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Protecting Civil Rights Amid U.S.-China Competition

National security claims do not justify racial profiling by the Department of Justice or discriminatory state laws that conflict with federal powers.

In a second Trump administration, deepening geopolitical tensions between the United States and China may have grave implications for civil rights.

In recent years, federal and state governments have sought to address real and perceived threats to national security through a variety of anti-China laws and policies. This trend is now likely to intensify. Many of these measures harm U.S. interests. Being overbroad, they stigmatize people of Asian descent and immigrants while doing little to address genuine security concerns.

As litigators at the American Civil Liberties Union seeking to safeguard civil rights in the United States, we've represented wrongly prosecuted Chinese American scientists; we advocated for the end to the China Initiative; and we are currently fighting Florida's alien land law in court. We've seen firsthand how fearmongering, xenophobia, and sweeping national security claims result in policies that erode people's civil rights and civil liberties. The new administration must pursue more effective ways to keep America secure.

THE CHINA INITIATIVE

As President Trump takes office, politicians—primarily but not only Republicans—are all but certain to urge the Department of Justice (DOJ) to revive its now-abandoned China Initiative. Doing so would be a grave mistake. That program, launched during the first Trump administration, didn't work and did great damage to Asian American communities in the process.

Under the China Initiative, the U.S. government aggressively prosecuted scientists and academics at U.S. universities and research institutions, scrutinizing Asian American researchers and others with perceived connections to China. **Officials have argued** that the idea of the initiative was to develop “a coherent approach to the challenges posed” by the Chinese government.

In practice, the China Initiative incentivized FBI agents and DOJ prosecutors to profile people of Asian descent as ‘spies’ and to pursue weak and flawed criminal investigations. The consequences were devastating for the people affected and for scientific research in the United States (see the Huang and Kusakawa memos elsewhere in this collection).

The China Initiative was cast as an effort to address economic espionage and the theft of trade secrets—legitimate law enforcement concerns. But many of the resulting prosecutions **had no connection to espionage**, instead citing alleged false statements, visa fraud, or tax avoidance. Most disturbingly, many China Initiative prosecutions were based on scientists' alleged failures to adequately disclose their work history or international collaborations—conduct that, just a few years earlier, would have been addressed through civil or administrative processes. Under the China Initiative, these failures-to-disclose formed the basis for extraordinarily harsh criminal charges and penalties.

As part of this effort, high-ranking officials cast broad suspicion on scientists, technologists, and academics of Chinese heritage, encouraging FBI agents and prosecutors around the country to find and bring China Initiative cases. For example, FBI Director Christopher Wray described the “China threat” as “not just a whole of government threat, but a whole of society threat,” requiring “**a whole of society response**.” Agents and prosecutors heeded the call, subjecting individuals with academic or other scientific ties to China to disproportionate scrutiny and novel prosecution theories.

Unsurprisingly, many of the government's prosecutions of scientists of Asian descent turned out to be irretrievably flawed. The **list of failed cases is long**. It includes **Gang Chen**, a decorated professor of mechanical engineering at MIT who was wrongly accused of failing to disclose Chinese academic affiliations in grant applications; Anming Hu, a scientist at the University of Tennessee, Knoxville, falsely accused by the FBI of having ties to the Chinese military and placed on the No Fly List; Feng Tao, a professor of chemical engineering at the University of Kansas who was acquitted of baseless charges of wire fraud and giving false statements; and Chen Song, a Stanford neurologist who was wrongly accused of visa fraud with four other scientists. That is just the start.

DOJ’s framing and focus on the “China threat”—as opposed to discrete evidence of wrongdoing—encouraged agents and prosecutors to look for people and alleged crimes that ‘fit’ the initiative. Discriminatory profiling like this produces weak cases because it is especially prone to confirmation bias. Investigators interpret findings to support a belief or suspicion, rather than examining the evidence objectively for flaws or alternative explanations.

As Republicans in Congress seek to reinstate the China Initiative, the DOJ would be wise to resist. Far better is to focus FBI agents and prosecutors on specific types of serious misconduct—whatever its origin—and to follow the evidence (see the Hung memo in this report). If economic espionage and theft of trade secrets are urgent priorities, the focus must be on investigating those specific offenses based on credible information—not on broadly scrutinizing scientists with connections to China in search of something to charge.

Further reforms would also help guard against bias and its effects. DOJ must overhaul other long-standing policies that permit racial, ethnic, and national origin profiling in the name of national security. That means closing the loopholes and gaps in DOJ guidance, and it means tightening the FBI rules that allow agents to open and pursue investigations without evidence of wrongdoing.

DISCRIMINATORY LAND LAWS


At the state level, politicians have also sought to capitalize on increased tensions by proposing anti-China measures. These efforts—and the xenophobic rhetoric surrounding them—have profound consequences for Chinese and other Asian communities in the United States. Florida Governor Ron DeSantis, for example, has pushed several laws to “crack down on Communist China.” These include severe restrictions on the ability of Chinese immigrants to buy homes in the state.

Florida is not alone. Over the past two years, more than a dozen states have enacted laws limiting the ability of “foreign adversaries” to acquire real property, with a particular focus on people and businesses connected to China. With Republicans now in control of Congress, similar proposals may gain new traction in Washington.


This new wave of discriminatory land laws harks back to a previous racist chapter of American history. In the 19th and early 20th centuries, many states enacted similar “alien land laws,” largely to prohibit Chinese and Japanese immigrants from acquiring land, gaining an economic foothold in the United States, and becoming full members of American society. Over the 20th century, nearly all of these laws were repealed or struck down by courts.

The claim that such laws are once again necessary fails for two key reasons.

First, many of the new state land laws prohibit the purchase of ordinary homes. Indiana, for example, prohibits any Chinese citizen who is not a U.S. lawful permanent resident from purchasing a home within ten miles of a “military installation,” which is defined to encompass Indiana National Guard armories. There are 64 of these armories across the state, in nearly every major urban area—putting large swaths of the state off-limits to Chinese



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immigrants. Other new state laws are similarly restrictive. But there is no evidence that homeownership by Chinese people in the United States harms national security. Like the earlier generation of discriminatory laws, these sweeping measures serve only to stigmatize immigrant communities seeking better lives for themselves and their families.

Second, the federal government already has a process for reviewing real estate transactions that may impact national security. Congress has vested the Committee on Foreign Investment in the United States (CFIUS) with broad jurisdiction to evaluate real estate transactions near military installations, to impose mitigation measures, and to refer problematic transactions to the President for prohibition. This gives the federal government the flexibility to address genuine national security threats on a case-by-case basis, and to account for the foreign affairs implications of prohibiting any one transaction.

This nuanced federal scheme conflicts with categorical state prohibitions. The state-level laws provide no opportunity for case-by-case review or mitigation measures, and they risk creating substantial foreign policy complications.

MOVING FORWARD

The United States must adopt targeted, evidence-based approaches to national security that address actual threats without undermining the fundamental rights of Asian Americans and immigrants. The Trump administration and the new Congress should refuse to resurrect the China Initiative and reject legislative proposals that restrict the ability of ordinary immigrants to lease land or buy homes.

Crucially, the federal government should reform policies that invite racial profiling in the national security context, and aggressively challenge state laws that conflict with federal regulation, infringe on the President's foreign affairs powers, and unconstitutionally discriminate against people. By rejecting overbroad and biased laws and policies, the United States can both ensure its security and uphold its commitment to equal justice under the law.

FURTHER READING

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