

Inside View of Fort Hood Gunman Trial

By Mike Hashimoto Nearly four years since the horrific mass shooting at Fort Hood near Killeen, testimony in the court-martial of accused gunman Nidal Hasan is scheduled to begin Aug. 6. Points asked Lisa Marie Windsor, a 22-year veteran of the Judge Advocate General Corps and retired Army colonel, about the main differences between military and civilian trials. Windsor, who now practices at Tully Rinckey in Washington, is a graduate of UT-Arlington and the University of Houston Law Center and has tried more than 75 courts-martial on both sides. Most of us are more familiar with civilian trials. What are some of the most important differences that we should see in tracking the Nidal Hasan court-martial?

In a capital case where the death penalty is an option, such as the case against Maj. Hasan, the differences are not as numerous as you might think. Twelve military members will sit on the panel, the military equivalent of a jury, and will hear evidence and render a verdict. The verdict must be unanimous for guilt for the death penalty to remain an option. If two-thirds vote for guilt, Maj. Hasan is guilty but will not face the death penalty. If they fail to reach a two-thirds majority on the first vote, Maj. Hasan will be acquitted. Unlike a civilian jury, the members vote in secret and will not continue to revote in order to reach a unanimous verdict. The panel in a court-martial is allowed to ask questions of any witness, as is the judge. Given the high stakes and intense interest, would you expect the Hasan trial to differ significantly from other military trials?

Yes, and it already has. Most courts-martial are not followed closely by the media. This resulted in additional questioning by attorneys to make sure panel members had not already formed an opinion on guilt or innocence. In this case, prospective panel members were flown in from all parts of the U.S. in an effort to ensure objectivity. The length of time that this case has taken to reach trial is extremely rare; most courts-martial are tried in three to six months from convening authority action and are completed through sentencing in a few days. This case has seen multiple defense attorneys, two judges and appellate involvement. Maj. Hasan's physical and mental competency has been an issue, and he has complicated the proceeding by growing a beard and, lastly, requesting to represent himself. Have you ever participated in or witnessed a court-martial in which the defendant represents himself?

An accused representing himself is extremely rare; in fact, this is the first case I've heard of a judge allowing it. Maj. Hasan is not an attorney and is not competent to represent himself in a death penalty case. To avoid issues on appeal, the judge will keep a tight rein on the proceeding and assist Maj. Hasan in questioning witnesses, and the defense counsel advising him will be quick to step in to avoid a mistrial. If Maj. Hasan is disruptive or fails to follow the judge's instructions, his permission to represent himself will be revoked, and his defense counsel will take over. You know the judge, Col. Tara Osborn, from your days in JAG, correct? Were you surprised that she allowed Maj. Hasan to represent himself or by any other rulings so far?

Tara and I were students together at the Command and General Staff Officers' Course in Leavenworth, Kan., in 1998-99. I also worked with her briefly when she was the chief of justice at Fort Hood in the '90s. The Army JAG Corps is a small family and, luckily, a happy

one. She is definitely up for this assignment and has years of experience. I would expect her to be decisive and fair. Her rulings so far have all been within the boundaries of what is allowed under the Uniform Code of Military Justice. She appears to be allowing Maj. Hasan significant latitude in presenting his case while still ensuring that the trial progresses in an orderly manner. Death penalties are not common in military justice. How do you anticipate this affecting the trial?

The death penalty has a chilling effect on all parties involved, and all parties will feel a heightened sense of responsibility to ensure that a correct verdict is reached. Panel members are questioned on their personal beliefs concerning the death penalty, and it is common that witnesses and maybe even victims and their families may believe it is not appropriate. However, all persons involved in a trial swear an oath to follow the law. Personal beliefs must not be allowed to overshadow the facts. Given that, is it worth the military keeping the death penalty as a punishment option?

It is, even though there is debate on the subject, particularly given the fact that the military has not executed anyone since 1961. Having the death penalty as an option still provides a deterrent effect, and in a case like this one where you have multiple fatalities, it still has a place as a punishment option. What did you think of *A Few Good Men*? Can we handle the truth?

I was a trial counsel for 1st Cavalry Division when that film came out [in 1992], and I was amused by the theatrics in the courtroom. It certainly wasn't my experience. Criminal trials are serious business, and I'm always proud of the manner in which both civilian and military juries handle themselves. Public opinion, the media or even public officials cannot be allowed to influence the ability of an individual on a jury or panel to vote their conscience. As long as the justice system is free to work the way the law is written, we can certainly handle the truth.