UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES

v.

John C. RIESBECK
Boatswain's Mate Second Class (E-5), U.S. Coast Guard

CGCMG 0291

Docket No. 1374

30 November 2016

General Court-Martial convened by Commander, Coast Guard Pacific Area. Tried at Alameda, California, and Seattle, Washington, on 4 April 2012, 23-24 May 2012, and 12-16 June 2012. Post-trial hearing on 17 March and 14 May 2015.

Military Judge at trial:	CAPT Michael E. Tousley, USCG
Trial Counsel at trial:	LT Luke R. Petersen, USCG
Assistant Trial Counsel at trial:	LT Bryan R. Blackmore, USCG
Civilian Defense Counsel at trial:	Mr. Stephen H. Carpenter, Esq.
Military Defense Counsel at trial:	LT Jennifer L. Pollio, JAGC, USN
Military Judge at post-trial hearing:	CAPT Gary E. Felicetti, USCG
Trial Counsel at post-trial hearing:	Mr. Stephen P. McCleary, Esq.
Assistant Trial Counsel at post-trial hearing:	LCDR Robert E. Stiles, USCG
Assistant Trial Counsel at post-trial hearing:	LCDR Amanda M. Lee, USCG
Civilian Defense Counsel at post-trial hearing:	Mr. John M. Smith, Esq.
Military Defense Counsel at post-trial hearing:	LT Philip A. Jones, USCGR
Civilian Appellate Defense Counsel:	Mr. John M. Smith, Esq.
Military Appellate Defense Counsel:	LT Philip A. Jones, USCGR
Appellate Government Counsel:	LT Tereza Z. Ohley, USCGR

BEFORE
MCCLELLAND, CLEMENS & BRUCE
Appellate Military Judges

MCCLELLAND, Chief Judge:

Appellant was tried by general court-martial composed of officer and enlisted members. Contrary to his pleas, Appellant was convicted of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); one specification of rape, in violation of Article 120, UCMJ; and one specification of orally communicating indecent language, in violation of Article 134, UCMJ. The court sentenced Appellant to confinement for

three months, reduction to E-2, and a bad-conduct discharge. The Convening Authority approved the sentence.

On 5 August 2014, this Court issued its opinion on this case under Article 66, UCMJ, affirming the findings of guilty and the sentence. *United States v. Riesbeck*, No. 1374 (C.G.Ct.Crim.App. Aug. 5, 2014). On 11 December 2014, the Court of Appeals for the Armed Forces vacated our decision and remanded the case for further review. *United States v. Riesbeck*, 74 M.J. 176 (C.A.A.F. 2014). On 20 January 2015, we ordered a post-trial hearing in accordance with *United States v. DuBay*, 17 USCMA 147, 37 C.M.R. 411 (1967). On 29 January 2015, the Judge Advocate General returned the record to Commander, Coast Guard Pacific Area, the same command that had convened the court-martial, although a different individual occupied the billet as Commander. A post-trial hearing was duly held, and the military judge at the hearing made findings of fact, which are found at Appellate Exhibit 113.

Following the post-trial hearing, Appellant raises the following issues:

I. The convening authority did not personally select the members, disregarded the criteria for selection found in Article 25, UCMJ, and improperly considered the gender of prospective members, selecting a panel with a disproportionate number of female members.

II. The convening authority was disqualified from acting as convening authority in Appellant's case in that he had an inelastic and intolerant attitude toward the alleged offenses, and he exercised unlawful command influence (UCI) based on that intolerant attitude.

III. The Judge Advocate General of the Coast Guard wrongly sent the record of trial for a DuBay hearing to a convening authority who had adopted the predecessor convening authority's unlawful command influence, intolerance and bias.

We heard oral argument on the first issue on 12 July 2016. We affirm.

I. Member selection

Appellant argues that the convening authority did not personally select the members, in that a subordinate made member selections and the convening authority was presented with a *fait accompli* in the form of a draft convening order to sign. He further asserts that the convening authority and his subordinates did not properly apply Article 25, UCMJ, because they were not given sufficient information about prospective members and about Article 25 to do so. Finally, he

complains that the panel included a disproportionately high number of female members, implying that this was the result of impermissible "court stacking."

Whether a panel has been properly selected is a question of law reviewed *de novo*. *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011) (citing *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004)). The military judge's findings of fact are binding unless they are clearly erroneous. *Id.* (citing *Dowty*, 60 M.J. at 171). "The defense shoulders the burden of establishing improper exclusion of qualified personnel from the selection process. Once the defense establishes such exclusion, the Government must show that no impropriety occurred when selecting appellant's court-martial members." *Dowty*, 60 M.J. at 171 (citations omitted) (quoting *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000)). A few general principles apply: (1) an improper motive to "pack" the member pool (attempt to influence the outcome of the trial through member selection) is forbidden; (2) systemic exclusion of otherwise qualified potential members based on rank or other impermissible variable is improper; but (3) good faith attempts to be inclusive of all segments of the military community are allowed. *Gooch*, 69 M.J. at 358 (quoting *Dowty*, 60 M.J. at 171). Beyond these relatively bright-line principles, errors are still possible, as in *Dowty*, where solicitation of volunteers to be members of courts-martial was held to introduce "a substantial variable, not contemplated [by the statute]" – an irrelevant variable injected into the selection of members, infecting the court-martial with error. *Dowty*, 60 M.J. at 173.

Where error is found, consideration of prejudice under Article 59(a), UCMJ, "depends on the manner in which the error occurred." *United States v. Bartlett*, 66 M.J. 426, 430 (2008). In a case of error in appointing court members resulting from unlawful command influence – "court-packing" – the Government can avoid reversal only by establishing beyond a reasonable doubt that the error was harmless. *Id.* (citing *United States v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991) and *United States v. McClain*, 22 M.J. 124, 132 (C.M.A. 1986)). Where a convening authority has intentionally included or excluded certain classes of individuals, while attempting to comply with Article 25, the burden is upon the Government to demonstrate harmlessness. *Id.* (citing *Dowty*, 60 M.J. at 173-75). When there is a simple administrative error, the burden is on the appellant to show prejudice. *Id.* (citing *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998)). The foundation of the prejudice analysis is that "an accused must be provided both a fair panel . . . and the appearance of a fair panel . . . ." *United States v. Ward*, 74 M.J. 225, 228 (C.A.A.F. 2015)

(citing *Bartlett* and *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000)). Hence, prejudice would be the lack of a fair panel or the appearance of the lack of a fair panel.

Appointment of members is a responsibility of the convening authority, and may not be delegated. *Dowty*, 60 M.J. at 169 (quoting *United States v. Ryan*, 5 M.J. 97, 100 (C.M.A. 1978)). The convening authority may rely on staff to nominate court members. *Id.* at 170 (quoting *United States v. Benedict*, 55 M.J. 451, 455 (C.A.A.F. 2001)). However, the convening authority must be unfettered in his or her choices; a *fait accompli* leaving the convening authority with no real choice but to appoint the persons recommended by subordinates would violate Article 25. *United States v. Marsh*, 21 M.J. 445, 449 (C.M.A. 1986).[1]

Concerning Appellant's complaint of a disproportionately high number of female members on the panel, we bear in mind that we are concerned with intent, rather than impact. *United States v. McClain*, 22 M.J. 124, 131 (C.M.A. 1986). Two cases offer guidance. In *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988), the court reversed a conviction of indecent assault under Article 133, UCMJ, by a male officer on a female officer, concluding that the selection of two female court members "seems to have been intended to 'achieve a particular result as to findings or sentence'; this is prohibited." *Id.* at 250 (quoting *McClain*, 22 M.J. at 132). The court observed that "a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population." *Id.* at 249. However, the convening authority in that case had stated, "In sex cases . . . I have a predilection toward insuring that females sit on the court." *Id.* at 247-48. The court opined that ensuring the presence of females on panels was "relevant *only* in cases involving sex offenses," leading to the court's conclusion quoted above that the selection of female court members appeared intended to achieve a particular result.

By contrast, in *United States v. Lewis*, 46 M.J. 338 (C.A.A.F. 1997), the court affirmed convictions of attempted voluntary manslaughter, assault, and aggravated assault of the appellant's wife, rejecting the issue of court-packing where the panel was composed of five men and four women. The court summarized its reasoning thus:

[1] In *Marsh*, the record "does not support such a conclusion." *Marsh*, 21 M.J. at 449.

> Statistically, appellant's case was an anomaly, with five women detailed and four women actually sitting on the case. While no one could explain why so many women were detailed to appellant's case, no one could show a pattern of court stacking or improper actions or motive on the part of the Government. . . . In short, appellant failed to produce sufficient evidence to raise the issue of court stacking, either as a consistent practice in the command or in his individual case.

Id. at 342.

The following brief summary of events from the post-trial hearing's military judge's findings of fact, Appellate Exhibit 113, is supported by the evidence (and by the convening orders in the record) and is not clearly erroneous. The charges in this case were referred by VADM Brown, Commander, Coast Guard Pacific Area, on 14 March 2012 to a court-martial created on the same date. After a change of command, VADM Zukunft, the new Commander, Coast Guard Pacific Area, on 8 June 2012 signed an amendment to the convening order for Appellant's case only, adding enlisted members and removing some of the officers. This was preceded by a two-step process in which two different subordinates of the convening authority deselected officers and selected enlisted personnel, and then selected more enlisted personnel, over a period of about two weeks. Three days later, the day before trial was to begin, the successor convening authority, VADM Zukunft, signed a second amendment for Appellant's case only, adding another enlisted member, drawing on the earlier process by the two subordinates.

"*Fait accompli*"

Appellant claims that some members of the court were selected by the convening authority's deputy, acting without authority. There is no evidence in the record to support this claim. The deputy did not sign a convening order or amendment to a convening order, thus we reject the unsupportable claim that the deputy selected court members. Appellant goes on to assert alternatively that the convening authority was provided with a draft convening order "implementing his subordinate's decisions" as to member selections, without an opportunity to review the materials used by his subordinate to make the selections, and that this process constituted an impermissible *fait accompli*. In each of the "Digests" from the SJA explaining the situation to the convening authority (including unavailable prospective members) and recommending that he sign the convening order amendment that is provided therewith, this closing appears: "I have prepared a convening order amendment for your signature. If you desire to take an action other than those I've

recommended, I will prepare additional documents accordingly." (Appellate Ex. 91 and 105.) This contradicts, at least in part, the notion that the convening authority's choice was fettered, and there is no evidence refuting the contradiction. Nor does the fact that the second amendment was signed the day before trial was scheduled to begin establish that there were fetters on the convening authority's choice.

This case is unlike *Smith* in that there is no evidence that either the Convening Authority or the staff were motivated by the intent to achieve a particular result as to findings or sentence. This case is more like *Lewis* in that Appellant has failed to present sufficient evidence to raise the issue. By analogy with the defense burden of establishing improper exclusion of qualified personnel from the selection process, as set forth in *Dowty*, 60 M.J. at 171, we believe the defense has the burden of establishing the flaw asserted here. Neither the findings of fact nor the underlying evidence establishes such a flaw. Appellant has not met his burden of establishing that the member selection process was fatally flawed through a *fait accompli*.

Article 25, UCMJ

Appellant asserts that Article 25, UCMJ, was not properly applied during the selection process. Article 25(d)(2) requires the convening authority to detail as members of a court-martial "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

The following facts are taken from the military judge's findings of fact, Appellate Ex. 113. They are supported by evidence and are not clearly erroneous. The original convening authority, VADM Brown, and the two subordinates who made selections to be included in the two amendments by the successor convening authority were given a "Digest" reciting the Article 25 criteria, and personnel rosters that contained data fields for name, rank, date of rank, gender, age, education level, time in service, current unit and brief billet description. (Appellate Ex. 113 at 2, 4, 5.)[2] The original convening authority and one subordinate each knew personally one of the people he selected. (Appellate Ex. 113 at 4.)

[2] According to the findings of fact, VADM Zukunft, the successor convening authority who signed the two amendments, did not receive the rosters. (Appellate Ex. 113 at 6.) This is conceded by the Government, although there is some evidence casting doubt on it (post-trial hearing R. at lines 2845-46, 2889-95, 2917-18).

Appellant calls attention to the fact that the roster information contains little explicit information about experience and none about judicial temperament. He asserts that this, in the absence of evidence that additional information was provided to the persons involved in the selection process, means that it was impossible to apply Article 25 properly.

We have found no case offering guidance about how much information must be provided in the member selection process concerning the Article 25 factors. We are not prepared to hold that the information available in this case was insufficient or that the process was fatally flawed because of insufficient information. Further, if there was error, it was administrative, and we see no evidence of prejudice flowing from the limited information.

Appellant also argues that the successor convening authority, VADM Zukunft, who signed the two amendments, had no information at all about the prospective members before he appointed them, and therefore could not have applied Article 25. As previously noted, a convening authority may rely on staff to nominate court members, but must be unfettered in his or her choices. Appellant's argument would add a proviso that a convening authority may not rely on staff nominations if he does not also have information about the prospective members. We reject this argument.

Finally, Appellant asserts that the successor convening authority, VADM Zukunft, was not instructed on the Article 25 factors and did not understand them. The record contains a stipulation of expected testimony from him, Appellate Exhibit 109, in which the question is asked, "How did you consider each member 'best qualified'?" The answer: "This is not a 'best qualified' process – but I do look for diversity." (Appellate Ex. 109 at 1.)[3] His apparent ignorance, albeit displayed three years after his activities in this case, gives us pause. However, in light of the fact that he relied on his staff and adopted their selections of court members, we cannot see how this prejudiced appellant.

[3] This answer is reflected in the findings of fact, Appellate Exhibit 113, which also notes that he "seemed familiar with the military justice process in 2012." (Appellate Ex. 113 at 6.)

Too many female members of panel

Appellant asserts, "It is no coincidence" that every selection decision by the initial convening authority and the two subordinates of the successor convening authority "resulted in an unusually large number of females being selected or being highly ranked for future selections." (Supplemental Assignments of Error and Brief on behalf of Appellant at 13.) This assertion repeats an assertion in the military judge's findings of fact. (Appellate Ex. 113 at 7.)[4] When the court was assembled, it included seven women and three men. After challenges, six women and two men were seated. Women constituted around twenty percent of the pool of potential officer members, and around thirteen percent of the pool of potential enlisted members. (Appellate Ex. 113 at 3, 4.) Aside from the numbers, the record is devoid of any evidence as to why so many women were selected or the selectors' intentions. The findings of fact note that the SJA was aware of the high percentage of women on the panel but had no discussion with any of the selectors about it, and had never had any discussions about a desired gender composition of any court-martial. (Appellate Ex. 113 at 7.)

We see this case as being like *United States v. Lewis*, 46 M.J. 338 (C.A.A.F. 1997). As in that case, there is no explanation of why so many women were selected for Appellant's case, but there is no pattern of court stacking and no evidence of improper actions or motive on the part of the Government. Under *Lewis*, the issue of court stacking is not raised by an anomalous number of women on a single court-martial panel, in the absence of evidence of a pattern or of improper motive or other impropriety. *Lewis* does not suggest, and we have not found any other caselaw suggesting, that gender is a substantial variable not contemplated by Article 25 that would infect the court-martial with error, as was held in *Dowty*, 60 M.J. at 173 concerning volunteers. To the contrary, *Dowty* and other cases decided after *Lewis* portray inclusiveness of "all segments of the military community" as benign. *Id.* at 171; *United States v. White*, 48 M.J. 251, 254 (C.A.A.F. 1998); *Gooch*, 69 M.J. at 358.

Notwithstanding his pronouncement that intentional selection of female members for a sex assault case is a form of impermissible court stacking, citing *United States v. Smith*, 27 M.J. 242

[4] Exactly what is meant by "it is no coincidence," or its legal significance, is not apparent. More understandably, but still not of apparent legal significance, for each of the three individuals making selections, the findings of fact state that the "most obvious explanation" for the large percentage of women is a desire, conscious or unconscious, to have a significant number of women on the panel. (Appellate Ex. 113 at 3, 4, 5.)

(C.M.A. 1988), Appellant has failed to produce sufficient evidence to raise the issue of court stacking.

Accuser and unlawful command influence issues

In his second issue, Appellant contends that the convening authority, VADM Zukunft, was disqualified from acting as convening authority in Appellant's case in that he had an inelastic and intolerant attitude toward the alleged offenses and had personalized them, thereby becoming an accuser. Further, he contends that the convening authority has exerted unlawful command influence upon every member of his command, and thus every individual in the pool of potential members, by exhorting them to embrace his intolerant attitude. In his third issue, he goes on to assert that the convening authority to whom this case has been remanded, VADM Ray, adopted the same intolerant attitude.

The question of whether a convening authority is an accuser is a question of law reviewed *de novo*. *United States v. Ashby*, 68 M.J. 108, 129 (C.A.A.F. 2009) (citing *United States v. Conn*, 6 M.J. 351, 354 (C.M.A. 1979)). An accuser, including a person who has an interest other than an official interest in the prosecution of the accused, may not convene a general court-martial to try the accused. Article 1(9), UCMJ; Rule for Courts-Martial (R.C.M.) 504(c)(1), Manual for Courts-Martial, United States (2012 ed.). The test for determining whether a convening authority is an accuser is whether he was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter. *Ashby*, 68 M.J. at 130 (quoting *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999)); *United States v. Gordon*, 1 USCMA 255, 261, 2 C.M.R. 161, 167 (1952). Personal interests relate to matters affecting the convening authority's ego, family, and personal property. *Ashby*, 68 M.J. at 130 (quoting *Voorhees*, 50 M.J. at 499).

Unlawful command influence is a violation of Article 37, UCMJ, which provides, "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof . . . , or the action of any convening, approving, or reviewing authority with respect to his judicial acts." The military judge's findings of fact on an issue of unlawful command influence are reviewed under a clearly erroneous standard; the question of command influence flowing from the facts is reviewed *de novo*. *United States v. Stirewalt*, 60 M.J. 297, 300 (C.A.A.F. 2004) (citing *United States v. Johnson*, 54.M.J. 32, 34 (C.A.A.F.

2000)). An accused bears the burden of raising the issue of unlawful command influence by producing some evidence of facts which, if true, constitute unlawful command influence and that the alleged unlawful command influence logically had the potential to cause unfairness in the court-martial. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). Whether the defense carried that burden is reviewed *de novo*. *Id.* The initial burden is low, but is more than mere allegation or speculation. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). Once the issue of unlawful command influence is raised by some evidence, the burden shifts to the Government to rebut by showing beyond a reasonable doubt that the predicate facts do not exist or do not constitute unlawful command influence, or that the unlawful command influence did not affect the findings or sentence. *Id.* (citing *Biagase*, 50 M.J. at 151).

Our order for a *Dubay* (post-trial) hearing focused on the issue of whether Appellant had been deprived of an impartial panel, and specifically, "why were there so many women on the panel?" Before the initial session, the defense filed a motion seeking to disqualify the convening authority. (Appellate Ex. 62 (Motion for a New DuBay Convening Authority dtd 12 March 2015).) This motion sought to have VADM Ray disqualified to act as the convening authority in the case. The motion presented a Pacific Area webpage containing a statement from VADM Zukunft characterized as "demonstrat[ing] an inflexible, biased and prejudiced attitude toward allegations of sexual assault", and asserted that the statement made VADM Zukunft an accuser. (*Id.* at 4.) Moreover, the defense argued, the statement constituted unlawful command influence on potential members of the court. (*Id.* at 4-5.) Since the statement was still on Pacific Area's website at the time of the motion, the defense argued that VADM Ray, the current Commander, Pacific Area, had adopted the statement and was also an accuser. (*Id.* at 5.)[5]

The military judge at the post-trial hearing invited evidence on both the issue of whether Appellant had been deprived of an impartial panel, and unlawful command influence on the convening authority for the post-trial hearing. (Appellate Ex. 72.) Considerable documentary

[5] The defense went on to point out that since VADM Zukunft had become ADM Zukunft, Commandant of the Coast Guard, his influence "permeates the entire Coast Guard" and only a convening authority not influenced by him, namely the Secretary of Homeland Security, was available to perform those duties without taint. (*Id.*) We take judicial notice that ADM Zukunft became Commandant in May 2014.

evidence[6] consisting of Coast Guard materials on the subject of sexual assault dating from 2013 to early 2014 was considered on the issue of unlawful command influence, as well as a stipulation of expected testimony of ADM Zukunft that included the information that he wrote the statement that was posted on the Pacific Area website in "approximately June 2012." (Appellate Ex. 106; Appellate Ex. 109 at 2.) The military judge's findings of fact include, under the heading "UCI on the CA for this hearing," the concluding statement: "On balance it does not appear that the obvious pressure on the CA to solve the overall problem of sexual assaults in the Coast Guard is intended to influence, or has actually influenced, any specific decisions of the CA in this case."

The findings of fact do not address the question of whether the convening authority for the post-trial hearing, VADM Ray, was an accuser because he had adopted ADM Zukunft's webpage statement, as argued in the Motion for a New DuBay Convening Authority. They address only the question of whether VADM Ray was subjected to unlawful command influence (primarily but not solely by ADM Zukunft as Commandant), which might be remedied by replacing VADM Ray as convening authority for the post-trial hearing. The findings of fact also do not address the question of whether the members of the court were subjected to unlawful command influence, as the motion asserted but for which it sought no remedy. More fundamentally, no evidence was adduced on that question, beyond the existence of the webpage statement and ADM Zukunft's expected testimony that he had written the statement in approximately June 2012.[7]

On appeal, the headline issue of the Motion for a New DuBay Convening Authority has been transformed into Appellant's third issue, and the motion's other arguments, that then-VADM Zukunft was an accuser at the time of trial and that the court members were subjected to unlawful command influence, have been transformed into Appellant's second issue.

> The basis for all the arguments is then-VADM Zukunft's statement on the webpage:
>
> I view all 13,000 Coast Guard men and women in PACAREA as members of my immediate family and accordingly am intolerant and will hold accountable all acts of sexual assault that undermine the well being of my family tree. Clearly, I cannot

[6] The documentary evidence consisted of Coast Guard materials ("Coast Guard All Hands" blog posts, ALCOAST general messages, Commandant testimony before the Senate Armed Services Committee) dated between May 2013 and February 2014, during the previous Commandant's tenure, and two more ALCOASTs dated August 2014 and March 2015, after ADM Zukunft became Commandant.

[7] It does not appear that the defense sought any other evidence on the question of unlawful command influence upon the members, such as information on whether members of the court-martial had seen the webpage statement.

> undertake this campaign single-handedly and require all hands on deck to courageously assert intrusive leadership in preventing such criminal acts that physically and emotionally scar each victim and our shipmate for life. Duty demands courage and we are all on duty 24 x 7 when it comes to up holding our core values - honor, respect and devotion to duty.

(Appellate Ex. 62 at 7.)

If we were to take the first sentence of this statement literally, we might infer that the Area Commander, then-VADM Zukunft, would consider each sexual assault case, when reported, to involve a member of his immediate family. Clearly, this would make him an accuser of whatever person became an accused in that case. *See United States v. Ashby*, 68 M.J. 108, 130 (C.A.A.F. 2009) (citing *United States v. Voorhees*, 50 M.J. 495, 499 (C.A.A.F. 1999)) (personal interests relate to matters affecting the convening authority's ego, family, and personal property). Yet this general prospective statement, not associated with any particular case, is unlike any circumstance in caselaw previously held to cause a person to be considered an accuser. We see the statement as an exaggerated expression of VADM Zukunft's intention not to disregard sexual assault cases or relegate them to a weak claim on his attention. Rhetorically asserting that the 13,000 personnel under his command are immediate family does not make them family in fact for purposes of deciding whether the Convening Authority would have an other than official interest in any particular case involving a sexual assault against a person under his command. While perhaps not well advised, the statement alone is insufficient to convince us that the Convening Authority had an other than official interest in this case. Nor do we believe that a reasonable person would impute to the Convening Authority a personal feeling or interest in the outcome of this case. *See Gordon*, 1 USCMA at 260, 2 C.M.R. at 166. Further, contrary to Appellant's argument, the statement explicitly exhorts the members of his command to take preventive measures, rather than to embrace his intolerance.

The statement does not say what Appellant reads into it, that an allegation of sexual assault is equated to a finding of guilt. It says abstractly that a victim of "such criminal acts" – presumably a true victim – is scarred for life. It does not, as Appellant claims, demonstrate "an inflexible, biased and prejudiced attitude toward the *mere allegations* of sexual assault." (Emphasis added.) We acknowledge the absolute necessity to distinguish between an unproved allegation and a completed adjudication in the course of a military justice case. However, to assume that no one

makes or understands this distinction, as Appellant appears to do, is unwarranted. We further acknowledge that the statement does literally demonstrate intolerance of acts of sexual assault, as does the law. Such intolerance, along with the promise to "hold accountable all acts of sexual assault," does imply that as convening authority, then-VADM Zukunft would convene a court-martial when appropriate and would not likely do away with every consequence ensuing upon a finding of guilt of sexual assault; aside from its rhetorical value, this is no more than confirmation that he would carry out his duty as a convening authority. There is no basis for the notion that the expressed intolerance of sexual assault demonstrates any improper inflexibility, bias or prejudice concerning sexual assault or those accused of it.

We conclude that then-VADM Zukunft's webpage statement did not make him an accuser. We further conclude that it did not constitute unlawful command influence; unlawful command influence has not been raised by the evidence. Nor did it taint other convening authorities, including VADM Ray. Finally, if VADM Ray adopted the statement by allowing it to remain on the Pacific Area website after he took command of Pacific Area, that did not make him an accuser any more than the statement made then-VADM Zukunft an accuser.

Decision

We have reviewed the record in accordance with Article 66, UCMJ. Upon such review, the findings and sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. Accordingly, the findings of guilty and the sentence, as approved below, are affirmed.

Judges CLEMENS and BRUCE concur.

For the Court,

Sarah P. Valdes
Clerk of the Court