

United States Senate

January 6, 2023

The Honorable Merrick Garland
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530

The Honorable John Roberts
Chairman
Judicial Conference of the United States
1 First Street NE
Washington, DC 20543

Dear General Garland and Chief Justice Roberts,

I write to you out of grave concern about the growing threat to national security from foreign entities funding litigation in our nation's courts. Few safeguards exist in any form of law, rule, or regulation to prevent foreign adversaries from participating in civil litigation as an undisclosed third-party in our country's federal courtrooms –this resulting in our national security and our entire government being vulnerable to manipulation.

A recent report estimated that the United States maintains one of the largest worldwide third-party litigation funding markets, where foreign hedge funds, private equity funds, and even sovereign wealth funds closely connected to hostile governments finance civil lawsuits as an investment in a desired outcome.¹ Foreign funders bankrolling these suits exert varying degrees of control and influence regarding litigation strategy, often even sidelining the original plaintiff in a case, or a portfolio of cases, in which the funder has an interest. According to the Institute for Legal Reform, foreign litigation funding risks destabilizing our civil legal system, in part by “increasing the filing of questionable claims, deterring and prolonging settlement efforts, contravening longstanding ethical rules for attorney conduct, and compromising the sanctity of the attorney-client relationship.”²

The more pernicious threat is that hostile foreign governments or companies closely connected to them could use control of lawsuits in federal courtrooms to harm the United States' national security. The National Counterintelligence and Security Center has warned, for example, that

¹ Erica A. Moran and Theresa A. Griffin, *Considerations from the ABA's Best Practices for Litigation Funding*, THE NAT'L REV. (Feb. 16, 2021), <https://www.natlawreview.com/article/considerations-aba-s-best-practices-litigation-funding>.

² Institute for Legal Reform, U.S. Chamber of Commerce, *A New Threat: The National Security Risk of Third Party Litigation Funding*, Nov. 2022, <https://instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf>.

adversaries like the People’s Republic of China and the Russian Federation “use all instruments of national power to target the United States.”³ Our intelligence community recently concluded that China, in particular, “will remain the top threat to U.S. technological competitiveness as Beijing targets key technology sectors and proprietary commercial and military technology from U.S. and allied companies and research institutions associated with defense, energy, finance, and other sectors.”⁴ Given the relentless efforts by these adversaries, among others, in pursuit of their foreign policy goals, we should expect that litigation financing in our courtrooms is another dangerous weapon among their arsenal.

Merely by financing litigation in the United States against influential individuals, corporations, or highly sensitive sectors, a foreign actor can advance its strategic interests in the shadows since few disclosure requirements exist in jurisdictions across our country.⁵ Foreign entities, including adversaries, “can fund frivolous litigation to overwhelm U.S. courts, target lawsuits to weaken critical industries, or obtain confidential materials through the discovery process.”⁶ Depending on the scale of involvement, foreign entities could exploit disputes to drain the resources of American companies in key industries with national security implications or cause them significant reputational harm in ways that benefit companies in their home country. If, for example, a foreign entity finances multiple lawsuits impacting a particular industry, it could even “destabilize entire sectors of the U.S. economy that are vital to American national and economic security.”⁷ In addition, foreign entities could also access sensitive technologies and information by circumventing existing controls embedded in federal law, like those enforced by the Committee on Foreign Investment in the United States, that exist to protect our security interests.

As a member of the Judiciary Committee, I ask that the Department of Justice provide details about any course of action that has been taken to mitigate this threat. I also recommend that the Judicial Conference of the United States consider proactively providing guidance to courts from coast to coast as means of preventing foreign entities from hijacking our federal judiciary.

I understand that Congress may be forced to consider amending the Foreign Agents Registration Act—among other actions—to protect the integrity of our nation’s judicial system at the end of the day. Until that becomes necessary, I respectfully request a response to this inquiry no later than January 23, 2023 by contacting my Chief Counsel on the Judiciary Committee, Nathan Williams, at nathan_williams@kennedy.judiciary.gov.

³ *Id.*

⁴ Off. of the Dir. of Nat’l Intel., *Annual Threat Assessment of the U.S. Intelligence Community*, (Feb. 7, 2022), <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2022-Unclassified-Report.pdf>.

⁵ Only the District of New Jersey requires disclosure by “non-parties that provide non-recourse funding for attorneys’ fees and expenses.” Sara Merken, *Litigation Funders Howl as NJ Adopts Disclosure Requirement*, REUTERS (June 22, 2022), <https://www.reuters.com/legal/litigation/litigation-funders-howl-nj-adopts-disclosure-requirement-2021-06-22/>. This broad requirement is not limited though to foreign entities.

⁶ Donald J. Kochlan, *Keep Foreign Cash Out of U.S. Courts*, WALL ST. J. (Nov. 24, 2022), <https://www.wsj.com/articles/keep-foreign-cash-out-of-u-s-courts-litigation-courts-foreign-cash-profit-legal-reform-funder-lawsuit-money-1166922764>.

⁷ *Supra* note 2, at 12.

Sincerely,

A handwritten signature in blue ink that reads "John Kennedy". The signature is fluid and cursive, with a long horizontal stroke extending to the right from the end of the word "Kennedy".

John Kennedy
United States Senate