

Private Action: Strengthening Governmental Lawfare Against the CCP and other Foreign Adversaries

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Introduction

Chairman Moolenaar, Ranking Member Krishnamoorthi, and distinguished members of this Committee, thank you for inviting my written testimony on Chinese political warfare and how to combat Chinese Communist Party (“CCP”)¹ abuses through our legal system.

The lawfare witnesses scheduled to appear before the Committee are far better equipped than I to explain the full gamut of Chinese lawfare² and the need to strengthen America’s response. The

¹ Throughout this testimony, the terms China, the People’s Republic of China (“PRC”), and CCP are used interchangeably reflecting that, for the purpose of the Foreign Sovereign Immunities Act (the “FSIA”), courts recognize the CCP as the “body politic that governs China.” *See Missouri ex rel. Bailey v. People’s Republic of China*, 90 F.4th 930, 935 (8th Cir. 2024).

² My use of the term “lawfare” draws from the definition advanced by Professor Goldenziel of the National Defense University – College of Information and Cyberspace (formerly of the Marine Corps University Command and Staff College):

I define lawfare as 1) the purposeful use of law taken toward a particular adversary with the goal of achieving a particular strategic, operational, or tactical objective, or 2) the purposeful use of law to bolster the legitimacy of one’s own strategic, operational, or tactical objectives toward a particular adversary, or to weaken the legitimacy of a particular adversary’s particular strategic, operational, or tactical objectives.

See Jill I. Goldenziel, *Law as a Battlefield: The US, China, and the Global Escalation of Lawfare*, 106 CORNELL LAW REVIEW 1085, 1097 (2021), accessible at <https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2021/09/Goldenziel-final11234.pdf>. As Professor Goldenziel points out, there are many other uses of the term. *Id.* at 1094–1096 (citing the definitions of lawfare popularized by former Major General Charles Dunlap, Professor Orde Kittrie, and Professor Joel Trachtman); *see also* David Kennedy, *Lawfare and Warfare*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 158, 160 (James Crawford & Martti Koskeniemi eds., Cambridge Univ. Press 2012) (discussing the definition of lawfare and providing examples of its military and political uses).

subject of my testimony is using private action (“Private Action”) to strengthen governmental lawfare.³ Private Action includes all efforts to curb threats from foreign adversaries⁴ by private citizens, businesses, and organizations through 1) judicial and administrative litigation, 2) public education regarding the nature of those threats, 3) participation in administrative rulemaking, and 4) the design of, and advocacy for, new private and governmental remedies that strengthen America’s lawfare arsenal.⁵ Private Action is one of the most powerful tools America has to counter its Foreign Adversaries—a lawfare weapon unavailable to the citizens of any Foreign Adversary.⁶

This Committee has well documented the reality that the CCP is more committed than ever to its long-standing⁷ goal of weakening democratic states and the American way of life (the “CCP Threat”). Yet many private commercial and financial enterprises (“enterprise” or “enterprises”)⁸

³ The term “Private Action” reflects that “lawfare” is a governmental function that Private Action can support but cannot replace.

⁴ The PRC, Republic of Cuba, Islamic Republic of Iran, Democratic People’s Republic of Korea, Russian Federation, and Nicolás Maduro are our foreign adversaries (individually, a “Foreign Adversary;” collectively, our “Foreign Adversaries”). 47 U.S.C. § 1607(c)(2); 15 C.F.R. § 791.4(a)(1).

⁵ The opportunity of Private Action to address threats from Foreign Adversaries is illustrated by a discrepancy in legal resources; in recent years only ten percent of recent law school graduates take government jobs, while over fifty percent join law firms. See AMERICAN BAR ASSOCIATION, 2023 PROFILE OF THE LEGAL PROFESSION (2023), accessible at <https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf>.

⁶ See, e.g., CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, 2023 ANNUAL REPORT, 118th Cong. 121–127 (May 2024), accessible at <https://www.cecc.gov/sites/evo-subsites/www.cecc.gov/files/2024-07/2023%20CECC%20Annual%20Report.pdf> (describing the lack of an independent judiciary in China).

⁷ The handwriting has been on the wall for decades: “China’s dream has been imperial in scope, and the party has never wavered in its intent to be in control when China realizes that dream.” See GARY J. SCHMITT, THE CHINA DREAM: AMERICA’S, CHINA’S AND THE RESULTING COMPETITION 11 (American Enterprise Institute, Jan. 18, 2019), accessible at <https://www.aei.org/wp-content/uploads/2019/01/The-China-Dream.pdf?x85095>; see also DANIEL TOBIN, HOW XI JINPING’S “NEW ERA” SHOULD HAVE ENDED U.S. DEBATE ON BEIJING’S AMBITIONS (Center for Strategic & International Studies, May 2020), accessible at https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200508_Tobin_NewEra_v4%5B2%5D.pdf; QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE (Albatross Publishers ed., 2020). It has been unmistakable since no later than 2020. See Kevin Rudd, The Interrelationship between Chinese Ideology, Strategy and Deterrence: The CCP’s Ideological Framework for Strategic Decision-Making, Differing US and Chinese Concepts of Deterrence, and the Impact on Strategic Stability in the Taiwan Straits (Sept. 4, 2024) (transcript accessible at <https://kevinrudd.com/media/kennan-lecture-24>) (discussing the 2020 edition of *The Science of Military Strategy*).

⁸ Merriam Webster defines an enterprise as a “unit of economic organization or activity.” *Enterprise*, MERRIAM-WEBSTER, accessible at <https://www.merriam-webster.com/dictionary/enterprise> (last visited Sept. 17, 2024).

doing business in the U.S. and China have not adapted to this reality. They continue to support our strongest Foreign Adversary's human rights violations, predatory commercial practices, and challenges to U.S. National Security.⁹ Here, I refer to enterprise support for the CCP Threat and that of other Foreign Adversaries as "Enterprise Complicity."

Spurred by the Committee's work, after decades of work centered on defending commerce and capital,¹⁰ my focus has shifted to another aspect of that defense: developing new legal tools to curb the CCP Threat and Enterprise Complicity. The goal of these efforts is to protect the values and economic system that make American free enterprise possible.¹¹

⁹ See, e.g., Ryan Gallagher, *How Microsoft's Bing Helps Maintain Beijing's Great Firewall*, BLOOMBERG (Mar. 7, 2024, 5:00AM), accessible at <https://www.bloomberg.com/news/features/2024-03-07/microsoft-s-bing-helps-maintain-china-s-great-firewall?srnd=undefined>. By contrast, companies such as IBM, Dell, Stanley Black & Decker, and Airbnb have pulled back from China due to lowered confidence in China's markets and business ecosystem, see Dean DeBiase, *Why Companies Are Exiting China And What Leaders Can Do About It*, FORBES (Aug. 30, 2024, 5:45 AM), accessible at <https://www.forbes.com/sites/deandebiase/2024/08/30/why-companies-are-exiting-china-and-what-leaders-can-do-about-it/>; see also Casey Hall, *US businesses' optimism in China falls to record low, survey shows*, REUTERS (Sept. 11, 2024, 9:02 PM), accessible at <https://www.reuters.com/markets/us-businesses-optimism-china-falls-record-low-survey-shows-2024-09-12/>. Others have learned the hard way through government intervention, see Mike Stone, *RTX fined \$200 million for exports to China and others, US says*, REUTERS (Aug. 30, 2024, 1:26 PM), accessible at <https://www.reuters.com/business/aerospace-defense/rtx-pay-200-million-fine-export-mistakes-state-department-says-2024-08-30/>; see also Peter S. Goodman et al., *Global Brands Find It Hard to Untangle Themselves From Xinjiang Cotton*, NEW YORK TIMES (last revised July 2, 2021), accessible at <https://www.nytimes.com/2021/04/06/business/xinjiang-china-cotton-brands.html#:~:text=Faced%20with%20accusations%20that%20it%20was%20profiting%20from> (describing Chinese consumer backlash to H&M's press release regarding the CCP's ongoing genocide of the Uyghurs).

¹⁰ I am a Washington D.C. attorney with over 50 years of experience. I began my professional life as a Senate staff attorney supporting legislation to deregulate network infrastructure industries. Since then, my work as a specialist in economic regulation has principally involved designing and implementing strategies to persuade lawmakers, administrative agencies, and courts to increase opportunities for the efficient use of resources by large and small public and private entities in that sector.

¹¹ The need to defend America's values is no better stated than in the preamble to our Constitution, which was established "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." See U.S. CONST. pmbl; see also DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1950, NATIONAL SECURITY AFFAIRS; FOREIGN ECONOMIC POLICY, VOLUME 1 238 (1977), accessible at <https://history.state.gov/historicaldocuments/frus1950v01/d85> (citing the Preamble of the Constitution as a guiding principle for the U.S. post-World War II security establishment).

My immediate focus is on litigation using existing laws to target the CCP Threat and Enterprise Complicity. My broader interest is using all the potential of Private Action to combat the CCP Threat.

Here I outline why:

- Private Action strengthens America’s lawfare arsenal;
- Private litigation is likely to be an effective tool against the CCP Threat;
- Private litigation is not a silver bullet; and
- New laws strengthening our capacity for public lawfare and Private Action are needed to help the United States overcome the CCP’s leadership in total lawfare.

To perpetuate our free enterprise system, we must engage in more aggressive, multifaceted lawfare against the CCP and Enterprise Complicity. The U.S. has the world’s strongest economy. We foster free enterprise capitalism because it serves the public interest. It enables America to offer its citizens more personal freedom and economic opportunity than any other major power. Where it does not serve the public interest, we erect guardrails to keep free enterprise on track.¹² The CCP, like our other Foreign Adversaries, is, in effect, an advocate of gangster capitalism. The CCP’s goal is to establish a global market “with Chinese characteristics,”¹³ one designed not to foster a free society and free enterprise but to strengthen the CCP and force America and other democratic nations to accept the dominance of CCP values.

¹² One of the common guardrails is to require commercial actors to absorb the costs of “externalities”—the costs of adverse impacts of their activity that are not reflected in the cost of doing business—through payments to injured parties or changes in their way of doing business. The elements of the CCP Threat to our values that are encouraged by Enterprise Complicity should be viewed by policy makers and the legal system as unacceptable and regulated like any other “externalities.”

¹³ JOHN POMFRET ET AL., CAPITAL MARKETS WITH CHINESE CHARACTERISTICS: XI’S DECLARATION OF LAWFARE 3 (Foundation for Defense of Democracies, Sep. 14, 2023), accessible at <https://www.fdd.org/wp-content/uploads/2023/09/fdd-memo-capital-markets-chinese-characteristics.pdf> (“The [CCP’s] recent moves to subordinate foreign investment banks, law firms, consultancies, data providers, and, in effect, regulators such as the U.S. Securities and Exchange Commission (SEC) represent a new phase in the creation of capital markets with ‘Chinese characteristics.’”).

We should not deny the genuine benefits that China’s economic development has brought the Chinese people and the world. But we must also recognize that China could have realized those benefits without reliance on the key characteristics of CCP tyranny. The magnitude of China’s economic power and the allure of its markets and resources cannot obscure the incompatibility of the CCP’s world view with that of America and the West. The CCP abhors truly free enterprise and economically sustainable competition, human rights, and the independent security of other nations, especially the United States. America has no long-term interest in facilitating the CCP Threat or Enterprise Complicity.¹⁴

Why Private Action to curb the CCP Threat strengthens the U.S. lawfare arsenal.

The CCP is exploiting its economic, technological, and military capacities—many first enabled by the science, technology, capital, and markets of democratic regimes—to dominate the West. Yet too many powerful global enterprises are actively supporting the CCP Threat and opposing policies, law, and regulation proposed to reduce it.¹⁵ Many are American-based enterprises that

¹⁴ We also cannot deny that there may be possibilities for legitimate, mutually beneficial exchange with China or that the lines between supporting the CCP threat and engaging in mutually beneficial exchange are not always clear. *See, e.g.*, Anshu Siripurapu & Noah Berman, *The Contentious U.S.-China Trade Relationship*, COUNCIL ON FOREIGN RELATIONS (last revised May 14, 2024, 3:15 PM), accessible at <https://www.cfr.org/backgrounders/contentious-us-china-trade-relationship>; Jessica Chen Weiss, *The Case Against the China Consensus*, FOREIGN AFFAIRS (Sept. 16, 2024), accessible at <https://www.foreignaffairs.com/united-states/case-against-china-consensus>. Nonetheless, the burden of proof should shift to those asserting exchange is mutually beneficial to establish that their cost-benefit analysis accounts for all support that any such exchange adds to the CCP threat.

¹⁵ For example, many representatives of global enterprise have opposed the administration’s efforts to effectively define the commercial relationship between the U.S. and the CCP. *See, e.g.*, U.S. Chamber of Commerce, Comment on Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, at 1–2 (Aug. 2, 2024), accessible at <https://www.regulations.gov/comment/TREAS-DO-2024-0012-0030> (suggesting “clarifications” to the Treasury Department’s controls on investments to ensure there are neither “excessive restrictions on beneficial U.S. business activity” nor “disproportionate regulatory burden[s] on U.S. companies”); HALEY BYRD WILT, ‘THE LIBERTY OF DEMOCRACY IS A COMPLICATED UNDERTAKING’: HOW THE UYGHUR FORCED LABOR PREVENTION ACT BECAME LAW 16–17 (The Dispatch, June 20, 2022), accessible at <https://thedispatch.com/wp-content/uploads/2022/10/How-the-Uyghur-Forced-Labor-Prevention-Act-Became-Law-Final-Version.pdf> (describing the intensity of Coca-Cola’s opposition to the passage of the Uyghur Forced Labor Prevention Act (the “UFLPA”)); Jasper Goodman & Eleanor Mueller, *Wall Street wins in GOP stalemate on China*, POLITICO (Sept. 13, 2024, 9:18 AM), accessible at <https://www.politico.com/news/2024/09/13/house-republicans-china-wall-street-00179056> (describing Wall Street’s opposition to the Congress’ efforts to rein in U.S. capital flowing to China).

owe their global dominance to the fact that the U.S. has authorized and protected their private status.¹⁶ Others are foreign-based enterprises assured of the right to do business in America, the world's most free and lucrative market. These complicit enterprises all value the prospect of Chinese markets, materials, and production capacity over containing the CCP Threat.¹⁷

Continued Enterprise Complicity is encouraged by our muddled U.S. policy stance. Despite growing citizen recognition that the CCP Threat is existential,¹⁸ Congress and the Executive branch have had trouble defining principled lines between legitimate enterprise activity and aiding and abetting a Foreign Adversary. Congress, for example, has voted against CCP control of TikTok but not against Wall Street's support for the CCP's military suppliers.¹⁹ The Executive

¹⁶ Coca-Cola is reported to be a notable example. See Haley Byrd Wilt, *supra* note 15, at 16–17.

¹⁷ See, e.g., Gabrielle Fonrouge, *Nike CEO John Donahoe says breaking up with China would be 'disastrous' amid rising geopolitical tensions*, CNBC (last revised May 23, 2023, 5:40 PM), accessible at <https://www.cnbc.com/2023/05/23/nike-ceo-john-donahoe-says-decoupling-from-china-would-be-disastrous.html> (“If you’re a global company, you’ve got to just accept [the China-related risks] and try to steer a course that is consistent with your strategy and consistent with their values.”); see also Ana Swanson, *Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill*, NEW YORK TIMES (last revised Jan. 20, 2021), accessible at <https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html> (supporting the proposition that Nike is a complicit enterprise).

¹⁸ See, e.g., Nam Lam & Laura Silver, *Americans name China as the country posing the greatest threat to the U.S.*, PEW RESEARCH CENTER (July 27, 2023), available at <https://www.pewresearch.org/short-reads/2023/07/27/americans-name-china-as-the-country-posing-the-greatest-threat-to-the-us/>. Yet there is so little consensus on the CCP Threat that policy makers cannot agree to spend what it takes to maintain military superiority over our Foreign Adversaries. See *America is not ready for a major war; says a bipartisan commission*, THE ECONOMIST (July 29, 2024), accessible at <https://www.economist.com/united-states/2024/07/29/america-is-not-ready-for-a-major-war-says-a-bipartisan-commission>.

¹⁹ Compare Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 815, 118th Cong., Pub. L. No. 118-50, § 2(g)(3)(A)(ii) (2024) (passed House 360-58 and Senate 79-18, then signed into law by President Biden) with DITCH Act, H.R. 5109, 118th Cong. (2023) (introduced in House but no vote held); Preventing Adversaries from Developing Critical Capabilities Act, H.R. 6349, 118th Cong. (2023) (same); PRC Risk Transparency Act, H.R. 9162, 118th Cong. (2024) (same); see also Zachary Warmbrodt & Jasper Goodman, *China hawks plot McHenry end-run*, POLITICO (Dec. 1, 2023, 8:00AM), accessible at <https://www.politico.com/newsletters/morning-money/2023/12/01/china-hawks-plot-mchenry-end-run-00129511> (describing the House Financial Services Committee Chairman's fight to remove China investment restrictions from the annual defense spending bill).

branch imposes export controls on cutting-edge technology—but not sufficiently to deter Chinese access to that technology.²⁰

There are several reasons for this policy gap. Many policy advocates and governmental decision makers favor overlooking aspects of the CCP Threat to aid the advance of other domestic policy goals.²¹ Other overlooking may rest on false premises that render otherwise attractive trade-offs

²⁰ Compare David Shepardson, *US Commerce chief says China export controls will hit companies' revenue*, REUTERS (July 26, 2023, 9:00 PM), accessible at <https://www.reuters.com/technology/us-commerce-chief-says-china-export-controls-will-hit-companies-revenue-2023-07-27/> (quoting Secretary of Commerce Gina Raimondo, who explained that export controls are not “about holding China back or denying them commodity technology,” rather the controls deny Chinese access to the most sophisticated U.S. technology that would “advance their military,” which “we’re not going to allow”) with Juro Osawa & Aaron Holmes, *Google, Microsoft Help Chinese Firms Skirt Ban on Nvidia Chips*, THE INFORMATION (July 17, 2024, 6:00 AM), accessible at https://www.theinformation.com/articles/google-microsoft-help-chinese-firms-skirt-ban-on-nvidia-chips?utm_campaign=article_email&utm_content=article-13232&utm_medium=email&utm_source=sg; Cheryl Yu, *PRC-UAE Collaboration and US Technology Transfer Concerns in Abu Dhabi*, THE JAMESTOWN FOUNDATION (Aug. 31, 2024), accessible at <https://jamestown.substack.com/p/prc-uae-collaboration-and-us-technology>.

²¹ Many fear taking a hard stance against the CCP Threat because it may inhibit our ability to transition to renewable sources of energy that would mitigate the deleterious effects of the climate crisis. See, e.g., Sara Schonhardt & Phelim Kine, *‘It’s just crazy’: How the U.S.-China energy race imperils the climate fight*, POLITICO (May 18, 2023, 4:30AM), accessible at <https://www.politico.com/news/2023/05/18/us-china-energy-fossil-fuels-00097207>, (discussing debates over the risks posed by U.S. tariffs, grants, and regulations targeting Chinese solar and electric vehicle battery components). For example, the solar panel industry reportedly relies heavily on materials sourced from the Uyghur region. See generally LAURA T. MURPHY & NYROLA ELIMÄ, *IN BROAD DAYLIGHT: UYGHUR FORCED LABOR AND GLOBAL SOLAR SUPPLY CHAINS* (Sheffield Hallam University Helena Kennedy Centre for International Justice, 2021), accessible at <https://www.shu.ac.uk/helena-kennedy-centre-international-justice/research-and-projects/all-projects/in-broad-daylight>. When the UFLPA cracked down on imports of solar materials tied to the Uyghur region, the solar industry faced delays in importing and supplying solar infrastructure to meet U.S. climate goals. See Nichola Groom & Richard Valdmanis, *Exclusive: U.S. solar panel imports from China grow, alleviating gridlock, officials say*, REUTERS (Mar. 6, 2023, 11:13PM), accessible at <https://www.reuters.com/business/energy/us-solar-panel-imports-china-grow-alleviating-gridlock-officials-say-2023-03-06/>. As these debates occur, the ambiguous status quo allows the CCP to use the revenues earned from climate sensitive democracies to increase its CO₂ output and fuel its military capacity, essentially holding us hostage on the climate front. INTERNATIONAL ENERGY AGENCY, *CO₂ EMISSIONS IN 2023 15–17* (March 2024), accessible at <https://iea.blob.core.windows.net/assets/33e2badc-b839-4c18-84ce-f6387b3c008f/CO2Emissionsin2023.pdf> (indicating that while we depend on China to reach our CO₂ reduction goals, China’s CO₂ emissions continue to skyrocket).

a fool's errand.²² And some of this overlooking may be strategically warranted.²³ What's clear is the need to clarify our policies. Nonetheless, policy ambiguity seems to have widespread enterprise and academic support.²⁴

Complicit enterprises exploit the absence of clear policy addressing the CCP Threat.²⁵ They pursue profit and their own short-term interests in ways that often jeopardize U.S. national security interests and our long-term economic well-being.²⁶ Their complicity and defense of the status quo strengthens the CCP's ability to subvert human rights and destroy the American system that has enabled their economic success.

Private litigation can help curb the CCP Threat.

The expected profitability of Enterprise Complicity undermines U.S. efforts to counter the CCP Threat. It will do so until the perpetrators face a coherent, aggressively enforced public-private strategy to counter the CCP Threat. Yet even fully developing and implementing an effective

²² The false premise, as this Committee's 2023 report stated is that: "The United States bet that robust economic engagement would lead the CCP to . . . liberalize its political system and abide by the rule of law. Those reforms did not occur." See THE U.S. HOUSE SELECT COMMITTEE ON THE STRATEGIC COMPETITION BETWEEN THE U.S. AND THE CCP, RESET, PREVENT, BUILD: A STRATEGY TO WIN AMERICA'S ECONOMIC COMPETITION WITH THE CHINESE COMMUNIST PARTY, 118th Cong. 2 (Dec. 12, 2023), accessible at <https://selectcommitteeontheccp.house.gov/media/policy-recommendations/reset-prevent-build-strategy-win-americas-economic-competition-chinese>. The U.S. has operated under the belief that "if we engage with them, [] they would change their behavior at some point in time." See *Hearing Wrap Up: Federal Agencies Have Succumbed to CCP Influence and the Oversight Committee is Demanding Answers*, COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY (June 26, 2024), accessible at <https://oversight.house.gov/release/hearing-wrap-up-federal-agencies-have-succumbed-to-ccp-influence-and-the-oversight-committee-is-demanding-answers/> (summarizing the testimony of Captain James E. Fanell).

²³ *Supra* note 14.

²⁴ See M. Taylor Fravel, et al., *China is not an enemy*, THE WASHINGTON POST (July 3, 2019, 9:00 AM), accessible at https://www.washingtonpost.com/opinions/making-china-a-us-enemy-is-counterproductive/2019/07/02/647d49d0-9bfa-11e9-b27f-ed2942f73d70_story.html (open letter to President Trump signed by 100 members of the scholarly, foreign policy, military and business communities).

²⁵ This Committee's policy and economic framework outlined in *Reset, Prevent, Build* provides a roadmap to addressing this policy gap. See The U.S. House Select Committee on the Strategic Competition between the U.S. and the CCP, *supra* note 22, at 14–53. Expanding opportunities for lawfare aligns with the Committee's strategic goals and many of their policy recommendations. See *infra* note 29.

²⁶ See, e.g., *supra* note 9; *infra* note 46.

governmental lawfare policy directed at one aspect of the CCP Threat—Enterprise Complicity—will take time. Policy makers must struggle with the tension between 1) our national heritage of being friendly to commerce and capital and 2) our adversarial relationship with the CCP. One immediately available path to reducing the CCP Threat is Private Action.²⁷

Unlike our autocratic Foreign Adversaries, Americans can supplement our capacity for governmental lawfare with private resources. American history has proven that private actors can play a key role in implementing governmental strategies. For example, the United States effectively employed privateers in both the American Revolution and the War of 1812, allowing the United States to challenge British naval dominance despite having a much smaller official navy.²⁸ Those efforts contributed to the successful foundation of our nation and defense of our freedoms.

The goals of this Private Action follow the three pillars of this Committee’s strategy for economic and technological competition with the CCP and follow many of the Committee’s recent policy recommendations.²⁹

Private Action can creatively apply existing law to support administrative and judicial litigation.

The world’s largest economy is served by the world’s strongest legal system and private bar—

²⁷ Private Action can help fill gaps in the enforcement of governmental tools designed to counter the CCP Threat. See, e.g., Marti Flacks, *What’s Next for the Uyghur Forced Labor Prevention Act?*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (June 21, 2023), accessible at <https://www.csis.org/analysis/whats-next-uyghur-forced-labor-prevention-act#:~:text=One%20year%20into%20enforcement%20of%20the%20Uyghur%20Forced> (describing loopholes in the UFLPA, such as the \$800 *de minimis* threshold).

²⁸ Frederick C. Leiner, *Yes, Privateers Mattered*, U.S. NAVAL INSTITUTE (March 2014), accessible at <https://www.usni.org/magazines/naval-history-magazine/2014/march/yes-privateers-mattered>.

²⁹ See The U.S. House Select Committee on the Strategic Competition between the U.S. and the CCP, *supra* note 22, at 6–7. Notable policy recommendations consistent with the goals of lawfare include: 1) Create transparency into U.S. investment in the PRC, the recipients of that funding, and the risks associated with it; 2) Prevent U.S. companies from being driven out of the U.S. market by market-distorting PRC products; and 3) Restrict U.S. investment in entities tied to the People’s Liberation Army, critical technology sectors, or forced labor and genocide. *Id.* at 17, 20, 26.

resources that are well suited to support private litigation against the CCP Threat. While more lawmaking is required to fully exploit those resources, there are immediate opportunities for civil litigation on behalf of injured U.S. consumers and businesses to curb the CCP Threat and discourage Enterprise Complicity.³⁰ These actions can offer effective remedies, be self-sustaining, educate the public about the details of the CCP Threat,³¹ and materially reduce the commercial success of the defendants in the U.S.

Existing state and federal laws designed to protect the interests of consumers, investors, and businesses share common elements. American citizens are entitled to know about the business practices of the enterprises with which they are dealing, and to be protected from harmful enterprise activity.³² Americans are entitled to know, for example, if they are buying products or services from enterprises that are complicit in any aspect of the CCP Threat. And they are entitled to remedies when denied that information or otherwise harmed by an enterprise complicit in or otherwise supporting that threat.³³

Actions asserting consumer’s rights are already being brought, with varying levels of success.

For example, state attorney generals, often aided by private counsel, have brought claims using

³⁰ For example, it is possible for PRC-affiliated enterprises to be held accountable for their theft of American businesses’ intellectual property. *See, e.g., Motorola Sols., Inc. v. Hytera Commc’ns Corp. Ltd.*, 108 F.4th 458, 468 (7th Cir. 2024) (Chinese company held liable for its “blatant theft of trade secrets and copying of proprietary computer code”). But actions against the true perpetrator—the CCP—often face almost insurmountable hurdles. Dore Feith, *The First “State Sponsor of Mass IP Theft”*, COLUMBIA BUSINESS LAW REVIEW (forthcoming) (manuscript at 2–4), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4783195 (explaining the difficulty in suing the PRC and CCP for mass IP theft).

³¹ Many Americans, though possessing a high-level understanding of the CCP Threat, may not understand the more subtle ways the CCP Threat manifests itself. *See, e.g.,* Mike Gallagher, *Americans are unwittingly financing the CCP. It has to stop.*, WASHINGTON POST (Aug. 29, 2023, 7:15 AM), accessible at <https://www.washingtonpost.com/opinions/2023/08/29/us-investment-china-technology-companies/>.

³² *See, e.g.,* D.C. Code § 28-3901(c) (“[D.C.’s consumer protection statute] establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia.”).

³³ *See, e.g.,* D.C. Code § 28-3905(k)(2)(A)–(F) (treble damages, \$1,500 statutory damages per violation, reasonable attorney’s fees, punitive damages, injunctions, and any other equitable relief the court deems proper).

state consumer protection laws.³⁴ Private actors have also initiated civil actions under other statutes to hold enterprises accountable.³⁵ Future actions could assert the rights of injured businesses, which are entitled, for example, to relief from IP theft, racketeering, and anticompetitive practices. Attorneys within and outside the Beltway—mostly from smaller firms—are exploring collaborative efforts to distribute the risk and cost of major litigation. They hope to bundle a portfolio of these actions to reduce costs and facilitate litigation financing. Our firm is participating in one such effort; I doubt it is unique.

Our firm is exploring new applications of several existing laws, including civil RICO,³⁶ antitrust,³⁷ securities,³⁸ and consumer protection law³⁹ to curb enterprise complicity with the CCP Threat. While work remains to be done, we have identified several likely viable claims against prominent complicit enterprises that appear to be especially egregious supporters of the CCP Threat. We are also exploring other legal tools aimed at other forms of malfeasance by the CCP and complicit enterprise.⁴⁰

Below are examples of reported actions by U.S. and foreign enterprises that, assuming the reported facts, would be subject to legitimate claims for liability and material remedies under existing law. The private litigant, however, relies on secondhand reports for these facts. Citizens

³⁴ See, e.g., Order, *Arkansas ex rel. Griffin v. TikTok, Inc.*, No. 70CV-23-115 (Ark. Cir. Ct. June 28, 2024); Complaint, *Arkansas ex rel. Griffin v. PDD Holdings Inc. F/K/A Pinduoduo Inc.*, No. 12CV-24-149 (Ark. Cir. Ct. June 25, 2024). While some of these actions have successfully survived motions to dismiss and begun discovery, many may struggle to prove liability due to strenuous burdens of proof or other statutory or judicial constraints.

³⁵ See, e.g., Complaint, *Xu Lun v. Milwaukee Electric Tool Corporation*, No. 24-cv-803 (E.D. Wis. June 27, 2024).

³⁶ 18 U.S.C. § 1964(c).

³⁷ 15 U.S.C. §§ 1, 2.

³⁸ 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.

³⁹ See, e.g., D.C. Code § 28-3905(k)(1)(A). Many states' consumer protection laws rely on, or provide consideration to, the FTC's and federal courts' interpretation of "unfair or deceptive act or practices" as defined in 15 U.S.C. § 45(a)(1) and the regulations promulgated thereunder. See, e.g., D.C. Code § 28-3901(d).

⁴⁰ See, e.g., 18 U.S.C. § 2333(a) (Antiterrorism Act); 18 U.S.C. § 1595(a) (Trafficking Victims Protection Reauthorization Act).

rarely have access to governmental intelligence gathering, and no one has yet secured discovery that would prove their truth or falsity.⁴¹ Discovery is thus one of the main purposes of anti-CCP litigation. And the risk plaintiffs will not secure adequate factual discovery is one factor, along with others outlined further below, that requires careful management to assure success.

Assuming the truth of public reports, enterprises could be liable to private plaintiffs for enabling the CCP Threat, for example, by:

- Facilitating the CCP's tyrannical censorship of free expression over the internet.⁴²
- Selling consumer products in the U.S. with forced labor content entering under the \$800 limit or escaping CBP enforcement⁴³ or relying on forced labor in their overseas sales supply chains.⁴⁴
- Knowingly evading export controls to facilitate sales.⁴⁵

⁴¹ Governments will often know more than what is publicly available to the citizenry. *See, e.g.*, Public Redacted Brief for Respondent at 29–34, 39–44, 45–48, 54–57, *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. July 26, 2024).

⁴² *See* Gallagher, *supra* note 9.

⁴³ *See, e.g.*, Yoko Kubota, *The Blacklisted Component That's Disrupting the Luxury-Car Market*, WALL STREET JOURNAL (Mar. 6, 2024, 2:29AM), accessible at <https://www.wsj.com/business/autos/the-blacklisted-component-thats-disrupting-the-luxury-car-market-df87a3b3> (reporting on Volkswagen group cars stopped at U.S. ports for violations of forced labor prevention laws in its supply chains); THE U.S. HOUSE SELECT COMMITTEE ON STRATEGIC COMPETITION BETWEEN THE U.S. AND THE CCP, FAST FASHION AND THE UYGHUR GENOCIDE: INTERIM FINDINGS, 118th Cong. (June 22, 2023), accessible at [fast-fashion-and-the-uyghur-genocide-interim-findings.pdf \(house.gov\)](https://www.house.gov/committees/strategic-competition-between-the-u-s-and-the-ccp/fast-fashion-and-the-uyghur-genocide-interim-findings) (describing Temu and Shein's use of the *de minimis* loophole to import goods made with forced Uyghur labor).

⁴⁴ Eva Dou & Chao Deng, *Western Companies Get Tangled in China's Muslim Clampdown*, WALL STREET JOURNAL (May 16, 2019, 10:37AM), accessible at <https://www.wsj.com/articles/western-companies-get-tangled-in-chinas-muslim-clampdown-11558017472>, (Coca-Cola sources sugar from COFCO Tunhe Co., a PRC-run company with its largest production base in Xinjiang); *see also* DHS Designates Three Additional PRC-Based Companies to the UFLPA Entity List, DEPARTMENT OF HOMELAND SECURITY (Dec. 8, 2023), accessible at <https://www.dhs.gov/news/2023/12/08/dhs-designates-three-additional-prc-based-companies-uflpa-entity-list> (Department of Homeland Security named Coca-Cola supplier COFCO Sugar Holding Co., Ltd. to the UFLPA Entity List in December 2023).

⁴⁵ Qianer Liu, *Nvidia AI Chip Smuggling to China Becomes an Industry*, THE INFORMATION (Aug. 12, 2024, 6:00AM), accessible at https://www.theinformation.com/articles/nvidia-ai-chip-smuggling-to-china-becomes-an-industry?utm_source=ti_app.

- Developing software in China for the U.S., thereby facilitating CCP-sponsored hacking in the U.S.⁴⁶
- Gathering customer data in the U.S. that they must disclose to the CCP.⁴⁷
- Investing in suppliers to the Chinese military.⁴⁸
- Buying or selling technology supporting CCP military operations, human rights violations, and surveillance of activists and minorities.⁴⁹

Many enterprises see their practices as justifiable or at least not actionable. They contend, e.g., that 1) they are only complying with applicable Chinese laws;⁵⁰ 2) their presence in China

⁴⁶ See Karen Weise et al., *Microsoft Debates What to Do With A.I. Lab in China*, NEW YORK TIMES (last revised Jan. 11, 2024), accessible at <https://www.nytimes.com/2024/01/10/technology/microsoft-china-ai-lab.html> (explaining that there are U.S. national security concerns over Microsoft’s development of advanced AI software in labs based in China).

⁴⁷ *TikTok: A Threat to US National Security*, THE JAMESTOWN FOUNDATION (Mar. 26, 2024), accessible at https://open.substack.com/pub/jamestown/p/tiktok-a-threat-to-us-national-security?utm_campaign=post&utm_medium=web (describing how ByteDance and TikTok are bound by PRC national security laws to make customer data available to the CCP).

⁴⁸ This Committee has investigated U.S. enterprises for investing in People’s Liberation Army contractors and PRC companies with military ties, including venture capital firms, MSCI, and BlackRock. See The U.S. House Select Committee on the Strategic Competition between the U.S. and the CCP, *supra* note 22, at 11.

⁴⁹ See Sui-Lee Wee, *China Uses DNA to Track Its People, With the Help of American Expertise*, NEW YORK TIMES (Feb. 21, 2019), accessible at <https://www.nytimes.com/2019/02/21/business/china-xinjiang-uyghur-dna-thermo-fisher.html> (detailing China’s use of Thermo Fisher scientific equipment and genetic material provided by a Yale University geneticist to identify and track Uyghurs); Krystal Hu & Jeffrey Dastin, *Exclusive: Amazon turns to Chinese firm on U.S. blacklist to meet thermal camera needs*, REUTERS (April 29, 2020, 9:36 PM), accessible at <https://www.reuters.com/article/us-health-coronavirus-amazon-com-cameras/exclusive-amazon-turns-to-chinese-firm-on-u-s-blacklist-to-meet-thermal-camera-needs-idUSKBN22B1AL/> (describing Amazon’s \$10 million procurement of at least 500 camera systems from a blacklisted firm that surveilled Uyghurs intended for U.S. use).

⁵⁰ See, e.g., Gallagher, *supra* note 9 (as expressed by Microsoft’s chief communications officer, “[Microsoft] only censor[s] a result in response to a narrow legal order that we conclude obligates us to do so, and we regularly push back when we believe an order doesn’t comply with proper interpretation of Chinese rules. The alternative is to leave the market which would only serve to cut people off from information they otherwise have through Bing.”); see also Joanna Chiu, *Exclusive: Microsoft Bing’s censorship in China is even “more extreme” than Chinese companies’*, REST OF WORLD (June 27, 2024), accessible at <https://restofworld.org/2024/microsoft-bing-chinese-censorship/> (as stated by Samm Sacks, a senior fellow at Yale Law School’s Paul Tsai China Center, “You either comply with Chinese laws or not, and Microsoft has made the calculus that it is what they have to do to stay in China.”); *Yahoo gave e-mail account data used to imprison journalist*, THE COMMITTEE TO PROTECT JOURNALISTS (Sept. 7, 2005, 12:00 PM), accessible at <https://cpj.org/2005/09/yahoo-gave-email-account-data-used-to-imprison-jou/> (In response to reports that Yahoo! assisted Chinese authorities in identifying and jailing a reporter, a company spokesperson stated, “Just like any other global company, Yahoo must ensure that its local country sites must operate within the laws, regulations and customs of the country in which they are based.”).

promotes democracy and human rights;⁵¹ 3) they are rarely specifically required by U.S. law to limit or disclose their complicity with the CCP Threat;⁵² and 4) their practices are constitutionally protected.⁵³ They may also assume, notwithstanding the work of this Committee and many others, that Congress will not soon overcome global enterprise opposition to new laws proscribing anti-American dealings with Foreign Adversaries.⁵⁴

Thus, we expect a long-term need for litigation aimed at the CCP Threat. We are confident that several complicit enterprises⁵⁵ are subject to non-frivolous suits under laws designed to protect consumers and businesses from enterprise malfeasance. If public reports are substantiated and can be proven, the defendants would face monetary damages and injunctive relief requiring disclosure or curtailment of their activities. Most important, these enterprises face a material risk of damaged reputations that would reduce their revenues in what, for most global companies, are their most lucrative markets.⁵⁶

⁵¹ See, e.g., Gallagher, *supra* note 9 (“Bing is the least censored search engine in China and is often the only accessible source for volumes of information there, even if we must eliminate certain results under Chinese law”; “Business can most effectively respect human rights throughout presence in, rather than absence from, countries that present significant human rights risks.”).

⁵² See, e.g., THE U.S. HOUSE SELECT COMMITTEE ON THE STRATEGIC COMPETITION BETWEEN THE U.S. AND THE CCP, INVESTIGATIVE REPORT: HOW AMERICAN INSTITUTIONS PROVIDE BILLIONS OF DOLLARS TO PRC COMPANIES COMMITTING HUMAN RIGHTS ABUSES AND FUELING THE PRC’S MILITARY, 118th Cong. 23–25 (April 18, 2024) (describing the disclosure practices of major U.S. asset managers).

⁵³ See, e.g., Brief of Petitioners TikTok Inc. and ByteDance Ltd. at 29–31, No. 24-1113 (D.C. Cir. June 20, 2024), Doc. #2060743 (claiming protections under the First Amendment); Memorandum of Law in Support of Defendants’ Motion to Dismiss Amended Complaint at 30–32, *Arkansas ex rel. Griffin v. TikTok, Inc.*, No. 70CV-23-135 (Ark. Cir. Ct. Nov. 29, 2023) (same).

⁵⁴ See, e.g., Kaya Yurieff & Juro Osawa, *Inside TikTok, It’s Business as Usual-ish as Ban Looms*, THE INFORMATION (Sept. 10, 2024, 6:00 AM), accessible at <https://www.theinformation.com/articles/inside-tiktok-its-business-as-usual-ish-as-ban-looms> (describing TikTok executives’ confidence that TikTok will successfully render the divestment bill unconstitutional).

⁵⁵ The Committee has investigated some of these actors for supporting the CCP’s military, intelligence, and human rights abuses. See The U.S. House Select Committee on the Strategic Competition between the U.S. and the CCP, *supra* note 22, at 11 (describing some of this Committee’s investigations). The next step is translating the information collected by the Committee’s investigations into legal action.

⁵⁶ The European Union (“EU”) and its member states have many parallel laws that could be applied to EU-headquartered enterprises and enterprises doing business in the EU. See, e.g., Jennifer Bryant, *CJEU ruling on GDPR litigation builds ‘jurisprudence on data protection’*, INTERNATIONAL ASSOCIATION OF PRIVACY

Successful anti-CCP litigation would change enterprises' calculus in assessing how they do business with China. Establishing clear legal precedents would place these enterprises at greater risk for liability and sizeable damages awards. Faced with a choice between 1) supporting the CCP Threat and the consequent economic cost and reputational risk of private litigation or 2) limiting their business operations to the more lucrative markets in the U.S. and other countries, many complicit enterprises may be more inclined to choose the latter, reducing the CCP Threat. Should these enterprises weigh the scales differently and remain complicit with the CCP Threat, litigation and other Private Action will set the stage for more aggressive governmental action.

Private litigation is not a silver bullet.

Private litigation will face several impediments to securing results that will substantially impact enterprise or Foreign Adversary behavior. Those impediments fall into two broad categories: 1) the asymmetry of resources available to plaintiffs and complicit enterprises to support protracted litigation; and 2) current U.S. law and policy, which, for good reason, usually favors global enterprise.

Parties and their attorneys using creative lawyering to materially reduce the CCP Threat will be engaged in asymmetric conflict against opposing forces with ample resources to continue litigation indefinitely via procedural wars of attrition. To prevail they must:

- Demonstrate their ability to support an action through trial. To be most effective at furthering anti-CCP goals, attorneys representing private litigants must demonstrate a capacity to support multi-million-dollar speculative ventures that will require funding

PROFESSIONALS (May 24, 2022), accessible at <https://iapp.org/news/a/cjeu-ruling-on-gdpr-litigation-by-consumer-groups-builds-jurisprudence-on-data-protection/> (Consumer and consumer groups have the right to file private representative actions against enterprises over EU General Data Protection Regulation violations).

thousands of hours of legal work, expert testimony, and public communications efforts. They must demonstrate this ability because neither the CCP nor large complicit enterprises will consider settlements beyond minimally compensating plaintiffs and their attorneys unless they know plaintiffs can persist until they secure changes in enterprise policies.

- Expect to function without the resources of “Big Law” firms. Smaller firms often collaborate with these firms and their extraordinary legal resources to help manage the load of extensive discovery, lengthy procedural disputes, and complicated trials. But many, if not most, of the “Big Law” firms are likely barred by professional conflicts from supporting anti-CCP actions. Their clients may include potential defendants or parties subject to direct or indirect CCP (or other Foreign Adversary) influence. Alternatively, these firms—as well as many medium and small sized firms—may have positional conflicts with clients that, while not doing business in or with Foreign Adversaries, want to discourage litigation against major enterprises. These large firms are more likely to be defending parties complicit in the CCP Threat or their philosophical allies.
- Be prepared for personal and business risks. Lawyers may be at physical risk from retaliation for attempting to reduce the CCP Threat. The CCP’s coercive tendencies are unbounded even within the United States,⁵⁷ and U.S.-based lawyers with family or friends in China are especially vulnerable to CCP reprisals.⁵⁸ Additionally, law firm (and individual lawyers’) technology may be susceptible to CCP cyberattacks. Even with

⁵⁷ See, e.g., Shibani Mahtani et al., *How China extended its repression into an American city*, WASHINGTON POST (Sept. 3, 2024, 5:00 AM), accessible at <https://www.washingtonpost.com/world/interactive/2024/chinese-communist-party-us-repression-xi-jinping-apec/>.

⁵⁸ Cf. Sebastian Rotella, *Even on U.S. Campuses, China Cracks Down on Students Who Speak Out*, PROPUBLICA (Nov. 30, 2021, 5:00 AM), accessible at <https://www.propublica.org/article/even-on-us-campuses-china-cracks-down-on-students-who-speak-out>.

commercial grade security and expensive upgrades to military standards, law firms may not withstand concerted attacks by state-sponsored hackers.

Private litigation against large enterprises is largely limited to enforcing laws that, to date, are not specifically aimed at, or have not yet been applied to, the CCP Threat. Use of these laws to curb the CCP Threat and Enterprise Complicity follows the original intent of Congress and the states when those laws were enacted. However, private litigants' claims to be injured by the CCP Threat and Enterprise Complicity will need to face and resolve several legal and factual limitations that may materially affect their chances of success:

- Judicial constraints on what constitutes a “concrete and particularized injury” that gives a suing party “standing,” i.e., the right to seek a remedy in a federal court.⁵⁹
- Judicial presumptions against statutes' application to conduct occurring abroad—which are intended to preclude judicial intrusion into foreign affairs.⁶⁰ Even if an action can overcome Foreign Adversaries' immunity to civil actions,⁶¹ these presumptions make it harder to use conventional laws to combat the CCP Threat.
- The lack of effective remedies under existing statutes, especially for injured businesses.⁶²
- Legislative and judicial hostility to class actions that may be abused through “strike suits” brought by certain plaintiffs' advocates.⁶³

⁵⁹ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424–429 (2021) (describing limitations on what constitutes a “concrete” injury).

⁶⁰ *RJR Nabisco v. European Community*, 579 U.S. 325, 335–344 (2016) (describing the presumption against extraterritoriality and analyzing to what extent that presumption is rebutted by RICO's substantive prohibitions).

⁶¹ 28 U.S.C. § 1605(a) (listing exceptions to foreign states' grant of civil immunity).

⁶² *See, e.g., Dore Feith*, *supra* note 30 (manuscript at 2–4).

⁶³ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78–82 (2006) (describing Congress' and the Supreme Court's historical approach to limiting the scope of class actions initiated under the Securities Exchange Act of 1934).

- The existence of innocently complicit individuals and businesses. The largest enterprises' complicity with the CCP Threat is far from innocent; they willfully ignore the CCP Threat so they can use their capital to support PRC-based supply chains and investments.⁶⁴ But smaller enterprises may have conducted business in China because the United States encouraged them to engage in such business. As a result, these enterprises may have been forced by the CCP to pay for the privilege of continuing business in or with China by, for example, abstaining from pursuing IP theft litigation, remaining silent on the CCP's tyranny, or advocating pro-China positions. Their circumstances may place smaller enterprises in a different position from larger ones in terms of culpability. It may also require different lawfare strategies to permit them to escape from complicity with the CCP Threat if they have, in effect, been held hostage.
- The difficulty of identifying individual and business victims adversely affected by the CCP Threat and willing to pursue litigation.
- The lack of widespread understanding of the exact nature of the CCP Threat.

Notwithstanding the valiant efforts of this Committee and many others, most legal decision makers and private citizens may not fully appreciate the gravity and nature of that threat. Law is the rules that society will enforce. Absent a more widespread consciousness of the CCP Threat, litigators fighting that threat under existing law will face not only the usual hurdles but the task of educating their forum regarding the harm they seek to remedy.

⁶⁴ To the extent large enterprises feel they cannot compete with subsidized Chinese corporations and must therefore engage in Enterprise Complicity, America has means to address those issues other than tolerating Enterprise Complicity.

- The need for a paradigm shift in the judicial conception of the benefits of enterprise. In the domestic context, our laws expect private enterprises to pursue profit subject to the rules that permit their existence and curb their adverse impacts on the public interest. Enterprise is often given the benefit of the doubt. That presumption must be abandoned in challenges to Enterprise Complicity and the CCP Threat; they serve no American public interest.

As noted *infra* pp. 21–22, Congress can address some of these issues without inventing entirely new remedies. Some ills may only be cured by creative new laws. New laws will be required to empower the full capacity of Private Action to aid America’s combat with the CCP’s multilateral lawfare campaigns.

Beyond Litigation under Existing Law—The Need for New Legislation and for Private Action to Spur Prompt Enactments

Lawfare has long been a chapter in the CCP’s playbook; its legal warfare is designed to supplement traditional military activity.⁶⁵ The U.S. government has used lawfare to combat malign CCP practices, including prosecution against Huawei and its subsidiaries for misrepresenting material information to a financial institution.⁶⁶ However, U.S. lawfare has not yet been able to draw back the “curtain of legally mandated opacity rapidly descending on the

⁶⁵ See Jill I. Goldenziel, *supra* note 2, at 1092–1094. An example of the CCP’s lawfare against the U.S. is its complaint in the World Trade Organization challenging the Biden administration’s export controls related to the CHIPS and Science Act. See Laura He, *China challenges US chip curbs at WTO, citing ‘trade protectionism’*, CNN (Dec. 13, 2022, 1:24 AM), accessible at <https://www.cnn.com/2022/12/13/business/china-wto-lawsuit-chip-controls-intl-hnk/index.html>.

⁶⁶ Superseding Indictment, *U.S. v. Huawei Technologies Co., Ltd.*, No. 1:18-cr-00457 (S-3) (AMD), 2020 WL 1319126 (E.D.N.Y. Feb. 13, 2020); see also U.S. Attorney’s Office, Eastern District of New York, *Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution*, DEPARTMENT OF JUSTICE (Sept. 24, 2021), accessible at <https://www.justice.gov/usao-edny/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution>.

Chinese economy and business environment.”⁶⁷ Harnessing the U.S. legal system’s full capacity to combat the CPP Threat can help America catch up.

Congress can strengthen support for the government’s lawfare efforts and enable private litigants to bring civil actions directly against enterprises and the CCP for aiding and abetting the CCP Threat. To help overcome political resistance to new laws, Private Action must extend to educating the public and policy makers about the need for lawfare, participating in administrative rulemaking, and designing and advocating legislation that would add to the public and Private Action arsenal. This Committee’s work has given concerned private actors a strong platform for these efforts.

Here are some of the steps Congress could take to strengthen opportunities for private litigation against the CCP Threat:

- **Amend the FSIA to increase Foreign Adversaries’ liability for actions having an adverse effect in America.** Congress should create a new exception to the grant of civil immunity to Foreign Adversaries for their sponsorship of mass IP theft.⁶⁸ Congress should also reform the FSIA’s commercial and non-commercial tort exceptions to allow private litigants to hold Foreign Adversaries liable for injuries that occur in the United States if the precipitating act occurs abroad.⁶⁹

⁶⁷ John Pomfret et al., *supra* note 13, at 7.

⁶⁸ Dore Feith, *supra* note 30 (manuscript at 24–35).

⁶⁹ One commentator believed that such an action was possible under the FSIA, but a federal appellate court disagreed. Compare Scott A. Gilmore, *Suing the Surveillance States: The (Cyber) Tort Exception to the Foreign Sovereign Immunities Act*, 46 COLUMBIA HUMAN RIGHTS LAW REVIEW 227, 253–259 (2015), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622184 (suggesting such an action may be possible under the FSIA) with *Doe v. Federal Democratic Republic of Ethiopia*, 851 F.3d 7, 10–12 (D.C. Cir. 2017) (rejecting that possibility).

- **Define new “unfair or deceptive acts or practices.”** Congress should define enterprise practices contrary to U.S. values, such as use of Uyghur or other forced labor in their supply chains, support for Foreign Adversaries’ military mobilization, and misrepresentations/omissions of their relationship with Foreign Adversaries, as “unfair or deceptive acts or practices.”⁷⁰ That change may make those practices actionable under state consumer protection laws that may not otherwise be read to address those practices.⁷¹ Congress should also include an explicit private right of action to discourage enterprises’ use of these practices.
- **Amend the UFLPA or § 307 of the Tariff Act of 1930 to include an express private right of action.**⁷²
- **Amend the Securities Exchange Act of 1934 and Rule 10b-5 to require disclosure of PRC-related supply chain risks and use of Uyghur forced labor.**⁷³ Congress should also consider requiring disclosure of why their corporate activities in China are unrelated to the CCP Threat.
- **Require additional corporate disclosures under Fed. R. Civ. P. 26(a)(1)(A) for Foreign Adversary entities and entities under Foreign Adversary control regarding their litigation funding and, if applicable, ownership and connection with Foreign Adversaries.**⁷⁴

⁷⁰ The Protecting Americans’ Data from Foreign Adversaries Act of 2024 could even serve as a model for this legislation. See 15 U.S.C. § 9901.

⁷¹ See *supra* note 39.

⁷² Uyghur Forced Labor Prevention Act, Pub. L. No. 117-18, 135 Stat. 1525 (2021); 19 U.S.C. § 1307; see also *McKinney v. U.S. Dept. of Treasury*, 799 F.2d 1544, 1551–1553 (Fed. Cir. 1986) (explaining that there is not a private right of action under § 307 of the Tariff Act).

⁷³ See, e.g., PRC Risk Transparency Act, H.R. 9162, 118th Cong. (2024).

⁷⁴ See The U.S. House Select Committee on the Strategic Competition Between the U.S. and the CCP, *supra* note 22, at 21.

- **Provide greater damages awards and attorney’s fees for successful lawsuits against complicit enterprises.**
- **Optimize the likelihood that parties bringing actions to curb the CCP Threat will be found to have Article III standing.** Plaintiffs must have an “injury in fact” to satisfy the “standing” requirement of the federal courts. Regarding current and future private rights of action under federal law, Congress should make clear its intention to “elevate to the status of legally cognizable injuries, concrete *de facto* injuries [related to the CCP Threat] that [may] previously [have been] inadequate at law.”⁷⁵ Such an identification alone may not be always be sufficient to give a plaintiff Article III standing to invoke relevant federal law.⁷⁶ It will, however, lessen the burdens on any Private Action in the federal courts.

Conclusion

We must face the harsh reality that the United States is not yet fully equipped to engage in total lawfare with the CCP and other Foreign Adversaries, all of which play by different rules. To counter their lawfare, we must develop creative solutions to better defend and promote our democratic values. Private Action will substantially enhance governmental lawfare.

⁷⁵ See *TransUnion*, 594 U.S. at 425 (quoting *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 341 (2016)).

⁷⁶ *Spokeo*, 578 at 341 (“Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.”).