

## US unfairly targeting Chinese over industrial spying, says report

A new study of economic espionage cases in the US says people of Chinese heritage are more likely to be charged with crimes—and less likely to be convicted.

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For years, civil rights groups have accused the US Department of Justice of racial profiling against scientists of Chinese descent. Today, a new report provides data that may quantify some of their claims.

The study, published by the Committee of 100, an association of prominent Chinese-American civic leaders, found that individuals of Chinese heritage were more likely than others to be charged under the Economic Espionage Act—and significantly *less* likely to be convicted.

“The basic question that this study tries to answer is whether Asian-Americans are treated differently with respect to suspicions of espionage,” said the report’s author, Andrew C. Kim, a lawyer and visiting scholar at the South Texas College of Law Houston. “The answer to that question is yes. “

The study, which looked at data from economic espionage cases brought by the US from 1996 to 2020, found that just under half of all defendants were accused of stealing secrets that would benefit China. This is far lower than the figures laid out by US officials to justify the Department of Justice’s flagship China Initiative.

**The study found that 46% of all defendants were accused of stealing secrets that would benefit China, while 42% of cases involved American businesses.**

According to the report, 46% of defendants charged under the Economic Espionage Act were accused of activity that would benefit Chinese people or entities, while 42% of defendants were accused of stealing secrets that would benefit American businesses.

The numbers directly contradict much of the Justice Department’s messaging around the China Initiative, which was launched in 2018 to combat economic espionage. The department has stated publicly—for example, in the first line of its home page for the China Initiative—that 80% of its prosecutions would benefit the Chinese state, reflecting “theft on a scale so massive that it represents one of the largest transfers of wealth in human history,” as FBI director Christopher Wray described it in 2020.

Since 2019, the program has largely targeted academic researchers.

### **“Strong evidence of charges with less evidence”**

The report was based on an analysis of public court filings, as well as Department of Justice press releases, for all Economic Espionage Act prosecutions between 1996 and 2020. It’s an update of an earlier analysis, published in the Cardozo Law Review, which covered the period up to 2016.

Charges for “theft of trade secrets” and “economic espionage” were both included, with the “economic espionage” charge requiring proof of a “nexus to foreign entity” and accompanied by higher penalties. (These two categories make up only a portion of the charges under the China Initiative; Kim briefly mentions “false statements and process crimes,” and people have also been charged with grant fraud and lying on visa applications, among other crimes.)

Because demographic information and citizenship data is not included in court filings, Kim used names as proxies for race, and he used Google searches when names, like Lee and Park, were ethnically ambiguous. For citizenship, Kim noted that press releases often make prominent mention if a defendant is a “foreign national,” so he assumed that defendants were all citizens unless otherwise indicated.

### **The FBI’s decades-long fight against industrial espionage hasn’t really worked**

In the global economy, companies that steal trade secrets rarely face the consequences

The report found that 89% of defendants with Western names who were charged with economic espionage were eventually convicted, versus 74% of defendants with Asian names.

Mike German, a former FBI special agent who is now a fellow at the Brennan Center for Justice at New York University, sees the higher acquittal or dismissal rates as “strong evidence that the Justice Department is levying charges with less evidence, perhaps counting on the bias they’re fomenting with their anti-China rhetoric to get judges and juries to convict anyway.”

The report also found that while the number of economic espionage cases decreased under the Trump administration, Chinese and Chinese-American defendants were charged at higher rates. The number of cases brought by the Department of Justice fell from 105 during the Obama administration to 52 between 2016 and 2020. But more than half the defendants in cases brought under the Trump administration had Chinese names. This follows a trend that started in 2009, when Chinese names began overtaking Western names among those charged.

And despite the supposed focus on academics, only 3% of economic espionage cases in the study involved university workers. The top industries actually targeted for theft were technology (23%), manufacturing (21%), defense/energy (15%), and business (10%.) “This study suggests that the government is looking for spies in the place least likely to find them,” it says.

### **“Risks painting the whole race”**

In what Kim described as one of the most important findings of the study, analysis found that the Department of Justice was more likely to publicize EEA cases that involved defendants with Asian names than EEA cases brought against defendants with Western names: 51% of Western defendants have DOJ press releases, compared with 80% of all Asian defendants and 83% of defendants with Chinese heritage. As Kim wrote, “Publicizing alleged crimes by a racial minority more than similar crimes committed by others risks painting the whole race as more prone to that criminal conduct than others.”

There are limitations in the study, as both the report itself and other researchers and close observers of the program have indicated. It does not cover all the potential charges under the China Initiative, and crucially, it also “does not help with the question of scale and scope of the threat related to China,” wrote Margaret Lewis, a law professor at Seton Hall Law School who has written about how connections to China have been criminalized, in an official response to the research.

She asks whether the low charge-to-conviction ratio for Chinese individuals and those of Chinese heritage reflects “a judicious culling of well-founded investigations ... or an expansive dragnet that is creating enhanced suspicion at least in part because of people’s connectivity to the PRC?”

**"The sheer magnitude of these disparities raises concerns that racial factors have caused our government to punish people of certain races more severely than others who committed similar crimes."**

*Andrew C. Kim, visiting scholar at the South Texas College of Law, Houston*

The study doesn’t tell us. But this represents a limitation in the data that’s available, says Alex Nowrasteh, the director of immigration studies and the Center for Trade Policy Studies at the Cato Institute, who earlier this year published his own research on espionage convictions.

“The problem with analyzing economic espionage is we don’t know the total universe of people who have [conducted] or have attempted economic espionage,” he says—only those that were caught.

Anming Hu's case was meant to be a victory for the "China Initiative," a US effort to root out spies. Instead, it turned more attention on the FBI.

Kim says he suspects that racial bias, even if implicit, was at play:

"The sheer magnitude of these disparities raises concerns that racial factors have caused our government to punish people of certain races more severely than others who committed similar crimes. Implicit biases need not be conscious or even 'racist' to produce unfair racial disparities."

Not everyone is convinced. "The government argues that disproportionate effects do not establish discriminatory intent—which is true—and, accordingly, it is not engaging in racial profiling," wrote Lewis.

But, she added, "bias is not required to conclude that the China Initiative is fatally flawed."

### **A chilling effect—and signs of a reversal?**

Asian-American civil rights groups have been raising concerns about the chilling effects of the FBI's racial profiling of Chinese-American scientists for years. Numerous academic groups, scientific associations, and congressional representatives have joined calls to investigate—or rein in—the FBI and DOJ's allegedly discriminatory investigations.

The tide may be turning. On September 9, a federal judge acquitted Anming Hu, a Chinese-Canadian academic and former professor at the University of Tennessee, of all counts of defrauding NASA on grant applications, three months after a jury was unable to reach a verdict on his case. In late July, the Department of Justice dropped the prosecutions of five other academic researchers in a single day; they had been accused of lying about connections to the Chinese military.

"The more we learn about the China Initiative, the more problematic it looks," Lewis told MIT Technology Review in an email. "We need to keep making the case to the government that there is a better way. No one is saying protecting research security while mitigating concerns about bias will be easy, but it is critical."

The Department of Justice has not yet responded to a request for comment.