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Senator Murkowski and Members of the Committee:

I want to thank the committee for giving me the honor to testify today on China's legal reform in recent years. My remarks are divided into three parts. The first part describes the progress made in the strengthening of China's legislative institutions and analyzes the limits of this process. The second part addresses the progress and limits in China's legal reform. The last part comments on policy options for the United States.

I. Progress and Limits in Building Legislative Institutions in
China

The emergence of the National People's Congress (NPC) and, to a lesser extent, local people's congress (LPC), as major actors in decision-making in China in the reform era has been hailed as a sign of political institutionalization or even pluralization. The growth of the NPC as one of the most important political institutions in China has been extensively documented.

Legislative Output: The most important achievement of the NPC was its enormous legislative output. (Table 1) The several hundred laws and resolutions passed by the NPC since 1978 have provided the legal framework for economic reform and rationalized administrative procedures. For example, of all the laws and resolutions that were enacted by the NPC from 1978 to 2002, 95, or about a third, were "economic laws." Of the 216

new laws passed from June 1979 to August 2000, 126 were classified as “administrative laws.” But these numbers should not be taken at face value. In the passage of most laws, the NPC has largely played a secondary role, endorsing the bills drafted by the executive branch. On a few rare occasions, the Standing Committee of the NPC showed its autonomy by rejecting the bills proposed by the government. Like the NPC, LPCs rarely rejected bills proposed by local governments. When they do, it becomes national news, as in the case of the People’s Congress of Shenzhen which voted down, in 2004, a law on auditing and supervising the local government’s investment, an unprecedented act of political independence. Official figures also indicate that individual legislators play an insignificant role in law-making. Not a single bill proposed by NPC delegates has been enacted into law. For example, from 1983 to 1995, more than five thousand bills were proposed by delegates, but only 933 (18 percent) of them were referred to committees. There was no record that any of the proposed bills ever becoming law.

Table 1. Legislative Output of the NPC, 1978-2003

Years	Laws Passed	Resolutions Passed
5 th NPC (1978-1983)	41	19
6 th NPC (1983-1988)	47	16
7 th NPC (1988-1993)	60	27
8 th NPC (1993-1998)	85	33
9 th NPC (1998-2003)	74	n.a.

Constitutional Oversight Power: On paper, the constitutional oversight power of the NPC has expanded significantly. The NPC supervises the courts and appoints and removes officials. It also investigates and oversees the work of the executive branch, approves the work reports of the State Council, the Supreme People’s Court, and the Supreme People’s Procuratorate, reviews and approves budgets, and provides legislative interpretations. The NPC can review the constitutionality of laws, inspect the implementation of specific laws by supervising individual court cases, hold hearings, conduct special investigations, and impeach and dismiss government officials. But in reality, the NPC has seldom asserted its formal oversight power. For example, the NPC has never

declared a law unconstitutional or rejected a working report by the State Council, the Supreme People's Court, or the Supreme People's Procuratorate. It had never refused to approve a budget, launched its own special investigations, or initiated proceedings of dismissal against a single government official. The NPC's inspection tours or hearings do not appear to have had any impact on policy, either. The most visible expression of the NPC's oversight power is rather symbolic: each year, about 20 percent of the NPC delegates voted against the work reports of the Supreme People's Court and the Supreme People's Procuratorate.

By comparison, in some provinces, cities, and counties, the LPCs occasionally have tried to be more assertive. LPC members sometimes take local bureaucracies to task for poor performance and corruption. Deputies of LPCs sometimes demanded audits of the expenditures of local governments and criticized local governments' commercial deals and corrupt activities. In wielding one its most controversial oversight powers, LPCs also began to monitor judicial proceedings, mainly as a response to rampant corruption in the judicial system. LPCs' oversight of judicial proceedings in both civil and criminal cases can force courts to conduct trials with greater transparency and integrity. Typically, LPC delegates would review files, interview witnesses, and sit in on trial proceedings. In one instance, such intervention helped free a peasant wrongly convicted of drug trafficking.

Appointment and Removal Power: Another noteworthy development is that LPCs have become an arena in which bureaucratic and factional politics begin to influence, in a very limited way, the appointment of local officials. Because Chinese law mandates "competitive elections" (cha'er xuanju) for senior local officials, LPC delegates have an opportunity to use such (indirect) "elections" to foil the appointment of official candidates and elect their own choices. Under Chinese law, an official candidate cannot be appointed if he/she fails to gain half of the votes of the delegates. LPC delegates can also write in their nominees. In Liaoning in the late 1990s, for example, the CCP's provincial organization department (POD) reported that an increasing number of official candidates could not be confirmed by LPCs due to factionalism, poor lobbying by the party, and unattractive nominees. Local legislators occasionally were successful in nominating and electing their own candidates to local offices. In five cities in Liaoning, twelve

"independent" candidates were elected to local offices. Similar incidents occurred in Hangzhou's twelve counties in the 1990s. Each time the county people's congress appointed officials nominated by the party, an average of six to nine official nominees would fail to be appointed, while the same number of unofficial candidates nominated by the delegates themselves would get "elected." In the counties where the LPC delegates were the most assertive, about 10 to 15 percent of the official nominees would fail to get elected. In practice, however, such revolt by LPC delegates is rare, and nearly all the candidates nominated by the CCP are appointed. According to a senior NPC official, from the mid-1980s to the mid-1990s, only 2 percent of the candidates nominated by the provincial CCP committee failed to win "elections" at the provincial people's congress.

Organizational Growth: Organizationally, the NPC has grown considerably as well. The body had only 54 full-time staffers in 1979. By the mid-1990s, the number had risen to about 2,000. The NPC's committee system grew as well. From 1983 to 2003, the number of specialized committees in the NPC Standing Committee rose from six to nine. Nationwide, the number of staffers in the people's congress system at and above the county-level reached 70,000 by 1997. However, as a whole, the membership of the NPC and LPC does not mirror Chinese society. Rather, it appears to better represent the bureaucratic interests of the Chinese state and the ruling CCP. For example, nearly all of the 134 members of the 9th NPC Standing Committee (average age 63.4) were retired government and party officials. CCP members make up about two-thirds of the delegates to the NPC and LPCs.

II. Legal Reform and its Limitations

The record in legal reform since the late 1970s has been mixed. While the Chinese government has made unprecedented progress in many areas of legal reform, the Chinese legal system remains structurally flawed and ineffective because the CCP is fundamentally unwilling to allow real judicial constraints on the exercise of its power.

The motivations to undertake even limited legal reform were compelling for the CCP in the post-Mao era. To restore political order and create a new legal framework for economic reforms, reforming and strengthening the legal system was a top priority for the Chinese

government. Indeed, China's legal system, developed under a planned economy and wrecked by a decade of political turmoil during the Cultural Revolution, was inadequate, outdated, and ill-suited for a transition economy. Economic reform would have been inconceivable without reforming the legal system. Thus, the CCP's need for survival through economic reform overlapped with the practical necessity for legal reform.

To be fair, the progress in legal reform since the end of the Mao era has been unprecedented in Chinese history, as reflected in the passage of a large number of new laws, the increasing use of the courts to resolve economic disputes, social and state-society conflicts, the development of a professional legal community, and improvements in judicial procedures. As a result, legal reform has greatly increased the role of courts in adjudicating civil, commercial and administrative disputes. As indicated by the data on the rapid growth of commercial, civil, and administrative litigation, Chinese courts have assumed an indispensable role in resolving economic, social and, to a limited extent--political--conflicts. (Table 2) A number of empirical studies on commercial and administrative litigation show that, despite its flaws, China's legal system is capable of providing limited protection of property and personal rights. In addition, China's legal profession, including judges and lawyers, has expanded rapidly during the reform era. The number of lawyers rose from a few thousand in the early 1980s to more than 100,000 in 2002. The number of judges nearly doubled from the late 1980s to the late 1990s. As measured by educational attainment, the qualifications of the legal profession have risen dramatically as well. The percentage of judges with a college or associate degree rose from 17 in 1987 to 40 in 2003. Of the 100,000 lawyers in 2002, 70 percent had undergraduate degree and better and 30 percent had only dazhuan (equivalent to an associate degree) or lower. However, the overall level of professional legal qualification remains relatively low, especially measured by Western standards.

Table 2. Growth of Litigation, 1986-2002 (Cases Accepted by Courts of First Instance).

a. including both commercial and civil lawsuits.

But behind these numbers lies a different political reality.

Year	Commercial	Civil	Administrative	
1986	308,393	989,409	632	For all the
1990	598,314	1,851,897	13,006	progress in
1996	1,519,793	3,093,995	79,966	reform, China's
1999	1,535,613	3,519,244	97,569	legal system
2000	1,297,843	3,412,259	85,760	remains
2002		4,420,123 ^a	80,728	politically

hobbled by the
ruling party's
restrictions.

Legal reform was apparently losing momentum in the late 1990s. For example, the growth of civil and administrative litigation slowed in the late 1990s, peaked by 1999, and began to decrease afterwards. (Table 2) The total number of civil and commercial cases fell from more than 5 million in 1999 to about 4.4 million in 2002 (a 12 percent decline over three years). Administrative litigation cases registered even more dramatic declines. After peaking in 2001, with 100,921 cases filed, the number of administrative lawsuits fell to about 80,000 in 2002, back to the level of 1996. Such broad and large declines in litigation may be indicative of the poor performance of the court system and the consequent erosion of the public's confidence in the courts' ability to adjudicate justly. Although there are no data available about the trial outcomes of civil cases, the trend of administrative litigation suggests that the decline in the number of administrative lawsuits filed against the government may be directly related to the increasing difficulty with which plaintiffs were winning these cases in courts (which in turn reflects the courts' pro-government bias). For example, plaintiffs suing the government had an effective winning rate of 38.3 percent (including favorable court judgments and settlements) in 1993. This rate rose to 41 percent in 1996, but fell to 32 percent in 1999. By 2002, the rate plummeted to 20.6 percent, half of the level reached in 1996. It is likely that the decreasing probability of receiving judicial relief through the administrative litigation process has discouraged many citizens from taking their cases to the courts.

The rapid growth of the legal profession has not led to the emergence of a genuinely independent bar or a well-trained judiciary.

The government maintains tight restrictions on lawyers in their representation of their clients. The Lawyers' Law (1996) provides for inadequate protection of lawyer's rights, leaving lawyers vulnerable to harassment and persecution by local officials. According to the president of the Chinese Lawyers Association, the number of incidents in which lawyers were mistreated was large. Law enforcement officers frequently assaulted, detained, and verbally abused lawyers. Many lawyers were wrongfully convicted and sentenced to jail terms. Lawyers' rights to defend their clients in court were restricted. Some lawyers were ejected from courts without justification. Despite a massive effort to raise the qualifications of judges, the overall level of professionalism of the judiciary is very low. For example, 60 percent of the judges in 2003 had not received a college or college-equivalent education. A large number of sitting judges, many of whom are former officers in the People's Liberation Army (PLA), have dubious legal qualifications. Perhaps the most revealing evidence that the rule of law is fundamentally incompatible with a one-party regime is the CCP's steadfast refusal to undertake the necessary reforms to correct the two following well-known institutional and structural flaws in the Chinese legal system--even though they have long been identified and numerous remedies have been proposed. For example, in a study commissioned by the Supreme People's Court to amend the "People's Court Organic Law," two leading academics detailed a long list of the symptoms that manifested these flaws. What is remarkable about the proposal by these two academics is that similar proposals had been floated before but were never acted upon by the Chinese government. To the extent that reforms are adopted to address the critical weaknesses in the legal system, the measures implemented by the government tend to be piecemeal and technical. They try to remedy the less controversial procedural flaws while avoiding the most sensitive political issues.

Politicization of the Courts and Lack of Judicial Independence: As a judicial institution, Chinese courts are heavily politicized and deprived of the independence crucial to their role as guardians of justice and adjudicators of disputes. The politicization of the courts is reflected in the control exercised by the CCP over the various aspects of the courts' operations. For example, each level of the CCP organization (down to the county level) has a special political and legal committee

(zhengfa weiyuanhui) headed by a senior party official. The committee directly makes decisions on important policies and issues related to the courts and law enforcement. In many cases, this committee even determines the outcomes of major court cases. In terms of judicial appointments, the CCP's organization department nominates candidates for the presidents and vice-presidents of courts (often regardless of their judicial training or the lack thereof). In the case of the SPC, the members of the party committee of the SPC (who are the most senior judge-officials of the court) are appointed and supervised by the Central Committee of the CCP, and the members of the party committee of provincial high courts are jointly supervised by the party committee of the SPC and the provincial party committees. The members of the party committees of intermediate courts are under the direct supervision of the party committees of the provincial high courts. The CCP's control of the most senior judicial appointments profoundly affects how judgments are determined by the courts.

Additionally, judicial independence is compromised by local governments which wield enormous influence over the courts through their control of judicial appointments and court finances. Dependent on the local governments for funding, services, and political support, Chinese courts find it hard to try cases fairly where the economic and political interests of the local governments and officials are at stake. In the most crucial respects, Chinese courts are run like other government bureaucracies and follow a similar modus operandi. Administrative ranking or seniority, not judicial qualifications and experience, determine the hierarchical structure in the courts. For example, trial committees, which have the ultimate authority in determining judgments, are composed of individuals with the most senior administrative ranks, rather than the best judicial qualifications.

Inevitably, the politicization and administrative control of the courts corrupts judicial integrity. In public perception, the Chinese judiciary is one of the most corrupt government institutions. A survey of 12,000 people in 10 provinces commissioned by the CCP's Central Discipline and Inspection Commission in late 2003 found that the courts, along with the police and the procuratorate, were considered among the five most corrupted public institutions (39 percent of the respondents said corruption in these three institutions was "quite serious"). Chinese press frequently reports corruption scandals involving judges. In Hubei

province, from 2002 to mid-2003, 91 judges were charged with corruption. The accused included one vice president of the provincial high court, two presidents of the intermediate court, four vice presidents of the intermediate court, and two presidents of the basic-level court. In 2003 alone, 794 judges in the country were investigated and punished (chachu). Corruption by senior provincial judges was reported in many other jurisdictions. The presidents of the provincial high courts in Guangdong and Hunan province were convicted of corruption in 2003 and 2004. In Heilongjiang, the president, a vice president of the provincial high court, and the head of the provincial judicial department were removed from office in late 2004 for corruption. In Hainan, a vice president of the provincial high court, along with the head of the enforcement department of the court, a vice president of an intermediate court, and a president of a district court, were sentenced in 2004 to long jail terms for corruption.

Fragmentation of Judicial Authority: The control by the party and local governments of the judiciary has contributed to the fragmentation of judicial authority and undermined its effectiveness. In addition to the weakening of the judiciary as a result of the CCP's control of judicial appointments, the enormous power wielded by local governments over the judiciary undercuts the authority of the courts. Because judicial jurisdictions and administrative jurisdictions completely overlap with one another, the dominance of the administrative authorities in effect creates what Chinese observers call judicial "independent kingdoms" in which local political interests, instead of national law, hold sway. Under these conditions, laws made by the central government cannot be implemented or enforced, leading to the widespread problem of "local protectionism"--the phenomenon of local authorities providing political protection to local interests in violation of national laws. Consequently, enforcement of court judgments is extremely difficult when judicial authority is fragmented. In some case, court judgments could not be executed without the explicit political backing from CCP officials. To remedy the structural weaknesses caused by such a fragmentation of judicial authority, Chinese scholars have offered several proposals for institutional reform. These proposals included the establishment of two separate judicial systems: a central system and a local system (similar to the American federal system), the formation of

cross-regional courts, and the use of the central government's appropriations to fund courts. However, the government has adopted none of them. Such a failure to implement crucial reforms led to a growing sense among China's legal community that the court system has become so dysfunctional that more radical measures--or "major surgery," to use a colorful phrase--would be required.

In summary, the Chinese government's lack of commitment to a genuine system of rule of law is the fundamental cause of the limitation of legal reform in China. The CCP's goals in allowing legal reform are tactical in nature: such reform must serve the party's overall strategy of maintaining its political power through economic reform. Measures of legal reform must not threaten its authority or the institutional structure upon which its political supremacy is based. As long as this mindset dominates the party's thinking, legal reform in China will unlikely lead to the emergence of the rule of law.

III. Policy recommendations

The United States can play a crucial role in promoting the rule of law in China. Through high-level political dialogue, financial and technical support, and consistent diplomatic pressures, the United States government can help create the right incentives for reform within China. In the short-term, the Administration must engage China's new leadership in the area of legal reform. For example, President Bush may use the two upcoming summits with President Hu Jintao to seek specific commitments from the Chinese government in the area of promoting the rule of law. In particular, pressures on China to take specific actions to improve its human rights practices and protection of property rights must be combined with offers of technical assistance because this strategy will be more credible and less confrontational. The United States government should also facilitate and support the efforts of American non-governmental organizations that are implementing various programs inside China that are designed to promote legal reform. Of course, we must remain realistic about the limits of external pressure and assistance. The ultimate choice lies with the Chinese government. But, by offering the right mix of incentives and disincentives, we may make it more likely that Beijing will make the right decision.