May Guide China into 21st Century

Hong Kong’s Top Lawyer Envisions “Sherpa” Role for Future

Daniel R. Fung, Solicitor-General of Hong Kong since 1994, addressed a Standing Committee breakfast on May 1st at the International Center. He was introduced by Standing Committee member (and former CIA General Counsel) Elizabeth Rindskopf, who noted the speaker’s remarkably broad credentials as a legal practitioner, writer, scholar, and in government service. Educated at the London College of Law, from which he received both LL.B. and LL.M. degrees, upon returning to Hong Kong he served for three years as Honorary Secretary of the Hong Kong Bar Association. He represented the Bar on the Basic Law Consultative Committee, a body established by the People’s Republic of China to establish the Basic Law that would serve as a mini-constitution for Hong Kong beginning in 1997. In 1990, he became the youngest member of the Hong Kong Bar to be appointed Queen’s Counsel, and he has also served as a judge. As a litigator, he has successfully defended pro-democracy demonstrators and has established a reputation as Hong Kong’s preeminent constitutional and human rights practitioner. Excerpts from his remarks follow. —Ed.

Hong Kong Solicitor General Daniel Fung discussed the ramifications of reversion to Chinese sovereign control at the May first breakfast.

A View from the Senate

by Suzanne Spaulding

Until the end of July, Ms. Spaulding served as General Counsel to the Senate Select Committee on Intelligence. She was recently appointed a member of the Standing Committee. —Ed.

After last year’s major effort at intelligence reform, it would be reasonable to expect a relatively quiescent legislative agenda for intelligence during this session of Congress. Indeed, the Senate Select Committee on Intelligence (SSCI) spent the first several months of the session immersed in the non-legislative, “advise and consent” functions of reviewing two nominees for Director of Central Intelligence (DCI) and contributing to the Senate’s debate on ratification of the Chemical Weapons Convention. The treaty debate included an unusual closed session of the Senate in the old Senate Chamber to consider classified information regarding verifiability and other sensitive issues. With respect to the nomination of George Tenet to be DCI, the Committee held hearings this spring and is now

Continued on page 2

Inside

3 Creighton on Kelly Flinn Case
5 ABA Leibman Award Announced
12 Calendar of Events
14 National Security Agenda

Continued on page 9
Fung on Hong Kong...

Continued from page 1

of China. Secondly, that great litmus test of the most important set of bilateral relations anywhere in the world—U.S.-China relations—the successful passage of Most Favored Nation status, looks more complicated this year than ever before. . . . The third is this: We are told by no less an authority than Professor Samuel Huntington that we stand at the verge of an era of clash of civilizations.

I would like this morning to posit a contrary thesis, which I will call “cross-cultural cooperation.” . . . applying what I would call the “Sherpa Paradigm” to explain what I think will happen around the turn of the century and into the next millennium, and use Hong Kong as a construct for illustrating this paradigm.

Why the Sherpa Paradigm? Sherpas, as we all know, as defined by the Oxford Encyclopedic Dictionary, are a group of mountaineering people who live at the edge of Nepal and Tibet without whose skills—considerable mountaineering and climbing experience and skills—such modern heroes as Sir Edmund Hillary could never have surmounted Everest. Paradigm is a word, we are told by Professor Thomas Kuhn, who wrote The Nature of Scientific Revolutions, describing a theory which is perhaps more persuasive than its competitors, but need not meet every single one of the objections thrown up by its competitors. I am assured by that definition, because it makes my life a lot easier.

It is my theory that Hong Kong, post-reversion to Chinese sovereignty, will be the Sherpa to help China surmount the great difficulties of entering the twenty-first century. Why am I so audacious in making that sort of claim? Because it’s a very good case, and it reveals a whole set of extraordinary challenges.

Why isn’t Hong Kong set to implode, as we are told reliably by editors of the New York Times and by various other media watchers all over the world? Why is there an apparent chasm between views and perceptions, particularly the western media perception, and what is happening on the ground in Hong Kong? Those of you who’ve been to Hong Kong, who’ve visited Hong Kong recently, who have business connections there, investments there, will know that there is something of a real difference between perceptions.

But it is not necessary for me take the pulse of Hong Kong people and Hong Kong businesses to reach that conclusion. It is good enough, also, to read, for example, the current issue of U.S. News & World Report, which tells us much the same story as the Asian Wall Street Journal—namely, that we have recently seen a record high of holdings in Hong Kong dollars instead of U.S. dollars.

In terms of movement of people, we have seen a record high of net inflow to our population, which explodes the myth of a brain-drain that worried so many people up until about eighteen months ago. And the inflow is not just returnees who were formerly Hong Kong residents who obtained Canadian or German passports or other rights of residence overseas, but a lot of young, motivated people who have no recent Hong Kong connections. They are very well educated, very well qualified—and we’re talking about lawyers, bankers, holders of MBAs from leading schools in this country and Western Europe.

The reason, I suppose, has to do with the underlying sense of the economy. As we look at jobs, we see that the stock market, which reached a record high in February of this year, has dipped slightly as a result of perceptions of pricing of interest rates in the United States. This, I suppose, underscores the old adage we have in Hong Kong that Hong Kong doesn’t really have a monetary policy; because by reason of the fact that the Hong Kong dollar is pegged to the U.S. dollar, our monetary policy is really set by Alan Greenspan in the Fed. There is a grain of truth in that perception.

In terms of property prices, we have now reached the extraordinary stage of a record rise in property prices whereby an average medium sized flat of 1,500 square feet in Hong Kong—modest two- to three-bedroom flats—cost on an average $2 million U.S. dollars. That, I think, is an outrageous sum, which leads to the paradox that the biggest problem

Continued on page 4
Point of View

Should the Military be Dealing with Adulterers?

By Neal Creighton

Neal Creighton, former Commanding General of the First Infantry Division, is President and Chief Executive Officer of The Robert R. McCormick Foundation in Chicago. The following article appeared in the Chicago Tribune on June 17, 1997. It is reprinted here with the permission of the author. —Ed.

Having spent a full career in the military, I was, perhaps, one of the few Americans who could follow the logic of Secretary of Defense William Cohen when he announced that the adultery of Air Force Gen. Joseph Ralston was not a violation of the military’s Uniform Code of Military Justice, where as the recent cases of Maj. Gen. John Longhouser and Lt. Kelly Flinn were.

Technically, and probably legal, Cohen was right. But, he never stood a chance of convincing the American public that Ralston was not getting preferential treatment.

Unless there are some changes made in military law, the issue will persist and continue to cause an unneeded distraction to those who lead our nation’s armed forces.

In the Manual for Courts Martial, the body of laws that govern military courts, adultery is not an offense against the code unless “the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.” That means the offense is in the eyes of the beholder, first being the commanding officer who submits the charges, then the members appointed to the court martial board and, finally, those who review the case. This leads to subjective decisions such as those in the Ralston, Longhouser and Flinn cases.

In my 31 years of active military service as an Army officer, I remember only one trial in which adultery was the principal charge involved. That incident came about because a witness who had claimed she was raped by a sergeant changed her testimony, admitting the sex was consensual. The court martial panel then found the sergeant guilty of adultery. Since I was then the senior officer in that jurisdiction, I soon heard from the sergeant’s senator, Margaret Chase Smith, who informed me that in our country today nobody ever gets convicted of adultery. Unfortunately for the sergeant, he did.

During my military service, I was aware of a number of instances of adultery, some by those senior to me, some by contemporaries and some by those of less rank than I. So why weren’t there more charges of adultery?

First we did not feel that many of the cases, such as those involving a member of the military with a civilian, had any impact on our military function.

Secondly, most of us probably agreed with Sen. Smith and felt that adultery was not a crime that should be tried by a military court. A major reason we felt that was because there were other remedies for those cases where such conduct threatened the “good order and discipline” or was “of a nature to bring discredit upon the armed forces.”

The first instance of this nature that I remember occurred when I was a cadet at West Point when two of my instructors were found to be “swapping wives.” I don’t know any of the details but I remember that they were gone from West Point within days. I also suspect that each officer received an efficiency report that effectively ruined any chance of advancement.

The second instance was when I was a lieutenant and my captain company commander was court martialed on charges of “conduct unbecoming an officer.” Although the charges could have included adultery, they didn’t since he had piled up enough other offenses to make that one superfluous. He was found guilty and was soon out of the Army.

If the Kelly Flinn case had been handled in a manner similar to those I just described, most of us would have never heard about it. She could have been transferred to another post with a detrimental efficiency report or she could have been court martialed on the other charges of disobeying an order and making a false official statement. If adultery hadn’t been a part of the charges, then the case would not have received national attention.

The military did handle the Longhouser and Ralston cases without using a military court, forcing Longhouser to retire and Ralston to withdraw from consideration for the nation’s top military job. But it was again the adultery charges, that brought the cases to the headlines of the country’s newspapers and evening television news shows.

The fates of Ralston, Flinn and Longhouser have been decided and Secretary Cohen now has called for a panel to study how similar cases should be handled in the future.

The Secretary’s recent experience in trying to absolve Ralston should make it clear to the panel that the American people will not accept a continuation of the current code which defines some cas-

Continued on page 4
Dealing With Military Adulterers . . .

Continued from page 3

es of adultery as violations and others as not. It would be in the best interests of the military and our country to exclude adultery as a code violation entirely.

Administratively, sufficient remedies exist to take care of any problem caused by this type of behavior. The remaining articles of the code concerning conduct, fraternization and other actions which affect "good order and discipline" can be used to insure that our military remains a highly effective and disciplined force.

Perhaps if we had listened to Sen. Margaret Chase Smith back in 1975, our armed forces could concentrate on such things as strategy, tactics, and weapons systems rather than the definition of adultery.

Fung on Hong Kong . . .

Continued from page 2

Facing the incoming government in fifty days time, is not so much questions of preservation of civil rights, civil liberties, etcetera, although those are extremely important, but how to control the runaway property market. Because this market is unhealthy in the sense that the ordinary man on the street can't afford housing, in the sense that a young graduate starting a family can't buy himself, or herself, into the property market. This property market is fueled by money not from Hong Kong, but money from the PRC, from the United States, from Japan, from the U.K.—from overseas, principally.

So, why is there this big difference in opinion on what makes Hong Kong tick? Why do we say Hong Kong may not necessarily be controlled, but instead would act as the communicator between China and the outside world—as the Sherpa for China's entry to the 21st century?

If we look at the structures that have made Hong Kong so successful, that have made for a remarkably stable transition, you will find some of our answers. We have had, I believe, the longest orderly transfer of sovereignty in human history. Our drama started in 1982, we finish our marathon in fifty days time. If we look back over the last fifteen years, I think we can recognize a number of milestones which have marked our passage and which also act as harbingers of things to come. And those milestones can be represented temporarily by the years 1982, 1984, 1991, and 1995.

I start at 1982, which is not where most people start looking—most people would probably start in 1984—but I think 1982 is actually a seminal year, because 1982—being six years after the official termination of the Cultural Revolution, six years after the death of Mao, four years after Deng Xiaoping's accession to power—was the first year we saw a major change in the PRC Constitution. The fourth edition of the Constitution came out with one article, never previously seen, and that is Article 31. This is what it says: that the State may, when the conditions are right, establish "special administrative regions." The systems to be applied in these special administrative regions shall be prescribed by law, laid down by the National People's Congress, the content of such law will depend on the circumstances existing in those respective regions. This, as you will recognize, is the constitutional reduction of Deng Xiaoping's famous dictum: "one country, two systems."

"One country, two systems," was a concept which was rooted in the late-seventies as a Chinese concept, shared with the outside world at least as early as 1979, if the recollection of one of our former governors, Lord MacLehose, is reliable, that somebody told him of this in 1979 on a visit to Beijing. Originally formulated as a solution for the reunification of Taiwan, in 1981 the priorities changed whereby Hong Kong became the main focus for the application of this formula; and in 1982 we see the change that is now in the Constitution laying down the legal foundation for the application of this concept.

In the same year, Margaret Thatcher visited Beijing to inaugurate two years of negotiations over Hong Kong's future. The catalyst for her visit was the fact that in those days, much of the wealth in Hong Kong was tied up in property financed by fifteen-year mortgages. By 1982, only fifteen years remained of the 1898 treaty whereby China leased to Britain something like 98 percent of Hong Kong's territory. So time was running out, commercial imperatives indicated that there must be a negotiated solution to this question.

At the end of the two year process, in 1984, we get the Joint Declaration which is a setting up of the "one country, two systems," concept. Now some people have interpreted the Joint Declaration as a series of British capitulations to Chinese calculations, and if you bear in mind the fact that the Battle of the Falklands was in 1982, we might wish to subscribe to that theory. My feeling is that it is simplistic, because the two years were seminal years whereby the veto was threaded to that concept, with very considerable British importance. As we all know, the devil lies in the veto.

Continued on page 5
Nominations Sought for New ABA Leibman Award

The Standing Committee on Law and National Security, with approval from the ABA Board of Governors, has established the Morris I. Leibman Award in Law and National Security. This Award recognizes the example of Morry’s lifelong dedication to the rule of law, his legacy as a founder of the Committee, his leadership in the field of law and national security affairs, and his strong support for those engaged in this field.

I am delighted that the Committee inaugurates this Award — and, on behalf of the American Bar Association, will recognize individuals who have made exemplary contributions in the law and national security arena.

The guidelines for submission of nominations were mailed with the May issue of the National Security Law Report. The deadline for receiving nominations has been extended to September 15, 1997. Should you need further information, I strongly encourage you to call or write our Committee (see page 13).

The Committee plans to present this Award for the first time in the Fall of 1997, at our “Annual Review of the Field of National Security Law” Conference.

I strongly encourage you to nominate persons for the Committee’s consideration whom you believe to have demonstrated a sustained commitment to and notably benefitted or advanced the field of law and national security affairs.

—Paul Schott Stevens
Chair

Fung on Hong Kong...
Continued from page 4

So, in 1984, we had a document which binds Britain to China—Britain as the outgoing sovereign, China as the incoming sovereign—a document registered with the United Nations, a document which had the nature of a bilateral treaty bound in international law. This is what it said.

I won’t recite any of the provisions of the Joint Declaration. I think most of you know them pretty well by now, but a few key points are worthy of highlighting.

First and foremost, there is a provision which says that Hong Kong will retain its own currency—the Hong Kong dollar—which is a hard currency, which is a tool of international trade, which is pegged to the U.S. dollar, which is backed up currently by US$63 billion of reserve, which makes Hong Kong:

- the second richest per capita territory anywhere in the world;
- the fifth richest in Asia-Pacific, including the United States;
- the seventh richest anywhere in the world in absolute terms.

Another provision in the Joint Declaration—a very important one—is that which says that we are to enjoy fiscal autonomy. We are to remain a low-tax area, a tax haven, with maximum tax pegged in advance by the Joint Declaration. This will be retained. We will have fiscal autonomy in the sense that we collect our own taxes, we remit no taxes whatsoever to the central government. By the same token, we can’t ask them to bail us out if there ever is trouble, but we’re constrained to practice fiscal conservatism.

We will also remain a separate customs territory. We have our separate shipping register, our separate aircraft register. We will enjoy a separate international identity. For example, Hong Kong is a charter member of the WTO. China is not. China is encountering great difficulty in entering the WTO. Come the first of July, 1997, Hong Kong retains its seat on the WTO—irrespective of whether then, or at any stage thereafter, China could accede.

Another example: Hong Kong is a charter member of APEC (Asia-Pacific Economic Cooperation). Hong Kong sits alongside China in APEC. Come the first of July 1997, Hong Kong continues to be alongside China in APEC; the only difference would be a change of name—we’ll be know as “Hong Kong-China.”

Most significant of all, to my mind, and perhaps also to some of you here, is the provision in the Joint Declaration that prescribes that we are to retain our own separate legal system—the common law

Continued on page 8
Fung on Hong Kong . . .
Continued from page 5

system—which is arguably Britain's proudest legacy to Hong Kong after a century and a half of colonial rule. The common law means that Hong Kong is locked into the international grid. It is locked into the international grid, because one of the hallmarks of the common law is reference to a case-law system—and reference to a case-law system that is not just domestic in nature. So that today, our courts in Hong Kong refer regularly—and quite regularly—to decisions of the Privy Council, to decisions of the House of Lords in England, decisions of the High Court of Australia, the Court of Appeal of New Zealand, the South African Constitutional Court, the South African Supreme Court, the Supreme Court of Canada, the U.S. Supreme Court, U.S. District Court decisions, on relevant issues—not by way of final authority but by way of persuasive precedent. This is slated to continue, so that, come the year 2000, it is entirely conceivable that our Court of Final Appeals, for example, may cite a relevant decision of the U.S. Supreme Court arrived at in the year 1999—again by way of persuasive precedent.

Backing up this privilege is a very important one, which says that Hong Kong is to have judicial autonomy with the power of final decision. This is significant, because even today, arguably, we do not enjoy full power of final adjudication. Today, the highest court in Hong Kong is in fact a court outside of Hong Kong—the Privy Council in London. During the two years of negotiation—1982 to 1984—one of the most intractable of issues was what to do about the Privy Council; because the doctrine of mirror imaging virtually mandated replacement of the Privy Council by an equivalent court in Beijing as our court of last resort. But, after two years of often difficult negotiations, both architects of the Joint Declaration—that is, both Britain and China—are I think to be congratulated for arriving at a solution that is pragmatic, that is imaginative, that is radical, that works for Hong Kong; which is to replace the Privy Council not by a court in Beijing but by a court in Hong Kong. It is to be a common-law court, in fact, from which, ex hypothesi, PRC judges are excluded; because PRC judges are not, by definition, common law judges.

To this court, judges from other common-law jurisdictions may be invited to sit to participate in a deliberative process; which is extraordinary, because if you look at any major jurisdiction in the world, I think you would be hard pushed to identify a system which allows non-nationals, nonresident aliens, to have an input into the judicial process at the very highest levels. Now this court exists on its own with no overarching supreme court sitting on top of it, so that we have our court of final appeals, China will have its own Supreme Legal Court.

If we pause and look at that structure erected in 1984, I think we see something very interesting. We see a system of government that has gone way beyond any central model in terms of tolerating separatists and in terms of tolerating autonomy. Because no federal State which I can identify, anywhere in the world—neither India, nor Australia, nor Canada, nor the United States, nor Germany—would tolerate any integral part of its territory circulating its own exclusive hard currency or excluding the national currency from circulating in that region, so that after ninety-seven the Yuan will be viewed as foreign currency in Hong Kong.

Having separate international personae—a separate vote even on bodies to which the national government is not a signatory—having a separate legal system, which is basically different from the national system; having a judicial system which is quarantined from the mainland system, operating under its own terms, with no responsibility to the judiciary at the center.

What we see is an experimentation by China with a form of government that would resolve many intractable problems in China today. Because China is the world's most populous nation, and is structured with a unitary system, the problem of government in China is the most difficult, I think, anywhere in the world.

China is not monolithic. China is extremely heterogeneous, and I'm not just referring to the 55 minorities in China, I'm referring also to the Han Chinese population, which speaks a number of different sub-languages, as different as French is from Italian; which practices cultures as different as Norwegian from Greek; which makes, I think, Henry Kissinger's point, that China could have gone the way of Europe, and Europe could have gone the way of China, if Europe did not have a Cardinal Richelieu.

China did go the way of Europe at different times of its history. For at least the last 2,000 years of the imperial era we have seen China break up and China come back together again, so the centrifugal tendencies in China are very great—and they are forces with which the current leadership had to contend. "One country two systems," if it works, is a system that would resolve not just the Hong Kong issue, it might resolve the Taiwan issue, with luck, it might resolve the Tibet issue, and many other centrifugal forces endemic in China today.
Let me move on to elaborate a little bit more about what the Joint Declaration obliges China to do. First of all, the Joint Declaration has an annex which is longer than the body of the Joint Declaration itself, whereby China spells out in detail its basic policies towards Hong Kong after July 1997. This document is also registered with the United Nations. It also has the force of international law, it is known as Annex One.

Annex One gives the details. For example, in Part Thirteen to Annex One, China spells out that the provisions of the two most successful comprehensive multilateral human rights treaties ever sponsored by the United Nations, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, shall continue to apply to Hong Kong, and, more importantly, shall be implemented through Hong Kong’s domestic laws after June 30, 1997.

This has very important ramifications. First, as we are all aware, bearing in mind the common law doctrine that international rights and obligations do not automatically translate themselves into enforceable domestic law, the statement by China that these two sets of provisions shall be implemented domestically is a very important step in the right direction.

Secondly, the fact that China herself is not yet a signatory to either of those treaties, but is content for those to apply to Hong Kong and be implemented to Hong Kong is a major realization of the concept "one country, two systems." We are assured, recently, that China is seriously considering the question of accession. A statement made by Jiang Zemin last month to French Defense Minister Alain Richard in Beijing, that China is considering the question of accession and will do so to the International Covenant on Economic and Social and Cultural Rights before the end of this year, is a very major step forward. If that happens, that will resolve the question of reporting on the Hong Kong situation to the United Nations Economic, Social, Cultural Rights Committee post-1997. I am personally optimistic that we will see Chinese accession to the other covenant, the ICCPR, sometime before the year 2000.

Two years ago, I was rash enough to make the prediction that we will not see Chinese accession to either treaty this side of the Hong Kong reversion, we will not see Chinese accession until the Fifteenth Party Congress, which is to take place in September or October of this year . . . But I predicted we are likely to see Chinese accession before the year 2000.

One of those predictions looks likely to come true—the ICESCR accession. The other one, I think, has a very good chance. China for many years has had a very good alibi for non-accession, even though China acceded to a whole string of other human rights treaties like the Convention Against Discrimination Against Women, the Covenant on Eradication of Racial Discrimination, the Rights of the Child, the Convention on Torture, and so on; but, on the two major ones, China could always point to the United States as a major superpower which had not acceded yet to the treaties. But U.S. accession in 1994 to the ICCPR, and reporting for the first time under the ICCPR in 1995, has left China isolated as the only member of P-5 not yet a signatory to the ICCPR. As far as the ICESCR is concerned, the boot, as it were, is on the other foot. I expect we will see U.S. accession at some stage in the near future to the ICESCR.

The Joint Declaration, as I mentioned earlier, obliges China also to reduce the terms of the Joint Declaration to an enforceable domestic form. This was done very shortly after the Joint Declaration was signed in Beijing in December of 1984, it was ratified by Parliament in the United Kingdom in May of 1985, and in June of 1985 China established the first of two bodies to work on the drafting process—the Basic Law drafting committee—to work in tandem with the Basic Law Consultative Committee. They started an unprecedented process of constitutional drafting—unprecedented because China had never previously drafted a separate constitution for any part of its territory, and because Hong Kong has never had a comprehensive constitution before.

Even today, the closest equivalent we have to a written constitution is a document known as the Letters Patent, which is a badge of office given by Her Majesty the Queen to the Governor as her plenipotentiary or representative in Hong Kong. It is a document drafted in 1917 by the Foreign Office in London with a pedigree going way back to the nineteenth century, a standard instrument of the government of imperial possessions. It is generalized, it is short (it can be reproduced on two sides of an envelope), and, for example, it empowers the Governor to make laws "for the peace, order, and good government of the territory." Those are the exact words of one key paragraph in the Letters Patent, which means this—it is not a modern constitution which we would feel comfortable with for governing Hong Kong post reversion to Chinese sovereignty.

In 1990, at the end of that five-year process, we came up with a 160-article Constitution which re- Continued on page 8
peats all the key points in the Joint Declaration and is consistent with the Joint Declaration. It is consistent because, throughout the 1985 to 1990 period, for the most part, Sino-British relations were extremely good, which meant there was very considerable British input into the drafting of the Basic Law—a not well-publicized fact. That input came via an official channel known as the Joint Liaison Group, a diplomatic channel of communications between Britain and China on the implementation of the Joint Declaration—so that the Basic Law actually says in clear terms that the Hong Kong Court may refer to overseas case law, post 1997, with no difficulty whatsoever.

There is within the Basic Law itself a Bill of Rights, which is known as "Chapter III," consisting of 19 articles, 18 of which spell out individual forms of protection for separate, discrete forms of human rights and civil liberties. The 19th article, Article 39, is I think by far the most momentous, because Article 39 says this, that the provisions of the two major covenants I referred to—the ICCPR and the ICESCR—shall be implemented through the laws of the SAR, and the second paragraph is this: "There shall be no curtailment of any rights protected under this chapter, save by law, but no law shall contravene the provisions of the preceding paragraph of this article. This means that the bottom line, for human rights protection, after 30 June 1997, are the provisions of the two international covenants. They form a floor below which human rights protection, by law, cannot legally fall. Which means that Hong Kong has built in to future constitutions a set of laws which is cosmopolitan, universalistic, based on UN standards.

In 1991 we come to the fourth milestone, which is the year we enacted our own Bill of Rights to dovetail with the provisions of Article 39. This bill was a Hong Kong Government initiative, which started its gestation period in 1987 and we took expert advice from major common-law jurisdictions with written constitutions and bills of rights, particularly from Canada. We ended up in ninety-one reproducing verbatim the language of the International Covenant of Civil and Political Rights.

Of all the 138 countries that have acceded to the ICCPR, the UN tells us that Hong Kong is unique in being the only country that has actually taken the terms of the ICCPR and made them enforceable domestic code. We have done so in a common-law context, which means that it is living law, which means that we interpret these provisions using case law from the other common-law jurisdictions as well as from our own jurisdiction, and we've gone beyond the common-law world in looking at the issues of the European Court of Human Rights at Strasbourg, looking at UN Human Rights Committee decisions on individual references under the optional protocol, so that today, six years after that event, we have a synthesis of local and international jurisprudence, and which is looked on I'm told with great interest by other jurisdictions around the world.

In 1995, we come to the last milestone, where we enacted our own court of final appeals statute. What we did was work for Chinese support, secured through the JLG. We passed a domestic statute which gives Hong Kong a five-person court, led by a Chief Justice, with three permanent judges, with a fifth seat to be filled on an ad hoc basis by invitees coming, case-by-case, from one of two panels—a Hong Kong panel of jurists, and an overseas panel of jurists. On the overseas panel, we expect to get the most preeminent common-law jurists from around the world.

Last year I spoke to the Lord Chancellor in England and to every single judge in the House of Lords, and every single judge expressed an interest in sitting on the overseas panel. We have currently at least one U.S. Supreme Court Justice who is interested in sitting on the overseas panel; we have one New Zealand Privy Counselor interested in sitting on the overseas panel; and we expect to get judges from Australia, from South Africa, from Canada, from Zimbabwe, from India, and all the major common-law jurisdictions around the world. This would make for an extremely cosmopolitan court, and would rightly, I think, reflect Hong Kong's international culture.

If you look at the requirements for the permanent appointees, there is no nationality requirement, save only for the Chief Justice, who must be a Hong Kong Chinese person, a permanent resident with no foreign passport. But the other three permanent judges could be of any nationality whatsoever, provided they are common lawyers. As I say, the extraordinary nature of this structure means that judges from the national system cannot gain access because they are not common lawyers. And that is why I said, at the beginning of my address, that one would be hard pushed to identify any major jurisdiction, anywhere around the world, where nonresident, non-national, aliens could have an input into the judicial process at the very highest level.

So where does Hong Kong go from here? I touched very briefly at the outset on the Sherpa paradigm.
We have always, in Hong Kong, been a major financier and bankroller of China’s modernization program. We’ve done this since the program began in 1978. But ... Hong Kong actually has a much more important role to play—a historic role which is gaining ascendancy today—which is to act as an interpreter and a mentor for China.

Hong Kong has always been interlocked between China and the outside world. Some of you who invest in China, have clients who invest in China, or who are trying to undertake China trade may disagree; but dealing with China through a Hong Kong partner is usually the least painful option, and usually also the most effective, the most profitable.

The greatest European business lobby group, IPAC, which is the International Public Affairs Center, recently issued a directive to its members—and I’m told this by the chairman, whom I met last week in London—that those within IPAC who wish to deal with China should find a Hong Kong partner.

The converse likewise applies, that Chinese enterprises who deal with the outside world tend to find that the easiest, most effective approach is through a Hong Kong intermediary. Because Hong Kong tells China what the international community expects of China, reminds China what the international community expects, by their standards, by their behavior, by way of culture.

In the legal sphere, which is the area with which I am most familiar, this works out in a rather interesting way. Since 1987, China has evinced a fascination with the common law, because the common law—with its doctrine of case precedent—is able to achieve a degree of precision and predictability which is absent from Chinese law.

So, since 1987, at least three different law schools in China have been studying Hong Kong law as a specialty, translating our law into Chinese. Now we as a Government have overaken them in this game, because we have virtually completed the translation of all of our statute law into Chinese, and we draft new pieces of legislation bilingually. Not just in English, but we have two teams drafting in tandem in both languages; and the Chinese text we supply to our mainland counterparts. Not because we have to, buy by way of interest, for their education.

So, if you look, for example, at China’s recent bankruptcy law, or China’s commercial legislation, you will find Hong Kong fingerprints all over the place. Why? Because they’ve copied from our legislation as a direct result of the material we’ve give to them—specifically to the National People’s Congress Legislative Affairs Commission—and they acknowledged it openly.

At the regional level, the degree of influence revealed is even more startling. Shenzhou is the court of our immediate northern neighbor. Shenzhou is the court of the special economic zone. In 1992, Shenzhou was given legislative authority, which meant that Shenzhou pass its own laws, different and separate from the rest of the country. Since then, Shenzhou has enacted close to 300 pieces of primary and secondary legislation, of which two-thirds come from Hong Kong sources.

To some extent, that Shenzhou wasn’t up to code, their government lawyers fought us—in the drafting process, in policymaking, and so forth. And Shenzhou tells us they want to attain legal parity with Hong Kong, leading to eventual economic integration, on Hong Kong’s terms. Now, whether or not you think that a bit of a pipe dream, whether you think that is a crackpot idea, I think matters less, that the fact that it does indicate the lines upon which Shenzhou is thinking ....

I conclude my remarks this morning by saying that Hong Kong has already adopted the role of mentor—or Sherpa, if you will—and I look forward to many future opportunities in which we may be able to assist in integrating China into the international community.

Spaulding on the Senate ...

Continued from page 1

waiting for the Department of Justice to conclude a preliminary investigation into financial disclosure issues before deciding how to proceed. [DCI Tenet took his oath of office on July 11. —Ed.]

Nevertheless, a number of significant legislative issues involving intelligence have emerged for consideration. Some of these issues are related to the handling of classified information, a perennial topic brought back into the forefront by, among other things, the recently released report of the Commission on Protecting and Reducing Government Secrecy. The SSCI, in its annual intelligence authorization bill, focused particularly on two aspects of this issue: improving the ability of the Congress to conduct effective oversight of clandestine activities, and the importance of providing as much information as possible to the families of victims killed or kidnapped overseas. There also are indications that Congress may be moving closer to some resolution of another issue that has been kicking around for quite some time, the export of encryption technology.

Continued on page 10
Spaulding on Senate . . .

Continued from page 9

**Recommendations of the Secrecy Commission**

This past March, the Commission on Protecting and Reducing Government Secrecy, chaired by Senator Daniel Patrick Moynihan and Congressman Larry Combest, released its report. The Commission was established in the Foreign Relations Authorization Act for fiscal years 1994 and 1995 to recommend proposals designed to "reduce the volume of information classified and thereby to strengthen the protection of legitimately classified information," as well as to improve existing personnel security procedures. The Commission also looked at the impact of new information technologies on the protection of classified information. Among the recommendations in the report was a statutory framework that would establish principles for classification and declassification decisions. The Commission found that classification and declassification have been governed over the years by a series of executive orders and "none has created a stable and reliable system that ensures we protect well what needs protecting but nothing more."

Among the key provisions in the Commission's statutory proposal is a requirement that the President establish procedures and structures for the classification and declassification of information and publish in the Federal Register, subject to notice and comment procedures, the details of these programs and any revisions to them. The statute would also require classifiers to balance the benefit of public disclosure of the information against the need for initial or continued protection. Classifiers would be directed to resolve significant doubts in favor of not classifying the information. Information would be declassified after 10 years unless the agency specifically recertifies that continued protection is required. Declassification is automatic after 30 years unless release of the information will result in demonstrable harm to an individual or ongoing government activity. Finally, the proposed legislation would establish a National Declassification Center to coordinate, implement, and oversee the declassification policies and practices of the Federal Government.

Senators Moynihan and Helms introduced legislation reflecting this proposal (S.712, the Government Secrecy Act of 1997) and it was referred to the Committee on Governmental Affairs. Congressmen Combest and Hamilton introduced similar legislation in the House of Representatives (H.R.1546).

**SSCI Legislation**

Much of the focus of the Senate Select Committee on Intelligence continues to be on ensuring that the intelligence reform provisions adopted during the 104th Congress are fully and appropriately implemented. For example, once a new Director of Central Intelligence is confirmed, the Committee will be expecting to receive nominations for the new community management positions and for the General Counsel. In addition, the Committee's mark-up of the Intelligence Authorization Act for Fiscal Year 1998, S.858, included a number of legislative proposals to address concerns developed through its ongoing oversight activities. The bill was adopted by the full Senate on June 19, 1997, by a vote of 98 to one. The House Permanent Select Committee on Intelligence reported its version of the Intelligence Authorization Act for FY 1998 on June 18 and it is awaiting floor action.

**Improving Oversight of Clandestine Activities**

Included in the Senate's intelligence bill was a provision that calls upon the President to notify federal employees and classified contractors that they are not violating any law, executive order, regulation, or policy if they disclose information, including classified information, evidencing wrongdoing to the committee with oversight over the department or agency involved, or to the employee's own Congressional representative.

This provision was prompted by a review of executive branch actions and opinions in this area, including a November 26, 1996, opinion from the Department of Justice stating that a congressional enactment would be unconstitutional if it were interpreted to vest "lower-ranking personnel" with a "right" to furnish national security information to any Member of Congress without receiving official authorization to do so. According to this opinion, laws currently on the books that are designed to protect the right of any individual to petition or communicate with Members of Congress in a secure manner without prior authorization either do not apply with respect to classified information or are unconstitutional.

The executive branch argues that, while Members of Congress have a clearance by virtue of their office, in order to have access to classified information they must also have a "need to know" the information. That determination, the Administration asserts, can only be made by the President or a senior official with delegated authority. The provi-
sion adopted by the Senate calls on the President to make the determination that, at a minimum, the committee with primary oversight jurisdiction over the element allegedly engaged in wrongdoing has a need to know the information in order to effectively fulfill their constitutional responsibilities. Members of oversight committees who receive classified information of this nature will be presumed to have received it in their capacity as members of the committee and held responsible for handling it appropriately. Disclosure to cleared committee staff would also be permitted.

In addition, the provision recognizes that members of Congress have a responsibility to their constituents. There may be instances in which an employee, particularly an employee working outside the Washington, D.C., area will need the assistance of their elected representative in reaching the appropriate oversight committee or in dealing with the bureaucratic pressures and complexities that often confront a "whistleblower." The employee would be permitted to reveal classified information directly to their Congressional representative to the extent necessary to enable the member to fulfill this responsibility.

The Committee fully appreciates the need to carefully protect national security information, particularly information the disclosure of which might reveal sensitive intelligence sources or methods. Indeed, the select intelligence committees were established, in part, to balance that need for protection with the equally compelling need for Congress to have access to information necessary for effective oversight. The Committee has worked closely with the Intelligence Community to establish appropriate procedures for the routine provision of intelligence information to the committees. However, the Committee believes that where these standard procedures fail to get the necessary information to Congress because, for example, the wrongdoing involves the very individuals who would have to authorize the disclosure or the authorization is not forthcoming, then employees must have an alternative.

The Senate Armed Services Committee (SASC) has also been examining the ability of federal employees to bring evidence of wrongdoing to Congress where classified information is involved. The SASC has included language in the Defense Authorization bill (S.936) that would amend the appropriate provision of the Whistleblower Protection Act, 5 U.S.C. § 2302(b). The two committees have been working together to ensure that provisions emerging from the respective conferences on the two bills are consistent and comprehensive.

Providing Information to Victims and Victims' Families

The Senate-passed Intelligence Authorization Act also included a provision designed to improve the prospect that individuals taken hostage abroad, their families, and the families of those murdered outside the United States, will receive all relevant information the US government may have, consistent with the need to protect sensitive information. The Committee recently heard from the families of several Marines who were murdered in a terrorist attack in El Salvador, in 1985. A common refrain in their testimony was concern about how little information they received from their government regarding the attack and its perpetrators. Americans who lost family members to violence in Guatemala expressed similar frustration during a Committee investigation in the last Congress. The Administration ultimately established a focal point on the Guatemala issues and this proved helpful to the families trying to negotiate through the bureaucratic maze in search of relevant information.

The Committee believes it is in the national interests of the United States to provide information regarding the murder or kidnapping of United States persons abroad to the families of the victims. Moreover, given the difficulty inherent in identifying all relevant information that might be held by disparate elements of the government, and the likely resistance to providing information that is currently classified, the Committee determined that this important responsibility must ultimately be vested in a cabinet-level official. Therefore, the Committee adopted a provision requiring the Secretary of State to ensure that all appropriate actions are

Continued on page 12
taken within the US Government to identify promptly all relevant information and, in consultation with the DCI, make it available to families to the maximum extent possible without jeopardizing sensitive intelligence sources and methods or other vital national security interests.

Subpoena Authority for the CIA IG

The Senate also decided that the Inspector General (IG) for the CIA should have authority to issue subpoenas to obtain documentary evidence necessary to fulfill its congressionally-mandated mission. The provision included in S.858 is modeled on the statutes providing subpoena authority for Inspectors General at the Departments of Defense, Justice, and the Treasury. Thus, it gives the DCI authority to prohibit issuance of a subpoena where necessary to protect vital national security interests of the United States.

Until now, the IG has conducted investigations and inquiries without the subpoena authority routinely employed by all other statutory Inspectors General. Congress acknowledged at the time it created the CIA IG in 1989 that it was not providing a full complement of investigative tools, but directed the IG to compile information in each semiannual report to the Director of Central Intelligence regarding any instances where the absence of subpoena authority has been an impediment.

Over the intervening years, the IG has provided the Committee with several examples of cases that illustrate the problems created by the lack of subpoena authority. Without this authority, for example, the CIA IG is forced to reverse the normal order of an investigation. Typically, an investigator will interview the target of an investigation last, after using subpoenas to carefully compile evidence with which to confront the target, thereby maximizing the prospect for getting useful information during the interview. Without authority to compel the production of relevant documents, however, the CIA IG must rely on voluntary cooperation to gain access to the necessary evidence. Thus, IG investigators often interview the presumed target early in the investigation in an effort to get their cooperation. Cooperation, not surprisingly, is not always forthcoming. Moreover, this technique provides an early tip-off to the target and often limits the overall usefulness of the interview.

The CIA IG can, in criminal investigations, ask the Department of Justice to convene a grand jury and obtain grand jury subpoenas to acquire necessary records. This option, however, is only available for cases that have already been deemed worthy of a criminal investigation. Other Inspectors General often use the information obtained through their subpoena authority to help decide if a case should be pursued as a criminal, civil, or administrative case. Also, reliance on a grand jury subpoena limits the usefulness of the information for other purposes because of the rules restricting disclosure of grand jury information. For example, information obtained through a grand jury subpoena cannot be used later for administrative purposes without a formal proceeding before a federal judge.

Congress acknowledged the importance of the CIA Inspector General's mission when it adopted legislation providing a statutory basis for this function. The CIA IG statute was designed to ensure that the Inspector General was sufficiently independent from the Director of Central Intelligence to provide effective oversight. It is the SSCI's assessment that, during the intervening years, the

Calendar of Events

September 18—Caspar Weinberger, former Secretary of Defense, Breakfast Meeting at the University Club
November 6-7—Seventh Annual Review of the Field Conference (location to be announced)
mission of the CIA IG has become increasingly important, particularly in support of the oversight responsibilities of the Committee. Moreover, the independence of the Inspector General has been consistently reflected in the reports of investigations, audits, and inspections provided to the Committee. The Committee was aware that granting subpoena authority to the CIA IG might raise some concerns. However, the Committee determined that, in light of the importance of the IG’s function, the need for this authority to effectively fulfill that function, and the independence reflected in its activities to date, the CIA IG should be granted subpoena authority to the same extent it is currently granted to other national security Inspectors General.

Encryption Technology — A compromise?

There are also indications that Congress and the Administration may be moving closer to resolution of the thorny issues involved in the use and export of encryption technology. A new bill recently introduced by Senators John McCain, Robert Kerrey, and Fritz Hollings was adopted by the Senate Committee on Commerce, Science, and Transportation on June 19, 1997. This bill, the Secure Public Networks Act of 1997 (S.909), attempts to strike a balance between the software industry and privacy groups, which oppose any government interference in the use or export of encryption technology, and the concerns of law enforcement and intelligence about losing access to information related to national security or criminal activities.

Like legislation previously introduced by Senato

tors Conrad Burns (S.377) and Patrick Leahy (S.376), S.909 allows any encryption product to continue to be used domestically, prohibits mandatory third party escrow, criminalizes the use of encryption in furtherance of a crime, and gives the Secretary of Commerce jurisdiction over encryption exports. Like the Leahy bill, the McCain-Kerrey legislation also contains guidelines for voluntary private sector participation in a key management structure.

The Secure Public Networks Act, however, contains several provisions designed to promote the development of a key management structure. The bill requires that encryption products purchased by the federal government for general use, as well as all encrypted public networks developed with federal funds, include key recovery. The bill also creates a voluntary registration system for certificate authorities and key recovery agents. The Secretary of Commerce will determine standards that certificate authorities and key recovery agents must meet to merit government approval. Key recovery agents, authentication authorities, and their users who operate within this voluntary registration system are granted statutory protections against certain liability.

With regard to export of encryption technology, S.909 allows the export of encryption products of up to 56 bit DES (Data Encryption Standard) without key recovery. Products that incorporate qualified key recovery can be exported regardless of the strength of the encryption. The President can also increase the strength of non-key recovery encryption products allowed for export and the bill provides criteria to be considered by the Secretary of Commerce in reviewing non-key recovery products above the 56 bit DES level.

Continued on page 14

Standing Committee on Law and National Security

Chairman: Paul Schott Stevens
Advisory Committee Chair: Richard E. Friedman
Board of Governors Liaison: Truman Q. McNulty

Staff Director: Holly Stewart McMahon
740 15th St., NW
Washington, D.C. 20005-1009
(202) 662-1035
fax (202) 662-1032
e-mail: natsecurity@abanet.org
web page: http://www.abanet.org/natsecurity

—13—
The National Security Agenda . . .

By Daniel Richard

Defense Spending Bills Move Rapidly Through Both the House and the Senate—The House National Security Appropriations Subcommittee completed work on the 1998 defense appropriations bill that included money for nine more stealth B-2 bombers and cuts off funding for troops in Bosnia as of June 30, 1998. Subcommittee Chairman C.W. Young (R-FL) plans to have the measure on the House floor before the August recess. The Senate Appropriations Committee also passed their $247 billion defense appropriations bill “in record time,” according to Appropriations Chairman Ted Stevens (R-AK). The Senate version proposes $3 billion more than the Clinton Administration request but about $1 billion short of the House version of the spending bill. The major differences between the House and the Senate versions appear to be the status of the B-2 bomber, the number of DDG-51 class destroyers that will be ordered and the amount of start-up money for the next aircraft carrier slated to begin construction in 2002. Notwithstanding these differences, the 1998 defense authorization bill has generated far less controversy than in past years.

House Passes Bill Calling for Greater Attention on Chinese Intelligence, Military Activities—The full House approved an Intelligence Committee proposal to have the CIA and the FBI prepare an annual report on Chinese intelligence activity directed against United States interests. Moreover, the House authorized $5 million to create by March 1, 1998 a Center for the study of Chinese military at the National Defense University. The legislation’s sponsors argued that China’s stated geopolitical ambitions may increasingly be at odds with US national security interests and in order to counter this their intelligence and military activities need to be tracked. According to Representative Bill McCollum (R-FL), “China has apparently decided to take a more aggressive approach to influencing American politics.”

Congress Scrutinizing Secretary Cohen’s Base-Closing Plan—The House Defense Authorization Bill (H.R. 1111) rejected Secretary of Defense Cohen’s proposal to schedule additional rounds of base closings by failing to include any language in the bill supporting his proposal. Secretary Cohen wanted to close additional military bases across the United States in order to help fund a new generation of high technology weapons. The House was reluctant to allow more base closings because they have proven to be unpopular at a local level. The Senate, however, may turn out to be more sympathetic to Cohen’s plan as a small group of bipartisan members may attempt to introduce an amendment to the Defense Authorization bill as it reaches the Senate floor.

Spaulding on the Senate . . .

Continued from page 13

Aside from the export issue, one of the most challenging issues in this area has been determining how to balance the privacy rights of the individual and the interest of public safety. The McCain-Kerrey bill grants access to key recovery information for government entities that have authority for access to the underlying information based on existing statute, rule, or law. The legislation requires the Department of Justice to perform regular audits to ensure the process is not circumvented or abused. Criminal penalties would be imposed on any individual who unlawfully gains access to key recovery information. Further privacy protections include provisions making it illegal to exceed lawful authority in decrypting data or communication; break the encryption code of another for the purpose of violating privacy, security, and property rights; steal intellectual property on a public communications network; impersonate another person for the purpose of obtaining recovery information; or misuse key recovery information.

While some members of the encryption industry support this legislation, the main industry groups believe it is too restrictive with regard to exports and effectively imposes a key recovery system through the power of the federal purse. Given the continued opposition within the industry and from privacy groups, as well as the number of committees asserting jurisdiction (including the Intelligence Committee), final action during this session is uncertain. However, with the Chairman of the Commerce Committee and the Vice Chairman of the Intelligence Committee as its two primary cosponsors, S.909 is likely to bring sharper focus to the debate.