

Steps For Universities As DOJ Shifts Foreign Influence Policy

By **Stephen Anthony, Aaron Lewis and Michelle Coquelin**

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Leaders of universities across the nation have watched a series of dramatic events unfold in the U.S. Department of Justice's China Initiative, one aspect of which examines disclosures of foreign support and connections by recipients of federal research grants.

On Wednesday, Assistant Attorney General Matthew Olsen, the head of the DOJ's National Security Division, announced that foreign influence enforcement would no longer proceed under the banner of the China Initiative, in favor of the broader strategy for countering nation-state threats, to oppose not only threats from China but also from Russia, Iran and North Korea.[1]

But Olsen did not back away from the DOJ's focus on the threat to the U.S. posed by Chinese espionage, saying DOJ "will be relentless in defending our country from China." He quoted FBI Director Christopher Wray's previous statements that threats from the Chinese government are "more brazen [and] more damaging than ever." [2]

This view echoes Attorney General Merrick Garland's defense of the China Initiative before Congress last fall, in which he called China an "extraordinarily serious and aggressive threat to our intellectual property, to our universities." [3]

Olsen did indicate that the DOJ will subject cases involving academic integrity and research security to greater scrutiny, indicating they will be handled differently from foreign malign-influence campaigns, cybersecurity threats and espionage. He said the National Security Division will have an active supervisory role in academic cases, and will work closely with the FBI and other investigative agencies to guide whether civil or administrative remedies are more appropriate than criminal prosecution. [4]

But he reiterated that the DOJ will use all the tools available when it comes to possible future cases involving researchers, and that the DOJ will not drop any of its outstanding cases against professors, of which there are dozens on court dockets. [5]



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Wednesday's announcement signals a nuanced shift in the DOJ's approach to foreign influence enforcement, following a period of dizzying prosecution activity. In recent months, the DOJ secured a conviction against Harvard University professor Charles Lieber and a guilty plea from University of Arkansas professor Simon Saw-Teong Ang.[6]

But the DOJ also dropped its cases against at least seven professors — Gang Chen, Qing Wang, Juan Tang, Xin Wang, Chen Song, Guan Lei and Kaikai Zhao — and suffered a blow when professor Anming Hu was acquitted by a federal judge in the U.S. District Court for the Eastern District of Tennessee after a jury deadlocked at trial.[7]

Universities and civil rights advocates will likely welcome the news and appreciate the recognition that prosecution of grant fraud cases "can lead to a chilling atmosphere for scientists and scholars." [8] At the same time, universities may be unsure what the DOJ's shift will mean in practice.

Even after the DOJ's announced shift away from focusing on a single nation and its adoption of a higher bar for criminal prosecution, universities and their general counsels should remain vigilant to the risk of potential enforcement. Universities should prepare both to demonstrate compliance with newly issued government requirements and to respond efficiently to government requests for information in connection with pending or new investigations.

Universities should implement compliance measures.

In January, President Joe Biden issued guidance to federal agencies regarding their national security strategy for federally supported research. The guidance, contained in National Security Presidential Memorandum 33, or NSPM-33, directs agencies to strengthen and standardize disclosure requirements for research awards, indicating continued attention to foreign affiliations of university researchers.[9]

Olsen said in his remarks that these federal funding agencies have primary responsibility for research integrity and security.[10]

As government agencies take action in accordance with NSPM-33, universities and other research organizations should assess whether their existing policies for outside interest disclosures are consistent with updated guidance, and continue to monitor for further developments.

At the same time, universities should enhance existing compliance policies addressing the requirement that grant recipients disclose information about their interests and sources of support, to ensure compliance with the recently restated requirements, and complete and accurate reporting to government funding agencies.

Universities should consider having each of their researchers fill out a questionnaire as one step in the proposal submission and review process. The questionnaire would ask researchers precise questions about their foreign activities.

For instance, the questions could ask about participation in a foreign or international talent recruitment program, affiliation with a foreign entity or institution, the amount of funds related to research received from a foreign entity, receipt of nonmonetary resources — equipment, materials, personnel — from a foreign entity and the number of days spent at a foreign institution.

Universities could also identify university officials who are knowledgeable about foreign influence

matters, or train such individuals, and have them available to review questionnaire responses and flag issues for follow-up.

Follow-up could be triaged based on certain criteria, such as participation in talent programs, which have drawn particularly intense U.S. government scrutiny. Where follow-up is warranted, university administrators could meet with the affected faculty investigator to discuss foreign affiliations and obtain more details.

To state the obvious, at a time when the DOJ continues to emphasize the threat from China, and now expands its focus to Russia, Iran and North Korea, any proactive and preventive measures implemented by universities should apply to all foreign entities, no matter the country.

The university's focus should be limited to ensuring complete disclosure, and not involve discussion or consideration of which faculty member should participate in or lead federally-funded research, as that is a decision for the funding agency.

Universities should be prepared to respond to government requests.

Although the DOJ has now indicated that academic integrity and research security may be more appropriately addressed by civil and administrative remedies, that does not mean universities should disregard risks associated with responding to investigative requests from various government investigative agencies.

Universities should consider now the practices and protocols they have in place that would enable them to quickly and efficiently gather information and documents in response to a government request.

When a university receives government process related to potential foreign influence on federally funded research, its general counsel will likely need to coordinate with contacts across the university to collect all the responsive records.

An efficient approach is often to designate a point person in the legal department to coordinate collection. That lawyer should begin by instructing relevant departments to preserve all responsive data until that instruction is lifted in writing by the legal department.

Documents to be collected could include personnel records, records of disclosures to funding agencies by relevant faculty members, records reflecting the university's review of such disclosures, proposals or status reports relating to sponsored projects, and documents relating to intellectual property or business ventures.

Counsel should review the collected documents and determine which ones are responsive to the specific requests, as well as consider whether they are protected from disclosure by the attorney-client privilege or another doctrine.

After the university has submitted documents in response to the government's request, universities should prepare for follow-up document requests or requests to interview employees who might possess relevant information. Counsel will need to prepare university personnel carefully for any such interviews and give guidance about interactions with federal investigators.

Universities should communicate with their faculty and encourage them to raise compliance

questions proactively.

Despite the shift in DOJ's programmatic focus, the continuing risk of potential enforcement actions requires universities to walk a difficult path. The institution will naturally be committed to providing complete and accurate information in response to a government inquiry. At the same time, it will consider the imperative of protecting and supporting its own faculty.

Universities should consider communicating with their faculty members about the disclosure guidance government agencies issue in the wake of the Biden administration's security memorandum, NSPM-33. The message should be that the university is required to gather more detailed information about foreign affiliations, and that the university's purpose in doing so is to protect both the university and its faculty members.

The institution should inform faculty about its compliance structure and make training available, to make sure researchers understand which categories of interests and activities must be reported. It should emphasize the importance of promptly reporting changes, even after a reporting period has ended.

The university may also want to explain that it may be required to turn over the records requested by the government, and that it may be prevented — under threat of serious legal consequences — from telling affected faculty members that the government has sought and received records.

The message that a university should try to communicate to its faculty is that full and accurate disclosures are the best way to prevent undue scrutiny in the future — and to resolve it as quickly and efficiently as possible.

Although researchers across the country are understandably troubled by the U.S. government's intense focus on foreign affiliations, the university's message should be that foreign affiliations are not in themselves discouraged, except to the extent future government guidance were to be issued specifying certain activities as disqualifying researchers from federal funding.

Universities should encourage faculty members to seek guidance from research administrators or legal departments when compliance questions arise. It is better to make an inquiry before engaging in foreign activities or projects than to discover after the fact that a particular activity has disrupted federal funding or drawn enforcement scrutiny.

It is understandable that some researchers view the government's ongoing focus on foreign affiliations as unfair, xenophobic or worse, but both the institution and its faculty will be best served if the lines of communication between them are fully open.

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[1] Matthew Olsen, Assistant Att'y Gen., National Security Div., U.S. Dep't of Justice, Remarks at National Security Institute (Feb. 23, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-olsen-delivers-remarks-counter-nation-state-threats>.

[2] *Id.*

[3] See Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary, 177th Cong. (2021) (testimony of Merrick B. Garland, U.S. Attorney General), transcript available at <https://www.rev.com/blog/transcripts/ag-merrick-garland-testifies-on-justice-department-oversight-full-senate-hearing-transcript>.

[4] Olsen, Remarks at National Security Institute.

[5] MIT Technology Review identified 79 cases as of Dec. 1, 2021. See, <https://airtable.com/shrQhBkuDPvEvig4h/tblbHcFMmohIPsVVJ?backgroundColor=teal&viewControls=on>. See also, Sarah N. Lynch, U.S. Justice Department to end Trump-era program targeting threats posed by China, Reuters (Feb. 23, 2022), <https://www.reuters.com/world/us/us-justice-department-end-trump-era-program-targeting-threats-posed-by-china-2022-02-23/>.

[6] Jury Verdict, U.S. v. Charles Lieber, No. 1:20-cr-10111 (D. Mass. Dec. 21, 2021); see also Press Release, U.S. Dep't of Just., Harvard University Professor Convicted of Making False Statements and Tax Offenses (Dec. 21, 2021), <https://www.justice.gov/opa/pr/harvard-university-professor-convicted-making-false-statements-and-tax-offenses>; Plea Agreement, U.S. v. Simon Saw-Teong Ang, No. 5:20-cr-50029 (W.D. Ark. Jan. 21, 2022); see also Press Release, U.S. Dep't of Just., University of Arkansas Professor Pleads Guilty to Lying to Federal Agents About Patents in China (Jan. 21, 2022), <https://www.justice.gov/opa/pr/university-arkansas-professor-pleads-guilty-lying-federal-agents-about-patents-china>.

[7] See Dismissal of Indictment, U.S. v. Gang Chen, No. 1:21-cr-10018 (D. Mass. Jan. 20, 2022); Order for Dismissal, U.S. v. Qing Wang, No. 1:20-mj-09111 (N.D. Ohio July 20, 2021); Order Granting Government's Motion to Dismiss, U.S. v. Tang Juan, No. 2:20-cr-00134 (E.D. Cal. July 23, 2021); Notice of Dismissal, U.S. v. Xin Wang, No. 3:20-cr-00251 (N.D. Cal. July 23, 2021); Notice of Dismissal, U.S. v. Chen Song, No. 3:21-cr-00011 (N.D. Cal. July 23, 2021); Order Granting Motion to Dismiss, U.S. v. Guan Lei, No. 8:20-cr-00127 (C.D. Cal. July 26, 2021); Order Granting Leave to Dismiss Indictment, U.S. v. Kaikai Zhao, No. 1:20-cr-00187 (S.D. Ind. July 26, 2021); Memorandum Opinion & Order, U.S. v. Anming Hu, No. 3:20-CR-21-TAV-DCP-1 (E.D. Tenn. Sept. 9, 2021) (granting Hu's motion for a judgment of acquittal and acquitting Hu on all charges).

[8] Olsen, Remarks at National Security Institute.

[9] National Science and Technology Counsel, Guidance For Implementing National Security Presidential Memorandum 33 (NSPM-33) On National Security Strategy For United States Government-Supported Research And Development (Jan. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/01/010422-NSPM-33-Implementation-Guidance.pdf>.

[10] Olsen, Remarks at National Security Institute.