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Professor acquittal – Is China Initiative out of control?

Nathan M Greenfield 25 September 2021

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The 52-page judicial opinion that accompanied Judge Thomas A Varlan's one-page acquittal of Dr Anming Hu of six federal charges laid bare the weakness of the United States Federal Bureau of Investigation's (FBI) case against the University of Tennessee, Knoxville physics professor in his trial last June.

Hu was accused of having hidden his connection to Beijing University of Technology while being funded for a nanotechnology project by the US National Aeronautics and Space Administration (NASA).

He was the 12th professor of Chinese origin or descent to be charged under the **China Initiative**, announced by former attorney general Jeff Sessions in 2018, but the first to go to trial.

The initiative was billed as the nation's premier effort to prevent economic espionage, theft of intellectual property, sensitive technology and information or that which could aid China's military or economy. Its primary tool is criminal investigation and prosecution.

But Judge Varlan was scathing in his dismissal of the case.

"There was no evidence presented that the defendant ever collaborated with a Chinese university in conducting NASA-funded research, or used facilities, equipment or funds from a Chinese university in the course of such research," wrote Varlan in his opinion released on 10 September that explained why he invoked Rule 29 to dismiss the case that federal prosecutors had given notice they wanted to retry.

Hu was charged with three counts of wire fraud and three counts of making false statements.

The 'false statement' was that he supposedly hid his connection to China and Beijing University of Technology (BJUT), which then led the University of Tennessee, Knoxville (UTK) to misrepresent Hu's relationship with China to NASA.

The wire fraud charge was related to a funds dispersed by NASA through UTK and subsequently to Hu. According to Hu's Defence Attorney Phil Lomonaco: "FBI Knoxville (Tennessee) made this assessment [of Hu's alleged illegal activities] with 'medium confidence based on multiple sources, with varying degrees of reliability,'" but the prosecutors decided to continue to trial, making him the 12th professor of Chinese origin or descent to face trial under the China Initiative.

The order to dismiss the *United States of America v Anming Hu* case marked the end of a three-and-a-half-year legal ordeal that began even before February 2020, when Hu was indicted for violating the 2011 Wolf Amendment. The amendment prevents NASA from engaging in cooperation with China or Chinese organisations without the FBI's

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approval.

Three years earlier, the FBI interviewed Hu about his links to the Chinese Thousand Talents Program (TTP). (The TTP is the vehicle by which the Chinese government funds both Chinese scholars abroad and Western scholars to collaborate with Chinese universities, but intelligence agencies in the United States, Australia and Canada have warned that the TTP has been used as a cover for both espionage and stealing intellectual property.)

Under cross examination at the trial this past June, FBI Agent Kujtim Sadiku admitted that he believed Hu when he denied being a member of the TTP. Lomonaco leaves open the possibility that one of the professors Hu had collaborated with on one of his scholarly papers might have been one.

“They believed that this man was an expert evaluator for China’s Ministry of Science and Technology,” says Lomonaco.

Nevertheless, Sadiku continued investigating Hu. At one point, Sadiku pressured Hu to attend a conference in Beijing and report on the TTP. Hu, who is a naturalised Canadian citizen, knew that the sentence for being caught spying in China is death and refused.

According to Lomonaco, Sadiku responded to Hu’s refusal by following him around for a year and a half to try to get anything he could. “Then they found this NASA restriction [the Wolf Amendment] and they concocted a crime where one didn’t exist.”

‘Ridiculous case’

At first, as she sat in the jury box, Juror 44, Wendy Chandler, assumed that the “government had some reason to be there”, she told Mara Hvistendahl of the online journal *The Intercept* for an article published on 23 June. It didn’t take long, however, for Chandler to change her mind. “It was the most ridiculous case. If this is who is protecting America, we’ve got problems.”

Lomonaco soon had Sadiku admitting that he had relied on Google Translate to translate the Chinese articles that had first triggered the investigation, a fact which prompted Law Professor Maggie Lewis of Seton Hall University, New York, to deadpan to *University World News*: “I love Google Translate but not when determining investigations.”

Worse, from the prosecution’s point of view, Sadiku admitted that he “wasn’t familiar with NASA grants” or with the “granting process of government agencies, of university conflict of interest policies, nor was he familiar with the ways universities engage with government agencies for purposes of sponsorship proposals”, wrote Varlan in a stinging footnote to his opinion.

On the strength of a PowerPoint presentation, Sadiku convinced UTK that Hu had made false statements on his grant applications to NASA, which precipitated his being fired. According to Lomonaco, Sadiku “weaponised” the UTK’s administration, who appeared at the trial as a witness for the prosecution.

Hu’s lawyer tore apart the government’s case about making fraudulent statements. The prosecution said that Hu lied when he said he did not have any conflict of interest or any other employment besides UTK because he was employed part-time (during the summer) by BJUT.

We were able to show that the document the FBI relied on refers to UTK’s policy manual, which defines a conflict of interest as a job that pays more than US\$10,000 a year, says Lomonaco. Hu was paid US\$3,000 by BJUT.



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The charges of wire fraud were dispatched when FBI agent Gibson testified that the NASA grant money went first to UTK, which then dispersed it to Hu. Under questioning, Gibson also testified that “NASA got what they thought they had bargained for” and that the “technical reviewer was satisfied with it”.

Nor was there any evidence that Hu “took any money to China or had anybody in China working on” the NASA grants, reported Varlan in his judicial opinion.

For Chandler, the juror, one of the key moments in the trial was when she heard that Sadiku tried to strong-arm Hu into spying for the government. “If the FBI came and saw me and said, ‘Come back and report after you go to China’, I wouldn’t go,” she told *The Intercept*.

Another was when Sadiku told the court that based on the summary of translations, reports and the outline of his investigation, the FBI agent believed that Hu “wasn’t involved with the Chinese military”. And yet, Sadiku presented to UTK’s administration a PowerPoint presentation designed to make them believe Hu was guilty.

“They spent all this time and money on this big giant nothing burger,” Chandler told *The Intercept*, “and they were not going to leave without a pound of flesh.” She, and at least three other jurors, however, refused to be cowed. At 4.45pm on 16 June, after a full day of discussion in the jury room, the foreperson told Varlan that they were deadlocked, and he declared a mistrial.

Pressure to find cases

Given the defects in the prosecution’s case, why, I asked Lewis and Lomonaco, did the government proceed with the case against Hu? Both pointed to the China Initiative.

The US government had been prosecuting professors that involved China before former attorney general Sessions announced the China Initiative. However, Lewis says: “Once you call something and make it an initiative, you start seeing which officers are doing cases that fit that description. And whether you say it or not, that does put pressure, intended or unintended, to find cases that fit that initiative which is in the spotlight.”

For his part, Hu’s defence lawyer says: “I believe our FBI agent [Sadiku] wanted to have one of those cases badly enough that he went forward with questionable evidence and then when he couldn’t find a case, he kept on going.”

Lewis also drew my attention to the likely role of ‘anchoring bias’, which she explained by reference to the 1989 case of the Central Park Five, which led to five wrongful convictions of five black teenagers for the rape and assault of a white woman; prosecutors were so convinced they had found the perpetrators they effectively put blinders on that made it really hard for investigators and prosecutors to be open minded about the evidence before them, she says.

In Hu’s instance, “the elephant in the room is that Hu is originally from China. And with what we increasingly know about how bias works, both explicitly and implicitly the concerns about his ethnicity and former nationality would play into the perceptions of potential criminality,” Lewis told *University World News*.

In my interview with Dr Jeremy Wu, who worked as a statistician for the United States government for three decades and is co-organiser of the Asian Pacific American Justice Task Force (APA Justice), we discussed how the China Initiative is hardly the first time the American government has targeted Chinese immigrants.

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The 1875 Page Act banned Chinese women from immigrating to the United States, even as tens of thousands of Chinese worked to build the transcontinental railroad. The Chinese Exclusion Act of 1882 closed the country's doors to Chinese labourers. Speaking of the China Initiative, Wu highlighted how, by engaging in racial profiling, the China Initiative both tars all Asian Americans and increases bigotry.

While the wrongful prosecutions of Asian American scientists did not begin with the Trump administration, the current administration's China Initiative has greatly increased the targeting and profiling of Asian Americans and immigrants, particularly those of Chinese descent who are working in science and technology.

In the past four years, we have witnessed scapegoating and racist rhetoric by officials at the highest levels of government, with the former president himself stating that almost every student that comes over to this country from China is a spy.

FBI Director Chris Wray stated that the FBI in almost every field office... around the country "sees counterintelligence risks in Chinese professors, scientists and students across basically every discipline".

This rhetoric has translated into racially biased policies and government efforts such as the China Initiative, which create widespread fear among Asian American scientists and promote bigotry against the greater Asian American community.

China Initiative under fire

The Biden administration has heard plenty about the problems with the China Initiative from professors like Lewis and as dozens of members of Congress have weighed in with their concerns. Three weeks ago, 177 Stanford University professors signed an open letter condemning the China Initiative.

In an open letter dated 5 January 2021, APA Justice, the Brennan Center for Justice and Asian Americans Advancing Justice wrote to then president-elect Joe Biden calling for the end of the initiative.

The letter notes, for example, that in 2020 "John Demers, the Justice Department's assistant attorney general for national security, stated that the DOJ [Department of Justice] wanted each of the country's 94 US attorney's districts to bring cases of Chinese espionage or economic theft, without any apparent reason to believe that such crimes were being committed in every district in the country".

A further "consequence of these mandates has been that the FBI and federal agencies have put pressure on grant makers, universities and research institutions to participate in racial, ethnic and national origin profiling, collectively leading to discriminatory and stigmatising investigations of people of Chinese descent", the letter states.

Under the China Initiative, "the FBI and federal agencies have conducted threat awareness sessions at universities and circulated information singling out the threat from China and labelling students, faculty and researchers as 'non-traditional collectors'."

In "Addressing the China Challenge for American Universities", a working paper prepared this spring for the University of Pennsylvania's Penn Project on the Future of US-China Relations, Princeton University Professor Rory Truex, who teaches in the department of politics and school of public and international affairs, showed how the inefficacy of the China Initiative fostered the view that Chinese professors and those of Chinese descent are security risks.

"Given that there are about 107,000 Chinese citizens in science,

technology, engineering and mathematics (STEM) at US universities at the graduate level or above, current [Justice Department] charges imply a criminality rate in this population of .0000934, less than 1/10,000,” he wrote.

But a better gauge of criminality rates is the number of convictions. Overall, federal prosecutors have brought 28 prosecutions under the China Initiative. They have garnered a total of eight convictions or guilty pleas. Of the dozen Chinese professors or professors of Chinese descent, the government has convicted just four, none for economic espionage or theft of trade secrets or intellectual property.

There are signs that the government is listening to criticism coming from senior former prosecutors, like John Demers, who, according to Lewis, are saying “that the gas pedal doesn’t need to be pushed as hard as it is right now”. Just a few weeks ago, the Department of Justice dropped five cases in the San Francisco Bay Area.

Can US-China collaboration continue?

Given the tensions between the United States and China, and the presumption that China has stolen intellectual property from American universities, when I asked Emily Weinstein, a research analyst at the Centre for Security and Emerging Technology at Georgetown University in Washington DC, how collaboration between Chinese and American scientists can continue, she began by explaining how the Chinese university system differs from America’s.

In China, ultimately, every university is under the control of one or another national ministry. Hence, “if the government says, ‘We want to improve our capacity in XYZ type of technology and university science’, the universities are going to do it.”

By contrast, if the US government wants to develop quantum encryption and goes to the Massachusetts Institute of Technology (MIT) to see if they want to work on it, “MIT can say, ‘Thanks for recognising us but, no, we don’t want to work with you on this’,” she says.

Further, Weinstein told *University World News*, China is no longer seeking to place its students only at premier universities like Harvard, MIT or Stanford.

“Their strategy is much broader. I think they understand there are reasons to go to technical colleges too. University of California, Davis came up in one of the China Initiative cases recently. UC Davis is not a school you think of as a place you can go to steal technology.”

Further, most universities do not have the resources to have investigators versed, say, in low temperature physics, not to mention the language skills needed to understand articles published in Mandarin. Accordingly, Weinstein would like to see a public-private clearing house set up that would conduct the due diligence investigations of Chinese scholars seeking to come to the United States and those scholars Americans would work with in China.

Hu’s defence attorney is concerned about FBI agents undertaking years’ long investigations without some sort of checks and balances. Pointing to the 20 months during which the FBI tailed Hu, interviewed his employer and others, Lomonaco says that he would like to see a law that required investigators to present their evidence to a court similar to the Foreign Intelligence Surveillance Court.

Established after the 9/11 terror attacks in the US, the FISA court is a secret court that federal agents investigating national security cases go to get search warrants.

Investigators should be limited, he says, “unless something comes up early, with reasonable suspicion of some facts that they can articulate that shows something is going on and then present them to an impartial jury, maybe like a FISA court, before they can go forward with a year and a half worth of investigation that leads to nothing.”

Wu characterises the China Initiative as being a broad brush that targets people of Chinese heritage and descent that deviates from American judicial values.

“The US judicial system has always been based on facts and evidence. All we are asking for is for them to make use of facts and evidence for their investigations and prosecutions. Right now, when the director of the FBI and other officials talk about ‘non-traditional collectors’ that’s basically racial profiling. That puts everyone of Chinese descent under the cloud of suspicion.”

Threat of 75 years in prison

However much Lomonaco might have been able to take heart from Chandler’s and several of the other juror’s body language, the fact remained that in that Knoxville, Tennessee court room his client faced up to 75 years in prison and up to US\$750,000 in fines.

From both the evidence Lomonaco saw when he met Hu and the story told by the mild-mannered, wearer of wire-rimmed glasses and holder of two PhDs, he believed Hu “didn’t do anything wrong”.

I was surprised when he then added that this made him very nervous. When I asked why, he answered slowly: “That’s when I get most nervous, when my clients are innocent. We have so much to lose if they get convicted.”

Within a few hours of Varlan dismissing all charges against Hu, the chancellor of the University of Tennessee, Knoxville, Dr Donde A Plowman, wrote to the university community telling them that he had written to Lomonaco to tell him that the university was open to reinstating Hu.

In part, Plowman wrote, if Hu can “verify authorisation to work in the United States in the next year, the administrative termination will be reversed, and his faculty appointment will be reinstated with expectations in place around disclosures and outside interests”.

Lomonaco told *University World News* that Hu would very much like to have his old job back.

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