

Commentary by Carol Lam for the Committee of 100

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.¹

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

¹ 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.”)

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.