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## A PRACTITIONER'S VIEW OF CHINESE LEGAL DEVELOPMENTS

### KEYNOTE ADDRESS<sup>†</sup>

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I have had conversations over the years with my good friend and former Freeborn & Peters lawyer, Spencer Waller, about the importance of China, and I am glad to see that there are now serious discussions about the very important legal developments that are taking place in the lives of 1.3 billion Chinese people. I know that you have taken a look at intellectual property, corporate, health, and human rights issues for the past several hours, and I am honored to have been asked to give a somewhat broader perspective.

I've also been asked to give you some biographical information and a personal perspective, and tell you about my work as co-chairman of the Sister Cities China Committee and some of the things that are happening here in Chicago, which are drawing us into an ever closer relationship with the People's Republic of China.

I graduated from Northwestern University as an undergrad in the 1960s and Loyola University Chicago School of Law in 1971. Those were times of protest and the emergence of student rights. I was President of the Student Bar Association, and when students were shot by the National Guard at Kent State we persuaded the administration to shut down the law school for a day so that we could have teach-ins by the professors on civil rights and free speech issues. I clerked for Judge Robert English on the Illinois Appellate Court, and then went to work for the firm Pope & Ballard. Later, I spent eight years at the U.S. Attorneys Office, a year at Isham, Lincoln & Beale, and have been at Freeborn & Peters ever since. I am currently the head of the China Practice Group at Freeborn & Peters.

My wife and I first went to China in 1987. The lights were dim. There were millions of bicycles, few cars, and all of the adult men and women were wearing

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<sup>†</sup> The Loyola University Chicago International Law Review Symposium on Emerging Legal Issues in China, Feb. 17, 2006. Mr. Max Gu, an associate at Freeborn & Peters, delivered this speech on behalf of Mr. Spence, who could not attend due to illness. Before delivering the speech Mr. Gu commented, "I was first asked by Bill Spence to give some comments on his speech, because I was personally involved in these projects. If Bill were here he might be speaking the same way because he has already developed a little bit of a Chinese accent since he has been working in China for over fifteen years. Bill is the one who got China onto the map of Chicago. I am here to deliver Bill Spence's speech." Mr. Gu's commentary on selected items appears in the footnotes

<sup>††</sup> Mr. Spence is of counsel at Freeborn & Peters. Prior to joining Freeborn & Peters, he was a partner at Isham, Lincoln & Beale, and he served for eight years as an Assistant United States Attorney for the Northern District of Illinois. He also clerked for Judge Robert E. English of the Illinois Appellate Court. Mr. Spence has taught law in China and lectured to government agencies about various aspects of American law. He was appointed as one of two foreign advisors to the State Pharmaceutical Administration of China in 1995 and legal advisor to the Dalian High Tech Industrial Zone in 1998. Additionally, Mayor Richard M. Daley appointed him as Co-Chairman of the Chicago Sister Cities China Committee and a member of the Sister Cities Executive Committee.

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blue or green Mao jackets. I have now been to China more than thirty times. Every trip has had its highlights.

Most memorable was in late May and early June of 1989, in Beijing and Shanghai. Some of you may recognize the importance of those dates, because that was when the students were occupying Tiananmen Square, flashing peace signs to foreigners and as it turns out, naively telling many of us that "the People's Army will never fire on the people."

Every night after our business meetings, we went down to the square to talk to the students. What we heard was a very different perspective than what we had been reading in the U.S. papers before we left. The students said:

No, we do not want democracy as you have it back in the West. No, we do not want to get rid of the Communist Party. The Party has been very good to us and has done some great things for our country. What we want is a voice. We want to be heard. We want to end the corruption. We want the new jobs to go to people who deserve them not to the sons and daughters of the party officials. Please, go back and tell the people in your country, so that they will understand.

I left for Shanghai two days before the tanks came in, and my American friends got out on the last flight leaving Beijing after a back-roads trip through Beijing to the airport and through Army check points where machine guns were aimed through windows of their cars.

Remember the picture of the man standing in front of the tank? For many of us the picture of that one man, standing in front of the tank, is the greatest single picture of courage we have ever seen.

After Tiananmen, many Westerners pulled out of China. I lived in Shanghai for six months in 1994. I taught law at the East China Law School and sent my children through the back alleys of Shanghai to the Shanghai American School, while my wife taught English to a nearby school for secretaries.

The courses I was asked to teach were the investigation and prosecution of white collar crime and real estate development.<sup>1</sup> The criminal law course was in response to the aftermath of the Tiananmen disaster, and the university officials wanted someone to talk about how lawyers could participate in cleaning up some of the favoritism that was sending money and jobs only to friends of high ranking officials and causing social unrest. The real estate development course was requested because that was the beginning of the economic boom. More importantly, it was the beginning of the true real estate market in China because at that time, no one owned their own home or apartment. Most city people were paying three dollars a month to the government to rent their apartments. All housing was owned by the government and the idea of private ownership was still a couple years away in the future. It was also the time when the construction crane was just beginning to fly as the national bird of China.

As of result of that experience, my daughter, who threatened to run away from home if we moved to China (it was her sophomore year at St. Ignatius College

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<sup>1</sup> Mr. Gu added "I hope these are two separate topics."

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Prep in Chicago), majored in Chinese in college and later lived in Beijing and Kuming for a year. My son just returned from a one-year immersion program in Chinese language at Tsing Hua University, after majoring in Asian Studies in college. I came back from teaching to form a China practice group with my firm.

My background is all in litigation. I leave the corporate work to others. We represent several large Chinese state-owned enterprises and corporate entities and begin trial in a few weeks on behalf of one of them in a federal court in Houston.

As I mentioned, I am also the co-chairman of the Chicago Sister Cities China Committee.<sup>2</sup> In that position, we have organized groups of lawyers, doctors, health care officials and government leaders, including Mayor Daley, four trips to China, and have arranged a wide array of cultural exchanges with Shanghai and Shenyang, two of Chicago's sister cities. We have also hosted scores of delegations from China here in Chicago.

Notable trips include one with a group of legal assistance lawyers from Chicago who went to Beijing and Shanghai to explain how the delivery of legal services to the poor is done in the United States. When we got to Beijing, we found that China in many instances was way ahead. They had just established 2,500 legal clinics around the country and made *pro bono* representation of at least one case a year mandatory for all Chinese lawyers. They had also set up an evening hotline for legal complaints at most of the clinics.

Another was a group of pediatric surgeons from seven Chicago area hospitals who went to Beijing and Shanghai to perform demonstration surgical procedures on children at Chinese hospitals. To their surprise, they found that the Chinese doctors were generally more skilled at surgery than they were, having labored in operating rooms for years without the vast array of technological equipment that we have in most U.S. hospitals. As a result of that trip, Chinese doctors are now being trained in many of the new technologies at Chicago area hospitals and the technology is being sold in China.

In October 2004, in conjunction with the Chicago Council on Foreign Relations, the Sister Cities China Committee sponsored Mayor Daley's trip to Shanghai and Shenyang, our two sister cities, as part of the first Shanghai-Chicago Dialogue. I can tell you that the trip was originally planned for 1999, but was cancelled four days before departure when the U.S. bombed the Chinese embassy in Belgrade and students were throwing stones at the U.S. embassy where we were scheduled to have dinner.

The stories about traveling with the Mayor are true. "Take a picture of this: we need that in Chicago," he said about many things we saw on the trip. It happened so often, that one of the staff people from the Foreign Affairs Office in Shanghai asked several times: "Does he ever stop working?" The answer given was "No."

One of the stops on the trip was to a school in Shenyang where all of the students spoke almost perfect English. As a result of the trip, and especially the school visit, the Mayor came back on fire about the importance of the Mandarin language in the Chicago Public Schools. Last year, when Shanghai's Mayor Han

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<sup>2</sup> For information about the Chicago Sister Cities International Program and its work in China, see <http://www.chinachicago.com>.

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made a reciprocal trip to Chicago, we reached an agreement with Shanghai to bring Chinese teachers to Chicago to assist with the expansion of the Mandarin program to twenty-six Chicago public schools reaching more than 3,000 students, making it the largest public school program in the nation teaching Mandarin.<sup>3</sup> Also, as a result of the trip, opening soon in the Walter Payton Elementary School, there will be the nation's second Confucius Institute, which will teach Mandarin to adults and help spread the Chinese culture here in the Midwest. That covers some of what we have accomplished at Sister Cities.

### Rule of Law in China

First, let's begin with the criminal law. When I was teaching in Shanghai in 1994, as my final exam, I sent out a fact pattern, this was in the Investigation and Prosecution of White Collar Crime class, and I asked each of my thirteen graduate students how they would investigate the case. The responses that I got were all very similar. They were variations on one theme: "We would identify the defendant, we would have him arrested, he would come to the police station, he would confess, and he would go to jail."

In a discussion afterward, I explained to the students that most of them had missed the point. "No, no," they said, "that is the way it always happens here. The person who is arrested is always guilty and he always admits his guilt after he is brought to the police station." I sensed that there was more behind the answers than I had originally anticipated.

"What aspect," I asked, "of the American criminal legal system, would you most like to have incorporated into your system here in China?" The almost universal response was not surprising, as I would see it now. What almost all of them wanted was the exclusionary rule.<sup>4</sup> Keep in mind that this was ten years ago when things were not as openly discussed as they are now. What I found was that most students recognized, without saying it directly, a Chinese characteristic, that police beatings were common place and those who were arrested and sent to "reform through labor camps" usually were sent there without a formal trial. By the way, at that time, there was a five day period of appeal in capital cases before the defendant was executed.

That was twelve years ago. Let's fast forward. Two years ago, I attended the World Economic Forum China Summit in Beijing. I was approached by a young lady who said she was trying to get government approval to put recently passed Miranda-type warnings on large wall posters in all of the 2,500 legal clinics spread around China. At the same time, she wanted support for a campaign to help defend lawyers who had been put in jail for what we would say was "zealously defending the rights of their clients." Thus, we see steps that go forward and backwards. It is a complicated dance.

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<sup>3</sup> Paul O'Connor, *Will Chicago Keep Up With Shanghai?*, WORLD BUSINESS CHICAGO (2005), <http://www.worldbusinesschicago.com/email.April.htm#story1>.

<sup>4</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending exclusionary rule to state courts); See also *U.S. v. Calandra*, 414 U.S. 338 (1974) (limiting rationale of the rule to deterrence).

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Now let's talk about the enormous change in commercial law. During the Cultural Revolution in the 1960s, there were no lawyers, no judges, and no courts. The law schools were closed down, and Rule of Law was an unrecognized concept. When I was asked to teach in 1994, I was told that there were about 30,000 lawyers in all of China. With more than a billion people, that was about one lawyer per 300,000 people. Compare that to the United States where there are approximately 300 million people and a ratio of about one lawyer per 300 people.<sup>5</sup>

I was told that China wanted to double the number of lawyers in five years to 60,000. That goal has been achieved. Now, ten years later, I am told that there are now about 120,000 lawyers and the ultimate goal is to have 300,000 lawyers throughout the country. That will mean China will have one lawyer for every 3,000 people. This is a remarkable improvement in a very short period of time.

The recognized need for more lawyers comes from several sources. Most important is the recognition that without a safety valve and access to the courts, an enormous segment of the population will feel disenfranchised without a place to go to redress its citizens' grievances.

One of the groups that we have entertained here in the past was a group of lawyers from Beijing studying our administrative law process. They wanted to see how simple things are done here, such as adjudicating disputes over taxi cab, liquor, and restaurant licenses. They also wanted to know how we handle eminent domain issues, because many Chinese citizens were becoming upset by the government building programs which forced people out of their old, run down homes and moved them to new apartment towers far from friends and family. One of the biggest fears in China is that people far from Beijing and major cities will protest, organize, and overwhelm the government's ability to respond. They worry about a small spark that could become a revolution.<sup>6</sup>

The situation with the *Falun Gong* is but one example of the difficulty the government has dealing with mass movements. I recently spoke with Mike Lev from the *Chicago Tribune* who spent five years as the Tribune's correspondent in Beijing. He is absolutely convinced that the crackdown on the internet and limitations on news coverage within China are driven by the fear that the countryside, which still comprises eighty percent of China's population (although that is changing quickly), will be able to organize around the common cause and bring the government to a standstill. The recent protest in the Guangdong province, against the government taking of land for a power plant where police fired into a crowd of protestors, is but one example of the backlash against government authority which the Party fears most.<sup>7</sup> It is protest and violence born from the people's perception that the government and the Rule of Law does not work for them.

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<sup>5</sup> See *Number of Lawyers Rapidly Rising in China*, <http://www.china.org.cn/english/Life/36430.htm> (last visited Mar. 24, 2006).

<sup>6</sup> Mr. Gu added, "That is a Mao saying, a very old Chinese saying."

<sup>7</sup> See generally Howard W. French, *Police in China Battle Villagers in Land Protest*, N.Y. TIMES, Jan. 17, 2006, at A1; see also Evan Osnos, *Economic Growth Leaves Out Many Chinese*, CHI. TRIB., Jan. 15, 2006, at C8.

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Another reason for the development of Rule of Law and training more lawyers is the recent admission of China to the World Trade Organization (“WTO”). When Zhu Rongji was in Chicago several years ago he spoke eloquently about the importance of the WTO, not necessarily for the rest of world, but for domestic reform issues within China. Entry into the WTO, he said, would require China to blend its laws with those of the rest of the world so that the internal and external standards would mesh, forcing China to reform its economic and legal system.

Now, in the six years since China's accession, thousands of lawyers and government officials in China have been working feverishly to change laws and regulations within China so that China can participate and compete effectively in the world product markets and the markets of ideas. Intellectual property issues are probably the most visible to many on the outside. As you discussed earlier today in the symposium, new courts have been developed, judges are being specifically trained, and enforcement mechanisms are put in place all in an area of the law that has historically never existed in China. But it's not just intellectual property—it's everywhere in Chinese society where change is taking place.

Rule of Law also gives a level of predictability: that the huge inflow of foreign direct investment needs to provide a stable foundation for China's economic growth. China recognizes that without some level of predictability, which comes from a uniform application of law and regulation, many will shy away from China. The obvious risks will be greater than the rewards of investment if the whims of local officials are allowed to guide the conduct of business.

Thus, enormous progress is being made both economically and socially. Ten years ago, if I wanted to have a political discussion, it usually consisted of whispers outside or in a very large empty room. Now, most people are at least willing to engage in the discussion. But there is still a very strong sense of caution in most political discourses.

Discussion of China's enormous economic progress often leads to a discussion of social inequities. For example, a lawyer who I met last week who had been involved in the protests in Tiananmen in 1989 told me that corruption is worse now than it was then. She said the struggle between rich and poor—and believe me there is vast wealth now in China—is greater than ever before. She and many others blame the Communist Party for not taking stronger actions against corruption and for not solving many of the social problems. She said, “Imagine what it would be like if you just had the Republicans in the United States. Where would that leave you?” Scary thought.

While China is quickly turning out many times the number of engineers as we are in the United States, and building at an unprecedented pace, which is probably the greatest economic burst in the history of the world, one-party rule will continue to be an impediment to good governance in most areas in the country.

I have been asked to discuss briefly the interaction between Chinese and American lawyers and judges. Ed Lehman<sup>8</sup> can certainly speak to that much

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<sup>8</sup> Edward Lehman is an alumnus of Loyola University Chicago School of Law (J.D. 1986). Mr. Lehman is the Managing Director of Lehman, Lee & Xu in China. He advises foreign companies on

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better than I, but I can say that we do not intend to have an office in China for one very simple reason. That reason is that we can find highly qualified local Chinese counsel who have knowledge of the domestic environment and connections (“*quanxi*”), and highly developed legal skills, without having to move our own lawyers into an office in China.

That was not always the case. In 1994, there were still no private Chinese lawyers in Chinese firms. It was the number one law firm, the number two law firm, the number three law firm, etc., and those firms all were under the control of the Ministry of Justice and were basically arms of the government. Now, private practice is flourishing. In fact, some Chinese lawyers in private firms make far more money every year than the average lawyer in the United States.

Judges now, believe it or not, actually must have legal training in order to go on the bench. As recently as two years ago, new judges did not have to attend law school, but were usually retired military officers. Fortunately for everyone in China, that now has changed.

When I go to China to do legal work, I always have local counsel with me. He is my translator of legal issues and cultural differences. He helps me overcome the difficulties of communicating in two cultures.

So where is all of this going? Robert Zoellick, this administration's spokesman on China policy recently announced:

China needs a peaceful political transition to make its government responsible and accountable to its people. Village and grassroots elections are a start. They might be expanded—perhaps to counties and provinces—as a next step. China needs to reform its judiciary. It should open government processes to the involvement of civil society and stop harassing journalists who point out problems. China should also expand religious freedom and make real the guarantees of rights that exist on paper—but not in practice.<sup>9</sup>

Each of these areas will require the involvement of lawyers and expansion of the Rule of Law.

There is no doubt that we will be in competition with China in many areas, but we must avoid the easy solution of “China bashing,” which will do nothing more than create an enemy where currently a friend exists. Every time I return to China, I am reminded that the Chinese people are more like Americans than most of us ever realized. They are friendly, outgoing, and hardworking. They are risk-takers and entrepreneurs. They are a people with a similar sense of destiny, as we have here. Did you know that in eighteen of the last twenty centuries China had the largest economy and the most sophisticated culture in the world?

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joint ventures, wholly-owned subsidiaries and holding companies, technology licensing, engineering and construction projects, and the financing of such projects, as well as the protection of intellectual property rights in transactions and projects in China. He was recently named one of the top thirty lawyers in China by *The American Lawyer* magazine. See Michael D. Goldhaber, *The Bamboo Dynasty*, *THE AMERICAN LAWYER*, Nov. 2005, at 88.

<sup>9</sup> Robert Zoellick, *Whither China: From Membership to Responsibility?*, Remarks to National Committee on U.S.-China Relations, (Sept. 21, 2005), <http://www.state.gov/s/d/former/zoellick/rem/53682.htm>.

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In fact, the recent book *1421: The Year China Discovered America*<sup>10</sup> points out that but for a political twist of fate, our official language could easily have been Chinese rather than English.

It is only in our recent eyes and in the last 200 years that China has been subjected to the humiliation of foreign influences, political chaos, and economic decline. All of that has changed, most obviously in the last ten years alone. Soon Chinese universities will rival ours. Some predict that with a stable political process their economy will be larger than ours within twenty years.<sup>11</sup> This will challenge all of our perceptions of China and America's place in the world. From the factory worker looking for a job that went to Shanghai, to the lawyer whose real estate client wants to build office buildings in Beijing, we will be working together. As Thomas Friedman recently wrote, "The world is getting very flat, very quickly and the flat world rewards hard work, education, and the entrepreneur."<sup>12</sup>

The Chinese are forcing us to re-examine all of our assumptions about the role of the United States economically and politically in the twenty first century. My Sister Cities Committee is trying to play a small part. We are trying to build as many bridges as possible between these two great powers so that we understand each other, learn from each other, and respect each other, both for our similarities and for our differences. I would encourage each of you to play some role in these important developments between the United States and China which will dramatically change the world as we know it. Thank you very much.

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<sup>10</sup> See generally Gavin Menzies, *1421: THE YEAR CHINA DISCOVERED AMERICA* (2003).

<sup>11</sup> Cf. Charles Wolf, Jr., *China: Pitfalls on the Path of Continued Growth*, L.A. TIMES, Jun. 1, 2003, at M2.

<sup>12</sup> See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).