16 September 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 16-0546/AF
Airman (E-2), **RODNEY B. BOYCE**, USAF, *Appellant.*	)	Crim. App. No. 38673

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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Airman (E-2),[1] **RODNEY B. BOYCE**, USAF, *Appellant.*	)	Crim. App. No. 38673

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

ISSUE PRESENTED

THE CHIEF OF STAFF OF THE AIR FORCE ADVISED THE CONVENING AUTHORITY THAT, UNLESS HE RETIRED, THE SECRETARY OF THE AIR FORCE WOULD FIRE HIM. WAS THE CONVENING AUTHORITY'S SUBSEQUENT REFERRAL OF CHARGES UNLAWFULLY INFLUENCED BY THE THREAT TO HIS POSITION AND CAREER?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

[1] In his brief and on the Joint Appendix, Appellant is incorrectly referred to as a Senior Airman (E-4). His rank at trial was Airman (E-2).

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

INTRODUCTION

> I [take] my role as [a] convening authority very seriously. Any comments by superior government officials, both civilian and military, had absolutely no impact on my decision-making as a convening authority . . . .
>
> I am aware that my independent and impartial decision to not approve the findings and to dismiss the charges in United States v. Lt Col Wilkerson has been and continues to be a subject of substantial public controversy. I believe that I independently and impartially made the right decision to not approve the findings and to dismiss the charges in United States v. Lt Col Wilkerson and I stand by that decision. I am aware that the charges I dismissed in United States v. A1C Wright have been re-preferred by the Air Force District of Washington. I believe that I independently and impartially made the right decision to dismiss the charges in United States v. A1C Wright and I stand by that decision. My independent and impartial decisions in these two above cases, and all other cases, did not impact any decision I made in the case, United States v. Amn Rodney B. Boyce.
>
> I did not and would not allow improper outside influence to impact my independent and impartial decisions as a GCMCA to dismiss charges, refer a case to trial, to grant or deny clemency, or to take any other military justice action.
>
> - Affidavit of Lt Gen Craig A. Franklin
> 13 February 2014

(JA at 345.)

STATEMENT OF FACTS

A. The Crimes.

On the day A1C DR married Appellant, he raped her.[2] (JA at 76, 140.) The day was 12 September 2009. (JA at 136.) The rape took place after their wedding ceremony, when the two were alone in their Las Vegas hotel room. (JA at 76.) Because Appellant was convinced that the couple was obligated to have sex on their wedding night, he refused to take A1C DR's "no"[3] for an answer. (Id.) When she refused, "he got mad and proceeded to have sex with [her] after throwing [her] around a little bit. [She] tried to fight him off. [But, h]e was continuing, pinning [her] down with his hands while on top of [her]." (Id.) By the time Appellant finished, A1C DR was "in shock."[4] (Id.) And, until she learned that, years later, Appellant had purportedly raped another Airman, she refused to share what happened on her wedding night with anyone "because it [was] not really something [she] want[ed] to talk about." (JA at 76, 145.)

---

[2] The facts presented here generally originate from the 27 November 2013 Article 32 Report completed in this case. (JA at 35-92.) The United States submits the facts to the Court in this manner since this is how the facts were presented to Lt Gen Franklin prior to his decision to refer this case on 6 January 2016.

[3] Although it is completely immaterial to the illegality of Appellant's conduct that night, A1C DR's reluctance to engage in sexual intercourse stemmed from the fact that the two were sharing the hotel room with A1C DR's parents, who, she feared, could return to the room at a moment's notice. (JA at 76.)

[4] At trial, A1C DR elaborated, "I told him no, to get off of me. And he started like – he started calling me names, like 'Stop being a bitch. Stop being a stupid whore.' – stuff like that. And he raped me." (JA at 140.) "He's really strong. He's like six something and he's just – he had like 50 pounds on me already." (JA at 142.)

Notwithstanding this horrific incident, A1C DR stayed with Appellant, eventually enlisted in the Air Force, and, in October 2010, was stationed with Appellant at Aviano Air Base, near Venice, Italy. (JA at 76, 78, 144.) Despite the idyllic location, Appellant's abuse of A1C DR continued. (JA at 76.) On Saturday, 12 February 2011, after a night out sharing drinks with friends, the couple ended up in an argument. (JA at 44, 76.) By the time they arrived home, the argument became physical, and Appellant "threw [A1C DR] off the wall." (JA at 76, 147.) Appellant then violently pushed A1C DR against their dresser, causing her to hit her eye and then fall onto the floor. (JA at 76, 148.) When A1C DR fell to the floor, she soon became dizzy and disoriented. (JA at 76, 148.) Appellant then held A1C DR down to the floor, took off her pants, and began having sex with her, despite her repeated demands to stop.[5] (JA at 76, 149.) As Appellant was raping his wife, he called her a "bitch," a "skank," and a "slut." (JA at 76, 148.) Due to the terror of what was happening to her, A1C DR urinated on herself. (JA at 76, 150.) After Appellant finished and observed what she had done, he responded that "he thought he had killed [her] because he read somewhere that when someone dies[,] they let go of their bowels." (Id.)

[5] A1C DR later testified, "I told him to get off of me." (JA at 148.) "And I was – I got to where I couldn't – I just laid there and let it happen. It was just easier to just get it over with, to just have him finish and just have it stop." (Id.) She further elaborated that she "felt stupid because it was – he said he wasn't going to do that again, and now he's – his second time, and he's still doing it. [She] just [felt] stupid." (JA at 149.)

The following week, A1C DR's First Sergeant confronted her after he noticed her black eye. (JA at 77, 151-52.) After the First Sergeant brought her into his office and politely inquired about her home life, A1C DR reluctantly admitted that Appellant had thrown her into a wall and their dresser. (JA at 77, 152.) After their conversation, he sent A1C DR to meet with investigators from the 31st Security Forces Squadron. (JA at 70-71, 152.) She met with the investigators on 16 February 2011. (JA at 70-71.) As she did with her First Sergeant, A1C DR provided details regarding the origin of her black eye, but she would not elaborate and tell the investigators about the rapes. (JA at 71.) The investigators collected a written statement from A1C DR, in addition to photographing her injuries. (JA at 71, 82-87; Pros. Ex. 1.)

When the investigators interviewed Appellant two days later, he explained the incident as follows:

> Got in car with my wife we started arguing don't remember what about. Got home around 0300-0400, don't remember. Told her to get ready for bed. She started yelling at me in my way to my side of bed. I took my hand and moved her out of the way. She could barely stand up. She stumbled on the carpet and fell into the wall then into the dresser. She fell to the floor so I went down to help her up and apologize. She told me to leave her there so I went to my side and got ready for bed. When I finished I helped her up and to bed and we both fell asleep. Monday morning I noticed a bump on her eye and Tuesday it turned purple.

(JA at 68.)

Although she could not recall the exact dates, A1C DR declared that there were several other times when Appellant raped her. (JA at 77.) On a number of occasions, she would try to avoid his angry outbursts by going to a different room in the house.[6] (Id.) But, if Appellant was determined to hurt her, A1C DR testified at the Article 32 Hearing, "he was [just] too strong and I could not push him off. He [was] a lot bigger than I was." (Id.)

Not long after the 12 February 2011 rape, A1C DR decided to divorce Appellant. (JA at 156.) By September 2011, Appellant had moved out of their shared apartment while the divorce process was ongoing. (JA at 77, 166.) But, on the night of 21 September 2011, Appellant returned to the apartment and knocked on the door. (JA at 77, 168.) A1C DR answered the door and Appellant told her that "he needed to pick something up and he would be quick …" A1C DR let Appellant into the apartment and "went to finish getting ready for work." (Id.) By the time she finished, she saw that A1C DR was still present in the apartment, and he soon began pleading with her to reconcile. (Id.) When A1C DR said, "no," Appellant became very angry, smashed his own head on the door (leaving a dent in the door), and pushed her onto the bed. (JA at 77, 169.)

[6] A1C DR testified at trial that she would try to avoid Appellant's temper in other ways: "I would do anything to stay at work longer. I would volunteer for stuff just so I could avoid coming home. I was staying awake all night just to have an excuse not to lie down in the bed with him. I would fall asleep on the couch. I would be working out at one and two o'clock in the morning." (JA at 155.)

Appellant climbed on top of A1C DR, and she started screaming. (Id.) He then covered her mouth and nose with his hand, making it difficult for her to breathe. (Id.) As she squirmed and fought to break loose from Appellant, in an effort to calm him down, she told him that "[they] could make it work and [they] would be okay." (JA at 77, 170.) Thinking Appellant may kill her, she continued to tell him that they "would be okay and work it out." (Id.) Appellant's temper cooled, and he released A1C DR from his grasp. (Id.)

After Appellant eventually left the apartment, A1C DR immediately reported the incident to her supervisor. (JA at 72-73, 170.) As a result, that night, she was interviewed by investigators with the 31st Security Forces Squadron, and, like the time before, she provided them a sworn statement. (Id.) On 23 September 2011, A1C DR provided an additional sworn statement based on the investigators' follow-up questions. (JA at 74-75, 171.) When asked whether, during the altercation, A1C DR felt that her husband could have killed her, she unequivocally stated, "yes." (JA at 75.) As they had done before, the investigators photographed A1C DR's facial injuries.[7] (JA at 88-91, 171; Pros. Ex. 2.)

On 6 October 2011, Appellant was offered an Article 15 nonjudicial punishment for the 21 September 2011 incident perpetrated against his wife. (JA

[7] The quality of the photographs in the ROT (IO Ex. 20; Pros. Ex. 1, 2) is low, and even worse in the Joint Appendix. (JA at 82-91.) The United States would thus prefer this Court observe the exhibits contained in the ROT.

at 94; Pros. Ex. 8.) Appellant waived his right to a court-martial and accepted nonjudicial punishment proceedings on 12 October 2011. (Id.) Two days later, Appellant's commander found him guilty of the assaults consummated by a battery. (Id.) This nonjudicial punishment, while not discussed in the Article 32 Report, was mentioned in the Squadron Commander's First Indorsement, alongside another nonjudicial punishment, vacation of suspended punishment, and letter of reprimand that Appellant had received for other misconduct. (JA at 93.) AFCCA later discussed this NJP in relation to Pierce credit. (JA at 12-13.)

After A1C DR and Appellant's divorce was finalized, the two finally parted ways.[8] A1C DR moved to Monterrey, California, and remarried. (JA at 81, 173.) In May 2013, however, agents with the Air Force Office of Special Investigations (AFOSI) contacted A1C DR after an allegation surfaced that Appellant had sexually assaulted another Airman, SrA FW.[9] (JA at 81, 174.) When she learned that Appellant may have assaulted someone else, A1C DR told the agents "about the times [Appellant] had raped [her]."[10] (JA at 175.)

[8] Although he was later acquitted of the offense, the Investigating Officer (IO) recommended referring an Article 92, Failure to Obey a Lawful Order, charge and specification to trial. (JA at 50.) This offense was based on allegations that Appellant repeatedly violated a no-contact order by contacting A1C DR. (Id.)
[9] Although the IO found that sufficient evidence existed to refer the Article 120 and 128 charges regarding SrA FW, and the charges were referred to trial, Appellant was acquitted of these offenses at trial. (JA at 239.)
[10] A1C DR testified at trial, "I felt personally responsible because if I would have said something earlier, it probably wouldn't have happened to her." (JA at 175.)

B. The Command and its Influence.

Lieutenant General Craig A. Franklin[11] took command of Third Air Force[12] on 30 March 2012. (JA at 345, 371 – Attach. 51.) General Mark A. Welsh III, who was, at the time, the United States Air Forces in Europe (USAFE) Commander, spoke at the 30 March change of command ceremony. (JA at 371 – Attach. 51.) At the ceremony, Gen Welsh said of Lt Gen Franklin, "We are very lucky to have him. We got a commander who on 13 of his performance reports, the evaluator said he was the best officer they had ever seen." (Id.)

Almost a year later, on 26 February 2013, in accordance with his clemency authority under Article 60, UCMJ, 10 U.S.C. § 860 (2012), Lt Gen Franklin decided to set aside all charges and specifications in the case of United States v. Lt Col James H. Wilkerson III.[13] (JA at 371 – Attach. 52, 58.) Included among the charges Wilkerson was found guilty of committing (by a panel of officer members) was the charge of aggravated sexual assault. (JA at 371 – Attach. 54.) In his 12 March 2013 letter to then-Secretary of the Air Force Michael B. Donley, which attempted to explain his decision in the case, Lt Gen Franklin wrote, "Obviously it

[11] Although he retired as a Major General, the United States will refer to him as "Lt Gen Franklin" as that was his rank during the events of this case. He retired at this grade since he did not have enough time in grade as a Lieutenant General.
[12] Third Air Force is a Numbered Air Force (NAF) of the USAFE Major Command (MAJCOM).
[13] Lt Gen Franklin's decision was accomplished against the advice of his Staff Judge Advocate (SJA), Col Joseph Bialke, who recommended instead that Lt Gen Franklin merely disapprove the adjudged dismissal. (JA at 371 – Attachment 54.)

would have been exceedingly less volatile for the Air Force and for me professionally, to have simply approved the finding of guilty. [But, t]his would have been an act of cowardice on my part and a breach of my integrity."[14] (JA at 371 – Attach. 52.) On the same day Lt Gen Franklin sent his letter to Secretary Donley, Gen Welsh, who had recently been promoted to the Chief of Staff of the Air Force (CSAF), emailed Lt Gen Franklin. (JA at 371 – Attach. 58.) He wrote, "It's going to be a little uncomfortable for awhile [sic]. Hang in there." (Id.)

Given the political climate and scrutiny concerning the issue of sexual assault in the military, the backlash to Lt Gen Franklin's decision was "almost immediate." (Id.) Nevertheless, Lt Gen Franklin continued to defend his decision. (*See, e.g.*, JA at 322-337.) He even attempted to intervene on behalf of then-Lt Col Wilkerson in order to have his promotion to Colonel approved (once Wilkerson was released from confinement): "I will call the [Air Force Personnel Center] directly," Lt Gen Franklin said in a 28 February 2013 email. (JA at 371 – Attach. 58.) While later testifying in an unlawful command influence (UCI) motion

[14] Among the reasons listed why Lt Gen Franklin opted to set aside the convictions was the claim that then-Lt Col Wilkerson was a "doting father and husband." (JA at 371, Attach. 52.) Likely troubling to the current SECAF, however, was the fact that, in March 2013, the Air Force discovered that Wilkerson had, years before, engaged in an extramarital affair that produced a child. (JA at 371 – Attach. 55.) In connection with his committing adultery, Wilkerson also misused government resources. (Id.) These discoveries were inconsistent with Wilkerson's earlier promise to Lt Gen Franklin "that there [was] no adverse information to his knowledge outside the charges brought against him in court." (Id.) Wilkerson was eventually retired in the grade of Major.

hearing for a court-martial he referred to trial, Lt Gen Franklin explained his thought-process prior to dismissing the charges in the Wilkerson case:

> Yes, I thought about [my career advancement] just knowing that this was probably going to get Congressional interest and the Senate, who confirms GOs for Three and Four Star billets, so whether or not I was going to go to another Three-Star billet after this job, or maybe get a Four-Star billet, you know, I knew this would probably make this my last job potentially, so yeah, I knew this was going to have probable future impact on me.

(JA at 325.) When asked if he had any regrets about his decision because of the political fallout, Lt Gen Franklin replied, "No, I'll tell you I am sleeping like a baby at nighttime. I made the right decision even amidst all the attacks . . . ." (JA at 326.)

Despite the backlash regarding the Wilkerson case, on 3 September 2013, Lt Gen Franklin opted to dismiss sexual assault charges in yet another case, United States v. A1C Brandon Wright. *See* United States v. Wright, 75 M.J. 501, 502 (A.F. Ct. Crim. App. 2015) (en banc). This time, however, he did so prior to trial (in accordance with R.C.M. 306), and consistent with his SJA's recommendation. Id. Lt Gen Franklin was again criticized for his decision, primarily because the named victim in the case indicated that she wanted to speak with Lt Gen Franklin

prior to his disposition of charges.[15] Id. Notwithstanding that request, Lt Gen Franklin declined to meet with the named victim, and dismissed the charges and specifications anyway.[16] Id.

Three days later, on 6 September 2013, the Acting Secretary of the Air Force, Eric K. Fanning, attached A1C Wright to the Air Force District of Washington at Joint Base, Andrews, Maryland. Wright, 75 M.J. at 503. The memorandum effecting the transfer stated that "[d]isposition of this case, whether by no action, administrative action, nonjudicial punishment, court-martial or otherwise, is entirely within the discretion of the commander or convening authority as appropriate, under applicable directives." Id. Acting Secretary Fanning was eventually replaced by Secretary Deborah Lee James (SECAF) on 20 December 2013.[17] (JA at 253.)

One week after Secretary James took over as SECAF, on 27 December 2013, Lt Gen Franklin received a phone call from Gen Welsh, the CSAF. (JA at 371 – Attach. 60.) Gen Welsh relayed that the new Secretary had "lost

[15] The Judge Advocate General (TJAG) also privately spoke with the SJA, Col Bialke, concerning his advice to the convening authority since Lt Gen Franklin had chosen not to meet the named victim. Wright, 75 M.J. at 503.
[16] Lt Gen Franklin's actions were arguably a violation of Air Force Instruction 51-201, ¶¶ 4.14, 4.21, 4.22.3 which provided a victim the opportunity to express her preference as to disposition of the relevant charges prior to a final decision by the convening authority. *See* Wright, 75 M.J. at 503 n.5.
[17] Secretary Fanning is now the Secretary of the Army, after being confirmed by the Senate on 17 May 2016.

confidence" in him, and would leave it up to Lt Gen Franklin whether or not he wanted to retire. (JA at 60.) Gen Welsh also told "Lt Gen Franklin that 'he had fought for [him] to be allowed to retire.'"[18] (JA at 263.) "After the conversation, Lt Gen Franklin contemplated his options for approximately three hours, and after deciding that he didn't want SECAF to remove him from his position, he submitted his retirement paperwork to General Welsh."[19] (Id.) (emphasis added.) In his written retirement request, Lt Gen Franklin expressed a concern for both prosecutors and defense counsel going forward: "The last thing I want in this command is for people to feel they cannot bring a sexual assault case forward or feel it won't be dealt with fairly." (JA at 363 – Attach. T.) He also worried about the "media attention that will likely occur on subsequent sexual assault cases [he] deal[t] with" that "could jeopardize the privacy of both the victim and the accused." (Id.) As such, he "respectfully request[ed] to step down from [his] position as Third Air Force Commander . . . effective 31 January 2014." (Id.)

[18] This important fact was omitted from the 6 February 2014 affidavit prepared by the Defense for its UCI motion. This fact was, however, included as a direct quote in the Defense's UCI motion. (JA at 263, ¶ 99.) The Senior Defense Counsel, Maj Shane McCammon, authored the UCI motion and ostensibly added this quote since he was present for the 28 January 2014 Defense interview of Lt Gen Franklin. (JA at 371 – Attach. 60.)

[19] The United States again highlights that this fact (that SECAF, not CSAF, was the one seeking removal) originates from a Defense interview (from 28 January 2014), documented in a Defense affidavit, which was attached to the Defense's UCI motion at trial. (JA at 371 – Attach. 60.) Lt Gen Franklin's email to the CSAF was time stamped 1936 hours on 27 December 2013. (JA at 363 – Attach. T.)

At 2256 hours on Friday, 27 December 2014, Gen Welsh responded to Lt Gen Franklin's email as follows:

> Got it Craig. Thanks – I have a meeting with SECAF on Monday at 1030 our time. I have a series of meetings immediately following, but will send you an update NLT 1500 my time on Monday.

(JA at 363 – Attach. T.) Lt Gen Franklin publicly announced his retirement on Wednesday, 8 January 2014. (JA at 371 – Attach. 61.) He began terminal leave on 31 January 2014, and officially retired as a Major General on 1 April 2014. (JA at 363 – Attach. N.)

C. The Charges in this Case.

Charges relating to SrA FW were preferred against the Appellant on 7 November 2013. (JA at 109.) The charges relating to the Appellant's ex-wife, A1C DR, were preferred on 5 December 2013. (JA at 111.) The Article 32 Report in this case, which discussed and analyzed the allegations concerning both SrA FW and A1C DR, was completed on 27 November 2013. (JA at 38.) Other than Charge II and its Specifications (an Article 128 charge and two specifications relating to SrA FW), the IO recommended referring all other charges and specifications to a general court-martial (GCM). (JA at 54.)

In his First Indorsement to the Charge Sheet, the Appellant's Squadron Commander, Maj Franklyn K. Shepherd, Jr., recommended that all "charges be referred to trial by General [sic] court-martial." (JA at 93.) On 6 December 2013,

in his advice to the Special Court-Martial Convening Authority (SPCMCA), Lt Col Chad Carter, the Wing Staff Judge Advocate, recommended "forwarding all charges and specifications to 3 AF/CC [Lt Gen Franklin] with a recommendation for referral to trial." (JA at 95.) On the same day, the SPCMCA forwarded all charges and specifications to the GCMCA with a recommendation for trial by GCM. (JA at 97.) Similarly, in his 27 December 2013 pretrial advice to the General Court-Martial Convening Authority (GCMCA), Acting NAF Staff Judge Advocate, Lt Col Richard H. Ladue, advised Lt Gen Franklin that all "charges and specifications are warranted by the evidence contained in the [attached documents]." (Id.)

Even though every single subordinate commander and SJA was recommending referral in the present case, Lt Gen Franklin did not immediately refer the case on 27 December 2013.[20] (JA at 371 – Attach. 60.) Nor did he on the following Monday, 30 December 2013. (Id.) Because he was concerned about the possible appearance of UCI, Lt Gen Franklin "sat on the package for a while." (Id.) After contemplating his decision for well over a week, considering "the recommendation from the SJA[,] and after thoroughly reviewing all of the evidence, Lt Gen Franklin decided to 'move forward with [United States v.] Boyce.'" (Id.)

[20] Lt Gen Franklin "received Boyce's referral package on the morning of 27 December 2013 . . ." (JA at 371 – Attach. 60.) (emphasis added.)

On Monday, 6 January 2014, Lt Gen Franklin referred all charges and specifications in this case. (JA at 110, 112.) Later, in a 13 February 2014 affidavit, provided by the Government at trial in response to the Defense's omnibus UCI motion, Lt Gen Franklin made clear that "[w]hen taking action in a case, [he] reviewed each case independently and impartially, relying on the facts and circumstances of any crimes of which the accused had been found guilty, any potential aggravating, mitigating or extenuating circumstances, and [his] Staff Judge Advocate's recommendation." (JA at 345.) With respect to the case at bar specifically, Lt Gen Franklin unequivocally declared that he "reviewed and considered the Article 32 Investigation. [And a]fter reviewing the Article 32 and [the] Staff Judge Advocate's recommendation, [he] believe[d] there were reasonable grounds to refer all charges and specifications to trial by [GCM]." (Id.)

In addition to Lt Gen Franklin's affidavit, the Government also provided affidavits from the preferral commander, Maj Shepherd, as well as the SPCMA, Brig Gen Jon A. Norman. Maj Shepherd stated, "After reviewing the [ROI] and my SJA's recommendation, I believed there were reasonable grounds upon which to prefer all Charges and their Specifications . . . ." (JA at 340.) Additionally, Brig Gen Norman stated that his "evaluation of the evidence [left him] firmly convinced" referral was "the most appropriate action." (JA at 338.) He continued, "there are very clear grounds to support referral to trial by [GCM]." (Id.)

At trial, the military judge reviewed the UCI motions and the voluminous evidence presented to him by both Government and Defense counsel. (JA at 122.) He commented,

> The UCI motion is a, honestly, an outstanding motion, and it has a number of attachments. I am working on a written ruling right now, but I do say that I do divide it up into both accusatory and adjudicative phases. And I'll just give you my ruling at this time.
>
> With regards to the accusatorial phase, while I do believe that a burden shift was required and that the defense did meet its very low burden with regards to the accusatory phase, I do believe the government has proven beyond a reasonable doubt that it, in fact, if UCI did exist or apparent UCI existed, that it had absolutely no impact on this particular case. There could be an argument, in fact, that General Franklin may be the most bombproof of any convening authority out there simply because of the fact with regards to his retirement, and the fact that he has, on occasion, seemingly gone against the interests of others in the military.

(JA at 123.)

As regards his ruling on whether adjudicative UCI existed, the military judge stated that he would reserve his ruling for a later date. (Id.) True to his word, the military judge released his written ruling on 12 June 2014. (JA at 367.) In it, he stated that the "Court is convinced beyond a reasonable doubt that there was no UCI or apparent UCI in [either] the accusatorial or adjudicative phases of this proceeding." (JA at 369.)

SUMMARY OF THE ARGUMENT

No UCI impacted the decision to refer charges in this case. No one in a position of authority over Lt Gen Franklin attempted to influence, or even knew the existence of, the specific case against the Appellant. There was zero evidence presented at trial, at AFCCA, or at CAAF, that SECAF or CSAF knew about, or were particularly concerned with, the charges preferred against the Appellant.

Even assuming that the Appellant met his low burden to show some evidence of actual UCI, the Government proved beyond a reasonable doubt that the decision to offer retirement in lieu of removal was not unlawful, nor was it an attempt to influence a particular outcome in this case. Lt Gen Franklin not only voluntarily agreed to a thorough interview with the Defense prior to trial, where he answered all of their questions, but he provided a detailed and case-specific affidavit that explained he was in no way influenced to refer charges in this case.

An objective, disinterested observer, fully informed of all the facts and circumstances of this case, would not harbor a significant doubt as to the fairness of the referral decision for a number of very good reasons. Chief among them is the fact that, of all the general court-martial convening authorities that the Appellant could have ended up with, he was fortunate enough to have drawn a convening authority who had a long history of ignoring political pressure, and, by the time he reviewed the Appellant's case, no longer had anything to gain or lose

when it came to his Air Force career. Additionally, even if Lt Gen Franklin's decision to refer in this case was tangentially impacted by SECAF's actions, the Appellant was not prejudiced because the evidence against him was plentiful.

ARGUMENT

THE SECRETARY OF THE AIR FORCE DID NOT ENGAGE IN ANY KIND OF UNLAWFUL COMMAND INFLUENCE WHEN SHE PROVIDED LIEUTENANT GENERAL CRAIG FRANKLIN THE OPTION TO RETIRE IN LIEU OF REMOVAL FROM HIS POSITION. HER PLENARY AUTHORITY OVER AIR FORCE ASSIGNMENTS WAS NOT EXERCISED IN AN ATTEMPT TO INFLUENCE THE REFERRAL DECISION IN THIS OR ANY OTHER CASE. ANY MEMBER OF THE PUBLIC, FULLY INFORMED OF THESE FACTS, WOULD THEREFORE NOT HARBOR ANY DOUBT AS TO THE FAIRNESS OF THESE PROCEEDINGS.

Standard of Review

This Court has declared that, in cases involving UCI, appellate courts "review issues involving a military judge's decision not to dismiss for abuse of discretion." United States v. Douglas, 68 M.J. 349, 354 (C.A.A.F. 2010) (citing United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)). Under this standard, "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." Douglas, 68 M.J. at 354 (quoting United States

v. Houser, 36 M.J. 392, 397 (C.M.A. 1993)). This Court has also stated, however, that "[w]here the issue of [UCI] is litigated on the record, the military judge's findings of fact are reviewed under a clearly-erroneous standard, [and] the question of command influence flowing from those facts is a question of law that this Court reviews *de novo*." United States v. Reed, 65 M.J. 487, 488 (C.A.A.F. 2008) (United States v. Wallace, 39 M.J. 284, 286 (C.M.A. 1994)); *see also* United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013) ("Allegations of [UCI] are reviewed *de novo*."); United States v. Johnson, 54 M.J. 32, 34 (C.A.A.F. 2000).

The Law

The principal statutory provision prohibiting unlawful command influence is Article 37, UCMJ. It states in pertinent part:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

10 U.S.C. § 837(a) (2012); *see also* 10 U.S.C. § 898 (2012); Weiss v. United States, 510 U.S. 163 (1994); Noyd v. Bond, 395 U.S. 683 (1969); R.C.M. 104.

"The threshold for raising the issue [of UCI] at trial is low, but more than mere allegation or speculation."[21] United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999) (emphasis added) (citation omitted). This Court has "defined the evidentiary standard for raising the issue as the same as required to raise an issue of fact, *i.e.*, 'some evidence.'" Id. (quoting United States v. Ayala, 43 M.J. 296, 300 (C.A.A.F. 1995). "At trial, the accused must show facts which, if true, constitute [UCI], and that the alleged [UCI] has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." Biagase, 50 M.J. at 151 (citing United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991)). "Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no [UCI] or show that [UCI] will not affect

[21] All of the cases quoted in this paragraph concern adjudicative, not accusatory, UCI. *See, e.g.*, Biagase, 50 M.J. at 144-45 (interference with potential defense witnesses); Ayala, 43 M.J. at 296 (alleged coercion of witnesses); Allen, 33 M.J. at 212 (improper influence over trial judge). Accusatory UCI can exist during the preferral, forwarding, and referral of charges, whereas adjudicative UCI exists when there is interference with witnesses, judges, members, and counsel. United States v. Weasler, 43 M.J. 15, 17-18 (C.A.A.F. 1995). As such, it is unclear whether the "beyond a reasonable doubt" quantum of proof is necessary with respect to accusatory UCI since it does not raise the same constitutional issues as adjudicative UCI. *Compare, e.g.*, Weasler, 43 M.J. at 19 (permitting waiver of accusatory UCI); United States v. Corcoran, 40 M.J. 478, 484 (C.M.A. 1994) ("nonjurisdictional defects in the preferral, forwarding, and referral process are waived if not raised prior to entry of pleas"), *with* United States v. Baldwin, 54 M.J. 308, 310 n.2 (C.A.A.F. 2001) (emphasis added) ("We have never held that an issue of [UCI] arising during trial may be waived by a failure to object or call the matter to the judge's attention."); *but see* United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994) (not permitting waiver of UCI found in referral).

the proceedings." Biagase, 50 M.J. at 151. Therefore, "once the issue of [UCI] is raised, the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute [UCI]; or (3) that the [UCI] will not prejudice the proceedings or did not affect the findings and sentence." 50 M.J. at 151.

When approaching an issue of UCI "[on] appeal, the accused bears the initial burden of raising [UCI]. Appellant must show: (1) facts, which if true, constitute [UCI]; (2) that the proceedings were unfair; and (3) that the [UCI] was the cause of the unfairness." Salyer, 72 M.J. at 423 (citing United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999); Biagase, 50 M.J. at 150.[22] Just like at trial, on appeal, "[o]nce an issue of [UCI] is raised by some evidence, the burden shifts to the government to rebut an allegation of [UCI] by persuading the Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not

[22] The United States will again note that Salyer and Biagase were cases analyzing issues of adjudicative UCI. The three-prong analytical framework articulated in those cases, therefore, does not address an issue where UCI is alleged in the accusatory phase (in this case, referral), because Appellant is not arguing (and the Court did not specify an issue addressing whether) the trial itself was unfair (rightfully so, since, *inter alia*, Appellant was acquitted of four out of seven specifications). And, with respect Biagase's burden shift to the Government, it is equally difficult to conceptualize how or why the Government would prove beyond a reasonable doubt that "the [UCI] did not affect the findings or sentence," when the allegation is that UCI impacted the very decision to prosecute. Biagase, 50 M.J. at 151. Perhaps the prong concerning Appellant's burden ought to require Appellant to show some evidence that the decision to refer was unfair. And, regarding the Government's burden, the question perhaps ought to be: Has the Government proved the UCI did not affect the decision to refer the case?

constitute [UCI]; or (3) the [UCI] did not affect the findings or sentence." Id. (citing Biagase, 50 M.J. at 151). Prejudice is not presumed until an appellant "produces evidence of proximate causation between the acts constituting [UCI] and the outcome." Biagase, 50 M.J. at 150.

Allegations of UCI[23] are reviewed for actual UCI, as well as the appearance of UCI. Salyer, 72 M.J. at 423; United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991). Actual UCI exists when a commander or others attempt the "actual manipulation of any given trial." United States v. Ayers, 54 M.J. 85, 94-95 (C.A.A.F. 2000) (quoting Allen, 33 M.J. at 212). Consequently, actual UCI, committed by a commander or other qualifying authority, is understood within the context of Article 37's prohibitions.[24]

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[23] UCI is frequently described as "the mortal enemy of military justice." Gore, 60 M.J. at 178 (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986)). However, "it is also fair to acknowledge that the system has matured and evolved since Thomas." Douglas, 68 M.J. at 358 (Baker, J., dissenting).

[24] This Court has questioned the argument that civilian military leaders cannot commit UCI, despite the fact that civilians typically do not fall within the ambit of Article 2(a), UCMJ, 10 U.S.C. § 802(a) (2012). *See, e.g.*, United States v. Hutchins, 72 M.J. 294, 313 (C.A.A.F. 2013) (Baker, C.J., dissenting) ("an accused has a due process right to a fair trial and appeal, free from the undue influence of superiors, whether they are military officers or civilians in policy and administrative positions. Thus, regardless of whether Article 37, UCMJ, applies to the Secretary of the Navy, unlawful influence by a civilian official may present a due process 'error of constitutional dimension.'"); *but see* Hutchins, 72 M.J. 302 (Ryan, J., concurring) (analyzing the Secretary of the Navy's actions under Article 37, UCMJ); United States v. Estrada, 7 U.S.C.M.A. 635, 638 (C.M.A. 1957) (reviewing a SECNAV Instruction in the context of Article 37, not the Due Process Clause of the Fifth Amendment).

Even if there is no actual UCI, there may be a question whether the command placed 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). The test for appearance of unlawful influence is an objective one. Salyer, 72 M.J. 423. The Court focuses "upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." United States v. Ashby, 68 M.J. 108, 129 (C.A.A.F. 2009) (citing Lewis, 63 M.J. at 415). An appearance of UCI arises "where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[25] Id.

[25] This standard, however, raises a paradoxical question: If the Government has publicly proven, beyond a reasonable doubt, that no actual UCI infected the case, how would a member of the public, aware of that fact, and all other facts and circumstances, harbor a significant doubt about the fairness of the proceedings? The doctrine of apparent UCI itself is not based on the text of Article 37 or the Due Process Clause, but, rather, on "the spirit of the Code" and legislative history. United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979) ("we believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom . . . [The judge's] limited approach . . . failed to take into consideration the concern of Congress . . . in eliminating even the appearance of [UCI] at courts-martial."); *see also* United States v. Stoneman, 57 M.J. 35, 42 (C.A.A.F. 2002) (discussing the Court's long-held recognition of Rosser's reasoning); United States v. Cruz, 20 M.J. 873, 879 (A.C.M.R. 1985), *rev'd on other grounds*, 25 M.J. 326 (C.M.A. 1987) (providing an historical exegesis on apparent UCI, and stating that Rosser was the only case, up until that point in time, "in which the Court of Military Appeals ha[d] based its remedy on a finding of appearance of [UCI] without finding (sometimes tacitly), that actual [UCI] had occurred.").

That said, "[t]here must be something more than an appearance of evil to justify action by an appellate court in a particular case." Allen, 33 M.J. at 212. "Proof of [UCI] in the air, so to speak, will not do." Id. This Court's evaluation of allegations of apparent UCI "is highly case-specific." United States v. Reed, 65 M.J. 487, 492 (C.A.A.F. 2008) (citing United States v. Simpson, 58 M.J. 368, 376 (C.A.A.F. 2003)). Yet, one of the "most effective and satisfactory remedies center on the process of appellate review, which is itself a powerful force for public confidence." Cruz, 20 M.J. at 890. "The mere fact that an appellate court has examined a case and affirmed the results is sufficient in the vast majority of court-martial cases to satisfy the public that justice was done by the trial court." Id.

Analysis

No actual or apparent, accusatory or adjudicative UCI existed in this case. Of all the general court-martial convening authorities that the Appellant could have ended up with, he was fortunate enough to have drawn a convening authority who had a long history of ignoring political pressure, and, by the time he reviewed the Appellant's case, no longer had anything to gain or lose when it came to his Air Force career. Not only that, but that same convening authority held onto and reviewed the Appellant's case for well over a week prior to making the decision to refer. That convening authority would later swear that his decision was "independent," "impartial," and absolutely free from any improper influence.

A. The Facts in the This Case Do Not Constitute UCI.

One fact is absolutely clear in this case: No one in a position of authority over Lt Gen Franklin attempted to influence, or even knew the existence of, the specific case against Airman Rodney B. Boyce. There has been zero evidence presented at trial, at AFCCA, or here, that SECAF or CSAF knew about the charges preferred against Appellant. Appellant himself tacitly acknowledged this fact in his brief by essentially admitting that any influence was unintentional: "The military justice system is tarnished by [UCI] whether the source of the influence intended the adverse effects on the case or not." (App. Br. at 7.) Because no facts exist that show SECAF or CSAF's actions were intended to impact this, or any other, case before Lt Gen Franklin, Appellant cannot meet his low burden to demonstrate actual UCI and shift the burden to the Government.[26] But, even if Appellant could meet his low burden, the Government has proved, well beyond a reasonable doubt, that no actual UCI exists.

1. No Actual UCI Existed in this Case.

At the outset, it is important to correct a factual error in Appellant's brief. He states that "as a result of [the Wilkerson and Wright] decisions . . . the Chief of Staff of the Air Force (CSAF) informed Lt Gen Franklin that the Secretary of the Air Force (SECAF) had 'lost confidence' in him and that he could either resign or

[26] Appellant did not argue actual UCI at AFCCA. Nor did Appellant argue actual UCI in his 23 May 2016 Supplement to Petition for Grant of Review.

be fired because of his lawful decisions in previous sexual assault cases."[27] (App. Br. at 3.) (emphasis added.) While there is little doubt that SECAF lost confidence in Lt Gen Franklin, there is scant evidence in the record that the decision to remove Lt Gen Franklin was because "of his lawful decisions in previous sexual assault cases." (Id.) Even if those decisions played a part in SECAF's thought-process, there is no evidence that SECAF made the decision solely because of Lt Gen Franklin's decisions to dismiss charges in Wilkerson or Wright. This 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.[28] Wright, 75 M.J. at 503. It is Appellant's burden to demonstrate that SECAF's discretionary, executive authority over assignments was exercised in an improper, unlawful

[27] Appellant cites "JA at 371, Attachment 59" for this proposition. However, Attachment 59 is a 4 October 2013 email between Col Bialke, the Third Air Force Staff Judge Advocate, and the Senior Defense Counsel (SDC) in United States v. Wright. Even if Appellant meant Attachment 60—the interview between the SDC in this case and Lt Gen Franklin—there is no mention from Lt Gen Franklin in that interview of the fact that he was "fired because of his lawful decisions in previous sexual assault cases." (JA at 371 – Attach. 60; App. Br. at 3.)

[28] Attachment 62 to Joint Appendix page 371 states that Senator Gillibrand had hoped Lt Gen Franklin would be removed because he denied proceeding "to a court martial after refusing to speak with the alleged victim."

way.[29] *See* United States v. Simpson, 58 M.J. 368, 373 (C.A.A.F. 2003) (the defense must "show facts which, if true, constitute [UCI].") (emphasis added) (citing Biagase, 50 M.J. at 150). Because Appellant failed to provide the trial court, AFCCA, or this Court with sufficient evidence concerning SECAF or CSAF's motivations,[30] despite ample time and opportunity to do so, he fails to meet his low burden.

Furthermore, Appellant spends much of his brief arguing that CSAF, not SECAF, was the one who "*de facto* fired" Lt Gen Franklin: "CSAF engaged in UCI when he *de facto* fired Lt Gen Franklin." (App. Br. at 6.) This may have been done intentionally in order to avoid an argument that SECAF is not subject to the Code. But, the facts are very clear that it was SECAF, not CSAF, who actually directed that Lt Gen Franklin retire or face removal from his position:[31]

[29] "The Secretary of the Air Force may . . . assign, detail, and prescribe the duties of members of the Air Force . . . [and] change the title of any officer or activity of the Department of the Air Force not prescribed by law." 10 U.S.C. § 8013(g) (2012); *see also* United States v. Hardy, 4 M.J. 20, 24 (C.M.A. 1977) (commanders have plenary power over subordinate officers regarding command functions).

[30] Appellant has provided public statements made by CSAF and SECAF concerning sexual assaults in the military, but nothing having to do with the case against Appellant specifically, nor having to do with the reasons behind Lt Gen Franklin's "threatened" removal.

[31] "An officer who is appointed to the grade of general, admiral, lieutenant general, or vice admiral for service in a position designated . . . by law to carry that grade shall continue to hold that grade . . . while serving in that position [or] while awaiting retirement." 10 U.S.C. § 601 (2012).

> [CSAF] called him and said that [SECAF], The Honorable Deborah Lee James, had "lost confidence" in him, but General Welsh would leave it up to him whether or not he wanted to retire/resign. Additionally, General Welsh informed him that SECAF wouldn't support a Time in Grade (TIG) waiver.[32] After the conversation, Lt Gen Franklin contemplated his options for approximately three hours, and after deciding that he didn't want SECAF to remove him from his position, he submitted his retirement paperwork to General Welsh.
>
> Lt Gen Franklin stated that since SECAF is a new secretary, Sexual Assault is on her plate.

(JA at 371 – Attach. 60.) (emphasis and footnote added.) It is unclear whether CSAF himself could even remove Lt Gen Franklin without SECAF's approval;[33] regardless, the facts in the record are fairly straightforward that the decision to offer retirement in lieu of removal from the position was SECAF's to make.

Assuming *arguendo*, that SECAF can commit actual UCI under Article 37, and that Appellant has met his low burden to show some evidence of actual UCI, the Government proved beyond a reasonable doubt that the decision to offer retirement in lieu of removal was not unlawful, nor was it an attempt to influence a

[32] "[A] commissioned officer of the . . . Air Force . . . must have served on active duty in that grade for not less than three years, except that the Secretary of Defense may authorize the Secretary of a military department to reduce such period to a period not less than two years." 10 U.S.C. § 1370(a)(2)(A) (2012). "In the case of an officer to be retired in a general or flag officer grade, authority provided by the Secretary of Defense [(SECDEF)] to the Secretary of a military department . . . may be exercised with respect to that officer only if approved by [SECDEF] . . . by and with the advice and consent of the Senate." 10 U.S.C. § 1370(a)(2)(B) (emphasis added).

[33] *See* 10 U.S.C. § 8033 (2012) (outlining CSAF's authority).

particular outcome in any given case. Lt Gen Franklin himself swore that, when making the decision to refer in this case, he reviewed "the Article 32 report and my Staff Judge Advocate's recommendation, I believed there were reasonable grounds to refer all charges and specifications to trial by general court-martial." (JA at 345.) Lt Gen Franklin also made clear that any "comments by superior officials, both civilian and military, had absolutely no impact on my decision-making as a convening authority." (Id.) Furthermore, Lt Gen Franklin reiterated that he never allowed "improper outside influences to impact [his] independent and impartial decisions as a GCMCA to dismiss charges, to refer a case to trial, to grant or deny clemency, or to take any other military justice action." (Id.)

Lt Gen Franklin also voluntarily submitted to a Defense interview on 28 January 2014. (JA at 371 – Attach. 60.) Regarding the case against Appellant, Lt Gen Franklin "stated that he looked at Boyce's case the same way he looked at all of his other cases – independently." (Id.) While acknowledging the possibility of apparent UCI, Lt Gen Franklin nonetheless stated that "Convening Authorities are 'put in these positions to do the right thing' . . . ." (Id.) This is consistent with other comments Lt Gen Franklin has made in other defense interviews in the past, when he has stated, for example, that he "thinks of his disposition decision as putting on a cone of silence and ignoring outside influence to reach his own decision." (JA at 371 – Attach. A.)

While Appellant is indeed correct that this Court views with suspicion "perfunctory statements from subordinates" or "blanket assertion[s] of a subordinate in rank that he was not influenced," Lt Gen Franklin's statements in this case, including his sworn statement,[34] are far from "perfunctory." *See* United States v. Wallace, 39 M.J. 284, 287 n.1 (citing Rosser, 6 M.J. at 272). His affidavit is lengthy and specific to this case. He voluntarily cooperated in a Defense interview and answered all questions. He was a very high ranking general officer with a history of making independent decisions, and no evidence exists in the record, or elsewhere, that he did not possess anything but a sterling character for truthfulness. Lt Gen Franklin was intimately familiar with the political environment regarding sexual assaults in the military, and he repeatedly declared he was impervious to either political or command pressure. As he testified in one court-martial motion's hearing: "I can't take [my career] into account because I got to do the right thing and I am a man of integrity and in every case I'm going to make the right call based on the facts and based on what I see, regardless of any impacts on me." (JA at 325.) As stated *infra*, regarding his decisions in difficult

[34] The in-court testimony from Lt Gen Franklin provided to this Court was included as an attachment to the Government's Reply to the Defense's UCI Motion. (JA at 322-37.) It was from a different case than the case here, but the kitchen-sink UCI motion in that case was similar to the one here.

cases, Lt Gen Franklin stated, "I am sleeping like a baby at nighttime."[35] (JA at 326.)

This case is not at all similar to the fairly recent case of United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013), where efforts were taken by the Government to remove a military judge in order to secure a more favorable ruling. Id. at 428. Here, SECAF's actions were not done in an attempt to obtain a favorable referral decision in Appellant's case. After all, the whole purpose of firing a person is to stop him from doing his job, not hope he continues doing it the way you want him to do it. This case is also unlike United States v. Reed, 65 M.J. 487 (C.A.A.F. 2008), where a deputy commander communicated that certain offenses qualified as an "automatic court-martial referral." Id. at 492. In this case, Lt Gen Franklin stated unequivocally that he reviewed each case on its own merits and made his decision independently. (JA at 345.) And, even though Lt Gen Franklin knew very well the political environment and policy preferences of some political appointees within the Department of Defense (DoD) when it came to sexual assault cases, the important point here "is not whether the convening authority gave

[35] There is no allegation in this case that Lt Gen Franklin should have been disqualified as convening authority because he somehow based his decision on a personal rather than an official interest. *See, e.g.*, United States v. Voorhees, 50 M.J. 494, 499 (C.A.A.F. 1999) (personal interests relate to matters affecting the convening authority's ego, family, and personal property). As stated before, Lt Gen Franklin had nothing to gain or lose by referring, or not referring, Appellant's case to trial.

consideration to the policy but rather did he understand fully that he had a choice to accept or reject it." United States v. Rivera, 12 U.S.C.M.A. 507, 509 (C.M.A. 1961). Lt Gen Franklin confirmed time and time again with conviction that he knew his decisions as a convening authority were his and his alone to make. Reed, 65 M.J. at 490; *see also* United States v. Davis, 37 M.J. 152, 155-56 (C.M.A. 1993) (a commander independently arrived at his decision to GCM and was not unlawfully influenced by superior authority in arriving at his decision). Therefore, Lt Gen Franklin was not subject to actual unlawful command influence by either SECAF or CSAF when he decided to refer charges in this case.[36]

2. No Apparent UCI Existed in this Case.

Appellant next argues that "CSAF's adverse action against Lt Gen Franklin presents to the public an image of a system in which convening authorities lose their jobs unless they, without exception, refer cases to trial and approve

[36] In referring a case to trial, a convening authority is functioning in a prosecutorial role. Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982). "Preferral and referral decisions are inextricably tied to the exercise of command discretion. While command influence at any stage is abhorrent, demonstrating a nexus or causal connection between the unlawful influences alleged and command discretion exercised is very difficult, absent testimony or other evidence that, but for the pressure exerted, someone would not have preferred, forwarded, or referred charges." United States v. Simpson, 55 M.J. 674, 689 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (C.A.A.F. 2003).

sentences."[37] (App. Br. at 16.) For a number of reasons, Appellant is mistaken. No apparent UCI existed in the case against him.

Bare allegations of UCI "in the air," are not sufficient to raise the issue. United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992). This Court will not presume that a commander or judicial officer "has been [improperly] influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular" case. United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994) (citing United States v. Thomas, 22 M.J. 388, 396 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987)).

All Appellant can point to here is the proximity of Lt Gen Franklin's removal with his decision to refer the case. He cannot produce any evidence of proximate causation between the removal of Lt Gen Franklin and the decision to refer this case. *See* Biagase, 50 M.J. at 150. This is despite the fact that Lt Gen Franklin himself was questioned at length by the Defense prior to trial. (JA at 371

[37] Regarding CSAF, Appellant attempts to conflate the time period surrounding referral with the time CSAF gave an interview to USA Today. (App. Br. at 14.) Appellant asserts that CSAF made a "braggadocio" statement to the paper that he "'was not too concerned about' the effects of UCI, adding 'I don't know if we can avoid that one completely.'" (Id.) The United States has searched thoroughly through Joint Appendix at 371, Attachment 44, and cannot find language remotely similar in that interview. Nevertheless, CSAF gave the interview on 14 May 2013 (over six months prior to referral in this case), the interview had no relationship whatsoever to the case at bar, and, even if CSAF said something similar, Appellant's selective quoting certainly takes his comments well out of context.

– Attach. 60). This Court, again, focuses "upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." Ashby, 68 M.J. at 129. A reasonable member of the public would understand that, a general officer who just submitted his retirement paperwork and knew that he would be retiring in a lower grade no matter what he did, would have nothing to gain or lose by referring (or not referring) Appellant's case. As the military judge said in his ruling, Lt Gen Franklin was, in many ways, "bombproof" (or, as the United States prefers, insulated) from any type of command influence the minute he submitted his retirement papers. (JA at 123.) Therefore, Appellant cannot meet his initial burden of showing apparent UCI in this case.

Even assuming *arguendo* (as the trial judge did) that some evidence of apparent UCI existed in this case, the Government has proven well beyond a reasonable doubt that no apparent UCI existed. An objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt as to the fairness of the referral decision in this case for a number of very good reasons. For one, Lt Gen Franklin made clear, months before this case, that he "would be comfortable retiring as a two-star if he made an unpopular but morally right [referral] decision in his mind." (JA at 363 – Attach. A). Because he had nothing to lose or gain after his phone call with CSAF, if this case had been a close call—and it was not—Lt Gen Franklin would have had no issue

whatsoever recommending that the charge or charges not go forward. Second, the reasonable, disinterested observer would also know that Lt Gen Franklin had a consistent record of "voting his conscience" when it came to difficult cases: In two recent, high-profile sexual assault cases, Lt Gen Franklin had no compunction about "doing the right thing" and making decisions consistent with his independent judgment. His actions are striking when one considers Lt Gen Franklin's decision in United States v. Wright, a case that came only months after Lt Gen Franklin's other controversial decision in United States v. Wilkerson. If Lt Gen Franklin was vulnerable to influence, he would not have dismissed the case in Wright.

Third, every single subordinate commander was recommending referral in this case. And those commanders made the recommendations well before the phone call from CSAF on 27 December 2013. Additionally, the Article 32 IO, save a few assault specifications, recommended that the sexual assault charges for both victims be referred to trial. Fourth, there were two alleged victims in this case; so, unlike the "typical" sexual assault "he said-she said" case, this case had substantial corroborating testimony and evidence. This case was going to be referred to trial regardless of the convening authority because it absolutely had to be resolved at a GCM. A convening authority only needs probable cause to refer a case: If there "are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it . . . the convening

authority may refer it." R.C.M. 601(d)(1). There was ample probable cause existent in this case.

Fifth, Lt Gen Franklin agreed to an interview with the Defense prior to trial, where he answered their questions fully, and with no regard to political considerations.[38] Sixth, Lt Gen Franklin, concerned with the perception of UCI, deliberated on Appellant's case for well over a week before making his decision. And, he did not make the decision to keep Appellant's case lightly; he consulted with his SJA to make sure he was acting properly. (JA at 371 – Attach. 60.) Last, when this Court assesses the issue of UCI, it takes into account the full and open litigation of the issue and the evidence adduced at trial. Reed, 65 M.J. at 492 (citing United States v. Campos, 42 M.J. 253, 261 (C.A.A.F. 1995)). Here, just as in Reed, the Defense had a "full opportunity to present witnesses and documents on the issue of [UCI]. The Government presented extensive [written] testimony from the convening authority . . . and members of the chain of command about the processing of charges against Appellant, and the defense had a full opportunity to [interview] these witnesses." Reed, 65 M.J. at 492; *see also* United States v. Simpson, 58 M.J. 368-373-74 (C.A.A.F. 2003) (the Government may demonstrate that UCI will not affect the proceedings in a particular case as a result of ameliorative actions). Thus, to any outside observer viewing this case, there can

[38] "There 'probably is an appearance of UCI but I wasn't affected by it; you have to shield yourself from the media.'" (JA at 371 – Attach. 60.)

be no doubt that the Defense was afforded every opportunity to ensure the referral decision was fair, and that the Government proved, beyond a reasonable doubt,[39] that the referral decision was, in fact, fair, independent, and free from influence.

With respect to the political environment and the influence "in the air" concerning sexual assault in the military, this Court has held that the prohibition against UCI "does not require senior military and civilian officials to refrain from addressing [policy] concerns through press releases, responses to press inquiries, and similar communications." United States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003). Therefore, myriad statements from public officials and military leaders provided in attachments to the Defense motion should be viewed through the lens articulated in Simpson, and not viewed as being directed at, or having any influence on, the case at bar.

The preferring commander in this case swore that he believed the charges and specifications were warranted by the evidence, and that a GCM was the appropriate forum. (JA at 93, 109, 111.) The SPCMCA, too, recommended that the case go forward as a GCM. (JA at 97.) And, the Article 32 IO concluded that there were reasonable grounds to believe that the sexual assault offenses had been committed and that Appellant committed them. If apparent UCI is found to exist

[39] Appellant asserts that the Government must provide actual evidence of the "public[s] opinion" when it comes to disproving apparent UCI. He provides no cite from this court or any other to support this incorrect proposition.

in this case, then the UCI falcon truly cannot hear its UCMJ falconer. The Government proved well beyond a reasonable doubt that no actual or apparent UCI existed in this case. Appellant's request for relief in this case should be denied.

B. Appellant Was Not Prejudiced by SECAF's Actions.

Even if Lt Gen Franklin was somehow influenced by SECAF's promise to remove him if he did not retire, Appellant was not prejudiced by that influence. As discussed, the evidence against Appellant around the time of referral was significant: Two witnesses alleging abuse, in addition to physical evidence (photographs) and previous substantiated instances of violence inflicted against Appellant's wife. It is impossible to imagine a convening authority that would not refer this case to trial.

Moreover, had Lt Gen Franklin elected not to act as convening authority in this case, Appellant surely would be arguing that his successor would have been under even more pressure to refer this case. A replacement convening authority, completely new to the job and without any limitations on his or her advancement in the Air Force (unlike Lt Gen Franklin), would be, according to Appellant's likely argument, extremely vulnerable to outside influence. Any alternative convening authority, Appellant would claim, would be bound to refer this case for fear that she would end up having to retire early, just like her predecessor. Thus,

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.

More importantly, Lt Gen Franklin began his terminal leave on 31 January 2014. His replacement, Maj Gen Carlton D. Everhart took over as Third Air Force Commander. (JA at 19.) Appellant's trial began on 18 February 2014, with the findings portion proceeding on 10 March 2014. As such, Appellant had two convening authorities preside over his case. (JA at 365.) Ostensibly, Maj Gen Everhart, upon finding insufficient probable cause after taking over for Lt Gen Franklin, could have dismissed (R.C.M. 401(c)(1)), modified (R.C.M. 603), or withdrawn (R.C.M. 604) the charges. In fact, if Maj Gen Everhart concluded that insufficient evidence existed, he could have, even during trial, withdrawn all charges and specifications, as long as it was "before findings [were] announced." R.C.M. 604(a).[40]

Appellant concludes his brief by arguing that dismissal is the only appropriate remedy here. But, dismissal in this case would be a draconian and unnecessary remedy. "Dismissal is a drastic remedy" and is "permissible [only] when necessary to avoid prejudice against the accused." United States v. Harvey, 64 M.J. 13, 21 (C.A.A.F. 2006). Even if this Court is troubled by SECAF's actions, there is insufficient evidence in this specific case to demonstrate actual or

[40] A third GCMCA, Lt Gen Darryl Roberson, took action in Appellant's case. (JA at 19.)

apparent UCI, and it is evident based on the record that this Appellant suffered no prejudice.

An objective, disinterested, and reasonable member of the public, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of Appellant's proceedings. *See* Lewis, 63 M.J. at 415. Accordingly, Appellant's request for relief should be denied.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 16 September 2016.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

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