

# Trying Trade Secrets: *Stories from the Trenches*

## Panelists

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## Moderator

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# AGENDA

- Targets of trade secret theft prosecutions
- Investigations
- Charges
- Overseas jurisdiction
- Pre-Trial and Trial issues
- Sentencing

# POLICY FOCUS ON TRADE SECRET THEFT

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“We really have to look at access, forced technology transfer, and the theft of intellectual property, which just, by and of itself, is costing the United States and its companies at least \$300 billion a year.” (Remarks by President Trump at World Economic Forum (Jan. 26, 2018)).

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“[M]any US companies remain cautious about bringing intellectual property (IP) developed abroad into [China]. They fear that requirements like source code review could endanger the value of their innovations. Over 50% of member companies still believe IP leakage and data security threats are higher in China than elsewhere, and 27% say a lack of sufficient IP protection is a barrier to increased innovation. ” (American Chamber of Commerce, China Business Climate Survey Report, 2018).

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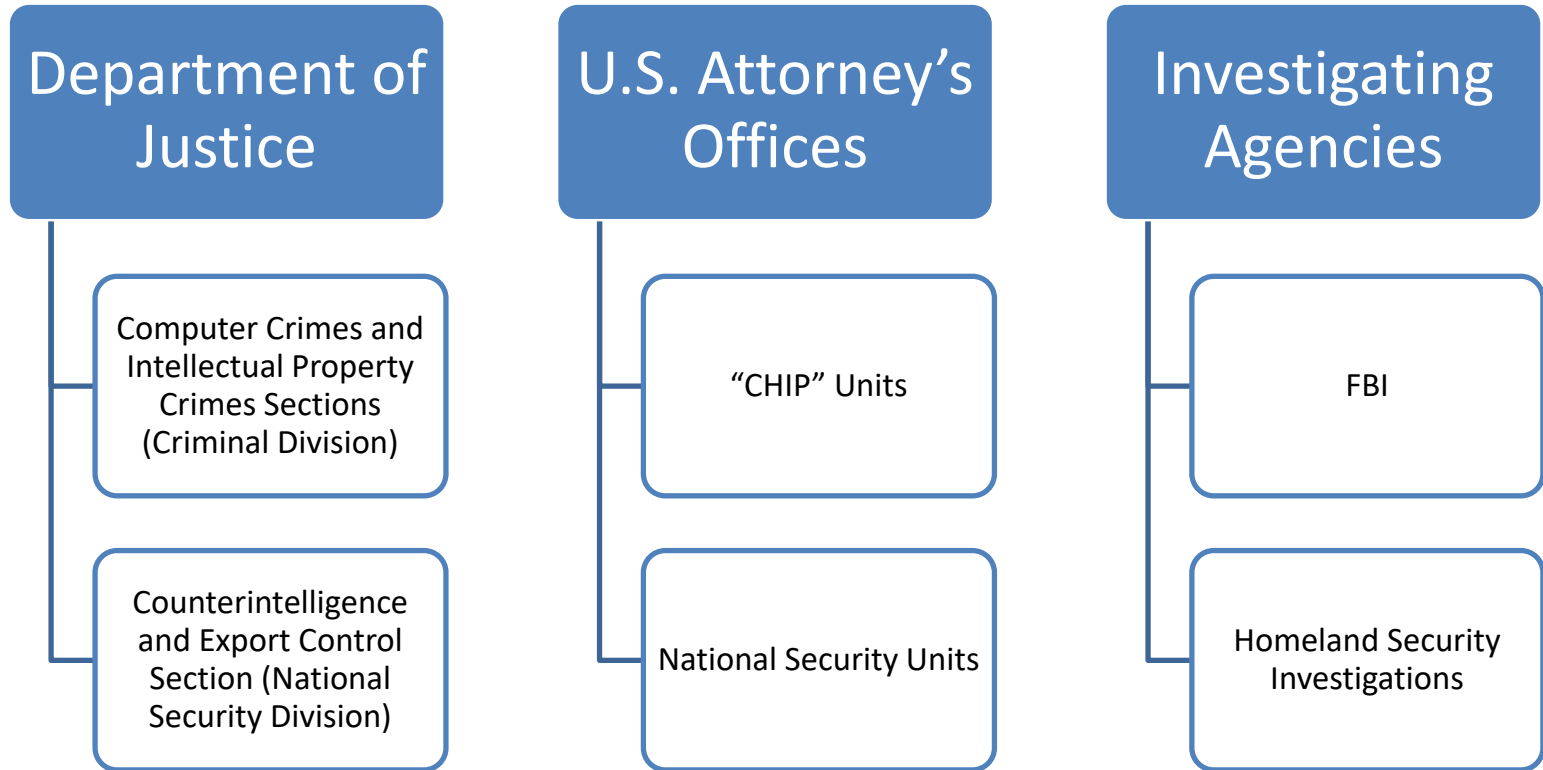
“As the global economy has increased its dependence on information systems in recent years, cyber theft became one of China’s preferred methods of collecting commercial information because of its logistical advantages and plausible deniability.” Computer Intrusion to Steal Intellectual Property (U.S. Trade Representative, Section 301 investigation, Mar. 22, 2018, findings).

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“We've discovered the dragnet isn't just catching Chinese spies, it's ensnaring a growing number of Americans who aren't spies at all.” (60 Minutes, “U.S. Fight Against Chinese Espionage Ensnares Innocent Americans,” re-broadcast Aug. 26, 2018).

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# LAW ENFORCEMENT AUTHORITIES



# INVESTIGATIONS (LAW ENFORCEMENT AND INTERNAL CORPORATE)

Review of company data (emails, documents, company-issued cellphones and other devices)

Interviewing witnesses (and the target/subject)

Document requests and grand jury subpoenas

Search warrants (including ISP information)

Arrest and searches of devices on the target's person

Disclosure to law enforcement of confidential trade secret information

# COMMONLY USED CHARGES

Economic Espionage/Theft of Trade Secrets (18 U.S.C. §§ 1831-1832)

- To benefit foreign government (§ 1831) / economic benefit (§ 1832)

Computer Crime (18 U.S.C. § 1030)

Wire Fraud (18 U.S.C. § 1343)

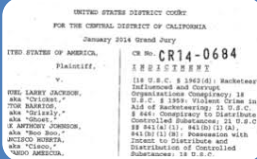
Money Laundering (18 U.S.C. §§ 1956-1957)

Foreign Agents Registration Act (22 U.S.C. §§ 611-622)

Conspiracy, Aiding and Abetting (18 U.S.C. §§ 371 and 2)

N.B. These charges apply to both individuals and entities

# OVERSEAS JURISDICTION



## SERVICE ON OVERSEAS DEFENDANT



## Previously:

- Official channels (Mutual Legal Assistance Agreements or Treaties)
- Mail and delivery of summons to U.S. affiliates



## 2016 amendments to Fed. R. Crim. P. 4

- “Any other means that gives notice.”



## In re Pangang Group Co., No. 17-72370 (9th Cir. Aug, 22, 2018)

- Service on counsel making limited appearance to contest jurisdiction

# PRETRIAL ISSUES

Bail / Detention

Plea Negotiations / Cooperation

Protective Order / Graymail

Search and seizure issues (motions to suppress evidence)

Challenges to jurisdiction



# TRIAL ISSUES

*Voir dire*

Evidentiary issues  
(including experts,  
authenticating  
electronic evidence)

## Common defenses

- Whether the information is even a “trade secret”
  - “Tool kit”
- Proof of reasonable measures to keep the information secret
- Reverse engineering
- For foreign espionage charges, whether the activity is for the benefit of a foreign government

# SENTENCING

- Sentencing Guidelines
  - Loss (Guideline § 2B1.1(b)(1))
    - *U.S. v. Pu*, 814 F.3d 818 (7th Cir. 2016) (cost of development not a measure of intended loss where no evidence that defendant intended to cause that loss to victims)
  - Sophisticated Means (Guideline § 2B1.1(b)(10))
  - Trade secret enhancements (Guideline § 2B1.1(b)(13))
    - +2 if trade secret to be transported outside U.S.
    - +4 if trade secret would benefit a foreign government
  - Leadership enhancements (Guideline § 3B1.1)
- Apprendi issues (whether there are facts affecting sentencing that must be proven at trial)
- Restitution (18 U.S.C. §3663(a) – MVRA)