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THE FIGHT AGAINST CHINA'S BRIBE MACHINE:
THE PITFALLS OF CONDUCTING US FOREIGN POLICY THROUGH THE COURTS

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The Fight Against China's Bribe Machine:

The Pitfalls of Conducting US Foreign Policy Through the Courts

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In 2012—following a surge of increased enforcement—a high-profile businessman went on CNBC to question whether the Foreign Corrupt Practices Act served American interests. “[Every other country goes into these places, and they do what they have to do.](#)” Donald J. Trump complained. If foreign firms could pay bribes for business, Trump mused, why did US law prevent American firms from doing so? Equally problematic, in Trump’s view, was the FCPA’s role in furthering America’s status as “policeman of the world.” “[Why are we prosecuting people to keep China honest?](#)” he demanded.

Nearly a decade later, Trump’s question has renewed relevance. Since taking office President Biden has formally designated foreign bribery—traditionally a regulatory and criminal issue—a national security one. Combating overseas corruption, Biden recently declared, “is not just good governance. It is self-defense.” At the G7 this past June, Biden successfully enlisted key allies to declare that corruption threatens the stability and security of societies and to pledge strengthened multilateral efforts to “deny safe haven to corrupt individuals” and their ill-gotten gains.

These statements reflect a set of values that the Biden Administration is eager to showcase in the wake of the Trump era. Yet they also highlight an increasingly bipartisan foreign policy focus: the global competition over infrastructure. Earlier this year, Senators Ben Cardin, a Democrat, and Roger Wicker, a Republican, wrote that “The FCPA represents America’s commitment never to export corruption abroad. This draws a stark contrast with kleptocratic powers like China, a nation that exports corruption skillfully and aggressively through its Belt and Road Initiative” (BRI).

Indeed, few developments better explain the US’ newfound focus on foreign bribery than the BRI. With enormous capacity and capital, China now threatens to dominate the global race for ports, railways, and telecommunications networks throughout the globe—a feat accomplished, critics submit, by [enriching foreign leaders in the short term](#) at [the expense of their citizens in the long term](#).

There are two main ways for the US and its partners to push back. One is to outshine the BRI by offering more attractive and equitable infrastructure investments, as the G7 promised to do. In the short term, however, the US is pursuing a second strategy: level the playing field by criminally prosecuting Chinese actors who compete unfairly. Highlighted by the Trump Justice Department in 2018 under the label of the “China Initiative,” these varied prosecutions and investigations—[at least 2,000 to date](#)—

present a new front in the nation's complex competition with its largest trading partner and strategic rival. But whereas historical China-related prosecutions have focused on hacking, economic espionage, and intellectual property theft, the China Initiative stands to transform this approach via its mandate to identify bribery cases involving "Chinese companies that compete with American businesses."

How We Got Here: Changing Aims and Opportunities for US Foreign Bribery Enforcement

The FCPA was created during the Cold War as an instrument of self-regulation. First passed in 1977, the law reflected, among other things, Congressional concern that America's image abroad was undermined by the specter of "corrupt capitalism." In short, regulating the conduct of American firms was an original focus of anti-bribery enforcement; policing Soviet activity was not. Some of those historical motivations may continue to inform the Biden Administration's emphasis on foreign bribery enforcement. But in other aspects, the game has changed.

First, whereas the US and USSR directly competed for influence via foreign aid and military assistance, the US-China competition now also unfolds indirectly via the private sector. Second, the US and Chinese economies are far more intertwined; many Chinese firms issue securities, maintain offices, operate subsidiaries, and process payments in the US. Third, post-Cold War changes to the FCPA expanded its extraterritorial reach to foreign entities whose illegal conduct only tangentially touches US territory – enabling prosecutors to either charge FCPA violations directly, or employ other statutes often implicated by bribery (such as money laundering). Prosecuting Chinese actors this way generates obstacles—in particular, the near-impossibility of obtaining evidence or extradition from China—but the DOJ has often overcome such roadblocks.

Take, for example, the recent prosecution of Chi Ping "Patrick" Ho. Ho led the nonprofit arm of a Chinese energy conglomerate known as CEFC, [a position that enabled him to pitch the virtues of the BRI at the United Nations and elsewhere](#). Behind the scenes, Ho was also attempting to orchestrate geostrategic coups for Beijing by paying bribes masked as "donations" to Chadian and Ugandan officials in exchange for access to oil. But Ho made a fatal blunder that ultimately [landed him in handcuffs at John F. Kennedy International Airport](#). By maintaining a US physical footprint and employing US banks to transmit funds, Ho exposed himself to a litany of FCPA and money laundering charges. The ensuing trial and conviction enabled the Justice Department to disrupt a key BRI-aligned bribery scheme, dealing a blow to the credibility of the BRI and leading to the eventual dissolution of CEFC.

The Government's Case: Benefits of Bringing China to Court

Combating Chinese bribery via criminal enforcement—as opposed to political channels—appears advantageous for the US. Chinese executives operating under Beijing's protection may not especially fear Treasury-imposed sanctions or civil penalties sought by the SEC. The prospect of prison time is different. Those executives—and their companies—will face a choice: refrain from bribery, or avoid American jurisdiction entirely.

The rub is that it is the very intertwining of US and Chinese economies that makes this last choice difficult. To avoid the risk of prosecution, Chinese firms may choose to forgo issuing securities, maintaining US offices, and generally engaging American capital and consumer markets. A credible threat of FCPA enforcement effectively imposes a tax on Chinese bribery—and ensures that Chinese firms cannot reap the benefits of the US market while choosing to ignore its anti-bribery laws. But for many other Chinese entities, the prospect of “jurisdiction-proofing” is likely to prove too costly. These firms may be more likely to be deterred from engaging in foreign bribery altogether.

In addition to deterring or taxing the “supply-side” of Chinese bribery, BRI-focused enforcement may indirectly prevent its “demand-side” equivalent. While the FCPA does not address foreign officials who accept bribes, they may [still be vulnerable to prosecution for other offenses](#). And even if the DOJ is understandably reluctant to charge foreign officials, merely being mentioned in a federal indictment can create serious reputational costs for foreign governments. The Ho case, for example, provoked a political scandal in both Chad and Uganda—one that other state leaders are undoubtedly keen to avoid. Each successive bribery expose makes foreign officials more likely to rebuff Chinese bribes for fear of being named in the next indictment. Beyond that, aggressive FCPA enforcement may spur overseas regulators to raise their game. Foreign law enforcement will be faced with an ultimatum: police BRI bribery, or the Justice Department will.

Not Without Risks

Injecting the US-China competition into the courtroom raises a number of concerns. Most obvious is the prospect of retaliatory prosecutions. Whereas Chinese citizens in the US generally enjoy the protection of an independent judiciary, their American counterparts have less protection against spurious retaliatory prosecutions in China. One need only look at China’s response to Canada’s arrest of a Huawei executive. In that case, two Canadians ended up in Chinese jail for [unspecified charges of “espionage”](#), prompting an outcry over the use of arrests as bargaining chips.

Another important risk relates to the impartiality and independence of the US justice system. While presidents have long directed federal prosecutors to pursue certain offenses (say, drug trafficking), the China Initiative creeps into the sensitive area of offender identity. Human rights advocates have already raised concerns that the China Initiative may inadvertently stigmatize Asian-Americans. China, in turn, exploits these sentiments to cast doubt on the fairness of the US justice system. Chinese state media complained in the *Ho* case that the charged conduct had nothing to do with the US—and suggested that the prosecution had only been brought to “[head off a perceived threat to \[American\] hegemony](#).” Finally, too strong an emphasis on prosecuting Chinese entities may enable defendants to make claims of unconstitutional prosecution.

The China Initiative also creates difficulty with allies. Specifically, Article V of the [1997 OECD Convention on Combating Bribery](#), of which the US is a party, explicitly prohibits the “considerations of national economic interest...or the identity of the natural or legal persons involved” in bribery enforcement. Indeed, the China Initiative has [already raised the eyebrows of OECD monitors in a recent report](#). But even if the OECD reluctantly accepts the China Initiative, other countries may not. Foreign nations may

begin to view China-related arrest or legal assistance requests as politically motivated, posing difficulties for legal assistance and extradition efforts.

Bribery prosecutions can also generate unwanted publicity. National security-related prosecutions may expose sensitive sources and methods, and foreign partners may become wary of furnishing future assistance. On the flip side, there are diplomatic dangers in publicly accusing foreign officials of criminal conduct. The Ho case is again emblematic. Chad—a key US security partner—blasted the US for unleashing what it called a [“fierce attack against our head of state”](#) in alleging that Ho had attempted to bribe its President. Even officials not directly implicated in Chinese bribery schemes may be wary of cooperating with the US for fear of appearing subservient. The natural reaction to the China Initiative, in short, may be for many countries targeted with BRI bribes to take more sophisticated steps to conceal them, rather than cooperate with the US to expose them.

Doing It Right

These risks, however, can be mitigated. If the Biden Administration is intent on making Chinese bribery a focal point of its foreign policy agenda, it should build in safeguards to seek to protect prosecutorial impartiality, reduce damage to international partnerships, and preempt Chinese retaliatory prosecutions.

In the first instance, the US needs to forcefully reaffirm the separation between law enforcement and politics—a line that was tested during the Trump years. In particular, Trump took the extraordinary step of [dangling a detained Chinese executive](#) as leverage in trade negotiations. The Biden Administration ought to clearly reject that approach. It should ensure that other federal agencies adopt the posture of the DOJ and implement a gag order prohibiting officials from commenting on enforcement matters. Doing so will help assuage concerns that federal prosecutions are serving as a front for White House political objectives.

Meanwhile the DOJ, which has long operated on uncodified norms of prosecutorial independence, should build in more formalized safeguards, [as Attorney General Garland has already begun to do](#). It should also clarify how the China Initiative functions. There is a key difference between allocating more resources to foreign bribery (which is wholly legitimate), and directing prosecutors to selectively pursue cases with Chinese links (which is not). Finally, the DOJ and SEC should continue their efforts to ensure the FCPA is robustly enforced against Americans. Doing so not only demonstrates the leadership by example that Biden seeks – it also undermines claims of selective prosecution against foreign companies.

Relatedly, the Biden Administration must acknowledge that policing overseas bribes is liable to generate resentment over purported American interference. To preempt blowback, the US should make enforcement more multilateral. While partnering with Chinese regulators is an unlikely prospect, the US should continue to seek out cooperation from other foreign partners. Most importantly, the US must be willing to step back when local prosecutors are willing to step up. Where countries are willing to make good-faith efforts to prosecute Chinese bribery within their own borders, the US should support local

efforts—rather than haul prized cases off to faraway American courtrooms in support of the China Initiative.

Ultimately, the Biden Administration needs to weigh whether and when American courts ought to be employed to solve what is chiefly a foreign policy problem. It may be the case that diplomatic olive branches—rather than prosecutorial arrows—are more effective in encouraging foreign leaders to reject BRI bribes. Bringing China to court may blunt some corruption, but it will not address its underlying causes and enablers. For that, the Biden Administration will need to look beyond law enforcement. It will need to continue its efforts to lobby foreign partners to crack down on corruption. It will need to help strengthen the rule of law in countries vulnerable to bribery solicitation. And in the long term, it will need to convince Beijing that the cost of turning a blind eye to its firms' overseas activities exceeds any benefits—and move closer to a world in which Chinese firms will be held accountable by Beijing, not Washington.