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America's New Covenant with Hong Kong: The Hong Kong Human Rights and Democracy Act of 2019

JASON BUHI*

Abstract

The United States has long accepted the invitation of the People's Republic of China to treat Hong Kong as an autonomous territory for the purpose of granting it special bilateral privileges. For that reason, the US made support for Hong Kong's autonomy a matter of law by adopting the US-Hong Kong Policy Act of 1992. The law authorizes the US President to monitor whether Hong Kong remains truly autonomous and, if it ceases to be, to suspend US laws affording it such special treatment. China promised Hong Kong a high degree of autonomy under an international treaty known as the Sino-British Joint Declaration, so Hong Kong's autonomy should not have become a concern. The arrangement worked relatively well until 2014, when the administration of Chinese leader Xi Jinping began a series of actions aimed at assimilating Hong Kong. After a long train of encroachments, the Beijing-appointed local government proposed an extradition bill in 2019 that would expose all persons in Hong Kong to the mainland Chinese criminal justice system, where they may face political prosecutions, forced confessions, and torture. In light of this shrinking sphere of autonomy, it became clear that the US Government needed more flexible tools at its disposal short of punishing every Hongkonger by completely revoking the city's special treatment. To this end, the Hong Kong Human Rights and Democracy Act of 2019 was tabled. It amends the 1992 Act to better protect American interests in Hong Kong and provide a check against further encroachments by encouraging Chinese policy-makers to seriously consider the costs of violating their international legal commitments. This article explores the five major ways the 2019 Amendment expands the US foreign policy toolbox, including a deeper inquiry into Hong Kong's actual autonomy, possible trade restrictions, and reiterating sanctions modeled on the Global Magnitsky Human Rights Accountability Act. Legislative history and suggestions for interpretation are provided. In sum, the new law emphasizes the core nature of respecting human rights in both US foreign policy and the success of Hong Kong.

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INTRODUCTION

After 156 years of British colonial rule, Hong Kong was reconstituted as a Special Administrative Region of the People’s Republic of China (PRC) in 1997.¹ Far more than a simple land annexation, the PRC adopted responsibility for the fate of over six million persons accustomed to living in a world-class, capitalist metropolis featuring an independent judiciary and a full array of internationally recognized individual rights.² The city was restored to PRC administration upon an understanding of autonomy underpinned by three legal documents: the Sino-British Joint Declaration of 1984 (“Joint Declaration”),³ the Hong Kong Basic Law (“Basic Law”),⁴ and the International Covenant on Civil and Political Rights (ICCPR).⁵ These documents help to establish the “one country, two systems” (OCTS) framework under which

1. Decree of the President of the People’s Republic of China, No. 26, (Apr. 4, 1990) (China).

2. See generally STEVE TSANG, A MODERN HISTORY OF HONG KONG (2003).

3. See generally Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, 26 Sept. 1984, 23 I.L.M. 1371, <https://www.cmab.gov.hk/en/issues/jd2.htm>, [hereinafter Joint Declaration].

4. See generally XIANGGANG JIBEN FA (H.K) [hereinafter Basic Law].

5. See generally International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (referenced and incorporated by Article 39 of the Hong Kong Basic Law).

Hong Kong was promised a high degree of autonomy in all matters except defense and foreign affairs.⁶

Like many nations, the United States accepted the PRC's invitation to treat post-handover Hong Kong as an autonomous territory for the purpose of granting it special privileges in finance, trade, and cultural exchange.⁷ For that reason, and to ensure the continuation of laws already in force, the US made support for Hong Kong's autonomy a matter of law by adopting the US-Hong Kong Policy Act of 1992 ("1992 Act").⁸ This law authorized the US President to monitor whether Hong Kong is truly autonomous and, if it ceases to be, to suspend US laws affording Hong Kong such special treatment.⁹

The 1992 Act worked well for about a quarter of a century, until the PRC took a troubling turn toward dictatorship under the administration of Chinese leader Xi Jinping.¹⁰ Among its targets, the Xi administration has undertaken a series of policies apparently aimed at assimilating Hong Kong.¹¹ Between 2014 and 2019, the PRC implemented or instigated a series of actions that included disqualifying locally elected officials, kidnapping political critics, and jailing democracy activists.¹² Then, in 2019, the Beijing-appointed Hong Kong Government proposed an extradition bill exposing all persons under its jurisdiction to the PRC criminal justice system, which is still burdened by political prosecutions, forced confessions, and torture.¹³ Denied a meaningful voice in their own government,¹⁴ Hongkongers took to the streets to register their fear and anxiety.¹⁵ However, throughout the summer of 2019 the protestors were met with a violent crackdown from their own police force.¹⁶

Because Hong Kong's unique status as a leading global financial center depends on its autonomy, it was entirely predictable that Beijing's parade of encroachments would trigger responses from the international community.¹⁷ So far, the strongest response has come from

6. See Basic Law, *supra* note 4, at preamble (introducing "one country, two systems" as a founding principle of the Hong Kong Special Administrative Region); see also Joint Declaration, *supra* note 3, art. 3.

7. United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701–5732 (1992) [hereinafter 1992 Act].

8. *Id.*

9. *Id.* § 5722.

10. See, e.g., Eric Baculnao, *China's President Xi Beefs Up His Anti-Corruption Crackdown*, NBC NEWS (Feb. 27, 2018), <https://www.nbcnews.com/news/china/china-s-president-xi-beefs-his-anti-corruption-crackdown-n851491> (explaining Xi's rise to power on an aggressive campaign against corruption).

11. See, e.g., Hannah Beech, *Is China Kidnapping Its Critics?*, TIME (Jan. 21, 2016), <https://time.com/4188307/china-kidnapping-dissidents-lee-bo-gui-minhai-mighty-current> (identifying kidnappings in Hong Kong as one of the recurring issues that gained prevalence after Xi Jinping took office).

12. See *id.* (detailing a series of kidnappings of Chinese critics in Hong Kong).

13. See, e.g., Nick Cumming-Brice, *Chinese Justice System Relies on Torture, U.N. Panel Says*, N.Y. TIMES (Dec. 9, 2015), <https://www.nytimes.com/2015/12/10/world/asia/chinese-justice-system-relies-on-torture-un-panel-says.html>; Zhiyuan Guo, *Torture and Exclusion of Evidence in China*, 2019 CHINA PERSPECTIVES 45, 45 (2019) (detailing the prevalence and history of torture in China's criminal justice system).

14. See Census and Statistics Department, *Population, HONG KONG* (Jan. 20, 2020), <https://www.censtatd.gov.hk/hkstat/sub/so20.jsp> (noting that Hong Kong's population is currently 7.4 million); see also *Government Structure*, GOVHK (May 2019), <https://www.gov.hk/en/about/govdirectory/govstructure.htm> (explaining Hong Kong's government structure: the Chief Executive is selected by an Election Committee and the Legislative Council, Hong Kong's law-making body, is made up of 70 members, 35 of whom are elected by functional constituencies).

15. See Elaine Yu et. al, *Hong Kong Police Shoot Protester Amid Clashes*, N.Y. TIMES, (Nov. 10, 2019), <https://www.nytimes.com/2019/11/10/world/asia/hong-kong-protests-general-strike.html> (detailing recent developments in the ongoing protests in Hong Kong).

16. *Id.*

17. See e.g., *G7 Leaders' Declaration*, G7 BIARRITZ (Aug. 26, 2019), <https://www.elysee.fr/en/g7/2019/08/26/g7-leaders-declaration> (expressing the G7's call for violence in Hong Kong to end).

the United States. In light of the shrinking sphere of autonomy witnessed between 2014 and 2019, it gradually became clear that the US government simply needed more tools at its disposal aside from either just filing reports on Hong Kong's situation, or completely revoking the city's special treatment.

To this end, the Hong Kong Human Rights and Democracy Act of 2019 ("2019 Amendment"), an amendment to the 1992 Act, was tabled in June 2019.¹⁸ It passed the U.S. Senate unanimously on 19 November 2019, the U.S. House by a vote of 417-1 on 20 November 2019, and was signed into law by President Trump on 27 November 2019. On the same day, President Trump signed a second piece of legislation, S. 2710, Pub.L. 116-77,¹⁹ banning the export to the Hong Kong police of crowd-control munitions, such as teargas, pepper spray, rubber bullets and stun guns.

Confronted with the effective dissolution of Hong Kong's rule of law firewall, the 2019 Amendment expands the US policy toolbox contained in the 1992 Act in five major ways:

1. Expanding the scope of inquiry of the Secretary of State's required annual report to Congress certifying Hong Kong's autonomy to include sections on local political developments, civil liberties, rule of law, and other fundamental rights guaranteed by the UN Declaration of Human Rights;
2. Prohibiting US visa denials for Hongkongers on the basis of any politically motivated arrest, detention, or conviction in Hong Kong;
3. Requiring the Commerce, Treasury, and State Departments to report on whether the Hong Kong government is adequately enforcing US export laws, especially regarding sensitive dual-use items of potential use in the ubiquitous Chinese domestic surveillance apparatus;
4. Authorizing the adoption of measures to protect US citizens from extradition, abduction, or rendition to mainland China from Hong Kong; and
5. Reiterating the US Executive's authority to impose Global Magnitsky Human Rights Accountability Act sanctions, identifying and punishing those individuals responsible for suppressing human rights by banning their travel to and freezing their assets in the US.²⁰

This Article explores the new US-Hong Kong Policy Act framework. Following this introduction, Section II begins with the background context justifying the congressional findings underlying adoption of the 1992 Act and 2019 Amendment. Next, Section III examines the 1992 Act itself, as amended, introducing its original terms while analyzing each of the five major provisions adopted in the 2019 Amendment. The legislative history of the drafting process is included where it may help to illuminate future interpretations. Section IV recaps suggestions made for future application. Section V provides a brief conclusion.

18. Hong Kong Human Rights and Democracy Act, 22 U.S.C. §§ 5721-5726 (2019-2020) [hereinafter 2019 Amendment]; Hong Kong Human Rights and Democracy Act, H.R. 3289, 116th Cong. (2019-2020).

19. An Act to Prohibit the Commercial Export of Covered Munitions Items to the Hong Kong Police Force, S. 2710, Pub.L. 116-77 (2019).

20. See H.R. 3289, 116th Cong. (2019-2020) §§ 4-7 (detailing proposed amendments to the U.S.-Hong Kong Policy Act of 1992).

I. CONGRESSIONAL FINDINGS IN CONTEXT

Both the 1992 Act and 2019 Amendment contain congressional findings and policy statements justifying their adoption.²¹ Understanding those findings requires knowledge of the sociopolitical context of Hong Kong. This section chronicles those events in three subsections: (A) Pre-2014; (B) 2014–March 2019; and (C) April 2019–Present.

The first section (Pre-2014) covers the logic behind the adoption of the 1992 Act and its original operation. The second section (2014–March 2019) explains the growing pattern of encroachment upon Hong Kong’s autonomy in the past five years. The third section (April 2019–Present) chronicles recent events necessitating adoption of the 2019 Amendment.

A. Pre-2014: The Context of the 1992 Act

As stated, Hong Kong was reconstituted as a Special Administrative Region of the PRC after 156 years of British colonial rule in 1997.²² Already a semi-autonomous metropolis under the United Kingdom, the city was restored to PRC sovereignty upon an understanding of autonomy described in and underpinned by three legal documents: the Joint Declaration, the Basic Law, and the ICCPR.²³ These documents establish the OCTS framework under which the PRC promised Hong Kong a high degree of autonomy.²⁴ The third paragraph of the Joint Declaration lists 12 commitments undertaken by the PRC regarding the post-handover administration of Hong Kong.²⁵ Key among them are that Hong Kong:

“[...] will enjoy a high degree of autonomy, except in foreign and defense affairs.”

“[...] will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.”

“The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law [...]”

“The above-stated basic policies [...] will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, by the National People’s Congress of the People’s Republic of China, and they will remain unchanged for 50 years” [i.e., to 2047].²⁶

21. 1992 Act, *supra* note 7, § 5701; H.R. 3289, 116th Cong. (2019–2020) § 3.

22. Decree of the President of the People’s Republic of China, *supra* note 1.

23. See Joint Declaration, *supra* note 3; *Basic Law*, *supra* note 4; and ICCPR, *supra* note 5 (facilitating the handover of Hong Kong from the United Kingdom back to the PRC).

24. Gregory S. Gordon, *When ‘One Country, One Vote’ Meets One Person, One Vote’: The Law of Treaties and the Handover Narrative through the Crucible of Hong Kong’s Election Crisis*, 16 MELB. J. OF INT’L L. 1, 10–14 (2015).

25. Joint Declaration, *supra* note 3.

26. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong with Annexes, Gr.Br.-China, Dec. 19, 1984 [1985], Gr. Brit. T.X. No. 26 (Cmnd 9543).

Although the Joint Declaration was signed by London and Beijing, its legal significance transcends bilateral importance. The Joint Declaration is an international treaty on file at the United Nations.²⁷ Domestically, its 12 key provisions were grafted into the Basic Law, Hong Kong's post-handover constitutional charter, which now governs almost 7.5 million people.²⁸ Internationally, The Joint Declaration's declaration of autonomy motivates an entire community of nations to treat Hong Kong as a separate territory for the purposes of finance and trade, and they do. According to the *UNCTAD World Investment Report 2019*, global FDI inflows to Hong Kong amounted to US \$115.7 billion in 2018, ranking 3rd globally, behind only mainland China (US \$139 billion) in Asia.²⁹ Hong Kong is also a free port and has its own easily convertible currency, the Hong Kong Dollar.³⁰

In 1984, when the Joint Declaration was signed, the PRC was less than a decade removed from the senseless brutality of the Great Proletarian Cultural Revolution.³¹ That decade-long, state-sponsored catastrophe caused by Mao Zedong's radical vision to establish a cult of personal rule cost between 500,000 and two million Chinese lives.³² China's next paramount leader, Deng Xiaoping, restored a measure of rationality to national governance, but refused to install any deep checks on the Communist Party's power.³³ Under his leadership, the world witnessed the merciless crackdown on the peaceful pro-democracy movement at Tiananmen Square in 1989.³⁴

With those events in mind, the United States recognized and supported the Joint Declaration as a matter of law by passing the 1992 Act. Congress' list of findings and policies began by recognizing the Joint Declaration, declaring a wish to see it fully implemented, and highlighting its pledges of autonomy and 50 years of non-interference.³⁵ Congress also declared that the US has "a strong interest in the continued vitality, prosperity, and stability

27. Gordon, *supra* note 23, at 20.

28. TSANG, *supra* note 2, at 222.

29. H. K. Trade and Dev. Council, *Economic and Trade Information on Hong Kong*, <http://hong-kong-economy-research.hktdc.com/business-news/article/Market-Environment/Economic-and-Trade-Information-on-Hong-Kong/etihk/en/1/1X000000/1X09OVUL.htm> (last visited Oct. 25, 2019); Office of U.S. Trade Rep., U.S.-Hong Kong Facts, <https://ustr.gov/countries-regions/china-mongolia-taiwan/hong-kong> (last visited Oct. 25, 2019). (U.S. foreign direct investment (FDI) in Hong Kong was \$81.2 billion in 2017, while goods and services trade with Hong Kong totaled an estimated \$66.9 billion in 2018).

30. Steve Hanke, *The Ever-Solid Hong Kong Dollar*, FORBES MAG. (July 5, 2019), <https://www.forbes.com/sites/stevehanke/2019/07/05/the-ever-solid-hong-kong-dollar/#543e4252cdf0> ("A currency board issues notes and coins convertible on demand into a foreign anchor currency at a fixed rate of exchange.")

31. Jay R. Goldstein, *Chinese and Western Treaty Practice: An Application to the Joint Declaration Between the People's Republic of China and Great Britain Concerning the Question of Hong Kong*, 1 AM. U. INT'L L. REV. 167, 193 (1986).

32. Tom Phillips, *The Cultural Revolution: All You Need to Know About China's Political Convulsion*, THE GUARDIAN (May 10, 2016), <https://www.theguardian.com/world/2016/may/11/the-cultural-revolution-50-years-on-all-you-need-to-know-about-chinas-political-convulsion>.

33. Chris Buckley, *New Documents Show Power Games Behind China's Tiananmen Crackdown*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/world/asia/china-tiananmen-crackdown.html?searchResult-Position=1>.

34. *Id.*

35. 1992 Act, *supra* note 7, § 5701.

of Hong Kong” as a leading financial global center;³⁶ reiterated that “support for democratization is a fundamental principle of US foreign policy[;]”³⁷ and stated:

The human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to United States interests in Hong Kong. A fully successful transition in the exercise of sovereignty over Hong Kong must safeguard human rights in and of themselves. Human rights also serve as a basis for Hong Kong’s continued economic prosperity.³⁸

Significantly, the 1992 Act directly linked Hong Kong’s autonomy to future US-Hong Kong relations by authorizing the US President to determine whether Hong Kong is truly autonomous and, if it ceases to be, to suspend US laws affording Hong Kong separate treatment from the PRC.³⁹ The touchstone of that inquiry is PRC compliance with the terms of the Joint Declaration:

SEC 202. Presidential Order.

Presidential Determination.—On or after July 1, 1997, whenever the President determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People’s Republic of China, the President may issue an executive order suspending the application of [any] such law or provision of law.

Factor for Consideration.—*In making a determination* under subsection (a) with respect to the application of a law of the United States, or any provision thereof, to Hong Kong, *the President should consider the terms, obligations, and expectations expressed in the Joint Declaration* with respect to Hong Kong.⁴⁰

By passing the 1992 Act, the US not only accepted China’s invitation to treat Hong Kong as an autonomous territory but also theoretically co-signed as a third-party guarantor of the Joint Declaration. Per its terms, if the PRC wishes to continue to receive the massive benefits it enjoys by holding Hong Kong out as an autonomous territory—including the massive sum of US investment that goes through Hong Kong and free convertibility of the Hong Kong Dollar to the US Dollar—the PRC must honor its commitment to Hong Kong’s autonomy made in the Joint Declaration.⁴¹ Theoretically, this quid pro quo can extend indefinitely.

The 1992 Act worked well for over 20 years, applying steadily even as Hong Kong became more and more influenced by PRC politics. Although there were incidents of unrest, such as the attempted imposition of a controversial national security law in 2003,⁴² and

36. *Id.*; see also Mark Yeandle & Mike Wardle, *The Global Financial Centres Index 26*, LONG FINANCE AND FINANCIAL CENTRE FUTURES, (Sept. 2019), https://www.zyen.com/media/documents/GFCI_26_Report_v1.0.pdf (last visited 25 Oct. 2019) (stating Hong Kong is currently the third leading global financial center, only after New York and London).

37. 1992 Act, *supra* note 7, § 5701.

38. *Id.*

39. *Id.* § 5722 (emphasis added).

40. *Id.*

41. Chi Lo, *The Hong Kong dollar peg is different – long live the peg*, BNP PARIBAS ASSET MGMT. INV. CORNER (June 28, 2019), <https://investors-corner.bnpparibas-am.com/investment-themes/emerging-markets/hong-kong-dollar-peg/>.

42. CAROLE J. PETERSON, NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY 13 (Fu Hualing et al. eds., 2005).

national education curriculum in 2012,⁴³ the basic nexus between the 1992 Act and the OCTS policy held. By abiding by these and other controversial initiatives, American foreign policy proved itself flexible enough to understand that Hong Kong would need to adapt to governance under a new sovereign so long as the Joint Declaration's bottom line held.

B. 2014–March 2019: Beijing's Attempted Rectification of Hong Kong

The PRC began an aggressive pattern of encroachment upon Hong Kong's promised sphere of autonomy in 2014. Indeed, the world has witnessed as the PRC government has chosen a troubling autocratic course under the Xi Jinping administration: initiating crackdowns in Tibet and Xinjiang,⁴⁴ military confrontations in the East and South China Seas,⁴⁵ and economic imperialism inherent in the heralded "Belt and Road" initiative.⁴⁶ The attempted political and social assimilation of Hong Kong has also reached an alarming pace.

Beijing foreshadowed the effort in its June 2014 "State Council White Paper on One Country Two Systems," an unexpected but grandiose document containing a lengthy explication of the Xi administration's governance vision for Hong Kong.⁴⁷ The document recast the 12 commitments undertaken in the Joint Declaration as domestic policies,⁴⁸ announced Beijing's "comprehensive jurisdiction" over the city,⁴⁹ and referred to members of Hong Kong's independent judiciary as mere "administrators."⁵⁰ Soon thereafter, the Chinese Foreign Ministry declared that the Joint Declaration was merely a "historical document" of no practical significance.⁵¹

Two months later, Beijing reneged on its pre-handover pledge to support democratic reforms in Hong Kong.⁵² It proposed legislation intending to redefine the promise of "universal suffrage" codified at Article 45 of the Basic Law as a choice between three candidates pre-selected by the Communist Party's local United Front apparatus and then

43. Stuart Lau et al., *Protest Against National Education to End after Government Climbdown*, S. CHINA MORNING POST (Sept. 9, 2012, 12:00 AM), <https://www.scmp.com/news/hong-kong/article/1032535/protest-against-national-education-end-after-government-climbdown>.

44. Kevin Holden, *China's Crackdowns in Tibet*, THE DIPLOMAT (Apr. 14, 2015), <https://thediplomat.com/2015/04/chinas-crackdowns-in-tibet/>; see also, Lindsay Maizland, *China's Repression of Uighurs in Xinjiang*, COUNCIL ON FOREIGN REL. (Oct. 9, 2019), <https://www.cfr.org/backgrounders/chinas-repression-uighurs-xinjiang> (discussing the government response in Tibet and Xinjiang).

45. COUNCIL ON FOREIGN REL., *Territorial Disputes in the South China Sea* (Oct. 11, 2019), <https://www.cfr.org/interactive/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>; Liu Dan, *Di-aoyu Islands Dispute: A Chinese Perspective*, THE DIPLOMAT (Aug. 8, 2018), <https://thediplomat.com/2018/08/di-aoyu-islands-dispute-a-chinese-perspective> (last updated Oct. 11, 2019).

46. Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN REL. (May 21, 2019), <https://www.cfr.org/backgrounders/chinas-massive-belt-and-road-initiative>.

47. *Full text: Chinese State Council White Paper on 'One Country, Two Systems' Policy in Hong Kong*, S. CHINA MORNING POST (June 10, 2014), <https://www.scmp.com/news/hong-kong/article/1529167/full-text-practice-one-country-two-systems-policy-hong-kong-special>.

48. *Id.* § I.

49. *Id.* § V(1).

50. *Id.* § V(3).

51. Grace Tsoi, *Does China Think the Sino-British Joint Declaration is Void?*, FOREIGN POLICY, 18 Dec. 2014, available at <https://foreignpolicy.com/2014/12/18/does-china-think-the-sino-british-joint-declaration-is-void/>.

52. See Michael C. Davis, *Hong Kong's Umbrella Movement: Beijing's Broken Promises*, 26 J. OF DEMOCRACY 101, 101 (2015) (describing the peaceful protests in Hong Kong that led to the Chinese government's decision to renege on previously promised support for reforms).

formally appointed by Beijing.⁵³ Although Beijing's plan was shelved after a largely peaceful 79-day display of civil disobedience known as the Umbrella Movement,⁵⁴ the city paid the price for its intransigence over the next five years. A chain of threats to Hong Kong's rule of law and fundamental freedoms followed, including:

- Booksellers who were selling books critical of the central government were abducted from Hong Kong and renditioned to secret prisons in mainland China,⁵⁵ while the central government's local liaison office reportedly acquired indirect ownership of over half the bookstores in the city;⁵⁶
- Academics critical of the PRC government were blocked from earning promotions,⁵⁷ while the same government ramped up grants to support researchers who pass the litmus test of "love the country and love Hong Kong;"⁵⁸
- Scores of political activists were handed disproportionate prison sentences for their roles in peaceful protests;⁵⁹
- A political party has been banned;⁶⁰
- Legally elected opposition lawmakers have been disqualified in sufficient numbers to prevent the pan-democratic camp from exercising a legislative veto;⁶¹
- With an artificial legislative super-majority in place, internal quorum rules were changed to block filibusters and prevent the establishment of oversight committees;⁶²

53. *The Decision on the Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016* [August 31 Decision] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 31, 2014), P.R.C. Laws (China).

54. Davis, *supra* note 50.

55. See Press Release, Chris Smith and Marco Rubio, Chair and Cochair, Congressional-Executive Commission on China (CECC), President Xi Tightens Grip: CECC Cochairs Say No One is Outside His Reach (Jan. 22, 2016), <https://www.cecc.gov/media-center/press-releases/president-xi-tightens-grip-cecc-cochairs-say-no-one-is-outside-his-reach>. (highlighting the mysterious disappearances of several Hong Kong booksellers best known for publishing books banned in mainland China).

56. Tony Cheung, *Beijing's Liaison Office Free to do its Own Thing, Hong Kong Leader Carrie Lam Says After Ownership of Leading Publisher Revealed*, S. CHINA MORNING POST (May 29, 2018), <https://www.scmp.com/news/hong-kong/politics/article/2148274/beijings-liaison-office-free-do-its-own-thing-hong-kong>.

57. See Opinion, *Hong Kong University Purge*, WALL ST. J. (Oct. 7, 2015), <https://www.wsj.com/articles/hong-kong-university-purge-1444261236> (describing the recent blocked appointment of former law dean Johannes Chan at Hong Kong University to a higher position due to his involvement with the Umbrella movement).

58. See generally U.S. Dep't of State, Bureau of East Asian and Pacific Affairs, 2019 Hong Kong Policy Act Report (Mar. 21, 2019) [hereinafter Policy Act Report].

59. See Press Release, Marco Rubio and Chris Smith, Cochair and Chair, Congressional-Executive Commission on China (CECC), Statements by Chairs on the "Political Prosecutions" of Umbrella Movement Leaders, (Aug. 17, 2017), <https://www.cecc.gov/media-center/press-releases/statement-by-chairs-on-the-%E2%80%9Cpolitical-prosecutions%E2%80%9D-of-umbrella-movement> (asserting that the criminal penalties imposed on pro-democracy demonstrators erode the rule of law).

60. Austin Ramzy, *Hong Kong Bans Pro-Independence Party*, N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/world/asia/hong-kong-party-ban-andy-chan.html>.

61. Kevin Lui, *Four More Hong Kong Lawmakers Ousted In a Blow to Democratic Hopes*, TIME (July 14, 2017), <https://time.com/4856181/hong-kong-lawmakers-oath-china-disqualified/>.

62. Kimmy Chung, *Legco Approves Rule Book Changes After Dramatic Debate with 11 Pan-Dems Booted Out of Chamber*, S. CHINA MORNING POST (Dec. 15, 2017), <https://www.scmp.com/news/hong-kong/politics/article/2124467/two-pan-dems-kicked-out-legco-meeting-after-disrupting>.

- Other would-be opposition candidates are now screened by bureaucrats and banned from running for office based on their imputed viewpoints;⁶³
- It was made a criminal offense to disrespect the national anthem, flag, or symbols;⁶⁴
- A foreign journalist was denied a working visa after he hosted a controversial talk in his capacity as Vice President of the Foreign Correspondent's Club,⁶⁵ and
- Mainland Chinese law was imposed at a cross-border train station within Hong Kong arguably in violation of Basic Law Article 18.⁶⁶

While no singular event triggered an international response, the tempo of central government intervention in Hong Kong over matters seemingly outside the scope of OCTS has accelerated.⁶⁷ Over the same period, the Beijing-appointed Hong Kong government has proven unwilling or unable to safeguard local autonomy; indeed, it has become complicit in undermining basic freedoms.⁶⁸ For example, the local government failed to make any enquiry after the fate of its kidnapped booksellers in the 2015.⁶⁹ This specific incident led to a first draft of the Hong Kong Human Rights and Democracy Act in 2016—a proposal to address these issues with human rights, freedoms, and autonomy in Hong Kong—though the draft failed to advance past the committee stage in Congress.⁷⁰

Notwithstanding these cumulative events, the State Department concluded in March 2019 that, “[a]s a general matter, Hong Kong maintains a sufficient—although diminished—degree of autonomy under the ‘one country, two systems’ framework to justify continued special treatment by the United States for bilateral agreements and programs per the Act.”⁷¹

63. Kimmy Chung and Tony Cheung, *Political Storm in Hong Kong as Activist Agnes Chow Banned from By-Election Over Party's Call for City's 'Self-Determination'*, S. CHINA MORNING POST (Jan. 27, 2018), <https://www.scmp.com/news/hong-kong/politics/article/2130714/hong-kong-activist-agnes-chow-banned-legco-election>.

64. Kevin Carrico, *Hong Kong Watch, Legal Malware: Hong Kong's National Anthem Ordinance* 7, 9–11 (Mar. 2019), https://static1.squarespace.com/static/58ecfa82e3df284d3a13dd41/t/5c9bfacc7817f7bd42363a98/1553726160344/hkw+report_march19+%282%29.pdf.

65. Alvin Lum et al., *British Journalist Victor Mallet Denied Entry to Hong Kong as Tourist*, S. CHINA MORNING POST (Nov. 9, 2018), <https://www.scmp.com/news/hong-kong/politics/article/2172383/british-journalist-victor-mallet-denied-entry-hong-kong>.

66. Lily Kuo, *'This is Part of the Plan': New Train Blurs Line Between China and Hong Kong*, THE GUARDIAN (Oct. 4, 2018), <https://www.theguardian.com/cities/2018/oct/04/high-speed-train-brings-chinese-border-into-heart-of-hong-kong> (demonstrating how, under Article 18, no mainland law shall be applied in Hong Kong except for those relating to defense, foreign affairs, and “other matters outside the limits” of the city’s autonomy).

67. See generally Policy Act Report, *supra* note 56.

68. Michael C. Davis, Opinion, *Hong Kong's Right to Resolve its Own Problems, Provided by Law, is Lost on Leung Chun-ying*, S. CHINA MORNING POST (Jan. 20, 2015), <https://www.scmp.com/print/comment/insight-opinion/article/1682865/hong-kongs-right-resolve-its-own-problems-provided-law-lost>.

69. Simon Denyer, *The Saga of Hong Kong's Abducted Booksellers Takes a Darker Turn*, WASH. POST (June 17, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/06/17/complete-lawlessness-booksellers-dramatic-tale-spoofs-hong-kong-underlines-concern-for-swede/>.

70. See generally *Will The Hong Kong Model Survive?: An Assessment 20 Years After The Handover: Hearing Before the Congressional-Executive Commission on China*, 115th Cong. 26–340 (2017).

71. See Policy Act Report, *supra* note 56.

C. April 2019–Present: The Extradition Bill Fiasco

Hong Kong finally reached the tipping point in 2019. With the loyal opposition ostracized and blocked from meaningful participation in local politics, no mitigating political forces or legal procedures appeared able to thwart Beijing's imposition of its policy vision on Hong Kong. The local government obliged again in April 2019, declaring its intent to amend Hong Kong's Fugitive Offender Ordinance to allow extradition of Hong Kong residents to mainland China upon request of the central authorities (hereinafter extradition bill).⁷²

In many ways, this would have effectively marked the end of Hong Kong's autonomy. Whereas the city enjoys a common law legal system, independent judiciary, and robust fundamental freedoms, the PRC's criminal justice system is still marred by political crimes, forced confessions, and lack of habeas corpus.⁷³ Indeed, a New Zealand court blocked an extradition to the PRC one day before the Hong Kong Legislative Council was to debate the extradition bill.⁷⁴ The judge's opinion noted the nation's non-independent judiciary, lack of adequate representation for criminal defendants, common use of torture to induce confessions, and reports of extra-judicial killings.⁷⁵ Such an independent judicial evaluation could not happen in Hong Kong because the National People's Congress Standing Committee in Beijing has the power to overrule the Hong Kong judiciary on matters of central-local relations, and it has done so.⁷⁶ Thus, as far as any political assurances go, once a suspect is surrendered their welfare depends entirely on the authorities in the other jurisdiction.

Deprived of an institutional voice in their own governance, millions of Hongkongers took to the streets in peaceful demonstrations to register their fear and anxiety.⁷⁷ They were first ignored and then assaulted by the city's police force in a brutal and disproportionate campaign of physical violence.⁷⁸ Such government actions awoke the latent fear and anger in the population and caused enormous, wide-scale protests.⁷⁹ Both the PRC and the Hong Kong governments have encouraged abusive paramilitary police practices to quell the demonstrations, exacerbating the situation.⁸⁰ Authorities are even credibly suspected of complicity in the beating of protesters and bystanders by a marauding criminal gang.⁸¹

72. Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, (2019) Cap. 503, C513 § (a) (H.K.).

73. Nick Cumming-Brice, *Chinese Justice System Depends on Torture*, N.Y. TIMES (2015), <https://www.nytimes.com/2015/12/10/world/asia/chinese-justice-system-relies-on-torture-un-panel-says.html>; Zhiyuan Guo, *Torture and Exclusion of Evidence in China*, 1 CHINA PERSPECTIVES, no. 1, 2019, at 45–53.

74. Minister of Justice v. Kyung Yup Kim [2019] NZSC 100.

75. *New Zealand Court halts murder suspect's extradition to China over torture fears*, HONG KONG FREE PRESS (June 11, 2019), <https://www.hongkongfp.com/2019/06/11/new-zealand-court-halts-murder-suspects-extradition-china-torture-fears/>.

76. Ng Ka Ling v. Director of Immigration, [1999] 94 H.K.C.F.A.R. 167 (C.F.A.).

77. Charlotte Graham-McLay, *New Zealand Court, Blocking Extradition, Is Latest to Rebuke China's Judiciary*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/world/asia/new-zealand-china-extradition.html>.

78. Jin Wu et al., *Six Months of Hong Kong Protests. How Did We Get Here?*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/interactive/2019/world/asia/hong-kong-protests-arc.html>.

79. *Id.*

80. Holmes Chan, *Beijing's top office on Hong Kong affairs backs city's gov't and police, condemning recent protests at rare press con*, HONG KONG FREE PRESS (July 29, 2019), <https://www.hongkongfp.com/2019/07/29/breaking-beijings-top-office-hong-kong-backs-citys-govt-police-condemning-recent-protests-rare-press-con/>.

81. Jeffie Lam et al., *At least 45 injured as rod-wielding mob dressed in white rampages through Yuen Long MTR station, beating screaming protesters*, S. CHINA MORNING POST (July 22, 2019), <https://www.scmp.com/news/hong-kong/law-and-crime/article/3019524/least-10-injured-baton-wielding-mob-suspected-triad>.

Journalists have been deliberately targeted,⁸² and protesters have been shot with live rounds.⁸³ Requests for an independent investigation have been rejected.⁸⁴

In response to these developing circumstances, what began as the public's sole demand to withdraw the extradition bill quickly expanded to encompass five demands: (1) withdraw the extradition bill; (2) hold an independent inquiry into police abuses; (3) retract the labeling of the demonstrations as riots; (4) release the prisoners arrested during the demonstrations; and (5) permit genuine universal suffrage.⁸⁵

The Hong Kong Government only acceded to the first demand days before the US Congress was set to return from recess and begin debating the 2019 Amendment.⁸⁶ The 2019 Amendment was first tabled three months earlier, on June 13, 2019, one day after the initial, disproportionate crackdown on a peaceful assembly outside of the Hong Kong Legislative Council.⁸⁷ As stated, the initial draft ("June Draft") was ready because these measures were already proposed in the wake of the 2015 kidnappings of local booksellers.⁸⁸ It was amended to reflect current events in September 2019.⁸⁹

In light of these circumstances, the US Congress in the 2019 Amendment adds to the narrow statement of policies contained in the 1992 Act that it is the policy of the United States to:

- Reaffirm the principles and objectives set forth in [the 1992 Act];
- Support the high degree of autonomy and fundamental rights of the people of Hong Kong guaranteed by the Joint Declaration, the Basic Law, the ICCPR, and the UN Declaration of Human Rights;
- Support the democratic aspirations of the people of Hong Kong;
- Urge the PRC to uphold its commitments to Hong Kong;
- Support the establishment of a genuine democratic option to freely and fairly nominate and elect the Chief Executive of Hong Kong, and the establishment by

82. Emma Graham-Harrison, *Hong Kong protests: journalist blinded in one eye amid mounting violence*, THE GUARDIAN (Oct. 3, 2019), <https://www.theguardian.com/world/2019/oct/03/hong-kong-protests-journalist-blinded-in-one-eye-as-attacks-on-media-escalate>.

83. Mike Ives, *Hong Kong Police Shoot a Protester, 18, With a Live Bullet for the First Time*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/world/asia/hong-kong-protestor-shot.html>.

84. Amy Gunia, *Hong Kong's Police Watchdog Is Unable to Do Its Job, Experts Say*, TIME, 11 Nov 2019, available at <https://time.com/5723615/hong-kong-ipcc-police-complaints/>.

85. Alice Su & Ryan Ho Kilpatrick, *One down, four to go, Hong Kong protesters say as the government meets its first demand*, L.A. TIMES (Sept. 4, 2019), <https://www.latimes.com/world-nation/story/2019-09-04/carriam-set-to-withdraw-extradition-bill>.

86. *Id.* (stating the extradition bill was withdrawn on September 4th, just before the first session of the 116th Congress resumed on September 7th).

87. Kenneth Rapoza, *Ten Congressmen Introduce Bill Threatening Hong Kong's Special Trade Relationship With The U.S.*, FORBES (June 13, 2019), <https://www.forbes.com/sites/kenrapoza/2019/06/13/ten-congressmen-introduce-bill-threatening-hong-kongs-special-trade-relationship-with-the-us/#168567c748ff>.

88. Press Release, Congressional-Executive Commission on China, President Xi Tightens Grip: CECC Co-chairs Say No One is Outside His Reach (Jan. 22, 2016), <https://www.cecc.gov/media-center/press-releases/president-xi-tightens-grip-cecc-cochairs-say-no-one-is-outside-his-reach>.

89. Kris Cheng, *US Bill to Punish Hong Kong Officials Strengthened as it Passes in Congressional Committees, Says Student Lobbying Leader*, HONG KONG FREE PRESS (Sept. 26, 2019), <https://www.hongkongfp.com/2019/09/26/us-bill-punish-hong-kong-officials-strengthened-passes-congressional-committees-says-student-lobbying-leader/>.

2020 of open and direct democratic elections for all members of the Hong Kong Legislative Council;⁹⁰

- Support the robust exercise by residents of Hong Kong of the rights to free speech and the press as guaranteed to them;⁹¹
- Support freedom from arbitrary or unlawful arrest, detention, or imprisonment or all Hong Kong residents;
- Draw international attention to any violations of fundamental rights and any encroachment upon the autonomy guaranteed to Hong Kong;
- Protect US citizens and long-term permanent residents living in Hong Kong and those visiting and transiting through Hong Kong;
- Maintain the economic and cultural ties that provide significant benefits to the US and Hong Kong; and
- Coordinate with allies to promote democracy and human rights in Hong Kong.⁹²

American interests are directly at stake. In addition to the policy reasons stated above, an estimated 85,000 US citizens live, work, and study in Hong Kong, and a further 1.3 million visited or transited it in 2018. In addition, at least 434 US companies had regional offices in Hong Kong, including 290 regional headquarters.⁹³

II. THE FIVE MAJOR PROVISIONS OF THE 2019 HONG KONG HUMAN RIGHTS AND DEMOCRACY ACT

The 1992 Act was an important step at the time of its adoption but required amendment in light of the chain of abuses listed above. In many economic matters Hong Kong appears to remain substantially autonomous from mainland China.⁹⁴ However, both the public life of the city and the private lives of individual Hongkongers have been encroached upon in constant and tremendous ways by the structural violence of the regime.

It gradually became clear that the US government simply needed more options at its disposal between filing critical reports, on the one hand, and totally suspending Hong Kong's access to special programs, on the other. As stated, the US President can impose territory-wide sanctions under the 1992 Act by suspending the special treatment granted to Hong Kong should it be deemed "not sufficiently autonomous."⁹⁵ However, while territory-wide sanctions have the advantage of quick and decisive execution, they are 'nuclear options' in

90. See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China arts. 45, 68. (promulgated in Beijing in 1990 and speaking to the "ultimate aim" of electing the Chief Executive and all legislative councilors by universal suffrage).

91. See The Basic Law of Hong Special Administrative Region of the People's Republic of China art. 39. (incorporating the ICCPR, which was originally introduced into Hong Kong's domestic law via the Hong Kong Bill of Rights Ordinance (cap. 383) in 1991).

92. 2019 Amendment, *supra* note 18, § 3.

93. Iain Marlow & Daniel Flatley, *Why Hong Kong's 'Special Status' in the U.S. is Touchy Territory*, WASH. POST (Nov. 21, 2019), https://www.washingtonpost.com/business/how-us-congress-is-angering-china-overhong-kong/2019/11/19/b32326ac-0b4b-11ea-8054-289aef6e38a3_story.html.

94. Huileng Tan, *Hong Kong is Still 'a very good proxy' for Chinese Assets Despite the Unrest*, Says an Economist, CNBC (Nov. 13, 2019), <https://www.cnbc.com/2019/11/14/hong-kong-is-still-a-very-good-proxy-for-chinese-assets-economist.html>.

95. 1992 Act, *supra* note 7, § 5722.

that all innocent citizens of Hong Kong will equally suffer the punishments intended for bad governmental actors.

The 2019 Amendment thus creates narrowly-targeted sanctions for deployment against specific PRC and Hong Kong government officials for their infringements of the promised OCTS framework. Such targeted sanctions are intended to protect US interests in Hong Kong, spare local society the consequences intended for bad actors, and increase the transaction costs for PRC and Hong Kong officials to execute Beijing's interventions to the territory—providing a small check against further erosion of Hong Kong's autonomy.

Those five tools are introduced and analyzed here.

A. Expanding the Scope of the Secretary of State's Annual Report Regarding the Actual Situation in Hong Kong

Title III, Section 301 of the 1992 Act required the Secretary of State to make an annual or twice-annual report to Congress “on conditions in Hong Kong of interest to the United States” up to the year 2000.⁹⁶ That report was required to cover “significant developments in US relations with Hong Kong.”⁹⁷ It needed to include a description of any new bilateral agreements entering into force, “other matters, including developments related to the change in exercise of sovereignty over Hong Kong, affecting US interests in Hong Kong,” and “the development of democratic institutions in Hong Kong.”⁹⁸

The 2019 Amendment requires annual re-certification by the Secretary of State of Hong Kong's autonomy into the indefinite future. The 2019 Amendment added a new Section 205 to Title II of the 1992 Act, which specifically requires the Secretary of State to certify to Congress on at least an annual basis “whether Hong Kong continues to warrant treatment under United States law in the same manner as United States laws were applied to Hong Kong before July 1, 1997.”⁹⁹ To that end, the report shall include “an assessment of the degree of any erosions to Hong Kong's autonomy,” due to actions taken by the PRC Government “that are inconsistent with its commitments under the Basic Law or the Joint Declaration.”¹⁰⁰ Areas of specific consideration include a long list of issues related to political rights, civil liberties, rule of law, police functions, freedom of information, education, and democratic governance, punctuated by an open-ended reference to any “other rights enumerated in the Universal Declaration of Human Rights.”¹⁰¹

Just like the US President in making the final determination about Hong Kong's autonomy for access to special US trade preferences, this new section states that the factor which the Secretary of State should consider in making these determinations is, simply put, “the terms, obligations, and expectations expressed in the Joint Declaration with respect to Hong Kong.”¹⁰² Additional reports may be filed at any time as circumstances demand.¹⁰³

By expanding and extending the scope of the Secretary of State's report on the actual situation in Hong Kong, this provision adds deeper political judgment to the oversight process. Whereas the former inquiry was confined to an enumerated list of economic concerns and a vaguely constructed “other matters” arguably limited in scope by the principle of

96. *Id.* § 5731.

97. *Id.* § 5731(1).

98. *Id.* § 5731(2), (7).

99. 2019 Amendment, *supra* note 18, § 205(a)(1).

100. *Id.*

101. *Id.*

102. *Id.* at § 205(a)(2).

103. *Id.* at § 205(a)(3).

ejusdem generis, the new report shall consider a broader array of political rights and civil liberties. And the new report is limited only by the enumeration contained in the Universal Declaration of Human Rights.

Furthermore, the new requirement expands the reporting criteria to the touchstone of the treaty obligations the PRC undertook in the Joint Declaration *as well as* the domestic and international commitments it made in promulgating the Basic Law. By doing so, the United States supports and fortifies the traditional basis of Hong Kong's autonomy under Chinese sovereignty.

Theoretically, US oversight of this condition may continue indefinitely, even beyond the 2047 sunset provision officially included in the Joint Declaration itself,¹⁰⁴ so long as China holds out Hong Kong as an autonomous territory worthy of special treatment. For its part, the PRC will continue to protest that this is interference in its domestic affairs,¹⁰⁵ but this article has already established the *quid pro quo* by which the US recognizes Hong Kong's autonomy and extends specific privileges. Furthermore, the architect of the Joint Declaration and OCTS theory, former Chinese paramount leader Deng Xiaoping, himself acknowledged that Hong Kong's autonomy should enjoy an perpetual status, stating:

We have solemnly promised that our policy towards Hong Kong will remain unchanged for 50 years after 1997. Why 50 years? There is a reason for that . . . to achieve the strategic objective of development, we need to open wider to the outside world. Such being the case, how can we change our policy toward Hong Kong? As a matter of fact, 50 years is only a vivid way of putting it. Even after 50 years our policy will not change either. That is, for the first 50 years it cannot be changed, and for the second there will be no need to change it. So this is not just idle talk.¹⁰⁶

Further to the point, Article 31 of the PRC Constitution, which authorizes the existence of Special Administrative Regions, does not itself contain a sunset provision.¹⁰⁷ The PRC should also seek to honor its commitment and consider longer term autonomy for Hong Kong if it seriously wishes to entice Taiwan back into the fold, which was the original intent of OCTS policy to begin with.¹⁰⁸

The 2019 Amendment does contain an option to waive the report if the Secretary of State determines it to be "in the national security interests of the US" and notifies Congress of that intent.¹⁰⁹ The Act should be amended or interpreted to require the Secretary of State to explain in writing his or her reasoning for doing so.

B. Prohibiting US Visa Denials for Hongkongers on the Grounds of Politically-

104. Joint Declaration, *supra* note 3, at annex III paras. 2–3.

105. Catherine Wong & Shi Jiangtao, *Beijing vows to retaliate after US' Hong Kong human rights bill is approved by congressional committees*, S. CHINA MORNING POST (Sep. 26, 2019), <https://www.scmp.com/news/china/diplomacy/article/3030403/beijing-vows-retaliate-after-us-hong-kong-human-rights-bill>.

106. 3 DENG XIAOPING, SELECTED WORKS OF DENG XIAOPING 84–85 (1994).

107. XIANFA [CONSTITUTION] art. 31 (1982) (China).

108. XIAOPING, *supra* note 104, 7–10

109. 2019 Amendment, *supra* note 18, § 4(a)(2).

Motivated Arrests, Detentions, or Convictions

The 1992 Act did not include any specific provision on the impact of politically-motivated arrests, detentions, or convictions on visa processing.¹¹⁰ Rather, Section 105 of the 1992 Act spoke only of official support for cultural, educational, scientific and academic exchanges.¹¹¹ This included separate status under the Fulbright Academic Exchange Program, and a duty to “actively encourage Hong Kong residents to visit the US on non-immigrant visas for such purposes as business, tourism, education, and scientific and academic research.”¹¹²

The 2019 Amendment adds to Title II of the 1992 Act guidelines for the Secretary of State to follow in reviewing visa applications from Hong Kong.¹¹³ New Section 206 states that:

[a]pplications for visas to enter, study, or work in the United States, which are submitted by otherwise qualified applicants who resided in Hong Kong in 2014 and later, may not be denied primarily on the basis of the applicant’s subjection to politically-motivated arrest, detention, or other adverse government action.¹¹⁴

To this end, the Secretary shall ensure that consular officers are aware of and trained to implement this policy.¹¹⁵ Furthermore, the US Consulate in Hong Kong is charged with maintaining an active list of individuals whom are known to have been detained, arrested, or otherwise targeted by the Government of Hong Kong or the PRC, or intermediaries of such governments, “based on politically-motivated considerations related to their exercise of rights” enumerated in the UN Declaration of Human Rights or the ICCPR.¹¹⁶ Finally, the Secretary shall contact appropriate representatives of other “like-minded” democratic countries to encourage adoption of the same measures and share information regarding vulnerable individuals.¹¹⁷

This provision ensures protection for demonstrators exercising and defending their fundamental individual rights as recognized under both the Basic Law and international law.¹¹⁸ As such, it provides support for such internationally-recognized fundamental rights and an avenue of escape from political prosecution.

The June Draft was found to be too limited under the changing circumstances in Hong Kong. It read that such applications

[s]hall not be denied on the basis of the applicant’s arrest, detention, or other adverse government action taken as a result of the applicant’s participation in nonviolent protest activities related to the electoral process, internationally

110. See generally 1992 Act, *supra* note 7.

111. 1992 Act, *supra* note 7, § 105.

112. *Id.* §§ 105(3), 105(4).

113. 2019 Amendment, *supra* note 18, § 4.

114. *Id.* § 4(b) (proposed amendment to the United States–Hong Kong Policy Act § 206(a)).

115. *Id.* § 4(b), (proposed amendment to the United States–Hong Kong Policy Act § 206(b)).

116. *Id.* § 4(b), (proposed amendment to the United States–Hong Kong Policy Act § 206(b)(1)).

117. *Id.* § 4(b), (proposed amendment to the United States–Hong Kong Policy Act § 206(c)).

118. See XIANGANG JIBEN FA arts. 27, 39, § 3 (H.K.) (the interaction of articles 27 and 39 provides that HongKongers may exercise their “freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration.”).

recognized human rights, protecting an independent judiciary, or the rule of law (emphasis added).¹¹⁹

The clause about “nonviolent protest activities” was an endorsement of the peaceful Umbrella Movement of 2014, but it nonetheless remains unclear if the new phrasing can account for personal efforts at self-defense or defense of others in the face of a paramilitary police force. Therefore, the reference should be expanded or interpreted to allow an *ad hoc* consideration of any applicant’s circumstances. Beyond that, consideration for asylum in advance of or upon expiry of a student or visitor visa should be given priority status.¹²⁰

Furthermore, Section 206 shores up the American foreign policy alliance system by mandating engagement and cooperation with other like-minded democratic nations, although those nations are not listed here.¹²¹ Instead, there is a list of “allies” included in the new Statement of Policy, listing allies “including the United Kingdom, Australia, Canada, Japan, and the Republic of Korea,”¹²² though by its own terms this list should not be read exclusively. Naturally, the first nation to come to mind is the United Kingdom, upon which the Joint Declaration provides the primary moral and legal obligation guarantee the terms of the Joint Declaration.¹²³ Were the human rights situation in Hong Kong to deteriorate, the US should not have to put pressure on the United Kingdom to take its own affirmative provisions, perhaps including extending right of abode in the UK to its British National Overseas passport holders and their children residing in Hong Kong.

C. Requiring the Commerce, Treasury, and State Departments to Report on Whether the Hong Kong Government is Adequately Enforcing US Export Laws Regarding Sensitive Dual-Use Items

The 1992 Act did not contemplate a specific role for the Commerce and Treasury Departments, which are now brought into the plan. In specific reference to sensitive items, the 1992 Act said only that:

the United States should continue to support access by Hong Kong to sensitive technologies controlled under the agreement of the Coordinating Committee for Multilateral Export Controls (commonly referred to as “COCOM”) for so long as the United States is satisfied that such technologies are protected from improper use for export.¹²⁴

COCOM ceased to function in 1994, and the PRC was not encompassed by its successor.¹²⁵ The 2019 Amendment now requires the Secretary of Commerce, in consultation with the Secretary of the Treasury and the Secretary of State, to submit an annual assessment of whether the Hong Kong Government has adequately enforced American export control laws with respect to sensitive “dual-use” items.¹²⁶ The report shall be submitted to five

119. 2019 Amendment, *supra* note 18, § 4(b) (proposed amendment to the United States–Hong Kong Policy Act §206(a)).

120. *Id.*

121. *Id.* (proposed amendment to the United States–Hong Kong Policy Act § 206(c)).

122. *Id.* § 3(11).

123. Joint Declaration, *supra* note 3, para. 4.

124. 1992 Act, *supra* note 7, § 5713(8).

125. *About Us*, THE WASSENAAR AGREEMENT (last updated Aug. 9, 2019), <https://www.wassenaar.org/about-us/>.

126. According to the Export Administration Regulations (EAR), part 730.3, “A ‘dual use’ item is one that has civil applications as well as terrorism and military or weapons of mass destruction (WMD)-related applications.” 15 C.F.R. § 730.3 (2013).

congressional committees and identify the items that were re-exported, the destination of the items, and how the items are being used.¹²⁷

Unlike the 1992 Act, this provision focuses on mainland China itself. It requires monitoring whether any of these items is being used to develop or fortify the PRC surveillance state, including specifically-named domestic mass surveillance programs known as Sharp Eyes,¹²⁸ Skynet,¹²⁹ and the Integrated Joint Operations Platform (“IJOP”).¹³⁰ Further, the Secretaries are to assess whether these items are used to develop China’s so-called social credit system, wherein individuals are assigned a “credit rating” for good political behavior (and, conversely, deductions for bad political behavior) that can be redeemed for access to (and denial of) services.¹³¹ Any transfer across the existing mainland border, even if disguised by the PRC government as part of a “Greater Bay Area” development project, would not be permitted.¹³²

Furthermore, this report would include an assessment of whether the Hong Kong Government has adequately enforced sanctions imposed by the United Nations, including to North Korea or Iran.¹³³

Whereas the first provision gave the State Department authority to monitor Hong Kong’s political autonomy, this provision gives Commerce and Treasury some authority to monitor its economic autonomy. According to the World Trade Organization, Hong Kong is the world’s 8th largest exporter of merchandise trade and the world’s 15th largest exporter of commercial services in 2018.¹³⁴ This provision also addresses the vital question of technology transfers.

Although China was not designated a Soviet Bloc state for COCOM purposes, the PRC did use British Hong Kong and the former Portuguese colony of Macau to evade UN sanctions during the Korean War.¹³⁵ The PRC government remains the primary patron of the North

127. 2019 Amendment, *supra* note 18, § 5(b). (These are the Senate Foreign Relations Committee; Senate Committee on Banking, Housing, and Urban Affairs; Senate Committee on Commerce, Science, and Transportation of the Senate; House Committee on Foreign Affairs; and House Committee on Energy and Commerce).

128. *China’s Sharp Eyes Surveillance System Puts the Security Focus on Public Shaming*, S. CHINA MORNING POST (Oct. 30, 2018), <https://www.scmp.com/news/china/politics/article/2170834/chinas-sharp-eyes-surveillance-system-puts-security-focus-public> (discussing that some people favor the Sharp Eyes surveillance system as it is beating crime, whereas human rights groups are against it as they see it as a threat to civil liberties).

129. Stephen Chen, *How Tensions with the West are Putting the Future of China’s Skynet Mass Surveillance System at Stake*, S. CHINA MORNING POST (Sept. 23, 2018, 11:30 PM), <https://www.scmp.com/news/china/science/article/2165372/how-tensions-west-are-putting-future-chinas-skynet-mass> (explaining that Skynet is under threat because the US and some European countries have stopped shipping necessary components to China that are essential to its continued functionality).

130. *China’s Algorithms of Repression*, HUMAN RIGHTS WATCH, (May 1, 2019), available at <https://www.hrw.org/report/2019/05/01/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass-surveillance> (detailing a mobile app that police and other officials use to communicate with the IJOP, one of the main systems Chinese authorities use for mass surveillance in Xinjiang).

131. Charlie Campbell, *How China is Using “Social Credit Scores” to Reward and Punish Its Citizens*, TIME, <https://time.com/collection/davos-2019/5502592/china-social-credit-score> (last visited Oct. 25, 2019) (explaining the use of a social credit score system allowed by the government and broader implications of this system in China).

132. 2019 Amendment, *supra* note 18, § 5(a)(4).

133. *Id.* § 5(a)(6)(A).

134. Doris Fung, *Economic and Trade Information on Hong Kong*, HKTDC RESEARCH (Oct. 31, 2019), <http://hong-kong-economy-research.hktdc.com/business-news/article/Market-Environment/Economic-and-Trade-Information-on-Hong-Kong/etihk/en/1/1X000000/1X09OVUL.htm>.

135. See Tsang, *supra* note 2, at 154 (explaining Hong Kong’s value in helping the PRC break the embargoes the USA and UN had imposed on it as a result of the Korean war).

Korean regime.¹³⁶ Also, a recent scandal has emerged with accusations that the massive state-run telecommunications enterprise Huawei has dealt with the Iranian regime in violation of US sanctions.¹³⁷

Of more interest to the people of the PRC and Hong Kong is the inclusion of the ubiquitous Chinese surveillance state. At the time of this writing, the northwestern region of Xinjiang is facing an Orwellian nightmare of comprehensive electronic surveillance and concentration camps.¹³⁸ In October 2019, the Trump Administration added 28 Chinese organizations to a US blacklist over concerns about their role in human rights violations, effectively blocking those entities from buying American products.¹³⁹ Similar treatment may now be imposed vis-à-vis conditions in Hong Kong.

Fearing the same fate, protesters in Hong Kong have disabled “smart” lampposts containing advanced Bluetooth and facial recognition technologies that contain similar parts as instrumentalities deployed in Xinjiang.¹⁴⁰ The Hong Kong government has been conducting a mandatory replacement of all current resident ID cards with new cards featuring RFID chips.¹⁴¹

For the Hong Kong audience, the Greater Bay Area reference is of key importance.¹⁴² PRC policy since 2014 has been aimed at blending Hong Kong into a mega-region encompassing Shenzhen, Macau, and Zhuhai.¹⁴³ Many locals see this plan as a hostile scheme to dilute and suppress the Hong Kong identity.¹⁴⁴ According to this reasoning, the PRC

136. See Robert E. Kelly, *North Korea is Ultimately China's Problem*, FOREIGN AFFAIRS (June 8, 2018) (describing China as North Korea's “neighbor, largest trading partner, and most important patron [.]”).

137. See Kate Conger, *Huawei Executive Took Part in Sanctions Fraud, Prosecutors Say*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/technology/huawei-meng-wanzhou-fraud.html> (discussing accusations against Meng Wanzhou, the chief financial officer of Huawei of participating in a scheme to trick financial institutions into making transactions in violation of U.S. sanctions against Iran).

138. See *How Mass Surveillance Works in Xinjiang, China*, HUMAN RIGHTS WATCH (May 2, 2019), <https://www.hrw.org/video-photos/interactive/2019/05/02/china-how-mass-surveillance-works-xinjiang> (detailing a policing application used by the Chinese government to monitor 13 million Turkic Muslims in Xinjiang, China); see also Chris Buckley and Paul Mozur, *How China Uses High-Tech Surveillance to Subdue Minorities*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/world/asia/china-surveillance-xinjiang.html> (discussing the submission of ethnic minorities to monitoring and data collection in Xinjiang, China).

139. Ana Swanson & Paul Mozur, *U.S. Blacklists 28 Chinese Entities Over Abuses in Xinjiang*, NEW YORK TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/10/07/us/politics/us-to-blacklist-28-chinese-entities-over-abuses-in-xinjiang.html>.

140. See Holmes Chan, *Hong Kong Tech Firm Pulls Out of Smart Lamppost Programme After Surveillance Accusations and Staff Threats*, HONG KONG FREE PRESS (Aug. 26, 2019), <https://www.hongkongfp.com/2019/08/26/hong-kong-tech-firm-pulls-smart-lamppost-programme-surveillance-accusations-staff-threats/> (describing the pressure campaign mounted against a Hong Kong tech firm to stop supplying parts for “smart lampposts”); Eli Binder, *Hong Kong Protesters Spy a New Enemy: Lampposts*, WALL ST. JOURNAL (Aug. 30, 2019), <https://www.wsj.com/articles/hong-kong-protesters-spy-a-new-enemy-lampposts-11567161002> (explaining the motivations of protesters that tore down several lampposts during antigovernment protests in Hong Kong).

141. Christy Leung, *New Hong Kong ID Cards To Be Rolled Out from Late December*, S. CHINA MORNING POST (Oct. 18, 2018), <https://www.scmp.com/news/hong-kong/law-and-crime/article/2169180/new-hong-kong-id-cards-be-rolled-out-late-december>.

142. Christine Loh, *Greater Bay Area is More Than a Map – It's a Vision for Hong Kong and Macau to Lead China's Modernisation*, S. CHINA MORNING POST (Mar. 24, 2019), <https://www.scmp.com/print/comment/insight-opinion/hong-kong/article/3002825/greater-bay-area-not-map-vision-hong-kong-and>.

143. *Id.*

144. See Hilton Yip, *Greater Bay Area Concept is Ambitious, Nebulous, and Threatens Hong Kong's Distinctive Advantage*, HONG KONG FREE PRESS (June 3, 2018), <https://www.hongkongfp.com/2018/06/03/greater-bay-area-concept-ambitious-nebulous-threatens-hong-kongs-distinctive-> (stating that “the [Greater Bay Area plan] has failed to catch on with the general Hong Kong public”).

authorities are unconcerned with the exorbitant cost of living they have created in Hong Kong as the situation is forcing more Hongkongers to move across the mainland border into Shenzhen.¹⁴⁵ Although Shenzhen is a sprawling metropolis full of good, hard-working people and space to spare, the primary language is Mandarin rather than Cantonese, and it has far less shared identity with Hong Kong than the provincial capital of Guangzhou.¹⁴⁶

Although this provision does not include any enforcement mechanisms within it, it does escalate this reporting to five separate Congressional committees.¹⁴⁷ From there, it authorizes the President to exercise various options, including the “nuclear option” discussed before,¹⁴⁸ and the targeted sanctions provisions, discussed ahead.¹⁴⁹

D. Protecting US Citizens and Others from Rendition to Mainland China

The 1992 Act did not contain a provision protecting US citizens and others from rendition to the PRC. Instead, the US President was authorized to decide whether the Hong Kong Government was legally competent to carry out its obligations under treaties and international agreements established between the US and Hong Kong.¹⁵⁰ For now, extraditions are handled under the 1996 Hong Kong-United States Agreement for the Surrender of Fugitive Offenders.¹⁵¹

While the specific trigger for this provision was the extradition bill, the statutory text is written more generally. The statutory text refers to any “legislation proposed or enacted by the Government of Hong Kong [that] would put United States citizens at risk of extradition or rendition to the People’s Republic of China or to other countries that lack protections for the rights of defendants[.]”¹⁵²

If those circumstances were to occur, the 2019 Amendment would require the US President to submit a report to Congress within 30 days providing a strategy to protect US citizens in Hong Kong and determine whether the Hong Kong Government remains “legally competent” to administer the existing extradition agreement.¹⁵³

The provision’s legislative history yields interesting insight, as it has been both narrowed and expanded in significant regards.

145. Hong Kong is already one of the most densely populated cities in the world, but imposed migration policies continue to overwhelm infrastructure and inflate the price of basic necessities. Beginning in 1997 a “reunion scheme” was imposed that permits up to 150 mainland Chinese persons to permanently resettle in Hong Kong every day. Housing prices have tripled in the last decade, and nearly one in five people now lives in poverty. *See LCQ1: Operation of One-way Permits Scheme*, GOV’T OF THE HONG KONG SPECIAL ADMIN. REGION (Mar. 20, 2019), <https://www.info.gov.hk/gia/general/201903/20/P2019032000536.htm> (discussing the One-Way Permits that allow mainland residents from China to come to Hong Kong to join their next-of-kin).

146. He Huifeng, *Why has Cantonese Fallen Out of Favour with Guangzhou Youngsters?*, S. CHINA MORNING POST (Mar. 12, 2018), <https://www.scmp.com/news/china/society/article/2136237/why-has-cantonese-fallen-out-favour-guangzhou-youngsters> (discussing the decreasing use of Cantonese in Guangzhou as the Chinese government and schools continue to discourage it).

147. *See* 2019 Amendment, *supra* note 18, § 6(b) (requiring the U.S. Secretary of State to submit to five congressional committees a notification if the Hong Kong government proposes or enacts a legislation that would put U.S. citizens or permanent residents at risk of rendition to China or other countries with which the U.S. does not have an extradition agreement).

148. 1992 Act, *supra* note 7, § 5722.

149. *See* discussion *infra* Section E.

150. 1992 Act, *supra* note 7, § 5721.

151. *See generally* Agreement with Hong Kong for the Surrender of Fugitive Offenders, U.S.—H.K., Dec. 20, 1996, S. Treaty Doc. 105–3.

152. 2019 Amendment, *supra* note 18, § 6(b).

153. *Id.*

On the one hand, the range of Chinese actions that may trigger a US response is broader. The June Draft was narrowly-tailored with specific references to both the extradition bill and the prospective implementation of controversial national security legislation as provided in Article 23 of the Basic Law,¹⁵⁴ the triggering language was expanded to refer to any “legislation proposed or enacted by the Government of Hong Kong [that] would put United States citizens at risk” for a reason.¹⁵⁵ The broader phrasing appears meant to encompass these and anticipate other more creative legislative means.

On the other hand, the range of people this provision attempts to protect appears smaller. Though titled “Protecting United States Citizens and Others,”¹⁵⁶ this particular provision appears focused solely on US citizens. This focus represents a narrowing from the June Draft which referred to Hong Kong residents and foreign nationals. That document contained congressional findings that the PRC Government had subjected both Chinese and foreign nationals, including citizens of the United States, Canada, Australia, Sweden, and Taiwan, to arbitrary detention, televised confessions, denial of legal representation and medical treatment, and other types of mistreatment.¹⁵⁷

It is unclear how these provisions will be interpreted. Theoretically, it remains possible for the Chinese government to tailor extradition arrangements that may be opposed by Hongkongers but do not involve US citizens and therefore do not seem to trigger these specific sanctions as written.

One suggestion is that this provision should not be limited to “legislation.” First, the Hong Kong Legislative Council is not yet an entity that represents the will of its people. Thirty of its 70 seats are reserved for pro-Beijing special interest groups known as “functional constituencies,” and sufficient legislators were disqualified in 2016 to deprive the opposition of a veto. Second, the PRC or Hong Kong Governments are capable of passing significant acts via edict. A recent ban on wearing masks in public assemblies was achieved via an Emergency Regulations Ordinance dating from 1922 that would allow the colonial government to impose martial law.¹⁵⁸

E. Providing Authority to Punish those Individuals Responsible for Suppressing Human Rights in Hong Kong with Global Magnitsky Act-like Sanctions

The teeth of the 2019 Amendment are found in Sections Seven and Eight, imposing targeted penalties in line with those of the 2012 Global Magnitsky Act.¹⁵⁹ Section Seven calls for identification of persons responsible for actions to suppress basic freedoms in Hong Kong,

154. See generally Hong Kong Policy Reevaluation Act of 2019, S. 1824, 116th Cong. (2019); see also Basic Law *supra* note 4, at Art. 23 (stating that Hong Kong shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.)

155. Global Magnitsky Human Rights Accountability Act, Pub.L. No. 114-328, 130 Stat. 2533 § 6(b) (June 13, 2019 draft).

156. *Id.* § 6.

157. *Id.* § 6(a)(2).

158. Wilfred Chan & JN Chien, *Hong Kong’s Mask Ban Is Just a Cover for a Police Crackdown*, THE NATION (Oct. 4, 2019), <https://www.thenation.com/article/hong-kong-mask-police/>.

159. 2019 Amendment, *supra* note 18, §§ 7, 8; H.R. 6156, 112th Cong. (2012) (enacted); Global Magnitsky Human Rights Accountability Act, § 1261–1265, subtitle F, P.L. 114–328 (2016). Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, 112th Cong., Pub.L. 112-208. Subsequently, in 2016, Congress enacted the Global Magnitsky Act (P.L. 114-328) which allows the US government to sanction foreign government officials implicated in human rights abuses anywhere in the world.

banning their travel to the US, and blocking access to their US-based assets.¹⁶⁰ Section Eight requires ongoing sanctions reports to better inform congressional decision-making going forward.¹⁶¹

Section Seven requires the US President to submit a report identifying those persons associated with the “extrajudicial rendition, arbitrary detention, torture, or forced confession of any person in Hong Kong,” or any other “gross violations of internationally recognized human rights in Hong Kong.”¹⁶² Any person so identified for such violations, or for conspiracy in such violations, is inadmissible to the US.¹⁶³ Also, any valid preexisting visas they hold shall be revoked.¹⁶⁴ In preparing this list, the President is required to consider information provided jointly by the chairperson and ranking member of each of the appropriate congressional committees.¹⁶⁵ The President also must consider any “credible information obtained by other countries or reputable nongovernmental organizations,” including organizations inside China or Hong Kong, “that monitor the human rights abuses of the Government of the China or its agents.”¹⁶⁶

Section Seven also lists financial measures to be taken against individual actors.¹⁶⁷ These include a delegation of authority from Congress for the US President to block access to all US-based property by exercising the full extent of his or her powers granted under the International Emergency Economic Powers Act.¹⁶⁸

These sanctions, once imposed, can be terminated by the President.¹⁶⁹ Termination requires a finding that the target did not engage in the accused activity, was prosecuted appropriately, “has credibly demonstrated a significant change in behavior,” or for national security reasons.¹⁷⁰ The Congress shall be notified of any intent to waive or terminate these sanctions at least 15 days prior to that order.¹⁷¹

Section Eight of the 2019 Amendment requires the President to submit ongoing reports listing all persons targeted by sanctions, the reasons for their imposition or termination and a description of efforts undertaken to encourage government of other countries to impose similar sanctions.¹⁷² These sanctions are modeled on those included in the Global Magnitsky Human Rights Accountability Act of 2016.¹⁷³

The 2012 Act was named for a Russian accountant who exposed high-level government officials alleged involvement in a major tax fraud scheme.¹⁷⁴ The accountant was found dead in his Moscow jail cell after being tortured and denied medical attention.¹⁷⁵ The U.S. Congress imposed sanctions on the Russian officials allegedly responsible, freezing their U.S. assets

160. 2019 Amendment, *supra* note 18, § 7.

161. *Id.* § 8.

162. *Id.* § 7(a)(1).

163. *Id.* § 7(a)(1)(C)(2)(a)(i).

164. *Id.* § 7(c)(3).

165. *Id.* § 7(a)(3).

166. 2019 Amendment, *supra* note 18, § 7(a)(3)(B).

167. *Id.* § 7.

168. *Id.*

169. *Id.* § 7(g).

170. *Id.*

171. *Id.* § 7(g), § 7(e).

172. 2019 Amendment, *supra* note 18, § 8(a).

173. Global Magnitsky Human Rights Accountability Act, § 1261–1265, subtitle F, P.L. 114–328 (2016).

174. *The US Global Magnitsky Act: Questions and Answers*, HUMAN RIGHTS WATCH (Sept. 13, 2017), <https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act#>.

175. *Id.*

and banning them from entering the country.¹⁷⁶ In 2016, Congress expanded the Act to cover non-Russian human rights violations.¹⁷⁷ Under the expanded Global Magnitsky Human Rights Accountability Act, the executive branch may impose similar sanctions on human rights violators globally.¹⁷⁸ Violations may include being

- “responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights”;¹⁷⁹
- “an agent of or on behalf of a foreign person in a matter relating to an activity described in paragraph”;¹⁸⁰ or
- “a government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption”¹⁸¹

Global Magnitsky Act sanctions are already available for actions taken anywhere in the world, but the 2019 Amendment emphasizes the additional scrutiny placed on Hong Kong.¹⁸² This emphasis represents the most significant addition to the 1992 Act. Whereas before the 2019 Amendment the US could only suspend Hong Kong’s special treatment for bilateral exchanges, the 2019 Amendment gives the US government authority to target individual bad actors.¹⁸³ This authority helps to distinguish government officials from the innocent citizens of Hong Kong for sanctions purposes.

Section 7 sets out the criteria for identifying persons eligible for sanctions as any foreign person that the President identifies as responsible for “the extrajudicial rendition, arbitrary detention, torture, or forced confession of any person in Hong Kong [or] other gross violations of internationally recognized human rights in Hong Kong.”¹⁸⁴

Congress worded the June Draft more narrowly, tracing the events of the 2015 bookseller abduction situation.¹⁸⁵ It was possible under that reading that those who would be responsible for passing the extradition bill would not necessarily be caught by this provision.¹⁸⁶ It was thus suggested by a group of Hong Kong-based civil society organizations that this section be edited to cast a wider net.¹⁸⁷ Although Congresspersons pushed for a scope that would encompass any individual responsible for any “infringement of autonomy with respect to and suppression of basic freedoms in Hong Kong[.]” such a scope may have proven unworkable.¹⁸⁸ The chosen styling to address specific identifiable actors is a balance between the two positions grounded in international law.

176. *Id.*

177. *Id.*

178. *Id.*

179. 2016 Magnitsky Act, *supra* note 157, at § 1263(a)(1).

180. *Id.* at § 1263(b).

181. *Id.* at § 1263(c).

182. *Id.*

183. Global Magnitsky Human Rights Accountability Act, *supra* note 171.

184. *Id.* § 7(a)(1)(A)–(B). According to the 2016 Global Magnitsky Act, “gross violations of internationally recognized human rights” is interpreted identically to the same term in § 502B(d)(1) of the Foreign Assistance Act of 1961 (22 U.S.C. § 2304(d)(1)).

185. Global Magnitsky Human Rights Accountability Act, Pub.L. No. 114-328, 130 Stat. 2533 (June 13, 2019 draft).

186. *Id.*

187. 22 post-umbrella professional groups in Hong Kong, Joint submission in support of the Hong Kong Human Rights and Democracy Act of 2019 H.R. 3289/S. 1838 116th Cong., <https://www.scribd.com/document/417799509/22-professional-groups-joint-submission-in-support-of-the-Hong-Kong-Human-Rights-and-Democracy-Act-of-2019>

188. *Id.*

Sections Seven and Eight assure individual accountability, but may also be amended or read in *pari materia* with anti-corruption legislation to refer to family members of any such persons expressly, given the propensity for foreign elite to send their families abroad.¹⁸⁹ Similarly, it may be read or amended to allow the President to freeze the assets not only of the individual bad actor, but also those of his immediate family members within US jurisdiction.¹⁹⁰ This interpretation would mitigate the risk of such persons evading this section by offloading assets to family members and/or holding assets through offshore trusts.

The imposition of Magnitsky Act sanctions should be undertaken with great care. While it is easy to initiate such sanctions, it can become politically dangerous to discuss removing them. Magnitsky sanctions currently target almost 850 Russian individuals and entities over the invasion of Ukraine and other specific human rights violations; however, former US Ambassador Jon Huntsman warns that there is “little or no analysis measuring their efficacy.”¹⁹¹ The reporting officers and agencies should carefully conduct their evaluations in support of imposing or maintaining sanctions to ensure this scheme is as effective as possible.

The deterrent effect is amplified when other like-minded nations agree to the same terms. Several European countries, Canada, and the European Parliament followed the US lead in imposing sanctions on Russian officials implicated in Magnitsky’s death.¹⁹² Recently, several countries have expanded their sanctions regimes to include human rights abusers from any country. The United Kingdom passed its own version of the Global Magnitsky Act in 2017, while the Canadian, Dutch, and European Parliaments are both considering their own bills to target international human rights violators.¹⁹³

III. SUGGESTIONS

Ultimately, this entire scheme serves to emphasize the core nature of human rights and the rule of law both in US foreign policy and in the success of Hong Kong. This article has made several suggestions about amending and applying the 1992 US-Hong Kong Policy Act, as amended. In recap, those specific suggestions are:

- Where the 1992 Act as amended contains options for the US President or Secretary of State to waive reporting requirements if determined to be “in the national security interests of the US,” such as Section 301 and new Section Seven, the Executive should be required to explain reasons for doing so to the Congress in writing.
- The wording of Section 206 may be too limited to account for the now entrenched cycle of structural and physical violence. For instance, it may not cover those who engage the police force’s new paramilitary tactics in self-defense or defense of others. Therefore, the reference should be expanded to allow an *ad hoc* consideration of any applicant’s circumstances for visa purposes.

189. See generally Duncan Deaeth, *Xi Jinping’s daughter rumored to have returned to US to resume studies*, TAIWAN NEWS (Oct. 15, 2019), <https://www.taiwannews.com.tw/en/news/3796172> (describing how Xi Jinping persuaded his daughter to return to school at Harvard University).

190. 2019 Amendment, *supra* note 18, §§ 7–8.

191. Jon Huntsman, Opinion, *America Needs Dialog with Moscow*, WALL STREET J. (Oct. 7, 2019), <https://www.wsj.com/articles/america-needs-dialogue-with-moscow-11570488054>.

192. European Parliament Press Release, MEPs call for EU Magnitsky Act to impose sanctions on human rights abusers (Mar. 14, 2019).

193. Neil Buckley, *UK MPs vote for power to freeze assets of human rights abusers*, FINANCIAL TIMES, (Feb. 21, 2017), <https://www.ft.com/content/a02a4c60-f85c-11e6-9516-2d969e0d3b65>; European Parliament Press Release, *supra* note 190.

- Consideration for asylum in advance of expiry of a student or visitor visa should be given priority status.
- As Section 206 shores up the American foreign policy alliance system by mandating engagement and cooperation with other like-minded democratic nations, primary pressure should be applied to the United Kingdom, upon which the Joint Declaration provides the primary moral and legal obligation to stand with the people of Hong Kong. The United Kingdom should move to protect its freedom-loving British National Overseas passport holders and their children in Hong Kong if the local human rights situation were to further deteriorate.
- Under Section Five on sensitive dual-use technologies, the US should utilize its provisions to block technology transfers used for human rights violations and bar access to the US for human rights violators in Hong Kong in the same manner as the Trump Administration did regarding violations in Xinjiang in October 2019.
- The evaluations and sanctions listed in Section Six to protect US citizens from rendition should not only be triggered by “legislation,” considering the undemocratic composition of the Hong Kong Legislative Council and the ability of the PRC and Hong Kong Governments to rule by decree.
- Section Seven should be interpreted to cast a wide enough net to identify and punish those individuals responsible for human rights violations or material breaches of the Sino-British Joint Declaration and frustrate attempts to hide their US-based assets by transfers to trusts, friends, or family members.

Beyond that, the HKHRDA may prove to be too limited in scope. By primarily focusing its sanctions on the Hong Kong Government and specific individuals who may violate human rights in the city, the HKHRDA represents a narrowly-tailored attempt to recalibrate U.S. policy vis-à-vis specific Hong Kong actors. In fact, it painstakingly avoids coupling Hong Kong with other U.S.-China conflicts, especially the contemporaneous trade war. However, the Chinese Communist Party and its political infrastructure have been stepping out of the shadows in Hong Kong. Beijing’s June 2014 pronouncement of a right to exercise “comprehensive jurisdiction” has been followed by the delivery of press conferences by the Hong Kong and Macau Affairs Office of the State Council in Beijing, the first such broadcasts since the handover. As U.S. policymakers are aware of this, the HKHRDA’s narrow focus carries with it a clear diplomatic message that the U.S. remains willing to address Hong Kong issues as Hong Kong issues should the PRC maintain the status quo. Should mainland authorities attempt to exert more direct control of the city, however, the HKHRDA may quickly find itself a secondary consideration as U.S. policy toward Hong Kong gets swept into broader Sino-American foreign policy disputes.

No foreign policymaker can predict exactly what actions the PRC central government will take toward Hong Kong in the years ahead. It is likely that it will attempt to assert its command and control of the city in more subtle ways than those witnessed in the summer of 2019. It is also likely that the central government will return to the pattern of low-level structural violence witnessed between 2014-2019, with particular emphasis on rectifying the local business sector, at least in the short term.¹⁹⁴ It is more likely, however, that the central government will seek to thrust its legislative wish-list upon Hong Kong while it holds such a decisive grip on the local political apparatus, including an expedited re-introduction of controversial “Article 23” national security legislation.

194. See Michael Schuman, *Angering China can now get you fired*, THE ATLANTIC (Aug. 27, 2019), <https://www.theatlantic.com/international/archive/2019/08/beijing-pressure-hong-kong-companies/596869/> (describing Beijing’s pressure on Hong Kong businesses to “act against democracy advocates”).

Ultimately, the PRC will decide if it wishes to destroy the immense benefits it derives from a free Hong Kong in a dogmatic pursuit of communist ideology. Should that day come new emergency measures may be needed, though those challenges must be handled as they occur. Perhaps the ultimate measure the US can take is broadening the visa provisions at Section 206 to allow more freedom-loving Hongkongers to immigrate to the US, and encourage its allies to do the same. In that case, it would be recommended to screen applicants for their embrace of democratic ideals and appreciation of human rights.

For now, the 2019 Amendment represents a more narrowly-tailored attempt to recalibrate US policy in light of real circumstances and restore the *status quo ante* of autonomy described in the Sino-British Joint Declaration into the indefinite future.

CONCLUSION

Twenty-eight years ago, the United States accepted the PRC's invitation to treat post-handover Hong Kong as an autonomous territory for the purposes of trade, investment, and cultural exchange by passing the 1992 US-Hong Kong Policy Act.¹⁹⁵ American recognition of Hong Kong's special status was dependent upon the PRC respecting the sphere of autonomy it promised Hong Kong under the Sino-British Joint Declaration.¹⁹⁶

Despite those commitments, the Xi Jinping administration wants to have its cake and eat it too: to exercise central command of the city but continue to enjoy the economic benefits of its autonomy. Triggered by recent encroachments of the central government, including a controversial extradition bill and the subsequent imposition of paramilitary policing, the Hong Kong Human Rights and Democracy Act thus became a necessary amendment to the 1992 US-Hong Kong Policy Act.

The 2019 Amendment recalibrates US policy toward Hong Kong in light of the changed circumstances. Three of its five policies—extending the scope of inquiry of the annual report certifying Hong Kong's autonomy for trade purposes,¹⁹⁷ enlisting executive departments to enforce US export laws regarding sensitive dual-use items,¹⁹⁸ and authorizing the adoption of measures to protect US citizens from rendition to mainland China—¹⁹⁹ are tailored to protect US business interests. The other two policies—prohibiting visa denials for Hongkongers on the basis of their participation in pro-democracy rallies and imposing Magnitsky Act sanctions on human rights violators in Hong Kong—support longstanding US foreign policy in favor of human rights and democratic development.

Ultimately, this entire scheme serves to emphasize the core nature of human rights and the rule of law both in US foreign policy and in the success of Hong Kong. The 2019 Amendment does not force the US to go out of its way to promote and defend these interests abroad. Nonetheless, it manages to add a small check upon the PRC central government's apparent desire to pierce Hong Kong's sphere of autonomy. The HKHRDA's narrow focus carries with it a clear diplomatic message that the U.S. remains willing to address Hong Kong issues as Hong Kong issues should the PRC maintain the status quo. Should mainland authorities attempt to exert more direct control of the city, however, the HKHRDA may quickly find itself a secondary consideration as U.S. policy toward Hong Kong gets swept into negotiations over broader Sino-American foreign policy disputes.

195. See generally 1992 Act, *supra* note 7.

196. See generally Joint Declaration, *supra* note 3.

197. Global Magnitsky Human Rights Accountability Act, *supra* note 171.

198. *Id.*

199. *Id.*

The US can only do so much to protect the autonomy of Hong Kong, a city contiguous to the Chinese mainland itself. Ultimately, the PRC will decide if it wishes to sacrifice the benefits it derives from a free Hong Kong to the dogma of communist ideology. Should that day come, new emergency measures will be needed. For now, the 2019 Amendment represents a narrowly-tailored attempt to recalibrate US policy in light of real circumstances and restore the *status quo ante* of autonomy described in the Sino-British Joint Declaration into the indefinite future.