

Testimony of
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Through U.S. Refugee Policy”,
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Introduction and summary

I would like to thank the Chairman, the Ranking Member, and the distinguished members of this Subcommittee for inviting me to participate in today’s hearing.

I am a professor of law at Hofstra University with a particular expertise in the law governing U.S. foreign relations and the impact of US and international laws on U.S.-China relations.

My testimony today will rely on both of these areas of expertise. First, I will provide an overview of the U.S. laws and policies that have shaped US policy toward Hong Kong since the extradition law crisis of 2019. Second, I will explain how the Hong Kong Safe Harbor Act fills a gap in the U.S. response to China’s repression of Hong Kong by giving Hong Kong residents who dare to defy China the opportunity to continue to stand up for their legally guaranteed rights and freedoms.

I. Background: The 2019 Extradition Law and the Hong Kong Protests

In February 2019, the Hong Kong government proposed an extradition bill that would have authorized, among other things, the extradition of individuals in Hong Kong to China upon request of the Chinese government. The bill sparked a massive outpouring of public opposition that manifested itself most dramatically in huge peaceful marches by hundreds of thousands of Hong Kong residents. The often violent actions of the Hong Kong police against some protesters became another source of contention and a separate basis for protest and dissent. Of course, some Hong Kong protesters resorted to destruction of property and this sparked even more aggressive actions by the Hong Kong police. Nonetheless, the Hong Kong government finally withdrew the Extradition Bill in October 2019. Although protesters continued to demand greater

participation in the Hong Kong government and redress for police violence, the protest movement's energy was dampened dramatically when the COVID19 pandemic hit Hong Kong in January and February of 2020.

In May 2020, the National People's Congress, China's top legislative body, authorized the drafting of a new National Security Law¹ for Hong Kong. Although Hong Kong's government was guaranteed autonomy over most lawmaking within its jurisdiction, the new National Security Law (NSL) was drafted and implemented by the Chinese government with no formal input or approval from the Hong Kong government. This action violates the promise China made to respect Hong Kong's autonomy in the Sino-British Joint Declaration, the international treaty which transferred Hong Kong from Britain to China.²

But the outside imposition of the NSL was not the only violation of the Joint Declaration. The NSL creates at least four new crimes in Hong Kong: secession, subversion, terrorist activities, and collusion with "foreign countr[ies] or external elements". All four of these new crimes, as defined by the NSL, seriously endanger the ability of Hong Kongers to enjoy the rights and freedoms they are guaranteed under the Joint Declaration and under Hong Kong's Basic Law.³

I will not attempt a comprehensive analysis of the law here, but I will point out that the law's definition of "subversion" and "collusion" with foreign actors is quite broad and vague enough to encompass mere speech that is found to "seriously interfere" with or "provoke hatred" toward the Chinese or Hong Kong governments.⁴ Such "collusion" language appears to have been

¹ "In full: Official English translation of the Hong Kong national security law," *Hong Kong Free Press*, 1 July 2020 (available at <https://hongkongfp.com/2020/07/01/in-full-english-translation-of-the-hong-kong-national-security-law/>).

² See China's proposed national security law for Hong Kong: Foreign Secretary's statement to Parliament, 2 June 2020 (stating that "the imposition of national security legislation on Hong Kong by the government in Beijing, rather than through Hong Kong's own institutions, lies in direct conflict with Article 23 of China's own Basic Law. And it lies in direct conflict with China's international obligations freely assumed under the Joint Declaration.") <https://www.gov.uk/government/speeches/foreign-secretary-statement-to-parliament-on-hong-kong>

³ See Joint Statement on Hong Kong of the Governments of the United States, the United Kingdom, Australia, and Canada, 28 May 2020 (the NSL "also raises the prospect of prosecution in Hong Kong for political crimes, and undermines existing commitments to protect the rights of Hong Kong people – including those set out in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.)

⁴ See Jerome Cohen, "My quick reading on the troubling national security law for Hong Kong," July 2, 2020 ("All in all, this is a Takeover of HK, not, as billed, a "second Handover".) (available at <http://www.jeromecohen.net/jerrys-blog/my-quick-reading-of-the-troubling-national-security-law-for-hong-kong>).

invoked to prosecute Hong Kong media publisher Jimmy Lai merely for seeking foreign support for respecting Hong Kong's autonomy, including meeting with members of this Congress.

Finally, Article 38 of the NSL seems to criminalize any violations of the NSL by anyone anywhere in the world.⁵ Thus, as Samuel Chu, one of our panelists today, has discovered, mere speech by a US citizen while in the United States subjects that person to possible prosecution in Hong Kong under the NSL. It is possible that I am violating the NSL at this very moment by giving this testimony. This is a breathtaking assertion of universal jurisdiction without precedent under international law and practice.

Since the implementation of the NSL on June 30, four individuals have been charged with violations. Most prominently, the owner and two executives of a leading Hong Kong news site Apple Daily have recently been charged with violating the NSL. It appears that the owner of Apple Daily, Jimmy Lai, is being charged for seeking support for Hong Kong's autonomy and freedoms in the US.

The main impact of the NSL is not how many people have been charged, but the knowledge in Hong Kong that almost anyone can be charged and detained under its extremely broad and expansive definitions. This has further chilled the speech and actions of those in Hong Kong who might have sought to continue to advocate for Hong Kong's autonomy and freedom.

II. The U.S. Response to the Extradition Law and the National Security Law

The United States has responded vigorously to the events I have described. The Trump Administration has spoken out early and often in support of the rights of Hong Kongers under the Joint Declaration and the Basic Law. The administration, and this Congress, have also worked together to take specific measures to 1) support Hong Kong's autonomy and freedoms; and 2) deter Chinese and Hong Kong officials from taking actions that undermine those rights and freedoms.

Congress has played a central role in Hong Kong policy dating back to the enactment of the Hong Kong Policy Act of 1992.⁶ That law guaranteed that Hong Kong would be treated as a separate entity from China under U.S. laws and international agreements. But it also delegated to the President the power to terminate such "special status" upon his determination that Hong Kong was no longer sufficiently autonomous to merit such special treatment.

⁵ See NSL, art. 38 ("This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.")

⁶ Pub.L. 102-383, § 1, Oct. 5, 1992, 106 Stat. 1448,

After the protests against the Extradition Act broke out in 2019, this Congress also enacted the Hong Kong Human Rights and Democracy Act⁷ in November 2019. This new law authorized individual sanctions against specific Hong Kong and Chinese officials who acted in ways that violated Hong Kongers' human rights and individual freedoms under the Joint Declaration and the Basic Law. It also mandated an annual affirmative certification by the Secretary of State that Hong Kong was sufficiently autonomous to maintain its special status under U.S. law.⁸

As I have discussed, however, these various U.S. actions did not deter the Chinese and Hong Kong governments. Thus, when it became clear in May 2020 that the Chinese government was going to impose the aforementioned National Security Law on Hong Kong, President Trump invoked his authority under the HKHRDA and the Hong Kong Policy Act to begin the process of terminating Hong Kong's special status under U.S. law.⁹

Congress affirmed President Trump's action by enacting the Hong Kong Autonomy Act¹⁰ in June 2020. This new law authorized individual sanctions against Chinese and Hong Kong government officials who "materially contributed" to the erosion of Hong Kong's autonomy under the Basic Law and the Joint Declaration. It also sanctioned any financial institution who conducts "significant transactions" with those individuals, thus cutting off certain Chinese and Hong Kong officials from the US and much of the world's financial system. President Trump implemented the Hong Kong Autonomy Act in July 2020.¹¹

It is worth noting that while all of these events have taken place during a highly contentious and divisive election season (not to mention during a deadly pandemic), both of the new laws supporting Hong Kong were passed with nearly unanimous consent in both Houses and thus with broad bipartisan support.

III. The Gap in US Hong Kong Policy: Safe Harbor for Political Refugees

While I commend this bipartisan resolve in support of Hong Kong, I believe that there is a substantial gap in the US government's response to China's unfortunate (and illegal) suppression of Hong Kong's autonomy and freedoms. As described above, U.S. policies toward Hong Kong

⁷ Pub.L. 116-76, § 1(a), Nov. 27, 2019, 133 Stat. 1161.

⁸ See Julian Ku, *The Hong Kong Human Rights and Democracy Act Is Redundant, but Still Worthwhile*, November 25, 2019 (available at <https://www.lawfareblog.com/hong-kong-human-rights-and-democracy-act-redundant-still-worthwhile>).

⁹ Remarks by President Trump on Actions Against China, May 29, 2020 (available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-actions-china/>).

¹⁰ Pub.L. 116-149, July 14, 2020, 134 Stat. 663.

¹¹ The President's Executive Order on Hong Kong Normalization, July 14, 2020 (available at <https://www.whitehouse.gov/presidential-actions/presidents-executive-order-hong-kong-normalization/>).

have essentially relied on various kinds of economic sanctions. The HKHRDA called for sanctions on individuals for human rights abuses. The termination of Hong Kong's special status is essentially one general economic sanction on Hong Kong as a whole. The more recent individual blockages of Chinese and HK leaders limiting their access to financial institutions are economic sanctions. All of these actions are intended to pressure those leaders and to reverse their actions against Hong Kong and to deter them from taking even more actions against Hong Kong's rights in the future.

I support all of the laws enacted by this Congress to protect Hong Kong's autonomy and freedoms and I support all of the actions taken by the Trump administration to execute these laws. But while those actions are worth doing, we have to admit that neither this Congress' laws nor the Trump Administration's actions have succeeded in reversing any of the repressive policies in Hong Kong. Just a few weeks ago, the Hong Kong government essentially forced the resignation of the few remaining democratically elected opposition legislators by threatening them with disqualification for "unpatriotic" statements and actions.¹² Of course, the recent arrest of Jimmy Lai (and the negative impact of that arrest on one of Hong Kong's last remaining independent media voices) shows that the Hong Kong government is doubling down on its repressive approach, at least in the short term.

Any change in China's policies in Hong Kong will thus occur, if at all, in the long term. In the meantime, those persistent few who continue to stand up for Hong Kong's autonomy and freedoms can look forward to a depressing cycle of arrest, imprisonment, and punishment under current Hong Kong law. These brave and persistent few dissenters are being punished for standing up for those rights and freedoms that are guaranteed under the Joint Declaration and the Basic Law and that this Congress has repeatedly endorsed and demanded China uphold.

I believe it is time for the U.S. to consider the "long game". Hong Kong's freedom will not be restored next week or next year, even under the sanctions the U.S. has imposed. Instead, the U.S. needs to work to provide a safe harbor for those Hong Kongers who have stood up for their own rights and freedoms, and suffered the negative consequences of exercising those rights and freedom that the U.S. Congress has encouraged them to exercise. Preserving their voices, and their movement, is the best hope for the future restoration of an autonomous and free Hong Kong.

This is not a humanitarian gesture. Rather, it is a long term bet that a safe harbor in the U.S. will allow those seeking to advocate for Hong Kong's freedoms and autonomy to continue to do so outside of China. This does not guarantee any change in Hong Kong, but it dramatically

¹² Lily Kuo and Helen Davidson, "Hong Kong opposition lawmakers all quit after four members ousted," *The Guardian*, 11 November 2020 (available at <https://www.theguardian.com/world/2020/nov/11/china-pro-democracy-hong-kong-lawmakers-opposition-oust>).

increases the likelihood that the movement that arose in 2019 will survive China's repression to fight another day.

It is worth noting that other countries have tried to provide some relief along this line to Hong Kongers. Most notably, the UK has offered residence rights with the possibility of citizenship to holders of the UK British National Overseas passport holders. This currently encompasses around 350,000 people but could encompass many more current Hong Kong residents. This is a deeply laudable action, but it does not target its relief on those who actually stood up for Hong Kong's autonomy and freedoms since it is based on age and family status or other non-political factors. In other words, some of those protesters targeted by China are still not eligible for the UK's expanded residency rights since they are not holders of the BNO passport. Taiwan is considering offering asylum for some Hong Kongers, but it faces ongoing Chinese pressure and threats itself. Similarly, Australia and Canada are embroiled with their own disputes with China that make it harder for those countries to commit to offer refugee access to Hong Kongers.

The U.S. will not be the only country to serve as a refuge for Hong Kongers fleeing political repression, but the Hong Kong Safe Harbor Act can provide the leadership and confidence for other countries to do the same. I believe it would make a huge difference around the world if this Congress shows that the U.S. is willing to give refuge to Hong Kongers who defied Chinese repression. It will show that the U.S. is willing to suffer Chinese government blowback and retaliation for daring to protect Hong Kongers who stood up for their city's autonomy and freedoms. It is always better to face Chinese government displeasure with allies, but sometimes the U.S. has to be willing to act first to show the way for others also facing Chinese government pressure and bullying.

Conclusion

There are no silver policy bullets that can achieve desired U.S. policy outcomes in Hong Kong. The U.S. government, both Congress and the President, have acted decisively to support Hong Kong's autonomy and freedoms. But despite these dramatic series of economic sanctions, it seems clear that China is not going to back off its repressive actions toward Hong Kong in the short term.

The U.S. now needs to think about the long term. While Hong Kong will not be restored to its past glory anytime soon, it is essential that those who have stood up fighting for Hong Kong's autonomy and freedoms be given an opportunity to keep fighting for a better Hong Kong. As this Congress has made clear, a free and autonomous Hong Kong is in the national interest of the United States. I believe bills like the Safe Harbor Act are necessary to keep alive the hope that this version of Hong Kong will one day return.