



Science, Technology, Espionage, and Math

Are STEM students from the People's Republic of China jeopardizing our economic and national security?

By George Fishman

Executive Summary

The People's Republic of China under Xi Jinping believes that war with the United States is inevitable. Depending on the outcome of Russia's invasion of Ukraine, the risk of armed conflict might come sooner rather than later. A Russian victory might entice the PRC to invade Taiwan, which could very well draw in U.S. troops.

The Chinese Communist Party is intently focused on modernizing its military to close the gap between U.S. and Chinese military power, embracing critical and emerging technologies to serve as "assassin's mace" or "silver bullet" technologies. A RAND Corporation analyst has testified that should it succeed:

[This would] represent perhaps the most destabilizing geostrategic development of the 21st century. [S]teep advances in the [People's Liberation Army's] PLA's conventional capabilities ... could, for the first time in modern history, pit the United States against a militarily superior adversary.

At the same time, the number of students from the PRC at U.S. universities has skyrocketed in recent years to 317,299, representing more than one-third of all foreign students. As recently as 2008/09, they accounted for only 14.6 percent of all foreign students, in 1994/95 only 8.7 percent, and in 1984/85 only 3.0 percent.

FBI Director Christopher Wray has stated that:

[N]o country poses a broader, more severe intelligence collection threat than China. China has pioneered a societal approach to stealing innovation any way it can [including] ... through graduate students and researchers. ... Nation-state actors are ... targeting academia — including professors, research scientists, and graduate students [seeking] our cutting-edge research, our advanced technology, and our world-class equipment and expertise.

In 2018, the Department of Justice set up the "China Initiative" to deal with these threats. The Biden administration has shut it down.

Given the paucity of effective mechanisms to prevent students from the PRC once in the U.S. from engaging in espionage and otherwise bringing the fruits of our scientific research back home, it may be time to consider barring the entry of all students from the PRC, or at least those who will be studying in STEM or other fields likely to give them access to information and research of value to the PLA.

While of course not every such student will engage in deleterious activities while in the U.S. (or after they return home), a sufficiently large number will that, given the impossibility of the U.S. government conducting sufficiently

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in-depth background checks on each of them (as a result of a lack of resources or access to the necessary information), a blanket ban might be the only effective alternative. And, in many instances, students are only approached for intelligence-gathering purposes by the PRC *after* they have arrived in the U.S. or *after* they have returned home to China. In such cases, pre-vetting would be ineffectual.

Such a blanket ban would be advisable only for so long as the PRC seeks to undermine around the world the values we hold dear, considers America an enemy, conducts (and solicits Chinese students in the U.S. to conduct) massive amounts of espionage against us, pilfers our nation's intellectual property, and prepares for future armed conflict against us. However, it is impossible to say when the PRC will cease and desist.

China's Preparation for War with the United States

A staff report of the U.S.-China Economic and Security Review Commission (ESRC), which was established by Congress to review the national security implications of trade and economic ties between the United States and the People's Republic of China (PRC),¹ notes that:

*National rejuvenation, or "the great rejuvenation of the Chinese nation," is the [Chinese Communist Party's] CCP's broad goal to restore China to what its leaders perceive as its rightful position as the most powerful country in the world, a status it lost as a result of what is now called the "century of humiliation" beginning in the mid-19th century. This aspiration involves transforming China into a modern, wealthy, powerful country that ... excels across all aspects of its society, including military strength, cultural influence, scientific advancement, and economic prosperity.*²

The latest annual report by ESRC notes that "China's leadership is increasingly uninterested in compromise and willing to engage in destabilizing and aggressive actions in its efforts to insulate itself from perceived threats or to press perceived advantages."³ And just one year ago, the PRC's Central Military Commission (CMC) made an unprecedented public statement:

*China's CMC Vice Chairman Xu Qiliang made a provocative statement about the likelihood of war with the United States. "The top uniformed soldier in China, chairman of China's [CMC], stated that war with the United States is inevitable," [Maj. General Richard] Coffman [director of the Army's Next Generation Combat Vehicle Cross Functional Team] said. "That is the first time China has made that statement publicly." [Emphasis added.]*⁴

At around the same time, Bloomberg reported that:

*China must boost military spending to prepare for a possible confrontation with the U.S., top [PRC] generals said, in an unusual acknowledgment of the risk of a clash between the world's two largest economies. ... Vice Chairman Xu Qiliang, China's top uniformed officer, said the country needed to brace for a "Thucydides Trap," an inevitable conflict between a rising power and an established one. [Emphasis added.]*⁵

How is China preparing for its self-perceived future of conflict with the U.S.? Recently, the South China Morning Post reported that:

China's military modernisation and efforts to leverage technology in warfare have so far been directed to reduce th[e] gap [in U.S. and Chinese military power]. Thus, Beijing is working to incorporate modern technology into the People's Liberation Army (PLA). ... China's armed forces have started to embrace critical and emerging technologies. ... [leading] to the creation of the Strategic Support Force, a branch of the PLA dedicated to cyber warfare, electronic warfare and using other technology for military operations.

Shashoujian refers to the Chinese strategic concept focused on creating "assassin's mace" or "silver bullet" technologies that can reduce the gap between US and Chinese military power. *These efforts have manifested themselves in policies, directions and plans that push for the development of dual-use technologies [for use both in military and civilian fields].*

...

The use of emerging technologies such as AI [artificial intelligence] and big data in the military has also been incorporated into the 14th five-year plan. ... Beijing is now exploring next-generation operational concepts for “intelligentised warfare”[, including] attrition warfare by intelligent robotic swarms, cross-domain mobile warfare, AI-based space confrontation and cognitive control operations.

...

It is clear to the Chinese military apparatus that Beijing will have to rely on emerging technologies to close the gap to US military power. This is evident in the reorganisation of the PLA under President Xi Jinping. At the heart of this effort lies the focus on critical and emerging technologies. As the world moves further into the digital age, the emphasis on dual-use applications of emerging technologies will keep growing. Thus, Beijing sees the need to develop military competency in critical and emerging technologies to gain an advantage over its adversaries. [Emphasis added.]⁶

Derek Grossman of the RAND Corporation has testified as to the alarming implications this holds for the U.S.:

Xi’s pursuit of a world-class PLA, if realized by 2050 ... will represent perhaps the most destabilizing geostrategic development of the 21st century. [S]teep advances in the PLA’s conventional capabilities, along with additional boosts to power projection and offsetting technologies, could, for the first time in modern history, pit the United States against a militarily superior adversary. The impact of this development will only be magnified if Washington allows its current technological and military edge over China to decline further. [Emphasis added.]⁷

Grossman urges that we “[e]nsure the U.S. military retains the scientific, mathematical, and technological edge in growing U.S.-China competition. Losing the edge may result in China achieving the next offset, not the United States.”⁸ What he means by “offset”:

[President] Xi appears to be ... interested in leapfrogging the U.S. military by 2050 through the development of disruptive military technologies. In other words, Beijing probably plans to achieve the “Third Offset” strategy [a Pentagon military strategy to invest in key innovative technologies ... to gain asymmetric advantages in great power competition] before the U.S. military can do so, thereby enabling Xi’s world-class PLA to defeat the United States in a conventional regional conflict and to protect Chinese interests worldwide.

Xi has also prioritized the acceleration of programs to develop disruptive military technologies that offer China asymmetric advantages against the United States. These technologies are being indigenously researched and developed to advance the construction of next-generation weapon systems, with the intent of leapfrogging Washington by midcentury. ... [I]t is the component of the PRC’s military strategy that Xi hopes will put the PLA over the edge in terms of becoming world-class — that is, eclipsing U.S. battlefield capabilities. [Emphasis added.]⁹

There are many different examples of disruptive military technologies, and China is developing virtually anything that might come to mind. Retired Senior Colonel Fan Gaoyue, who served as a director and chief specialist at China’s Academy of Military Science, noted that Beijing might be researching offsetting capabilities in aerospace, cyberspace, unmanned systems, and underwater warfare. Other areas, at a minimum, include robotics, autonomous weapons, nanotechnology, 3-D printing, big data analytics, advanced manufacturing, AI, quantum computing, biotechnology, human-machine cooperation, cloud computing, and hypersonics. Beijing seeks to leverage its growing expertise in one or more of these or other areas to develop next-generation weapon systems that will challenge U.S. military capabilities by the 2050s. Xi, along with other senior Chinese leaders, believes that the next five to ten years will be the “decisive period” in U.S.-China technological competition. Beijing almost certainly believes that the PLA successful intelligentization of warfare and system-of-systems construct will better position it to prevail in future armed conflicts. [Emphasis added.]¹⁰

Conflict might actually occur sooner rather than later. Scott Kennedy, a China expert at the Center for Strategic and International Studies, states that:

China is either going to side with Russia and reinforce the sense that it has joined an ‘axis of autocracy,’ or it is going to put significant space between Moscow and Beijing and demonstrate that it genuinely cares about preserving even a basic relationship with the rest of the world. If it turns down this opportunity, it’s not clear to me there will be a next time to meet and set aside differences. The ball is entirely in Beijing’s court.¹¹

And German Lopez warns in the New York Times that:

*China has laid claim to Taiwan since the island split off from the mainland in 1949 and has threatened to forcibly reunite the two. It views the issue as a top priority: Days after Russia's invasion [of Ukraine], Chinese officials reiterated that they were committed to "resolving the Taiwan question." ... [W]hat happens in Taiwan will likely be influenced by what happens in Ukraine. **If Russia succeeds in overtaking Ukraine, it increases the danger for Taiwan. If Russia ultimately retreats, or suffers lasting, damaging consequences, that could be good news for the island. ... The West's resolve could go even further in Taiwan [than regarding Ukraine], with the possibility of U.S. forces directly intervening against an invasion.** Biden has said American troops will not fight in Ukraine, but the U.S. keeps a deliberately vague line on Taiwan. [Emphasis added.]¹²*

The Role of Espionage and Intellectual Property Theft

ESRC's 2021 annual report concludes that:

The Chinese government sees itself as competing directly with the United States for global economic leadership, a rivalry in which technological prowess will play a central role. ... China's economic policy blueprint issued in March 2021, emphasizes innovation and development not only for economic growth but more importantly for technological self-sufficiency, national security, and international influence.¹³

As the ESRC noted, for the PRC, economic dominance is as much a military as a commercial goal, because so many emerging technologies now are dual-use and because of the CCP's belief in "military-civilian fusion", with which it "seeks to mobilize civilian technological advances in support of China's military modernization and spur broader economic growth and innovation by eliminating barriers between the commercial and defense sectors."¹⁴ Thus, for the PRC, espionage and intellectual property theft of both military and civilian technology are necessary for its military.

I should note that industrial espionage between China and the West has been a two-way street. Professor Mark Button, director of the Centre for Counter Fraud Studies at the University of Portsmouth in the United Kingdom, has written that "[i]n one of the most significant acts of industrial espionage ever, in the 1800s the British East India Company hired the botanist, Richard Fortune, to smuggle out of China tea cuttings, seeds, etc., which were used to help grow a tea industry in India which eclipsed the Chinese in a few decades."¹⁵

However, the stakes involved in today's espionage are immense. And the PRC is unrivaled in the world in its efforts to abscond with American technology. This was true in 2005 — when my then-boss John Hostettler stated, when chairing a hearing of the House Judiciary Committee's Subcommittee on Immigration, Border Security and Claims on economic and military espionage, that:¹⁶

*Nationals of many nations come to the United States to engage in espionage. Our closest allies are not excluded from this list. However, all evidence indicates that certain nations are the most egregious violators. **There is no nation that engages in surreptitious illegal technology acquisition for purposes of both commercial piracy and military advancement on a scale that approaches that of the People's Republic of China.** [Emphasis added.]¹⁷*

And it is even more true today. Thomas Friedman writes in the New York Times that:

*For the past five years ... the United States and China have been stumbling down a path of de-integration and maybe toward outright confrontation. ... [i]t is China's increasingly bullying leadership style at home and abroad, its heads-we-win-tails-you-lose trade policies and the changing makeup of its economy that are largely responsible for this reversal. ... [Factors including] Xi's determination that China must never again be dependent on America for advanced technologies, and **Beijing's willingness to do whatever it takes — buy, steal, copy, invent or intimidate — to guarantee that, and you have a much more aggressive China. ... The level of technology theft and penetration of U.S. institutions has become intolerable.** [Emphasis added.]¹⁸*

In February, Matthew Olsen, assistant attorney general for National Security, stated that:

We see nations such as China, Russia, Iran and North Korea becoming more aggressive and more capable in their nefarious activity than ever before. These nations seek to undermine our core democratic, economic and scientific in-

stitutions. And they employ a growing range of tactics to advance their interests and to harm the United States. Defending American institutions and values against these threats is a national security imperative.

...

[T]here is no one threat that is unique to a single adversary. At the same time, it is clear that the government of China stands apart. ... As the FBI Director publicly noted a few weeks ago, the threats from the PRC government are “more brazen [and] more damaging than ever before.” He is absolutely right: the PRC government threatens our security through its concerted use of espionage, theft of trade secrets, malicious cyber activity, transnational repression, and other tactics to advance its interests — all to the detriment of the United States and other democratic nations and their citizens around the world. [Emphasis added.]¹⁹

John Demers, assistant attorney general, National Security Division, DOJ, testified before the Senate Judiciary Committee in December 2018 that:

In 2015, China’s State Council released the “Made in China 2025 Notice,” a ten-year plan for targeting ten strategic advanced technology manufacturing industries for promotion and development. ... The program leverages the Chinese government’s power and central role in economic planning to alter competitive dynamics in global markets and acquire technologies in these industries. To achieve the program’s benchmarks, China aims to localize research and development, control segments of global supply chains, prioritize domestic production of technology, and capture global market share across these industries. In so doing so, China has committed to pursuing an “innovation-driven” development strategy and prioritizing breakthroughs in higher-end innovation. But that is only part of the story: “Made in China 2025” is as much roadmap to theft as it is guidance to innovate.

No one begrudges a nation that generates the most innovative ideas and from them develops the best technology. But we cannot tolerate a nation that steals our firepower and the fruits of our brainpower. And this is just what China is doing to achieve its development goals[,] ... pursuing [them] through malign behaviors that exploit features of a free-market economy and an open society like ours ... using a variety of means, ranging from the facially legal to the illicit, including various forms of economic espionage, forced technology transfer, strategic acquisitions, and other, less obvious tactics to advance its economic development at our expense. [Emphasis added.]²⁰

From 2011-2018, more than 90 percent of the Department’s cases alleging economic espionage by or to benefit a state involve China, and more than two-thirds of the Department’s theft of trade secrets cases have had a nexus to China.

...

In all of these cases, China’s strategy is the same: rob, replicate, and replace. Rob the American company of its intellectual property, replicate the technology, and replace the American company in the Chinese market and, one day, the global market.²¹

It should be noted that not all of the PRC’s activities violate federal law, even as they threaten national security. As the ESRC staff report explains:

While the transfer of information and processes associated with fundamental research conducted in the United States is legal, the Chinese government vigorously seeks to acquire such research precisely because it recognizes its strategic value, and by extension, the advantages it confers in the emerging competition with the United States.²²

Chinese Students in the U.S.

The Institute of International Education’s (IIE) annual census of international students²³ in the United States (which began in 1919), is viewed as “the comprehensive information resource on international students and scholars in the United States and on U.S. students studying abroad.”²⁴ It reports that in the 2019/2020 academic year, 372,532 foreign students from the PRC were attending school in the United States on student visas, representing more than one-third (34.6 percent) of the entire foreign student population and 1.9 percent of all students at U.S. institutions of higher education. As a consequence of the Covid pandemic, in the 2020/2021 academic year the number of students from the PRC dropped to 317,299, but still represented more than one-third (34.7 percent) of all foreign students and 1.6 percent of all students.²⁵

In the 2019/2020 and 2020/2021 academic years, 39.8/39.6 percent of Chinese students were undergraduates, 36.8/37.5 percent were graduate students, and 19.2/20.6 percent were taking advantage of Optional Practical Training (largely with U.S. corporations).²⁶ In those academic years, 17.5/17.5 percent of PRC students were studying engineering, 21.2/22.2 percent math or computer science, and 8.4/9.1 percent the physical or life sciences.²⁷

The predominance of students from the PRC is a relatively new development. As recently as the 2008/2009 academic year, there were fewer than 100,000 students from the PRC; in 1994/1995, fewer than 34,000, and in 1984/1985, barely 10,000.²⁸ Lest one think this is simply reflective of a growing overall population of foreign students, PRC students represented 14.6 percent of all foreign students in 2008/2009, 8.7 percent in 1994/1995, and 3.0 percent in 1984/1985.²⁹

What has accounted for the great escalation in the number of students from the PRC? The ESRC staff report concludes that “[t]his growth ... was driven by several important [visa policy] changes during the George W. Bush and Barack Obama administrations, which reflected an assumption in U.S. policy that China would gradually liberalize as the result of increased engagement.”³⁰

Unfortunately, China has most assuredly not liberalized. In fact, it would be more accurate to say that the PRC has been rapidly deliberalizing. Thomas Friedman finds that “the leadership strategy of President Xi Jinping ... has been to extend the control of the Communist Party into every pore of Chinese society, culture and commerce. This has reversed a trajectory of gradually opening China to the world since 1979.”³¹ And the ESRC itself concluded in 2020 that:

China’s view of the United States is based on the ideology of the ruling CCP, which regards the liberal democratic values championed by the United States as a fundamental impediment to its external ambitions and an existential threat to its domestic rule.

*Beijing’s view of the United States as a dangerous and firmly committed opponent has informed nearly every facet of China’s diplomatic strategy, economic policy, and military planning in the post Cold War era.*³²

*Xi oversaw the publication of “Document Number 9,” an internal Party communique ordering heightened vigilance against seven “false ideological trends, positions, and activities” purportedly inspired by U.S. ideals. Proscribed beliefs included constitutional democracy, universal values, “Western”-inspired notions of media independence and civil society, pro-market neoliberalism, “nihilistic” views of the CCP’s history, and the “questioning [of] ... the socialist nature of socialism with Chinese characteristics.” The document further described China’s ideological situation as a “complicated, intense struggle” and framed the proponents of its proscribed ideals as enemies.*³³

The Role of Chinese Students in the Preparation for War

The ESRC staff report found that:

*Xi Jinping, has ... [made] clear that overseas Chinese students and scholars are key to his plans to transform China into an innovative and militarily formidable world power. As early as 2013, he argued publicly that Western countries’ leadership of the world depended on their mastery of advanced technologies and that China “must adopt an asymmetrical strategy of catching up.” Of particular importance were the key fields and areas in which General Secretary Xi perceived “a [Western] stranglehold” and in which “it would be impossible for [China] to catch up [by itself] by 2050.”[Emphasis added.]*³⁴

As John Hostettler stated in 2005, “[m]any ... visitors [from the PRC], even when they are visiting for legitimate purposes, are tasked with obtaining whatever technological information they can.”³⁵

FBI Director Christopher Wray stated on April 26, 2019, that:

[N]o country poses a broader, more severe intelligence collection threat than China. China has pioneered a societal approach to stealing innovation any way it can, from a wide array of businesses, universities, and organizations. They’re doing this through Chinese intelligence services, through state-owned enterprises, through ostensibly private companies, through graduate students and researchers, and through a variety of actors working on behalf of China. At the FBI, we have economic espionage investigations that almost invariably lead back to China in nearly all of our 56 field offices, and they span almost every industry or sector. The activity I’m talking about goes way beyond fair-market competition. It’s

illegal. It's a threat to our economic security. And by extension, it's a threat to our national security. ... **Put plainly, China seems determined to steal its way up the economic ladder, at our expense.** ... They're strategic in their approach — they actually have a formal plan, set out in five-year increments, to achieve dominance in critical areas. To get there, they're using an expanding set of non-traditional methods — both lawful and unlawful — weaving together things like foreign investment and corporate acquisitions with cyber intrusions and supply chain threats.

...

Nation-state actors are also targeting academia — including professors, research scientists, and graduate students. They seek our cutting-edge research, our advanced technology, and our world-class equipment and expertise. [Emphasis added.]³⁶

It is not necessarily that students come here from the PRC intending to engage in espionage. Rather, many are inevitably pressured to do so by the PRC. Edward Ramotowski, deputy assistant secretary of State, testified before the Senate Judiciary Committee on June 6, 2018, that “foreign students, often with no nefarious intent in their plan of study in the United States, are later co-opted to work for their government.”³⁷ And former CIA officer Joe Augustyn states that “[w]e know without a doubt that anytime a graduate student from China comes to the US, they are briefed when they go, and briefed when they come back.”³⁸

E.W. Priestap, assistant director, Counterintelligence Division, FBI, also testified before the Senate Judiciary Committee in June 2018 that:

*In many cases, **foreign intelligence services do not necessarily pre-task or pre-position [foreign students and scholars]. Instead, the services allow the[m] to conduct their U.S.-based academic pursuits, waiting to leverage them once they return to their home countries either during an academic break or at the end of their studies. Many of those whom they target are young, inexperienced, and impressionable.*** [Emphasis added.]³⁹

As Sen. Mark Warner (D-Va.) has pointed out:

*In China, only the government can grant someone permission to leave the country to study or work in the United States and **we have seen the Chinese government use their power over their citizens to, in some cases, encourage those citizens to commit acts of scientific or industrial espionage to the benefit of the Chinese government.*** [Emphasis added.]⁴⁰

Warner has also stated that:

*China uses all of the traditional tools of the state to exert influence [including] the aggressive deployment of espionage to steal military, and industrial secrets. But it's also using more creative mechanisms — that take advantage of its authoritarian model to force Chinese companies, researchers, and others to act on behalf of China's national interests. In 2015 and 2016, China enacted new laws requiring all Chinese citizens and companies to act in support of “national security” and the Chinese government. All of this has set the stage for China to aggressively deploy every lever of power in service to the state — and, at the same time, exploit the openness of our society to gain geopolitical and economic advantage. ... **Through strategic collaboration with Western companies and universities, China is able to gain access and transfer emerging technologies.*** [Emphasis added.]⁴¹

What are the mechanisms that the PRC is using to “transform China into an innovative and militarily formidable world power”? E.W. Priestap testified in December 2018 before the Senate Judiciary Committee that:

*The Chinese government ... has created **comprehensive programs to identify, develop, and retain their most talented citizens. These talent recruitment and “brain gain” programs ... also encourage theft of intellectual property from U.S. institutions.** For example, China's talent recruitment plans, such as the Thousand Talents Program, offer competitive salaries, state-of-the-art research facilities, and honorific titles, luring both Chinese overseas talent and foreign experts alike to bring their knowledge and experience to China, even if that means stealing proprietary information or violating export controls to do so.* [Emphasis added.]⁴²

The ESRC staff report stated that:

While many countries institute preferential policies to attract highly skilled personnel to their economies, no country in the world employs an S&T transfer system that is remotely comparable to China's in terms of scale, comprehensiveness, or determination to leverage its overseas nationals. China's S&T transfer ecosystem exploits overseas Chinese students and scholars for technology and know-how that can be commercialized or militarized in China ... directly contributing to a strategic competitor's technological advances. [Emphasis added.]⁴³

How does the PRC do it?

- *Since the 1990s, China's government has built a sprawling ecosystem of structures, programs, and incentives to coopt and exploit Chinese students and scholars for the [science and technology] S&T they acquire abroad.*
- *This ecosystem sponsors promising Chinese students and scholars at U.S. and other foreign universities, incentivizes their return to China for the long term, and employs transnational organizations to channel S&T know-how from those remaining abroad back to mainland China. The purpose of this ecosystem is to leverage the resources of American universities to provide the technology and talent Beijing needs to win its national competition with the United States.*
- *Many programs associated with Beijing's S&T transfer ecosystem — including scholarships to study abroad, talent recruitment plans, and entrepreneurship parks — contribute to China's military-civil fusion strategy by collecting specific technologies and know-how that improve the capabilities of the ... PLA ... and advance the goals" of the ... CCP. [Emphasis added.]⁴⁴*

The ecosystem rests on three mutually reinforcing pillars: scholarships that send promising Chinese students and scholars overseas with a requirement to return, policies encouraging Chinese students and scholars to return to China in the long term, and policies enabling Chinese students and scholars who remain overseas to transfer knowledge and technology back to the Mainland.

- *The first pillar uses government-run scholarship programs to fund Chinese students to study STEM fields at foreign universities in exchange for an obligation to return home immediately and complete a national service work requirement lasting several years.*
- *The second pillar offers robust incentives to Chinese students who are studying or working abroad to return to China at some point in the future. These incentives include perks associated with talent programs, like the opportunity to conduct research at prestigious institutions, employment in specialized entrepreneurship parks, and special government subsidies to start their own businesses.*
- *The third pillar uses a network of transnational technology transfer organizations to target Chinese students and scholars who have permanently settled in other countries. These transnational organizations are part of the CCP's United Front system, which is tasked with mobilizing Chinese citizens and ethnic Chinese in pursuit of the Party's goals. Such transnational organizations incentivize Chinese students and scholars to contribute to China's national rejuvenation through appeals to national pride, ethnic identity, or desire for financial reward. [Emphasis added.]⁴⁵*

The PLA also actively targets returning overseas students in its recruitment efforts to ensure the technical proficiency of its personnel. [The PLA has written that] the 2.6 million overseas Chinese students and scholars studying abroad provide "fertile soil" for the PLA's efforts to recruit capable civilian personnel [and it] has worked to boost its recruitment of returning overseas students since at least 2013 to make up for insufficient expertise in key technical areas. [Emphasis added.]⁴⁶

Many of these talent programs focus not only on foreign education and training for their talents, but also on the transfer of fundamental research.⁴⁷

To take one example, the Hundred Talents Program ... offers academic appointments to overseas Chinese students and scholars aged 50 or younger who have received their doctorates and have a distinguished record of research.

... [T]he Program seeks to attract researchers who can contribute to projects furthering military-civil fusion. [Emphasis added.]⁴⁸

China's government runs myriad programs to bring Chinese students and scholars living in the United States back to China temporarily to engage in scientific activities relevant to its economic and military modernization. One prominent program targets high-profile Chinese scholars appointed to teaching positions at prominent universities [by] recruit[ing] "overseas Chinese talents who have been appointed as assistant professors or above at famous foreign universities" in emerging technologies and other areas important to national development. The program provides funding, housing, and medical insurance to overseas Chinese scholars in exchange for a commitment to travel back to China over school breaks to lecture and conduct research at domestic universities for three months to a year at a time.⁴⁹

When Chinese students and scholars trained at U.S. universities return to China to commercialize the ideas and technologies they developed while abroad ... this U.S.-funded research can ultimately benefit Chinese state-owned or defense enterprises that are competing with the United States. **Even when overseas Chinese students and scholars do stay in the United States after graduation, China's transnational technology transfer organizations and talent recruitment plans provide a means to contribute to China's national rejuvenation by transferring technology and know-how without requiring physical return.**

Because China's leaders have promoted a military-civil fusion strategy and dictated that those with S&T expertise serve the cause of national rejuvenation, state-affiliated institutions absorb the knowledge of overseas Chinese students and scholars and then leverage it to improve China's military capabilities. [Emphasis added.]⁵⁰

The PRC has even been able to send its military scientists to American universities:

At least 500 Chinese military scientists have been sent to study at U.S. universities since 2007 ... an outflow coupled with efforts by PLA universities to establish cooperative arrangements with U.S. institutions. While these military scientists and engineers sometimes disclose their affiliations with the PLA, others deliberately obscure them. ... The United States' July 2020 decision to close the Chinese Consulate in Houston reportedly stemmed in part from U.S. officials' assessment that diplomats posted there facilitated technology transfer by Chinese postgraduate researchers in areas such as artificial intelligence and biology who had hidden their active-duty status with the PLA.

...

The recent case of Wang Xin, a PLA officer and scientist arrested in June 2020 for alleged visa fraud, illustrates how Beijing sends military personnel to U.S. universities to collect information that advances its military capabilities. According to DOJ, Wang allegedly lied about his ongoing employment as a PLA technician in order to gain admission to the University of California, San Francisco (UCSF) in 2019. Once at UCSF, Wang's PLA supervisor tasked him with observing the layout of UCSF's lab ... and bringing back information to help his military university replicate the lab in China. ... Wang had emailed research to his lab in China and had in his possession UCSF studies he was intending to share with PLA colleagues when he was apprehended. ... Wang also allegedly told his supervisor at UCSF that he had already succeeded in duplicating some of the UCSF lab's research in China. [Emphasis added.]⁵¹

The report concludes that:

*In effect, U.S. universities are training scientists and engineers who will work in a range of organizations antithetical to U.S. national security interests, including the PLA.*⁵²

DHS has provided other examples:

In September 2019 ... the FBI charged Chinese government official Liu Zhongsan with conspiracy to fraudulently procure U.S. research scholar visas for Chinese officials whose actual purpose was to recruit U.S. scientists for high technology development programs within China. Additionally, in December 2019, a 29-year-old graduate student in J-1 status participating in an exchange visitor program at Harvard University was stopped at Boston Logan International Airport. Federal agents determined he was a "high risk for possibly exporting undeclared biological material" after finding 21 vials of brown liquid wrapped in a plastic bag inside a sock in his checked luggage; typed and handwritten notes indicated

“that [the exchange visitor] ... was knowingly gathering and collecting intellectual property ... possibly on behalf of the Chinese government.”⁵³

The U.S. Government Response

The China Initiative

In November 2018, Attorney General Jeff Sessions launched the China Initiative to better counter economic espionage by the PRC. Assistant Attorney General John Demers testified in 2018 that:

Broadly speaking, the China Initiative aims to raise awareness of the threats we face, to focus the Department’s resources in confronting them, and to improve the Department’s response, particularly to newer challenges. ... Investigating and prosecuting economic espionage and other federal crimes will remain at the heart of our work. ... But ... we must broaden our approach.

- *First, we need to adapt our enforcement strategy to reach non-traditional collectors, including researchers in labs, universities, and the defense industrial base, some of whom may have undisclosed ties to Chinese institutions and conflicted loyalties;*
- *Second, we will work with U.S. Attorneys and their Assistants across the country to develop a broad outreach campaign to engage with companies, universities, and others ... both to raise awareness of ... threats ... and to reinforce the trust that leads to cooperation with law enforcement. [Emphasis added.]⁵⁴*

But the Biden administration has already reversed course. Assistant Attorney General Matthew Olsen stated on February 23 that:

[The China Initiative] effectively focused attention on the multi-faceted threat from the PRC. But it has also engendered growing concerns that we must take seriously. ... We have heard concerns from the civil rights community that the “China Initiative” fueled a narrative of intolerance and bias. To many, that narrative suggests that the Justice Department treats people from China or of Chinese descent differently. The rise in anti-Asian hate crime and hate incidents only heightens these concerns. ... There are also increasing concerns from the academic and scientific community about the department’s pursuit of certain research grant fraud cases. We have heard that these prosecutions — and the public narrative they create — can lead to a chilling atmosphere for scientists and scholars that damages the scientific enterprise in this country. Safeguarding the integrity and transparency of research institutions is a matter of national security. But so is ensuring that we continue to attract the best and the brightest researchers and scholars to our country from all around the world — and that we all continue to honor our tradition of academic openness and collaboration.⁵⁵

Olson concludes that:

While I remain focused on the evolving, significant threat that the government of China poses, I have concluded that this initiative is not the right approach. Instead, the current threat landscape demands a broader approach. I want to emphasize my belief that the department’s actions have been driven by genuine national security concerns. But by grouping cases under the China Initiative rubric, we helped give rise to a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to that country or that we in some way view people with racial, ethnic or familial ties to China differently.⁵⁶

Wait a second. It doesn’t mean that at all. It is in fact the PRC itself that views people differently with racial, ethnic, or familial ties to China. Retired Air Force Brigadier General Robert Spalding notes that “[t]he Chinese are notorious for appealing to the nationalism and loyalty of their citizens to coerce them into carrying out acts of espionage, lawmakers and intelligence officials say.”⁵⁷ And, as noted, it is the CCP and affiliated organizations that make “appeals to national pride [and] ethnic identity.”⁵⁸ In one case, the CCP wanted a graduate student from the PRC to “obtain information on ethnic Chinese who were naturalized American citizens working on military-related aerospace projects.”⁵⁹ It certainly behooves our law enforcement and agencies to focus on the population that the PRC has decided to profile.

Olsen goes on: “When it comes to these cases [involving academic integrity and research security], the National Security Division will take an active supervisory role in the investigations and prosecutions.”⁶⁰ In my experience, these are code words for DOJ headquarters exerting overt and covert pressure on investigators and prosecutors to be as ineffectual as possible.

Olson claims that:

*Make no mistake, we will be relentless in defending our country from China. The Department will continue to prioritize and aggressively counter the actions of the PRC government that harm our people and our institutions. But our review convinced us that a new approach is needed to tackle the most severe threats from a range of hostile nation-states.*⁶¹

I take this to mean that even though the China Initiative “effectively focused attention on the multi-faceted threat from the PRC”, it is being abandoned for reasons of political correctness and identity politics.

Visa Screening

The ESRC staff report found that:

*Successive U.S. administrations have struggled to respond effectively due to the seeming contradiction between attracting bright foreign STEM researchers and addressing the threat posed by nontraditional intelligence collectors. Consular officers are unable to comprehensively and quickly assess visa applicants for risks at post.*⁶²

Given the volume involved, it is simply impossible for DHS and DOS to adequately vet students and scholars from the PRC seeking visas, if what is meant by “adequately” is to prevent large-scale industrial/military espionage on U.S. campuses. As the staff report explains:

The U.S. interagency process to screen visa applicants for technology transfer risks, which relies on matching applicants to known sources of concern, reviews applicants from China more than those from any other country. The review process is slow, since relevant agencies continually struggle with high backlogs of reviews [and] analyst shortages. The U.S. government screens over 100,000 visa applications annually for risks, including illicit technology transfer, proliferation of weapons of mass destruction, and terrorism. According to one former State Department employee familiar with the process, it is like “drinking from a fire hose.”

The screening process is cumbersome since the system used is outdated and the bar for visa denial is high: applicants may be denied if they are deemed likely to violate specific export controls, but not if they are deemed likely to transfer sensitive emerging technologies that are not subject to export controls.

...

Following this initial processing, when an applicant’s background or proposed activities indicate they may seek access to a technology contained in the State Department’s interagency Technology Alert List, consular officers can request a Visa Mantis security advisory opinion (SAO), a type of analytical review to assess technology transfer risk.

*The SAO process can help consular officers judge whether a visa applicant poses a risk for technology transfer. ... [but] less than five percent of Chinese visa applications flagged for a Visa Mantis SAO are denied. After the initial flag, if a Mantis SAO indicates an applicant “seeks to ... solely, principally, or incidentally” violate U.S. export control laws or engage in espionage, this finding is a basis to deny the visa. ... **However, the relevant portion of the law does not include past instances of engaging in such activities as a basis for denial, only the risk of future transgressions. Furthermore, even if an applicant poses a likely risk for future transfer ... potentially sensitive emerging technologies are often not subject to export controls, so this is insufficient basis to deny a visa. Finally, not only is participation in foreign talent programs not a basis for visa denial under U.S. law, but the State Department also does not even systematically track participation in such programs. ... [A]s of July 2019 only 0.0001 percent of all Chinese student visa applications had been denied due to concerns relating to espionage or theft of IP.** [Emphasis added.]⁶³*

In June 2018, the Trump administration implemented a new policy to limit the validity of visas to one year for some Chinese nationals seeking to study in STEM fields at the graduate level, returning to pre-Obama administration practice.⁶⁴ The Hill

reported that “The changes are part of the national security strategy that attempts to prevent U.S. intellectual property from being transferred to competitors, [an] official said.”⁶⁵ The Associated Press reported that:

*[A]ccording to instructions sent to U.S. embassies and consulates, Chinese graduate students will be limited to one-year visas if they are studying in fields like robotics, aviation and high-tech manufacturing. China identified those areas as priorities in its “Made in China” 2025 manufacturing plan. The instructions also say that Chinese citizens seeking visas will need special clearance from multiple U.S. agencies if they work as researchers or managers for companies on a U.S. Commerce Department list of entities requiring higher scrutiny.*⁶⁶

In May 2020, President Trump issued a proclamation suspending the entry into the U.S. of certain nationals of the PRC coming to study or conduct research at the graduate level:

*[The suspension applies to an individual] who either receives funding from or who currently is employed by, studies at, or conducts research at or on behalf of, or has been employed by, studied at, or conducted research at or on behalf of, an entity in the PRC that implements or supports the PRC’s “military-civil fusion strategy” [defined as] actions by or at the behest of the PRC to acquire and divert foreign technologies, specifically critical and emerging technologies, to incorporate into and advance the PRC’s military capabilities.*⁶⁷

The Proclamation stated that:

The ... PRC ... is engaged in a wideranging and heavily resourced campaign to acquire sensitive United States technologies and intellectual property, in part to bolster the modernization and capability of [the] PLA. The PRC’s acquisition of sensitive United States technologies and intellectual property to modernize its military is a threat to our Nation’s long-term economic vitality and the safety and security of the American people.

The PRC authorities use some Chinese students, mostly postgraduate students and post-doctorate researchers, to operate as non-traditional collectors of intellectual property. Thus, students or researchers from the PRC studying or researching beyond the undergraduate level who are or have been associated with the PLA are at high risk of being exploited or co-opted by the PRC authorities and provide particular cause for concern. [Emphasis added.]⁶⁸

The Response of Higher Education

In 2020, Mary Sue Coleman, president of the Association of American Universities (which represents America’s leading research universities) wrote that:

[T]here have been many ... incidents of U.S. researchers allegedly failing to properly disclose relations with outside governments or otherwise safeguard their research from foreign intervention.

...

Many of these ideas and technologies are important to national security. U.S. universities and institutions are taking steps to ensure that we protect the intellectual capital generated through taxpayer-supported federal research. [O]ur institutions take these issues seriously.

...

Leaders at these universities are ... alert[ing] all their researchers about possible security threats and to clarify security protocols. And research administrators are directly engaging faculty who have significant levels of foreign research engagement to ensure that they fully understand their responsibilities. ... Universities are developing new training programs for both faculty and students to educate them about security risks and to make them aware of ethical research practices that must be followed.

...

Crucially, universities are establishing stronger relations with their local FBI offices and other federal law-enforcement agencies. ... New processes are now commonplace for monitoring data systems and networks for cyberintrusions, reporting suspected breaches and improving data security. ... [O]ur members are expanding required security screening to cover all visiting scholars.⁶⁹

Coleman concludes that:

[I]f universities fail to police themselves adequately in these areas, we face the specter of more draconian reactions from lawmakers.

The good news is that members of the Association of American Universities and others are stepping up to the plate and taking actions to secure sensitive research. We hope all universities will follow our example.⁷⁰

It does not appear that all universities are indeed following the example. “Administrators say the universities briefed by the FBI have not yet implemented additional monitoring protocols. They say they have pushed back because of skepticism of the threat level and because the FBI requests lack specificity in implementation.”⁷¹ FBI Director Wray has testified that “I think the level of naiveté on the part of the academic sector about this creates its own issues.”⁷²

Peter Salovey, President of Yale University, made clear where Yale’s allegiance lies:

In recent weeks, tensions in United States–China relations and increased scrutiny of academic exchanges have added to a sense of unease among many international students and scholars here at Yale and at universities across the country. I write now to affirm Yale’s steadfast commitment to our international students and scholars; they are vital to the university community.⁷³

And officials at the University of California at Berkeley cast efforts to prevent academic espionage as simple racism:

[We have] received several reports of negative comments directed at our Chinese-American faculty, as well as at researchers engaged in collaborations with Chinese companies and institutions, implying without basis that these scholars could be acting as spies or otherwise working at odds with the interests of the United States. ... Let us be clear that comments of this sort breed hurt and distrust, discriminate against members of our community. ... [I]t is critical that we not become any less welcoming to students, staff, faculty, visiting scholars, and other members of our community who come from those countries, or for whom those countries are an ancestral home. As California’s own dark history teaches us, an automatic suspicion of people based on their national origin can lead to terrible injustices.⁷⁴

Remedies

Sen. Warner has said that “we need to work with our universities to protect our research and development in cutting-edge technologies. This might mean better background checks for foreign students with former military or political associations, and greater oversight and even restrictions on research collaboration.”⁷⁵ But would such efforts be enough?

Student Visa Reform

In 2020, the Trump administration proposed a regulation that would have changed the period of admission for F visa holders (foreign students), J visa holders (exchange program visitors), and certain others aliens on nonimmigrant visas from the current “duration of status” to a fixed period (as is the case with most other temporary visa categories). Under duration of status, an alien can remain in the U.S. for as long as they are complying with the terms and condition of their visa category — for a foreign student, this essentially means remaining enrolled in school. DHS found that “[s]ome aliens have used the F classification to reside in the United States for decades by continuously enrolling in or transferring between schools, a practice facilitated by the [duration of status] framework”⁷⁶ and it identified aliens who had been in the United States in F-1 status since the 1990s and early 2000s, some of whom were still in active F-1 status as of the time of the publication of the proposed rule.⁷⁷ DHS argued that:

[The duration of status] framework, because it reduces opportunities for direct vetting of foreign academic students by immigration officers, creates opportunities for foreign adversaries to exploit the F-1 program and undermine U.S. national security. ... Foreign adversaries are using progressively sophisticated and resourceful methods to exploit the U.S. educational environment, including well-documented cases of espionage through the student program. ... DHS believes that replacing [duration of status with a fixed period of admission] would help mitigate these national security risks by ensuring an immigration official directly and periodically vets applicants for extensions of stay and, in so doing, confirms they are engaged only in activities consistent with their student status.⁷⁸

DHS believes a shorter admission period, up to 2 years, would be appropriate for a subset of the F and J population due to heightened concerns related to fraud, abuse, and national security. ... For this subset of the F and J population, DHS believes that a 2-year maximum period of admission would be appropriate. This would give the Department an opportunity to verify that they are complying with the terms and conditions of their status more frequently and thereby better address any national security concerns.⁷⁹

For example, the Secretary of Homeland Security could determine that it is appropriate to limit the length of admission of students who are enrolled in specific courses of study, such as nuclear science.⁸⁰

The Biden administration rescinded the proposed rule.⁸¹ While it should certainly reevaluate its rescission, the rule's practical effectiveness might be limited. It is unlikely that DHS officers could grant more than a cursory amount attention to requests to extend periods of stay made by hundreds of thousands of students from the PRC. Without an in-depth investigation of each request, it is likewise unlikely that DHS officers would have available the information necessary to make informed decisions and do anything other than rubber-stamp the requests. Even if officers did possess derogatory information, lawsuits challenging denials would be likely, and the government would often be faced with the dilemma of having to reveal classified information in open court.

Another option was proposed by the ESRC:

Congress [should] clarify that association with a foreign government's technology transfer programs may be considered grounds to deny a nonimmigrant visa if the foreign government in question is deemed a strategic competitor of the United States, or if the applicant has engaged in violations of U.S. laws relating to espionage, sabotage, or export controls. Association with a foreign government's technology transfer programs can include any of the following:

- *Participation in a foreign government-sponsored program designed to incentivize participants to transfer fundamental research to a foreign country via a talent recruitment program or in a foreign government-sponsored startup competition;*
- *Acceptance of a government scholarship that facilitates coordination with talent programs or requires recipients to study specific strategic scientific and technological fields or to return to the foreign country for a government work requirement after the scholarship term ends;*
- *Association with a university or a department of a university that the U.S. government has designated as a participant in the foreign government's military-civil fusion efforts; or*
- *Status (current or past) as a scientist, technician, or officer for a foreign military, if the applicant does not disclose such information when applying for a visa.⁸²*

While such a provision could be valuable, its effectiveness would depend on consular officers having the necessary information about each visa applicant. Again, given the many thousands of student and exchange visas requested by nationals of the PRC each year — in 2019, Chinese students received 107,974 F visas and 50,148 J visas⁸³ — it is unlikely that consular officers could grant more than a cursory amount attention (including an interview lasting a few minutes) to such visa applications. Unless U.S. intelligence services had already placed necessary derogatory information in accessible databases, it is unlikely that consular officers would have available the information necessary to make informed decisions and do anything other than rubber-stamp the visa applications.

Keeping Foreign Students Out

It may be time to consider barring the entry of, or issuance of visas to, all students and exchange visitors from the PRC, or at least those who will be studying in STEM or other fields likely to give them access to information and research of value to the PLA. While of course not every such student will engage in deleterious activities while in the U.S. (or after they return home), a sufficiently large number will that given the impossibility of the U.S. government conducting sufficiently in-depth background checks on each of them (as a result of a lack of resources or access to the necessary information), a blanket ban might be the only effective alternative. And, as I have noted, in many instances students are only approached for intelligence-gathering purposes by the PRC *after* they have arrived in the U.S. or *after* they have returned home to China. In such cases, pre-vetting would be ineffectual.

Such a blanket ban would be advisable only for so long as the PRC seeks to undermine around the world the values we hold dear, considers America an enemy, conducts (and solicits Chinese students in the U.S. to conduct) massive amounts of espionage against us, pilfers our nation's intellectual property, and prepares for "inevitable" armed conflict against us. However, it is impossible to say when the PRC will cease and desist.

While the American higher education community has certainly grown accustomed to the financial benefits of the mass matriculation of students from the PRC, a ban would simply return the academy to the state of affairs of a few decades ago, when relatively few such students came to the U.S.

If an administration ever made the decision to bar students from the PRC, what options would it have under current law?

Security and Foreign Policy Grounds of Inadmissibility. The general security ground of inadmissibility provides that:

Any alien who a consular officer or the [Secretary of Homeland Security] knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

- (i) *any activity*
- (I) *to violate any law of the United States relating to espionage or sabotage or*
- (II) *to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,*
- (ii) *any other unlawful activity, or*
- (iii) *any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is inadmissible.*⁸⁴

As to the foreign policy ground of inadmissibility, "An alien whose entry or proposed activities in the United States the Secretary of State [SOS] has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible."⁸⁵ The provision also states that:

*An alien ... shall not be excludable or subject to restrictions or conditions on entry into the United States [on a foreign policy ground] because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the [SOS] personally determines that the alien's admission would compromise a compelling United States foreign policy interest.*⁸⁶

How feasible would it be to utilize these grounds of inadmissibility on a large scale to deny visas to applicants from the PRC? One impediment might be consular officers' belief that they don't have an adequate basis to make the determinations required to deny visas pursuant to these grounds of inadmissibility — which they very well might not on an individualized basis. Of course, some consular officers might simply categorically refuse to deny visas on these bases.

There is also the question of whether the applicants themselves, or interested American citizens, could challenge the denials in federal court. Under the long-standing doctrine of consular non-reviewability, federal courts have no jurisdiction over

visa denials to aliens overseas, as consular officers have complete discretion over the issuance and denial of visas (and federal courts have extended this doctrine to cover the revocation of visas). However, in 1972, the Supreme Court in *Kleindienst v. Mandel*, held that federal courts have jurisdiction to consider whether the reason an alien's application for a waiver of visa ineligibility is facially legitimate and bona fide when U.S. citizens' constitutional rights are threatened by the waiver's denial.⁸⁷ While the Court did not elaborate as to the meaning of "facially legitimate" or "bona fide", it did state that it could not look behind the exercise of discretion if the government satisfies such standards. Federal courts have since extended the principle to cover visa denials, and they would likely reason that they have the same ability to review revocations.

Presumably, American citizens (and universities) opposed to the large-scale application of these grounds of inadmissibility to students from the PRC would challenge their use in federal court. U.S. citizens have generally asserted two constitutional rights in litigation pursuant to the *Kleindienst* rule, the one relevant for our purposes being their First Amendment right to hear an alien's viewpoint, which would be frustrated by a visa denial.

As the Second Circuit asked in *American Academy of Religion v. Napolitano*,⁸⁸ "what will render the Government's reason 'facially legitimate and bona fide' [and] does the prohibition on 'look[ing] behind' the decision mean that a reviewing court may not determine, after considering evidence, whether the facts support the Government's reason?"⁸⁹ The court ruled that:

*[T]he identification of both a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she "knows or has reason to believe" that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason. ... We also conclude, in agreement with the Ninth Circuit, that the absence of an allegation that the consular officer acted in bad faith satisfies the requirement that the reason is bona fide.*⁹⁰

*[W]e have to take literally the statement in Mandel that courts may not "look behind" exclusion decisions, whether the decision is the ... exercise of discretion to waive inadmissibility or the consular officer's decision that a statutory ground of inadmissibility applies to the visa applicant, at least in the absence of a well supported allegation of bad faith, which would render the decision not bona fide.*⁹¹

Under *Kleindienst*, respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the government is obliged to disclose about a consular officer's denial of a visa to an alien abroad. And it is likely that federal courts would extend the "facially legitimate and bona fide" standard to a contested visa revocation. However, this avenue would hold substantial risk, for even if hostile federal courts don't find ways to conclude that the reasons for the visa denials were not "facially legitimate and bona fide", large-scale use regarding students from the PRC might catalyze their rejection of the doctrine of consular non-reviewability. Should millions of aliens around the world suddenly be allowed to contest visa denials in federal court, the damage to our nation's sovereignty would be profound.

For a fuller discussion of these grounds of inadmissibility (and the power of visa revocation), see my March 4 blog post, "A Russian Ban? A Toolkit for President Biden".⁹²

§ 212(f). President Biden, like Presidents Trump, Obama, and others before them, has relied on a provision of the Immigration and Nationality Act of 1952, now found at § 212(f) of the INA, to bar the entry of categories of foreign nationals:

*Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.*⁹³

In *Trump v. Hawaii*,⁹⁴ the Supreme Court brushed aside statutory and constitutional challenges to President Trump's use of this power and emphasized its extraordinary potency: § 212(f) "exudes deference to the President in every clause. ... It is therefore unsurprising that we have previously observed that [it] vests the President with 'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA."⁹⁵ The Court also emphasized the great deference it would grant the Executive Branch regarding issues of national security:

[Kleindienst's] narrow standard of review "has particular force" in admission and immigration cases that overlap with "the area of national security." ... For one, "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs. ... For another, "when it comes to collecting evidence and drawing inferences" on questions of national security, "the lack of competence on the part of the courts is marked."

...

The upshot of our cases in this context is clear: "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained.⁹⁶

[P]laintiffs ... challenge the entry suspension based on their perception of its effectiveness and wisdom. ... But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs."⁹⁷

The Court was also clear that "the word 'class' comfortably encompasses a group of people linked by nationality."⁹⁸ The use of § 212(f) would seem to be the preferable avenue should it be decided to bar entry to students (or a subset of students) from the PRC.

For a fuller discussion of 212(f), see "A Russian Ban? A Toolkit for President Biden."

Removing Foreign Students Already Here

What of the hundreds of thousands of students from the PRC who have already been issued visas and admitted to the U.S.? What would be an administration's options in removing them in appropriate cases? Of course, should they leave the U.S., a § 212(f) proclamation could bar their return (even should their visas still be valid). However, it would be extremely difficult to remove them, even under grounds of deportation identical to the grounds of inadmissibility discussed, for reason of the statutory and constitutional rights their presence in the U.S. affords them.

Visa Revocation for Aliens Present in the United States. In 2004, Congress provided DHS with specific authority to remove an admitted alien whose temporary visa has been revoked. The House bill would have completely barred judicial review. However, at the insistence of the Senate, the INA now provides a right to judicial review for aliens already present in the U.S.:

There shall be no means of judicial review ... of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 237(a)(1)(B) [making deportable any alien whose nonimmigrant visa has been revoked].⁹⁹

The House Committee Report explained the problematic nature of such judicial review:

[Visa] revocation is problematic ... when the alien has entered the U.S. by the time the visa has been revoked because there is no provision that allows DHS to remove an alien whose visa has been revoked. If DHS has information that establishes that the alien is otherwise removable (such as for a crime, or illness), it will place the alien in removal proceedings on those grounds. However, DHS bears the burden of proof in deportation proceedings, and if the agency cannot prove that the alien is deportable, it must allow the alien to remain until the alien's period of authorized admission ends. This policy is a particular problem in terrorism cases because information linking an alien to terrorism is often classified, and classified information cannot be used to prove deportability. In October 2002, GAO reported that the State Department had revoked 105 visas that had been erroneously issued to aliens about whom there were questions about possible terror ties before their background checks had been completed. The GAO found that immigration agents did not attempt to track down those aliens whose visas had been revoked because of the difficulty in removing those aliens from the United States.¹⁰⁰

Similar problems, especially regarding the use of classified evidence, would present themselves should DHS try to bring deportation proceedings against students from the PRC present in the U.S. after the revocation of their visas. The Biden administration might consider requesting that Congress pass the original House-passed language and completely bar judicial review of visa revocations, in order to make such revocations a viable option.

Foreign Policy Ground of Deportability. Similar to the foreign-policy ground of inadmissibility, the INA provides that “an alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.”¹⁰¹

However, this ground of deportability has been used — and thus tested in court — very rarely.¹⁰² In *Massieu v. Reno*,¹⁰³ a federal district court found the provision unconstitutional as being 1) void for vagueness, 2) in violation of the Due Process Clause of the Fifth Amendment, and 3) an unconstitutional delegation of legislative power to the executive branch.

As to vagueness, the court ruled that:

*[T]he void-for-vagueness doctrine ... requires that prohibitory statutes define the conduct proscribed with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” ... [F]or over forty years, courts ... have examined deportation statutes for a constitutionally required degree of specificity.*¹⁰⁴

*[T]here is no conceivable way that an alien could know ... how to conform his or her activities to the requirements of [the foreign policy ground of deportability]. Of course, it is even less likely that an alien could know that his or her mere presence here would or could cause adverse foreign policy consequences when our foreign policy is unpublished, ever-changing, and often highly confidential.*¹⁰⁵

*This court recognizes that neither the legislature nor the judiciary possesses the institutional competence to question the [SOS’s] decisions on matters of foreign policy. ... [but] Congress cannot hide behind this required deference as a justification for granting the Secretary carte blanche to declare an alien’s deportability at will.*¹⁰⁶

*[The foreign policy ground of deportability] is void for vagueness.*¹⁰⁷

As to due process, the court ruled that:

For many of the same reasons ... the [ground] also deprives aliens ... of due process of law. ... [A]liens are entitled to due process of law in deportation proceedings.

...

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” ... [T]his court must apply the ... three-part balancing test enunciated by the Supreme Court ... [and] must consider: (1) the importance to all aliens of not being imprisoned, forced to leave the United States, and sent to the country of our government’s choosing; (2) the adequacy of the hearing afforded and the likelihood that increased procedures would diminish the risk of an erroneous deprivation of liberty; and (3) the governmental interest, as well as that of the public, in allowing the [SOS] to declare an alien deportable in the interests of our foreign policy as well as the increased cost of requiring additional procedures.

*[The ground] applies to all aliens, be they temporary visitors or life-long permanent residents. To attempt to measure the importance to these individuals of avoiding the complete deprivation of liberty that results from executive confinement and deportation would near the impossible.*¹⁰⁸

As the government itself has forcefully argued, plaintiff’s deportability ... has been conclusively pre-determined by the [SOS]. Accordingly, while plaintiff will be given his ... hearing before an [immigration judge] I], the hearing will be a sham. The real decision already has been made off-stage, and, according to the government, that decision is an unreviewable exercise of the Secretary’s “unfettered discretion.”

...

[The] due process clause “is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process ‘due process of law’ by its mere will.”¹⁰⁹

Absent a meaningful opportunity to be heard, the [SOS’s] ... “unfettered discretion” ... is ... unconstitutional.¹¹⁰

As to delegation of powers, the court ruled that:

For many of the same reasons that ... [the ground] also is an unconstitutional delegation of legislative power to the executive.¹¹¹

“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” ... It has long been recognized, however, that some level of legislative delegation is necessary to the efficient administration of the ever-broadening regulatory course charted by Congress. ... The delegation doctrine, then ... requir[es Congress] to articulate intelligible standards to guide (1) the exercise of the delegatee’s authority, and (2) the judiciary’s ability to review the exercise of that authority against a congressionally mandated policy.¹¹²

[It is true that] in regard to legislation with foreign policy implications, Congress must be allowed to delegate broader discretion to the President and his agents out of respect for the executive’s residual authority over foreign affairs and the impracticability of requiring Congress to dictate with precision in an area in which it lacks the expertise to do so. ... [However, t]he unprecedented delegation at issue here is, indeed, unconstitutional.¹¹³

*[T]he [Supreme] Court [in *Zemel v. Rusk*¹¹⁴] stressed that “**this does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice.**” [Emphasis in original.]¹¹⁵*

[Under the foreign policy ground of deportability] ... the judiciary will be prevented from performing its duty to meaningfully review the Secretary’s exercise of his discretion.¹¹⁶

[B]y leaving deportability determinations to the wholly unguided and unreviewable discretion of the [SOS] ... represents an unconstitutional delegation of legislative power.¹¹⁷

An appeals court overturned this decision because the plaintiff had failed to exhaust their administrative remedies.¹¹⁸ However, the appeals court did not address the constitutional issues. On remand, the Board of Immigration Appeals (BIA)¹¹⁹ did not (and by law could not) address the constitutional issues raised by the district court. The BIA ruled that as long as the SOS’s determination was bona-fide, the IJ could not second-guess the decision:

We conclude that Congress’ decision to require a specific determination by the [SOS], based on foreign policy interests, to establish deportability ... coupled with the division of authority in section 103 of the Act between the Attorney General and the [SOS], make it clear that the [latter’s] reasonable determination ... should be treated as conclusive evidence of ... deportability. The [IJ] thus erred in holding that the [INS] is obliged to present clear, unequivocal, and convincing evidence in support of the [SOS’s] belief. The requirement that the [INS] demonstrate that the respondent is deportable ... is met by the [SOS’s] facially reasonable and bona fide determination that the respondent’s presence here would cause potentially serious adverse foreign policy consequences for the United States.

...

The respondent’s position would ... require an evaluation of what, in fact, are the foreign policy interests of the United States, and [whether they] are themselves reasonable.

Such review is not contemplated by ... the Act.

...

Congress has explicitly and deliberately carved out a provision that requires a foreign policy determination by the [SOS] before an alien can be excluded or removed.

...

[T]he role of the [SOS] ... is sui generis. In no other deportation provision is the Secretary assigned such authority.¹²⁰

It is unlikely that Congress, having made the Secretary's foreign policy determination essential for such proceedings to be initiated, would then grant an [IJ] ... authority to question the validity of that determination.¹²¹

This standard of inquiry would entangle the Immigration Court in matters of foreign policy and involve that court in weighing the importance of various factors in an area in which it has no special expertise. Such an in depth examination could well require the [INS] to proffer secret or confidential information and expert witnesses, or involve a deposition of the Secretary of State.

...

[H]owever ... the language ... of the Act, together with the structure of responsibility set forth in section 103, require[s] that the [SOS] have set forth a facially reasonable and bona fide basis for a determination. ... [T]he Secretary must state that he or she has a "reasonable ground".

...

*We apply the standard of facial reasonableness that was adopted by the Supreme Court in *Kleindienst v. Mandel*.¹²²*

Should DHS attempt to deport a large number of students from the PRC pursuant to the foreign policy ground of deportability, there is a great risk that other federal courts would adopt the reasoning of the court in *Massieu v. Reno* and declare the ground unconstitutional. However, the Third Circuit has positively cited the BIA decision:

*[T]he BIA previously has recognized that Congress can — and has — limited the jurisdiction of the immigration agencies by delegating decision-making authority to other federal departments. For example, in *In re Ruiz-Massieu*, the BIA held that immigration judges could not exercise *de novo* review over the Secretary of State's finding.¹²³*

In conclusion, it might prove extremely difficult legally to seek the deportation of large numbers of students from the PRC (not even considering the operational and resource obstacles involved in bringing thousands of deportation cases in a vastly backlogged immigration court). As long as they are here under a "duration of status" regime and decline to leave the U.S., many will remain here far into the future.

End Notes

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³ [“2021 Report to Congress”](#), U.S.-China Economic and Security Review Commission, 2021, at 1.

⁴ Matthew Cox, [“As China Declares War with US Inevitable, Army General Highlights Need for Fighting Vehicles”](#), Military.com, March 11, 2022.

⁵ [“China Generals Urge More Spending for U.S. Conflict ‘Trap’”](#), Bloomberg Quint, March 9, 2021.

⁶ Megha Pardhi and Arjun Gargeyas, [“How Emerging Technologies Are Driving China’s Readiness for Modern Warfare”](#), South China Morning Post, March 15, 2022.

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¹³ [“2021 Report to Congress”](#), at 7.

¹⁴ [“2019 Report to Congress”](#), U.S.-China Economic and Security Review Commission, 2019, at 8.

¹⁵ M. Button, [“Editorial: Economic and Industrial Espionage”](#), 33 Security Journal 1 (2020).

¹⁶ See [“Sources and Methods of Foreign Nationals Engaged in Economic and Military Espionage: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the House Judiciary Committee”](#), 109th Cong. at 1 (2005).

¹⁷ [“Sources and Methods of Foreign Nationals Engaged in Economic and Military Espionage”](#), Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary, September 15, 2005.

¹⁸ Thomas Friedman, [“What Comes After the War on Terrorism? War on China?”](#), The New York Times, September 8, 2021.

¹⁹ Matthew Olsen, assistant attorney general, [“Remarks on Countering Nation-State Threats”](#), Department of Justice, February 23, 2022.

²⁰ [“China’s Non-Traditional Espionage Against the United States: The Threat and Potential Policy Responses: Hearing Before the Senate Judiciary Committee”](#), 115th Congress, December 12, 2018.

²¹ *Id.*

²² [“Staff Research Report: Overseas Chinese Students and Scholars in China’s Drive for Innovation”](#), at 23.

²³ This discussion doesn’t focus on Russian students in large part because only 5,293 Russian nationals on student visas studied at U.S. institutions of higher education in the 2019/2020 academic year (and 4,805 in 2020/2021), See [“All Places of Origin”](#), Open Doors, IIE.

²⁴ [“About”](#), Open Doors, IIE.

²⁵ [“Fast Facts 2021”](#), Open Doors, IIE (4.3/2.4 percent were in non-degree programs).

²⁶ [“Academic Level and Places of Origin”](#), Open Doors, IIE.

²⁷ [“Fields of Study by Place of Origin”](#), Open Doors, IIE.

²⁸ [“All Places of Origin”](#), Open Doors, IIE.

²⁹ *Id.*

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³¹ Thomas L. Friedman, [“What Comes After the War on Terrorism? War on China?”](#), The New York Times, September 8, 2021.

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⁴⁵ *Id.* at 11. (Footnote omitted.)

⁴⁶ *Id.* at 14.

⁴⁷ *Id.* at 15.

⁴⁸ *Id.* at 17. (Footnote omitted.)

⁴⁹ *Id.* at 18. (Footnotes omitted).

⁵⁰ *Id.* at 23.

⁵¹ *Id.* at 14. (Footnotes omitted.)

⁵² *Id.* at 23.

⁵³ 85 FR 60526, 60535, U.S. Immigration and Customs Enforcement, DHS, [“Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media”](#) (proposed rule), September 25, 2020. (footnotes omitted).

⁵⁴ [“China’s Non-Traditional Espionage Against the United States: The Threat and Potential Policy Responses: Hearing Before the Senate Judiciary Committee”](#), 115th Congress, December 12, 2018.

⁵⁵ [“Remarks on Countering Nation-State Threats”](#).

⁵⁶ *Id.*

⁵⁷ [“US Intelligence Warns China Is Using Student Spies to Steal Secrets”](#).

⁵⁸ [“Staff Research Report: Overseas Chinese Students and Scholars in China’s Drive for Innovation”](#), at 11.

⁵⁹ Robert Spalding & A.J. Rice, [“How US Visas Can Help China’s Intel Agencies to Spy on Us”](#), The Hill, April 13, 2020.

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⁶¹ *Id.*

⁶² [“Staff Research Report: Overseas Chinese Students and Scholars in China’s Drive for Innovation”](#), at 24. (Footnotes omitted).

⁶³ *Id.* at 21-22. (Footnotes omitted.)

⁶⁴ Luis Sanchez, [“Trump Administration to Tighten Restrictions on Some Chinese Visas”](#), The Hill, May 29, 2018.

⁶⁵ *Id.*

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⁸² [“2020 Report to Congress”](#), at 34.

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⁹⁸ *Id.* at 2410.

⁹⁹ INA § 221(i), 8 U.S.C. § 1201(i).

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¹⁰¹ INA § 237(a)(4)(C)(i), 8 U.S.C. § 1227(a)(4)(C)(i).

¹⁰² *In re Mario Salvador Ruiz-Massieu*, 22 I. & N. Dec. 833, 838 (B.I.A. 1999).

¹⁰³ *Massieu v. Reno*, 915 F. Supp. 681 (D.N.J. 1996).

¹⁰⁴ *Id.* at 699. (Citations and footnote omitted.)

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