

November 8, 2021

/via email/

The Honorable Eric S. Lander  
President's Science Advisor and  
Director of the Office of Science and Technology Policy  
The White House  
1600 Pennsylvania Avenue NW,  
Washington, DC 20500

## **Re: Comment on Research Security, Open Science, and Racial Profiling**

Dear Dr. Lander,

The APA Justice Task Force (APA Justice) is a group of volunteers formed in 2015 to build a sustainable ecosystem to address racial profiling issues and to facilitate, inform, and advocate on selected issues related to justice and fairness for the Asian American community. It was created after a series of innocent Chinese American scientists in the federal government, academia, and private industry were wrongfully accused of passing secrets to China.<sup>1</sup>

For the past six years, APA Justice has been listening and collecting inputs and comments from academics, community and scientific organizations, think tanks, congressional staffers and members, attorneys, reporters, concerned individuals, and impacted scientists and researchers. They share their views and on-the-ground real-life experiences that are captured in our comprehensive website at <https://www.apajustice.org/> through monthly meetings, newsletters, webinars, and direct communications.

We submit this response to your call for comments on protecting research security while maintaining the core values behind America's scientific leadership, including openness, transparency, honesty, equity, fair competition, objectivity, and democratic values.<sup>2</sup>

While you have aptly pointed out that we must assiduously avoid basing policies or processes on xenophobia or prejudice, this has unfortunately already happened to bring us to the current state.

In this regard, research security cannot be discussed in isolation without taking into account the current injustice and systematic discrimination when the lives and careers of many Asian American scientists have been seriously damaged and the threats to open science and the future of American leading are materializing.

Placing responsibility solely on researchers is misguided when federal agencies are direct contributors to the present situation. We believe that without addressing the root causes of this national disease, treatment of some of the symptoms will have limited effectiveness, if not compounding the problems further.

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<sup>1</sup> APA Justice. Historical Background and Our Purpose. <https://bit.ly/3b42Miw>

<sup>2</sup> The White House (2021/08/10). Clear Rules for Research Security and Researcher Responsibility. <https://bit.ly/37UiOKo>

We respectfully request the Office of Science and Technology Policy (OSTP) to take a holistic approach to balance research security, open science, and protection of civil rights and civil liberties of Asian Americans and immigrant communities by honestly addressing the existing conditions and the core systemic causes and upholding the fundamental values of America’s scientific leadership.

In particular, in responding the implementation of the National Security Presidential Memorandum (NSPM-33), we urge OSTP to

- Harmonize disclosure policy across funding agencies to minimize the confusion to researchers.
- Set the requirement of disclosure at a reasonable level to avoid overly burden on the researcher.
- Leave the oversight and enforcement functions of the universities to funding agencies, not law enforcement. The universities and research institutions do not have the resource and appropriate level of authority to adopt and implement the principles and best practices of evidence-based policymaking. The Department of Justice does not have the knowledge and expertise to make judgment on leading-edge science and technology research and the complexity of international collaboration.
- Support the call to end the “China Initiative” to remove the oversight and enforcement roles and responsibilities from the Department of Justice.
- Lead an independent review of the ongoing investigations and practices by federal agencies to repair the damage that the “China Initiative” has done.

## **Background and Additional Description**

On November 3, 2021, APA Justice sent an open letter<sup>3</sup> to Attorney General Merrick Garland calling for the end of the “China Initiative.” It was co-signed by 841 faculty members from 202 universities in all 50 states and Puerto Rico. These co-signers joined 579 colleagues from University of California Berkeley, Temple University, and Princeton University in endorsing the original letter sent by 177 Stanford University faculty members, including 8 Nobel laureates, on September 8, 2021.<sup>4</sup>

On November 7, 2021, the number of endorsers nationwide has increased to 1,747 from more than 210 institutions across the nation. They agree on three fundamental flaws of the “China Initiative:”

- It disproportionately targets researchers of Chinese origin,
- In most of the China Initiative cases involving academics, the alleged crime has nothing to do with scientific espionage or intellectual property theft,
- The China Initiative is harming the U.S. science and technology enterprise and the future of the U.S. STEM workforce.

We are certain that many others have expressed these and additional concerns about the civil rights and civil liberties of Asian Americans and immigrant communities. For example, the American Physical Society sent a letter to you on September 1, 2021,<sup>5</sup> and a coalition of 13 Asian American and Chinese American university organizations sent a letter to President Biden on November 1, 2021.<sup>6</sup>

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<sup>3</sup> APA Justice (2021/11/03). Letter to AG Garland Calling for the End of the “China Initiative.” <https://bit.ly/3k59Kc4>.

<sup>4</sup> Winds of Freedom (2021/09/08): Stanford Faculty Members Letter to AG Garland Calling for the End of the “China Initiative.” <https://bit.ly/3GCjyUD>

<sup>5</sup> American Physical Society (2021/09/01). Letter to AG Garland and OSTP Director Eric Lander. <https://bit.ly/3i3EpWg>

<sup>6</sup> Federation of Associations of Chinese Professors (2021/11/01). Letter to President Biden. <https://bit.ly/3kgfYVW>

Earlier on January 5, 2021, APA Justice joined Advancing Justice | AAJC and the Brennan Center for Justice at New York University Law School in a letter to then President-Elect Biden.<sup>7</sup> This was followed by a petition with 30,000 signatories to President Biden on April 9, 2021.<sup>8</sup>

Launched by the Department of Justice (DOJ) on November 1, 2018, the “China Initiative” purportedly combats economic espionage and trade secret theft. Asian Americans and the academic/scientific communities are not naïve about the need for national security, but are deeply concerned about the ill-conceived and counter-productive approach, including the scapegoating of Asian Americans.

The label of “China Initiative” itself is as unacceptable as the “China Virus” because it incites anti-Asian hate and discrimination in addressing a broad issue that is not limited to one nation. We understand that it is unprecedented for DOJ to name an initiative to specifically target a country.

In addition, the new term of “Non-Traditional Collectors” used by Christopher Wray, Director of the Federal Bureau of Investigation (FBI), sends the same old stereotypical messages such as “Thousand Grains of Sand” during the persecution of Dr. Wen Ho Lee two decades earlier, “Fifth Column” during the internment of Japanese Americans in World War II, and “Communist Sympathizers” during the Red Scare of the McCarthy era. They play on xenophobic fear to propagate the image of Asian Americans as untrustworthy “perpetual foreigners” in our nation that is ironically built mostly by immigrants including Chinese American scientists. Words matter.

To date, DOJ and FBI have not defined the scope and boundaries of the “China Initiative.” There is not even an official count of how many prosecutions in DOJ or how many investigations in FBI under the “China Initiative.” The ambiguity creates confusion and allows manipulation regardless of intention.

While DOJ and FBI repeatedly deny use of race, ethnicity, and national origin to target Asian Americans, DOJ and FBI, they are not supported by available data and empirical evidence that increasingly show the opposite.<sup>9</sup>

Federal agencies have not responded to numerous congressional and public requests and inquiries for more transparency and accountability.

In one situation, a report required by law concerning the civil rights and civil liberties of Asian Americans can be ignored by the Office of the Director of National Intelligence for 17 months and counting without consequences.<sup>10</sup>

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<sup>7</sup> Advancing Justice | AAJC (2021/01/05): Joint Letter to President-elect Joe Biden to End DOJ's "China Initiative." <https://bit.ly/2Z1pBha>

<sup>8</sup> Advancing Justice | AAJC (2021/04/09): Joint Letter to President-elect Joe Biden to End DOJ's "China Initiative." <https://bit.ly/2Z1pBha>

<sup>9</sup> APA Justice. Data and Information Sources. <https://bit.ly/3vYRK7W>

<sup>10</sup> Section 5712 of the FY20 National Defense Authorization Act (NDAA) (pages 989-990 <https://bit.ly/3eVEHgY>) mandated the Director of National Intelligence, acting through the Office of Civil Liberties, Privacy, and Transparency, to submit a report to the congressional intelligence committees containing (1) a review of how the policies, procedures, and practices of the intelligence community that govern the intelligence activities and operations targeting the People’s Republic of China affect policies, procedures, and practices relating to the privacy and civil liberties of Americans of Chinese descent who may be targets of espionage and influence operations by China; and (2) recommendations to ensure that the privacy and civil liberties of Americans of Chinese descent are sufficiently protected. An unclassified report was due in June 2020.

The case of University of Tennessee Knoxville (UTK) Professor Anming Hu exemplifies the gross injustice of the current situation when an ineffective “China Initiative” is compounded by gross misconduct and highly questionable tactics.

As the first academic to go to jury trial under the “China Initiative,” one may reasonably expect the government to have a strong case against Professor Hu.

Instead, it was revealed<sup>11</sup> upon testimony and cross examination that in the zeal to find a spy in Knoxville, Tennessee, federal agents:

- Falsely accused former UTK associate Professor Anming Hu of being a Chinese spy.
- Falsely implicated him as an operative for the Chinese military in meetings with Hu’s bosses.
- Used false information to put Hu on the federal no-fly list.
- Spurred U.S. customs agents to seize Hu’s computer and phone and spread word throughout the international research community that Hu was poison.
- Used false information to justify putting a team of agents to spy on Hu and his son, a freshman at UTK, for nearly two years.
- Used false information to press Hu to become a spy for the U.S. government.

More than three years after the FBI launched a national security investigation against Professor Hu, the agent was not able to provide any proof that he is or was a spy. Professor Hu was then charged for wire fraud and making false statements. Those charges also collapsed upon cross examination with university officials, leading the judge to acquit Professor Hu of all charges because the evidence presented clearly was insufficient to allow a reasonable jury to convict Dr. Hu of the crimes alleged.<sup>12</sup>

This is not the only example when a federal agency has gone rogue. On July 13, 2021, the minority staff of the U.S. Senate Committee on Commerce, Science, and Transportation released a 37-page investigative report, "Abuse and Misconduct at the Commerce Department."<sup>13</sup>

The investigation began after whistleblowers reported a variety of improper activities dating back to the mid-2000s involving abuses of authority, mismanagement, and reprisal against Department of Commerce (DOC) employees. The Senate Committee Minority Staff conducted over 100 interviews and reviewed thousands of documents supporting allegations from over two dozen whistleblowers.

Findings of the report include:

- The Investigations and Threat Management Service (ITMS) targeted departmental divisions with comparably high proportions of Asian-American employees.
- Over-classification allowed ITMS to block the release of investigative files for criminal targets whose cases proceeded through the judicial system and to members of the public requesting documents through the Freedom of Information Act.
- Across the Department of Commerce, the ITMS opened frivolous investigations on a variety of employees without probable cause for the purpose of exaggerating the unit’s ability to uncover security threats within the civil service.

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<sup>11</sup> Knox News (2021/06/13). Trial reveals federal agents falsely accused a UT professor born in China of spying. <https://bit.ly/3zimH8q>

<sup>12</sup> APA Justice. Anming Hu. [https://bit.ly/APAJ\\_AnmingHu](https://bit.ly/APAJ_AnmingHu)

<sup>13</sup> Senate Commerce, Science, and Transportation Committee Investigative Report (2021/07/13): Abuse and Misconduct at The Commerce Department. <https://bit.ly/3i6ju43>

- Because of inadequate oversight by the Inspector General’s office, the unit’s improper exercises of law enforcement powers likely resulted in preventable violations of civil liberties and other constitutional rights, as well as a gross abuse of taxpayer funds.

"This unchecked race-based targeting disproportionately impacted employees of Chinese ancestry," including at least two known Chinese American employees who were subject to unauthorized investigations and wrongful criminal prosecutions that alleged them to be spies for China.

Although DOC has announced<sup>14</sup> that it would abolish the rogue unit and re-distribute its functions, concerns about violations of civil rights and constitutional rights and systemic causes that sustained these violations for over a decade remain unanswered. The rogue unit in fact received a Gold Medal Award, the highest form of recognition in DOC, in 2016. Not only was there no oversight and accountability for the rogue operation, there was top level departmental support and recognition. We are afraid that concerns of such systemic discrimination will again be ignored and silenced.

Attorney General Merrick Garland was on record committing to a thorough review of the “China Initiative” in a House Judiciary Committee meeting on October 21, 2021.<sup>15</sup> A week later, Mr. Matthew Olsen was confirmed by the Senate to serve as the Assistant Attorney General, National Security Division. He is designated by the Attorney General to conduct a thorough review of the “China Initiative.”

We urge you and OSTP to lead or coordinate an independent review of the ongoing investigations and practices by federal agencies outside DOJ, with full participation of Asian American scientists and community leaders according to the letter and spirit of the Presidential Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.<sup>16</sup>

A specific example on the need for such an independent review is the Senior/Key Personnel Foreign Influence Risk Rubric<sup>17</sup> or "risk levels" of Principal Investigators issued by Defense Advanced Research Projects Agency (DARPA) on September 20, 2021. According to the Rubric, a key personnel is categorized as at least "Moderate Risk" for having some foreign ties (family, friends, professional, financial), some of which are with strategic competitors (i.e., Russia, China) or other countries with a history of targeting U.S. technologies for unauthorized transfer.

Temple University Professor Xiaoxing Xi observes that Chinese Americans with family and friends in China would automatically be categorized as “High Risk” in the Rubric. This appears to be profiling based on an individual’s national origin and inherently discriminatory.

We urge OSTP to adopt and implement the principles and best practices of evidence-based policymaking, which combined with transparency, accountability and oversight is the best and maybe the only way to minimize xenophobia or prejudice.

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<sup>14</sup> Department of Commerce (2021/09/03). U.S. Department of Commerce Accepts Findings and Recommendations from Investigations and Threat Management Service Review. <https://bit.ly/3yDg2Ek>

<sup>15</sup> U.S. House Committee on the Judiciary (2021/10/21). Oversight of the United States Department of Justice. <https://bit.ly/3kfrAZV>

<sup>16</sup> The White House (2021/01/20). Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. <https://bit.ly/2MfNSgx>

<sup>17</sup> Defense Advanced Research Projects Agency (2021/09/20). Senior/Key Personnel Foreign Influence Risk Rubric. <https://bit.ly/2YPCFy1>

Sincerely Yours,

/s/ Steven Pei

/s/ Vincent Wang

/s/ Jeremy Wu

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