

## Dismounting the ‘China Initiative’ Tiger

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### I. INTRODUCTION

Writing this Reflection during the Year of the Tiger<sup>1</sup> about the “National Security and Intellectual Property” panel (“IP panel”) of the Seton Hall Law Review Symposium turned my thoughts to a Chinese saying: “If you ride a tiger, it is hard to dismount” (骑虎难下).<sup>2</sup> The literal image created by this saying portrays a person who fears getting hurt—or even consumed—if they try to dismount the tiger. Figuratively, it refers to a situation without a clear path for retreat, so you stay the course.

This saying is apt in part because the IP panel, not surprisingly, focused on China. The U.S. government has identified as a paramount threat the government of the People’s Republic of China (PRC or China) and intertwined Chinese Communist Party (CCP, and the collective ruling entity best termed the PRC party-state): “About 80 percent of all economic espionage prosecutions brought by the U.S. Department of Justice (DOJ) allege conduct that would benefit the Chinese state, and there is at least some nexus to China in around 60 percent of all trade secret theft cases.”<sup>3</sup>

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<sup>1</sup> The Year of the Tiger began February 1, 2022. See *Chinese New Year 2022: Year of the Tiger*, CHINESE NEW YEAR, <https://chinesenewyear.net/> (last visited Feb. 19, 2022).

<sup>2</sup> See, e.g., PLECO, <https://www.pleco.com/> (Chinese dictionary app) (last visited Feb. 19, 2022).

<sup>3</sup> U.S. DEP’T OF JUST., INFORMATION ABOUT THE DEPARTMENT OF JUSTICE’S CHINA INITIATIVE AND A COMPILATION OF CHINA-RELATED PROSECUTIONS SINCE 2018, <https://www.justice.gov/nsd/information-about-department-justice-s-china-initiative-and-compilation-china-related> (last updated Nov. 19, 2021) [hereinafter CHINA-RELATED PROSECUTIONS].

The meaning of the tiger saying is fitting because a critical piece in the U.S. government's response to concerns about intellectual property (IP) theft tied to the PRC party-state was for over three years the China Initiative: a DOJ-led effort "reflect[ing] the strategic priority of countering Chinese national security threats . . ."<sup>4</sup> Launched in November 2018 under President Trump, this tiger continued to barrel forward under President Biden with, for example, Federal Bureau of Investigation (FBI) Director Christopher Wray emphasizing that the FBI was opening counterintelligence investigations connected to China every twelve hours.<sup>5</sup>

As recently as January 31, 2022, Director Wray drew parallels to the Cold War, stressing that today "the United States and the Western world find ourselves in a very different struggle against another global adversary—the Chinese Communist Party" and explaining his focus on "the threat posed by the Chinese government" because "in many ways it's reached a new level—more brazen, more damaging than ever before, and it's vital—vital—that all of us focus on that threat together."<sup>6</sup> Nonetheless, less than a month after this speech, the DOJ concluded that the Initiative was "not the right approach" and replaced the China Initiative with a new "Strategy for Countering Nation-State Threats."<sup>7</sup> Formally ending the China Initiative was the first step in the DOJ transitioning to this country-neutral strategy that has the potential to be both a more holistic and less rhetorically charged approach to protecting IP and research integrity.

That the Biden administration took so long to end the China Initiative was, of course, not because it was worried that the Initiative's sharp teeth of criminal prosecutions would directly harm itself. Rather, the challenge of dismantling was to reassure domestic audiences that there was no slackening with respect to vigilantly protecting against national security threats tied to the PRC party-state. In other words, the

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<sup>4</sup> *Id.*

<sup>5</sup> Dareh Gregorian, *FBI Director Says New Probes into China Launched 'Every 12 Hours,'* NBC NEWS (Sept. 21, 2021, 11:59 AM), <https://www.nbcnews.com/politics/national-security/fbi-director-says-new-probes-china-launched-every-12-hours-n1279724>.

<sup>6</sup> Christopher Wray, Dir., Fed. Bureau of Investigation, *Countering Threats Posed by the Chinese Government Inside the U.S.* (Jan. 31, 2022) (transcript available at <https://www.fbi.gov/news/speeches/countering-threats-posed-by-the-chinese-government-inside-the-us-wray-013122>) (remarks given at the Ronald Reagan Presidential Library and Museum).

<sup>7</sup> Matthew Olsen, Assistant Att'y Gen., Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats (Feb. 23, 2022) (transcript available at <https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-olsen-delivers-remarks-countering-nation-state-threats>) (remarks given at George Mason University).

Biden administration sought to project that it was landing firmly on the ground ready to safeguard national security without the 'China Initiative' framing. Yet the announcement ending the China Initiative was followed by criticism that the dismount left the United States tumbling in the dirt. Some Republican members of Congress, in particular, immediately reacted that this was a dangerous softening in U.S. policy toward the PRC.<sup>8</sup>

I followed the China Initiative closely throughout its existence and, along with other critics, was deeply concerned about its potential to fuel bias and create a chilling effect among researchers with ties to the PRC based on ethnicity, nationality, or national origin. In short, framing the initiative in terms of "China" placed a cloud of suspicion over people connected therewith.<sup>9</sup> This Reflection briefly explains the China Initiative (*The Tiger*) and its path up to its conclusion in late-February 2022 (*The Ride*). Finally, this Reflection encourages an offramp (*The Dismount*) that not only ends use of the 'China Initiative' title but also energizes a multifaceted effort to strengthen protection of IP and research integrity while mitigating bias.

## II. THE TIGER

The China Initiative did not emerge out of thin air. The U.S. government had for years been increasingly concerned about protecting IP owned by U.S. entities from being stolen by PRC-based entities. In addition to bringing criminal penalties, it also increased its public-facing efforts. Near the end of the Obama administration, for instance, the FBI released a "threat-awareness film" titled "The Company Man" that told

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<sup>8</sup> See, e.g., Press Release, Chuck Grassley, Grassley Pushes DOJ to Reconsider Plans to Cancel China Crackdown Amid Persistent Threats (Feb. 28, 2022), <https://www.grassley.senate.gov/news/news-releases/grassley-pushes-doj-to-reconsider-plans-to-cancel-china-crackdown-amid-persistent-threats>; Press Release, Tom Cotton, Cotton Statement on DOJ Termination of its "China Initiative" (Feb. 23, 2022), <https://www.cotton.senate.gov/news/press-releases/cotton-statement-on-doj-termination-of-its-china-initiative> ("Cancelling this initiative is just another instance of weakness from an administration more concerned with being politically correct than protecting Americans."); Press Release, Marco Rubio, Rubio Releases Statement on DOJ's Decision to End China Initiative (Feb. 23, 2022), <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=8FE8C7EF-F7CE-437D-8176-40CDD1B9731C> (arguing that by ending the Initiative, "the Biden Administration is once again showing that it just doesn't understand the nature or severity of the CCP's threat").

<sup>9</sup> See generally Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145 (2021); Margaret K. Lewis, *Time to End the U.S. Justice Department's China Initiative*, FOREIGN POL'Y (July 22, 2021, 1:15 PM), <https://foreignpolicy.com/2021/07/22/china-initiative-espionage-mistrial-hu/>.

the story of an American who provided his employer's trade secrets to PRC nationals.<sup>10</sup>

What changed under the Trump administration was the framing of the threat narrative and the emphasis placed on using criminal law as means of protecting IP. At the Initiative's launch in November 2018, then-Attorney General Jeff Sessions stated that, "under President Donald Trump, the United States is standing up to the deliberate, systematic, and calculated threats posed, in particular, by the communist regime in China, which is notorious around the world for intellectual property theft."<sup>11</sup>

Beyond the China Initiative itself, the Trump administration depicted an existential threat posed by the PRC. The introduction to the Trump White House's collection of speeches on China begins by declaring that, "[f]or decades, Donald J. Trump was one of the few prominent Americans to recognize the true nature of the Chinese Communist Party and its threat to America's economic and political way of life."<sup>12</sup> The FBI likewise articulated an expansive "China Threat" narrative describing "the government of China and the Chinese Communist Party [as] a grave threat to the economic well-being and democratic values of the United States."<sup>13</sup>

In addition to stressing the "communist regime," the Trump administration emphasized the role of "non-traditional collectors": academics, students, businesspeople, and other actors who do not fall under the traditional 'spy' profile.<sup>14</sup> The Trump administration simultaneously warned against and welcomed Chinese students and scholars. In "China: The Risk to Academia," the FBI notes that it "recognizes, and values, [the] unique package of benefits these

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<sup>10</sup> *The Company Man: Protecting America's Secrets*, FED. BUREAU OF INVESTIGATION (July 23, 2015), <https://www.fbi.gov/video-repository/newss-the-company-man-protecting-americas-secrets/view>.

<sup>11</sup> U.S. DEP'T OF JUST., *Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage* (Nov. 1, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage>.

<sup>12</sup> Robert C. O'Brien, *Introduction*, in *TRUMP ON CHINA: PUTTING AMERICA FIRST 1* (Robert C. O'Brien, ed., 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/11/Trump-on-China-Putting-America-First.pdf>.

<sup>13</sup> *The China Threat*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/counterintelligence/the-china-threat> (last visited Feb. 7, 2022).

<sup>14</sup> See Press Release, U.S. Dep't of Just., *The China Initiative: Year-in-Review (2019-20)* (Nov. 16, 2020), <https://www.justice.gov/opa/pr/china-initiative-year-review-2019-20> (warning of PRC-funded "talent programs" as part of the section titled "*Develop an enforcement strategy for non-traditional collectors*").

international students and professors provide.”<sup>15</sup> The same publication warns, however, that the United States’ open academic environment “also puts academia at risk for exploitation by foreign actors who do not follow our rules or share our values,” and that “the Chinese government uses some Chinese students—mostly post-graduate students and post-doctorate researchers studying science, technology, engineering, and mathematics (STEM)—and professors to operate as non-traditional collectors of intellectual property . . . .”<sup>16</sup>

The front page of the FBI publication includes both a large map of China with the PRC flag and a highlighted box asserting, “[t]he annual cost to the U.S. economy of counterfeit goods, pirated software, and theft of trade secrets is \$226–\$600 BILLION.” While recognizing that the PRC party-state has incentivized and even directed activities that violate U.S. criminal laws, the scope and scale of those threats remains debated. Mark Cohen of Berkeley Law, who formerly worked for the U.S. government, cautioned in 2019 that “[t]hese numbers have taken on a greater legitimacy than they likely deserve, in terms of capturing the scope of US concerns, the magnitude of the loss and shaping the Trump administration’s unilateral retaliation.”<sup>17</sup>

Economic (or “industrial”) espionage—trade secret theft with a nexus to a foreign government or entity connected therewith<sup>18</sup>—was the marquee crime when the DOJ kicked off the China Initiative. The initial announcement, for example, was accompanied by an indictment of a PRC state-owned enterprise and other defendants of a conspiracy to commit economic espionage.<sup>19</sup> Yet the Initiative was framed in much broader terms. The ten bullet-pointed goals of the Initiative addressed concerns from “potential threats to academic freedom” to “supply chain threats.”<sup>20</sup>

The scope of the Initiative as set forth in 2018 was thus broad and somewhat blurry. A connection with the PRC was necessary, but not sufficient, for the DOJ to refer to a case as part of the China Initiative. For

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<sup>15</sup> FED. BUREAU OF INVESTIGATION, CHINA: THE RISK TO ACADEMIA 8 (2019), <https://www.fbi.gov/file-repository/china-risk-to-academia-2019.pdf/view> [<https://perma.cc/HNW9-U79M>].

<sup>16</sup> *Id.* at 1–2.

<sup>17</sup> Mark Cohen, *The 600 Billion Dollar China IP Echo Chamber*, CHINA IPR (May 12, 2019), <https://chinaipr.com/2019/05/12/the-600-billion-dollar-china-ip-echo-chamber/>.

<sup>18</sup> 18 U.S.C. § 1831.

<sup>19</sup> See Press Release, U.S. Dep’t of Just., PRC State-Owned Company, Taiwan Company, and Three Individuals Charged With Economic Espionage (Nov. 1, 2018), <https://www.justice.gov/opa/pr/prc-state-owned-company-taiwan-company-and-three-individuals-charged-economic-espionage>.

<sup>20</sup> CHINA-RELATED PROSECUTIONS, *supra* note 3.

example, while halting the importation of the illicit drug fentanyl and its precursors from the PRC is a U.S. government priority<sup>21</sup>—and the DOJ had active cases during the time of the China Initiative<sup>22</sup>—no fentanyl-related cases were listed on the DOJ’s China Initiative webpage, nor were the words “drugs” or “narcotics” mentioned.

Indictments did not get stamped “China Initiative,” nor was there a definitive list of China Initiative cases. The DOJ maintained a list of “China-related cases examples,”<sup>23</sup> which was not static. In addition to cases understandably being added as they were brought, others were removed. Some cases were removed because they did not result in convictions,<sup>24</sup> and others for unexplained reasons but presumably because reconsideration deemed them outside the China Initiative’s mission: “Some cases, [a former DOJ official] said, such as that of a man who organized a turtle-smuggling ring, originally may have been added to the department’s list by mistake.”<sup>25</sup>

Nor did the DOJ conceive the China Initiative as having any set duration. In contrast, the long-term, existential nature of the described threat from China by the Trump administration suggested that it would have a prolonged existence.<sup>26</sup> What was less expected, however, was the

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<sup>21</sup> LIANA W. ROSEN & SUSAN V. LAWRENCE, CONG. RSCH. SERV., IF 10890, CHINA PRIMER: ILLICIT FENTANYL AND CHINA’S ROLE (2021), <https://crsreports.congress.gov/product/pdf/IF/IF10890> (“In recent years, counternarcotics attention has focused on reducing fentanyl flows from China.”); *see also id.* at 2 (“Some U.S. objectives with respect to China remain unmet. China has not taken action to control additional fentanyl precursors, following China’s listing of two fentanyl precursors, NPP and 4-ANPP, as controlled substances in February 2018.”).

<sup>22</sup> *See, e.g.*, Press Release, U.S. Dep’t of Just., Man Convicted of Conspiracy to Import and Distribute Fentanyl (July 9, 2021), <https://www.justice.gov/opa/pr/man-convicted-conspiracy-import-and-distribute-fentanyl>.

<sup>23</sup> CHINA-RELATED PROSECUTIONS, *supra* note 3.

<sup>24</sup> *See, e.g.*, Eileen Guo, Jess Aloe & Karen Hao, *We Built a Database to Understand the China Initiative. Then the Government Changed Its Records*, MIT TECH. REV. (Dec. 2, 2021), <https://www.technologyreview.com/2021/12/02/1039397/china-initiative-database-doj>; *see also* Press Release, U.S. Dep’t of Just., Researcher at University Arrested for Wire Fraud and Making False Statements About Affiliation with a Chinese University (Feb. 27, 2020), <https://www.justice.gov/opa/pr/researcher-university-arrested-wire-fraud-and-making-false-statements-about-affiliation> (including updated notation that “[t]he defendant in this case, Anming Hu, was acquitted by the court of the charges alleged in the indictment described in the press release below”).

<sup>25</sup> Guo et al., *supra* note 24.

<sup>26</sup> *See, e.g.*, Secretary Michael R. Pompeo With Ben Shapiro of *The Ben Shapiro Show*, U.S. DEP’T OF STATE (Dec. 15, 2020), <https://2017-2021.state.gov/secretary-michael-r-pompeo-with-ben-shapiro-of-the-ben-shapiro-show-6/index.html> (“This challenge from the Chinese Communist Party is the most existential threat to the United States and its prosperity and security. President Trump is the first president to have recognized that.”).

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China Initiative's continued momentum once President Biden took office.

## III. THE RIDE

The China Initiative carried through the Trump administration and more than a year under President Biden. Economic espionage remained a concern over the China Initiative's three-year history. In late 2021, for example, the FBI released the documentary "Made in Beijing: The Plan for Global Market Domination," which it describes as using "interviews with executives from victim companies to create a compelling narrative for the private sector and help them protect their intellectual property against industrial espionage by the [CCP]."<sup>27</sup>

The bulk of China Initiative cases, however, focused not on the theft, or attempted theft, of IP, but rather on research integrity—a key component of which is honesty, including, as described by the National Institutes of Health, "following commonly accepted professional codes or norms."<sup>28</sup> Charges related to transparency and honesty in research include false statements, wire fraud, tax fraud, and similar offenses involving lying or concealment. When in late 2021 reporters at MIT Technology Review sought to "create as comprehensive a database of China Initiative prosecutions as possible[,] they found that "only 13 of the 23 research integrity cases included in our database are currently on the website. (One of those cases was settled before charges could be filed.) Six of those cases ended in guilty pleas. Seven are still pending."<sup>29</sup> A Bloomberg analysis released in December 2021 found as follows:

[O]f the 50 indictments announced or unsealed since the start of the program and posted on the Justice Department's China Initiative webpage reveals a further problem: The China Initiative hasn't been very successful at catching spies. The largest group of cases, 38% of the total, have charged academic researchers and professors with fraud for failing to disclose affiliations with Chinese universities. None of them has been accused of spying, and almost half of those cases have been dropped. About half as many China Initiative cases concern violations of U.S. sanctions or illegal exports, and a smaller percentage involve cyber intrusions that prosecutors

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<sup>27</sup> FBI – Federal Bureau of Investigation, *Made in Beijing: The Plan for Global Market Domination*, YOUTUBE (Nov. 5, 2021), <https://www.youtube.com/watch?v=HAe4PWjP1f0>.

<sup>28</sup> NAT'L INST. OF HEALTH, *What is Research Integrity*, [https://grants.nih.gov/policy/research\\_integrity/what-is.htm](https://grants.nih.gov/policy/research_integrity/what-is.htm) (last visited Feb. 7, 2022).

<sup>29</sup> Guo et al., *supra* note 24.

attributed to China. Only 20% of the cases allege economic espionage, and most of those are unresolved. Just three claim that secrets were handed over to Chinese agents.<sup>30</sup>

This Initiative's path thus proved a bumpy ride. There were convictions: the DOJ's National Security Division spokesperson reported in late 2021, "[s]ince November 2018, we have brought or resolved nine economic espionage prosecutions and seven theft of trade secrets cases with a nexus to the PRC. We also have brought 12 matters involving fraud on universities and/or grant making institutions . . . ."<sup>31</sup>

Yet, at the end of 2021, "[i]n eight cases, academics have pleaded guilty and received prison sentences of up to thirty-seven months. But the government dropped its prosecution of seven other scientists."<sup>32</sup> At the time of writing, the trial was imminent of a China Initiative case involving an academic, Franklin (Feng) Tao, who allegedly failed to disclose participation in a PRC-government talent program.<sup>33</sup> To date, however, the only guilty verdict from a jury in a case involving an academic under the China Initiative came in December 2021. Charles Lieber, the former Chair of Harvard University's Chemistry and Chemical Biology Department, was convicted of making false statements, filing false tax returns, and failing to report a bank account in China.<sup>34</sup> The evidence included video footage of Lieber's

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<sup>30</sup> Sheridan Prasso, *China Initiative Set Out to Catch Spies. It Didn't Find Many*, BLOOMBERG (Dec. 14, 2021, 10:00 AM), <https://www.bloomberg.com/news/features/2021-12-14/doj-china-initiative-to-catch-spies-prompts-fbi-misconduct-racism-claims>.

<sup>31</sup> Guo et al., *supra* note 24.

<sup>32</sup> Jeffrey Mervis, *What the Charles Lieber Verdict Says About U.S. China Initiative*, SCIENCE (Dec. 28, 2021, 3:40 PM), <https://www.science.org/content/article/what-charles-lieber-verdict-says-about-u-s-china-initiative>. That the vast majority of convictions under the China Initiative umbrella have been in the form of guilty pleas is not surprising. Plea bargaining is a dominant feature of the federal criminal justice system. *See, e.g.*, RAM SUBRAMANIAN ET AL., *IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING*, VERA INST. OF JUST. (2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf> ("Only 2 percent of federal criminal cases—and a similar number of state cases—are brought to trial.")

<sup>33</sup> *See* Gideon Lewis-Kraus, *Have Chinese Spies Infiltrated American Campuses?*, NEW YORKER (Mar. 14, 2022), <https://www.newyorker.com/magazine/2022/03/21/have-chinese-spies-infiltrated-american-campuses> (examining the pending case against Franklin (Feng) Tao, a chemistry professor at the University of Kansas).

<sup>34</sup> *See* Press Release, U.S. Dep't of Just., *Harvard University Professor Convicted of Making False Statements and Tax Offenses* (Dec. 21, 2021), <https://www.justice.gov/opa/pr/harvard-university-professor-convicted-making-false-statements-and-tax-offenses>. *See generally* *The Lawfare Podcast: Dr. Charles Lieber and the China Initiative*, LAWFARE (Jan. 11, 2022), <https://www.lawfareblog.com/lawfare-podcast-dr-charles-lieber-and-china-initiative> (Jacob Schulz, Emily Weinstein, and Margaret Lewis discussing the verdict and the China Initiative generally.).



interrogation by the FBI in which he acknowledged that the government had “damning” evidence against him.<sup>35</sup>

In contrast to the unanimous jury verdict after less than three hours of deliberation in the Lieber case,<sup>36</sup> the jury deadlocked in the case of Anming Hu, a professor at the University of Tennessee, Knoxville, who was charged with wire fraud and false statements.<sup>37</sup> When the DOJ decided to pursue a new trial,<sup>38</sup> Judge Thomas A. Varlan issued a judgment of acquittal on all counts because the government failed to provide sufficient evidence to prove that Hu had the requisite intent to defraud NASA by failing to disclose an affiliation with a Chinese academic institution.<sup>39</sup> The fifty-two-page opinion emphasized the high bar: “[G]ranting a motion for a judgment of acquittal is ‘confined to cases where the prosecution’s failure is clear.’”<sup>40</sup>

In January 2022, news broke regarding the demise of another high-profile case under the China Initiative. Massachusetts Institute of Technology (MIT) Professor Gang Chen faced charges based on alleged concealment of ties to PRC-based institutions in grant filings with the U.S. Department of Energy.<sup>41</sup> Chen firmly asserted his innocence, and his colleagues at MIT voiced their strong support,<sup>42</sup> along with the highly unusual step of MIT paying his legal bills.<sup>43</sup> On January 14, 2022, the

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<sup>35</sup> Mervis, *supra* note 32.

<sup>36</sup> *Id.*

<sup>37</sup> See David Nakamura & Ellen Nakashima, *Mistrial in Justice Dept. Fraud Case Against College Professor Prompts Renewed Scrutiny of Agency’s ‘China Initiative’*, WASH. POST (June 17, 2021, 7:06 PM), [https://www.washingtonpost.com/national-security/doj-china-initiative-mistrial/2021/06/17/7571c73c-cf8f-11eb-8014-2f3926ca24d9\\_story.html](https://www.washingtonpost.com/national-security/doj-china-initiative-mistrial/2021/06/17/7571c73c-cf8f-11eb-8014-2f3926ca24d9_story.html).

<sup>38</sup> See *Chinese Espionage Retrial Sought for Tennessee Researcher*, ASSOCIATED PRESS (Aug. 3, 2021), <https://apnews.com/article/technology-business-education-tennessee-espionage-0145bdff82b8b00932794295cd270686>.

<sup>39</sup> CT. LISTENER, Judgment of Acquittal as to Anming Hu, *United States v. Hu*, Case No. 3:20-cr-00021 (E.D. Tenn.) (Sept. 9, 2021), <https://www.courtlistener.com/docket/16900191/united-states-v-hu-tv1/>.

<sup>40</sup> CT. LISTENER, Memorandum Opinion and Order as to Anming Hu, *United States v. Hu*, Case No. 3:20-cr-00021 (E.D. Tenn.) (Sept. 9, 2021), <https://www.courtlistener.com/docket/16900191/united-states-v-hu-tv1/> (quoting *United States v. Donaldson*, 52 F. App’x 700, 706 (6th Cir. 2002) (quoting *Burks v. United States*, 437 U.S. 1, 17 (1978))).

<sup>41</sup> Press Release, U.S. Dep’t of Just., MIT Professor Indicted on Charges Related to Grant Fraud (Jan. 20, 2021), <https://www.justice.gov/usao-ma/pr/mit-professor-indicted-charges-relating-grant-fraud>.

<sup>42</sup> See *Why Have We, a Group of MIT Faculty, Signed the Letter in Support of Gang Chen?*, MIT Faculty Newsletter (Jan./Feb. 2021), <https://fnl.mit.edu/january-february-2021/why-have-we-a-group-of-mit-faculty-signed-the-letter-in-support-of-gang-chen/>.

<sup>43</sup> See Ellen Nakashima & David Nakamura, *In High-Profile Case Against MIT’s Gang Chen, Prosecutors Seeking to Drop Charges*, WASH. POST (Jan. 14, 2022, 1:37 PM),

Wall Street Journal reported that prosecutors in the case recommended to the DOJ headquarters that it drop the case.<sup>44</sup> When announcing the case's dismissal on January 20, Rachael Rollins, the newly appointed U.S. Attorney for the District of Massachusetts, released a statement that the dismissal was "in the interests of justice" because of "recently obtained additional information pertaining to the materiality of Professor Chen's alleged omissions in the context of the grant review process . . . ."<sup>45</sup>

Chen's case underscored a primary concern raised by me and other critics of the China Initiative: framing the initiative in terms of "China" has put people who are seen as connected to China based on their nationality, national origin, ethnicity,<sup>46</sup> and other bases under enhanced scrutiny.<sup>47</sup> When announcing charges against naturalized U.S. citizen Chen in January 2021, Andrew Lelling—then-U.S. Attorney for the District of Massachusetts—went so far as to assert, "[t]he allegations of the complaint imply that this was not just about greed, but about loyalty to China."<sup>48</sup> The comment struck a nerve given the deep history of

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[https://www.washingtonpost.com/national-security/gang-chen-charges-drop-china/2022/01/14/51bae1e2-6f59-11ec-b9fc-b394d592a7a6\\_story.html](https://www.washingtonpost.com/national-security/gang-chen-charges-drop-china/2022/01/14/51bae1e2-6f59-11ec-b9fc-b394d592a7a6_story.html) ("Chen has been on paid leave since he was arrested last January. MIT has been footing his legal bill.")

<sup>44</sup> See Aruna Viswanatha, *Prosecutors Recommend Dropping Case Over China Ties Against MIT Scientist*, WALL ST. J. (Jan. 14, 2022, 11:51 AM), <https://www.wsj.com/articles/prosecutors-recommend-dropping-case-over-china-ties-against-mit-scientist-11642177123>.

<sup>45</sup> Press Release, U.S. Dep't of Just., Statement from U.S. Attorney Rachael S. Rollins on the Dismissal of the Gang Chen Case (Jan. 20, 2022), <https://www.justice.gov/usao-ma/pr/statement-us-attorney-rachael-s-rollins-dismissal-gang-chen-case>.

<sup>46</sup> I use "ethnicity," though "race" is also used in discussions about the China Initiative. The U.S. census includes "Asian" as a racial category. *About the Topic of Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> (last updated Mar. 1, 2022). I use "ethnicity" to emphasize common ties to the PRC or, if predating 1949, the area that is now the PRC. Cf. *Race & Ethnicity*, GENDERED INNOVATIONS, <https://genderedinnovations.stanford.edu/terms/race.html> ("Ethnicity denotes groups, such as Irish, Fijian, or Sioux, etc., that share a common identity-based ancestry, language, or culture.")

<sup>47</sup> See, e.g., Press Release, AAJC Delivers Petition of Nearly 30,000 Signatures Urging President Biden to End the "China Initiative," ASIAN AM. ADVANCING JUST. (Apr. 12, 2021), <https://advancingjustice-aaajc.org/petition-delivered-end-china-initiative> ("[U]rging the administration to put an immediate end to the 'China Initiative' and take action to combat the racial profiling and targeting of Asian Americans and Asian immigrants by federal agencies."); Letter to the Hon. Merrick B. Garland, U.S. Att'y Gen. (Jan. 10, 2022), [https://www.apajustice.org/uploads/1/1/5/7/115708039/yale\\_open\\_letter\\_to\\_attorney\\_general\\_jan\\_10\\_2022.pdf](https://www.apajustice.org/uploads/1/1/5/7/115708039/yale_open_letter_to_attorney_general_jan_10_2022.pdf) (Letter signed by 192 Yale University faculty concurring with a 2021 letter signed by 177 Stanford University faculty and asserting that the Initiative is "fueling biases that, in turn, raise concerns about racial profiling").

<sup>48</sup> Ellen Barry, *A Scientist Is Arrested, and Academics Push Back*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/us/mit-scientist-charges.html>.

distrust of Chinese-American scientists.<sup>49</sup> That the late-2021 MIT Technology Review investigation found that nearly 90 percent of defendants under the China Initiative were of Chinese heritage underscores the Initiative's disproportional impact.<sup>50</sup>

DOJ officials have pushed back on these concerns, stressing that the focus "is on behavior, not ethnicity."<sup>51</sup> When ending the China Initiative, Assistant Attorney General Matthew Olsen acknowledged the "harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to that country or that we in some way view people with racial, ethnic or familial ties to China differently."<sup>52</sup> He was clear, however, that the DOJ found no basis during its review of the program that this *perception* was indeed reality: "I never saw any indication, none, that any decision that the Justice Department made was based on bias or prejudice of any kind."<sup>53</sup>

Disproportionate effects alone do not prove discriminatory intent, but the vastly disproportionate prosecutions of ethnically Chinese defendants—and the acquittals and dropping of cases—gives reason to question how cases are initiated and what oversight is present at all steps in the process. Moreover, even though the Biden administration pulled back on the mentions of "loyalty" and other problematic rhetoric under the Trump administration, the DOJ's assurances remain unsatisfying because we know from work by the American Bar Association and others that implicit bias can influence the behavior of well-intentioned investigators and prosecutors.<sup>54</sup>

Concerns about bias are reason enough to question the China Initiative, given that a foundational principle of criminal justice in the United States is non-discrimination—even if there is much work to be done in upholding that value. No matter how many times the U.S.

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<sup>49</sup> See Mara Hvistendahl, *The FBI's China Obsession*, THE INTERCEPT (Feb. 2, 2020, 5:00 AM), <https://theintercept.com/2020/02/02/fbi-chinese-scientists-surveillance/>.

<sup>50</sup> See Kaiser Kuo, *Inside the DOJ's China Initiative with the MIT Technology Review*, SUPCHINA (Dec. 23, 2021), <https://supchina.com/2021/12/23/inside-the-doj-s-china-initiative/> (journalists Eileen Guo and Jess Aloe discussing the 130 out of 148 number in their findings).

<sup>51</sup> Laura Lambert, *Three Takes on the China Initiative, from the USC U.S.-China Institute*, USC GLOB. (Oct. 7, 2020), <https://global.usc.edu/three-takes-on-the-china-initiative-from-the-usc-u-s-china-institute/> (quoting then-Assistant Attorney General for National Security, John Demers).

<sup>52</sup> Olsen, *supra* note 7.

<sup>53</sup> Hadley Baker, *Lawfare No Bull: The DOJ's Role in Combatting Nation State Threats*, LAWFARE (Feb. 25, 2022, 10:08 AM), <https://www.lawfareblog.com/lawfare-no-bull-doj-s-role-combatting-nation-state-threats> (audio replay of question and answer portion of Olsen's February 23, 2022, remarks).

<sup>54</sup> See *Implicit Bias Videos and Toolkit*, AM. BAR ASS'N, <https://www.americanbar.org/groups/diversity/resources/implicit-bias/> (last visited Feb. 23, 2022).

government reiterates that it is surgically targeting threats from the PRC party-state, that bias is influencing at least some decisions is increasingly difficult for the government to refute when its pervasive “Chinese national security threats”<sup>55</sup> language is coupled with the collapse of several high-profile prosecutions of people of Chinese descent who had the resources and will to vigorously challenge the government’s allegations. For those defendants under the China Initiative who entered guilty pleas, little is known about the circumstances surrounding those cases because of the lack of transparency in the plea-bargaining process.

That there is increasing documentation of a chilling effect adds another layer of critique: the China Initiative undermined the very economic competitiveness that it was meant to support. Researchers at the University of Arizona, for example, found that “among scientists of Chinese descent, more than 40 percent . . . reported feeling profiled by the U.S. government. By comparison, less than 10 percent of non-Chinese researchers said they believed they had been singled out because of their race.”<sup>56</sup> This chilling effect has spurred worries that it will be more difficult to recruit talented students and researchers from China and that those in the United States will depart: “‘There are certainly people leaving,’ says Steven Chu, a Nobel-prizewinning physicist at Stanford.”<sup>57</sup>

#### IV. THE DISMOUNT

Reports surfaced in fall 2022 that the Biden administration was looking for a way off the tiger. The new Assistant Attorney General for National Security, Matthew Olsen, led a review of the China Initiative beyond the case-specific reviews that have already resulted in the DOJ dropping a number of cases.<sup>58</sup> With tiger years known as a time for bold action,<sup>59</sup> eyes were on the DOJ to see whether it would choose mild

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<sup>55</sup> CHINA-RELATED PROSECUTIONS, *supra* note 3.

<sup>56</sup> Karin Fischer, *Chinese Scientists Feel a Chill Under U.S. Investigation of Higher Ed’s China Ties, a New Survey Shows*, THE CHRON. OF HIGHER EDUC. (Oct. 28, 2021), <https://www.chronicle.com/article/chinese-scientists-feel-a-chill-under-u-s-investigation-of-higher-eds-china-ties-a-new-survey-shows>.

<sup>57</sup> Andrew Silver, *U.S. Political Crackdown Spurs Fears of Chinese Brain-Drain*, NATURE (Sept. 7, 2020), <https://www.nature.com/articles/d41586-020-02359-5>.

<sup>58</sup> See Viswanatha, *supra* note 44 (reporting that Attorney General Garland tasked Olsen “with reviewing the department’s approach to countering threats posed by the Chinese government”).

<sup>59</sup> 2022 Chinese Zodiac Predictions: What Will the Year of the Tiger Bring?, HARPER’S BAZAAR (SINGAPORE) (Jan. 9, 2022), <https://www.harperbazaar.com.sg/gallery/2022-chinese-zodiac-predictions/>.

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recalibration as compared with a robust, holistic reform to the DOJ's use of criminal law to protect both IP and broader research integrity.

President Biden voiced the need for boldness in other contexts. On the anniversary of the January 6, 2021, assault on the U.S. Capitol, President Biden addressed the need to grapple with events on that date:

This isn't about being bogged down in the past. This is about making sure the past isn't buried. That's the only way forward. That's what great nations do. They don't bury the truth, they face up to it. Sounds like hyperbole, but that's the truth: They face up to it. We are a great nation.<sup>60</sup>

Truly ending the China Initiative likewise requires not just removing the name but also the more challenging work of reflecting on the long history of discrimination against people of Chinese descent—and of Asian Americans and Pacific Islanders more broadly—and doing the work to reduce how bias can permeate into decision-making. The DOJ has yet to face up to this past or articulate a path that will protect against bias in the future.

Specifically, while the DOJ's long-awaited announcement on February 23, 2022, took the critical step of removing the 'China Initiative' name, it left open questions about how the replacement 'Strategy for Countering Nation-State Threats' would differ in practice.<sup>61</sup> Was this an actual dismount or rather a decision to continue the ride while calling the tiger a different name? Assistant Attorney General Olsen recognized that "by grouping cases under the China Initiative rubric, we helped give rise to a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to that country or that we in some way view people with racial, ethnic or familial ties to China differently."<sup>62</sup> As noted above, however, he made clear that the DOJ's review found that this view was merely a "perception" with no factual basis.<sup>63</sup>

Assistant Attorney General Olsen further assured that the DOJ would alter its approach to academic integrity and research security cases by applying a more stringent review when determining "whether criminal prosecution is warranted or whether civil or administrative

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<sup>60</sup> *Remarks by President Biden to Mark One Year Since the January 6th Deadly Assault on the U.S. Capitol*, THE WHITE HOUSE (Jan. 6, 2022, 9:16 AM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/06/remarks-by-president-biden-to-mark-one-year-since-the-january-6th-deadly-assault-on-the-u-s-capitol/>.

<sup>61</sup> Olsen, *supra* note 7.

<sup>62</sup> *Id.*

<sup>63</sup> *See supra* notes 52–53.

remedies are more appropriate.”<sup>64</sup> A pressing concern is what the DOJ’s enhanced supervision of these cases will entail and, most immediately, what guardrails are being built to scrutinize how potential criminal cases are identified and proceed toward trial. That the DOJ made no alterations to Franklin Tao’s case—one squarely in the academic integrity and research security category<sup>65</sup>—nor explained why it was proceeding to trial as before, exacerbated doubts about how different the stated new approach would be.

To be clear, concerns about how the PRC leadership intends to become the world’s primary center for science and technology<sup>66</sup> are well-founded, including that the PRC party-state will use both legal and extralegal means in hopes of achieving this goal.<sup>67</sup> But there is a smarter way of pursuing the United States’ own goal of remaining a leader in science and technology as, in President Biden’s words, “[w]e are in competition with China and other countries to win the 21st century.”<sup>68</sup> The Biden administration can be a tougher competitor with China by being tough on bias and discrimination at home in the United States.

Alongside tackling issues of bias and fostering a more welcoming and inclusive atmosphere for foreign talent, even greater momentum is needed to clarify and streamline research reporting requirements. The Trump administration issued Presidential Memorandum on United States Government-Supported Research and Development National Security Policy (known as NSPM-33) in its waning days.<sup>69</sup> The Biden administration issued guidance on implementing NSPM-33 in January 2022 following calls for public comments.<sup>70</sup>

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<sup>64</sup> Olsen, *supra* note 7.

<sup>65</sup> See Lewis-Kraus, *supra* note 33.

<sup>66</sup> See Xi Jinping: ‘Strive to Become the World’s Primary Center for Science and High Ground for Innovation,’ DIGICHINA (Mar. 18, 2021), <https://digichina.stanford.edu/work/xi-jinping-strive-to-become-the-worlds-primary-center-for-science-and-high-ground-for-innovation/>.

<sup>67</sup> See, e.g., *Legal, Illegal, and Extralegal: China’s Pursuit of Its Tech Future*, CTR. FOR SEC. & EMERGING TECH. (GEORGETOWN) (Mar. 18, 2021), <https://cset.georgetown.edu/event/legal-illegal-and-extralegal-chinas-pursuit-of-its-tech-future/>.

<sup>68</sup> Evelyn Cheng, *Biden Calls for the U.S. to Become More Competitive Against a ‘Deadly Earnest’ China*, CNBC (Apr. 29, 2021, 1:15 AM), <https://www.cnbc.com/2021/04/29/biden-calls-for-us-to-become-more-competitive-against-china.html>.

<sup>69</sup> *Presidential Memorandum on United States Government-Supported Research and Development National Security Policy*, TRUMP WHITE HOUSE (Jan. 14, 2021), <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-united-states-government-supported-research-development-national-security-policy/>.

<sup>70</sup> SUBCOMM. FOR RSCH. SEC. & JOINT COMM. ON THE RSCH. ENV’T, GUIDANCE FOR IMPLEMENTING NATIONAL SECURITY PRESIDENTIAL MEMORANDUM 33 (NSPM-33) ON NATIONAL SECURITY STRATEGY FOR UNITED STATES GOVERNMENT—SUPPORTED RESEARCH AND DEVELOPMENT (2022),

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NSPM-33 and the new guidelines lay a foundation. There is still much work to do with respect to clarifying and streamlining grant reporting procedures, as well as determining whether current research security rules should be strengthened. There are also serious questions about the appropriate use of disclosed information.<sup>71</sup> The hope is that a collaborative process involving governmental and non-governmental actors will lead the United States to a place where the criminal law plays only a backstop role in protecting research security and is accompanied by measures that mitigate, even if not fully eliminate, bias.

Not just in the Year of the Tiger but also in the decades ahead, the United States' strength in science and technology—the foundation upon which new valuable IP is created—will depend on sustaining an environment that values creativity and openness. Interestingly, 2022 is not merely a tiger year, it is a water tiger year. The rotation of the twelve zodiac animals occurs along with the rotation of five elements (“wood, fire, earth, metal and water”),<sup>72</sup> with water tigers characterized as “creative and open to change.”<sup>73</sup> Perhaps then the goal for the U.S. government over the remaining months of 2022 is to prove through actions that it has indeed dismounted the ‘China Initiative’ tiger and, instead, is transforming into a water tiger: to be bold and strong in pursuing science and technology while being creative and open about how to do this in a way that protects national security and the core American value of equal justice to all.

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<https://www.whitehouse.gov/wp-content/uploads/2022/01/010422-NSPM-33-Implementation-Guidance.pdf>

<sup>71</sup> See Mitch Ambrose, *White House Clarifies Disclosure Requirements for R&D Funding*, AM. INST. OF PHYSICS (Jan. 4, 2022), <https://www.aip.org/fyi/2022/white-house-clarifies-disclosure-requirements-rd-funding>.

<sup>72</sup> Rachael Evans, *What Does the Year of the Water Tiger Mean?*, ABC EVERYDAY, <https://www.abc.net.au/everyday/what-does-the-year-of-the-water-tiger-mean-lunar-new-year-2022/100785464#:~:text=Dr%20Lin%20says%20that%20as,can%20be%20associated%20with%20destruction>.

<sup>73</sup> HARPER'S BAZAAR, *supra* note 59.