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**Changes in the Legal System
of the People's Republic of China
and the Projected Impact on
National Security of
the United States**

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ABSTRACT

TITLE: Changes in the Legal System of the People's Republic of China and the Projected Impact on the National Security of the United States.

AUTHOR: Paul C. Kelbaugh

PURPOSE: To evaluate the history, structure and evolution of the Chinese legal system and determine a range of United States national security strategy options to influence continued developments in China.

BRIEF SUMMARY: There are significant similarities and stark differences between East and West in their respective approaches to law and its purpose in the society. It is not enough to merely understand the differences between the two approaches to the law and its application to diverse societies. It is more important to realize the legal system of the People's Republic of China (PRC) is slowly but significantly changing. These changes are subject to those influences which can impact upon other parts of the Chinese government and economic structure. The United States has the opportunity through careful application of national strategy to influence these changes in the law. This paper offers a brief overview of the history of the Chinese legal system, its place in the Chinese governmental organization, and the differences between the Chinese and Western concepts of "law". Against this background, the fundamental issues of Chinese involvement in joint ventures with United States companies and the Chinese developments in the area of human rights are discussed from a "legalist" approach. Armed with a basic understanding of the Chinese legal system and the theories upon which it is based, consideration is given to how United States national strategy options may be pursued relating to the People's Republic of China so as to develop an effective United States policy.

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Introduction

The court chamber of the United States Supreme Court is steeped in symbolism and tradition. Every chair, every bench and every table is placed with a reason and purpose. The courtroom which seats the Justices reflects over two hundred years of continuity. Even the entrance and departure by the nine Justices to or from the Supreme Court bench is done in keeping with strict tradition and procedure. As the Supreme Court Justices are seated at the front of the court, they are able to look upward and observe three masonry frieze works banding the room at ceiling level. To their viewing left, the frieze contains carvings of world figures who have developed the principles of law and order. It is worthy of note that a prominent figure in the frieze, gazing down upon the Justices, is the visage of Confucius. East meets West, even in the highest court in the United States of America.

There are significant similarities and stark differences between East and West in their respective approaches to law and its purpose in the society. However, fundamental legal concepts such as natural law, equity, civil and human rights and responsibilities are evident in both. It is not enough to merely understand the differences between the two approaches to the law and its application to the lives of men. It is more important to realize the legal system of the People's Republic of China (PRC) is slowly but significantly changing. These changes are subject to those influences which can impact upon other parts of the Chinese government and economic structure. The United States has the opportunity through careful application of national strategy to influence these

changes in the law. In turn, changes in the legal system of China will influence the direction China takes in the areas of world economics and human rights for the next twenty years.

This paper will offer a brief overview of the history of the Chinese legal system, its place in the Chinese governmental organization, and the differences between the Chinese and Western concepts of "law". Against this background, the fundamental issues of Chinese involvement in joint ventures with United States companies and the Chinese developments in the area of human rights will be explored from a "legalist" approach. Armed with a basic understanding of the Chinese legal system and the theories upon which it is based, consideration will be given to how United States national strategy options may be pursued relating to the People's Republic of China so as to develop an effective United States policy.

In the National Military Strategy of the United States January, 1992, four national interests and objectives are established for the 1990's:

- Survival of U.S. as a free nation
- Healthy and growing U.S. economy
- Healthy relations with allies and friendly nations
- Stable and secure world where, inter alia, human rights flourish¹

For purposes of review and comment, this paper will assess the range of these national strategy objectives in two significant categories as specifically applied to the People's Republic of China:

- International Commerce/Economic Relations with China
- Human Rights in China

I. Philosophy of the Chinese Legal System

China's legal system was derived from renzhi, the rule of men.² Simply put,

civilized men will know what is right. In this system, there is no need for extensive volumes of detailed laws. For millennia, emperors and warlords did not make written laws available to the governed for reference and reading. In Chinese society, the leaders hold rights that flow to that ruler as an unquestioned grant. Under traditional Confucian terms, a ruler should govern by virtue, rather than strict tenants of law.³ To resort to "law" is to admit to a breakdown in the system. Confucian philosophy suggests that man is basically good or he is capable of being educated to act in a good and gentle way. To be effective in this context, all laws must follow the moral order of society.⁴ This is not to suggest there is no tradition of written laws in China. To the contrary, some regions had established volumes of applicable rules which had to be followed with great specificity. But these usually were collections of tribal customs and formalities reduce to writing but not disseminated or made available to those governed by the rules. Tribal leaders or village elders "knew" which laws should be applied. In turn, these writings could not be used to build expanded interpretations of legal rights through any tradition of adversarial advocacy. The legal system which developed under such a forced structure could best be referred to as "Confucian legalism".

As a result, historically the Chinese have focused little attention on courts. Instead, they used peer group sanctions and committee reviews under a derivative concept of Confucian "striving to know what is right". It is inherent in the Chinese culture that the way to get a person to behave is by on-going education and indoctrination instead of rules and laws stating what is forbidden.⁵ There is also an aversion to settling disputes through adversarial conflict. Litigation is perceived as disrupting the social harmony. ⁶

The conflict with Western values and training becomes clear. By Judeo-Christian

heritage, Western values have less faith in the goodness of man. Western laws restrain and bound. This has resulted in a Western legal system based on the fundamental concept that the law exists to tell people what not to do.⁷ The equivalent school of thought in the Chinese culture is the order of fa or fazhi, the rule of law.⁸ International business dealings required more than the "right" men to be in control of China. Instead, the parties to international economic and contractual relations need the security that comes beyond "men" whereby the duties and responsibilities of all parties are clearly defined without ambiguity. All parties are protected by written and detailed language which puts all parties on notice of what each must do and what consequences will occur in the event of a breach of duty.

The legal profession in China is unique and subject to many systemic conflicts. To understand the differences in the application of a concept of "law" between the Peoples Republic of China and the West, one should only consider the typical American and Chinese citizen, each standing in a large stream. It is easy to perceive that the Westerner would look downstream to see where the water is going. The Chinese citizen would turn to look upstream to see from where the water is coming.⁹

In all of China, the total number of volumes of statutory materials, judicial decisions, treaties and legal codes dating from 1949 would not fill a small bookcase.¹⁰ For instance, the typical Chinese Lawyer's library of national laws would consist of two 400 page volumes containing all the laws, amendments and resolutions approved by the National Peoples Congress (NPC) from 1979 to the present.¹¹

Lawyers licensed prior to 1949 were considered "dregs of society or reactionaries."¹² By 1956, only 2100 full time lawyers had been recertified or licensed by the Chinese government.¹³ In 1978, the United States employed 400,000

lawyers against a national population of 200 million people. By contrast, China had 3,500 lawyers for 800 million people.¹⁴ Most important, until 1988, all lawyers in China were, by definition, government employees, called "state legal workers". They are expected to serve the state, the party and the good of the people rather than individual clients.¹⁵ It has only been in the last three years that Chinese lawyers have been allowed to enter what is commonly referred to in the West as "private practice". Even these Chinese "private practice" lawyers are limited to involvement with trade issues and working on the contracts associated with joint economic ventures. Some pundits in the West might speculate that China is better off for having fewer lawyers. Indeed, rather than follow Shakespeare's advice to first kill the lawyers, China is in position to have fewer with whom to deal.¹⁶

II. Post-1949 Chinese Government Influence on the Law

In February, 1949, the Chinese Communist Party issued a directive abolishing "The Complete Book of Six Codes".¹⁷ This was the whole body of laws, constitution, criminal code, civil code, commercial laws, code of civil procedure and the code of criminal procedure. A Supreme People's Court replaced it and "people's courts" were established to punish criminals, settle disputes and to spread propaganda. By comparison, Western law is based on the "common law" which has developed and matured over the last 400 years. It assumes that there is a collection of court decisions which have evolved based on certain common legal principles. In turn, these Western court decisions are controlling on the subsequent cases which might occur in the future which contain a similar fact pattern. However, lacking a foundation of "stare decisis", or prior case law, the Chinese courts had the widest latitude in deciding cases.

It must also be understood that the Chinese government system evolved with no concept of separation of powers and is therefore difficult to fathom by Western standards. The four elements of the Chinese government structure are:

- Communist Party
- Legislature
- Executive
- Judiciary. ¹⁸

The political power structure of the PRC was most recently established by the twelfth CCP Congress held in late 1982. The supreme body is the Communist Party and its Central Committee. All the other elements of government are responsive to and held accountable by the Communist Party. The legislature is composed of the "National People's Congress" and "The Congress of the Communist Party." Deputies to the People's Congress are elected at the provincial level and from the Army and have 3,500 members. This is the highest legislative body in China. However, it is still subordinate to the Communist Party. The chief executive of China is the Premier and technically is responsible to the Communist Party and the National People's Congress. ¹⁹

The Chinese judiciary is headed by the Supreme People's Court which is responsible to the National People's Congress and the Communist Party. There are also assorted provincial and local courts throughout the country.²⁰ Clearly, the concept of separation of power and "checks and balances" does not apply in the Chinese government structure. The Communist Party is supreme to all three traditional branches. As such, the courts exist as a subset of the legislature and the Communist Party.²¹ This is a fundamental concept of the Maoist theory of the judiciary as a weapon of the state. The most immediate manifestation of this hierarchy is to acknowledge that the courts in China carefully consider the political aspects of cases. Such a bias of the judiciary is not

comprehensible by Western standards.

III. China and the West: International Commerce and Joint Ventures

From the time of Marco Polo, the West has always wanted to trade and engage in business collaborations with China. Actually, the first documented trade between the United States and China occurred in 1784 when the American merchant ship "Empress of China" sailed from New York harbor to Canton and unloaded furs, wool and ginseng in exchange for Chinese teas, silk and porcelain.²² These trades were generally one-sided and not highly desired by the Chinese until foreign traders began bringing in opium. The industrial revolution generated manufactured goods which were needed by the Chinese, but internal revolution and a general distrust of the abusive foreign capitalists minimized the consumption. In the mid-nineteenth century, the government of China was required to sign treaties granting foreign (read: capitalist) control in Shanghai and Tianjin²³. Ironically, people in these areas were actually above the law of the government of China. A special privileged social group developed in these areas, called compradores. These compradores made their wealth from dealing with the foreign capitalists and were perceived as having turned their back on the collective well-being of China.

The Chinese view of the history of imperialism states that in 1900, troops of the Western powers destroyed the town of Tanggu (population 50,000), reduced the population of Tianjin from one million to 100,000 and killed thousands of citizens of Beijing.²⁴ Chinese students are taught these atrocities were committed in the name of imperialism.

Given these and similar experiences with foreigners, there understandably had

been a reluctance by the Chinese people to offer any protected rights or contracts terms to foreign visitors or investors. However, in the early 1970's, a handful of American businesses expanded their contacts in China in hopes of a breakthrough. The United States political climate had changed and President Richard Nixon authorized overtures to "open" China to the United States. The Chinese referred to these contacts as: Tong chuang yi meng²⁵ which loosely translates as "same bed, different dreams." Chinese trade with the United States formally resumed after Nixon's 1972 visit and diplomatic relations with the European Community were finally opened in September 1975²⁶. Negotiations for complete imported plants, machinery, equipment, technology and services were frenetic. Private enterprises throughout the West had great aspirations of long term economic deals with China.

The period of Chinese socialist modernization commenced in 1978 when the Third Plenum of the Eleventh Communist Party Congress initiated a policy of reform and openings toward the west. The Central Committee of the Chinese Communist Party set up the "Four Modernizations." ²⁷ Of these goals, the most important was the desire to reach technological parity with the West by the year 2,000. In the Chinese language, the phrase jishu yinjin, or "technology introduction from the outside", became a well recognized phrase.²⁸ A related phrase, jishu gaizao refers to a technological transformation.²⁹ The government quickly realized there were significant deficiencies in the Chinese legal system which would impede these modernizations and which would seriously delay the flow of the much valued technology into China from the West. China's leaders understood they would need a relatively long period of political stability in China and in its dealings with world trade partners to concentrate on jishu gaizao. It then became necessary to consider the implementation of new laws which would assist global

business relationships.³⁰

In February 1979, claiming economic necessity, China suspended \$2 billion in contracts for Japanese equipment and delayed in concluding contracts with assorted European suppliers.³¹ There was no Chinese law to protect the foreign parties to these "contracts". The failure of an instrument to protect foreign business ventures became evident. Westerners wanted security in detailed contracts, spelling out what would be done and how disputes would be resolved. In China, rules were prone to change without public announcement or publication.³² The Chinese believed in guanxi (connections) as a way of rewarding old friends. None of these was conducive to formal contract terms and agreements.

Dealing with the west offered access for the Chinese to technology, modern equipment and complex machinery. The leadership knew these were all crucial to developing China's economy and dealing with the needs of the people. However, Western cultures expect binding documents which clearly detail the responsibilities of the parties to the agreement. As pointed out by Arlene Wilson, an international trade specialist with the Congressional Research Service, "The Chinese sometimes interpreted legal contracts as non-binding, and did not always permit foreign investors to make personnel decisions."³³ This was all part of a Chinese mentality referred to as "The Middle Kingdom Complex", which is best typified as a Chinese superiority attitude and disregard for the legal rights of business counterparts³⁴. The usual scenario involved the Chinese leaders giving speeches about the mutual benefits to both parties of an economic venture while at the same time disregarding the rights of the opposing parties.³⁵ The end result was that the initial euphoria of having the opportunity to actually deal with the Chinese on business ventures was past, and unless the government of China took

immediate action, there would be no jishu yinjin.

IV. Chinese Laws In Support of Joint Ventures

On July 1, 1979, the Second Session of the Fifth National People's Congress, Second Session, adopted "The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investments". This momentous law marked the point in time when the Western need for legal protection and rights came home to Chinese soil. This law was the first time the specific property rights of foreign investors doing business in the PRC were codified. It was not enough that the parties would be trusted to "do the right thing." West had met East and the East agreed to the needs of Western culture to be assured that foreign investments would be strictly protected. These laws went into effect on 1 January 1980. Indeed, the Western response to the protection of this law and others that followed to protect economic relationships was measurable. Foreign investment contracts in China totaled 1.7 billion in 1980, but had more than tripled by 1989.³⁶

The government of China finally established formal written guidelines for foreign joint ventures in 1981. These statements of Chinese policy stated:

"Joint ventures serve to facilitate the modernization of China and to improve the standard of living for the people." Priorities for joint ventures included:

- light industries such as textiles, food processing and electronics
- heavy industries such as machinery, equipment and chemicals
- agriculture, and
- tourist industry.³⁷

Armed with a blueprint of what the Chinese government wanted to immediately pursue, Western businesses began submitting joint venture proposals. The first three

economic joint ventures to be approved were, not surprisingly, tourism related. Tourism was the vanguard of the foreign interest in China and was relatively easy to start-up and implement. These ventures involved the Great Wall Hotel, the Jiango Hotel and an airline food catering service.³⁸ Many of the other early joint ventures with China were Natural Resources exploitation and large plant manufacturing opportunities: ARCO oil exploration (1981), Chevron oil exploration (1984), McDonnell Douglas coproduction of twenty-six jet airplanes (1981), American Motors Jeep vehicles (1983)³⁹, American Occidental Petroleum coal mining (1985), Babcock & Wilcox boiler production (1986), American Athletic Shoe Company (1982) and Pepsico (1985).

V. The Beijing Jeep Joint Venture

One of the most popular vehicles of World War II was the "Jeep". In the post-WWII era, American Motors (AMC) had redesigned it for mass marketing and had limited success throughout the world. American Motors was looking for a new market of consumers for the Jeep and was interested in the potential of the nearly one billion people in China. In many ways, the Beijing Jeep Joint Venture Between the PRC and AMC became a textbook case for all the technology related joint ventures of the 1980's. It typified the problems and issues which occurred between East and West as cultures with different legal backgrounds attempted to engage in high-stakes economic activities.

In the Autumn of 1978, AMC made the first overture to China. The AMC managers were given a tour of the Beijing Auto Works, and on January 26, 1979, American Motors and the Chinese government executed a memorandum of understanding to pursue a joint economic venture to manufacture vehicles.⁴⁰ Interestingly, this agreement was not

reduced to a contract. While AMC wanted to produce 40,000 Jeep Cherokees per year at the Beijing plant, this figure was never agreed to by the Chinese. American Motors put up \$16 million in capital and the Chinese provided the Beijing Autoworks plant which was desperately in need of retooling and repair. The Beijing factory was to be used to produce the older Jeep, called the "BJ212". Both the Chinese government and the leadership of American Motors were in agreement that a new vehicle should be produced at some point in the future, but there was no concurrence as to what that vehicle should be. The Chinese wanted a completely retooled vehicle and had expressed an interest in a four door convertible, mostly for export. AMC, which was producing the Jeep Cherokee in quantities in the United States, wanted to produce the two door (hard top) Cherokee at the Beijing plant to be marketed internally in China.⁴¹ Thus, without a formal contract, uncertainty as to what the long term production plan was to be, confusion as to what parts could be imported and no agreement regarding how funding was to be handled, AMC proudly proclaimed it had a contract to proceed with a joint economic venture in China.

Many felt the true omen of the joint venture was reflected in the necessity to push the first Jeep Cherokee to be produced at the Beijing Jeep plant off the assembly line because it was not assembled correctly and would not move under its own power. East had met West and the resulting economic venture was about to be a failure of momentous proportions. Suddenly, AMC realized the gravity of a foreign venture in which the terms were not properly reduced to binding contract language. Labor disharmony was a severe cultural problem as Western trained AMC plant managers attempted to overcome such obstacles as xixi - small cots located in all the plant offices for afternoon naps. Worker quality was substandard. The average Beijing Jeep plant worker was working an average 4.5 to 5 hours per day.⁴² Management was

prohibited from firing anyone. The plant was overstaffed in order to meet even minimal assembly needs. Of the 4,000 workers at the plant, 300 were party members and not directly involved in the assembly process.⁴³

Even currency was an obstacle. China had two forms of currency. The internal PRC currency, called renminbi, was not convertible to foreign "hard" currency. The Chinese use FECs, or foreign exchange certificates, for this purpose. Any joint venture needs to be able to use the foreign exchange to make support purchases. Usually, this is obtained through sales in the host country market and then this currency is converted to be used to buy imported parts and pay foreign dividends and expenses. Expenses within the host country are traditionally paid in the internal currency of the host country.

However, in the Beijing Jeep joint economic venture, none of the manufactured Jeeps were being sold in China. China had wanted the Jeeps to be manufactured as a foreign export item. AMC had not realized this "not so subtle" distinction in their hurry to attempt to market motor vehicles in a country with one billion potential consumers. Unfortunately, AMC was already successfully marketing and selling Jeeps in the rest of the world independent of the Beijing Jeep venture. Tempers flared as Japanese vehicles continued to flow into China at the same time none of the domestically produced Jeeps was being sold. By 1985, the Beijing Jeep economic joint venture ran out of money.

To save face as the negotiations regarding the future of the venture continued, the government of China made a token, but very symbolic purchase of 450 Jeeps. Even this was a short term act inasmuch as the money did not flow to AMC. Again, in the absence of a legally binding contract as would have been routine in a Western transaction, the more nebulous "agreement" was unclear as to whether the payment was to be made in FECs or

the internal currency. To avoid total failure, in May, 1986 the government of China guaranteed production of 12,500 Jeep Cherokees at the Beijing plant. A month later, Chinese Premier Zhao Ziyang had to formally declare that China would honor its contractual obligations.

The Beijing Jeep joint economic venture reminded the businesses of the Western world that doing business with the Chinese was not easy.

VI. Development of Chinese Laws to Encourage International Economic Activities

Under Chinese law, joint ventures may be terminated on demand and all disputes are subject to litigation in the Chinese courts.⁴⁴ The exact language (by translation) passed by the People's Congress is carefully crafted.

Article 1 clearly permits, albeit in very bland language,

"foreign companies, enterprises, other economic entities or individuals to incorporate themselves within the territory of the PRC..."⁴⁵

The Protection permitted by Article 2 to foreigners is carefully worded:

"The Chinese government protects, by the legislation in force, the resources invested by a foreign participant in joint venture and the profits due him pursuant to the agreements..."⁴⁶

The most interesting language is contained at Article 15:

"The present law comes into force on the date of its promulgation. The power of amendment is vested in the National People's Congress."⁴⁷

On April 14, 1986, the Peoples Congress enacted "The Law of the Peoples Republic of China on Enterprises Operated Exclusively with Foreign Capital". This law allows foreign firms to come into the PRC with complete control over their own enterprises and without need for a PRC joint venture. Again, the Chinese came to this

law reluctantly, but without a viable alternative if they wanted to progress and modernize. To date, this law has been used primarily only for advanced technology companies.

The period of the 1980's is a significant turning point in the world emergence of the People's Republic of China. Yielding to Western needs for codified rights, the Chinese National People's Congress proceeded to enact over sixty laws and regulations tied directly to foreign economic activities.⁴⁸

More recently the National People's Congress and its Standing Committee became more focused on a codified and public legal system for China. They enacted 94 laws and revised or amended 73 other legal matters between 1979 and the end of 1990.⁴⁹ It was not a coincidence that the dramatic increase in laws and regulations occurred concurrent with increased overtures to the West for joint ventures, economic aid and technology transfers. Indeed, between 1979 and 1989, Chinese entities entered into over 4,700 "contracts" for foreign technology. The value of these instruments was approximately \$36.4 billion (U.S.).⁵⁰ Much of this was spent to license equipment for domestic use. China revealed a willingness to develop its legal system along more traditional Western, or "fazhi" lines in return for this level of world technological assistance. These laws were the direct result of international economic pressure on China to protect intellectual property rights when China is working so aggressively to import technology. Intellectual property, trade secrets, trademarks, patents and copyrights are generally unprotected by Chinese law. More recently, and of great interest, China has enacted the first, albeit very limited, copyright protection laws for works first published in China.⁵¹ However, the substantial financial investments represented by copyrighted software, chemical formulas and pharmaceuticals, continue to be unprotected.

VII. Law and Human Rights in China

There is a concept called the "Fifth Modernization" discussed in socio-political circles that suggests the original "Four Modernizations" need a fifth modernization target: human rights.⁵² Beijing is under increasing policy pressure from the West to address the issue of human rights. While all Chinese constitutions have always acknowledged a common core of rights due to all citizens, the Chinese interpretation of these rights has differed from the Western perspective. The 1982 constitution stated:

" All citizens of the People's Republic of China are equal before the law...enjoy the rights...and duties prescribed by the constitution and the law...have the right to vote and stand for election...enjoy freedom of speech, of the press, of assembly, of association...of demonstration...of religious belief..."⁵³

Perhaps the best way to understand how such rights, which certainly are on a par with the general concept of human rights in the West, could be routinely denied to Chinese citizens lies in understanding the Chinese culture. It is natural to regard all dissenters as non-people who are therefore not entitled to these constitutional rights.⁵⁴ Countries differ in their application of "human rights." Certainly, "human rights" is a term used without unanimous agreement as to its meaning. These are rights every individual should have, regardless of citizenship.

The Chinese philosophy regarding "human rights" has caused such international problems for the government of China that it has issued a book through the Information Office of the State Council entitled "Human Rights in China".⁵⁵ This 86 page book seeks to put the world community on notice that the Chinese people do respect human rights. While it would be unfair to characterize the "Human Rights in China" book as

propaganda, it certainly takes a radically polarized view.

The Chinese are quick to point out that during the years of capitalist and imperialist oppression in old China (read: pre-revolution) there were no human rights.⁵⁶ Most important:

“... the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights.”⁵⁷

The Chinese believe that Western concepts of “human rights” ignore the substantial human rights violations which occurred against the people of China over the years. The Chinese believe 12 million Chinese laborers were sold into indentured labor from the mid nineteenth century until the 1920’s.⁵⁸ The Chinese government states that it has provided the “Right of Subsistence”, i.e., food clothing and shelter, to one billion people. That alone has dramatically increased the lot of a population which has routinely been subjected to starvation and deprivation.

Fundamental to understanding human rights in China is the concept of the unity between rights and duties. Just as the Chinese constitution prescribes freedoms and rights, there are also duties to the state and the fellow citizenry. The Chinese government does link the right to subsistence with the right to work. Those who do not work are not necessarily entitled to the right of subsistence.⁵⁹ The point of the argument is obvious. Only those who support their obligations and duties to the state are fully entitled to rights whether they be human rights or subsistence rights.

In its most recent statement on human rights, the Chinese government strongly advocated mutual respect for state sovereignty and safeguarding the right of the people

of developing countries to subsistence and development which in turn will foster human rights.⁶⁰ Also, Chinese policy indicates a strong abhorrence to interfering in a nation's human rights under a pretense of interest in promulgation of human rights. China also points out that since 1980, the Chinese government has signed and ratified seven UN human rights conventions.⁶¹

However, the United States has become a world leader in advocating the protection and expansion of human rights. A crucial element of the National Military Strategy is to foster a world in which human rights flourish.⁶² There is a strong feeling in the West that for all its Eastern rhetoric, the leadership of the PRC continues to grossly undermine the global approach to human rights and continues to use obstruction of individual rights to continue to maintain political control of over one billion people. The reaction of the United States to the Tiananmen Square incident in 1989 was to declare this as a major violation of the human rights of the people of China. By votes of 418 to 0 and 82 to 0, the U.S. House of Representative and the U.S. Senate respectively imposed two-year sanctions on trade with China.⁶³ President Bush vetoed the sanctions, but the message was sent: the West will react to human rights violations anywhere in the world with economic sanctions.

VIII. United States National Strategy Considerations

It is clear that the American foreign policy strategy as applied to the PRC since the announcement of the four modernizations in 1979 has been to encourage China to remain politically stable. A more subtle but important policy has been to discreetly encourage expansion of a market-oriented economy in China and democratic reform from within. The extreme difference in values between China and the United States will

ultimately control the direction which the United States must take in following its National Military Strategy toward China. The United States is founded on the constitutional principles of civil and human rights, entrepreneurship and free enterprise. China is tied to fundamentalist Communism and socialism with limited, albeit evolving, concepts or support for private ownership of elements of enterprise. It is clear the United States has a high political commitment to human rights. Second to human rights is support for increased economic trade opportunities. Any strategy must foster these beliefs.

As previously discussed in this paper, there are significant differences in the legal structures of the East and West. The Western legal system strongly influences and benefits the spread of Democratic government principles. Eastern legal culture does not. The United States and the technology-rich countries of the Western world have the opportunity to use technology as a trade off with China to encourage these changes in the fundamental applications of the legal system in China. Actually, the important alternatives for United States strategy options toward the People's Republic of China may best be placed on a sliding scale composed of four major options with minor variations extrapolated between. These options are:

- Improved cooperation and advanced partnership with China (expanded interdependence with China and the West) through C3 (collaboration, cooperation and conflict-avoidance)
- Strained relations with China (much like the status quo)
- U.S. relationship with select parts of a fragmented China
- Heightened confrontation resulting in an economically isolated and "go-it alone" China

Consideration needs to be given to whether the United States strategy position on this scale should support an economically strong and technologically advanced China which receives economic and technical support assistance from the West or a China

which is placed in significant isolation from Western economic and technological assistance. These distinct and opposite ends of the strategy scale are referred to herein as the Chinese interdependence option and the Chinese go-it-alone option with status quo at the middle of the scale.

The strategy to be followed by the United States will be strongly influenced by the Western ethnocentric attitudes toward economic ventures and human rights. We, as a nation, are measured by our goals and objectives, our national interests. We achieve these interests through the assertion of national power in diplomatic, international, intelligence, economic and military forums. Therefore, national power is the sum force of applied elements. The economic instrument of national power will be the most influential determinant over the next decade. The post World War II euphoria of being the industrial and technological "600 pound gorilla" is now overcome by the reality that our industrial and technological bases are dependent and, in some cases, even relocated to South Korea, Japan and Germany. Therefore, any strategy decision regarding the PRC will be influenced, perhaps driven by, the economic reality of what benefits may be realized from joint ventures or trade.

The failure of such world economic efforts as the General Agreement on Tariffs and Trade (GATT) to overcome the parochial interests of 108 nations continues to show there is no such thing as a "World Community." The United States is as much an obstacle to the success of the GATT as any other world power. As recently as 12/13/91, the United States was jeopardizing the GATT by standing firm on the right to press unfair trade cases against Asian nations "dumping" products in America.⁶⁴ The United States also is a minority voice at GATT in objecting to free world trade in financial services, demanding prevention of computer software piracy, and protection of intellectual

property rights. ⁶⁵

United States strategy must consider that it no longer has a self contained industry support base. The U.S. needs parts and materials provided by Japan and Germany, both former enemies in world battles. Furthermore, it needs the financial support of global partners to wage military actions and give the actions legitimacy. Reductions in military spending will place a greater reliance on the high level defense of nuclear deterrence and rapid deployment expeditionary forces. The military will be unable, financially, to continue to maintain forward deployed forces and bases in the current configurations. Americans do not have a strong sense of external threat to the geographical borders, so the threat will have to be economic and through diminution of the quality of life.

Thus, the two elements which will drive our future strategy with China are economic and those issues associated with human rights. As previously discussed in this paper, East and West have the best opportunity to resolve these issues by assisting Chinese law as it evolves toward the codified legal concepts of the West.

During the next decade, projections show China will invest over \$2.1 billion (U.S.) in high technology development so as to avoid falling too far behind Western technology.⁶⁶ Regardless of well intentioned internal programs, China's leadership understands that to expand and grow and be competitive in the world economy, the technology infusions must come from outside China. It is also equally clear that the United States did not hesitate to impose trade sanctions on China after the alleged sale of silkworm missiles to Iran and Saudi Arabia and the very real human rights crack down in Tiananmen Square in 1989. All this shows that the United States is clearly in position to take the initiative and concretely establish the direction of U.S-China relations.

A. A Strategy of Chinese "Interdependence"

At one far end of the United States strategy scale, the Chinese interdependence option would work toward developing a long term strategy of economic cooperation and understanding between the West and the PRC. Such a program would foster stable economic growth in China, provide technology transfers, support making increased World Bank funds available to China and continue to provide Most Favored Nation (MFN) trade status to China. It would lessen trade and import/export quotas and tariffs and seek to improve the daily living conditions of the people of China. By the end of the last decade, direct foreign investment in China totaled \$32.1 billion spanning 20, 000 projects.⁶⁷ These figures could be doubled under an aggressive United States strategy of interdependence.

The keystone of this strategy is the continued fostering of expanded written laws in the People's Republic of China. The United States would expect continuation of the Chinese efforts to clearly codify and established laws, internal legal protection of the "human rights" of all Chinese citizens, international economic protection and some level of negotiated Western commercial access to the one billion consumers and workers in the PRC. Arguably, an economically sound China with a clearly structured legal system would benefit the economic soundness of the West.

The rewards to China are not just economic. China has a sense of worldliness and a strong need to be a recognized voice in international affairs. The expanded Chinese involvement in the balance of world affairs must come with a price: interdependence with the West and a need to be responsive to daily world affairs. The PRC has shown a

willingness to wear this mantle. China has been an influential player in dealings between the North and South Koreans. China has shown maturity on the National Security Council of the United Nations. Amid fear that it would use its vote to avoid UN sanctions against Iraq after the occupation of Kuwait, China chose instead to abstain and allow the sanctions to go forward.

China entered into the current period of limited interdependence of necessity. To have remained in an isolationist mode would have certainly doomed the current leadership to failure and probable social upheaval and political change. The dramatic recent events in Eastern Europe and the former Soviet Union attest to the pent-up demands for government and economic change which occur in isolationist environments. China had in the past depended on the USSR-US-China triangle to finesse a span of peace by playing off interests with the US and USSR against each other. China now finds itself in a position to not be able to exploit this situation. Instead, its role is based on its own actions directly with the West.

The previously discussed Beijing Jeep venture typifies this approach. With the active involvement of both sides, the parties were able to collaborate, cooperate and avoid conflict toward a common economic goal. This reflects the occidental willingness to take a long approach and look for benefits which are not immediately quantifiable or spendable. However, it was not enough for AMC to be part of an historic venture which might result in many long term benefits for the company. The issue was "What is this doing for AMC now?" Any inroads in this strategy would be dependent on the ability of the respective parties to achieve legal agreements which would be acceptable under Western standards.

B. Strained Relations in the Pursuit of the Status Quo Between East and West

As is often the case in diplomatic and strategic considerations, the status quo is maintained because it is the least abrasive and can be most easily maintained. The status quo between East and West may best be described as strained but functioning. China has shown a grudging accommodation of United States economic demands, nuclear proliferation support and a willingness to address human rights issues. This status quo has given us diplomatic cooperation, U.S. access to Chinese markets and Chinese economic development. China continues to enjoy Most Favored Nation status and the United States withheld aggressive sanctions in the post-Tiananmen Square period. China gave ground on the issue of a limited group of copyrightable materials and agreed to further study the need to protect patented medicines and intellectual property.

There is no rancor or overt hostility between China and the United States. Disagreements and problems are not handled with a long term plan. United States political strategy seems to reach only as far as the next presidential election. Such a national strategy toward China exists only because it involves limited change and a limited chance to react. However, even the status quo requires greater legal support and compromise than in the past. For, the current status quo involves thousands of joint economic ventures and increased Chinese acknowledgment of fundamental human rights. These legal advances reflect the increased "Westernization" of the Chinese legal system.

C. Fragmentation of China: National Strategy Opportunity?

This United States strategy option would actually anticipate and exploit changes in the political and geographic structure of the People's Republic of China. Other United States strategy options assume the continued ability of whatever government is in control of China to maintain the existing structure of the country. However, there is some indication that the United States needs a national strategy which takes a realistic approach toward the possibility of a political fissure of China as it now exists.

In the millennia of the Emperors, the people of China would say, "The mountain is high and the emperor is far away" to describe how government, even under the all powerful emperor, was not a major concern in day to day life. The Communist government in Peking is extremely remote from most of China. In reality there are three Chinas which actually exist:

- The Southeast coastal trade zone
- The Eastern coastal China (which includes Peking)
- The rural outlying areas of China.

United States strategy must consider that the Chinese economy has now become too complex to be operated from one centralized location. Independent political organizations are already flourishing in China. Village councils and regional governments independent of the Communist party control some portion of the lives of many millions of Chinese citizens. The prosperity of Southeast China in contrast to the rest of the country has not gone unnoticed. Rural Chinese clog the trains into these areas attempting to get a small piece of this extremely regional prosperity. Those benefiting from regional wealth are not anxious to see all this destroyed by a Communist decision to reject any vestige of capitalism.

United States strategy should anticipate the possibility of internal conflict and

separation within China which would yield a separate country or at least a province in Southeast China with which to develop continued trade and political venues. This section of China is already very "Western" in its approach to business and capitalism. In fact, the Southeast China trade zone has already adopted many Western legal concepts not found in the rest of China. Chinese lawyers are allowed to engage in private practice and are not held to a duty to represent the interests of the state. Most economic agreements involving Chinese businesses in the Southeast zone are properly reduced to writing with binding terms on the parties. This strategy would benefit from continued Western efforts to have the Chinese implement regional laws which are applicable only in certain economic areas. Continued pressure for "special economic zone" zones and economic development laws which are only applicable in those parts of China which have on-going joint economic efforts would be part of this.

D. Isolationist Strategy for China to "go-it alone"

The most conservative and regressive United States strategy toward China would be combined with an extended period of confrontation over all issues between the two countries. This strategy would be the obvious extension of United States impatience with Chinese foot dragging over nuclear proliferation, continued human rights violations and failure of the Chinese government to make good on current promises to the West concerning such issues as balancing of import/exports, access to Chinese markets and protection of intellectual property and copyrights.

This ~~go-it-alone~~ China option would be more of an arms length approach to international affairs involving the People's Republic of China. Such a strategy readily assumes that a fully economically developed China will become a significant threat and

possible adversary to the interests of the United States. The People's Republic of China is the largest country in the world and is clearly destined to become a great power during the lifetime of the generation now being born. The economic and technical influences of the West cannot overcome the societal and ethnic philosophies and ways of life of one billion people in one generation. China is the largest surviving Communist nation in the world. It has a wealth of natural resources and a population controlled by a totalitarian government committed to basic Communist doctrine. As China overcomes its transportation and energy infrastructure shortcomings by developing improved ports, airports, railroads, highways and power plants, China will increase in efficiency and reap the economic benefits. As high technology and manufacturing methodology catch up with that of the Western world, the advantages of China's population and natural resources will become clear.

A go-it-alone option would place restraints of China's economic and technological growth in anticipation that there are internal political and groups which would be able to rise up and unify the population in support of a more democratic form of government. Tools available to such a strategy include refusal to renew Most Favored Nation (MFN) trade status, double tariffs on Chinese exports, restrict technology licenses and inhibit private enterprise economic ventures involving China. This strategy option would conclude it is not in the best interests of the West to currently assist China with its current form of government structure in rising to an economic level from which it can possibly achieve economic parity, or even superiority, with the West. Such economic strength would increase the ability of the existing government to stay in power and not evolve toward democracy.

One of the most apparent ways to influence this option would be to discontinue

pressure on China to enact laws protecting international right, property rights of foreigners in China or laws which acknowledge international copyrights and patents. The continued absence of such laws will indeed isolate China from the much needed influx of computer technology, software applications and joint economic ventures.

The go-it-alone approach with China will actually be aided by China's own fear of embarking too deeply on a path of interdependence. By pulling back from this approach, China, by definition, slows its own economic and technological advances. China will fall further behind both from where it could be with regard to where it could advance to but also based on the relative position of the other powers in the world. The downside to such a strategy option is that it almost certainly would result in a significant regression of the government to a severe authoritarian basis with little hope of any development of democratic principles for several decades.

IX. Conclusions Concerning the Influence of "Western" Law Theories on a Sound and Far-reaching Strategy Toward China

This paper has attempted to show a viable connection between three concepts: Differences in the foundations of the legal structure of the United States and China, how these differences are evident in interaction between the United States and China in areas of international venue such as economic ventures and human rights, and the ability of United States strategy toward China to react to these differences. Ultimately, the ability of the West to guide the evolution of Chinese law toward a codified system of law will guide the decisions as to which strategy to follow toward China.

"Law" is that which is laid down, ordained, or established...That which must be obeyed and followed by citizens..."⁶⁸ In its simplest form, a law is an ordered way of

living which is imposed by the rulers on the ruled. In a democracy, those citizens ruled have a voice in the selection of those who impose and enforce the law and can unify to revise and change laws. There is no such direct link in totalitarian or communist governments.

As has been discussed in this paper, China has a very limited number of codified laws. The citizens of China have not had access to the laws which control their lives. The most immediate result is that the human rights, the fundamental protection of basic rights and needs, are not legally embraced in China as they are in the West. International business dealings with China have been hampered by the inability of the parties to know what "laws" apply and will be followed in economic activities.

Through the application of political pressures and economic sanctions, the United States has been able to project its national power through a national strategy which has caused China to continue to reluctantly establish a "Western" type of codified system of laws. As these laws become known and relied upon within China, the people of China are becoming increasingly aware of the rights and privileges to which they are entitled under the law. Increased reform from within will be inevitable.

A system of fahzi, or rule of law, in China will increase the accessibility of the people to knowledge of what they are entitled to. It will enhance demands for equality and protection. It will diffuse the arbitrary power of the government. In short, replacement of renzhi, the rule of man, with the rule of law is the first crucial step toward democracy. The groundwork has been laid because of Western pressure on China at a time when China had to acquiesce in order to get much needed economic and technological help in support of its modernization program. Our national strategy must now continue to endorse this progress and seek to continue to influence the increased adoption of the

rule of law in China through all means possible.

However, there are at least four discernable United States strategy options, as set forth in this paper, which will place the United States and China in roles ranging from international partners to isolated adversaries. A proactive national strategy option must be put forth at this time. Maintenance of the status quo should only be done if that is the carefully considered strategy option of the United States.

This is the time to aggressively push for a strategy which endorses a China which is interdependent with the Western powers. Concurrently, all Western economic support and technological assistance must be firmly based upon progress by China toward a codified rule of law. This is the only viable United States strategy which advances the national will of the United States in dealing with the People's Republic of China. While arguably ethnocentric in its belief that the "Western" approach to a codified body of law is preferable to the rule of men without codified laws, the drawback is that, inevitably, the number of lawyers in China will grow incrementally as the rule of law expands. Some may argue that such a dramatic increase in the number of attorneys in China will qualify as a human rights violation by inflicting such a vicious class of people on the over one billion people of China.

ENDNOTES

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3. Victor H. Li, Law Without Lawyers: A comparative View of Law in China and the United States (Boulder, CO: Westview Press, 1978), p. 13.
4. Edwards, Human Rights in Contemporary China, p. 127.
5. Li, Law Without Lawyers, p. 25.
6. Edwards, Human Rights in Contemporary China, p. 45-46.
7. Of the Ten Commandments which form the foundation of the Western Christian heritage, seven are in the negative declaratory voice: "Thou Shalt NOT" (emphasis added). The Holy Bible. (King James Version), Book of Exodus, chapter 20: 3 - 17. (New York: World Publishing Co. 1964).
8. The significance of the Chinese concept of "fa" or "fazhi" is discussed in China, a Country Study (Washington, DC: Library of Congress, 1988), p. 508.
9. Li, Law Without Lawyers, p. 4.
10. Ibid., p. 15.
11. It is not the intent of this paper to provide a detailed analysis of the finer elements of Chinese law. For an excellent detailed review of the history of Chinese Law and how it has developed, see: Jerome Alan Cohen and Hungdah Chiu, People's China and International Law. A Documentary Study (Princeton, N.J.: Princeton University Press, 1974). For a scholarly analysis which assesses Chinese Law and Chinese contract law, see: Capener, "An American in Beijing: Perspectives on the Rule of Law in China," 1988 Brigham Young University Law Review, p. 567. See also, Hayden, "The Role of Contract Law in Developing the Chinese Legal Culture," 10 Hastings International & Comparative Law Review (1987), p. 571.

12. Tao-Tai Hsai, Guide to Selected Legal Sources of Mainland China (Washington, DC: Library of Congress, 1967), p. 48.
13. Ibid., p. 51.
14. Li, Law Without Lawyers, p. 4.
15. James M. Ethridge, China's Unfinished Revolution (San Francisco: China Books and Periodicals, Inc., 1990), p. 269.
16. The actual quote from Shakespeare, in King Henry the Sixth is " The first thing we do, let's kill all the lawyers..." It should be noted that the context of the comment is in a recipe for how to bring chaos into the controlling government. The greater thought presented by Shakespeare was that in the absence of lawyers, the system is unable to interpret itself or maintain control.
17. Hsia, Guide to Selected Legal Resources of Mainland China, p. 2.
18. Alfred K. Ho, Joint Ventures in the People's Republic of China: Can Capitalism and Communism Coexist? (New York: Praeger Publishers, 1990), p. 11.
19. Ibid., p. 13.
20. Ibid., p. 14.
21. Li, Law Without Lawyers, p. 14.
22. Jim Mann, Beijing Jeep (New York: Simon and Schuster, 1989), p. 30.
23. Ho, Joint Ventures in the People's Republic of China, p. 7
24. Human Rights in China (Beijing, China: Information Office of the State Council, 1991), p. 2.
25. Mann, Beijing Jeep, p. 24.
26. Penelope Hartland-Thunberg, A Decade of China's Economic Reform. The Center for Strategic and International Studies, Washington D.C. vol XI, No 12 in Significant Issues Series, 1989, p. 35.
27. The four modernizations are categorized as: Agriculture, Industry, National Defense, and Technology. There has never been any indication from China that these were listed in order of importance.

28. Denis Fred Simon, "China's Acquisition and Assimilation of Foreign Technology: Beijing's Search for Excellence," China's Economic Dilemmas in the 1990's: the Problems of Reforms, Modernization, and Interdependence. Study Papers Submitted to the Joint Economic Committee of the Congress of the United States (Washington, D.C.: U.S. Government Printing Office, April 1991), p. 568.
29. Ibid.
30. Rosalie L. Tung, Chinese Industrial Society After Mao (Lexington, MA: Lexington Books, 1982), p. 97.
31. Ibid.
32. Ibid., p. 58.
33. Arlene Wilson, "Interdependence," China's Economic Dilemmas in the 1990's: the Problems of Reforms, Modernization, and Interdependence. Study Papers Submitted to the Joint Economic Committee of the Congress of the United States (Washington, D.C.: U.S. Government Printing Office, April 1991), p. 714.
34. Martin Weil, "The Business Climate in China: Half Empty of Half Full?" China's Economic Dilemmas in the 1990's: the Problems of Reforms, Modernization, and Interdependence. Study Papers Submitted to the Joint Economic Committee of the Congress of the United States (Washington, D.C.: U.S. Government Printing Office, April 1991), p. 778.
35. Ibid.
36. Wilson, "Interdependence", p. 714.
37. Ho, Joint Ventures in the People's Republic of China, p. 7.
38. Mann, Beijing Jeep, p. 69.
39. Following four years of intense negotiations, the parties agreed to a plant to manufacture 85,000 American Motors Jeep Cherokee four wheel drive vehicles. See: Ho, Joint Ventures in the People's Republic of China, p. 53.
40. Mann, Beijing Jeep, p. 47.
41. Ibid., p. 156.
42. Ibid., p. 199.

43. Ibid., p. 248.
44. Ho, Joint Ventures in the People's Republic of China, p. 14.
45. Ibid., Appendix 1, p 107.
46. Ibid.
47. Ibid., Appendix 1, p. 112.
48. Yang Xiaobing, "Laws Back Foreign Economic Activities," Beijing Review, Vol. 30, No. 7, February 16, 1987, p. 14.
49. Wu Naitao, "The Origin of the Chinese Legal System," Beijing Review, Vol. 33, No. 38, September 17-23, 1990, p. 27.
50. Simon, "China's Acquisition and Assimilation of Foreign Technology", p. 572.
51. Gayle Feldman, "China Adopts Its First Copyright Law," Publishers Weekly, September 21, 1990, p. 12.
52. James P. Harrison, "The Problem of the Fifth Modernization - A Review Article," The Journal of Asian Studies, Vol. 42, No. 4, August 1983, p. 869.
53. Ibid., p. 871.
54. Ibid., p. 872.
55. Human Rights in China (Beijing, China: Information Office of the State Council, 1991). The 5" X 7" format book is actually more of an extended booklet with 86 pages. No individual authors are credited and the style is propagandistic. In the preface to the book, it states: "In order to help the international community understand the human rights situation as it is in China, we present the following brief account of China's basic position on and practice of human rights. " While frequent historical references are made throughout the book, there are no footnotes or references to other sources for additional information.
56. Ibid, p.I.
57. Ibid., p. II.

58. Ibid., p. 2.
59. Ibid., p. 43.
60. Ibid., p. 79.
61. Ibid., p. 82.
62. "National Military Strategy", p. 5.
63. Ho, Joint Ventures in the People's Republic of China, p. 81.
64. Stuart Auerbach, "Down to the Wire on Global Trade", Washington Post December 14, 1991, p. B1.
65. Ibid.
66. Simon, "China's Acquisition and Assimilation of Foreign Technology", p. 567.
67. Wendy Frieman and Thomas W. Robinson, "Costs and Benefits of Interdependence: A Net Assessment", China's Economic Dilemmas in the 1990's: the Problems of Reforms, Modernization, and Interdependence. Study Papers Submitted to the Joint Economic Committee of the Congress of the United States (Washington, D.C.: U.S. Government Printing Office, April 1991), p. 724.
68. Extract of the full definition of "law" from Black's Law Dictionary (St. Paul, MN: West Publishing, 1968). The complete definition covers three columns of text and makes frequent references to various court cases in support of nuances found in court interpretation of what makes up a "law".

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