

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

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“In God we trust, all others bring data.”

- W. Edwards Deming, Statistician

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

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

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

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

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

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

Based on prosecutions under the Economic Espionage Act (EEA) since its enactment in 1996 to July 1, 2015, and data collected from [the PACER system](#) and other sources, Kim’s study provided ground-breaking findings that are consistent with the fear and concerns that the DOJ investigations of suspected espionage have been infected by racial biases. In particular, the conclusion of Kim’s article started with:

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

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

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

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

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

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

Kim’s questions and concerns proved to be prophetic.

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

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

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

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

The online report includes a list of case examples and is updated approximately monthly. As of August 9, 2021, only 17 out of 71, or 23.9%, of the listed cases since the launch of the “China Initiative” include at least one charge under the EEA. It also includes one case already closed prior to the start of the “China Initiative.” In the most recent 13 months since July 1, 2020, just 3 out of 31 newly added cases, or 9.7%, are based on EEA charges.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>9</sup> Advancing Justice | AAJC (2021). Asian Americans Advancing Justice | AAJC Delivers Petition of Nearly 30,000 Signatures Urging President Biden to End the "China Initiative." <https://bit.ly/2TW0dbI>