

HEARING OF THE CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

"POLITICAL PRISONERS IN CHINA: TRENDS AND IMPLICATIONS FOR U.S. POLICY"

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Dirksen Senate Office Building, Room 628

INTRODUCTORY STATEMENT OF JEROME A. COHEN

**Professor of Law and Co-Director, US-Asia Law Institute, New York University; Adjunct Senior
Fellow for Asia, Council on Foreign Relations**

Chairman Dorgan and Co-Chairman Levin:

I am grateful for the opportunity to participate in this Hearing as well as for the Commission's invaluable contributions to American understanding of China.

Today's topic—"Political Prisoners in China: Trends and Implications for U.S. Policy"—is as broad as it is important. Because introductory statements are necessarily brief, I will only emphasize several significant points and am confident that my distinguished colleagues will provide more comprehensive coverage.

WHAT IS "POLITICAL"?

The Chinese government generally denies that any of its criminal prosecutions are "political". People are supposedly convicted for violating specific provisions of the Criminal Law, not for their political conduct. Yet some provisions of the Law are so vague and all-encompassing that it is a simple matter to charge democratic activists and a huge range of peaceful protesters with their violation, especially since the courts are under Communist Party control.

For example, for trying to exercise the freedoms set forth in China's Constitution, many people have been convicted of "endangering state security". We know names such as Liu Xiaobo and Hu Jia, but the non-transparency of China prevents an accurate accounting. The statistics we do have, however, indicate a troubling trend.

Many people who initially had no interest in political reform became "political" offenders when the government suppressed their efforts to protest property deprivations, labor abuses or religious restrictions. Even lawyers who were not originally "political" have been sent to prison for too effectively representing protesters, activists and other controversial clients.

But "political" can also embrace many other types of cases. I am sure that the American petroleum geologist Xue Feng, who last month was sentenced to eight years in prison for "gathering intelligence" and "unlawfully sending abroad state secrets", thought he was engaging in commercial activity when he helped his employer, a leading U.S. oil consulting company, purchase a database regarding oil resources.

Yet his case became "political" because of its inevitable impact on Sino-American relations and international business.

To take a very different situation, China's leadership politics was reportedly involved in the recent prosecutions of organized crime figures and officials who allegedly corrupted the city of Chongqing.

There are multiple reasons why the Chinese call their system for administering justice a "political-legal" system.

POLITICAL TRIALS ARE MARRED BY EVEN MORE UNFAIRNESS THAN NON-POLITICAL ONES

Despite the dedicated law reform efforts of many Chinese officials, judges, lawyers and scholars, criminal justice is still the weakest link in the country's burgeoning legal system. Gradually, some improvements in the Criminal Procedure Law and Criminal Law continue to be made, even in China's current very conservative political climate. But in non-political cases as well as political ones, law enforcement agencies frequently violate their country's laws or interpret them in ways that defeat legislative purposes.

Justice in non-political cases is often marred by arbitrary arrest, illegal search, extended incommunicado detention, torture and coerced confession, barriers against defense lawyers who seek to meet their detained clients, gather evidence and learn the prosecution's case, and failure to require prosecution witnesses to come to court or to allow defense witnesses to appear. There are also the distorting effects of widespread corruption and protean "guanxi", the networks of personal relationships that are a dominant feature of Chinese life.

Political trials feature the same abuses plus additional ones. Often they are closed to all but defense counsel, and even when "open" they are restricted to selected auditors. Lawyers who wage a vigorous defense at trial risk sanctions against themselves, including disbarment and prosecution. Court leaders rather than trial judges usually make "sensitive" decisions, and the local Party political-committee generally controls the entire process.

WHO ARE "PRISONERS"?

Punishment of political offenders is not confined to criminal cases. Political offenders are often severely punished outside the formal criminal justice system. Police do not need to ask any prosecutor or judge for approval before they sentence someone to up to three years of "reeducation through labor" or subject them to similar supposedly "non-criminal" sanctions.

Persistent critics and petitioners with legitimate grievances regularly suffer even less formal but harsh punishments. Some are committed to mental hospitals, many more to notorious "black jails". Moreover, many rights activists who nominally are "free" actually have their freedoms denied by low-visibility police harassment and surveillance that continue without end. Some civil liberties lawyers avoid prison but lose their right to practice law. Political offenders who have served their prison sentence suffer further constraints after release if they have also been sentenced to "deprivation of political rights" for a period. Yet even after that deprivation has expired, they continue to be restricted, often confined to their home, without any legal authority or time limit, as is the case with unfrocked Shanghai lawyer Zheng Enchong. In effect they are "prisoners" for life. I hope this will not be the fate of the blind "barefoot lawyer" Chen Guangcheng when his sentence of four years and three months is completed in September. And at least one famous lawyer, Gao Zhisheng, after disbarment, torture and a prison term, has mysteriously been "disappeared" by the authorities, perhaps forever.

The many Chinese democratic activists who live outside their country and are not allowed to return are also "prisoners" in a different way because they are excluded from their own society.

So the definition of "political prisoners" is broad and complicated.

FOREIGNERS ARE NOT IMMUNE TO THIS UNFAIR SYSTEM, ESPECIALLY IN "POLITICAL" CASES

In announcing this Hearing, the Commission recognized the impact that criminal injustice can have on international commercial cooperation with China. Foreign business personnel as well as other foreigners are subject to the same inadequacies in China's criminal justice legislation as the Chinese people and to many of the same abuses that occur in implementing the laws, especially if their case becomes "political" for one reason or other.

Although Americans and many other foreigners have some additional protections under bilateral and multilateral consular agreements that their governments have concluded with China, those agreements are themselves imperfect and are sometimes ignored in practice by the Chinese government.

That is the significance of the now highly-politicized case of American citizen Xue Feng, which is currently on appeal. It illustrates not only some of the problems experienced by Chinese criminal defendants but also the operation of the U.S.-China Consular Convention that is supposed to alleviate some of those problems when Americans run afoul of Chinese law. I attach, as Appendix 1, an "op-ed" article that I recently published on the Xue case.

SHOULD THE U.S.-CHINA CONSULAR CONVENTION BE REVISED TO BETTER PROTECT INDIVIDUALS?

The Xue case shows the need to consider amending the Convention in at least four ways that would enhance the protection of Americans who fall into the hands of China's law enforcers:

1. Reconfirm that the host state is required to notify the sending state whenever one of the latter's nationals is placed under "any form of detention", as the Convention now puts it, by spelling out the various forms of detention that China has imposed on Americans over the thirty years of the Convention's life, so there can be no excuse for failure to notify;
2. Reduce the maximum time allowed between detention and notification to consular officials, and between notification and the first consular visit;
3. Clarify that consular officials and the detainee have a right to discuss any matters including the details of the detainee's case; and
4. Confirm that consular officials have the right to attend defendant's trial even if the trial is "closed" to the public and family.

Of course, the protection of individual rights is not the only factor to be considered when contemplating revision of the Convention. Under the Convention, Chinese nationals and officials are entitled to reciprocal consular rights in the U.S., and some U.S. federal or state agencies may object to the suggested proposals for enhancing individual rights because of their impact on the handling of criminal cases against Chinese in this country. Moreover, the Chinese government will have its own ideas about whether and how to revise the Convention.

The Xue case revealed the need to improve one aspect of U.S. consular assistance to Americans detained in China. From their first visit with Xue, he reportedly asked consular officials to make his case known to

the public. Although able and conscientious, they declined to do so, because his wife wished to keep the matter confidential. Thus, for two years Xue lost the potential benefits that publicity might have brought him. In future cases, our consular officials should honor the detainee's wishes in this respect unless there is strong reason to doubt his mental stability.

One additional benefit of seeking renewed U.S. government attention to consular issues with China is that it will remind many members of the Executive Branch and the Congress, not to mention the American people, of the appalling record of both our federal and state governments in complying with the multilateral and bilateral consular commitments we have made to many countries. The long-standing, irresponsible U.S. failures to notify foreign governments of their nationals' detentions, and foreign detainees of their rights to contact their governments, even in capital cases, place us in a poor position to ask for compliance by other countries. Although the U.S. government has taken steps to rectify this stupefying contempt for international agreements and international law, the topic deserves detailed Congressional and public scrutiny. I attach as Appendix 2 to these remarks an "op-ed" article that I will publish tomorrow about the US-China Consular Convention.

"POLITICAL PRISONERS" AND THE OFFICIAL US-CHINA HUMAN RIGHTS DIALOGUES

It is good news that the Obama and Hu Jintao administrations have renewed the official bilateral human rights dialogue and agreed to revive the official "experts' dialogue". It is regrettable that these meetings have often been postponed and in any event proceed at a glacial pace inappropriate to the urgency of the problems. Like discussions that other Western governments have conducted with China on human rights, these discussions have been generally disappointing, at least to most outside observers. Perhaps greater transparency might give us a more favorable view, but I doubt it. I am glad that the Department of State is earnestly seeking new methods of investing these dialogues with greater significance. Heaven is wonderful, but the problem is how to get there!

I believe that both official dialogues should take place every quarter. The traditional desultory, and often interrupted, pace, has to be quickened. Moreover, joint committees should be established on various important topics, including those we discuss today, and they should operate on a continuing basis and prepare reports for advance submission to participants in the quarterly meetings. Although the Chinese side shies away from discussion of concrete cases, analysis of actual cases illuminates human rights problems more than consideration of abstract principles.

Higher level, responsible leaders should take part in these meetings, not merely to symbolize that the governments take these matters seriously but also to bring the matters to the attention, and increase the understanding, of the highest leaders and their staff, those who make decisions.

Is it too much to hope that, on the Chinese side, one quarterly meeting might involve the leader of the Central Party Political-Legal Committee, usually a member of the Politburo Standing Committee, or one of his key deputies? After all, they really run China's legal system.

Is it unreasonable to expect the participation of the President of the Supreme People's Court in another quarterly session and of the Procurator-General and the Minister of Justice in other sessions?

Of course, the U.S. would have to produce their counterparts, and in a meaningful way. But aren't the human rights of 1.4 billion Chinese and 300 million Americans worth a higher priority than either government has given them to date?

Thank you for the opportunity to present a few thoughts. I look forward to the statements of the other panelists and our discussion with the Commission.