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The Chinese Party-State's Use of Asymmetric Lawfare to Suppress History

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Congressman Smith, Senator Merkley, Honorable Members of the Commission, thank you for the invitation to appear before you today.

I am a legal scholar specializing in the inter-relationship of international, foreign, and U.S. law. In recent years, I have focused my research on studying U.S.-China relations in the international law sphere, but also in the realm of domestic litigation in the Chinese and American legal systems.

Overview

My remarks today will focus on the way in which the Chinese party-state has used tactics that take advantage of the weaknesses of its own court system and the strengths of the U.S. court system to advance its ideological goal of suppressing evidence and narratives about its own history. In particular, I will explain how the ongoing litigation over Stanford University's possession of the personal diaries of one of Mao Zedong's secretaries illustrates how the U.S. legal system can be manipulated by the "lawfare" tactics of the Chinese party-state. This type of what I call "asymmetric lawfare" takes advantage of a fundamental difference between the Chinese and U.S. legal systems. The Chinese legal system is often subject to political control by the Chinese Communist Party while the U.S. legal system, for all of its faults, is committed to judicial independence, fairness to all litigants (including foreign citizens and corporations), and deference to foreign court judgments. This asymmetry allows Chinese interests to gain substantial advantages in their domestic legal system, while the U.S. legal system affords Chinese interests wide-ranging and generous legal and constitutional protections. In addition to the Stanford case, I will also discuss other examples of this asymmetric lawfare in cases brought by Huawei, TikTok and others. I conclude by offering recommendations for ways to limit the impact of these asymmetric lawfare tactics in U.S. courts.

Chinese Lawfare in U.S. Courts

I define lawfare as the strategic use of legal systems and institutions to achieve military or political objectives.¹ This concept involves leveraging legal mechanisms to damage or delegitimize an opponent, often by imposing legal and financial burdens through litigation or other legal actions.

In the United States, the concept was initially used to describe efforts to use law to undermine U.S. efforts in the war on terrorism.² But China's People's Liberation Army (PLA) has long used "lawfare", along with public opinion warfare and psychological warfare, as an essential component of its Three Warfares strategic doctrine. It has been described by Chinese sources as using legal arguments to assert that one's own side is obeying the law while criticizing the opponent for violating it.³ Lawfare aims to demoralize the PLA's enemies through legal means, constrain their actions, and seize the political initiative. The instruments of lawfare include all forms of Chinese domestic law as well as international law. But in recent years, Chinese entities have shown lawfare can also use the U.S. legal system as well.

For instance, certain Chinese companies and individuals have filed lawsuits against Chinese nationals residing in the U.S. that purportedly involve commercial disputes, but seem to be motivated by efforts to achieve Chinese government objectives. Commercial lawsuits filed against Chinese nationals wanted for alleged bribery or corruption in China appear to be efforts to harass those Chinese individuals and pressure them to return to China.⁴ Similar lawsuits appear to have been used against Chinese dissidents living in the U.S.⁵ All of these lawsuits share similar characteristics: an entity officially unrelated to the Chinese government or CCP files the lawsuit, the Chinese plaintiff is typically represented by a well-known high-reputation U.S. law firm, and the lawsuit almost never gets past the initial discovery stage but imposes significant costs on the defendants. Thus far, none of these lawsuits appear to actually resulted in a favorable judgment for the Chinese plaintiffs, but at least one lawsuit may have played a role in pressuring a Chinese national to return to China.⁶

In a related way, Chinese companies have not been shy to invoke the full range of international and U.S. constitutional protections to defend against U.S. government policies aimed at reducing the risk of Chinese government influence on U.S. public opinion. In 2019, the Department of

¹ See Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare*, 106 CORNELL L. REV. 1085, 1097 (2021).

² See Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21ST CENTURY CONFLICTS* 4 (Nov. 29, 2001).

³ Han Yanrong, "Legal Warfare: Military Legal Work's High Ground: An Interview with Chinese Politics and Law University Military Legal Research Center Special Researcher Xun Dandong," *Legal Daily* (PRC), February 12, 2006, cited in Dean Cheng, "Winning Without Fighting: Chinese Legal Warfare", The Heritage Foundation (May 21, 2012), <https://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare>.

⁴ Aruna Viswanatha and Kate O'Keefe, "China's Corruption Crackdown Snares Thousands of Fugitives in California," *WALL ST. J.* (July 29, 2020), <https://www.wsj.com/articles/china-corruption-president-xi-communist-party-fugitives-california-lawsuits-us-courts-11596032112>.

⁵ *Id.*

⁶ Aruna Viswanatha and Kate O'Keefe, "China's New Tool to Chase Down Fugitives: American Courts," *WALL ST. J.* (July 29, 2020), <https://www.wsj.com/articles/china-corruption-president-xi-communist-party-fugitives-california-lawsuits-us-courts-11596032112>.

Justice (DOJ) charged Huawei and its subsidiaries with racketeering conspiracy and conspiracy to steal trade secrets, alleging that Huawei engaged in a long-running scheme to misappropriate intellectual property from U.S. companies.⁷

Huawei's defense to this lawsuit illustrates how the U.S. legal system's openness and fairness to foreign defendants can benefit the Chinese party-state's lawfare goals. First, Huawei retained James Cole, an attorney at the global law firm of Sidley, who had also served as deputy Attorney General during the Obama administration.⁸ Although Cole was later forced off the case after a motion by the Justice Department, the ability of Huawei to retain the highest quality legal representation has benefited its defense.⁹ Relatedly, Huawei itself sued the U.S. government alleging a federal law banning Huawei from use by federal government agencies violated the U.S. Constitution's bill of attainder clause as well as its constitutional due process and administrative process rights.¹⁰ The Department of Justice also alleged in a subsequent case that Chinese party-state related intelligence agencies attempted to bribe employees in the U.S. Attorney's office prosecuting the Huawei case in order to gain information on the prosecution.¹¹ Although the party-state's alleged spying failed, and Huawei's arguments were eventually rejected by a federal appeals court,¹² the ability of Chinese entities that are likely affiliated to the Chinese Communist Party or the Chinese government to marshal high-priced legal talent to deploy creative constitutional arguments could serve as a deterrent to future U.S. government actions against Huawei and other Chinese companies. The Huawei case is scheduled for a trial in January 2026, seven years after the initial indictment.¹³

In a similar way, TikTok USA has also launched an all-out legal battle against a recently passed federal law requiring it divest itself of its Chinese owner ByteDance. It has invoked the First Amendment's Free Speech Clause as its primary defense to enforcing the federal divestment law, and has even managed to rally political and legal support from unaffiliated U.S. free speech advocates.¹⁴

Neither Huawei nor Tiktok have violated any laws in using all possible legal means to defend themselves in U.S. courts. Their ability to do so is a testament to the U.S. legal system's commitment to protect the rights of foreign as well as U.S. companies. But the openness and

⁷ David E. Sanger, Katie Benner and Matthew Goldstein, "Huawei and Top Executive Face Criminal Charges in the U.S.", N.Y. TIMES (January 28, 2019), <https://www.nytimes.com/2019/01/28/us/politics/meng-wanzhou-huawei-iran.html>.

⁸ Paul Mozur, Huawei Hires Former Obama Cybersecurity Official as Lawyer, N.Y. Times (May 10, 2019), <https://www.nytimes.com/2019/05/10/business/huawei-lawyer-james-cole.html>.

⁹ See *United States v. Huawei Techs. Co.*, 18-CR-457 (S-2) (AMD) (E.D.N.Y. Dec. 3, 2019)

¹⁰ See Joanna R. Lampe, Coordinator, Legislative Attorney, Congressional Research Service, *Huawei v. United States: The Bill of Attainder Clause and Huawei's Lawsuit Against the United States* 1 (2019).

¹¹ Alison Durkee, "DOJ Charges Alleged Chinese Intelligence Officers With Trying to Interfere With Huawei Prosecution", FORBES (Oct. 24, 2022), <https://www.forbes.com/sites/alisondurkee/2022/10/24/doj-charges-alleged-chinese-intelligence-officers-with-trying-to-interfere-with-huawei-prosecution/>.

¹² *Huawei Techs. U.S., Inc. v. Fed. Comm'n's Comm'n*, 2 F.4th 421 (5th Cir. 2021).

¹³ Reuters, "China's Huawei Technologies Seeks Dismissal of U.S. Criminal Charges" (Nov. 11, 2024), <https://www.reuters.com/default/chinas-huawei-technologies-seeks-dismissal-us-criminal-charges-2024-11-11/>.

¹⁴ Bobby Allyn, "TikTok Challenges U.S. Ban in Court, Calling it Unconstitutional", NPR, May 7, 2024, <https://www.npr.org/2024/05/07/1246532784/tiktok-ban-us-court-biden-congress>.

fairness of the U.S. legal system (especially when compared with China's legal system), allows the possible success of lawfare tactics to delay or obstruct U.S. national security goals.

Stanford University v. Zhang: Asymmetric Lawfare in Practice

The litigation over the ownership of the personal diaries of Li Rui (李锐), a former personal secretary to Mao Zedong and, in his later life, a prominent critic of the Chinese Communist Party, illustrates another type of Chinese lawfare. In what I call asymmetric lawfare, Chinese interests leverage the weak and politically manipulable Chinese court system to gain advantages in an open and fair-minded U.S. court system.

Li, through his daughter, had agreed to donate his personal diaries to the Hoover Institute for War and Peace at Stanford University. After Li Rui's death in 2019, however, his widow Zhang Yuzhen (张玉珍) filed a lawsuit in a Beijing court claiming ownership of the diaries. She argued that the documents contained deeply personal information and that Li intended for her to decide which documents would be made public. The Beijing court ruled in her favor, awarding her ownership of the archives and ordering Stanford to return them.¹⁵

Stanford argues that it was never given adequate judicial notice of the Chinese court proceedings, and even when it tried to appear in the Chinese court, it was denied. Thus, despite its best efforts, Stanford was not able to contest its rights in China, and is now under a Chinese court order requiring it to turn over the diaries to Zhang.

To its credit, Stanford is fighting back. It filed a "quiet title claim" in U.S. federal court to affirm its right to the diaries arguing the Li donation was proper, and that the Chinese court judgment should not be enforced in the U.S. due to the unfairness of the Chinese court proceeding.¹⁶ Zhang counterclaimed, alleging copyright infringement and public disclosure of private facts, among other issues. So far, the U.S. trial court has allowed some of Zhang's claims to proceed while dismissing other claims. The trial court is currently considering the parties' trial briefs and will issue a judgment soon.

This litigation is significant in at least two ways. First, it illustrates how the Chinese party-state is willing to use lawfare techniques in the U.S. for ideological purposes as opposed to seeking to harass political opponents or wanted ex-government officials. It is not hard to imagine future uses of lawfare in U.S. courts to challenge title to other important historical archives of Chinese Communist Party history, such as those held at Harvard's Yenching Library. Or lawsuits to delay or suppress artwork displays in the U.S. that criticize Chinese leaders.¹⁷

¹⁵ Guo Rui, "Widow of Mao Zedong's Secretary Li Rui Sues in Chinese Court to Demand Return of Diaries from Stanford University," *South China Morning Post*, April 25, 2019.

¹⁶ U.S. District Court for the Northern District of California Oakland Division, "The Board of Trustees of the Leland Stanford Junior University, Plaintiff, vs. Zhang Yuzhen, et al, Defendants, Case No. 19-cv-02904 SBA, Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings," September 28, 2022.

¹⁷ Michael Finnegan, Did Chinese Spies Burn Anti-China Sculpture and Stalk Olympic Skater and Congressional Candidate?, *L.A. Times* (Mar. 18, 2022), <https://www.latimes.com/california/story/2022-03-18/did-chinese-spies-burn-anti-china-sculpture-and-stalk-olympic-skater-and-congressional-candidate>.

Second, the Li Rui litigation illustrates the effectiveness of asymmetric lawfare. The key to the Chinese party-state's strategy is to leverage its ability to easily generate favorable outcomes in the Chinese legal system to gain advantages in the U.S. legal system. Stanford was provided no official notice of the Chinese court proceeding, and then denied the ability to defend itself in that proceeding. This forced Stanford to initiate legal proceedings in the U.S. where it will have to overcome the traditional U.S. judicial doctrine that gives effect to foreign court judgments in most cases. Meanwhile, Li's widow has been given full due process rights and the opportunity to defend her case, and has been able to hire some of the most highly-rated (and expensive) attorneys in the U.S. to prosecute her case. Due to the elimination in most states of champerty law doctrines and weak third-party litigation disclosure rules, Zhang, who has incurred huge legal fees on a widow's Chinese state pension, does not have to disclose if any third party has helped foot her legal costs.¹⁸ Even if she does not prevail, the litigation (which has dragged on for nearly four years and has cost Stanford untold legal fees) is likely to deter other smaller archives and museums from acquiring items that are historically or politically sensitive in China.

This type of asymmetric lawfare was previewed by Huawei executive Meng Wanzhou's legal battle to block her extradition to the U.S. from Canada on bank fraud charges. While Meng used every part of both U.S. and Canadian law to contest her extradition – dragging out her extradition proceedings for years – the Chinese government arrested and held two Canadians and provided them with no due process or any other legal rights for over three years. The ability of the Chinese legal system to be used for what amounts to hostage-taking, while the Canadian system allowed Meng exquisite levels of due process, eventually forced the U.S. and Canada to release Meng without any real punishment in order to win the Canadian hostages' release. Less dramatic cases of asymmetric lawfare involve Chinese companies winning anti-suit injunctions in Chinese courts that block foreign companies from contesting Chinese claims to contested intellectual property rights. Because Chinese judicial standards for granting such injunctions is less onerous than in most foreign jurisdictions, it gives Chinese companies an ability to limit their exposure to claims of IP infringement, especially by foreign companies.¹⁹

Conclusion and Recommendations

There are no simple fixes to solve the problem of asymmetric lawfare by the Chinese party-state or any other nefarious foreign state actor. The strengths of the U.S. legal system - judicial independence, non-discrimination against foreign citizens and companies, comity and deference to foreign courts - are crucial to making the U.S. an ideal place to live, work and invest.

Still, U.S. policymakers might make some headway by enacting laws to expedite proceedings to dismiss efforts to enforce Chinese court judgments in the U.S. Current doctrine, which varies from state-to-state, generally places the burden on U.S. parties challenging enforcement to demonstrate fundamental unfairness in the Chinese court proceedings.²⁰ Congress or state legislatures could shift this burden to parties seeking to enforce Chinese court actions and even

¹⁸ John Pomfret, "The Diary Duel," *The Wire China*, September 26, 2021.

¹⁹ Alexandr Svetlicinii, Fali Xie, The anti-suit injunctions in patent litigation in China: what role for judicial self-restraint?, *Journal of Intellectual Property Law & Practice*, Volume 19, Issue 9, September 2024, Pages 734–742, <https://doi.org/10.1093/jiplp/jpae049>

²⁰ Courts may refuse to recognize a foreign judgment on a variety of grounds, including but not limited to public policy, unfairness, fraud, or lack of notice (Restatement (Fourth) of Foreign Relations Law § 484).

allow U.S. defendants expedited procedures for dismissing such actions. Congress could enact something similar to the SPEECH Act, which protects U.S. defendants from foreign defamation judgments that do not meet U.S. free speech standards.²¹ Such action could deter some of these asymmetric lawfare techniques, and since Chinese courts rarely enforce U.S. court judgments, U.S. companies would not be in a worse off position there than they are now.

Relatedly, policymakers could bolster disclosure rules for third-party litigation funding, especially for foreign plaintiffs. Current disclosure rules would allow foreign sovereigns, or foreign sovereign-affiliates like the CCP to fund litigation in the U.S. without anyone knowing.²² Changes to disclosure might take the form of amendments to the Foreign Agent Registration Act or other reforms to ensure that if the party-state is engaging in lawfare in U.S. courts, the rest of us will know about it.

Such actions are not a complete solution, but it is the right place to start. As the Li Rui litigation demonstrates, the Chinese party-state has many political objectives at odds with U.S. interests, including the suppression of narratives about its own history. Deterring or eliminating asymmetric lawfare will not end its pursuit of these political objectives, but it will be an important first start.

²¹ 28 U.S.C. §§ 4101–4105.

²² Institute for Legal Reform, “What You Need to Know About Third Party Litigation Funding”, Inst. for Legal Reform (June 7, 2024), <https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/>.