

THE BROOKINGS INSTITUTION
RULE OF LAW IN CHINA:
PROSPECTS AND CHALLENGES

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PANEL 1: THE QUEST FOR JUDICIAL INDEPENDENCE

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PANEL 2: PROSPECTS AND CHALLENGES FOR RULE OF LAW

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PANEL 3: CONSTITUTIONALISM AND ITS SIGNIFICANCE FOR CHINA

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P R O C E E D I N G S

MR. POLLACK: We are joined today by a number of distinguished guests that I wish to acknowledge at the outset: Justice Stephen Breyer, Associate Justice of the Supreme Court of the United States; Jon Huntsman, former Ambassador to China, and now a Distinguished Fellow here at Brookings; John Thornton, the Chairman of the Board of Trustees here at Brookings; and a variety of other very, very distinguished guests -- but, most particularly, to welcome Professor He Weifang, the Peking University, who is author of the latest volume in our China book series, *Critical Thinkers*, here at Brookings.

You know, as other participants will note today, Professor He is an extraordinary thinker. He speaks his mind. He is principled. His knowledge is wide-ranging, both about Western philosophy and history, as well as Chinese philosophy and history. He reveals a deep knowledge of many, many subjects, but writes in a very, very easy and engaging style.

He is an autonomous and authentic Chinese voice, with a profound commitment to the development, the full development, of law in China, without which China's transition to modernity will be very, very incomplete.

So, without taking too much time in the introduction, I want to acknowledge all of our guests here today, in particular, Professor He. We will have a series of presentations in our program today, beginning with an exchange between Professor He and my good colleague and friend, Cheng Li, Director of Research in the John L. Thornton Center, as well as a Senior Fellow, and it is a book series, of course, that Cheng has been personally responsible for creating and facilitating. It really opens important Chinese voices to audiences here in the United States that may not be able to fully grasp Chinese, or may not understand it at all -- but really provides extraordinary

insights into the evolution of thinking in China today in ways that, here in the United States, we so much need to hear.

So, with congratulations to Cheng for not only this important book series but, of course, making the necessary arrangements to have Professor He here today -- without further ado, I think we will begin with the dialogue between our first two speakers, and then proceed to other speakers.

Thank you.

Oh, Professor He will speak first. So, Professor He, the podium is yours.

(Applause.)

MR. HE: Thank you, Jon. Distinguished Justice Breyer, Ambassador Huntsman, and Mr. Thornton, and all my old friends from Harvard, from NYU, from Yale Law School, and so many professors. I'm very sorry; I have to ask you to listen through interpreters because my English is not good.

Today, for me, is a very important moment, because it's my first book published in English -- published by Brookings and Thornton China Center arranged the publication. My work being published overseas, for me, it's very important. Over a thousand years ago, a novelist in China they wrote their novels for a majority to the West. We know, in that novel, the Tang Dynasty, a monk who went to India to obtain Buddhist scriptures at that time, the monk Xuanzang. And that's the important character in the novel. He went to the Western world, or he went to other countries. And one important thing he could do to the outside is to publish their books in China, make them famous in China. As in Tang Dynasty, at that time, probably Tang China is like America today, their global position. Tang China, at that time, was like America today. So, my book being published in America is a great honor.

The book of mine, this book, is a collection of my speeches and articles, letters, including open letters. They're translated into English so, strictly speaking, it's not a real academic book, it's a collection of my writings in the past two decades.

In this book, I think probably for me a very important thing is it reflects my work in the past two decades, to show what I did in the past 20 years. And you can see that I'm not a pure scholar, and also I'm not a pure practitioner. So I try to combine both, so to get my own characteristics. Especially, I'm working in China, China hasn't established the rule of law completely, it's still far away from that stage.

So, to many friends -- I think, especially, Americans who are looking, who are interested in China, the "China-hands," they're very interested in the rule of law in China, and they want to see whether China can build a rule of law, and this will affect Sino-U.S. relations in the future -- and probably it will affect a global society. So I, personally, I'm very much to promote this field. For this book, I can see my personal comments in some contemporary issues in China.

I have 20 minutes to make my presentation so maybe I have to speed up.

First, summary, is like introductory remarks from Chongqing, from the story happened in Chongqing City, and then I want to talk about our historical background of the change of law in China, and our pursuit of judicial independence. They're two background stories: one is traditional China, and another one is our socialist China, new tradition. And the third aspect, in the past 20 years, and what achievements we have made, what contributions we have made, what efforts we have made. And the fourth aspect I want to talk about, the future: what we should do, what main effort we should give in the future. And then I will have my conclusion.

Pretty recently, China has caught the world's attention and partly because of a story in Chongqing. It's southwestern China, mega-city in southwestern China, many things took place, and people are paying attention. In February this year, the former police chief of Chongqing City, Mr. Wang Lijun, he fled to U.S. consulate in Chengdu City. His action involved four prominent members of the U.N. Security Council and became a global incident. And the *New York Times* and other newspapers gave a lot of coverage.

This March, China was holding a so-called Two Meetings, very important meetings. It's like China's parliament, if we can call it "congress" or "parliament." But I suggest don't call it "congress," just call it "jin da" -- by its pronunciation, use it as a "high opinion," because it's not really a congress.

But in this congress, the politicians were showing their characteristics, their nature. In this meeting -- and the part chief of Chongqing City, the one in front, Mr. Bo, once the media paid a lot of attention to him, they took a lot of photos of him, and we can see people behind him, they're whispering, because at this time Bo, he himself, he's one of the like the most powerful 20 people in China. But at that time, he was already under crisis. Probably he could hear what people were talking behind his back. So look at his expression, he's very upset. Kind of he wants to pour water at people behind him.

We know, in the past four years in Chongqing City, there was a massive Red Culture revival. Bo Xilai, during the Cultural Revolution, his family was persecuted. And yet now, look at the photo, every time when he makes a speech he will quote from Chairman Mao. He showed that he loved Chairman Mao so much, he organized many events singing the Red songs.

And we know, in Chongqing, they're not only singing Red songs, they were also having a campaign, we call it "Black Society." Well, I don't want -- we should

translate it to "mafia," or "organized crime." Basically, some organized groups, and they were cracking down on these groups. And then they find lawyers become the obstacle to their actual judicial crackdown. It's the lawyers and their defense made the government less free to crack down on the so-called organized crime.

So there's a very famous case involving lawyer Li Zhuang. He's a lawyer. He was not that famous, now he has become very famous in China, even in the world. Mr. Li Zhuang, he was charged with perjury and was sentenced to one-and-a-half years in prison. During the whole process, this became a turning point in the city of Chongqing, since this crackdown on lawyers showed that what they were doing actually was in violation of law.

So, I wrote an open letter in April last year. So this is after the introduction by Dr. Li Cheng in the first chapter in my new book, that open letter was written by me in April last year. I want to make it heavy, very convincing. So after the publication of the letter, I became very influential. Later a Chinese newspaper published my open letter.

And we can see in Chongqing, probably the page has been turned. I know Bo Xilai is waiting for trial. Some people say that China will become, will have another case in which the supreme court will act as a court of first trial. And what the result will be, we don't know. Because, obviously, in Chongqing, in the crackdown on crimes organized by him, it's totally, they're totally different law. But later on, when Bo Xilai and Wang Lijun, and Bo Xilai's wife, when they were arrested, the authorities are not really following the law strictly, either.

So, I think it's very complicated, because many people in China, they forget the fact that China is still a socialist country. It still has a lot of socialist characteristics. We're still under the leadership of the Communist Party. The law must

be subject to the will of the Party. So we still have that nature. That hasn't been changed today.

And we also know, in addition to the past six decades, in relation to communist practice, we have an even longer history that doesn't really respect law. I would say, like, 2,000 years of Chinese history, there hasn't been a tradition of the rule of law in the society, otherwise, we wouldn't have gone to the socialist ways. And that's my kind of recent thought. For those countries who have a strong tradition of rule of law, probably they will not accept socialism and communism. Those countries who embraced communism, like the Soviet Union and East European countries, probably these places, why they accept socialism, it was because they hadn't had a good tradition of rule of law.

This picture was taken by foreigners in China more than 100 years ago, and we can also see that this is a kind of court trial that continued to exist, as it is a trial without the lawyers. And this is the kind of system that had been there, where the role of the legal profession was not part of the picture, because they wanted to seek a society that's without law, which they think is probably the best society.

Well, we said that in the last 20 years the legal system building, especially in a judicial independence has actually achieved some -- has made some achievements. For example, I think the society as a whole has unprecedentedly brought consensus and understanding of the importance of the judicial system. So they do understand that, without a good judicial system, you may have very good laws, but then these laws will not be able to be implemented among the society. And, for example, in a court dispute, if the laws cannot be executed or implemented, then this is going to be a problem. And, therefore, we need a very good court system. For the last 20 years, many people have written articles, and including my counterparts in the U.S. had also witnessed the situation in China, in that the Chinese legal professionals are also trying to

come, as I said, the United States to learn from your courts, from the Supreme Court, and so and so forth.

Also, when you look at the political, the process of political reform in China, more and more people believe that the judicial reform should be an important part of the agenda of the political reform process. Now, there are issues that may be hard to resolve right now which are kind of sensitive, for example, multiparty system. If you advocate a multiparty system in China, and that the Communist Party has to be in parallel with the other parties, then this is going to be quite a radical change.

However, if you talk about judicial reform, this is part of a very important component, or a very important component of the entire reform process, and therefore, if we can screen and vet the judges in China more stringently, so that not everyone can become a judge, then it would be a good thing. Because in the past, the judges -- anyone could be a judge in China. But we can't do that anymore. Now, they have to take the judicial exam, and they have to be college graduates -- other than the head of the court, who does not have to be a college graduate, the rest of the judges, they all have to be college graduates. So our chief justice is Wang. He is our chief justice in China. He is chief justice Mr. Blind-to-the-Law, because he has never been in the legal profession before, but now he's the chief justice.

So now half of the judges are in the same situation. So, even though we have achieved quite a bit, we still have to be cautiously optimistic in our accommodations.

And our lawyers, judges, and prosecutors have this kind of flaws. For example, in Japan, or other Oriental countries, a lot of time the prosecutors belong to the government and the lawyers are in the private sector. So this is the same in the U.S. But nowadays we have heard more voices say that we should look at the body politic; we are

needed to seek our common interest. And this is the kind of voice that we're beginning to hear more and more in China.

So, we can see that professional ethics has also been progressing quite well in China. In other words, our cries or our calls for judicial independence have become louder and louder.

So, this is -- let's look at this very quickly. This is the Party Congress, with the hammer and the sickle. So I wonder, what are we going to do, what are you going to do with this picture? You can see these are the pictures of the new Politburo members. And you can see more and more people who have studied law now account for a bigger part of this Politburo. Of course, there are some ugly faces here. For example, Mr. Li Keqiang, he actually graduated from Peking University, in law. Xi Jinping actually graduated from Tsinghua University, the so-called law of jurisprudence. So, we see that maybe more and more people in the legal professions will also become members of the Politburo.

In the future, what are things that we're going to do? I think maybe we should look at the deconstruction of socialist ideology. In other words, we cannot adhere stubbornly to the mistaken ideology of the past, and continue to want to move forward that way.

This is actually a commercial, or advertisements from Philips. And it says, "Let's do better." Right? From a long beard to no beard. So this is actually an advertisement of Philips.

Let's skip that.

Because of the socialist ideology, it has become an obstacle to our judicial independence. So this is the biggest influence that socialism has cast upon our judicial system. And we also need to look at a separation of powers, so that we can

gather more empirical data, so that the officials and the ordinary people can understand that separation of powers is not a terrible and scary thing, actually, separation of powers includes separation of powers at the local level.

So I also had a slide to explain our understanding of separation of powers, but I don't think I have time. They already gave me a minute warning, so I only have three minutes left. So, don't worry. Don't worry, because later on I'm still going to have a Q&A with you guys, so we can later on elaborate on what I intended to speak here. We can talk about the spirit of the law by Montesquieu, and how this particular publication has its influence on China. I have friends who actually helped me translate all of this into English.

And we're also seeking, in the future, a better performance of the judiciary. In other words, we want to discover facts even more, because currently, in our system, the most serious problem is that we cannot discover facts properly. For example, you look at the case of the wife of Bo Xilai, which is this lady, she also actually a law graduate from Peking. So, if they are lawyers and they become a country's leaders, that's not necessarily always a good thing. Because his wife is a lawyer -- or was a lawyer.

So, it seems like instead of discovery of facts, it's more like trying to cover up the facts. That's the kind of impression that we've been giving others. And so there are a lot of things that we need to do, the efforts that we need to put on how are we going to achieve the identification of rules, in other words in a judicial process we need to fine tune our process. We are still far from that. We are still not able to achieve that.

We also need to also protect the freedom of speech through a judiciary so that the freedom of speech can be exercised. And, of course, freedom of speech is only a part, a small part, of the bigger picture.

And also we need to transform, and in depth, our social structure.

Actually, when a country is trying to build its legal system, it's not because we will -- it doesn't mean that we have to set up very good laws, or we have a good group of lawyers, but we can follow what the justices and judges in the U.S. have said, that it's not important just to have good laws, we also need to make social changes. You cannot just have a good federal (inaudible), and then the individuals. Therefore, we also need to allow the freedom of association and freedom of assembly, so that we can also transform the society.

And then, also, we need to have even more frequent interactions with the West, which is also very important.

These cartoons are actually taken from the *International Herald Tribune*, when I was flying from Beijing to Washington, D.C., and I read this newspaper and I like these cartoons, and so I cut that -- oh, actually, no, I took a picture of it. Because Obama, on the left, is actually quoting a lady, Asia. And then Asia is stretching out her arm, and holding an arm of this other guy sitting next to her, who is China. Okay, this is irrelevant to what I'm saying, but what I'm trying to say is that we need to have more interaction with the West.

I think that a lot of people who study laws in China, including Mr. Jerome Cohen and others, have recently met with some kind of obstacles in terms of legal corporation, for instance Paul Gewirtz, is the same thing. Awhile ago you set up the Yale China Law Center, and you were very proactive, in terms of legal cooperation with China, but then you had encountered some obstacles and some challenges.

But I hope that you will not be discouraged by these temporary challenges, but please continue to move forward the legal reform in China with us.

And so, finally, I feel that what is really important, and a kind of dilemma that we're facing, is that because whether we're talking about jurisprudence, or laws, it is very unique, like Hayek has said, that especially in the countries of common law, in the U.S. and the U.K., this is really important. But in China, people believe that the law comes from the outside. This is very foreign to us. But then it's foreign, and yet it's conservative. So this is something I want to elaborate with Professor Li Cheng later on, in greater detail.

So, finally, this is the Goddess of Justice. She visited China, and then she came home injured all over. So I hope that she will recover very quickly, so that when she goes to China again, she will discover that China has become a wonderful country.

So, once again, I want to thank Justice Breyer. I want to thank you.

My book is called, *In the Name of Justice*, and I am happy to see that today, in the presence of Justice Breyer, I can also say in the name of Justice Breyer.

Thank you very much. (Applause)

MR. CHENG: Is that on? Okay.

This session, the first session, has three parts. The first, we just heard Professor He's presentation. And the second part is a dialogue between the two of us. And then we'll leave the third part for open audience questions.

Well, thank you so much for that excellent presentation, and also I want to congratulate you on the publication of your first English book. I hope that the Brookings Press will also publish, have the opportunity to publish your second English book.

Now, we have such a large audience today because the development of law in China is enormously important. The fact that there are so many people, including

our distinguished speakers that are here is also a sign of profound respect we all have for you. Your vision of and dedication to a constitutional China, your courage to speak inconvenient truths, your constant fight against lawlessness in the name of justice, and your liberal views about China's role and responsibility in the world all earn our tremendous respect. Thank you very much, Professor He.

Now, our gratitude to you also reflects our, it also reflects our respect for many Chinese public intellectuals like you, and also for the nation that, in the midst of the major social, political transformation.

Now, for me, it has been really a joy, privilege, and a learning experience to work with you for the past few years. Actually, I think probably it's one benefit of the audience, I want to share some, you know, background about this book project.

Actually, there were three people initiated this project four years ago: John Thornton, and Professor He, and myself -- and four years. And a lot of things happened.

And I should say that there were two major events happened to He Weifang. The first delayed the book project for two years, and the second thrust He Weifang and his work into the limelight of Chinese politics.

Now, let's begin with the first one, the first event. In 2009, He Weifang was removed from Beijing to a small city in Xinjiang. It was his punishment, as many believe, for signing Charter 08, as we know that it was a manifesto that adopted the name and style of the anti-Soviet summit. During these two years that I could not reach him by e-mail or phone call for various reasons, as a result, the book project moved very slowly, and he remained in Xinjiang for two long years.

Now, the second event happened in the spring of 2011, soon after He Weifang returned to Beijing from Xinjiang. That was a time when Bo Xilai's political

campaign, known as "Singing the Red Song, and Strike the Black Mafia," you know, (speaking in Chinese) was in its peak. And He Weifang was the leading voice in the country challenging Bo Xilai and Wang Lijun, then the police chief in Chongqing.

Now, Professor He, as he also mentioned, wrote the open letter to legal professionals in Chongqing, which is included as a prolog, as we decided almost immediately after you, you know, wrote that letter, we said that we should use it as the opening piece.

So, in that letter, he directly challenged Bo Xilai, and also had a line telling Wang Lijun, the police chief. He said, "What happened to your predecessor, who was the police chief in Chongqing, was purged and executed." He said in that letter, "What happened to him, Wen Qiang, today will happen to you tomorrow." Now, I think these words, your warning, it's very much in his mind when he made the decision, 10 months later, went to Chongqing consulate.

Now, more importantly, this letter of remarkable foresight conveyed a much needed warning to the nation about radicalism, about violence, abuse of power, the rise of a demagogic dictator, and the complete retreat of law and justice.

Now, 10 years later, Bo Xilai is in jail --

MR. HE: 20 months later.

MR. CHENG: 20 months. Yes -- awaiting his trial. And, what will likely be a suspended life -- you know, death penalty, or death sentence. And, Professor, I guess, you told me that.

Now, on the other hand, you are here today, at Brookings, talking about judicial independence and justice. Now, here I have some questions, a set of questions.

While writing the open letter, did you ever fear that you might be in serious danger? That you will be poisoned, or face a fatal car incident, as happens in

China often? Or face charges against you, like being a CIA spy or agent -- that WikiLeaks actually did mention that several times, you are a CIA spy or agent. Or possession, shareholding of Ping An shares, 2.7 billion -- for those of you who read the *New York Times* story.

Now, what happened? So why -- now, did you feel safe, because you have some friends in high places? Or something else? Could you tell us what's in your mind? Seriously.

MR. HE: Mainly, another friend to Bo Xilai's wife, okay, so maybe he won't give -- point to me. No opportunity.

Well, in fact, at that time I was a little bit concerned, because at that time they were very powerful, they were at the peak of their power. I know what they did in the past, people; they don't really care about killing people. And so some friends told me after they saw my open letter, they said, "When you cross the street, be careful, okay? Look over for cars." Because this is something you cannot just prevent, so I'm not that particularly worried. So if they want to take such action against me, they have to think about what a price they are going to pay: a Beijing University professor simply criticized him. As a matter of fact, I thought I became safer, because whatever will happen to me, it will be done by people from Chongqing, by people from Bo Xilai. So probably for that reason, they wouldn't really hurt me.

So I think being truthful is very important, because I'm very sincere when I wrote the letter. Because I attended university in Chongqing, Southwestern Legal University, so that's where I graduated, and I knew a lot of people in the legal community over there. I mentioned their names in my letter. We came from the same school, because we had feelings to each other.

So, personally, when I criticized Chongqing, in fact I took that out of my sincere feeling. I'm not really attacking them, not to criticize them for the sake of criticizing, because I provided evidence. I clearly told them, "Look at your official newspaper. See their coverage, how totally they are disregarding the law." And I even quoted Sophocles, the Greek playwright's words, so I'm telling them if you want to do something against me, I'm not afraid of death. So I made a hint in the letter.

So, in the end, probably they never planned to take action against me, or maybe they were out of time, you know. If Bo Xilai became a legal czar in China, and if he became a permanent Politburo Standing member, then probably I have to move to America.

MR. CHENG: In terms of how Bo Xilai thinks of you now -- because you are the leading voice to abolish death penalty.

MR. HE: Mm-hmm.

MR. CHENG: And so now he's in trouble, and do you think he now appreciates your longstanding view on challenging, abolish --

MR. HE: Well, he will hate me for, like a wise -- am I advocate for the repeal of death penalty earlier. Because right now, I'm quoting for abolish death penalty, but death penalty is still there, especially for murder charges. So, probably, he will think, you know, if He Weifang made the point earlier, then I wouldn't face such a danger now.

But my prediction, probably the death sentence, especially immediate execution, in Bo Xilai's case is not that possible. I think in the past three to five years, China's been more and more judicious when using death sentence. The supreme court has effectively reduced death sentences. We used to have 67 counts that are death, but now they have reduced that number. For purely economic crimes, or crimes related to our office, death sentence is seldom used now.

So, I personally, I hope we have a very good judicial process, procedure, so Bo Xilai can have a good defense, and all the witnesses can come to testify, so we can tell Bo Xilai, even though you did that to your opponents, your enemies, the so-called criminals in Chongqing, however this country will not use your methods, will not use these bad methods against you. If we can do this, we can show the world China is sincere in promoting the rule of law.

So, if you have a chance, you can see Xi Jinping -- I know Brookings has a lot of opportunities to meet with our leaders. So, John Thornton, he has more opportunities to meet with our leaders, and I don't have these opportunities, so you people can tell them, this case is a landmark case -- if you can have a real trial, with justice done.

MR. CHENG: It's interesting to note that both left-wing intellectuals sympathetic with Bo Xilai, and also liberal intellectuals like you both call for open, fair trial, this, itself, is a remarkable development in today's China.

Now, in the conclusion of your presentation you used the term "paradox," or china's unique legal paradox, referring to the nature of the revolutionary nature in terms of adopting Western legal system or mind or thought, but at the same time the system itself could be also seen as a conservative approach to the country's problems. Now, certainly, you have added a new paradox to the study of China, and there are so many paradoxes when we talk about China.

Now, the greatest paradox of China arguably relates to its future. It's a paradox of hope and fear. We start to cover about that.

Now, the obstacles or opportunities for the country's judiciary reform arguably are the centerpiece of this paradox. Now, the main obstacle is that, as you said repeatedly, the supreme authority of the Party-State structure is incompatible with

constitutionalism. And in such a structure, any effort on the part of legal professionals or the public to use the law against the Party-State rule is similar to what some Chinese public calls "asking the Tiger for his skin."

Now, not surprisingly, there has been growing public cynicism in China, widely spread, about the rule of law in China. Now, you have also sharply and insightfully, in some of your blogs, mentioned that the Bo Xilai case, that this is, you know, his wife is a lawyer by training, dared to kill a British businessman, and in front of her family maid.

MR. HE: Yes.

MR. CHENG: And also dared to do that herself, dared to ask the senior police officers to cover up a story, and they did.

So what kind of confidence do you gain by doing this? And, also, when Wang Lijun reports to Bo Xilai, and Bo Xilai just slaps his face, that the slapped face changed China's course of history.

MR. HE: Yes.

MR. CHENG: So, people said, this is a leader, really famous for being an anti-corruption person, anti-Mafia, but he ends up as a Mafia kingpin, you know, the leader.

So how would you reconcile this, you know, kind of fear, but at the same time the fact is that you actually dared to challenge some of most powerful politicians. In the Lijun case, it was very, very successful.

And also you mentioned about the achievements, you know, progress made in China over the past 20 years. How would you reconcile this paradox?

And also, it seems to me that you're more optimistic than pessimistic. What's the single most important reason for your optimism?

MR. HE: There are kangaroos in Australia, and your question is like a kangaroo, because in a pouch, there's a pouch within a pouch.

I think what you said is like a basic paradox, the Chinese Communist Party, okay, from its history, its basic philosophy, or Chinese political philosophy is a philosophy that abolishes conflicts. It supposedly it will represent the most fundamental rights of the people, we would like to say "fundamental interest." What is "fundamental interest?" It's something that you don't feel, feel it. For example, I confiscate your house, you'll feel pain. And then we'll say, you don't understand your fundamental interest. I take away your house because that's in your interest.

So that kind of philosophy, it's beyond argument, because they say "We represent the fundamental interest of people," then they do. So that excludes any ways to make laws to restrict their power.

I, myself, in my book, also there's an article calling for the Chinese Communist Party to register. So, the Party, they had 60 years of history, still not a legal person, there's no personalty. It's just an organization, but it has power everywhere. It uses all kinds of power, but there's no obligations. When you want to sue the Party, then you find, okay, I can see Party everywhere, then, when I want to sue the Party, the Party is nowhere to be seen. It becomes invisible. So that's something very interesting.

So I like to say, over 60 years of Chinese Party, the Communist Party still acts like an underground party, still operates underground. Can we bring them above the ground? Ask the Party to register, to make it a legal person, so separate their finance from the country's physical planning.

So, you want to promote rule of law, genuinely promote the rule of law, we have to change this traditional ideology. This ideology must be changed, because that's when you have to stop arguing that I represent the fundamental interest of the

people, okay? I am only a party, I am one party only. And you're only a part of it -- okay? And every party is a part, then you have to acknowledge the legitimacy of other parties. If you acknowledge that, then you have to acknowledge the fundamental rights of the people, like freedom of speech, freedom of publication. And, then, the army shouldn't be controlled by one party. The army must be loyal to the country, not to the Party.

So, all these things will become logical. So, in that case, the Chinese Communist Party, they should undergo a fundamental reform to become like European-style social democrats, and that's more practical.

So, should be push to that direction? And then, if we do that, then probably there will be no such paradox.

MR. CHENG: A year ago in Beijing, I think in November, I attended your panel discussion with Professor Xu Xin, on judicial independence, and organized by Beida Law Society. And it's a really wonderful experience for me, as a foreign visitor. It's quite eye-opening.

Now, actually, I used that as a beginning of the introductory chapter, and with a really detailed description.

Now, at the panel discussion, you and Xu Xin outlined five proposed important systematic changes for judicial independence in China. Now, let me very, very briefly go through them, for those of you who haven't read the book.

Number one, transferring the leadership of judiciary reform from the Central Commission of Politics and Law, (speaking in Chinese), to the National People's Congress, what you call (speaking in Chinese). And in the form of a yet-to-be-established judiciary reform committee, in which legal scholars, lawyers, and NGO representatives occupy more than half of the seats. This is number one.

Number two, adjusting the role of the CCP from appointing presidents of courts, and the chief prosecutors, to only nominating them. The real decision-making, the appointment, goes to this independent selection committee rather than the CCP organization department.

Number three, prohibiting interference by the CCP in any legal cases, especially by prohibiting judges from being CCP members, and banning Party organization within law firms -- a very ambitious demand.

Number four, reducing the power of both presidents of courts, and chief prosecutors, in order to enhance procedural justice.

And, number five, finally, establishing a constitutional review system, including a new constitutional committee, and new constitutional court.

MR. HE: Uh-huh.

MR. CHENG: Are they realistic? I mean, we heard that just encouraging, actually, a few weeks ago, that they reduced, demoted, the chairman of the (speaking in Chinese), the Central Commission of Political Science and Law from a Standing Committee member to Politburo.

But the other things are not happening. It seems to me that you are really asking -- what's it called? -- asking the Tiger for his skin, aren't you? Do you think it's possible? What's the procedure? Is that just a --

MR. HE: I think, Dr. Li Cheng, these things actually, well, you don't make an argument in China, very few people say "You're wrong." Nobody can write an article to say that these proposals are wrong, or shouldn't propose these points.

But, in fact, people in power, they all feel this cannot be done, we have to grasp our power, let the Party control the power. That proves China has entered its juncture that we must have reforms.

Why? Because the existing practice cannot find a theoretical solution -- must we go to violence, resort to violence?

So the legitimacy of power, the fundamentals of the power, if they're based on force -- "because I'm more powerful, I have guns" -- if that is the case, that cannot be sustained for long.

So, our old practices cannot argue for the things that we have done, gradually will become unacceptable. For example, a review, a constitutional review, actually for the Chinese government, for our top leaders, these are very serious issues. There are a lot of laws in violation of the constitution. They create a lot of chaos.

Do we like chaos? Even from their interest, you know, it's hard to argue in their favor.

So, many years ago, with Professor Gewirtz, we held a meeting on constitutional review, and judicial review. We had a lot of in-depth discussion. And at that time there were some people from the government and from the People's Congress, they were all interested. They feel that this is the future path for China.

So my feeling is the Party Committee, their present power over the courts, over the judges, if the power was reduced -- in my micro-blog I raised a series of explicit proposals: Can we ask the Party to withdraw from the court, like to be a court de-politicized, and all the judges and prosecutors should not join any party? Now, maybe the prosecutors it's okay, but the judge must be neutral. And would that be helpful to establish the rule of law?

My micro-blog was not deleted. It's still there. It's not censored. So, probably, they're listening, too.

MR. CHENG: Well, this is related to my next question, the 18th Party Congress that just completed earlier this month. A number of leaders with law degrees -- and I mean real law degrees, with solid training --

MR. HE: Yes.

MR. CHENG: -- not a part-time, or whatever. The pinnacle of power is the member of the Politburo Standing Committee, Politburo, and the Central Committee -- that included, you mentioned, Li Keqiang. Also another person in Wang Funin, he's former dean of the Law School at the (inaudible), and also I found that there are several of your classmates from Southwest University in political science and law -- actually, really the same class, including Su Chang --

MR. HE: Su Chang.

MR. CHENG: And Wu Judring is the number two person in the (inaudible). And, also, that another is Yao Huaying is the number two person in the Public --

MR. HE: Security.

MR. CHENG: -- police, Security.

MR. HE: Yes.

MR. CHENG: Now, do you know them? And, because they're your classmates, what do you think of them? And do you think this is the result of very positive, welcoming result? You always argue the professionalism, the legal professionalism for, you know, these kind of three branches.

But now it's happening, it sounds like -- at least in the Central Committee level, you always see the number one, number two leaders got the solid training in this, you know, court, prosecutor, and also the police.

So, what do you think? And particularly, you know, in terms of general, and also individually, the personal thing?

MR. HE: Well, let me use a Western phrase, "friend in power, friend lost." So these people who have obtained high positions, to me, they're no longer my friends. Okay, they don't talk to me anymore. Maybe sometime they need some classmates, but when they talk with me, maybe it's too sensitive. It's like they don't want to touch someone with a virus. You know, they want to be infected.

In fact, these people, I think, in my heart, my feeling is these classmates of mine, they were promoted to such high positions, maybe a little bit have some good feeling to the Party, because they are good people. Mr. Jiaocheng, after he graduated, he actually was studying civil law. And then, after he got his master's degree, and then he went to work for the Ministry of Justice.

So, strictly speaking he was really not of the Communist League, Youth League member – so, unlike Li Keqiang. So, to me he is a very practical person. He's open-minded, and he is very receptive to criticisms, especially when he was in Hunan, he actually advocated for the openness and transparency of the judicial process.

So, he was not just an officer, but he was also a professor at the school. I remember when he came to become the Deputy Minister of Justice in Beijing, he actually called me up and asked me for my opinion on how to establish a jurors system.

And then, Wang Min, I don't know him very well, and so I cannot comment too much on him. But Shen Deyong did not come from my alma mater, but I think he was a very talented person.

And I saw, as far as this 18th Party Congress is concerned, although we have some reservations on the top seven members, however, below them, I think that as far as Central Committee members, the concern that we do see quite a bit of talents

going into the Center Commission, including the Central Disciplinary Committee members, the Standing members, and the Deputy Secretary -- I think they're all very talented people.

So, in my view, I think when lawyers enter politics I have good expectations. I hope that they will work very hard to make changes.

And at the same time, let's not be too idealistic, because a lot of times they can't really say what we want them to say. Because some of us can speak really loud, and we can be critical of them, but once they're in there, you have to know that they have to take care of their own interests, they have to do things. So, inside and outside, our voices have to coordinate. Well, I'm not saying this is a conspiracy, okay? But we just have to strike a balance there.

MR. CHENG: My last question, you are a major supporter for reform rather than revolution. But in your discussion, you also mention the danger of revolution. And, as we know, that term, the concept, really dominated the political thinking in urban China in recent months, or within a year.

And, now, the one thing is that you talk about change, you're optimistic about change. My question is about the timetable of change.

MR. HE: Mm-hmm.

MR. CHENG: And while you now talk about the 20 years or 30 years, you're probably talking a relatively short period of time. But also, there's a possibility about the sudden, but largely peaceful transition to a rule of law, or even constitutional democracy.

And some liberal intellectuals argue that culture change in China takes 60 years.

MR. HE: Mm-hmm.

MR. CHENG: Economic change takes six years. And political change takes six days, or even a weekend. So it's a very rapid change, can come as a surprise, like what happens in many other countries.

Now, so what do you think of this assessment? And, also, do you think the generation of your son in China will live in a constitutional democracy -- or not? Timetable.

MR. HE: This is a really hard question, because I'm not a good calculator of time, because fortunately, this change does not occur in six minutes, so it gives us a little bit of time to make preparations.

I think that currently the changes in China are not well prepared. In other words, everyone is so focused on the 18th Party Congress, everyone was going to see who is going to be in the Politburo, who is going to be a potential candidate, who is going to be losing a position -- including your article. I know you have a lot of fans in China, because a lot of people are analyzing who is going to come in, who is going to go out.

But even if the personnel are selected, for example, Wang Yang, and even Li Yuanchao, do you think that there's going to be really profound changes? No, because we're not prepared. What kind of preparations, the preparations that we need to know where the society is heading, which direction the society is going to head.

So, as we're trying to make all this movement, what is our goal? Where is your target, what is our goal? What's our destination? We don't know.

We talk a lot, and then we say a lot of "harmonious society," "well-being society." We don't even know what's not so well-to-do society. I know the Westerners listen to us, and listen to Chinese leaders, and say, "What are they talking about?"

And then what about how to develop China with science and technology. So we say three representatives -- who? Who are the three? So the Westerners are confused. In other words, we don't even know where our society is headed to.

The legitimacy of this regime is only based on a good economy, or good economic development. But what is the goal for our political system, for our legal system?

So to do all that, we need to look back at our history. For example, yesterday when I arrived in Washington, D.C., I added something in the blog, I said we need to do three things. First, we need to realize the law of archives, because from yenan, the cultural revolution, we need to publicize and declassify all these documents, all these archives, so that people know what's going --

And then, with these archives being opened, then we will be able to know what's going on in history. And then, when we can really assess, for example, the historical figures and events, for example, the incident of Tiananmen Square. Because then we will know what had happened in history.

Because what has been done in Chongqing was without foundation, including the leftist scholars are talking about "democratic society." What do they understand about democratic society? And then they want to talk about oligarch kind of group, and then we don't understand, they don't understand that. Then you have one person who wants to lead, and then you call it democracy.

So people democracy in China, if you change the second character, it becomes "people perish."

So we need to know, we need to define the goal of our society: freedom of speech, freedom of press, protection of private properties. We need to have this very

good theoretical structure as a foundation that, without doing this, we can't really do anything.

And so need to work on this very hard. And this is what I mean by deconstruction of socialist ideology. And that's what I meant.

MR. CHENG: So, for Q & A. And be sure, just introduce yourself, and only one question. No basket of questions, or several parts of questions.

Yes, please.

SPEAKER: Hi, my name is Eric (inaudible), with the (inaudible).

My question is, you know, in thinking about like the law in China, but I think the most important thing -- I first thought about law in China when Hong Kong came back to China in 1997. We're talking about the basic law.

So -- and the interesting thing is that the basic law must be explained by China. So if you talk about this, something about a problem with (inaudible), how can they explain the law which deals with the law, which basically has its origins in English, call it common law?

So what do you think? Do you think that China can learn from the experience from Hong Kong and Taiwan in their structuring of a future law in China?

MR. HE: Thank you. Actually, I can give you a very simple answer. When Deng Xiaoping represented the Communist Party in China to promise Hong Kong that it wouldn't change for the next 50 years, as far as its legal system is concerned, that it can continue to use common law. But you know, the parliament only care about, or legislation also care about setting up the law. But then the lawyers who explained the law, in England, many years ago, the parliament also they only kind of had a balance, a check and balance on the monarchy, so they didn't really make laws.

So, rules actually, or the law is actually explained. So we don't have to really adhere too much to what Montesquieu was saying. However, if the judges not longer have any monopoly to explain the law, then the law will have to be executed or implemented by a government organization, then this common law will change. So this is a very serious problem.

So I, personally, am empathetic with the legal professions in Hong Kong, and I believe that when they protested, there was a point about what they were doing. And I think that there must be some kind of interaction, in that in the future, if you look at Guangdong and Shenzhen, there are a lot of legal professionals that are really paying attention to what's going on in Hong Kong. And I think, so eventually maybe we're going to be more federalistic than any federalism countries, including United States. You see that the United States, you don't give the final authority to the state level, they have to keep appealing up. Because if they can have the final decision, then Justice Breyer will not have a job anymore.

And so I think they need to have good interactions on a local level, but I think, currently, central government is quite domineering. It has not tried to engage in a more rational conversation. I hope that when Xi Jinping -- I remember when Xi Jinping visited South America, he said something that was quite glaring, but I think that in the future he will take this matter very seriously.

SPEAKER: Hi, Professor. This is the fourth time I listen to you. The last time, I was in Shandong.

I have a question. Currently, the balance of powers is the best political system that human beings can find, because it is the shortest distance between two points, which is in a linear direction.

Currently I'm a lawyer. I came from Shandong, so we lawyers believe that this is the truth, that this is a linear, the shortest linear distance between two points.

But -- so any animals know this, because if you give something, feed an animal with something, it will go forward.

But errors are also valuable, because only when we make mistakes, that we'll find the truth. And therefore, in the process of trying to achieve balance of powers, how do we travel on this journey? For example, you take the case of Mr. Bo Xilai. Basically, if Mr. Bo Xilai is wrong, then is he playing the role of making a mistake so that it will push forward the legal reform in China?

So, can you write an article which is -- show a kinder article towards this Mr. Bo?

MR. HE: Actually, to tell me to be "kind" to Mr. Bo, actually I have been very kind to him, because if he had listened to me, then he would not have been in the situation today. Because at the time, in calling on lawyers in Chongqing, had stood up to say, hey, that's not the path that we should be taking. And if he had listened, then he would be able to stop before he made bigger mistakes.

And, therefore -- I remember President Clinton, when he went to Peking University to make a speech, he said the critics are our friends, because they're able to tell us the truth very candidly.

So, I think that in China we need more of this kind of critics who can come out and shout, and raise our voice. At lunch today we were eating with Professor Alford of Harvard Law School, and also other law professors. We talked about all these very serious cases of human rights violations in the past.

Some lawyers, they would keep their mouths shut. So this has conveyed a very wrong message, because it let the authorities think that they were doing

something right, instead of something wrong, for (inaudible). Everyone was quiet, so they thought that he should be convicted.

And I think this is a very misleading -- this was misleading the government officials. If we really love our government," then we should really say something that they don't like to hear which is very important.

And also, you mentioned about universal truth, and the shortest linear distance between two points.

Of course, this is a very easy to understand analogy, however, remember that we are human, and a lot of times we think that this is a path that is correct for me, but it may not necessarily be a linear path. Because if you turn and make the twists and turns -- ah, this is very fitting for the conditions in China.

So, in a way, you have to make judgments about values, because you cannot say that -- I will be like everything is pure. No, we're humans, and therefore we are complicated. I think this is very difficult to achieve.

SPEAKER: (inaudible) from Shanghai, and a visiting scholar here.

Chinese, for the sake of democracy and freedom, have paid a lot of price in the past. And when we talk about rule of law, I study intellectual property rights. And I think with IPR law, the problem lies with the constitution, and not the law itself. And so, when I study this, I also realized that legal problems actually stem from the entire political and social system of a country, and not really from the law itself. And so this comes to the question of democracy. And I feel that we academics don't like the system, but I think a lot of the ruling officials, they also do not like the system. So at this point, everyone knows that there needs to be reform and changes in the society.

However, how come it has still not been accomplished yet? Now, this kind of changes or reform, how is it going to be accomplished? This is my biggest

question. In the process of this transformation or reform, I would like to know what you have in mind concerning how we're going to go through this process and reach the goal.

Thank you. Thank you very much.

MR. HE: So, I have a lot of Chinese friends here in D.C. And I see that I think the Chinese have already conquered Washington, D.C.

So, I personally feel that your question is very -- asked correctly. Not only we need to reform, but we also need to have an arrangement, and we need to have a timetable. But, like I said, we need to start from the historical archives. We need to see the archives and understand what happened in the last 60 years. And this is what I mean by going step by step.

But then, at the same time, you know, reform is just like building a structure. First of all, you need an architect to draw the picture, and to have the blueprint. You know that in Beijing we have like the ugliest buildings. So you cannot have architects do the drawings quickly and draw all these ugly buildings like those in Beijing.

So, once the architect is done, then you have to follow the architect's blueprints. So, reform, and especially social reform, is very difficult, because you don't have an architect who can draw this blueprint and then you can just do it accordingly. Because you have to kind of go and explore what you need to do in the process, as far as reform is concerned.

And I think that, for example, our parliament, a lot of the time they have debates, they have discussions over an issue. I think that is very important. Because you need to have everyone's talents, everyone's opinions be exposed.

What is truth? What is the rational choice of the public? And we need this kind of discussion so that we will make less mistakes.

But we're not going to have an architect who will just show us the path.

Yes.

MR. SCHOETTLE: Thank you very much. My name is Peter Schoettle. And I can understand how the Chinese Communist Party does not want the rule of law, to preserve its own power.

So my question is, couldn't law be divided into different areas, and certain sections of law? I'm thinking maybe family law, or so -- would allow the rule of law in that sector of the legal system.

And my question is: Is there any sector of the legal system where the rule of law is already quite strong, and where the Party would not be interested in controlling it?

MR. CHENG: Probably we'll wait a couple more questions for the last round.

Now the person in the back.

MS. SIMON: Nice to see you again, Professor He. Carla Simon, from Catholic University. We met when I was teaching at Beida.

I noticed that when you were talking about the various things that need to be done, you differentiated between separation of powers and better governance -- governance reform.

So I'd be interested to know what you mean by "governance reform," in that context. Xie xie.

MR. CHENG: My Japanese friend. Yes.

MR. CHIBA: Thank you. Akira Chiba, Japanese Embassy.

I have a technical question of the words being used today. I wonder how the terminology "rule of law" should be translated into Chinese. And if it is "fázhi," then,

in Japanese we have the same word. It has a different meaning, it means "rule by law," not "rule of law."

And the reason why I'm asking this is because the rule of law is incompatible with Marxist jurisprudence. And we could be lost in translation if we're not careful.

MR. CHENG: Well, actually, for this question, the book has the detailed explanation. Just read the book. Yeah. (Laughter.)

So, the first two questions.

MR. HE: Thank you, Peter, for your question. It's very original, original thought, that law, that we can functionally divide them into different sectors. In fact, where there's a lot of rule of law, then we will have rule of law.

So, it's like comparative law, legal transplantation. Some laws, it's probably easier to be transplanted and maintained. But some laws, it's very hard to make it go across the border to transplant it. People have a lot of, have had a lot of discussions.

And I think, in China, currently, gradually we will have some sectors -- for example, just like the teacher from Shanghai, he's seen intellectual property. In cultural areas, some courts, the IPR issues, they have more independence than criminal courts, because it's very technical. And people, like parties that couldn't even understand IPR issues, so they cannot understand intellectual property or trademarks. So, they have to select real educated judges. They just cannot pick anyone to be a judge.

So this is a kind of thinking, so maybe we can -- if we can do this in IPR sector, and how about land transfer, land disputes? Based on Roman law, land issue is very complicated. Of course, the common law, the land law is very complicated, too.

Maybe gradually we can let the courts use some sophisticated rules to adjudicate these cases, and then the people who don't understand law cannot interfere.

But, fundamentally, we still need to make an effort, just like you said, the Communist Party, make them love the rule of law -- not like a (inaudible). So you have to tell them, without good rule of law, even they cannot achieve their goals. For example, without the rule of law, the economy and the market and transaction security, they all need rule of law. So, we need to make better arguments. The Chinese Communist Party, I always feel, is still quite flexible. They're not that rigid. It's not like the old Communist Party in the Soviet Union. In Gorbachev's time, the party, every article will quote Karl Marx, or Lenin. Now, in China, the Chinese Communists have stopped doing that, stopped making these quotations, like Li Peng. He'd say, we, Communist Party, we are Marxists, blah, blah, blah. The Western reporter ask me, you say you are Marxist, which books have you read? Then he said, "No comment." He thought for awhile, he said, "No comment." So even he hadn't read any Marxist books. So that's a question raised by a Western reporter.

So, when we talk about good governance, there's a very comprehensive thinking. It's just, regrettably, we don't have enough time today. So many important speakers, I don't want to take up too much time.

But I think we need to have a comprehensive, overall thinking how we can have good governance. Maybe we have to protect private property, and we have to safeguard the security of transactions. We should separate powers. If the power can be used by the people, then don't let the government interfere.

When you look at traffic congestion in Beijing, the traffic congestion -- why? Because the central power. The more powerful the central government is, the more congested it will be. If America follows the Chinese model, then you cannot live here. You have to move away from Washington, D.C. Because everyone wants to go to Beijing to seek all kind of resources.

And also, we have to protect individual decency. I'm very happy to hear from Premier Wen Jiabao, and also President Hu Jintao, they both mentioned individual decency. Hu Jintao, he's the one without individual decency. He couldn't even laugh, he couldn't even smile. Every day, look at his expression, like he's obviously in pain.

So this system is not good to anyone. President Hu Jintao, he was like under pressure. He was suffering.

So, last year, we wished he could live like a man. You know, "I quit." No, but in the end, he still didn't have dignity. So, decency, dignity are very important.

So maybe I'm rambling. But in the future we have more time, we'll keep talking about this issue. Okay.

Okay, about the "rule of law," "rule by law." Maybe we -- sometimes we exaggerate the meaning of a single word. Probably in Japanese the rule of law is like the rule of the law -- actually, it's the rule of law. It's very close.

When we talk about "fázhi" in Chinese, it's very short. There are no specific definitions. But I think the real issue is whether our action model, the action model how the pattern of our government whether their behavior is subject to strict rules. So that's more -- even Chinese scholars, they keep saying that fázhi, the rule of law in Chinese, and other fázhi in Chinese, which means "legal system," they're two different characters, the same pronunciation. You know, maybe if we consider with Japanese, we both use Chinese characters, so maybe we have a lot in common.

So they kept talking about the difference between these two words. I think we are spending too much time on textual meanings. But what is important is more what you understand from your heart.

MR. CHENG: We have to end this session. And I apologize for those who did not get a chance to ask questions, but we still have two more sessions -- and more interesting sessions.

And it has been a wonderful discussion, in my view. And I'm particularly impressed by, really, the extraordinary combination of emotion and reasoning, and the combination of very strong critique, but also very calm forgiveness. And also the combination of your great sense of humor, and also profound thinking.

I want to ask the audience to join me, thank you again. (Applause)

So, 10 minutes break, then we resume. Thank you.

(Recess)

MR. THORNTON: Okay, this next session, we're extremely fortunate to have three of the great legal scholars in this country on the topic of China and rule of law. They'll be introduced in a minute by Jon Huntsman. I just want to say very briefly that I feel very fortunate to have Jon here. He's going to lead this session. He's going to make

some comments himself. We're very fortunate to have him at Brookings as a distinguished fellow.

And I spent the last 10 years talking to leaders in this country on the topic of China, political leaders, business leaders, educators, and as you all know, those of us who are interested in this topic, there are too few leaders in our country that are sufficiently deeply engaged in the topic of China and Jon Huntsman stands out to my mind as the single most engaged public leader in the country. And I'm hoping that in the future he will be in increasingly important public roles because we can very much use him in the overall U.S.-China relationship. So, I'm delighted to have him and I turn it over to Jon.

Jon, thank you. (Applause)

MR. HUNTSMAN: John, thank you very much for that very kind and undeserved introduction.

I have the great honor of being a distinguished fellow here at Brookings, but I can tell with Justice Breyer and with He Weifang and with these distinguished legal experts up here there's nothing distinguished about me at all. (Laughter)

So, today, I come to you pretty much as a regular fellow as opposed to any kind of "distinguished fellow" and what we have ahead is a great presentation by some people I think you're going to find very interesting about development of the rule of law in China. I just kind of wanted to offer a few introductory comments on the China relationship in general.

But may I first thank you, John Thornton, for your vision and support for this center here at Brookings and for the leadership that you provide and for Cheng Li, who's an extraordinary scholar and every utterance and every monograph that you put out is read and scrutinized by everybody. I just know there's somebody out there on the

Chinese side who writes about candidates who run for the presidency. (Laughter) I'd like to find that person at some point, the way that you provide such meticulous detail on the leadership in China. Thank you for that.

For He Weifang, you're an extraordinary human being and we are so honored and delighted to be in your company. You're courageous, you're outspoken, you're thoughtful, and your insightful and I'm reminded of a Chinese phrase standing before you and that would be (speaking in Chinese.) Or how about (speaking in Chinese)? (Laughter) Or I guess the analogy would be something that Winston Churchill said during his life, which is there are some things you never do in life. You never kiss a person who's leaning away from you, you never climb a hill that's leaning toward you, and you never speak to a group of people who know a hell of a lot more about the subject matter than you do. (Laughter) And there is no one more distinguished and more practiced than you.

My only lament is that we don't have more He Weifangs up here on stage because I know there are a lot of very brave and courageous people in China, many of whom I'm met who are pushing for legal reform, a great independent judiciary, property law, and human rights law, trying to expand civil society in ways that will make China flourish into the future, but we're lucky to have you.

Three quick points that I want to make before we move on to hear from Professors Alford, Cohen, and Gerwitz. First of all, I think it's important to note that in the cycles of the U.S.-China relationship, we're entering, I think, an extraordinary interesting period because I can't remember a time in recent history where we've had a presidential election that roughly coincided exactly with the leadership change in Beijing.

So, what have we seen in Beijing in recent weeks, in fact, this very month? Two thousand delegates visiting Beijing, putting together a slate of 370 roughly

central committee members, chopping up on the 25 members of the politburo, and some agreement around not 9, but 7 members of the Standing Committee of the Politburo, which I would refer to or consider to be the board of directors, if you will, and we have a reelected president here on this side. Which is to say we're going to begin the new year with a clean slate and an ability which is so unusual in the U.S.-China relationship to start fresh and I hope that isn't missed.

And there are a whole lot of people in this room, practitioners and professionals who have a say in exactly how this relationship will evolve, but I didn't want it lost on anyone. To leave this gathering here today without remembering that the cycles of the relationship are remarkably in sync for the next couple of years, of course there are always externalities, the events that nobody can predict that pop for from time to time that influence the overall trajectory of the relationship, but we're starting out fresh and the cycles, distinct as they are, disrupted by politics on the Chinese side, on the American side, arms sales to Taiwan. As Wang Qishan used to tell me when I was living in Beijing (speaking in Chinese). (Laughter) We also have politics in China. Sometimes you at American don't quite understand that. So, let's recognize those cycles. And opening for reform, I believe, lies ahead.

Number two, legal reform efforts in China will be central to any future reform agenda, broadly speaking. So, we're ending, in a sense, the Deng Xiaoping dynasty. Why do I say that? Because we have the rise of the fifth generation, Xi Jinping, the first Chinese leader who wasn't anointed, so to speak, by Deng Xiaoping, and we're closing out the generation that is responsible for some important events at least in my lifetime with respect to broad openings in China. A, the diplomatic opening, so, only those who want to recognize China will abide by the One-China Policy. Two, the opening of the economic doors, which have taken China from a relatively small

economy to the second largest in the world today. And, three, primacy of the party with its 80 million members and 3,900 outposts around the country, which still lives on today.

And now you have Xi Jinping rising to power, who has been given the party mantel and soon the military and the presidency. And before him will be new questions, much different than the ones that Deng Xiaoping was responsible for addressing and acting upon. And before Xi Jinping will be questions like is China more repressive at home today than in earlier years? Is China more nationalist in terms of its economic practices, particularly those among the state-owned enterprises? Has China become more assertive internationally? And I would argue each one of these questions carry fairly profound rule of law implications. So, as Xi Jinping rises to take the top position in China and now wrestles with new challenges and attempts to answer new questions, I would argue that many of them are steeped, based in basic rule of law doctrine.

In fact, the most important steps, I would argue, ahead for China will be around bolstering the rule of law because the implications are profound for expanding civil society for human rights, for addressing the needs of ordinary citizens, for building greater economic certainty. Rule of law is an essential pillar of our democracy, but for China, rule of law is the best way of regulating and settling disputes in society and serving as a check against the abuse of power.

So, the real question for China over the next few years will be what reigns supreme for the world's most populous country and the second largest economy, the party or the law? So, despite setbacks in recent years, changes occurring, Wen Jiabao said not too many years ago rule of law will be one of three components of any future democracy along with dignity, justice, and independence as guarantees in any future reform effort.

Number two, we've gone from the days where Jerry Cohen, my friend, was the only lawyer in China, sometime shortly after the fall of the Qin Dynasty I think that was, Jerry. (Laughter) To 17,000 law firms and over 200,000 licensed attorneys, and He Weifang so eloquently stated, in 1995, only 5 percent of judges in China held a bachelor's degree.

Today, there are basic standards, a bar exam, and some legal experience that is even required. Yet, too often, China's justice system falls short of the laws on the books both in practice and spirit. Corruption is widespread, collusion among police and prosecutors and judges is common. And most critical, the fundamental question of judicial independence remains ever elusive. The most sensitive cases still remain within party control.

Point number three and finally, so, what will be the process for future collaboration between the United States and China? Something I hope that this distinguished group can talk about because we have such firepower here in the United States with great universities, wonderful schools of law and learned legal societies that are all too willing to share our knowledge around rule of law and our legal development. So, how do we package ongoing efforts in ways that are coordinated and productive that will ultimately yield real benefits for the future and the people of China?

So, with that, it would be a great honor to hear individually from three distinguished experts up here each of whom will take I think 15 minutes for a presentation, after which we're going to have a conversation and then use a few moments to open it up to the audience. So, it's now a great honor and privilege to be able to turn the floor over to Professors Alford, Cohen, and Gerwitz and we'll just go in that order, if that would be okay, and Bill, we'll start with you. Thank you very much.
(Applause)

MR. ALFORD: So, thank you, Ambassador Huntsman, both for the introduction and for your superb service to our nation in Beijing.

I'd like to thank John Thornton, Cheng Li, and Brookings for the superb, excellent China program and in particular for this series, the Thornton Center China Thinker Series by bringing people like Yuka Ping, Hu Angang, and now He Weifang to the broader international audience. You are enriching our understanding not only of Chinese ideas, but really of the basic humanity of our Chinese colleagues. So, thank you very much.

It is fitting that He Weifang should be the first person from the world of law in this series because as you saw in the last hour, he is someone of incredible courage, wit, incisiveness, and prescience.

Now, in the interest of full disclosure, I need to say that we have been good friends for several decades and I cherish memories from his visiting scholar days in the 1990s at Harvard when we had lively discussions across the seminar table, experienced civil society by going to the Boston Symphony and New England Town Squares and maybe best of all, enjoyed pickled tongue sandwiches at Rubin's Kosher Delicatessen in Brookline, which Weifang tells me was very similar to what he was eating when he was a young man back in Shandong.

Now, I want to frame my remarks today around Weifang's writings but also is exemplified in his speaking both because of my great respect for him and affection for him, I want to try to convey the majesty of what he has done, but in a friendly constructive way, maybe push a little bit. He knows I'm going to do this, on a few points. Specifically, I want to engage Weifang's work in four respects that I trust will illuminate broader points about the challenges of law reform in China.

So, the first concerns the Chinese tradition. While Weifang justifiably takes great pride in his heritage, as he should, he does not view it as least prior to engagement with the west in the 19th Century as providing abundant resources for the construction of rule of law today. Now, I understand full well Weifang's desire to avoid dimensions of the Chinese past that constrain liberty and law and I certainly am aware as I argue now for a greater attention to the Chinese past how some observers in China do invoke it to try to avoid talking about reform today. That's not my goal.

My own view is that both politically and conceptually, it is crucial to try to anchor the development of rule of law in China today more in the Chinese past. Politically, it is, to me, it seemed hard to imagine the rule of law taking hold in China if it is seen rightly or wrongly largely as a foreign import, particularly since the early history of rule of law borrowings was not a pleasant one. It was initially forced on China to some degree. Conceptually, happily, there are great and abundant resources from which to draw and not that it's an easy task.

Time being limited, let me just make a few points here that I'd be glad to amplify in the question-answer period.

So, the great Chinese classics provide us with some rich material for thinking about rule of law today for grounding the idea. Think of the Confucian intellectuals in which the rulers' legitimacy is inescapably tied to his duties to the people or how Mencius, one of his prime disciples, takes this further by explicitly justifying the removal of rulers if they fail adequately to serve the people or how Shin Za, another famous disciple of Confucius, repeatedly underscores the importance of equitable and clear law evenly applied to all in society with the possible exception of the ruler.

The (inaudible) richness just add an abstract level. Several Chinese dynasties developed very sophisticated procedural rules to monitor the exercise of power

which rules officials were expected to know and to follow and which rules at least in some instances gave aggrieved citizens some avenues for redress.

Over the past three decades, scholars both in China and the outside world have uncovered massive, and I really mean massive, archival data that shows contrary to the stereotype, ordinary Chinese citizens say in the 19th Century, the 18th Century did use law, did invoke it to protect their interests and at times in doing that, they were aided by experts in the law who may not have constituted a legal profession in a contemporary sense, but who knew how to use the law to protect individuals. And there was the institution of what was called the *dūcháyuàn* or censorate, a woodsman-like figure whose job it was to try to check official abuse even to the level of remonstrating with the emperor.

Now, in making these points, none of this is to suggest that China's past alone is sufficient to root a rule of law and it's also to be fair to Weifang and others the task of extricating what's most positive from the rest is no easy job, but I do think there are important resources there on which we can draw.

My second point concerns borrowing from abroad. Obviously, it is indispensable and I personally am proud to have worked with a couple of people in the room, Randle Edwards of Columbia Law School and Stanley Lubman of Berkeley Law School 30-plus years ago to have established the first academic program on U.S. and China under the auspices of the Ford Foundation. I'm also proud of the role of my law school and of my colleagues' law schools in educating people like He Weifang and hundreds of other Chinese scholars over the past three decades.

But I do think we need to be as clear-eyed as possible. Historically, too often, Chinese reformers and some of their foreign friends have taken too un-nuanced a view of law here which I think at times may make the task of law reform there more

complicated. Our legal history is not always what we wish it might be. The progress we have made is not inevitable, but often the result of heartfelt battles and it's helpful to underscore how even today it can be challenging at times here fully to maintain the rule of law that law by its nature is dynamic as society changes and requires constant vigilance, as Justice Breyer so wonderfully spelled out in his book "*Making Our Democracy Work*."

Now, I can't resist one anecdote here. It's slightly light, but I hope germane. The dean of one of the great Chinese law schools a decade ago was visiting me in Boston. We went to dinner and he says can I ask you something very, very personal. And I said of course, you can ask anything. He said no, this is a really private, intimate question. So, I was trying to figure is this scholarly? (Laughter) Is it religion? Is it politics? Is it sex? What is it? He leans across the table, he's very nervous about it. He leans across the table and says Professor Alford, this separation of powers business (speaking in Chinese) separation of powers; you don't really believe it, do you? (Laughter) He was rather amazed when I told him that I thought it was a very noble ideal.

Anyway, going back to my broader point, as inspiring as our example in the U.S. may be, I also think we owe it to the Chinese and Chinese reforms in particular to encourage them to familiarize themselves with an even broader range of foreign models and possibilities, as my friend, Paul Gerwitz, has done wonderfully, for example, with the conference that Weifang referred to.

Prior to the financial crisis of 2008, but still to some degree today, many Chinese reformers have tended to focus chiefly on the U.S., often to the exclusion of other models, drawn no doubt as much by our power as our ideals and ideas. I personally think it's more empowering to our Chinese friends both politically and conceptually for us to lay out a very broad array of possibilities so that reform is not

understood as either the U.S. model or nothing, that, instead, our Chinese friends can see a range of possibilities, can see what our universal ideals about promoting human dignity in a range of different types of institutional design to get us there so that they can then craft something that is true to those ideals, but reflective of Chinese society.

So, just by way of example and, again, we could draw examples from Yale or NYU or Columbia, or other schools, but just an example closer to home, six years ago, our Harvard Law School project on disability working with two Chinese partner institutions did the first conference ever in China's history on disability rights and we drew experts from an array of different countries, many of them individuals with disabilities, each of whom discussed the model of his or her country and the pros and cons and historical contingencies and so forth. Obviously, disability remains today a very problematic area in China, but there has been real progress we have seen and many Chinese friends were very grateful for the array of different models.

So, we've seen since then significant legislative reform and even on the ground efforts building clinics, of engaging people, real NGOs with educators and officials, publications designated to acquaint people with their rights and so forth. That's my second point.

My third point concerns the legal profession. Weifang in his writing expresses the view, expresses "Optimism that with our legal professionals, there's a tremendous prospect for constitutional governments." Of course, the legal professional is ultimately crucial to the rule of law anywhere and Weifang surely is correct to use the platform he has before thousands of Chinese students to try to inspire them as he has done so well, but I think it is important that we remain mindful of de Tocqueville's admonition that even though lawyers "value liberty...provided that it is the lawgiver himself who is responsible for taking away...liberty, they," the lawyers, "are more or less

content.” de Tocqueville’s point is not to dis all lawyers at all times, far from it, but simply to note as Weifang did in his remarks, that lawyers and the legal profession are very much tied to the status quo.

This really in my mind captures the dilemma of the elite bar today in China. Its capacity to advance liberalization is somewhat constrained by its need to stay on good terms with Official Deng and with the party. I can’t tell you how many dozens of Chinese lawyers have a great regret, told me this themselves, and honestly compels me to say that if I were in their position, I’m not sure I would act all that much differently. There is a reason that we are honoring He Weifang today and it is because he has an unusual and singular degree of courage.

Now, of course, Weifang is not alone, but it is striking to me how much of the impetus for rule of law in China has come not so much from elite professionals, but from Chinese so far more humble and modest station. If you look at the ranks of the so-called (speaking in Chinese) or rights protective lawyers or the heroic blind activist Chen Guangcheng, who contrary to U.S. media reports, was not a lawyer in China, but knew brilliantly how to use and invoke the law and thanks to my teacher, Jerry Cohen, is now receiving a legal education here, but you see a lot of energy coming out from elite legal circles or if you consider the extraordinary work that other non-lawyer activists are doing, taking seriously the promises that the Chinese state makes in its law about environmental rights, consumer rights, disability rights, or combatting discrimination around gender or disease, you see again a tremendous energy. These less obvious figures, some not legal elite professionals, some not even legal professions, deserve more credit and more attention and more help from us if we want to promote rule of law in China.

I would pause here just briefly to commend Weifang on being a public intellectual in China. He's been criticized for not just doing footnotes in the university and although I'm a footnotes person, I think he's doing exactly what history best calls for.

My former student, Ella, is looking at me nervously to finish, so, let me get to my fourth and final point to conclude and it concerns the incredibly hard but unavoidable question of politics. We long for the rule of law in China as constraint on the powerful, but how do we get there from here? So, Weifang has not been hesitant to say it takes bold political reform to get the rule of law, but, again, the fact we're honoring him today indicates that, again, he is unusual. Too many scholars, both Chinese and foreign, have instead acted as if legal reform itself will be the driving wedge for political reform so that they can avoid having to confront these very difficult questions of political reform now.

I really hope I'm wrong in this next point, but I think the experience of both Korea and Taiwan suggests otherwise. Even though each of them before their transitions was less authoritarian than China is today and had a depreciable more independent judiciary, the evidence from those two cases suggests that legal system reform actually has more to do with consolidating matters after political reform than itself initiating broad political reform, which I think it's absolutely necessary to have sustainable legal reform.

Now, beyond these hard threshold questions, there are many others. I'll just mention one or two and conclude as we think about some of these hard political questions.

For example, what are we going to do about the ill-gotten gains that have occurred? Imminent Chinese Economist Wu Jinglian, one of the most distinguished economists in the country in China, estimates that Chinese peasants have been deprived

of more than \$500 billion worth of value of their land that has been taken without adequate compensation. How does one think of addressing that? Or how do we reconcile on the one hand a growing popular and media scrutiny the judiciary, which in some ways seems desirable, with a need to shield the courts from Populist as well as Communist Party pressures?

Now, there are no easy answers to these or to many of the other questions that we'll talk about today that China poses, but I do feel strongly that we are blessed, really that's the right word, "blessed," to have so gifted and courageous a friend as Hu Weifang, a champion really for his country and leading it toward rule of law and a teacher, inspiration for any of us outside of China who are engaged with law. So, thank you very much for having me today. (Applause)

MR. COHEN: I'm very happy to join this chorus of praise for the Brookings Institution and for the leadership of John Thornton and Cheng Li and colleagues in putting China's legal system on the political map in Washington.

When I started long ago to study about China's legal system, most people who were charitable felt sorry for me. They felt I must be having a nervous breakdown. (Laughter) To throw away a promising, conventional career in the law on a country we couldn't visit, on a country which we even seven years after the Korean War's end, we had very, very bad relations and American attitudes toward Red China were to say the least very negative. And I guess I've always wanted to have the attention and help of the political science community in analyzing the rule of law in China.

And it wasn't easy. I remember a conference in 1964, 1965 that Zbigniew Brzezinski convened out in Lake Tahoe comparing the Soviet and Chinese political systems and I was asked on the first day to talk about law and I talked about law, courts, judges. The political scientists there couldn't have been less interested. And I

was very disappointed. But the next day after talking with the conference organizers, I made another attempt. I never mentioned law. I talked about norms, institutions, sanctions, using all the jargon of political science and they all said that's really fundamental. (Laughter) So, I discovered a little bit about how to be persuasive in a political milieu.

But having an exercise like today's that recognizes as He Weifang's book recognizes and as Chung Li's wonderful introduction to the book recognizes, how to deal with the legal system may well be the new leadership and China's biggest problem and the one that they're least equipped to handle. We're all trying to take different slices of looking at this reality today and Bill has given us some very good perspectives and I liked particularly what he said about the impact of history.

Today, I want to look at three aspects very briefly. The first I'll give the most time to because I think it has the least analysis in the public domain, which is the relationship of the party to the legal system. How should the party be structured to deal with the legal system? How should the parties' authoritative agency, the political legal commissions that flourish at every level deal with prosecutors and judges and others?

Second issue I'll talk about briefly is (speaking in Chinese) reeducation through labor because I regard that as one of the litmus tests for the new Chinese leadership. Will they do something about it and what will they do?

And, thirdly, in order to provide a different perspective that relates to the historical and contemporary comparative law perspectives, I want to mention the relevance of Taiwan because Taiwan shows how a Chinese culture has been able to deal with the luminous political legal system, how it's been able to establish a constitutional court and how it's been able to do away with reeducation through labors equivalent.

Well, first, we all paid attention in recent weeks to the parties relevant to the legal system because of the reduction of the membership of the Standing Committee of the Politburo from nine to seven. The ostensible reason was this is designed to enhance efficiency, promote discussion, but many people feel and I think rightly that it also has something to do with fear of the political legal system's security system, internal security.

That Zhou Yongkang, who was a member of the standing committee, had too much power and this of course relates to the Bo Xilai case and they didn't want the head of the political legal commission who succeeded Zhou to have a similar opportunity to influence the highest leadership in the country. And, so, rather ostentatiously, they reduced the number of people on the standing committee from nine to seven, dropping the position of the political legal commission's chief to the politburo and the new successor to Zhou, Mr. Meng Jianzhu currently minister of Public Security is now filling that spot.

Well, that creates awkward problems because it's a new shift in political legal relations. It raises, first of all, how will the standing committee, the charmed seven, keep track of what the political legal commission is up to? Are they going to have a watchdog? Who is it going to be?

From one point of view, you could argue that Wang Qishan, who's a very capable person who's been put in charge of the Party's Discipline and Inspection Commission, some people wrongly think that's a kind of demotion away from his economic responsibilities. I think that's a mistake. Wang is a highly intelligent, very capable man, well-qualified to deal with the immense challenge of corruption among the Chinese business elite and their relations to government. But you could argue because the Discipline Inspection Commission is so intimately connected to the legal system even

though it proceeds the legal system, it's not part of the government, that Wang could take that brief of watching the political legal commission on.

But I think it's likely to go to the person number three in the party ranking, I believe, Mr. Zhang Dejiang, who is going to be responsible for the national People's Congress because it's the NPC to which the courts, the procuracy, and the executive agencies, all the relevant ministries has to report. So, logically, from the point of view of good government, one would think that Zhang would be put in charge.

But more than that, they have to figure out how is he going to exercise supervision? And beyond that comes more fundamental questions about what should the new political legal commission's powers be? We have the wonderful suggestions by He Weifang with Professor Chu about how radically to reform the legal system. If you really want judicial independence, and many major steps have to be taken, I just want to talk about some of the most immediate and fundamental issues. And one Professor He mentioned before, which is should the political legal commission continue to have the power to decide individual cases? Concrete cases.

At the end of the 1980s, before he had to step down before the Tiananmen tragedy, the then leader of the party, Zhao Ziyang, was trying to get the party of out court decision-making on individual cases, leaving its function to policy questions and a number of general ideological and other questions and even tolerating party selection of the leadership of the courts and the procuracy.

Well, when Zhao Ziyang fell, that idea fell, but now after so many years, it's receiving renewed discussion and we'll see whether the leaders of the party are willing to clip the power of the *zhengfawei*, the political legal commission so they don't decide individual cases.

More immediate is the question of who will run the *zhengfawu* at every level? Traditionally, as you know, the police chief has been the boss and it's a little awkward for the head of the local court and the head of the local procuracy to discuss the fate of a particular defendant when the police chief is running the show and outranks them not in government terms, but in party terms. So, already before the 18th Party Congress, a movement has been underway to change that and one prominent way to deal with this is to have the deputy party secretary at the local party committee preside over the local political legal commission so that the police chief, the court president, and the prosecutor when they discuss cases and other matters are on an even plane.

Another way is to have them rotate. They can alternate. A lot of ideas are being bandied about, but this is maybe the most immediately achievable one. It's in the process of happening and the details have not been exposed. We don't have much exposure of how a political legal commission works even though it's very, very important. It works in different ways in different parts of China and at different times, but its role is obviously very important.

Now, more could be done. Not only Professor He's suggestions, but, for example, if the party wants to start giving greater autonomy to the judicial system, the prosecutors as well as the judges, it could decide that courts in the procuracy no longer should come under the jurisdiction of the political legal commission for any purpose, not merely individual case determinations. That would go a long way. That would leave the political legal commission in charge of the Ministry of State Security, the Ministry of Public Security, and the Ministry of Justice. So, we don't know that's going pretty far. I don't see that happening in the immediate future certainly.

Well, there are a lot of questions. I could ring the changes on, but I want to get people to focus attention on this very important commission. We've had much

more attention understandably focused on the party's military commission and how that relates to the party and how it relates to the government, et cetera. We're beginning to see even the party discipline and inspection committee that has just turned over Bo Xilai after many months to the former legal process. We're beginning to learn more about them. But we don't know much about how the political legal commission actually operates.

Well, let me just say a word about reeducation through labor. Every year, 200,000 to 300,000 people are sent off to reeducation through labor by the police alone. No prosecutor's approval is required. No court approval is required. This is something handled by the police. And it comes in very handy. I'll just use an illustration that came up again this week.

The other day in Chongqing, a young official of the Chongqing government named Ren was released from reeducation through labor after serving 14 months of his 2-year term. How did he get there? He was first prosecuted for making fun of his leaders in Bo Xilai's Cultural Revolution campaign. And in a very unusual event, the prosecutor in charge refused to indict him. I don't know whatever happened to that prosecutor because Bo Xilai was still in power, but I'd like to now. But, in any event, the police were not fazed by failure to get the prosecutor to prosecute; they simply went around and gave him reeducation through labor. It's very convenient.

And when I went to Taiwan in the early 60s, I was interested already in this mainland phenomenon and I learned Taiwan had something similar called (speaking in Chinese). And I went to a (speaking in Chinese) labor camp and it was frightening, much different from the formal prison they also allowed me to visit. Well, Taiwan has done away with it. After a long struggle due to Taiwan's constitutional court interacting with its legislature and its executive branch, in January 2009, this hated sanction that was

used not merely for (speaking in Chinese) hoodlums, et cetera, but for political offenders. It was abolished finally in Taiwan and it's one of the things the government of Guangdong government of Ma Ying-jeou can take some credit for, but the key was the role of the constitutional court.

In China, they talked in 2003, 2004 about abolishing reeducation through labor. It was in a reformist era, the last one we've seen until now, but it didn't happen. Now the question is: Will it be changed merely in name? Will the nature of the punishment be changed? Will the procedures by which one gets there be improved? Will lawyers be allowed to take part consistently? What will be done about it? That's the litmus test, as I said.

Now, just a final word about Taiwan. Taiwan, like mainland China, was a luminous dictatorship. Chiang Kai-Shek learned at the same feat that Chairman Mao, Chairman Liu, and others learned that. Deng Xiaoping among them. But what we witnessed over time beginning in the mid-80s was the transformation of a traditional Chinese political dictatorship, gradually, peacefully into democratic system that has been successfully struggling as every democratic system does to create an impressive independent legal system and judicial independence. This is a great achievement.

If we look to history as a source of reforming what takes place in China, we don't have to look very far across the water to see in Taiwan people who are Chinese people, despite their important 50-year experience with Japanese colonialism, have made enormous progress. They are refuting the alibi that we're different, we're Chinese, we didn't go through the two English 17th Century revolutions, we didn't go through the Bill of Rights experience of the United States or the Rights of Man experience of France. So, go away, don't bother us with rule of law and judicial independence. Taiwan is a refutation and I think all of us who study what's taking place in China ought to understand

its relevance, not that the mainland is destined necessarily to follow it, but to learn more and to be stimulated by it.

Well, I hope this is useful and I look forward to the discussion.

(Applause)

MR. GERWITZ: Thank you, Ambassador Huntsman. Thank you, John Thornton and Brookings for your exceptional China program and thanks, of course, to Cheng Li and colleagues for organizing this really wonderful day of activities.

Whatever Cheng Li may have called this event, and I have actually forgotten what he's called it, it's above all a celebration of He Weifang. He Weifang is a remarkable figure. He's brilliant, he's learned, he's courageous, he's a tenacious person with the soul of a saint in fighting for justice, and at the same time, he's a soul of wit who somehow convinces us that fighting for fundamental change in China is a joyful activity. (Laughter) But don't be fooled by the twinkle and sparks of wit that flow from him as readily as sparks flow from an iron factory. As China watchers know, to forge iron, one must be strong, and He Weifang is strong.

The panel has been asked under a title that I do not exactly remember to talk about the prospects and changes and challenges of legal reform in China, and I'm certainly honored to share the stage with such distinguished colleagues as Bill Alford and Jerry Cohen. Of course, none of us know for sure what the prospects for the rule of law in China are.

Partly, that depends on the timeframe. If you look at the last 30 years, day by day, progress seems slow, the challenges and frustrations seem large. He Weifang endures them day by day. If you look at the timeframe the way a historian would, 30 years is a blip on the screen and China's progress on so many fronts and I would argue on the front of legal reform has been remarkable in that blip of history. So,

both timeframes, I think, have truth. The wisest reformers that I know in China try to keep and do keep both timeframes in mind and since I tried to follow the wisest of Chinese legal reformers, I always try to keep the double timeframe in mind.

Truly, the last five years have been disappointing. Much less was done than optimists had hoped would be possible during Hu Jintao's second term, but hopes for legal reform seem to be rising again not I think because anyone imagines that China's new leaders have in their desk drawer a program for legal reform that they're just waiting to implement impatiently. Probably not, but optimism, I think, because of the need for legal reform seems so clear to so many people.

I think any effort to seek truth from facts would reveal that continuing in broad legal reform is needed to sustain China's strength, to sustain China's stability. And there is a rising demand for it within Chinese society. I wouldn't say that that demand is necessarily framed in terms of we want legal reform, we want rule of law, but they want the things that a strong and better legal system can provide to China. More orderly ways of addressing grievances, more fairness, less corruption, more transparency in government, more limitations on government, and more practical ways to implement legal rights.

So, I want to comment on three. Three seems to be the number for several of us. Three areas of law where there's ferment in China and to point to some aspects of each. The three areas are judicial reform, administrative law, and constitutionalism, and for the sake of making a contrast among the three areas, I'm going to simplify things a little bit, but I hope that I will thereby put some reasonably important issues on the table.

So, first, with respect to legal reform, there certainly have been some very significant judicial reforms. I mean, starting with judicial reforms, judicial reforms

over the last 30 years and the reforms continue to be made. The civil litigation system has, I think, become much improved. There's a brand-new civil procedural law. There is growing professionalism among judges, which is very encouraging, and can produce long-term effects.

He Weifang has written about this, although Bill Alford just authored some less-optimistic, cautionary words about what to expect from that professionalism. There's a new criminal procedural law. It's just gone into effect. As a general matter, its implementation is completely up in the air and more specifically I think there's no reason to expect that this new law is going to be followed in the political cases that the party considers to be important, but major issues have been given new attention in the law: police torture, coerced confessions, role of defense lawyers, sentencing reform, and so forth.

The key problem, and this is the point I want to make about judicial reform, the key problem is that the fundamental principle of judicial independence is still not really accepted by China's leaders, even though it appears in the constitution, it appears in the 18th Party Congress report, it appears in most of the party documents. Indeed, one of the disappointing things in the last five years is that after a quite reform-oriented of the Supreme People's Court under Zhao Ziyang, the person who replaced him as president of the court was a non-lawyer, Zhang Weiqing, who came directly from the party and he became a symbol of non-independence of the Chinese judiciary. And I think it's fair to say that the CCB still sees a truly independent judiciary as an unacceptable diminution of administrative power and the parties' power, even though I share the arguments that He Weifang and others make, that the party itself, the Chinese government itself would be stronger and more stable and more legitimate if they were a truly independent judiciary.

So, the obstacle here for judicial reform as I see it is in the political structure and ideology which does not accept separation of powers and checks and balances and thus doesn't accept true judicial independence. So, I view judicial reform as an example of an area where there, yes, have been valuable incremental changes, but there's probably a very real limit on what can be done in the area of legal reform without more basic political reforms.

The second area is administrative law and I'm going to tell a somewhat more positive story, use this example for a more positive story and I want to emphasize two administrative law developments. Please don't glaze over at the mere words of "administrative law." It is an exciting terrain and in China, even more exciting than it is in the U.S. It's the sphere of public law that is the most vibrant.

So, the two examples I want to give you are the promulgation of national Open Government Information regulations in 2008, OGI for short, which is China's version of our Freedom of Information Act. Implementation of these OGI regulations have been thus far quite imperfect, but as my Yale colleague, Jamie Horsley, has documented, the Chinese public's response to these regulations has been enthusiastic and vibrant. There have been a huge number of requests filed for information and the government is quite often taken to court if it refuses. And, so, this is a significant development in the administrative state in the China.

The second example I want to give are guidelines issued by the state council, also I think in 2008, requiring increased public participation in the development of administrative rules and regulations, requiring that virtually all draft rules and regulations be published in advance, that is other than those in state security and national security area and be open for public comment. In other words, China's implementing a mechanism similar to what we here would call notice and comment rulemaking. That,

too, the implementation has been imperfect, but I'm excited by these developments or certainly consider them noteworthy as pointing to a positive story because these OGI rules and public participation rules in my view reflect or at least embody a profound change in the relationship between the state and the people.

And, I mean, China, for thousands of years, has had a secretive government for thousands of years, the people have been kept at bay from governance and these OGI rules and public participation guidelines, and I recognize the problem of implementation as always a serious problem in China, but these new rules give the Chinese people a greater role in governance.

And most crucially, I think, they change the public's expectation of the public's relationship to the state. Chinese citizens believe they have a right to know. Chinese citizens are told they have a right to participate in the making of laws and regulations. Now, that's hardly democracy, but it's a step in the direction to greater democratization and with changed understandings and these changed public expectations, it's at least possible to imagine over time that these reforms are going to contribute to broader public demands to participate in governance, including even mechanisms for electing leaders or holding leaders more directly accountable.

Now, that's, of course, just speculation, may be exaggerated, but I'm using this example of administrative law to suggest that sometimes incremental legal reform may be able to open up foundational political reform. So, it's sort of an opposite kind of example to the one about judicial reform that I mentioned in which political obstacles are going to limit the legal potential.

So, my last example is constitutionalism and I'm going to use that term in its narrow sense, not quite in the full-throated sense that He Weifang uses it in his book, meaning simply to give life to the Chinese constitution to make it "a living truth" in that

wonderful phrase of Chief Justice Warren's in *Cooper vs. Aaron*. Reality. (Laughter) In the last five years, there have been no steps since our conference, no real steps towards judicial review on constitutional issues in China. But what's been happening in China is a variant of what legal scholars in the U.S. today call popular constitutionalism. Most people in the U.S., most people generally think about constitutionalism, constitutions as institutions like courts enforcing the constitution within society. That's a top-down kind of understanding and Justice Breyer's most recent book is all about some of the difficulties that come about from that top-down system such as will the people obey the court?

Let me just make an aside here by the way, Justice Breyer, I recently traveled with him to China, where he spoke in a number of settings about his book and about other issues. One of the truly underestimated things in U.S. diplomacy, I think, is how effective someone like Justice Breyer can be in projecting the soft power of the United States. He was an extraordinary diplomat in his time in China. And if only his day job did not require so much of him. He should be sent as the roving ambassador for the rule of law. (Laughter)

Well, my point though is that in China, they don't have that institutional arrangement, top-down constitutional. Zero. But what's been happening is there has been a lot of ferment within society in a bottom-up way of scholars, media, ordinary Chinese citizens talking about the Chinese constitution, invoking it, saying it means something, and gaining political traction for it in the sense that policies that are being challenged are sometimes changed. They may go to court, they're thrown out of court because there's no judicial review, but the coverage of the constitutional claims has an effect in changing the policy.

I'm almost done.

We've seen that in the Chen Guangcheng case, we've seen it in a lot of discrimination cases. There are a whole bunch of examples that I'd discuss in more detail, but the point that I'm using this third example to illustrate is how people outside of government, scholars, journalists, ordinary people are sometimes able give forced law, even though the legal institutions do not, and this is a quite fascinating area, I think, of the legal reform taking place in China because it's important in itself and also because I think it's connected to the development over time of a culture of law within Chinese society. And at the bedrock, this is a point that hasn't been mentioned yet, it's not just about the party, it's not just about the state, it's not just about institutions, it's about is there a culture of law within the society that can nurture, support, obey, and hold to account legal institutions?

So, those are my three examples. I won't summarize them, but I will have a closing thought about He Weifang, which is that he is not only a scholar who is addressing one or another of these aspects in these terrains of legal reform, he's a scholar that addresses the Chinese people, the Chinese public, he's not only advancing legal reform through institutions, he's addressing issues of political reform and he's addressing this broader problem of building a culture of law and I think the publication of his book is going to introduce him to people worldwide as the extraordinary figure that he is. So, we're delighted that you're here and I'm delighted to have an opportunity to participate in celebrating you. (Applause)

MR. HUNTSMAN: Thank you, Paul, Jerry, and Bill, and now for the fun part of it, and we don't have a lot of time left, so, we're going to jump right in, and here's what we're going to do. I'm going to get through a couple of questions that I have that I think are interesting and topical that drop from the sense of history that all three of our

panelists bring to the stage and then we're going to turn to you. So, get thinking about what you would like to ask.

But I'm going to ask our panelists, as well, to do something that is totally countercultural on a leading university campus, to be brief. (Laughter) And let's see how much of this we can get through because I know many of you in the audience are going to have a lot of very good questions.

So, drawing from history, we've just wrapped up the 18th Party Congress, Paul, and we're able now to reflect let's say back 10 years. Let's go back to the 16th Party Congress, so, I guess back to 2002. You were all around; you gave it a whole lot of thought back in those early days.

Where did you expect China to be at the 18th Party Congress as you look back from the 16th Party Congress? Where has China fallen short? And what have we missed? So, Bill, we're going to start with you and we're going to go straight across.

MR. ALFORD: I was more hopeful, even earlier, of reform. I think the massive corruption has created strong reasons for senior leaders not to promote beyond the ideological, to be adverse to reform. So, I was more hopeful than the last few years have been, as Paul said, somewhat disappointing.

MR. HUNTSMAN: Yes, Paul's point is specifically the last five years.

So, let's go back, Paul, to five years before that. So, did we have a hopeful run of years right after the 16th Party Congress and things fell flat or what exactly happened?

MR. GERWITZ: The most important thing that I keep reminding myself is how opaque --

SPEAKERS: Microphone.

MR. HUNTSMAN: Maybe we can bring the handheld up here just in case.

MR. GERWITZ: Yes, great.

MR. HUNTSMAN: Just in case.

MR. GERWITZ: The Chinese system is so opaque that, yes, I did study the 16th Party Congress report in a detail that shocked both my American friends and my Chinese friends. But do you really get guidance to be able to make a prediction? I'm not so sure, but, yes, we did think, I did think that there would be stronger steps in the direction of judicial reform because the courts, impartial, fair courts seemed to me to be so important for China's own strength, own interests, I thought there would be more of a recognition of that. I did not anticipate, however, just where I underestimated, I didn't anticipate this Open Government Information and public participation development, which I think does reflect a change in the relationship between the state and the people that has a lot of potential.

So, it'd be interesting to ask you a question right now about the 18th Party Congress and I would honestly confess to you that I don't know and that's one of the things I've learned from the 2002 party report. (Laughter)

MR. HUNTSMAN: Jerry, I'll put a little spin on that question, and that is: Do draw from history and give us where you thought we would be as you were standing back at the 16th Party Congress, but picking up on what Paul mentioned, is there any kind of grassroots movement in China among the (speaking in Chinese) where there is a recognition of the importance of the rule of law, legal reform, whether it's around property law or human rights law, expanding civil society, and does that have implications going forward in terms of moving the party forward?

MR. COHEN: Well, we're all a little jaded, as Paul implied, through our experience after the 16th Party Congress. Hu Jintao came in; he was such a nice-looking person. (Laughter) We thought he must be for human rights and then we have this extraordinary optimism, not just foreign observers, Chinese insiders, the most important law reformers some of them, told me flatly in 2003 the NPC is about to abolish reeducation through labor. Flatly, and they were flatly wrong because the Ministry of Public Security and the party political -- they're formidable foes. They're willing to make a concession here or there, but they fight a last stitch battle and they win. So, that's what we learned and it's was very, of course, disillusioning.

Then we thought ah, look, the first term of Hu Jintao, he's still controlled by the previous leaders, but in the second term, we'll really see he'll come into his own. Now, what we've seen is this backward movement on human rights, and, yet, it's not absolute because as others have also said, some good laws have been passed and sometimes that's the compromise. A party says we'll give you this in a good law, we'll have a new revised criminal procedure law go into effect January 1, and it has a number of real improvements as well as some setbacks, but the compromise is we'll give the piece of paper, but we'll keep the practice. (Laughter) So, that leads to the Shakespearian problem of keeping the promise to the ear, but breaking it to the hope, and that's what we're seeing. Sometimes, Chinese scholars, they'll go for better pieces of paper, but keep quiet about practice.

I asked at a conference about six years ago at People's University why don't you speak out about the way the criminal procedure law is actually being enforced? And one promising young law professor said it's too early to worry about practice. I said when will it be time to worry about practice?

MR. HUNTSMAN: And how about the (speaking in Chinese)?

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MR. COHEN: The (speaking in Chinese) --China remains a nontransparent society. It's hard for us to give any scientific answer. I like to interpret reality in a way that I find optimistic and I certainly think we are seeing more and more evidence, as has been said here, of ordinary people, not the rich, not the *bourgeoisie*, not the people who have the party membership and the connections to local government, the people who have nothing other than the words of the law. They are trying to get their hands on this law and put it into effect.

That's what Chen Guangcheng represented. People literally taking the law into their own hands because the local lawyers wouldn't help him. Even the local disability society headed in Beijing by Deng Xiaoping's son, Den Pufang, wouldn't help disabled people in Dongshigu Province. So, he had to turn to himself, and that's why eventually they cut him off because if you have the people taking the law into their own hands, that is the most effective challenge to the party's authority.

MR. HUNTSMAN: All right, we're now going to look forward. I'm not going to ask for any forecasts. I'm simply going to ask what the appropriate role is for the United States in all of this? You've all been involved for years supporting and leading various programs that have been very specific in their focus, some broad in their focus. But as we move forward, how does the United States choreograph this brainpower, the firepower, the expertise and use it effectively and is there a legitimate role in terms of one of the major bilateral issues between the United States and China, the whole area of legal reform?

Bill?

MR. ALFORD: So, thank you. So, I think the broad and variegated way in which we, the United States, engage with China on these issues is actually better than they were designed, top-down way. And, so, the government's engagement, the role you

played when you were ambassador certainly was very constructive, but I also think that kind of expansiveness and messiness of American civil society and different universities offering different models of engagement with China, American NGOs, I think that tends to be very positive.

As I said in my remarks, I also hope that it's more than just bilateral. I think the Chinese benefit greatly from seeing that the Europeans may do things in a different way or Japanese in a third way, but I think the somewhat uncoordinated nature of how we do things is actually both beneficial by offering a lot of different examples and also is demonstrating in the doing one of the values that we're not an entirely top-down society, that ideas germinate from many different sources.

MR. HUNTSMAN: Jerry, your views on dexterity and coordination.

MR. COHEN: Well, we've heard plugs for Harvard's program and for Yale's. I don't want to be deficient in mentioning (Laughter) --

MR. HUNTSMAN: It's which one of them are you going to mention is the question?

MR. COHEN: Of course, we can go on trying to cooperate with Chinese experts including many government experts. They want our help. People who are officials even want to see us unofficially if they can't see us officially. They thirst for knowledge and we should try to continue to work with them to provide information.

Our NYU program just opened a new Web site. We hope it will be blocked like our main Web site. (Laughter) To talk about our experiences and legal problems of administering the death penalty in this country, the legal procedures for the death penalty. I hope that'll be useful, but, frankly, the most effective thing we can do to promote human rights in China is to improve our own example. The Chinese people are not foolish. They have access now to all kinds of information.

I remember doing a Voice of America broadcast a few years ago about criminal justice in China. Every question I got from China concerned America's failing in our domestic human rights. So, we can't go on saying do as we say, not as we do. They look to us for being a model. So, we have to walk on two legs this chairman now admonished us. On the one hand, cooperate to the extent we can overtly with China directly. On the other hand, improve our human rights challenges which have accumulated in the last decade.

MR. HUNTSMAN: Paul, final word. How do we maximize our tools?

MR. GERWITZ: Next to final word is the problem with Jerry Cohen is that he's such a pioneer that everybody believes that we have a piece of ownership of you. Nobody remembers that he's a Yale College, Yale Law School graduate. Nobody remembers that he taught for how many years at Harvard Law School?

SPEAKER: Two decades, right.

MR. GERWITZ: So, you just have to live with it, Jerry. (Laughter)

And, so, for me, just the only thing I would add is that there seemed to me to be two paths that are open practically. One is a path of open criticism of China's deficiencies in the legal area and in the adjacent human rights area and the other path is a quieter path of engaging cooperatively, the reformers and the people in government who are reform-oriented to try to move the ball forward that way. And my basic judgment is that both paths contribute.

The path that I've chosen is cooperative engagement path. Do I think that's because I think it's the best idea? Honestly, I think it's just temperamental. That's the kind of person I am, so, I preferred doing it that way. But those are the choices that I think are open to the U.S. government, open to people in the U.S., open to Brookings; open to anyone in the U.S. who wants to engage China.

MR. HUNTSMAN: All right, Bill?

MR. ALFORD: I'm sorry to intrude. If I could jump in, I want to underscore the wisdom of Paul's last point. It seems to me there's some spectrum of ways of engaging with China from very sharp open criticism of human rights problems to more cooperation with the authorities and I think they're all needed, and, indeed, they all reinforce one another. So, the fact that there are people being more sharply critical does create some space for people in the universities who want to create more constructive relationships.

MR. HUNTSMAN: All right, we've got time for just a couple of questions. Over here on this side. Yes, sir. Yes, right there.

MR. ZEITLIN: My name is Arnold Zeitlin and I have been teaching in Guangzhou at the university there.

Ambassador Huntsman compared the standing committee to a board of directors earlier. I think I'm correct. Therefore, Mr. Xi is going to be the chairman, presumably within the first -- and equal among the first among equals. But the other six members of so do not have allegiance to him because they don't seem to be on that board through his manipulation, but from someone else, and you suggested that might be an aspect of the Deng Xiaoping dynasty.

So, in this kind of system, who is the decider? At what desk in China does the buck stop? (Laughter) That's what I'd like to know.

MR. HUNTSMAN: Jerry, you did a pretty good of giving us a historic overview. Give us a quick response to that. Where "does the buck stop?" (Laughter)

MR. COHEN: Well, what the Standing Committee of the Politburo generally has done is divide operational responsibility. To that extent, they are not a typical board of directors; it's more like a board made up of executive directors who are

internal company people responsible for different departments of the company's operation.

So, that's a very important issue and we're used to boards of directors that represent different interests. That's why a minority shareholder wants a seat on the board in order to represent a view different from the dominant view. But you're putting your finger on a very delicate question, but this is a conservative bunch that has learned to operate from consensus. They have spheres of influence and respect for each other's sphere of authority, but when it comes to important issues, they have to talk them out and try to reach a consensus and that's why it's hard to reform because a consensus usually ends with the lowest common denominator.

So, it's not a very efficient system of government, except it looks to many people more efficient than our own. (Laughter)

MR. HUNTSMAN: We'll leave it at that. (Laughter)

All right, we've got time for one more. Over on this side, anybody? Yes, ma'am, right here.

MS. CHOW: Hi, my name is Nadia Chow, a Washington correspondent for *Liberty Times*.

I have a question for Professor Cohen. You mentioned Taiwan as a model, but also Taiwan is the first Chinese society actually put there, elected a president into jail. So, when Chinese leaders look at this, is this still inspiring to them? (Laughter) Or a role model?

And some of the people outside of Taiwan advocating medical parole for President Chen. I wonder would you like to have a comment? Thank you.

MR. COHEN: Well, I could invoke the rule of relevance against the last question, but I won't. I think Taiwan is a model and if it's necessary to put a president in

jail in order to show the country really forbids a massive corruption on the part of its leaders, then it's done the right thing. If you put a president in jail for political reasons, that's another story.

South Korea has had to figure out how to draw the line. No system can be very attractive to leaders if every ex-president goes to jail. (Laughter) But in Taiwan, this guy has been proved to have stolen with his wife's help and that of his family, et cetera, and his son is a NYU LLM graduate. (Laughter) Although, I didn't teach him anything. (Laughter) But the fact is that's a very serious corruption situation.

Now, China is facing massive corruption. I would like to see each one of the leaders who has built a fortune through his family, et cetera, investigated in order to see to what extent that success has been a product of corruption, but the trouble is you would end up destroying the party, destroying the system.

And, by the way, with respect to courts, we keep talking about political influence because that was the problem today, but courts have been distorted in their impact, their judgment by many factors. Corruption is one, local protection is another, and the most severe and hard to eradicate is Guangzhou relations, who your friends are, your cousins, your classmates, et cetera. How that's going to be eradicated is difficult and that's where legal ethics, the least taught subject in Chinese 640 law schools is legal ethics and it's very boring to study legal ethics, unless you have an unusually good teacher, but it happens to be very, very important.

And Taiwan again, when I say "a model," it's worthy to be studied; its function is to stimulate, not necessarily to be followed. The mainland has its own situation, but it can't ignore what's going on and the people in China increasingly are becoming aware of what's going on in Taiwan and that's a useful stimulus.

MR. HUNTSMAN: Okay, last part because our time pretty much is up. But I want to ask both Bill and Paul this: If you were to sit down with the new seven members in total, the board of directors if you will, the members of the Standing Committee of the Politburo and you were to get their insights, Bill, on how they perceive our legal system in the United States, which parts they like, which parts they don't like, and, Paul, for you, too, real quick, what is going through their head as they sit around that table, newly constituted and say look at our U.S. system?

MR. ALFORD: So, I think some of them would see advantages in our system. Li Keqiang, who like would be the new premier is well-trained at Beijing University and I think he would understand. I do think some Chinese leaders understand that all this pent up energy and profound turmoil and change in society needs constructive channels through which legitimate grievances can be put.

So, some people, I think, would think that. Others, I think, would think the decline of the United States, which some Chinese leaders believe is happening, is traceable to our having too many lawyers and too much litigation and such a divided form of government.

MR. HUNTSMAN: Paul, final word.

MR. GERWITZ: I think they probably do not see the invisible strengths of the legal system because they are sort of invisible and what they see and probably would point to are the excesses; too much litigation, too much tangling up of government officials, too much conflict in the courts, and they don't yet fully understand how much a strong legal system can contribute positively. They see the extremes. And, by the way, so do we I think see the extremes in our system and many of us are in favor of some reforms in our system, as Bill was indicating in his remarks.

I'm curious, what do you think, if I may give you the last word.

MR. HUNTSMAN: It's a good thing time is up, time is over. (Laughter)

MR. GERWITZ: We'll save that for the next go around session.

MR. HUNTSMAN: Bill, Jerry, and Paul and to our friends here at the Thornton Center, Cheng Li foremost among them, we thank you all very much for being here. (Applause)

MR. LI: I have a quick announcement. But before that, what a wonderful panel and Paul asked me about the name of the panel. So, it's a dream panel. (Laughter)

Okay. The announcement is that Governor Huntsman has another commitment. He needs to leave immediately after this panel and we stay, let him to leave, like the (inaudible) to leave first, but thank you so much for a wonderful, wonderful discussion. (Applause)

We have a 10-minute break, 10 to 15-minute break and then the final panel.

(Recess)

MR. INDYK: Our distinguished speakers in our last panel -- I say "quick" because I know you'd rather hear from them than from me -- and it's a great honor for us at Brookings to have both our chairman, John Thornton, here on this panel today and, of course, Justice Breyer, no stranger to Brookings. We have had the opportunity to host him on a number of previous occasions. It's, I think, a tribute to his interest in the topic that he's been with us all afternoon, but we're particularly interested in hearing from him this afternoon in this final session.

I want to take a moment to say a special thank you to John Thornton. He is not only the chairman of the board of the Brookings Institution, but the founder and patron, of course, of the China Center here which bears his name, the John L. Thornton

China Center. And beyond that, the Brookings Tsinghua Center, which is China Center over in Beijing, based in Tsinghua University, where John is professor and director of the Global Leadership Program. John has been an inspiration to our work on China from the very beginning. He is responsible for our ability to have created a very strong and leading group of scholars and thinkers and experts on China both here and at the Brookings Tsinghua Center.

But beyond all of that, he's also responsible for this special series that the Thornton China Center produces on Chinese thinkers. And I think it's typical of the way that John himself thinks about China that he brought this idea to us and has been the guiding light for it. The idea is that we learn so much about China from Western experts on China, but we know so little about what Chinese experts on China actually think. And John's idea was to pick out the best of them and have Cheng Li edit and curate their thinking, translating into English for the benefit of Western audiences. And as a result of that, this book, *In the Name of Justice*, of course by He Weifang, is the third in the series. The first focused on Chinese thinking about democracy; the second, China in 2020 as a new superpower. And we will continue to publish the great Chinese thinkers in English in this series as a result of John's inspiration. So I wanted to thank you in particular for that contribution.

Justice Stephen Breyer is no stranger to any of you, but perhaps some of you are less aware of the involvement that he has had in legal issues in China. He has, as well as his important work -- I should say highly significant work -- on the bench, been a prolific author of a series of books, the most recent, *Making Our Democracy Work*, and before that, in 2006, *Active Liberty: Interpreting Our Democratic Constitution*. And it is in the pursuit of a greater global understanding of the role of constitutionalism in a democracy that Justice Breyer has been an inveterate traveler to so many parts of the

globe to espouse his understanding of the way that democracy works and the importance of constitutionalism in that regard. And that has included his advocacy for constitutionalism in China.

And I think it's fair to say that his book has earned him wide admiration in Chinese legal circles and, in many ways, he's an inspiration to them. So it's particularly appropriate that we have Justice Breyer here in conversation with John Thornton to close out our discussions today on constitutionalism in China.

Thank you both very much for joining us. (Applause)

MR. THORNTON: Martin, thank you very much. We have about an hour and here's the way I'm going to run this session. I'm going to give just two comments by way of context to the day and to this particular conversation. I'm then going to ask Justice Breyer a few questions and then I'm going to open it to the floor in about 30 minutes time. So there should be plenty of questions from the floor for Justice Breyer.

Okay, context. For 20 years I've been advising the very senior Chinese. Roughly half of that on financial and economic matters, then the second half on a whole variety of topics. About 10 years ago, I remember the very first time I met Jerry Cohen, we started talking about rule of law. And I said to him at the time what strikes me about this topic is other than the one occasion I can think of -- and there may be others, but I can only think of one -- other than the occasion when Paul Gewirtz was in the State Department and Bill Clinton was president, that this topic, in my view, has never gotten the attention it deserves at the most senior level of government-to-government discussions. It's been treated, as far as I'm concerned, as too much like a kind of technical topic that is dealt with by technicians and not as a fundamental topic between relations of the two states.

And in my own experience, I always say that the Chinese leadership, their most distinctive characteristic to me is that they are systematically open. That is to say that their basic modus operandi is, on any particular topic, let's look throughout the world, get the best ideas throughout the world, bring them back, study them, and then customize them as appropriate for our own system. And yet, in this one respect, they've been, as far as I'm concerned, a little bit slow.

So we had that conversation 10 years ago. Now, Jon Huntsman asked about what's going to happen after the 18th Party Congress, so I'll stick my neck out and I'll say for a variety of reasons, some of which are circumstantial and some of which have to do with the particular leadership in the seven-person Standing Committee, I believe that this topic will have to become a more important topic and that it'll have to be treated, as all things in China are, top down in addition to what Bill said earlier that let's let a thousand flowers bloom and interact in all kinds of ways. But the truth is, the fundamental's not going to change unless there's a top-down decision to change it.

And in addition to that, I remember having a conversation with one of the seven, one of the current seven, just about two years ago in which he made the following remark: One of the problems with American politicians is they think that in China we can do whatever we want to do. The truth is, increasingly, we have to be responsive to the people. And that's increasingly so for all kinds of reasons, including the fact that social media is making it so.

And so the truth is the senior leadership in China keeps very close tabs on what's going on among the ordinary people. And to the extent that the ordinary people are increasingly having to have their own grievances adjudicated in some more systematic fashion and want to see their rights observed and so on, this will create a kind of implicit pressure, which, in my view, will, among other reasons, lead the top leadership

to have to deal with this thing much more directly. And so if that theory of the case is correct, then I would say, to extend the analogy, it will be absolutely essential that there are some number of very senior people who are engaging with the very senior Chinese on these topics over an extended period of time, recognizing that the contribution of insiders in the end can only be modest. It can be profound in its lending of ideas and of thinking, but modest in what actually happens.

And I would finally say that my experience also tells me that the Chinese leadership, they don't need help on the concepts. The conceptual understanding they have down just fine. What they need is extremely practical, concrete advice. If we want to go from here to there, how do we get there? Give me very specific steps to take and give me a sequence of those steps. What exactly would you do? And in the absence of that kind of advice, typically, it's a kind of wasted conversation. So I say that point because I would encourage the people who are much, much closer to the subject matter to be thinking along those lines because it's going to come in handy, in my view.

So that's, as far as I'm concerned, where this is headed and one of the reasons that this particular topic I'd like to see Brookings raise to a much higher level of visibility and I'd like to see the U.S. Government raise it to a higher level of visibility.

Now, in context of this particular session, both Justice Breyer and I were guests at a dinner for Hu Jintao when he was here. And we were talking beforehand and we were talking about his book, which has been referred to many times by people, *Making Our Democracy Work*. And I said to Justice Breyer, I just finished reading your book. It's a fantastic book. By the way, you should get it translated into Chinese because the lessons in this book, as important as they are for Americans, are at least as important for the Chinese. And I believe that the Chinese leadership would read this book.

And Justice Breyer said to me, well, it's funny you mentioned that because I've already had that idea. It was given to me by Paul Gewirtz and we're actually in the middle of trying to do that right now.

And sure enough, the book was translated and it's sold very well in China.

Justice Breyer then went to China in June, as was referred to earlier by Paul, and was very well received in all kinds of venues talking about his book, including what I thought was a wonderful kind of, I don't know what to call it, poetic justice on the cover here of *Caijing* magazine, which you all know is -- I guess the best equivalent might be *The Economist*, and here he is the cover story. Now, that in itself is interesting. It tells you something about what the editors think about this topic. What I find even more interesting is the date of this magazine is June the 4th. So I thought to myself that cannot have been lost on the editors.

So it has thrilled me no end that someone as eminent as Justice Breyer and who's such a profound thinker has become increasingly engaged in this topic. And when we were talking earlier this afternoon he said to me, you know, I'm no expert on China, so what do I have to contribute to this conversation? And I said, Justice Breyer, trust me, I'm going to drag you into this thing every single step of the way and we're going to make you an expert sooner or later. Because, as was said earlier, if we can just get him out of his day job, we would make him a permanent diplomat for rule of law. So I'm very, very pleased that he's here today and very honored.

Where I'd like to start is I'd like you to, if you could, talk a bit about your book and it's relevance in your mind to the Chinese situation, and give us some sense of how that was received when you were over there talking to various audiences.

JUSTICE BREYER: I know how it was received in the audience is that

I'm not an expert on China, despite your reference to qualify me. My relation to China is I read -- there was a professor who went to China and the press said when did you come here? He said yesterday. They said how long you staying? Today. When are you leaving? Tomorrow. What are you doing? I'm writing a book. It's called *China Yesterday, Today, and Tomorrow*. (Laughter)

But I did go over there and I did talk to some students at Tsinghua, yes. And there are about 600 of them and, you know, they speak English and it's like talking to a group in Texas. There's no problem with understanding what the concepts are, how the system works here pretty well. And you got exactly the same question in the first part of your book, just what you said and exactly what they said, the first question is, yeah, but how do we get from here to there? To which my response is I don't know. That is a problem for you to solve, I can't do it. (Laughter) I can tell you some things about the United States and you have to take them insofar as they're relevant.

And so what is it that they seem to be interested in and what they're interested in in the magazine? First, of course, which is so obvious, you think we don't have these problems? Do you think that this rule of law has been given on day one and suddenly it was followed? Of course not. Of course the problems of -- and don't think democracy will solve them. It's a step on the way, but it's not -- also, it's both your friend and your enemy. So let me say what I mean in a little more detail.

Hamilton -- this is the document, okay -- Hamilton and Madison write this document with some others, and it's a very good document. If you ask any of us on the Court, any of us, we'll be absolutely in agreement on the basic things it does. It isn't one thing and it isn't a million, but the basic framework is it creates institutions of democracy so that people can decide for themselves, through their representatives, what kinds of communities they want.

But it is a special kind of democracy. It is a democracy that protects certain basic human rights, that assures some degree of equality, it has what you call separation of powers. That is not what you're looking for here. You're looking for judicial independence, which is different. Separation of powers is -- and what I liked about his book very much when I read these pages, he's very clear and he has precise notions and he makes these distinctions. The separation of powers is both vertical -- state, federal -- and it is also horizontal -- three branches -- but the basic function of separation of powers is not to preserve a rule of law. It's to divide power into pockets. And by dividing power into pockets, you prevent any group of people in the government from being too powerful. That's the basic purpose. And finally, a rule of law.

So you've got a document here that is trying to assure democratic institutions, but with protection of basic human rights; assuring a degree of equality; separating power horizontally, vertically, so no one becomes too powerful; and guaranteeing a rule of law.

Now, Hamilton is the one who in Federalist 78 brings in the courts because he's trying to answer a question. He says we've written a beautiful document. Read 78, read Federalist 78, absolutely worth reading. He says we've created a beautiful -- well, he doesn't say it quite in these words, I'm parodying it slightly, but he says we've created a beautiful document, but if nobody follows the rules, these are the ground rules, and if there's no one to say when somebody in the government strays outside the boundaries here, we should just hang it up in a museum, put it in the National Gallery. He actually did not say National Gallery because it wasn't built then. (Laughter) But nonetheless, you get the point.

He says somebody has to have the power to say when the others have gone too far. Well, who should that be? The President? He's already too powerful. He'll

just say whatever he does is right.

Congress? Ah, yeah, they're elected. But wait a minute, they are experts in popularity. Believe me, they know popularity. If they did not, they would not be where they are.

Now, this document gives the same rights and protections exactly to the least popular person in the United States as to the most popular. So you're not going to get them to do it often when it's a question of the least popular. That leaves the judges. And if you read 78, it's not that he thought the judges were so wonderful. What he thought was that's the best choice available. So we will give them the power.

Who are they? We don't know. Perfect. Nobody knows their name, wonderful. They are not egomaniacs yet. (Laughter) And they are sort of gray, bureaucratic types, and they do not have the power of the purse and they do not have the power of the sword. Wonderful. They won't overdo it, we hope. So we give them the power to declare what the others are doing is contrary to the Constitution. And that's his reason, we can't think of anything better.

It then takes a long time, close to 200 years, before that power becomes really effective. And the thing I think to study there is the history of slavery and the history of segregation. Why? Because it's so tempting to say, oh, well, the United States is child of the French Enlightenment, the Scottish Enlightenment, the British tradition. It is in many respects, but not in respect to slavery.

Read what Tocqueville writes. He writes -- he comes over here because he wants to study what the democracy, equality is going to be like in the future. And he finds a lot of things that he writes about very accurately and very good, quite right. But he says I'll tell you two things that are going happen, there's big problems in the United States. The first is the Indians. And he says that won't be such a terrible problem

because they'll kill them all. (Laughter) Right. And he says the second is slavery. He says they'll never -- we don't know how they're going to deal with it.

So remember that there were large sections of the country where the natural state of things was not human rights. The natural state of things was slavery and then racial segregation. And that took a very long time and a Civil War and 80 years of segregation before we began to deal with that problem.

And to me, you go back and look at one of these cases, go look at the history of the Cherokee Indian case. The Supreme Court says the law says that Northern Georgia belongs to the Cherokee Indian tribe. The President of the United States Andrew Jackson says the Supreme Court made its decision, now let it enforce it. And he sends troops not to enforce the decision, but to evict the Indians, where they go down to Oklahoma on a Trail of Tears, it's so-called because so many died, and the descendents live there to this day.

And then go forward to the efforts that were made to desegregate after the -- Holmes has a decision when Holmes on the Court, where it's a decision pretty clearly they're keeping a black person from the polls contrary to what the 15th Amendment says. And he says we can't really strike this down because nobody will do it when we say it.

You see? We're not unfamiliar with this kind of problem, maybe not as seriously. Or maybe not, it depends. So what I usually say because I believe it so much is I think a great day in the history of the law of the United States in respect to establishing a rule of law was the day when the nine in Little Rock, nine black children, were finally ordered after *Brown v. Board* said segregation is absolutely contrary to the Constitution. Then you have the case of *Cooper v. Aaron*, which arises out of Little Rock. Little Rock begins when a judge says we mean it.

By the way, the first year after *Brown*, what happened? Nothing. The second year? Nothing. The third year they finally got around to doing something. And in Little Rock, the judge said put those nine children in the school. And so what happened? Some of us can remember. The governor of Arkansas calls in his militia. What, to get them in the school? No, to keep them out.

And the congressman down there, Brooks Hays, who was a moderate, and the school boards who were moderate on race, they arrange a meeting with Eisenhower, who's president. And President Eisenhower meets with Governor Faubus. He goes into the room and Governor Faubus says, oh, I'll let them do it, I'll let them do it. I will integrate the school. And Governor Faubus goes out of the room and tells the press the opposite. And he said, oh, the President dressed me down like a general dresses down a sergeant. Right? That's what happened.

So then Eisenhower has to say, well, what am I going to do? And Eisenhower says to Jimmy Byrnes, the governor of South Carolina, what do I do? And Byrnes, who was a moderate and a Democrat and had resigned from the Supreme Court and helped run the war effort, he says, well, if you send in troops into Arkansas, you're going to have to reoccupy the South.

Public opinion for human rights in the South. Uh-huh, yep, sure was exactly the opposite.

And Brownell, his attorney general, says to Eisenhower you've got to send in troops. And he did. He took a thousand paratroopers from the 101st Airborne, which were the heroes. Now, you see what I'm showing you? I'm showing you that it has to be popular. And he took those thousand troops deliberately chosen because they were the heroes of World War II and parachuted into Normandy and they were shot down and every American knew that at that time. And they put them on the airplanes, then

they go into that school, and they take those children and they go in the white school, and that picture went around the world. Fabulous. Fabulous.

And the Supreme Court said absolutely, you go ahead and do this. Fabulous. The day after the Supreme Court said that, by the way, Governor Faubus closed the schools. Mm-hmm, and they remained closed for about eight months, but they couldn't do it forever. And that was the beginning of the Freedom Riders into the South, Martin Luther King, and it was a whole movement.

Now, why am I telling you this story? Because I don't see how you bring about the rule of law without making the rule of law popular. The people have to understand the virtue of it. And that's tough because what it means is that you will have institutions called "the courts" which, by definition, are there to do things when they're unpopular. Wow. Wow. Yeah.

And how do we bring about that kind of society where when you have *Bush v. Gore*, a decision that I thought was totally wrong, 5-to-4, and probably half the country agreed with me, but what Senator Reid said is the most remarkable thing about that case is -- never remarked. And although it was very unpopular and, I think in his view, too, very wrong, despite that, people followed it. No guns, no riots. And when I tell the university students to talk about that, just as I just did, with the same tone of voice, the same words, et cetera, I say I know what half of you are thinking. You're thinking too bad there weren't some riots, too bad there weren't a few guns, et cetera. I said before you think that -- before you think that -- you go turn on your television set and see what happens in countries that solve their problems that way.

And so what I see every day in the courtroom is people who, by and large, have somehow -- I don't know how, it's partly education, it's partly they think it's normal. All right? So I can write down my list. I asked my colleagues, I said I've read in

this book, which was your book, and the same question you asked, the same question they asked. Justice Kennedy goes over to China a lot. He understands it pretty well. And I said but what would you say as to what steps concretely you take? So we wrote down eight or nine. But ultimately -- ultimately -- what you're working towards is a general understanding.

Now, I found my own way, just for me, of expressing that, of what that understanding has to be, and maybe you can get there, is when I saw the apartheid in South Africa, when apartheid's going on in South Africa. This is a little farfetched, but it meant something to me. I look at the television one day and on the television there is a woman, well dressed, obviously in business, and a well-educated woman, well-spoken, she's black, and she says the following. She says, you know, it's apartheid time. And she says you know what happens in this country? She says our situation is not normal.

I heard that word "not normal." I thought something's going to change.

So problem: How do you get people to think that it's normal -- normal -- to follow a rule of law and follow the judges even when the judges decide something you think is wrong and even when it's unpopular? All right. That, I think, is how I explain to myself the problem.

Now, I have a few ideas if you want.

MR. THORNTON: Keep going, you're doing great.

JUSTICE BREYER: All right. (Laughter) The first thing we wrote down - - I mean, because I asked at lunch, I asked what was your -- I put the problem because the problem was put to me by those students at the university in China. Exactly the same problem, exactly the same one.

Well, he says, number one, you put on the list you've got to have an independent judiciary. How do you do that? Well, the first thing is tell them they can't be

fired. That's simple. They'll love that. (Laughter)

And then you tell them, which we don't live up to here, by the way, tell them we won't cut your pay. Hmm, they'll like that, too. I heard the Russian judges talk about that. I heard -- they love that. I heard the Russian judges speak about it thereafter. It sounded like an American judges meeting. (Laughter) But, you see, a simple thing.

And then how do you -- I heard Jerry Cohen, I mean, I don't know how you get them out of this tripartite thing. But as long as you have three people -- the police chief, the prosecutor, and the judge -- sitting there deciding individual cases, you're not going to have the independence, but you could perhaps create a situation where the general public thinks that that's abnormal; that they think it's abnormal to take a case; that they think this is sort of weird.

Now, how do you bring that about? I don't know. That's why you have two chapters in your book, you have one called "Free Press" and you have one called "Building a Bar," and independent lawyers. So the thing I like best about our bar in this respect is a lawyer will come in and say to a judge, Judge, you're wrong, you are just wrong. Now, they'll say it politely because the judge is going to decide the case eventually, but they'll say it, you are wrong. (Laughter) And you get enough esprit de corps in the bar, they'll say it. And then the judge will feel a little sheepish if, in fact, he's going to decide something so obviously wrong.

And the press -- I said this once, we were talking with a group of -- I won't say what country it was, but I said I know the greatest pests are the independent bar and the independent press. The press is always criticizing you and the bar is always telling you you're wrong. And my point is but they're necessary. They are absolutely necessary.

But the judge said in the other country, he said I agree with Justice Breyer. We should do something about the press and the bar. They're too -- I said no, no, no, that's not the point. (Laughter) The point is the opposite. And indeed, you just -- I mean, you can't deal without this press writing all kinds of things, some of which isn't true, some of which is, and so forth and so on. Because unless you give the publicity to it, there's no way to build the -- all right, so that's one. This is a dream, but nonetheless, it's the right dream, I think.

And when some group of democratic people take over, the first thing they want to do is fire all the judges who were put in there by the last regime who were so corrupt. Now, remember, everyone you fire -- everyone you fire -- you are weakening the independent judiciary link. Because you fire one of these bad judges, they others think I could be fired, too. And the good ones think I could be fired, too. So that's why I find South Africa very interesting. Very interesting example.

And go look and see how they dealt with their judiciaries there. They put in new judges, but they didn't fire the old ones. And it's very -- I find it instructive, but I don't know if you will. Anyway, that was one.

Two, the best thing that I find in the Administrative Procedure Act, which Professor Gewirtz pointed out, the best thing I find is a very simple rule, which I believe is helpful: If it isn't public, it isn't a law. Okay? Simple. So that when the judge is going to say this is what happens to you, you say where's the law? And if it isn't public, it's not a law, so the law can't do it to you. That's a very, very simple, I think, and very important rule, and it comes under the guise of administrative procedure.

Three, now, I don't know, I mean, I put them in order of what you try to get first, second, and third, but I don't know, you know, so don't take this as some. These are just -- everything, every legal procedure will be conducted in public. Now, wait a

minute. What about the judges or juries deliberating? Hmm, the deliberations aren't public. No, I don't think they should be. So how do you run that?

Well, there's a rule there called -- it sounds technical, but it's pretty important. It's called ex parte communication. No ex parte communication. What does that mean? That means all the bases for taking the decision, all the proofs, all the evidence has to be public. The deliberations can be private because you're not going to make the deliberations public and get honest deliberations. I wouldn't do that. But this rule against ex parte communications, nothing goes in to the decision maker's mind except -- see, and it's wonderful that it sounds technical. The more technical it sounds, the better. (Laughter) Because one of the things that I thought was terrific on your suggestion here, and you seemed not to -- proceed part by part. Take some of it.

Take the part about commercial law, for example. There you have a great -- I mean, are you going to get the investment if, in fact, people feel in the businesses that their disputes are not going to be decided fairly? And there people say, yeah, we want the investment. Of course we do. Of course we want businesses. Of course we've got to have a fair way of doing it. You say you're right, you do. And one of those you need what we call minimum due process: an impartial decision maker, an opportunity to present proofs and arguments, and an opportunity to see the proofs and arguments of the other side. We need those so that the businesses will see that, in fact, their disputes are being resolved fairly. And pretty soon you have this independent judiciary going. And once it's going for the business things, you say, you know -- I saw that in your book, I thought it was great -- you say to the people in the government world, now, aren't you a little worried about being accused, sometimes perhaps unfairly, of a business-related crime, which is called corruption? And if you end up being accused very unfairly of that, wouldn't you like a fair and impartial tribunal? I don't know, some of them

might like that idea or they might now.

But what I found interesting in the thought over here is that bit by bit, take an area that's not threatening and then you move to the area -- and you build the protection -- all right, five, habeas corpus. That should be far higher up on the list. I mean, King John -- and you have that in the book, absolutely -- King John was asked by his barons for really one basic thing. There was a tax part, too, but the thing that's lasted is here's all we want: Don't affect a person's liberty negatively except according to law. What a simple rule. And that doesn't seem too threatening because they think, well, we can pass whatever laws we want. Okay, okay, yeah, you can, but we'll start with this: Nobody's liberty is affected without a law.

And remember, the law has to be public. And remember, if you can get word to a judge -- by the way, I had a case like that in the 1st Circuit, unbelievable. Somebody was picked up by the Customs authorities or something from the Dominican Republic and put into confinement and he actually threw a rock out the window with a note and said send it to my wife. And his wife got the note, went to the judge, and said bring my husband in. He said habeas corpus, of course. Bring the body. You have it. Who's keeping him there? What's your explanation? The explanation has to be according to law. And there we are, see, because you make people -- people try to do their job.

What else did I write down here? A public defender corps, that's helpful if you move into the criminal area because then you build a corps of people with a professional interest in seeing that the process remains what it's supposed to be, which is basically fair. And if you think they always succeed here, they don't. Plenty of problems with our system. There are plenty of them. And that's actually a virtue for the other countries because by looking at these problem areas they can see not necessarily what

to avoid, but how people take steps to try to overcome them. All right, I think that's enough.

MR. THORNTON: Wonderful. Now, I want to open the floor right now because we've got half an hour to go, so who wants to ask the first question? In the back.

MR. HOAGLAND: Thank you. Jim Hoagland, *Washington Post*. Justice Breyer, thank you for those remarks. You've taken us a little bit into thorny territory, though. I wonder, from your visits to China, your conversations with the students there and with officials there, if you have a sense that we are on a path where an independent judiciary can be formed in a system that is ruled by a Communist party that puts other values much more on a supreme level than the ones that you're citing? Do you have a sense that the party is willing to make the kind of compromises that essentially will put it out of business?

JUSTICE BREYER: There I have not -- you know, you're asking me a question I can't answer insofar as you're talking about the party because I don't know. But I do know that you have an entire generation of students -- that was my impression -- who are very much up to speed on this and they do see a rule of law and the kind of values that are in our Constitution as worthwhile and important. And once the question becomes how do we get from here to there, the battle becomes -- I mean, it seems half won at least because it's now just a question of what are the means. And as you can see, if people can start thinking about these means and -- but people eventually -- it's an article of faith with me that there is no dictatorship or whatever so awful, and I'm not saying this is one of them or whatever, but eventually public opinion does matter. And informed public opinion does matter, no matter what the country, no matter what the situation. At least that's -- that's perhaps just an article of faith. And I don't see how

that's resistible when you have it so widespread.

MR. THORNTON: Right here, sir.

SPEAKER: My first question is that --

MR. THORNTON: If you could identify yourself, please.

MR. DENG: My name's Deng Sha. I come from Peking University, from Beijing. My first question is that when Stephen says the China problem is China's problem. It's your problem. It's yourself to solve the problem. And the sense is that China feels that their own systems are very special, particularly in recent years, this global financial crisis. China economically doing very well compared with the rest of the world. And it is true that China's doing very well economically, but increasingly many students and even many of those coming to study in the U.S., they feel that they are part of the systems. In many ways, China is divided where the China systems is better than Western systems or China is special.

Second is that when the people expect that Xi Jinping becomes the new leader after the 18th Party Congress, is starting to become a strong leader like Chiang Ching-kuo in Taiwan. But that is the dilemma if a Chinese leader becomes very, very strong, typically it will suppress the freedom of speech, will maybe make the current security apparatus even stronger, meaning that it is a big dilemma whether Xi Jinping becomes stronger is better or China become democratic systems as happens in Taiwan.

Those are the two questions. First is China becomes -- whether China is part of global problems or part of the global solutions. And many people in the economic world, particularly multinationals, feel that the China problem is a global problem. It's not just a Chinese problem.

JUSTICE BREYER: You're getting beyond me in this respect. I'm not seeing, and I can't see, a thing as a China problem or an American problem. I can see

something as a human problem. And it seems to me as a human problem I agree actually with something you don't agree with necessarily, which is that if you could find a way to have a society without conflicts, that should be what you do. Because ultimately law and courts are ways of resolving conflicts among human beings.

Now, I think a good way to do that when people were simple tribes of 100 or 200 people and they were wandering in a desert, you could solve their problems by having someone -- even then they had problems, you know, and they had someone sit under a tree and dispense justice individual by individual. And it worked. But where you're dealing with groups of people who are tens of millions or hundreds of millions of people, then there are conflicts that I think you can't solve except through rules. And once you have a system of rules, you have a system of laws. And as soon as you have a system of laws, people say but why should I do that? And at that point you gotten very big conflicts. So you have to have some kind of answer to give them that's satisfactory. And one kind of answer -- I'm not saying the only kind of answer, but one kind of answer - that seems to work pretty well is: but you had a say in this, you know. You had a say yourself. Maybe it's secondhand, but you had a say.

And then they say but the majority's ganging up on me or the people in power don't like me. And that's no reason. So you say very well, what we'll do is we'll have a basic system here that gives even you who are not popular certain basic rights.

But how do I know we'll do it? Well, we've set up this imperfect system filled with problems, but an imperfect system to help, to make certain you're not being unfairly picked on. And unfairly picked on is not something that's an American notion, a Chinese notion, or any other kind of notion. You go back to the Bible and it says justice, justice shall you pursue, not dispense. It's not something somebody dispenses. It's something somebody pursues. And, therefore, the idea is it's universal.

Now, maybe I'm wrong, maybe it isn't, but I suspect there are certain things in human nature when they get together in society that are universal, and having a say might be one. And certainly not being picked on unfairly is one. And certainly having some kind of guarantees against being unfairly picked on is important. And that all goes into justice. And that's why I think we're basically here, whether we're from China or wherever we're from. We're trying to find solutions when there are tens of millions of people trying to live together in communities about how to satisfy those very basic, very, very basic human desires.

MR. THORNTON: The woman in the back right there.

MS. JUNG: Hi. My name is Louisa Jung. I work for the National Endowment for Democracy. My question is I think that -- I'm sort of just paraphrasing Chinese civil society censor voices, but often I think the West doesn't always hear as often as probably some of us would like. And so I think for them a huge legal issue that remains unresolved in the PRC are the number of human rights abuses, including the starvation of, you know, tens of millions, possibly up to 30- or 45 million, during the Great Leap Forward as well as a lot of other political campaigns, including the Cultural Revolution. And again, you know, tens of millions involved that to this day remain completely off the table. And my question is how -- you know, what are the limitations and solutions that you think rule of law can provide for that problem? Thank you.

JUSTICE BREYER: Well, I think people would not vote to starve 35 million people. I think that that is unlikely to occur. And the -- but, look, courts and judges and constitutions have been proved popular outside the United States and Europe and so forth because people see it as one possible small guarantee against the kinds of horrors that happened before and during World War II, for example, that happened all over the world.

They don't think -- I mean, we're nine people. But you put the nine people together with a system of education and experience and try to get a press in and try to make it public, and maybe -- maybe -- it's a little bit of a help. That's where I really think we are and that's what I think our strength is. The strength is having trained -- not trained, but had gotten accepted over the course of many years a notion that I will accept this court decision even though I don't really like those judges and even though I really think they're wrong half the time, and dah-dah-dah. And I won't even tell you what the lawyers say when they're outside the courtroom. (Laughter)

But it's sort of, well, it may help a little bit. It may help. It may help that maybe there is a guarantee, a kind of guarantee, that could be swept away pretty easily, but -- and that's why I say, that's why you heard at the very beginning people were saying, look, we keep working at it. You think our criminal justice system -- you know, I've heard the reaction to you say, well, in China, they just have the police chief and the prosecutor and the judge, and they get together. What kind of a system is that? Where does the defense have his rights? And I say that's right, you know, you've got to have -- and then I think, you know, 98 percent of our -- or 95 percent of our cases are decided by a plea bargain between the prosecutor and the defense lawyer. And I think, well, hey, what kind of a system is that? (Laughter)

I mean, think of the prosecutor. The prosecutor can sit there and say if you don't agree with this, I'm going to accuse you of a higher crime and you'll go to jail the rest of your life. I say that's not a perfect system and maybe we should -- you know, there are a lot -- so there are criticisms of our system and there are problems, but the important thing for us, I think, is keep working on them. So when people didn't like the government, the students are angry, I say, hey, your job is to go participate and take part and convince the -- if you don't like it, convince the majority to vote your way. If you don't

like what's going on and you think it really is picking on somebody, there are still Legal Aid societies or get some -- go into a courtroom.

It's a messy system and it isn't terribly efficient, but they put it in because Hamilton and the others hoped it would be one kind of a guarantee of a certain kind of basic liberty. And, of course, I believe in that or I wouldn't be -- you know, I wouldn't spend so much time at it. Yes.

MR. MITCHELL: Thanks, Justice Breyer and John Thornton. I'm Garrett Mitchell and I write *The Mitchell Report*. And as I was listening to the beginning of this conversation between the two of you, I was reminded of a wonderful conversation that took place probably 30+ years ago between Bill Moyers and a former justice, Justice Blackman, talking about the Constitution. And so this question sort of goes to what's at the heart of constitutionalism and rule of law, and I was looking back at the list of things that you listed.

In the course of that conversation, after a long discussion about constitutionalism, et cetera, essentially Blackman turns to Moyers and says it's really the Preamble that breathes life into the Constitution. And I wondered whether that's a point of view that you hold and whether you think it has relevance in the situation that we're talking about now.

JUSTICE BREYER: No, the Preamble says, "We, the people of the United States, in order to assure domestic tranquility," et cetera. I used to be able to quote it, but I don't think I can now. (Laughter) Anyway, it's written down in here.

And the Preamble's important, saying, "We, the people," but it's not the only thing. And I say that because I do think -- I had a very interesting conversation in China, I thought. I've gone there twice and the first time was a few years ago, maybe 8 or 10, where Joanna and I, with Paul really, went to Beijing and then we went to

Shanghai. And in Shanghai, we were asked to meet with a group of businessmen. And these businessmen had all been involved in the dot-coms and they'd lost a lot of money, but most of them had made a lot back. So they're talking and I was fascinated listening to them. And one of them says, you know, I preferred the Cultural Revolution. And the others said what? You preferred the Cultural Revolution? Why? And he says because then you knew the government was the enemy. (Laughter) He says now you're not sure. He says this is why.

So I said that you all really want to bring about a democratic system. They said yes. So I can't resist it, I'm a law teacher. So after they say how much they all favor democracy, I said, okay. I said that's a very interesting question -- point. I said I favor it. I favor it. But, you know, I've noticed, from what I've read, that there are millions of people in China who make just a few dollars a day and they're off their own land and they're not very rich really. And you have quite a lot of money, I gather, at least I was told. And suppose they all say, look, we're in the majority and you have this money down here, we're going to take it all away from you and give it to us. So the one who had started this said -- I said are you in favor of that if that's the result? He says I am in favor of democracy, but maybe not right now. (Laughter)

So you see, it's like a tiger by the tail. And so you start looking at the other side and they're afraid of a certain kind of chaos or of a certain kind of -- and so somehow you have to -- now, that is partly, that fear is partly, but not completely sort of assuaged or dampened or something by the parts of the Constitution that guarantee property. They can't just take it away from you. But maybe if they think about it they could figure out a way to. (Laughter)

And so, you see, it's a need to find ways to take the fears of different people -- I heard this last night on NPR. I heard Jane Harmon and she was talking

something about in Egypt, where they're trying to write a Constitution. And she said the liberals walked out. And she said she had told the liberals go back in that room. Don't stay out of the room. Listen to what people are saying. And if you have to make a compromise, you do. But move it along. Move it along.

And that was what she said. I thought, well, you know, there's quite a lot to that. So anyway, that was my reaction.

SPEAKER: My Chinese is not that good, but my English is even worse. Let me ask Mr. Thornton and Justice Breyer before I ask my question I want to talk two points, my feelings.

Professor He's book was published in America in English. That shows China still doesn't have freedom of the press and the judiciary is not independent.

Secondly, I am from -- I'm a common lawyer in China. In order not to split my personality I'll do one year administrative lawsuit and then I'll do one year of commerce lawyer. That's how I can afford buying a business suit. China's a very complicated country compared with America. You can -- an American can hardly imagine our situation.

Twenty-four years ago, I was like basically -- I followed the government rules. I am mentally kind of ignorant. At that time my values, my perspectives told me at that time it's correct to support our system. And history told us America's imperialists invaded China. When I heard that part of the story I was so angry. Then after I studied law, after I entered law school, then I learned probably maybe your system is the best. I don't know whether God has created a better one, I don't know.

So let me say, totally to make this statement, right now I am someone who accepts universal values now as an individual, a humble man, a humble individual. However, we know that there's 1.3 billion people in China. How many folks can reach

this level, like my level? It's not that easy.

So my question -- okay, I'm going to raise my question. It's not -- Brookings Institution probably it's very popular to talk about Chinese leadership and Chinese law. My question is how for those people who still don't understand law, who still haven't accepted universal values, how to make them understand what is law, what is rule of law and why human should deal with each other in this way? Professor Li just said, so I learned one word in English, seek skin from the tiger. So how can you influence them? They know very well, they know that they cannot be influenced. So what are we trying to influence here?

Now, in my family, when I was fighting with my parents, I couldn't win over them because they were my parents. Because when they say how I should live, then I have to live. So my questions are the Brookings Institution, how, by what kind of steps that you will be able to allow the regular people, ordinary people, to really feel and understand the rule of law and why do we need the rule of law?

JUSTICE BREYER: Well, I don't have more of an answer to that than we were talking about. You keep doing what you're doing. You keep doing it. You just keep doing it. I mean, when I talked to the students, Sandra O'Connor, one of my colleagues, you know, she -- and Kennedy, all of us feel very strongly about in the United States the fact that teenagers and high school students are not learning civics. They don't know how the government of the United States works. And so she spends a lot of her time trying to develop programs on computers, on television that you could send into the classrooms, so they'd understand.

None of us thinks that the rule of law is the American system in its entirety. We think the fact that people will apply and follow a rule of law is one thing that we think -- I think, and I think that people who think about it think -- is a national treasure.

But it's a treasure that's developed, and that's been my point, over many, many, many years with many setbacks along the way. And, of course, in my own mind, there's no way or maintaining it without teaching the next generation, the generation after that, and that means teaching. It doesn't mean propaganda. It means giving them a chance to discuss these things to understand how the system works, to participate.

One of the things we used to do when I grew up in San Francisco was we'd have a day called Youth in Government Day, and I'd get to go -- everybody in the class would get to go down and sort of shadow a member of the Board of Supervisors or the mayor or the city attorney or somebody and see what his job was like. And what a good thing that was. I remember that.

And one of the reasons had to do with architecture that I was in China, but one of the things I thought was great in architecture is in Australia, which they've changed now, but they built a parliament. And this parliament, for whatever architectural reason, it goes up like this and it's huge and the building goes down almost to the ground and it's covered with grass, the whole ceiling. So what -- the children would come in droves in the buses and they'd go to the top and they'd roll down like that to the bottom. And I thought what a good idea. The association in their mind will be this democratic government of Australia and it has a place where I can go and roll down the hill. (Laughter) So they'll have a positive association and it'll make them more interested and they'll learn about it.

So I'm just pointing out there is no single technique, but, ultimately, it does depend on building the support for this idea, which means explaining, which means debating, which means discussing, which means the press eventually comes in and shows everybody what's going on. And if there had been people there with the press, I think, that could report on things, maybe some of the terrible things that had happened in

the world in the 20th century wouldn't have happened.

MR. THORNTON: No, no, right here.

MS. HOMER: My name is Lauren Homer. I'm an attorney here in D.C. and I've been working on rule of law issues for many years in Russia and China and other places. Probably it's safe to say the greatest threat right now that the Chinese leadership feels is instability and social disharmony. And I think the Chinese people also have experienced, particularly lawyers, a lot of very difficult things, including being jailed and beaten and thrown out of the legal profession as they have attempted to bring about the rule of law. And, of course, in our own country lawyers and people have experienced a lot of pain in the civil rights movement. So my question is in line with Mr. Thornton's comment about practical steps. What would be a phasing of the introduction of the rule of law that might be suggested to the Chinese government and to Chinese political and legal leaders as a way to avoid these calamitous events and bring about the rule of law?

JUSTICE BREYER: Can you suggest to them that they pay the judges and say we won't reduce your salary, we won't fire you? Well, they might be willing to do that. And if they did that, you know, the judges would love it and nobody else would like it. But, I mean, maybe they'd do it or maybe they'd say, hey, we have an administrative law rule here. By the way, let's have all the court proceedings on television. The proceedings, I'm not saying the deliberations.

And you say, well, why don't they do that? Let's not get into that. (Laughter) Let's have the trials and all those things. Maybe they'd do that. Maybe they would. Or what about this arbitration system for resolving business differences? Would you be willing to take some of these judges? After all, you're now paying them so much and you can't fire them. At least let them do a little work. Why don't they come over here and handle some of the arbitration cases? And why don't we do it according to pre-

published rules? You know, I mean, there are so many things, the publicity, and you don't have to do everything at once.

And I saw Brooke Shearer before she died. Wonderful person. And she sent us a film from China, which we looked at, and it was a school of fifth graders. And the fifth graders had been -- they suggested to the government -- the government had suggested what you should have are elections for the monitor in the class. And they did a film and it's absolutely priceless. I mean, the parents took the -- they didn't know how to do it, you see, the teachers weren't sure how to do it. And they would make this mistake or that thing and it would have its comical elements, but the students got interested. They got interested and they ended up electing a monitor. I don't know how good the monitor was, but it was all right. It was all right.

And so there are ways, I think, which you're more likely to be able to think of than I am of taking these different ideas and say try this out over here or try it out over there and you're building the bar. And it's true that there are -- they're not a solution. None of these things is -- everything has drawbacks, but you sort of move along.

MR. THORNTON: I'll take the final two questions. This gentleman right here and back there.

MR. LUBMAN: Thank you. My name is Stanley Lubman and I've been involved in studying and practicing Chinese law for the last 45 years, and I just want to add a positive note. You, Justice Breyer, and also I think Paul Gewirtz have talked in slight different language about changing a legal culture in China. And I wanted to mention one incremental -- a kind of incremental improvement that doesn't come from the top, but from lower down.

I was at a meeting last year to discuss administrative law reform. And

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we were told that the Central Government still does not want to pass a nationwide Administrative Procedure Act. One was drafted in 2003 and it was rejected because it was too much of a professor's law, so-called, because the drafters looked very hard at the American Administrative Procedure Act. So that has been lying around as have a draft administrative litigation law also been lying around. However, the leadership has countenanced the notion of local experimentation.

And I was very interested to learn that two provinces have adopted Administrative Procedure regulations, namely Hunan and Shandong. And I went to Shandong and heard the mayor of a fairly large city there talk about what he had learned as a mayor. He'd been a Central Government official before he was posted down and he realized once he got there that Central Government officials don't really understand the lives of ordinary people. And then he began to watch the proceedings, the process of drafting the local Administrative Procedure regulation and he came to understand the importance of procedural justice. And that was one of the first times in 35, 40 years of going to China that I heard a Chinese talk about procedural justice.

So I think that the term is in the vocabulary and I think that local experimentation may at least help in the incremental building of a changed legal culture.

JUSTICE BREYER: That is supposed to be one of the virtues of the American federal system is what called Brandeis called "the laboratories of experiment." Now, one problem of having a population of 1.3 billion is it's a very big population and it's hard to govern. But one virtue of it is you can divide it into parts and provinces and you really can have real experiment. Try this over here, try that over there. So that's a tremendous virtue.

And I read in your book, well, you have the Confucian tradition which says morality is what's important and not necessarily the law. Yes, but now with 1.3

billion people, of course morality is important, but how do you create a system that is moral? How do you get people to feel that they can follow the rules of morality? Perhaps when they were just smaller in number and everybody's closely knit in families you can just rely on the family. But in today's world everywhere with this television and the computers and everybody working hard all the time maybe you can't so completely. And so maybe to get to the Confucian goal, you have to use a rule of law means. I don't know, it's possible. But, I mean, all these things you can experiment and that's such a plus. That's a plus.

MR. THORNTON: Final question right here.

SPEAKER: (inaudible) and I'm a Chinese lawyer, so maybe the justices are not familiar with China. So my question I think you can certainly answer. My question is if a case comes to the Supreme Court and the (inaudible) his family have interest in the case, then how to make a decision in other eight justices? But if the decision is 4-to-4, then how to resolve this problem? Thank you.

JUSTICE BREYER: Well, if it's 4-to-4 there's a rule on that. It's normally all 9 participate and, therefore, it's not going to be 4-to-4. But if one person were disqualified and there were only 8, then if it splits 4-to-4, the lower court decision is automatically affirmed.

SPEAKER: Okay, thank you.

MR. THORNTON: Okay. So we're at the end. I want to just make one minute of closing remarks by thanking all of you for coming; thanking Cheng Li and my colleagues at Brookings for putting on a wonderful program; thanking Jerry, Paul, and Bill for your wonderful contributions. And He Weifang, we could have paid you no higher compliment than to finish by having Justice Breyer here. So we thank you and we thank Justice Breyer. And please join me. (Applause)

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