



April 23, 2021

Francis S. Collins
Office of The Director,
National Institutes of Health,
United States Department of Health and Human Services
9000 Rockville Pike
Bethesda, Maryland 20892
Submitted via www.rfi.grants.nih.gov

RE: Request for Information: Comments and Suggestions to Advance and Strengthen Racial Equity, Diversity, and Inclusion in Biomedical Research and Advance Health Disparities and Health Equity Research (Notice No. NOT-OD-21-066)

Dear Dr. Collins:

We, the undersigned organizations and individuals, submit this comment in response to NIH's Office of the Director's Notice No. NOT-OD-21-066, *Request of Information (RFI): Inviting Comments and Suggestions to Advance and Strengthen Racial Equity, Diversity, and Inclusion in Biomedical Research and Advance Health Disparities and Health Equity Research*. (March 1, 2021) (hereinafter, RFI).¹ We write to draw your attention to the mass racial profiling and discriminatory investigations and prosecutions of Asian American and immigrant scientists, researchers and scholars and NIH's role in these efforts. This conduct is ruining lives and having a broader chilling effect on Asian American and immigrant scientists by discouraging them from being lead researchers in applying for federally funded grants.

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

¹ National Institute of Health, U.S. Department of Health and Human Services. Notice of Request for Information "Inviting Comments and Suggestions to Advance and Strengthen Racial Equity, Diversity, and Inclusion in the Biomedical Research Workforce and Advance Health Disparities and Health Equity Research" (hereinafter, RFI (Notice No. NOT-OD-21-066)) March 1, 2021, available at <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-21-066.html>.

We appreciate this opportunity to comment on the harms resulting from the racial discrimination and profiling of Asian Americans and Asian immigrants in the scientific research environment. Asian American communities have been grossly impacted by the profiling and wrongful prosecutions for espionage of students, scientists, and researchers of Asian descent under the pretext of securing American research. While the prosecutions of Asian American and Asian immigrant scientists did not begin with the administration's "China Initiative," the White House mandate increased pressure on the FBI to scrutinize and target Asian Americans and Asian immigrants based on their ethnicity rather than criminal activity. In turn, the FBI have pressured academic institutions and grantmaking agencies such as NIH to participate in racial, ethnic, and national origin discrimination and profiling, impacting scientists, researchers, and scholars of Asian descent across the country. NIH intervention and investigations have led to the dismissal, resignation, and termination of Asian scientists, as well a growing fear among Asian Americans and Asian immigrants of being targeted and scapegoated based on their race, ethnicity, and national origin.

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

Xenophobic, anti-immigrant, and racist rhetoric used by former President Trump and other elected officials fueled this resurgent xenophobia against immigrants and those of Asian descent.² Former President Trump and other elected officials blamed China for COVID-19, and called it the "Chinese virus," "Wuhan virus," "kung flu," and "China plague." Public health experts have advised that language that stigmatizes communities must not be used.³ Public and government officials must be cautious of engaging in anti-China rhetoric and must challenge colleagues and peers who do so. The cost to the Asian American community is clear. A Pew Report published in July 2020 revealed similar findings, with a majority of Asian adults (58%) saying it is more common for people to express racist or racially insensitive views about people who are Asian than it was before the COVID-19 outbreak.⁴

² The Advancing Justice affiliation launched the Stand Against Hatred website in January 2017 in response to the increase in hate incidents against Asian Americans connected to this anti-Asian, anti-immigrant, and racist rhetoric from former President Trump's presidential campaign in the 2016 election cycle.

³ "WHO issues best practices for naming new human infectious diseases," World Health Organization (May 8, 2015), [WHO issues best practices for naming new human infectious diseases](#).

⁴ Pew Research Center, "Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID19 Outbreak," (July 1, 2020), <https://www.pewresearch.org/social-trends/2020/07/01/many-black-and-asian-americans-say-they-have-experienced-discrimination-amid-the-covid-19-outbreak/>

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

As part of NIH’s goal to foster a research community free from discrimination based on race, we seek to draw NIH’s attention to the harmful and ineffective racial profiling conducted by federal agencies in their investigation and prosecutions of Asian Americans and Asian immigrants. We are deeply concerned about the federal government’s racial, ethnic, and national origin profiling and discriminatory investigations and prosecutions of Asian Americans and Asian immigrants, which are harming the lives of not just individuals, their families, and communities, but eroding the health of our democracy. Biased public statements by public officials, combined with data and individual cases indicating that there have been unjust arrests and prosecutions of Asian Americans, have raised red flags for us that federal agencies are engaged in biased investigations and policing. We encourage NIH to consider the facts below in contemplating any further strategies or efforts to promote racial equity in NIH, NIH-supported institutions, and the greater scientific community.

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

The government has been heavily scrutinizing and racially targeting Asian American and Asian immigrant scientists and researchers, particularly through the “China Initiative.” Although the U.S. Department of Justice (“DOJ”) presents it as a national security measure meant to combat economic espionage by the Chinese government, the China Initiative’s reach has become overbroad. In its quest to protect national security, the government casts a wider-than-necessary net and uses overly simplistic measures that are susceptible to abuse by law enforcement to the detriment of people of Chinese origin—citizens and immigrants alike.

The current social and political environment has created fear among our communities as rhetoric from public leaders encourages bias and fosters hate against Asian Americans and Asian immigrants. One need look no further than former President Trump’s choice to refer to the coronavirus as “‘kung flu,’ eliciting laughter and wild cheers” at recent rallies in Oklahoma and Arizona in late June 2020.⁵ In yet another example, former President Trump, at a private event in 2018, “noted of an unnamed country that the attendee said was clearly China, ‘almost every student that comes over to this country is a spy.’”⁶ Senator Tom Cotton made similar remarks, stating

⁵ Colby Itkowitz, *Trump Again Uses Racially Insensitive Term to Describe Coronavirus*, WASH. POST (June 23, 2020), https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html.

⁶ Annie Karni, *Trump Rants Behind Closed Doors with CEOs*, POLITICO (Aug. 8, 2018), <https://www.politico.com/story/2018/08/08/trump-executive-dinner-bedminster-china-766609>.

broadly that Chinese students come to the U.S. “to steal [] property.”⁷ In an interview last year with Fox News, Secretary of State Michael Pompeo made the following sweeping, dangerous statement: “[S]tudents that come here who have connections deeply to the Chinese state, they shouldn’t be here in our schools spying.”⁸ This rhetoric has alarmed academic institutions and raised concerns within the Asian American community.⁹ This rhetoric has translated into racially biased policies and government efforts such as the “China Initiative,” which create widespread fear among Asian American and Asian immigrant scientists and promote bigotry against the greater Asian American community.

This is not a new phenomenon. For more than a decade, the government has prosecuted people of Chinese and Asian descent at a disproportionate rate under the Economic Espionage Act of 1996 (“EEA”).¹⁰ Although the EEA was intended to address economic espionage from all foreign governments following the Cold War, it has increasingly been used to prosecute those of Chinese or Asian descent.¹¹ Between 1996 and 2009, 17% of the defendants charged under the EEA’s provisions were of Chinese descent.¹² Since 2009, that percentage has more than tripled, jumping to 52%.¹³ Moreover, Asian Americans and immigrants are overall more likely than any other racial group to be charged under the EEA, making up 62% of EEA defendants charged since 2009.¹⁴ For individuals of Asian descent who were prosecuted, the rate at which they were “acquitted at trial, pled guilty only to ‘false statements’ and released on probation, or, most often, had all charges dropped against them” was twice as high as individuals of any other race.¹⁵

In November 2018, Former U.S. Attorney General Jeff Sessions launched the “China Initiative” to counter the threat of economic espionage and trade secrets theft conducted by or for the benefit of the “communist regime in China.”¹⁶ The White House mandate put great pressure on the FBI to scrutinize and target Asian Americans and Asian immigrants—particularly of Chinese descent—based on their ethnicity, rather than on suspicion of criminal activity. For example, in 2020 John Demers, the Justice Department’s Assistant Attorney General for National Security, stated that the DOJ wanted each of the country’s 94 U.S. Attorney’s districts to bring cases of Chinese espionage or economic theft, without any apparent reason to believe that such crimes were being committed

⁷ Ros Krasny, *GOP Senator Says Don’t Let Chinese Students Study STEM in U.S.*, BLOOMBERG (Apr. 26, 2020), <https://www.bloomberg.com/news/articles/2020-04-26/gop-senator-says-don-t-let-chinese-students-study-stem-in-u-s>.

⁸ *Secretary Michael R. Pompeo with Laura Ingraham of Fox News*, U.S. DEP’T OF STATE (May 28, 2020), <https://www.state.gov/secretary-michael-r-pompeo-with-laura-ingraham-of-fox-news-2/>.

⁹ See *Information About the Department of Justice’s China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEP’T OF JUSTICE (Mar. 9, 2021), <https://www.justice.gov/nsd/information-about-department-justice-s-china-initiative-and-compilation-china-related>. [hereinafter “China Initiative”].

¹⁰ See Andrew Chongseh Kim, *Prosecuting Chinese “Spies”: An Empirical Analysis of the Economic Espionage Act*, 40 *Cardozo L. Rev.* 749, 763 (2018).

¹¹ *Id.* at 753.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage, U.S. DEP’T OF JUSTICE (Nov. 1, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage>.

in every district in the country.¹⁷ In practice, many of the investigations and prosecutions under this initiative are not based upon evidence of economic espionage and do not target individuals acting at the direction of or on behalf of the PRC government or Chinese Communist Party. Instead, these investigations target individuals with any “nexus to China,”¹⁸ which often is merely ancestral, leading to profiling by race, ethnicity, and national origin. When the government fails to find evidence of economic espionage, it then opts to charge people for lesser offenses, such as making false statements during the course of the investigation.

Federal prosecutors are also charging many Asian Americans and Asian immigrants with federal crimes based on administrative errors or minor offenses, such as failing to fully disclose conflict-of-interest information to their universities or research institutions and other activities that are not normally treated as crimes except under the pretext of combating economic espionage. As of November 12, 2020, DOJ’s own press releases about the “China Initiative” show that only about 25% of the 61 cases under the initiative are for economic espionage.¹⁹ The rest of the prosecutions were for ancillary matters or minor crimes, such as making false statements, and “lying” on university conflicts of interest forms. Still many other individuals were investigated by the FBI or NIH and not prosecuted yet faced employment consequences such as terminations.²⁰ The DOJ’s strategy is ineffective against combatting security threats, but also extremely harmful to the Asian American community.²¹ It has also damaged American leadership in science and international collaboration on basic research.

Through rhetoric, rapidly changing policies, and targeted prosecutions, Asian American and Asian immigrant scientists and researchers are again caught in a pattern of suspicion and racial discrimination that has harmed Asian American communities in the United States for more than 150 years. We describe below existing agency biases and profiling, and how efforts to prosecute our communities have been extremely harmful. We caution against overly broad policies that would exclude the vast majority of students, scientists, and researchers of Asian descent who contribute to the U.S. research enterprise, our economy, and our communities. We provide recommendations to address the profiling of our communities. Profiling does not make the United States safer and serves only to undermine the very values and characteristics that propelled the United States as a global leader in innovation, science, and technology.

II. Racist and Biased Rhetoric by FBI Officials Drives Racially Targeted Decision-Making and Training

The government has shifted from a policy of engagement with China to an emphasis on the “threat” of China.²² Part of this shift includes the change in treatment of any individuals connected to China

¹⁷ Betsy Woodruff Swan, *Inside DOJ’s Nationwide Effort to Take on China*, POLITICO (Apr. 7, 2020), <https://www.politico.com/news/2020/04/07/justice-department-china-espionage-169653>.

¹⁸ See “China Initiative,” *supra* note 9.

¹⁹ *Id.*

²⁰ Chia-Yi Hou, *More Scientists Dismissed for Undisclosed Foreign Ties, Says NIH*, THE SCIENTIST (Jun. 28, 2019), <https://www.the-scientist.com/news-opinion/more-scientists-dismissed-for-undisclosed-foreign-ties--says-nih-66060>.

²¹ *Racial Profiling*, ACLU (2019), <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling>.

²² See “China Initiative,” *supra* note 9.

as the FBI adopts “a whole of society” approach toward all individuals of Asian descent. The FBI “view[s] the China threat as not just a whole of government threat, but [also] a whole of society threat”²³ encompassing those of Asian descent, including civilians such as professors and academics. As recently as February 2020, FBI Director Christopher Wray called for a “whole-of-society” response to Chinese economic espionage and the threat of “non-traditional collectors,” singling out graduate students and researchers.²⁴ Director Wray painted with a broad brush for all persons of Chinese descent when he stated that the FBI “in almost every field office . . . around the country” sees counterintelligence risks in Chinese professors, scientists and students “across basically every discipline,”²⁵ casting hundreds of thousands of Chinese professionals and students in academia as potential threats to the U.S.²⁶

This racially biased rhetoric from government officials in turn influences the decision-making, culture, and training at federal agencies. According to a recent study of over a dozen former federal investigators, “[the] distrust of people of Chinese heritage [too often] drives decision-making at the FBI and other U.S. security agencies.”²⁷ The report found that the FBI started an initiative that mapped out U.S. neighborhoods by race and ethnicity to monitor potential terrorists and spies in 2005.²⁸ An FBI memo revealed that the FBI continued the initiative by doing an assessment for Chinese communities in San Francisco in 2009.²⁹ Not only were strategic decisions and investigations based on this inherent distrust of those of Chinese descent, but training materials perpetuated and created a culture of bias and distrust against Asian Americans and Asian immigrants.

According to former FBI agent Mike German, after September 11, “[X]enophobia . . . spread like a cancer”³⁰ within the FBI and impacted FBI training materials for both Muslim Americans and Chinese Americans. One presentation on “the Chinese” warned, “Never attempt to shake hands with an Asian.”³¹ A counterintelligence presentation, in turn, “warn[ed] agents against giving too many compliments to a Chinese woman as it might suggest a romantic relationship is desired,

²³ *Open Hearing on Worldwide Threats: Before the S. Select Comm. on Intelligence*, 115th Cong. 50 (2018) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation) [hereinafter *Open Hearing on Worldwide Threats*].

²⁴ Christopher Wray, Director, Fed. Bureau of Investigation, Responding Effectively to the Chinese Economic Espionage Threat, Remarks at the Department of Justice China Initiative Conference (Feb. 6, 2020), <https://www.fbi.gov/news/speeches/responding-effectively-to-the-chinese-economic-espionage-threat>.

²⁵ *Open Hearing on Worldwide Threats*, *supra* note 23.; see also Elizabeth Redden, *The Chinese Student Threat?*, INSIDE HIGHER ED (Feb 15, 2018), <https://www.insidehighered.com/news/2018/02/15/fbi-director-testifies-chinese-students-and-intelligence-threats>.

²⁶ Our organization signed a letter requesting a meeting with Director Wray on March 1, 2018 along with other civil rights organizations regarding his statement and we have yet to receive a meeting. See here for more information: http://www.committee100.org/press_release/community-organizations-call-for-meeting-with-fbi-director-christopher-wray-regarding-profiling-of-students-scholars-and-scientists-with-chinese-origins/.

²⁷ Peter Waldman, *Mistrust and the Hunt for Spies Among Chinese Americans*, BLOOMBERG (Dec. 10, 2019) (according to a recent study of more than a dozen former federal investigators), <https://www.bloomberg.com/news/features/2019-12-10/the-u-s-government-s-mistrust-of-chinese-americans>.

²⁸ *Id.*

²⁹ *Id.* The FBI memo was obtained by ACLU in 2011.

³⁰ MIKE GERMAN, DISRUPT, DISCREDIT, AND DIVIDE 77, 339 (The New Press 2019).

³¹ *Id.* at 83, 339.

[and] another [told agents] to never stare at or attempt to shake hands with an Asian.”³² This training fostered the idea of Asian Americans and Asian immigrants as “the threatening ‘other’” rather than as “fellow American[s],” and furthered the narrative of Asian Americans as the “perpetual foreigner” where “Asian Americans . . . [are] . . . more closely associate[ed] . . . with their ethnicity and national origin than their nationality, no matter how long they’ve been Americans.”³³ The training is “more likely to implant bias than to educate agents about the complex behavior of spies.”³⁴ These training materials, lack of diversity, and existing practices fostered an environment ripe for bias and profiling against Asian Americans.³⁵ According to German, even Asian FBI agents and other federal agency employees of Asian descent have felt marginalized and targeted by the agencies they serve.³⁶

III. NIH’s Entanglement with the FBI Has Resulted in Biased Investigations and Profiling of Individuals of Asian Descent

Advancing Justice | AAJC has grown concerned about NIH entanglement with the FBI, given the latter’s biased policing and profiling of individuals of Asian descent. As a consequence of the White House’s mandate through the “China Initiative,” the FBI and federal agencies have put pressure on grantmakers, universities, and research institutions to participate in racial, ethnic, and national origin profiling, collectively leading to discriminatory and stigmatizing investigations of Asian Americans and Asian immigrants. The FBI has focused on federal grant agencies such as NIH and academic institutions to target scientists and researchers of Asian descent by conducting threat awareness sessions and circulating information on the threat of China and these so-called non-traditional collectors.³⁷ As a result, they have injected racial bias into these institutions, discouraged collaboration, criminalized connections to China, and encouraged these entities to view researchers and scientists of Asian descent differently than their colleagues because of race.³⁸

According to Bloomberg, the FBI collaborated with NIH, which “started probes into some 180 researchers at more than 70 hospitals and universities, seeking undisclosed ties to China.”³⁹ NIH alone sent letters to over 10,000 institutions warning against the threat of intellectual property theft

³² *Id.* at 192 (citing Sean McElwee et al., *4 Pieces of Evidence Showing FBI Director James Comey Cost Clinton the Election*, VOX (Jan. 11, 2017)), <https://www.vox.com/the-big-idea/2017/1/11/14215930/comey-email-election-clinton-campaign>).

³³ *Id.* at 190–92.

³⁴ Waldman, *supra* note 27.

³⁵ MIKE GERMAN, *DISRUPT, DISCREDIT, AND DIVIDE* 83, 192 (The New Press 2019).

³⁶ *Id.* at 83 (The New Press 2019).

³⁷ *FBI Director Christopher Wray’s Opening Remarks: China Initiative Conference*, CIS (Feb. 6, 2020), <https://www.csis.org/analysis/fbi-director-christopher-wrays-opening-remarks-china-initiative-conference> (According to FBI Director, the FBI now has “private-sector coordinators in each of the FBI’s 56 field offices who lead [their] engagement with local businesses and universities.” “[They] meet with these partners frequently, providing threat awareness briefings. . . .”); *see also* Ana Swanson, *A New Red Scare Is Reshaping Washington*, N.Y. TIMES (July 20, 2019), <https://www.nytimes.com/2019/07/20/us/politics/china-red-scare-washington.html> (“Officials from the F.B.I and the National Security Council have been dispatched to Ivy League universities to warn administrators to be vigilant against Chinese students who may be gathering technological secrets from their laboratories to pass to Beijing.”).

³⁸ *Open Hearing on Worldwide Threats*, *supra* note 23.

³⁹ Waldman, *supra* note 27.

by foreign nationals.⁴⁰ NIH also sent about 180 letters to over 60 U.S. institutions regarding the non-disclosure issue.⁴¹ NIH investigations have resulted in dismissals, resignations, and terminations of Asian American scientists, such as at the MD Anderson Cancer Center.⁴² In a presentation to a senior advisory panel, Michael Lauer, NIH's head of extramural research, stated that 82% of those under investigation are of Asian descent. These investigations, along with Mr. Lauer's statement, suggest that these strategic decisions and investigations are often based on broad generalizations and an inherent distrust of those of Asian descent.⁴³

IV. Racially Biased Prosecutions Caused Immense Harm to Asian American and Asian Immigrant Communities

Despite the ongoing issues of implicit bias, discrimination, and race- and ethnicity-based profiling, the U.S. government continues investigative and prosecutorial efforts that cause immense harm to Asian Americans and Asian immigrants. American citizens such as Wen Ho Lee, Guoqing Cao, Shuyu Li, Sherry Chen, and Xiaoxing Xi have already suffered harm from these unwarranted investigations and prosecutions. The use of stereotypes and biases prevalent in the FBI is extremely harmful and leads to the wrongful prosecutions of individuals subjected to profiling. As former FBI agent German has stated, ““The [FBI] training is a form of othering, which is a dangerous thing to do to a national security workforce learning to identify the dangerous ‘them’ they’re supposed to protect ‘us’ from.””⁴⁴ This danger of othering is all too real for many Asian Americans. Their cases show ongoing bias, discrimination, and race- and ethnicity-based profiling of individuals of Asian descent by the U.S. government.

In December 1999, the government prosecuted Wen Ho Lee, a Taiwanese American scientist, accusing him of passing secrets to the Chinese government about a U.S. nuclear program despite lacking evidence of espionage.⁴⁵ Although Lee received restitution, great damage had been done. In addition to suffering from a damaged reputation, he spent nine months in solitary confinement and was denied basic legal protection under the law.⁴⁶ At Mr. Lee's dismissal hearing, federal District Court Judge James A. Parker apologized to him and reproached the government's conduct.⁴⁷

⁴⁰ Chia-Yi Hou, *Three Researchers Ousted from MD Anderson*, THE SCIENTIST (Apr. 22, 2019) <https://www.the-scientist.com/news-opinion/three-researchers-ousted-from-md-anderson-65772>.

⁴¹ Chia-Yi Hou, *More Scientists Dismissed for Undisclosed Foreign Ties, Says NIH*, THE SCIENTIST (Jun. 28, 2019), <https://www.the-scientist.com/news-opinion/more-scientists-dismissed-for-undisclosed-foreign-ties--says-nih-66060>.

⁴² *Id.*

⁴³ Jeffrey Mervis, *Fifty-four Scientists Have Lost Their Jobs as a Result of NIH Probe into Foreign Ties*, SCI. MAG. (June 12, 2020), <https://www.sciencemag.org/news/2020/06/fifty-four-scientists-have-lost-their-jobs-result-nihprobe-foreign-ties>.

⁴⁴ Waldman, *supra* note 27.

⁴⁵ See *United States v. Wen Ho Lee*, 79 F. Supp. 2d 1280 (1999); Lowen Liu, *Just the Wrong Amount of American*, SLATE (Sept. 11, 2016), <https://slate.com/news-and-politics/2016/09/the-case-of-scientist-wen-ho-lee-and-chinese-americans-under-suspicion-for-espionage.html>.

⁴⁶ *Id.*

⁴⁷ *Statement by Judge in Los Alamos Case, with Apology for Abuse of Power*, N.Y. TIMES (Sept. 14, 2000), <https://www.nytimes.com/2000/09/14/us/statement-by-judge-in-los-alamos-case-with-apology-for-abuse-of-power.html>.

Despite the injustice in Mr. Lee’s case, the government continues to bring indictments based on faulty and unclear grounds against Asian scientists. In 2013, a federal grand jury indicted two former Eli Lilly & Co. senior biologists, Guoqing Cao and Shuyu “Dan” Li, on charges of stealing nine drug discovery trade secrets and passing them to a Chinese drug company.⁴⁸ The U.S. attorney’s office later requested the dismissal of all charges but neglected to specify the reasons for doing so.

In 2014, federal agents accused Sherry Chen, a Chinese American hydrologist, then employed at the National Weather Service, of using a stolen password to download information from a federal dam database and of lying about meeting with a high-ranking Chinese official.⁴⁹ Ms. Chen had sent publicly available information to a former classmate in China and then connected him to a colleague for further information about his inquiry.⁵⁰ The colleague reported her.⁵¹ During the course of the investigation, investigators asked Ms. Chen when she last saw a former classmate. She told them, “I think 2011” when they had actually met in 2012.⁵² Prosecutors then sought to convict her of making a false statement before later dropping all charges.⁵³ While the DOJ dropped the case after finding no evidence of espionage, the United States Department of Commerce announced in 2015 its plan to fire Ms. Chen. Although the federal Merit Systems Protection Board in April 2018 ruled in favor of her reinstatement and suggested that Commerce Department officials had buried exculpatory evidence, the Department still plans to appeal the ruling and proceed with her dismissal.⁵⁴

In 2015, the DOJ accused Xiaoxing Xi, a Chinese American physics professor at Temple University, of sharing sensitive technology with Chinese scientists—essentially casting him as a Chinese spy.⁵⁵ As “proof” of its accusations, the FBI pointed to email exchanges between Professor Xi and his colleagues in China that the government had obtained. But, in reality, the emails had nothing to do with the FBI’s claims: they instead consisted of routine academic correspondence about Professor Xi’s own research, which had been public for years. After Professor Xi and his defense attorneys presented this information to prosecutors, the government

⁴⁸ *Feds dismiss charges against former Eli Lilly scientists accused of stealing trade secrets*, INDY STAR (Dec. 5, 2014), <https://www.indystar.com/story/news/crime/2014/12/05/feds-dismiss-charges-former-eli-lilly-scientists-accused-stealing-trade-secrets/19959235/>.

⁴⁹ Nicole Perloth, *Accused of Spying for China, Until She Wasn’t*, N.Y. TIMES (May 9, 2015), <https://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html>.

⁵⁰ Kim, *supra* note 10, at 774.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Perloth, *supra* note 49; Nicole Perloth, *Cleared of Spying for China, She Still Doesn’t Have Her Job Back*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/technology/sherry-chen-national-weather-service.html>; *Chen v. Dep’t of Commerce*, No. CH-0752-17-0028-I-1, 2018 WL 2128716 (Apr. 23, 2018); *Statement in Response to DOC Filing Appeal*, SHERRY CHEN DEFENSE FUND, https://www.sherrychendefensefund.org/uploads/9/9/2/8/99280080/statement_in_reponse_to_doc_filing_appeal_20180618.pdf.

⁵⁵ Matt Apuzzo, *U.S. Drops Charges That Professor Shared Technology with China*, N.Y. TIMES (Sept. 11, 2015), <https://www.nytimes.com/2015/09/12/us/politics/us-drops-charges-that-professor-shared-technology-with-china.html>.

dismissed its indictment.⁵⁶ However, once again, the damage to Professor Xi’s reputation was done and to date, there has been no apology or compensation by the government.

These cases lead us to believe that race and ethnicity-based profiling are indeed driving these prosecutions.⁵⁷ Examined in conjunction, these cases validate a disturbing yet ongoing trend—the criminalization of Asian Americans in the name of national security. When a subset of the population is regarded as “perpetual foreigners” or as “the other,” national security arguments can too easily overshadow civil and human rights considerations.

Wei Su, a former scientist for the U.S. Army, is an example of a government employee impacted by bias against Asian Americans. Despite 24 years of working for the government without incident, Mr. Su found himself in the midst of an FBI investigation in 2011 when he was placed under surveillance, threatened with arrest, and stripped of his security clearance.⁵⁸ Although the FBI began to interrogate him in 2011, Mr. Su believes that the investigations started much earlier.⁵⁹ The investigation was eventually dropped.⁶⁰ Then, in 2015, the Pentagon’s Consolidated Adjudications Facility (“CAF”) suspended his security clearance based on false evidence.⁶¹ For years, Mr. Su fought to clear his name. Finally, in May 2019, the CAF sent Mr. Su a letter rescinding the Pentagon’s previous letters that suspended and revoked his security clearance.⁶² According to this letter, the Pentagon’s previous letters suspending and revoking his security clearance were “not accurate.”⁶³ Despite not doing anything wrong, Mr. Su found himself under investigation by the FBI, and his life upended. Even after CAF rescinded the Pentagon’s previous letters that suspended and revoked his security clearance, Mr. Su is still extremely cautious about his actions.⁶⁴ To this day, Mr. Su does not know why the FBI investigated him.⁶⁵

The prosecutions of Asian American scientists and ongoing investigations have harmed not just individuals but have rippled out into the Asian American community in the United States as a whole. As discussed below, the government’s broad suspicion of Asian American and Asian immigrant scientists has created an environment of uncertainty and fear for the community across the country. Even individuals who have not been prosecuted have been driven from the country they consider home and have suffered immeasurable harm to their livelihood, relationships, and personal health. Moreover, there is a pervasive “psychological fear” among scientists of Chinese origin in an environment that has increasingly become hostile to them.⁶⁶ A former MIT engineering postdoc who is now in Beijing described FBI investigations as “scary” and wished to remain

⁵⁶ *Id.*

⁵⁷ See *Racial Profiling*, *supra* note 21.

⁵⁸ Waldman, *supra* note 27.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Gisela Perez Kusakawa, *Concern for the Younger Generation: The Targeting and Profiling of Chinese and Asian Americans and Immigrants*, ADVANCING JUSTICE | AAJC (Aug. 14, 2020), <https://advancingjustice-ajc.org/dr-su-profiling-chinese-american-immigrants>.

⁶⁵ *Id.*

⁶⁶ Elie Dolgin, ‘Psychological Fear’: MIT Scientists of Chinese Origin Protest Toxic US Climate, NATURE (July 2, 2019), <https://www.nature.com/articles/d41586-019-02063-z>.

anonymous.⁶⁷ He was questioned about his involvement in China’s Thousand Talents Plan, and said that “[he] fe[lt] like [he] was unfairly targeted just because [he’s] Chinese.”⁶⁸

As another example, in Cincinnati, Ohio, there are reports of FBI intimidation and harassment of Chinese employees and professors at the University of Cincinnati.⁶⁹ Eric Palmer, the Executive Director of the local chapter of the American Association of University Professors, stated that the FBI contacted at least three faculty members at the university in 2018 in connection to China’s Thousand Talents programs.⁷⁰ According to Mr. Palmer, FBI agents harassed these individuals by showing up both at their workplace and at their homes.⁷¹ FBI agents then asked some faculty members “to turn over information about other Chinese national faculty members with at least an implicit threat that if they don’t, they will be investigated further.”⁷² Mr. Palmer considers the government’s approach to be “scare and authoritarian tactics” where the government “assum[es] Chinese scholars are trying to steal intellectual property” rather than determining whether “there’s credible information pointing to individuals and investigate on that basis.”⁷³

The impact of these biases and profiling extends to international scholars, particularly to Asian students seeking to study and contribute to academia in the United States. FBI surveillance and prosecution of individuals of Asian descent has created a chilling effect at universities and fosters an environment of fear, discouraging students from studying here. According to the most recent State Department *Open Doors* report, there has been a 6.6% decrease in new international student enrollment in 2017–2018 which was double the rate of decrease from the previous year.⁷⁴ This marked “the first time America has seen a two-year decline,” and signified the shift in perception by international students of how welcoming the United States is.⁷⁵ The loss of international students, including those from China, is a tremendous loss for the United States. Overall, foreign students contribute \$39 billion to our country, and have created or supported more than 455,000 jobs just within the 2017–2018 academic year.⁷⁶ Although Chinese students make up only 1.7% of the total U.S. higher education enrollment, they contributed to about \$12 billion to the U.S. economy in 2016, according to the State Department’s *Open Doors* report.⁷⁷ Many of these students go on to become citizens and have families here in the United States.

Concerns about the impact of these investigations on human lives and for the academic arena are prevalent across universities. MIT, Yale University, Stanford University and at least eight other

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Bill Rinehart, *FBI Is ‘Harassing’ Some Chinese Citizens Says Academic Group*, WVXU (Aug. 26, 2019), <https://www.wvxu.org/post/fbi-harassing-some-chinese-citizens-says-academic-group#stream/0>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ OPEN DOORS REPORT (2017/2018).

⁷⁵ *Id.*

⁷⁶ LOSING TALENT 1, 1 (2019).

⁷⁷ Statement of Ms. Jill Welch, Deputy Executive Director for Public Policy NAFSA: Association of International Educators at the Hearing on Student Visa Integrity: Protecting Educational Opportunity and National Security at 9 (citing Institute of International Education. “Opening Doors Fact Sheet: China.” Accessed September 13, 2019. <https://p.widencdn.net/ymtzur/Open-Doors-2017-Country-Sheets-China.>).

institutions have issued statements detailing their concerns with the targeting of the Chinese scientists and academics.⁷⁸ However, many universities provide inadequate support to their faculty who find themselves targets of the U.S. government. Caught in the middle of the investigations and prosecutions, many scientists, professionals, and academics of Asian descent fear they will be criminalized under the government's broad net of suspicion. "The investigations have left Chinese and Chinese-American academics feeling 'that they will be targeted and that they are at risk,'" said Frank Wu, former president of C-100, a prominent Chinese American organization.⁷⁹ "People are living in fear."⁸⁰ The damage from the government's overzealous prosecutions has already harmed Americans and has now permeated various facets of our society, creating an environment of fear and impacting the actions and abilities of Chinese scientists and researchers today to work and live in the United States.

V. Recommendations

In order to address inequities in scientific research, NIH must first stop the surveillance and overbroad targeting of Asian Americans and immigrants, examine existing policies and procedures, and take steps to eliminate the bias and profiling that ruin innocent lives. The mass profiling of Asian communities harms American citizens and immigrants, creating fear nationwide. We provide the following recommendations to the federal government, including NIH, to take appropriate measures with input from community members to address the racial profiling and targeting of Asian Americans and Asian immigrants.

- 1) NIH is not a law enforcement agency and should not engage in surveillance or policing activities. It should minimize entanglements with the FBI which leads to bias and profiling of Asian Americans and Asian immigrants. It could do so by only sharing information with law enforcement where there is individualized suspicion of criminal activity.
- 2) NIH, along with other government grantmaking agencies and universities, should provide greater clarity in its guidelines and instructions regarding requirements for grant applications, disclosures, and conflicts of interest. Information should be provided about consequences for failure to adhere to requirements. Government grantmaking agencies and universities can and should take steps to educate grantees and potential grantees about the need for disclosures and conflicts of interest, including as they relate to the activities with the Chinese government, Chinese universities, and Chinese corporations or nationals. But they can do so without targeting researchers of Asian descent for special scrutiny and criminalizing minor conduct and mistakes that end careers and cause financial ruin.
- 3) Any new rules or clarification of existing rules should be applied to conduct prospectively, as much as possible. People should not be punished for past, lawful scientific collaboration with Chinese research institutions or honorary programs, by being summarily denied for any future federal government funding opportunities.

⁷⁸ Dolgin, *supra* note 66.

⁷⁹ Gina Kolata, *Vast Dragnet Targets Theft of Biomedical Secrets for China*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html>.

⁸⁰ *Id.*

- 4) As new and clearer guidelines are created, faculty, staff, and scholars should have the opportunity to adjust their previous forms and provide any additional disclosures without being prosecuted or facing negative employment consequences. Most Asian American and immigrant scientists under surveillance under the China Initiative have nothing to hide and would openly share any of their past activities if they did not fear prosecution.
- 5) NIH should examine existing procedures to find ways to improve and eliminate bias, both explicit and implicit. NIH should review training materials, testimony, and presentations regarding economic espionage for evidence of bias, remove it, and take remedial action to address it. We urge caution in the use of anti-China rhetoric. While there are valid reasons to critique the policies and actions of the Chinese government, broader anti-China statements can contribute to and inflame bias against Asian Americans and immigrants.
- 6) NIH should include the needs and concerns of Asian Americans in its efforts to address racial equity. It should engage with Asian American community leaders and community-based organizations to ensure a better understanding of the needs of the community and the impact of discrimination on Asian Americans. NIH should increase engagement with civil rights organizations and impacted communities to minimize the impact of bias in hiring, admissions, and grant approvals.

Thank you for the opportunity to submit comments on the American scientific research environment. Please do not hesitate to contact Gisela Perez Kusakawa or Megan Essaheb to provide further information.

Gisela Perez Kusakawa
NAPABA Law Foundation Community Law Fellow
gkusakawa@advancingjustice-aaajc.org
Asian Americans Advancing Justice - AAJC

Megan Essaheb
Director of Immigration Advocacy
messaheb@advancingjustice-aaajc.org
Asian Americans Advancing Justice – AAJC

Asian Americans Advancing Justice - AAJC
Advancing Justice - Asian Law Caucus
Advancing Justice - Atlanta
Advancing Justice - Chicago
Advancing Justice - Los Angeles

AAUP Chapter, NYU
ACCESS of WNY
American Civil Liberties Union
American Muslim Empowerment Network (AMEN)
American-Arab Anti-Discrimination Committee (ADC)
Anti-Defamation League
APA Justice

APAPA Albany Chapter
APAPA GBC
APAPA Greater-Fremont Chapter
APAPA Ohio
APAPA, Bay Area Region
APAPA-San Francisco
APAPA-UTC
Asian American Federation of Florida
Asian Caribbean Exchange
Asian Community & Cultural Center
Asian Pacific American Labor Alliance, AFL-CIO
Asian Pacific Community in Action
Asian Pacific Islander American Public Affairs - Los Angeles Chapter
Asian Pacific Islander American Public Affairs (APAPA)
Asian Pacific Islander American Public Affairs Association
Asian Pacific Islander American Public Affairs Association (APAPA) - San Diego Chapter
Asian Pacific Islander American Public Affairs Association (APAPA) New York
Asian Services in Action, Inc.
Asian/Pacific Islander Domestic Violence Resource Project
Association of Chinese Americans in Cancer Research (ACACR)
CASA
CCHMC
Chinese for Affirmative Action
Chinese-American Oceanic and Atmospheric Association
Chinese-American Planning Council (CPC)
Christine Chin Ryan
Civic Leadership USA
Community Organizing for Radical Empathy
Defending Rights & Dissent
Demand Progress Education Fund
Disability Rights Education & Defense Fund
Florida Asian Services
Hindus of Greater Houston
Hmong Nationality Organization
Houston Coalition Against Hate
Indian Horizon of Florida
Islamic Networks Group (ING)
Laotian American National Alliance
Legal Aid at Work
Montgomery County Civil Rights Coalition
Muslim Justice League
National Asian American Pacific Islander Mental Health Association
National Association of Asian American Professionals
National Association of Social Workers
National Council of Asian Pacific Americans (NCAPA)
National Immigration Law Center

National Iranian American Council
National Network for Arab American Communities
New York Sichuan Association, Inc.
NPNA
OAAHC
OCA - Asian Pacific American Advocates
OCA Greater Chicago
OCA South Florida Chapter
OCA-Greater Houston
Ohio Asian American Pacific Islander Advisory Council
Ohio Chinese American Association
Project South
Revolutionary Love Project
SHK Global Health
Sikh American Legal Defense and Education Fund (SALDEF)
South Asian Americans Leading Together (SAALT)
Southeast Asia Resource Action Center (SEARAC)
Talem Consulting
The Society of Chinese Bioscientists in America
United Chinese American-CT Chapter
VAYLA New Orleans
Win Without War

Individuals:

Ambrose Ng
Andrew Ross
Angela Xiao Wu
Anming Hu
Arvind Rajagopal
Biao Wang
Bing Ren
Bingcheng Wang
Binhai Zheng
Bolin Liu
Carl Patton
Chan Zhou
Charlie Dong
Chiang C Mei
Chris Li
Congcong He
Da-Lin Zhang
Dandi Qiao
Dong Feng Chen
Dongmin Liu
Edward Ziff

Emily Sun
Eugene Chen
Fan Jiao
Feng Liu
Frank Yang
Gen-Sheng Feng
Guo-Min Li
Haibin Ruan
Haitao Wen
Henry Dong
Hongju Wu
Hua Lu
James Meixiong
Jan Xie
Jane Wu
Jian Hua
Jianzhu Chen
Jing Li
Jing Pu
Jingwu Xie
John King
John M Archer
Joshua Yuan
Jun Liu
Keer Sun
Kent Ren
Kevin Xiang
Kun-Liang Guan
Li Liu
Li Wen
Li Zhang
Liang Zhou
Lily Dong
Ling Liu
Ling Yang
Liya Gu
Long-Sheng Song
Lu Cai
Manu Goswami
Meilian Liu
Min Wu
Min Wu
Ming Xu
Moosa Mohammadi
Nathaniel J Traaseth
Ning Zheng

Norman Zalkind
Paige Best
Patrick S. Moore
Peng Jin
Peng Xu
Penghua Wang
Peter X Ma
Peter Yingxiao Wang
Pinghui Feng
Pingwen Xu
Qiang Zhou
Qing Zhang
Qingzhong Kong
Qisheng Tu
Qihong Wang
Qunfeng Dong
Rebecca E Karl
Regina Goetz
Robert Fisher
Rong Fang
Rory Truex
Ruiwen Zhang
Shan-Lu Liu
Shaorong Liu
Sheng Wu
Shengfang Jin
Shengmin Yan
Shiyuan Cheng
Shou-Jiang Gao
Shusheng Wang
Stephen Chang
Susan Yu
Tac Phung
Thuy Linh Tu
Tianxi Cai
Tracy Sun
Tsan Sam Xiao
Wang Min
Wei Su
Wenbiao Chen
Willis Li
Xia Yang
Xiang-Dong Fu
Xiaoming Jin
Xiao-Ming Xu
Xiaoyan Zhang

Xiaoyi Liu
Xiaoyong Yang
Xinyuan Cui
Xueyun Zheng
Yan Li
Yang-Xin fu
Yi Tan
Yibin Wang
Yihong Wan
Yin-Yuan Mo
YiPing Chen
Yi-Ping Li
Young Chen
Young Jung
Youxing Jiang
Yuguang Shi
Yuwei Jiang
Z. Chen
Zhen Bouman Chen
Zhen Y. Jiang
Zheng Sun
Zhenghe Wang
Zhenkun Lou
Zhenwei Gong
Zhibo Yang
Zhijian Chen
Zhi-Long Chen
Zhiyu Dai
Zuoshang Xu