Constitutional Rights & Government Actions

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Jeremy Wu, Ph.D.

Jeremy-wu.info

Jeremy.S.Wu@gmail.com WeChat: jeremywu1

Before We Start

Disclaimer: The views and opinions expressed in this presentation are mine and mine only; they do not reflect the official policy or position of any organization.

Personal Thought: The United States is not a perfect nation, but it is made more perfect over time because of the wisdom and participation of its people, including Asian Americans.

Our Constitutional Rights

Do the government actions described here violate our constitutional rights, especially...?

The Fourth Amendment

 Privacy and freedom from arbitrary governmental intrusions (e.g., search and seizures)

The Fifth Amendment

 Equal protection and due process relevant to legal proceedings

Outline of Presentation

- Prosecutions of Chinese American scientists
 - Government actions
 - Media reports
 - Civic engagement
- Case updates
 - Sherry Chen MSPB appeal
 - Xiaoxing Xi Bivens action suit
- Legislative developments/Constitutional rights
 - What is FISA (and Section 702)?
 - Reauthorization of FISA amendments

Oct. 2013 - Sep. 2015

Xiaoxing Xi Temple University **Physicist** Naturalized US Citizen Sensitive Technology to China All charges dropped



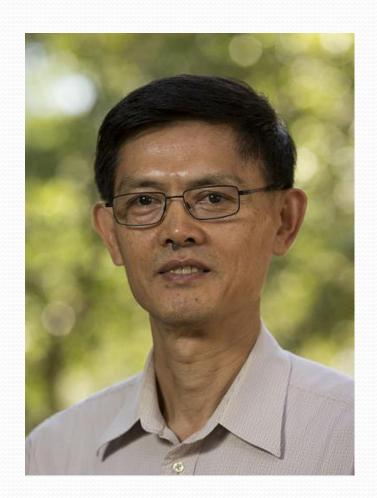
Guoqing Cao and Shuyu Li Eli Lilly Research Lab **Biologists** Naturalized US Citizens Sensitive Data to China All charges dropped

1/1/2014

1/1/2015

Xiaoxing Xi

- Penn Valley, Pennsylvania
- Naturalized U.S. citizen
- Ph. D., Physics, 1987,
 Beijing University
- Former Chair and Current Professor of Physics, Temple University
- World renowned expert in thin film materials
- Married, 2 daughters



Xiafen "Sherry" Chen

- Wilmington, Ohio
- Naturalized U.S. citizen
- Tsinghua University
- Award-winning hydrologist, National Weather Service
- Improve flood prediction to save lives/properties
- Terminated by NWS in March 2016
- Married



China the main economic espionage threat to U.S.: FBI

FBI blames China for 53% spy case surge

Former Lilly scientists indicted for passing R&D secrets to Chinese drugmaker

FBI eyes Chinese hacking of dams database

Temple professor is Chinese spy: Justice Dept.

Accused of Spying for China, Until She Wasn't

By NICOLE PERLROTH MAY 9, 2015



Charges dropped against Eli Lilly scientists accused of selling trade secrets

Published: December 5, 2014, 4:06 pm | Updated: May 14, 2015, 2:43 pm







U.S. Drops Charges That Professor Shared Technology With China

点击查看本文中文版 Read in Chinese

By MATT APUZZO SEPT. 11, 2015



WASHINGTON -When the Justice Department arrested the chairman of Temple University's physics department this spring and accused him of sharing sensitive



COLLATERAL DAMAGE

Bill Whitaker reports on Americans wrongly accused of espionage-related crimes as the U.S. steps up the fight against Chinese theft of U.S. trade secrets and intellectual property

The New York Times

By THE EDITORIAL BOARD SEPT. 15, 2015

But these concerns cannot justify prosecutions driven by supposition rather than solid evidence. The charges filed against Mr. Xi and Ms. Chen traumatized them and their families and needlessly damaged their professional reputations. Neither got an explanation or an apology from the government. They deserve both.

CAPAC

- Press conferences
- Joint letters calling for investigations
- Budget hearings
- Public speeches
- Bi-weekly conference calls

Congress of the United States

May 21, 2015

Honosoble Lopetta E. Lynch Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, O.C. 20530

Thank you fee you history of public service and your commitment to protect all Americans. We are writing againful, National Womber Service employees Servey Chers, who may have been traggisted by foliast Franciscus for sufficient public but of not not recentable evidence, but no case. We also would like to know whether cheer is nelly writine or unwritine policy, pragram, pattern or practice of more of orther or in plant standardizates when the public, profest and statistical engits being used by foliastic algorithm of the foliastic profess or survivalence, received for committee of the contraction of the contraction of the contraction of survivalence and the contraction of the contraction of the contraction of survivalence, received protections of survivalence, received protections of survivalence of contractions of survivalence of contractions of survivalence of contractions of survivalence surv

Sherry Chen, who received awards for her government service, worked as a foderal hydrologist at the National Weather Service in Wilnington, Ofto. Her life two strond upoids down when she was handorfied and prained port her convolent for lallegal upsying. The allegal evidence is septoned in the media approach to be flimay and charges were eventually dropped, her not until Mo. Charls life were thin a talkippin due to the arrest, he appreted in the New York Town, federal to the charge of the service of the se Ms. Chará life weat sina a utilipio due to the surest. An reported in the New York Towns, foderal investigators "man aerous a purson is of Chinese decorat and a faithe thir of cladence that they can have been trying to buseful the Chinese government, but it's dear there was a line but of Red Score and racini mirrodo/s, sial effect. I Town, a florent feriodest prosecutor who specialized in computar crimes and industrial explorange" (New York Town, Accused of Spying für China, Utall She Wartf, May 20, 20, 20).

This is not the first time spying allegations against Asian Pacific Americans were made and then dropped. For example, tast December federal prosecutors dropped charges against Gusquing Cau

doing data to a Chinese-drug company (Wall Sense) nor Lifty Scientists Are Dismissed, Dec 8, 2014). Like to down by being targeted and then having charges

secreted off the premises of Arnes Research Center in adags taken from him. The only explanation given to safety take. Dr. Su believed by was a visation of racial toon (New America Medici, in Arnii-Discrimination L. Feb 19, 2015). But like Ms. Chen, his life was also

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Congress of the United States Machington, D€ 20313

Honorable Loretta E. Lynch Attorney General U.S. Department of Justice 950 Descriptions Avenue N.W. Washington, D.C. 20530

We write to request an independent investigation into whether race, ethnicity or national origin played a part in recent cases in which Asian Americans have been wrongfully arrested and indicted for alleged esplorage only to have those charges later dropped. Specifically, we request that you address why there appears to be an ongoing pattern and practice of people of color being singled out by federal law enforcement and prosecutors. Twenty-two Members of Congress sent you a letter on May 21, 2015, requesting such an investigation in light of the case of National Oceanic and Atmospheric Administration employee Sherry Chen. Since then, yet another festeral case occurred of an Asian American, Dr. Xlaoxing XI, who was wrongfully arrested and

In a response to the 22 Members of Congress sent on July 27, 2015, the Department of Justice stated that "no policy exists for using race or any other civil rights classifications to actions." However, the May 21 letter requested an investigation to determine whether any federal agency has a pattern or practice of using these civil rights classifications. The DOI reconsic letter was silent as to whether there is a pattern or mactice of federal law enforcement and prosecutors singling out minorities for arrest and indictment.

labsequent to the DOI response, there has been a troubling new case that is similar to that of Ms. Ches. The DOJ arrested and indicted Dr. Xiaoxing XI, the chairman of Tomple University's physics department, for allegedly sharing schematics for a sensitive American-made conductor research with China. FBI agents with gaze-drawn stormed Dr. Xi's house, and his wife and daughter watched him exceeted out in handcuffs. Despite tatements from leading scientists, it took the DOJ four months to concode that the sche

es were eventually drooped against Dr. Xi ral damage was done. It

prosecutors have withdrawn high-profile and the nation who had been accused of from a coalition of national Asian Pacific ian Americans being singled out falsely for

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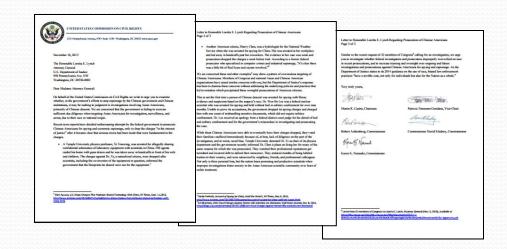
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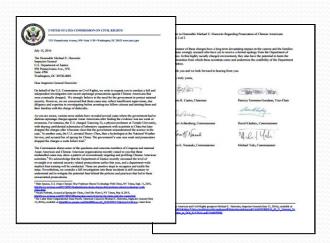




U.S. Commission on Civil Rights

"... conduct a full and independent investigation into recent espionage prosecutions against Chinese Americans that were eventually dropped ..."



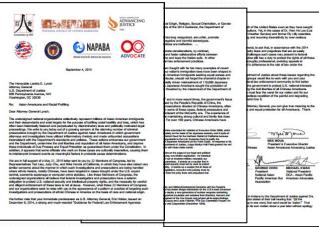


Community Actions

70+ Asian Pacific American, Civil Rights, and Civil Liberties Organizations Urge U.S. Attorney General to Investigate Possible Profiling of Asian American Scientists

Posted on November 16, 2015

- Letter writing
- Press conferences
- Online petitions
- Educational seminars
- Fundraising
- Street rally









Xiaoxing Xi/ John Lee

Wen Ho Lee/ John Lee

A trend of wrongful prosecutions















DOJ and FBI Responses

On Sherry Chen

"... exercised its discretion to dismiss the indictment without prejudice..."

DOJ Office of Inspector General does not have jurisdiction to investigate, referred to the Office of Professional Responsibilities

On Xiaoxing Xi

"... information that became available after the indictment ... not in the interests of justice nor consistent with the Principles of Federal Prosecutions..."

Update on Sherry Chen

- Terminated by National Weather Service in March 2016
- Filed administrative appeal to Merit Systems Protection Board (MSPB)
 - Wrongful termination
 - Racial discrimination
 - Unlawful retaliation
- Public MSPB hearing held in Cincinnati, Ohio on March 14-15, 2017
- MSPB decision anticipated in the next month



Principals in Sherry Chen Case



Deborah Lee. Reported Sherry Chen as suspicious "Chinese national" to open investigation. Promoted from ACE into the NOAA.



Laura Furgione. NWS deputy director never met or discussed with Sherry Chen, but initiated action to terminate. Now reported to be acting deputy director of Census Bureau.



Louis Uccellini. NWS director recused himself from the role of official decision maker on the termination of Sherry Chen.



Michael Devany. NOAA Deputy Under Secretary approved Sherry Chen termination. Retired one month after action.





Update on Xiaoxing Xi

- Filed "Bivens Action" against lead FBI and unnamed agents in May 2017
 - A violation of one's Fourth Amendment rights by federal officers can give rise to a federal cause of action for damages.
- May file claims under the Federal Tort Claims Act next
- Recent featured speaker on Capitol Hill for the 4th
 Amendment Advisory Committee and "Color of Surveillance" conference by the Center on Privacy & Technology of Georgetown Law School
 - "The usual suspects Bias in government surveillance"
 - "I am not a spy A personal account"

Xiaoxing Xi's Lawsuit

- Malicious Prosecution (4th)
- Equal Protection and Due Process Violation (5th)
- Unlawful Search and Seizure FISA Orders (4th)
- Unlawful Search and Seizure Warrantless Surveillance (4th)
- Unlawful Search and Seizure of Property and Belongings (4th)

- 1978. Foreign Intelligence Surveillance Act (FISA) passed in the aftermath of Watergate and domestic spying
 - Judicial and congressional oversight
 - Forbids domestic spying in name of security
 - Sets up FISA court to approve surveillance up to 1 year
 - Requires probable cause and surveillance location
 - Surveillance to target foreign powers/agents
 - Imposes "minimization" or constraints on government

• 2001. After the 9/11 attacks, the Bush administration began a series of massive secret warrantless wiretapping programs, which include monitoring of the telephone, email, and other electronic communications of millions of Americans, under questionable executive authority

- 2008. Congress amended FISA in 2008 to help legitimize some of the secret programs. The FISA Amendments Act adds Chapter VII including Section 702:
 - Restricts targeting to only the communications of non-U.S. persons located outside the U.S.
 - Cannot intentionally target U.S. persons in the U.S.
 - Must protect privacy and civil liberty under the 4th Amendment

- **2008.** The FISA amendments expanded the scope from Al-Qaeda and terrorist groups to include "the conduct of the foreign affairs of the U.S."
 - The DOJ and FBI began publicity campaigns that economic espionage is second only to terrorism as a threat to the U.S., with China as the primary culprit
 - FBI reported a 53% increase in its economic espionage investigations involving China in 2015 alone
 - Economic espionage prosecutions involving Chinese persons tripled after 2008 compare to before 2008

- **2012.** The FISA Amendments Act was extended for another 5 years, expiring on December 31, 2017
- **2013.** The massive surveillance programs were cloaked in secrecy until Edward Snowden made significant revelations.
 - Dragnet collection of "incidental" data belonging to millions of Americans without a warrant
 - PRISM and Upstream two massive secret data collection programs without search warrant

- 2013. Additional revelations and investigative reports also show
 - No official estimate on how many Americans are swept up
 - "About" data collection
 - "Backdoor search loopholes"
 - May include attorney-client and doctor-patient information
 - "Parallel construction"
 - "Masking" and "unmasking"
 - A "vocabulary of misdirection" to "say one thing while meaning quite another."

- **2016.** The FISA court reviewed and opined in a 99-page declassified report about the targeting and minimization procedures:
 - U.S. intelligence agencies were found to have continuing "non-compliance" problems for over five years
 - The government reporting efforts have been lacking in "institutional candor"
 - They represent "a very serious Fourth Amendment issue."
- This is from the FISA court that has approved over 99.5% of the government's requests since 1978 or 2008

Legislative Development

- 2017. Senate bill 1297 was introduced on June 6 to make Title VII (covering Section 702) of FISA permanent law without change before its expiration on December 31
 - Chinese Exclusion Act of 1882 was initiated for a term of 10 years; it was expanded and extended for 10 years in 1892 and then made permanent law in 1902
 - Once a law is permanent, further debate is no longer needed

Choice of Actions/Inactions

- Let it go
 - Not of interest or importance
- Make FISA amendments permanent
 - Support the Senate bill
- Support the expiration of FISA amendments
 - Let them expire on December 31
- Support reforms to reauthorize the FISA amendments
 - Will not happen by inaction

Personal Views

- Chinese Americans and other Asian Americans did not have a chance to participate in the debate about the Chinese Exclusion Act, but we do now
- Some Chinese Americans have already suffered severe damage as "perpetual foreigners" and "suspicious spies"
- This is an issue beyond just Chinese/Asian Americans; it involves fundamental constitutional rights for all Americans.

Personal Views

- We share the importance of national security, but we cannot continue to be "collateral damage," convenient scapegoats, or victims of racial profiling
- The American justice system must punish the guilty, but also protect the innocent, including Asian Americans
- We are not alone
- We will bear the consequences of our actions/inactions

Personal Views

Asian American organizations and individuals should

- Be aware of these issues
- Voice your concerns
- Participate in the legislative process

The United States is not a perfect nation, but it is made more perfect over time because of the wisdom and participation of its people

We are America's people

Thank You

www.Jeremy-Wu.info

Jeremy.S.Wu@gmail.com

WeChat: jeremywu1