

12-31-2020

## Red Scare or Red Herring: How the “China Initiative” Strategy for Non-Traditional Collectors is Stifling Innovation in the United States

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### Recommended Citation

Tillman, Bianca (2020) "Red Scare or Red Herring: How the “China Initiative” Strategy for Non-Traditional Collectors is Stifling Innovation in the United States," *Seattle Journal of Technology, Environmental & Innovation Law*. Vol. 11: Iss. 1, Article 6.

Available at: <https://digitalcommons.law.seattleu.edu/sjteil/vol11/iss1/6>

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# Red Scare or Red Herring: How the “China Initiative” Strategy for Non-Traditional Collectors is Stifling Innovation in the United States

*Bianca T. Tillman* \*

## I. INTRODUCTION

### *A. The Changing Face of Global Innovation*

The United States (U.S.) is a consistent leader in global innovation and scientific discourse.<sup>1</sup> Since 2007, the World Intellectual Property Organization (WIPO) has ranked the U.S. amongst the world’s top ten most innovative countries, based on both subjective and objective innovative capacity data.<sup>2</sup> In its annual Global Innovation Index (GII),<sup>3</sup> the WIPO aims to recognize the human aspects behind innovations<sup>4</sup> that are essential

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\* Bianca Tillman is originally from Vancouver, Canada and graduates from Seattle University School of Law in May 2021. Ms. Tillman would like to thank her family, friends, faculty advisors, and fellow SJTEIL members for their support. A special thanks to Tyler for his love, patience, and encouragement.

<sup>1</sup> WORLD INTELL. PROP. ORG., THE GLOB. INNOVATION INDEX 2020 xxxii (Sumitra Dutta, Bruno Lanvin, & Sacha Wunsch-Vincent eds., 13th ed. 2020), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_gii\\_2020.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020.pdf) [<https://perma.cc/5YF5-5ZLF>] [hereinafter “GII 2020”]; see generally *About the Global Innovation Index*, GLOB. INNOVATION INDEX, <https://www.globalinnovation-index.org/about-gii> [<https://perma.cc/66YQ-NDTW>] (last visited Oct. 31, 2020, 2:39 PM) [hereinafter “About GII”].

<sup>2</sup> *Id.*

<sup>3</sup> The GII is computed by taking a simple average of the scores in two sub-indices, the Innovation Input Index and Innovation Output Index, which are composed of five and two pillars respectively. Each of these pillars describe an attribute of innovation, and comprise up to five indicators, and their score is calculated by the weighted average method. Five input pillars capture elements of the national economy that enable innovative activities: (1) Institutions, (2) Human capital and research, (3) Infrastructure, (4) Market sophistication, and (5) Business sophistication. Two output pillars capture actual evidence of innovation outputs: (6) Knowledge and technology outputs and (7) Creative outputs. *Id.*

<sup>4</sup> Such as work organization practices (ex. monitoring the quality of products or services, monitoring external/global ideas, the structure of the work organization, collaboration and the degree of team autonomy or task autonomy), human resource management (ex. recruiting diverse and skilled employees, financial, educational, and professional development incentives for exemplary work), and

for designing policies aimed at promoting economic development and richer innovation-prone environments.<sup>5</sup> The U.S. not only excels on the non-technological side of innovation, but also models exemplary scores in traditional innovation markers, such as research and development (R&D) expenditures, market sophistication, infrastructure, and creative outputs.<sup>6</sup>

The WIPO vigorously emphasizes the importance of international openness and robust knowledge flow for the “development of successful innovation nations and international innovation networks.”<sup>7</sup> Economies are more innovative when they incorporate a diverse set of scholarly voices with the ability to speak on an expansive range of social and scientific issues.<sup>8</sup> Furthermore, global value chains, bilateral technology agreements,<sup>9</sup> and increased international cooperation are essential building blocks of today’s global innovation networks. By expanding these networks to connect scientists and innovators across the world, countries and citizens have gained access to important scientific exchanges for the benefit of humankind.<sup>10</sup> In March 2020, for example, a virology lab at the University of Pittsburg collaborated with the Pasteur Institute in Paris and the Austrian drug company Themis Bioscience on potential advances toward animal vaccine testing for COVID-19.<sup>11</sup> With experts scattered all

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employee/researcher participation (ex. employee involvement in decision-making and management consultation with employees). Also known as the “non-technological” side of innovation. Stavroula Demetriades & Franz Ferdinand Eiffe, *Innovative Changes in European Companies*, EUROFOUND 20, <https://www.eurofound.europa.eu/publications/report/2017/innovative-changes-in-european-companies#tab-01> [<https://perma.cc/Z2S6-JH4V>] (last updated June 26, 2017).

<sup>5</sup> See generally About GII, *supra* note 1.

<sup>6</sup> WORLD INTELL. PROP. ORG., THE GLOB. INNOVATION INDEX 2019 341 (Sumitra Dutta, Bruno Lanvin, & Sacha Wunnsch-Vincent eds., 12th ed. 2019), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_gii\\_2019.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2019.pdf) [<https://perma.cc/X3AA-MXZQ>] [hereinafter “GII 2019”].

<sup>7</sup> *Id.* at 9.

<sup>8</sup> Richard B. Freeman, *One Ring to Rule Them All? Globalization of Knowledge and Knowledge Creation*, NAT’L BUREAU ECON. RSCH. 18 (2013), <https://www.nber.org/papers/w19301.pdf> [<https://perma.cc/QE3Y-DPB3>].

<sup>9</sup> *Fact Sheet: U.S.-China Science and Technology Cooperation Highlights: 32 Years of Collaboration*, OBAMA WHITE HOUSE ARCHIVES (2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/st-fact-sheet.pdf> [<https://perma.cc/V5GV-58Z3>] (last visited Oct 31, 2020, 3:00 PM) [hereinafter “S&T Fact Sheet”].

<sup>10</sup> Researchers from around the world have been using free online web servers to distribute their complete but unpublished manuscripts (known as preprints) in various fields of research like science, mathematics, and economics, since as early as 1991. See e.g. *About arXiv*, ARXIV <https://arxiv.org/about> [<https://perma.cc/K4BC-SU3K>] (last visited Oct. 31, 2020, 4:25 PM); Instead of facing lengthy delays in the peer-review process, the open source distribution model allows authors to receive immediate feedback from the academic community, with the average paper receiving hundreds of downloads, comments, tweets, and notes in its first few months. Richard J. Abdill & Ran Blekhan, *Tracking the Popularity and Outcomes of All bioRxiv Preprints*, BIORXIV 26-27 (2019), <https://www.biorxiv.org/content/10.1101/515643v2.full.pdf> [<https://perma.cc/9YL2-NZJ5>] (last updated Apr. 2, 2019).

<sup>11</sup> *Researchers in Pittsburgh, Paris and Vienna Win Grant for COVID-19 Vaccine* (Mar. 20, 2020), <https://www.upmc.com/media/news/032020-cepi-grant> [<https://perma.cc/R76V-3VGW>].

around the world, the globalization of knowledge creation is the inevitable next step as we look to solve ever more complex problems with increasingly innovative and sophisticated solutions.

In the GII 2019 report, the WIPO voiced concern about increasing protectionism;<sup>12</sup> particularly, “protectionism that impacts technology-intensive sectors and knowledge flows [posing] risks to global innovation networks and innovation diffusion.”<sup>13</sup> While some experts tout the Trump Administration’s “America First” policy as the greatest protectionist threat to global trade,<sup>14</sup> other political strategies, such as the EU Common Agricultural Policy, Brexit, and Made in China 2025, also evoke WIPO apprehension, as each causes global protectionism to rise. If left uncontained, these new obstacles to international trade, investment, and workforce mobility could lead to a slowdown of growth in innovation productivity in the U.S. and globally.<sup>15</sup> As more countries develop, gain access to the global scientific conversation, and welcome international discourse, some experts warn that the Trump Administration’s protectionist policies will cause students and scholars to take their talent and academic ambitions elsewhere.<sup>16</sup> When we turn fledgling innovators away from the U.S., experts explain that we lose much more than the individuals themselves. Eventually,

we lose their inventions and innovation, their collaborative input and their contributions to our communities. In time, we will lose our centers of technical excellence, which will, inevitably, migrate to places where every talented contributor is welcome. Ultimately, we will lose not just our status as a global leader, but the very identity that earned it.<sup>17</sup>

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<sup>12</sup> Protectionism refers to government policies that restrict international trade to help domestic industries. Protectionist policies are usually implemented with the goal to improve economic activity within a domestic economy but can also be implemented for safety or quality concerns. Examples of protectionist policies include tariffs, quotas, standardization, and government subsidies. Protectionism itself is not inherently problematic, however too much protectionism may result in stagnation of technological advancements. *Protectionism: The Practice of Following Protectionist Trade Policies*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/economics/protectionism/> [https://perma.cc/4RHR-HGX4].

<sup>13</sup> *GI 2019*, *supra* note 6, at xvii.

<sup>14</sup> Daniel Ben-Ami, *World Trade: Is Protectionism on the Rise?*, INV. AND PENSIONS EUROPE (Feb. 2017), <https://www.ipe.com/world-trade-is-protectionism-on-the-rise/10017403.article> [https://perma.cc/QKY6-MWWY].

<sup>15</sup> *Id.*

<sup>16</sup> In fact, new international student enrollment has been on a steady decline since 2016. *Losing Talent 2020: An Economic and Foreign Policy Risk America Can’t Ignore*, NAFSA 5 (Mar. 2020), <https://www.nafsa.org/sites/default/files/media/document/nafsa-losing-talent.pdf> [https://perma.cc/ZHW5-8JHK] [hereinafter “*NAFSA Losing Talent Report*”].

<sup>17</sup> *Id.* at 1.

In recent years, the U.S. has exhibited especially protectionist behavior in its relationship with China, a country that the U.S. has been formally collaborating with for more than 40 years.<sup>18</sup> Despite China's documented instances of economic aggression towards the U.S. and the world,<sup>19</sup> the U.S. was careful to preserve its valuable scientific and research partnerships with the emerging state up until 2018. Some scholars argue that the U.S.' status as a leading global innovator could not have been maintained without the help of its Chinese counterparts.<sup>20</sup> A recent study on the nature of co-publications between the U.S. and China showed that recent growth in U.S. science and engineering research was dependent on collaboration with Chinese scholars, whereas China's total growth in science and engineering research output would have increased over the same period regardless of contribution from the U.S.<sup>21</sup> Consequently, the U.S. has more to lose than gain if it chooses to cut ties with China, especially when considered "[f]rom [the] U.S. nation-state perspective, that views scientific advancement as zero-sum competition with winners and losers."<sup>22</sup> Even so, the U.S. recently moved forward with a robust protectionist policy, the China Initiative, to aggressively counter China's "threat to our ideas, our innovation, and our economic security."<sup>23</sup>

### B. *More than a Friendly Rivalry*

As part of its national security strategy, the U.S. Department of Justice (DOJ) implemented the "China Initiative" on November 1, 2018, a "whole-of-government approach" to maintaining the country's military, technological, and economic edge over China.<sup>24</sup> Launched against a backdrop of concern over China's aggressive economic practices, the China

<sup>18</sup> See U.S. SECRETARY OF STATE, UNITED STATES – CHINA SCIENCE AND TECHNOLOGY COOPERATION, BIENNIAL REP. TO U.S. CONG. (July 2012), <https://2009-2017.state.gov/documents/organization/197119.pdf> [<https://perma.cc/WDU6-A8ZA>] [hereinafter "SECRETARY OF STATE S&T COOPERATION REPORT 2012"]; *S&T Fact Sheet*, *supra* note 9.

<sup>19</sup> See generally White House Office of Trade and Manufacturing Policy, *How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World* (Jun. 18, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf> [<https://perma.cc/JBC8-D74K>] [hereinafter "White House China Report"].

<sup>20</sup> Jenny J. Lee & John P. Haupt, *Winners and Losers in US-China Scientific Research Collaborations*, 80 HIGHER EDUC. 57 (2020), <https://doi.org/10.1007/s10734-019-00464-7> [<https://perma.cc/25E4-STLX>].

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.* at 14.

<sup>23</sup> Department of Justice, ATTORNEY GENERAL JEFF SESSION'S CHINA INITIATIVE FACT SHEET (2018), <https://www.justice.gov/opa/speech/file/1107256/download> [<https://perma.cc/TLP5-N28S>] [hereinafter "Fact Sheet"].

<sup>24</sup> *Id.*

Initiative aims to restrict Chinese access to U.S. technology and intellectual property through protectionist legal and policy procedures.<sup>25</sup> U.S. and Chinese intelligence agencies have spied on each other for decades,<sup>26</sup> but in recent years, “China has increased both the scope and the sophistication of its efforts to steal secrets from the U.S.”<sup>27</sup> While the DOJ’s goal to increase safeguards of U.S. military, intelligence, and private sector assets may be justified, the department’s decision to include non-traditional collectors, like researchers in labs and universities, is worryingly overbroad and distracting.<sup>28</sup>

American universities and research institutions have always been leaders in fostering open and collaborative spaces where academics and researchers from all over the world come together to solve some of the world’s greatest challenges. The scientific community asserts that such international collaboration is crucial for the advancement of scientific innovation and breakthroughs. The DOJ’s China Initiative threatens to stifle these collaborations by intimidating, discouraging, and driving out international researchers, especially those of Chinese origin.

The China Initiative broadens the DOJ’s discretion to investigate universities and research institutions for instances of academic espionage—that is, stealing American data, information, and ideas from research settings for the benefit of a foreign government.<sup>29</sup> Prior to the initiative, academic espionage convictions were challenging to prove because they required actual intent to share sensitive information and direct evidence of intellectual property theft.<sup>30</sup> The China Initiative lessens the evidentiary burden on the DOJ by allowing academic espionage to be implied

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<sup>25</sup> *Id.*

<sup>26</sup> See generally, Alexander Holt, *A brief history of US-China espionage entanglements*, MIT TECHNOLOGY REVIEW (Sep. 3, 2020), <https://www.technologyreview.com/2020/09/03/1007609/trade-secrets-china-us-espionage-timeline/> [<https://perma.cc/C2PP-HRMK>].

<sup>27</sup> In 2019, for example, three former U.S. intelligence officers pled guilty to espionage-related charges involving China, a former General Electric engineer was charged with theft of trade secrets related to gas and steam turbines, and two Chinese hackers were charged with leading a hacking group targeting U.S. intellectual property and confidential business information. Mike Giglio, *China’s Spies Are on the Offensive*, THE ATLANTIC (Aug. 26, 2019), <https://www.theatlantic.com/politics/archive/2019/08/inside-us-china-espionage-war/595747/> [<https://perma.cc/L3N7-3N43>].

<sup>28</sup> Fact Sheet, *supra* note 23.

<sup>29</sup> Erin N. Grubbs, Note, *Academic Espionage: Striking the Balance Between Open and Collaborative Universities and Protecting National Security*, 20 N.C. J.L. & TECH. 235, 239 (2019).

<sup>30</sup> *Id.* at 257-259.

through a collection of previously dormant or underutilized federal reporting statutes.<sup>31</sup> The FBI alleges that a researcher's failure to accurately report ties to China-based employment, grants, or other funding sources implies that the researcher must be engaging in academic espionage on behalf of China.<sup>32</sup> Since launching the initiative in 2018, the DOJ has charged various scientists, researchers, and institutions with crimes of wire fraud for failing to accurately report their financial or academic ties to China.<sup>33</sup> This new enforcement strategy has caused upheaval at universities and research institutions as they scramble to comply with these previously ignored reporting rules or abruptly dismiss "suspicious" researchers for fear of losing crucial federal funding.<sup>34</sup>

Scholars of Chinese descent have historically struggled for equality in the American academic system,<sup>35</sup> but since the turn of the century, they have experienced an alarming uptick in wrongful accusations of suspicious activity, such as economic espionage.<sup>36</sup> The China Initiative has ramped up this inequity. While threats to national security must be taken seriously, the U.S. should change the DOJ's ambiguous and overly broad China Initiative enforcement strategy to preserve its reputation as a leading global innovator.

The DOJ's China Initiative should be analyzed and reformed with respect to academia for three very important reasons. First, the initiative was created to preserve the U.S.' position as a world leader in science and innovation; however, by alienating scientists of Chinese descent, the initiative puts the U.S. at risk of falling behind other nations who choose to nurture and protect open lines of international scientific discourse. Trump

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<sup>31</sup> See e.g. HEA section 117, 20 U.S.C. § 1011f (1965); *Notice of Investigation and Record Requests*, 84 Fed. Reg. 34,878 (July 18, 2019).

<sup>32</sup> David Bowdich, Deputy Director, FBI, Remarks at Texas A&M University Academic Security and Counter Exploitation Annual Seminar: The Importance of Partnerships in Responding to the Chinese Economic Espionage Threat to Academia (Mar 4, 2020), <https://www.fbi.gov/news/speeches/the-importance-of-partnerships-in-responding-to-the-chinese-economic-espionage-threat-to-academia> [<https://perma.cc/N4XL-MJTB>].

<sup>33</sup> High profile arrests include the chair of Harvard University's chemistry department, Charles Lieber, and in "December 2019, the DOJ reached a USD 5.5 million settlement with Van Andel Research Institute to resolve allegations that the institute failed to disclose its receipt of Chinese government grants that funded the work of two of its researchers." Jack P. DiCanio et al., *DOJ's 'China Initiative' Uses Scheme-to-Defraud Charges for Nondisclosure of Ties to China*, SKADDEN (APR. 2, 2020), <https://www.skadden.com/insights/publications/2020/04/dojs-china-initiative> [<https://perma.cc/X5XH-S5MP>].

<sup>34</sup> *Id.*

<sup>35</sup> For a high-level outline of anti-Asian racism in the U.S., see e.g. Adrian De Leon, *The Long History of Racism Against Asian Americans in the U.S.*, PBS (Apr. 9, 2020), <https://www.pbs.org/news-hour/nation/the-long-history-of-racism-against-asian-americans-in-the-u-s> [<https://perma.cc/Z45J-SHC6>].

<sup>36</sup> Andrew Chongseh Kim, *Prosecuting Chinese "Spies": An Empirical Analysis of the Economic Espionage Act*, 40 CARDOZO L. REV. 749, 752 (2018).

Administration policies, such as “America First,” have made the U.S. a less attractive destination for aspiring innovators, and the China Initiative threatens to exacerbate those chilling effects. Second, as a world leader in scientific research and innovation, the U.S. is often seen as a hub for international knowledge exchange; thus, increased protectionism poses a great risk to global innovation networks and innovation diffusion. If left unreformed, these new obstacles to international trade, investment, and academic mobility will diminish growth in innovation productivity and diffusion in both the U.S. and across the globe. Lastly, racially oppressive policies and practices have historically left lasting negative impacts on American society.<sup>37</sup> The China Initiative has potential to permanently damage the Asian-American community, further proliferating ethnic and cultural divides in the U.S.

This article examines whether the China Initiative obstructs the U.S.’ goal of maintaining its status as a leader in global innovation and scientific discourse. It contends that although the DOJ’s sweeping approach to “non-traditional collectors” is meant to protect the U.S.’ innovative advantage, it stifles innovation by exacerbating existing issues of racial animus and increasing uncertainty for U.S.-based researchers and institutions. Part II documents the evolution of China from an integral partner to a perceived threat to the U.S. in recent decades. Part III defines the China Initiative and explains why the DOJ’s current wholesale enforcement approach is problematic rather than protective. Part IV analyzes the negative effects of the China Initiative on academia through the eyes of institutions, students, administrators, and scholars. These negative effects vary in size and scale, ranging from subtle declines in international student enrollment, to administrative backlogs, forced removals, and criminal indictments of scientists and researchers with Chinese ties. Part V recognizes the importance of the DOJ’s robust China focus but presents alternative ideas for creating a more nuanced enforcement approach, such as improving the DOJ’s understanding of scientific research, expanding diversity within the DOJ, and creating programs to address implicit bias and racial profiling inside the DOJ.

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<sup>37</sup> See e.g. Kelly Tian, *The Chinese Exclusion Act of 1882 and Its Impact on North American Society*, 9 UNDERGRADUATE RESEARCH JOURNAL FOR THE HUMAN SCIENCES (2010) <https://www.kon.org/urc/v9/tian.html> [<https://perma.cc/927K-XHS7>] (describing how the Chinese Exclusion Act harmed relations between the Chinese community and Americans).



## II. THE RISE OF CHINA

### A. *A Brief History of China*

Mao Zedong was the founding father of the People's Republic of China. Amidst the uncertainty following Mao's death in 1976, Chinese leaders struggled to find a way to move their country forward.<sup>38</sup> Under Mao, living standards for both rural and urban Chinese deteriorated significantly, resulting in tremendous rates of absolute poverty.<sup>39</sup> Decades of centralized planning and state control of the economy brought much of the country to its knees, leaving Chinese officials inevitably grasping for a solution to the country's social and economic problems.<sup>40</sup> At the beginning of the 1980s, Chinese officials cautiously decided to introduce capitalism while still maintaining the country's meticulous authoritarian social structure.<sup>41</sup> What followed was over 40 years of explosive economic growth, taking China from the ranks of a developing nation and emerging market, to upper-middle income nation and established market, in just a few short decades.<sup>42</sup>

This booming economic growth was aided by China's adoption of capitalism coinciding with the world's shift towards globalization, which perfectly positioned China as an underregulated, inexpensive, and attractive place to build the "world's factory."<sup>43</sup> Confidence in globalization empowered massive amounts of Western capital and intellectual property to flow into the emerging Chinese market, but few Western investors recognized the geopolitical significance of this shift at the time.<sup>44</sup> Instead, they

<sup>38</sup> Megan Specia, *Five Takeaways from Our New China Project*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/world/asia/china-rules-takeaways.html> [<https://perma.cc/X4UH-Q5T5>].

<sup>39</sup> Kent Deng, *Great Leaps Backward: Poverty Under Mao*, LSE RSCH. ONLINE 36-37 (2000), <http://eprints.lse.ac.uk/652/> [<https://perma.cc/Z8KL-JWSS>]. "Absolute poverty" is defined by the UN as "a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to social services." United Nations Department of Economic and Social Affairs, *World Summit for Social Development 1995: WSSD 1995 Agreements: PAWSSD Chapter 2* (Copenhagen: United Nations, 1995), available from <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995/wssd-1995-agreements/pawssd-chapter-2.html> [<https://perma.cc/VB9X-7D3K>].

<sup>40</sup> Specia, *supra* note 38.

<sup>41</sup> *Id.*

<sup>42</sup> *GII 2019*, *supra* note 6 at xx.

<sup>43</sup> Prableen Bajpai, *Why China is "The World's Factory,"* INVESTOPEDIA, <https://www.investopedia.com/articles/investing/102214/why-china-worlds-factory.asp> [<https://perma.cc/D583-24W5>] (last updated Feb. 13, 2020).

<sup>44</sup> Mile Simpson, *Globalization Has Created a Chinese Monster*, FOREIGN POL'Y (Feb. 26, 2018, 3:13 PM) <https://foreignpolicy.com/2018/02/26/globalization-has-created-a-chinese-monster/> [<https://perma.cc/J6S5-PABQ>].

praised the economic growth story, and not without good reason: the integration of China into global markets lifted nearly a billion people out of poverty.<sup>45</sup> China's rapid economic growth remains a testament to the material benefits of removing geopolitical obstructions from the development of global business.

### B. *The United States Opens Up to China*

The U.S. and China officially began collaborating in the realm of science and innovation in 1979, when the countries bilaterally embraced the U.S.-China Science and Technology Cooperation Agreement (S&T Agreement).<sup>46</sup> With periodic renewals spanning the last forty plus years, the S&T Agreement launched

an era of robust government-to-government science and technology collaboration[,] ...[with] exchanges fostered under the Agreement [that] advanced cooperative research in a diverse array of fields, including fisheries, earth and atmospheric sciences, basic research in physics and chemistry, a variety of energy-related areas, agriculture, civil industrial technology, geology, health, and disaster research.<sup>47</sup>

Under the S&T Agreement, the U.S. received significant benefit from its collaborations with Chinese subject matter experts in various areas.

In the realm of agriculture, for example, cooperation between the U.S. Agricultural Research Service and the Chinese Ministry of Science and Technology “enhanced U.S. preparedness to control invasive agricultural pest species[,] helped U.S. scientists develop new seed varieties[,] and [kept domestic] food prices competitive by gaining access to genetic resources in Chinese collections.”<sup>48</sup> The Environmental Protection Agency (EPA) further collaborated with Chinese partners to “reduce pollution loads and their impacts on the United States...[while also] improv[ing] Chinese environmental laws, regulations and enforcement.”<sup>49</sup> Additionally, the National Institutes of Health (NIH) collaborated with China in global immunization, epidemiologic training, and biomedical re-

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<sup>45</sup> *Id.*; Javier C. Hernández & Quoc Trung Bui, *The American Dream Is Alive. In China*, N.Y. TIMES (Nov. 18, 2018), <https://www.nytimes.com/interactive/2018/11/18/world/asia/china-social-mobility.html> [<https://perma.cc/NHV7-AWU9>].

<sup>46</sup> *See generally*, U.S. SECRETARY OF STATE, UNITED STATES – CHINA SCIENCE AND TECHNOLOGY COOPERATION, BIENNIAL REP. TO U.S. – CHINA ECON. & SEC COMM’N (Dec. 2006), <https://2001-2009.state.gov/documents/organization/96437.pdf> [<https://perma.cc/U5ZB-TJ5Q>].

<sup>47</sup> *S&T Fact Sheet*, *supra* note 9.

<sup>48</sup> SECRETARY OF STATE S&T COOPERATION REPORT 2012, *supra* note 18, at 2.

<sup>49</sup> *Id.* at 6.

search resulting in an enhanced “ability to recognize and respond to domestic and global disease outbreaks and by providing opportunities to advance treatment and prevention of diseases that affect Americans.”<sup>50</sup>

### C. *Made in China 2025*

At first, China was slow at implementing comprehensive, long-term industrial strategies to safeguard its eventual rise as a global economic superpower.<sup>51</sup> In 2015, however, the Chinese government released its new state-led industrial policy called *Made in China 2025*, which, according to U.S. experts, “aims to use government subsidies, mobilize state-owned enterprises, and pursue intellectual property acquisition to catch up with—and then surpass—Western technological prowess in advanced industries.”<sup>52</sup> Chinese state officials describe the plan as part of a “‘three step’ strategy of transforming China into a leading manufacturing power by the year 2049, which marks the 100th anniversary of the founding of the People’s Republic of China.”<sup>53</sup> By 2019, China became the first middle-income nation to break into the top 15 of WIPO’s Global Innovation Index,<sup>54</sup> indicating that the country’s new policy is likely working.

According to U.S. officials, China’s recent growth has been achieved “through aggressive acts, policies, and practices that fall outside of global norms and rules.”<sup>55</sup> In some respects, China has been transparent about these aggressive acts, policies, and practices. A 2018 White House report found hostile economic commands in Chinese government documents, in Chinese state actor’s behaviors, and in reports produced by various business organizations, think tanks, and government agencies.<sup>56</sup> Even so, the DOJ reports that nearly “80 percent of all economic espionage prosecutions ... allege conduct that would benefit the Chinese state, and

<sup>50</sup> *Id.* at 5.

<sup>51</sup> Press Release, White House, Office of Trade & Manufacturing, Policy Report: “How China’s Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World” (June 19, 2018), <https://www.whitehouse.gov/briefings-statements/office-trade-manufacturing-policy-report-chinas-economic-aggression-threatens-technologies-intellectual-property-united-states-world/> [<https://perma.cc/ETS8-DUNK>].

<sup>52</sup> James McBride & Andrew Chatzky, *Is ‘Made in China 2025’ a Threat to Global Trade?*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade> [<https://perma.cc/YAY7-2DSP>] (last updated May 13, 2019); *About CFR*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/about> [<https://perma.cc/EFC6-EKKF>] (last visited Oct 31, 2020, 4:48 PM).

<sup>53</sup> ‘*Made in China 2025*’ Plan Issued, STATE COUNCIL PEOPLE’S REPUBLIC CHINA, [http://english.www.gov.cn/policies/latest\\_releases/2015/05/19/content\\_281475110703534.htm](http://english.www.gov.cn/policies/latest_releases/2015/05/19/content_281475110703534.htm) [<https://perma.cc/EQP5-68BQ>] (last updated May 19, 2015).

<sup>54</sup> *GII 2019*, *supra* note 6, at 12. China maintained its rank of 14<sup>th</sup> in the 2020 *GII*. See *GII 2020*, *supra* note 1, at xxxii.

<sup>55</sup> See Press Release, White House, *supra* note 51.

<sup>56</sup> *Id.*

around 60 percent of all trade secret theft cases ... involve some nexus to China.”<sup>57</sup> A 2017 report projected that Chinese theft of U.S. intellectual property could be costing anywhere from \$225 to \$600 billion on an annual basis.<sup>58</sup> Given the size of China’s economy and the extent of its market-distorting ways, the White House warns that China’s newest wave of economic aggression threatens to undermine U.S. economic and national security.<sup>59</sup>

“Made in China 2025” is not the first illustration of aggressive Chinese economic policy appearing to compromise U.S. intellectual property rights, violate U.S. privacy norms, or threaten U.S. dominance as the world’s economic leader.<sup>60</sup> In an analysis of charges brought under the Economic Espionage Act<sup>61</sup> (EEA) from 2009-2015, one study found that 62% of defendants charged under the EEA were of Asian Heritage.<sup>62</sup> Experts, who support the DOJ, contend that such a high rate of race-specific prosecutions can only be explained by the fact that Chinese-Americans and Chinese nationals are the main perpetrators of economic crimes for the benefit of their home country.<sup>63</sup> Made in China 2025 further reinforces that narrative by “encourag[ing] state subsidies for domestic companies and forc[ing] technology transfer from foreign companies with the aim of driving them out of business.”<sup>64</sup>

The Trade Expansion Act of 1962, the Trade Act of 1974, and other legislation grant the president the power to levy tariffs and other

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<sup>57</sup> Press Release, Dep’t of Justice, Information About the Department of Justice’s China Initiative and a Compilation of China-Related Prosecutions Since 2018, <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related> [https://perma.cc/5237-A8KL] (last updated Oct. 20, 2020).

<sup>58</sup> *The Report of the Commission on the Theft of American Intellectual Property*, INTELL. PROP. COMM’N 12 (2017), [http://ipcommission.org/report/IP\\_Commission\\_Report\\_Update\\_2017.pdf](http://ipcommission.org/report/IP_Commission_Report_Update_2017.pdf) [https://perma.cc/WXA5-MPBY].

<sup>59</sup> White House China Report, *supra* note 19, at 2.

<sup>60</sup> *Breaking the Mould: Trump’s China Policy*, INST. FOR SEC. & DEV. POL’Y (Feb. 2018), <https://isdpeu/publication/breaking-mould-trumps-china-policy/> [https://perma.cc/3K4W-3ZA9].

<sup>61</sup> The Economic Espionage Act is one of many statutes used by federal prosecutors to convict defendants suspected of espionage. See Pub. L. No. 104-294, 110 Stat. 3488 (codified as amended at 18 U.S.C. §§ 1831-39 (2006)).

<sup>62</sup> Defendants charged under the EEA are alleged to have stolen trade secrets to benefit foreign entities and nations. See Kim, *supra* note 36, at 753.

<sup>63</sup> Arguing that the Chinese government and businesses target people of Chinese descent around the world and ask them to steal secrets for China, and as a result, Chinese spies are simply more prevalent than spies of other races. John R. Schindler, *The Unpleasant Truth About Chinese Espionage*, OBSERVER (Apr. 22, 2016), <https://observer.com/2016/04/the-unpleasant-truth-about-chinese-espionage/> [https://perma.cc/GVE7-TFSQ].

<sup>64</sup> Lingling Wei, *Beijing Drops Contentious ‘Made in China 2025’ Slogan, but Policy Remains*, WALL ST. J. (Mar. 5, 2019, 9:16 AM), <https://www.wsj.com/articles/china-drops-a-policy-the-u-s-dislikes-at-least-in-name-11551795370> [https://perma.cc/H232-ZQCB].

trade measures if he determines it necessary for the country's national security.<sup>65</sup> The Trump Administration and the DOJ developed the China Initiative on these national security grounds, in response to China's perceived eagerness to obtain economic superiority at all costs. China's rapid economic expansion, combined with a record of co-opting Chinese nationals to "get ahead," raised such an alarm inside the White House that the Trump Administration felt compelled to react with similar aggression.

### III. LEGAL BACKGROUND

#### A. *What is the China Initiative?*

In November 2018, the DOJ launched the China Initiative with the specific goal of clamping down on China's unfair economic policies, including, but not limited to, China's history of co-opting U.S. intellectual property.<sup>66</sup> The China Initiative is a sweeping federal plan aimed at satisfying the DOJ's strategic priority of countering Chinese national security threats, from the illegal export of military- and space-grade technology to suspicions of stealing U.S. scientific ideas.<sup>67</sup>

As a basis for launching the China Initiative, the DOJ relied, in part, on a pair of damning reports outlining the threat to the U.S. posed by Chinese intellectual property, technology, and innovation policy. In March 2018, an investigative report by the Executive Office of the President concluded that several of China's trade practices were unreasonable, including its outbound investment policies and sponsorship of unauthorized computer intrusions.<sup>68</sup> The report claimed that "China's foreign investment restrictions[,] ... administrative review, and licensing systems not only exert

<sup>65</sup> See generally Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (1962) (codified as amended at 19 U.S.C. §§ 1801-1991).

<sup>66</sup> Fact Sheet, *supra* note 23.

<sup>67</sup> Press Release, Dep't of Justice, Chinese National Sentenced to 40 Months in Prison for Conspiring to Illegally Export Military- and Space-Grade Technology from the United States to China (Oct. 18, 2019), <https://www.justice.gov/opa/pr/chinese-national-sentenced-40-months-prison-conspiring-illegally-export-military-and-space> [<https://perma.cc/6C2M-J2VR>]; Christopher L. Nasson et al., *DOJ v. China: Is DOJ Acting as an Instrument of Foreign Policy?*, K&L GATES (Oct. 1, 2019), <https://www.klgates.com/doj-v-china-is-doj-acting-as-an-instrument-of-foreign-policy-10-01-2019/> [<https://perma.cc/5P7F-59HE>]; see e.g. Ellen Loanes, *China Steals U.S. Designs for New Weapons, and It's Getting Away with 'the Greatest Intellectual Property Theft in Human History'*, BUS. INSIDER (Sept. 24, 2019, 12:44 PM), <https://www.businessinsider.com/esper-warning-china-intellectual-property-theft-greatest-in-history-2019-9> [<https://perma.cc/6V6C-GNMQ>].

<sup>68</sup> *Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974*, EXEC. OFF. OF PRESIDENT 42-45 (Mar. 18, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [<https://perma.cc/BP5K-AQ9Z>]. Conduct defined as "unreasonable" if it "burdens or restricts U.S. commerce." *Id.* at 3. Section 301 of The Act defines an "unreasonable" act, practice, or policy as one that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable." *Id.*

great technology transfer pressures on U.S. companies, but also are substantially more restrictive than those of the U.S. and most other countries.”<sup>69</sup> A June 2018 report further outlined “two major strategies and various acts, policies, and practices Chinese industrial policy use[d] in seeking to acquire the intellectual property and technologies of the world.”<sup>70</sup> The subsequent investigation warned of deceptive Chinese trade practices, including the use of state-sanctioned “security reviews” forcing companies to reveal confidential information as a precondition to doing business in China.<sup>71</sup> The China Initiative empowers a working group of federal prosecutors and investigators with a conglomerate of tools necessary to address these serious matters.<sup>72</sup>

The National Security Division (NSD) of the DOJ is responsible for countering nation-state threats to the country’s critical infrastructure and private sector.<sup>73</sup> The DOJ’s Criminal Division, in turn, is tasked with “aggressively investigat[ing] Chinese companies and individuals for theft of trade secrets.”<sup>74</sup> Additionally, the China Initiative increases efforts to protect critical domestic infrastructure against external threats—including foreign direct investment, supply chain threats, and foreign agents—seeking to influence the American public and policymakers without proper registration.<sup>75</sup> The China Initiative is led by the Assistant Attorney General, a senior Federal Bureau of Investigation (FBI) Executive, five U.S. Attorneys, and several DOJ leaders.<sup>76</sup>

### B. *Why is the China Initiative Problematic?*

The original DOJ China Initiative fact sheet grants sweeping discretion to federal agencies tasked with carrying out enforcement across various industries and focus areas.<sup>77</sup> While outlining a list of goals set out by the department, the fact sheet is void of any instructions regarding how investigation or enforcement should be carried out to achieve those

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<sup>69</sup> *Id.* at 44.

<sup>70</sup> [White House China Report](#), *supra* note 19, at 20; these strategies were identified as (1) “Acquire Key Technologies and Intellectual Property From Other Countries, Including the United States[.]” and (2) “Capture the Emerging High-Technology Industries That Will Drive Future Economic Growth and Many Advancements in the Defense Industry.” *Id.* at 2.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> Press Release, Dep’t of Justice, *supra* note 57.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Fact Sheet, *supra* note 23.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

goals.<sup>78</sup> By announcing the China Initiative without a clear policy objective or enforcement mechanism, the DOJ has the authority to solve the Chinese threat by whatever means it deems necessary.

Since launching the China Initiative in 2018, the DOJ has

aggressively use[d] existing authorities, including the False Claims Act, Foreign Corrupt Practices Act (“FCPA”), Foreign Agent Registration Act, Foreign Investment Risk Review Modernization Act, NIH and DOD grant rules, university ethics rules and conflicts of interest policy, and export control laws, to target companies and persons seeking to obtain U.S. companies’ intellectual property and technology.<sup>79</sup>

While these sweeping enforcement measures work to produce high-profile arrests and convictions,<sup>80</sup> they also incite anxiety and confusion at universities and research institutes across the country as scholars and scientists scramble to comply with the new enforcement procedures.<sup>81</sup> The American Council on Education’s (ACE) public request for clarification on how to comply with grant rules, ethics rules, and conflicts of interest policies was effectively ignored by the department of education.<sup>82</sup> Law firms who advise academic institutions fear that the “[i]nitiative has targeted professors acting in good faith who just didn’t understand the rules for applying for government grants.”<sup>83</sup> Members of the Chinese-American academic community feel especially vulnerable, with many living in fear that their sincerest efforts to comply with U.S. academic rules will be overshadowed by their Chinese ancestry.<sup>84</sup>

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<sup>78</sup> *Id.* at 2.

<sup>79</sup> Dorsey “China Initiative” Task Force, DORSEY, [https://www.dorsey.com/-/media/files/china/dorsey-china-initiative-task-force\\_finaal.pdf?la=en&hash=A23EED8142206163ECA83769A24E05F1](https://www.dorsey.com/-/media/files/china/dorsey-china-initiative-task-force_finaal.pdf?la=en&hash=A23EED8142206163ECA83769A24E05F1) [https://perma.cc/X5YT-FSE3] (last visited Oct. 31, 2020, 5:00 PM).

<sup>80</sup> DiCanio et al., *supra* note 33.

<sup>81</sup> Letter from Terry Hartle, Senior Vice President of ACE, Gov. Rel. & Pub. Aff., to Diane Jones, Delegated Under Secretary (Jan. 18, 2019), <https://www.acenet.edu/Documents/Letter-to-Dept-of-Education-Regarding-Section-117-of-HEA.pdf> [https://perma.cc/PA5W-T7PL].

<sup>82</sup> See e.g. *Id.*

<sup>83</sup> Betsy Woodruff Swan, *Inside DOJ’s Nationwide Effort to Take on China*, POLITICO (Apr. 7, 2020), [https://www.politico-com.cdn.ampproject.org/c/s/www.politico.com/amp/news/2020/04/07/justice-department-china-espionage-169653?fbclid=IwAR1JfWB02H\\_1ZMUrtBfq79mBtnFtecJ7H-XDfRYVfh6RmysBYuFy8cPXqs](https://www.politico-com.cdn.ampproject.org/c/s/www.politico.com/amp/news/2020/04/07/justice-department-china-espionage-169653?fbclid=IwAR1JfWB02H_1ZMUrtBfq79mBtnFtecJ7H-XDfRYVfh6RmysBYuFy8cPXqs), [https://perma.cc/QR3S-T5SE] (quoting Catherine Pan, partner at Dorsey).

<sup>84</sup> Gina Kolta, *Vast Dragnet Targets Theft of Biomedical Secrets for China*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html> [https://perma.cc/5JTG-PYRY] (Statement of Mr. Wu: “We can’t tell who is guilty or innocent[] but look at the actual effect on people of Chinese descent, People are living in fear. It is a question of impact rather than intent”).

#### IV. HOW THE CHINA INITIATIVE AFFECTS ACADEMIA

Two of the China Initiative's goals specifically implicate college campuses and research institutes<sup>85</sup> as potential targets of Chinese academic espionage.<sup>86</sup> These goals aim to "[ (1) ] develop an enforcement strategy concerning non-traditional collectors (e.g., researchers in labs, universities, and the defense industrial base) that are being co[-]opted into transferring technology contrary to U.S. interests; [and (2) ] educate colleges and universities about potential threats to academic freedom and open discourse from influence efforts on campus."<sup>87</sup>

During a February 2018 U.S. Senate Intelligence Committee hearing, then FBI Director Christopher Wray described Chinese students—particularly those in advanced science and mathematics programs—as “exploiting the very open research and development environment that we have, which we [the U.S. society] all revere.”<sup>88</sup> Wray further implicated professors and scientists of Chinese origin as the type of non-traditional collectors who threaten to co-opt U.S. innovation for the Chinese government.<sup>89</sup> While not the first federal scheme to target a specific racial minority group in the name of national security,<sup>90</sup> the China Initiative's methods for achieving its goals lack the nuance required to avoid discriminatory or xenophobic outcomes. The hostile environment created by the China Initiative is contributing to a decline in international student enrollment across the U.S., and many Chinese-American students have expressed fear and concern about their overall safety.<sup>91</sup> The enforcement of previously dormant or underutilized federal reporting statutes in the name of academic espionage is overloading university administrations and threatening to diminish U.S. research funding pathways.<sup>92</sup> Furthermore, the broad reach of the DOJ's enforcement power exacerbates the issue of national

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<sup>85</sup> Fact Sheet, *supra* note 23.

<sup>86</sup> Academic espionage is defined as the complex practices of using “non-traditional collectors” like students and professors to gather intelligence information, in the form of trade secrets and technological advancements, from universities or other advanced research settings. Grubbs, *supra* note 28, at 235 (2019).

<sup>87</sup> Fact Sheet, *supra* note 23, at 2.

<sup>88</sup> See Press Release, White House, *supra* note 51, at 14.

<sup>89</sup> *Id.*

<sup>90</sup> See e.g. *Korematsu v. United States*, 323 U.S. 214, (1944), *overruled by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>91</sup> Elizabeth Redden, *A Welcome Message, or a Warning?* INSIDE HIGHER ED (July 31, 2019), <https://www.insidehighered.com/news/2019/07/31/state-departments-top-education-official-says-chinese-students-are-welcome-%E2%80%A6> [<https://perma.cc/LJU2-3PDS>].

<sup>92</sup> Memorandum from Ted Mitchell, President of ACE, to Stephanie Valentine, PRA Coordinator (Nov. 5, 2019), <https://www.acenet.edu/Documents/Comments-Memo-Sec-117.pdf> [<https://perma.cc/39VR-C9LE>].



security scapegoating experienced by visiting Chinese scholars and American citizens of Asian descent.<sup>93</sup>

### A. *The China Initiative's Effects on Universities and Research Institutions*

#### 1. Decline in International Student Enrollment

In May 2019, the National Association of Foreign Student Advisers (NAFSA)<sup>94</sup> reported that new international student enrollment was down 6.6%, double the decrease from 2018.<sup>95</sup> This sharp decline is partly due to the shrinking size of many countries' college-age cohorts,<sup>96</sup> but troubling U.S. policy changes and anti-immigrant rhetoric continue to worsen the problem.<sup>97</sup> The China Initiative exacerbates the negative perception of the U.S. as an academic destination by creating an increasingly hostile environment for aspiring scholars of Asian heritage.

Since the 1990s, China has been a substantial pipeline for international student enrollment in American colleges and universities.<sup>98</sup> Therefore, the DOJ's heightened scrutiny of students of Chinese descent could dramatically affect international student enrollment across U.S. college and university campuses that depend on international diversity to prepare students for an increasingly globalized world.<sup>99</sup> Moreover, while it may be "shortsighted to think of this issue solely in terms of revenue: international students studying at U.S. colleges and universities ...contribute[d] \$39 billion and support[ed] more than 455,000 jobs [in] the U.S. economy during

<sup>93</sup> Homepage for End National Security Scapegoating, END NAT'L SEC. SCAPEGOATING, <http://end-nationalsecurityscapegoating.org/#home> [<https://perma.cc/F3AP-GG7Y>] [hereinafter "END NAT'L SEC. SCAPEGOATING"].

<sup>94</sup> *NAFSA Losing Talent Report*, *supra* note 16.

<sup>95</sup> *Id.* at 2.

<sup>96</sup> Countries like Japan and South Korea have simply started having fewer children, meaning they have fewer college-age students to send abroad. Justin Fox, Opinion, *The International Student Slump Isn't Just About Trump*, BLOOMBERG (Aug. 21, 2019), <https://www.bloomberg.com/opinion/articles/2019-08-21/why-fewer-international-students-are-choosing-u-s-colleges> [<https://perma.cc/H8FS-G9NF>].

<sup>97</sup> These policy changes include increases to international student visa application fees, new ways to punish students who violate the conditions of their visas, and intense scrutiny over permit programs that enable students to work in the U.S. after graduation. Marnette Federis, *Visa Rules are Restricting the Future of International Students in the U.S.*, WORLD (June 20, 2019), <https://www.pri.org/stories/2019-06-20/visa-rules-are-restricting-future-international-students-us> [<https://perma.cc/HK4E-WYSX>].

<sup>98</sup> Nick Anderson et al., *Universities Worry About Potential Loss of Chinese Students*, WASH. POST (June 3, 2019), [https://www.washingtonpost.com/local/education/universities-worry-about-potential-loss-of-chinese-students/2019/06/03/567044ea-861b-11e9-98c1-e945ae5db8fb\\_story.html](https://www.washingtonpost.com/local/education/universities-worry-about-potential-loss-of-chinese-students/2019/06/03/567044ea-861b-11e9-98c1-e945ae5db8fb_story.html) [<https://perma.cc/BUH8-Z56N>].

<sup>99</sup> *Id.*

the 2017–2018 academic year.”<sup>100</sup> The U.S. cannot afford to close the pipeline of talent and tuition that supports its education system and drives its economy forward.

International students cite the tenuous sociopolitical environment and the general feeling of unwelcomeness as key factors precluding them from pursuing an education in the U.S.<sup>101</sup> Potential college and university students also cite a significant increase in concerns about physical safety in the U.S., including gun violence and civil unrest.<sup>102</sup> For students of Chinese descent, the increased risk of racial profiling both on campus and in American society has caused them to look to other countries—such as Canada, Australia, or India—where they feel they can study in a more welcoming and less hostile environment.<sup>103</sup> Furthermore, since June 2018, the state department has shortened the visa length for Chinese graduate students studying in sensitive research fields from five years to one year, with the chance to reapply annually.<sup>104</sup> This added hurdle means that some students must fly back to China once a year, even if their graduate program is multi-year, risking denial partway through completion of their academic studies. The China Initiative further deteriorates the U.S.’ educational environment at a time when international students are already starting to choose other countries in which to pursue their academic aspirations. Chinese students faced with unstable policies and an unsafe environment are likely to take their talent, ideas, and tuition dollars to places like Canada, Australia, or India, ultimately diminishing the U.S.’ potential as a future hub for innovation.

## 2. Sudden Enforcement of Section 117 of the HEA: Disclosure of Foreign Gifts

The China Initiative prompted the DOJ to begin using various administrative rules or statutes to infer academic espionage from a failure to comply with laws that had neither a clear guide for compliance nor a history of enforcement in the last few decades.<sup>105</sup> Section 117 of the Higher Education Act of 1965<sup>106</sup> is one such formerly dormant statute. The Higher Education Act (HEA) was signed into U.S. law on November 8, 1965, as

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<sup>100</sup> *NAFSA Losing Talent Report*, *supra* note 16, at 4.

<sup>101</sup> *Id.* at 6.

<sup>102</sup> *Id.* at 8.

<sup>103</sup> *Id.* at 7.

<sup>104</sup> Alexandra Yoon-Hendricks, *Visa Restrictions for Chinese Students Alarm Academia*, N.Y. TIMES (Jul. 25, 2018), <https://www.nytimes.com/2018/07/25/us/politics/visa-restrictions-chinese-students.html> [<https://perma.cc/ML2F-KUKM>].

<sup>105</sup> Letter from Terry Hartle to Diane Jones, *supra* note 81.

<sup>106</sup> Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as 20 U.S.C. § 1011f).

part of President Lyndon Johnson's Great Society domestic agenda.<sup>107</sup> The HEA's intention was "to strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education."<sup>108</sup> It increased federal money given to universities, created scholarships, gave students low-interest loans, and established a National Teachers Corps.<sup>109</sup>

Section 117 of the HEA was part of the act's reauthorization in 1986 to deal specifically with the disclosure of foreign gift; however, the statute has been largely ignored by the U.S. Department of Education (DOE) and other federal policymakers since its enactment.<sup>110</sup> The statute provides that an institution must file an annual disclosure report with the Secretary of Education if it "receives a gift from or enters into a contract with a foreign source, the value of which is \$250,000 or more...within a calendar year."<sup>111</sup> Each report must contain, at minimum, the "aggregate amount of such gifts and contracts received," with additional content requirements depending on the nature of or restrictions on the gift.<sup>112</sup> Although Congress codified section 117 of the HEA more than thirty years ago, the DOE never issued accompanying regulations.<sup>113</sup> In order to comply, universities relied solely on two "Dear Colleague" letters, one issued in 1995 and the other in 2004, that vaguely outline the section 117 requirements.<sup>114</sup> The DOE later rescinded the 2004 letter and, on June 22, 2020,

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<sup>107</sup> Lyndon B. Johnson, President, United States, Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965), available at <https://www.presidency.ucsb.edu/documents/remarks-southwest-texas-state-college-upon-signing-the-higher-education-act-1965> [<https://perma.cc/Y9UN-XNE9>] (last visited Nov. 5, 2020, 9:03 PM).

<sup>108</sup> Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1219 (1965).

<sup>109</sup> *Id.* §§ 101-105.

<sup>110</sup> 20 U.S.C. § 1011f (1998); The Department has never issued any regulations implementing the statute, instead only issuing two so-called "Dear Colleague" letters in 1995 and 2004 which provide limited guidance about how institutions are to comply with the law. For decades, the reported data was not even readily accessible, until the Department, through the Federal Student Aid office, starting posting it on a downloadable spreadsheet in 2019. ACE Government Relations, SECTION 117 OF THE HIGHER EDUCATION ACT FOREIGN GIFT AND CONTRACT REPORTING: BACKGROUND AND SUMMARY OF ISSUES OF CONCERN 1 (2019), <https://www.acenet.edu/Documents/Summary-Sec-117-and-ED-comment-request.pdf> [<https://perma.cc/P79A-7DC6>].

<sup>111</sup> 20 U.S.C. § 1011f(a) (1998).

<sup>112</sup> See e.g., *Id.* § 1011f(c) (requiring additional disclosures for restricted and conditional gifts).

<sup>113</sup> Letter from Terry Hartle to Diane Joes, *supra* note 81.

<sup>114</sup> Dep't of Educ. DCLID GEN-95-12 (Feb. 1, 1995)

[https://ifap.ed.gov/dpceletters/doc0158\\_bodyoftext.htm](https://ifap.ed.gov/dpceletters/doc0158_bodyoftext.htm) [<https://perma.cc/XTM2-59PY>]; Dep't of Educ. DCLID GEN-04-11 (Oct. 4, 2004) <https://ifap.ed.gov/dpceletters/GEN0411.html>

[<https://perma.cc/GKN9-5BM4>]; A "Dear Colleague" letter is a guidance document issued by a federal agency that helps explain and interpret existing laws and regulations. These letters are non-binding, but they are meant to provide helpful guidance in interpreting existing laws by indicating how a particular agency will enforce its own laws or rules. Christy Reese, *What are "Dear Colleague" Letters, and Why are They Important?* FACTOREGON, Dec. 21, 2016, <https://factoregon.org/dear-colleague-letters/> [<https://perma.cc/X6BV-Q62J>].

launched an online compliance portal through which institutions are now required to report foreign gifts and contracts.<sup>115</sup>

Under the China Initiative, the DOE filed a new Information Collection Request (ICR) to obtain information about foreign research funding under section 117.<sup>116</sup> This new ICR is problematic because it originates from a vague statute and creates unnecessary administrative burdens, undermines relationships, and restricts foreign investment into U.S. based initiatives. The ACE and twenty-nine other higher education organizations drafted a letter<sup>117</sup> to the DOE arguing that the scope of the proposed ICR goes beyond the scope of section 117. The group argued that “aspects of the proposed information collection would go far beyond the plain language of section 117, clearly directing institutions to make disclosures—with no statutory basis—of a vastly expanded amount of information and documents.”<sup>118</sup> The group further suggested that “the manner in which other aspects of the proposed information collection is organized and written makes the information collection subject to differing reasonable interpretations, with some of those interpretations also well beyond what [section] 117 requires.”<sup>119</sup> International donors are a key source of capital behind the important research and innovation occurring inside American institutions. By alienating foreign donors or exceedingly disrupting the flow of foreign funds into U.S. schools, the U.S. will have fewer resources to maintain its status as an innovation leader.

The DOE’s new ICR expects institutions to identify individual foreign donors by name and address, raising concerns about the loss of “anonymous gifts from foreign individuals...which is likely to have a chilling effect on the willingness of such donors to make charitable contributions at a time when affordability is a key issue on campuses and among policymakers.”<sup>120</sup> Furthermore, research institutions and universities must shoulder the increased administrative costs required to “address the volume and nature of the additional information, with no discernable benefits.”<sup>121</sup> ACE advocates stress that

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<sup>115</sup> Press Release, Dep’t of Educ., Secretary DeVos Unveils Enhanced Online Portal for Higher Education Institutions to Report Foreign Gifts and Contracts (Jun. 22, 2020), <https://www.ed.gov/news/press-releases/secretary-devos-unveils-enhanced-online-portal-higher-education-institutions-report-foreign-gifts-and-contracts> [<https://perma.cc/DHM6-D9HS>].

<sup>116</sup> Agency Information Collection Activities, Comment Requests, Foreign Gifts and Contracts Disclosures, 84 Fed. 46943 (Sept. 6, 2019).

<sup>117</sup> Memorandum from Ted Mitchell, *supra* note 92.

<sup>118</sup> *Id.* at 2.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 10-11.

<sup>121</sup> *Id.* at 3.

[t]he [DOE] has greatly underestimated the time it will take for institutions to comply with the vast and unnecessary expansion of the foreign gift reporting requirements. At the same time, the [DOE]’s information collection request requires such a large amount of information that it will actually undermine, as opposed to increase, the transparency of the relationships colleges and universities have with foreign individuals and entities, and efforts to identify nefarious conduct or inappropriate relationships. The [DOE]’s actions also risk a chilling effect on foreign giving and the willingness of foreign entities to enter contractual agreements with colleges and universities.<sup>122</sup>

Failure to comply with section 117 can result in a criminal penalty of up to twenty years; therefore, a mere administrative error could lead to the indictment of U.S.-based scholars.<sup>123</sup> In short, this sudden change in enforcement, combined with a lack of clarity from the DOE, is overwhelming institutional administrative staff. At the same time, the ICR puts researchers at risk of criminal fraud prosecution if staff fail to accurately disclose pertinent information and documents.

### 3. Widespread NIH and FBI Investigations

The China Initiative also emboldened the DOJ to co-opt the investigative powers of the U.S. National Institutes of Health (NIH) and FBI to further weed out alleged Chinese influence on U.S. research initiatives. On August 20<sup>th</sup>, 2018, the NIH sent 18,000 letters to university administrators asking to increase scrutiny of scientists and researchers with foreign ties.<sup>124</sup> While the letters themselves were vague as to the racial identity of the scientist who should be monitored, by March 2019 some institutions were reporting that every single researcher flagged by NIH was Chinese or Chinese-American.<sup>125</sup> At the 2020 World Economic Forum in Davos, the head of Beijing’s Capital Medical University, Rao Yi, criticized the U.S. for “institut[ing] policies specifically targeting scientists of Chinese

<sup>122</sup> *Id.*

<sup>123</sup> See e.g. 18 U.S.C. § 1341, 1343.

<sup>124</sup> Gina Kolta, *supra* note 84; “These efforts will be supported by a working group of the Advisory Committee to the (NIH) Director that will tap experts in academic research and security to develop robust methods to: 1. Improve accurate reporting of all sources of research support, financial interests, and relevant affiliations; 2. Mitigate the risk to IP security while continuing NIH’s long tradition of collaborations with foreign scientists and institutions; and 3. Explore additional steps to protect the integrity of peer review.” Letter from Francis S. Collins, Director of NIH, to Colleagues (Aug. 20, 2018), [https://www.insidehighered.com/sites/default/server\\_files/media/NIH%20Foreign%20Influence%20Letter%20to%20Grantees%2008-20-18.pdf](https://www.insidehighered.com/sites/default/server_files/media/NIH%20Foreign%20Influence%20Letter%20to%20Grantees%2008-20-18.pdf) [<https://perma.cc/5XYB-64QX>].

<sup>125</sup> Jeffrey Mervis, *NIH Letters Asking about Undisclosed Foreign Ties Rattle U.S. Univ.*, SCI. MAG. (Mar. 1, 2019), <https://www.sciencemag.org/news/2019/03/nih-letters-asking-about-undisclosed-foreign-ties-rattle-us-universities> [<https://perma.cc/H8MY-8N87>].

origin in biomedical science.”<sup>126</sup> Rao, a former Chinese-American who spent more than two decades studying and working in the U.S. before returning to China and withdrawing his U.S. citizenship, was outspoken in his belief that the U.S.’ approach was hurting the global scientific landscape, expressing that “[at a] global level in science, there’s no nationalism. There [is] only Trumpism in the U.S., which is damaging international collaboration.”<sup>127</sup>

The NIH and FBI investigations target scientists and researchers who fail to accurately complete NIH Foreign Financial Interest reports or properly disclose their involvement in China’s “Thousand Talent Plan” (TTP).<sup>128</sup> The TTP is a Chinese government-run program that seeks to recruit Chinese talent, as well as foreign academics and entrepreneurs, to work in science and technology fields in China.<sup>129</sup> The NIH concluded that the program, which was established in 2008, was used by the Chinese government to obtain confidential NIH grant applications and to establish so-called shadow labs in China, where NIH-funded research could be reproduced.<sup>130</sup> NIH Foreign Financial Interest reporting, similar to reporting under HEA section 117, was scarcely enforced and sporadically regulated until the announcement of the China Initiative in 2018.<sup>131</sup> Even so, the NIH used tactics such as data mining to flag cases in which scientists publicly mentioned relationships to foreign entities that were not otherwise logged in the NIH database.<sup>132</sup> The 2018 NIH letters to university administrators demanded disclosure of “all forms of other support and financial interests,

<sup>126</sup> Éanna Kelly, *Crackdown on Scientists from China is Trump-led Intimidation*, SCIENCE BUSINESS (Jan. 23, 2020), <https://sciencebusiness.net/news/crackdown-scientists-china-trump-led-intimidation-says-leading-chinese-academic> [https://perma.cc/E8K8-5ASN].

<sup>127</sup> *Id.*

<sup>128</sup> *Compliance with Foreign Grants*, NAT’L INST. ALLERGY AND INFECTIOUS DISEASES, <https://www.niaid.nih.gov/grants-contracts/compliance-foreign-grants> [https://perma.cc/Z33K-3D5T] (last viewed Sept. 25, 2019).

<sup>129</sup> James Jin Kang, *The Thousand Talents Plan is part of China’s long quest to become the global scientific leader*, THE CONVERSATION (Aug. 31, 2020), <https://theconversation.com/the-thousand-talents-plan-is-part-of-chinas-long-quest-to-become-the-global-scientific-leader-145100#:~:text=The%20Thousand%20Talents%20Plan%20is%20a%20Chinese%20government%20program%20to,%2C%20Japan%2C%20France%20and%20Australia.> [https://perma.cc/9L9E-2XXJ].

<sup>130</sup> Jeffery Mervis, *NIH Reveals Its Formula for Tracking Foreign Influences*, SCI. MAG. (Oct. 4, 2019), [https://www.sciencemagazinedigital.org/sciencemagazine/04\\_october\\_2019\\_Main/MobilePagedArticle.action?articleId=1527182#articleId1527182](https://www.sciencemagazinedigital.org/sciencemagazine/04_october_2019_Main/MobilePagedArticle.action?articleId=1527182#articleId1527182) [https://perma.cc/SKQ6-NFTC].

<sup>131</sup> While DOJ had historically focused on thefts of trade secrets and intellectual property from private U.S. companies or federal agencies, the China Initiative expanded the government’s focus to the alleged threat posed by individuals working within academic institutions in 2018. *The China Initiative Heads to School*, JD SUPRA (Mar. 25, 2019), <https://www.jdsupra.com/legalnews/the-china-initiative-heads-to-school-47755/> [https://perma.cc/2PYZ-Z6KR].

<sup>132</sup> Mervis, *supra* note 130.

including support coming from foreign governments or other foreign entities,”<sup>133</sup> despite much of the information being publicly available.

By February 2020, the House Committee on Oversight and Reform expressed alarm over the growing number of NIH investigations that targeted ethnically Chinese scientists.<sup>134</sup> In letters addressed separately to the FBI and NIH Directors, lawmakers shared their concern that ethnically Chinese scientists were being racially profiled while trying to work in the U.S.<sup>135</sup> While acknowledging the legitimate need to investigate concerns of intellectual property theft and espionage, the House Committee highlighted evidence that the FBI was disproportionately arresting and charging Chinese-American scientists who turned out to be innocent of all charges.<sup>136</sup> The lawmakers further quoted the former president of the Committee of 100,<sup>137</sup> Frank Wu, saying that he was “getting calls and emails constantly now from ethnic Chinese—even those who are U.S. citizens—who feel threatened” by racial profiling, discrimination, and unfair treatment by government officials.<sup>138</sup>

The U.S. has a long history of over-prosecuting innocent Chinese “spies” for industrial, economic, and academic espionage related charges.<sup>139</sup> This history, combined with overbroad federal statutes criminalizing erroneous funding reports, has created the newly coined crime of “researching while Asian.”<sup>140</sup> The DOJ is adamant that their approach to the China Initiative is not specifically targeting Chinese people, but rather

<sup>133</sup> Letter from Francis S. Collins to Colleagues, *supra* note 124; disclosure requirements are outlined under 42 CFR Part 50, Subpart F, Objectivity of Research. 42 C.F.R. §§ 50.604-50.605 (2016).

<sup>134</sup> Cristina Marcos, *House Democrats Launch Probe into NIH and FBI Suspecting Chinese Americans of Espionage*, HILL (Feb. 20, 2020), <https://thehill.com/homenews/house/483910-house-democrats-launch-probe-into-nih-and-fbi-suspecting-chinese-americans-of> [<https://perma.cc/LA9S-QY34>].

<sup>135</sup> *Id.*

<sup>136</sup> Letter from Jamie Raskin, Chairman, Subcomm. on Civil Rights and Civil Liberties & Judy Chu, Chair, Cong. Asian Pac. Am. Caucus, to Christopher Way, Dir., FBI, H.R. Comm. on Oversight and Reform (Feb. 20, 2020), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-02-20.JR%20Chu%20to%20Collins-NIH%20re%20Ethnic%20Targeting.pdf> [<https://perma.cc/ZXG4-JP9R>].

<sup>137</sup> The Committee of 100 (C100) is a non-partisan leadership organization of prominent Chinese Americans in business, government, academia, and the arts. For more information, see Charlie Woo, *Frank Wu Steps Down as President of Committee of 100*, COMM. 100 (Sept. 24, 2019), [https://www.committee100.org/press\\_release/frank-h-wu-steps-down-as-president-of-committee-of-100/](https://www.committee100.org/press_release/frank-h-wu-steps-down-as-president-of-committee-of-100/), [<https://perma.cc/CZV2-XNPR>].

<sup>138</sup> Letter from Francis S. Collins to Colleagues, *supra* note 124.

<sup>139</sup> MARA HVISTENDAHL, *THE SCIENTIST AND THE SPY: A TRUE STORY OF CHINA, THE FBI, AND INDUSTRIAL ESPIONAGE* 103, 153, 155 (Penguin Random House, 1<sup>st</sup> ed. 2020).

<sup>140</sup> Peter Walden, *Chinese Scientists Guilty of ‘Researching While Asian’ in Trump’s America*, SOUTH CHINA MORNING POST (Jun. 29, 2019), <https://www.scmp.com/magazines/post-magazine/long-reads/article/3016267/chinese-scientists-guilty-researching-while>, [<https://perma.cc/86BY-3MRF>].

is meant to target the Chinese government and the Chinese Communist Party. However, current evidence and the prosecutorial record suggest otherwise.

## B. *The China Initiative's Effects on Researchers*

### 1. The Tip of the Iceberg

The “China Initiative” is hardly the first state-sponsored program targeting Chinese people trying to work, live, or study in the U.S.<sup>141</sup> Since 2012, federal prosecutors have implicated China, or individuals of Chinese descent, in more than 80 percent of all cases involving actual or attempted theft of critical economic and scientific intellectual property.<sup>142</sup> As ethnically Chinese individuals find themselves increasingly more likely to be arrested or charged with crimes related to espionage, they also find themselves twice as likely to have their charges dropped, be acquitted at trial, or plead to a lesser charge before trial.<sup>143</sup> As mentioned above, experts acknowledge that it is possible that ethnically-Chinese scientists are simply committing more intellectual property crimes.<sup>144</sup> They also warn, however, of the possibility that Chinese and other Asians are disproportionately prosecuted, and often falsely prosecuted, due to specific racial targeting, implicit bias, or intense DOJ pressure to hold *someone* accountable for “[t]he long-term existential threat [posed by China] to the security of our nation.”<sup>145</sup> Leaders in the Asian-American scientific community do not dispute that such crimes have occurred, nor that a need to prevent them exists, but they argue that a blanket approach to investigating scientists

<sup>141</sup> See e.g. Chinese Exclusion Act, Pub L. No. 47-126, 22 Stat. 58 (1882) (prohibiting all immigration of Chinese laborers); Immigration Act of 1924, Pub.L. No. 68-139, 43 Stat. 153 (1924) (prevented immigration from Asia, set quotas on the number of immigrants from the Eastern Hemisphere, and provided funding and an enforcement mechanism to carry out the longstanding ban on other immigrants); Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113-6, 127 Stat. 198 (2013) (prohibiting NASA from using any funds “to effectuate the hosting of official Chinese visitors at facilities belonging to or utilized by NASA”).

<sup>142</sup> Nancy Hungerford, *Chinese Theft of Trade Secrets on the Rise*, the US Justice Department Warns, CNBC WORLD POLITICS (Sep. 22, 2019, 11:30 PM), <https://www.cnbc.com/2019/09/23/chinese-theft-of-trade-secrets-is-on-the-rise-us-doj-warns.html>, [<https://perma.cc/F89Q-SWGW>].

<sup>143</sup> when compared to defendants with “western” last names. See Kim, *supra* note 36, at 754; The study analyzed the ethnicity of individuals prosecuted under the Economic Espionage Act from 1997 to 2015 by coding each defendant’s last name as either “Chinese,” “Other Asian” (including East Asian, South Asian, and Southeast Asian names), “Western named” (including Latino and Eastern European names), or “Arabic.” *Id.* t 782.

<sup>144</sup> *Id.* at 754.

<sup>145</sup> *Id.*; quoting William Evanina, the head of U.S. counterintelligence, in a press briefing in Washington, DC on February 6, 2020. Caitlin Yilek, *‘Existential threat’: US warns of Chinese espionage capabilities*, WASHINGTON EXAMINER (Feb. 6, 2020 12:10 PM) <https://www.washingtonexaminer.com/news/existential-threat-us-warns-of-chinese-espionage-capabilities> [<https://perma.cc/3THY-689Z>].



who are ethnically Chinese is both disruptive and counterintuitive.<sup>146</sup> An anti-Chinese climate in the U.S. could cut U.S. scientists off from open lines of academic discourse that are crucial for the ongoing exchange of ideas that lead to innovative breakthroughs.

False allegations prior to the China Initiative proved devastating to Chinese-American scientists who spent years building lives and prestigious careers in the United States. For example, Xiafen "Sherry" Chen, a former hydrologist for the National Weather Service (NWS), was arrested in 2014 for allegedly using a stolen password to download secret information about U.S. dams to be shared with Chinese officials.<sup>147</sup> Chen's charges were eventually dropped in early 2015,<sup>148</sup> but Chen later lost her job with the NWS and found herself locked in various legal battles with the Merit Systems Protection Board (MSPB), the Department of Commerce, and, most recently, the U.S. government.<sup>149</sup> Similarly, Dr. Xiaoxing Xi, the former chairman of the Temple University physics department, was arrested at gunpoint in 2015 for allegedly sharing information with entities in China "concerning a 'pocket heater' belonging to Superconductor Technologies Inc.,"<sup>150</sup> only to have his charges dropped by prosecutors due to inaccurate and conflicting evidence.<sup>151</sup> Even though the arrest failed to result in a prosecution, it cast a shadow of suspicion over Dr. Xi, ultimately causing the suspension from his job as a professor and the removal of his title as the chairman of the physics department.<sup>152</sup> By rushing to arrest Chinese scientists before fully corroborating key elements of the case, federal prosecutors ruin the lives and careers of innocent individuals.

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<sup>146</sup> Shan Lu et al., *Racial Profiling Harms Science*, 363 SCIENCE 1290, 1290 (2019). DOI: 10.1126/science.aaw6854.

<sup>147</sup> Nicole Perlroth, *Accused of Spying for China Until She Wasn't*, (May 9, 2015), <https://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html>, [https://perma.cc/VVK7-U43S].

<sup>148</sup> Order Granting Motion to Dismiss the Indictment, *United States v. Xiafen Chen*, No. 3:14-cr-00149 (S.D. Ohio Oct 16, 2014).

<sup>149</sup> Sherry Chen Legal Defense Fund, *2018-Now: Post-MSPB Decision Developments and Actions* (2019), <https://www.sherrychendefensefund.org/2018-now.html>, [https://perma.cc/W6G3-HJM7]; see e.g. Amended Complaint, *Xiafen Chen v. United States*, No. 1:19-cv-00045, 2019 BL 322990 (S.D. Ohio Sep. 23, 2019).

<sup>150</sup> Complaint at 1, 15, *Xi v. Haugen*, No. 2:17-cv-02132 (E.D. Pa. May 10, 2017).

<sup>151</sup> 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> [https://perma.cc/GR8F-SGPB].

<sup>152</sup> Matt Apuzzo, *Former Espionage Suspect Sues, Accusing F.B.I. of Falsifying Evidence*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/us/politics/fbi-xi-xiaoxing.html> [https://perma.cc/VVF5-2DLJ].

In 2016, the Congressional Asian Pacific American Caucus (CAPAC) wrote a letter to then Inspector General Michael Horowitz demanding “an independent investigation into whether race, ethnicity, or national origin played a part in recent cases in which Asian Americans have been wrongfully arrested and indicted for alleged espionage.”<sup>153</sup> Rather than conducting an investigation, the DOJ subsequently issued a press release announcing new Department-wide implicit bias training for all of its law enforcement agents and prosecutors.<sup>154</sup> Since the press release, the DOJ has been silent on the implementation or effectiveness of such training, yet the department has doubled down on its scrutiny and suspicion of individuals of Chinese heritage.<sup>155</sup>

## 2. A “Spike” in Prosecutions

In a press conference from the Center for Strategic and International Studies on February 6<sup>th</sup>, 2020, a panel of U.S. attorneys warned that “[r]esearchers in academia and industry who work with Chinese institutions should expect a ‘spike’ in prosecutions this year as a result of a U.S. government initiative to stop economic espionage.”<sup>156</sup> By the end of 2020, the DOJ boasted thousands of open investigations involving China, with the “FBI open[ing] a new China-related counterintelligence case nearly every 10 hours.”<sup>157</sup> While FBI officials spoke candidly about their success in prosecuting crimes of “academic espionage,” they failed to mention that

<sup>153</sup> Letter from Congressional Asian Pacific American Caucus to Inspector General Michael E. Horowitz (May 13, 2016) [https://drive.google.com/file/d/0Bysg-cpS\\_9OIU09WUXhkemxrZzQ/view](https://drive.google.com/file/d/0Bysg-cpS_9OIU09WUXhkemxrZzQ/view) [https://perma.cc/V473-WC6Y].

<sup>154</sup> *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, DEP’T OF JUSTICE OFF. PUB. AFF. (June 27, 2016), <https://www.justice.gov/opa/pr/departement-justice-announces-new-department-wide-implicit-bias-training-personnel> [https://perma.cc/K9VX-TZVU].

<sup>155</sup> See Press Release, White House, *supra* note 51.

<sup>156</sup> Catherine Matacic, *U.S. Attorneys Warn of Upcoming ‘Spike’ in Prosecutions Related to China Ties*, SCI. MAG. (Feb. 7, 2020, 3:15 PM), <https://www.sciencemag.org/news/2020/02/us-attorneys-warn-upcoming-spike-prosecutions-related-china-ties> [https://perma.cc/3W5M-NV2U]. A video of the press conference is available at Center for Strategic & International Studies, *China Initiative Conference*, YOUTUBE (Feb. 6, 2020), [https://www.youtube.com/watch?v=M1dxt82HFE&feature=emb\\_logo](https://www.youtube.com/watch?v=M1dxt82HFE&feature=emb_logo) [https://perma.cc/7AEF-9AZF].

<sup>157</sup> *FBI Director Christopher Wray’s Opening Remarks: China Initiative Conference*, CTR. FOR STRATEGIC INT’L STUD. 2 (Feb. 6, 2020), <https://www.csis.org/analysis/fbi-director-christopher-wrays-opening-remarks-china-initiative-conference>, [https://perma.cc/3KXW-TSLU]; Press Release, Dep’t of Justice Off. Pub. Aff., *The China Initiative: Year-in-Review (2019-20)* (Nov. 16, 2020), <https://www.justice.gov/opa/pr/china-initiative-year-review-2019-20> [https://perma.cc/F5LA-8QX4].

most “espionage” claims were now being inferred through fraud prosecutions.<sup>158</sup> Although the DOJ ramped up its investigations of Chinese nationals and Chinese-Americans, definitive findings of espionage against such targets are much less tangible. By using the China Initiative to prosecute researchers for fraudulent reporting under the HEA or NIH guidelines, the DOJ can still remove alleged Chinese “threats” while avoiding the heavy burden of proof required to prosecute under more rigorous laws, such as the EEA.<sup>159</sup> Now, experts warn that “the aggressive enforcement posture of the China Initiative is on full display—even if the factual record contains no evidence of [actually spying for China].”<sup>160</sup>

The China Initiative’s “spike” in prosecutions now targets both ethnically Chinese scientists and ethnically American scientists with close ties or relationships with Chinese scientists or institutions. High profile indictments like those of University of Kansas researcher Franklin Tao; Emory University neuroscientist Xiao-jiang Li; or former Harvard chemistry chair Dr. Christopher Lieber exemplify the China Initiative’s widespread effect on scientific researchers.

In 2019, Feng “Franklin” Tao, an associate professor at the University of Kansas (KU) Center for Environmentally Beneficial Catalysis (CEBC), was charged with wire fraud and program fraud under 18 U.S.C. §§ 1343 and 666.<sup>161</sup> A superseding indictment filed on January 15, 2020 alleged that Tao submitted false conflict of interest forms to KU, and thus “obtained by fraud, property worth at least \$5,000.”<sup>162</sup> By failing to disclose an active affiliation with a Chinese university on two KU conflict-of-interest forms, Tao now faces “up to 20 years in federal prison and a

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<sup>158</sup> Before the China Initiative, federal prosecutors could only bring claims of espionage under the Economic Espionage Act. See 18 U.S.C. §§ 1831-32 (1996).

<sup>159</sup> The Economic Espionage Act provides two statutory avenues for criminal prosecution: (1) economic espionage, which involves the misappropriation of a trade secret with the intent to benefit a foreign government, foreign instrumentality, or foreign agent, *Id.* § 1831; and (2) trade secret theft, which involves the misappropriation of a trade secret with the intent to convert the trade secret to the economic benefit of anyone other than the owner and to injure the owner of the trade secret, *Id.* § 1832.

<sup>160</sup> Christopher Nasson, David Peet, & Neil Smith, *DOJ v. China: Is DOJ Acting as an Instrument of Foreign Policy?*, JD SUPRA (Oct. 3, 2019), <https://www.jdsupra.com/legalnews/doj-v-china-is-doj-acting-as-an-64952/>, [<https://perma.cc/V77C-T5MU>].

<sup>161</sup> Sealed Indictment, *United States v. Tao*, 2:19-cr-20025-JAR Doc 1 (D. Kan. Aug. 21, 2019); Mot. to Dismiss Indictment at 1, *United States v. Tao*, 2:19-cr-20052-JAR Doc. 30 (D. Kan. Nov. 17, 2019).

<sup>162</sup> Superseding Indictment at 12, 13, *United States v. Tao*, 2:19-cr-20052-JAR. (D. Kan. Jan. 15, 2020).

A Second Superseding indictment brings Professor Tao’s total charges to 10: 7 for wire fraud and 3 for making false statements. None of the indictments make any mention of IP theft or cooption of protected trade secrets or scientific materials. Second Superseding Indictment at 11-14, *United States v. Tao*, 2:19-cr-20052-JAR. (D. Kan. Jun. 24, 2020).

fine up to \$250,000.”<sup>163</sup> In a motion to dismiss filed on August 14, 2020, counsel for Tao stressed that “the government has turned a garden-variety employment issue that is well within the jurisdiction of a Human Resources department ... into a federal case involving nearly a dozen felony charges.”<sup>164</sup>

Xiao-jiang Li, a neuroscientist and biomedical researcher at Emory University, was also charged in 2019 with program fraud under 18 U.S.C. § 666(a)(1)(A), for “theft or bribery concerning programs receiving [f]ederal funds.”<sup>165</sup> Li, who had already been fired from Emory in the wake of his investigation,<sup>166</sup> allegedly accepted a full salary from Emory, paid in part by federal research grants, despite spending a significant portion of the time concurrently working in China.<sup>167</sup> In May 2020, federal prosecutors abruptly dismissed all fraud charges against Li; instead, the former Emory professor pled guilty to filing a false tax return and was sentenced to one year probation.<sup>168</sup> The DOJ was careful to point out that Li was living “two, separate lives” but could not prove that he was engaging in intellectual property theft or any other activities amounting to espionage.

In January 2020, Dr. Charles Lieber, chair of Harvard’s chemistry department, was arrested on charges in violation of 18 U.S.C. § 1001(a)(2), making false statements to the agency of the U.S. government.<sup>169</sup> Later, in July 2020, the DOJ added charges of tax fraud and alleged failure to disclose a foreign bank account related to Dr. Lieber’s supposed failure to disclose his research and related income linked to China.<sup>170</sup> Federal prosecutors claimed that Dr. Lieber, one of the world’s leading nanoelectronics experts, failed to divulge a \$1.5 million research partnership with China’s Wuhan University of Technology, and lied about his involvement with the TTP.<sup>171</sup> Dr. Lieber, who was placed on indefinite administrative leave from Harvard, faces up to five years in prison and a

<sup>163</sup> Press Release, Dep’t of Justice Off. Pub. Aff., University of Kansas Researcher Indicted for Fraud for Failing to Disclose Conflict of Interest with Chinese University (Aug. 21, 2019), <https://www.justice.gov/opa/pr/university-kansas-researcher-indicted-fraud-failing-disclose-conflict-interest-chinese> [<https://perma.cc/K6UV-VG3T>].

<sup>164</sup> Memorandum of Dr. Franklin Tao in support of his motion to dismiss the second superseding indictment for failure to state an offense and lack of venue at 3, United States v. Feng Tao, No.2:19-cr-20052-JAR (D.Kan., Aug. 14, 2020).

<sup>165</sup> Criminal Complaint at 3, United States v. Li, 1:19-mj-01007-JFK (N.D. Ga. Nov. 21, 2019).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Aff. in Supp. of Appl. for Criminal Complaint at 2, United States v. Lieber, 1:20-mj-02158-MBB (D. Mass Jan. 27, 2020).

<sup>169</sup> Complaint at 1, United States v. Lieber, No. 1:20-mj-02158-MBB (D. Mass. Jan. 27, 2020).

<sup>170</sup> First Superseding Indict., United States v. Lieber, No. 20-cr-10111-RWZ (D. Mass. July 28, 2020).

<sup>171</sup> Aff. in Supp. of Appl. for Criminal Complaint at 2, United States v. Lieber, 1:20-mj-02158-MBB (D. Mass Jan. 27, 2020).

\$250,000 fine for the false statement claims, three years in prison and a \$100,000 fine for the false tax returns, and an additional five years in prison and a \$250,000 fine for failing to disclose his foreign bank account.<sup>172</sup> Upon entering a plea of not guilty on all charges, counsel for Dr. Lieber ardently maintained their client's innocence, noting that "the government has this wrong" and that "when justice is done, Charlie's good name will be restored."<sup>173</sup>

By indicting scientists, like those mentioned above, on allegations of fraudulent reporting rather than economic or academic espionage (or other more narrowly tailored crimes), the DOJ conflates their "spike" in prosecutions with "success" in weeding out Chinese intellectual property thieves. It is impossible to tell whether such arrests are rooted in administrative oversight or bona fide nefarious intentions. In addition, by intensifying distrust and suspicion of individuals with ties to China, the DOJ's actions discourage open communication between U.S. researchers and the rest of the scientific community. At a time when scientific discovery is becoming increasingly globalized,<sup>174</sup> a "spike" in prosecutions of internationally connected scientists in the U.S. will likely result in a reduction to the United States' innovative capacity.

### 3. Dismissed, Let Go, or Summarily Fired

By December 2020, the DOJ reported that more than 1,000 foreign researchers affiliated with China had left the U.S. in the wake of China Initiative crackdowns.<sup>175</sup> In some cases, researchers were let go at the first sign of an investigation amidst fears of reputational harm or loss of critical federal research funding.<sup>176</sup> Because the NIH is the main public funder of research in the U.S., the loss of its support would be devastating to most institutions.

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<sup>172</sup> Bethany Halford, *Charles Lieber Pleads Not Guilty to Charges of Tax Offenses and Lying to Investigators*, CHEMICAL & ENG'G NEWS (July 30, 2020), <https://cen.acs.org/research-integrity/misconduct/Charles-Lieber-pleads-guilty-charges/98/web/2020/07> [<https://perma.cc/T66P-7CT4>].

<sup>173</sup> *Harvard Professor Pleads Not Guilty To Hiding Ties To China*, WBUR (June 16, 2020), <https://www.wbur.org/news/2020/06/16/charles-lieber-not-guilty-plea-chinese-run-recruitment>, [<https://perma.cc/PB4K-9BNV>].

<sup>174</sup> *Id.*; See also *infra* Section V(A).

<sup>175</sup> Reuters, *Official: Over 1,000 Chinese Researchers Have Left US Amid Tech Theft Crackdown*, VOICE OF AMERICA (Dec. 2, 2020) <https://www.voanews.com/usa/official-over-1000-chinese-researchers-have-left-us-amid-tech-theft-crackdown> [<https://perma.cc/2HK5-5BXJ>].

<sup>176</sup> See e.g. Owen Dyer, *US Hospitals Predict Wave of Dismissals Over Undisclosed China Links*, BMJ (Apr. 25, 2019), <https://www.bmj.com/content/365/bmj.11911> [<https://perma.cc/E3B3-ZN9B>].

In May 2019, neuroscientists Li Xiao-Jiang and Li Shihua were fired from Emory University “simultaneously without any notice or opportunity...to respond to unverified accusations.”<sup>177</sup> The two researchers, known for their research on Huntington disease, are both U.S. citizens and worked at Emory for over twenty-three years. The University immediately closed the pair’s joint laboratory, shut down their websites, and ordered four Chinese postdoctoral students working in the lab to leave the U.S. within thirty days.<sup>178</sup> Publicly available papers published by the Lis in high-profile journals, as well as biographical information posted online, have widely disclosed the couple’s Chinese funding and affiliations,<sup>179</sup> yet the NIH insisted that they were engaging in widespread program deception.

The MD Anderson Cancer Center in Houston, Texas similarly ousted top epidemiologists in April 2019 after receiving NIH e-mails describing conflicts of interest or unreported foreign income by five faculty members.<sup>180</sup> Dr. Wu Xifeng, a naturalized U.S. citizen who had worked at MD Anderson for twenty-seven years, was pressured to resign from her position and has since relocated to the School of Public Health at Zhejiang University in Hangzhou, China.<sup>181</sup> Simultaneously, Hung Mien-Chie, a Taiwanese-born cancer researcher, retired from his position as MD Anderson’s vice president for basic research to take a job as president of China Medical University in Taichung, Taiwan.<sup>182</sup> Although Hung did not publicly connect his resignation with the ongoing NIH probe, he previously raised concerns about possible racial profiling at institutions across the country, expressing hope that “increased security measures will not be

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<sup>177</sup> Jon Cohen, *Terminated Emory Researcher Disputes University’s Allegations Ties*, SCI. MAG. (May 24, 2019), <https://www.sciencemag.org/news/2019/05/terminated-emory-researcher-disputes-university-s-allegations> [https://perma.cc/792T-2RUD].

<sup>178</sup> *Id.*

<sup>179</sup> See e.g. Li Shihua et al., *CRISPR/Cas9-mediated gene editing ameliorates neurotoxicity in mouse model of Huntington’s disease*, 127 J. CLINICAL INVESTIGATION 2719, 2723 (2017) (Acknowledging grants from the NIH and the National Natural Science Foundation of China) [https://doi.org/10.1172/JCI92087].

<sup>180</sup> Todd Ackerman, *MD Anderson Ousts 3 Scientists over Concerns About Chinese Conflicts of Interest*, HOUSTON CHRON. (Apr. 19, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/MD-Anderson-fires-3-scientists-over-concerns-13780570.php> [https://perma.cc/V34C-KYSY].

<sup>181</sup> Gina Kolata, *Vast Dragnet Targets Theft of Biomedical Secrets for China*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html> [https://perma.cc/WLW5-LC38].

<sup>182</sup> Marva Hvistendahl, *Exclusive: Major U.S. Cancer Center Ousts ‘Asian’ Researchers After NIH Flags their Foreign Ties*, SCI. MAG. (Apr. 19, 2019), <https://www.sciencemag.org/news/2019/04/exclusive-major-us-cancer-center-ousts-asian-researchers-after-nih-flags-their-foreign> [https://perma.cc/3FGS-EHPC].

used to tarnish law-abiding scientists.”<sup>183</sup> Of the five researchers under increased scrutiny by the NIH, three were pressured to leave MD Anderson, a fourth was removed through termination proceedings, and the fifth was eventually cleared, but not without rumors, confusion, anxiety, and probable racial profiling.<sup>184</sup> The DOJ’s wholesale investigative approach is driving talented scientists out of their jobs, out of the country, and out of the domestic pipeline for future U.S. innovative discovery.

## V. SUGGESTIONS FOR A REFORMED APPROACH

The China Initiative is far-reaching in nature given the new powers granted to federal agencies working to counter the “nation state threats” posed to the U.S. by China. Despite the collateral damage described above, analysts expect the Biden Administration to continue the program, with only a few minor changes made for good reason.<sup>185</sup> The national security threat posed by China is real and the interception of Chinese intellectual property theft is important, but the Biden Administration must address the DOJ’s indiscriminate approach with respect to non-traditional collectors. The DOJ’s use of fraud statutes to infer academic espionage means that researchers of Chinese-descent or with ties to China are “having their lives wrecked unnecessarily”<sup>186</sup> regardless of nefarious intent to benefit China. In order to achieve the goals of the China Initiative *and* preserve the integrity of the U.S. academic community, the DOJ and the Biden Administration should implement the following reforms to the program’s current wholesale enforcement approach.

### A. *Increase DOJ Understanding of the Nature of Scientific Research*

Advanced scientific research is an inherently public process that relies on robust collaboration and international discourse. While privately funded research has certainly been on the rise,<sup>187</sup> a significant amount of

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<sup>183</sup> *Id.*

<sup>184</sup> Marva Hvistendahl, *MD Anderson Clears Researcher Flagged by NIH for Not Disclosing Foreign Ties*, SCI. MAG. (May 30, 2019), <https://www.sciencemag.org/news/2019/05/md-anderson-clears-researcher-flagged-nih-not-disclosing-foreign-ties> [https://perma.cc/SWL2-7Y2G].

<sup>185</sup> Eric Tucker, *Justice Dept. ’s China focus likely to continue under Biden*, AP NEWS (Nov. 19, 2020), <https://apnews.com/article/donald-trump-beijing-coronavirus-pandemic-china-intellectual-property-07c4ba551790692b8757aa5d2218764e> [https://perma.cc/LCE8-VYUZ].

<sup>186</sup> Quoting Washington defense lawyer, Peter Zeidenberg, who represents Chinese professors across the country. *Id.*

<sup>187</sup> By 2018, private sector spending on scientific research outperformed US government spending by three to one. In contrast, federal government funding supported 70% of the basic research conducted in the 1960s and 1970s. Bernard B. Tulsi, *As Federal Research Funds Recede, the Private Sector is*

research continues to occur in the public sector for the purpose of advancing greater social good.<sup>188</sup> The sweeping nature of the DOJ's China Initiative exposes the department's failure to understand the "difference between [s]cientific [r]esearch being conducted at [r]esearch ... [i]nstitutions and R&D products development taking place at private pharmaceutical and biotech companies."<sup>189</sup> In a rebuke of the current federal bureaucracy, one scientist warned that while Americans continue to "fight among ourselves, China is getting ahead with its research programs because its [s]cientific [r]esearchers are not distracted by the toxic atmosphere of distrust and paranoia."<sup>190</sup> Chinese-American scientists and researchers are increasingly frustrated with the ongoing scrutiny of their ties to Chinese institutions, in part because almost all NIH-funded research is published in publicly available scientific journals.<sup>191</sup> Even proprietary data destined for patent applications eventually finds its way into the public realm: either as a published work in a scientific journal, or later through the USPTO's exhaustive public patent database.<sup>192</sup>

In 2020, the COVID-19 pandemic further exposed gaps in the government's understanding of the nature of scientific research. While scientists from around the globe put all other research on hold to contain the virus, the Trump Administration continued to tout a nationalist agenda, ripe with terms like "biotech arms race," and the classic, "America

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*Filling the Gap*, LAB MANAGER (May 6, 2018), <https://www.labmanager.com/business-management/as-federal-research-funds-recede-the-private-sector-is-filling-the-gap-2182> [<https://perma.cc/4ACJ-TBEZ>].

<sup>188</sup> The public research sector includes entities that carry out research works funded by government departments, public universities, or non-profit research foundations. *Supplemental Guidance: Public Sector Definition*, INST. OF INTERNAL AUDITORS (Dec. 2011), <https://global.theiia.org/standards-guidance/Public%20Documents/Public%20Sector%20Definition.pdf> [<https://perma.cc/35ZC-CE7J>]. For more on recent scientific advancements occurring at public institutions, see generally *Public Research Universities: Why They Matter*, AM. ACAD. ARTS & SCI. (Dec. 2011), [https://www.amacad.org/sites/default/files/publication/downloads/PublicResearchUniv\\_WhyTheyMatter.pdf](https://www.amacad.org/sites/default/files/publication/downloads/PublicResearchUniv_WhyTheyMatter.pdf) [<https://perma.cc/U9VR-L5HT>].

<sup>189</sup> H.Y. Lim Tung, *In the Matter of United States v. Charles M. Lieber: A Case of Scientific Misconduct or Political Paranoia*, 2 J. INVESTIGATIVE CRITIQUE OF PUBLISHED SCI. ARTICLES 6, 20 (Jan. 2020).

<sup>190</sup> *Id.* at 20.

<sup>191</sup> For a list of searchable public databases, see *Searchable Public Databases*, U.S. DEP'T OF HEALTH & HUM. SERV., [https://report.nih.gov/searchable\\_public\\_databases/](https://report.nih.gov/searchable_public_databases/) [<https://perma.cc/9RFU-L962>]. ("In addition to carrying out its scientific mission, the NIH exemplifies and promotes the highest level of public accountability. To that end, the Research Portfolio Online Reporting Tools provides access to reports, data, and analyses of NIH research activities, including information on NIH expenditures and the results of NIH supported research.")

<sup>192</sup> *Search for Patents*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/patents-application-process/search-patents#heading-1>, [<https://perma.cc/8R2T-2PF8>].



first.”<sup>193</sup> Scientific progress in the twenty-first century relies heavily on the efficient transmission of research results to the scientific community via open-access platforms. During COVID-19, scientists from across the globe, including the U.S., used public databases like bioRxiv<sup>194</sup> to collaborate on the creation of a vaccine or treatment.<sup>195</sup> By April 2020, “creative, persistent[,] and indefatigable researchers [were] working on more than 140 experimental drug treatments and vaccines [for the virus], cooperating across company lines and national borders.”<sup>196</sup> At the time, President Trump remained ardent in the U.S.’ commitment to being “first” to produce a vaccine, but scientists stressed that “trying to sew a ‘Made in the USA’ label onto scientific research gets complicated.”<sup>197</sup>

Academic and other scientific research, as well as the public patent system, have historically relied on international collaboration and robust public discourse. If it really is NIH policy to make the results and accomplishments of the activities that it funds available to the public,<sup>198</sup> it seems counterintuitive that the NIH or other federal agencies would seek to alienate students, scientists, and scholars over fear that they may be sharing their results and accomplishments with the wrong people. While it is clear that *some* publicly funded research must be protected on national security grounds,<sup>199</sup> the blanket approach to scrutinizing scientists with ties to China in *every* discipline of publicly funded science is surely too broad, and ultimately harmful. The DOJ would benefit from a more nuanced approach where research is categorized carefully based on *actual risk* to na-

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<sup>193</sup> Matt Apuzzo & David D. Kirkpatrick, *Covid-19 Changed How the World Does Science, Together*, <https://www.nytimes.com/2020/04/01/world/europe/coronavirus-science-research-cooperation.html?referring=Source=articleShare&fbclid=IwAR0jLwzl6l-67qSoHNe7rLe2dbHf7lmeBbPQI0fZabSpMkUepVpBSmxJBQ>, [https://perma.cc/U42T-24JE] (last updated Apr. 14, 2020).

<sup>194</sup> See Abdill & Blekman, *supra* note 10.

<sup>195</sup> Jeffrey S. Flier, *Covid-19 is Reshaping the World of Bioscience Publishing*, STAT NEWS (Mar. 23, 2020), <https://www.statnews.com/2020/03/23/bioscience-publishing-resaped-covid-19/> [https://perma.cc/R7V2-8KXW]; see also Abdill & Blekman, *supra* note 10.

<sup>196</sup> *The Science is Challenging. But We Should Be Hopefully for a Covid-19 Vaccine or Drug*, WASH. POST (Apr. 14, 2020), [https://www.washingtonpost-com.cdn.ampproject.org/c/s/www.washingtonpost.com/opinions/global-opinions/the-science-is-challenging-but-we-should-be-hopeful-for-a-covid-19-vaccine-or-drug/2020/04/14/bc83d6c8-7906-11ea-9bee-c5bf9d2e3288\\_story.html?output=amp&fbclid=IwAR37Vl-zmbfNBKqw\\_yZXA6wQNdmHA1B0E6igyZrt\\_c2z3SAEwiVenFoL\\_Fk](https://www.washingtonpost-com.cdn.ampproject.org/c/s/www.washingtonpost.com/opinions/global-opinions/the-science-is-challenging-but-we-should-be-hopeful-for-a-covid-19-vaccine-or-drug/2020/04/14/bc83d6c8-7906-11ea-9bee-c5bf9d2e3288_story.html?output=amp&fbclid=IwAR37Vl-zmbfNBKqw_yZXA6wQNdmHA1B0E6igyZrt_c2z3SAEwiVenFoL_Fk) [https://perma.cc/8NTA-FRVN].

<sup>197</sup> Apuzzo & Kirkpatrick, *supra* note 193.

<sup>198</sup> *NIH Sharing Policies and Related Guidance on NIH-Funded Research Resources*, NAT’L INST. HEALTH <https://grants.nih.gov/policy/sharing.htm> [https://perma.cc/XU2L-36L7] (last visited Oct. 31, 2020, 6:40 PM).

<sup>199</sup> See e.g. *Grant Program Highlights*, US DEP’T HEALTH & HUM. SERV., <https://www.grants.gov/learn-grants/grant-making-agencies/departments-of-defense.html> [https://perma.cc/H4HY-P5Q5] (last visited Oct. 31, 2020, 6:42 PM).

tional security. Ethnically Chinese researchers conducting NIH biomedical research or government funded environmental projects may seem like tempting political targets at a time when U.S.-China tensions are high, but alienating such individuals in these highly open and collaborative fields is both futile and self-harming to the U.S.

The DOJ should end its wholesale approach to prosecuting scientists and researchers for failing to comply with foreign gift reporting statutes, especially considering that, until June 2020, the DOE offered little to no guidance to institutions on how to effectively or accurately comply with these statutes.<sup>200</sup> The tracking of foreign gifts and contracts is an important task, but inferring academic espionage from an error in reporting fails to distinguish mere administrative oversights from bona fide threats of espionage. HEA and NIH reporting statutes are inappropriate tools for catching spies because compliance with such statutes is an administrative job that rarely falls on the alleged spies in the first place.<sup>201</sup> As institutions get up to speed with new online reporting mechanisms,<sup>202</sup> the DOJ should offer a grace period to allow good faith compliance with laws that were otherwise unregulated for more than three decades.<sup>203</sup> In the meantime, the DOJ should work with the scientific community to classify research areas based on actual risk to national security.

#### B. *Increase Diversity, Implicit Bias, and Racial Profiling Education*

The DOJ does not provide data on the demographics of current U.S. attorneys, but 2018 diversity statistics show that just 5% of U.S. attorneys' office employees are of Asian heritage.<sup>204</sup> For an organization that claims to "value diversity in [its] workforce and embrace the cultural and demographic dimensions of our country,"<sup>205</sup> the DOJ has categorically fallen short of its goal to "attract and retain a workforce that represents the

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<sup>200</sup> Press Release, NAFSA, Foreign Gift and Contract Reporting (Oct. 21, 2020), <https://www.nafsa.org/regulatory-information/foreign-gift-and-contract-reporting> [<https://perma.cc/6RWF-3RT4>].

<sup>201</sup> Institutional compliance with reporting requirements is typically managed through the offices of general counsel, accounting and finance, and offices that report data directly to the Department of Education. *Id.*

<sup>202</sup> Press Release, Dep't of Educ., *supra* note 115.

<sup>203</sup> In 1995, the DOE stated in regard to HEA section 117 that "Although the statute permits the Secretary [of Education] to issue regulations concerning this reporting requirement, the Secretary has determined that regulations are unnecessary." Press Release, NAFSA, *supra* note 200.

<sup>204</sup> *Workforce Size and Demographics*, BEST PLACES TO WORK, <https://bestplacetowork.org/rankings/detail/DJ09#workforce> [<https://perma.cc/KU8E-AP75>].

<sup>205</sup> *Department of Justice Diversity Management Policy Statement*, DEP'T OF JUSTICE, <https://www.justice.gov/careers/diversity-policy> [<https://perma.cc/33SF-8ZE5>] (last updated July 11, 2014).

range of personal and professional backgrounds, and experiences and perspectives that arise from differences of culture and circumstances.”<sup>206</sup> If nearly 95% of the U.S. attorneys responsible for investigating and prosecuting crimes related to national security overwhelmingly represent just one demographic, it is impossible to know whether their decisions to over-prosecute ethnically Chinese individuals is rooted in bona fide suspicion or implicit bias and racial profiling. Implicit bias is defined as the unconscious attitudes or stereotypes that affect our understanding, actions, and everyday decision-making.<sup>207</sup> Racial profiling, in the context of law enforcement, is defined as “the systematic association of sets of physical, behavioral or psychological characteristics with particular offences and their use as a basis for making law enforcement decisions.”<sup>208</sup> Due to this racial profiling and implicit bias in law enforcement, “prosecutors may be more likely to view ambiguous evidence of guilt as conclusive when it involves an Asian suspect because that evidence comports with their preexisting image of Asians as spies.”<sup>209</sup> Prosecutors may honestly believe evidence is stronger than it really is simply because they lack the training necessary to identify and interrogate their implicit prejudices.

While working to diversify the field of U.S. attorneys to include more Asian-Americans,<sup>210</sup> the DOJ should also implement tangible measures to adequately train current DOJ prosecutors. The DOJ was praised in 2016 when it announced implicit bias training,<sup>211</sup> but the department has failed to provide information about the training’s success, either explicitly through reported metrics or implicitly through its prosecutorial patterns. The DOJ should not only implement a more transparent plan for addressing implicit bias and racial profiling through trainings, but it should also ensure that such practices become a routine part of everyday DOJ operations. The following recommendations incorporate the ideas of

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<sup>206</sup> *Id.*

<sup>207</sup> *Understanding Implicit Bias*, KIRWAN INST. FOR STUDY RACE & ETHNICITY (2015), <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>, [<https://perma.cc/KD7D-VC7A>] [hereinafter “KIRWAN INST.”].

<sup>208</sup> United Nations Department of Global Communications and the Office of the High Commissioner for Human Rights, *Preventing and Countering Racial Profiling of People of African Descent: Good Practices and Challenges*, ¶ 1, U.N. Doc. A/73/354/18-21669 (2019) <https://www.un.org/sites/un2.un.org/files/preventracialprofiling-en.pdf> [<https://perma.cc/MH23-PGXV>]. [hereinafter “*Preventing Racial Profiling*”].

<sup>209</sup> See Kim, *supra* note 36, at 755.

<sup>210</sup> We generally tend to hold implicit biases that favor our own ingroup, so achieving balanced diversity of the DOJ should have the immediate effect of balancing the implicit biases held by its officers. KIRWAN INST., *supra* note 195.

<sup>211</sup> Victor Li, *An Explicit Step*, 102 ABA Journal 66, 70 (Dec. 2016) <https://www.jstor.org/stable/10.2307/26515907> [<https://perma.cc/ZF7U-25W4>].

advocacy groups, scholars, and the United Nations (UN), for addressing implicit bias and racial profiling inside the DOJ.

### 1. Recommendations on Implicit Bias Training

Calls for an in-depth investigation of the DOJ's "policies and practices that led to [the] apparent pattern and practice of wrongful prosecutions [of Chinese-American scientists]" have gone largely unanswered since 2016.<sup>212</sup> In 2016, the DOJ was vocal about its newfound commitment to implicit bias training;<sup>213</sup> yet, without follow-up programs or reporting, there is no way to know whether the DOJ is progressing toward those declared goals. Implicit bias training is evidently not a cure-all for wrongful prosecutions based on race, ethnicity, or national origin, but "the trainings themselves are still valuable as a palatable entryway into discussing disparities and the need for reform."<sup>214</sup> In order to address racial disparities within the DOJ while also easing the anxiety of the Asian-American scientific community, the DOJ should be transparent about how implicit bias training is implemented, tracked, and reviewed inside the department.

Effective implicit bias training is a vigorous process that requires "more than just a few hours in a classroom."<sup>215</sup> Experts compare reducing implicit bias over a period of time to breaking a bad habit, a process that first requires awareness of one's prejudice; then a desire to reduce it, an understanding of the times and places in which one's prejudice operates; and finally, an understanding of how to consistently use tools that help replace biased responses with egalitarian responses.<sup>216</sup> For an implicit bias training program to be successful, Professor Patricia Devine and her colleagues recommend coaching individuals on five key strategies for reducing implicit bias,<sup>217</sup> then continuing to follow up with bias trainees on a

<sup>212</sup> Letter from Asian Americans Advancing Justice et al. to Michael E. Horowitz, Inspector General (June 21, 2016).

[https://static1.squarespace.com/static/5715ad13d51cd48f82ac962e/t/59125bdc3e00be4549370863/14943753\\_94061/2016\\_06\\_21\\_National\\_Orgs\\_Letter\\_to\\_DOJ\\_IG-FINAL.pdf](https://static1.squarespace.com/static/5715ad13d51cd48f82ac962e/t/59125bdc3e00be4549370863/14943753_94061/2016_06_21_National_Orgs_Letter_to_DOJ_IG-FINAL.pdf),  
[<https://perma.cc/S5XN-QVTM>].

<sup>213</sup> *FAQs on Implicit Bias*, DEP'T OF JUSTICE 1, <https://www.justice.gov/opa/file/871121/download>,  
[<https://perma.cc/4XJ3-92JN>].

<sup>214</sup> Li, *supra* note 211, at 66.

<sup>215</sup> *Id.* at 70. (quoting David A. Harris, a leading national authority on racial profiling and professor at the University of Pittsburgh School of Law).

<sup>216</sup> Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer*, 37 U. Haw. L. Rev. 295 (2015) (quoting Patricia G. Devine et al., *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXP. SOC. PSYCH. 1267, 1268 (2012)).

<sup>217</sup> The five implicit-bias reducing strategies are: (1) Stereotype Replacement: recognizing and acknowledging that one's response is stereotype consistent, ponders why they responded in a stereotypical way, then creates a plan for how they will respond to a similar prompt in an unbiased way,

regular basis.<sup>218</sup> Generally, “implicit bias training should provide exercises that help [trainees] experience the emotions associated with being on the receiving end of negative or positive biases,”<sup>219</sup> and develop tools and skills to respond in a more inclusive way. Ultimately, to measure the effectiveness of such training, an organization can define and track specific measurable outcomes over time related to the training’s specific goals.<sup>220</sup> Here, the most obvious measurable sign of success would be a reduction in the number of false charges brought against Chinese-Americans, indicating that the DOJ has shifted its view of Asian-Americans from one of implied suspicion to unambiguous neutrality.

## 2. Recommendations on Preventing and Countering Racial Profiling

The UN describes racial profiling as “incompatible with the protection of human rights [yet] found in practice among police, customs, immigration and national security agencies. It is often manifested in the context of ...targeting for surveillance or immigration decisions carried out by such agencies.”<sup>221</sup> In the U.S., “driving while black” is an ironic name given to the racial profiling of African American drivers, implying that a police officer will pull over an African American motorist largely because of racial profiling rather than any visible violation of traffic law.<sup>222</sup> “Researching while Asian,” as mentioned above,<sup>223</sup> similarly scoffs at the DOJ’s history of profiling Asian-Americans as spies.

The UN Department of Global Communications and the Office of the High Commissioner for Human Rights recommend that every member state develop a legal framework to prohibit racial discrimination and the practice of racial profiling.<sup>224</sup> The High Commissioner for Human Rights

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(2) Counter-stereotypic imaging: The participant practices imagining positive exemplars of individuals of stereotyped demographics. (3) Individuation: The participant obtains specific details about a person so that they can be evaluated as a person as opposed to a member of a group. (4) Perspective Taking: The participant envisioning himself as a member of a stereotyped group considers how she might think, feel, etc. (5) Increasing opportunities for contact: The participant seeks opportunities to encounter and engage in positive interactions with out-group members. Devine et al., *supra* note 216, at 1270-71.

<sup>218</sup> *Id.* at 1274.

<sup>219</sup> Neal Goodman, *Measuring Outcomes of Bias Training*, TRAINING MAG. (Mar. 21, 2017), <https://trainingmag.com/trgmag-article/measuring-outcomes-bias-training/> [<https://perma.cc/T2DD-Y78Q>].

<sup>220</sup> For a list of potential measurable outcomes based on hundreds of successful Unconscious Bias trainings, *see Id.*

<sup>221</sup> Preventing Racial Profiling, *supra* note 208 at ¶ 4.

<sup>222</sup> Eric Deggans, *PBS Documentary, 'Driving While Black,' Examines Long Road Of Racism*, NPR (Oct. 13, 2020) <https://www.npr.org/2020/10/13/923170416/pbs-documentary-driving-while-black-examines-long-road-of-racism> [<https://perma.cc/AE2U-TEPM>].

<sup>223</sup> *See supra* Section IV(A)(3).

<sup>224</sup> Preventing Racial Profiling, *supra* note 208 at ¶ 28.

also suggests that countries draft “formal and explicit guidelines that specifically prohibit ethnic or racial profiling and are intended to help [law enforcement] make suspicion-led [as opposed to racially-motivated] decisions.”<sup>225</sup> Other recommendations for reducing racial profiling include community engagement, raising awareness, diverse recruitment, and detailed data collection to be used to measure departmental accountability.<sup>226</sup>

In 2017, representative John Conyers Jr. of Michigan introduced the End Racial Profiling Act to the 115<sup>th</sup> Congress. The bill had the potential to fulfill the above-mentioned UN recommendations.<sup>227</sup> After passing through various house subcommittees and securing eighty-one cosponsors; however, the House never voted on the bill and it was never enacted.<sup>228</sup> Legislation like the End Racial Profiling Act of 2017 could dramatically transform the DOJ while also providing peace of mind and tangible solutions to communities of color, including Asian Americans. Representative Conyers’s bill should be reintroduced, and Congress should enact the End Racial Profiling Act as an initial step towards “[b]uilding bridges, solidarity and connecting efforts across Asian and non-Asian communities...to achiev[e] a collective vision for social justice.”<sup>229</sup>

## VI. CONCLUSION

The China Initiative is a sweeping federal plan aimed at satisfying the DOJ’s strategic priority of countering the national security threat posed by China. The Initiative is designed, in part, to protect the United States’ status as a leader in global innovation and scientific discourse. The DOJ’s enforcement approach to “non-traditional collectors,” meant to protect the United States’ innovative advantage, is unnecessarily over-broad and thus tends to stifle innovation by exacerbating existing issues of racial animus and creating even more uncertainty for U.S.-based researchers and institutions.

The U.S. is justified in its concern that China may be using unfair practices to achieve economic prominence. Nevertheless, the current approach to enforcing the China Initiative is hurting rather than helping the

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<sup>225</sup> *Id.* at ¶ 29.

<sup>226</sup> *Id.* at ¶¶ 30, 33, 34, 36.

<sup>227</sup> End Racial Profiling Act of 2017, H.R. 1498, 115<sup>th</sup> Cong. (2017). The goal of the bill was to eliminate racial profiling by law enforcement. Its language prohibits racial profiling by a federal, state, local, or tribal law enforcement agency or agent, requires federal law enforcement agencies to maintain policies and procedures to eliminate racial profiling, including training on racial profiling issues, the collection of data, and procedures for handling complaints, and expects the DOJ to report annually on racial profiling by law enforcement agencies. *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> END NAT’L SEC. SCAPEGOATING, *supra* note 93.

U.S. in its efforts remain a hub for scientific discovery, technological growth, and academic discourse. While the China Initiative's sweeping enforcement measures may succeed in stopping some intellectual property theft and producing high-profile convictions, they also incite anxiety, fear, and confusion at universities and research institutes across the country. Chinese students, who comprise the largest cohort of international enrollees at American universities, are alienated by the increasingly suspicious and hostile environment for aspiring academics of Asian heritage. University administrators are paralyzed by the possibility that an administrative error may lead to the imprisonment of a respected colleague. Scientists and researchers—marred by investigations, arrests, and removals—are ostensibly driven out of their jobs, out of the country, and out of the domestic pipeline for future U.S.-based innovative discovery.

The national security threat posed by China is real and the interception of Chinese intellectual property theft is important, but the Biden Administration must develop a more nuanced enforcement approach with respect to non-traditional collectors. First, the DOJ should stop using administrative reporting statutes as a basis to prosecute academic espionage across all fields of U.S.-based academic discourse. Instead, the DOJ should increase its understanding of the nature of scientific research in order to more carefully categorize research fields based on *actual risk* to national security. Ethnically Chinese researchers conducting NIH biomedical research or government funded environmental projects may seem like tempting political targets, but alienating such individuals in highly open and collaborative fields is both futile and self-harming to the U.S. Ultimately, the DOJ should diversify the field of U.S. attorneys responsible for bringing charges under the China Initiative. By introducing new perspectives, the DOJ improves its chances of prosecuting individuals based on bona fide suspicion rather than implicit bias and racial profiling. In the meantime, the DOJ should begin by implementing implicit bias training as well as measures to prevent and counter racial profiling within the department. As the United States seeks to protect and expand its innovative capacity in years to come, it requires a more nuanced approach to dealing with threats and rivals.