

# Constitutional Rights & Government Actions

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# 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

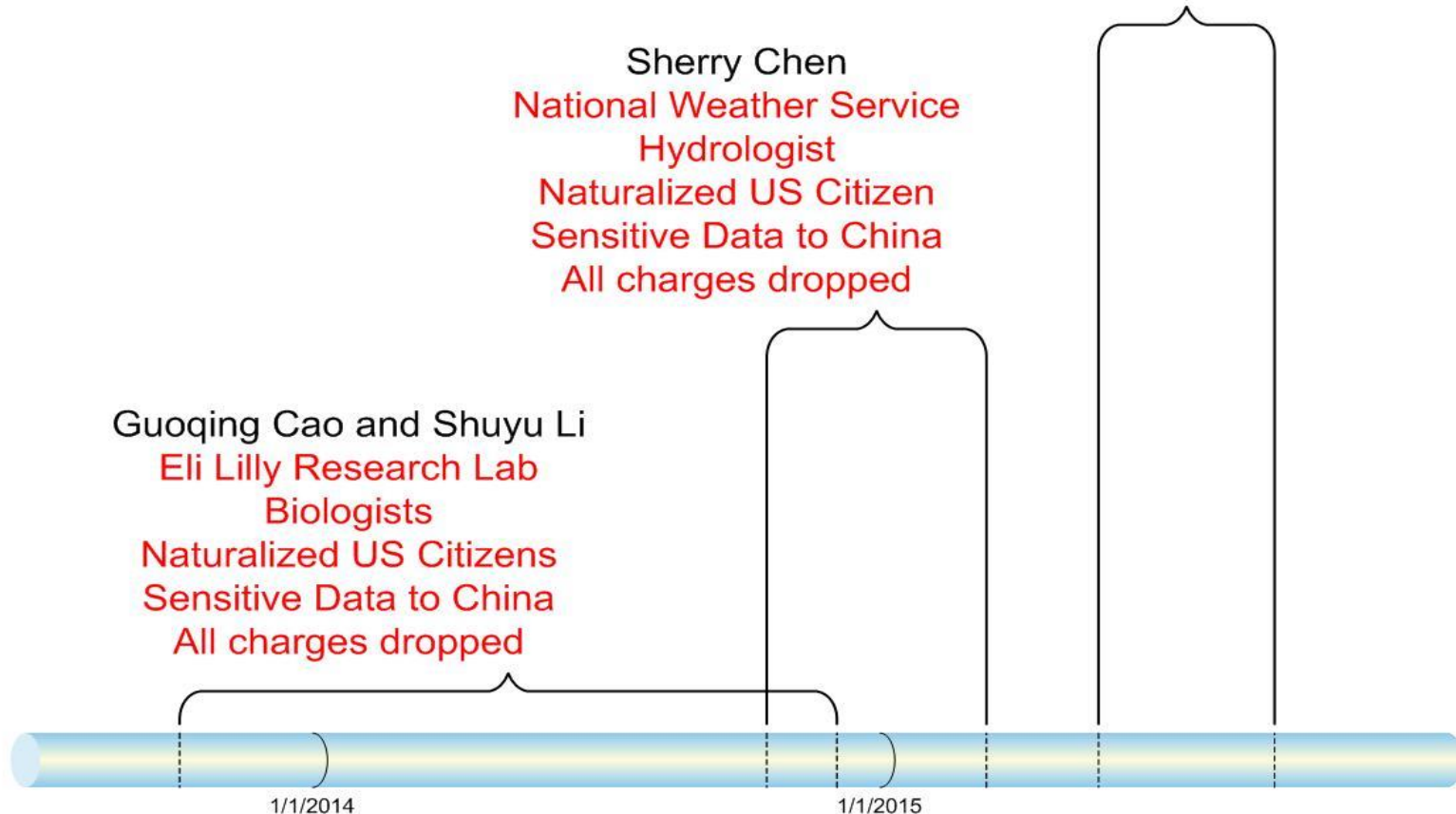
- **Prosecutions of Chinese American scientists**
  - Government actions
  - Media reports
  - Civic engagement
- **Case updates**
  - Sherry Chen – MSPB appeal
  - Xiaoxing Xi – Bivens action suit
- **Legislative developments/Constitutional rights**
  - What is FISA (and Section 702)?
  - Reauthorization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

# Oct. 2013 – Sep. 2015

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

Sherry Chen  
National Weather Service  
Hydrologist  
Naturalized US Citizen  
Sensitive Data 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



# 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**

NOAA worker charged in case

**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

By Troy Kehoe

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



(WISH Photo/Brett Bensley)

## 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*

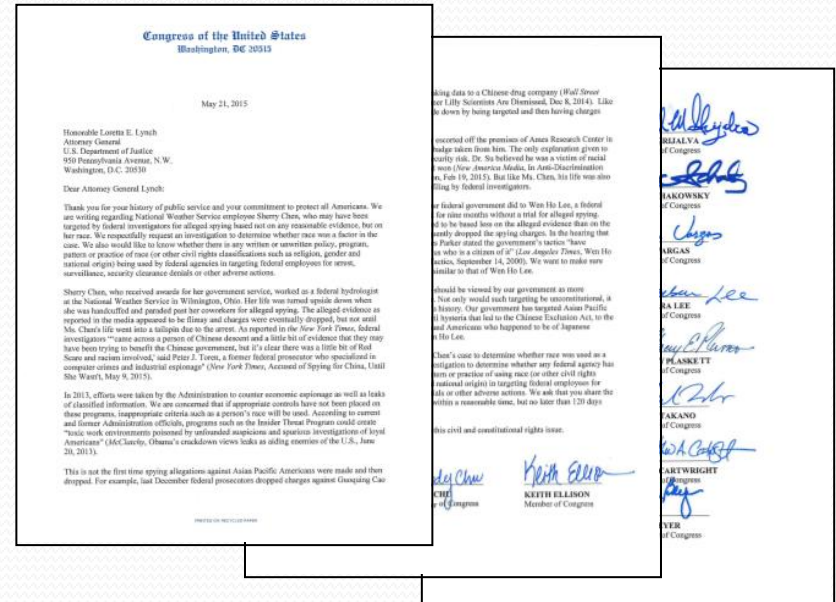
**The New York Times**

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

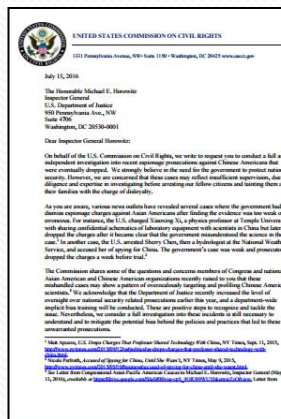
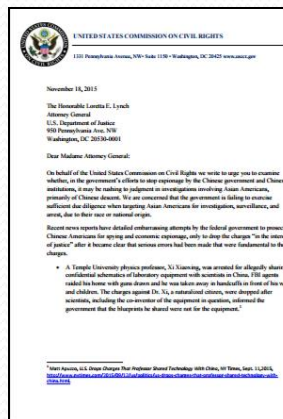
- Press conferences
- Joint letters calling for investigations
- Budget hearings
- Public speeches
- Bi-weekly conference calls





# U.S. Commission on Civil Rights

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

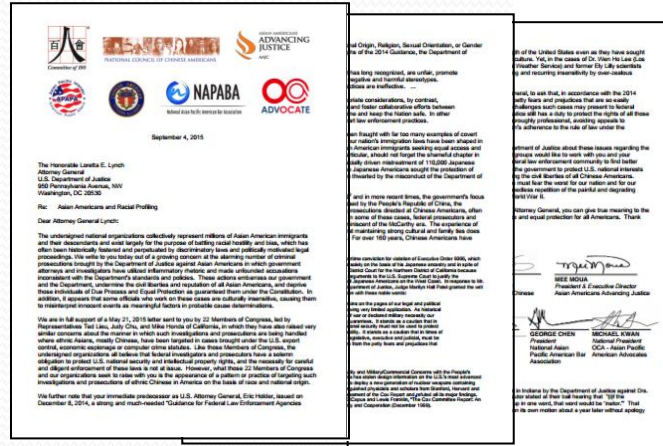


# Community Actions

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

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



Xiaoxing Xi/ John Lee



Wen Ho Lee/ John Lee

A trend of wrongful prosecutions

Petitioning Attorney General of the United States

We Want An Independent Investigation

Concerned Scientists, Engineers and Professors



Petition Closed

8,188 supporters

1,812 needed to reach 10,000

Share on Facebook

Add a personal message (optional)

Stop Prosecuting the...



# 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





I fought for this Country  
and  
I Support its people (Sherry Chen)



# 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.



U.S. Department of Commerce

Office of Security



# 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 4<sup>th</sup> 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 (4<sup>th</sup>)
- Equal Protection and Due Process Violation (5<sup>th</sup>)
- Unlawful Search and Seizure – **FISA Orders** (4<sup>th</sup>)
- Unlawful Search and Seizure – **Warrantless Surveillance** (4<sup>th</sup>)
- Unlawful Search and Seizure of Property and Belongings (4<sup>th</sup>)

# What is FISA (and Section 702)?

- **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

# What is FISA (and Section 702)?

- **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

# What is FISA (and Section 702)?

- **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 4<sup>th</sup> Amendment



# What is FISA (and Section 702)?

- **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

# What is FISA (and Section 702)?

- **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

# What is FISA (and Section 702)?

- **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.”

# What is FISA (and Section 702)?

- **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

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