

SHAVE THAT MAN'S BEARD, THAT IS AN ORDER: WHY UNITED STATES ARMY SERVICE MEMBERS CAN BE FORCIBLY SHAVED

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I. INTRODUCTION

Army Regulation (AR) 670-1 states that males will be clean-shaven while in uniform.² Civilians are familiar with AR 670-1, maybe not by name, but by sight. Most service members seen on TV, in person, or in a movie are beardless.³ But what happens when AR 670-1 is disobeyed? The court-martial proceeding, *Hasan v. Gross*,⁴ analyzed whether a military judge's order to forcibly shave Malik Nadal Hasan,⁵ a bearded service member, was legal.⁶

Hasan's defense counsel countered the order by claiming that the military judge exhibited bias and asked for his removal from the proceeding.⁷ The bias contention involved multiple claims,⁸ but the most important claim was the military judge's insistence that Hasan adhere to AR 670-1 and be forcibly shaved for his trial.⁹ Defense counsel prevailed, and the U.S. Court of Appeals

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2. U.S. DEPT OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 1-8.a (2)(c) (Feb. 3, 2005), available at http://www.apd.army.mil/pdffiles/r670_1.pdf [hereinafter AR 670-1].

3. *E.g.*, A FEW GOOD MEN (Columbia Pictures 1992) (Colonel Nathan R. Jessup, portrayed by Jack Nicholson, is clean-shaven during his court-martial testimony).

4. *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012).

5. The defendant in *Hasan v. Gross*, who was a military psychiatrist accused of murder in a mass shooting at Fort Hood. Yochi Dreazen & Ana Campoy, *Lethal Rampage at Fort Hood*, WALL ST. J., Nov. 6, 2009, <http://online.wsj.com/article/SB125745253140431689.html>.

6. *Hasan*, 71 M.J. at 417.

7. *Id.*

8. Defense claimed that the military judge should have been recused earlier because of his close personal ties to Fort Hood, particularly, because he was adjudicating a case on the base during the massacre. *Hasan*, 71 M.J. at 417 n.1. Another claim for bias stemmed from the judge's accusation that Hasan defecated on the courtroom's bathroom floor. *Id.* at 417. It was later determined that the supposed feces was only mud. *Id.* at 417-18.

9. *Id.* at 417.

for the Armed Forces held that the military judge should be removed for bias, and the forced beard shaving order was vacated.¹⁰

This article analyzes why the U.S. Court of Appeals for the Armed Forces ruled incorrectly. It explains why the intermediate court, the U.S. Army Court of Criminal Appeals in *Hasan v. United States*¹¹ was correct when it held that the military judge should not have been removed for bias, because he legally ordered Hasan to be forcibly shaved.¹² The military judge's actions were legal, because Hasan was not wearing a beard as an exercise of his religious beliefs.¹³ Additionally, the military judge legally ordered Hasan to be shaved, because both he and Hasan's commander had the power to determine how Hasan should appear in court.¹⁴ Finally, this article discusses why the military judge should not have been removed for bias, because Hasan's beard was disruptive to the courtroom and materially interfered with the proceedings.¹⁵

II. LEGAL BACKGROUND

This section discusses the United States Army's governing power, and how the Army controls its service members' uniforms through its Army Regulations.¹⁶ This section also discusses the legal requirements to bring and defeat a Religious Freedom Restoration Act¹⁷ (RFRA) claim by explaining the compelling interests the United States Army has in governing beard wearing. Lastly,

10. *Id.* at 419.

11. *Hasan v. United States*, Army Misc. 20120876, Army Misc. 20120877, 2012 WL 5077652, at *1 (A. Ct. Crim. App. Oct. 18, 2012).

12. *Hasan*, 2012 WL 5077652, at *1.

13. *Id.* at *3.

14. *Id.* at *4.

15. *Id.*

16. Army Regulations are passed down by the President and are binding within his legal and constitutional authority. 10 U.S.C.A. § 3061; *cf.*, *Maxwell v. United States*, 49 Ct. Cl. 262, 274 (1914) ("The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the Nation, and rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority. Such regulations can not be questioned or defied because they may be thought unwise or mistaken. The right of so considering and treating the authority of the Executive, vested as it is with the command of the military and naval forces, could not be intrusted [sic] to officers of any grade inferior to the commander in chief; its consequences, if tolerated, would be a complete disorganization of both the Army and Navy.") (quoting *United States v. Eliason*, 41 U.S. 291, 302 (1842)).

17. 42 U.S.C.A. § 2000bb (1993).

this section discusses the military court hierarchy and the power a military judge has in regulating the military uniform in his courtroom.

AR 670-1 reads, “[M]ales will keep their face clean-shaven when in uniform or in civilian clothes on duty.”¹⁸ The unit’s military commander prescribes the appropriate uniform.¹⁹ Under AR 600-20, changes to the standard uniform may be approved to accommodate religious exercises.²⁰ However, this accommodation is rarely granted, and it is only granted by the subordinate’s immediate commanding officer.²¹ If the request is denied, the service member shall prescribe to the appropriate Army grooming standards.²² From 2009 to 2012, the Army granted six accommodations, a stark contrast from the past, considering the Army had not granted any accommodations since the 1980s.²³ Out of the six accommodations, two were for Muslims serving in a health care capacity,²⁴ allowing them to grow beards in accordance with their religious exercises.²⁵

The RFRA states that the United States government cannot substantially burden religious exercise without a compelling justi-

18. AR 670-1, at para. 1-8.a.(2)(c).

19. “Unless specified in this regulation, the commander issuing the clothing and equipment will establish wear policies for organizational clothing and equipment.” *Id.* at para. 1-4.a; *see also id.* at para. 1-7.a (“It is the responsibility of commanders to ensure that military personnel under their command present a neat and soldierly appearance. Therefore, in the absence of specific procedures or guidelines, commanders must determine a soldier’s compliance with standards in this regulation.”).

20. U.S. DEPT OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-6.a (Mar. 18, 2008), *available at* http://www.apd.army.mil/pdffiles/r600_20.pdf [hereinafter AR 600-20].

21. “Requests for religious accommodation of wear and appearance of the uniform and personal grooming practices will not be entertained . . . Soldiers will submit requests for religious accommodation on other matters to their immediate commander. The commander may approve the request either informally or formally (in writing), or disapprove it. Commanders will respond to requests for religious accommodation within 10 working days of receipt.” *Id.* at para. 5-6.g(4)(h)1-2.

22. *Hasan v. Gross*, 71 M.J. 416, 417 (C.A.A.F. 2012).

23. Colonel Marian Amrein, *Recent Religious Accommodations: Have We Gone Too Far Too Fast?* (Dec. 3, 2012) (unpublished manuscript), *available at* www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA560831.

24. *Id.* at 9 (three accommodations were for Sikhs who were in the medical field and one accommodation was for a Rabbi chaplain).

25. *Ruling on Shaving the Beard*, ISLAMQA, <http://islamqa.com/en/ref/1189> (last visited Jan. 2, 2013) (stating it is a requirement of Muslims to trim their mustache and let their beard grow, because shaving the beard is *haram*).

fication.²⁶ If the government has a compelling justification, the action it takes must further that justification and be the least restrictive means of furthering that justification.²⁷ The compelling justifications the United States government has given for the necessity of uniformity in the Army are: 1) a uniform standard of appearance and 2) safety.²⁸

The United States Army uniform creates a uniform standard of appearance that, for psychological reasons, instills discipline, morale, *esprit de corps*,²⁹ pride, and public image.³⁰ The uniform standard also serves a safety purpose; beards may interfere with certain protective military gear, such as a gas mask.³¹

Adjudicating military personnel issues, like AR 670-1 disobedience, occurs in a military court through a court-martial proceeding.³² The military courts are organized similarly to federal civilian courts.³³ If the defendant feels that his case has been ruled improperly at the trial level, he has the ability to appeal to a higher court, in Hasan's case, the U.S. Army Court of Criminal Appeals.³⁴ If the defendant still feels that his ruling was improper,

26. 42 U.S.C.A. § 2000bb (1993).

27. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

28. Chaplain Colonel Richard M. Goellen et al., *A Study of the Accommodation of Religious Practice in the United States Army* 23-24 (Mar. 31, 1989) (unpublished manuscript), available at www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA208000; see also Amrein, *supra* note 23, at 1 (explaining that the Army uniform and grooming standards are enacted to elicit discipline as well as promote soldier safety).

29. "A sense of unity and of common interests and responsibilities, as developed among a group of persons closely associated in task, cause, enterprise, etc." WEBSTER'S UNABRIDGED DICTIONARY 662 (2d ed. 2001).

30. Goellen et al., *supra* note 28, at 23; see also *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (holding that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and *esprit de corps*").

31. Goellen et al., *supra* note 28, at 23.

32. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 202(a) (2012) (explaining that "[C]ourt-martial jurisdiction is most commonly exercised over active duty personnel.>").

33. 1 Stat. 73 (1789); see also DONALD J. SAVERY ET AL., MASS. PRACTICE, FED. PRACTICE AND PROCEDURE § 1:2 (2d ed. 2013) (stating the federal courts are setup in a three-tiered system, with appeals traveling up the chain: the district court is the bottom tier where the claim originates, the circuit court is the middle tier, and the Supreme Court is the top tier).

34. 10 U.S.C.A. § 866 (1996); see *United States Army Court of Criminal Appeals*, <https://www.jagcnet.army.mil/8525749F007224E4> (last visited Jan. 3, 2014) (the military appellate courts are the Air Force Court of Criminal Appeals, the Army Court of Criminal Appeals, the Coast Guard Court of Criminal Appeals,

he can appeal to the highest military court, the U.S. Court of Appeals for the Armed Forces.³⁵ One difference between military and civilian courts is military courts have military rather than civilian jurors.³⁶

During these court-martial proceedings, the military judge has control over what the accused can wear under Rules for Courts-Martial (RCM) 804(e)(1).³⁷ This provision is set up to ensure the trial is conducted in a fair manner under RCM 801(a),³⁸ in order to avoid prejudice.³⁹ The military judge also has the power to remove the defendant from the proceedings for disruptive behavior under RCM 804(c).⁴⁰ No one formula for maintaining appropriate court-

and the Navy-Marine Corps Court of Criminal Appeals); *see also* RCM 1203(b) (2012).

35. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 1204(a) (2012).

36. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 502(a) (2012).

37. “The accused shall be properly attired in the uniform or dress prescribed by the military judge. . . . The accused and defense counsel are responsible for ensuring that the accused is properly attired; however, upon request, the accused’s commander shall render such assistance as may be reasonably necessary to ensure that the accused is properly attired.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 804(e)(1) (2012).

38. “The military judge is responsible for ensuring that court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 801(a) (2012).

39. “It cannot be denied, we think, that the sight of the accused at trial, as he is arraigned, as he testifies . . . as he confers with counsel, and as he stands to be sentenced, is part of the ‘silent evidence’ in the case. Accordingly, it is but part of a full and fair proceeding that he be entitled to stand before the court-martial as a sailor should, neat, clean and sharp, in the uniform-of-the-day, complete with merited insignia, ribbons and decorations. Anything less must be presumed to be prejudicial *pro tanto*. This presumption contemplates that nothing is more inflammatory to an officer of the military than to see a member of his service ‘out of uniform’ or wearing a soiled or ill-fitting uniform.” *United States v. Taylor*, 31 M.J. 905, 906 (A.F.C.M.R. 1990) (quoting *United States v. Whitehead*, 27 C.M.R. 875, 876 (N.B.R. 1959)).

40. “*Removal for disruption*. Trial may proceed without the presence of an accused who has disrupted the proceedings, but only after at least one warning by the military judge that such behavior may result in removal from the courtroom. In order to justify removal from the proceedings, the accused’s behavior should be of such a nature as to materially interfere with the conduct of the proceedings.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 804(c) (2012); *see Illinois v. Allen*, 397 U.S. 337, 339-40 (1970) (holding that a judge correctly removed the defendant from his proceeding when he threatened the judge’s life, tore up his attorney’s papers, and talked back to the judge); *cf.*, *United States v. Gentile*, 1 M.J. 69, 70 (C.M.A. 1975) (finding it necessary to keep the defendant in handcuffs

room atmosphere will be best in all situations.⁴¹ However, a military judge shall disqualify himself if his impartiality might reasonably be questioned,⁴² for example, by exhibiting bias.⁴³ Exhibiting bias does not require actual bias, just the appearance of bias,⁴⁴ and the test determining if a judge has exhibited bias is a reasonable man test.⁴⁵

III. ANALYSIS

A. *Factual Background*

Malik Nadal Hasan opened fire on military personnel at Fort Hood, in Killeen, Texas, on November 5, 2009.⁴⁶ The personnel were unarmed, while Hasan wielded two handguns with multiple extra rounds.⁴⁷ Thirteen people were killed with dozens more injured.⁴⁸ Hasan was a Major in the Army and a psychiatrist who specialized in post-traumatic stress disorder and other emotional issues common with soldiers.⁴⁹ Hasan was charged with thirteen specifications of murder and thirty-two specifications of attempted murder.⁵⁰

Hasan is a practicing Muslim.⁵¹ Before and during the incident, as well as during certain pretrial hearings, Hasan was clean-shaven.⁵² However, on June 8, 2012, Hasan entered the courtroom

in order to prevent him from removing his military uniform during the proceedings).

41. United States v. Gentile, 1 M.J. 69, 70 (C.M.A. 1975).

42. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 902(a) (2012).

43. “[B]ut requiring them all to be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever impartiality might reasonably be questioned.” *Liteky v. United States*, 510 U.S. 540, 548 (1994).

44. *Id.*

45. “The proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge’s impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion . . . but rather in the mind of the reasonable man.” *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976).

46. Dreazen & Campoy, *supra* note 5.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Hasan v. Gross*, 71 M.J. 416, 417 (C.A.A.F. 2012).

51. *Id.*

52. *Hasan v. United States*, Army Misc. 20120876, Army Misc. 20120877, 2012 WL 5077652, at *2 (A. Ct. Crim. App. Oct. 18, 2012).

for a pretrial hearing wearing a full beard.⁵³ Hasan claimed, “[H]e was wearing a beard as an exercise of his religious beliefs.”⁵⁴ Hasan, pursuant to AR 600-20, requested an exemption from his commanding officer from AR 670-1, thereby allowing him to don the beard during the court-martial.⁵⁵ His request was denied.⁵⁶ The military judge, based on the “disruption”⁵⁷ Hasan’s beard caused, stated that if Defendant did not shave, he would be held in contempt and be forced to participate in the proceedings via closed-circuit television from either the deliberation room or in a trailer outside the courtroom.⁵⁸ Defendant refused to shave, and the judge held him in contempt, fined him \$1000, and had him removed to watch the proceedings by closed-circuit television at each subsequent hearing.⁵⁹

The judge then ordered Hasan to be forcibly shaved on September 6, 2012.⁶⁰ Defendant appealed for relief to the U.S. Army Court of Criminal Appeals.⁶¹ Hasan sought relief by issuing two writs of appeals:⁶² 1) a writ of prohibition,⁶³ barring enforcement of the military judge’s order to forcibly shave Hasan’s beard, on the grounds that the order violated the RFRA,⁶⁴ and 2) a writ of mandamus,⁶⁵ which ordered the removal of the military judge on the

53. *Id.* at *1.

54. *Id.*

55. *Hasan*, 71 M.J. at 417.

56. *Id.*

57. The judge argued that Hasan’s conduct was not disruptive in the normal case “where someone is yelling, arguing with the military judge,” but that his appearance “[was] disrespectful . . . his appearance [took] away from the dignity, order and decorum of a court-martial.” *Id.* at 418.

58. *Id.* at 417.

59. *Id.*

60. *Hasan*, 71 M.J. at 418.

61. *Hasan v. United States*, Army Misc. 20120876, Army Misc. 20120877, 2012 WL 5077652, at *1 (A. Ct. Crim. App. Oct. 18, 2012).

62. *Id.* at *1; *c.f.* Military Courts of Criminal Appeals can hear “all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C.A. § 1651 (1948).

63. “An extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a non-judicial officer or entity from exercising a power.” BLACK’S LAW DICTIONARY 1331 (9th ed. 2009).

64. *Hasan*, 2012 WL 5077652, at *2.

65. “A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu. to correct a prior action or failure to act.” BLACK’S LAW DICTIONARY 1046-47 (9th ed. 2009); *c.f.*, *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380-81 (2004) (holding a writ of mandamus prevails if the petitioner shows that: 1) there is no other adequate

basis of actual bias, or in the alternative, the appearance of bias.⁶⁶ The U.S. Army Court of Criminal Appeals denied both writs on October 18, 2012.⁶⁷

Judge Yob held for the U.S. Army Court of Criminal Appeals that the writ of prohibition failed, because Hasan had not “demonstrated he is growing his beard at this time because of a sincerely held religious belief . . . because the accused has not demonstrated growing a beard at this time is an exercise of religion,” in order to prove his RFRA claim.⁶⁸ He reached this conclusion by reasoning Hasan was not wearing a beard during the shooting or during earlier pretrial hearings and therefore could not meet his burden.⁶⁹

He further held that even if Hasan’s beard-growing were based on a religious exercise, the government had a strong, compelling justification to warrant the forced shaving.⁷⁰ Judge Yob cited that well-groomed service members are fundamental to the United States Army;⁷¹ well-groomed service members ensure uniformity, good order, discipline, unit cohesion, and morale.⁷² In Judge Yob’s opinion, that interest outweighed Hasan’s right to exercise his religious beliefs.⁷³

Additionally, Judge Yob held, pursuant to RCM 804(e)(1), the military judge had every right to prescribe what uniform Hasan could wear in order to avoid prejudice under RCM 801(a).⁷⁴ He explained if Hasan were not shaved, the military jury would have been prejudiced.⁷⁵ He argued that the jury members were subject to AR 670-1 and would question why Hasan had a beard without a suitable exception for it.⁷⁶ Therefore, giving a jury instruction⁷⁷ to explain Hasan’s beard would not have eliminated the prejudice.⁷⁸ Consequently, there was no lesser restrictive means to achieve the

means to attain relief, 2) the right to issuance of the writ is clear and indisputable, and 3) the issuance of the writ is appropriate under the circumstance).

66. *Hasan*, 2012 WL 5077652, at *1.

67. *Id.*

68. *Id.* at *2.

69. *Id.*

70. *Id.* at *4.

71. *Hasan*, 2012 WL 5077652, at *4.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Hasan*, 2012 WL 5077652, at *4.

77. “A direction or guidelines that a judge gives a jury concerning the law of the case.” BLACK’S LAW DICTIONARY 935 (9th ed. 2009).

78. *Hasan*, 2012 WL 5077652, at *4.

government's compelling interest other than to forcibly shave Defendant.⁷⁹

After determining the original military judge had every right to forcibly shave Hasan, the writ of mandamus was denied with no discussion.⁸⁰ Judge Yob noted that he agreed with the military judge in that Hasan's behavior was disruptive to the decorum, dignity, and order of the court-martial proceeding, pursuant to RCM 804(c).⁸¹

The U.S. Court of Appeals for the Armed Forces then stayed the forcible shaving on October 22, 2012, until it heard the two writ-appeal petitions.⁸² The court reviewed these writs on December 3, 2012,⁸³ de novo.⁸⁴ The U.S. Court of Appeals for the Armed Forces reversed the U.S. Army Court of Criminal Appeals and granted both writs.⁸⁵ In ruling, the court never addressed Defendant's RFRA claim. Instead the court focused on the original military judge's bias.⁸⁶

In granting the writ of mandamus, the military judge was removed for bias.⁸⁷ The court reasoned that it was the commander's duty to determine and enforce the grooming standards, not the military judge's.⁸⁸ Also, the court ruled that Hasan had not disrupted the proceedings with his beard, because there was insufficient evidence that Hasan's beard materially interfered with the proceedings.⁸⁹ The court then listed all the factors that could lead an objective observer to conclude that the military judge was biased towards Hasan.⁹⁰ The most glaring, the court held, were the military judge's orders to forcibly shave Hasan, the fines, the contempt citations, and the removal from the court room.⁹¹ Additionally, it noted the military judge's accusation of Hasan's defecation

79. *Id.*

80. *Id.* at *1

81. *Id.* at *4

82. Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012).

83. *Id.* at 416.

84. United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996) (explaining that RFRA claims are reviewed de novo on appeal); *c.f.* BLACK'S LAW DICTIONARY 500 (9th ed. 2009) (defining de novo as "anew").

85. Hasan, 71 M.J. at 419

86. *Id.* at 416.

87. *Id.* at 419.

88. *Id.*

89. *Id.*

90. Hasan, 71 M.J. at 419.

91. *Id.*

on the bathroom floor, and the judge's presence at Fort Hood during the shooting contributed to the bias claim.⁹²

The court concluded that Hasan satisfied the *Cheney* test and had shown that: 1) there was no other adequate means for Hasan to attain relief, 2) there was a clear and indisputable right to remove the military judge, and 3) that removal was appropriate under the circumstances.⁹³ Therefore, Defendant had satisfied the appropriate writ of mandamus elements.⁹⁴ Additionally, the contempt convictions and order to forcibly shave Hasan were vacated, effectively granting the writ of prohibition.⁹⁵ However, the court did not decide how Hasan's RFRA claim might apply to his beard.⁹⁶

It should be noted that Hasan was later convicted of murder and was sentenced to death.⁹⁷ After being convicted, his beard was subsequently shaved in jail (prisoner's religious rights will not be discussed in this article).⁹⁸

B. Discussion

The U.S. Court of Appeal for the Armed Forces in *Hasan v. Gross* ruled improperly. It failed procedurally when it never analyzed Hasan's writ of prohibition,⁹⁹ and it failed legally when it granted Hasan's writ of prohibition and writ of mandamus.¹⁰⁰

1. Procedural Failure

The U.S. Court of Appeals for the Armed Forces did not follow the appropriate steps to determine if Hasan's writs had merit. The court should have followed the U.S. Army Court of Criminal Appeals' procedure by first determining if Hasan's RFRA claim

92. *Id.*

93. *Id.*

94. *Id.*

95. *Hasan*, 71 M.J. at 419.

96. *Id.* at 417.

97. *Fort Hood Gunman Maj. Nidal Hasan Sentenced to Death*, FOX NEWS, (Aug. 28, 2013), available at <http://www.foxnews.com/us/2013/08/28/fort-hood-gunman-maj-nidal-hasan-sentenced-to-death/>.

98. *Convicted Fort Hood Killer Hasan Forcibly Shaved in Prison*, FOX NEWS (Sept. 3, 2013), available at <http://www.foxnews.com/us/2013/09/03/convicted-fort-hood-killer-hasan-forcibly-shaved-in-prison/>.

99. "We need not and do not decide if and how RFRA might apply to [Hasan's] beard." *Hasan*, 71 M.J. at 416.

100. *Id.* at 419.

had validity.¹⁰¹ If Hasan's beard-growing were an exercise of a religious belief, the court then had to determine if the government had a compelling interest to regulate a service member's beard-growing.¹⁰² The court failed to analyze any aspect of Hasan's RFRA claim.

After analyzing the RFRA claim, the U.S. Court of Appeals for the Armed Forces should have determined if the military judge¹⁰³ and Hasan's commander¹⁰⁴ had the right to prescribe how Defendant should appear at his court-martial. The court failed to follow this procedure.

Finally, only after evaluating Hasan's RFRA claim and examining the appropriate RCM provisions and Army Regulations should the U.S. Court of Appeals for the Armed Forces have entertained Hasan's writ of mandamus. The U.S. Court of Appeal for the Armed Forces gave great weight to Hasan's bias claim based on the order to forcibly shave Hasan.¹⁰⁵ If the order to shave Hasan were legal, the only ground the bias claim could stand on would be the defecation accusation and the military judge's presence on the base during the shooting, issues barely touched upon in the court's opinion.¹⁰⁶

2. Writ of Prohibition

The U.S. Court of Appeals for the Armed Forces effectively granted Hasan's writ of prohibition.¹⁰⁷ This ruling was incorrect. Hasan's writ of probation should have been denied, because he failed to establish an adequate RFRA claim. The U.S. Army Court of Criminal Appeals was correct when it held that Hasan was not wearing a beard as an exercise of his religious beliefs.¹⁰⁸ He was growing a beard out of defiance.¹⁰⁹ Analyzing Hasan's actions before and during the crime can lend support to this claim. Hasan

101. Hasan v. United States, Army Misc. 20120876, Army Misc. 20120877, 2012 WL 5077652, at *3 (A. Ct. Crim. App. Oct. 18, 2012).

102. 42 U.S.C.A. § 2000bb (1993).

103. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 804(e)(1) (2012).

104. AR 670-1, at para. 1-4.a.

105. Hasan, 71 M.J. at 419.

106. *Id.*

107. *Id.*

108. Hasan v. United States, Army Misc. 20120876, Army Misc. 20120877, 2012 WL 5077652, at *3 (A. Ct. Crim. App. Oct. 18, 2012).

109. *Id.* at *2

did not have a beard before the murders.¹¹⁰ Nor did he have a beard while he was committing his heinous act.¹¹¹ Nor did he have a beard during early pretrial hearings.¹¹² Additionally, there is no evidence showing Hasan petitioned his commanding officer, pursuant to AR 600-20, at any point before the proceeding to ask if he could grow a beard. Hasan did not produce enough evidence to prove he was growing a beard as a religious exercise, and therefore, the government did not substantially burden Hasan's right to exercise his religious freedoms. His writ of prohibition should have failed.

If Hasan's religious freedoms were substantially burdened by being forcibly shaved,¹¹³ the RFRA claim still fails, because the government has a strong, compelling justification to keep all military men clean-shaven.¹¹⁴ The military requires men to be clean-shaven for two reasons: 1) for safety and 2) to preserve a uniform standard of appearance.¹¹⁵ The safety issue is moot in this case, because Hasan was not currently in a military confrontation, meaning he would not be utilizing any facially protective military equipment. The uniform standard of appearance, however, is compelling, because military uniforms foster instinctive obedience, unity, commitment, and *esprit de corps*.¹¹⁶ To prepare for and perform its role to fight, the military must insist upon a respect for duty and discipline.¹¹⁷ Hasan disregarded this duty and discipline.¹¹⁸ This disobedience is unwelcomed in a setting where life and death hinges on your ability to accept and execute orders. Therefore, Hasan's RFRA claim should have been unsuccessful, because the government put forth a strong, compelling governmental interest, more practical than Hasan's religious exercises.

110. Daniel Zwerdling, *Walter Reed Officials Asked: Was Hasan Psychotic?*, NPR (Nov. 11, 2009, 2:54 PM), available at <http://www.npr.org/templates/story/story.php?storyId=120313570> (showing a beardless Hasan photograph in military uniform, dated 2007).

111. *Hasan*, 2012 WL 5077652, at *2.

112. *Id.*

113. Analysis of Hasan's writ of prohibition and writ of mandamus would end once Hasan's RFRA claim failed. His writ of prohibition would fail, because his religious freedoms were not burdened. At that point, Hasan's writ of mandamus would be moot, because the judge was clearly not biased when he ordered him to be forcibly shaved.

114. *Hasan*, 2012 WL 5077652, at *4.

115. Goellen et al., *supra* note 28, at 23-24.

116. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

117. *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

118. *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012).

Additionally, Hasan's forced shaving was the least restrictive means to accomplish the compelling interest to keep all military men clean-shaven. Because Hasan refused to shave, the military judge had two options: 1) let Hasan keep his beard and give an instruction to the military jury or 2) shave Hasan. If Hasan appeared before a military jury with a beard, the jury would convict him not on the merits of the case but out of disgust, because nothing is more "inflammatory . . . than to see a member of his service 'out of uniform.'"¹¹⁹ A limiting instruction by the judge would not ease the tension the jury would feel, because there was no "suitable exception" for Hasan's beard.¹²⁰ If the jurors were subject to AR 670-1, Defendant should have been too. It was the military judge's job under RCM 801(a) to prevent Hasan from being paraded in front of a jury with a beard.¹²¹ Therefore, in order to prevent an unfair prejudice against Hasan, it was necessary for the military judge to have Hasan forcibly shaved.

RCM 804(e)(1) gives the military judge the power to determine how the defendant will appear in court. The U.S. Court of Appeals for the Armed Forces argued it is only the commander's duty to enforce the appearance of the defendant.¹²² This court incorrectly applied the standards set forth in RCM 804(e)(1). It is true that the military commander prescribes the appropriate military uniform.¹²³ However, the AR 670-1 guidelines also state, "[I]n the absence of *specific procedures or guidelines*, commanders must determine a soldier's compliance with standards in this regulation."¹²⁴ Reading this provision with RCM 804(e)(1), which specifically states, "[T]he accused shall be properly attired in the uniform or dress prescribed by the military judge,"¹²⁵ it can be argued that RCM 804(e)(1) is a *specific procedure or guideline* that allows a military judge to prescribe the defendant's appropriate attire. This conclusion can be drawn, because RCM 804(e)(1) is located in Chapter VIII: Trial Procedure Generally, under the Rules for

119. United States v. Taylor, 31 M.J. 905, 906 (A.F.C.M.R. 1990).

120. Hasan v. United States, Army Misc. 20120876, Army Misc. 20120877, 2012 WL 5077652, at *4 (A. Ct. Crim. App. Oct. 18, 2012).

121. Taylor, 31 M.J. at 906.

122. Hasan v. Gross, 71 M.J. 416, 419 (C.A.A.F. 2012).

123. AR 670-1, at para. 1-4.a.

124. AR 670-1, at para. 1-7.a.

125. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 804(e)(1) (2012).

Courts-Martial.¹²⁶ Therefore, it was within the military judge's power to order Hasan's beard shaven.

However, if RCM 804(e)(1) were deemed not a *specific procedure or guideline*, Hasan's beard still should have been forcibly shaved. AR 600-20 allows service members to receive specific accommodations to alter their uniform in order to conform to their religious beliefs.¹²⁷ If a service member's request is denied, the commander has every right to direct the service member to prescribe to the regular Army grooming standards.¹²⁸ Hasan requested his commander give him a special accommodation to grow a beard, but his commander properly denied this request.¹²⁹ Hasan was then under command to refrain from growing a beard.¹³⁰ Yet he defied¹³¹ his commander and entered the courtroom with a beard. So on its face, Hasan was required by his commander to shave his beard. The U.S. Court of Appeals for the Armed Forces argued this away by stating, "[H]is commander denied his request . . . but took no further action to enforce [Hasan's] compliance."¹³² The commander did not enforce the compliance because the military judge had already taken up the mantel. Both of their remedies were to shave Hasan's beard. So, if it were by the hand of the military judge, or by the hand of the commander, the remedy was the same.

Finally, RCM 804 (e)(1) states, "[U]pon request, the accused's commander shall render such assistance as may be reasonably necessary to ensure that the accused is properly attired [for trial]."¹³³ Hasan's AR 600-20 request was denied, and his commanding officer ordered Hasan to prescribe to the "Army's grooming standards."¹³⁴ The commander lent his assistance when he ordered Hasan to prescribe to AR 670-1 standards. It was then appropriate for the military judge to follow the commander's order and require Hasan to be shaved.

126. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 101(a) (2012).

127. AR 600-20.

128. Hasan v. Gross, 71 M.J. 416, 417 (C.A.A.F. 2012).

129. *Id.*

130. *Id.* at 418.

131. "[H]e is disobeying an order from his commander to be clean shaven." *Id.* at 418.

132. *Id.* at 417.

133. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 804(e)(1) (2012).

134. Hasan, 71 M.J. at 417.

3. Writ of Mandamus and Public Policy

Like the U.S. Army Court of Criminal Appeals explained, Hasan's writ of mandamus should have failed, because the military judge had every right to determine Hasan's beard was disruptive to the proceedings.¹³⁵ The *Gentile* court described appropriately that no formula works in all cases when determining if a defendant's actions are disruptive.¹³⁶ As mentioned above, *Whitehead* said, "[N]othing is more inflammatory to an officer of the military than to see a member of his service 'out of uniform.'"¹³⁷ Additionally, the *Gentile* court held that just the threat of removing a military uniform would be disruptive to the court-martial.¹³⁸ Combining these factors, Hasan's appearance was inflammatory, because his uniform was inappropriate and it took away from the dignity and order of the court-martial.¹³⁹ Therefore, utilizing his power under 804(c), the military judge properly determined Hasan's beard was disruptive.

Hasan's disruption materially interfered with the court-martial proceeding, because he interfered with the proceeding's dignity and order.¹⁴⁰ Material interference occurred when he stepped into the courtroom with a beard. He deliberately disobeyed an order from his commander to be clean-shaven,¹⁴¹ he deliberately disobeyed the military judge's order to be clean-shaven,¹⁴² and his appearance was inflammatory.¹⁴³ Additionally, and most importantly, the military jury viewed Hasan's bearded face. This action materially interfered with the proceeding, because, as discussed earlier, it created a prejudice that would cause the jury to convict out of spite rather than on the merits of the case.¹⁴⁴

The important bias contentions the U.S. Court of Appeals for the Armed Forces laid out all stemmed from Hasan's beard: the fines, contempt citations, removal from the courtroom, and order

135. Hasan v. United States, Army Misc. 20120876, Army Misc. 20120877, 2012 WL 5077652, at *4 (A. Ct. Crim. App. Oct. 18, 2012).

136. United States v. Gentile, 1 M.J. 69, 70 (C.M.A. 1975).

137. United States v. Whitehead, 27 C.M.R. 875, 876 (N.B.R. 1959).

138. *Gentile*, 1 M.J. at 70.

139. Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012).

140. *Id.*

141. *Id.*

142. *Id.*

143. United States v. Whitehead, 27 C.M.R. 875, 876 (N.B.R. 1959).

144. See *supra* text accompanying notes 119-20.

to forcibly shave Hasan.¹⁴⁵ Thus, since Hasan's beard was disruptive and materially interfered with the proceedings, the judge was neither biased nor exhibiting bias when he ordered Hasan to shave.

Furthermore, Hasan's beard should have been deemed disruptive as a public policy issue. Since it was deemed otherwise, it sent the message that military rules are relaxed during court-martial proceedings. The decision rewards the defendant because it gives the defendant more freedom to grow a beard compared to those who were not court-martialed who must remain clean-shaven. Additionally, because the U.S. Court of Appeals for the Armed Forces never addressed Hasan's RFRA claim and determined Hasan's beard was not disruptive; it calls into question the enforcement of AR 670-1 for all service members.

IV. CONCLUSION

The U.S. Army Court of Criminal Appeals ruled properly when it denied Hasan's writ of prohibition and writ of mandamus. The U.S. Court of Appeals for the Armed Forces was incorrect to reverse those rulings. Hasan's beard should have been forcibly shaved. Hasan did not establish a legal claim under the RFRA, because his beard-growing was not an exercise of his religious beliefs. Additionally, the United States government had a compelling interest to restrict military members from growing beards to create a uniform standard of appearance.

Moreover, the military judge was not biased when determining Hasan's beard had disrupted the court-martial proceeding. Hasan's beard materially interfered with the proceedings, because it prejudiced him in front of the military judge and jury and was inflammatory to those who saw him. By ruling that the beard was not disruptive, it wrongly calls into question whether AR 670-1 should be enforced on any military personnel. This ruling erodes the *esprit de corps* needed to accomplish the Army's goals.

145. *Hasan*, 71 M.J. at 419.