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Article

***447** “A FAIR GAME”? OF LAW AND POLITICS IN CHINA, AND THE “SENSITIVE” CASE OF DEMOCRACY ACTIVIST YANG JIANLI

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INTRODUCTION

In April 2002, democracy activist Yang Jianli, a Chinese citizen and U.S. permanent resident, returned to China using a friend's passport. [FN1] The Chinese government had “blacklisted” Yang after his involvement in the 1989 Tiananmen pro-democracy protests so when Yang's passport expired in 1991, Chinese consular officials in the United States refused to renew it. [FN2] After Yang was detained for nearly fifteen months *incommunicado*, he was indicted for illegal entry and espionage for Taiwan. [FN3] Yang was convicted of both charges in May 2004 and sentenced*448 to five years' imprisonment (with credit for time served) and the denial of political rights for one year upon release. [FN4] Yang was released from prison in April 2007 and returned to the United States a few months later, in August of 2007. [FN5]

“Politically sensitive” cases, such as Yang's that are deemed to present a threat to the legitimacy of the Chinese Communist Party (CCP or Party), and criminal cases are the two areas in which law is least autonomous and the policies of the CCP most likely to prevail over law. [FN6] The rights of criminal suspects and defendants, as well as their lawyers, are routinely ignored in criminal cases in favor of the Party's ongoing policy of preserving social order and stability at all costs. [FN7] When a political dissident is charged with a crime, the superior position of policy over law is most stark. [FN8]

*449 This article examines the detention, prosecution and defense of Yang Jianli, and the campaign for his release. It demonstrates how Yang's procedural rights were repeatedly violated; explains the obstacles Yang's lawyer, the well-known criminal defense attorney Mo Shaoping, encountered in attempting to present an effective defense; and ultimately shows how, in this “sensitive case,” politics trumped law. The article also argues that it was precisely because Yang's case was handled as a political matter within China that external influence and pressure--such as international media attention, advocacy by the United States and other national governments, the United Nations, and human rights organizations--mattered. Perhaps the most significant outcome of this pressure was the relatively light sentence Yang received for the espionage charge, which carries a maximum punishment of life imprisonment or death. [FN9] The article also shows that despite the politicization of Yang's case, law and Mo Shaoping's lawyering skills nonetheless played an important role. Finally, the article concludes with some observations regarding the challenges facing China's criminal justice system that Yang's case highlights.

This article proceeds chronologically through Yang's detention, indictment, trial and return to the United

States. Part I provides an introduction to Yang Jianli and his lawyer Mo Shaoping. Part II examines specific provisions of the 1996 Criminal Procedure Law that are relevant to Yang's case, and the obstacles to their implementation. Part III describes and analyzes Yang's pre-trial detention, Mo Shaoping's entry into the case, and the indictment. Part IV addresses the pre-trial advocacy for Yang Jianli's release. The trial and Yang's post-trial extended detention are covered in Parts V and Part VI, respectively. Part VII examines the judgment, and Part VIII addresses Yang's incarceration and release. The article concludes with observations in Part IX.

I. BACKGROUND: YANG JIANLI AND MO SHAOPING

A. *Yang Jianli*

Yang Jianli left China to pursue graduate studies in the United States in 1986. He was studying for his Ph.D. in mathematics at University of *450 California, Berkeley when the pro-democracy protests of 1989 swept through China. He went back to China in the spring of 1989 to support the protestors in Tiananmen Square. [FN10] After the crackdown in Beijing, he returned to the United States and established the Foundation for China in the 21st Century, which promotes democracy and rule of law in China. Yang completed his Ph.D., but decided to devote himself to the Chinese pro-democracy movement rather than pursue a career in math. [FN11] In 2001, Yang obtained a second doctorate in political economy and government from the Harvard Kennedy School of Government.

Yang, along with many other Chinese democracy activists abroad, became stateless. After the 1989 protests, the Party-state adopted a policy of enforced exile of prominent dissidents. [FN12] A “re-entry blacklist” was created, listing forty-nine dissidents who would be denied entry into China. Because Yang was on the blacklist, Chinese consular officials in New York repeatedly refused to renew his passport, which expired in 1991. [FN13]

When Yang decided to return to China in April 2002 using the passport of a Chinese friend, Rao Qing, Yang was fully aware that his conduct was illegal. Yang's position was that because it was illegal for the Chinese government to arbitrarily refuse to renew his passport (thereby violating his right to return to his own country under international law), he would use illegal means to resist. [FN14] At that time, labor protests were becoming more widespread in China, particularly in the Northeast, and Yang wanted to document the protests first hand. After his release from prison and return to the United States in August 2007, Yang explained, “I needed to investigate the Chinese labor movement, to understand it for myself, to be part of it and to have real contact with the workers.” [FN15] Yang also wanted to encourage other “blacklisted” overseas dissidents to return to China. [FN16]

*451 B. *Mo Shaoping*

Yang Jianli had not heard of Mo Shaoping before Mo showed up at the Beijing State Security Detention Center for their first meeting in July 2003, nearly fifteen months after Yang was taken into custody. One of China's first human rights lawyers, Mo was named an “Asian Hero” by *Time Asia* in April 2003, which described him as “China's leading advocate for political dissidents.” [FN17] Hong Kong's *Asia Weekly* included Mo Shaoping as one of its fourteen Men of the Year in 2005. [FN18] In December 2007, Mo received the French Republic Human Rights Prize. [FN19]

Mo has been a practicing attorney for over twenty years. Rejected from the Military Academy in 1977 because of “complications in family history,” Mo went to work for the Beijing procuratorate, and in 1981 was ad-

mitted to the Beijing College of Political Science and Law. [FN20] Upon graduation, he pursued an advanced degree in criminal law at the Chinese Academy of Social Sciences. Mo was one of the first lawyers to join a private partnership after they were permitted in 1992, and in 1995, he founded his own firm--Mo Shaoping, L.L.P. [FN21]

Mo took on his first politically sensitive case in 1995, when Liu Nianchun, who had previously been imprisoned for his involvement with the Democracy Wall movement in 1978, was arrested for advocating the abolishment of the reform through labor system. [FN22] Liu's wife was not able to find any other lawyer willing to defend her husband; Mo finally agreed. [FN23] Mo has since acted as defense counsel in many prominent political cases: veteran pro-democracy activist Xu Wenli, who is now in exile in the United States; leading intellectual dissident *452 Liu Xiaobo, who returned to Beijing from abroad during the 1989 protests; Jiang Qisheng, who called for a silent candlelight vigil on the tenth anniversary of June 4, 1989, to commemorate those who were killed in Beijing; [FN24] labor leader Yao Fuxin; journalist Shi Tao; *New York Times* researcher Zhao Yan; [FN25] and most recently Huang Qi, a Chengdu-based human rights activist and writer who was charged with "illegal possession of state secrets" in connection with articles posted on his website concerning shoddy school construction and the mismanagement of relief funds in the aftermath of the May 12, 2008 earthquake in Sichuan province. [FN26] Mo has also represented fellow human rights lawyers, such as Gao Zhisheng and Guo Feixiong. [FN27]

Mo explains his involvement in such risky cases in terms of his professional duty:

Every profession has its own professional demands It's not normal if the lawyers of a country do not dare to represent defendants accused of political crimes. The purpose of law and lawyers is to safeguard human rights. It is entirely proper for lawyers to fulfill this professional duty. Of course, representing political suspects is very risky, and the remuneration is not much--sometimes I even have to spend my own money, and it's impossible to win. Nevertheless, when a lawyer shows up to represent political suspects, it demonstrates the existence of law *453 and that we are protecting the rights of those accused of political crimes. This is a lawyer's duty. [FN28]

Mo was one of China's first "*weiquan liushi*" or "rights defense lawyers." [FN29] In Professors Fu Hualing and Richard Cullen's study of *weiquan* lawyering, which they describe as "cause lawyering" or public interest legal work, [FN30] they observe that "[w]eiquan lawyers take law and legal process seriously while realizing the 'outer limits' of law in an authoritarian state." [FN31] Fu and Cullen note that the approach of rights defense lawyers is "law-based" and that they use "legal and other (extra-legal) means, mobilizing social, legal or political mechanisms and processes" both for the benefit of the client and "at the same time to achieve a larger objective." [FN32]

Mo's "larger objective" is to advance the rule of law in China, which he believes he can do one case at a time by taking professionalism seriously and resolving cases "within the existing legal framework." [FN33] He dreams of "some day having a constitutional government and perfecting the legal system." [FN34] Recognizing how far China has come since the Mao era, he observes that there is more "space" now, which rights defense lawyers and others should take full advantage of. [FN35] Mo acts with an eye towards history. His view is that "much progress in the *454 world takes place gradually, imperceptibly." [FN36]

The most significant role Mo played in Yang's case was not in the courtroom, since Yang's fate was not determined by the panel of judges who heard the case, but rather as an intermediary between Yang and the outside world. Like other *weiquan* lawyers, Mo used international media and the Party-state's professed commitment to

legal reform and rule of law to, on occasion, force transparency and accountability on the part of officials whose actions contravened the law or widely publicized legal reform priorities. [FN37]

II. THE 1996 CRIMINAL PROCEDURE LAW

In this section, the article discusses China's Criminal Procedure Law with a focus on the provisions relevant to Yang's case and the substantial difficulties criminal defense lawyers face in representing their clients, in political as well as garden-variety cases. [FN38] Mo encountered many of these well-documented obstacles in his representation of Yang.

A. Background

In 1996, as part of China's legal reform project and in response to domestic and international pressures, the Criminal Procedure Law (CPL), which was originally enacted in 1979, was revised to strengthen *455 the rights of criminal suspects and defendants. [FN39] These revisions were heralded by many within and outside China as moving the criminal process closer to internationally recognized human rights standards. [FN40] The 1996 CPL contained new provisions aimed at involving the defense lawyer at an earlier stage of the criminal process than was permitted under the 1979 CPL. The 1996 revisions also provided for a more significant role for defense counsel in the trial process. [FN41]

While many were hopeful that the 1996 CPL would fundamentally transform the criminal justice process, [FN42] the implementation of the revised CPL met with significant resistance from the law implementation agencies--the public security or police (*gongan*), procuracy (*jianchayuan*), and the courts (*fayuan*), or collectively, *gongjianfa*. [FN43] A committee of the National People's Congress conducted an investigation in 2000 to study the implementation of the revised CPL. The committee highlighted three "chronic diseases": (1) confessions coerced through torture (*xingxun bigong*), (2) unlawful extended detention (*chaoqi jiya*), [FN44] and (3) obstacles facing criminal defense lawyers in providing representation to their clients (*lüshi bianhu nan*). [FN45] With respect to the *456 third "chronic disease," criminal defense lawyers' concerns have been further summarized as the "Three Difficulties" and "Big Stick 306." [FN46] The "Three Difficulties" are (1) meeting criminal suspects, (2) obtaining access to case files, and (3) collecting evidence and cross-examining witnesses at trial. "Big Stick 306" refers to the lawyer-perjury statute, [FN47] which has resulted in the procuracy having "unlimited power" to lock up defense lawyers who present evidence that is inconsistent with the government's. [FN48] Mo's view is that "Big Stick 306" is one of the primary reasons many lawyers refuse to take criminal cases, and he, as well as other lawyers and legal scholars, have pressed for the repeal of Article 306. [FN49]

As this article shows, with the exception of coerced confessions (Yang said he did not confess to any of the allegations relating to the espionage charge), the "chronic diseases" and "Three Difficulties" were in full play in Yang's case. [FN50] It is unclear to what extent Mo Shaoping felt constrained by "Big Stick 306," but, as mentioned above, he has been a vocal critic of Article 306. Jerome Cohen, a professor at New *457 York University Law School and a pro bono legal advisor to Yang's wife, Christina Fu, observed in an op-ed published on the day of Yang's trial that if Mo assisted Yang in retracting any of the statements made during his interrogations, Mo risked being prosecuted under Article 306 for submitting "false evidence" to the court. [FN51]

B. Specific provisions of the criminal procedure law

Next we will turn to some of the specific provisions of the CPL that are relevant to Yang's case, and the problems that have been identified with their implementation. We will return to these provisions later in Parts III through VI of the article, which describe and analyze Yang's detention, trial, and post-trial extended detention.

1. Notice of detention

Article 64 of the CPL provides that within twenty-four hours of detaining an individual, the police must notify his or her family or work unit of the reasons for the detention and the place of custody, except in circumstances where such notification would “hinder the investigation,” or notification is “impossible.” The Ministry of Public Security has interpreted this provision as requiring that the notice of detention be in writing. [FN52]

Professor Jerome Cohen, who has advised many American families of individuals detained in China, observed that written notice of detention is often not provided in political cases in order to prevent a lawyer from entering the case. [FN53] Although the CPL does not require a lawyer to show officials a copy of the detention notice in order to meet with his or her client, police and prosecutors nevertheless frequently demand it. [FN54] As a result, lawyers generally require that a copy of the detention notice be provided to them before they agree to accept a case. The lack of a detention notice in Yang's case proved to be an obstacle to obtaining counsel for Yang, and at least in part explains Mo's belated *458 entry into the case. [FN55]

2. Lawyers' entry into the case and access to clients

Under Article 96 of the CPL, after the first time the suspect is interrogated by investigators or from the first day of detention (or other “coercive measures”), a suspect has the right to hire legal counsel. [FN56] This revision was a “major innovation” of the 1996 CPL, and a dramatic improvement over the prior CPL. [FN57] However, in cases involving “state secrets,” the request for a lawyer by a suspect or his family must be approved by the investigating authorities. [FN58] And a lawyer must first obtain approval of the police in order to meet with his or her client in cases involving “state secrets.” [FN59] Moreover, the police are entitled to be present at any meeting between the lawyer and detained suspect, “based on the circumstances and needs of the case.” [FN60] During the investigation stage of the case, a lawyer may provide legal consultation (but not collect evidence or otherwise begin his or her own investigation), [FN61] file petitions or complaints on behalf of the client, and if the suspect has been arrested, the lawyer may seek the application of *qubao houshen* (“obtaining a guarantee and awaiting trial”), a non-custodial measure. [FN62]

Defense lawyers have encountered substantial difficulties in meeting their clients during the investigation phase. Virtually all political cases are likely to be deemed to involve “state secrets,” a term that is not defined in the CPL, but is generally given an “expansive definition” in *459 China. [FN63] From February 2003, when Mo was hired by Yang's wife, Christina Fu, until he first met with Yang in July 2003, Mo was repeatedly denied permission to meet with Yang based on “state secrets.” [FN64] There is no procedural mechanism to challenge the public security's “state secrets” determination.

Furthermore, when a lawyer is finally able to meet his or her client, their meetings are often monitored; the presence of officials at such meetings is described as an official “right.” [FN65] Police officers were present and took notes at the three meetings between Yang and Mo that were permitted before Yang's trial. [FN66]

3. Detention time limits

The 1996 CPL stipulates time limits for each phase of the criminal justice process (*i.e.*, pre-arrest, post-arrest investigation, review for prosecution, trial, and post-trial (awaiting judgment)). Most of these provisions are framed in terms of a basic authorized time limit, which, if certain vague conditions are met, may be extended for various periods of time. Where the CPL does not specifically stipulate a time limit for custodial detention during a particular stage of the process, the time limit for the handling of a case at that phase is taken as the time limit for detention. [FN67] Although there is no mechanism to challenge decisions to extend detention pursuant to the extension provisions contained in the CPL, [FN68] a detainee or his lawyer may challenge detention that exceeds the permissible time limits under the CPL. Because the *460 challenge is made to the bureau that is responsible for the detention, however, success is unlikely. [FN69] Yang was held in unlawful extended detention during the pre-arrest and investigation stages of the criminal justice process. In addition, Yang was held in detention beyond the permissible time limits after his trial, before his verdict was announced.

a. Pre-arrest warrantless detention

Article 69 of the CPL provides that within three days of detaining a suspect, the police must submit a request to the procuratorate for approval to arrest. Under “special circumstances,” the time limit may be extended to one week. An additional extension of thirty days is permitted if the detainee is a “major suspect involved in crimes committed from one place to another, repeatedly, or in a gang.” Thus, the maximum permissible length of pre-arrest warrantless detention, assuming the criteria for the two extensions are satisfied, is thirty-seven days. [FN70]

b. Post-arrest investigative detention

Article 124 stipulates two months as the basic time limit for holding a suspect in detention after arrest and before trial for investigation. [FN71] If the case is “complex,” and cannot be concluded within the two-month time limit; a one-month extension is permissible if the procuratorate at the next higher level approves the extension request. “Complexity” is not defined in the CPL or in any of the accompanying rules and regulations.

Article 126 permits an additional two months of detention if the case cannot be resolved within the time limit set forth in Article 124, and if certain circumstances are satisfied and approval is obtained from the provincial-level procuratorate. Extension under Article 126 is limited to major criminal gang cases and major and complex cases that are in remote areas that are difficult to access, that involve alleged crimes committed in various locations, or that involve a wide range of crimes *461 for which evidence is difficult to collect. [FN72]

Article 127 provides that detention may be extended for yet another two months with the approval of the provincial-level procuratorate if the investigation cannot be concluded within the extended time limit of Article 126 and if the suspect may be sentenced to at least ten years in prison for the crime for which he is being investigated. [FN73]

If Article 124, 126 and 127 are all utilized to their fullest extent--as they were in Yang's case--the post-arrest investigative detention period is seven months. [FN74] But if the authorities suspect the detainee of “new major crimes” during the investigation, Article 128 authorizes the investigatory authorities to reset the detention clock to “zero,” as of the date on which the new crimes are discovered. [FN75] The CPL does not define “new major crimes.” [FN76] The police have complete discretion to reset the detention clock under Article 128; no approval from the procuratorate is needed. [FN77]

Consequently, investigative detention can continue for an additional seven months while the new crime or crimes are being investigated. In Yang's case, the detention clock to begin investigating the "new crime" of espionage was reset on January 14, 2003, one week before the seven-month period for investigation of the illegal entry charge was to expire. [FN78] The unfolding of events during Yang's investigative detention,*462 which are described below, shows how Article 128 was manipulated to continue to hold Yang in detention without legal justification. The CPL contains no mechanism to challenge a decision under Article 128 to reset the detention clock. [FN79]

c. Time limit for trial and judgment phase

Judgment must be pronounced by a court within one and a half months of accepting the case. [FN80] If certain conditions are met (those outlined in Article 126), then the period may be extended by another month upon approval by the Higher People's Court. [FN81] Accordingly, the total time a case may be with the court under Article 168 is two and a half months. Two and a half months is also considered the time limit for post-trial, pre-verdict custodial detention. [FN82] For cases in which the trial is suspended for supplementary investigation by the procuratorate, the time clock is reset from when the case is transferred back to the court from the procuratorate after the supplementary investigation has been completed. [FN83] As detailed below, Yang was held beyond the legally prescribed time limits after his trial, and the supplementary investigation provisions were manipulated to present the appearance (for a while, at least) that the Party-state was acting in accordance with the law in holding Yang for nine months after his trial, before a verdict was announced.

4. Collection of evidence and access to the case file

During the investigation stage, lawyers are not permitted to interview witnesses or collect evidence. [FN84] After the case is transferred to the procuratorate, lawyers have the right to consult and copy certain documents ("litigation documents" and "technical authentication documents") in the possession of the procuratorate. [FN85] The CPL permits *463 defense lawyers to collect evidence, but requires that they obtain the consent of the witnesses or entities from whom evidence is sought. [FN86] They may also apply to the procuratorate or the court for permission to collect evidence. [FN87] In order to obtain evidence from the victim or witnesses provided by the victim, defense lawyers must have their consent and also obtain permission from the procuratorate or the court. [FN88]

Not surprisingly, the ability of defense lawyers to put on a defense has been hampered by, among other things, their insufficient authority to collect evidence and their restricted access to evidence collected by prosecutors. [FN89] Courts often reject applications by defense lawyers to collect evidence on the basis that the evidence sought is "unnecessary or insignificant," or they will give no reason at all. [FN90] And Article 306 looms large, which deters defense lawyers from aggressively seeking out evidence that might actually call into question the government's case. [FN91]

Defense lawyers have found that their access to evidence in the case file is even more restricted now than it was under the 1979 CPL. [FN92] The term "litigation documents"--those documents that the prosecutor is required to show the defense lawyer at the indictment stage--has been narrowly construed by the Supreme People's Procuratorate to *exclude* documentary evidence, physical evidence, witness statements, the victim's statements, and statements made by the suspect during the investigation stage. Defense lawyers are only entitled to obtain copies of formal documents such as detention and arrest notices. [FN93] In addition, under the 1996 CPL pro-

secutors are not required to transfer the entire case file to the court, but rather can select what gets sent to the court, thus further impeding the defense lawyers' ability to mount an effective defense. [FN94]

*464 5. Calling witnesses and cross-examination

Although the 1996 CPL contains provisions that would appear to have made the presence of witnesses at the courtroom trial routine (thereby reversing the common practice of witnesses submitting written statements and not appearing in trial for cross-examination), witnesses still rarely appear in court. [FN95] According to a September 2008 report in the official Chinese media, witnesses appear in court in less than five percent of criminal cases. [FN96]

A defense attorney may request that the court inform witnesses to appear in court, but there is no penalty if an “informed” witness ignores the court and fails to appear. [FN97] Most trials proceed, as they did prior to the enactment of the 1996 CPL, with prosecutors and judges reading written statements and defense lawyers occasionally questioning the written statement. [FN98] This is precisely how Yang's trial unfolded. Had Mo been able to cross-examine witnesses at trial, however, he might have been able to elicit that one of the written statements cited in the court's judgment was extracted from a friend of Yang's based in the United States, who had been detained on a business trip to China and as a *quid pro quo* for his release compelled to sign a statement that described Yang's purported connections to Taiwan spy agencies. [FN99]

III. YANG'S PRE-TRIAL DETENTION AND THE INDICTMENT

We now turn to Yang's case, starting with his *incommunicado* pre-indictment detention. This part argues that there was no legal basis for the multiple extensions of detention Yang was subjected to before he *465 had access to a lawyer and a link to the outside world. [FN100]

A. Yang's initial detention

Yang was taken into custody in the evening of April 26, 2002, in Kunming, Yunnan province, as he was preparing to get on a flight to Xishuangbanna, where he planned to exit China. [FN101] He was initially detained for having a false Chinese identification card. [FN102] The police almost let Yang go with just a fine, [FN103] but then one of the police officers discovered his notebooks filled with notes from approximately 100 interviews with labor movement leaders and participants. The Kunming public security bureau informed the provincial public security bureau, which in turn reported the information to the Ministry of Public Security in Beijing, and then, according to Yang, “everything came out.” [FN104] They knew his true identity by around 2 a.m. the next morning, April 27, [FN105] Yang was held in Kunming for twelve days. [FN106] He was then taken to Qincheng Prison, the maximum security prison for political prisoners, near Beijing. [FN107] After eight months in Qincheng, Yang was transferred to the Beijing State Security Detention Center, where he spent the next year and eight months. [FN108]

On May 10, two weeks after Yang was detained, the Ministry of Foreign Affairs issued its first statement about Yang: “There is a person who claims to be Yang Jianli who entered the country illegally. The *466 Public Security Bureau is looking into the case.” [FN109] When Yang's wife, Christina Fu (a U.S. citizen) learned of this statement, she went to the U.S. State Department, which contacted the Chinese Embassy in Washington, D.C. Fu soon learned that the Chinese government had invoked its fight against terrorism as the basis for hold-

ing Yang. Chinese officials had told the U.S. government that just as it was fighting terrorism, China too was fighting terrorism, and anyone possessing false identification would be punished. [FN110]

Shortly after Yang was detained, Fu was told by the Chinese consul in charge of overseas Chinese affairs that “[i]f we do not give him [Yang Jianli] a passport, he should not go back to China.” [FN111] Fu obtained a Chinese visa and arrived in Beijing on May 23 to try to obtain information about her husband. Despite having a valid visa, she was not allowed to enter the country and was expelled from China on the same day. [FN112] She was told that she was a threat to China’s national security. [FN113]

B. Interrogations

Yang was held *incommunicado* for over a year, much of which was spent in solitary confinement. Prior to his first meeting with Mo Shaoping on July 8, 2003, he had been interrogated more than 100 times. [FN114] When asked after his return to the United States what his interrogators questioned him about, Yang replied that “the information they were most interested in was ‘my relationship’ with the FBI and the CIA.” [FN115] Yang explained that they already knew about his pro-democracy activities in the United States because much of that information was readily available on his website and elsewhere online. [FN116] Yang stated that his interrogators were trying to obtain information from him that they did not have, but were certain must exist: *i.e.*, his *467 relationship with the FBI and CIA. [FN117] He repeatedly told his interrogators that he knew nothing about the CIA or FBI, but they persisted in asking him over and over again. [FN118]

Seven or eight different entities were involved in questioning him at various times. Not everyone identified themselves, but Yang was questioned--at a minimum--by officials from the Ministry of Public Security, the Ministry of State Security, Beijing’s Public Security and State Security Bureaus, and by officials from several provinces and municipalities that had been sent to interrogate him. Officials from Shanghai, Jiangsu, Shandong and Guangdong identified themselves. They wanted to know if he had contact with specific dissidents in their jurisdictions, and they questioned Yang about dissidents abroad who were originally from their locales. [FN119] They were also interested in whom he contacted while he was in China. [FN120] Yang’s interrogators sought information about his connections with Taiwan, in particular, Taiwan’s intelligence agencies. They asked him if Taiwan funded his activities; he explained that he accepted money from two Taiwan NGOs, and that he had nothing to do with Taiwan’s intelligence community.

Yang was not physically tortured by his interrogators, but they tormented him psychologically by telling him, for example, that his wife and son had been taken into custody and that his mother had gone crazy. [FN121]

C. Conditions of detention

Yang spent most of his pre-trial detention in solitary confinement and was not allowed outside for over seven months. [FN122] He was denied reading materials for more than fourteen months, and he was not able *468 to send correspondence to his family, nor receive letters from them. [FN123]

Shortly after Yang was transferred from Qincheng Prison to the Beijing State Security Detention Center, he unwittingly broke a prison rule, and was forced by prison officials to sit and reflect on his error. [FN124] As Yang sat under guard, he began to pray. The guard told him to stop. Yang said that he had the right to freedom

of religion and the right to pray. [FN125] Later that night, four guards took Yang to an interrogation room, told him he needed to be dealt with for protesting so soon after he arrived at the detention center, forced him to the floor, and beat him with their batons. [FN126] This was the only time he was beaten during his detention, but he was mistreated in other ways.

One of the regular practices Yang was subjected to on a daily basis in detention--"sitting the plank"--constitutes torture under international law. [FN127] During the nearly fifteen months before Yang first met with Mo Shaoping, officials at the detention center forced Yang, along with the other inmates, to "sit the plank" every day for two hours in the morning and two hours in the afternoon. This practice involved sitting absolutely straight on a stool facing the wall, without moving at all or speaking. [FN128] After Yang was finally able to meet with Mo Shaoping in July 2003 and learned that many people were fighting on his behalf, he was encouraged to fight himself. [FN129] Yang's first protest was directed at "sitting the plank." Yang sought out the deputy director of the detention center and told him that starting the following day he would no longer "sit the plank." He argued to the official that "sitting the plank" constituted corporal punishment under international standards, including the UN Convention against Torture, which China had ratified, and that such mistreatment of prisoners was illegal. Apparently surprised by Yang's argument, the deputy director told Yang that they would consider what he said. Soon the practice of "sitting the plank" ceased for Yang *469 as well as the other inmates, and was replaced with study sessions. [FN130]

D. *Pre-indictment extended detention*

There was no basis, even under the most generous reading of the CPL, for the extensions of detention that Yang was subjected to while he was being held *incommunicado* before he was indicted. At the very first stage of detention, after he was taken into custody but before he was arrested, the authorities simply ignored the maximum thirty-seven day limit for pre-arrest warrantless detention. Yang was first taken into custody on April 26, 2002, but not arrested (*daibu*) until nearly two months later, on June 21, 2002. [FN131] He was arrested on one charge: suspicion of having violated Article 322 of the Criminal Law, which prohibits illegally crossing the border and provides for a maximum one-year sentence in prison, if the circumstances are serious. [FN132]

Yang was held in post-arrest investigative detention for over a year, from the date of his formal arrest on June 21, 2002, to his indictment on July 14, 2003. As discussed earlier, the basic time period under the CPL for investigative detention, before any extension provisions are applied, is two months. [FN133] Two months of investigative detention, in addition to the two months he had already been detained pre-arrest, should have been more than enough time for the authorities to investigate the single charge for which he was arrested.

The illegal entry case against Yang was straightforward. Yang was caught with a false identification card (which showed his name as "Yang Jianli" but with different characters than his actual name) and a passport belonging to his friend, Rao Qing, which he had used to enter China. Yang had no other passport in his possession. Among his effects were his valid re-entry permit to the United States and his U.S. green card, which were noted by the court in its written judgment as evidence *470 supporting his conviction for illegal entry into China. [FN134] As discussed above, the authorities in Kunming knew his true identity by the early morning of April 27. [FN135] The statement a Chinese consular official in the United States made to Fu in mid-May--"If we do not give him [Yang Jianli] a passport, he should not go back to China" [FN136]--further demonstrates that the government knew exactly who Yang was and that he had entered China using a passport other than his own.

Nevertheless, the period for investigative detention of the illegal entry into China charge was extended by

one month under Article 124 until September 21, 2002. Yang's detention was then extended for another two months, until November 21, and it was extended again for two months until January 21, 2003. This final two-month extension was made pursuant to Article 127, which provides that detention may be extended for two months with the approval of the provincial level procuratorate if the investigation cannot be concluded within the extended time limit of Article 126, *and if the suspect may be sentenced to at least ten years in prison for the crime for which he is being investigated.* [FN137] The one-year maximum sentence for illegal entry is a far cry from the minimum of ten years required for an extension of detention under Article 127. [FN138] With the Article 127 extension, the seven-month maximum time period for investigative detention would be exhausted.

But on January 14, 2003, one week before the expiration of the Article 127 extension, the Beijing Public Security Bureau decided to restart the detention time clock on the basis that a new crime had been discovered on that day. On January 20, the Bureau transferred the case to the Beijing State Security Bureau, which then followed suit in repeatedly extending Yang's detention in order to investigate the “newly discovered crime.”

Article 128 provides that as soon as evidence of a possible “new major crime” is discovered, the detention clock is to be reset from the date of discovery of such new evidence. In other words, according to the official story as reflected in the legal documents in Yang's case, evidence of Yang's alleged espionage was not “discovered” until January 14, 2003. But Yang was asked about his Taiwan connections as soon as *471 he arrived at Qincheng--a few weeks after he was initially taken into custody in Kunming--and where more than 100 of his interrogations occurred. [FN139] He was questioned only two or three times, in total, after his transfer to the Beijing State Security Detention Center, where he was purportedly being investigated for the “new crime” of espionage for Taiwan. [FN140] Moreover, Yang's friend who provided a statement against Yang regarding his alleged connections to Taiwan espionage agencies had been detained (for that purpose) approximately six months after Yang was taken into custody. [FN141] Thus “evidence” of Yang's alleged espionage was apparently “discovered” long before January 14, 2003.

As Yang explained after his return to the United States, the numerous interrogations and “chats” were basically a fishing expedition. [FN142] The authorities also were perhaps hoping that Yang would break down and confess if they kept him in *incommunicado* detention long enough. The authorities apparently were using the investigative detention extension provisions to *create*, not investigate, a more serious case against Yang than illegal entry.

Before Mo Shaoping's appearance in the case, no one knew where Yang was or what the charges against him were. His brother, Yang Jianjun, a Chinese citizen, tried numerous times to visit Yang Jianli but never received permission from the Chinese authorities. Yang Jianli's sister, a U.S. citizen, tried to visit Yang in February 2003, but was also denied permission to see him. [FN143] Yang had no ability to challenge either the lawfulness of his detention in the first instance or the repeated extensions of his detention. [FN144]

E. Mo Shaoping's entry into the case

While Yang was being held *incommunicado*, his family was trying in vain to find him a lawyer. The absence of a detention notice presented *472 a substantial hurdle for Christina Fu, Professor Cohen, and Yang's brother--all of whom were trying to find an attorney who would be willing to represent Yang. Yang's family made frequent requests for the written detention notice, but the police refused to issue it. [FN145] Mo Shaoping resisted taking Yang's case for this very reason, but eventually agreed to do so in February 2003, more than nine months after Yang was taken into custody. [FN146] Yang was not informed by the authorities at the detention center

that Yang's family had retained a lawyer for him; Yang only learned of Mo when Mo showed up at the detention center to meet with him in early July 2003. [FN147]

Mo was able to track down where Yang was being held and learned that on January 20, 2003 Yang's case had been transferred from the Beijing Public Security Bureau to the Beijing State Security Bureau for investigation of the "new crime" of espionage for Taiwan. Mo made many requests to the Beijing State Security Bureau to meet with Yang. His requests were repeatedly denied on the grounds of "state secrets." [FN148]

On July 8, 2003, after the Beijing State Security Bureau concluded its "investigation" and Yang's case was transferred to the procuratorate for prosecution, Mo was finally permitted to see Yang. [FN149] They met in an attorney interview room at the Beijing State Security Detention Center, separated by a glass partition, and spoke using a phone. [FN150] A police officer sat on Yang's side of the partition and took notes. [FN151] Mo showed Yang letters from Christina Fu, Yang's sister, and Professor Cohen, whom Yang Jianli knew; they all recommended that Yang hire Mo. Yang, however, was convinced he did not need a lawyer; he believed that his case was simple and that he could defend himself. [FN152]

After a few exchanges between Mo and Yang on the issue of representation, the police officer on Yang's side of the partition turned off the *473 phone and whispered to Yang that he should hire Mo. [FN153] The guard told Yang he should listen to the advice of those who were recommending Mo because they clearly thought he was very qualified, and that Mo could at least pass news back and forth between him and his family. Yang eventually agreed to have Mo represent him, after first confirming that Mo was willing to present a "not guilty" defense. [FN154]

Yang spoke to Mo about his wife and two children. [FN155] Mo relayed to Yang the efforts that were being made on his behalf at the United Nations and in the United States. Mo informed him that in early June 2003, the UN Working Group on Arbitrary Detention (UNWGAD) had issued a decision finding that Yang's detention violated international law. Mo also told Yang that in late June, the U.S. House of Representatives unanimously passed a resolution calling for Yang's release and that a similar resolution had been introduced in the Senate. [FN156]

F. The indictment and allegations against Yang

On July 14, 2003, the Beijing No. 2 Procuratorate formally indicted Yang on two charges: 1) illegal entry into China in violation of the 1997 Criminal Law, Article 322, and, 2) espionage for Taiwan, in violation of the 1979 Criminal Law, Article 97, section 3.

Article 322 of the 1997 Criminal Law stipulates that anyone who violates the laws or regulations relating to the administration of the national border, if the circumstances are serious, shall be sentenced to a maximum of one year in prison. [FN157] It was alleged that Yang used the passport of Rao Qing, a 32-year-old Chinese living in the United States, to illegally enter the country, and that Yang also carried a forged identification card to "conduct activities" in Beijing, Liaoning, Heilongjiang, and Yunnan provinces. Yang was not charged with any crime relating to the false Chinese identification card or for any of the unspecified "activities" allegedly conducted while he was traveling through China. The alleged evidence in support of the charge included Yang Jianli's statements, his re-entry permit for his return to the United States, his U.S. green card, Rao Qing's passport, a Chinese identification card for a "Yang Jianli" (which had characters for "Jianli" that were different than his real name), verifications from the Beijing *474 Public Security Bureau and the Guangzhou City Public Security Bur-

eau, and witness testimony from five individuals. [FN158]

With respect to the much more serious charge of espionage, Yang was technically indicted for “counterrevolutionary” espionage, because he was charged under the 1979 Criminal Law (Article 97(3)), which was in force when the alleged espionage occurred. Espionage was a counterrevolutionary crime under the 1979 Criminal Law for which the establishment of subjective counterrevolutionary purpose (*fangeming mudi*) was required. The 1997 revisions to the Criminal Law abolished the category of “counterrevolutionary” crimes and re-framed them in a more politically neutral light as crimes of “endangering state security.” The 1997 endangering-state-security iteration of the former counterrevolutionary crimes became easier to establish, however, because the prosecution was relieved of the burden of having to prove counterrevolutionary intent. [FN159] Yang was indicted under the 1979 statute, but neither the indictment nor any of the other legal documents from the case mention counterrevolution or counterrevolutionary purpose. Nor was counterrevolutionary purpose raised during Yang's trial. [FN160] The sentencing range under both the 1979 Criminal Code and the 1997 revision is the same: three years to life imprisonment;*475 or death. [FN161]

It was alleged that in the early 1990s, Yang accepted assignments and financial support from the Mainland Work Committee (MWC), which was alleged to be an intelligence agency of Taiwan's Nationalist Party (KMT). Yang's purported assignments were to spread the Three People's Principles (*i.e.*, democracy, human rights, and welfare), to make a wide circle of acquaintances in China, and to collect public opinion on mainland's internal situation. [FN162] The indictment also alleged that Yang requested PRC internal materials (“*neimu cailiao*”) [FN163] from an individual named Han Yue.

The indictment further alleged that Yang established the Chinese Youth Development Foundation (CYDF) in the United States in 1992 in order to fulfill his assignment of “making a wide circle of acquaintances” in China. Yang allegedly sent Foundation application forms to three of his relatives and a high school friend in China. [FN164] The indictment states that in 1993 and 1994 Yang sent the completed application forms along with the applicants' resumes to a contact at the MWC, and that Yang subsequently sent each of them \$100--funds that were provided by the MWC. [FN165] Evidence in support of these allegations purportedly included Yang's “confession,” application forms for the CYDF, witness testimony, and a document created by the Ministry of State Security *after* Yang was detained that declared the MWC a spy organization.

One of the application forms was from Gong Benqin, Yang's brother-in-law, who was a teacher in the department of fruit trees at the Linyi School of Agriculture in Shandong Province. Gong was interested in applying for a grant to pursue, among other things, research into the selective breeding of the Linyi papaya as well as the economics of *476 planting ginkgo and to research the best regions in China for its growth. [FN166]

On July 16, 2003, pursuant to Article 141 of the CPL, Yang's case was transferred to Beijing No. 2 Intermediate People's Court for trial. [FN167]

IV. PRE-TRIAL ADVOCACY FOR YANG'S RELEASE

A. *The Weiquan Movement and an early petition for Yang's release*

As Yang's case was making its way to trial in the second half of 2003, rights defense, or *weiquan*, activism was coalescing into a discernible movement in China. The *weiquan* movement involves activists, lawyers, and

ordinary citizens who seek to protect the rights accorded to citizens under China's Constitution and laws. [FN168] Sociologist Ching Kwan Lee describes *weiquan* as a “quiet ‘rights revolution’” that has “become a generalized social movement.” [FN169] A broad range of issues are addressed under the rubric of *weiquan*, including property rights, worker rights, freedom of expression and association, rights of criminal suspects and defendants, and the rights of human rights lawyers themselves. [FN170]

Weiquan lawyers not only use lawsuits to seek redress and publicize their causes, but they also appeal to the media and engage the online community by posting petitions and essays on the Internet in the hope that public opinion will force a favorable response from authorities. [FN171] In their study of *weiquan* lawyering in China, Professors Fu Hualing and Richard Cullen describe the dynamic as one in which *weiquan* lawyers *477 are compelled to rely on extralegal influences in order to counteract the outside political interference courts face when handling sensitive cases. [FN172] They also note that in a number of *weiquan* cases in China, lawyers have sought to “internationalize” their cause by using foreign media and NGOs to bring international attention to their cases and causes. [FN173] The *weiquan* lawyers contend that such internationalization provides them with “a degree of security against [Chinese] government harassment and persecution.” [FN174]

The importance of extralegal tactics to *weiquan* lawyering highlights the fact that in sensitive cases, like criminal cases involving political dissidents, “those who hear the case do not decide the verdict; and those who decide the verdict do not hear the case.” [FN175] A case as high profile and sensitive as Yang Jianli's would not have been handled by the court or even its adjudication committee, [FN176] but rather directly by Beijing's Party political-legal committee. [FN177] One Chinese criminal law expert stated simply that Yang's case “was outside the criminal justice system.” [FN178] The political-legal committee's role in a case such as Yang's would have been to seek the opinions and recommendations of the relevant departments and ministries, including the Ministry of Foreign Affairs. It is likely that high level Party officials, perhaps even at the highest level, were involved in--if not formulating--the precise outcome, then endorsing the decision that was made below. [FN179] The only plausible explanation for the nine-month delay between Yang's trial and verdict was a lack of agreement and coordination among the various government and Party decision-makers and stakeholders. [FN180]

Tactics such as media coverage and recruiting the support of China's *478 online community [FN181] were not a viable option in Yang's case. Little was known about Yang internally in China, and what was known made him too politically sensitive (and thus risky) for rights activism on his behalf. There was one attempt by a Chinese dissident, early in Yang's detention (before Mo Shaoping had entered the case), to campaign for Yang's release. Zhao Changqing, who, like Yang, was a veteran of Tiananmen Square, collected approximately 170 names on a petition calling for Yang's release, and then disappeared in late June or early July 2002. [FN182]

B. *International advocacy for Yang's release*

As with *weiquan* activism for domestic rights-related issues within China, extralegal tactics and external pressure from outside China's borders would prove key to the resolution of Yang's case. [FN183] Yang's wife and her U.S.-based legal advisors, Professor Jerome Cohen and Jared Genser, President of Freedom Now, made full use of the media. They mobilized supporters in Washington and elsewhere to keep a spotlight on Yang's case. [FN184] The attention that Yang's *incommunicado* detention *479 was receiving outside China--from the media; human rights organizations such as Human Rights in China, Amnesty International, and Reporters Without Borders; the U.S. Congress; the Bush Administration; the United Nations; Canada; and the European

Parliament--was reflected back to Chinese officials through the Ministry of Foreign Affairs, and over the Internet through online media outlets, which the Party-state would have been monitoring (although censors would have prevented the Chinese public from accessing online news coverage about Yang's case). [FN185]

This attention mattered immensely to Yang. Not only was Yang encouraged when he learned of the efforts being made on his behalf outside of China, but external pressure and scrutiny gave him a certain degree of leverage in his interactions with guards at the detention center. Yang said he thought that the prison officials knew about the media coverage of his case because they had access to the Internet. And the Ministry of Foreign Affairs certainly was in communication with the prison authorities about Yang. [FN186] Yang believed this external scrutiny provided a check on the officials' behavior: "[Prison authorities] are afraid news of mistreatment will get out and be condemned by public opinion and then higher authorities might discipline them." [FN187] Apparently appreciating the similarity between international pressure and exposure in cases like his and internal *wei-quan* strategies in China, Yang elaborated:

*480 The more widely the news [of mistreatment] is circulated the better, and it is even better to have it reported overseas. Public opinion will result in pressure and pressure brings results. Even when the family of an ordinary criminal makes a 'fuss' in public, public opinion brings results. [FN188]

As of mid-April 2003, State Department officials in Washington and Beijing had raised Yang's case on an almost weekly basis with the Chinese authorities since his initial detention in late April 2002. In mid-March 2003, during a meeting with senior Chinese officials, then-Assistant Secretary of State for Democracy, Human Rights, and Labor Lorne Craner asked China to release Yang. [FN189] Numerous letters were sent during Yang's *incommunicado* detention to Chinese leaders from members of Congress inquiring about Yang's health and whereabouts and citing the Chinese government's violations of its own Criminal Procedure Law. And former President of Harvard University, Lawrence Summers, wrote to Ambassador Yang Jiechi "on behalf of [the Harvard] community," expressing concern about the handling of Yang's case. [FN190]

On June 3, 2003, the UN Working Group on Arbitrary Detention (UNWGAD) publicly issued its decision on the petition submitted by Freedom Now and Christina Fu a year earlier. [FN191] The UNWGAD found that Yang was being held in arbitrary detention in contravention of "the basic international norms relating to the right to a fair trial" (such as illegally prolonged detention and lack of access to counsel). [FN192] The *481 Chinese Foreign Ministry rejected UNWGAD's ruling. [FN193] The U.S. State Department responded by calling on the Chinese government to release Yang. [FN194]

Although not binding on the Chinese government, the UN Working Group on Arbitrary Detention's decision played an important role in generating further international support and media attention for Yang's case. [FN195] On June 25, the U.S. House of Representatives unanimously passed a resolution calling for Yang's release. [FN196] Introduced by Yang's congressman, Massachusetts Democrat Barney Frank, the resolution cited UNWGAD's decision, and stated that the House of Representatives "condemns and deplores the incommunicado detention of Dr. Yang Jianli, and calls for his immediate and unconditional release." [FN197] A month later the Senate passed by unanimous consent a resolution also calling for Yang's immediate release. [FN198]

V. THE TRIAL

Yang's trial was held on August 4, 2003. Yang was permitted to meet with Mo Shaoping only three times, for a total of about four hours, to prepare his defense of not guilty on both charges. [FN199] During each of these pre-trial meetings, police officers were present, monitoring Mo and Yang's conversations, and taking

notes. [FN200]

***482** The U.S. Embassy in Beijing requested permission to attend Yang's trial. The Chinese authorities denied the U.S. Embassy's request, explaining that the trial would be closed because the case involved "state secrets." [FN201] Although top officials at the U.S. State Department had pressed China for more transparency in Yang's case, the Chinese government was not legally obligated to grant U.S. Embassy officials access to the trial because Yang was not a U.S. citizen. [FN202] Nor was Yang's family in China permitted to attend the trial. [FN203] Christina Fu--a U.S. citizen--was denied a visa to return to China for the trial. [FN204]

Yang's trial in Beijing No. 2 Intermediate People's Court started at 9:30 am and took three hours or less to complete. [FN205] Yang's sister and brother had traveled from Shandong in an attempt to see him, but were not allowed into the court, nor were they able to meet Yang. [FN206] A court spokesman would not even confirm whether the trial had taken place, since it was closed to the public. [FN207] Mo Shaoping told Agence France-Presse shortly after the trial ended that Yang had "used his right to defend himself in court and declared himself innocent of both charges." [FN208] Mo expected the court to issue a verdict within a month. [FN209]

***483** Three judges heard Yang's case, but the only judge that spoke during the trial was the presiding judge. [FN210] Yang thought the presiding judge seemed friendly, and he clearly knew Mo Shaoping and treated him with respect. [FN211] After preliminary matters were addressed (such as confirming the defendant's identity), the trial began with the prosecutor reading the indictment and the procuratorate's statement of facts. [FN212] As with most criminal trials in China, no witnesses were present in court. The prosecutor relied solely on written statements and documentary evidence. The presiding judge and prosecutor directly questioned Yang. Yang was asked, "Did you meet so-and-so? Do you know so-and-so? Did you accept funding from so-and-so?" [FN213] Yang answered the questions that he was asked. [FN214]

Mo Shaoping questioned the prosecutors. He apparently raised two questions that were later used as a basis for the procuratorate to request "supplementary investigation" after the trial had concluded: 1) the legal basis and process involved in the public security bureau's seizure of Yang Jianli's private correspondence with his family and friend in China ten years earlier; and 2) the identity of a witness who submitted a statement in October 2002--the friend of Yang's who was detained for the purpose of providing a statement against Yang--regarding the funds that Yang's foundation received during 1993-94. [FN215]

Then Mo presented his legal arguments in Yang's defense. [FN216] According to Yang, the judges listened very carefully. [FN217]

A. Illegal border crossing

Mo's defense of Yang was based on international and domestic law. Mo conceded that Yang Jianli had returned to China using someone else's passport, but Mo contended that Yang had no alternative because ***484** the Chinese consular officials in the United States had repeatedly denied Yang's request to renew his expired passport. Mo also stated that the consular officials had never explained to Yang the legal basis for their repeated refusals to renew his passport. Mo argued that this conduct on the part of China's consular officials violated the International Covenant on Civil and Political Rights (ICCPR), which China signed in 1998. Article 12, section 4 of the ICCPR provides, "[n]o one shall be arbitrarily deprived of the right to enter his own country." Mo argued that the Chinese officials in the U.S. had arbitrarily deprived Yang of his right to enter his own country by refusing, without any legal basis, to renew his passport. He explained that "it was precisely because Yang was arbit-

rarily deprived of his right to return to his own country that he had no alternative but to borrow someone else's passport to return to China.” [FN218]

Mo's next argument was that under China's criminal law and regulations related to the illegal crossing of China's borders, the circumstances surrounding Yang's border crossing into China could not be considered “serious” and thus did not amount to a crime. Rather, Mo argued, Yang should be punished administratively. Under China's criminal law, if the circumstances of a suspect's conduct are clearly minor and the harm done is not serious, the act should not be considered a crime. [FN219] Indeed, Article 322 of the Criminal Law expressly criminalizes only “serious” violations of the laws and regulations governing administration of the national border. Otherwise, the violation should be dealt with under the relevant administrative regulations. Mo argued that since no serious consequences had resulted from Yang's crossing the border, Yang should not be punished criminally, but rather administratively, pursuant to Article 23 of the Detailed Implementing Rules for the Law on the Control of the Exit and Entry of Citizens. [FN220] Article 23 stipulates that if the circumstances are not serious, the maximum punishment for crossing the border without proper documentation is no more than five days of administrative detention. [FN221]

*485 B. *Espionage*

As discussed above, Yang was charged with espionage under Article 97(3), of the 1979 Criminal Law--a counterrevolutionary crime. [FN222] Neither the prosecution nor Mo Shaoping raised the issue of counterrevolutionary purpose in their statements to the court. Mo Shaoping began by challenging the written “proof” submitted by the Ministry of State Security (MSS), which stated that the MWC was a spy organization. The certificate had been created *after* Yang Jianli was detained and, Mo argued, represented the subjective reflections of the investigating authorities. Mo argued that such a document could not be considered as documentary evidence to establish that Yang Jianli had engaged in espionage activities. [FN223] Consequently, he concluded, this evidence could not validly be used as a basis for deciding the case against Yang. He further contended that the MSS “proof” only contained the Ministry's conclusion that Yang had engaged in espionage activities and lacked any concrete evidence to support its conclusion. Mo also argued that Yang could not have had the intent to commit espionage because when Yang allegedly had contact with the MWC, he did not know (nor could he have known) that the MSS would subsequently identify the MWC as an espionage organization. The prosecution had offered no evidence that MWC was considered an espionage organization in the *486 early 1990s. [FN224]

Mo Shaoping also argued that the only evidence the prosecution had to support its allegations regarding Yang's purported acceptance in 1991 of espionage assignments from the MWC (*e.g.*, making a wide circle of friends, spreading the Three People's Principles, etc.) came from Yang's statements. Under Article 46 of the CPL, a defendant cannot be found guilty and sentenced to a criminal punishment if there is only the defendant's statement(s) and no other evidence. [FN225]

Mo also contended that the evidence proffered by the prosecution failed to establish that Yang's foundation, CYDF, engaged in any espionage activities. Mo cited the documentary evidence offered by the prosecution--“A Brief Introduction to the China Youth Development Foundation,” which stated that the purpose of CYDF was to encourage the promotion of self-development among Chinese youth and to foster mutual exchange and communication by providing financial support for various activities such as conducting research, writing books, and producing works of art. He contended that Yang's purpose in mailing the applications to the four individuals noted above was only to promote communication and dialogue with people within China, and not to recruit

members for the MWC. [FN226]

Moreover, Mo argued that even if Yang Jianli had accepted the tasks of spreading the Three People's Principles, making a wide circle of friends, and investigating the people's feelings and opinions on the mainland for the MWC, such conduct does not constitute "espionage." [FN227] He argued that the MWC does not represent the government; rather, it was an organization that was established under the KMT party, which opposes Taiwan independence and advocates "one China." Mo argued, "according to the Chinese government's policy that anything can be discussed under the premise of 'one China,' the MWC should belong to those that mainland Chinese should contact and negotiate with." [FN228]

**487 C. Yang's final statement in court*

The CPL provides that every defendant has the right to make a final statement. Often in political cases, however, defendants are interrupted by the judges or their statements are cut short. [FN229] Yang made a final statement and was indeed interrupted by the presiding judge, who told Yang that he was speaking about matters "irrelevant" to the case. Yang kept speaking however, and the judge let him finish.

Yang began his statement, which was titled "Not Unnecessary Words: My Final Statement in Court," (*Bu douyude hua: zai fatingshang de zuihou chenshu*) by stating that he had been ably defended by Mo Shaoping and would not repeat his arguments. [FN230] Instead, he wanted to share his reflections on Chinese politics and the state of China's legal system based on his experience in detention during the preceding fifteen months. Yang mentioned that during his first interrogation he was told by the lead prosecutor, "the prosecutor and defendant are equal" ("*gongsufang he beigaofang shi pingdengde*"). Yang observed that, in other words, he was being told that the two sides in his case were playing by equal rules in a fair game. Yang told the court:

Even according to China's laws, up to this moment I am still only a "defendant"; before a court declares that I am guilty, I cannot be punished or treated as if I were a criminal. But to date [August 4, 2003], I have already been detained for one year, three months and nine days (464 days). For one year, two months and fifteen days of this time, I was held in *incommunicado* detention. For seven months and six days I was not permitted to go outside for exercise, and for one year and two months and sixteen days I was not permitted access to any written materials. The police and prosecutors used 464 days to prepare so-called evidence, such as statements and testimony, etc., to try to prove my guilt. But I was only able to meet with my lawyer three times, for a total of only about four hours. These meetings, in which I was preparing my case for innocence, were monitored by the police. How can this possibly be a fair game? [FN231]

*488 Yang told the court that he had been banned from returning to his motherland for thirteen years by the Chinese government: "Today I finally have the opportunity, in a court of law in China, to ask, '[o]n what legal basis may the government deprive a citizen of his right to return to his own country?'" Yang further stated that he was saddened and shocked when he learned that Yao Fuxin, a labor protest leader, had been sentenced to seven years in prison. [FN232] Yang explained that one of the reasons he had come back to China was to learn first hand about laid-off workers in the Northeast and their struggles to protect their interests.

Despite the presiding judge's apparent annoyance with Yang for mentioning "irrelevant" matters in his statement, Yang overheard that the judge had ordered him the best lunch available after he was escorted back to his holding cell. [FN233]

D. Conclusion of the trial

The trial came to a conclusion after Yang's final statement. [FN234] The CPL provides that “[a]fter a defendant makes his final statement, the presiding judge shall announce an adjournment (*xiuting*), and the collegial panel shall conduct its deliberations.” [FN235] The presiding judge announced that the court was adjourned and said that the verdict would be announced at a later date (*zeri xuanpan*). [FN236] Mo Shaoping stated after the trial that a verdict should be expected within four weeks. [FN237] The Chinese authorities soon would inform Mo, however, that the trial had not, in fact, concluded, but rather had been postponed (*yanqi shenli*), and that supplementary investigation was necessary. While the CPL authorizes the postponement of a hearing *during* the courtroom trial (*zai fating shenpan guocheng zhong*), if the prosecutors*489 find that supplementary investigation is necessary, [FN238] the CPL does not expressly authorize the re-opening of a concluded trial for supplementary investigation by the procuratorate. [FN239] Yang spent the next nine months in post-trial detention, much of which was illegal, awaiting a verdict.

VI. POST-TRIAL EXTENDED DETENTION

A. Waiting for judgment

As discussed earlier, a court has a maximum time limit of two and a half months from when it accepts a case to pronounce judgment, assuming it receives approval from the relevant higher people's court for the final month of that time period. [FN240] Although the precise date the court accepted Yang's case is unclear, a conservative estimate is July 21, 2003--the date the court was required to deliver a copy of the indictment to Yang. Accordingly, the court should have delivered a verdict, at the latest, by the beginning of October 2003. Two and a half months was also the legal limit on Yang's post-trial detention. [FN241] But with the decision by the court that Yang's trial had not, in fact, come to a conclusion on August 4, it was possible for the authorities to offer a rationale couched in vague legal terms to support the extension of time within which to render a decision, and extend Yang's post-trial detention. This narrative worked for only so long, however, and in December 2003, the procuratorate and the court both acknowledged that Yang *490 was being held illegally. [FN242]

The delay was an example of the “disaggregated” Party-state at work. [FN243] As Yang aptly put it after his return to the United States, “[d]ifferent branches of government have different interests.” [FN244] Yang believed that the Ministry of State Security and Ministry of Public Security wanted to punish him for his pro-democracy activities overseas, and that the Ministry of Foreign Affairs wanted him released early. [FN245] Party leaders were also involved, and all of these entities had to coordinate, Yang explained. [FN246]

On August 15, about a week and a half after the trial, Mo Shaoping informed Christina Fu that the court was in the process of “seeking instructions” and conducting research. Mo anticipated there would be a decision soon. [FN247] Shortly thereafter, the prosecutor reportedly asked for additional time to gather evidence (to purportedly deal with the two questions discussed earlier that Mo raised during the trial). [FN248] In all likelihood, the court was directed to create more time for the various decision-makers to come to an agreement on how to resolve the case.

B. Post-trial supplementary investigation

The CPL provides that prosecutors have one month to complete a supplementary investigation, but it does

not appear to authorize post-trial supplementary investigation by the procuratorate. [FN249] Mo, however, *491 did not object, [FN250] and the procuratorate proceeded, apparently guided by the Supreme People's Court's interpretation of the CPL that permits the prosecution to conduct two one-month supplementary investigations. [FN251] After the supplementary investigation is completed and the case is transferred back to the court, the CPL stipulates that the time limit for pronouncing the verdict is reset. [FN252] The procuratorate took the two months for supplementary investigation back to back, however, without transferring the case back to the court at the conclusion of the first supplementary investigation (*i.e.*, the first month). [FN253] The two-month period was thus apparently exhausted in mid-October. [FN254] The court had an additional one and a half months to issue its verdict, or till the beginning of December (if an additional month authorized under the CPL was not sought from the Beijing Higher People's Court).

On October 22, Mo received a call from the court and was asked to invoke his right to request a one month extension to gather further defense evidence. [FN255] Illustrating that the court was implementing decisions that were being made elsewhere--and that there was some concern about procedural appearances--the court urged Mo to agree to take the extra month, explaining that the request had come "from above." [FN256] Mo did not immediately respond to the request, stating that it was Yang's decision to make. At a meeting between Mo and Yang in early November, Yang refused to request an extension. [FN257]

A second hearing (framed by the court as a continuation of the first hearing) was scheduled to be held on November 21, 2003. [FN258] Apparently, the Beijing State Security Bureau had submitted a letter and a few *492 documents to the court in response to the questions Mo had raised during the August 4 trial about the legal basis for obtaining his private correspondence and the identity of a witness who had submitted a written statement. [FN259] Yang had not been interrogated during the supplementary investigation period. [FN260] The supplemental hearing was scheduled to last between 20-30 minutes to address these two questions. [FN261]

The second hearing was suddenly postponed, however, because the judges reportedly had an important meeting to attend. No new court date was given. [FN262] More than five months would pass before the supplemental hearing was finally held. Shortly after the supplemental hearing was postponed, in early December 2003, Mo Shaoping and officials at the detention center informed Yang that he was likely to be released. They told him to prepare clothes, and asked him if he needed anything. Yang requested a belt and shoes, but then nothing happened. [FN263] Given that Yang's fate was being decided outside the court, it is possible that Yang's near-release had something to do with Premier Wen Jiabao's visit to the United States in early December 2003, which included a stop at Yang's alma mater, Harvard University. [FN264]

C. Premier Wen Jiabao visits the United States and Harvard faculty urge Yang's release

Senior U.S. officials and others raised Yang's case directly with Premier Wen during his December 2003 visit to the United States. [FN265] Among those who used the opportunity of Wen's visit to urge the Chinese government to release Yang were former President of Harvard University, Larry Summers, and numerous Harvard faculty. Premier Wen was scheduled to give a speech at the Harvard Business School on December 10. [FN266] Yang and Christina Fu have substantial connections *493 with Harvard; he received a doctorate from the Kennedy School in 2001 and was a research fellow at Harvard before he returned to China in April 2002. Fu was (and still is) a researcher at Harvard Medical School. Before Wen's stop at Harvard, Fu faxed a letter to the Chinese Embassy in Washington D.C. requesting a meeting with Premier Wen to discuss Yang's case. Although the Embassy did not respond to the letter, Fu heard "indirectly" that she should not attend Premier Wen's address

at the Harvard Business School; “They said that if I wasn't there, it would be better for my husband.” [FN267]

A senior Harvard official said that the university quietly raised Yang's case with Chinese officials a few days before Wen's visit to Harvard. [FN268] And in a strong show of support for Yang and Fu, over 100 Harvard faculty (including twenty-nine law school professors) signed two collective letters with essentially the same text to Premier Wen, welcoming Wen to Harvard on December 10, noting Harvard's “deep and longstanding ties” with China, and urging Wen to release Yang. [FN269] Then P.R.C. Ambassador to the United States, Yang Jiechi, responded to the letters about a month later, after the Chinese authorities had admitted that Yang Jianli was being held in extended detention. His law-based rhetoric masked the unlawfulness of much of Yang's post-trial detention:

***494** Since the charges against him involved state secrets, the Court held a non-public trial in early August pursuant to the Criminal Procedure Law of China. Thereafter, in view of some questions raised by the defending lawyers, the Court decided to postpone the trial twice in accordance with the law. At present, the Court is preparing to continue to try the case. It must be pointed out that China is a country ruled by law, and that the Chinese judiciary is dealing with this case independently. [FN270]

D. The procuratorate and court admit Yang held in detention beyond the legal time limit

In December 2003, the Chinese authorities admitted that Yang was being held in unlawful extended detention. The procuratorial office housed in the Beijing State Security Detention Center acknowledged that as of December 1, 2003, Yang's detention was illegal, but also reportedly stated that Yang's case was “special,” implying that normal procedures did not apply in such cases. [FN271] Yang wrote in his “Statement on Not Seeking an Appeal,” that every official he and Mo Shaoping had contacted within the procuratorate and at the court indicated that Yang's case was out of their hands. Even the presiding judge apparently expressed the same view. [FN272]

The admission that Yang was being held in illegally prolonged detention at the end of 2003 is even more striking given that during the latter half of 2003 the Supreme People's Procuratorate (SPP) had launched a high profile campaign to resolve all cases of illegally prolonged detention. [FN273] The media highlighted stories of illegally ***495** prolonged detention and featured interviews with Chinese legal scholars and government officials regarding the causes of the problem and potential solutions. [FN274] The Supreme People's Court (SPC) also took part in the campaign. In late August 2003, when SPC President Xiao Yang addressed a meeting of high court presidents, he urged them to clear up all longstanding unresolved cases of extended detention in the court system by November of that year. [FN275]

According to the SPP, the cases of more than 25,000 individuals who had been held in illegally prolonged detention were resolved by the end of 2003. The SPC noted that 7,658 of those 25,000 detainees had been in the court system. [FN276] Xiao Yang reported that basically all of the cases in the court system had been resolved, except for a small number “due to the legal particulars” of those cases. [FN277] Yang Jianli's case presumably was counted among that small number of cases; the “particulars,” however, were political, not legal. But the fact that the campaign had been launched, with the ensuing publicity and official statements condemning the problem of extended detention and demanding resolution, provided a timely opportunity for Mo, Yang Jianli, and Yang's family to protest.

E. Mo Shaoping, Yang Jianli and Yang's family challenge his illegally prolonged detention

On January 18, 2004, Mo Shaoping submitted a petition to the SPP, the top legal supervisory body in China, to investigate and resolve Yang Jianli's illegally prolonged detention. In his brief to the SPP, Mo framed Yang's case in the context of the campaign that the SPP had spearheaded to resolve all outstanding cases of unlawfully prolonged *496 detention. [FN278]

Where Mo's arguments to the court during Yang's trial were cast in a purely legal framework, in his petition to the SPP Mo relied on political as well as legal arguments. Mo pointed out in his petition that Yang Jianli's case had received much attention from the U.S. administration, the U.S. Congress, and the international media. He mentioned the two resolutions passed by the Senate and the House in the summer of 2003 calling for the Chinese government to release Yang unconditionally. Mo also noted the letters from the Harvard faculty to Premier Wen calling for Yang's release and that President Bush had apparently raised Yang's case with Premier Wen when he visited the United States in December 2003. Mo asked the SPP to promptly correct the court's mistake of keeping Yang in illegally prolonged detention "and to protect Yang's legitimate interests and rights and avoid harmful international repercussions."

On February 4, 2004, Mo Shaoping submitted a petition to the presiding judge of the panel at the Beijing No. 2 Intermediate People's Court responsible for Yang's case, and requested that because Yang was being held unlawfully, he be allowed to obtain *qubao houshen*--a form of non-custodial detention--or be moved to residential surveillance. [FN279] Around this same time, the SPP responded to Mo's earlier petition, and reportedly sent a letter to Beijing No. 2 Procuratorate (the entity handling the prosecution, but which also has supervisory authority over the Beijing No. 2 Intermediate Court) ordering it to investigate the delay and report back to the SPP as soon as possible. The letter was also copied to the Supreme People's Court. [FN280] In mid-February 2004, Mo received a telephone call from the court in response to his petition. The court implicitly acknowledged that Yang was being held in illegally prolonged detention and explained to Mo that because the case was highly sensitive, it could not be handled according to regular procedures. [FN281]

Taking a page from the domestic *weiquan* playbook, Christina Fu and her legal advisors then petitioned the National People's Congress *497 (NPC), which was holding its annual meeting in Beijing during March 2004. [FN282] They requested that the NPC Standing Committee "conduct an independent and impartial investigation regarding the reasons behind Yang Jianli's ongoing illegally prolonged detention, so that Yang Jianli's case could be resolved timely, fairly and legally." The petition was signed by members of Yang's family, including his father and mother, his wife, brother and sisters, and his children, Aaron and Anita. [FN283]

Around the time his family filed the petition with the NPC, Yang Jianli engaged in a protest from prison. He had initially considered a hunger strike to protest his extended detention, but eventually decided against it because of concern from his wife, which was conveyed to Yang through Mo Shaoping. [FN284] Yang opted instead to engage in a symbolic protest by not complying with a few of the rules of the detention center. From March 12 through March 14, Yang refused to wear the detention center uniform and to respond to orders addressing him by his inmate number (*i.e.*, Yang demanded to be called by his name). He also refused to fold his blanket, as required by the detention center rules. [FN285]

F. Yang's mistreatment and possibility of release

From March 15 to March 21, Yang was handcuffed, put in solitary confinement, and denied access to reading materials, TV, and exercise. [FN286] He made many requests to see his lawyer, which were denied. [FN287] Mo called the detention center during this time and was told that *498 "everything was fine" and that Yang did

not want to see him. [FN288] While Yang was in solitary confinement, a mid-level official from the procuratorate came to speak with him. [FN289] When Yang mentioned that he wanted to protest his treatment, the prosecutor told him that his office had authorized the treatment. [FN290]

The official asked him to be patient and wait and told Yang that they were waiting for the right time to release him. [FN291] The official also told Yang that good news was coming, and that he would be released once the verdict was announced. [FN292] Indeed, in early March, in advance of the annual meeting in Geneva of the UN Human Rights Commission, the Chinese government released several political prisoners who were also on the United States' priority list. [FN293] Despite China's prisoner releases, which was a typical move prior to meetings of the Human Rights Commission, the State Department's view was that in many respects China was "backsliding" on human rights, [FN294] and it informed the Chinese government that the United States would seek a China resolution at the upcoming Human Rights Commission meeting. [FN295] The Chinese government responded by suspending the official United States-China bilateral human rights dialogue. [FN296] After this exchange, it *499 was unlikely that China would release Yang anytime soon. [FN297]

In mid-April, Mo Shaoping filed another petition with the SPP as well as the NPC Standing Committee protesting Yang's unlawful extended detention. In his submission, Mo explained that he had already filed a petition with the SPP on January 18, but without any result, and thus he was submitting a second petition to the SPP, and also to the NPC Standing Committee. As in his earlier petition, Mo included a paragraph about the U.S. reaction to Yang's ongoing detention, including the Congressional resolutions, the Harvard faculty letters as well as letters from members of Congress to Premier Wen calling for Yang's release. Mo also mentioned that President Bush raised Yang's case with Premier Wen on his visit to the United States, and that Vice President Cheney had also raised Yang's case with the Chinese government during his trip to China that month. [FN298] Mo called on the SPP and the NPC Standing Committee to immediately resolve Yang's illegally prolonged detention, "in order to safeguard the legitimate rights and interests of defendant Yang Jianli and to avoid harmful international consequences."

VII. THE VERDICT AND WRITTEN JUDGMENT

A. The verdict is delivered

A few weeks later, on May 13, 2004, the second hearing that had originally been scheduled for November 2003 was finally held. [FN299] Yang refused to answer any of the presiding judge's questions during the *500 hearing. He also refused to stand up. Yang told the court that he was being detained unlawfully and should be released on bail, and that the court had exceeded the permissible time limit to render a judgment. [FN300] During the hearing, which lasted approximately thirty minutes, the court briefly dealt with the issues that Mo had raised during the August 2003 trial that purportedly necessitated the supplementary investigation. [FN301] With respect to the process followed for obtaining Yang's private correspondence to his family members, the court simply stated that everything was legal and proper procedures were followed. [FN302]

When the presiding judge announced adjournment, he also stated that the verdict would be delivered in court that day. [FN303] The adjournment lasted twenty-five minutes. [FN304] Mo Shaoping was not expecting a verdict to be announced at this hearing; nor was Yang's brother, Yang Jianjun, who had been contacted by the court on May 10 and told that he would be permitted to attend a hearing in which new evidence would be introduced. [FN305] All verdicts, even those in "state secrets" cases, must be pronounced publicly. [FN306]

Yang's view is that by failing to notify Mo Shaoping in advance that the verdict would be announced that day, the court was hoping to avoid a scene with Yang's supporters. When Mo protested that the announcement of the verdict must be made publicly, the presiding judge said that Mo was free to go get some people and bring them into the courtroom. Mo went to get Yang's brother who was waiting outside the courtroom. [FN307] The court rounded up five or six other people who were awaiting news of other cases. [FN308] The officials took pictures, which Yang thought was intended to "document" that the verdict had been publicly announced. [FN309]

The presiding judge read the written decision aloud in court. [FN310] The decision is dated May 13--the same day as the hearing. Yang was found guilty of illegal border crossing and espionage for Taiwan, and was *501 sentenced to five years in prison (with credit for time served) and deprived of his political rights for one year. After the verdict was announced, Yang stood up in court and protested. [FN311] A copy of the written decision was sent to his prison a few days later, but he refused to accept it. [FN312]

The hearing served several purposes. It created an impression of legality to Yang's ongoing detention and the delay in rendering a verdict, which had proven useful on the political front. Ambassador Yang Jiechi had been able to respond to the December 2003 Harvard faculty protest letters with the following explanation, "in view of some questions raised by the defending lawyers, the Court decided to postpone the trial twice in accordance with the law. At present, the Court is preparing to continue to try the case." [FN313] Moreover, the hearing created the opportunity for a surprise announcement of the verdict, which meant that there would be no "scene" at the courthouse by supporters of Yang.

B. *The written judgment*

The written judgment in Yang's case is simplistic and conclusory. It does not deal substantively with any of the legal arguments Mo raised in Yang's defense; nor does it address any of Mo's evidentiary arguments. Although conclusory decisions are not unusual in China--given that court judgments are not intended to be used as precedent--the Supreme People's Court has told courts that judgments should include legal reasoning. [FN314] The simplistic nature of the decision in Yang's case undermines the numerous references made by Chinese authorities to the "complex" nature of Yang's case. [FN315] The lengthy period of investigative detention, the purported need for supplementary investigation after the trial, and the lengthy delay in rendering a verdict, were all explained ultimately in terms of "complexity." The complexity lay not *502 in the law, but in the internal politics within China and bilateral dynamics between the U.S. and China. [FN316]

The opinion consists essentially of a recitation of the allegations in the indictment, many conclusions, and a nod to a few of the arguments made by Mo Shaoping and Yang, which are then promptly dismissed.

1. Yang's unlawful extended detention

The court's decision does not respond directly to Mo Shaoping's or Yang Jianli's protests about Yang's illegally prolonged detention after the conclusion of the trial. It explained the nine months between the trial and the decision in the following way:

During the courtroom trial, because of questions raised by the defense attorney, the prosecutors believed that they needed to conduct a supplementary investigation, and recommended that the trial be post-

poned. The court decided to postpone the trial twice. After the case was reinstated (*huifu fating shenli*) with the court, because the facts of the case were significant and complex, the deadline for resolving the case was extended with the approval of the Beijing Higher People's Court. On May 13, the court resumed hearing the case in court (*jixu kaiting shenli*). [FN317]

This vague discussion of the events that followed Yang's trial on August 4, 2003 masks the fact that there was no legal basis for a substantial portion of Yang's post-trial detention. If specific dates had been included and relevant provisions of the Criminal Procedure Law and accompanying regulations cited, it would have been impossible to gloss over Yang's unlawful extended detention. The trial was not postponed during the courtroom hearing. The trial had concluded on August 4 with Yang's final statement and the pronouncement by the presiding judge that a verdict would be announced at a later date. It was not until almost two weeks later that "supplementary investigation" was raised. [FN318] The judgment does not explain how a trial that had concluded could then later be "postponed." No law or statute is cited in the written decision to support the extension of the deadline to resolve the *503 case with the purported approval of the Beijing Higher People's Court. [FN319] Nor does the decision specify the time period of the purported approved extension.

The opinion sidesteps the May 13 hearing, acknowledging only that it took place. The court puts the responsibility for the extended delay on the defense attorney for having "raised questions." Blaming Yang's attorney for his extended post-trial detention sends another cautionary message to already beleaguered defense attorneys--question the procuratorate's procedures and evidence at your client's peril.

2. Illegal border crossing

The decision states that the indictment alleged that Yang Jianli arrived at the Beijing International Airport from the United States on April 19, 2002, carrying someone else's passport (belonging to Rao Qing) and using a false identity card, went to Beijing, Liaoning, Heilongjiang, Yunnan and other places, and "engaged in activities" (*jinxing huodong*). [FN320] The court agreed with those allegations and added that on April 26, 2002, when Yang tried to use Rao Qing's passport to illegally leave the country, he was apprehended and brought to justice. [FN321]

The court concluded that Yang violated the administrative regulations governing the management of the border and that the "circumstances were serious" so that his conduct also constituted the crime of illegal border crossing. [FN322] There is no discussion of what "seriousness" entails or why the circumstances were deemed to have been "serious." After reciting the standard for guilt--that the facts are clear and the evidence reliable and sufficient--the court stated that the prosecution *504 had established the crime of illegal border crossing. [FN323]

Article 322 of the Criminal Law provides for a maximum imprisonment of one year for illegal border crossing. Although the court had determined that the circumstances of the border crossing were serious enough for Yang's conduct to qualify as a crime (as opposed to being addressed only with an administrative punishment as Mo had argued), the court, without explanation, sentenced Yang not to the maximum full year sentence, but rather to six months (and a fine of 1000 RMB). [FN324] The decision does not explain why the circumstances were serious enough to qualify as a crime, but not serious enough to warrant the maximum sentence.

3. Espionage

The judgment restates the espionage allegations contained in the indictment. Then the court proceeds to explain that upon concluding its own examination it found that in 1991 in San Francisco Yang Jianli and unspecified others accepted tasks from Wang Quanbin, a spy for a “Taiwan spy organization,” who was based in the United States. [FN325] These work assignments included seeking internal materials (*neibu ziliao*) from personnel within China. The judgment states that in 1992, Yang Jianli, colluding with (unnamed) others, established the China Youth Development Foundation (CYDF). [FN326] Then from 1993 to 1994, Yang Jianli and others, in the name of CYDF, accepted financial support from a Taiwan spy organization. Yang and his group mailed applications to join the CYDF to four individuals in China. [FN327] The decision does not note the relationship between each of these four individuals and Yang Jianli.

The decision then states that Yang and his group sent the four completed application forms to Wang Quanbin for his examination and approval. [FN328] With Wang's agreement, Yang used funds from the “Taiwan spy organization” to “develop personnel” in mainland China. *505 The judgment does not explain how providing minimal financial support to three family members and a friend for research constitutes “developing personnel” for subversive purposes in China. Though the decision does not mention the amount of money involved the four grants were for \$100 each. In addition, the decision concludes, without explanation, that Yang sought internal (*neibu*) documents from personnel within China. [FN329]

The judgment does not analyze the important element of intent. There is no mention of “counterrevolutionary purpose” as required under the 1979 Criminal Law; nor is there any discussion of the element of intent needed to prove espionage under the 1997 Criminal Law. Although the judgment cites the 1979 Criminal Law, the court appears to have analyzed the espionage charge under the 1997 Criminal Law. Under the 1997 law, espionage is an intentional crime (*guyi fanzui*), and the prosecution must prove that the defendant acted with the intent (*guyi*) to engage in the prescribed conduct and that he recognized the harmful consequences of his actions. [FN330] Article 14 of the 1997 Criminal Law provides that an intentional crime “refers to an act committed by a person who clearly knows (*mingzhi*) that his act will entail harmful consequences to society but who wishes or allows such consequences to occur, thus constituting a crime.” [FN331] According to a Chinese criminal law treatise, “*mingzhi*” means that the actor must “clearly foresee and recognize the harmful consequences of his conduct.” [FN332]

Without describing the nature and content of the evidence, the decision mentions written testimony from several individuals, including two of the four recipients of the \$100 grants and Bao Xiansen (whose statement was procured while he was detained), as well as evidence from the Ministry of State Security, the Beijing Bureau of State Security, and the Shandong Department of State Security. [FN333] It also claims that in Yang Jianli's declarations and statements made under examination, he “confessed to everything.” [FN334]

*506 The court concluded that Yang had accepted and carried out the tasks assigned by the spy organization and that his conduct “harmed the security of the state” without specifying what harm ensued from his actions. [FN335] After stating that the “facts are clear, the evidence reliable and sufficient, and that the charged crime [of espionage] had been established,” the opinion proceeds to explain that due to the specific details of the case (which are left unspecified), the circumstances of the espionage crime were found to be relatively mild. [FN336] This statement apparently explains the light sentence Yang received for espionage (five years, with credit for the more than two years already served in detention), and one-year deprivation of political rights. [FN337]

Mo Shaoping told Agence France-Presse that the charges were baseless and that the court lacked the evidence to support the verdict. [FN338] Yang Jianli's brother, Yang Jianjun, told the Los Angeles Times that the es-

pionage charge was ridiculous. [FN339] He explained that the few hundred dollars at issue in the case were given to family members, and that “[w]e have absolutely nothing to do with Taiwan.” [FN340] The spokesman for the Ministry of Foreign Affairs, Liu Jianchao, stated that “China’s judicial mechanism heard and delivered judgment on the case in complete accordance with Chinese law,” [FN341] that Yang had been permitted to meet with his lawyers numerous times, and that he had “made a full defense.” [FN342] The U.S. State Department expressed disappointment with the decision. A State Department spokesperson said, “We have repeatedly called on Chinese officials to release [Yang] and we will continue to do so. We note that he had been detained without conviction for more than two years, which is against China’s own laws.” [FN343] Members of Congress condemned Yang’s verdict and sentence. [FN344] The Chinese government called these post-verdict protests *507 “interference in the judicial process of China.” [FN345]

On the same day the verdict was announced, the official Chinese news service, *Xinhua*, issued a brief piece in English, embellishing the court’s findings to make Yang’s alleged conduct sound more sinister and his criminal conviction more justifiable. Among other things, the *Xinhua* article inaccurately stated that the court determined that Yang Jianli “established his own spy agency with funds from Taiwan” and that he “conducted illegal activities” while he was in China in April 2002 on a false passport. [FN346]

VIII. YANG’S INCARCERATION AND RELEASE

A. *Decision not to appeal*

During his interviews with foreign journalists after the verdict was announced, Mo Shaoping could not address whether there would be an appeal, because he had not yet conferred with Yang and it was Yang’s decision to make. Despite pressure from his wife and his legal team in the U.S. to seek an appeal--Yang decided not to appeal the judgment. [FN347] Fu explained that “[t]he family wanted [Yang] to appeal, but he refused. He said that he had totally lost confidence in the system and that he felt like the whole procedure was a sham.” [FN348] Mo Shaoping had also pressed Yang to seek an appeal, reasoning that if Yang did not appeal the judgment, people would think that he accepted the verdict and that he was, in fact, guilty of the crimes he was convicted. [FN349] Yang told Mo he would write a statement explaining his reasons for not appealing the judgment. [FN350] Mo Shaoping explained to Agence France-Presse, “Yang Jianli has decided not to appeal the case I’ve spoken with him two times since he was sentenced and he believes that the verdict is unjust and illegal and he does not want to participate in this kind of procedure anymore.” [FN351]

On May 18, Yang issued his statement. [FN352] Yang protested his illegally *508 prolonged detention and stated that the court had violated the Criminal Procedure Law in holding him beyond the legal time limit. He explained that his decision not to seek an appeal did not mean that he accepted the illegal, “so-called judgment” of the “so-called collegial panel.” Rather, Yang wrote, “It’s just that I have decided to no longer perform in this fake legal show with the so-called ‘people’s court.’” [FN353]

Yang praised Mo Shaoping for presenting thorough, powerful, and well-grounded legal arguments on his behalf. He stated that Mo Shaoping and his assistant Xie Wei’s professionalism and sense of justice were admirable, and that from them he could see “a glimmer of hope for judicial independence and comprehensive rule of law in China.” [FN354]

Yang highlighted the instances during his case in which he contended the Chinese authorities violated

China's own law. He argued that the Chinese authorities had violated his constitutional right of communication during the entire period of his detention, and neither China's Constitution nor the Criminal Procedure Law restricts suspects' rights of communication. He also stated that his right to privacy had been consistently violated during his detention. Yang explained that he had met with his lawyer about twenty times (as of May 18) and that during eighteen of those meetings there were police officers present monitoring the conversation and taking notes. There were no police officers present at the two most recent meetings Yang had with Mo Shaoping, but Yang said it is possible, though he obviously cannot be sure, that their conversations were monitored remotely.

Yang also argued that the Chinese authorities had violated Article 36 of the Criminal Procedure Law, which provides that lawyers and detained clients are permitted to correspond by letter. Yang explained that every word he wrote to his lawyer was examined, and that almost all of his correspondence was, in the end, blocked from being transmitted to Mo Shaoping. He stated that the materials he wrote for his defense in court were also examined by the authorities. Yang further argued that these transgressions also clearly infringed on his right to a defense. [FN355]

B. Tianhe prison transfer station

After his verdict was announced, Yang was transferred from the *509 Beijing State Security Detention Center to the Tianhe Prison Transfer Station. He stayed at Tianhe from September through November 2004 for a prison "orientation program" before being transferred to Beijing No. 2 Prison, where he served out his term. [FN356] Tianhe is a place where convicted defendants are sent before they are dispatched to the prisons where they will serve out their sentence. It was the worst of all the detention facilities Yang experienced. Because the duration is only three months, there is no time to develop relationships with the guards, Yang said. [FN357] Yang's view was that the guards used physical and psychological torture to break individuals down in preparation for serving their sentences. [FN358]

During his time at Tianhe, Yang reached the mid-point of his sentence, and thus become eligible for parole. As the mid-point date neared, there was a new round of advocacy for his release. On October 6, 2004, eighty-five members of the House of Representatives and twenty-one Senators wrote President Hu Jintao urging him to grant Yang parole. [FN359] The next day a group of sixty-three faculty from Harvard University signed a letter to President Hu Jintao urging the Chinese government "to respond favorably to a petition to grant [Yang] parole," and observing that granting Yang parole "would both show a commitment to justice within your country's legal system, and help to strengthen the bilateral ties between China and the United States." [FN360] Then President of Harvard Larry Summers sent an individual letter to the PRC Ambassador to the United States, Yang Jiechi, asking that the Chinese government grant Yang parole, "as a humanitarian gesture," when he became eligible at the end of October 2004. [FN361]

Yang, meanwhile, was being denied access to Mo Shaoping. He had not met with Mo Shaoping since May 19, 2004. Yang would not see him again until a year and a half later, on November 10, 2005. Yang was *510 denied access to Mo because the prison authorities knew of his intention to sue the four prison guards who had beaten him soon after he arrived at the Beijing State Security Detention Center. [FN362]

In early November, while Yang Jianli was still at Tianhe Prison Transfer Station, his brother, Yang Jianjun, showed up without prior notice and requested to see Yang Jianli. Much to Yang Jianjun's surprise, his request was granted. He and Yang Jianli met for twenty minutes, separated by glass and spoke via phone. Yang Jianjun reported that his brother looked to be in good health and was surprised to see him. [FN363]

C. Beijing No. 2 Prison

In early December 2004, Yang was transferred to Beijing No. 2 Prison (Prison No. 2). In sharp contrast to Tianhe, Yang described Prison No. 2 as the best place he stayed during his five-year detention in China because he was able to form long-term relationships with the guards and his fellow inmates. [FN364] In prison, Yang explained, “money and friends are important.” [FN365] The prison authorities dealt with him carefully, because they were aware that Yang would likely be able to get information out regarding anything that happened to him there. For example, upon seeing his various protest letters that he sent out (or tried to send out) from prison, the authorities would come talk to him and tell him that there was no need to send such a petition; they would tell him, “we'll take care of this internally through official channels.” [FN366]

Although the prison officials were determined to keep Mo Shaoping from meeting with Yang, they appeared amenable to visits from Yang's family. [FN367] Two weeks after Yang's arrival at Prison No. 2, on December 14, Yang Jianli was able to meet with his brother Yang Jianjun, his sister Yang Jianrong, and his nephew. Their visit lasted for over an hour, and in contrast to Tianhe, they were permitted to meet in person in a small room with couches. Two guards were present during the meeting, however. Yang was reportedly in good spirits, but complained about *511 constant numbness on the left side of his body, a result of a minor stroke he had suffered earlier in the year. [FN368] Yang told his family members that he hoped medical parole could be granted soon. [FN369]

D. Christina Fu's visit with Yang

In early January 2005, Christina Fu and their nine-year old son, Aaron, finally received visas to travel to China to visit Yang. Upon arriving in Beijing on January 12, 2005, Fu and their son were met by officials from the Beijing State Security Bureau, who, among other things, warned Fu that she should only discuss family matters with her husband and nothing political. On January 17, they met with Yang in a small room at Prison No. 2 for about an hour. [FN370] After a quick embrace, Yang and Fu were made to sit at opposite ends of the room with a table between them. [FN371] Two guards were present in the room, and one of them took notes. [FN372] They were forbidden to speak in English. [FN373] Yang asked Fu to assist him in gaining access to Mo Shaoping and to seek medical parole on his behalf. He also wanted an end to the correspondence ban. Yang had not been allowed to send any letters to Fu or his children for the entire period of his detention, although he had begun to be permitted to receive postcards from Fu. [FN374] Yang told Fu that a few months ago he had received many pieces of mail from members of Amnesty International around the world. [FN375] After her return to the United States, Fu recounted that Yang had lost a lot of weight, looked much older, and did not smile. [FN376] She contacted one of the prison officials and asked for a copy of her husband's medical records. The official denied her request, and also told Fu that it would be impossible *512 for her husband to get medical parole because he was not ill enough. [FN377]

E. Efforts to seek medical parole

After Yang Jianli told his brother and sister about his desire to seek medical parole during their family visit in mid-December 2004, Fu and Jared Genser, Yang's Kennedy School classmate and president of the NGO Freedom Now, went into action. They held a press conference to mark the 1000th day of Yang's detention and to again call for his release. Genser and Fu each wrote a letter to Secretary of State Condoleezza Rice explaining Yang's health condition and requesting she intervene with the Chinese government for his release. [FN378] Fu

received a response from Robert Goldberg, then Acting Director of the Office of Chinese and Mongolian Affairs, who expressed the State Department's disappointment that the Chinese government had not yet agreed to release Yang and noted that the Embassy had raised Yang's case with Chinese officials more than sixty times to date. [FN379] Goldberg related that the "[Ministry of Foreign Affairs] officials assured us that they did not want his health to deteriorate in custody and said they would reiterate to the prison warden the need to provide him with medical care." [FN380] During her trip to China a week later, Secretary Rice "personally urged Chinese Foreign Minister Li Zhaoxing to take action on Dr. Yang's case." [FN381]

F. Continued denial of access to counsel

Meanwhile, Mo Shaoping and Yang Jianli were still being denied permission to meet because Yang was planning to file a petition or lawsuit against the four guards who had beaten him during his first year of detention. [FN382] Mo Shaoping had tried many times to see Yang, to no avail. Mo wrote three letters to the prison authorities between January *513 and March 2005 requesting to meet with Yang, but he received no reply. [FN383] Mo repeatedly pressed the prison authorities for a response, but they kept stating that they needed instructions from above. [FN384] On March 25, Mo received a response from Prison No. 2 through the Lawyers' Administration Section of the Beijing Judicial Bureau, formally denying his request to see Yang. [FN385]

Mo challenged the bases for denying him access to his client in a petition to the Beijing Judicial Bureau. Apparently, Prison No. 2 had rejected a meeting on the grounds that a family member could not hire Mo on Yang's behalf to represent him in his petition against the four guards who had beaten him. Yang had asked his family members during a visit to the prison to pass his "petition statement" to Mo Shaoping, but the authorities at Prison No. 2 denied this request.

The officials at Prison No. 2 also invoked "state secrets" as a reason to deny Mo's request to visit Yang. Mo contended that Yang's case was over--the sentence had taken effect and the verdict was announced publicly in accordance with the law. Mo argued that there was no legal basis for invoking "state secrets" as a reason to deny Mo permission to meet with Yang. Mo further argued that because Yang Jianli's case had received so much attention, noting that the U.S government and Congress were still very concerned about his situation, "we should follow the laws even more carefully to ensure Yang's legal rights (including his rights to petition and to see his lawyer)." [FN386] Despite Mo's efforts, he would not be able to see Yang until November 10, 2005, ten days before the UN Special Rapporteur on Torture, Manfred Nowak, was due to arrive in China.

G. Near-releases

President Bush raised Yang's case directly with President Hu Jintao when they met in New York in September 2005. [FN387] Bush was also scheduled to travel to China in November 2005. Around this time, in October 2005, Yang was told by the prison authorities that he would be released soon; once again, nothing happened. [FN388] President Bush raised *514 Yang's case again when he met with Chinese leaders in Beijing on November 20. [FN389]

In March 2006, the UN Special Rapporteur on Torture, Manfred Nowak, who met with Yang in late November during his visit to China, stated in his report on his mission that Yang's conviction may have been based on information obtained by torture and appealed to the Chinese government to release Yang. [FN390] That same month, in advance of President Hu Jintao's visit to the United States, the prison officials prepared Yang for his

release; again, nothing happened. [FN391]

On April 10, 2006, 119 Members of Congress wrote to Bush urging him to raise Yang's case with Hu Jintao during Bush's upcoming meeting with Hu at the White House on April 20. [FN392] Chinese Vice Foreign Minister (and former Ambassador to the United States) Yang Jiechi dismissed questions from reporters about whether there would be any prisoner releases in advance of Hu's trip to the United States. Yang Jiechi stated: "China is a country under the rule of law We handle cases according to the law." [FN393]

On September 3, 2006, approximately eight months before his scheduled release date, Yang was taken to the Beijing International Airport. [FN394] Everything was all set for his departure--he had a boarding pass and cleared customs. Yang, however, made two demands before he would get on a plane to the United States: he wanted to be guaranteed the right to return to China and he wanted to visit the grave of his father, who had passed away the year before while Yang was in prison. [FN395] After several hours of negotiations, the officials told him they could not grant his requests. Yang told them he would prefer to be taken back to prison and serve out his sentence. [FN396] Yang returned to prison and was released, as scheduled, on April 27, 2007.

**515 H. Yang Jianli's release and return to the United States*

Upon his release, Yang was technically without legal status in China. The authorities refused to issue him a passport or grant him residency status in China. Despite being in legal limbo, Yang traveled freely and met with many activists. [FN397] The State Department pressed the Chinese government for a passport for Yang. Although there was agreement among Chinese officials that they wanted Yang out of China, there apparently was disagreement with respect to how to ensure his departure. Rep. Barney Frank, Christina Fu and Yang Jianli's representative in Congress, had an idea to break through this impasse. As chair of the House Financial Services Committee, Frank had developed a good relationship with U.S. Treasury Secretary Henry Paulson, Jr. [FN398] Paulson went to see Frank about some legislation before his July 2007 trip to China for the U.S.-China Strategic Economic Dialogue (SED). [FN399] Frank took that opportunity to brief Paulson on Yang's case and asked him to intervene with Chinese leaders during his trip. Paulson agreed and raised Yang's case with his counterpart in the SED, then Vice Premier Wu Yi, with whom he had developed a friendly relationship. [FN400] Wu Yi responded that she needed confirmation that Yang would actually leave China if he was given the opportunity. Paulson asked the State Department to contact Yang to confirm that he would, in fact, leave China if he was given a Chinese passport. Once confirmation was received, Paulson told Wu Yi that he had been assured that Yang would leave China. [FN401] As Yang was about to depart from China, he was handed a ten-year Chinese passport. [FN402] Yang returned to the United States on August 18, 2007. At a press conference held shortly after Yang's return, Rep. Frank remarked, "it shouldn't be this accidental." [FN403]

As The Dui Hua Foundation observed, the Chinese government *516 apparently violated its own law in issuing Yang a passport. [FN404] As part of his sentence, Yang was denied "political rights" for one year after his release. China's Passport Law denies individuals who are still serving their sentences the right to obtain a passport. [FN405]

IX. CONCLUDING OBSERVATIONS

What conclusions can be drawn from Yang Jianli's encounter with the Chinese criminal justice system and the efforts of his lawyer Mo Shaoping and advocates outside of China on his behalf? It was, of course, entirely

appropriate and expected for Yang to be taken into custody when he was caught with a fake identification card and someone else's passport as his travel document, but his case soon turned into something much more. Yang was a prominent blacklisted dissident whom the Party-state could not afford to release without punishing him for his activities abroad and for sneaking back into China. The Chinese authorities made an example of Yang. The message to other stateless dissidents was clear: return to China at your own peril. The political persecution of Yang was played out as legal theater, staged in the language and rhetoric of the law.

The problems Yang encountered during his processing through the criminal justice system--multiple violations of the CPL, lack of access to counsel, incommunicado detention, illegally prolonged detention, fabricated evidence, torture--reflect problems that many "nonpolitical" criminal suspects and defendants experience as well. Mo Shaoping, as well as other lawyers and legal scholars, contend that the pernicious problems of illegally prolonged detention and torture are the consequences of lengthy pretrial detention, the lack of a bail system, and the absence of the right to remain silent. [FN406] There is no legal mechanism through which detained persons can challenge decisions relating to their pretrial detention before an independent judicial*517 officer. [FN407] Moreover, the power of the public security apparatus at the pre-trial stage, particularly when access to counsel is denied, is virtually unchecked.

With key decisions on Yang's detention and the outcome of his case being determined as a matter of politics, external forces and events that could influence decision-makers played a significant role. For example, once the UN Working Group on Arbitrary Detention issued its opinion in June 2003 finding that Yang's detention was arbitrary under international law, and the U.S. Congress passed resolutions calling for Yang's release, Yang's situation improved significantly and he fared better than many in China's criminal justice system. The significance of the sustained and vocal attention Yang's case received--from the U.S. Department of State and Congress, the media, the United Nations, other national governments, human rights organizations, Harvard University, and others--cannot be underestimated.

Many of Yang's international supporters and advocates may have felt that their efforts were in vain. They repeatedly called for Yang's release during the five years he was detained in China, and yet Yang remained in prison. At the press conference held to mark Yang's return to the United States, Rep. Barney Frank, for example, remarked with regret that they had not been successful in securing Yang's release from prison. [FN408] Yet, Yang Jianli is "certain" that without such advocacy, he would have received a longer prison term. [FN409] The tireless campaigning of Christina Fu, Jared Genser, Rep. Barney Frank, Jerome Cohen and others is the best explanation for the relatively light five-year sentence Yang received for espionage, and the several instances of possible early release that did not materialize (likely thwarted by other events in the bilateral relationship, or in one instance, possibly Yang's protests in prison), as well as the actual offer of early release in September 2006. When Yang finally learned about the campaign for his release, it gave him strength and courage to engage in protests and assert his rights in prison. The advocacy also helped Mo Shaoping in his defense of Yang. The international pressure and Mo's access to foreign media served as an important, albeit limited, check on the *gongjianfa*. Yang's case is also a reminder that while international pressure makes a difference in *518 most cases, the result does not necessarily track the form or time frame that supporters, or the prisoner, might desire. [FN410]

The Party-state's legal reform commitments and the law itself mattered insofar as they were promises and commitments that the Party-state could be pressured to fulfill. Mo was able to use such commitments not only in his defense of Yang, but also to occasionally force a certain degree of accountability from the *gongjianfa*. Advocates for Yang outside of China were doing the same, pressing China's Party-state for an account of Yang's

treatment under Chinese as well as international law. International scrutiny and Mo Shaoping's persistence and reputation made the procuratorate and court pay attention to what they were doing. When the court and procuratorate admitted that Yang was being held in unlawful extended detention, but that the matter was out of their hands, it was a discomfiting recognition that an applicable law existed, that it should be followed, and that the officials at the court and procuratorate actually wanted to abide by the law, but they could not. Political power trumped law, and there was nothing they could do about it.

What can be done? The Criminal Procedure Law is under revision, but it has been for a while and there is not much hope that a revised CPL will be adopted anytime soon. The revised Lawyers' Law took effect on June 1, 2008. [FN411] It contains several new provisions that enhance the rights of criminal defense lawyers; some of which directly contradict the current CPL. Many of the problems, however, stem from the failure to implement protections and rights of defendants and lawyers that already exist, and the inability of lawyers to challenge many of the decisions that are made in the crucial early stages of the criminal process (*e.g.*, whether the case involves "state secrets," denials of requests to meet a detained suspect, and determinations regarding extensions of detention). A view held by some rights defense lawyers and legal academics is that simply revising existing laws is not sufficient, *519 but rather fundamental structural changes--an independent judicial system and a constitutional government--are necessary before problems like those that Yang and Mo encountered in defending Yang's case can be resolved. [FN412]

In early December 2008, Mo Shaoping was one of 303 Chinese citizens-- including rights defense activists and lawyers, scholars, artists, former officials, farmers, and workers--that issued Charter 08, a sweeping call for political reform and greater protection of human rights in China. [FN413] The document, inspired by the Charter 77 movement in Czechoslovakia, [FN414] includes constitutionalism as one of its fundamental principles; "Constitutional rule ... means protecting the freedom and the rights of citizens, limiting and defining the scope of legitimate government power, and providing the administrative apparatus necessary to serve these ends." The Charter contains nineteen recommendations, ranging from an end to one-party rule to the creation of a federated republic and enhanced protection of the environment. The signatories call for the release of all political prisoners, and an end to illegal detentions and the "practice of viewing words as crimes." [FN415] They also advocate for an independent judiciary:

The rule of law must be above the interests of any particular political party and judges must be independent. We need to establish a constitutional supreme court and institute procedures for constitutional review. As soon as possible, we should abolish all of the Committees on Political and Legal Affairs that now allow Communist Party officials at every level to decide politically-sensitive cases in advance and out of the court. [FN416]

*520 Even before Charter 08 was released publicly, some of the signatories were harassed and questioned and the prominent dissident intellectual Liu Xiaobo was detained. Mo Shaoping had represented Liu years earlier in connection with Liu's involvement in the Tiananmen protests in 1989. [FN417] Liu Xiaobo's wife hired Mo to represent him again. The police failed to provide Liu's wife with a formal detention notice within twenty-four hours of Liu Xiaobo's detention as required by Article 64 of the CPL; at the time of this writing, more than ten days after Liu's detention, it was still unclear where he was being held. [FN418] Mo Shaoping had not yet seen his client. On December 11, the U.S. Department of State issued a press release "calling on the government of China to release Liu Xiaobo and cease harassment of all Chinese citizens who peacefully express their desire for internationally-recognized fundamental freedoms." [FN419] The European Union expressed "deep concern" about Liu's detention. [FN420] The Chinese government rejected the concerns raised by the United States and the EU as interference in China's domestic affairs. [FN421]

Since it first appeared online on the eve of December, 10 Charter 08 has been accumulating signatures. By mid-December, thousands of Chinese had signed the document. [FN422] The official list of the second set of signatories contained the names of 440 individuals. Yang Jianli was one of them. [FN423] In an essay titled "Liberation of the Soul--Further *521 Thoughts on the Significance of Charter 08," Yang Jianli wrote:

To people who understand the current situation in China, the appearance of Charter 08 cannot come as a surprise, but for each person who signed the Charter, it was a soul-stirring decision Signing the Charter signified a refusal to obey the rules of the game laid down by the authorities; violating the rules was tantamount to destroying the game itself. The danger facing the signatories one can well imagine. [FN424]

[FN1]. The author is currently General Counsel of the Congressional-Executive Commission on China (CECC) and an adjunct lecturer at American University, Washington College of Law. The views and analysis expressed in this article are hers alone, and do not necessarily reflect the views of the CECC, its staff, membership, or leadership. She would like to thank the following individuals for their assistance, advice, and/or comments on an earlier draft: Ira Belkin, Donald Clarke, Jennifer Choo, Jerome Cohen, Mike Dowdle, David Evans, Christina Fu, Fu Hualing, Jared Genser, Keith Hand, Jonathan Hecht, John Kamm, Benjamin Liebman, Carl Minzner, Josh Rosenzweig, Tang Liang, Teemu Ruskola, Yang Jianli, The China Law Center at Yale Law School, and the participants of the *New Scholarship in Chinese Law* conference in honor of Stanley Lubman at Columbia Law School in April 2005. This article has benefited from interviews with several Chinese legal scholars, whose identity shall remain anonymous given the sensitivity of Yang's case. During the years of Yang Jianli's detention, the author developed a friendship with his wife, Christina Fu, and occasionally assisted with her efforts to seek Yang's release. © 2009, Andrea J. Worden.

[FN1]. Yi Ping, *Prison is a Different Kind of Life* [Interview with Yang Jianli], 4 CHINA RTS. F., No. 4 2007, at 57, 57 [hereinafter *A Different Kind of Life*].

[FN2]. *Open Forum: Public Perspectives on Human Rights Practices in China, Roundtable before the Cong.-Exec. Comm'n on China*, 107th Cong. (Dec. 9, 2002 (as revised on 2/6/03)) (statement of Christina Fu, Harvard Medical School researcher and Yang Jianli's wife) [hereinafter *Statement Before the CECC*], available at <http://www.cecc.gov/pages/roundtables/120902/fu.php>. Fu included as an appendix to her statement a report from the non-governmental organization Human Rights in China (HRIC) entitled *China: Enforced Exile of Dissidents; Government "Re-entry Blacklist" Revealed* (Jan. 6, 1995).

[FN3]. See Beijing shi renmin jianchayuan di er fenyuan qisushu, [Indictment of the Beijing No. 2 People's Procuratorate], *Jing jian er fen gong su xing su zi*, [2003] 102 hao (July 14, 2003) [hereinafter *Indictment*] (Chinese original and English translation provided by Freedom Now on file with author); see also Interview with Yang Jianli, President and Founder of Initiatives for China Foundation, in Wash., D.C. (Jan. 19, 2008) [hereinafter *Yang Jianli Interview*].

[FN4]. Beijing shi di er zhongji renmin fayuan xingshi panjueshu [Trial Judgment of the Beijing No. 2 Intermediate People's Court], *Er zhong xing chu zi di No. 1224* [2003] (May 13, 2004), at 5 [hereinafter *Trial Judgment*] (Citations are to the Chinese version, translations are the author's unless otherwise indicated) (Chinese translation provided by Freedom Now on file with author).

[FN5]. Yang Jianli, Remarks at the Press Conference Announcing Yang's Return to the United States, at the

Rayburn House Office Building (Aug. 21, 2007) (on file with author) [hereinafter Yang Jianli Remarks at Aug. 21, 2007 Press Conference].

[FN6]. “Politically sensitive” cases are those involving, for example, pro-democracy activists, human rights defenders who have crossed an undefined line, cyber-dissidents, Falun Gong practitioners, Tibetan and Uighur and other minority activists, and virtually anyone charged with “endangering state security” or leaking state secrets. *See, e.g.*, HUMAN RIGHTS IN CHINA, EMPTY PROMISES: HUMAN RIGHTS PROTECTIONS AND CHINA'S CRIMINAL PROCEDURE LAW IN PRACTICE 85-86 (2001) [hereinafter EMPTY PROMISES]; Randall Peerenboom, *Out of the Pan and Into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 98 NW. U. L. REV. 991, 994-95 (2004). *See also* STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 3 (1999) (describing the criminal process as “still in the grip of CCP authoritarianism”); Fu Hualing, When Lawyers are Prosecuted: The Struggle of a Profession in Transition, at 10 (May 2006) [hereinafter When Lawyers are Prosecuted], available at <http://ssrn.com/abstract=956500> (observing that China's One Party State “politicizes crime”); *China's Legal System in Transition: Hearing before the Cong.-Exec.Comm'n on China*, 109th Cong. (July 26, 2005) (written statement of Jerome A. Cohen), available at <http://www.cecc.gov/pages/hearings/072605/Cohen.php> (describing criminal justice as the “weakest link in the PRC legal system”).

[FN7]. *See, e.g.*, LUBMAN, *supra* note 6, at 300; Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 228 (2005) (describing politically sensitive cases and criminal law as “trouble spot[s]” for China's legal system); Fu Hualing, When Lawyers are Prosecuted, *supra* note 6, at 1, 12, 15; JONATHAN HECHT, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 5-6 (Lawyers' Committee for Human Rights, 1996); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 137 (2002) (observing that when “vital interests of the Party are at stake” they “prevail over legal niceties such as the procedural rights of the accused.”) [hereinafter CHINA'S LONG MARCH].

[FN8]. *See, e.g.*, LUBMAN, *supra* note 6, at 300 (noting that “[t]he most visible expressions” of law serving policy is in the repeated “strike hard” campaigns and the “obedience shown by the courts to the Party when dissidents are accused”); Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 CHI. J. INT'L L. 1, 257, 314 (Party intervention in politically sensitive cases has “long been a feature of the Chinese legal system”).

[FN9]. Yang Jianli Interview, *supra* note 3 (stating that without international advocacy and pressure he is “certain” that he would have been sentenced to a longer prison term).

[FN10]. Yi Ping, *Using Our Constitutional Rights to Advocate for Our Family Members, An Interview with Fu Xiang*, CHINA RTS. F., No. 4 2007, at 36, 37 [hereinafter *An Interview with Fu Xiang*]. Fu Xiang is the Chinese name of Yang's wife, Christina Fu.

[FN11]. *Id.* at 37.

[FN12]. Professor Kenneth Lieberthal has observed that China is often referred to as a party-state because “the party dominates and monopolizes political power in China.” KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 220 (2d ed., 2004).

[FN13]. Statement Before the CECC, *supra* note 2.

[FN14]. *A Different Kind of Life*, *supra* note 1, at 57.

[FN15]. *Id.*

[FN16]. *Id.*

[FN17]. Susan Jakes, *Mo Shaoping: Defending those who have already lost*, TIME, Apr. 8, 2003, available at http://www.time.com/time/asia/2003/heroes/mo_shaoping.html.

[FN18]. See China Law Digest, *Mo Shaoping: Advocate for Political Cases* (compiled materials) (April 25, 2006) (on file with author), available at <http://www.chinalawdigest.com>; see also Keith Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen's Action in China*, 45 COLUM. J. TRANSNAT'L L. 114, n. 229 (2006).

[FN19]. Award of the French Republic's human rights prize, in Paris, France (December 10, 2007), http://www.diplomatic.gouv.fr/en/france-priorities_1/democracy-human-rights_1101/events_2128/french-republic-human-rights-prize_5937/award-of-the-french-republic-human-rights-prize-10.12.07_10442.html. Two other rights defense attorneys in China, Teng Biao and Li Jingsong, were among those to receive the prize.

[FN20]. China Law Digest, *supra* note 18.

[FN21]. MERLE GOLDMAN, FROM COMRADE TO CITIZEN: THE STRUGGLE FOR POLITICAL RIGHTS IN CHINA 75-76 (2005).

[FN22]. China Law Digest, *supra* note 18.

[FN23]. *Id.*

[FN24]. Human Rights in China, *On Trial for Commemorating June Fourth Victims*, (Jan. 23, 2001), available at <http://www.hrichina.org> (follow "June 4th Crackdown," then follow "Multimedia Resources"); GOLDMAN, *supra* note 22, at 74-76.

[FN25]. *A Rights Defense Lawyer Takes the Long View. An Interview with Mo Shaoping by the Editors of Ren Yu Renquan*, in CHINA RTS. F., No. 2 2007, at 76, 80 [hereinafter *Long View*].

[FN26]. Reporters without Borders, *Huang Qi did what any Chinese citizen would have done in his place: Appeal by wife of cyber-dissident who has just completed third month in jail*, (Sept. 10, 2008), available at http://www.rsf.org/article.php?id_article=28495; *Mo Shaoping: Chishouxindi Minzhu, Fazhi, Xianzheng Xinnian er Fengyuqianxing* [*Mo Shaoping: Holds Firmly in His Heart Faith in Democracy, Rule of Law, and Constitutional Government, and Marches Forward Despite Wind and Rain*], GONGMIN YUEKAN [CITIZEN MONTHLY], Sept. 10, 2008 (vol. 19) [hereinafter *Citizen Monthly Interview*], available at <http://www.cncitizens.org/2008/09/20089.html>.

[FN27]. *Long View*, *supra* note 25, at 79. Mo had been appointed to represent Gao Zhisheng by Gao's brother Gao Zhiyi, but Mo was not given prior notice of the trial and was not permitted to attend. The court appointed two defense attorneys to represent Gao at the trial, but Gao's family had never met them and did not know anything about them. See *Top Chinese Civil Rights Lawyer Tried in Secret: Recordings*, Radio Free Asia, Dec. 12,

2006, available at http://www.rfa.org/english/news/politics/2006/12/12/china_gaozhisheng/.

[FN28]. *Zhongguo Xuyao Gengduode Renquan Lushi: Mo Shaoping Lushi Fangtan* [China Needs More Human Rights Lawyers], REN YU RENQUAN [HUMANITY AND HUMAN RIGHTS], (Mar. 2007), available at http://www.renyurenquan.org/ryrq_article.asp?article_id=610 [hereinafter *China Needs More Human Rights Lawyers*].

[FN29]. See, e.g., Hand, *supra* note 18, at 159, 161 (describing *weiquan* as “rights defense” and *weiquan lishi* as “rights defense lawyers”); Fu Hualing & Richard Cullen, *Weiquan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public Interest Lawyering* (Jan. 15, 2008) at 1 n.1, (on file with the author), available at <http://ssm.com/abstract=1083925> (noting that *weiquan* means “rights protection” and that *weiquan* lawyers are China's “cause” or “public interest” lawyers); Yi Ping, *Protect Human Rights Lawyers, Establish a True Legal System: Interview with Teng Biao*, CHINA RTS. F., No. 1 2008, at 87, 90 [hereinafter *Interview with Teng Biao*]. In October 2007, *weiquan* lawyer Teng Biao estimated that there were only about 100 rights defense lawyers and activists in China.

[FN30]. See generally, Austin Sarat & Stuart A.Scheingold, *The Dynamics of Cause Lawyering: Constraints and Opportunities*, in THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 1 (Austin Sarat & Stuart A.Scheingold, eds., 2005); Fu & Cullen, *supra* note 29, at 1 n.1.

[FN31]. Fu & Cullen, *supra* note 29, at 3.

[FN32]. *Id.*

[FN33]. Long View, *supra* note 25, at 81. See also Eva Pils, *Asking the Tiger for his Skin: Rights Activism in China*, 30 FORDHAM INT'L L.J. 1209, 1210-12 (discussing the debate among China's rights defenders about gradualist versus radical strategies).

[FN34]. Long View, *supra* note 25, at 81.

[FN35]. *Id.* at 80.

[FN36]. *Id.*

[FN37]. See generally, KEVIN O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006); ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE (Neil Diamant et al. eds., 2006).

[FN38]. English language scholarship analyzing the 1996 CPL and problems with its implementation include: HECHT, *supra* note 7; Ping Yu, *Glittery Promise vs. Dismal Reality: The Role of a Criminal Lawyer in the People's Republic of China after the 1996 Revision of the Criminal Procedure Law*, 35 VAND. J. TRANSNAT'L L. 827 (2002); EMPTY PROMISES, *supra* note 6; Terrence C. Halliday & Sida Liu, *Birth of a Liberal Movement? Looking Through a One-Way Mirror at Lawyers' Defence of Criminal Defendants in China*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM (T.C. Halliday, L. Karpik & M.M. Feeley, eds., 2007); Ethan Michelson, *Unhooking from the State: Chinese Lawyers in Transition* (Aug. 2003) (unpublished Ph.D. dissertation, Univ. of Chicago) (see, e.g., chapter 4: “Plight of Criminal Defense Lawyers”), available at <http://www.indiana.edu/emsoc/Dissertation.html>; Yi Sheng, *A Promise Unfulfilled: The Impact of China's 1996 Crim-*

inal-Procedure Reform on China's Criminal Defense Lawyers' Role at the Pretrial Stage (Part 1), 4 PERSP. 1 (2003) [hereinafter *A Promise Unfulfilled* (Part 1)]; Yi Sheng, *A Promise Unfulfilled: The Impact of China's 1996 Criminal-Procedure Reform on China's Criminal Defense Lawyers' Role at the Pretrial Stage* (Part 2), 5 PERSP. 1 (2004) [hereinafter *A Promise Unfulfilled* (Part 2)]; Jerome Cohen, *The Plight of China's Criminal Defence Lawyers*, 33 H.K.L.J. 231, 245 (2003).

[FN39]. HECHT, *supra* note 7, at 5-13 (discussing the factors that led to the decision to revise the CPL); Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, in *THE PEOPLE'S REPUBLIC OF CHINA AFTER 50 YEARS* 111, 120 (Richard Louis Edmonds ed., 1999).

[FN40]. *See, e.g.*, HECHT, *supra* note 7, at 77-79; Halliday & Liu, *supra* note 39, at 71; RONALD C. KEITH & ZHIQIU LIN, *LAW AND JUSTICE IN CHINA'S NEW MARKETPLACE* 185-86 (2001).

[FN41]. *See, e.g.*, Ping Yu, *supra* note 38, at 830-33; *A Promise Unfulfilled* (Part 1), *supra* note 39, at 5.

[FN42]. *See, e.g.*, Ping Yu, *supra* note 38 at 830-31; *A Promise Unfulfilled* (Part 1), *supra* note 39, at 7.

[FN43]. *See, e.g.*, Halliday & Liu, *supra* note 38, at 83 (describing the *gongjianfa* as an “iron triangle”); Potter, *supra* note 39, at 119 (noting references to the *gongjianfa* as a “tripartite network”); EMPTY PROMISES, *supra* note 7, at 1 (observing that “doubts have been raised” regarding the implementation of the revised CPL); *A Promise Unfulfilled* (Part 2), *supra* note 39, at 1, 8 (describing resistance from different state bureaucracies, such as the procuratorate, to the revised CPL since it threatened the prosecutors' power and interests). Public security bureaus (*i.e.*, the police), the procuratorates, and the courts are sometimes referred to as the “law implementation agencies.” *See* EMPTY PROMISES, *supra* note 6, at 21. Public security bureaus (and state security bureaus) investigate crimes; the procuratorates review cases for indictment, and if approved for prosecution (the usual course), take the case to trial. The courts try the cases. *Id.* at 22. *See also* Interview with Chinese criminal law expert (2008) [hereinafter Interview with Expert (2008)].

[FN44]. The term “*chaoqi jiya*”--literally “detention that exceeds the time limit”--is referred to in this article variously as “unlawful extended detention,” “illegally prolonged detention,” or simply “extended detention.” These terms all refer to the same phenomenon and Chinese term--*chaoqi jiya*.

[FN45]. *See NPC Legislator: Extended Detention, Forced Confessions 'Salient Problems' in PRC*, XINHUA (Dec. 28, 2000) (on file with author); CHEN WEIDONG, XINGSHI SUSONGFA SHISHI WENTI DIAOYAN BAOGAO [REPORT ON THE INVESTIGATION OF PROBLEMS WITH THE IMPLEMENTATION OF THE CRIMINAL PROCEDURE LAW] 1 (2001) [hereinafter INVESTIGATION REPORT] (describing in the introductory explanation that the NPC investigation in 2000 identified three major problems: coerced confessions, illegally prolonged detention, and the difficulties facing criminal defense lawyers).

[FN46]. Halliday & Liu, *supra* note 38, at 83. Lawyers in China also refer to Article 306 of the Criminal Law as “Noose 306” or the “Sword of Damocles.” *See* Xiao Hanwen, *Zhengfu Gai Ruhe Miandui Lüshi*, [How Should the Government Treat Lawyers], CAIJING, Aug. 18, 2008, available at <http://magazine.caijing.com.cn/20080815/77275.shtml>; Cohen, *supra* note 38, at 244-45. Article 306 provides that defense lawyers may face up to seven years imprisonment (if the circumstances are serious) for fabricating evidence or suborning perjury. Cohen, *supra* note 38, at 245. A lawyer who advises his or her client to change his testimony or repudiate a confession that was coerced during the investigation stage risks being prosecuted under Article 306. *Id.*

[FN47]. Xing fa [Criminal Law] (promulgated by the President of the People's Republic of China Mar. 14, 1997, effective Mar. 14, 1997 (P.R.C.) art. 306) [hereinafter CL]. English translations used throughout this Article, unless otherwise noted, are from *Xing fa*, ZHONG YINGWEN DUIZHAO FALU LEIBIAN [CRIMINAL LAW: CHINESE-ENGLISH LEGAL SERIES], (Zhongguo fazhi chubanshe [China Legal Publishing House] 2002).

[FN48]. Halliday & Liu, *supra* note 38, at 88.

[FN49]. Li Weiping, *Renquan Dalushi: Mo Shaoping [The Great Human Rights Lawyer: Mo Shaoping]*, DAJIYUAN [EPOCH TIMES], Sept. 17, 2005, available at <http://epochtimes.com/gb/5/9/17/n1055871.htm>; Tom Kellogg, *A Case for the Defense*, CHINA RTS. F. No. 2 2003, at 31, 33; Halliday & Liu, *supra* note 38, at 90 (most ACLA online forum users advocated for abolition of Article 306).

[FN50]. However, the UN Special Rapporteur on Torture, Manfred Nowak, who interviewed Yang Jianli during his visit to China in late 2005, recommended in his report that the Chinese government release Yang, "since he has been convicted of a political crime, possibly on the basis of information extracted by torture." UN ECON. & SOC. COUNCIL [ECOSOC], Commission on Human Rights, *Mission to China: Report of the Special Rapporteur on torture, and other cruel, inhuman, or degrading treatment or punishment*, at 43, ¶ 7, UN Doc. E/CN.4/2006/Add.6 (March 10, 2006) (prepared by Manfred Nowak) [hereinafter *Nowak Report on Mission to China*].

[FN51]. Jerome A. Cohen & Jared Genser, Op-Ed., *Yang Jianli's Trial of Injustice*, ASIAN WALL ST. J., Aug. 4, 2003 [hereinafter *Trial of Injustice*], available at <http://www.freedom-now.org/pdfs/AWSJ.pdf>.

[FN52]. Gong'an jiguan banli xingshi anjian chengxu guiding [Regulations Regarding the Process of Handling Criminal Cases by Public Security Organs] (issued by the Ministry of Public Security, Apr. 20, 1998, effective May 14, 1998), art. 108 (P.R.C.).

[FN53]. See Cohen, *supra* note 38, at 233-34; EMPTY PROMISES, *supra* note 7, at 87 (families of political dissidents are "invariably" not provided timely notice of detention).

[FN54]. Cohen, *supra* note 38, at 233-34.

[FN55]. *Id.* at 235.

[FN56]. "Coercive measures" include three forms of custodial detention ("coercive summons," "criminal detention or custody," and "arrest") and two types of non-custodial detention ("obtaining a guarantee and awaiting trial," and "residential surveillance"). See Xingshi susong fa [Criminal Procedure Law] (promulgated by the Nat'l People's Cong., Mar. 17, 1996, effective Jan. 1, 1997) (P.R.C.), arts. 50-68 [hereinafter "CPL"] (English translations used throughout this Article, unless otherwise noted, are from Zhonghua Renmin Gongheguo xingshi susong fa [Criminal Procedure Law of the People's Republic of China] (Zhongguo Fazhi Chubanshe [China Legal System Publishing House] 1999); EMPTY PROMISES, *supra* note 6, at 58-64 (discussing coercive measures).

[FN57]. Cohen, *supra* note 38, at 232.

[FN58]. *Id.* CPL, *supra* note 56, art. 96.

[FN59]. CPL, *supra* note 56, art. 96.

[FN60]. Cohen, *supra* note 38, at 232; CPL, *supra* note 56, art. 96.

[FN61]. Cohen, *supra* note 38, at 236-37.

[FN62]. CPL, *supra* note 56, art. 96; *see also* EMPTY PROMISES, *supra* note 6, at 62-63.

[FN63]. HECHT, *supra* note 8, at 40 (describing the vast discretion the revised CPL grants police to use “state secrets” as a rationale for denying suspects access to counsel as “the most glaring deficiency of the revised CPL”) (citing Timothy A. Gelatt, *Recent Development: The New Chinese State Secrets Law*, 22 CORNELL INT'L L. J. 255 (1989)).

[FN64]. *Trial of Injustice*, *supra* note 51.

[FN65]. Ping Yu, *supra* note 38, at 839.

[FN66]. Yang Jianli, *Not Unnecessary Words: My Closing Statement in the Court* (Aug. 4, 2003) [hereinafter *Not Unnecessary Words*], http://www.yangjianli.com/articles/yangjianli20030804_en.htm. The original Chinese version, *Bu duoyu de hua - zai fating shang de zuihou chenshu*, is available at <http://www.yangjianli.com/articles/yangjianli20030804.htm>.

[FN67]. *See* Xiong Qiuhong, *Jiejian baoshi zhidu yu jianshao shenqian jiya* [*Drawing Lessons from Bail and Reducing Pretrial Detention*], in BAOSHI ZHIDU YU QUBAO HOUSHEN [BAIL & GUARANTEED PENDING TRIAL] 174, 175 (Chen Weidong ed., 2003) (noting that once a criminal case moves to the stage of review for prosecution, for example, the CPL has no provisions regarding detention time limits and that in practice the time limits at various stages for “handling a case” (*ban'an qixian*) are treated as detention time limits).

[FN68]. EMPTY PROMISES, *supra* note 6, at 53 (noting that there is no procedure to review *ex ante* or *ex post* the legality of time limit extensions); HECHT, *supra* note 7, at 30.

[FN69]. CPL, *supra* note 56, art. 75; *see also* EMPTY PROMISES, *supra* note 6, at 56-57.

[FN70]. The 1996 CPL contains a warrant requirement (Art. 61), and warrantless pre-arrest detention is supposed to be the exception, applicable only when certain conditions are present (including various exigent circumstances). In practice, however, this requirement is disregarded and the thirty-seven day time limit for warrantless pre-arrest detention “is routinely applied to all suspects.” EMPTY PROMISES, *supra* note 6, at 48-49.)

[FN71]. CPL, *supra* note 56, art. 124.

[FN72]. *Id.*, art. 126 (in relevant part). *See also* EMPTY PROMISES, *supra* note 6, at 66.

[FN73]. Article 127 of the 1996 CPL provides in full: “If in the case of a criminal suspect who may be sentenced to fixed-term imprisonment of ten years at least, investigation of the case can still not be concluded upon expiration of the extended time limit as provided in Article 126 of this Law, another extension of two months may be allowed upon approval or decision by the People's Procuratorate of a province, autonomous region, or municipality directly under the Central Government.”

[FN74]. CHEN WEIDONG, XINGSHI SUSONGFA SHISHI WENTI DUICE YANJIU [RESEARCH ON COUNTERMEASURES FOR DEALING WITH THE PROBLEMS IN IMPLEMENTATION OF THE CRIM-

INAL PROCEDURE LAW] 37 (2001) (noting that the longest possible period for investigative detention is seven months, but that if Article 128 comes into play, the investigative detention period could be even longer).

[FN75]. Article 128 provides in relevant part: “If during the period of investigation a criminal suspect is found to have committed other major crimes, the time limit for holding the criminal suspect in custody during investigation shall be recalculated, in accordance with the provisions of Article 124 of this Law, from the date on which such crimes are found.”

[FN76]. EMPTY PROMISES, *supra* note 6, at 54 (concluding that the detention time limits are ambiguous and “can essentially be applied at official pleasure.”)

[FN77]. HECHT, *supra* note 7, at 30-31 (noting that unlike under the 1979 CPL, the police do not need authorization from the procuratorate in order to restart the detention clock).

[FN78]. Professor Chen Weidong noted in his INVESTIGATION REPORT, *supra* note 45, at 24-25, that frequently as the seven-month period for the first single charge nears its end, the investigating authority will, on its own and without the need for authorization or approval, declare the discovery of a “new major crime” and reset the detention clock, which both circumvents the necessity of obtaining approval for arrest from the procuratorate on the “new” charge and at the same time prolongs pre-indictment investigation detention by up to 7 more months. This is precisely what happened in Yang's case.

[FN79]. EMPTY PROMISES, *supra* note 6, at 53.

[FN80]. CPL, *supra* note 56, art. 168.

[FN81]. *Id.*

[FN82]. Xiong Qiuhong, *supra* note 68.

[FN83]. CPL, *supra* note 56, art. 168.

[FN84]. Cohen, *supra* note 38, at 237.

[FN85]. CPL, *supra* note 56, art. 36; Cohen, *supra* note 38, at 238-39; Ping Yu, *supra* note 38, at 845.

[FN86]. CPL, *supra* note 56, art. 37.

[FN87]. *Id.*

[FN88]. *Id.*

[FN89]. Ping Yu, *supra* note 38, at 845.

[FN90]. *Id.* at 849.

[FN91]. Halliday & Liu, *supra* note 38, at 87.

[FN92]. Cohen, *supra* note 38, at 240-41.

[FN93]. *Id.* at 238-39; Ping Yu, *supra* note 38, at 845-46.

[FN94]. Cohen, *supra* note 38, at 240-41 (concluding that defense lawyers are more disadvantaged now than under the 1979 CPL with respect to knowledge about the prosecution's case); Halliday & Liu, *supra* note 38, at 85 (observing that with respect to access to the case file and evidence “they find themselves actually in a worse situation after than before the [revision to the CPL]”).

[FN95]. See CPL, *supra* note 56, arts. 37, 47-49; Ping Yu, *supra* note 38, at 850; Cohen, *supra* note 38, at 241-42 (stating that witnesses only appear in a “tiny percentage” of cases).

[FN96]. *Bu zu 5% xingshi zhengren yuan chuting zuozheng; zhuanjia huyu wanshan baohu zhidu* [Less than 5% of Witnesses in Criminal Cases are Willing to Testify in Court; Experts Call for Better System of Protection], JIEFANG RIBAO [LIBERATION DAILY], reprinted in FAZHI RIBAO [LEGAL DAILY], Sept. 8, 2008, available at http://www.legaldaily.com.cn/0705/2008-09/08/content_941124.htm#.

[FN97]. Ping Yu, *supra* note 38, at 850.

[FN98]. *Id.*; Cohen, *supra* note 38, at 241.

[FN99]. Yang Jianli Interview, *supra* note 3. Bao Xiansen, a friend of Yang's who was involved in the China Youth Development Foundation, was based in San Francisco and made frequent trips to China for business. On one of these trips, about 6 months after Yang was taken into custody, Bao was detained in his Shanghai hotel. The police forced him to make a statement implicating Yang with purported Taiwan intelligence agencies. After Yang returned to the United States, Bao left him a voicemail, apologizing for what he had done. Bao said that if he did not give the police the statement they wanted, they would not let him go (“*Bu shuo, ta bu rang wo zou*”). See also Telephone Interview with Christina Fu (May 19, 2005) (notes on file with author).

[FN100]. It is difficult to write about Yang's *incommunicado* detention, denial of access to counsel, and torture without instantly being reminded of the Bush administration's policies towards detainees in Guantanamo and elsewhere. Indeed, Rep. Barney Frank, Fu and Yang's congressman, stated in May 2003 while Yang was still being held *incommunicado*, that the treatment by the United States of detainees suspected of terrorism has diminished the credibility of the administration on human rights. Frank is quoted as saying: “When the Chinese hold him [Yang] indefinitely, it's not all that much different from what (Attorney General) John Ashcroft has done.” Bill Nichols, *House members hope Bush discusses prisoner with China*, USA TODAY, May 30, 2003, at 4A.

[FN101]. *A Different Kind of Life*, *supra* note 1, at 58; Email (and attachment) from Christina Fu to author, (Mar. 30, 2008, 14:47 EST) [hereinafter Fu Email, Mar. 30, 2008, 14:47 EST] (on file with author).

[FN102]. *Id.*

[FN103]. Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN104]. *Id.*

[FN105]. *Id.*

[FN106]. Yang Jianli Interview, *supra* note 3.

[FN107]. *A Different Kind of Life*, *supra* note 1, at 59; see GEORGE BLACK & ROBIN MUNRO, BLACK HANDS OF BEIJING: LIVES OF DEFIANCE IN CHINA'S DEMOCRACY MOVEMENT 293-94 (1993)

(describing Qincheng and some of its famous former inmates, including Mao's wife Jiang Qing, Wei Jingsheng, and Wang Juntao, Chen Ziming and others from the 1989 pro-democracy movement.)

[FN108]. *A Different Kind of Life*, *supra* note 1, at 61; Yang Jianli Interview, *supra* note 2.

[FN109]. *An Interview with Fu Xiang*, *supra* note 10, at 39.

[FN110]. *Id.*

[FN111]. Statement before the CECC, *supra* note 2.

[FN112]. *Id.*

[FN113]. See Christopher Bodeen, *Wife of Detained Chinese Dissident Refused Entry to China*, ASSOCIATED PRESS, May 23, 2002, available at http://www.yangjianli.com/news/AP10_en.htm.

[FN114]. *A Different Kind of Life*, *supra* note 1, at 61. Yang has said elsewhere that he was interrogated 120 times before his first meeting with Mo Shaoping. See Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN115]. Yang Jianli Interview, *supra* note 3.

[FN116]. *Id.*

[FN117]. *Id.* Yang's interrogators were certain that the CIA had helped him get into Berkeley and Harvard. After Yang described the workings of the U.S. educational system (and that the CIA was not involved in admissions decisions), his interrogators became very interested, eager to learn how they could get their children into college in the United States. *Id.*

[FN118]. *Id.*

[FN119]. *Id.*

[FN120]. His interrogators included at least one sympathetic officer. The guard, who knew that Yang was a Christian, asked Yang to pray for his family and told Yang, "A good person like you shouldn't have such a bad future." Yang Jianli, *Overcome Fear*, Speech at Harvard Kennedy School of Government Forum, Dec. 5, 2007, available at <http://www.yangjianli.com/articles/overcome%20fear.htm> [hereinafter *Overcome Fear*].

[FN121]. Yang Jianli Interview, *supra* note 3; see also *Overcome Fear*, *supra* note 120 (noting the "psychological torture inflicted by the interrogators").

[FN122]. See, e.g., *Overcome Fear*, *supra* note 120; *Not Unnecessary Words*, *supra* note 66.

[FN123]. *Id.*

[FN124]. *A Different Kind of Life*, *supra* note 1, at 62.

[FN125]. *Id.*

[FN126]. *Id.*

[FN127]. *Nowak Report on Mission to China*, *supra* note 50, at 14 (¶ 45) (confirming that, based on information received during his mission, methods of torture, including “being forced to maintain uncomfortable positions, such as sitting, squatting, lying down, or standing for long periods of time” have been used in China).

[FN128]. *See* *Overcome Fear*, *supra* note 120; *see also* *A Different Kind of Life*, *supra* note 1, at 62; Yang Jianli Interview, *supra* note 3.

[FN129]. *See* Yang Jianli Remarks at Aug. 21, 2007 Press Conference, *supra* note 5; *Overcome Fear*, *supra* note 120.

[FN130]. *See* *A Different Kind of Life*, *supra* note 1, at 62.

[FN131]. The date of arrest is variously indicated as June 20 or June 21, 2002. The trial judgment has June 21, 2002. The trial judgment along with other official documents have April 28, 2002 as the date Yang was taken into custody (in Kunming), but he was deprived of his freedom of movement on April 26, 2002.

[FN132]. It was not until March 2003, when the Chinese government provided a response to the UN Working Group on Arbitrary Detention (UNWGAD) regarding a petition that was submitted on Yang's behalf that the basis for his detention (*i.e.*, suspected violation of Article 322) was known with certainty. Letter from Miguel de la Lama, Sec'y Working Group on Arbitrary Detention, to Jared Genser, Pres. of Freedom Now (Mar. 25, 2003) (attaching the Chinese government's response) (on file with the author).

[FN133]. CPL, *supra* note 56, art. 124.

[FN134]. Trial Judgment, *supra* note 4, at 3.

[FN135]. Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101; *see also* *An Interview with Fu Xiang*, *supra* note 10, at 38; *A Different Kind of Life*, *supra* note 1, at 58.

[FN136]. Statement before the CECC, *supra* note 2.

[FN137]. CPL, *supra* note 56, art. 127 (emphasis added).

[FN138]. Article 322 of China's Criminal Law provides for a maximum penalty of one-year imprisonment, if the circumstances of the illegal border crossing are “serious.” CL, *supra* note 47.

[FN139]. *See* Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101; *see also* Email from Christina Fu to author (Mar. 31, 2008) (on file with author).

[FN140]. *See* Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN141]. Yang Jianli Interview, *supra* note 3; Telephone Interview with Christina Fu (May 19, 2005), *supra* note 99.

[FN142]. Yang Jianli Interview, *supra* note 3.

[FN143]. Letter from James A. Kelly, Asst. Sec'y, Bureau of East Asian and Pacific Affairs, U.S. Department of State, to Jared Genser, Pres. of Freedom Now (Apr. 15, 2003) [hereinafter Kelly Letter] (on file with author).

[FN144]. HECHT, *supra* note 7, at 33 (observing that the 1996 CPL does not provide a suspect or defendant with the right of *habeas* to contest the lawfulness of his or her detention).

[FN145]. *Trial of Injustice*, *supra* note 51.

[FN146]. *See* Cohen, *supra* note 38, at 235.

[FN147]. *See* Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN148]. *Trial of Injustice*, *supra* note 51. U.S. Embassy officials in Beijing were told on January 15, 2003 that Yang might be charged with espionage. *See* Kelly Letter, *supra* note 143.

[FN149]. Lolita C. Baldor, *Activist Jailed in China Confirmed Alive*, ASSOC. PRESS, July 8, 2003, available at http://www.yangjianli.com/news/AP/20030708_en.htm. Fu expressed relief that he was alive, and comfort that “now through his lawyer we can continue to communicate with him.” *Id.*

[FN150]. *See* Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN151]. *Id.*; *see* Simon W. Vozick-Levinson, *Jailed Chinese Dissident Sees Lawyer for First Time*, HARVARD CRIMSON, July 11, 2003, available at <http://www.thecrimson.com/article.aspx?ref=348520>.

[FN152]. Yang Jianli Interview, *supra* note 3.

[FN153]. *Id.*

[FN154]. *Id.*; *see also* Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN155]. *Id.*

[FN156]. Yang Jianli Remarks at Aug. 21, 2007 Press Conference, *supra* note 5.

[FN157]. CL, *supra* note 47, art. 322.

[FN158]. *See* Indictment, *supra* note 3; *see also* *Trial of Injustice*, *supra* note 51.

[FN159]. *See* DONALD CLARKE, WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW 44-45 & n.119 (Lawyer's Comm. for Human Rights ed., 1998) (observing that one of the reasons behind the replacement of counterrevolutionary crimes with “crimes of endangering state security” was the procedural difficulty courts experienced in handling the requirement of a subjective counterrevolutionary purpose). The recategorization of these crimes was not intended to result in any substantive change. *Id.* at 43. *See also* Human Rights Watch/Asia, *Whose Security? “State Security” in CHINA'S NEW CRIMINAL CODE* 8-10 (vol. 9, no. 4 (C) 1997), [hereinafter *Whose Security?*], available at <http://www.hrw.org/reports/1997/china5/>.

[FN160]. Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101. Yang was aware that he had been charged with a counterrevolutionary crime. To be sure, introducing counterrevolution into the mix would have further politicized and complicated the resolution of Yang's case. At the same time the Party-state was pursuing Yang for espionage (without identifying the crime as counterrevolutionary espionage), it was engaged in discussions with the U.S. government and The Dui Hua Foundation regarding possible sentence reductions for approximately five

hundred prisoners who were still serving time for counterrevolutionary crimes under the 1979 law. *See, e.g.*, DUI HUA FOUND. ANN, REP. 13 (2003) (describing the beginning of a dialogue in February 2003 with the Supreme People's Court on parole and sentence reductions for individuals convicted of counter-revolutionary crimes) (on file with author); Congressional-Executive Commission on China, Ann. Rep. 36 (2007), *available at* <http://www.cecc.gov/> (on menu on left side of page, follow "Publications;" then follow "Annual Reports;" then follow "2007 Annual Reports") (noting that the Chinese central government had pledged to "provide relief" to those imprisoned for political acts that were no longer crimes).

[FN161]. *Whose Security?*, *supra* note 159, at 19.

[FN162]. *Trial of Injustice*, *supra* note 51.

[FN163]. It is unclear what legal force, if any, "neimu" has. The term does not appear in the "state secrets" legal framework. *See* HUMAN RIGHTS IN CHINA, STATE SECRETS: CHINA'S LEGAL LABYRINTH 9 (2007) [hereinafter HRIC STATE SECRETS] (noting the categories of classification of information under the state secrets system, which include "neibu" (internal) and work secrets (of an organization or work unit), but not "neimu").

[FN164]. Targeting his family members and a high school friend does not exactly square with the "making a wide circle of friends" allegation.

[FN165]. The Indictment is dated July 14, 2003. Some media apparently took July 17 as the date of indictment. *See, e.g.*, Lolita C. Baldor, *Boston activist to be tried in China*, ASSOC. PRESS, July 29, 2003, *available at* http://www.yangjianli.com/news/AP20030729_en.htm. The Trial Judgment states that the procuratorate initiated prosecution in the court on July 16, 2003. *See* Trial Judgment, *supra* note 4, at 1.

[FN166]. *Trial of Injustice*, *supra* note 51. A copy of Gong Benqin's application form was received from Freedom Now (on file with author).

[FN167]. Article 141 of the CPL provides that when a procuratorate considers that the facts of a suspect's crime have been ascertained and the evidence is reliable and sufficient, it shall initiate a public prosecution in a People's Court. *See* Trial Judgment, *supra* note 4, at 1.

[FN168]. Suisheng Zhao, *Toward a Rule of Law Regime: Political Reform under China's Fourth Generation of Leadership*, in DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION 230, 241-43 (Suizheng Zhao ed., 2006).

[FN169]. Ching Kwan Lee, *Rights Activism in China*, in CONTEXTS 14, 15 (vol. 7, no. 3, 2008).

[FN170]. *Id.* at 14 (describing examples of labor rights activism, property rights activism, and rural land rights activism); *see also* *Interview with Teng Biao*, *supra* note 29 at 87, 88.

[FN171]. *See, e.g.*, Pils, *supra* note 34, at 1226-27; Hand, *supra* note 19, at 160-61; *Interview with Teng Biao*, *supra* note 30, at 87, 89; George J. Gilboy and Benjamin L. Read, *Political and Social Reform in China: Alive and Walking*, in WASHINGTON QUARTERLY 143, 150-51, 156 (Summer 2008); Fu & Cullen, *supra* note 30, at 12; Benjamin Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 87-89 (2005); Dingjian Cai, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 COLUM. J. ASIAN L., 1, 27 (2005) (discussing the crucial role played by media and public opinion in the

development of constitutionalism in China).

[FN172]. Fu & Cullen, *supra* note 29, at 12.

[FN173]. *Id.* at 13.

[FN174]. *Id.*

[FN175]. The Chinese expression is “*shenzhe bu pan, panzhe bu shen.*” *China Needs More Human Rights Lawyers*, *supra* note 28.

[FN176]. Each court has an adjudication committee (*shenpan weiyuanhui*). They are comprised of the president of the court, vice presidents, department chiefs, and senior judges. One of its primary responsibilities is to decide “major” or “complicated” cases (*zhongda yinan anjian*). CHINA'S LONG MARCH, *supra* note 7, at 284; EMPTY PROMISES, *supra* note 6, at 16-19.

[FN177]. Interview with Expert (2008), *supra* note 43; Political-Legal Committees are responsible for coordinating and implementing the Party's legal policy, and are authorized to intervene in pending cases. *See* Liebman, *supra* note 171, at 66-67; Ping Yu, *supra* note 38, at 864.

[FN178]. Interview with Expert (2008), *supra* note 43.

[FN179]. *Id.*; *see also* EMPTY PROMISES, *supra* note 6, at 95 (“[C]ases involving dissidents are usually decided by the local or central Party leadership.”).

[FN180]. Interview with Expert (2008), *supra* note 43; Jerome A. Cohen & Jared Genser, Op-Ed., *Waiting on China*, WASH. POST, Apr. 26, 2004 (describing “political-legal gridlock” resulting from disagreement of party leaders regarding the outcome of Yang's case) [hereinafter *Waiting on China*].

[FN181]. In mid-2008, China overtook the United States to become the world's leader in the number of Internet users--an estimated 253 million. Ninety million new Internet users came online during the past year. *See* David Barboza, *China Surpasses U.S. in Number of Internet Users*, N.Y. TIMES, July 26, 2008, available at <http://www.nytimes.com/2008/07/26/business/worldbusiness/26internet.html>.

[FN182]. *Dissident reported missing after campaign to free US-based democracy activist*, ASSOC. PRESS, July 10, 2002; *see also* GOLDMAN, *supra* note 22, at 176; Cai Jiquan, *Prisoner Profile: Zhao Changqing*, CHINA RTS. F. No. 2 2003, at 105, available at <http://hrichina.org/public/PDFs/CRF.2.2003/pprofile2.2003.pdf>. Zhao resurfaced and subsequently wrote an open letter to the Party Congress in early November 2002 (for which he gathered 192 signatures), which listed six political demands, including a reassessment of the 1989 democracy movement and the right of political exiles to return to China. Zhao was charged and convicted of incitement to subvert state power under article 105 of the Criminal Law and sentenced to five years imprisonment. Human Rights in China, *Dissident Zhao Changqing Abused in Prison* (Feb. 8, 2006), http://www.hrichina.org/public/contents/press?print=t&revision_id=27107&item_id=27103.

[FN183]. *See* Fu & Cullen, *supra* note 29, at 13.

[FN184]. Genser and Yang were classmates at the Kennedy School. In 1997, they went on a hunger strike to protest Jiang Zemin's visit to Harvard. Yang inspired Genser to become a human rights lawyer and establish his

own NGO, whose mission is to work for the release of prisoners of conscience through legal, political and public relations advocacy. See Michael D. Goldhaber, *A Friend in Need: A DLA Piper associate's human rights organization helps free a Chinese dissident*, AM. LAWYER, Oct. 2007, at 89, 90. These strategies for attempting to obtain the release of political prisoners in China were, of course, not unique to Yang's case. For example, The Dui Hua Foundation, which advocates on behalf of prisoners of conscience in China, observes in its mission statement that one of the principal hypotheses behind its work is that: "frequent intervention on behalf of prisoners encourages leniency and better treatment, and may result in reductions of sentences and early releases." *Dui Hua: Our Mission*, <http://www.duihua.org/mission/mission.htm> (last visited Nov. 15, 2008).

[FN185]. Accounts of the extensive efforts of Fu and Genser, and the numerous letters sent by members of Congress to the Chinese government expressing concern about the *incommunicado* detention of Yang, as well as media reports about efforts made by the Bush administration, other foreign governments, and human rights organizations on behalf of Yang, are available on the websites of Yang Jianli and Freedom Now. See *Yang Jianli Homepage*, <http://www.yangjianli.com> (last visited Nov. 15, 2008); *Freedom Now*, <http://www.freedom-now.org> (last visited Nov. 15, 2008).

[FN186]. The Ministry of Foreign Affairs (MFA) needed information from the prison authorities in order to respond to questions from the U.S. Embassy in Beijing, members of Congress, State Department officials in Washington, as well as the media during its press briefings. See Kelly Letter, *supra* note 143 (which recounts that the MFA had informed them that Yang had been "treated well" in detention).

[FN187]. *A Different Kind of Life*, *supra* note 2, at 63; Interview with Expert (2008), *supra* note 43 (observing that state and Party actors are concerned about doing something wrong, which then becomes public, and for which they will then be disciplined). The expert also noted that Mo Shaoping's access to western media provided a check on the *gongjianfa* and made them behave well.

[FN188]. *A Different Kind of Life*, *supra* note 1, at 63.

[FN189]. Kelly Letter, *supra* note 143.

[FN190]. Letter from Lawrence H. Summers, Pres. Harv. U., to Hon. Yang Jiechi, Chinese Ambassador to U.S. (Oct. 19, 2002), available at <http://www.yangjianli.com/appeals/1019092-1.pdf>. Members of Congress also wrote letters to State Department officials asking them to raise Yang's case with the Chinese government. See, e.g., Letter from Reps. Barney Frank, Christopher Cox, Michael E. Capuano, and Chris Smith, U.S. Reps., to Lorne W. Craner, Asst. Sec'y State for Bureau of Democracy, Human Rights, and Labor (Dec. 11, 2002), available at <http://www.freedom-now.org/letters/121102-1.pdf>.

[FN191]. The decision was adopted on May 7, 2003 (which is when China and Freedom Now learned of the outcome), but not issued publicly until June 3, 2003. Human Rights in China (HRIC) also submitted a petition to the UN Working Group on Arbitrary Detention on behalf of Yang Jianli, see Human Rights in China, *Bulletin*, CHINA RTS. F. No. 1 2004, at 85 (noting the UNWGAD's decision that Yang's detention was arbitrary under international law).

[FN192]. See Letter from Miguel de la Lama, Sec'y, U.N. High Comm'r for Hum. Rts. to Jared Genser, Pres. of Freedom Now (June 3, 2003) (attaching Opinion No. 2/2003 (People's Republic of China) of the UN Working Group on Arbitrary Detention [UNWGAD], ¶¶ 10-11), available at <http://www.freedom-now.org/pdfs/WorkingGroupOpinion.pdf>. The UNWGAD found that the Chinese govern-

ment's actions with respect to Yang Jianli, including illegally prolonged detention and lack of access to counsel, "constitute the infringement of the basic international norms relating to the right to a fair trial" and therefore his deprivation of liberty was "arbitrary."

[FN193]. Press Release, Freedom Now, U.S. House Unanimously Passes Resolution Demanding Release of Imprisoned Chinese Activist Yang Jianli, (June 25, 2003) (on file with author).

[FN194]. *Id.*

[FN195]. *See, e.g.*, Lolita C. Baldor, *U.N. Committee Blast's Activist's Jailing*, ASSOC. PRESS, June 4, 2003 (reporting that Yang's wife was told by National Security Advisor Condoleeza Rice that the Administration had pressed "high level" Chinese government officials on Yang's case), *available at* <http://www.freedom-now.org/pdfs/AP.pdf>; Letter from Martin Callanan, Member of the European Parliament, to Hu Jintao, Pres. of the P.R.C. (June 11, 2003); Letter from Lennart Sacredeus, Member of the European Parliament, to Hu Jintao, Pres. of the P.R.C. (June 12, 2003); Letter from Roger Helmer Member of European Parliament, to Hu Jintao, Pres. of the P.R.C. (June 13, 2003), *available at* <http://www.freedom-now.org/documents/EuropeanParliament.pdf>.

[FN196]. *See* Press Release, Freedom Now, *supra* note 194.

[FN197]. H.R. 199, 108th Cong. (2003), *available at* <http://www.freedom-now.org/pdfs/HRES199.pdf>.

[FN198]. S. Res. 184, 108th Cong. (2003), *available at* <http://www.freedom-now.org/pdfs/SRES184.pdf>.

[FN199]. *Not Unnecessary Words*, *supra* note 66.

[FN200]. *Id.*; *see also* Yang Jianli, *My Statement on Not Seeking an Appeal*, May 18, 2004 [hereinafter *No Appeal Statement*], http://www.yangjianli.com/articles/yangjianli20040518_en.htm.

[FN201]. *US Officials Denied Access to Dissident Yang Jianli's Spy Trial in China*, AGENCE FRANCE PRESSE, Aug. 2, 2003, *available at* http://www.yangjianli.com/news/AFP30030802_en.htm; *see also* CPL, *supra* note 56, art. 152 (providing that all cases shall be heard in public, except those cases involving "state secrets" or "private affairs of individuals").

[FN202]. *See* Consular Convention Between the U.S. and the P.R.C. art. 35(5), Jan. 17, 1981, 33 U.S.T. 2973 (provides that "a consular officer shall be permitted to attend the trial or other legal proceedings" involving its citizens in the foreign country) (emphasis added).

[FN203]. *Beijing tries dissident on spurious spying charge*, AGENCE FRANCE PRESSE, Aug. 5, 2003, at 1, *available at* www.yangjianli.com/news/taipeitimes20030805_en.htm.

[FN204]. Lolita C. Baldor, *China Bars U.S. From Activist's Trial*, ASSOC. PRESS, Aug. 1, 2003, *available at* <http://www.nytimes.com/aponline/international/AP-Chinese-Activist.html>.

[FN205]. *Espionage trial of US-based dissident Yang Jianli opens in Beijing*, AGENCE FRANCE PRESSE, Aug. 4, 2003, *available at* http://www.yangjianli.com/news/AFP20030803_en.htm. Most of the contemporaneous press reports cite Mo Shaoping as saying the trial lasted three hours. *See, e.g.*, Philip P. Pan, *Chinese Dissident Tried for Espionage: Court Adjourns Without Verdict*, WASH. POST, Aug. 4, 2003, *available at* <http://>

www.yangjianli.com/news/washingtonpost20030804_en.htm; Ray Cheung, *Three Hour Trial for Democracy Activist*, S. CHINA MORNING POST, Aug. 5, 2003; *Chinese activist on trial*, BBC NEWS, Aug. 4, 2003, available at <http://news.bbc.co.uk/2/hi/asia-pacific/3121733.stm>. However, Yang's recollection is that it took one or two hours. See Fu Email, March 30, 2008 14:47 EST, *supra* note 101.

[FN206]. See, e.g., Cheung, *supra* note 206; Tsai Ting-I, *Local Activists Decry Alleged Spy's PRC Trial*, TAIWAN NEWS, Aug. 5, 2003, available at http://www.yangjianli.com/news/eTaiwan/20030804_en.htm.

[FN207]. See Tsai Ting-I, *supra* note 206.

[FN208]. Cheung, *supra* note 205, at 5; see also Pan, *supra* note 205, at A8.

[FN209]. Pan, *supra* note 205, at A8.

[FN210]. Yang Jianli Interview, *supra* note 3.

[FN211]. *Id.*

[FN212]. *Id.*

[FN213]. *Id.*

[FN214]. *Id.*; see also Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN215]. Telephone Interview with Christina Fu (May 19, 2005), *supra* note 99. Yang's friend, Bao Xiansen, was reported to be the assistant to the president of some university in California, but Mo questioned the existence of such university. See also Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN216]. See Mo Shaoping, *Defense Statement*, Aug. 13, 2003 [hereinafter *Defense Statement*] (written statement translated by Freedom Now) (on file with author) It is unclear to what extent the final written submission differed from the statement Mo delivered in court.

[FN217]. Yang Jianli Interview, *supra* note 3.

[FN218]. See *Defense Statement*, *supra* note 216, at 6 (author's translation).

[FN219]. CL, *supra* note 47, art. 13. Article 13 provides (in relevant part): "if the circumstances [of the crime] are obviously minor and the harm is not serious, the act shall not be considered a crime." The Criminal Law provides no further guidance regarding standards for determining which circumstances are minor and what harm is not serious.

[FN220]. *Defense Statement*, *supra* note 216, at 8.

[FN221]. Article 23 of the rules provide: "Whoever holds forged or altered or otherwise invalid travel documents, or uses another person's documents to enter or leave the country shall be given a warning, or not more than five days in detention, in addition to confiscation of the identification document." Zhonghua Renmin Gongheguo gongmin chujing rujing guanli fa shishi zize [Detailed Implementing Rules for the P.R.C. Law on the Control of the Exit and Entry of Citizens] (promulgated by the Ministry of Transportation, Ministry of Public Security, and Ministry of Foreign Affairs, July 15, 1994, effective same date).

[FN222]. The 1979 Criminal Law, article 97 (3) provides:

Whoever commits any of the following acts of espionage or aiding an enemy is to be sentenced to not less than ten years of fixed-term imprisonment, or life imprisonment; when the circumstances are relatively minor, the sentence is to be not less than three years and not more than ten years of fixed-term imprisonment:

(1) Stealing, secretly gathering, or providing intelligence for an enemy;

(2) Supplying arms and ammunition or other military materials to an enemy; and

(3) Taking part in a secret service or espionage organization or accepting a mission assigned by an enemy.

Translation from *Whose Security?*, *supra* note 160, at 53.

[FN223]. See *Defense Statement*, *supra* note 216, at 1-2. Article 42 of the CPL sets forth seven categories of evidence: (1) material and documentary evidence (*wuzheng, shuzheng*), (2) testimony of witnesses, (3) statements of victims, (4) statements and exculpations of criminal suspects or defendants, (5) expert conclusions, (6) records of inquests and examination, and (7) audio-visual materials. See CPL, *supra* note 56, art. 42.

[FN224]. *Id.* at 5.

[FN225]. Article 46 of the CPL provides in relevant part: “In the decision of all cases, stress shall be laid on evidence, investigation and study; credence shall not be readily given to oral statements. A defendant cannot be found guilty and sentenced to a criminal punishment if there is only his statement but no evidence.” See CPL, *supra* note 56, art. 46.

[FN226]. Recall that the four individuals that were the basis for the allegation that Yang was “making a wide circle of friends” (recruits) as part of his “spying” activities were his brother, brother-in-law, father-in-law, and a high school friend.

[FN227]. *Defense Statement*, *supra* note 217, at 3.

[FN228]. *Id.*

[FN229]. EMPTY PROMISES, *supra* note 6, at 95. See CPL, *supra* note 56, art. 160 (providing that after the presentation of evidence and debate in a trial of first instance, and after the presiding judge has declared the conclusion of the debate, the defendant has the right to make a final statement).

[FN230]. *Not Unnecessary Words*, *supra* note 66.

[FN231]. *Id.*

[FN232]. Mo Shaoping also represented Yao Fuxin. Yao Fuxin and Mo were only permitted to meet five days before his trial. Mo's earlier requests to meet with Yao had all been rejected on “state secrets” grounds. See HRIC STATE SECRETS, *supra* note 163, at 27.

[FN233]. Yang Jianli Interview, *supra* note 3; see also Fu Email, Mar. 30, 2008, 14:57 EST, *supra* note 102.

[FN234]. Yang Jianli Interview, *supra* note 3 (stating that the chief judge announced “*xiuting*” and “*zeri xuanpan*”); *see also* *Waiting on China*, *supra* note 180.

[FN235]. CPL, *supra* note 56, art. 162.

[FN236]. Yang Jianli Interview, *supra* note 4; *Waiting on China*, *supra* note 180 (“After a half-day hearing, the three-judge panel announced that a decision would be issued in due course, and Yang was returned to his cell.”).

[FN237]. Pan, *supra* note 205.

[FN238]. CPL, *supra* note 56, art. 165(2).

[FN239]. The Organic Law of the People's Courts of the P.R.C. contains a vaguely worded provision that could be interpreted to authorize supplementary investigation after the conclusion of a trial. Article 15 provides: “If a people's court considers that the principal facts of a case in which a people's procuratorate has initiated a public prosecution are not clear and the evidence is insufficient, or there are illegalities in the prosecution, the court may remand the case to the people's procuratorate for supplementary investigation.” Organic Law of the People's Courts of the P.R.C., adopted on July 1, 1979, revised on September 2, 1983. (The Organic Law of the People's Courts was amended again in 2006 to address the restoration of death penalty review to the Supreme People's Court.) At the time of Yang's trial in 2003, if there existed a conflict between the 1996 Criminal Procedure Law (CPL) and the 1983 Organic Law of the People's Courts, the 1996 CPL would prevail as the more recent law. *See* Flora Sapio, “What happens if the Lawyers Law Conflicts with the Criminal Procedure Law?”, Aug. 17, 2008, http://florasapio.blogspot.com/2008_08_01_archive.html (discussing the NPC's Standing Committee's Legal Affairs Commission reply (*dafu*) to a proposal by He Yue, a member of the 11th National Committee of the Chinese People's Political Consultative Conference, regarding a conflict of laws question involving the CPL and the newly revised Lawyers Law).

[FN240]. CPL, *supra* note 57, art. 167.

[FN241]. *See* Xiong Qihong, *supra* note 67.

[FN242]. Yang Jianli, Some of My Thoughts (Dec. 26, 2003), http://www.yangjianli.com/articles/yangjianli20031226_en.htm. Note that the article was written before the court adjudication.

[FN243]. *See, e.g.*, O'BRIEN & LI, *supra* note 38, at 51 (discussing the importance of disaggregating the state and “recognizing that every regime has its own institutional structure and that agents of a government are not always principled agents”); ENGAGING THE LAW IN CHINA, *supra* note 37, at 3, 19 (suggesting the usefulness of approaching state power in China (as elsewhere) as fragmented rather than cohesive).

[FN244]. Yang Jianli Interview, *supra* note 3.

[FN245]. *Id.*; *see also* Interview with Expert (2008), *supra* note 43; CHINA'S LONG MARCH, *supra* note 8, at 189 (observing that “different entities have different interests and incentive structures”).

[FN246]. *Id.*; *see also* Interview with Expert (2008), *supra* note 43 (the delay in Yang's case can be explained by a lack of coordination among different ministries, departments and Party officials, and the likelihood that no one wanted to take responsibility for the ultimate decision).

[FN247]. Fax from Mo Shaoping to Christina Fu (Aug. 15, 2003) (on file with author). For a discussion of the practice of “seeking instructions” (*qingshi*), see Liebman, *supra* note 171, at 67-68; Liebman & Wu, *supra* note 8, at 288.

[FN248]. See Email from Christina Fu to author, (Oct. 16, 2003) (on file with author); Email from Christina Fu to author (Nov. 19, 2003).

[FN249]. CPL, *supra* note 56, art. 166 (stating that if the hearing of a case is postponed because the prosecutors have proposed (during a trial) that supplementary investigation is needed under article 165, the procuratorate has one month to complete the investigation).

[FN250]. An expert on Chinese criminal law stated in an interview that a request by the procuratorate for supplementary investigation after the conclusion of the courtroom hearing is not permissible under Chinese law. Interview with Expert (2004).

[FN251]. Zuigao renmin fayuan guanyu zhixing Zhonghua Renmin Gongheguo Xingshi Susongfa ruogan wenti de jieshi, [Supreme People's Court (SPC) Interpretation of Several Issues Regarding Implementation of the Criminal Procedure Law] (promulgated by the SPC, Sept. 2, 1998, effective date Sept. 8, 1998) art. 157, sec. 1 (P.R.C.).

[FN252]. See CPL, *supra* note 56, art. 168.

[FN253]. See Email from Christina Fu to author, (Oct. 22, 2003) (on file with author) (stating that Fu learned that the prosecutors had used up their two months around mid-October).

[FN254]. *Id.*

[FN255]. See *Waiting on China*, *supra* note 180; see also Email from Christina Fu to author, (Oct. 22, 2003), *supra* note 253; *Rights Group: Beijing Court Cancels Session in Case Against US-Based Dissident*, AGENCE FRANCE PRESSE, Nov. 22, 2003.

[FN256]. Email from Christina Fu to author (Oct. 22, 2003), *supra* note 253.

[FN257]. Email from Christina Fu to author (Nov. 11, 2003) (on file with author).

[FN258]. Email from Christina Fu to author (Nov. 20, 2003) (on file with author).

[FN259]. Telephone interview with Christina Fu (May 19, 2005), *supra* note 99.

[FN260]. Email from Christina Fu to author (Mar. 30, 2008, 12:56 EST) (on file with author).

[FN261]. Email from Christina Fu to author, (Nov. 20, 2003).

[FN262]. *Id.*; see *Dissident still awaiting sentence in China*, ABC RADIO AUSTRALIA NEWS, Nov. 23, 2003, http://www.yangjianli.com/news/ra20031122_en.htm (court cancelled hearing “in which it was due to contemplate new evidence” against Yang).

[FN263]. Yang Jianli Interview, *supra* note 3.

[FN264]. Email from Christina Fu to author (Apr. 23, 2008) (on file with author).

[FN265]. Email from Jared Genser, Freedom Now, Update on Dr. Yang Jianli (Dec. 10, 2003) (on file with author); see Lolita C. Baldor, *Bush Pressed on Activist Jailed in China*, ASSOC. PRESS, Dec. 8, 2003.

[FN266]. See Letter from William P. Alford *et al.*, Harvard Law School Faculty, to Premier Wen Jiabao (Dec. 8, 2003), available at <http://www.freedom-now.org/documents/HarvardLaw.pdf>.

[FN267]. May Habib, *Dissident's Wife Avoids Premier's Speech*, HARVARD CRIMSON, Dec. 15, 2003, available at http://www.yangjianli.com/news/Crimson20031215_en.htm (quoting Christina Fu).

[FN268]. *Id.* Summers also raised Yang's case with Chinese officials during his trip to China in 2002. *Id.*

[FN269]. See Jared Stearns, *Dissident's wife seeks to raise his case: Harvard graduate detained by China in passport case*, BOSTON GLOBE, Dec. 10, 2003, available at http://www.yangjianli.com/news/Globe20031210_en.htm; Letter from William P. Alford, *supra* note 267. The letters stated:

As you know, Harvard University has enjoyed deep and long-standing ties with the People's Republic of China. Many of your citizens are graduates of Harvard, and a great number of Chinese students are studying here at the moment. In addition, Harvard has numerous ongoing programs and exchanges with Chinese universities and your government. It is in this spirit of cooperation that we ask your government, as a humanitarian gesture, to do everything in its power to facilitate Dr. Yang's immediate release, so he can return home to his family and his work in the United States. Such an action will also help ensure that Dr. Yang's detention does not interfere with our strong partnership, which we hope will continue to flourish in the years to come.

See also Letter from Joseph S. Nye, Jr. et al, Faculty of the Kennedy School of Government and Harvard Medical School, to Premier Wen Jiabao (Dec. 10, 2003), available at <http://www.freedom-now.org.documents/KennedySchool.pdf>.

[FN270]. Letter from Yang Jiechi, P.R.C. Ambassador to the U.S., to Barbara McNeil, Professor at Harvard Medical School (Jan. 28, 2004) (on file with the author).

[FN271]. See Mo Shaoping Report on Yang Jianli's Case to the Supreme People's Procuratorate and the NPC Standing Committee (Apr. 19, 2004) (on file with the author). The process by which the procuratorate decided upon December 1 as the date on which Yang's illegally prolonged detention began is unclear. In any event, the office's statement is an official recognition of the fact he was being illegally detained. See also *Waiting on China*, *supra* note 181. Confusion over the date on which Yang's illegal detention began is reflected in Western media reports on the case as well; December 18, 2003 is the commonly cited date. See Elaine Kurtenbach, *U.S. officials await response from China on protest over jailed activist*, ASSOC. PRESS, Apr. 27, 2004, available at http://www.yangjianli.com/news/AP20040427_en.htm.

[FN272]. *No Appeal Statement*, *supra* note 200.

[FN273]. See, e.g., *Putting the Curb on Illegal Custody*, CHINA DAILY, Nov. 25, 2003, available at http://www.chinadaily.com.cn/en/doc/2003-11/25/content_284689.htm; Zhao Ling, *Chaoqi jiya jiushi feifa jujin*, [Extended Detention is Illegal Custody], QILU WANBAO [QILU EVENING NEWS], Nov. 4, 2003, available

at <http://dzwww.com/qiluwanbao/qilujinzhoumo/200307250865.htm>.

[FN274]. See “Articles on illegally prolonged detention and the rectification campaign,” available at <http://www.jrb.com/zyw/cqjygdtdb/index.htm> (last visited Dec. 8, 2003); see, e.g., Cai Ping, *Chaoji jiya jiu nian zhi jin reng wei shenjie; falu zhuanjia pinglun ban an guocheng*, [Illegally detained for over 9 years without a verdict; legal experts discuss the handling of the case], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Aug. 13, 2003, available at <http://www.jrb.com/zyw/n189/cal07940.htm> (noting that the delay in this case was caused by a lack of evidence and an unwillingness to let the defendants go--the Hebei provincial high court remanded the case for retrial three times).

[FN275]. *Judiciary Sets Itself for Battle*, CHINA DAILY, Aug. 26, 2003, available at http://www.chinadaily.com.cn/en/doc/2003-08/26/content_258163.htm_.

[FN276]. Andrea Worden, *Illegally Prolonged Detention in China and the Case of Yang Jianli 1*, <http://www.wmd.org/documents/andreaworden.pdf> (last visited Apr. 27, 2008). Labor leader Yao Fuxin was also held in illegally prolonged detention after his trial. Yao was tried in mid-January of 2003, but a verdict was not issued until early May, 2003.

[FN277]. *Id.*

[FN278]. Mo Shaoping, Case Report to the Supreme People's Procuratorate (Jan. 18, 2004) (on file with author).

[FN279]. Article 75 of the CPL provides that if compulsory measures, including custodial detention, exceed the time limit prescribed by law, the defendant or lawyer has the right to demand cancellation of the compulsory measures. The court may release the defendant or order residential surveillance or “guarantor pending trial.”

[FN280]. Email from Christina Fu to Roger Lau (Feb. 6, 2004) (on file with author).

[FN281]. Email from Christina Fu to author (Feb. 25, 2004).

[FN282]. Family Petition Regarding the Illegally Prolonged Detention of Yang Jianli to the Standing Committee of the National People's Congress, Mar. 12, 2003, available at http://www.yangjianli.com/news/yjlcom20040312_en.htm (Chinese original available at <http://www.freedom-now.org/documents/ChinesePetition.pdf> (Mar. 12, 2004)).

[FN283]. *Id.*; see *China's Parliament Asked to Probe Scholar's Detention*, REUTERS, Mar. 13, 2004, http://www.yangjianli.com/news/Reuters200403313_en.htm.

[FN284]. Christopher Bodeen, *Lawyer: U.S.-Based Chinese Pro-Democracy Activist Plans Hunger Strike*, ASSOC. PRESS, Mar. 3, 2004, available at http://www.yangjianli.com/news/AP20040303_en.htm.

[FN285]. Letter from Jared Genser, Pres. of Freedom Now, to Hon. James A. Kelly, Asst. Sec'y of State for East Asian and Pacific Affairs, (Apr. 16, 2004) (on file with author).

[FN286]. Press Release, Freedom Now, *Members of Congress to Call for Yang Jianli's Release* (Apr. 20, 2004) (on file with author).

[FN287]. Email from Jared Genser, Pres. of Freedom Now, to author (Apr. 16, 2004) (attaching his letter to As-

sistant Secretary Kelly and Christina Fu's Summary of Conversation with Mo Shaoping) (on file with author). Yang had considered going on a hunger strike to protest his unlawful detention, but in the end, decided against it and opted to engage in a more mild form of protest.

[FN288]. See Christina Fu, *Summary of Conversation with Mo Shaoping* (Apr. 16, 2004) (“Throughout this time period, Jianli's lawyer had been calling to see about Jianli and was told that ‘everything was fine’ and Jianli did not want to see him.”)

[FN289]. Yang Jianli Interview, *supra* note 3; see *Summary of Conversation with Mo Shaoping*, *supra* note 289.

[FN290]. *Summary of Conversation with Mo Shaoping*, *supra* note 288.

[FN291]. Yang Jianli Interview, *supra* note 3.

[FN292]. *Id.* It appears that this visit and the encouraging words from the procuratorial official may have just been an effort to momentarily rein in Yang. China was gearing up for the 2004 Meeting of the UN Human Rights Commission set to begin in Geneva on March 15, and had released or reduced the sentences of several prisoners who were on the U.S.'s seven-name priority prisoner list in early March. See Philip P. Pan, *China Gives Political Prisoner Medical Parole*, WASH. POST, Mar. 4, 2004 (noting that the “unusual flurry of activity” suggests an effort to persuade the U.S. government not to pursue a resolution condemning China's human rights record during the upcoming meeting in Geneva), available at http://www.yangjianli.com/news/washingtonpost20040304_en.htm.

[FN293]. Ted Anthony, *Family of Democracy Activist Imprisoned in China Petitions for his Freedom*, ASSOC. PRESS, Mar. 13, 2004, available at http://www.yangjianli.com/news/AP20040313_en.htm.

[FN294]. *Id.* The two prisoners who were released were pro-democracy activist Wang Youcai and Tibetan nun Phuntsog Nyidron, Chinese officials also reduced the prison sentence for another high priority prisoner, Rebiya Kadeer, by one year.

[FN295]. The Dui Hua Foundation, *US-China Dialogue Stymied After Geneva, Abu Ghraib*, DIALOGUE, Summer 2004, at 1, 2, available at http://www.duihua.org/work/publications/n1/n1_pdf/n1_16_1.pdf.

[FN296]. *Id.*

[FN297]. Then-Assistant Secretary of State for Democracy, Human Rights and Labor, Lorne Craner stated that Yang's case was a top priority for the United States, but he did not know what effect the suspension of the U.S.-China human rights dialogue would have on his case. See *U.S.-China Dialogue Stymied After Geneva, Abu Ghraib*, *supra* note 295, at 1 (“April was a cruel month for US human rights diplomacy in China, dominated by the defeat of Washington's latest China resolution at the UN Human Rights Commission in Geneva and breaking news, in the month's waning days, of the abuse of Iraqi prisoners by American soldiers at Abu Ghraib Prison in Baghdad. Alleged abuse of political prisoners in Chinese prisons has long been a theme of American complaints against Beijing, and there was barely concealed glee in China's capital at the tables having turned so decisively against Washington”).

[FN298]. See, e.g., *Leading Chinese Dissident Yang Jianli gets Five Years for Spying*, AGENCE FRANCE PRESSE, May 13, 2004 (noting that Cheney raised Yang's case during his visit to China in April), available at http://www.yangjianli.com/news/AFP20040513_en.htm.

[FN299]. Then-Representative Christopher Cox was reported as wondering whether the Chinese government chose to announce the verdict at that time because of the intense focus in the United States on the Iraqi prisoner abuse scandal. *U.S. Lawmakers Condemn Sentencing of Leading Chinese Dissident*, AGENCE FRANCE PRESSE, May 13, 2004, available at http://www.yangjianli.com/news/AFP20040513b_en.htm.

[FN300]. Yang Jianli Interview, *supra* note 3.

[FN301]. *Id.*; Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN302]. Yang Jianli Interview, *supra* note 3.

[FN303]. *No Appeal Statement*, *supra* note 201.

[FN304]. *Id.*; Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN305]. *Leading Chinese Dissident Yang Jianli gets Five Years for Spying*, *supra* note 299.

[FN306]. CPL, *supra* note 56, art. 163 (“In all cases, judgments shall be pronounced publicly.”) There is no “state secrets” exception.

[FN307]. *No Appeal Statement*, *supra* note 200.

[FN308]. *Id.*

[FN309]. *Id.*

[FN310]. Yang Jianli Interview, *supra* note 3; Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN311]. Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 101.

[FN312]. *Id.*

[FN313]. Letter from Hon. Yang Jiechi, *supra* note 270.

[FN314]. *See, e.g.*, Cohen, *supra* note 38, at 241 (“Although the Supreme Court has instructed the courts to state the reasons for their judgments, their decisions are often cloaked in cursory generalities.”); Liebman & Wu, *supra* note 8, at 289 (observing that “China is officially a civil law system and does not formally recognize precedent as such”).

[FN315]. *See* Posting of Liu Nanping, liunanping@aim.com to CHINALAW @hermes.gwu.edu (March 21, 2008, 4:58 am) (referencing his article entitled *Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China*, which describes the “verbal acrobatics and legal fudging” in trial judgments as often a cover for corruption) (on file with author).

[FN316]. *See Waiting on China*, *supra* note 180 (“When leaders [the real decision makers in politically sensitive cases] disagree on the outcome of a controversial case, the hapless accused is simply forced to wait.”).

[FN317]. Trial Judgment, *supra* note 4, at 1.

[FN318]. *See* discussion *supra* pp. 494-97.

[FN319]. Indeed, if there were a Beijing local regulation authorizing such an extension, it would arguably be invalid as conflicting with national level laws and regulations governing the time limits for resolving court cases. Article 168 of the Criminal Procedure Law stipulates that a court has one and a half months to pronounce judgment on a case after accepting it. This period may be extended by one month upon approval of the Higher People's Court of the province or municipality. Yang was held in post-trial detention far longer than the time period permitted under the Criminal Procedure Law, even taking into account resetting the clock for the supplementary investigation. CPL, *supra* note 56, art. 168 (“As to a case for which a People's Procuratorate has to conduct supplementary investigation, the People's Court shall start to calculate anew the time line for handling the case after the supplementary investigation has been completed and the case has been transferred to it”).

[FN320]. Trial Judgment, *supra* note 4, at 2.

[FN321]. *Id.* at 3. In this discussion I use the term “court” loosely. A three-judge collegial panel issued the decision in the case, but they clearly were not the decision-makers.

[FN322]. *Id.* at 4.

[FN323]. *Id.* See CPL, *supra* note 56, art. 162 (1) (“If the facts of a case are clear, the evidence is reliable and sufficient (*shishi qingchu, zhengju qushi, chongfen*), and the defendant is found guilty in accordance with law, he shall be pronounced guilty accordingly”).

[FN324]. Trial Judgment, *supra* note 4, at 5.

[FN325]. *Id.* at 3.

[FN326]. *Id.*

[FN327]. *Id.* The four individuals were Fu Zhiyuan (Yang's father-in-law), Yang Jianxin (Yang's older brother), Liu Jiannong (a friend of Yang Jianli's from high school), and Gong Benqin (Yang's brother-in-law).

[FN328]. *Id.*

[FN329]. *Id.* at 3 The decision did not adopt the indictment's puzzling description of the documents as “*neimu cailiao*.”

[FN330]. See XINGSHI FALU SHIYONG XIN JIEXI [A NEW ANALYSIS OF THE APPLICATION OF THE CRIMINAL LAW] 28 (Wei Kejia ed., 2003) (noting that the subjective element of the crime of espionage is intent).

[FN331]. CL, *supra* note 47, art. 14.

[FN332]. ZHONGHUA RENMIN GONGHEGUO FALU ZHIDU [THE PRC LEGAL SYSTEM] 550 (Hu Honggao ed., Hong Kong, 1999).

[FN333]. Trial Judgment, *supra* note 4, at 3.

[FN334]. *Id.* at 4.

[FN335]. *Id.*

[FN336]. *Id.* at 4.

[FN337]. See Joseph Kahn, *U.S.-Based Activist gets 5-Year Sentence as a Spy in China*, N.Y. TIMES, May 13, 2004, available at http://www.yangjianli.com/news/NYT20040513_en.htm.

[FN338]. *Leading Chinese Dissident Yang Jianli gets Five Years for Spying*, *supra* note 298.

[FN339]. Mark Magnier, *China Sentences Prominent Dissident to 5 Years*, L.A. TIMES, May 13, 2004.

[FN340]. *Id.*

[FN341]. Magnier, *supra* note 339 (quoting Liu Jianchao).

[FN342]. Kahn, *supra* note 337.

[FN343]. May Habib, *Former Student Sentenced to Chinese Prison*, HARVARD CRIMSON, May 14, 2004, available at http://www.yangjianli.com/news/Crimson2004014_en.htm (quoting Steve Pike).

[FN344]. *US lawmakers Condemn Sentencing of Leading Chinese Dissident*, *supra* note 299.

[FN345]. Dan Robinson, *U.S. Lawmakers Criticize China for Jailing U.S.-Based Dissident*, VOANEWS.COM, May 13, 2004, available at http://www.yangjianli.com/news/VOA20040513b_en.htm.

[FN346]. *Taiwan Spy gets 5-year Jail Term*, XINHUANET, May 13, 2004 (on file with author).

[FN347]. *Chinese dissident refuses to appeal espionage sentence*, TAIPEI TIMES, May 26, 2004, at 5, available at <http://www.taipeitimes.com/News/world/archives/2004/05/26/2003157000>.

[FN348]. *Id.*

[FN349]. Yang Jianli Interview, *supra* note 3.

[FN350]. *Id.*

[FN351]. *Id.*

[FN352]. *No Appeal Statement*, *supra* note 200.

[FN353]. *Id.* (author's translation).

[FN354]. *Id.*

[FN355]. *Id.*

[FN356]. Yang Jianli Interview, *supra* note 3; Email from Christina Fu to author (Mar. 24, 2005) (on file with author).

[FN357]. Yang Jianli Interview, *supra* note 3.

[FN358]. *Id.*

[FN359]. See Letter from 85 Members of the House of Representatives to Hu Jintao, Pres. of the P.R.C. (Oct. 6, 2004), available at <http://www.freedom-now.org/documents/YJLHouse10-6-04.pdf>; Letter from 21 Senators to Hu Jintao, Pres. of the P.R.C. (Oct. 6, 2004), available at <http://www.freedom-now.org/documents/YJLSenate10-6-04.pdf>.

[FN360]. Letter from 63 Harv. Univ. Faculty to Hu Jintao, Pres. of the P.R.C. (Oct. 7, 2004), available at <http://www.freedom-now.org/documents/YangJianliHarvardLetter.pdf>.

[FN361]. Letter from Lawrence Summers, Pres. of Harv. Univ. to Hon. Yang Jiechi, P.R.C. Ambassador to the U.S. (Oct. 13, 2004), available at <http://www.freedom-now.org/documents/Summers10-13-04.pdf>.

[FN362]. Email from Jared Genser to author (Jan. 20, 2005) (on file with author).

[FN363]. Email from Christina Fu to SupportJianli@yahoo.com (Nov. 24, 2004); Email from Christina Fu to author (Nov. 15, 2004) (on file with author)

[FN364]. Yang Jianli Interview, *supra* note 3.

[FN365]. *Id.*

[FN366]. *Id.*

[FN367]. As of May 24, 2005, there were six separate visits by family members to Yang Jianli since he was transferred to Prison No. 2 in December 2004. See Christina Fu email to author (May 24, 2005) (on file with author).

[FN368]. Email from Christina Fu to author (Dec. 14, 2004) (on file with author). Yang learned on July 31, 2004 during a routine medical exam that he had suffered a stroke. See also Yang Jianli Interview, *supra* note 3. He did not know when the stroke had occurred. See Fu Email, Mar. 30, 2008, 14:47 EST, *supra* note 102. It was widely reported (inaccurately) that Yang's suffered a stroke on July 31, 2004.

[FN369]. Email from Christina Fu to author (Dec. 14, 2004).

[FN370]. Audra Ang, *Wife Meets with Boston-Based Dissident Husband Jailed in China*, ASSOC. PRESS, Jan. 20, 2005, available at http://www.yangjianli.com/news/AP20050120_en.htm.

[FN371]. *Id.*

[FN372]. *Id.*

[FN373]. *Id.*

[FN374]. *Id.*; see also Clinton, Kerry among Senators Urging China to Release Dissident, AGENCE FRANCE PRESSE, June 16, 2005, available at http://www.yangjianli.com/news/AFP20050616_en.htm.

[FN375]. Email from Han Shaohan to SupportJianli@yahoo.com (Jan. 27, 2005) (on file with author).

[FN376]. Ang, *supra* note 370.

[FN377]. Email from Christina Fu to author (May 24, 2005) (on file with author).

[FN378]. Natalie I. Sherman, *Yang Jianli Will Seek Medical Parole*, HARVARD CRIMSON, Dec. 16, 2004, available at <http://www.thecrimson.com/article.aspx?ref=505129>; Letter from Christina Fu to Hon. Condoleezza Rice, Sec'y of U.S. Dept. of State (Mar. 9, 2005) (on file with author).

[FN379]. Letter from Robert Goldberg, Acting Director, Office of Chinese and Mongolian Affairs, to Christina Fu (Mar. 14, 2005) (on file with author).

[FN380]. *Id.*

[FN381]. Letter from Hon. Clark T. Randt, Jr., U.S. Ambassador to the P.R.C., to Christina Fu (June 6, 2005) (on file with author).

[FN382]. *See, e.g.*, Letter from 40 U.S. Senators to Hu Jintao, Pres. of the P.R.C., available at http://www.freedom-now.org/documents/SenateLetter6-15--05_000.pdf; *Clinton, Kerry among Senators Urging China to Release Dissident*, *supra* note 374.

[FN383]. Email from Christina Fu to author (May 24, 2005).

[FN384]. Letter from Mo Shaoping's Law Firm to Beijing Judicial Bureau Lawyers' Administration Section (Mar. 29, 2005) (translation provided by Christina Fu) (on file with author).

[FN385]. *Id.*

[FN386]. *Id.*

[FN387]. Letter from Hon. Clark T. Randt, U.S. Ambassador to the P.R.C., to Christina Fu (Dec. 14, 2005) (on file with author).

[FN388]. Yang Jianli Interview, *supra* note 3.

[FN389]. Letter from Ambassador Randt to Fu, *supra* note 387.

[FN390]. *Nowak Report on Mission to China*, *supra* note 50.

[FN391]. Yang Jianli Interview, *supra* note 3.

[FN392]. *See* Letter from 119 Members of Congress to George W. Bush, Pres. of the United States (Apr. 10, 2006), available at http://www.freedom-now.org/documents/Bush4-10-06_000.pdf.

[FN393]. Bill Nichols, *China Prisoners' Supporters Look to Bush*, USA TODAY, Apr. 17, 2006, available at http://www.yangjianli.com/news/USAToday20060417_en.htm.

[FN394]. *Zhuming yi yi renshi Yang Jianli fan Mei, Jieshou bentai jizhe caifang* [*Famous Dissident Yang Jianli Returns to the U.S.: Interview with RFA*], RADIO FREE ASIA (Chinese), Aug. 20, 2007 [hereinafter RFA Interview], <http://www.rfa.org/mandarin/shenrubao/2007/08/20/yangjianli/>.

[FN395]. Goldhaber, *supra* note 184, at 90; RFA Interview, *supra* note 394.

[FN396]. RFA Interview, *supra* note 394.

[FN397]. Yang Jianli, Free Border Crossing as a Condition for Boycotting, Opening Statement at Amnesty International Northeast Regional Conference, Oct. 27, 2007, available at <http://www.yangjianli.com/articles/A110272007.htm>; see RFA Interview, *supra* note 394.

[FN398]. Philip Weiss, *A Rebel's Road Home*, 02138, Nov.-Dec. 2007, at 49, available at <http://www.02138mag.com/magazine/article/1755.html>.

[FN399]. *Id.*

[FN400]. See Nora Boustany, *Dissident Returns After Long Struggle*, WASH. POST, Aug. 21, 2007, at A08; see also Rep. Barney Frank, Remarks at Press Conference Announcing Yang Jianli's Return to the United States (Aug. 21, 2007) [hereinafter Frank Press Conference Remarks] (notes on file with author). Vice-Premier Wu Yi retired in March 2008.

[FN401]. Frank Press Conference Remarks, *supra* note 400.

[FN402]. Benjamin Kang Lim, *China Lets Dissident Go in Nod to Paulson*, REUTERS, Aug. 21, 2007.

[FN403]. Frank Press Conference Remarks, *supra* note 400.

[FN404]. For Dui Hua's insightful analysis of the Chinese government's restrictions on travel of its own citizens, see *Welcome Return for Chinese Dissident, Others Not Free to Travel*, DUI HUA NEWS, Aug. 27, 2007, available at http://www.duihua.org/dhf_news.htm.

[FN405]. See *id.*; see also Huzhao fa [Passport Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr.29, 2006, effective Jan.1, 2007), art. 13, sec. 4 (P.R.C.) CHINACOURT.ORG (last visited Apr. 20, 2008) (P.R.C.)

[FN406]. See, e.g., Citizen Monthly Interview, *supra* note 27; *Nowak Report on Mission to China*, *supra* note 50, at 2 (summary) and ¶ 54 (finding that lengthy periods of pretrial detention without judicial involvement, absence of the right to remain silent, lack of a bail system and habeas corpus, and lack of timely access to counsel, etc. contribute to the ongoing problem of torture in China).

[FN407]. See *Nowak Report on Mission to China*, *supra* note 50, at ¶ 27.

[FN408]. Frank Press Conference Remarks, *supra* note 401. SEC Commissioner Christopher Cox, who had been active in seeking Yang's release while he was a member of the House of Representatives, similarly remarked at the press conference that he was saddened that the United States' efforts had not led to Yang's early departure from prison.

[FN409]. Yang Jianli Interview, *supra* note 3.

[FN410]. The case of Jude Shao also illustrates this point. Shao, a naturalized U.S. citizen with an M.B.A. from Stanford, reportedly refused to pay a bribe while he was doing business in Shanghai and ended up getting convicted of tax evasion and sentenced to sixteen years in prison. He served ten years of his sentence before obtaining parole in July 2008. There were many individuals, including Shao's Stanford classmates, members of Con-

gress, Foreign Service officers and State Department officials, John Kamm of The Dui Hua Foundation, and Prof. Jerome Cohen, who have worked tirelessly to secure Shao's release since 2003, when the "Free Jude Shao Campaign" was launched by his Stanford classmates. *See* Free Jude Shao, www.freejudeshao.com (last visited Dec. 18, 2008).

[FN411]. Lushi fa [Law on Lawyers] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008) (P.R.C.).

[FN412]. *See, e.g., Long View, supra* note 25, at 79. Teng Biao, a prominent rights defense lawyer whose lawyer's license was revoked in the summer of 2008 because of his offer of free legal representation to Tibetans detained after the March protests in Tibet, stated in the fall of 2007, "[i]t is only with a separation of powers and an independent judiciary that human rights can be reliably guaranteed, and thereby human rights issues in China thoroughly solved. We risk life and limb through our involvement in the rights defense activities in order to bring into being a true legal system in China." *Interview with Teng Biao, supra* note 29, at 87, 91.

[FN413]. *Charter 08*, NEW YORK REVIEW OF BOOKS, Jan. 15, 2009 (translated by Perry Link), *available at* <http://www.nybooks.com/articles/22210>.

[FN414]. Over 200 Czech and Slovak citizens, including Vaclav Havel, launched Charter 77 in January 1977 as a loose group of individuals who shared a common goal of the realization of human rights and civil rights. *See id.*; Vaclav Havel, *China's Human-Rights Activists Need Support*, WALL ST. J., Dec. 19, 2008, *available at* <http://online.wsj.com/article/SB122964944665820499.html>.

[FN415]. *Charter 08, supra* note 413.

[FN416]. *Charter 08, supra* note 413.

[FN417]. *See supra* note 24 and accompanying text.

[FN418]. *Writer Held After Charter 08'*, RADIO FREE ASIA, Dec. 14, 2008, *available at* <http://www.rfa.org/english/news/china/charter08-12122008082843.html>.

[FN419]. Sean McCormack, Spokesman of the U.S. Department of State, Press Statement: Harassment of Chinese Signatories to Charter 08, No. 2008/1033, Dec. 11, 2008, *available at* <http://www.state.gov/r/pa/prs/ps/2008/dec/113124.htm>.

[FN420]. Vivian Wu, *European Parliament Hails Mainland Dissident*, S. CHINA MORNING POST, Dec. 18, 2008.

[FN421]. *See, e.g., Beijing Rejects U.S. Call to Release Activist*, MACAU DAILY TIMES, Dec. 17, 2008, *available at* http://www.macaudailytimesnews.com/index.php?option=com_content&task=view&id=20549&Itemid=31; Wu, *European Parliament Hails Mainland Dissident, supra* note 420.

[FN422]. *China's Charter* (Editorial), WASH. POST, Dec. 17, 2008, at A16, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/16/AR2008121602476_pf.html. December 10, 2008 was the sixtieth anniversary of the adoption of the Universal Declaration of Human Rights, and International Human Rights Day is celebrated on December 10 every year.

[FN423]. *Charter 08: Official List of Second Group of Signatories (440 People)* [*“Ling ba xianzhang” di er pi qianming ren zhengshi mingdan (440 ren)*], BOXUN, Dec. 11, 2008, available at <http://www.peacehall.com/news/gb/china/2008/12/200812111257.shtml>. As of December 14, more than 2,500 Chinese living in China and abroad had signed the Charter. See *Charter 08: Signatories Already Have Reached 2500 Individuals; Official List of Fourth Group of Signatories (1231 People)* [*“Ling ba xiangzhang” qianshuzhe yi da 2500 ren, di si pi qianming ren zhengshi mingdan (gong 1231 ren)*], BOXUN, Dec. 14, 2008, available at <http://www.peacehall.com/news/gb/china/2008/12/200812140812.shtml>.

[FN424]. Yang Jianli, *Liberation of the Soul--Further Thoughts on the Significance of Charter 08* [*Xinling de jiefang--zai tan “lingba xianzhang” de yiyi*], BOXUN, Dec. 18, 2008, available at <http://news.boxun.com/news/gb/pubvp/2008/12/200812182346.shtml>.

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