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'No Evidence': Judges Toss KU Researcher's Conviction; Reinstatement Battle Is Next

By Theresa Defino

"I am writing with good news!!! Yesterday, the 10th Circuit overturned Franklin's only remaining conviction and ordered the trial judge to enter a verdict of NOT GUILTY!!! After five long and difficult years, Franklin has been completely exonerated!!!"^[1]

So wrote Hong Peng, the wife of Feng "Franklin" Tao, former associate professor of chemical engineering at the University of Kansas (KU), in a July 12 update on a GoFundMe page. Peng called the last five years "like navigating the valley of death," and noted that Tao "has not earned a salary for over four years." Born into extreme poverty in China in 1971, Tao came to the U.S. in 2002, earning a doctorate from Princeton and later joining KU as a tenured professor in 2014.

He was accused of failing to disclose a position and support from a Chinese university that he received at the same time he was the principal investigator on National Science Foundation (NSF) and Department of Energy (DoE) awards.^[2]

Tao's attorney told RRC in January 2023 after his sentencing, that KU's termination of Tao in April 2022 was "premature" because the case was still being appealed.^[3] With the July 11 dismissal of the sole conviction on a false statement charge, Tao's bid to regain his job is now moving forward in earnest.

"We are going to push KU to rehire Franklin, as we believe he was wrongfully terminated," Peter Zeidenberg, a partner with ArentFox Schiff LLP, said in a July 18 email. "The basis of the dismissal was the fact that he was convicted of a felony. We had asked that KU not take any adverse action until the appeal process was complete, because we expected that the conviction would be overturned. Now that it has been, there simply was no proper basis for Dr. Tao to have been dismissed."

KU officials did not respond to RRC's request for comment on the appeals court's reversal of Tao's conviction or on his desire to be reinstated.

The quest to be rehired is the coda to the government's first case of a scientist charged under the Trump administration's "China Initiative," one that federal authorities lost at every turn.

Tao was indicted three times as the government revised the charges; the first was in April 2019 when three charges were brought against him, a number that later grew to 10 before ending with eight. Following a 12-day trial in April 2022, the jury rendered a split verdict: guilty on four of eight counts—three for wire fraud and one for making a false statement—and not guilty on three other charges for wire fraud and one of making a false statement.^[4]

But six months later, Julie A. Robinson, the senior judge for the District of Kansas who had presided over the trial, reversed the guilty verdict on three charges. She upheld Tao's conviction for making a false statement, which

related to his failure in 2018 to disclose on a KU form his affiliation with a Chinese university.^[5] In January 2023, Robinson sentenced Tao to time served—he spent a week in prison after his arrest—and two years of supervised release, turning aside the government’s recommendation for 30 months in prison and a \$100,000 fine.

Zeidenberg and Tao’s other attorneys continued to fight, appealing the standing false statement conviction that the U.S. Court of Appeals for the Tenth Circuit tossed July 11; the decision was 2-1.

Disgruntled Scholar Sparked FBI Inquiry

Although the judges gave a lengthy explanation for their decision, it came down to this short sentence: “Because we agree with Tao that the government offered insufficient evidence for a rational jury to find that his statement to his employer was material to any DOE or NSF decision, we reverse Tao’s conviction and remand for the district court to enter a judgment of acquittal.”

In their ruling, the judges describe the path that led the case to them, including actions by Tao, KU and the funding agencies, details that should prove enlightening to research compliance officials.

The genesis of the case against Tao, the judges recounted, was a failed extortion attempt against Tao by a visiting scholar “upset over an authorship dispute” who demanded he pay her \$300,000 or she would report him to the FBI as a “tech spy.”

“When Tao ignored her demand, the scholar made good on her threat—she submitted an anonymous tip to the FBI accusing Tao of economic espionage and later impersonated others to make additional espionage allegations. As a result, the FBI launched an espionage investigation,” they wrote. “In the end, the FBI found no evidence of espionage. But the FBI learned that Tao had potentially accepted a second full-time professorship at Fuzhou University in China and hid it from KU.”

Lone False Statement Wasn’t ‘Material’

The government “alleged that Tao concealed his relationship with Fuzhou University in certain documents, including, as relevant to this appeal, an annual institutional responsibilities form that he submitted to KU in September 2018. The wire fraud counts alleged that by failing to disclose his relationship with Fuzhou University, Tao defrauded KU of his salary and the DOE and the NSF of federal grant funds,” they continued.

Yet, as noted, lower-court judge Robinson wasn’t buying it. “The district court acquitted Tao on the three wire-fraud counts, holding that the government failed to prove Tao engaged in a fraudulent scheme to deprive KU, the NSF, or the DOE of money or property,” according to the appeals court ruling. “But it concluded that the government introduced enough evidence to support the one false statement conviction based on the institutional-responsibilities form he submitted to KU in September 2018.”

This last point was the issue before the appeals court. The majority opinion holds that because neither NSF nor DoE had any proposals before them from Tao, this failure wasn’t material as defined by case law.

Reviewing developments leading up to Tao’s indictment, the appeals court described how Tao, in July 2017, “applied to become a Changjiang Distinguished Professor at Fuzhou University under the Changjiang Scholar program, a prestigious Chinese talent-recruitment program sponsored by China’s Ministry of Education. By January 2018, the Ministry of Education had named Tao a Changjiang Scholar. Fuzhou University then sent Tao a draft employment contract for a five-year, full-time appointment as a Changjiang Distinguished Professor at the university.”

However, the appeals court also said the government introduced no evidence that any employment arrangements

were finalized.

Judges: Agencies Faced No Decisions

“Throughout the spring and into the summer of 2018, Tao tried to set up a research team and laboratory at Fuzhou University. For example, he recruited graduate and postdoctoral students to join his team; helped a postdoctoral researcher on his KU research team receive a job offer from Fuzhou University; and directed this researcher to obtain price quotes from various vendors for laboratory equipment. Tao also prepared grant applications seeking research funding in China,” according to the appeals court ruling. “In June 2018, Tao obtained a course buyout at KU for the 2019 spring semester, purportedly to focus on research. And in September 2018, Tao submitted his annual institutional-responsibilities form for 2019—the form at the heart of this appeal. He left the disclosures section blank, making no mention of Fuzhou University.” At this point in the ruling, the judges took the unusual step of inserting a portion of the disclosure form into the document.

“Tao then flew to China in December 2018 and spent most of his time there until his arrest in August 2019. Upon his arrest, KU placed Tao on administrative leave, and the NSF and the DOE suspended the research grants,” the judges wrote.

According to the judges, the question of “materiality” turns on two issues: “What decision was the agency trying to make,” and was the false statement “capable of influencing that particular decision.” They concluded that “Tao correctly points out that neither the government nor the district court ever identified any decision that either the DOE or the NSF was ‘trying to make.’”

The government contended that “the ‘agencies were considering whether to fund or to continue funding Tao’s research’ and that Tao’s false statement could have influenced these funding decisions. Alternatively, the government falls back on the district court’s analysis, which reasoned that Tao’s false statement was material to the NSF because the agency relies on KU to identify and manage conflicts of interest,” according to the decision.

The judges were unmoved. The government, they wrote, “critically overlook[ed] that both agencies received and funded the proposals before Tao submitted his institutional responsibilities form to KU in September 2018. And KU never applied for additional funding after he did so. As the district court observed, [t]he last proposal KU... submitted to a federal agency to support Tao’s research was in 2017—before Tao had [even] been selected as a Changjiang Scholar.”

In sum, “without evidence of an actual decision capable of being influenced by the statement, the government cannot establish materiality,” the judges said.

‘No Evidence’ of Financial Interest, Conflict

They also discounted Robinson’s materiality analysis, which rested on Tao’s false statement being material to NSF because it purportedly prevented KU—as required under the NSF Proposal & Award Policies & Procedures Guide’s (PAPPG) conflict policy—from determining “whether Tao’s relationship with Fuzhou University presented a conflict of interest and, if so, whether KU needed to manage the conflict.”

Again noting that this scenario lacks the mention of a decision by NSF—a gap the judges called “fatal to the materiality element”—assuming there was such a pending decision still wouldn’t mean that it could be influenced by the false statement. That’s because the judges, showing a remarkable grasp of the arcana of the PAPPG, concluded there wasn’t actually a reportable potential conflict under the PAPPG that KU had to manage.

“To be sure, the PAPPG provides that before ‘the expenditure of the award funds’ the grantee organization must identify and then manage, reduce, or eliminate ‘all conflicts of interest for each award’ (or report to the NSF any

conflicts that ‘it is unable to satisfactorily manage’),” the judges wrote. “But critically, the PAPPG does not apply to any and all potential conflicts. Rather, it requires researchers to disclose, and the organization to then review for conflicts of interest, only financial interests exceeding \$10,000 that: (1) ‘reasonably appear to be affected by the research or educational activities funded...by [the] NSF’ or (2) are ‘in entities whose financial interests would reasonably appear to be affected by such activities.’ And a conflict of interest exists only if the organization determines that the financial interest ‘could directly and significantly affect the design, conduct, or reporting of NSF-funded research.’”

They pointed out that, “at trial, the government neither argued nor presented evidence that Tao’s relationship with Fuzhou University created a disclosable financial interest under the PAPPG. Even on appeal, as Tao points out, the government does not argue as much. And without such evidence, no reasonable jury could find that the PAPPG’s conflict policy required KU to review the relationship and determine whether it presented a conflict of interest.”

Broader Oversight Claim Also Disputed

The judges also pushed back on the government’s broader claim that the false statement was material “because it was ‘part of the regulatory structure’” governing conflicts of interest for federal research awards under 2 C.F.R. § 200.112. They said the government never entered “any regulations governing federal research awards into evidence and then successfully objected when Tao tried to do so, arguing in part that they were not ‘relevan[t].’”

In sum, the “government presented no evidence that Tao had a disclosable financial interest under the PAPPG, much less a conflict of interest that KU could not manage,” the judges said. Moreover, they added in a footnote, “it also bears noting that the regulation does not define ‘potential conflicts of interest’ or even mention time conflicts.” They also said DOE has no corollary to 2 C.F.R. § 200.112.

The decision then accuses the government of borderline “misrepresentation” for arguing that “the agencies suspended Tao’s grants ‘when the truth about [Tao’s] activities [at Fuzhou University] came to light’ and suggest[ing] this confirms it proved materiality.”

In fact, “the agencies suspended the grants shortly after Tao’s indictment on federal criminal charges alleging that he fraudulently obtained the federal funds. And as should be obvious, the government may not manufacture materiality by charging someone with a federal crime,” the judges said.

Legal Defense Cost Tao Millions

Interestingly, the 21-page majority opinion is joined by a 28-page dissent. Judge Mary Beck Briscoe disputed a number of the other judges’ conclusions, ultimately determining that Tao’s false statement was material to the two agencies.

Zeidenberg called the acquittal “some measure of justice” for Tao, whose family of seven subsisted on corn powder while living in a clay and straw cottage without running water or electricity. Despite incredible odds, this deprivation propelled him through college and to the U.S., shaping his desire to succeed, according to the sentencing memorandum submitted by Tao’s attorneys.

In her plea for funds, Tao’s wife—educated in China as a radiologist but reportedly working as an ultrasound technician—expressed pride at having confronted the “political and arbitrary manipulations targeting scholars of Asian origin.”

But, she noted, “fighting these bogus charges over the past five years cost over \$2.3 million,” and the family still owes more than \$1.1 million.

- 1** “Legal Defense Fund for Franklin Tao,” GoFundMe, updated on July 12, 2024, by Hong Peng and Jesse Song, <https://bit.ly/4cVr4tK>.
- 2** U.S. Department of Justice, U.S. Attorney’s Office for the District of Kansas, “University of Kansas Researcher Indicted for Fraud for Failing to Disclose Conflict of Interest with Chinese University,” news release, August 21, 2019, <https://bit.ly/3M7LOR1>.
- 3** Theresa Defino, “Citing ‘Deception, ‘Not ‘Espionage,’ Judge in KU Case Imposes Supervised Release, Not Jail,” *Report on Research Compliance* 20, no. 2 (February 2023), <https://bit.ly/3LyhyAv>.
- 4** 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/3VeFzRM>.
- 5** Theresa Defino, *RRC E-Alerts: October 13, 2022*, <https://bit.ly/3Wk2euw>.

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