

What is Going On in the Fort Hood Shooter Trial?

By Jessica TestaMaj. Nidal Malik Hasan is a former Army psychiatrist charged in the 2009 mass shooting at Texas' Fort Hood, in which 13 people died and more than 30 were injured at the military base's Soldier Readiness Processing Center. Hasan's trial began on Aug. 6. If found guilty he could face the death penalty, but Hasan has so far denied all legal counsel. He is representing himself. Court-appointed attorneys for Hasan — his "standby defense" — believe that the 42-year-old former Army psychiatrist is deliberately trying to get the death penalty. The judge, Col. Tara Osborn, has denied Hasan's attorneys' plea to either take over the case or leave it altogether. Lisa Windsor, a former Army lawyer who was based at Fort Hood, explains Hasan's defense strategy, the differences between military and civilian trials, and the likelihood of a death penalty sentence. What is Hasan's defense strategy?

Lisa Windsor:

It's kind of hard to tell. He started out his opening statement by saying, you know, 'I'm an imperfect Muslim. I made a mistake. The evidence will show that I'm the shooter, but in essence I want you to forgive me because I made a mistake.' He doesn't appear to be cross-examining many witnesses, so it looks to me like he's trying to not offend the panel in any way and be a more sympathetic character. What role is Hasan's standby defense playing right now? The judge won't allow them to take over the case, but she won't release them either.

LW:

Under the rules for court martial, the judge has allowed [Hasan] to defend himself unless he is disruptive in the courtroom. At any point in the trial, that permission could be withdrawn — at that point his defense counsel would take over, and they would really have needed to been there the whole time to do that effectively. Right now, they're there to provide him any assistance that he needs. His lawyers are convinced that Hasan wants the death penalty. Do you agree?

LW:

No, I don't see that at this point. They've said that they felt his defense is "morally repugnant." Short of violating some ethics or rules of professional responsibility, their job is representation of their client. There are certain decisions that are the client's decision to make. Just because the attorney disagrees doesn't mean they get to withdraw from the trial. Many anticipated this would be a strange trial because Hasan, representing himself, would have to cross-examine survivors of his attack. But so far, he's declined to do that. Why?

LW:

He may be trying to not to turn the panel against him, or he may simply be a coward and not be willing to face them after what he did. Definitely there is a danger that if he approaches them, if he speaks to them, that it could re-traumatize somebody. But from a legal standpoint, the accuser has a right to face their accused. They were going to see him in court no matter what. If Hasan has already admitted that he was the shooter, why didn't he just plead guilty?

LW:

An individual is not allowed to plead guilty in a capital case, even if they say, 'I just want to avoid trial and go straight to being convicted and get the death penalty.' [Hasan] still has the option of putting up defense or no defense, but he does not have the option of pleading guilty. [Ed.: Hasan could have pled guilty if government prosecutors agreed not to pursue the death penalty.] How is a military panel different from a civilian jury?

LW:

A traditional jury is going to be chosen from a huge pool. They're not going to be in the same profession as the person tried in a civil court. On a military panel, they're all going to be military members who are of senior rank to Maj. Hasan. In this case, I believe there are nine colonels, one major, and the rest lieutenant colonels. [Ed.: There are 13 total serving on the panel.] These people are very, very familiar with the military justice system. They may have also sat on military panels in the past. A civilian jury is also required to reach a unanimous verdict one way or the other or they're hung. That's not the case with a military verdict. They're going to vote one time, and [Hasan] could be found guilty without a unanimous vote. But there does need to be a unanimous guilty verdict to keep the death penalty on the table. So how does the panel make its decision?

LW:

It starts out in deliberations with a full and open discussion of the evidence in the case. They can ask to have testimony read back to them, and they can even come back and have a witness recalled. There are a lot of charges in this case, but the voting tends to not last very long. The junior member collects and counts votes, and a senior member then publishes their results. The president of the panel announces the verdict. They're not sequestered, but they are cautioned when they're selected to not discuss the case outside the courtroom. The pace of trial has been described as rapid. Should we expect a decision soon?

LW:

I think there are a lot of witnesses that the government plans to bring forward. I had heard that it was moving quickly, but I would still anticipate two to three weeks before any sort of verdict is reached. It could be a fairly short trial and we could see swift justice — the major drama so far has come from the defense counsel. For Hasan to get the death penalty, what would have to happen, besides a unanimous guilty vote?

LW:

The panel would vote on whether aggravating factors were present. If one person says no or doesn't vote with the majority, that can take the death penalty off the table. Once they've gotten past that hurdle, the members propose an appropriate sentence and then they'll vote on it. The other outcome here is life in prison without possibility of parole. What are aggravating factors?

LW:

Aggravating factors come into play with a death penalty case, and there's a whole list of them, but two big ones that apply to this case are: Did these events occur in time of war? Were there multiple victims involved? In this case, both are true. What do you expect the verdict will be?

LW:

I don't think there's a possibility of him walking away not guilty from this. I think the hardest part for the government with these types of cases is proving premeditation. If they don't prove premeditation, then the crime is not a death penalty offense. Is that the prosecution's main

objective right now — proving premeditation?

LW:

Yes, I believe so, and I think that's why the government has already made a motion to include certain types of evidence, such as his communication with extremist groups prior to the shooting. Is it likely that the government will be unable to prove premeditation?

LW:

It could happen, but there may be plenty of evidence of premeditation already. You don't usually show up at a Soldier Readiness Center with a bunch of automatic weapons. If premeditation is not proven, the panel could still find him guilty, but their decision would say something like "not guilty of the charge as written."