



REFLECTION

Where Are We Trying to Get to?

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At the beginning of every Pentagon meeting involving the Army's senior staff, General George Casey, then-Chief of Staff of the Army, asked: "Where are we trying to get to?" That question never lost relevance. For the leader of any organization, identifying the desired end state constitutes the critical task. For example, CEOs develop and direct the execution of corporate strategy to achieve growth or revenue goals. Similarly, senior military leaders marshal resources to achieve strategic aims—the maintenance of an alliance, the return to governance based on the rule of law, or the transition from combat operations to stability operations and then to peace.

November 2009: Tragedy at Fort Hood

General Casey's simple question should have fundamentally guided my actions. If I could get a second chance, maybe it would, but it took time for his focus to sink in. In November 2009, one short month into my four-year tenure as the Judge Advocate General (TJAG), U.S. Army,¹ Major Nidal Hasan opened fire at a deployment center located on the Fort Hood military installation, killing thirteen soldiers and wounding many more. As events unfolded that day, reports initially said that the alleged shooter had died at the scene. Whether appropriate or not, I felt relieved, knowing the monumental tasks ahead in a criminal prosecution of this magnitude. That feeling dissipated

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1. See 10 U.S.C. § 3037 (2015).

quickly when initial reports proved wrong.² In fact, a criminal prosecution would ensue.

Under what system would this case proceed? One option would be a criminal trial in U.S. district court. Another would be a court-martial conducted under the authority of the Uniform Code of Military Justice (UCMJ), in which Army judge advocates would exercise key roles, including staff judge advocate (a quasi-district attorney), prosecutor, defense attorney, and judge. In cases arising on military installations like Fort Hood, federal jurisdiction exists for criminal offenses. Typically, a negotiation occurs between the staff judge advocate of the installation and the affected U.S. Attorney's Office.³ Topics addressed might include: (1) What offenses best capture the gravamen of Hasan's conduct? Terrorism-related charges? Felony-murder? (2) Where did the events occur? (3) Who were the victims? (4) What community has greater equities in a prosecution: Killeen, Texas, the nearest city, or the Fort Hood installation?

Jurisdiction negotiations did not endure long, for it rapidly became clear in the aftermath of the mass shooting that Hasan would be tried at a military court-martial. General Casey's guidance from the outset was to do all we could to enable Fort Hood's recovery from this horrific event. That recovery entailed operations on several lines of effort, each important for healing a community that had borne a great deal of loss in near-constant deployments of soldiers and installation units since the tragic attacks of September 11, 2001. A necessary aspect of my role as TJAG was to ensure a legally sound prosecution under the UCMJ, delivering accountability under our system that both seeks justice and enforces good order and discipline. This case was the Army's to try, though we obtained superb support from the Federal Bureau of Investigation in developing the evidence to be used at trial.

Keeping the case on track became the fundamental challenge. Derailments presented in ways both expected and unanticipated. First, public statements by senior government officials, from the President down, afforded Hasan the ability to claim that he could not receive a fair trial under the UCMJ anywhere in the country.⁴ Second, Congress's interest in exercising its constitutional oversight authority threatened to overtake the criminal prosecution already

2. *Officials: Fort Hood Shootings Suspect Alive; 12 Dead*, CNN (Nov. 7, 2009, 7:49 AM EST), <http://www.cnn.com/2009/US/11/05/texas.fort.hood.shootings/index.html>.

3. See U.S. Dep't of Defense Directive 5525.7, *Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes* (1985).

4. Cf. Scott Butterworth, *Did Obama Just Convict the Suspected Fort Hood Shooter?*, WASH. POST (Nov. 7, 2009, 5:06 PM ET), http://voices.washingtonpost.com/44/2009/11/07/did_obama_convict_the_suspecte.html.

underway, particularly as the prosecution dragged on for nearly four years.⁵ Third, we faced criticism concerning the charges levied against Hasan. For example, some observers were troubled that this was not a terrorism prosecution.⁶ For me, that simply did not matter. We had a U.S. Army soldier in uniform accused of killing other soldiers in U.S. Army uniforms on a military installation—murder was a sufficient charge to pursue. Other voices questioned the failure to charge Hasan with the murder of a fetus of unknown gestation⁷ carried by one of the victims; proving that offense would have further complicated an already challenging prosecution. Finally, we had to respond to the concern that the victims at Fort Hood were initially deemed ineligible for award of the Purple Heart, traditionally given to a soldier killed or wounded by enemy action in combat.⁸

What Does a Beard Have to Do with Justice?

The issue that ultimately ground the case to a full stop was unexpected: Hasan's beard. Armed with the reflection of time and distance, I know now we could have handled it more effectively. Initially, we seemed to be proceeding toward trial in a reasonable, if deliberate, manner. As pretrial proceedings continued, and Hasan's recovery enabled him to participate, he decided he would no longer shave.⁹ Hasan's unwillingness to shave his beard for courtroom appearances (and thus refusing to present in a military manner) should have been a momentary blip on the radar, quickly overcome. Instead, the issue birthed a contest of wills and tactics, including interlocutory appeals, an unnecessary diversion of time and effort from General Casey's fundamental goal of putting the Fort Hood community back together.

As noted above, our system of military justice pursues dual goals: justice, both perceived and real, and good order and discipline. Ultimately, discipline

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5. See Chelsea J. Carter, *Nidal Hasan Convicted in Fort Hood Shootings; Jurors Can Decide Death*, CNN (Aug. 23, 2013, 7:28 PM ET), <http://www.cnn.com/2013/08/23/justice/nidal-hasan-court-martial-friday/index.html>.
 6. Geoffrey S. Corn, *The Difference Between Motive and Crime: The Court-Martial of Major Nidal Hasan*, U. UTAH S.J. QUINNEY C. OF L. (Aug. 26, 2013), <http://law.utah.edu/the-difference-between-motive-and-crime-the-court-martial-of-major-nidal-hasan>.
 7. Gene Tarne, *Prosecutors Not Holding Ft. Hood Shooter Accountable for Killing Unborn Baby*, LIFE NEWS.COM (Feb. 4, 2013, 4:42 PM), <http://www.lifeneews.com/2013/02/04/obama-admin-not-holding-ft-hood-shooter-accountable-for-killing-unborn-baby>.
 8. Pamela K. Browne & Catherine Herridge, *Defense Department Says Giving Purple Heart to Fort Hood Survivors Would Hurt Hasan Trial*, FOX NEWS (Mar. 30, 2013), <http://fxn.ws/1rStiPm>.
 9. Jonathan Turley, *Major Hasan Sanctioned for Failing to Shave for Court in Fort Hood Case*, JONATHAN TURLEY.ORG (Aug. 6, 2012), <https://jonathanturley.org/2012/08/06/major-hasan-sanctioned-for-failing-to-shave-for-court-in-fort-hood-case>.

compels the soldier safely secured in a foxhole to exit on the command of a supervisor to charge pell-mell in the direction from which bullets are traveling. That discipline begins with the first day of basic training or the first day for a new cadet at West Point. Upon arrival, one of the first stations for a new recruit is the barber. A regulation haircut is a physical aspect of desired conformity: conformity to specialized values and standards of discipline as well as uniformity of appearance within a profession that emphasizes teamwork over individualism. Sporting a military haircut and clean-shaven, one is prepared for the wholesale indoctrination to follow. It may seem entirely unnecessary, but the standard of being clean-shaven contributes to both the perception and the reality of self-discipline, even at a 6:00 AM military formation for breakfast. That discipline ultimately underlies military effectiveness.

Soldiers facing court-martial for various offenses do not gain an exemption from uniform and appearance standards.¹⁰ In fact, one of the more tedious tasks for the unit that receives a soldier who returns from months or years of absent without leave (AWOL) or deserter status is securing a serviceable uniform for the AWOL returnee to wear. And, on many occasions, servicemen who had sought to avoid shaving upon return to military control found themselves in receipt of the firm application of an electric razor.

Typically, that process would not involve the military judge presiding over a court-martial, at least not explicitly. The judge would convey her expectations to both the prosecution and to counsel representing the accused. In most cases, an escort or supervisor from the unit of the soldier on trial accompanies him to each courtroom appearance and might receive the military judge's expectations concerning the accused's appearance at trial. In part, this practice ensures that the "panel" (military jury) sits in judgment of a soldier whose appearance conforms to that of each of the panel members assembled, a tangible reminder they are judging one of their own.

With Hasan, however, customs and culture yielded to a range of other, more pressing concerns, at least in the eyes of senior civilian policymakers. A savvy leader should have understood that the primary goal at issue was not Hasan in uniform, clean-shaven in the Fort Hood courtroom. Rather, the fundamental goal was a properly tried criminal case, able to withstand successive levels of appellate review, with an outcome both just in fact and perceived by the public as just.

10. R. COURTS-MARTIAL 804(e)(1) discussion ("This subsection recognizes the right, as well as the obligation, of an accused servicemember to present a good military appearance at trial. An accused servicemember who refuses to present a proper military appearance before a court-martial may be compelled to do so.").

**I Have Seen Photos of Bearded U.S. Servicemen in Afghanistan—
Why Did This Issue Trip You Up?**

A savvy leader would have also weighed Hasan's beard in broader context, informed by the key question: Where are we trying to get to? The answer was not a beard-free world. In fact, following 9/11, I deployed with a special operations task force focused on bringing Osama bin Laden and Mullah Omar, the Afghan Taliban leader, to justice. The special operators of that task force (the lawyers who accompanied them were not at all "special") grew luxurious beards to blend in with their Afghan counterparts and assimilate more effectively into that culture.¹¹ By 2009, we had seen bearded U.S. servicemen conducting operations in Afghanistan for eight years, and no one had identified a loss of self-discipline in our elite special operations forces. Afghanistan, though, was not the only combat theater for beards—the Pentagon offered its own opportunity for "combat" involving bearded servicemen.

As Hasan's criminal case was winding through the court-martial process, in 2010 and 2011 the leadership of the Defense Department was facing ongoing litigation involving religious accommodation requests for Orthodox Jews, Muslims, and Sikhs who sought to serve in the Army and yet retain their articles of faith and grooming practices to the extent possible.¹² Sikhs were serving, wearing their traditional turbans, when I joined the Army in 1980,¹³ and I found their appearance unremarkable. The Sikhs I observed were tactically proficient and maintained superb military bearing. In a firefight, anyone would welcome a Sikh on his or her flank.

Moreover, by 2009, senior combat leaders recognized the critical need to recruit soldiers with the language and cultural skills unique to Afghanistan, Iraq, and other countries in the Middle East and Southwest Asia.¹⁴ Some of these leaders were willing to allow grooming accommodations if that allowance might yield the enlistment of a soldier with the desired skills sought. Those views did not, however, hold sway, at least at that time.

As Hasan proceeded toward trial, it became increasingly clear that the senior leaders of the Defense Department would not countenance a "forced

11. James Brooke, *VIGILANCE AND MEMORY: KANDAHAR*; *Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right*, N.Y. TIMES (Sept. 12, 2002), <https://nyti.ms/2q1WZSe>.

12. Corey Kilgannon, *Beard and All, a Rabbi Is Joining the Army*, N.Y. TIMES: CITY ROOM (Dec. 7, 2011, 12:17 PM), <https://nyti.ms/2q1L1ry>.

13. Steve Elliott, *Sikh Soldiers Allowed to Serve, Retain Their Articles of Faith*, U.S. ARMY (Mar. 25, 2010), <https://www.army.mil/article/36339/sikh-soldiers-allowed-to-serve-retain-their-articles-of-faith>.

14. *Update on Military Accessions Vital to the National Interest Pilot Recruiting Program*, U.S. ARMY (Oct. 4, 2009), https://www.army.mil/article/28310/Update_on_Military_Accessions_Vital_to_the_National_Interest_Pilot_Recruiting_Program.

shave” of Hasan. That development presented a difficulty we failed to surmount, because by then we had effectively boxed in the military judge. The judge occupied a lonely perch—we failed, collectively, to give him cover in working through the issue of Hasan’s appearance in court. Had the chain of command (Hasan’s military supervisors) appeared before the judge to convey their acquiescence to a bearded Hasan for all courtroom appearances, we might have averted what ultimately occurred. Instead, while we debated various options, policy considerations, and effects on the religious accommodation cases then pending, Hasan’s case crept forward. The military judge determined that he needed to confront the perception of indiscipline in the court-martial process.

On July 25, 2012, the judge issued a contempt order for Hasan’s failure to shave.¹⁵ Over the next month, the judge found Hasan in contempt four more times.¹⁶ Hasan filed an interlocutory appeal, first with the Army Court of Criminal Appeals and ultimately with the Court of Appeals for the Armed Forces (CAAF). After briefing and argument, the CAAF reversed on December 3, 2012, removing the judge from the case based on the appearance of bias and suggesting that the judge had exceeded his authority by holding Hasan in contempt.¹⁷ How had we allowed a wayward beard to derail a case with so much interest on the part of so many? General Casey’s straightforward, reflexive question echoed in my thoughts: Where are we trying to get to?

The result of Hasan’s successful interlocutory appeal was that we were compelled to bring in a new judge. She required several months to get up to speed on what was already a robust record of pretrial proceedings held to date, time also necessary to fairly try a high-visibility, complex capital case.¹⁸ As that effort unfolded, justice was delayed, Congress was increasingly impatient, an element of Fort Hood’s recovery was stymied, and we faced mounting criticism over the ability of our military justice system to successfully handle a high-profile case.

Lessons Learned: *United States v. Chelsea Manning* Will Be Smoother!

Did I learn anything from this episode, anything that might help me avoid such a morass if I encounter it again? Perhaps, but only grudgingly. As Hasan’s case moved through pretrial proceedings, Private Chelsea Manning seized the

15. U.S. Army, *Timeline for Judicial Process*, FORT HOOD PRESS CTR., <http://www.forthoodpresscenter.com/go/doc/3439/1229091> (last visited June 6, 2017).

16. *Id.*

17. *Hasan v. Gross*, 71 M.J. 416, 418-19 (C.A.A.F. 2012) (per curiam).

18. U.S. Army, *supra* note 15.

spotlight of public attention in June 2010, with her arrest for disclosing a tremendous volume of classified information to WikiLeaks.¹⁹

Upon arrest, Manning was placed in pretrial confinement, where she would remain during the pendency of the court-martial process, given the gravity of her misconduct. As we began to plan for the support structure that would allow for a trial involving reams of classified documents, we quickly realized that the trial process would potentially consume far more time than even the Hasan case. Interagency review and coordination, as well as the resolution of intelligence community and executive branch concerns over a broad array of classified evidence disclosed by WikiLeaks, proved a daunting challenge. Given that necessity, we needed a pretrial confinement venue that would quiet the public clamor surrounding Manning, who, depending on one's perspective, was either a folk hero or a traitor of the worst degree.

Where were we trying to get to? As with Hasan, we were trying to get to a place where we had fairly tried a complex case, attracting a great deal of national and international attention to the defendant herself, to the conduct of our military operations, and to our public diplomacy. We sought to do this in a manner that reinforced the UCMJ as both just in fact and so perceived.

At Quantico, Virginia, the designated pretrial confinement facility for the East Coast, quiet would not obtain. Almost immediately, interactions between Manning and the guard force of Marines generated public controversy on a near-daily basis,²⁰ ensuring that Manning would remain in the public eye.²¹ Pretrial confinement problems rarely present; we did not anticipate that they would pose a challenge in this case.

Frustrated by the inability to quiet the public clamor, I argued that we had to defuse the tension between the Quantico guards and Manning. We needed to retain Manning in the D.C. area, at a location from which she could readily appear at pretrial proceedings and consult with her D.C.-based counsel. Moreover, we possessed another critical interest: conveying the perception of a first-class, professionally run pretrial detention facility. That capability simply had to exist given the likelihood of future high-profile courts-martial in the greater D.C. area.

Ultimately, my frustration yielded to political realities. Summoned to the Secretary of Defense's office, I quickly understood from Secretary Panetta that we had no option other than to reduce the "noise" of Private Manning's

19. Kim Zetter & Kevin Poulsen, *U.S. Intelligence Analyst Arrested in Wikileaks Video Probe*, WIRED (June 6, 2010, 9:31 PM), <https://www.wired.com/2010/06/leak>.

20. *U.N. Checking on WikiLeaks Suspect's Treatment*, CBS NEWS (Dec. 22, 2010, 7:16 PM), <http://www.cbsnews.com/news/un-checking-on-wikileaks-suspects-treatment>.

21. *See, e.g., Joshua Norman, Report: Bradley Manning, Alleged WikiLeaks Source, in Solitary Confinement*, CBS NEWS (Dec. 15, 2010, 11:13 AM), <http://www.cbsnews.com/news/report-bradley-manning-alleged-wikileaks-source-in-solitary-confinement>.

continued presence in the greater D.C. area, which we could do only by physically transferring her to a facility that would “shift the narrative” of her detention. We transferred Manning to Fort Leavenworth, Kansas.²² The Joint Regional Correctional Facility and U.S. Disciplinary Barracks, two facilities located there, have always been the gold standard for both pretrial detention and confinement operations. Thereafter, we managed the attendant difficulties and costs of periodic transport of Manning to and from the D.C. area for key pretrial events, the trial process continued unimpeded, and public focus soon shifted to another spectacle.

General Casey’s words echoed in the course of my discussion with Secretary Leon Panetta: Where were we trying to get to? To a place where we could look backwards at a fairly conducted criminal trial. The most critical task for an effective leader in government is to correctly identify the end state sought, guiding her actions with that end state always in mind and ignoring the “noise” that always exists. I will not be granted a do-over, as my term as TJAG has ended, but I understand that critical inquiry far better now, gifted with the benefit of detached reflection.

22. Donna Miles, *Army to Transfer Manning to New Leavenworth Correctional Facility*, U.S. ARMY (Apr. 19, 2011), https://www.army.mil/article/55211/Army_to_transfer_Manning_to_new_Leavenworth_correctional_facility.