

APA Justice Conference Call – Monday, 07/06/2020

**11:55 am Eastern Time/8:55 am Pacific Time**

**Join Zoom meeting: <https://us02web.zoom.us/j/82477126216>**

## Agenda

### 0. Introduction

1. [Margaret Lewis](#), Professor, Seton Hall Law School

Due to heightened interest in Professor Margaret Lewis' talk on the Department of Justice's "China Initiative," the meeting was conducted under the Zoom webinar format instead of the customary conference call format. It allowed broader participation. Video clips for this meeting are now available at <https://www.apajustice.org/call-summaries.html>.

We thank UCA for allowing us to use their Zoom service. We also thank Professor Steven Pei and Vincent Wang for their behind-the-scene work to make the meeting possible and successful.

### 1. CAPAC updates

Speaker: Krystal Ka'ai, Executive Director, CAPAC, invited

- a. NIH and FBI responses to [congressional requests](#) by 03/05?
- b. Other

Krystal reported that on April 15, NIH responded on April 15 and followed by a staff member briefing to the oversight committee in June. FBI responded on May 13, but a classified briefing has not been set due to the covid crisis. Both agencies denied racial profiling and claimed that their prosecutions were legitimate. NIH did admit that 80% of their cases were Asian Americans, mostly ex-pats from China. But without getting into the classified nature of their letters, NIH said that their cases were based on violations of at least one of the following reasons: (a) Undisclosed research support, (b) Undisclosed conflict of interest, and (c) Peer review violation.

On June 23, the White House Office of Science and Technology issued strengthened guidelines towards enhancing security in US research enterprise. A report on the Case amendment (clarifications on the civil rights of Chinese Americans) to the last year's Intelligence Authorization Act was due in June was pushed back to the Fall, again due to the pandemic.

### 2. Criminalizing China

Speaker: Maggie Lewis, Seton Hall law professor, confirmed

If "China Virus" is not acceptable, why is "China Initiative?" How the U.S. government's use of criminal prosecutions to address a broad "China" threat deviates from the foundational principles of the American justice system and what should be done.

- [Criminalizing China](#): to appear in Journal of Criminal Law and Criminology, Vol. 111, No. 1, 2020 (73 pages)

- 06/09 NCUSCR: [Audio: The U.S. Department of Justice's China Initiative](#) (1:00:38)
- 06/12 USC US-China Institute: [Video: Margaret Lewis On The DOJ's "China Initiative"](#) (1:14:05)

Professor Lewis opened by providing her background on studying criminal justice in the U.S. and China and expressed her concerns about the plight of Chinese Americans in these times of tension between the U.S. and China. She is pleased to be allied with the community.

Citations of foreign threats of economic threats began in the Obama administration, culminating in DOJ's "China Initiative" in November 2018. It is unusual, if not unprecedented, to name an initiative after a country. DOJ gave high priority by devoting time and resources, especially with AG Barr and FBI Director Wray. From February to June this year, FBI doubled its investigations from 1,000 to 2,000, but the numbers do not tell us whether it is due to increasing prevalence of criminal activity. There is no breakdown, such as whether they are economic espionage or peer review violations. The number feeds into the narrative that China is an existential threat without the tools to understand the real nature of the concern amidst the rhetoric.

In her 30,000-word law review article, Professor Lewis found that the China Initiative does not live up to the DOJ's own standard set for itself. First, the title of "China" is too expansive, more precise and thoughtful language is needed instead of connotating with the DNA of a Chinese person or the China-ness of a non-Chinese person. Second, the initiative fails the standard goals of deterrence, incapacitation, rehabilitation, and retribution as part of the justification for prosecution and resulting punishment. Empirical research and analysis, such as on AI, shows that heavy-handed over-deterrence approach cuts off benefits to or harms the U.S. While China is not an entity subject to criminal law, the initiative instead creates a bogeyman.

Professor Lewis provided 5 suggestions on what can or should be done:

1. A necessary but insufficient step is to remove the label "China" and adopt a country-neutral framework for non-discrimination reasons as well as to ensure the U.S. protection of certain interests from threats wherever they may come from. Using federal law and prosecution on peer review violations is too severe. DOJ and the scientific community should discuss drawing lines keeping fundamental research open science from IP protection to a real national security threat.
2. Curtail further criminalization of academic misconduct. The DOJ justice manual itself that non-criminal alternatives should be considered before pursuit of prosecution and punishment. Alternatives exists and can be strengthened such as improved auditing, grant oversight, and better education. There are also bipartisan concerns in Congress about over-criminalization in general.
3. Expand from a negative agenda into a positive one. Consider this to be a Sputnik moment. There are threats from China, but instead of create barriers, stop research, and protect existing IP, consider putting the U.S. in a more competitive space by investing more in our own research and come up with new and better IP. Get more country expertise, linguistic expertise, and other aspects to give counter-intelligence a more rounded view.
4. Push back on the ongoing prosecutions and those in the pipeline. Prosecutors are notoriously opaque even without national security concerns. Seeking more data and

information is necessary but keep expectations realistic. Information is always asymmetric. Selective prosecutions are extremely difficult to overcome.

5. There is a need for diversity, equity, and inclusiveness initiatives in DOJ. Implicit bias training, as an example, is necessary but not sufficient. “When officials talk about the China Initiative, they tend to say that they love the Chinese people, they welcome the Chinese people, and they are not being racist.” That is good but not good enough. It is not an antidote to all the training and all the other language put out there. They need to recognize that how their deeds are perceived and how their messages are heard. History has repeatedly showed how national security overwhelmed other values.

Professor Xiaoxing Xi, recipient of the 2020 Andrei Sakharov Prize, led off the Q&A session by citing the JASON report recommendation that alleged failure to disclose foreign ties and presumptive violations of academic integrity should be investigated and adjudicated by the funding agencies and academic institutions. He opined that these processes and procedures are in place as part of various alternatives to prosecutions. Most of the current China Initiative cases are about scientific misconduct, not for stealing secrets. Guidelines on disclosure are either not clear or non-existent while collaboration with China was encouraged only a few years ago. According to National Security Decision Directive 189 (NSDD-189), fundamental research is open and unrestricted. Barriers and over-deterrence stifles American innovation and competitiveness that will also inhibit attracting talents from around the world. Professor Xi raised these questions: Does the China Initiative make the prosecutors more reluctant to drop cases even when they are wrong? Do prosecutors have to get a win no matter what under the China Initiative?

From the floor, questions were raised about recommendations for non-profits to fight the China Initiative in addition Congress and the Courts, building allyship beyond the Asian American groups, and cooperation and coordination among scientific and community organizations. They were summarized into an overall question of what the Chinese American community can do about the China Initiative practices.

Another set of questions was on accountability: How to hold the government accountable for any case that eventually ends in dropped charges, dismissal, or a not guilty finding? What is the best policy instrument to remedy the victims?

For Professor Lewis’ response to these questions, watch the video clip at <https://www.apajjustice.org/call-summaries.html>.

### **3. Racial Profiling/Targeting updates**

- a. Speaker: John Yang, President and Executive Director, AAAJ | Asian American Justice Center, confirmed  
Update on Anti-Racial Profiling Project
  - [Justice in Policing Act of 2020 \(H.R.7120\)](#)
  - 06/19 [H. Rept. 116-434 – George Floyd Justice in Policing Act of 2020](#)
  - 06/18 [House Judiciary Committee Passes George Floyd Justice In Policing Act](#)
  - 06/17 [Senator Tim Scott: JUSTICE Act Introduced in United States Senate](#)

- 06/12 Science: [Fifty-four scientists have lost their jobs as a result of NIH probe into foreign ties](#)
- 06/10 [President's Commission on Law Enforcement and the Administration of Justice Continues Hearing on Community Engagement](#)
- b. 06/21 [Committee of 100 Guidelines for Political Candidates and Campaigns on China-Related Issues](#)

John followed Maggie's presentation by describing the deep dive of AAJC's work on the policy and legal side, such as collaborating with organizations such as ACLU and filing amicus briefs in court cases. John described three aspects of the Anti-Racial Profiling Project:

1. Know your rights when the university or the FBI knocks on your door.
2. Build a legal referral network with an understood fee structure.
3. Advocate in Congress in terms of legislation and DOJ/FBI in terms of what the cases look like.

On one level, career U.S. attorneys in DOJ try to do the right thing. There are also U.S. attorneys who are politically appointed. Career attorneys will unfortunately feel pressure from the Attorney General to take on certain cases in the China Initiative and what type of resolutions to contemplate in these cases. Organizations have various roles to play and deep dive such as foreign or economic policy.

AAJC is looking into more data and research into the cases to find out more about the common attributes, identify systemic problems, and change the narrative.

The general public also has a role to play such as in the political campaigns and in elections. While there is no certainty on what the next administration will do, the public can speak up and help to push for a better, more nuance approach to address the foreign threats, using a scalpel rather than a jack hammer.

#### **4. 2020 Policy Platform**

Speaker: Gregg Orton, National Director, National Council of Asian Pacific Americans, confirmed

2020 NCAPA civil rights national policy platform

- NCAPA: [2020 Policy Platform](#)

After listening to the perspectives from Krystal, Maggie, and John, Gregg described the NCAPA 2020 National Policy Platform as a comprehensive product of 37 national organizations. It is updated and published every four years. The civil portion of this year's platform includes racial profiling and discrimination as it relates to Chinese American scientists, as well as South Asians who face lingering fear from the consequences of 9/11.

The NCAPA platform ([https://www.ncapaonline.org/wp-content/uploads/2020/05/NCAPA\\_PolicyPlatform\\_2020.pdf](https://www.ncapaonline.org/wp-content/uploads/2020/05/NCAPA_PolicyPlatform_2020.pdf)) lays out the positions of the

Asian American community. NCAPA has ongoing conversations with political campaigns on the platform including the civil rights portion, which hopefully will have impact and leverage with the next administration.

Gregg welcomes feedback from all participants to add more details to the racial profiling and civil rights issues and make them as robust as possible. The platform is a living document that is continuously updated to make the best case in front of policy and decision makers.

## **5. 2020 Census**

- a. Census Bureau: [National self-response rate](#) as of July 1: 61.8%
- b. 06/30 Politico: ['They basically swallowed hard': Trumpy Census Bureau hires revive fears of political meddling](#)

## **6. Catch-up on all developments**

- [Website](https://www.apajustice.org/): <https://www.apajustice.org/>
- [LinkedIn](https://www.linkedin.com/groups/12395028/): <https://www.linkedin.com/groups/12395028/>
- [Facebook](https://www.facebook.com/groups/386238778398753/): <https://www.facebook.com/groups/386238778398753/>

## **7. Upcoming Events**

- a. 07/11 AAUC webinar: [AAPI Solidarity: Calling on Full Civic Engagement](#)
- b. 07/29-08/01 OCA Summit - Resilient Communities
- c. 08/08 AAUC webinar: Celebrating 100 years of Women's Suffrage with National Organization for Women
- d. 09/12-26 2020 [National Civic Leadership Forum on AAPI Unity](#): The Power of We. AAUC is soliciting ideas and proposals from all AAPI organizations to participate in this common platform to build trust and solidarity

## **8. Next Call**

- a. Next Call: 2020/08/03

Email Jeremy Wu at [Jeremy.S.Wu@gmail.com](mailto:Jeremy.S.Wu@gmail.com) or Vincent Wang at [wang177@gmail.com](mailto:wang177@gmail.com) to submit agenda items. Thank you.