No. 4

Voir Dire in a Time of "Me Too"

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Due process as a cultural matter is influenced by legal ideas but it is really a cluster of fluid notions that arise when people in different social and political contexts react to what they perceive as unfairness, abuse, and oppression.[1]

"Me Too"[2]

Have you or a close member of your family ever been a victim of sexual assault?[3] Posed to some people, this question may provoke an emotional or overwhelming response. It may also elicit feelings of shame or embarrassment. These natural reactions can be expected when discussing such a traumatic event. Because of these feelings, victims of sexual assault may be reluctant to come forward and report these crimes.[4] While the paradigm has started to shift, the private and sometimes embarrassing nature of sexual assault still sends most victims to the shadows. This reluctance creates its own set of problems for investigating and prosecuting sexual assaults. To counteract these problems, the U.S. Army has taken a multitude of steps to improve protections for victims and encourage reporting.[5] In spite of these safeguards, there is still at least one area that falls short in providing protections to victims: voir dire.

Voir dire begins with the panel members being asked questions in a group setting.[6] Once the military judge has finished asking the panel members standard questions from the Military Judges' Benchbook,[7] the judge has the discretion to allow counsel from both sides to ask questions of the panel members.[8] The military judge will then excuse the panel members, and each party will have a chance to request individual voir dire of particular panel members.[9] While this questioning is done outside the presence of the other members, it is still done in an open courtroom with spectators, to include: commanders, noncommissioned officers, Soldiers from the accused's unit, civilians, Family members of the accused, and possibly members of the press. If a member answers affirmatively to being a victim of sexual assault or to having someone close to them who is a victim of sexual assault, the parties can question the member about the incident. While the military judge can limit the scope of these questions, the member is still required, by oath, to be truthful. Currently, no additional protections exist to protect a sexual assault victim who is being questioned during voir dire.

In today's climate, nothing has become more contentious than the delicate balancing act of the rights of the accused and the rights of the victim in sexual assault cases. This stress exists throughout the military justice process, from the investigative stages through post-trial. However, one commonly overlooked, yet important, area where this tension creates significant strains is voir dire. As society and the military become more aware of what constitutes sexual assault, more and more service members are coming forward as victims.[10] In addition to this awakening, the military has put more procedures and protections in place for victims of sexual assault.[11] However, one protection that must continue to be honored, is the protection of the court-martial process and a fair hearing for the accused.

To protect the individuals on both ends of the military justice spectrum, changes must be made to the voir dire process. These changes include adding additional questions to the panel member questionnaires, adjusting voir dire questions in the Military Judges' Benchbook, and revising Rules for Court-Martial (RCM) 912 to allow the military judge to seal portions of individual voir dire and close the courtroom during questioning. These changes are required to protect the process, the accused, and the privacy of victims by allowing panel members to feel more comfortable answering questions during voir dire that concern whether they or someone close to them has been a victim of sexual assault. The honesty and openness of panel members allow for the accused to effectively question the members and decide whether it is appropriate to exercise a challenge for cause. Additionally, the panel member who has been a victim of sexual assault or has a Family member who is a victim of sexual assault is protected from the embarrassing nature of having to discuss it in an open courtroom.

This article will explore the purpose behind voir dire both philosophically and practically. It will open with a real world example that demonstrates the importance of changing the voir dire process in sexual assault cases and then address the current rules and law pertaining to voir dire and the rights the accused has as it pertains to the process. This will include the panel members' duty to disclose and possible challenges the accused may have. It will then discuss some of the rights victims have during the investigative process and how there are currently no protections for victims when it comes to voir dire. The article will conclude by proposing changes to RCM 912, the Military Judges' Benchbook, and panel questionnaires that will help ensure the privacy of victims of sexual assault but also continue to protect the accused by providing a fair voir dire process.

Voir Dire

The Sound of Silence[12]

During a court-martial for which a Soldier was accused of rape, an enlisted panel was assembled.[13] The panel members were asked during voir dire: "Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?" Two officers responded in the affirmative. The remaining panel members responded in the negative. After individual voir dire was conducted with the two officers who responded in the affirmative, the defense counsel challenged both members for cause for implied bias. Both challenges were granted by the military judge. The court-martial continued, and the Soldier was convicted of rape and sentenced to over ten years of confinement.

Approximately three months later, the same panel members were selected for another court-martial for sexual assault. The same defense counsel from the previous court-martial was representing the accused. During group voir dire, when asked if any member or someone close to them had ever been the victim of a similar offense, all members responded as they had in the previous court-martial except for two enlisted members. During individual voir dire, the defense counsel questioned both members about their responses. Both members stated that they had been victims of sexual assault as children and that they had never disclosed the incidents to anyone until then. When asked by the defense counsel why they did not disclose their status as victims during voir dire at the previous court-martial, they stated that they were not ready to publicly disclose that they were victims of sexual assault. After being challenged for cause, both members were excused by the military judge.

This fact pattern creates two serious issues: one obvious and one not so apparent to those unfamiliar with military justice. The first is the unfortunate and embarrassing situation the panel members were placed in by having to reveal for the first time, in a room full of people, that they were victims of sexual assault. This disclosure, while necessary and required for justice, could have been given under circumstances that provided more privacy to the victims. The second issue raised by this fact pattern, and the one tied directly to due process, is that the accused did not receive a fair and impartial panel at the first court-martial. With some relatively minor changes to voir dire, these issues can be avoided while still protecting the process, the accused, and victims.

Voir Dire as a Shield

Voir dire can set the tone for an entire court-martial. It is arguably the most important aspect of a trial. This is especially true for the accused. Voir dire is the stage of trial where the individuals who will decide the accused's fate are determined. The Uniform Code of Military Justice (UCMJ) provides the accused the right to trial before members.[14] "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel."[15] However, protections for the accused under the UCMJ process do not stop at being provided the right to a panel. What is even more important than having a panel, is having an impartial panel who will hear the evidence and correctly apply the law to the facts in determining whether the accused is guilty or not. Members are subject to voir dire by the military judge and counsel.[16] "The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial."[17] Fleshing out the impartiality of court members is key to a successful voir dire. Without an impartial panel, the accused loses his due process rights and the entire UCMJ process can be brought into question by the public.

Voir dire and the panel selection process is designed to serve as a shield to protect the accused by producing an impartial panel. The UCMJ has direct prohibitions on who can serve on the panel. For example, an accuser or witness for the prosecution cannot serve as a panel member in a general or special courts-martial.[18] The UCMJ also directs what member characteristics the convening authority must consider in detailing a panel. When selecting a panel, the general court-martial convening authority must select those members who, in his or her personal opinion, are "best qualified" in terms of age, experience, education, training, length of service, and judicial temperament.[19] These criteria usually lead to the convening authority selecting members who are older and have been in the military for a substantial amount of time. The one trait these

members will usually all have in common is experience. However, that experience will be vastly different from member to member.

Everyone's own personal experiences shape and define the lens through which they view most situations in life. This is especially true when it comes to experiencing any traumatic event and can apply whether the person experienced the event first or second hand. While combat is what most individuals think of when discussing trauma and the military, what is sometimes forgotten is the trauma of sexual assault and how it affects a service member's experiences and viewpoints.[20] This trauma also extends to those who have a close family member who has been a victim of sexual assault. According to the National Center for Injury Prevention and Control, nearly 1 in 5 women (18.3%) and 1 in 71 men (1.4%) in the United States have been raped during their lifetime.[21] These staggering numbers implicate all professions and demographics, including the military. The make-up of a traditional panel, as provided for in the UCMJ, increases the likelihood that a potential member is or has been married, has children, and has supervised Soldiers. This further increases the probability that a potential panel member is or knows someone who is a victim of sexual assault. This becomes more relevant in today's Army because a high number of contested courts-martial involve sexual offenses.[22] This probability creates an issue of partiality that must be further explored and challenged.

Voir Dire as a Sword

The opportunity for voir dire exists so parties can obtain information to intelligently exercise their challenges.[23] To effectuate this, parties must be able to develop effective questions and explore potential biases of members. Voir dire examination protects the accused's right to a fair trial "by exposing possible biases, both known and unknown, on the part of potential jurors."[24] Voir dire is the procedural mechanism for testing member bias.[25]

Before voir dire, the trial counsel administers an oath to panel members to "answer truthfully the questions concerning whether you should serve as a member of this court-martial."[26] In theory, this oath is the foundation for which the voir dire process is based. Court-martial members have a duty to disclose and are required to honestly answer questions during voir dire.[27] The entire procedure relies on the honesty of the panel members and their forthcoming answers. Without it, the accused cannot effectively explore the potential biases of those members who are charged with fairly hearing the case.

To challenge members for cause, the defense must show that the member has one of two types of bias: actual or implied. Actual and implied bias are based on RCM 912, which states that a member should not sit on the court-martial if serving would create a "substantial doubt as to [the] legality, fairness, and impartiality" of the court-martial proceedings.[28] In contemporary courts-martial, this is seen most in whether a panel member can be impartial in hearing a case involving sexual assault. Actual and implied bias have separate legal tests; however, they are not separate grounds for challenge.[29] A challenge for implied bias is reviewed objectively, through the eyes of the public.[30] "Implied bias exists when most people in the same position would be prejudiced."[31] The military judge should focus on "the perception or appearance of fairness of the military justice system" when applying the implied bias standard.[32] The military justice system, while possessing some similarities with the civilian justice system, has its own unique complexities that may be foreign to those who are not familiar with the military.

One perception is that the military system is inherently unfair and that military courts are just a "rubber stamp" from the command.[33] Presently, this perception is not without merit.[34] To counter this view, military judges should liberally grant challenges for cause from the defense.[35] Known as the "liberal grant mandate,"[36] this judicial directive levels the playing field for the accused. The "liberal grant mandate" and challenges for implied bias address "historic concerns about the real and perceived potential for command influence on members' deliberations."[37] Not only does the convening authority decide which cases to send to a court-martial, the convening authority also selects the panel members who will hear the case. At first glance, the convening authority's power to both refer the case and select the panel seems unjust. However, the "liberal grant mandate" counterbalances this by giving military judges leeway in granting challenges for implied bias; thereby, increasing the public's confidence in the fairness of the military justice system.

The liberal grant mandate not only addresses the fairness of the military justice system in the eyes of the public, it also advances justice by other means.

> The liberal grant mandate is part of the fabric of military law. The mandate recognizes that the trial judiciary has the primary responsibility of preventing both the reality and the appearance of bias involving potential court members. To start, military judges are in the best position to address issues of actual bias, as well as the appearance of bias of court members. Guided by their knowledge of the law, military judges observe the demeanor of the members and are better situated to make credibility judgments. However, implied bias and the liberal grant mandate also recognize that the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings, before a full trial and possibly years of appellate litigation. The prompt resolution of member challenges spares the victim the potential of testifying anew, the government the expense of retrial, as well as society the risk that evidence (in particular witness recollection) may be lost or degraded over time. As a result, in close cases military judges are enjoined to liberally grant challenges for cause. It is at the preliminary stage of the proceedings that questions involving member selection are relatively easy to rapidly address and remedy.[38]

By addressing potential panel issues at the trial level, the accused, the government, and any victim benefit. The accused receives a fair trial and is able to address issues with the panel at the outset. The government benefits by saving the time

and resources that would be required for a potential retrial or *DuBay* hearing.[39] Finally, the victim benefits by not having to endure the stress and burdens of a new contested court-martial.

Victim Bias

The most common issue that arises during voir dire is implied bias. As can be expected, panel members bring their own experiences, both negative and positive, with them when they are selected for a court-martial. These experiences can range from negative or positive involvements with law enforcement or having been a witness to a crime. Sometimes these experiences are benign and leave nothing more than a fleeting memory of the events. On the other hand, some occurrences can be so disturbing or traumatic that they may be forever ingrained in the individual's memory and have lasting effects on their decision-making and opinions. These biases are the exact kind of predispositions that voir dire is designed to confront. The accused's ability to explore a member's potential bias as a victim or close relationship to a victim has been and continues to be a crucial component in sexual assault courts-martial.

An effective voir dire does not stop at just identifying an event that may affect a member. The accused must still develop questions for the members that will explore whether the member's past experiences will affect their ability to fairly serve as a panel member or cause the public to question that member's impartiality. *United States v. Terry* offers a great contrast between potential panel members' past experiences and whether there may be an actual or implied bias.[40] In *Terry*, the accused was tried for rape.[41] During voir dire, two officer members indicated that they knew family or friends who had been the victims of sexual assault, and the accused challenged both for cause.[42] The first member stated that his wife had been a victim of some form of sexual assault by a family member. However, he also stated that she had not discussed it in over five years, had reconciled with the individual, and the incident had occurred ten to twenty years earlier.[43] The court held that "a prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service," and the military judge properly denied the challenge for cause.[44] The other officer member stated that his girlfriend (whom he intended to marry) had been raped and became pregnant.[45] Because of that experience, she broke off her relationship with the member.[46] The court held that the military judge erred in not granting the challenge for cause under the implied bias theory and "liberal grant mandate" because most persons in the member's position would have difficulty sitting on a rape trial, and an objective observer may have doubts about the fairness of the accused's court-martial panel.[47] The court found that the member's experience with rape was "too distinct to pass the implied bias muster."[48] This case exemplifies the importance of a thorough voir dire.

A detailed voir dire with forthcoming panel members benefits both the accused and the government. Even though a potential member may be a victim of a crime, they are not per se disqualified.[49] A victim of a crime similar to that being tried can sit as a member if they are unequivocal in their voir dire responses and are able to be open-minded and consider the full range of permissible findings and punishments.[50] To promote justice and ensure a fair trial, the trial counsel must also effectively examine a potential panel member to reveal bias or develop the record to support that the member can be open-minded. The exploration of potential biases by both parties is key to an efficient and fair court-martial process.

However, an honest panel is necessary to have a full and open voir dire. "Where a potential member is not forthcoming, however, the process may well be burdened intolerably."[51] The effect of a panel member's nondisclosure during voir dire can be significant and result in an entirely new trial. When a juror fails to disclose information during voir dire, the Supreme Court has held that a party must "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."[52] The Court further asserts that the normal procedure when a party asserts juror nondisclosure is to remand the issue to the trial court to develop a record or resolve factual controversies.[53]

Protecting Victims

Protecting victims of sexual assault has become an important facet of military justice. Recently, the Military Justice Act of 2016 has made significant changes to the UCMJ and RCM.[54] While these new rights and protections for victims and the accused are important, one overlooked area that currently does not provide any protections to victims of sexual assault is voir dire. When impaneling court members in a case involving sexual assault, a potential panel member who has been a victim may find themselves being questioned in open court about the event and how it has affected them. Being questioned about such a personal and traumatic experience can be intimidating and embarrassing. For some panel members, this may be the first time they have ever been questioned about the incident or it may even be the first time they have ever disclosed such an event.

In spite of the rights given to victims of sexual assault over the last decade, voir dire can potentially violate some of these rights. For example, victims in the military have a right to file a restricted report of sexual assault.[55] A restricted report in the Department of Defense is an option for an adult victim of a sexual assault to confidentially disclose the crime to a specifically identified individual without their chain of command being notified or having an official law enforcement investigation opened.[56] The three types of individuals authorized to receive a restricted report are a Sexual Assault Prevention and Response Office Victim Advocate, Sexual Assault Response Coordinator, or a healthcare provider or personnel.[57] Restricted reporting allows the victim to receive healthcare after the assault and gives them time to process the assault and heal.[58] This is a critical resource that is provided to victims of sexual assault. However, voir dire can deprive victims of this important right by essentially turning a restricted report into an unrestricted report. Because panel members have a duty to be honest during voir dire, they must disclose whether they are a victim or know someone close to them that is a victim of sexual assault when they are questioned under oath. However, by divulging this information in a courtroom with numerous spectators, the panel member has

inadvertently made an unrestricted report of sexual assault. This prevents victims from disclosing the sexual assault on their terms and must be remedied.

Achieving Hydrostatic Equilibrium[59]

Rarely do the interests of an accused and a sexual assault victim intersect. While the accused requires due process and the fair administration of justice, a victim requires privacy and support. The constant struggle of these competing interests is at the heart of many of the changes to the court-martial and investigative processes over the last decade. Voir dire can offer the rare forum for which this balancing act achieves its goal of benefiting the accused and victims. The below recommended protections are best implemented by making changes to RCM 912.[60] These proposals are in line with recent trends in improving victims' rights under the UCMJ and still allow for the fair and efficient administration of justice during the court-martial process.

Panel Questionnaires

For all practical purposes, voir dire begins at the panel questionnaires. Under RCM 912(a)(1), trial counsel may (and shall upon request of defense counsel) submit to members written questionnaires before trial.[61] "Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges."[62] These questionnaires are the first opportunity for the prosecution and defense to learn about the panel members' backgrounds and start developing voir dire questions. However, counsel are limited to the somewhat narrow information provided on the forms. Even though the questionnaires contain ample information about the members' military careers, education, and basic familial facts, they provide little background into any potential personal biases the member may harbor.

When a panel member's questionnaire contains information that may result in disqualification, the defense must make reasonable inquiries into the background of the member.[63] The issue then becomes a matter of how defense counsel can make reasonable inquiries about an issue that is not identified before trial. One method to remedy this is by adding a few questions to the questionnaire that identifies whether the potential panel member is a victim of sexual assault or has someone close to them who is a victim of sexual assault. A questionnaire that provides this additional information allows the defense counsel the ability to develop appropriate voir dire questions that may reveal member bias. These new questionnaires would alert the counsel and military judge to the issue so that the questioning of the member can be avoided in a public forum. This allows the member the opportunity to be more candid, which can be beneficial to counsel from both sides.

Closing Court

To protect victims of sexual assault and encourage candor during voir dire, the court should be closed when a potential member is being examined by either party about a sexual assault. The structure for this can be found in the Military Rules of Evidence (MRE) 412 hearing procedure.[64] During a motions hearing under MRE 412, the military judge will close the courtroom.[65] In practice, the military judge will ask all spectators to leave the courtroom before the motions hearing begins. The judge will then instruct the bailiff to also leave the courtroom and ensure that no one enters the courtroom until the hearing on the motion is complete. The only individuals left in the courtroom will be the accused, counsel for the accused, government counsel, the court reporter, and the military judge. For the duration of the hearing, to include witness examination and argument, these are the only individuals who will be present in the courtroom. This closure is intended to protect the privacy rights of victims of sexual assault.

Potential panel members can also benefit from having the courtroom closed during specific portions of voir dire. To protect those individuals who have been victims of sexual assault, a new procedure should be established for this closure. When the convening order is due to the court in accordance with the military judge's pre-trial order, the trial counsel will also alert the court to whether a potential panel member has indicated on their questionnaire that they or a close family member has been a victim of sexual assault. During an RCM 802[66] session before trial, the military judge will ensure that both parties understand which potential members have indicated that they or a close family member are a victim of sexual assault. The military judge will then instruct the parties on the order of individual voir dire for those members and when during that individual voir dire session that the courtroom will be closed.

When the panel is brought in at the beginning of the court-martial, the military judge will give the standard preliminary instructions and begin group voir dire with the questions found in the Military Judges' Benchbook.[67] Because the panel questionnaires will now reflect whether or not a potential member has been a victim of sexual assault or has a close family member who has been a victim, the military judge will not ask the panel members in group voir dire if any member has been a victim of a similar crime.[68] Once group voir dire is complete, the panel members will be excused. The military judge will ask counsel from both sides which panel members, excluding the members who were discussed during the RCM 802 session, that they would like to question individually and the reasons why. Once the military judge determines which members will be individually questioned, the individual voir dire process will begin.

The military judge, at her discretion, will determine the order of individual voir dire and when the courtroom will be closed for the parties to question a particular panel member about being a victim of sexual assault.[69] By allowing the military judge to close the courtroom during voir dire, victims of sexual assault are given additional protections that have not been previously afforded to victims in this manner under the UCMJ.

Sealing the Record of Trial[70]

To further protect victims of sexual assault who serve as panel members, the portion of the Record of Trial that includes the closed session of their individual voir dire examination should be sealed. This would be done in the same manner that a motions hearing under MRE 412 or MRE 513 is sealed by the military judge.[71] Sealing the

(Credit: istockphotograph.com/JakeOlimb)

portion of the Record of Trial concerning the questions and answers of a victim of sexual assault is narrowly tailored to protect the privacy interest of the victim, and the military judge would only be sealing the portion of questioning that pertains directly to the member's status as a victim or having a close family member who has been a victim. The sealing order would address the four-part test for closing a court-martial[72] and is narrowly tailored to protect the interest of victims.

While not required, a minor change could be made to RCM 1112 to reflect the sealing of the closed individual voir dire sessions. The new RCM 1112(e)(3)(B)(ii) would read: any recording or transcript of a session that was ordered closed by the military judge, to include closed sessions held pursuant Mil. R. Evid. 412, 513, 514, or RCM 912.

Challenges

The proposed changes are not without their own difficulties. The most challenging difficulty is ensuring that the accused gets a fair trial while also ensuring that the closure and sealing are limited to only what is necessary to achieve the objective of protecting victims' rights. Arguably, the accused benefits from these protections because it encourages the potential panel members to be more open. When the panel members are more forthright in their voir dire answers, the accused can better use his challenges for cause. It is important to balance the rights of the accused and a victim while still maintaining the openness of the criminal justice process.[73] "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness."[74] This fairness to the public is in conflict with closing the courtroom and sealing the record to protect the privacy rights of victims.

In *Press-Enterprise Co. v. Superior Court of California*, the defendant was tried and convicted of the rape and murder of a teenager.[75] The petitioner moved that voir dire be open to the public and press; however, the motion was opposed by the prosecutor because the state felt that if the press was present, the responses from the jurors "would lack the candor necessary to assure a fair trial."[76] The judge agreed with the state and closed the six weeks of voir dire, except for three days.[77] The Supreme Court held that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[78]

The Supreme Court does acknowledge that some voir dire questions may implicate legitimate privacy concerns of prospective jurors.[79] The Court gives the example of a prospective juror who has been raped or has a member of her family that has been raped and declined to disclose the crime because of the embarrassment and emotional trauma that may come from the disclosure.[80] "The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process."[81] To protect the privacy interests of victims and preserve fairness, the Court proposes that the trial judge should inform the prospective jurors of the sensitive nature of the questions and any juror who believes that the public questioning may be damaging because of the embarrassment it brings, may request an opportunity to present the matter to the judge in camera while on the record and with both parties present.[82]

> By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes on a significant interest in privacy. This process will minimize the risk of unnecessary closure . . . . When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.[83]

The privacy issues and proposal in *Press-Enterprise* are similar to those addressed in this article's proposed changes

to RCM 912. The proposed RCM 912 balances the rights of the accused, the victim, and the public by limiting the closure of the proceedings to only what is necessary to protect the privacy interests of the victims or family members of victims.

Another challenge facing this proposal is the amount of time that the new voir dire process will take. For the individual voir dire sessions involving panel members who are victims of sexual assault, the military judge will have to close and then open the courtroom each time a member is questioned about the events. Depending upon the size of the courtroom and the number of spectators, this can be very time-consuming. This is even more burdensome if a majority of the potential panel members need to be questioned in a closed session. The voir dire process, as currently constructed, can already create long days for the panel members, the military judge, and both parties. The proposed changes to the voir dire process make it likely that the long, tedious days in the courtroom may get even longer. While this is a valid concern, one could argue that this is offset by the time and resources that would be expended for a new trial or *DuBay* hearing, should a panel member fail to disclose that they were a victim of sexual assault.

Conclusion

Under the UCMJ, nothing may be as important as providing an accused due process and a fair and impartial trial. Voir dire is a significant component of this. However, in addition to protecting the accused, victims of sexual assault should also be protected. While these two parties are usually on opposing ends of the military justice spectrum, both deserve our attention. Significant strides have been made in protecting the accused and victim. In addition to creating new rights for the accused, the implementation of the Military Justice Act 2016 has provided significant rights to victims.[84] While the Army has taken these steps to provide new rights and resources to victims, voir dire has been overlooked as a potential area that can provide additional safeguards. By allowing victims of sexual assault to be questioned in an open courtroom about such a traumatic and disturbing event, we are further compounding their suffering and pain. To better protect victims, and by extension the court-martial process, changes should be made to the voir dire process. These changes include adding a section to panel member questionnaires that allows the member to note whether they or someone close to them has been a victim of sexual assault. After noting whether they are a victim or know someone who is a victim, steps should be taken to ensure they are not further embarrassed by having to discuss the event in an open courtroom. This can be accomplished by adding a section to RCM 912 that allows the military judge to close the courtroom during the examination of panel members about such matters. This closure would be limited to the questioning about the specific instance that the member disclosed on their questionnaire. After trial, that portion of the Record of Trial that contains the closed examination of a panel member, should be sealed by the military judge.

By making these proposed changes to voir dire, victims of sexual assault are better protected from unnecessary disclosure or questioning in a public setting. Furthermore, these changes also serve the accused by providing him the opportunity for a fair voir dire procedure. By allowing panel members a more private setting to discuss the sexual assault, they will likely be more forthcoming with their answers. This candor will allow the defense counsel to effectively develop their voir dire and intelligently use their challenges. This may be one of the few areas of the law where the rights of the accused and the victim intersect. By making these simple, yet important, changes to the voir dire process, we can close a gap in the rights that are provided to victims of sexual assault while also further promoting justice for the accused. **TAL**

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Notes

1. Emily Stewart, *Trump Wants "Due Process" for Abuse Allegations. I Asked 8 Legal Experts What That Means.*, Vox (Feb. 12, 2018, 3:08 PM), https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump.

2. *See generally* Me Too, https://metoomvmt.org (last visited July 24, 2019) (providing a brief background on the "Me Too" movement).

3. This question is similar to a question asked of panel members by the military judge during voir dire. "Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?" U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook para. 2-5-1 (10 Sept. 2014) [hereinafter DA Pam. 27-9].

4. In addition to reluctance to report sexual assaults based on the personal and private nature of the event, a victim may also be reluctant to report because of the status of the perpetrator, such as a boss, family member, or significant other.

5. One of these provided protections is the ability for a Soldier to make a "restricted report" of a sexual assault. *See Restricted Reporting*, U.S. Dep't of Def. Sexual Assault Prevention and Response Off., https://www.sapr.mil/restricted-reporting (last visited July 24, 2019) [hereinafter DoD SAPRO] (providing an explanation of restricted reporting in the Army).

6. Manual for Courts-Martial, United States, R.C.M. 912(d) (2019) [hereinafter MCM].

7. DA Pam. 27-9, *supra* note 3.

8. MCM, *supra* note 6.

9. MCM, *supra* note 6.

10. *See* Thomas Gibbons-Neff, *Reports of Sexual Assault in the Military Rise by 10 Percent, Pentagon Finds*, N.Y. Times (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/us/politics/sexual-assault-reports-military-increase.html; Greg Myre, *Despite Prevention Programs, Sexual Assaults Rise at Military Academies*, NPR (Feb. 14, 2019, 9:44 AM), https://www.npr.org/2019/02/14/694597943/despite-prevention-programs-sexual-assaults-rise-at-military-academies.

11. *See generally*, Military Justice Act of 2016, 114 Pub. L. No. 328, Division E, 130 Stat. 2000, 2894 (2016) (prescribing reform of the UCMJ).

12. Simon & Garfunkel, The Sound of Silence (Columbia Records 1965).

13. Some facts have been changed to protect the identities of the panel members and victims.

14. UCMJ art. 25 (2018).

15. United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001).

16. UCMJ art. 41 (2018).

17. United States v. Jefferson, 44 M.J. 312, 321 (C.A.A.F. 1996).

18. UCMJ art. 25(e) (2018).

19. UCMJ art. 25 (2018).

20. In fiscal year 2017, there were 6,769 restricted and unrestricted reports of sexual assault involving service members as either victim or subject. U.S. Dep't of Def. Sexual Assault Prevention and Response Off., Statistical Data on Sexual Assault, app. B, 8 (Apr. 2018), http://sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf. These figures do not include sexual assault allegations involving spouses and/or intimate partners. *Id.* at 4.

21. Nat'l Ctr. for Injury Prevention and Control, National Intimate Partner and Sexual Violence

Survey 2010 Summary Report, 1 (Nov. 2011), https://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.

22. U.S. Dep't of Def. Sexual Assault and Prevention and Response Off., Metrics and Military Justice Indicators on Sexual Assault, app. C, 27-30 (Apr. 2018), https://sapr.mil/public/docs/reports/FY17_Annual/Appendix_C_Metrics_and_Military_Justice_Indicators.pdf.

23. MCM, *supra* note 6, R.C.M. 912(d) discussion ("The opportunity for *voir dire* should be used to obtain information for the intelligent exercise of challenges[.]").

24. McDonough Power Equipment, Inc. v. Greenwood, 104 S. Ct. 845, 849 (1984).

25. United States v. Richardson, 61 M.J. 113, 118 (C.A.A.F. 2005).

26. DA Pam. 27-9, *supra* note 3, para. 2-5. *See also* MCM, *supra* note 6, R.C.M. 807(b)(2) discussion (providing suggested oath for panel members); MCM, *supra* note 6, R.C.M. 912(d) discussion ("If the members have not already been placed under oath for the purpose of voir dire . . . , they should be sworn before they are questioned.").

27. United States v. Albaaj, 65 M.J. 167, 170 (C.A.A.F. 2007); United States v. Commisso, 76 M.J. 315, 322 (CAAF 2016).

28. MCM, *supra* note 6, R.C.M. 912 (f)(1)(N).

29. United States v. Armstrong, 54 M.J. 51, 53 (C.A.A.F. 2000).

30. United States v. Elfayoumi, 66 M.J. 354 (C.A.A.F. 2008).

31. United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996).

32. United States v. New, 55 M.J. 95, 100 (C.A.A.F. 2001).

33. *See generally* Colonel James F. Garrett et al., *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results*, Army Law., Aug. 2014, at 4 (providing a historical background of unlawful command influence and discussing the evolution of the court-martial process).

34. *See generally* United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018) (holding that the Deputy Judge Advocate General of the Navy's unlawful influence tainted a service member's case); *see also* U.S. v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2017).

35. United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005).

36. *Id.*

37. United States v. Clay, 64 MJ 274, 276-77 (C.A.A.F. 2007).

38. *Id.* at 277.

39. *See* United States v. Mack, 41 M.J. 51 (CMA 1994). In *Mack*, an officer member in an assault case did not mention during voir dire that he had been a victim of assault. *Id.* at 52. Even after being asked by the military judge if any member had been a victim of a physical attack, the record did not reflect any response in the affirmative or negative from the member. *Id.* After being convicted, the accused discovered during the post-trial process that the officer member failed to disclose that he had been held at gunpoint, tied up, and threatened with death during an armed robbery thirty years earlier. *Id.* at 53. On appeal the case was returned for a *DuBay* hearing to determine if there was a failure to honestly answer a material question and would the response provide a valid basis for a challenge for cause. *Id.* at 55-56. This case offers an example of the time and resources that can be spent trying to fix an issue that was not discovered during voir dire.

40. United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007).

41. *Id.* at 296.

42. *Id.* at 297.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* United States v. Smith, 25 M.J. 785, 787 (A.C.M.R. 1988) (holding that a recent crime victim is not automatically disqualified). *But see* United States v. Jefferson, 44 M.J. 312, 322 (C.A.A.F. 1996) (holding that the military judge abused his discretion by not allowing defense to reopen voir dire to explore member impartiality).

50. United States v. Basnight, 29 M.J. 838, 839 (A.C.M.R. 1989) (holding that denial of challenge for cause was proper based on member's candor and willingness to consider complete range of punishments). *See also* United States v. Reichardt, 28 M.J. 113, 116 (C.M.A. 1989) (holding that it was not error to deny challenge based on the judge's voir dire of the member and the member's unequivocal responses). *But see* United States v. Campbell, 26 M.J. 970, 971-72 (A.C.M.R. 1988) (holding that the challenge should have been granted based on the member's equivocal responses).

51. U.S. v. Mack, 41 M.J. 51, 54 (C.M.A. 1994).

52. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

53. *Id.* at 551-52 n.3.

54. *See generally*, Colonel Sarah Root, *New Year, New Laws: What the Military Justice Act's Changes Will Mean for Judge Advocates*, Army Law., Sept./Oct. 2018, at 19 (providing an overview of changes to the UCMJ after the Military Justice Act of 2016). In addition to the Military of Justice Act of 2016, see Policy Memorandum 17-08, Office of The Judge Advocate Gen., U.S. Army, subject: Disclosure of Information to Crime Victims (1 Dec. 17); U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (28 Mar. 2013) (C, 24 May 2017); U.S. Dep't of Army, Dir. 2014-20, Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense (19 June 2014); for examples of additional measures intended for crime victims.

55. DoD SAPRO, *supra* note 5.

56. DoD SAPRO, *supra* note 5.

57. DoD SAPRO, *supra* note 5.

58. DoD SAPRO, *supra* note 5.

59. Hydrostatic equilibrium is the balance between the thermal pressure (outward) and the weight of the material above pressing downward (inward) in a star. *Interior Structure of Stars*, Astronomy Notes (May 24, 2001), https://www.astronomynotes.com/starsun/s7.htm. A star is like a balloon in that the gas inside the balloon pushes outward and the elastic material supplies just enough inward compression to balance the gas pressure. *Id.*

60. See Appendix A for a proposed RCM 912 that incorporates the changes outlined in sections IV(A)-(B). The proposed changes are in bold.

61. MCM, *supra* note 6, R.C.M. 912(a)(1).

62. MCM, *supra* note 6, R.C.M. 912(a)(1) discussion.

63. United States v. Dunbar, 48 M.J. 288, 290 (C.A.A.F. 1998).

64. MCM, *supra* note 6, Mil. R. Evid. 412(c).

65. MCM, *supra* note 6, Mil. R. Evid. 412(c)(2).

66. MCM, *supra* note 6, R.C.M. 802.

67. DA Pam. 27-9, *supra* note 3.

68. See Appendix C for example of a change to the questions found in DA Pam. 27-9, para. 2-5-1.

69. United States v. Jefferson, 44 M.J. 312, 318 (C.A.A.F. 1996) (holding that the procedures for voir dire are generally within the discretion of the trial judge). *See also* MCM, *supra* note 6, R.C.M. 912(d) and discussion ("The nature and scope of the examination of members is within the discretion of the military judge.").

70. Appendix D contains a sample seal order that can be used by the military judge. The sample is a modification of the sample seal order that is provided in the U.S. Army Trial Judiciary, Standard Operating Procedures 38 (12 Feb. 2018) [hereinafter Trial Jud. SOP].

71. *See* MCM, *supra* note 6, R.C.M. 1113; Trial Jud. SOP, *supra* note 70, 34-35; Rules of Practice Before Army Courts-Martial 17-18 (1 Jan. 2019) (providing additional guidance on sealing).

72. *See* U.S. v. Scott, 48 M.J. 663 (A.C.C.A. 1998).

73. *See* United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) ("[P]ublic confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public").

74. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 508 (1984).

75. *Id.* at 503.

76. *Id.*

77. *Id.*

78. *Id.* at 510.

79. *Id.* at 512.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Root, *supra* note 54, at 19.