

## THE U.S.-CHINA RULE OF LAW INITIATIVE

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My subject is the U.S.-China Rule of Law Initiative, a government-to-government effort with which I was personally involved as a U.S. government official. In discussing this Initiative, I hope to provide a little indirect light on two broader matters that are far more important than the fate of one U.S. government program: (1) What are the possibilities and prospects for legal reform in China?; and (2) what role can foreign entities play, and what role is appropriate for foreign entities to play, in the legal reform process in China?

Let me begin with a bit of personal memoir. I use that term with considerable self-irony. I was basically a temp at the State Department, and temps do not do memoirs. I am a career law professor at Yale Law School, but I took a leave of absence from 1997 to 1998 to work at the U.S. Department of State in Washington, D.C. For some time, I had peddled an idea in various venues that U.S. foreign policy should focus more on legal reform in other countries. My argument was that, if other countries' legal systems could be improved, a range of U.S. foreign policy interests could be advanced: Legal reform could support economic development in other countries, legal reform could advance human rights, legal reform could improve the ability to combat global crime, and so forth. Therefore, I argued, U.S. diplomacy and U.S. foreign assistance should focus more intensively on legal reform than it had, and diplomacy and foreign assistance should be more closely synchronized. The idea was hardly original with me, but it was timely for a variety of reasons. Reasonably senior people in the State Department and the White House thought it made sense, and a post at the State Department was created for me in 1997 to try to strengthen the Department's efforts along the lines I had been suggesting.

China was the area of my greatest interest from the beginning, and I thought the timing was favorable for China-related work. President Jiang Zemin of China had already accepted President Bill Clinton's invitation that he visit the United States later that year. Indeed, on my watch, President Clinton and President Jiang held two Summit meetings. Summits are great action-forcing events as each side seeks to have things to show for its efforts. Things that might otherwise take diplomats

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years to accomplish, or that might not be accomplished at all, can often be accomplished rather quickly under the liberating pressure to produce what are called "Summit deliverables." And so it was with the so-called U.S.-China Rule of Law Initiative.

I proposed to State Department and White House officials that we try to reach a Summit agreement with the Chinese that our two countries would cooperate in the legal field. As early as 1994, President Clinton had expressed "support for efforts underway in China to promote the rule of law,"<sup>1</sup> but little concrete had occurred. The upcoming Summit, I argued, created a new opportunity. Within a few weeks of my arrival at the State Department, Sandy Berger, the National Security Advisor, told me to go to Beijing to see if I could negotiate something. It may sound a little implausible, but that was what happened.

I pursued the Initiative with a variety of premises. Let me mention four of the main ones.

First, I believed then, and I believe now, that legal reform in China is of great importance to China and to the world. Legal reform can enhance economic development, advance human rights, contribute to political reform, counter corruption, and improve China's interactions with the international community, to mention just a few things. Legal reform in China can be valuable in its own right and can contribute to wider reforms.

Second, I believed then and believe now that China is serious about legal reform in a variety of different areas, not just commercial law. After a long period of devaluing law, China's leaders are placing considerable emphasis on the role of the legal system in ensuring stable and sustainable social development. Significant changes in the legal system have already taken place. Two statistics stand out to me: In 1979 there were only two law schools in China; twenty years later there were more than 200. In 1979 there were fewer than 3000 lawyers in China; twenty years later there were over 100,000. During this same period, China enacted a very large number of new laws and regulations, reconstructed a court system that now hears over six million cases a year, and elevated the concept of "ruling the country according to law" to a prominent ideological and constitutional place.

It is important to appreciate that the motives for legal reform in China are complex and multi-faceted.

- The role of legal reform in China's economic development is widely recognized in China. China's leaders see developing its legal system as an important element in its economic development by providing rules of the game to guide transactions and institutions to enforce those rules. But there are other motives as well.

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<sup>1</sup> *U.S. Renews Most-Favored-Nation Trade Status for China*, 5 U.S. DEP'T ST. DISPATCH 345, 347 (1994) (President Clinton's opening statement at a news conference, Washington, D.C., May 26, 1994).

- Chinese leaders want to prevent the recurrence of abuses of the Cultural Revolution, which affected many of them personally.
- They want to reign in wayward and arbitrary bureaucracies and local governments.
- They want to strengthen China's ability to fight crime, including corruption (at least on a selective basis).
- They want to respond to expanding rights-consciousness in the public. This is not at all to say that they embrace U.S. conceptions of human rights — far from it. Nor is it to deny that the Confucian tradition downplays the idea of individual rights and sees conflict resolution as less about realizing rights and more about achieving compromise. However, there is a clearly expanding rights-consciousness in Chinese society today that the country's leadership cannot ignore.
- In a related vein, China's leaders recognize that they need to provide some peaceful channels for the citizenry to express grievances at a time of great social change and few democratic outlets.
- China's widening role in global markets and on the world stage has made it more receptive to following international legal norms and to developing legal arrangements that parallel those of other countries.
- Chinese leaders are also interested in legitimating their regime, both domestically and internationally, and this too pushes them to develop China's legal system to make it more fair and reliable and to give people at least some sense of possible recourse for grievances.

These multiple purposes have made China receptive to legal reforms that are not limited to the commercial area. For example, China has adopted an Administrative Litigation Law<sup>2</sup> that gives citizens the right to sue government officials for violating the law; China's criminal procedure law has been amended to begin providing greater protections for defendants;<sup>3</sup> and a system of legal aid for the poor has been established.<sup>4</sup>

I certainly do not want to overstate any of these advances. There are very significant boundaries on the sorts of legal reforms that are possible within China's current political system. Deficiencies remain great on most fronts, including widespread corruption, poor professional training and limited independence among judges, all too frequent torture and arbitrary detention by the police, and often opaque and arbitrary bureaucratic action. In matters that involve political

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<sup>2</sup> Administrative Litigation Law of the People's Republic of China (1989).

<sup>3</sup> Criminal Procedure Law of the People's Republic of China (1979) (amended 1996); JONATHAN HECHT, *OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW* (1996).

<sup>4</sup> See, e.g., Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 *TEX. INT'L. L.J.* 211 (1999).

dissidents, all bets are off. Even with these serious constraints, however, my second large premise was, and remains, that there are significant possibilities for legal reform in China.

The third premise I had in developing the Rule of Law Initiative was that, if the approach was framed properly, China would be receptive to working with foreigners, including U.S. experts, on legal reform issues — seeing this as a way to strengthen their own efforts with ideas, expertise and comparative experience that foreign experts could provide. In fact, the Chinese had been working on legal reform issues with foreigners long before the U.S.-China government-to-government Initiative was conceived. We were coming in on the shoulders of institutions like the Ford Foundation, which had conducted legal reform work for years, and a pioneering generation of American law school professors who worked closely with Chinese counterparts. Of course there are distinctive sensitivities when the U.S. government is directly involved. Still, I thought there was a good chance the Chinese would be receptive to the Initiative if we used language and rhetoric carefully — if we phrased this as a “cooperative” initiative, not one responding to U.S. complaints, and if we characterized the work as “law” and “legal expertise,” rather than emphasizing the more highly charged phrases of “human rights” and “political reform.” I should add, however, that I always believed that the Chinese side understood that at its core this Initiative was an extension of efforts within the United States to improve human rights in China.

The fourth premise I had was that an initiative like this could build positive channels of communication, deepen mutual understanding between the two countries, and develop webs of people-to-people relationships in ways that could nurture the entire U.S.-China relationship. It is not surprising, perhaps, that virtually all the other issues addressed at the 1997 Summit (Summit diplomats call them “baskets”) were matters in which one side was complaining to the other about something. We certainly had things to complain about, but I was convinced then and I remain convinced now that a relationship with a country like China needs to be more than mutual complaints. I saw this Initiative as the creation of a positive new channel between the two countries.

I arrived in Beijing as a novice diplomat. National Security Advisor Sandy Berger had already raised my idea of a law-related initiative with his Chinese counterpart, but it had been touched on very briefly, and the Chinese had been only mildly encouraging. A door had been opened, but it is probably fair to say that no one in either government other than me had an intense commitment to this “basket,” and time was short. As I arrived at the Chinese Foreign Ministry building with political officer Woo Lee from the U.S. Embassy in China (now our Consul-General in Fukoka, Japan), a large sofa and some other furniture were being carried out the front door. We stood and waited to let the men pass. “They’re moving,” Woo Lee said to me, explaining the surreal scene. Indeed, this was moving day at the old

Foreign Ministry building, the last day at the old headquarters before the new Foreign Ministry building opened for business. I remember at that moment trying to interpret Woo Lee's phrase metaphorically — China was “moving” forward, and things like legal reform were real possibilities — but the meeting at the near-empty Ministry building resisted metaphoric transfiguration. Among other things, although I had rehearsed the meeting in my head and on my notepad many times over, I had not taken account of the seating arrangement. As only a novice China hand could have done, I had imagined sitting across a table from my Chinese counterpart, whereas in fact we were seated side by side in club chairs, each of us facing forward into the room unless we turned to look at the other — the customary architecture of Chinese meetings. It was uncomfortable, and looking at notes was difficult. My counterpart, the head of the “North American desk” at the Chinese Foreign Ministry, was clearly most interested in trying to figure what our motives were in proposing the Initiative. He was moderately encouraging on the substance of the Initiative, but very far from committal. I left the meeting aware that the Chinese would need time to digest what we were proposing, unclear what the next diplomatic step would be, and uncertain whether quick enough progress could be made to achieve a Summit “deliverable.”

What followed were many more meetings and exchanges, both with the Chinese and with U.S. colleagues. I met both with Chinese government officials and also with many others in the Chinese legal community, especially Chinese law professors who were thinkers and doers in legal reform work. Thus, at the same time that I was trying to move the Initiative forward diplomatically, I was seeking to deepen my knowledge of the Chinese legal reform process, to develop and deepen relationships with Chinese experts actually involved in legal reform, and thus to lay the groundwork for actual cooperative projects with Chinese counterparts should a Summit agreement be reached.

My “identity” was often a subject of interest to the Chinese. Chinese government officials were always trying to figure out how senior I was and how influential I was. Part of this was simply their effort to figure out who my appropriate counterpart on the Chinese side should be, for the Chinese are meticulous in trying to maintain this sort of parity. But their curiosity seemed broader than that. My State Department title was an opaque original. They knew that I was not a professional diplomat and that I had been a professor at Yale Law School — but the idea of a professor taking a leave of absence for a few years to go into the government is not a typical Chinese phenomenon and not one they could easily interpret. I did not seek to hide that I was a professor on leave from Yale in my discussions with Chinese government officials because I hoped that they might think of me somewhat differently from the professional U.S. diplomats with whom they often had rancorous exchanges. They saw me emerge in the Summit discussions rather suddenly, so they assumed that I had high-level support. They

knew that President Clinton and his wife had gone to Yale Law School and were curious about my connection to the Clintons.

In my efforts to get a Summit agreement with the Chinese and to keep the support of other U.S. diplomats working on the Clinton-Jiang Summit, what I lacked in diplomatic experience, I made up for in tenaciousness. No one, not even I, could rank a new law-related Initiative as among the highest priorities for the Summit, and there were many moments when it could easily have fallen off the table. Still, I did everything I could to prevent this from happening. I worked every angle I could to keep the Initiative on the minds of those with overall responsibility for the Summit; I relentlessly pushed them to promote the Initiative with the Chinese and with others in the U.S. government; I made sure that I was included in key State Department or White House meetings both to be visible and to have the opportunity to advance the Initiative; I sought to be included in key U.S.-Chinese meetings, even without any speaking role, so that my visibility would remind my U.S. colleagues to push the Initiative and so that the Chinese would not doubt that I was a player; I pushed the Chinese to make decisions; I pushed my point of view in writing, over the telephone, and in person with everyone; and if I was met with temporizing or less than complete success, I kept pushing. Not surprisingly, I tried to keep control of every aspect of the Initiative as much as I could, but I also recognized, thank goodness, that decisions and actions concerning the Initiative would sometimes be taken when I was not present, so that I needed to broaden the sense of ownership of the Initiative within the government.

There were many bumps in the road to the Summit agreement, but the end result was that an agreement on a new Initiative was announced as part of the Joint Statement that was issued at the end of the 1997 Summit: China and the United States would open up a new channel of cooperation to assist legal reforms in China. This could not have been achieved without the participation and help of many many others — including not only senior figures in the State Department, White House, and U.S. Embassy in Beijing, but also my day-to-day deputy Stephen Higginson (on loan from the Department of Justice) and consultant Jonathan Hecht, one of the finest scholars of Chinese law in the United States and an innovator in U.S.-China legal exchanges long before the government-to-government Initiative was a gleam in my eye.

The relevant portion of the Joint Statement reads as follows:

*Cooperation in the Field of Law*

The United States and China agree that promoting cooperation in the field of law serves the interests and needs of both countries. . . .

. . . Recognizing the importance the United States and China each attaches to legal exchanges, they intend to establish a joint liaison group

to pursue cooperative activities in this area. These may include exchanges of legal experts; training of judges and lawyers; strengthening legal information systems and the exchange of legal materials; sharing ideas about legal assistance; consulting on administrative procedures; and strengthening commercial law and arbitration.

As part of this program of legal cooperation, China's Minister of Justice will visit the United States in November 1997 at the invitation of the U.S. Attorney General.<sup>5</sup>

I want to point out several things about the Joint Statement:

First, notice the caption. This is not called the "Rule of Law Initiative" — although it continues to be referred to as such. We had indeed proposed to the Chinese that the Initiative be called "Cooperation on the Rule of Law," but the Chinese would not go along. This was, and should remain, a cautionary and sobering reminder that foundational ideas remain in dispute within China, and that the "rule of law" remains a contested ideal and is still contending for preeminence with phrases such as "rule by law" and "ruling the country according to law."<sup>6</sup> Indeed, the phrase "rule of law" has been used to mean a variety of different things in the West, ranging from a narrow notion of "procedural regularity," to a notion that the government is constrained by law, to a notion that includes a number of substantive rights. I think that the Chinese negotiators recognized that to use the phrase "rule of law" in the Joint Statement might suggest things that the leadership in China does not accept. The bottom line is that we accepted the blander label: "Cooperation in the Field of Law."<sup>7</sup> More generally, we did not formally agree with the Chinese about our goals for the Initiative; we did not agree that our goal was to advance the rule of law in China; and we did not agree on a concept of the rule of law that we could each embrace. We agreed to do things, not *why* we were doing things.

A second thing to notice about the Joint Statement is the scope of what we agreed to do. However bland the Initiative's caption, the areas of programmatic agreement were broad and meaty. The agreement covered judicial training, legal assistance for the poor, administrative law, and the catchall "exchanges of legal experts" in every field — and I knew from the detailed discussions that we had already had that the Chinese were ready for cooperative projects in a wide variety of areas, including quite sensitive ones and ones that would seek to advance at least some elements of even the broadest Western conception of the "rule of law." It has

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<sup>5</sup> Joint United States-China Statement, 33 WEEKLY COMP. PRES. DOC. 1680, 1683 (Oct. 29, 1997).

<sup>6</sup> For an excellent discussion of the concept of the rule of law in the Chinese context, see RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

<sup>7</sup> Joint United States-China Statement, *supra* note 5, at 1683.

been suggested that the “strategy” of the Initiative was first to promote legal reforms in the commercial area that might then “spread beyond economic transactions to other areas” and plant seeds that would “strengthen the hand of reformers in China who want to push for legal reforms in other areas.”<sup>8</sup> But in fact, from the very beginning, the Initiative’s explicit focus was much broader than commercial law. Indeed, as reflected in the Joint Statement itself, the Initiative actually emphasized areas of cooperation that did *not* have a commercial law focus.

Third, consider the first sentence: “The United States and China agree that promoting cooperation in the field of law serves the interests and needs of both countries.”<sup>9</sup> When I drafted this sentence and sent it to the White House, a White House official wanted to take it out. This is just rhetoric, I was told: The Chinese are the ones always trying to put rhetoric into agreements, and the U.S. side resists this, so we should not be in a position of pushing for rhetoric ourselves. I disagreed and pushed back. Why? Here rhetoric was substance. Indeed, the biggest contribution of the Initiative, I thought, was that President Jiang Zemin was blessing cooperation with United States experts on legal matters. For President Jiang to affirm that cooperation with U.S. legal experts “serves the interests and needs” of China would provide strong protective cover to legal reformers in China who are looking to U.S. experience and expertise as a source of ideas that could potentially be transplanted to China. In earlier times, such looking outward and consorting with U.S. experts might have raised questions in China, particularly because legal issues often touch upon matters that are “sensitive” domestically. Reformers in China would be comforted, encouraged, and even emboldened by an affirmation from China’s leader that looking to U.S. legal expertise “serves the interests and needs” of China. The sentence stayed in our draft, and the Chinese side accepted it.

Fourth, the Joint Statement provided for the establishment of a “joint liaison group to pursue cooperative activities in this area.”<sup>10</sup> This was a Chinese addition, and not one I particularly liked, but it is a fairly typical element of bilateral agreements. Some mechanism typically needs to be provided to implement an agreement, and establishing a “joint liaison group” is one way to provide a structure to keep the government-to-government exchanges moving forward. Nothing specific about the composition and role of this “joint liaison group” was indicated in the Joint Statement, so it might seem altogether innocuous. But the downside of including this in the Summit agreement soon became clear. On the Chinese side this structure was under the direction of the Ministry of Foreign Affairs.

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<sup>8</sup> Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 78 (2000).

<sup>9</sup> Joint United States-China Statement, *supra* note 5, at 1683.

<sup>10</sup> *Id.*



Establishing such an entity on the Chinese side that would manage this Initiative ran two interrelated risks: First, that some of the more adventuresome projects that we might develop with particular adventuresome Chinese entities — projects that could go forward if they were not highly visible — might be blocked or deterred if they had to be screened and approved by some central “joint liaison group”; and second, there was the risk that this “joint liaison group” on the Chinese side might evolve into a kind of central clearinghouse that started monitoring “cooperation in the field of law” unrelated to the new government-to-government Initiative, including efforts between U.S. nongovernmental organizations (NGOs) and their Chinese counterparts that had long preceded our new Initiative.

I was quite concerned about this. Following the Summit, there was no way to avoid establishing and working through a “joint liaison group” process to some extent, but I followed a two-track approach. In addition to attending to the joint liaison group process, I actively pursued projects and counterparts outside of the joint liaison group process, and I tried to sew up various projects before the joint liaison group got into the picture. At the same time, the Chinese side pushed for us to adopt a “Memorandum of Understanding” about the structure and role of the joint liaison group, and that became an extended and complex process. The main areas of contention were (1) who should be on the joint liaison group from each side; and (2) what the role of the joint liaison group should be. The Chinese wanted representatives from a large number of different governmental entities; I wanted the process to be as simple as possible and favored having the joint liaison group be just a Department of State-Ministry of Foreign Affairs entity. We compromised by providing that “[t]he JLG [Joint Liaison Group] will include representatives of the U.S. Department of State and the Chinese Ministry of Foreign Affairs, and representatives of other government departments and state organs as each side determines.”<sup>11</sup>

The stickier matter concerned the joint liaison group’s role. This took months of negotiation. We ended up with just a few sentences that achieved our main objectives: (1) limiting the joint liaison group to “guiding,” “facilitating” and “reporting back” functions, not approving or disapproving particular projects; and (2) making clear that the joint liaison group had no role with respect to legal cooperation projects unrelated to the government-to-government Initiative.<sup>12</sup> In the

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<sup>11</sup> Memorandum of Understanding Concerning the Establishment of a Joint Liaison Group on Cooperation in the Field of Law (May 19, 1998).

<sup>12</sup> The JLG will provide a mechanism for generally guiding the Summit Initiative, facilitating the effective and efficient implementation of activities which both sides agree to include in the Initiative, and reporting back to the Presidents of the United States and China about the progress of the Initiative. Both sides recognize that within the six categories and in other areas there have been and will continue to be cooperative legal activities outside the Initiative that serve the interests and needs of both countries.

end, the joint liaison group played a quite limited role.

Much of my work on the Initiative following the October 1997 Summit involved developing various specific Initiative activities that could be announced at the second Clinton-Jiang Summit that was held in China in June 1998. A crucial development occurred only two weeks after the first Summit, when then-Minister of Justice (now Supreme People's Court President) Xiao Yang made a long-postponed visit to the United States. Xiao had been invited to the United States by Attorney General Janet Reno more than a year previously. However, his visit occurred at a time when the Attorney General was facing criticism for how she was handling allegations that Chinese officials had made contributions to President Clinton's reelection campaign; Justice Minister Xiao's visit put a further uncomfortable spotlight on this,<sup>13</sup> and U.S. Justice Department officials met with him only briefly. Over at the State Department, however, we saw Minister Xiao's visit as a unique opportunity to develop the new Initiative. With no resistance from anywhere else in the U.S. government, I planned most of the Minister's activities while he was in the United States, met with him extensively, and accompanied him everywhere for four days, shaping virtually his entire trip to advance the new Initiative. The good will and concrete plans that I developed with Xiao Yang during his visit gave the Initiative an important new advocate within the Chinese government, one who arranged several of the most significant early activities under the Initiative.

At least as important were a series of trips that I took to China between the two Summits, including a Summit planning visit with Secretary of State Madeleine Albright during which she participated in several law-related events (including a speech at the National Judges College and a meeting with Xiao Yang in his new post as Supreme People's Court President). During my visits, I gave particular attention to various law professors in China who were working on legal reform issues, believing that these professors had both the independence and the originality to do the most innovative thinking and also were respected and influential within official circles. A number of reform minded senior scholars such as Professor Ying Songnian and Professor Chen Guangzhong had put together Research Groups composed of leading scholars and selected reform-minded officials in their fields to develop and draft reform ideas. They seemed like ideal potential partners for projects with U.S. experts who might assist them in assessing relevant foreign examples and experience in connection with their work.

In addition, I made vigorous efforts within the United States to explain the Initiative, to persuade others of its importance, and to encourage entities and individuals both inside and outside the government to become involved (or more

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*Id.*

<sup>13</sup> See *Reno Asks Chinese Official for Help in Finance Probe*, WASH. POST, Nov. 18, 1997, at A9.

involved) in work to help advance legal reform in China. I sought to involve U.S. parties in particular projects that I was developing and also to encourage them to develop or expand their own work.

In late May and early June 1998, after developing a number of specific Initiative projects that could be announced at the Summit, I accompanied President Clinton to China. In public life there is no activity to compare with a presidential Summit visit. During a Summit, the President acts as representative of the whole country and as a world leader, not as a controverted if preeminent figure in ongoing domestic political struggles. The special status of the United States is foregrounded and felt constantly. The President's party lives in a world within a world, moving along with insular complexity and energy, and with domestic bureaucratic and personal barriers among delegation members temporarily lowered because of compressed space and time and a focused common purpose. The excitement and the tension of the presidency feels different on foreign shores, with the sense of scale both augmented (the stakes are openly global) and contracted (our government is operating out of hotel rooms).

The Rule of Law Initiative was hardly the centerpiece of the Summit, but it received very considerable attention. The President discussed it on many occasions. The First Lady made a highly publicized visit to a women's legal rights center in Beijing and the Secretary of State visited with lawyers at a legal aid center in Shanghai. The "deliverable" for the Summit was the announcement of a variety of initial Initiative projects. These included a symposium on the legal protection of human rights; a conference of U.S. and Chinese law deans to explore expanded cooperation on legal education; a cooperative project on administrative law; judicial exchanges and judicial training seminars; cooperative efforts on legal aid for the poor, beginning with a symposium in Beijing; a program to translate American law books into Chinese; a commitment by the American Bar Association to undertake a program of legal cooperation with its Chinese counterparts; a program to train arbitrators; and exchanges on securities regulation, electronic commerce, and corporate law (the latter was part of a Department of Commerce program).<sup>14</sup> Significantly, these were largely activities that I arranged to be undertaken on the U.S. side by entities outside the government, both because that was where the legal expertise to pursue the projects was and because the State Department did not have more than a trivial amount of funds to run these projects.

There was considerable media interest in the Initiative. At a press conference in Beijing to describe and discuss the Initiative, I spoke of it as "a broad new

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<sup>14</sup> Press Release, Office of Communications, The White House, Fact Sheet: Achievements of U.S.-China Summit (June 27, 1998), 1998 WL 354254; Press Release, Office of the Press Secretary, The White House, Press Briefing by Paul Gerwitz [sic], State Department, and Mark Gearan, Director of the Peace Corps (June 29, 1998), at <http://clinton3.nara.gov/WH/New/China/19980629-8091.html>.

channel [of cooperation] with the Chinese which we think is very significant and holds promise — at least promise — for producing some long-term benefits in improving legal institutions in China in a way that affects many aspects of life.”<sup>15</sup> “I want to emphasize that this is a long-term effort, it’s a difficult effort,” I said, “but one with, I think, real promise.”<sup>16</sup> There were a few tough questions from the press — for example, one reporter asked “Would you explain how you ensure that your effort doesn’t just make the Chinese legal system more efficient at dispensing unfair or brutal punishments to people?”<sup>17</sup> But the general response to the Initiative was extremely positive. Anthony Lewis of *The New York Times* wrote an op-ed column in the *Times* praising the Initiative and saying that “it has the potential to be an engine of change in China.”<sup>18</sup>

The most important events of the 1998 Summit in China were two meetings between President Clinton and President Jiang, a joint press conference with Presidents Clinton and Jiang that was broadcast live in China, and a high profile speech with question/answer session by President Clinton at Beijing University — and when this last event was over, everyone in President’s party relaxed, even though visits to Shanghai and Hong Kong lay ahead. We moved from the Beijing University auditorium into an adjacent courtyard to wait for the President to come out. The weather was sultry and blazingly sunny. A large crowd of Chinese students had gathered and cheered us boisterously with broad smiles and great enthusiasm. All of the official Summit events had gone well, and we Americans felt a huge sense of release and satisfaction. Everyone talked, laughed, waved, took pictures — American and Chinese alike. The heat was overwhelming, the student enthusiasm gleefully spontaneous, our own sense of release profound, our delight at seeing the Chinese students obvious — and as the sun and sweat poured over us, it felt as if the United States and China were friends forever. The President came into the courtyard, to renewed cheers, and he caught the mood immediately and spun it onward. There in the courtyard, with all official poses relaxed, our own unguarded humanness and that of Chinese became an insistent affirmation of our common life on the planet. Sobering realities would reemerge soon enough, of course, but the sense of possibility in international relations — and perhaps more broadly as well — is sustained by moments like what we all experienced that early afternoon, for me the most powerful and memorable moments of the Summit.

Shortly thereafter, I returned to Yale. Significant further progress on the Initiative was difficult in the subsequent period, even though people of great ability took over my portfolio, largely because Congress refused to provide funding assistance for work to advance the rule of law in China. Funding became caught up

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Anthony Lewis, *The Engine of Law*, N.Y. TIMES, July 6, 1998, at A11.

in the complex and often harsh Congressional politics concerning China. More precisely, Congress refused to lift existing legislative prohibitions on the use of Foreign Assistance Act<sup>19</sup> money for China,<sup>20</sup> and Congress failed to appropriate any funds specifically earmarked for legal cooperation with China, so the U.S. government had only very small pockets of money with which to do things. Although significant preparatory work for follow-up activities was done at the State Department, no coordinated legal reform strategy or program could emerge without money to back it up.

Some have suggested that this means that the Initiative failed.<sup>21</sup> I completely disagree. The main goals of the Initiative were to secure Jiang Zemin's blessing for this kind of cooperation, which would open new doors in China, to increase attention to this work and understanding of its importance, and to promote more work being done. Those goals were accomplished. Precise causal linkages are difficult to sort out, of course, but more doors in China are certainly now open for this work than in 1997. More attention is being paid to this work. And there is now significantly more activity by U.S. NGOs in China and more funds from foundations and other donors now available for this work.<sup>22</sup> As far as government funding goes, the critics have used a much too narrow and impatient time frame. It is true that Congress did not appropriate money immediately. But because of the continued efforts of people both inside and outside the government, in 2002 legislation was signed appropriating \$10,000,000 for programs concerning democracy and the rule of law in China,<sup>23</sup> and those funds are now being allocated. A whole new phase in the U.S. Government's role is beginning.

In assessing the Rule of Law Initiative, success or failure needs to be appraised

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<sup>19</sup> Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. §§ 2151-2431k (2000)).

<sup>20</sup> See, e.g., 22 U.S.C. § 2370(f)(1) (2000) (prohibiting nonmedical assistance to Communist countries, including the People's Republic of China); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2001, Pub. L. No. 106-429, app. A § 523, 114 Stat. 1900, 1900A-29 (explicitly prohibiting assistance to the People's Republic of China).

<sup>21</sup> See Stephenson, *supra* note 8, at 71-72 (quoting anonymous interviewees).

<sup>22</sup> The National Committee on U.S.-China Relations has compiled a "Rule of Law Database" that lists numerous U.S. entities undertaking programs related to Chinese legal reform. Nat'l Comm. on U.S.-China Relations, Rule of Law Database, at [http://www.ncuscr.org/Resources/Rule\\_of\\_Law/rolcover.htm](http://www.ncuscr.org/Resources/Rule_of_Law/rolcover.htm) (last visited Apr. 29, 2003). Many of these programs were established or expanded in the time period after the first Clinton-Jiang Summit meeting, in some cases with explicit linkage to the Summit agreement and in other cases with some indirect linkage likely.

<sup>23</sup> Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, Pub. L. No. 107-115, § 526(a), 115 Stat. 2118, 2147 (authorizing not less than \$10 million assistance "to support democracy, human rights, and the rule of law in the People's Republic of China").

on a somewhat broader time frame than the critics suggest. This is a point generally true of China. All of us often feel frustration that China is not changing as quickly as we would like, and we become upset that many disturbing things about China have not changed much at all. But in the sweep of world history, the twenty-four years since Deng Xiaoping's opening up began is just a momentary blip, a tiny unit of time — and there are few if any large countries throughout world history that have ever changed for the better at a faster pace than China has changed during this period.

More personally, my State Department work changed my professional life. As the saying goes, I caught the China bug big-time. In 1999, a year after I returned to Yale Law School, Jonathan Hecht and I established The China Law Center there. In addition to a research and teaching mission, the core of the Center's work is to try to support China's legal reform process by undertaking a variety of cooperative projects with legal experts in China on key legal reform issues. The Center typically assembles a group of top U.S. experts in a particular field to work in depth and over a period of time with Chinese counterparts. These experts might be an academic group, a government entity, or a joint academic-government group that is developing a legal reform proposal, actual legislation, or a scholars' draft of legislation. The Center's projects are illustrative, I think, of the kind of work foreign institutions can do with Chinese counterparts these days.

Let me mention just a few of our projects to give you an idea of the kind of work that is being done.<sup>24</sup>

- We are working with both an academic group and a group at the National People's Congress on China's first criminal evidence law, which would address such important issues as the establishment of a right to silence during police interrogations, the treatment of illegally obtained evidence at trial, and the wider use of witnesses at trial.
- We are working with an academic group on ideas for strengthening China's Administrative Litigation Law, the important law that gives Chinese citizens limited rights to sue government agencies and officials who violate the law.
- We are working with the Shanghai courts on trial procedure reforms.
- We are working with leading academics and others to develop proposals for replacing or fundamentally reforming the system of reeducation through labor, one of the most serious human rights problems in China.
- We are working with both the Supreme People's Court and an academic group on developing ideas for structural reforms of the Chinese judiciary to help bring about greater judicial independence and professionalism and

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<sup>24</sup> For a fuller description of The China Law Center, see the Center's website at <http://www.yale.edu/chinalaw> (last visited Apr. 29, 2003).

to reduce local protectionism by local courts.<sup>25</sup>

- We are working with an academic group, the State Council's Office of Legislative Affairs (OLA), and the Legislative Affairs Commission of the Standing Committee of the National People's Congress (NPC) in their efforts to draft new legislation reforming the licensing system in China. The legislation seeks to give greater scope to the market and individual initiative by reducing the number of economic activities requiring government permission and by increasing the predictability and transparency of licensing procedures.
- We are working with OLA to assist its drafting of a fair credit reporting law to promote the development of a personal consumer credit system in China and to improve "social trust."
- We are working with the Legislative Affairs Commission of the NPC and an academic group in their efforts to draft China's first tort law.
- We are working with the Shanghai Municipal Government and other legal experts to assist in developing a new approach to professional and business associations, to allow them to be more independent, self-funded, and self-regulating interest groups instead of extensions of the government bureaucracy.
- We are working with OLA to develop procedures for public hearings and other forms of public participation in administrative rulemaking.
- We are working with various Chinese legal scholars to explore short-term and long-term ideas for developing a system of constitutional review in China.
- We are working with a number of different Chinese law schools to help them establish the first-ever clinical legal education programs in China.

While these projects are ongoing and it is too early to assess the impact of such cooperative work definitively, there is no doubt that we have at least introduced the Chinese to new ideas and new approaches to the problems they are addressing and that our Chinese counterparts have been intensely engaged in the cooperative work we are undertaking.

As I reflect back on my experience in the government and on the continuing work that I am doing on legal reform issues through our China Law Center, what insights or lessons do I take away? From the beginning, I have been very aware that there was an active "Law and Development" movement in the 1960s and 1970s, and many of its practitioners and theorists ended up disillusioned and estranged.<sup>26</sup> I

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<sup>25</sup> For a discussion of the some of the issues, see Paul Gewirtz, *Independence and Accountability of Courts*, 24 GLOBAL LAW REV. 7 (2002), available both in Chinese (as published in China) and in English at <http://chinalaw.law.yale.edu/html/publications.htm>.

<sup>26</sup> See, e.g., David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L.

have also been aware of the long history of China's resistance to outside efforts to influence its development, chronicled by my colleague Jonathan Spence in his early book *To Change China*.<sup>27</sup> Can another wave of disillusionment and estrangement be avoided? No one can be sure, but here are some things I suggest we all keep in mind as we think about deeper engagement with China's legal reform process:

1. There is no one true path for outsiders to take in trying to promote change in China. Different kinds of efforts make sense. Cooperation with the Chinese on legal reform was never intended to replace other human rights policies, and it should not. It is right to complain to China and to put pressures on China to change its policies that violate international human rights norms. But there is also an important role for those who engage China and work closely with Chinese reformers to make progress where progress can be made. My own view is that the two approaches reinforce each other, and suggestions that one must choose between the two approaches are misguided.

2. It is crucial to understand the substantial obstacles to legal reform that exist in China to avoid exaggerated expectations and unrealistic recommendations. Many of these obstacles derive from basic political arrangements (such as the role of the Communist Party or the lack of a free press) or from deeply ingrained ideological and cultural beliefs (such as a belief that courts are like other administrative organs rather than distinctive kinds of institutions or a view that law is basically an instrument of governing rather than a restraint on government). Specific legal reform efforts cannot hope to address those framing arrangements and

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REV. 1062 (1974). For a contemporary criticism of the Trubek & Galanter article, see Robert B. Seidman, *The Lessons of Self-Estrangement: On the Methodology of Law and Development*, in 1 RESEARCH IN LAW AND SOCIOLOGY 1 (Rita James Simon ed., 1978). For more recent assessments of law and development, see, e.g., THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 157-87 (1999); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998); Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117 (1999). For discussions of law and development in the specific context of China, see, e.g., *Taming the Dragon: Can Legal Reform Foster Respect for Human Rights in China?: Hearing Before the Cong.-Exec. Comm'n on China*, 107th Cong. 26-29 (Comm'n Print 2002) (prepared statement of Jonathan Hecht, Deputy Director & Senior Research Fellow, The China Law Center, Yale Law School), available at <http://www.cecc.gov/pages/hearings/041102/index.php>; STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999); William P. Alford, *Exporting "The Pursuit of Happiness,"* 113 HARV. L. REV. 1677 (2000) (reviewing CAROTHERS, *supra*); William P. Alford, *A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction*, 11 CULTURAL DYNAMICS 193 (1999); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999); Stephenson, *supra* note 8.

<sup>27</sup> JONATHAN D. SPENCE, *TO CHANGE CHINA: WESTERN ADVISERS IN CHINA, 1620-1960* (1980).



understandings directly, but true legal reformers can neither ignore them nor accept them. Foreign experts invite their own disillusionment, and certainly look foolish, when they propose specific reforms that simply ignore or wish away the framing obstacles. The challenge is to find the targets of opportunity within the constraints — an effort that not all idealists find congenial.

3. The basic goal of foreign efforts should be to increase the capacity of reform-oriented individuals in China to be effective in their own work. They are the ones who will be bringing about the reform, not the foreign experts. The only way to be effective in this business is to work with the right Chinese counterparts, but figuring out who those are is not easy. None of this requires that the foreign expert take simply a reactive approach — Chinese reformers are definitely interested in normative and practical suggestions from foreigners as well as their technical knowledge — but it does mean that the appropriate mind set you should have is that you are assisting Chinese reformers in doing their work, not coming in as a great savior.

4. At least as a priority, foreign efforts to assist China's legal development should focus on legal institutions in China, not just substantive law. These key institutions include the courts, the administrative bureaucracies, the law schools, and the legal profession. The reason is that improvements in institutions can have beneficial effects cutting across many different fields of substantive law. A corollary is that efforts need to focus more on implementation of laws, not just the drafting of new laws. By focusing on the courts and the administrative bureaucracies, attention is focused more readily on how laws are implemented, not just how they are drafted. This also suggests that we need to focus not only on those official entities that make and apply the law, but also on those in China who can demand that the law serve them better — the slowly emerging civil society in China, including but not limited to universities, the practicing bar, associations, and the sometimes surprising Chinese media. Attention to the demand side of legal reform also makes it more likely that issues of social inequality will be addressed in the legal reform process.

5. The focus of this work is almost always incremental change, and one has to accept that. Over time, cumulative incremental changes may yield foundational change — for example, a transformation in the role of courts in Chinese society, or basic changes in the way that people think about law both within the legal culture and outside of it. But incremental change also has risks. We have seen this, for example, with the criminal procedure reforms of 1996. These amendments introduced seemingly valuable incremental reforms in the trial court's role in criminal cases. For example, prior to these amendments the trial court received a full "file" from the prosecutor, making it more likely that the trial court would prejudge many cases before the actual trial. To reduce prejudgment and to try to make the actual trial a more significant arena, the 1996 amendments limited what

was given to the court before trial. But there was an unintended consequence. Because the full "file" given to the court was made available to defendants a week before their trial, defendants received rather extensive notice of the prosecutor's evidence against them. By reducing what was in the file that went to the judge, the amendments also deprived defendants of that information; and because the 1996 reforms were only partial and incremental, and did not introduce an alternative system of pretrial discovery for defendants, defendants arguably ended up worse off than they had been prior to the reforms.

6. The modalities of the cooperative work are important. In-depth and long-term projects are far more valuable than one-shot conferences or "study tours." In-depth exchanges are necessary for the Chinese to gain more than a superficial understanding of foreign experience and to explore with foreign experts the relevance of the foreign experience for China. Similarly, for foreign experts to be truly useful, they must develop an understanding of the Chinese context so that they can shape their presentations to that context and address pivot points in Chinese debates; to do that also takes time. In-depth and long-term exchanges also build trust, another key element in this kind of cooperative work. Interactive discussion is far more valuable than lecturing and exchanging large amounts of written material, and creating real interaction requires both time and trust. In my experience, the most successful cooperative projects proceed on multiple fronts, including longer-term research visits so that some members of the Chinese team can develop real expertise; a series of workshops that allows the main matters to be explored more widely over time; and regular, informal exchanges among the project's leading figures.

7. The role of the U.S. government in such efforts is limited. Most of the actual cooperative law reform work is best done outside of the government for two reasons: First, much of the actual legal expertise that the Chinese want exists outside of our government. But more importantly, the U.S.-China government-to-government relationship is so volatile and affected by mutual wariness that I think Chinese counterparts will simply trust U.S. NGOs more and be more open with them, and projects with U.S. NGOs are less likely to be thrown off track if there are disruptions in the government-to-government relationship. This is not to argue against U.S. Government funding for such work, which is a practical necessity. But it does argue for the U.S. Government not to do the actual cooperative work itself and for it to let the people it funds do their work for the most part as independent actors.

8. This kind of cooperative work must be done in a spirit of multiple humilities. U.S. experts should remember that U.S. practices are not the only alternative that the Chinese are considering. The Chinese are interested in how we do it, of course, but they are also interested in how the Germans, Japanese, British, Singaporeans,

Hong Kongers and Taiwanese do it (among others).<sup>28</sup> And of course they are making reforms that have to fit the distinctive Chinese context. The best U.S. experts in this kind of work explain the *range of choices* open to the Chinese, admit shortcomings in our way of doing things as well as the advantages, and learn as much as possible about the Chinese context before giving advice.

9. We must accept uncertainties. Things are in great flux in China. There are reformers everywhere, and there are people trying to limit reforms everywhere as well. The boundaries of the possible are not set and are probably unknowable. The best people we work with in China are those who are very savvy about the possibilities, but are pushing the envelope, and who themselves sometimes do not know just how far the reforms can go. For some foreigners, this uncertainty can be frustrating, but for me it is sometimes the most exciting part of the work — watching our Chinese counterparts looking for their own targets of opportunity, testing the boundaries, taking chances, and on the very best days, sharing with us their own uncertainties and their own strategies.

10. The last lesson is probably the most important. We need to recognize that this is difficult and long-term work. To achieve true legal reform, even to approximate a minimum conception of the rule of law, and to build a public culture that values and supports it, is a truly vast task. If in the end it proves successful, it almost surely will take a long time; disillusionment is all but guaranteed if one looks for quick success. Hopefulness derives from the sense that changes that seem slow to a participant may in fact be rather rapid in the perspective of history — and China's changes in the last twenty-four years do seem rapid when viewed in historian's time. Thus, I have spoken here largely as an optimist. But no one should underestimate the complexities and difficulties of trying to advance legal reform in China. And the outcome of these efforts is by no means certain.

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<sup>28</sup> A variety of other governments in addition to the United States now support and fund programs and activities with China in the legal field, at times at financial levels that significantly exceed the U.S. Congress' recent appropriation, including: Australia, Canada, Denmark, the European Union, Germany, Norway, Sweden, and the United Kingdom. Hong Kong also has many legal exchanges with the mainland. In addition, international organizations such as the Asian Development Bank (ADB), United Nations Development Programme (UNDP), and World Bank have given financial support to such efforts, typically involving experts from a variety of different countries. Law schools in countries other than the United States also undertake activities and programs in China. For a listing of various U.S. entities undertaking programs and activities with China in the legal field, see Nat'l Comm. on U.S.-China Relations, *supra* note 22.

