

## What We Know—and Know We Don't Know—About Economic Espionage and Being 'Chinese'

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

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

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

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

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

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

Kim's study further highlights the challenges of what kinds of personal connectivity to "China" are indicators of a statistically higher likelihood of prosecution. He primarily uses Chinese and

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

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

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

At present, the government’s approach to “[countering Chinese national security threats](#)” is worrisome. For example, we know that the FBI’s [thousands](#) of investigations under the China Initiative [have not, at least to date, unearthed widespread criminal activity](#) among researchers resulting in numerous convictions. Viewed in a favorable light to the US government, this substantial attrition could be the result of a highly judicious process of deciding which investigations proceed to charging with the bulk instead being dropped or handled through other

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

forms of mitigation, such as administrative measures. On the flip side, widespread investigations with few convictions could be caused by sweeping with a broad net—in the process potentially causing serious consequences for people being investigated—and then not finding evidence that is sufficient to meet the high beyond-a-reasonable-doubt standard for criminal convictions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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