A FEW GOOD MEN: SEATING AN IMPARTIAL AND UNBIASED PANEL OF MILITARY OFFICERS TO TRY THE ACCUSED IN THE 9/11 COMMISSION

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The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict. I am not arguing against bringing those accused of war crimes to trial. I am pointing out hazards that attend such use of the judicial process – risk on the one hand that the decision which most of the world thinks should be made may not be justified as a judicial finding, even if perfectly justified as a political policy; and the alternative risk of damage to the future credit of judicial proceedings by manipulations of trial personnel or procedure to invest temporarily with judicial character what is in fact a political decision.[1]

- Justice Robert Jackson, discussing the Nuremberg Trials.

INTRODUCTION

Throughout the 1990s two men were plotting. One, a radical Islamic jihadist, was plotting to destroy the United States through an attack on American soil by targeting both its citizens and symbols of capitalistic wealth.[2] Another, a self-described "maverick businessman," was attempting to build a novel business model exploiting Reagan-era market deregulation to promote rapid growth in

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1. Robert Jackson, Supreme Court Justice, Address to American Society of International Law: Rule of Law Among Nations (Apr. 13, 1945).

2. Carol Rosenberg, *Trial Guide: The Sept. 11 Case at Guantánamo Bay*, N.Y. TIMES (Feb. 3, 2020), https://www.nytimes.com/2020/02/03/us/politics/september-11-trial-guantanamo-bay.html?searchResultPosition=1.

emerging gas markets using shady financial manipulations.[3] While the schemes were ultimately successful, both men were eventually caught, and mired in public media shame and scandal as the depth of their atrocities unfolded. Although it may seem insensitive to compare Khaled Sheik Mohammad (KSM), the architect of the September 11 terror plot that killed thousands of American citizens to former Enron CEO Jeffrey Skilling, who was eventually convicted for orchestrating the unsound business practices that led to the bankrupting of what was once the seventh largest American company, Enron, and causing thousands of Enron employees to lose their life savings in August of 2001, important lessons can be learned from how the negative publicity factored into the voir dire process in Skilling's criminal trial and from what the accused in the 9/11 Commission will experience as they face an upcoming trial date.[4]

Skilling was released from federal prison in 2019 after having served fourteen years following his conviction by a Houston jury that had to overcome a significant presumption of bias.[5] During this time, KSM has awaited trial at Guantanamo Bay, Cuba, after a long and protracted legal process, resulting in a military commission that has finally been established in order to bring him and his fellow accused to some sort of justice.[6] While the trial date has inevitably been pushed back due to staffing and COVID-19 related delays,[7] the defense teams of the accused men in the 9/11 Commission have assumed a more offensive posture in preparation for the trial phase of the commission, and could glean powerful lessons from the proceedings in Skilling's federal criminal prosecution on how to navigate the commission voir dire process.[8]

In the current military commission structure, the United States Constitution, Federal Rules of Criminal Procedure, and military rules for courts-martial under the Uniform Code of Military Justice do not apply or have any binding influence on the commission proceedings.[9] However, the commission judges have consistently looked to precedent set in federal and courts-martial practice when

3. *See* BETHANY MCLEAN AND PETER ELKIND, THE SMARTEST GUYS IN THE ROOM 27, 34, 39, 125 (Portfolio) (2003).

4. Matt Stevens & Matthew Haag, *Jeffrey Skilling, Former Enron Chief, Released After 12 Years in Prison*, N.Y. TIMES (Feb. 22, 2019), https://www.nytimes.com/2019/02/22/business/enron-ceo-skilling-scandal.html; Rosenberg, *supra* note 2.

5. Stevens & Haag, *supra* note 4.

6. Rosenberg, *supra* note 2.

7. Carol Rosenberg, *Prosecutors Struggle to Resume Guantánamo Trials*, N.Y. TIMES (July 27, 2020), https://www.nytimes.com/2020/07/27/us/politics/guantanamo-bay-coronavirus.html; Carol Rosenberg, *For Families of 9/11 Victims, Virus Further Slows the Pace of Justice*, N.Y. TIMES (July 18, 2020), https://www.nytimes.com/2020/07/18/us/politics/coronavirus-guantanamo-911-victims.html; Carol Rosenberg, *Military Judge in 9/11 Trial at Guantánamo Is Retiring*, N.Y. TIMES (March 25, 2020), https://www.nytimes.com/2020/03/25/us/politics/guantanamo-judge-sept-11-trial.html?searchResultPosition=16.

8. Carol Rosenberg, *Trial for Men Accused of Plotting 9/11 Attacks Is Set for 2021*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/30/us/politics/sept-11-trial-guantanamo-bay.html; *See* Skilling v. United States, 561 U.S. 358, 361 (2010) (Holding that Skilling had received a fair trial with a verdict rendered by a jury free of bias).

9. Rosenberg, *supra* note 8.

developing rules of practice within the commission structure.[10] KSM and his fellow accused will face a commission consisting of a panel of twelve military officers, men and women who have all served in senior commanding positions in a landscape where the United States has been engaged in hostilities with al-Qaeda, the Taliban, and other subsequent terrorist organizations, and who have most likely been personally impacted by the tragic events of September 11 ingrained in the collective consciousness of the nation.[11] It will be important for the commission to ensure that both bias and the perception of bias are eliminated from the venire and voir dire process, in order to legitimize whatever sentence is passed down to the accused men in this capital case. This note will discuss how the commissions[12] can establish a voir dire process to mimic the regular order of American federal courts and military courts-martial to protect against the implication of juror bias, and how the commission can avoid being seen as a sort of "kangaroo court" that eschews burdensome due process requirements in favor of efficiency and political gains over the civil liberties and human rights of the accused.

There is no guarantee the trial will begin before the 20th anniversary of the September 11 tragedy. Though a previous military judge, Air Force Colonel Shane Cohen, had issued a ten-page scheduling order giving all parties a timeline of activities leading up to a set January 11, 2021, trial date; that date has obviously come and gone.[13] The commission, including the convening authority (CA), prosecution, and defense, will have to jump through a myriad of logistical and discovery hurdles to be ready to conduct a trial in the commission. And now, after Judge Cohen unexpectedly resigned to seek civilian employment, aging defense team members have resigned and been recently replaced, and COVID-19 restrictions have prevented in-person commission proceedings, the accused of the 9/11 Commission may still have to wait several years for their day in court.[14] Specifically, even if the trial does start anytime soon, selection of the panel, or jury, is expected to last months.[15]

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10. *Comparison of Rules and Procedures in Tribunals that Try Individuals for Alleged War Crimes*, OFF. OF MIL. COMM'NS , https://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx; Jennifer K. Elsea, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, CONGR. RESEARCH SERV. (March 21, 2014), https://fas.org/sgp/crs/natsec/R40932.pdf; Paul H. Hennessy, *Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis*, 75 FEDERAL PROBATION 1, https://www.uscourts.gov/sites/default/files/75_1_5_0.pdf.

11. *Id.*

12. *How Military Commissions Work*, OFF. OF MIL. COMM'NS, https://www.mc.mil/ABOUTUS.aspx (last visited May 10, 2021) ("A military commission is a military court of law traditionally used to try law of war and other offenses. An alien unprivileged enemy belligerent who has engaged in hostilities, or who has purposefully and materially supported hostilities against the United States, its coalition partners or was a part of al Qaeda, is subject to trial by military commission under the Military Commissions Act of 2009.").

13. Order Establishing Trial Schedule, United States v. Khalid Shaikh Mohammad, AE 639M (U.S.C.M.C.R. 2019).

14. Carol Rosenberg, *For Families of 9/11 Victims, Virus Further Slows the Pace of Justice*, N.Y. TIMES (July 18, 2020), https://www.nytimes.com/2020/07/18/us/politics/coronavirus-guantanamo-911-victims.html.

15. Rosenberg, *supra* note 8; Rosenberg, *supra* note 2.

As Justice Jackson noted, there can be no legitimate sentence passed down in a legal system where the judicial forms do not respect judicial norms.[16] The voir dire process currently envisioned by the military commission system leaves room for a deviation from regular order.[17] Particularly, the accused in 9/11 case are entitled to a jury panel that presumes them innocent, and that will not apply a moral sentence, but instead apply a legal standard in order to render a verdict for or against the accused. Therefore, no member of the panel should, inadvertently or not, allow past experience, moral abhorrence, emotion, service considerations, or patriotism to color their decision making when deliberating. Voir dire should be designed to flush out any disqualifying member bias from the panel. In Part I, this note will map the development of the commission process, which is important to understand how some aspects of due process and fair-trial procedure were granted and denied to the accused held at Guantanamo. Part II, considering the Supreme Court's decision in *Hamdan*, will lay-out how voir dire is conducted in regular American courts, which should serve as a model for the construction of any military commission procedure. Part III will give a case study in managing voir dire in the face of a significant presumption of venire bias by exploring how the trial court in *United States v. Skilling* was able to overcome the presumption of jury bias. Finally, Part IV will offer a suggested amendment to the statute controlling the military commission trial procedure, providing a framework for more extensive, counsel-led voir dire of potential panel members in the 9/11 Commission, which could better guard against member bias and improve the perception of fairness in the military commission process.

In his inaugural address to the members of the tribunal proceedings trying the Nazi war criminals of World War II, Justice Jackson noted that:

> [u]nfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The worldwide scope of the aggressions carried out by these men has left but few real neutrals…The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.[18]

The 9/11 Commission of KSM and his alleged co-conspirators is a joint prosecution, tracking in the vision of the Nuremberg model over which Justice

16. *See* Robert Jackson, Supreme Court Justice, Opening Statement before the International Military Tribunal (Nov. 21, 1945), https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/); Jackson, *supra* note 1.

17. R.C.M. 912(a)(1).

18. Jackson, *supra* note 16.

Jackson presided, by showcasing those allegedly responsible for the core crimes of al-Qaeda, and holding them responsible for their crimes against America and individual victims of the September 11 attacks.[19] The five accused men in *United States v. Khalid Sheikh Mohammed, et al*. are charged[20] with conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking an aircraft, and terrorism in connection with their alleged roles in the planning and execution of the attacks of September 11, 2001, in New York, Washington D.C., and Shanksville, Pennsylvania, resulting in the killing of 2,976 people.[21] The Government prosecution team is seeking the death penalty against all five accused in the conspiracy for their crimes against humanity.[22]

The five accused were first detained by United States government entities, namely the Central Intelligence Agency (CIA), between 2001 to 2003, then interrogated and tortured in a network of overseas secret CIA prisons, known as "black sites," before being turned over to the Department of Defense and brought to Naval Station Guantanamo Bay in and around 2006.[23] The named defendant, KSM, is described by the 9/11 Commission Report as being the "principal architect" of 9/11 attacks.[24] KSM's co-defendants in the conspiracy are all men with varying degrees of involvement in the 9/11 plot.[25] The co-accused are Walid bin Attash, alleged to have run an al-Qaida training camp in Afghanistan where two of the hijackers were trained; Ramzi bin al-Shibh, a Yemeni man accused of helping organize logistics for the attack as KSM's go-between; Ammar al-Baluchi, KSM's nephew and "alleged to have played a critical role in funding the hijackers and organizing their flight school training"; and Mustafa al-Hawsawi, a Saudi national accused of "acquiring cash, credit cards and clothing for the hijackers."[26]

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19. JESS BRAVIN, THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY 318 (2003 Yale University Press) (2013).

20. CHARGE SHEET, https://www.documentcloud.org/documents/3559432-The-Sept-11-charge-sheet-as-of-April-2012.html. *See also* Jess Bravin, *Military Judge Sets January 2021 Trial Date for Accused 9/11 Conspirators*, THE WALL STREET JOURNAL (Aug. 30, 2019), https://www.wsj.com/articles/military-judge-sets-january-2021-trial-date-for-accused-9-11-conspirators-11567200907; Rosenberg, *supra* note 8; Carol Rosenberg, *About the 9/11 War Crimes Trial*, MIAMI HERALD, (Nov. 05, 2013), https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1928877.html (including a detailed description of accused).

21. Rosenberg, *supra* note 8.

22. *Id.*

23. Carol Rosenberg, *Architect of C.I.A. Interrogation Program Testifies at Guantánamo Bay*, N.Y. TIMES (Jan. 21, 2020), https://www.nytimes.com/2020/01/21/us/politics/guantanamo-bay-interrogation.html?fbclid=IwAR3n1iYnqmdQfyJnZ0oL6N_OO4GvX80UOcr6-Ol0215XBZ-8I68NsGtB6sg;
Khalid Sheikh Mohammed Fast Facts, CNN, https://www.cnn.com/2013/02/03/world/meast/khalid-sheikh-mohammed-fast-facts/index.html.

24. NATIONAL COMMISSION ON TERRORIST ATTACKS, The 9/11 Commission Report 145 (2004), https://govinfo.library.unt.edu/911/report/911Report.pdf.

25. *Id.*

26. Julian Borger, '*Why Can't We Get This Over?': 9/11 Hearings Drag on at Guantánamo*, THE GUARDIAN (Feb. 2, 2019), https://www.theguardian.com/us-news/2019/feb/02/why-cant-we-get-this-over-911-hearings-drag-on-guantanamo; Carol Rosenberg, *About the 9/11 War Crimes*

"A Pentagon Convening Authority[27] for Military Commissions has twice approved capital murder charges against five detainees…naming them as alleged conspirators" in the 9/11 terror attacks.[28] The five were most recently "arraigned on May 5, 2012 at the Camp Justice war-court compound at the U.S. Navy base in" Guantanamo Bay, Cuba, after the CA, at that time retired Navy Vice Adm. Bruce MacDonald, approved the charges on April 4, 2012.[29] They were earlier arraigned June 5, 2008, during the Bush administration, only to see the process suspended when President Barack Obama referred the case to federal court upon his entry into office.[30] Since the five were arraigned in May of 2012, the commission has held more than forty pretrial hearing sessions[31] in a protracted process to resolve questions of law and evidence that would apply at an actual trial.[32]

I. THE EVOLUTION OF THE USE OF THE COMMISSION TO TRY DETAINEES OF THE WAR ON TERROR

A. A Brief History of the Use of Military Commissions in the United States

The use of military commission-like tribunals in the American justice system dates to the American Revolution, when General George Washington convened a board of general officers to investigate a soldier on suspicion of spying for the British.[33] The term "military commission" first became common parlance in the United States during the Mexican-American War of the mid-19th century, when General Winfield Scott used the commissions as a stopgap solution to prosecute his own soldiers to avoid trying them in civilian Mexican courts.[34] Thereafter, military commissions were employed during the Civil War and the Philippine

Trial, MIAMI HERALD, (Nov. 05, 2013), https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1928877.html.

27. *Organization Overview*, OFF. OF MIL. COMM'NS, https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx (last visited May 10, 2021) (A Convening Authority is "empowered to convene military commissions, refer charges to trial, negotiate pre-trial agreements, and review records of trial. The Convening Authority also provides an accused an opportunity for clemency before taking action on the findings and sentence of all military commission cases.").

28. *See* Rosenberg, *supra* note 23.

29. *Id.*

30. *Id.*

31. Margot Williams, *At Guantanamo Bay, Torture Apologists Take Refuge in Empty Code Words and Euphemisms*, THE INTERCEPT, (date accessed), https://theintercept.com/2020/01/29/guantanamo-9-11-forever-trials///.

32. OBAMA'S GUANTANAMO: STORIES FROM AN ENDURING PRISON 209 (Jonathan Hafetz 2016).

33. T.K. Bryon, *John Andrè*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/john-andre/ (last visited May 10, 2021).

34. WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 832 (rev. 2d ed. 1920).

insurrection, and most recently, prior to President Bush's order, during and immediately following World War II.[35]

During WWII, a military commission led to the 1942 Supreme Court case *Ex parte Quirin*, which affirmed the convictions of seven Nazi saboteurs captured by the Federal Bureau of Investigation (FBI).[36] When the saboteurs were apprehended, President Franklin Roosevelt issued a proclamation denying the saboteurs access to regular American courts, as well as a military order convening a military commission to try the agents for offenses against the law of war and the Articles of War.[37] Until *Quirin*, military commissions adhered to courts-martial practice, providing the same rights available to charged United States military service members in regularly constituted courts, as practicable.[38] *Quirin* broke with that tradition, allowing hearsay and other traditionally inadmissible evidence in American court systems to be heard by the commission, and otherwise dispensing with traditional constitutional protections for the accused.[39] In denying the saboteurs' petition for a writ of habeas corpus, the Court held that the federal government, as a whole, had the power to try unlawful enemy combatants for violating the law of war in a tribunal process outside of regular constitutional protections.[40]

The Bush administration looked to *Quirin* when establishing the first iteration of the Guantanamo military commissions, rather than earlier traditions that would have mimicked military courts-martial practice.[41] One week after the September 11 terrorist attacks, Congress adopted the Authorization for Use of Military Force (AUMF) joint resolution authorizing President George W. Bush to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11 terrorist attacks.[42] Imbued with that authority, President Bush ordered the United States military forces to Afghanistan "to subdue al Qaeda and quell the Taliban regime that was known to support it."[43] Subsequently, United States and allied nations' armed forces engaged in military operations collectively known as Operation Enduring Freedom (OEF) in Afghanistan, beginning on October 7, 2001.[44]

On November 13, 2001, relying on the precedent established by President Roosevelt in *Quirin*, and anticipating the eventual capture of the individuals responsible for the 9/11 attacks and other enemy combatants in OEF, President Bush issued Military Order No. 1 (MO1), authorizing noncitizens "to be tried for

35. *Military Commissions History*, OFF. OF MIL. COMM'NS, https://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx#:~:text=History&text=Military%20commissions%20are%20a%20form,the%20international%20laws%20of%20war (last visited May 10, 2021).

36. *See* BRAVIN, *supra* note 19, at 21, 33-34; *Ex parte* Quirin, 317 U.S. 1, 48 (1942).

37. *Quirin*, 317 U.S. at 21-23.

38. *See* BRAVIN, *supra* note 19, at 34.

39. *See id.* at 33.

40. *See id.* at 34-35, 38.

41. *See id.* at 35.

42. Pub. L. No. 107-40, 115 Stat. 224 (2001).

43. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

44. *U.S. Led Attack on Afghanistan Begins*, HISTORY, (Oct. 7, 2001), https://www.history.com/this-day-in-history/u-s-led-attack-on-afghanistan-begins.

violations of the laws of war and other applicable laws by military tribunals."[45] MO1 governed the detention, treatment, and trial of certain noncitizens captured in OEF, and provided for trial by military commission of any noncitizen for whom there was "reason to believe" that the person was a member of al Qaeda or had engaged or participated in terrorist activities aimed at or harmful to the United States.[46]

Specifically, MO1 characterized the events of September 11 as an attack that created an amount to an act of armed conflict, and thus necessitated a military legal remedy for captured noncitizen enemy combatants that was governed by the law of war, and not the law of the United States.[47] Historically, the strategy of the United States in response to terrorism was grounded largely in law enforcement solutions.[48] However, the magnitude of the September 11 attacks, coupled with the penetrating nature of the attack on the American homeland, led many to believe that the response to the attacks should be grounded in something more than an exclusively law enforcement-based response, and that military force of law was the only legitimate option.[49]

Additionally, the use of a law of war solution provided the legal basis for a tribunal justice system to try alien-enemy combatants, as the law of war draws a distinction between those who are lawful and unlawful combatants.[50] "Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[51]

> A military commission could quickly prosecute and execute the defendants without following elaborate rules of criminal procedure. The symbolism would matter as much as the substance: resurrecting the military commission, a nearly forgotten relic

45. BRAVIN, *Supra* note 19, at 34-35, 38; Brigadier General John G. Baker, MILITARY COMMISSION DEFENSE ORGANIZATION, UPENN, https://www.law.upenn.edu/live/files/5860-a-defending-the-rule-of-law.

46. Military Order of November 13, 2001 on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001).

47. *Id. See also* JONATHAN HAFETZ, THE GUANTANAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 17 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009); Abby Goodnough & Scott Shane, *Padilla Is Guilty On All Charges In Terror Trial*, N.Y. TIMES, (Aug. 17, 2007), https://www.nytimes.com/2007/08/17/us/17padilla.html.

48. President George W. Bush, National Strategy for Combating Terrorism (Feb. 2003), https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf); Abby Goodnough & Scott Shane, *Padilla Is Guilty On All Charges In Terror Trial*, N.Y. TIMES, (Aug. 17, 2007), https://www.nytimes.com/2007/08/17/us/17padilla.html.

49. WILLIAM K. LIETZAU, *Military Commissions: Old Laws for New Wars*, INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM 256 (Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006).

50. Quirin, 317 U.S. at 30-31.

51. *Id.*

> of war's rough justice, would convey that the modern terrorist was no freedom fighter but, like a pirate in ages past, *hostis humani genris*—an enemy of all mankind.[52]

Specifically, MO1 provided for sparse and expeditious procedure to try alien-enemy combatants where "[i]nstead of separating the roles of judge and jury, the order merged them into a single finder of law and fact, a commission," with no member of the commission being required to be an attorney.[53]

Military commissions pursuant to MO1 began in November 2004 against four accused declared eligible for trial, but proceedings were almost immediately suspended when a federal district court granted a habeas petition and stayed the military commission of Salim Ahmed Hamdan.[54] The Supreme Court granted certiorari and struck down the commission system devised under MO1 in its 2006 *Hamdan v. Rumsfeld* decision, holding that the tribunal system created in MO1 was an unjustifiable deviation from regular court systems of the United States,[55] particularly that the military commission scheme violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions, and that Hamdan was entitled to the protections of Common Article 3 of the Geneva Conventions that would afford him and other accused non-citizen enemy combatants certain rights in a justice system constructed by Congress.[56] Though the commission system

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52. BRAVIN, *Supra* note 19, at 22.

53. *Id.* at 39.

54. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004). (Hamdan was captured in Afghanistan in late 2001 and detained as a suspected member of al-Qaeda wand having close ties to Osama Bin Laden).

55. Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006); *Customary IHL: Rule 100. Fair Trial Guarantees*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule 100. (The ICRC, in its study on customary IHL, states that a "regularly constituted court" is one which has been "established and organized in accordance with the laws and procedures already in force in a country."); *See generally Factsheet: Military Commissions*, CTR. FOR CONST. RTS., http://ccrjustice.org/learn-more/faqs/factsheet:-military-commissions (last visited Aug. 6, 2013) (The U.S. government asserts that the MCA was enacted by Congress and signed by the President pursuant to pre-existing Constitutional and statutory authority and therefore the military commissions meet this standard.).

56. *Id.* (First, the Court held that Article 36 of the UCMJ required that the rules and procedures for military commissions be the same as those used in courts-martial unless the President has determined that uniformity is impracticable. The rules and procedures for Hamdan's military commission under MO1 differed substantially from the courts-martial rules, and President Bush had not adequately established that the courts-martial rules would be impracticable. Also, because nothing in the record of the case justified the differences between the military commission's procedures and those used in courts-martial, Hamdan's military commission therefore violated UCMJ Article 36. Second, the Court held that Hamdan's military commission violated the laws of war – specifically Common Article 3 of the Geneva Conventions. Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The "regular" military courts in the U.S. system are courts-martial. Therefore, a military commission would be "regularly constituted …only if some practical need explain[ed] deviations from court-martial practice." Additionally, Congress, not the executive, is vested with the power to define violations of international law and "make Rules concerning Captures on Land and Water." As the rules for Hamdan's commission deviate substantially from those used in courts-martial and the government had identified no practical need for any deviations, Hamdan's commission, as established under MO1 was not "regularly constituted," and the

created under MO1 was eventually replaced, surviving from MO1 is the mandate that the commissions provide "a full and fair trial" for the accused men. [57]

Though the Court ultimately held that the military commission convened under MO1 did not have the power to try Hamdan, the Court left open the possibility that Congress could authorize military commissions with rules and procedures that differ from those used in courts-martial to try noncitizen enemy combatants.[58] In response, Congress passed the Military Commissions Act (MCA) of 2006.[59] The MCA authorized the trial by military commission of noncitizen unlawful enemy combatants engaged in hostilities against the U.S. for violations of the law of war and other offenses triable by military commission.[60] It also gave explicit authorization for a new type of military commission that is not based on United States law or UCMJ, and limited the applicability of the Geneva Conventions, excluded Constitutional protections for the detainees, and attempted to eliminate judicial review of the proceedings except for military commission trial verdicts.[61] However, the statute did provide a more comprehensive structure for military commissions than MO1 and guaranteed the accused certain rights, such as the rights to see all evidence admitted against him, to be present at all proceedings, to a trial before a qualified military judge and a panel (jury) of members, to obtain evidence and witnesses in his or her defense, and to appellate review.[62] The statute also contained controversial provisions, including a limit on the right of detainees to seek a writ of habeas corpus, limited rights to counsel, placing the burden for the use in evidence of hearsay on the opponent, and not prohibiting the use in evidence of statements obtained by coercion.[63] The so-called "first round" of the 9/11 conspiracy and USS Cole bombing charges (along with charges related to the 1998 African Embassy Bombings that were subsequently removed to federal court)[64] were brought under the 2006 MCA during President Bush's time in office.[65]

When President Obama entered office in January of 2009, he ordered the Secretary of Defense to seek a stay in all military commission proceedings to allow

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commissions established under MO1 therefore violated the laws of war as set out in the Geneva Conventions.).

57. WILLIAM K. LIETZAU, *Military Commissions: Old Laws for New Wars, in* INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM 263. (Thomas M. Sparks & Glenn M. Sulmasy eds., 2006).

58. Hamdan, 548 U.S. at 590.

59. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.A).

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* Aziz Huq, *How the Military Commissions Act of 2006 Threatens Judicial Independence: Attempting to Keep the Courts out of the Business of Geneva Conventions Enforcement*, FINDLAW (Sept. 26, 2006) https://supreme.findlaw.com/legal-commentary/how-the-military-commissions-act-of-2006-threatens-judicial-independence-attempting-to-keep-the-courts-out-of-the-business-of-geneva-conventions-enforcement.html; Keith Olbermann, *National Yawn As Our Rights Evaporate*, NBC NEWS (Oct. 18, 2006), https://www.nbcnews.com/id/wbna15318240.

64. *See* United States v. Ghailani, 733 F.3d 29, 36 (2d Cir. 2013).

65. *See Ghailani*, 733 F.3d at 39-40.

time for a comprehensive review of commission and detention operations, resulting in all military commissions halting until November 2009.[66] Later that year, the Secretary of Defense revised the Manual for Military Commissions, providing additional rights for the accused to counsel, amending the hearsay provisions, and eliminating the use of statements obtained through cruel, inhuman, or degrading treatment (torture statements).[67] The Obama Administration then announced their policy preference to use federal criminal courts for prosecuting combatant detainees "where feasible," but to keep the military commissions available as a secondary option, especially for law of war violations.[68]

In late 2009 the 9/11 case was transferred to federal court.[69] Subsequently, the 9/11 defendants were indicted in the Southern District of New York.[70] However, in the face of mounting political opposition, the Justice Department shelved the plan to prosecute in federal court and the 9/11 case was subsequently referred back to the military commissions at Guantanamo.[71]

The federal court option was foreclosed by legislation after the federal trial of a former Guantanamo detainee, Ahmed Khalfan Ghailani, was acquitted of all but one charge.[72] Ghailani had previously been charged in the military commissions on terrorism charges, but those charges were dismissed.[73] Although Ghailani was convicted of material support to terrorism in federal court and received a sentence of life in prison, his acquittal of the majority of the charges against him, coupled with the fact that coerced evidence was suppressed by the federal judge, galvanized Congressional opponents' actions of trying detainees in federal court.[74] After Ghailani's trial, Congress passed legislation in a provision of the Fiscal Year 2011 National Defense Authorization Act (NDAA), blocking the Obama Administration from transferring any more detainees to the United States to be prosecuted in federal court, leaving military commissions as the only available prosecution option.[75] The restriction against detainee transfers to the

66. THE GUANTANAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 4 (Mark P. Denbeaux and Jonathan Hafetz 2009).

67. DENBEAUX & HAFETZ, *supra* note 66, at 2.

68. Press Release, The White House, Remarks by the President on National Security (May 21, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09.

69. *Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial*, CNN (Nov. 13, 2009, 2:01 PM), http://www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/.

70. *Id.*

71. *US: Military Commission Trials for 9/11 Suspects a Blow to Justice*, HUM. RTS. WATCH (Apr. 4, 2011, 5:42 PM), http://www.hrw.org/news/2011/04/04/us-military-commission-trials-911-suspects-blow-justice.

72. *See Ghailani*, 733 F.3d at 40 (Ghailani was transferred from Guantanamo to the United States to face terrorism charges related to the Embassy Bombings in Kenya and Tanzania).

73. *See id*.

74. Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombings*, N.Y. TIMES (Nov. 17, 2010), https://www.nytimes.com/2010/11/18/nyregion/18ghailani.html?_r=0. (Ghailani was acquitted of all but one of 280 charges for his involvement in the deaths and destruction on two US embassies in Africa in 1998. This followed the judge's orders to throw out evidence deemed inadmissible in court because it was obtained through the use of illegal torture.).

75. *US: Military Commission Trials for 9/11 Suspects a Blow to Justice*, *supra* note 71.

United States to face trial was renewed in subsequent NDAAs despite President Obama's threat to veto any legislation which included such a restriction.[76] Thus, military commissions remain the only practicable option for the trial of Guantanamo detainees at this time.

B. The Modern Military Commission Structure

In response to President Obama's request to fix some of the troubling aspects of the 2006 MCA, Congress passed the Military Commissions Act of 2009, which remains in effect today.[77] The 2009 MCA expands the rights of an accused to align more closely with the rights afforded to defendants in courts-martial and federal criminal cases.[78] The statute also enhances an accused's rights to counsel, including the right to request a specific counsel from the defense pool and, in capital cases, to have counsel with expertise in capital cases, colloquially called "learned counsel."[79] The MCA directed the Secretary of Defense to promulgate rules and procedures for the military commissions in consultation with the Attorney General, which became the Manual for Military Commissions (MMC).[80] Published in 2010 and revised in 2012, the MMC is the primary implementing regulation for the MCA.[81] The MMC includes the Rules for Military Commissions (RMC).[82] This comprehensive procedural guide covers pretrial, trial, sentencing, and appellate procedures and includes such topics as swearing and referral of charges, convening of commissions and selection of court members (jurors), pleas and pretrial agreements, pretrial motions, interlocutory appeals, and methods of obtaining witnesses, evidence, and expert witnesses, and lays out the structure for conducting a commission.[83]

One critical aspect of fairness and justice in a tribunal proceeding is the independence and impartiality of the deciding body (a panel or jury) is because the accused in the 9/11 Commission are entitled to the presumption of innocence.[84] It is the duty of the commission's panel of members to "determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge."[85] However, the jury selection process in the current procedural structure of the military commissions creates a serious perception of unfairness and lack of independence

76. Connor Adams Sheets, *Why Did Obama Sign the 2013 NDAA After Threatening A Veto?*, INT'L BUS. TIMES (Jan. 3, 2013, 9:39 PM), http://www.ibtimes.com/why-did-obama-sign-2013-ndaa-afterthreatening-veto-992860.

77. *See* Military Commissions Act of 2009, 10 U.S.C. § 949a (2009).

78. *Id*.

79. *Id*.

80. *Id*.

81. *See generally* Military Commissions Act of 2009, 10 U.S.C. § 948a (2009); U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS (2010 ed.) [hereinafter M.M.C.], available at http://www.mc.mil/Portals/0/2010_Manual_for_Military_Commissions.pdf.

82. M.M.C., *supra* note 81.

83. 10 U.S.C. § 948a; M.M.C., *supra* note 81.

84. M.M.C., *supra* note 81, at II-123.

85. M.M.C., *supra* note 81, at II-23.

and impartiality.[86] After a set of charges and specifications have been approved for prosecution, the Convening Authority (CA) is responsible for referring the charges to a military commission to hear the case.[87] As mandated by the 2009 MCA, a military commission is then also formed by the CA and composed of a military judge (also denoted as the presiding officer who must be a judge advocate of any of the United States armed forces) and at least twelve "members," who are the equivalent of jurors.[88] The potential members, handpicked by the CA, must be active-duty commissioned officers from any military branch.[89] When convening the commission, the CA is authorized to choose members of the military for the panel venire who, in the opinion of the CA, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.[90] Military commissions require the selection of twelve primary members, all of whom must unanimously convict the accused of the offense or accept a guilty plea that was not withdrawn prior to announcement of the sentence.[91] Thus far, in other commission proceedings, the convening authority has selected only senior, field-grade military officers to serve in this role.[92]

The military judge, who is also detailed by the CA, is prohibited from voting with the members of the commission and is barred from communicating with the commission members outside of the courtroom.[93] Whenever court proceedings in a military commission matter are convened, the military judge, the commission members and the attorneys, along with any victims, witnesses, human rights observers, and ancillary court support personnel are flown by military charter from Andrews Air Force Base in Maryland to the U.S. Naval Station at Guantanamo Bay, Cuba, where hearings are conducted in the Expeditionary Legal Center at Camp Justice, specifically and solely designated for commissions business.[94]

Having served throughout the entire Global War on Terror fighting Al Qaeda, the Taliban, and associated groups, it is reasonable to ask whether such officers can serve impartially in trials of accused individuals already determined to be enemy combatants. The process under the 2009 MCA offers little guidance for the commission on how to select a fair and unbiased panel to try the accused in military commissions. RMC 912 allows counsel for the defense and prosecution to submit member questions to be included in a pre-trial questionnaire.[95] As to the examination of members:

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86. Rosenberg, *supra* note 2.

87. 10 U.S.C. § 948i(a) (2009).

88. *Id*.

89. *Id.*

90. 10 U.S.C. § 948i(b) (2009); M.M.C., *supra* note 81, at II-26.

91. 10 U.S.C. § 949m (2009); 10 U.S.C. § 949i(b) (2009).

92. William Glaberson, *Bin Laden's Former Driver is Convicted in Split Verdict*, N.Y. TIMES (Aug. 6, 2008), https://www.nytimes.com/2008/08/06/washington/07gitmo.html; *U.S.: Hamdan Trial Exposes Flaws in Military Commissions*, HUM. RTS. WATCH (Aug. 6, 2008, 8:00 PM), https://www.hrw.org/news/2008/08/06/us-hamdan-trial-exposes-flaws-military-commissions.

93. 10 U.S.C. § 948i(b).

94. Rosenberg, *supra* note 2.

95. M.M.C., *supra* note 81, at II-98.

> The military judge may permit the parties to conduct the examination of 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 member may be questioned outside the presence of other members when the military judge so directs.[96]

While the rules then allow challenges for cause, as well as entitle the defense and prosecution one peremptory challenge, they offer little guidance on how the parties should conduct member voir dire and much is left to the discretion of the judge.[97] As for those challenged for cause, the rules offer a number of grounds, the most relevant being whether a member "has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged," or whether there is substantial doubt as to legality, fairness, and impartiality of seating any particular member.[98]

The limited evidence available indicates that military commission panels can act independently to render unbiased verdicts. There has been only one contested military commission trial, the 2008 commission of Salim Hamdan, which was tried under the previous iteration of the MCA.[99] In that case, the jury not only acquitted Mr. Hamdan of the most serious charges but also gave him a far shorter sentence than the prosecutor sought.[100] However, the content, charges, and notoriety of the Hamdan commission is not analogous to the 9/11 case. And, despite the seemingly fair trial for Mr. Hamdan, the military commissions clearly suffer from a perception problem, and the lack of relevant case law or statutory direction leave room for the commission, directed by the military judge, to adopt best practices to ensure the fairness and impartiality of panel voir dire.

II. REGULAR ORDER: HOW VOIR DIRE IS CONDUCTED IN AMERICAN FEDERAL CRIMINAL DISTRICT AND REGULAR MILITARY COURTS

The jury selection process in the American criminal legal system, termed "voir dire," dates to the inception of American jurisprudence.[101] 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.[102] While other countries' legal systems reject the idea of extensive questioning of venire members before seating a jury, the American jury systems has always included voir dire.[103] Voir dire in criminal cases developed under common law as

96. M.M.C., *supra* note 81, at II-99.

97. 10 U.S.C. § 949f (2009).

98. M.M.C., *supra* note 81, at II-100.

99. United States v. Hamdan, 801 F. Supp. 2d 1247 (U.S.C.M.C.R. 2011).

100. *See* BRAVIN, *Supra* note 19, at 344; *Hamdan*, 801 F. Supp. 2d at 1322.

101. Nancy S. Marder*, Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 928 (2015).

102. *Voir dire*, BLACK'S LAW DICTIONARY (7th ed. 1999).

103. Marder, *supra* note 101.

a natural component of the Sixth Amendment's impartial jury guarantee, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed."[104] Effective voir dire practices merit jurors who can set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence "based on the evidence presented in court."[105]

Generally, in most jurisdictions' voir dire, parties have the opportunity to request the court to remove prospective jurors following questions by the judge, lawyers, or both.[106] Because this process is perhaps a criminal defendant's best and only chance to ensure an impartial jury, voir dire has become an integral aspect of any legitimate American criminal justice system.[107]

A. Voir Dire in Federal Criminal Courts

Federal rules of criminal procedure specify that juries in federal criminal trials must consist of twelve members.[108] The provisions of 28 U.S.C. § 1865(b) establish the statutory qualifications to serve as a member of a federal grand jury or trial jury.[109] A person is qualified to serve as a juror if he or she (1) is a citizen of the United States who has resided for one year or more within the judicial district; (2) is at least 18 years of age; (3) is able "to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form"; (4) is able to speak the English language; (5) is mentally and physically capable of rendering satisfactory jury service; (6) does not have "a charge pending against him for the commission of […] a crime punishable by imprisonment for more than one year…"; and (7) has not been convicted of a crime punishable by more than one year in prison unless the prospective juror's civil rights have been restored.[110] The determination of the qualifications of a juror, within the statutory limits, rests in the trial court and will not be overturned absent the showing of a clear abuse of discretion by any appellate court.[111]

"[A] defendant is entitled to a voir dire that fairly and adequately probes a juror's qualifications…"[112] Of those qualifications, beyond determining if a potential juror meets the statutory qualifications of service, the purpose of voir dire in the American federal jury system is to determine if a prospective juror can be impartial. Because there is no constitutional right to peremptory challenges, questioning of potential jurors originally served to disclose any actual bias. Specifically, in both state and federal courts, "[l]awyers and judges typically

104. U.S. CONST. amend. VI, § 1. (emphasis added).

105. Irvin v. Dowd, 366 U.S. 717, 723 (1961); *see also* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

106. Marder, *supra* note 101.

107. OBAMA'S GUANTANAMO: STORIES FROM AN ENDURING PRISON 169 (Johnathan Hafetz ed., 2016).

108. FED. R. CRIM. P. 23(b)(1).

109. 28 U.S.C. § 1865(b) (1948).

110. *Id.*

111. *See* United States v. Sferas, 210 F.2d 69, 75 (7th Cir. 1954).

112. United States v. Toomey, 764 F.2d 678, 683 (9th Cir. 1985).

describe the purpose of voir dire as revealing which prospective jurors have biases that preclude them from serving on the petit jury in a particular case," so that those individuals can be removed from the venire.[113]

Voir dire practice differs widely from jurisdiction to jurisdiction. In federal court, the judge usually conducts the questioning of the venire; however, the rules of procedure do allow direct attorney participation in the voir dire examination at the discretion of the court,[114] though the extent of attorney participation varies greatly from court to court. Some courts permit attorneys to participate by asking oral questions of the venire, some permit attorney participation via written questions read by the judge, and others use a combination of the practices.[115] However, voir dire in federal practice does have some common features. Generally, prospective jurors are sworn in and given a short summary about the issues presented in the case and the parties and participants by the judge.[116] Questioning by the judge is usually basic and generic, with questions about basic biographical information such as where a potential juror lives, what they do for work, if they are single or married, if they have children, and most importantly, if there is anything a juror can think of that would bias them in deciding the case or cause them to be anything but impartial.[117]

While questioning need not be long in duration, the judges' questioning should be extensive enough to determine whether each individual juror: (1) lacks the requisite statutory qualifications; (2) has an implied bias that would render him or her impartial;[118] (3) has an express bias, for which a juror is unable to suspend or put aside his or her opinion and consider the merits of the case fairly based upon the evidence presented at trial[119] (which can include prejudice relating to the crime charged, or bias or prejudice based on race);[120] (4) has knowledge of the factual circumstances giving rise to the charge being tried;[121] and (5) possesses a willingness to follow the applicable law.[122] Beyond these basic inquiries, "[i]t is wholly within the judge's discretion to reject supplemental questions proposed by counsel if the voir dire is otherwise reasonably sufficient to test the jury for bias or partiality."[123] However, voir dire must be extensive and inclusive enough to form

113. Marder, *supra* note 101, at 930.

114. Nicklasson v. Roper, 491 F.3d 830, 835 (8th Cir. 2007) ("The conduct of voir dire is generally left to the trial court's sound discretion.").

115. *See* Csiszer v. Wren, 614 F.3d 866, 875 (8th Cir. 2010).

116. Judge Jack Zouhary, *Jury Instructions* (2018), https://www.ohnd.uscourts.gov/sites/ohnd/files/JZ-JuryInstructions-beforeOpeningStatements.pdf.

117. Zouhary, *supra* note 116.

118. *Id.* (Explaining that the circumstances that support a challenge for implied bias ordinarily include: (1) a financial interest or other direct personal stake in the outcome of the case, and (2) a familial relationship, business relationship, or other close connection to the respondent, the complainant or victim, a witness, or counsel for one of the parties.).

119. Patton v. Yount, 467 U.S. 1025, 1035 (1984) ("[S]uch fixed opinions that [the juror cannot] judge impartially the guilt of the defendant").

120. Lincoln v. Sunn, 807 F.2d 805, 816 (9th Cir. 1987).

121. Titus v. State, 963 P.2d 258, 262-63 (Alaska 1998).

122. United States v. Padilla-Mendoza, 157 F.3d 730, 733 (9th Cir. 1998).

123. United States v. Powell, 932 F.2d 1337, 1340 (9th Cir. 1991).

an impartial jury, as "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."[124]

Challenges for cause raised by either the prosecution or the defense assert that a prospective juror is not lawfully able to serve.[125] These challenges may be based on several grounds, the most important being any state of mind that makes it impossible for the juror to follow the court's instructions and to decide the case according to the facts presented in court and the controlling law.[126] When further inquiry discloses grounds that require a prospective juror be discharged for cause, that person may be excluded by the court *sua sponte*, or challenged by the prosecutor or defense counsel.[127] Technically, the number of challenges for cause that counsel is permitted to make is unlimited;[128] however, each challenge must be tested by the court for its legal validity and sustained if valid, regardless of how many other challenges for cause counsel has made.[129]

Peremptory challenges, however, are not guaranteed by the Constitution; the challenges are created exclusively by statute, and give the parties the ability to remove an otherwise qualified potential juror without providing a basis for the challenge.[130] Section 24(b) of the Federal Rules of Criminal Procedure provides that in a case where the government seeks the death penalty, twenty preemptory strikes are authorized for each side, while the government receives only six preemptory challenges and a defendant ten in a non-capital case where an offense is punishable by imprisonment for more than one year.[131]

There is no automatic right to additional peremptory challenges in cases that have multiple defendants, although the court has discretion to award of additional challenges.[132] Furthermore, disagreement between codefendants on the exercise of joint peremptory challenges does not mandate a grant of additional challenges unless the defendants demonstrate that the jury ultimately selected is not impartial or representative of the community.[133]

Peremptory challenges are not without their limitations. In *Batson v. Kentucky*, the Supreme Court held that the racially discriminatory exercise of peremptory challenges by a prosecutor violated the equal protection rights of both the criminal defendant and the challenged juror.[134] The *Batson* objection also applies to the exercise of peremptory challenges by criminal defendants.[135]

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124. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

125. Caren M. Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 2 (2014).

126. *Id.* at 11.

127. *Id.* at 8-9.

128. 28 U.S.C. § 1870 (2018).

129. FED. R. CRIM. P. 24(b).

130. *Id.*

131. *Id.*

132. *Id.*

133. *See* United States v. Ellenbogen, 365 F.2d 982 (2d Cir. 1966).

134. Batson v. Kentucky, 476 U.S. 79, 87-98 (1986).

135. Georgia v. McCollum, 505 U.S. 42, 59 (1992); United States v. De Gross, 960 F.2d 1433, 1442 (9th Cir. 1992) (en banc).

Peremptory challenges based on religion may also be improper, although there is no consensus among federal courts.[136] *Batson* challenges based on age, political ideology, and membership in other definable classes are typically rejected by courts.[137]

Because the federal rules grant peremptory challenges, the scope of voir dire is usually considerably broad in order to help parties intelligently exercise their challenges.[138] Regardless of the questions posed or challenges made to prospective jurors by the parties, the ultimate responsibility for impaneling an impartial jury rests with the trial judge who retains significant discretion in crafting questions appropriate for the case at hand.[139]

B. Voir Dire In Military Courts-Martial

As in civilian courts, voir dire to select a panel in a military court-martial is permitted to ensure impartiality and to "obtain information for the intelligent exercise of challenges."[140] The Sixth Amendment right to a jury trial in criminal cases does not apply to the military.[141] Nonetheless, the UCMJ provides for a court consisting of members who adjudicate the guilt or innocence of the accused.[142] Once this statutory right is granted, the Fifth Amendment Due Process clause guarantees that the accused also has the constitutional right to an impartial panel.[143]In contrast to federal courts, the accused in a military court-martial has no absolute right, constitutional, statutory, or otherwise, to conduct voir dire.[144]

In the military system, jury selection is unique. The CA, usually the first general officer in a service member's chain of command, has many of the same powers conferred upon a prosecutor in civilian trials, in addition to some powers that a prosecutor does not have, such as picking the jury venire.[145] The CA selects

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136. *Compare* United States v. Brown, 352 F.3d 654, 668 (2d Cir. 2003) (extending *Batson* to religion), *with* Fisher v. Texas, 169 F.3d 295, 305 (5th Cir. 1999) (holding that no precedent exists dictating extension of *Batson* to religion).

137. United States v. Prince, 647 F.3d 1257, 1262 (10th Cir. 2011) (holding that *Batson* is not applicable to groups with similar political or ideological beliefs); Weber v. Strippit, Inc., 186 F.3d 907, 911 (8th Cir. 1999) (declining to extend *Batson* to peremptory challenges based on age); United States v. Santiago-Martinez, 58 F.3d 422, 423 (9th Cir. 1995) (holding no *Batson* challenge based on obesity); United States v. Omoruyi, 7 F.3d 880, 881 (9th Cir. 1993) (holding no *Batson* challenge based on marital status); United States v. Pichay, 986 F.2d 1259, 1260 (9th Cir. 1993) (holding young adults are not a cognizable group for purposes of a *Batson* challenge).

138. Swain v. Alabama, 380 U.S. 202, 220-21 (1965).

139. Mu'Min v. Virginia, 500 U.S. 415, 427 (1991); Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981).

140. R.C.M. 912(d).

141. *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").

142. 10 U.S.C.S. § 825 (LexisNexis 2008).

143. U.S. CONST. amend. V.

144. R.C.M. 912(a)(1) (stating that trial counsel may, and upon request of defense, shall, submit questionnaires to members).

145. Phillip Carter, *Jeremy Sivits: Fired and Demoted?*, SLATE (May 20, 2004), https://slate.com/news-and-politics/2004/05/how-does-a-court-martial-work.html.

the venire from a pool of available members of the command, and has wide discretion in selecting members of the jury venire.[146] Typically, the CA will choose mature and responsible officers for a court-martial, meaning officers and senior enlisted persons with long service and command experience.[147]

Article 41 of the UCMJ, and Rule for Courts-Martial (RCM) 912 governs the actual practice of voir dire at courts-martial.[148] Once the CA provides the potential pool of officers to sit on the panel, military judges are given wide discretion in how voir dire of that panel is conducted.[149] Though not required, a minimal written questionnaire is usually completed by members after they have been notified about their selected service.[150] RCM 912(a)(1) provides several required questions concerning the member's potential bias (actual or implied).[151] At the discretion of the trial judge, this questionnaire may be supplemented with an additional questionnaire much like what is allowed in civilian courts.[152]

The general selection procedure at trial starts with group voir dire conducted by a judge, followed by group voir dire conducted by the parties. The Military Judges' Benchbook provides twenty-eight standard questions for the military judge to ask the venire during group voir dire.[153] In addition, RCM 912(d) provides the following guidance on the examination of members:

> The military judge may permit the parties to conduct examination of 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 member may be questioned outside the presence of other members when the military judge so directs.[154]

The judge may or may not allow follow-up questioning in the group format, but the only time the judge must permit questions for counsel is when the judge personally conducts voir dire.[155] Even in that instance, the judge has discretion to consider whether the supplemental examination is "proper," and may also choose to ask the supplemental questions personally.[156] Thus, RCM 912 does not prohibit a military judge from conducting voir dire in such a manner that prohibits lawyers from addressing the members at all.[157]

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146. *Id.*
147. 10 U.S.C.S. § 825(e)(2) (2008).
148. R.C.M. 912.
149. R.C.M. 912(d).
150. R.C.M. 912(a)(1).
151. *Id.*
152. *Id.*
153. U.S. Dep't of Army, PAM. 27-9, Military Judges' Benchbook 40-42 (Jan. 1, 2010).
154. R.C.M. 912(d).
155. *Id.*
156. *Id.*
157. *Id.*

Following the questioning of the pool of potential members, "[t]he purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel."[158] As of 2019, court-martials have a fixed composition; voir dire in a General Court-Martial will need to produce an eight-member panel, and in capital cases, the jury panel consists of twelve members.[159]

In courts-martial, trial and defense counsel each have unlimited challenges for cause and one peremptory challenge.[160] Looking first at challenges for cause, RCM 912(f)(1) provides fourteen bases for such challenges – the first thirteen are nondiscretionary, such that if the panel member falls into one of the identified categories, the member must be removed.[161] RCM 912(f)(1)(N) allows for challenges for cause when it is demonstrated that a potential panel member may possess an actual or implied bias.[162] "The test for actual bias is whether any bias 'is such that [a member] will not yield to the evidence presented and the judge's instructions.'"[163] Challenges based on implied bias are unique to the military justice system in this context, as these challenges do not merely focus on a subjective determination of a member's ability to adhere to the evidence and the judge's instructions, but rather, the test for implied bias is whether "most people in the same position [as the prospective member] would be prejudiced."[164] It is an objective test that focuses on the public's "perception . . . of fairness of the military justice system."[165]

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel,"[166] where "[a] member shall be excused for cause whenever it appears that the member . . . [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."[167] Known as the liberal grant mandate, it directs the trial judge to liberally grant the accused's challenges for cause based on actual or implied bias.[168] A military judge looks to the "totality of the circumstances" of a particular case when determining actual or implied member bias.[169]

158. United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008).

159. 10 U.S.C.S. § 825a.

160. 10 U.S.C.S. § 841.

161. R.C.M. 912(f)(1) (examples include accusers, witnesses, counsel, or someone who has acted as the convening authority in the case).

162. R.C.M. 912(f)(1)(A)(N).

163. United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997).

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

165. *Id.*

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

167. R.C.M. 912(f)(1)(N).

168. *See Id.*; *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002) (In the context of challenges brought by a defendant, the court stated that "military judges must liberally grant challenges for cause.").

169. United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012).

Qualified disclaimers of bias are insufficient to overcome a member's implied bias.[170] As the Court opined in United States v. Mitchell, "[a] prospective juror's assessment of her own ability to remain impartial is irrelevant for the purposes of the [implied bias] test."[171] A qualified response to rehabilitative questions may raise additional doubts about a panel member's impartiality,[172] and "[w]hile the military judge is in the best position to judge the demeanor of a member, in certain contexts mere declarations of impartiality, no matter how sincere, may not be sufficient,"[173] such that simple "yes" or "no" answers to a military judge's leading, rehabilitative questions may not overcome the bias.[174] "[I]n close cases military judges are enjoined to liberally grant challenges for cause."[175] Federal courts follow the same rule; doubts about juror impartiality should be resolved against the juror.[176] The liberal grant mandate is even more significant in the military context because the defense has only one peremptory challenge.[177]

III. *SKILLING*: A CASE STUDY ON HOW A COURT OVERCAME THE PRESUMPTION OF BIAS IN VOIR DIRE

Sixth Amendment due process guarantees a federal criminal defendant a fair trial by a panel of impartial jurors.[178] When adverse pretrial publicity is so inflammatory and prejudicial that an impartial jury cannot be seated from the community's venire, due process requires that the court take measures to protect and promote the impartially of a jury. Often, this can mean transferring the action to another venue[179] if "the hostility of the community becomes so severe as to give rise to a 'presumption of [juror] prejudice.'"[180] There are two types of prejudice

170. United States v. Martinez, 67 M.J. 59, 61 (C.A.A.F. 2008).

171. United States v. Mitchell, 690 F.3d 137, 142 (3d Cir. 2012) (citing United States v. Torres, 128 F.3d 38, 45 (2d Cir. 1997)).

172. *Nash*, 71 M.J. at 88.

173. *Nash*, 71 M.J. at 89.

174. *See Martinez*, 67 M.J. at 60-61.

175. *Id.* at 61 (citing United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)).

176. United States v. Polichemi, 219 F.3d 698, 704 (7th Cir. 2000) (explaining that a juror who belongs to a class presumed biased "may well be objective in fact, but the relationship is so close that the law errs on the side of caution.").

177. United States v. Schlamer, 52 M.J. 80, 93 (C.A.A.F. 1999).

178. U.S. CONST. amend. VI.

179. *See* Hayes v. Ayers, 632 F.3d 500, 507-08 (9th Cir. 2011); FED. R. CRIM. P. 21(a).

180. Skilling v. United States, 561 U.S. 358 (2010) (6-3 decision) (Sotomayor, J., concurring in part and dissenting in part) (quoting Patton v. Yount, 467 U.S. 1025, 1031 (1984))*; see also Hayes,* 632 F.3d at 508 (noting that prejudice is presumed only in the most extreme circumstances "'when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity'" about the case (quoting Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir. 1998)); *Skilling,* 561 U.S. at 379-86 (distinguishing *Skilling* from prior cases in which Court found presumption of prejudice because of size and characteristics of community in which crime occurred, nature of information, and images displayed in media and timing of trial).

that require transfer: "presumed" or "actual."[181] If negative pretrial publicity is extreme, the district court must consider whether the pretrial publicity or community outrage has effected the venire in a way that results in a jury that is "actually prejudiced" against a defendant.[182]

In 2010, the case of *United States v. Skilling*[183] was appealed to the Supreme Court after former Enron Chief Executive Officer Jeffrey Skilling was convicted, in 2006, of nineteen counts of conspiracy, securities fraud, making false representations to auditors, and insider trading in connection with the 2001 collapse of the company.[184] At the time of its collapse, Enron was the largest United States corporation to have declared bankruptcy,[185] during which approximately 4,000 Enron employees lost their jobs and retirement funds, and there was widespread economic damage as the effects of the bankruptcy reverberated throughout the Houston economy.[186]

Not surprisingly, the case generated significant media attention, both nationally, and particularly in Houston.[187] Skilling, who had served as Enron's CEO for six months, had abruptly quit the company[188] four months before the company's collapse, claiming purely personal reasons in his resignation.[189] However, Skilling featured prominently in the media's coverage of the company's

181. *See Skilling,* 561 U.S. at 382, 385-86 (holding that no presumption of prejudice arose and no actual prejudice infected jury that found defendant guilty of nineteen counts and not guilty of nine counts); *Hayes*, 632 F.3d at 508, 510, 512 (holding that negative pretrial publicity did not raise presumption of prejudice and jury was not actually prejudiced against defendant).

182. *See Skilling*, 561 U.S. at 385; *Hayes*, 632 F.3d at 510-11.

183. *See* United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), cert. granted, 561 U.S. 358, 358 (2010).

184. *See* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003); *Skilling*, 561 U.S. at 358; *Timeline: A Chronology of Enron Corp.*, N.Y. TIMES (Jan. 18, 2006), https://www.nytimes.com/2006/01/18/business/worldbusiness/timeline-a-chronology-of-enron-corp.html?module=inline.

185. *See* Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES (Dec. 3, 2001), https://www.nytimes.com/2001/12/03/business/enron-s-collapse-the-overview-enron-corp-files-largest-us-claim-for-bankruptcy.html?module=inline.

186. *See* Jim Yardley, *Enron's Collapse: The Hometown; Fall of Enron Ends Its Dance with Houston*, N.Y. TIMES (Jan 14, 2002), https://www.nytimes.com/2002/01/14/us/enron-s-collapse-the-hometown-fall-of-enron-ends-its-dance-with-houston.html; Scott Cohn, *Former Enron CEO Jeffrey Skilling Wants Back into the Energy Business*, CNBC (Mar. 23, 2019, 12:32 AM), https://www.cnbc.com/2019/03/23/former-enron-ceo-jeffrey-skilling-wants-back-into-the-energy-business.html; *What Enron Employees Have Lost*, NPR (Jan. 22, 2002), https://legacy.npr.org/news/specials/enron/employees.html.

187. *See generally* Yardley, *supra* note 186; Cohn, *supra* note 186; *What Enron Employees Have Lost*, *supra* note 186.

188. Richard A. Oppel Jr. with Alex Berenson, *Enron's Chief Executive Quits After Only 6 Months in Job*, N.Y. TIMES (Aug. 15, 2001), https://www.nytimes.com/2001/08/15/business/enron-s-chief-executive-quits-after-only-6-months-in-job.html?module=inline.

189. Matt Stevens & Matthew Haag, *Jeffrey Skilling, Former Enron Chief, Released After 12 Years in Prison*, N.Y. TIMES (Feb. 22, 2019) https://www.nytimes.com/2019/02/22/business/enron-ceo-skilling-scandal.html.

downfall as it became obvious that his toxic leadership had been at the heart of the company's misfortune.[190]

At the outset of his criminal trial, Skilling had unsuccessfully argued for a venue transfer because of pretrial publicity, saying that "pervasive animosity" in Houston had tainted the jury voir dire process.[191] The federal district court, finding that the facts of the case were "neither heinous nor sensational" and that the media coverage had been "objective and unemotional," denied the venue transfer motion and proceeded with jury selection in Houston.[192] The jury selection during voir dire in this case was based on answers venire members had provided to the judge on questionnaires, as well as in-person questioning.[193] Based on venire members' answers to a fourteen-page questionnaire, the prosecution and defense initially agreed to excuse 42 percent of potential jurors.[194] The court then conducted extensive questioning of the venire, where many members of the group were struck for cause.[195] In some instances, however, the court rehabilitated jurors who had expressed some bias by eliciting their commitments to set aside what they had heard and decide the case on the evidence.[196]

On appeal, the Fifth Circuit disagreed with the district court's conclusions about the impact of the Enron publicity on the jury selection, finding that the media coverage "literally saturated" the community and that the "sheer number of victims" in Houston resulted in widespread "non-media prejudice."[197] Accordingly, the court concluded that Skilling was entitled to a presumption of prejudice and observed that it "would not have been imprudent for the court to have granted Skilling's transfer motion."[198] The court, however, noted that an "effective voir dire generally is a strong disinfectant of community prejudice" and held that that the presumption of prejudice had been overcome by a showing that an impartial jury had been impaneled.[199]

Skilling then appealed to the Supreme Court, arguing that the trial venue should have been moved and that, among other things, the court had not allowed the lawyers to sufficiently question prospective jurors in order to elicit potential bias and had been insufficiently sensitive of jurors' assertions that they could be impartial.[200] The government countered that the vetting of jurors, including an extensive questionnaire, had been effective.[201] Though multiple justices wrote opinions in *Skilling v. United States*, the first change-of-venue case the court has

190. *Id.*
191. *Skilling*, 554 F.3d at 557, 559.
192. *Id.*
193. *Id.* at 562.
194. *Id.*
195. *Id.* at 529.
196. *Id.* at 562.
197. *Id.* at 558-60.
198. *Id.* at 558.
199. *Id.* at 562. (emphasis omitted).
200. *Skilling*, 561 U.S. at 377.
201. *Id.* at 358.

heard since the 1960s, most agreed that Skilling had, in fact, received a fair trial before an impartial jury.[202]

On the issue of bias, the Court found that the Sixth Amendment right to trial by an impartial jury was not violated in Skilling's case, as no presumption of juror prejudice arose, nor was there a showing of actual prejudice because the comprehensive questionnaire that was used in addition to oral voir dire adequately ensured against jury bias. "Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance," the court stated.[203] Further stating, "In sum, Skilling failed to establish that a presumption of prejudice arose or that actual bias infected the jury that tried him."[204] Finally, "Jurors, the trial court correctly comprehended, need not enter the box with empty heads in order to determine the facts impartially. 'It is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court.'"[205]

The Court divided Skilling's fair-trial claim into two questions: first, whether the lower court should have granted a change of venue based on a presumption of juror prejudice, and second, whether Skilling's jury was, in fact, prejudiced.[206] The Court was quick to point out that past cases showed that pretrial publicity, even if it is pervasive and adverse, does not inevitably lead to an unfair trial.[207] Furthermore, the Court said that Skilling's case shared little in common with the few cases where a transfer of venue had been granted, which tended to involve murder trials, small towns, published confessions of guilt, and media coverage that resulted in a "carnival atmosphere" at trial.[208] "[N]ews stories about Enron did not present the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact."[209] The Court also noted that more than four years had passed between Enron's collapse and Skilling's trial, during which "the decibel level of media attention diminished somewhat."[210] Most notable though, was that fact that Skilling was actually acquitted of nine insider trading counts.[211] "It would be odd

202. *See generally id.* (Discussing the opinions of the Court when agreeing that a fair trial was received before an impartial jury).

203. *Id.* at 377-78, 381(emphasis omitted); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (Jurors are not required to be "totally ignorant of the facts and issues involved in the case . . . ," as "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); Reynolds v. United States, 98 U.S. 145, 155-56 (1879) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.").

204. *Skilling*, 561 U.S. at 398.

205. *Id.* at 398-99.

206. *Id.* at 377.

207. *Id.* at 384.

208. *Id.*

209. *Skilling*, 561 U.S. at 384.

210. *Id.* at 361.

211. *Id.*

for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption."[212]

Having ruled that there was no presumption of prejudice, the Court then held that Skilling's specific jury was not tainted by actual prejudice because the voir dire was successful in weeding out juror bias. "Inspection of the questionnaires and voir dire of the individuals who actually served as jurors satisfies us that, notwithstanding the flaws Skilling lists, the selection process successfully secured jurors who were largely untouched by Enron's collapse."[213] Skilling's attorneys had argued that voir dire was insufficient because it had lasted for only five hours, whereas in other high-profile cases it had taken days.[214] The government responded that the fourteen-page, seventy-seven question form filled out by all potential jurors was effective in weeding out any biases; "A normal trial would not have had a fourteen-page questionnaire," Deputy Solicitor General Michael R. Dreeben of the Justice Department told the Court during oral arguments.[215] The Court pointed out that all of Skilling's jurors had already stated on their questionnaires that they would be able to base a verdict on only the evidence presented at trial.[216] Furthermore, the trial judge had also questioned each juror individually to further ferret out any bias.[217]

IV. REMEDYING THE PERCEPTION OF BIAS DURING THE 9/11 COMMISSION PANEL VOIR DIRE

Though neither Constitutional, federal, nor military law precedent is controlling to the commission in the 9/11 case, the commission has used best practices from both systems when crafting decisions and structures within the guidelines of the statutory structure of the 2009 MCA when conducting business. In order for the commission process to seem legitimate and pass down a sentence that is backed by the authority of a functioning legal system, the commission must undertake measures to apply the most progressive voir dire standards. This can be done by mimicking the best practices of federal court and military courts-martial to ensure that the commission minimizes any perception or presumption of bias on the panel that is selected through its voir dire process. "[T]he more intense the public's antipathy toward a defendant, the more careful a court must be to prevent that sentiment from tainting the jury."[218] Because the panel members are service members who have served during ongoing conflicts with Middle Eastern terror organizations, they are particularly attuned to come into the commission proceedings with an implicit bias about the accused and the nature of the charges

212. *Id.*

213. *Id.* (emphasis omitted).

214. *Id.*

215. *Justices Consider Whether Enron Exec Got Fair Trial*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Mar. 1, 2010), https://www.rcfp.org/justices-consider-whether-enron-exec-got-fair-trial/.

216. *Skilling*, 561 U.S. at 391-92.

217. *Id.* at 358.

218. *Skilling*, 561 U.S. at 427 (Sotomayor, J., dissenting).

they face. To guard against actual prejudice, the commission must engage in extensive voir dire regarding the prospective panel members exposure to pretrial publicity, given the public knowledge surrounding the atrocities of the September 11 terror attacks.

There are generally three criteria commonly applied to determine the independence of a tribunal system like the military commission that are germane to panel voir dire: (1) the manner in which judicial officers are appointed; (2) the existence of adequate guarantees protecting the tribunal and its members from external pressures, and (3) an outward appearance that the tribunal is independent.[219] Without broadening its voir dire practice, the commission will continue to suffer in it's ability to ferret out panel member bias. The Commissions will also suffer as well as the public perception from both watchful nations and the American public that would question the integrity of the trial process from the day the trier of fact is impaneled.

"In selecting a jury, a trial court must take measures adapted to the intensity, pervasiveness, and character of the pretrial publicity and community animus."[220] In order to provide more statutory guidance, the following proposed amendment should be added to 10 U.S.C.S. § 949f, the statutory home of the 2009 MCA, and incorporated into the RMC, in order to ensure an extensive and counsel-led voir dire is conducted in military commissions:

> *Examination of members*. The military judge shall initially ask the panel sufficient questions to determine whether any member: (1) is statutorily unqualified to serve; (2) has acted as in a role during his or her military career that would render him or her unfit to serve on the military commission panel; (3) is related to any witness, counsel, military judge, other commission member, or the accused; (4) has served for or with any witness, counsel, military judge, other commission member; (5) has an interest, financial or otherwise, in the case; (6) has expressed or formed an opinion on the case; (7) is aware of any personal bias or prejudice regarding the case; and (8) knows of any reason why he or she cannot judge the case fairly and impartially. After the military judge's examination, counsel for the prosecution and each defense team shall have the right to examine the members, and shall have the right to ask the members directly, and outside the presence of any other member, relevant question to ascertain bias, prejudice, or any other reason whereby the member may be disqualified. Opposing counsel may object to, and the military judge may limit or disallow, questions that are not directly relevant or that further the interest of justice to ascertaining a member's qualification to sit as an impartial panel member.

First, this amendment would demand that the commission adopt a voir dire practice that combines the best practices of all American regular courts and allows for counsel-led questioning of potential panel members, in addition to an extensive pre-trial questionnaire of relevant questions and the military judge's group questions. The commission should seek input from counsel to develop the pretrial

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219. *Legal Analysis: Independence of the Judiciary*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE 13, (Dec. 31, 2009), https://www.osce.org/files/f/documents/f/e/67584.pdf.

220. *Skilling*, 561 U.S. at 439 (Sotomayor, J. dissenting).

questionnaire and group questions of the members. After reviewing the prospective panelist's responses to the questionnaires and consulting with counsel for the accused, the commission should excuse any officer for cause based on their biased representations on the questionnaires.

The commission should conduct a careful group and individual voir dire of each remaining member of the venire. While group questioning is fine, it is usually not adequate to completely ferret out truthful answers from potential members, especially on sensitive topics about a service member's service record or bias relating to relevant topics in this case. As such, the proposed amendment directs that individual questioning of members should be allowed, and that it should be done for each member, by both the defense and prosecution counsel, out of the presence of the other members of the panel to give potential panel members more opportunity to answer honestly.

The court should inquire about a panel member's exposure to the September 11 attacks, publicity and the content of any stories that stood out in the prospective panel member's mind regarding those events, and the member's service history for obvious conflicts to the case. In addition, the court should make additional inquiries regarding any other questionnaire answers that suggest bias or cause for concern. As was shown in the *Skilling* case, in the face of widespread public knowledge and media coverage, the only way to inoculate jury selection from seeping bias is by addressing the topic directly and ensuring that the members selected can serve free from outside knowledge, emotion, and influence.

Although the commission has wide discretion to evaluate a prospective member's impartiality, the commission may not simply take the member's subjective assessment of their impartiality at face value. As such, the 9/11 commission should adopt the liberal mandate of military courts martial practice and similarly enforced in federal criminal court proceedings and give the accused and their defense counsel liberal means of challenging potential members of the panel, which would allow greater fairness (actual or perceived) in the process.

There seems to be some hope that the commission can conduct an adequate voir dire to seat an impartial jury in the 9/11 Commission. First, as discussed earlier, evidence suggests that in the 2008 *Hamdan* case, though tried under previous iterations of the MCA, an impartial panel of military officers was able to decide the case, in which they showed leniency to the accused, suggesting that the group overcame any bias that could be expected.

Second, the 9/11 Commission parties have conducted voir dire when seating the three judges that have presided over the 9/11 Commission since 2012, including the most recent voir dire of current Judge Cohen. The RMC dictates that, among other reasons, a military judge must disqualify himself or herself in the following circumstances:

> (1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

> (2) Where the military judge has acted as counsel, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.[221]

Judge Cohen's first day on the bench was devoted to voir dire, where defense and prosecution were able to question him on his qualifications and for potential issues that could raise a perception of bias.[222]

> [Voir Dire] offered a window into the style, experience and thinking of Colonel Cohen, a 48-year-old career military lawyer, whose last assignment was as chief of the Air Force's environmental law and litigation division. "I do not recall ever being angry about anything that happened with Sept. 11," he said, adding that he did not know a single victim of the attacks. On that day, he said, he was taking a defense lawyer's course at the Bolling Air Force Base in Washington, across the Potomac River from the Pentagon. When James Harrington, a defense lawyer representing Ramzi bin al-Shibh, one of the accused plotters, asked if the colonel was aware that the C.I.A. torture of the defendants "was a big issue in this case," the judge responded, "I understand that the parties will be arguing over whether or not your clients were tortured…Mr. Harrington replied, "Welcome to the sewer, judge."[223]

However, the selection of previous judges, most notably Marine Col. Keith Parrella, was controversial, and raised questions as to how the CA was screening potential judge and panel candidates who have backgrounds that could be a conflict of interest to sit on the panel of the 9/11 accused. Judge Parella also subjected himself to voir dire on his first morning on the bench, "fielding questions from defense attorneys about his capacity to take on the case and rejecting suggestions that he should learn in detail what came before him before continuing. 'I've been detailed by a competent authority and we're moving out,' said Parrella."[224] Several of the accused had requested Judge Parrrella to recuse himself, after a study of his resume ferreted that "Parrella's 2014-15 Marine fellowship as an on-loan prosecutor at the Department of Justice's Counterterrorism section of the National Security Division presented a particular ethical conflict because four of the nine prosecutors currently on the case work[ed] for the same unit."[225]

CONCLUSION

Mark Twain once remarked "[w]e have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of

221. R.M.C. 902(b).

222. Carol Rosenberg, *New Judge in the 9/11 Trial at Guantánamo Inherits a Complex History*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/us/politics/w-shane-cohen-guantanamo.html.

223. *Id.*

224. Carol Rosenberg, *New 9/11 Trial Judge May Preside Less Than a Year*, MCCLATCHYDC (Sept. 10, 2018), https://www.mcclatchydc.com/latest-news/article218005120.html.

225. *Id.*

finding twelve men every day who don't know anything and can't read."[226] Though a justice system that offers the opportunity to be adjudged by a group of strangers is not perfect and has its inherent dangers, it has been proven to be a strong safeguard of judicial integrity when executed properly. The fundamental right to an impartial jury in criminal legal proceedings has existed prior to America's inception, is guaranteed by the Constitution, and can be derived from sources like the UCMJ, as well as international law such as Article 3 of the Geneva Conventions. As repeatedly illustrated by courts, although extensive voir dire is not a fundamental right, it is inextricably linked to enforcing the guarantee of a fair trial with an impartial and unbiased trier of fact. Only by a thorough examination of potential jurors can counsel seek to challenge those predisposed jurors.

"'This is by definition a broken system. If the purpose of all this is justice, no one is getting any,' said Brig Gen [sic] John Baker, who oversees all the defense teams at Guantánamo. 'The bedrock principle of our nation is justice, due process and rule of law, making sure people get proper representation. Our system is on trial here.'"[227] While Brigadier General Mark Martins, the current Chief Prosecutor of the military commissions, has argued that the military commissions do meet or exceed applicable fair trial standards under international humanitarian law, this note argues that the commission's voir dire process does not conform with the expectations of regular criminal or military courts in the United States. This note also argues that the public, both American and worldwide, is likely to continue to lose confidence in the proceedings at Guantanamo unless the commission works to rehabilitate its image and infuse justice in the process that many criticize is just designed to ensure that the detainees are handed death sentences[228] after an arduous and protracted legal process.[229]

However, this note will hopefully serve as a launching point for anyone who wishes to challenge this assumption and will be a tool for the defense teams as they lobby the military judge to craft a framework for voir dire that allows the defense teams liberal challenges and an opportunity to confront any potentially biased panel members. Cases like *Skilling* demonstrate the inherent tensions regarding voir dire in a very public and charged case, and why liberal voir dire should be allowed to enable the defense to make more informed exercises of challenges and

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226. Mark Twain, Fourth of July Speech (July 4, 1873), (available at http://www.twainquotes.com/Jury.html).

227. Borger, *supra* note 26.

228. Carrie Budoff Brown, *Gibbs Won't Commit to Civilian Trial for KSM*, POLITICO (Jan. 31, 2010), https://www.politico.com/blogs/politico-now/2010/01/gibbs-wont-commit-to-civilian-trial-for-ksm-024688.).

229. Brigadier Gen. Mark Martins, Chief Prosecutor of the U.S. Mil. Comm'ns, Reformed Military Commissions, International Perceptions, and the Cycle of Terrorism, Address at the Royal Institute of International Affairs, Chatham House, London (Sept. 28, 2012), (available at https://www.lawfareblog.com/brig-gen-mark-martins-address-chatham-house) (Brigadier General Martins noted in his address that "all three branches of government in the United States now regard military commissions as being bound to comply with the requirement of Common Article 3 of the Geneva Conventions of 1949. The pertinent provision requires that an accused detainee be tried by a 'regularly constituted court affording all of the judicial guarantees . . . recognized as indispensable by civilized peoples.' The protections incorporated into the Military Commissions Act of 2009 clearly far exceed this international standard.").

ensure impartiality. Enacting the proposed practices would ensure the fair administration of justice, protect the fundamental rights of the accused in the 9/11 Commission, and strengthen the public's perception of the fairness of justice in the military commission system.