AAPIs have long been accused of spying for foreign countries and engaging in acts of treason. In 2021, an MIT professor -- a U.S. citizen of Chinese descent -- was arrested by federal agents for failing to disclose ties to China. A year later, all charges were dropped, shortly before the U.S. government announced the discontinuance of its "China Initiative," which targeted Chinese academics. There have been other occasions in recent years when the government arrested individuals of Asian descent with great fanfare, only to eventually drop the charges with little explanation. Unfortunately, this is nothing new. More than two decades ago, Dr. Wen Ho Lee, a Taiwanese-born American citizen and a scientist at Los Alamos National Laboratory, was arrested and accused of being a spy who had given U.S. nuclear secrets to China. After 278 days in custody in harsh conditions, he pleaded guilty to one count of mishandling national defense information. The 58 other counts were dismissed, and he was released. Even earlier, in 1949, Iva Toguri D'Aquino was tried for treason in San Francisco -- as the infamous "Tokyo Rose." Years later, she was pardoned. Have AAPIs been unfairly singled out in espionage investigations? Or does the government have legitimate concerns? This program, the 14th in a series of reenactments presented by the Asian American Bar Association of New York, considers the history of the government's actions in this area, through narration, reenactment of court proceedings, and historic photos and documents.

Moderators:
Denny Chin, U.S. Circuit Judge, Second Circuit
Kathy Hirata Chin, Partner, Crowell & Moring, LLP
Vincent T. Chang, Partner, Wollmuth Maher & Deutsch, LLP

Cast:
Members of the Asian American Bar Association of New York
## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Timed Agenda</td>
<td>1</td>
</tr>
<tr>
<td>DOJ Documents in <em>Iva Toguri</em> Case (May 25, 1948 and May 27 &amp; 28, 1948)</td>
<td>2</td>
</tr>
<tr>
<td>Judge Parker's Statement at Sentencing in <em>United States v. Wen Ho Lee</em> (Sept. 13, 2000)</td>
<td>22</td>
</tr>
<tr>
<td>DOJ Release: Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats (Feb. 23, 2022)</td>
<td>32</td>
</tr>
<tr>
<td>Bibliography</td>
<td>38</td>
</tr>
</tbody>
</table>
## Timed Agenda

<table>
<thead>
<tr>
<th>The Reenactment</th>
<th>Minutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>2</td>
</tr>
<tr>
<td>II. Tokyo Rose</td>
<td>20</td>
</tr>
<tr>
<td>III. The Cold War</td>
<td>4</td>
</tr>
<tr>
<td>IV. Wen Ho Lee</td>
<td>20</td>
</tr>
<tr>
<td>V. Contemporary Cases</td>
<td>8</td>
</tr>
<tr>
<td>VI. Conclusion</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>60</td>
</tr>
</tbody>
</table>

**Discussion and Q&A**

| Discussion and Q&A               | 15      |
| **Total**                        | 75      |
Office Memorandum - UNITED STATES GOVERNMENT

TO: Raymond F. Whearty, Esquire
FROM: Tom DeWolfe
SUBJECT: Iva Toguri

DATE: May 25, 1942

STATEMENT OF THE CASE

Reference is made to the above-entitled prospective treason prosecution, presently pending in the Department. Subject is not under restraint or in custody, and no criminal proceedings have ever been instituted against her in the United States.

Subject will be 32 years of age on 4 July next. She is a Nisei, having been born in California of Japanese non-United States-citizen parentage. She graduated from the University of California, Los Angeles Branch, in 1940.

Her aunt was ill in Tokyo and subject's mother, being of unsound health, requested subject in the summer of 1941 to proceed to the Orient for the purpose of nursing subject's aunt. In July 1941, lacking a passport but provided with a certificate of identification, subject sailed from southern California to the Orient. Having made the voyage without a passport and wishing to secure one, she visited the American Embassy in Tokyo and executed the appropriate application. In the latter part of November 1941 she wished to return to the United States. She again visited the American Embassy for the purpose of obtaining a passport and was advised by American Embassy officials that they had received no authorization from Washington to issue her a passport. However, the Embassy furnished her with a letter at that time stating that an application had been made for a passport. With this letter an attempt was made by subject to book passage on a ship scheduled to sail for the United States on 2 December 1941. She then learned that a permit was necessary from the Japanese Finance Ministry authorizing and empowering her to take out of Japan the money she had brought with her from the United States. Before this permit was obtainable the ship had sailed and subject was left in Japan at the beginning of the war on 8 December 1941.

Finding it difficult to adjust herself among the citizens of Tokyo through her inability to speak the Japanese language, subject enrolled in the School of Japanese Language and Culture in Tokyo shortly after her arrival and continued to attend this school until December 1942. Early in 1942 she was advised that United States citizens desiring evacuation to the United States should make application at the Swiss Legation. She was advised
that the passage would cost approximately $400 and that it would be necessary for her to pay the cost of the passage either before she left Japan or for someone in the United States to guarantee payment on her arrival in this country. Furthermore, she was told by the Swiss Legation that because of the fact that she was without a passport there was little chance that she would be evacuated to America on the first repatriation ship. In September 1942 she again went to the Swiss Legation in an endeavor to secure passage to New York on the Gripsholm but was unable to raise the amount of money required for the passage. After this occurrence she registered at a Japanese ward police station as an alien and continuously thereafter until the fall of Japan was under the surveillance and scrutiny of the Japanese police.

With her funds becoming exhausted in July 1942 she obtained employment with the Japanese Domei News Agency as a typist in the monitoring section. In August 1943 subject obtained a part-time position as a typist with Radio Tokyo, in which type of work she was engaged until November 1943. In November 1943, at the instigation of one Major Charles Cousens, an Australian prisoner of war, subject was selected through the medium of a voice test to participate as an announcer on Radio Tokyo's program called "Zero Hour". She worked in this capacity approximately five days a week until 13 August 1945.

Three prisoners of war, to wit, Lieutenant Norman Reyes (Filipino), Major Wallace E. Ince (American), Major Charles Cousens (Australian), were in charge of the production of Radio Tokyo's "Zero Hour" broadcasting activities for the Japanese Government. These three men have all been cleared by their respective governments of any charge of treasonous activity in connection with their alleged broadcasting work. They will be the three most important witnesses against subject if an indictment should be returned against her by a grand jury in a United States court. They will testify that subject broadcast no information of military or intelligence value and at no time beamed anything to troops in the southwest Pacific of a propagandistic nature. Her sole work, according to these witnesses, consisted of introducing musical recordings which were beamed to Allied troops in the southwest Pacific. They will testify that they selected subject as an announcer because she was the only woman available, white or Nisei, whom they could trust not to betray to the Japanese their efforts to sabotage any propaganda which the Japanese might and would attempt to broadcast to American troops then fighting in the Asiatic Theater. The three men above mentioned will testify that subject was likewise selected by them because she possessed a masculine
voice which it was thought would not be attractive to Allied soldiers and fighting men in the Pacific. They will testify that subject never worked at the radio station more than two hours a day in the afternoon for five days a week in connection with her preparation for and actual broadcasting of the introductions to the musical recordings aforesaid. In order to earn a living to sustain herself subject was forced at the conclusion of her 20-minute portion of the program in question to work at the Danish Legation in Tokyo. The witnesses above mentioned will likewise testify that subject on some occasions made every endeavor to see that propagandistic matter was not inserted in or utilized by the "Zero Hour" program. She frequently expressed pro-American sentiments in the presence of many witnesses and often evinced the wish and desire, when Japanese officials were not present, that the war would end soon and that the United States, her native land, would emerge victorious therefrom.

The three prisoners of war above mentioned who were instrumental in carrying out the program known as the "Zero Hour" and others will testify that subject aided American prisoners of war and often brought them food and sustenance. The three prisoners of war above mentioned were, during a major portion of their broadcasting activity, housed in a rather luxurious Japanese hotel and were not under any more police surveillance than subject. They seem just as much or more culpable than she. The scripts of her programs seem totally innocuous and might be said to have little, if any, entertainment value. The scripts containing the introductions to musical recordings, which scripts subject read over the air, were for the most part written for her in their entirety by Major Cousens (Australian prisoner of war).

The evidence at hand discloses that the appellation "Tokyo Rose" was never used by subject but was one indiscriminately given to subject or any one of five female announcers working at Radio Tokyo. 

THERE IS INSUFFICIENT EVIDENCE TO MAKE OUT A PRIMA FACIE CASE.

If an indictment is returned against subject by Federal grand venire men in the appropriate Federal judicial district the three Allied prisoners of war, Major Charles Cousens (Australian), Major Wallace E. Ince (American), and Lieutenant Norman Reyes (Filipino), will be necessary and material witnesses for and on behalf of the United States against subject at the trial on the merits before a petit jury. These witnesses have all been cleared of any charge of treasonable activity in connection with their work for Radio
Tokyo. According to the available facts they were under no more
duress or compulsion than was subject. As Government witnesses
the Government will as a matter of law be forced to vouch for the
truth of their testimony. They will testify to facts which will
disclose as a part of the Government's case in chief that defendant
lacked the requisite intent to betray. It must be proved that the
accused acted with an intention and purpose to betray or there is

Here, anticipating the interposition of a motion for judgment of
acquittal and assuming the verity of the testimony of the Government
witnesses and all reasonable Inferences that may be drawn therefrom,
still the Government's case must fail as a matter of law because the
testimony of the Government will disclose that subject did not adhere
to the enemy or possess the requisite disloyal state of mind.
Cramer v. United States, 325 U. S., 31. If the situation were such
that witnesses were available to testify that defendant actually
broadcast propaganda to American troops in an endeavor to lower their
morale and hinder and impede the American war effort and the defense
produced evidence to combat said Government testimony, then a jury
question would be presented but that is not the situation here.

The Government witnesses, almost to a man, will testify to facts
which show that subject was pro-American, wished to return to the United
States and tried so to do prior to Pearl Harbor, attempted unsuccessfully
to return to the United States in 1942, and beamed to American
troops only the introduction to innocuous musical recordings. The
Government's evidence likewise will show that subject was a trusted
and selected agent of the Allied prisoners of war, who selected her
as the one they could trust not to sabotage their efforts against the
success of the Japanese propaganda machine. In other words, the
testimony which the Government will offer will not make out a case
sufficient as a matter of law to withstand a motion for an instructed
verdict.

It is also believed that the two overt acts against subject which
are presently available, i.e. proof from Reyes and Ince, prisoners
of war, that subject broadcast two scripts in March 1944, are from
a factual and trial standpoint insufficient as a matter of law. The
two overt acts adverted to refer to broadcasts by subject which are
nothing but introductions to musical recordings. There is no proof
available that when subject committed said acts she intended to
betray the United States by means of said acts. Cramer v. United
States, 325 U. S., 31. Such proof is a vital element of the
Government's case before submission of the same to a trial jury is
warranted. The available proof on the overt acts committed by sub-
ject, i.e. broadcasting of two introductions to musical recordings
in 1944, will not from a trial standpoint show that said acts were acts
in furtherance of the Japanese war effort. In the treason trials
recently successfully concluded in Boston, Federal Judge Ford held as a matter of law that in order for an overt act to be sufficient to warrant submission of the same to the jury the proof thereon must show that the same was actually committed for the purpose of furthering the enemy's war effort.

There is no available evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt and consequently a motion for a judgment of acquittal under F.R. Crim. P. 29(a) would probably be granted by the trial court. Conley v. United States, 160 F. (2d) 229, cert. den. 357 S. Ct. 1511.

The statement of defendant given to Bureau agent Tillman might not be admissible in evidence due to the fact that subject was in military custody at the time and had been for some time without any military or civil charges ever having been brought against her. United States v. Bayer, 331 U. S. 532. Similar statements given to Department of Justice lawyers under similar circumstances were ruled out in recent treason trials in the Federal Judicial District of Massachusetts, although their admissibility was strenuously urged by the Government. The proof available on the merits in the treason cases successfully concluded during the past year in Boston showed that the defendants in those cases expressed pro-German and anti-American sentiments, broadcast propaganda from Berlin over the German Radio, intended to dissuade American citizens from supporting the American war effort, and broadcast military information and information concerning the maritime losses of the Allied merchant marine, all obviously calculated and intended to impede and hamper the American war effort and lower the morale of American citizens. The type and quantum of the proof available in the case against subject is the direct antithesis of that available and utilized in the Boston litigation aforesaid.

The so-called "confession or "admission against interest" given by subject to newspaper men Lee and Brundidge was given only after those gentlemen offered subject $2,000 for exclusive rights for subject's story, which was to be given to the Cosmopolitan Magazine, which journalistic enterprise said newspaper men represented. Of course, Lee and Brundidge at the time were not acting under the authorization of the Department of Justice but were acting in their private capacity. Any inducements held out by a private person who is not occupying a position of authority to secure a confession do not per se render the same inadmissible. United States v. Stone, 8 Fed. 222, Steiner v. United States, 134 F. (2d) 931 (C.C.A. 5), cert. den. 319 U. S. 774, 87 L. Ed. 1721. However, the methods by
which these newspaper men obtained the so-called "admission against interest" or "confession" from subject appear at least questionable and of doubtful propriety and would, no doubt, be submitted to the trial jury by the court for the purpose of enabling the petit venire men to determine whether or not the same was voluntarily obtained and was given by the defendant of her own free will.

RECOMMENDATION

Should the Department disagree with the views herein expressed and desire the case against subject to be presented to a Federal grand jury it is recommended that a no true bill be sought. Should an indictment be returned against subject under the applicable provisions of Title 18 U.S.C., Sec. 1 (treason) and the cause pushed for trial on its merits before a petit jury it is recommended that every possible effort be made to secure Federal Communications Commission records of monitorings of subject's broadcasts, which were until recently in the possession of the Federal Bureau of Investigation, together with the Naval sound track film and also the Naval Government recordings made of subject's voice in Guam, which matters are frequently mentioned in the numerous reports of the Bureau, which will be found scattered throughout the various sections of the file in this case.
MEMORANDUM

From
ASSISTANT ATTORNEY GENERAL T. VINCENT QUINN
Criminal Division
to
Official indicated by check mark

| The Attorney General |  
|----------------------|---------------------|
| The Solicitor General |  
| The Assistant to the Attorney General |  
| Assistant Attorney General (Antitrust) |  
| Assistant Attorney General (Claims) |  
| Assistant Attorney General (Lands) |  
| Assistant Attorney General (Tax) |  
| Assistant Solicitor General |  
| Director, FBI |  
| Director of Prisons |  
| Commissioner, Immigration & Naturalization |  
| Pardon Attorney |  
| The Administrative Assistant to the Atty.Gen. |  
| The Executive Assistant to the Atty. Gen. |  
| Director of Public Information |  

1. BROCK, Mr. 
2. BROOKLEY, Miss 
3. BROWN, Mr. 
4. COOK, Mr. 
5. DAGGER, Mr. 
6. ERDAHL, Mr. 
7. FISHER, Mr. 
8. FOLEY, Mr. 

Thought you'd see this; in the light of all the publicity given to this case.  
 approved  
7/22/48  

Please note it.
UNITED STATE DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA vs. WEN HO LEE, Defendant

No. CR 99-1417 JP

BRIEF OF AMICI CURIAE IN SUPPORT OF
DEFENDANT'S MOTION FOR DISCOVERY OF MATERIALS
RELATED TO SELECTIVE PROSECUTION

INTEREST OF AMICI CURIAE

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit civil rights organization based in New York City. AALDEF protects and promotes the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has challenged discrimination on the basis of race, national origin, and immigration status, in both the public and private sectors, and works to secure opportunities denied to Asian Americans as a result of their historic exclusion from the mainstream of American life and of a legacy of discrimination sanctioned by law.

Chinese for Affirmative Action ("CAA") is a 31-year-old, member-supported civil rights organization based in the San Francisco Bay Area. CAA serves Asian Americans and immigrants seeking employment opportunities, provides support to language minority students and parents in the public schools, and engages in local, state, and national policy advocacy to advance the civil and political rights of Asian American and immigrant communities. CAA combats all forms of discrimination through community education, policy reform, and direct services. CAA has advocated on behalf of individuals who have been targeted for unfair treatment in employment, education, and other aspects of public life, based upon racial stereotypes.

CAA has carefully monitored the investigation and prosecution of Dr. Wen Ho Lee for nearly two years. CAA staff have played a community convening role to bring public information about the case to the community and to increase mainstream awareness of the civil rights issues implicated by Dr. Lee's case. CAA is a founding member of, and provides staff for the Coalition Against Racial and Ethnic Scapegoating ("CARES"), a national ad hoc coalition combating the use of racial profiles at all levels of the government. CAA has a strong interest in the defense being granted every opportunity to support its argument that Dr. Lee has been the victim of selective prosecution.

The Committee of 100 ("C-100") is a not-for-profit New York foundation that has twin objectives: (1) the advancement of Chinese Americans across the full spectrum of social, legal, political, cultural, and economic participation in American society, and (2) the improvement of relations between the United States and China. The C-100 was incorporated in 1989 to provide a voice for its distinguished membership of outstanding Chinese Americans in the professions, the arts, business, and science and technology. To advance these goals, the C-100 monitors legislative developments and public policy debates, sponsors periodic public meetings, collaborates on scholarly research, publishes bulletins and informational materials, and advocates on issues of importance to Chinese Americans and the Asian Pacific American community generally. In particular, the C-100 focuses on cases where it appears that Chinese Americans have been the subject of racial discrimination, disparate treatment, or bias in the media on the basis of their race or national origin. In recent years, the C-100 has taken a major leadership role in the case of the Air

9
Force's court martial of Captain Jim Wang, the only officer prosecuted in the tragic accidental shooting down of allied helicopters over the "no fly zone" of northern Iraq in 1993, and in the apparent "racial profiling" of Chinese American scientists and engineers at the national laboratories operated by the U.S. Department of Energy and those in the defense industry.

The Japanese American Citizens League ("JACL") was founded in 1929 to fight discrimination against people of Japanese descent. It is the largest and one of the oldest Asian American organizations in the United States. The JACL has over 24,500 members, in 112 chapters, located in 25 states, Washington, D.C., and Japan. The JACL has a long history of fighting against discriminatory laws such as the anti-miscegenation statutes prevalent in the United States until the 1960s. The JACL took part in arguing a case before the Supreme Court against a state law that prohibited the cohabitation of spouses of mixed ancestry and imposed legal penalties even if the marriages were legal in the state in which the ceremonies were performed. The JACL has brought suit against the San Francisco YWCA for its failure to return property held in trust because of the Alien Land Laws which prevented Japanese Americans from owning land.

The National Asian Pacific American Bar Association ("NAPABA") is the national professional association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA was incorporated in 1989 to represent and advocate the interests of Asian Pacific American attorneys and their communities on a national level. To advance its goals, NAPABA monitors legislative developments and judicial appointments and advocates on issues of importance to Asian Pacific American lawyers and the community, including preparing and filing amici curiae briefs in U.S. Supreme Court and other federal cases. NAPABA has joined as amicus curiae in New Jersey v. Mortimer, 513 U.S. 970 (1994) (concerning the validity of hate crimes statutes); Atonio v. Wards Cove Packing Co., 513 U.S. 809 (1994) (involving employment discrimination against Asian Pacific Americans); Ezold v. Wolf, 510 U.S. 826 (1993) (involving glass ceiling discrimination in law firms); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (regarding enhanced penalty statutes for hate crimes); and Madison Hughes v. Shalala, 80 F.3d 1121 (6th Cir. 1996) (seeking to require the U.S. Department of Health and Human Services to collect health information data by specific ethnic groups instead of grouping Asian Pacific Americans under a collective "other" category). NAPABA also filed amici curiae briefs in cases stemming from the Golden Venture incident involving the incarceration of Chinese nationals awaiting deportation hearings after their ship ran aground near New York City in 1993.

Serving as a vehicle to connect Asian Pacific American communities with the American justice system, NAPABA has a vital interest in ensuring the protection of constitutional rights, including due process and equal protection of the laws for all Americans, particularly for Asian Pacific Americans. NAPABA has a strong interest in seeing that discovery is permitted to determine if Dr. Wen Ho Lee was targeted for selective prosecution on the basis of his ethnicity.

The National Asian Pacific American Legal Consortium ("Consortium") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, the Consortium and its affiliates, AALDEF, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over fifty years of experience in providing legal advocacy and community education on discrimination issues. The Consortium is a leading national voice against racial profiling and is interested in Dr. Lee's case for this reason.

The National Lawyers Guild ("Guild") was founded in 1937 and seeks to unite lawyers, law students, legal workers, and jailhouse lawyers of America in an organization that functions as an effective political and social force in the service of the people. The Guild is adamantly opposed to selective prosecution, especially when based on race or ethnicity, as a violation of the Fourteenth Amendment rights to equal protection and due process of law. The Guild has also worked for years to fight the government's use of secret evidence and to urge full disclosure of evidence in the government's possession that might cast doubt
on the government's case. In addition, it has worked to protest illegal searches and seizures in violation of the Fourth Amendment, as well as governmental practices of harassment and intimidation.

The Guild is committed to safeguarding and extending the rights of minority groups upon whom the welfare of the entire nation depends. It seeks actively to eliminate racism, to maintain and protect all citizens' civil rights and liberties in the face of persistent attacks, and to use the law as an instrument for the protection of the people, rather than for their repression.

The Organization of Chinese Americans ("OCA") is a nationally recognized, non-profit advocacy and civil rights organization for Chinese and Asian Pacific Americans in the United States. Founded in 1973, OCA represents 10,000 individuals in eighty chapters and college affiliates around the country. OCA advocates for the rights of Asian Pacific American citizens and permanent residents through legislative and policy initiatives at all levels of government. OCA is dedicated to eliminating prejudices and stereotypes about Asian Pacific Americans and to securing social justice, equal opportunity, and equal treatment for Asian Pacific Americans.

**Introduction and Summary**

On behalf of the largest and oldest civil rights organizations representing the Asian Pacific American community, we file this brief in support of Dr. Wen Ho Lee's Motion for Discovery Related to Selective Prosecution (hereinafter "Defense Motion"). Dr. Lee's case raises a great deal of concern within the Asian Pacific American community in that many of the public justifications for his arrest and prosecution have echoed historical prejudices and stereotypes used to rationalize past acts of anti-Asian discrimination.

This brief will argue that through the government's prosecution of Dr. Lee in the courts and in the public arena, a sufficient taint of discriminatory intent and effect has been raised to warrant discovery. In order for all Americans to maintain faith in the integrity and protections of our system of justice, we respectfully urge the court to grant the Defense Motion.

**ARGUMENT**

**I.**

**The Stereotyping of Asian Pacific Americans as Suspect Aliens Has Been Used Historically to Justify Racial Discrimination and Political Scapegoating**

Since the first arrival of Asians to America in the early nineteenth century, the Asian Pacific American community has been subject to racial discrimination, anti-Asian violence, and selective prosecution premised upon a characterization of Asian Pacific Americans as inassimilable foreigners, "alien in manners [and] … fundamentally un-American." Andrew Gyory, Closing the Gate: Race, Politics, and the Chinese Exclusion Act 5 (1998); see generally Keith Aoki, "Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 UCLA Asian Pac. Am. L.J. 1 (1996); Natsu Taylor Saito, Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity, 4 Asian L.J. 71 (1997).

As early as 1877, in response to the growing Asian immigrant population, Congress convened a Joint Special Committee to Investigate Chinese Immigration, which documented as part of its findings that the Chinese can never assimilate with us; that they are a perpetual, unchanging, and unchangeable alien element that can never become homogeneous; that their civilization is demoralizing and degrading to our people; that they degrade and dishonor labor; that they can never become citizens, and that an alien, degraded labor class, without desire of citizenship, without
education, and without interest in the country it inhabits, is an element both demoralizing and dangerous to the community within which it exists.


Similarly, the press of the period characterized Chinese Americans as "[a] population born in China, expecting to return to China, living here in a little China of its own, and without the slightest attachment to the country - utter heathens, treacherous, sensual, cowardly and cruel." Phillip S. Foner & Daniel Rosenberg, Racism, Dissent, and Asian Americans from 1850 to Present 86-87 (1993) (citing The Chinese in California, N.Y. Trib., May 1, 1869, [page number omitted in original]).

Ironically, even while politicians and the popular press railed against Chinese immigrants on the basis that they were an "alien element" living apart, "without education," and "without the desire of citizenship," federal and state laws based upon this very same "perpetual foreigner" stereotype barred Asian Pacific Americans from living outside certain designated, ethnic ghettos (Act of Apr. 3, 1880, ch. 66, 1880 Cal. Stat. 114-15), enrolling in public schools (Gong Lum v. Rice, 275 U.S. 78 (1927)), or applying for American citizenship (Burlingame Treaty, July 28, 1868, art. 6, U.S.-P.R.C., 16 Stat. 739 (barring naturalization of Chinese immigrants)); United States v. Thind, 261 U.S. 204 (1923) (denying naturalization to South Asian immigrants); Osawa v. United States, 260 U.S. 178 (1922) (denying naturalization to Japanese immigrants).

This prejudice manifested itself through a range of city ordinances, state and federal legislation, and court rulings as Asian Pacific Americans were subject to the special imposition of taxes based on race, 1 restricted from travel and excluded from re-entry to the United States, 2 prohibited from employment by corporations or public agencies (Cal. Const. art. XIX), separated from families through bans on the immigration of women including wives, sisters, and daughters (Page Act, ch. 141, 18 Stat. 477 (1875)), required to carry registration papers at all times or be subject to arrest and deportation (Geary Act, ch. 60, 27 Stat. 25 (1892)), barred from fishing in state waters (Act of Apr. 23, 1880, ch. 226, 1880 Cal. Stat. 388-89), incarcerated for carrying wares on baskets suspended by poles (San Francisco, Cal., An Act Against Chinese Scavengers (1870)), and forced to shave off their queues (San Francisco, Cal., Queue Ordinance (June 14, 1876)). See Charles J. McClain, In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America (1994).

This same rationale was later used to deny Asian Pacific Americans the right to own land or enter into sharecropping agreements through the passage of the Alien Land Laws, which barred aliens ineligible for citizenship from owning land. The U.S. Supreme Court upheld the statutes by speculating about the security implications of land ownership by Asian Pacific Americans: "The quality and allegiance of those

1 A series of taxes were passed to target Chinese Americans in California from 1850 to 1862, beginning with the Foreign Miners' Tax (taxing miners ineligible for U.S. citizenship), then expanding to the Foreign Miners' License Tax (requiring all foreigners ineligible for citizenship to purchase a miner's license regardless of occupation) and culminating with the Chinese Police Tax (imposing a head tax on all adult Chinese Americans). See Hyung-Chan Kim, A Legal History of Asian Americans, 1790-1990, at 48-49 (1994).

who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself. "Terrace v. Thompson, 263 U.S. 197, 221 (1923). Even with regard to a cropping contract between a Japanese American farmer and a white landowner, the Court ruled that "conceivably by the use of such contracts, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety." Webb v. O'Brien, 263 U.S. 313, 324 (1923).

Perhaps most notably, Asian Pacific Americans were largely denied meaningful access to the protections of the criminal justice system in California by rendering inadmissible the testimony of Chinese American witnesses in courts of law not only on the basis of suspected untrustworthiness but also on the grounds that Asian Pacific Americans should not be accorded any of the privileges of citizenship. In People v. Hall, 4 Cal. 399 (1854), the murder conviction of a defendant who had killed a Chinese man in front of Chinese witnesses was vacated by the California Supreme Court which reasoned:

The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls... . The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior ... is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.

People v. Hall, 4 Cal. at 404 (emphasis added).

Ultimately, this historical pattern of treating Asian Pacific Americans as inherently suspect and perpetually foreign aliens resulted in what has been described as one of the worst wholesale violations of due process and equal protection in American judicial history: the exclusion and internment of 120,000 Americans of Japanese descent during World War II. Despite the lack of a single case of reported treason, newspaper headlines blared "Japan Pictured as Nation of Spies," "Eviction of Jap Aliens Sought," and editorials urged the forced relocation and incarceration of all Japanese Americans claiming, "A viper is nonetheless a viper wherever the egg is hatched." Mitchell T. Maki et al., Achieving the Impossible Dream 27 (1999) (citing various headlines of the Los Angeles Times).

Despite the fact that several independent federal investigatory agencies concluded that there was no evidence of actual espionage and thus no military necessity justifying the exclusion of Japanese Americans, such reports were suppressed in military briefings to the court, resulting in a successful coram nobis motion forty years later clearing the conviction of Fred Korematsu, who had defied the exclusion order. In Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984), the district court cited the findings of the Commission on Wartime Relocation and Internment of Civilians to conclude that "military necessity did not warrant the exclusion and detention of ethnic Japanese," but instead the "'broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership.'" Korematsu, 584 F. Supp. at 1416-17. Four years later, President Ronald Reagan signed the Civil Liberties Act of 1988, acknowledging that the exclusion and internment of Japanese Americans "was based solely on race ... here we admit a wrong; here we affirm our commitment as a nation to equal justice under the law." Maki et al., supra, at 195.
II.

The Investigation and Impetus Leading Up to the Arrest and Prosecution of Dr. Wen Ho Lee Are Premised Upon These Same Racial Stereotypes of Asian Pacific Americans as Suspect and Perpetual Foreigners

It is within this historical framework and pattern of treatment of Asian Pacific Americans that we urge the court to review carefully the chain of events leading up to the investigation, arrest, and prosecution of Dr. Wen Ho Lee. From the unfounded and later discredited allegations of widespread Chinese espionage published in the Cox Committee Report 3 to the recent revelation that claims of Dr. Lee's "deviousness" were greatly exaggerated by law enforcement (Def.'s Renewed Mot. for Pretrial Release at 16-21), the racialized stereotypes of Asian Pacific Americans as suspect and perpetual foreigners have tainted this investigation and prosecution. Reviewing the facts of this case through a historical lens, it is evident that Dr. Lee would not have faced the intensive investigation, termination of employment, arrest, and prosecution but for his ethnicity.

A. The Department of Justice Has Already Concluded That the Initial Investigation Launched by the Department of Energy and FBI Failed to Follow Protocol in Selectively Investigating Dr. Lee

The current investigation into Dr. Wen Ho Lee began in 1996 after a double agent "walked in" to the Central Intelligence Agency and turned over an official People's Republic of China classified document purporting to contain information on the W-88 Trident D-5 warhead, as well as a number of other U.S. warheads. (Messemer Decl. P 3a.)

Notra Trulock, then director of counterintelligence for the Department of Energy ("DOE"), led an Administrative Inquiry ("AI") with the assistance of the FBI, entitled "Kindred Spirit," to look into the suspected loss of nuclear information. Id. It must be noted at the outset that Mr. Trulock is an individual whose credibility has been severely undermined (see generally Def. Exh. F (discussing Mr. Trulock's resignation amid growing controversy over his handling of the case)). He is currently under investigation himself for mishandling classified information (see FBI Investigates Former Energy Department Intelligence Chief, July 20, 2000, at http://www.cnn.com/2000/US/07/20/energy.investigation/index.html) and earlier had been reported by colleagues for stating that "ethnic Chinese should not be allowed to work on classified projects, including nuclear weapons." (Def. Exh. C; Vrooman Decl. P 13 at 3.)

The "Kindred Spirit" investigation utilized a matrix protocol purportedly to neutrally focus on individuals who met the following criteria:

(1) individuals at the Los Alamos National Laboratory ("LANL") having access to the design information in question;

(2) individuals at LANL who have traveled to China during the years 1984-88; and

(3) individuals at LANL who had contact with Chinese scientific delegations visiting Los Alamos during this period.

Special Statement on the Wen Ho Lee Espionage Investigation, 1999: Hearings on the Department of Energy, FBI, and Department of Justice Handling of the Espionage Investigation into the Compromise of Design Information on the W-88 Warhead Before the Senate Governmental Affairs Committee, 105th

3 See, e.g., Jack Prather, A Technical Reassessment of the Cox Committee Report, at http://www.polyeconomics.com/prather.html. Dr. Prather, a nuclear physicist with extensive experience in both nuclear weapons and government service, disputed the Cox Report's conclusions that U.S. nuclear laboratories were penetrated by Chinese agents. See also Alastair Iain Johnston et al., The Cox Committee Report: An Assessment (1999).
While serious questions have been raised over the assumption that the leak occurred at LANL (see, e.g., Def. Exh. B (indicating that the likely leak of the W-88 warhead came from a defense sub-contractor and not the LANL)) and whether there was a leak of information at all (see generally Def. Exh. I at 30-31), these questions become largely irrelevant because Mr. Trulock failed to even follow the flawed logic of the matrix, and instead chose to selectively investigate Dr. Lee. (Vrooman Decl. PP 6-15.)

The "selectivity" of this investigation was first revealed in 1997 when the FBI took the results of the "Kindred Spirit" investigation to the Department of Justice ("DOJ") Office of Intelligence Policy and Review ("OIPR") to apply for a warrant under the Foreign Intelligence Surveillance Act ("FISA"). The OIPR refused to move forward on the warrant at that time, citing the failure of the DOE and FBI to investigate any of the other similarly situated suspects matching the matrix criteria other than Dr. Lee and his wife. As OIPR Attorney Allan Kornblum noted, "the DOE and Bureau had [multiple] suspects, and only two were investigated." (Thompson/Lieberman Report at 10.)

B. The Decision to Terminate Dr. Lee and the Subsequent Decisions to Continue the Investigation Were Driven by Media and Political Pressure Based on Racial Stereotypes.

The investigation into Dr. Lee became largely inactive following the denial of the FISA warrant until December 1998, on the eve of the release of the Cox Committee Report. The Cox Report charged that the DOE had permitted the Chinese government to penetrate successfully into the national laboratories to access U.S. nuclear secrets and that the espionage was current and ongoing. 4 According to Senator Arlen Specter, following Senate Judiciary Committee's oversight hearings, the DOE subjected Dr. Lee to an irregular polygraph examination out of concern for the charges raised in the Cox Report.

Other sources, including an FBI HQ memorandum for Director Freeh, dated December 21, 1998, and a sworn deposition from an FBI agent who worked on the case, indicate that senior DOE officials were concerned about the release of the Cox Committee report and wanted to bring the case to a conclusion.

Regardless of these acts, and for reasons still unknown, the DOE reversed the findings of its own three polygraphers several weeks later and assigned the polygraph a designation of "incomplete" which the FBI then reported as a failure on the part of Dr. Lee. The FBI subsequently re-interrogated Dr. Lee on

4 Among its many other questionable allegations, the Cox Report claimed that "almost every [Chinese] citizen allowed to go to the United States" as part of an officially sanctioned delegation "likely receives some type of [intelligence] collection requirement" and that the Chinese have 3,000 U.S.-based "front corporations." Bill Messler, The Spy Who Wasn't: National Insecurity State, The Nation, Aug. 8, 1999, at 269.
January 17, 1999. Again, the field agents, in a memo five days later to FBI headquarters, concluded that the investigation into Dr. Lee should not be pursued. Id.

On March 5, 1999, CBS News publicly announced allegations of Chinese espionage at LANL, and the FBI questioned Dr. Lee yet again. Once more the FBI concluded that Dr. Lee was most likely not the person who gave the W-88 missile information to China. Id. However, within forty-eight hours of the publication of a New York Times article alleging Chinese espionage, Dr. Lee was terminated from his employment of twenty years, in a move which the Secretary of Energy claimed was purely coincidental.\(^5\)

In the eight-month period between March 25, 1999, and October 26, 1999, no fewer than seventeen Senate hearings were convened on the question of "alleged Chinese espionage," with numerous hearings specifically naming Dr. Lee as a suspect and featuring testimony from Attorney General Janet Reno, Secretary of Energy Bill Richardson, Notra Trulock, counterintelligence, DOE officials, and other involved parties.\(^6\) On December 10, 1999, more than four years after the opening of the original investigation into the loss of the W-88 missile design, Dr. Lee was indicted and arrested on fifty-nine counts of mishandling classified information.

III.

Discovery Should Be Ordered Where There Is "Some Evidence" of Discriminatory Effect and Discriminatory Intent

In order to obtain discovery in support of a selective prosecution claim, a defendant usually must present "some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent." \(\text{United States v. Armstrong, 517 U.S. 456, 468 (1996)}\) (quoting \(\text{United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)}\)). The standard for discovery is lower than the "clear evidence" standard required for a motion for dismissal based on selective prosecution and has been described in various circuits as "colorable," "substantial threshold showing," "substantial and concrete basis," or "reasonable likelihood." \(\text{Armstrong, 517 U.S. at 468}\).

Because the vast majority of selective prosecution cases involve instances where courts have been asked to infer the existence of some discriminatory purpose on the part of prosecutors based solely upon the showing of disparate impact, courts have generally required defendants to meet a higher threshold of proof in showing that "similarly situated defendants of other races could have been prosecuted, but were not." \(\text{Id. at 469}\) (citations omitted). The Supreme Court specifically left unanswered the question of whether such a requirement would be necessary in the case of a direct admission of discriminatory purpose. \(\text{Id. at 469 n.3; accord United States v. Falk, 479 F.2d 616, 620-21 (7th Cir. 1973)}\) (opining that "when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised").

\(^5\) The Thompson/Lieberman Report, at 17, noted with some sarcasm that "Energy Secretary Richardson has said that it was 'strictly a coincidence' that [the firing of Dr. Lee] occurred within 48 hours of the first press accounts," referring to James Risen & Jeff Gerth, China Stole Nuclear Secrets for Bombs, U.S. Aides Say, N.Y. Times, Mar. 6, 1999, at A1.

A. Defendant Has Shown "Discriminatory Effect" in That No Other Laboratory Employee Mishandling Classified Information Has Ever Been Charged and That the Government Has Conceded That Dr. Lee Was Selectively Investigated

As noted earlier, a defendant must generally offer some evidence that "similarly situated defendants of other races could have been prosecuted, but were not" in order to establish discriminatory intent. Armstrong, 517 U.S. at 469. Defendant's motion documents a well-established pattern and twenty-year policy of not prosecuting civilians similarly situated to Dr. Lee. According to the Washington Post, "Justice Department officials say they do not generally prosecute civilians … who mishandle secret documents, as long as there is no evidence of criminal intent, the information is not divulged to a third party, and the employees are disciplined administratively by their agencies." (Def. Exh. G at 1.)

In Dr. Lee's case, the contrast is even more striking in that not only have similar individuals not been prosecuted, they have not even been subjected to criminal investigation. The report of the President's Foreign Intelligence Advisory Board of June 1999 (Def. Exh. I) documents routine and ongoing serious violations of security protocols within the national laboratories, demonstrating an open and lax scientific culture hostile to military security regulations. According to the report, classified documents detailing the designs of the most advanced nuclear weapons were found "on library shelves accessible to the public at the Los Alamos laboratory" (Def. Exh. I at 1), classified and restricted documents continued to be assigned to a deceased employee eleven months after he had passed away (Def. Exh. I at 15), a broken doorknob allowing access to sensitive areas was allowed to go unrepaired for nearly four years (Def. Exh. I at 15), and a safe in a public area containing restricted data was found unsecured (Def. Exh. I at 40).

Yet, according to a DOE spokesperson, Dr. Lee is the "first employee in lab history to be charged in a criminal case for improper handling of classified information, although other employees have been disciplined or fired for the same offense." Brendan Smith, Criminal Charges 1st in Lab History, Albuquerque J., Dec. 11, 1999, at A1 (emphasis added). The decision to file criminal charges against Dr. Lee becomes even more peculiar when considered in light of the fact that most of the files he allegedly downloaded were not even classified as secret or confidential until after [*67] Dr. Lee was arrested. Report: Files Weren't Secret, Data in Lee Case Was Under Low Security, Apr. 15, 2000, available at http://www.abcnews.go.com/sections/us/DailyNews/lee 000415.html.

Moreover, with respect to the conduct of the W-88 investigation which directly led to the charges against Dr. Lee, the Attorney General conceded that law enforcement failed to investigate the cases of similarly situated individuals matching the matrix and that the "elimination of logical suspects, having the same access and opportunity, did not occur." Top Secret Hearing (Declassified Version), 106th Cong. (June 8, 1999) Senate Comm. on the Judiciary (testimony of Attorney General Janet Reno). Michael Soukup, a LANL physicist and former counterintelligence agent, concluded that the matrix "was, and still is, a sham. I fit their matrix perfectly, and I was never interviewed and questioned." (Def. Exh. F.) While the exact number of individuals who are similarly situated has been classified by the DOJ "for some inexplicable reason" (Specter Report at 13), it is evident that Dr. Lee has been singled out for investigation.

Whether the court uses as the basis for comparison the pool of similarly situated LANL employees who have mishandled information, those specifically matching the matrix criteria developed by law enforcement, or those who have been discovered by law enforcement to have mishandled classified information, there is no question that similarly situated individuals could have been prosecuted but were not.
B. Defendant Has Demonstrated "Discriminatory Intent" and Should Be Entitled to Discovery Under a Relaxed Standard

A single unsworn, hearsay statement can be sufficient evidence to meet the threshold for compelling discovery. See, e.g., United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987) (ordering discovery based on statement allegedly made by DOJ spokesperson to college student). In Dr. Lee's case, there have been a number of statements by high-ranking government officials and witnesses involved in the investigation of Dr. Lee which all confirm the fact that he was selected for prosecution due to his race and ethnicity.

Robert Vrooman, the Chief Counterintelligence Officer at LANL from 1987-1998 who worked directly on the investigation of Dr. Lee, declared that "Mr. Trulock's office chose to focus specifically on Dr. Lee because he is 'ethnic Chinese.' Caucasians with the same background and foreign contacts as Dr. Lee were ignored." (Vrooman Decl. P 9 at 3.) Eugene Washington, the former acting Director of Counterintelligence at DOE, "told Trulock that he was unfairly singling out Lee and another Chinese American scientist." (Def. Exh. F.) Michael Soukup agreed that "racial profiling of Asian-Americans … took place." (Def. Mot. 10.)

In these rare instances where there is an actual admission by the government of racially discriminatory intent, a heightened level of scrutiny by the court is appropriate. See Owens v. Ventura County Super. Ct., 42 F. Supp. 2d 993, 998 (C.D. Cal. 1999) (opining that "to trigger strict judicial scrutiny in the discriminatory enforcement context, a defendant must show that the decision to prosecute him was based on his membership in a suspect class or infringed on a fundamental right he was exercising") (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)); see also Loving v. Virginia, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny … .' " (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

Thus, where a defendant can produce evidence of a direct admission of discriminatory intent by the government against individuals who either exercised a fundamental right or are members of a suspect class, courts have relaxed the threshold for demonstrating discriminatory effect. See U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998) (ordering discovery despite a failure to establish a prima facie case of discriminatory effect); Gordon, 817 F.2d at 1540 (ordering discovery based on showing that government targeted majority African American districts for voting fraud investigation); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972) (granting discovery on defendant's showing that six other similarly situated persons had committed the same offense but had not been prosecuted, where the government compiled background reports only on persons who had publicly attacked the census).

Similarly, in United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972), in reversing the convictions of religious protestors, the Fourth Circuit held that "when the record strongly suggests invidious discrimination and selective application of a regulation to inhibit the expression of an unpopular viewpoint, and where it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and to require the government to come forward with evidence... ."

This standard is appropriate because where discriminatory intent has been proven, the detrimental effect can generally be inferred. See Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (holding that even though physical facilities and other tangible factors may be equal, racial segregation violated the Equal Protection Clause); see also Washington v. Davis, 426 U.S. 229, 239 (1976) (opining that "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race"); United States v. Tuitt, 68 F. Supp. 2d 4, 10 (D. Mass. 1999) (observing that discriminatory intent is the underlying claim of selective prosecution).
Given the strong statements by multiple government officials in this case alleging selective prosecution on the basis of Dr. Lee's ethnicity, discovery should be granted regardless of the showing of discriminatory effect.

**C. The "Kindred Spirit" Investigation Is Itself Evidence of "Discriminatory Intent"

Perhaps even more telling and disturbing than the individual statements and prejudices of those involved in the investigation are the underlying policies and presumptions of law enforcement in its official conduct of the "Kindred Spirit" investigation. The very name chosen evidences that Asian Pacific Americans would be the target of the investigation as individuals who might be more likely to engage in espionage based upon a kinship or common ancestry. Furthermore, in the government's application for warrants and moving papers, the government has stood by its policy of targeting Chinese Americans based upon a stereotypical belief that Asian Pacific Americans are more susceptible than most citizens to being spies for some "ancestral homeland."

The echoes of historical prejudices and racial stereotypes are thinly-masked in press statements and in court documents. According to a Defense Intelligence Agency analyst, the Chinese method of espionage involves tasking thousands of Chinese abroad to bring secrets "home" one at a time, analogizing them to "ants carrying grains of sand." Vernon Loeb, Chinese Spy Methods Limit Bid To Find Truth, Officials Say, Wash. Post, Mar. 21, 1999, at A24. According to the same article, "the Chinese have been assembling such grains of sand since at least the fourth century B.C., when the military philosopher Sun Tzu noted the value of espionage in his classic work, 'The Art of War.'" Id.

Harry Brandon, a former FBI head of counterintelligence, explained, "Critics say our government is racist because the government is targeting [Chinese Americans] because they are Chinese… . And the answer is, Yes, we are targeting them, because they are targets (of Beijing)." Jeff Stein, Espionage Without Evidence (Aug. 26, 1999) at http://www.salon.com/news/feature/1999/08/26/china/index.html.

FBI Deputy Director Paul Moore, who oversaw portions of the criminal investigation of Dr. Lee, agreed with this notion of racial targeting, stating that "if the PRC [People's Republic of China] is greatly interested in the activities of Chinese-Americans, the FBI is greatly interested in the activities of the PRC as [regards] Chinese-Americans." (Def. Exh. E at 12.)

This practice of targeting Chinese Americans was incorporated into the application for a FISA warrant in August 1997 in which the FBI listed the following among the grounds to justify their claim of probable cause:

-- It was standard PRC intelligence tradecraft to focus particularly upon targeting and recruitment of ethnic Chinese living in foreign countries (e.g., Chinese-Americans).

-- It was standard PRC intelligence tradecraft, when targeting ethnic Chinese living overseas, to encourage travel to the 'homeland' - particularly where visits to ancestral villages and/or old family members could be arranged - as a way to dilute loyalty to other countries and encourage solidarity with the authorities in Beijing.


The FBI's practice of targeting Chinese Americans - and in this particular case, an individual born in Taiwan - based upon a belief that they are susceptible to the ties of "ancestral villages" in China, harkens back to the dangerous rationale advanced by the military to exclude, remove, and imprison Japanese Americans during World War II, based upon a presumption of shared loyalty through common ethnicity or ancestry.
But even during the midst of World War II, the Supreme Court recognized the principles that distinctions between citizens "solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" (Hirabayashi v. United States, 320 U.S. 81, 100 (1943)), and that race-based actions by the government are subject to the "most rigid scrutiny" (Korematsu, 323 U.S. at 216).

As in the case of the Japanese Americans, there is simply no factual evidence to support the proposition that Chinese Americans are more likely than other Americans to betray the United States, regardless of whether they are the focus of the Chinese government. As Mr. Moore admitted, China's track record with Chinese Americans has been extremely poor since most Chinese Americans refuse to cooperate with Chinese intelligence agents. Vernon Loeb & Walter Pincus, China Prefers the Sand to the Moles, Wash. Post, Dec. 12, 1999, at A02.

Moreover, as in the case of the wartime decision to exclude Japanese Americans from the West Coast, there is substantial evidence in this case which has not been disclosed by the government to show that Dr. Lee does not, in fact, pose any danger to the community. Chief among these are the numerous FBI memoranda explaining why Dr. Lee had been cleared of suspicion and other government information documenting Dr. Lee's active cooperation with United States counterintelligence agents. 7

In granting the writ of coram nobis to vacate, after forty-two years, the wartime conviction of Fred Korematsu based upon the suppression of evidence by the government, Judge Marilyn Hall Patel warned:

As historical precedent it stands as a constant caution that in times of war or declared military necessity, our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect government actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.


Amici curiae urge this Court to heed those words of caution and grant the Defense Motion for Discovery.

Conclusion

More than a century ago, when Asian Pacific Americans were still barred from citizenship and full participation in American society, the Supreme Court took a strong stand in vacating the conviction of a Chinese laundryman based upon the principle that:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.


Yet, only ten years later, Justice Harlan opined in his memorable dissent in *Plessy v. Ferguson, 163 U.S. 537, 561 (1896):*

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.

As representatives of the Asian Pacific American community, amici curiae urge this Court to rise above the racial stereotyping of Asian Pacific Americans and to continue our judicial system's protection of the rights of minorities. For the above stated reasons, we urge the Court to grant the Defense Motion for Discovery related to selective prosecution.

DATED: August 8, 2000

Respectfully submitted:

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JUDGE PARKER -- Dr. Lee, you have pled guilty to a serious crime. It's a felony offense. For that you deserved to be punished. In my opinion, you have been punished harshly, both by the severe conditions of pretrial confinement and by the fact that you have lost valuable rights as a citizen.

Under the laws of our country, a person charged in federal court with commission of a crime normally is entitled to be released from jail until that person is tried and convicted. Congress expressed in the Bail Reform Act its distinct preference for pretrial release from jail and prescribed that release on conditions be denied to a person charged with a crime only in exceptional circumstances.

The executive branch of the United States government has until today actually, or just recently, vigorously opposed your release from jail, even under what I had previously described as draconian conditions of release.

During December 1999, the then-United States attorney, who has since resigned, and his assistants presented me, during the three-day hearing between Christmas and New Year's Day, with information that was so extreme it convinced me that releasing you, even under the most stringent of conditions, would be a danger to the safety of this nation. The then-United States attorney personally argued vehemently against your release and ultimately persuaded me not to release you.

In my opinion and order that was entered Dec. 30, 1999, I stated the following: "With a great deal of concern about the conditions under which Dr. Lee is presently being held in custody, which is in solitary confinement all but one hour of the week, when he is permitted to be visited by his family, the court finds, based on the record before it, that the government has shown by clear and convincing evidence that there is no combination of conditions of release that would reasonably assure the safety of any other person and the community or the nation."

After stating that in the opinion, I made this request in the opinion right at the end: "Although the court concludes that Dr. Lee must remain in custody, the court urges the government attorneys to explore ways to lessen the severe restrictions currently imposed upon Dr. Lee while preserving the security of sensitive information."
I was very disappointed that my request was not promptly heeded by the government attorneys.

After December, your lawyers developed information that was not available to you or them during December. And I ordered the executive branch of the government to provide additional information that I reviewed, a lot of which you and your attorneys have not seen.

With more complete, balanced information before me, I felt the picture had changed significantly from that painted by the government during the December hearing. Hence, after the August hearing, I ordered your release despite the continued argument by the executive branch, through its government attorneys, that your release still presented an unacceptable extreme danger.

I find it most perplexing, although appropriate, that the executive branch today has suddenly agreed to your release without any significant conditions or restrictions whatsoever on your activities. I note that this has occurred shortly before the executive branch was to have produced, for my review in camera, a large volume of information that I previously ordered it to produce.

From the beginning, the focus of this case was on your motive or intent in taking the information from the secure computers and eventually downloading it on to tapes. There was never really any dispute about your having done that, only about why you did it.

What I believe remains unanswered is the question: What was the government’s motive in insisting on your being jailed pretrial under extraordinarily onerous conditions of confinement until today, when the executive branch agrees that you may be set free essentially unrestricted? This makes no sense to me.

A corollary question I guess is: Why were you charged with the many Atomic Energy Act counts for which the penalty is life imprisonment, all of which the executive branch has now moved to dismiss and which I just dismissed?

During the proceedings in this case, I was told two things: first, the decision to prosecute you was made at the highest levels of the executive branch of the United States Government in Washington, D.C.
With respect to that, I quote from a transcript of the Aug. 15, 2000, hearing, where I asked this question. This was asked of Dr. Lee's lawyers: "Who do you contend made the decision to prosecute?"

Mr. Holscher responded: "We know that the decision was made at the highest levels in Washington. We know that there was a meeting at the White House the Saturday before the indictment, which was attended by the heads of a number of agencies. I believe the No. 2 and No. 3 persons in the Department of Justice were present. I don't know if the attorney general herself was present. It was actually held at the White House rather than the Department of Justice, which is, in our view, unusual circumstances for a meeting."

That statement by Mr. Holscher was not challenged.

The second thing that I was told was that the decision to prosecute you on the 39 Atomic Energy Act counts, each of which had life imprisonment as a penalty, was made personally by the president's attorney general.

In that respect, I will quote one of the assistant U.S. attorneys, a very fine attorney in this case -- this was also at the Aug. 15 hearing. This is talking about materials that I ordered to be produced in connection with Dr. Lee's motion relating to selective prosecution. The first category of materials involved the January 2000 report by the Department of Energy task force on racial profiling: "How would that in any way disclose prosecutorial strategy?"

Miss Fashing responded: "That I think falls more into the category of being burdensome on the government. I mean if the government -- if we step back for just a second -- I mean the prosecution decision and the investigation in this case, the investigation was conducted by the F.B.I., referred to the United States attorney's office, and then the United States attorney's office, in conjunction with -- well, actually, the attorney general, Janet Reno, made the ultimate decision on the Atomic Energy Act counts."

Dr. Lee, you're a citizen of the United States and so am I, but there is a difference between us. You had to study the Constitution of the United States to become a citizen. Most of us are citizens by reason of the simple serendipitous fact of our birth here. So what I am now about to explain to you, you probably already know from having studied it, but I will explain it anyway.

Under the Constitution of the United States, there are three branches of government. There is the executive branch, of which the president of the United States is the head.
Next to him is the vice president of the United States. The president operates the executive branch with his cabinet, which is composed of secretaries or heads of the different departments of the executive branch. The vice president participates in cabinet meetings.

In this prosecution, the more important members of the president's cabinet were the attorney general and the secretary of the Department of Energy, both of whom were appointed to their positions by the president.

The attorney general is the head of the United States Department of Justice, which despite its title, is a part of the executive branch, not a part of the judicial branch of our government.

The United States Marshal Service, which was charged with overseeing your pretrial detention, also is a part of the executive branch, not the judicial branch.

The executive branch has enormous power, the abuse of which can be devastating to our citizens.

The second branch of our national government is the legislative branch, our Congress. Congress promulgated the laws under which you were prosecuted, the criminal statutes. And it also promulgated the Bail Reform Act, under which in hindsight you should not have been held in custody.

The judicial branch of government, of which I am a member, is called the third branch of government because it's described in Article III of our Constitution.

Judges must interpret the laws and must preside over criminal prosecutions brought by the executive branch. Since I am not a member of the executive branch, I cannot speak on behalf of the president of the United States, the vice president of the United States, their attorney general, their secretary of the Department of Energy or their former United States attorney in this district, who vigorously insisted that you had to be kept in jail under extreme restrictions because your release pretrial would pose a grave threat to our nation's security.

I want everyone to know that I agree, based on the information that so far has been made available to me, that you, Dr. Lee, faced some risk of conviction by a jury if you were to have proceeded to trial. Because of that, I decided to accept the agreement you made with the United States executive branch under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.
Further, I feel that the 278 days of confinement for your offense is not unjust; however, I believe you were terribly wronged by being held in custody pretrial in the Santa Fe County Detention Center under demeaning, unnecessarily punitive conditions. I am truly sorry that I was led by our executive branch of government to order your detention last December.

Dr. Lee, I tell you with great sadness that I feel I was led astray last December by the executive branch of our government through its Department of Justice, by its Federal Bureau of Investigation and by its United States attorney for the district of New Mexico, who held the office at that time.

I am sad for you and your family because of the way in which you were kept in custody while you were presumed under the law to be innocent of the charges the executive branch brought against you.

I am sad that I was induced in December to order your detention, since by the terms of the plea agreement that frees you today without conditions, it becomes clear that the executive branch now concedes, or should concede, that it was not necessary to confine you last December or at any time before your trial.

I am sad because the resolution of this case drug on unnecessarily long. Before the executive branch obtained your indictment on the 59 charges last December, your attorney, Mr. Holscher, made a written offer to the office of the United States attorney to have you explain the missing tapes under polygraph examination.

I'll read from that letter of Dec. 10, 1999. I quote from that letter:

"Dear United States Attorney Kelly and First Assistant Gorence: I write to accept Mr. Kelly's request that we provide them with additional credible and verifiable information which will prove that Dr. Lee is innocent. On the afternoon of Wednesday, Dec. 8, Mr. Kelly informed me that it was very likely that Dr. Lee will be indicted within the next three to four business days. In our phone conversation, Mr. Kelly told me that the only way that we could prevent this indictment would be to provide a credible and verifiable explanation of what he described as missing tapes.

"We will immediately provide this credible and verifiable explanation. Specifically we are prepared to make Dr. Lee immediately available to a mutually agreeable polygraph examiner to verify our repeated written representations that at no time did he
mishandle those tapes in question and to confirm that he did not provide the tapes to any third party.

"As a sign of our good faith, we will agree to submit Dr. Lee to the type of polygraph examination procedure that has recently been instituted at the Los Alamos Laboratory to question scientists. It is our understanding that the government has reaffirmed that this new polygraph procedure is the best and most accurate way to verify that scientists are properly handling classified information."

At the inception of the December hearing, I asked the parties to pursue that offer made by Mr. Holscher on behalf of Dr. Lee, but that was to no avail.

MR. STAMBOULIDIS -- Your Honor, most respectfully, I take issue with that. There has been a full record of letters that were sent back and forth to you, and Mr. Holscher withdrew that offer.

JUDGE PARKER -- Nothing came of it, and I was saddened by the fact that nothing came of it. I did read the letters that were sent and exchanged. I think I commented one time that I think both sides prepared their letters primarily for use by the media and not by me. Notwithstanding that, I thought my request was not taken seriously into consideration.

Let me turn for the moment to something else. Although I have indicated that I am sorry that I was led by the executive branch to order your detention last December, I want to make a clarification here. In fairness, I must note that virtually all of the lawyers who work for the Department of Justice are honest, honorable, dedicated people, who exemplify the best of those who represent our federal government.

Your attorney, Mr. Holscher, formerly was an assistant United States attorney. The new United States attorney for the district of New Mexico, Mr. Norman Bay, and the many assistant United States attorneys here in New Mexico -- and I include in this Mr. Stamboulidis and Mr. Liebman, who are present here today -- have toiled long hours on this case in opposition to you. They are all outstanding members of the bar, and I have the highest regard for all of them.

It is only the top decision makers in the executive branch, especially the Department of Justice and the Department of Energy and locally, during December, who have caused embarrassment by the way this case began and was handled. They did not embarrass me alone. They have embarrassed our entire nation and each of us who is a citizen of it.
I might say that I am also sad and troubled because I do not know the real reasons why the executive branch has done all of this. We will not learn why because the plea agreement shields the executive branch from disclosing a lot of information that it was under order to produce that might have supplied the answer.

Although, as I indicated, I have no authority to speak on behalf of the executive branch, the president, the vice president, the attorney general, or the secretary of the Department of Energy, as a member of the third branch of the United States Government, the judiciary, the United States courts, I sincerely apologize to you, Dr. Lee, for the unfair manner you were held in custody by the executive branch.
Thank you all for being here.

For decades, the United States has led the world in science, technology, research, and development. Without a doubt, we are the world’s top innovator. Billions have been invested to achieve that status.

This has given this country advantages both economically and militarily that have directly benefitted the daily lives of the American people.

It is no surprise that geopolitical rival states around the world have taken notice.

That is why they often try to steal our inventions and defraud us of their proceeds. Too often, they are successful.

Discoveries that took years of work and millions of dollars in investment here in the United States can be stolen by computer hackers or carried out the door by an employee in a matter of minutes.

This theft is not just wrong; it poses a grave threat to our national security. And it is unlawful.

But under President Donald Trump, the United States is standing up to the deliberate, systematic, and calculated threats posed, in particular, by the communist regime in China, which is notorious around the world for intellectual property theft.

Earlier this year, a report from U.S. Trade Representative Robert Lighthizer found that Chinese sponsorship of hacking into American businesses and commercial networks has been taking place for more than a decade and is a serious problem that burdens American commerce.

The problem has been growing rapidly, and along with China’s other unfair trade practices, it poses a real and illegal threat to our nation’s economic prosperity and competitiveness.

Perhaps this threat has been overshadowed in the press by threats from Russia or radical Islamic terrorism. But while it has been in the shadows, the threat has only grown more dangerous.

From 2013 to 2016, the Department of Justice did not charge anyone with spying for China.

But since the beginning of 2017, we have charged three people with spying for China or attempting or conspiring to do so. And when it comes to trade secret theft, we are currently prosecuting five other cases where the theft or attempted theft was for the benefit of the Chinese government.

In 2015, China committed publicly that it would not target American companies for economic gain.

Obviously, that commitment has not been kept.

Just ask GE Aviation, or Trimble, of Sunnyvale, California.
Today I am announcing another economic espionage case against Chinese interests.

And before I do that I want to remind everyone that the defendants in this case—as in every case—are innocent until proven guilty.

I am announcing that a grand jury in San Francisco has returned an indictment alleging economic espionage on the part of a Chinese state-owned, government owned, company, a Taiwan company, and three Taiwan individuals for an alleged scheme to steal trade secrets from Micron, an Idaho-based semi-conductor company.

The worldwide supply for DRAM is worth nearly $100 billion; Micron controls about 20 to 25 percent of the dynamic random access memory industry—a technology not possessed by the Chinese until very recently.

One of the defendants served as president of a company acquired by Micron in 2013. He left the company in 2015 and went to work for the Taiwan defendant company—from where he is alleged to have orchestrated the theft of trade secrets from Micron worth up to $8.75 billion.

The Taiwan defendant company then partnered with a Chinese state-owned company—so that ultimately China could steal this technology from the United States and then use it to compete against us in the market. This is a brazen scheme.

If convicted, the defendants face up to 15 years in prison and $5 million in fines. The companies could face forfeiture and fines worth more than $20 billion.

This week the Commerce Department added the Chinese company to the Entity List to prevent it from buying goods and services in the United States, to keep it from profiting from the technology it stole.

And today the Department of Justice is filing a civil action to seek an injunction that would prevent the Chinese and Taiwan companies from transferring the stolen technology, or exporting products based on it to the United States.

We are not just reacting to crimes—we are acting to block the defendants from doing any more harm to our U.S. based company, Micron.

United States Attorney Alex Tse of the Northern District of California will provide more information on this case in a moment.

And once again I want to remind everyone that the defendants in this case—as in every case—are innocent until proven guilty.

As the cases I’ve discussed have shown, Chinese economic espionage against the United States has been increasing—and it has been increasing rapidly.

We are here today to say: enough is enough. We’re not going to take it anymore.

It is unacceptable. It is time for China to join the community of lawful nations. International trade has been good for China, but the cheating must stop. And we must have more law enforcement cooperation; China cannot be a safe haven for criminals who run to China when they are in trouble, never to be extradited. China must accept the repatriation of Chinese citizens who break U.S. immigration law and are awaiting return.

We will continue to charge wrongdoers based on carefully conducted investigations done with integrity and professionalism, not politics, and we will seek extradition of criminals.

To be prosperous trading partners, integrity and cooperation are essential.

And today I am focusing more Department of Justice resources to counter these threats.

I am announcing that I have ordered the creation of a China Initiative led by Assistant Attorney General John Demers, who heads our National Security Division, and composed of a senior FBI Executive, five United States Attorneys including Alex, and several other Department of Justice leaders and officials, including Assistant Attorney General for our Criminal Division, Brian Benczkowski.
This Initiative will identify priority Chinese trade theft cases, ensure that we have enough resources dedicated to them, and make sure that we bring them to an appropriate conclusion quickly and effectively.

This administration’s new initiative will also address two major responsibilities of our National Security Division: the Foreign Investment Review Staff’s review of investments and licenses in U.S. infrastructure and telecommunications, and the Foreign Agent Registration Act Unit’s work to counter covert efforts to influence our leaders and the general public.

This will help us meet the new and evolving threats to our economy. Today, we see Chinese espionage not just taking place against traditional targets like our defense and intelligence agencies, but against targets like research labs and universities, and we see Chinese propaganda disseminated on our campuses.

And so I have directed this initiative to focus on these problems as well and to recommend legislation to Congress if necessary.

China—like any advanced nation—must decide whether it wants to be a trusted partner on the world stage—or whether it wants to be known around the world as a dishonest regime running a corrupt economy founded on fraud, theft, and strong-arm tactics. Our wish is to have a trusted partner.

The President has made clear that this country remains open to friendship and productive relationships with China. Nothing is more important for the world. We want our relationships to improve, not get worse.

But these problems must be solved. These threats must be ended.

This Department of Justice—and the Trump administration—have already made our decision: we will not allow our sovereignty to be disrespected, our intellectual property to be stolen, or our people to be robbed of their hard-earned prosperity. We want fair trade and good relationships based on honest dealing. We will enforce our laws—and we will protect America’s national interests.

Speaker:
Attorney General Jeff Sessions

Attachment(s):
Download China Initiative Fact Sheet

Topic(s):
Cybercrime
Intellectual Property
National Security

Component(s):
Office of the Attorney General

Updated November 7, 2018
Good afternoon. Thank you to the National Security Institute and George Mason University for inviting me. Unfortunately, my good friend Jamil Jaffer wasn’t able to be here today.

As I have told Jamil, I am so impressed with what you have built here at NSI. You all have a well-deserved reputation for taking on hard problems and developing practical solutions.

Jamil and I first worked together in the brand new National Security Division more than 15 years ago.

When NSD was established in 2006, I was the senior career official responsible for the Department of Justice's intelligence work. In November, I returned as the Assistant Attorney General for National Security. It is remarkable to see how the division has grown and what it has achieved over the years. And I am so proud to be leading NSD and its dedicated workforce now.

The Role of the National Security Division

As many of you know, Congress created NSD in the wake of the September 11th terrorist attacks. The idea was to unify and prioritize DOJ's national security work and to promote cooperation with the intelligence community and the broader national security community. In the years since, again and again, the work of NSD has proven critical to our national security.

In everything we do at DOJ, our first priority is to adhere to the Constitution and to pursue equal justice under the law. That mandate is the north star of our work.

The division has a wide range of responsibilities. Those include going after terrorists and spies, including in cyberspace, countering foreign malign influence, enforcing our export controls and sanctions laws, and reviewing foreign investments in U.S. companies.

We also handle intelligence operations and oversight. This includes the FISA process, as well as providing advice and support on a variety of national security laws and policies.

Within each of those areas, NSD is at the forefront of our nation’s efforts to use our legal authorities and tools to tackle evolving national security threats.

When I was first at NSD, our number one focus was on terrorism. That stayed true throughout my time as the General Counsel of NSA and then as Director of the National Counterterrorism Center.

Today, as I have seen firsthand over my first few months on the job, international terrorism remains a critical concern. But the overall threat landscape is much more complex. We face an elevated threat from domestic terrorists who are motivated by a mix of ideologies. In cyberspace, we confront everything from profit-driven efforts to steal trade secrets and military technology to state-sponsored actors targeting critical infrastructure. Hostile foreign governments assault our democratic and economic institutions in pursuit of strategic competitive advantage.

These threats are dynamic. We and our partners at the FBI and the intelligence community must adapt with determination and agility to meet them.
Strategy for Countering Nation-State Threats

Today, I want to focus specifically on the threats we face from hostile nations. In the National Security Division, we are launching a new Strategy for Countering Nation-State Threats. Our goal with this strategy is to take a comprehensive approach that draws on the full extent of our tools and authorities to address the alarming rise in illegal activity from hostile nations. This includes growing threats within the United States and to Americans and U.S. businesses abroad.

We see nations such as China, Russia, Iran and North Korea becoming more aggressive and more capable in their nefarious activity than ever before. These nations seek to undermine our core democratic, economic and scientific institutions. And they employ a growing range of tactics to advance their interests and to harm the United States. Defending American institutions and values against these threats is a national security imperative and a priority for the department.

Our new strategy is threat driven. We will prioritize NSD’s ongoing work and allocate our resources to address these threats head on, while at the same time preserving our flexibility to counter this activity effectively. We are deploying this strategy to focus on those areas where the department’s authorities can have the most impact in combating the greatest threats to our national security.

Transnational Repression

Let me give you some examples.

In recent years, we have seen a rise in efforts by authoritarian regimes to interfere with freedom of expression and punish dissidents abroad. These acts of repression cross national borders, often reaching into the United States.

We have pursued agents of the Chinese government who have tried to coerce American citizens and residents to comply with China’s repressive and extralegal orders. For example, we charged PRC government officials for taking part in Operation Foxhunt, an illegal multiyear campaign to coerce the return of certain Chinese nationals to China. What is alleged in the indictment represents a direct affront to the rule of law, human rights and American sovereignty. Instead of operating with the approval and coordination of our government, PRC officials traveled to the United States and directed PRC operatives to violate U.S. law. This scheme included, for example, threatening one victim’s daughter over social media and even bringing his elderly father from China to the United States to warn that the victim’s family would be harmed if the victim did not return. DOJ has charged nine people in relation to Operation Foxhunt, including for acting as illegal agents of the PRC government and for interstate and international stalking.

Just last month, we charged four senior officials of the government of Belarus. We allege that they conspired to use a false bomb threat to unlawfully divert a passenger flight that was carrying American citizens in order to arrest a prominent Belarusian dissident.

And last summer, we charged four Iranian intelligence agents for conspiring to kidnap a U.S.-based journalist and human rights activist who was speaking out against Iran’s repressive laws and practices.

This sort of oppressive behavior is antithetical to our values as Americans. People from all over the world are drawn to the United States by the promise of living in a free and open society — one that adheres to the rule of law. To ensure that this promise remains a reality, we must continue to use all of our tools to block authoritarian regimes that seek to extend their tactics of repression beyond their shores.

Foreign Malign Influence

We must also defend the integrity of American political discourse by exposing foreign malign influence campaigns. Our laws demand that foreign governments and agents be transparent about their efforts to influence the American public and insist that they respect those parts of our electoral processes that are reserved to Americans alone.

In recent years DOJ has exposed and prosecuted covert influence efforts undertaken on behalf of the governments of Russia, China, Malaysia and Pakistan, to name just a few. At the same time, we are strengthening the civil and administrative enforcement of the Foreign Agents Registration Act.
Cyber Threats

The failure of hostile nation states to respect national borders and basic legal norms is even more stark in the cyber realm. We continue to see costly interference with critical infrastructure and public service systems, supply chains and private businesses. We also confront campaigns of theft of sensitive information, ransomware attacks and digital extortion.

Last year, the PRC government engaged in a malicious cyber campaign using vulnerabilities in the Microsoft Exchange Server that targeted thousands of victims around the world.

Russia’s Solar Winds attack similarly compromised tens of thousands of networks globally, including those of U.S. federal, state and local governments.

Iranian government actors have interfered with the systems of a broad range of victims in critical infrastructure sectors.

And North Korean government actors have robbed cryptocurrency exchanges and central banks alike, stealing hundreds of millions of dollars and evading international sanctions designed to limit their weapons programs.

Our role at DOJ is to seek to identify and disrupt cyber threats to national security and hold malicious actors accountable wherever possible.

Espionage and Export Control

Finally, of course, we remain vigilant against core national security threats like traditional espionage activities and efforts to evade export control and sanctions laws. It is essential that we thwart attempts to unlawfully obtain classified information relating to our national defense, weapons systems and sensitive technologies and research.

We must continue to hold rogue actors accountable for their malign activities and work with like-minded partners to deter and impose consequences on those who flout the rule of law.

The PRC Threat

As you can see from these examples, we at the Justice Department confront threats from a variety of nation-state actors. Our new strategy reflects this reality — there is no one threat that is unique to a single adversary.

At the same time, it is clear that the government of China stands apart. So, I want to address how the department’s approach to Chinese government activity fits within our overall strategy.

As the FBI Director publicly noted a few weeks ago, the threats from the PRC government are “more brazen [and] more damaging than ever before.” He is absolutely right: the PRC government threatens our security through its concerted use of espionage, theft of trade secrets, malicious cyber activity, transnational repression, and other tactics to advance its interests — all to the detriment of the United States and other democratic nations and their citizens around the world.

To be clear, we are focused on the actions of the PRC government, the Chinese Communist Party, and their agents — not the Chinese people or those of Chinese descent. As we talk about the threats that the PRC government poses to the United States, we must never lose sight of that fundamental distinction. We must always be vigilant to ensure that no one is treated differently based on race, ethnicity, familial ties, or national origin. This is a foundational commitment of the Department of Justice.

I’ll give you a few examples of what the PRC government is doing.

First, it has targeted U.S. citizens with connections to the intelligence community to obtain valuable government and military secrets. In recent years, we have prosecuted four espionage cases involving the PRC, reflecting a concerted effort to steal our most sensitive information.

Second, the government of China has also used espionage tools and tactics against U.S. companies and American workers to steal critical and emerging technologies. Agents of the PRC government have been caught stealing
everything from cutting-edge semiconductor technology to actual seeds that had been developed for pharmaceutical uses after years of research and the investment of millions of dollars.

Third, the PRC government has used malicious and unlawful cyber campaigns to pursue technological advancement and profit. The PRC reaps the benefits of these criminal activities, while the victims, including governments, businesses and critical infrastructure operators, lose billions of dollars in intellectual property, proprietary information, ransom payments and mitigation efforts.

Finally, China’s government has gone to great lengths to silence dissent. It has intimidated journalists and employed a variety of means to attempt to censor and punish U.S. citizens, residents, and companies for exercising their rights to free expression. I mentioned earlier Operation Fox Hunt — the PRC’s illegal effort to coerce the return of certain Chinese dissidents to China — which is just one example.

**Strategic Review**

Against this backdrop, the department announced the “China Initiative” in 2018. The idea behind the initiative was to develop a coherent approach to the challenges posed by the PRC government. The initiative effectively focused attention on the multi-faceted threat from the PRC. But it has also engendered growing concerns that we must take seriously.

I want to take this opportunity today—discussing our approach to nation-state threats overall—to also address the China Initiative directly.

We have heard concerns from the civil rights community that the “China Initiative” fueled a narrative of intolerance and bias. To many, that narrative suggests that the Justice Department treats people from China or of Chinese descent differently. The rise in anti-Asian hate crime and hate incidents only heightens these concerns. The Department is keenly aware of this threat and is enhancing efforts to combat acts of hate. These efforts are reflected in the Attorney General’s memorandum issued last year following the enactment of the COVID-19 Hate Crimes Act.

There are also increasing concerns from the academic and scientific community about the department’s pursuit of certain research grant fraud cases. We have heard that these prosecutions — and the public narrative they create — can lead to a chilling atmosphere for scientists and scholars that damages the scientific enterprise in this country.

Safeguarding the integrity and transparency of research institutions is a matter of national security. But so is ensuring that we continue to attract the best and the brightest researchers and scholars to our country from all around the world — and that we all continue to honor our tradition of academic openness and collaboration.

In light of these concerns, we began a review soon after I took office. The review’s purpose was forward-looking. The key question was whether this framework still best serves the strategic needs and priorities of the department. While I remain focused on the evolving, significant threat that the government of China poses, I have concluded that this initiative is not the right approach. Instead, the current threat landscape demands a broader approach.

I want to emphasize my belief that the department’s actions have been driven by genuine national security concerns. 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.

I began my career as a trial attorney in the Civil Rights Division. The department is committed to protecting the civil rights of everyone in our country. But this erosion of trust in the department can impair our national security by alienating us from the people we serve, including the very communities the PRC government targets as victims. Our reputation around the world for being a country dedicated to civil rights and the rule of law is one of our greatest strengths.

As part of this review, I have paid particular attention to cases involving academic integrity and research security. When it comes to these cases, the National Security Division will take an active supervisory role in the investigations and prosecutions. In evaluating cases moving forward, NSD will work with the FBI and other investigative agencies to assess the evidence of intent and materiality, as well as the nexus to our national or economic security. These
considerations will guide our decisions — including whether criminal prosecution is warranted or whether civil or administrative remedies are more appropriate.

In addition, the White House Office of Science and Technology has released new guidance to federal funding agencies, including procedures to correct inaccurate or incomplete prior disclosures. These agencies have primary responsibility for research integrity and security. Where individuals voluntarily correct prior material omissions and resolve related administrative inquiries, this will counsel against a criminal prosecution under longstanding department principles of prosecutorial discretion.

Make no mistake, we will be relentless in defending our country from China. The Department will continue to prioritize and aggressively counter the actions of the PRC government that harm our people and our institutions. But our review convinced us that a new approach is needed to tackle the most severe threats from a range of hostile nation-states.

**NSD’s Approach Moving Forward**

Going forward, the National Security Division will pursue this work guided by our Strategy for Countering Nation-State Threats. Our recent experience confronting the varied threats posed by the Chinese government has shown that a multi-faceted challenge demands an integrated and multi-faceted response. We need to expand our approach to these threats by recognizing the capabilities of each hostile nation and the full spectrum of activity each country undertakes to achieve its goals. And we must align our capabilities, tools and resources with those across the federal government to meet and counter these threats.

Our work will be informed by three strategic imperatives.

First, we must continue to defend core national security interests and protect our most sensitive information and resources. We will continue to aggressively investigate and prosecute espionage, export control and sanctions violations, and interference with our critical infrastructure.

Second, we must protect our economic security and prosperity, including key technologies, private information about Americans and supply chains and industry. We will bring all tools to bear, including the regulatory authorities of the Committee on Foreign Investment in the United States and Team Telecom — as well as criminal process where appropriate — to prevent and mitigate harms from economic espionage, hostile manipulation and cyber-enabled malicious activity.

Third, we must defend our democratic institutions and values to ensure that the promise of freedom remains a reality in the face of rising authoritarianism. We remain steadfast in our commitment to preventing malign influence inside our borders and to promoting freedom of expression and democracy against corrupt and repressive forces.

As we move forward, the department remains committed to confronting any nation that threatens U.S. national security, economic security or our democratic institutions and freedoms.

We will use all the legal tools in our arsenal to combat these threats. The cornerstone of our work at the Justice Department is to investigate and prosecute crimes sponsored by hostile governments and their agents. This includes prosecuting state agents for espionage, hacking campaigns against our government and the private sector, and the repression of critics, as well as efforts to manipulate public discourse in the United States.

In addition to our criminal enforcement work, NSD will use our civil and administrative tools to mitigate threats from foreign investment activity and foreign interests that seek to secretly influence public opinion in the United States.

We also will support broader whole-of-government efforts — which include diplomatic engagement, the use of economic tools and resilience building in communities within the United States and abroad — to address these threats. We will reach out, along with our federal partners, to build trust with affected communities to understand their public safety needs, and to ensure they feel comfortable reporting crimes and incidents.

Finally, we will continue to engage with democratic allies to share information and to discuss how we can make our partner countries more secure. Together, we will develop strategies for effectively responding to these grave threats to the rule of law and to our economic integrity.
Conclusion

The United States is a beacon for people all over the world who seek to live in an open and democratic society. It is our duty in the National Security Division to protect the United States from the myriad threats we face, while staying true to the Constitution and the values of the Justice Department. I know that this commitment to securing equal justice while defending our national security is shared by everyone in the National Security Division and the Department of Justice.

With that, my thanks again to John, to NSI, and to all of you for being here. I would be happy to take some questions.

Speaker:
Matthew G. Olsen, Assistant Attorney General

Topic(s):
Countering Nation-State Threats
Counterintelligence
Counterterrorism
National Security

Component(s):
National Security Division (NSD)
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**Books**


