

**[Priority] Department of Defense Language Position Paper
FY 2013 Defense Authorization Bill**

Subject: Award of Purple Heart to Members of the Armed Forces Who Were Victims of the Attacks at Recruiting Station in Little Rock, Arkansas, and at Fort Hood, Texas

Appeal Citation: H.R. 4310, sec. 552

Language/Provision: This section would require the Secretary concerned to award the Purple Heart to members of the Armed Forces who were killed or wounded in the attacks that occurred at the recruiting station in Little Rock, Arkansas, on June 1, 2009, and at Fort Hood, Texas, on November 5, 2009.

DoD Position/Impact: The DoD position is the Purple Heart is awarded to Servicemembers who are killed, or wounded and require treatment by a medical officer, in action against the enemy of the United States; as the result of an act of any hostile foreign force; or as the result of an international terrorist attack against the United States. Adhering to the criterion for award of the Purple Heart is essential to preserve the integrity of the award. To do otherwise could irrevocably alter the fundamental character of this time-honored decoration.

The proposed bill alters the long established Purple Heart award criterion contained in Executive Order 11016. The tradition of awarding the Purple Heart for wounds received in action against an enemy of the U.S. dates back to WWII. This criterion was later retroactively extended to cover WWI. The criteria have since been modified to include those wounded or killed as the result of being held as a prisoner of war or from an international terrorist attack as determined by the Secretary of the department concerned. This “international” distinction is important because US military personnel are organized, trained and equipped to combat foreign – not domestic – forces or threats. To expand the Purple Heart award criteria to include domestic criminal acts or domestic terror attacks would be a dramatic departure from the traditional Purple Heart award criteria. The Congressional Research Service report, “American Jihadist Terrorism: Combating a Complex Threat,” November 15, 2011, characterizes the Little Rock shooter (Abdulahakin Muhammad) and the Ft Hood shooter (Major Nidal Hasan) as “lone wolves,” who were not members of international terrorist organizations.

The Army objects to section 552 because it would undermine the prosecution of Major Nidal Hasan by materially and directly compromising Major Hasan’s ability to receive a fair trial. This provision will be viewed as setting the stage for a formal declaration that Major Hasan is a terrorist, on what is now the eve of trial. Such a situation, prior to trial, would fundamentally compromise the fairness and due process of the pending trial. Moreover, the effect of such an act by Congress would be to deprive the victims of these crimes the right to see justice done. Whether Fort Hood is mentioned or not, the intent and target seem obvious – to address and duly recognize the sacrifices of those killed and wounded at Fort Hood. This laudable sentiment mistakenly and unwittingly supplants the criminal trial process by infusing official, formal statutory conclusions about the motive, intent and culpability of the man charged with the crime.

Passage of this legislation could directly and indirectly influence potential court-martial panel members, witnesses, or the chain of command, all of whom exercise a critical role under the Uniform Code of Military Justice (UCMJ). Defense counsel will argue that Major Hasan cannot receive a fair trial because a branch of government has indirectly declared that Major Hasan is a terrorist – that he is criminally culpable. Voir dire of the panel members, ordinarily the “cure” by military judges for potential prejudicial effects on panel members, may be deemed insufficient, at least for a substantial passage of time. It is foreseeable that a military judge could order a delay to the start of a trial of a year or more to attempt to cure any prejudice to the panel that would arise. Such a delay would not only hurt the prosecution, but delay closure to the family members of those killed and to personnel injured. If the trial judge does not provide a remedy to Major Hasan, it is very possible that an appellate court could overturn any convictions or punishments obtained in Major Hasan’s court-martial. Mindful that capital litigation is “simply different” in the level of scrutiny imposed by reviewing courts, such legislation, and in particular its timing, would be viewed with exceptional rigor.

Ultimately, such an unprecedented action would thwart the real and lasting measure that will bring closure to the grieving and harmed victims and families – the trial itself. The Government has vigilantly tended to the needs of the victims and their families since the tragic events of November 5, 2009. The Government – as much if not more than other

interested parties – very much desires emotional closure for victims and families. Purple Heart legislation, in advance of a finding of guilt or an acquittal, is not the answer to address these most sensitive concerns.

Internal Control Notes:

Appeal #:

Submitting Component:

Bill Version/Section Number: H.R. 4310, sec. 552