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## From Criminalizing China to Criminalizing the Chinese

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# FROM CRIMINALIZING CHINA TO CRIMINALIZING THE CHINESE

Leo Yu\*

Many scholars have studied the racialization of Asian Americans and found that perpetual foreignness stands at the core of their ascriptive identity. This identity was formed in the 19th century and is also closely related to the dominant society's racial understanding of 'the Chinese'—which refers, for the purposes of this Article, to people of actual or perceived Chinese descent in the United States. This Article investigates this racialization process, with a contemporary lens: What does perpetual foreignness mean to the Chinese in the 21st century?

This Article argues that, for the Chinese, their foreignness in today's United States means more than just otherness, inferiority, and inassimilability; instead, the Chinese foreignness has acquired an additional specific meaning: the unquestionable linkage to China, the United States' most significant geopolitical challenger.

This Article uses the U.S. Department of Justice's failed China Initiative to investigate this new ascriptive identity of the Chinese and argues that the geopolitical tension between China and the United States plays a vital role in this change. As the United States' most significant challenger in geopolitics, China has taken a central role in the racial understanding of the Chinese in the 21st century. To many non-Chinese Americans, the Chinese are more than just foreigners who are culturally associated with a far away, inferior oriental country as they were perceived in the 19th and 20th centuries. Today, they are a suspect race who possess an unbreakable linkage to China, the dangerous perpetrator in geopolitics. In short, today, the

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Chinese are not just foreign; they are foreign perpetrators. This new ascriptive identity of the Chinese resonates with the differential racialization tenet of the Critical Race Theory that the dominant society racializes different minority groups at different times in response to shifting needs and interests.

How the United States views China has a direct impact on how Americans views the Chinese. Since China will likely remain the United States' geopolitical challenger, this Article predicts that the foreign perpetrator identity will be attached to the Chinese community in the foreseeable future.

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## INTRODUCTION

*"[I]n the end, you're treated like a spy. That just breaks your heart. It breaks your confidence."*<sup>1</sup>

Prof. Gang Chen

On January 20, 2022, the U.S. District Court for the District of Massachusetts dismissed all criminal charges against defendant Gang Chen, a professor at the Massachusetts Institute of Technology (MIT).<sup>2</sup> Chen was accused of failing to sufficiently disclose his ties to China in his research grant applications, leading to an indictment for wire fraud, failure to report a foreign bank account, and making a false statement to a federal agent.<sup>3</sup>

Chen was one of the 148 individual defendants charged under the China Initiative, launched by the United States Department of Justice (DOJ).<sup>4</sup> Established by former Attorney General Jeff Sessions in 2018, the China Initiative was DOJ's first country-specific initiative meant to deter economic espionage.<sup>5</sup> Margaret Lewis observed that the use of "China" in this initiative

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1. Ellen Barry, *'In the End, You're Treated Like a Spy,' Says M.I.T. Scientist*, N.Y. TIMES (Jan. 24, 2022), [www.nytimes.com/2022/01/24/science/gang-chen-mit-china](https://www.nytimes.com/2022/01/24/science/gang-chen-mit-china) (on file with the *Columbia Human Rights Law Review*).

2. Press Release, U.S. Attorney's Office, District of Massachusetts, 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> [<https://perma.cc/V4L4-RBEL>]; see also Ellen Barry & Katie Benner, *U.S. Drops Its Case Against M.I.T. Scientist Accused of Hiding China Links*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/20/science/gang-chen-mit-china-initiative.html> (on file with the *Columbia Human Rights Law Review*) (detailing the charges that were filed and subsequently dropped against Professor Chen).

3. Criminal Complaint, United States v. Chen, No. 21-mj-1011-DLC, 1–23 (D. Mass. Jan. 13, 2021).

4. See Eileen Guo et al., *The U.S. Crackdown on Chinese Economic Espionage Is a Mess. We Have the Data to Show It.*, MIT TECH. REV. (Dec. 2, 2021), <https://www.technologyreview.com/2021/12/02/1040656/china-initiative-us-justice-department/> [<https://perma.cc/8ZV2-ADPA>]. At this point, the MIT Technology Review is the only organization that has conducted a thorough review of all China Initiative cases. Its research is based on publicly available information, including the Justice Department's own webpage. Before the MIT Technology Review published its research, it requested comment from the Justice Department regarding the China Initiative. Two days later, the department made significant changes to its own list of cases on its website, adding some and deleting thirty-nine defendants previously connected to the China Initiative. Nevertheless, this paper takes the position that the MIT Technology Review's research on the China Initiative represents the most comprehensive accounting of the China Initiative prosecutions.

5. Jess Aloe & Eileen Guo, *The U.S. Government Is Ending the China Initiative. Now What?*, MIT TECH. REV. (Feb. 23, 2022), <https://www.technologyreview.com/2022/02/23/1046460/us-government-china-initiative-over/> [<https://perma.cc/QF38-53YW>].

is not just a branding to heighten awareness; instead, it characterizes China as a perpetrator in the criminal justice context.<sup>6</sup> China as a country is not a defendant in any of the China Initiative cases, but the concept of China, or “China-ness,” is the subject that has been criminalized.<sup>7</sup>

The process of criminalizing China was not a home run for DOJ. From November 2018 to December 2021, at least 77 cases were pursued under the China Initiative.<sup>8</sup> Contrary to Sessions’ pledge to combat Chinese espionage, only 19 cases—about 25 percent—included charges of violating the Economic Espionage Act (EEA).<sup>9</sup> Moreover, only about 25 percent of defendants have been convicted, which is drastically lower than DOJ’s 91 percent overall conviction rate.<sup>10</sup> The China Initiative’s ineffectiveness is not its only flaw. Civil rights advocates, the Asian American community, and the science community all pointed out that this initiative had an undeniable racial profiling trait. Of the 148 defendants across the 77 cases collected in the database, 130—approximately 90 percent—were of Chinese heritage.<sup>11</sup> Few of them received a conviction relating to espionage.<sup>12</sup> A closer look at high-profile China Initiative cases provides a clearer picture of DOJ’s racial profiling actions. A disproportionate number of the Chinese defendants were

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6. See Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145, 148–49 (2021).

7. See *id.* at 171 (arguing that the China Initiative use of “China” as the glue connecting cases under the initiative’s umbrella creates an overinclusive conception of the threat and attaches a criminal taint to entities that possess “China-ness”).

8. See generally Guo et al., *supra* note 4.

9. *Id.*

10. *Id.*; see also John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [<https://perma.cc/S3CA-HWHF>]. According to research from the Pew Research Center in 2019, defendants in 90 percent of cases in the federal system pled guilty, 8 percent of cases were dismissed, and 2 percent of the cases went to trial. When a case went to trial, 83 percent of cases received convictions. Thus, the overall conviction rate, from guilty pleas and trials, added up to at least 91 percent.

11. Guo et al., *supra* note 4; see also MIT TECH. REV., MIT TECHNOLOGY REVIEW’S CHINA INITIATIVE DATABASE, <https://airtable.com/appSZ6NS11SbCLHrM/shrQhBkuDPvEvig4h/tblbHcFMohIPsVVV?> [<https://perma.cc/6BK7-XDWG>] (last visited Sept. 17, 2022). Along with the publication of the general date of the China Initiative cases, the MIT Technology Review also published a chart with detailed information of all the all the case, including case numbers, jurisdictions, defendants’ backgrounds, the Justice Department’s main allegations, nature of the crimes, and courts’ dispositions. It is up to date as of December 2021, roughly two months before the China Initiative was abolished. In this paper, this chart is referred to as the MIT Case Chart.

12. *Id.* (“The China Initiative claims to be centered on countering economic espionage, yet our database finds that only 19 of the 77 cases (25%) include charges of violating the Economic Espionage Act (EEA).”).

accused of lacking “research integrity,” meaning that they failed to sufficiently disclose their “nexus to China” in their academic careers.<sup>13</sup> From 2018 until 2022, DOJ vigorously prosecuted defendants like Chen, whose “nexus to China’ . . . often consisted of no more than ancestry or association with Chinese students and universities.”<sup>14</sup> The result is revealing: as of February 2023, only two research integrity defendants were found guilty after a trial (one Chinese and one white), eight cases have been dismissed in full before or during trial, and one case ended with full acquittal.<sup>15</sup> Criminalizing China has transcended into criminalizing “China-ness.”<sup>16</sup> The Chinese became a target simply because of their ties to China or the failure to fully disclose such connections to the U.S. government. The process of criminalizing China has evolved into an effort to criminalize the Chinese.

There has never been a clear line separating a foreign country and immigrants to the United States from that country. Critical Race Theory (CRT) scholars have long observed the correlations between geopolitical tensions and the ascriptive identities imposed on racially diverse immigrants.<sup>17</sup> Robert Chang, Eric Yamamoto, Lorraine Bannai, and Margaret Chon produced rich literature regarding how the geopolitical tension between Japan and the United States during World War II impacted the racial understanding of the Japanese, eventually leading to the mass incarceration

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13. *Id.*

14. Michael German & Alex Liang, *End of Justice Department’s ‘China Initiative’ Brings Little Relief to U.S. Academics*, BRENNAN CTR. FOR JUST. (Mar. 25, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/end-justice-departments-china-initiative-brings-little-relief-us> [<https://perma.cc/88ER-28GK>].

15. MIT TECH. REV., *supra* note 11. Eight defendants’ cases were dismissed either before or after trial: Kailai Zhao, 1:20-cr-00187 (S.D. Ind.); Qing Wang, 1:20-cr-mj-09111 (N.D. Ohio); Gang Chen, 1:21-10018 (D. Mass.); Juan Tang, 2:20-cr-00134 (E.D. Cal.); Xin Wang, 3:20-cr-00251 (N.D. Cal.); Haizhou Hu, 3:20-mj-00036 (W.D. Vir.); Chen Song, 3:21-cr-00011 (N.D. Cal.); Guan Lei, 8:20-cr-00127 (C.D. Cal.). One case ended up with acquittal: Anming Hu, 3:20-cr-00021 (E.D. Tenn.). Two defendants were found guilty after trial: Charles Lieber (1:20-cr-10111, D. Mass.), a Harvard professor, and Feng Franklin Tao (2:19-cr-20052, D. Kas.), a Chinese professor from the University of Kansas. None of them were found to be engaged in espionage.

16. See Lewis, *supra* note 6, at 171 for an in-depth explanation of the term “China-ness.”

17. Eric K. Yamamoto, Lorraine J. Bannai and Margaret Chon comprehensively analyzed how the World War II geopolitics directly contributed to the massive incarceration of the Japanese community. ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 89–101 (2021). Robert Chang argued that “boundary against Asians may be erected at the geopolitical border.” ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 89–92 (1999). Sahar Aziz systematically investigated how the Muslim community was racialized after 9/11 through the racial-religious hierarchies. SAHAR AZIZ, *THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM*, 132–37 (2021).

of the entire Japanese community.<sup>18</sup> In analyzing Muslims' racialization process in the United States, Sahar Aziz concluded that global geopolitics plays a vital part in shaping domestic racial-religious hierarchies.<sup>19</sup> In sum, when a foreign country generates a geopolitical crisis that threatens America, immigrants from that country frequently become collateral damage in this conflict, resulting in massive violations of their civil rights and liberties.

China has always played a part in the racial identity of the Chinese in the United States.<sup>20</sup> The initial racial understanding of the Chinese, developed in the nineteenth century, broadly resonated with the United States' political view of China during the same period. China was a far away, mysterious, and poor oriental country, which produced the Chinese: "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown . . ." <sup>21</sup> The "inferior" Chinese culture made the Chinese inassimilable, incompetent, and perhaps disloyal.<sup>22</sup> As Robert Chang summarized, "[f]oreignness and the associated traits of mendacity, inscrutability, disloyalty, and unassimilability permanently marked the Chinese body. Foreignness, ascribed onto the racialized Chinese body, rendered legal all manner of different treatment."<sup>23</sup>

But China in the 21st century is different from China in the 1800s and 1900s. In the past two decades, China has lifted 800 million people out of poverty, and become the second-largest economy in the world.<sup>24</sup> China has

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18. YAMAMOTO ET AL., *supra* note 17, at 89–101; *see also* CHANG, *supra* note 17, at 17.

19. AZIZ, *supra* note 17, at 132.

20. In this Article, I specifically avoid the use of "Chinese American(s)", as this term excludes a significant number of Chinese people who are not U.S. citizens when describing the Chinese community. According to the Pew Research Center, in 2019, 57 percent of Chinese people in America were foreign born, and 41 percent of foreign-born Chinese are not citizens. *See* Abby Budiman, *Chinese in the U.S. Fact Sheet*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-chinese-in-the-u-s/> [<https://perma.cc/WFJ6-379N>]. Limiting this research to Chinese American citizens will not reflect the immigrants-condensed nature of the Chinese community in America.

21. *People v. Hall*, 4 Cal. 399, 405 (Cal. 1854).

22. Gabriel J. Chin, "A Chinaman's Chance" in *Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 UC IRVINE L. REV. 965, 967–70 (2013); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1691–92 (2000).

23. Robert S. Chang, *The Invention of Asian Americans*, 3 UC IRVINE L. REV., 947, 954 (2013).

24. *China Overtakes Japan as World's Second-Biggest Economy*, BBC NEWS (Feb. 14, 2011), <https://www.bbc.com/news/business-12427321> [<https://perma.cc/URK8-M84T>]; *see also* WORLD BANK & DEV. RSCH. CRT. OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, FOUR DECADES OF POVERTY REDUCTION IN CHINA: DRIVERS, INSIGHTS FOR THE



become a world power and is widely expected to overtake the United States' economic preeminence in the near future.<sup>25</sup> American policymakers responded accordingly, establishing a bipartisan consensus that China is the United States' most significant geopolitical challenger. The Obama Administration's "Pivot to Asia" agenda marked the shift in United States foreign policy, shifting away from the "War on Terror" and towards Asia and China's dominance.<sup>26</sup> The Biden Administration reinforces this agenda through unprecedented actions, such as withdrawing from Afghanistan and restricting U.S. investment in China's semiconductor industry.<sup>27</sup> This geopolitical tension fosters a widely shared, bipartisan anti-China sentiment. The highly polarized American political parties finally have a common ground: being anti-China.<sup>28</sup> The so-called "China Threat" has become an indispensable part of campaign speeches for Republicans and Democrats, both promising to be tough on China.<sup>29</sup>

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WORLD, & THE WAY AHEAD, at xiii (2022), <https://thedocs.worldbank.org/en/doc/bdad16a4f5c1c88a839c0f905cde802-0070012022/original/Poverty-Synthesis-Report-final.pdf> [<https://perma.cc/JB3E-MN58>] ("Over the past 40 years, the number of people in China with incomes below US \$1.90 per day—the international poverty line as defined by the World Bank to track global extreme poverty—has fallen by close to 800 million. With this, China has accounted for almost 75 percent of the global reduction in the number of people living in extreme poverty.").

25. *China Seen Overtaking U.S. as Global Superpower*, PEW RSCH. CTR. (July 13, 2011), <https://www.pewresearch.org/global/2011/07/13/china-seen-overtaking-us-as-global-superpower/> [<https://perma.cc/3PS6-AXUC>] ("...the balance of opinion is that China either will replace or already has replaced the United States as the world's leading superpower. This view is especially widespread in Western Europe, where at least six-in-ten in France (72%), Spain (67%), Britain (65%) and Germany (61%) see China overtaking the U.S.").

26. Hillary Clinton, *America's Pacific Century*, FOREIGN POL'Y (Oct. 11, 2011, 12:41 AM), <https://foreignpolicy.com/2011/10/11/americas-pacific-century/> [<https://perma.cc/5CDM-TDRF>]; Barack Obama, *Remarks by President Obama to the Australian Parliament*, YOUTUBE (Nov. 17, 2011), <https://www.youtube.com/watch?v=hdq114rBswE> [<https://perma.cc/EUH6-KMQL>].

27. Greg Myre, *Long Promised and Often Delayed, the 'Pivot to Asia' Takes Shape Under Biden*, NAT'L PUB. RADIO (Oct. 6, 2021), <https://www.npr.org/2021/10/06/1043329242/long-promised-and-often-delayed-the-pivot-to-asia-takes-shape-under-biden> [<https://perma.cc/6JHX-4NDN>]; see also Ana Swanson & Lauren Hirsch, *U.S. Aims to Curtail Technology Investment in China*, N.Y. TIMES (Feb. 9, 2023), <https://www.nytimes.com/2023/02/09/business/us-china-investing-tech-biden.html> [<https://perma.cc/3DSM-F6FN>].

28. Ryan Hass, *Why Has China Become Such a Big Political Issue?*, BROOKINGS INST. (Nov. 15, 2019), <https://www.brookings.edu/policy2020/votervital/why-has-china-become-such-a-big-political-issue/> [<https://perma.cc/2MMH-4EKJ>].

29. Josh Rogin, Opinion, *The Trump-Biden Debate Showed How Broken Our China Discussion Has Become*, WASH. POST (Oct. 1, 2020, 5:24 PM), <https://www.washingtonpost.com/opinions/2020/10/01/trump-biden-debate-how-d>

The United States' cultural understanding of China has changed. China is no longer viewed as the origin of an inferior culture. Today's China equals danger, unfair competition, and communism. Many view China as the American empire's biggest threat and as a source for destroying the American dream.<sup>30</sup> In short, China is a perpetrator who must be brought to justice. Therefore, the foreignness ascribed to the Chinese mutates. Politicians aggressively cultivate the anti-China sentiment, and portray the Chinese as dangerous, calculating, and callous figures—a similar picture to that painted of Muslims post 9/11<sup>31</sup>—who consistently plan to defeat America by stealing its secrets.<sup>32</sup> Their foreignness today is no longer blankly associated with overt orientalism and white supremacy as it was in the 1800s. Instead, it is enmeshed within and inseparable from a substantive geopolitical crisis. While the Chinese might still seem foreign in an abstract, cultural way, mainstream America's core concern over the Chinese today is their linkage to China: a competent, dangerous perpetrator.<sup>33</sup> This new racial understanding of the Chinese has made them a suspect race, whose loyalty

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how-broken-our-china-discussion-has-become/[https://perma.cc/E3AM4XEM]; see also John Cole, *PA8: Bognet Blasts China in 1st TV Ad*, POL. PA. (Apr. 30, 2020, 12:23 PM), <https://www.politicspa.com/pa8-bognet-blasts-china-in-1st-tv-ad/94337/> [https://perma.cc/DB94-RM4N] (quoting Jim Bognet, who stated, "When I'm your Congressman, we'll make China pay for the lies they told, the jobs they stole, and the lives we've lost"); Seth Dawson, Opinion, *Marsha Blackburn's 'Cheating and Stealing' Attack on China Is Historically Inaccurate*, THE TENNESSEAN (Dec. 21, 2020, 7:00 AM), <https://www.tennessean.com/story/opinion/2020/12/21/marsha-blackburns-twitter-attack-china-historically-inaccurate/3934233001/> [https://perma.cc/4CY9-MSUL] (discussing a tweet by Marsha Blackburn, in which she claims that "China has a 5,000 year history of cheating and stealing"); @TimRyan, TWITTER (Mar. 29, 2022, 8:18 AM), [https://twitter.com/TimRyan/status/1508795783210016772?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1508795783210016772%7Ctwgr%5E%7Ctwcon%5Es1\\_c10&ref\\_url=https%3A%2F%2Fframe.nbcnews.com%2F1VRG1Zv%3F\\_showcaption%3Dtrueapp%3D1](https://twitter.com/TimRyan/status/1508795783210016772?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1508795783210016772%7Ctwgr%5E%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Fframe.nbcnews.com%2F1VRG1Zv%3F_showcaption%3Dtrueapp%3D1) [https://perma.cc/Q8M2-5GM9] ("China is winning. [American] [w]orkers are losing"); Kimmy Yam, *Lawmakers of Both Parties Slam Texas GOP Candidate Who Called for Ban on Chinese Students*, NBC NEWS (Jan. 11, 2022, 7:58 PM), <https://www.nbcnews.com/news/asian-america/lawmakers-both-parties-slam-texas-gop-candidate-called-ban-chinese-stu-rcna11814> [https://perma.cc/GYU7-DSG3] (quoting Shelley Luther, who stated "Chinese students should be banned from attending all Texas universities").

30. Hass, *supra* note 28; see also Cole, *supra* note 29.

31. See AZIZ, *supra* note 17, at 155–58 (finding that post 9/11, Muslims were treated as "presumptive threats", and numerous elected officials started to engage in Islamophobia, which portrayed all Muslims as likely terrorist attack aiders and urged law enforcement and Congress to initiate investigation specially made for Muslims and agencies that related to Muslims. Aziz also argues that the treatment of Muslims post-9/11 is comparable to "McCarthy's Communist witch-hunt").

32. See sources cited *supra* note 29.

33. *Infra* Part II(D)(a).

to America must continually be checked to ensure they are not possible agents of the government of China. This new racial identity of the Chinese functions to justify the United States' criminal legal response, and the China Initiative is a natural product of this process.

The "differential racialization" theory provides a critical lens through which to analyze how the ascribed racial identity of the Chinese has evolved. As Richard Delgado and Jean Stefancic have explained, "the dominant society racializes different minority groups at different times, in response to shifting needs" and economic and political interests.<sup>34</sup> Muslims and those perceived to be Muslim, for example, were long stereotyped in American media and film—but particularly after 9/11, the U.S. government and many non-Muslim, non-Arab Americans came to view Muslims and Arabs as a national security threat writ-large.<sup>35</sup> The shift overtime in the Chinese's ascriptive identity demonstrates this process, as well.

China's geopolitical position in relation to the United States thus looms over the racial identity of Chinese people in the United States. The Chinese in America have found themselves unable to escape this new racial identity by assimilating through citizenship, education, professional jobs, or, as Mr. Andrew suggested, "wear[ing] red, white, and blue."<sup>36</sup> After all, race is a social construct, and racialization of minorities has never been a fact-based process; instead, it is "the process by which social and political meanings are attributed to particular biological features."<sup>37</sup> More significantly, this new racial understanding of the Chinese, which closely associates the Chinese with a geopolitical crisis, makes it much harder for the Chinese to combat racial profiling. Geopolitics closely overlaps a national security apparatus that has expanded greatly since 9/11.<sup>38</sup> The national security tone in this new racial identity of the Chinese makes their racial profiling more acceptable than that of many other races. Just as anti-China sentiment is bipartisan,

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34. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* 9–10 (3d ed. 2017). ("Critical writers in law, as well as in social science, have drawn attention to the ways the dominant society racializes different minority groups at different times, in response to shifting needs such as the labor market.")

35. *Id.*

36. Andrew Yang, Opinion, *Andrew Yang: We Asian Americans Are Not the Virus, But We Can Be Part of The Cure*, WASH. POST (Apr. 1, 2020, 4:23 PM), <https://www.washingtonpost.com/opinions/2020/04/01/andrew-yang-coronavirus-discrimination/> [<https://perma.cc/5JCP-S6NP>] ("We Asian Americans need to embrace and show our American-ness in ways we never have before. We need to step up, help our neighbors, donate gear, vote, wear red, white and blue, volunteer, fund aid organizations, and do everything in our power to accelerate the end of this crisis.")

37. AZIZ, *supra* note 17 at 30; see also IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 10–13 (2006).

38. AZIZ, *supra* note 17, at 169–171.

racial profiling of the Chinese has also been sustained within Republican and Democratic administrations alike.

China is widely expected to remain the main competitor of the United States, both economically and in geopolitical influence, for the foreseeable future.<sup>39</sup> For the Chinese living in the United States, this reality likely means they will be attached to the foreign perpetrator identity for a long time, regardless of the administration's party affiliation. Failed cases like Gang Chen's did not lead the Biden Administration to terminate the China Initiative. Instead, the Initiative has simply evolved into the "Strategy for Countering Nation-State Threats."<sup>40</sup>

This Article predicts that, in the 2024 presidential election cycle, more China Initiative-like policies will emerge on both the federal and state levels.

This Article has three parts. Part I provides a brief overview of Asian American Jurisprudence and reviews how the perpetual foreign racial identity of the Chinese was forged in the 1800s. Part II investigates the historical dynamic between geopolitics and the Chinese community's racial identity in America.<sup>41</sup> Specifically, this Part studies how the Chinese community's identity changes from perpetual foreigners to foreign perpetrators, an evolution that triggers policies like the China Initiative. Part III provides a prediction and a conclusion: Including because the Biden Administration has not terminated the China Initiative in a meaningful way,

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39. See Derek Saul, *China and India Will Overtake U.S. Economically by 2075*, *Goldman Sachs Economists Say*, FORBES, Dec. 6, 2022, 10:51 AM, <https://www.forbes.com/sites/dereksaul/2022/12/06/china-and-india-will-overtake-us-economically-by-2075-goldman-sachs-economists-say/?sh=15a750598ea9> [https://perma.cc/W4LD-FQSB]; see also Ralph Jennings, *China's Economy Could Overtake U.S. Economy by 2030*, VOICE OF AM. (Jan. 4, 2022, 7:45 AM), <https://www.voanews.com/a/chinas-economy-could-overtake-us-economy-by-2030/6380892.html> [https://perma.cc/J7M9-D4ME]; but see Ruchir Sharma, *China's Economy Will Not Overtake The US Until 2060, If Ever*, FIN. TIMES (Oct. 24, 2022), <https://www.ft.com/content/cff42bc4-f9e3-4f51-985a-86518934afbe> [https://perma.cc/395R-UN7D].

40. Matthew Olsen, Asst. Att'y Gen., Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats (Feb. 23, 2022) [hereinafter Olsen Announcement], <https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-olsen-delivers-remarks-countering-nation-state-threats> [https://perma.cc/2PD2-3EWX].

41. This Article generally follows Jeffery Sachs's approach and divides U.S. history into five phases in according to the geopolitical atmosphere: (1) 1815–1914 was the era of British hegemony; (2) 1914–1945 was the period of two World Wars and the Great Depression; (3) 1947–1989 was the period that gave the rise of the United States as the new hegemon and the start of the Cold War; (4) 1989–2008 saw the United States, the sole superpower; and 5) 2008–present has been the Multilateralist era. See Jeffery D. Sachs, *The New Geopolitics*, 22 HORIZONS 10, 10–12 (2023).

the Chinese will be attached to China as a foreign perpetrator for as long as China remains a major geopolitical challenge to the United States.

#### I. ASIAN AMERICAN JURISPRUDENCE & THE PERPETUAL FOREIGN IDENTITY

##### A) Asian American Jurisprudence

Asian Critical Race Theory, or Asian American Jurisprudence, is a subdivision of Critical Race Theory (CRT),<sup>42</sup> created by a group of Asian American law professors including Neil Gotanda, Robert Chang, Eric Yamamoto, Mari Matsuda, Jerry Kang, and others.<sup>43</sup> Asian American Jurisprudence investigates the social struggles in the Asian community's racialization process in the United States.<sup>44</sup> Due to the Asian American community's incredibly diverse nature, there is no unified methodology for studying this racialization process.<sup>45</sup> Nevertheless, Gotanda, after analyzing scholarship throughout the generations, concluded that Asian American Jurisprudence scholars investigate Asians' racialization process by creating a space and locale in legal studies for identity, interrogation, and praxis.<sup>46</sup>

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42. See DELGADO & STEFANCIC, *supra* note 34, at 9–10. The critical race theory (CRT) movement started in the 1970s, and it is a collection of activist and scholars engaged in studies in the dynamic between race and power. The founding scholars of CRT—Derrick Bell, Richard Delgado, Alan Freeman, and others—challenged the very foundation of the liberal order, including equality theory, step by step progress, legal reasoning, and neutral principles of constitution interpretations. CRT scholars build their theories on legal storytelling and counternarrative, drawing attention on the untold stories and alternative perceptions. This approach sharply contradicts with traditional legal studies, in which scholars treat facts as the foundation, and build their theories from a seemingly neutral, observant standpoint. Due to this sharp contrast between CRT jurisprudence and traditional legal studies, controversy and pushbacks of CRT arose at the very beginning of the CRT movement, from the left and the right.

Despite pushback, many law scholars from diverse backgrounds joined the CRT movement, and developed a rich series of literatures on the racial dynamic in America. Throughout the past several decades, CRT scholars created several theoretical tenets. First, they theorized that racism is an ordinary, common practice in American life. Second is the interest convergence theory, that racism can only be deterred when the deterring of racism can benefit white elites. Third, race is a social construct—minorities are racialized by social thoughts and relations, instead of scientific proof. The fourth tenet is the differential racialization theory. It argues that the dominant society racializes different minority groups at different time, in response to shifting needs and interests.

43. *Id.* at 6.

44. See Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 *ASIAN AM. L.J.* 5, 8–9 (2010) (discussing the social struggles in the Asian community's racialization process in America).

45. *Id.* at 6.

46. *Id.* at 8.

The identity study stands at the heart of Asian American Jurisprudence.<sup>47</sup> Scholars attempt to answer the fundamental question—what does it mean to be Asian in the United States?—by analyzing three dimensions of identities: individual identity, collective identity, and ascriptive identity.<sup>48</sup> Individual identity and collective identity are internal identities, as they focus on how Asians see themselves as individuals and as a community in America. Ascriptive identity is the external, racial identity<sup>49</sup> that the dominant society imposes on Asians.<sup>50</sup> The ascriptive identity dimension closely relates to the social construct tenant of the CRT jurisprudence. How Asian Americans are viewed and treated is primarily based on the ascriptive identity imposed by the dominant society instead of the individual or collective identities. In this sense, the concept of Asian Americans is a societal invention, often through stereotypes, and then imposed on Asians individually.<sup>51</sup> As Frank Wu concluded, “Asian Americans are made, not born.”<sup>52</sup>

Generations of Asian American Jurisprudence scholars have engaged in studies on the ascriptive Asian identities. Gotanda concluded that three major ascriptive identities had been imposed on Asians in U.S. history: foreignness, model minority, and 9/11 terrorists.<sup>53</sup>

Among the three ascriptive identities, the foreignness identity remains central in analyzing Asians Americans’ racialization process.<sup>54</sup> The foreignness identity was created in the 1800s through a series of efforts to exclude Chinese immigrants.<sup>55</sup> This identity deeply intertwines with white

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47. *Id.*

48. *Id.* at 12–16.

49. This paper uses ascriptive identity and racial identity interchangeably.

50. K. ANTHONY APPIAH, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 76, 79–80 (1998).

51. See Chang, *supra* note 23, at 956 (“Born in Korea, I wasn’t born Asian American. Nor did I magically transform when I entered the United States in 1970. Instead, Asian American is something that I became and continue to become.”); see also CHANG, *supra* note 17, at 1 (“To bastardize Simone de Beauvoir’s famous phrase, one is not born an Asian American, one becomes one.”).

52. FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 306 (2002).

53. See Gotanda, *supra* note 44, at 9. Under Gotanda’s theory, Asian American Jurisprudence studies is not restricted to social struggles faced by East Asian or Chinese Americans, and it also includes the ascriptive identity within the South Asian community, such as the post 9/11 terrorist identity,

54. *Id.* at 15.

55. See Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681, 685–91 (2018) (describing discrimination against the Chinese people running Chinese restaurants); Gabriel J. Chin & Sam Chew Chin, *The War Against Asian Sailors and Fishers*, 69 UCLA L. REV. 572, 580–591 (2022) (describing discrimination against the Chinese sailors and fishers); Chin, *supra* note 22 at 970–72 (noting that Asians did not have the right to testify against another person in open courts); Gabriel J. Chin &

supremacy and orientalism. Also, the Chinese foreign identity is not confined to the Chinese community; instead, this foreign image has been projected to many, if not all, Asian communities and profoundly impacts the racialization of Asians throughout history.<sup>56</sup>

#### B) The Chinese Foreignness Ascriptive Identity

There is abundant scholarship evaluating the foreignness ascriptive identity of the Chinese as foreigners in the United States.<sup>57</sup> Gotanda has made the convincing argument that, as demonstrated by a series of legislation and court rulings from the Chinese Exclusion Act era, mainstream America's racial understanding of the Chinese largely concentrates on their inability to assimilate.<sup>58</sup> Thus, many scholars have engaged in the interrogation of the state and federal laws in the 1800s and 1900s that discriminated against the Chinese as a methodology to find the root of the foreignness identity. The discriminatory laws against the Chinese in the 1800s and 1900s were not confined to the immigration law realm. Rather, they existed in many forms: eligibility for certain professions, the ability to own real properties, the right to testify in court, and so on.<sup>59</sup> The theme, however, was quite consistent: the Chinese were an "oriental" and "inferior" race that should not be allowed to become as American as *us*—the white European descendent—or compete with white laborers in the job market.<sup>60</sup>

This image of the Chinese was an overt expression of orientalism and white supremacy, and courts in the 1800s—both the state and federal systems—did not shy away from this truth. In *People v. Hall*, the California Supreme Court ruled that a trial court may not allow a Chinese person to testify against a white man who was convicted of murder.<sup>61</sup> The court provided a portrait of the Chinese to justify this ruling. According to the court, the Chinese were a race "whose mendacity is proverbial...whom

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Anna Ratner, *The End of California's Anti-Asian Alien Land Law: A Case Study in Reparations and Transitional Justice*, 29 ASIAN AM. L.J. 17, 18–19 (2022) (describing a law discriminating against Asians' rights to own real property).

56. All Asians were burdened by racial restrictions on naturalization in federal law between 1790 to 1952, and the restrictions on immigration in force between 1882 and 1965. See Chin, *supra* note 22, at 966.

57. Neil Gotanda intensively investigated multiple scholars' research on how the Chinese have been racialized in America. See Gotanda, *supra* note 44, 37–43.

58. *Id.* at 38–40.

59. See *supra* note 55 and accompanying text.

60. Michael Luo, *The Forgotten History of the Purging of Chinese from America*, THE NEW YORKER (2021), <https://www.newyorker.com/news/daily-comment/the-forgotten-history-of-the-purging-of-chinese-from-america> [<https://perma.cc/6WPG-UMAT>].

61. *People v. Hall*, 4 Cal. 399, 404–5 (Cal. 1854).

nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference . . .”<sup>62</sup>

The court’s characterization of the Chinese reflected the mainstream view of the Chinese in California the 1800s.<sup>63</sup> The inferior foreign image was amplified when the Chinese posed a cultural and economic threat to whites. White labor unions aggressively lobbied Congress and state legislatures to exclude the Chinese from America, and they were successful.<sup>64</sup> In the 1880s, Congress enacted multiple Chinese Exclusion Acts.<sup>65</sup> The 1888 Chinese Exclusion Act prohibited the entry of all Chinese laborers.<sup>66</sup> Chae Chan Ping, a Chinese laborer who resided in San Francisco, was denied access to the United States upon returning from his trip to China, and he challenged the legality of the 1888 Chinese Exclusion Act.<sup>67</sup> To the Supreme Court, the Chinese’s inability to assimilate was a legitimate public interest concern that could justify their exclusion:

“[The Chinese] remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.”<sup>68</sup>

The Supreme Court confirmed this racial identity of the Chinese three years later in *Fong Yue Ting v. United States*,<sup>69</sup> in which the Plaintiff challenged the 1882 Chinese Exclusion Act. In 1892, the Act had been expanded into the Geary Act, which applied the exclusion of Chinese laborers

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62. *Id.* at 405.

63. Nicholas Sean Hall, *The Wasp’s “Troublesome Children”: Culture, Satire, and the Anti-Chinese Movement in the American West*, 90 CAL. HIST. 42, 42–63, 74–76 (2013).

64. Chin & Ormonde, *supra* note 55, at 685–91; Chin & Chin, *supra* note 55, at 580–91.

65. See AZIZ, *supra* note 17, at 38–39.

66. Chae Chan Ping v. United States, 130 U.S. 581, 582 (1889).

67. *Id.*

68. *Id.* at 593–94.

69. Fong Yue Ting v. United States, 149 U.S. 698 (1893).



to all “Chinese persons or persons of Chinese descent.”<sup>70</sup> Writing for the majority that upheld this more restrictive Chinese exclusion legislation, Justice Gray stated:

After some years’ experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests . . .<sup>71</sup>

The two Supreme Court rulings were significant. They demonstrated that the inferior foreign racial identity of the Chinese was adopted on the national level. The Chinese were a race that refused to let go of their inferior culture, and were incapable of assimilating into white Christian America. Foreignness became the general label for the Chinese: they were foreign and would remain foreign perpetually.

## II. GEOPOLITICS AND THE RACIAL IDENTITY OF THE CHINESE

Geopolitics profoundly impacts the racial identity of the Chinese and many other Asians in the United States.

Jeffery D. Sachs divided the world’s geopolitical phases in the past 200 years to five historical periods: (1) 1815-1914, the era of British hegemony; (2) 1914-1945, the period of two world wars and the Great Depression; (3) 1947 to 1989, the rise of the United States as the new hegemon and the start of the Cold War; (4) 1989–2008, the United States as the sole superpower; and (5) 2008–present, the Multilateralist Era.<sup>72</sup>

This Article generally follows Sachs’ theory and investigates how geopolitics impacts the foreign identity of the Chinese in America. This Article observes that from the 1800s to the late 1900s, this perpetual foreignness identity of the Chinese was primarily based on overt orientalism and white supremacy, emphasizing the Chinese cultural inferiority and incompatibility with the white American society. However, when China started to play a major role in the 2000s, the meaning of the foreignness identity began to change. The emphasis was no longer on cultural inferiority.

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70. See AZIZ, *supra* note 17, at 39.

71. *Fong Yue Ting*, 149 U.S. at 717.

72. See generally Sachs, *supra* note 41 (Sachs divided the past 200 years of history into five phases pursuant to the geopolitical dynamic).

Rather, the meaning of “foreignness” has become much more specific: it is about Chinese individuals’ perceived unbreakable ties to China, which makes the Chinese a suspect race whose loyalty to the United States must be checked.

This change also affects how the Chinese are treated in the United States. When foreignness was about cultural inferiority, racial discrimination against them often came as expulsion: expulsion from mainstream America—if not physically, from the nation.<sup>73</sup> When the meaning of foreignness becomes more specific and directly related to China, discrimination in the criminal legal system becomes more prevalent.

This change resonates with the differential racialization theory of the CRT—that society racializes minorities differently from time to time, to accommodate changing needs and interests.<sup>74</sup> The China-dominated foreignness is a response to a new geopolitical dynamic between the United States, a declining world power, and China, the rising new power from the East.<sup>75</sup> The Chinese community’s natural ties to China make the racial profiling of the Chinese more acceptable, as politicians, from left and right, actively rebrand this type of racial profiling with a patriotic, anti-China exterior.

A) China and the Racial Identity of the Chinese: 1800s to Early 1900s

China has not always been a geopolitical challenge to America. In the 1800s, China was perceived as a faraway, poor, oriental treaty partner that was a part of the United Kingdom’s Asian colonial empire.<sup>76</sup> In the early 1900s, China’s position in geopolitics became weaker. The United Kingdom defeated the Qing Dynasty in the First Opium War, opening the door for unequal treaties with Western powers.<sup>77</sup> After the Qing Dynasty’s collapse, China suffered two World Wars, and millions of Chinese people were killed

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73. See Gotanda, *supra* note 44, at 39; see also Chin, *supra* note 22. Chin produced a series of articles revisiting various acts of discrimination against Asians, especially the Chinese, in the late 1800s and early 1900s. The acts were not limited to deportations; rather, the Chinese were systemically excluded from basic social functions, such as the rights to testify in court and to own real properties, and from becoming a member to many professions, such as fishing and the food businesses.

74. DELGADO & STEFANCIC, *supra* note 34.

75. See *infra* note 140, 141, & 144 and accompanying text.

76. See generally John K. Fairbank, “*American China Policy*” to 1898: A Misconception, 39 PAC. HIST. REV. 409, 410 (1970) (describing China as the United Kingdom’s informal empire from 1872 to 1943).

77. *Id.*

by the Japanese military.<sup>78</sup> Consequently, China did not impose geopolitical tension on the United States during this period.

To the Supreme Court, China was a failed treaty country where the Chinese crowded in millions, “press[ing] upon the means of subsistence.”<sup>79</sup> Before the Court rendered its racial judgment of the Chinese in *Chae Chan Ping*, it first recognized that China was a treaty country with America.<sup>80</sup> The Court’s frustration was that the treaty between China and America did not enable the Chinese to assimilate culturally to white America. Despite an 1868 treaty granting China “the favorable provisions . . . by which all the privileges, immunities, and exemptions were extended to [its] subjects . . .” the Chinese living in America “remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country.”<sup>81</sup> In *Fong Yue Ting*, the Court again used the treaty between China and the United States as a preamble for its racialization of the Chinese as a race that was too foreign to assimilate.<sup>82</sup> The Chinese living in the United States during that time—the cheap laborers that resided exclusively in Chinatowns—were something the Court was more familiar with. The Chinese laborers, who acted so differently and grew so rapidly on the West Coast, presented a threat to white America that warranted “protective legislation,” as the population consisted of were too many, who were too different and working too hard.

Thus, the Chinese Exclusion Act was not about deterring China; it was created to deter immigrants from China. A closer look at the public opinions during this period reveals that the hostility against the Chinese had little relation to China, which was considered a failed state in Asia. The public

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78. *Id.*

79. *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

80. *Id.* at 591–93. (analyzing the treaties between the United States and China in 1844 and 1858).

81. *Id.* (“Notwithstanding the favorable provisions of the new articles of the treaty of 1868, by which all the privileges, immunities, and exemptions were extended to subjects of China in the United States which were accorded to . . . subjects of the most favored nation, [the Chinese] remained strangers in the land . . .”).

82. *Fong Yue Ting v. United States*, 149 U.S. 698, 716–17 (1893). The Court first cited two articles of the 1868 treaty that allowed some Chinese citizens to reside in America. Then the Court came to the conclusion that

“After some years’ experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests, and therefore requested and obtained from China a modification of the treaty.”

image of the Chinese was closely attached to Chinatowns, the symbol of foreignness in oriental style: dirty, slimy, and sexually predatory.<sup>83</sup> The negative image of Chinatowns was an overt expression of orientalism and white supremacy without sugarcoating. The Yellow Peril—the fear of the Chinese and Japanese invasion—came from ignorance and race-based bias against Asian culture, which was perceived as inferior, predatory, and barbaric.<sup>84</sup> For example, in a congressional hearing regarding opium regulations, a congressman stated the following in 1910:

In the Chinatown in the city of Philadelphia there are enormous quantities of opium consumed, and it is quite common, gentlemen, for these Chinese...to have as a concubine a white woman. There is one particular house where I would say there are 20 white women living with Chinamen as their common-law wives. The Chinamen require these women to do no work, and they do nothing at all but smoke opium day and night. A great many of the girls are girls of family, and the history of some of them is very pathetic. You will find those girls in their younger days went out with sporty boys, and they got to drinking. The next step was cigarettes. Then they go to the Chinese restaurants, and after they go there a couple of times and get a drink in them they want to 'hit the pipe.' They do it either out of curiosity or pure devilishness.<sup>85</sup>

Movies made during that time also showcased a devilish image of Chinatowns as full of drug dens hoping to trap innocent, young white women.<sup>86</sup> As unfavorable depictions of Chinatowns dominated the popular conception, white unions lobbied for restrictions against Chinese restaurants owned by the Chinese.<sup>87</sup>

## B) The Foreignness Identity During the Cold War Era

While China was not a major power during the Cold War Era,<sup>88</sup> another Asian country was presenting geopolitical challenges against the

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83. See Chin & Ormonde, *supra* note 55, at 699–700; see also CHANG, *supra* note 17, at 14–18 (Chin, Ormonde, and Chang analyzed many forms of discrimination against the Chinese during this period and the main society's portrayal of Chinese figures).

84. CHANG, *supra* note 17, at 14–18.

85. Chin & Ormonde, *supra* note 55, 699–703 (citing *Importation and Use of Opium: Hearing on H.R. 25240, H.R. 25241, H.R. 25242, and H.R. 28971 Before the H. Comm. on Ways and Means*, 61st Cong. 71 (1910-1911)).

86. PHANTOM OF CHINATOWN (Monogram Pictures 1940); THE CHINESE RING (Monogram Pictures 1947); MR. WONG IN CHINATOWN (Monogram Pictures 1939).

87. See Chin & Ormonde, *supra* note 55, at 702.

88. In the 1960s, the vast majority of China's population was considered poor by an American standard. Indermit Gil, *Deep-Sixing Poverty in China*, BROOKINGS INST. (Jan. 25,

United States. Japan became the world's second-largest economy in 1968<sup>89</sup> and was perceived as a major economic threat to the United States, leading to widespread anti-Japanese sentiment.<sup>90</sup> But this sentiment was not confined to the Japanese community alone, as the murder of Vincent Chin demonstrates.

Vincent Chin's murder in 1982 reminded the Chinese of their 'otherness.' Vincent Chin, a Chinese American, was murdered by two white autoworkers in Detroit.<sup>91</sup> Chin's Asian-ness offended the two white autoworkers during an altercation in a strip club, as to them, people like Chin stole their jobs and the sexual attention to which they felt entitled.<sup>92</sup> The two white autoworkers, while found guilty, did not receive much punishment and were given three years of probation and fines totaling \$3,780.<sup>93</sup> The presiding judge explained his sentence by noting that the defendants had no prior crimes, were "longtime residents of the area, and were respectfully employed citizens."<sup>94</sup>

Vincent Chin was a Chinese American without any known connection to Japan. Nevertheless, Chin's Chinese identity did not exempt him from being targeted. His Asian appearance automatically associated him with the prevalent negative racial understanding of Asians during that period: "little yellow men" who stole jobs from white Americans.<sup>95</sup>

The "little yellow man" reference comes directly from the remarks of John Dingell Jr., a Michigan congressman who vocally blamed the Japanese for the economic woes of American automakers, whose products were facing unprecedented competition.<sup>96</sup> His remarks and Chin's murder marked a change in the meaning of foreignness for the Chinese and many other Asians. While white supremacy and orientalism still played a part, the theme of the foreignness identity became more specific. It was less closely attached to the perception of an oriental culture and its inferior nature. Instead, it became more closely associated with nativism and economic anxiety. The Chinese were no longer perceived as odd-looking, cheap laborers who exclusively

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2021), <https://www.brookings.edu/blog/future-development/2021/01/25/deepsixing-poverty-in-china/> [<https://perma.cc/82YE-UNJA>].

89. Koichi Hamada, *Japan 1968: A Reflection Point During the Era of The Economic Miracle* 1–2 (Yale Univ. Econ. Growth Ctr., Discussion Paper No. 764, 1996), [http://www.econ.yale.edu/growth\\_pdf/cdp764.pdf](http://www.econ.yale.edu/growth_pdf/cdp764.pdf) [<https://perma.cc/49RP-X3R2>].

90. M.J. Heale, *Anatomy of a Scare: Yellow Peril Politics in America, 1980-1993*, 43 J. AM. STUD. 19, 22–23 (2009).

91. WU, *supra* note 52, at 70.

92. CHANG, *supra* note 17, at 23.

93. *Id.* at 22.

94. *Id.*

95. See WU, *supra* note 52, at 70.

96. *Id.*

resided in slimy Chinatowns. As the Chinese moved out of Chinatowns, became white Americans' neighbors, and worked alongside white Americans, the rhetoric's theme changed from "they don't belong here" to "they came here to steal from us."

C) Late 20th Century to 2008: From "Stealing from Us" to "Stealing for China."

During this period, the United States was the only superpower in the world.<sup>97</sup> However, China started to grow economically and show potential to be another superpower in the world.<sup>98</sup> With this, the Chinese's perceived ties to China began to play an increasingly important role in shaping the Chinese's racial identity in America.

1) China's Uprising & the China Threat Theory

China's modern economic success started in the late 1970s following prosperity-inducing economic reform.<sup>99</sup> This economic reform profoundly and quickly changed China's role in geopolitics. China started to deviate from its previous strict communist economic ideology that opposed private business.<sup>100</sup> The Chinese government encouraged the formation of private businesses, liberalized foreign trade and investment, relaxed estate control over price, and invested in industrial production and the education of its workforce.<sup>101</sup> From 1985 to 2008, China's gross domestic product (GDP) increased by 14.76 times, from \$310.13 billion to \$4,577.28 billion.<sup>102</sup>

While China attempted to maintain a low profile in geopolitics during this period, its astonishing economic success triggered suspicions from the West regarding its agenda on the international stage.<sup>103</sup> Unlike Japan, China was not an ally to the United States or any other Western states

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97. Sachs, *supra* note 41.

98. See generally Saul, *supra* note 39 (arguing that China and India will economically overtake the U.S. by 2075).

99. WORLD BANK, THE WORLD BANK IN CHINA (2022), <https://www.worldbank.org/en/country/china/overview> [https://perma.cc/99DT-D8S3].

100. ZULIU HU & MOHSIN S. KHAN, INT'L MONETARY FUND, WHY IS CHINA GROWING SO FAST? (1997).

101. *Id.*

102. *Gross domestic product (GDP) at current prices in China from 1985 to 2022 with forecasts until 2028*, STATISTA, <https://www.statista.com/statistics/263770/gross-domestic-product-gdp-of-china/> [https://perma.cc/KFW6-6ZPU] (last visited Feb. 17, 2023).

103. Xuetong Yan, *From Keeping a Low Profile to Striving for Achievement*, 7 CHINESE J. INT'L POL. 153, 153-54 (2014).

and China's socialist orientation further exacerbated Western concerns.<sup>104</sup> In the early 1990s, the idea of the China Threat started to receive increased attention in the United States.<sup>105</sup> Proponents of the China Threat theory argued that China imposed alarming threats to American interests in various fields, including national security, economic growth, and democracy.<sup>106</sup> The China Threat theory was well-received in Congress. Congress scrutinized investment from China, citing threats from China to take over American business interests.<sup>107</sup> In the political arena, politicians started to use anti-China rhetoric during their campaigns, and soon all politicians would fear being labeled "soft on China."<sup>108</sup> Chinese private and state-owned investors first encountered hostility from both Congress and the Executive Branch in the early 2000s<sup>109</sup> as China started to be portrayed as a national security risk in various congressional debates.<sup>110</sup>

Subsequently, the image of the Chinese in America started to mutate. White America's racial understanding of the Chinese was no longer limited to Chinatowns, as the growing economic power of Communist China began shape the ascriptive Chinese image.<sup>111</sup> The Chinese were already perceived as perpetually foreign, stealing jobs, and now, they were perceived as having come here to steal *for China*.<sup>112</sup>

This "steal for China" identity was new. The Chinese in America had never been so closely associated with China, the sovereign.<sup>113</sup> The case of Wen Ho Lee is one example of the emerging racial identity thrust onto the Chinese.

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104. See generally RICHARD C. BUSH ET AL., BROOKINGS INST., *THE STRESS TEST: JAPAN IN AN ERA OF GREAT POWER COMPETITION 1-2* (2019) (observing that Japan has been a U.S. ally and the level of alliance has increased due to a mutual intention to curb China).

105. Yi Edward Yang & Xinsheng Liu, *The 'China Threat' Through the Lens of US Print Media: 1992-2006*, 21 J. CONTEMP. CHINA 695, 697 (2012).

106. *Id.* at 699.

107. Timothy Webster, *Why Does the United States Oppose Asian Investment?*, 37 NW. J. INT'L L. & BUS. 213, 233 (2017) (using a state-owned Chinese oil company's failed acquisition of an American oil company in 2005 as an example of China's ambitions to take over American business interests and analyzing how members of Congress and the Cabinet portrayed China as a national security concern).

108. Wu, *supra* note 52, at 176-77.

109. Webster, *supra* note 107, at 233.

110. *Id.* at 262.

111. *Infra* Part II(C-D).

112. *Infra* Part II(C)(1).

113. *Supra* Part I(B).

## 2) The Case of Wen Ho Lee: The Start of a New Imputed Racial Identity for the Chinese

The case of Wen Ho Lee did not start with Lee, the named defendant. Rather, it started with an alleged espionage crisis involving China. On March 6, 1999, the *New York Times* “reported that China possessed ‘nuclear secrets stolen from an American government laboratory,’” and that “American experts believed Beijing had tested a weapon ‘configured remarkably like the W-88,’” considered the crown jewel of America’s nuclear secrets.<sup>114</sup> Two months later, U.S. Representative Christopher Cox released a report—the Cox Report—alleging that China had gained crucial design information on not just W-88s but *all* U.S. nuclear weapons.<sup>115</sup> Moreover, the Cox Report identified the Chinese in the United States, including immigrants and citizens, as the community that helped China commit espionage.<sup>116</sup>

The Cox Report received broad criticism from the U.S. intelligence and science communities for its inaccuracy.<sup>117</sup> Experts directly refuted this report on many counts, calling its key allegations against China “quite wrong”.<sup>118</sup> The alleged Chinese espionage crisis, as described in the Cox Report, has never been proven true. However, groundless rumors of such a crisis persisted despite the Report’s demonstrated inaccuracy. The Clinton DOJ cultivated this crisis without evidence and put it into action in court.

Defeating a supposed Chinese espionage crisis was a political win the Clinton Administration needed at that moment. President Clinton was on verge of being impeached, and his administration was also frequently accused of being too soft on China and having too many suspicious Chinese ties in campaign finance.<sup>119</sup> Catching a “Chinese spy” and successfully putting

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114. Matthew Purdy, *The Making of a Suspect: The Case of Wen Ho Lee*, N.Y. TIMES (Feb. 4, 2001) <https://www.nytimes.com/2001/02/04/us/the-making-of-a-suspect-the-case-of-wen-ho-lee.html> (on file with the *Columbia Human Rights Law Review*); for the *New York Times*’ original 1999 report, see James Risen & Jeff Girth, *Breach at Los Alamos: A Special Report; China Stole Nuclear Secrets for Bombs, U.S. Aides Say*, N.Y. TIMES (March 6, 1999), <https://www.nytimes.com/1999/03/06/world/breach-los-alamos-special-report-china-stole-nuclear-secrets-for-bombs-us-aides.html?searchResultPosition=1> (on file with the *Columbia Human Rights Law Review*); see also YAMAMOTO ET AL., *supra* note 17, at 360 (summarizing the DOJ’s assertion and news media’s coverage of the case of Wen Ho Lee).

115. Purdy, *supra* note 114; YAMAMOTO ET AL., *supra* note 17, at 362.

116. Wu, *supra* note 52, at 177 (“Most importantly, the Cox report suggests that every Chinese visitor to this country, every Chinese scholar, every Chinese student, every Chinese permanent resident, and even every Chinese American citizen is a spy, potentially spy, or sleeper agent, merely waiting for the signal to rise up. . . .”) (citing the late journalist Lars-Erik Nelson).

117. YAMAMOTO ET AL., *supra* note 17, at 363.

118. *Id.* at 384.

119. Wu, *supra* note 52, at 178; see also Purdy, *supra* note 114 (“The case of Wen Ho Lee was propelled by the divisive politics of Clinton-era Washington...[including] a White



them behind bars would have, for the Administration, been an ideal response to the China-related criticisms it faced. A major problem, however, was that nobody had evidence to prove the Chinese spy crisis was true.

The fallacy of this crisis did not stop the Clinton DOJ from fabricating evidence, making very public allegations, and creating a Chinese spy from nothing. Dr. Wen Ho Lee, a Taiwanese American nuclear scientist, became a perfect target in the making of a Chinese spy: he was of Chinese descent, he had friends in China, and he was a nuclear scientist who worked for a lab funded by the Department of Energy (DOE), which oversees nuclear energy infrastructure.<sup>120</sup> Lee fit the profile.

On December 10, 1999, Lee was arrested by the Federal Bureau of Investigation (FBI) and indicted on 59 counts of federal crimes, with 20 counts under the Espionage Act, and 39 counts under the Atomic Energy Act for mishandling information.<sup>121</sup> He was jailed in solitary confinement without bail for more than nine months, and Lee, who was 65 at that time, almost died as a result.<sup>122</sup> The American news media was ecstatic. The media characterized Dr. Lee as the “spy of the century,” an “evil China spy,” “the Dragon” and “the worst spy since the Rosenbergs”—someone who supposedly was “far more damaging to the national security than Aldrich Ames.”<sup>123</sup>

It turned out that the government had not caught anything. FBI and Central Intelligence Agency (CIA) officers involved in this case later admitted there was never any evidence to support espionage charges against Lee.<sup>124</sup> The FBI, together with the U.S. Attorney’s office, blatantly fabricated evidence to mislead the court and the public.<sup>125</sup> In the bond hearing, Robert Messemer, the lead FBI agent of Lee’s case, submitted faulty testimony to the U.S. District Court for the District of New Mexico regarding Lee’s motivation, and successfully persuaded Judge James A. Parker to deny Lee’s bail based on his “deeply troubling deceptions.”<sup>126</sup> Messemer acknowledged that he

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House under siege of impeachment . . . [and] festering accusations of Chinese money funneled to Democratic campaigns.”).

120. YAMAMOTO ET AL., *supra* note 17, at 363; WU, *supra* note 52, at 178.

121. Indictment United States v. Lee, (No. 99-1417) (D.N.M. 1999).

122. YAMAMOTO ET AL., *supra* note 17, at 360–61.

123. *Id.*

124. *Id.*; WU, *supra* note 52, at 180–82.

125. WU, *supra* note 52, at 180–81.

126. James Sterngold, *F.B.I. Agent Gave Faulty Testimony in Weapons Case*, N.Y. Times (Aug. 18, 2000), <https://www.nytimes.com/2000/08/18/us/fbi-agent-gave-faulty-testimony-in-weapons-case.html> (on file with the *Columbia Human Rights Law Review*) (Messemer had said to the court that Lee he lied to his colleague about his intention to borrow a computer, and said that Lee’s true intention was to illegally download

made an “honest error”<sup>127</sup>, but a newly publicized FBI investigation report indicated that it was more than a careless error. The reports shows that two FBI agents lied to Lee and told him that he failed a polygraph that he passed, and they also tried to trick Lee to sign a confession with espionage offense when his attorney was not present.<sup>128</sup>

The case fell apart before going to trial. Eventually, Lee pled guilty only to one count of unlawful gathering of information, and the court sentenced him to time served.<sup>129</sup> Ironically, during the Lee case, John Deutch, the former CIA director, was found to have committed similar, if not more serious, security violations.<sup>130</sup> Deutch received a presidential pardon from President Clinton.<sup>131</sup>

Lee’s case demonstrates how geopolitics projected its impact on domestic politics and how the racial identity imputed on the United States’ Chinese community changed in the process. The geopolitical tension started with China’s nuclear power development, and this tension quickly transcended into domestic politics, affecting politicians’ images. The pressure needed to be diffused, and the Chinese in the United States, many of whom carried were culturally connected to China, became a perfect vehicle for that diffusion. The Cox Report directly linked all Chinese in America with a groundless Chinese espionage crisis, and the administration created a Chinese defendant to support this linkage.<sup>132</sup> Mainstream news media did not question this linkage as racial profiling. Instead, they cultivated it.<sup>133</sup>

Lee did not become a defendant because of what he did; he became a defendant because he perfectly fit into the profile of a Chinese spy. The

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restricted information, but he lied and said was just going to download a resume, which was not true. Messemer recanted this testimony.)

127. *Id.*

128. Wu, *supra* note 52, at 181.

129. YAMAMOTO ET AL., *supra* note 17, at 364.

130. *Id.* at 360.

131. Wu, *supra* note 52, at 183.

132. REP. OF THE SELECT COMM. ON U.S. NAT’L SEC. AND MIL./COM. CONCERNS WITH THE P.R.C., H.R. Rep No. 105-85, Ch 1, at 38--41 (June 1999), available at <https://www.govinfo.gov/content/pkg/GPO-CRPT-105hrpt851/pdf/GPO-CRPT-105hrpt851.pdf> [<https://perma.cc/FP9J-9UY6>]. The report claimed that “[a]most every PRC citizen allowed to go to the United States as part of these delegations likely receives some type of collection requirement, according to official sources.” The report did not clarify what official sources it replied on. The report also claimed that the P.R.C. was able to “identify scientists whose views might support the PRC, and whose knowledge would be of value to PRC programs.” Those scientists, according to this report, tend to be Chinese Americans: “The Select Committee has received information about Chinese-American scientists from U.S. nuclear weapons design laboratories being identified in this manner.”

133. *Supra* note 123.

government did not know whether this Chinese spy existed, but the government firmly understood that even if the spy did exist, Lee was not that spy.<sup>134</sup> But it didn't matter. Lee was simply a symbol in this case—a symbol of China. Thus, punishing Lee would create an image that the government was tough on China. That was all the government intended to deliver.<sup>135</sup>

The Lee case was a disgrace. The presiding judge James Parker called this case an “embarrassment to the nation,” and added:

“Although . . . I have no authority to speak on behalf of the executive branch, the president, the vice president, the attorney general, or the secretary of the Department of Energy, as a member of the third branch of the United States Government, the judiciary, the United States courts, I sincerely apologize to you, Dr. Lee, for the unfair manner in which you were held in custody by the executive branch.”<sup>136</sup>

During this period, a new racial identity of the Chinese had started to mature: the Chinese were, on the basis of their identity, suspected of stealing for China. Not only were the Chinese regarded as culturally inassimilable and accused of stealing jobs from white workers, but they were now accused of stealing things for China—harming the United States as a whole.<sup>137</sup> They were seen not just as foreigners, but also as foreign perpetrators.

D) 2008 to present: From “Steal for China” to “You are China.”

The Chinese community's foreign perpetrator image became more pronounced through the Obama Administration's enforcement of the Economic Espionage Act and the Trump Administration's China Initiative.<sup>138</sup> The Chinese became a suspect race, as they were seen as representatives of China, a perpetrator in geopolitics.

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134. *Supra* notes 128–131.

135. *See* Wu, *supra* note 52, at 177–78. Wu decried the Clinton Administration's urgent need to create a tough on China image, and how this need facilitated the Cox Report, and how Lee became a vehicle to deliver this image.

136. Wu, *supra* note 52, at 184; *see also* YAMAMOTO ET AL., *supra* note 17, at 365.

137. *Supra* Part II(C)(2).

138. *Infra* Part II(D)(2) & (3).

### 1) Post-2008 Geopolitics & Its Projection onto American Domestic Politics

Post-2008 geopolitics is an ongoing development, and scholars have created multiple theories to describe it.<sup>139</sup> While the theories vary, one trend remains solid: China is on track to become a new superpower in the world.<sup>140</sup>

The 2008 economic recession marked the United States' decline in geopolitics.<sup>141</sup> The U.S. share of global output declined from 21 percent in 1991 to 15.7 percent in 2021, while China's rose from 4.3 percent in 1991 to 18.6 percent in 2021.<sup>142</sup> Many Americans' lives were shattered in this recession while the Obama Administration bailed out big corporations.<sup>143</sup> Meanwhile, in 2010, China overtook Japan to become the world's second-largest economic power behind the United States in terms of GDP expressed in current dollar terms.<sup>144</sup> The debate regarding whether China was going to collapse was over. China was not falling; rather, China was catching up.

Economists and business leaders predict that China's GDP will surpass the United States' in the first half of the 21st century.<sup>145</sup> The economic success seems to have boosted China's confidence.<sup>146</sup> China started to change its strategy in geopolitics.<sup>147</sup> Its new President, Xi Jinping, deviated from his predecessors' policy of "keeping a low profile" in geopolitics. Under Xi, China has become much more assertive internationally.<sup>148</sup> China has started to aggressively assert territory rights in the South China Sea,<sup>149</sup> while its military budget expanded about six times from 2005 to 2020.<sup>150</sup> China has become the top trading partner of Japan, South Korea, Malaysia, and Germany, all of which are American allies.<sup>151</sup> China also created the "One Belt,

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139. Sachs, *supra* note 41, at 10–11.

140. *Id.* at 10–11, 13–14.

141. *Id.* at 10–14.

142. *Id.* at 13–14.

143. Michael Grunwald, *About That Next Bailout: One Big Lesson from 2009*, POLITICO (Aug. 3, 2020, 7:55 PM), <https://www.politico.com/news/magazine/2020/08/03/obama-stimulus-congress-bailout-lessons-390951> [<https://perma.cc/V5ZV-4Z3F>].

144. *China Overtakes Japan as World's Second-Biggest Economy*, *supra* note 24.

145. Saul, *supra* note 39.

146. See Yan, *supra* note 103, at 158–61.

147. *Id.*

148. *Id.*

149. Andrew Chubb, *PRC Assertiveness in the South China Sea: Measuring Continuity and Change, 1970–2015*, 45 INT'L SEC. 79, 93 (2007).

150. WORLD BANK, *Military Expenditure (Current USD) - China* (last visited Sept. 17, 2023), <https://data.worldbank.org/indicator/MS.MIL.XPND.CD?locations=CN> [<https://perma.cc/F88G-G6R7>] (calculating 2005 military expenditures to amount to \$42.79 billion; calculating 2020 military expenditures to amount to \$257.97 billion).

151. WORLD INTEGRATED TRADE SOL., *Japan Trade* (Feb. 23, 2023), <https://wits.worldbank.org/CountrySnapshot/en/JPN> [<https://perma.cc/YQ2H-H4LN>].

One Road” initiative, aiming to develop multiple economic corridors in Asia, Africa, and Europe.<sup>152</sup> China also created the “Thousand Talents Plan” to attract international scientists to come to China.<sup>153</sup> Generations of discussions forecasting China’s economic ascension have finally materialized.

China’s ascent forced American policymakers to reassess their priorities in international politics. In October 2011, Hillary Clinton published her essay—“America’s Pacific Century”—in *Foreign Policy*.<sup>154</sup> Clinton stated that in the first decade of the 21st century, America’s foreign policy prioritized two wars: the war in Afghanistan and the war in Iraq.<sup>155</sup> However, Clinton said, “[a]s those wars wind down, [America] will need to accelerate [its] efforts to pivot to new global realities.”<sup>156</sup> In the next decade, she argued, America “will therefore [need] to lock in a substantially increased investment—diplomatic, economic, strategic, and otherwise—in the Asia-Pacific region.”<sup>157</sup> She spent significant portions of her essay on China and recognized that “China represents one of the most challenging and consequential bilateral relationships the United States has ever had to manage.”<sup>158</sup> A month later, President Obama officially introduced his administration’s “Pivot to Asia” agenda.<sup>159</sup> He declared that the United States’ “enduring interests in [Asia] demand our enduring presence in the region. The United States is a Pacific power, and we are here to stay . . . So let there be no doubt: In the Asia-Pacific in the 21st century, the United States of America is all in.”<sup>160</sup> It was widely understood that Pivot to Asia was the Obama Administration’s response to China’s ascent.<sup>161</sup>

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152. JOSHUA P. MELTZER, BROOKINGS INST., CHINA’S ONE BELT ONE ROAD INITIATIVE: A VIEW FROM THE UNITED STATES (June 19, 2017), <https://www.brookings.edu/research/chinas-one-belt-one-road-initiative-a-view-from-the-united-states/> [<https://perma.cc/449X-VCBT>]; see also Deborah Brautigam & Meg Rithmire, The Chinese ‘Debt Trap’ Is a Myth, *THE ATLANTIC* (Feb. 6, 2021), <https://www.theatlantic.com/international/archive/2021/02/china-debt-trap-diplomacy/617953/> (on file with the *Columbia Human Rights Law Review*) (arguing that the fears of China trapping developing countries into debts are wrongly amplified); but see generally HUMAN RIGHTS WATCH, UNDERWATER: HUMAN RIGHTS IMPACTS OF A CHINA BELT AND ROAD PROJECT IN CAMBODIA, (2021) (finding that China’s One Belt, One Road initiative facilitated human rights violations in Cambodia).

153. Hepeng Jia, *What Is China’s Thousand Talents Plan?*, *NATURE* S8 (2018), <https://media.nature.com/original/magazine-assets/d41586-018-00538-z/d41586-018-00538-z.pdf> [<https://perma.cc/NC9N-4RWX>].

154. Clinton, *supra* note 26.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. Obama, *supra* note 26, at 12:37, 24:39.

160. Myre, *supra* note 27.

161. *Id.*

The “China Threat” theory is now better accepted than it was in the late 1990s. An anti-China sentiment, with a strong bipartisan hold, has started to grow rapidly in American domestic politics. The former FBI director James Comey stated in 2014 that the Chinese had hacked all American companies.<sup>162</sup> Christopher Wray, who served as the FBI director under the Trump Administration and is the current FBI director under the Biden Administration, has repeatedly warned Congress and the public that “[the] Chinese government . . . poses the biggest long-term threat to our economic and national security,”<sup>163</sup> despite the fact that Russia was found to have attempted to interfere with the 2016 U.S. presidential election.<sup>164</sup> Citing no reference, he alleged in a 2020 speech that “[i]t’s the people of the United States who are the victims of what amounts to Chinese theft on a scale so massive that it represents one of the largest transfers of wealth in human history.”<sup>165</sup>

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162. Dexter Roberts, *Chinese Hackers Like a ‘Drunk Burglar,’ ‘Kicking Down the Door,’ Says FBI Director*, BLOOMBERG NEWS (Oct. 6, 2014, 1:16 PM), <https://www.bloomberg.com/news/articles/2014-10-06/fbi-chief-james-comey-lambasts-chinese-hackers> (on file with the *Columbia Human Rights Law Review*) (noting, “[t]here are those who’ve been hacked by the Chinese and those who don’t know they’ve been hacked by the Chinese.”).

163. Rachel Tillman, *FBI, MI5 Directors Warn China Poses ‘Biggest Long-Term Threat’ to Economic, National Security*, SPECTRUM NEWS NY1 (October 9, 2022, 2:15 PM), <https://www.ny1.com/nyc/all-boroughs/news/2022/07/07/christopher-wray-fbi-mi5-china-threat-us-uk-national-security-business> [<https://perma.cc/MJR9-XGL9>].

164. FED. BUREAU OF INVESTIGATION, *Russian Interference In 2016 U.S. Elections*, (last visited Oct. 14, 2022), <https://www.fbi.gov/wanted/cyber/russian-interference-in-2016-u-s-elections> [<https://perma.cc/N9H8-F6AG>].

165. CHRISTOPHER WRAY, FED. BUREAU OF INVESTIGATION, *The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States* (July 7, 2020), <https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states> [<https://perma.cc/3H4H-A873>] (Wray tried to make the distinction between China and the Chinese later in his speech and stated that:

“[b]ut before I go on, let me be clear: This is not about the Chinese people, and it’s certainly not about Chinese Americans. Every year, the United States welcomes more than 100,000 Chinese students and researchers into this country. For generations, people have journeyed from China to the United States to secure the blessings of liberty for themselves and their families—and our society is better for their contributions. So, when I speak of the threat from China, I mean the government of China and the Chinese Communist Party”).

Frank Wu: *China Initiative and Chinese American Scientists*, US-CHINA PERCEPTION MONITOR (Sep. 11, 2020), available at <https://uscnpm.org/2020/09/11/frank-wu-china-initiative-and-chinese-american-scientists/> [<https://perma.cc/3KGX-H863>]. Wu pointed out Wray’s statement, which characterized China as a “whole of society threat,” created a sentiment that “the Chinese society presents a threat to all of American society.” This

China has also become one of the hottest topics in American politics. Presidential candidates of both the Democratic and Republican parties politicized China to score points in the presidential campaigns of 2012 and 2016, promising to get tough and secure better terms from the relationship than their predecessors and their challengers would.<sup>166</sup> This trend escalated dramatically in the 2020 presidential campaign. In the final presidential debate on October 22, 2020, China was mentioned 13 times, although China was not one of the topics on the agenda.<sup>167</sup>

Presidential candidates are not the only politicians who like to talk about China. An increasing number of American politicians seeking congressional positions have made China an indispensable part of their campaign messages.<sup>168</sup> However, the theme of their messages regarding China is not entirely based on the “China Threat” theory. Rather, it is an anti-China rhetoric that, often without supporting evidence, labels China as the answer to all the problems that afflict America.<sup>169</sup> Some American politicians, such as Tim Ryan and Marco Rubio, have even made anti-China sentiments a core theme throughout their political careers, as it is considered a message that bears a cross-party appeal.<sup>170</sup> American politicians’ messages about China are universally negative: “*Chinese* cheating has cost American jobs”;<sup>171</sup> “It’s us v. China”;<sup>172</sup> “China has a 5,000-year history of cheating and

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sentiment facilities the China Initiative. Wu also pointed out that Wray’s statement lacks factual foundation, as he attempted to use a small number of criminal cases, in which Chinese international students were defendants, to represent about 350,000 Chinese international students in America.

166. See Hass, *supra* note 28.

167. Rogin, *supra* note 29.

168. See generally *supra* note 29 (examples include campaign messages from Tim Ryan, Jim Bognet, Masha Blackburn and Shelley Luther); Dawson, *supra* note 29; @TimRyan, *supra* note 29; Yan, *supra* note 103.

169. Dawson, *supra* note 29; @TimRyan, *supra* note 29; Yan, *supra* note 103.

170. Herb Jackson, *Facing Criticism, Tim Ryan Defends Anti-China Ad in Ohio Senate Race*, ROLL CALL (Apr. 4, 2022, 6:58 PM), <https://rollcall.com/2022/04/04/facing-criticism-tim-ryan-defends-anti-china-ad-in-ohio-senate-race/> [https://perma.cc/4YZ8-C23E].

171. Press Release, Sen. Sherrod Brown, Brown Applauds Tough Enforcement Action Against China, Calls for Long-Term Strategy (Mar. 22, 2018), <https://www.brown.senate.gov/newsroom/press/release/brown-applauds-tough-enforcement-action-against-china-calls-for-long-term-strategy> [https://perma.cc/4CZ6-HDM8] (“Chinese cheating has cost American jobs, and I applaud the Administration for standing firm in its commitment to crack down on China’s continued violations . . .”).

172. @TimRyan, *supra* note 29.

stealing.”<sup>173</sup> Anti-China rhetoric has become one of the few bipartisan political tools widely used by Republicans and Democrats.<sup>174</sup>

More importantly, in anti-China rhetoric, politicians and government officials often do not make the effort to distinguish China from the Chinese. China and the Chinese are often used interchangeably, as the Chinese people are portrayed as the default agents of the Chinese government. While FBI Director Christopher Wray purported to distinguish between the Chinese government and Chinese people in his July 2020 speech,<sup>175</sup> he also stated in 2018 that “[We see China] us[ing] ... professors, scientists, students [to steal intelligence] in almost every field office that the FBI has around the country. It’s not just in major cities. It’s in small ones as well. It’s across basically every discipline.”<sup>176</sup> He further alleged that the threats from China are not just from the Chinese government, but from the entire Chinese society as well.<sup>177</sup> Marco Rubio, in support of Wray’s position, criticized American universities and industry, as their collaborations with Chinese entities provided the Chinese more access to the United States.<sup>178</sup> Donald Trump repeatedly called the COVID-19 virus the “Chinese Virus.”<sup>179</sup> Political rhetoric tightly bundles China, the perpetrator in international politics, with the Chinese, who naturally possess cultural connections with

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173. Dawson, *supra* note 29.

174. See *supra* note 29. Tim Ryan is a Democrat U.S. Representative. Sherrod Brown is a Democrat U.S. Senator. Jim Bognet is a Republican running in the 2022 midterm Congressional election. Shelley Luther is a Republican candidate who ran for multiple Texas legislator positions.

175. See Wray, *supra* note 165.

176. Andrew Chongseh Kim, *Prosecuting Chinese “Spies”: An Empirical Analysis of the Economic Espionage Act*, 40 CARDOZO L. REV. 749, 749 (2018).

177. Elizabeth Redden, *The Chinese Student Threat?*, INSIDE HIGHER ED (Feb. 15, 2018), <https://www.insidehighered.com/news/2018/02/15/fbi-director-testifies-chinese-students-and-intelligence-threats> [<https://perma.cc/EYU7-LG8B>] (“... [T]he China threat [is] not just a whole-of-government threat but a whole-of-society threat on their end, and ... it’s going to take a whole-of-society response by us. So it’s not just the intelligence community, but it’s raising awareness within our academic sector, within our private sector, as part of the defense.”).

178. Press Release, Marco Rubio, United States Senate, Rubio Speaks on the Threat of Communist China at The Heritage Foundation (May 29, 2022) <https://www.rubio.senate.gov/public/index.cfm/2022/3/icymi-rubio-speaks-on-the-threat-of-communist-china-at-the-heritage-foundation> [<https://perma.cc/QLK3-D6DQ>] (“...the Chinese are stealing from now but with less money—now they’ll just have access to more.”).

179. Katie Rogers, Lara Jakes & Ana Swanson, *Trump Defends Using ‘Chinese Virus’ Label, Ignoring Growing Criticism*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2020/03/18/us/politics/china-virus.html> (on file with the *Columbia Human Rights Law Review*) (quoting Scott Kennedy, presently Senior Adviser and Trustee Chair in Chinese Business and Economics at the Center for Strategic and International Studies).



China. China is not just a factor in the Chinese's foreign identity, but has become the dominant factor.

Politicians' rhetoric deeply affects how Americans see the world. In 2022, 79 percent of Americans had negative views toward China, up from 45 percent in 2018.<sup>180</sup> In 2021, "53% of Americans want[ed] to get much tougher with China on its economic policies, and even more—70%—want[ed] the U.S. to confront China over its human rights policy."<sup>181</sup>

This new racial identity of the Chinese—the foreign perpetrator—demands a policy response, and the Obama and the Trump administrations responded accordingly. While both administrations responded with criminal legal tools, they did so with different approaches. As the next Section discusses, the Obama Administration targeted the Chinese community through DOJ's enforcement of the Economic Espionage Act and the Trump Administration did so through the China Initiative.

## 2) Obama's Enforcement of the Economic Espionage Act and the Case of Sherry Chen

During the Obama Administration, there was a clear surge in the Justice Department's enforcement of the Economic Espionage Act (EEA). The Clinton and Bush administrations together brought 119 EEA charges, against an average of 9.7 defendants per year.<sup>182</sup> The Obama Administration alone prosecuted 105 defendants under the EEA, against an average of 13.1 defendants per year.<sup>183</sup> The EEA defendants' racial demographics also changed during the Obama Administration. During the Clinton and Bush administrations, 27 percent of EEA defendants were Asian, out of which 16 percent were of Chinese descent.<sup>184</sup> Under the Obama Administration, 66 percent of EEA defendants were Asian and the percentage of Chinese defendants within this group surged to 57 percent.<sup>185</sup> The percentage of Chinese EEA defendants increased by 312.5 percent during the Obama Administration.<sup>186</sup> The difference in the defendants' nationalities correlates

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180. *Country Ratings*, GALLUP, <https://news.gallup.com/poll/1624/perceptions-foreign-countries.aspx> [<https://perma.cc/L3GF-DAZJ>] (last visited Oct. 12, 2022).

181. William A. Galston, *A Momentous Shift in US Public Attitudes Toward China*, BROOKINGS INST. (Mar. 22, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/03/22/a-momentous-shift-in-us-public-attitudes-toward-china/> [<https://perma.cc/7J57-UNFV>].

182. ANDREW CHONGSEH KIM & COMM. OF 100, RACIAL DISPARITIES IN ECONOMIC ESPIONAGE ACT PROSECUTIONS: A WINDOW INTO THE NEW RED SCARE 13 (2021).

183. *Id.*

184. *Id.* at 16.

185. *Id.*

186. *Id.*

with China's uprising and rising anti-China sentiment in American domestic politics.

However, charging more Asian defendants did not result in successful enforcement.<sup>187</sup> Research shows that Asians, who became the vast majority of defendants during the Obama Administration, were less likely than non-Asian defendants to be convicted of EEA violations.<sup>188</sup> Approximately 68 percent of Asian defendants were found guilty of violating the EEA.<sup>189</sup> Meanwhile, 74 percent of non-Asian defendants were found guilty.<sup>190</sup>

During the Obama Administration DOJ's EEA enforcement spree, Sherry Chen was one of the many Chinese individuals who was falsely accused. Sherry Chen's story is strikingly similar to Wen Ho Lee's.

Sherry Chen, a naturalized U.S. citizen, had worked as a hydrologist for the National Weather Service since 2007.<sup>191</sup> She was an outstanding employee and was widely appreciated and recognized for her expertise in flood prediction.<sup>192</sup> She would take a routine trip to China every year to visit her parents.<sup>193</sup> However, her 2012 visit triggered a years-long nightmare.

During her visit to China, Sherry Chen met her old classmate, Jiao Yong, who had become the vice minister of China's Ministry of Water Resources.<sup>194</sup> Jiao Yong asked Sherry Chen about the funding process for reservoir systems, to which Sherry Chen had no answer.<sup>195</sup> After her return to the United States, Sherry Chen briefly researched this question using the National Inventory of Dams database, which the U.S. Army Corps of

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187. *Id.* at 19 (noting that in addition to the 70 percent of defendants who were found violating the EEA, 16 percent of defendants were found guilty of process crimes, and 10 percent of them were found guilty of fraud. This paper does not analyze frauds and process crimes as they are not EEA violations, and they do not require a defendant to act for the benefit of a foreign country.)

188. *Id.*

189. *Id.* at 20. Seventy-one percent of defendants of Chinese descent were found guilty, which is still lower than the conviction rate of western defendants. Andrew Chongseh Kim and the Committee of 100 also analyzed data regarding the conviction rate of frauds and process crimes. This paper does not analyze frauds and process crimes, as they are not EEA crimes, and they do not require the defendant to act for the benefit of a foreign country.

190. *Id.*

191. *United States v. Xiafen Chan*, No. 3:14-cr-149, 2015 WL 1020330, at \*1 (S.D. Ohio Mar. 9, 2015).

192. Nicole Perloth, *Accused of Spying for China, Until She Wasn't*, N.Y. TIMES (May 9, 2015), [https://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html?\\_r=0](https://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html?_r=0) (on file with *Columbia Human Rights Law Review*).

193. *Id.*

194. *Id.*

195. *Id.*

Engineers (USACE) maintained, available to government workers.<sup>196</sup> She could not find any good information and she called her colleague, Deborah H. Lee, then the chief of the water management division at USACE.<sup>197</sup> Lee told Sherry Chen that she could ask Jiao to contact her directly. Sherry Chen then connected Jiao Yong and Lee via email.<sup>198</sup>

What Sherry Chen did not know was that Lee immediately reported their correspondence to security staff at the Department of Commerce, the parent agency of the National Weather Service.<sup>199</sup> Lee's email to the security staff portrayed a very dangerous picture of a Chinese foreign perpetrator, her colleague Sherry Chen:

"I received a call today, 24 May 2012—3:00 ET from Ms. Sherry Chen (email address), who is a hydrologist with the National Weather Service, Ohio River Forecast Center. *She is a US citizen, but a Chinese national.* She said based on a recent trip to China, where she was *approached by Chinese colleagues*, she was asked to *collect information* on how US Federal reservoirs are authorized, designed, and built. She was looking for specific documents on the planning process . . . .

In the past, she has requested detailed design documents of the Ohio River navigable dams, *ostensibly* for the purpose of hydraulic modeling for the National Weather Service, but that level of detail is not necessary and she was referred to the information available on the public navigation charts for her purposes. I'm concerned that an effort is being made to collect a comprehensive collection of USACE water control manuals by a foreign interest. *While the manuals are not secret*, they contain sensitive information on points of contact, dam site information, and operating priorities such as navigation, fossil fuel plants, etc"<sup>200</sup> (emphasis added) (citations omitted).

Lee's email speaks volumes as it directly reflects how the Chinese are racialized and viewed as suspect in today's America. Lee made sure that before addressing the specific suspicion, she must mention that Sherry Lee, despite being a U.S. citizen, was naturalized and of Chinese origin. Lee's suspicion of Sherry Chen started with her being Chinese, and her Chinese-ness was the tone of this entire email. Without any background knowledge,

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196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Chen v. Dept. of Com.*, CH-0752-17-0028-I-1, at \*14 (U.S. Merit Sys. Prot. Board, Cent. Reg'l Off., Apr. 23, 2018), [https://www.sherrychendefensefund.org/uplo ads/9/9/2/8/99280080/chen\\_v\\_dept\\_of\\_commerce-ch-0752-17-0028-i-1-\\_initial\\_decision.pdf](https://www.sherrychendefensefund.org/uplo ads/9/9/2/8/99280080/chen_v_dept_of_commerce-ch-0752-17-0028-i-1-_initial_decision.pdf) (emphasis added).

Lee decided that Sherry Chen's meeting with her old colleague was a foreign spy intelligence collection scheme (Sherry Chen was "approached" by a Chinese official who wanted to "collect information" about America).

The second paragraph is even more revealing. To Lee, Sherry Chen was suspicious long before this correspondence. She said that previously, Sherry Chen ostensibly requested access to information regarding the Ohio River navigable dams, indicating that Sherry Chen was attempting to collect intelligence for China long before. The most revealing part of this email came last: Lee admitted that the information Sherry Chen was after was not secretive information. Indeed, it was available on a public website.<sup>201</sup> Nevertheless, she still believed that the information was too "sensitive" to be obtained by Sherry Chen.

Lee's email and her groundless accusation of Sherry Chen came at a time when the Obama Administration aggressively prioritized combating Chinese economic espionage. Between 2009 and 2013, the FBI's trade-secret investigations increased by 60 percent, and a closer look at those cases shows that China was the focus.<sup>202</sup> This was the time the FBI was "looking everywhere for spies."<sup>203</sup> Sherry Chen fit their profile too well. She is a scientist with potential access to sensitive information, and she happens to be a Chinese immigrant with Chinese connections, just like Wen Ho Lee. The fact that Lee's accusation was groundless, or that Sherry Chen did not provide any restricted information to a Chinese official, would not stop Sherry Chen from being pursued by the criminal legal system.

On October 20, 2014, six FBI agents arrested Sherry Chen in her office, and handcuffed her in front of her colleagues.<sup>204</sup> Since Sherry Chen did not steal anything or provide any restricted information to anybody, DOJ had no ground to bring a typical EEA case in which a defendant is accused of stealing trade secrets, often for the benefit of foreign sovereignty.<sup>205</sup> Nevertheless, DOJ was creative. They found that when Sherry Chen logged into the National Inventory of Dams database, she used her colleague Ray Davis's credentials.<sup>206</sup> Thus, along with several processing crimes, she was

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201. Nicole Perlroth, *Chinese-American Cleared of Spying Charges Now Faces Firing*, N.Y. TIMES (Sept. 15, 2015), <https://www.nytimes.com/2015/09/16/technology/chinese-american-cleared-of-spying-charges-now-faces-firing.html> (on file with the *Columbia Human Rights Law Review*).

202. See Perlroth, *supra* note 192.

203. *Id.*

204. *Id.*

205. See 18 U.S.C. § 1831(a): "Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly [steals, copies, receives, buys or possesses a trade secret] shall...be fined not more than \$5,000,000 or imprisoned not more than 15 years, or both."

206. See Perlroth, *supra* note 192.

indicted on 18 U.S.C. § 1030 (a), a much less known section under the EEA, as she

“intentionally exceeded authorized access to a protected United States Government computer database, namely the National Inventory of Dams database which is maintained by the United States Army Corps of Engineers . . . and thereby obtained information from a department and agency of the United States, to wit: sensitive, restricted, and proprietary fields of data concerning critical national dam infrastructures.”<sup>207</sup>

This creative approach, however, was flawed. Davis’ login credentials were shared by everyone in his office, in the same fashion a lawyer’s Public Access to Court Electronic Records (PACER) login credentials are shared by every lawyer in their entire firm.<sup>208</sup> The FBI’s approach, then, should have made all of Sherry Chen’s colleagues criminally liable under the EEA.

A week before the trial, DOJ dropped all charges against Sherry Chen.<sup>209</sup> It then took her three years to get her job back<sup>210</sup>, and then eight years to settle a civil lawsuit she filed against the federal government.<sup>211</sup> Her civil suit settled for \$1.5 million.<sup>212</sup>

Sherry Chen’s case is very similar to Wen Ho Lee’s, as they both, unfortunately, fit into the “Chinese spy” stereotype too well at a time when the government was looking for spies everywhere. The similarity of these two cases, along with many other failed EEA cases that targeted the Chinese during the Obama years, suggests that the disgrace of the Wen Ho Lee case did not deter the government from groundlessly connecting Chinese individuals with China. Rather, China’s economic ascension and the China dog whistle politics have strengthened the unquestionable bond with China imputed to the Chinese in the United States.

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207. Superseding Indictment, *United States v. Xiafen Chen*, 2015 WL 2448899 (S.D. Ohio) (No. 3:14CR149).

208. See Perlroth, *supra* note 192.

209. Government’s Motion to Dismiss the Indictment, *United States v. Xiafen Chen*, 2015 WL 2448895 (S.D. Ohio) (No. 3:14CR149TMR).

210. Cameron Knight, *Accused of Espionage, Now a Chinese-American Scientist Gets Her Government Job Back*, CINCINNATI ENQUIRER (May 7, 2018, 11:24 AM), <https://www.cincinnati.com/story/news/2018/05/03/after-wrongful-espionage-charges-scientist-sherry-chen-gets-her-job-back/576857002/> [https://perma.cc/YV3W-HBT3].

211. Kimmy Yam, *After Being Falsely Accused of Spying for China, Sherry Chen Wins Significant Settlement*, NBC NEWS (Nov. 15, 2022, 5:16 PM), <https://www.nbcnews.com/news/asian-america/falsely-accused-spying-china-sherry-chen-wins-significant-settlement-rcna56847> [https://perma.cc/QL99-E7DQ].

212. *Id.*

### 3. The China Initiative under the Trump Administration

Under the Trump Administration, the China Initiative played a major role in targeting the Chinese community. The China Initiative took the targeting of the Chinese strategy to a new latitude. The Initiative was not a crime-based, traditional law enforcement initiative meant to deter a specific *actus reus*, such as economic espionage or fraud. Rather, it expressly targeted a country: China.

China, as a country, cannot serve as a defendant in any criminal proceedings.<sup>213</sup> To compensate for this perceived limitation, eventually, the concept of China, or the “China-ness,” was criminalized under the China Initiative. Chinese living in the United States, especially those who engage in scientific research, suddenly found themselves within this initiative’s shooting range, as they inevitably demonstrated a high level of “China-ness.”<sup>214</sup> Through the China Initiative’s implementation, the foreign perpetrator racial identity was concretized for the Chinese living in the United States. The China Initiative represented DOJ’s official endorsement of this racial identity. In the Trump DOJ’s view, punishing the Chinese who possess ties to China equated punishing China, as the Chinese were perceived to be default agents of China until they were able to prove otherwise. DOJ’s arbitrary targeting of Chinese people also signifies that in the agency’s view, that some Chinese people were falsely accused did not matter—their livelihoods, health, and reputations were just the price of defeating China.

#### a) An Overview of the China Initiative

On November 1, 2018, Jeff Sessions announced the establishment of the China Initiative.<sup>215</sup> In his announcement, he alleged that “geopolitical rival states” have been taking advantage of the United States’ innovative

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213. Lewis, *supra* note 6, at 219 (“...China cannot be punished through the U.S. criminal justice system. It is one thing to “punish” the PRC party-state via tariffs or sanctions,<sup>382</sup> but the subjects of criminal punishment are individuals.”).

214. See Dan Wang, *China Hawks Don’t Understand How Science Advances*, THE ATLANTIC (Dec. 18, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/china-initiative-intellectual-property-theft/621058/> (on file with the *Columbia Human Rights Law Review*). Wang found that “Washington has decried China’s intellectual-property theft.” Washington’s response to the intellectual property theft was to “protect[] its tools and blueprints while harming a far more valuable asset: its scientists and scientific communities.” Wang also found that the China Initiative is not the first time that scientists became the targets; the same pattern occurred in the 1950s.

215. Jeff Sessions, Att’y Gen., 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> [<https://perma.cc/7KRU-NWR4>].

spirits and have been stealing American inventions.<sup>216</sup> Although the term “geopolitical rival states” came in plural, China was the only country singled out. 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>217</sup> He also mentioned that the threats from China were equally dangerous compared with threats from Russia and “Islamic terrorism,” if not more dangerous.<sup>218</sup> He then hinted that the Obama DOJ was too weak on China.<sup>219</sup> The Trump DOJ, however, would stand up to China. Sessions stated that “China—like any advanced nation—must decide whether it wants to be a trusted partner on the world stage—or whether it wants to be known around the world as a dishonest regime running a corrupt economy founded on fraud, theft, and strong-arm tactics.”<sup>220</sup> He then announced the creation of the China Initiative, to be led by Assistant Attorney General John Demers, who headed the National Security Division.<sup>221</sup>

Sessions’ speech resonated with anti-China sentiment in the political arena. However, Sessions did not clarify some fundamental details that people expected by someone in his role. For example, he did not define the scope of the China Initiative, or what type of case would fall under this initiative.<sup>222</sup> He vaguely mentioned that “[t]his Initiative [would] identify priority Chinese trade theft cases, ensure that we have enough resources dedicated to them, and make sure that we bring them to an appropriate conclusion quickly and effectively.”<sup>223</sup> He also briefly mentioned his concern with “Chinese propaganda.”<sup>224</sup> Wyn Hornbuckle, the deputy director of DOJ’s public affairs office, later confirmed that the Trump DOJ had “no definition of a ‘China Initiative’ case other than the goals and priorities we set out for the

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216. *Id.*

217. *Id.*

218. *Id.* (“Perhaps this threat has been overshadowed in the press by threats from Russia or radical Islamic terrorism. But while it has been in the shadows, the threat has only grown more dangerous.”).

219. *Id.* (“From 2013 to 2016, the Department of Justice did not charge anyone with spying for China.”).

220. *Id.*

221. *Id.* (“I have ordered the creation of a China Initiative led by Assistant Attorney General John Demers, who heads our National Security Division, and composed of a senior FBI Executive, five United States Attorneys including Alex, and several other Department of Justice leaders and officials, including Assistant Attorney General for our Criminal Division, Brian Benczkowski.”).

222. *See* Guo et al., *supra* note 4.

223. Sessions, *supra* note 215.

224. *Id.* (“Today, we see Chinese espionage not just taking place against traditional targets like our defense and intelligence agencies, but against targets like research labs and universities, and we see Chinese propaganda disseminated on our campuses.”).

initiative in 2018.”<sup>225</sup> Andrew Lelling, former U.S. Attorney for the District of Massachusetts and a founding member of the initiative’s steering committee, said that his interpretation was that “all cases involving researchers got in,” and that, “if the tech was going to China, I’m certain they would categorize that as in the China Initiative.”<sup>226</sup>

It is worth noting that “tech going to China” is not a criminal offense. No federal statute criminalizes a defendant simply because the defendant carried some technology to China. Carrying technology to China usually becomes an offense under U.S. law when a defendant allegedly steals or obtains the technology from a restricted governmental entity without permission.<sup>227</sup> However, under Lelling’s interpretation of the China Initiative, DOJ did not need to find a potential crime to initiate a case under the China Initiative; the mere fact that “the tech was going to China” was enough.

The China Initiative quickly rolled out nationwide. Lelling’s interpretation of the scope of the China Initiative turned out to be most closely aligned with its reality. The focus of this initiative was not the EEA; instead, it was about scrutinizing technology research that might have a linkage to China. The *MIT Technology Review* conducted comprehensive research based on publicly available data, and eventually tracked 77 China Initiative cases.<sup>228</sup> Among the 77 China Initiative cases, EEA cases were only 19—roughly 25 percent.<sup>229</sup> DOJ’s attention continued to drift away from the EEA: in 2018, DOJ filed 12 China Initiative cases, four of which (33 percent) involved EEA violations.<sup>230</sup> In 2020, only 16 percent of newly opened cases involved EEA violations.<sup>231</sup>

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225. Guo et al., *supra* note 4.

226. *Id.*

227. See 18 U.S.C. §§ 1831, 1832; 18 U.S.C. § 641.

228. At this point, the *MIT Technology Review* is the only organization that has conducted a thorough review of all China Initiative cases. Its research is based on publicly available information, including the Justice Department’s own webpage. Before the *MIT Technology Review* published its research, it requested comment from the Justice Department regarding the China Initiative. Two days later, the department made significant changes to its own list of cases on its website, adding some and deleting thirty-nine defendants previously connected to the China Initiative. Nevertheless, this paper takes the position that the *MIT Technology Review*’s research on the China Initiative represents the most comprehensive accounting of the China Initiative prosecutions. See Guo et al., *supra* note 4.

229. *Id.*

230. *Id.*

231. *Id.* It is also worth to note that, among all the nineteen EEA cases, only eight of them specifically involved economic espionage, and for the remaining 11, the Justice Department only alleged trade secrets theft. The key difference between economic espionage and trade secrets theft is that for the former charge, in addition to proving a theft or an attempt of theft of a trade secret, the prosecution also needs to prove that the



DOJ's declined interest in pursuing EEA violations was accompanied by its increased interest in pursuing a different line of cases: research integrity cases. In this line of cases, DOJ often alleged that defendants, who were almost always university professors or researchers in the United States, failed to disclose their ties to China during their U.S. research careers.<sup>232</sup> The most common charge for research integrity defendants pursued through the China Initiative is a violation of 18 U.S.C. § 1001—making a false statement to a federal agent.<sup>233</sup> DOJ often argued that defendants violated section 1001 when they failed to disclose their ties or incomes from China—frequently referred to as the “nexus to China”—when they applied for a federally funded grant for their research.<sup>234</sup> Some defendants also received charges related to tax discrepancies, visa term violations, and wire fraud.<sup>235</sup> Nevertheless, DOJ could not establish that the visa violation, fraud, and failure to disclose the Chinese ties were attempts to benefit China, as none of the defendants were charged as such.<sup>236</sup> Research integrity cases eventually dominated the docket of the China Initiative. By 2020, 52 percent of newly opened cases were research integrity cases, and this trend continued in 2021.<sup>237</sup> All defendants were researchers or faculty members in American research institutions or universities, and all had a background in science, technology, engineering, and mathematics (STEM).<sup>238</sup>

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actus reus is for the benefit of a foreign government, instrumentality or agent. Thus, among the 19 EEA cases, only eight of them involved China.

232. See MIT TECHNOLOGY REVIEW'S CHINA INITIATIVE DATABASE., *supra* note 12.

233. *Id.* Among the 22 individual research integrity defendants, 16 defendants were charged under 18 U.S.C. § 1001.

234. *See id.*

235. *Id.* Six defendants were charged with visa frauds; eight defendants were charged with wire frauds; four were charged with tax related crimes. Most defendants were charged with multiple crimes.

236. *Id.* Haizhou Hu was the only research integrity defendant who was also charged with an EEA violation. Hu was charged with trade secret theft, which is a crime that does not require the defendant to act for the benefit of another country. Nevertheless, the court dismissed all charges against Hu per the Justice Department's motion. *See Order Granting Mot. Dismiss, United States v. Hu*, No. 3:20-mj-00036-JCH-1 (W.D. Va. Sept. 21, 2020).

237. In 2021, six new cases were opened, and three of them were research integrity cases. *See Guo et al.*, *supra* note 4.

238. The only institutional defendant under the Research Integrity docket is Van Andel Research Institute. The remaining 22 Research Integrity defendants were all individuals. Four of the 22 individual defendants worked for American research facilities, including NASA, the Los Alamos National Laboratory, Beth Israel Deaconess Medical, and Cleveland Clinic Foundation. The remaining eighteen defendants worked for American universities, including Harvard University; University of California, Los Angeles (UCLA); University of Kansas; etc. *See MIT TECHNOLOGY REVIEW'S CHINA INITIATIVE DATABASE*, *supra* note 12.

The enforcement of the China Initiative drew heavy criticism from the science and Asian communities. The science community argued that the China Initiative negatively affected academic freedom, compromised research collaborations, and harmed technology competitiveness.<sup>239</sup> The Asian community's criticism focused on the racial background of the defendants—nearly 90 percent of the individual defendants under the China Initiative were of Chinese descent, a number that included U.S. citizens of Chinese origin as well as Chinese non-citizens in the United States.<sup>240</sup>

As was true of the Obama Administration's EEA enforcement scheme, the Trump Administration's effort to disproportionately pursue Chinese defendants did not result in a convincing number of guilty verdicts or pleas—of the total 148 individuals charged under the China Initiative, only 40 have pleaded or been found guilty, with guilty pleas often involving lesser charges than initially brought. Almost two-thirds of cases—64 percent—are still pending.<sup>241</sup> Eight cases were dismissed per DOJ's own motion.<sup>242</sup> Only three cases went to trial, and DOJ obtained two guilty verdicts and an acquittal.<sup>243</sup> The two guilty verdicts involved one white defendant and one

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239. See Open Letter from Concerned Yale Faculty Members, to Merrick Garland, Att'y Gen., (Jan. 10, 2022), [https://docs.google.com/document/d/10ksy8l2MfWZS\\_jMtXaXj\\_IaK8lVzQihM](https://docs.google.com/document/d/10ksy8l2MfWZS_jMtXaXj_IaK8lVzQihM) (on file with the *Columbia Human Rights Law Review*); Jeffrey Mervis, *U.S. Scientists Want Congress to Look into Complaints of Racial Profiling in China Initiative*, SCI. (Feb. 5, 2021), <https://www.science.org/content/article/us-scientists-want-congress-look-complaints-racial-profiling-china-initiative> [<https://perma.cc/JAV5-KETY>] [hereinafter Mervis, *U.S. Scientists*]; Emi Tuyetnhi Tran, *Over 150 Penn Faculty Rebuke U.S. Government for Racial Profiling of Chinese Academics*, THE DAILY PENNSYLVANIAN (Feb. 11, 2022, 12:53 AM), <https://www.thedp.com/article/2022/02/168-penn-faculty-sign-open-letter-merrick-garland-china-initiative> [<https://perma.cc/U49V-EQCK>]; Jeffrey Mervis, *Controversial U.S. China Initiative Gets New Name, Tighter Focus on Industrial Espionage*, SCI. (Feb. 22, 2022), <https://www.science.org/content/article/controversial-u-s-china-initiative-gets-new-name-tighter-focus-industrial-espionage> [<https://perma.cc/DX84-6V4X>]; Natasha Gilbert & Max Kozlov, *The Controversial China Initiative Is Ending—Researchers Are Relieved*, NATURE (Feb. 24, 2022), <https://www.nature.com/articles/d41586-022-00555-z> (on file with the *Columbia Human Rights Law Review*); Izzy Jacobson, *198 Princeton Faculty Sign Letter Criticizing Department of Justice's China Initiative*, THE DAILY PRINCETONIAN (Nov. 17, 2021, 11:16 PM), <https://www.dailyprincetonian.com/article/2021/11/china-initiative-doj-open-letter-princeton-faculty> [<https://perma.cc/ALU7-5MP9>].

240. The *MIT Technology Review* was able to identify 148 individual defendants under the China Initiative. Of the 148 individuals charged under the China Initiative, 130 of them—or 88 percent—are of Chinese heritage. Sixteen (or 11 percent) are Caucasian, African or African American, or other Asian, and two others' backgrounds (1.4 percent) could not be determined. See Guo et al., *supra* note 4.

241. *Id.*

242. *Id.*; see also MIT TECH. REV., *supra* note 11.

243. Guo et al., *supra* note 4.

Chinese-born American defendant.<sup>244</sup> While they were found guilty by juries, none of them were found guilty of espionage. They were found guilty of making false statements and tax code violations.<sup>245</sup>

The China Initiative's overall conviction rate is 27 percent.<sup>246</sup> DOJ's overall conviction rate is about 91 percent.<sup>247</sup> Statistically speaking, this initiative has failed, and it reeks of racial profiling. Nevertheless, DOJ officials denied racial profiling allegations. They argued that the high number of Chinese defendants is inevitable as China, the "rival nation," is made up almost exclusively of Chinese.<sup>248</sup> Moreover, Lelling praised this initiative for its potential to warn scientists to rethink their connections to China.<sup>249</sup>

Lelling's statement strongly signals that the ultimate goal of the China Initiative is not to catch spies; instead, it is to further reinforce the anti-China sentiment and create fear in the American academic community.<sup>250</sup> Race is indeed a social construct that is not based on science and facts.<sup>251</sup> The Chinese have acquired the foreign perpetrator racial identity through political rhetoric and policy implementation. The fact that the Chinese living in the United States are quite unlikely the agents of the Chinese government is not sufficient to debunk it. The increasing geopolitical tension

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244. *Id.*; see also 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/usao-ma/pr/harvard-university-professor-convicted-making-false-statements-and-tax-offenses> [<https://perma.cc/NFL8-L4VY>]; United States v. Tao, No. 19-20052-JAR, 2022 WL 4355302, at \*1 (D. Kan. Sept. 20, 2022).

245. See Guo et al., *supra* note 4.

246. Guo et al., *supra* note 4 ("Of the 148 individuals charged, only 40 have pleaded or been found guilty, with guilty pleas often involving lesser charges than originally brought.").

247. According to research from Pew Research Center in 2019, in the federal system, 90 percent of cases ended up with the defendant pleading guilty, 8 percent of cases were dismissed, and 2 percent of the cases went to trial. Of the cases that went to trial, 83 percent received convictions. Thus, the overall conviction rate, from guilty pleadings and trials, added up to at least 91 percent. See Gramlich, *supra* note 11.

248. Jeffrey Mervis, *U.S. Prosecutor Leading China Probe Explains Effort That Led to Charges Against Harvard Chemist*, SCI. (Feb. 3, 2020), <https://www.science.org/content/article/us-prosecutor-leading-china-probe-explains-effort-led-charges-against-harvard-chemist> [<https://perma.cc/2TMH-B63F>].

249. Sha Hua, *U.S.-China Tensions Fuel Outflow of Chinese Scientists from U.S. Universities*, WALL ST. J. (Sept. 22, 2022, 1:15 PM), <https://www.wsj.com/articles/u-s-china-tensions-fuel-outflow-of-chinese-scientists-from-u-s-universities-11663866938> [<https://perma.cc/9DNG-2GVJ>].

250. Andrew Lelling later admitted that the China Initiative achieved "general deterrence among academic researchers." Shelley Murphy, *Harvard Professor's Conviction Brings Scrutiny of China Initiative*, BOS. GLOBE (Dec. 23, 2021, 11:54 AM), <https://www.bostonglobe.com/2021/12/23/metro/harvard-professors-conviction-brings-scrutiny-china-initiative/> (on file with the *Columbia Human Rights Law Review*).

251. HANEY LOPEZ, *supra* note 38, at 10–13.

makes it nearly impossible for the Chinese community to debunk this new racial identity. Defeating China is a political priority. Thus, DOJ is expected to deliver on this priority, and, perhaps in the interest of currying political favor it is expected to do so the most publicly visible fashion.

It is particularly in their delivery on this priority that the Obama DOJ and the Trump DOJ differ. For the former, to deliver a visible anti-China stance, it utilized the “catch a Chinese spy” narrative, likening the Chinese community’s natural ties to China to specific *actus rea* under the EEA or fraud statutes. But for the latter, a Chinese person does not even need to fit a “Chinese spy” profile to become a target. The Trump DOJ did not spend much time elaborating on any substantive national security threat in initiating investigations against the Chinese under the China Initiative. A person’s “China-ness,” no matter how tenuous it was, was enough to trigger the criminal legal machine, especially when this person possessed useful STEM knowledge. The fact that one has Chinese connections and might have skills that could be useful to the Chinese government was enough for the Trump DOJ to keep an eye on this person, with the goal of testing their loyalty to the United States. The cases of Anming Hu and Gang Chen illustrate this new approach.

#### b) The Case of Anming Hu

Anming Hu, a China-born Canadian citizen, was a professor in the Department of Mechanical, Aerospace & Biomedical Engineering at the University of Tennessee in Knoxville (UTK) and performed research under grants funded by a variety of agencies, including the National Aeronautics and Space Administration (NASA).<sup>252</sup> Hu was arrested by the FBI on February 27, 2020, and later indicted for violations of wire fraud (18 U.S.C. § 1343) and making false statements to federal agents (18 U.S.C. § 1001).<sup>253</sup> DOJ alleged that Hu, while holding his position at UTK, also held a part-time professorship at the Beijing University of Technology (BJUT) since 2016 and received approximately \$4,700 in total.<sup>254</sup> DOJ further alleged that Hu concealed his affiliation with BJUT to UTK, which caused UTK to falsely certify to NASA that UTK complied with NASA’s China Funding Restriction.<sup>255</sup>

This case was not about espionage, trade secret theft, or anything that might benefit China, as Hu was not charged with any of those crimes. However, China was everywhere in Hu’s indictment. The word “China” and

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252. *United States v. Hu*, No. 3:20-CR-21-TAV-DCP-1, 2021 WL 4130515, at \*1-\*2 (E.D. Tenn. Sept. 9, 2021).

253. *Id.* at \*1.

254. *Id.* at \*1-\*2.

255. *Id.* at \*1.

“PRC,” referring to the People’s Republic of China, appeared 34 times in this 17-page indictment.<sup>256</sup> DOJ even made the argument that Hu’s affiliation with a Chinese university alone constituted a part of a criminal scheme:

“It was part of the scheme that HU worked as a professor at BJUT. HU self-identified as a BJUT professor in research publications, patent applications in China, and certain of his curricula vitae (“CVs”). HU also supervised graduate students at BJUT, made and communicated decisions about whether to accept graduate students at BJUT, supervised the operation of a laboratory at BJUT, and worked on projects sponsored by the Chinese government at BJUT, all while also working as a professor at UTK.”<sup>257</sup>

None of the activities—accepting a second professorship appointment at a Chinese university, filing patent applications in China, or supervising Chinese students—may lead to a criminal offense. Nevertheless, DOJ argued that Hu intentionally concealed his BJUT association when he applied for a research fund from NASA.<sup>258</sup> Since NASA is a federal agency, Hu’s alleged concealment constituted a violation of 18 U.S.C. § 1001.

The case went to trial in May 2021, and DOJ’s case started to fumble from the beginning. FBI agent Kujtim Sadiku, the lead agent investigating Hu’s case, testified in court, which proved to be beyond damaging to DOJ’s case.<sup>259</sup> It turned out that Hu became Sadiku’s target simply because Sadiku heard from someone that Hu might be a spy, but Sadiku could not remember who told him that.<sup>260</sup> Sadiku then conducted an “open source” search for information on Hu, meaning googling Hu’s name online and using Google Translate when the information was in Chinese.<sup>261</sup> Sadiku could not find any evidence indicating Hu was a spy, but the FBI assigned seven agents to follow Hu and his family members for almost two years.<sup>262</sup> The two-year investigation did not lead to any espionage charges against Hu.<sup>263</sup>

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256. Indictment, 1–15, *United States v. Anming Hu*, No. 3:20-CR-21-TAV-DCP-1 (E.D. Tenn. Feb. 25, 2020).

257. *Id.* at 6.

258. *Id.* at 14. DOJ alleged that Hu “knowingly, willfully, and with intent to defraud, devise and intend to devise, and attempt to devise a scheme to defraud NASA.”

259. Joseph Choi, *Federal Agents Admit to Falsely Accusing Chinese Professor of Being a Spy*, THE HILL (June 14, 2021, 3:20 PM), <https://thehill.com/regulation/court-battles/558345-federal-agents-admit-to-falsely-accusing-chinese-professor-of-being/> [<https://perma.cc/REV9-Y8V5>].

260. *Id.*

261. Transcript of Trial Proceedings at 187–88, *United States v. Hu*, No. 3:20-CR-21 (E.D. Tenn. June 10, 2021).

262. *Id.* at 227.

263. Transcript of Trial Proceedings at 19–21, *United States v. Hu*, No. 3:20-CR-21 (E.D. Tenn. June 11, 2021).

Nevertheless, Sadiku proceeded to provide Hu's employer, UTK, with loads of unverified information strongly indicating that Hu was a Chinese military operative, eventually costing Hu his job.<sup>264</sup>

Throughout the trial, DOJ could not produce consistent evidence showing that Hu intentionally concealed his BJUT association.<sup>265</sup> On the contrary, there was evidence showing that, per UTK's policy, Hu did not need to disclose his BJUT association because he was paid less than \$10,000 for his BJUT job.<sup>266</sup> More importantly, there was evidence showing that Hu never intended to conceal his BJUT affiliation, as he specifically identified himself as affiliated with UTK and BJUT in many annual activity reports to UTK.<sup>267</sup> Sadiku admitted that he did not review all of Hu's annual reports during the investigation.<sup>268</sup>

Hu's case, which was presented to an all-white jury,<sup>269</sup> resulted in a mistrial.<sup>270</sup> A juror summarized that case as "a series of plausible errors, a lack of support from [UTK], and ruthless ambition on behalf of the FBI."<sup>271</sup> However, the U.S. Attorney's Office for the Eastern District of Tennessee decided to retry the case.<sup>272</sup> Marc Raimondi, a DOJ spokesman, defended the decision and stated that the agency would "not back off prosecuting crimes involving a nexus with the People's Republic of China."<sup>273</sup>

On September 9, 2019, the U.S. District Court of the Eastern District of Tennessee acquitted Hu of all charges.<sup>274</sup> Judge Thomas Varlan, the presiding judge of this case, pointed out numerous evidentiary flaws in the government case and decided that no reasonable jury would be able to find

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264. *Id.*, at 27; Choi, *supra* note 259.

265. *Hu*, 2021 WL 4130515, at \*3-12.

266. *Id.* at \*19, n. 6.

267. *Id.* at \*4.

268. *Id.*

269. The jury consisted of "four women and eight men, all white." Jamie Satterfield, *Trump Administration's First 'China Initiative' Prosecution Sputters as Jurors Deadlock*, KNOX NEWS (June 16, 2021, 10:00 PM), <https://www.knoxnews.com/story/news/crime/2021/06/17/anming-hu-case-jurors-trump-china-initiative-trial-deadlocked/7712463002/> [<https://perma.cc/55FP-RYSF>].

270. *Hu*, 2021 WL 4130515, at \*12.

271. Mara Hvistendahl, "Ridiculous Case": Juror Criticizes DOJ for Charging Scientist with Hiding Ties to China, THE INTERCEPT (June 23, 2021, 5:42 PM), <https://theintercept.com/2021/06/23/anming-hu-trial-fbi-china/> [<https://perma.cc/4M6Y-U28A>].

272. *Hu*, 2021 WL 4130515, at \*12.

273. 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) [<https://perma.cc/TX2P-RX8D>].

274. *Hu*, 2021 WL 4130515, at \*1.

Hu guilty.<sup>275</sup> Specifically, he found that DOJ's argument that Hu's affiliation with the BJUT was part of a criminal scheme was unreasonable.<sup>276</sup> He found that the most compelling factor against this argument was that Hu was not even the principal applicant to NASA's grant; instead, he was passively involved in the application process, as his colleague, the lead applicant, believed that Hu could be helpful in this project.<sup>277</sup> As Hu began to affiliate with BJUT in 2013, it would be unreasonable for any juror to conclude that Hu somehow could anticipate that he would be passively involved in a NASA research grant three years later.<sup>278</sup> Judge Varlan also expressed his frustration with the leading FBI agent's testimony, as it simply could not support the indictment against Hu.<sup>279</sup> On the contrary, it showed that, in testifying for a case built on a defendant's failure to disclose information in the research grant process, the FBI agent did not demonstrate "substantial experience or knowledge of the grant processes of government agencies or university conflict of interest policies, nor was he familiar with the ways in which universities engage with government agencies for purposes of sponsoring proposals."<sup>280</sup>

Hu's trial, the U.S. Attorney's decision to retry, and Raimondi's statement together revealed the nature of Hu's case—it was never about "catching the Chinese spy," as Hu was clearly not one. Hu was brought within the shooting range of the China Initiative simply due to his affiliation with a Chinese university. To the government, collaboration with a Chinese university, by default, equaled a nexus to the People's Republic of China.<sup>281</sup> This nexus alone may constitute a part of a criminal scheme. This nexus to China, which was established solely by hearsay without any evidentiary foundation, was also sufficient for the FBI to open a nearly two-year investigation, hinder Hu's job by making false statements to his employer about his being a Chinese military operative, and put him on the no-fly list.<sup>282</sup>

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275. *Id.* at \*18–\*22.

276. *Id.*

277. *Id.* at \*19.

278. *Id.*

279. *Id.* at \*4, n.2.

280. *Id.*

281. The court found that the government never presented any evidence to prove that BJUT was supposed to be considered as "China or a Chinese company." Specifically, the NASA criminal investigator testified that he was "not sure whether BJUT was incorporated under the laws of the People's Republic of China." *Hu*, 2021 WL 4130515, at \*20.

282. Jamie Satterfield, *Trial Reveals Federal Agents Falsely Accused A UT Professor Born in China of Spying*, KNOX NEWS (June 13, 2021, 10:00 PM), <https://www.knoxnews.com/story/news/crime/2021/06/14/federal-agents-falsely-accused-university-of-tennessee-professor-spying-china/7649378002/> [<https://perma.cc/GHP4-AZX9>].

After all these efforts ended unsuccessfully, DOJ did not drop this case. It decided to move forward to trial with paper-thin evidence.

DOJ's decision to retry this case after a mistrial was more revealing of the nature of this case. Raimondi's response that DOJ would "not back off prosecuting crimes involving a nexus with the People's Republic of China" revealed that this case was no longer about Hu. To DOJ, walking away from this case meant more than just walking away from a bad case. Such a move, rather, would indicate a defeat that it could not afford—a defeat by China. While this case was titled *United States v. Hu*, it is probably more appropriately titled "*United States v. China*," with Hu being the representative of China.

Hu's case drew broad criticism from the public, especially the Asian American and Pacific Islander (AAPI) community in the United States. John Yang, president and executive director of Asian Americans Advancing Justice, urged Attorney General Merrick Garland to drop the case, arguing that "[a]fter two years of failing to find any evidence of economic espionage, this case was built on fabricated evidence and flimsy charges rooted in racial bias and profiling under the Trump-era 'China Initiative.'"<sup>283</sup> Representative Ted Lieu, joined by 90 members of Congress, sent a letter to Garland.<sup>284</sup> The members of Congress expressed that they were "...deeply troubled by reports of alleged misconduct by the Federal Bureau of Investigation in the unsuccessful prosecution of [Anming Hu]" and urged DOJ to engage in further policy changes in implicit bias and racial profiling.<sup>285</sup>

Waves of criticism from the Asian American community put pressure on DOJ to address its China Initiative. The case of Gang Chen ultimately pushed DOJ to abolish the China Initiative in 2022, or at the very least to find an alternative name for it.<sup>286</sup>

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283. Press Release, Asian Am. Advancing Just., Asian American Civil Rights Group Urges U.S. Attorney to Drop Case Against University of Tennessee Professor Wrongly Prosecuted Under the "China Initiative" After Trial Results in Deadlocked Jury (June 16, 2021), <https://www.advancingjustice-aajc.org/press-release/asian-american-civil-rights-group-urges-us-attorney-drop-case-against-university> [https://perma.cc/SU8Q-EHCD].

284. Press Release, Ted Lieu, Rep., Rep. Lieu and 90 Members of Congress Urge DOJ Probe into Alleged Racial Profiling of Asians (July 30, 2021), <https://lieu.house.gov/media-center/press-releases/rep-lieu-and-90-members-congress-urge-doj-probe-alleged-racial-profiling> [https://perma.cc/9628-HDDC].

285. *Id.*

286. See, e.g., Barry & Benner, *supra* note 2 ("The move for dismissal [of the case against Gang Chen] comes as the Justice Department is reviewing the China Initiative, considering steps such as retiring the name and reclassifying the pending cases."); see *infra* Part II(D)(3)(c) for an in-depth discussion of the case against Gang Chen.



## c) The Case of Gang Chen

The fact pattern of the Gang Chen case is very similar to that of Hu's case: on January 14, 2021, Gang Chen, a Chinese American working at an American university, was arrested for failing to disclose his nexus to China in his research fund application.<sup>287</sup> After the arrest, Andrew Lelling, the then-U.S. Attorney for the District of Massachusetts, held a press conference in which he stated that "the allegations of the complaint imply that this was not just about greed, but about loyalty to China."<sup>288</sup> Lelling also alleged that Chen received about \$19 million dollars in foreign funding, and a substantial amount of it came from a public university funded by the Chinese government.<sup>289</sup> DOJ also published a press release in which it pointed out that Chen is a naturalized U.S. citizen who was born in China, and it also accused Chen of his "efforts to promote [China's] scientific and economic development."<sup>290</sup> According to DOJ, Chen made efforts to promote China's scientific development by providing his expertise to China.<sup>291</sup>

None of the highlighted "nexus to China"—the alleged loyalty to China, receiving research funds from Chinese universities, or making efforts to help China in science—constituted any federal criminal offense. Nevertheless DOJ charged Chen under 18 U.S.C. § 1001—making false statements to a federal agent—and alleged that he failed to disclose his nexus to China when he applied for and obtained a U.S. Department of Energy (DOE) grant to fund a portion of his research at MIT.<sup>292</sup> Chen was also charged with wire fraud and failure to disclose a foreign bank account.<sup>293</sup> He was not charged with any EEA-related crimes. Similar to the case of Anming Hu, this case was not about catching a Chinese spy. DOJ never alleged that Chen stole technology or transported any restricted information to China. DOJ also did not allege that China benefited from Chen's actions either. However, China is everywhere in this case—in Lelling's conference, the official press release, and the criminal complaint. In the 24 pages of the

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287. *United States v. Chen*, 547 F. Supp. 3d 151, 152–53 (D. Mass. 2021).

288. *Id.* at 155.

289. *Id.* at 153.

290. *Id.*; see also Press Release, U.S. Att'y's Off., Dist. of Mass., MIT Professor Indicted on Charges Relating to Grant Fraud (Jan. 20, 2021), <https://www.justice.gov/usao-ma/pr/mit-professor-indicted-charges-relating-grant-fraud> [<https://perma.cc/KSH5-JMUJ>].

291. Press Release, U.S. Att'y's Off., Dist. Of Mass., MIT Professor Indicted on Charges Relating to Grant Fraud (Jan. 20, 2021), <https://www.justice.gov/usao-ma/pr/mit-professor-indicted-charges-relating-grant-fraud> [<https://perma.cc/KSH5-JMUJ>].

292. *Id.*

293. *Id.*

criminal complaint, “China” and “PRC”<sup>294</sup> together appear 124 times.<sup>295</sup> The focus of this criminal complaint is on Chen’s “[e]xtensive Dealings with the PRC and the PRC Government.”<sup>296</sup> According to the Homeland Security agent who made the affidavit in this criminal affidavit, any contact with a Chinese public university constituted contact with the Chinese government, as the Chinese government established such universities.<sup>297</sup> A significant portion of the affidavit highlighted Chen’s alleged secret plan to help China advance scientific development. The primary supporting evidence was a 2016 email Chen sent to himself. Allegedly, this email contained Chen’s detailed to-do list for helping China.<sup>298</sup> The agent also included details about how the Chinese government recognized Chen as a leading science expert and included him in its “Thousand Talents Plan,” an initiative providing incentives to recruit international scientists to work in China.<sup>299</sup> In a footnote, the agent admitted that an affiliation with a Chinese talent program is not illegal; however, he also stated that the failure to disclose this affiliation may “violate one or more laws.”<sup>300</sup>

While both Hu and Chen were outstanding STEM scholars, Chen is an internationally renowned mechanical engineer and nanotechnologist who used to serve as the head of the Department of Mechanical Engineering at the Massachusetts Institute of Technology (MIT), one of the best engineering programs in the world.<sup>301</sup> Chen’s arrest caused a shockwave in the science community.<sup>302</sup> Within a week of Chen’s arrest, more than 160 MIT faculty members signed a letter addressed to MIT’s president L. Rafael Reif, requesting MIT “to stand forthrightly, proudly, and energetically behind Professor Chen.”<sup>303</sup> To support their request, the faculty members outlined DOJ’s allegations against Chen, and debunked them categorically.<sup>304</sup> They pointed out that Chen never concealed his nexus to China, as his curriculum

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294. People’s Republic of China.

295. Criminal Complaint, *United States v. Chen*, No. 21-mj-1011-DLC, 1–23 (D. Mass. Jan. 13, 2021).

296. *Id.* 9–15.

297. *Id.*

298. *Id.* at 10–11.

299. *Id.* at 9–15.

300. *Id.* at 12 n. 4.

301. *Professor Gang Chen*, MASS. INST. OF TECH., <https://meche.mit.edu/people/faculty/gchen2@mit.edu> (last visited Sept. 29, 2022); [<https://perma.cc/Z4YJ-JT8B>] Gang Chen, GOOGLE SCHOLAR, <https://scholar.google.com/citations?user=YLB6tnwAAAA&hl=en> (last visited Sept. 29, 2022) [<https://perma.cc/Z4YJ-JT8B>].

302. Mervis, *U.S. Scientists*, *supra* note 239.

303. *Faculty Letter to President Reif in Support of Professor Gang Chen*, MASS. INST. OF TECH. (Jan. 21, 2021), <https://fml.mit.edu/january-february-2021/faculty-letter-to-president-reif-in-support-of-professor-gang-chen/> [<https://perma.cc/WP3B-2KPN>]

304. *Id.*

vitae, publicly available on MIT's website, contained at least 62 references to his Chinese collaborations.<sup>305</sup> The allegation that Chen received \$19 million of funding from China was not true; MIT was the receiver of the \$19 million as a part of an international collaboration that was long approved.<sup>306</sup> MIT faculty members also criticized the China Initiative as a whole, stating that this initiative was created to use “‘innovative prosecutorial methods’ to target academics who have participated in scientific exchange with China.”<sup>307</sup>

DOJ's case eventually fell apart when a Memorandum of Investigative Activity emerged, which records an FBI interview with Dr. Andrew Schwartz, the acting chief of DOE's Office of Basic Energy Sciences.<sup>308</sup> The interview was specifically regarding whether Chen was required to report his nexus to China when he applied for research funds from DOE.<sup>309</sup> Schwartz's answer was a firm no, and he answered “definitely not” when asked whether Chen was required to report that he was a review expert for the Chinese National Natural Science Foundation.<sup>310</sup> It turned out that Chen's affiliations with China would not have prevented DOE from extending the grant money. Thus, whether Chen disclosed his Chinese affiliations was irrelevant. DOJ's key allegation was therefore discredited in full. On January 20, 2022, the U.S. Attorney's Office dropped all charges against Chen, citing “new information indicating that the Chinese affiliations at the center of the case were not of material importance to the funding agency.”<sup>311</sup>

The case of Chen is a case about punishing the alleged loyalty to China, which Lelling accurately summarized. Chen is not a spy; he was pursued by the China Initiative because he is a scientist born in China, and DOJ believed that his loyalty, despite his being an American, is to China. This alleged loyalty, just as in Hu's case, was established by a series of vague “nexus[es] to China,” with a focus on affiliations with Chinese public universities. While the alleged loyalty to China is not criminally actionable, the U.S. imposed criminal liabilities on Chen by enforcing “one or more

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305. *Id.*

306. *Id.*

307. *Id.*

308. Exhibit A, 2–4, *United States v. Tao*, 2:19-cr-20052-JAR-JPO (D. Kan. Feb. 18, 2022); see also Josh Gerstein, *Report Details Collapse of China Initiative Case*, POLITICO (Feb. 18, 2022, 6:00 PM), <https://www.politico.com/news/2022/02/18/china-initiative-case-00010281>.

309. *Id.*

310. *Id.*

311. 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>. [<https://perma.cc/3RJ7-N96R>]

laws.”<sup>312</sup> The “one or more laws” here—fraud, making false statements, and failure to disclose a foreign bank account—were simply pretextual. DOJ’s goal was to use the pretextual crimes to punish Chen’s alleged loyalty to China and create a chilling effect on schools like MIT that frequently collaborate with Chinese universities.

Pretextual prosecution—the so-called Al Capone strategy—is not new to DOJ.<sup>313</sup> However, the pretextual prosecution used in the China Initiative, as demonstrated in the cases of *Chen* and *Hu*, is a dangerous and newer development of the Al Capone strategy’s use. Traditionally, DOJ employs the Al Capone strategy when it struggles to gather enough evidence to pursue a “true crime” that is not easy to prove in court. It then retreats to “detour crimes,” such as tax evasion or making false statements, that are easier to prove in court.<sup>314</sup> Here, there was no “true crime.” For *Hu* and *Chen*, the alleged activities linked to China—holding appointments at a Chinese public university, participating in a Chinese talent program, receiving research funds from a Chinese source, etc.—were completely legal, and an American court may not convict them even assuming all the activities can be proved in court. Put more bluntly: it was not a “catch the criminal no matter what” strategy. Instead, the use of detour crimes here is to punish defendants like *Hu* and *Chen*, who are not criminals, but are Chinese individuals who present a high level of “China-ness” that makes DOJ question their loyalty to America.

#### E) Differential Racialization: From Perpetual Foreign to Foreign Perpetrator

The new Chinese racial identity is a result of the dominant society’s need to manage the geopolitical challenges imposed by China. The Japanese and the Muslim communities have similar experiences, and their racial identities have changed multiple times throughout history pursuant to the dominant society’s shifting needs to respond to geopolitical challenges.<sup>315</sup>

The Japanese community’s racial identity in the 1800s and early 1900s was closely connected with the Chinese, with perpetual foreignness and cultural inferiority at the center of this identity.<sup>316</sup> As a result, they were subject to similar discrimination during that period, with exclusion being the theme. They were unable to become American citizens, to own property, or

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312. *Chen*, *supra* note 273, at 12 n. 4.

313. Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 584–88 (2005).

314. *Id.* at 588–92.

315. DELGADO & STEFANCIC, *supra* note 34, at 9–10.

316. YAMAMOTO ET AL., *supra* note 17, 77–85.

to send their children to white schools.<sup>317</sup> However, World War II deeply changed the Japanese community's racial identity.<sup>318</sup> Their racial identity became directly associated with the Japanese Empire, and the Japanese population on the west coast was sent to concentration camps for this linkage, with the endorsement of the Supreme Court.<sup>319</sup> However, such a challenge disappeared after the asset price bubble's collapse in 1991, causing decades-long economic stagnation in Japan.<sup>320</sup> Japan's role in international politics has now been firmly established as America's loyal ally rather than a challenger.<sup>321</sup> Anti-Japan or anti-Japanese rhetoric almost disappeared in America. Americans' attitude towards Japan has skyrocketed in the past three decades.<sup>322</sup>

The Muslim community also experienced differential racialization. For a long time, Muslims were considered to be white Americans' "exotic" neighbors who prayed five times a day.<sup>323</sup> This racial identity quickly changed following 9/11. The U.S. government initiated its war against terror and implemented a series of military operations in the Middle East and Asia, and President Bush and other top officials have characterized the war against terror as a battle for "civilization"—indeed, a "crusade."<sup>324</sup> The war against terror festered widespread anti-Muslim sentiment shared by many Americans across the political spectrum.<sup>325</sup> The entire Muslim community was subjected to many attacks from the public and the government due to negative racial stereotyping and associations with terrorism. More than 1,700 incidents of hate crimes against people who appeared to be Muslims

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317. *Id.*

318. YAMAMOTO ET AL., *supra* note 17, at 89–101.

319. *Id.*; *Korematsu v. United States*, 323 U.S. 214, 215–16 (1944).

320. Fumio Hayashi & Edward C. Prescott, *The 1990s in Japan: A Lost Decade*, 5 REV. OF ECON. DYNAMICS 206, 206–07 (2002).

321. See BUSH ET AL., *supra* note 104, at 1–2.

322. *Country Ratings*, *supra* note 180.

323. DELGADO & STEFANCIC, *supra* note 34, at 10.

324. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1582 (2002).

325. *Anti-Muslim*, S. POVERTY L. CTR. (last visited Oct. 12, 2022), <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-muslim>; Faiza Patel, *The Islamophobic Administration*, BRENNAN CTR. FOR JUST. (Apr. 19, 2017), <https://www.brennancenter.org/our-work/research-reports/islamophobic-administration> [<https://perma.cc/2AAZ-WYXK>]; Lisa Mascaro, *House Responds to Rep. Boebert's Anti-Muslim Remarks with Islamophobia Bill*, PBS NewsHour (Dec. 15, 2021, 9:46 AM), <https://www.pbs.org/newshour/politics/house-responds-to-rep-boeberts-anti-muslim-remarks-with-islamophobia-bill> [<https://perma.cc/Q29Q-DM6L>]; Matt Friedman, *State Senator Who Once Denigrated Islam as a 'Cult of Hate' Seeks Recognition for Muslim Holidays*, POLITICO (Feb. 15, 2022, 8:41 PM), <https://www.politico.com/news/2022/02/15/state-senator-who-once-denigrated-islam-as-a-cult-of-hate-seeks-recognition-for-muslim-holidays-00009070> [<https://perma.cc/L3VG-MWKR>]

were reported within one year following 9/11.<sup>326</sup> Over 1,200 noncitizens who appeared to be Muslims were swept into detention without due process of law, in the name of investigation and prevention of terrorist attacks.<sup>327</sup> Many Muslims, citizens and noncitizens alike, were put on the no-fly list without being informed.<sup>328</sup>

The Chinese community's story is another example of differential racialization. One hundred forty years ago, the Chinese were perceived as oriental immigrants who refused to let go of their "inferior" culture and were, therefore, unable to assimilate into white America.<sup>329</sup> Thus, foreignness was at the core of the Chinese racial identity—they came from a foreign nation and would remain foreign perpetually.

Today, cultural inferiority no longer stands at the core of the racial identity of the Chinese, at least not overtly. This is an era where America's geopolitical influence is declining, the shrinking American middle class is struggling, racial conflicts frequently erupt nationwide, and domestic politics has become much more polarized. Politicians need to provide a scapegoat, and China is the perfect one. But punishing a country is too abstract of a concept, especially when the target is a significant nuclear power like China, which makes military deterrence unlikely. The other routine methods such as economic restrictions and trade wars, often lack the tangible, theatrical effect to showcase a hard stance against China to the domestic public. A hard stance in the criminal legal system—punishing people allegedly helping China—provides a much better solution. Nothing is more tangible, more direct, more visually and emotionally vindictive than having FBI agents storm an alleged Chinese spy's home, handcuff and escort the person into a police car, and hold a fanfare press release, announcing that "we caught the Chinese spy, and she was just among us."<sup>330</sup> China, the perpetrator, is then punished through the punishment of a Chinese person. The fact that the foreign perpetrator image is projected on the Chinese person and the entire community is simply irrelevant, as this is what people want to see, and the administration is giving it to them. In other words, the new Chinese racial

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326. Volpp, *supra* note 324, at 1575 n.1.

327. *Id.* at 1577.

328. Amy Roe, *Airline "No-Fly" Lists Trample the Rights of People of Color. Seattle Should Not Allow Hotels to Create "No Stay" Lists*, ACLU (July 19, 2019) [<https://perma.cc/9T9J-KPFF>]; *see also* Latif v. Holder, 28 F. Supp. 3d 1134, 1141-43 (D. Or. 2014).

329. Chae Chan Ping v. United States, 130 U.S. 581, 582, 593-94 (1889); *see also* AZIZ, *supra* note 17, at 39; Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893).

330. Guo et al., *supra* note 4 (recognizing that DOJ often announced China Initiative cases "with great fanfare."); *also see* Perlroth, *supra* note 192 (Sherry Chen was arrested in front of her colleagues at her work, in front of her colleagues); Barry, *supra* note 1 (10 to 20 FBI agents raided Gang Chen's house at 6:30 a.m. in the morning).

identity—the foreign perpetrator—responded to the general public’s need to identify a tangible party to blame for the many American problems. It also responded to the need of politicians and policymakers, who desperately sought opportunities to showcase their toughness on America’s chief enemy, China. The China Initiative was thus a natural product of this differential racialization process.

It is worth noting that orientalism and white supremacy still play a big part in this new racial identity. The Chinese community’s unquestionable linkage to China arises from the misguided perception that the Chinese are a group of conformist and unintellectual immigrants who cannot think independently, which leads to the conclusion that they are all victims of the Chinese Communist Party (CCP) brainwashing and subject to its control. Only “true” Americans have the privilege of distinguishing themselves from their government and political parties. “[T]he Chinese simply cannot—once Chinese, always Chinese, always the CCP.”<sup>331</sup>

### III. THE ABOLISHMENT OF THE CHINA INITIATIVE: AN ENDING, OR A NEW START?

On January 23, 2022, Assistant Attorney General Matthew Olsen announced the end of the China Initiative.<sup>332</sup> The dissolution of the China Initiative was necessary, according to Olson, because there was a “perception” that the U.S. Department of Justice (DOJ) racially profiled the Chinese community in enforcing the China Initiative.<sup>333</sup> He announced that DOJ has established a new program to replace the China Initiative: the Strategy for Countering Nation-State Threats.<sup>334</sup>

What has been truly terminated from Olsen’s announcement? Not much, and the name change is perhaps the biggest change regarding the ending of the China Initiative.

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331. Leo Yu, *Opinion: Banning Chinese from Buying Land Has a Racist Past*, HOUS. CHRON. (Jan. 24, 2023) (on file with the *Columbia Human Rights Law Review*).

332. Olsen Announcement, *supra* note 40.

333. *Id.* (“I want to emphasize my belief that the department’s actions have been driven by genuine national security concerns. [By] grouping cases under the China Initiative rubric, we helped give rise to a harmful perception . . . that we in some way view people with racial, ethnic or familial ties to China differently . . .”); Phelim Kine, *DOJ’s “China Initiative” is Dead but Racial Profiling Fears Are Still Very Much Alive.*, POLITICO (February 24, 2022, 8:30 AM) <https://www.politico.com/newsletters/politico-china-watcher/2022/02/24/dojs-china-initiative-is-dead-but-racial-profiling-fears-are-still-very-much-alive-00011182> [<https://perma.cc/TEN3-JGM5>] (“...Rep. Judy Chu (D-Calif.) . . . told China Watcher that Olsen’s ‘major step forward’ in junking the China Initiative won’t erase its harms. ‘The China Initiative engaged in blatant racial profiling, it reinforced harmful stereotypes that Asian Americans are the perpetual ‘others’ and it ruined numerous lives in the process,’ said Chu.”).

334. Olsen Announcement, *supra* note 40.

Olsen stated that DOJ will continue to pursue all the pending cases initiated under the China Initiative.<sup>335</sup> He did not clarify whether DOJ would re-evaluate any of the pending cases in the continued pursuit.<sup>336</sup> In addition, he denied that DOJ engaged in any racial profiling actions towards the Chinese community.<sup>337</sup> He said he was aware of the broad concerns relating to the racial bias against the Chinese in the China Initiative enforcement, including those from Congress; however, those concerns were “mere perceptions.”<sup>338</sup> After reviewing all the all the China Initiative cases, he said he “never saw any indication, none, that any decision that the Justice Department made was based on bias or prejudice of any kind.”<sup>339</sup> Nevertheless, he believed that the change of this perception was important, because “the mere perception of that type of bias undermines our efforts and it makes it harder for us to you know earn the trust of the communities ...”<sup>340</sup>

Since the China Initiative’s racial profiling concern is a mere perception, it is not necessary for DOJ to promote any policy change regarding racial profiling, as Congress expressly demanded.<sup>341</sup> A new program name—the Strategy for Countering Nation-State Threats—serves this purpose as it no longer mentions China specifically, and it also indicates that more countries may be included under this program.<sup>342</sup> This approach shows a similarity with the Trump Administration’s attempts to change people’s perception of the Muslim ban by adding North Korea and Venezuela into the mix.<sup>343</sup>

While “China” is no longer in the new program’s name, Olsen made sure that his audience understood that combating China remained DOJ’s top

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335. When Olsen was asked how the Justice Department would handle the pending China Initiative cases, Olsen replied that “We continue to pursue the cases that have been pending ... I am comfortable, although I’m not gonna talk and can’t talk about specifics in any of these cases. I am comfortable with those cases as they stand and their continued pursuit.” *U.S. Dep’t of Just.*, Assistant Attorney General Matthew Olsen on Countering Nation-State Threats, YOUTUBE at 12:00–12:30 (Feb. 24, 2022), <https://www.youtube.com/watch?v=OgZMKbIX6d4>, at 51:10–51:47.

336. *Id.*

337. *Id.* at 50:20–50:36.

338. *Id.* at 50:20–51:06.

339. *Id.* at 50:20–50:36.

340. *Id.*

341. *Supra* note 284.

342. Olsen Announcement, *supra* note 40. Other countries include Russia, Iran and North Korea.

343. Harsha Panduranga, Faiza Patel & Michael Price, *Extreme Vetting and the Muslim Ban*, BRENNAN CENTER FOR JUSTICE (Oct. 2, 2017), <https://www.brennancenter.org/our-work/research-reports/extreme-vetting-and-muslim-ban>. Panduranga, Patel and Price concluded that despite adding North Korean and Venezuela onto the list of the travel ban, the ban’s impact is overwhelmingly on Muslims.



priority. Similar to Sessions' announcement in 2018, China was the only country that Olsen dedicated a separate section in his announcement.<sup>344</sup> Olsen stressed that "make no mistake, we will be relentless in defending our country, and the Justice Department will continue to prioritize and aggressively counter the actions of the PRC government that harm our people and our institutions."<sup>345</sup>

People like Anming Hu and Gang Chen continued to be subject to the China Initiative style investigations and prosecutions.<sup>346</sup> The Biden Administration's failure to fully denounce the China Initiative and its racial profiling trait also has a long-term impact on policies: it is a silent endorsement of policies that racially profile the Chinese in the name of being anti-China, which fuels the spreading of many China Initiative style policies on the federal and state levels.

On the federal level, Representative Harold Rogers introduced a bill, H.R. 5893.<sup>347</sup> The explanatory materials of this bill expressly state that one of the main goals of this bill is to "Reverse the unwise decision to end the Justice Department's China Initiative[.]"<sup>348</sup> Representative Dan Newhouse introduced H.R. 7892—Prohibition of Agricultural Land for the People's

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344. Olsen Announcement, *supra*, note 40. Olsen dedicated a subsection named "The PRC Threat", which is the only subsection that is dedicated to a country that is on the list of the Strategy for Countering Nation-State Threats, despite that there are four countries on the list.

345. *Id.*

346. See *United States v. Tao*, 629 F. Supp. 3d 1083 (D. Kan. 2022). Tao's case went to trial on March 21, 2022, which was after Olsen announced the ending of the China Initiative. Tao was charged with multiple counts of frauds and one count of failure to disclose information to federal agents based on his alleged failure to disclose his ties to a Chinese university. The jury found him guilty of all, but the judge, Tao's motion, acquitted him of all the fraud convictions. See also Edward Wong & Amy Qin, *Asian American Officials Cite Unfair Scrutiny and Lost Jobs in China Spy Tensions*, N.Y. TIMES (Dec. 31, 2023), <https://www.nytimes.com/2023/12/31/us/politics/china-spy-asian-americans.html?smid=nytcore-ios-share&referringSource=articleShare> (on file with the *Columbia Human Rights Law Review*). This Article reports multiple stories that Asian American diplomats are banned to work at Asian countries unless they went through additional scrutiny without any specific reasons.

347. H.R.5893—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2024 (Introduced Oct. 6, 2023), available at <https://www.congress.gov/bill/118th-congress/house-bill/5893/text> [<https://perma.cc/G7M6-BZXX>].

348. U.S. House. Committee on Appropriations Commerce, Justice, Science, and Related Agencies Subcommittee (2024). Explanatory Materials for the Commerce, Justice, Science, and Related Agencies Appropriations Bill—H.R. 5893.

<https://appropriations.house.gov/sites/republicans.appropriations.house.gov/files/FY24-CJS-Explanatory-Materials.pdf> [<https://perma.cc/S7RT-JCEV>].

Republic of China Act.<sup>349</sup> This bill would grant the President the authority to “...take [] actions as may be necessary to prohibit the purchase of public or private agricultural (including ranching) real estate located in the United States by nonresident aliens, foreign businesses, an agent, trustee, or fiduciary associated with the Government of the People’s Republic of China.”<sup>350</sup> Chinese farmland holdings, however, account less than 1 percent of all purchased farmland in America.<sup>351</sup> Nevertheless, Republican Representative took a more aggressive approach, and introduced H.R.344—Securing America’s Land from Foreign Interference Act, which will prohibit ownership of any real property by “members of the Chinese Communist Party and entities that are under the ownership, control, or influence of the Chinese Communist Party.”<sup>352</sup>

States have also become excessively enthusiastic about anti-China bills. According to research conducted by Asian Americans Advancing Justice, there are at least 27 states have passed law that would restrict land ownership to individuals from specific countries. Some of these bills strongly resonate with the Alien Land Laws in the early 1900s that were specifically designed to prohibit land ownership by Asian immigrants.<sup>353</sup> Florida recently passed a law that restricts public universities and colleges from working with individuals or schools from seven countries, including China.<sup>354</sup> While China is not the only county on this list, it is clear that this new law is a part of Gov. Ron DeSantis’ anti-CCP policy.<sup>355</sup>

The China Initiative has not been terminated in any meaningful way. Rather, it marks a start of a series of policies that target the Chinese community. China is widely expected to be the main competitor of the United States for the foreseeable future. For the Chinese living in the United States, this reality means that they will be attached to the foreign perpetrator identity for a long time, regardless of the administration’s party affiliation.

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349. H.R. 7892– Prohibition of Agricultural Land for the People’s Republic of China Act (Introduced May 27, 2022), available at <https://www.congress.gov/bill/117th-congress/house-bill/7892/text?s=1&r=27> [<https://perma.cc/AK7R-LYFZ>].

350. *Id.*

351. Ximena Bustillo & Hanzhang Jin, *China Owns 380,000 Acres Of Land In The U.S. Here’s Where*, NPR (June 26, 2023, 5:01 AM), <https://www.npr.org/2023/06/26/1184053690/chinese-owned-farmland-united-states> [<https://perma.cc/M3T9-GD7C>].

352. H.R.344—Securing America’s Land from Foreign Interference Act (Introduced Jan. 12, 2023), available at <https://www.congress.gov/bill/118th-congress/house-bill/344/text> [<https://perma.cc/FQ67-DFJ4>].

353. Yu, *supra* note 331.

354. Amy Qin, *Florida Law Chills Chinese Student Recruitment*, N.Y. TIMES (Dec. 22, 2023), <https://www.nytimes.com/2023/12/15/us/florida-law-chills-chinese-student-recruitment.html#> (on file with the *Columbia Human Rights Law Review*).

355. *Id.*

## CONCLUSION

How the United States views China has a significant impact on how Americans views the Chinese. China, a country that has one of the worst public images in America, has become Chinese Americans' dilemma. Unsurprisingly, Chinese Americans are the only Asian American group in which the majority views its ancestral homeland unfavorable.<sup>356</sup>

The last part of this Article is dedicated to the Chinese Americans who are struggling with, or even ashamed of their Chinese heritage. You are not responsible for the CCP's action. Be proud of your heritage. China is first a civilization that has thousands of years of history.<sup>357</sup> None of the governments, rulers, or colonizers in China's long history can represent this civilization on their own. Thus, identifying with China does not mean pro-dictatorship, pro-restraining personal liberties; just as identifying with the United States does not necessarily mean condoning racism and colonialism. It is natural for Asian Americans to have emotional attachments with an Asian country that holds their cultural heritage. As Anupam Chander, an Asian American law scholar, put it: "Whether by choice or not, we live in one country, even though our hearts might belong to two."<sup>358</sup>

And that's ok.

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356. Neil G. Ruiz, Carolyne Im, Christine Huang & Laura Silver, *Most Asian Americans View Their Ancestral Homelands Favorably, Except Chinese Americans*, PEW RESEARCH CENTER (July 19, 2023), <https://www.pewresearch.org/race-ethnicity/2023/07/19/most-asian-americans-view-their-ancestral-homelands-favorably-except-chinese-americans/> [<https://perma.cc/ALY5-YVRN>].

357. *The Oldest Living Civilization*, AMERICAN HISTORY ASSOCIATION, [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-42-our-chinese-ally-\(1944\)/the-oldest-living-civilization](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-42-our-chinese-ally-(1944)/the-oldest-living-civilization) [<https://perma.cc/3UE4-XPQ2>].

358. Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1099 (2001).