

While China Initiative may have ended, foreign influence remains DOJ enforcement priority

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The last two years saw widespread reports that the U.S. Department of Justice's (DOJ) China Initiative, which surged resources to prosecutors investigating the transfer of sensitive U.S. technologies and information to the Chinese government, was floundering. See, "China Initiative aims to stop economic espionage. Is targeting academics over grant fraud 'overkill'?" The Washington Post, Sept. 15, 2021.

There is good reason to believe DOJ will continue to pursue many of the goals of the China Initiative, and often by the same means — namely, criminal prosecution.

DOJ dropped multiple, high-profile, China-related cases, and at least one China-related case ended (<https://bit.ly/3N2m1Lq>) in a judgment of acquittal. Political and civil rights leaders — as well as members of the research community — sounded the alarm, claiming that the initiative was improperly targeting Chinese people, contributing to negative stereotypes, and stifling international collaboration, innovation, and economic development. In late 2021, DOJ undertook a strategic review of the China Initiative, and in February 2022 ended that initiative.

As detailed below, however, there is good reason to believe DOJ will continue to pursue many of the goals of the China Initiative, and often by the same means — namely, criminal prosecution. DOJ has not publicly released official guidelines for its so-called "new approach" to handling China-related matters. Nevertheless, Assistant Attorney General (AAG) for National Security Matthew Olsen's Feb. 23, 2022, remarks on the topic hardly indicate an end to criminal cases relating to China.

Instead, those remarks suggest that DOJ's National Security Division (NSD), which has approval authority over some China-related charges, may exercise greater care in initiating criminal cases, focus on cases with a demonstrable nexus to the Chinese government or the Chinese Communist Party (CCP), and more

expansively consider remedies other than criminal charges for alleged misconduct.

DOJ announces the China Initiative

In November 2018, former Attorney General Jeff Sessions announced the China Initiative. In that announcement (<https://bit.ly/3MXgpSx>), he lambasted China, accusing it of stealing U.S. inventions and defrauding U.S. citizens; of posing a "grave threat" to U.S. national security; of being a "notorious" intellectual property thief; of engaging in unfair trade practices; of hacking into American business and commercial networks; and of existing outside "the community of lawful nations." "[E]nough is enough," said AG Sessions. "We're not going to take it anymore."

Thereafter, on its webpage (<https://bit.ly/3JnrfPs>), DOJ posted the components of the China Initiative, which included the following goals:

- Identify priority trade secret theft cases, ensure that investigations are adequately resourced, and work to bring them to fruition in a timely manner and according to the facts and applicable law;
- Develop an enforcement strategy concerning non-traditional collectors (e.g., researchers in labs, universities and the defense industrial base) that are being co-opted into transferring technology contrary to U.S. interests;
- Educate colleges and universities about potential threats to academic freedom and open discourse from influence efforts on campus; and
- Apply the Foreign Agents Registration Act to unregistered agents seeking to advance China's political agenda, bringing enforcement actions when appropriate.

Cases dismissed

During the China Initiative, DOJ brought criminal charges against researchers at several high-profile institutions, only for those charges to be dismissed. One theme of these dismissals was the government's apparent inability to prove the elements of the charged crimes beyond a reasonable doubt.

In September 2020, for example, DOJ dropped charges against a visiting Chinese researcher at the University of Virginia, who

allegedly stole proprietary software code. According to media reports, DOJ dropped that case after discovering that some part of that code was actually in a shared space to which the researcher had authorized access (“U.S. Drops Case Against Chinese Scientist at UVA,” The Wall Street Journal, <https://on.wsj.com/37yEEpT>, Sept. 23, 2020).

In September 2021, a federal judge dismissed wire fraud and false statements charges against an Associate Professor at the University of Tennessee, Knoxville (UTK). Those charges arose from allegations that the researcher performed research under grants funded by the National Aeronautics and Space Administration (NASA) while failing to disclose that he was also a faculty member at a university in Beijing.

After the case resulted in a mistrial, the court entered a judgment of acquittal on all charges, citing the government’s failure to present evidence sufficient to prove the researcher intended to harm NASA or that he intended to cause UTK to submit false certifications to NASA.

In January 2022, DOJ dismissed criminal charges against a professor at the Massachusetts Institute of Technology. Citing (<https://bit.ly/3lgP2zf>) “recently obtained additional information pertaining to the materiality of [the professor’s] alleged omissions in the context of the grant review process at issue in the case,” DOJ prosecutors concluded they could “no longer meet [the government’s] burden of proof at trial.”

The China Initiative ends

Fast forward to Feb. 23, 2022. In remarks delivered at George Mason University, Olsen announced (<https://bit.ly/3u6oMCP>) DOJ’s decision to end the China Initiative. In that announcement, Olsen emphasized that adherence to the Constitution and equal justice under the law is “the north star” of DOJ’s work.

According to Olsen, in deciding to end the China Initiative, DOJ had listened to concerns that the initiative had “fueled a narrative of intolerance and bias,” had led “to a chilling atmosphere for scientists and scholars that damages the scientific enterprise in this country,” and had given rise “to a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to [China] or that [DOJ] in some way view[s] people with racial, ethnic or familial ties to China differently.”

As of March 12, 2022, DOJ had posted a disclaimer at the top of its China Initiative webpage. It read: “The information here may be outdated and links may no longer function.” So, the China Initiative has ended.

Or has it?

Long live the China Initiative

Despite the placating tone of Olsen’s remarks, he was clear that DOJ continues to view the Chinese government as an increasingly aggressive threat to U.S. national security, including through its alleged theft of trade secrets, and that DOJ “will continue to prioritize and aggressively counter the actions of the PRC government that harm our people and our institutions.”

In outlining DOJ’s “new approach,” Olsen also suggested that many of the components of the now-defunct China Initiative may continue: exposing foreign influence campaigns and aggressively prosecuting espionage, export control and sanctions violations.

DOJ may prioritize cases with a provable nexus to the Chinese government or CCP. Repeatedly in his remarks, AAG Olsen emphasized DOJ’s focus on China’s political institutions, not the Chinese people or people of Chinese descent.

Based on Olsen’s remarks, it appears that DOJ will (to the extent it has not done so already) adopt new policies and procedures concerning China-related crimes and that it may exercise its discretion to pursue remedies other than criminal charges in more China-related cases.

DOJ may implement this “new approach” in various ways, as detailed below.

- DOJ may prioritize cases with a provable nexus to the Chinese government or CCP. Repeatedly in his remarks, Olsen emphasized DOJ’s focus on China’s political institutions, not the Chinese people or people of Chinese descent. That does not mean that DOJ will no longer scrutinize the activities of Chinese or China-funded researchers. According to the U.S. State Department, China has implemented a policy of military-civil fusion, a key part of which “is the elimination of barriers between China’s civilian research and commercial sectors, and its military and defense industrial sectors.” On account of this policy, DOJ may continue to investigate alleged links between U.S. researchers and China, even where their research may be academic or commercial in nature.
- DOJ may require its prosecutors to obtain NSD approval before investigating and charging a wider range of cases involving China or Chinese nationals. The DOJ’s Justice Manual contains the department’s publicly available policies and procedures and establishes NSD consultation and approval requirements related to the alleged violation of certain listed statutes. The Justice Manual also includes a “catch-all” clause, which provides for NSD oversight of any matter that “affects the national security, regardless of the specific statute(s) implicated.” Apparently relying on this broad mandate, Olsen announced that NSD would “take an active supervisory role” in investigations and prosecutions “involving academic integrity and research security.” This layer of oversight may cause some investigations to proceed more slowly and may prevent other investigations from ever getting off the ground.
- Before approving criminal charges, NSD may also require from prosecutors more (or better) evidence of criminal intent

and materiality, especially in light of the high-profile cases dismissed during the China Initiative. To that end, NSD may more rigorously apply a Justice Manual comment providing that “[m]erely because [the probable cause] requirement can be met in a given case does not automatically warrant prosecution; further investigation may instead be warranted.”

- DOJ may also take a lenient view of allegedly material omissions in grant applications and disclosures where those omissions are voluntarily corrected and related administrative inquiries are resolved. In his remarks, Olsen affirmed that the voluntary undertaking of corrective measures would “counsel against a criminal prosecution under longstanding department principles of prosecutorial discretion.”

- Similarly, DOJ may use its civil and administrative authorities to address alleged national security threats in cases that may previously have resulted in criminal charges. Olsen specifically referenced DOJ’s use of those tools “to mitigate threats from foreign investment activity and foreign interests that seek to secretly influence public opinion in the United States.”

The bottom line is that the end of the China Initiative hardly signals the end of the federal focus on foreign influence. DOJ’s “new approach” to China, however, may result in prosecutors exercising greater care and caution before filing charges. Stay tuned.

About the author



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