

**Comments by Judge Timothy H. Gailey**  
Panel on Legal Reform in China  
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Good afternoon. I am very pleased to be able to join this eminent panel and to meet with all of you today. I need to say at the outset that unlike my colleagues I am not an expert on legal or judicial reform in China. I am here to give some personal observations as an experienced American judge who has had an opportunity to participate in a judicial exchange and education program between Massachusetts judges and judges in Western China for the past two years. My personal observations might give a prospective a little different from experts in the field, in that I am a trial judge who has dealt with colleagues who are also trial or local appellate judges in China, and I have had an opportunity to see some of their individual and local reactions to change and potential change. Those reactions have been very positive.

I have been a trial court judge in Massachusetts for about 14 years, with a caseload of criminal and civil cases more or less typical of busy urban courts. The Courts and judges I visited in China were more or less comparable.

First, a little bit about the program. For several years now my professional association, the Massachusetts Judges Conference, has worked with The John w. McCormack Graduate School of Policy Studies at the University of Massachusetts, Boston, and the United States State Department in an ongoing series of judicial exchanges with judges in China. I would like to describe series of two exchanges that I personally was involved in, a September 2003 exchange in Western China and a spring 2004 exchange in Boston with judges primarily from the same area in China that we had previously met.

The September exchange in China, on the Rule of Law, was sponsored by the United States State Department through a grant to the McCormack School. The substance of the program and its presentation was the product of about a dozen of my colleagues, with strong support from the McCormack School, the Judges Conference and a great deal of help from the State Department.

This program was one of the most successful and stimulating educational programs I have ever been a part of -- in China or anywhere. It was an unparalleled learning experience both for the American judges who presented the program and for the literally thousands of Chinese students, professors, judges, lawyers, prosecutors and members of the press who attended.

The heart of the program in Western China was an American civil mock trial which we presented at about half a dozen different law schools and universities in Xi'an, Chongqing and Chengdu, together with seminars and question and answer sessions.

At each school venue, numbers of local judges attended as well as professors and hundreds of students from the schools.

In every venue we were warmly received, and in several venues the reception was almost physically overwhelming. I recall one in particular in which the auditorium seated about 600, but every inch of space, window ledges, the stairs leading up to the projection booth, the windows in the projection booth and even the halls and outdoor areas outside the doors and windows, everywhere within hearing were jammed with students in numbers almost beyond comprehension. The unequivocal message from the students, professors and many judges was

that they were eager to see our approaches to common legal problems, looking for ideas to improve their judicial system.

Their openness to new approaches, however, was in no way uncritical acceptance. The people we met with were not wearing blinders to the flaws or perceived flaws in our system and I will talk a little more about that later.

The civil mock trial we presented at several law schools was based on a recent Massachusetts personal injury tort case, with the members of our delegation taking various roles as attorneys, court personnel and witnesses. We presented the case to a jury composed of Chinese students and/or faculty, chosen more or less randomly from the audience (although once by accident a member of the press got on the jury with serendipitously good results). In every school the student jurors responded just as our own juries respond, sometimes with heated arguments while they were deliberating, and they arrived at verdicts in each instance. While they were deliberating, the members of the delegation responded to questions from the audience, and after the verdict was reached the questioning and commentary continued, usually following us out of the building and right to the door and windows of the waiting bus.

Some of the comments and questions stand out vividly. For example, at every school, with local judges manifestly in attendance, some audience member invariably asked a question relating to what to do about judicial corruption, or what we do to prevent it. To my mind this was extremely encouraging, not only in that the subject could be opened up to discussion so publicly, but that everywhere we went there was a deeply rooted interest among students, professors and many judges in moving toward an improved rule of law.

Some of the judges we met with were eager to show their openness to reform, while holding on to the basic structures they were used to. The trial judges in Chengdu demonstrated for us a Chinese mock trial in a Chinese court presented by a panel of three judges. This civil mock trial was in the traditional format. Later, when many of the same judges came to Boston, they demonstrated their new procedures, which allow for the first time limited testimony of live witnesses at trial and some cross examination. We take those procedures for granted, yet their adoption and acceptance by Chinese courts and judges is truly a major change.

Although I cannot say that it was a statistically representative sample, but the judges we met with showed a great deal of interest in enhancing an independent judiciary, and they asked practical questions about how we preserve that independence. Our systems are dramatically different in this regard, and translating our experience to theirs is not easy. In Massachusetts our judges are appointed usually in their forties or fifties, essentially for life, after twenty or more years of legal experience. Compensation and continued appointment is not subject to discriminatory or punitive action depending on the outcome of particular cases. In the Chinese system a judicial career is simply a parallel career path like being a prosecutor or a practicing lawyer. It is an option open to young law school graduates, or at least in the past to persons ending a period of military service, with significant prerequisites and personal advancement, compensation, and sometimes job retention determined by internal or external political processes. The judiciary is not, as here, an independent branch of government, but rather the judges I met with believed that they are perceived by the public as simply another type of government official in the same administration as the police and civil authorities. Our concept of an independent judiciary is therefore something that is easier to contextualize in our system than it is in China.

As I said, we had presented a civil jury trial, which was something of a novelty in western China. Although our audiences were familiar with the jury concept from the web and international media, they had no actual experience with anything like a jury. In post mock trial one-on-one discussions with members of our audience on several occasions I heard an interesting train of thought: First, there was an expression of scepticism that ordinary people could decide cases as jurors. Then there might be grudging acceptance that the more educated citizenry might be suitable jurors. Finally, when I explained that we have ordinary people sit as jurors in part to invest them with participation in (Aownership of@) the judicial system, I heard, in the words of more than one student, AI think that=s very democratic@. They were clearly listening, and thinking about the values inherent in our system.

One point that occurred again and again was prompted by the presence of the press at our programs. The press gave us significant, often glowing, coverage everywhere, and people in one city would have read the press accounts of our previous programs, oftentimes bringing those one or two-day old out-of-town newspaper accounts to our program in their city. Reporters, and also students and judges, asked pointedly about press coverage of our proceedings, which of course led into one of our main points B the transparency of our system, which has profound affects on public trust and confidence. The reporters were very receptive to this message, as might be expected, but the students and professors, and many judges, were also obviously receptive and clearly understood the importance of the legal system being open and public, particularly in connection with the concerns about corruption.

A few months after the western China trip, a group of judges from the same area we had visited came to Boston to see American courts first hand. They saw our busy urban courts in session, how our drug courts work, our specialized domestic violence court, and they met with us to continue the dialogue. They also presented in one of our courtrooms -- and this was extraordinary to see -- a Chinese criminal mock trial, including the new procedures for testimony of live witnesses at trial on controverted issues and limited cross-examination. I do not know if this was the first such presentation in this country, but it was an important and impressive event. It reflected not only a willingness to demonstrate their system, but also a very real pride in the new procedures and in their evolving trial system.

In looking for improvements, judges in China are willing to examine what our experience has been. Almost everyone in the law schools, students, professors, as well as attorneys and judges now have at least some access to the web, to the Hong Kong, Shanghai and other coastal newspapers and indirectly to the western press, as well as email and cell phones. American cases tend to be highly publicized and everyone in the legal community we met with had some very basic knowledge of the American legal system. While the international media and the internet are not necessarily the most balanced source of information, it did give them a basis for intelligent questions, and it gave them enough healthy scepticism to show us that they were thinking and evaluating what we were saying. They brought up difficulties in our system, pointedly mentioning Bush v. Gore in the context of judicial independence and the O.J. Simpson case in a variety of contexts. They also raised some of the same concerns that we have ourselves B for example, the high cost and delays in complex litigation, and they were interested in some of our attempted solutions, such as arbitration and other forms of alternative dispute resolution. When we acknowledged the reasonableness of some of their concerns it leant credibility to our discussion of the positives in our system, and it opened the way for productive discussion. They clearly wanted to see how our system actually works, what seems to work best and what raises

difficulties.

I would like to close with a few general comments about the generation of students, lawyers, prosecutors and judges that we will be interacting with in coming years. The first is, that pressures for change are coming both from above and from the grass roots of the judicial system. From above, prompted perhaps by phenomenal economic growth, international trade and other important international contacts, there is a perceived need for a fair, reliable and transparent legal system to deal with international trade, investment, development and environmental disputes and other interactions.

At the same time, we have seen from the bottom up that newer, lower level judges especially want to raise the status of the judicial system, foster judicial independence and try new methods to improve the system. These two forces present primary opportunities for positive change.

After my first exchange, and for the past two years I have traded e-mails with professionals I met in western China, and have responded to many questions of both a practical and theoretical nature. I have also posed a few questions myself and feel that it is a two-way communication. It is exciting to think that this personal exchange of ideas will continue, that despite our differences we have common issues and many common interests and that there are creative, dedicated people on both sides of the Pacific working to make our legal systems better. It is exciting to be even a small participant in that process.