



# RACIAL DISPARITIES IN ECONOMIC ESPIONAGE ACT PROSECUTIONS: A WINDOW INTO THE NEW RED SCARE



**COMMITTEE OF 100**

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## Letters & Opening Comments



**EXTRAORDINARY CHINESE AMERICANS**

ENSURING FULL INCLUSION IN AMERICA  
ADVANCING U.S.-CHINA RELATIONS

### *Letter from Gary Locke, Chairman of Committee of 100*

My grandfather came to this country from China over a century ago and worked as a servant in exchange for English lessons. My father arrived years later and became a member of the Greatest Generation. He enlisted in the U.S. Army in 1941 before the outbreak of WWII, was part of the Normandy invasion, and marched to Berlin to protect freedom and defeat fascism before coming home to raise a family and build a small business in Seattle.

I was deeply humbled and honored to serve as Governor of Washington State (1997-2005), as U.S. Secretary of Commerce (2009-2011) and as U.S. Ambassador to China (2011-2014). It would have been one of my father's proudest moments to see his son serve as America's official representative in his and my mother's country of birth.

My own family's story is the story of America and the story shared by millions of other Americans who have come here from around the world. America is a nation of immigrants. What makes America great is its diversity of people with their unique cultures from around the world. That diversity has powered America's innovation and dynamism. We must therefore be steadfast and vigilant in fostering an inclusive and welcoming America that embraces our diversity as our nation's strength.

As Chairman of the Committee of 100, I am glad to present this White Paper, "*Racial Disparities in Economic Espionage Act Prosecutions: A Window into the New Red Scare.*" This empirical research was conducted by Committee of 100 and legal scholar Andrew Chongseh Kim, attorney at Greenberg Traurig, visiting scholar at South Texas College of Law Houston, and participant in Committee of 100's Next Generation Leader program. The empirical data and analysis are a timely and necessary contribution to our understanding of discrimination and targeting of Chinese Americans during a time of heightened tension between the United States and China.

The United States and China have a profoundly important and complex diplomatic, economic, and strategic bilateral relationship. Tensions and competitions have increased. The U.S. has deep concerns with China over such issues as trade, protection of intellectual property, theft of trade secrets, and human rights. Those issues must be dealt with forthrightly. But the relationship also holds opportunities for expanded cooperation and collaboration. Based on all my years of government



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experience, I firmly believe that a stable, peaceful and mutually respectful relationship between the U.S. and China is critical not just for the benefit of our own two countries but for the entire world.

While there is a legitimate concern about the threat of Chinese espionage, the method the U.S. Justice Department has adapted through efforts such as the “China Initiative” results in unacceptable damage to the lives of innocent Chinese Americans and, if left uncorrected, will likely harm vital American economic and national security interests.

As U.S.-China relations have become more tense and as fears about China’s illicit activities have grown, there is increasing anecdotal evidence of racial profiling and discrimination against Chinese American scientists and engineers. Recently a Congressional Oversight investigation<sup>1</sup> and a roundtable entitled “Researching while Chinese American: Ethnic Profiling, Chinese American Scientists and a New American Brain Drain”<sup>2</sup> explored this topic.

Committee of 100’s concern is that anti-*China* rhetoric has increasingly morphed into anti-*Chinese* rhetoric, which then adversely affects some six million innocent and law-abiding Chinese Americans. We must never let our national competition with China sink into racial profiling and discrimination against any race or ethnicity. As the title of this White Paper suggests, this “New Red Scare” resembles the painful history of the Red Scare and McCarthyism of the 1950’s. Look no further than the story of Qian Xuesen, a rocket scientist and physicist who immigrated to the U.S. and made significant contributions to help America win World War II. After the war when Qian returned to Caltech, he was accused of being a Communist sympathizer and spy for China but never officially charged with any crime. The innuendo and accusations effectively ended his career, and disgusted with his treatment, he returned to China in 1955 to help develop China’s nuclear weapons program and to become the “Father of Chinese Rocketry.”<sup>3</sup> The U.S., driven by fear and hysteria, had created such a hostile culture for Qian and others that he and others were driven away from our country. The Secretary of the Navy at the time said, “It was the stupidest thing this country ever did. He was no more a Communist than I was – and we forced him to go.”<sup>4</sup>

Another lesson learned from the Red Scare and McCarthyism of the 1950s is from former Secretary of Defense Robert McNamara. McNamara believed that one lesson from the Vietnam War is that the U.S. “misjudged then — as we have since — the geopolitical intentions of our adversaries.”<sup>5</sup> He blamed the purge of American government experts in Asian affairs during the “McCarthy hysteria of the 1950s” as one reason for this grave strategic mistake that ultimately cost hundreds of thousands of American and Vietnamese lives.<sup>6</sup>

Today, the U.S. may be on the verge of repeating these same tragic errors, harming the individual lives of certain Chinese Americans but also damaging U.S. national and economic security. Many Chinese American scientists and academics feel increasingly unwelcome.<sup>7 8 9</sup> Yet these may be among the very people best equipped to ensure America remains at the forefront of global science and technology and to foster understanding and peaceful collaboration between the U.S. and China. Moreover, the perception that such racial discrimination exists will inevitably make America seem a less attractive place for potential immigrants of all backgrounds from all corners of the world, not just those from China.

Committee of 100 sponsored and supported this important study being released today because this research is wholly consistent with both of Committee of 100’s missions for the past three decades – to enhance equal opportunity for Chinese Americans to engage in all aspects of American society, free of racial or national origin discrimination, and to improve mutual understanding in the U.S.-China relationship.



Committee of 100 believes strongly that immigration into the U.S. from places like China is essential for America's continued moral leadership and its leadership in science and technology. As Americans, we must therefore continue to make all people feel welcome here and to embrace our nation's historic diversity as one of our unique strengths.

I hope you find the issues discussed in this white paper informative and thought provoking. I would like to close with this wise observation that sums up the importance of our diversity in America derived from the constant influx of people from around the world:

*We create the future, and the world follows us into tomorrow. Thanks to each wave of new arrivals to this land of opportunity, we're a nation forever young, forever bursting with energy and new ideas, and always on the cutting edge, always leading the world to the next frontier. This quality is vital to our future as a nation. If we ever closed the door to new Americans, our leadership in the world would soon be lost.*

President Ronald Reagan

--GARY F. LOCKE

<sup>1</sup> "Raskin and Chu Launch Investigation into NIH and FBI Probes of Chinese Scientists," *House Oversight Committee*, February 20, 2020, <https://oversight.house.gov/news/press-releases/raskin-and-chu-launch-investigation-into-nih-and-fbi-probes-of-chinese>

<sup>2</sup> "House Oversight Committee, Roundtable Led By Reps. Raskin And Chu Hears About Effects Of Ethnic Profiling Against Chinese American Scientists," June 30, 2021, <https://raskin.house.gov/2021/6/roundtable-led-by-reps-raskin-and-chu-hears-about-effects-of-ethnic-profiling-against-chinese-american-scientists>

<sup>3</sup> Chang, Iris. *Thread of the Silkworm*. New York, NY: Basic Books, 1995. Print.

<sup>4</sup> Chang, Iris. *Thread of the Silkworm*. Page 200. New York, NY: Basic Books, 1995. Print.

<sup>5</sup> McNamara, Robert S, and Brian VanDeMark. *In Retrospect: The Tragedy and Lessons of Vietnam*. , 1995. Page 321. Print.

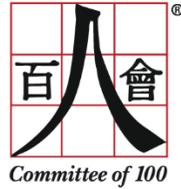
<sup>6</sup> McNamara, Robert S, and Brian VanDeMark. *In Retrospect: The Tragedy and Lessons of Vietnam*. , Page 32. 1995. Print.

<sup>7</sup> Peter Waldman, "Anti-Asian Atmosphere Chills Chinese Scientists Working in the U.S.," *Bloomberg Businessweek*, April 26, 2021, <https://www.bloomberg.com/news/articles/2021-04-26/anti-asian-atmosphere-chills-chinese-scientists-working-in-u-s>

<sup>8</sup> Jeffery Mervis, "Fifty-four scientists have lost their jobs as a result of NIH probe into foreign ties," *Science Magazine*, June 12, 2020, <https://www.science.org/news/2020/06/fifty-four-scientists-have-lost-their-jobs-result-nih-probe-foreign-ties>

<sup>9</sup> Peter Waldman, "The U.S. Is Purging Chinese Cancer Researchers From Top Institutions," *Bloomberg Businessweek*, June 13, 2019, <https://www.bloomberg.com/news/features/2019-06-13/the-u-s-is-purging-chinese-americans-from-top-cancer-research>





## EXTRAORDINARY CHINESE AMERICANS

ENSURING FULL INCLUSION IN AMERICA  
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### *Open Letter from Committee of 100 President Zhengyu Huang*

Over the last year and a half, America has experienced a national reckoning on race in which the killings of George Floyd, Breonna Taylor, and others have resulted in a mass movement and calls for change. Moreover, in 2020, Asian Americans were blamed for the COVID-19 pandemic and subjected to a string of violent and horrific hate crimes. What has become abundantly clear for the Asian American community is the need to (1) track data on racial profiling, discrimination, and hate crimes and (2) push back against discrimination and hate wherever they may occur, in particular those emanating from our own government leaders.

The Committee of 100 is pleased to present this important white paper, “*Racial Disparities in Economic Espionage Act Prosecutions: A Window into the New Red Scare*,” jointly conducted by Committee of 100 and legal scholar Andrew Chongseh Kim, attorney at Greenberg Traurig, Visiting Scholar at South Texas College of Law Houston, and participant in Committee of 100’s Next Generation Leader program. The study, which Committee of 100 and Kim co-developed over years of research, includes data from 1996 to 2020 and offers an empirical analysis of U.S. government economic espionage claims. It is an updated and revised edition of a previous study which was published in 2017 by Committee of 100 and Kim “*Prosecuting Chinese Spies: An Empirical Analysis of the Economic Espionage Act*” as well as in the *Cardozo Law Review* in 2018.

This study is particularly relevant at this moment because it provides hard evidence that indicates a concerning trend of racial profiling in Economic Espionage Act (EEA) prosecutions. It is important to consider the backdrop of these prosecutions. In recent years the U.S. has devoted increasing amounts of attention and resources to countering Chinese espionage, theft, and hacking, most notably through the “China Initiative,” which started in November 2018. Although limited in scope, this study seeks to provide an empirical lens as an initial evaluation of efforts such as the “China Initiative” and the phenomenon of “researching while Chinese.”

In addition to Kim’s findings, this White Paper includes a statement from Gary Locke – the Chairman of the Committee of 100 and the first Chinese American Ambassador to China – as well as five independent commentaries to provide further context to the study’s findings.

Among the findings, the study provides empirical evidence that people of Asian ethnicity, and particularly those of Chinese descent, are disproportionately and adversely impacted under Economic Espionage Act prosecutions. In this era of geopolitical competition between the U.S. and China, Committee of 100 firmly believes in acknowledging and promoting the enduring contributions of Chinese Americans in American society. In our report “*From Foundations to Frontiers: Chinese American Contributions to the Fabric of America*,” published in February 2021, we showcased the numerous and significant contributions that Chinese Americans have made to America. We must never



forget the historical context that the Asian American community has suffered under two centuries of racial stereotyping starting from the “Yellow Peril” of the 19th century to the “perpetual foreigner” stereotype that still exists today. Recently, it manifested its ugly head in political catchphrases such as “Kung Flu,” “Chinese Virus,” “Wuhan Virus,” among others.

We Americans are not perfect. But we work on making this country a more perfect union that lives up to our founding ideals. For this purpose, every American must understand and push back against anti-Chinese sentiments, as we push back against biases towards any other races, ethnicities, and backgrounds.

Fostering such an America requires solidarity with other racial groups. Black Americans know all too well the fear associated with “driving while black.” Muslim Americans understand the pain of having their loyalties questioned during the “War on Terror,” and Japanese Americans can recount the painful history of mass internment during World War II. Unconscious biases racially charged rhetoric, explicit discrimination, and racial profiling are not only issues important to Chinese Americans. They are issues important for *all* Americans.

Please join me in exploring the topics discussed in this White Paper as part of a larger conversation about race in our country and how together we can do our part in forging a better America.

--Sincerely, Zhengyu Huang



***Open Letter from Andrew Chongseh Kim***

When I started down this research path, I did not know what I would find. I was familiar with names like Sherry Chen, Xi Xiaoxing, Guoqing Cao, Shuyu Li, and Wen Ho Lee, but I wanted to know whether these, and other cases like them, were isolated cases or symptomatic of systemic problems within the Department of Justice. Sadly, the findings of this study support the latter hypothesis.

The research presented in this White Paper took years to collect and analyze and would not have been possible without the support of an incredible group of people, starting with the Committee of 100. I want to thank Committee of 100 Chairman Gary Locke and Committee of 100 President Zhengyu Huang, respectfully, for their full collaboration and support on this project.

A special thank you to the commentators Ms. Carol Lam, Dr. Randy Katz, Professor Margaret Lewis, Ms. Ashley Gorski, Mr. Patrick Toomey, and Dr. Jeremy Wu for sharing your unique insights on this issue.

Special thanks to Felicia Zhang for your invaluable assistance in project coordination, data collection, and analysis. Thank you to Alex Liang for your incredible research assistance, initiative and leadership, and coordination of the commentaries for this white paper. I also want to thank Greenberg Traurig, LLP and South Texas College of Law for their support.

A special thanks to Fulton Hou, Lloyd Feng, Charles Zinkowski, and Elizabeth Kerr from Committee of 100 for your dedication and hard work.

And finally, a special thank you to Dr. Jeremy Wu for your unwavering support, expertise, and commitment to this research since its inception. Without him, this project would not have been possible.

Sincerely,  
Andy Kim



## **Introduction**

In 2018, the Trump administration announced the “China Initiative,” a program to “identify[] and prosecut[e] those engaged in trade secret theft, hacking and economic espionage” intended to steal American technology.<sup>1</sup> Although President Trump was the first to create a formal initiative, concerns about the threat of the People’s Republic of China to American trade secrets were widespread during the Obama administration and continue under the Biden administration. Although few would downplay the significance of China as a trade partner and economic rival, civil rights leaders have long raised concerns that the federal government’s responses to these threats have been influenced by racial profiling and implicit biases. Indeed, the high-profile prosecutions of several innocent Chinese Americans who were later exonerated have raised concerns that innocent American citizens have been wrongly profiled as spies. Moreover, numerous American academics, primarily of Chinese descent, have been investigated and asked to resign even in the absence of any criminal charges. In the absence of hard data, it has been difficult, if not impossible, for the American public and policymakers to objectively assess the prosecutions ostensibly brought to protect our economic interests. This study attempts to fill that gap.

This study analyzed public court filings and Department of Justice (DOJ) press releases for all available Economic Espionage Act (EEA) prosecutions brought between 1996 and 2020, 190 cases involving 276 individual defendants. This study finds:

- From 1996 to 2008, people of Chinese descent represented only 16% of defendants accused of EEA crimes. Since 2009, however, the majority of defendants charged under the EEA have been people of Chinese descent.
- Since 1996, 46% of defendants charged under the EEA were accused of stealing secrets for the benefit of people or entities in China. 42% of defendants were accused of stealing secrets to benefit American people or entities.
- Although the current China Initiative focuses heavily on scientists in American universities, only 3% percent of EEA cases alleged thefts of trade secrets from academic research institutions.
- 11% of Western defendants charged with stealing trade secrets were never convicted or pled guilty to only false statements or process crimes. This rate is 26% for all defendants with Asian names, including U.S. citizens. Therefore, defendants with Asian names were more than twice as likely to be falsely accused of espionage.
- Furthermore, this same metric was even higher for Asian Americans. As many as 1 in 3 Asian Americans accused of espionage may have been falsely accused.
- Defendants of Asian descent, including Chinese and South Asian descent, were punished twice as severely as defendants of other races.
- Defendants of Asian descent were denied bail five times more often than defendants of other races.
- The Department of Justice is much more likely to publicize EEA cases that involve defendants with Asian names than EEA cases brought against defendants with Western names.



## **BACKGROUND**

### **Data**

This study analyzes racial disparities in the prosecutions of people who allegedly stole, or attempted to steal, American trade secrets - “spies,” for lack of a better term. Although the China Initiative was announced as an attempt to protect American trade secrets, the majority of charges brought under the China Initiative do not even allege attempts to steal.

To produce an unbiased sample of “spying” cases, those in which the government alleges theft of trade secrets, this study analyzes court filings for all cases charged under the Espionage Act of 1996 (EEA) between 1996 and 2020, as coded in the federal PACER<sup>2</sup> system. The data sample includes 276 individual defendants charged across 190 separate cases.

### **Coding for Race and Citizenship**

Because PACER is designed primarily to assist in the administration of ongoing cases, PACER filings do not generally record demographic information of the defendants, including race and citizenship. To work around this otherwise fatal complication, this study used the defendant’s full name as a proxy for race. The sample includes 137 defendants with “Western” names, (defined to include those with Eastern European, Hispanic, and Latino names), 104 defendants with Chinese names, 25 defendants with other Asian names (including Indian names), 6 defendants with Arabic names, and 4 that were other/unclear. Each name was coded and verified by multiple American citizens, including some born in the United States and others born in China or Taiwan. Searches on Google and Facebook were used to disambiguate any names with unclear national origins, such as “Lee” or “Park.”<sup>3</sup>

Most criminal indictments and DOJ press releases do not mention the nationality of the defendant. Because the vast majority of defendants charged in the United States are American citizens, that fact is generally assumed. In contrast, the fact that a defendant is a foreign national can have legal as well as policy implications with respect to whom is being charged and why. As a result, the fact that a defendant is a foreign national will often appear in the criminal indictment or press releases published by the DOJ. This study coded as foreign nationals all defendants who were identified as such in the indictments or press releases while were presumed to be U.S. citizens.

The term “Asian American” is defined by the Census Bureau to include people of Asian descent who reside in the United States regardless of citizenship.<sup>4</sup> As used in this study, however, the “Asian American” and “Chinese American” exclude defendants who were identified as citizens of any foreign nation, such as Canada or the People’s Republic of China.



### **Coding for final disposition of cases**

In addition to coding race and citizenship for all 276 defendants, this study coded the final disposition for all cases that were finalized as of September 2, 2020. The final disposition statistics exclude 21 cases still pending in court. Two defendants who died before trial and were similarly excluded. The data collected also included 17 defendants whose cases are still pending in court, but for whom no adversarial proceedings had occurred. Further examination indicated that each of these individuals had been publicly charged in absentia when they were outside of the jurisdictional reach of the United States. All but one such defendant was a person of Chinese descent, and most were Chinese nationals.

Fed. R. Crim. P. 6(e)(4) allows federal prosecutors to file charges via a “sealed indictment.” Sealed indictments play a crucial role in our justice system. As a practical matter, people are generally reluctant to buy their own plane ticket for the sole purpose of being arrested once they get off their flight. Requiring prosecutors to publicly file charges against defendants while they are overseas could make it extremely difficult for American courts to exercise jurisdiction over the defendant. Sealed indictments help ensure that the government has the opportunity to prove its case in court. Indeed, this study also includes a number of defendants who were charged via sealed indictment and whose cases were unsealed only after the arrest. The fact that prosecutors in these 17 cases chose to file charges publicly, rather than via sealed indictment, raises questions as to whether the prosecutors ever expected to have to prove their case in court.

Although America’s justice system presumes innocence, these 17 defendants for whom adversarial proceedings have not yet occurred were not coded as innocent or guilty. Instead, these cases were treated as still pending and excluded from calculation of final disposition. One case in the sample is still pending because the defendant fled the country after being charged. This defendant was coded as guilty of espionage.

### **Overview of cases**

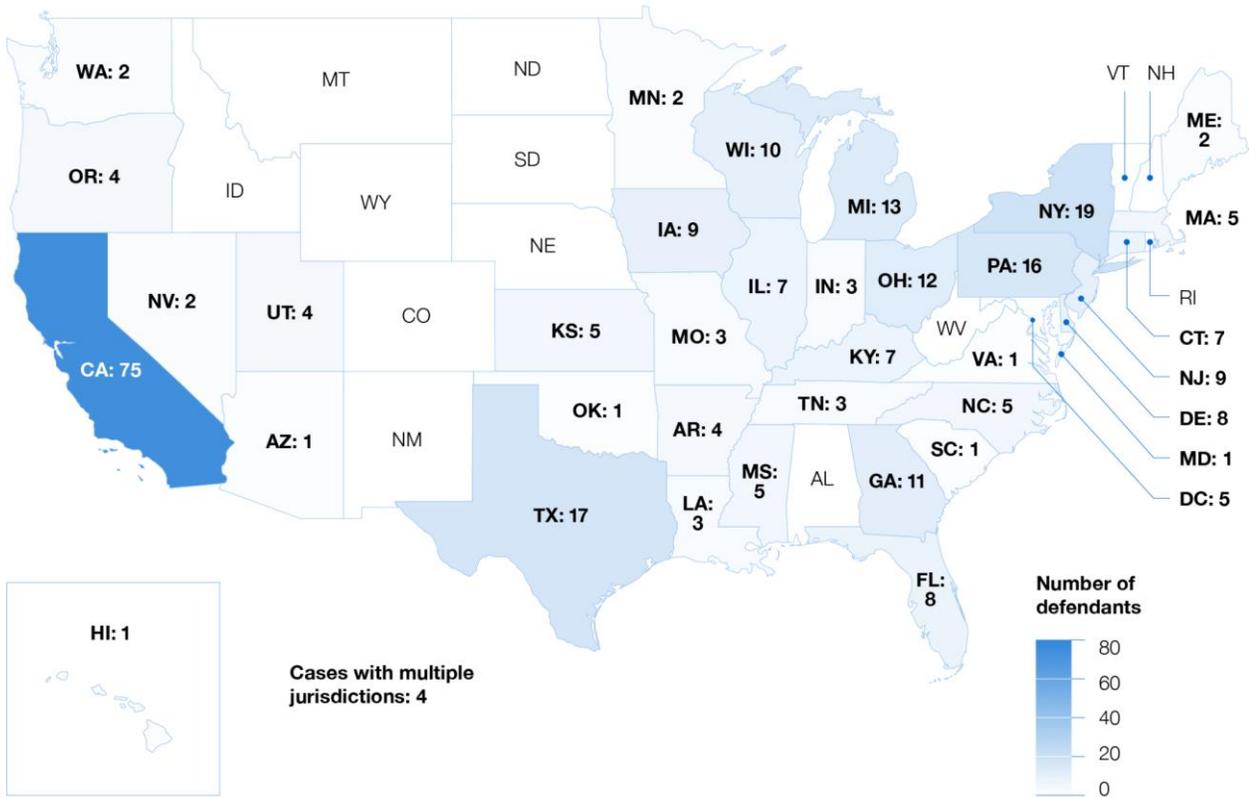
This sample includes 119 defendants from 1996 to the inauguration of President Barack Obama, 105 defendants during the Obama Administration, and 52 defendants during the first three and a half years of the Trump Administration.

EEA charges include charges under 18 U.S.C § 1832, (“theft of trade secrets”), and 18 U.S.C. § 1831 (“economic espionage”). Out of the 276 defendants charged under the EEA, 245 were charged under 18 U.S.C § 1832, (“theft of trade secrets”) and 31 charged under 18 U.S.C. § 1831 (“economic espionage”), including 20 who were charged under both §§ 1831 and 1832. Although both charges require an attempt to steal trade secrets, § 1831 requires proof of a nexus to a foreign entity and carries higher potential penalties. The vast majority of defendants charged under §1831, 81%, were of Chinese descent, 6% were of other Asian descent; 13% had Western names.

EEA cases were filed in jurisdictions across the United States, with the top three states being California, (75 cases), New York (19 cases), and Texas (17 cases).



# Number of Defendants by State

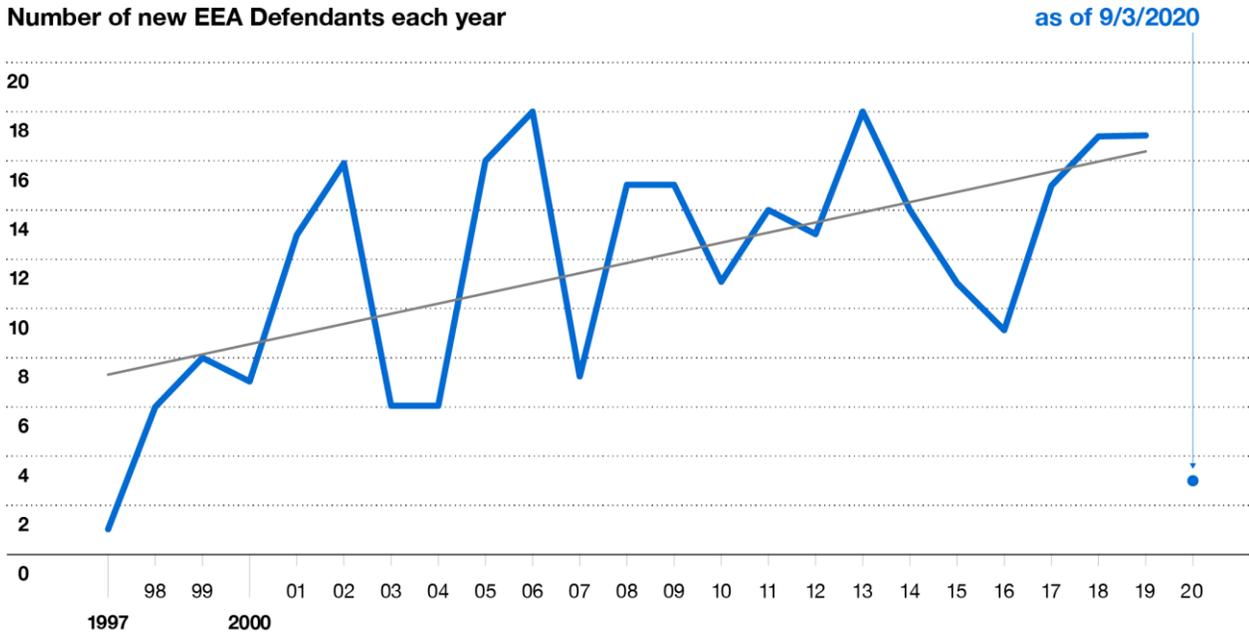


# **FINDINGS**

## **The number of defendants charged under the EEA has increased since 1996**

The number of defendants charged under the EEA has increased steadily since the EEA became law in 1996.

### **Number of EEA Defendants is Rising**



Only three EEA cases were filed in the first nine months of 2020. This, however, appears to be related to the COVID-19 pandemic, rather than any changes in governmental charging criteria.

From 1996 to 2009, the DOJ brought EEA charges against an average of 9.7 defendants per year. This rate increased to 13.1 under the Obama administration and to 16.3 during the first three years of the Trump administration.<sup>5</sup>

## **Beneficiary Nations**

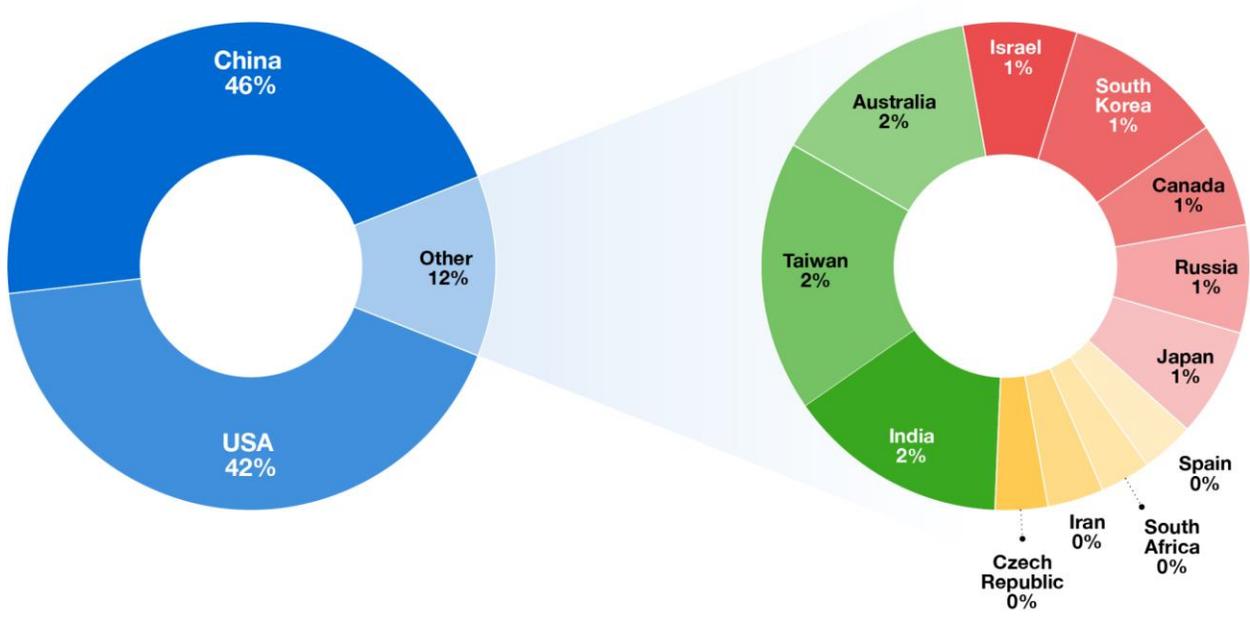
**42% of EEA cases alleged theft of secrets for a U.S. entity, 46% for China, and 1% for Russia**

Although news stories often focus on international espionage, 42% of defendants charged under the EEA were alleged to have stolen trade secrets for the benefit of an American business or person. Nonetheless, almost half of EEA cases (46%), alleged the theft of trade secrets to benefit a person or



entity in China. The remaining cases alleged a connection to various other nations including India, and Australia.<sup>6</sup> Only two defendants, (1%), were alleged to have stolen trade secrets for the benefit of Russia.

**Nationality of Alleged Beneficiary of Theft**



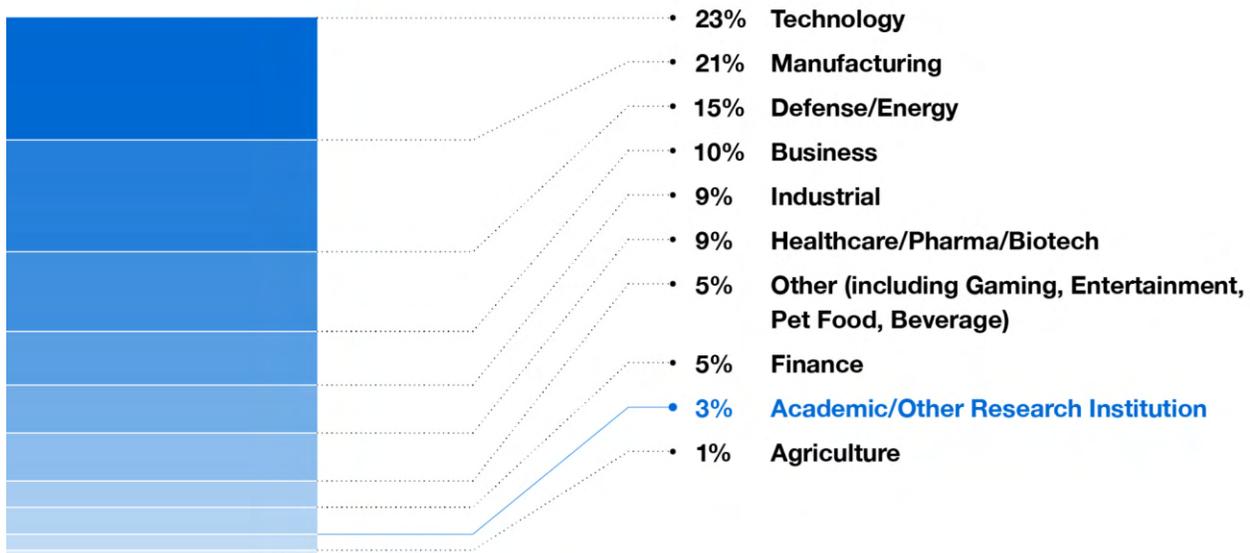
**The Victims of Economic Espionage, by Industry**

**Universities account for only 3% of alleged thefts of trade secrets.**

Cases brought under the Economic Espionage Act allege the theft or attempted theft of trade secrets from entities in a wide range of industries because any American business with valuable trade secrets is a potential victim of espionage.



## Industry of Corporation Victim (n<sub>cases</sub> = 186)



In recent years, several high-profile investigations related to the China Initiative have focused on American academic institutions that receive federal research grants. This study found, however, that only 3% of cases brought under the EEA alleged theft of secrets from academic or governmental research institutions. This finding is consistent with the fact that cutting-edge academic research is rarely intended to be kept “secret.”

Professors, particularly those engaged in the fundamental sciences, build their careers under the mantra of “publish or perish.” Rather than hiding their insights from fellow scientists, academic researchers are encouraged, and required, to share their research with the world. Because scientific findings are not considered valid unless they are “reproduced,” academics have historically been encouraged to collaborate with their peers across the world.

While American businesses must fight to protect their trade secrets, American academics whose research is not copied are doomed to toil in obscurity. The fact that prosecutors have alleged so few thefts of trade secrets in academia likely reflects the fact that academics have very few “secrets” to steal.

In recent years, however, several broad federal investigations brought to prevent “trade secret theft, hacking, and economic espionage”<sup>7</sup> have increasingly focused on universities and American scientists engaged in fundamental research.<sup>8</sup> The fact that only 3% of alleged thefts of trade secrets have occurred in these institutions suggests that the DOJ is looking for spies in the places they are least likely to find them.

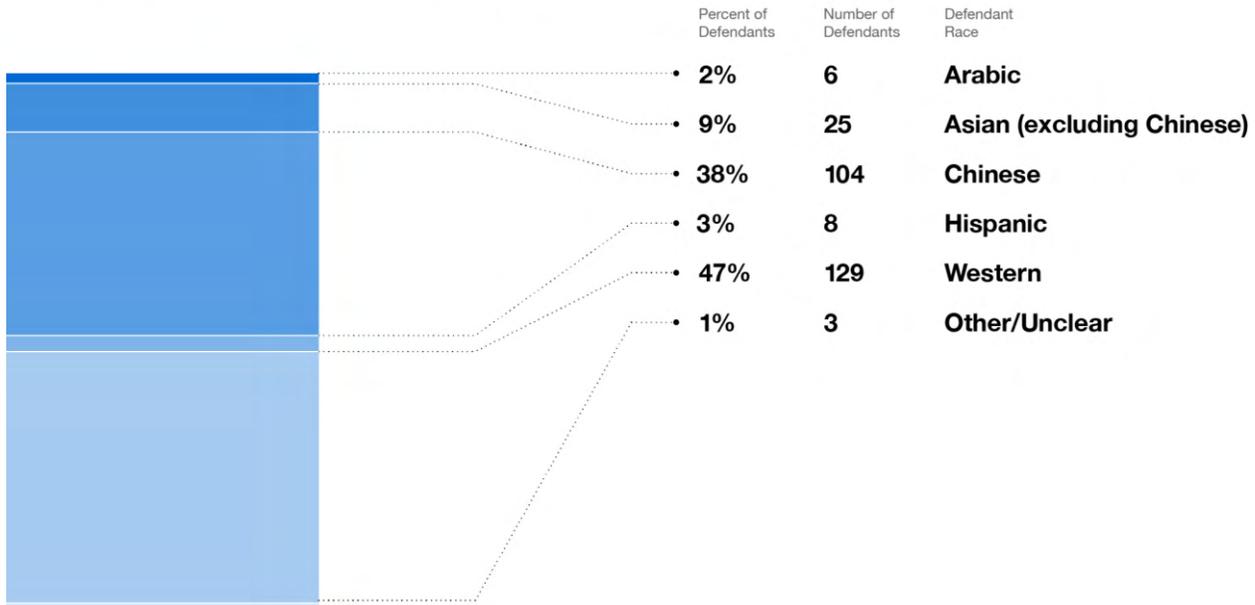


## Race of Defendants

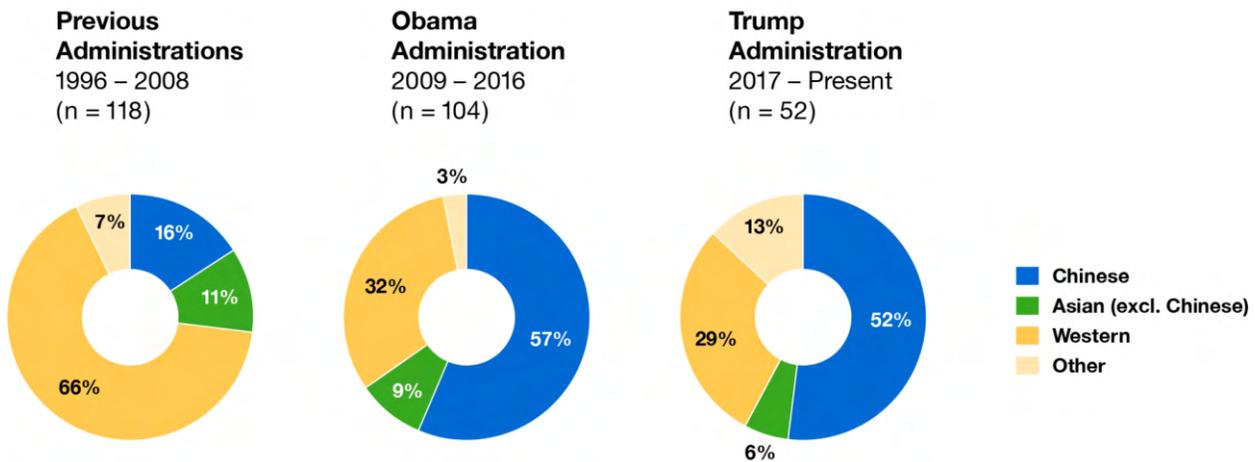
Since 2009, the majority of alleged “spies” are of Chinese descent.

Between 1996 and 2020, 47% of defendants charged under the EEA have been of Western descent, 38% of Chinese descent, 9% of other Asian descent, including South Asian descent. A closer look, however, reveals significant changes in the past decade.

### Race of Defendants (1996 – 2020)



**In the past decade, the majority of people accused of espionage are of Chinese or Asian descent (including South Asian)**



Asian American populations have grown significantly in the past two decades. In 2000, Asian Americans comprised 4.1% of the American population in 2000.<sup>9</sup> This number grew to 5.6% in 2010,<sup>10</sup> and 7.2% in 2020.<sup>11</sup>

Prior to 2009, the vast majority (66%) of defendants charged under the EEA were people with Western names while 27% were of Asian descent. Although Asians were disproportionately charged with espionage crimes prior to 2009, it is possible that much of these disparities were related to demographic differences in the business and scientific fields that produced America’s trade secrets.

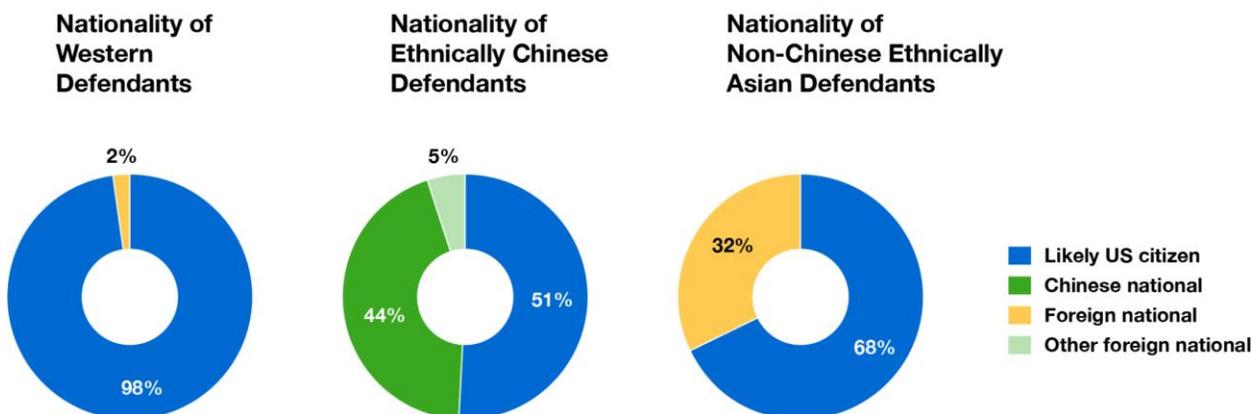
Around 2009, however, something changed. Under the Obama administration, two-thirds (66%) of defendants accused of stealing trade secrets were people of Asian descent, primarily Chinese descent, a trend that continued under the Trump administration. Indeed, the proportion of defendants of Chinese descent accused of espionage has more than tripled since 2009.

## Citizenship

### Half of EEA Defendants of Chinese Descent are Foreign Nationals

Only 2% of people with Western names were affirmatively identified as foreign nationals. The remaining 98% were coded as U.S. citizens. Half (49%) of defendants of Chinese descent were affirmatively identified as foreign nationals, including 44% identified as Chinese nationals, 4% Canadians, and 1% as Taiwanese. The remaining 51% of defendants of Chinese descent were coded as U.S. citizens. Similarly, a third (32%) of non-Chinese Asian defendants were identified as citizens of other countries, predominantly India, while the remaining 68% were coded as U.S. citizens.

### Citizenship



## **The Problem of Innocence**

In the American criminal justice system, there is no such thing as a judgment of “innocence.” Even an acquittal at trial does not declare a defendant innocent: a verdict of “not guilty” means only that the government was not able to prove the defendant’s guilt beyond a reasonable doubt. Nonetheless, our justice system is intended to ensure that the guilty are punished and the innocent are not.

Another complication with the concept of “innocence” is the fact, well known amongst lawyers and academics, that almost all Americans are guilty of at least one serious federal felony.<sup>12</sup> Anyone who ever fudged their income on a credit card application is guilty of false statements to an FDIC insured institution and exposed to penalties as high as 30 years in prison and a \$1 million fine.<sup>13</sup> Anyone who rounded up the value of their donations on their income tax filings is guilty of tax fraud, with penalties as high as 5 years and a \$100,000 fine.<sup>14</sup> Indeed, the DOJ is now forwarding the theory that any professor who clicks send on a federal conflicts of interest form without fully updating their resume could be guilty of false statements to the federal government, with penalties of up to five years in prison.

Unfortunately, the problem of federal “innocence” is not limited to actions that the person has taken in the past. As Lisa Kern Griffin explains, the federal government has the power to cause otherwise innocent people to commit “process crimes” by asking questions the FBI already knows the answers to.<sup>15</sup> If the suspect answers truthfully, the FBI has done nothing more than confirmed the facts they already knew. However, if the suspect reflexively denies even innocent actions, the otherwise innocent suspect is now guilty of the federal felony of “false statements.” As countless attorneys and scholars have observed, such laws give the government the power to manufacture crimes with which to prosecute, and convict, otherwise innocent people.<sup>16</sup> Such “pretextual prosecutions” are especially troubling when the suspects the government choose to interrogate are selected in part by characteristics shared by racial minorities, such as having friends in and working with people in a different country.<sup>17</sup>

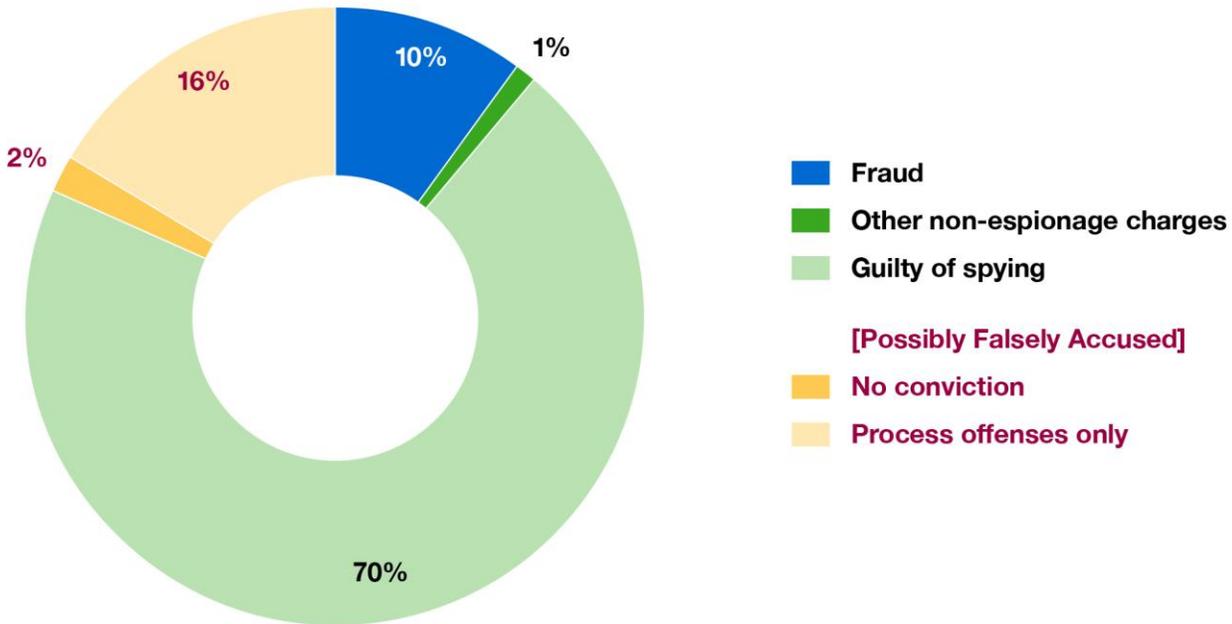
This study codes as possibly innocent or falsely accused all defendants who were acquitted at trial and those against whom all charges were dropped. In a handful of cases, court records indicated that although all charges were dropped, prosecutors intended to re-indict the defendant on related charges. These cases were treated as still pending and excluded from the analysis of final dispositions. This study also codes as possibly innocent or falsely accused defendants convicted only of false statements or similar “process offenses” and so may have been innocent of any crime absent the federal investigation

The vast majority (70%) of defendants in the sample were convicted of theft of trade secrets. Ten percent (10%) of defendants were convicted of fraud, while an additional 1% of defendants were convicted of other serious crimes. Sixteen percent (16%) of defendants charged under the EEA were acquitted at trial or had all charges dropped against them. An additional 2% of defendants pled guilty only to false statements or similar process offenses. In sum, 18% of defendants in the study were never proved guilty of spying or a non-process offense. The fact that these defendants were never proved guilty of espionage does not necessarily mean they were innocent, or not spies. After all, there are reasons other than innocence, such as suppression of key evidence, for why a prosecutor might drop all



charges or allow a defendant to plead guilty to a minor offense like false statements. Nonetheless, such high rates of possible innocence or false accusations raise serious concerns, especially when the cases are broken out by race.

### Outcomes Finalized Cases (1996 – 2020)



#### One in four people of Chinese or Asian descent possibly falsely accused

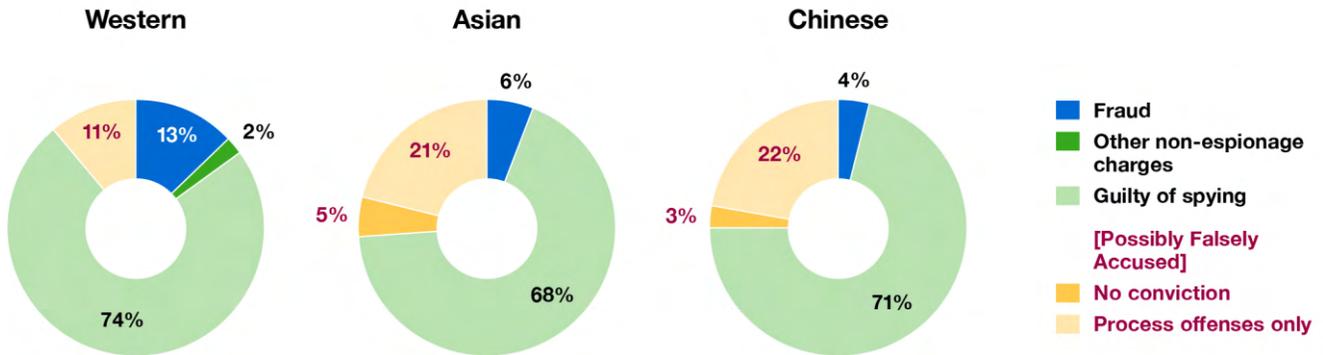
One in five people of Asian (21%) or Chinese descent (22%) charged under the Economic Espionage Act are never convicted of any crime. When defendants convicted of only false statements or other process crimes are included, as many as one in four people of Asian (26%) or Chinese descent (25%) may have been innocent when the investigations into their conduct began. This rate of possible innocence is much greater than for people of Western descent (11%).<sup>18</sup>

#### “Defendants of Asian Descent More Likely to be Innocent”



## Defendants of Asian Descent Appear More Likely to be Innocent

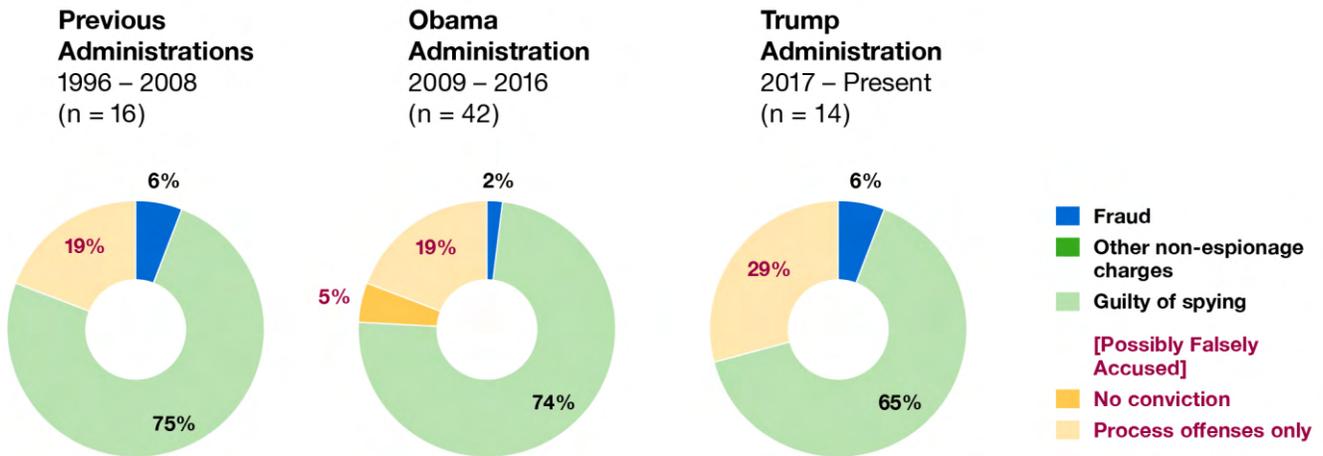
Outcomes for all finalized cases (1996 – 2020)



Although the rates of possible innocence were somewhat larger under the Trump administration, these differences are generally not statistically significant.

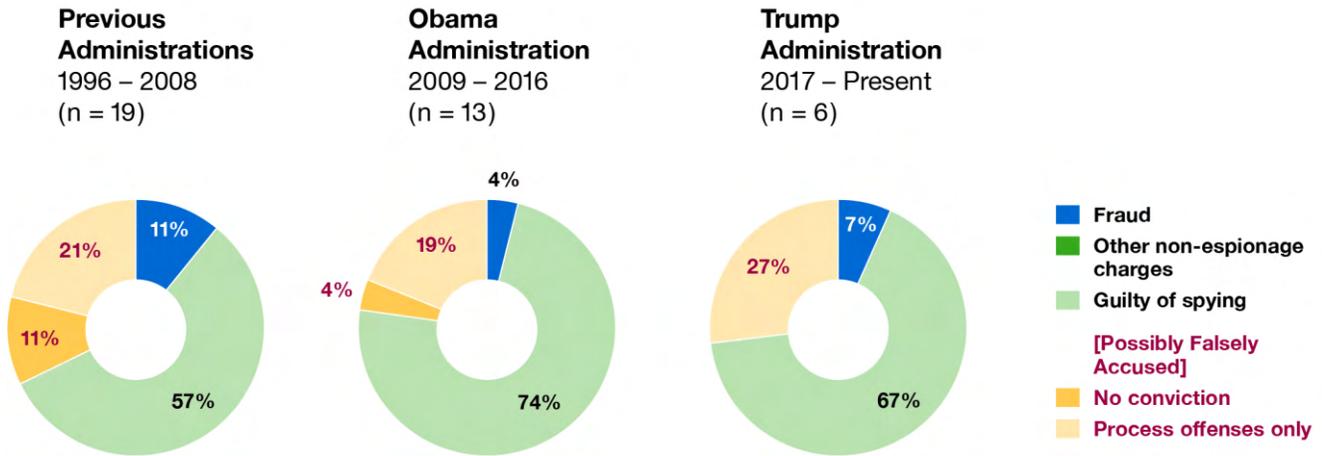
## Defendants of Chinese Descent More Likely to be Innocent

Outcomes by charging administration



## Defendants of Asian Descent More Likely to be Innocent

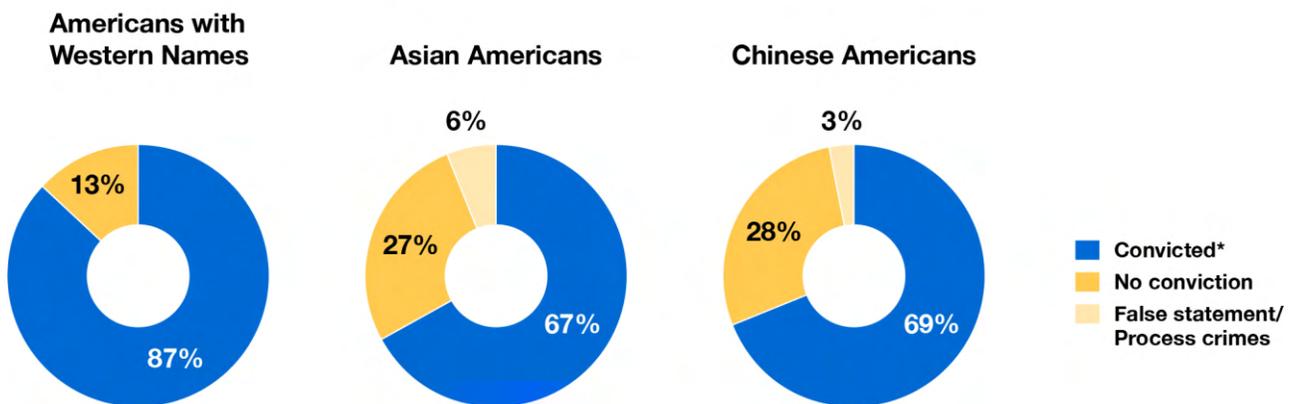
### Outcomes by charging administration



### One in three Asian-Americans may have been falsely accused

Unfortunately, the problem of innocence is not limited to foreign nationals charged with espionage. After excluding defendants affirmatively identified as citizens of other countries, this study found that 27% of Asian Americans were not convicted of any crime. An additional 6% of Asian Americans were convicted only of false statements. **In total, 1 in 3 Asian Americans accused of espionage may have been falsely accused.** Similarly, 28% of Chinese Americans were not convicted of any crime, and 3% were convicted only of false statements, making a total of 31% of Chinese American accused of spying who may have been innocent of any crime prior to the federal investigation.

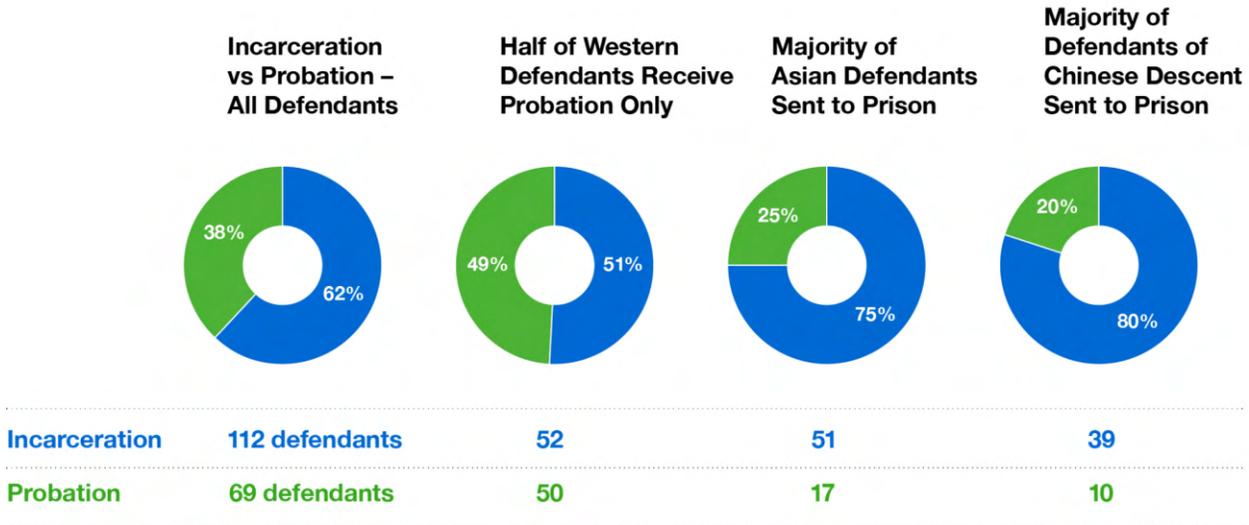
### Asian Americans More Likely to be Falsely Accused



## Racial Disparities in Punishment

**Defendants of Asian descent are punished twice as harshly as others**

### Racial Disparities in Punishment



Half of defendants with Western names (49%) convicted under EEA received a sentence of probation only and avoided any prison sentence. In contrast, the vast majority of defendants of Asian descent (75%) went to prison, as were defendants of Chinese descent (80%).

Defendants of Asian descent convicted of economic espionage received an average sentence of 23 months, while defendants of Chinese descent received an average sentence of 27 months, roughly twice as long as the average sentence of 12 months for defendants with Western names.

### Average Sentence Charts

Race	Number of Defendants	Length of Sentence (months)
<b>All defendants</b>	<b>255</b>	<b>16.7</b>
<b>Western defendants</b>	<b>127</b>	<b>11.9</b>
<b>All Asian defendants</b>	<b>113</b>	<b>22.9</b>
<b>Chinese defendants</b>	<b>89</b>	<b>27.4</b>



Under the Federal Sentencing Guidelines, the recommended sentence for a defendant convicted under the EEA depends on several factors, including the value of the secrets stolen and whether the defendant had prior criminal history. Although the judge has the final say on a defendant's punishment, the prosecutor can influence these decisions by asking for a harsher or lighter sentence or engaging in plea bargaining with the defendant. Although all defendants in this study were charged under the EEA, this study could not control for the severity of the crimes the defendants committed. In other words, although these defendants were convicted under the statute, this study cannot rule out the possibility that defendants of Asian descent stole secrets that were much more valuable than defendants of other races.

The sheer magnitude of these disparities raises concerns that racial factors have caused our government to punish people of certain races more severely than others who committed similar crimes. Implicit biases need not be conscious or even "racist" to produce unfair racial disparities.<sup>19</sup> There are good reasons for the U.S. government to be particularly concerned about crimes related to the People's Republic of China. Perhaps some of these disparities reflect an unconscious, or even a conscious, belief that people who have connections to China should be punished more severely in the interests of national security. Or, perhaps judges and prosecutors subconsciously perceive crimes performed to be more severe because the defendant fits the image of a "Chinese spy" that we have been taught to fear. In this light, the fact that non-Chinese people of Asian descent are also punished more severely is especially troubling: perhaps the reason that "other Asians" are punished more severely is because they physically look like a feared Chinese spy, even if their heritage comes from a different country altogether.

## **Disparities in Pre-Trial Treatment**

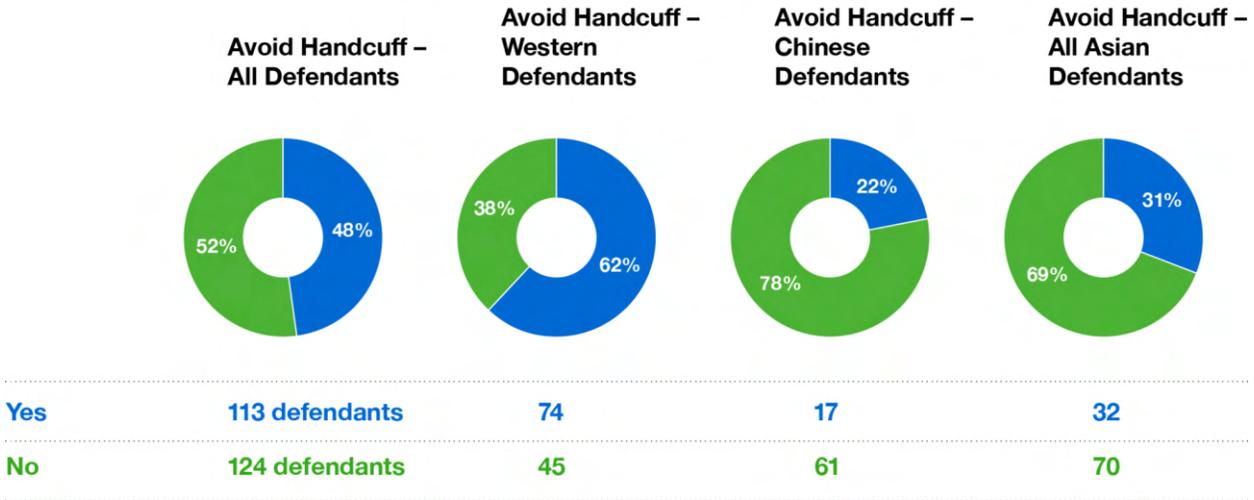
**Most Chinese and Asian defendants were arrested and handcuffed. Most Western defendants were not.**

Although media portrayals of law and order involve police chases ending in handcuffs, such practices are much less common in federal white-collar prosecutions. For many defendants, their first formal notice that they have been charged with a crime comes in the form of a written letter, a paper summons ordering the person to appear in court in a few days' time.

From 1996 to 2020, 62% of EEA defendants with Western names received a summons to appear rather than surprised by an arrest.<sup>20</sup> This courtesy was extended to only 31% of defendants of Asian descent and only 22% of defendants of Chinese descent. Unlike defendants with Western names, most defendants of Asian descent were arrested and handcuffed before they were convicted of a crime.<sup>21</sup>



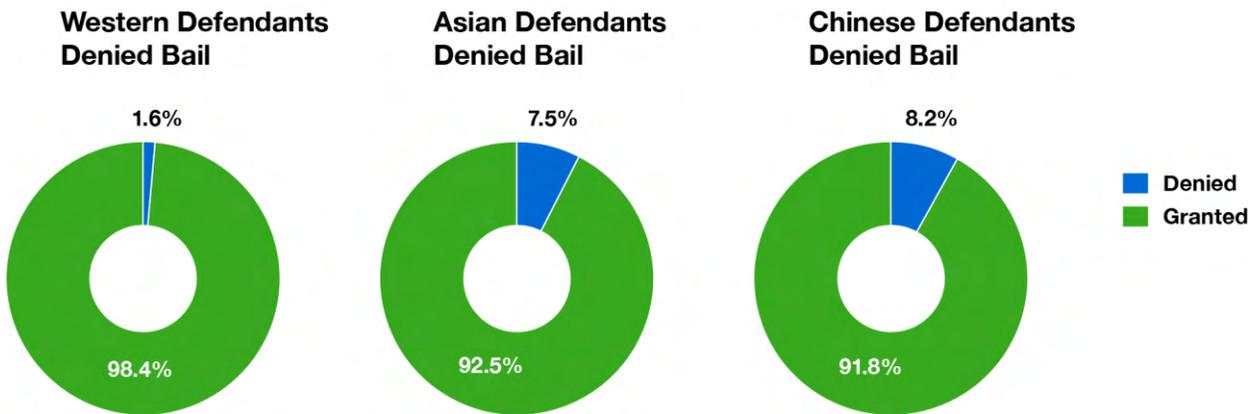
## Disparities in Pre-Trial Treatment



### Chinese and Asian defendants were five times more likely to be denied bail than Western defendants

Almost all defendants with Western names (98.4%) charged under the EEA were granted bail. Although the vast majority of defendants of Asian and Chinese descent were also granted bail, many were not. Defendants of Asian descent were denied bail in 7.5% of cases, while defendants of Chinese descent were denied bail in 8.2% of cases.

### Asian and Chinese Defendants Denied Bail More Often



## **Little evidence of risk of flight**

Fears that a criminal suspect will flee the country underlie decisions to deny bail and to arrest defendants rather than issue a summons. Although authorities must take concerns of flight seriously, this study found little evidence to support fears that defendants charged under the EEA will flee after being granted bail.

The need to maintain jurisdiction over criminal suspects raises acute concerns with defendants who have a connection to another country. People who are fluent in another language, like many first-generation immigrants, have more options of countries in which they could build a life. People with friends or colleagues in a country with no extradition treaty with the United States, such as Russia, China, Serbia, or Saudi Arabia, have a better chance of permanently escaping the long arm of American law.

The common practice of requiring the defendant to surrender their passport as a condition of release on bail can significantly diminish these concerns. It is hard for a person to be flight risk when they are unable to board an international flight.

Out of 249 EEA defendants identified as released on bail, only one defendant has actually jumped bail since 1996. This one fugitive was a Chinese citizen of Chinese descent. However, this study included 25 other Chinese citizens charged under the EEA who were granted bail and did not flee the country. No American citizen naturalized or native born, who was granted bail has fled the country to avoid facing charges under the EEA.

## **Creating implicit biases: The DOJ publicizes charges against defendants with Chinese names more than those with Western names**

This study finds that the DOJ is much more likely to publicize Economic Espionage Act charges for defendants with Asian names than for defendants with Western names. The DOJ issued a press release to publicize EEA charges against 80% of defendants with Asian names and 83% of defendants with Chinese names. In contrast, the DOJ issued press releases for only half (51%) of defendants with Western names.



## DOJ Publicizes Charges Against Chinese Defendants More Than Western Defendants

### Western



51% of Western defendants have DOJ press release

### Chinese



83% of Chinese defendants have DOJ press release

### Asian, including Chinese



80% of Asian defendants (including Chinese) have DOJ press release

Issuing a press release about EEA charges helps inform the public about the crimes being committed against American interests. It also highlights what the DOJ is doing to protect American interests. The fact that the DOJ publicizes Economic Espionage Act crimes allegedly committed by people with Asian names more than those allegedly committed by people with Western names raises serious concerns. Publicizing alleged crimes by a racial minority more than similar crimes committed by others risks painting the whole race as more prone to that criminal conduct than others. This phenomenon had been well documented with respect to African Americans and drug offenses.<sup>22</sup> Unfortunately, there is evidence that the DOJ is intentionally attempting to “sensitize” Americans to the threat posed by Americans with connections to China.

In 2020, then-U.S. Attorney for the District of Massachusetts and “China Initiative” Steering Committee Member Andrew Lelling addressed the NIH probe into hundreds of primarily Chinese American professors who had participated in the Thousand Talents Program. These letters led to numerous criminal charges alleging, not theft of trade secrets, but primarily false statements charges for failure to fully disclose the professors’ academic relationships abroad. As Lelling explained, “I think those letters have had an in terrorem effect. . . And that’s good, because you want a little bit of fear out there to sensitize people to the magnitude of the problem.”<sup>23</sup> Regardless of intention, there is no doubt that fears of “Chinese spies” are common among Americans, as Asian American scientists feel “increasingly afraid that they’re no longer welcome in the U.S.”<sup>24</sup>

It is important for the DOJ to educate Americans about the crimes committed against our businesses, government, and universities. It is concerning, however, that the DOJ is much more likely to publicize accusations of spying against people of Asian descent and less likely to publicize allegations that people with Western names are also spies. Such disparities risks encouraging Americans to underestimate the threat that people with Western names pose to our nation’s economy and overestimate the threat posed by ordinary Americans with “foreign” names.



## **Conclusion: A New Red Scare?**

This Study reveals that around 2009, the DOJ made a significant shift to focus heavily on the alleged theft of trade secrets for the benefit of people or entities within the People’s Republic of China. As China has grown into a major trade partner and economic rival of the United States, such a shift in focus may simply reflect the level of interaction between the two countries. America needs to deter the theft of American trade secrets and to punish serious criminals of any race, and to be forthright about the legitimate threat of espionage from China. However, unfortunately, this study reveals significant cause for concern that the war on China has had disparate effects on ordinary American citizens of Chinese or Asian descent.

This study found that 1 in 4 American citizens of Asian descent charged under the EEA are never convicted of any crime. Adding in defendants convicted only of false statements or other process offenses and as many as 1 in 3 American citizens of Asian descent charged under the EEA may have been falsely accused. The study also shows that individuals who are of Asian or Chinese heritage are imprisoned and denied bail far more often than defendants with Western names. Indeed, prison sentences for defendants of Chinese and Asian descent are twice as severe as defendants with Western names.

Perhaps even more telling is the fact that the DOJ publicizes EEA charges against people of Asian descent more often than EEA charges against people with Western names. The DOJ publicizes the cases they want the American public to be more aware of. Although there could be legitimate explanations for these disparities, the fact that the DOJ publicizes alleged espionage by “spies” with Chinese names more than “spies” with Western names can only reinforce the false stereotype that Americans of Chinese descent have less “loyalty”<sup>25</sup> than Americans of other races.

These false stereotypes do play a role in decisions to grant or deny bail. People of Asian descent are 5 times more likely than people with Western names to be denied bail and to be detained prior to trial. As discussed above, although it is important for judges to consider the risk of flight when deciding whether to release a defendant on bail, it is actually quite difficult for white collar defendants to leave the country after a judge orders the defendant to surrender their passport. Since 1996, only one defendant in this Study fled the country after being released on bail. In this study, not a single U.S. citizen, naturalized or otherwise, fled the country after being released on bond. However well intentioned, concerns that foreign born American citizens will flee the country they chose as their home are false and misguided.

It is also important to recognize what this study does not show. This study only analyzed charges brought under the Economic Espionage Act. Each defendant in this study was formally accused of stealing or attempting to steal economically valuable trade secrets. Although the current “China Initiative” is ostensibly intended to protect American trade secrets, the charges brought in many “China Initiative” cases have nothing to do with trade secrets.

For example, the case against Dr. Anming Hu, former professor at the University of Tennessee in Knoxville<sup>26</sup> alleged no attempt to steal trade secrets. Rather, he was charged only for false statements



and fraud for securing a federal grant without directly disclosing a teaching position he held overseas - a position the University knew about.<sup>27</sup> A federal judge ultimately acquitted Dr. Hu of all charges after determining that no reasonable jury could have found him guilty. As U.S. Congressman Ted Lieu opined, “if Hu’s last name was Smith, [the DOJ] would not have brought this case.”<sup>28</sup>

Dr. Gang Chen, a naturalized US citizen at the Massachusetts Institute of Technology, was similarly charged with false statements and fraud for failing to disclose teaching positions and other connections in the PRC.<sup>29</sup> Notably absent from the indictments is any charge that Dr. Chen stole or attempted to steal trade secrets from MIT or any other institution.

Dr. Xiao-Jiang Li moved to the U.S. from China in the late 1980’s and became a naturalized American citizen. He rose through American academia to become a distinguished professor at Emory University where he led genetic research into treatments for Huntington’s disease.<sup>30</sup> In 2020, he pled guilty to filing a false tax return.<sup>31</sup> Like Professor Hu and Professor Chen, Professor Li was never charged with attempting to steal trade secrets for China or anyone else. Nonetheless, in the wake of the federal investigation, Dr. Li was fired from his tenured position at Emory and had to seek employment elsewhere. In an ironic twist, Dr. Li is now a researcher at the China Academy of Sciences in Beijing.<sup>32</sup> Cases like Dr. Li’s have prompted concerns of a “New American Brain Drain.”<sup>33</sup>

This study includes none of these high-profile cases because none of these defendants were charged under the EEA. Indeed, none of the indictments allege that the defendant attempted to steal any trade secrets. As discussed above, most university professors engage in “fundamental research” with the primary goal of publishing their findings to share with the world. This is a good thing. In academic settings, scientific “trade secrets” are all but a non-sequitur. Why, then, has the DOJ focused so many resources investigating the academic institutions that account for only 3% of actual allegations of thefts of trade secrets?

This study reveals significant disparities in the treatment of Asian Americans suspected of stealing trade secrets. America *needs* to protect our nation against economic espionage, both foreign and domestic. Nonetheless, these findings support concerns that overzealous attempts to fight “Chinese espionage” are unfairly upending the lives of ordinary Asian Americans. Moreover, by disproportionately publicizing alleged spying by people with Asian names, the DOJ may be contributing to the stereotype that Asian Americans are less loyal than Americans with Western names. The American dream of justice and equality cannot exist in a vacuum. It is a goal that we must all work together to achieve.



## **About**

### **Committee of 100**

Committee of 100 is a non-profit U.S. leadership organization of prominent Chinese Americans in business, government, academia, healthcare, and the arts focused on public policy engagement, civic engagement, and philanthropy. For over 30 years, Committee of 100 has served as a preeminent organization committed to the dual missions of promoting the full participation of Chinese Americans in all aspects of American life and constructive relations between the United States and Greater China.

Committee of 100 collaborated with Andrew Chongseh Kim on the initial research back in 2017 “Prosecuting Chinese Spies” and co-led the most recent research project “Racial Disparities in Economic Espionage Act Prosecutions: A Window Into The New Red Scare.”

For more information, visit <https://www.committee100.org>.

### **Andrew Chongseh Kim**

Andrew Chongseh Kim is an attorney at Greenberg Traurig and Visiting Scholar at South Texas College of Law Houston. Kim is also a member of Committee of 100’s Next Generation Leaders Program. Kim received his undergraduate degree from the University of Chicago with triple majors in Economics, Physics, and Anthropology. He graduated cum laude from Harvard Law School and clerked at the Supreme Court of Connecticut. As a scholar, Kim applies sophisticated statistical techniques to the study of the American law. His research has been peer reviewed, published in top 100 law reviews, and has been cited in newspapers, television, and in briefs to the Supreme Court. Kim’s private practice work focuses on commercial litigation and white-collar defense. In 2020, he was recognized as The Best Lawyers in America, "Ones to Watch" in Commercial Litigation.



## Commentary

### Commentary by Dr. Randy Katz

“Fiat Lux: Let There Be Light”

The University of California’s founding principle enshrines the open pursuit of new fundamental knowledge, to be shared globally. Fundamental research thrives on international collaboration; it would be a tragedy to compromise this, particularly given such pressing societal challenges as climate change, which can only be effectively addressed globally.

I am deeply concerned about the recent investigations into foreign influence in our universities. Collaboration with Chinese researchers appears to be an invitation for an investigation. During my time as the Vice Chancellor for Research at the University of California, Berkeley, I asked my Berkeley Chinese-American colleagues to share with me incidents of harassment they knew of or had experienced. They reported occurrences of suspended funding for investigators who had collaborated with Chinese universities. They believe that faculty with Chinese collaborators have received increased scrutiny of their grants for disclosure violations. There are indications that proposals submitted by Chinese American researchers are subjected to a more intensive review. It has also been reported that the funding success rate for Asian-American investigators is lower than for their Caucasian colleagues. This Study suggests that these observations, deeply troubling in themselves, may relate to a broader national issue.

In one case, a Federal agency informed me of its suspicion that one of our faculty had a significant affiliation with an institute in China, and that we should investigate it as a conflict of commitment. I did what any academic would do, and performed an extensive Google search for the Institute and our faculty member’s name. Other than a large number of co-authored publications, all of which had appeared in the open literature, I found no suspicious affiliation. I reported my finding to the agency. They responded by producing a set of web page screen images, which I had been unable to access, that suggested the individual did have an affiliation with the institute in question. It was never made clear to me how the agency was able to navigate to these pages, or why they had not shared this information initially. I believe the affiliation was honorific – not unlike a visiting professor – and did not suggest a conflict of commitment. The agency then requested that I investigate whether the faculty member had received duplicate funding from China for work that had already been federally funded, in clear violation of agency rules. After extensive investigation, I concluded that the collaborative work performed with Chinese colleagues was independent of work performed under U.S. sponsorship. The agency remained unconvinced by the evidence I provided.

As we are aware from press reports, there have been researcher abuses, particularly in terms of excessive time spent abroad or payments received that have gone unreported. Those who have violated either university or government rules should be punished. In my case, at the very worst the faculty member had omitted to disclose collaborations with Chinese colleagues or to report



the related but independent work they were pursuing. To avoid the displeasure of the agency, which holds sway over funding decisions that can make or break a researcher's career, the faculty member agreed to forgo submitting a proposal for a time.

Let me state emphatically that I support all Federal agency disclosure rules. As Vice Chancellor, my office did everything to communicate these requirements to our research community, and to assist our researchers in being in compliance. Nonetheless, the Federal agencies have not been entirely clear and consistent on the rules about disclosure, which are now being clarified.

These investigations have been conducted in a manner that does not adhere to our American values: an open and transparent process, an assumption of innocence until proven guilty, and the right of appeal.

There is little doubt that these investigations have had a particular focus on Chinese American researchers. In my story, the faculty member is Chinese American, born in China, yet whose scientific career has been almost entirely in the U.S. This person first came under suspicion because of the number of co-authored papers with Chinese researchers. This is hardly surprising, given the language and cultural familiarities, as well as the reality that for some fields of science, the best researchers and resources are to be found in China. This was the case for this researcher. We learn as much from researchers in China as they learn from us. Let me emphasize that the joint work was not secret but appeared as publications in the open venues of science.

This faculty member's experience is not unique. The Federal agencies have undertaken hundreds of similar investigations – no one really knows the numbers. Some have resulted in job dismissals and legal indictments. What we don't know are those investigations that were inconclusive, or represented little more than errors of omission, or ended with complete exoneration. The agencies know this; the public only the most sensational – and typically most egregious – cases.

These investigations and related actions – such as the increased interrogation of Chinese American researchers by Customs and Border Patrol officers at airports – have resulted in a chilling effect on our Chinese American research community in particular, and America's international collaborations and our continued ability to attract the world's best and brightest. Much of America's scientific and technical workforce in our leading institutions are Americans originally from China. My university has seen a decline in graduate students, postdoctoral scholars, and visiting students from China that began even before the Covid-19 pandemic. Closing off such a tremendous source of technical talent will have ramifications for America's research enterprise for many years to come. Fundamental research is a global activity. We depend on a global workforce. We depend on global collaborations.



## Commentary

### Commentary by Carol Lam

In November of 2018, the U.S. Department of Justice (“DOJ”) announced a new law enforcement effort bearing the unfortunate name “the China Initiative.” In one fell swoop, Attorney General Jeff Sessions – and his successor William Barr, along with FBI Director Chris Wray – managed to cast a broad shadow of suspicion over the entire Chinese and Chinese American population of the United States.

I was a federal prosecutor at the Department of Justice for twenty years, more than four of those years as the United States Attorney for the Southern District of California. For two decades, from my post in San Diego, I observed the workings of those at the Department of Justice in Washington D.C. During that time, I witnessed the announcement of many DOJ prosecution “initiatives” purporting to address various crime problems: financial institution fraud, human trafficking, defense procurement fraud, terrorism, health care fraud, illegal immigration, crack cocaine, marijuana, illegal firearms...the list goes on. Each initiative was usually accompanied by additional funds and personnel, as well as press conferences with the President or the Attorney General to announce interim achievements in the fight against the targeted crimes.

I came to be wary of such prosecution “initiatives.”

It may seem like common sense to create a criminal prosecution “initiative” as a way to pool resources in order to tackle a particularly vexing crime problem. But there is a troubling side to “initiatives” that are designed to convict more people. By contrast, good initiatives can be created to, say, house the homeless or feed the hungry; but initiatives that target people suspected of committing a particular type of crime are different both in nature and in consequence.

Every criminal prosecution features unique facts and a unique defendant, and it is a prosecutor’s obligation to consider each case on its own merits. But initiatives create – perhaps inadvertently – perverse incentives. When a criminal prosecution is brought as part of an initiative – and therefore tagged as a statistic for a future press release – it allows errant motives, poor judgment, and/or incompetence to creep in. That’s because a criminal prosecution “initiative” imposes an arbitrary goal, often with an arbitrary deadline, and as law enforcement scrambles to reach that goal, it disrupts the natural rhythm of criminal investigations.

To understand the motivation behind criminal prosecution initiatives, one must understand that there are many more potential criminal cases out there than prosecutors will ever be able to prosecute. That means prosecutors routinely engage in a culling process where only the most suitable cases are indicted and tried. Ideally, the criminal cases that prosecutors bring are the ones that are the most significant, and – importantly – strong on the facts and the law.

A criminal prosecution “initiative” gets this culling process backwards. An initiative assumes a particular outcome – more prosecutions of the targeted crime – and that, in turn, creates the expectation that prosecutors and investigators will somehow achieve that outcome. But individual criminal prosecutions don’t lend themselves well to this process. Prosecutors do not make crimes or create



evidence; they can only prosecute crimes that have already occurred, and for which they have sufficient evidence. When deciding whether to charge a defendant with a crime, a prosecutor must use a moral compass to make that decision, without stretching either the evidence or the prosecution theory. But when prosecutors and investigators are instructed to obtain certain results, in volume and within a specified time frame, that moral compass is corrupted.

I have seen numerous prosecution “initiatives” go off the rails. Here are some examples: In the wake of the savings and loan crisis in the 1980s the Department of Justice created regional “Financial Institution Fraud” (“FIF”) task forces. Prosecutors assigned to those task forces eventually realized that large, systemic bank fraud cases against individuals are hard to prosecute. The result? To meet DOJ’s expectations, routine cases involving small embezzlements by bank tellers (and usually pled out to misdemeanors with a sentence of time served) were shoehorned into FIF statistics and exaggerated into triumphs for an initiative purporting to address large frauds that contributed to the failure of savings and loan institutions.

Similarly, when DOJ prioritized illegal immigration cases where the defendant used a false document to attempt entry into the United States, many of the resulting prosecutions involved nannies presenting false identification at the border to return to their jobs in the U.S. after spending the weekend visiting family in Mexico.

“Project Safe Neighborhoods” – initially a well-intentioned, effective effort (then known as “Project Exile”) by a single U.S. Attorney’s Office in Virginia to tackle illegal firearms in its crime-ridden neighborhoods – later took on a cartoonish dimension when DOJ, eager to capitalize on that success and already envisioning its own future press release touting lofty statistics, imposed it on all 93 U.S. Attorney’s Offices in the nation. The inevitable result was that some districts without a serious illegal firearms problem were forced to wrest such cases away from the local district attorneys’ offices, with no net reduction in crime in those areas.<sup>1</sup>

That is the problem with initiatives. They put the cart before the horse, and often the cart doesn’t arrive at its intended destination.

Professor Kim’s careful analysis illustrates this danger well. The rising percentage of Chinese defendants ultimately found to be not guilty of espionage charges suggests that investigators and prosecutors, pressured to meet higher prosecution expectations, are stretching the facts and jumping to unwarranted conclusions. Add in two unique problems that plague law enforcement and the “China Initiative” – that is, that most FBI agents and federal prosecutors lack expertise in cutting-edge science and technology, and that they are generally unfamiliar with academic culture at research universities – and the resulting rise in unsuccessful prosecutions is no surprise. Indeed, it should have been expected, and that risk should have been – but wasn’t – mitigated.

When U.S. Attorney Andrew Lelling, one of the federal prosecutors charged with leading the “China Initiative,” announced the indictment of MIT professor Gang Chen, he [said](#) of the professor’s work with Chinese institutions that “The problem is not the collaboration itself. The problem is lying about it.” But that’s not really true – while the “lying” (that is, failures in certain years to disclose the existence of foreign bank accounts, and failure to list positions with Chinese schools and universities on conflict-of-interest forms) might be all law enforcement can prove, there is no question that the



collaborations themselves are the motivation for the prosecution. In fact, that was made clear the same day by Joseph Bonavolonta, Special Agent-in-Charge of FBI's Boston office, who [said](#):

“The cutting-edge research and technologies that are being developed here in Massachusetts must be carefully protected from our foreign adversaries and the FBI will continue to do everything it can to safeguard these important innovations.

....

We know they use some Chinese students in the U.S. as non-traditional collectors to steal our intellectual property. We know that through their “Thousand Talents Plan” and similar programs, they try to entice researchers at our universities to bring their knowledge to China—even if that means stealing proprietary information or violating export controls or conflict-of-interest policies to do so.

We also know they support the establishment of institutes on our campuses that are more concerned with promoting Communist Party ideology than independent scholarship. They try to pressure Chinese students to self-censor their views while studying here, and they use campus proxies to monitor both U.S. and foreign students and staff.

And we know they use financial donations as leverage, to discourage American universities from hosting speakers with views the Chinese Communist Government doesn't like.”

After reciting that wide-ranging catalogue of what the FBI “know[s],” much of which went far beyond the alleged facts of Professor Chen's case, Mr. Bonavolonta adds, “We are not suggesting that all, or even most, Chinese students, professors, and researchers are somehow up to no good.” But by that point in his press release, his protest rings fairly hollow.

When then-Attorney General Jeff Sessions launched the Department of Justice “China Initiative,” then-Assistant Attorney General for National Security John Demers [made it clear](#) that U.S. Attorneys were expected to bring more cases under that initiative: “You're going to do maybe one, which would be great. If you do two, that's very impressive. If you do none, that's understandable and you'll get there next year.” Such numbers may not seem large, but these cases are complicated and challenging, and sometimes at the end of the day there isn't a good case to be brought. But that conclusion would be inconsistent with Demers' expectations.

The bottom line is that it's dangerous for DOJ to even suggest that it is eyeing its U.S. Attorneys offices, expecting them to bring the next indictment. Why? Because DOJ is never able to resist turning a goal into a performance measurement. With messages like Demers' coming from Main Justice, it is no surprise that the FBI – which is part of the Department of Justice – soon took to proudly [declaring](#) that “the FBI is opening a new China-related counterintelligence case about every 10 hours.” Of course, opening an investigation at the FBI requires only the thinnest justification; that is, it doesn't have to meet any legal standard. So, one might ask, is a new China-related investigation being opened every 10 hours because the evidence justifies it or because the FBI is stretching to reach an expected result? It's an important question to ask, because to some extent FBI agents, their



supervisors, prosecutors and U.S. Attorneys are all evaluated – formally or informally – on how well they satisfy the expectations of a national “initiative.”

Government prosecutors are stewards of the criminal justice system, and they have an obligation not to cast too wide a net simply because, as appears to be the case with the “China Initiative,” they are worried about being behind the curve in addressing a problem. America is a great country, but law enforcement should keep in mind that it is also a country that once also passed – and vigorously enforced – a law called “the Chinese Exclusion Act.” “Initiatives” are crude political vehicles poorly suited to the exacting, consequential work of criminal prosecution. For that reason, the Department of Justice should always think long and hard about the unintended consequences of rolling out yet another such “initiative.” Clearly that wasn’t done here.

<sup>1</sup> Twenty years after its inception, Project Safe Neighborhoods now touts a revised purpose that moves away from the problematic goal of increasing criminal prosecution statistics. <https://www.justice.gov/psn> (“And the Department expressly underscores that the fundamental goal of this work is to reduce violent crime in the places we call home, not to increase the number of arrests or prosecutions as if they were ends in themselves.”)



## Commentary

### Commentary by Ashley Gorski & Patrick Toomey<sup>1</sup>

Andrew Kim’s study is a critically important illustration of bias in prosecutions of individuals of Asian heritage under the Economic Espionage Act (EEA). By quantifying the ethnicity of individuals prosecuted under the EEA and their sentences, Kim has helped to establish that concerns about prosecutorial bias against Asian communities are well-founded.

While the white paper shines much-needed light on the government’s targeting of Asian communities in the name of national security, this targeting sweeps even more broadly than the white paper’s analysis might suggest. As Kim notes, the study does not address the enormous volume of *non*-EEA charges brought against individuals of Asian descent, in cases where the government was purportedly seeking to combat economic espionage and trade secrets theft.

Under the so-called “China Initiative,” the Department of Justice has aggressively prosecuted scientists and academics at U.S. universities and research institutions, seeking to criminalize conduct far beyond the bounds of the EEA. Although the China Initiative has been cast as an effort to address economic espionage and the theft of trade secrets, many of the resulting prosecutions include no EEA charges whatsoever, but instead concern alleged false statements to government officials, visa fraud, or tax avoidance. Most disturbingly, many China Initiative prosecutions are based on scientists’ alleged failures to adequately disclose their work history or international collaborations—conduct that, just a few years earlier, would have been addressed through civil or administrative processes.<sup>2</sup> But today, under the China Initiative, these failures-to-disclose form the basis for significant criminal charges and penalties.

As part of this effort, high-ranking officials have cast broad suspicion on scientists, technologists, and academics of Chinese heritage, encouraging FBI agents and prosecutors around the country to find and bring China Initiative cases. For example, FBI Director Christopher Wray has described the “China threat” as “not just a whole of government threat, but a whole of society threat on their end,” requiring “a whole of society response by us.”<sup>3</sup> Agents and prosecutors have heeded the call, subjecting individuals with ties to China to disproportionate scrutiny, extreme charging decisions, and novel prosecution theories.

Unsurprisingly, several of the government’s prosecutions of scientists of Asian descent have been based on faulty grounds. Below, to help provide greater context for Kim’s study, we discuss in detail the cases of five scientists of Asian heritage who were prosecuted for offenses unrelated to the EEA. In Part I, we discuss the cases of Dr. Xiaoxing Xi, Sherry Chen, and Dr. Chen Song, all of which involved weak, stretched, or flatly wrong prosecution theories. In Part II, we discuss the cases of Dr. Feng Tao and Dr. Anming Hu, both of which reflect the government’s criminalization of employment or administrative matters. And in Part III, we discuss the immense consequences of these discriminatory prosecutions for the lives of the people targeted and their families.

#### **I. Prosecutors have regularly resorted to charging scientists of Asian heritage with non-EEA offenses that rest on weak, stretched, or flatly wrong prosecution theories.**

Even before the China Initiative, the Department of Justice and the FBI brought non-EEA cases that were based on entirely incorrect facts. One of the most striking examples involves Professor



Xiaoxing Xi, a Chinese American scientist whom the government wrongly accused of wire fraud in 2015.<sup>4</sup> The government claimed that Dr. Xi had been sharing information about a sensitive technology known as a “pocket heater”<sup>5</sup> with scientists in China, and that those communications violated a legal agreement Dr. Xi had signed with the company that owned the pocket heater. But the government’s accusations were entirely false.

As “proof” of its accusations, the FBI pointed to several of Dr. Xi’s emails, which it had acquired under a law authorizing surveillance of foreign agents.<sup>6</sup> However, these emails consisted of routine academic correspondence between the professor and his colleagues about Dr. Xi’s own research—research that had been public for years, and that had nothing to do with the FBI’s claims. After Dr. Xi and his defense attorneys presented this information to prosecutors, the government dismissed the indictment.<sup>7</sup> But as discussed below, the harm to Dr. Xi and his family was already significant.

In another high-profile case, the government charged Sherry Chen, a Chinese American hydrologist employed by the U.S. National Weather Service, with making false statements to government investigators and unlawfully downloading data from a restricted government database. According to the *New York Times*, “prosecutors hunted for evidence of espionage, failed and settled on lesser charges”—charges that they ultimately dropped five months later, but that still upended Ms. Chen’s life. *See infra*.<sup>8</sup>

These charges stemmed from a 2012 trip to Beijing, where Ms. Chen met briefly with one of her former classmates, Jiao Yong. According to Ms. Chen, she had hoped that Mr. Jiao—who had become vice minister of China’s Ministry of Water Resources—could intervene in a familial dispute concerning a water pipeline.<sup>9</sup> Toward the end of their conversation, Mr. Jiao raised the issue of reservoir repairs and asked Ms. Chen how these repairs are funded in the United States. Ms. Chen was embarrassed that she did not know the answer and told Mr. Jiao that she would find out.<sup>10</sup> After returning to the United States, Ms. Chen began researching the issue, including by accessing the National Inventory of Dams database. This database is largely accessible to the public, with a small portion accessible only to government workers. Ms. Chen asked a colleague, who had already made the password available to their entire office, to send her the password, which she used to download information relevant to her work. Ms. Chen later sent Mr. Jiao an email with a link to the publicly available database, explaining that if he needed more information, he should contact a colleague of hers.<sup>11</sup>

A year later, in 2013, two special agents from the Commerce Department visited Ms. Chen and interrogated her for seven hours about her use of the password and her 15-minute visit with Mr. Jiao. During that interrogation, Ms. Chen misstated the year that she visited Mr. Jiao, recalling the trip as taking place in 2011, not 2012.<sup>12</sup> In 2014, the government charged Ms. Chen with two counts of unlawfully downloading data from a government database and two counts of making false statements to federal agents. After Ms. Chen’s lawyer met with prosecutors and raised questions about the government’s case, the prosecutors dropped the charges. A federal administrative judge later observed that investigators “found no evidence that Ms. Chen had ever provided secret, classified, or proprietary information to a Chinese official or anyone outside of the agency.”<sup>13</sup>

In July 2021, the Senate Commerce Committee released a report summarizing its investigation into the Commerce Department office that was responsible for the interrogation of Ms. Chen.<sup>14</sup> It



found that this “threat management” office operated entirely outside the law. Without legal authority to even conduct criminal investigations, this office for years conducted baseless and discriminatory investigations of government employees of Asian descent, sometimes with the help of the FBI and CIA.<sup>15</sup> The Senate report specifically highlighted Ms. Chen’s case as an investigation that was “conducted in an overzealous manner,” where agents “abused steps in the investigative process.”<sup>16</sup>

In another set of overzealous prosecutions, the Biden administration recently dismissed five visa fraud cases brought against Chinese nationals, stating that the prosecutions were no longer “in the interest of justice.”<sup>17</sup> One of these cases involves a neurologist and Chinese national, Dr. Chen Song, who allegedly concealed her employment at an Air Force hospital in her visa application. Although the government never accused Dr. Song of spying or economic espionage, she faced years in prison for the alleged visa fraud and charges related to obstruction of justice.<sup>18</sup> The Biden administration dropped its charges against Dr. Song and other researchers after the disclosure of a report by FBI analysts, which raised concerns that the visa application question on “military service” may not be clear enough for Chinese medical scientists at military universities and hospitals.<sup>19</sup>

The cases of Dr. Xi, Ms. Chen, and Dr. Song are not isolated examples of weak or faulty prosecutions of scientists of Chinese descent. Several other recent prosecutions of Chinese and Chinese American scientists have resulted in acquittals, hung juries, or DOJ’s dropping charges, as discussed below.

## **II. Prosecutors have sought to criminalize employment and administrative matters involving scientists of Asian heritage.**

Under the China Initiative, the government has also sought to criminalize conduct that historically would have been addressed through civil or administrative processes. In some cases, the government has advanced novel theories of criminal liability, only to abandon them. But even if the facts of some cases *could* support criminal charges, it is a misuse of prosecutorial discretion to selectively pursue harsh criminal penalties in cases involving people of Asian descent or with ties to China.

For instance, the government continues to prosecute Dr. Feng Tao, a chemical engineering professor at the University of Kansas, for allegedly failing to disclose an affiliation with a university in China and with a talent-recruitment program.<sup>20</sup> Professor Tao has been employed at the University of Kansas since 2014, where he conducts research on technology designed to conserve natural resources. Prosecutors do not accuse Dr. Tao of espionage or trade-secrets theft; instead, they have charged him with multiple counts of wire fraud and making false statements in a government matter.<sup>21</sup> They contend Dr. Tao sought to defraud Kansas University of his salary, as well as the U.S. Department of Energy and the National Science Foundation, whose grants partially funded his salary. But nondisclosure of a relationship with a Chinese university is not a crime, nor is association with a talent program. Indeed, until recently, U.S. institutions broadly encouraged participation in foreign-talent programs as an ordinary part of international academic collaboration.<sup>22</sup>

The government first charged Professor Tao in 2019 with program fraud and wire fraud. Since that time, it has filed two superseding indictments, adding and dropping various charges in an effort to substantiate its theory of the case.<sup>23</sup> As Dr. Tao’s defense counsel have explained, the prosecution’s current theory has far-reaching consequences for DOJ’s power to criminalize workplace communications. If successful, it would mean that any employee who makes a material



misrepresentation to his employer via email, mail, or phone, could be subject to a felony for mail or wire fraud—a crime with a penalty of up to 20 years in prison.<sup>24</sup>

Another example of the criminalization of an administrative matter is the government’s prosecution of Anming Hu, a Canadian citizen and expert in a specialized welding technique who was, until recently, a scientist at the University of Tennessee at Knoxville.<sup>25</sup> The government charged Dr. Hu with three counts of wire fraud and three counts of making false statements in connection with his alleged failure to disclose his ties to a Chinese university when applying for two NASA grants.<sup>26</sup>

Prosecutors brought these charges after nearly two years of surveilling Hu and failing to find evidence of espionage.<sup>27</sup> An FBI agent began scrutinizing Dr. Hu after receiving a tip that he was associated with China’s Thousand Talents program. Soon after, the agent interviewed Dr. Hu, who explained that he had ties to the Beijing University of Technology—ties that he had repeatedly disclosed to the University of Tennessee. At that point, the FBI agent asked Dr. Hu to spy for the FBI, and Dr. Hu declined. A team of FBI agents then monitored Dr. Hu and his son, a freshman at the University of Tennessee, for 21 months.<sup>28</sup>

During Dr. Hu’s trial in 2021, the FBI agent who had originally interviewed him admitted that he had falsely accused Dr. Hu of spying for China, used false information to put Dr. Hu on the federal no-fly list, and pushed U.S. customs agents to seize Dr. Hu’s laptop and phone.<sup>29</sup> The agent also testified that he shared a presentation with University of Tennessee administrators that described Dr. Hu’s purported ties to the Chinese military. Following that presentation, the university terminated Dr. Hu’s employment. But at trial, the FBI agent testified that his accusations were false, and that “Hu wasn’t involved with the Chinese military.”<sup>30</sup> Additional testimony from other witnesses undermined the government’s contention that Dr. Hu intentionally withheld information from NASA.<sup>31</sup>

The jury in Dr. Hu’s case deadlocked, and the court declared a mistrial. After the government attempted to retry the case, the federal judge presiding over the prosecution acquitted Dr. Hu of all charges. The court held that no rational jury could find Dr. Hu guilty of a scheme to defraud NASA or of making false statements.<sup>32</sup>

\* \* \*

The result of the government’s sprawling, aggressive approach has been a disproportionate number of failed or abandoned prosecutions. The white paper’s statistics capture this reality, but many of the individual cases described above highlight just how flawed the government’s prosecutions have often been. Other cases include the prosecution of Dr. Qing Wang, a Cleveland Clinic doctor who was wrongly charged with making false claims and wire fraud before prosecutors abandoned the case in July 2021;<sup>33</sup> Ehab Meselhe and Kelin Hu, coastal research scientists wrongly accused of conspiring to steal trade secrets in 2019;<sup>34</sup> Guoqing Cao and Shuyu Li, senior biologists at Eli Lilly & Company, whose cases were dismissed in December 2014;<sup>35</sup> Ning Xi, a robotics expert at Michigan State University, who was cleared of wire fraud charges after a mistrial;<sup>36</sup> Jing Zeng, a former employee of gaming company Machine Zone, who was acquitted of a computer fraud and abuse charge after prosecutors dropped other charges related to theft of trade secrets;<sup>37</sup> and Xiaorong Wang, a research scientist at the Bridgestone Americas Center for Research and Technology in Akron, Ohio, who was cleared of economic espionage charges in 2012 after the judge rejected the government’s evidence.<sup>38</sup> This is only a sampling of the reported cases.<sup>39</sup>



While other prosecutions have resulted in guilty pleas and convictions, this pattern of overreach should come as little surprise. The government’s framing and rhetoric around the China Initiative has led to profiling and overzealous investigations, encouraging agents and prosecutors to look for people and alleged crimes that “fit” DOJ’s initiative. Profiling like this produces weak cases in court because it is especially prone to confirmation bias—where investigators interpret facts to fit a preexisting belief, suspicion, or bias, rather than examining the evidence objectively for weaknesses or alternative explanations.

### III. The human impact of these prosecutions is immense.

Even when the government ultimately abandons a prosecution, the effects for innocent individuals and their families are devastating. The slate is not simply wiped clean: the ordeal itself is terrifying and the consequences long-lasting. In Xiaoxing Xi’s case, FBI agents stormed his home at dawn one morning in May 2015, weapons drawn. His wife and young daughters, held by the FBI agents at gunpoint, watched as Dr. Xi was forcefully arrested and taken away in handcuffs. He was strip-searched, subjected to interrogation on the false premise that he was a spy for China, and told that he faced charges for which he could be imprisoned for 80 years and fined \$1 million. Over the next four months, Dr. Xi and his family lived under the cloud of this prosecution, his travel was restricted, he was suspended from his position as the interim chair of the Physics Department, he was denied access to his lab and to the graduate students working under his supervision, and he had to pay substantial legal fees to defend himself. His entire family bears the scars of this experience.<sup>40</sup>

Similarly, in Sherry Chen’s case, her arrest was only the beginning: she was suspended without pay from her job at the National Weather Service, she had to turn to family in China to support her legal defense, friends and co-workers distanced themselves in the face of the government’s shocking criminal charges, and television crews parked outside her house in suburban Ohio, hoping to capture a shot of the hydrologist prosecutors had accused of being a foreign spy.<sup>41</sup> As Ms. Chen later told the *New York Times*, “I could not sleep. I could not eat. I did nothing but cry for days.” To this day—even after revelations of gross abuses by Commerce Department investigators—Ms. Chen remains suspended from her job at the National Weather Service as she continues to fight for reinstatement and backpay. The government, rather than apologize, hid evidence of misconduct for years and appealed an employment decision overwhelmingly finding for Ms. Chen.

Finally, this commentary—like the white paper itself—has focused on the government’s prosecutions, but the China Initiative’s impact on Asian Americans has been far broader. The initiative has fed suspicion within universities and research institutions, fueled by rhetoric from top FBI officials and more than 10,000 letters dispatched by the National Institutes of Health urging institutions to meet with FBI agents or investigate individual scientists.<sup>42</sup> Asian American scientists have had their email accounts secretly searched by their employers and then turned over to the FBI,<sup>43</sup> and they have been subjected to highly irregular disciplinary processes at some prominent institutions.<sup>44</sup> These steps and others have chilled international collaboration with scientists in China—when the same collaborations would have been celebrated by research institutions just a few years ago—and have sown widespread confusion over disclosure requirements. The resulting climate of fear and suspicion has encouraged an exodus of talented scientists from the United States, and discouraged others from ever coming to study or work in the United States in the first place.<sup>45</sup> That is a significant loss for the United States in terms of scientific innovation. Most of all, it is a sign of how difficult and uncertain life has become under the Department of Justice’s China Initiative for many Asian American scientists and their families.



<sup>1</sup> The authors are Senior Staff Attorneys in the ACLU’s National Security Project. The views expressed here are their own.

<sup>2</sup> See Margaret K. Lewis, *Criminalizing China*, 111 *J. Crim. L. & Criminology* 145, 146 (2020); see also Dep’t of Justice, *Information About the Department of Justice’s China Initiative and a Compilation of China-Related Prosecutions Since 2018*, June 14, 2021, <https://www.justice.gov/nsd/information-about-department-justice-s-china-initiative-and-compilation-china-related>.

<sup>3</sup> *Open Hearing on Worldwide Threats: Hearing Before the S. Select Comm. on Intel.*, 115th Cong. 2 (2018), <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-0>.

<sup>4</sup> The American Civil Liberties Union and the civil rights law firm Kairys, Rudovsky, Messing, Feinberg & Lin LLP represent Dr. Xi in a civil suit challenging the government’s wrongful investigation and prosecution of him.

<sup>5</sup> Matt Apuzzo, *U.S. Drops Charges That Professor Shared Technology With China*, *N.Y. Times* (Sept. 11, 2015), <https://www.nytimes.com/2015/09/12/us/politics/us-drops-charges-that-professor-shared-technology-with-china.html>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Nicole Perlroth, *Accused of Spying, Until She Wasn’t*, *N.Y. Times* (May 9, 2015), <https://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Slip Op. at 11–13, *Chen v. Dep’t of Commerce*, No. CH-0752-17-0028-I-1 (M.S.P.B. Apr. 23, 2018), available at [https://www.sherrychendefensefund.org/uploads/9/9/2/8/99280080/chen\\_v\\_dept\\_of\\_commerce-ch-0752-17-0028-i-1-\\_initial\\_decision.pdf](https://www.sherrychendefensefund.org/uploads/9/9/2/8/99280080/chen_v_dept_of_commerce-ch-0752-17-0028-i-1-_initial_decision.pdf).

<sup>12</sup> *Id.* at 57 n.33.

<sup>13</sup> *Id.* at 62.

<sup>14</sup> See U.S. Senate Comm. on Commerce, Science, & Transportation, *Committee Investigation Report: Abuse & Misconduct at the Commerce Department* (July 2021), <https://www.commerce.senate.gov/services/files/3893917C-A6CE-4D6C-AA9D-781401322BF3>.

<sup>15</sup> *Id.* at 4–5, 12, 18.

<sup>16</sup> *Id.* at 12.

<sup>17</sup> Aruna Viswanatha, *U.S. Drops Visa Fraud Cases Against Five Chinese Researchers*, *Wall St. J.* (July 23, 2021), <https://www.wsj.com/articles/u-s-drops-visa-fraud-cases-against-5-chinese-researchers-11627074870>.

<sup>18</sup> Nicholas Iovino, *Feds Abruptly Drop Visa Fraud Charges Against Chinese Military Scientists*, *Courthouse News Serv.* (July 23, 2021), <https://www.courthousenews.com/feds-abruptly-drop-visa-fraud-charges-against-chinese-military-scientists>.



<sup>19</sup> Jane L. Lee, U.S. Moves To Drop Visa Fraud Charges Against Chinese Researcher, Reuters (July 23, 2021), <https://www.reuters.com/world/china/us-moves-drop-charges-against-chinese-researcher-arrested-visa-fraud-2021-07-23>.

<sup>20</sup> Roxana Hegeman & Eric Tucker, Filing: Kansas Prof's Prosecution Criminalizes Job Disputes, Wash. Post (Aug. 14, 2020), [https://www.washingtonpost.com/local/education/filing-kansas-profs-prosecution-criminalizes-job-disputes/2020/08/14/9a2dbfe0-de36-11ea-b4f1-25b762cddb4\\_story.html](https://www.washingtonpost.com/local/education/filing-kansas-profs-prosecution-criminalizes-job-disputes/2020/08/14/9a2dbfe0-de36-11ea-b4f1-25b762cddb4_story.html).

<sup>21</sup> Mot. To Dismiss the Second Superseding Indictment at 2, 41, United States v. Feng Tao, No. 19-20052-JAR-JPO (D. Kan. Aug. 14, 2020) (ECF No. 82) (“Tao MTD”).

<sup>22</sup> See, e.g., Elias Zerhouni, Chinese Scientists & Security, Science (July 5, 2019), <https://science.sciencemag.org/content/365/6448/9>.

<sup>23</sup> Tao MTD at 4–5.

<sup>24</sup> *Id.* at 42.

<sup>25</sup> Mara Hvistendahl, “Ridiculous Case”: Juror Criticizes DOJ for Charging Scientist With Hiding Ties to China, Intercept (June 23, 2021), <https://theintercept.com/2021/06/23/anming-hu-trial-fbi-china>.

<sup>26</sup> Jamie Satterfield, Former University of Tennessee Professor Falsely Accused of Espionage Faces Second Trial, Knoxville News Sentinel (Aug. 2, 2021), <https://www.knoxnews.com/story/news/crime/2021/08/02/tennessee-professor-anming-hu-accused-spying-faces-second-trial/5457371001>.

<sup>27</sup> Hvistendahl, *supra* note 25.

<sup>28</sup> Jamie Satterfield, Trial Reveals Federal Agents Falsely Accused a UT Professor Born in China of Spying, Knoxville News Sentinel (June 13, 2021), <https://www.knoxnews.com/story/news/crime/2021/06/14/federal-agents-falsely-accused-university-of-tennessee-professor-spying-china/7649378002>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Satterfield, Former University of Tennessee Professor Falsely Accused of Espionage Faces Second Trial, *supra* note 26.

<sup>32</sup> Mem. Op. & Order, United States v. Anming Hu, No. 3:20-CR-021-TAV-DCP (E.D. Tenn. Sept. 9, 2021) (ECF No. 141).

<sup>33</sup> Ron Regan, Fed. Prosecutors Dismiss Criminal Case Involving Former Cleveland Clinic Doctor with Ties to China, News 5 Cleveland (July 15, 2021), <https://www.news5cleveland.com/news/local-news/investigations/fed-prosecutors-dismiss-criminal-case-involving-former-cleveland-clinic-doctor-with-ties-to-china>.

<sup>34</sup> Rebecca Santana, Scientist Ready to Get Back to Work After Case Dismissed, ABC News (July 16, 2019), <https://abcnews.go.com/US/wireStory/scientist-ready-back-work-case-dismissed-64377528>.

<sup>35</sup> Jeff Swiatek & Kristine Guerra, Feds Dismiss Charges Against Former Eli Lilly Scientists Accused of Stealing Trade Secrets, Indy Star (Dec. 5, 2014), <https://www.indystar.com/story/news/crime/2014/12/05/fedsdismisscharges-former-eli-lilly-scientists-accused-stealing-trade-secrets/19959235>.



<sup>36</sup> Jon Agar, Ex-MSU Professor, World-Renowned Robotics Expert Cleared of Wire Fraud, MLive.com (July 20, 2019), <https://www.mlive.com/news/grand-rapids/2019/07/ex-msu-professor-world-renowned-robotics-expert-cleared-of-wire-fraud.html>.

<sup>37</sup> Foley & Larder LLP, Foley Obtains Acquittal for Former Machine Zone Employee (Dec. 6, 2017), <https://www.foley.com/en/insights/news/2017/12/foley-obtains-acquittal-for-former-machine-zone-em>.

<sup>38</sup> Alison Grant, Ex-Bridgestone Scientist Cleared of Trade Secret Theft Charges, Cleveland.com (Jan. 12, 2019), [https://www.cleveland.com/business/2012/10/former\\_bridgestone\\_scientist\\_c.html](https://www.cleveland.com/business/2012/10/former_bridgestone_scientist_c.html).

<sup>39</sup> Jeremy Wu has cataloged materials related to many of these cases—and many other China Initiative prosecutions—at this extraordinarily useful resource: <https://jeremy-wu.info/fed-cases>.

<sup>40</sup> Joyce Xi, The FBI Wrongly Accused My Father of Spying for China. Government Has a Role in Anti-Asian Violence, USA Today (Apr. 29, 2021), <https://www.usatoday.com/story/opinion/voices/2021/04/27/chinese-american-professor-bias-fbi-attacks-government-column/7385996002>

<sup>41</sup> Nicole Perloth, Accused of Spying for China, Until She Wasn't, supra note 8; see also Angela Fritz, Falsely Accused of Spying, Weather Service Employee's Life Turned Upside Down, Wash. Post (May 12, 2015), <https://www.washingtonpost.com/news/capital-weather-gang/wp/2015/05/12/falsely-accused-of-spying-weather-service-employees-life-turned-upside-down/>.

<sup>42</sup> Chia-Yi Hou, Three Researchers Ousted from MD Anderson, The Scientist (Apr. 22, 2019) <https://www.the-scientist.com/newsopinion/three-researchers-ousted-from-md-anderson-65772>.

<sup>43</sup> Beth Mole, NIH, FBI Accuse Scientists in US of Sending IP to China, Running Shadow Labs, Ars Technica (Apr. 22, 2019), <https://arstechnica.com/science/2019/04/nih-fbi-accuse-scientists-in-us-of-sending-ip-to-china-running-shadow-labs>.

<sup>44</sup> Peter Waldman, Anti-Asian Atmosphere Chills Chinese Scientists Working in the U.S., MSN.com (Apr. 26, 2021), <https://www.msn.com/en-us/news/us/anti-asian-atmosphere-chills-chinese-scientists-working-in-the-u-s/ar-BB1g3Tnp>.

<sup>45</sup> *Id*



## Commentary

What We Know—and Know We Don’t Know—About Economic Espionage and Being ‘Chinese’

Margaret K. Lewis<sup>1</sup>

*Commentary on Andrew Chongseh Kim’s  
“Racial Disparities in Economic Espionage Act cases 1996-2020” (data as of 4/6/2021)*

“There are known knowns. There are things we know we know. We also know there are known unknowns. That is to say, we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know”

—Feb. 12, 2002, Donald Rumsfeld, Secretary of Defense.

Reviewing Andrew Kim’s work soon after the passing of former Secretary of Defense Donald Rumsfeld turned my thoughts to his famous quote. There is a lot that we know, and a lot that we do not know, about the threat of economic espionage related to China and about America’s response to that threat. Kim’s study on Economic Espionage Act (EEA) cases enlarges the ‘known knowns’ about certain DOJ prosecutions and, in the process, highlights the significant ‘known unknowns.’ For example, it is unclear to what extent DOJ’s messaging of deterring illegal activities is spilling over into a wider chilling effect that could impede American innovation not just for the length of the China Initiative (however long that might be) but also in the decades ahead. Kim’s work also leads us inevitably to the questions of what ‘unknown unknowns’ are not even on our radar screen and how, through collaboration with the government, we can get to a better place for both promoting US-based innovation and decreasing bias.

Among the knowns, it is well established that people with connections to the governing party-state structure of the People’s Republic of China (PRC or China) have engaged in trade secret theft and other activities that are criminal under US law. There is a threat, but the scale and scope of that threat is debated. Similarly, we know that the US government has taken actions in response to this threat; much of the government response is, however, shrouded in opacity because of prosecutorial discretion and national security. We thus know little about how effective the government’s response has been in combatting this amorphous threat.

Kim’s study does not help us with the question of scale and scope of the threat related to China. His research found that 40% of the alleged beneficiaries of the IP theft had PRC nationality and 47% of defendants were “Asian” (including 38% Chinese). But that of course does not tell us whether these percentages hold for unprosecuted and even undetected theft. Perhaps, along the lines of “driving while black or brown,” the government disproportionately catches and charges people of Asian descent for crimes because investigations are focused on them due to bias (explicit and/or implicit), a possibility Kim previously coined as “researching while Asian.” Or maybe this ratio shows that, not only is the PRC a disproportionate threat to America, but also that this threat manifests itself in illegal activities by people of Asian descent, and particularly of PRC nationality and/or Chinese ethnicity.



Kim’s study further highlights the challenges of what kinds of personal connectivity to “China” are indicators of a statistically higher likelihood of prosecution. He primarily uses Chinese and Western names as proxies for ethnicity.<sup>2</sup> Even allowing for some wiggle room for last names not always accurately reflecting a person’s ethnic heritage, Kim’s study shows that people of Chinese heritage (whether or not they currently hold PRC citizenship) constitute more than a third of all prosecutions, and the proportion of defendants of Chinese heritage has grown over the years. His data also shows that approximately half of the Chinese-heritage defendants were also PRC citizens. That said, one issue that we cannot disentangle from the cases is the extent to which being Chinese American (or Chinese Canadian, like [Anming Hu](#), or other nationality), as compared with a PRC national, changes treatment and outcomes.

A more uncomfortable “unknown” is whether the treatment and outcomes for Chinese-heritage persons are justified based on factors unrelated to their heritage. The government insists it is only investigating criminal activity—that so many suspects are of Chinese ethnicity and/or PRC nationality because of what they do, not because of who they are. In other words, the government argues that disproportionate effects do not establish discriminatory intent—which is true—and, accordingly, it is not engaging in racial profiling. But this explanation fails to grapple with deeper concerns: the government’s generic denial does not assuage concerns that some combination of racism and xenophobia—whether conscious or unconscious—is influencing how the government is investigating and charging EEA cases. It also bears emphasizing that the US government does not think with a single mind. In my experience, there is variance among individuals working at the DOJ, FBI, and other parts of the U.S. government with respect to how seriously they view concerns about bias.

As work in this area continues, I suggest that one concrete step to a more productive conversation between the US government and groups with concerns about “researching while Asian” is to clarify terminology. Here I have used “Chinese-heritage” to lump together PRC nationals and people of Chinese descent who hold foreign passports—the former having immediate ties to the PRC as well as likely longer heritage ties. Kim for parts of his analysis separates nationality and ethnicity, which can help distinguish the extent to which xenophobia and not just racism might be in play. Including other “Asians” adds a layer of complexity; for instance, to what extent are people who appear to have some ancestral link to China (e.g., Singaporean [Jun Wei “Dickson” Yeo](#)) exhibiting different treatment and/or outcomes as compared with people from say India with no apparent or known ties to China. Or what about [defendants from Taiwan](#), where the majority of the population is Han Chinese but even members of that group vary dramatically in the proximity of their ties (and current views on) the PRC. Clarifying terminology is not in itself a solution to concerns, but it could help pave the way for a more precise and constructive conversation.

At present, the government’s approach to “[countering Chinese national security threats](#)” is worrisome. For example, we know that the FBI’s [thousands](#) of investigations under the China Initiative [have not, at least to date, unearthed widespread criminal activity](#) among researchers resulting in numerous convictions. Viewed in a favorable light to the US government, this substantial attrition could be the result of a highly judicious process of deciding which investigations proceed to charging with the bulk instead being dropped or handled through other forms of mitigation, such as administrative measures. On the flip side, widespread investigations with few convictions could be caused by sweeping with a broad net—in the process potentially causing serious consequences for people being



investigated—and then not finding evidence that is sufficient to meet the high beyond-a-reasonable-doubt standard for criminal convictions.

Those of us outside the government simply do not know which scenario is dominant: a judicious culling of well-founded investigations or an expansive dragnet that is creating enhanced suspicion at least in part because of people’s connectivity to the PRC. This inquiry is critical because the stakes are so high. Investigation alone can destroy careers and lives. For the cases that proceed beyond investigation to actual charges, Kim’s use of “Committed real crimes but not spying” as compared with “Process offences and minor crimes” suggests that the latter are quite light when [false statements](#) can carry a sentence of five years (and increase to eight in certain circumstances) and [grant fraud](#) can carry a sentence of ten years. These and other non-espionage and non-IP-theft charges being charged under and prior to the China Initiative are serious felonies.

Again, the lack of transparency is partially understandable because of the need for law enforcement to be able to build cases without exposing an ongoing investigation. The national security overlay to many of these cases heightens opacity. That said, it is fair to request greater clarity about how cases originate and how they are screened and supervised. Additional information regarding the process would at least shed some light on whether the disparities are based on justifiable reasons.

In critiquing the US government’s approach, Kim’s study does not claim that the US government is intentionally prosecuting people simply because of their ethnicity, national origin, or both. Similarly, I have argued elsewhere that such express bias is not required to conclude that the China Initiative is fatally flawed. Lumping together cases as part of a “[China threat](#)” with language about what “[China](#)” [has stolen](#) depicts a xenophobic, existential threat rather than a focus on individualized judgments about potential criminal liability.

For example, when announcing charges against a “Chinese National,” then Assistant Attorney General John Demers [stated](#), “What China cannot develop itself, it acquires illegally through others. This is yet another example of a proxy acting to further China’s malign interests.” Andrew Lelling, the former United States Attorney for the District of Massachusetts, [asserted](#) when bringing fraud charges against naturalized US citizen and MIT Professor Gang Chen, “The allegations of the complaint imply that this was not just about greed, but about loyalty to China.”

Such negative depictions under the “China Initiative” umbrella at a minimum undermine the spirit of the [Justice Manual](#), which provides that prosecutors “should not be influenced by” a person’s race or national origin. Even taking as true government assurances that there is no intentional focus on certain groups, the term [influenced by](#) goes beyond explicit bias to include implicit bias, which affects law enforcement because, as Attorney General Merrick Garland explained, “[every human being has biases](#).” Yet the Initiative’s dominant national-security framing has downplayed how unconscious bias can impact decision-making. The [American Bar Association](#), for instance, has created resources on how prosecutors’ [innate attitudes shape behavior and can distort justice](#).

It is unclear what role bias might play in Kim’s analysis of the crimes for which people are charged and eventually convicted. The mere fact that the crimes for which someone is convicted are different from those which were initially investigated, or that some cases are dropped, is not surprising. That is part and parcel of how the US federal criminal justice system operates.



What is eyebrow raising is that for most of the years in the study, a noticeably larger percentage of Chinese-heritage defendants are not convicted as compared with those coded as Western. (Although the non-conviction rate was similar for Western and Chinese named defendants in the latter period of the study, this was because the non-conviction rate for Western named defendants increased under Trump, rather than decreasing for Chinese named defendants.)

It is possible that factors unrelated to race or nationality can explain this (e.g., perhaps the cases involving Chinese-heritage defendants just happened to be those in which important evidence was suppressed because it was obtained in violation of the defendant’s rights without any discernible connection to the characteristics of the defendant). But can the government provide an explanation that is race and nationality neutral?

Likewise, areas warranting further study are whether Kim’s noted discrepancies in arrest procedures, press-release frequency, and sentencing outcomes can be explained by race- and nationality-neutral factors. Although Kim’s study shows that Chinese-heritage defendants receive much harsher sentences, it does not address whether those cases involve larger dollar amounts of theft or other severe circumstances that would justify higher sentences.

Finally, Kim’s study raises a crucial question that is not legal in nature: at a time that the United States seeks to enhance its long-term economic competitiveness by encouraging science and technology, how is the information viewed by people who can help achieve that aim even if they never have any contact with law enforcement?

The China Initiative and earlier cases have created a chilling effect on the United States’ ability to retain and attract the research talent needed for its own economic competitiveness. On June 30, for example, a Congressional Roundtable examined “Researching While Chinese American: Ethnic Profiling, Chinese American Scientists and a New American Brain Drain.”

In February 2020, Andrew Lelling explained that “[t]he primary goal of the China Initiative is to sensitize private industry and academic institutions to this problem [of IP theft connected to the PRC]” and that academic institutes might think harder about collaboration with PRC-linked entities in the future. When asked if this approach would have a chilling effect on collaboration with Chinese entities, he responded, “Yes, it will.”

Increasingly a concern is that people based in the United States will actually leave as well as that the pipeline of graduate students from China will dry up: it is not just a question of whether collaboration with entities in China will decrease but also whether people in the United States—or who were considering moving to the United States—will instead be a full-time part of China-based drivers of the PRC party-state’s innovation goals. DOJ’s decision on July 30 to seek a retrial of Anming Hu after the jury deadlocked in the first trial will only deepen the chill.

We are unable to quantify the extent of this chill, but the fear among Chinese Americans and PRC nationals working in the United States is real, and their voicing of this fear deserves to be taken seriously. Enhancing research security in a country-neutral manner that takes into consideration the lived experience of people of Chinese heritage can help chart a better path to mitigating security risks while incentivizing US-based research. Ultimately, a hope is that the ‘unknown unknowns’ of future science and technology breakthroughs be done by people whose lives are rooted in the United States.



<sup>1</sup> Professor of Law, Seton Hall University. This Commentary draws on my article Criminalizing China and related writings on the China Initiative.

<sup>2</sup> I use “ethnicity” though “race” is also used in discussions around EEA cases and the China Initiative. The US census includes “Asian” as a [racial category](#). I use “ethnicity” to emphasize common ties to the PRC or, if pre-dating 1949, the area that is now the PRC (see, e.g., “[Ethnicity](#) denotes groups, such as Irish, Fijian, or Sioux, etc. that share a common identity-based ancestry, language, or culture.”). I do, however, use “racism” to encompass discrimination based on ethnicity.



## Commentary

### A Deeper Look at Department of Justice Data and the “China Initiative”

Jeremy S. Wu, Ph. D.<sup>1</sup>  
September 10, 2021

“In God we trust, all others bring data.”  
- W. Edwards Deming, Statistician

“It was the most ridiculous case,” she said. About the FBI, she added: “If this is who is protecting America, we’ve got problems.”

- A juror’s comment on the first trial of an academic under the “China Initiative”

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On January 31, 2016, Frank Wu, current President of Queen’s College and then Chair of the Committee of 100, put out a call to the legal community on a research opportunity:

“As a resource to monitor and analyze the application of economic espionage and theft of trade secret laws to Chinese Americans, a complete list of all such known federal prosecutions under the Economic Espionage Act since its enactment has been created in the form of a webpage (<http://bit.ly/FedCases>). The inaugural version of FedCases, covering the period of 1996 to January 2016, contains 50 prosecutions with 3 cases yet to be confirmed for possible inclusion at this time. Efforts to assure a consistent process and data quality, as well as to verify and validate its content, are needed to establish the webpage as a reliable information source and to sustain its continuing operation and purpose.”

After retiring from the federal government, I started FedCases and founded [the APA Justice Task Force](#) in 2015. In a brief two years, a series of innocent Chinese American scientists in academia (Professor Xiaoxing Xi of Temple University), federal government (Sherry Chen of the National Weather Service), and private industry (Guoqing Cao and Shuyu Li of Eli Lilly Research Lab) were accused of passing secrets to China but all had their cases eventually dropped without explanation from the Department of Justice (DOJ). All are China-born, naturalized U.S. citizens. Reliable data and analyses are needed to address the racial profiling concerns and the non-response of the government.

Andrew C. Kim, then Professor at the Concordia University School of Law, was among the first to respond to Wu’s call. In less than a week, Kim and I began our collaborative efforts,<sup>2</sup> which subsequently led to his [White Paper](#) in 2017 and his authoritative [Cardozo Law Review](#) paper in 2018, both titled “Prosecuting Chinese ‘Spies’: An Empirical Analysis of the Economic Espionage Act.”

Based on prosecutions under the Economic Espionage Act (EEA) since its enactment in 1996 to July 1, 2015, and data collected from [the PACER system](#) and other sources, Kim’s study provided ground-breaking findings that are consistent with the fear and concerns that the DOJ investigations of



suspected espionage have been infected by racial biases. In particular, the conclusion of Kim’s article started with:

“Chinese and other Asian Americans are disproportionately charged under the Economic Espionage Act, receive much longer sentences, and are significantly more likely to be innocent than defendants of other races.”

EEA charges against Chinese Americans had an unexplained spike around 2009, tripling the proportion of Chinese defendants from 17% of all defendants prior to 2009 to 52% between 2009 and 2015.

“Is it possible that three times as many Chinese Americans began stealing secrets around that time, or did the DOJ under the Obama administration simply devote more resources to identifying and prosecuting espionage related to China? If the latter is true, does this reflect a legitimate prioritization of DOJ resources, or is it a case of unfair racial profiling and the start of a ‘New Red Scare’?”

Among these and other troubling questions raised by Kim was his insight into “pretextual prosecution,” when prosecutors who believe, but cannot prove, that a defendant is guilty of a serious offense will seek conviction and punishment for a more minor offense. Al Capone, the notorious gangster who was suspected of numerous homicides and was ultimately convicted for tax evasion in the 1930s, was cited as a prime example of this strategy. A fatally unjust and unfair premise of this approach is the presumption of guilt in treating defendants as if they were all Al Capones, especially if it is based wholly or partly on race, ethnicity, and national origin.

Kim’s questions and concerns proved to be prophetic.

On November 1, 2018, former Attorney General Jeff Sessions launched [the “China Initiative”](#) under the Trump administration, declaring that “[t]his Initiative will identify priority Chinese trade theft cases, ensure that we have enough resources dedicated to them, and make sure that we bring them to an appropriate conclusion quickly and effectively.”

Intense publicity campaigns by the FBI to [Corporate America](#) and [Academia](#) followed to justify and mobilize a whole-of-government effort with massive federal dollars and resources, a new xenophobic label of “non-traditional collectors,”<sup>3</sup> and dramatic but misleading data.<sup>4</sup>

[The DOJ online report](#) on the “China Initiative” begins with:

“About 80 percent of all economic espionage prosecutions brought by the U.S. Department of Justice (DOJ) allege conduct that would benefit the Chinese state, and there is at least some nexus to China in around 60 percent of all trade secret theft cases,”

The online report includes a list of case examples and is updated approximately monthly. As of August 9, 2021, only 17 out of 71, or 23.9%, of the listed cases since the launch of the “China Initiative” include at least one charge under the EEA. It also includes one case already closed prior to



the start of the “China Initiative.” In the most recent 13 months since July 1, 2020, just 3 out of 31 newly added cases, or 9.7%, are based on EEA charges.

The list of case examples in the online report is not complete and has high selection bias in favor of the DOJ narrative. For example, the case of Cleveland Clinic researcher [Qing Wang](#) was removed from the list after it was dismissed last month. Until the recent dismissals of Qing Wang and the [five visa fraud cases](#), the online report did not include any cases that were acquitted, dismissed, or failed to obtain a guilty finding or plea agreement.

The case of MIT professor [Gang Chen](#), born in China and a naturalized U.S. citizen, is surprisingly not included in the online report. His case stirred not only Asian Americans, but also the domestic and international communities. It is perhaps also significant that former U.S. Attorney Andrew Lelling publicly [questioned Professor Chen’s loyalty](#) in a case officially about wire fraud and false statements.

The incomplete online report and obvious manipulation of its content raise fundamental questions of its integrity – what is the definition of a “China Initiative?” How many “China Initiative” cases are there? Without this basic understanding, analysis of biased data can only lead to biased results. The ambiguity does not conform with the letter or the spirit of [the Foundations for Evidence-Based Policymaking Act of 2018](#), under which DOJ and FBI are not exempt.

Among the 71 known “China Initiative” cases, about a dozen or more of them are filed against academic and biomedical scientists who work on fundamental research, which the [National Security Decision Directives 189](#) explains as “basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.” To put it plainly, there is no secret to be given away or stolen in fundamental research.

None of these scientists, whose reputation and standing are unlike Al Capone’s, have been charged for espionage or theft of trade secrets, but instead for failing to disclose Chinese ties to federal grant-making agencies or academic institutions, false statements to government authorities, and tax and visa fraud.

Former University of Tennessee Knoxville (UTK) Professor [Anming Hu](#) was the first case of an academic to go to trial under the “China Initiative” in June 2021.

The trial revealed the zeal of the misguided “China Initiative” and FBI agent Kujtim Sadiku to criminalize Professor Hu with [reckless and deplorable tactics](#) of spreading false information to cast him as a spy for China and press him to become a spy for the U.S. government. When these efforts failed, DOJ brought charges against Professor Hu for intentionally hiding his ties to a Chinese university, which also fell apart upon cross examination of UTK officials during the trial.

After the presiding judge declared a mistrial with a hung jury, [a juror commented](#) that “[i]t was the most ridiculous case.” About the FBI, she added: “If this is who is protecting America, we’ve got problems.”



Despite these backdrops, DOJ announced its intent to retry Professor Hu, including ironically multiple charges of making false statements. Meanwhile, it prompted Congressional members to request [an investigation](#) of misconduct of the FBI and the racial profiling practices. On September 9, 2021, Professor Hu was acquitted by the judge of all charges.<sup>5</sup>

Additional data have been collected since Kim's papers to answer some of his original questions, but new ones have also risen, such as

Does the scarcity of the EEA cases under the "China Initiative" indicate that DOJ has successfully stopped China's efforts to steal our nation's secrets? Or does it indicate that the massive but unaccounted taxpayers' dollars have failed to catch many real economic spies? Are the remaining "China Initiative" cases pretext to create fear, suspicion, and a new "Red Scare?" Or are they truly effective, responsible efforts to protect our nation's research integrity?

Many including APA Justice have called for the end or at least a moratorium on the "China Initiative" in view of the heavy human and scientific costs it has already inflicted and the high risk of losing needed talents and our global leadership in science and technology.<sup>6 7 8 9</sup>

When confronted by questions on racial profiling concerns and requests for information by Congress and the public, DOJ, FBI, and other federal agencies either have no response or issue standard denials without supporting data and documents.

This is irresponsible and unacceptable, especially when there is now growing evidence to the contrary. Transparency, accountability, and oversight are cornerstones of American democracy. [Fred Korematsu](#) exemplifies the gross injustice of how the federal government withheld exculpatory evidence that misled the nation to intern 120,000 Japanese Americans during the Second World War. This history must not repeat itself.

Congress is taking a deeper look into the racial profiling concerns. Within the last month,

- The House Subcommittee on Civil Rights and Civil Liberties convened [a Roundtable](#) on "Researching while Chinese American: Ethnic Profiling, Chinese American Scientists and a New American Brain Drain."
- The Ranking Member of the Senate Commerce, Science, and Transportation Committee released [an investigative report](#) that confirmed a rogue unit in the Department of Commerce (DOC) has been targeting Asian American employees in DOC for more than 15 years. With lack of oversight, they likely have resulted in preventable violations of civil liberties and other constitutional rights, as well as a gross abuse of taxpayer funds.
- Rep. Ted Lieu delivered [a bicameral coalition letter](#) with 90 co-signers to Attorney General Merrick Garland calling for an investigation into DOJ's "repeated, wrongful targeting of individuals of Asian descent for alleged espionage."

The need for timely and continuing empirical research such as Kim's work and [the Cato Institute](#) will increase with these and other inquiries. Federal agencies have the responsibility and obligation to keep the public informed about their policies and practices. Their release of complete, good quality data and supporting documents is the first step to help restore public trust and confidence in America's law enforcement and judicial system.



<sup>1</sup> Jeremy S. Wu. Retired, U.S. government. <https://bit.ly/3xzKUpD>

<sup>2</sup> Professor Shubha Ghosh of Syracuse University College of Law was also an active collaborator in the project with assistance from more than a dozen other lawyers and researchers.

<sup>3</sup> “Thousand grains of sand” was the term used about two decades ago in the Wen Ho Lee era; “Fifth Column” during World War II; “Communist Sympathizer” during the “Red Scare” in the 1940s and 1950s.

<sup>4</sup> APS News (2019). “Openness, Security, and APS Activities to Help Maintain the Balance.” Aug./Sept. 2019, Vol. 28, No. 8, pg. 8. <https://bit.ly/3bxuVwI>

<sup>5</sup> Judge Thomas Varlan (2021). Memorandum Opinion and Order to acquit all charges against Professor Anming Hu. <https://bit.ly/38RTaXp>

<sup>6</sup> Lewis, Margaret K. (2020). “Criminalizing China,” 111 J. Crim. L. & Criminology 145. <https://bit.ly/2S5oCfX>

<sup>7</sup> Kania, Elsa and McReynolds, Joe (2021). “The Biden Administration Should Review and Rebuild the Trump Administration’s China Initiative from the Ground Up,” Lawfare. <https://bit.ly/3qSaWRK>

<sup>8</sup> APA Justice (2021). Joint Letter to President-Elect Biden to End “China Initiative.” <https://bit.ly/3xZrQqQ>

<sup>9</sup> Advancing Justice | AAJC (2021). Asian Americans Advancing Justice | AAJC Delivers Petition of Nearly 30,000 Signatures Urging President Biden to End the “China Initiative.” <https://bit.ly/2TWodBI>



## **Footnotes to the Main Research**

<sup>1</sup> <https://www.justice.gov/opa/speech/file/1107256/download>

<sup>2</sup> Specifically, the Study includes all cases in the federal Public Access to Court Electronic Records system (PACER) coded as charged under 18 U.S.C. § 1831 or § 1832 as of September 2020. [insert language about “population” v. “sample”]

<sup>3</sup> See, Andrew Chongseh Kim, “Prosecuting Chinese ‘Spies’: An Empirical Analysis of the Economic Espionage Act,” *Cardozo Law Review* 40, no. 2 (December 2018) (“name analysis” a reliable coding technique for identifying people of Asian descent, particularly when first names are included).

<sup>4</sup> [https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018\\_04-appendix.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_04-appendix.pdf)

<sup>5</sup> EEA charges were brought against 16.3 defendants per year from January 20, 2017, to January 20, 2020. Extending the timeline to September 2, 2020, adds only three additional defendants and reduces the rate to 14.4 defendants per year for the first 3.6 years of the Trump administration.

<sup>6</sup> The alleged beneficiary nation could be determined for 218 of 276 defendants. Two cases alleged beneficiaries in more than one nation and were coded separately for each, for a total of 223 observations.

<sup>7</sup> The China Initiative’s goal as found on the DOJ website: “In addition to identifying and prosecuting those engaged in trade secret theft, hacking, and economic espionage, the Initiative focuses on protecting our critical infrastructure against external threats through foreign direct investment and supply chain compromises, as well as combatting covert efforts to influence the American public and policymakers without proper transparency.”

<sup>8</sup> <https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html>

<sup>9</sup> <https://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>

<sup>10</sup> <https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf>

<sup>11</sup> <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>

<sup>12</sup> See, Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2011)

<sup>13</sup> 18 U.S.C. § 1014

<sup>14</sup> 26 U.S.C. § 7201

<sup>15</sup> Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 *Calif. L. Rev.* 1515 (2009) (false statements prosecutions can discourage cooperation with investigators).



<sup>16</sup> *Brogan v. United States*, 522 U.S. 398 (1998), at 408–09 (Ginsburg, J., concurring) (observing that the false statements statute, 18 U.S.C. § 1001, gives prosecutors the power “to manufacture crimes”) (“it is, instead, Government generation of a crime when the underlying suspected wrongdoing is or has become nonpunishable”)

<sup>17</sup> Andrew Chongseh Kim, “Prosecuting Chinese ‘Spies’: An Empirical Analysis of the Economic Espionage Act,” *Cardozo Law Review* 40, no. 2 (December 2018); see generally, Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583, 583 (2005).

<sup>18</sup> Difference between possible innocence rates for Chinese v. Western defendants is statistically significant to  $p < 0.05$ . The difference between rates for all Asian v. Western defendants is significant at  $p < 0.06$ .

<sup>19</sup> See, Andrew Chongseh Kim, “Prosecuting Chinese ‘Spies’: An Empirical Analysis of the Economic Espionage Act,” *Cardozo Law Review* 40, no. 2 (December 2018) (discussing how implicit biases can contribute to racial disparities in EEA charging and sentencing decisions).

<sup>20</sup> Cases were coded based on information in PACER docket reports regarding summonses and execution of arrest warrants.

<sup>21</sup> Differences between Asian or Chinese and Western defendants significant to  $p < .001$ .

<sup>22</sup> See generally, David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 *Minn. L. Rev.* 265, 300–01 (1999).

<sup>23</sup> <https://www.science.org/news/2020/02/us-prosecutor-leading-china-probe-explains-effort-led-charges-against-harvard-chemist>

<sup>24</sup> See generally, <https://www.bloomberg.com/news/articles/2021-04-26/anti-asian-atmosphere-chills-chinese-scientists-working-in-u-s> (“anti-Chinese sentiment is palpable” and scientists of Chinese descent are “increasingly afraid that they’re no longer welcome in the U.S.”)

<sup>25</sup> “The allegations of the complaint imply that this was not just about greed, but about loyalty to China,” remarked Former US Attorney for the District of Massachusetts and China Initiative Steering Committee Member, Andrew Lelling, regarding a case against Gang Chen, a Chinese American scientist at MIT, <https://www.reuters.com/legal/litigation/mit-professor-loses-bid-sanction-former-us-attorney-elling-2021-07-06/>

<sup>26</sup> Although Dr. Hu has lived in Tennessee for many years, as a Canadian citizen he would be treated as a “foreign national” rather than a “Chinese American” by the limited definition used in this Study.

<sup>27</sup> <https://www.knoxnews.com/story/news/crime/2021/08/02/tennessee-professor-anming-hu-accused-spying-faces-second-trial/5457371001/>

<sup>28</sup> <https://twitter.com/tedlieu/status/1436110764041924608?s=20>

<sup>29</sup> <https://www.justice.gov/usao-ma/pr/mit-professor-arrested-and-charged-grant-fraud>



<sup>30</sup> <https://finance.yahoo.com/news/professors-fired-from-emory-university-for-hiding-grants-from-china-215407630.html>

<sup>31</sup> <https://www.justice.gov/usao-ndga/pr/former-emory-university-professor-and-chinese-thousand-talents-participant-convicted>

<sup>32</sup> <https://www.apajustice.org/xiao-jiang-li.html>

<sup>33</sup> <https://raskin.house.gov/2021/6/roundtable-led-by-reps-raskin-and-chu-hears-about-effects-of-ethnic-profiling-against-chinese-american-scientists>

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