2022/06/06 APA Justice Meeting

APA Justice Meeting – Monday, 2022/06/06
11:55 am Eastern Time / 8:55 am Pacific Time

Final Agenda

0. Introduction of New Speakers

   a. Tobin Smith, Vice President for Science Policy & Global Affairs, Association of American Universities (AAU)
   b. Patrick Linehan and Michelle Nasser, Defense Attorneys for Southern Illinois University Professor Mingqing Xiao
   c. Hanming Fang, Joseph M. Cohen Term Professor of Economics, University of Pennsylvania

1. CAPAC updates

   a. Speaker: Nisha Ramachandran, Executive Director, Congressional Asian Pacific American Caucus (CAPAC)

Nisha reported on two recent CAPAC activities:

   • **ODNI Report.** The Office of the Director of National Intelligence (ODNI) released an overdue report after an inquiry was made by Reps. Ted Lieu, Judy Chu, Ed Case, and Adam Schiff. The report regarding the privacy, civil liberties, and civil rights of Americans of Chinese descent was due two years ago. CAPAC is studying the report at this time.

   • **Bipartisan Innovation Act.** Conference continues in Congress to reconcile differences between the Senate’s United States Innovation and Competition Act (USICA) and the House’s America COMPETES Act. There are a handful of problematic provisions specifically related to Asian American civil rights in the Senate bill. CAPAC is going through them in depth, as well as recommending alternatives, frequently pulled from the House bill in the conference process. CAPAC is making sure that Senate and House leadership, as well as the committees involved are aware of these changes. The concerns cover issues of Chinese scientists and researchers. Once the official letter is finalized, APA Justice will help to share copies. CAPAC Chair Rep. Chu and seven other CAPAC members are part of the conference process, which will likely continue for weeks.

2. Association of American Universities and Its Activities

   a. Tobin Smith, Vice President for Science Policy & Global Affairs, AAU
As the Vice President for Science Policy & Global Affairs at the Association of American Universities (AAU), Toby oversees matters related to science and innovation policy, broader impacts of science, and AAU’s international activities, including AAU’s work on immigration, open science and research security and integrity.

AAU represents the Presidents and Chancellors of 63 leading research universities in the United States and 2 in Canada. There are a few more public universities than private universities. AAU was founded in 1900.

Starting with the Cold War, AAU became more involved with issues related to research security. There was that the Soviet Union was trying to infiltrate U.S. universities, using various means to take back military secrets that would harm our national security. It opened the debate that led to a report by the National Academies chaired by Dr. Dale Corson, President of Cornell University. It resulted in the National Security Decision Directive 189 (NSDD-189) which was issued under the Reagan Administration.

NSDD-189 defines fundamental research, which should be open and to be shared publicly. Where the national security requires control, the mechanism is classification. Unlike industry, universities are in the information sharing business. Faculty get promoted by publishing, unlike industry that does a lot of proprietary research. AAU has defended this policy rigorously throughout time.

AAU has also fought on key immigration issues after 9/11. There were lots of processing delays. AAU worked with colleagues to fight the delays and is again actively engaged in these issues now.

In terms of the current AAU efforts related to research security, there is one point in time that started the most recent round with great concerns about China and theft of intellectual property. Back in February 2018, FBI Director Christopher Wray testified in the Senate Intelligence Committee. He was asked by Florida Senator Marco Rubio to which Wray responded that China uses scientists and students as “non-traditional collectors” of information.

Toby said that was the moment his second full-time job started.

This issue just took off. Soon there was a hearing called Scholars and Spies in the House and it has been going on ever since. The bottom line of what is driving is, according to Toby, US policy towards China – 40 years of the engagement policy that was started under China - is changing. There is a view in the U.S. that policy has not worked effectively.

Given that we have the most authoritarian leader that we have seen in recent years in charge in China, there is a view that communism and capitalism could not work together and the past policy has not been worked effectively. It caused a lot of policy re-examination and led to some of the policies that we have seen, such as the “China Initiative.”

We have seen these concerns coming from the government. AAU has dealt with them on the Confucius Institutes on the soft power side. One AAU university continues to maintain a Confucius Institute although there were several a few years ago.
There are also concerns about talent recruitment programs, particularly those like the Thousand Talent Program. It has been a problem when AAU looks at non-disclosure, which has caused issues for the faculty. One of the challenges has been: if you go back 5, 6, or 7 years ago, those programs were even encouraged and promoted by the AAU universities.

One of the problems is that there were money that went directly to faculty and did not go through the institution. This led to the situation where many faculty did not report to their institutions or the federal agencies and led to some of the cases brought under the “China Initiative.”

Bottom line is that concerns about this in Congress are significant. They are bipartisan in nature although we are in such polarized time that the Republicans do not want the Democrats to look weaker on China.

Toby and AAU have been fighting against a lot of very problematic policy decisions, which will help scientific research advance as opposed to actually harming our ability to do so.

Toby then turned to the USICA and the COMPETES Act. Some of the provisions are very troublesome and problematic. AAU is fighting to find the right balance between science and security.

The reason we need to secure research is to protect the very values that we have and the openness which has been a hallmark of the US system. One of the reasons we have been successful in scientific research is because we have been open. We ought not to defend against that openness or try to start using practices that are pursued by countries such as China, where there is not an open society and there is a lot of restrictions on what you can say, what you cannot say, or what you can publish. We do not want to go that way.

Another issue is the importance of international talent. In its interactions with the intelligence community and Congress, AAU wanted to make clear that it takes research security seriously. AAU has encouraged campuses, and many of them have, to take steps to better track conflict of interest and conflict to commitment; strengthen those requirements; enhance in their communications and training of faculty on issues they should be concerned about, including things to avoid especially in signing certain agreements.

AAU has been meeting on a quarterly basis with representatives from the FBI and also with the intelligence community. There is always a total misunderstanding of what the objectives of the academic community and what the intelligence community thinks when you get into these discussions. The intelligence community thinks first about security. The academic community thinks first about science.

There is usually a good middle ground that Toby believes is getting closer to where we need to be for everybody to be on the same page. AAU supported specific regulatory, administrative, and legislative efforts that would be helpful.
The discussions have been very active and engaging on concerns about the threats and Chinese and Asian Americans’ feeling being targeted by the government, specifically on the “China Initiative.” Toby is very happy that the “China Initiative” has been rolled back. However, Toby and AAU still do not know what it means and what it looks like.

Toby also shared best practices, including surveys of AAU members in terms of what research security looks like. There is a presidential research with the Association of Public Land Grant Universities. A working group of 17 presidents and chancellors is engaged in this effort. They have developed a set of important principles on what the government and universities should value, such as the importance of international talent, zero tolerance for harassment and coercion, transparency, inclusion and diversity, pushing back on any practices that would be discriminatory in nature, and the importance of openness in advancing science.

The way Toby understands the end of the “China Initiative,” it will be left to research agencies to look at what administrative actions they might take when there was a failure to report or something more egregious that might be criminal. Toby and AAU want that process to be well defined and transparent, including a due process for faculty when agencies take action in a way to engage and make sure that they are not being targeted or unfairly treated. It is a topic that Toby and the AAU’s vice presidents for research groups meet and talk regularly. It is a topic of great concern.

Toby then talked about some of the legislative and administrative issues involving the National Defense Authorization Act (NDAA). The interagency working group that led to the creation of the National Security Presidential Memorandum 33 (NSPM-33) was an effort that AAU put forward to try to get intelligence agencies talking with research agencies.

Oftentimes, they do not talk. That leads to problems. In some cases, the intelligence community did not consult with research agencies and made big mistakes as a result of it. Toby and AAU have also pushed and promoted that non-disclosure must be made very clearly to be statutorily prohibited. Make it clear that you have to disclose, but make sure that the definitions must be correct.

Toby drew particular attention to two items in Section 223 of the FY21 NDAA that he and AAU were quite pleased.

One is the NSPM-33 implementation guidance that came out in January of this year. It states that any practices that would be discriminatory are prohibited.

Building upon that, Toby and AAU are very interested in what the actual consequences for violations of non-disclosure and make sure they are clarified so that the process is transparent and fair.

One of the concerns Toby has on Capitol Hill as related to the Senate’s USICA is the new requirement on receipt of gifts and contracts that might involve critical technologies and are subject to The Committee on Foreign Investment in the United States (CFIUS) review.
CFIUS review is currently applied to foreign companies that might be taking over US companies where there might be critical or sensitive technologies involved that the US does not want to lose.

This would apply to gifts and contracts for universities that are in excess of $1 million. Toby and AAU are very concerned that it is not the right process to use here.

Toby and AAU are also concerned about another provision that many are not aware of. The bill would require faculty to report any gift or contract they receive from a foreign country at a $0 threshold and to maintain the records on a searchable database.

It could be a coffee mug. It could be a lunch.

If you want to stop and slow down international science collaboration, that is the way to do it. Toby and AAU are very concerned about this provision and are pushing hard against it.

In closing, Toby returned to the importance of international talent. He and AAU recognize that immigrants have made and continue to make contributions to our nation. There are recent reports that a majority of artificial intelligence companies are started not by native-born U.S. citizens but by immigrants. A large percentage of those who work in our defense and industrial base are foreign-born. There is a reason why China has created talent recruitment programs, the very ones that Congress and our intelligence community are so concerned about. It is because the US for a long time has had the best talent recruitment program of the world.

It is partially the US values. It has not always been helped by our immigration policies on which Toby is working to improve. We have the top universities in the world. You can come here, work with top scientists, and many who have come here agree and buy into our values. They want to stay. They do stay. And they contribute to the US economy.

Toby will continue to fight for all these issues at AAU. Meredith Asbury was also present in the meeting on behalf of AAU.

3. Update on The Case of Southern Illinois University Professor Mingqing Xiao

a. Speakers: Patrick Linehan and Michelle Nasser, Defense Attorneys for Professor Mingling Xiao

- APA Justice: Impacted Persons: Mingqing Xiao

Dr. Xiao was the last academic indicted under the now-defunct “China Initiative.” He is a Mathematics professor at Southern Illinois University (SIU) in Carbondale. His case went to a jury trial on April 25. Patrick Linehan is a partner at Steptoe & Johnson LLP. Michelle Nasser is a partner at Dowd Bennett LLP. They provided an objective update of the case.
Dr. Xiao was originally indicted for three counts in early 2021 - two counts on wire fraud and one count on making a false statement to a government agency. All the counts arose from Dr. Xiao allegedly failed to disclose certain grants and certain relations he had with two different universities, both in his original National Science Foundation (NSF) grant application and a follow-up email exchange with a NSF program director.

It was originally scheduled to go to trial in October 2021. About one week before the trial was to begin, the government filed a superseding indictment, adding four counts of tax-related offenses. These were offenses related to a bank account in Dr. Xiao’s name allegedly with money deposited by one of the universities claimed by the government that Dr. Xiao allegedly failed to disclose the foreign bank account in his tax returns and to file an associated Foreign Bank and Financial Accounts Report (FBAR).

Dr. Xiao filed a motion to dismiss based almost exclusively on the Fundamental Ambiguity Doctrine, arguing that the NSF application and tax return were so incomprehensible to a reasonable person that they do not justify a prosecution. That motion was denied.

The case went to trial in late April of this year. It was a 5-day trial. It was an all-women jury. The government put on 7-8 witnesses, and most of them were government agents. Two noteworthy witnesses were (1) a NSF official who talked about the importance of the questions in the NSF grant application for which Dr. Xiao was alleged to have answered falsely, and (2) the program director who reviewed Dr. Xiao’s grant application. Her testimony was intended to establish the alleged falsities were material to her decision to grant the application.

At the end of the government’s case, the legal team filed a motion for acquittal to all counts. The Court granted acquittal to the first two counts of wire fraud because in its view the government failed to show or produce evidence that Dr. Xiao intended to defraud NSF. The judge denied the motion as to the third count of making a false statement as well as the other tax-related offenses.

Dr. Xiao’s legal team put on a narrow case and called two witnesses, both of whom were SIU professors. After receiving instructions, the jury came back after three hours and acquitted on the third count of making a false statement but convicted counts 4 through 7 of the tax-related charges. With the acquittal of Count 3, Dr. Xiao was cleared of all charges related to his grant application. The legal team considers it a victory.

The legal team has filed a motion of acquittal on the tax-related charges. The core argument is that the government failed to present sufficient evidence for a reasonable jury to find that Dr. Xiao’s failure to acknowledge the bank accounts on his tax returns and failure to file a report was not willful.

Sentencing is scheduled for August.

The docket containing all the court documents for Dr. Xiao’s case is publicly available via CourtListener here: https://bit.ly/3xwbY9N. Michelle commended Patrick for the Rule 29 motion that was submitted in the middle of trial right before the defense presented its case. It goes into details about facts and
evidence. The legal team also filed a thorough post-conviction motion that goes through the facts of the trial.

Patrick and Michelle did not take questions because post-trial motions, sentencing, and appeals are pending, but Patrick is available to respond to questions if you send them via his email at plinehan@steptoe.com.

4. Red Scare? A Study of Ethnic Prejudice in the Prosecutions under the Economic Espionage Act

a. Speaker: Hanming Fang, Joseph M. Cohen Term Professor of Economics, University of Pennsylvania


Professor Fang is an economist who has done extensive work on discrimination and affirmative action. His study on the Department of Justice's prosecutorial decisions in the application of the Economic Espionage Act is now posted as a Working Paper under the National Bureau of Economic Research. The working paper "provides the first systematic evidence that the Department of Justice's prosecutorial decisions in the application of the EEA may have been tainted by ethnic prejudice against Chinese, including American citizens of Chinese descent."

Hanming acknowledged the presence of attorney and researcher Andy Kim whose Committee of 100 white paper in 2018 inspired Hanming to conduct his research to produce additional results. They had chatted about the idea on the phone.

Hanming’s work prior to this project has been on similar topics about differentiating statistical discrimination from racial, ethnic practices in other contexts, such as racial profiling in motor vehicle searches, potential prejudice in the emergency room or department, or in the parole board release decisions.

The methods that Hanming uses have also been used in other studies.

The topic here is the Economic Espionage Act (EEA), which is a 1996 law passed during President Clinton’s administration. It criminalizes the theft of trade secrets and economic espionage as federal crimes. Prior to 1996, companies whose trade secrets were stolen could be protected only under civil lawsuits.

Andy Kim’s original 2018 study covered about 100 EEA cases. Hanming extended the study time period from 1996 to the end of June 2021, which includes 253 EEA cases, including 384 individual defendants and 35 corporate defendants.

Here are some basic results from the study.
First of all, consistent with what Andy found in his earlier study, Hanming found that the proportion of Chinese-name defendants charged under the EEA rose dramatically after 2009. Before 2009, after 18% of the defendants charged with EEA crimes under US codes 1831 and 1832 had Chinese names. Since 2009, more than 50% of EEA defendants have Chinese names.

For the same time periods, the proportion of western names declined from 59% before 2009 to 28% thereafter. Defendants of other ethnicities, including corporate defendants, remained more or less stable at around 21%.

So there is a higher fraction of EEA charges against Chinese-name defendants. The next question is: what does that tell us? Does it indicate some degree of ethnic prejudice? Or is this justified by higher underlying criminality among the Chinese?

Economists have developed methods to differentiate statistical discrimination from prejudice. The idea belongs to Nobel Laureate Gary Becker, who basically come up with the idea of an outcome test. The idea of an outcome test is basically to test whether prejudice or statistical discrimination is underlining the differential fraction of Chinese versus other names being prosecuted by looking at what happened to these cases.

The idea is simple. If Federal prosecutors engage in ethnic prejudice against Chinese defendants, then the cases against Chinese defendants will have higher probability of being dismissed in court or acquitted by jury. Why is that? If the prosecutors have prejudice against ethnic Chinese, they are more willing to file a charge under flimsy or weak evidence.

That will be reflected, under the assumption that the court or the jury is more or less impartial, by the cases against Chinese defendants being dismissed or found acquitted at a higher rate.

That is the outcome test idea. Rather than just focusing on more than 50% of the EEA cases charged against the Chinese, Hanming looks at what happened to these cases.

Hanming’s study finds that Chinese name defendants were 30.2% more likely to have their cases dismissed or acquitted, compared to other defendants. The Chinese name cases were acquitted or dismissed at a 30% rate, versus 18% for non-Chinese name cases. They are 30.5% less likely to be found guilty on EEA related charges than defendants with non-Chinese names.

This is the first major finding. While there was a higher fraction of cases brought against Chinese defendants, these cases are more likely to be dismissed or acquitted compared to other defendants. This result confirms Andy Kim’s findings in his earlier paper.

Hanming also looked at the stock market reactions to case-related news.

The idea is that maybe the stock market is more rational. They can be more objective. After all, the investors in the stock market are interested in making money. There is no room for them to engage in ethnic prejudice in the stock market.
Hanming found that for publicly listed firms, whose trade secrets were allegedly stolen by the charged defendants, the stock market reacted much less forcefully to the news if the defendants were of Chinese descent.

What it means basically is that, when a case against a Chinese defendant is announced by the Department of Justice, the stock market will examine the charges and then react. Investors will react to the trade secrets that were allegedly stolen. When the trade secrets were allegedly stolen by a Chinese defendant, the stock market basically reacted with a shrug. This is indicating that the stock market perceives that there is a higher dismissal rate against Chinese defendants and therefore reacts less to those cases.

Summarizing these two pieces of evidence, Hanming’s findings reinforces Andy Kim’s 2018 results. They are independently derived. Hanming deliberately decided not to collaborate with Andy on this project because he wanted to have independent examination with a broader dataset.

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

a. Speaker: Gisela Kusakawa, Assistant Director, 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.
   • 2202/05/31 Advancing Justice | AAJC: From Japanese American Incarceration to the China Initiative, Discrimination Against AAPI Communities Must End
   • Introduction of Tahir Imin, new Coordinator for the Anti-Racial Profiling Project

Gisela commented that a lot of work moving forward, especially with the Department of Justice, depends on future administrative advocacy work with the Office of Science and Technology Policy (OSTP) and multiple federal agencies.

Advancing Justice | AAJC, ACLU, and a couple of impacted persons and their attorneys met with OSTP along with multiple Federal agencies. This was closing out the official engagement period. Gisela expects that there will be more engagement sessions in June and July for new organizations, and hopefully reconnection with older organizations that they have already touched base in August. Gisela also understands that there may be a comment period coming up this summer that will give folks an opportunity to provide their input as well if they have not already been engaged in these engagement hours.

Advancing Justice | AAJC is focusing on four important areas:

1. Long-term engagement
2. Oversight and accountability
3. Transparency
4. Cure period

As a civil rights organization, these are the most crucial parts for Advancing Justice | AAJC.

On long-term engagement, Gisela hopes that OSTP will consider this initial implementation as a pilot, and provide more than just one comment period, and hopefully, some sort of reporting, perhaps in the first 6 months on the successes and failures of the implementation.

Gisela’s perspective is to consider that the Asian American and immigrant community are directly impacted by this implementation. She wants to have this continuous engagement and discussion that does not end simply once the implementation plans are set out.

On oversight and accountability, the non-discriminatory section of the OSTP guidance is absolutely crucial. That was the only part of the guidance that was mandatory. Advancing Justice | AAJC is asking for more teeth and oversight - what exactly are the measures and avenues in which people could submit a complaint, whether it be some office or some sort of accountability.

Gisela understands that it would be difficult for people to file any concerns directly with the Federal agencies.

In addition, Gisela hopes that when it comes to anti-biased training that they do connect with Asian American civil rights organizations. Anti-Asian hate has been an issue across the country. Anti-bias training is something that many civil rights organizations have already invested time and resources in. It will be important for many of the Federal grant agencies to take our existing models when they are trying to create it internally.

Additionally, Gisela hopes that they can connect with many of the academic organizations such as the Asian American Scholars Forum to provide adequate training or scientific consultation for Federal agents and prosecutors.

When it comes to transparency, It is very difficult for many of our organizations to provide input without more information. That is something we are hoping can come from the Federal grant agencies.

One of the key things that many civil rights groups are working on is discouraging criminalization of unintentional or inadvertent or administrative errors. Gisela hopes that there can be some cure period where people can disclose past conduct that has not been illegal or perhaps even encouraged.

If folks are interested in this sort of work or providing comments in the future, please stay connected with Gisela, and she will make sure many of your ideas are shared with the coalition that includes APA Justice and many others on this call.

Gisela and Advancing Justice | AAJC are still working on some more discrete Federal agency meetings in the future. What would be very helpful is, if you have any poor experiences, whether it be with the FBI or some sort of Federal agency post “China Initiative,” please share your concerns.
Tahir Imin is the current Project Coordinator of the Anti-Racial Profiling Project at Advancing Justice | AAJC where he conducts legal referrals and intakes, as well as coordinating communications and outreach work, including managing media relationships.

If you believe that you are being targeted or profiled based on your ethnicity, you may contact Advancing Justice | AAJC at 202-935-6014 using the Signal app. A staff member from Advanced Justice | AAJC will reach out to you directly. Signal is used to better protect your privacy. It is an encrypted messaging app designed to never collect or store any sensitive information. It is free to download and use.

If you have trouble using Signal, please text only your name and a phone number to 202-935-6014 so that a staff member can contact you.


6. Q&A and Discussions

7. Next Meeting

July 4 is Independence Day. Our next monthly meeting will be scheduled for Monday, July 11, 2022.