WHO QUESTIONS THE QUESTIONERS? REFORMING THE VOIR DIRE PROCESS IN COURTS-MARTIAL

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The jury, passing on the prisoner's life,
May in the sworn twelve have a thief or two
Guiltier than him they try.[1]

I. Introduction

The above quote, from Shakespeare's *Measure for Measure*, exemplifies an inherent danger in a trial by jury—jurors who are incapable of judging a case in a fair and impartial manner. Both the prosecution and defense want to know whether any jurors are biased, predisposed to a certain result, or otherwise unqualified to sit in judgment on "the prisoner's life."[2] Ferreting out unqualified members is accomplished through voir dire, which has been called "the start of a criminal trial,"[3] "a valued and integral part of the adversary process,"[4] and "the most important aspect of the trial."[5]

Indeed, an impartial jury is a constitutional right.[6] Although voir dire itself is not mentioned in the Constitution, courts have long recognized it

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[1] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2.

[2] *Id.*

[3] Editorial, *Trials: The Art of Voir Dire*, TIME, Apr. 7, 1967, *available at* http://www.time.com/magazine/article/0,9171,843543,00.html [hereinafter Editorial] (quoting F. Lee Bailey) (internal quotations omitted).

[4] AM. BAR ASS'N, AM. JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS 73 (2005) [hereinafter ABA PRINCIPLES] (citing Swain v. Alabama, 380 U.S. 202, 218–19 (1965)).

[5] Sydney Gibbs Ballesteros, *Don't Mess with Texas Voir Dire*, 39 HOUS. L. REV. 201, 204 (2002).

[6] *See* U.S. CONST. amend. VI (guaranteeing, *inter alia*, "an impartial jury of the State and district wherein the crime shall have been committed").

as the means to achieve the right to an impartial jury.[7] Given that this process is the defendant's best—and perhaps only—chance to ensure an impartial jury, voir dire is an integral aspect of the criminal justice system.

Despite its the vital nature, several jurisdictions significantly limit counsel's ability to participate in voir dire. Notably, in courts-martial the military judge completely controls this key aspect of the trial, with broad discretion to limit or deny direct questioning by counsel.[8] This procedure implicates the competing interests of judge and counsel during voir dire; generally speaking, judges are concerned about efficiency and protecting the record, while counsel may view voir dire as their first opportunity to present their case to the members.[9] Recent military appellate cases, however, have identified some weaknesses in a military judge-controlled approach, going so far as to find abuse of discretion in the military judge's denial of defense counsel's questions.[10]

Having wrestled with similar issues, civilian jurisdictions throughout the United States take various approaches toward the level of control judges and counsel exert over voir dire.[11] Several states follow the military and federal courts' method and place voir dire entirely under the judge's control.[12] Others allow counsel greater control, in some instances even creating a statutory right to counsel-conducted voir dire.[13] States that grant control to counsel recognize several significant legal and policy interests that favor this approach. Chief among these are guaranteeing a defendant's constitutional right to an impartial jury by ensuring that counsel have the most thorough and effective means of challenging biased venire members. The military justice system can benefit from examining these state approaches and adopting their best practices.[14]

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[7] *See, e.g.*, Pointer v. United States, 151 U.S. 396, 408 (1894).
[8] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912 (2008) [hereinafter MCM].
[9] *See, e.g.*, Jackson Howard, *Lawyer-Conducted* Voir Dire *is a Seventh Amendment Right*, VOIR DIRE, Summer 1995, at 40, 40.
[10] *See, e.g.*, United States v. Richardson, 61 M.J. 113 (C.A.A.F. 2005); United States v. Jefferson, 44 M.J. 312 (C.A.A.F. 1996); United States v. Adams, 36 M.J. 1201 (N.M.C.M.R. 1993). These cases are discussed further in Part III, *infra.*
[11] *See infra* notes 139–68 and accompanying text.
[12] *See infra* notes 152–60 and accompanying text.
[13] *See infra* notes 164–68 and accompanying text.
[14] *See infra* notes 194–204 and accompanying text.

This article explores the history and purpose of voir dire in the United States, and its crucial role in ensuring a defendant's constitutional right to an impartial jury. Sections III and IV examine the different approaches to voir dire used in federal and state courts, emphasizing the effectiveness of those states that allow counsel to participate significantly in the process.[15] Section V analyzes the applicability of these approaches to the military, keeping in mind notable differences between military and civilian courts, and recommends an amendment to the Rules for Courts-Martial to allow counsel more control over voir dire.[16] Section V further addresses the key counterarguments against changing voir dire in courts-martial, and, in turn, argues that reform can actually improve the process for counsel, judges, and the accused.[17] A thorough examination of this "most important aspect of [a] trial"[18] and its place in the military justice system will demonstrate that, rather than diminishing the efficient administration of justice, granting counsel a statutory right to participate in voir dire will benefit all parties.[19] First, however, this article will step back a few hundred years and examine how voir dire evolved into its current form in our justice system.

II. Voir Dire: Purpose and Practice

A brief discussion of the evolution of the jury trial sets the backdrop for a greater appreciation of the purpose of voir dire. Prior to the thirteenth century, accusatorial trial practices existed throughout Europe, such as trial by ordeal or trial by battle.[20] Over time, inquisitorial practices and the use of juries became more widespread, although certain practices we now take for granted—such as not punishing jurors for returning a verdict of not guilty—did not develop in England until the late seventeenth century.[21]

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[15] *Infra* notes 63–168 and accompanying text.
[16] *Infra* notes 169–204 and accompanying text.
[17] *Infra* notes 205–34 and accompanying text.
[18] Ballesteros, *supra* note 5, at 204.
[19] *Infra* notes 169–234 and accompanying text.
[20] *See* LEONARD W. LEVY, THE PALLADIUM OF JUSTICE 4–5 (1999). In a trial by ordeal, "[t]he accused underwent a physical trial . . . . Cold water, boiling water, and hot iron were the principal ordeals, all of which the clergy administered." *Id.* at 5. It was believed that the innocent would better survive the ordeal. *Id.* In trial by battle, it was thought that the innocent party would prevail, regardless of the circumstances: "Right, not might, would therefore conquer." *Id.* at 6.
[21] *See id.* at 49. This rule was not put into place until 1670, when a juror named Edward Bushell sought a writ of habeas corpus after being confined for "influencing" a jury to

Across the Atlantic, the proper function of a jury became a topic of heated debate between Federalists and Anti-Federalists in 1787.[22] The draft Constitution presented to the thirteen states provided for a right to trial by jury in criminal matters, but allowed for that trial to take place anywhere in the state where the crime occurred.[23] The Anti-Federalists opposed this viewpoint, arguing that only a local jury (drawn from the "vicinage") could properly dispense justice.[24] Members of the vicinage were thought to be those in the best position to already have an opinion as to the accused's character, some knowledge of what had occurred, and a greater stake in the outcome of the case.[25] Naturally, the Federalist counterpoint was that a just verdict was one delivered by a disinterested group, free of prior knowledge or bias.[26] The Federalist position prevailed; thus, the concept of trial by an impartial jury displaced the traditional practice of juries of the vicinage.[27]

From this requirement of an impartial jury evolved the practice of voir dire.[28] In modern usage, voir dire refers to the formal process by which judges and attorneys question prospective jurors to determine their qualifications and ability to serve on a jury.[29] Although not specifically referenced in the Constitution, voir dire finds its roots in the Sixth and Seventh Amendments.[30] The Sixth Amendment provides, *inter alia*, that criminal defendants have the right to "an impartial jury of the State and

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return a not guilty verdict. *Id.* at 57–61. The lord chief justice of England, Lord Vaughn, ordered his release, stating in his opinion that such action "subverted the functions of the jury." *Id.* at 61.

[22] *Id.* at 22–36.

[23] *Id.* at 22.

[24] *Id.* at 22–28.

[25] *Id.* at 27–29. One Anti-Federalist, James Winthrop, argued that "jurors from afar did not know whether the accused was 'habitually a good or bad man.'" *Id.* at 27.

[26] *Id.* at 25–26. As Massachusetts delegate to the Constitutional Convention Christopher Gore stated, "The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable." *Id.* at 26 (internal citations omitted).

[27] *Id.* at 36–38. As discussed *infra*, the actual language regarding juries drawn from the state (not the vicinage) became part of the Bill of Rights. *See* U.S. CONST. amend. VI.

[28] Despite the creative pronunciations heard in courtrooms across the country, *voir dire* comes from Old French, and literally means "to speak the truth." BLACK'S LAW DICTIONARY 1569 (7th ed. 1999).

[29] *Id.*

[30] *See, e.g.*, Rachel Harris, *Questioning the Questions: How Voir Dire Is Currently Abused and Suggestions for Efficient and Ethical Use of the Voir Dire Process*, 32 J. LEGAL PROF. 317, 317–18 (2008) (discussing the creation of the right to a jury in the U.S. Constitution).

district where in the crime shall have been committed."[31] Similarly, the Seventh Amendment guarantees an impartial jury in any civil dispute "where the value in controversy shall exceed twenty dollars."[32] These rights also apply to criminal and civil proceedings in states, through the Due Process clause of the Fourteenth Amendment.[33]

To give these rights meaning, courts use voir dire to determine whether a potential juror is impartial. Following questioning, whether by judge alone, lawyers, or both, parties have the opportunity to request the court to remove prospective jurors.[34] Although the exact method varies among jurisdictions, typically each side may challenge jurors for cause as well as exercise some number of peremptory challenges, for which no stated cause is required.[35]

Although this method seems simple at first glance, in practice judges and lawyers wrestle with the purpose of voir dire. This tension between judges and counsel is not new; an 1891 opinion from the Illinois Supreme Court aptly illustrates the issues that trouble courts to this day.[36] In *Donovan v. People*, the court reversed and remanded a criminal case because of the judge's denial of the defense request to personally question the jurors.[37] In denying this request, the trial judge stated, "Except you examine the jurors for cause through the mouth of the court, you cannot examine them at all."[38] In response, the Illinois Supreme Court stated, "To deprive a party, whether the people or defendant, of an intelligent exercise of [peremptory challenges], is practically to take

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[31] U.S. CONST. amend. VI.
[32] *Id.* amend. VII.
[33] *Id.* amend. XIV, sec. 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law"). All states provide a constitutional right to jury trials, although they differ in the specific details as to how that right shall be guaranteed. *See, e.g.*, VA. CONST. art. I, sec. 8 (providing that "unanimous consent" is required for a jury to find a criminal defendant guilty, and specifying the number of persons to serve on the jury).
[34] *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 1093 (1999).
[35] *See id.* One exception to the "no cause required" rule, however, is the *Batson* challenge. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids the exercise of peremptory challenges to eliminate jurors based solely on race).
[36] Donovan v. People, 28 N.E. 964 (Ill. 1891). In *Donovan*, the trial court in a grand larceny case denied counsel's request to personally examine jurors, both for cause and for exercise of peremptory challenges, following the court's group voir dire. *Id.* at 965.
[37] *Id.* at 966.
[38] *Id.* at 965.

away the right; and every lawyer experienced in the trial of causes knows that to its intelligent exercise a reasonable examination of the juror is frequently absolutely necessary."[39] The court acknowledged the State's concern that "exercise of this right by counsel has led to great abuse, and that 'honest and fair-minded men,' compelled to attend as jurors, have left the box, after being questioned, feeling as if they had fortunately escaped conviction of some grave offense"; however, the court responded that it was "not disposed to give credence to this caustic criticism."[40] As this opinion exemplifies, eighteenth-century appellate courts found themselves balancing the oft-competing interests of judges and lawyers concerning voir dire.

The debate continues in the twenty-first century. The American Bar Association (ABA), in its *Principles for Juries and Jury Trials*, states that "[v]oir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."[41] Other commentators express this principle more firmly: "The *sole* purpose of voir dire is to determine, through questioning, whether any member is not qualified to sit on the court-martial."[42] Naturally, this is the standard to which judges adhere; after all, these purposes relate directly to the concept of an impartial jury.

Any trial practitioner knows, however, that lawyers prepare for voir dire with several other purposes in mind. As voir dire is the only time that lawyers can potentially interact directly with jurors and discern potential biases, voir dire could make or break a case.[43] Although voir dire "is not to be used as a mini-trial, an opportunity to persuade jurors to a litigant's point of view, or as a dress rehearsal,"[44] trial advocacy courses routinely coach lawyers on how to "establish rapport" and "preview themes" within the confines of permissible areas of examination.[45] For example, Professor Steven Lubet's[46] *Modern Trial*

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[39] *Id.*
[40] *Id.* at 966.
[41] ABA PRINCIPLES, *supra* note 4, at 14.
[42] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE §15-10(A), at 825 (6th ed. 2004) (emphasis added).
[43] Editorial, *supra* note 3 (quoting famed trial attorney F. Lee Bailey: "If you do it [voir dire] carelessly, you can lose a case by the time you get a jury together.").
[44] Phylis Skloot Bamberger, *Jury Voir Dire in Criminal Cases*, N.Y. STATE BAR ASS'N J., Oct. 2006, at 24.
[45] *See, e.g.*, Patricia F. Kuehn, *Hot Tips for Jury Selection*, DCBA BRIEF ONLINE, Oct. 1999, http://www.dcba.org/brief/octissue/1999/art21099.htm. This article—one of hundreds, perhaps thousands, like it available on the Internet—offers tips such as "use

Advocacy: Analysis and Practice specifically cites "Developing Rapport" as one of five permissible purposes of voir dire.[47] Indeed, he describes it as a lawyer's "best opportunity to develop a positive relationship with the jury," as it is the "only opportunity to converse directly with" jurors.[48] Professor Lubet does caution practitioners to "avoid inconveniencing or embarrassing members of the venire panel,"[49] and to refrain from objectionable conduct such as contact with the venire,[50] improper questioning,[51] and "impermissible use of peremptory challenges."[52] Nonetheless, his attitude toward voir dire reflects a wider range of permissible purposes than those envisioned by the American Bar Association or Professor Schlueter.[53]

Given that judges and lawyers approach the voir dire process with conflicting purposes, it is not surprising that some describe voir dire as "a tug-of-war between judges and lawyers with different agendas."[54] One common complaint among trial lawyers is that judges are overly occupied with "administer[ing] justice in a timely and efficient manner."[55] This factor is often a driving force behind judges' decisions to limit, or even disallow, direct questioning of prospective jurors by lawyers. In fact, a 1994 survey of federal district court judges found that fifty percent agreed with the statement "Questioning of prospective

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this opportunity to establish a good rapport," "[b]e aware of your facial expressions," and [s]tart with non-threatening questions in order to relax the potential jurors." *Id.*

[46] Professor Lubet is the Director of Northwestern's Bartlitt Center on Trial Strategy; he "teaches courses on Legal Ethics, Trial Advocacy, and Narrative Structures." Northwestern Law, Faculty Profiles: Steven Lubet, http://www.law.northwestern.edu/faculty/profiles/stevenlubet/ (last visited Mar. 3, 2010).

[47] STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 515–24 (2d ed. 1997). The other purposes are: "Gathering Information," "Challenges for Cause," "Testing Reactions," and "Obtaining Commitment." *Id.* at 515–23. Note that Lubet defines "Obtaining Commitment" as "an opportunity to gain a commitment from each juror to be fair and to follow the law." *Id.* at 523. This is not to be confused with questions designed to commit jurors to specific verdict-dispositive facts, whether actual or hypothetical, as discussed by one of the concurring opinions in *United States v. Nieto*, discussed *infra*. *See* United States v. Nieto, 66 M.J. 146, 151 (C.A.A.F. 2008) (Baker & Erdmann, JJ., concurring in the result).

[48] LUBET, *supra* note 47, at 524.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 525.

[52] *Id.* at 526.

[53] *See supra* notes 41–42 and accompanying text.

[54] Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, 47 JUDGES' J. 1 (Winter 2008).

[55] *Id.*

jurors by counsel takes too much time," while only four percent agreed that counsel-conducted voir dire "[is] less time consuming than voir dire conducted entirely by the judge."[56] Although timeliness is a laudable goal, it becomes problematic when it leads to denial of time-consuming, but valuable, procedures like individual voir dire.[57]

On the other hand, some judges believe that counsel waste time and create appellate issues through improper questioning.[58] When asked if counsel-conducted voir dire "[r]esults in counsel using voir dire for inappropriate purposes (e.g., to argue their case, or simply to 'befriend' jurors)," sixty-seven percent of federal judges agreed.[59] This point of view is not unique to the federal judiciary. For example, in advocating against New York's attorney-controlled approach, one commentator described the system as "extremely time consuming" and fraught with the danger of "inappropriate trial arguments to the venire."[60] This point of view was recently echoed by a military judge, who stated that counsel "ask questions that are (1) confusing; (2) already covered by the [military judge], and (3) misstate the law."[61] These comments reflect legitimate concerns regarding lawyer-controlled voir dire.

The competing approaches and goals of judges and counsel in the voir dire process set the stage for the issues discussed further in this article. As the next section explains, military judges exert a great deal of control

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[56] Memorandum from John Shapard & Molly Johnson, Fed. Judicial Ctr., to Advisory Comm. on Civil Rules & Advisory Comm. on Criminal Rules 4 (Oct. 4, 1994), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/0022.pdf/$file/0022.pdf [hereinafter Shapard & Johnson Memo].

[57] For example, in a case discussed *infra* at Part III, the Court of Appeals for the Armed Forces held that the military judge abused his discretion by refusing to reopen voir dire for the civilian defense counsel to recall three members to question them further about their relationship with trial counsel. One reason the military judge denied this request was that he thought "there's been enough that's been brought out [concerning the relationship]." United States v. Richardson, 61 M.J. 113, 116 (C.A.A.F. 2005). Although not explicitly discussed, the military judge's desire to conclude voir dire seems implicit in his actions.

[58] *See* Shapard & Johnson Memo, *supra* note 56, at 4.

[59] *Id.*

[60] Emily F. Moloney, *As Good as it Gets: Why Massachusetts Should Not Adopt an Attorney-Conducted Voir Dire Process for Civil Trials*, 39 SUFFOLK L. REV. 1047, 1062 (2006).

[61] E-mail from Colonel Timothy Grammel, U.S. Army, Military Judge, to author (Feb. 26, 2010, 10:15 EST) [hereinafter Grammel E-mail].

over voir dire, much more so than in many state jurisdictions.[62] Although it is appropriate for the court to oversee this process, some recent appellate cases demonstrate that sometimes too much control interferes with the accused's right to an impartial panel and a fair trial.

III. Voir Dire in the Military Justice System

A. Voir Dire Practice in Courts-Martial

The Sixth Amendment right to a jury trial in criminal cases does not apply to the military.[63] Nonetheless, the Uniform Code of Military Justice (UCMJ) provides for a court consisting of members who adjudicate the guilt or innocence of the accused.[64] Once granted this statutory right, the Fifth Amendment Due Process clause guarantees that the accused also has the constitutional right to an impartial panel.[65] As in federal courts, however, the accused has no absolute right—constitutional, statutory, or otherwise—to conduct voir dire.[66]

Article 41, UCMJ, and Rule for Courts-Martial (RCM) 912 govern the actual practice of voir dire at courts-martial.[67] Before the parties even enter the courtroom, defense counsel often have access to panel questionnaires.[68] Although not required in every case, as a matter of practice panel questionnaires are routinely used to shape and expedite voir dire.[69] Rule for Courts-Martial 912(a)(1) provides several required questions concerning the member's potential bias (actual or implied).[70]

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[62] *See* Mize & Hannaford-Agor, *supra* note 54, at 4 (citing a study that shows a majority of states "lean toward attorney-conducted voir dire").
[63] *See* United States v. Witham, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no Sixth Amendment right to trial by jury").
[64] *See* UCMJ art. 25 (2008) (describing the requirement and qualification of court-martial members); MCM, *supra* note 8, R.C.M. 501(a) (members are "courts-martial personnel").
[65] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").
[66] *See* United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001) ("Neither the UCMJ nor the *Manual for Courts-Martial*, United States (2000 ed.), gives the defense the right to individually question the members.").
[67] UCMJ art. 41; MCM, *supra* note 8, R.C.M. 912.
[68] MCM, *supra* note 8, R.C.M. 912(a)(1) (stating that trial counsel may, and upon request of defense, shall, submit questionnaires to members).
[69] *Id.* R.C.M. 912(a)(1) discussion ("Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges.").
[70] *Id.* R.C.M. 912(a)(1). Actual and implied bias are discussed at *infra* notes 85–99 and accompanying text.

The trial counsel is not prohibited from going beyond these questions to explore potentially relevant sources of bias.[71] Thus, trial and defense counsel can get a head start on voir dire by carefully examining the questionnaires.

Although not required by the *Manual for Courts-Martial*, pretrial conferences (802 sessions) among counsel and the military judge provide an opportunity to discuss voir dire questions.[72] As stated in the Discussion to RCM 802(a), "conduct of voir dire" is a matter "ultimately in the military judge's discretion."[73] Thus, to the extent the topic is not discussed in local court rules, the military judge may explain how she will conduct voir dire and what role the counsel will play in the process. In addition, military judges may require counsel to submit questions in writing before the trial.[74]

By the time the parties get to the courtroom, the actual mechanics of voir dire are left to the military judge's discretion. The *Military Judges' Benchbook* provides twenty-eight standard questions for the military judge to ask during group voir dire.[75] In addition, RCM 912(d) provides the following guidance:

> (d) *Examination of members*. The military judge *may* permit the parties to conduct the examination of the members or may personally conduct the examination. In the latter event the military judge *shall* permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A

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[71] *Id.*

[72] *See id.* R.C.M. 802(a) ("After referral, the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial."). The Discussion to RCM 802(a) specifically lists "conduct of voir dire" as an item that may be appropriate for discussion. *Id.* R.C.M. 802(a) discussion.

[73] *Id.* R.C.M. 802(a) discussion.

[74] *See, e.g.*, E-mail from Colonel David Conn, U.S. Army, Military Appellate Judge, to author (Feb. 25, 2010, 15:17 EST) [hereinafter Conn E-mail] (describing his requirement, during his tenure as a trial judge, for counsel to "submit their exact questions in advance" for his approval).

[75] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK 40–42 (1 Jan. 2010) [hereinafter DA PAM. 27-9].

> member may be questioned outside the presence of other members when the military judge so directs.[76]

As the emphasized words indicate, the only time the military judge must permit questions for counsel is when the judge personally conducts voir dire. Even in that instance, however, the judge has the discretion to consider whether the supplemental examination is "proper," and may also choose to ask supplemental questions personally. Thus, RCM 912 does not prohibit a military judge from conducting voir dire in such a manner that lawyers never address the members.[77] Ultimately, the appellate courts will review a military judge's decisions related to voir dire for abuse of discretion.[78] Questioning the panel is only one part of the process, however; counsel ultimately use information gained through questioning to challenge members whom they believe are biased or otherwise unqualified.[79] The next section discusses the process by which counsel may challenge panel members.

B. Challenging Panel Members

In courts-martial, trial and defense counsel each have unlimited challenges for cause and one peremptory challenge.[80] Looking first at challenges for cause, RCM 912(f)(1) provides fourteen bases for such challenges.[81] The first thirteen are nondiscretionary—in other words, if the panel member falls into one of those categories, the member must be removed.[82] Examples include accusers, witnesses, counsel, or someone who has acted as the convening authority in the case.[83] Discretionary

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[76] MCM, *supra* note 8, R.C.M. 912(d) (emphasis added).

[77] *Id.* The non-binding Discussion accompanying this section does indicate that, "[o]rdinarily, the military judge should permit counsel to personally question the members." *Id.* R.C.M. 912(d) discussion. The reality is that voir dire in courts-martial is largely a matter of the judge's personal preference in most routine cases. One former military judge had a firm rule that counsel did not personally address the members; in his experience, counsel routinely wasted time and asked improper or confusing questions. Interview with Major Wilbur Lee, USMC, Student, 58th Judge Advocate Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & School, in Charlottesville, Va. (Nov. 13, 2009) [hereinafter Lee Interview].

[78] *See, e.g.*, United States v. Belflower, 50 M.J. 306 (C.A.A.F. 1999).

[79] MCM, *supra* note 8, R.C.M. 912(d) discussion ("The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges.").

[80] UCMJ, art. 41 (2008); MCM, *supra* note 8, R.C.M. 912(f).

[81] MCM, *supra* note 8, R.C.M. 912(f)(1).

[82] *Id.* R.C.M. 912(f)(1)(A)–(M).

[83] *Id.*

challenges for cause fall under RCM 912(f)(1)(N), which covers panel members who "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[84]

Challenges brought under RCM 912(f)(1)(N) comprise two categories: challenges for actual and implied bias.[85] "The test for actual bias is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'"[86] For example, in *United States v. Smart*, a member in a robbery case who had been burglary victim stated that he could not "totally disregard" his prior experience, and that he would "not consider" the option of no punishment.[87] The statement revealed actual bias of the panel member. Actual bias is a factual determination on the part of the military judge; appellate courts use an abuse of discretion standard, and generally defer to the trial judge, who had the opportunity to observe the member and her demeanor.[88] In other words, the military judge's subjective opinion as to the member's credibility is the standard by which appellate courts will view the judge's decision to deny a challenge for cause based on actual bias.[89]

In comparison, challenges based on implied bias do not focus on a subjective determination of a member's ability to adhere to the evidence and the judge's instructions. Rather, the test for implied bias is whether "most people in the same position [as the prospective member] would be prejudiced."[90] In addition, implied bias focuses on the public's

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[84] *Id.* R.C.M. 912(f)(1)(N).
[85] *See id.*:

> The text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the appearance of fairness as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal.

United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008).
[86] United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997) (citation omitted).
[87] United States v. Smart, 21 M.J. 15, 16–17 (C.M.A. 1985). These statements demonstrate actual bias because the military judge instructs members that they must consider an entire range of punishments, if any punishment at all. *See* DA PAM. 27-9, *supra* note 75, at 93–100.
[88] *See Bragg*, 66 M.J. 325.
[89] *See* United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000).
[90] United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996).

"perception . . . of the fairness of the military justice system."[91] Therefore, the test for implied bias is objective.[92] Furthermore, due to the objective nature of the implied bias test, it does not require an affirmative assertion of bias by the panel member.[93] Thus, challenges based on implied bias outnumber those based on actual bias, although challenges for cause often invoke principles of both actual and implied bias.[94]

A judge's ruling on implied bias also does not merit the same level of deference on appeal, thereby increasing the case law on the subject. "[I]ssues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo."[95] Furthermore, implied bias encompasses a broad range of potential issues. Examples include rating chain relationships among panel members,[96] predisposition toward a certain punishment,[97] knowledge of the case,[98] and being or knowing a victim of a similar crime.[99]

Another component of challenges for cause is the liberal grant mandate. In close cases, military judges have a responsibility to liberally

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[91] *See* United States v. New, 55 M.J. 95, 100 (C.A.A.F. 2001).
[92] *See Daulton*, 45 M.J. 212.
[93] *See, e.g.*, United States v. Clay, 64 M.J. 274 (C.A.A.F. 2007). Senior panel member initially indicated that in a rape case he would be "merciless within the limit of the law." *Id.* at 275. After being asked rehabilitative questions, he indicated that he believed he could follow the judge's instructions to consider the full range of punishments. *Id.* at 275–76. Although the member did not demonstrate actual bias, because of his subsequent answers to rehabilitative questions, the CAAF still found implied bias. *Id.* at 278.
[94] United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008) ("[I]mplied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal.").
[95] United States v. Strand, 59 M.J. 455, 459 (C.A.A.F. 2004).
[96] *See* United States v. Wiesen, 56 M.J. 172 (C.A.A.F. 2001) (holding that the military judge abused discretion by not excusing for cause a member who supervised six other members).
[97] *See* United States v. Martinez, 67 M.J. 59 (C.A.A.F. 2008) (finding that a member demonstrated an inelastic attitude toward punishment by stating there is "no room in my Air Force for people that abuse drugs" and that "something has to be done").
[98] *See Bragg*, 66 M.J. 325. In *Bragg*, a panel member could not remember having reviewed a relief for cause packet on accused, but if he had, he would have recommended relief. *Id.* The court held that the member should have been excused based on implied bias. *Id.*
[99] *See* United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007). *Terry* was a rape trial in which a member had a girlfriend who was raped; under the circumstances, it would be objectively unfair for that member to sit on appellant's court-martial.

grant defense challenges for cause.[100] The rationale is that the Government has greater control over the panel selection process, especially in the convening authority's ability to personally select members.[101] Therefore, the liberal grant mandate does not apply to government challenges for cause.[102] Although at first glance, it appears that the liberal grant mandate is meant solely to benefit the defense, it actually serves a broader purpose: "[T]he liberal grant mandate exists not just to protect an accused's right to a fair trial, but also to protect society's interest, including the interests of the Government and the victims of crime, in the prompt and final adjudication of criminal accusations."[103]

Although counsel have unlimited for-cause challenges, in courts-martial each side is limited to one peremptory challenge.[104] When exercising a peremptory challenge, counsel does not need to give a reason.[105] However, some limitations exist on the exercise of peremptory challenges. In keeping with *Batson v. Kentucky*,[106] race-based

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[100] *See* United States v. Clay, 64 M.J. 274, 277–78 (C.A.A.F. 2007); United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987).

[101] *See* United States v. James, 61 M.J. 132 (C.A.A.F. 2005):

> Unlike the convening authority, who has the opportunity to provide his input into the makeup of the panel through his power to detail "such members of the armed forces as, in his opinion, are best qualified for duty," the defendant has only one peremptory challenge at his or her disposal. The liberal grant rule protects the "perception or appearance of fairness in the military justice system."

Id. at 139 (internal citations omitted).

[102] *Id.* at 139 ("Given the convening authority's broad power to appoint, we find no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause.").

[103] *Terry*, 64 M.J. at 296 (citing *Clay*, 64 M.J. 274).

[104] UCMJ art. 41 (2008) states:

> *Procedure*. Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

Id.; MCM, *supra* note 8, R.C.M. 912(g)(1).

[105] MCM, *supra* note 8, R.C.M. 912(g)(1) discussion ("Generally, no reason is necessary for a peremptory challenge.").

[106] 476 U.S. 79 (1986).

peremptory challenges are prohibited in military courts.[107] If the opposing party objects, the challenging party has the burden to provide a race-neutral explanation.[108] This explanation cannot be "unreasonable, implausible, or . . . otherwise make[] no sense."[109] In addition, the prohibition on gender-based peremptory challenges from *JEB v. Alabama*[110] applies to military courts, as well.[111] As with *Batson* challenges, upon objection the challenging party must provide a gender-neutral explanation that is not implausible or otherwise nonsensical.[112]

Whether the military judge or counsel conducts voir dire, once all challenges are ruled on, the remaining members will be impaneled. The buck does not stop there, however. A military accused's automatic right of appeal ensures that rulings involving voir dire and challenges are subject to scrutiny at the appellate level.[113] As the next section demonstrates, military appellate courts are not reluctant to examine and criticize military trial judges' decisions regarding voir dire.

C. Appellate Cases Reviewing Military Judges' Control of Voir Dire

This section will review two appellate cases where the Court of Appeals for the Armed Forces (CAAF) analyzed the military judges' decisions regarding the conduct of voir dire at courts-martial. The first, and most recent, is *United States v. Richardson*.[114] This case involved an appellant convicted of drug offenses pursuant to Article 112a, UCMJ.[115] On appeal, he raised a "compound issue":

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[107] *See* United States v. Hurn, 58 M.J. 199 (C.A.A.F. 2003) (applying *Batson* per se to military courts).
[108] *See id.* The prohibition against race-based challenges applies to both prosecution and defense. *See* United States v. Chaney, 53 M.J. 383 (C.A.A.F. 2000).
[109] United States v. Tulloch, 47 M.J. 283, 287 (C.A.A.F. 1997). This standard is actually higher than that required in civilian courts, where an implausible explanation is permissible as long as it is not "inherently discriminatory." *See* Rice v. Collins, 546 U.S. 333 (2006).
[110] 511 U.S. 127 (1994).
[111] United States v. Witham, 47 M.J. 297 (C.A.A.F. 1997).
[112] United States v. Norfleet, 53 M.J. 262 (C.A.A.F. 2000).
[113] *See* UCMJ art. 66 (2008). This right of appeal to the Court of Criminal Appeals applies to every case where "the sentence, as approved, extends to death, dismissal . . . , dishonorable or bad-conduct discharge, or confinement for one year or more . . . ." *Id.*
[114] 61 M.J. 113 (C.A.A.F. 2005).
[115] *Id.* at 114.

> Whether the lower court erred when it determined that the military judge did not abuse his discretion during voir dire by applying an "actual bias" standard to deny the defense's three "implied bias" challenges and by *preventing the defense from fully developing the facts* to support the challenges to members who were or had been trial counsel's clients.[116]

This article focuses on the second part of the issue emphasized above.

In *Richardson*, four of the ten members admitted knowing the trial counsel in a professional capacity, in response to the military judge's examination.[117] During defense voir dire, the civilian defense counsel explored the nature of this relationship with the fourth member questioned, but not with the first three.[118] Responding to the civilian defense counsel, the member affirmed that the trial counsel had been a "good" and "trusted legal advisor."[119] After questioning this member, the civilian defense counsel requested to "'briefly recall three of the members' to allow him 'to look at and to expand on . . . the issue with the relationship with the trial counsel.'"[120] The military judge denied the defense request. Subsequently, the defense challenged, among other members, all four who had indicated a relationship with trial counsel.[121] The military judge denied the challenges for all but one member of those four, whom the defense had not questioned individually about his relationship with trial counsel.

In its discussion, the court reiterated that the right to a "fair and impartial panel" required members to be "test[ed] . . . on the basis of both actual and implied bias."[122] Further, the court emphasized that voir dire is the "procedural vehicle for testing member bias."[123] Although the court acknowledged the military judge's discretion in controlling voir dire, it stated that this discretion "is not without limits."[124] In examining both issues raised by the appellant, the court bemoaned the lack of facts

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[116] *Id.* (emphasis added).
[117] *Id.*
[118] *Id.* at 115–16.
[119] *Id.* at 116.
[120] *Id.* (quoting civilian defense counsel).
[121] *Id.* at 117.
[122] *Id.* at 116.
[123] *Id.* at 119.
[124] *Id.* at 116.

on the record for the court to use in analyzing the denial of the defense's challenges for implied bias.[125]

Ultimately, the court concluded that the military judge had abused his discretion when he denied defense counsel's request for further voir dire.[126] In supporting this decision, the court stated:

> Finally, our opinion in this case should not be read to necessarily bar the participation of members who might have had previous or current official contact with the trial participants. To the contrary, we recognize that in a close-knit system like the military justice system, such situations will arise and may at times be unavoidable. But where such situations are identified, military judges should not hesitate to test these relationships for actual and implied bias. And a factual record should be created that will demonstrate to an objective observer that notwithstanding the relationships at issue, the accused received a fair trial. *Member voir dire is the mechanism for doing so*.[127]

Thus, the opinion in *Richardson* underscores the importance of thorough voir dire in developing the facts necessary to seat an impartial panel, through the informed exercise of challenges.

The CAAF had addressed a similar issue in 1996 in *United States v. Jefferson*.[128] In *Jefferson*, the appellant argued that he had not received a fundamentally fair trial due to the military judge's limitations on questions and denial of conducting and reopening individual voir dire.[129] When it came to limitations on questions, the appellant specified three topics: "burden of proof . . . members' inelastic attitude towards punishment, and credibility of witnesses."[130] The court ultimately held that the military judge did not abuse his discretion when limiting defense

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[125] *Id.* at 119 ("[T]he military judge had a responsibility to further examine the nature of relationships in the context of implied bias review, particularly when asked to do so by defense counsel.").
[126] *Id.* at 120 ("There was a further abuse of discretion in the denial of counsel's request to reopen voir dire in a case raising implied bias considerations.").
[127] *Id.* at 120 (emphasis added).
[128] 44 M.J. 312 (C.A.A.F. 1996).
[129] *Id.* at 314.
[130] *Id.* at 315.

questions on these topics.[131] Looking at the facts, the CAAF determined that the questions on burden of proof were properly clarified through defense counsel's further questioning; the military judge rehabilitated the members concerning the viability of a "no punishment" option; and that the issue of pre-judging credibility was essentially a non-issue, as all members agreed to adhere to the judge's instruction regarding credibility of witnesses.[132]

The court did, however, conclude that the military judge had abused his discretion by not reopening voir dire upon defense request.[133] After voir dire had concluded, defense counsel requested to reopen voir dire to explore statements by two members that they or a close friend or relative had been a crime victim.[134] Although the court acknowledged that such status is not a per se disqualification, it also stated that it "cannot countenance cutting off voir dire questions as to potential grounds for challenge of members having friends and family who were victims of crimes."[135] The CAAF eloquently summed up the impact of overly restrictive voir dire:

> The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial. Central to this right is the need to conduct a full voir dire to determine challenges for cause and peremptory challenges. We recognize that judges are sometimes required to "ride" a circuit and often have crowded dockets. But when co-counsel reminds counsel conducting the voir dire that further inquiry was omitted on a crucial issue, judges should be patient and allow that inquiry to be conducted. We hold that the judge abused his ample discretion by failing to allow counsel to reopen the voir dire to ensure impartial court members. Because of the potential impact of this abuse on the right to a trial by impartial members, corrective action is needed.[136]

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[131] *Id.* at 319.
[132] *Id.*
[133] *Id.* at 320.
[134] *Id.* at 317.
[135] *Id.* at 321.
[136] *Id.* at 321–22 (internal citations omitted).

Thus, just as it would later hold in *Richardson*, the CAAF acknowledged that voir dire is essential to ensuring an accused's right to a fair trial. The court's opinion summed up the tension between counsel and judges over voir dire, as discussed in Part II, *supra*: "[S]ince counsel ask questions that go beyond determining challenges, many judges prefer to conduct the voir dire to prevent wasting valuable time."[137] Nonetheless, the court seemingly admonished military judges by counseling them "to be patient and allow" additional questioning when needed.[138]

The history and purpose of voir dire discussed in Part II provided a backdrop for exploring the military justice system's method of voir dire and jury empanelment. The next part will, in turn, examine how civilian jurisdictions approach voir dire. Careful examination of civilian practices can inform any discussion of whether the military should change to incorporate the techniques of its non-uniformed brethren.

IV. Voir Dire in Federal and State Courts

A. Civilian Jurisdictions in General

Civilian federal and state courts vary widely in how they approach voir dire. Federal courts, like military courts, reserve complete control to the judge.[139] In comparison, most state courts allow counsel significant participation in voir dire, although in ten states, voir dire is dominated by the judge and in eight states, judges and lawyers play an equal role in questioning the prospective jurors.[140] This section discusses voir dire in federal courts and then examines three representative states: Massachusetts, Texas, and Virginia. In Massachusetts, judges control voir dire.[141] In Texas, counsel have wide latitude to participate and

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[137] *Id.* at 318.
[138] *Id.* at 321–22 (internal citations omitted).
[139] *See* FED. R. CRIM. P. 24(a) (explaining that the "court may examine prospective jurors or may permit attorneys to do so").
[140] *See* Mize & Hannaford-Agor, *supra* note 54. In reaching these conclusions, the authors relied on the *State-of-the-States Survey of Jury Improvement Efforts* compiled by the Center for Jury Studies of the National Center for State Courts, published in 2007. *Id.* n.17 (citing GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 29–31 (Apr. 2007)).
[141] *See infra* notes 152–58 and accompanying text.

question the venire.[142] In Virginia, the legislature has actually granted a statutory right to counsel to conduct voir dire.[143]

B. Federal Courts

Federal Rule of Criminal Procedure 24(a) states that the "court may examine prospective jurors or may permit the attorneys to do so."[144] However, this rule also says that if the court conducts voir dire, "it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper."[145]

Although the rule states that the court "may permit" counsel-conducted voir dire, anecdotal evidence indicates that federal courts either do not allow counsel-conducted voir dire, or limit it to a few minutes.[146] A survey of judges by the Federal Judicial Center confirms that belief.[147] The survey found that in forty-six percent of routine criminal cases and in thirty-eight percent of "exceptional" criminal cases, the judge conducted the entire voir dire, not permitting counsel to directly question the jury.[148] At the other end of the spectrum, in only seven percent of routine and six percent of exceptional criminal cases did the judges surveyed allow counsel to "conduct most or all of voir dire."[149]

Thus, the federal system mirrors the military practice. Not surprisingly, this approach has engendered criticism from trial lawyers, especially criminal defense attorneys.[150] Apparently, these dissenters

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[142] *See infra* notes 161–63 and accompanying text.
[143] *See infra* notes 164–68 and accompanying text.
[144] FED. R. CRIM. P. 24(a).
[145] *Id. Cf.* MCM, *supra* note 8, R.C.M. 912(d).
[146] Dennis G. Terez, *Who Said Voir Dire Wasn't Important*?, NAT'L ASS'N CRIM. DEF. LAW. CHAMPION, Apr. 2006, at 56, *available at* http://www.nacdl.org/public.nsf/0/54965 8461382a8852.
[147] Shapard & Johnson Memo, *supra* note 56.
[148] *Id.* at 2.
[149] *Id.*
[150] *See* Terez, *supra* note 146. According to the National Association of Criminal Defense Lawyers (NACDL), restricting voir dire actually prevents "lawyers [from being] advocates." *Id.* The NACDL is not unique in condemning judge-controlled voir dire. Lawyers and jury consultants roundly criticize this practice because it curtails a lawyer's ability to accomplish the "unofficial" purposes of voir dire, such as establishing a rapport

have gained some traction over the years; a 1977 survey of federal judges found even lower rates of counsel participation.[151] Those advocating counsel-conducted voir dire have made the most progress in state courts, however. The next section explores three state systems, demonstrating that in some jurisdictions, counsel have gained more control over the voir dire process.

C. Representative State Systems

Massachusetts parallels the federal system in how judges have total control over voir dire in both criminal and civil cases.[152] In practice, the trial judge has a minimum of six required questions to determine prior knowledge of prospective jurors.[153] The judge may then permit counsel to directly question jurors; "however, judges rarely allow such motions [to question the venire]."[154] Rather, counsel can provide prospective questions ahead of time, which the judge may incorporate into his voir dire, at his discretion.[155] As the trial judge is granted substantial

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and communicating to them a theory of the case. *See, e.g.*, Theresa Zagnoli, Zagnoli McEvoy Foley Ltd., *Jury Selection Without Attorney-Conducted Voir Dire* (2001), *available at* http://www.voirdirebase.com/pdfs/juryselect.pdf?eSESSION=5974c004b13e143.

[151] Shapard & Johnson Memo, *supra* note 56, at 1. The 1977 survey, also conducted by the Federal Judicial Center, found that less than thirty percent of federal district court judges permitted counsel to conduct any questioning. *Id.* The 1994 survey, however, reported that in routine criminal cases, fifty-four percent of judges permitted at least some questioning. *Id.*

[152] *See* Moloney, *supra* note 60, at 1053 (2006) (primarily discussing civil procedure, although Massachusetts has similar laws and procedures for criminal jury trials).

[153] *See* MASS. GEN. LAWS ANN. ch. 234, § 28 (West 2009). Massachusetts's Rules of Civil Procedure prescribe six questions:

> (1) whether any juror or any member of his family is related to any party or attorney therein; (2) whether any has any interest therein; (3) whether any has expressed any opinion on the case; (4) whether any has formed any opinion thereon; (5) whether any is sensible of any bias or prejudice therein; and (6) whether any knows of any reason why he cannot or does not stand indifferent in the case.

MASS. R. CIV. P. 47.

[154] *See* Moloney, *supra* note 60, at 1054.

[155] *See id.* at 1055.

discretion by statute in conducting voir dire, the Appeals Court reviews any issues for abuse of discretion.[156]

Massachusetts's system has the advantage of maximum efficiency. The judge acts as both examiner and gatekeeper for counsel's questions. Unsurprisingly, however, this practice has generated criticism from lawyers and lawmakers in Massachusetts. One response to this practice was the proposal of a Juror Examination Act by the Massachusetts legislature in 2003 (followed by a Revised Juror Examination Act after the original bill died in the Ways and Means Committee).[157] This Act would have mandated the court to grant a motion from either party to personally conduct voir dire.[158] As of this writing, however, Massachusetts has not revised its voir dire practice.

The staunch refusal of Massachusetts judges to allow counsel-conducted voir dire is viewed by some as the antithesis of a fair trial. In 2008, Neil Entwistle was tried in Massachusetts for charges that he murdered his wife and daughter.[159] One attorney commenting on the case had these scathing comments concerning the Massachusetts system:

> In Massachusetts, voir dire is not a tool, but a hoax. Like an apparition, it only gives the appearance of substance. Our "voir dire" amounts to no more than the defense lawyer, and maybe the prosecutor, formally submitting maybe [ten] or [twenty] questions for the judge to ask the jury pool. The judge skims the questions, and if he feels like it, asks the jury pool maybe three or four of them.[160]

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[156] *See id.* at 1054 (citing Commonwealth v. Lopes, 802 N.E.2d 97, 102 (Mass. 2004)) (other citations omitted).
[157] *Id.* at 1056.
[158] *Id.* at 1057.
[159] *See* Franci R. Ellement & Michael Levenson, *Entwistle Convicted of Murder*, BOSTON GLOBE, June 26, 2008, *available at* http://www.boston.com/news/local/articles/2008/06/26/entwistle_convicted_of_murder/?page=2.
[160] Posting of Kevin J. Mahoney to Relentless Defense, http://www.relentlessdefense.com/neil-entwistle.html (last visited Jan. 3, 2010). Mr. Mahoney is a Cambridge, Massachusetts, defense lawyer, named by the American Trial Lawyers Association as one of America's Top 100 Trial Lawyers. *See* Am. Trial Lawyer's Ass'n, The Top 100 Trial Lawyers—Massachusetts, http://www.theatla.com/top-100-lawyers-massachusetts.html (last visited Mar. 3, 2010).

It appears that Massachusetts voir dire, at least in practice, curtails attorney participation even more than federal and military courts. On the other end of the scale is Texas, which by practice has a system of attorney-conducted voir dire for both civil and criminal trials. This practice is "largely judicially created."[161] Texas case law has established a great deal of latitude for attorneys, both in the method in which they conduct voir dire and the substance of the questions and comments.[162] Thus, Texas experiences an opposite form of pushback than Massachusetts does: anecdotal criticism from lawmakers and judges "regarding alleged abuses of the voir dire system . . . ."[163]

The third approach is that of Virginia. In contrast to the judicially-created concept of expansive voir dire found in Texas, Virginia has actually implemented a statutory right for counsel to personally conduct voir dire. Virginia Code § 8.01-358 states:

> The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.
>
> A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.[164]

A plain reading of this statute reveals that the Virginia legislature granted counsel the right to conduct voir dire by stating that "counsel for either party *shall* have the right to examine" the venire.[165] Notably, the statute

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[161] *See* Ballesteros, *supra* note 5, at 207.
[162] *See id.*
[163] *See id.* at 209.
[164] VA. CODE ANN. § 8.01-358 (West 2009).
[165] *Id.* (emphasis added).

itself does not place any limitations on questioning other than to limit questions to those that are "relevant" to determine general bias.

Judicial interpretation of § 8.01-358, however, has set some boundaries when it comes to proper questioning and the judge's discretion in controlling voir dire. Virginia appellate courts, like military appellate courts, use an abuse of discretion standard to review a judge's rulings regarding voir dire.[166] Virginia case law further recognizes that judges have considerable discretion in limiting, or even prohibiting, improper or irrelevant questions.[167] As noted in one opinion,

> A party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning *ad infinitum*. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors stand "indifferent in the cause," but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so.[168]

Virginia, therefore, has seemingly struck a balance between recognizing the legal and policy concerns which mandate the use of counsel-conducted voir dire, while still allowing trial judges the discretion to ensure that counsel use this statutory right only to propound questions that go directly toward the goal of seating an impartial panel.

As these three examples demonstrate, states employ widely different practices in conducting voir dire. Determining which method would be best for the military is not simply a matter of picking and choosing, however. Unique features of the military justice system make certain approaches more appropriate than others. The following section will argue that the ultimate goals of voir dire in military justice are to allow the intelligent exercise of challenges and to establish rapport, and that granting counsel the right to personally conduct voir dire is essential to achieving these goals.

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[166] *See, e.g.*, Bassett v. Commonwealth, 284 S.E.2d 844, 853 (Va. 1981) (holding that absent a showing that the trial court abused its discretion in limiting voir dire, the court "will not disturb the [trial] court's ruling").

[167] *See* Chichester v. Commonwealth, 448 S.E.2d 638, 647 (Va. 1994) (finding that the court has discretion to determine relevancy); LeVasseur v. Commonwealth, 304 S.E.2d 644, 653 (Va. 1983); Barrette v. Commonwealth, 398 S.E.2d 695 (Va. Ct. App. 1990) (finding that the court may exclude irrelevant questions).

[168] *LeVasseur*, 304 S.E.2d at 653.

V. Changing the Military's Voir Dire Practice

A. Direct Questioning By Counsel Will Achieve the Goals of Voir Dire

In order to discuss whether a different approach to voir dire would benefit the courts-martial process, a preliminary question must be addressed: What is the purpose of voir dire in the military justice system? At first blush, it seems the purpose is the same as that in the civilian system—to seat an impartial panel.[169] This simple answer, however, overlooks fundamental distinctions between civilian and military justice.

First, the process by which military panel members are selected supports an approach that permits counsel (particularly defense counsel) to personally question the members. Rather than pulling from a random cross section of the local community, a military panel consists of members hand-picked by the convening authority.[170] The convening authority not only selects panel members, he also refers charges to courts-martial and ultimately acts on the findings and sentence.[171] Furthermore, his authority to personally select members (and the staff judge advocate's authority to excuse up to one-third of the members)[172] reflects the type of control over the process that led to the creation of the liberal grant mandate.[173] Thus, in keeping with the spirit of the liberal grant mandate, judges should also liberally grant defense voir dire to allow greater fairness (actual or perceived) in the process. Furthermore, past appellate cases have demonstrated that liberal voir dire can actually preclude reversal on appeal. For example, in *United States v. Dowty*, the convening authority used a "novel" method of soliciting volunteers to select court-martial members.[174] In affirming the case, CAAF noted that the military judge had allowed liberal voir dire.[175]

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[169] *See, e.g.*, United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008) ("The purpose of voir dire and challenges is, in part, to . . . adjudicate the members' ability to sit as part of a fair and impartial panel.").
[170] UCMJ art. 25 (2008); MCM, *supra* note 8, R.C.M. 503(a).
[171] UCMJ arts. 34, 60.
[172] MCM, *supra* note 8, R.C.M. 505(c)(1)(B).
[173] *See* United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005).
[174] United States v. Dowty, 60 M.J. 163, 164 (C.A.A.F. 2004). In *Dowty*, the "novel method" involved the Assistant Staff Judge Advocate publishing a notice soliciting volunteers to serve on the panel, rather than calling for nominations from subordinate commanders.
[175] *Id.* at 168.

Another consideration that militates toward liberal voir dire is military counsel's limit of one peremptory challenge.[176] The nature of a court-martial panel versus a civilian venire dictates such a limitation on peremptory challenges.[177] Nonetheless, the peremptory challenge remains as crucial to military counsel as it does in civilian jurisdictions.[178] The careful exercise of this one challenge, even though counsel need not state a reason, requires counsel to obtain as much information as possible from the panel. This aids in determining whether to use for-cause or peremptory challenges on particular members. Permitting counsel thorough voir dire allows them to make this vital decision in an informed, intelligent manner.[179]

Above all, the most compelling argument for counsel-conducted voir dire may be to militate against the impact of the military's rigid hierarchy. The military's rank-based structure impedes two significant aspects of voir dire: rapport-building between counsel and the members, and the members' candor toward the court regarding bases for challenge.

The concept of rapport-building as a legitimate purpose of voir dire is a controversial one.[180] After all, it falls outside of the standard belief that voir dire be used only for intelligent exercise of challenges. However, rapport building can actually enhance both the voir dire process and the member's ability to judge a case impartially on the facts. For one,

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[176] MCM, *supra* note 8, R.C.M. 912(g)(1).

[177] Unlike civilian jurisdictions, which can bring in a "cattle call" of potential jurors, the convening authority personally selects a standing court-martial panel. Allowing more than one peremptory could arguably lead to depleting the members prior to empanelment.

[178] *See, e.g.*, Ballesteros, *supra* note 5, at 231–35. In this article, the author makes a compelling argument that peremptories aid in seating an impartial panel by allowing counsel to challenge members whose "bias slips past the narrow standard of challenges for cause because the standard serves only to eliminate 'categorical' bias." *Id.* at 232 (citation omitted).

[179] One argument is that counsel have superior knowledge of the facts, and can thereby tailor voir dire accordingly in ferreting out bases for challenge. *See* Lee Smith, *Voir Dire in New Hampshire: A Flawed Process*, 25 VT. L. REV. 575, 579–80 (2001) (arguing that the trial judge "may be unaware of certain facts, issues, or evidence that are crucial to the jury's determination of the case"); *see also* E-mail from Colonel James L. Pohl, U.S. Army, Military Judge, to author (Feb. 25, 2010, 15:51 EST) [hereinafter Pohl E-mail] (stating that he allows counsel to conduct individual voir dire without justifying it to the court, "because they have access to information [the judge does not] have").

[180] *See, e.g.*, Conn E-mail, *supra* note 74 (stating that he "is not a proponent of the 'rapport building,' 'educating members on the case' theories of voir dire"). *Cf.* David Court, *Voir Dire: It's Not Just What's Asked, But Who's Asking and How*, ARMY LAW., Sept. 2003, at 32, 33–34.

establishing a rapport with the members diminishes the role of counsel as an authority figure in the courtroom, thereby prompting more candid responses during voir dire.[181] Additionally, building rapport allows jurors the chance to assess the credibility of the advocates themselves, thus enhancing jurors' ability to appropriately weigh the evidence.[182] Finally, rapport-building can allow counsel to diminish potential personality conflicts with panel members, and possibly exercise the peremptory challenge to strike a "hostile" member.[183] This increases the likelihood that the facts, themselves—not the members' attitude toward counsel—influence the panel's decision-making process.[184]

Another benefit of counsel-conducted voir dire is drawing out more candid responses from prospective panel members. A 1987 study in the journal *Law and Human Behavior* concluded that

> subjects were considerably more candid in disclosing their attitudes and beliefs about a large number of potentially important topics during an attorney-conducted voir dire. Importantly, in none of the cases were judges more effective than attorneys, a finding that contradict[ed] previous assertions that a judge-conducted voir dire will elicit greater juror candor than an attorney-conducted voir dire.[185]

Among others, one consideration in this study was the nature of different roles and approaches of judges and counsel. The concern is "that the judge will be seen as an important authority figure, and as such, jurors will tend to be concerned about displeasing him or her. Such a concern is likely to cause jurors to be less than honest in their replies."[186] The study concluded that the perception of a judge as an authority figure did, in fact, influence prospective jurors' candor.[187]

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[181] *See infra* notes 185–88 and accompanying text (discussing how jurors are less candid with those perceived as authority figures in the courtroom).
[182] Court, *supra* note 180, at 33–34 ("Each advocate's credibility may be as important to the panel members' decision-making process as the facts themselves.").
[183] *See* Smith, *supra* note 179, at 581.
[184] *See id.*
[185] Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & HUM. BEHAV. 131, 143 (1987).
[186] *Id.* at 132.
[187] *Id.* at 144.

Practitioners also support the theory that jurors are more open with counsel than with judges. One Utah practitioner commented, "since jurors look upon the judge as an important authority figure, they are reluctant to displease him and therefore tend to respond to his questions with less candor than if the questions were posed by counsel."[188] One could further argue that the influence of a judge's role as an authority figure is enhanced in the military setting. Strict hierarchy and obedience to superiors is a cornerstone of military discipline.[189] The Army fraternization policy is one example of the emphasis placed on maintaining the military hierarchy.[190] Adherence to rank structure is so essential to military discipline that the Army criminalizes relationships between Soldiers of different rank for which civilians would not face criminal charges, such as dating, marriage, or business partnerships.[191]

This necessary respect for rank in the military does not disappear in the courtroom. Indeed, a court-martial has a hierarchy which overlays the pre-existing military structure. A military judge is typically a senior field grade officer. Some military judges hold the grade of O-4, although more often the military judge holds the grade of O-5 or O-6.[192] As such, the military judge is likely senior to most, if not all, members of the panel. In contrast, trial and defense counsel tend to be more junior officers. Given the military's emphasis on deference to one's seniors (whether by virtue of rank, position, or experience), one can quickly conclude that the influence over juror candor cited in studies of civilian courtrooms is magnified in the military courtroom. Therefore, allowing counsel—the junior officers—more opportunity to question the members could possibly elicit more candid, forthcoming responses. That, of course, directly assists the goal of intelligently exercising challenges.

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[188] Howard, *supra* note 9, at 15 (citing legal psychologist Neal Bush, *The Case for Expansive Voir Dire*, 12 L. & PSYCHOL. REV. (1975)).

[189] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-1 (18 Mar. 2008) ("Military discipline is founded upon self-discipline, respect for properly constituted authority, and the embracing of the professional Army ethic with its supporting individual values."). Army Regulation 600-20 also states, "All persons in the military service are required to strictly obey and promptly execute the legal orders of their lawful seniors." *Id.* para. 4-2.

[190] *See id.* paras. 4-14 to 4-16. Paragraphs 4-14 and 4-15 define prohibited relationships, while 4-16 renders punitive any violations of paragraphs 4-14*b*, 4-14*c*, and 4-15. *Id.*

[191] *See id.*

[192] *See* U.S. DEP'T OF ARMY, OFFICE OF THE JUDGE ADVOCATE GEN. PUB. 1-1, DIRECTORY 12–16 (2009). Of twenty-two Army military judges in the trial judiciary in 2009, two were majors, eight were lieutenant colonels, and twelve were colonels. *Id.*

Based on these unique features of the military system, counsel's primary purpose in courts-martial should be to elicit information that can aid in making appropriate challenges, both for-cause and peremptory.[193] Yet, a secondary, still vital, purpose is for counsel to establish rapport. The following subsection proposes an amendment to RCM 912 to grant counsel the right to personally question members, and discusses how this amendment would best achieve the above-stated goals while still ensuring the fair and orderly administration of justice in a military environment.

B. Proposed Amendment to RCM 912

Allowing counsel to conduct voir dire in courts-martial furthers justice by maximizing counsel's ability to gather information to use in challenging members. Recent military appellate cases, such as *Richardson*, support this argument by demonstrating how restrictive voir dire prevents counsel from discovering facts upon which to properly base challenges for cause.[194] Establishing liberal voir dire can be best accomplished through amending RCM 912 to grant counsel the right to personally conduct voir dire.

Such an amendment could take one of several possible forms. One seemingly simple fix would be to replace "may" in RCM 912(d) with "shall," so that it reads: "(d) *Examination of members*. The military judge *shall* permit the parties to conduct examination of the members, or the military judge may personally conduct the examination."[195] This approach would cause the least upheaval to the current system. By replacing "may" with "shall," counsel will have a right to personally conduct voir dire. At the same time, the military judge would retain ultimate control over the process, limiting or cutting off questioning when necessary.[196] A significant drawback, however, would be that this change could potentially have little to no impact on the current system. So long as the military judge permits counsel to attempt to question the

[193] As previously discussed in this article, courts and commentators have cited multiple purposes for voir dire. Based on the unique nature of the military system, however, the Discussion following RCM 912(d) best states the paramount purpose of voir dire: "voir dire should be used to obtain information for the intelligent exercise of challenges . . . ." MCM, *supra* note 8, R.C.M. 912(d) discussion.
[194] United States v. Richardson, 61 M.J. 113 (C.A.A.F. 2005).
[195] *See* MCM, *supra* note 8, R.C.M. 912(d).
[196] *Id.* R.C.M. 912(d) discussion.

prospective members, she may properly restrict or take over voir dire while still complying with the proposed rule.[197]

Another possibility would be to grant counsel the right to personally question the panel, and limit the judge's involvement only in instances where counsel strayed into certain enumerated, off-limits areas. For example, the proposed amendment could state: "(d) *Examination of members*. Both government and defense counsel shall be permitted to personally conduct voir dire. Such right is not to be limited unless, sua sponte or pursuant to an objection, the military judge disallows the following improper forms of questioning: . . . ." The amended RCM 912(d) would then list impermissible questions, such as those that improperly state the law, seek to introduce inadmissible facts, or commit members to verdict-dispositive facts.

Such an amendment would undoubtedly shift control from the military judge to counsel, effectively making the military judge's involvement in voir dire the exception, not the rule. Although allowing counsel ultimate control over voir dire is a direct method to achieve the goals discussed in the previous subsection, a drastic shift like this is unwise for several reasons. First, in the military, trial practitioners tend to be more junior and inexperienced attorneys. Shifting the balance in favor of pure counsel-conducted voir dire would take control of this vital process completely away from the most experienced lawyer in the courtroom and place it solely in the hands of (typically) the most inexperienced. Second, vesting virtually limitless discretion in counsel could lead to abuse of the system—whether by conducting protracted voir dire, or by attempting to explore areas prohibited by the rule in the form of pretextual questions.[198] Finally, the solemnity and decorum of a military courtroom call for the military judge to retain authority during all aspects of trial.[199] For the foregoing reasons, turning complete control of voir dire over to counsel would be an ill-advised reform.

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[197] *Id.* The Discussion to RCM 912(d) states, "The nature and scope of the examination of members is within the discretion of the military judge." *Id.* Assuming this language remains, a military judge could conceivably exercise her discretion to limit counsel's questions, so long as she permitted counsel an attempt to exercise that right.

[198] This concern is not without merit. For example, one senior Army judge states, "Many times I see counsel using voir dire to argue their case, plant their theory, and/or get members to commit." Pohl E-mail, *supra* note 179.

[199] Judge advocates may have a hard time conceiving of voir dire conducted outside the presence of the military judge—yet, at least one civilian jurisdiction has such a method for civil and criminal trials. *See* Deborah A. Cancado, *The Inadequacy of Massachusetts Voir Dire*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 81, 93 (2000) (describing the Connecticut

Rather than adopt one of the two extremes discussed above, this article advocates a third approach to amending RCM 912 that balances the interests of both counsel and military judges. The ABA's *Principles for Juries and Jury Trials* calls for voir dire to be conducted by both the court and counsel:

> 1. Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors' legal qualification to sit in the case.
> 2. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel . . . .[200]

The proposed amendment to RCM 912 would reflect the ABA's balanced approach by requiring the court to make a preliminary examination of the members, then allowing both trial and defense counsel the opportunity to directly question the members. With the amendment, RCM 912 would thus read:

> (d) *Examination of members*. The military judge shall initially ask the panel sufficient questions to determine whether any member: (1) has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition; (2) is related to any witness, other court member, or the accused; (3) has an interest, financial or otherwise, in the case; (4) has expressed or formed an opinion on the case; (5) is aware of any personal bias or prejudice regarding the case; and (6) knows of any reason why he or she cannot judge the case fairly and impartially. After the military judge's examination, counsel for each side shall have the right to examine the members, and shall have the right to ask the members directly any relevant question to ascertain bias, prejudice, or any other reason whereby the member may be disqualified. Opposing counsel may object to, and

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voir dire system, in which "[t]he judge generally remains away from the courtroom while the attorneys question the jurors").

[200] ABA PRINCIPLES, *supra* note 4, at 13.

> the military judge may limit or disallow, questions that are not directly relevant to ascertaining a member's qualification to sit as an impartial panel member, or are otherwise improper.

In essence, this proposed amendment conforms with the ABA's *Principles* by combining aspects of both Massachusetts's and Virginia's approach to voir dire. The first part of the rule mirrors Massachusetts's rule, which requires the judge to conduct an initial screening of the venire.[201] This will allow the military judge to set the tone, as well as reveal those members who are clearly unqualified to be impaneled. The second part of the rule is drawn from Virginia's statute, and confers upon counsel the right to question the panel regarding qualification to judge a particular case.[202] Crucial to this rule, however, is the notion that counsel can ask only *relevant* questions for *proper* purposes. This proposal specifically leaves these definitions open for judicial interpretation, rather than enumerating a laundry list of irrelevant or improper questions. For one, relevancy will necessarily depend on the facts of each particular case. Furthermore, this rule can allow the military judge to rely on precedent and discretion when supervising voir dire, while also giving counsel latitude to craft case-specific questions.[203]

Granting counsel the right to personally conduct voir dire will not bring the criminal justice system to a halt.[204] On the contrary, creating an

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[201] *See* MASS. GEN. LAWS ANN. ch. 234, § 28 (West 2009); MASS. R. CRIM. P. 47. In practice, Virginia also requires the trial judge to open voir dire with mandatory questions of the venire, even though the statute does not explicitly require this. *See* VA. PRAC. CRIM. P. § 16:5 (West 2009).

[202] *See* VA. CODE ANN. § 8.01-358 (West 2009).

[203] A look at Virginia courts' interpretation of its statute demonstrates that even an open-ended statute is subject to the trial court's discretion and appellate scrutiny. *See* LeVasseur v. Commonwealth, 304 S.E.2d 644, 653 (Va. 1983):

> While the 1981 amendment [to § 8.01-358] makes mandatory the formerly discretionary right of counsel to question the prospective jurors directly, it has no effect on the nature of the questions which may be asked. The questions propounded by counsel must be relevant, as always, and the trial court must, in its discretion, decide the issue of relevancy, subject to review for abuse.

Id.

[204] *See id. See generally* Charity v. Commonwealth, 482 S.E.2d 59 (Va. Ct. App. 1997) (holding that failure to grant counsel the statutory right to conduct voir dire was harmless

affirmative right to conduct voir dire places the burden on counsel to prepare, practice, and perfect their approach to this fundamental trial skill. Furthermore, the military judge will still retain ultimate control of this process, including the ability to restrict improper or irrelevant questioning. Thus, an affirmative right to voir dire will not give counsel free license to abuse the process.

As with any proposal for change, however, compelling arguments exist either to maintain the status quo or eliminate participation of counsel altogether. The following section examines and addresses these counterarguments, concluding that reforming voir dire will not spell disaster; rather, it will improve the process for all parties involved.

C. Counterarguments and Responses

As previously discussed, the tension between judges and lawyers over voir dire could aptly be described as a "tug-of-war."[205] Typically, even military judges who allow counsel to conduct voir dire concede that it takes up too much time and often leads to improper, embarrassing, and confusing questions.[206] As one senior Army judge flatly stated, "[A]ny blame lies with counsel asking insipid, repetitive, confusing and inane questions largely unrelated to the issues in the case."[207] This tension gives rise to four significant arguments against changing the military's voir dire process: (1) counsel's inexperience and/or abuse will create appellate issues that a judge could better avoid; (2) as neutral arbiters, judges are better suited to seat an impartial panel; (3) counsel-conducted voir dire will consume too much time, thereby impeding judicial economy; and (4) the current system works well as-is. This subsection will address each counterargument in turn.

The first counterargument is one that merits significant analysis. Critics of a change to RCM 912 may argue that granting counsel the right to conduct voir dire will lead to abuse. For instance, counsel could

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error when it did not deprive the defendant of a fair trial); *supra* notes 161–68 and accompanying text.

[205] *See supra* notes 54–57 and accompanying text.

[206] *See* Pohl E-mail, *supra* note 179; Grammel E-mail, *supra* note 61 ("Counsel do not do a good job with their current limited role. . . . Improper voir dire questions [are] a common problem.").

[207] E-mail from Colonel Stephen R. Henley, U.S. Army, Chief Trial Judge, to author (Feb. 25, 2010, 14:46 EST).

misstate the law, discuss inadmissible evidence, or ingratiate themselves in a manner that goes beyond permissible rapport-building.[208] In some instances such antics could be annoying and wasteful, but a greater concern is the creation of appellate issues.

The recent CAAF decision in *United States v. Nieto*[209] illustrates this concern. In *Nieto*, trial counsel posed a hypothetical scenario to the members during individual voir dire concerning the validity of a urinalysis with minor procedural defects. While conducting group voir dire, the trial counsel asked, "Does any member believe that any technical error in the collection process, no matter how small[,] means that the urinalysis is per se invalid?"[210] After receiving an affirmative response from each member, the trial counsel attempted to rehabilitate the members during individual voir dire.[211] His tortuous attempts at

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[208] As previously noted, some military justice commentators believe that using voir dire for purposes such as previewing the theory of the case is improper. *See* SCHLUETER, *supra* note 42, § 15-10(A), at 825:

> The sole purpose of voir dire is to determine, through questioning, whether any member is not qualified to sit on the court-martial. And it is improper for counsel to use voir dire to present information that would not be admissible at trial, and to attempt to educate the jury about his theory of the case. There is obviously a thin line between thoroughly questioning the members and educating them about the case, and possible uses of testimony and other evidence. Prudent counsel should, however, focus primarily on the former and avoid questions and comments which could reasonably be interpreted as an attempt to influence the court members.

Id.

[209] 66 M.J. 146 (C.A.A.F. 2008).

[210] *Id.* at 148 (alterations in original).

[211] *Id.* at 148–49. A representative portion of the trial counsel's attempt at rehabilitation reads as follows:

> TC: You believe that any type of deviation from the SOP automatically invalidates that[,] there is no weight to be assigned to it, you didn't follow procedures so therefore you can't rely on it, it is unreliable evidence?
>
> MBR ([Chief Warrant Officer 3 (CWO3)] [M]): Any time you have a gap in the chain, sir[,] it makes it a weak link. So it is possible that any part of that gap could have been tampered with. I would like to hear the evidence of why there is a gap there, and based off of that evidence I could make a better determination of whether it is valid or not valid.

rehabilitation resulted in several members further emphasizing that "any violation of the SOP, no matter [how minor]" would, in their opinion, invalidate the urinalysis results.[212]

The appellant argued that the military judge committed plain error by allowing the prosecution to ask questions which "improperly sought to obtain from the panel members a commitment to convict Appellant based on a hypothetical set of facts."[213] According to the appellant, this attempt at commitment deprived him of his right to an impartial panel.[214] Of significance in this case was defense counsel's failure to object to these questions at trial. Absent such an objection, the CAAF applied a plain error analysis, whereby the "appellant bears the burden of demonstrating '(1) an error was committed, (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to an appellant's substantial rights.'"[215]

The CAAF noted that, rather than ask the court to analyze a military judge's ruling on a challenge, the appellant was essentially asking the court to rule on the "scope of permissible questioning" concerning

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> TC: Okay. So you are talking about custody issues when you talk about the collection process?
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> MBR (CWO3 [M]): Yes, sir.
>
> TC: What if it was something else[?] What if there was a particular space where someone didn't initial, where other wise [sic] they would have? Is that the sort of procedural error that you think would invalidate a urinalysis test per se?
>
> MBR (CWO3 [M]): Only if it is a standard operating procedure for that point in time, yes, sir.
>
> TC: So if there were some body [sic] like the coordinator who was supposed to initial the bottle, and he didn't, that would necessarily mean that you couldn't rely on that sample that was collected because he didn't fulfill the duties he should have?
>
> MBR (CWO3 [M]): Yes, sir.

Id. at 148 (alterations in original).
[212] *Id.* at 148.
[213] *Id.* at 149.
[214] *Id.*
[215] *Id.*

hypotheticals.[216] Acknowledging that this was a "matter of first impression," and absent an objection at trial, the CAAF determined that the military judge had not committed plain error.[217]

On its face, *Nieto* represents a judge's voir dire nightmare. Trial counsel asked a confusing hypothetical question and spent valuable court time trying to recover from his mistake.[218] The concurring opinions give rise to another set of concerns for military judges, however. In one concurring opinion, Judges Baker and Erdmann stated that in cases where counsel's hypothetical questions were "obvious attempts to commit the members," the "military judge would err in not testing the basis for such questions."[219] In other words, these judges would seemingly "impose a sua sponte duty on a military judge" to cut off improper questions, such as those presented in *Nieto*.[220]

The prospect of having to frequently step in to "manage" voir dire in order to avoid appellate issues understandably leads some judges to prohibit counsel-conducted voir dire all together.[221] Certainly, this approach would obviate a *Nieto* scenario. Completely eliminating voir dire by counsel is not an appropriate solution, however. For one, counsel cannot improve their ability to conduct voir dire without practice. Operating from the premise that counsel-conducted voir dire is at least sometimes appropriate, military judges may have to endure some stumbling (and the occasional train wreck) to give counsel the opportunity to develop their skills. Second, the psychological benefits discussed above regarding juror candor militate against the complete elimination of counsel-conducted voir dire.[222] Perhaps the most compelling reason to permit counsel-conducted voir dire, however, is that outright denial could lead to its own set of appellate issues.[223] In other words, rather than eliminating an unnecessary evil, denying counsel the chance to conduct voir dire could give rise to a different aspect of the same problem.

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[216] *Id.* at 150.
[217] *Id.*
[218] *Id.*
[219] *Id.* at 152 (Baker & Erdmann, JJ., concurring in the result).
[220] Major S. Charles Neill, *There's More to the Game than Shooting: Appellate Court Coaching of Panel Selection, Voir Dire, and Challenges for Cause*, ARMY LAW. Mar. 2009, at 72, 82.
[221] *See* Lee Interview, *supra* note 77.
[222] *See supra* notes 185–93 and accompanying text.
[223] *See, e.g.*, United States v. Jefferson, 44 M.J. 312 (C.A.A.F. 1996) (holding that the military judge abused his discretion by refusing to reopen voir dire upon defense request).

The remaining counterarguments can be addressed fairly succinctly. Some critics may argue that judges are in a better position to seat an impartial panel. Proponents of this viewpoint would argue that counsel must advocate for a certain position, thereby lacking impartiality themselves. In other words, rather than seek a "neutral" panel, counsel will seek a "favorable" panel. This counterargument rightly points out that trial and defense counsel step into a courtroom with a decided goal and point of view, one not shared by the judge. Nonetheless, counsel are still in a superior position to exercise challenges in a fashion that leads to an impartial panel. As discussed *infra*, counsel have access to facts about panel members as well as case-dispositive facts that allow for carefully tailored questioning. Furthermore, both case law[224] and the judge's discretion during voir dire limit the use of questions and challenges to seat a panel that is "favorable" (i.e., biased). For these reasons, allocating the responsibility to conduct voir dire among the judge and counsel will better ensure an impartial panel than voir dire conducted solely by the military judge.

Another counterargument is that granting the right to counsel voir dire would lead to tedious, inartful questioning, thereby wasting valuable court time. Once again, the counterpoint to this critique is the military judge's overall responsibility for controlling voir dire and protecting the record. As discussed previously, the proposed change to RCM 912 would still require counsel to ask only relevant questions for proper purposes. Therefore, counsel could object, or judges could sua sponte limit questioning, once the limits of relevancy were strained. Furthermore, one could argue that creating a right to conduct voir dire will provide counsel a strong incentive to thoroughly prepare for voir dire. For example, depending on the circumstances, an appellant could argue that failure to request counsel-conducted voir dire resulted in ineffective assistance of counsel.[225] The potential for such an argument

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[224] *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids the exercise of peremptory challenges to eliminate jurors based solely on race); J.E.B. v. Alabama, 511 U.S. 127 (1994) (holding that exercising peremptory challenges based solely on sex is unconstitutional).

[225] The test for ineffective assistance of counsel comes from *Strickland v. Washington*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the

could energize defense counsel to develop their advocacy skills in this area.

Another consideration when looking at judicial economy is the access that military counsel have to information about the panel. Compared to their civilian counterparts, military counsel can conduct an effective "pre-screening," thereby eliminating the need to use courtroom time for preliminary questions. First, the convening authority must follow Article 25, UCMJ, criteria when selecting the members.[226] These criteria include age, experience, and judicial temperament.[227] Thus, counsel approach the voir dire process knowing that the members have already been through a screening process more rigorous than those found in civilian jurisdictions.[228] Second, counsel typically have some knowledge of the members prior to trial. Some of that information may be naturally derived from working with the members in the course of regular duties.[229] Unique to the military is the concept that everyone in the courtroom—counsel, members, accused—often work on the same military installation. Furthermore, counsel have access to panel member questionnaires.[230] These documents provide information ranging from basic (e.g., past duty assignments) to complex (if requested by counsel, with the military judge's approval).[231] Therefore, military trial and

> defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

[226] UCMJ art. 25 (2008).

[227] *Id.* Specifically, Article 25(d)(2) states: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id.* art. 25(d)(2).

[228] *See, e.g.*, 28 U.S.C.A. §§ 1861–1878 (West 2009) (setting forth the criteria for serving on a federal jury). In essence, the default is that any U.S. citizen can serve as a federal juror, absent specific statutory qualifications such as lack of English proficiency, mental or physical infirmity, pending felony charges, or a felony conviction. *Id.* § 1865.

[229] *See* United States v. Richardson, 61 M.J. 113, 119 (C.A.A.F. 2005) (noting that in the military, trial counsel and members of commands they advise can develop close personal and professional relationships).

[230] MCM, *supra* note 8, R.C.M. 912(a)(1).

[231] *Id.* R.C.M. 912(a)(1)(A)–(K). An example of more complex information that could be adduced by a questionnaire would be the member's prior experience with law enforcement, or as a victim of crime.

defense counsel can approach voir dire already aware of preliminary information which would require a great deal of time to elicit in civilian jurisdictions.

A final criticism of this proposal might be that such a change is wholly unnecessary. Most of the time, regardless of who conducts voir dire and how, the process "works." If it does not, then the appellate courts can clean it up at their level. This argument, however, focuses on the end result, and not the process. When speaking broadly about the rule of law, crucial to the functioning of a system of justice are the perception of fairness, and the trust of the people in the system.[232] As discussed previously, the concept of trial before an impartial jury is fundamental in the American justice system.[233] Procedures that restrict, or even remove, the ability of government and defense counsel to fully participate in ensuring an impartial jury infringe upon that fundamental right.[234] Even if such a restriction results in harmless error, a perception of unfairness diminishes trust in the process. Therefore, counsel should have the opportunity at courts-martial to fully participate in voir dire.

Given the points and counterpoints discussed above, an amendment to RCM 912(d) granting a right to counsel-conducted voir dire is an appropriate change to the military justice system. The unique nature of the selection of members in courts-martial, the composition of military panels, and the restrictions on peremptory challenges make voir dire crucial for counsel to elicit information to intelligently exercise challenges. Such a change will minimally disrupt the current practice of military justice, because military judges will still retain inherent control over the process. Furthermore, this amendment can motivate counsel on both sides to focus on voir dire and its importance in seating an impartial panel. An additional—and significant—benefit will be an increase in candid responses from members. Finally, this change strengthens the

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[232] *See* CTR. FOR MILITARY L. & OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., RULE OF LAW HANDBOOK 4–5 (2009) (citing Richard H. Fallon, *The Rule of Law as a Concept in International Discourse*, 97 COLUM. L. REV. 1, 7–8 (1997) (citations omitted)). "The final element [of the rule of law] involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures." Fallon, *supra*, at 9.

[233] *See supra* notes 22–28 and accompanying text (discussing the development of an impartial, versus local, jury in the United States in the late eighteenth century).

[234] *See, e.g.*, United States v. Jefferson, 44 M.J. 312 (C.A.A.F. 1996) (holding that the military judge abused his discretion by refusing to reopen voir dire upon defense request).

military justice system by emphasizing the significance of an impartial jury as a fundamental right in the adversarial trial process.

VI. Conclusion

The opening quote from *Measure for Measure* demonstrates that the opportunity to be judged by a group of strangers has its inherent dangers. The fundamental right to an impartial jury has existed prior to our country's inception, and is guaranteed by the Constitution. As repeatedly illustrated by courts and commentators, although voir dire is not a fundamental right, it is inextricably linked to enforcing the Sixth Amendment's guarantee. Only by a thorough examination of potential jurors can counsel seek to challenge those jurors "[g]uiltier than him they try."[235]

Although some may argue that the military's current voir dire process is not broken, it certainly can be improved. The current system allows the military judge great latitude to restrict or deny counsel-conducted voir dire. Yet, both judges and courts agree that liberal voir dire can allow for a more informed exercise of challenges, improve counsel's advocacy skills, and even save a case on appeal. An amendment to RCM 912 guaranteeing counsel's right to conduct voir dire can accomplish these goals, while also ensuring that voir dire is conducted uniformly throughout the military.[236]

Whether by means of this article's proposal or some other version, the time has come to re-look how military courts conduct voir dire. Cases like *Donovan v. People* demonstrate that the inherent tensions regarding counsel-conducted voir dire have existed for decades.[237] The states have repeatedly researched, debated, and completely reformed voir dire practice in their courtrooms. And yet, the process used by military courts has remained virtually untouched since 1950. A respected cultural icon once wisely stated, "A change would do you good."[238] In this instance, a change to RCM 912 would benefit courts in the fair administration of

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[235] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2.
[236] *See* Conn E-mail, *supra* note 74 (stating that voir dire may need "more uniformity in practice").
[237] Donovan v. People, 28 N.E. 964 (Ill. 1891).
[238] SHERYL CROW, A CHANGE WOULD DO YOU GOOD (A&M Records 1996).

justice, protect the fundamental rights of the accused, and strengthen the public's perception of the fairness of military justice. Good, indeed.