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The 2000 Botein Awards were presented by Hon. Ernst H. Rosenberger, Appellate Division, First Department, at the Association on March 27, 2000.

The Awards, dedicated to the memory of Bernard Botein, former President of the Association, have been presented annually since 1976 to pay tribute to court personnel in the First Department who have made outstanding contributions to the administration of the courts.

The awards are sponsored by the Special Committee on the Botein Awards.

This year's recipients are: Steven Kufs, New York Criminal Court, deputy chief clerk; Joseph Monastra, New York Criminal Court, deputy chief clerk; Vincent J. Homenick, Jury Division, New York County, court clerk; Jane
Passenant, New York County Surrogate's Court, court clerk; Carmen Ruiz, Appellate Division, First Department, senior principal appellate court clerk; and Conrad Martin, New York County Supreme Court Criminal Branch, court clerk.

* IN MAY, THE ASSOCIATION DEMONSTRATED ITS INCREASING COMMITMENT to Continuing Legal Education (CLE), when it completed construction of its new 130-seat Training Center on the second floor of the Bar Building. The Center will feature state-of-the-art audio-visual equipment to enable instructors to utilize a variety of media for presentations and to allow the staff to produce high-quality audio and video tapes for those who want to study in their offices or at home.

The Association’s CitiBar Center for Continuing Legal Education, created in 1995, now annually offers nearly 100 programs, including introductory courses for new lawyers, updates and “hot topic” programs for experienced practitioners, and skills training courses. A complete listing of the Winter/Spring 2000 courses can be found on the Association’s website—www.abcny.org—which can also be used for on-line registration.

* THE ASSOCIATION HAS ALSO RECENTLY CREATED A SMALL LAW FIRM Center to address the needs of solo and small-firm practitioners—roughly 6,000 of its 21,000 members. The end-product of an intensive two-year effort, the Center is planning to offer the following products and services:

  • information on technology hardware and software, as well as the opportunity to experiment with new applications and participate in group buying programs that will permit members to take advantage of volume purchase discounts;
  • a separate reference library of materials relating to law practice management;
  • a dedicated web page and a listserve to facilitate dissemination of information and communication both with the Center staff and among members of the Center;
  • assistance to lawyers in filling legal and non-legal employment positions;
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• programs geared to the solo and small firm practitioner, including programs qualifying for CLE credit;

• networking opportunities that will, among other things, permit lawyers with different practice specialties to assist each other in solving problems and perhaps to join forces in serving a client’s multiple needs; and

• a general clearinghouse for information on products, services, law practice and management that are particularly relevant to meeting the needs of solo and small firm practitioners.

The Center will be communicating further with the Association’s small firm and solo practitioners to determine how the Center can effectively meet their needs.
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Welcoming Address


Michael A. Cooper

Good afternoon. My name is Michael Cooper, and it is my privilege to welcome you to this opening plenary session of a three-day conference on access to justice for poor people. You have traveled to New York City from 14 different countries to discuss this subject. What is it that has persuaded you to come thousands of miles from such distant countries as Australia, Japan, South Africa and Chile to exchange experiences and views on the delivery of civil legal services to poor people? What do we have in common that leads us to believe that a global forum on access to justice issues is a worthwhile endeavor? The answer, I suggest, has five elements.
First, however different the economies of our countries may be, each has a significant population of poor people. One of the great ironies and paradoxes of our time, here in the United States, is that during the recent years of continuous economic growth and prosperity, with more and more individuals accumulating great—in some cases almost unimaginable—wealth, a significant stratum of our society continues to live in poverty. The New York Times ran a feature story this past December under the headline: “Poverty Rate Persists in City Despite Boom.” The article reported that 1.8 million New York City residents, a full one-quarter of the population, live below the poverty line. That number is as great as, if not greater than, the number living below the poverty line during the last recession in the early nineties. The prevalence of poverty in the United States is not confined to New York City. The United States Bureau of the Census reported four years ago that the share of total household income of the poorest one-fifth of the country’s population had decreased 15% over the previous two decades. I cannot cite statistics for each of the countries represented at this conference, but I am confident that each has a population of poor people of sufficient number that their legal needs cannot be overlooked.

The second characteristic we share is that the basic needs of our respective populations of poor people—such as shelter, food, medical care and family unity—are protected by legal rights, the enforcement of which normally requires the services of a lawyer. The poor tenant threatened with eviction, the family that is denied subsistence benefits, the physically disabled individual who cannot enter a public place because it does not accommodate a wheelchair, each needs legal assistance in dealing effectively with governmental bureaucrats or landlords.

Third, the resources available to address the legal needs of the poor are woefully inadequate to the task. That is true of both governmental and private resources. Again speaking only of the United States, the Legal Services Corporation, the principal federal source of funds for civil legal services to the poor, has seen its funding by Congress decline during the past decade both in actual dollars and even more when adjusted for inflation; and Congress has imposed severe restrictions on the freedom of grantees to handle certain kinds of matters. Funding of civil legal services is also provided in New York by the State and the City, but these funds are made available reluctantly, belatedly, unpredictably and in amounts that are far too low. To make matters worse, state funding is a political football; the Senate and Assembly jockey each year to include their respective favored items in the state budget, and legal services providers receive the scraps off the table. They have had to curtail their programs and cut back
on staff as a direct consequence of inadequate governmental funding. I look forward to learning whether you have been more successful than have we in persuading your respective governments to fund legal services, and if you have, whether we can learn from your success.

The private Bar in New York City and elsewhere in this country devotes many thousands of hours to doing volunteer pro bono work, frequently in collaboration with legal services staff programs. The Administrative Board of the New York Courts passed a resolution last year exhorting lawyers in private practice to devote at least 20 hours a year to pro bono volunteer work, and the Bar of this State has been generous in its response. There is undoubtedly more that the private Bar can do to support legal services to the poor by way of both monetary contributions to legal services organizations and increasing the number of volunteer hours, but it is simply impossible in this country, and I suspect in other countries as well, to expect volunteer attorneys to fill the entire gap between needs and resources.

The final two traits we share that have brought us together in this meeting hall today are (i) a common commitment to find new ways, and to improve existing methods, of effectively addressing the legal needs of the poor, and (ii) a belief that each of us can learn something from, and hopefully contribute in turn to, other conference participants.

While the challenge of providing legal services to the poor is global, approaches and resources differ widely from country to country. In fact, one impetus behind the convening of this conference is the fact that the United States, the wealthiest of nations, appears to lag far behind many other nations in the resources—public and private—devoted to civil legal services to the poor. In calling for an expanded constitutional right to counsel in civil matters, United States District Judge Robert W. Sweet noted in a lecture given from this very podium in 1997 that England has recognized a common law right to counsel in civil matters since the fifteenth century; France, Germany, Switzerland and other European countries recognize a statutory or constitutional right to counsel; and the European Court of Human Rights has interpreted the European Convention on Human Rights to require that member governments provide counsel to the poor in civil cases where representation by a lawyer is necessary to provide effective access to the courts. Hon. Robert W. Sweet, Civil “Gideon” and Justice in the Trial Court (the Rabbi’s Beard), 52 The Record 915, 925-26 (1998) (citing Airey v. Ireland, 32 Eur. Ct. H. R. (ser. A)(1979)). Judge Sweet cited an article by one of our conference participants, Earl Johnson, Jr., Associate Justice of the California Court of Appeal. Toward Equal Justice:
The United States Stands Two Decades Later, 5 Md. J. Contemp. Legal Issues 199, 205 (1994). These European examples stand in contrast to the willingness of the courts and legislatures of this country to recognize a right to counsel in only a small category of civil cases—at least so far.

Many other nations have been more generous in funding civil legal services to the poor than has the United States. Let me give you one example close to home: the funding provided by some Canadian provinces has greatly exceeded on a per capita basis the funding provided in this country, despite the similarities of our legal systems.

Unfortunately, the news from abroad is not all good. There are reports that governmental funding of civil legal services to the poor is being cut in a number of countries, as the welfare state shrinks. Other nations are looking to pro bono legal services as a potential means of providing additional resources. However, we in the United States, who probably have the most extensive experience with pro bono services, are increasingly recognizing, as I've already stated, that private lawyers acting as volunteers can play only a supporting role, albeit a critical role, in providing legal services to the poor.

In short, this conference is being convened at a difficult time for legal services. It is a time when new approaches must be explored, and we must all learn from one another. This is a working conference; it will be short on speeches and consist primarily of panel discussions and breakout sessions. There is one additional feature of the conference I should mention. During breaks Fordham Law School students will be conducting a survey of conference participants; they will be asking you questions about legal services organizations, funding and initiatives in your respective home countries. I hope you will answer their questions frankly and fully. The survey results will be communicated to you and should help to extend the impact of this conference beyond this week.

A conference such as this does not simply happen. It requires careful planning and presents a host of logistical problems. Fortunately, the Association has not had to shoulder the burden unaided. We have four co-sponsors: the Global Public Service Law Project of New York University School of Law, New York Lawyers for the Public Interest, the Public Interest Law Initiative in Transitional Societies of Columbia Law School, and the Stein Center for Law and Ethics at Fordham Law School. The planning committee was co-chaired by James E. Brumm, Chair of the Association’s Task Force on International Legal Services; Allan L. Gropper, the principal author of the Association’s 1996 Civil Justice Crisis Plan; and Joan Vermeulen, Executive Director of New York Lawyers for the Public Interest. Maria Im-
perial, the Executive Director of the City Bar Fund, who supervises the many public service and pro bono programs of the Association, has made major contributions to the preparations for the conference. The Secretary of the Planning Committee, who assisted many of you in making travel arrangements and finding lodging in New York City, is Dennis Cariello, the Association’s Presidential Fellow. Dennis’s office is across from mine, and I can attest that he has devoted hundreds of hours to assisting in all aspects of the conference planning.

I thank you all deeply for participating in the conference. I hope you will leave here believing that you have profited from attending.
One Country, Two Legal Systems? The Rule of Law, Democracy, and the Protection of Fundamental Rights in Post-Handover Hong Kong

The Committee on International Human Rights*

In January 1999, the Hong Kong Court of Final Appeal ("CFA") for the first time exercised its power of judicial review under the Basic Law of the Hong Kong Special Administrative Region ("HKSAR"). The Basic Law, which has been in place since the July 1997 transfer of sovereignty from the United Kingdom to the People's Republic of China ("PRC"), effectively serves as Hong Kong's Constitution and implements the idea that Hong Kong and the PRC will function as "One Country, Two Systems." The CFA's decisions—which expansively interpreted the Basic Law's right of abode, or permanent residency within Hong Kong, to apply to a broad class of persons currently residing in mainland China—generated immediate and substantial controversy. No less controversial was the response of the HKSAR administration, which ultimately

* This report was co-sponsored by the Joseph R. Crowley Program in International Human Rights at Fordham Law School.
requested the authorities in Beijing to reinterpret (or interpret) the provisions on which the CFA had relied so as to restrict the right of abode. By June 1999, the Standing Committee (“NPCSC”) of the National People’s Congress (“NPC”) effectively granted the Hong Kong administration’s request.

It was amid these widely-reported events that the Association of the Bar of the City of New York (the “Association”), in conjunction with the Joseph R. Crowley Program in International Human Rights at Fordham Law School (“Crowley Program”), undertook its second mission to Hong Kong. A central purpose of the mission was to follow up on the work of the Association’s first Hong Kong mission, which took place in October 1995. That mission was sent to Hong Kong to monitor and report on issues that were anticipated to affect the rule of law in Hong Kong as a result of the transfer of governmental authority from the United Kingdom to the PRC. The Report of that Mission was published in the Record, under the title Preserving the Rule of Law in Hong Kong after July 1, 1997: A Report of a Mission of Inquiry, by the Committee on International Human Rights. The Report was reprinted in the University of Pennsylvania Journal of International Economic Law, and was broadly disseminated.

1. See infra note 114.
2. For a recently published book that brings together the principal documents related to the right of abode controversy, see HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION (Johannes Chan, H.L. Fu, and Yash Ghai eds., 2000).
The Association’s earlier mission stressed the importance of continuing to monitor events in Hong Kong: “It is also imperative that this monitoring continue well beyond July 1, 1997. Many have expressed to us the view that the risks to Hong Kong’s preservation of the rule of law and of its economy will not be as great in the early years of the transition as they will be in later years, when world attention on Hong Kong will have abated and the temptations for exploitation may have increased. . . . It is imperative that questions relating to the preservation of the rule of law in Hong Kong not be overlooked or compromised because attention is focused elsewhere. We believe the Association may play a role in assuring that this does not occur.”

Since its first mission, the Association has remained active in following developments in Hong Kong and in maintaining and strengthening ties with Hong Kong legal institutions. In 1997 Michael Cardozo, then President of the Association, visited Hong Kong and was warmly received by leading judges, barristers, solicitors, and government officials. In addition, in May 1999, the Association’s Committee on Asian Affairs sponsored a highly visible panel discussion that brought together Hong Kong lawyers and officials who have been at the forefront of recent controversies, as well as academic experts on Hong Kong, Chinese, and American constitutional law.

Given its ongoing commitment to monitor the status of the rule of law in Hong Kong, the Association readily agreed to join forces with the Crowley Program on another mission to examine legal developments in Hong Kong two years after the turnover. The joint delegation traveled to Hong Kong on May 28, 1999, and spent approximately two weeks in the HKSAR. The Association was represented by Senior United States District Judge Leonard B. Sand of the Southern District of New York (who also had headed the 1995 mission) and Mae Hsieh and Tracy E. Higgins, members of the Committee on International Human Rights. The Crowley Program was also represented by Professor Higgins, as well as by Professor

6. Preserving the Rule of Law, supra note 4, at 388.

7. The panel was moderated by Daniel Fung, the former Solicitor of Hong Kong, and included Robert Alcock, then Acting Solicitor General of the HKSAR; Denis Chang, Lead Counsel for the plaintiffs in the “Right of Abode” cases and former Chair of the Hong Kong Bar Association; Phillip Dykes, Vice Chair of the Hong Kong Bar Association and Co-Lead Counsel for plaintiffs in the “Right of Abode” cases; Stephen Wong, Deputy Solicitor General of Hong Kong; Professor R. Randle Edwards of Columbia University School of Law and Director of the Center for Chinese Legal Studies; and Professor Paul Gewirtz of Yale Law School and Director of the Global Constitutionalism Project.
Martin Flaherty, who together are the Co-Directors of the Crowley Program, and by Robert J. Quinn, Crowley Fellow for 1998/99 and Adjunct Professor at Fordham Law School. The mission included eight Fordham Law students who had been selected as Crowley Scholars in International Human Rights: Elizabeth Crotty, Nate Heasley, Roger Hurley, Kara Irwin, Andrew Kaufman, Nadine Moustafa, Alain Personna, and John Rothermich. In Hong Kong, ten students from the University of Hong Kong assisted the delegation.

As was the case in 1995, the mission devoted its time in Hong Kong to meeting with members of the Hong Kong government, judges, legislators, leaders of the Hong Kong bar (both barristers and solicitors) law professors, journalists, human rights advocates, consular officials and business leaders. Our request to meet with Tung Che-wa, Chief Executive of Hong Kong, was not granted, but Mrs. Anson Chan, Chief Secretary for Administration, met with us and she and members of her staff were generous in the amount of time they provided. Meeting again with individuals visited in 1995 presented a special opportunity to compare the events of the ensuing four years with what had then been predicted before the handover and provided a unique perspective for considering the problems that lie ahead.

8. Charlotte Tse, Felix Ng, Jonathan Chang, Josiah Chan, Lee Lap Hang, Marina Tong, Sarah Cheng Po San, Scarlett Cheung, Susan Li Shui Jing, and Annie Szeto. The delegation is indebted to them and to Professor Andrew Byrnes for arranging their participation. In addition, the delegation is indebted to numerous officials, judges, lawyers, scholars, activists, and other informed individuals who met and consulted with the delegation during its visit and the drafting of this Report. We would specifically like to thank the Hong Kong Bar Association, especially Philip Dykes, SC, Denis Chang, SC, Margaret Ng, Ronnie Tong, SC, and Audrey Eu, SC; Christine Loh, of the Citizen’s Party; the Hong Kong Human Rights Monitor, especially Dr. Stephen Ng, and Law Yuk Kai; the Asian Migrant Resource Center, especially Apo Leung and Chan Ka Wai; and the Law Society of Hong Kong, especially Patrick Moss. None of these individuals or organizations bears any responsibility for the views expressed in this Report.

The administration of the Hong Kong Special Administrative Region merits special mention for its cooperation in facilitating the delegation’s access to officials and in providing information during our mission. In particular, we are grateful to Mrs. Anson Chan, Chief Secretary for Administration, Mrs. Elsie Leung, the Hong Kong Secretary of Justice, Robert Allcock, Assistant Secretary of Justice, and Michael Suen, Secretary of Constitutional Affairs Bureau. The delegation also would like to thank Dean John Feerick, the alumni of Fordham Law School for their support of the Crowley Program, and Luke McGrath, the 1999-2000 Crowley Fellow, for his efforts in the publication of this report.

9. A list of those with whom the present mission met is set forth in the Appendix to this Report. A list of the persons with whom the 1995 Mission met appears as an Appendix to the 1995 Report. Preserving the Rule of Law, supra note 4, at 390.
A. OVERVIEW

In 1995, the Association noted the extent to which persons in Hong Kong are concerned about “the quality and accuracy of criticisms and expressions of concern by persons outside Hong Kong.”10 That sensitivity to foreign perceptions continues unabated and without regard to whether the perceptions are generally critical or supportive of the Administration or the influence of Mainland China. The mission interviews made clear that Hong Kong officials, businessmen, legislators and civic leaders continue to care, and care deeply, how the HKSAR is viewed abroad, not only on matters affecting foreign investment and Hong Kong’s role as a world financial center, but also on broader political and social issues. World opinion is thought to have a great impact on how China and Hong Kong will interact with each other and third parties. Not surprisingly, therefore, and just as in 1995, our mission was warmly welcomed and treated with great respect.

The defining events in any current consideration of how well Hong Kong has fared in preserving the rule of law are the right of abode cases. A significant portion of this report is therefore devoted to a discussion of these cases, not all aspects of which have been resolved as of this writing (March 24, 2000). In the Association’s 1995 report we noted that the powers given to the NPCSC to interpret the Basic Law could “seriously undercut the HKSAR’s autonomy and the independence of its courts.”11 The concern then expressed was that mainland China might wield this power to exercise untoward dominion over Hong Kong and its courts. At the time of the 1995 mission, however, we did not anticipate that Hong Kong’s administrative authority might itself initiate a reference to Beijing to overrule a decision of Hong Kong’s highest court. As we relate here, this is exactly what has occurred.12

Though we concentrate here on the right to abode, the 1999 mission also gave the delegation an opportunity to revisit other issues. In 1995, our report noted that although virtually all legal proceedings were conducted in English, “[m]uch of this will change as of July 1, 1997. The Hong Kong legal system will become a bilingual system.”13 For reasons we discuss below, the progress of bilingualization has proceeded more slowly than anticipated in 1995.14 Conversely, other concerns that were previ-
ously expressed have failed to materialize. The fear that there would be a difficult transition proved to be exaggerated, although many would argue that most contentious items have been left open. With respect to the judiciary, fears that judges appointed after the turnover would be less qualified and independent have proven illusory. Knowledgeable observers from across the political spectrum unanimously assured our delegation that recent appointments continue Hong Kong's exemplary tradition of judicial independence and ability.

This mission produced two different but related reports. This Report appearing in the Record deals primarily with issues involving the rule of law, the heart of the 1995 Report. The protection of human rights, however, obviously encompasses more than what happens in courts of law. A longer Report, which will be reproduced as a stand-alone publication and will be made available principally to relevant individuals in Hong Kong and New York, will therefore examine issues beyond the scope of the 1995 Report. In addition to addressing the rule of law, that longer Report examines democratization and the implementation of certain fundamental rights, including guarantees against discrimination, labor rights, and access to legal services.

The delegation's hope is that these Reports will make a positive contribution to the ongoing debate within Hong Kong on how best to carry out the difficult challenge of "One Country, Two Systems" in a manner that preserves the rule of law and protects human rights in Hong Kong.16

I. PRESERVING THE RULE OF LAW

Under the "One Country, Two Systems" pledge, Hong Kong was to retain its autonomous common law framework, including an independent judiciary to exercise the power of final adjudication. Coming as it did so soon after the transition to mainland rule, the right of abode controversy cast an inauspicious light on China's commitment to this legal independence.

15. This report is available from the Executive Director's Office at the Association of the Bar of the City of New York.

16. In addition to the two versions of the joint Association/Crowley report, the Crowley Program published its own report. Joseph R. Crowley Program/Association of the Bar of the City of New York, One Country Two Systems? The Rule of Law, Democracy, and the Protection of Fundamental Rights on Post-Handover Hong Kong, 23 FORDHAM INT'L L.J. 401 (1999). While this report is also based on findings made during the same mission, the Crowley Program is solely responsible for its contents and the views expressed therein. Id. at 1.
The challenge to Hong Kong’s legal system presented by the right of abode controversy stems, in large part, from the readiness of the HKSAR government, having lost in Hong Kong’s highest court, to seek relief from the PRC, thereby undermining the finality of the CFA decision and subjecting the territory to mainland legal principles that are foreign, and in certain respects at odds with, the common law tradition of Hong Kong’s legal culture. This challenge posed by the right of abode controversy arrived in a manner that was not anticipated at the time of the Association of the Bar’s mission prior to the handover. Contrary to the fears expressed at the time, the Hong Kong judiciary has remained highly qualified and independent. The mainland government, moreover, has demonstrated a desire to let Hong Kong administer its own legal and political affairs. HKSAR government officials insist that turning to Beijing was the best way to meet the pressing crisis arising in the context of an untried constitutional system. Nevertheless, the potential cost to the rule of law has been high. By effectively circumventing the CFA’s interpretation of the Basic Law, the HKSAR administration’s actions have threatened judicial independence. These actions have also introduced Chinese legal concepts into Hong Kong that could further threaten Hong Kong’s common law system, including its ability to safeguard fundamental rights.

This report first considers the importance of the rule of law as a foundation for international human rights and China’s obligations under international law to protect the rule of law in Hong Kong. After reviewing the right of abode decisions, it examines both the legality and the prudence of the Hong Kong government’s request for a reinterpretation, including the alternatives that the HKSAR government might have pursued. The report concludes by analyzing the NPCSC’s reinterpretation and its implications for cases that are likely to raise similar issues in the near future.

A. THE RULE OF LAW

1. General International Standards

The Universal Declaration of Human Rights (or “Declaration”) enshrines an international commitment to “the rule of law” as fundamental to the protection of international human rights. No fewer than six of

17. See infra note 114.
18. Id.
the Declaration's first twelve articles specify principles fundamental to a nation's law and legal system. Both the Declaration and subsequent international instruments elaborate on these principles by guaranteeing an array of specific rights as well as mandating various procedures and institutions. Many of these instruments are directly binding on Hong Kong, including the International Covenant on Civil and Political Rights ("ICCPR").

Although nations are free to implement the rule of law in any number of ways, certain general principles must be honored. In particular, the U.N. Basic Principles on the Independence of the Judiciary set forth guidelines to safeguard the integrity and autonomy of courts throughout

20. Id. at arts. 6, 7, 8, 10, 11, 12.
22. See, e.g., id. at art. 13 (stating that everyone shall be entitled to fair and public hearing by a competent, independent, and impartial tribunal established by law).
the world. The Basic Principles state that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is therefore the duty of all governmental and other institutions to respect and observe the independence of the judiciary."26 They further provide that the judiciary shall decide matters, "without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect from any quarter or for any reason."27 In addition, the Basic Principles declare that "[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."28 Finally, the Basic Principles prohibit "any inappropriate or unwarranted interference with the judicial process," and forbid that any "judicial decision by the courts be subject to revision."29 In these ways, the Basic Principles make clear that legal controversies must be settled by authorities that are not beholden to policymakers who might have a vested interest in the outcome. In the eyes of the world community, judicial independence is a cornerstone principle for the rule of law enshrined in the major human rights instruments.

2. The Sino-British Joint Declaration

Beyond its obligation to respect the rule of law as an aspect of international human rights law, the PRC has undertaken specific obligations to preserve Hong Kong's legal structure. These obligations are set forth in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong30 (the "Joint Declaration"). The Joint Declaration makes clear that for Hong Kong, "rule of law" means the common law, including judicial independence and finality of judicial decisions.

26. Id. at No. 1.
27. Id. at No. 2.
28. Id. at No. 3.
29. The provision adds: "This principle is without prejudice to judicial review or to mitigation or communication by competent authorities of sentences imposed by the judiciary." Id. at No. 4.
Despite its name, the Joint Declaration is a treaty. Initially, China resisted the idea of a binding international agreement, but it ultimately agreed to memorializing the handover in treaty form in part because it came to recognize that such a commitment would provide the world community greater assurance of its intent to respect Hong Kong’s special status. Accordingly, the Joint Declaration mandated that the United Kingdom restore Hong Kong to Chinese sovereignty on July 1, 1997, and in turn obligated China to establish the territory as a “Special Administrative Region.” As such, the territory would “enjoy a high degree of autonomy, except in foreign and defense affairs, which are the responsibilities of the Central People’s Government.” China thus bound itself under international law to implement the formula of “One Country, Two Systems” originally envisioned by Deng Xiaoping.

The Joint Declaration makes clear that the high degree of autonomy that Hong Kong currently enjoys extends to its legal system. The main document declares that the HKSAR “will be vested with executive, legislative, and independent judicial power, including the power of final adjudication,” and further states that “the laws currently in force in Hong Kong will remain basically unchanged.”

A series of binding Annexes to the Joint Declaration flesh out these commitments. Annex II states that “laws previously enforced,” specifically “the common law” as well as “rules of equity, ordinances, subordinate legislation, and customary law,” will remain in effect. Addressing the judiciary, Annex III preserves “the judicial system as previously practiced in Hong Kong except for those changes consequent upon vesting the courts of the Hong Kong Special Administrative Region of the power of final adjudication.” This provision actually reflects a strengthening of the role of the Hong Kong judiciary, since the Joint Declaration elsewhere vests “the power of final judgment” for the HKSAR in a new “court of final appeal” for cases that previously would have been adjudicated by the Privy Council in the United Kingdom. Annex III further provides that “the courts shall exercise judicial power independently and free from...
any interference . . . and may refer [to] precedents in other common law jurisdictions. In addition, the CFA “may as required invite judges from other common law jurisdictions” to adjudicate cases.

By acceding to the Joint Declaration, China expressly committed itself to respecting the independence of the Hong Kong judiciary, including the finality of its decisions. Any compromise of this commitment places China in violation of these international legal obligations.

B. Implementing International Commitments:
Hong Kong and the Basic Law

The PRC implemented its obligations under the Joint Declaration through the Basic Law. The Basic Law was enacted by the NPC on April 4, 1990 under Article 31 of the PRC Constitution, and took effect on July 1, 1999. The legal status of the Basic Law remains to be fully defined and integrated. In part, the Basic Law derives its legitimacy from, and is intended to comply with, the Joint Declaration. It is also a national statute of the People's Republic. Yet, it also serves as Hong Kong’s “constitution,” replacing the Letters Patent issued by the British Crown that established the framework for the colonial government.

The Basic Law provides that Hong Kong will maintain its own legal system, along with its distinct political and economic systems, for fifty years. To this end, it authorizes Hong Kong “to exercise a high degree of autonomy and enjoy executive, legislative, and independent judicial power, including that of final adjudication.” The Basic Law safeguards the existing common law framework, declaring that “the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to amendment by the [Hong Kong] legislature.” The Basic Law further elaborates its guarantee of the judicial independence that characterizes common law systems. After repeating the Basic Law’s grant of independent judicial power to Hong Kong,
“including that of final adjudication,” Article 19 grants the HKSAR courts “jurisdiction over all cases in the Region, except that the restrictions imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”

Notwithstanding its commitment to preserving the common law system, the Basic Law itself contains provisions which, depending upon their interpretation, could undercut judicial independence and the finality of decisions. Specifically, provisions governing the interpretation and amendment of the Basic Law risk subordinating the courts to oversight by NPCSC.

For example, Article 158, which addresses interpretation, begins by declaring that “[t]he power of interpretation of [the Basic Law] shall be vested in the [NPCSC].” The balance of Article 158 discusses the interpretation of the Basic Law in the context of actual cases. It directs the NPCSC to authorize the HKSAR courts “to interpret, on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.” Article 158 then specifies the NPCSC’s role by

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43. Id. at art. 19, para. 1 & 2. The Basic Law, however, arguably deviates from the Joint Declaration on various matters, including judicial authority. The same article that guarantees an independent judiciary, for example, denies the Hong Kong courts “jurisdiction over acts of state such as defense and foreign affairs.” Id. at art. 19, para. 3. Not only is this restriction unmentioned in the Joint Declaration, but it may also be overbroad, if interpreted under mainland, and not common law principles. Ghai, supra note 31, at 318-20. This deviation from the Joint Declaration is but one of many that resulted from the Basic Law drafting process. Many of these changes may have resulted from a hardening of Chinese attitudes in the wake of the crackdown at Tiananmen Square and Hong Kong’s strong public support for the suppressed pro-democracy movement. Ghai, supra note 31, at 63-64.

44. See Ghai, supra note 31, at 68, 149; Peter Wesley-Smith, Constitutional and Administrative Law in Hong Kong 69 (1994).

45. Basic Law, supra note 23, at art. 158.

46. Basic Law, supra note 23, at art. 158, para. 2. The meaning of this statement generated considerable debate. Some analysts argued that the statement merely notes the existence of a general power that the NPCSC enjoys before directing the NPCSC to divide this authority between itself and the Hong Kong courts. Others contended that this provision grants the NPCSC a general power to “clarify” the Basic Law whenever it sees fit. Margaret Ng, Time for the Next Test To Begin, S. China Morning Post, July 16, 1999, at 1; interview with Denis Chang, Lead Counsel for Appellants in Ng Ka Ling, in Hong Kong (June 8, 1999). In part this argument depended on the Chinese version of the provision, which bears a meaning closer to “possesses,” as opposed to “vests.” Id. Since the completion of the 1999 mission, the CFA has rendered this debate moot by endorsing the broad view that the NPCSC may interpret the Basic Law at its own discretion. See Lau Kong Yung (an infant suing by his father and next friend Lau Yi To) and 16 others v. Director of Immigration, Nos. 10 and 11 of 1999, HKSAR Court of Final Appeal, 15-16, 19 (Dec. 3, 1999). All citations are to the official version of the
requiring that certain matters be referred to Beijing. The article states that the Hong Kong courts may interpret provisions outside the limits of their autonomy when adjudicating cases. If, however, a court needs to interpret Basic Law provisions that concern “affairs which are the responsibility of the Central People’s Government” or “the relationship between the Central Authorities and the Region” and the interpretation will “affect the judgment of the case and will not be appealable, then the court must seek an interpretation of the relevant provision” from the NPCSC. Should the NPCSC interpret the provisions concerned, the Hong Kong courts must follow that interpretation. Judgments previously rendered, however, “shall not be affected.”

From the beginning, the NPCSC’s role in interpreting the Basic Law under Article 158 prompted significant concern. Ironically, government officials assured the Association’s 1995 mission that the NPCSC’s power of interpretation through referral, as well as its general power of interpretation, were included in the Basic Law principally as a symbolic gesture to Beijing and were not likely ever to be used. Fewer than five years later, Article 158 was at the heart of the challenge to Hong Kong’s judicial independence.

C. The Right of Abode Decisions

The right of abode controversy began with a challenge to the constitutionality of certain restrictive immigration legislation passed by Hong Kong’s Legislative Council (“LegCo”). In two cases, Ng Ka Ling (an infant) & Ors v. Director of Immigration, and Chan Kam Nga (an infant) & Ors v. Director of Immigration.

47. Id. at art. 158, para. 3. Paragraph 4 adds that the NPCSC “shall consult its Committee for the Basic Law”—a group of 12 individuals, six from the mainland and six from Hong Kong, most of whom are not legal experts—“before giving its interpretation of this Law.” Id. at para. 4.

48. See supra note 114 for discussion of interpretation versus reinterpretation/controversy.

49. Honorable Leonard B. Sand, recollection from the 1995 Hong Kong Delegation of the Association of the Bar of the City of New York (1995). Reference was made to the infrequency with which the Standing Committee’s interpretative role had been invoked with regard to mainland issues. Id.

50. See M a, [1997] 2 HKC at 337-44 (discussing formation and legality of Provisional Legislative Council (or “LegCo?”)).

51. See Ng Ka Ling (an infant) & Ors v. Director of Immigration, [1997] 1 HKC 291.
Director of Immigration, the appellants challenged two ordinances that controlled the right of mainland children of Hong Kong permanent residents to emigrate to the HKSAR as unconstitutionally restrictive of rights guaranteed by Article 24 of the Basic Law.

1. Background

Immediately after China's resumed sovereignty over Hong Kong, the Provisional LegCo enacted two immigration ordinances that defined eligibility for the right of abode and outlined an administrative scheme for allowing mainland Chinese citizens with the right of abode to emigrate to Hong Kong. The Immigration (Amendment) (No. 2) Ordinance (“No. 2 Ordinance”), enacted on July 1, 1997, set out the categories of individuals entitled to the right of abode, adding two limitations not mentioned in Article 24 of the Basic Law. First, the No. 2 Ordinance provided that a child of a parent with the right of abode in Hong Kong would be entitled to the right of abode only if her parent already had the right when the child was born. Second, the No. 2 Ordinance added a requirement that those claiming the right of abode on the basis of their fathers' right of abode must have been born within a marriage.

The Immigration (Amendment) (No. 3) Ordinance (“No. 3 Ordinance”), enacted by the Provisional LegCo on July 10, 1997, established an administrative “Certificate of Entitlement Scheme” under which mainland Chinese with the right of abode would be allowed to emigrate to Hong Kong. The immigration scheme required mainland residents claiming a right of abode through their parents to obtain a one-way exit permit from the mainland authorities before being allowed to emigrate, as well as a “Cert-
Certificate of Entitlement” from the HKSAR Director of Immigration.\(^{58}\) The Mainland Bureau of the Exit-Entry Administration limited the number of such permits that would be issued each day to 150.\(^{59}\)

In Ng Ka Ling, the HKSAR courts considered three consolidated challenges to these ordinances on behalf of four individuals claiming the right of abode as the natural children of Hong Kong permanent residents.\(^{60}\) Although all four had emigrated illegally in contravention of the No. 3 Ordinance, one had been born outside of marriage, and was therefore denied the right of abode exclusively under the No. 2 Ordinance.\(^{61}\) Their combined cases were heard as a test case on behalf of more than a thousand named immigrants claiming the right of abode. The petitioners challenged both immigration ordinances as unconstitutionally restricting the right of abode as guaranteed by Article 24 of the Basic Law.\(^{62}\)

In Chan Kam Nga, eighty-one children born of parents who obtained the right of abode only after their birth challenged the No. 2 Ordinance’s requirement that a parent possess the right at the time of the child’s birth. As in Ng Ka Ling, the children argued that the requirement unconstitutionally denied them the right of abode granted by Article 24.\(^{63}\) Thus, while Ng Ka Ling presented a challenge to the No. 3 Ordinance’s permit scheme and the No. 2 Ordinance’s legitimacy requirement, Chan Kam Nga focused on a challenge to the No. 2 Ordinance’s limitation of the right of abode to children of Hong Kong residents whose right of abode had already vested at the time of the child’s birth.

2. The Court of Final Appeal’s Decisions

The right of abode cases presented the CFA with its first occasion to exercise its power of judicial review under the Basic Law.\(^{64}\) Regrettably perhaps, the CFA confronted a situation far different from that facing the

58. Id. schedule 1, para 2(c); Ng Ka Ling, 1 HKC at 314-16.
59. Ng Ka Ling, 1 HKC at 317.
60. Id. at 319.
61. Id.
62. Id. at 294-95.
64. The Hong Kong Court of Appeal had previously considered the power of judicial review in HKSAR v. Ma Wai Kwan & Ors, [1997] 2 HKC 315. Ma dealt with the legality of the establishment of the mainland-appointed Provisional LegCo as Hong Kong’s first post-handover legislative body. See id. at 333.
U.S. Supreme Court in Marbury v. Madison.\(^{65}\) Whereas the immediate result in Marbury directly affected only a handful of minor Federal appointees, any ruling on the right of abode would have far-reaching social, political, and economic consequences in Hong Kong. Indeed, the HKSAR administration would later maintain that a broad interpretation of the right would open the doors to up to 1.67 million mainland immigrants over the next decade. Although this figure was keenly disputed, nearly all interested observers agreed that the practical implications of the cases were substantial.\(^{66}\)

The CFA, nonetheless, seized the opportunity that Ng Ka Ling provided by asserting the power to review not only acts of the HKSAR, but also acts of China’s NPC.\(^{67}\) The CFA supported these assertions through reference to China’s basic policy, as enunciated in the Joint Declaration, that the HKSAR courts should have the jurisdiction to enforce and interpret the Basic Law, “which necessarily entails jurisdiction . . . over acts of the National People's Congress and its Standing Committee to ensure consistency with the Basic Law.”\(^{68}\) This strong language planted the seed of the first political crisis to grow out of the decision.\(^{69}\)

### a. Article 158: The Reference Issue

At the time the CFA issued its first right of abode decision in Ng Ka Ling, the question of referral under Article 158 appeared to be the most controversial question presented by the case.\(^{70}\) Specifically, the CFA first had to rule on who should determine whether an issue fell within the scope of the referral provision, and second, whether articles 22 and 24 should be referred to the NPC in this case. The court resolved these issues in a manner that both accorded with the language of Article 158 and defended the independence of Hong Kong’s judiciary.

The CFA approached this issue employing a “purposive” analysis, emphasizing the second paragraph of Article 158, which provides that

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\(^{65}\) Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

\(^{66}\) See infra notes 117–119 and accompanying text.

\(^{67}\) See Ng Ka Ling, 1 HKC at 322-23. This assertion represented a radical departure from the Hong Kong Court of Appeal decision in the Ma case. There, the Court of Appeals suggested in dicta that the HKSAR courts had no review jurisdiction over the “sovereign” NPC by analogy to the irrevisability of acts of the British Parliament prior to the handover. See HKSAR v. Ma Wai Kwan David & ORS, [1997] 2 HKC 315, 333-34.

\(^{68}\) Ng Ka Ling, 1 HKC at 322-23.

\(^{69}\) See infra notes 99-113 and accompanying text.

\(^{70}\) See supra notes 45-47 and accompanying text (discussing Basic Law, Article 158).
the NPCSC “shall authorize” the courts of the Region “to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of autonomy of the Region.” The Court read the phrase “on their own” to “emphasize the high degree of autonomy of the Region and the independence of its courts.” The opinion did, however, acknowledge the limitations on its interpretive authority. It noted that the third paragraph of Article 158 mandates referral to the NPCSC of interpretations “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region . . . if such interpretation will affect the judgments on the cases.”

Article 158 does not state who determines which provisions must be referred to the NPC and which provisions may be interpreted solely by the courts of the HKSAR. Faced with this question, the CFA reasoned that it held this power exclusively:

In our view it is for the Court of Final Appeal and for it alone to decide [which interpretations must be referred]. . . . It is significant that what has to be referred to the Standing Committee is not the question of interpretation involved generally, but the interpretation of the specific excluded provisions.

Having declared its authority to decide the scope of any referral, the CFA concluded that the interpretation of Article 24, guaranteeing the right of abode, was a matter for its own determination rather than interpretation by the NPCSC.

The interaction between Articles 22 and 24 raised an even more difficult question. Though counsel for the Director of Immigration conceded that Article 24 was a provision “within the limits of autonomy of the Region,” and thus did not mandate referral, he argued that a proper interpretation of Article 24 required interpretation of Article 22, which did mandate referral. Article 22 provides that immigrants to Hong Kong
"from other parts of China" must apply for approval and that an immigration limit will be determined by the Central People’s Government ("CPG"). The Director argued that because Article 22 specifically deals with the relationship between the Central Authorities and the HKSAR, and because interpretation of Article 22 is required for proper interpretation of Article 24, the CFA should have referred the entire case.

Rejecting this argument, the CFA held that if the “predominant provision” at issue in the case is within the jurisdiction of the HKSAR, then it is unnecessary to refer any subsidiary provisions to the NPCSC, even if those provisions arguably fell within the mandatory referral categories of Article 158. The Court again justified its conclusion on “purposive” grounds, reasoning that this “predominant provision” test properly effectuates Article 158’s division of interpretive authority between the HKSAR courts and the CPG.

The significance of the CFA’s method of analysis cannot be overemphasized. By relying on a “purposive” constitutional interpretation that carefully considered the context of the provisions and the PRC’s “underlying policies” toward Hong Kong, the CFA appropriately emphasized both

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78. Article 22 of the Basic Law states:

> For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People’s Government after consulting the government of the Region.

Basic Law, supra note 23, at art. 22, para. 4. It could be argued that a literal reading of Article 22 directly conflicts with the right of abode guarantee in Article 24.

79. Ng Ka Ling, 1 HKC at 329.

80. Id. at 330.

81. Id. at 331. The CFA’s stance on referral did not pass without significant criticism. Within Hong Kong, for example, Professor Peter Wesley-Smith of the University of Hong Kong argued that there was a strong case to be made that the Court may have been incorrect in relying on the predominant provision test as the basis not to make a referral. Peter Wesley-Smith, "The Options" (May 13, 1999) (Draft paper prepared for presentation at a seminar organized by the Central Policy Unit, on file with the Crowley Program. The author points out that the views expressed do not necessarily represent his final opinions.) In a similar fashion, Jerome Cohen, a prominent Chinese law expert at New York University Law School, publicly took the CFA to task for failing to ask the NPCSC to consider whether mainland migrants needed permission from Chinese authorities to leave the mainland. According to Professor Cohen, this failure set in motion the resulting right of abode crisis. See Court Flunked Test, Says US Professor, S. China Morning Post, Dec. 6, 1999.
HKSAR’s political autonomy and the primacy of individual rights. But more than that, the purposive approach, in the Court’s own view, represented a commitment to traditional common law principles of adjudication as previously practiced in Hong Kong. Hence, the CFA took pains to declare that “the courts must avoid a literal, technical, narrow or rigid approach.” The CFA’s reliance on what it viewed as standard common law methods, however, would later come into conflict with the “true legislative intent” approach employed by the NPCSC in its reinterpretation.

b. Articles 22 and 24 of the Basic Law

The CFA next considered the right of abode restrictions themselves. Ng Ka Ling and Chan Kam Nga challenged three specific limitations: (1) the requirement of a mainland certificate; (2) the limitation of the right to children born within marriage; and (3) the requirement that the right of abode have vested in at least one parent at the time of the child’s birth. The CFA invalidated all three.

On the first issue, the Director of Immigration argued that Article 22 of the Basic Law limits the right of abode for mainland Chinese residents by requiring approval by mainland authorities. The certificate of entitlement scheme was therefore constitutional under the Basic Law in that it simply implemented a scheme for approval of requests to emigrate. The Court in Ng Ka Ling unequivocally rejected this argument, holding that the right of abode was a “core right,” without which all of the other rights guaranteed in Chapter III of the Basic Law would be useless. Accordingly, the CFA narrowly interpreted Article 22 as applying only to those who lacked the right of abode under Article 24.

The CFA did, however, hold that the Director of Immigration could require verification of an individual’s claim to permanent resident status. The Court therefore ruled that the No. 3 Ordinance’s requirement

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82. Ng Ka Ling, 1 HKC at 326.
83. See G HAI , supra note 31, at 225-26; M ICHAEL  C. D AVIS , W RITTEN  T ESTIMONY  FOR  THE  L EGISLATIVE  C OUNCIL  ON  THE  Q UESTION  OF  M ECHANISMS  FOR  S EEKING  NPCSC S TANDING  C OMMITTEE  I NTERPRETATION  (June 12, 1999).
84. Basic Law, supra note 23, at art. 22.
85. Ng Ka Ling, 1 HKC at 331.
86. Id. at 332.
87. Id. at 332-33.
88. Id. at 334.
of a certificate of entitlement from the HKSAR government was permissible, so long as the Director of Immigration operated the scheme in a “fair and reasonable manner” without “unlawful delay.” This request would become central to a follow-up case that the CFA would decide near the end of 1999.

The Court in Ng Ka Ling next addressed the illegitimacy issue. The CFA held that the No. 2 Ordinance’s restriction of the right of abode to children born within marriage violated the Basic Law for two primary reasons. First, the Court reasoned that the No. 2 Ordinance’s discrimination between legitimate and illegitimate children was antithetical to the “principle of equality” enshrined in both the Basic Law and the ICCPR.

Second, the CFA found that the “plain meaning” of Article suggested no restriction: “[a] child born out of wedlock is no more or less a person born of [a permanent] resident than a child born in wedlock.”

Issued the same day as the decision in Ng Ka Ling, Chan Kam Nga addressed what would emerge as the most important restriction on the right of abode—the No. 2 Ordinance’s limitation of the right to children born after their parents already had acquired permanent residency status. Following the pattern of Ng Ka Ling, the CFA again found this restriction on the right of abode unconstitutional. Echoing its analysis of the legitimacy requirement, the Court held that the “natural meaning” of Article 24(3) included all children born of permanent residents regardless of when the parents acquired such status. The CFA also justified its holding under its “purposive” interpretation of Article 24, reasoning that an unrestricted right of abode “enabl[es] that child to be with that parent [in Hong Kong], thereby securing the unity of the family.”

89. Id. at 334–35
90. See infra notes 226–241 and accompanying text.
91. Id. at 339.
92. Id. at 340.
93. Id. at 340.
95. Id. at 348, 354–55.
96. Id. at 354.
97. Id. The CFA also noted that the ICCPR defines the family as “the natural and fundamental group unit of society and is entitled to protection by society and the State.” Id. at 355 (quoting ICCPR art. 23(1)).
3. The Clarification Controversy

The CFA's unequivocal assertion of the power of judicial review and its narrow interpretation of the mandatory referral provisions of Article 158 assuaged some commentators' fears that the autonomy granted by the Basic Law was little more than an empty promise.98 Others, however, not the least the CPG, perceived aspects of the decision as threatening to China's sovereignty, and as usurping the NPCSC's ultimate interpretive authority over the Basic Law. Still others feared that the HKSAR administration's concern over increased immigration might lead it to disregard the ruling.99 This last fear was soon realized when Chief Executive Tung Chee Hwa expressly supported the deportation of overstayers claiming the right of abode pending the negotiation of a new immigration procedure with the mainland.100

The most critical responses to the decision initially came from Beijing. Dr. Raymond Wu Wai-yung, a professor and leading advisor to the CPG, argued that the CFA's decision was simply wrong. In his view, the issue should have been referred to the NPCSC for interpretation, and the Basic Law should have been interpreted in accordance with the mainland legal system, not common law principles.101 In the first official comment of the mainland government on the abode ruling, Zhao Qizheng, a senior official of the State Council, likewise claimed that the decision was contrary to the Basic Law and should be changed.102 Importantly, this criticism of the right of abode ruling had less to do with the substance of the CFA's decision than with the dictum in Ng Ka Ling that the Basic Law gave the CFA authority to review acts of the NPC. In statements widely perceived

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98. See, e.g., Editorial, Landmark Ruling, S. China Morning Post, Jan. 30, 1999 (referring to right of abode decision as "restoring" the public's flagging confidence, following months of anxiety that Hong Kong's most cherished institutions were being slowly eroded"); Yash Ghai, Abode Verdict a Resounding Victory for the Rule of Law, S. China Morning Post, Feb. 3, 1999.

99. See e.g., Margaret Ng, Right of Abode Justice Speaks with a Clear Voice, S. China Morning Post, Feb. 5, 1999. LegCo member Margaret Ng warned that "any suggestion of maintaining policies calculated to frustrate the judgment of the court will be a serious challenge to the rule of law in the HKSAR and will shock the world." Id.


102. Ruling Against Basic Law, Senior Official Says, S. China Morning Post, Feb. 8, 1999. Zhao Qizheng later publicly clarified this statement, saying that these were only his personal views and not necessarily those of the Central Authorities. See also, Tung Sends Justice Chief to Beijing To Smooth Out Row, S. China Morning Post, Feb. 10, 1999.
to reflect Beijing's official position, four prominent mainland legal scholars emphatically denied that the Hong Kong courts had any authority to invalidate mainland legislation that applied to Hong Kong.  

The HKSAR Administration was quick to respond to the brewing controversy. On February 12, 1999, Chief Executive Tung dispatched the HKSAR's Secretary for Justice, Elsie Leung, to Beijing to discuss the right of abode decision with mainland government authorities. On February 24, Leung filed an “application for clarification” of the right of abode judgment with the CFA. In addition, she also directly telephoned the Chief Justice of the CFA, Andrew Li Kwok-nang, to request an early hearing date for the clarification process. The Hong Kong Deputies to the NPC also entered the fray by proposing submissions for the NPC's next plenum meeting asking the NPCSC to interpret Articles 22, 24, and 158 of the Basic Law to “rectify” perceived “errors” in the right of abode judgments.

Responding to these developments on February 26, 1999 (less than one month after the original judgment), the CFA issued a terse opinion “clarifying” its decision in the right of abode cases. The Court acknowledged that it was following “an exceptional course” by reconsidering its prior judgment. It briefly noted that its judicial power is “derived from and is subject to” the Basic Law, and for the first time referred to the first paragraph of Article 158 which vests the power of interpretation of the Basic Law in the NPCSC. The most important portion of the clarification addressed the CFA's authority relative to the NPCSC:

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\text{[T]he Court's judgment} \ldots \text{did not question the authority of the Standing Committee to make an interpretation under article 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question} \ldots \text{the authority of the National People's Congress or the Standing Committee to do}\]

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103. Mark O'Neill, Beijing Says Abode Ruling Was Wrong and Should Be Changed, S. China Morning Post, Feb. 9, 1999, at 1; Chris Yeung, Pressure on Abode Court for Rethink, S. China Morning Post, Apr. 30, 1999, at 1.

104. Justice Chief Leaves for Hong Kong Talks on Friday, S. China Morning Post, Feb. 11, 1999.


106. Ng Ka Ling (an infant) v. Director of Immigration, [1999] 1 HKC 425-26 (factual background in case reporter explaining the CFA's clarification).

107. Id at 427.

108. Id
any act which is in accordance with the provisions of the Basic Law. 109

Nowhere in the clarification did the court expressly vacate or modify any of the conclusions of its original opinion. The clarification instead mainly tracked Article 158’s initial grant of interpretive authority to the NPCSC. 110

The clarification apparently had the desired political effect on Beijing. At its annual plenum session eleven days after the CFA issued its “clarification,” 111 the NPC chose neither to address the right of abode ruling nor refer the matter to the NPCSC. Beijing had apparently received adequate assurance of the CPG’s sovereignty and authority under the Basic Law and seemed content to let Hong Kong deal with the potentially large influx of mainland immigrants on its own. 112 The possibility that the NPC would authorize the NPCSC to override the Court’s decision by reinterpreting the Basic Law was defused and a constitutional crisis was narrowly averted. Chinese President Jiang Zemin signaled the apparent end of the controversy, when he poetically declared that “the ripples in the pond have become calm.” 113

D. Challenge from Within: The Request for NPCSC Reinterpretation 114

Though it averted a direct clash between the Hong Kong courts and the mainland authorities, Hong Kong could not avoid a constitutional

109. Id.

110. The one area where the CFA may have made a concession beyond the Basic Law’s language was its statement that the courts of the HKSAR would have to follow an NPCSC interpretation in adjudicating cases, which is nowhere provided for expressly. Interview with Denis Chang, Lead Counsel for the Petitioners in Ng Ka Ling, in Hong Kong (June 8, 1999).


113. Interview with Denis Chang, Lead Counsel for the Petitioners in Ng Ka Ling, in Hong Kong (June 8, 1999).

114. There is a controversy over the use of the term reinterpretation as opposed to interpretation. Those who are more sympathetic to the use of this power by the NPCSC, usually use interpretation because that term is used in Article 158 or because it reflects mainland legal concepts. Those who harbor greater concern over the NPCSC’s role, generally use reinterpretation, at least when the NPCSC is passing on provisions that Hong Kong courts have already ruled on. We will employ reinterpretation, with regard to the right of abode controversy because we believe this term more accurately reflects what the NPCSC did and was asked to do in that situation.
crisis, triggered from within. In retrospect, this development is not altogether surprising. Hong Kong's legal community, and the HKSAR administration in particular, faced the enormous challenge of implementing a novel and complex constitutional order in the context of what the local government perceived as a potentially massive social and demographic crisis.

Even conceding the difficulty of the task at hand, however, the administration's response to the right of abode decisions proved to be controversial and problematic. Claiming that the CFA decision would produce dire social consequences, the HKSAR administration decided to proceed directly with a request to the NPCSC for reinterpretation of the Basic Law provisions on which the CFA had relied. Both the wisdom and the legality of the administration's request are open to serious question. By refusing to implement the CFA judgment, pursuing a request for reinterpretation, and ignoring the more palatable and legally sound alternatives that were available, the HKSAR administration actions served to undermine the Court and cast doubt on its commitment to defend Hong Kong's common law legal traditions.

1. The HKSAR's Failure To Implement the CFA Judgment

Before the "clarification" was even issued, Hong Kong's administration already indicated that it would not readily implement the CFA decision. Soon after the CFA's original ruling, the HKSAR government arrested a number of mainlanders who had overstayed their two-way travel permits and were claiming the right of abode under the Court's judgment.\(^{115}\) The government did agree, however, to expedite the immigration process for 13,000 mainlanders who already had been issued one-way permits but were delayed by the 150 person-per-day immigration quota.\(^{116}\)

It was at this point that the HKSAR government, together with mainland authorities, also conducted a survey of mainlanders in an effort to determine the likely number of immigrants that would be generated by the CFA's decision. The preliminary results, which were issued on April 28, 1999, were ominous and controversial. According to the government's figures, enforcement of the CFA decision would result in 1.67 million additional mainlanders acquiring the right of abode over the next seven years.

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115. See Arrests Pave Way, supra note 100.
The study indicated that 200,000 of the potential immigrants were illegitimate children and that the remaining 1.4 million were children of Hong Kong residents whose right of abode had not yet vested at the time of the child’s birth. The analysis assumed that all mainlanders who were eligible for permanent residence would claim this right. Based on that assumption, the administration predicted that 690,000 would be eligible to enter immediately and the remaining 980,000 would come in within the next seven years.

Repeated and alarming government statements stressed that “social resources could hardly meet the immediate needs of this large group of immigrants for education, housing, medical and health, social welfare, etc., thereby triggering severe social problems.” Not surprisingly, the government’s survey results and dramatic predictions of economic catastrophe generated widespread public concern and a demand that some solution be found. The administration soon made clear its belief that only a reversal or nullification of the CFA’s judgment could avert imminent crisis. The administration floated three possible options: 1) asking the CFA to reconsider its interpretation in the upcoming “overstayer” test cases; 2) amending the Basic Law; or 3) asking the NPCSC to give its own


118. See Chris Yeung, Pressure on Abode Court for Rethink, S. China Morning Post, Apr. 30, 1999, at 1; Hong Kong Human Rights Monitor, supra note 117.

119. See interview with Dr. Stephen Ng, Director, Hong Kong Human Rights Monitor, in Hong Kong (May 31, 1999) (noting that survey methodology has been widely criticized and that there is little evidence that all right of abode holders would actually want to permanently emigrate to Hong Kong); remarks of Gladys Li, SC, Barrister, at Crowley Mission Wrap-Up Session No.1, in Hong Kong (June 10, 1999). Critics claimed that these figures were grossly inflated and that the actual numbers were as low as half the administration estimate.

120. Chief Executive’s Submission to Legislative Council House Committee, Right of Abode: The Solution (May 18, 1999) [hereinafter Right of Abode: The Solution] (stating that government’s opinion polls show that “public is very concerned about these unbearable consequences”).

121. Id. Many in Hong Kong opined that government statements were essentially “scare tactics” to draw criticism away from the proposed NPCSC interpretation solution. See Jason Felton, President, American Chamber of Commerce in Hong Kong, Remarks at the Crowley Mission Breakfast with the American Chamber of Commerce in Hong Kong (June 4, 1999); Interview with Dr. Stephen Ng, Director, Hong Kong Human Rights Monitor, in Hong Kong (May 31, 1999).
interpretation of Articles 22 and 24 of the Basic Law. After brief deliberation, the administration determined that the third choice, requesting an interpretation from the NPCSC, was the only feasible alternative.

This decision immediately met with significant opposition from the Hong Kong legal community, which expressed concern over Hong Kong’s autonomy and urged alternative approaches. Undeterred, the administration secured a resolution supporting its plan from LegCo, but not before “nineteen members, led by Democratic Party chairman Martin Lee and dressed in black” walked out prior to the vote. In the meantime, many of the Hong Kong Deputies to the NPC, who are themselves not directly elected, made public their view favoring reinterpretation over amendment.

On May 20, 1999, the Chief Executive submitted a formal report to the State Council in Beijing. Among other things, the report observed that the CFA’s interpretation differed from the administration’s understanding of the wording, purpose, and legislative intent of these provisions; that the control of mainland resident immigration into Hong Kong has a bearing on the relationship between the Central Authorities and the HKSAR; that the HKSAR is no longer capable of resolving the problem on its own; and that the CFA was compelled to approach Beijing in the face of exceptional circumstances. The Chief Executive concluded his report by suggesting that the State Council should ask the NPCSC to interpret, under the relevant provisions of the Constitution and the Basic Law, Article 22(4) and 24(2)(3) of the Basic Law according to the true legislative intent.

122. See Right of Abode: The Solution, supra note 120.
123. See Hong Kong Bar Association, Press Release, Open Letter to the Chief Executive on the Right of Abode Case (May 5, 1999); Hong Kong Human Rights Monitor, supra note 117.
124. See Chris Yeung, LegCo Walkout on Abode Vote, S. China Morning Post, May 20, 1999, at 1; Interview with Rita Fan, President, HKSAR Legislative Council, in Hong Kong (June 7, 1999).
125. See Chris Yeung, Balance Between Legality and Reality, S. China Morning Post, May 1, 1999, at 13 (noting that key local NPC deputies have insisted that constitution should not be altered simply because of “wrong ruling” by CFA); Interview with Margaret Ng, Legislative Councillor, in Hong Kong (June 7, 1999).
127. Id.
2. Legality of the Reinterpretation Request

The request for reinterpretation generated a controversy that dominated Hong Kong political life for weeks. As a threshold matter, prominent members of the Hong Kong bar and academy argued that the Chief Executive's action was flatly inconsistent with the Basic Law. In contrast, the administration, with some support from the legal community, contended that the Basic Law all but mandated the request.

Led by the Hong Kong Bar Association, administration critics first contended that the request itself was ultra vires. As the critics pointed out, the Basic Law nowhere authorizes the Chief Executive to seek an interpretation. On the contrary, the Basic Law expressly grants to the CFA alone the power to refer interpretive matters to the NPCSC, and then only in the context of adjudicating cases.\(^{128}\) The structure of the Basic Law, moreover, contemplates that NPCSC interpretations will be issued before, and not after, the CFA rules on a provision of the Basic Law. This sequence accords respect both to the interpretive authority of the NPCSC and the finality of CFA adjudication. Article 159 reinforces this conclusion by providing a mechanism to change CFA interpretations through amendment to the Basic Law. This procedure, found in many common law systems, reconciles the need for judicial finality with the need to modify fundamental legal provisions in extraordinary circumstances through democratic means.\(^{129}\)

As the administration's opponents further noted, a government request for reinterpretation is in tension with the Basic Law's central commitments to Hong Kong's high degree of autonomy, common law system, judicial independence, and adjudicative finality.\(^{130}\) Asking a higher mainland authority to "correct" the judgment reached by Hong Kong's highest court has substantially the same effect as appellate review by the mainland over the CFA. Although the HKSAR administration insisted that, under Article 158, the reinterpretation would not alter the judgment as it affects the named appellants, its argument ignored the importance of the decision's precedential authority in a common law system.\(^{131}\) While it might

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128. Basic Law, supra note 23, art. 158, para. 2.
129. See Michael C. Davis, supra note 83; Hong Kong Human Rights Monitor, supra note 117; interview with Margaret Ng, Legislative Councillor, in Hong Kong (June 7, 1999).
130. See supra text accompanying notes 38-46.
131. See Margaret Ng, Time for the Next Test To Begin, S. China Morning Post, July 16, 1999; Hong Kong Bar Association, Press Release, Open Letter to the Chief Executive on the Right of Abode Case (May 5, 1999). The absence of a class action device worsens this problem by making it difficult, if not impossible, for individuals with similar claims to preserve their rights by joining a suit in which the CFA would issue an initial judgment.
"preserve" the judgment as a technical matter, reinterpretation undermines the values of predictability, reliance, and fairness promoted by the doctrine of stare decisis. These values are particularly important to the proper role of a court, such as the CFA, with jurisdiction over constitutional cases.\textsuperscript{132}

The Hong Kong administration justified the request by asserting the NPCSC’s general power of interpretation, together with the Chief Executive’s general powers and duties, arise under the Basic Law. On this view, it claimed Article 158’s broad grant of interpretive power “may be exercised by [the NPCSC] in the absence of any reference to it by the CFA . . . [and] . . . may also be exercised in respect of any provision of the Basic Law.”\textsuperscript{133} Analytically, this argument depends in large measure on drawing a sharp distinction between interpretation and adjudication, a distinction more easily made in mainland legal circles but largely alien to the common law tradition in Hong Kong. Relying on this formal dichotomy, the administration concluded that legislative interpretation by the NPCSC would neither usurp the rightful powers of the Hong Kong judiciary nor interfere with the freedom of Hong Kong judges to decide future cases in accordance with the NPCSC’s interpretation.\textsuperscript{134}

Assuming the NPCSC’s interpretive authority, the administration located its own power to approach that body in Basic Law Articles 43 and 48. Article 43 makes the Chief Executive the head of the HKSAR and provides that he or she shall be “accountable” to the CPG as well as to Hong Kong.\textsuperscript{135} Article 48 enumerates the Chief Executive’s powers, including the responsibility for the implementation of the Basic Law.\textsuperscript{136} According to the administration, these general powers necessarily encompass the au-

\textsuperscript{132} Critics added that this particular request further undermined Hong Kong’s autonomy in seeking a reinterpretation of both Articles 22 and 24, given that the government had conceded before the Court that Article 24 was not a referable matter dealing with the relationship between the HKSAR and the mainland. See, e.g., interview with Denis Chang, lead counsel for practitioners in Ng Ka Ling, in Hong Kong (June 8, 1999); see also Ng Ka Ling (an infant) v. Director of Immigration, [1999] 1 H.K.C. 291, 329–31 (discussing whether Article 158 of Basic Law mandates referring to Article 22 or 24 for interpretation).

\textsuperscript{133} Elsie Leung, Secretary for Justice of the HKSAR, Statement to the House Committee of LegCo (May 18, 1999).

\textsuperscript{134} See id.; see also Right of Abode: The Solution, supra note 120 (arguing that NPCSC interpretation of Articles 22 and 24 does not undermine judicial independence).

\textsuperscript{135} Basic Law, supra note 23, art. 43. “The Chief Executive of the Hong Kong Special Administrative region shall be accountable to the Central People’s Government and the Hong Kong Special Administrative Region in accordance to provisions of this Law.” id.

\textsuperscript{136} Id. art. 48(2).
3. The Amendment Alternative

The prudence of the reinterpretation request generated even greater controversy than the question of its formal legality. Even assuming that the right of abode decision would have an enormous social impact that would have to be contained,\textsuperscript{139} alternatives existed that were not only undoubtedly legal, but also accorded greater respect to Hong Kong's rule of law, autonomy, and evolving democracy. These alternatives were raised at the time, and the HKSAR administration itself acknowledged that other possible solutions existed and merited consideration. Of these alternatives, amending the Basic Law under Article 159 was the most widely urged. In contrast to legislative interpretation, amendment is the formal mechanism employed by most common law systems for changing constitutional rules.\textsuperscript{140}

As set forth in Article 159, the power to amend the Basic Law "shall be vested in the . . . National People's Congress."\textsuperscript{141} Bills for amendments may be proposed by the NPCSC, the State Council, or the Hong Kong government. If the amendment proposed comes from Hong Kong, the bill must clear three hurdles before being submitted by the Hong Kong deputies who represent the HKSAR in the NPC. The bill must be approved by: 1) two-thirds of the deputies themselves; 2) two-thirds of all the members of LegCo; and 3) the HKSAR's Chief Executive.\textsuperscript{142}

Within Hong Kong, nearly all sides agreed that overturning a judi-


\textsuperscript{138} Peter Wesley-Smith, supra note 81.

\textsuperscript{139} Though widespread, this assumption was by no means universal. During the delegation's stay, the Catholic Cardinal of Hong Kong made front page news by declaring that, even if the projection of 1.6 million new arrivals was correct, the HKSAR could and should accommodate all right of abode claimants. See Jo Pegg, Cardinal Slams Tung Abode Moves, S. China Morning Post, June 6, 1999, at 1.

\textsuperscript{140} The main exception, of course, is the British Constitution, which remains unwritten. See Albert Venn Dicey, Introduction to the Study of Law of the Constitution 330 (1889).

\textsuperscript{141} Basic Law, supra note 23, art. 159, para. 1.

\textsuperscript{142} Id. art. 159, ¶ 2. Before the NPC considers an amendment bill, "the Committee of the Basic Law shall study it and submit its views." Id. ¶ 3. In addition, no amendment shall contravene the established policies of the PRC regarding Hong Kong. Id. ¶ 4.
cial interpretation of the Basic Law through amendment would have generated substantially less concern about maintaining judicial independence than seeking reinterpretation. Advocates of the amendment route noted, first, that an amendment would fully accord with the "power of final adjudication" guaranteed by both the Joint Declaration143 and the Basic Law.144 Instead of asking the NPCSC to "correct" an erroneous interpretation by the HKSAR’s highest court, an amendment would simply alter the relevant constitutional provision. In this way, an amendment would have addressed the feared crisis created by the CFA’s action without undermining the finality of the CFA’s judgment or its independence, and it would have preserved the unity of final adjudication and the practice of interpretation that characterizes the common law tradition. Second, an amendment would have better accorded with the HKSAR’s “high degree of autonomy,” especially as reflected in Article 158. Article 158 expressly assigns to the Hong Kong courts the responsibility of interpreting Basic Law provisions “within the limits of the autonomy of the Region.” A clear consensus in the Hong Kong legal community viewed Article 24’s right of abode guarantee as falling within the HKSAR’s “limits of autonomy,” a point that even the government conceded at trial.145 Assuming that any amendment to Article 24 would have originated in Hong Kong, the amendment process would have better maintained the HKSAR’s autonomy by allowing it to consider, as an initial matter, any narrowing of the scope of Article 24. In contrast, an NPCSC correction of a considered judgment of the CFA, even at the request of the HKSAR government, compromised the HKSAR’s autonomy and consolidated power in the Central People’s Government.

In addition, the amendment process would have entailed at least a formal role for Hong Kong’s representative institutions, and greater public debate and democratic participation than did reinterpretation.146 Article 159’s requirement that amendment bills be forwarded to the NPC only after gaining approval by the Chief Executive, two-thirds of the LegCo, and two-thirds of the Hong Kong deputies to the NPC,147 would have

143. Joint Declaration, supra note 30, at art. 3. See supra text accompanying notes 30-38 (discussing Joint Declaration’s guarantee of judicial independence and finality).

144. Basic Law, supra note 23, arts. 2, 19. See supra text accompanying notes 41-43 (discussing Basic law’s guarantee of judicial independence and finality).

145. Supra note 76.

146. The government could have created opportunities for greater democratic participation in the decision to request reinterpretation, but failed to do so.

147. Basic Law, supra note 23, art. 159, para. 2.
ensured at least some degree of public deliberation and guaranteed that Hong Kong's fundamental law, including its protection of rights, could only be altered with overwhelming public support within the HKSAR.

In this case, the governments in both Hong Kong and Beijing seemed determined to foreclose democratic participation in the reinterpretation process. First, the HKSAR administration did not make the text of its request public until over three weeks after it had been submitted to the State Council. Then, when two LegCo members attempted to fly to Beijing to make the case against reinterpretation, they were barred from boarding the plane at the Hong Kong airport at the direction of mainland authorities. These episodes tended to confirm criticisms that the hasty and secretive reinterpretation process effectively precluded a considered discussion about whether the CFA decision created a potential demographic crisis in the first place, much less the best legal means to resolve it.

Stung by opposition to the request, the HKSAR administration went to great lengths to refute accusations that the decision was made out of sheer expediency. In the Chief Executive's submission to the LegCo House Committee, the government argued both that the amendment process would take too long and that it lacked support politically. As a practical matter, the administration asserted that an amendment could not be enacted in time to avert the impending immigration crisis even if sufficient political support existed. Officials pointed out that since Article 159 vests the power of amendment solely in the NPC, and since the NPC had recently concluded its sole plenary meeting for 1999 in March, the HKSAR would face a potentially massive influx of immigrants claiming the right of abode for almost a full year before the law could be changed. The administration also expressed concern that the CFA judgment would en-

148. The request was submitted on May 20 and not released until June 11. See Margaret Ng, Wrapped Up in Secrecy, S. CHINA MORNING POST, June 4, 1999, at 1.

149. See Angela Li, Legislators Barred from Beijing Flights, S. CHINA MORNING POST, June 11, 1999, at 1.

150. See, e.g., Elsie Leung, Secretary for Justice of the HKSAR, Statement at the House Committee Meeting of the Legislative Council (May 18, 1999) ("In deciding between an interpretation and an amendment, the Administration has been guided by firm principle, not expediency.").

151. Right of Abode: The Solution, supra note 120.

152. Id. (arguing that before amendment could be passed, many mainland residents will have exercised or obtained the right of abode under the CFA ruling).

153. Id.
courage mainlanders asserting the right of abode to emigrate illegally and then claim the right once in Hong Kong. 154

This argument, however, overlooked several aspects of the government's own inaction. On the one hand, the HKSAR made no effort to implement the decision immediately. Indeed, the government remained in negotiations with the mainland about enforcement of the CFA judgment for almost six months after it had been issued. 155 On the other hand, the HKSAR government apparently failed to consider the possibility of interim legislation as a means to control the flow of mainland immigration while abiding by the CFA's judgment pending an amendment. 156 Some observers argued that such legislation could mitigate any immigration influx pending amendment, thereby eliminating the need to request an NPCSC reinterpretation. 157 Although the authorities were made aware of this alternative, both in public statements by the Hong Kong Bar Association and in testimony before LegCo, 158 the administration never seriously considered the possibility of interim legislation and neither the legality nor feasibility of this option was ever widely addressed. 159

The CFA's judgment implicitly endorses legislative measures that would implement the right of abode gradually in the face of exigent circumstances. 160 First, the CFA upheld the "certificate of entitlement scheme"
under the No. 3 Ordinance, allowing the HKSAR authorities some degree
of control over the process of verifying immigrant’s claims to the right of
abode. Second, the CFA expressly noted that such a verification scheme
was subject to a “reasonableness” requirement. Having been granted
“reasonable” control over the verification of permanent resident status,
the HKSAR could have adopted lawful legislative and administrative
measures to implement the decision in an orderly fashion.

Administration authorities initially rejected the use of such interim
measures to facilitate amendment. This initial resistance was based on the
view that any less than total and immediate implementation of the CFA
judgment would be illegal. Some language in the decision can be read
to support this view. The CFA warned, for example, that any immigrant
who experiences “unlawful delay” in the acceptance or rejection of her
permanent resident application could “invoke public law remedies in our
courts.” Nevertheless, senior officials at the Department of Justice (“DOJ”)
advised our delegation that the alleged immediacy of the immigration
crisis prevented them from exploring this option fully. The DOJ, however,
did express genuine interest in the possibility in the event of a similar
crisis in the future.

For their part, most opponents of reinterpretation did not advocate

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161. Ng Ka Ling, [1999] 1 HKC at 334 (stating that “[i]t is reasonable for the legislature to
introduce a scheme which provides for verification of a person’s claim to be a permanent
resident.” (emphasis in original)).

162. Id. at 335 (“As a matter of statutory construction, the courts would import the require-
ment of reasonableness into a number of provisions for operating such verification scheme.”).

163. Interview with Denis Chang, Lead Counsel for the petitioners in the right of abode cases,
in Hong Kong (June 8, 1999).

164. Interview with Robert Alcock, HKSAR DOJ, in Hong Kong (June 4, 1999) (arguing that
under CFA’s actual abode order, no partial implementation of judgment would have been
legal).

165. Ng Ka Ling, 1 HKC at 335. Additionally, the CFA decision granted a statutory right of
appeal to the HKSAR Immigration Tribunal for any rejected abode applicants applying for a
certificate of entitlement.

166. Interview with Elsie Leung, HKSAR Secretary of Justice, and Robert Alcock, HKSAR
DOJ, in Hong Kong (June 10, 1999).
interim measures to facilitate amendment either.\textsuperscript{167} Indeed, numerous interviews revealed somewhat less interest in the idea than was shown by administration officials.\textsuperscript{168} Administration opponents declined to pursue the idea in the right of abode context for several reasons. First, the HKSAR administration, not individual LegCo members, controls the introduction of such legislation. Second, most defenders of the CFA decision believed the administration was committed to reinterpretation almost from the beginning, making attempts at compromise futile.\textsuperscript{169} Finally, the lawyers who argued the right of abode cases were constrained by the possibility that agreeing to delay in the implementation of the CFA's decision might violate their ethical obligation to their clients.

Despite concerns on both sides, the possibility of seeking amendment to the Basic Law, combined with reasonable interim legislation narrowly tailored to address any genuine short-term crisis, could have been explored. Certainly the legal obstacles do not appear so great as to preclude further exploration of this type of approach. The administration's main argument to the contrary—that the CFA judgment required complete and immediate implementation—carries little weight, given the government's failure to even begin enforcement by the time the NPCSC issued its reinterpretation almost five months later.\textsuperscript{170}

While the legal obstacles to interim legislation do not appear to have been overwhelming, the potential benefits were substantial. Assuming that the CFA's judgment could have been implemented in a reasonable, orderly and gradual manner, the purported socio-economic crisis could have been averted in the short term.\textsuperscript{171} The delay would have allowed a public debate about the scope of the problem, permitted the formulation of a politically feasible amendment if one were deemed necessary, and would have controlled the situation pending the next plenum meeting of the

\textsuperscript{167} One exception was Professor Michael C. Davis of the City University of Hong Kong, who proposed this type of approach in testimony before LegCo. See supra notes 157-158.

\textsuperscript{168} Interview with Denis Chang, Lead Counsel for Petitioners in Ng Ka Ling, in Hong Kong (June 8, 1999); interview with Elsie Leung, HKSAR Secretary of Justice, and Robert Allcock, HKSAR DOJ, in Hong Kong (June 10, 1999).

\textsuperscript{169} See, e.g., interview with Denis Chang, Lead Counsel for Petitioners in Ng Ka Ling, in Hong Kong (June 8, 1999).

\textsuperscript{170} Interview with Robert Allcock, HKSAR DOJ, in Hong Kong (June 4, 1999). Indeed, the administration had in the meantime continued to arrest illegal immigrants claiming the right of abode without a certificate of entitlement. See Arrests Pave Way, supra note 100.

\textsuperscript{171} Hong Kong Bar Association, supra note 157.
NPC in March of 2000. If the Basic Law had been amended, the controversy would have been satisfactorily resolved. The authority of the CFA would have remained unchallenged, the rule of law would have remained unquestioned, and Hong Kong’s autonomy would have been preserved.

Even assuming that the problem of timing could have been addressed through interim legislation, HKSAR authorities contended that the amendment commanded insufficient support in both LegCo and among the Hong Kong deputies to the NPC to meet Article 159’s two-thirds requirement in each. Others argued that the Hong Kong deputies to the NPC doomed any potential amendment when they signed a unanimous statement stating that they would not support amendment. Moreover, LegCo passed a resolution supporting the request for reinterpretation, albeit without the participation of the directly elected members.

These obstacles to amendment, though formidable, might not have prevented an amendment supported by the administration. Moreover, these obstacles are an appropriate part of the entrenchment of the Basic Law under Article 159. As one prominent lawyer observed, amendments to constitutions are supposed to be difficult to obtain, especially when they would restrict rights. If a society lacks the consensus to support such a change despite significant social consequences, then the right should be preserved.

4. Legislative Interpretation in a “Hybrid” System

More than any one step that it took in this drama, the administration’s basic argument—that an NPCSC reinterpretation better reflects the hy-
brid legal system that the Basic Law created—may pose the most serious threat to the common law tradition as Hong Kong has known it.\(^\text{178}\) The administration argued that, because the CFA had simply misinterpreted the legislative intent behind Article 24, the article need not be amended; rather, it contended the drafters’ “true legislative intent” could be furnished, as it frequently is in the mainland legal system, by the national Chinese body that adopted the law in the first place.\(^\text{179}\) Though the administration recognized that “[i]t is natural for those familiar with a common law system to object to a non-judicial body revising an interpretation . . . given by a final appellate court,” it nonetheless considered legislative interpretation proper because “Hong Kong is part of the [PRC], which has a civil law system.”\(^\text{180}\)

Such an erosion of the “One Country, Two Systems” ideal threatens to supplant Hong Kong’s common law framework with the materially different approach to law practiced in the mainland. Indeed, a number of Hong Kong officials appear either to welcome this prospect or view it to some extent as inevitable. Both in meetings and in public statements, Mrs. Elsie Leung, the Hong Kong Secretary of Justice, indicated that resistance to mainland legal ideas reflected “arrogance” on the part of those steeped in the common law.\(^\text{181}\) The fact remains, however, that this concept of a hybrid system conflicts with the mainland’s pledge to maintain “two systems”—the very commitment that was necessitated by the mainland legal system’s failure to secure a comparable degree of confidence from the legal and investment communities in and outside China.\(^\text{182}\)

It has often been said that the Chinese system reflects the Chinese...
Communist Party's ("CCP") "rule by law," rather than the rule of law. During the Cultural Revolution, the regime sought to dispense with the law outright, purging the nation of judges, lawyers, and law schools. Under Deng Xiaoping, the mainland recommitted itself to building a legal system, making substantial strides that have paralleled its economic progress. These vast changes in the mainland legal tradition achieved a type of milestone in 1999, when the NPC adopted a constitutional amendment committing the mainland to the "rule of law." Notwithstanding these considerable achievements, the mainland system remains fundamentally different from the common law framework that Deng's pledge of "One Country, Two Systems" was designed to protect.

183. As generally used outside China, "rule of law," indicates government constrained by legal norms, while "rule by law," suggests the use or manipulation of the law to facilitate government policies, including those that infringe on fundamental rights. See, e.g., Jacob A. Fisch, China Entry Will Help More Than Just Trade, L.A. TIMES, Nov. 26, 1999, at B9 ("that the government has now ratified a law banning 'cults' appears to support the argument that China is governed by a system of rule by law rather than rule of law"), Testimony of Xiao Qiang, Executive Director of Human Rights in China before the House Committee on International Relations, Subcommittee on Human Rights (June 26, 1998), Federal News Service, available in LEXIS, News Library, Curnws File ("r[ule by law is not rule of law]"). It should be noted, however, that within China, "rule by law" can have a meaning very close to "rule of law" as used outside the country. Specifically, "rule by law" within China is sometimes employed to suggest government action that is subject to certain checks, and it has been contrasted to the phrase, "rule by men," which is used to indicate less constrained government decision-making. See, e.g., Li Nuer, Village Autonomy Opens China's Future Democratization, XINHUA NEWS AGENCY, Nov. 29, 1998, Item No. 1129006 (the development of village self-governance is "one of the transition from 'rule by man' to 'rule by law'").

184. CHEN, supra note 182, at 33-34.

185. XIANFA art. 5, (1982). Article 5 was adopted at the Second session of the Ninth National People's Congress, on March 15, 1999.

186. Though our delegation found this sentiment to be the dominant view among the Hong Kong legal community, we also encountered dissenting views independent of the administration both within and outside of the HKSAR. During our meeting with the Law Society of Hong Kong, for example, several solicitors expressed the view that intervention by the NPCSC should not be opposed out of an automatic fear of Chinese legal processes. See Interview with officers and members of the Law Society of Hong Kong, in Hong Kong, (June 8, 1999). In the U.S., Michael Dowdle, a Chinese law expert at Columbia University, has argued that China's larger constitutional system . . . has developed to the point where it deserves to be taken seriously." He further insists that "the Hong Kong community's failure to even try to integrate Hong Kong's domestic constitutional design and principles into those of China's larger constitutional structure . . . threatens the security of Hong Kong autonomy." Michael Dowdle, Assessing the Relationship Between the Right of Abode Cases and China's Constitutional Development (unpublished manuscript on file with Crowley Program). For a perspective on
The differences between the systems begin with the Chinese constitutional framework. In contrast to liberal constitutions, China’s socialist constitution serves not to constrain state power, but to enhance it in service of the policies and goals of the CCP. The most recent constitution, adopted in 1982, accordingly rejects the separation of powers and instead concentrates authority in the NPC, which meets annually, the much smaller NPCSC, which meets bimonthly, the State Council, which acts as the administration, and the Central Military Commission, which directs the armed forces. Although the Chinese constitution does confer an impressive array of individual rights, these provisions are not directly enforceable, since judicial review of constitutional claims is unknown in China. Taken together, these institutional and formal conditions point to significant differences between the mainland and common law traditions.

Further, the Chinese approach draws a functional distinction between legal interpretation, in the sense of determining the meaning of a given provision, and adjudication, understood as the practice of hearing and resolving cases. In the mainland system, the power of interpretation may be “legislative” and “administrative” as well as judicial. This conception formally contrasts with the common law tradition, in which courts generally exercise interpretive and adjudicatory authority together. Mainland interpretive methods also differ from common law approaches by, among other things, rejecting stare decisis. As one of Hong Kong’s leading consti-
tutional experts put it, “the approaches of the two systems to the question of interpretation are strikingly different.”

The tensions between the mainland and common law approaches are reflected, to a degree, in the two core legal documents marking the transition of Hong Kong from British to Chinese rule. In the earlier of these documents, the Joint Declaration, the power of “final adjudication” was understood, in practice, as necessarily entailing the authority to engage in interpretation. The Basic Law, however, divides the two functions, albeit in a limited way: it reposes in the NPCSC the ultimate power of interpretation, yet extends to the CFA the power of final adjudication. To the extent that the two powers might clash, the Basic Law contemplates a unitary proceeding, in which the CFA itself would seek the NPCSC’s guidance, before issuing its mandate, on matters effecting the mainland or Hong Kong’s relations with the mainland.

Beyond the distinction between adjudication and interpretation, the common law and mainland traditions differ markedly in their approach to interpretation itself. The key document in mainland legal interpretation, the NPC Standing Committee’s 1981 Resolution on Strengthening the Work of Interpretation of Laws (“1981 Resolution”), outlines a “concept of ‘interpretation’ . . . quite different from that accepted in the common law or even civil law jurisdictions . . . [and] clearly inconsistent with the principle of separation of powers, judicial interpretation, and the rule of law as understood in many countries in the contemporary world.”

Most importantly, the 1981 Resolution gives the NPCSC power to provide a “legislative interpretation” of any legal provisions that need to be clarified or supplemented. One prominent legal scholar has pointed out that in practice, this idea of “legislative interpretation” is “tantamount to legislative amendment in most legal systems.” There also seem to be no particular limitations on the NPCSC’s power of legislative interpretation, other than the NPCSC’s own guidelines.

Whereas common law interpretation generally claims fidelity to the

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194. Id. at 212. For a detailed analysis supporting this assessment, see id. at 198-202, 211-18.
196. Chen, supra note 182, at 95.
197. Id.
198. See also, Gwai, supra note 31, at 225 (“The NPCSC has, in all instances, modified law rather than interpreted it.”).
199. See NPCSC, Resolution Strengthening the Work of Interpretation of Laws (1981). The Resolution’s “four basic rules” are set forth in Chen, supra note 182, at 95-96.
law as a set of constraints, the NPCSC approach stresses deference to government policy and ultimately to the rule of the CCP. As one leading scholar notes, “[t]he NPC and the judicial and administrative bodies under it are instruments of the Communist Party, and as their primary function is the implementation of its policy, there has been little reason to develop the science of autonomous legal interpretation.” The NPCSC Interpretation confirms this observation. Indeed, the only instance in which the document departs from the HKSAR’s Chief Executive’s request is its conclusion that the matter should have been referred to Beijing in the first place, thereby placing Hong Kong affairs more closely under the supervision of mainland policymakers.

E. The NPCSC’s Interpretation and the Implications for the Rule of Law in Hong Kong

Notwithstanding the legal and prudential objections raised by the Hong Kong legal community, the Chief Executive proceeded to request the reinterpretation, in the form of a report to the State Council in Beijing. Several features of the actual request confirm concerns put forward by members of the Hong Kong bar. In procedural terms, the request was far from transparent. As noted, the contents of the request were not made public until June 11, 1999, even though the report to the State Council was submitted on May 20. No formal mechanism was established, moreover, for opponents of reinterpretation to submit their views.

On the merits, the request sought reinterpretation of Articles 22(4), 24(2) and (3) by relying primarily on mainland legal principles. In particular, the Chief Executive sought to have the provisions restored to their “true legislative intent,” citing among other things a 1996 “opinion” issued by the Preparatory Committee for the HKSAR, a body of mainland and Hong Kong members established by the NPC to form the first post-handover administration and legislature. Conversely, the request did

201. Id
202. See The Interpretation by the Standing Committee of the National People’s Congress of Articles 22(4) and 24(2) (3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, June 26, 1999 [hereinafter NPCSC Interpretation]. We defer to the official designation when referring to the document itself. But see supra note 114; Ng, supra note 130, at 3-4.
203. See supra, note 148.
204. Ghai, supra note 31, at 75.
not ask the NPCSC to consider whether the CFA should have initially referred the two articles in question to Beijing under Article 158. As many commentators had expected, the NPCSC granted the Chief Executive's request, issuing its own interpretation of Articles 22 and 24 on June 26, 1999.

1. Toward a Hybrid System?

In contrast to a common law opinion, the substance of the NPCSC Interpretation was conclusory, lacking reasoned analysis. In substance, moreover, the NPCSC Interpretation realized the fears of administration opponents in several ways. First, it rejected the CFA's determination that the abode cases did not require referral of Articles 22 and 24 to the NPCSC under Article 158. Instead, the NPCSC concluded that Articles 22 and 24 “concern the relationship between the Central Authorities and the [HKSAR]” and so should have been referred initially under Article 158. At no point, however, did the NPCSC Interpretation address the CFA's “predominant provision” test, or any other aspect of the Court's analysis concerning the division of interpretive authority under Article 158.

Second, the NPCSC Interpretation briefly noted the grant of interpretive authority to the NPCSC under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law, giving it the power to restore the true legislative intent. It then overturned the CFA's interpretation of Articles 22 and 24, stating that “the interpretation of the Court of Final Appeal is not consistent with the legislative intent.” Finally, the NPCSC Interpretation construed Article 22(4) as requiring approval by the mainland authorities for residents of the mainland to enter the HKSAR.


206. Interview with Denis Chang, Lead Counsel for the Petitioners in the Right of Abode Cases, in Hong Kong (June 8, 1999).

207. NPCSC Interpretation, supra note 202, at 1.

208. Id., at 2.

209. See supra notes 80-81 and accompanying text.

210. NPCSC Interpretation, supra note 202, at 2.

211. Basic Law, supra note 23, at art. 22(4). Article 22(4) states that “for entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval.”
proclaimed that there are no exceptions to this approval requirement. It insisted that to enter Hong Kong without such approval is “unlawful.”\footnote{NPCSC Interpretation, supra note 202, at 2.} The NPCSC Interpretation made no attempt to explain why such a requirement should apply to those who enjoy the right of abode nor why the CFA’s interpretation of the Article was incorrect.

The NPCSC Interpretation considered Article 24 in the same manner, quoting the language of the article that grants the right of abode to the children of permanent residents.\footnote{Id.} It then simply stated that these provisions “mean . . . such parents must have fulfilled the condition prescribed by category (1) or (2) of Article 24(2) of the Basic Law . . . at the time of [the child’s] birth.”\footnote{Id.}

The NPCSC Interpretation concluded by directing the courts of the HKSAR to “adhere to this Interpretation” in adjudicating all future questions under Articles 22 and 24.\footnote{Id.} In apparent deference to Article 158’s requirement that “judgments previously rendered shall not be affected” by any NPCSC reinterpretation, however, the NPCSC Interpretation stated that it “does not affect the right of abode . . . under the judgment of the [CFA] on the relevant cases dated 29 January 1999 by the parties concerned in the relevant legal proceedings.”\footnote{Id.}

The NPCSC Interpretation underscored the differences between mainland legal interpretation on the one hand, and the approach of the common law, which was to be maintained in Hong Kong under Article 8 of the Basic Law, on the other. As a mainland institution, the NPCSC inevitably approached the Basic Law from the PRC interpretive tradition. The Interpretation that resulted accordingly represented a significant step toward a hybrid system and away from the idea of “One Country, Two Systems.”

To the extent that its reasoning is articulated, the NPCSC Interpretation relied for its conclusion exclusively on “true legislative intent” of Article 24, an argument previously made by the HKSAR government in its request.\footnote{See id. at 1. See also Right of Abode: The Solution, supra note 120, at para. 15 (arguing that “legislative interpretation is not equivalent to amendment, because such interpretation must be faithful to true legislative intent”). Application of this approach, however, did little to validate
this basis of decision. According to the NPCSC, the “true legislative intent,” at least with respect to Article 24, may be found in the NPC’s resolution approving its Preparatory Committee’s report on the HKSAR, both issued in 1996. Reliance on these materials for legislative intent is worthless, both because they were issued six years after the NPC adopted the Basic Law and because the Preparatory Committee did not draft the Basic Law.218 This dubious application of original intent is not surprising since there are no rules or guidelines limiting an NPCSC legislative interpretation to the “true legislative intent” of a provision.219 By relying on legisla-

218. A related problem is that reliance on the NPC resolution would, in effect, permit amendment of the Basic Law by means of post-hoc measures claiming to clarify the true legislative intent. To be sure, in U.S. constitutional jurisprudence, the Supreme Court has relied on occasion upon the actions of early Congresses, especially the First Congress, as probative of the Constitution’s “original understanding.” See, e.g., Lynch v. Donnelly, 465 U.S. 668, 673-75 (1984) (relying on actions of the First Congress for the contemporaneous understanding of the Establishment Clause). This practice, however, differs from the NPCSC’s Interpretation in several key respects. First, the First Congress convened in 1789, even before the ratification process in the original thirteen states had concluded (though after the Constitution had received the requisite nine ratifications). Second, 20 of the 79 members of the First Congress had served as delegates at the Federal Convention that drafted the Constitution, and some of these and other members had participated in the state ratifying conventions. Jacobus Ten Broek, The Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction (pt. 4) 27 Calif. L. Rev. 157 (1939); see also Bowsher v. Synar 478 U.S. 714, 724 n.3 (listing members of the First Congress who had been delegates at the Federal Convention). Finally, the Supreme Court typically relies on the actions of early Congress to confirm conclusions based upon sources that are contemporaneous with the Constitution’s drafting and ratification. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 975-85 (relying on the First Congress in conjunction with other sources of original understanding). By contrast, the 1996 NPC approval of the Preparatory Committee opinion that same year came six years after the Basic Law had been drafted and adopted. In addition, no claim has ever been advanced that the composition of the NPC or Preparatory Committee overlaps with the Basic Law’s drafters to an extent comparable to the First Congress and Federal Convention. Finally, the NPCSC Interpretation did not rely on post-drafting materials merely to confirm a legislative intent based upon earlier or contemporaneous sources, but instead relied exclusively on the later sources. See Peter Weather-Smith, supra note 40; Ghai, supra note 31, at 57-61, 75.

219. See supra notes 181-187 and accompanying text (discussing lack of rules or limitations on mainland conceptions of legal interpretation). In its request, the HKSAR administration also supported a “true legislative intent” argument with reference to the NPC’s adoption of the Preparatory Committee’s 1996 opinion. It further cited a 1993 agreement of the Joint Liaison Group reflecting the views of the mainland and UK governments. Reliance on these documents for the “true legislative intent,” however, is unconvincing because, among other reasons, the Basic Law was promulgated in 1990 and neither the NPC as a whole, the Preparatory Committee, or the Joint Liaison Group played a direct role in the drafting process. Michael C. Davis, Legislative Intent and the CFA Right of Abode Judgment, Forum on Current
tive documents that actually post-date the Basic Law by several years, the NPCSC Interpretation made clear that it was effectively overriding, not interpreting, the provisions in question, and effectively imposing mainland legal principles onto Hong Kong’s common law system. 220

2. The Question of Guidelines Governing Future Reinterpretation Requests

In the wake of the right of abode litigation, several observers suggested that some sort of constitutional or legislative mechanism should be promulgated in order to control and limit the influence of mainland interpretation and its potential to subvert the “One Country, Two Systems” ideal. 221 Such a mechanism might consist of legislative guidelines or a constitutional amendment limiting HKSAR government requests for NPCSC interpretation to circumstances of social emergency. Presumably, such a mechanism would implement some kind of procedure requiring legislative input and public debate on the question, and perhaps requiring super-majority vote of LegCo. Such a convention, its proponents argue, would “judicialize” NPCSC interpretation, and prohibit its overuse or abuse simply to overrule court decisions perceived as unfavorable by the government. 222

Conversely, others argue that the adoption of guidelines or rules governing NPCSC interpretation requests, however well intentioned, would...
encourage interpretations to be sought more frequently.223 As Denis Chang told the delegation, such guidelines or conventions would actually legitimize a “post-remedial mechanism” by which to circumvent the rulings of the Hong Kong courts.224 In this perspective, the normalization of such requests would also serve to validate mainland legal norms as an appropriate method of constitutional and statutory interpretation, further weakening Hong Kong’s common law system.

Whether additional guidelines or safeguards would better secure the rule of law in Hong Kong depends on the frequency with which the HKSAR government resorts to requests for NPCSC interpretation in the future. If future requests are infrequent, then arguably it would be better to avoid promulgation of explicit guidelines, and thereby leave the government’s strategy in a state of questionable legality under the Basic Law. In the words of Denis Chang, “at this stage of political development in China, the less said the better.”225 On the other hand, if HKSAR government requests for NPCSC intervention become the norm, then explicit guidelines, requiring the government at least to satisfy clear legal conditions and open up the requests to some kind of public debate, may be preferable.

3. Subsequent Controversies

Following the right of abode controversy, the fate of the “One Country, Two Systems” ideal will almost certainly turn on the frequency and resolution of future constitutional controversies. As this Report went to press, the CFA already had handed down two cases, both of which presented potential for substantial conflict. In both, the CFA ruled in favor of the HKSAR government, thereby avoiding the possibility of another reinterpretation request. To this extent, these cases tend to confirm the government’s prediction that the need for NPCSC reinterpretation would arise infrequently. Precisely because the judgments affirmed the government, however, they do not test the resolve of the HKSAR to seek reinterpretation only rarely, and they do not test the willingness of the NPCSC to intervene in cases that go against the government.

223. Interview with Denis Chang, Lead Counsel for the Petitioners in Ng Ka Ling, in Hong Kong (June 8, 1999).
224. Id. Mr. Chang suggested that Beijing originally wanted such a “post-remedial mechanism” written into the Basic Law, but that then-governor Christopher Patten refused to accept such a provision. Id.
225. Id.
a. The Legitimacy of NPCSC Interpretation

Within months of the NPCSC’s Interpretation, the CFA heard arguments on a new challenge that could well have generated a constitutional crisis even more profound than the initial right of abode controversy. The case, Lau Kong Yung v. Director of Immigration,226 arose directly out of that controversy and attacked the legality of the NPCSC Interpretation itself. The Court rejected this challenge unanimously, broadly affirming the NPCSC’s power of interpretation. The judgment therefore avoided a confrontation that would have directly pitted Hong Kong’s highest court against the CPG.

Lau Kong Yung involved seventeen mainlanders who had illegally overstayed the terms of their admission to Hong Kong, most by remaining after their mainland two-way exit permits had expired. The HKSAR Director of Immigration issued removal orders against the mainlanders under the local Immigration Ordinance. Following the original right of abode decisions, the seventeen challenged their removal on the grounds that they had qualified for the right of abode as interpreted by the CFA. Those rulings, however, had also struck down the statutory mechanism for obtaining an HKSAR certificate of entitlement recognizing a person’s right of abode, thereby eliminating their only means to legalize their status in Hong Kong.227

In the face of this dilemma, the petitioners argued that the proper resolution was to invalidate the removal orders against them, pending the development of a new method for vetting individual right of abode claims. As in the earlier right of abode cases, the principles at issue applied not just to the parties in the case but to possibly thousands of mainlanders in a similar situation. In June, before the NPCSC issued its Interpretation, the Court of Appeal struck down the removal orders as to the seventeen individuals before that court.228 The Director then appealed to the CFA. By the time the case was argued in the highest court, the NPCSC had issued its Interpretation, which apparently invalidated the underlying basis for the claimants’ right of abode.

The timing ensured that Lau Kong Yung would involve issues at least as important as those considered in the original right of abode decisions.


228. [1999] HKLRD 516 (Chief Judge, Nazareth and Mortimer VPP).
themselves. Armed with the NPCSC Interpretation, the administration argued that the pronouncement was legitimate and binding; that it restored the requirement of obtaining a mainland one-way permit as a condition to obtain an HKSAR certificate of entitlement; and that nothing in the statutory scheme or other source of law required the HKSAR immigration authorities to consider the individuals’ right of abode claims. In response, the seventeen claimants directly questioned the NPCSC’s authority to act. Most significantly, they argued that the NPCSC lacked the power to interpret the Basic Law unless requested to do so by the CFA under Article 158(3), and therefore that the NPCSC Interpretation was invalid. In addition, they contended that any applicable power the NPCSC could wield did not apply to matters purely internal to Hong Kong, such as the ability to establish the right of abode independent of mainland permits; that the HKSAR’s request for a reinterpretation had been illegal; and that in light of the circumstances, the Director had been under a duty to establish right of abode claims in the absence of the then-invalid one way permit requirement.

In December, the CFA upheld the removal orders. It was a resounding, though not unexpected, victory for the government. Addressing the point individually, each of the five Justices agreed that the NPCSC possesses plenary authority to interpret the Basic Law. Chief Justice Li’s opinion of the Court located NPCSC authority in Article 67(4) of the PRC Constitution together with Article 158(1) of the Basic Law. The Court further ruled that the NPCSC’s Interpretation must be deemed effective as

229. Lau Kong Yung, at 2-16.
230. Id. at 15-16.
231. Id. at 30 (Litton, J., concurring).
232. The relevant article states:

The Standing Committee of the National People’s Congress exercises the following functions and powers:

....

(4) to interpret laws; ....

Xianfa, art. 67(4).

233. On this point, Chief Justice Li specifically rejected Denis Chang’s argument that the final version of Article 158 reflected a narrowing of the NPCSC’s power, which had been more broadly stated in an earlier draft. The Court further rejected the structural argument that Articles 158(2) & (3) are best read as provisions constraining the NPCSC’s authority consistent with the Basic Law’s goal of guaranteeing a “high degree of autonomy.” Lau Kong Yung, at 15-16.
of July 1, 1997, the date the Basic Law came into effect, since it “declared what the law had always been.”\textsuperscript{234} The Court's opinion conspicuously did not analyze the legality of the HKSAR administration's request for a reinterpretation, nor did it address its own decision not to refer Articles 22 and 24 to the NPCSC initially.\textsuperscript{235}

Given the Court's constitutional rulings, it followed that the removal orders against the seventeen claimants were valid. The CFA also rejected other arguments that the removal orders were unlawful.\textsuperscript{236} On this point, Justice Bokhary issued Lau Kong Yung's lone dissent, arguing that the claimants would have asserted humanitarian grounds for remaining had they known of the NPCSC Interpretation at the time. The dissent reasoned that general notions of fairness implicit in the common law should compel the

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\textsuperscript{234} Id. at 18. Here the Court analogized to “the common law declaratory theory of judicial decisions,” citing Kleinwort Benson Ltd. v. Lincoln City Council (1998), 3 WLR 1095, 1117-19 and 1148.

\textsuperscript{235} The opinion summarized the Court's “view on Interpretation” as follows:

(1) The Standing Committee has the power to make the Interpretation under Article 158(1).

(2) It is a valid and binding Interpretation of Article 22(4) and Article 24(2)(3) which the courts in the HKSAR are bound to follow.

(3) The effect of the Interpretation is:

(a) Under Article 22(4), persons from all provinces, autonomous regions or municipalities directly under the Central Government including those persons within Article 24(2)(3), who wish to enter the HKSAR for whatever reason, must apply to the relevant authorities of their residential districts for approval in accordance with the relevant national laws and administrative regulations and must hold valid documents issued by the relevant authorities before they can enter the HKSAR.

(b) To qualify as a permanent resident under Article 24(2)(3), it is necessary that both the parents or either parent of the person concerned must be a permanent resident within Article 24(2)(1) or Article 24(2)(2) at the time of birth of the person concerned.

(4) The Interpretation has effect from July 1, 1997.

\textsuperscript{236} With the exception of Justice Mason's concurrence, which elaborated on aspects of the Court's constitutional analysis, the other opinions concentrated on claims that the Director had a duty at least to consider the mainlanders' "humanitarian" claims against removal under the ordinance or general administrative law principles.
Director to consider humanitarian considerations before returning the claimants to the mainland.  

The reactions to the CFA decision in Lau Kong Yung largely echoed reactions to the reinterpretation itself. Few observers expected the CFA to initiate an even more profound constitutional crisis by challenging the NPCSC’s authority, whether out of prudence or a regard to merits of the case. The HKSAR administration, not surprisingly, heralded the decision as a vindication of the NPCSC’s authority and its own decision to seek reinterpretation. At the same time, officials continued to stress that requests for reinterpretation would be made only in exceptional circumstances; as Secretary of Justice Elsie Leung declared, “time and again we have said the Government is not going to press for interpretations lightly, nor is the Standing Committee going to exercise the power lightly.”  

Conversely, critics of the reinterpretation expressed disappointment that the Court had upheld the NPCSC’s authority in such sweeping terms. Margaret Ng stated that, “I’m very disappointed about the ruling as it means that the NPC Standing Committee can interpret any part of the Basic Law at any time, and the interpretation has a binding effect on the courts in Hong Kong.” A number of critics nonetheless continued to direct their harshest criticisms at the administration for seeking the reinterpretation in the first place, asserting that the CFA had little room to maneuver once the NPCSC had been brought in. 

b. Desecration of the PRC and HKSAR Flags

Just two weeks after Lau Kong Yung, the CFA avoided another possible constitutional crisis in HKSAR v. Ng Kung Siu, a case involving a consti-
tutional challenge to Hong Kong ordinances banning the desecration of the PRC and HKSAR flags.

In May 1998, two individuals who had engaged in a non-violent protest of the killings in Tiananmen Square were convicted of defacing the PRC and HKSAR flags under Hong Kong’s National and Regional Flag Ordinances. The Provisional Legco had enacted the National Flag Ordinance pursuant to Article 18(2) and Annex III of the Basic Law, which obliged the HKSAR legislature to apply the PRC Flag Law to Hong Kong. The Provisional LegCo further enacted the Regional Flag Ordinance to safeguard the HKSAR flag. Each ordinance makes desecration of the flag a criminal offense subject to fine and imprisonment. The defendants challenged these provisions as unconstitutional under the Basic Law. The Court of Appeal upheld the challenge, holding that the laws violated freedom of speech under Basic Law Article 39,243 which incorporates protections of the ICCPR,244 including ICCPR Article 19’s protection of free speech.245

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243. Basic Law, art. 39. Article 39 states:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

244. The Hong Kong Bill of Rights Ordinance, Cap. 383, incorporates many of the provisions of the ICCPR into the domestic laws of Hong Kong. See Ng Kung Siu, at 12.

245. ICCPR, art. 19(2) and (3). Article 19 provides:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others.

(b) For the protection of national security or of public order (ordre public), or of public health or morals.
This language is identical to Article 16 in Part II of the Bill of Rights Ordinance.

The resulting appeal set the stage for a new constitutional dispute that promised to involve Beijing more directly than any of the previous controversies. In contrast to the right of abode cases, Ng Kung Siu implicated the status of a mainland statute made applicable to the HKSAR through an annex to the Basic Law. Many observers, moreover, believed that Beijing would be far more concerned about the treatment of the national flag than with the migration of mainlanders claiming a right to live in the HKSAR. Such concern, speculation ran, might lead either to NPCSC intervention of its own accord or to another reinterpretation request by the HKSAR administration.

The chance for either possibility evaporated when the CFA ruled in favor of the government. In another unanimous judgment, the CFA rejected both the free speech claim under Article 39 as it incorporates the ICCPR, as well as a related claim under Basic Law Article 27. Chief Justice Li’s opinion first concluded that the two ordinances did not amount to “a wide restriction on freedom of expression.” Turning directly to the ICCPR, the Court next considered whether the restrictions were “necessary” means to further the permissible governmental ends of “national security . . . public order (ordre public), or . . . public health or morals.” In the view of the Court, public order as used in the ICCPR was broad enough to encompass the government’s interest in protecting the flags as national

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246. Technically, the national law did not automatically apply directly to Hong Kong, but instead had to be implemented through local legislation. As the CFA noted, under Annex III of the Basic Law (which specifies national laws to be applied to the HKSAR), the HKSAR was obliged by virtue of Article 18(2) of the Basic Law, to apply the PRC Law on the National Flag locally by way of promulgation or legislation. Accordingly, the legislature (then the Provisional Legislative Council) applied it to the HKSAR by legislation by the enactment of the National Flag Ordinance. Legislation as opposed to promulgation was appropriate since the national law had to be adapted for application in the HKSAR.” Ng Kung Siu, at 5.


249. Basic Law, art. 27 provides:

Hong Kong residents shall have freedom of speech, of the press and of publica-
tion; freedom of association, of assembly, of procession and of demonstration;
and the right and freedom to form and join trade unions, and to strike.

250. Ng Kung Siu, at 12.
and regional symbols. Relying on Hong Kong precedents, the CFA further concluded that the “limited restriction on the right to the freedom of expression . . . satisfied the test of necessity.” 251 In a lone concurrence, Justice Bokhary noted that the protection of speech under Article 27 of the Basic Law was even broader than under the ICCPR, since Article 27 is devoid of any express limitation of the right. The Justice nonetheless observed that numerous jurisdictions had either upheld or maintained flag desecration laws, including Italy, Germany, Japan, Norway, and Portugal, and further commented that the contrary U.S. precedents themselves had been decided by 5-4 majorities. 252 Despite voting to uphold the ordinances, Justice Bokhary made clear that in his view, the laws “lie just within the outer limits of constitutionality,” and that restrictions of expression under the Basic Law should end “where these restrictions are located.” 253

Compared with the right of abode decisions, reaction to Ng Kung Siu was generally muted. Supporters of the ordinances applauded the decision while opponents, expressing disappointment, nonetheless acknowledged that the underlying flag desecration issue had produced different results in different jurisdictions. 254 The Hong Kong Bar Association appeared to sum up the general response in declaring that the “CFA’s conclusion is a judicial value judgment made in the context of balancing the rights in question with the legislature’s undoubted right to place some restrictions on these rights,” that the “decision does not signify that there is any wholesale curtailment of the basic human rights enshrined in the Basic Law,” and that “the Rule of Law dictates that all decisions of the Courts must be respected and accepted.” 255

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251. Id. at 12-16.
253. Id. at 24, 18-25 (Bokhary, PJ, concurring).
255. Hong Kong Bar Association, “Press Release On Flag Desecration Case,” (Dec. 15, 1999), <http://www.hkba.org/press-release/19991215.htm>. Another potential constitutional issue now confronting the Hong Kong courts deals with the definition of “ratable value” of property for the purposes of assessing government rent—the rough equivalent of property taxes in Hong Kong. See Agrila Ltd. v. Commissioner of Rating and Valuation, [1999] 2 HRC 168; interview with Johannes Chan & Yash Ghai, Professors of Law, University of Hong Kong, in Hong Kong (June 8, 1999). The appellant property developers in Agrila Limited v. Commissioner of Rating and Valuation argued to the Lands Tribunal that the HKSAR government’s definition of ratable value under several local ordinances was inconsistent with the government rent definition in Article 121 of the Basic Law. See Basic Law supra note 23, at art. 121; Agrila Ltd., [1999] 2 HRC at 168. The Lands Tribunal agreed, finding the government’s rent...
4. Bilingualization

For both Hong Kong and China, the potential benefits of the “One Country, Two Systems” experiment go beyond the preservation of the common law tradition within the mainland’s legal framework. The resumption of PRC sovereignty promises to make Hong Kong’s legal system accessible to millions of people by making it available in both English, the traditional colonial language, and Chinese. Bilingualization of the HKSAR legal system would be a signal achievement for the mainland and Hong Kong alike. Direct access to the common law tradition would enhance China’s ongoing efforts at legal reform and modernization, allowing for a critical assessment from a different legal system’s perspective. Conversely, the increased use of Chinese within the Hong Kong legal system would promote a greater understanding of mainland legal principles. For the first time, bilingualization promises to make the workings of the law accessible and comprehensible to the vast majority of the Hong Kong population. Indeed, for the Hong Kong citizen, this might well be the most important legal consequence of the “One Country, Two Systems” ideal. Nevertheless, some members of the legal profession have expressed concern that the decreased use of English will lead to a dilution of common law standards. While this concern should not be dismissed, we believe that the potential advantages of bilingualization far outweigh any liabilities, and we encourage the efforts currently underway to make Hong Kong’s legal system more genuinely available to all.

In addition, bilingualization should bring Hong Kong in closer compliance with international standards concerning the rule of law, which typically direct governments to provide adequate access to legal services regardless of language. Approximately ninety-five percent of Hong Kong’s regulations to be an unacceptable modification of the valuation scheme set out by Article 121. See Agrila Ltd., [1999] 2 HKC at 168 A government appeal is now pending. This ruling, if it stands, will cost the HKSAR government substantial revenue in lost rents. The Agrila case may well become another instance in which the HKSAR administration finds the temptation to request an interpretation outweighs the potential cost to the rule of law.

256. The Joint Declaration in effect mandates adequate linguistic access to the justice system by assuming that Chinese shall be the HKSAR’s official language while additionally permitting the use of English. Joint Declaration, supra note 30, at annex I, art. 1. Implementing this obligation, Article 9 declares that “[i]n addition to the Chinese language, English may also be used as an official language by executive authorities, legislature, and judiciary” of the HKSAR. Basic Law, supra note 23, at art. 9 (emphasis added).

257. Article 2 of the U.N. Basic Principles on the Role of Lawyers, for example, declares that:

Governments shall ensure that efficient procedures and responsive mechanisms
population speaks Cantonese, the principal dialect of the region. “Putonghua,” known in the West as Mandarin, is China’s official dialect and is the main spoken language of Beijing and much of the rest of the country. While China has hundreds of other dialects, the country has one written language. Hong Kong Cantonese is a partial exception, however, since it employs classical Chinese characters, while the mainland employs characters that were simplified after the PRC was established.258 For most of the colonial period, however, Hong Kong’s executive, legislative, and judicial functions were conducted neither in Cantonese nor in Putonghua, but almost entirely in English.259 The resumption of China’s sovereignty has accelerated efforts to create a truly bilingual system of governance.260

Already, significant steps toward this goal have been achieved. All of the laws of the HKSAR have been translated and published in equally...
authoritative English and Chinese versions. In addition, the HKSAR judiciary is establishing a basic Chinese-language version of the common law by translating significant earlier English-language court decisions from Hong Kong and other jurisdictions. The judiciary also has been developing a legal glossary to establish and record accepted Chinese equivalents to established English common law terms. As for court access, sixty-five percent of lower-level court proceedings are now conducted in Chinese. Although most upper-level legal proceedings still are conducted in English, recent legislation allows members of the court, counsel, parties, and witnesses to any proceeding to use either or both languages. Given this background, the delegation finds it surprising that, two and a half years after the turnover, there has yet to be a case argued in Hong Kong's highest court in anything but English. In 1995, the perception among bar leaders was that the introduction of Chinese would proceed at a more rapid pace. Indeed, several prominent members of the bar, including native-born but English-educated barristers, advised us that they were brushing up on their Chinese because they would not otherwise feel comfortable arguing in that language.

Judges on the higher courts informed the delegation that English remains the language of choice because some of the members of the Court speak only that language. This is especially true in the cases of visiting

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261. Id. § 1.5. Both Chinese and English language texts of all laws are also readily available on a website attached to the DOJ’s website. See ELIS on the Internet, (visited May 6, 1999) <http://www.justice.gov.hk/blis.nsf> (on file with the Fordham International Law Journal).

262. Interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong (June 10, 1999). The Committee for a Bilingual Legal System is currently choosing the most important common law cases from both Hong Kong and other common law jurisdictions to translate into Chinese. Id.

263. HONG KONG COURT INTERPRETERS GRADE, JUDICIARY, A GLOSSARY OF LEGAL EXPRESSIONS; see also interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong (June 10, 1999).

264. Interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong (June 10, 1999).

265. Id. Sixty-five percent of all cases in the registries courts are now heard in Chinese, but only thirty-five percent of all cases in the district courts and fifteen percent of cases in the High Court are heard in Chinese. Id.

266. Official Languages (Amendment) Ordinance, Cap. 5, ¶ 5 (in force June 11, 1999). Finally, to combat the lack of proficiency in Cantonese among many members of the judiciary, the judiciary has begun sending several judges to Beijing each year for intensive Chinese language training. See Interview with Patrick Chan, Chief Justice of the High Court (June 10, 1999).
judges sitting on the CFA. Yet it is difficult to believe that Hong Kong can much longer maintain a legal system in a language other than that of its sovereign and the vast majority of its population. It is of course difficult to evaluate how much of the desire to continue litigating exclusively in English is motivated by the sense that English and the common law are inexorably entwined, and how much derives from the simple preference for that which is familiar and comfortable. Further, those who hope the interchange of legal thinking between Hong Kong and the mainland may have a salutary impact on China's legal system will find their hopes diminished if the common law is a legal system that is entirely dependent on a foreign tongue. The scene outside the CFA during oral argument in Lau Kong Yung, the follow-up right to abode case heard in October, was particularly poignant in this context: as one newspaper reported, “[u]p to 200 anxious right of abode seekers gathered outside [the Court] as arguments were heard on whether they should be allowed to stay in Hong Kong . . . . Most listened intently to arguments, broadcast via television, even though they could not understand the English used.”

Modern simultaneous translation devices exist and are utilized by many courts to enable proceedings to go forward among participants who speak different languages. While we recognize that using more than a single language creates difficulties, we believe that the accelerating use of Chinese in Hong Kong courts is necessary if the courts are to be fully accessible to the populace.

One serious concern, however, is that rather than develop a truly bilingual system of co-equal languages, Hong Kong will increasingly adopt the Chinese language and abandon English. The delegation met with members of the legal profession and judiciary who expressed this concern, citing as evidence a perceived decline in English-language fluency among members of the bar and law students. The importance of this concern stems from the reality that English is the language of the vast body of precedent and history that constitutes the common law tradition. This tradition includes not only the case law of pre-1997 Hong Kong, but also of other common law jurisdictions like Australia, Canada, En-

268. Interview with Audrey Eu, Chair of the Hong Kong Bar Association, in Hong Kong (June 10, 1999).
269. Id. Interview with Professor Albert Chen, University of Hong Kong, in Hong Kong (June 7, 1999).
A deterioration of English-language usage in Hong Kong risks weakening reliance on this established body of jurisprudence. Moreover, the common law is constantly evolving. A deterioration of English-language usage risks isolating Hong Kong’s system not only from its own past, but also from contemporary developments in the common law.

Despite these concerns, the delegation strongly applauds the efforts that the HKSAR has made towards greater bilingualization. In contrast to efforts that seek to make Hong Kong’s legal system a “hybrid” of common law and mainland principles, making the common law system available in both Chinese and English clearly comports with general international standards, the Joint Declaration and the Basic Law. We take seriously local concerns about the diminution of the common law should Chinese supplant English. Nonetheless, the delegation believes that greater access to the system for the majority Chinese-speaking population would not only enhance its fairness, but also would actually broaden, through increased understanding, the support it currently commands.

F. Conclusions

If the PRC’s pledge to maintain “One Country, Two Systems” has meaning, it must include a commitment to preserve the rule of law in Hong Kong and in particular, judicial independence, the finality of decisions, and the respect for precedent, as those judicial qualities have been known in practice in Hong Kong for decades. This common law tradition, has been a central component of what makes Hong Kong among the most stable, open, and productive societies both in Asia and the world. The right of abode controversy reflects a grave threat to this system, whether intended or not, and merits the attention and concern of lawyers around the world. This threat came with unexpected swiftness, within a mere two years of the resumption of Chinese sovereignty. It also came from an unexpected quarter, prompted not by the mainland, but by the Hong Kong administration itself.

Even in isolation, the right of abode controversy is significant because it challenges Hong Kong’s common law traditions on several fronts.

270. The Joint Declaration and the Basic Law recognize a role for the international common law tradition in adjudication by Hong Kong courts. See Joint Declaration, supra note 30, at § III (1984) (stating that HKSAR courts may refer to precedents in other common law jurisdictions); see also Basic Law, supra note 23, at art. 84 (authorizing courts to refer to precedents in other common law jurisdictions).
simultaneously. First, the HKSAR administration undermined respect for law by failing to implement the CFA’s judgment. Second, its request for a reinterpretation was, at best, inconsistent with an alternative interpretation of the Basic Law that would have limited the role of the NPCSC and therefore better secured judicial independence. Third, by failing to pursue the amendment process or to consider interim measures that might have allowed that process to go forward, the administration abandoned a course that might have addressed the alleged immigration crisis while avoiding significant costs to the rule of law. Perhaps most important, the request for reinterpretation has introduced the concept of Hong Kong as a “hybrid” legal system, a prospect that certain HKSAR officials apparently view as an opportunity for closer ties with Beijing rather than as fundamentally inconsistent with the common law system that Beijing pledged to uphold.

Although Beijing itself appears not to have instigated the right of abode crisis, its actions in the matter here largely confirmed the concerns of those who questioned its commitment to Hong Kong’s legal independence. Not only did the NPCSC grant the HKSAR executive everything it requested, but it also went further by castigating the CFA for not having referred all relevant provisions to it in the first place. In so doing, the NPCSC engaged in an instrumental analysis that takes a significant step toward realizing a “hybrid” system.

Ironically, the HKSAR administration’s insistence that it took these steps only to meet an unusual and compelling crisis acknowledges that Hong Kong’s legal system paid a price for reinterpretation. In contrast to the original right of abode cases, recent CFA rulings have avoided challenging Beijing’s authority, thus denying the HKSAR leadership an opportunity to demonstrate whether reinterpretation will be an extraordinary measure. Should the right of abode controversy turn out to have been an isolated event, as the administration maintains, the damage done need be neither fundamental nor lasting. If, however, further requests lead to further reinterpretations, then Hong Kong’s common law traditions will necessarily erode. It is our hope that this will not come to pass, and that instead the efforts and goodwill of the Hong Kong legal community, and of the Hong Kong and PRC governments, will make good the “One Country, Two Systems” pledge.

April 2000
APPENDIX I.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK /
JOSEPH R. CROWLEY PROGRAM
MISSION ITINERARY

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<td>Thursday, May 27</td>
<td>Meeting with Hong Kong University students Membership meeting, Hong Kong Human Rights Monitor</td>
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<td>Saturday, May 29</td>
<td>Panel on Right of Abode organized by JUSTICE (local branch of International Commission of Jurists)</td>
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<td>Attendance and observation at march marking 10th Anniversary of Tiananmen Square Attendance and observation at rally concluding march at Government House</td>
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<td>Monday, May 31</td>
<td>Meeting with Hong Kong University students and faculty Meeting with Professor Tim Hamlett and Professor Judith Clarke, Hong Kong Baptist University Meeting with the Hong Kong Human Rights Monitor, Dr. Stephen Ng, Law Yuk Kai, and Belinda Winterbourne in attendance</td>
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<td>Tuesday, June 1</td>
<td>Interview with Emily Lau and Cyd Ho, The Frontier Interview with Franklen Choi, Hong Kong Catholic Commission for Labour Affairs Interview with Kin-ming Liu, Hong Kong</td>
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271. Unless otherwise noted all interviews and meetings took place in Hong Kong.
Journalists Association
Interview with Martin Lee, The Democratic Party
Interview with Elizabeth Tang, Confederation of Trade Unions
Interview with Philip Segal, The International Herald Tribune

Wednesday, June 2
Interview with Martin Clarke & Mayella Chung, Radio Television Hong Kong
Interview with May Wong, Hong Kong Coalition for the Safe Production of Toys
Interview with Maryanne King, Hong Kong Christian Women’s Council
Interview with Lina Paclibar-Deslate, Mission for Filipino Migrant Workers
Meeting with Hong Kong People’s Council on Public Housing Policy, Virginia Ip Chiu Ping, Ronald So Nga Long, and Cherry Che Wai Ling in attendance
Meeting with Sidney Jones, Human Rights Watch
Interview with Dennis Yau, Hong Kong Trade Development Council
Interview with Lekhanath Koirala, Far East Overseas Nepalese Association

Thursday, June 3
Interview with York Liao, Varitronix Limited
Interview with Bob Lee, Hasbro
Interview with Tsang Yok Sing, Democratic Alliance for Betterment of Hong Kong
Interview with Fly Lam Ying Hing, Women’s Workers Association
Interview with Fly Lam Ying Hing, Women’s Workers Association
Interview with Glen Schlosh, South China Morning Post
Interview with Mary Yuen, Catholic Peace and Justice Center
Interviews with S.C. Liu, and Yip So, residents, Diamond Hill squatter area
Interview with Ms. Bong-on, Friends of Thai
Interview with Edith Chang, Harmony House
Friday, June 4
Meeting with American Chamber of Commerce Jason Felton, Frank Martin, Sharon Mann, Sally Harpole, Jon Zinke, W. Anthony Stewart, and Paul Muther in attendance
Interview with Robert Allcock, Department of Justice
Interview with Dr. Eden Woon, Director, Hong Kong General Chamber of Commerce
Interview with The Honorable Justice Litton, Court of Final Appeals
Interview with Edgar Yuen, Ming Pao Newspapers Ltd.
Interview with Michael Davis, Chinese University
Interview with Michael MY Suen, Secretary of Constitutional Affairs Bureau
Interview with Mohamed Ali Din, United Muslims Association of Hong Kong
Interview with Lee Wing Tat, Democratic Party and Chair, LegCo Housing Committee
Meeting with Nelsy Hasibuan, and Reiko Harima, Asian Migrant Center
Attendance and observation at Tianamen Square 10th Anniversary Vigil

Saturday, June 5
Interview with TS Won, Hong Kong Toy Council

Sunday, June 6
Meeting with Lina Paclibar-Deslate and Lori Brunio, Filipino Migrant Workers’ Union
Interview with Sunik Karyawat, Indonesian Women Workers
Interview with Umaporn Meskri, Thai Women Association in Hong Kong

Monday, June 7
Interview with Helene Curran, Christian Action Domestic Helpers and Migrant Workers Programme
Interview with Rita Fan, President LegCo
Interview with Margaret Ng, LegCo
Interview with Professor Albert Chen, Hong Kong University
Interview with The Honorable Mr. Justice Bokhary,
Tuesday, June 8
Meeting with Vision 2047 Foundation Kelly Loper, Nicholas Allen, Peter Barrett, Robert Dorfman, Dr. Patrick Leung, Louis Loong, Kenneth Morrison, David Teng Pong, Paul Woodward, and Ashok Kothari, in attendance
Interview with CK Law, LegCo
Meeting with Dr. Dora Choi and Grace Mak, Chinese University
Interview with Professor H.L. Fu, Hong Kong University
Meeting with Johannes Chan and Yash Ghai, Hong Kong University
Interview with Yim Yuet Lim, Zitang Sex Workers Concern Organization
Meeting with The Law Society of Hong Kong, Patrick Moss, Anthony Chow, Peter C.L. Lo, Simon Ip Shing Hing, and Mark Bradley in attendance
Interview with Cherry Che Wai Ling, Hong Kong People's Council on Public Housing Policy
Telephone interview with Tessa Stewart, HK Federation of Women's Centres
Interview with Denis Chang, SC
Interview with Law Yuk Kai, Hong Kong Human Rights Monitor

Wednesday, June 9
Interview with Lee Cheuk Yan, LegCo and Hong Kong Confederation of Trade Unions
Interview with Andrew Wong, LegCo Constitutional Affairs Committee
Interview with Philip Dykes, SC
Meeting with Hong Kong Christian Industrial Committee Eli Chan Ka Wai, Alice Kwan Ming Wai, and Xavier Chan Yi Chi in attendance
Interview with Danny Gittings, South China Morning Post
Interview with Anson Chan, Chief Secretary for Administration, HKSAR
Interview with Philip SL Beh, The University of Hong Kong Faculty of Medicine, Dept. of Pathology
Interview with Wong Ka Ying, Association Concerning Sexual Violence Against Women
Interview with Vandana Rajwani, Indian Resources Group
Meeting with Ho Hei Wah, and Lai Shan Sze, Society of Community Organizations
Meetings with City University Law Faculty, Professors Lin Feng, Zhu Guobin, Priscilla M.F. Leung, Gu Main, Wang Chen Guang, and David N. Smith in attendance
Interview with Willy Wo Lap Lam
Interview with David Lan and John Dean, Home Affairs Secretaries, HKSAR
Meeting with US Consul General Richard Boucher and US Consul Kenneth Chern
Interview with Fannie Cheung, Equal Opportunities Commission
Attended and observed Denis Chang, SC, lecture at Hong Kong University
Interview with Ronald Arculli, Liberal Party

Thursday, June 10
Wrap up session #1: Rule of Law; LegCo Conference Room
Mak Hoi Wah, Vice Chair, Alliance for the Patriotic Democratic Movement in China
CJ Chan, High Court
Harry F.M. Mak, Justice Department, Legal Aid Division

Wrap up session #2: Business & Labour
Elsie Leung, Secretary for Justice, Department of Justice
Edward Ho, LegCo, Liberal Party
Virginia Ip Chiu Ping, Ronald So Ngai Long, and Cherry Che Wai Ling, Hong Kong People’s Council on Public Housing Policy
The Committee on
International Human Rights

David E. Nachman, Chair
Lee A. Schneider, Secretary

Tsang Kar Yin, Association For the Advancement of Feminism

Friday, June 11
Interview with T.K. Lai and David Tong, Immigration Department, HKSAR
Interview with Jimmy Lai, Apple Daily
Wrap up discussions with Hong Kong University students
Interview with Fernando Cheung, Polytechnic University
Meeting with Professor Peter Wesley-Smith, University of Hong Kong

INTERNATIONAL HUMAN RIGHTS

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The Future of CUNY, Part II

Governance and Funding: “By the Popular Will, Not by the Privileged Few”

The Commission on the Future of CUNY

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The Future of CUNY, Part II

Governance and Funding: “By the Popular Will, Not by the Privileged Few”* 

The Commission on the Future of CUNY

“The experiment is to be tried, whether the children of the people, the children of the whole people, can be educated; and whether an institution of the highest grade can be successfully controlled by the popular will, not by the privileged few.”

Dr. Horace Webster, first president of the Free Academy (later City College) on the occasion of its formal opening January 21, 1849

EXECUTIVE SUMMARY

When the Commission on the Future of CUNY was formed in June 1999,¹ the City University of New York was in the middle of a boisterous debate over remediation and access at its senior colleges. Hoping to add a more objective voice to this debate, we explored these issues extensively and discussed our findings at length and in considerable detail in Part I

*The report also contains exhibits and appendices comprising various materials and a bibliography. Copies of the full report, including exhibits and appendices, are available from the Association’s Executive Director’s office, 212-382-6658.

¹A special grant from the New York Community Trust to The Association of the Bar of the City of New York funded this project.
of our report—“Remediation and Access: To Educate the ‘Children of the Whole People.’”

Although our report was narrowly focused on remediation at CUNY, it led us to consider two more general issues facing the system and entwined with the remediation question: CUNY’s governance and its funding. Reform in these areas is key to CUNY’s continuing to provide “access to excellence in education” for the citizens of New York. Indeed, we believe that the system’s compromised governance system and its decayed financial standing are the two most critical challenges facing CUNY. In this, the second part of the Commission’s report, we discuss these broad and complex issues, and present a few suggestions for reform.

Unlike Part I, this report summarizes the background research of others and identifies a few particularly important points for emphasis. Both governance and finance were covered extensively in the Report of the Mayor’s Advisory Task Force on The City University of New York, The City University of New York: An Institution Adrift. June 7, 1999, (the “Schmidt Report”) as well as its supporting reports and documents. We rely on that work, particularly The Governance of the City University of New York: A System at Odds with Itself, by Brian Gill (RAND, May 1999) (hereinafter the “Gill Report”) and the reports of PricewaterhouseCoopers (the “PwC Reports”). We agree with a good deal of what is contained in the Gill Report, and outline both the areas of agreement as well as disagreement with its recommendations. We have also reviewed the final report, “The City University of New York: Diagnostic Review of the Organizational Structure and Functions of the Office of the Chancellor,” January 10, 2000, (“the Pappas Report”) by the management consulting organization, the Pappas Consulting Group, Inc., retained by the central administration.

**Governance**

We agree with the conclusion of the Gill Report that CUNY’s system of governance has been “dysfunctional.” Indeed, the Gill Report allocates “significant responsibility for CUNY’s problems” to failings in governance. Good faith collaboration and cooperation between the system’s distinct actors—faculty and administrators, colleges and the central administration at 80th Street, and even the Chancellor and the Board of Trustees—have been rare. Rather, interaction within much of the University is marked by mutual mistrust and ill-will.

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2. Gill Report, p.1
3. Ibid.
A good deal of this mistrust is grounded in the common perception that many of CUNY’s most important leaders are subject to untoward political influence. Brian Gill notes that “Some observers believe that elected officials (especially the Mayor) have used their influence to undermine the traditional independence of the Board.”4 State Comptroller H. Carl McCall has questioned “whether trustees can be expected to independently serve as guardians of their institutions if they are either directly or indirectly in the employ of the appointing authority.”5

Nine of CUNY’s 15 appointed Trustees have, or recently have had, close professional connections with the government of the City or the State of New York which are sometimes alleged to have created an atmosphere of undue pressure to follow the dictates of the Mayor and the Governor (see, infra, pp. 401-405). Additionally, as the Trustees have become increasingly activist in educational policy, Trustee discussions of pressing CUNY issues are characterized by what many observers would regard as undue haste, creating the impression that they are rubber stamping the agenda of the political powers that be.6

Even if the perception of political impropriety is exaggerated or mistaken, it must be addressed so that CUNY’s factions can find common ground and begin to work together in good faith. Indeed, whatever the merits of the proposal to eliminate remediation at the senior colleges, the absence of a Board of Trustees at CUNY that is perceived to be independent led to the issue being debated more in political than in educational terms.

Accordingly, the Commission proposes that the adoption of legislation:

(1) requiring all appointments to the Board to be pre-screened and approved by an independent and diverse blue ribbon panel; and

(2) prohibiting Board service by any person who holds regular employment by or contracts at the pleasure of, one of the appointing authorities. This would be consistent with the recommendations of a national commission sponsored by the Association of Governing Boards. We submit that these relatively simple reforms would improve CUNY’s governance processes significantly.

4. Ibid. p. 12.


6. See, for example, Part I of our Report, pp. 4-7, 13-14, 77-78.
The tension at CUNY between the central administration and the individual colleges, however, is considerably more difficult to address. We agree with the Schmidt Report's diagnosis of this tension: "CUNY, as a university system, has never surmounted its history as a group of separate institutions." Further, we agree that CUNY must establish procedures to make the system more "unified, coherent, [and] integrated." To this end, we are pleased to note that, since the appointment of Chancellor Goldstein, the Board of Trustees has taken several steps to cede certain managerial responsibilities to the Chancellor's office and to give the Chancellor clear authority over the college presidents. We advise caution, however, with respect to other moves toward centralization at CUNY. The system is large and remarkably diverse, and it is important that the interests of its many stakeholders be actively included in decision-making processes. Without this type of inclusion, the good will necessary for the creation of a unified CUNY system will be impossible.

**Funding**

While our investigation of CUNY's governance structure found an extremely complicated web of problems that must be carefully and patiently untangled, we submit that CUNY's financial challenges are relatively simple: CUNY is dramatically underfunded.

Enrollment in the CUNY colleges has generally grown over the past decade, and the costs of providing higher education have increased significantly. Nevertheless, since 1990, State and local appropriations to CUNY have dropped dramatically. In constant dollar terms, New York State's appropriations to CUNY have dropped by 40% since 1980, and New York City's appropriations have fallen by 90%. To make up for these declining appropriations, CUNY has been forced to cut costs, watch its proportion of full-time, tenured and tenure-track professors dwindle as it relies increasingly on relatively inexpensive adjunct instructors, and charge its students increasing rates of tuition. As a result, nearly 60% of CUNY's faculty are adjuncts, up from 40% in 1980, and CUNY's tuition levels, especially at the community colleges, are considerably higher than the national average for public colleges and universities.

New York State's generous financial aid program, the Tuition Assis-

tance Program ("TAP"), is invaluable to CUNY students who may not otherwise be able to afford the system's increasing tuition. But several of TAP's eligibility requirements make it inaccessible to many of the system's most needy students. We argue that TAP must be made available to CUNY's growing non-traditional student body; limits on TAP eligibility must be eliminated; and TAP must be made available to remedial students.

Our treatment of CUNY's funding considers the Schmidt Report's many recommendations for improving CUNY's budgeting and financing mechanisms, and endorses several of them. We believe, however, that these recommendations, which are focused on diversifying CUNY's financial base and streamlining the distribution of funds within the CUNY system, fail to emphasize the central point: the City and State have effectively cut CUNY funding dramatically and left CUNY seriously underfunded. New York State is one of three states that have cut funding for higher education in the past decade, and the state currently ranks 46th in the nation in funding for higher education per $1000 income. CUNY already raises a larger percentage of its revenues from non-governmental or non-state sources and spends a higher proportion of its total funds on direct instruction than do many of its peers.

The Schmidt Report failed to fully factor into its conclusions some of the important findings of both the Gill and the PwC Reports on CUNY finances, in particular, the effect of the long-term under-funding of the system. While the Schmidt Report noted that CUNY's "State and City appropriations processes need improvement," it avoided meeting the issue head on by calling on CUNY to "do much more to increase alternative revenues," rather than calling on the State and City to restore CUNY funding.

CUNY continues to provide a significant public good. It creates tax revenues that far outpace its governmental appropriations. Further, we maintain that CUNY graduates are more likely to be employed and to vote than their peers who have not attended college and are far less likely to live in poverty or commit crimes. Their children are more likely to succeed in the educational system, providing a significant inter-generational benefit. If New York City and State are to continue to enjoy this public good, they must reaffirm their investment in it.

In our report's conclusion, we note the continuing need for diligent

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monitoring, open communications, and inclusive debate in the CUNY system. At the dawn of the 21st Century, CUNY must reinvigorate its commitment to serving the “children of the whole people” and maintaining an institution “of the highest grade ... controlled by the popular will, not by the privileged few.” It must retrain its focus on the contributions it can make to the lives of its students and the public weal; it must take care to inform the public about its achievements; and it must undertake reforms to secure both access and excellence for every student in the system.

Case Study: Articulation

Our Report concludes with a consideration of “articulation” among the community and senior colleges within CUNY as a case study in governance. CUNY colleges have failed over the years to resolve this increasingly complex and consequential issue. Its satisfactory resolution will require difficult and detailed work by the faculty to negotiate program to program articulation agreements. The Trustees’ actions late last year have reflected the haste and superficiality that our early Report criticized. The Board of Trustees and the central administration should not force an overly simplistic approach which is not workable. This case study indicates the importance of reforming CUNY’s governance mechanisms to create a system that is marked by cooperation and integrated planning. We have also made a number of specific substantive recommendations with respect to this issue.

* * * *

Part II of our Report has a somewhat different target audience than Part I. In Part I we addressed ourselves primarily to the New York State Board of Regents, whose responsibility it was to decide whether or not to approve CUNY’s proposed Amendment to its Master Plan by eliminating remedial courses at the senior colleges. Part II is addressed more broadly to educational policy makers and elected officials responsible for the direction of public higher education in New York City. Many of our recommendations, such as changes in the trustee selection process and the lift-

11. “Articulation” in the academic setting refers to the interrelation and transferability of credits, courses, and programs from one college to another, often within a state-wide or city-wide university system, particularly in this instance from a community college to a senior college.
ing of restrictions on TAP availability, would require action by the State legislature and governor; others will require further and more in-depth study, such as general questions concerning finance and various specific aspects of the future of CUNY.

GOVERNANCE

The System of Governance at CUNY

For the purposes of this Report, we will define the governance system of CUNY as: that constellation of policies, procedures (written and unwritten), and decision-making units that control the educational policy and resource allocation within and among CUNY institutions and units at all levels. Governance also refers to the relationships among the various decision-making units, the process for making decisions both within the colleges and at the University level. Governance is the control and direction, the making and administration of policy for an institution or other entity. Simply put, governance is how entities are run.

The Gill Report provides the following flow chart as “an overview of CUNY governance” but notes that the structure is “even more complex” than the flow chart would suggest. This chart apparently suggests that the Chancellor has no real authority, an interpretation with which we would disagree. It also creates the impression that faculty governance bodies share authority with college presidents. In fact the faculty role is to recommend policy to the presidents, who, as a practical matter, normally follow such recommendations. The chart does, however, introduce most of the players.

The governor and the mayor each have appointing authority over the Board of Trustees. As will be discussed in greater detail below, the governor appoints 10 members of the Board of Trustees and the mayor appoints five, both with the advice and consent of the State Senate. The State legislature and the governor have statutory and budgetary author-

12. Roger Benjamin, Stephen Carroll, Maryann Jacobi, Cathy Krop, Michael Shires, The Redesign of Governance in Higher Education, RAND, Institute on Education and Training, 1993, p. 23, (“RAND Redesign Report”). In this report, RAND defines the term “governance system” as “the constellation of policies, procedures (written and unwritten), and decisionmaking units that control resource allocation within and among higher education institutions at all levels.” For our current purposes, we have added control of educational policy to the control of resource allocation.


ity over CUNY. They have determined the mission, the structure, and the governance system of the University and are, through the budget process, primarily responsible for determining most of the system's funding, including levels of tuition and student aid, in addition to direct appropriations.

The State Board of Regents, which is appointed jointly by the two houses of the legislature, has broad policymaking oversight of all higher education in New York State. The State Constitution establishes the Board of Regents as the governing body of the University of the State of New York. The City of New York is responsible for a portion of the funding of the community colleges. See, infra, pp. 418 et seq. for a fuller discussion of the finances of the system.

15. The City of New York is responsible for a portion of the funding of the community colleges. See, infra, pp. 418 et seq. for a fuller discussion of the finances of the system.

York, which consists of all secondary and higher education institutions, public and private, incorporated by the State of New York, including CUNY. The Regents have the power to grant and, for sufficient cause, to revoke the charters of colleges and universities. As discussed in Part I, this authority includes, among other things, the approval of the Master Plan and admissions criteria, but the Regents have no budgetary authority whatever.

The ultimate responsibility for the governance of CUNY is vested in its Board of Trustees. As noted, the Governor appoints ten Trustees and the Mayor appoints five, both with the advice and consent of the State Senate. When the former Board of Higher Education of the City of New York was converted into the City University of New York in 1975, the Legislature provided that:

The board of trustees shall govern and administer the city university. The control of the educational work of the city university shall rest solely in the board of trustees which shall govern and administer all educational units of the city university.

The powers and duties of the Board of Trustees are specified in detail in §6206 of the State Education Law. These include submitting a Master Plan to the Board of Regents including plans for new curricula, new facilities, policies with respect to admissions, potential enrollments, etc. The Trustees have the power to pass on all plans for buildings, to “approve and administer” courses, prepare budgets, and in general, “to control and administer all public education in the colleges and institutions of which the city university is composed.” They also have the authority to appoint a chancellor as the chief educational and administrative officer of the university and who serves at their pleasure. The Board of Trustees has

17. Education Law §214.
18. Education Law §216.
20. Education Law §6204.1.
21. Education Law §6206.5
22. Ibid. The Governor and Mayor both played very prominent, if not decisive, roles in the selection of the current Chancellor, Matthew Goldstein. On July 20, the Governor and the Mayor announced that they supported Goldstein for CUNY Chancellor and Goldstein issued a statement saying “this is a wonderful honor for me to return to the university.” These announcements gave many the impression that the selection had been made, even though the Trustees had not yet considered Goldstein’s nomination. Indeed, The New York Times re-
the authority to establish positions, departments, divisions and faculties, to appoint instructional and non-instructional staff, “establish and conduct” courses, determine conditions of admissions, attendance and discharge, and set rates of tuition and other fees. 23

CUNY bylaws, the Board of Trustees Manual of General Policy, and long years of custom and practice have created highly complex interrelationships among units that report to the Chancellor and the Board of Trustees. These include the college presidents and the various faculty governance units such as the Faculty Senate, college councils, discipline councils, and department chairs. The college presidents are the chief executive officers of their respective colleges, which do not have separate boards of trustees. Each college has its own faculty governance unit, and each has representatives at the University level Faculty Senate. 24 As is usual in the academic setting, the faculty has been delegated the responsibility to set academic policies, such as admissions standards, curriculum, and graduation requirements. (See, infra, pp. 444-445 for more detailed discussion of faculty governance responsibility.)

The decision-making process at CUNY varies greatly, depending upon the subject matter. For example, although all major (and some minor) decisions go through the Board of Trustees, they arrive there by different routes, some coming from the colleges usually via the Chancellor, some from the central administration, some self-initiated. As with any governing body, the Board of Trustees has a number of committees through which proposals pass.

For the purposes of governance aspects of this part of our Report, we will divide our discussion into two basic areas: 1) approaches we would recommend for the decision-making process of the CUNY system, and 2) the major issues facing CUNY in the immediate and near future. We shall not, in most instances, propose specific answers to the issues faced, but rather a framework for addressing them.

23. Education Law §6206.7.

24. The Faculty Senate should not be confused with the union, the Professional Staff Congress (“PSC”) which represents the faculty for collective bargaining purposes.
Before discussing these issues, however, we shall focus on the critical issue concerning the process of selection of Trustees to CUNY’s Board. Reform of this process should help in effecting meaningful change in CUNY’s governance system and educational policies.

**Board of Trustees—Selection Process**

As discussed above, the Governor and the Mayor appoint the Board, both with the advice and consent of the State Senate. These Trustees serve a seven-year term and may be re-appointed for one additional term.\(^25\) There are no limitations on, or qualifications for, eligibility for appointment to the Board, except that both the mayoral and gubernatorial appointees must include at least one resident of each of the five boroughs of the city and the Mayor must appoint one CUNY graduate and the Governor must appoint two. There are no rules prohibiting any categories of persons from serving and/or voting on any given issue. The elected head of the student government also serves ex-officio as a voting Trustee and the president of the Faculty Senate serves as an ex-officio but non-voting Trustee.

By statute, the Trustees are to “independently” fulfill their charge.\(^26\) Presumably, this means that they are to be free from political intrusion. Unfortunately, there are no rules or regulations assuring that this statutory mandate be satisfied. Both Governor Pataki and Mayor Giuliani have appointed to the Board current or former staff members, as well as people who currently do business with the State or City government. Of the five current mayoral appointees to the Board of Trustees, three, Satish Babbar, Ronald Marino, and George Rios, are or have been employed as high level political appointees of the City government and the other two, Alfred Curtis and Randy Mastro,\(^27\) have until recently been employed in such political positions. Of the current gubernatorial appointees, one, Jeffrey Wiesenfeld, was until recently the Governor’s Executive Assistant. Herman Badillo, a lawyer whom the Governor appointed as Chairman of CUNY’s

\(^{25}\) New York State Education Law § 6204.

\(^{26}\) New York State Education Law, §6201.2. “The legislature intends that the City University of New York should be maintained as an independent system of higher education governed by its own board of trustees ....”

\(^{27}\) Trustee Mastro is currently primarily employed as a partner in a private law firm, but has also, at the same time, served as Chairman of the Mayor’s Charter Revision Commission. He also served under Mayor Giuliani when he was the United States Attorney for the Southern District of New York.
Board of Trustees, is also the Mayor’s unpaid education advisor and has been the Mayor’s Special Counsel for the Fiscal Oversight of Education, as well as co-chair of the Mayor's Task Force on CUNY. Benno Schmidt, Chair of the Mayor’s Task Force, and now Vice-Chair of the CUNY Board of Trustees, has been careful to note that the Edison Project, his for-profit school management company, would not bid for any future outsourcing of remedial education by CUNY.

Although Trustees can be removed from that office only for cause (misconduct, neglect of duties, or mental or physical incapacity), they have no protection whatever from removal, for political or any other reasons, from their primary employment or from not receiving material contracts by an appointing authority.

State Comptroller Carl H. McCall has questioned “whether trustees can be expected to independently serve as guardians of their institutions if they are either directly or indirectly in the employ of the appointing authority (i.e., as a governmental or public authority employee).” As noted in the Gill report:

CUNY is a public institution, funded by public money; the public interest should be represented by their elected officials...[T]he influence of elected officials is appropriately expressed through their statutory authority to define CUNY’s structure and mission, their control over CUNY’s budget, and their appointment of trustees. Beyond that, however, at most public universities it is considered appropriate for the trustees to have a degree of independence from the officials who appointed them when dealing with the day-to-day governance of the university.... The board’s relationship with the administration and faculty is likely to benefit from a degree of independence. The perception of political interference, by contrast, creates instability and lowers morale.  

28. Service on that Task Force itself need not be disabling for service on the Board of Trustees. However, the Board of Trustees is currently moving quite swiftly to put the Schmidt recommendations into effect without having first thoroughly considered them as a Board, (see, infra, pp. 412-413). The fact that the Chair and Vice Chair of the Board of Trustees were also the leaders of the Mayor’s Task Force does not obviate the necessity of the Board of Trustees itself to perform its statutorily mandated functions.


30. p. 30 (citations omitted).
The Gill Report notes that "[s]ome observers believe that elected officials (especially the Mayor) have used their influence to undermine the traditional independence of the Board." 31

This Commission agrees with these observations. In addition, a perception that the Trustees are not independent tends to create a feeling of distrust about substantive decisions. Certainly some of the reaction to the proposals to change remediation and admissions policies, and especially the timing and manner in which these proposals were advanced, was colored by a mood of distrust. There is a perception by some current and former Trustees, former administrators and current and former faculty, that decisions made by the current Board of Trustees are not always made with the best interests of the institution as the guiding principle. As discussed infra, pp. 401-405, the appearance of political interference in the governance of CUNY has been heightened in recent months, for example, by the swift implementation of many of the Schmidt Report’s recommendations without appropriate consideration and discussion by the Board itself. The proposed Amendment to the Master Plan submitted to the Board of Regents last July simply stated in a footnote that the Schmidt Report would be a “blueprint” for the future of CUNY. We have seen no indication that the Schmidt Report, much less its massive supporting documents, were ever formally discussed by the Board of Trustees. 32 This is an abdication of the Trustees’ statutory responsibility to govern CUNY themselves as the duly constituted body rather than cede that authority to a group created and appointed solely by the Mayor.

The apparent politicization of the Board may also have affected the quality of its deliberations. At the Board of Regents meeting on November 22, 1999, at which the plan to remove remedial instruction from the senior colleges at CUNY was debated, Regent Edward Meyers discussed the fact that some of Regents had hailed a “new dynamic partnership” with the CUNY Board of Trustees; he disagreed saying there was “no dynamic partnership, no partnership.” As the senior Regent (22 years on the Board) he pointed out that at one time such a relationship did exist, that the two groups met once a year and exchanged views, until recently when that was cut off. Normally, they would have sat down and talked out the issues. This time, he said, that except for a “perfunctory” letter from Herman

31. p. 12.

32. At the June 28,1999 meeting of the Board of Trustees at which the Amendment to the Master Plan was approved, Trustees complained that they had not yet been furnished with supporting documentation.
Badillo, he had not gotten a single call or letter from a member of the CUNY Board of Trustees. He then reported that he had examined the minutes of the Trustees meetings on May 26, 1998, and January 25, 1999, the dates on which they passed the resolutions ending remedial instruction at the senior colleges. He said, “I looked at the quality of the discussion and debate and it was shallow.”

In discussing Board meetings, James Murphy, a former CUNY Trustee (for 20 years) and Chair (for 17 years) said, “The intrusiveness of the mayor’s office was appalling... The governor’s people made it clear this is what they wanted but they didn’t do the arm twisting the mayor did. The independence of governance in this country has worked very well, but this intrusion was terrible.”

In commenting on the problem of having current City and State employees and contractors as mayoral and gubernatorial appointees to the CUNY Board of Trustees, former Trustee Edith Everett (for 23 years) and Vice Chair (for 13 years) went so far as to charge:

It is shocking and frightening to observe the methods employed by Mayor Giuliani and Governor Pataki to influence their CUNY Board appointees. The threats and intimidation of Board members to assure that they vote as these politicians direct them, resemble tactics used in third world dictatorships masquerading as democracies.

On the one hand, CUNY must in some manner be accountable to elected officials. On the other hand, as a public institution, the politicization of the Board of Trustees, or even the perception of politicization, does much to undermine confidence in the governance processes of the University. CUNY Trustees have a fiduciary duty to serve the best interests of the University. They cannot be expected to serve two masters.

In order to balance these competing needs, the Commission proposes that legislation should be enacted:

- prohibiting service on the Board by individuals who, because of their employment by, or continuing financial relationships

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34. Testimony, Hearing before the New York State Assembly Committee on Higher Education, June 5, 1999.
with, the appointing authority, either have or appear to have a conflict of interest or a lack of independence; and

- requiring the establishment of a blue ribbon panel reflective of the City’s population, including educators, business leaders, representatives of various professional groups, and civic and community leaders, to screen all nominees for the Board of Trustees of CUNY.

Screening/Nominating Panel—Other States’ Experience

In 1980, in an attempt to ensure that university trustees would be qualified to fulfill their public trust, a national commission sponsored by the Association of Governing Boards of Universities and Colleges (AGB), and chaired by former Governor Robert Scott of North Carolina, recommended that the appointment of trustees be made from a list of candidates submitted and carefully screened by a special nominating committee that should be diverse and reflective of the state’s population.

Three states, Kentucky, Massachusetts and Minnesota, have promulgated legislation establishing screening or nominating committees for the selection of trustees. Neither Governor Pataki nor Mayor Giuliani has voluntarily established a panel to screen candidates for the Board of Trustees and there has not been a public outcry for such a panel. Although such panels are often created in response to a scandal, involving political misuse of the appointment process, the Commission believes that the principle for creating such a panel is sound and there should be no need for a precipitating crisis to establish one.

In Kentucky, the legislature created the Governor’s Higher Education Nominating Committee in 1992. It consists of seven members appointed

35. In January, 1999, A.02560 was introduced by Assembly member Ed Sullivan and co-sponsored by Assembly member Deborah Glick. It prohibits appointment of persons in the employ or under the supervision of an appointing authority. It passed the Assembly but died in the Senate early this year.

36. In March, 1999, Assembly member Luster introduced A.06817 which establishes a committee for the purpose of identifying properly qualified candidates for trustees of SUNY and CUNY, establishes conflict of interest provisions, and creates mandatory training and continuing education programs for trustees. It was referred to the Committee on Higher Education, but has not been brought to a vote.


38. Ibid. p. 4.
by the governor, with confirmation required by both houses of the legislature. Each member of the screening/nominating committee represents a State Supreme Court District; there can be no more than two persons with undergraduate degrees from the same institution; and the committee must be representative of the racial composition of the state. The legislation also requires that the characteristics of the current members of the university board also be taken into account by the screening/nominating committee. The university governing boards must also be reflective of the racial composition, political party affiliation, and geographic distribution within the state.39

In Massachusetts, the Public Education Nominating Council (PENC) was originally created through executive orders and then granted statutory authority in 1991. It consists of 12 to 15 members who serve at the pleasure of the governor. The statute requires that the PENC reflect the cultural, racial, social, geographic, and ethnic diversity of the state. The PENC is required to submit at least three times as many names as there are vacancies on the boards of trustees of all public universities and colleges. The council must evaluate its nominees on a non-discriminatory basis.40

Minnesota also has had a legislatively created screening panel since 1988. Currently known as the Higher Education Board Candidate Advisory Council (HEBCAC), this council, consisting of 24 members, half of whom are selected by each house of the State Legislature, must be geographically representative, and no more than two-thirds may be from any one political party. The governor, who is the appointing authority of the 15 member Higher Education Board, is, however, not required to appoint trustees only from the list submitted by the council.41

A nominating/screening panel for selecting CUNY trustees would raise public and stakeholder confidence in the governance of the university and should attract more experienced and able persons to serve on the Board of Trustees. Hopefully, such a board would include people with experience in educational institutions, and prominent leaders in business, civic, and philanthropic organizations. It has been suggested that former Mayor Dinkins and former Governor Cuomo may have failed to appoint a number of trustees to fill vacancies arising during their terms of office allegedly due to concern that the Republican-controlled State Senate would subject their nominees to difficult confirmation

39. Kentucky Revised Statutes 164.005.
40. 6 M.G.L.A. §18B.
41. Minn. Stat. 15A.081.
processes. A screening panel might help alleviate similar concerns since appointing authorities would not be subject to the accusation that their appointments are made for purely political purposes.

The Commission believes that politicization, or even the widely held perception of politicization of CUNY governance, must come to an end if true educational reform is to be accomplished. We recommend in the strongest terms the adoption of legislation eliminating conflicts of interests and establishing a nominating/screening panel.

**Board of Trustees/ Chancellor Functions**

The traditional role of a governing board of a public institution of higher education is to set its broad educational policies and to chart the general allocation of its resources, while the role of its chief executive officer (president or chancellor) is to execute and enlarge on those policies and to administer the educational programs and operations of the institution. The CEO of CUNY, the Chancellor, must also be in a position to propose and advise the Board on educational policy and to anticipate a high degree of deference by the Board to his or her opinion. The Board should neither micromanage the institution nor serve as a rubber stamp for the Chancellor or any elected official. Unfortunately, at one time or another, each of these basic principles has been observed in the breach at CUNY.

The Gill Report notes that, on more than one occasion, the Board has argued over individual course descriptions, held up approval of programs, challenged faculty control over course content, disputed relatively minor personnel actions and contracts for computers and photocopying, and mandated the use of a particular set of standardized tests “despite unresolved concerns about the validity of the tests.” To some degree, the tendency of the CUNY Board of Trustees to micromanage the University is built into CUNY’s governing statutes. For example, in contrast to most universities and university systems, CUNY’s enabling statute states that the board “shall govern and administer all educational units of the city university” and requires Board approval of all expenditures in excess of $20,000.

42. When their terms expire, sitting Trustees are permitted to continue in office until their successors are confirmed, so the Board remains at full strength even when there are vacancies.
43. p. 11-12.
44. See e.g., Gill Report, p. 9.
45. N.Y. Education Law §6204 (emphasis added).
46. N.Y. Education Law §6218.
Chancellor Goldstein commands a great deal of well deserved respect. Since his appointment, the Trustees have taken some actions to augment the authority of the Chancellor. They amended §11.2 of the CUNY by-laws, which defines the position of the Chancellor, to add the function “chief executive officer” to the existing language of “chief educational and administrative officer.” Further, the Chancellor has for the first time been granted the authority to “initiate, plan, develop and implement institutional strategy and policy” rather than simply “to report to the board his/her recommendations for consideration or action.” Under a new subsection, 11.2(c), the Chancellor is given the authority to, among other things, “oversee and hold accountable campus leadership, including by setting goals and academic and financial performance standards for each campus.” The position description now speaks in terms of the Chancellor representing “the university” in various capacities and venues, rather than representing “the board” or “the colleges”, thus sending at least a symbolic message that the whole is greater than the sum of its parts.

Reorganization of the Central Office

Early in his tenure, Chancellor Goldstein retained the services of the Pappas Consulting Group, Inc. to evaluate the structure and organization of the central administration. The Pappas Report was issued on January 10, 2000. Some of the changes it proposes are primarily symbolic, e.g., renaming the central office as “the Office of the Chancellor”, 47 or requiring uniformity of graphics, typeface on letterheads, business cards, and Web pages, etc. 48 But others, such as re-structuring the academic affairs function, re-organizing the Chancellor’s cabinet and the system of reporting to the Chancellor, have very substantive implications.

The Pappas Report essentially recommends a streamlined structure that is more of a pyramid, with fewer direct reports to the Chancellor than under the current one, which it aptly describes as a sort of “silo.” 49 It recommends elimination of the position of Deputy Chancellor and proposes three major vice chancellorships: elevation of the position of Vice Chancellor for Academic Affairs to Executive Vice Chancellor and Chief Academic Officer (for academic affairs), a senior Vice Chancellor and Chief Operating Officer (for internal finance and budget), and a Vice Chancellor and Chief External Affairs Officer (for external affairs.)

47. Pappas Report, p.16.
49. p.22.
The Executive Vice Chancellor, under this re-structuring, clearly will be the number two person in the central office. S/he will have overall supervision of the following functions:  

- University Academic Plans  
- College-based Academic Program Evaluation Processes and Performance Measures  
- Instructional Technology  
- University Admissions and Financial Aid Standards, Policies and Processes  
- Sponsored Research and Economic Development  
- Distance Learning  
- College Articulation Agreements  
- Student Assessment Programs  
- Remediation Program  
- Collaborative Programs with the NYCPS  
- Faculty Research Incentive Program  

The Senior Vice Chancellor and COO will have responsibility for:  

- University Long-Range Financial Plan  
- University Capital and Operating Budgets  
- Annual Financial Report  
- University Personnel Policies  
- Campus Master Site Plans  
- University Capital Plan  
- University Information Technology Plan (in coordination with Instructional Technology Plan)  

The Vice Chancellor and Chief External Affairs Officer will manage:  

- Legislative Lobbying

50. p. 17.  
51. p.18.  
52. Ibid.
A number of other positions are redefined, and reporting relations changed, including University Deans for various functions under the rubric of academic affairs. The position of Vice Chancellor for Student Affairs and Enrollment Services, which reports directly to the Chancellor, and the University Dean for Student Affairs and Enrollment Management, reporting to the Vice Chancellor for Academic Affairs, are both eliminated and replaced with a Vice Chancellor for Student Development and Enrollment Services reporting to the Executive Vice Chancellor and Chief Academic Officer. The Pappas Report is quite detailed and useful. Its recommendations appear sensible. Of course, these newly structured positions will only help to produce more effective governance if they are filled after a careful and open search process.

Distribution of Authority—The University/ The Colleges
This Commission has taken a particular interest in the question of the centralization of CUNY governance. Is CUNY a centralized system or a loose confederation of relatively independent colleges? And, regardless of what it is, what should it be? According to the Schmidt Report,

CUNY, as a university system, has never surmounted its history as a group of separate institutions, founded at different times for different purposes. When it became a system in 1961, there was no planning addressed to its system architecture or its system governance. Since then, CUNY’s haphazard evolution—characterized by rapid expansion and contraction, sudden change of academic direction, and frequent administrative turnover—has resulted not in a coherent university, but in an amorphous confederation of individual colleges.

The solution suggested by the Schmidt Report and by the Gill Report is to “re-think” CUNY as a truly centralized system that is “unified, coherent...”

53. p.21. Other than the apparent consolidation of two similar sounding positions reporting to two different officials, the stated rationale for the change from the words “services” and “affairs” to the word “development” is unclear. It is said to be “utilized to underscore the academic support nature of this position.” Ibid.
ent, [and] integrated.” We agree that for a number of purposes, there are clear advantages to a more unified and integrated—and even a more centralized—system of governance than CUNY has had in the past. History and the experiences of other similar systems suggest, however, that this could be difficult to accomplish—especially in a way that allows the various stakeholders in the system to feel invested in needed changes.

Tension between centralized authority and dispersed authority exists in every large university. Indeed, it is rare to find a university system (or major company, organization or government agency for that matter) where the central authority is not resented as having too much power and for not understanding the local scene. This universal tendency is built into organizations, including colleges and universities.55

[T]here always seems to be a “we” and “they” perception. “We,” the campus faculty and administrators, may wage battle against “them,” the system administrators. “We” don’t like “them” telling us what to do. “We,” the system administrators, know how to run our business better than “they” the state officials do....As the saying goes, “Where you stand depends on where you sit.” It is not a case of being right or wrong, but of seeing the world from a different perspective.56

Thus, it is not surprising that according to many faculty members and college administrators with whom we spoke, there is already too much control coming from CUNY’s central administration. Some are frustrated, angry and confused by conflicting signals and what they see as unrealistic demands to “turn on a dime.” In various interviews, college officials told us that “80th Street” is a hindrance rather than a help in running a campus: denying flexibility, demanding reports and statistics and then ignoring the results, generally micromanaging the colleges. One college president commented that CUNY is a “historically bounded” system, in which layers of regulation have been added without the elimination of old or outmoded regulations. The Gill Report described CUNY governance as suffering from “the worst of both elements of centralization and decentralization: red tape without coherent leadership.”57

The Pappas Report also makes some comments about centralization

56. Ibid.
versus decentralization issues but comes to no definite conclusion. However, it apparently proceeds from the assumption that an objective of the Chancellor is to transfer increased authority to the campus Presidents as well as to provide more accountable and supportive administrative services to the campuses. It observes that “...the current organizational structure for the central office promotes a command and control culture. A corporate-like culture that focuses on leadership rather than control, and on service rather than command, needs to be instilled into the central office organization.”

There are, of course, excellent arguments in favor of decentralized decisionmaking. This is the thrust of the movement on the federal level toward “devolution” of governmental power back to state and local government and of much modern management theory. In Part I of our Report, we urged that the individual colleges be given greater flexibility in carrying out the policy of reducing or eliminating remediation. It is often preferable to make important decisions at the scene where local conditions may be better understood and appreciated.

The Board of Trustees has referred to the Schmidt Report as the “blueprint” for future changes at CUNY and has already made a number of moves toward implementing the report’s governance recommendations. In addition to the changes in the Chancellor’s job description, outlined above, the Trustees have taken steps toward increasing central authority with respect to the powers formerly enjoyed by the individual college presidents. Most prominently, the Board has amended §4.2 and §11.4 of its bylaws (the definition of the position of college president) to provide that the college presidents no longer report directly to the Board of Trustees but rather to the Chancellor and through him or her to the Board, although the Board and any president “may consult directly with each other on any issue of institutional importance.” This is the normal process. The Council of Presidents, which recommends procedures and policies that affect more than one of the colleges, now also reports to the Chancellor rather than directly to the Board. Bylaw §6.6 has been amended to provide that the hiring of the instructional staff “shall be

58. See Pappas Report p. 31.
60. p. 8. Some faculty members take umbrage at anything deemed to be in the corporate image and it is not entirely clear to us that this statement represents a realistic characterization of corporate culture in general. Nevertheless, we wholeheartedly support any reforms in this general direction.
made by the board upon the recommendation of the chancellor” rather than upon the recommendation of the Presidents. The Chancellor has also been given the power, in consultation with the Chair and Vice Chair and with notice to the Board, to suspend a President and appoint an interim President in extraordinary situations.61 Chancellor Goldstein has also initiated a number of other changes in the structure of the central administration in a stated intention to make it run in a more business-like fashion.

This Commission supports these particular changes. But whatever can be said in their favor, we believe that the Board has erred in making changes of this significance without extensive deliberation and consultation. Whether or not one agrees with the conclusions and recommendations of the Schmidt Report, the Task Force making them was constituted and charged solely by the Mayor and should not be substituted for a proper governance process by the Board of Trustees that is charged under law with that responsibility. The recent enactment by the Board of Trustees of the Schmidt Report recommendation to adopt a differential pay scale for college presidents, based upon their degree of responsibility and complexity of their institutions, was done only after public hearings.62 This process should be adhered to for other major initiatives in the future. CUNY’s Board should move cautiously toward any major restructuring that may impact on the ability of the system to deliver a quality education, encouraging system-wide discussion at each step, and resisting the temptation to brand opponents to proposed changes as defenders of the status quo.

Some History of Attempted Centralization at CUNY
Part of our ambivalence about the advisability of a more centralized command and control governance system for CUNY arises out of our concern as to whether the central administration of CUNY will be able to create and sustain such a system. First of all, the “culture” of CUNY militates against it. In other states, university systems that have been cobbled together from pre-existing independent colleges with separate identities and different missions have not been as successful in creating and maintain-

61. Unfortunately, on June 28, and again on August 27, 1999, the Board permanently appointed two new college presidents without following the standard search procedures, such as setting up a representative search committee, as required by its own guidelines for Presidential Searches as amended, November 24, 1987 and without following affirmative action requirements. As in the case of the appointment of Chancellor Goldstein, we do not question the qualifications of these individuals, only the manner of their appointments.

ing an effective educational program and identity here as systems initially established as systems.63

Secondly, the centrifugal forces at CUNY have usually been successful in the past. The most commonly cited example of this is the ill-fated and much maligned (Leon) Goldstein Report.64 Established by former CUNY Chancellor W. Ann Reynolds in 1992, the Chancellor’s Advisory Committee on Academic Program Planning, was chaired by then President of Kingsborough Community College Leon Goldstein. Consisting of senior faculty members and college presidents in the CUNY system, the Committee issued its report at the end of that year.65 Although composed of representatives of various campuses, the Committee was perceived by some faculty members as being an instrument of the central administration. Noting that shrinking resources made more coherent academic planning a necessity, the Committee expressed the view that “if CUNY could conceive of itself and act as a unified institution,”66 it would be able to concentrate and differentiate program offerings among the separate campuses, strengthen and develop programs in specific areas, and improve its ability to share scarce resources, including full-time faculty. It recommended a two-level review of courses and programs to determine whether and where there was program overlap, duplication, underutilization, etc. Based upon its “level one” review, consisting of an examination of numerical data such as enrollment figures, degrees granted, and available faculty resources, the committee recommended further in-depth study or “second level” review of several specific programs for possible reduction or consolidation.

Due to what the Gill Report characterizes as “a firestorm of resistance,”67 the proposals were more or less dead on arrival. They clearly threatened a good deal of “turf” and would have resulted in a significant shift of the control of academic resources from the colleges to the central administration. The RAND Redesign Report predicts that “when central administra-

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65. Usually called the “Goldstein Report” we have referred to it as the “(Leon) Goldstein Report” to avoid any confusion with the current Chancellor, Matthew Goldstein.

66. p. 3; (emphasis in original.)

tors do propose sweeping cuts of entire departments... [s]uch attempts virtually always fail to be carried out.” 68 They go on to observe that

Indeed, there are significant numbers of higher education institutions that have been damaged by top-down efforts that were eventually aborted but nonetheless have left individual academic units weakened because of negative publicity, the sense of collegiality ... destroyed, and the reputation of the institution as a whole weakened. Attempts at setting priorities, a mission, and implementation of choices that fail to be implemented can create more problems for the institution than it faced before it began the process of setting priorities. 69

It seems to us to be both necessary and appropriate for the University to make hard choices, particularly in times of financial cut-backs, based upon centralized planning and coordination and on an agreed upon set of goals and priorities rather than leaving these matters to the vagaries of happenstance such as attrition, or making formulaic or across-the-board cuts. The question is how to accomplish this result without trampling either on the individuality of the colleges or on the traditional prerogatives of the faculty with respect to setting curriculum and course content, and without the unfortunate consequences visited upon the (Leon) Goldstein Report.

The RAND Redesign Report provides guidelines for a governance process that is most likely to allow for successful priority setting. The first requirement it suggests is that the system should be neither top-down nor bottom-up but interactive if it is to succeed. Second, while the central administration should have final authority to make decisions, the planning and priority setting process should be university-wide, involving all academic and non-academic units; all participants must have a role in formulating the rules of the process. Third, the process should be conducted in the most open manner possible, including the free flow of information. 70 As part of that process, they note that “initial recommendations of faculty task forces and central administrators should be public and preliminary so as to allow affected units to rebut and reply.” 71 Arguably, all three of these steps were taken in the case of the (Leon) Goldstein Committee’s report and they do not appear to have had the desired ef-

68. p. 29.
69. Ibid. p. 30.
70. Ibid. pp. 42-44.
71. Ibid.
fext. We are not, of course, in a position to explore or analyze exactly what happened and what went wrong in that situation. It may simply show that any reduction in resources or change in priorities will be resisted by those negatively affected. Nevertheless, it does serve to illustrate the tremendous difficulty inherent in establishing centrally planned priorities for CUNY.

Should CUNY Be More Centralized?

As noted above, the Gill Report and the Schmidt Report envision a significantly more centralized administration for CUNY. Regardless of the theoretical or practical problems of such a structure, we can see no legal objection to it. On the contrary, as in the case of our earlier discussion of access and excellence, our position on the issue of centralization is guided primarily by CUNY’s governing statute. The mission statement in §6201 suggests that when the State took over the funding of CUNY, the Legislature intended that it be operated as an integrated system and that “[w]here possible, governance and operation of senior and community colleges should be jointly conducted or conducted by similar procedures to maintain the university as an integrated system....”72 Certainly in times of scarcity and retrenchment it makes sense to have central and rational planning of priorities, to designate areas of specialization and eliminate redundant and under-enrolled programs or to replace programs that may no longer meet the needs of students with new ones that do meet their needs in a changing economy. We are also sympathetic to the notion that a strong hand is often needed to overcome institutional inertia when making difficult and even painful changes in long standing policies and practices to which stakeholders have become accustomed and in which they may have considerable personal interest. CUNY clearly needs some sort of rational priority-setting mechanism to replace what often appears to be, at least to the outside observer, a rather ad hoc and sometimes chaotic process. CUNY, however, also suffers from a lack of clear mission delineation at its colleges, little program/need analysis, and poor market data. In short, CUNY lacks the basic prerequisites for a rational planning process, centralized or otherwise. It is likely, however, that there is no one answer to the question of how authority should be dispersed within CUNY.

Thus, we do not believe that centralization is an either/or question. CUNY’s governance system is composed of a plurality of actors at the central and at the local level. These governing interests deal with dozens

72. Education Law § 6201.2
of distinct issues. The degree of centralization should vary depending upon the function. For example, the Association of Governing Boards (AGB) Special Report, *Four Multicampus Systems: Some Policies and Practices That Work*, proposes fourteen “ideas to consider adapting or adopting.” Although they are all worthy of consideration by CUNY, there are a number that are particularly relevant to the question of which functions should be centralized and which de-centralized in a multi-campus system.\(^7\) They include:

- “Protect education and research from undue outside pressures. These activities should take place [primarily] on campuses, not systems.”
- “Leave the coordination and control of academic affairs in faculty hands. The system chief executive’s role is to use his or her influence and budgetary powers to initiate and encourage systemwide academic initiatives.”
- “Encourage intercampus cooperation in program development and operation.”
- “Ensure open communication—formal and informal—based on mutual respect and trust at all levels of a system. The board must be an integral part of the communications network.”
- “Centralize relations with the state and federal governments, with the exception of individual grants to researchers.”
- “After budgets are allocated to campuses, maximize local control.”
- “Consider fund-raising from individuals and private organizations as principally a campus, not a system, activity.”

The question is where to draw the lines and how to make the allocation of responsibility and authority, to figure out what works and what does not work. It is a difficult process that requires a large reservoir of good will, perhaps more than is currently available at CUNY. It should also be appreciated that the CUNY “system”—though geographically compact compared to statewide systems—is so large and diverse that unilateral attempts at “command and control” style management are largely ineffective and often deeply resented. The Schmidt Report’s call for a more “uni-

fied, coherent, [and] integrated" system is an insufficient template for the governance reform the report recommends. Most importantly, there must be a concerted effort at communication and clarity about what is sought to be achieved and why.

FUNDING

The Commission believes that CUNY simply cannot satisfy its historic mission without increased funding.Repeatedly, during the course of our investigation of the system, we have been dismayed by the fiscal austerity under which the system operates. We have heard complaints from students about college libraries limiting hours in order to operate within their budgets. Faculty members have impressed upon us the importance of introducing new faculty lines to departments across the university, and of replacing a portion of the system’s corps of adjunct faculty with full-time faculty. College presidents and administrators have spoken to us about tight budgetary restraints under which they operate—restraints that make campus maintenance look like a luxury and essential investments in technology nearly impossible.

While CUNY’s revenues, inflation adjusted, have remained relatively constant over the past 20 years, total enrollment has increased, the share of the revenues CUNY has received from state and local government appropriations has dwindled, and the system has been forced to cut costs and rely increasingly on student tuition. CUNY’s senior colleges now spend, on average, less per student than their peers, and far less than the national average for four-year colleges and universities.

74. Unless otherwise noted, all figures are adjusted for inflation using the Higher Education Price Index ("HEPI").
75. PricewaterhouseCoopers, along with RAND and the Mayor’s Task Force staff, created a peer group of eleven senior colleges and ten community colleges to compare against CUNY. The system’s senior college peers are: California State University at Los Angeles, Florida International University, Georgia State University, Chicago State University, Northeastern Illinois University, San Francisco State University, Jersey City State College, SUNY College at Purchase, SUNY College at Buffalo, SUNY College at Old Westbury, and the University of Texas at El Paso. The system’s community college peers are: City Colleges of Chicago—Malcolm X College, Community College of Denver, Community College of Philadelphia, Delgado Community College, Essex County College, Los Angeles City College, Miami-Dade Community College, San Antonio College, Seattle Community College—Central Campus, and Wayne County Community College. (PwC III, pp. 18-19).
76. PwC III, p. 78.
Meanwhile, CUNY students spend more on tuition than their peers at public colleges and universities in the region. While New York State’s Tuition Assistance Program (“TAP”) provides a great deal of assistance to many CUNY students, several of the program’s requirements limit its effectiveness for other CUNY students. (See, infra, pp. 425-429.)

If CUNY is to continue to provide access to educational excellence for New York City’s students, TAP must be reformed, and both the City and the State must reaffirm their commitment to CUNY and must act to restore the system’s funding base.

Summary of Revenues and Expenditures

After substantial gains in the 1980s, CUNY’s funding leveled off between 1988 and 1997. During the course of this 10-year period, CUNY’s enrollment increased by 9.2%. Total University revenues failed to keep pace with this growth in enrollment. Between 1988 and 1997, CUNY’s total revenues grew by only 7% in constant dollars.

Furthermore, not all of these funds are available for student instruction. Much of CUNY’s revenue growth over the past decade has been in restricted funds—gifts, grants, and contracts earmarked for specific projects. These funds are earmarked for specific research initiatives or special instructional programs and cannot be used to cover general university costs. Between 1988 and 1997, CUNY’s unrestricted revenues—City and State appropriations and tuition revenues—actually decreased by 11% in constant dollar terms.

As a result, CUNY’s spending for “Student/Instruction-Related Expenditures” (S/I Cost) declined by 8% between 1988 and 1997, even as total expenditures increased by 5%. Coupled with rising enrollments, this decline in S/I Cost is even more striking: between 1988 and 1997, the system-wide S/I cost per full time equivalent student (“FTE”) declined 16%, from
$11,218 to $9,377 in constant dollars. Furthermore, within the category of S/I cost, significant budgeting changes occurred between 1988 and 1997: CUNY spending on direct instruction per FTE has fallen 26%, while spending on academic support and student services increased by 13% and 14%, respectively.

A brief analysis of the changes in CUNY’s faculty composition over the past two decades illustrates the impact of the system’s recent cuts in instructional expenditures. In 1980, 58.1% of CUNY’s faculty was full-time and adjuncts made up a significant minority at 41.9%. In the last two decades, the positions have reversed: in 1997, 42.3% of CUNY’s faculty was full-time and the majority of the system’s instructors, 57.7%, were adjuncts. Furthermore, CUNY’s budget crunch manifests itself in the system’s libraries where the costs of books and journals outpaced inflation and funds have been extremely tight. According to a survey by the Association of Research Libraries, libraries purchased 7% fewer journals in 1996 than they did in 1986, but spent 100% more. At CUNY these rising costs combined with restricted budgets, and college libraries have had to let journal subscriptions lapse and restrict purchases of new books. Indeed, in recent years, some CUNY libraries have had to suspend interlibrary loans due to insufficient staffing. One faculty member noticed this lack of resources particularly intensely when her son was attending Brandeis University and she was confronted with the stark comparison of library resources and computers: “Students wait for hours to get access to a computer for an hour, and the libraries are practically disappearing.”

In the face of tight budgetary constraints, CUNY has been forced to choose among necessities. In this context, the system has chosen to cut its expenditures on direct classroom instruction particularly deeply. We have neither the resources nor the inclination to criticize this budgetary decision. We do, however, believe that CUNY’s current S/I costs are unacceptably low; its faculty is weighted too heavily toward part-time adjunct professors; and its expenditures on direct instruction must increase, if the system is to improve the quality of its academic offerings.

82. Ibid., p. 9.
83. Ibid., p. 11.
84. Ibid., Appendix D.
86. Interview with Philippa Strum, Emerita Broeklundian Professor of Political Science, Brooklyn College and GSUC, December 15, 1999.
State and City Appropriations

Even as CUNY has managed to maintain its revenues, it has suffered dramatic cutbacks in direct support from New York State and New York City. Since 1980, New York State's appropriations to CUNY have declined 40% in constant dollar terms.87 In the same period, New York City's CUNY appropriations have fallen by an astonishing 90%.88 (See Tables 2 and 3).

CUNY is not alone among public colleges and universities in feeling the pressure of declining State appropriations. State appropriations for higher education have been unpredictable and variable in nearly every state of the union throughout the 1990s. However, New York State's record for funding higher education has been particularly deficient in recent decades. Twelve states have cut higher education appropriations over the past five years, but only two have cut more deeply than New York: Alaska and Hawaii.89 In 1998, New York rated 42nd in the nation in higher education appropriations per capita, and 46th in the nation in higher education appropriations per $1000 in per capita income.90 In 1980, State appropriations made up 43% of CUNY's total revenues; in 1988 they accounted for 56%; by 1997, they had fallen to 32%.

The decline in City appropriations for CUNY has been even more pronounced. In 1980, CUNY received 19% of its revenues from the City of

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87. PwC III, p. 49.
88. PwC III, p. 51.
89. Grapevine: Center for Higher Education & Educational Finance, Illinois State University.
90. Ibid.
New York; in 1997, City funds made up just 6% of the CUNY budget. City funds directly benefit CUNY’s community colleges and, according to State Education Law §6304, the City of New York, as a local sponsor, is responsible for at least one-third of the community colleges’ operating costs.\(^{91}\) Due to recent legislative action and a 1994 court decision, however, New York City is now exempt from that requirement, and is instead required to refrain from cutting its funding for CUNY’s community colleges, in absolute terms.\(^{92}\) Far from a constant level of support, City funding for CUNY community colleges fell from $122 million to $78.5 million between 1988 and 1994, in unadjusted dollars. During the same period, CUNY community college FTE enrollment grew by 28%. When City and State funding are considered together, CUNY’s community colleges have been particularly hard hit by the decline in governmental appropriations.

As a result of these declines in governmental appropriations, CUNY’s colleges are now underfunded relative to their peers. With the exception of City College, which receives special state funding for its resource intensive engineering and science programs, each of CUNY’s senior and com-

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\(^{91}\) Recent decisions in the court have exempted New York City from this requirement, however, and the City is now required only to maintain current support levels for the community colleges.

Community colleges receive a smaller portion of its total revenues from governmental sources than its peers. Indeed, CUNY's community colleges receive an average of 10% less in state and local appropriations as a proportion of total revenues and CUNY's senior colleges receive as much as 20% less than their peers from state and local appropriations.93

**Tuition**

To make up for losses in governmental funding, CUNY has been forced to increase its reliance on tuition as a revenue source. As a result of rising enrollments and rising tuition charges, CUNY's tuition revenues rose by 93% between 1988 and 1997.94 Tuition charges to students increased by 81% for senior college students and 44% for community college students.95 Tuition now accounts for 31% of CUNY's total revenues, up from 17% in 1990 and 25% in 1980.96 CUNY's tuition levels are set by the Board of Trustees but, because they must be formulated in response to levels of governmental appropriations and annual revenue targets which are also set by the State, tuition at CUNY often has grown dramatically, rather than incrementally.97 Tuition at CUNY's senior colleges—$3,200 per semester for in-state, full-time undergraduates—is now 12% higher than the national average for public four-year universities.98 At the community colleges, the $2,500 tuition for in-state, full-time students is 83% higher than the national average.99

**Assessment of CUNY's Funding Structure**

Each of these revenue trends—declining State and City appropriations, rising tuition rates, and increased student reliance on financial aid—are thoroughly explained in PricewaterhouseCoopers' Report III: Review of CUNY's Revenues and Expenses ("PwC III"), prepared for the Schmidt Task Force. Their implications, however, have yet to be thoroughly addressed. We do not have the resources to perform a complete analysis on CUNY's financing and funding structure. However, with the data compiled in PwC

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93. PwC III, p. 52.
94. Kim, p. 5. (Figures are in constant dollars, adjusted according to the HEPI.)
95. Ibid., p. 6. (Figures are in constant dollars, adjusted according to the HEPI.)
96. PwC III, p. 41.
97. PwC III, p. 46.
98. Kim, p. 5.
99. Ibid.
III, we can make a few preliminary comments regarding CUNY’s financial condition and funding structure.

Over the past twenty years, CUNY has been forced to discard a funding model that relied on direct City and State appropriations rather than tuition and student aid, and replace it with a model in which appropriations are far less important, and tuition and student aid dollars are crucial to the system’s survival. Built into CUNY’s new funding model is a strong economic incentive to maintain and improve enrollments: tuition revenue comes to the system on a per student basis. If CUNY loses students, it loses the tuition revenue they provide. CUNY’s rising enrollments over the past two decades suggest that it has effectively responded to these governmental and economic pressures. It is important to note, however, that in the past five years, CUNY enrollments have begun to decline. We can only speculate as to the cause of these declines, but it seems possible that they bear some relation to recent debates surrounding CUNY’s admissions standards. These debates have reflected poorly on CUNY’s image, and they may also have discouraged students who were afraid that they may not meet stricter standards from applying. (See Table 4.)

TABLE 4: Total CUNY enrollment, 1980-1987

<table>
<thead>
<tr>
<th>Year</th>
<th>Enrollment</th>
</tr>
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<tbody>
<tr>
<td>1980</td>
<td>220000</td>
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<tr>
<td>1982</td>
<td>210000</td>
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<tr>
<td>1984</td>
<td>200000</td>
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<td>1994</td>
<td>150000</td>
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<tr>
<td>1996</td>
<td>220000</td>
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</table>

Given CUNY’s statutory mission “to maintain and expand its commitment to academic excellence and to the provision of equal access and opportunity,” and the “commitment to the special needs of an urban constituency” that justified the creation of an independent CUNY sys-

100. CUNY Student Data Book: Fall 1997, p. 36.
the Commission is inclined to support a funding structure that encourages the system to expand enrollment and tailor offerings to consumer demand. We are wary, however, of the unintended consequences that this funding structure may have.

In light of CUNY's rising tuition, it seems likely that many students who would otherwise enroll in a CUNY college may instead enroll in a private or proprietary college or forego college altogether. CUNY could be losing some top flight candidates as a result. Although we cannot provide a complete data analysis of this proposition, national studies suggest that rising rates of tuition can have a profound effect on student choices in higher education. As a rule of thumb, researchers have found that enrollments decrease by 0.5%-1% with every $100 increase in tuition. It is possible, then, that CUNY's recent enrollment declines (see Table 4) may be partially due to sticker shock.

Student Financial Aid (TAP)

As CUNY has begun to rely more and more heavily on tuition as a revenue source, need-based student financial aid has become increasingly important to its students. In 1997 approximately 110,000 CUNY students received a total of $479 million in financial aid. Much of this aid ($157 million, or 35% in 1997) comes from New York State's Tuition Assistance Program ("TAP"). As direct State appropriations to CUNY have dropped, the State's financial aid funding has risen, and New York State now provides more financial aid per capita than any other State. While increased TAP funding has failed to make up for the decline in direct State appropriations to CUNY, leaving the system with an absolute decline in State funding, it helps considerably to offset the negative implications that rising tuition rates could have on the budgets of CUNY colleges and CUNY students.

Thirty-five percent of the financial aid that CUNY students receive comes from the TAP program. Because TAP is a grant, rather than a

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101. Education Law, § 6201.3 and 6201.5.
104. New York State Education Law, §604.1 establishes the TAP program and makes TAP funds available to "all students who are enrolled in approved programs and who demonstrate the ability to complete such courses."
105. PwC III, p. 69.
loan, program, it allows students from low-income and middle-income families who enroll in CUNY or other institutions of higher education to graduate with a minimum of debt. Several restrictions, however, govern student use of TAP funds and new ones are constantly being proposed. For example, since 1995, when the legislature scaled back the Supplementary Tuition Assistance Program, students with remedial needs who benefit from TAP are required to take credit-bearing courses and remedial courses simultaneously. TAP is only available for three years for students enrolled in associate degree programs, and for most students in baccalaureate programs, it is only available for four years.¹⁰⁷ These limits serve as de facto requirements that TAP recipients be full-time students. For many CUNY students, however, this requirement is simply untenable.

Part-time and non-traditional students compose a sizeable proportion of CUNY’s undergraduate population. As Figure 6 indicates, CUNY students are increasingly likely to enroll part-time as their educational careers progress.¹⁰⁸ As a result of CUNY students’ likelihood to enroll part-time, and to take semesters off on their way to graduation, barely 10% of the students who enrolled in baccalaureate programs in 1988 graduated from CUNY or another college or university within four years of enrolling. Within eight years, however, more than 60% of these students had earned a baccalaureate degree.¹⁰⁹ Those students who take more than four

![Table 5: 1997 CUNY undergraduates part-time and full-time](image)

¹⁰⁷. New York State Higher Education Services Corporation, Programs, Policies and Procedures: Guide to Grant and Scholarship Programs, April 1999.

¹⁰⁸. CUNY Student Data Book: Fall 1997, p.

¹⁰⁹. CUNY Student Data Book: Fall 1997, Part II, p. xii.
years to earn their baccalaureate degree—whether delayed by economic need, the unavailability of necessary courses, or personal reasons—suffer under the current TAP restrictions. After four years of TAP funding, these senior college students face a choice: continue on without State financial assistance, or leave school to reestablish TAP eligibility. Regardless of their decision, these students are penalized, and we believe that the penalties they face are inequitable and counter-productive.

It is possible that the restrictions on TAP funds, coupled with CUNY’s tuition-heavy and enrollment-sensitive funding model, create significant economic incentives for both students and colleges to prioritize lower-level schooling at the expense of higher-level schooling. TAP’s time limits often mean that students’ State assistance runs out before they reach junior- and senior-level courses. Faced with a choice between accruing substantial debt before graduating and entering the workforce without a degree, many students decide to drop out of college once their TAP funds expire. For a system that relies heavily on per-student funding, this can provide a certain economic advantage since upper-level courses—particularly in fields that require laboratory work, like engineering and the hard sciences—tend to be more expensive for the colleges than lower-level courses. Ultimately, of course, this tendency lowers graduation rates and thus harms the reputation of CUNY colleges.

**Table 6: Percentage of first-time freshmen enrolled in 4-year institutions**

It is beyond the scope of this Report to provide a detailed analysis of the impact that the TAP restrictions have had on CUNY’s enrollment patterns. Evidence of their impact, however, is plentiful. CUNY students are increasingly tending to enroll in community colleges, rather than senior colleges, as is apparent in Table 6.110 Furthermore, the Schmidt Report points out that:

enrollment at the senior colleges has gradually decreased between 1980 and 1997, while the community and comprehensive colleges have experienced significant increases. These enrollment trends have led to an overall level of instruction at CUNY that is heavily weighted toward lower-level education. Moreover, because community college funding is driven by enrollment, CUNY’s community colleges have seen their revenues more than double over this period, while the senior colleges’ historically-based revenues have increased more slowly.\footnote{Schmidt Report, p. 70 (NOTE: The Schmidt Report’s revenue figures are not adjusted for inflation.).}

The State of New York’s generous TAP helps a great deal to ameliorate the negative consequences of CUNY’s high tuition charges. Its efficacy on this front is limited, however, by flaws in its construction. TAP funding provides limited assistance to part-time students, cannot be used to cover non-credit bearing remedial courses taken during the academic year, and is only available for four years for students in baccalaureate programs and three years for students in associate’s degree programs. TAP awards are also calculated to decline progressively as students receive assistance for their second, third, and fourth years of college enrollment.\footnote{New York State Higher Education Services Corporation, Programs, Policies, and Procedures: Guide to Grant and Scholarship Programs, April 1999, pp. 1-1-1-2.} These statutory\footnote{Education Law, §667.} provisions create unnecessary financial hurdles for CUNY students, and they should be eliminated.

- New York State should make TAP funds fully available to part-time students. At CUNY, 40% of the student body enrolls part-time.\footnote{CUNY Student Data Book: Fall 1997, p. 6.} Many of these students must work to pay tuition and meet their family responsibilities. The State’s refusal to help fund their education punishes these students.\footnote{This year’s Executive Budget for CUNY contains a provision designed to make TAP funds available to part-time CUNY students who have successfully completed 24 credits. This Part-Time TAP program (“PTAP”) is much needed.}

- Supplemental TAP funds (STAP) should be available to students who are enrolled in, and paying tuition for, remedial courses during the regular school year. To meet this recommendation, the State must reinstate the full STAP program, and
repeal the 1995 legislative amendment that limited eligibility to STAP funds to students enrolled in summer-term remedial programs.116

- The State’s time limits on TAP funding should be eliminated. Instead of time limits, TAP should institute a policy that prohibits students from receiving TAP funds for courses that they must retake due to failure.

- The provision in the TAP legislation that decreases a student’s TAP funding progressively as their educational career progresses is particularly counter-productive, and should be eliminated. This provision serves to make the actual price of attending college increase for students as they near graduation, creating an incentive to drop out without a degree.

In a report dated December, 1999, the Commission on New York State Student Financial Aid, appointed by the State Senate and headed by Paul Volcker, former chairman of the Federal Reserve Board and Clifton R. Wharton, Jr., former Chancellor of SUNY, recommended that the state pay 100 percent of the tuition for the neediest students at both SUNY and CUNY, rather than the 90 percent it currently pays. The Commission stated that cutbacks in higher education and TAP grants threaten New York State’s ability to provide sufficient and outstanding higher education opportunities to its citizens.117 This recent report reinforces the recommendations of this Commission; and we endorse its emphasis on the importance of financial aid for low income students and their families.

**CUNY’s Budgeting and Allocations Process**

Both the Schmidt Report and its supplementary materials prepared by PricewaterhouseCoopers argue that CUNY’s budgeting processes hamstring the system’s efforts to expand and diversify its revenues and lead to an inefficient distribution of current funds.118 To address these budgeting problems, the Schmidt Report recommended that CUNY articulate a long-range strategic plan that coordinates campus-level initiatives with the system’s

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116. For original STAP legislation, see New York State Education Law, Title I, Art. 14, §667-a; for amended legislation, see pocket part.


118. Ibid., pp. 60, 70-71; PwC II.
common goals. Based on this University-wide plan, the Schmidt Report argued CUNY should adopt a centralized, performance-based budgeting system. To implement these far-reaching reforms, it rightly notes, CUNY will have to improve its lines of internal communication, enhance its institutional research capabilities, and repair faulty governance mechanisms. This Commission endorses the foregoing analysis and supports the following recommendations of the Schmidt Report:

- “CUNY must make student instruction and assessment the center of its financial priorities.” 119
- “CUNY must adopt an ‘all funds’ approach to budgeting and fiscal management,” 120 in which grant and contract funds, along with other monies from alternative funding sources, are considered integral, rather than supplemental, to the University.
- “CUNY must establish university-wide fiscal management policies, and must give individual campuses the responsibility to spend funds according to those policies; before CUNY can require budget accountability, however, it must ensure that campus business managers have access to the information they need to be responsible and accountable for funds received.” 121

We agree that CUNY’s current budgeting process is torturous and is in need of reform. Under the current mechanism, it is the Chancellor’s responsibility to formulate an annual budget request to be submitted to the Mayor and the State Legislature, in consultation with college presidents and subject to the Board of Trustees’ approval. 122 This request traditionally consists of two parts: the operating budget and special funds. State and city appropriations for CUNY’s operating budget are historically determined and are largely assumed in the budgeting process. (While community college operating budgets are pegged to enrollment, operating budgets at CUNY’s senior colleges do not respond to changes in their enrollments.) 123 Requests for special funds, however, are line-items in the budget process. This year’s budget asks for special funds in five categories:

119. Ibid.
120. Ibid., p. 102.
121. Ibid.
122. CUNY Board of Regents Bylaws, §11.1
“creating a flagship environment,” “supporting academic achievement,” improving the undergraduate experience,” “establishing a CUNY economic development initiative,” and “upgrading technology and managing data.”

With the exception of gifts, donations, and bequests, all incoming revenues are processed through the central administration and, as a result, college operating budgets are often unresponsive to enrollment changes and new funding needs. Indeed, CUNY allocates State operating funds to each senior college according to past allocations. As a result, schools with growing enrollments tend to receive less money per student than schools with shrinking enrollments. Furthermore, since 80th Street does not handle grant, gift, and contract funds raised at the college level, these items are not considered in funds allocation. Generally, these allocation processes are neither well-articulated at the system level nor well understood at the college level. This situation gives rise to considerable mistrust and misunderstanding, making effective strategic planning at CUNY difficult.

Like so many of CUNY’s governance procedures, the system’s budgeting mechanism does not facilitate the sort of discussion, cooperation, and strategizing that is necessary for the University to articulate a coherent vision of the future, prioritize financial needs, and raise and distribute funds. We agree with the Schmidt Report, therefore, that this system must be reformed. We tentatively endorse the general direction it outlines for reform. We must point out, however, that there is a fundamental tension between these budgeting recommendations and the Schmidt Report’s plans to centralize CUNY system governance. If CUNY adopts a budgeting system that is more directly tied to performance and outcomes, it must give colleges the leeway to experiment and differentiate themselves from one another.

Assuming that CUNY can strike a proper balance between an integrated governance system and a distributed budgeting process, these recommendations only begin to address the serious financial issues facing CUNY. The basic point is the need for more money. We agree that CUNY must improve its budgeting and allocations processes; that it must find a way to articulate a set of institutional goals and priorities; and that it must be able to monitor outcomes to assess its progress. All of this planning is for naught, however, if the system does not have enough funds to distribute, colleges are forced to choose between necessities, and students are trapped by high tuition and restrictive financial aid policies. The end result of budgetary reforms must be both improved distribution and

more efficient use of the system's limited funds and the expansion of available funds.

The Schmidt Report does not adequately address CUNY's severe budgetary constraints. While it does note that "[o]ver the past two decades, real government financial support to CUNY has declined (even if we take into account increases in State-funded tuition assistance for students)," the Schmidt Report takes these declines for granted. Rather than calling for improved governmental appropriations, the Schmidt Report argues that these declines "increase the importance to CUNY both of improving its management of its existing resources and of increasing revenues from alternative sources, including fund-raising and extramural funding for grants and contracts."125 It then recommends that "The University must do much more to increase alternative revenues."126 We must point out, however, that CUNY is already far more reliant on alternative revenue sources—gifts, grants, and contracts—than it has been in the past, and that these funds have done little to alleviate the system's revenue shortage. Grants, gifts, and contracts grew from 11% to 26% of the system's total revenues between 1980 and 1997.127 These funds, however, are often restricted and are earmarked for specific purposes. While these restricted funds allow the CUNY system to carry out several special research, instructional, cultural, and public service initiatives, they cannot be used to supplement the system's general funds. As such, they do little to alleviate the system's shortage of unrestricted funds—by and large, the funds that support direct instruction. Such additional sources of funding must be seen as a supplement to traditional public support, not a replacement for it.

The Schmidt report also recommends:

- "The Mayor and the Governor must work together and with the City and State legislatures to define education priorities, promote systematic assessment of performance, and use multi-year, performance-based funding policies to reinforce accountability."128
- "CUNY must reorganize itself around a system of outcome-based accountability for all programs and institutions."129

125. Ibid., p. 69.
126. Ibid.
127. PwC III, p. 54.
128. Ibid.
129. Ibid. The Pappas Report, p.32, also recommends the implementation of a performance-based budgeting system, but provides no details as to what the performance measures should be.
This Commission endorses these recommendations, but only up to a point. Our support for the notion of performance funding and budgeting is very cautious and with some important caveats. We endorse funding ideas that give schools strong incentives to succeed and reward schools that achieve excellence—but the devil is in the details. A performance funding mechanism that measures all CUNY colleges against a single standardized set of criteria would inevitably and unfairly punish schools whose missions do not match the performance measures.130 A performance funding mechanism that pulls necessary funding out from failing departments or colleges would be counter-productive in the CUNY context, since it would force already underfunded units to operate in an even more austere funding environment.

Similarly, a zero-sum performance funding system, in which one college's financial gain would inevitably cause another's loss, would be particularly dangerous at CUNY since it would undermine attempts to integrate the system's units into a coherent whole and would likely serve to broaden what PwC II describes as the already “wide variations in per student resources among the CUNY colleges.”131 Furthermore, it strikes us as perverse to require CUNY colleges to compete tooth and nail for an ever-shrinking pool of State and City funds.

Some of the most “objective” measurements of excellence may cut in entirely opposite directions depending on which stakeholders' interests are taken into account. For example, CUNY students benefit educationally from a low student/faculty ratio. However, if the goal is reducing costs, a low student/faculty ratio is impossible to maintain. If a performance funding mechanism is rewarding academic excellence, it must reward schools with low student/faculty ratios. If it is rewarding cost-effectiveness, it will punish schools with low student/faculty ratios. The same may be true of measures of faculty performance that reward teaching or publishing as compared to obtaining grants, contracts or other outside sources of funding.

We suggest, therefore, establishing a carefully constructed performance funding mechanism that commits the City and State of New York to improved funding for CUNY, allows the colleges to participate in formulating several different measures of excellence that apply differently to col-

130. For example, the use of graduation rates as an indicator of a school’s performance creates a bias in which schools with a larger proportion of traditional, full-time students are likely to perform well. Such an indicator fails to account for the distinct needs and interests of CUNY’s growing non-traditional student body.

leges according to their articulated missions, gives due consideration to the unique needs of CUNY students in defining performance, makes funds available to elevate the performance of schools that fail to meet agreed standards, and carefully protects each school’s base operating budget. Failure to perform is not always or solely a function of inadequate funding, but it must be acknowledged that it too plays an important role. It is vital to understand that not all performance funding mechanisms are alike.

Under-Funding: CUNY’s Real Financial Challenge

These managerial suggestions, whatever their merits, fail to address CUNY’s single most pressing fiscal issue—the precipitous decline in public funds and unrestricted revenues appropriated to the university. While we support the implementation of many of the budgetary reforms the Schmidt Report advocates, we cannot endorse the Schmidt Report’s unwillingness to advocate for increased appropriations for CUNY.

CUNY’s contribution to New York’s economic and social well-being is immeasurable. But its benefits cannot be sustained unless the City and the State are willing to make significant investments in the system. Current State and local appropriations for CUNY are dangerously low, forcing the system to cut expenditures to the bone and raise student tuition charges. While other states are renewing their commitment to higher education, New York State has cut funding for its colleges and universities. New York State ranks near the bottom of the nation—46th—in funding for higher education per $1000 in per capita income. We believe that the City and State of New York must renew their commitment to CUNY, and overhaul their funding formulas to guarantee State and local appropriations that at least cover the system’s base operating expenditures.

Higher education’s positive impact on individual income and its other private benefits are well-known—CUNY, for example, argues that its average bachelor’s degree recipient earns $700,000 more over the course of a 40-year career than a high school graduate. These benefits, it is argued, justify the imposition of tuition, and make higher education a rational investment for many prospective students.

The private benefits, however, pale in comparison to the significant public good associated with higher education. CUNY estimates that the University’s direct impact on the New York State economy and tax base is $7.2 billion. Using a standard U.S. Department of Commerce’s multiplier to determine the system’s total economic impact, CUNY argues that its

The total economic impact amounts to $13.7 billion annually—“more than ten times the size of the CUNY budget”—and maintains that “326,000 citizens are working and paying taxes as a result of the University’s presence.”

Furthermore, as a recent RAND report demonstrates, “education leads to reduced crime, improved social cohesion, technological innovations, and inter-generational benefits (the benefits parents derive from their own education and transmit to their children.)” RAND argues that a significant education gap exists between white and Asian Americans and the rest of the population, and finds that “[a]n investment in closing the educational attainment gap between non-Hispanic whites, on one hand, and blacks and Hispanics, on the other, would clearly pay for itself in the form of long-term saving in income transfers and social programs, increased tax revenues, and increased disposable income for the individuals involved.” Additional research has found a strong positive correlation between a citizen’s educational attainment and likeliness to vote, give to charity, and engage in community service.

CUNY is at the front lines of the effort to close America’s educational gap. Of the students CUNY enrolled in the fall of 1997, 32.5% were black; 26.1% were Hispanic. By providing educational opportunity to these traditionally marginalized populations, CUNY performs a social role that far exceeds the income and tax roll benefits the system uses to calculate its economic impact. Chronic underfunding and an increasing reliance on tuition revenues impede the system’s ability to perform this critical social role. The City and State, as beneficiaries of CUNY’s social contribution, each have a responsibility to help remove these hurdles. Both the City and the State of New York, therefore, must reinvest in CUNY.

We recommend the following:

- Rather than basing future governmental appropriations on past appropriations, the City and State should review their

133. Ibid.
135. Ibid., p. 78.
138. CUNY Student Data Book: Fall 1997, p. 95.
CUNY appropriations and establish an appropriations mechanism that at least covers each institution's base operating expenses.

- If the State and City are to establish a performance funding mechanism for CUNY, it should be devised in cooperation with the CUNY system administration. Such a mechanism should allow for college-level input on standards of excellence and measurement devices, establish variable measurements for colleges with differing institutional missions, not punish institutions for the economic or educational disadvantages of their incoming students, and allow schools with performance shortcomings to receive performance improvement funding, and include public goods measures (i.e. institutional impact on crime rate, tax revenues, and civic engagement) as additional indicators of institutional strength. This mechanism should be an enrichment mechanism; it should not allow State and City appropriations for CUNY to fall further.

- To assess the system's base operating expenses, establish performance expectations, and measure outcomes, the State should establish a standing commission on higher education funding, composed of educators, business leaders, and community leaders.

Governmental reinvestment is far from inconsistent with the accountability and incentive-based funding and budgeting structures recommended by the Schmidt Report. Indeed, we believe that performance-based funding can only succeed if participating schools have sufficient resources to meet expectations and are competing for a significant basket of funds. It is clear to us that restored governmental appropriations are a necessary precondition of the establishment of an effective performance funding system. Furthermore, there is no reason that the restoration of governmental funds should compromise the market accountability implicit in CUNY's high-tuition funding model. We recommend that New York City and State establish a funding model in which baseline appropriations insure that college's fixed cost baselines are covered, and additional funds for improvements are available on a competitive basis. Under this model, student tuition would cover marginal costs. State-funded systems and schools would have an economic incentive to maximize enrollment,

139. The South Carolina Community College performance funding mechanism could be used as a model for New York State (information on this mechanism is an exhibit to this report, available from the Association's Executive Director's office.)
and thereby enjoy the additional resources made available by economies of scale.

To assess CUNY’s financial needs and to distribute funds on a performance basis, CUNY will have to radically upgrade its institutional research and data management infrastructure. This infrastructure upgrade must be distributed carefully throughout the system and before the creation of a performance-based funding system, particularly since the need for technology improvements is system-wide. We agree, therefore, with the following recommendation from the Schmidt report:

- “CUNY must invest in a university-wide technology infrastructure and create integrated management information systems that can support rational planning and budgeting, track student progress and outcomes, assess faculty productivity, and provide better and more accessible management information.” 140

An effective performance funding mechanism could improve CUNY’s educational offerings, since it could raise the system’s governmental appropriations, thereby improving its flagging supply of unrestricted revenues, even as it eliminates budgetary inefficiencies and rewards excellence. These improvements will do little good, however, if excessive tuition and unresponsive financial aid policies discourage potential students from enrolling in CUNY.

We believe that CUNY should lower its tuition and New York State should reform its financial aid policies. CUNY’s tuition is now considerably higher than its peers, and the burden that it imposes on CUNY students and their families is unacceptable. It makes a CUNY education considerably less accessible for middle- and working-class students, and it hinders CUNY’s competition in the marketplace for college students. Therefore, we recommend that:

- CUNY should attempt to lower its tuition levels or at least slow its rate of growth in future years. Tuition growth should not outpace the rate of growth in per capita personal income in New York City, and CUNY’s tuition levels should not be higher than those of its peers.

Of course, because the system must retain funding levels, tuition cuts are

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impossible without improvements in State appropriations or funding from other sources.

**CASE STUDY IN GOVERNANCE: ARTICULATION (OR THE WRONG WAY TO DO THE RIGHT THING)**

In the course of exploring the issues of governance and in some follow-up on the issues of remediation and access discussed in Part I, we have been impressed with the critical importance of the question of articulation between the community and senior colleges of CUNY, both as a case study in governance issues and as a vitally important substantive aspect of the future of CUNY. “Articulation” in the academic setting refers to the interrelation and transferability of credits, courses, and programs from one college to another, particularly in this instance from a community college to a senior college. In the wake of the controversy over remediation, articulation has emerged as an important issue within CUNY.

The need for articulation is accorded almost as much prominence in CUNY’s statutory mission statement as access, excellence, and urban focus:

> The legislature intends that the city university of New York should be maintained as an independent system of higher education governed by its own board of trustees responsible for the governance, maintenance, and development of both the senior and community college units of the city university. The university must remain responsive to the needs of its urban setting and maintain its close articulation between senior and community college units. Where possible, governance and operation of senior and community colleges should be jointly conducted or conducted by similar procedures to maintain the university as an integrated system and to facilitate articulation between units. (emphasis added)

We have found the issue of articulation at CUNY to be particularly complex. In Part I we expressed concern over the prospects of transfer to a senior college for the students diverted to community colleges by the new policy on remediation. We also pointed out that the problem of inadequate articulation between community and senior colleges is national in scope and not unique to CUNY. The proposed Amendment to the Master Plan promised to improve articulation, primarily through a new online

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141. Education Law §6201.2.
142. See pp. 40-42, 63.
computer program known as Transfer Information and Program Planning System ("TIPPS"). However, articulation quickly emerged as a major point of contention between the Trustees and the Chancellor on one side and significant numbers of faculty on the other. It is a classic illustration of how not to initiate and accomplish much needed change.

Articulation issues also represent an important lens through which to view the larger question of centralization because a truly effective and smooth system of articulation could easily lead to the increased concentration of power in the central administration and a concomitant loss of individuality by the separate campuses. We have often heard it suggested that the only way to deal with the question of distribution or of general education requirements might be to impose a university-wide 30 credit core. Such a core would, in turn, force the elimination of some of the unique requirements imposed by the different colleges and, unless negotiated among the campuses, a lengthy, extremely difficult and probably frustrating process, would ultimately result in a centralization of the curriculum planning function. Studies of effective methods to achieve improved articulation often recommend a single course numbering system. Thus, the current articulation position of the central administration could be interpreted as an opening wedge to achievement of the goal set in the Schmidt Report of greater central authority. We must keep in mind, however, that clear and well thought out articulation and transfer policies are plainly in the long range interests of the community college students and thus would be a positive development regardless of their effect on governance structures.

Some Background on Articulation at CUNY

In Part I of our Report, we cited some statistics and reports suggesting

143. See, infra, pp. 442, for a description of TIPPS.

144. For example, LaGuardia Community College has a cooperative education (internship) and urban studies requirement for its degrees.

145. Arthur M. Cohen and Florence B. Brawer, "Policies and Programs That Affect Transfer," American Council on Education, 1996, p.36; Report of "The Chancellor’s Advisory Committee on Articulation and Transfer," June 30, 1993, Recommendation 7.1, p. 36. Arizona has such a system in place and California and Florida are working on establishing common course numbering systems. In June, 1995, the CUNY board of Trustees passed Resolution 25 which established a program known as Inter-Campus Academic Mobility ("ICAM"). It resulted in a single academic calendar for all CUNY institutions, but its attempt to require a uniform course numbering system was successfully stalled at the campuses until it apparently fell through the cracks during the changes in personnel at the central administration.
that CUNY senior colleges have somewhat worse records than other four-year schools of accepting and granting full credit to students transferring from CUNY community colleges. We have often heard over the course of our investigation that it is “common knowledge” that at least some CUNY senior colleges are considered even more elitist than private colleges, including some selective private colleges, such as Vassar and New York University, when it comes to giving transferring students credit for courses taken at community colleges. Anecdotal accounts of community college students being snubbed by CUNY senior colleges but accepted for transfer to private colleges abound. We have rarely heard this piece of conventional wisdom disputed, but neither have we seen it conclusively proved or disproved with reliable data. Accusations fly back and forth between senior college faculty, community college faculty and the central administration as to who was responsible for the current state of affairs and even whether there is even that much of a problem to begin with.

A 1996 audit suggests that about six out of seven transferring students in the 1990 cohort were awarded the full required 64 transfer credits when admitted to a senior college, but that of those, four out of ten were required to take more than the additional 64 credits toward the then required 128 credits to complete a bachelor’s degree in their major. Liberal arts majors transferring to Brooklyn College, City College, and Hunter, as well as business and management majors, particularly those transferring to Baruch, were especially likely to be required to take more than the additional 64 credits. This study, however, was based upon a small sample and involved only those students who had successfully transferred to a CUNY senior college. Most of the anecdotal “horror stories” involve students who ended up in senior colleges outside the CUNY system because the CUNY colleges would have required many more courses and much more time to complete a bachelor’s degree. The question is further clouded by the fact that CUNY now requires only 120 credits for a bachelor’s de-

148. Considering that the CUNY central administration prides itself on its data collection (e.g., Interview with Vice Chancellor Louise Mirrer, August 13, 1999) there is little hard data to support or to refute the view that articulation at CUNY is worse than average, or indeed, the exact scope of the problem.
149. David B. Crook, Nava Lerrer, YoungMi Lim, “An Audit of University Policies on the Transfer of Credit from CUNY’s Associate Programs to its Baccalaureate Programs, Phase I” CUNY Office of Institutional Research, July 1996, (hereinafter “1996 Audit”).
gree and only 60 for an associate degree. Although this change might seem to make things easier for transferring students, it has actually complicated matters for the community colleges because they have fewer credits to work with in order to provide students the necessary basic liberal arts program in addition to the distribution requirements for their majors.

There is probably enough ‘fault’ to go around: some department chairs have arguably been too protective of their prerogatives and too inflexible in denying credit to transfers. Because of financial constraints, counseling for transfer has suffered at some community colleges where it may not be viewed as a top priority. The frustration and hurt feelings of community college faculties related to the perceived elitism of the senior college faculties is understandable, as is the central administration’s limited patience with delay and foot dragging over articulation agreements. Despite a 1972 Board of Trustees policy which has repeatedly been re-affirmed since then, most recently in 1985, articulation agreements must be negotiated individually with each department of each college. Not infrequently, individual students’ transfers are negotiated on a course-by-course basis. As noted by the Schmidt Report, “the faculty fiercely protect their right to withhold credit for courses taken at other colleges.” Undoubtedly, something had to be done to correct this situation. The solution recently proffered by the central administration (discussed below), however, especially in light of its previous insistence on the need to raise standards at CUNY, is puzzling and inconsistent.

In addition to the 120 credits, like most institutions of higher education, each CUNY senior college imposes general education or distribution requirements for graduation, such as a foreign language, lab sciences,

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150. Formerly, CUNY required 128 credits for a bachelor’s degree and 64 for an associate degree. In June, 1995, the Board of Trustees reduced the requirements to their present level. According to Professor Sandi Cooper, then the Chair of the University Faculty Senate, this was done without consultation with the duly constituted faculty governance structures. Although this put CUNY in line with other institutions nationally, it constituted a serious violation of the faculty prerogative to set degree requirements, and faculty representatives initiated a law suit to challenge what they considered a usurpation of their authority under CUNY by-law § 8.6 to establish policy relating to, inter alia, awarding credit and granting degrees. Under a settlement of that litigation, the new reduced graduation requirements were retained but, the Board acknowledged the authority of the faculty senate over a range of curricular matters. Polishook et al. v. CUNY, (Sup. Ct., N. Y. County Index No. 95/119332).

151. Interview with Professor Lawrence Rushing, former Director of Articulation and Transfer, and Professor Joanne Reitano, Chair of the Community College Caucus of the University Faculty Senate, LaGuardia Community College, November 29, 1999.

152. p. 82.
mathematics, etc. Furthermore, Brooklyn College has, after years of development, established a required core curriculum for all students. In accordance with their various missions and long history of independence, each of the colleges and often each degree program within the college, has different requirements. By the same token, the community colleges have also established criteria, including certain general education or distribution requirements, for their associate degree candidates. These are also highly variable from college to college and, within each college, from one degree program to another. Across CUNY, there is little uniformity of course content, course names or descriptions, prerequisites or numbering systems. Two courses with the same or similar sounding names may be quite different in content and/or level, and some courses with different names may have similar content. This variability is compounded by the differences between liberal arts courses and the more career-oriented courses, both in associate and baccalaureate degree programs.  

The TIPPS system, mentioned above, is essentially a computer-based course equivalency guide. It should provide some improvement to students' understanding of which community college courses will be considered equivalent to which senior college courses and how much credit they will carry. TIPPS, however, is not the panacea its proponents envision. Often, it serves to highlight some of the basic problems transferring students face. For example, many courses, especially those beyond the introductory level, carry the notation that they will be transferred as “free electives.” This means that although the students will receive credit for the course, it will not provide any credits toward fulfilling requirements for their major or toward general distribution requirements. In other words, they are counted as extra electives. The result is that transferring students often need more additional semesters to fulfill their degree requirements.  

153. It is a mistake to assume that only the community colleges have career-oriented programs. The question of what constitutes a career major is complex. Much of the difference between the community colleges and senior colleges is in the level of career preparation rather than the fact of career preparation. There are baccalaureate programs at CUNY in business administration, education, accounting, engineering, architecture, journalism, and various health sciences programs, including nursing.

154. This problem is not unique to students transferring from community colleges; it is also experienced by students transferring from other senior colleges and to anyone who changes majors. The problem (and expense) of accumulating too many of the wrong credits may also result from the fact that required courses are often unavailable or already filled. Since students must carry a minimum course load to maintain full-time status and keep receiving financial aid, they may be forced to take “unnecessary” courses.
THE RECORD

THE FUTURE OF CUNY, PART II

Push Comes to Shove
On November 1, 1999, the Chancellor recommended, and the Board of Trustees Committee on Academic Program and Planning passed, a resolution providing, in pertinent part:

...effective Fall 2000, students who have earned a City University Associate in Arts (A.A.) or an Associate in Science (A.S.) Degree will be deemed to have automatically fulfilled all lower division liberal arts and science distribution requirements for a baccalaureate degree....(emphasis added)\(^{155}\)

The problem according to senior college faculty is that the community colleges tend not to require as many social sciences, humanities, or lab sciences courses, as the senior colleges require of lower division students at their campuses. If students coming from community colleges with an A.A. or A.S. degree are deemed to have fulfilled all the distribution or general education requirements for a bachelor’s degree, needing only 60 upper division credits, they will be eligible for the bachelor’s degree without having met the possibly stiffer requirements imposed by the senior colleges on students who begin their college educations on their campuses.

In order to deal with this criticism, the policy passed by the full Board of Trustees on November 22, 1999 (shortly after the Board of Regents approved the amended plan to end remedial instruction in the senior colleges), added the following provision:\(^{156}\)

However, students may be asked to complete a course in a discipline required by a college’s baccalaureate distribution requirements that was not a part of the student’s associate degree program.

The net effect of this change is unclear. Does “a course” mean just one course? One course per discipline seems a more likely interpretation,

155. This did not apply to the Associate of Applied Science (A.A.S.) Degree which, according to the report of the Chancellor’s Advisory Committee on Articulation and Transfer, p. 2, (June 30, 1993) is the degree earned by approximately half of the transferring community college graduates. See also, the 1996 Audit, which supports this figure and suggests, contrary to common belief at CUNY, that holders of A.A.S. degrees do not have significantly more difficulty transferring than A.A. and A.S. holders.

156. This change was made by the central administration after the original proposal had passed the Committee on Academic Program and Planning without any changes and was sent directly to the Board without going back to the committee.
but it is difficult to construe this adjustment as requiring the full distribution load. Conversations with faculty members at both the senior and community colleges suggest that they are not at all clear about how to interpret the language of the November 22nd resolution, except that the former hope—and the latter fear—that it means that the status quo is preserved. The resolution in its final form does not clearly address the concerns raised by senior college faculty members that it would lower standards. Nor does it fully ease the anxiety of community college faculty members that it leaves a huge loophole or their fear that the current chaotic approach will continue.

This amended resolution adopted by the central administration and accepted by the Trustees represents an ironic turning of tables on the rhetoric of “standards.” Supporters of the new policy (often but not always the same people who supported ending remedial courses at the senior colleges) cite 1) fairness to students newly excluded from senior college, 2) the hard work and efforts of the community college faculties, and 3) the need to centralize or integrate the University. Chancellor Goldstein characterized it as a “wake-up call” to the senior colleges. But, senior college faculty, left, right and center appear united in opposition to this change both on the grounds of the intrusion in what traditionally has been and, more importantly, under CUNY’s bylaws, is an area of faculty autonomy, i.e., the setting of degree requirements, and (perhaps ultimately more important to the students) on the grounds that the forced acceptance of general education and distribution requirements established by the community colleges for a 60 credit degree will eventually water down the value of the baccalaureate degree at the senior colleges.

**Faculty Academic Autonomy and Articulation**

In addition to providing valuable insights into the issue of centralization of authority at CUNY, articulation and transfer issues serve to highlight the important matters of faculty control over curriculum, course content, and graduation requirements. Board of Trustees bylaw §8.6 vests in the faculty of the various colleges the responsibility, subject to the guidelines, if any, established by the board, for the formulation of policy relating to the admission and retention of students..., curriculum, awarding of college credit, granting of degrees......and conduct the educational affairs customarily cared for by a college faculty. (Emphasis added.)

As we observed with respect to the issue of articulation at CUNY in

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157. Statement at the Board of Trustees meeting, November 22, 1999.
Part I of our Report, "[a]ttempts to resolve it by fiat would undermine the autonomy of the faculty to set graduation requirements." This was precisely what was attempted. Whatever else may be said about governance of CUNY, in general, or the question of the proper degree of centralization, in particular, we are troubled by the increasing usurpation of the "customary" faculty autonomy to set the various academic requirements. The reduction in the number of credits required for a degree, the removal of remedial coursework from the senior colleges and the concomitant change in the admissions requirements, and now the imposition of articulation standards have, all been accomplished over the objections of, or absent proper consultation with, the duly constituted faculty governance bodies. Any proffered solution with respect to course content or graduation requirements must fall within the traditional scope of faculty autonomy over curricular matters.

Recommendations/Articulation

We must take account of the needs of community college students, especially given the recent remediation change, and of their palpable frustration with a system that has apparently made it too difficult to transfer, vis-à-vis what may be a real diminution of the value of the bachelor's degree. Even leaving aside the extremely touchy question of the quality and intellectual level of community college courses, the question of general education, distribution, and core requirements is a legitimate one and is directly linked to the meaning and value of a degree in a much more fundamental way than the mere existence of remedial classes. Students diverted to community colleges as a result of the change in remediation policy deserve full opportunities to transfer to a senior college. It is only fair. On the other hand, due to the exclusion of students with remedial needs from the senior colleges, there is likely to be an increasing gap between the preparation levels of students beginning their college careers at a senior college and those sent, or choosing to go, to a community college, a gap that may or may not be fully closed by those earning an associate degree. Any new policies or approaches to articulation and transfer must take that reality into account in order to insure that transferring students have a genuine opportunity to succeed and to earn a baccalaureate degree.

Although we are not in a position to make any detailed substantive recommendations with respect to articulation at CUNY, we can make some general observations:

- Articulation agreements are often very detailed, particularized and carefully negotiated on a program to program basis,
in contrast to the recent Trustees resolution requiring blanket transfer of all credits and courses for all purposes. Such individualized agreements should, in any event, be the province of the faculties of the senior and community colleges, with intervention by the central administration only if and when irreconcilable differences emerge.

- The CUNY Board of Trustees should consider requiring each senior college to complete an agreement with each feeder institution for a transfer curriculum for general education or distribution purposes and for its primary majors by a time definite.

- CUNY Trustees have initiated a policy requiring that, in order to receive approval, all new baccalaureate programs must be fully articulated with at least one community college associate degree program. CUNY might consider requiring all existing baccalaureate programs to have fully negotiated articulation agreements with at least one (for the larger programs possibly more) associate degree programs.

- CUNY should make counseling for transfer a priority. It is surprising that the Chancellor's Advisory Committee on Articulation and transfer found it necessary to “recommend” this along with orientation seminars and enough catalogues, program descriptions, to go around.

- CUNY should carefully and seriously consider making successful transfer from community to senior colleges a performance measure for both community and senior colleges.

- CUNY should consider dual admissions and advising for students seeking a bachelor's degree but not deemed ready for a senior college. In other words, students could be conditionally admitted to both the senior and community colleges and have advisors at both to ease the transition between them.

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158. A sample articulation agreement between LaGuardia Community College and NYU's School of Education is quite generous with respect to accepting credits and distribution requirements, but it is for transfer from one specific academic program to another, not a general transferability of all credits and courses for any purpose (agreement is an exhibit to this report, available from the Association's Executive Director's office).

159. Interview with Paul Arcario, Assistant Dean for Academic Affairs, LaGuardia Community College, November 29, 1999.

For purposes of this Report, however, we are particularly focused on the governance aspects of articulation and transfer. The way to achieve a more cohesive and integrated University is to include all the stakeholders in a discussion of the need for such an approach and how best to reach the goals. The Board of Trustees should respect its own governance by-laws, and not treat established procedures as annoyances to be ignored in the name of greater efficiency and “reform.” Change is necessary but it must be accomplished through an interactive and truly consultative process. For the Board of Trustees to rubber-stamp many of the Schmidt Report recommendations without formal discussion is an unfortunate way to initiate university-wide planning, and certainly does not fit in with RAND’s, the AGB’s or the Gill Report’s visions of governance. Each of those reports supports the goals of integration and some degree of centralization. None of these sources, in our view, would support the methods and process being used to accomplish those goals.

CUNY: THE UNFINISHED AGENDA

As this Report indicates, there remains a large unfinished agenda of issues and needs that must be addressed in order to sustain and strengthen the City University of New York in the 21st Century. A major part of that agenda must be to invigorate and re-build CUNY’s commitment to offering a meaningful opportunity for higher education for the “children of the whole people.” Part I of this Report focused on the vexing and politically volatile issue of the removal of remedial instruction from the senior colleges and its impact on full and open access for disadvantaged students. In Part II, we have dealt with two problems that impede opportunity for such students even as some of them manage to participate in the University: flawed governance and inadequate funding. We have sought to conduct our inquiries through the lens of these students. Although we have carefully considered and attempted to factor in the needs of other stakeholders, such as faculty, staff, administrators, governance bodies, and political, business and community leaders, we have tried to keep uppermost in our minds the reason for the existence of CUNY, i.e., the needs of its diverse “urban constituency”161 of students.

We have, however, only scratched the surface. This Commission was created as a temporary entity to address an immediate need: a disinterested analysis of a major proposed change in access to CUNY, i.e., the

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161. New York State Education Law §6501.5.
removal of remedial instruction at the senior colleges, and an impartial examination of some of the major issues discussed by the Schmidt Report, such as governance and finance. But the needs of the traditional students of the City University—be they poor, working class, minority, immigrants, or all of these—are ongoing. The Regents approved the change in remedial education, but only until 2002. The effect on the educational opportunities of the students who will depend upon CUNY for a foothold in the economy should be closely monitored by members of the larger community with the interests of these students as their uppermost concern. This Commission believes that the impact of the changes in remedial education at CUNY should be monitored and evaluated by an independent entity. Such an entity should carefully follow, as well, prospective changes in admission and graduation requirements, and governance changes such as greater centralization and performance-based funding, which may impact directly or indirectly on the ability of students to get access to and to successfully complete college education.

We believe that an independent entity should also carefully monitor State appropriations for higher education, paying careful attention not just to net appropriations, but also to the distribution of State funds for higher education. We are concerned to note, for example, that although the State Executive Budget Recommendations for 2000-2001 contain a small increase in total funds for CUNY, they also contain substantial decreases in TAP and SEEK appropriations. These two programs, as well as other programs designed to expand access to higher education, should be generously supported by the State.

In the future, New York and New Yorkers should pay greater attention to CUNY's community colleges. These institutions represent a major avenue of access to higher education for the graduates of the New York City school system and for others arriving here later in life with a thirst for further learning. Community colleges have received far too little notice from higher education policy makers and observers. There is a general tendency to apply to them measures of success that are not appropriate to their missions and student bodies. These colleges, however, should be


163. For example, Board of Trustees Chairman Herman Badillo has, on more than one occasion, attacked the CUNY community colleges for their low graduation rates, see e.g., Karen W. Arenson, "Badillo Says Community Colleges Need to Improve Graduation Rates," New York Times, December 1, 1999, p. B-4. Graduation rates are a particularly inappropriate yardstick for community colleges since many of their students attend for reasons other than...
nurtured and strengthened as second chance rather than second class opportunities for higher education or as a first choice institution for excellent career or vocational education. They need to be perceived as different, but equally important and significant post-secondary institutions, not simply as “junior” colleges.

In addition to further monitoring of equality of access to CUNY under the changes in remedial education, we have identified some issues for further examination and development:

• What reforms would be helpful to the traditional students of CUNY—low-income, working class, minority, and immigrant? What can be done to improve both the access to and the excellence of CUNY?

• We need to know what governance and funding reforms will enhance, from a student-based perspective, the goals of access and opportunity. The issue of performance based funding, for example, lies at the intersection of finance and governance. We need to know a great deal more about which kinds of college performance standards will benefit the traditional working class, minority and immigrant CUNY students and which might disadvantage them further.

The Commission is not satisfied with leaving these questions largely unanswered, but we are gratified to have been able, along with other reports and studies, to advance the inquiry and, more important, to have placed the focus where we believe it should be: on the needs of the students, rather than on the Trustees, the administration, the faculty and staff, or on the politicians.

March 2000

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to acquire a degree. Also, even more than at CUNY senior colleges, community college students tend to be older, and have greater family responsibilities and fewer economic resources.
The Commission on the Future of CUNY

Stanley M. Grossman, Chair

Alice Chandler               Jay Mazur
Claire M. Fagin              Margie McHugh
Robert Hughes               Robert Mundheim
Arthur Levine               David Z. Robinson
Lance Liebman               Margarita Rosa
Stanley Mark                Jack Rudin
Alton Marshall              O. Peter Sherwood

The Staff of the Commission:
Special Counsel: Isabelle Katz Pinzler, former Acting (and Deputy) Assistant Attorney General in charge of the Civil Rights Division of the U.S. Department of Justice, former Director, ACLU Women’s Rights Project.

Research Associate: Thurston A. Domina, formerly researcher at University Business.

The work of the Commission on the Future of CUNY was made possible by a grant from the New York Community Trust.
# New Members

As of May 2000

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<tr>
<th>RESIDENT</th>
<th>DATE ADMITTED TO PRACTICE</th>
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<tr>
<td>Vladimir M. Abreu Tozzini &amp; Freire Inc. New York</td>
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<td>Werner S. Achatz Reed Smith Shaw &amp; McClay LLP New York</td>
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<td>E. Regan Adams The Chase Manhattan Bank New York</td>
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<td>Lisa M. Altman NYC Family Court New York</td>
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<td>Caroline Antonacci NY Supreme Court-Appellate Division 1st Dept. New York</td>
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NEW MEMBERS

Bradley K. Edmister Sullivan & Cromwell New York NY 02/00
Kimberly Ellis 510 Main Street Roosevelt Island NY 12/99
Lee Adhemar G. Feldshon Kleinberg Kaplan Wolff & Cohen PC New York NY 04/95
Meira S. Ferziger 600 West 239th St. Bronx NY 11/94
Marian Finn Unified Court System New York NY 04/99
Marianne C. Fiorelli Cleary Gottlieb Steen & Hamilton New York NY 02/00
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Nadja K. Gareeb Queens Legal Services Jamaica NY 06/98
Anjli Garg Sullivan & Cromwell New York NY 03/00
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Aureliano Gonzalez-Baz Bryan Gonzalez Vargas & Gonzalez-Baz New York NY 06/71
Cheryl Gonzales NYS Office of Court Admin. Brooklyn NY 06/88
Laura C. Gonzalez The Bond Market Association New York NY 11/97
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Hayley Greenberg Greenberg & Merola LLP New York NY 02/95
Kate Greenwood The Association of the Bar/SHIELD New York NY 01/00
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Adele Hogan Cravath Swaine & Moore New York NY 05/86
Christopher B. Holt Coblence & Warner New York NY 10/99
Shannon C. Jones Cleary Gottlieb Steen & Hamilton New York NY 03/99
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### NON RESIDENT

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<td>Alexander Geiger</td>
<td>Geiger Rothenberg LLP</td>
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<td>Michael A. Poole</td>
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<td>Daniel E. Setness</td>
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MAY/JUNE 2000 ♦ VOL. 55, NO. 3

455
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<td>Paul Jawin</td>
<td>Grand Court Lifestyles Inc</td>
<td>Fort Lee, NJ</td>
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<td>David Osterman</td>
<td>McCarter &amp; English LLP</td>
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<td>Frank C. Randazzo</td>
<td>Pino &amp; Associates LLP</td>
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<tr>
<td>Meryl S. Reymann</td>
<td>406 River West</td>
<td>Greenwich, CT</td>
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### RECENT LAW GRADUATE

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### LAW SCHOOL STUDENT

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<td>Jim Stuart Andes</td>
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<td>David S. Arrick</td>
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<td>Christina J. Berman</td>
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<tr>
<td>Kimathi Foster</td>
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<tr>
<td>Christina M. Fry</td>
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<td>Krista Halpin</td>
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<td>Jin Hu</td>
<td>208-02 15th St. Ave.</td>
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<td>Marc M. Isaac</td>
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<td>Souren A. Israelyan</td>
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<tr>
<td>Vlad B. Kushnir</td>
<td>10920 Nandina Court</td>
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<td>Treasure L. McClain</td>
<td>630 St. Nicholas Ave.</td>
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<tr>
<td>Mara C.S. Moldwin</td>
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<td>Andrew J. Oliver</td>
<td>111-14 76th Avenue</td>
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<tr>
<td>Tricia R. Payne</td>
<td>2380 Meadow Village Dr</td>
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<td>Elizabeth Ponce</td>
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<tr>
<td>Adam J. Rosen</td>
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<td>Univ. Heights</td>
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<td>Adam S. Sultan</td>
<td>1421 E 8th St.</td>
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<tr>
<td>Aimee J. Vargas</td>
<td>111-01 106th St.</td>
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