

Congressional-Executive Commission on China

Human Rights and the Rule of Law in China

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Written Statement of

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Senator Hagel and Other Distinguished Members of this Commission,

All of us who focus on China's progress, problems and prospects with respect to human rights and the rule of law are grateful for this Commission's continuing interest and cooperation. Hearings such as today's and publications such as your just-released 2006 Annual Report, which offers a comprehensive, balanced and accurate account of recent developments, stimulate interest and spread knowledge about a vast, complex and important subject that receives too little public attention in both China and the United States. It would be wonderful if the 2006 Annual Report could be published in China as well as this country.

Striking the right tone for today's Hearing is a challenge. It has been over a year since my last appearance here, and this has not been a good time in China for either the rule of law or for human rights in the sense of political and religious freedoms, protection against arbitrary criminal punishment, the development of fair and independent courts and the growth of a free and vigorous legal profession.

The picture is somewhat brighter if we focus on the role of law and legal institutions in promoting China's remarkable economic progress. The new and long-awaited Bankruptcy Law and the forthcoming Antitrust Law are recent examples of ongoing legislative progress, although the temporary failure of the draft Property Law reminds us of the ideological as well as practical and technical challenges confronting the National People's Congress in seeking to regulate bitter rural and urban land use disputes.

Yet even commercial laws need credible enforcement. China's rapidly expanding institutions for legal education and scholarly publication are gradually improving the craft skills of the various branches of the legal profession. But the courts, the China International Economic and Trade Arbitration Commission and most, but not all, of the many municipal arbitration organizations continue to suffer from political interference, corruption, "local protectionism" and the corroding effects of personal ties compendiously described as "guanxi." The impact of these serious institutional shortcomings will become more apparent as China's economy reaches a higher stage of development. Moreover, not all

recent economic rule-making has been positive in facilitating either foreign business cooperation with China or even unfettered distribution of purely commercial news.

I am sure that my colleagues at this Hearing will analyze the continuing and extensive denials in practice of the freedoms to receive information, speak, publish, organize, assemble, demonstrate and worship that are enshrined, in principle, in China's Constitution. Here I will comment only on prospects for further legislative reform of the administration of criminal justice and relevant activities of Chinese courts and lawyers.

PROSPECTS FOR LEGISLATIVE REFORM OF THE CRIMINAL PROCESS

Chinese experts have long recognized that the 1996 Criminal Procedure Law (CPL) is in need of revision, clarification and elaboration. Several impressive academic drafts of a new law have been circulating in official circles for some time. Yet hopes that a new law might be enacted by the time of the Beijing Olympics in 2008 now appear to be receding. This new law was to accompany and implement China's long-awaited ratification of the International Covenant on Civil and Political Rights (ICCPR), which the People's Republic of China (PRC) signed in 1998. Ratification of the ICCPR – and implementation in accordance with its terms – would have a more profound effect on the PRC's political, legal and social systems than the PRC's entry into the World Trade Organization has had upon its economy. Undoubtedly for this reason, in what is plainly a very conservative climate for law reform, ICCPR ratification also seems to be retreating to the backburner of a leadership that has shown itself to be increasingly impervious to popular demands for due process in law enforcement. At least in the short term, the Politburo has decided to meet the spectre of social instability with harsh repression rather than legislative innovation.

This is unfortunate since a large number of Chinese criminal justice experts from the judiciary, the procuracy, the defense bar, the Ministry of Justice, the Ministry of Public Security, the NPC staff and academic life have been making impressive efforts to develop a national consensus on a broad range of understandably contentious issues. Should suspects generally be granted bail during the investigation period instead of languishing in detention as at present? Should they have a right to keep silent and not incriminate themselves? Should a presumption of innocence be confirmed and its implications spelled out? Should defense lawyers be allowed to monitor police interrogations, conduct their own investigation prior to indictment and freely meet detained clients? What steps should be adopted to make defense lawyers available to the accused who more often than not go unrepresented? What protections should be enacted to reduce the likelihood that suspects will be tortured and to curb widespread overtime detentions? What measures should be prescribed to strengthen the current insignificant legislative barriers to arbitrary search and seizure? Should all illegally-obtained evidence be excluded from trials? Should plea bargaining be fostered? Should prosecution witnesses be required to appear at trial in order to make meaningful the existing right to cross-examine one's accusers? What kind of appellate review should replace the current perfunctory procedure? None of these issues, which have long cried out for legislative resolution, is likely to be dealt with by the NPC in the near future.

Nor does the NPC seem ready to abolish the notorious, supposedly “non-criminal,” administrative punishment of “reeducation through labor” (RETL), which allows the police unilaterally to ship people off to three or even four years of confinement in circumstances that are similar to those of the conventional criminal punishment of “reform through labor”. Two or three years ago, many Chinese reformers, even within the Ministry of Public Security (MPS), seemed confident that the NPC was about to abolish or at least substantially revise RETL. There was widespread agreement among the experts that its continuing existence undermines the significance of the Criminal Procedure Law (CPL), since it allows the police to circumvent the protections of the CPL, including review by the procuracy and the courts, and nevertheless to send people to long periods of what is, for all intents and purposes, criminal punishment. But the apparent opposition of the Central Party Political-Legal Committee and the leadership of the MPS, which believes that it continues to need this weapon to help quell social unrest, has been sufficient to block adoption of the draft legislation that now lies dormant in the NPC.

SUPREME COURT EFFORTS TO RESTRICT APPLICATION OF THE DEATH PENALTY

Although one cannot be optimistic about immediate prospects for further NPC reforms of the criminal process, this does not rule out the efforts that can be made by other institutions, especially the Supreme People’s Court (SPC). Within its limited political power, the SPC has been trying to sustain the momentum for law reform. Early this year, it made public its Second Five-Year Reform Program for the People’s Courts, which sets forth an ambitious 50-goal agenda for court improvements of various kinds. It has more recently announced thirteen new research projects for implementation. Experience suggests caution before equating breathless pronouncements with actual accomplishments. Nevertheless, the most active law reform currently under way in the criminal justice field is the SPC’s energetic effort to dramatically improve the present inadequate procedures for trying and reviewing death penalty cases.

The SPC recently announced its determination to retrieve from the provincial high courts the responsibility the SPC had granted them for final review of all death penalty cases except for those involving crimes of corruption and of endangering state security, which the SPC has always retained. For practical rather than political reasons, implementation of this determination has proved to be a slow and painstaking task, largely because of the difficulty of recruiting the 300 to 400 new SPC judges who are deemed to be necessary to do the job. This estimate offers some clue to the huge, but unconfirmed, number of capital prosecutions brought by the procuracy each year. The SPC has reportedly recruited over 100 of the newly-needed contingent from the lower courts. In order to speed completion of the task, it has also begun to recruit Chinese law professors and lawyers to serve on its staff. Although this had occasionally been done in the past, the current attempt to recruit broadly outside the career judiciary bodes well for the future, if it proves successful.

Because the SPC is not expected to grant final review to the retrieved categories of capital cases until 2007, that responsibility will continue to rest with the high courts until then. Although some lawyers have urged the SPC to declare a moratorium on final reviews until it is ready to conduct them, the SPC has not responded to this proposal and is unlikely to do so. Even the SPC, which to its credit frequently adopts a dynamic view of its authority, would be hard-pressed to take such a bold step in the absence of new legislation or a Politburo instruction, neither of which is anticipated. This is especially the case since the enactment, just weeks ago, of a Supervision Law that strengthens the controls of the standing committees of the people’s congresses at all levels over government, court and procuracy activities. When this law goes into effect on January 1, 2007, the SPC will be required to file with the

NPC's Standing Committee each new interpretation it issues, knowing that the Standing Committee has the power to amend its interpretation.

What the SPC has done is to move ahead to improve procedures at the high court level. Since July 1, all appeals of death penalty cases require a formal court hearing – though not necessarily a public hearing – rather than merely what was often only a cursory review of the case file and the briefs submitted by the procuracy and defense lawyers.

Moreover, some SPC experts have recognized that not only are the appellate and final review processes in need of improvement, but also the trial itself. Capital trials inevitably suffer from the same deficiencies as other criminal trials in China, only the stakes are higher. In the absence of specific authorizing legislation, it is unclear how far the SPC can go in mandating more accurate and fairer procedures in capital trials. Yet if it does carry out far-reaching improvements, this would not be the first time it has tread upon the NPC's turf. Thus far, in order to guide trial courts, the SPC has reportedly drafted “standards for the application of the death penalty in certain cases,” namely, for crimes of murder, injury causing death, drug trafficking and robbery, which account for the bulk of PRC death sentences. These standards, which have not been made public, apparently call for the imposition of capital punishment only in cases in which the new and detailed conditions that they set forth have been met. Of course, law reformers will be quick to advocate that any new trial and appellate procedural guaranties in capital cases be extended to the processing of other serious crimes.

DISGRACEFUL HANDLING OF SOME RECENT CRIMINAL CASES

Unfortunately, the SPC's encouraging activism with respect to death penalty reform has not been matched by equal vigilance in supervising the conduct of lower courts in individual criminal cases. This past year has witnessed a series of outrageous criminal convictions in cases that have been widely publicized outside China despite being shrouded in secrecy within the country. I have served as an informal consultant in two of these cases. In one, the blind legal activist Chen Guangcheng was sentenced to four years and three months in prison by the Yinan County Basic Court in Linyi City, Shandong Province, allegedly for instigating a mob to block a road and for inflicting damage on public property. The detention procedures and trial in this case were a travesty of justice by any standards. In the other case, Zhao Yan, a Chinese staff member of the Beijing bureau of the New York Times, was sentenced to three years in prison allegedly for committing criminal fraud against a friend, again after detention and trial procedures that shamed a great nation, but this time not in a poor, rural Shandong county but in Beijing, the prosperous and impressive political and educational heart of the country.

These cases are merely the tip of a criminal process iceberg that is largely concealed from the scrutiny of both Chinese and foreigners and that functions with cynical disdain for the country's criminal justice laws and international human rights standards. Court procedures are sometimes a farce, but pre-trial police misconduct is frequently worse. The Ministry of Public Security in practice often condones the misbehavior of its police, who increasingly retain thugs to carry out some of their most lawless acts. And the Ministry of State Security, China's version of the former Soviet KGB, is even more a law unto itself because of the even greater secrecy of its operations.

At the national level, the Supreme People's Procuracy, the supposed “watchdog of legality” in Communist systems, continues to issue rules designed to curb actions such as illegal extended detentions

of suspects by investigating officials. Yet in practice, local procuracies are often politically helpless or uninterested in implementing such rules. Further, in pursuing their own responsibilities for the investigation of corruption cases, local procuracies themselves frequently disregard prescribed procedures. Thus far, efforts by the NPC and local people's congresses to ferret out law enforcement abuses have not proved effective and in some cases, have actually served as cover for illicit interference with law enforcement. Whether the recently-promulgated Supervision Law, which strengthens the powers of the standing committees of people's congresses to review the operation of various government agencies including the courts, will yield better results remains to be seen.

THE COMMUNIST PARTY'S PARTICIPATION IN CRIMINAL INVESTIGATION

One of the most prominent and interesting features of recent PRC criminal justice is the increasing visibility of the Party's own investigative and coercive apparatus. To be sure, the Party, through its political-legal committees and through organizations within every law enforcement agency and court, controls the operations of official law enforcement at every level of government. But it also plays a major role itself in investigating and confining suspect Party members in important and complex cases before their processing by the official law enforcement agencies even begins. The Party's 70 million members, and sometimes others as well, are subject to informal, but effective and often long-term compulsory detention by one of the Party's ubiquitous discipline and inspection commissions. This process is generally referred to as "shuanggui," which means "double regulation" or "the two stipulations," because investigative targets are ordered to report at a stipulated time and place.

Especially in major cases of corruption, shuanggui investigation/detention often precedes both the formal imposition of Party disciplinary sanctions against members who appear to have violated Party rules and the transfer of suspects to the law enforcement agencies if they appear to have violated the Criminal Law. Because shuanggui suspects are often relatively important Party figures, they are usually confined in more comfortable quarters than a regular police detention cell. Nevertheless, although recent Party documents purport to assure shuanggui detainees of humane treatment, guaranteeing them against abuses against their person and property and even authorizing contacts with their family, if their captors believe this would not adversely affect the investigation, they are generally held incommunicado and denied some of the protections to which criminal suspects are entitled at least in principle. Thus they may be detained for as long as the Party discipline and inspection commission thinks appropriate, have no right to the advice of counsel, and have no opportunity for the procuracy to review the basis for their detention. If the suspect is turned over for criminal investigation, these criminal procedure rights should come into play, but by then it is usually too late for them significantly to benefit the suspect even if they are observed in practice. Consequently, as suspects, Party members – the nation's elite – have even fewer due process rights than the masses!

NEW RESTRAINTS UPON LAWYERS

My last year's testimony to the Commission emphasized the many restrictions imposed on China's criminal defense lawyers during both the investigation and trial stages and the threat of criminal prosecution that hangs over any lawyer who presents too vigorous a challenge to the facts alleged by the procuracy. The situation is no better this year. Indeed, in several respects it has deteriorated.

During the past year police or their hired thugs have often beaten lawyers for controversial defendants in order to prevent the lawyers' access to their clients or to the courts. The courageous human rights lawyer Gao Zhisheng was deprived of his license to practice law and is now being detained for unspecified "criminal activities." His law firm has been suspended from practice for one year. Police illegally prohibit his family from leaving their home or receiving visitors.

Lawless police blockades, long a feature of PRC repression of political dissidents, seem more numerous at present than at any time I can recall and are now frequently imposed on lawyers and other legal activists as well as their clients. A large group of government officials and thugs have blockaded the farm house of blind "barefoot lawyer" Chen Guangcheng since August 11 of last year and have maintained the blockade against his wife even after Chen was illegally taken into custody in March of this year. In June, I was invited to dinner at the apartment of former Shanghai lawyer Zheng Enchong, who had lost his license because of his dogged defense of the real estate rights of Shanghai residents and who had just completed a three-year prison sentence for allegedly revealing "state secrets" about a public protest to an American-based human rights organization. However, a group of policemen, who could cite no legal authority and would give no reasons, barred my visit. When repeatedly asked to justify their interference, they merely said: "We are police".

Plainly, contacts between lawyers and the media, especially the foreign media, have become increasingly sensitive. Defense lawyers in "state secrets" cases have been warned not to inform the press, or even the defendant's family or legal consultants, of developments in the case, even though this may inhibit an effective defense. What triggered the persecution of "barefoot lawyer" Chen Guangcheng was his role in the internet report on Linyi's illegal birth control measures posted by several Beijing legal scholars and the long dispatches filed by foreign journalists about the situation, including a front-page story in the Washington Post. Two of the scholars who filed the internet report were subsequently threatened with being sacked by their law schools and have also suffered other sanctions. The prosecution of former lawyer Zheng Enchong demonstrated how easy it is for someone who has contacts with foreign reporters to be convicted of illegally transmitting "state secrets" or mere "intelligence" to a foreign entity. What constitutes a "state secret" or "intelligence" remains a fluid concept in the PRC and is subject to arbitrary, even retroactive, interpretation by the authorities.

Equally sensitive to the regime are the contacts that public-interest lawyers have been cultivating with aggrieved groups of citizens. Perhaps the most recent adverse development involving lawyers was the issuance on March 20, by the Executive Council of the All China Lawyers Association, of a "Guiding Opinion on Lawyers' Handling of Mass Cases." This document, evidently the product of pressure from the Ministry of Justice, which controls the legal profession, is applicable not only to criminal cases but also to all other instances in which a lawyer is asked to represent ten or more people in the same case. It has created an uproar among activist lawyers and law professors since it substantially restricts the conduct of lawyers in such cases and vitiates the loyalty to their clients that has been developing into one of the hallmarks of the legal profession in China.

The Guiding Opinion's most sinister provisions require lawyers, after accepting a mass case, promptly to "discuss the case fully" with "the relevant judicial departments," "honestly report the situation" to them and "actively assist the judicial organs to clarify the facts." In this context the terms "judicial departments" and "judicial organs" plainly refer to the law enforcement agencies, not only to the procuracy and the courts but also to the police! Lawyers are also required to report on the situation to

other government agencies concerned, including the “judicial administrative organ in charge,” *i.e.*, the local justice bureau under the Ministry of Justice.

The Guiding Opinion emphasizes that the lawyer has a duty to assist the government as well as his client in such cases and to mediate and promote solutions that are acceptable to all. The Guiding Opinion also prohibits lawyers from encouraging or participating in large group efforts peacefully to use letters and visits to petition government agencies to resolve problems. Yet it authorizes lawyers to take part in such efforts if invited to do so by relevant government agencies. The Guiding Opinion deserves detailed analysis, but it obviously seeks to convert lawyers into instruments of law enforcement and other government institutions to the prejudice of the interests of their clients in mass cases. This represents a giant step backward to the 1980s, when China’s newly-revived lawyers were deemed to be merely “state legal workers” rather than the independent representatives of their clients.

THE IMMEDIATE FUTURE

This is a gloomy time in China for the administration of criminal justice and related legislative and judicial reform. The NPC seems to be frozen in this area, and the only significant systemic reform – the SPC’s effort to improve procedures in death penalty cases – is moving slowly and toward an uncertain outcome. In too many cases, the police operate with reckless disregard for existing criminal procedures, and in making their decisions courts are the helpless tool of Party and government leaders and the objects of other distorting influences. Although the nation’s leaders continue to use the abstract rhetoric of the “rule of law,” they increasingly emphasize that the Western-style laws, institutions and procedures that the Party has introduced since 1978 are not to be applied in a Western manner. They want the legal system to repress the rising tide of social unrest generated by China’s rapid success rather than effectively process the new disputes and grievances that are being brought to it for solution. This in itself has added to social instability. The failure of the highly-touted “socialist rule of law” to meet popular needs and its frequent use as an instrument of repression have fueled feelings of frustration that are being transformed into what has accurately been called “rightful resistance.”

Are there any grounds for optimism? Although the engineer-dominated Politburo Standing Committee appears to have little appreciation of a legal system’s potential contribution to social engineering and to the resolution of social tensions, below the top leadership level a younger and more sophisticated generation of officials, legislative staff, scholars, judges, prosecutors and lawyers is actively engaged in field research and practical experiments relating to reform of the justice system. Moreover, ideas of due process and fair adjudication appear to be making inroads into the Party itself, as demonstrated by the continuing quiet efforts to improve the conditions of shuanggui detainees and to “judicialize” Party disciplinary tribunals.

A year from now, after the 17th Party Congress, at which the Hu Jintao-Wen Jiabao leadership is expected to be firmly-entrenched for the next five years, we will be able to form a clearer picture of the prospects for reform. Optimists already claim to see signs, or at least hear talk, of bringing officials educated in law into many higher posts within the Party and government, including the influential provincial Party discipline and inspection commissions. It would also be desirable to place law-trained officials in charge of all the country’s law enforcement agencies at every level.

The most obvious indication of the new leadership's intentions regarding the legal system will be personnel changes within the Politburo and its Standing Committee. The admission to the Politburo of Minister of Public Security Zhou Yongkang at the 16th Party Congress, making him the sole government representative of the entire legal system at the pinnacle of power, has not substantially benefitted criminal justice reform. It is rumored that next year Minister Zhou will be promoted to membership in the Politburo Standing Committee, perhaps replacing Luo Gan as the head of the Central Party Political-Legal Committee that leads the operations of the courts, the procuracy, the Ministry of Justice, and the law enforcement ministries. Some even believe that he will also become head of the Central Party Discipline Inspection Committee. How he would exercise such vast power is unclear, but it would be comforting if someone with greater knowledge and experience in legal affairs, and with greater zest for strengthening the rule of law, were appointed to the Politburo. It was disappointing that, at the previous Party Congress, SPC President Xiao Yang was not elevated. A seat in the Politburo would give him some of the political clout required to implement his ambitious plans. An earlier SPC President, Ren Jianxin, who had decades of legal experience, not only sat in the Politburo but also served as head of the Central Party Political-Legal Committee. But perhaps a leadership that wants to keep "politics in command" does not regard that as a desirable precedent.

Such personnel appointments will have a crucial impact upon whether the PRC decides to ratify the ICCPR prior to the 2008 Olympics, adopt a new Criminal Procedure Law, curb police lawlessness and remove the restrictions that hamstringing defense lawyers and other legal activists.

WHAT SHOULD WE DO?

Understandably, China has always gone its own way, and outsiders who have sought to influence its course have had much to be modest about. Yet China has never been more open to international cooperation in all fields than today, and the PRC's legal experts, in and out of government, genuinely welcome virtually all opportunities to work with counterparts from abroad. International organizations, foreign governments and charitable foundations, non-governmental organizations, universities and lawyers' groups from many countries have already helped to launch numerous joint law reform projects in China. Nevertheless, this impressive effort has merely scratched the surface of the need and revealed the depth, breadth and long-term dimensions of the opportunity.

My hope is that Congress and the Executive Branch will substantially increase existing United States Government funding for cooperation with the PRC in rule of law and human rights projects. Moreover, the scope of this funding should be expanded to support research into important problems of criminal justice and the development of legal institutions in China. Continuing government sponsorship of training, conferences and exchanges is vital. Yet, unless such activities rest upon an adequate research foundation, their impact will be limited. For example, everyone recognizes that, if China is ever to enjoy a genuine rule of law, the most fundamental reform required is the development of a fair and independent court system. China's neighbors – Japan, Taiwan and South Korea – have made great strides in this respect despite the fact that they share China's Confucian-Buddhist political-legal culture. How did they do it? And why did previous efforts to establish a fair and independent judiciary fail in China? This type of research deserves the highest priority. Yet it has thus far found no United States Government support.

Finally, no assessment of prospects for law reform in China should overlook the work on Chinese justice published by relevant United Nations agencies, the reports of international human rights

NGOs, the studies published by various governments including our own and the scholarship of the academic community. This vast literature not only enhances our knowledge of a complex and relatively non-transparent subject but also stimulates further progress by the PRC. The report on torture in China issued last spring by Professor Manfred Nowak of Austria, Special Rapporteur of the UN High Commissioner for Human Rights, goes far beyond a narrow focus on torture and should be required reading for China's leaders as well as all others concerned. The largely unnoticed but important decisions of the UN Working Group on Arbitrary Detention, which has repeatedly condemned PRC practices in a long series of sad cases, is another example of UN action that deserves greater circulation. The 2006 Annual Report released today by this Commission is a splendid example of how helpful a foreign government's report can be to China's progress.

I strongly urge that the United States Government devote greater financial support to the dissemination of all such material in China, where, largely because of well-known obstacles to communication, even judges, prosecutors, legal officials, lawyers and scholars often do not know about events, incidents and developments involving the administration of justice in their own country. It is shocking, for example, that many Chinese legal experts who would be appalled at their government's persecution of blind "barefoot lawyer" Chen Guangcheng have never heard of this case. This suggests that agencies such as Voice of America and Radio Free Asia still have a long way to go. Yet it is possible, even in today's controlled media environment in China, for Chinese language versions of such helpful material to circulate.