IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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IN THE UNITED STATES COURT OF APPEALS
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Major (O-4) **NIDAL M. HASAN** United States Army, Petitioner	)	REPLY TO GOVERNMENT ANSWER TO THE PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS
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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

COME NOW the undersigned appellate defense counsel, pursuant to Rule 28(c) of this Court's Rules of Practice and Procedure and this Court's order, dated December 28, 2018, and file a reply to the government's Answer to the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. For the reasons previously stated in the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, this Court should grant the requested relief.

I.

History of the Case

On November 5, 2018, petitioner filed a writ for extraordinary relief requesting the disqualification of the current sitting members of the Army Court of Criminal Appeals who have not already disqualified themselves. On December 28, 2018, this Court ordered the government to show cause why the requested relief should not be granted. The government filed its answer on January 22, 2018. Petitioner herein files a reply.

II.

Statement of Facts

Petitioner adopts the Statement of Facts contained in the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and in the government's answer. Additional facts are incorporated where necessary.

III.

Issue Presented

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

IV.

Law and Argument

The All Writs Act, 28 U.S.C. §1651, empowers this Court to issue writs in aid of its subject-matter jurisdiction. *United States v. Loving*, 62 M.J. 235, 256

(C.A.A.F. 2005). The party seeking a writ must establish that: (1) there is a clear and indisputable right to issuance of the writ; (2) there are no other adequate means of relief; (3) the issuance of the writ is appropriate. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004) (internal citations omitted).

1. This writ would be in aid of this Court's subject-matter jurisdiction.

As the government correctly concedes, this Court has jurisdiction over this case. (Gov. Answer, pg. 6). Under Article 67(c), this Court acts with respect to the findings and sentence of a court-martial. 10 U.S.C. § 867(c). Accordingly, this Court has jurisdiction to entertain writs where the harm has "the potential to directly affect the findings and the sentence." *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013).

A biased judge, whether appellate or trial, directly affects the findings and sentence. In this very case, this Court previously issued a writ of mandamus ordering the removal of a military judge due to an appearance of bias. *Hasan v. Gross*, 71 M.J. 416, 418-19 (C.A.A.F. 2012). Since then, this Court has cited *Hasan v. Gross* approvingly. *See Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013) ("Nor is [this case] like *Hasan v. Gross*, where the harm alleged by the appellant -- that the military judge was biased -- had the potential to directly affect the findings and sentence.").

Since this petition pertains to the apparent bias of military appellate judges, this writ is in aid of this Court's jurisdiction.

2. There is a clear and indisputable right to the requested relief.

A. The authorities cited in the government's answer cut in favor of an indisputable right.[1]

The government relies on *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994), and *United States v. Hutchins*, 2018 CCA LEXIS 31 (N.M. Ct. Crim. App. January 29, 2018), to support the notion that the petitioner does not have an indisputable right. (Gov. Answer, pgs. 11-12). These cases support the petitioner, not the government.

As the government notes, the Navy-Marine Corps Court of Criminal Appeals (CCA) rejected appellant's claims of a conflict of interest within the judicial chain of command in *Hutchins* because, in part, that court found no "supervisory intrusion" within the command structure. (Gov. Answer, pg. 12, citing *Hutchins*, 2018 CCA LEXIS 31 at *111). But *Hutchins* also addressed whether there was a

[1] Appellate defense counsel agree with the government that 28 U.S.C. § 455(a) applies here. *See United States v. Hamilton*, 41 M.J. 32, 39 (C.M.A. 1994) (28 U.S.C. § 455 applies to appellate judges). Rule for Courts-Martial 902(a), made applicable to the Army Court through the Code of Judicial Conduct for Army Trial and Appellate Judges (2008) and Army Regulation 27-10, Legal Services: Military Justice, para. 5-8 (May 11, 2016), is the same standard as 28 U.S.C. § 455(a). *See United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001). Consequently, the basis for disqualification of the Army Court rests on regulatory and statutory grounds.

conflict of interest since there was an allegation that the military judge's immediate supervisor was involved in an Article 13, Uniform Code of Military Justice (UCMJ), violation and would be possibly called as a witness. *Hutchins*, 2018 CCA LEXIS 31 at *114-16. The court indicated that in such a case, recusal is warranted since "*[t]he desire to spare a superior such an ordeal does create an apparent, if not actual, conflict of interest*." *Hutchins*, 2018 CCA LEXIS 31 at *116 (emphasis added). The significant fact there was that the military judge could (and did) resolve the Article 13, UCMJ, motion without addressing any judicial impropriety. *Hutchins*, 2018 CCA LEXIS 31 at *116. Here, the Army Court does not have that luxury. The members of the court *must* decide whether their superior erred, and if so, its effect on petitioner's court-martial.

The government further argues that the reasoning of this Court's predecessor court in *Mitchell* should control here. In *Mitchell*, this Court's predecessor determined that The Judge Advocate General (TJAG) of the Navy's signing of fitness reports for appellate judges that were prepared by the Assistant Judge Advocate of the Navy (AJAG) was not enough, by itself, for disqualification. *Mitchell*, 39 M.J. at 144. But *Mitchell* is clearly distinguishable.

First, *Mitchell* did not involve a conflict premised on the rater's involvement with a particular case, but only a structural conflict. The appellant in *Mitchell* claimed that having senior leaders conduct fitness reports on all appellate judges

deprived the judges of their independence. 39 M.J at 132-33. As stated in the original petition, the *Mitchell* court indicated that its judgment "might be different if the [court of criminal appeals] were reviewing a case where…the Judge Advocate General or Assistant Judge Advocate General, prior to their appointment, acted as a staff judge advocate in that case." *Mitchell*, 39 M.J. at 145, n. 8. That is what the petitioner is claiming here.

Moreover, *Mitchell* was a case involving theft, indecent assault, and indecent language, 39 M.J. at 132, while this is a capital murder appeal and perhaps the most notorious case in the military's history. *See United States v. Norfleet*, 53 M.J. 262, 271 (C.A.A.F. 2000) ("There may be cases in which the ruling by a military judge on an issue would have such a significant and lasting adverse direct impact on the professional reputation of a superior for competence and integrity that recusal should be considered.").

Additionally, *Mitchell* relied on *United States v. Weiss*, 510 U.S. 163 (1994). *Mitchell*, 39 M.J. at 145. Like *Mitchell*, *Weiss* was a structural challenge to the appointment and management of military judges – specifically, a claim that the appointment of military judges violated the Appointments Clause of the Constitution. 510 U.S. at 165. The Court found no constitutional violation in the appointment of uniformed officers as military judges. *Weiss*, 510 U.S. at 180. Notably, for purposes here, *Weiss* concluded that Congress achieved an *acceptable*

balance between independence and accountability in the military judiciary since judges are not controlled by convening authorities but rather by Judge Advocates General "*who have no interest in the outcome of a particular case*." *Id.* (emphasis added).

Consequently, *Mitchell* and *Hutchins* support petitioner's clear and indisputable right. That there is yet any evidence of "supervisory intrusion" or "threatened retribution," which may be necessary *if* this were a case about actual bias, *see Mitchell*, 39 M.J. at 149 (Wiss, J., dissenting), is not fatal to this case. Rather, the desire to spare a high ranking senior leader in the Army Judge Advocate General's Corps who rates (and, in most cases, senior rates) *every* member sitting on this high-profile capital case in which he may have committed error, standing alone, creates the appearance of impartiality. Every authority cited by the government, which are all readily distinguishable from petitioner's case in that none involve a judge in this unenviable position, should not persuade this Court otherwise.

B. A military judge's duty to uphold the law and the provisions of the UCMJ protecting judicial independence are insufficient to mitigate the appearance of impartiality in this case.

The government contends that the "UCMJ 'provides for substantial independence and protection for military judges'" and that "petitioner's claim that the [Army] court will disregard their judicial obligation to remain neutral and act only to receive a favorable rating from [Major General (MG)] Risch flies in the

face of their sworn duty to uphold the Constitution and statutory duty to 'set aside any possible outside influences to perform their sworn duties in each case." (Gov. Answer, pg. 15). This misses the mark.

As an initial matter, the question here is not whether the members of the Army Court *will* fail to keep their judicial obligations. The question is whether a reasonable person would question their ability to do so.

To say that a reasonable person would not question the impartiality of an appellate judge evaluating the errors of The Deputy Judge Advocate General (DJAG), his senior rater (and, in most cases, only rater), on a high-profile, capital appeal because that person has a statutory duty to set aside outside influence presumes infallible integrity and ignores human nature. Judges are not emotionless machines; they are imperfect human beings, and "while impartiality is the desideratum in judicial conduct, human nature still impedes the attainment of that legal millennium." *United States v. Cardwell*, 46 C.M.R. 1301, 1306 (A.C.M.R. 1973). As Judge Wiss stated in *Mitchell* regarding a judge's sworn duty to uphold the law, "[s]uch chest-pounding adds little to the balance. A similar type of claim that seems to suggest some sort of inherent integrity may be made of most any judge in most any judicial system in this country." *Mitchell*, 39 M.J. at 148 (Wiss, J., dissenting).

Furthermore, defense counsel, like military judges, also have a duty to uphold the Constitution and the same statutory duty to set aside any possible outside influence to perform their sworn duties. *United States v. Lane*, 60 M.J. 781, 793 (A.F. Ct. Crim. App. Dec. 17, 2004). Moreover, like military judges, the UCMJ similarly provides statutory protections to promote the independence of counsel. *See* 10 U.S.C. § 837. Yet, a bona fide conflict of interest would be readily apparent to *any* reasonable observer in this case if the DJAG rated (and senior rated) the undersigned counsel vice the Army court. Why, then, should judges who are required to independently review the entire record of trial under Article 66, 10 U.S.C. § 866(c), and who wield the Article's "awesome, plenary, *de novo*" statutory review powers that effectively gives them "carte blanche to do justice," *see United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (citations omitted), be no less affected by this relationship? The answer is that they should not. *See Weiss*, 510 U.S. at 198 (Scalia, J., concurring) ("[N]o one can suppose that [these UCMJ] protections against improper influence would suffice to validate a state criminal-law system…I am confident that we would not be satisfied with mere formal prohibitions in the civilian context[.]").

C. Conclusion

Under the specific facts of this case, there is a clear and indisputable right to the disqualification of the Army Court. The confluence of the rating relationship and

the potential claims of error on the part of an officer in the Army Court's rating chain, in addition to the Army Court's failure to disavow any impact on its decision-making, even upon request, (Appendix A), *see United States v. Campos*, 42 M.J. 253, 262 (C.A.A.F. 1995), compels this conclusion.[2]

3. There are no other adequate means of relief.

A. This issue is ripe.

The government contends that petitioner fails to demonstrate that there are no other adequate means of relief because the issue is not ripe. (Gov. Answer, pg. 8). The government is incorrect.

An issue in this case will be whether the DJAG erred in acting on this capital case when he served as Fort Hood's staff judge advocate, and appellate defense counsel have already moved the Army Court for resources to further investigate the suspected error. Appellate defense counsel moved for a fact investigator,

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[2] Additionally, the government downplays the significance of the fact that *eight* of the Army Court judges are recused. In *United States v. Morgan*, this Court left open the possibility that an association of a military appellate judge with a former case participant also serving on the same court may become disqualifying. 47 M.J. 27, 30 (C.A.A.F. 1997). To what extent here would a member of the public question whether any of the recused judges have participated informally in this case? It is not unreasonable for someone to conclude that members who are recused have discussed, in some manner, this case with the non-recused members. This is especially so considering this case's notoriety and the novel issues it presents. While the Army Court should be disqualified for the reasons stated above, the fact that the vast majority of the court are recused certainly strengthens this conclusion.

subsequently informing the Army Court that the fact investigator was necessary, in part, to investigate the DJAG as it pertains to the issue of disqualification. (Appendix B, C). The Army Court denied the motion. (Appendix B).

Appellate defense counsel also moved for funding for survey data to explore, in part, the public perception of the DJAG's duties in this case. (Appendix A, D). The Army Court denied the motion. (Appendix A, D).

Appellate defense counsel moved for a preservation order to instruct the DJAG and two members of the Army Court to preserve correspondence relating to this court-martial, while appellate defense counsel, without the aid of a fact investigator, fully investigates the assignment of error. (Appendix A, E). The Army Court denied the motion. (Appendix A, E).

How, then, can it be that this issue is not ripe?

Additionally, waiting to seek disqualification is contrary to the principle that judicial disqualification motions should be filed "at the earliest possible moment after obtaining knowledge of the facts demonstrating the basis for such a claim." *See Tri-State Fin., LLC v. Lovald*, 525 F. 3d 649, 653 (8th Cir. 2008); *see also* Discussion, Rule for Court-Martial 902(d)(1) (motions for disqualification should be raised at the earliest possible opportunity). That is exactly what the petitioner is doing here.

B. Notwithstanding the ability to appeal, a writ of mandamus is the only adequate means of total relief.

The government also claims that the petitioner has failed to demonstrate that there no other adequate means of relief because the issue regarding the interplay between the DJAG and those he rates can still be appealed. (Gov. Answer, pg. 8). The government is likewise incorrect here.

While this issue could perhaps be addressed on appeal, a writ of mandamus is appropriate now. *See In re School Asbestos Litigation*, 977 F. 2d 764, 777-78 (3rd Cir. 1992) ("although we do not rule out the use of interlocutory and final appeals to review disqualification decisions, we also refuse to rule out the use of mandamus petitions on the ground that those other avenues provide a presumptively adequate means of relief.") As stated in the original petition, nearly every United States jurisdiction has held that a writ of mandamus is necessary and appropriate to address judicial disqualification to ensure that judges do not hear cases that they do not have the authority to hear. *Id*. at 778, citing *In re United States,* 666 F.2d 690, 694 (1st Cir. 1981); *In re IBM Corp.,* 618 F.2d 923, 926-27 (2d Cir. 1980); *In re Rodgers,* 537 F.2d 1196, 1197 n.1 (4th Cir. 1976)(per curiam); *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 961 n.4 (5th Cir. 1980); *In re Aetna Casualty and Surety Co.,* 919 F.2d 1136, 1139-43 (6th Cir. 1990) (en banc); *SCA Services, Inc. v. Morgan,* 557 F.2d 110, 117 (7th Cir.

1977); *Liddell v. Board of Education*, 677 F.2d 626, 643 (8th Cir. 1982); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025 (9th Cir. 1982); *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978).

Addressing such issues by mandamus serves to prevent the public from having a perception of unfairness or a sense that the criminal justice system is unfair that would otherwise be difficult to correct on appeal. *See also Alexander v. Primerica Holdings*, 10 F. 3d 155, 163 (3rd Cir. 1993) (the harm to the litigant can be cured through an appeal, but the harm to the public cannot) (citations omitted). In fact, until just recently, Seventh Circuit precedent provided that a writ of mandamus was the sole remedy to pursue relief for disqualification under Sec. 455(a) partly for this very reason. *United States v. Balistrieri*, 779 F. 2d 1191, 1205 (7th Cir. 1985), *overruled in part on other grounds by Fowler v. Butts*, 829 F.3d 788, 791 (7th Cir. 2016).

Like the cases referenced above, this writ is the only adequate means of relief to fully vindicate petitioner's right to an impartial court in his capital case while *preventing* damage to the public confidence in the autonomy of the military judiciary that is "indispensable" to the military justice institution. *See* Memorandum for Army Judges, subj: Army Code of Judicial Conduct, *Code of Judicial Conduct for Army Trial and Appellate Judges* (2008). If petitioner waits

to vindicate his rights on appeal to this Court, irreparable harm to the military judiciary as an institution will have occurred.

C. Conclusion.

There are no other adequate remedies available to petitioner that will cure the damage to the public confidence that is certain to occur. Therefore, a writ of mandamus is the proper vehicle to address this disqualification issue.

4. The granting of the writ is otherwise appropriate

For reasons previously stated in the Petition for Extraordinary Relief in the Nature of Mandamus and Brief in Support, the granting of this writ is otherwise appropriate.

V.

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. 19-0054/AR was electronically filed with the Court, Respondent, and Government Appellate Division on January 28, 2019.

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APPENDIX A

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

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

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

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

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

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

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

Panel No. 2

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

MOTION FOR RECONSIDERATION OF THE DENIAL OF RECUSAL:

GRANTED: _____

DENIED: B

DATED: DEC 06 2018

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: B

DATED: DEC 06 2018

MOTION FOR
RECONSIDERATION OF THE
DENIAL OF THE PRESERVATION
ORDER:

GRANTED: _____

DENIED: _____
DEC 06 2018

DATED: _____

APPENDIX B

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

United States,
Appellee

v.

Major (O-4)
NIDAL M. HASAN,
United States Army,
Appellant

CONSOLIDATED MOTION FOR LEARNED COUNSEL, MITIGATION SPECIALIST, AND FACT INVESTIGATOR

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, 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 this Court grant the instant motion to order funding for learned appellate counsel, a capital mitigation specialist, and a fact investigator.

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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

Appellant's capital case involves 45 victims, 108 prosecution witnesses, and several hundred admitted prosecution exhibits. The record of trial is over 4,000 pages, and the complete file is 106 volumes, consisting of over 22,000 pages. This total is only a fraction of the information disclosed to defense through pretrial discovery, which amounts to a nearly unimaginable 400,000 pages.[1] (R. at 889, 1211). Presuming a diligent attorney is able to review 300 pages per work day, it would take an attorney over five years to simply read through the file and discovery documents. This, of course, does not account for other necessary duties, which include, but are not limited to, post-conviction investigation, attending capital training events, client consultations (both telephonic and in-person),

[1] The undersigned counsel has submitted a motion to compel this pretrial discovery.

extensive research, and writing various motions and the final brief. To better gauge the amount of work on this case, appellant's lead trial defense counsel's complete digital file is 1.8 terabytes (Def. App. Ex. L);[2] two terabytes is the informational equivalent of an academic research library.[3]

Appellant is currently represented on his capital appeal by the undersigned counsel. Taking into account previous assignments, the undersigned counsel only has approximately thirty-one months of military justice experience. Fifteen months were as a trial counsel; the other sixteen months have been as an appellate defense attorney. Except for the above-captioned case, the undersigned counsel has *zero* experience handling capital cases and similarly has *no* experience with homicide cases. Although woefully inexperienced in capital litigation, at the time this case was detailed, the undersigned counsel was best suited to represent appellant.[4]

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[2] All defense appellate exhibits referenced herein are enclosed in a motion to attach, which is filed contemporaneously with this motion.

[3] How big is a Petabyte, California Institute of Technology, http://pcbunn.cithep.caltech.edu/presentations/giod_status_sep97/tsld013.htm (last visited 30 May 2018).

[4] As of approximately July of 2018, the undersigned counsel will be one of the longest serving defense appellate attorneys at the DAD who is able to serve as lead counsel. The undersigned counsel will be second only to Captain Timothy Burroughs, who himself has been detailed to a separate capital case. Notably, Lieutenant Colonel Christopher Carrier, the Chief of Complex and Capital Litigation, has a conflict on this case and cannot formally serve as counsel.

To ensure appellant adequate and necessary representation, the DAD submitted requests for personnel to assist the undersigned counsel on appeal, including a counsel learned in the law of capital cases and a mitigation specialist. The DAD submitted these requests to three entities: (1) the appellant's general court-martial convening authority, (2) the appellate defense counsel's commander, and (3) the Chief of the Personnel, Planning, and Training Office (PPTO).[5] (Def. App. Ex. M, N, O). Despite the enormity and complexity of this case, the government has not provided the DAD with the requested resources.[6] As a result,

[5] Specifically, on 14 June 2017, the DAD submitted an administrative request to appellant's general court-martial convening authority for funding for a mitigation specialist and attachment of learned counsel, a qualified assistant appellate counsel, a warrant officer, and a paralegal to the case. (Def. App. Ex. M). On 15 June 2017, the DAD submitted an administrative request to the Commander, United States Army Legal Services Agency (USALSA), requesting funding for a mitigation specialist/investigator. (Def. App. Ex. N). Also on 15 June 2017, the DAD submitted an administrative request to the Chief, PPTO, requesting a learned counsel, a qualified assistant appellate counsel, a warrant officer, and a paralegal. (Def. App. Ex. O).

[6] Appellant's convening authority denied the request. (Def. App. Ex. P). USALSA returned the request without action. (Def. App. Ex. Q). PPTO has indicated that it intends to nominate individuals to fulfill the request. (Def. App. Ex. R). However, it is the DAD's understanding that the two counsel that have since been nominated do not have capital litigation experience, and only one counsel has appellate experience, which is approximately equivalent to the undersigned counsel's minimal appellate experience. Moreover, it is the DAD's understanding that neither counsel have been put on official orders to the DAD.

appellant's case presently rests solely in the hands of inexperienced counsel where the decision from this Court will mean life or death for appellant.

I.

LEARNED COUNSEL

Summary of Argument

The recent amendment to Article 70, UCMJ, 10 U.S.C. §870, providing an attorney "learned in the law applicable to [capital] cases" on appeal, *see* National Defense Authorization Act for Fiscal Year 2017 [hereinafter 2017 NDAA], Pub. L. 114-326, §5334 (23 Dec. 2016), should apply in this case. A plain reading of the "effective dates" statutory provision, prohibiting this amendment from applying to *cases* that have been referred to trial, *see* 2017 NDAA, §5542, produces an unreasonable result at odds with the legislative policy. If, however, the amendment is, in fact, inapplicable, there are three reasons why appellant is nonetheless entitled to a learned counsel in this case.

First, Article 70 and its implementing Rule for Courts-Martial (RCM) 1202, which establish the necessary qualifications for appellate defense attorneys, violate due process. Neither the statute nor RCM 1202 provide for the quality of representation that has since been determined to be essential to promote fundamental fairness in capital appellate proceedings, and the factors militating in

favor of learned counsel in this case substantially outweigh the balance struck by Congress.

Second, the failure to conform RCM 1202 to federal practice violates the tenets of Article 36, UCMJ, 10 U.S.C. §836, and Department of Defense (DoD) rules. In accordance with Article 36, the President *shall* apply the principles of law generally recognized in the trial of criminal cases in the United States district courts in so far as the President considers practicable. RCM 1202's criteria are a far cry from the current federal practice of learned counsel, and the decision to keep it so far out of step with federal criminal procedure is completely untethered to military necessity. Separately, the failure to conduct an obligatory comprehensive annual review of the RCMs to ensure conformity with federal practice as required by DoD Directive 5500.17 provides a related basis for learned counsel.

Third, the failure to provide learned counsel violates appellant's Fifth Amendment right to equal protection of the laws. The military provides an unprivileged enemy belligerent an *unqualified* regulatory right to learned appellate counsel in a military commission proceeding, but it denies that very same right to its own servicemembers in a similar proceeding, for which there is no rational basis.

Law

The road to learned counsel.

It is axiomatic and unassailable that, in the context of criminal punishment, "death is different." The "finality of death precludes relief." *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). Moreover, death is the "'ultimate' punishment, 'awesome' in its total denial of the humanity of the convict."[7] Such a distinction between death and all other forms of punishment has been recognized since the very first Congress gave the capital defendant – and only the capital defendant – a statutory right to counsel "learned in the law" more than 225 years ago. Judiciary Act of 1789, 1 Stat. 118 (1790).[8] Since that time, both legislatures and the courts have continuously afforded capital defendants more protections than others. *Murray v. Giarratano*, 492 U.S. 1, 20-21 (1989). Ultimately, "death is different" jurisprudence recognizes that additional safeguards

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[7] Jeffrey Abramson, *Death is Different Jurisprudence and the Role of Capital Jury*, 2 Ohio St. J. Crim. L. 117, 119 (2004) (quoting *United States v. Furman*, 408 U.S. 238, 286-90 (1972) (Brennan, J., concurring) (death is "ultimate sanction"; "uniqueness of death is its extreme severity"; death unusual punishment in its "enormity"; death "is truly an awesome punishment"); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (death "unique in its severity" and is "extreme sanction"); *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) ("severity"); *Id.* at 468 (Stevens, J., concurring in part and dissenting in part) ("severity"); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) ("severity")).

[8] Appointment of counsel in other contexts did not emerge until almost a century later. *See Murray v. Giarratano*, 492 U.S. 1, 20 (1989)(Stevens, J., dissenting).

are necessary before fallible men "play at God." Jeffrey Abramson, *Death is Different Jurisprudence and the Role of the Capital Jury*, 2 Ohio St. J. Crim. L. 117, 118 (2004); *see* also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (because of the qualitative difference of the death penalty, "there is a corresponding difference in the need for reliability in the determination that death is appropriate.").

The qualitative difference of death necessarily demands a qualitative difference in legal representation. Capital litigation is extremely complex. Death penalty cases call for an understanding of an extensive and complicated body of constitutional law governing capital punishment and of the intricacies of federal criminal practice and procedure. *Federal Death Penalty Cases: Recommendations Concerning Cost and Quality of Defense Representation* [hereinafter Spencer Report], Subcomm. on Fed. Death Penalty Cases, Comm. On. Defender Servs. Judicial Conference of the United States, 105th Cong., pt. I, para. C.1 (1998). This particular body of law "unquestionably is difficult even for a trained lawyer to master." *Giarrantano*, 492 U.S. at 28 (Breyer, J., dissenting). Adding to this, appellate practitioners must be "intimately familiar" with "percolating" issues to ensure that *every* legal claim that *may* ultimately prove meritorious is raised.[9]

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[9] *See* American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases [hereinafter ABA Guidelines], reprinted in 31 Hofstra L.R. Vol. 913, 931, n. 43 (2003) (citing *Smith v. Murray*,

American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* [hereinafter ABA Guidelines], reprinted in 31 Hofstra L.R. Vol. 913, 931 (2003). The sheer volume of this information alone is certainly tremendous,[10] let alone the ability to apprehend its significance to produce a quality of work commensurate with the gravity of the proceedings.[11]

In recognition of this, the American Bar Association (ABA) has, since 1989, set national standards for attorney qualifications in capital cases.[12] *See* ABA Guidelines, Introduction. The current guidelines list eight areas where proficiency must be demonstrated. These areas include "*substantial* knowledge and

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477 U.S. 527, 536-37 (1986) (holding that appellate counsel in a Virginia capital case had waived a legal issue by not raising it at an earlier stage of appeal. The novelty of the issue in Virginia was no excuse because it had been raised, though unsuccessfully, in an intermediate appellate court of another state)).

[10] Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services, Judicial Conference of the United States, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* [hereinafter Gould Report], § VI, para. H at 79 (2010)(in preparation for one trial, the materials compiled on capital cases "took up a whole wall.").

[11] *See* Gould Report, § VI, para. J.1 at 87 (noting the challenges unique to capital appeals, including the voluminous records of trial, the vast number of potential issues, the special need to select and present issues with a view toward future proceedings, and the special difficulties inherent in managing clients on death row).

[12] Although the ABA standards are not dispositive, the Supreme Court has stated that they have long been guides in determining what is reasonable. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;" "skill in the management and conduct of complex litigation;" and "skill in the investigation, preparation, and presentation of mitigating evidence."[13] ABA Guidelines, Guideline 5.1 (emphasis added). These criteria apply to *all* stages of capital proceedings.

Critically, Congress has also recognized the need for quality representation. Nearly a quarter of a century ago, and only five years after the ABA first published its national standards, Congress amended 18 U.S.C. §3005 to provide that, in every capital case, a defendant, upon request, has the right to two attorneys, at least one of whom is "learned in the law of capital cases."[14] Violent Crime Control and Law

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[13] This list also includes: "skill in legal research, analysis, and the drafting of litigation documents;" "skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;" and "skill in the investigation, preparation, and presentation of evidence bearing upon mental status." ABA Guidelines, Guideline 5.1.

[14] The Judicial Conference of the United States established criteria to determine whether counsel were "learned," stating:

> Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified by virtue of their prior defense experience, training and commitment to serve as counsel in this highly specialized and demanding litigation. Ordinarily, 'learned counsel' (see 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials,

Enforcement Act of 1994, 103 Pub. L. 322, §60026, 108 Stat. 1796, 1982 (13 Sep. 1994). Moreover, under 18 U.S.C. §3599, at least one attorney on appeal must have been appointed to the court of appeals for not less than five years and have not less than three years experience litigating appeals in that court in felony cases. 18 U.S.C. §3599(c). Unless replaced by similarly qualified counsel, each appointed attorney shall represent the defendant through every stage of the proceedings. 18 U.S.C. § 3599(e).

Interpreted against the backdrop of 18 U.S.C. § 3005, the continuity requirement embedded in Sec. 3599(e) provides for "learned counsel" on appeal so long as it was requested at trial.[15] Indeed, the Military Justice Review Group (MJRG), a body established by the Department of Defense General Counsel to conduct a holistic review of the UCMJ, found that the assignment of at least one capital appellate attorney "learned in the law applicable to capital cases" is consistent with the practice of federal courts. *Report of the Military Justice Review Group* [hereinafter MJRG Report], Military Justice Review Group, pt I: UCMJ

> appeals or post-conviction review that, in combination with co-counsel, will assure high-quality representation.

Guide to Judiciary Policy, Vol. 7 (Defender Services), pt. A, ch. VI, § 620.30(d)-(e) (2017).

[15] Appellant's trial defense counsel moved to set aside capital referral due to defective referral based on, in part, the lack of learned counsel. (App. Ex. 43).

Recommendations, §B, Article 70, para. 7, at 644 (2015). Significantly, the counsel qualification criteria in Sec. 3599, and by logical extension the current federal practice, "reflect a determination that quality legal representation *is necessary in all capital proceedings to foster fundamental fairness* in the imposition of the death penalty." *Martel v. Clair*, 565 U.S. 648, 659 (2012) (emphasis added).

Congress has also sought to ensure similar protections for unlawful enemy combatants. In accordance with the Military Commissions Act of 2009, an "unprivileged enemy belligerent" who is charged with a capital crime has a right to an attorney, and to the greatest extent practicable, a second attorney "learned in the law of capital cases." National Defense Authorization Act for Fiscal Year 2010 [hereinafter 2010 NDAA], Pub. L. 111-84, §§1801-1807, §1802 (28 Oct. 2009); *see* also 10 U.S.C. §949a(b)(2)(C)(ii). Congress specifically acknowledged that "the fairness and effectiveness of the military commissions ... will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused, *particularly in the case of capital cases*." 2010 NDAA, §1807(1) (emphasis added). Regulations promulgated by the Secretary of Defense have since given the unprivileged enemy belligerent an *unqualified* right to counsel learned in the law applicable to capital cases *at all stages of capital proceedings.*

Dep't of Defense, Regulation for Trial by Military Commission [hereinafter RTMC], paras. 9-1a.6 and 24-5d (2011).[16]

Only recently, however, has Congress taken steps to finally "modernize the military appellate practice"[17] with respect to servicemembers. In 2016, Congress substantially amended the UCMJ in the 2017 NDAA. Significant to this case, among many other of its changes, Congress amended Article 70, the statutory provision prescribing appellate attorney qualifications, to provide learned counsel on capital appeals. 2017 NDAA, § 5334. To the Senate Armed Services Committee, the 2017 NDAA constituted "the most significant reforms to the [UCMJ] since it was enacted six decades ago," designed to "enhance fairness and efficiency" and "incorporate best practices from federal criminal proceedings."[18]

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[16] In fact, a convening authority is powerless to even refer a capital charge against an unprivileged enemy belligerent until such time that he is represented by learned counsel. RTMC, para. 9-1a.6; *see* also Rules for Military Commissions [hereinafter RMC] 506(b), 601(d)(2).

[17] *See* Statement by John McCain, Senate Armed Service Committee Chairman, on National Defense Authorization Act Conference Report (2016). https://www.mccain.senate.gov/public/index.cfm/2016/11/statement-by-sasc-chairman-john-mccain-on-national-defense-authorization-act-conference-report (last visited 30 May 2018).

[18] *Id.*

The current requirements for learned counsel in military capital appeals – *United States v. Hennis* and its implications.

To the extent that the 2017 NDAA amendments seek to ensure quality representation, the Court of Appeals for the Armed Forces (CAAF) has since held in *United States v. Hennis* that an appellant whose case is currently pending appeal is not entitled to its protections. 77 M.J. 7, 11 (C.A.A.F. 2017). The *Hennis* decision primarily relied on the plain language of the statute. Specifically, the phrase "to the greatest extent practicable" did not provide a *requirement*, and Sec. 5542, which states that the amendments do not apply to *cases* referred to trial before its effective date, made clear that appellant was not entitled to relief. *Id.* at 9.

Two points compel a reconsideration of *Hennis*. First, "to the greatest extent practicable," which immediately precedes the word "shall," does impose a *requirement* to provide learned counsel so long as it is possible. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006).[19] Since the military already provides an

[19] The decision in *Hamdan* concerned the requirement of Article 36(b) that the rules in military criminal proceedings be uniform "insofar as practicable." *Hamdan*, 548 U.S. at 621. The Court determined that "insofar as practicable" means that the RCMs *must* apply to military commissions unless uniformity proves impracticable. Because there was no suggestion that uniformity was, in fact, impracticable, Hamdan's proceedings were invalidated. *Id.* at 623-25. Arguably, "to the greatest extent practicable" places an even more stringent demand on the government. *See Biodiversity Legal Found v. Babbitt*, 146 F.3d. 1249, 1254 (10th. Cir. 1998)(the phrase "to the maximum extent practicable" imposes a "clear duty" on an agency to satisfy statutory command where it is possible).

unprivileged enemy belligerent with an *unqualified* right to learned counsel in military proceedings, a finding of impracticably here would strain credulity. Second, and more importantly, a plain reading of Sec. 5542 produces an unreasonable result at odds with legislative policy: an accused whose capital case is referred today would not be entitled to learned counsel on his appeal, notwithstanding that the appeal is an entirely separate proceeding not likely begin for several more years, long after the amendments have taken effect. Accordingly, the word "cases" should be read to mean "trials," which better embraces a congressional intent not to disrupt on-going courts-martial and comports with the overall legislative policy to enhance fairness and efficiency and incorporate best practices from federal courts.[20] The recent amendment to Article 70 should, therefore, apply in this case.

If, however, it is in fact the case that Congress intended to deliberately leave behind those few servicemembers on death row in the wake of a legislative overhaul designed to improve the fairness of the very same proceedings they are taking part in, then the military capital appellant currently on death row has been greatly disserved. In devastatingly stark contrast to all other capital federal

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[20] *See United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (when the plain meaning of the statute would produce an absurd result or an unreasonable one at odds with policy of the legislation, courts look to statutory purpose rather its literal words).

appellants, and most state capital appellants,[21] the *only* current requirement necessary for an attorney to represent a capital military appellant before this Court under Article 70 is a bar membership. Article 27, UCMJ, 10 U.S.C. §827; Article 70, UCMJ; RCM 1202. Remarkably, a capital appellate attorney, unlike his military trial defense counterpart, need not even be certified as "competent."[22] Devoid of stricter standards, the government is free, and as appellant's case shows, clearly willing, to provide only attorneys with minimal appellate experience and zero capital litigation experience to be an appellant's likely final hope for life. In the military court-martial system, and perhaps only in the military court-martial system, is this practice somehow still not merely acceptable but the norm. *See*

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[21] Currently, there are thirty-one states that still authorize capital punishment. Of those, Delaware, Kansas, Kentucky, Oklahoma, and Wyoming have formally adopted the ABA Guidelines that require appointing counsel in capital cases; Georgia, Idaho, Louisiana, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Texas, and Washington have specific criteria that are consistent with ABA Guidelines; Arizona, Arkansas, California, Florida, Mississippi, and Montana require prior experience in either capital cases or homicide cases for appellate practitioners; and Colorado, Missouri, Pennsylvania, South Carolina, Tennessee all call for, at the very least, attorneys with numerous years of litigation experience consistent with Sec. 3599. *See* American Bar Association Death Penalty Representation Project *State Standards for the Appointment of Counsel in Death Penalty Cases* (2016).

[22] *See* Article 70, UCMJ. The only requirement for the detail of appellate attorneys is qualification under Article 27(b)(1). The statute makes no mention of the need for certification under Article 27(b)(2). Similarly, RCM 1202 only requires qualification under Article 27(b)(1) for detailing appellate attorneys.

generally *Hennis*, 77 M.J. 7; *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015); *United States v. Witt*, 73 M.J. 738 (AF. Ct. Crim. App. 2014); *United States v. Gray*, 51 M.J. 1, 54 (C.A.A.F. 1999); *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994).

Argument

Article 70, UCMJ, and RCM 1202 violate due process.

Due process embodies fundamental fairness. A violation of due process is a violation of "fundamental conceptions of justice which lie at the base of our civil and political institutions, and which *define the community's sense of fair play and decency*." *Dowling v. United States*, 493 U.S. 342, 353 (1990) (citations omitted) (emphasis added). It is a concept that is, "perhaps, the least frozen concept of our law – the least confined to history and the most absorptive of powerful social standards of a progressive society." *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring). In the context of the military, the test for determining a due process violation is whether the factors militating in favor of additional procedural safeguards are "so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf v. Henry*, 425 U.S. 25, 44 (1976); *see* also *Gray*, 51 M.J. at 54 ("the test for determining systemic due process violations in the military justice system is found in [*Middendorf*].").

Article 70, implemented by RCM 1202, prescribes the requirements for an appellate defense attorney. As previously discussed, the *only* requirement is that the attorney "be qualified under Article 27(b)(1)" – that is, the attorney must be a member of a bar. *See* Art. 27(b)(1), UCMJ. Neither Article 70 nor RCM 1202 make any exception for capital cases. Accordingly, an attorney "qualified" to represent an appellant in a misdemeanor offense is equally "qualified" to represent an appellant in a capital homicide case involving *forty-five* victims solely by virtue of his or her bar membership.

The astonishingly low standards of Article 70 and RCM 1202 are far from an embodiment of fundamental fairness. Congressional action to provide learned counsel, or, at the very least, significantly improve access to learned counsel, is the determination that quality representation is *necessary* to *foster fundamental fairness*. Congress, itself, explicitly stated this in the Military Commissions Act of 2009 and implicitly recognized this in the 2017 NDAA that "modernized military appellate practice" by demanding learned counsel to the greatest extent practicable. This legislation, together with the statutes and codal requirements in a vast majority of states that require similar attorney qualifications,[23] clearly demonstrate that learned counsel is now an integral component of the national community's "sense of fair play and decency" in death penalty cases.

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[23] *See* note 21, *supra*.

Moreover, the factors militating in favor of learned counsel in this case are so extraordinarily weighty as to overcome the balance struck by Congress. First, the interests at stake: appellant is facing execution, and the interests at stake are the gravest. Second, the demands of the case: the instant case is monstrously voluminous and exceptionally complex. Third, the critical nature of the pending proceeding: appellant's appeal to this Court, *if* meaningful, performs a vital role to "serv[e] as a check against the random or arbitrary imposition of the death penalty," *Gregg v. Georgia*, 428 U.S. 153, 195, 206 (1976). Fourth, and finally, the benefit to all parties: assurance that if appellant is condemned to die, his sentence is solely the result of just and fair proceedings. The totality of these factors are so extraordinarily weighty as to overcome the balance struck by Congress – that is, the ease and simplicity of assigning any barred attorney. Consequently, Article 70 and RCM 1202 violate appellant's due process.

RCM 1202 violates Article 36, UCMJ, and DoD regulations because it fails to provide the same quality of representation generally recognized in federal courts.

In Article 36, Congress delegated rulemaking authority to the President to issue rules for courts-martial procedure. The President's authority is thus constrained by the scope and intent of the statute. *See* generally, *Hamdan,* 548 U.S. 557 (2006). Importantly, under Article 36, the President "*shall*, so far as he considers practicable, apply the principles of law … generally recognized in the

trial of criminal cases in the United States district courts." Art. 36(a), UCMJ (emphasis added).

In executing this authority, the President has endeavored to conform the RCMs to generally recognized principles of law. In the 1980s, the President revised the *Manual for Courts-Martial* (*MCM*), the comprehensive body of military criminal law and procedure that includes the RCMs, with the primary goal of "conforming the *MCM* to Federal practice *to the extent possible, except where ... specific military requirements render such conformity impracticable. See Article 36.*" *MCM*, App. 21-1, (1984) (emphasis added). He then ordered the Secretary of Defense to revise the *MCM* annually and recommend appropriate amendments. Exec. Order No. 12,473 [hereinafter EO 12473], 49 Fed. Reg. 17,152 (13 Apr. 1984). In turn, the DoD has *directed* the Joint Service Commission on Military Justice (JSC) to conduct this comprehensive annual review to *ensure* that the RCMs apply the principles of law generally recognized in federal courts, *to the extent practicable.* Dep't of Defense Directive 5500.17, Role and Responsibilities of the Joint Service Committee on Military Justice [hereinafter DoDD 5500.17], Encl. 2, para. E2.1.1.3 (3 May 2003) (emphasis added).

Two conclusions are apparent. First, the Executive views its authority to issue rules that deviate from generally recognized principles of law as limited to circumstances where the UCMJ requires it or where *specific military requirements*

render such conformity impracticable and correctly so. The legislative history of Article 36 reveals that Congress never intended to provide carte blanche rulemaking authority. *See Uniform Code of Military Justice: Hearings before a Subcomm. of the Comm. on Armed Forces on H.R. 2498* [hereinafter Hearings on H.R. 2498], 81st Cong. 1016-19, 1061-64 (1949);[24] *see* also *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000) (the intent of Congress was that, *to the extent practicable*, courts-martial would resemble criminal trials) (emphasis added). Second, the responsibility to conform the *MCM*, and thereby the RCMs, to federal practice is an enduring one, congressionally imposed by Article 36 and self-imposed by Executive Order and DoD directive.

As previously discussed, RCM 1202, a rule the President promulgated pursuant to his Article 36 authority, *see United States v. Sutton*, 31 M.J. 11, 17 (C.M.A. 1990), prescribes the minimum qualifications of a capital appellate

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[24] At the time Article 36 passed, there was considerable consternation over the phrase "so far as he deems practicable." *See* Hearings on H.R. 2498 at 1016-19, 1061-64. It was characterized as "dangerous," likely to nullify congressional intent. *Id.* at 1015. An alternative phrase, "as near as may be," was suggested to more satisfactorily clarify legislative objectives. *Id.* at 1015-16. Congress ultimately relented on deleting the phrase entirely but only after testimony that subsequently identified specific circumstances which justified deviations from the federal rules and assurances that courts-martial would generally follow federal law. *See* e.g., Statement of Colonel John Dinsmore, Hearings on H.R. 2498 at 1017 ("[w]e have followed all through these years the rules of the Federal courts. There may be a few exceptions. And I feel sure we could present a good reason for each one of those.").

attorney as simply having obtained a bar membership. Thus, RCM 1202, a rule that has remained virtually untouched since 1969,[25] substantially deviates from the now generally recognized principle of providing learned appellate counsel in federal capital cases that existed long before appellant's 2011 capital referral. Critically, there are no specific military requirements that render compliance with this principle impracticable in this case, then or now. Any argument to the contrary may be summarily dismissed by the simple fact the military already provides an *unqualified* right to learned counsel in the military commissions and has done so since 2011.

Completely untethered to military necessity, RCM 1202 violates Article 36 because it fails to conform to the generally recognized principle of law that would provide appellant with the same quality of representation as provided in federal courts.

Additionally, and equally as significant, the military has violated its own rules in failing to timely amend the RCMs to comply with Article 36. Unquestionably, had the military properly executed its duties, RCM 1202 would have long since been amended, rendering this motion moot.[26] The failure of the

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[25] Paragraph 102 of the 1969 *MCM* lists the same requirements as the current RCM 1202.

[26] *See* MJRG Report, pt. I, UCMJ Recommendations, pg. 1022 (The members of the JSC and its working group all have other major responsibilities and serve on

government to follow its own rules in this regard serves as a related, but separate, basis to provide learned counsel in this case. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *United States v. Russo,* 1 M.J. 134 (C.M.A. 1975); *United States v. Howe*, 22 M.J. 704, 707 (A.C.M.R. 1986). Otherwise, the government stands free to reap the benefits of its own indolence.

RCM 1202 violates appellant's Fifth Amendment right to equal protection of the laws because it fails to provide the same quality of representation that is provided in similar military proceedings.

No state shall deny any person the equal protection of the laws. U.S. Const. amend. XIV, §1. This principle applies to the federal government through the Due Process Clause of the Fifth Amendment. *Vance v. Bradley*, 440 U.S. 93, 95 n.1 (1979). Although the government is not prohibited from treating classes of individuals in different ways, the guarantee of equal protection does prohibit the government from treating classes differently on the basis of criteria wholly unrelated to a state objective. *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972).

An equal protection violation has two parts. First, a class that is "similarly situated" has been treated disparately. *Arizona Dream Act Coalition v. Brewer*, 855 F.3d. 957, 966 (9th Cir.. 2017). Individuals are similarly situated when "their

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the Committee as a collateral duty. The JSC does not have the staffing necessary to conduct comprehensive periodic reviews of the military justice system on a regular basis. As a result, the JSC has focused on only "targeted issues.")

circumstances are alike in all material respects." *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60 (2d Cir. 1997). This does not require that the circumstances be identical; rather, there must be a "reasonably close resemblance of the facts and circumstances of [appellant's] and comparator's cases" to the extent that an "identifiable basis for comparability" exists. *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) (citations omitted).

Second, the disparate treatment among similarly situated individuals cannot survive the appropriate level of scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Classifications based on race and classifications affecting fundamental rights are analyzed under strict scrutiny. *Id.* Under strict scrutiny, a government action must be narrowly tailored to further a compelling state interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Classifications based on gender are analyzed under intermediate scrutiny. *Jeter*, 486 U.S. at 461. All other classifications are analyzed under the rational basis test. *Id.*

Here, appellant and the unprivileged belligerent on a capital appeal are similarly situated. Both have been tried by the military for capital crimes; both have been sentenced to death by a panel of military officers, *see* RTMC, para 5-2; and both are pending appeals in military appellate courts. More significantly, military commissions are "based on [...] trial by general courts-martial," 10 U.S.C. §948b(c); the procedures and evidentiary rules that apply in general courts-martial

apply to military commissions with limited exceptions, 10 U.S.C. § 949a(a); and the statutory standard of review for the Court of Military Commissions Review under 10 U.S.C. §950f(d) is identical to this Court's statutory standard of review under Article 66(c), 10 U.S.C. §866(c). Lastly, a general court-martial may try *any* offense triable in a military commission under Article 134, UCMJ, 10 U.S.C. §934, and it has the explicit jurisdiction to try violations of the laws of war. Article 2(a)(13), UCMJ, 10 U.S.C. §802(a)(13). Thus, both appellant and the unprivileged belligerent are in military criminal justice systems that closely mirror the other. Consequently, their circumstances are alike in all material aspects, and they are, therefore, similarly situated.

As this disparity implicates the Sixth Amendment's right to effective assistance of counsel, strict scrutiny is appropriate. However, even under a rational basis test, the disparity infringes on appellant's right to equal protection of the laws. Simply stated, there is no conceivable basis, let alone a rational one, as to why the unprivileged enemy belligerent has the regulatory *unqualified* right to learned counsel (and consequently the regulatory *unqualified* right to quality representation) while the servicemember must deal with whomever the government chooses for his capital case. Thus, RCM 1202 denies appellant equal protection of the laws under the Fifth Amendment because it fails to provide the same quality of representation that is provided in similar military proceedings.

Conclusion

The recent amendment to Article 70 providing learned counsel should apply in this case. If not, due process, Article 36, and equal protection nonetheless demand it. Thus, this Court should authorize funding for learned counsel.

II.

MITIGATION SPECIALIST AND FACT INVESTIGATOR

Summary of Argument

A mitigation specialist and fact investigator are necessary here. The undersigned counsel has a duty to reinvestigate this case and the client to ensure that the sentence satisfies constitutional and statutory requirements. Due to the complex nature of a mitigation investigation, the undersigned counsel is unable to satisfactorily perform the necessary investigation without assistance.

Law and Argument

Constitutionally speaking, mitigation is a necessary component in the determination as to whether to condemn an individual to death. As the Supreme Court has stated, "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender ... as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304. For capital punishment to meet constitutional demands in the military, for example, panel members must

unanimously agree that the mitigation is substantially outweighed by the aggravating factors. RCM 1004(a)(4)(C); *see* also *United States v. Curtis*, 32 M.J. 252, 256-57 (C.M.A. 1991).

Courts have defined mitigation very broadly. In capital cases, mitigation is "*any* aspect of a defendant's character or record and *any* of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added). This includes:

> compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability.

ABA, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* [hereinafter ABA Supplementary Guidelines] (2008).

Accordingly, the mitigation investigation needs to be vastly comprehensive. It must include: (1) a complete medical history,[27] (2) a multi-generational family

[27] This includes "hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage." ABA Guidelines, Guideline 10.7, commentary.

and social history,[28] (3) educational history,[29] (4) military service, and (5) employment and training history.[30] ABA Guidelines, Guideline 10.7, commentary. Accordingly, "[i]t is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and *virtually everyone else who knew the client and his family*." *Id* (emphasis added). Moreover, virtually every record needs to be reviewed, not only of the client, but

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[28] This includes:

> physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence; other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities).

Id. Notably, "[a] multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. *Id.*

[29] This includes "achievement, performance, behavior, and activities, special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities." *Id.*

[30] This includes skills and performance, in addition to barriers to employability. *Id.*

of the client's parents, grandparents, siblings, cousins, and children.[31] *Id.* Any information should be corroborated by multiple sources. *Id.*

This investigation requires a trained mitigation specialist as even an experienced attorney generally does not have the necessary expertise. (Def. App. Ex. S, paras. 19, 25); *see* also Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 Geo. Mason U. Civ. Rts. L.J. 199, 206-11 (2002).[32] For example, it is absolutely critical that the one performing the mitigation work understand human development and how it is shaped by genetics and environmental conditions. Jen Miller, *The Defense Team in Capital Cases*, 31 Hofstra L.R. 4, 11 (2003). Equally critical is the skill and proficiency in identifying "red flags" pertaining to cognitive impairments, mental issues, childhood abuse and trauma, and substance abuse. *Id.* at 11-12. Not surprisingly, most mitigation specialists are trained in social sciences, with degrees in social work and psychology, who know how to screen for subtle issues and successfully interview individuals who are often understandably reluctant to reveal

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[31] Records include, but are not limited to, "school records, social service and welfare records, juvenile dependency or family court records, medical records, military records, employment records, criminal and correctional records, family birth records, marriage records, and death records, alcohol and drug abuse assessment or treatment records, and INS records." *Id*

[32] Dwight Sullivan currently serves as the Department of Defense's Associate Deputy General Counsel for Military Justice.

the most extremely personal and embarrassing information about their lives. Honorable Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 Hofstra L.R. 819, 825, 827 (2008). Since at least as far back as late 1990s, mitigation specialists and their work have been part of the "standard of care" in federal capital cases. Spencer Report, pt. II, para. 7, Commentary.

Similar to the mitigation specialist, the fact investigator is an essential part the capital defense team. Fact investigators conduct thorough investigations of the charged offense[33] and are important to challenging aggravating factors. Miller at 1126. Importantly, the fact investigators also assist mitigation specialists in compiling the accused's complete life history, such as conducting witness interviews and obtaining records. Miller at 1126.

On appeal, the need for a mitigation specialist and a fact investigator remains critical. An appellate defense attorney has an affirmative duty to reinvestigate both the case and the client, the latter of which demands an even "more-thorough" mitigation investigation than at trial, aimed to discover previously undisclosed mitigation evidence and "*to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of*

[33] The ABA Guidelines require a complete investigation even in instances of "overwhelming guilt." ABA Guidelines, Guideline 10.7 A.1.

competency and mental-state defenses." *Id.* (emphasis added). ABA Guidelines, Guideline 10.15, commentary (prevailing on collateral relief involves changing the picture of the case). Accordingly, the mitigation specialist and fact investigator are as equally indispensable on appeal as at trial. *See Akbar*, 74 M.J. at 382 (C.A.A.F. 2015) (the mitigation specialist is an "indispensable member of the defense team throughout *all capital proceedings.*") (emphasis added).

A mitigation specialist and a fact investigator are necessary in this case.

For experts on appeal, the CAAF has held that *Ake v. Oklahoma,* 470 U.S. 68 (1985),[34] established what is appropriate for determining whether experts meet the reasonable necessity standard. *Gray*, 51 M.J. at 20 (C.A.A.F. 1999). Although it is not clear whether the three-pronged test articulated in *United States v. Gonzalez*, 35 M.J. 459 (C.M.A. 1994), which interpreted *Ake* to determine necessity for experts at trial, specifically applies to requests for experts on appeal, this Court has indicated as such. *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

[34] *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.

would achieve; and (3) why the defense attorney is unable to gather and present the information. *Gonzalez*, 39 M.J. at 461.

All three prongs are satisfied in this case. First, there is a need for a mitigation specialist and a fact investigator. The undersigned counsel has an affirmative duty to investigate for additional mitigation, especially relating to issues of competency. Notably, appellant proceeded pro se on the eve of his capital trial. He conducted relatively little cross-examination, presented *no* evidence (R. at 3604), called *no* witnesses (R. at 3604), made *no* closing argument (R. at 3708-09), waived *all* mitigation (R. at 3938, 3947, 3956), and presented *no* sentencing argument (R. at 3989). Given this, and the fact that his defense counsel attempted to withdraw at one time because he believed appellant was attempting to use the trial to commit suicide (R. at 2189), competency may be an issue in this case. (Def. App. Ex. S, para. 46).

Moreover, "[w]hatever incomplete pretrial investigation that was conducted prior to [appellant's] self-representation is not an adequate substitute for the investigation that is necessary now." (Def. App. Ex. S, para. 46). As a consequence, the undersigned counsel must reinvestigate the case and appellant to present this Court with appellant's story to ensure that it approves only the sentence that "should be approved" in accordance with its statutory mandate to "do justice." *See* Article 66(c), UCMJ. This is so regardless of an accused who waives

mitigation. *See United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (a waiver cannot waive a Criminal Court of Appeals' statutory mandate). Thus, the need for a mitigation specialist and a fact investigator, who will, in part, assist the mitigation specialist, is evident.[35]

Second, the mitigation specialist and fact investigator would achieve a complete and thorough investigation of the case and appellant in accordance with ABA Guidelines. This includes compiling a comprehensive multi-generational family and social history.

Third, and finally, the undersigned counsel is unable to gather and present this information. The undersigned counsel has, at best, an elementary understanding of the effect of genetics and environmental conditions on human development. Similarly, the undersigned counsel does not have the education, training, or expertise to identify the often subtle "red flags" associated with cognitive impairment, mental-health disorders, or trauma, nor does the undersigned counsel have the skills necessary to effectively interview individuals reluctant to divulge the most private, sensitive, and embarrassing information about their lives. Moreover, there is no reasonable amount of time or training that can be an

[35] Furthermore, outside the mitigation context, a fact investigator is needed to investigate several issues already identified as warranting further inquiry.

adequate substitute for the experience of a trained mitigation specialist or a fact investigator, most especially in capital case such as this.

Conclusion

A mitigation specialist and a fact investigator are necessary here. As such, in addition to authorizing funding for learned counsel, this Court should authorize funding for a mitigation specialist[36] and a fact investigator.

[36] CVA Consulting, a firm that previously worked on such cases as *Commonwealth of Virginia v. Lee Boyd Malvo*, has provided an estimated quote of $40,000 for initial mitigation work on this case. (Def. App. Ex. T). This includes an initial 300 hours at $125.00 per hour, plus expenses. (Def. App. Ex. T). The Curriculum Vitae of Carmeta Albarus, President of CVA Consulting, is enclosed as a separate defense appellate exhibit. (Def. App. Ex. U).

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

Panel No. 2

BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel

MOTION FOR
LEARNED COUNSEL

GRANTED: _____

DENIED: BS

DATE: 15 Oct 2018 OCT 15 2018

MOTION FOR
MITIGATION SPECIALIST

GRANTED: _____

DENIED: PS

DATE: 15 Oct 2018 OCT 15 2018

MOTION FOR
FACT INVESTIGATOR

GRANTED: _____

DENIED: PS

DATE: 15 Oct 2018 OCT 15 2018

APPENDIX C

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.

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

BRYAN A. OSTERHAGE
CPT, JA
Appellate Defense Counsel

APPENDIX D

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

APPENDIX E

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