

**Statement of
Gordon G. Chang
before the
U.S.-China Economic and Security Review Commission**

**China's Information Control Practices
and the Implications for the United States
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Chairwoman Cleveland, Chairman Fiedler, and distinguished members of the Commission:

It is a privilege to appear before you today, and I thank you for this opportunity.

My name is Gordon Guthrie Chang. I am a writer and live in Bedminster, New Jersey. I worked as a lawyer in Hong Kong from 1981-1991 and Shanghai from 1996-2001. Between these two periods, I frequently traveled to Hong Kong and China from California.

I am the author of *The Coming Collapse of China* (Random House, 2001) and *Nuclear Showdown: North Korea Takes On the World* (Random House, 2006). I am a Forbes.com columnist and write regularly about China.

Summary

China's has amended its State Secrets Law effective October 1. The amendments were issued about the same time as provisional regulations regarding the protection of information in the possession of state-owned enterprises and the government's white

paper on the control of the internet. As such, the new law is part of the party-state's broad-based effort to tighten control of information.

The amendments to the State Secrets Law centralize the authority to classify information as a state secret by providing that classification decisions will be made at higher levels of government.

The law in October will also provide for the declassification of information as secret after the passage of 10, 20, or 30 years. New language, clarifying existing law, requires internet service providers to stop the leak of state secrets. There is little change to the definition of what constitutes a state secret. In general, the new law will look like the existing one in broad outline.

The Chinese party-state, as seen in recent trials, has not respected its own laws in prosecutions for disclosures of state secrets. So the amendment of the law looks, at first glance, to be unnecessary and raises the question why the law was changed. There may be three reasons for doing so. First, the regime recognized that the Chinese people are increasingly taking law seriously and so it thought it must appear to do so as well. Second, Beijing amended the law because it realized it must be seen to be giving ground to the country's citizens, responding to popular opinion. Third, officials wanted to communicate to society the importance of keeping information secret.

The State Secrets Law affects American business in China by potentially criminalizing the gathering of ordinary business information. Beijing, in its prosecutions of employees of Rio Tinto, appeared to be willing to use this statute to obtain an advantage in commercial dealings. The lesson to the foreign business community is clear: the price for upsetting the Chinese central government is jail time for senior executives. Beijing's State Secrets Law is now a powerful weapon.

This unjustifiable use of the law is especially significant at a time when Beijing's leaders are developing a new economic model to replace Deng Xiaoping's policy of reform and opening up. President Hu Jintao is trying to undermine foreign business and reserve the domestic market for China's own enterprises. Unfortunately, Beijing is choosing to support its "national champions" by undermining foreign business.

The State Secrets Law can undermine American securities laws. Chinese enterprises that have listed securities in U.S. markets may decide not to disclose information, as required by American law, so as to avoid disclosing state secrets and thereby running afoul of China's broad statute.

Finally, the State Secrets Law poses a fundamental challenge to the American model of open governance.

Amendment of State Secrets Law

On October 1 of this year, the 61st anniversary of the founding of the People's Republic, amendments to China's State Secrets Law¹ come into effect. The new provisions—one additional chapter and 18 additional articles—clarify the procedures and requirements in existing law regarding the classification, handling, and declassification of information.

For example, Article 13 of the new law adopts a more-detailed procedure for classifying secrets. In general, the provision raises the level of government department that can determine what information is considered secret. For instance, only central or provincial-level organs and organs they authorize can classify a secret as “top confidential” whereas existing law contains no such restriction.

The new Article 15 contains a rule, not found in existing law, specifying the time periods in which “secrets” remain secret. Even “top confidential” secrets will lose their status as such in 30 years unless special provision is made. Less sensitive material generally will be declassified in 10 or 20 years.

The provision attracting the most publicity, Article 28, relates to the responsibility of “operators and service providers of the internet or any other public information network.” They must “immediately stop the transmission” of state secrets, “keep relevant records,” and report to public or state security organs or “other state protection administrative departments.” Although many consider these requirements new,² the existing Article 30, although not specifically referring to the internet, requires all persons to take “remedial action immediately” upon discovering a disclosure of state secrets.

Despite the amendments, the general outlines of the new law look like those of the existing one, which came into force May 1, 1989. The stated purpose of the law will remain unchanged: the law is supposed to “guard state secrets, protect state security and interests, and guarantee the smooth progress of reform and opening up and socialist construction.”

The key provision is the definition of “state secrets.” Both the existing and new laws define the term broadly. The official Xinhua News Agency has stated that “state secrets have a clearer definition in the amended law,”³ but the differences are insubstantial. Under the new law, “state secrets” include “matters concerning state security and interests that would, if leaked, damage state security and interests in the areas of politics, economy, national defense, and foreign affairs, among others” and which fall within seven categories. The old law, on the other hand, includes the same seven categories—with virtually identical language—but with somewhat broader introductory wording.

Significantly, the new law, like the existing one, states that secrets of political parties are eligible to be treated as secrets of the state. Of course, this provision is not surprising given that the People's Republic remains a one-party state.

Analysis

The initial question is whether the textual changes to the State Secrets Law have any significance. In a society where neither the Communist Party nor the government respects the rule of law, the fast—and definitive—answer is no. The Chinese party-state, unfortunately, does not feel it needs to meet the technical requirements of a statute to convict and imprison a defendant.

Not surprisingly, prosecutions in the People's Republic for state secret violations are noted for procedural and substantive unfairness. For instance, Shi Tao, a journalist in Hunan province, was detained, arrested, convicted, and sentenced to ten years in prison for sending to a New York-based website his notes of a Communist Party directive of media coverage of the 15th anniversary of the 1989 Tiananmen massacre. The finding of guilt rests on a retroactive classification of the document in question as a secret. The trial was marred by irregularities and conducted in private. Shi's attorney, Guo Guoting, lost his license to practice law for a year just before Shi's trial for no reason other than he chose to take on this politically charged case.

Another mockery of justice involved *New York Times* researcher Zhao Yan, who had been accused of leaking word of the retirement of Jiang Zemin from the Central Military Commission in 2004. After intense pressure from the White House, an intermediate court in Beijing in 2006 dropped a state-secrets charge and convicted Zhao of a lesser offense, fraud, in a secret trial conducted in violation of statutory safeguards. At his "trial," Mr. Zhao was not permitted to cross-examine prosecution witnesses or present any of his own. The conviction followed a series of unusual events, such as the taking of documents without permission or warrant from the *Times*'s Beijing offices by Chinese security officials.⁴

The Chinese party-state, in short, does what it wants in state-secret prosecutions. The question therefore arises: Why did the regime go to the bother of amending the State Secrets Law? There appear to be three reasons why it did so.

First, the regime realized that the Chinese people, despite everything, insist on taking their nation's law seriously. Although it may seem quixotic to us, *weiquan* lawyers make arguments based on the texts of statutes and regulations to keep their clients out of jail. Individuals will read, analyze, and seek to use laws for their own purposes, even when the chance of success is virtually nonexistent. Because the people take the law seriously, the regime must at least appear to do so as well.

Even though the people may believe the State Secrets Law has significance and the regime acts as if it does, we should never lose sight of the notion that this statute, like all other Chinese laws, does not have legitimacy. It was "enacted" by a rubber-stamp legislature, the National People's Congress, that was chosen in an undemocratic fashion. This body is, in sum, nothing more than a tool of a coercive state that itself lacks

legitimacy. In this sense, the nature of the single-party Chinese regime says just about all we really need to know about the State Secrets Law.

Second, the regime amended the law because it believed it must appear to give some ground to the country's citizens. It is significant that the central government, while generally strengthening its management of state secrets, portrays the amendments of the State Secrets Law as a liberalization. For example, Xinhua stated that the amendments were part of an effort to make government more visible. To this end, the official news agency cited Wang Xixin extensively. The Peking University Law School professor says, for instance, that the number of state secrets will decline as fewer government departments will have the power to hide information under the new law.⁵ This will, he maintains, eliminate "random classification." Borrowing one of Xinhua's favorite phrases, Wang noted the law will "help boost government transparency."

Wang's words not only are an effort to bolster the legitimacy of this particular law, but they also signal an increasing need for Beijing to respond to public opinion. If anything, China's people want to know more about government actions, and in various ways they have been pushing for more open governance. Chinese society is dynamic, changing faster than any other today. Beijing's leaders are acutely aware of these societal trends and, even as they tighten management of information, have to pretend they are liberalizing the law instead.

In this regard, the new Article 15, which contains declassification rules, could end up being significant. The provision, on its face, definitely liberalizes the law by imposing strict time limits on state secrecy status.

This article may, on first reading, look meaningless. Communist Party or government officials, to defend a prosecution for disclosure of a particular item of information, can always maintain they had previously extended the protection of that item before the general time limit had lapsed. It is most unlikely that senior leaders will ever allow a person to go unpunished for publishing, say, details regarding the mysterious plane-crash death of Mao's heir-apparent, Lin Biao, in 1971, although this sensitive incident occurred more than 30 years ago.

Nonetheless, officials have created a potential problem for themselves by introducing Article 15. Chinese people may try to use the provision to pry open archives, arguing that old material can no longer be "secret" and therefore should be obtainable pursuant to the Open Government Information regulations, which became effective on May 1, 2008. If government departments refuse to release materials—a safe bet in many instances—they could set the stage for confrontations with a newly assertive citizenry. This would not be the first time an attempt to create the appearance of liberalization spurred more calls for reform. Reform, simply stated, creates the demand for more of it, and as political scientists note, no reformer in history has been able to control the reform process once started.

Third, the Chinese regime probably chose to amend the State Secrets Law to communicate its priorities to Chinese society. Beijing will often enact a law or issue a regulation for the sole purpose of reminding officials, businesses, and citizens of the government's objectives at that moment. In some cases, especially where regulations are issued, new rules add little or nothing to existing substantive provisions.

The addition of new Article 28, for instance, indicates Beijing is especially concerned about the potential of the internet to spread information. The Chinese government did not need to add this special provision as a matter of substantive law. As noted, existing Article 30 is broader than the new measure. The State Council could have issued a regulation or a notice stating how it intended to enforce this provision. The amendment of the statute itself shows the party-state wanted to highlight its unease over forms of electronic communication.

Furthermore, the revision of the State Secrets Law seems to be part of a broader initiative to more effectively suppress information. Just before this statute was amended, the State-Owned Assets Supervision and Administration Commission issued Provisional Regulations on the Protection of Commercial Secrets for State-Owned Enterprises, which ensure the protection of state secrets in the possession of such businesses. These regulations, which took effect on issuance on March 25, provide that trade secrets can also be "state secrets."

And after the amendment of the State Secrets Law, the State Council's Information Office issued its white paper, "The Internet in China," on June 8. The document bases the central government's increasing censorship of the internet on, among other grounds, the need to protect state secrets.

These initiatives are indications that the Chinese party-state is turning inward, becoming more secretive and less confident. If there is one trend China watchers have observed during the rule of the so-called Fourth Generation leadership, it is the attempt of the Communist Party to increase political and social controls in a rapidly modernizing society. The effort to restrict information, embodied in the State Secrets Law, is indicative of this trend.

Effect on the United States

The State Secrets Law directly affects every American business operating in China. That, in short, is the lesson from China's successful prosecution of employees of Rio Tinto, the Anglo-Australian miner.

Last July, Chinese authorities detained four of them, including Stern Hu, the Shanghai-based general manager of the company's iron-ore division. Beijing alleged that Hu, a naturalized Australian citizen, and three Chinese citizens "stole Chinese state secrets for a foreign country." China never detailed the nature of this charge, but Foreign Ministry

spokesman Qin Gang said, soon after the detentions, that the employees “hurt China’s economic interests and economic security.” Then, *China Daily*, the country’s official English-language paper, reported that an unnamed “industry insider” claimed that Rio Tinto had bribed executives from all 16 Chinese steel mills that had been participating in drawn-out iron ore price negotiations.⁶

The detentions stunned the foreign business community. “What makes it so sensational is the combination of a highly publicized major commercial negotiation that has failed with the immediate arrest of a principal figure, raising the possible inference of retaliation,” said Jerome Cohen, the noted expert on the Chinese legal system.⁷

We may never know whether the retaliation theory is in fact correct, but it soon became conventional wisdom as observers analyzed contemporaneous developments. The four arrests, for instance, came soon after a round of the iron-ore price negotiations between China’s steel industry, on the one side, and Rio Tinto and other producers, on the other, ended without agreement. Moreover, Rio Tinto had also recently rejected Beijing’s attempt to take a big ownership stake in the miner. On its face, the arrest of the four employees looked like a bid to teach a foreign company—or perhaps all of them—a “very brutal point,” as one Australian journalist put it.⁸

Cohen has said the arrests were “not conventional.”⁹ Among the unusual aspects of the matter is that Hu Jintao, China’s president and the Communist Party’s general secretary, may have authorized the investigation leading to the four arrests.¹⁰ Last July, the Chinese Foreign Ministry denied Mr. Hu’s involvement in the case,¹¹ but the rumor gained currency because he had at the time—as he is now—been trying to recentralize the economy and impose discipline on important state enterprises, such as the steel mills that were buying iron ore from Rio Tinto.

Another explanation is that the arrests were part of an internal Communist Party struggle as senior leaders had been getting ready for the next leadership transition, scheduled to occur at the 18th Communist Party Congress in the fall of 2012. The theory was that the arrests of foreigners were a message to Chinese officials of what could happen to those not supporting Mr. Hu’s choices for new leadership slots.

Whatever the reason for the Rio Tinto prosecutions—and the reason is undoubtedly a “state secret”—Beijing chose to use the State Secrets Law in what was a messy commercial dispute that was not going favorably for the Chinese parties at the time. Because, as the March 25 Provisional Regulations confirm, secrets of commercial organizations can be “state secrets” and because state enterprises dominate the Chinese economy, Beijing has potentially criminalized the gathering of most commercial information in China.

The new Article 10, like existing Article 9, divides secrets into three categories. The least sensitive information—termed “confidential”—refers to “ordinary state secrets,” the disclosure of which would “cause harm to state security and interests.” Because the Communist Party considers almost everything relevant to state security, most commercial

information, such as the iron ore purchase requirements of a steel mill for a particular month, could be considered a common state secret.

The consequences of criminalization of information gathering could be far reaching. The Rio Tinto prosecutions, even in the face of international and domestic criticism, show that the central government will not be afraid to use the State Secrets Law to obtain an advantage in commercial transactions. There is nothing like the prospect of years in a Chinese prison to weaken the resolve of any foreign executive to obtain commercially useful information.

This intimidation factor, at this moment, is real. Stern Hu, the senior Rio Tinto manager, and his three co-defendants, are now serving long terms. In what appears to be a negotiated arrangement, Hu received a ten-year sentence for receiving bribes and infringing secrets. The other three accepted terms of between seven to fourteen years. The lesson to others is clear: the price for upsetting the Chinese central government is jail time. Beijing's weapon of choice, it now appears, is the State Secrets Law.

It is especially noteworthy that Beijing has amended the law at the same time the country is developing a new economic model. Senior leaders, led by Hu Jintao, in the last half of this decade have been moving away from Deng Xiaoping's policy of *gaige kaifang*—reform and opening up—to a policy of reserving the domestic market for domestic producers, and especially the so-called “national champions.” China, these days, does not think it needs foreign business that much.

Chinese officials are also worried about the “loss of economic sovereignty.” The perception is that foreigners have captured “excessive” market shares and own too much technology. There is also a fear of an over reliance on foreign direct investment. In this environment, Beijing is not hesitant to undermine multinationals, and the State Secrets Law is apparently one of its main tools to help domestic enterprises at home.

Moreover, the State Secrets Law has a potential reach beyond China. There are over 210 Chinese enterprises whose shares are listed in the United States. Those enterprises, by virtue of those listings, have disclosure obligations. There is, therefore, a potential conflict for them: U.S. securities law might require them to disclose information the Chinese government considers a secret of the state.

When I practiced law in Asia, it became apparent to me that businesses, when faced with conflicting legal requirements from different jurisdictions, generally chose to follow the law of their home country and violate the conflicting law of other nations. This is not to say Chinese enterprises will always follow this pattern, but those enterprises are invariably run by managers chosen by the Communist Party. Therefore, it would be most unlikely they would anger superiors by complying with U.S. laws and violating the State Secrets Law.

There is one final point to be noted. The State Secrets Law poses a fundamental challenge to the United States, a problem far more serious than incomplete disclosure to

investors. The new law legitimizes the Chinese party-state's management and suppression of information. Beijing's attitudes may not affect the United States, but they may do so in societies where notions of governance have not been as well institutionalized as they are here. China's authoritarianism is becoming a global model, and it is a model in conflict with the values that Americans hold dear.

¹ The formal name of the statute is Law of the People's Republic of China on Guarding State Secrets.

² For instance, Beijing-based human rights lawyer Mo Shaoping, speaking of new Article 28, said this: "Such regulation will leave users with no secrets at all, since the service providers have no means to resist the police." Gillian Wong, "China Wants Telecom Companies to Inform on Clients," Associated Press, April 27, 2010. Mo's use of the future tense is somewhat misleading because users have no privacy under the existing Article 30, which states in its entirety: "State functionaries and other citizens should, upon discovering that state secrets have been divulged or are in danger of being divulged, take remedial action immediately and promptly report the matter to the state organs and units concerned, which shall, upon receiving such reports, deal with the matter without delay."

³ Li Huizi and Cheng Zhuo, "China Narrows Definition of 'State Secrets' to Boost Gov't Transparency," Xinhua News Agency, April 29, 2010.

⁴ See Jim Yardley and Joseph Kahn, "China Gives Times Researcher 3 Years," *New York Times*, August 25, 2006.

⁵ Li Huizi and Cheng Zhuo, "China Narrows Definition of 'State Secrets' to Boost Gov't Transparency," Xinhua News Agency, April 29, 2010.

⁶ Zhang Qi and Tong Hao, "'Bribery Is Widespread' in Rio Case," *China Daily*, July 15, 2009.

⁷ James T. Areddy, "Rio Tinto Case Prompts Questions for Foreign Businesses in China," *Wall Street Journal*, July 9, 2009.

⁸ Andrew Main, "All Losers As Australia Hits China's Brick Wall," *Australian* (Sydney), July 14, 2009.

⁹ James T. Areddy, "Rio Tinto Case Prompts Questions for Foreign Businesses in China," *Wall Street Journal*, July 9, 2009.

¹⁰ See, e.g., Rob Taylor and Lucy Hornby, "China's Hu Endorsed Rio Arrests, Report Says," Reuters, July 12, 2009.

¹¹ Stephen McDonnell and Alexandra Kirk, "China Denies President Authorised Spy Probe," ABC News Online, July 14, 2009.