2022/03/07 APA Justice Meeting

APA Justice Meeting – Monday, 2022/03/07
11:55 am Eastern Time/8:55 am Pacific Time

Final Agenda

0. Introduction of New Speakers
   a. Roger Wicker, Member, U.S. Senate; Ranking Member, Senate Commerce, Science, and Transportation Committee (video)
   b. Rebecca Everly, Executive Director, International Human Rights Network of Academies and Scholarly Societies; Director, Committee on Human Rights, U.S. National Academies of Sciences, Engineering, and Medicine
   c. Adam Shelton, Fellow, Immunity and Accountability, Institute for Justice
   d. Francis Slakey, Chief External Affairs Officer, American Physical Society
   e. Jiny Kim, Vice President of Policy and Programs, Advancing Justice | AAJC

1. CAPAC updates
   a. Speaker: Nisha Ramachandran, Executive Director, Congressional Asian Pacific American Caucus

   - 2022/02/23 CAPAC: CAPAC Members Welcome End of China Initiative

Nisha reported on two recent developments.

Chair Rep. Judy Chu and CAPAC members are excited about the official end of the “China Initiative,” at least in name. They are pleased to see the program moving away from a China alone focus.

CAPAC is also encouraged by the recent work by the Office of Science and Technology Policy in the implementation of National Security Presidential Memorandum 33 (NSPM-33). CAPAC recommendations have generally been accepted by OSTP.

As is usually the case, it is the implementation of these two developments that really matter. CAPAC will continue to work closely with OSTP and the Department of Justice to ensure continuing progress.
2. Senator Wicker Provides Update on the Investigation of the Department of Commerce

a. Speaker: Roger Wicker, Member, U.S. Senate; Ranking Member, Senate Commerce, Science, and Transportation Committee (video)

- 2021/09/03 Press Release: Wicker Statement on Commerce Department’s Report Confirming Misconduct at ITMS
- 2021/07/13 Senate Commerce, Science, and Transportation Committee Minority Staff Investigative Report: Abuse and Misconduct at The Commerce Department
- 2021/05/24 Press Release: Wicker Releases Fact Sheet Revealing Misconduct at the Commerce Department
- 2021/05/24 Fact Sheet: Misconduct at the Commerce Department’s Investigations and Threat Management Service
- 2021/05/24 Washington Post: Commerce Department security unit evolved into counterintelligence-like operation, Washington Post examination found

Before the "China Initiative," Anming Hu, and Gang Chen, there was Sherry Chen.

U.S. Senator Roger Wicker provided an update on his continuing investigation of abuse and misconduct at the Department of Commerce (DOC) via video. Among the major points delivered by Senator Wicker were:

- "ITMS [The Investigations and Threat Management Service] has been and remains the subject of great concern... ITMS went rogue,"
- "My investigation has found more than enough evidence indicating ITMS acted outside the law on multiple occasions."
- "Sherry Chen ... was wrongfully targeted and had her life upended by charges stemming from ITMS... she is not alone"
- "... at least two of the whistleblowers who brought ITMS's conduct to our attention have suffered retaliation. Both lost their jobs in January of this year."
- "... the Commerce Department's Inspector General to be held accountable, given her failure to investigate ITMS properly for over 4 years."
- "I want to thank all of you for the role you've played in advocating for the victims. You have been a critical voice in this process. With your continuous advocacy, we will ensure that justice is served, and that our government stays accountable."

As Ranking Member of the Senate Commerce, Science and Transportation Committee, Senator Wicker oversees the DOC - its goals, personnel, and activities.

3. International Human Rights Network of Academies and Scholarly Societies

a. Rebecca Everly, Executive Director, International Human Rights Network of Academies and Scholarly Societies

• IHRN: Website and Beginning
• 2022/02/09 IHRN: Worrying Pattern of Investigations and Prosecutions involving Researchers of Asian Descent in the United States

Becca gave an introduction on the International Human Rights Network of Academies and Scholarly Societies (IHRN). It is an international consortium of honorary scientific societies around the world that have an interest in human rights, IHRN was formed almost 30 years ago by three Nobel laureates in the sciences - François Jacob, Torsten Wiesel, and Max Perutz, with an international human rights lawyer Peter Van Dyck.

The Committee on Human Rights of the U.S. National Academies of Sciences, Engineering and Medicine in Washington, D.C. serves as the IHRN’s secretariat.

IHRN is governed by an executive committee composed of members from 11 academies around the world from the Americas to Asia, Africa, and Europe.

One of the things that the network does is advocate for colleagues subjected to human rights abuse, including arbitrary arrests and detention, gross violations of the right to trial, torture, and other forms of ill treatment. The people IHRN has supported are often for abuse and in connection with their research and other professional work.

For the most part, advocacy of national academies in the world tends to be non-public in the form of appeals, letters, meetings with government and international, and sometimes regional, officials, and submissions to human rights complaint body. Often national academies work closely with organizations that take a more public approach including human rights organizations, but they tend to work more behind the scenes.

Many of the academy members are extremely familiar with the case of Wen Ho Lee and provided advocacy on his case. They are seeing disturbing similarities in terms of racial profiling and targeting and failures of due process. They wanted to make a statement.

The IHRN executive committee issued an infrequent public statement in February expressing serious concerns about the pattern of criminal cases brought against colleagues in the United States that later ended up collapsing when evidence came to light.

The statement talked about the “China Initiative” and gave examples of Anming Hu and Gang Chen, as well as the earlier disturbing cases of Sherry Chen and Professor Xiaoxing Xi in that context. These are not one-off situations, but part of an alarming
pattern. Members of the executive committee want to join the calls of many US scientific and scholarly colleagues for full investigations and accountability of abuses.

With issuance of the statement, the executive committee calls upon the members of the participating academies within our network, from the French Academy to the Indian Academy to the Brazilian Academy, and asks them to use the statement as the basis for their own advocacy, expressing solidarity with these colleagues in the United States, and their support, urging them to voice their concerns with US officials, for instance, through their US ambassadors, and some have done so.

This issue has also been a big problem for the U.S. National Academies for many years. In Becca’s capacity as the director of the Committee on Human Rights, she and the National Academies have done advocacy work in connection with the Departments of Commerce and Justice, as well as the Civil Rights Commission.

As the recent changes are made to the “China Initiative,” Becca is interested in what these developments really mean in practice. She will stay in touch and see how it plays out and how else the international scientific community will be useful.

4. Upcoming Trial of Feng "Franklin" Tao

   a. Speaker: Haipei Shue, President, United Chinese Americans
   b. Speaker: Peter Zeidenberg, Partner, Arent Fox

   • APA Justice: Feng "Franklin" Tao

Despite the identified flaws, new prosecution guidelines, and the end of the "China Initiative," the Department of Justice (DOJ) is proceeding with the prosecution of Professor Franklin Tao. Professor Tao was the first academic indicted under the "China Initiative" and charged for wire fraud and making false statements, not economic espionage or trade secret theft. His trial is scheduled to start on March 21, 2022, in Kansas City, KS.

Haipei Shue was in the company of University of Tennessee Knoxville Professor Anming Hu and gave an update about on the progress and preparation of community support for the trial of Professor Tao. The GoFundMe campaign for the legal defense of Professor Tao was restarted. At that time, about 3,500 donations had been made for a total of about $450,000. [Note as of March 14, the total has exceeded $553,000 with a goal of $1 million.] In terms of local Chinese community support, Haipei is mobilizing and encourages community members to attend the opening day of the trial and to help arrange an onsite news conference.
Peter Zeidenberg, defense attorney for Professor Tao, expressed his appreciation for the support of the Chinese American community. Peter explained that the declared demise of the "China initiative" is sort of the worst of both worlds for people like Franklin Tao. There is danger that many who have been holding the DOJ accountable will walk away and congratulate each other for a mission accomplished. However, the DOJ is continuing with this prosecution after the Assistant Attorney General said that going forward, they will only be prosecuting cases with a national security nexus. Professor Tao's case is a pure research integrity case about checking the right box on a conflict-of-interest form. Peter and Professor Tao dispute the factual predicate that he took the job in China.

Peter made his point to the government in a lengthy letter asking them to reevaluate the case. Even if what they say is true, it has nothing to do with national security. Like virtually all of the other professors, the research that is done is all published and required to be published. It is not secret or confidential. Instead, the DOJ turned that into a felony where Professor Tao is facing many years in prison and deportation if he is convicted. Peter and Professor Tao have been fighting this case vigorously for the last two and a half years, but apparently the DOJ will not open their eyes to Peter's letter.

5. Amici Briefs Filed in Support of Professor Xiaoxing Xi's Appeal for FBI Accountability

a. Speaker: Patrick Toomey, Senior Staff Attorney, ACLU
b. Speaker: Adam Shelton, Fellow, Institute for Justice
c. Speaker: Francis Slakey, Chief External Affairs Officer, American Physical Society
d. Speaker: Jiny Kim, Vice President of Policy and Programs, Advancing Justice | AAJC

- APA Justice: Xiaoxing Xi
- 2022/02/07 ACLU: Chinese American Professor, Falsely Painted as a Spy for China, Moves Forward with Appeal Against FBI
- 2022/02/07 ACLU: Xi v. Haugen - Third Circuit Court of Appeals Opening Brief
- Institute for Justice: amicus brief
- American Physical Society: amici brief
- Advancing Justice | AAJC: amici brief

Before the "China Initiative," Anming Hu, and Gang Chen, there was Xiaoxing Xi.

On February 7, 2022, Temple University Professor Xiaoxing Xi and his family filed the opening brief in their appeal against the U.S. government and the FBI agent involved in wrongly investigating and prosecuting him. Three amici briefs have followed in support to reinstate the damage claims and hold the FBI accountable.

Patrick Toomey and ACLU
Patrick reported that the ACLU represents Professor Xi and his family in his case challenging the baseless investigation and prosecution of him. The case has been going on for years as many have contributed their support and resources to supporting these efforts.

On February 7, the ACLU filed a brief in the Third Circuit Court of Appeals. The District Court, after sitting on the case for a number of years, dismissed nine out of 10 claims in the lawsuit. It is these nine claims that are on appeal. There are essentially two distinct buckets of claims. One is against the US government to try to recover damages for what occurred to Professor Xi and his family, the other is against the individual FBI agent. The claims against the FBI agent are sometimes called Bivens claims because of the Supreme Court case in the 1970s that created this right to or ability to recover damages for certain constitutional violations committed by federal agents.

Those dismissed claims are now on appeal by explaining why the District Court’s analysis was wrong across the board and why both sets of claims should be able to proceed.

As the appealing party, most of the ACLU arguments are focused on the specific legal claims and defenses that are at issue in the case. There is a much broader context to what has happened to the Xi family and what they have experienced.

The amicus briefs that followed will provide more context about the broader discrimination that is reflected in the “China initiative” but predates it in the need for accountability and mechanisms for people to recover damages when they are harmed by the actions of the federal government and its agents and the consequences that the China initiative is having in terms of siphoning off important talent and scientific research from the US and undermining our economic strength and our national security.

Now that the opening brief has been filed, the government will be filing its brief on April 8, and then the plaintiffs (ACLU and the Xi family) will have a chance to respond about two or three weeks later in a typical schedule. The court will schedule arguments in the case basically at its discretion. So it could be sometime in the summer and if there is a summer break, arguments may start in the fall.

On the “China initiative” announcement, there has been no accountability for people who were harmed by that initiative, or those who were harmed beforehand. There has not been any explanation for how we got to this point. The statement had no explanation for how the FBI has been conducting investigations and what has led to this really stark number of failed prosecutions of Asian American scientists and researchers.

ACLU thinks this case is part of that effort.
Adam Shelton and the Institute for Justice

The Institute for Justice (IJ) is a national nonprofit public interest law firm. IJ files cases across the country in both state and federal courts under both state constitutions and the Federal Constitution under four general areas such as economic liberty such as occupational licenses, private property rights, eminent domain, and forfeiture; free speech; and educational choice cases.

In recent years, IJ has started a couple projects, one of them being the project on immunity and accountability. Through that project IJ seeks to hold all government officials at both federal and state level accountable when they violate constitutional rights of individuals through what is known as section 1983 and what Patrick described as Bivens.

IJ has litigated these cases both directly and with the filing of amicus briefs. Adam noted that the courts make it very hard to file and go forward on Bivens claims against individual federal employees. IJ currently has two outstanding petitions at the Supreme Court waiting for action.

As IJ continues to fight for the legitimacy of Givens, it also noticed the Federal Torts Claims Act (FTCA) lawsuits directly against the government are really the only alternative remedy for individuals, when their rights are violated by a federal employee.

IJ has noticed a disturbing trend with the “discretionary function exception” to the FTCA, which has been interpreted broadly and threatens to swallow up the FTCA as a whole.

There is one special area of concern with constitutional violations. If a federal employee committed a tort and a constitutional violation, there is general belief that “discretionary function exception” cannot apply because federal officials do not have the discretion to violate the Constitution.

Two circuit courts – the seventh and the eleventh circuit – have recently held otherwise. However, the third circuit, where this case is, fortunately has long standing precedent that says that “discretionary function exception” cannot apply when the tort also violates the Constitution.

But the district court here attempted to get around that precedent by bringing in qualified immunity into the analysis.

The IJ amicus brief focuses on two main areas. First, IJ argues that the third circuit’s precedent is correct that if an action violates the constitution that necessarily cannot be discretionary. IJ goes through Supreme Court precedent and explains why the
Supreme Court precedent supports that ruling. IJ also explained why the seventh and the eleventh circuits are wrong because they misunderstand the role that the constitution plays in the FTCA application.

IJ also argued that the importation of qualified immunity analysis is wholly inappropriate in the FTCA context. Qualified immunity as we know it today was clearly invented by the Supreme Court in 1982 in the case Harlow v Fitzgerald. The Supreme Court worried that policies holding federal officials directly accountable by requiring federal officials to pay damages might leave federal employees to enforce federal laws with less vigor. So they created an immunity doctrine which prevents them from being held personally liable. Under the FTCA, no federal officials or individuals can be held personally liable to pay damages. It will be the federal government itself that is required to pay damages.

So IJ also argues that qualified immunity is entirely irrelevant in this context.

Therefore, in the context of the FTCA, when a federal official violates the constitution, discretionary function exception is categorically inapplicable.

**Francis Slakey and the American Physical Society**

“Slake” explained why APS – an organization of physicists, human rights, and science and not lawyers - for filing an amicus brief. “While Professor Xi was the one who had to suffer the handcuffs, the wider scientific community has felt their grip.” There have been several negative quantifiable impacts on US leadership in science as a result of the wrongful arrests of Professor Xi and other scientists.

APS recognizes that the unauthorized transfer of US-based knowledge or expertise to other countries does pose a threat to national security. APS supports the federal government making concerted efforts to address those threats, but for those efforts to be productive, there must be accountability when they go wrong. There must be accountability for the wrongful arrest of Professor Chen. And we have data that shows why.

First, the wrongful arrest of Professor Xi and others hinder our nation's ability to attract international graduate students and scientists. That is not notional. It is happening. According to a recent APS survey of international physics graduate students and early career scientists who chose not to come to the United States, nearly half of them say it is because the US is unwelcoming to foreigners. But even worse than that for the international students who do come here, more than 40% tell us that the US government's current approach to research security makes it likely that they will leave the US.

These two survey results are a clear indication that the US government's approach to research security, which includes the wrongful arrest of Professor Xi, are negatively impacting the US’s ability to retain and attract international scientific talent.
Second, the wrongful arrest has a chilling effect on international scientific collaboration that would benefit the United States. Again, this is not notional. It is happening. According to a recent survey, nearly 20% of physics professionals in the US have withdrawn from international collaborations due to federal research security actions. They are not ceasing their international collaborations because they have done anything wrong. Some university professors are being advised by administrators to cease collaboration with China simply to avoid the possibility of scrutiny from science agencies.

To remain competitive, the US has to capitalize on the two key advantages - being a destination of choice for the world's best and brightest and providing an environment that encourages collaboration.

Unfortunately, the wrongful arrest of Professor Xi contributes to the loss of both of those US advantages. The data shows why that is the case.

Simply put, Professor Xi’s wrongful arrest echoes across the scientific community and it does broad damage to the US.

On accountability, if the lack of accountability for the wrongful arrests were to continue, the international perception would understandably be that the US federal government is not concerned by the damaging mistakes it is making. The wrongful arrest could continue to occur. Those negative perceptions would continue to damage US science.

From the APS perspective, the negative perception of injustice and ethnic profiling that is created by the wrongful arrest of Professor Xi must be replaced by a perception of justice and accountability.

And it was for those reasons that APS supported Professor Xi’s case to hold the US government accountable for his wrongful arrest.

**Jiny Kim and Advancing Justice | AAJC**

Jiny highlighted the Anti-Racial Profiling Project at Asian American Advancing Justice | AAJC to be a part of this robust coalition, working toward the end of the China initiative and ending this government practice of racial profiling.

Professor Xi’s case preceded the China initiative, and these government actions are not going to stop immediately without scrutiny, vigilance, and ensuring that the implementation of the changes AAJC wants to see take place. Professors Xi’s case is one piece of the future work that needs to be done.

In this case, the role at Advancing Justice | AAJC was to show solid, broad Asian American, Asian immigrant, and Arab, Middle Eastern, Muslim, and South Asian
(AMEMSA) communities support for professor Xi’s case. We all share in the serious concerns regarding the violation of our communities’ civil rights.

AAJC is committed to holding our government accountable for its unjust actions.

AAJC together with affiliate Asian Law Caucus (ALC) in San Francisco led a total of 72 Asian American organization civil rights groups, science associations, and academic groups to file an amicus brief and support Temple University Professor Xiaoxing Xi’s appeal to reinstate his claims for damages against the US government for their discriminatory investigation and prosecution.

The brief laid out the recent 20-year history and by recent I mean, over the last 20 years because history of racial discrimination against Asian Americans – racial profiling, targeting, surveillance of Chinese American and immigrant scientists, as well as data on the stark contrast and scrutiny of Chinese American scientists and researchers compared to the scrutiny of the broader academic community.

The brief also laid out the concrete harms caused by the government’s actions, including losing grants and facing significant challenges in obtaining research funding for the individuals targeted.

Not only did AAJC and ALC have resounding support from a record number of organizations, but there was also incredible diversity in the organization’s represented, including faculty associations, civil rights groups, and more. In particular, Jiny lifted up and appreciated the solidarity from the many Japanese American and AMENSA groups who see the same parallel in the profiling that their communities have and continue to face.

It is critical that our communities stand together in solidarity in the face of the governments of this abysmal track record on the treatment of Asian American immigrant communities, often scapegoating our communities as national security threat, all the way back to the Chinese Exclusion Act, the incarceration of Japanese Americans during World War Two, to post-911 surveillance and now today.

This amicus brief showed that the Asian American community, along with civil rights and academic groups are standing in solidarity with Professor Xi and his family and calling for government accountability.

This is just the beginning. AAJC will continue to be vigilant and monitoring future government action because the end of the China initiative is just one milestone toward
that future goal of ensuring that race-based profiling targeting, surveillance, and prosecutions need to stop.

6. Anti-Racial Profiling Project and Related Activities - Asian Americans Advancing Justice | AAJC

a. Speaker: Jiny Kim, Vice President of Policy and Programs, Advancing Justice | AAJC

- Advancing Justice | AAJC: Anti-Racial Profiling Project
- Legal Referral Service: Contact 202-935-6014 using the Signal app for attorney referrals. AAJC staff can assist you in Mandarin Chinese and English.

Jiny reported that a briefing was held after Matt Olsen announcement regarding the China Initiative. About 70 different organizations participated.

In terms of what the announcement meant and what it means for the future, AAJC will continue to push for DOJ reforms, broaden and strengthen the coalition with other communities that are impacted by similar practices by the government.

In mid-March, AAJC, APA justice, and other members of the coalition will be conducting a town hall, that will provide community members with the space for discussion and to raise questions that many may have. [Note the townhall is now scheduled for March 17.]

AAJC will continue to work with impacted persons to meet with congressional members and push for congressional oversight of agency action to make sure that the end of the China initiative does not mean an end just in name only.

AAJC will continue active engagement with the administration, the Department of Justice, and all the other federal agencies that are involved in grant making that impact the individuals that are often targeted. AAJC and the coalition are also actively working on efforts related to NSPM-33 and the implementation guidance with federal grant agencies to make sure that our communities do not get caught up in this flawed system of surveillance and targeting.

Ending the China Initiative is a good first step. The next step is making sure that the changes actually happen internal.

7. Q&A and Discussions
8. Next Meeting
   - Next Meeting: Monday, April 4, 2022