

# LAW IN POLITICAL TRANSITIONS: LESSONS FROM EAST ASIA AND THE ROAD AHEAD FOR CHINA

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## HEARING BEFORE THE CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA ONE HUNDRED NINTH CONGRESS FIRST SESSION JULY 26, 2005

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## **LAW IN POLITICAL TRANSITIONS: LESSONS FROM EAST ASIA AND THE ROAD AHEAD FOR CHINA**

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**TUESDAY, JULY 26, 2005**

CONGRESSIONAL-EXECUTIVE  
COMMISSION ON CHINA,  
*Washington, DC.*

The hearing was convened, pursuant to notice, at 1 p.m., in room 419, Dirksen Senate Office Building, Representative James A. Leach (Co-chairman of the Commission) presiding.

### **OPENING STATEMENT OF HON. JAMES A. LEACH, A U.S. REPRESENTATIVE FROM IOWA, CO-CHAIRMAN, CONGRES- SIONAL-EXECUTIVE COMMISSION ON CHINA**

Representative LEACH. The Commission will come to order. First, let me say, Senator Hagel is tied up, briefly, on the floor for a vote and he will be joining us in 5 to 10 minutes. The House has also scheduled votes that are about to commence very quickly, and there will be four, so it will take 40 minutes or so, so I will need to go and return.

But Senator Hagel has asked if I could commence the hearing, and we will begin with you, Madame Secretary.

Let me say, I have a sonorous opening statement that I would seek unanimous consent to put in the record. I see no dissenters, so without objection, it shall be entered.

We will turn to Secretary Birkle. Gretchen Birkle is Deputy Assistant Secretary in the State Department's Bureau of Democracy, Human Rights, and Labor. She comes to us with a background at the International Republican Institute, and I guess also within the office of Senator Arlen Specter, who we admire greatly. She has a degree from Johns Hopkins SAIS, which we respect greatly, and she is, as I am told, a Russian scholar, which I once aspired to be at SAIS and elsewhere. So, dobro'yden, Ms. Birkle.

Ms. BIRKLE. Dobry'den.

Representative LEACH. Please commence as you see fit.

[The prepared statement of Representative Leach appears in the appendix.]

**STATEMENT OF GRETCHEN BIRKLE, PRINCIPAL DEPUTY ASSISTANT SECRETARY, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, DEPARTMENT OF STATE, WASHINGTON, DC**

Ms. BIRKLE. Congressman Leach, thank you very much, and thank you for your commitment to this issue.

I am delighted to be here today to testify before the Congressional-Executive Commission on China. The theme of my testimony today, rule of law in China, is of great interest and importance to the State Department, especially the Bureau of Democracy, Human Rights, and Labor. Secretary Rice spoke about the rule of law during her recent visit to China on July 10.

I appreciate this opportunity to provide our assessment of the current rule of law and human rights situation in China.

Since the grim last days of the Cultural Revolution when courthouses and law schools were closed and a handful of leaders arbitrarily exercised power, China has made some progress toward modernizing the legal system.

Representative LEACH. Excuse me, if I could interrupt, briefly. I am very apologetic. The phone call I just received indicates that the votes have started. I think that, out of etiquette and with an open panel, that we might ask you to commence all over when Senator Hagel arrives.

Ms. BIRKLE. That is fine.

Representative LEACH. I think that makes more sense. I am very apologetic. We thought we could give 5 or 10 minutes into this, but we cannot. So, I, at this point, would call the Commission into recess. Then when Senator Hagel arrives, he will call us back to order. We expect this in 5 to 10 minutes.

Ms. BIRKLE. Fine.

Representative LEACH. I am awfully apologetic, for such a distinguished witness, to be confronted with one, and then none.

Ms. BIRKLE. No problem.

Representative LEACH. The Commission stands in recess.

[Whereupon, at 1:07 p.m. the hearing was recessed.]

AFTER RECESS [1:58 P.M.]

Representative LEACH. The Commission will reconvene.

Let me express my apologies to the Secretary. We are like Pavlov's dog, we respond to bells and lights around here. The Senator is also detained for comparable reasons, and I am very apologetic for it.

At this point, I think it would be best if we commenced from the start, if that is all right. Of course, without objection, your full statement will be placed in the record and you can proceed as you see fit.

Please proceed.

**STATEMENT OF GRETCHEN BIRKLE, PRINCIPAL DEPUTY ASSISTANT SECRETARY, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, DEPARTMENT OF STATE, WASHINGTON, DC**

Ms. BIRKLE. Thank you. Again, thank you for your commitment to this issue.

The theme of my testimony today, the rule of law in China, is of great interest and importance to the State Department, especially the Bureau of Democracy, Human Rights, and Labor.

Since the grim last days of the Cultural Revolution when courthouses and law schools were closed and a handful of leaders arbitrarily exercised power, China has made some progress toward modernizing the legal system, but progress toward rule of law has been limited. A society living under the rule of law means more than laws on the books and open courthouses.

It requires independent institutions capable of dispensing justice fairly, transparently, and consistently, and it requires political leaders willing to submit themselves and their authority to the law, just as all other citizens.

China has passed laws, opened law schools, established examination requirements for judges, and expanded legal aid. However, these changes are not enough. These kinds of actions must be followed by the creation of an independent judiciary.

Chinese authorities use the law to rule. Human rights defenders, democracy activists, and those expressing views that challenge the Party's control are often convicted and jailed on trumped up charges. The case of Uighur businesswoman and activist Rebiya Kadeer is illustrative of the Chinese Government's use of the law to repress those perceived as a threat to power.

China's use of the law to repress is not limited to members of any one group. In another example, Hada, an ethnic Mongolian, has been in prison since 1995 for his peaceful political activities, including writing articles and books on political theory and Mongolian language and culture.

The Chinese Government has also used the legal system to control and regulate religious and spiritual activities. For instance, in October 2003, Beijing-based house church leader Christian Liu Fenggang was detained in Zhejiang Province, while conducting an investigation into reports of church demolitions and the detention of religious leaders. In August 2004, Liu was convicted on charges of disclosing state secrets and sentenced to three years in prison.

Ms. Kadeer, Mr. Hada, and Mr. Liu's cases are three prominent examples of the Chinese Government's use of the legal system to restrict freedom of expression and those it feels threatened by. In China, law is an instrument of the government, but not yet a mechanism to protect the people.

Freedom and legal reforms are urgently needed in China, and wanted by the Chinese people. Last month, international media reported on a land dispute between peasants and local officials in Shengyou village, Hebei Province. According to media reports, when the peasants of Shengyou village defied orders to surrender their land to local officials, the officials hired hundreds of armed men to attack the villages. A violent clash resulted that left six farmers dead and as many as 100 others seriously injured.

On June 3, there was also a labor incident in Guangdong Province involving several hundred anti-riot police firing tear gas into a group of 3,000 workers. As the workers pelted cars and buses with rocks and bricks, they chanted demands for higher pay. The workers, lacking independent labor representatives or a means to resolve a compensation dispute, turn to protests.

China has experienced tremendous economic progress over the past 20 years, but to achieve sustainable internal development and integration into the international community, we encourage China to develop a legal system that protects property rights and that Chinese citizens trust and use to resolve disputes.

There are signs, however, that Chinese citizens' rights consciousness is increasing, and they increasingly expect the legal system to provide justice. Several stories of wrongful executions of individuals whose trials did not meet international human rights standards resulted in a public outcry on the need for reform of China's criminal justice system.

Yet, the problems are manifest. Many defendants have been tried without adequate legal representation. Same-day executions, which do not allow for full due process, are not uncommon, though some in government recognize the need for a more deliberative review process. Coerced confessions, lack of defense counsel, law enforcement manipulation of procedural rules, pervasive presumption of guilt by law enforcers, judges, and the public, and extra-judicial influences on courts continue to undermine the fairness and credibility of the criminal process in China.

Equally troubling is the intimidation, detention, and arrest of those seeking to use the law to secure the freedom of Chinese citizens. Defense lawyers in China are coming under increasing pressure, especially those who use the legal system to protect the rights of fellow citizens. Lawyers representing activists, journalists, Falun Gong practitioners, and others perceived to be a threat to the government have been harassed, intimidated, and detained.

In March 2004, the National People's Congress amended China's Constitution to include the protection of human rights. While the passage of this amendment is welcome news, it will only become truly meaningful and effective if it results in genuine reform and protection of the rights of the people.

President Bush has made the promotion of freedom and democracy the cornerstone of U.S. foreign policy. This principle guides decisions about the character of our foreign assistance and allocation of resources.

Through a Congressional appropriation, the State Department is funding rule of law programs. We are actively engaged in promoting the rule of law in China through dialogue, programs, and multilateral fora.

As the President said, we must help other countries "build free institutions that will protect their liberty and extend it to future generations." We take seriously our responsibility toward individuals seeking to secure their inalienable rights. We also encourage China to exercise a responsible role, especially with regard to fundamental human freedoms, as it takes on a more global role.

This year, we are programming \$19 million to promote rule of law, civil society, human rights, and democracy in China. The



projects we fund assistant Chinese men and women who want to promote reforms that will lead to near-term results, while laying the foundation for a long-term structural political transformation. These programs address some of the most serious human rights concerns, including the need for due process, the harassment and detention of criminal defense lawyers, and the need to reform the reeducation-through-labor system. We support projects to train judges, prosecutors, and lawyers in the use of oral advocacy skills, ethics, and judicial independence. These training programs seek not only to build skills, but also to engage members of China's legal community in reforming their legal system.

Through programs such as these, judges, prosecutors, and lawyers learn about other legal systems, which can serve as a model for legal reforms. We need to continue engaging legal practitioners because the future direction of legal reform in China will be determined largely by them.

A strong civil society is indispensable for a key part of a nation governed by the rule of law. To this end, we are also supporting projects to help non-governmental organizations become effective advocates for their communities by training them in advocacy skills and project management.

The State Department is also committed to raising human rights concerns in bilateral and multilateral settings. Through bilateral pressure, we were able to secure the release of Rebiya Kadeer and gain China's agreement to take several positive steps, including giving prisoners convicted of political crimes the same rights of sentence reductions and paroles that are available to other prisoners.

We will continue to raise concern about the lack of democracy and respect for human rights directly with Chinese leaders and in public comments. During Secretary Rice's most recent trip, she raised human rights concerns, including specific cases with Chinese leaders.

We will not shy away from pressing our human rights concerns and urging the Chinese Government to implement structural reforms. Chinese citizens themselves have spoken out about the need for the rule of law. By lending our voice and our support, we can help their voices resonate. As President Bush said in his second inaugural address, our goal is "to help others find their own voice, to attain their own freedom, and to make their own way."

Congressman Leach, thank you for your commitment to this goal and your work with us as we promote our policy toward China.

I would be happy to take your questions.

[The prepared statement of Ms. Birkle appears in the appendix.]

Representative LEACH. Well, first, let me thank you for a thoughtful summary of the State Department position and your personal commitment to these issues.

May I just ask a couple of brief questions? Just in terms of measuring effectiveness, what kind of capacity do you have to assess the effectiveness of your programs? I mean, one of the great problems we have had in so many areas of foreign aid involving economic building projects, is to assess, after the fact, what has happened. It is more ethereal in idea areas such as rule of law programs.

Do you have a sense that what you are doing is helpful and appreciated or do you have a sense that it is resented and counter-productive? Do you have a way of measuring?

Ms. BIRKLE. Yes. Thank you. The Department, and my Bureau in particular, places very stringent reporting requirements on our grantees so we can assess and measure the accomplishments of our programs. Just as in the technical background, grantees are required to submit both long-term and short-term objectives, and we hold them to a very rigorous review process on a quarterly basis to ensure that they are meeting each of these objectives.

You raise very good points. It is an exceptionally challenging environment in which to do programming. I am convinced, however, particularly in this current environment where there is some political space, there is some opening in legal reforms, now is our time to be engaged on these issues. There are people in China who want to see legal reform, and we are reaching out to them. In that sense, I think we are also very effective.

Representative LEACH. As you know, most societies prefer to do things on their own, but there is probably no society that has that sense more than China. So, sometimes even when an outsider says something that might be right, it can cause friction. Do you have that sense with the rule of law initiatives?

Ms. BIRKLE. I do not. My sense is that our program participants and our interlocutors on the ground are open to learning about other systems and other ideas, and that they are actually thirsty for the information that we can convey to them. I do not sense a sense of friction.

Representative LEACH. We have two areas of law. One, is definitive. That is, societies have some levels of internal order, and that is domestic law. Then the other area of law is less definitive, particularly in enforcement in the international arena. For the sake of civilization, we want to build both, international and domestic.

Of particular relevance with regard to China, international law is everything concerning the fields of economics, trade, and commerce. But commercial law, in one sense, is domestic, but in another sense we have got all of these trade agreements and what we consider to be lack of compliance. Do you work in this area particularly, or is your emphasis more on the domestic side?

Ms. BIRKLE. It is more on the domestic side. There is another category, actually, which is international human rights law.

Representative LEACH. Of course.

Ms. BIRKLE. Which, of course, they are engaged with them on a regular bilateral basis with our human rights dialogue.

Representative LEACH. So your international emphasis is on human rights, not trade, and your domestic is on commercial, political, and environment. Would that be a fair way of describing it?

Ms. BIRKLE. Primarily, yes. We also do programming in public advocacy and in media transparency. In that sense, there is probably some way where we could address those issues as well. But primarily it is domestic.

Representative LEACH. When we think of environmental issues in this country, it is often fairly esoteric. At the risk of presumption, it is almost a set of class issues. That is, the upper classes are concerned about "green" things. In the rest of the world, it is

preeminently a lower class issue because the environment is not esoteric, it is pretty fundamental. It has everything to do with clean air, clean water, and disposal of waste that we look at kind of esoterically.

In eastern Europe, one has the sense that the environmental movement was one of the great movements that proved to be against the government in the Communist era. It took root, and the government could not hold it down. I have a sense that, in China, there is a much greater environmental activism going on than we would ever have suspected, and that this is kind of a freedom issue, as well as an environmental issue.

Is that your view of it?

Ms. BIRKLE. That is absolutely my view of it. I think it is—if it is the right word—a real opportunity there. I did not give the example of another recent protest in an industrial city where villagers refused the construction of yet another massively polluting plant in their city. It is a great area, with great promise, I think, to engage workers and human rights advocates on real fundamental issues that affect their daily life.

Representative LEACH. Yes. Well, thank you.

Madame Secretary, the circumstance is this. We are late, so I am going to ask for the second panel to come. I want to thank you very much, particularly on Senator Hagel's behalf.

One of the awkwardnesses, when you are a U.S. Senator, especially one who has been drinking from this fountain that says that one is a presidential candidate, you get people who suddenly take up your time in unexpected ways. I apologize. He hopes to make it, but may not be able to. But I will assure you that I will get your testimony to him.

I might say to the next group of witnesses, the panel is small, but we will distribute the information that you give us rather widely. So, we appreciate your testimony. Thank you.

Ms. BIRKLE. Thank you very much.

Representative LEACH. If I could ask the second panel to come up and take a seat, please.

The second panel consists of Professor Jerome A. Cohen, who is with the New York University Law School. He is an Adjunct Senior Fellow on Asia at the Council on Foreign Relations. He is also counsel to the distinguished law firm of Paul Weiss. Professor Cohen is a leading expert on the Chinese legal system and has published numerous books and articles on Chinese law.

With him is John Fuh-sheng Hsieh, who is Professor of Political Science at the University of South Carolina. By the way, one of my favorite anecdotes is that in America, virtually every state university has a department or two better than Harvard's. Your great institution, for example, the South Carolina International Business School, is number one in the country. So, you represent a distinguished state university, and I welcome you on those grounds, as well as on the grounds that you are a man of great reputation. Professor Hsieh has served as Secretary General of the Chinese Association of Political Science in Taipei. He has been Chairman of the Comparative Representation Electoral Systems Research Committee in the International Political Science Association. He has

written many books, and articles in scholarly journals, and we appreciate your presence today.

Our third witness is John Ohnesorge, who is Professor and Assistant Director of East Asian Legal Studies at the University of Wisconsin Law School, and is a fellow Midwesterner. We think that is a credential of fine proportions. Coming from the State of Iowa, we do not like everybody who wears your football uniform, but your academic departments we respect a great deal. The professor has practiced law in South Korea and he specializes in Korean law, comparative law, and economic development and the law. His recent publications include, "The Rule of Law and Economic Development in Development States of Northeast Asia," and several others that I will not mention at this time. Anyway, welcome, Professor.

Unless you have made prior arrangements, we will proceed in the order in which I have introduced you. Is that all right with the three of you?

[No response.]

Then we will begin with Mr. Cohen.

**STATEMENT OF JEROME A. COHEN, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY**

Mr. COHEN. Congressman Leach, our panel is delighted to see you. Your longstanding, intelligent interest in China is appreciated by those of us who labor in the vineyards of academe.

Representative LEACH. Well, thank you, sir.

Mr. COHEN. I just want to say that many of us believe that the rule of law in China is critical and its importance has been underestimated by the media. Every day, we read about China's great accomplishments economically, its importance politically, militarily, and diplomatically. But none of its ambitions, really, will be accomplished without a legal system commensurate with its goals.

China has made a lot of progress in the last 27 years since Deng Xiaoping unleashed the Reform and Opening Up Policy in 1978. I was in China at that time. If you looked for the indicia of a legal system, they were pretty hard to find. There were very few laws and regulations relevant to anything.

They were very poor legal institutions. The courts were a shambles. Prosecutors' offices had been abolished for 12 years, the legal profession for 20. Legal education was only beginning to recover from the Cultural Revolution. If you went into bookstores and looked for books on law, there often was not even a shelf that was relevant.

There has been a lot accomplished in the last 27 years. China now has an enormous amount of legislation, maybe too much. China has now adhered to the major multilateral agreements that affect law and business in China, and human rights, too. China has a host of bilateral agreements, whether you talk about taxation questions or protection of foreign investment against confiscation or other treatment of foreign nationals.

The courts have made some progress in China. Great efforts have been made by the Supreme People's Court to train a suitable number of judges. Prosecutors have been restored and they are making some progress. The legal profession now has about 120,000 lawyers, many of them very able.

Legal education is one of the growth industries—very prominent—in Chinese academic life, and legal publications are very available. There are over 90 law reviews, and a huge number of books. They have quality now. They are not just regurgitating what the previous writers said or what the government statute says. So, a lot has really been done.

The problem, as you know so well, is vast. You have got 1.4 billion people, a vast country, tremendous economic change. The very success of China economically has put enormous strains on the system. The pace of social change in China is very great.

The sense of injustice is growing among many of the people who are increasingly literate, educated, and open to the world. As was said by Ms. Birkle for the State Department in a very good presentation, rights consciousness has risen rapidly in China. This has posed an enormous problem for institutions generally, and especially legal institutions. If you do not want people protesting in the streets in China or rioting in the villages, then you have to have appropriate outlets for them. Yet the Chinese have not developed institutions, especially legal institutions, in which the populace can be generally confident. So that is a big problem. All this huge effort to create a legal system is paying off, but it is paying off at a pace that is rather slow. The legal system is constantly trying to play catch-up with the economic development of China, including its international business cooperation.

Now, there are a lot of problems, of course. The courts today, as was said earlier, are not independent institutions. You have about 200,000 judges who have to be trained. The educational level of these people has gone up dramatically. The courts were staffed largely by ex-military and police officers without legal, higher, or any education. The educational level now shows over half of the judges in China are university graduates, not always in law, but in something, and that helps a lot.

But you have almost an equal number of prosecutors to train. There are not enough lawyers. Only about 30 percent of the criminal cases, for example, are staffed by lawyers. China has a long way to go, as my perhaps-too-long paper demonstrates.

Nevertheless, it has done a lot. Business with China, between the United States and China, and between other foreign companies and countries and China, has been really promoted by the legal system. Business has also been an enormous stimulus to China's legal development.

Foreign investments and the development of capital markets have required a legal system in China. China's entry into the WTO is having profoundly important effects in improving the legal system. But it is all a process that is being played out.

The weakest link in the system is the criminal justice system. A country of China's accomplishments, magnitude, and desire for respect of the world deserves a much better criminal justice system than it has. The plight of defendants, suspects, and their lawyers is very dire.

Efforts are under way at the moment to revise the current criminal procedure law. But China is sort of stuck. On the one hand, the Chinese accept some of the principles of an adversary system. On the other hand, they are reluctant, really, to put them into effect.

So they have to make some fundamental decisions, including whether to put an end to the notorious administrative sanction of reeducation-through-labor, which allows the police to put somebody in a labor camp for three or four years without any prosecutorial participation, not to mention the approval of any court. That is a highly debated issue.

Many of these issues are hot issues that you, as a Congressman, would appreciate because the lobbying process in China is intense. The trouble is that it is hard to get agreement on many controversial questions. Should there be a right to silence? Should witnesses attend court so they can be cross-examined in criminal cases? Should defense lawyers no longer be subject to discrimination by holding them out for prosecution if they claim a different view of the evidence from that of the police and prosecutors? A lot of basic questions.

On the one hand, you have the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice, the Supreme Court, and the Procurator General's Office. They are vying with academic experts, members of the National People's Congress and the All China Lawyers Association. You can just imagine what a legislative lobbying stew this is when you have very controversial questions that involve the security of the country. So, it is hard to get further legislation, but it is coming.

One of the most interesting and important areas, and it was mentioned by Ms. Birkle, is there is now a kind of proto-constitutional law developing in China. They are just beginning to put flesh on the bones of many of the attractive slogans or principles in their Constitution. They are preparing to do it through the National People's Congress Standing Committee, not through a Supreme Court or a special constitutional court. But they are just getting to the point now, so many years after establishing their country, of making some machinery available for people who want to ask the National People's Congress, for example, is the regulation of the State Council with respect to anything that they happen to be regulating consistent with the Constitution?

People are beginning to get results. Not yet constitutional decisions, but by petitioning the National People's Congress. They have already prompted the State Council to cancel certain regulations that are not attractive.

So, this process is just getting under way. It is being fueled by not only international pressures, but, far more importantly, domestic pressures. That is where a lot of the human rights proposals are really coming from for the Chinese people.

At the same time, people are going to court. Even though, formally speaking, the courts are not authorized to make constitutional decisions, certainly not ones invalidating legislation or administrative regulations, the fact is that courts are taking in decisions gradually that, for example, are enforcing equal rights between men and women and between outsiders and insiders in various ways. Enforcement of anti-discrimination is coming to the courts, and the courts are trying to rise to that challenge. Even the Chinese Communist Party cannot ignore the new wave of rights consciousness.

There are 70 million Party members. Being thrown out the Party or given a lesser but still severe administrative sanction is a devastating blow to somebody's career. Nowadays, in most places in China, before that can be done you have to give the person against whom the action is to be taken notice of what it is he or she has done to offend Party discipline. You have got to give them a hearing, a right to defend themselves. They can have somebody who operates like a defense lawyer. They are entitled to bring witnesses. They can cross-examine the witnesses of the other side. In this respect, at least, it may be better than Chinese criminal courts!

But the point is, the idea of due process, of fairness, is catching on in China. If the Communist government is going to continue to be seen as legitimate by its people, and especially by the Party's own members, it has to start conforming to the demands of due process of law.

Now, finally, I want to congratulate the Commission on scheduling this hearing, particularly because I think the impact of Taiwan, and even South Korea, and what is taking place in China is significant, and can be more significant. On all the issues I have mentioned and many more, Taiwan has gone through relevant experience, and they are still going through this experience. Wisely or otherwise, they have decided to implement the adversary system rather than the original old-style European inquisitorial system that they put into effect under Chiang Kai-shek almost eight decades ago.

People in China need to know about this body of experience. My recommendation would be that this Commission consider proposing to the Congress that they include in their funding for the Department of State money for research on Taiwan's accomplishments and Taiwan's current struggle to develop a rule of law. You want to know about judicial independence? Taiwan has made remarkable progress in recent years in achieving judicial independence. You want to know about eliminating administrative punishments that challenge the criminal justice system? Taiwan is going through it today. There is so much we can learn from Taiwan.

We appreciate very much the funding that the Congress has given through the Department of State to those of us who work on Chinese law and train Chinese defense lawyers, judges, and prosecutors. But I would hope in the future you would include a recommendation that some funding go for research, not merely training, and research that includes what Taiwan's experience of the last 20 years has been. So, I thank you for the opportunity and hope there will be a chance to answer your questions.

[The prepared statement of Mr. Cohen appears in the appendix.]

Representative LEACH. Well, thank you for that thoughtful testimony.

I want to make a quick aside. You mentioned the rights of a person who gets thrown out of the Communist Party to try to stay in. I am reminded of Henry David Thoreau, who, in "Civil Disobedience," suggested that he wanted to sign off the membership rolls of any institution that he ever signed onto. So, those are two contrasting models, one wanting to stay in a party, one wanting to get out of anything.

Anyway, Professor Hsieh.

**STATEMENT OF JOHN FUH-SHENG HSIEH, PROFESSOR OF  
POLITICAL SCIENCE, UNIVERSITY OF SOUTH CAROLINA,  
COLUMBIA, SC**

Mr. HSIEH. Congressman Leach, my job today is to talk about the case of Taiwan and its implications for China.

The legal system in Taiwan has been shaped by several factors. For one thing, Taiwan is a Confucian society. In Confucian culture, stability is the paramount concern, and the moral examples set by superiors in interpersonal relationships are often considered more effective than legal codes in maintaining social and political order. Such an attitude has surely been significantly changed over the years as a result of exchanges between Taiwan and the outside world. However, there are still traces of Confucian culture in Taiwan.

For instance, in a series of nationwide surveys I have personally been involved, respondents were asked if they had to make a trade-off between, say, political reform and stability, which one they preferred. An overwhelming majority of respondents in Taiwan chose stability instead of political reform. This shows some legacy of Confucian culture on the island.

The first major change in Taiwan's legal system came with the Japanese in the late nineteenth and early twentieth century after Taiwan was ceded to Japan by the Qing Dynasty of China. The Japanese set up courts and brought in the Japanese legal codes as part of the colonial administration.

In 1949, when the Kuomintang [Nationalist Party, KMT] fled to Taiwan after being defeated by the Chinese Communists on the mainland, it also brought with it many laws it drafted but only partially implemented on the mainland. Indeed, many of these laws remain the backbone of Taiwan's current legal system, notably the Constitution, which was drafted in 1946 and took effect in 1947, the civil law effective in 1929 to 1931, and the criminal law effective from 1928.

To be sure, the first four decades of the KMT rule were not democratic, and the laws were often subject to the government's or the party's intervention. It was only after Taiwan became democratic that the independence of the judiciary has been better respected.

Yet, even today, instances of administrative intervention can be seen from time to time, and public officials may bypass or violate the laws, but cannot easily get away with that, showing that Taiwan's legal system has improved a great deal, but has not really lived up to the expectations.

How much did Taiwan's legal system contribute to its democratic transition? Probably not much. There are many other factors which may be more salient in Taiwan's democratization process.

For example, the popular support received by the opposition movement among the native Taiwanese as a result of their long exclusion from the political process was certainly a very important factor forcing the KMT Government, which was dominated by the minority mainlanders, to make concessions.

Other factors such as cultural change and the emergence of a civil society as a result of the remarkable economic development have all paved the way for reshaping Taiwan's political system.



The pressure from other countries, especially the United States, also, to some degree, facilitated Taiwan's political change.

Although the legal system may not directly contribute to Taiwan's democratic transition, it is undoubtedly a very important factor affecting the phase of democratic consolidation. Indeed, a sound legal system supported by an appropriate legal culture is one of the most important guarantees for the functioning of a liberal democracy.

Yes, Taiwan's legal system has greatly improved and its legal culture is now more in line with the Western notions of laws. Nevertheless, there is still room for improvement. For example, a lot of people, including many powerful politicians, may pay lip service to the notion of the rule of law, but it is doubtful how firmly rooted it is. Indeed, as these politicians act in clear violation of the laws, their acts may be dismissed as, say, election gimmicks or whatever, and forgotten quickly by the public. The recent stalemate in the political process between the executive and the legislative branches can also be partly attributed to the lack of true respect for laws on the part of many politicians in Taiwan.

Now, can Taiwan's experiences be exported to China? Probably not much, I think. The development in China, particularly since 1949, was very different from that in Taiwan. The infusion of Communism—or more precisely Maoist Communism—to a large extent, changed the very notion of laws and democracy.

Although Deng Xiaoping's reform revitalized some Western legal practices to serve the needs of economic reform and also to prevent the recurrence of the Cultural Revolution type of chaos, the country still has a long way to go before a well-functioning judicial system—not to mention a liberal democracy—can be established in China.

Thank you.

[The prepared statement of Mr. Hsieh appears in the appendix.] Representative LEACH. Thank you, Mr. Hsieh.

Professor Ohnesorge.

**STATEMENT OF JOHN K. OHNESORGE, PROFESSOR OF LAW,  
UNIVERSITY OF WISCONSIN SCHOOL OF LAW, MADISON, WI**

Mr. OHNESORGE. Thank you, Mr. Chairman. First of all, I would like to thank you, the Commission, and the Commission staff for inviting me here today to participate in this event.

I should say that, as a transplanted Minnesotan, I share your concerns about Bucky Badger and the dominance of the football team at Wisconsin. But I am not sure that makes you feel any better, because you may not feel any better about the Gophers than you do about the Badgers.

Turning to today's topic, which is Korea's experience of law and democratic transition, in my view the Korean experience gives us only limited cause for optimism when we imagine China's future.

Korea was essentially authoritarian from 1948 to 1987. And I should say, like Taiwan, since 1987, Korea has been undergoing a rapid transformation into a much more law governed society, and that process is well worth studying. But that is not the period I am focusing on here today. I share Jerry Cohen's interest in those post-transition developments in Korea as possible guideposts for China.

The authoritarian governments in Korea, however, abused human rights in ways reminiscent of what one hears about in China today. While I would never say that the abuses in Korea were of the scale that have taken place in China, the mechanisms under which they arose were sometimes quite similar. So the things that I will talk about here now would be familiar to anyone who has been paying attention to the law reform debates in China.

For example, due to the institutional weaknesses of the Korean courts, authoritarian Korea's various constitutions functioned more like policy statements than as fundamental law. They were changed by the executive branch at times and they really did not function as fundamental law because there was no court that was going to enforce them against the executive branch. Administrative law hardly functioned for decades, meaning that government agencies were very weakly constrained by judicial review. They were constrained perhaps internally through the laws that created them and governed them internally, but the courts, as a separate power to check them, really were not available using administrative law. Property rights were enshrined in the various constitutions and in the law, as is more and more the case in China today, but remained ultimately contingent upon maintaining political favor. So at times, when business groups got out of line in view of the government, they were destroyed by the government and their assets were redistributed.

The executive thus enjoyed enormous discretion when dealing with the private sector. And while such discretion was part of the authoritarian control system, it was also at the heart of the interventionist industrial policy which Korea practiced as it grew into an economic superpower. I should say that at times Americans who study economic development have been rather enamored of the discretion that the Korean state had to engage in industrial policy and planning, but it is a double-edged sword. The down side of unreviewable executive discretion is that it can be abused, of course, and I see similarities in China's case today. Some of the industrial policy tools that China engages in now are very similar to things that South Korea did, and I think they depend in some ways on a freedom of the executive from judicial control, which can be a serious problem.

With respect to civil society, the Korean Governments worked hard to neutralize organized labor by, among other things, demanding that unions belong to a single government-dominated federation. Other elements of civil society, such as religious groups or business interests, were also subject to severe pressures not to challenge the government's basic monopoly on power. The Korean CIA, an enormous organization relative to Korea's population, was a primary tool for this government penetration of civil society, insinuating itself into churches, unions, newspapers, student organizations and workplaces far beyond what I think most of us would understand as necessary. I say this even given the extremely serious security threat from North Korea, which I would not understate at all. The criminal law was another important tool of authoritarian control, with vaguely worded special statutes and special courts used to suppress dissent. Extra-legal means were also regularly

used to silence the government's critics, including, at times, torture and extra-legal detentions.

As I said at the outset, my reading of the Korean experience suggests to me that reform in China is going to be a very long, slow process. First of all, Korea's poor human rights record continued despite the fact that the country had become an economic powerhouse with an essentially capitalist economy. This suggests that even a very successful market economy cannot be relied upon to automatically unleash social forces potent enough to bring about democracy or the rule of law. In other words, I fear that this kind of authoritarian capitalism, which I think is where China is heading, or where certain people in China are trying to steer the country, may be a fairly stable system. Not everybody believes that, of course. There are arguments that, with economic growth and the growth of markets, you get social forces that demand the rule of law, demand democracy, and you get kind of a smooth, inevitable transition. I am less sanguine about that.

Nor is the technical development of law and legal institutions necessarily going to lead directly to the sorts of reforms that many hope for in China. In authoritarian Korea there was a technically complete, coherent system of law. Many students majored in law at university, and the few who became judges, prosecutors, or private practitioners were very well-educated and very talented. At various times some of Korea's legal professionals did resist authoritarianism, but most chose instead to work within a system that rewarded them very well, but demanded obedience.

A further cause for concern is that in Korea's case there were structural limits on the powers of the executive that are not present in the Chinese context, one of which was the relationship with the United States. To put it simply, China is truly sovereign in a way that Korea was not. Now, the influence of the United States on authoritarianism in Korea was a very complicated story, but there was at least a kind of constant pressure from the United States to perform better. In addition, although Korean dictators tried hard to suppress civil society, they faced obstacles that I do not think China faces. Korea's Christian churches, Catholic and Protestant, and often with support from churches in the United States, were pillars of resistance that the governments were never able to control, and the student movement was an active source of resistance for decades. Labor unions, likewise, fought to organize independent unions and maintained consistent pressure for democratization.

In China today, such forces seem weaker than they were in Korea, even at the height of its authoritarianism. If you go back and you read the history of the democracy movement in Korea, the churches were very much at the center of it and played a big role. The government tried its best to suppress them from time to time, but it was really difficult for the government to do that.

Despite these reasons for concern, there are also grounds for optimism. First, human rights, in many areas, can be improved within an authoritarian capitalist framework, which is where I think China is heading, and one could look at improvements to the criminal law, criminal procedure, and administrative law as the kinds of improvements to legal performance that may be consistent

still with authoritarianism, in a sense, but a law-governed authoritarianism. So not Maoism, not governance through ideological campaigns, or through unchecked discretion, but still at best a glass half full. It probably stops when it comes to the level of challenging government authority.

Second, globalization and new information technologies clearly make it much harder to control China's rising civil society than was the case in authoritarian Korea. Third, the international economic order now places demands upon national legal systems that are more exacting than the demands placed upon authoritarian Korea. China is more integrated into the international economic order than Korea was. Thus, while China pursues an industrial policy that is similar in some ways to what Korea did in its developmental era, I think that China is under more pressure now from the international community to go to a more rules-based governance order. Authoritarian Korea was brought into the General Agreement on Tariffs and Trade [GATT], but the GATT system was much less demanding than the WTO system. Also, during the cold war, the pressures on trade were always balanced off against pressures on security. I think the pressures on China today are much more focused on improving the legal system.

Finally, and most important, there are many people in China today, both inside and outside the government, who are working for reform. Therefore, like Professor Cohen, I believe in engagement with China's law reform efforts, even if change is likely to be slow and incremental.

Thank you very much.

[The prepared statement of Mr. Ohnesorge appears in the appendix.]

Representative LEACH. Thank you very much. Let me just begin with one Korea/China question relating to international law.

As you know, there is the tragedy of the North Korean refugees in China, and China is a party to international conventions relating to refugees. Is there any prospect that China will be more sensitive to the rule of law in this regard?

Mr. COHEN. I take it what you are referring to is the question of whether China's attention might be more focused on its obligations in treating migrants from North Korea who come into China and who claim to be refugees entitled to the protections of the relevant international conventions for the protection of refugees rather than mere economic migrants.

I, too, sympathize very much with the plight of those people. I feel many of them, although perhaps motivated by economic motives as well as desire for freedom, should be regarded as refugees, political refugees.

The difficulty is that in a system as highly repressive as the North Korean regime's, virtually anybody could claim to be a political refugee. Once they leave the country, if sent back, they would be subjected to severe sanction. So, I think the overwhelming number of these people should qualify for refugee treatment.

The problem, of course, is the context and the political sensitivities of dealing with North Korea, not only on this question, but the whole question of its legitimacy, its nuclear power, et cetera.

China, being on the North's doorstep, is extremely sensitive to these issues.

There is also a huge Chinese population of Korean descent that speaks the Korean language and that is very close to Korea in terms of geography, and China's leaders worry very much about the influence of adjacent countries on their minority populations.

Of course, this is not a typical question for judging the Chinese domestic legal system and where it is likely to make a transition to, but it is among those important questions of China's attitude toward international law.

I think the relevant international organizations, as well as governments, have to lean on China a little harder on this. Yet they find it difficult to do so because of our government's reliance on China, particularly with respect to getting the North Koreans to the bargaining table, as they now once again are in Beijing in the Six Party talks. So, it is part of a broader context.

Representative LEACH. Let me raise one other international law question. We are, in the next few days, going to be working in the Congress on a trade agreement, this one with so-called CAFTA countries and the Dominican Republic.

There is a lot of angst about trade agreements in general that is tied into the CAFTA debate because there is a sense that agreements that may or may not be exactly fair to both sides are not being implemented equally on both sides, and particularly there is concern, for example, in countries such as China that basic law is not being abided by. Do you sense that the Chinese are making legitimate efforts to try to abide by WTO rules, try to abide by intellectual property kinds of standards, or do you think this is a hopeless circumstance, that China will just go its direction, whatever it perceives to be in its short-term national interest?

Mr. COHEN. You are raising a very complex question, but one of huge, immediate practical importance. I like the Chinese phrase, "*xi yao yige guocheng*," which could be liberally translated as, "Rome wasn't built in a day." Everything requires a process.

China's compliance process has been under way for at least six or seven years, starting even well before it entered the WTO. It has been revising its legal system and its administrative practices in order to comply with the demands of entry into the WTO. This has had a profound effect and so we have seen a lot of effort by the central government.

The problem is that although China does not have a Federal system like ours, the Chinese unitary system, in practice, has many areas where it is the local authorities who have significant power, especially with respect to a lot of questions relating to trade, technology transfer, and investment. Beijing's writ does not run as effectively outside of Beijing as the central government would like, unless you are talking about cases like the control of the Falun Gong "religious cult," as they call it, or control of democratic activists, matters that the Chinese Government, rightly or wrongly, thinks threaten its security.

The central government does not allocate sufficient resources in terms of money, people, or attention, to many of its other obligations. They have a hard time controlling their own securities markets. They have a hard time controlling environmental pollution.

They have a hard time protecting intellectual property, according to their international obligations and domestic laws. They are trying, but not too effectively. This involves not only central-local tensions and problems, and regional questions, it also involves taxation. China has a weak tax system. The central government does not get enough money out of that tax system, therefore, their allocation of resources in implementing their commitments is affected by that.

There are a host of factors here, but I think the answer is that the Chinese Government is aware of its obligations. It is taking steps. Many of those steps are beginning to be effective. The problems are huge.

Congress is understandably impatient. You do not get these reforms by Congressional resolution or decree. Outsiders can only stimulate so much, and the pressures have to be generated internally.

The fact is that these pressures are growing. In China, the pressure for intellectual property protection is growing from domestic demands as their companies—as we have seen lately—are beginning to go global. As they need to invest more in creativity, in research, they want to protect the fruit of that research and creativity.

Of course, China is a huge country and conditions vary in various parts of the country. There is also a very delicate political situation. Although the Chinese Government has accomplished an amazing transformation of betterment of people's conditions for perhaps two-thirds of the population, and that is not to be underestimated, the fact is, people are living in a political tinderbox.

There are so many tensions, so many frustrations in China, rural and urban. Of course, what is fueling this, in part, is not only rights consciousness, but this growing gap between rich and poor. China, now, has one of the largest gaps in the world between the rich and the poor. Chinese people have a strong sense of resentment. They suffer, to as great an extent as any people, from the jealousies that people have when they see some are really using their political connections unfairly to profit disproportionately. This is not pure economic private development, but a lot of this richness, this new class that is created, comes from conspiring with local governments to achieve wealth, and this creates resentments, understandably.

So, this is a very complex stew here. But I think the answer is, China is doing quite a lot—not enough, but quite a lot—and I do not think the Congress should get unduly emotional about it, but we need to keep the pressure on.

Representative LEACH. Well, let me make several comments about this point.

One, if we go to Taiwan for a second, one of the least-noticed aspects of Taiwan that I think is one of the most extraordinary, is that, of all the countries that have gone through rapid development, I think Taiwan has had the least cleavage between the rich and the poor. There are very wealthy Taiwanese, but I do not know of any society where the so-called “lifting of all boats” has more generally occurred.

Part of it was against a background in which, when the mainlanders took over under the KMT, they certainly very rigorously controlled the political system, but the native Taiwanese controlled the land. Many native Taiwanese did well economically, even though they had very few political rights.

I want to mention as an anecdote—and this may seem odd, but it is very meaningful to me—my first professional job in life, I was a young Foreign Service officer. Right out of the Foreign Service Institute, I was on a three-week assignment to help a department that had gotten behind and write a background paper for an international conference to be held in Vienna on international road signs and signals. I wrote this up and I pointed out that the Europeans wanted us to adopt their road signs and signals, and we had our own, and to change them would be very expensive in the United States. In any regard, it was the province of state governments. I wrote this lengthy paper about this topic, and I got called into the Legal Adviser's office.

The Legal Adviser said to me, "Young man, you must realize, in the United States, the national government is sovereign. We can negotiate anything we want to do and the states have to follow. We are sovereign." He said, "As a practical reason, you might not want to put this burden on the states, but if we wanted to, we could."

So, one of the dilemmas with China is that in many areas, the government operates with complete sovereignty. In some areas, they seem to not have full sovereignty over their own society. So when you say local governments have to implement national treaties, it is as if they are imperfectly sovereign on enforcement.

It is a dilemma if one wants to be respectful of everything that has occurred in China that is progressive, and yet, at the same time, one's country, one's constituents are negatively affected by lack of sovereign implementation of law, because, one might say, it is the jurisdiction of a regional government or a city. That is very awkward, because you cannot enter into treaties with people that do not have sovereignty. So, sovereignty is a very important issue. Like everything, is the glass half full or half empty? In so many ways, what China is doing is thoroughly impressive. In other regards, it is very awkward.

One's sense is that when the central government really cares about something, such as the Falun Gong movement or whatever, it can put its foot down. When it is fought, it cannot, so that is difficult.

I will just end with, years ago, the Chinese Ambassador was leaving town and there was a lot of debating of China's scholars about China: would it become more decentralized, more centralized, et cetera? I asked this distinguished Ambassador his view of that. He said, "Well, just remember, Congressman, in China, the central government has a hard time taxing,"—just the point that you made—"and that makes it very difficult for the central government to control the regions as much as an outsider might wish, or as much as the government might wish." So, that tax issue is a central one, but it is not for us, particularly, to tell China how to tax. That is for China to devise in its own right.

Mr. COHEN. And it is not good enough for them simply, decade after decade, to use that as an excuse because, if it is an important

priority, the leaders of the Chinese Communist Party know how to enforce their will on the country, through the media, and, if necessary, through stronger measures. So, they should be strengthening their own tax system for their own purposes, but also in order to help them fulfill their international obligations.

But we cannot simply focus on China and have blinders on about the rest of the world's implementation of international agreements, including our own record. Our government has been notorious, on occasion, for thumbing its nose at international court judgments or paying no attention to certain international agreements. We do not implement, for example, very effectively, our obligation when a state prosecutor locks up a foreign national. Generally, we have a commitment to notify the government of that foreign national that the person is being detained, and perhaps being charged with a capital crime. We have often ignored that. Our record is more disgraceful than China's on that particular point.

I have always liked what Robert Burns said, "Oh, would some Power, the gift to give us, to see ourselves as others see us." That does not mean we are on the same plane as China, but it ought to at least leaven our concern with China's behavior with some consideration of the practical problems that lead to our own failures to observe what the international system demands. So, I realize that is not a popular view in the Congress, but I am not a Member of Congress, I am a citizen.

Mr. OHNESORGE. Mr. Chairman, could I interject on this issue of intellectual property rights, and industrial policy, more broadly?

Representative LEACH. Of course.

Mr. OHNESORGE. I was in private practice in Seoul from 1990 to 1994, representing foreign clients and Korean clients. In the Korean case, unlike in China, there was no question that the Korean Government was firmly in control of the provinces.

There really are no provinces, to speak of, that matter for Korean governance. Yet Korea still did not really enforce intellectual property rights, and they did not do it, I think, because they did not view it as being in their interests. They were behind the rest of the world in basically every technology, and they were committed to a kind of mercantilist, nationalist industrial policy, building national champion companies rather than allowing foreign companies to come in and participate and become major parts of their economy. So I always viewed the weak intellectual property regime in Korea as a kind of a negative industrial policy, and I did not think that there was any point in letting the Koreans off the hook as being culturally unaware of intellectual property. They just did not put resources into it. So the question for me, as a Korea watcher, is to what extent China is following the same kind of nationalist/mercantilist industrial policy that Korea followed, which I think is similar to Taiwan's and similar to Japan's? It is not clear at all. I think there is great debate on this.

China appears much more open to, for example, letting the foreign auto companies come in and become dominant players in the Chinese auto market. The development of capital markets in China, I think, is ahead of where they were in Korea at a similar stage. Korea had a much more bank-dominated financial system.



And because the government controlled the banks, the government could use that control to really control the political economy.

Mr. COHEN. China has been far more open to foreign direct investment at a comparable stage of development than any of the other North Asian countries. Of course, it is in its interest to do that, but we did not expect that in 1979. We did not know how important they would regard private capital, joint ventures, and all that. They created a legal system to attract it. Every year, they are opening their markets further in order to allow us to invest more, which also creates problems for your constituents, of course, because jobs are moving over there.

I would not be surprised if China's reaction to the Unocal problem might not only be to cut down their purchases of U.S. treasury bonds, but also begin to contemplate allowing us to purchase minority interests in their state-owned oil companies, just like we are purchasing minority interests in many other state-owned Chinese enterprises. I think they are under pressure to go that route.

They have gone far further than Japan or South Korea, our close allies, military as well as political, and we ought to encourage that process and not deter the process of opening by beginning to take sanctions against them that I think would be not justified at this stage.

Representative LEACH. Your wise words are noted.

We are all looking at long-term relations between Taiwan and China. In one sense, returning to the sovereignty issue, that is the central question that the Chinese on the mainland are looking at the Taiwanese issue in relationship to.

But is there any sense that the mainland is looking at Taiwan as a model? Because there are many things that have happened in Taiwan that are truly impressive, in a democratization, as well as rule of law, as well as in an economic development way.

But you have no conversation about the Taiwan model for China. The only conversation I hear is the question of the legal status of Taiwan vis-a-vis the mainland.

Mr. HSIEH. I think the Chinese did look at Taiwan as a model in some fields, for example, economic development. In fact, a number of very important architects of Taiwan's economic development have visited China and given advice to the top officials of China.

When China tries to rebuild their legal system, they have also looked at the situation in Taiwan since both sides share a common heritage. But those are probably the things we can talk about. If you are asking whether China will look at Taiwan as a model for democracy, the answer will be no. The Chinese leaders may prefer cases like Singapore. That is the case they are trying to emulate rather than Taiwan.

Mr. COHEN. Or Japan, or other one-party states, effectively, where you have a formal democratic system, but it leads to no change in the dominant political elite. I agree with that.

Mr. OHNESORGE. If I could interject. Again, in Taiwan, there is a great deal of legal exchange going on between China and Taiwan that people do not pay sufficient attention to. There are many exchanges now between Taiwanese law faculties and mainland law faculties. There are delegations that go back and forth each way. People read each other's journals. People go to conferences to-

gether. It is absolutely not the case that Chinese legal academics and law drafters are not paying close attention to Taiwan. They are. I think that is very important. I think that could be very beneficial, both to the Chinese in developing their legal system, but also for cross-straits relations. And maybe it is better that it is not studied, because then it can just go on the way it is going, which I think is very well.

Mr. COHEN. I think that exaggerates the situation quite a lot.

Representative LEACH. Did you want to amplify that?

Mr. COHEN. Yes. There are many barriers to interchanges between law reformers on the mainland and those in Taiwan, although they do have occasional meetings, sometimes on a very big scale so that there is no real opportunity for significant cooperation. But I know there are problems in the fields that I work in. For example, I arranged a meeting last February, under the auspices of NYU Law School and the Council on Foreign Relations, for experts on criminal justice; these people had never met before. We had to do it in New York. Even there, the Chinese Government made it difficult for anybody who worked for their official agencies to attend that conference. We could only get people who happened to be in this country, plus academics. The Chinese want more such meetings because they are not free to invite the Taiwanese, and it is very difficult for them to go to Taiwan and have meetings, even in Hong Kong, on sensitive political subjects such as we are talking about today: the rule of law, the rights of defense counsel, the adversary system. Both sides want our help in bringing them together. I think we should do more.

But the odd fact, Mr. Leach, is you will remember the period in the 1970s and even earlier when the Taiwanese Government, under Chiang Kai-shek, used to trumpet that it was "Free China." Supposedly, it had the rule of law, in contrast to those "bandits" on the mainland. That was sheer nonsense, but the government beat the drums because they knew that would sell in Washington. It was totally false.

Today, Taiwan has quite a free government. They have a real product to sell. They have an impressive, growing rule of law, but they are doing very little to advertise it. There are not many English language articles about Taiwan's legal accomplishments. Very little is known about that. Yet I think it is very important because, on every one of these questions, Taiwan is a kind of Chinese laboratory. Of course, Chinese are interested, on the mainland, in what takes place in Europe, the United States, and God-knows-where-else. But they know that Taiwan is China. Even President Chen Shui-bian has said, "we are all people of Chinese culture." They may not be Chinese nationals in his eyes, but he does not deny they are Chinese in origin.

In a Chinese political environment, as Professor Hsieh's remarks show, the Taiwanese have achieved changes that no other Chinese environment, including Singapore, has produced in moving toward an independent judiciary and a genuine rule of law.

I would supplement Professor Hsieh's paper by saying I think a careful look at the role of legal institutions will show that they have played an important role in Taiwan's democratization, and he should take account of, for example, Taiwan's constitutional court.

That court has been an activist court that has invalidated many legislative and administrative acts and has had a big impact on opening up the political process.

That is an exciting thing. Maybe Taiwan's judges are becoming too activist for a democratic system. Korea's constitutional court raises a similar kind of question because they, too, unlike Japan's Supreme Court, have been very active. Taiwan is a Confucian society that is adapting under various internal and external pressures to construct something we would have to recognize as an impressive rule of law.

Yet the Taiwanese Government ought to be doing more to tell the world about it. But we, in the meantime, ought to be learning as much as we can about Taiwan's legal progress, because what we are engaged in is a study not just of Taiwan, but of the potential legal rights of 1.4 billion people. That is one of the biggest legal challenges in the world.

Representative LEACH. Well, I appreciate this. I apologize, we are going to have to bring this dialogue to an end. I might say that the other model of Taiwan that is very impressive, is where Chiang Kai-shek was of the political right, his organizational model of party control was very similar to the Communist Party of the Soviet Union, so the KMT was modeled similarly, and they changed.

Mr. COHEN. They both learned from Lenin.

Representative LEACH. That is true.

In addition, the current president of Taiwan, Chen Shui-bian, was a lawyer who represented people who were in jail who are now in his government. That is a fairly impressive circumstance, and one for which I think the Taiwanese are to be commended.

I am reminded of a contrast, because you referenced Confucius. He argued kind of a Golden Rule in the negative, that is, "do not do unto others what you would not have them do unto you," which is kind of a less assertive Golden Rule. In the Christian-Judeo tradition, we are more assertive in our views, which is partly the implication of this Commission. That is, this Commission is set up to look at, in an intrusive way, another society.

I would only say that it is important that, as we make comments, it is clear that any commentary we make is intended to be constructive for the good of the Chinese people, not for some sort of acerbic reasons. We have to be very careful about not talking ourselves into conflict.

So, one of the things that is very impressive about this commentary today of yours, is that the constructive element, that one is assessing a system and how to improve it, is all for the good of the Chinese people and has nothing to do with what the American's strategic interests might or might not be.

I am very appreciative of your scholarship and your contributions. Again, I would stress, without objection, your full statements will be put in the record and circulated. Thank you all very much.

[The prepared statement of Senator Hagel appears in the appendix.]

Representative LEACH. The hearing is adjourned.

[Whereupon, at 3:20 p.m. the hearing was concluded.]



## **A P P E N D I X**

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## PREPARED STATEMENTS

## PREPARED STATEMENT OF GRETCHEN BIRKLE

JULY 26, 2005

Chairman Hagel, Commissioners, thank you for holding this important hearing, and for your excellent work. I am delighted to be here today to testify before the Congressional-Executive Commission on China.

The theme of my testimony today—the rule of law in China—is of great interest and importance to the State Department, especially the Bureau of Democracy, Human Rights and Labor; Secretary Rice spoke about it during her recent visit to China on July 10. I appreciate this opportunity to provide our assessment of the current rule of law and human rights situation in China.

Since the grim last days of the Cultural Revolution when courthouses and law schools were closed and a handful of leaders arbitrarily exercised power, China has made some progress toward modernizing the legal system. But progress toward true rule of law has been limited. The rule of law means more than laws on the books and open courthouses. It requires independent institutions capable of dispensing justice fairly, transparently, and consistently, and it requires political rulers willing to submit themselves and their authority to the law, just as all other citizens. China has passed laws, opened law schools, established examination requirements for judges, and expanded legal aid. However, these changes are not enough to establish the rule of law. These kinds of actions must be followed by the creation of an independent judiciary.

Chinese authorities use the law to rule. Human rights defenders, democracy activists, and those expressing views that challenge the party's control are often convicted and jailed on trumped up charges. The case of Uighur businesswoman and activist Rebiya Kadeer is illustrative of the Chinese government's use of the law to repress those perceived as a threat to power. In 1999, Ms. Kadeer was arrested on her way to meet with U.S. Congressional staff to discuss human rights in China. Ms. Kadeer was convicted of "providing secret information to foreigners," specifically newspaper articles she had sent to her husband in the United States. After spending more than five years in prison Ms. Kadeer was released last year in part due to U.S. Government and international pressure. But many other prisoners of conscience remain behind bars.

China's use of the law to repress is not limited to members of any one group. In another example, Hada, an ethnic Mongolian, has been in prison since 1995 for his peaceful political activities, including writing articles and books on political theory and Mongolian language and culture, and organizing the South Mongolian Democratic League, an organization seeking to promote and preserve Mongolian language, history and culture in Inner Mongolia and to strive for the civil and political rights of Mongolians in China.

The Chinese Government has also used the legal system to control and regulate religious and spiritual activities. For instance, in October 2003, Beijing-based house church Christian Liu Fenggang was detained in Zhejiang Province, while conducting an investigation into reports of church demolitions and the detention of religious leaders. In August 2004, Liu was convicted on charges of disclosing state secrets and sentenced to three years in prison. Ms. Kadeer, Mr. Hada, and Mr. Liu's cases are three prominent examples of the Chinese government's use of the legal system to restrict freedom of expression and imprison those it feels threatened by. In China, law is an instrument of the government, but not yet a mechanism to protect the people.

Freedom and legal reforms are urgently needed in China, and wanted by the Chinese people. Last month, the international media reported on a land dispute between peasants and local officials in Shengyou village, Hebei province. According to media reports, when the peasants of Shengyou village defied orders to surrender their land to local officials, the officials hired hundreds of armed men to attack the villages. A violent clash resulted that left six farmers dead and as many as 100 others seriously injured. On June 3, there was also a labor incident in Guangzhou province involving several hundred anti-riot police firing tear gas against a group of 3,000 workers. As the workers pelted cars and buses with rocks and bricks, they chanted demands for higher pay. The workers, lacking independent labor representatives or a means to resolve a compensation dispute, turned to protest. China has experienced tremendous economic progress over the past 20 years, but in order to achieve sustainable internal development and integration into the international

community, we encourage China to develop a legal system that protects property rights and that Chinese citizens trust and utilize to resolve disputes. China's nascent legal system is not effective in providing meaningful remediation, which further contributes to social unrest.

There are signs, however, that Chinese citizens' rights consciousness is increasing and they increasingly expect the legal system to provide justice. Several stories of wrongful executions of individuals whose trials did not meet international human rights standards resulted in a public outcry on the need for reform of China's criminal justice system. Yet the problems are manifest. Many defendants have been tried without adequate legal representation. Same day executions, which do not allow for full due process, are not uncommon, though some in the Government recognize the need for a more deliberate review process. Coerced confessions, lack of defense counsel, law enforcement manipulation of procedural rules, pervasive presumption of guilt by law enforcers, judges, and the public, and extra-judicial influences on courts continues to undermine the fairness and credibility of the criminal process in China.

Equally troubling is the intimidation, detention and arrest of those seeking to use the law to secure the freedom of Chinese citizens. Defense lawyers in China are coming under increasing pressure, especially those that use the legal system to protect the rights of fellow citizens. Lawyers representing activists, journalists, Falun Gong practitioners and others perceived to be a threat to Government power have been harassed, intimidated and detained.

In March 2004, the National People's Congress amended China's constitution to include the protection of human rights. While the passage of this amendment is welcome news, it will only become truly meaningful and effective if it results in genuine reform and protection of the rights of the people. Again, provision of constitutional rights requires strong and independent legal institutions capable of upholding the constitution. As President Bush said, "All democracies need an independent judiciary to guarantee rule of law and assure impartial justice for all citizens." The Chinese Government needs to make these words more than words on paper. They need to institutionalize this Constitutional amendment and implement steps to create the legal mechanisms that would protect rights.

President Bush has made the promotion of freedom and democracy the cornerstone of U.S. foreign policy. This principle guides decisions about the character of our foreign assistance and allocation of resources.

Through a Congressional appropriation, the State Department is funding rule of law programs. We are actively engaged in promoting the rule of law in China through dialogue, programs, and multilateral fora. As the President said we must help other countries "build free institutions that will protect their liberty and extend it to future generations." We take seriously our responsibility toward individuals seeking to secure their inalienable rights seriously. We also encourage China to exercise a responsible role, especially with regard to fundamental human freedoms, as it takes on a more global role.

We support Chinese citizens working to secure their own freedom, and freedom for their fellow citizens, including freedom of speech, assembly, press, and religion. We particularly support human rights defenders, democracy activists, independent journalists and those seeking legal reform. Through our rule of law program the United States is able to support reform-minded Chinese and their efforts to undertake structural reforms that promise increased fairness, transparency, and rights protection in the legal and political spheres. As Secretary Rice said, "People choose democracy freely. And successful reform is always homegrown." It is our job to amplify the voices of these people and to assist them as they seek to build the kinds of institutions that will deliver lasting freedom.

This year we are programming \$19 million to promote rule of law, civil society, human rights and democracy in China. The projects we fund assist Chinese men and women who want to promote reforms that will lead to near-term results, while laying the foundation for longer-term structural political transformation. These programs address some of the most serious human rights concerns, including the need for due process, the harassment and detention of criminal defense lawyers, and the need to reform the reeducation-through-labor system. We support projects to train judges, prosecutors and lawyers in the use of oral advocacy skills, ethics, and judicial independence. These training programs seek not only to build skills but also to engage members of China's legal community in reforming their legal system. Through programs like these, judges, prosecutors, and lawyers, learn about other legal systems, which can serve as a model for legal reforms. We need to continue engaging legal practitioners because the future direction of legal reform in China will be determined largely by them. These programs are already having an impact, but there is still more that we can and should do.

A strong civil society is indispensable for a key part of a nation governed by the rule of law. To this end, we are also supporting projects to help non-governmental organizations become effective advocates for their communities by training them in advocacy skills and project management. Some of these advocates seek to protect the rights of migrant workers, women, children and consumers. We also support programs aimed at improving public participation through elections and public hearings. Giving the Chinese people a greater voice is crucial to building a future China in which human potential is fully realized.

The State Department is also committed to raising human rights concerns in bilateral and multilateral settings. Through bilateral pressure, we were able to secure the release of Rebiya Kadeer and gain China's agreement to take several positive steps including: giving prisoners convicted of political crimes the same right to sentence reductions and paroles that are available to other prisoners, agreeing to host a visit by the Special Rapporteur on Torture, issuing a public statement that clarifies that religious education of minors is consistent with Chinese law and policy, agreeing to open an ICRC office by the end of July 2005, issuing an invitation to the Special Rapporteur on Religious Intolerance and agreeing to host a visit by the US Commission on International Religious Freedom.

We will continue to raise concern about the lack of democracy and respect for human rights directly with Chinese leaders and in public comments. During Secretary Rice's most recent trip, she raised human rights concerns, including specific cases, with Chinese leaders. We will not shy away from pressing our human rights concerns and urging the Chinese government to implement structural reforms. Chinese citizens themselves have spoken out about the need for the rule of law. By lending our voice and our support, we can help their voices resonate. As President Bush said in his Second Inaugural Address, our goal is "to help others find their own voice, to attain their own freedom, and to make their own way."

Chairman Hagel, Commissioners, promoting freedom and democracy is the cornerstone of U.S. foreign policy, and our policy toward China is not exception. Thank you, again, for this hearing. I would be happy to take your questions.

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#### PREPARED STATEMENT OF JEROME A. COHEN

JULY 26, 2005

#### CHINA'S LEGAL SYSTEM IN TRANSITION

Senator Hagel and other distinguished members of the Commission and staff:

I am pleased that the Commission has chosen to focus today on law and legal institutions in the People's Republic of China (PRC) and the relevance of recent developments in Taiwan and South Korea. Our media have understandably shown increasing interest in the political, economic and military aspects of China's rapid modernization. Yet too little attention has been paid to the role of the legal system.

#### OVERVIEW

In December 1978, when the Chinese Communist Party's new leadership under Deng Xiaoping announced the "Open Policy" that launched the country's impressive modernization program, it also recognized the importance of constructing a legal system commensurate with China's new ambitions. At that time, the Soviet-type legal system that the PRC had adopted in the early 1950s lay in tatters, a victim of twenty years of political turmoil that had culminated in the Cultural Revolution, whose spirit was encapsulated by a People's Daily editorial entitled "In Praise of Lawlessness!"

The new legal system was to fulfill many functions. It would provide for the orderly and efficient conduct of government not only at the central level but also at the provincial and local levels of a vast land and population. It would facilitate domestic industrial and commercial development and international trade and investment. And it would suppress what was deemed to be antisocial behavior, while assuring greater fairness and accuracy than had prevailed in the administration of justice during the three preceding decades of Communist rule.

At the time, only a quarter century ago, China displayed virtually none of the indicia of a formal legal system. Its Constitution was merely an unenforceable collection of political slogans and general principles. It had few useful laws and even fewer bilateral or multilateral agreements with other countries to offer guidance on legal problems. The National People's Congress (NPC), nominally the country's highest government authority, was in the process of resurrection. The courts were a shambles. The procuracy, which is responsible for criminal prosecutions and is sup-



posed to serve as the “watchdog of legality,” had been non-existent for twelve years, and Chinese lawyers for over twenty. China’s Soviet-style commercial arbitration institutions were not suitable for settling disputes with Western companies, and legal education and publications were only beginning to revive.

Today, China plainly has a formal legal system, one that, from the perspective of a generation ago, can be seen to have made significant progress. An increasingly robust National People’s Congress and its Standing Committee have enacted a huge amount of legislation on topics of all description. These laws have been supplemented by myriad regulations of the State Council, China’s leading executive institution, and the central ministries and commissions under it, as well as provincial and local people’s congresses and governments. The Supreme People’s Court (SPC) and the Supreme People’s Procuracy are both now vigorous organizations, although, like the State Council, they are subordinate to the NPC. They too have issued large numbers of “interpretations” and other documents, either separately or with each other and with other agencies, that are the substantive equivalent of supplementary legislation. The PRC has also concluded with other governments a large number of bilateral agreements bearing upon the domestic legal system and now adheres to many multilateral treaties concerned with international business law and human rights.

China today has a nationwide court system including over 3,000 basic courts and almost 200,000 judges. The task of forging this huge and inexperienced group, originally staffed mostly by former military and police officers without legal education but now increasingly recruited from law school graduates, into professionally competent, honest, impartial and independent decisionmakers is formidable. To do so the Supreme People’s Court has labored mightily, within the confines of Party policy and the SPC’s limited political power.

Much the same can be said about the procuracy. It now has almost as many legal personnel as the courts and is recruiting more and more law graduates. Lawyers, reestablished in 1980 and currently numbering approximately 120,000, play an increasingly important role in China’s cities, especially in civil and business transactions. Their ranks too are strengthened each year by thousands of new law graduates, who now have to pass, together with would-be judges and procurators, a challenging unified bar examination, with a pass-rate, last year, of only slightly over 11 percent. Legal education has become one of the fastest-growing branches of Chinese academic life, and the country now has almost 400 law schools of various kinds.

Moreover, legal scholarship has flourished in recent years. Bookstores that never before had a legal section or even a shelf devoted to law are now filled with collections of laws and analytical treatises and teaching materials on all subjects. They also carry “how to do it” self-help manuals on many topics such as civil and administrative law procedures, tax law and real estate transactions, for those who do not have access to or wish to avoid lawyers. There are now over 90 law magazines, rife with law reform proposals. Within the limits of Party policy, which fluctuates with the time, place and topic, the Internet has spawned nationwide legal discussions. It makes available information and views about law that newspapers and television, also under Party control, may have slighted.

Legal developments relating to foreign trade, technology transfer and investment have led this progress. During the decade prior to the tragedy of June 4, 1989, the PRC’s desire for foreign direct investment stimulated the steady creation of a useful legal framework. The PRC’s opening of capital markets in the early 1990s initiated a new wave of financial legislation and regulation, and its 2001 entry into the World Trade Organization has produced a host of substantive and institutional reforms that should continue for some time. China’s international commercial arbitration organization is now the world’s busiest, and almost 200 cities have established their own arbitration commissions to handle domestic and foreign-related disputes.

The development of law and legal institutions has contributed to a burgeoning popular awareness of law and indeed “rights consciousness.” Profound social and economic change has fostered this trend. An economy formerly dominated by state-owned enterprises and the “state plan” is now increasingly free, transactional/contractual and open to private entrepreneurs. A society that was once one of the world’s most egalitarian now features accumulations of wealth that have created one of the world’s biggest gaps between rich and poor. Much of this wealth has been created by collusion between government officials, still in command of land and other resources, and corrupt entrepreneurs. This, in turn, has generated not only demands for the protection of the personal and property rights of the successful but also even stronger demand for such protection from losers in the ongoing socio-economic transformation, who desperately seek legal remedies to alleviate perceived injustices. Women, minorities, the disabled and other victims of discrimination invoke

China's Administrative Litigation Law and related legislation to challenge arbitrary official action. Farmers strive to use the courts to stop unfair official land requisitions or financial impositions by local cadres, and urban residents try to rely on the law to prevent developers and city officials from demolishing their housing without adequate compensation.

Too often such efforts fail. Legislation is frequently inadequate, and many conflicts between national and local norms, and the proliferation of regulations, interpretations and other edicts often produce incoherence and inconsistency. There are too few able lawyers, and those who are not afraid to undertake sensitive cases sometimes lose their license to practice law or are detained and punished for "damaging public order" and similar offenses. Judges are often vulnerable to corruption, political control and the pressures of "guanxi" (social connections based on family, friendship, school or local ties). Since their appointment, promotion, assignment, compensation and removal are all at the pleasure of local government and Party leaders rather than the Supreme People's Court or provincial High Court, they and the litigants who appear before them are subject to the abuses of "local protectionism." Even PRC arbitration, to which many foreign businesses and Chinese turn in an effort to avoid the vagaries of the courts, sometimes suffer from the same types of pressures that distort judicial justice. Prosecutors, who are supposed to guard against such illegal conduct, are usually too weak politically and plagued by their own vulnerabilities to remedy the situation.

#### CRIMINAL JUSTICE

The weakest link in the PRC legal system is criminal justice. The codes of criminal procedure and criminal law, first enacted in 1979, three decades after the founding of the PRC, and revised in 1996 and 1997, respectively, lend themselves to abuse by law enforcement authorities. The PRC is, of course, far more notorious than the United States for its resort to the death penalty in many thousands of cases each year, with no fewer than 68 statutory provisions authorizing executions. The Chinese Government is so embarrassed by the number of executions it carries out that the precise figure is one of its most closely guarded secrets.

The Criminal Law is so broad and vague regarding both the conduct it prohibits and the punishments it prescribes that the regime has no difficulty imposing severe sentences on persons engaged in unapproved political or religious activity. Although "counterrevolutionary" conduct is no longer prohibited, its prohibition has been replaced by the equally imprecise crime of "endangering state security," which is often invoked. So too is the sending abroad of "state secrets," loosely defined, and often applied to information designated as secret after the fact, by the judicially unchallengeable National State Secrets Bureau. Also punishable is the sending abroad of "intelligence," which turns out to be merely information in the public domain that the regime does not want disseminated outside China. Moreover, the courts, and those Party and government leaders who dictate court decisions in sensitive cases, are free under the law to impose the harshest sentences "if the circumstances are serious" and especially "if the circumstances are especially serious."

The protections afforded by the Criminal Procedure Law (CPL) are too few, ineffectual, and riddled with exceptions to permit meaningful defense. When police or prosecutorial investigators wish to detain a person, they can do so on their own, without the approval of any outside agency. They need not notify the suspect's family or work unit of the detention, the basis for it or the suspect's location if, in their opinion, to do so might interfere with the investigation. In most PRC criminal cases the suspect is denied "release under guaranty pending trial," the Chinese equivalent of bail, again a decision made by the investigating agency alone. Nor do the investigators need outside approval if they decide to search the suspect's residence, office or car.

If the suspect's family can afford a lawyer to advise him, the lawyer can be prevented from meeting his client for the entire investigation period, which can last for months or even years, if the investigating authority claims that the case involves "state secrets." In cases where the lawyer does manage to meet his client, that meeting is usually monitored by the police. The lawyer, not considered by the law to be a "defense lawyer" until the investigation has concluded and the case has been sent to the prosecutor for indictment, is usually not permitted to question his client about the facts of the case but can only introduce him to the elements of the charge and his rights under the law. Nor may the lawyer begin his own inquiry into the case, gathering evidence and interviewing witnesses, until the official investigation has ended. Even then, interviewing witnesses is dangerous because of the risk that a witness, under government pressure, may change his statement and the lawyer might then be accused of falsifying evidence.

The suspect has no right to silence, and reticent suspects are frequently subjected to torture, despite the Criminal Law's explicit prohibition of such conduct in accordance with the obligations the PRC assumed when ratifying adherence to the U.N. Convention against torture in 1988. Suspects are also frequently subjected to "over-time detention," even if one accepts the investigating authorities' dubious interpretations of the time limits set forth in the CPL.

The outstanding feature of PRC criminal investigation is the inability of the suspect, his lawyer, family or friends to challenge the legality of any official actions before an independent tribunal or other agency. Any attempt to obtain administrative reconsideration of investigators' decisions by their higher authority is usually fruitless. In principle the local procuracy should be willing to review questionable decisions or practices, but political realities usually preclude this. The procuracy is without incentive to self-monitor its own investigations, as in official corruption cases, and even less likely to intervene in an investigation by either the Public Security Bureau or the State Security Bureau, whose investigators generally outrank their procuracy counterparts in the Party's political pecking order. Any effort to seek judicial review is rebuffed by the courts on the ground that they do not enter a criminal case until after indictment. And neither the local people's Congress nor government, the Party Discipline and Inspection Committee or the Party Political-Legal Committee that coordinates cooperation among the government law enforcement agencies will prove helpful. The result is unchecked discretion for the investigators and total frustration for the suspect and his lawyer.

Trial has its own frustrations for the defense. Witnesses rarely appear in court. The prosecution simply reads out their written statements, thereby depriving the accused and his lawyer of the opportunity to cross-examine them granted in principle by the 1996 CPL revision. Rules of evidence are rudimentary, and illegally obtained evidence is often admitted in practice. Defense lawyers must be careful during trial, as well as during earlier stages of the process, not to alienate prosecutors, who have the power under Section 306 of the Criminal Law, a provision aimed squarely at lawyers, to prosecute them for assisting in the falsification of evidence. This "Sword of Damocles," as it is known, has been invoked over 200 times.

#### LAW REFORM PROSPECTS

Yet we can expect robust law reform efforts to continue in China, even in the field of criminal justice. The PRC is still considering whether or not to ratify the International Covenant on Civil and Political Rights (ICCPR), which it signed in 1998. Ratification would commit the PRC to changes in law and practice in the criminal justice area as profound as those changes in economic law and practice required by the PRC's entry into the WTO. Regardless of ICCPR ratification, the Chinese Government, under strong domestic pressures to eliminate some of the most glaring defects in the CPL and some of the worst distortions of the CPL in practice, has already made clear its determination again to revise the CPL. Although optimists predict that the newly revised CPL might appear by next year, we should not underestimate the magnitude of the task. A multitude of controversial issues awaits the NPC, and achieving a meaningful reconciliation of the conflicting views of the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice, the Supreme People's Court, the Supreme People's Procuracy, the All China Lawyers Association, influential academic experts and relevant Party organizations will require enormous legislative skill, time and energy.

Pending comprehensive revision of the CPL, the NPC may decide to make certain urgently needed reforms earlier. For example, should the NPC do something about "reeducation through labor" ("laojiao")? It is an administrative punishment that is not authorized by NPC legislation (as now required by other NPC legislation) and that is dispensed by the police, who can send someone to labor camp for three or four years without the participation of lawyers or the approval of the procuracy or the courts. Although the Ministry of Public Security has been waging a public relations and lobbying campaign to retain "laojiao," even conducting limited experiments to allow lawyers into the proceeding in an effort to avoid losing this major sanction, its continuing existence is blatantly inconsistent with the premises of the CPL and the Law on Legislation, as well as perhaps the Constitution itself, as many Chinese judges, officials, lawyers and academic experts have pointed out.

Perhaps we can also expect an expanded role for the courts, and further strengthening of the courts and the legal profession in order to enable the courts to play this expanded role. The Chinese Government is plainly facing a domestic crisis of confidence caused by the failure of its institutions to deal adequately with a rising tide of public grievances relating to environmental pollution, real estate manipulation, unauthorized local financial demands, corruption, discrimination and other offi-

cial abuses. Increasingly, interest groups, fueled by a shared sense of injustice, are taking to the streets and even rioting. These protests threaten political, economic and social stability and indeed the common people's belief in the legitimacy of Communist rule. Too often, for example, the courts, instead of enforcing national laws against lawless local officials or conflicting local regulations, serve as the instruments of the local elite against the victimized populace. And lawyers brave enough to assist the protesters in their efforts to resort to courts in order to vindicate their rights are often detained or intimidated by the local police and prosecutors.

Thus it would be logical for the PRC leadership to try to lift local courts from the mire of "local protectionism" by placing the power to appoint, promote, assign, compensate and remove basic and intermediate court judges in the Supreme People's Court or the provincial High Courts so that local judges would become more responsive to national needs rather than local pressures. It would also be helpful to review the current criteria for compensating, assessing, promoting and removing judges. Similarly, we might expect enlightened leaders to sympathize with the growing consensus, at least among lawyers and scholars, that Section 306 of the Criminal Law should be repealed, in order to encourage more lawyers to take part in and vigorously defend criminal cases, and to try to channel public disputes into the courts instead of the streets.

#### EMERGING CONSTITUTIONAL LAW

The most interesting development in Chinese law at this time is the gradual emergence of constitutional law as a genuine subject and a factor to be reckoned with in Chinese politics and government. Although the PRC has had several constitutions in its 56 years, until recently few individuals or groups took seriously the idea that the provisions of the Constitution might actually be enforceable, whether through the NPC or the courts.

Neither Mao Zedong nor Deng Xiaoping endorsed Montesquieu's separation of powers. Nor did they embrace the revered Sun Yat-sen's distinctive five power division adopted by China's pre-Communist Government, that of Chiang Kaishek's Nationalist Party, which is still in use by the Republic of China on Taiwan and which is only now beginning to totter. As we have seen, in the PRC system, following the Soviet model, the national legislature, the NPC, is the single supreme power, and all other government institutions—executive, prosecutorial and judicial—are subordinate to it. Under this arrangement, the power to interpret and apply the Constitution is lodged in the Standing Committee of the NPC, not in the courts. Yet, given the realities of Communist Party control of government and public life, until two years ago no one activated this constitutional decisionmaking mechanism. The accepted view was that the Constitution recorded the nation's and the regime's basic principles, outlined the government structure and set forth the rights and duties of citizens. It served many purposes—as national symbol, ideological rallying point, educational instrument, policy vehicle and propaganda tool—but was not generally thought to be the source of enforceable legal rights. Recently, however, as a consequence of rising rights consciousness, reflected in and further spurred by constitutional amendments mandating respect for human rights and property rights, the idea of translating the promises of the Constitution into real life began to attract China's expanding legal community.

An important stepping stone toward the present was the enactment in 1989 of the Administrative Litigation Law, which for the first time made the legality of a broad range of concrete official decisions, but not abstract legislation or regulations, subject to judicial scrutiny. The concept that government itself should be under the law—and not merely use the law as an instrument of its will—was strengthened by the subsequent adoption of several other laws, especially a State Compensation Law offering limited redress, again through the courts, for certain wrongs inflicted by officials.

But, without a constitutional amendment or at least authorizing legislation, could the courts, which are subordinate to the NPC, also begin to enforce constitutional rights and, if so, to what extent? Could ordinary legislation authorize Chinese judges to invalidate on constitutional grounds abstract regulations and even laws of the NPC itself as well as concrete administrative decisions? If judicial review of the constitutionality of legislation and regulations seemed out of the question without a constitutional amendment and if such an amendment was impossible to achieve in the current political climate, would there be any better chance of acceptance for a constitutional amendment that would establish a separate and independent Constitutional Court to deal with such questions, along the lines of the German model that influenced the Republic of China on Taiwan and the Republic of Korea? Many reformers recognized that the Party leadership is not prepared to

endorse such a radical institutional move toward the rule of law. They believed that realism called for building on the existing constitutional structure by having the NPC prescribe procedures that would facilitate efforts to invoke the dormant constitutional decisionmaking power of the NPC Standing Committee, and, with little fanfare, that was accomplished as part of the Law on Legislation adopted in 2000.

This new procedure has actually begun to be used, and in a dramatic fashion that captured public attention. When in 2003 a hapless university graduate named Sun Zhigang died in police custody, the media and Internet ignited a storm of protest against the long unpopular State Council regulation on “shelter and repatriation” of migrants under which Sun had been detained. Three courageous law professors then petitioned the NPC Standing Committee to invalidate that regulation as unconstitutional. By swiftly revoking the regulation, however, the State Council moved to avoid the necessity for a constitutional decision by the NPC Standing Committee. This disposed of the immediate constitutional challenge, but it also vividly demonstrated to the country that a new legal weapon had entered the political arena.

Anticipating a flood of similar petitions relating to other grievances, the Legal Work Committee of the Standing Committee established a special office within the Legal Work Committee to give preliminary scrutiny to claims that government regulations violate the Constitution and should therefore be invalidated by the Standing Committee. Since then, although the petitioning process remains cloaked in obscurity, a series of complaints has reportedly been filed with the Standing Committee against various State Council regulations. Literally tens of thousands of Hepatitis B carriers claimed that civil service regulations unlawfully discriminated against them. Female civil servants petitioned to invalidate the requirement that women retire five years earlier than men, and thousands more have challenged national and local regulations authorizing demolition of their housing. These complaints have not yet resulted in a constitutional decision by the Standing Committee but they have spurred administrative reforms and added to popular support for the concept of constitutionalism.

While popular demands are compelling the NPC Standing Committee to inch forward in the development of a mechanism for reviewing the constitutionality of administrative regulations, if not yet legislation, they are also beginning to stimulate the courts to reconsider their long-held view that judges cannot refer to constitutional rights even in deciding cases in which plaintiffs are only seeking relief against concrete administrative acts or private wrongs. The Supreme Court led the way for the lower courts in its landmark 2001 interpretation approving reference to the constitutional right to education as a basis for awarding the plaintiff relief against both a private party and a government agency in a suit that was not brought to invalidate a law or regulation but to establish the liability of the defendants. The trial courts have since begun to grapple with a range of anti-discrimination complaints brought to challenge concrete administrative actions against individuals. On at least two occasions the bringing of a suit alleging denial of equal protection of the laws resulted in termination of the challenged conduct, even though the court ultimately dismissed the claim as not among those authorized for adjudication under the Administrative Litigation Law. In two other cases the court apparently granted relief to plaintiffs without clearly indicating its reliance on the constitutional claims made.

Plainly, this is an area that is only beginning to emerge, and the task of the foreign observer is not made easier by the limits of the PRC system for reporting judicial decisions, which makes it difficult to learn about and obtain court judgments. Yet, at this early stage, one might wonder why, in view of the SPC’s 2001 education case interpretation, lower courts seem reluctant to base their decisions on constitutional rights in concrete cases that do not attempt to invalidate legislation or regulations. If, for example, gender discrimination claims are not deemed to fall within those that can be asserted under the Administrative Litigation Law, they plainly are covered by the Constitution’s requirement of equal rights for men and women, not to mention the Marriage Law and other legislation. So long as the courts do not tread upon the exclusive prerogative of the NPC Standing Committee to review the validity of legislation and regulations but stick to the task of settling disputes about concrete administrative or private actions—a task that no one believes the NPC Standing Committee will ever take on—why should the courts deny Chinese citizens the benefits of their Constitution while nevertheless consulting lesser sources of law?

Will the judiciary respond in a creative way to the challenges presented by an increasingly litigious society? Much depends on whether the Party leadership has the wisdom and vision to appreciate the contribution that able and imaginative judges can make to stabilizing a country that is seething with injustice. I am confident that the quality of the judges is improving, as one recent statistic suggests. A decade ago

only 10,000 judges in the country, a mere 6.9 percent of the total at that time, had received an undergraduate education of any kind. Today, over 90,000 judges have reached that level, some 51.6 percent of the current total, and this trend toward greater education, increasingly legal education, will continue.

#### DUE PROCESS AND THE COMMUNIST PARTY

Albeit little known to most Chinese people, growing rights consciousness has even invaded the precincts of the Communist Party's 70 million members. When dealing with the crucial issue of the imposition of Party sanctions against individual members, the most severe of which is loss of membership, the Party Charter has long recognized certain elements of due process—notice to the individual of the adverse action proposed and a right to be heard before a decision is made. In practice that provision has often not been implemented. Recently, however, some notable steps have been taken to put living flesh on the bare bones. For the past four years local Party Discipline and Inspection Commissions (DIC) in at least twenty provinces have reportedly conducted a range of experiments with what has come to be known as a “Party Discipline Tribunal” or “Intra-Party Court” that adopts some basic features of PRC criminal court trials. In one respect at least—the opportunity to cross-examine witnesses—this evolving institution may do better than most criminal trials.

Although details have varied, at these tribunals Party investigators are required to present evidence, including witnesses, and the accused is permitted to challenge the evidence, produce witnesses of his own and even have the assistance of a fellow Party member in coping with the evidence and arguing his case. The triers of the case are designated by the local DIC and, like real PRC judges in sensitive or difficult cases, they merely report their findings to the tribunal's leadership for decision. In some cases the hearing is “open” in the sense of allowing certain Party members to attend, and the accused has a limited right to appeal an adverse decision. These Party tribunals have apparently not yet been convened at the provincial or central level, but their emergence at the grass roots demonstrates the spread of ideas of fundamental fairness among the country's elite when it comes to dealing with itself. Loss of Party membership, even in today's more mobile Chinese society, can be a devastating blow. These Party tribunals also reflect the Party's increasing concern for enhancing its legitimacy, punishing corruption and ventilating the punishment process to reduce the likelihood that it too is corrupted.

#### THE RELEVANCE OF TAIWAN AND SOUTH KOREA

I hope that enough has been said to suggest some of the progress, problems and prospects of law reform in China. Before concluding, I want to refer briefly to the relevance of Taiwan and South Korea and perhaps create an intellectual bridge to the remarks of my two colleagues on this panel, whose observations I am keen to hear.

Taiwan and South Korea, of course, have much in common regarding the development of the rule of law. Their current democratic governments both emerged from decades of authoritarian dictatorship at the same time. Both places are deeply influenced by China's Confucian/Buddhist culture and imperial Chinese bureaucratic traditions, and, like the PRC, have little in their pre-modern past to sustain legal concepts and practices such as those relating to individualism, government under law, judicial independence and constitutionalism. Each suffered decades of Japanese colonialism until 1945, and they learned even more about the virtues of a genuine rule of law from its absence during their respective post-World War II dictatorships. Yet both made rapid social, economic and educational progress during the post-war era, and, as part of this process, created a legal elite of law professors, lawyers, judges, prosecutors and officials familiar with other legal systems and international legal standards. This is undoubtedly what enabled each to make a relatively smooth transition to a democratic legal system once political circumstances permitted.

Each also features a constitutional court that in the democratic era has been remarkably free in invalidating legislation as well as regulations and administrative acts inconsistent with fundamental legal norms. Unelected judges making controversial constitutional decisions of profound political significance in a new and hotly contested electoral environment would test the mettle of any system, especially one rooted in East Asian political-legal culture. Japan's Supreme Court, by contrast, has been far more cautious in its constitutional decisionmaking. Yet, thus far, the constitutional judgments of Taiwanese and Korean courts have, by and large, been accepted as legitimate, even by powerful losers.

There are obviously important differences between the PRC, on the one hand, and Taiwan and South Korea, on the other—especially the huge discrepancies in popu-

lation and political systems. Nevertheless, some Chinese experts acknowledge that, as the PRC charts the course of its future law reform, there is much to be learned from the experience of both jurisdictions. Why this is so is easy to understand, as brief reference to Taiwan will illustrate.

Would it be feasible for the PRC to establish an independent constitutional court despite China's uncongenial traditions for it? Taiwan shares those traditions, of course. Yet the recent example of its Council of Grand Justices suggests that, given the political will, a constitutional court could function successfully in Mainland China also.

Can the PRC create a judiciary that is politically independent, free of corruption and "local protectionism," and immune to the distortions of "guanxi" (connections)? Under the Nationalist Party's dictatorship, Taiwan's judiciary and its prosecutors were a scandal. Yet, during the past fifteen years, starting long before the 2000 electoral victory of the Democratic Progressive Party ousted the Nationalists from the Presidency, Taiwan's judges—and prosecutors too—have undergone a remarkable transformation. How did this happen? How is it possible to create a professional elite, including lawyers, that has actually begun to take legal ethics seriously, even while the political process is still awash in corruption? PRC leaders may not like the answers to such questions, but should pursue them.

Would Chinese criminal investigators be able to do their job if their powers to search, arrest and detain become subject to review by an independent court? What would be the impact of granting Chinese suspects a right to silence? What effective measures might be taken to enforce the PRC's existing, but often ignored, prohibitions against police torture and coerced confessions? Should lawyers be allowed to begin defending their clients during the often lengthy criminal investigation stage? Again, Taiwan has a wealth of experience.

Perhaps most innovative and daring is Taiwan's recent determination to improve the fairness and accuracy of criminal trials by adapting the Anglo-American adversary system—minus the jury trial—to local needs. This has produced formidable challenges: How to cross-examine witnesses in open court and deal with other complex evidence problems? How to change the roles of prosecutor, defense lawyer and judge to break the mold of the traditional continental European model adopted by Chiang Kaishek's regime three-quarters of a century ago? PRC reformers are increasingly aware of the extent to which the continental European criminal procedures on which their system has also been based have themselves become more "adversary" in nature especially in the post-World War II years. They now confront the difficult issue of how far to follow through on the PRC's own considerable flirtations with the adversary system. Before making their decision on this major issue, it would seem highly desirable for them to take account of how a similar effort is faring in a legal environment much more similar to the PRC's than that of Europe.

Of course, as previously noted, China's long struggle to attain a civilized system of criminal justice is significantly undermined by the continuing power of the police to avoid the criminal process entirely by consigning people to as much as three or four years in a "reeducation through labor" camp. Even on this crucial question, the experience of Taiwan is strikingly relevant. For many years under the Nationalist Party, Taiwan had similar administrative punishments for "hooligans," political dissidents and others, until such punishments were held to be unconstitutional. At that point the legislature, no longer willing to punish dissenters but still concerned with "hooligans," established a special "Public Order Tribunal" under the ordinary courts in an attempt to deal in a constitutionally acceptable manner with the particular problems caused by "hooligans." That legislation has confronted a succession of challenges before the Council of Grand Justices, which is considering yet another constitutional petition relating to this issue. Before deciding to adopt a similar "public order" tribunal to preside over future "laojiao" cases, as has been proposed, the PRC would do well to consult Taiwan's long effort to cope with this problem.

Mr. Chairman, on the basis of the above remarks, I urge the Commission to endorse not only the continuing support of the Congress and the Executive Branch for rule of law-related cooperation with PRC lawyers, judges, prosecutors, officials and scholars but also the commencement of our government's support for research on the development of the rule of law in Taiwan and South Korea and its relevance to law reform in the PRC.

## PREPARED STATEMENT OF JOHN FUH-SHENG HSIEH

JULY 26, 2005

The legal system in Taiwan has been shaped by several factors. First, Taiwan is a Confucian society. In Confucian culture, stability is the paramount concern, and moral examples set by superiors are considered more effective than legal codes in maintaining social and political order. Such an attitude has surely been significantly changed over the years as a result of exchanges with the outside world. However, there are still traces of Confucian culture in Taiwan. In a series of islandwide surveys, for instance, when asked to make a tradeoff between political reform and stability, an overwhelming majority of the respondents chose stability instead of political reform.

The first major change in Taiwan's legal system came with the Japanese in the late nineteenth and early twentieth centuries after Taiwan was ceded to Japan by the Qing Dynasty. The Japanese set up courts and brought in Japanese legal codes as part of the colonial administration.

In 1949, when Kuomintang (Nationalist Party, KMT) fled to Taiwan after being defeated by the Chinese Communists on the mainland, it brought with it many laws it drafted and only partially implemented on the mainland. Indeed, many of these laws remain the backbone of Taiwan's current legal system, notably the Constitution (1947), the civil law (1929–31), and the criminal law (1928).

To be sure, the first four decades of the KMT rule was not democratic, and the laws were often subject to the government's or the party's intervention. It was only after Taiwan became democratic has the independence of the judiciary been better respected. Yet, even today, instances of administrative intervention can still be heard from time to time, and public officials may bypass or violate the laws but can easily get away with it, showing that Taiwan's legal system has improved, but has not lived up to the expectations.

How much did Taiwan's legal system contribute to its democratic transition? Probably not much. There are many other factors which may be more salient in Taiwan's democratization process. For example, the popular support received by the opposition movement among the native Taiwanese as a result of their long exclusion from the political process was certainly a very important factor forcing the KMT government, which was dominated by the minority mainlanders, to make concessions. Other factors such as cultural change and the emergence of a civil society as a result of the remarkable economic development have all paved the way for reshaping Taiwan's political system. The pressure from other countries, especially the United States, also, to some degree, facilitates Taiwan's political change.

Although the legal system may not directly contribute to Taiwan's democratic transition, it is undoubtedly a very important factor affecting the phase of democratic consolidation. Indeed, a sound legal system supported by an appropriate legal culture is one of the most important guarantees for the well-functioning of a liberal democracy.

Yes, Taiwan's legal system has greatly improved, and its legal culture is now more in line with the Western notions of laws. Nevertheless, there is still room for improvement. For one thing, many people may pay lip service to the notion of the rule of law, but it is doubtful how firmly rooted it is. Indeed, as powerful politicians act in clear violation of the law, their act was often dismissed as, say, election gimmick, and forgotten quickly by the public. The recent stalemate in the political process can be partly attributed to the lack of true respect for laws on the part of many politicians.

Now, can Taiwan's experiences be exported to China? Not really. The development in China, particularly since 1949, was very different from that in Taiwan. The infusion of communism—or more precisely, Maoist communism—to a large extent, changed the very notion of laws and democracy. Although Deng Xiaoping's reform revitalized some Western legal practices to serve the need of economic reform and to prevent the recurrence of the Cultural Revolution type of chaos, the country still has a long way to go before a well-functioning judicial system—not to mention a liberal democracy—can be established.



## PREPARED STATEMENT OF JOHN K. OHNESORGE

JULY 26, 2005

## I. INTRODUCTION

I have been involved with Northeast Asian legal issues in various ways since the mid-1980s, when I went to China to teach and then to study. I was an attorney in private practice in Seoul from 1990 to 1994, after which I went to Harvard Law School, where I focused on Northeast Asia in earning LL.M. and S.J.D. degrees. At the University of Wisconsin Law School I am Assistant Director of our East Asian Legal Studies Center, and I regularly teach and write on Northeast Asian legal issues. I just returned from three months as a visiting scholar in Japan, at the Nagoya University faculty of law.

Turning to the topic of this panel, in my view, the South Korean experience of law and democratic transition gives us only limited cause for optimism when we imagine China's future. I will provide the basis for my views, but first would like to present a very short overview of South Korean legal development, then describe the role of law in South Korean authoritarianism.

## II. SOUTH KOREAN LAW OVERVIEW

South Korea's modern legal system is closely related to the Japanese system, which was modeled primarily on German law. Japan imposed its legal system on South Korea during the colonial period, which lasted from roughly 1910 until 1945, and after independence South Korea did not radically reform the basic structure of its legal system. Unlike the U.S., South Korea has a single, bureaucratically organized judiciary, and a unitary legal system. Law is a popular undergraduate major in South Korean universities, but only a tiny percentage have been allowed to pass the national bar exam, and thus the practicing bar is very small. Unlike Japan, South Korea has a Constitutional Court as well as a Supreme Court, introduced in the democratic constitution of 1987.

## III. LAW IN AUTHORITARIAN SOUTH KOREA

South Korea was essentially authoritarian from 1948, when the U.S. military government handed back sovereignty, until 1987, when the first truly democratic elections were held, and the transition to full democracy began. South Korea's authoritarian governments, though stridently anti-communist and important U.S. allies during the cold war, abused human rights in ways reminiscent of things one hears about in China today. While these abuses were certainly not of the scale that have taken place in China, the conditions and mechanisms under which they arose were sometimes strikingly similar.

For example, due to the institutional weakness of the South Korean courts, authoritarian South Korea's various constitutions functioned more like policy statements than as fundamental law defining and constraining political power. Administrative law hardly functioned for decades, meaning that government agencies were only very weakly constrained by judicial review in their dealings with citizens and private economic actors. Property rights were enshrined in the various constitutions, and were well-specified in the German-style codes inherited from Japan's colonial rule, but remained ultimately contingent upon maintaining political favor, as from time to time the government confiscated property from those whose support for the regime wavered, and who thus breached the implicit compact between the authoritarian state and its leading economic actors. The executive thus enjoyed enormous discretion when dealing with the private sector, and while such discretion was part of authoritarian control, administrative discretion was also at the heart of the interventionist industrial policy which South Korea practiced as it grew in to an economic superpower.

With respect to civil society, the South Korean government worked hard to neutralize organized labor by, among other things, demanding that unions belong to the single, government-dominated Federation of Korean Trade Unions (FKTU). This served the dual purposes of suppressing wages and of controlling the rise of an autonomous civil society. Other elements of civil society, such as religious groups or business interests, were also subjected to severe pressures not to challenge the government's basic monopoly on political authority. The South Korean CIA (KCIA), an enormous organization relative to South Korea's population, was a primary tool for this government penetration of civil society, insinuating itself into churches, unions, newspapers, student organizations and work places far beyond what we would understand as necessary, even given the extremely serious security threats posed by North Korea.

The criminal law was another important tool of authoritarian control. For example, in 1974 and 1975 President Park, Chung-hee issued a series of notorious Presidential Emergency Decrees which, among other things, made it a crime to criticize the constitution, to propose revision thereof, to “fabricate or disseminate false rumors,” or to “defame” the Emergency Decrees themselves. Emergency Decree No. 1 dispensed with the warrant requirement for arrest, detention, search or seizure, with trials to be conducted by “Emergency Courts-Martial” established under Emergency Decree No. 2. Conviction under Emergency Decree No. 1 could result in a prison sentence of up to 15 years.<sup>1</sup> Many people were charged under these decrees, including a former President of South Korea, and a defense attorney who reportedly received a 15-year sentence for criticizing the Emergency Courts-Martial in the closing argument he made in the course of defending a client.

Extra-legal means were also regularly used to silence the government’s critics. Many will remember that in 1973 South Korean agents in Japan kidnapped Kim, Dae-jung, later the president of South Korea and a Nobel Peace Prize winner, and it was reportedly only intervention by the United States that kept them from murdering him. Less well remembered is Professor Choi, Jong-gil, of the prestigious Seoul National University law faculty, who died under very suspicious circumstances while in KCIA custody for his criticisms of the Park regime. Critics of the government were sometimes kept under house arrest or subjected to similar forms of control without legal basis. Furthermore, democracy activists who were arrested on dubious grounds were sometimes released if they would provide written promises not to continue their activities. Such statements could then be used by the authorities as justification for punishing those who returned to political activities. At times governments also reached beyond the political activists themselves to punish their family members.

President Park was assassinated by his own KCIA chief in 1979, but South Korea’s poor human rights performance continued under General Chun, Doo-hwan until 1987, when massive civil unrest convinced General Chun to allow the creation of a new constitution and democratic elections. General Roh, Tae-woo won the 1987 election, so South Korea had to wait until 1992 to have a civilian president, the former opposition leader Kim, Young-sam. Regular elections followed in 1997 and 2002, and democracy is now firmly established.

#### IV. LESSONS FROM SOUTH KOREA’S PAST FOR CHINA’S FUTURE

As I said at the outset, my reading of the South Korean experience suggests to me that reform in China is going to be a very long, slow process. I would like to now outline what I see as reasons for pessimism, then suggest reasons for optimism.

First of all, South Korea’s poor human rights record continued despite the fact that the country had become an economic powerhouse with an essentially capitalist economy. This suggests that even a very successful market economy cannot be relied upon to automatically unleash social forces potent enough to bring about democracy or the Rule of Law. The South Korean case suggests instead that law can be kept under political control for a very long time, even after a country has become quite wealthy. South Korean business interests, for example, were unwilling or unable to exert significant demand for the Rule of Law, as some approaches to law and development suggest they would have. Big business was instead entwined in a corrupt, non-law based relationship with the executive and the ruling party, the legacy of which continues to this day. Nor is the technical development of law and legal institutions necessarily going to lead directly to the sorts of legal and political reforms that many hope for in China. In authoritarian South Korea there was a technically complete, coherent system of law, many students majored in law at university, and the few who became judges, prosecutors, or private practitioners were well educated and very talented. At various times these talented, well-educated lawyers, judges, and prosecutors did resist the authoritarianism of the executive branch, but most chose instead to work within a system that rewarded them very well, but demanded obedience.

A further cause for concern is based upon structural differences between authoritarian South Korea and China today. In South Korea’s case there were structural limits on the powers of the executive branch that are not present in the Chinese context, one of which was the relationship with the United States. While America’s approach to South Korea was complex and sometimes contradictory—generally supporting the authoritarian governments for strategic reasons while specific individuals and institutions worked hard to support political and human rights reforms there—the pro-democracy, pro-human rights pressures being exerted from the

<sup>1</sup> Presidential Emergency Decree No. 1, effective January 8, 1974.

United States enjoyed a degree of influence over South Korea that no outside force will ever again have over China. While the international climate may now be less tolerant of authoritarianism than it was during the cold war, China is truly sovereign in a way that South Korea was not.

In addition, although South Korean dictators tried hard to suppress civil society and to organize it along corporatist lines, they faced obstacles that China doesn't face. South Korea's Christian churches, Catholic and Protestant, and often with support from churches in the United States, were pillars of resistance to human rights abuses that the governments were never able to control, though they certainly tried. The South Korean student movement as well was an active source of resistance for decades, drawing on a tradition of student activism dating back to the early 20th century. Labor unions also resisted repressive government labor policies, fighting to organize independent unions and maintaining consistent pressure for democratization. In China today such forces seem weaker than they were in South Korea even at the height of its authoritarianism. While religion is growing in importance in China, the churches don't yet appear to be significant actors in civil society, and the government is clearly committed to keeping them from playing such a role. Meanwhile, students in China today don't appear willing to take the risks necessary for collective political action, which Tiananmen Square showed could result in the ultimate sacrifice, and the government appears to have been quite successful in resisting the organization of independent labor groups. And while the press in China is certainly more vibrant and loosely controlled than it used to be, it seems still more subject to government control than the press was in authoritarian South Korea.

Finally, South Korea, arguably like the Soviet Union in its last days, was really led by one man, or a very small group of men, who had the power to bring the system to an end when the time finally came. Such concentrated authority was what made the system authoritarian in the first place, but perhaps paradoxically it may also have allowed for quite sudden political reform because there were fewer players whose interests had to be taken into account. Political authority in China today seems much more dispersed, which could make the system more resistant to dramatic reform than the South Korean system was.

Despite these reasons for concern, there are also grounds for optimism. First, human rights in many areas can be improved within an authoritarian capitalist framework, which seeks to govern for the most part through law and order and bureaucratic regularity rather than uncontrolled bureaucratic discretion or Maoist ideological campaigns. Recent reforms to China's criminal and administrative law can be understood in this light, for example. But this legal regularity and bureaucratic normalcy may not extend to civil and political activities that challenge state power, and the state retains the discretion to define what constitutes such a challenge.

Second, globalization and new information technologies clearly make it much harder to control China's rising civil society than was the case in authoritarian South Korea, where the government could more successfully control cross-border and domestic information flows. Combined with the fact China is much bigger and more socially diverse than South Korea, this must increase the difficulty of maintaining stable authoritarian rule.

Third, the international economic order now seeks to place demands upon national legal systems that are more exacting than the demands placed upon authoritarian South Korea, and foreign direct investment plays a larger role in China's economy than it ever did in South Korea's. Although China employs many of the interventionist, highly discretionary industrial policy measures that South Korea did, there is considerable pressure for more law-based economic governance. And while the impact of international economic integration as a force for political liberalization or the Rule of Law is easily overstated, it probably does play some positive role.

Finally, and most important, there are many people in China today who reject the idea that they are not ready for democracy, the idea that as East Asians they value order and hierarchy over individual rights, or the idea that political liberalization must be postponed until China's economy attains some magical level of Gross Domestic Product per capita. The study of history does not provide us with "laws," and while South Korea's experience suggests that legal and political reform in China is likely to be a long, slow process, I believe the aspirations of the Chinese people make progress inevitable.

Thank You.

PREPARED STATEMENT OF HON. CHUCK HAGEL, A U.S. SENATOR FROM NEBRASKA,  
CHAIRMAN, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

JULY 26, 2005

The Congressional-Executive Commission on China meets today to assess the development of the rule of law in China. The Commission will also examine the role of legal institutions in South Korea and Taiwan to determine what lessons there may be for reform in China.

Over the past 25 years, China has worked to build a market-based economy and rebuild a legal system and legal institutions that were destroyed during the Cultural Revolution. Today, we can see in every Chinese province the effects and achievements of market reforms, forward-looking economic changes, and legal development. But China's political system continues to leave most Chinese people without a voice in their own political future, and legal institutions have yet to provide a reliable check on the arbitrary exercise of government power. Popular frustration, especially with official corruption, seems to be growing. Without effective administrative, legal, and political channels through which to redress their grievances and protect their economic and civil rights, Chinese citizens often have little choice but to take to the streets. Such a result can only undermine China's progress.

China's legal system will be an important foundation for stability and development in that country. As Chinese scholars and officials have worked to reform China's legal system, they have demonstrated a consistent willingness to consider the characteristics and development experiences of other legal systems. Two neighboring legal systems, those of South Korea and Taiwan, provide particularly relevant examples. China today faces many of the same problems and decisions that South Korea and Taiwan faced in the 1970s and 1980s. As reform in these areas progressed, legal institutions provided a stable platform for the resolution of disputes, the enhancement of the protection of human rights, and the development of transparent and fair administration of government.

The U.S. Government supports the efforts of many Chinese citizens and government officials to reform their legal system and build a more transparent, fair, and participatory society. Political change is complex and imperfect, and China's future will be up to the Chinese people. This Commission has consistently recommended to Congress and the President that the United States increase funding for legal exchange with China and actively engage China in legal cooperation. As today's statements will suggest, such efforts need not be purely bilateral, and may benefit from incorporating the expertise and experience of scholars from South Korea and Taiwan, whose legal development models are in many ways more relevant to today's China than those of the United States.

To help us better understand current trends in the development of China's rule of law and the experiences of South Korea and Taiwan, we turn to our witnesses.

Principal Deputy Assistant Secretary of State, Gretchen Birkle, joins us from the Bureau of Democracy, Human Rights and Labor at the State Department, to present the U.S. Government's view of rule of law in China. Prior to joining the State Department, Ms. Birkle worked for more than five years at the International Republican Institute [IRI]. As deputy director for the Eurasia division, Ms. Birkle managed IRI's activities in nine countries of the former Soviet Union.

After Ms. Birkle, we will hear from a distinguished panel of private experts who will share their expertise. Professor Jerome Cohen of New York University Law School will give us an overview of legal reform in China and help us tie the South Korea and Taiwan experiences to China. Professor Cohen is also an adjunct senior fellow for Asia at the Council on Foreign Relations, a lawyer with the international law firm of Paul, Weiss, Rifkind, Wharton & Garrison, and a leading expert on the Chinese legal system and international relations in East Asia.

Professor John Hsieh will provide perspectives on Taiwan. Professor Hsieh teaches in the Department of Government and International Studies and is Director of the Center for Asian Studies at the University of South Carolina. He has written numerous books and articles on Taiwan's democratic transition and is a leading expert on this subject.

Professor John Ohnesorge of the University of Wisconsin School of Law will discuss the role of law and legal institutions in South Korea's democratic reform. Dr. Ohnesorge also serves as Assistant Director of the law school's East Asian Studies Department, practiced law in South Korea during several years of democratic transition (1990-1994) and is an expert on Korean law. He is the author of "The Rule of Law, Economic Development, and the Developmental States of Northeast Asia."

PREPARED STATEMENT OF HON. JAMES A. LEACH, A U.S. REPRESENTATIVE FROM  
IOWA, CO-CHAIRMAN, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

JULY 26, 2005

Mr. Chairman, I am pleased to join you and the Members of the Congressional-Executive Commission on China this afternoon for this important hearing on a topic of great interest to all of us who pay attention to China. I look forward to hearing our witnesses today on whether we may derive some insight into China's future political development by looking at the recent historical experience of South Korea and Taiwan.

I believe that the modern economic and democratic development of South Korea is a profound achievement for which the Korean people deserve great credit. The people of South Korea are deservedly proud of the Republic of Korea's arrival as a global actor—economically, militarily, and culturally. The United States not only welcomes those changes without reservation but we celebrate them together with the Korean people. I also believe that Americans can take some satisfaction in knowing that the United States has made an essential contribution to these developments.

Our two vibrant democracies remain tightly bound through a deep and long-standing security relationship, ongoing political and cultural affinities, extensive economic bonds, and extraordinary people-to-people ties, cemented in many instances by a common educational experience and led by the million-and-a-half strong Korean-American community here in the United States. It should be underscored that the United States is extraordinarily proud of its Korean population, which is the largest in the world outside of the Peninsula.

Perhaps uniquely in the world today, the United States is committed to a strong, independent, reunified Korea. America has sacrificed blood and treasure in defense of freedom for the people of South Korea, and we understand that freedom necessarily implies independence of judgment. From a Congressional perspective, America's commitment to South Korea has to be steadfast and our alliance unquestioned as the unpredictable unification process with the North proceeds. The North must not be allowed to drive a wedge between the U.S. and South Korea. The United States must take the long view, and the tone of our public and private diplomacy must give voice to our inner conviction that, as a vibrant democracy committed to economic and personal freedoms, the Republic of Korea is a Nation the dignity of which deserves our deepest respect.

Mr. Chairman, with respect to Taiwan, we marked in 2004 the 25th anniversary of the enactment of the Taiwan Relations Act (TRA). I am proud to have been among the proponents and supporters of the Act, and I am also proud of a small provision I authored relating to human rights and democratization. It is with the greatest respect that I observed the courage and sacrifices of those who challenged the Kuomintang government to open up to democracy. We recall that, while it supported the free market and was anti-communist, the party of Chiang Kai-shek on Taiwan had certain organizational attributes similar to the Communist Party on the mainland. All Americans strongly identify with Taiwan's democratic journey and we join in celebrating the fact that the people of Taiwan now enjoy such a full measure of human freedom.

The robust multi-party system and opportunity-oriented economy that has developed over the past 25 years on Taiwan is a prototype for the world of progressive political and economic change. Indeed, economics and politics have conjoined on Taiwan to allow more progressive strides to take place there than in any place on earth over the past generation. The miracle of Taiwan's peaceful democratic transition is of great significance not only to its 23 million citizens but also to the 1.3 billion residents of the Chinese mainland. These Chinese now have the chance to examine another model of governance and social organization made successful by a people with a similar cultural heritage.

Mr. Chairman, as our engagement with China deepens, and we mutually identify those issues in which the United States and China have a commonality of interest, it is my hope that Americans can play a role similar to that which we played in South Korea and Taiwan—supporting a peaceful transition to multiparty democracy and even greater economic freedom.

I look forward to hearing from our witnesses this afternoon.

Thank you.

