



November 8, 2021

*Submitted via email at [researchsecurity@ostp.eop.gov](mailto:researchsecurity@ostp.eop.gov)*

Director Eric Lander  
President's Science Advisor and Director of Office of Science and Technology Policy  
Office of Science and Technology Policy  
Executive Office of the President  
Eisenhower Executive Office Building  
1650 Pennsylvania Avenue  
Washington, DC 20504

**Re: Office of Science and Technology Policy Request for Input on NSPM-33  
Implementation**

Dear Director Eric Lander:

Asian Americans Advancing Justice | AAJC (Advancing Justice | AAJC) respectfully submits this comment in response to the request for input on the National Security Presidential Memorandum (NSPM-33) implementation guidance by Director Eric Lander on behalf of the Office of Science and Technology Policy (OSTP). We write to provide our implementation recommendations and express our concerns about the mass profiling and discriminatory investigations and prosecutions of Asian American and Asian immigrant scientists, researchers, and scholars, particularly of Chinese descent. This conduct is ruining lives and having a broader chilling effect on the Asian American and Asian immigrant community.

Advancing Justice | AAJC is a national non-profit, non-partisan organization that works through policy, advocacy, education, and litigation to advance the civil and human rights of Asian Americans and to build and promote a fair and equitable society for all. Founded in 1991, Advancing Justice | AAJC is one of the nation's leading experts on civil rights issues of importance to the Asian American and Pacific Islander (AAPI) community including racial profiling and immigrants' rights.

We appreciate this opportunity to comment on the implementation guidance and to share the harms resulting from the racial discrimination and profiling of Asian Americans and Asian immigrants working in science by federal government agencies. While the U.S. has a history of unjust prosecutions of Asian American and Asian immigrant scientists prior to the Trump administration, the Trump administration's "China Initiative," created a mandate and increased pressure on the FBI to scrutinize and target Asian Americans and Asian immigrants based on their ethnicity rather than criminal activity. This has led to prosecutions of many Asian Americans and immigrants for conduct that is minor, unrelated to espionage, and would not be subject to prosecution if the defendants were not people of Asian descent. Additionally, the FBI has collaborated with and at times pressured academic institutions and grantmaking agencies

resulting in the criminalization of scientists, researchers, and scholars of Asian descent across the country. Moreover, these entanglements and investigations have led to the dismissal, resignation and termination of Asian scientists as well as a growing fear among Asian Americans and Asian immigrants of being targeted and scapegoated based on their race, ethnicity, and national origin.

The pervasive racial bias and targeting of Asian Americans is not new, but a continuing reality that has been fueled in recent years by a growing xenophobic and racist backlash against immigrants. Despite being part of the fabric of American society for centuries, Asian immigrants and their descendants are viewed as “perpetual foreigners,” and not American. This racism has manifested itself at many points throughout U.S. history, including with the “Yellow Peril” and the Chinese Exclusion Act of 1882, the incarceration of over 120,000 Japanese Americans during World War II, and the scapegoating and violence directed against the Arab, Middle Eastern, Muslim, and South Asian communities after 9/11. Asian Americans are now living in the midst of the latest wave of resurgent xenophobia that is inextricably tied to this nation’s history. Not only are AAPI communities profiled by our own country as spies and terrorists, but the xenophobic rhetoric in our political discourse has also created a toxic atmosphere, emboldening those who would act on hate, terrorizing our communities.

Xenophobic, anti-immigrant, and racist rhetoric used by former President Trump and other elected officials fueled this resurgent xenophobia against immigrants and those of Asian descent.<sup>1</sup> Former President Trump and other elected officials blamed China for COVID-19, and called it the “Chinese virus,” “Wuhan virus,” “kung flu,” and “China plague.” Public health experts have advised that language that stigmatizes communities must not be used.<sup>2</sup> Public and government officials must be cautious of engaging in anti-China rhetoric and must challenge colleagues and peers who do so. The cost to the Asian American community is clear. A Pew Report published in July 2020 revealed similar findings, with a majority of Asian adults (58%) saying it is more common for people to express racist or racially insensitive views about people who are Asian than it was before the COVID-19 outbreak.<sup>3</sup>

President Biden has made it clear that combating racism, xenophobia, and intolerance against Asian Americans will be an important priority for the administration. President Biden’s executive actions disavowed discrimination against the AAPI community, including signing a Presidential Memorandum to condemn and combat racism, xenophobia, and intolerance against Asian Americans and Pacific Islander in the United States on January 26, 2021. We are pleased with President Biden’s recommitment to these efforts in his recent announcement on actions to respond to anti-Asian violence, xenophobia and bias on March 30, 2021. We urge federal

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<sup>1</sup> The Advancing Justice affiliation launched the Stand Against Hatred website in January 2017 in response to the increase in hate incidents against Asian Americans connected to this anti-Asian, anti-immigrant, and racist rhetoric from former President Trump’s presidential campaign in the 2016 election cycle.

<sup>2</sup> “WHO issues best practices for naming new human infectious diseases,” World Health Organization (May 8, 2015), [WHO issues best practices for naming new human infectious diseases](#).

<sup>3</sup> Pew Research Center, “Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID19 Outbreak,” (July 1, 2020), <https://www.pewresearch.org/social-trends/2020/07/01/many-black-and-asian-americans-say-they-have-experienced-discrimination-amid-the-covid-19-outbreak/>

agencies to follow President Biden’s commitment to combat racism and xenophobia against those of Asian descent and look forward to these efforts.

We are deeply concerned about the federal government’s investigations and prosecutions of Asian Americans and Asian immigrants, harming the lives of not just individuals, their families, and communities, but eroding the health of our democracy. Biased public statements by public officials combined with data and individual cases indicating that there have been unjust arrests and prosecutions of Asian Americans have raised red flags for us that federal agencies are engaged in biased investigations and policing. We encourage OSTP to consider our recommendations and exercise further oversight activities to end government activities that foster a climate of fear and targeting of the Asian American and immigrant community.

### **I. The Government Has Heavily Scrutinized and Racially Targeted Asian Americans and Asian Immigrants Particularly Through the “China Initiative”**

The Government has been heavily scrutinizing and racially targeting Asian American and Asian immigrant scientists and researchers particularly with the “China Initiative.” Although the U.S. Department of Justice (“DOJ”) presents it as a national security measure meant to combat economic espionage by the Chinese government, the “China Initiative” has instilled fear within the Asian American and Asian immigrant community as an initiative that uses national security as a pretext to the racial profiling and targeting of Asian American and Asian immigrants, particularly those of Chinese descent. In its quest to protect national security, the Government casts a wider-than-necessary net and uses overly simplistic measures that are susceptible to abuse by law enforcement to the detriment of people of Chinese origin—citizens and immigrants alike.

The current social and political environment has created fear among our communities as rhetoric from public leaders encourages bias and fosters hate against Asian Americans and immigrants. One needs look no further than former President Trump’s choice to refer to the coronavirus as “kung flu,” eliciting laughter and wild cheers” at rallies in Oklahoma and Arizona in late June 2020.<sup>4</sup> In yet another example, former President Trump, at a private event in 2018, “noted of an unnamed country that the attendee said was clearly China, ‘almost every student that comes over to this country is a spy.’”<sup>5</sup> Senator Tom Cotton made similar remarks in 2020, stating broadly that Chinese students come to the U.S. “to steal [] property.”<sup>6</sup> Finally, in an interview last year with Fox News, Secretary of State Michael Pompeo also made the following sweeping, dangerous statement: “[S]tudents that come here who have connections deeply to the Chinese state, they shouldn’t be here in our schools spying.”<sup>7</sup> This rhetoric has alarmed academic

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<sup>4</sup> Colby Itkowitz, *Trump Again Uses Racially Insensitive Term to Describe Coronavirus*, WASH. POST (June 23, 2020), [https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html).

<sup>5</sup> Annie Karni, *Trump Rants Behind Closed Doors with CEOs*, POLITICO (Aug. 8, 2018), <https://www.politico.com/story/2018/08/08/trump-executive-dinner-bedminster-china-766609>.

<sup>6</sup> Ros Krasny, *GOP Senator Says Don’t Let Chinese Students Study STEM in U.S.*, BLOOMBERG (Apr. 26, 2020), <https://www.bloomberg.com/news/articles/2020-04-26/gop-senator-says-don-t-let-chinese-students-study-stem-in-u-s>.

<sup>7</sup> *Secretary Michael R. Pompeo with Laura Ingraham of Fox News*, U.S. DEP’T OF STATE (May 28, 2020), <https://www.state.gov/secretary-michael-r-pompeo-with-laura-ingraham-of-fox-news-2/>.

institutions and raised concerns within the Asian American community. This rhetoric has translated into racially biased policies and government efforts such as the “China Initiative,” which create widespread fear among Asian American and immigrant scientists and promote bigotry against the greater Asian American community.

This is not a new phenomenon. For more than a decade, the Government has prosecuted people of Chinese and Asian descent at a disproportionate rate under the Economic Espionage Act of 1996 (“EEA”).<sup>8</sup> Although the EEA was intended to address economic espionage from all foreign governments following the Cold War, it has increasingly been used to prosecute those of Chinese or Asian descent.<sup>9</sup> Between 1996 and 2009, 17% of the defendants charged under the EEA’s provisions were of Chinese descent.<sup>10</sup> Since 2009, that percentage has more than tripled, jumping to 52%.<sup>11</sup> Moreover, Asian Americans and immigrants are overall more likely than any other racial group to be charged under the EEA, making up 62% of EEA defendants charged since 2009.<sup>12</sup> For individuals of Asian descent who were prosecuted, the rate at which they were “acquitted at trial, pled guilty only to ‘false statements’ and released on probation, or, most often, had all charges dropped against them” was twice as high as individuals of any other race.<sup>13</sup> Moreover, the updated report revealed that defendants with Asian names were more than twice as likely to be falsely accused of espionage, and defendants of Asian descent, including Chinese and South Asian descent were punished twice as severely as defendants of other races.<sup>14</sup> C-100’s survey in collaboration with the University of Arizona also revealed a widespread chilling effect among those of Asian descent within the academic community.<sup>15</sup> According to a Law 360 study, “[t]he China Initiative has increasingly targeted academics, but the overwhelming majority of them [are] accused of failing to disclose ties to Chinese institutions, not economic espionage.” The report found that “the prosecutors have not fared well with many defendants accusing investigators of engaging in misconduct to bolster what they are saying are weak cases.”<sup>16</sup>

In November 2018, Former U.S. Attorney General Jeff Sessions launched the “China Initiative” to counter the threat of economic espionage and trade secrets theft conducted by or for the benefit of the “communist regime in China.”<sup>17</sup> The White House mandate put great pressure on

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<sup>8</sup> See Andrew Chongseh Kim, *Prosecuting Chinese “Spies”: An Empirical Analysis of the Economic Espionage Act*, 40 *Cardozo L. Rev.* 749, 763 (2018).

<sup>9</sup> *Id.* at 753.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Andrew Chongseh Kim, *Racial Disparities in Economic Espionage Act Prosecutions: A Window Into the New Red Scare*, C-100 (2021), [Whitepaper-Final-9.21-UPDATE-compressed.pdf \(committee100.org\)](https://www.c100.org/Whitepaper-Final-9.21-UPDATE-compressed.pdf).

<sup>15</sup> See Jenny J. Lee, Xiaojie Lee & C-100 Staff, *Racial Profiling Among Scientists of Chinese Descent and Consequences for the U.S. Scientific Community*, C-100 & UNIVERSITY OF ARIZONA (2021), [C100-Lee-Li-White-Paper-FINAL-FINAL-10.28.pdf \(committee100.org\)](https://www.c100.org/C100-Lee-Li-White-Paper-FINAL-FINAL-10.28.pdf).

<sup>16</sup> See Jack Queen, ‘Overheated’: How A Chinese-Spy Hunt At DOJ Went Too Far, *Law 360* (Sep 2018), <https://www.law360.com/legalethics/articles/1425776/-overheated-how-a-chinese-spy-hunt-at-doj-went-too-far>.

<sup>17</sup> Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage, U.S. DEP’T OF JUSTICE (Nov. 1, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage>.

the FBI to scrutinize and target Asian Americans and Asian immigrants particularly of Chinese descent based on their ethnicity rather than on suspicion of criminal activity. For example, In 2020 John Demers, the Justice Department's Assistant Attorney General for National Security stated that the DOJ wanted each of the country's 94 U.S. Attorney's districts to bring cases of Chinese espionage or economic theft, without any apparent reason to believe that such crimes were being committed in every district in the country.<sup>18</sup> In practice, however, many of the investigations and prosecutions under this initiative are not based upon evidence of economic espionage and do not target individuals acting at the direction of or on behalf of the PRC government or Chinese Communist Party. Instead, these investigations target people working in science with any "nexus to China," invoking implicit and exacerbating implicit bias, and sometimes explicit bias against Asian Americans and immigrants. When the government fails to find evidence of economic espionage, it then opts to charge people for lesser offenses such as making false statements during the course of the investigation.

Federal prosecutors are also charging many Asian Americans and Asian immigrants with federal crimes based on administrative errors or minor offenses such as failing to fully disclose conflict of interest information to their universities or research institutions and other activities that are not normally treated as crimes except under the pretext of combating economic espionage. As of June 4, 2021, the DOJ's own press releases about the "China Initiative" show that almost 90% of the defendants are of Asian descent, and that a significant percentage of these cases include no charges of economic espionage, trade secrets or what we have identified as espionage-related crimes.<sup>19</sup> The rest of the prosecutions were for ancillary matters or minor crimes, such as making false statements, and "lying" on university conflicts of interest forms. Still many others were investigated by the FBI or NIH and not prosecuted yet faced employment consequences such as terminations.<sup>20</sup> The DOJ's strategy is ineffective against combatting security threats, but also extremely harmful to the Asian American community.<sup>21</sup> It has also damaged American leadership in science and international collaboration on basic research.

Through rhetoric, rapidly changing policies, and targeted prosecutions, Asian American and Asian immigrant scientists and researchers are again caught in a pattern of suspicion and racial discrimination that has harmed Asian American communities in the United States for more than 150 years. We provide recommendations for the implementation guidance that address the profiling and overcriminalization of our communities. Profiling does not make the United States safer and serves only to undermine the very values and characteristics that propelled the United States as a global leader in innovation, science, and technology.

## **II. History of Exclusion & The "Perpetual Foreigner"**

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<sup>18</sup> Betsy Woodruff Swan, Inside DOJ's Nationwide Effort to Take on China, POLITICO (Apr. 7, 2020), <https://www.politico.com/news/2020/04/07/justice-department-china-espionage-169653>.

<sup>19</sup> See Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018, U.S. DEP'T OF JUSTICE (Nov. 12, 2020), <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

At various times in our nation's history, Asian Americans have borne the brunt of this country's xenophobia. Asian Americans have been made the face of the "yellow peril," the "spy," and "the terrorist." Despite being part of the fabric of American society for centuries, Asian immigrants and their descendants are still caught up in the construct of the "perpetual foreigner." Regardless of being U.S. citizens and actively contributing to this nation's advancement, these Americans were treated with suspicion due to their race. Their appearance, accents, and connections with their country of origin made them convenient targets of scapegoating and profiling based on race or ethnicity.

The suspicion of people of Asian origin is deeply embedded in American history. The very first immigration law barring a whole ethnic group based on their origin of descent was against Chinese immigrants. Enacted in 1882, the Chinese Exclusion Act represented the first major law to restrict immigration to the United States, halting Chinese immigration for over 60 years and prohibiting Chinese individuals already living in the country from gaining citizenship.<sup>22</sup> Chinese immigrants faced severe limitations such as being required to carry a residence permit and the inability to bear witness in court.<sup>23</sup> Instead only a 'credible white witness' could testify for them.<sup>24</sup> The Chinese Exclusion Act was followed a decade later by the Geary Act, and then the 1921 Quota Act.<sup>25</sup> Exclusionary laws changed the face of America. As a result, by 1960, there were only 877,934 Asian Americans in the U.S.<sup>26</sup> That was a mere half of one percent of the American population.<sup>27</sup> Motivated by economic anxiety and racial scapegoating, these laws undermined the valuable contributions of these immigrants.

Later extended to other Asian ethnic groups, racial scapegoating was embodied by the emergence in the 20<sup>th</sup> century of "Yellow Peril" – a pejorative term demonizing people of East Asian descent and a political tool facilitating their exclusion from society.<sup>28</sup> During World War II, U.S. military leaders without cause feared that American citizens of Japanese descent would execute acts of sabotage against the government. Following Japan's attack on Pearl Harbor in December 1941, President Franklin D. Roosevelt issued Executive Order 9066, which permitted the military to infringe on their constitutional rights in the name of national security.<sup>29</sup> Despite never having been accused of any crime and without trial or representation, approximately 120,000 Japanese Americans, half of whom were children, were incarcerated in federal detention

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<sup>22</sup> "Chinese Exclusion Act (1882)," <http://ocp.hul.harvard.edu/immigration/exclusion.html>

<sup>23</sup> Maureen Fan, *An immigrant's story: Against a wall of exclusion*, SAN FRANCISCO CHRONICLE (Oct. 4, 2019), <https://www.sfchronicle.com/opinion/article/An-immigrant-s-story-Against-a-wall-of-14494875.php>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> INSIDE THE NUMBERS at 20.

<sup>27</sup> INSIDE THE NUMBERS at 20.

<sup>28</sup> Steven Heller, *The Artistic History of American Anti-Asian Racism*, THE ATLANTIC (Feb. 20, 2014), <https://www.theatlantic.com/entertainment/archive/2014/02/the-artistic-history-of-american-anti-asian-racism/283962/>.

<sup>29</sup> *Internment History*, PBS (1999), <http://www.pbs.org/childofcamp/history/>.

centers.<sup>30</sup> Over 5,000 American babies were born in detention, and about 2,000 died in incarceration as a result. Moreover, even as we strive to compete with China's government economically, we must be aware of the language and impact on Asian Americans. In 1982, Vincent Chin, a young Chinese American was beaten to death by two white men who perceived him to be "foreign" and Japanese at a time when there were insecurities about booming Japanese auto manufacturers and a declining American auto industry. Asian Americans are now living in the midst of the latest wave of resurgent xenophobia.

### **III. Racist and Biased Rhetoric by FBI Officials Drives Racially Targeted Decision-Making and Training**

The Government has shifted from a policy of engagement with China to an emphasis on the "threat" of China.<sup>31</sup> Part of this shift includes the change in treatment of any individuals connected to China as the FBI adopts "a whole of society" approach toward all individuals of Asian descent. The FBI "view[s] the China threat as not just a whole of government threat, but [also] a whole of society threat"<sup>32</sup> encompassing those of Asian descent, including civilians such as professors and academics. As recently as February 2020, FBI Director Christopher Wray called for a "whole-of-society" response to Chinese economic espionage and the threat of "non-traditional collectors," singling out graduate students and researchers.<sup>33</sup> FBI Director Chris Wray painted a broad brush for all persons of Chinese descent when he stated that the FBI "in almost every field office ...around the country" sees counterintelligence risks in Chinese professors, scientists and students "across basically every discipline,"<sup>34</sup> casting hundreds of thousands of Chinese professionals and students in academia as potential threats to the U.S.<sup>35</sup>

This racially biased rhetoric from government officials in turn influences the decision-making, culture, and training at federal agencies. According to a recent study of over a dozen former federal investigators, "[the] distrust of people of Chinese heritage [too often] drives

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<sup>30</sup> "Asian American History," <https://jacl.org/asian-american-history/>.

<sup>31</sup> See *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEP'T OF JUSTICE (Aug. 4, 2020), <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related> [hereinafter "China Initiative"].

<sup>32</sup> *Open Hearing on Worldwide Threats: Before the S. Select Comm. on Intelligence*, 115th Cong. 50 (2018) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation) [hereinafter *Open Hearing on Worldwide Threats*].

<sup>33</sup> Christopher Wray, Director, Fed. Bureau of Investigation, Responding Effectively to the Chinese Economic Espionage Threat, Remarks at the Department of Justice China Initiative Conference (Feb. 6, 2020), <https://www.fbi.gov/news/speeches/responding-effectively-to-the-chinese-economic-espionage-threat>.

<sup>34</sup> *Open Hearing on Worldwide Threats: Before the S. Select Comm. on Intelligence*, 115<sup>th</sup> Cong. (2018) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation); see also 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>.

<sup>35</sup> Our organization signed a letter requesting a meeting with Director Wray on March 1, 2018 along with other civil rights organizations regarding his statement and we have yet to receive a meeting. See here for more information: [http://www.committee100.org/press\\_release/community-organizations-call-for-meeting-with-fbi-director-christopher-wray-regarding-profiling-of-students-scholars-and-scientists-with-chinese-origins/](http://www.committee100.org/press_release/community-organizations-call-for-meeting-with-fbi-director-christopher-wray-regarding-profiling-of-students-scholars-and-scientists-with-chinese-origins/).

decision-making at the FBI and other U.S. security agencies.”<sup>36</sup> The report found that the FBI started an initiative that mapped out U.S. neighborhoods by race and ethnicity to monitor potential terrorists and spies in 2005.<sup>37</sup> An FBI memo revealed that the FBI continued the initiative by doing an assessment for Chinese communities in San Francisco in 2009.<sup>38</sup> Not only were strategic decisions and investigations based on this inherent distrust of those of Chinese descent, but training materials were created that perpetuated and created a culture of bias and distrust against Asian Americans and Asian immigrants.

According to former FBI agent Mike German, after September 11, “[X]enophobia . . . spread like a cancer”<sup>39</sup> within the FBI and impacted FBI training materials for both Muslim Americans and Chinese Americans. One presentation on “the Chinese” warned, “Never attempt to shake hands with an Asian.”<sup>40</sup> A counterintelligence presentation, in turn, “warn[ed] agents against giving too many compliments to a Chinese woman as it might suggest a romantic relationship is desired, [and] another [told agents] to never stare at or attempt to shake hands with an Asian.”<sup>41</sup> This training fostered the idea of Asian Americans and Asian immigrants as “the threatening ‘other’” rather than as “fellow American[s],” and furthered the narrative of Asian Americans as the “perpetual foreigner” where “Asian Americans . . . [are] . . . more closely associate[d] . . . with their ethnicity and national origin than their nationality, no matter how long they’ve been Americans.”<sup>42</sup> The training is “more likely to implant bias than to educate agents about the complex behavior of spies.”<sup>43</sup> These training materials, lack of diversity, and existing practices fostered an environment ripe for bias and profiling against Asian Americans.<sup>44</sup> According to German, even Asian FBI agents and other federal agency employees of Asian descent have felt marginalized and targeted by the agencies they served.<sup>45</sup>

#### **IV. Racially Biased Prosecutions Particularly Under the DOJ’s “China Initiative” & the Criminalization of Asian Americans and Asian Immigrants Causes Harm & Chilling Effect on Asian American and Asian Immigrant Communities**

Advancing Justice | AAJC has grown concerned that the DOJ had overreached with “China Initiative” leading to mass criminalization of Asian Americans and Asian immigrants. As a consequence of the White House’s mandate through the “China Initiative,” the FBI and federal agencies have put pressure on grantmakers, universities, and research institutions leading to

<sup>36</sup> Peter Waldman, *Mistrust and the Hunt for Spies Among Chinese Americans*, BLOOMBERG (Dec. 10, 2019) (according to a recent study of more than a dozen former federal investigators), <https://www.bloomberg.com/news/features/2019-12-10/the-u-s-government-s-mistrust-of-chinese-americans>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The FBI memo was obtained by ACLU in 2011.

<sup>39</sup> MIKE GERMAN, *DISRUPT, DISCREDIT, AND DIVIDE* 77, 339 (The New Press 2019).

<sup>40</sup> *Id.* at 83, 339.

<sup>41</sup> *Id.* at 192 (citing Sean McElwee et al., *4 Pieces of Evidence Showing FBI Director James Comey Cost Clinton the Election*, VOX (Jan. 11, 2017), <https://www.vox.com/the-big-idea/2017/1/11/14215930/comey-email-election-clinton-campaign>).

<sup>42</sup> *Id.* at 190–92.

<sup>43</sup> Waldman, *supra* note 36.

<sup>44</sup> MIKE GERMAN, *DISRUPT, DISCREDIT, AND DIVIDE* 83, 192 (The New Press 2019).

<sup>45</sup> *Id.* at 83 (The New Press 2019).

discriminatory and stigmatizing investigations of Asian Americans and Asian immigrants. The FBI has focused on federal grant agencies and academic institutions to target scientists and researchers of Asian descent by conducting threat awareness sessions and circulating information on the threat of China and these so-called non-traditional collectors.<sup>46</sup> As a result, they have injected racial bias into these institutions, discouraged collaboration, criminalized connections to China, and encouraged these entities to view researchers and scientists of Asian descent differently than their colleagues because of race.<sup>47</sup>

Despite the ongoing issues of implicit bias, discrimination, and race & ethnicity-based profiling, the U.S. government continues prosecutions efforts that cause immense harm to Asian Americans and Asian immigrants. American citizens such as Wen Ho Lee, Guoqing Cao, Shuyu Li, Sherry Chen, and Xiaoxing Xi have already suffered harm from these unwarranted investigations and prosecutions. The use of stereotypes and biases prevalent in the FBI is extremely harmful and leads to the wrongful prosecutions of individuals subjected to profiling. Former FBI agent German stated, ““The [FBI] training is a form of othering, which is a dangerous thing to do to a national security workforce learning to identify the dangerous ‘them’ they’re supposed to protect ‘us’ from.””<sup>48</sup> This danger of othering is all too real for many Asian Americans. Their cases show ongoing bias, discrimination, and race and ethnicity-based profiling of individuals of Asian descent by the U.S. Government.

In December 1999, the government prosecuted Wen Ho Lee, a Taiwanese American scientist, accusing him of passing secrets to the Chinese government about a U.S. nuclear program despite lacking evidence of espionage.<sup>49</sup> Although Lee received restitution, great damage had been done. In addition to suffering from a damaged reputation, he spent nine months in solitary confinement and was denied basic legal protection under the law.<sup>50</sup> At Mr. Lee’s dismissal hearing, federal District Court Judge James A. Parker apologized to him and reproached the Government’s conduct.<sup>51</sup>

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<sup>46</sup> *FBI Director Christopher Wray’s Opening Remarks: China Initiative Conference*, CIS (Feb. 6, 2020), <https://www.csis.org/analysis/fbi-director-christopher-wrays-opening-remarks-china-initiative-conference> (According to FBI Director, the FBI now has “private-sector coordinators in each of the FBI’s 56 field offices who lead [their] engagement with local businesses and universities.” “[They] meet with these partners frequently, providing threat awareness briefings...”); see also Ana Swanson, *A New Red Scare Is Reshaping Washington*, N.Y. TIMES (July 20, 2019), <https://www.nytimes.com/2019/07/20/us/politics/china-red-scare-washington.html> (“Officials from the F.B.I and the National Security Council have been dispatched to Ivy League universities to warn administrators to be vigilant against Chinese students who may be gathering technological secrets from their laboratories to pass to Beijing.”).

<sup>47</sup> *Open Hearing on Worldwide Threats*, *supra* note 32.

<sup>48</sup> Peter Waldman, *Mistrust and the Hunt for Spies Among Chinese Americans*, BLOOMBERG NEWS (Dec. 10, 2019), <https://www.bloomberg.com/news/features/2019-12-10/the-u-s-government-s-mistrust-of-chinese-americans>.

<sup>49</sup> See *United States v. Wen Ho Lee*, 79 F. Supp. 2d 1280 (1999); Lowen Liu, *Just the Wrong Amount of American*, SLATE (Sept. 11, 2016), <https://slate.com/news-and-politics/2016/09/the-case-of-scientist-wen-ho-lee-and-chinese-americans-under-suspicion-for-espionage.html>.

<sup>50</sup> *Id.*

<sup>51</sup> *Statement by Judge in Los Alamos Case, with Apology for Abuse of Power*, N.Y. TIMES (Sept. 14, 2000), <https://www.nytimes.com/2000/09/14/us/statement-by-judge-in-los-alamos-case-with-apology-for-abuse-of-power.html>.

Despite the injustice in Mr. Lee’s case, the Government continues to bring indictments based on faulty and unclear grounds against Asian scientists. In 2013, a federal grand jury indicted two former Eli Lilly and Co. senior biologists, Guoqing Cao and Shuyu “Dan” Li, on charges of stealing nine drug discovery trade secrets and passing them to a Chinese drug company.<sup>52</sup> The U.S. attorney’s office later requested the dismissal of all charges but neglected to specify the reasons for doing so.

In 2014, federal agents accused Sherry Chen, a Chinese American hydrologist, then employed at the National Weather Service, of using a stolen password to download information from a federal dam database and of lying about meeting with a high-ranking Chinese official.<sup>53</sup> Ms. Chen had sent publicly available information to a former classmate in China and then connected him to a colleague for further information about his inquiry.<sup>54</sup> The colleague reported her.<sup>55</sup> During the course of the investigation, investigators asked Ms. Chen when she last saw a former classmate. She told them, “I think 2011” when they had actually met in 2012.<sup>56</sup> Prosecutors then sought to convict her of making a false statement before later dropping all charges.<sup>57</sup> While the DOJ dropped the case after finding no evidence of espionage, the United States Department of Commerce announced in 2015 its plan to fire Ms. Chen. Although the federal Merit Systems Protection Board in April 2018 ruled in favor of her reinstatement and suggested that Commerce Department officials had buried exculpatory evidence, the Department still plans to appeal the ruling and proceed with her dismissal.<sup>58</sup>

In 2015, the DOJ accused Xiaoxing Xi, a Chinese American physics professor at Temple University, of sharing sensitive American-made technology with Chinese scientists.<sup>59</sup> Without consulting with experts to understand the technology, FBI agents and prosecutors branded Mr. Xi as a Chinese spy. He was eventually vindicated after independent experts discovered that the information that he shared for academic purposes was not classified and perfectly lawful.<sup>60</sup>

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<sup>52</sup> *Feds dismiss charges against former Eli Lilly scientists accused of stealing trade secrets*, INDY STAR (Dec. 5, 2014), <https://www.indystar.com/story/news/crime/2014/12/05/feds-dismiss-charges-former-eli-lilly-scientists-accused-stealing-trade-secrets/19959235/>.

<sup>53</sup> 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>.

<sup>54</sup> Kim, *supra* note 8, at 774.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Perloth, *supra* note 53; Nicole Perloth, *Cleared of Spying for China, She Still Doesn’t Have Her Job Back*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/technology/sherry-chen-national-weather-service.html>; *Chen v. Dep’t of Commerce*, No. CH-0752-17-0028-I-1, 2018 WL 2128716 (Apr. 23, 2018); *Statement in Response to DOC Filing Appeal*, SHERRY CHEN DEFENSE FUND, [https://www.sherrychendefensefund.org/uploads/9/9/2/8/99280080/statement\\_in\\_reponse\\_to\\_doc\\_filing\\_appeal\\_20180618.pdf](https://www.sherrychendefensefund.org/uploads/9/9/2/8/99280080/statement_in_reponse_to_doc_filing_appeal_20180618.pdf).

<sup>59</sup> Matt Apuzzo, *U.S. Drops Charges That Professor Shared Technology with China*, N.Y. TIMES (Sept. 11, 2015), <https://www.nytimes.com/2015/09/12/us/politics/us-drops-charges-that-professor-shared-technology-with-china.html>.

<sup>60</sup> *Id.*

However, once again, the damage to Mr. Xi’s reputation was done and to date, there has been no apology or compensation by the Government.

These cases lead us to believe that race and ethnicity-based profiling are indeed driving these prosecutions.<sup>61</sup> Examined in conjunction, these cases validate a disturbing yet ongoing trend – the criminalization of Asian Americans in the name of national security. When a subset of the population is regarded as “perpetual foreigners” or as “the other,” national security arguments can easily overshadow civil and human rights considerations.

Wei Su, a former scientist for the U.S. Army, is an example of a government employee impacted by bias against Asian Americans. Despite 24 years of working for the Government without incident, Mr. Su found himself in the midst of an FBI investigation in 2011 when he was placed under surveillance, threatened with arrest, and stripped of his security clearance.<sup>62</sup> Although the FBI began to interrogate him in 2011, Mr. Su believes that the investigations started much earlier.<sup>63</sup> The investigation was eventually dropped.<sup>64</sup> Then, in 2015, the Pentagon’s Consolidated Adjudications Facility (“CAF”) suspended his security clearance based on false evidence.<sup>65</sup> For years, Mr. Su fought to clear his name. Finally, in May 2019, the CAF sent Mr. Su a letter rescinding the Pentagon’s previous letters that suspended and revoked his security clearance.<sup>66</sup> According to this letter, the Pentagon’s previous letters suspending and revoking his security clearance were “not accurate.”<sup>67</sup> Despite not doing anything wrong, Mr. Su found himself under investigation by the FBI, and his life upended. Even after CAF rescinded the Pentagon’s previous letters that suspended and revoked his security clearance, Mr. Su is still extremely cautious about his actions.<sup>68</sup> To this day, Mr. Su does not know why the FBI investigated him.<sup>69</sup>

Most recently, on September 9, 2021, a federal judge from the U.S. District Court for the Eastern District of Tennessee acquitted University of Tennessee (UT) Engineering Professor Anming Hu of all charges after his trial resulted in a mistrial when the jury deadlocked. The well-reasoned decision of the federal district recognized that the evidence presented clearly was insufficient to allow a reasonable jury to convict Dr. Hu of the crimes alleged. The decision came after the U.S. government’s announcement to retry the case in July despite serious concerns voiced by elected officials, civil rights groups, and the Asian American community over the FBI’s conduct during the course of its investigation of Professor Hu.<sup>70</sup> This case exemplifies many of the concerns that community and civil rights groups have regarding the “China Initiative.”

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<sup>61</sup> *Racial Profiling*, ACLU (2019), <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling>.

<sup>62</sup> Waldman, *supra* note 36.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Mara Hvistendahl, “*Ridiculous Case*”: *Juror Criticizes DOJ for Charging Scientist with Hiding Ties to China*, *The Intercept* (Jun 23, 2021), <https://theintercept.com/2021/06/23/anming-hu-trial-fbi-china/>.

Professor Hu is a Canadian national and immigrant of Chinese descent who was living and working in the U.S. on an H-1B visa with a pending application to become a U.S. lawful permanent resident.<sup>71</sup> He is a husband and father of three children, and was under house arrest in Tennessee separated from his family living in Canada. Professor Hu's case is indicative of the deep flaws of the Trump-era "China Initiative," which often has initiated investigations of scientists, researchers, and scholars based merely on connections to China. Those connections are often ancestral or professionally legitimate, rather than actual evidence of espionage.

The prosecutions of Asian American scientists and ongoing investigations have harmed not just individuals but have rippled out into the Asian American community in the United States as a whole. As discussed below, the Government's broad suspicion of Asian American and Asian immigrant scientists has created an environment of uncertainty and fear for the community across the country. Even individuals who have not been prosecuted have been driven from the country they consider home and have suffered immeasurable harm to their livelihood, relationships and personal health. Moreover, there is a pervasive "psychological fear" among scientists of Chinese origin in an environment that has increasingly become hostile to them.<sup>72</sup> MIT mechanical engineer Gang Chen shared that "[t]he current atmosphere creates a lot of psychological fear."<sup>73</sup> A former MIT engineering postdoc who is now in Beijing described FBI investigations as "scary" and wished to remain anonymous.<sup>74</sup> He was questioned about his involvement in China's Thousand Talent Plan ("TTP"), and said that "[he] fe[lt] like [he] was unfairly targeted just because [he's] Chinese."<sup>75</sup>

In Cincinnati, Ohio, there are reports of FBI intimidation and harassment of Chinese employees and professors at the University of Cincinnati.<sup>76</sup> Eric Palmer, the Executive Director of the local chapter of the American Association of University Professors, stated that the FBI contacted at least three faculty members at the university in 2018 in connection to China's Thousand Talents programs.<sup>77</sup> According to Mr. Palmer, FBI agents harassed these individuals by showing up both at their workplace and at their homes.<sup>78</sup> FBI agents then asked some faculty members "to turn over information about other Chinese national faculty members with at least an implicit threat that if they don't, they will be investigated further."<sup>79</sup> Mr. Palmer considers the Government's approach to be "scare and authoritarian tactics" where the Government "assum[es] Chinese scholars are trying to steal intellectual property" rather than determining whether "there's credible information pointing to individuals and investigate on that basis."<sup>80</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> Elie Dolgin, 'Psychological Fear': MIT Scientists of Chinese Origin Protest Toxic US Climate, NATURE (July 2, 2019), <https://www.nature.com/articles/d41586-019-02063-z>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Bill Rinehart, *FBI Is 'Harassing' Some Chinese Citizens Says Academic Group*, WVXU (Aug. 26, 2019), <https://www.wvxu.org/post/fbi-harassing-some-chinese-citizens-says-academicgroup#stream/0>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

The impact of these biases and profiling extends to international scholars, particularly to Asian students seeking to study and contribute to academia in the United States. FBI surveillance and prosecution of individuals of Asian descent has created a chilling effect at universities and fosters an environment of fear discouraging students from studying here. According to the State Department *Open Doors* report, there has been a 6.6% decrease in new international student enrollment in 2017/18 which was double the rate of decrease from the previous year.<sup>81</sup> This marked “the first time America has seen a two-year decline,” and signified the shift in perception by international students of how welcoming the United States is.<sup>82</sup> The loss of international students, including those from China, is a tremendous loss for the United States. Overall, foreign students contribute \$39 billion to our country, and have created or supported more than 455,000 jobs just within the 2017-2018 academic year.<sup>83</sup> Although Chinese students make up only 1.7% of the total U.S. higher education enrollment, they contributed to about \$12 billion to the U.S. economy in 2016 according to the State Department’s *Open Doors* report.<sup>84</sup> Many of these students go on to become citizens and have families here in the United States.

Concerns about the impact of these investigations on human lives and for the academic arena are prevalent across universities. MIT, Yale University, Stanford University and at least eight other institutions have issued statements detailing their concerns with the targeting of Chinese scientists and academics.<sup>85</sup> However, many universities provide inadequate support to their faculty who find themselves targets of the U.S. Government. Caught in the middle of the investigations and prosecutions, many scientists, professionals, and academics of Asian descent fear they will be criminalized under the Government’s broad net of suspicion. “The investigations have left Chinese and Chinese-American academics feeling ‘that they will be targeted and that they are at risk,’” said Frank Wu, former president of C-100, a prominent Chinese American organization.<sup>86</sup> “People are living in fear.”<sup>87</sup> The damage from the Government’s overzealous prosecutions has already harmed Americans and has now permeated various facets of our society, creating an environment of fear and impacting the actions and abilities of Chinese scientists and researchers today to work and live in the United States.

## **V. Recommendations**

The mass profiling of Asian communities harms American citizens and immigrants creating fear, feelings of estrangement by Asian Americans and immigrants and furthers the biased “perpetual foreigner” narratives amongst the majority population. We have provided the following recommendations to OSTP as they implement guidance for NSPM-33. We ask OSTP to take

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> LOSING TALENT 1, 1 (2019).

<sup>84</sup> Statement of Ms. Jill Welch, Deputy Executive Director for Public Policy NAFSA: Association of International Educators at the Hearing on Student Visa Integrity: Protecting Educational Opportunity and National Security at 9 (citing Institute of International Education. “Opening Doors Fact Sheet: China.” Accessed September 13, 2019. <https://p.widencdn.net/ymtzur/Open-Doors-2017-Country-Sheets-China>).

<sup>85</sup> Dolgin, *supra* note 72.

<sup>86</sup> Gina Kolata, *Vast Dagnet Target Theft of Biomedical Secrets for China*, NY Times (Nov 2019), <https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html>.

<sup>87</sup> *Id.*

appropriate measures with input from community members to address the racial profiling and targeting of Asian Americans and Asian immigrants.

- 1) We urge OSTP to work with the U.S. Department of Justice to end the Justice Department's "China Initiative," which is based upon the bigoted premise that all scientists of Chinese descent or with connections to China should be treated with suspicion and investigated without evidence of wrongdoing, does not continue to harm Asian American and Asian immigrant scientists, researchers, and scholars. While we recognize that there are legitimate threats from China's government, there are serious concerns of the DOJ profiling Asian Americans and Asian immigrants and criminalizing integrity issues. We have called on the DOJ to end the initiative and review all "China Initiative" prosecutions and investigations closed prior to prosecution under the "China Initiative" to determine whether these cases targeted individuals based on their race, ethnicity, or ancestry, and, if so, take remedial action to prevent such profiling in the future.
- 2) OSTP should include the needs and concerns of Asian Americans in its efforts to address racial equity. It should engage with Asian American community leaders and community-based organizations to ensure a better understanding of the needs of the community and the impact of discrimination on Asian Americans. Federal agencies should increase engagement with civil rights organizations and impacted communities to minimize the impact of bias in hiring, admissions, and grant approvals.
- 3) OSTP must harmonize and implement uniform policies to bridge the gap between academia and U.S. government agencies about how to best protect U.S. interests in fundamental research while maintaining openness and successfully competing in the global marketplace for international scientific talent, particularly for disclosure requirements for conflicts of interests and commitments. Government grantmaking agencies such as NIH and NSF and universities should provide greater clarity in their guidelines and instruction regarding requirements for grant applications, disclosures, conflicts of commitments and conflicts of interests. Any policies and sanctions for failure to adhere to requirements or non-compliance should be clarified, standardized, and implemented uniformly. Government grantmaking agencies and universities can and should take steps to educate grantees and potential grantees about the need for disclosures and conflicts of interest, including as they relate to the activities with the Chinese government, Chinese universities and Chinese corporations or nationals.
- 4) OSTP must ensure transparency from federal agencies on their investigative process for violations of research integrity and how determinations are made for when these are shared with law enforcement. Federal grant-making agencies such as NIH and NSF are not law enforcement agencies and should minimize entanglements with the FBI. Integrity issues should not be criminalized or mistaken as national security concerns.
- 5) Any new rules or clarification of existing rules should be applied to conduct prospectively, as much as possible. People should not be punished for past, lawful

scientific collaboration with Chinese research institutions or honorary programs, by being summarily denied for any future federal government funding opportunities.

- 6) OSTP should discourage criminalization of unintentional, inadvertent and/or administrative errors. As new and clearer guidelines are created, faculty, staff and scholars should have the opportunity to adjust their previous forms and provide any additional disclosures without being prosecuted or facing negative employment consequences. Self-disclosures should be incentivized, and cases of non-disclosures should be handled on an individual basis. Most Asian American and immigrant scientists under surveillance under the “China Initiative” have nothing to hide and would openly share any of their past activities if they did not fear prosecution.
- 7) OSTP should review policies and take measures throughout the government to combat racial bias against Asian American and Asian immigrant scientists and federal employees, including but not limited to anti-bias training. OSTP must examine existing procedures to find ways to improve and eliminate bias, both explicit and implicit. To further these efforts, OSTP should provide adequate training or scientific consultation for federal agents and prosecutors handling these cases to prevent and minimize harmful errors. OSTP must increase engagement with the scientific community, civil rights organizations, and impacted communities to minimize the impact of bias in hiring, admissions, and grant approvals.
- 8) OSTP should encourage transparency from federal agencies on the implementation of guidance including any impacts such as chilling effects and the deterring of Asian Americans and immigrants from certain activities such as immigration, studying, and/or working in the United States.
- 9) OSTP should consider the initial implementation as a pilot and provide additional comment periods. As guidance is implemented for NSPM-33, OSTP should report in the first six months on the successes and failures of the implementation to stakeholders to continue the discussion on improvement. Asian American civil rights and community groups should be included in the discussion to address concerns of racial equity, bias, and profiling.

Thank you for the opportunity to submit this comment on the implementation of NSPM-33. Please do not hesitate to contact Gisela P. Kusakawa to provide further information on this comment.

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