

## DOJ's China Initiative On Trial As Harvard Prof. Faces Jury

By **Chris Villani**

*Law360, Boston (December 10, 2021, 4:16 PM EST)* -- A renowned Harvard University nanotechnology professor will stand trial starting Tuesday for allegedly hiding his ties to the Chinese government in what experts say will be a high-profile test for the U.S. Department of Justice's troubled China Initiative.

Charles Lieber was arrested nearly two years ago and has maintained his innocence. Federal prosecutors claim he lied to the U.S. Department of Defense and the National Institutes of Health about his involvement in China's Thousand Talents Plan and about becoming a "strategic scientist" at Wuhan University of Technology, all while reeling in \$15 million in grant funding from the two U.S. entities.

The prosecution of Lieber and more than two dozen other academics around the country, including another nanotechnology professor at nearby MIT, has been criticized for going beyond the scope of the China Initiative's original mission of prosecuting economic espionage. The defendants and outside critics of the program have accused prosecutors of racial profiling and, in some cases, misconduct in pursuing convictions.

The first China Initiative case against an academic to go to trial — against Tennessee professor Anming Hu — ended when a judge tossed the case following a mistrial, finding that no rational jury could convict Hu. Among similar cases, more have ended in dismissals than convictions, according to a Law360 analysis, and there are still at least a half dozen pending cases against researchers.

The government's loss in the Hu case puts an even brighter spotlight on the upcoming Lieber trial, experts say.

"This is an important case for the DOJ to show that the resources that they have put behind this and rhetoric they have put behind this are substantiated in court," said Margaret Lewis, a professor at Seton Hall Law who focuses on law in China and Taiwan.

### **Academics in the Government's Crosshairs**

The prosecutorial trends that spawned the current incarnation of the China Initiative began under former President Barack Obama.

Crowell & Moring LLP partner Caroline Brown, who previously worked for the DOJ's National Security Division, said the government focused on academics and researchers long before then-Attorney General Jeff Sessions formally announced the China Initiative in 2018. But even if investigations like the one that led to the Lieber charges are not new, the stakes in his case are high, she said.

"The Lieber case is, by far, the most high-profile case that has come about as part of the DOJ's China Initiative in the context of academics and researchers, and it has highlighted criticism of what the mission and intent of the initiative at the DOJ is," Brown said.

Some criticism of the program has focused on the notion that what constitutes a "China Initiative" case is ill-defined.

"The China Initiative is reportedly focused on combating economic espionage and trade secret theft, but few of the academics are really charged for that," said Jeremy Wu, co-organizer of Asian Pacific American Justice, a watchdog focused on combating racial profiling of Asians.

Only three cases brought against academics fit the mold of economic espionage, said Wu, whose organization has tracked China Initiative prosecutions.

"For all the others, including Professor Lieber, they were charged for false statements or various frauds," Wu said, "and that's a big red flag for us."

He said the prosecutions of academics seem like a pretext for going after researchers, especially Asian Americans, although Lieber is not of Asian descent.

But former Massachusetts U.S. Attorney Andrew Lelling said the program was never conceived with specific criteria of what conduct it would prosecute.

"The point of the China Initiative was to sensitize the public to what the government perceives as long-term economic espionage and to start aggressively targeting that and aggressively prosecuting those cases," said Lelling, who brought the Lieber case before leaving the office to become a partner at Jones Day in Boston.

The cases against researchers have garnered more attention than the economic espionage cases, Lelling said, but are not instances in which the government tried but failed to make an espionage case. They are still important, he said, because concealing a connection to China can lead to "double-dipping" if an academic receives grant money from both the U.S. and China and could present conflicts of interest.

"Doing research with the Chinese is not illegal at all. Lying about it is illegal," Lelling said.

### **The Case Against Lieber**

The government claims Lieber lied to federal authorities about his involvement in the Thousand Talents Plan and his affiliation with WUT. In tax years 2013 and 2014, Lieber earned income from WUT that he didn't disclose to the IRS, prosecutors said.

The Thousand Talents Plan is a Chinese government initiative aimed at recruiting experts in science and technology.

Lieber's attorney, Marc Mukasey of Mukasey Frenchman LLP, declined to weigh in on the upcoming trial, saying he and his team "are in full-time prep mode. We'll do our talking in the courtroom."

A government representative declined to comment.

The trial is expected to last about a week before U.S. District Judge Rya W. Zobel, a Holocaust survivor who was nominated by former President Jimmy Carter and will turn 90 mid-trial, on Dec. 18.

Prospective jurors will be asked, among other questions, whether they can read or speak Chinese, out of concern that that would allow them to interpret certain documents in what may be a document-laden case. Lieber's trial brief noted that the government has 175 documents on its exhibit list, including 93 emails between him and other individuals who will not testify at trial.

Judge Zobel balked at asking the Boston-area jury about their ties to Harvard, however. The German-born jurist, who graduated from Harvard Law in 1956, quipped, "Does that mean I have to excuse myself?"

Prosecutors have flagged the fact that at least 42 defense exhibits relate to Lieber's health. The nanotechnology professor was diagnosed with cancer a decade ago and is undergoing treatment, the government brief states, adding that emails between him and his doctors are inadmissible and "serve no apparent purpose other than to inflame the jury."

Mukasey said in court that Lieber will not be taking the stand, though the jury will hear portions of his post-arrest statements to the FBI. Lieber unsuccessfully tried to have the statements tossed, but Judge Zobel ruled that he did not make it clear enough that he wanted a lawyer when he told agents, "I guess I think probably I should have ... an attorney."

Lieber claimed he was "tricked and coerced" into talking without a lawyer present. It is unclear from court documents what he said on tape.

Lelling said it will be important for the government to explain to the jury why the claims against Lieber matter. To that end, prosecutors hope to call Barry Naughton, a University of California economics professor who specializes in the Chinese economy.

"We are calling him so the jurors can understand the evidence," Assistant U.S. Attorney Jason Casey said during a hearing on Wednesday.

Lieber and his legal team say Naughton should not take the stand.

"What the Chinese government is up to with regards to recruiting people — and by the way, it's a legal program, the Thousand Talents program — what they are up to bears in no way on the issues in this case," Mukasey said.

Judge Zobel has yet to rule on the matter.

### **A Murky Future for the Initiative**

The future of the China Initiative is unclear. Matthew Olsen, a veteran government official who most recently served as the chief trust and security officer at Uber Technologies Inc., was confirmed by the Senate in October to lead the DOJ's National Security Division and would play a key role in any overhaul.

Brown said "the government is going to look to see how [the Lieber charges] play out. That could definitely inform how it pursues cases and where it chooses to put its resources."

Lewis hopes the DOJ "takes a hard look" at these cases, regardless of what happens with Lieber.

"If the goal of the China Initiative was to increase awareness and deterrence of connections to China by people in the research community that are not disclosed, my sense is that has already very much been achieved," she said. "There is deterrence and increasing evidence of a negative chilling effect."

Compared to the case against Hu, Lelling said the charges against Lieber are more straightforward and an acquittal would be "more concerning." Either way, the former U.S. Attorney questioned the wisdom in bringing similar cases in the future.

"I think the point has been made and, going forward, they should stop. How many academics do you need?" Lelling said. "If the point was to scare the [expletive] out of the entire academic community, the Initiative did that. They should change or shut down that portion of the program."

The government is represented by Jason A. Casey and James R. Drabick of the U.S. Attorney's Office for the District of Massachusetts.

Lieber is represented by Marc L. Mukasey, Torrey K. Young and Catherine Deist of Mukasey Frenchman LLP.

The case is U.S. v. Lieber, case number 1:20-cr-10111, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Jack Queen. Editing by Adam LoBelia.