



WHITE PAPER

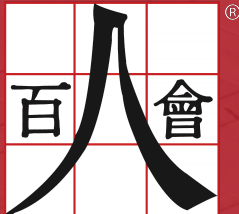
PROSECUTING CHINESE “SPIES:”

AN EMPIRICAL ANALYSIS
OF THE ECONOMIC
ESPIONAGE ACT

EXECUTIVE SUMMARY

PRESENTED BY COMMITTEE OF 100

AUTHOR: ANDREW KIM | MAY 2017 | WASHINGTON DC



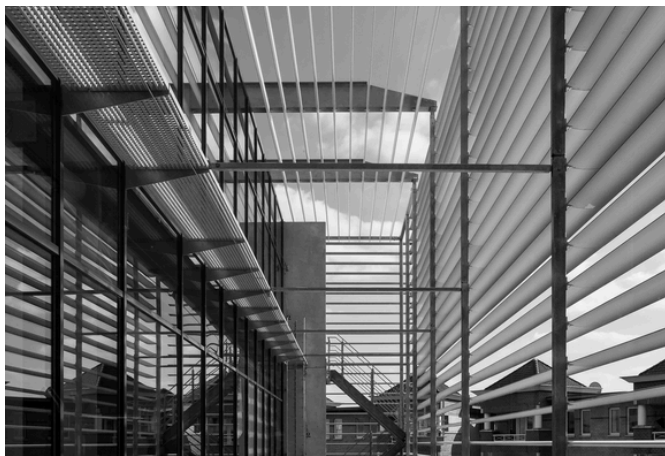
Committee of 100

The Committee of 100 is a leadership organization of prominent Chinese Americans in business, government, academia, and the arts. C100 members are leading U.S. citizens of Chinese descent who leverage their collective influence and resources to strengthen U.S.-China relations and promote the full participation of Chinese Americans. In 1999, the Committee led a coalition to raise national awareness of the denial of due process in the Wen Ho Lee case of alleged espionage, which later resulted in a public apology from the presiding judge. For over a quarter century, the Committee has monitored issues affecting Chinese Americans and served as a high-level bridge in the U.S.-China dialogue fostering regular exchanges with the leadership of Beijing, Taipei, and Washington. Learn more: www.committee100.org.

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FRANK H. WU

Chairman, Committee of 100

Distinguished Professor, UC Hastings College of Law

The Committee of 100 (C100) is pleased to present this important White Paper, “Prosecuting Chinese Spies: An Empirical Analysis of the Economic Espionage Act” by legal scholar Andrew C. Kim of South Texas College of Law, Houston. The study, which Kim developed over the course of a full year of research, offers an empirical analysis of recent U.S. government espionage claims brought against people of Asian heritage. C100 is publishing an executive summary of Kim’s report, along with two independent commentaries, to bring attention to the study’s findings, prior to its appearance in an academic version.

The study provides empirical indications that Asian Americans, whether immigrant or native-born, may be facing unfair and increasing racial prejudice in this era of geopolitical competition. C100 recognizes that these new risks are underscored by a legacy of almost two centuries of racial stereotyping as perpetual “foreigners,” where the loyalty of Asian Americans to the United States has been repeatedly challenged with similar themes.

During World War II, despite evidence known at the time that there was no genuine threat, 120,000 Japanese Americans — 2/3 of them U.S. citizens — were sent to internment camps and incarcerated based solely on the suspicions that their ethnic heritage made them “enemy aliens.” Despite such imprisonment of their own families, thousands of young Japanese American men served in segregated Army units as the 442nd Regimental Combat Team fighting across Europe. Their infantry became the most decorated for their size and length of service in U.S. Army history.

In 2000, Dr. Wen Ho Lee, a scientist who had dedicated his career to the American government, faced charges of disclosing secrets about the nation’s nuclear weapons and was held without bail in solitary confinement for over a year. In the end, the Justice Department dropped all of the charges against him except for one count to which he pled guilty to end his traumatizing ordeal. Many others who had committed the same acts were not similarly held accountable. Then-President Bill Clinton declared he was “troubled” by the matter. The federal judge who presided in the case publicly apologized for his mistreatment.

Today, there are more such cases similar to Dr. Lee’s in which racial profiling and ethnic hostility seem to have colored the judgment of government officials and tainted the criminal process. People such as Sherry Chen, a hydrologist with the National Oceanographic and Atmospheric Administration, and Dr. Xiaoxing Xi, a physicist at Temple University, are essentially “Wen Ho Lee 2.0.”

Chen and Xi have been exonerated in full. There was no basis for any suspicion of them — other than, apparently, the color of their skin. The sheer number and factual similarities among these prosecutions have created an apparent pattern and practice of selective and discriminatory treatment that demands greater transparency and accountability. Monitoring, oversight, and safeguards are needed.

The history of Asian Americans dates back to the early nineteenth century, with numerous contributions extraordinary and ordinary, in fields ranging from the sciences to the arts to technology and business. These

contributions have been made possible in a nation that welcomes everyone. The rule of law promises equality without regard to race, color, or creed.

Yet from time to time, we fail to live up to our own ideals. We have found evidence of deprivations of due process that affect innocent individuals. These prevent society from realizing the benefit of the full potential of Asian American contributions.

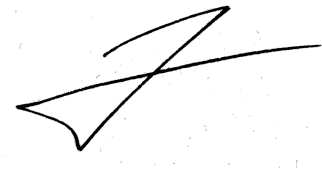
No doubt there have been instances of Asian Americans, like other Americans, who have violated the law and who have then faced justifiable investigation and prosecution. A definite line can be drawn between appropriate prosecution that is based on actual evidence and free of bias and overreaching persecution that is triggered by unfounded suspicions and tainted by racial prejudice. All Americans, regardless of ethnicity, depend on that line.

It is in this defense of constitutional rights for everyone, and the spirit of public service, that the Committee of 100 supports and releases the findings of Professor Kim's independent study.

The Committee of 100 is a non-partisan leadership organization of prominent Chinese Americans in business, government, academia, entertainment, and the arts. Established in 1990, the Committee has a long history of contribution to twin missions promoting the full participation and inclusion of Chinese Americans in all fields of American life, and encouraging constructive relations between the peoples of the United States and Greater China. For the past five years, C100 members such as Nelson Dong, George Koo,

and Brian Sun have led educational workshops around the nation presenting background on some of the issues discussed here.

Recently, the Committee of 100 formed a Legal Defense & Education Fund, through which financial support has been offered to victims of racial profiling. The Fund has also paid for the printing and distribution of this White Paper. C100 expresses its gratitude for all donors to the Fund. C100 Member Jeremy Wu has provided invaluable input as a statistician, which has helped to inform the findings presented in the following pages.



FRANK H. WU
CHAIRMAN, COMMITTEE OF 100



INTRODUCTION

Recent prosecutions of innocent Chinese Americans for espionage have raised concerns that Department of Justice (DOJ) investigations of suspected espionage have been infected by racial biases. Although not conclusive, this study finds evidence consistent with those concerns. It finds: 1) The percentage of people of Chinese heritage charged under the Economic Espionage Act (EEA) has tripled since 2009, to 52%. Including people of non-Chinese Asian descent, 62% of EEA defendants charged since 2009 have been people of Asian heritage; 2) In half (48%) of cases, the alleged beneficiary of espionage was an American entity while a third (34%) of cases involved a Chinese beneficiary.

Russia was not identified as the alleged beneficiary in any cases in the sample; 3) Defendants of Asian heritage convicted of espionage received sentences over twice as severe as those of other ethnicities; 4) 22% of people of Asian heritage charged with economic espionage were never convicted of espionage. In other words, as many as 1 in 5 Asian people prosecuted as spies may be innocent, a rate twice as large as for other races.



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62%

of EEA defendants charged since 2009 have been people of Asian heritage.

22%

of people of Asian heritage charged with economic espionage were never convicted of espionage.

EXECUTIVE SUMMARY

136 EEA CASES
187 DEFENDANTS

TO TEST FOR RACIAL DISPARITIES, THIS STUDY USED DEFENDANTS' NAMES AS PROXIES FOR THEIR RACE

4

DEFENDANTS WITH ARABIC NAMES

107

DEFENDANTS WITH "WESTERN" NAMES

59

DEFENDANTS WITH CHINESE NAMES

17

DEFENDANTS WITH NON-CHINESE ASIAN NAMES

DATA

This Study analyzes a random sample of cases charged under the Economic Espionage Act (EEA) from 1997 to 2015, (136 cases involving 187 individual defendants), using publicly available court documents drawn from the Public Access to Court Electronic Records system (PACER). Not all suspected economic espionage spies are prosecuted under the EEA. For example, Dr. Xi Xiaoxing, who was falsely accused of stealing superconductor technology for China, was charged with wire fraud, a crime that usually does not involve espionage-type activity. By focusing on EEA cases, however, this study was able to produce an unbiased sample of federal cases all of which include allegations of the theft of secret information.

Testing for racial disparities requires an indicator of the defendant's race, a variable that is absent from most PACER records. To work around this otherwise fatal complication, this study used the defendant's name as a proxy for race. The sample includes 107 defendants with "Western" names, (defined to include those with Eastern European, Hispanic, and Latino names), 59 defendants with Chinese names, 17 defendants with other Asian names (including Indian names), and 4 defendants with Arabic names. Searches on Google and Facebook were used to disambiguate any names with unclear national origins. Because this study could not identify defendants' citizenship statuses, it cannot distinguish between the treatment of Asian-American citizens and nationals of Asian countries.



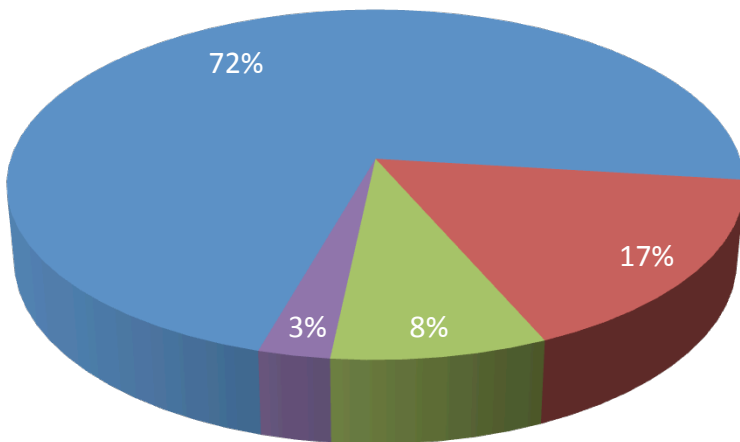
FINDINGS

(1) Since 2009, the majority of defendants charged under the EEA have been people of Asian heritage.

From 1996 to 2008, 17% of EEA defendants were Chinese while 8% were other Asians. Between 2009 and 2015, however, the rate of Chinese defendants tripled, to 52%. The rate for other Asians increased only slightly over the same time period, to 10%. In sum, 62% of EEA defendants prosecuted under the Obama administration were people of Asian heritage.

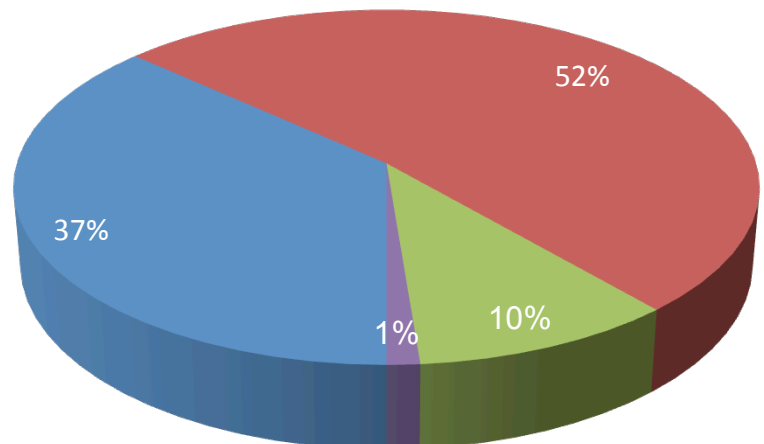
EEA DEFENDANTS BY RACE

1996-2008



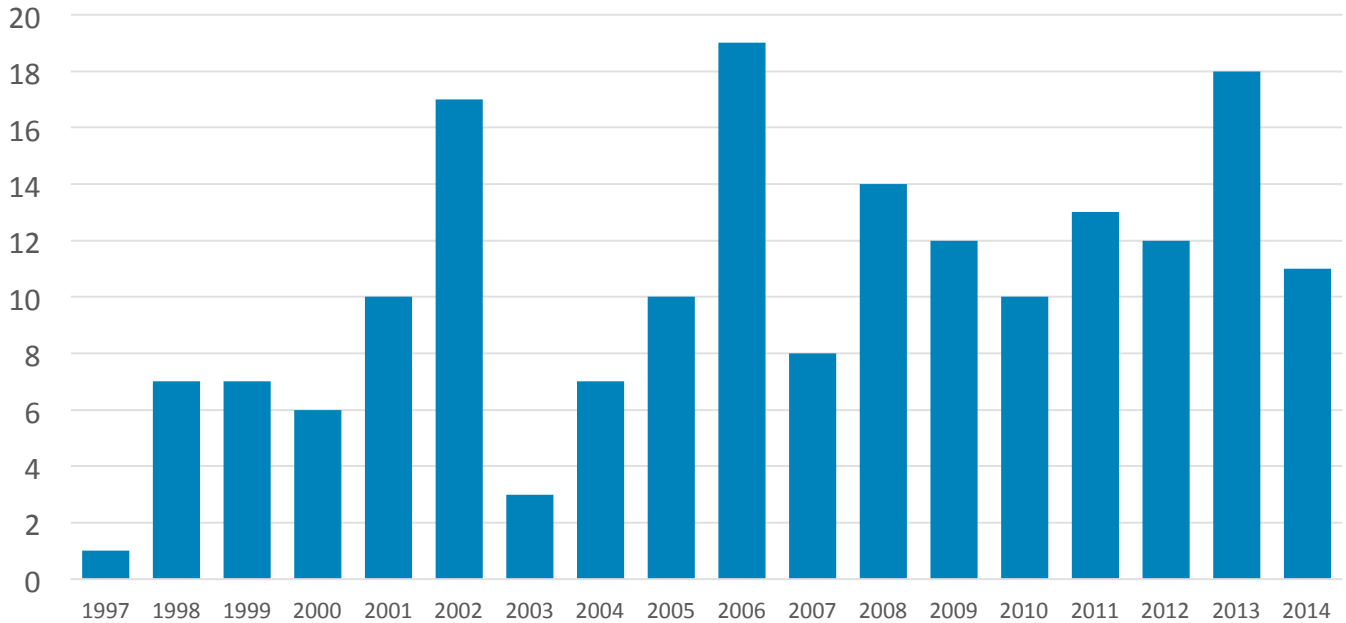
■ Western ■ Chinese
■ Other Asian ■ Arab

2009-2015



■ Western ■ Chinese
■ Other Asian ■ Arab

NUMBER OF EEA CASES FILED BY YEAR

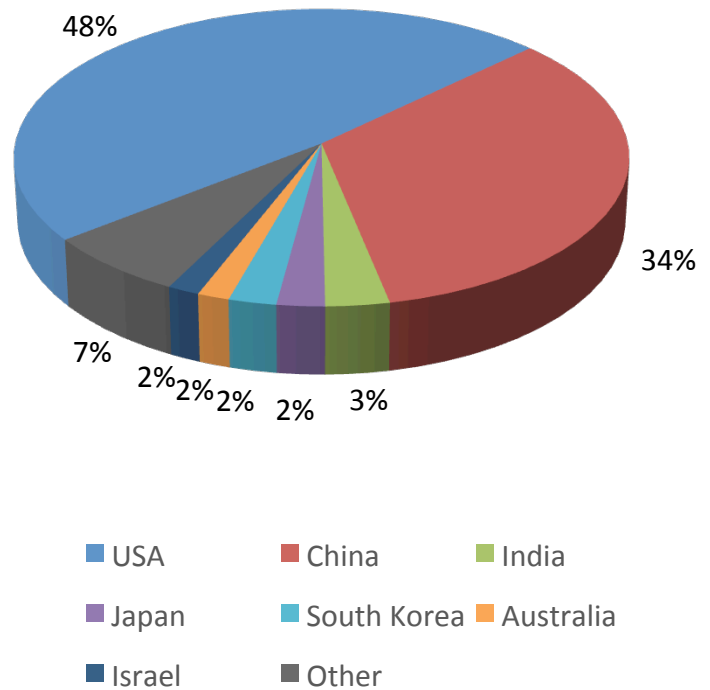


FINDINGS

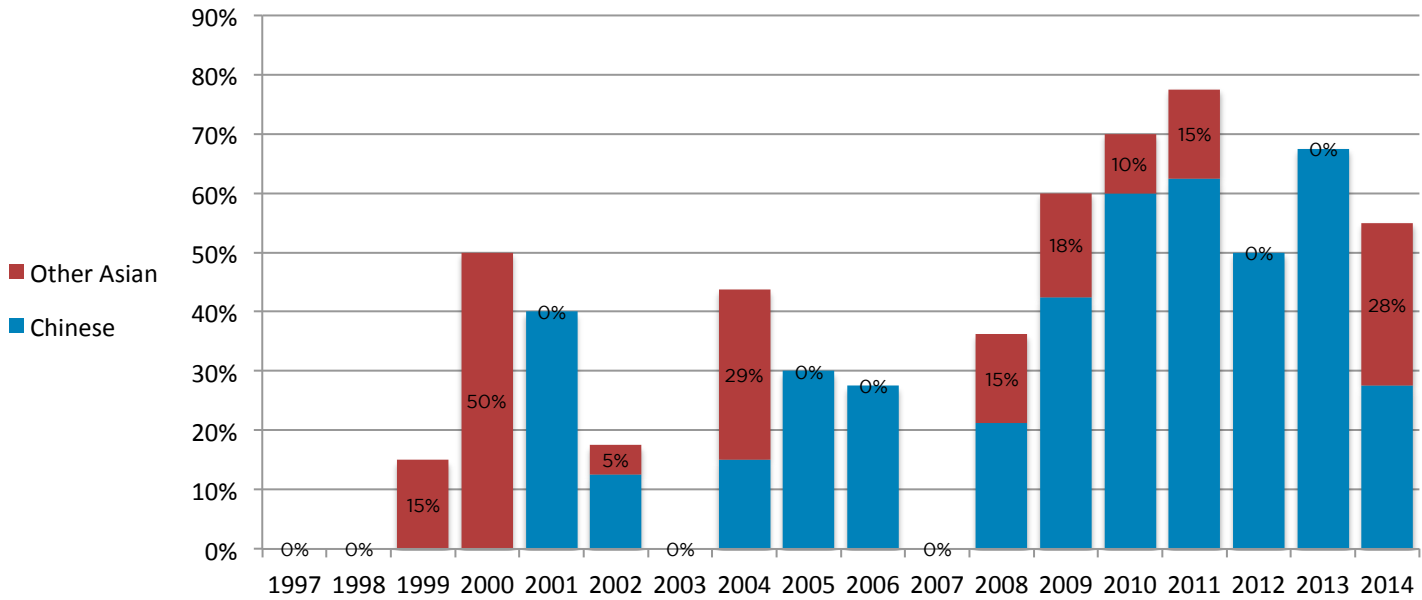
(2) Half of EEA cases alleged theft of secrets for a USA entity, one third for China, and none for Russia

The intended beneficiary of the alleged espionage could be identified in 118 out of the 136 cases in the sample. In half (48%) of cases, trade secrets were allegedly stolen to benefit an American entity. In one third (34%) of cases, the alleged thefts were intended to benefit Chinese entities. The remaining cases involved nations as diverse as South Africa, India, Iran, and the Czech Republic. None of the cases in which an alleged beneficiary could be identified involved Russia.

NATION OF BENEFITING ENTITY



% CHINESE AND ASIAN EEA DEFENDANTS BY YEAR



FINDINGS

(3) Convicted defendants of Asian heritage received sentences twice as severe

The average sentence for Chinese and all Asian defendants convicted of espionage was 25 months and 22 months respectively, twice as long as the 11 month average sentence for defendants with Western names. Where almost half (48%) of defendants with Western names received sentences of probation only, only 21% of Chinese defendants and 22% of all Asian defendants received probation only. These figures include only defendants who were convicted of any offense other than false statements.

(4) One in five accused “spies” of Asian heritage may be innocent

Twenty-one percent of Chinese and 22% of all Asian defendants charged under the EEA are never proven guilty of spying or any other serious crime, a rate twice as large as for defendants with Western names. Instead, these defendants were acquitted at trial, pled guilty only to “false statements” and released on probation, or, most often, had all charges against them dropped. The fact that these defendants were never proven guilty of espionage does not necessarily mean they were innocent. After all, there are reasons other than innocence, such as suppression of key evidence, for why a prosecutor might drop all charges or allow a defendant to plead guilty to a minor offense like false statements. Nonetheless, these findings raise the possibility that as many as one in five accused Asian “spies” might actually be innocent, a rate that is twice as large as that for defendants with Western names.

CONCLUSIONS: MORE QUESTIONS

These findings are consistent with concerns that the DOJ has improperly targeted, engaged in racial profiling of, and used biased judgment with respect to Asian Americans and Asian nationals suspected of espionage. Without further information, however, this study cannot rule out innocent explanations for these racial disparities. Rather than conclusions, this study raises a number of troubling questions that can only be answered through an independent and transparent investigation of DOJ espionage investigations.

First, why are so many EEA defendants of Asian descent, and how much, if any, of these disparities can be explained by the higher rates at which Asian-Americans work in technical fields? Why did the percentage of Chinese defendants triple under the Obama administration? Is it possible that three times as many Chinese-Americans began stealing secrets around 2009, or did the DOJ under Obama simply devote more resources to identifying and prosecuting espionage related to China? If the latter is true, does this reflect a legitimate prioritization of DOJ resources, or is it a case of unfair racial profiling and the start of a “New Red Scare”?

Second, why do none of the cases involve allegations of espionage to benefit Russia? Is it possible that in spite of recent allegations of state-sponsored hacking and decades of post-cold war espionage, Russia is actually not interested in obtaining American trade secrets? Are there diplomatic reasons for why the DOJ might avoid prosecuting Russian spies, or charge them under statutes other than the EEA? Has the DOJ focused so much energy on investigating Asia related spying that they have missed the Russian spies in our midst?

Third, why are guilty defendants of Asian descent punished more than twice as harshly as guilty defendants with Western names? Are the trade secrets stolen by

defendants with Asian names twice as harmful as those stolen by defendants with Western names? Alternatively, could it be that subconscious racial biases cause judges and prosecutors to perceive the crimes committed by Asian defendants as more severe than objectively similar crimes committed by non-Asian defendants?

Fourth, why does it appear that the DOJ accuses innocent people of Asian descent far more often than others? Could it be that preexisting images of Asian people as spies cause prosecutors to misinterpret ambiguous evidence as conclusive evidence of guilt? Might fears that a suspect will flee the country if tipped off justify filing charges early in the investigation, when the evidence is little more than innuendo? Although such concerns would be irrelevant in cases like Sherry Chen and Wen Ho Lee, where the suspect was aware of and cooperating with the investigation prior to filing charges, there were four defendants in the sample, all of Chinese descent, whose cases were never resolved because the defendant remains a fugitive from justice. Or, is it possible that, as has been argued in the war against terror, are the harms of some crimes so great that it is worth prosecuting some innocent Americans to avoid allowing the guilty to go free?

Fifth, why do prosecutors allow some defendants who were originally charged with espionage to plead guilty to minor crimes like false statements? Are these cases in which crafty spies cut a deal to avoid conviction on more serious charges? Or, could these be cases in which prosecutors accused an innocent defendant of espionage and insisted on obtaining a conviction for any crime rather than admit their mistake?

Finally, if these findings do reflect problems in the DOJ, what can be done to address those problems and reduce the number of innocent Americans whose lives are shattered by false accusations of betraying their own country?

DAVID A. HARRIS

Distinguished Faculty Scholar/Professor
University of Pittsburgh School of Law

With his study Prosecuting Chinese “Spies,” Professor Andrew C. Kim raises an important question. In light of the fact that prosecutions of Chinese and other Asian persons under the Economic Espionage Act (EEA) have increased since 2009, Professor Kim asks whether we are witnessing ethnic targeting of Chinese scientists and researchers. In other words, are we seeing racial profiling directed at a new group, for a new purpose, in much the same way we witnessed targeting of African Americans through “driving while black” in the past? The answer is that we simply don’t know yet; the data presented in the study do not prove the existence of “researching while Asian,” to borrow Professor Kim’s phrase. But we can see enough that, going forward, we must remain vigilant, watch the data, and follow up with further study.

Professor Kim begins by laying out the data he has, a sample of 136 cases brought under the Economic Espionage Act, between 1997 and 2015. From 1997 until 2008, Chinese persons made up 17 percent of the cases brought; between 2009 and 2015, that percentage tripled, to 52 percent. Convicted defendants in EEA cases of “Asian heritage” (including ethnicities other than Chinese) received sentences over twice as long, on average, as non-Asian defendants. Further, 21 percent of all Chinese EEA defendants were not proven guilty of spying or other serious crimes – about twice the rate of members of other ethnic groups; instead, they were acquitted, plead guilty only to making false statements

and not to espionage offenses, or had charges dropped against them entirely. “In other words,” Professor Kim says, “one in five accused Asian ‘spies’ might actually be innocent.”

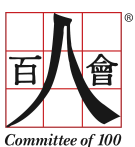
It is important, up front, to recognize the limitations of these data. First, the number of cases in the sample is relatively small, and a small sample size limits any analysis. (By way of comparison, the first studies of racial profiling of African Americans on highways in New Jersey and Maryland in the 1990s, conducted by Dr. John Lamberth, involved a vastly larger amount of data -- many thousands of vehicles observed, in addition to those vehicles stopped and searched.) We also cannot tell how many investigations under the EEA (as opposed to cases charged) took place during the study period, what ethnic groups the targets of those investigations came from (Chinese or Asian or other), and the rate at which those investigations actually blossomed into charged cases. We also do not know how many espionage related cases were charged under statutes other than the EEA (Professor Kim cites a number of other federal statutes prosecutors could use and have used in other cases.) Moreover, as Professor Kim himself acknowledges, there are “many reasons other than innocence” that could explain why defendants were acquitted, had charges dropped, or plead guilty to reduced charges.. Overall, as he says, his study “cannot rule out innocent explanations for the findings.”

First, Professor Kim says the data indicate that the average sentence for Chinese defendants “convicted of espionage” in these cases was 25 months (22 months for all Asian defendants combined), twice the average sentence for defendants from other ethnic groups. This troubling finding raises a red flag; the federal sentencing system is designed to ensure that defendants who commit similar crimes receive similar sentences, regardless of race, gender, or religion. This sentencing disparity is an obvious target for further study; if the finding of disparity holds up after controlling for the Federal Guidelines factors that were unavailable to Professor Kim, this would mean that we might indeed be seeing not just unexplained disparity, but discrimination.

Second, consider the data indicating that twice as many cases against Chinese defendants result in acquittals, guilty pleas to reduced charges, or dropped charges as is true of cases against non-Chinese defendants. Though these data are consistent with both innocent and troubling explanations, they deserve further scrutiny. This is because of the striking parallel with stop and frisk data gathered in New York over the last decade. In the *Floyd v. New York City* case, which resulted in a federal court order to reform the use of stop and frisk practices by the New York Police Department, an astonishing 88 percent of all stops yielded nothing – not an arrest, not a recovery of a gun or other contraband – not even a summons. Buried deeper in the data was this: police were more likely by far to stop African American and Latinos than whites, but much more likely to find contraband on, and make arrests of, whites than African Americans or Latinos.

This seeming contradiction laid bare a hidden operational standard – perhaps hidden even from officers themselves: while the legal standard for stopping any person was the same – reasonable, fact-based suspicion of involvement in criminal activity, according to the U.S. Supreme Court – the actual standard in use on the street seemed to be lower for African Americans and Latinos than for whites. In other words, African Americans and Latinos were seen as suspicious on much less evidence than were whites, resulting in stops that were “hits” – that is, they resulted in an arrest or a summons – much less often than stops of whites, because officers did not stop whites until they had more, and more solid, evidence of criminality. The same kind of process may be at work here: while there may be innocent explanations for the disparity, it may be that investigators and prosecutors are more willing to go forward with cases against Chinese and Asian defendants on less evidence than they are in investigations of whites. Because we have seen precedent for this in very different kinds of law enforcement activity, this is something to investigate more deeply in existing cases in the data, and to track carefully going forward.

For all these reasons, Professor Kim’s study does a real service. He points to an issue many perceive to exist in the real world, and marshals the data to examine it. While that data remains too scarce to draw definitive conclusions, he correctly points out that the data do raise serious questions. As we transition into a new presidential administration, with a new team atop the Department of Justice, these questions cannot – they must not be – ignored.



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Our federal criminal justice system is relentlessly efficient. Of the cases adjudicated each year, more than 97% are resolved by guilty plea, and 90% of the remainder end in guilty verdicts at trial. Less than 7% of charged cases are dismissed or deferred annually, and most of those through diversionary programs for low-level offenders. These statistics are due mainly to federal prosecutors' careful selection process (they decline as much as 63% of cases brought to them annually). With trials all but disappearing as an adjudicative mechanism, we trust these prosecutors – some say too much – to leverage their considerable charging, bargaining and sentencing power with proportionality and precision.

Against that backdrop, Andrew Kim's meticulous research on economic espionage cases raises many troubling questions. Not only are these cases out of whack with national averages (producing double the dismissals, five times more trials, and almost twice as many acquittals), but as Kim outlines, individuals of Chinese or other Asian descent are disproportionately charged with espionage, receive higher sentences, and are twice as likely as non-Asian defendants to have their charges dropped. Perhaps, as Kim evenhandedly suggests, individuals of Chinese or Asian descent are engaging in more (and more serious) acts of economic espionage, or perhaps prosecutors are forced to arrest before they have fully analyzed their case to avoid evidence destruction or flight. But another, simpler explanation is that these statistics reflect an implicit bias against Asians.

It's not that Chinese and Asian espionage is increasing, but rather that prosecutors believe it to be, and therefore, they may disproportionately and precipitously target individuals of Chinese and other Asian descent as spies, leading inevitably to a high rate of false positives.

There is a growing empirical literature examining how implicit bias pervades our criminal justice system, from the decision to stop and question an individual, to the decision to arrest, to the decision to charge, to the type of charge to be levied, to the degree of leniency offered in plea bargaining, to the severity of sentencing. Most of this research – driven by the disparities in our convicted and incarcerated populations, as well as studies of DNA exoneration cases – focuses on differences in the experiences and outcomes of whites and African Americans. Kim's research is a major contribution to this scholarship for two reasons. First, relatively little is known about implicit bias in our criminal justice system beyond the studies relating to biases against African Americans. By focusing on an ethnicity that is rarely the subject of such research – indeed, a group that is often viewed as having overcome historical prejudices – Kim corroborates and deepens the existing insights about implicit bias in the criminal justice context, demonstrating the potential for bias in a range of less traditional cases (beyond drugs and terrorism, for example) and among groups outside the traditional black-white paradigm of racial justice. In other words, implicit bias in a justice system that prizes accuracy but

essentially delegates the accuracy judgment to all-too-human prosecutors is likely far more pervasive than we are prepared to admit.

Second, Kim's work is an impressive example of how this research can and should be done. His analysis does not simply crunch disembodied numbers. It is based on a painstaking search of the electronic database of all but three of the 94 federal districts and an individual examination of the court filings or other publicly available information related to all 170 cases in his sample. As a result, his analysis of the data is especially nuanced and rich. He uncovered several cases where, for example, it was clear that charges were dismissed on innocence grounds, cases where risk of flight and destruction of evidence could not have been legitimate concerns, and cases where there was a strong inference that a conviction to a count of making a false statement did not indicate culpability for espionage. All of these findings strengthen the inevitable takeaway from the paper: it is likely that the charging, conviction and sentencing disparities in economic espionage cases are driven by bias against Asians.

Kim concludes with some practical calls for additional action, including implicit bias training for prosecutors, suggestions to slow the rush to indict, and, most notably, a requirement of transparent explanations for decisions to drop or significantly reduce charges. Prosecutorial discretion powers the efficiency of our criminal justice system, which, in the end, to borrow from Harold Lasswell, is all about who gets charged

what, where and why. As the statistics cited at the beginning of this commentary establish, a charge is tantamount to a conviction in most federal cases. Even without a conviction, a charge alone is certainly personally devastating to the individual involved. But apart from occasional high-profile examinations (the Ted Stevens case, for example), the operation of prosecutorial discretion is largely a black box. Kim's project in fact grew out of unheeded calls to the DOJ for an independent investigation into its espionage prosecutions to address concerns about racial disparity. Were the prosecutors, however, required to explain publicly why they dismissed espionage charges, we would get a window into the factors that lead both to a prosecutorial rush to a judgment and the more painful but necessary process of redressing initial errors. By illustrating both the dangers of relying too heavily on the initial judgments of police and prosecutors and the mechanisms by which prosecutors can reassess these judgments, this data reveals the prosecutor as the minister for justice that she must be (and is, for the most part), rather than just an advocate for conviction at all cost. Moreover, the fact that any later decision to dismiss espionage charges –among the most challenging for anyone to face – will be scrutinized closely may promote greater prosecutorial accountability throughout the life of the case.

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Andrew Chongseh Kim is an attorney at Beck Redden LLP and Visiting Scholar at South Texas College of Law Houston. Kim received his undergraduate degree from the University of Chicago with triple majors in Economics, Physics, and Anthropology. He graduated cum laude from Harvard Law School, where he was honored as a Dean's Scholar, and clerked at the Supreme Court of Connecticut. As a scholar, Kim applies sophisticated statistical techniques to the study of the American criminal justice system. His research has been peer reviewed and published in top 100 law reviews. Kim's private practice work focuses on commercial litigation.

DAVID A. HARRIS

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David A. Harris is the John E Murray Faculty Scholar and Professor of Law at the University of Pittsburgh. His book "Profiles in Injustice: Why Racial Profiling Cannot Work" is the standard work on the subject, and his research has led to statutes, regulations, and proposed laws against profiling in half the states and hundreds of police departments. He is also the creator and host of the "Criminal Injustice" podcast.

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JaneAnne Murray is Professor of Practice at the University of Minnesota Law School, where she teaches criminal procedure and runs a program in which students represent federal inmates seeking clemency. She is also a practicing federal criminal defense lawyer, and has represented clients in many high-profile criminal cases in Minneapolis and New York City. She is co-chair of the Sentencing Committee of the National Association of Criminal Defense Lawyers, and was a member of the Steering Committee of Clemency Project 2014 and of the ABA Task Force on the Reform of Federal Sentencing of Economic Crimes. She obtained her Bachelor in Civil Law from University College Cork and her Master in Laws from the University of Cambridge. From 1990 to 2000, she was the International Advisor for the Office of the United Nations High Commission for Human Rights in Kampot, Cambodia.

PROMOTIONAL PARTNERS



**LEADERS
FORUM**



Special Thanks to Adrian and Monica Arima



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