



9 December 2024 Features Trade Secrets Andrew Boutros And Jay Schleppenbach Of Shook, Hardy & Bacon.

2025 forecast: Trump's top target for secrets theft

The president-elect's previous term offers clues on how the new US administration will approach and tackle IP theft, say Andrew Boutros and Jay Schleppenbach of Shook, Hardy & Bacon.

With a change in the US presidential administrations a little more than a month away, naturally there comes a change in federal law enforcement priorities. So it has become a tradition of sorts for lawyers and commentators to predict what crimes a new administration will most likely be focused on prosecuting. In the case of President Donald Trump, such predictions can be well grounded in the four-year record of his previous term in office.

After all, as William Shakespeare observed in *The Tempest*, “what’s past is prologue”, meaning history sets the context for the present. In the case of President Trump, that record suggests that, among other things, he will make the theft of trade secrets by Chinese individuals and entities (or the government of China) a top target for vigorous federal enforcement.

President Trump’s focus on China

During the 2016 US presidential campaign, [President Trump sharply criticised China](#), for instance stating that it was responsible for “the greatest theft in the history of the world” and arguing that “we can’t continue to allow China to rape our country”.

After taking office in 2017, President Trump [rejected a potential trade deal with China](#) and directed investigations into whether Chinese steel imports posed a threat to national security and whether the Chinese were violating US intellectual property rights, with a particular focus on forced technology transfers.

The Commerce Department’s [report](#) on the steel issues was completed in January 2018, finding that the present quantities and circumstances of steel imports from China were weakening the US economy and threatening to impair national security. By March 2018, the US Trade Representative’s [investigation](#) of the intellectual property issues had also concluded, finding that “the acts, policies, and practices that comprise China’s technology transfer regime are unreasonable or discriminatory and burden or restrict US commerce”.

Escalating pressure

In July 2018, the Trump administration [escalated pressure on China](#) by imposing 25% tariffs on \$34 billion worth of products including water boilers, X-ray machine components, aeroplane tyres and various other industrial parts. In turn, China responded with similarly valued tariffs on soybeans, pork and electric vehicles.

About a month later in August 2018, [\\$16 billion in additional tariffs followed](#) from each country, with such tariffs applying to semiconductors, chemicals, plastics, motorbikes and electric scooters on the US side and fuel, steel products, autos and medical equipment on the Chinese side. Both sides continued to levy additional tit-for-tat tariffs throughout 2019.

President Trump’s DOJ-led ‘China Initiative’

In addition to these trade-related actions, in November 2018 President Trump’s Department of Justice (DOJ) [announced](#) new legal scrutiny of Chinese actions and actors in the US through what would be called the ‘China Initiative’.

The attorney general at the time, Jeff Sessions, stated that China's unfair trade practices "pose...a real and illegal threat to our nation's economic prosperity and competitiveness." He announced three prosecutions of people accused of spying for China, and five cases charging trade secret theft to benefit China.

AG Sessions continued that "Chinese economic espionage against the US has been increasing" and "we're not going to take it anymore," adding "international trade has been good for China, but the cheating must stop". He announced that he had ordered the creation of a 'China Initiative' to be led by the assistant attorney general for the National Security Division and also to include a senior FBI executive, five US attorneys, and several other DOJ leaders.

'Economic blitzkrieg'

As conceived by AG Sessions, the initiative would pursue Chinese trade secret theft cases, review Chinese licences in US infrastructure and communications, consider Chinese-related filings under the Foreign Agents Registration Act, and recommend additional legislation as it deemed necessary.

Though AG Sessions departed from the DOJ almost immediately after announcing the initiative, his successor, William Barr—widely regarded as a China hawk (Barr received a Master of Arts in government and Chinese studies at Columbia)—[followed through](#) on the China Initiative's development and execution.

In [public remarks](#) while serving as attorney general, Barr characterised China as engaging "in an economic blitzkrieg—an aggressive, orchestrated, whole-of-government (indeed, whole-of-society) campaign to seize the commanding heights of the global economy and to surpass the US as the world's preeminent superpower".

Highlighting "the grave risks" to China's influence over the 5G networks, AG Barr stated that China plans "to raid the US," is "leveraging its economic power to change America," and is "masking its participation in our political process" by using "American voices" to promote pro-China policies. AG Barr closed his remarks by saying that "our freedom depends" on standing up to China.

Mounting concern

Other top Trump administration officials also gave voice to concerns about China. In July 2020, FBI director Christopher Wray [told an audience](#) that the American people "are the victims of what amounts to Chinese theft on a scale so massive that it represents one of the largest transfers of wealth in human history," and that "our data...our health, our livelihoods, and our security" are jeopardised by "the Chinese threat".

Director Wray similarly opined that "the greatest long-term threat to our nation's information and intellectual property, and to our economic vitality, is the counterintelligence and economic espionage threat from China". That same month, Secretary of State Mike Pompeo gave a [speech](#) emphasising perceived "corporate acquiescence" to the Chinese Communist Party and claimed that "China ripped off our prized intellectual property and trade secrets, costing millions of jobs all across America. Of course, President Trump himself continued to put pressure on China, among other things stating that "[they have ripped off the US like no one has ever done before.](#)"

Trump's prosecutions

The Trump administration followed through on its rhetoric with numerous prosecutions against Chinese entities and individuals. In a [report](#) on the two-year anniversary of the China Initiative in November 2020, AG Barr remarked that the DOJ had “made incredible strides in countering the systemic efforts by the PRC to enhance its economic and military strength at America’s expense”.

FBI director Wray added that “the China Initiative is helping to disrupt” the Chinese government’s “theft of sensitive information and technology”. In particular, between the China Initiative’s inception and the issuance of the report, the DOJ had charged five economic espionage cases and more than ten trade-secret-related cases.

The DOJ highlighted the [high-profile trade secret case](#) brought against United Microelectronics (UMC), Fujian Jinhua (the Chinese state-owned enterprise), and several individual defendants.

In October 2020, UMC pleaded guilty to trade secret theft and paid a \$60 million fine, “the second largest ever in a criminal trade secret prosecution.” In its plea, UMC admitted to hiring three individual defendants who accessed confidential information from the victim company, Micron Technology, allegedly for the benefit of Fujian Jinhua. Among other things, these individuals used “off network” laptops to access Micron confidential information without detection by the UMC IT Department and, when Taiwan authorities searched UMC’s offices, asked another employee to hide papers, notes, USB drives, phones, and laptops.

Then assistant attorney general John Demers called the case a “glaring example of the PRC’s ‘rob, replicate, and replace’ strategy, in which it robs a US institution of its intellectual capital, replicates the stolen technology, and then endeavours to replace the US institution on the Chinese and then global market”.

The DOJ’s November 2020 report also highlighted its efforts to combat “non-traditional collectors” of sensitive technical information for China, such as professors and researchers. The DOJ called academia “one of our most vulnerable sectors, because of its traditions of openness, and the importance of international exchanges to the free flow of ideas” and stated that some researchers “have deliberately deceived authorities about their ties to China” to obtain information for the benefit of China’s economy or military.

Accordingly, the China Initiative had resulted in charges against ten researchers for “fraud, false statements, tax [and] smuggling,” three of which had already resulted in convictions.

Future trade secret prosecutions ‘likely’

President Joe Biden’s administration [discontinued the use of the China Initiative name](#), and revised the focus of Chinese-related prosecutions away from academics as well as regulatory or process crimes. But with President Trump’s tough campaign talk towards China, as well as his re-election and continued [no-nonsense approach towards China](#), it seems quite likely that his DOJ will again make the prosecution of Chinese trade secret theft a top enforcement priority.

Indeed, others in President Trump’s announced cabinet are also staunch opponents of China, not least of whom is Senator Marco Rubio, who has been nominated for the ever-important position of secretary of state. In that regard, while in the US Senate, and while serving as vice chair of the Senate Intelligence Committee and member of the Foreign Relations Committee, Senator Rubio was “[considered a foreign policy hawk, \[who\] has been intensely critical of China](#). . .”

There is support for such a move on Capitol Hill as well: in February 2023, Senator Rick Scott introduced [the Protect America’s Innovation And Economic Security from CCP Act](#), designed to “codify the China Initiative and reinstate its effort to prevent spying by the Chinese Communist Party on US intellectual property and US academic institution”.

Accordingly, holders of trade secrets in the US can fairly anticipate that the Department of Justice will instruct its federal prosecutors and FBI colleagues to focus their energy and resources on overseas intellectual property theft—particularly those involving China—when President Trump returns to office in January. Time will tell if our prediction proves right, but this is one we feel pretty good about.

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Shook, Hardy & Bacon was selected as a 'Notable' firm in the inaugural [WIPR USA Trade Secrets Rankings 2024](#). Boutros was ranked as a 'Highly Recommended' individual due to his “continuing craft in the trade secrets space.”

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