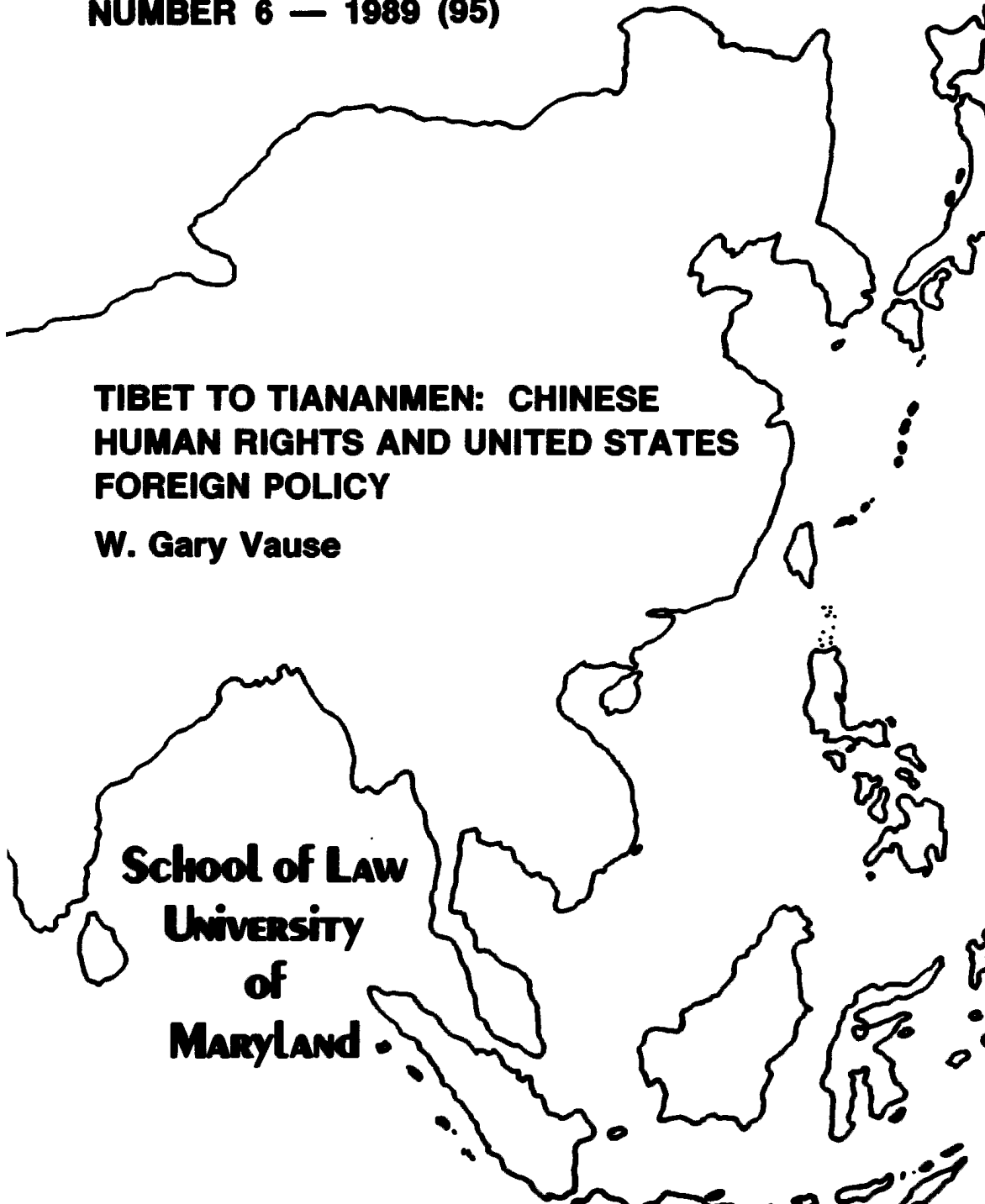


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**TIBET TO TIANANMEN: CHINESE  
HUMAN RIGHTS AND UNITED STATES  
FOREIGN POLICY**

**W. Gary Vause**

**School of Law  
University  
of  
Maryland**

***Occasional Papers/Reprint Series  
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# Tibet to Tiananmen: Chinese Human Rights and United States Foreign Policy

W. Gary Vause\*

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## I. INTRODUCTION—POLITICAL FIRESTORMS IN THE “LAND OF THE SNOWS”

The roof of the world, land of the snows, alleged home of the Abominable Snowman, and place for the timeless meeting of mountain and sky—these are the Western visions of Tibet.<sup>1</sup> Most Americans know little else about this strange and exotic land shrouded in historical obscurity. Modern Tibet is a curious stockpot of native Tibetans and immigrant Chinese, which until recently was seasoned with increas-

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1. Tibet was the land used by James Hilton as a model for Shangri-La in the Utopian 1933 novel, *Lost Horizon*, and Tibet continues to be romanticized by the press. See *Unrest Rocks the Calm of “Shangri-La,”* U.S. NEWS & WORLD REP., Oct. 19, 1987, at 10.

ing numbers of Western tourists, backpackers of all ages, vagabonds, and visitors from neighboring Nepal.<sup>2</sup>

On June 4, 1989, China's 27th Army brutally crushed democracy demonstrations that had extended for seven weeks in Beijing and other Chinese cities.<sup>3</sup> This crackdown, which came to be known as the "Beijing Massacre," was viewed with revulsion by the free world and resulted in economic sanctions by the United States, Japan, and Western Europe.<sup>4</sup> In contrast, China's activities in Tibet, which also have serious human rights implications, have received very little attention outside the United States. Most countries remained quiet about human rights violations in March 1989, when Beijing imposed martial law in Tibet and reportedly shot and executed protesters.<sup>5</sup> The United States Congress, however, has been openly critical of China's Tibetan policies.

During 1987 Tibet became the focal point of souring United States-China relations when Congress focused on the "Tibet Question" in congressional action challenging the Chinese record of alleged human rights abuses in this obscure and remote land.<sup>6</sup> Congress's denunciation of China soon was followed by an unprecedented appearance before Congress by the Dalai Lama, Tibet's god-king in exile. Soon thereafter, violent riots erupted in Lhasa, Tibet's capital city. The Chinese reacted bitterly, blaming the Dalai Lama for instigating the riots and members of the United States Congress for intervening in Chinese domestic affairs. The controversy over the "Tibet Question" highlights the divergence of opinions between the Congress and the executive branch over United States relations with China, and it provides a case study of the foreign policy dilemmas that emerge when these two branches of the United States government collide. This Article will explore the ramifications of these events, with particular attention to the impact on United States-China relations generated by the divergent approaches taken by the executive branch and Congress in dealing with China and the "Tibet Question."

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2. In 1987, according to official Chinese statistics, 43,500 foreigners visited Tibet and spent more than \$15 million. Many of those tourists were backpackers who entered by land from China's Sichuan province or neighboring Nepal. Gargan, *Beijing Is Said to Restrict Foreign Travel to Tibet*, N.Y. Times, Apr. 19, 1988, at A5, col. 1.

3. See *infra* notes 177-95 and accompanying text.

4. See *infra* notes 201-03 and accompanying text.

5. do Rosario, *The Misrule of Law*, FAR E. ECON. REV., July 6, 1989, at 12.

6. Representative Daniel Mica introduced amendments to H.R. 1777 that dealt with human rights violations in Tibet by the People's Republic of China. See 133 CONG. REC. H5218-20 (daily ed. June 18, 1987); see also *id.* at H5220-30 (congressional debate concerning the "Tibet Question").

## II. THE CHINESE PRESENCE IN TIBET

The conflict between the Tibetans and their Chinese rulers has its roots in a separatist religious movement but also reflects concerns over human rights abuses. The failure to separate the two issues has clouded debate about them. The debate that rages over whether, as the Chinese claim, Tibet historically has been part of China's sovereign lands or whether, as the Dalai Lama claims, Tibet is a captive country, taken and held hostage by superior military forces against the will of the Tibetan people, has been viewed by most of the world for many years as an increasingly academic issue. Neither the United States nor any other member of the United Nations has recognized Tibet as a sovereign state independent of China.<sup>7</sup> Most Western countries, including the United States, recognized China long after it had reasserted its rule over Tibet.

China's early claims over Tibet predate the American Revolution,<sup>8</sup> but because of the perennial weakness of the Chinese government, those claims lacked credibility until the new Chinese Communist government launched its military initiative to reassert its sovereignty over Tibet in 1950.<sup>9</sup> In the face of overwhelming military odds, the sixteen-year old Dalai Lama opted for negotiations rather than conquest. A Seventeen Point Agreement recognizing the "peaceful liberation of Tibet" by China was signed in May 1951 by the Dalai Lama's representatives in Beijing, and the Dalai Lama himself subsequently signed the agreement and returned from his brief self-imposed exile in India.<sup>10</sup> The Agreement allowed a semblance of self-governance to continue under the Dalai Lama and guaranteed both religious freedoms and the continued use of the Tibetan language. Dominance by the Chinese military was complete.

Despite initial harmony in the new relationship, sporadic armed resistance by Tibetans began to break out in 1954. The most notable resistance occurred in the southeastern "Kham" region, where the fierce Khampa tribesmen battled with Chinese regulars, often with the assis-

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7. Roy, *Human Rights Situation of the Tibetan People*, DEP'T ST. BULL., Dec. 1987, at 49, 51.

8. China's Manchu Qing dynasty (1644-1911) conquered Tibet after nearly 1000 years of intermittent hostilities between the two countries. By the late nineteenth century Tibet had become a sideshow in the rivalry between Britain and Czarist Russia for influence in south central Asia. In 1910 China's Qing Dynasty used its army to reassert control over Tibet. In 1911, however, the Nationalist revolution in China led to the collapse of China's control over Tibet. In 1913 the Dalai Lama declared Tibet independent. Nearly four decades of stable government under the feudal theocracy of the Dalai Lama's reign followed, free from foreign interference. *A History of Conflict*, WORLD PRESS REV., Dec. 1987, at 20.

9. See A. GRUNFELD, *THE MAKING OF MODERN TIBET* 104-06 (1987).

10. *Id.* at 106-07.

tance of monks and farmers.<sup>11</sup> The Chinese press continues to describe the uprising as one launched by "imperialists and a small number of reactionary elements in Tibet's upper ruling clique."<sup>12</sup> Unable to deal with the crisis at home, the twenty-three year old Dalai Lama fled his summer palace, Norbulingka, in early March 1959 and sought refuge in India, the homeland of Tibetan Buddhism. From his Indian refuge, the Dalai Lama renounced the 1951 Tibet-China agreement and established his "government-in-exile."<sup>13</sup> In 1965 China established the Tibet Autonomous Region and installed as its head the same Ngapo Ngawang Jigme who had signed the 1951 Seventeen Point Agreement.<sup>14</sup>

Since 1979 China has allowed the Dalai Lama to send six investigative missions to Tibet; several of those were led by close relatives of the Dalai Lama. During 1983 and 1984 discussions with the Chinese suggested that the Dalai Lama himself might soon return to China for a fact finding trip. Positions hardened, however, in 1985, and the trip never materialized.<sup>15</sup>

Part of the continuing tension occasioned by Chinese control of Tibet has been based upon cultural differences between the Chinese and the Tibetans and the way they view "progress" under Chinese rule. For example, under the feudal theocracies that prevailed before 1959, the rate of illiteracy in Tibet was ninety-five percent. There were only thirteen primary schools and one secondary school in what is now the Tibet Autonomous Region. Today, 2388 primary schools and 64 high schools exist, and about 4000 Tibetan students study in interior China. The Chinese view these improvements as indicators of great progress. In contrast, Tibetans view these changes as attempts by the Chinese to propagandize communism, advance Chinese ways and language, and denigrate religion.<sup>16</sup>

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11. *Id.* at 128.

12. Lobsang & Jin Yun, *Tibet: History and Anecdotes (II)*, BEIJING REV., June 27, 1983, at 25, 29.

13. See A. GRUNFELD, *supra* note 9, at 132.

14. China is divided into provinces, autonomous regions, and municipalities directly under the Central Government. See CONST. OF THE PEOPLE'S REPUBLIC OF CHINA [1982] art. 30(1) (adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Proclamation of the National People's Congress on Dec. 4, 1982) [hereinafter 1982 CONST.], *English translation in* 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) 1, 11 (1987) [hereinafter LAWS 1979-1982]. Other autonomous regions include Inner Mongolia and Xinjiang. National autonomous areas enjoy a measure of self-government, subject to final authority of the Party and Central Government. *Id.* arts. 112-22, *English translation in* 1 LAWS 1979-1982, *supra*, at 28-30.

15. Roy, *supra* note 7, at 49-50.

16. *Id.*

## III. TIBET'S IMPORTANCE TO CHINA

Why have the Chinese placed so much importance on this barren mountainous land that has remained so obscure throughout history? Tibet, about the size of Western Europe, is a dry and arid land clinging to the Himalayas, the highest mountain range in the world. It is largely undeveloped, with vast stretches of moonscape with hard rocky soil and thousands of glaciers, but very little economic development. In spite of its apparent economic unattractiveness, Tibet has been an enduring lure to Westerners and Easterners alike for centuries. In part the lure is one of curiosity for the exotic. Tibet is indeed a strange, exotic land of compelling raw beauty and isolated tranquility, with some historical exceptions. Trespassers in this "Land of Snows" have included occasional itinerant adventurers as well as formal military expeditions by Indian, British, Russian, and Chinese troops. Christian missionaries also ventured into Tibet but made little dent in the pervasive influence of Buddhism.<sup>17</sup>

Tibet does have an abundance of mineral resources that largely remains untapped. However, the most enduring attraction that Tibet has held for governments is its location as a buffer zone between India and China. Bordering India, Nepal, Sikkim, Bhutan, and Burma, Tibet serves the same role of strategic and military buffer state for China as the autonomous regions of Xinjiang in the west and Inner Mongolia in the north. Although de-emphasized by the Chinese press, China maintains a strong military presence in Tibet.<sup>18</sup> The estimated hundreds of thousands of Chinese troops stationed in Tibet are there not only to counter perceived threats from without by states like India, but also to suppress opposition from within. The strategic military importance of Tibet to China was underscored within weeks of the October 1987 riots in Lhasa when China deployed a squadron of J-7 fighters to the Gonggar Airfield near Lhasa to counter Indian air force flights over the border and incursions into Tibet by India's Soviet-built MiG-25s.<sup>19</sup>

Another reason for China's adamant position on Tibet is China's goal of consolidating those territories which it considers part of its his-

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17. A. GRUNFELD, *supra* note 9, at 46.

18. While visiting Tibet in 1987, even before the riots began, the Author observed military installations on the perimeter of Lhasa, and long convoys of troop transport vehicles with soldiers on the roads leading to the capital city.

19. Covault, *Chinese Deploy J-7 Fighters in Tibet to Counter Indian Threat*, AVIATION WEEK & SPACE TECH., Oct. 19, 1987, at 103. J-7 fighters are versions of the sophisticated Soviet MiG-21 fighter plane. China also is using its newly acquired United States-built Sikorsky S70C Black Hawk helicopters to support military operations in Tibet along the disputed border between China and India. *Black Hawk Helicopters Assist Tibetan Military Operations*, AVIATION WEEK & SPACE TECH., Oct. 19, 1987, at 104.

torical legacy.<sup>20</sup> Through wars, conquests, foreign invasion, and China's own imperial neglect, key areas of "old China" fell into hostile hands. Hong Kong was taken over by the British in 1842,<sup>21</sup> Macao by the Portuguese in 1557,<sup>22</sup> and Taiwan by the fleeing Nationalist Army in 1949.<sup>23</sup> China considers Tibet to be among those regions justifiably within China's historical claims of sovereignty, and the current Chinese move to consolidate and reunite all of its sovereign lands magnifies Tibet's significance.

Agreements already have been reached with the colonial powers to restore Chinese sovereignty over Hong Kong in 1997 and over Macao in 2000. China's new "one country, two systems" policy was the key to successful resolution of the Hong Kong negotiations. China's leader, Deng Xiaoping, promised that although Hong Kong clearly would be a part of China subject to Chinese sovereignty, it could continue to operate as virtually a pure capitalist system for the next fifty years.<sup>24</sup>

This "one country, two systems" concept obviously holds a certain appeal for those forces in Taiwan that long for reunification with their ancestral homeland. As the octogenarian Nationalist leaders, holdovers from Chiang Kaishek's days of battling the mainland Communists, disappear from Taiwan's leadership scene, the possibility of reconciliation, perhaps someday leading to reunification, appeared to be closer to becoming a reality by the time Taiwan's Finance Minister visited Beijing in 1989.<sup>25</sup> The ongoing effort to reunite the Chinese mainland and the island of Taiwan, and the accompanying rhetoric of both sides, has assumed a more moderate tone in recent years, perhaps in part as a result of increasing volumes of under-the-table economic relations between the two estranged Chinese republics.<sup>26</sup> To the extent that the human rights issue is kept alive, Taiwan's concerns about reunification will not be abated. The Beijing Massacre of June 1989 only served to exacerbate

20. This legacy includes Tibet, Hong Kong, Macao, and Taiwan.

21. The British took control over Hong Kong from China by the Treaty of Nanking in 1842, supplemented by the Convention of Peking in 1860, and a lease was concluded in 1898 granting Great Britain control over and use of the New Territories (adjacent to Hong Kong) for 99 years. It generally is conceded that all of these concessions were forced upon China by a superior military power. *HONG KONG IN TRANSITION* 3 (J. Cheng ed. 1986).

22. See *MACAU: CITY OF COMMERCE AND CULTURE* 10 (R. Cremer ed. 1987).

23. See A. BARNETT, *CHINA AND THE MAJOR POWERS IN EAST ASIA* 171 (1977).

24. See Lee, *One Country, Two Systems*, *Asian Wall St. J.*, May 7, 1987, at 8, col. 1.

25. See *infra* notes 179-80 and accompanying text.

26. Trade between China and Taiwan, principally through Hong Kong, reached \$1.51 billion (United States dollars) in 1987, an increase of 58.7% over their 1986 trade volume. *China, Taiwan Trade*, *Asian Wall St. J.*, Feb. 26-27, 1988, at 8, col. 2; see also *Taiwan-China Trade Seen Surging to Record in Year*, *Asian Wall St. J.*, Dec. 14, 1987, at 5, col. 1. By mid-1989 Taiwan was manifesting a more relaxed attitude in general with respect to economic relations with Communist countries. See *Taiwan to Expand Communist Trade*, *Asian Wall St. J.*, May 18, 1989, at 3, col. 1.



those concerns in Taiwan.

#### IV. THE CHINESE REFORM MOVEMENT AND STRATEGIC IMPLICATIONS FOR THE UNITED STATES

Although Tibet itself has very little commercial contact with the outside world, China has pursued an aggressive "open" policy since 1978, encouraging tourism as well as trade and investment relations with the United States and other Western nations. Economically, the policy has been highly successful for both China and the United States. By 1987 the United States was second only to Hong Kong in direct investment in China and was China's third largest trading partner behind Hong Kong and Japan.<sup>27</sup> Strategically, the new United States-China rapprochement has been one of the greatest successes in contemporary United States foreign relations.

The sudden shift of Chinese policy, from one of isolationism and extreme ethnocentrism to open economic relations with the Western world and more conciliatory foreign relations, generally was made possible by the modernization program of Deng Xiaoping. Mao Zedong, China's charismatic revolutionary leader, "liberated" China in 1949 and subsequently led it for almost three decades on a sometimes tortured path of increasingly leftist political extremism. The notorious decade of virtual anarchy known as the "Cultural Revolution" (1966-1976) started by Mao to suppress his political opponents, spread havoc, death, and destruction throughout all of China and Tibet.<sup>28</sup> The present government led by Deng Xiaoping denounced the extreme leftism of the Cultural Revolution soon after Deng assumed power. Four of the principal leaders of the Cultural Revolution, the notorious "Gang of Four" including Mao's widow, were tried for their crimes soon after Mao's 1976 death; all were committed to life in prison.<sup>29</sup> Most of the examples of repression cited by Congress in its 1987 condemnation of China were drawn from the pre-1976 period.<sup>30</sup> To the extent that Congress had a proper role in the denunciation of the Cultural Revolution, the timing of its 1987 resolutions was late by more than a decade.

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27. NAT'L COUNCIL FOR U.S.-CHINA TRADE, U.S. JOINT VENTURES IN CHINA: A PROGRESS REPORT 2 (1987).

28. There are numerous accounts of the Cultural Revolution. Contemporary historian Paul Johnson places it in historical perspective in P. JOHNSON, MODERN TIMES ch. 16 (1983). For personal accounts of the period by Chinese writers, see F. BUTTERFIELD, CHINA: ALIVE IN THE BITTER SEA (1982); NIEN CHENG, LIFE AND DEATH IN SHANGHAI (1986); SEEDS OF FIRE: CHINESE VOICES OF CONSCIENCE (G. Barmé & J. Minford eds. 1986). The damage caused by the wanton destruction and the fighting in Tibet was described by one authority as "awesome." See A. GRUNFELD, *supra* note 9, at 180.

29. See generally D. BONAVIA, VERDICT IN PEKING: THE TRIAL OF THE GANG OF FOUR (1984).

30. See *supra* note 6.

Beginning in 1978 the new Chinese leadership instituted a series of significant economic and legal reforms that have been accompanied by both political and human rights reforms. Early reforms in agriculture were the linchpin of China's economic recovery,<sup>31</sup> and subsequent liberalizations virtually have transformed the communal system of agricultural production to one of private ownership. The "responsibility system" in agriculture, which motivates workers by combining individual or group responsibility with greater opportunities for material rewards, proved to be so successful that it had been adopted by more than ninety-seven percent of agricultural accounting units by 1982.<sup>32</sup> Much of China's agricultural production today is accomplished through "household contract" arrangements between the state and families, an outgrowth of the responsibility system. Land is leased to an individual or household that assumes full responsibility for production, including risks of loss and prospects of gain. The lessee pays taxes and a land use fee but keeps profits from sale of the produce.<sup>33</sup>

Similar contract responsibility systems now are being introduced in Chinese enterprises to inspire greater productivity from a work force grown lethargic under the Communist system.<sup>34</sup> Labor law reforms have been extensive during the past decade as part of China's effort to increase productivity. The movement from reliance upon ideological appeals to motivate the workers to a system of material incentives has resulted in the reversal of many of Mao Zedong's extreme leftist policies.<sup>35</sup>

The United States-China relationship has experienced a virtual 180 degree turn during the past decade. Following President Richard Nixon's historic visit to China in 1972, Deng Xiaoping visited the

31. The Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party met in 1978 and identified agricultural reform as a major priority. Determined to overcome the disincentives for individual initiative that were inherent in Mao Zedong's collectivization of agriculture, the Committee gave authorization for the establishment of the new "responsibility system," which shifted responsibility for tasks or production to individuals or groups, accompanied by prospects for greater rewards if productivity was high. See generally Vause & Vrionis, *China's Labor Reform Challenge: Motivation of the Productive Forces*, 24 STAN. J. INT'L L. 447, 451-57 (1988).

32. WANG GUICHEN & ZHOU QIREN, *SMASHING THE COMMUNAL POT: FORMULATION AND DEVELOPMENT OF CHINA'S RURAL RESPONSIBILITY SYSTEM* 46 (1985).

33. See generally A. KHAN & E. LEE, *AGRARIAN POLICIES AND INSTITUTIONS IN CHINA AFTER MAO* (1983). The percentage of average annual income of peasants derived from household contracts grew from 32.7% of total income in 1980 to 81.1% in 1985. 1986 CHINA AGRIC. Y.B. (Agricultural Publishing House) 289 (English trans.).

34. See Li Dewei, Jiang Jinyong & Gai Jianling, *New Trend in Enterprise Reform*, BEIJING REV., Apr. 4-10, 1988, at 23; Zhou Xiaochuan, *Contract System in China's Enterprises*, BEIJING REV., Apr. 4-10, 1988, at 22.

35. See generally Vause & Vrionis, *supra* note 31.

United States in 1979.<sup>36</sup> President Jimmy Carter increased the momentum towards favorable relations by signing the Agreement on Trade Relations Between the United States of America and the People's Republic of China in 1979.<sup>37</sup> The successful economic relations that subsequently developed between the United States and China encompassed both trade and investment. By 1987 trade between the United States and China reached ten billion dollars, an increase of twenty percent over 1986.<sup>38</sup> Although there have been some problems and necessary adjustments as the relationship has developed,<sup>39</sup> the trade relationship has been regularized and was expected to grow.<sup>40</sup> For example, a new four-year United States-China textile agreement signed in February 1988 further regularized the growing trade in the area of textile imports from China, a politically sensitive area for some members of Congress.<sup>41</sup> At the time of this writing, the full effects of the Beijing Massacre and subsequent repression on United States-China trade are uncertain.

Foreign investment has been embraced enthusiastically by China to infuse needed foreign exchange into the nation's economy. In 1979 China passed an Equity Joint Venture Law<sup>42</sup> which allowed foreign firms to have significant ownership interests in Chinese enterprises. American firms have been among the largest investors.<sup>43</sup> More recently China passed the Wholly Foreign-Owned Enterprise Law<sup>44</sup> which allows

36. See generally [D]Jeng's Great Leap Outward, TIME, Feb. 5, 1979, at 24.

37. Agreement on Trade Relations, July 7, 1979, United States-People's Republic of China, 31 U.S.T. 4651, T.I.A.S. No. 9630.

38. Yeutter Expected to Urge China to Open Markets Wider to U.S., Asian Wall St. J., Feb. 1, 1988, at 1, col. 4.

39. Protectionist forces in the United States have strengthened because of the United States trade deficit in the relationship. See Level of Trade Rises Between U.S., China, Asian Wall St. J., Jan. 28, 1988, at 3, col. 1. Other problems include China's concerns over United States limitations on export of sophisticated technology. Yeutter Expected to Urge China to Open Markets Wider to U.S., supra note 38, at 8, col. 5.

40. Expected Rise in Trade with U.S. Underlines China's Growing Role, Asian Wall St. J., Dec. 18-19, 1987, at 5, col. 4.

41. See China and U.S. Sign Textile Agreement That Limits Exports, Asian Wall St. J., Feb. 3, 1988, at 3, col. 1; see also China, U.S. Starting Talks in Washington on Textile Imports, Asian Wall St. J., Dec. 8, 1987, at 12, col. 6.

42. Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 7 of the Chairman of the Standing Committee of the National People's Congress, and effective as of July 8, 1979), English translation in 1 LAWS 1979-1982, supra note 14, at 150.

43. Weil, China Market Still Attracting U.S. Firms, Asian Wall St. J., Feb. 12-13, 1988, at 8, col. 1.

44. Law of the People's Republic of China on Foreign-Capital Enterprises (adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No. 39 of the President of the People's Republic of China, and effective on Apr. 12, 1986), English translation in 2 LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1983-1986) 254 (1987) [hereinafter LAWS 1983-1986].

foreign investors to own one hundred percent of a business within China's borders and a law authorizing Chinese-foreign contractual joint ventures.<sup>45</sup>

Economic reforms have not been restricted to the arena of foreign business. They also have changed the way Chinese do business on the domestic front and the relationship between the state and the people. As a generalization, the Deng Administration has sought to retract the state's role as paternalistic provider of all the people's needs while shifting responsibility and granting material incentives to individuals. For example, Mao Zedong's "iron rice bowl" system, which guaranteed lifetime employment to every individual regardless of performance, resulted in bloated and notoriously inefficient and unproductive state enterprises.<sup>46</sup> Few real options existed because the state made all education and job assignments and kept labor mobility minimal. Starting one's own business was "bourgeois" and out of the question.<sup>47</sup>

In 1986 new regulations instituted a "labor contract"<sup>48</sup> system whereby newly hired employees in state enterprises enjoy job security only for the contractual term of employment. Employees have new freedom to seek more remunerative work, for example, in foreign joint ventures, at the end of the contract term. Additional regulations were designed to tighten discipline in state enterprises.<sup>49</sup> Moreover, the government now officially encourages individuals and groups to start their own businesses in the cities and rural townships. Private farmers' markets are flourishing, and a whole new set of societal norms have been introduced which place value on individual entrepreneurship.<sup>50</sup> By 1987 private businesses were sanctioned specifically,<sup>51</sup> and provisional regulations on private enterprises went into effect in 1988.<sup>52</sup> In 1989 bold pro-

45. Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures (adopted at the First Session of the Seventh National People's Congress on Apr. 13, 1980), *English translation in BEIJING REV.*, June 20-26, 1988, at 29.

46. See J. PRYBYLA, *THE CHINESE ECONOMY: PROBLEMS & POLICIES* 132, 173 (2d ed. 1981).

47. Mao's emphasis upon collective economic activities allowed little room for individual enterprise, however small. Peasant households sometimes were allowed to engage in sideline activities like chicken raising and handicrafts, and the cultivation of small private farm plots, but even these were considered the "tails of capitalism" to be "cut off" during the Cultural Revolution. L. PAN, *THE NEW CHINESE REVOLUTION* 22 (1987).

48. Interim Regulations on Labor Contracts in State-Owned Enterprises, July 12, 1986, *published in Renmin Ribao* (People's Daily), Sept. 10, 1986, at 2, col. 1.

49. Provisional Regulations of the State Council Governing the Dismissal of Undisciplined Staff Members and Workers by State-Owned Enterprises, July 12, 1986, *published in Renmin Ribao* (People's Daily), Sept. 10, 1986, at 2, col. 1.

50. See generally O. SCHELL, *TO GET RICH IS GLORIOUS: CHINA IN THE EIGHTIES* (1984).

51. *Regulation Issued to Supervise Private Businesses*, China Daily, Aug. 19, 1987, at 1, col. 1.

52. Provisional Regulations of the People's Republic of China Concerning Private Enterprises (promulgated by the State Council on June 25, 1988, and effective on July 1, 1988), *English*

posals to end state ownership were being debated openly by leading Chinese economists.<sup>53</sup>

The Chinese economic system appears to have been undergoing a fundamental restructuring, adopting many features of a private sector, free market economy. The favorable developments on China's economic front have been accompanied by legal reforms aimed at improving human rights protections. In part because of the new importance of its place on the world stage, China formally has recognized certain basic freedoms of Chinese citizens.

The 1982 Constitution contains a number of significant promises. Chapter II is devoted to fundamental rights and duties of citizens and includes guarantees of freedoms of religious belief,<sup>54</sup> speech, press, assembly, association, procession, and demonstration.<sup>55</sup> The Constitution also declares that the "[f]reedom of the person of citizens of the People's Republic of China is inviolable," and provides safeguards for proper arrests and prohibitions against unlawful detentions or searches of persons<sup>56</sup> and searches of residences.<sup>57</sup> The Constitution guarantees freedom and privacy of correspondence,<sup>58</sup> and the right of citizens to criticize and make suggestions regarding any state organ or functionary.<sup>59</sup>

Many of China's contemporary leaders, including Deng Xiaoping, personally endured great hardship and suffering during the Cultural Revolution; the Constitution reflects a commitment to avoid such harsh abuses of power that were perpetrated by the leadership on the Chinese people in the past.<sup>60</sup> Under its present leadership modern China already had remedied many of the more serious abuses of its recent past by the time the controversial-congressional resolution on the "Tibet Question" was promulgated in 1987.<sup>61</sup>

The Chinese are extremely sensitive about the world's perception

*translation in East Asian Exec. Rep.*, Oct. 15, 1988, at 24.

53. Kristof, *In Beijing, a Bold New Proposal: End State Ownership of Industry*, N.Y. Times, Jan. 10, 1989, at A1, col. 4.

54. 1982 CONST., *supra* note 14, arts. 34, 36, *English translation in 1 LAWS 1979-1982, supra* note 14, at 12.

55. *Id.* art. 35, *English translation in 1 LAWS 1979-1982, supra* note 14, at 12.

56. *Id.* art. 37, *English translation in 1 LAWS 1979-1982, supra* note 14, at 12.

57. *Id.* art. 39, *English translation in 1 LAWS 1979-1982, supra* note 14, at 13.

58. *Id.* art. 40, *English translation in 1 LAWS 1979-1982, supra* note 14, at 13.

59. *Id.* art. 41, *English translation in 1 LAWS 1979-1982, supra* note 14, at 13.

60. For example, article 38 states that "[t]he personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited." *Id.* art. 38, *English translation in 1 LAWS 1979-1982, supra* note 14, at 12-13. The language of this article addresses precisely the kind of abuses fostered by the Red Guards during the decade prior to Mao's death.

61. *See supra* note 6.

of their actions in Tibet. As a minority population in the Tibet Autonomous Region, the backward Tibetans obviously are helpless in the hands of the well-armed Chinese. The Deng regime has recognized the important role of national ethnic minorities in China's unification movement. The preamble to the 1982 Constitution states that "China is a unitary multi-national state created jointly by the people of all its nationalities."<sup>62</sup> Equal treatment of all nationalities is guaranteed, and the state is pledged to assist minority nationality areas in their economic and cultural development.<sup>63</sup> Discrimination against or oppression of any nationality is prohibited expressly.<sup>64</sup> Placed in the context of China's move to unify traditionally Chinese areas, its treatment of minorities assumes particular importance. Taiwan is considered part of the "sacred territory" of China, and the Constitution states that it is the inviolable duty of all Chinese people to accomplish the task of re-unifying Taiwan with the Chinese motherland.<sup>65</sup>

These developments are not only advantageous to the United States from an economic perspective but also hold great potential for strategic advantage. Particularly after the ignominious withdrawal of United States forces from Vietnam, the Pacific Ocean no longer can be claimed as the "American Sea." The Soviet Union gained its only warm water port to the Pacific through a 1978 defense pact with Vietnam, which gave it access to Cam Ranh Bay, and has proceeded to expand its Pacific presence.<sup>66</sup> With American influence in the region under challenge from many directions, the continuing risks of losing Clark Air Force Base and Subic Naval Base in the Philippines pose major strategic challenges for the United States presence in the eastern Pacific region. A friendly and supportive relationship with China, which borders Russia along thousands of miles of common frontier, obviously augers well for the United States.

However, the warming of the United States-China relationship over the past decade has not occurred without legal, economic, and political problems. In spite of its ambitious drive to develop a modern, more Western legal system that will provide a receptive and secure environment for Western investment, the bureaucratic inertia of the Chinese system has created many problems for Western investors and potential trading partners. The Western business press has appeared preoccupied during recent years with the problems of United States investments in

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62. 1982 CONST., *supra* note 14, preamble, *English translation in 1 LAWS 1979-1982, supra* note 14, at 4.

63. *Id.* art. 4, *English translation in 1 LAWS 1979-1982, supra* note 14, at 6.

64. *Id.*

65. *Id.* preamble, *English translation in 1 LAWS 1979-1982, supra* note 14, at 4.

66. *The Russians Are Landing*, *ECONOMIST*, Apr. 28, 1984, at 57.

China.<sup>67</sup> Trade between the two nations, while growing, also has been attended by other nagging problems such as protectionist concerns in the United States over cheap textile imports from China, United States barriers to the export of high technology to China, and concerns over the use of Chinese-built Silkworm missiles by Iran in the Persian Gulf.<sup>68</sup>

Individually and cumulatively, these problems should not threaten the fundamental viability of the United States-China relationship. While such problems arise primarily from commercial practices and can be solved with commercial solutions, the "Tibet Question" raised by Congress is potentially more serious because it raises political issues that cut to the very heart of deeply held convictions of both the Chinese and the Americans. It also illustrates the indissoluble linkage between presidential foreign relations powers and congressional foreign relations powers, and provides a contemporary case study of the frustration of United States interests when those powers are not exercised in concert.

#### V. THE CONGRESSIONAL ACTION ON THE "TIBET QUESTION" AND ITS EFFECT ON RELATIONS BETWEEN THE UNITED STATES AND CHINA

In spite of its historical obscurity, Tibet has been the subject of much recent political notoriety, highlighted by violent anti-Chinese demonstrations in its capital city, Lhasa, beginning in the fall of 1987. Concern in the American Congress about the human rights situation in Tibet had been building for months before the demonstrations began. From the Chinese perspective, a combination of congressional meddling in China's domestic affairs and anti-Chinese propaganda by the Dalai Lama precipitated the violence in Lhasa. On June 18, 1987, the United States House of Representatives debated amendments to the appropriations bill, House Bill 1777, for the fiscal years 1988 and 1989.<sup>69</sup> The amendment, introduced by Congressman Daniel Mica, charged the Chinese with continued human rights abuses in Tibet, commended the Dalai Lama for his efforts to secure peace and religious freedom in Tibet, and reiterated the 1985 request made to China by ninety-one members

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67. See, e.g., *China's Economic Reforms Don't Impress Foreigners*, *Asian Wall St. J.*, July 27, 1987, at 3, col. 1.

68. The possible Chinese military application of Western technology continues to concern United States policy makers. Although the prospects for increased military exchanges between the two countries have been explored, recent incidents such as use of China's Silkworm missile by Iran have exacerbated sore points in the United States-China relationship. Related concerns surfaced again in spring 1989 when it was disclosed that Iran was building a missile plant and continuing to develop its chemical warfare capability with China's assistance. See *China Helping Iran to Build Missile Factory*, *Asian Wall St. J.*, Mar. 9, 1989, at 3, col. 3.

69. See 133 CONG. REC. H5217-30 (daily ed. June 18, 1987).

of Congress that China conduct direct talks with the Dalai Lama and the Tibetans in exile.<sup>70</sup> This amendment was passed with the companion House amendment that condemned China generally for its failure to grant adequate religious freedoms.<sup>71</sup> The support in Congress that led to passage of the amendments was generated in part through the lobbying efforts of Tibetan centers in the United States.<sup>72</sup>

The House action stung the tourist-hungry Chinese who need the continuing influx of foreign currency into Tibet and China to fuel China's aggressive program of modernization. Chinese resentment of the congressional action was widespread among the general populace<sup>73</sup> as well as among official government and Party spokespersons.<sup>74</sup> Congressman Mica's amendment to House Bill 1777 called upon the President of the United States to instruct United States officials, including ambassadors to China and India, "to pay greater attention to the concerns of the Tibetan people and to work closely with all concerned about human rights violations in Tibet."<sup>75</sup> The stage was set for conflict between the political aspirations of Congress and the executive branch policies pursued for more than fifteen years to develop a rapprochement with China.

On September 21, 1987, the Dalai Lama made an unprecedented appearance before the Congressional Human Rights Caucus and presented a five point plan designed to transform Tibet into a "zone of peace and non-violence."<sup>76</sup> The plan was presented to the House of Representatives and read into the record by Congressman Tom Lantos

70. Ninety-one members of Congress signed a letter to China's President Li Xiannian on July 24, 1988, which contained the request. *Id.* at H5219.

71. *Id.* at H5231.

72. *Tiny Group of Tibetans Raises Loud Voice of Conscience*, INSIGHT, Apr. 25, 1988, at 18. The "Office of Tibet," the unofficial consulate of the Dalai Lama's government-in-exile, is a "grapevine federation" of 15 regional offices throughout the United States devoted to calling attention to the political aims of Tibet's exile community. Although there were only about 500 Tibetans in the United States by 1988, there are 250 Tibetan centers nationwide, most of them built since 1970 to accommodate growing interest in Tibetan culture, specifically in Tibetan Buddhism. *Id.*

73. The Author was in China when the controversial amendment was addressed by the House of Representatives, and bases his conclusions on Chinese reactions in the Chinese press as well as numerous interviews with Chinese students, intellectuals, and others.

74. Officially recognized "Tibetan leaders," who generally are viewed as subservient to the Chinese power structure, also joined the chorus against the United States Congress and the Dalai Lama. See, e.g., *Panchen Lama on "Tibetan Independence,"* CHINA RECONSTRUCTS, Jan. 1988, at 8; *Tibetan Leaders on the Tibet Situation*, BEIJING REV., Apr. 18-24, 1988, at 18.

75. 133 CONG. REC. H5219 (daily ed. June 18, 1987).

76. See Roy, *supra* note 7, at 50. Before his September 1987 visit to the United States, the Dalai Lama had visited the United States on three previous occasions during which he had not engaged in any activities other than those expected from his status as a respected religious leader. The United States visa for his September 1987 visit was granted to him only in his capacity as a religious leader, ostensibly to enable him to consecrate a Buddhist shrine at the University of Indiana. *Id.*



on the next day as a “political statement” by the Dalai Lama as “political leader of the Tibetan people” from his government-in-exile.<sup>77</sup> The Dalai Lama’s peace plan contained the following five basic components: (1) transformation of the whole of Tibet into a zone of peace; (2) abandonment of China’s population transfer policy; (3) respect for the Tibetan people’s fundamental human rights and democratic freedoms; (4) restoration and protection of Tibet’s natural environment and the abandonment of China’s use of Tibet for the production of nuclear weapons and dumping of nuclear waste; and (5) commencement of earnest negotiations on the future status of Tibet and of relations between the Tibetan and Chinese peoples.<sup>78</sup>

The United States House of Representatives also passed a resolution in which the Senate concurred on September 22, 1987, welcoming the Dalai Lama on the occasion of his visit to the United States, and commending him “for furthering the just and honorable causes that he has championed.”<sup>79</sup> His principal cause, of course, always had been to have the Chinese totally removed or withdrawn from Tibet.

As a prelude to the Dalai Lama’s appearance, the Senate Foreign Relations Subcommittee on Human Rights had heard testimony on the Tibetan situation on September 17, 1987.<sup>80</sup> Appearing before the Subcommittee were Deputy Assistant Secretary of State Stapleton Roy, the executive director of Amnesty International, and four other experts on the Tibetan situation. Based on that testimony, Senator Claiborne Pell reported to the Senate that the human rights situation had improved along with the economy under the administration of Deng Xiaoping. Nevertheless, it was noted that some human rights abuses were continuing, specifically in the detention and abuse of political prisoners in Tibet.<sup>81</sup>

The new trends in Chinese policy towards Tibet were documented in a special report on the treatment of minorities in China prepared by the Department of State at the request of the Subcommittee on Human Rights and submitted to the Subcommittee on October 1, 1987.<sup>82</sup> The report concluded that important aspects of Chinese policy toward Tibet improved after 1980, but that problems remain and the current situation is not as favorable as the Chinese would have Americans believe.<sup>83</sup>

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77. *Proposal for Peace and Accommodation in Tibet—Statement of the Dalai Lama*, 133 CONG. REC. E3641 (daily ed. Sept. 22, 1987).

78. *Id.* at E3642.

79. H.R. Con. Res. 191, 100th Cong., 1st Sess., 133 CONG. REC. H7745 (daily ed. Sept. 22, 1987).

80. *See* 133 CONG. REC. S12,496 (daily ed. Sept. 22, 1987) (remarks of Sen. Claiborne Pell).

81. *See id.*

82. Roy, *supra* note 7, at 51.

83. *Id.*

In his statement, Deputy Assistant Secretary of State Roy observed that the Dalai Lama was granted a United States visa for his current visit solely in his capacity as a religious leader, "since the United States Government considers Tibet to be a part of China and does not in any way recognize the Tibetan government in exile that the Dalai Lama claims to head."<sup>84</sup> The Chinese Minister of Justice issued a protest against the Dalai Lama's remarks and those of "some United States Congressmen" who had spoken on the issue, characterizing their statements as "sinister slander."<sup>85</sup>

On September 27, 1987, within days of the Dalai Lama's appearance before the Congressional Human Rights Caucus, a separatist demonstration was held at Tibetan Buddhism's most holy site, the Jokhang Temple in Lhasa. Tibetan Buddhist monks impatient for the return of the Dalai Lama and restive under Chinese domination led the movement.<sup>86</sup> On September 30 Congressman Lantos reported to the press information he had received that the Chinese government had executed at least two Tibetan nationalists as a political message in reprisal for the speeches given by the Dalai Lama during his visit to the United States.<sup>87</sup> Congressman Lantos attributed the report "to a translation of Radio Lhasa made by Tibetan exiles in India, who monitor the state-controlled radio broadcasts." Representatives of the Dalai Lama in New York provided the transcript to Lantos. The Chinese Embassy in Washington denied the allegations.<sup>88</sup>

October 7, 1987, marked the thirty-seventh anniversary of the Chinese Army's invasion of Tibet, but the attitude of Tibetans was not celebratory. On October 1 violence had erupted in Lhasa, leaving at least six persons dead, many arrested, and considerable property damaged.<sup>89</sup> According to Chinese sources, about fifty foreign tourists and nationals were seen among the rioters.<sup>90</sup> Two Americans who were present in Lhasa during the riots were ordered out of Tibet.<sup>91</sup> The Chinese response was swift and certain. Beijing issued one of its harshest at-

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84. *U.S. Can Not Support Dalai Lama Programme*, China Daily, Oct. 17, 1987, at 1, col. 7. Roy further stated the Administration's position that when the Dalai Lama "assumes a political status and advances a political programme for Tibet, which we consider to be part of China, the United States Government cannot support him." *Id.*

85. *Accusations by Dalai Lama False*, China Daily, Oct. 1, 1987, at 1, col. 3.

86. *Chinese Report Protest by Lamas to Free Tibet*, N.Y. Times, Oct. 1, 1987, at A8, col. 3.

87. *Executions Are Claimed*, N.Y. Times, Oct. 1, 1987, at A8, col. 4.

88. *Id.*

89. *See Tibetan Protest for Independence Becomes Violent*, N.Y. Times, Oct. 3, 1987, at A1, col. 6.

90. *Foreigners Found in Lhasa Violence*, China Daily, Oct. 12, 1987, at 3, col. 1.

91. *2 American Mountaineers Tell of Witnessing Tibet Protests*, N.Y. Times, Nov. 13, 1987, at A6, col. 1.

tacks on the Dalai Lama, whom it blamed for inciting the riot,<sup>92</sup> and immediately dispatched additional security forces to Lhasa.<sup>93</sup> Telephone and telex communications were interrupted within days of the October riots, and Tibet virtually was sealed off from the outside world.<sup>94</sup> A curfew was imposed,<sup>95</sup> foreign journalists were barred from reporting in Lhasa<sup>96</sup> after additional demonstrations occurred on the sixth of October,<sup>97</sup> and Western reporters subsequently were expelled.<sup>98</sup> On October 7 the Dalai Lama held a press conference at his headquarters near Dharamasala, India, and urged his supporters to continue protesting Chinese rule but to do so peacefully.<sup>99</sup> Chinese criticism, provoked by the Dalai Lama's press conference, resulted in a reaffirmation by Indian government spokesmen that Tibet is considered part of China and that the Dalai Lama should limit his activities to nonpolitical matters.<sup>100</sup> By mid-October the Chinese government imposed a temporary ban on all foreign visitors to Tibet<sup>101</sup> and set deadlines for the surrender of separatist protesters.

Congress and the executive branch were divided sharply in their reactions to the Chinese crackdown. On October 6, 1987, the Reagan Administration voiced support for China's position in controlling the unrest in Lhasa.<sup>102</sup> On the same day the United States Senate voted unanimously to condemn China for its response to the demonstrations and urged the President to meet with the Dalai Lama. The resolution also threatened to link future American arms sales to China to improvement in China's human rights record.<sup>103</sup> This movement in the Senate was led by a coalition of Democrats who promoted human rights and

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92. *China Blames Tibetan Leader for Violent Protest*, N.Y. Times, Oct. 4, 1987, § 1, at 16, col. 1.

93. *Chinese Police Take Over Section of Holiest Buddhist Site in Tibet*, N.Y. Times, Oct. 6, 1987, at A1, col. 1; *Chinese Move to Quell Tibet Demonstrations*, Asian Wall St. J., Oct. 5, 1987, at 1, col. 3.

94. *Communications to Tibet Curbed and Foreigners Are Banned*, N.Y. Times, Oct. 8, 1987, at A8, col. 5.

95. *Chinese Curfew in the Tibet Capital*, N.Y. Times, Oct. 5, 1987, at A6, col. 1.

96. *Beijing Barring Journalists from Reporting in Lhasa*, Asian Wall St. J., Oct. 9-10, 1987, at 8, col. 1.

97. On October 6, 1987, about 60 people were arrested in Lhasa when they marched on government offices. *60 Shout Out Dalai Lama's Name and Are Seized in Protest in Tibet*, N.Y. Times, Oct. 7, 1987, at A8, col. 1.

98. *China Expels Western Reporters in Tibet*, N.Y. Times, Oct. 9, 1987, at A3, col. 4.

99. *Dalai Lama Urges Peaceful Protest Against China*, N.Y. Times, Oct. 8, 1987, at A8, col. 3.

100. *In Tibet's Dark Hour, Dalai Lama Is Their Refuge*, N.Y. Times, Jan. 9, 1988, at A4, col. 3.

101. *Government Restricts Tibet Visits*, China Daily, Oct. 15, 1987, at 1, col. 1.

102. *Beijing Is Backed by Administration on Unrest in Tibet*, N.Y. Times, Oct. 7, 1987, at A1, col. 3.

103. *Id.*

Republican conservatives who supported Taiwan.<sup>104</sup> Congressman Lantos advanced a plan that would give the Dalai Lama's government-in-exile observer status at the United Nations, similar to the status enjoyed by the Palestine Liberation Organization.<sup>105</sup> On the day of the Senate condemnation of China, protests were renewed in Lhasa, and sixty people who marched to a government office in the capital city were arrested.<sup>106</sup>

State Department officials assailed the Senate action and predicted that it was almost certain to damage United States-China ties.<sup>107</sup> The State Department reaffirmed the position that Tibet is a part of China and that the Dalai Lama is a religious leader only, not the head of a Tibetan government-in-exile.<sup>108</sup> This position of moderation subjected the State Department to immediate and continuing criticism by the press.<sup>109</sup> In response to sharp criticism from Congress, Stapleton Roy defended the Administration's position before a joint hearing of two subcommittees of the House Foreign Affairs Committee on October 14, 1987. He cautioned that a distinction should be made between expression of concern over human rights and interference in Chinese domestic affairs.<sup>110</sup> Roy explained that the Administration agreed with the Dalai Lama with respect to the need for preservation of fundamental human rights in Tibet, and for freedom of Tibetan people to develop and to exercise basic democratic freedoms, but could not support him "when he assumes a political status and advances a political program for Tibet, which we consider to be part of China."<sup>111</sup>

104. *Fire at the Top of the World*, NEWSWEEK, Oct. 19, 1987, at 50.

105. *U.S. Official Defends Stance on Turmoil in Tibet*, N.Y. Times, Oct. 15, 1987, at A18, col. 1.

106. *60 Shout Out Dalai Lama's Name and Are Seized in Protest in Tibet*, *supra* note 97. The Chinese code of criminal procedure specifically prohibits the use of torture. See Criminal Procedure Law of the People's Republic of China, art. 32 (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 6 of the Chairman of the Standing Committee of the National People's Congress on July 7, 1979, and effective as of Jan. 1, 1980), *English translation in 1 LAWS 1979-1982, supra* note 14, at 120, 126. However, the United States State Department has reported that public security personnel sometimes use harsh treatment at the time of detention of suspects, and that a number of reliable sources reported that People's Armed Police severely beat several monks who were detained during the demonstrations in Lhasa on October 6, 1987. See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1987: REPORT SUBMITTED TO THE HOUSE COMM. ON FOREIGN AFFAIRS AND THE SENATE COMM. ON FOREIGN RELATIONS BY THE DEP'T OF STATE, 100th Cong., 2d Sess. 662 (Joint Comm. Print 1987) [hereinafter 1987 HUMAN RIGHTS REPORT].

107. *Beijing Is Backed by Administration on Unrest in Tibet*, *supra* note 102.

108. *Id.* The United States has recognized the sovereignty of China over Tibet since the 1940s; since 1978, the United States has recognized Tibet only as part of China. *Id.* at A9, col. 1.

109. See, e.g., Rosenthal, *Selling Out Tibet*, N.Y. Times, Jan. 8, 1988, at A31, col. 6; *Stand Up for Decency in Tibet*, N.Y. Times, Oct. 8, 1987, at A38, col. 1.

110. *U.S. Official Defends Stance on Turmoil in Tibet*, *supra* note 105.

111. Roy, *supra* note 7, at 51.

Unsettled by the congressional offensive in setting United States foreign policy, senior State Department officials engaged in serious discussions during mid-October to reassess the Department's position on Tibet. The principal objective seemed to be the identification of more effective ways for the Department to express displeasure over alleged human rights abuses in ways that would not offend China unnecessarily and that would assure it that the United States has no intention of upsetting China's security arrangements on its border.<sup>112</sup>

Chinese sources promptly denounced the Senate action and expressed "strong indignation."<sup>113</sup> On October 16, 1987, Deng Xiaoping verbally lashed out at several members of Congress for their continued provocative statements on Tibet and for the recent disturbances there. Although he affirmed that the Tibetan situation would not affect the "overall good situation" between the United States and China, he did express concern over the "ignorance and arrogance" of the members of Congress concerned.<sup>114</sup> On the same day the Chinese government denied permission to a delegation of members of Congress headed by Representative Lantos to visit Tibet.<sup>115</sup> By early 1988 an uneasy peace had been restored to Lhasa, but it remained clouded by serious unresolved questions about Tibet's past, present, and future.<sup>116</sup>

By late 1987 the highly publicized debate over the "Tibet Question" ensured that any position taken on amending House Bill 1777<sup>117</sup> would be interpreted as either favoring or opposing human rights. Amid such controversy it virtually was a foregone conclusion that Congress's condemnation of China would become part of the national laws. On December 22, 1987, Congress passed the Foreign Relations Authorization Act for fiscal years 1988 and 1989.<sup>118</sup> Section 1243 condemned China for alleged violations of human rights in Tibet and announced a congressional policy that "the United States should make the treatment of the Tibetan people an important factor in its conduct of relations with the People's Republic of China."<sup>119</sup> Similar condemnations were made in section 1245 for other alleged abuses in China.<sup>120</sup> One interpretation of

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112. *U.S. Is Reassessing Response on Tibet*, N.Y. Times, Oct. 18, 1987, § 1, at 17, col. 1.

113. *See U.S. Amendment on Tibet "a Farce"*, China Daily, Oct. 17, 1987, at 4, col. 3.

114. *Chinese Leader Faults U.S. Lawmakers on Tibet*, N.Y. Times, Oct. 17, 1987, at 32, col. 1.

115. *Id.*

116. *Chinese Established a Truce, Though Shaky, in Tibet*, St. Petersburg Times, Feb. 5, 1988, at A16, col. 1.

117. *See supra* note 6 and accompanying text.

118. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 100 Stat. 1331 (codified in part in scattered sections of 22 U.S.C.).

119. *Id.* § 1243(b)(2), 100 Stat. at 1423.

120. *Id.* § 1245, 100 Stat. at 1425-26.

this series of events, clearly implied by congressional treatment of the Dalai Lama, is that Congress regarded Tibet as a sovereign nation entitled to independence from China, with the Dalai Lama as the political head of that nation.

Other events strained United States-China relations in 1988. In January it was disclosed that Defense Department officials soon would add China to a public list of nations designated as hostile to the United States. The list applies only to the Defense Department and is published under a Pentagon regulation that forbids the issuance of security clearances to naturalized citizens from "hostile" nations until they have been American citizens for five years.<sup>121</sup> The decision to add China to the list was made after a review following the Reagan Administration's concerns over the use of Chinese-made Silkworm missiles by Iran in the Persian Gulf.<sup>122</sup>

By mid-February 1988 a Chinese official described United States-China relations as "potentially unstable," and attacked what he characterized as interference in China's internal affairs. Congressional criticism of China's handling of the Tibet situation and congressional allegations of human rights abuses in China were among the principal problems cited in the climate of worsening relations.<sup>123</sup> By early March of 1988, however, the Reagan Administration was reported to have been considering relaxation of restrictions on high technology exports to China because it had been determined that China no longer sold Silkworm missiles to Iran.<sup>124</sup>

After the October 1987 turmoil in Lhasa had subsided, Chinese authorities began a series of initiatives to reduce tensions in Tibet. An extensive political indoctrination campaign was conducted in major Buddhist monasteries in an effort to persuade Tibetans of the futility and illegality of calling for independence.<sup>125</sup> Improvements in Tibetan living conditions under Chinese rule were highlighted both in such meetings and in the Chinese press. The Panchen Lama, who ranked second to the Dalai Lama as Tibet's spiritual leader, but lived in Beijing and served in an official role recognized by the Chinese government,

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121. *Secret Is Out on Listing China as Hostile Country*, N.Y. Times, Jan. 25, 1988, at A20, col. 1.

122. *Id.*

123. The other four problems cited were: (1) American sanctions for what the Reagan Administration has charged were Chinese arms sales to Iran; (2) Washington's continued arms sales to Taiwan; (3) the Administration's continuing criticism of China's family planning program; and (4) United States impatience with the pace of China's opening to the outside world. *Chinese Official Lists 6 Grievances Against U.S.*, N.Y. Times, Feb. 16, 1988, at A3, col. 1.

124. *U.S. Informs China High-Tech Exports Could Be Widened*, N.Y. Times, Mar. 10, 1988, at A1, col. 1.

125. *Tibet Unrest: Fears Return*, N.Y. Times, Mar. 9, 1988, at A7, col. 1.

visited Lhasa in January of 1988 in an effort to conciliate Tibetans.

The Chinese displays of tolerance failed to control the tension, and the short-lived peace disintegrated. On March 5, 1988, Tibetan mobs again took to the streets in Lhasa, reportedly killing three Chinese policemen; the police killed at least five Tibetans as rioting ravaged the city.<sup>126</sup> The rioting came at the close of the week-long Great Prayer Festival, which had been opened to foreign journalists. Tibetans reportedly were concerned that the Chinese used the festival as a showcase for foreigners to display the relative calm that existed in Lhasa.<sup>127</sup>

The rioting could not have been timed better to embarrass Chinese officials and to place additional strains on the United States-China relationship. The riots broke out on the eve of the arrival of the Chinese foreign minister, Wu Xueqian, in Washington for meetings with American officials to discuss problems that recently had surfaced in United States-China relations, including the congressional allegations of human rights abuses in Tibet.<sup>128</sup> Many officials in China blamed the resurgence of riots on too much Chinese leniency, and hardliners briefly appeared to be in the ascendancy. In response to the March rioting, the Panchen Lama called for heavy punishment of the rioters and warned Tibetans that they should not misinterpret Chinese "leniency and forbearance as signs of weakness."<sup>129</sup> Strict limits on tourism to Tibet continued to be imposed after the renewed rioting in March 1988.<sup>130</sup>

In early April, however, China again reverted to a conciliatory approach by inviting the Dalai Lama to return to live in Tibet if he would cease to call for Tibetan independence.<sup>131</sup> In contrast to previous Chinese offers to give him a post in Beijing, this offer was the first time he had been invited to live in Tibet.<sup>132</sup> Although the Dalai Lama rejected the offer, he also appeared more conciliatory in his response.<sup>133</sup> The Dalai Lama's position generally has been one of strong opposition to the Chinese military presence in Tibet with little or no acknowledgement of any legitimate Chinese interests in Tibet. He also has denied China's right to handle Tibet's foreign affairs. In a dramatic shift, he reversed both positions in a speech to a meeting of members of the European

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126. *Id.* Unconfirmed and anonymous reports made to the *New York Times* by a foreigner claimed that 18 monks died in the March rioting. *New Report Says 18 Monks Died in Tibet Protest*, N.Y. Times, May 8, 1988, § 1, at 6, col. 1.

127. *3 Reported Dead in Latest Tibet Riots*, N.Y. Times, Mar. 7, 1988, at A3, col. 1.

128. *See id.*

129. *Bad Faith at the Temple*, NEWSWEEK, Mar. 21, 1988, at 40.

130. *Beijing Is Said to Restrict Foreign Travel to Tibet*, N.Y. Times, Apr. 19, 1988, at A5, col. 1.

131. *Inching Toward a "Middle Way" on Tibet*, N.Y. Times, Apr. 7, 1988, at A26, col. 1.

132. *Id.*

133. *Id.*

Parliament in Strasbourg, France, on June 15, 1988.<sup>134</sup> He recognized China's right to handle Tibet's foreign affairs and at least temporarily to maintain troops on Chinese soil until talks with China could be consummated to make Tibet "a self-governing democratic political entity" associated with China.<sup>135</sup>

By early 1989 events again soured the prospects for a meaningful dialogue between the Dalai Lama and Beijing. In January the Panchen Lama died. Although he was regarded as Beijing's lackey, the Panchen Lama decried China's abuses in his Tibetan homeland before his death.<sup>136</sup> On March 5, 1989, a small group of Buddhist monks and nuns marched near the Jokhang Temple in Lhasa, carrying proindependence signs. The protests quickly escalated into open clashes with the police, and riots lasted for several days.<sup>137</sup> The outbursts left as many as thirty persons dead, and martial law was imposed by Chinese authorities.<sup>138</sup> By March 10, 1989, the thirtieth anniversary of the 1959 Tibetan uprising against Chinese domination, Tibet's capital city was marked by relative calm only because of a military clampdown.<sup>139</sup>

Congress has a legitimate concern over the human rights records of other countries, particularly those with whom the United States has economic and other special relationships. Congress premised its involvement in the above scenario on its concern with China's human rights record generally and specifically with respect to Tibet. Those original concerns of the House of Representatives<sup>140</sup> may be categorized into six different areas: (1) Chinese dominion over Tibet; (2) the abuses perpetrated upon Tibet and Tibetans during the Cultural Revolution; (3) poor living conditions in Tibet; (4) the influx of Chinese into Tibet; (5) reports by Amnesty International of current human rights abuses of Tibetans for the nonviolent expression of religious and political beliefs; and (6) the failure of the Deng government to respond to the 1985 letter signed by ninety-one members of Congress calling for direct talks between China and the Dalai Lama.<sup>141</sup> To evaluate these concerns in the context of the above events, it is useful first to review the human rights situation in China and particularly China's position on issues of critical concern to the Tibetans, such as freedom of religion. A complete

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134. *Dalai Lama Approves Chinese Role in Tibet*, N.Y. Times, June 16, 1988, at A7, col. 1.

135. *Id.*

136. McGurn, *Dalai Lama Seeks Middle Way on Tibet*, Wall Street J., Mar. 8, 1989, at A14, col. 3.

137. *Chinese Declare Martial Law in Lhasa*, Asian Wall St. J., Mar. 8, 1989, at 3, col. 4.

138. *Id.*

139. *Id.*

140. See 133 CONG. REC. H5219 (daily ed. June 18, 1987) (setting forth congressional findings on human rights violations in Tibet by the People's Republic of China).

141. *Id.*



analysis of the subject of human rights in China is beyond the scope of this Article, but the following highlights describe the situation that prevailed in China, including Tibet, when the controversial amendments to House Bill 1777 were introduced and debated.

#### VI. THE CHINESE RECORD ON HUMAN RIGHTS

When the United States formally recognized China in 1979 and ended the decades of United States-China estrangement, China was ruled by an authoritarian government dominated by a privileged elite that exercised control through a one party system. That situation has not changed to this day. China continues to be ruled by a small group of leaders who dominate several key organizations, including the Politburo and its five-member standing committee, the Military Commission, and the Secretariat. All share power within the overall dominance of the Chinese Communist Party. Deng Xiaoping, who serves as Chairman of the Party's key Central Military Commission, clearly continues to be China's preeminent leader.<sup>142</sup> Freedoms of speech, press, religion, and other basic human rights continue to be circumscribed, although liberalizations have occurred in recent years.<sup>143</sup>

Congressional concern over the Cultural Revolution as expressed in the amendments to House Bill 1777 certainly was valid. The Tibet Autonomous Region was hit particularly hard by the Cultural Revolution. Mao's "Red Guards" flooded into Lhasa in 1966, and many young Tibetans joined them, engaging in virtually unrestrained destruction of Tibetan history. Religious scriptures and texts were burned, and thousands of monasteries and other historical buildings that had witnessed centuries of Tibetan history were destroyed. The people were subjugated totally, their religious and social customs banned, and even the traditional crops of barley were changed by government decree. Many Tibetans were subjected to public humiliation and abuse. There is no accurate measure available for the number of lives lost. The congressional amendment stated that "over one million Tibetans have perished since 1949 as a direct result of political instability, imprisonment, and widescale famine."<sup>144</sup> No source for this data was indicated, nor was a more specific time period designated, but it is fair to assume that this estimate focused primarily on the period of the Cultural Revolution.

The Tibetans did not suffer alone. The Han Chinese, the dominant ruling group in China, likewise suffered throughout the nation from the virtually unrestrained rampages of Mao's "Red Guards" during the Cul-

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142. 1987 HUMAN RIGHTS REPORT, *supra* note 106, at 660.

143. *Id.*

144. 133 CONG. REC. H5219 (daily ed. June 18, 1987).

tural Revolution. Many of the abuses of human rights during the Cultural Revolution have been chronicled by Amnesty International<sup>145</sup> and others.<sup>146</sup> An initial and basic tenet announced by the post-Mao regime in China was that those abuses should never be allowed to happen again. One of the first reforms of the Deng government took the unprecedented step of publicly recognizing and condemning those abuses of the past.<sup>147</sup> The United States State Department issued a public statement commending China's new government for this forthright action,<sup>148</sup> and Congress was informed of the new government's position in public hearings.<sup>149</sup> Members of the notorious "Gang of Four," considered responsible for the excesses of the Cultural Revolution, were arrested, tried, and punished severely.<sup>150</sup>

Deng stated early in his regime that "to practise people's democracy to the full" was one of three major objectives of China's modernization.<sup>151</sup> No one, especially the Chinese, would suggest that they aspire to the same level of democracy that is practiced in the United States. Moreover, it is clear that human rights do not enjoy the same protections in China as they do in the United States and most other Western democracies. However, the trend in China for more than a decade has been towards greater liberalization in political and religious freedoms, and increased governmental respect for human rights generally.

One of the principal thrusts of the Deng government has been to establish the consistent rule of law and to reduce the arbitrary rule of men. This trend is directly contrary to the highly personalized rule of Mao Zedong. The importance of this change may be illustrated in the Deng regime's liberalization of religious freedoms, a subject of considerable relevance to the Tibetan Buddhists.

In China, as in other Communist countries, religion is considered to be a potential competitor for the people's loyalty to the state. The extreme leftism of the Cultural Revolution sought a final solution in the

145. See, e.g., AMNESTY INT'L, 1980 ANNUAL REPORT; AMNESTY INT'L, 1979 ANNUAL REPORT.

146. See, e.g., R. EDWARDS, L. HENKIN & A. NATHAN, HUMAN RIGHTS IN CONTEMPORARY CHINA (1986).

147. See *Human Rights in Asia: Communist Countries: Hearings Before the Subcomm. on Asian and Pacific Affairs and on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 43, 44 (1980) [hereinafter *1980 Hearings*] (statement of Charles W. Freeman) (referring to an interview with Deng Xiaoping in which Deng admitted that over one million persons were killed during the rise of the Gang of Four).

148. *China Commended for Acknowledging Past Rights Abuses*, Wash. Post, Nov. 29, 1978, at A17, col. 1.

149. See generally *1980 Hearings*, *supra* note 147.

150. See generally D. BONAVIA, *supra* note 29.

151. *Reform of System of Party, State Leadership*, China Daily, July 1, 1987, at 4, col. 1 (English language translation of a major speech given by Deng in 1980 to a meeting held by the Political Bureau of the Central Committee of the Communist Party of China).

eradication of all religious practices. That effort was unsuccessful, and Deng Xiaoping's reformist government initiated a policy of limited religious toleration in 1978.<sup>152</sup> The Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party (CCP) convened under Deng's leadership and became a watershed event in the economic opening of China.<sup>153</sup> The new Constitution of the People's Republic of China, adopted on March 5, 1978, by the Fifth National People's Congress, contained the following provision on religion: "Citizens enjoy freedom to believe in religion and freedom not to believe in religion and to propagate atheism."<sup>154</sup> Although the new leadership did not abandon the ultimate goal of weakening religion's influence, it appeared to have reversed its position on abolishing religion, at least for the foreseeable future.

The 1982 Constitution expanded the protections for freedom of religious belief:

*Article 34.*

All citizens of the People's Republic of China who have reached the age of 18 have the right to vote and stand for election, regardless of . . . religious belief . . ., except persons deprived of political rights according to law.<sup>155</sup>

*Article 36.*

Citizens of the People's Republic of China enjoy freedom of religious belief.

No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.

The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state.

Religious bodies and religious affairs are not subject to any foreign domination.<sup>156</sup>

Following the official liberalization of religious freedoms under Deng, religion appears to have enjoyed a substantial resurgence

152. 1987 HUMAN RIGHTS REPORT, *supra* note 106, at 670.

153. See *China's Developing Legal Structure for Trade and Commerce: Hearings Before the Special Subcomm. on U.S. Trade with China of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 8 (1984) (containing materials submitted by Tao-Tai Hsia).

154. CONST. OF THE PEOPLE'S REPUBLIC OF CHINA [1978] art. 46 (adopted at the First Session of the Fifth National People's Congress of the People's Republic of China on Mar. 5, 1978), *English translation in 2 SELECTED DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA* 165 (J. Wang ed. 1979) [hereinafter *SELECTED DOCUMENTS*]. The 1954 Constitution stated that "[c]itizens of the People's Republic of China enjoy freedom of religious belief." CONST. OF THE PEOPLE'S REPUBLIC OF CHINA [1954] art. 88 (adopted at the First Session of the First National People's Congress of the People's Republic of China on Sept. 20, 1954), *English translation in 1 SELECTED DOCUMENTS*, *supra*, at 52. However, the increasingly repressive policies of Mao Zedong eviscerated the promise of any religious freedom under the 1954 Constitution.

155. 1982 CONST., *supra* note 14, art. 34, *English translation in 1 LAWS 1979-1982*, *supra* note 14, at 12.

156. *Id.* art. 36, *English translation in 1 LAWS 1979-1982*, *supra* note 14, at 12.

throughout China and Tibet, particularly during the year preceding the United States congressional resolution of June 1987.<sup>157</sup> The number of Chinese who practice religion reportedly has increased since 1978; official estimates in 1987 placed the totals at three million Catholics, four million Protestants, fifteen million Muslims, and more than ten million Buddhists. Daoists are estimated into millions at a minimum.<sup>158</sup> Many of the religious institutions that had been closed during the Cultural Revolution have been reopened. In 1987 there were more than 30,000 churches, temples, monasteries, and mosques in service in China. Many of the Buddhists and Daoist temples have been reopened, often after restoration by the Chinese government.<sup>159</sup> The restoration of Tibetan monasteries also is continuing, although only a fraction of the 2700 monasteries open before the Chinese suppression of the 1959 Tibetan uprising have been reopened. In addition to the appropriation of funds for extensive renovations, the government provides other financial support for religious bodies, including tax exemptions and certain cash subsidies.<sup>160</sup>

There continues to be a pressing shortage of priests, ministers, monks, imams, and other religious leaders because older leaders are dying and the government limits the number of new clergy.<sup>161</sup> However, the government has relaxed controls somewhat on access to the clergy. In 1981 rules were liberalized to permit the establishment of seminaries.<sup>162</sup> Individual temples and mosques may run their own training programs. Religious publications are printed in all languages that have religious significance in China.<sup>163</sup>

When one's own religious beliefs begin to affect others, however, the state may intervene. Article 36 of the 1982 Constitution clearly forbids discrimination based upon religious beliefs, or imposition of religious beliefs upon others. It has been reported that official government policy forbids religious proselytizing other than at places of worship or believers' homes and discourages conversion of those under eighteen years of age.<sup>164</sup>

The Chinese government has sought to attain a high degree of national organization and control over religious bodies and to isolate them

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157. See 1987 HUMAN RIGHTS REPORT, *supra* note 106, at 671.

158. *Id.* at 671-72.

159. *Id.* at 671.

160. *Id.*

161. *Id.* at 672.

162. In 1987 the Catholic and Protestant churches each had ten seminaries in operation, the Islamic Association had nine institutes to train imams and Islamic scholars, and the Buddhist Association had approximately twenty institutes nationwide, including facilities in Lhasa. *Id.*

163. *Id.* at 671.

164. *Id.* at 670.

from foreign influences. Every religious body must affiliate with one of the eight national organizations representing Christianity, Buddhism, Islam, and Daoism. The government required all Protestant denominations to merge in the 1950s, and the Chinese Catholic church was split forcibly from Rome. Today there are five Chinese Christian organizations; two are Protestant and three are Catholic.<sup>166</sup> There is no question that these official religious organizations are subject to the leadership of the Chinese state and the Communist Party.

One of the most sensitive areas of official concern is the potential for foreign domination or influence over China's religious groups. This concern is rooted deeply in the bitter history of China's earlier contacts with the West when the influence of foreign missionaries was viewed as an integral element in the Western domination and resulting national humiliation of China. Article 36 of the 1982 Constitution asserts the principle of independence clearly: "Religious bodies and religious affairs are not subject to any foreign domination."<sup>166</sup> Although the government prohibits foreign missionaries from practicing among Chinese citizens, it has allowed some foreign clergymen to enter for brief periods to serve the resident foreign community.<sup>167</sup> The government carefully monitors and controls contacts between Chinese and foreign religious organizations, although it has encouraged Chinese religious leaders to participate in international exchange activities.<sup>168</sup> In an effort to cultivate the goodwill of Islamic nations and to gain support in critical minority areas of China, the government resumed giving permission to Muslim citizens to make the Hajj in 1979. From 1985 to 1988 over 2000 Chinese have made the trip to Mecca each year. Chinese religious organizations also may accept unconditional gifts from foreign religious organizations.<sup>169</sup>

Official Chinese concern in this regard traditionally has focused on the Vatican, in part because of its continued diplomatic ties with Taiwan. Loyalty to Rome simply will not be tolerated by the authorities.<sup>170</sup> More recently, however, concern has focused on Tibetan loyalty to the Dalai Lama, particularly because of the mixed political and religious aspirations of his government-in-exile. While the Tibetan reverence of the Dalai Lama as religious leader has been tolerated, the difficulty arises in drawing a line of demarcation between religious and political

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165. *Id.* at 670-71.

166. 1982 CONST., *supra* note 14, art. 36, *English translation in 1 LAWS 1979-1982, supra* note 14, at 12.

167. 1987 HUMAN RIGHTS REPORT, *supra* note 106, at 672-73.

168. *Id.* at 672.

169. *Id.*

170. *Id.* at 673.

allegiance and activities. Article 24 of the 1982 Constitution promotes education to combat "feudal" ideas,<sup>171</sup> and the Chinese have identified pre-1950 Tibet under the Dalai Lama as a feudal society.<sup>172</sup> Article 15 states that "[d]isturbance of the socioeconomic order or disruption of the state economic plan by any organization or individual is prohibited."<sup>173</sup> The Chinese Criminal Law<sup>174</sup> contains a wide variety of provisions that might reach not only such overt activity as participation in the Lhasa riots, but also covert, nonviolent subversion of Chinese policies. For example, the Criminal Law broadly reaches "crimes of counterrevolution"<sup>175</sup> and "crimes of endangering public security."<sup>176</sup>

China's human rights record clearly improved after reestablishment of relations with the United States. That pattern of improvement has continued in recent years, although recent developments, including those in Tibet, have served as a reminder that China continues to be an authoritarian society and that liberalization clearly has its limits. One of the glaring deficiencies in the congressional findings supporting the amendments to House Bill 1777 was the failure to acknowledge the specific advances China has made in human rights during the past decade and its ongoing efforts to implement additional political liberalizations. However, the Beijing Massacre and the subsequent repression of the Tiananmen Square democracy movement of 1989 have rekindled the congressional concerns expressed two years earlier.

There have been earlier popular demonstrations in China to promote freedom and democracy, but none has had such profound consequences as the democracy movement of spring 1989. The first public manifestations of the movement appeared when student protesters assembled in the historic Tiananmen Square of Beijing to protest corruption in government and the Communist leadership's antidemocratic policies.<sup>177</sup> The movement quickly gained broad-based grass roots sup-

171. 1982 CONST., *supra* note 14, art. 24, *English translation in 1 LAWS 1979-1982, supra* note 14, at 10.

172. See *Tibetan Deputies on "Human Rights," BEIJING REV.*, Apr. 24-30, 1989, at 27.

173. 1982 CONST., *supra* note 14, art. 15, *English translation in 1 LAWS 1979-1982, supra* note 14, at 9.

174. Criminal Law of the People's Republic of China (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 5 of the Chairman of the Standing Committee of the National People's Congress on July 6, 1979, and effective as of Jan. 1, 1980), *English translation in 1 LAWS 1979-1982, supra* note 14, at 87.

175. *Id.* ch. I, *English translation in 1 LAWS 1979-1982, supra* note 14, at 103.

176. *Id.* ch. II, *English translation in 1 LAWS 1979-1982, supra* note 14, at 105.

177. The Author arrived in Beijing on April 18, 1989, three days after the initial protests began, and observed the demonstrations and interviewed participants for the next several weeks. His observations on the 1989 democracy movement and the implications of the Beijing Massacre on China's program of legal and economic reforms will be explored in an article (yet untitled) to be published in volume 23:1 of the *George Washington Journal of International Law and*

port during the next seven weeks when it was joined by intellectuals, journalists, workers, union representatives, and common people.<sup>178</sup>

Normally sensitive to any kind of open challenge, China's leaders were embarrassed particularly by the timing of these demonstrations. The Taiwan Finance Minister, Shirley Kuo, arrived in Beijing on May 1, 1989, for a meeting of the Asian Development Bank (ADB).<sup>179</sup> Although she was to have no official contact with the Beijing Government<sup>180</sup> and limited her business to meetings with the ADB, the Chinese leadership clearly hoped to use the occasion of her visit to make a favorable impression on Taiwan. More importantly, Mikhail Gorbachev, General Secretary to the Soviet Union, arrived in Beijing on May 15, 1989, for the first official summit meeting between the two Communist superpowers in thirty years.<sup>181</sup>

The Chinese security forces exercised restraint in dealing with the protesters until two weeks after Gorbachev's departure. Units of the Chinese 27th Army began to disperse forcefully demonstrators on June 3, 1989, but met resistance. By the early morning hours of June 4 soldiers were firing on unarmed civilian protesters in Tiananmen Square and the streets of Beijing. Hundreds, perhaps thousands, were killed and countless others were wounded.<sup>182</sup> The world was horrified by the regime's brutal repression of its own people, using tanks and automatic assault rifles, apparently without discrimination, against unarmed people in the Square and in the streets.<sup>183</sup> Although the conservative Premier Li Peng was the official spokesman for the Government, the real leader behind the repression clearly was Deng Xiaoping,<sup>184</sup> the eighty-four year old patriarch who emerged as the de facto leader of China in 1978,<sup>185</sup> and who holds no official position in government except the powerful Chairmanship of the Military Commission.<sup>186</sup>

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*Economics.*

178. For numerous contemporary accounts of the democracy movement appearing in the popular press, see Leung, *Beijing's Repressive Weapons Lose Edge*, NEWSWEEK, May 29, 1989, at 14; *Upheaval in China: A Tumultuous Struggle over the Destiny of a Nation*, NEWSWEEK, May 29, 1989, at 14; *Beijing Protest Swells to More Than a Million*, Asian Wall St. J., May 18, 1989, at 1, col. 3.

179. McGregor, *Taiwan's Kuo Faces Tough Task in China*, Asian Wall St. J., May 3, 1989, at 1, col. 3.

180. *Id.* Mrs. Kuo's presence in Beijing was a particularly sensitive situation because Taiwan and China each claims to be the legitimate government of all of China. *Id.*

181. *Students Cast Shadow on Historic Talks*, Asian Wall St. J., May 15, 1989, at 1, col. 3.

182. *Despair and Death in a Beijing Square*, TIME, June 12, 1989, at 10, 11-12.

183. *Id.*; see also *Beijing Bloodbath*, NEWSWEEK, June 12, 1989, at 24; *Reign of Terror*, NEWSWEEK, June 19, 1989, at 14, 16.

184. See Butterfield, *Hard Line: Deng Reappears with a Chilling Lesson About Power in China*, N.Y. Times, June 11, 1989, § 4, at 1, col. 1.

185. J. TOWNSEND & B. WOMACK, *POLITICS IN CHINA* 141 (3d ed. 1986).

186. *Id.* at 91. Deng reportedly was so offended by the student demonstration that he or-

Early reports indicated that after the massacre there were open conflicts in Beijing and elsewhere in China between different military units of the Army,<sup>187</sup> but the old guard conservatives clearly emerged in control and imposed martial law to maintain dominance by military units.<sup>188</sup> World concern was heightened further as the postrepression actions of the Deng regime suggested that China was falling back into the chaos of the Cultural Revolution.<sup>189</sup> Party Chairman Zhao Ziyang, former premier and a leader of China's reform movement, abruptly disappeared from public view and later was stripped of his official position.<sup>190</sup>

The Chinese Government boldly denied the essential facts of the confrontation, despite the fact that they had been recorded and publicized in graphic detail by the world's news media.<sup>191</sup> The Chinese Government denounced its critics, and rejoined that no one had died in Tiananmen Square on the fourth of June, and that when the Army cleared the Square, student protesters left peacefully, with banners flying. According to this official version, any trouble that had occurred was caused elsewhere in Beijing by a counterrevolutionary rebellion of thugs who were attempting to overthrow the Communist state.<sup>192</sup> The United States news media was accused of spreading falsehoods and rumormongering.<sup>193</sup> Premier Li Peng stated further that the incident was "a good thing" because it gave the Party "another severe test."<sup>194</sup> Amid fears of widespread purge, Chinese security forces arrested hundreds and systematically executed many who were involved in the

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dered the army to move in and quash the movement, "no matter what the cost," as early as April 27, 1989. See Leung, *Party Blocked Call from Deng for Crackdown*, *Asian Wall St. J.*, May 12-13, 1989, at 1, col. 3. The crackdown was delayed by many senior Communist Party officials who risked his wrath by urging the Central Government to exercise restraint, and not to use violence. *Id.*

187. See Trainor, *An Army's Agony*, *N.Y. Times*, June 19, 1989, at A10, col. 1; Kristof, *Moderates Appear on Beijing TV, Easing Fears of Wholesale Purge*, *N.Y. Times*, June 14, 1989, at A1, col. 4; *Army Factions Battle in Beijing, Witnesses Say*, *Asian Wall St. J.*, June 7, 1989, at 1, col. 6.

188. See *Martial Law to Last till "All Back to Normal,"* *China Daily*, July 12, 1989, at 1, col. 1.

189. See Kristof, *Unleashing the Dark Methods of the Cultural Revolution*, *N.Y. Times*, June 18, 1989, § 4, at 1, col. 1.

190. *Small Carrot, Big Stick*, *NEWSWEEK*, July 3, 1989, at 28, 29. Later reports disclosed that Zhao was under house arrest in his official residence in Zhongnanhai. *Deng Talks Again of Plan to Retire*, *N.Y. Times*, July 23, 1989, § 1, at 9, col. 1.

191. See, e.g., *Dealing Death with a Big Lie*, *NEWSWEEK*, June 26, 1989, at 26; see also *Deng's Big Lie*, *TIME*, June 26, 1989, at 6.

192. See *Dealing Death with a Big Lie*, *supra* note 191, at 26.

193. *U.S. News Media in China's Riot*, *China Daily*, July 13, 1989, at 4, col. 2.

194. *Top Leaders Tell Envoys Be Vigilant, Work Hard*, *China Daily*, July 13, 1989, at 1, col. 1.



demonstrations.<sup>196</sup>

The brutality of the crackdown sent shock waves throughout those areas China considered its traditional lands and which it currently is trying to bring back under its control. Most immediately threatened was Hong Kong, the economically powerful British enclave destined to return to Chinese control in 1997<sup>196</sup> under the Chinese promise that its capitalist system will remain undisturbed for fifty years.<sup>197</sup> Although its response was measured, Taiwan also was gravely concerned by a renewed fear of threat from Beijing.<sup>198</sup>

Beijing's crushing of the democracy movement was a serious setback for the cordial relations that had developed between China and the Western democracies during China's reform era.<sup>199</sup> Many Western businessmen who had invested heavily in China during the heady era of economic reforms scrambled to get out.<sup>200</sup> President Bush, responding in measured terms,<sup>201</sup> immediately ordered a suspension of American military sales to China.<sup>202</sup> At the subsequent economic summit in Paris, representatives of the United States and six other major Western pow-

195. *Chinese Execute 24 More People, Including 7 from Beijing Protests*, N.Y. Times, June 23, 1989, at A1, col. 4; *Chinese Arrest 400 in Beijing Amid Fears of a Wide Purge; Roundups in Other Cities*, N.Y. Times, June 11, 1989, § 1, at 1, col. 4; *Shanghai Reports Dissidents' Arrest*, N.Y. Times, June 11, 1989, § 1, at 8, col. 1. The United States Secretary of State and leaders from many other nations lodged strong official protests against the events and executions. See *Baker Denounces Executions of Chinese Protesters*, N.Y. Times, June 22, 1989, at A10, col. 4.

196. See generally HONG KONG IN TRANSITION, *supra* note 21; HONG KONG AND 1997: STRATEGIES FOR THE FUTURE (1985). The Portuguese colony of Macao also returns to China on December 20, 1999. Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao, reprinted in EDIÇÕES EM LÍNGUAS ESTRANGEIRAS, DECLARAÇÃO CONJUNTA SINO-PORTUGUESA SOBRE A QUESTÃO DE MACAU 59 (1987).

197. See Reiss, *Specter of 1997*, NEWSWEEK INT'L, July 3, 1989, at 16, 17; Wong, *Hong Kong Is Jolted into Grim Visions of Transition in 1997*, Asian Wall St. J., June 8, 1989, at 1, col. 3.

198. See Wu Wen-Cheng & Chen I-Hsin, *Tiananmen Is Also a Tragedy for Taiwan*, Asian Wall St. J., July 6, 1989, at 8, col. 3.

199. Kristof, *Relations with U.S. Seem Badly Hurt by Crushing of Democracy Protests*, N.Y. Times, June 11, 1989, § 1, at 16, col. 1.

200. See *China: Now, Where Were We?*, NEWSWEEK INT'L, July 3, 1989, at 44; *Foreigners Scramble to Leave Beijing*, N.Y. Times, June 7, 1989, at A9, col. 1; *Companies Speeding Beijing Exodus*, N.Y. Times, June 7, 1989, at D7, col. 3.

201. See Gergen, *A Cautious Man Plays China by the Book*, U.S. NEWS & WORLD REP., June 5, 1989, at 27.

202. *Bush Order May Affect Grumman*, N.Y. Times, June 7, 1989, at D7, col. 1; *Bush Suspends Sales of Weapons to China, Halts Military Links*, Asian Wall St. J., June 6, 1989, at 1, col. 5. Prior to the Beijing Massacre, expansion of security cooperation with China was being given consideration by the United States. See, e.g., H. GASS, SINO-AMERICAN SECURITY RELATIONS 1 (1984). Although President Bush's immediate sanction actions limited military relations and high technology exports, subsequent sanctions imposed by the White House in late June included suspension of high-level government exchanges and pressures to postpone new loans from international lending institutions. See *Bush Imposes More Sanctions Against Beijing*, Asian Wall St. J., June 21, 1989, at 1, col. 6.

ers agreed to impose economic sanctions on China.<sup>203</sup> The flow of foreign tourism to China, which had brought in 2.2 billion dollars for China in 1988, dried up and remained at only a trickle in the aftermath of the incident.<sup>204</sup>

Members of Congress appeared very dissatisfied with the President's measured approach. Several different amendments to the Foreign Aid Authorization Bill for fiscal years 1990 and 1991 were introduced that severely would curtail United States exports of computers, weapons, satellites, and financing to China.<sup>205</sup> Thus, the broad chasm of disagreement between congressional and presidential perceptions of appropriate United States foreign policy toward China evidenced by the "Tibet Question" not only continues, but appears to have been exacerbated by the 1989 repression.

#### VII. THE ROLE OF CONGRESS IN AMERICAN FOREIGN POLICY

The conventional judicial wisdom holds that the United States speaks with one voice on matters of foreign policy through the federal government: "[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."<sup>206</sup> Unfortunately, the federal government too often speaks through two voices, that of the President and the Congress, on sensitive foreign affairs issues. The resulting dissonance undermines the effectiveness and credibility of American foreign policy. The congressional role in foreign relations should be considered; specifically, did Congress usurp presidential powers in foreign relations by its positions on the "Tibet Question"? Even if this question has no clear answer, the practical question remains whether the best interests of the United States are served when Congress disrupts established foreign relation policies of the executive branch. Consensus clearly exists that the United States possesses all the "foreign affairs powers" of a sovereign nation, and that this power is an inherent attribute of sovereignty,<sup>207</sup> but the debate contin-

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203. The decision to halt official and multilateral agency credit to China was the main choice of protest the major industrial nations took. An early step was the freezing of \$10 billion (United States dollars) in aid projects from the World Bank and Japan. The most painful and immediate impact came from the World Bank's decision, under pressure from the United States and Europe, to freeze loans totaling \$780.2 million (United States dollars), which had been slated for approval by the end of June. *World Bank Forced to Defer China Loans*, FAR E. ECON. REV., July 6, 1989, at 69.

204. WuDunn, *For the Tourists, an Even More Forbidding City*, N.Y. Times, July 24, 1989, at A4, col. 3.

205. *Congress, Angry at China, Moves to Impose Sanctions*, N.Y. Times, June 23, 1989, at A5, col. 1.

206. *Zschernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J., concurring) (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889)).

207. See *Burnet v. Brooks*, 288 U.S. 378, 396 (1933).

ues over the proper allocation of the foreign affairs power between the legislative and executive branches. Although disagreements between these branches over domestic policies are not uncommon, the whole world becomes a stage for display of United States governmental gridlock when the two branches of government work at cross purposes in foreign relations.

This debate initially started during America's early constitutional era, with Alexander Hamilton and James Madison taking sides over which branch of government should preside over foreign affairs. The Hamilton-Madison dispute over presidential versus congressional powers in foreign affairs continues to be one of the longest running debates in United States constitutional history. Hamilton argued in favor of presidential supremacy in foreign affairs. Presidential powers in foreign affairs emanate from article II of the Constitution, which contains specific enumerations of powers, including the power to make treaties, with the concurrence of two-thirds of the Senate; and to appoint ambassadors, public ministers, and consuls with the Senate's advice and consent.<sup>208</sup> As Commander in Chief, the President clearly has enormous influence over the conduct of foreign affairs.<sup>209</sup> Hamilton argued that the first clause of article II constituted a general grant of power to the executive not limited by the specific enumeration of powers which followed: "The executive powers shall be vested in a President of the United States . . . ."<sup>210</sup> According to Hamilton's theory, any foreign affairs power not specifically granted to Congress under the Constitution was reserved to the President through the executive power clause.<sup>211</sup>

Because the early Supreme Court often was reluctant to serve as umpire in executive-legislative branch disputes, early assertions of power by the President sometimes were approved tacitly by the Court's failure to interfere.<sup>212</sup> On occasion, the early Congress even appeared to share an expansive view of presidential powers. For example, the Sen-

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208. U.S. CONST. art. II, § 2, cl. 2.

209. *See id.* art. II, § 2.

210. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 179-81 (4th rev. ed. 1957) (citing 7 *THE WORKS OF ALEXANDER HAMILTON* 76 (H. Lodge ed. 1904)).

211. *Id.*

212. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Less than a year later, however, Chief Justice Marshall did not even discuss the "political question" option, and held that the President's enumerated powers as Commander in Chief of the armed forces did not allow him to order seizure of foreign vessels beyond the specific authorization granted by Congress. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). *See generally* Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 *YALE J. INT'L L.* 5 (1988). The debate has continued to have contemporary viability. For example, President Nixon vetoed the War Powers Resolution of Congress as an unconstitutional infringement on his powers as Commander in Chief. *See* 3 T. FRANCK & M. GLENNON, *UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES* 125-28 (1981).

ate Committee on Foreign Relations stated on February 15, 1816: "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations . . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch."<sup>213</sup>

When Congress and the President were in accord, the Court has echoed similar language in constitutional disputes initiated by third parties. For example, in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,<sup>214</sup> the Court upheld the grant of an overseas air route to Chicago & Southern Air Lines and denial of the route to its rival, Waterman Steamship Corp., pursuant to an executive order issued under congressional authorization. The Court held that the portion of the order which was based upon presidential powers alone was not subject to judicial review:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret . . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial.<sup>215</sup>

The most commonly cited contemporary reference to this type of Hamiltonian view is Justice Sutherland's decision in the leading case of *United States v. Curtiss-Wright Export Corp.*,<sup>216</sup> in which the Supreme Court concluded that:

[T]he President alone has the power to speak or listen as a representative of the nation . . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>217</sup>

The era spanning the Watergate through the Iran-Contra scandals has left little untarnished about the executive image and has resulted in greater congressional distrust and assertiveness in foreign affairs and other areas that otherwise might be left largely to executive discretion. James Madison's original thesis that Congress, and not the President, should be dominant in foreign affairs has been revived with a vengeance, although the current fervor stops short of congressional demands for total dominance.

James Madison's position was in direct opposition to Hamilton's;

213. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting U.S. Senate Reports, Committee on Foreign Relations, vol. 8, at 24 (1816)).

214. 333 U.S. 103 (1948).

215. *Id.* at 111.

216. 299 U.S. 304 (1936).

217. *Id.* at 319.

Madison asserted that Congress enjoyed broad powers under the express and implied constitutional grants, and that the President's powers in foreign affairs were limited specifically.<sup>218</sup> Authority for congressional action affecting foreign affairs can be found in several articles of the Constitution. Article I, section 8 defines congressional powers broadly: "Congress shall have Power to provide for the common Defense, . . . to regulate foreign commerce, . . . and to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the law of Nations."<sup>219</sup> Congress also has the power to declare war, to make rules of war, to grant letters of marque and reprisal,<sup>220</sup> and to raise, support, and regulate an army and a navy.<sup>221</sup> Treaties require approval by two-thirds of the Senate before ratification, and the Senate is empowered to advise the President on the terms of the treaty.<sup>222</sup> Finally, international postal agreements may be authorized by Congress under the "postal power" clause.<sup>223</sup>

In addition to the above specific constitutional grants of congressional power affecting foreign affairs, there are a variety of ways in which Congress can interfere with presidential attempts to exercise foreign affairs powers. The congressional power over the purse, for example, is a very effective means for limiting presidential aspirations in the international arena. By exercise of congressional powers under the "spending power" clause,<sup>224</sup> Congress virtually can veto programs essential to the presidential foreign affairs agenda. One of the most fertile sources of congressional power in modern times has been the commerce clause,<sup>225</sup> which continues to be used to regulate United States foreign trade. The United States only recently has emerged from a posture of relative nonchalance toward world trade matters. The exercise of the commerce clause by Congress no doubt will result in ever-increasing influence over foreign affairs because the United States now faces a highly competitive international market and the immediate necessity for active participation in that market in order to remain a major player in the world economy. The "necessary and proper" clause also has been used to control the exercise of presidential foreign affairs power. Article I, section 8 provides that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the

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218. E. CORWIN, *supra* note 210, at 180-82, 184-85 (citing 6 THE WRITINGS OF JAMES MADISON 138 (G. Hunt ed. 1900)).

219. U.S. CONST. art. I, § 8.

220. *Id.* § 8, cl. 11.

221. *Id.* § 8, cls. 12, 13.

222. *Id.* art. II, § 2, cl. 2.

223. *Id.* art. I, § 8, cl. 7.

224. *Id.* § 8, cl. 1.

225. *Id.* § 8, cl. 3.

. . . Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.”<sup>226</sup>

Early Supreme Court decisions recognized congressional power in foreign affairs,<sup>227</sup> and various theories upholding congressional powers in foreign affairs have been sustained by contemporary decisions as well.<sup>228</sup> Even in *Curtiss-Wright*, the decision so often quoted in support of an expansive view of presidential powers, Justice Sutherland acknowledged that the “foreign affairs power” arising from the sovereign status of the United States included some congressional authority in international matters.<sup>229</sup> The Supreme Court has upheld significant foreign affairs powers for Congress that are only implied by the Constitution. For example, in *Perez v. Brownell*,<sup>230</sup> the Court sustained a congressional exercise of power affecting foreign affairs by upholding the Nationality Act of 1940. The Court stated:

[W]hat is the source of power on which Congress must be assumed to have drawn? Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation . . . [A] Federal Government to conduct the affairs of that nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign nations, . . . [i]t must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.<sup>231</sup>

Because conflicts over the allocation of foreign affairs powers often have been considered by the Supreme Court to constitute a “political question,” the Hamilton-Madison debate has not been resolved by the judicial branch. As stated by Justice Brennan in writing for the Court in *Baker v. Carr*,<sup>232</sup> “The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”<sup>233</sup> On occasion, the Court has avoided direct intervention in such “political questions,” but has resolved the matter indirectly by allowing to stand action by the branch

226. *Id.* § 8, cl. 18.

227. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

228. *See, e.g., Blackmer v. United States*, 284 U.S. 421 (1932); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

229. 299 U.S. at 318-19.

230. 356 U.S. 44 (1958).

231. *Id.* at 57 (citation omitted). *Perez* subsequently was overruled on other grounds in *Afroyim v. Rusk*, 387 U.S. 253 (1967).

232. 369 U.S. 186 (1962).

233. *Id.* at 211 n.31 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

of government that appears to be acting within the scope of its constitutional authority.<sup>234</sup> It cannot be said that Congress has no power to enact legislation conditioning United States foreign economic relations on the satisfaction of specific congressional requirements.

To the extent that congressional actions toward China and the Dalai Lama constituted recognition of the Dalai Lama as head of the independent State of Tibet, however, a good argument can be made that Congress exceeded its powers. In *United States v. Belmont*<sup>235</sup> the Supreme Court sustained the presidential exercise of powers in recognizing a foreign government. The Soviet Union had seized and nationalized property of an American corporation within its territories. The Soviet Union's appropriation extended to a bank account originally held by the American corporation in a New York bank. Pursuant to an agreement between the Soviet Union and the United States, the Soviet Union assigned its rights in the account to the government of the United States. When the United States government attempted to collect the money, the bank refused to pay. In the resulting litigation, the Supreme Court held for the United States and stated:

We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet government and normal diplomatic relations were established between that government and the Government of the United States, followed by an exchange of ambassadors. *The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence. . . .* That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. . . . And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.<sup>236</sup>

The audience accorded to the Dalai Lama before the United States Congress in September 1987 was more befitting to a head of state than to a religious leader. The Dalai Lama's five point program introduced before Congress and strongly supported by some members of Congress, as laudable as its goals may be, rightly could be interpreted by China and the rest of the world as nothing less than a challenge to China's sovereignty in Tibet. Congress improperly received the Dalai Lama as the head of the Tibetan government-in-exile to make a "political statement"<sup>237</sup> advancing his position that Tibet is an independent state

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234. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 213-14, 449-50 n.26 (1972).

235. 301 U.S. 324 (1937).

236. *Id.* at 330 (emphasis added).

237. 133 CONG. REC. E3641 (daily ed. Sept. 22, 1987) (remarks of Rep. Tom Lantos).

under illegal occupation.<sup>238</sup> It was improper not only because it represented an attempted usurpation of presidential powers to recognize and receive foreign heads of state, it also directly contravened all other congressional and executive acts in the continuous pattern of recognition of China for more than a decade.

Undeniably, however, the Congress possesses the power to take public positions, as representatives of the American people, on matters affecting United States foreign policy. The divergence of opinion between Congress and the President on certain aspects of the United States-China relationship is inevitable, and is not resolved by any interpretation of their respective powers under the Constitution. Rather, it is a political problem that must be resolved through political means.

#### VIII. CONCLUSION

Part of the problem in assessing the events surrounding the "Tibet Question" is that the energy expended on the subject generally has produced more heat than light. The United States Congress focused almost exclusively on the highly emotional aspects of human rights with little or no apparent effort to separate the political aspirations of the Dalai Lama's program from his religious and human rights concerns. The Chinese also responded to the congressional accusations from an emotional plane. Chinese authorities appear to have overreacted to the riots in Tibet. To the extent that China disregarded fundamental individual rights as guaranteed by its own laws in the suppression of those disorders, it rightly may be subjected to world criticism. However, as a sovereign power, it also has the inherent police power to suppress rioting in the streets that endangers public order and safety.

The quality of the facts cited by Congress in House Bill 1777 also was poor; most of the allegations related to events that occurred during the Cultural Revolution under former leader Mao Zedong, who died in 1976. The 1987 congressional allegations of human rights abuses had little foundation in hard data or information, and seemed to reflect or parrot the Dalai Lama's accusations.

The 1989 Beijing Massacre and China's subsequent acts of repression are a different matter but clearly exacerbate concerns for the prospective treatment of the Tibetan people. The massacre itself and the widespread arrests and executions that followed raise considerable doubts about the continued viability of China's ambitious law-making efforts of the past ten years,<sup>239</sup> in which individual rights and protections received unprecedented attention. In short, the question of

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238. *Proposal for Peace and Accommodation in Tibet—Statement of the Dalai Lama, id.*

239. *See supra* notes 31-35 and accompanying text.



whether the incumbent Deng regime can be counted on to make a sincere commitment to the rule of law is still pending. For many, Beijing has lost its credibility. Just before the massacre occurred, Beijing sent a message to the Dalai Lama indicating that the Chinese Government wanted to discuss the Tibetan situation.<sup>240</sup> After the student democracy movement was crushed, however, the Dalai Lama expressed reluctance to enter such discussions because he was concerned that "the Chinese Government may not be the people's government."<sup>241</sup>

When the United States has a special relationship with another country, such as the special economic relationship that has been developing with China for more than a decade, the United States should be able to communicate its concerns over human rights and other legitimate matters through proper channels without fear of jeopardizing the underlying relationship. However, it is important to rationalize the debate over the Tibetan situation by recognizing that there are two related but severable issues. The human rights question is a matter of legitimate concern for the American people and their elected representatives. Involvement in the separatist movement, however, and the political programs advocated by the Dalai Lama, are not legitimate roles for Congress. Until these issues are clearly identified and dealt with separately, legitimate concern over human rights violations in Tibet will be diluted.

The process of institutionalizing the relationship between China and the United States has seen remarkable advances during the past decade. Those advances were achieved by careful planning, deliberate actions, and due regard for the respective sovereign interests of both nations. Since the initial United States recognition of the Government of the People's Republic of China, Tibet has been considered a part of China. No country in the world has recognized Tibet as an independent nation, and no country has qualified its recognition of China by an exclusion of the Tibet Autonomous Region. If either the executive or legislative branch chooses to take such a position, that branch has had ample opportunity with each successive treaty or intergovernmental United States-China agreement to do so.

The difficulties arising from the "Tibet Question" debate also emphasize the need for greater Chinese appreciation of the importance of human rights in the free world economic order. In the long term, successful economic relations with the United States require the recognition and observance of fundamental human rights. Otherwise, the American people, speaking through both the Congress and the Presi-

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240. *Dalai Lama Says Beijing Can't Crush Hopes*, N.Y. Times, June 28, 1989, at A11, col. 1.

241. *Id.*

dent, will begin to chafe under the relationship. As China, the Soviet Union, and other Communist nations seek to modernize their own economies through an increased opening to the West, it is timely that this reality in East-West relations be confronted by the East.

As an ideological leader in the free world, the United States has an obligation to provide leadership in human rights reform. But when that leadership is asserted in the form of intervention in the domestic affairs of another state, it should be measured, consistent with the goal to be accomplished, unassailable in its factual foundations, and coordinated through the foreign policy-making channels of government. Just as importantly, the goals of such intervention should be reconciled with the United States' overall interests, including geostrategic interests.

Much of the rancor generated between the United States Congress and China by the "Tibet Question" has subsided, but the momentum in the developing relationship between the United States and China may have cooled as well. The greatest beneficiaries of the unrest in Tibet likely were the hard-liners in Beijing who oppose China's current liberalization movement.<sup>242</sup> The controversy brought to light some fundamental truths about relationships between Communist countries and the free world. Despite China's economic reforms and opening to the West, now followed by the Soviet Union's related version of *perestroika* (restructuring), some very basic differences remain in the way the leaders in our diverse political systems view the relationship between individuals and the state. China remains essentially an authoritarian nation that still does not share many of the values of freedom that are the pillars of the United States system of government. Although the economic liberalizations in China appeared to have been leading to political liberalizations as well, fundamental differences in our two systems will remain for a very long time, perhaps forever. At the time of this writing, great uncertainty remains over the future directions of China's reform movement. The repression begun with the Beijing Massacre continues to pose the single greatest threat to the maintenance of cordial relations between the United States and China. The problems in that relationship, from the "Tibet Question" to the present, were exacerbated greatly by the Tiananmen Square incident of June 4, 1989, and its aftermath.

The stakes are high for both countries in the United States-China relationship, and the long-term success of that relationship requires consistency and reliability in our mutual dealings. For the United States, it is essential that a coherent, credible, and cohesive United

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242. Kristof, *Tibet Unrest Said to Aid Hard-Liners in Beijing*, N.Y. Times, Oct. 6, 1987, at A12, col. 1; see also *Unrest Rocks the Calm of "Shangri-La," supra* note 1, at 10.

States-China policy be developed and observed consistently, with government policy makers speaking with one voice on that policy's fundamental aspects.

### POSTSCRIPT

On December 12, 1989, the Norwegian Nobel Committee awarded the Dalai Lama the 1989 Nobel Peace Prize, commenting that: "It would be difficult to cite any historical example of a minority's struggle to secure its rights, in which a more conciliatory attitude to the adversary has been adopted than in the case of the Dalai Lama."<sup>243</sup> In accepting the prize, the Dalai Lama reiterated his Five Point Peace Plan for the restoration of peace and human rights in Tibet.<sup>244</sup> The Dalai Lama's approach has remained consistently conciliatory, despite the leftist retrenchment in China that followed the Beijing massacre of June 1989. Meanwhile, the disagreement between the United States Congress and the President has reintensified over an appropriate United States foreign policy towards China.

During the period immediately following the Beijing Massacre, China's leaders moved quickly to consolidate their control and to impose a new regime of political and economic retrenchment. Politically, members of China's ultra-conservative "old guard" consolidated their power and began to systematically replace or curb the activities of reformers. An internal leadership struggle no doubt was intensified when Deng Xiaoping went into public seclusion for several months, following his June 9, 1989 appearance to congratulate army troops for crushing the democracy movement.<sup>245</sup> After Deng's reappearance in September, it was announced that Jiang Zemin had been named as China's new Communist Party General Secretary to replace the discredited reformer, Zhao Ziyang.<sup>246</sup> Formerly the Party Chief in Shanghai, Jiang Zemin had led the crackdown on intellectuals in that city during the spring 1989 democracy movement. He generally has been viewed as a moderate on economic reforms.<sup>247</sup> Jiang quickly adopted the conservative party line in his first public contacts with the

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243. *A Prayer for Peace in Tibet*, Asian Wall St. J., Dec. 22-23, 1989, at 8, col. 3.

244. *Id.* See also *supra* note 134.

245. Kristof, *Deng Reappears, Saying China Will Seek Change*, N.Y. Times, Sept. 17, 1989, at 5, col. 1.

246. WuDunn, *Deng is Reported to Name his Heir, the Party Chief*, N.Y. Times, Sept. 18, 1989, at 1, col. 6.

247. *Id.*

news media, giving no indication that the current wave of oppression, arrests and executions would subside, or that executions of dissident students and intellectuals would be ruled out.<sup>248</sup>

On September 13, 1989, it was reported that Chinese courts had sentenced ten Tibetans to prison terms ranging from three years to life on charges of rioting and spying during the pro-independence unrest in Tibet in March, 1989.<sup>249</sup> The harshness of these sentences appeared to be calculated to discourage similar demonstrations in the future.

Although the official party line continued to express allegiance to the modernization reform movement, Beijing clearly retreated from many of the most significant economic reform measures of the past decade. Among the key programs which were aborted was decontrol of prices, sales of state-owned enterprises, strengthening of the private enterprise sector, and encouragement of rural enterprises.<sup>250</sup>

It soon became clear that China was locked into a period of severe economic austerity, with diminishing tourism and foreign trade, and domestic budget shortages that threatened to create new political discontent. China braced for the most severe foreign trade slump in a decade.<sup>251</sup> Steep wage cuts were ordered; many employees were paid in part with a new kind of three-year interest-paying bond; unemployment was rising; and labor productivity was falling.<sup>252</sup> China's central bank issued an emergency loan of more than five billion dollars to help local banks avoid a recurrence of the government's inability in 1988 to pay farmers for their crops.<sup>253</sup> Fears of a major economic recession mounted as industry output slowed to the lowest point in ten years, in a climate of falling sales and rising prices.<sup>254</sup>

By early November, 1989, it was reported that the Beijing government had adopted a new economic program which assured increased

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248. Ignatius, *Chinese Leaders Tow Party Line at Press Meeting*, Asian Wall St. J., Sept. 27, 1989, at 1, col. 3.

249. *10 Tibetans Sentenced after Rioting in March*, N.Y. Times, Sept. 14, 1989, at 5, col. 1.

250. Ignatius, *China is Retreating on Market Reforms*, Asian Wall St. J., Sept. 25, 1989, at 1, col. 3.

251. Leung, *China Traders Braced for Severe Slump*, Asian Wall St. J., Oct. 5, 1989, at 1, col. 3.

252. Kristof, *Beijing is Fearful Severe Austerity Stirs Discontent*, N.Y. Times, Oct. 8, 1989, at 1, col. 16.

253. *Beijing Issues Exigency Loan to Pay Farmers*, Asian Wall St. J., Oct. 18, 1989, at 3, col. 3.

254. Ignatius, *Economic Woes, Recession Fears Mount in China*, Asian Wall St. J., Oct. 20-21, 1989, at 1, col. 6.

political and economic centralization.<sup>255</sup> One of the victims of the new program was the robust and growing private enterprise sector in China, which was made the subject of a sweeping nationwide crack-down in late fall, 1989.<sup>256</sup> Under the new guidelines, domestic investment was practically called to a halt.<sup>257</sup> The booming coastal towns in China, often the showcases of economic reform, were hit the hardest by the economic retrenchment.<sup>258</sup> The austerity program made it increasingly difficult for foreign firms still operating in China,<sup>259</sup> and investors complained of increased interference with foreign investment enterprises by Party cadres.<sup>260</sup>

The confidence of foreign investors clearly was shaken by the events in China during 1989.<sup>261</sup> In an effort to restore investor confidence, China's Standing Committee of the National People's Congress renewed discussions of possible reform of the Joint Venture Law.<sup>262</sup> In late December, 1989, the Minister of Foreign Economic Relations and Trade explained that three proposed changes were under consideration: (1) new guarantees against nationalization or expropriation of joint venture enterprises, (2) an end to the Chinese partner's exclusive right to appoint the chairman of the joint venture's board of directors, and (3) a liberalization of the rules currently limiting the duration of joint ventures.<sup>263</sup>

Throughout 1989, the China-United States relationship was tense. Soon after the conservative leadership asserted its control, Beijing announced a major shift in policy, permitting fewer Chinese stu-

255. Leung, *Beijing Maps Radical Economic Program*, *Asian Wall St. J.*, Nov. 28, 1989, at 1, col. 3.

256. WuDunn, *China Cracks Down on Private Work*, *N.Y. Times*, Nov. 8, 1989, at 3, col. 4.

257. *Beijing is Reasserting Centralized Control*, *Wall St. J.*, Nov. 28, 1989, at A10, col. 1.

258. WuDunn, *China Feels the Cuts in its Economy*, *N.Y. Times*, Dec. 25, 1989, at 26, col. 1.

259. Ignatius, *Austerity Hobbles Foreign Firms in China*, *Asian Wall St. J.*, Dec. 14, 1989, at 1, col. 3.

260. Leung, *Return of "Big Brother" Irks China's Investors*, *Asian Wall St. J.*, Dec. 28, 1989, at 9, col. 3.

261. The foreign investment community already had serious concerns with the long-term profitability of investment in China. For an in-depth study of the experiences of a major manufacturing enterprise investment in China by a United States automaker through the events of summer 1989, see J. Mann, *Beijing Jeep—The Short, Unhappy Romance of American Business in China* (1990).

262. See *China Prepares Joint Venture Law Changes*, 12 *East Asian Exec. Rep. No. 1*, at 4 (Jan. 15, 1990).

263. *Id.*

dents to study in the United States.<sup>264</sup> In early November, the United States Congress approved a package of sanctions against China to protest the crackdown on the democracy movement, including suspension of trade assistance and an end to insurance for American companies doing business in China.<sup>265</sup> The sanctions also froze exports of satellites, controlled munitions (e.g., helicopters), and certain nuclear material and components. China reacted to the sanctions by expressing "utmost indignation."<sup>266</sup>

A visit to China by former President Richard Nixon, who reported back to President Bush, failed to ease the growing tensions between China and the United States.<sup>267</sup> Deng Xiaoping's response to Mr. Nixon's overtures was that "the U.S. was involved too deeply in the turmoil and counterrevolutionary rebellion that occurred in Beijing. . . . China was the real victim and it is unjust to reprove China for it. . . . It is up to the U.S. to take the initiative."<sup>268</sup>

In early December, 1989, President Bush took a calculated risk by sending his National Security Advisor, Brent Scowcroft, to China in an effort to improve relations with Beijing. Soon thereafter, information was leaked disclosing that the President had sent Scowcroft on an earlier trip to Beijing in July, soon after the Beijing Massacre and in violation of the President's own ban on high-level official visits.<sup>269</sup> Later in December, President Bush approved the sale of three American-made satellites to be launched on Chinese rockets, and waived restrictions on financing for China by the U.S. Export-Import Bank.<sup>270</sup>

During this same period, China's conservative leaders appeared to harden their positions in response to the political liberalization in Eastern Europe. Beijing reportedly was particularly shocked by the revolution in Rumania.<sup>271</sup> Nevertheless, in an apparent effort to ap-

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264. Sanger, *China to Permit Fewer Students to Study in U.S.*, N.Y. Times, Sept. 3, 1989, at 1, col. 3.

265. WuDunn, *Chinairate at Congress' Sanctions*, N.Y. Times, Nov. 20, 1989, at 6, col. 4.

266. *Id.*

267. Ignatius, *Nixon Visit Fails to Ease Sino-U.S. Strains*, Asian Wall St. J., Nov. 2, 1989, at D1, col. 3.

268. Kristof, *Deng Tells Nixon U.S. Has Burden of New Ties*, N.Y. Times, Nov. 1, 1989, at 7, col. 1.

269. Dowd, *2 U.S. Aides Visited Beijing in Month After the Killings*, N.Y. Times, Dec. 19, 1989, at 1, col. 3.

270. Seib & Greenberger, *Bush Clears Satellites for China Launch*, Asian Wall St. J., Dec. 21, 1989, at 1, col. 3.

271. Kristof, *In Reaction to Rumania, A Hardening in Beijing*, N.Y. Times, Jan 7, 1990, at 8, col. 5.

pease foreign critics, especially in the U.S., China lifted martial law in early January 1990.<sup>272</sup> Thereafter, China announced that it was freeing 573 people who had been imprisoned for taking part in the democracy movement.<sup>273</sup> President Bush hailed the lifting of martial law in China as “a very sound step,”<sup>274</sup> but he appeared to find little support in Congress.

Throughout late 1989 and early 1990, the focal point of the heated presidential-congressional policy conflict was H.R. 2712, the Emergency Chinese Adjustment of Status Facilitation Act of 1989.<sup>275</sup> Essentially, H.R. 2712 waived the two-year home country and physical presence period requirements under the Immigration and Nationality Act<sup>276</sup> for Chinese nationals holding a “J” visa and present in the United States on the date of enactment. The dilemma posed to President Bush was that the bill would inflame Beijing’s growing anti-American sentiment at a time when he was taking a measured approach to reestablish normal relations with China, and attempting to obtain China’s cooperation on other critical foreign policy fronts, such as negotiations for a permanent settlement of the Cambodian conflict.

On November 30, 1989, the President issued a memorandum disapproving H.R. 2712, citing the need to preserve his ability to manage foreign relations.<sup>277</sup> The President concluded that H.R. 2712 was unnecessary because of his earlier administrative actions taken on June 5th, immediately after the Beijing Massacre, and action he was taking on November 30, 1989, to direct the Attorney General and the Secretary of State to provide additional protections to certain Chinese nationals in the United States.<sup>278</sup>

On January 24, 1990, the President was sharply rebuffed by a

272. Ignatius, *End of Beijing Martial Law is Called Cosmetic by Many*, Wall St. J., Jan. 11, 1990, at A10, col. 1.

273. Kristof, *China Said to Free 573 Held in Revolt*, N.Y. Times, Jan. 19, 1990, at 7, col. 4.

274. Pear, *Bush Hails a Thaw in China: Congress is Skeptical*, N.Y. Times, Jan. 12, 1990, at 1, col. 3.

275. H.R. 2712, 101st Cong., 1st Sess. (1989).

276. 8 U.S.C. 1182(e) (1982).

277. “Memorandum of Disapproval for the Emergency Chinese Immigration Act of 1989,” issued Nov. 30, 1989, Weekly Comp. Pres. Doc. 1853 (Dec. 4, 1989) (hereinafter *Memorandum of Disapproval*). See also “Statement on the Disapproval of the Emergency Chinese Immigration Relief Act of 1989, issued Nov. 30, 1989, *id.* at 1854 (“My administration has opposed congressional micromanagement of foreign policy.”).

278. *Memorandum of Disapproval*, *supra* note 277, at 1853. See also letter from Office of Attorney General to the President, Jan. 16, 1990, reprinted in 136 Cong. Rec. 5335, at 351 (1990).

392-25 vote in the House to override his pocket veto of H.R. 2712.<sup>279</sup> Following an extensive lobbying effort by the President, and a lengthy debate in the Senate,<sup>280</sup> the Senate failed to gather sufficient votes to override the President's veto.<sup>281</sup> On January 30, 1990, the Senate unanimously approved legislation that included a series of economic sanctions against China, but reserved to the President wide discretion to waive those sanctions if he considers it in the national interest to do so.<sup>282</sup>

Efforts by President Bush to use moderation in dealing with the current Chinese regime will be made more difficult by the announcement on February 3, 1990, that a confidential State Department report concludes that there were pervasive and severe violations of human rights in Beijing, Tibet and other parts of China during 1989.<sup>283</sup> The study reportedly was reviewed by White House officials, but was not watered down on the assumption that any effort at censorship would cause an additional uproar.<sup>284</sup>

In the context of these events, it now seems highly unlikely that Chinese officials, who strongly resent even mild criticism, will give very much attention to the Tibet question for some time to come. This is particularly true in light of the larger issues they now face, both domestically and in China's foreign relations. The pattern of political and economic retrenchment that was established throughout late 1989 and early 1990 likely will not be reversed unless there is a major change in China's top leadership. A political revolution from within the Party seems remote as long as Deng Xiaoping lives; the gerontocracy ruling China remains very much under the influence of this durable patriarch. Although Deng resigned in November, 1989, from his last official post, the chairmanship of the Central Military Commission, and relinquished control over that commission to Jiang Zemin, he clearly remains the de facto ruler of the nation.<sup>285</sup> Although it appears that Jiang Zemin is the heir-apparent tapped by Deng, it is not yet clear whether Jiang's support extends much beyond his mentor.

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279. 136 Cong. Rec. H66-67 (1990). Friedman, *Bush is Set Back by House Override of Veto on China*, N.Y. Times, Jan. 25, 1990, at 1, col. 4.

280. 136 Cong. Rec. 5335-396 (1990).

281. *Id.* at 396 (The vote was 62 in favor of an override, and 37 against.).

282. Holmes, *Senate Votes China Curbs But Gives Bush Power to End Them*, N.Y. Times, Jan. 31, 1990, at A4, col. 1.

283. Pear, *U.S. Report Accuses China of Deep Rights Abuses*, N.Y. Times (Int'l), Feb. 4, 1990, at 13, col. 3.

284. *Id.*

285. Kristof, *Deng is Resigning Last Formal Post with China Party*, N.Y. Times, Nov. 10, 1989, at 1, col. 2.



Other elderly conservative leaders who share considerable power are Chen Yun, a highly influential conservative economist; and Yang Shangkun, the most powerful person in the military, and one viewed by many as a possible successor to Deng Xiaoping as paramount leader.<sup>286</sup> In November, 1989, Mr. Yang's brother, Yang Baibing, was elevated to the position of Secretary General of the Central Military Commission and to a position in the Party's Secretariat.<sup>287</sup> Another military hardliner, Liu Huaqing, was appointed as the military commission's vice-chairman.<sup>288</sup>

As China enters the last decade of the twentieth century, it addresses one of Chinese Communism's most serious crises. That crisis has engulfed the United States' foreign policy-making apparatus in an intense presidential-congressional conflict as well. Predictions about the political future of China can be speculative at best in this climate of uncertainty, but the groundswell of democratic sentiment in China likely will resurface. One of the most famous contemporary Chinese dissidents, Wei Jingsheng, was arrested during the spring 1978 democracy demonstrations and continues to serve a fifteen-year sentence in prison. In one of his most famous articles, Mr. Wei describes "The Fifth Modernization—Democracy."<sup>289</sup> Inevitably, as the walls of totalitarianism and communism continue to rapidly crumble throughout the world, China risks standing alone as an isolated behemoth of outdated Stalinist methods unless it combines political reform with economic reform. The only way it can modernize and remain in the ranks of respected nations is to address the democratic imperative of its people.

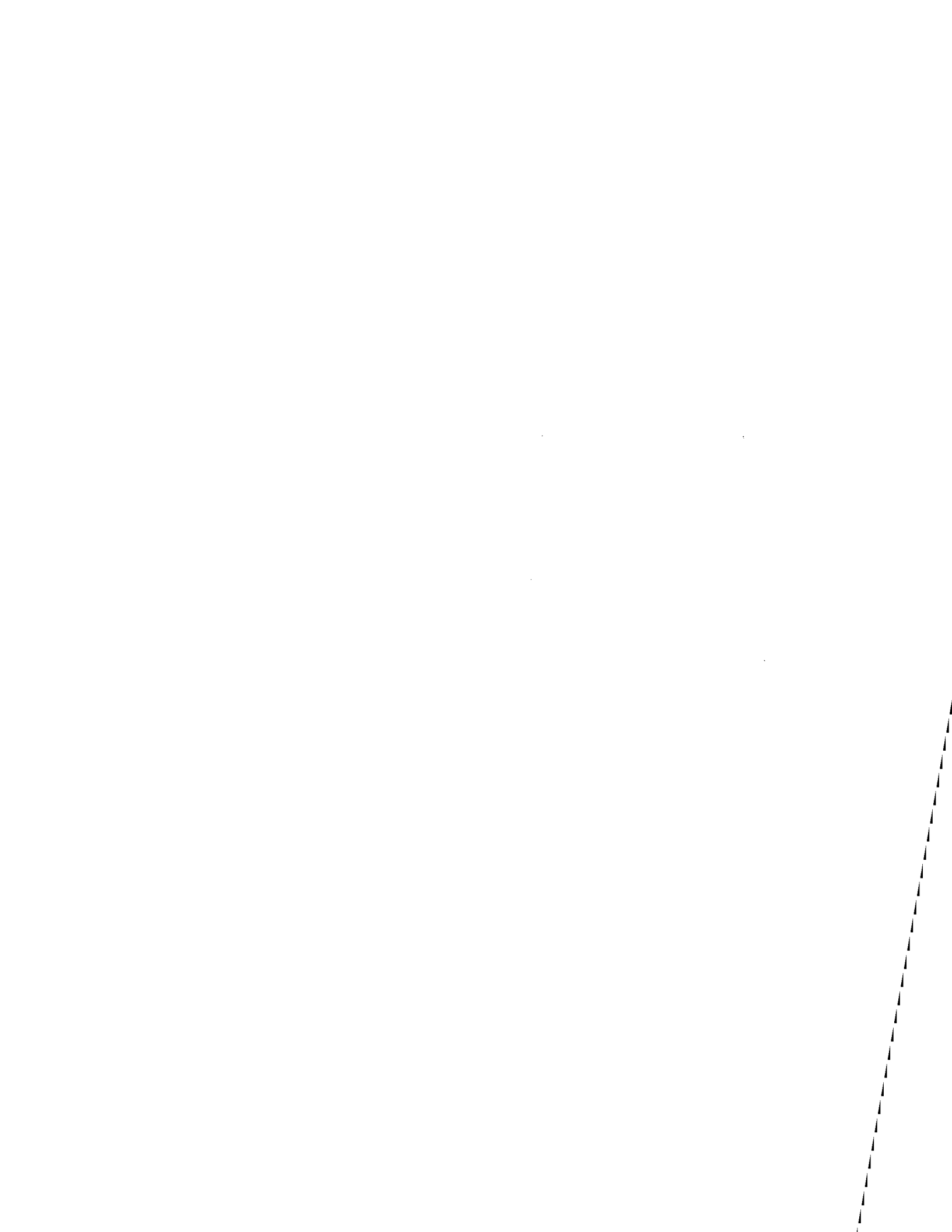
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286. Ignatius, *In China, Who Dies and When is Crucial*, Asian Wall St. J., Dec. 12, 1989, at 1, col. 3.

287. Ignatius, *China's Deng Quits Last Official Post*, Asian Wall St. J., Nov. 10-11, 1989, at 1, col. 4.

288. *Id.*

289. *The Fifth Modernization—Democracy*, Asian Wall St. J., Jan. 2, 1990, at 6, col. 3.



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