

Commentary on Andrew Kim's White Paper

Ashley Gorski & Patrick Toomey¹

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.² 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."³ 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

¹ The authors are Senior Staff Attorneys in the ACLU's National Security Project. The views expressed here are their own.

² 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>.

³ *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>.

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 2015.⁴ The government claimed that Dr. Xi had been sharing information about a sensitive technology known as a “pocket heater” with scientists in China, and that those communications violated a legal agreement Dr. Xi had signed with the company that owned the pocket heater.⁵ 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.⁶ 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.⁷ 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*.⁸

⁴ 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.

⁵ 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>.

⁶ *Id.*

⁷ *Id.*

⁸ 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>.

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.⁹ 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.¹⁰ 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.¹¹

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 2012.¹² 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.”¹³

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.¹⁴ 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,

⁹ *Id.*

¹⁰ *Id.*

¹¹ 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.

¹² *Id.* at 57 n.33.

¹³ *Id.* at 62.

¹⁴ 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>.

sometimes with the help of the FBI and CIA.¹⁵ 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.”¹⁶

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.”¹⁷ 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.¹⁸ 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.¹⁹

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

¹⁵ *Id.* at 4–5, 12, 18.

¹⁶ *Id.* at 12.

¹⁷ 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>.

¹⁸ 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>.

¹⁹ 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>.

with a university in China and with a talent-recruitment program.²⁰ 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.²¹ 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.²²

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.²³ 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.²⁴

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.²⁵ 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.²⁶

²⁰ 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-b4f1-25b762cdbbf4_story.html.

²¹ 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*”).

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

²³ *Tao MTD* at 4–5.

²⁴ *Id.* at 42.

²⁵ 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>.

²⁶ Jamie Satterfield, *Former University of Tennessee Professor Falsely Accused of Espionage Faces Second Trial*, Knoxville News Sentinel (Aug. 2, 2021),

Prosecutors brought these charges after nearly two years of surveilling Hu and failing to find evidence of espionage.²⁷ 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.²⁸

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.²⁹ 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."³⁰ Additional testimony from other witnesses undermined the government's contention that Dr. Hu intentionally withheld information from NASA.³¹

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.³²

* * *

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

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

²⁷ Hvistendahl, *supra* note 25.

²⁸ 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>.

²⁹ *Id.*

³⁰ *Id.*

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

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

fraud before prosecutors abandoned the case in July 2021;³³ Ehab Meselhe and Kelin Hu, coastal research scientists wrongly accused of conspiring to steal trade secrets in 2019;³⁴ Guoqing Cao and Shuyu Li, senior biologists at Eli Lilly & Company, whose cases were dismissed in December 2014;³⁵ Ning Xi, a robotics expert at Michigan State University, who was cleared of wire fraud charges after a mistrial;³⁶ 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;³⁷ 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.³⁸ This is only a sampling of the reported cases.³⁹

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.

³³ 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>.

³⁴ 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>.

³⁵ 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>.

³⁶ 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>.

³⁷ 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>.

³⁸ 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.

³⁹ 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>.

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.⁴⁰

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.⁴¹ 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.⁴² Asian American

⁴⁰ 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>.

⁴¹ Nicole Perlroth, *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/>.

⁴² 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>.

scientists have had their email accounts secretly searched by their employers and then turned over to the FBI,⁴³ and they have been subjected to highly irregular disciplinary processes at some prominent institutions.⁴⁴ 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.⁴⁵ 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.

⁴³ 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>.

⁴⁴ 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>.

⁴⁵ *Id.*