

## Report on Research Compliance Volume 20, Number 2. January 25, 2023

### Citing 'Deception,' Not 'Espionage,' Judge in KU Case Imposes Supervised Release, Not Jail

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By Theresa Defino

Since his arrest in August 2019, Feng “Franklin” Tao has published 16 “research articles” for the University of Kansas (KU), authored a book and began writing a second one. To attorneys for the associate professor of chemical engineering, these activities are further evidence that Tao’s “truly breath-taking” productivity continued at home and that he should be sentenced to no more than time served.

Prosecutors, however, argued Tao was “appearing to act as if he has done nothing wrong” and said his research-related efforts demonstrated his “lack of remorse” that warranted a 30-month jail term on the sole count of making a false statement for which he was convicted in September. The government, claiming Tao’s “unreported support and affiliations call into question the validity of all of the research that he has performed” under National Science Foundation (NSF) awards, also wanted Tao to be fined \$100,000.

Tried on eight charges, a jury in April found Tao, 51, not guilty on four and guilty on four.<sup>[1]</sup> In September, Julie A. Robinson, senior judge for the District of Kansas, reversed the guilty verdict on three charges but upheld the charge of making a false statement, which related to his failure in 2018 to disclose on a KU form his affiliation with a Chinese university.<sup>[2]</sup> Robinson tossed wire and grant fraud charges.

Tao’s crime of being “deceptive” about what he was doing, Robinson said, did not warrant jail time. Her remarks during sentencing provide rare insight into such highly controversial cases related to investigators’ ties to China, illuminating both the pressures Tao faced and how KU responded, as well as the seemingly fraught nature of most of the government’s claims. Tao plans to appeal his conviction.

Citing her changed understanding of the case, on Jan. 18, Robinson sentenced Tao to two years of supervised release (which, unlike probation, is imposed instead of jail, not afterward). In her view, Tao was a “mid-career” researcher whose work had little commercial value and went to China to see if his academic fortunes would be superior there than at KU.

“Frankly, I thought going into this case I was going to hear evidence that whatever Dr. Tao’s research was about, it was something that would hurt our taxpayer-funded research [and] science agencies, it would hurt the taxpayers that he went to China and spent time there working with them because he was sharing information that taxpayers had funded for him to share with KU and with the federal government or whatever, but that’s not what the evidence was,” Robinson said, according to a transcript of the sentencing hearing *RRC* obtained.

#### **Tao Raised in Extreme Poverty**

Tao, who also had awards from the Department of Energy (DOE), was not engaged in espionage, Robinson said, adding there was no “evidence that Dr. Tao stole anything from KU, NSF, DOE, or the American taxpayers. This is not a case where there’s any evidence that the time he spent in China was spent to share intellectual property, proprietary information, inside information that was funded by the taxpayers or anyone else with the People’s

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Republic of China.”

In reality, Tao went to China to explore “starting to build a lab” at Fuzhou University [FZU] during a period when he obtained a buyout from KU or during the semester that he was able to be off campus,” Robinson said.

Tao’s attorneys described him as a rare success who overcame a childhood “marked by deprivation” to obtain a post at KU, only to lose his job, reputation and suffer, along with his family members, “great psychological trauma”—due to his failure to report being named a professor at FZU.

His parents were “forcibly relocated [and] forced to farm a tiny plot of land assigned by their local government,” according to his attorneys’ sentencing memorandum. “Their home was a small cottage made of clay and straw, consisting of two small bedrooms where seven people—grandparents, parents, Dr. Tao and his siblings—all lived. The cottage had no living room and no indoor bathroom, running water or electricity. The only light source was a kerosene lamp.”

Tao “never drank a glass of milk, enjoyed an apple or tasted beef until he left for college,” according to the court document. Motivated by a “dream of making foods for his family and neighbors so that they would not be hungry,” Tao graduated college and obtained a master’s degree in China and, in 2006, a Ph.D. from Princeton, his defense team wrote.

In their sentencing memorandum, government attorneys said a significant sentence would keep Tao out of the research enterprise and deter others “like Tao here, who perform scientific research funded by the U.S. government and may not be truthful in their disclosures to their universities and government agencies.”

A harsh penalty would discourage individuals from “undermining the U.S. research enterprise and the integrity of fundamental research funded by the federal government by flouting funding disclosure requirements and lying to the sponsoring university and federal funding agency about foreign activities that could compromise the research funding process and the scientific research itself,” the government argued.

## **KU Claim of Lost Funds Disputed**

Tao’s attorneys rejected the government’s claim that his “research for NSF—dating back more than a decade—was tainted by an Institutional Responsibility form submitted in 2018. Dr. Tao worked on his first NSF grant in 2011; since then, he has worked on NSF grants awarded in 2013, 2014, 2015, and 2018,” they wrote in response to the government’s sentencing memorandum.

“These grants resulted in approximately 40 publications in high-impact journals that have been cited more than 2,500 times. There is simply no basis to claim that an undisclosed time commitment that began in May 2018 somehow retroactively taints thoroughly vetted research completed years earlier,” they said.

Citing a victim impact statement by KU, the government, in its sentencing memorandum, said that from May 2018 to August 2019, “KU paid Tao over \$120,000 in salary for work that he was supposed to solely perform for KU. Unbeknownst to KU, during that time, Tao was actually spending most of his effort in furtherance of his job at FZU, including spending nearly all of the first eight months of 2019 in China working at FZU.”

KU also said Tao’s NSF and DOE grants “were suspended and KU was unable to spend further funds from those grants. KU also is still working on being reimbursed from NSF and DOE for approximately \$147,000 in grant funds that Tao used. In total, Tao’s conduct caused KU to lose nearly \$460,000,” according to the government.

Tao’s attorneys argued in their response that the “claim that KU is no longer able to expend \$336,000 in federal research money that had been earmarked for Dr. Tao is the direct result of KU’s unilateral decision to place Dr.

Tao on administrative leave without pay and bar him from campus. Dr. Tao was—and remains—fully able and willing to continue his work on these grants if KU would permit him to do so. But KU cannot bar Dr. Tao from working on grants and then claim that it is somehow being harmed as a result of its own decision to place Dr. Tao on administrative leave and bar him from campus.”

They added it was inappropriate to count \$147,000 as a loss if the agencies might still repay KU and noted that in acquitting Tao of all but the one charge, Robinson had already ruled that “Tao earned his salary” and that in April 2019, he was among “four professors at KU to receive the University Scholarly Achievement Award, in recognition of his significant research contribution.”

Tao’s time in China was unpaid; he did not think he needed to report it on an institutional responsibilities form, which asked for disclosure of “any conflicts of interest or time,” his attorneys wrote in Tao’s sentencing memorandum.

“In September 2018, Dr. Tao submitted his KU Institutional Responsibilities form and did not report that he had any conflicts of time or interest. Dr. Tao did not believe it was necessary to report his interactions related to FZU because, among other reasons, the form asked whether the signatory had a time commitment in an entity with which he ‘engage[d] in personal professional activities that take time away from your university responsibilities.’ This question required the signatory to make a subjective judgment as to whether his/her outside professional activities would take time away from their university responsibilities, and Dr. Tao did not believe that to be the case,” according to the memorandum.

### **Judge: Many Fear Disclosure**

In pronouncing her sentence, Robinson said, “there was no evidence that there was any conflict of interest in that sense in this case. What there was concern about was a conflict of time. Dr. Tao is over in China, but yet he’s supposed to be supervising research at KU even during that buyout semester. And it turns out he was; he was supervising the research at KU because apparently he’s somebody that can work 70 or 80 hours a week consistently. Should he have disclosed these things? Absolutely.”

However, Robinson added that she “heard a lot of evidence that called into question how much did anybody understand...what they were supposed to disclose when certain things happened after the fact, after the application process.”

She cited a letter of support for Tao submitted by a researcher who said, in sum, “I’ve been worried about these conflict-of-interest forms for several years, and I have asked for more clarity from the organization and I never get it and I’m terrified.”

The judge said she expected “not only that person [who authored the letter] but probably other researchers have seen what happened to Dr. Tao and perhaps some other people that were prosecuted as part of this Department of Justice initiative and are terrified that it could happen to them.”

Robinson pointed out that, in April 2019, Tao was one of four professors at KU to be recognized for his research. She noted that Chinese talent programs “are not going to be an issue anyway, one, because NSF and DOE or whoever aren’t going to fund people if they do disclose that” and said that, two, “in any event the Department of Justice apparently is no longer pursuing these prosecutions that are solely on that basis anyway.” But she added, “I don’t know.”

Biden officials said they were ending the China Initiative in early 2022, but their decision wasn’t retroactive, and the government continued Tao’s case to trial. Peter Zeidenberg, one of Tao’s attorneys, previously told RRC he represents more than a half-dozen similar clients, including some whose investigations began after the

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initiative was formally dropped.<sup>13</sup> Since then, there have been no new indictments, however, he said.

## **Tao's Research Efforts Show Remorse**

According to Robinson's summary of the case, Tao was unable to interest students in joining him at a new lab in China and, ultimately, didn't get a job offer.

"They weren't going to give him enough money to build the lab that he needed that would come even close to what he had at KU. He had one student that acted like he might be willing to come over there, but another one, no. His family did not want to move there. His children were born in the United States. They're Americans. They didn't want to go there," she said. "So he tested the waters and probably figured out pretty quickly this wasn't going to work, but apparently he thought it made sense to be deceptive with KU and not let them know he was doing that. And frankly a lot of people go out in the world and apply for other jobs and don't tell their employers what they're up to for obvious reasons."

Robinson recounted "interesting" testimony from Tao's departmental chair, who said, "I

wouldn't have cared if he was in China; I didn't care if he was in Germany; I didn't care where he was as long as the work got done." Added Robinson: "I think if Dr. Tao had disclosed what he was doing exactly, maybe we wouldn't be here. I don't know. Maybe the government would have pursued him anyway. I don't know."

The judge disagreed with the government that Tao's actions showed a lack of remorse, saying the opposite was true: his work ethic was his downfall.

His activity "shows a commitment to the work, and that was his failing, I think. He was afraid that if he, I guess, was completely transparent, you know, maybe he wouldn't be able to test the waters, maybe he wouldn't be able to build a world-class lab as being a Changjiang scholar as part of the Chinese talent program," said Robinson.

Tao faced a maximum sentence of five years in prison, three years of supervised release, from one-to-five years of probation and a \$250,000 fine.

Noting that he served one week in prison after his arrest, Robinson said two years of supervised release is appropriate given Tao had no previous criminal history and complied with the conditions of his home detention, which involved wearing an ankle monitor.

Robinson added that she thinks "the scientific community is generally deterred to see somebody of Dr. Tao's acclaim and accomplishment go down the tubes like he has because of this, so I don't think a custodial sentence is necessary to further deter people."

Under supervised release, Tao does not have to wear a monitor and is not confined to his home, and the period could be shortened to one year if he meets the terms, Robinson said.

## **Amid Appeal, Termination is 'Premature'**

As noted earlier, Tao's attorneys had sought no additional penalties beyond the one week he had already spent in jail. After the sentencing, Zeidenberg told RRC that while he appreciated that no jail time was imposed, "we do intend to appeal this conviction."

"Dr. Tao is immensely relieved that Judge Robinson agreed that a sentence of time served was appropriate," Zeidenberg said. "We were also gratified to hear the judge say, once again, that neither the government nor KU was defrauded or harmed, and that Dr. Tao did all of the work required of him to the complete satisfaction of

these entities. And she reiterated that this was never a case about espionage; all of the work Dr. Tao did was fundamental research meant for publication.”

A KU spokesperson declined to comment on the sentence and Tao’s status with KU except to say he “is no longer employed.”

The government’s sentencing memorandum shed light on Tao’s job situation.

“KU placed Tao on paid administrative leave in August 2019 after he was arrested. Tao later agreed to go on unpaid administrative leave in exchange for KU staying termination proceedings pending the outcome of the criminal prosecution,” the memorandum states. “It is the Government’s understanding that based on his agreement with KU, Tao agreed that if he was convicted, he would not contest his termination. The Government further understands, however, that after Tao was convicted at trial and KU contacted Tao’s employment counsel to proceed with his termination, Tao’s counsel told KU that based on post-conviction comments from the Court, in his view, Tao had not been convicted and the criminal proceeding had not concluded.”

Zeidenberg told RRC KU’s termination is “premature, since no conviction is final before an appeal is heard.” The request for an appeal must be filed within 14 days of the sentence.

**1** Theresa Defino, “After Researcher’s Conviction on Some Counts, Attorney Chides Universities, Sees ‘No Harm,’” *Report on Research Compliance* 19, no. 5 (May 2022), <https://bit.ly/3xCfYGw>.

**2** Theresa Defino, “Resolutions of Two ‘China Initiative’ Cases Favor Investigators,” *RRC E-Alerts: October 13, 2022*, <https://bit.ly/3Wk2euw>.

**3** Theresa Defino, “First Charged Under China Initiative, KU Researcher Faces Sentencing; Suit Settled,” *Report on Research Compliance* 20, no. 1 (January 2023), <https://bit.ly/3IZPkyA>.

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