

**GENERAL COURT-MARTIAL  
UNITED STATES COAST GUARD**

UNITED STATES v. EMC Zane Josi U.S. Coast Guard	OPINION AND ORDER:  Defense Motion to Dismiss due to Unlawful Command Influence
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The defense seeks dismissal of all charges and specifications due to the unlawful command influence of CGIS agent(s) and the trial counsel. The government opposes.

**FINDINGS OF FACT**

See Opinion and Order of 1 August 2016 (Defense Motion to Dismiss all Charges). The findings of facts are incorporated into this ruling. Hereinafter 1 August findings of fact.

On or about 12 September 2015, the accused was locked out of the family home after another argument. He was without his cell phone, passports, or other personal effects. He eventually obtained lodging with Daniel Rayne and obtained some personal effects. These personal effects included some video discs that are believed to contain images of sexual activity.

Over the next several days, EMC Josi attempted to obstruct the anticipated investigation and prosecution. These efforts are detailed in the 1 August findings of fact. None of these efforts involved or included Ms. WAGDY.

The accused was placed into pretrial confinement on 22 September. His personal effects remained at his private apartment. CGIS agents were interested in them but did not have probable cause to obtain a search warrant. They did not or could not obtain the items by other lawful means. In early October 2015, EMC Josi arranged for Ms. Mariam WAGDY to retrieve his personal effects and ship them to his mother in Maryland. Ms. WAGDY retrieved them on 5 October and provided a copy of her passport to the landlord, Daniel Rayne.

CGIS appears to have become aware of this by no later than 9 October when Agent James Head conducted a background check of Ms. WAGDY “who is a person of interest as a possible witness and financial supporter of (S) EMC Zane Josi.” Agents later interviewed the landlord and obtained a copy of Ms. WAGDY’s passport.

EMC Josi appears to have asked Ms. WAGDY to destroy the video disks before shipping his personal effects to his mother. She did not do so, however. Instead, she took them to her home in the United Arab Emirates.

CGIS Agent Huntington interviewed Ms. WAGDY during one of her frequent visits to the United States. The timeframe is unclear. He requested the video disks. She had left them in the United Arab Emirates. It was, therefore, physically impossible for her to provide them. She also wanted to consult with EMC Josi's legal counsel before turning over items to CGIS. There is nothing suspicious about declining to do something that is physically impossible to accomplish.

Agent Huntington had no further contact with Ms. WAGDY so did not ask her for the disks again. Nonetheless, up to and including his testimony of 4 August 2016, he claims that MS. WAGDY "refused" to provide him the items. In later government communications and documents, this "refusal" gradually morphed into "tampering with evidence" and obstructing justice.

No such negative characterizations have been used by any government official when describing Ms. Josi's repeated and explicit refusal to provide investigators the iPhone used by EMC Josi. Ms. Josi also denied agents full access to other obvious sources of relevant evidence. Yet her obstructive behavior was apparently considered normal, or at least not suspicious. See 1 August findings of fact.

Sometime in or after October 2015, Ms. WAGDY, again at the urging of the accused, lawfully engaged a private investigator to gather information on Ms. Catherine Josi and to locate a military member. Ms. WAGDY specifically sought information about if Ms. Josi was leaving the child alone or with other people when she went out. She also desired a hair sample of Ms. Josi (from her trash), most likely for drug testing.

This lawful surveillance of Ms. Josi was a total failure. She lived in a locked gated community and the investigator could not gain entrance. Ms. WAGDY's credit card payments were recalled and cancelled so the attempted surveillance abruptly ended. By no later than early February 2016, Coast Guard investigators were aware of the attempted surveillance and the investigator's inability to gain access to Ms. Josi's neighborhood.

Late in 2015 and into early 2016, Ms. Josi reported suspicious activities near her residence. The events remain vague and murky. Nonetheless, Ms. Josi felt intimidated by these activities by unknown individuals. Coast Guard investigators appeared to adopt the idea that Ms. WAGDY had some connection to these activities that unsettled Ms. Josi.

At some future point, Ms. WAGDY became part of a social media page supporting EMC Josi. She attempted to locate supporters who might become defense witnesses. A relative of a potential government witness initiated contact with Ms. WAGDY via the social media page. A heated back-and-forth ensued. It was consistent with the much more aggressive public and political discourse now common in large parts of American society. At least one of the planned government witnesses complained to the government in late April of feeling harassed or intimidated by these social media exchanges. However, no evidence of criminal activity was produced.

Nonetheless, the commanding officer of Coast Guard Headquarters adopted a narrative that EMC Josi used Ms. WAGDY to obstruct the investigation and to harass and

intimidate witnesses. A military protective order dated 23 April 2016 prohibited any contact by EMC Josi with Ms. WAGDY. This order was entirely based on the previously described lawful conduct of Ms. WAGDY and speculation that she was involved in the vague but unsettling events reported by Ms. Josi.

Agent Huntington contacted DOS security officials on or about 23 April in an attempt to have them revoke Ms. WAGDY's visa. This would result in her being deported as she was already in the United States. As a result of these communications, state department visa officials came to believe that Ms. WAGDY had "intentionally interfered with a criminal investigation by tampering with evidence related to the pending criminal case against JOSI." She "further has threatened witnesses and victims related to the case and continues to cause problems with the investigation." Agent Huntington also informed immigration officials that Ms. WAGDY was to be denied access or entry to the courthouse for the duration of the (May 2016) trial and that the victim would be provided an escort to and from the courthouse. The clear, and intended, implication was that Ms. WAGDY was a significant threat to the physical safety of the victim and witnesses. In fact, no order had been issued denying Ms. WAGDY access to the Coast Guard building where the court-martial was to be held.

On 27 April, defense counsel formally notified the government that Ms. WADGY was a "key witness." This information did not, however, alter the government's ongoing actions with regard to Ms. WAGDY. The military protective order remained in place as of 5 August 2016.

Agent Huntington's request to revoke Ms. WAGDY's visa was processed by the appropriate officials at Department of State field office in Miami. The derogatory information provided by the Coast Guard was also entered into various government databases where it remains. On 4 May 2016, the Department of State Miami Field Office and partner agencies requested revocation of Ms. WAGDY's visa. The decision official was in Washington, DC. The revocation official declined, however, since Ms. WADGY had not been charged with a crime and was already in the country. However, the rejection notice advised that the decision would be reconsidered if there was additional information. In other words, the door was still open for a visa revocation.

Agent Huntington was informed of these results on 5 May and that the appropriate officials at the Department of State Miami Field Office would "try again" when Ms. WADGY departed the country. It is, apparently, much easier to prevent someone from entering the country than it is to revoke their visa while they are here. Agent Huntington also was informed that these State Department officials now believed that Ms. WADGY "has a restraining order" and "has threatened other victims." This highly misleading impression was based entirely on the information Agent Huntington had provided.

Agent Huntington forwarded these communications to the trial and assistant trial counsel. He also suggested going to the USAO to obtain charges against Ms. WADGY for obstruction of justice. Trial counsel declined on 5 May but did not immediately advise Agent Huntington that Ms. WADGY was a defense witness. He learned this sometime later. Neither the trial counsel nor assistant trial counsel informed the defense or the

court of the government efforts to have Ms. WADGY, a named defense witness, deported on the eve of trial.

The trial began on 11 May 2016. Ms. WADGY was in the courtroom at times. The military judge was not advised Ms. WADGY was considered dangerous or that EMC Josi had been ordered to have no contact with a defense witness. The trial was unexpectedly delayed due to an accidental discovery violation by the government. It would have been very easy to preserve Ms. WADGY's testimony at that time.

The social media "war of words" between Ms. WADGY and others continued during the recess. On 13 July, trial counsel contacted the USAO in an effort to have Ms. WADGY charged for her part of the social media disputes. On 14 July, a special assistant U.S. Attorney wrote that the cryptic/veiled messages did not rise to the level of stalking, communicating a threat, or witness tampering.

As of 5 August 2016, no one from the Coast Guard has attempted to correct or update the previous derogatory information on Ms. WADGY sent to the Department of State diplomatic security field office Miami. This information painted a highly inaccurate and misleading picture of Ms. WADGY. It contains at least some totally false information. Correcting the information, now in several government databases, is technically possible.

Given the current state of information in DOS databases, and very low standard to revoke a visa when someone is attempting to enter the country, it is not surprising that Ms. WADGY's visa was revoked when she attempted to return for the trial on or about 28 July 2016. Subsequent efforts by Coast Guard officials to remedy the situation have been unsuccessful. None of these efforts, however, have walked-back or corrected the earlier derogatory information on Ms. WADGY contained in Coast Guard communications to the DOS field office and in the military protective order of 23 April 2016.

## CONCLUSIONS OF LAW

No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any member thereof, in reaching the finding or sentence in any case, or the action of any convening, approving or reviewing authority with respect to his judicial acts. ART 37, UCMJ. In addition to guarding against actual violations, a military judge has an affirmative responsibility to avoid the appearance of evil in the courtroom and to foster informed public confidence in court-martial proceedings. *United States v. Rosser*, 6 M.J. 267, 273 (C.M.A. 1979); *See also United States v. Lewis*, 63 M.J. 405, 415. (C.A.A.F. 2006)(Apparent UCI, even if unintentional, causes a reasonable informed member of the public to question the fairness of the military justice system).

Of course, military commanders are expected to identify and solve problems at their commands. They may speak about significant public issues related to discipline and even adopt "zero-tolerance" toward certain forms of misconduct. *See, United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003). Moreover, the exercise of lawful authority in a way that disappoints either party is also not prohibited under either the actual or apparent UCI theory.

To prevail, the accused must show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to this particular court-martial, in terms of its potential to cause unfairness in the proceedings. *U.S. v. Biagase* 50 M.J. 143, 151 (C.A.A.F. 1999) (citing *U.S. v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)). This prong is commonly known as “some evidence” of unlawful command influence. *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). The burden shifts to the Government if the accused meets this standard. The Government may then show, beyond a reasonable doubt, that the asserted facts do not exist, the facts do not constitute unlawful command influence, or that the unlawful command influence will not affect the proceedings. *Id.*

The defense has met its initial burden with respect to apparent UCI. The government was unable to meet its burden to disprove the apparent UCI.

This presents a realistic potential for unfairness in this case. Ms. WAGDY’s anticipated testimony goes to the critical issue of this case – the credibility of EMC Josi and Ms. Catherine Josi. It has the potential to be somewhat significant for the members.

Ms. WAGDY’s absence is a result of mistakes, confirmation bias or tunnel vision by government personnel and, in some instances, a lack of action. Nonetheless, a reasonable informed member of the public would still lack confidence in the fairness of the military justice process and the fairness of this trial.

However, this same reasonable person would also realize that a key event in the error chain was the lack of notice in May 2016 of Coast Guard efforts to have Ms. WAGDY deported. If this notice had been provided, she would have been able to testify fully at that time since she was in the courtroom vicinity. This recorded testimony would, therefore, be available to play in this court-martial. This is a useful reference point when determining how to make the defense whole.

**Accordingly**, the following remedies are ordered.

(1) If desired, the defense may prepare a stipulation of expected testimony for Ms. WAGDY. The stipulation may include an introduction indicating that Ms. WAGDY desired to testify in this court-martial but was precluded from doing so through no fault of her own. Preparing this stipulation of expected testimony does not admit that this remedy is adequate. Should the government decline to enter into the defense-drafted stipulation of expected testimony, additional remedies may be ordered.

(2) Government counsel may not object on the basis of foundation to any defense exhibits that would have been authenticated by Ms. WAGDY.

(3) Much of Ms. WAGNY’s anticipated testimony concerns prior statements of the accused that will be consistent with his anticipated in-court testimony. Government counsel may not cross-examine EMC Josi on any aspect of his testimony supported by these prior consistent statements to Ms. WAGNY.

(4) The remaining defense witnesses, with the exception of EMC Josi and the anticipated expert witness Dr. Richards, will not be subject to any cross-examination by government counsel. Moreover, government counsel may not impeach the testimony of any defense witness through cross-examination of EMC Josi. This provision does not apply to any rebuttal witnesses.

(5) Any person who has non-casual contact with any of the following individuals after Monday, 8 August 2016 is disqualified from acting as SJA or CA in any post-trial processing of this case: Trial Counsel, Assistant Trial Counsel, S/A Huntington, and CAPT S.A. Keister. This provision expires upon convening authority action.

Effective 6 August 2016, modified 8 August

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Gary E. Felicetti  
Captain, U.S. Coast Guard  
Senior Military Judge