IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Airman (E-2)
RODNEY B. BOYCE,
USAF,
Appellant.

Crim. App. No. 38673
USCA Dkt. No. 16-0546/AF

REPLY BRIEF OF BEHALF OF APPELLANT

JAMES S. TRIESCHMAN
Civilian Defense Counsel
USCAAF Bar No. 35501
Law Office of James Trieschmann
P.O. Box 73616
Washington, DC 20056
(202)765-4598
advice@defendsoldiers.com

ANNIE W. MORGAN, Capt, USAF
Appellate Defense Counsel
USCAAF Bar No. 35151
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews NAF, MD 20762
(240) 612-4770

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	**REPLY TO GOVERNMENT'S ANSWER**
v.	)	USCA Dkt. No. 16-0546/AF
Airman (E-2) **RODNEY B. BOYCE**, USAF, *Appellant.*	)	Crim. App. Dkt. No. 38673

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Pursuant to Rule 19 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby submits his reply to the government's answer.

1. **The Government inaccurately avers that "The Facts in the This Case (sic) Do Not Constitute UCI."**

According to the government, "There has been zero evidence presented at trial, at AFCCA, or here, that SECAF or CSAF knew about the charges preferred against Appellant." (Gov. Br. at 27). This statement is irrelevant. SECAF and CSAF's subjective knowledge of the particulars of Appellant's case is not germane because CSAF categorically influenced Lt. Gen. Franklin concerning sexual assault cases. Since this case is a sexual assault case, it is within the category which SECAF and CSAF intended to influence.

UCI may occur with regard to a category of cases; hence, policy statements or guidance about acceptable dispositions in particular types of cases are

prohibited. *United States v. Fowle*, 7 U.S.C.M.A. 349, 351 (C.M.A. 1956). A superior may influence his subordinate with regard to a category of cases; there is no specific intent or *mens rea* requirement with regard to a specific case or type of case, and UCI may occur unintentionally. *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999). The only relevant inquiry is whether or not UCI occurred, not whether the UCI was intended. *United States v. Jameson*, 33 M.J. 669, 673 (N.M.C.M.R. 1991).

The government argues that "Appellant himself tacitly acknowledged this fact in his brief by essentially admitting that any influence was unintentional." (Gov. Br. at 27). This statement is incorrect and is not supported by Appellant's brief. Appellant argues instead that both SECAF and CSAF specifically intended to prevent Lt. Gen. Franklin from repeating his lenient past actions in any other sexual assault case. The government concedes as much when it argues that CSAF's phone call was not an attempt "to influence a particular outcome in any given case." (Gov. Br. at 18-19). This is not relevant, because SECAF and CSAF had an unmistakable intent to influence Lt. Gen. Franklin concerning the outcome of a category of cases, sexual assault cases. The government does not argue the absence of this blanket intent.

Intent to influence is not a predicate for UCI. *United States v. Jameson*, 33 M.J. 669, 673 (N.M.C.M.R. 1991). The government argues

> [T]his Court cannot be certain precisely why SECAF wanted to remove Lt Gen Franklin. Appellant fails to consider the possibility that SECAF may have been dismayed that Lt Gen Franklin became too personally involved in the Wilkerson case and its aftermath, or that Lt. Gen Franklin refused to meet with an alleged victim prior to dismissing charges in a case, as he was encouraged by regulation to do.

(Gov. Br. at 27).

The Defense does not bear the burden of proving incorrect the Government's speculation as to CSAF and SECAF's actions. The government, rather, must disprove an allegation of UCI which is fairly raised by the evidence beyond a reasonable doubt. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). In ruling on the defense motion to dismiss for lack of UCI, the military judge in this case found that the defense had satisfied its burden of showing "some evidence" of apparent UCI. JA at 368. That finding has not been contested. Therefore, the burden is on the government to disprove the UCI; Appellant need not prove it. *Stoneman*, 57 M.J. at 41.

Assuming arguendo that the government's proposed explanations were true, they still would not eradicate the UCI present here. The government speculates that perhaps "Lt. Gen. Franklin's refusal to meet with an alleged victim prior to dismissing charges" in *Wilkerson* or his possible "personally involvement" are legitimate reasons for removing Lt. Gen. Franklin. First, the existence of these alternative reasons rely on speculation, which is insufficient to meet the

government's burden to disprove the allegation of UCI beyond a reasonable doubt. Second, even if these alternatives were true, a firing or forced resignation for these alternative reasons would also constitute both actual and apparent UCI.

A superior commits UCI when he takes adverse action against a Convening Authority "with respect to his judicial acts." Art. 37(a), UCMJ. Lt. Gen. Franklin's "refus(al) to meet with an alleged victim," (Gov. Br. at 27) is a decision concerning which witness he would interview in his action on the findings. A decision concerning which witnesses are appropriate to interview is unquestionably a judicial act. Therefore, he may not lawful be sanctioned for it. Any attempt to do so is UCI.

Similarly, the government argues that Lt. Gen. Franklin's phone call to the Air Force Personnel Action Center on behalf of Lt. Col. Wilkerson constituted "personal involvement" legitimating Lt. Gen. Franklin's firing. (Gov. Br. at 10, 27). Lt. Gen. Franklin's mitigation of the collateral consequences of a disapproved conviction is also judicial because it relates to Lt. Gen. Franklin's judicial act of clemency. What the government terms Lt. Gen. Franklin's "personal involvement" in *United States v. Wilkerson* is also not the proper subject of sanction.

Finally, the government's own brief makes clear that Lt. Gen. Franklin is an extraordinary officer who would not be removed, but for his judicial acts. Lt. Gen Franklin is an officer whose evaluators stated that "he was the best officer they had

ever seen" – 13 times. (Gov. Br. at 10). The government's recitation of the facts indicates that "political backlash" to his judicial action in *Wilkerson* was "almost immediate." (Gov. Br. at 11). After his subsequent action in *Wright*, CSAF told Lt. Gen. Franklin to retire or be fired. Lt. Gen. Franklin had no other reason to leave, according to the government's recitation of the facts. (Gov. Br. at 13-14). The government's contention that CSAF told Lt. Gen. Franklin to leave for any reason besides his judicial actions is thus incredible.

The law is unmistakably clear. A Convening Authority's judicial acts are not the proper subject of adverse personnel actions. The government must prove beyond a reasonable doubt that CSAF's actions had a proper purpose. This, it cannot do. Therefore, UCI was present in this case.

2. **The Government avers that "Appellant Was Not Prejudiced by SECAF's Actions."**

The government's view of prejudice is contrary to law. An appellant is not entitled to have a Convening Authority of his choice, but he is entitled to have his Convening Authority consider his case without influence from superiors. *United States v. Salyer*, 72 M.J. 415, 428 (C.A.A.F. 2013). The government's argument, that all is well because another Convening Authority also acted on the case, ignores *Salyer*. In fact, it is an additional ground for prejudice. An appellant is prejudiced when wrongful governmental action deprives him of the particular judicial official hearing his case. *Id*. In this case, SECAF and CSAF's desire to

prevent Lt. Gen. Franklin from granting further clemency caused them to force him from command. Since Lt. Gen Franklin has now retired, it is impossible for him to act on Appellant's case without influence. (Gov. Br. at 40). Therefore, Appellant was prejudiced by the government action.

Even if there were no prejudice, no prejudice is required because the UCI here was both actual and apparent. Apparent UCI occurs when an improper appearance of taints the public perception of the military justice system, even if there is no actual wrongdoing and therefore no prejudice. *United State v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003). Prejudice is not required in cases of apparent UCI. *United States v. Rosser*, 6 M.J. 267, 272 (CMA 1979). The government position eviscerates that doctrine of apparent UCI. This Court should decline the government's invitation to graft a requirement of prejudice where apparent UCI places an "intolerable strain on public perception of the military justice system." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). To do so would prevent a court from ever imposing a prophylactic remedy against patently outrageous attempts at influence, even if no actual influence occurred.

The government posits a floodgates argument in stating that "Appellant is essentially arguing there was no possible way the Air Force could have successfully prosecuted this case, with this or any other convening authority." (Gov. Br. at 40). Appellant makes no such argument. Rather, Appellant asserts

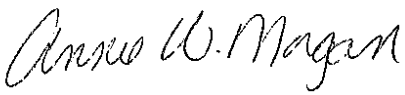
that the unique facts in this case, in which Lt. Gen. Franklin acted on Appellant's case after he had been harshly disciplined, show both actual and apparent UCI.

The government proves the need for prophylaxis here in its glib view of the role of the Convening Authority. According to the government, "This case was going to be referred to trial regardless of the convening authority because it absolutely **had** to be resolved at a GCM." (emphasis added)(Gov. Br. at 36). The doctrine of UCI, both actual and apparent, exists precisely to prevent a superior from instructing a Convening Authority that a certain category of case "has" to be referred for a certain disposition.[1] CSAF and SECAF, through their actions, attempted to impart that sexual assault cases had to be referred to trial. This honorable Court should make clear the unacceptable nature of CSAF and SECAF's conduct here through the forceful action of setting aside dismissing the findings in this case.

[1] Only Congress may make such a determination through amendments to the UCMJ.

Respectfully submitted,

JAMES S. TRIESCHMAN
Civilian Defense Counsel
USCAAF Bar No. 35501
Law Office of James Trieschmann
P.O. Box 73616
Washington, DC 20056
(202)765-4598
advice@defendsoldiers.com

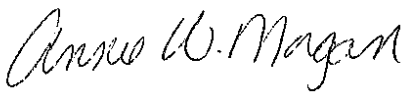


ANNIE W. MORGAN, Capt, USAF
Appellate Defense Counsel
USCAAF Bar No. 35151
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews NAF, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to this Honorable Court and the Appellate Government Division on 26 September 2016.

Respectfully submitted,



ANNIE W. MORGAN, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35151
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770