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The China Initiative May Have Finally Died—Killed Not by DOJ but the Courts

The courts have, for now, stepped in and put a halt to the most egregious of prosecutions under the China Initiative. By the time the courts acted, great damage has already been done—careers are lost, finances drained, and lives forever scarred.

BY PETER R. ZEIDENBERG AND MICHAEL F. DEARINGTON

The China Initiative, announced with great fanfare by then-Attorney General Jeff Sessions in November 2019, was supposed to combat the national security threat posed by China by focusing prosecutorial attention on "identifying and prosecuting those engaged in trade secret theft, hacking and economic espionage."

According to Sessions, "Chinese economic espionage against the United States has been increasing and it has been increasing rapidly. Enough is enough. We're not taking it anymore." Sessions announced a task force dedicated to rooting out the suspected evil-doers who were targeting American intellectual property.

It did not take long for prosecutors to realize that cases of economic espionage or theft of intellectual property were exceedingly rare, especially among university professors. Yet, instead of shelving the initiative, it morphed into a search for paperwork errors—reams of paper submitted in connection with federal grants was scrutinized in the hopes of finding an omission about a Chinese affiliation.

Aggressive prosecutors, with the blessings of the DOJ, contended that any failure to report such an affiliation justified charges of wire fraud—an offense that carries a maximum 20-year prison sentence. But just this past week, the third district court in a row to hear such a case rejected this theory, finding that mere nondisclosure of a foreign affiliation, where all of the academic or grant work is completed, is not enough to violate the wire fraud statute.

In what will hopefully prove to be the death knell for the China Initiative, Dr. Franklin Tao, the first ethnically Chinese scientist prosecuted under the China Initiative, had his remaining fraud charges thrown out last week. The government had charged Tao, a Chinese-born scientist at the University of Kansas, with 10 felonies, including seven counts of wire fraud. The government alleged that because Tao had failed to disclose a relationship with a Chinese University, the federal agencies whose grants Tao had been the principal investigator (PI) on were victims of wire fraud—even if the agencies were fully satisfied with the all of the work that Tao had done on the grants, and even if he made no misrepresentation in applying for the grants.

Courtesy photos

Peter R. Zeidenberg, left is a partner with ArentFox Schiff, and Michael F. Dearington, right, is an associate with the firm.

The trial judge, in granting the defense's motion for judgment of acquittal, disagreed with this "logic," finding that there was no evidence that the granting agencies would not have awarded the grants even if they had known about Tao's alleged undisclosed affiliation, and that the granting agencies and KU all received exactly what they bargained for: Tao carried out all of his research duties to the complete satisfaction of the government agencies, and KU even recognized Tao as one of the most accomplished researchers at the university at the same time that the alleged scheme was ongoing.

Indeed, at an awards ceremony recognizing Tao's accomplishments, the chancellor noted that Tao "had far exceeded expectations in his field in terms of his productivity and [ ] his level of ingenuity." In

addition, the court found that Tao "never missed a day of work[,] worked seven days a week, and except for Sundays, he typically worked fourteen to sixteen-hour days [and] never took any vacations." He was, in short, the type of employee that was rightfully celebrated before the DOJ filed charges against him. Given all this, it is indeed breathtaking to think the government would argue that KU was defrauded by Tao and, thankfully, the court agreed that there was no evidence to support the charge.

The court in Tao's case hardly broke new ground in concluding that mere nondisclosure of Chinese affiliations does not equal grant fraud where the professor performs all work and obligations. The only two other district courts that have considered motions for judgment of acquittal in these circumstances likewise granted acquittals. In *United States v. Anming Hu*, a district court in the Eastern District of Tennessee acquitted Dr. Hu, who had been charged with defrauding NASA of grant funds by concealing a second position in China. In granting Dr. Anming Hu's MJOA, the court reasoned that even if Hu "intentionally deceived NASA about his affiliation" in China, there was "no evidence that NASA did not receive exactly the type of research that it bargained for [and] … NASA was satisfied with defendant's work on their grants." The court concluded that there "is simply no evidence that NASA did not receive … the benefit of its bargain."

Similarly, in *United States v. Mingqing Xiao*, a district court in the Southern District of Illinois granted the defense's MJOA for a university professor accused of wire fraud for allegedly causing his university to apply for a federal grant without disclosing an active Chinese grant or a second position at a Chinese university. Once again, the court reasoned that while there was evidence of deceit, "one can deceive without defrauding." Because the defendant did not deny the agency the benefit of its bargain, did not steal the grant funds, and did not otherwise cause harm through his deceit, there was insufficient evidence that he had an intent to defraud. While Chinese American scientists can all be grateful that district court judges have curbed these runaway prosecutions, the question must be asked why the DOJ has persisted in bringing these cases despite there being no harm to the agencies.

In February of this year, the DOJ announced that it was tabling the China Initiative and would no longer be prosecuting mere failures to disclose foreign affiliations absent a national security nexus. Yet less than one month after that announcement, the DOJ proceeded to try Tao for a "mere non-disclosure" case with "no national security nexus." If not for judges willing to overrule these jury verdicts, Tao, Hu and Xiao would be facing the prospect of years in prison for their paperwork errors. Rather than protect American intellectual property, the China Initiative has been counter-productive.

The DOJ targeted this country's academic community, rather than nation-state actors or intellectual property thieves, and fearful Chinese American scientists, harassed by aggressive investigators and threatened with the loss of research funding, have found no choice but to return, reluctantly, to China, a country they happily left decades ago and where they had no desire to return. The best and brightest scientists in China may also think twice before emigrating to the United States, given the risks and unwarranted scrutiny they will face upon arrival.

The putative shelving of the China Initiative was cheered by many of its critics, hopeful that the DOJ had finally recognized the harm it was causing. Yet, despite the promising words, the DOJ's actions speak much more loudly, and it is clear that, but for the courts, the initiative would live on, despite a name change.

Thankfully, the courts have, for now, stepped in and put a halt to the most egregious of these prosecutions. But, unfortunately, by the time the courts have an opportunity to act, great damage has already been done—careers are lost, finances drained, and lives forever scarred. The China Initiative may finally be over, but its devastating toll on academia and ethnically Chinese professors should not be forgotten, so that its mistakes are never repeated.

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