

## 'Branded As Spies,' Chinese Academics Vindicated In Court

By **Ivan Moreno**

Law360 (October 25, 2022, 8:00 PM EDT) -- University of Kansas researcher Feng "Franklin" Tao had recently returned home after a two-week trip to his native China in August 2019 when FBI agents acted on their growing suspicions that the chemistry and engineering professor may be a spy.

The agents led Tao away in handcuffs in front of his family and took family photos, along with anything they could find written in Chinese, according to one of his attorneys. In a subsequent indictment, prosecutors alleged that over the previous two years, Tao had taken 14 trips to China as a Changjiang Scholar — one of the many awards from his native country that the federal government sees as a vehicle for stealing original ideas from U.S. universities. Prosecutors said Tao concealed the award from his employers.



Feng "Franklin" Tao, a University of Kansas professor who was charged as part of the China Initiative, was acquitted by a judge of fraud charges in September, but federal prosecutors are appealing.

Further fueling federal agents' suspicions, the U.S. Department of Energy and the National Science Foundation were funding Tao's research at KU when he received the Changjiang Scholar award, which granted him a position at Fuzhou University in China. What's more, prosecutors allege Tao spent the first eight months of 2019 at Fuzhou University in preparation of building a lab there and attempted to "buy out" his spring teaching responsibilities at KU. Tao has contended KU accepted his offer; the government had alleged KU had not.

Tao seemed to fit the profile of the Chinese academics that the U.S. Justice Department was targeting in its declared battle against espionage and trade secret theft. Instead of counting as a DOJ success, however, Tao's case has become an example of the dearth of evidence Chinese academics suspected of spying have sometimes faced under the Trump-era effort known as the China Initiative. Except for a false statement charge, Tao has been cleared of all other counts in his indictment.

Following a string of unsuccessful prosecutions, the DOJ announced in February it would scrap the initiative's name to reflect a focus on a broader range of multinational threats instead of singling out one country. Pending cases have continued, however, and the government took two to trial this year — including Tao's — only to encounter the now familiar reality that sometimes the only evidence to support suspicions of espionage are omissions on research grant applications that may have been unintentional or harmless.

In both trials, judges have dismissed some charges while jurors have acquitted on others, a stinging rebuke of the government's theory that omissions on research grant applications were part of a scheme to defraud the government.

Tao's sentencing for the false statement charge is set for January. In the meantime, the government has filed a notice of appeal to the Tenth Circuit to restore the wire fraud counts a federal district judge dismissed.

"What this notice of appeal shows is that the DOJ's declaration that the China Initiative is dead is all talk," said one of Tao's attorneys, Peter Zeidenberg of ArentFox Schiff LLP. "DOJ is still pursuing these cases, even when a federal judge has found that there was no harm caused to the granting agencies or the university."

### **'Branded as Spies'**

Former Attorney General Jeff Sessions had stern words for one the U.S.'s biggest geopolitical rivals when he announced the creation of the China Initiative to combat economic espionage and trade secret theft: "Enough is enough. We're not going to take it anymore."

It was Nov. 1, 2018, and the Trump administration was escalating its anti-China rhetoric amid an intensifying fight over tariffs. The U.S. has long been focused on China as a threat, but Sessions said the new initiative would focus more DOJ resources to "identify priority Chinese trade theft cases" and to "bring them to an appropriate conclusion quickly and effectively."

University professors are not doing what the government is so frightened about or so worried about.



Peter Zeidenberg

ArentFox Schiff

The initiative would look for violations of the Foreign Agents Registration Act to address "covert efforts" to influence political leaders and the public, Sessions said, and ramp up reviews of foreign investments and licenses in U.S. infrastructure and telecommunications. Besides "traditional targets like our defense and intelligence agencies," the Chinese government was also focusing on research labs and universities, Sessions said.

The mandate to target espionage and trade secret theft quickly morphed to focus on research integrity cases at academic institutions. Those cases allege the defendant failed to disclose ties to foreign governments on grant applications and other documents.

A database created by the Massachusetts Institute of Technology found that prosecutors filed no research integrity cases in 2018 but by 2020, 16 of the 31 newly announced China Initiative cases fit that category.

MIT compiled its database based on DOJ press releases, court records and interviews with defense attorneys and former prosecutors. The DOJ has maintained a list of China Initiative investigations on its website, but has deleted cases that have been dismissed or resulted in acquittals.

In all, MIT tallied 77 cases tied to the China Initiative involving more than 150 defendants. Of those cases, 23 have dealt with research integrity, according to MIT, while another 19 cases included charges alleging violations of the Economic Espionage Act. Others included charges for hacking, corruption and being agents of a foreign government.

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George Varghese

WilmerHale

Not all prosecutions alleging trade secret thefts on behalf of China have faltered. In 2020, a married couple pled guilty in Ohio to conspiring to steal trade secrets from Nationwide Children's Hospital Research Institute. In 2019, an associate scientist at an Oklahoma petroleum company pled guilty to trade-secret theft for stealing information on battery technology and energy storage. And this January, an imaging scientist affiliated with one of China's talent programs pled guilty to conspiracy to commit economic espionage while working for a Monsanto subsidiary.

But overall, the results have been mixed.

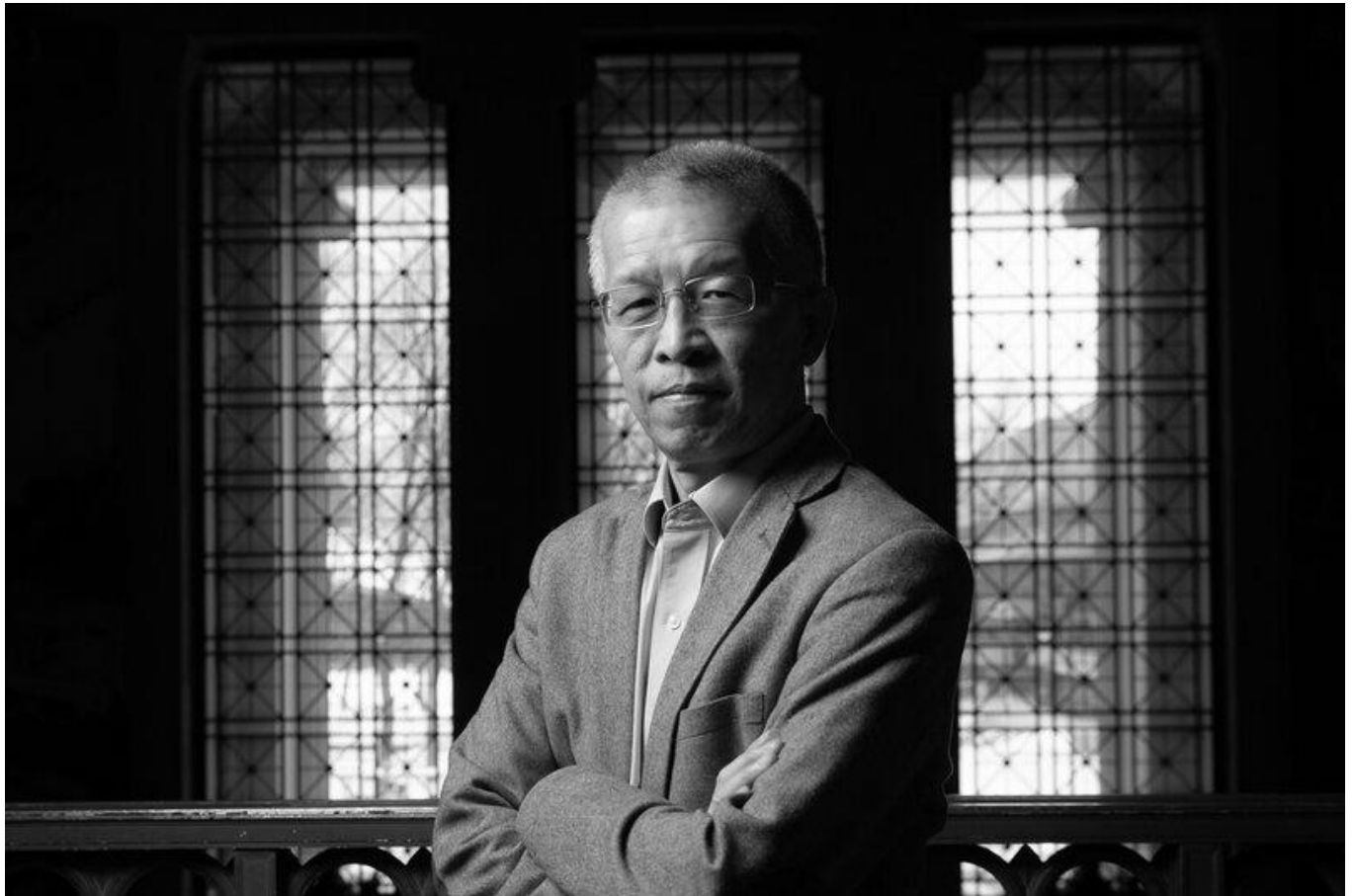
Of the 23 research integrity cases, eight resulted in guilty pleas and another eight ended in dismissals by prosecutors.

Three other defendants have been fully or partially acquitted. Two cases are pending and one, involving the Van Andel Research Institute, settled.

"They were essentially being branded as spies," said George Varghese, a WilmerHale attorney who previously helped prosecute Charles Lieber, 63, a former Harvard University professor convicted of lying about his connection to a Chinese research program that paid him while he received U.S. grant dollars. "The image that they were using, the terminology they were using was essentially that these were spies running around college campuses trying to steal taxpayer-funded research and I don't think the evidence supports that."

Varghese has gone on to represent universities who've had researchers under investigation, including the high-profile case of MIT professor Gang Chen.

"I think where they fell down was in this kind of overzealous rhetoric," Varghese said.



Gang Chen, an MIT professor, was accused of hiding his connections with China to defraud the U.S. government. Prosecutors dropped the case in January after finding the evidence did not support their claims. (Photo credit: Tony Pulsone, MIT MechE)

Lieber is the only academic who has been convicted on all charges — none of which included espionage or trade-secret theft. In fact, none of the indictments against professors have included such allegations.

"This program was meant to protect intellectual property and against economic espionage. The problem is they were fishing in the wrong pool," said Zeidenberg, the attorney for Tao. "University professors are not doing what the government is so frightened about or so worried about. They are involved in the research and they publish the results. This is the opposite of intellectual property [theft]. It's the opposite of it. They don't own it, they don't possess it, they publish the results."

In January, prosecutors abruptly **dropped** the case of MIT professor Chen, 58, a naturalized U.S. citizen accused of not reporting his affiliation with Chinese government institutions on grant applications to the Department of Energy.

"But the grant forms weren't clear that any of that needed to be reported," said Chen's attorney, Robert Fisher of Nixon Peabody LLP. "The straw that broke the camel's back, or however you want to phrase it, was when they spoke to the DOE and the response they got back was, no, at that point in time, that wasn't required" to be reported.

### **A Dearth of Evidence**

Tao's trial began in March, a month after DOJ National Security Division Chief Matthew Olsen announced the agency would drop the China Initiative name to reflect the department's broader approach to combating trade-secret theft and spying. He acknowledged that singling out one country had "fueled a narrative of intolerance and bias."

The DOJ declined to answer questions for this story and instead referred to Olsen's previous comments.

"I want to emphasize my belief that the department's actions have been driven by genuine national security concerns," Olsen said in his February remarks. "But by grouping cases under the China Initiative rubric, we helped give rise to a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to that country or that we in some way view people with racial, ethnic or familial ties to China differently."

Zeidenberg was skeptical.

"It was hard to take very seriously when a month later my client was being forced to go to trial on the very type of case that the Department of Justice just said we are no longer prosecuting," he said. "That bothered me a great deal."

Besides former Harvard professor Lieber, who is **appealing** his conviction to the First Circuit, the only other research integrity case to go to trial at the time was that of Anming Hu, 54, an engineering professor at the University of Tennessee, Knoxville, accused of not telling his employer about his connection to a state-run Chinese university while working on projects funded by the National Aeronautics and Space Administration.

Jurors deadlocked in June 2021 and the court declared a mistrial. Three months later, as the government prepared to retry the case, a judge granted Hu's motion for acquittal on all his wire fraud and false statement charges, saying there was insufficient evidence to prove the professor understood the agency's restrictions against using grants in collaboration with Chinese-owned companies.

"There is ultimately no evidence that defendant intended to deceive NASA about the nature of the bargains involved in the research grants at issue, and thus, no evidence that defendant had a scheme to defraud NASA," U.S. District Judge Thomas A. Varlan wrote. In a footnote, he said that the FBI agent who began investigating Hu did so "based on suspicions of economic espionage that were ultimately deemed unfounded through the investigation."

A NASA employee had also testified that the agency was happy with Hu's work and there was no evidence he stole any money from the agency.

During University of Kansas researcher Tao's trial, employees from the federal agencies that provided him grants also testified they were satisfied with his work. Rebecca Keiser, the National Science Foundation's chief of Research Security Strategy and Policy, said there were no allegations that Tao did not finish his work as directed or that he used any NSF funds to support foreign organizations.

Jurors delivered a split verdict in April. They acquitted Tao on three counts of wire fraud and one count of making a false statement. They also convicted him on three counts of wire fraud and one count of making a false statement.

The fraud convictions wouldn't stand for long, though. In **September**, U.S. District Judge Julie A. Robinson granted Tao's motion for acquittal on the three wire fraud charges but kept the guilty verdict for making a false statement, saying the chemical engineering professor was deceptive for not disclosing his work at Fuzhou University, of FZU.

As in Hu's case, Judge Robinson said the government failed to prove a scheme to defraud.

"Viewing the evidence in the light most favorable to the government, no reasonable jury could find that Tao's conduct, however deceitful, amounted to a scheme to deprive KU, DOE, or NSF of money or property," Judge Robinson said.

Judge Robinson also said "certain allegations in the indictment were not borne out by the evidence," such as the claim that Tao began his scheme to defraud KU in 2015 "by misrepresenting and concealing his affiliation with FZU." Tao did not get the Changjiang Scholar award until January 2018, after the Department of Energy and National Science Foundation had awarded him and the University of Kansas the grants in question.

## **DOJ Undeterred**

A week after jurors delivered a split verdict in Tao's case, Southern Illinois University math professor MingQing Xiao, 60, went on trial. Prosecutors alleged Xiao did not disclose his employment with Shenzhen University as well as a grant from China's Natural Science Foundation when he and SIU applied for a grant with the U.S. National Science Foundation.

"I'll tell you, when that [DOJ] announcement came out, we were hopeful that they were reviewing our case and realizing how much of a travesty it was, but they didn't," said one of Xiao's attorneys, Ryan Poscablo of Steptoe & Johnson LLP.

After the government presented its evidence over five days, Xiao's attorneys moved for acquittal, saying prosecutors fell "woefully short" of backing up their case. Prosecutors had no evidence and presented zero witnesses to support the claim that Xiao ever received the Chinese grant, according to Xiao's motion. Nor did they have evidence or witnesses to show the existence of a contract between Xiao and Shenzhen University, the motion said.

"In failing to present sufficient evidence on these two facts, it has failed to present sufficient evidence that Professor Xiao's certification of the grant application as 'truthful, accurate and complete' was in fact false," Xiao's motion said.

U.S. District Judge Staci M. Yandle dismissed two counts of wire fraud but let jurors decide the remaining charges. Jurors dismissed a false statement charge but convicted Xiao on four tax-related counts added in a superseding indictment — three for filing false income tax returns and one for failing to report a foreign bank account.

Xiao, who became a U.S. citizen in 2006, said he had corrected his tax returns soon after federal agents first questioned him in December 2020 and paid the nearly \$32,000 he owed to the IRS in August 2021 — before prosecutors added the tax charges in the superseding indictment.

In a sentencing memo, prosecutors wanted Xiao sent to prison for a year because he "chose to cheat the system." Xiao, who asked for probation, replied that the government only filed the tax charges after he "refused to accept a plea offer to the charges for which he was ultimately acquitted."

He was sentenced to a year of **probation** in September. His attorneys are appealing to the Seventh Circuit to get the tax convictions overturned.

Patrick Linehan, another attorney who represented Xiao, said prosecutors were "overaggressive" in bringing charges.

"They brought this case having never met our client personally. There was an interview done voluntarily by FBI agents, but our client never set foot in the U.S. attorney's office to explain things before the indictment, never had an opportunity to do that," said Linehan, also with Steptoe & Johnson.

Tao's attorney Zeidenberg said he hoped the three straight rulings from judges against the DOJ in the Hu, Tao and Xiao cases would send a strong message to the department that their strategy of charging people with wire fraud for not disclosing an affiliation on grant paperwork would no longer work.

"You've now got three judges in a row in the only three non-disclosure China Initiative cases that have gone to trial, and all three have said this is not a crime," he said.

### 'People's Lives Are Ruined'

On Sept. 22, Zhengdong Cheng, 55, became the latest academic to plead guilty to charges in a China Initiative case. According to a plea agreement, the former professor of chemical engineering at Texas A&M University had spent years concealing his academic and business ties to China in disclosure forms while receiving a NASA-funded grant.

They usually come and say, 'We were visited by the FBI. Is there a lawyer you recommend?'



Zhengyu Huang

Committee of 100

For pleading guilty to violating NASA regulations and making false statements, prosecutors dropped the indictment, which included a charge for wire fraud, and he was **sentenced** to time served. Cheng, a naturalized U.S. citizen, had been free on bond since September 2021, but had already spent nearly two years in custody awaiting trial, his attorney said.

"What surprises me is that he was, in fact, prosecuted, because this case did not involve technology transfer, it did not involve economic espionage, trade secrets, export control violations or commercial bribery," said Philip Hilder of Hilder & Associates PC.

Hilder said Cheng pled guilty because of the risk of a longer prison sentence if he had gone to trial.

"It was a question of just moving on," Hilder said. "NASA got what they bargained for. He was doing research on liquid crystals and how they would interact in space and the research was done. There was no criticism of the research."

Cheng was fired from his job in December 2020, a few months after being charged.

"The human cost, the human toll of this is really, really, really high. I cannot overemphasize this. People's lives are ruined and that's why everybody is afraid," said Zhengyu Huang, president of the Committee of 100, a Chinese-American leadership organization.

Huang said that while recasting the China Initiative is an important step, "China is still top of mind for a lot of political leaders."

"So there may still be a lot of pressure for agents, etc., to build these cases, sometimes very hastily," he said, adding that he's heard from Chinese scientists who are under investigation. "They usually come and say, 'We were visited by the FBI. Is there a lawyer you recommend?'"

While Chinese-American advocacy groups and defense attorneys welcomed DOJ National Security Division Chief Olsen's announcement, not everyone agreed it was the right call.

"I think what was going on was an activist campaign to end the China Initiative, which the DOJ ultimately succumbed to," said Michael Ellis, a visiting fellow at the conservative Heritage Foundation and former senior director for intelligence programs at the National Security Council. "There were a lot of other really important aspects of the China Initiative that I fear the administration has thrown out the baby with the bathwater."

Ellis said because of the China Initiative, the DOJ compelled Chinese government-owned outlets like the Xinhua News agency and CGTN America to register as foreign agencies under the Foreign Agents Registration Act, or FARA.

"These media outlets had for years been operating inside the United States failing to disclose their affiliation with the Chinese government to register under FARA and it's really inexcusable that we let this happen for so long," he said.

Ellis said he's concerned federal prosecutors and FBI agents will now back off from some investigations they would've otherwise pursued.

"When Main Justice tells them, as they did, 'We're ending the China Initiative, China is just one of many nation state threats,' that sends a message to the field and ambitious AUSAs, ambitious FBI agents, they hear that message and they will use their time to investigate other kinds of cases," he said.

Olsen said in his February remarks the DOJ will continue to "be relentless in defending our country from China" but that in cases involving academic integrity, his division will "take an active supervisory role" in evaluating "whether criminal prosecution is warranted or whether civil or administrative remedies are more appropriate."

WilmerHale's Varghese agrees the DOJ should continue pursuing cases of economic espionage and trade-secret theft "because the threat from China is still there."

"But when they bring those cases, they need to have the evidence that supports that technology is actually being taken and that secrets are actually being stolen," he said. "In terms of these failure-to-disclose research cases, I don't think there will be many going forward because I think the department has seen with its track record that these cases are problematic."

The prosecutions of recent years have created an atmosphere of fear among Chinese academics, according to a September report by MIT, Princeton and Harvard universities on behalf of the Asian American Scholar Forum for a report called, "Caught in the Crossfire: Fears of Chinese-American Scientists."

In an online survey that included 1,304 Chinese-American academics employed at U.S. universities, 72 percent of respondents said they did not feel safe as researchers and 42 percent said they are fearful of conducting research. Six out of 10 said they have thought about leaving the U.S. and 45 percent say they want to avoid applying for federal grants.

The survey was conducted from December 2021 to March 2022.

Still, Gisela Perez Kusakawa, the director of Anti-Profilng, Civil Rights and National Security at Asian Americans Advancing Justice, said she's heard from Chinese scientists who lived through that country's Cultural Revolution and who do want to stay in the U.S.

"I've heard folks share their stories of going up to their rooftops in China to listen to American radio and they would dream about safety, freedom and sanctuary. It was very unsettling for many of them to find that that sanctuary may not be here in the United States," she said. "They want to stay. They want to help our country live up to its values because in their minds they're still that person on that rooftop."

--Editing by Michael Watanabe.