# In the United States Court of Appeals for the Armed Forces

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| UNITED STATES,<br><br>*Appellee*,<br><br>v.<br><br>DOWTY, Thomas W.<br>Lieutenant (03), U. S. Navy,<br><br>*Appellant* | ) | BRIEF OF<br>NATIONAL INSTITUTE<br>OF MILITARY JUSTICE<br>AS AMICUS CURIAE<br>IN SUPPORT OF<br>THE GRANTED ISSUE<br><br>Crim. App. No. 99-01701<br><br>USCA Dkt. No. 03-0152/NA |

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BRIEF *AMICUS CURIAE* OF
NATIONAL INSTITUTE OF MILITARY JUSTICE

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Kevin J. Barry
13406 Sand Rock Court
Chantilly, Virginia 20151-2472
(703) 968-7247
kjbarry@erols.com

Philip D. Cave
107 North Payne St.
Alexandria, VA 22314
703-928-8901

Eugene R. Fidell
2001 L Street, NW
Second Floor
Washington, D.C. 20036
(202) 466-8960

Stephen A. Saltzburg
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7089

*Attorneys for Amicus*

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**TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

The National Institute of Military Justice ("NIMJ") respectfully submits this Brief as *Amicus Curiae* pursuant to the invitation of the Court, *U.S. v. Dowty*. No. 03-0152/NA (May 21, 2003)(Order Granting Petition for Review), and in accordance with Rule 26, Rules of Practice and Procedure.

***Granted Issue***

WHETHER APPELLANT'S COURT-MARTIAL WAS PROPERLY CONVENED WHERE THE MEMBERS POOL WAS CREATED THROUGH SELF-SELECTION AND NO MEMBERS WERE SELECTED BY THE CONVENING AUTHORITY ACCORDING TO THE CRITERIA CONTAINED IN ARTICLE 25, UCMJ.

***Statement of Jurisdiction, of the Case, and of the Facts***

*Amicus* accepts the Statements of Jurisdiction, of the Case, and of the Facts, as set forth in

Appellant's Brief.

### *Summary of Argument*

I. This case raises an important issue that bears on the structural integrity of *this* court-martial. The Navy-Marine Corps Court of Criminal Appeals approved a member-selection arrangement that it termed "both novel and potentially troubling." *United States v. Dowty*, 57 M.J. 707, 711 (N-M. Ct. Crim. App. 2002). The selection process in this case involved not only a previously unheard of "volunteer jury" approach, but in addition is one in which the convening authority did not properly apply the selection criteria set forth in Article 25, UCMJ when he allegedly "personally selected" the members. Together these defects raise substantial doubts regarding the proper composition, the structural integrity, and the jurisdictional foundation of Appellant's court-martial, warranting this Court's intervention and remedial action.

II. Further, this case raises again the "most vulnerable aspect of the court-martial system [and] the easiest for critics to attack."[1] Questions regarding the selection of members for courts-martial, and the fairness of the subsequent courts-martial, are recurring issues.[2] This case provides an opportunity for this Court to examine the court-martial member selection process as it plays out in the real world, and to exercise it's supervisory authority over the system by considering the need for fundamental change.

### *Argument - I*

DUE TO THE FLAWED SOLICITATION PROCESS FOR OBTAINING POTENTIAL MEMBERS, AND THE INADEQUATE "PERSONAL SELECTION" OF MEMBERS BY THE CONVENING AUTHORITY, THE

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[1] *United States v. Smith*, 27 M.J. 242, 252 (1988) (Cox, J. concurring).

[2] *See, e.g., United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991), *United States v. Benedict*, 55 M.J. 451 (2001).

COURT-MARTIAL WAS IMPROPERLY CONSTITUTED AND LACKED JURISDICTION.

The statutory requirement at issue is that the convening authority detail as court-martial members only those "members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d)(2) UCMJ. That requirement was compromised here in at least two ways.

First, the Assistant Staff Judge Advocate (ASJA) used a previously unknown approach in assembling the member pool for the convening authority (CA) by soliciting volunteers through a notice in the command's Plan of the Week. About 50 responses to the notice were received from officers and enlisted persons, and all who responded were provided questionnaires. Forty-seven questionnaires were returned, 25 from enlisted members, and 22 from officers. There were 140 officers at the command that were potentially available for duty as members.[3]

Thus, by using this volunteer process, the ASJA, on his own, completely eliminated from consideration 118 of the 140 officers at the command. He utterly failed to consider any of these for service as court members; none had a chance to make the pool of "best qualified" officers. NIMJ questions whether *any* court-martial member selection process such as this – that at the outset excludes from consideration 85% of the available officers at the command – can ever be adequate to allow the convening authority to fulfill the mandatory statutory duty to "detail as members thereof such members of the armed forces as, *in his opinion, are best qualified* for the duty." Art. 25(d)(2), UCMJ (emphasis added). Certainly when such a massive exclusion is

[3] *United States v. Dowty*, 57 M.J. 707, 713 (N.M.Ct.Crim.App. 2002).

accomplished by a junior staff officer, using a novel and unprecedented procedure such as used here, the doubts about the integrity of the process must overwhelm any presumptions normally accorded the member selection process.

Here, of course, there was more. After eliminating 2 others due to the ASJA's perception of their "close relationship" with the legal office, the ASJA eliminated another 5 officers – 1/4 of the remaining 20 officers – by uncritically accepting those officers' own subjective determinations of unavailability. Whatever justification may support them, such determinations – without command review and concurrence – fail to meet "the acute need to prevent unnecessary operational interference," one of the three "philosophical assumptions" underlying the present statutory system for selection of court members.[4]

Thus, the "pool" of officers the ASJA forwarded to the CA included only those 15 he had selected,[5] of which he then recommended only 9 for actual selection.[6] The CA largely followed the ASJA's advice and selected 8 of the 9 recommended officers, adding one additional officer of his own selection. Thus, the CA had as his basic consideration, a "pool" of officers that was arbitrarily – without applying any of he Article 25(d)(2) criteria – reduced to include less than 11% of the officers under his command. NIMJ submits that such a pool fails to meet the requirements of the statute; it destroys any potential for the accused to be tried by "the best

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[4] The other two "philosophical assumptions" underlying the member selection system are: "the desire for an experienced and knowledgeable panel" and "a preference to ensure trial by the best qualified panel possible." 2 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* 15, ¶ 15-31.00 (2nd ed. 1999)[hereinafter Gilligan & Lederer].

[5] This fact is stated in Appellant's Brief at 3, note 1, and is not disputed in Appellee's Brief.

[6] NIMJ notes that the ASJA advised the CA that he could "select up to nine." We are aware of no statute or regulation that so limits the discretion of the CA to select only 9 officers for a general court-martial, and consider this to constitute an additional error in the processing of this case.

qualified panel possible."[7]

Secondly, in forwarding to the CA the list and questionnaires of those 15 volunteers that he had pre-selected, (including his own list of 9 nominations), the ASJA advised the CA as follows: "As convening authority, you must select personnel qualified by age, training, length of service, and judicial temperament." This list of four qualifications omits the additional two statutory criteria of "experience" and "education." There is no indication that the CA was ever advised of the actual statutory criteria set forth in Art. 25(d)(2). The fact that 2 of the 9 officers recommended by the ASJA were junior to the accused, and that both of these officers were selected by the CA, seems to indicate that neither the ASJA in assembling the pool, nor the CA in "personally selecting" the members, were independently aware of the requirements of Article 25(d). *See* Article 25(d)(1), UCMJ.

The court below apparently was not particularly concerned with this failure to follow the statute, finding that the military judge "ruled correctly that the members who sat on Appellant's panel were fair and impartial and personally selected by the CA *based on appropriate statutory criteria.*"[8] First of all, even the court did not realize that the ASJA's four stated criteria omitted *two* additional factors, stating that he had missed only the one factor, "experience." 57 M.J. at 713 (note 7). Secondly, the court found that the "ASJA applied *most* of the Article 25(d)(2), UCMJ, standards in nominating the 15 members and recommending nine members to the CA." 57 M.J. at 714 (emphasis added).

In these findings are two remarkable flaws. First, The court never addressed with

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[7] 2 Gilligan & Lederer, *supra* note 4, at 15, ¶ 15-31.00.

[8] *Dowty*, 57 M.J. at 714 (emphasis added).

particularity which of the criteria were applied by the CA, simply stating that the members were "personally selected by the CA based on appropriate statutory criteria." As noted above, the only evidence is that the CA was *never advised* of the actual statutory requirements, and was *affirmatively misadvised* regarding the Article 25(d)(2) criteria. Second, the court determined that application of "most of" the statutory requirements (by the ASJA – but by necessary implication by the CA as well) was sufficient.[9] For an issue that is arguably, if not demonstrably, jurisdictional,[10] a standard of review that amounts to "close enough for government work" is simply unacceptable and wrong. Where the CA's selection the members does not follow the requirements of the statute, those members have not been properly selected, and that selection does not amount to the "personal selection" required by this Court's precedents.[11] The remedy is not to review for prejudice, but to set aside the conviction as having been arrived at by a court that was improperly constituted, and thus lacked jurisdiction.

### ***Argument II***

THE FACTS OF THIS CASE RAISE IMPORTANT AND RECURRING ISSUES AND FLAWS IN THE CURRENT PROCESSES FOR SELECTING COURT-MARTIAL PANELS THAT WARRANT THIS COURT'S

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[9] For the court, "most of" was 4 of 5, or 80%. In actuality, it was 4 of 6, a mere 67%.

[10] *United States v. Ryan*, 5 M.J. 97, 101 (1978)("we believe the proper inquiry is whether the jurisdiction of the court survived the defect in the appointment of the members . . [it did] not." Failure of the CA to personally detail the members should be raised by "motion to dismiss for want of jurisdiction." 1 Gilligan & Lederer, *supra* note 4, at 515, ¶ 13-14.00. In addition to the issue as to whether selection of the improperly prepared proposed panel, almost without change, is a personal selection, this case presents the additional question of a "personal" selection that does not apply the appropriate statutory criteria. Both deserve the same analysis and treatment.

[11] In the federal civilian system, failure to closely follow the requirements of the jury selection statute is fatal error. *United States v. Kennedy*, 548 F.2d 608 (5th Cir. 1977) ("the emergency use of volunteer jurors selected from those citizens who have just finished a term of jury service violated both the letter and spirit of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 . . . and its requirement of random selection from eligible members of the community.")

CONSIDERATION AND USE OF ITS SUPERVISORY JURISDICTION TO AFFORD PROSPECTIVE REMEDIAL ACTION.

This case presents several larger, recurring, issues. These affect the question of expanding the process of member selection to include random selection, the involvement of the convening authority in the member selection process, and the involvement of the office of the staff judge advocate in assisting the convening authority in this matter. Although arguably not necessary to the decision, in view of the fatally flawed selection process set forth in *Argument I*, they are pressing issues that continually and systemically undermine the integrity of the military justice system, and the credibility with which convictions in this system can be viewed. They deserve attention here, and the consideration of the Court in its supervisory role as the highest court in this specialized system of justice.[12]

*Random Selection*

Random selection of court members is not prohibited by Article 25 or by any other statute. Indeed, random selection has been tried, with apparent success,[13] primarily in experiments in the early 1970's,[14] and has received favorable comment from this Court.[15] One

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[12] This Court has, in appropriate cases, suggested rulemaking action or consideration by Congress when it has seen the desirability of making adjustments to the system. *See* Eugene R. Fidell, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* 32-34 (11th ed.) (collecting cases). Such action would not be inappropriate regarding these issues. NIMJ herein recommends a somewhat more direct approach – but does not exclude the desirability of the Court making appropriate recommendations to those other entities.

[13] 2 Gilligan & Lederer, *supra* note 4, at 15, ¶ 15-31.00.

[14] *See, e.g.,* Department of Defense, Joint Service Committee on Military Justice, *Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial* (1999). [Hereinafter JSC Report]. Appendix J of the JSC Report describes random selection test programs conducted in the Army both in the continental United States at Fort Riley, KS, and in Vietnam. The JSC Report was prepared in response to a congressional mandate. *See* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 1920, 2023 (1998). This Report has

noted authority in 1991 proposed computerized random selection, consistent with Article 25, as a solution: "I can not believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a service member's liberty and property interests are at stake."[16] Other respected commentators have called for congressional action to adopt a random selection method "as soon as possible," because it would help "eliminate an unnecessary anachronism that distorts the military and civilian perception of an otherwise model system."[17] The General Accounting Office, after a two year study, recommended in 1977 that "the Congress amend Article 25: Uniform Code of Military Justice to require the random selection of military jurors and that it reexamine related issues."[18] The procedures used in the case at bar are the antithesis of a random selection model, and necessarily fail to promote the "representative" quality of the panel that is seen as desirable

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been addressed by the Court. *See, e.g., United States v. Benedict*, 55 M.J. 451, 457-58 (2001) (Effron, J. dissenting), and it is further discussed below.

[15] We are aware that at times there have been experiments in the armed services with some form of random selection of court-martial members. In view of [*United States v.*] *Crawford*, [15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964)], it would appear that even this method of selection is permissible, if the convening authority decides to employ it in order to obtain representativeness in his court-martial panels and if he personally appoints the court members who have been randomly selected.
*United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 249)(dicta).
*See also United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (upholding a conviction over objections concerning the exclusion of junior enlisted members in a trial conducted under the random selection program at Fort Riley, KS. The case is discussed in JSC Report, Appendix J, at 6.)

[16] David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 Mil. L. Rev. 1, 20 (1991).

[17] 2 Gilligan & Lederer, *supra* note 4, at 16, ¶ 15-31.00.

[18] Comptroller General of the United States, *Military Jury System Needs Safeguards Found in Civilian Federal Courts* (B-186183, June 6, 1977) (Letter of Transmittal) *reprinted in* JSC Report, *supra* note 14, at Appendix S.

in military court panels, and as a necessary element in civilian juries.

*Convening Authority*

The involvement of the convening authority has been the factor that has, more than any other, contributed to the member selection process being the "most vulnerable aspect of the court-martial system [and] the easiest for critics to attack."[19] As the officer exercising prosecutorial discretion, the convening authority's statutory duty to hand-select the members of the court-martial panel that will sit in judgment over the accused remains one that seemingly cannot be made to appear proper to those outside the system. As noted by then Chief Judge Young of the Air Force Court of Criminal Appeals, when he suggested changing the system of selecting members, "[I]t is impossible to convince even military judges from other countries that our current system of selecting court members is fair."[20] Other well respected commentators have similarly called for change,[21] and both the United Kingdom and Canada, with virtually the same issue facing them, have reformed their systems to eliminate the court member selection role of the convening authority.[22]

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[19] *Smith*, 27 M.J. at 252 (Cox, J. concurring).

[20] Colonel James A. Young III, *Revising the Court Member Selection Process* ,163 Mil. L. Rev. 91, 125 (2000).

[21] "Arguably, the most critical and least necessary vestige of the historical origins of the military criminal legal system is the personal appointment of the members by the convening authority." 2 Gilligan & Lederer, *supra* note 4, at 14, ¶ 15-31.00 (citing additional commentators at note 73). *See also* David A. Schlueter, *Military Criminal Justice: Practice and Procedure* 356, § 8-3(C)(4), n. 178 (5th ed. 1999).

[22] *See, e.g., Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221 (1997); J.W. Rant, *The British Courts-Martial System: It Ain't Broke, But It Needs Fixing*, 152 Mil. L. Rev. 179 (1996); *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 September 1999 to 31 March 2000*, §2.6, *available at* http://www.forces.gc.ca/jag/office/publications/annual_reports/2000annualreport_e.pdf; JSC Report, *supra* note 14, at Appendices M, N, & O. *See also* Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: the Cox Commission Recommendations to Rejuvenate the Uniform Code of Military*

Perhaps the most important of the reviews of this issue is that conducted in 2001 by the NIMJ-sponsored "Commission on the 50th Anniversary of the Uniform Code of Military Justice," commonly referred to as the "Cox Commission."[23] The very first recommendation made by the Cox Commission was to "modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge."[24] The commentary supporting this recommendation contains specific recommendations, in language that is remarkable for its power.[25] Much that the Cox

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*Justice*, [2002] L. Rev. M.S.U.-D.C.L. 57, 100-03.

[23] Honorable Walter T. Cox III et al., *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* (May 2001), *available at* http://www.nimj.org/documents/Cox_Comm_Report.pdf [hereinafter Cox Commission Report].

[24] *Id.* § III.A.

[25] The Cox Commission Report contains supporting commentary as well as specific recommendations:

> [T]he far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces. Fifty years into the legal regime implemented by the UCMJ, commanding officers still loom over courts-martial, able to intervene and affect the outcomes of trials in a variety of ways. The Commission recognizes that in order to maintain a disciplinary system as well as a justice system commanders must have a significant role in the prosecution of crime at courts-martial. But this role must not be permitted to undermine the standard of due process to which servicemembers are entitled.
>
> . . . [B]ased on the Commission's experience, and on the input received in submissions and testimony, there is one action that should be taken immediately: *Convening authorities must not be permitted to select the members of courts-martial.*
>
> There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection. The current practice is an invitation to mischief. It permits – indeed, requires – a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority. The Commission trusts the judgment of convening authorities as well as the officers and enlisted members who are appointed to serve on courts-martial. But there is no reason to preserve a practice that creates such a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates. Members of courts-martial should be chosen

Commission recommended, such as a random selection model, can likely be accomplished without amendment to Article 25, but the fundamental changes the Commission recommended support its recommendation for this statute to be amended.

*The Court's Role in Addressing the Random Selection and Convening Authority Issues*

NIMJ recommends that the Court carefully consider the impact of the current system on both the reality, and the perception, of fairness in the military justice system, and the potential for substantial improvement if that system were modified, even modestly. NIMJ urges the Court to consider the Cox Commission Report and Recommendations on these issues – including its disagreement with the JSC Report on court member selection.[26] The implications for the integrity, and perceptions of fairness, of military justice, make such a review both desirable and necessary.[27]

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> at random from a list of eligible servicemembers prepared by the convening authority, taking into account operational needs as well as the limitations on rank, enlisted or officer status, and same-unit considerations currently followed in the selection of members. Article 25 of the UCMJ should be amended to require this improvement in the fundamental fairness of court-martial procedure.
>
> . . .
>
> The Commission is aware of the 1999-2000 comprehensive study completed by the Joint Service Committee on Military Justice of the Department of Defense, which concluded that the present allocation of responsibility among convening authorities and military judges should be retained. We respectfully disagree with the conclusions reached by that body. The combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.

*Id.* (Emphasis added).

[26] *Id.*

[27] NIMJ supports the kind of independent study of the military justice system that the Cox Commission recommended but was not equipped to accomplish: "The Commission's work is not intended to substitute for congressional hearings or officially sponsored government studies of military

Substantial improvement in the system can be accomplished even while more complete statutory relief is being considered, and such can be – and we recommend such should be – immediately accomplished by this Court in the exercise of its supervisory jurisdiction over military justice. Random selection can be used, consistent with Article 25(d)(2), to substantially remove the potential for the appearance of both command influence and other improper influence over the selection process (even where it may be so inadvertent, subtle, or secret, that it is unknown even to the convening authority[28]). The JSC Report described one such process, in which the CA would apply the Article 25(d)(2) criteria to the greater list of potential members, of whom an appropriate number would thereupon be selected for the individual court-martial using a random selection method.[29] NIMJ suggests that such an arrangement is not the only mechanism that could be utilized; any process including random selection, consistent with the convening authority remaining involved consistent with Article 25(d)(2), that would effectively remove any reasonable potential for the perception of evil in the process, would well serve the system.

NIMJ recommends that the Court consider establishing a presumption, as one way to exercise its supervisory authority in this critical arena. The following language is suggested as one possibility:

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justice, both of which the Commissioners would heartily welcome." *Id.* at § I. But review action by this Court need not and should not await such future studies.

[28] *See United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991).

[29] JSC Report, *supra* note 14, "Alternative 3 - Random Selection" at 26. The JSC Report also discussed various other alternatives through which the member selection process might be modified, including other ways in which the concept of "randomness" might be introduced into the member selection process. *Id.* at 220-25, 30-43.

> Henceforth, this Court will presume that the use of a method of random selection of members is a strong protection against allegations of command influence and bias. The burden will fall upon the accused to demonstrate with specific and credible evidence that a random selection policy was not actually random or was otherwise operated unfairly. The court will presume that convening authorities who decline to adopt a random selection policy prefer having to defend their selection procedure against such allegations on a case by case basis, and to bear the burden of demonstrating that it involved no command influence, bias or misapplication of Article 25 (d)(2), UCMJ.

*Staff Judge Advocate*

Even without the remedy suggested above, a more immediate problem with the current process should be immediately addressed by the Court. An examination of the JSC Report reveals that there currently exists no uniform method of selecting members across the services.[30] Each service follows a variety of methods to identify potential members, and then to narrow that list, prior to submission of the list to the CA for selection. Even within services there are a variety of methods used.

In three of the five armed services, the office of the staff judge advocate, or the legal office, is involved in the process at the identification stage or at the narrowing stage, or both. Only in the Marine Corps and the Coast Guard is it the personnel (or administrative) officer, rather than the SJA or legal officer, that generates the nominee list. Thus, NIMJ believes that the basic recommendation of the JSC Report is subject to serious misinterpretation, in that it implies that there is one standard method of selection: "The *existing system* for selecting court-martial members is a fair and efficient method that has worked well and withstood judicial scrutiny for fifty years . . . Of the considered alternatives, the *current practice* best applies the criteria in

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[30] JSC Report, *supra* note 14, at 9-12, & Appendices E-1.

Article 25(d), UCMJ, in a fair and efficient manner."[31] In the broader discussion of the "current practice," the report emphasizes the use of "subordinate commander nominations as the first step, followed by the role of the convening authority applying "the Article 25(d)(2), UCMJ, criteria a second time when selecting court-martial members," but does not mention the intermediate – and potentially critical – step of "narrowing" the list of potential nominees.[32]

In fact, much of the potential for criticism of the member selection process as it is currently carried out results from the role of the staff judge advocate and the SJA's staff. There is no doubt that the staff judge advocate in today's military justice system would be ineligible to sit as a member of a court-martial. The SJA's role in advising the CA, especially since the advent of independent defense counsel structures, makes that officer "more than ever the chief prosecutor."[33] It is equally clear that the trial counsel and chief of military justice (both officers on the SJA's staff in most circumstances) not only could not serve as members, but in addition are ineligible to participate in the selection process.[34] Yet for years this system has allowed both the SJA, and other attorneys in the SJA office, to play a pivotal role in the court member selection process. The imputed disqualification concerns are all too apparent.[35]

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[31] JSC Report, *supra* note 14, at 47 (JSC Conclusions 7 and 8) (emphasis added).

[32] *Id.* at 17-19.

[33] 2 Gilligan & Lederer, *supra* note 4, at 17, ¶ 15-32.00.

[34] *Id.*; *see also Smith*, 27 M.J. at 251 (Cox, J., concurring).

[35] NIMJ is aware that the usual attorney disciplinary rules regarding imputed disqualification do not necessarily apply in the military. *See, e.g.*, Department of the Navy, Judge Advocate General Instruction 5803.1B, *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General*, Rule of Professional Conduct 1.10: Imputed Disqualification: General Rule, at 40-42 ("Covered USG [U.S. Government] attorneys working in the same military law office are not *automatically* disqualified from representing a client because any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8, 1.9, or 2.2") (emphasis

The JSC Report, in concluding that the "current system" is the best, does note the problems of perception that the role of the CA – and by implication the role of the SJA and SJA staff – raises, but blames them on misperceptions:

> Public perceptions of the court-martial selection process are often based on limited information and misunderstanding of the process itself, the safeguards inherent in the military justice system and the convening authority's quasi-judicial role. Criticisms by legal commentators generally focus on public misperceptions. These inaccurate perceptions are best addressed through a comprehensive education process.[36]

NIMJ would suggest that – when the public looks at the selection process in which the SJA, or other attorneys (perhaps trial counsel in other cases) on the SJA's staff, are fully involved in the preparation of the list of nominees – the negative perceptions arise not from misperceptions but from entirely reasonable perceptions and conclusions. What the public sees is the functional equivalent of the jury being hand picked by the United States Attorney (or the district attorney) or his or her staff, and the perceptions that what is happening is both unfair and unAmerican are more than reasonable.

In this case the ASJA broke no Manual for Court-Martial rule in devising his scheme – that is because there really are no rules governing member selection in the military. After a half century, that is a situation that can and should be remedied. One of the new rules that should be adopted is one establishing and limiting (or rather *eliminating*) the role of the SJA and SJA staff in the member selection process. Every CA has administrative or personnel officers who can and should be the ones assembling and culling the lists of potential members for presentation to the

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added). NIMJ believes that, to the extent that there may be justification for the military not to apply the usual *automatic* imputed disqualification rule in other circumstances, the member selection process is one in which *all* attorneys in the SJA office *must*, for the integrity of the system, be deemed to be disqualified from engaging in any role in member selection.

[36] JSC Report, *supra* note 14, at 47 (JSC Conclusion 7).

CA. This is more than simply an appearance or perception issue. It is a matter well within this Court's supervisory jurisdiction, and it is one whose time has come.

Again, the application by the Court of a presumption would be one way to exercise its supervisory authority. The following language would be one possibility:

> Henceforth, this Court will presume that, whether or not a random selection of members method is utilized, the use of a method of member selection that does not involve the office of the staff judge advocate will establish a strong protection against allegations of command influence and bias regarding the process. The Court will presume that Convening Authorities who continue to utilize the office of the staff judge advocate in the member selection process prefer having to defend their selection procedure against allegations of command influence and bias on a case by case basis and to bear the burden of demonstrating that the process involved no command influence, bias or misapplication of Article 25(d)(2), UCMJ.[37]

## *Conclusion*

The process of selection engaged in by the ASJA in this case did not comply with the requirements of Article 25(d)(2). The CA was never informed of the process employed or its flaws, and was misadvised regarding the requirements of the law – misadvise that was never corrected. The "personal selection" by the CA failed to comply with the requirements of the statute, resulting in a court-martial that was not properly constituted, and was no court-martial at all. The decision below should be reversed and the conviction set aside.

Larger issues are presented by the case – continuing systemic problems in the mostly unregulated process of selecting court members. The calls for reform have been loud and long, but have been ignored or resisted by those charged with the administration of this system.

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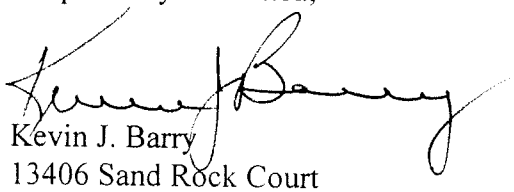
[37] NIMJ emphasizes that it has the highest regard for the integrity and good faith of officers filling roles as SJAs and CAs and their staffs, and does not see this recommendation in any way as calling into question the motives or integrity of any such persons. What is at stake here is designing a system that has structural integrity, one that does *not depend* on individuals performing properly for it to function as intended.

Clearly congressional action to examine and remedy the statutory structure is overdue. Just as clearly, many remedies can be effected by Presidential rule, or by simple adjustment to the process effected by service rule, or by response to a court decision. NIMJ recommends this Court act in its supervisory capacity to prospectively establish a presumption favoring random selection of members.[38] NIMJ also recommends that the Court establish a presumption disfavoring the involvement of SJAs and their staffs in the court-martial member selection process.[39]

Respectfully submitted,



Kevin J. Barry
13406 Sand Rock Court
Chantilly, Virginia 20151-2472
(703) 968-7247
kjbarry@erols.com

Philip D. Cave
107 North Payne St.

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[38] This remedy is less than that recommended by the Cox Commission, which would seemingly require Congressional action. It also falls short of the three decades' old recommendation of a true giant in military justice, Major General Ken Hodson, JAGC, USA, that "commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty." Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 Kan. L. Rev. 31 (1973), reprinted Mil. L. Rev. Bicent. Issue 577, 605 (1975). Random selection of military juries was Hodson's first of seven suggestions for improvement of the military justice system; removal of the commander from (inter alia) the military jury selection process was the seventh. Neither, regrettably, have yet been implemented. General Hodson, fully aware of the requirements for conducting courts-martial in a combat zone (Vietnam), made no allowance for a variation in the selection process for combat conditions, presumably believing none was needed. Nevertheless, NIMJ would not oppose a rule that made allowance for the potential need for some relaxation of the random selection model in a combat or hostile fire arena.

[39] The SJA (and SJA staff) role should, in the future, be limited to advising the CA on the prosecution discretion decisions, and prosecuting the cases thereafter referred for trial.

Alexandria, VA 22314
703-928-8901

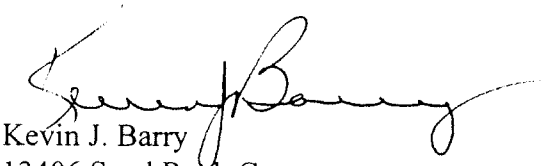
Eugene R. Fidell
2001 L Street, NW
Second Floor
Washington, D.C. 20036
(202) 466-8960

Stephen A. Saltzburg
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7089

*Attorneys for Amicus*

## CERTIFICATE OF FILING AND SERVICE

I certify that an original and seven copies of the foregoing was placed with Federal Express for delivery on September 26, 2003, and that a copy was mailed to the Director, Appellate Government Division, Navy-Marine Corps Appellate Review Activity, 716 Sicard Street, Washington Navy Yard, Washington, DC, 20374-5047, and Director, Appellate Defense Division, Navy-Marine Corps Appellate Review Activity, 716 Sicard Street, Washington Navy Yard, Washington, DC, 20374-5047 on September 25, 2003.



Kevin J. Barry
13406 Sand Rock Court
Chantilly, Virginia 20151-2472
(703) 968-7247
kjbarry@erols.com