capital litigation, an advocacy role is simply inconsistent with fostering an environment where victim-survivors are comfortable bringing forward questions and concerns. Victim-survivors are specifically informed that DIVO staff are not advocates for the Defense team, which completely changes the tenor of interaction. Unlike VWLs, however, DIVO staff are obligated to disclose any and all victim-related information to the Defense for which a victim-survivor authorizes release.

Just as the Defense could *attempt* to conduct its own victim-survivor outreach apart from DIVO, the Government could theoretically attempt to conduct its own outreach apart from the VWL program. But Congress saw fit to enact the VWL program in recognition of the complexity, sensitivity, and specialized nature of victim outreach. By the same token, the Defense has equally weighty victim outreach concerns, but no mechanism to address them.

2. *The Defense are not trained or qualified to conduct victim outreach.* Effective DIVO outreach requires communication and listening skills by those who are trained and experienced in dealing with victim-survivors. It is obvious that Ms. Frogge, as representative of the DIVO community, possesses a background, skills, and training that are much different from any other member of the Defense team. Ms. Frogge, with her social work background and decades of experience in victim outreach, provides just the expertise the Defense needs in order to carry out this important function. In addition to typically utilizing individuals with social work or related backgrounds, the DIVO field itself conducts intensive training programs that are necessary to effectively conduct DIVO. No member of the Defense possesses this specialized training or experience – nor could any Defense member properly conduct DIVO in an advocacy role.

3. *Outreach by the Defense team simply does not work.* There are, unfortunately, already examples of opportunities lost. On one occasion the VWL, Ms. Speaker, identified several surviving family members who indicated they wished to speak with the Defense but subsequently backed out. On at least one other occasion, a surviving family member contacted the Defense directly, only to also eventually back away (see Enclosure 21). The reasons for these changes could be many, and the decision to engage or not engage certainly remains the prerogative of the victim-survivor. But the outcome may have different had a liaison, in the form of DIVO, been available. In terms of both the Defense's ethical obligation and out of respect for victim-survivors, the fact that some victim-survivors clearly feel a need to reach out is too important to ignore.

CONCLUSION

Based on the foregoing, the Defense moves this Court to compel the Government to appoint the Institute for Restorative Justice and Restorative Dialogue (IRJRD) to provide Defense-Initiated Victim Outreach (DIVO) in this case, and to authorize $30,000 for these services.

CHRISTOPHER E. MARTIN
MAJ, JA
Defense Counsel

November 20, 2009
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MEDIA ADVISORY
= = = = = = = = = =
Release No. **20091120-01**

Contact III Corps & Fort Hood Media Operations Center
1001 761st Tank Battalion Ave.
Bldg. 1001, Room W-105
Fort Hood, TX 76544-5005
Email: hood.pao.news@conus.army.mil
Phone: (254) 287-2903

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FORT HOOD INCIDENT UPDATE
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FORT HOOD, Texas -The following update of the Nov. 5 mass casualty incident at this sprawling Central Texas Army post was developed by the staff of Fort Hood's Media Operations Center and is distributed as a service to all news media representatives.

Fort Hood leaders are expressing their "utmost gratitude for the immense and ongoing support in the wake of this unfortunate tragedy."

According to officials on post, "All the support received is proof that the Army family isn't just made of Soldiers." Fort Hood leadership continues to focus on providing quality medical care for Soldiers, their families and affiliated civilians to ensure a safe and speedy recovery from this incident.

The current number of hospitalized victims is five -including the alleged shooter. Of the four still hospitalized, three are in stable condition and one Soldier is in fair condition.

All questions related to the alleged shooter Army Maj. Nidal M. Hasan should be directed to his civilian lawyer John Galligan (254) 939-5646.

Charges were filed Nov. 12 against Major Hasan for the Nov. 5 shooting incident at Fort Hood. The charges included 13 specifications of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice. These charges are allegations and the accused is considered innocent until and unless proven guilty.

There are currently 245 behavioral health professionals on Fort Hood, to include psychiatrists, counselors, and Army chaplains. Of the 748 people present at the SRP site Nov. 5, all have attended a critical incident stress debriefing. Soldiers, family members and civilians also have access to military chaplains and counselors on the Fort Hood Resiliency Campus. Mental health, professionals are also available at Fort Hood's Urgent Care and Triage Clinic.

To help ensure everyone authorized assistance knows how to access behavioral health services on Fort Hood, post officials are asking for the news media's help in dissemination of contact numbers and locations, to include:

Fort Hood Resiliency Campus
31st St. & Battalion Ave.
Phone (254) 383-1631

Behavioral Health Hotline
Phone (254) 553-3480

Urgent Care and Triage Clinic
Bldg. 36009 on Wratten Dr.
Phone (254) 285-6881

Army Community Service
Phone (254) 288-7570

Fort Hood Chaplain
Phone (254) 287-CHAP (2427)

The status of the investigation is ongoing. The primary concern is maintaining the integrity of the investigation. All updates pertaining to the investigation will be released by the Criminal Investigation Division (CID).

END###

EDITOR'S NOTE: The following summary is provided to assist news media representatives, webmasters, public affairs officers and concerned citizens in expeditiously obtaining that information and reducing the telephone burden on the Fort Hood communications team.

Fort Hood Homepage -Provides the latest information on all things happening at The Great Place, as well as links to media updates and donation information. http://www.hood.army.mil

Casualty Listing -A news release with the victims' names, ages, hometown and job at Fort Hood is available online. http://www.hood.army.mil/newsreleases/20091107-01.htm

Victims' Photos -A tribute to the fallen, including individual photos, is part of the Fort Hood Sentinel special edition tribute available for download at any time. http://www.forthoodsentinel.com/story.php?id=2390

Donations -An up-to-date listing of relief agencies on post and how to contact them is readily , available online. http://www.hood.army.mil/newsreleases/20091106-03.htm

News Releases -All news releases and advisories are posted to Fort Hood's Virtual News Center and can be accessed by anyone. http://www.hood.army.mil/news.releases.aspx

Fort Hood Sentinel Newspaper -Review this week's special edition that publicizes so many of the stories and images from across the post this past week as Soldiers move forward. http://www.forthoodsentinel.com/

Fort Hood Leaders -Photos and biographies of III Corps and U.S. Army Garrison leaders, as well as directorates and support agencies are readily available online for downloading.
http://www.hood.army.mil/corps.leaders.aspx

Fort Hood releases are now online at http://www.hood.army.mil/news/newsreleases/
Army releases are virtually posted at http://www.army.mil/news/newsreleases/
DOD media resources can be found at http://www.defenselink.mil/news/

Still have questions, comments, concerns, or suggestions about how the III Corps & Fort Hood Public Affairs Office can serve you better? E-mail us at Hood.Garr.PAO@conus.army.mil

From: HOOD PAO PHANTOM DISTRO
Sent: Monday, January 11, 2010 2:37 PM
To: HOOD PHANTOM DISTRO
Subject: From the Office of the Commanding General (UNCLASSIFIED)
Signed By: jeffery.dean.collins@us.army.mil

Classification: UNCLASSIFIED
Caveats: NONE

Dear Fort Hood Soldiers, Family Members and Employees:

The tragic events of November 5th profoundly impacted each of us personally and the community as a whole. Our ability to cope with this tragedy was strengthened by the resolve of the community and your commitment to supporting one another. Many of you have been able to move forward and put this event behind you; however, others may still be experiencing more long-lasting effects.

As your Commander, I want to make sure everyone is moving toward recovery, but I need each member of our community to continue to help. We have worked hard to ensure that all necessary support programs are available to each of you and that they are meeting your needs. In order to measure the success of our efforts, I am asking each of you to complete an online community survey. This survey is part of the US Army Public Health Command's (Provisional) behavioral health surveillance plan.

The survey, which opens on January 11, 2010 and closes on January 27, can be accessed by clicking or typing into your web-browser the Following URL: www.FortHoodCommunityNeedsAssessment.org

All Soldiers, Spouses/ Family Members (18 or older), DA Civilians, and Contractors working and living on or around Fort Hood are asked to participate. The survey will take approximately 15-30 minutes of your time to complete and all responses will remain completely anonymous.

Please keep in mind the survey ends on January 27, 2010. Together our community will remain strong. Together we will continue to move forward.

[The full text of LTG Cone's Invitation can be viewed at www.FortHoodCommunityNeedsAssessment.org]

Sincerely,
Robert W. Cone
Lieutenant General, Us Army
Commanding

More information about the web-based community survey can be found by following the web-address provided under frequently asked questions (FAQs).

For further information please contact Dr. Shayne Gallaway from the Army Public Health Command (Provisional) at Shayne.Gallaway@us.army.mil.

Classification: UNCLASSIFIED
Caveats: NONE

DEPARTMENT OF THE ARMY
HEADQUARTERS, III CORPS AND FORT HOOD
1001 761ST TANK BATTALION AVENUE
FORT HOOD, TEXAS 76544-5000

May 17, 2010

REPLY TO
ATTENTION OF

Office of the Fort Hood Commander

Dear Fort Hood, Soldiers, Family Members, and Employees:

Help us make Fort Hood a better place by participating in the upcoming Community Needs Survey and focus groups that will lead to newly established standards of behavioral health services. Your opinion and feedback are important.

The surveys and focus groups are being conducted in order to improve the health of our Fort Hood community following the November 5, 2009 shootings. I am asking each of you to participate even if you have placed this event behind you or were not present at the time of the shooting. Everyone's support is needed if we are to establish a new standard of medical health services; identify positive aspects of the community's adjustment; and ensure that everyone has access to the support and resources needed to keep our Fort Hood community healthy.

The survey opens on May 17, 2010 and closes on June 7, 2010. I am asking that you complete this survey within the next week by clicking or typing into your web-browser the following URL: www.FortHoodCommunityNeedsAssessment.org

The survey will take approximately 15-30 minutes to complete, and all of your responses will remain completely anonymous. Although participation is completely voluntary, I strongly encourage all Soldiers, spouses/ family members (18 or older), DA civilians, and contractors working and living on or around Fort Hood to complete the survey.

Family participation is so vital to the survey findings that I've directed an incentive package for the large, medium, and small units that achieve the greatest number of spouse participation. This incentive package includes a training holiday at BLORA with free pavilions and reduced rates on all rentals. Additionally, every unit that achieves or exceeds 50% family member participation will receive funds (amount yet to be determined) deposited directly to their FRG accounts.

Along with the Community Needs Survey, focus groups will be held with select groups of Soldiers, family members, DA civilians, and contractors to discuss personal experiences and opinions about how the Fort Hood community is doing. If you would like to participate in these focus groups, please contact the following: family members can contact their unit's FRSAs or FRG leaders; Soldiers can volunteer through their unit chain of command; and civilians can contact their supervisors. This upcoming May effort will be followed by two more web-based surveys and focus groups over the next 12 months as part of the long-term Fort Hood Behavioral Health Campaign Plan. This plan is designed to help identify positive aspects of the community's adjustment over time.

Our ability to cope with the tragedy of 5 November was strengthened by the resolve of the community and your commitment to support one another. Thank you in advance for completing the survey. Please keep in mind the survey closes on June 7, 2010. Together our community will remain strong.

Phantom Warriors!

William F. Grimsley
Major General, US Army
Acting Commander

FORT HOOD
SENTINEL

FortHoodSentinel.com
http://www.forthoodsentinel.com/story.php?id=2985

Behavioral Health Plan starts 2nd Phase

by Dave Larsen, Sentinel Editor
January 28, 2010

The Fort Hood Behavioral Health Campaign was developed in the wake of the Nov. 5 shootings here to reach out to anyone affected by the tragedy. The three-phase plan was implemented immediately.

"Phase One was the immediate, or crisis (phase)," Col. Bill Rabena, the commandant of the Resiliency Campus who is overseeing the campaign, explained. "That began right at Nov. 5. What we did was meet the immediate needs. That involved group counseling sessions and mandatory one-on-one sessions. Every individual was given the opportunity to get behavioral health screening for further needs and intervention. It was no small task."

There were 1,113 people identified in the initial phase of the plan for follow-up.

"The 1,113 are people who were highly exposed, to include those Soldiers wounded, civilians wounded, family members, people at the SRP site and health care providers," Col. Thomas R. Yarber, officer-in-charge, Carl R. Darnall Army Medical Center's Behavioral Health Operations Cell, said. "In fact, in my own personal caseload I'm seeing three personnel who were directly affected at the SRP site."

With the immediate crisis past, the second phase of the plan has already begun with an online survey conducted in the community. The survey concluded Wednesday.

"Then, we'll conduct a series of 500 (follow-up) phone calls," Rabena said. "What we're trying to do is ... make sure that we have the random sampling that we're looking for, and then it will take Public Health Command a couple of weeks to package it and they'll bring it to Fort Hood and we'll go ahead and review the results."

Besides the survey, re-screening sessions have been scheduled at the Ironhorse Physical Fitness center Feb. 18-26 from 9 a.m. to 5 p.m. each weekday.

"We're going to be in contact with commands and arrange times that work for them," Yarber said. "They'll come in and fill out a paper screening tool that will be scored and then they'll be interviewed by a clinical professional, either a psychologist or a social worker. If they need further intervention ... we'll provide immediate intervention and coordinate follow-up care for them."

Rabena said the plan h een instrumental in getting help t se who need it in the wake of the tragedy, but he said the scope of the plan goes far beyond that incident.

"The Nov. 5 tragedy, if there's anything good to come out of that, it would be the Behavioral Health Campaign Plan," Rabena said. "The specific things that make it so unique is it's a whole community approach. You've seen internal assets to Fort Hood, at CRDAMC, you've seen Department of the Army level assets – they're interested in this and they've been a huge part of it – you've seen Southern Region Medical Command assets flex to this institution to help this post, and you've also seen is a huge outreach to the local community for the network providers and (even) those that are not network providers. That is what particularly unique about this approach."

Community outreach started almost immediately as Central Texas health care providers reviewed the plan in November and added their recommendations. Rabena said Fort Hood is planning more outreach sessions with the community to strengthen the bond already established.

"We really want to reach out to them," he said. "I can tell you that the next event we have is Feb. 5 and invitations have already gone out, where we've invited a lot of the same agencies that were here in November.

"We will cover the campaign plan with them and we want their feedback. We also want to give them their due time and they're going to brief their particular agency," Rabena added. "At the end, what we want to do is to have that dialogue where we're meeting regularly – behavioral health advisory councils. If they know someone who fell through the cracks, we want to know about it."

Of primary concern for the command is ensuring that anyone who needs behavioral health care assistance gets it. That has been the top priority since November, when the plan was announced by Lt. Gen. Robert Cone, III Corps and Fort Hood commanding general.

"General Cone is determined that no one falls through the cracks," Rabena said. "This campaign plan is a safety net to make sure that no one does, meticulously tracking individuals."

Rabena said the campaign plan will continue with surveys, re-screenings and follow-up care for individuals for 18 months. The comprehensive approach to this issue, he said, is showing benefits to Fort Hood's on-going health care programs.

"(The Behavioral Health Campaign Plan) was designed really for the Nov. 5 tragedy, make no bones about it, it really was," Rabena said, "The whole-community approach, though, applies to behavioral health assets beyond that. That's the beauty of it. We're seeing that already and we're already seeing some of the effects of it."

GET HELP

Behavioral Health Hotline: 553-3480

APPENDIX M

UNITED STATES ARMY TRIAL JUDICIARY
THIRD JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
v.	)	Motion for Appropriate Relief
	)	
NIDAL M. HASAN	)	Defective Referral
Major, U.S. Army	)	
Headquarters and Headquarters Troop	)	
21st Cavalry Brigade	)	
Fort Hood, Texas 76544	)	10 August 2012

RELIEF REQUESTED

MAJ Nidal M. Hasan, by and through counsel, hereby moves this Court to stay the proceedings, set aside the panel selection and referral of the case, and to order the disqualification of the Convening Authority and Staff Judge Advocate.

BURDEN OF PROOF AND STANDARD OF PROOF

The Defense has the burden of proof on any factual issue. R.C.M. 905(c)(2). The standard of proof on any factual issue is preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. On 12 November 2009, MAJ Hasan was charged with 13 specifications of premeditated murder pursuant to Article 18, UCMJ for allegedly shooting multiple individuals at the Fort Hood Soldier Readiness Center on 5 November 2009. On 2 December 2009, MAJ Hasan was charged with 32 specifications of attempted murder pursuant to Article 80, UCMJ arising from the same incidents.

2. Beginning on 5 November 2009, and continuing through the present, there has been a massive public reaction to the shootings alleged in this case. Thousands of articles have been published on the shootings and this case, and thousands more have appeared on television and radio. U.S. Senate investigations have been directed, congressional hearings have been held, and reports concerning the failures of government agencies in relation to the shootings have been released to the public. Further, the President, former President, Secretary of the Army, former III Corps commander, Senators, Congressmen, and heads of various executive branch agencies and departments have made public statements about the case.

APPELLATE EXHIBIT CLXXII
1 OF 35 R. 722

3. Between 5 November 2009 and 30 March 2012, there have been over 21,230 publications nationally about the Fort Hood shooting, MAJ Hasan, and this Court-Martial. This extensive media coverage has included newspaper articles, television reports, magazine articles, online media, blogs, and virtually every form of publication possible. This does not include local articles.

4. In a special 'double issue' of Time Magazine published before referral and panel selection on 23 November 2009, MAJ Hasan's photograph appeared on the front cover with the word 'terrorist' spelled out across his face. The approximate circulation of Time Magazine is 3,300,000 readers. As an introduction to the enclosed story about MAJ Hasan, an illustration appears with MAJ Hasan, in uniform, face covered in blood, the Islamic Crescent appears on a Mosque in the background, and blood is dripping down an American Flag. In the article itself, MAJ Hasan is referenced as the 'new face of terrorism' and a 'violent Islamic extremist.' Importantly, he article contains accounts the President's reaction to the shooting including his attendance at a memorial service held at Fort Hood. (Enclosure 1)

5. In the President's remarks at the memorial ceremony held for the victims of the shooting on 10 November 2009, which was widely reported across the nation, the President stated, "no faith justifies these murderous and craven actions... for what he has done, we know that the killer will be met with justice – in this world and the next." Later in his remarks, the President commented on how we are a nation of laws where "justice is so enduring that we would treat a gunman and give him due process, *just as surely as we will see that he pays for his crimes*." (Enclosure 2) (emphasis added).

6. The President also mentioned the shooting in his 14 November 2009, weekly radio address where he discussed the shootings and meetings had taken place between himself, the Secretary of Defense, Chairman of the Joint Chiefs of Staff, and Director of the FBI. The President also indicated that he had subsequent meetings with leadership of the military and the intelligence community. (Enclosure 3).

6. As exemplified in three articles out of thousands published nationwide, there is a national call for MAJ Hasan to be considered a murdering terrorist. Examples of pre-referral and panel selection statements by senior political representatives include: *Common Sense Says Major Hasan was a Terrorist* by Ed Koch (former Mayor of New York City), published on the website www.realclearpolitics.com, 11 November 2009 (which discusses Senator Lieberman as the arbiter in the court of public opinion, which has found MAJ Hasan guilty) (Enclosure 4); *Fort Hood Attack Publically Called 'Terrorism'* by Mike Levine, Fox News Blog, 24 February 2010 (describing United States Secretary for Homeland Security Janet Napolitano, FBI Director Robert Mueller, and United States Senator Joseph Lieberman all publicly labeling MAJ Hasan as a terrorist well before any conclusion of guilt has been reached by a court) (Enclosure 5).

7. On 7 November 2009, Senator Joseph Lieberman said that he intends to launch a congressional investigation into circumstances around the "worst terrorist attack since 9/11." His call for an investigation was widely publicized. Senator Lieberman also said that the military needs to have "zero tolerance" for those expressing extremist views. (Enclosure 6).

8. While the Defense Counsel was unable to gather some examples of unlawful command influence because of the Court's denial of the Defense Motion to Compel the production of evidence related to unlawful command influence, filed on 2 December 2011. The material requested by the Defense concerns conversations about MAJ Hasan and the alleged shootings that occurred between the President and senior government t and military official, including the Secretary of Defense and the Chief of Staff of the Army.

9. While the Defense Counsel was able to gather some examples of statements made by senior governmental leaders, it was unable to do a thorough media analysis in order to gather all statements which may have affected the referral decision in this case. The Defense was unable to gather these publications due to the denial by the Military Judge of a media analysis expert consultant and access to the Department of the Army Public Affairs Office. The Defense believes that there were many more public comments made by senior government leaders, which the Defense has been unable to obtain and present in support of this motion.

9. On 2 August 2012, the Defense interviewed LTG Donald Campbell, Commander, III Corps and Fort Hood, as well as COL Stewart Risch, Staff Judge Advocate, III Corps and Fort Hood.

a. During the interview, LTG Donald Campbell stated that at the time of the shootings he was the Commanding General of U.S. Army Recruiting Command (USAREC). While on a recruiting trip in Puerto Rico, he was informed of the shootings by another General officer. After the shootings, he was exposed to various news and television reports concerning the shootings. Though the force protection measures were regularly reviewed at USAREC, the shootings did prompt a review of the Fort Protection posture. Prior to becoming the Commander, he received a series of briefings about the shootings from COL Risch in order to be familiar with the facts of the case and the status of the investigation prior to taking command.

b. LTG Campbell discussed the effect that the shootings had on the community and those stationed at Fort Hood. LTG Campbell believes that those who were most greatly affected in a negative way are those who were stationed at Fort Hood at the time of the shootings and who lived in the local Killeen, TX community. According to LTG Campbell, when at social events in the community, he occasionally receives questions about that case due to his position as Convening Authority, but declines to comment. After referring the case capital he was occasionally thanked for referring the case death eligible by members of the community. LTG Campbell also stated that the local Killeen, TX community might be upset if a sentence of life was adjudicated.

c. LTG Campbell discussed his knowledge of statements made by John Galligan, MAJ Hasan's former attorney. LTG Campbell explained that he was aware of complaints made by Galligan with respect to the venue of trial and MAJ Hasan's ability to receive a fair trial at Fort Hood. LTG Campbell also explained that he expected the Defense to request a change of venue at some point in the proceedings. Despite his knowledge of the aforementioned, LTG Campbell made a statement to the press on 27 July 2011, indicating

that he would like the trial to stay at Fort Hood both because the installation has the capacity to host the trial and because it can be fair. (Enclosure 7).

d. COL Rish stated that he was the Fort Hood and III Corps Staff Judge Advocate at the time of the shooting and lived with his family on Fort Hood when the shooting occurred. Since the shootings he has continued to live on Fort Hood. When the shootings occurred his spouse was at home. COL Risch stated that at the time of the shootings he was in his office at III Corps headquarters. Upon being notified of the shootings by the III Corps Chief of Justice, he called his family to ensure their safety. After being guaranteed by his wife that his family was okay, he informed the III Corps Chief of Staff that an incident had taken place, and then subsequently briefed the III Corps Commanding General, LTG Robert Cone. In the days and weeks after the shooting, COL Risch attended various briefings about the event itself and status of the investigation.

e. COL Risch also discussed the effect that the shootings had on the community. He recognized that those at Fort Hood, at the time of the shooting, might be greatly affected by the event. Further, he noted the impact on the community and stated that he had occasionally been approached by members of the community who were seeking information about the case.

f. COL Risch was the Staff Judge Advocate at Fort Hood when the President, former President and Secretary of the Army visited the installation in aftermath of the shootings to attend a memorial ceremony for the victims. Further, he was the Staff Judge Advocate that provided panel selection advice to the Convening Authority and he also provided pretrial advice to the Convening Authority.

8. Traditionally when selecting panel members for a General Courts-Martial, the III Corps General Courts Martial Convening Authority has selected 10 primary members. This practice has continued under LTG Campbell, with the exception of this case.

9. On 9 November 2009, the Deputy Staff Judge Advocate of III Corps and Fort Hood, LTC Robert Vasquez directed that an email be sent to all personnel in the III Corps Office of the Staff Judge Advocate. The email discussed the following day's ceremony to be held for the victims of the shooting. In the email it directed that only those who are mission essential work the following day. Finally, all those in the Office of the Staff Judge Advocate were encouraged to attend the memorial ceremony. This email is evidence that everybody in the Office of the Staff Judge Advocate was affected by the shooting and the aftermath of the shootings. (Enclosure 8).

10. On 6 January 2010, LTG Robert Cone sent a letter to all Fort Hood Soldiers, family members, and employees. In the very first line of this letter, LTG Cone recognized the profound impact of the shootings on each person. This presumably included the Staff Judge Advocate. (Enclosure 9).

9. Prior to the selection of panel members, COL Risch indicated that his office coordinated with the Office of the Staff Judge Advocate at Fort Sill, OK in order to have an additional pool of panel members. On 29 June 2011, LTG Donald Campbell, the GCMCA, selected a panel specifically for the case of *United States v. MAJ Nidal M. Hasan* with 16 primary members and 12 alternate members.

10. The GCMCA referred the case to Court-Martial convening Order (CMCO) Number 11, dated 6 July 2011, CMCO 14 on 15 July 2011, and CMCO 25 on 20 March 2012 with a different panel entirely.

WITNESSES AND EVIDENCE

1. The Defense Requests that the Court consider the facts contained within this motion as evidence in order to avoid the necessity of calling the Convening Authority and Staff Judge Advocate at witnesses in support of its motion.

AUTHORITIES

Fifth and Sixth Amendments to the United States Constitution
Uniform Code of Military Justice Article 1, 6, 22, 34
Rule for Courts Martial 406
Woodson v. North Carolina, 428 U.S. 280 (1976)
Lockett v. Ohio, 438 U.S. 586 (1978)
United States v. Gordon, 2 C.M.R. 161 (C.M.A. 1952)
United States v. Calley, 46 C.M.R. 1131 (C.M.R. 1973)
Brookings v. Cullins, U.S.C.M.A. 216 (CMA 1974)
United States v. Crossley, 10 M.J. 176 (CMA 1981)
United States v. Thomas, 22 M.J. 388 (C.M.A. 1986)
United States v. Allen, 33 M.J. 209 (C.M.A. 1991)
United States v. Jeter, 35 M.J. 442 (C.M.A. 1992)
United States v. Johnston, 39 M.J. 242 (C.M.A. 1994)
United States v. Ayala, 43 M.J. 296 (C.A.A.F. 1995)
United States v. Dresen, 47 M.J. 122 (C.A.A.F. 1997)
United States v. Biagase, 50 M.J. 143 (C.A.A.F. 1999)
United States v. Stoneman, 57 M.J. 35 (C.A.A.F. 2002)
United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003)
United States v. Taylor, 60 M.J. 190 (C.A.A.F. 2004)
United States v. Gore, 60 M.J. 178 (C.A.A.F. 2004)
United States v. Douglas, 68 M.J. 349 (C.A.A.F. 2010)
United States v. Mallicote, 13 U.S.C.M.A. 374 (C.M.A. 1962)
United States v. Zaptin, 41 M.J. 877 (N-M. Ct. Crim. App. 1995)

ARGUMENT

BECAUSE OF UNLAWFUL COMMAND INFLUENCE, THE MILITARY JUDGE SHOULD FIND THE REFERRAL OF THIS CASE TO BE DEFECTIVE.

Article 37, UCMJ, provides that "no person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case." *Id.* Unlawful command influence [UCI] has repeatedly been called "the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010). The "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (*quoting United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002)). The existence of unlawful command influence creates constitutional error. *United States v. Thomas* 22 M.J. at 393-94.

The Court of Appeals of the Armed Forces in *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999), addressed the issue of UCI, and laid out the standard for raising unlawful command influence. The Defense has the initial burden to raise unlawful command influence, by showing "facts, which if true, constitute unlawful command influence, and that the alleged UCI has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* at 150, citing *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991). The Court of Military Appeals has stated that "the threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id.* at 150, citing *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994). The evidentiary standard for raising the issue is 'some evidence.' *Id.* citing *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995).

UCI is not limited to service members; the President, as Commander in Chief, along with other senior government officials, can engage in UCI. *See generally United States v. Calley*, 46 C.M.R. 1131 (C.M.R. 1973).

The UCMJ, as implemented by the M.C.M. provides the law and procedure for courts-martial across all services. The courts-martial referral process is the same for both capital and non-capital courts-martial. When deciding how to dispose of an offense, the discussion to R.C.M. 306 provides general policy guidance to a commander. The actual referral decision is a matter of command discretion.

On multiple occasions the President has commented, in the national press, about the shootings for which MAJ Hasan has been charged. In his 10 November 2009, remarks *at Fort Hood*, the President stated "no faith justifies these murderous and craven actions... for what he has done, we know that the killer will be met with justice – in this life or the next." By referring to the death of MAJ Hasan at Fort Hood just days after the shooting, The President sent a clear message, 'refer this case capital.' Later in his remarks, the President commented on how we are

a nation of laws where "justice is so enduring that we would treat a gunman and give him due process, *just as surely as we will see that he pays for his crimes.*" This too sends a clear message, that MAJ Hasan must pay for his crime. Read in conjunction with the previous statement, the message received by the nation and every military member under the President's Command is, *refer this case capital and sentence MAJ Hasan to death where he will meet his maker.* These comments, made at Fort Hood, in and of them self raise some evidence of unlawful influence with respect to the decision to refer this case capital.

On another separate occasion the President mentioned the shootings in his weekly radio address. In this address, it is abundantly clear that the President had discussed the shooting with senior members of his cabinet, to include senior military officials. The President's actions were also documented in the Time Magazine article addressing the shootings.

While it is unique and irregular for senior government and military officials to comment on potential Courts-Martial, this case has been subject to a tremendous amount of scrutiny. Thousands of articles have been published on the shootings and this case, and thousands more have appeared on television and radio. In addition to the President, a former President, The Secretary of the Army, former III Corps commander, Senators, Congressmen, and heads of various executive branch agencies and departments have made public statements about the case.[1] U.S. Senate investigations have been directed, congressional hearings have been held, and reports concerning the failures of government agencies in relation to the shootings have been released to the public. Notably, Senator Joseph Lieberman called for Congressional inquiry just days after the shooting, and stated on national television that the military needs to have "zero tolerance" for those expressing extremist views. This comment and this evidence also raise some evidence of unlawful influence.

Ultimately, the Convening Authority is the sole individual responsible for overseeing the administration of justice for this case. Like a United States Attorney he represents the public, and when referring charges to trial, represents the interest of the public in determining where MAJ Hasan will be tried and whether he will face the death penalty. In the 2 August 2012, meeting with Defense counsel, LTG Campbell indeed did discuss these responsibilities as well as his obligation to ensure that the courts-martial be conducted in a fair manner. However, he also explained that he had been exposed to media coverage of shootings and had been briefed by the Staff Judge Advocate about the investigation and courts-martial prior to taking command. Given the nature of his position as the Convening Authority, and the fact that he is the public figure responsible for the administration of justice in this highly contentious case, it is inevitable that LTG Campbell has been exposed to the public's outcry. Even according to LTG Campbell, he had the sense that the local community, to include those stationed at Fort Hood at the time of the shooting, had been significantly affected by the shootings. As mentioned above, this outcry has included various comments by the President, former President, Secretary of the Army, Attorney General, Director of Homeland Security, Senators, and Congressmen, and various other governmental officials, along with highly prejudicial pretrial publicity in massive volumes. Simply put, LTG Campbell was, at no fault of his own, unavoidably unlawfully influenced.

[1] While these and many other government officials made comments about this case, the Defense has been unable to gather all the statements related to this case due to the Military Judge's denial of a media content analysis expert consultant, and access to the Department of the Army Public Affairs Office.

The process in which this case was referred and the manner in which the panel was selected both amount to evidence of unlawful command influence. Specific evidence showing that LTG Campbell was actually influenced include: the fact that the selection of members was case specific, that a "capital panel" with 16 members instead of the traditional 10 members was selected even prior to a referral decision being made, that members from other jurisdictions were nominated despite a plethora of eligible officers located at Fort Hood, and that the case was actually referred capital. In this case, public comments by governmental officials were irregular, the volume and nature of the pretrial publicity was irregular, and every aspect of the panel selection and referral of this case has been irregular and thus suspect. This is especially true in light of the fact that III Corps had a standing panel for General Court's Martial to which this case could have been referred. The Convening Authority could have referred the case to the standing panel and later substituted a larger panel capable of adjudicating a capital case after the referral decision had been made. However, in this case that was not the sequence by which the panel was selected and the case was referred, and is therefore evidence that the Convening Authority had been unlawfully influenced.

As explained in *Biagase*, the threshold for raising the issue at trial is low and the evidentiary standard is some evidence. *United States v. Biagase*, 50 M.J. at 150. The process by which the case was referred and the manner in which the panel was selected satisfy this evidentiary threshold and require the Government to prove beyond a reasonable doubt that the Convening Authority was free from unlawful influence. Should they fail to do so, the Court should set aside the referral and panel selection of this case and also disqualify the Convening Authority due to unlawful command influence.

There is a high likelihood that there are a number of statements between public and military officials which may raise some evidence of unlawful command influence. Further, there is also a high likelihood that there are a number of other public statements, which may raise some evidence of unlawful command influence, however, the Defense has not been able to gather such statements. With nearly 22,000 articles published prior to 30 March 2012, the Defense did not have adequate resources to review every publication. Instead the Defense was forced to review only a small selection of articles. The Defense did request that documents be compelled related to unlawful command influence, and also requested the assistance of an expert consultant in media content analysis who could have assisted the Defense in conducting a more thorough review of media to identify any potential statements that could be considered unlawful command influence; however, the request was denied by the Military Judge. The Court also denied access to the Department of the Army Public Affairs Office who could have potentially provided similar support. Further, the Court denied a request for delay, which could have given the Defense sufficient time to review each publication. Because this is the case, the Court should find that the Defense has raised sufficient evidence to require the Government to prove beyond a reasonable doubt that the Convening Authority was not unlawfully influenced when he made his referral decision in this case.

THE MILITARY JUDGE SHOULD DISQUALIFY THE GENERAL COURTS MARTIAL CONVENING AUTHORITY BECAUSE HE HAD AN OTHER THAN OFFICIAL INTEREST IN THE OUTCOME OF THIS CASE.

According to Article 1(9) UCMJ, an accuser is "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than official interest in the prosecution of the accused." Article 1(9), UCMJ. "If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him." Article 22(b), UCMJ. "The test of a convening authority's status as an accuser is whether, under the particular facts and circumstances [ ] a reasonable person would impute to him a personal feeling or interest in the *outcome* of the litigation." *United States v. Jeter*, 35 M.J. 442, 445 (C.M.A. 1992) (*emphasis added*) (internal citations omitted).

A convening authority may not be an accuser, and if the convening authority is an accuser, he may not refer the case to court-martial. Stated another way, "the appointing authority may not be so connected with the transactions giving rise to the charges that reasonable persons will impute to him a personal feeling or interest in the matter." *United States v. Gordon*, 2 C.M.R. 161, 165 (C.M.A. 1952). In explaining the logic of this prohibition the Court of Military Appeals held, "the prohibition against the convening of a general or special court-martial by an "accuser" was designed to protect an accused from a vindictive commander seeking to obtain a conviction because of some personal interest in the case and using his power as a convening authority to obtain this result." *United States v. Jeter*, 35 M.J. 442, 446 (C.M.A. 1992).

As explained in *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952):

> "The purposes are to guard against results which would not be in harmony with a proper sense of justice, and which might ensue if the officer by whom the charge is made, and who is interested in the issue, were permitted to detail the members of the court which is to try the accused, the danger being that such officer, under the influence of a strong feeling against the accused, might select those who are hostile to the latter or unduly biased in his own favor, and who, for that reason, would be less able to render a fair judgment in the case."

Id. at 166.

While a personal interest in the matter might give rise to the mandatory disqualification of the convening authority, due to his status as an accuser by law, courts have differentiated between a personal interest and an official interest. *Gordon* also explained this difference:

> "[W]here, upon the facts of the supposed offence being reported to him, and appearing to call for investigation by court-martial, he has, as commander, directed some proper officer, as the commander of the regiment or company of the accused, or his own staff judge advocate, to prepare the charges, (indicating or not their form,) or has approved or revised charges already prepared, he is not to

be regarded as an 'accuser' in the sense of the Article, his action having been official and in the strict line of his duty."

Id. at 164. This said, "[c]onvening officers should remember that there are easy and adequate means to have a court appointed by one entirely divorced from the offense and if there is any doubt about the propriety of the selection it should be resolved in favor of the accused." *Id.* at 167-68.

In this case there are a number of indications, which in the totality of the circumstances, would lead a reasonable person to perceive the Convening Authority as possessing a personal interest in the outcome of the case, thus requiring disqualification.

First and foremost, while LTG Campbell wasn't the Convening Authority at the time of the shootings, he did become the Convening Authority, and given the nature of this case a reasonable person would impute a personal interest in the outcome of this case to any convening authority at Fort Hood. Examples of where a convening authority has been disqualified include: *Brookings v. Cullins*, U.S.C.M.A. 216 (CMA 1974) (where the commanding officer of a Navy ship was disqualified from convening a courts-martial stemming from a riot on the ship he commanded); *United States v. Gordon* 2 C.M.R 161 (1952) (where the convening authority himself had been the victim of a burglary); *United States v. Crossley*, 10 M.J. 176 (CMA 1981) (where the accused, a member of the band, refused to perform at a public ceremony presided over by the convening authority creating possible embarrassment to the convening authority). The fact is, this case has received publicity unparalleled by any military case of recent memory. Indeed the term most frequently used by the public and the press for this case is "The Fort Hood Shooting." Arguably, reasonable members of the public associate this case with Fort Hood and any Convening Authority stationed at Fort Hood. The picture painted is the most senior convening authority at *Fort Hood* accusing the *Fort Hood* shooter of the *Fort Hood* shooting. This incestual appearance removes any perception of fairness in the eyes of a reasonable member of the public, and fits squarely within the examples above. This alone requires the referral of this case to be set aside and the disqualification of the Convening Authority.

The referral of this case should also be set aside because LTG Campbell has demonstrated that he has had a personal interest in the venue of trial beginning on the day of the shooting. On 5 November 2009, LTG Campbell was in Puerto Rico on an official recruiting trip in his capacity as the Commanding General of USAREC. At some point after the shootings, on the same day, he was briefed by another General that the shootings had taken place. This prompted LTG Campbell to review the Force Protection posture for his command. Even though this posture was reviewed regularly, the Fort Hood shooting did have an immediate effect on him and his command, and it cannot be said that he was entirely insulated from the effect of the shooting.

As the Convening Authority, LTG Campbell has also taken steps which indicate a personal and other than official interest. During his interview with Defense counsel on 2 August 2012, LTG Campbell stated that he expected the Defense to request a change of venue. This was partly because of the statements made by John Galligan complaining about the venue of trial, and partly because LTG Campbell understood that it might be difficult for MAJ Hasan to receive a

fair trial at Fort Hood, due to the impact of the shootings on the community and personnel stationed at the installation. Indeed, during the 2 August 2012, interview LTG Campbell expressed recognition of the difficulty MAJ Hasan would have in receiving a fair trial should the panel be convened entirely of officers stationed at Fort Hood. Changing the venue of trial would have been very easy in relation to the potential for harm to MAJ Hasan. This decision would have been viewed objectively in the eyes of the public and ensured that MAJ Hasan receives a fair trial. Despite this recognition, he ordered that the trial take place at Fort Hood instead of transferring venue to a different installation.

While not stated expressly during his interview with Defense counsel, it can be inferred that LTG Campbell was personally affected by statements from Galligan concerning the venue of trial and the community's interest in seeking justice locally. LTG Campbell's actions and decisions with respect to the venue of the trial indicate that he has a personal interest in keeping the trial at Fort Hood and thus has taken several steps to ensure this. First, he ordered that the trial actually occur at Fort Hood. Second, he selected some panel members from Fort Sill, OK, which arguably was to ensure that the venue of trial wasn't transferred by the Military Judge. Third, he personally made statements to the press claiming that the trial would occur at Fort Hood and that he wants the trial to stay at Fort Hood, though "not for any ulterior reason, but that we have the capacity to have it here." (Enclosure 7). This statement can be viewed as an attempt to influence the Military Judge indirectly by sending the message through the media that the trial should not be transferred to a different venue. Fourth, because he retroactively approved security measures that surround the court house. Specifically the grounds surrounding the court have been turned into a forward operating base providing security equivalent to that of a combat zone or prison. This will only have the effect of biasing panel members. While not specifically authorized by LTG Campbell beforehand, he did personally tour the grounds after the containers were stacked and therefore tacitly approved the construction. The construction of such extreme security measures completely undercuts LTG Campbell's argument that Fort Hood possesses the capacity to host this trial, especially the capacity of Fort Hood to host the trial without creating prejudice amongst the panel. By personally ensuring that the trial occurs at Fort Hood in such an environment, LTG Campbell has guaranteed that the trial take place at an installation surrounded by a community he recognizes as negatively impacted by the shooting and interested in the death of MAJ Hasan.

Viewed in their totality, it is abundantly clear that LTG Campbell should not have been the convening authority who referred this case. From the view point of a reasonable member of the public, the only conclusion that can be reached is that LTG Campbell has a personal interest in the outcome of this trial. He is a Convening Authority at Fort Hood who was personally briefed on the shooting, he responded to the shootings as the Commanding General of USAREC, he ordered that the trial take place at Fort Hood instead of changing venue, he took steps to ensure the trial was not transferred away from Fort Hood (to include statements to the media), and he retroactively approved extreme security measures around the court house which will only serve to bias every panel member on this case. Transferring this case to a senior convening authority not at Fort Hood would have been easy compared to the relative harm that will result should the referral not be set aside. Therefore, because a reasonable member of the public would view LTG Campbell has having an other than official interest in the outcome of this trial, the

referral should be set aside and he should be disqualified as the Convening Authority for this case.

BECAUSE THE STAFF JUDGE ADVOCATE WAS UNLAWFULLY INFLUENCED, AND BECAUSE HE HAD A PERSONAL INTEREST IN THE OUTCOME OF THE CASE, THE COURT SHOULD FIND THE REFERRAL DEFENSE.

Under the Fifth and Sixth Amendments of the United States Constitution, MAJ Hasan is guaranteed the right to due process and a fair trial. As applied to R.C.M 406(b), and the included discussion, this includes an "independent and informed appraisal of the charges" by the Staff Judge Advocate when making a recommendation to the Convening Authority under R.C.M. 406(a). Generally, the law discussed above for both unlawful command influence and accusers applies to Staff Judge Advocates. Staff Judge Advocates must be impartial, neutral, and objective. *See* R.C.M. 406(b) Discussion; *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004); *United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997); *United States v. Zaptin*, 41 M.J. 877, 880 (N-M. Ct. Crim. App. 1995); *United States v. Bygrave*, 40 M.J. 839, 845-46 (N.M.C.M.R. 1994); *United States v. Mallicote*, 13 U.S.C.M.A. 374, 377 (C.M.A. 1962). While Article 6 of the UCMJ, and Article 34 of the UCMJ do not expressly require pretrial advice from a Staff Judge Advocate free from a personal interest in the outcome of the litigation in the same manner as an accuser (see Article 1, UCMJ), because this case is a highly unusual capital case, such a requirement should apply to the Staff Judge Advocate. Death is different; for that reason more process is due, not less. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976). This heightened level of due process requires that an independent, uninfluenced, and unbiased Staff Judge Advocate provide the pretrial advice.

Given the fact that COL Risch has been the Staff Judge Advocate at III Corps from the time of the shootings through the present, it is simply unavoidable that he has been unlawfully influenced. Further, the fact that he has served as the SJA during this time period has undoubtedly bias COL Risch and caused him to have an other than official interest in the outcome of this case. For these reasons he should have disqualified himself from giving pretrial advice in this case. His failure to do so has violated MAJ Hasan's Fifth and Sixth Amendment rights to due process and a fair trial.

COL Risch was the acting Staff Judge Advocate at the time of the shootings. When the shootings occurred he was at work and was informed of the shootings by his Chief of Justice. Based upon his immediate concern for the safety of his family, since he and his family reside at Fort Hood, he immediately called his wife to see if his family was safe. After his wife ensured him of their safety, the SJA briefed the III Corps Chief of Staff and ultimately the Commanding General on the shootings. In the days and weeks after the shooting, the SJA attended various briefings about the event itself and the status of the investigation. This is the first example of how the shootings impacted the SJA, and is also the moment when he began to gain a personal interest in the outcome of the litigation.

Following the shootings, former President George W. Bush and his wife came to Fort Hood to visit the victims of the shooting. Days later, the President, First Lady and Secretary of the Army all visited Fort Hood to attend a ceremony honoring the victims of the shooting. Prior to this ceremony, the III Corps and Fort Hood Deputy Staff Judge Advocate sent an email to all members of the Office of the Staff Judge Advocate stating that only those who were mission essential should come to work the day of the ceremony. Despite their excusal from work, all members of the office were encouraged to attend the ceremony. This is another clear example of the impact of the shootings on the SJA and his entire office.

LTG Cone, General Casey, and the President all spoke at the ceremony. In his 10 November 2009, remarks *at Fort Hood*, the President stated "no faith justifies these murderous and craven actions... for what he has done, we know that the killer will be met with justice – in this life or the next." By referring to the death of MAJ Hasan at Fort Hood just days after the shooting, and directly outside the SJA's office, The President sent a clear message to the SJA, 'refer this case capital.' Later in his remarks, the President commented on how we are a nation of laws where "justice is so enduring that we would treat a gunman and give him due process, *just as surely as we will see that he pays for his crimes.*" This too sends a clear message that MAJ Hasan must pay for his crime. Read in conjunction with the previous statement, the inevitable message received by the Staff Judge Advocate was, *recommend that this case be referred capital and ensure that MAJ Hasan is sentenced to death where he will meet his maker.* These comments are evidence of unlawful influence and raise serious questions about the SJA's ability to provide an *independent assessment* as required in the discussion of R.C.M. 406(b).

Two months after the shooting, LTG Cone sent a letter to all Soldiers, families, and employees at Fort Hood, which in the first sentence stated, "[t]he tragic events of November 5th profoundly impacted each of us personally and the community as a whole." This is an explicit recognition of the impact of the shootings on all members of the Fort Hood community, which includes the Staff Judge Advocate. This is another example of how the shootings personally impacted the SJA thus created a situation where a reasonable person would question whether he had an other than official interest in the outcome of this case.

Unlike LTG Cone, the SJA held his position from the time of the shooting through referral. Over the course of this period thousands of articles were been published on the shootings and this case, and thousands more have appeared on television and radio. In addition to the President, a former President, The Secretary of the Army, former III Corps Commander, Senators, Congressmen, and heads of various executive branch agencies and departments have made public statements about the case. U.S. Senate investigations have been directed, congressional hearings have been held, and reports concerning the failures of government agencies in relation to the shootings have been released to the public. Notably, Senator Joseph Lieberman called for Congressional inquiry just days after the shooting, and stated on national television that the military needs to have "zero tolerance" for those expressing extremist views. This comment and this evidence also raise some evidence that the SJA was unlawfully influenced as evidenced by his ultimate recommendation that the case be referred capital.

During the interview with LTG Campbell and the SJA on 2 August 2012, LTG Campbell stated that he has perceived that the shootings have had a significant impact on those who were stationed at Fort Hood on 5 November 2009. Again, this pool of individuals includes the SJA. This is the second General officer and the second convening authority to recognize that the shootings had a deep impact on everybody stationed at Fort Hood on 5 November 2009. Indeed during the 2 August 2012 interview, even the SJA discussed the significant effect of the shootings on the community. The simply serves as a additional example of how the SJA was personally impacted by the shootings to the extent that a reasonable member of the community would perceive that he had a personal interest in the outcome of this case.

Eventually, the SJA recommended that the case be referred capital and also that a special panel be selected specifically for this case. These recommendations are the product of the unlawful influence and SJA's personal interest in the outcome of this case.

Despite the fact that the SJA was unlawfully influenced and effected by the shootings to the extent that a reasonable person would view him as having an other than official interest in this case, he nonetheless provided pretrial advice to the Convening Authority. Because this is a capital case where an accused enjoys a heightened level of due process, and because the discussion of R.C.M. 406(b) requires an independent and informed appraisal of the charges, COL Risch violated MAJ Hasan's Fifth and Sixth Amendment rights to due process and a fair trial by providing pretrial advice, and advice on the selection of panel members specific to this case. Instead, the SJA should have disqualified himself and asked an independent, unbiased, and uninfluenced Staff Judge Advocate to prepare the advice and recommendation. Because this did not occur, the Court should find the referral defective and disqualify the COL Risch as the Staff Judge Advocate.

CONCLUSION

For the stated reasons, this Court should stay the proceedings, set aside the referral as defective, and disqualify the LTG Campbell as the Convening Authority and COL Risch as the Staff Judge Advocate.

KRIS R. POPPE
LTC, JA
Defense Counsel

SERVICE

A true copy of the foregoing was served electronically on Trial Counsel and the Court on 10 August 2012.

KRIS R. POPPE
LTC, JA
Defense Counsel

APPENDIX N

DEPARTMENT OF THE ARMY
HEADQUARTERS, III CORPS AND FORT HOOD
1001 761ST TANK BATTALION AVENUE
FORT HOOD, TEXAS 76544-5000

REPLY TO
ATTENTION OF

AFZF-JA

26 JUL 2011

MEMORANDUM FOR Commander, III Corps and Fort Hood, Fort Hood TX 76544

SUBJECT: Advice on Disposition of the Court-Martial Charge and the Additional Charge Preferred Against MAJ Nidal M. Hasan, SSN 226-35-0777, Headquarters and Headquarters Troop, 21st Cavalry Brigade, Fort Hood, Texas 76544

1. Purpose. To provide advice to the General Court-Martial Convening Authority pursuant to Article 34, Uniform Code of Military Justice (UCMJ) and Rule for Courts-Martial (RCM) 406.

2. Background. On 3 March 2011, the Commander, 21st Cavalry Brigade forwarded to you for disposition the Charge and its Specifications and the Additional Charge and its Specifications preferred against Major Nidal M. Hasan. Pursuant to a defense request, before making a disposition decision in this case, you met with defense counsel for the accused on 19 May 2011. At that meeting, the accused's defense team provided you with an oral presentation and written submissions in support of their request for a non-capital referral. You are not required to take any specific action or to dispose of the charges in any particular manner. Any action taken by you is to be made within your sole, independent discretion as a General Court-Martial Convening Authority.

3. Staff Judge Advocate Review. In accordance with RCM 406 and Article 34, UCMJ, I have reviewed the attached Charge and its Specifications, the Additional Charge and its Specifications, the RCM 706 Board results, the Report of Investigation and the verbatim transcript of the Article 32 Investigation, the transmittal documents from the chain of command, and the defense team's written submissions. It is my legal conclusion that:

a. Each specification alleges an offense under the UCMJ;

b. The allegation of each offense is warranted by the evidence in the Report of Investigation; and

c. The court-martial will have jurisdiction over the accused and the alleged offenses.

4. Chain-of-Command and Investigating Officer Recommendations.

a. The Company Commander and the Special Court Martial Convening Authority recommend trial by General Court-Martial (the accused's chain of command does not contain a battalion commander). The Special Court-Martial Convening Authority also recommends a capital referral.

b. The Article 32 Investigating Officer investigated the Charge and its Specifications and the Additional Charge and its Specifications and recommends trial by General Court-Martial. Additionally, after finding reasonable grounds exist to believe a capital aggravating factor is present under RCM 1004(c)(7)(J) (having been alleged to have committed a violation of Article 118(1), UCMJ, the accused is also alleged to have committed another violation of Article 118, UCMJ, in the same case), the Investigating Officer recommends a capital referral. The accused's defense team filed written objections to the Article 32 Investigation, which are enclosed with the Article 32 Investigation. The Special Court-Martial Convening Authority determined the written objections required no corrective action and stated this in his transmittal document to you. I concur in that determination.

5. Recommendations of the Staff Judge Advocate.

a. I recommend you refer the attached Charge and its Specifications and the Additional Charge and its Specifications to the General Court-Martial, empowered to adjudge a capital sentence, convened by General Court-Martial Convening Order Number 11, dated 6 July 2011. I further recommend you:

1. Direct that the Additional Charge and its Specifications (dated 2 December 2009) be tried in conjunction with the Original Charge and its Specifications (dated 12 November 2009);

2. Direct the case be tried as capital; and

3. Direct trial counsel to provide defense notice of the aggravating factor under R.C.M. 1004(c)(7)(J).

b. If you elect to refer the case as non-capital, I recommend the following:

1. Refer the attached Charge and its Specifications and the Additional Charge and its Specifications to a General Court-Martial convened by General Court-Martial Convening Order Number 11, dated 6 July 2011.

2. Direct the case be tried as non-capital; and

3. Direct that the Additional Charge and its Specifications (dated 2 December 2009) be tried in conjunction with the Original Charge and its Specifications (dated 12 November 2009).

STUART W. RISCH
COL, JA
Staff Judge Advocate

7 Encls
1. Charge Sheet (dtd 12 Nov 09)
2. Add'l Charge Sheet (dtd 2 Dec 09)
3. Sanity Board Short Form Results
4. Article 32 Report of Investigation
5. Article 32 Verbatim Transcript
6. Chain of Command Transmittal Documents
7. Defense Written Submissions

APPENDIX O

UNITED STATES ARMY TRIAL JUDICIARY
THIRD JUDICIAL CIRCUIT

UNITED STATES	)	Motion to Set Aside
	)	Capital Referral due to
v.	)	Violation of Article 36, UCMJ
	)	and Equal Protection Clause
NIDAL M. HASAN	)	
Major, U.S. Army	)	Supplemental Submission
Headquarters and Headquarters Troop	)	for Motion to Reconsider
21st Cavalry Brigade	)	
Fort Hood, Texas 76544	)	22 January 2013

The Defense requests that the Court consider this Supplemental Submission in conjunction with the original motion dated 10 November 2011, and the supplement dated 18 November 2011.

Oral argument on this motion is requested.

ADDITIONAL FACTS

On 1 August 2012, after being ordered by the military judge, the convening authority LTG Donald M. Campbell, Jr. and the Staff Judge Advocate, COL Stuart Risch, conducted a joint interview with the Defense. Pertinent information from this interview includes:

a. LTG Campbell stated that the Staff Judge Advocate, COL Risch, was the only person he discussed the case with prior to his referral decision.

b. The only information relied on by LTG Campbell prior to his capital referral decision were the Article 32 investigation; chain of command recommendations; Defense pre-referral briefing; and conversations with the Staff Judge Advocate. The only legal advice that LTG Campbell received about the referral decision was from COL Risch.

c. COL Risch stated that he specifically discussed with The Office of the Judge Advocate General (OTJAG) the need to "stay out of the way" in order to avoid unlawful command influence, and that OTJAG "allowed me to do my job."

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WITNESSES AND EVIDENCE

The Defense does not request production of witnesses for this hearing.

The Defense requests the Court to consider enclosures 1 through 12 to the original motion dated 10 November 2011, and enclosures 1 through 3 to the supplement dated 18 November 2011.

ADDITIONAL AUTHORITIES

United States v. Czeschin, 56 M.J. 346 (C.A.A.F. 2002)
United States v. Lopez, 35 M.J. 35 (C.M.A. 1992)
Manual for Military Commissions, 2012 (updated from 2010 edition)
David C. Baldus, et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. LAW & CRIMINOLOGY 1227 (2012).

ADDITIONAL LAW AND ARGUMENT

The capital referral decision in this case was made in a virtual vacuum, with both the convening authority and the Staff Judge Advocate claiming to have had no substantive discussions about the referral decision other than with each other. This lack of legal and procedural accountability markedly contrasts the centralized, deliberate authorization processes in federal and military commissions cases.

Recent empirical scholarship highlights that the death penalty is arbitrarily charged and sentenced in the military. *See* David C. Baldus, et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. LAW & CRIMINOLOGY 1227 (2012). Although discrimination against *racial* minorities is the focus of this study, there is no doubt that as a Muslim, MAJ Hasan belongs to the most scrutinized class of persons in the United States since 9/11. The Baldus study highlights the overarching point that influences other than case factors often affect capital case decision-making in the military.

Reasons for concern cited in the Baldus study include the "breadth of discretion exercised by senior commanders," the broad discretion of panel members, and the lack of transparency in military charging decisions compared to most civilian jurisdictions. *See* Baldus, et al. at 1237-38. Two of these concerns, commanders' overbroad discretion and a lack of transparency, run afoul of Article 36 and the Constitution, and could be addressed by appropriate reforms in the referral process, such as adding the levels of review and checks and balances employed in the federal system.

As the Court of Appeals for the Armed Forces noted:

> Our Court has observed that there are 'hierarchical sources of rights' in the military justice system, including the Constitution, federal statutes, Executive Orders, Department of Defense Directives, service directives, and federal common law. 'Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual.'

United States v. Czeschin, 56 M.J. 346, 348 (C.A.A.F. 2002), citing to *United States v. Lopez,* 35 M.J. 35, 39 (C.M.A. 1992). While the President has procedural rule-making authority, he cannot rely on these rules to deprive service members of Constitutional protections. The military capital referral process deprives service members of such protections when compared to federal and military commissions practices.

CONCLUSION

For the reasons stated above and in the earlier Defense submissions, this Court should set aside the capital referral in this case.

CHRISTOPHER E. MARTIN
MAJ, JA
Defense Counsel

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
FORT HOOD FIELD OFFICE
FORT HOOD, TEXAS 76544

REPLY TO
ATTENTION OF:

AFZF-JA-TDS

29 January 2013

MEMORANDUM FOR RECORD

SUBJECT: Capital Experience of the GCMCA and Staff Judge Advocate in the case of *United States v. Hasan*

1. On 2 August 2012, I participated in an interview of Lieutenant General Donald Campbell, the III Corps's General Court Martial Convening Authority, and Colonel Stewart Risch, the III Corps Staff Judge Advocate, both of whom partook in the referral of the case *United States v. Hasan*, which was referred death penalty eligible. Also present during the interview were Lieutenant Colonel Kris Poppe and Major Joseph Marcee. During the interview of LTG Campbell, he indicated that he had never received training on the referral of death penalty cases and had never previously referred a case death eligible. Similarly, COL Risch indicated that he had never previously provided a recommendation that a case be referred death eligible. Both individuals indicated that they did not have any discussions or seek outside advice with respect to the appropriate referral in case of *United States v. Hasan*.

2. Point of contact is the undersigned at 254-553-3753 or ryan.s.coward.mil@mail.mil

RYAN S. COWARD
CPT, JA
Defense Counsel

APPENDIX P

TJAG and DJAG FY 17/18 Published Rating Scheme

Rank	Name	Org	Position	Rater	Senior Rater	Begin	End
BG	Berger, Joseph	USALSA	Commander	DJAG	TJAG	2-Jun-17	1-Jun-18
						19-Jul-17	18-Jul-18
						2-Dec-17	1-Dec-18
						22-Jun-17	21-Jun-18
						22-Jun-17	21-Jun-18
COL	Bradley, Mary	USALSA	Ch, DAD	CDR, TJAGLCS	DJAG	22-Jun-17	21-Jun-18
COL	Campanella, Lorianne	JALS	App Judge	DJAG	DJAG	27-Jun-17	26-Jun-18
						20-Jan-17	18-May-18
COL	Febbo, Tony	JALS	Sr. App Judge	DJAG	DJAG	2-Jul-17	1-Jul-18
						9-Oct-16	10-Nov-17
COL	Hagler, Jeffrey	JALS	App Judge	DJAG	DJAG	6-Sep-17	5-Sep-18
						30-Jun-17	29-Jun-18
						15-Jul-17	14-Jul-18
						2-Dec-17	1-Dec-18
						24-Jun-17	23-Jun-18
						1-Jul-17	30-Jun-18
COL	Martin, Tania	USALSA	Ch, GAD	MLO	DJAG	22-Jun-17	21-Jun-18
						15-Jul-17	14-Jul-18
COL	Mulligan, Michael	JALS	Sr. App Judge	DJAG	DJAG	15-Jul-17	14-Jul-18
						2-Dec-17	1-Dec-18
						22-May-16	8-Jun-18
COL	Saladino, Gary	JALS	App Judge (Reserve)	DJAG	DJAG	15-Jul-17	14-Jul-18
COL	Salussolia, Paul	JALS	App Judge	DJAG	DJAG	23-Jun-17	22-Jun-18
COL	Schasberger, Paula	JALS	App Judge	DJAG	DJAG	1-Jul-17	30-Jun-18
						8-Jun-17	7-Jun-18
						22-Jun-17	21-Jun-18
						23-Jul-17	22-Jul-18
						7-Jun-17	6-Jun-18
						12-Jul-17	11-Jul-18
						11-Jun-17	10-Jun-18
						31-May-17	30-May-18
						2-Jun-17	1-Jun-18
						11-Jun-17	10-Jun-18
						11-Jun-17	10-Jun-18
LTC	Burton, Paulette	JALS	App Judge	DJAG	DJAG	1-Jun-17	31-May-18
						22-May-17	16-Jul-18
						14-Jun-17	13-Jun-18
						17-Jun-17	16-Jun-18
LTC	Fleming, Deidra	JALS	App Judge	DJAG	DJAG	10-Jun-17	9-Jun-18
						22-Jun-17	21-Jun-18

as of 7/11/2018

TJAG and DJAG FY 17/18 Published Rating Scheme

Rank	Name	Org	Position	Rater	Senior Rater	Begin	End
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	28-Apr-17	16-Jul-18
						17-Jun-17	16-Jun-18
						1-Jul-17	30-Jun-18
						23-Apr-17	4-Jun-18
LTC	Weis, Richard	JALS	App Judge (Reserve)	DJAG	DJAG	1-Mar-17	28-Feb-18
LTC	Wolfe, Stefan	JALS	App Judge	DJAG	DJAG	15-Jul-17	14-Jul-18
LTC	Levin, Steven	JALS	App Judge (Reserve)	DJAG	DJAG	1-Apr-17	31-Mar-18
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	14-Jul-17	13-Jul-18
						1-Jul-17	30-Jun-18
						17-Jun-17	16-Jun-18
						13-Jun-17	12-Jun-18

as of 7/11/2018

From:	Curto, Toby N LTC USARMY HQDA OTJAG (US)
To:	Osterhage, Bryan A CPT USARMY HQDA OTJAG (US)
Cc:	Mendelson, David E COL USARMY HQDA (US)
Subject:	OER Rating Scheme
Date:	Thursday, March 15, 2018 7:11:51 AM
Attachments:	2017-2018 Rating Scheme - DAD.xlsx

Bryan,

Here is the rating scheme we are working off of. I owe you a couple of dates for the rating period. In each of the cases, MG Risch has not rated them as DJAG and the rating period will be roughly June/July 17 to June/July 18, give or take a month. I will try to finalize the info for you. I will also update it, should anything change. I'm not tracking that anything will, but sometimes there are changes in an officer's status, need to close an OER out early, etc.

Let me know if you need anything else.

v/r,

LTC C

Toby N. Curto
LTC, JA
AXO, TJAG
Office of the Judge Advocate General
Army Pentagon, 3E542
[redacted]

DECLARATION

I, Bryan Osterhage, on this 11th day of July, 2018, declare under the penalty of perjury that the information contained herein is the truth.

The email that accompanies Defense Appellate Exhibit Y accurately reflects a communication I had with Lieutenant Colonel Toby Curto by email on 15 March 2018 regarding the rating scheme of Major General Stuart Risch, and Defense Appellate Exhibit Y is the attachment to said email that was subsequently redacted by the undersigned.

I, Bryan Osterhage, fully understand the contents of this entire statement. This statement was made freely, without hope of benefit or reward, without threat of punishment and without coercion, unlawful influence, or unlawful inducement. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Bryan Osterhage