

THE CONSTITUTIONAL DEVELOPMENT AND OPERATIONS OF THE NATIONAL PEOPLE'S CONGRESS

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INTRODUCTION: CONSTITUTIONALISM AND THE DEVELOPMENT OF THE NATIONAL PEOPLE'S CONGRESS

It is no longer a secret that the National People's Congress ("NPC") has recently shed its 'rubber-stamp' character and emerged as an independent and influential force in China's political arena. What is generally overlooked, however, is that at the same time, the NPC has undergone a constitutional transformation heretofore unprecedented among political organs in mainland China. In an environment which traditionally regards recognition of divergent and competing social interests as political heresy, the NPC has developed internal structures that actively seek out input from different social interests in order to better effectuate its representative function within China's constitutional system. In an

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environment that traditionally distrusts compromise and in which political operations traditionally revolve around vertical, patron-client relationships, the NPC has developed an internal structure focusing much more on horizontal relationship, thus promoting bargaining and compromise among competing interests.

Nevertheless, it does surprise us. Received wisdom tells us that constitutional principles do not significantly affect China's political environment. The development of the NPC, on the other hand, tells us otherwise.

This article looks at the development of the NPC from the perspective of constitutional law. Traditional analyses of the NPC's development have focused primarily on the role that the personal resources of its leaders, particularly Peng Zhen and Qiao Shi, have played in the NPC's institutional emergence. This has led some to conclude that the NPC's development is unrelated to constitutionalism. However, even in the most developed of constitutional systems, constitutional institutions benefit from strong leaders, and suffer from weak ones. The fact that the NPC may also benefit from strong leadership does not preclude the possibility that constitutional forces may also have a role in its operations. Looking at the NPC from the perspective of constitutional law allows us to gauge where and how well constitutional concerns may be affecting the NPC's development.

This article is divided into three parts. Part I provides a brief analysis of the NPC's institutional emergence since 1978. First, it recounts the path of that emergence. Then, it identifies some of the forces behind this emergence, including the receding influence of the CCP, the emergence of more pluralist forces in Chinese society, the articulation of regional interests, and the development of regional people's congresses. Finally, it argues that both the path of and the various motors behind the NPC's institutional development strongly evince the presence of an emerging "constitutional consciousness" within China's political environment.

Parts II and III examine the structure and operations of the NPC, respectively. While these two attributes are analyzed separately for the sake of convenience, both are means to the same end: the realization of the NPC's various constitutional responsibilities. Inter alia, the NPC's structure and attendant operations reveal a political entity attempting to develop and rationalize its various constitutional roles into a coherent institutional framework within the significant constraints of its political environment.

I. DEVELOPMENT OF THE NATIONAL PEOPLE'S CONGRESS

A. History

The NPC was first established under the 1954 Constitution.¹ For the first 25 years of its existence, it was of little real political import.² The Plenary Session,³ the principal institutional manifestation of the NPC, was and is only a temporary body, one re-born for a couple of weeks each year originally simply to clothe party dictates in constitutional legitimacy. The 1954 Constitution also established a "Standing Committee" — a smaller, permanent body comprised of selected NPC delegates — to administer the NPC's ongoing constitutional commitments while the Plenary Session was not in session. However, that Committee's original constitutional authority was far too circumspect to allow it to effectively execute its caretaker responsibilities.⁴

The institutional irrelevance of the NPC was evinced by its lack of organizational structure. The Plenary Session itself had no institutional permanence — even its leadership was temporary.⁵ Neither the size of its delegate body, the length, time, nor the number of its meetings were standardized.⁶ The same held true for the Standing Committee. During the Great Leap Forward, and again during the Cultural Revolution, neither the

1. MURRAY SCOT TANNER, *Organizations and Politics in China's Post-Mao Law-Making System* in DOMESTIC LAW REFORMS IN POST-MAO CHINA (STUDIES ON CONTEMPORARY CHINA) 56, 98 (Pittman Potter, ed., 1994); RENMIN DAIBIAO DAHUI ZHIDU JIANGHUA 38 (Liu Zheng & Cheng Xiangqing eds., 1992) [hereinafter Liu & Cheng].

2. This point was acknowledged even in China. See Tanner, *supra* note 1, at 76 (quoting Peng Zhen referring to the NPC's 'rubber-stamp' reputation); See Chen Sixi, *Shilun Zai Gaige Guocheng Zhong de Lifa Fanglue* [Discussing the Role of Legislation in the Process of Reform], ZHONGGUO FAXUE, No. 5, 1995, at 2 (acknowledging weak role of earlier NPCs).

3. The term 'Plenary Session' as used in Chinese constitutional discourse can either refer to an event or a body, depending on context. As an event, the plenary session is the annual meeting of all the delegates. As a body, the plenary session is the institution that is brought into being by that event.

4. See CAI DINGJIAN, ZHONGGUO RENDA ZHIDU 205-06 (3d ed. 1996) (discussing constitutional responsibilities of early NPCs); Tanner, *supra* note 1, at 58-59, 77.

5. Technically, the leadership of the Plenary Session is the Presidium, not the Standing Committee. The Standing Committee is an alternate manifestation of the NPC, the Plenary Session's 'alter ego.' See notes 104-105 and accompanying text *infra*.

6. See Liu & Cheng, *supra* note 1, at 38-40; Liu Zheng, *Jiaqiang Renmin Daibiao Dahui Zhudu Shi de Yanjiu* [Research Into the History of the Development of the National People's Congress], ZHENGZHI YU FALU, 1991, at 4, 4-5 [hereinafter *History and Development*].

Plenary Session nor the Standing Committee met at all.⁷ The NPC delegate body ranged in size from as little as 1220 during the 1950s and early 1960s (the 1st and 2nd NPCs) to as many as 3497 between 1978 and 1982 (the 5th NPC).⁸ Neither the NPC Plenary Session nor the Standing Committee had any standardized meeting procedures or normative procedures for any type of institutional operations. The NPC also possessed virtually no institutional resources. Prior to 1978, the NPC's total permanent support staff never exceeded a dozen.⁹

In the late 1970s, the NPC embarked on its present course of institutional development,¹⁰ initially and mainly as the result of the efforts of conservative party leader Peng Zhen. Peng Zhen sought to convert the NPC into an institutional base from which he could temper the reform policies of Deng Xiaoping.¹¹ The NPC has developed continuously from that time. Even the Tiananmen demonstration and its resulting political retrenchments did not significantly curb the NPC's growth.

The NPC's developmental path can be broadly divided into three phases. The first phase focused on developing support services to assist the NPC (particularly the Standing Committee) in reifying its constitutional authority. In 1978, the Standing Committee established the Legislative Work Commission (the forerunner of today's Commission on Legislative Affairs) in order to help rationalize China's corpus of laws and regulations (which has fallen into great disrepair during the Cultural Revolution).¹² It also re-established the General Office Research Department,¹³ whose job

7. See ZHONGGUO RENMIN GONGHEGUO CHUANGUO RENMIN DAIBIAO DAHUI WENXIAN ZILIAO HUANBIAN 1949 - 1990 854-855 (1991) [hereinafter Documents]; *History and development*, *supra* note 6, at 5, 5-6.

8. See Documents, *supra* note 7, at 854 (giving dates of terms); *id.* at 857 (number of delegates per term); ZHONGGUO RENMIN GONGHEGUO CHUANGUO RENMIN DAIBIAO DAHUI JIQI CHANGWU WEIYAHUI DASHIJI 1949-1993 787 (1994) [hereinafter Records] (same, but includes figures for 8th NPC). See also Cai, *supra* note 4, at 134-135.

9. See *id.*

10. See Tanner, *supra* note 1, at 57-58. Previous efforts to develop the NPC occurred in the middle 1950s and again in early the 1960s. These efforts were nullified by the Great Leap Forward and the Cultural Revolution respectively. See *History and development*, *supra* note 6, at 5-7.

11. See Tanner, *supra* note 1, at 74-76.

12. Interview (General Office Research Department).

13. The General Office Research Department was part of a newly re-established General Office. The General Office's responsibility initially was to oversee the managerial administration of the Standing Committee and its growing body of employees. See Cai, *supra* note 4, at 77. The NPC had a General Office in the 1950s, but that Office was disbanded during the Great Leap Forward.

was to research issues assigned by Standing Committee chairmen.¹⁴ Also in the late 1970s, the Plenary Session formed several specialized committees in order to help it achieve greater expertise in certain key legislative and constitutional areas.¹⁵ Like the Standing Committee, these specialized committees were constituted as continuously standing bodies, thus providing the NPC with a greater institutional permanence.

Overall staffing levels for the NPC grew rapidly during the 1980s. When the legislative work commission was first formed in 1979, it supported a permanent staff of 54.¹⁶ By 1983, its staff had grown to 121.¹⁷ By the end of the 1980s, the NPC's total support staff had grown to over 2000.¹⁸

The second phase of the NPC's development began in 1982, with the drafting of China's current constitution ("the 1982 Constitution"). This phase focused on the development of internal work procedures. The 1982 Constitution laid out for the first time the basic institutional parameters of the NPC. It clarified the role of the NPC within the constitutional system by providing a much more comprehensive description of the NPC's constitutional powers and responsibilities than previously existed. The 1982 Constitution also expanded the authority of the Standing Committee,¹⁹ allowing that committee to assume its logical role as the principal organ through which the NPC executes its responsibilities.²⁰ The specialized committees created by the NPC in the late 1970s were also rationalized into the overall constitutional framework. These committees, now called special standing committees, also gained new powers and greater status under the 1982 Constitution, thus enabling them to better fulfill their institutional mandates.

With its particular powers and responsibilities clarified, the NPC was now able to begin rationalizing its organizational structure and internal operations: more effectively mating its growing institutional resources with its now defined constitutional responsibilities. The various roles and jurisdictions of the Legislative Works Commission, the General Office

14. See Cai, *supra* note 4, at 412.

15. See *id.* at 206.

16. See Tanner, *supra* note 1, at 77; see also Cai, *supra* note 4, at 412.

17. See Tanner, *supra* note 1, at 77.

18. See *id.*

19. Compare CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA [hereinafter PRC CONSTITUTION] art. 67 (listing powers of the Standing Committee) with PRC CONSTITUTION art. 62 (listing powers of the Plenary Session).

20. See notes 106-126 and accompanying text *infra*.

Research Department, and the special standing committees were harmonized in 1983 (with the Legislative Work Commission being reconstituted as the Commission on Legislative Affairs ["CLA"]), resulting in the current pattern of NPC support services.²¹ Each special standing committee was also allowed to develop its own permanent research and support staff.²² The NPC also began devising standardized procedures for various institutional operations. The first of these was the NPC Organization Law, enacted in 1982, which set out the basic procedures for both the NPC Plenary Session and the Standing Committee.²³ In 1987, this law was supplemented by more detailed procedural rules for the NPC Standing Committee.²⁴ Two years later, the NPC enacted similar rules for the Plenary Session.²⁵ Since the late 1980s, the NPC has also been developing more sophisticated — albeit largely uncoded — procedures for legislative drafting and review.²⁶

Almost immediately, these first two phases of the NPC's organizational development began to bear fruit.²⁷ In 1983, the Standing Committee voted down a draft law submitted to it by the State Council.²⁸ This was the first time the NPC ever challenged State Council legislation.

Between 1985 and 1988, the NPC effected over twenty amendments to the State Council's original draft of the State-run Industrial Enterprise

21. See Cai, *supra* note 4, at 413.

22. See *id.* at 206. These special standing committees are the only support services to receive constitutional recognition.

23. See Organization Law of the National People's Congress [hereinafter NPC Organization Law].

24. See Procedural Rules of the Standing Committee.

25. See Procedural Rules of the Plenary Session.

26. Judging from scholarly articles written by NPC research staff prior to that time, most of the practices became standardized in the 1990. Compare Wu Haimin, *Zhongguo Lifashishang de Nanti* [Difficult Issues in the Legislative History of China], BAILIAO ZHISHI, Oct. 1993, at 18, 18 (noting that during NPC's consideration of draft Copyright legislation in 1989, standardized legislative vetting procedures had not yet developed) [hereinafter *Difficult Issues*] with Liu & Cheng, *supra* note 1, at 233-236 (discussing standardized vetting procedures in 1992).

27. See Tanner, *supra* note 1, at 78. Cf. ROBERT D. PUTMAN, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993) (discussing relationship between organizational development and organizational effectiveness).

28. See Zhang Sutang, *Zhongguo "Yihui" Lifa Neiqing* [Inside Information on Legislative Sessions in China], LIAOWANG, No. 2, 1994, at 26, 26-27 (discussing Standing Committee's rejection of draft PRC Maritime Traffic Safety Law [Zhonghua Renmin Gongheguo Haishang Jiaotong Anchuan Fa]) [hereinafter *Inside Information*]. This rejection appears to have been due in large part to the fact that the presiding chairman did not understand the Standing Committee's own procedural rules. See *id.*

Law.²⁹ During that time, the NPC also significantly altered the shape of China's Copyright Law.³⁰ In the late 1980s, the NPC was able to take a draft administrative litigation law that the State Council had originally intended to focus on the problem of administrative corruption and rework it into an instrument for supervising a much broader range of administrative behavior. Among the NPC changes was the authorization — over State Council opposition — of judicial review of administrative actions of the subordinate State Council organs as well as the private actions of individual administrative actors.³¹

In the early 1990s, the NPC's institutional evolution allowed it to begin to seize control of legislative development. During the 1980s, all major pieces of legislation were drafted by the State Council, in accordance with the State Council's own legislative plans. The State Council's hegemony began to erode in 1992, when the NPC threatened drafting economic reform legislation itself unless administrative drafters start taking greater account of the NPC's concerns.³² Such threats became promises in 1993, when the NPC Standing Committee refused to consider a draft Company Law submitted to it by the State Council,³³ and instead drew up its own draft Company Law which it passed in December of that year.³⁴

Also in 1993, the NPC drew up for the first time its own legislative plan, and let it be known that it would not consider any legislative proposal that was not in conformity with that plan. This plan not only listed the pieces of legislation the NPC would consider, but also dictated who should draft each piece of legislation. In doing so, the NPC gave unprecedented drafting responsibilities to its own support services, with the most notable beneficiaries being the CLA and the special standing committees. One of the first casualties of this new plan was the State Council's draft securities law. The NPC plan had assigned responsibility for drafting the securities law to the Economic and Finance Committee (one of the special standing committees), despite the fact that the State Council had been working on its own draft of this law for some two years. Ultimately, the NPC refused

29. See *id.* at 27; Tanner, *supra* note 1, at 71.

30. See *Difficult Issues*, *supra* note 26, at 18-19 (discussing NPC's influence on draft intellectual property rights legislation in 1985-1986).

31. See Tanner, *supra* note 1, at 71-72, 91-92 n. 40.

32. See *id.* at 78. See also *id.* (quoting NPC source noting that the development of the NPC's support staff and support resources had finally made such threats viable).

33. "Zhonghua Renmin Gongheguo Gongsì Fa."

34. See Jerome Cohen & Charles Goldsmith, *Company Law — Unfinished Business* in INTERNATIONAL CORPORATE LAW, May 1994, at 37, 40 [hereinafter *Unfinished Business*].

to consider the State Council's existing draft,³⁵ and the State Council had to develop a whole new draft working in conjunction with the Economic and Finance Committee.

The best example of the NPC's legislative independence to date involves the 1996 Amendments to the Criminal Procedure Code, passed by the 1996 Plenary Session. The NPC's original draft, which greatly liberalized criminal procedure in China, met concerted opposition from the Ministry of Public Security ("MPS"). The MPS is one of the most powerful organs in China, and possesses great influence with CCP leadership. (The MPS's objections focused primarily on a strong antipathy towards an amendment provision abolishing administrative detention, a widely used procedure that allowed local security organs to incarcerate persons indefinitely without trial and without access to a lawyer.) Despite this, the amendments as passed by the NPC were virtually identical to the original draft so strongly opposed by the MPS.³⁶

More recently, a third phase of the NPC's development has focused on the development of the delegates themselves.³⁷ Efforts by the NPC to promote a more professional, independent and conscientious delegate body date back at least to the middle 1980s.³⁸ Much of this early effort met with competing efforts of the CCP leadership to rein in delegate independence.³⁹ Nevertheless, the delegate body has become increasingly independent and assertive. By the 1995 Plenary Session, NPC delegates began showing an assertiveness even greater than that which caused significant party alarm in the late 1980s. At that session, over one-third of the delegates failed to support the CCP's nominee for Vice Premier, Jiang Chunyun. Over a quarter of the delegates also failed to support State Council proposals for a draft Banking Law and a draft Education Law.⁴⁰

35. Interview (China Securities Regulatory Commission [hereinafter CSRC]). Since Chinese sources do not wish to be identified by name, I have identified them by affiliation.

36. Interview (CLA drafting group). Cf. *Xingsufa Xiugaian Shouge Jieguanyi* in FAZHI RIBAO [LEGAL SYSTEM DAILY], Feb. 3, 1996, at 1 (noting repeated and acrimonious meetings with the State Council, Ministry of Public Security, Supreme People's Procurate and Supreme People's Court).

37. See *Active Elements Invigorate "Rubber Stamp" Institution*, SOUTH CHINA MORNING POST, March 3, 1997, at 3 (noting effects of delegate development).

38. See, Cheng & Liu, *supra* note 1, at 258, 260; Tanner, *supra* note 1, at 75, 79. This earlier development was suspended for a while following the Tiananmen demonstrations in 1989. See *id.* at 79.

39. See Tanner, *supra* note 1, at 76, 79.

40. See *NPC Vote Snub for Jiang Ally*, SOUTH CHINA MORNING POST, March 18, 1995, at 1 (noting delegate dissension over CCP's nomination for Vice Premier)[hereinafter *NPC Vote Snub For Jiang Ally*]; *Defiant NPC Deputies Want More Power*, SOUTH CHINA MORNING POST, March

The delegate independence that manifested itself at the 1995 Plenary Session surfaced again at the 1996 Plenary Session. At that Session, over a quarter of the delegates refused to endorse the work reports of the Supreme People's Procurate and the Supreme People's Court.⁴¹ Delegates also became increasingly active and overt in their criticisms of various aspects of political operations in China, including some aspects of the CCP itself.⁴²

Delegate independence was just as evident during the 1997 Plenary Session. Unprecedented numbers of delegates again failed to support the work reports of both the Supreme People's Court and the Supreme People's Procurate (44% in the case of the Supreme People's Procurate's work report). This dissent prompted the Supreme People's Court to form a special investigation commission to look into the problem of judicial corruption, the principal source of the delegates' concerns.⁴³ Delegates were also able to introduce and push through a highly controversial change in the draft amendments to the criminal code. This change, which removed a draft provision providing immunity from criminal prosecution to police who injure or kill others while on duty, was even opposed by the NPC leadership itself.⁴⁴ Delegates were also highly critical of the State Council's work report, particularly focusing on the State Council's lack of attention to the plight of agricultural workers and laid-off employees of state-owned enterprises. Their criticisms resulted in numerous amendments to the State Council's stated policy goals in these areas.⁴⁵

19, 1995, at 1 (noting delegate dissension over draft Banking Law and draft Education Law) [hereinafter *Defiant Deputies*].

41. See *Lawmakers Angry at Lack of Enforcement*, HONG KONG STANDARD, March 15, 1997 (Internet edition) (noting high opposition to both 1996 and 1997 work reports by Procurate and Court).

42. See notes 637-644 and accompanying text *infra*.

43. See *NPC Lodges Protest Vote At Worsening Crime Record*, SOUTH CHINA MORNING POST, March 15, 1997 (Internet edition) (reporting on delegate protest); *Judicial Chief Seeks More Ethical Courts*, SOUTH CHINA MORNING POST, April 3, 1997 (Internet edition) (President of the Supreme People's Court noting high NPC dissent at the most recent Plenary as a major reason for forming this special investigation); *Caiqu Youli Cuoshi HenzhuaYansu Zhifa [Seizing Effective Measures to Seriously Enforce the Law]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], April 1, 1997 (same).

44. See *Deputies Reject Revisions in Rare Show of Dissent*, HONG KONG STANDARD, March 15, 1997 (Internet edition) (noting that Tian Qiyu, widely seen as the number two man in the NPC, opposed the delegates' amendment).

45. *Li Takes Flak For Ailing State Firm*, HONG KONG STANDARD, March 5, 1997 (Internet edition) (noting delegates' numerous criticisms); *Prime Minister's Work Report Amended*, SOUTH CHINA MORNING POST, March 15, 1997 (Internet edition).

Over the years delegates have also become increasingly assertive in introducing their own items into the NPC's legislative and political agenda. Recent examples include repeated attempts by delegates to press the Standing Committee to introduce a draft Euthanasia Law and a law protecting laid-off workers.⁴⁶ During the 1997 Plenary Session, one delegate from Sichuan even arranged for a textile worker laid-off from a state-owned firm to address a meeting of NPC delegates, in order to dramatize the plight of such workers.⁴⁷ Twice during the 1996-97 term, large groups of NPC delegates independently petitioned the party for changes in national policy.⁴⁸ During the 1996 Plenary Session, delegates from Beijing tried to introduce a draft proposal to have the NPC investigate party corruption in Beijing under former mayor Chen Xitong.⁴⁹ Delegate criticisms voiced during the 1995 Plenary Session were instrumental in persuading the State Council and the CCP to launch the "Strike Hard [Dayan]" anti-crime campaign in 1996.⁵⁰

Unlike the earlier manifestation of delegate independence in the late 1980s, this recent manifestation appears to be more permanent. Whereas the early manifestation lasted only briefly before being met with concerted and overwhelming opposition from the CCP, this current manifestation has lasted over three years, and the CCP's response has been one of grudging accommodation rather than political retrenchment. Following strong delegate criticisms of the quality of administrative and party presentations to the 1995 Plenary Session, the CCP and State Council jointly promulgated internal guidelines requiring party and executive official to be more available to NPC delegates. The Guidelines also required party and

46. See *Euthanasia Helps Terminal Patients Die With Dignity*, CHINA DAILY, March 17, 1995, at 4 (noting that a proposal for legalizing voluntary euthanasia had been submitted to the NPC by 76 delegates, also noting that delegates had submitted similar legislative proposals twice previously) [hereinafter *Euthanasia Helps Terminal Patients Die with Dignity*]; *Call For Law to Protect Redundant*, HONG KONG STANDARD, March 6, 1997 (Internet edition) (delegate calls for law to provide more help to workers who have been laid-off by state firms). Not all delegates' proposals have dealt with such weighty national matters, however. See, e.g., *Chuandawu Buneng Biancheng Xiaomaibu* [Doormen should not become merchants], FAZHI RIBAO [LEGAL SYSTEM DAILY], March 12, 1997, at 3 (discussing a delegate's bill to regulate the activities of apartment building doormen).

47. See *Plea on Reforms as Poverty Takes Hold*, SOUTH CHINA MORNING POST, March 5, 1997 (Internet edition) (reporting on Sichuan delegate's witness).

48. See *Xenophobia on the Rise, Leaders Told*, SOUTH CHINA MORNING POST, January 31, 1997 (Internet edition) (reporting on delegate petition advising senior party cadres not to confuse patriotism with xenophobia); *Industry Protections Urged*, SOUTH CHINA MORNING POST, September 23, 1996 (Internet edition) (100 NPC delegates petition CCP for more protectionist trade policies).

49. Interview with Western diplomatic personnel.

50. Interview with NPC consultant.

executive officials to be more professional in their dealings with NPC delegates. Following the large delegate opposition to the CCP's nomination of Jiang Chenyun for Vice Premiership in 1995, the CCP is considering amending its nomination procedures so as to allow the NPC to vet the CCP's considered nominations before the official nomination list is set.⁵¹

It is also significant to note that this development in delegate behavior has increasingly brought the delegate body into conflict with the NPC's own leadership. The delegate body's willingness to challenge the NPC leadership over the draft criminal law amendments is only the most visible manifestation of a trend that dates back to the late 1980s. Delegates have also challenged or otherwise gone against the wishes of NPC leadership on issues of educational spending, lack of women delegates, lack of supervisory legislation, and nominations for NPC positions.⁵² In spite of this, the NPC leadership has continued to encourage delegate independence, even after losing the battle over the criminal law amendments in 1997. As discussed below, the fact that the NPC leadership would continue to promote a force which increasingly opposes the leadership's own attempts to control it strongly evinces a significant constitutional component to the NPC's development.

B. *The factors behind the development of the NPC*

Many scholars have noted the institutional emergence of the NPC. What is less examined are the factors behind this emergence. Obviously, the new-found ability of the NPC to exercise its constitutional authorities is due in some part to its organizational development. But this organizational development is as much the product of as it is the cause

51. See *NPC Sets Regulations for Sessions*, CHINA DAILY, March 1, 1996, at 2 (reporting on new regulations by the State Council and the CCP intended to insure that governmental and party officials be more responsive to NPC delegates)[hereinafter *NPC Sets Regulations*]; notes 593-595 and accompanying text *infra* (discussing proposed changes in party's nomination procedures).

52. See *Deputies Reject Revisions in Rare Show of Dissent*, HONG KONG STANDARD, March 15, 1997 (Internet edition); *Education Funding Goal Long Way Off*, HONG KONG STANDARD, March 5, 1997 (Internet edition) (noting divergence of opinions between Qiao Shi and deputies regarding national educational spending); *Women in Protest Over NPC*, SOUTH CHINA MORNING POST, December 31, 1996 (Internet edition) (women delegates complain to NPC leadership about lack of women on Standing Committee) [hereinafter *Women in Protest*]; *Deputies Accuse Party of Ignoring Congress*, SOUTH CHINA MORNING POST, March 17, 1995, at 1 [hereinafter *Deputies Accuse Party*]. See also Tanner, *supra* note 1, at 76, 79 (noting several instances prior to 1993 when "delegates have arisen to embarrass the [NPC] leadership").

behind the NPC's new political importance. The NPC itself does not control national expenditures, and thus cannot simply command the budgetary increases necessary to fuel this development. The NPC's development is thus the product of deeper and more fundamental changes within China's political environment.

The most commonly articulated explanation for the NPC's institutional emergence is that the NPC has been riding on the coattails of the personal power of the current Chairman of its Standing Committee, Qiao Shi. However, this explanation is not particularly satisfying. There is no question that the NPC has benefitted significantly from the prestige that Qiao Shi's leadership has brought to that institution. But, as noted above, the institutional development of the NPC actually began in the early 1980's, over ten years before Qiao Shi assumed its mantle in 1993.

Moreover, this explanation may be confusing the horse for the cart. Why would someone with the personal power of a Qiao Shi choose to operate through the NPC in the first place (as opposed to through the State Council, for example)?⁵³ Since 1982, the NPC has been able to offer a particularly stable political foundation from which its leadership could pursue their various political agendas, despite the fact that the NPC's leadership has been among the most visible opponents of that orthodoxy.⁵⁴ Since the NPC's reconstitution in 1978, only one NPC vice chairman has ever been removed from his post prior to the end of his constitutional tenure. Leadership of both the party and the State Council, by contrast, has been much more volatile. In the aftermath of Tiananmen, for example, the leadership of both the CCP and the State Council underwent considerable reorganization. In contrast, the leadership of the NPC was not significantly affected in those years, despite the fact that the NPC Standing Committee actively opposed the CCP's/State Council's decision to declare martial law.⁵⁵ This stability, combined with the NPC's considerable internal

53. See Tanner, *supra* note 1, at 74-76 (discussing how the NPC has become an attractive alternative for ambitious cadres).

54. Professor Tanner argues that the initial development of the NPC was greatly fueled by Peng Zhen's opposition to the reform policies of Deng. See Tanner, *supra* note 1, at 74-75. Similarly, the NPC, then under the leadership of Wan Li, was the only political organ that voiced objections to the State Council's decision to impose martial law in 1989. See *id.* at 63. Qiao Shi's opposition to Jiang Zemin is also well known. See, e.g., *Reform-Minded Qiao Flies Deng's Banner*, SOUTH CHINA MORNING POST, Jan. 13, 1997 (Internet edition).

55. Zhao Ziyang, for example, was both CCP General Secretary and Premier of the State Council; Bao Tong, the only senior official to have been imprisoned following the Tiananmen uprisings, was also a high official in both the CCP and the State Council. After 1989, both ceased to have any visible effect on China's political system. By contrast, Hu Jiwei and Jiang Ping, the

resources, could well explain why positions within NPC leadership are particularly appealing to 'strong leaders' who may be chaffing against the party orthodoxy.

This is not to imply that the CCP is *unable* to reach into the NPC to pick at political irritations. In fact, in the aftermath of the events of 1989, the CCP did just that.⁵⁶ However, at the very least, the party appears significantly less willing to or interested in censuring political opposition in the NPC than in other political bodies. Why this should be so is an important question, one which we will return to below when we evaluate the evolving role of constitutionalism in Chinese politics.

1. Retreat of the CCP

The NPC's institutional emergence owes much to a corresponding decrease in the CCP's own willingness to intervene in or otherwise oversee a wide range of constitutional activities. For the first 30 years of the "New China," constitutional operations were officially subordinated to the CCP's political authority.⁵⁷ The constitutional structure, when and where it functioned at all,⁵⁸ functioned mainly to tailor legal cloth to fit the party's political directives.⁵⁹ In the 1980s, however, this situation began to change. Official control over constitutional operations increasingly migrated from the CCP over to the appropriate constitutional structures.⁶⁰ With regards to the NPC, this transition was made overt by an internal party document issued in 1991 misleadingly entitled "Several Opinions of the Central

two officials of the NPC who bore the brunt of the CCP's post-Tiananmen retribution, continued to exercise considerable and overt political influence. Jiang Ping, for example, served as President of University of Politics and Law, one of the top law schools in China, and was a key figure in the subsequent drafting of a number of important pieces of NPC legislation. Hu Jiwei continued to wield considerable influence as a "liberal thinker." See *Stick to Deng Line of Reform Cadres Urged*, SOUTH CHINA MORNING POST, December 31, 1996 (Internet edition).

56. See Tanner, *supra* note 1, at 63.

57. This subordination was readily acknowledged even in China. See, e.g., Peng Zhen, *Bujin Yao Kao Dang de Zheng ce, Erqie Yao Yi Fa Banshi* [Not Only Follow Party Principles, Also Work According to the Law], DOCUMENTS, *supra* note 7, at 590, 590 (speech by Peng Zhen given before a meeting of officials from lower level people's congresses on March 13, 1984, noting traditional subordination of constitutional to party apparatuses) [hereinafter *Party Principles*].

58. For most of the 1960s and 1970s, constitutional operation was completely shut down by the cultural revolution.

59. See *Party Principles*, *supra* note 57.

60. See generally, Tanner, *supra* note 1, at 61-62, 72-74. The principal exceptions are in matters involving criminal law and public security.

Committee on Strengthening Leadership over Lawmaking Work."⁶¹ In that document, the CCP for the first time set out explicit normative limits on its own authority to oversee legislative drafting. This move generally limited the CCP's legislative input to one of broad policy direction, and increased the NPC's role in the legislative process.⁶²

Once this document was issued, there was a wide retreat by the party from the NPC's actual legislative drafting process, as well as from many other aspects of the NPC's constitutional operations. For example, the 1993 Plenary Session was even able to refuse to accept a draft constitutional amendment tendered to it directly by the CCP.⁶³ Of course, the CCP has not completely sworn off its old ways. It was quite active in the drafting of the 1997 criminal law amendments, for example. However, that involvement is the exception that proves the rule. It was obvious to persons participating in the drafting of these amendments that the CLA was seeking party approval for individual provisions (even though the CLA never acknowledged this).⁶⁴ The fact that the CCP's attempt at quasi-covert intervention was so visible in this instance suggests that if such intervention were indeed rampant, it should be obvious.⁶⁵ In fact, it is not. No one who has written about legislative processes, no one who has investigated legislative processes, and no one who was interviewed for this study has reported any other instance of such systemic intervention by the CCP in legislative drafting in the 1990s (which includes the 1996 amendments to the criminal procedure law).⁶⁶

61. This document is discussed in Tanner, *supra* note 1, at 73-74.

62. *See id.*

63. This event is discussed in Chen Sixi, *Yian Shenyi Guocheng Zhong Xiuzhengan de Yunyong [Handling Amendments in the Bill Review Process]*, FAXUE YANJIU, No. 5, 1994, at 25 [hereinafter *Handling Amendments*].

64. For the criminal law amendments after the drafting group, working with the CLA, had arrived at a decision on a major issue, the CLA leadership would announce that they would take that decision "under advisement." About two weeks later, they would announce their decision to the drafters. This two week grace period was used to allow the CLA leadership to consult with CCP leadership. Interview (drafting group). This advisement period appears unique to the drafting of this particular piece of legislation. It did not occur during the preparation of any other legislative draft that inform this study. Interviews (drafting groups).

The CCP's involvement in the legislative process up through the 1980s was similarly obvious. *See* Tanner, *supra* note 1, at 60-61.

65. This was true during the 1980s. *See* Tanner, *supra* note 1, at 61.

66. *See* Correspondences with Benjamin L. Liebman [hereinafter *Liebman Correspondences*] (finding no evidence of CCP involvement in the drafting of environmental protection legislation) (information attributed in this Article to Mr. Liebman derives from interviews he conducted in Summer of 1996 in preparation for a forthcoming article on environmental law in China by Mr. Liebman, William Alford and Shen Yuanyuan; Mr. Liebman wishes to keep his notes from this

Similarly, in other areas of NPC operations in which CCP intervention is known to exist (such as control over information flows or over personnel placement), this intervention is easy to detect and well-documented.⁶⁷ It is thus telling that in an increasing number of NPC activities, evidence of control or intervention is becoming harder to find.⁶⁸

The CCP's withdrawal from the NPC's constitutional jurisdiction is also supported by the growing number of increasingly public disagreements between different departments in the NPC and between these departments and other administrative bodies outside the NPC. Such disagreements would not normally arise in a system in which all political decisions are guided by the same hand. Indeed, such disagreements were unheard of in China until the late 1980s. These disagreements only began appearing when the CCP started withdrawing from the constitutional arena, and these disagreements have increased as the CCP's withdrawal has increased.⁶⁹

Of course, the CCP still exercises significant influence over China's and the NPC's constitutional operations. But party influence in parliamentary operations, even great party influence, is by no means inapposite to constitutionalism. From a constitutional perspective, what is important is not party control per se, but the means of control — and the means by which the CCP “controls” the NPC now largely resembles the means by which majority parties control national parliaments in many

research private, but has reviewed and confirmed all information attributed to him in this Article as consistent with his investigations). See also interviews (drafting groups, CSRC, CLA, General Office Research Department) (noting no CCP involvement in legislative drafting on development). See generally, Tanner, *supra* note 1, at 68. Many of these same source do report CCP intervention in other areas of NPC activity, such as delegate selection and nominations.

67. Reports of the CCP's involvement in determining personnel placement are well documented, for example. See, e.g., Cai, *supra* note 4, at 141; Tanner, *supra* note 1, at 60, 90 n.21.

68. Of course, lack of evidence is not that same as disproof, as both NPC skeptics and stalwart Elvis fans are quick to point out. Some have argued, for example, that such intervention is in fact obvious to inside participants, but that these participants are afraid to acknowledge such intervention for fear of political persecution. But this argument fails to explain why many of these same persons do not hesitate to acknowledge party intervention in other areas of NPC operations. See, e.g., Cai, *supra* note 4, at 141. Moreover, reports of CCP intervention in the constitutional operations of other constitutional organs, such as the courts, are rampant. It is illogical to assume that the CCP has been almost 100% effective in covering up its interventions in a the NPC when the CCP has been unable to cover up reports of its unconstitutional interventions in other areas of constitutional activity.

69. See Tanner, *supra* note 1, at 56-57.

developed constitutional systems.⁷⁰ Even in the most liberal of constitutional systems, controlling political parties exercise great say in setting policy goals for legislative development, shaping the legislative agenda, and determining who gets what office within the legislature. These are also the principal means by which the CCP now “controls” the NPC.⁷¹

Many skeptical commentators nevertheless suggest that the CCP may still exercise inordinate control over the NPC’s constitutional operations. They note, for example, that the CCP can effectively veto any NPC action that threatens its interest. But the same is true of many Western parliaments, including that of the United States and Great Britain. In these systems, party discipline combined with party control over parliamentary agenda ensure that proposals significantly threatening to the controlling party’s interests will not acted upon. The British House of Commons, for example, has not passed or acted upon any proposal opposed by the controlling party since before the Second World War. The same holds true for the Japanese Diet prior to 1993.⁷²

Skeptics might also note that all of the NPC’s leaders, and most of its staff and delegates, are members of the CCP, and that this shows that the CCP is really controlling NPC operations. There are two problems with this argument. First, as discussed above, it fails to distinguish the CCP’s role in the NPC from the controlling party’s role in many developed parliaments. In most parliamentary systems, including that of the United States, parliamentary offices are allocated by the controlling party to members of that controlling party, and those officers may be removed at the party’s pleasure.

More significantly, this argument conflates party affiliation with party “control.” NPC leaders are members of the NPC as well as of the CCP.

70. See, e.g., GARY W. COX & MATHEW P. McCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993). As noted above, this is not to claim that the CCP itself resembles a controlling party in Western constitutional systems, clearly it does not. Nor is it to claim that the rest of the constitutional structure is a rationalized vis-a-vis the CCP as is that of the NPC. The CCP still routinely and systemically intervenes in the judicial process, for example. Nor is it to claim that constitutional operations in general in China resemble those of development Western countries. It is merely to say that the institutional relationship between the CCP and the NPC does not explain differences between Chinese and Western constitutional and political operations, as some commentators suggest it does.

71. The CCP also seeks to “control” the NPC by controlling access to information. These efforts, however, are now largely ineffective. Interviews (CLA; General Office Research Department).

72. Interviews with William Proctor, Clerk of Standing Committees for the House of Commons and Yasue Tanaguchi, Professor of Law at Kyoto University..

In instances in which the two organizations' interests conflict, there is no reason why these people should automatically give priority to the CCP's interests. Given that many of these leaders have been among the most visible opponents of CCP orthodoxy, and that the CCP seems unwilling or uninterested in disciplining intellectual independence with the NPC, the argument for CCP dominance seems problematic.⁷³

In fact, the CCP itself recognizes that mere party affiliation is insufficient to discipline NPC members. The principal means by which the CCP seeks to enforce party discipline over NPC activities is through the "party cell," a party organization inside NPC whose function is similar to that of the party whips in the American congress. But even these party cells are ineffective, because the staffing of those cells is coterminous with that of the NPC leadership⁷⁴ — the same leadership that has traditionally challenged party control. The NPC appears to have "captured" its party cells in much the same way that regulated industries in the United States frequently are able to "capture" the administrative organs responsible for regulating them.⁷⁵

Finally, skeptics might also argue that, as evidenced by the drafting of the 1997 amendments to the criminal law, the CCP can still intervene in any aspect of NPC activity "when it wants to." Ultimately, however, any constitution is merely a document. The true force of constitutional principle comes precisely from the fact that most political actors and institutions do not want to breach constitutional mandates, not from the fact that they "can't."⁷⁶ Thus, the fact that the CCP also does not want to intervene in the constitutional operations of the NPC is highly significant,

73. In fact, the CCP appears to have even greater difficulty enforcing party discipline within the NPC than to controlling parties in many Western parliaments. This is because the CCP has lost its ideological identity, and there is no competing party organizations that bind the career interests of the members to the institutional interests of the CCP. Thus, unlike for most Western parliaments, there is little institutional incentive in the absence of direct threats from the party (of which there is no evidence) for NPC delegates, staff and leadership to toe the party line. This is reflected in the high party dissension rates among NPC delegates as reported above. These rates, which reached 40% in 1997 (the last year of this study), far exceed anything that has occurred in the British House of Commons or the Japanese Diet since the end of the Second World War. Cf. *Major Faces Growing Revolt in Party*, INTERNATIONAL HERALD TRIBUNE, April 17, 1997 at 1 (referring to it as an "open revolt" when 20% of the Conservative Party members failed to support an initiative by the Conservative Prime Minister).

74. See Tanner, *supra* note 1, at 74.

75. Interviews (various drafting groups; General Office Research Department).

76. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

as this is the same fundamental force that disciplines political actors and institutions in more developed constitutional systems.

2. Pluralism

Another important force behind the NPC's development is pluralism. Traditionally, pluralism has been regarded as an anathema to the CCP's "democratic centralism" ideology, which regards the existence of competing political interests as a significant threat to its legitimacy. This is still the ideology. It is not, however, the reality. As the control of the CCP began receding in the 1980s, other entities and interests have stepped in to fill the vacuum. These include, not only constitutional entities such as the NPC, but also regional and, later, certain professional interests (such as the All-China Lawyers Association and the coal and power industries).⁷⁷ In the 1990s, more socially-oriented interests also began to form, focusing on issues such as labor rights, environmental protection, consumer protection and the protection of women and children.⁷⁸

The NPC is the most accessible forum through which these various interests can attempt to affect central-level policy making. The NPC is the only central-level constitutional institution⁷⁹ whose members are not selected directly by the central level CCP.⁸⁰ Thus, it provides regional interests a unique opportunity to send persons to Beijing who are more responsive to their own regional needs than to the wishes of central-level policymakers. Beyond this, the NPC has also developed a number of internal procedures and practices that facilitate and encourage interest

77. Of course, many of these professional interests have strong political ties to CCP leadership, which leads some to suggest that interests are merely the CCP acting under a different guise. Be that as it may, however constituted, these new professional interests have increasingly found themselves in political and economic competition. In doing so, these interests are clearly competing for their own benefit, not for the benefit of the CCP. *See* TIANGJIAN SHI, *POLITICAL PARTICIPATION IN BEIJING* (1997).

78. *See* Zhang Mingjie, *Lun Liyi Jituan Canyu Quanli Juece* [On Interest Group Participation in Political Decision-making] (May 1988) (unpublished Masters dissertation, Zhongguo Zhengfa Daxue Yanjiusheng Yuan) (discussing the development of interest group politics in China in the late 1980s).

79. There is also a central-level political institution, called the Chinese People's Political Consultative Committee, that also sports regional representation. However, as discussed below, this institution has not harnessed the powers of pluralism as much as the NPC, and its institutional development subsequently lagged.

80. Delegates to the NPC are in the main selected by the provincial CCP/people's congresses, and ratified by the central level. Given the fact that there are almost 3000 delegates, the central level's ratification would appear to be generally *pro forma*.

group representation. Over half the seats on the Standing Committee, for example, are by tradition assigned to regional as well as specified professional and social entities, such as the All-China Women's Federation and All-China Labor Federation.⁸¹

The NPC has intentionally tailored its structure and decision-making procedures so as to be more receptive (as compared to other central-level constitutional and political organs) to the input of different interests.⁸² The NPC's organizational structure encourages horizontal bargaining and decision-making between and among sibling departments in the NPC, and between these departments and equivalent bodies in other governmental and political organs.⁸³ This is in sharp contrast to the vertical, patron-client relationships that characterize other constitutional and political organs in China. This horizontal focus encourages pluralist dynamics by providing multiple points of entry into the NPC's decision-making process.⁸⁴ If a particular interest has been frozen out of one department, it can try to find other departments more sensitive to its particular needs. Indeed, the CLA actively represents itself as a champion of last resort for interests frozen out of the earlier stages of the legislative decision-making process.⁸⁵

As China's political environment adjusts to the new reality of independent and powerful interests existing outside the CCP's/State Council's small cadre of central-level policy makers,⁸⁶ the NPC's role in accommodating these interests becomes evermore crucial - not just to these interests themselves, but also to the central-level policymakers that must increasingly take these interests into account. This unique function gives the NPC important leverage in China's political environment.

81. These seats are assigned by the NPC, and are ratified by the CCP. Interview (General Office Research Department). See also notes 186-189 and accompanying text *infra*.

82. See, e.g., *Party Principles*, *supra* note 57 (suggesting that the role of the NPC is to provide a forum in which different social interests can express themselves); Zou Pingxue, *Guanyu renda Daibiao Xingshi Quanli de Shenfen de Lilun yu Shixian* [On the Theory and Practice of the Ability of NPC Delegates to Exercise Their Powers], *ZHONGGUO FAXUE*, No. 6, 1994, at 37 (arguing that the role of NPC delegates needs to be adjusted to reflect the greater pluralist forces in Chinese society) [hereinafter *Theory and Practice*]. For more on the role of horizontal relations in contributing to effective pluralist political dynamics, and the dynamics between the development of such relations and formal institutional structure, see Putman, *supra* note 27, at 163-185.

83. The NPC leadership serves primarily to ratify the results of these bargains, rather than to dictate the outcome.

84. See Putman, *supra* note 27, at 163-185.

85. See notes 212-219 and accompanying text *infra*.

86. This would include not only monied interest, but interests such as those of women and workers, which have traditionally sat at the core of the State's legitimacy.

However, this is not to say that the appearance of such pluralism is universally welcomed in China. The CCP's central leadership apparatus, in particular, continues to espouse the ideological primacy of democratic centralism and "unified thought." The domestic press generally does not acknowledge, and frequently denies, the pluralist aspects of political decision-making. Nevertheless, this pluralism is real, and it is growing. The CCP's ideological disavowal of this development has not noticeably impeded the NPC's ability to take advantage of this new reality.

3. Development of provincial and regional people's congresses

An often-overlooked factor in the NPC's development is the concurrent, and in many cases prior, development of provincial and regional people's congresses.⁸⁷ Government at the provincial level (and in self-governing municipalities like Beijing and Shanghai) revolves around the same general quartet of congress, executive, court and procurate as it does at the central level. The inter-branch relationships among these lower-level governmental entities also generally parallel those of their central level counterparts. The institutional development of several provincial and regional congresses has significantly outpaced that of the NPC in a number of areas, such as those involving supervision and delegate/leadership selection. Such prior developments in regional congresses have frequently provided useful precedents for the NPC's own development.⁸⁸

Lower level congressional development stimulates NPC development in two ways. First, provincial innovations provide useful models for the NPC to consider in addressing its own organizational issues. Much of the NPC's earlier work on developing a supervision law, for example, was patterned on existing provincial practices. NPC guidelines for supervising

87. In fact, NPC scholars and staffers cite the earlier institutional development of a number of regional people's congress as one of the most important catalysts for the institutional development of the NPC since in the early 1980s. Interview (General Office Research Department).

88. See, e.g., *Renda Jiandu Falu Zhidu Yantaohui Zongshu* [Summary of Seminar on the NPC Supervision Law], ZHONGGUO FAXUE, No. 1, 1993, at 124 (noting that provincial supervisions laws are providing strong precedents for national legislation); Wang Dexiang and Mo Jihong, *Difang Renda Jiandu de Mogan Qingkuang he Jianyi* [Several Conditions and Proposals Regarding Supervision by Regional Congresses], FAXUE YANJIU, No. 5, 1992, at 72 (report on investigation of supervision procedures used by regional congress conducted by the authors on behalf of the NPC). See also notes 610-611 and accompanying text *infra* (noting how provincial congress's handling of court supervision became model for NPC's supervision of courts).

the judiciary are patterned on those used by the Shanghai people's congress. Secondly, existing provincial precedents can provide important normative ammunition for NPC arguments seeking to promote similar developments at the national level. NPC staff and commentators seeking to promote the notion of congressional supervision over the party frequently appeal to provincial and regional precedents to demonstrate the orthodoxy of this idea.

The NPC has actively exploited the symbiotic relationship between itself and provincial level parliaments. Starting in the late 1980s and running through 1995, the General Office Research Department routinely held workshops and seminars with its counterparts in regional people's congresses to discuss parliamentary development issues.⁸⁹ Like other areas of the NPC's activity, these workshops and seminars were structured as horizontal interactions between General Offices rather than vertical interactions between superior and subordinate congresses.⁹⁰ This reflects both the importance of these lower congresses and their innovations to the NPC, as well as the NPC's own general preference for pluralist collaboration over patron-client posturing.

C. Indications of Constitutionalism

The various factors discussed above all allow for a more developed NPC, but none compel such a result. The CCP may have chosen to remove itself from many aspects of the NPC's constitutional decision-making process, but it was not forced to. And the CCP was certainly not forced to bequeath the bulk of its abandoned legislative prerogative to the NPC rather than to its closer soul mate, the State Council. Nor was there any apparent organizational compulsion for the CCP to allow the NPC to promote political pluralism, particularly given that such pluralism goes against long-standing party principles. Similarly, there is no apparent organizational linkage between congressional development at the provincial level and that at the central level. Provincial leadership has no binding authority over the center. If the center were not inclined to adapt a particular practice, the fact that a regional congress may already have

89. These meetings had to be halted in 1996 due to lack of funding. The General Office Research Department is hoping to revive them in 1997. Interview (General Office Research Department).

90. Interview (General Office Research Department).

adapted such a practice has no effect on the center's rational incentive structure.

There is one explanation for these phenomena, however – they are all consistent with constitutional development. The Chinese constitution places limits on the CCP's authority to manipulate constitutional operations, and the CCP's withdraw from NPC legislative decision-making processes is consistent with these limits. The constitution suggests that pluralism, even if not accepted by the dominant political ideology, is nevertheless a defining feature of its own legitimacy, and that the NPC is the principal repository for this pluralism. Finally, constitutionalism is a principled conceit, and such principle can be observed in the operations of provincial as well as central governmental organs. Provincial developments can thus provide important intellectual authority for similar developments on the national level.

The above discussion raises the specter that a deeper *eminence grise* of emerging constitutional consciousness may actually be underwriting much of the NPC's development.⁹¹ Appeals to such consciousness have in fact been a constant feature of the NPC's political emergence, dating back to the earliest efforts by Peng Zhen to promote the NPC's development to the rest of the party hierarchy in the early 1980s.⁹² Peng's general argument (which has since become a canon for the NPC and its scholars) begins with a claim that the NPC is the principal repository for the government's constitutional legitimacy. This can be seen both from the NPC's status as China's supreme constitutional body, and the NPC's role

91. Most outside commentators, however, have been unwilling to admit to the possibility of a budding constitutionalism in China for a number of reasons. They note that China lacks recognized mechanism for constitutional enforcement. There is no separation of powers, there are no procedures for constitutional review. In addition, they note that violations of articulated constitutional rights are rampant. But none of these conditions are fatal to constitutionalism. Many recognized constitutional cultures lack or lacked effective proceedings for constitutional enforcement. France did not develop such proceedings until 1959, and even today the scope of these proceedings is limited to legislative proposals, not to passed legislation. Great Britain arguable still does not have such proceedings, in fact. The principal source of constitutional effectiveness, even in cultures which have such proceedings, is the normative force that attaches to the constitution itself. Similarly, many recognized constitutional cultures do not recognize a principle of separation of powers, including Great Britain, France, Australia, and almost every other parliamentary system.. Finally, the fact that some constitutional principles are not respected does not mean that no constitutional principles are respected. In the United States, for example, the contracts clause today has become for all intents and purposes a dead letter.

92. Most people regard Peng Zhen as the most influential figure in the NPC's development. See, e.g., Tanner, *supra* note 1, at 74-75. This is the unanimous opinion of everyone I interviewed in the NPC.

as the only representative institution in a constitutional system that claims to derive its legitimacy from its democratic character. Therefore, Peng reasoned, a stronger, more independent, and more assertive NPC is a condition precedent for China's political development.⁹³ This argument is still the centerpiece of the NPC's campaign to further develop its institutional capabilities.⁹⁴

At least two reasons suggest why we should take seriously this argument and its effect on the NPC's development. First, this argument was and is directed at the party elite, rather than at the ordinary citizenry. This is demonstrated not only by the fora in which it appears,⁹⁵ but also by its general focus. Ultimately, it is an argument for political change, an argument that calls for the party to sacrifice part of its own power.⁹⁶ This is the sole prerogative of the party leadership, not the rank and file, and certainly not the general citizenry. The fact that Peng and other NPC advocates of this argument (many of whom are themselves part of the party leadership) direct this argument to the political elite suggests that constitutional principle can effect even the highest level of political decision-makers in China.⁹⁷

Secondly, there is a principled consistency to the NPC's use of this constitutional argument. The NPC not only directs this argument toward

93. See, e.g., *Party Principles*, *supra* note 57; Peng Zhen, *Zai Zhongyang Fhengsa Weiyuanhui Kuoda Huiyi Shang de Jianghua* [Speech Given at the Enlarged Meeting of the CCP Politburo] (February 26, 1983), DOCUMENTS, *supra* note 7, at 582 [hereinafter *Speech*]. See also, Tanner, *supra* note 1, at 75.

94. See, e.g., Cai, *supra* note 4, at 1-3 (using same argument as Peng); Liu & Cheng, *supra* note 1, at 2-3 (same). See also Yu Ziqing, *Yetan Dangdao Renmin yu Renmin Jiandu Dang* [Discussing the Party Leading the People and the People Supervising the Party], FAXUE, No. 5, 1996, at 5 (using constitutional argument to assert that the NPC has power to supervise the CCP); Ren Wanxing, *Dui Chongfen Fahui Renmin Daibiao Dahui Zhidu Zuoyong de Ji Dian Sikao* [Several Thoughts on Filling Out the Supervisory System of the NPC], HEBEI FAXUE, No. 3, 1994, at 22 (same).

95. See, e.g., *Speech*, *supra* note 93 (using constitutional theory to argue for an expanded NPC role in front of the CCP Politburo).

96. See, e.g., *id.* (arguing that new developments in China require that the CCP must start to share political authority with the constitution).

97. There are numerous examples of constitutions gaining some measure of normative weight. See, e.g., Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U.Chi.L.Rev. 595, 596-598 (1991) (noting constitutional development in Poland during the 1950s). Studies of institutional development confirm that hortatory principles frequently develop normative effect even if they were not originally regarded as such by their original proponents. For over 40 years now, China has been claiming that it is and should be a constitutional polity. It should not surprise us if some of Chinese have been persuaded by that claim.

outside actors, it also uses it internally to help guide its own organizational development.⁹⁸ For example, pluralist considerations appear to motivate the NPC's concern with delegate development, and with increasing access for outside interests. NPC research staff frequently appeal to the NPC's constitutional role in order to criticize other aspects of NPC internal operations.⁹⁹ NPC leaders have also championed pluralist political reforms not directly involving the NPC. For example, Peng Zhen was a major supporter of the Ministry of Civil Affairs efforts to "experiment" with village democracy. In promoting these early experiments, Peng drew explicit constitutional parallel between these experiments and the NPC's own development.¹⁰⁰ Fifteen years later, the NPC continues to be one of the most aggressive supporters of these experiments.¹⁰¹

Principled consistency is not a feature of the type of simple power politics that we traditionally associate with China. It is, however, a defining feature of constitutionalism. Even if the NPC's consistency is due as much to strategic as to heart-felt reasons, such strategic benefits can nevertheless give constitutional principles significant disciplining effect. This is not to claim that constitutional concerns are the sole or even the principal factor driving political behavior in China or in the NPC. Even in the most developed constitutional environments, constitutionalism is just one of many factors that enter into the political decision-making process.¹⁰² In a recently emergent constitutional culture such as that of China, the weight afforded to constitutional considerations is going to be far less than, for example, in the United States or France. Nevertheless, the development

98. See, e.g., notes 37-50 and accompanying text *supra* (discussing delegate development).

99. See, e.g., Cai, *supra* note 4, at 156-57 (urging the NPC to increase the number by which nominees for Standing Committee positions exceed position); *id.* at 261 (criticizing existing procedures for failing to give delegates adequate opportunity to tender legislative proposals); Liu & Cheng, *supra* note 1, at 53 (NPC staffer arguing that the NPC's constitutional role requires it to make its operations more transparent and increase avenues for popular input); *id.* at 263 (using constitutional argument to argue for increased role of special standing committees in legislative process).

100. See RESEARCH GROUP ON THE SYSTEM OF VILLAGE SELF-GOVERNMENT IN RURAL CHINA, CHINA RESEARCH SOCIETY OF BASIC-LEVEL GOVERNANCE, THE REPORT ON THE VILLAGERS REPRESENTATIVE ASSEMBLIES IN CHINA 4 (December 1994) (quoting Peng Zeng).

101. See *More Direct Elections Ruled Out*, SOUTH CHINA MORNING POST, May 20, 1995, at 7 (noting strong support for expanding direct elections on the part of NPC delegates).

102. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); [Oliver Wendell Holmes quote: "the constitution is not a suicide pact"]. The need to balance enforcement of constitutional mandate with other political concerns is a major rationale behind the political question doctrine. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166(1803) (noting that the courts would only enforce the constitution against other branches in limited situations).

of the NPC strongly suggests that constitutional considerations can affect political operations in China, and that such effect can no longer be ignored.

II. NPC STRUCTURE

The development of the NPC's internal structure has had a major effect on the emergence of the NPC within China's political environment. The NPC's structural evolution is notable for its emphasis on horizontal bargaining in the decision-making process. The NPC leadership generally ratifies these bargains, rather than dictates solutions.¹⁰³ Support services, for their part, are structured so as to be responsive to different institutional and social interests. Inter alia, this gives the NPC a much more pluralist institutional dynamic than those found in other political institutions in China.

A. *The Standing Committee and the Plenary Session*

The NPC has two institutional manifestations: the Standing Committee and the Plenary Session. Both enjoy similar constellations of authority such as independent legislative competence,¹⁰⁴ and power to question, investigate and supervise governmental activity.¹⁰⁵ In practice, however, the Standing Committee has great say over the Plenary Sessions activities, and for this reason is often regarded as the "leader" of the NPC and the Plenary Session. But this is not theoretically accurate. The Standing Committee and the Plenary Session are really alter egos of the same institution. The Standing Committee is the NPC's permanent, corporate manifestation. It oversees the continuous operation of the NPC's constitutional responsibilities. The Plenary Session is not so much an organization as an event — an event which, due to its greater representational character, reifies the NPC's constitutional identity. This alter-ego relationship is highlighted by the fact that the institutional tenures of these two institutions never overlap. The Plenary Session has no

103. Of course, the leadership also determines the NPC's agenda, which allows it to limit the types of issues over which the various support services may bargain.

104. See PRC CONSTITUTION art. 62(3) (giving Plenary Session authority to pass and amend 'basic' legislation); PRC CONSTITUTION art. 67(2) (giving Standing Committee authority to pass and amend all other forms of statutory legislation. For a discussion of the differences between basic and other statutory legislation, see notes 141-148 and accompanying text *infra*).

105. See Part III *infra*.

permanent institutional manifestation, when the Plenary Session is not in session, the Standing Committee is the NPC. But when the Plenary Session is in session, the Standing Committee ceases to exist, and control over the NPC's corporate activities is assumed by the Plenary Session's temporary leadership, the Presidium.

1. The Standing Committee

The Standing Committee houses the NPC's permanent leadership and most of its permanent resources. It meets in two-week session once every two months.¹⁰⁶ In addition to overseeing the NPC's constitutional responsibilities when the Plenary Session is not in session, it also administers the NPC's bureaucracy, formulates and directs the NPC's long-term plans (such as the legislative plan and legislative drafting), sets the agenda both for itself and for the Plenary Session, and directs information flow both within the NPC and between the NPC and outside entities.

The Standing Committee is comprised of 156 members selected from among the Plenary Session's delegates.¹⁰⁷ According to one NPC staffer, about half of these positions are delegated (by tradition) to specific geographical, ethnic or professional constituencies.¹⁰⁸ The remainder are filled at-large. The term of office for delegates on the Standing Committee is five years (as it is for all delegates to the NPC), commencing with the first session of each new NPC.¹⁰⁹ There are no term limits on Standing Committee delegates.

The Standing Committee is headed by a Chairmen's Group. The principal function of the Chairmen's Group is to set and oversee the agenda for both the Standing Committee and — indirectly — the Plenary Session.¹¹⁰ This includes setting meeting dates and approving the agenda for Standing Committee sessions, overseeing the work of and setting the assignments for the special standing committees and any other special committees the NPC has formed, and serving as the "floor manager" for draft bills. The Chairmen's Group may also develop its own legislative

106. See Standing Committee Procedural Rules, art. 3. Special meetings may also be called.

107. See Records, *supra* note 8, at 782.

108. Interview (General Office Research Dept). See, e.g., Tanner, *supra* note 1, at 86.

109. If a delegate is replaced, the successor assumes the term of her predecessor.

110. See NPC Organization Law, art. 25.

proposals, and may instigate changes in the structure of the Standing Committee.¹¹¹

Although these powers are primarily procedural, they give the Chairmen's Group a great deal of control over the activities of the Standing Committee (and, by extension, over the activities of the whole NPC). As *ersatz* floor manager for all bills that come before the Standing Committee, the Chairmen's Group decides not only when a particular bill will go to the floor, but also *if* a particular draft will go the floor at all.¹¹² This gives the Chairmen's Group *de facto* veto over all legislative proposals (and other matters) submitted to the NPC.¹¹³

The Chairmen's Group is chaired by the Chairman of the Standing Committee, who is generally identified as the "leader" of the NPC.¹¹⁴ The rest of the Chairmen's Group consists of the several Vice Chairmen¹¹⁵ and the General Secretary. Under the Constitution, tenure for the Chairman and the Vice Chairmen is limited to two full, consecutive five-year terms.¹¹⁶ The Chairmen's Group meets once every two weeks.¹¹⁷ The agenda for each meeting is drafted by the General Secretary and is approved by the Chairman of the Standing Committee.¹¹⁸ According to procedural rules, all members must receive information regarding items to be discussed at that meeting at least two days before the meeting is held.¹¹⁹

In 1987, the Chairman's Group established a Secretary's Group to assist the General Secretary.¹²⁰ The Secretary's Group is composed of the General Secretary, the several Assistant General Secretaries, and one Vice-Director from each of the eight special standing committees.¹²¹ Like the

111. See Procedural Rules for the Chairmen's Group of the NPC, art. 5. See also NPC Organization Law, art. 25; Procedural Rules of the Standing Committee, art. 12 -13, 27. See generally Cai, *supra* note 4, at 211; Liu & Cheng, *supra* note 1, at 229.

112. See notes 378-383 and accompanying text *infra*.

113. Its control in this regard is similar to that exercised by the chair of a House or Senate committee in the United States Congress.

114. The Chairman of the Standing Committee is sometimes wrongly referred to as the "Chairman of the NPC." In fact, the NPC itself has no Chairman.

115. Currently there are 19 Vice Chairmen. See Records, *supra* note 8, at 782.

116. PRC CONSTITUTION, art. 66. According to a 1989 constitutional interpretation of the NPC, partial terms do not count towards this limit.

117. See Cai, *supra* note 4, at 211.

118. See Procedural Rules for the Chairmen's Group, art. 6.

119. See Procedural Rules for the Chairmen's Group, art. 7.

120. See Liu & Cheng, *supra* note 1, at 229. This Secretary's Group should not be confused with the Secretariat, which oversees the Standing Committee's corporate operations.

121. See Procedural Rules for the Secretary's Group, art. 2. None of these members have constitutional limitations placed on their tenure.

Chairman's Group, the Secretary's Group meets once every two weeks.¹²² The Secretary's Group prepares the draft agenda for both the Chairmen's Group and for the Standing Committee, and assembles and distributes material relevant to these sessions to their respective members.¹²³ It also drafts the legislative plans, and acts as a kind of preliminary floor manager for legislative proposals originating outside of the Standing Committee itself.¹²⁴

The procedural powers of both the Chairmen's Group and the Chairman are considerable, but they are limited. The Chairman of the Standing Committee does not control personnel placement either on the Standing Committee or in the Chairmen's Group. For this reason, while the Chairman does possess strong say over what the Chairmen's Group (and by extension the Standing Committee and the Plenary Session) will consider, he cannot direct the outcome of that consideration once it reaches the floor. The Chairman must still bargain with other members of the Group in order to effectuate his particular interests.¹²⁵ Moreover, the Chairman's personal resources are limited, and thus he must rely on expertise of NPC staff in making many decisions. Most of that staff owe their allegiances to the NPC, not the Chairman.¹²⁶

2. The Plenary Session

The Plenary Session is the full meeting of the NPC delegates. Under the constitution, the Plenary Session must convene at least once a year in the first quarter of the year.¹²⁷ Sessions normally run for between two and

122. See Procedural Rules for the Secretary's Group, art. 4(1).

123. See Procedural Rules for the Secretary's Group, art. 2(3). The Secretary Group's draft agenda for the Chairmen's Group is approved by the Chairman of the Standing Committee. The draft agenda for the Standing Committee is approved by the Chairman and the Chairmen's Group. See generally Liu & Cheng, *supra* note 1, at 229; Cai, *supra* note 4, at 414.

124. This process is described in further detail below. See notes 378-407 and accompanying text *infra*.

125. Interview (Law Committee).

126. Interview (Secretary's Group). Staffers working with the Secretary's Group, which drafts the agendas for both the Chairmen's Group and the Standing Committee, report that the Chairman routinely approves their draft agendas with no amendment.

127. PRC CONSTITUTION, art. 61 (NPC Plenary Session must meet a minimum of once per year); Procedural Rules of the Plenary Session, art. 2 (Plenary Session must meet in the first quarter of each calendar year). Additional sessions can be called by either the Standing Committee or by 2/3rds of the delegates, but there is no record of this yet happening.

three weeks.¹²⁸ Sessions require a quorum of at least 2/3rd of the 2978-member delegate body in order to be convened.¹²⁹

During a Plenary Session, the delegate body is divided into 32 delegate groups, which provide more practical fora for delegate discussion.¹³⁰ Delegate groups are formed according to appointing jurisdiction.¹³¹ A delegate group has corporate capacity to submit legislative proposals to the Plenary Session, and to subpoena governmental actors.¹³² Larger groups, such as those for Sichuan and Guangdong, will frequently sub-divide themselves into smaller, sub-groups to facilitate vetting. However, these sub-groups have no independent corporate capacities.¹³³

Each Plenary Session is administered by a Presidium. The function of the Presidium during a Plenary Session is similar to that of the Chairmen's Group in the Standing Committee, but with several notable additions. First, the Presidium directs the preliminary evaluation of new legislative proposals submitted to a Plenary Session. This power is exercised by the Secretary's Group in the Standing Committee. Second, a special meeting of the Presidium will sometimes vet and amend certain types of items while that item is under consideration on the floor of a Plenary Session.¹³⁴ The Chairmen's Group, by contrast, does not vet items currently under consideration on the Standing Committee floor.

The Presidium is a temporary body, existing only for the duration of the Plenary Session. Each session elects its own Presidium anew. There is no corporate continuity between the Presidiums of different Plenary Sessions.

128. See Documents, *supra* note 7, at 854-855.

129. See Procedural Rules of the Plenary Session, art. 4 (requiring quorum). See also Records, *supra* note 8, at 742 (stating size of delegate body).

130. See Procedural Rules of the Plenary Session, art. 7.

131. See Procedural Rules of the Plenary Session, art. 7. With regard to most delegates, the appointing jurisdiction is their respective province. However, the PLA also selects a certain number of delegates, and these delegates meet in a PLA delegate group.

132. See Procedural Rules of the Plenary Session, art. 21 (authorizing delegate groups to submit legislative proposals); Procedural Rules of the Plenary Session, art. 41 (authorizing delegate groups to subpoena of governmental officials). Group subpoena's must be approved by the Presidium (the leadership of the Plenary Session) before issuing.

Corporate actions of the Delegate Group are manifested by affirmative vote of more than one-half of its members.

133. See Procedural Rules of the Plenary Session, art. 7.

134. See notes 417-419 and accompanying text *infra*.

The Presidium consists of around 150 members. The Presidium may include members who are not delegates to the NPC, and by tradition will include party leaders of the CCP and other political parties, and representatives from the military, various trade associations, and representatives of other social interests.¹³⁵ The Presidium also includes representatives from each province, and from each national minority group of over 100,000 members. By tradition, the Presidium does not include senior governmental leaders.¹³⁶ Presidium members are nominated by the Standing Committee¹³⁷ and confirmed by the Plenary Session.¹³⁸ Once formed, the Presidium elects its own leadership, called the Standing Chairmen, to preside over the Presidium's own agenda. By tradition, the members of the Presidium's Standing Chairmen consist of the NPC Standing Committee's Chairmen's Group, along with one additional person drawn from and selected by the CCP Politburo.¹³⁹

Despite the fact that its membership includes CCP officials, the Presidium is sometimes able to act somewhat independently of the CCP hierarchy. For example, the 1993 Presidium, acting on the complaint of a number of delegates, refused to accept a bill tendered to the Plenary Session directly by the party on the grounds that the CCP lacked standing to submit the bill.¹⁴⁰

3. Basic vs. Ordinary Legislation

The principal jurisdictional distinction between the Plenary Session and the Standing Committee lies in their different legislative competencies. The Plenary Session's legislative competence is limited to "basic" legislation, over which it enjoys exclusive legislative jurisdiction.¹⁴¹ Basic

135. See Cai, *supra* note 4, at 359.

136. See *Presidium Members Announced*, SOUTH CHINA MORNING POST, March 1, 1997, at 11.

137. See note 591 *infra* (discussing CCP's role in nominating persons for high constitutional office).

138. See Procedural Rules of the Plenary Session, art. 8. The Presidium is elected in a special meeting of the Plenary Session, called the Preparatory Meeting. Technically, this Preparatory Meeting occurs a day before the Plenary Session is formally convened. See notes 664-666 and accompanying text *infra*.

139. See Cai, *supra* note 4, at 364.

140. See *Handling Amendments*, *supra* note 63 (discussing this incident).

141. See PRC CONSTITUTION, art. 62(3). There are other differences as well. Only the Plenary Session may confirm persons to high constitutional office or amend the constitution. On the other side, authority to interpret the constitution and the laws is only given to the Standing Committee.

laws take precedence over other forms of legislation, including ordinary legislation as passed by the Standing Committee.

The constitution enumerates three basic laws - civil law, criminal law, and organization laws,¹⁴² but it also states that this list is not exclusive.¹⁴³ The question determining whether to treat a particular legislative matter as a basic law or as an ordinary law is a point of considerable debate among NPC staffers, scholars and commentators. Most suggest that laws significantly affecting either governmental operations or the constitutional rights of citizens should be regarded as basic laws.¹⁴⁴ Since such laws have significant impact on the constitutional structure, the argument goes, they require the stronger constitutional pedigree of the more representative Plenary Session. The General Office Research Staff (which recommends to the NPC leadership whether a legislative proposal should be handled as a basic or ordinary law) uses this principle in making its recommendations.¹⁴⁵ Its arguments can sometimes have persuasive effect as in the case of the village government law (which the Chairmen's Group reclassified as a basic law on the General Office's recommendation).¹⁴⁶

The decision of whether a particular piece of legislation goes to the Plenary Session is not without its consequences. Basic laws receive considerably greater publicity than those which only go through the

142. Organization laws set out the basic parameters of the operations of the various constitutional bodies. In a sense, their basic function is similar to a corporate charter. All constitutional organs have organization laws attached to them except the Central Military Commission and the Presidency.

143. See PRC CONSTITUTION, art. 62(3). This is a product of China's civil law heritage. The drafters of the original constitution in which this was framed envisioned China developing its own code, with these divisions forming the fundamental sections of the code. China has yet to codify its laws.

144. See, e.g., Cai, *supra* note 4, at 236-38; Liu & Cheng, *supra* note 1, at 82-83. See also Cai Dingjian, *Lifa Quan yu Lifa Quanzhan [Legislative Authority and its Limits]*, *FALU YANJIU*, No. 5, 1993, at 3.

145. Interview (General Office Research Department).

146. Interview (General Office Research Department). See also, Tanner, *supra* note 1, at 79. However, attempts to get the Standing Committee to reclassify a public demonstration law as a basic law failed in 1989. See *id.* See also Cai, *supra* note 144, at 5 (article by General Office Research Department staffer arguing that public demonstration law should be treated as a basic law).

Standing Committee.¹⁴⁷ Therefore, basic legislation may well have a stronger disciplining effect on other political actors.¹⁴⁸

B. *The Delegate Body*

At present, the principal purpose of the delegate body is to vet and amend agenda items, rather than to conceive them or judge their fate. Delegates have capacity to introduce items to the NPC's agenda, but are not particularly effective in doing so.¹⁴⁹ On the other hand, delegates, while not yet able to defeat agenda items outright, increasingly show the ability to defeat them in detail. For example, delegate opposition in the Plenary Session forced significant changes to the 1997 amendments to the criminal law, the resolution establishing Shenzhen as a special economic zone,¹⁵⁰ the Education Law and Banking Law,¹⁵¹ and to the policy goals outlined in the 1997 work report of the State Council.¹⁵² Delegate opposition in the Standing Committee forced significant changes in the

147. Because of the greater publicity attaching to meetings of the Plenary Session, draft basic laws are routinely discussed and analyzed in articles in the popular press. Ordinary legislation is less frequently discussed.

148. See, e.g., *Guofang Lingcheng de Jiben Fa — Guofang Fa Kewang Chu Tai* [A Basic Law for National Defense — National Defense Law Can Go to the [NPC] floor], FAZHI RIBAO [LEGAL SYSTEM DAILY], Jan 28, 1997, at 3 (noting that in choosing to treat a proposed national defense law as a basic law rather than as ordinary legislation, the Standing Committee demonstrated its appreciation of the importance of national defense) [hereinafter *National Defense Law*]. Even without effective court enforcement, there is a cost associated with overtly breaking a known legal norm. This fact is recognized even in China. See, e.g., Chen Youxi, *Dui Xingzheng suong Kunjing de Hongguan Sikao* [Thought on the Difficulties of Administrative Litigation], XINGZHENG FAXUE YANJIU, No. 4, 1993, at 41, 41 (noting the political costs of overt administrative disregard for legal mandate).

149. According to a recent interview with Qiao Shi, Chairman of the NPC's Standing Committee, during the 1997 NPC plenary session, delegates sought to introduce some 700 items into the NPC's agenda. Of these, some 140 were forwarded to relevant NPC departments for consideration. Mr. Qiao notes that some of the items in the legislative plan were introduced via delegate initiatives, but does not say which ones. See *Qiao Shi Weiyuanzhang Jieshou "Ouzhou Shibao" Caifang* [Chairman Qiao Shi Interviewed by "European Times"], FAZHI RIBAO [LEGAL SYSTEM DAILY], April 1, 1997, at 1 [hereinafter *Chairman Qiao Shi Interviewed by "European Times"*]. See Cai, *supra* note 6, at 261 (noting that delegate legislative initiatives stand virtually no chance of getting to the floor of the NPC); notes 327-329 and accompanying text *infra* (discussing how the legislative plan discriminates against delegate legislative initiatives).

150. See Cai, *supra* note 4, at 280.

151. See *Defiant deputies*, *supra* note 40, at 1.

152. See *Prime Minister's Work Report Amended*, SOUTH CHINA MORNING POST, March 15, 1997 (Internet edition) (noting how threat of delegate defection inspired Li Peng to amend his work report).

Copyright Law,¹⁵³ the State-Owned Enterprises Law,¹⁵⁴ and even in the politically-sensitive resolution approving the Three Gorges Dam Project.¹⁵⁵ Opposition by NPC delegates in the Standing Committee even forced the State Council to withdraw draft bankruptcy legislation.¹⁵⁶

Both delegate dissension and threat of delegate dissension do have a disciplining effect on other political actors.¹⁵⁷ For example, during the 1995 Plenary Session, over a quarter of the delegate body failed to support a draft Banking Law and a draft Education Law tendered by the State Council. The failure to support was due in large part to delegate dissatisfaction with the lackadaisical way the State Council and the CCP presented these bills to the NPC.¹⁵⁸ The following year, the State Council released a set of internal regulations requiring administrative officials to be more responsive to the NPC and its delegates.¹⁵⁹ During the same 1995 Plenary Session, over a third of the delegates also failed to approve the CCP's nominee for Vice Premier, Jiang Chunyun, because of concerns over his qualifications and abilities.¹⁶⁰ Subsequently, the CCP began discussing changes to the procedures it uses to place nominations before the NPC.¹⁶¹

153. See *Difficult Issues*, *supra* note 26 (discussing delegates' effect on draft copyright law).

154. See Tanner, *supra* note 1, at 71.

155. See Cai, *supra* note 4, at 280.

156. See *id.* at 262.

157. See *Opposing Votes Seen as Warning to Jiang*, HONG KONG STANDARD, March 15, 1997 (Internet edition); *Critics of Jiang Join Forces in Opposition*, SOUTH CHINA MORNING POST, March 18, 1995 (noting ability of NPC to serve as a forum for opposition bandwagoning); *NPC Vote Snub for Jiang Ally*, *supra* note 40, at 1 (same); *Defiant Deputies*, *supra* note 40, at 7 (noting political concerns caused by large dissent).

158. Interview with Sarah Lawrence, reporter for U.S. News & World Report. See also *Deputies Accuse Party*, *supra* note 52, at 1.

159. See *NPC Sets Regulations*, *supra* note 51, at 2.

160. See *Deputies Accuse Party*, *supra* note 52, at 1 (noting strong delegate opposition to Jiang's nomination); *NPC Vote Snub for Jiang Ally*, *supra* note 40, at 1 (36% of NPC delegates fail to support Jiang's nomination).

161. The CCP considered adding a preliminary NPC vetting process in the session before the CCP finalized its nomination list, thus allowing the CCP to take better account of possible delegate objections. See *Beijing to Replace 20 Ministers in Reshuffle*, SOUTH CHINA MORNING POST, January 14, 1997 (Internet edition). This is in addition to the normal vetting that takes place after the finalized list is submitted. See *infra* notes 570-595 and accompanying text *infra* (discussing procedure for NPC confirmation). In effect, this makes the NPC's confirmation process somewhat similar to its process used by the Standing Committee for passing legislation. See notes 387-397 and accompanying text *infra* (discussing how Standing Committee double-vets of statutory legislation). This change has not been implemented, however.

Despite these recent successes, many among the NPC staff feel that the delegate body is still the weak link in the NPC's institutional development.¹⁶² The principal complaint is that delegates still display insufficient professionalism.¹⁶³ Not only does this make it difficult for the NPC to develop the role of the delegate within the NPC system, it also renders the NPC much more susceptible to outside pressures.

Nevertheless, as noted above, the delegate body is developing in this area.¹⁶⁴ This is due in part to concerted efforts by the NPC leadership to

162. See, e.g., *Higher Standards for Deputies*, CHINA DAILY, June 13, 1995, at 4 (translation of June 12, 1995 editorial in Fazhi Ribao noting relationship between delegate quality and the effectiveness of the NPC)[hereinafter *Higher Standards*]; see also Wu Wenbao, *Guanyu Daibiao Yian Wenti de Sikao [Reflections on the Problem of Delegate Bills]*, ZHONGGUO FAXUE, No. , 1993, at 33 (article by member of Standing Committee secretariat noting need to improve delegate participation) [hereinafter *Reflections*]. See also Liu & Cheng, *supra* note 1, at 260 (noting NPC efforts to increase the professionalization and role of the delegate body).

163. See, e.g., Liu & Cheng, *supra* note 1, at 258 (noting low quality of delegates); Cai Dingjian, *Rendahuiyi Biaoju Jipiao Fangfa Yanjiao [Research Into NPC Voting Methods]*, FAXUE, No. 9, 1994, at 9, 10 (noting problem of delegates not attending session meetings).

The reasons for the NPC's weak delegate body are part historical and part systemic. As noted above, for most of its history the NPC played little real role in China's political operation – it was basically the hand-maiden of the State Council and the CCP. See Cai, *supra* note 4, at 380. With little hope of exerting any real impact, there was little incentive for delegates to adopt professional attitudes or develop professional norms. Moreover, the provincial bodies responsible for selecting delegates to the NPC and assigning these positions tended to regard these positions as a kind of honorary posting into which they could ease their older or less competent cadres in order to make room in more vital positions for younger, better educated staff. Cf. Tanner, *supra* note 1, at 74, 75 (noting a similar attitude among the central leadership). As a result, the delegate body tended to be composed of less capable persons, forcing the NPC to devote most of its earlier institutional development to support services (over whose staffing it has much more control).

Other more structural factors continue to prevent the NPC from developing more mature delegate institutions. Delegate selection and remuneration are wholly controlled by the provinces, which have traditionally perceived little utility in devoting particular attention or resources towards this position. The professional development of the delegate body is also hindered by the fact that the delegate position, including that for the Standing Committee, is not a full-time position. See Cai, *supra* note 4, at 382; Liu & Cheng, *supra* note 1, at 50. Of course, any effort to increase delegate commitment to his or her NPC duties would be severely hampered by the fact that each delegate's remuneration comes from the province he or she represents, which would likely oppose the greater financial burden associated with increasing the commitments associated with the position.

Professionalization is further hindered by the procedures and structure of the NPC itself, which tend to discourage contributions from individual delegates. Few institutional resources are made available to delegates. See *Reflections*, *supra* note 162, at 34. Individual delegates do not have their own research staff (unlike the members of the American Congress, for instance). Meeting procedures and legislative procedures make it exceedingly difficult for individual delegates to bring items to the attention of the floor. See *id.* Moreover, with regard to the Plenary Session, the potential contributions of the individual delegate are further devalued by both the sheer size of the delegate body and its transient existence. See Cai, *supra* note 4, at 381-382.

164. See notes 37-55 and accompanying text *supra*.

foster such development.¹⁶⁵ The NPC devotes considerable resources both to keeping delegates informed about the matters they are expected to discuss (during both the Plenary Session and in the meetings of the Standing Committee) and to recording and responding to delegate concerns.¹⁶⁶ Further efforts along these lines, including the development of more rigorous delegate qualifications, are currently being explored by the General Office Research Department.¹⁶⁷ Commentators, including those from the NPC itself, have also been publicly debating the proper relationship between a delegate and his or her constituency.¹⁶⁸ Not only does this debate stimulate the development of professional norms attached to the delegate position, but the public nature of this debate should promote the internalization of these norms by delegates.¹⁶⁹

A more powerful factor driving this development is the increasing role that pluralist bargaining plays in both the NPC and in China's political environment. Lobbying has become a significant activity within the NPC, and much of this lobbying revolves around the delegates. Such lobbying appears in many forms. The most prevalent form of lobbying is by NPC delegates on behalf of regional interests or constituents. For example, NPC delegates from the areas affected by the Three Gorges Dam Project were among the most active opponents to the resolution authorizing that project. Their opposition was able to force that resolution back to committee for revision several times. During recent years, delegates from underdeveloped provinces have also lobbied the State Council to relax public credit restrictions. Women from the NPC have lobbied the NPC leadership to increase the number of women delegates to the Standing

165. See, e.g., Liu & Cheng, *supra* note 1, at 260 (noting effort by NPC and Peng Zhen to develop the delegate body during the 1980s); Tanner, *supra* note 1, at (noting efforts of Peng Zhen); *Defiant deputies*, *supra* note 40, at 1 (noting Qiao Shi's public support for delegate "defiance" of party leaders); *Deputies Accuse Party*, *supra* note 52 (Vice Chairman Tian Jiyun encouraging delegates that their votes would not be "investigated" by the party).

166. See, e.g., notes 366-429 and accompanying text *infra* (discussing vetting procedures for legislative bills).

167. See, e.g., Liu & Cheng, *supra* note 1, at 258-62 (noting the General Office's thinking along these lines).

168. See, e.g., *Theory and Practice*, *supra* note 81; *Higher Standards*, *supra* note 162 (reprint of Fazhi Ribao editorial discussing need for more professional NPC delegates).

169. See John W. Meyer & Brian Rowan, *Institutional Organizations: Formal Structure as Myth and Ceremony*, in *THE NEW INSTITUTIONALISM* 41 (Walter Powell & Paul DiMaggio, eds. 1991) (discussing how institutional justifications become internalized as institutional norms by succeeding generations).

Committee.¹⁷⁰ Delegates also routinely petition the NPC and other constitutional actors — most prominently the Supreme People's Court — to investigate particular matters involving a constituency or regional interests.¹⁷¹ Delegates, particularly those to the Plenary Session, also use the session meetings to attract business to their home provinces.¹⁷² Delegates are also becoming the focus of lobbying efforts by others, particularly governmental and party actors.¹⁷³

As such lobbying develops, it counteracts one of the principal structural impediments facing the institutional development of the delegate body — the provinces' low regard for the utility of the delegate position. The advent of such lobbying means that better and more respected delegates are more able to attract attention and benefits to their respective provinces or constituencies. Lobbying also increases the power and status of the delegate position. This development should make the position more attractive to more educated and motivated individuals.

170. See, e.g., Cai, *supra* note 4, at 280 (discussing delegates opposition to Three Gorges dam resolution); *Industry Protection Urged*, SOUTH CHINA MORNING POST, September 23, 1996, at 6 (reporting on a petition sent to the CCP by 100 NPC delegates urging more protectionist trade policies); *Funding Pleas Fail*, SOUTH CHINA MORNING POST, March 17, 1996, at 6 (NPC delegates from central provinces lobby State Council for extra development funds); *Helping the West*, CHINA DAILY, March 15, 1996, at 4 (letter from Gansu NPC delegate saying that "[t]he central government should pay more attention to the development of the hinterland regions . . ."); *Desperate Cry From Hinterlands for Funds*, SOUTH CHINA MORNING POST, March 17, 1995, at 6 (same) [hereinafter *Desperate Cry From Hinterlands for Fund*]; *Women in Protest*, *supra* note 52 (reporting on petition by women delegates to increase female representation on the Standing Committee).

See also Tanner, *supra* note 1, at 86 (lobbying by the All-China Trade Federation Union); Zhang Mingjie, *supra* note 78 (discussing the development of such interest groups in the late 1980s). Cf. *Dumping Ban for Yangtze*, SOUTH CHINA MORNING POST, December 10, 1996 (Internet edition) (noting development of environmental lobby in China).

171. See Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. (1993) at 145, 153.

172. See, e.g., *Desperate Cry From Hinterlands for Fund*, *supra* note 170 (noting that efforts by Shaanxi delegates to attract business to their province).

173. As noted above, this concern has caused the CCP and the State Council to pass internal rules regulating when and how party and executive officials can interact with NPC delegates during the NPC's Plenary Session. See *NPC Sets Regulations*, *supra* note 51 (internal regulations jointly passed by State Council and CCP forbidding unauthorized contact between department officials and NPC delegates). According to one NPC staffer, however, the State Council and the CCP overestimate the extent of this form of lobbying. Interview (General Office Research Department).

1. Selection to the Plenary Session

The full delegate body of the NPC currently consists of 2,978 members.¹⁷⁴ Delegates serve for coterminous five-year terms, and are elected and paid by the province or unit they represent.¹⁷⁵ Representation is not strictly proportional - urban areas receive four times as many delegates per voter as do rural areas.¹⁷⁶ In addition to provincially-assigned slots, a certain number of delegate slots are assigned to the People's Liberation Army.¹⁷⁷ A delegate must be over 18 years old, a citizen of China, mentally competent, and not have had any of her political rights curtailed by criminal conviction.¹⁷⁸ A delegate may be removed from office if he or she misses two plenary sessions.¹⁷⁹

The procedure for selecting delegates to the Plenary Session is as follows.¹⁸⁰ For each new term of the NPC, the outgoing NPC Standing

174. See Records, *supra* note 8, at 742.

175. See PRC CONSTITUTION, art. 60.

176. For the 8th NPC, delegate-to-population ratio for rural areas was one delegate for every 825,200 persons (1,091 delegate slots total). For urban areas, the ration was one delegate for every 206,300 residents (1,263 delegate slots total). It is unclear whether these figures take into account the large — and largely underground — migrant worker populations that are building up in many of the major urban centers in China. See Cai, *supra* note 4, at 132.

Such malapportionment practices are not unknown to liberal democracies. Both Japan and France give greater representational weight to rural areas in their national legislature, on the theory that without such assistance, the legitimate needs of the rural minority would be ignored by an urban-dominated parliament. In 1787, a similar concern voiced by low-population states lead to the creation of the still malapportioned United States Senate. The official theory underlying China's malapportionment is somewhat different, since China's Marxist ideology will not admit of different social interests. Instead, the Chinese justification for this practice is that the urban population is more sophisticated than the rural, and thus produces a better quality delegate. See Andrew Nathan, China's Constitutionalist Option 18 (forthcoming 1996) (on file with author) [hereinafter China's Constitutional Option].

177. As with provincial delegates, PLA delegates are remunerated by the PLA and selected according to the PLA's own procedures and criteria. The 8th NPC included some 267 delegates from the PLA, the largest single contingent in the NPC. See Records, *supra* note 8, at 764. Sichuan, the most represented province, has only 205 delegates. See *id.* at 759.

178. See Zhongguo Renmin Gongheguo Chuanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Xuanju Fa, art. 3 (requiring that delegates be over 18 and not be subject to criminal conviction depriving them of political rights); art. 26 (requiring that delegates be mentally competent); Zhongguo Renmin Gongheguo Chuanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Daibiao Fa, art. 42 (requiring that a delegate be removed if he or she loses citizenship).

179. Zhongguo Renmin Gongheguo Chuanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Daibiao Fa, art. 41.

180. Unless otherwise noted, all information in this section is taken from Cai, *supra* note 4, at 151-153. This procedure varies somewhat from province to province.

Committee determines how many delegate slots shall be apportioned to each province (and the PLA). The provincial Party Standing Committee then drafts up a name list of proposed delegate nominees. Most of these nominees are selected in consultation with various parties and social organizations. But some of these nominees (about 10% of the total NPC delegate slots) are designated by the NPC Standing Committee itself, a process called ‘capping’ (“daimao”).¹⁸¹ The Provincial Party Standing Committee then submits its draft list (which includes the NPC’s list of “capped” delegates) to the Standing Committee of the Provincial People’s Congress for confirmation.

At the same time, the Provincial People’s Congress draws up its own list of nominees. Generally, a nominee is placed on that list upon motion by 10 or more delegates.¹⁸² The party’s list (which includes ‘capped’ nominees) is combined with the congress’s list, and the combined list is then submitted to the floor of the provincial congress for preliminary vetting. Thereafter, the Standing Committee for the Provincial People’s Congress draws up the official list of nominees. The number of nominees on the official list generally exceeds the number of allocated delegate slots by between 20% and 50%, depending on the province.¹⁸³ The official list is then submitted to the delegates for formal vote.

Each nominee is voted on individually. Capped nominees are confirmed if they receive affirmative votes from more than half those casting ballots. If a capped nominee is rejected, the NPC Standing Committee submits another nomination — the capped nominee is not replaced by a locally selected nominee. Non-capped nominees are also confirmed if they receive at least 50% affirmative votes. If the number of candidates confirmed exceeds the number of delegate positions available, delegates are selected on the basis of the highest number of affirmative votes received. If the number of confirmed candidates is less than the number of delegate slots to be filled, a second list of nominees is made up for the remaining slots. As with the original nominee list, the number of

181. The 8th NPC included 220 delegates who had been ‘capped’ by the NPC Standing Committee. Capping is often used in part to insure that desired numbers of women, minorities and other constituency groups are included in the delegate body. Cai, *supra* note 4, at 151-152; China’s Constitutional Option, *supra* note 176, at 47. Cf. *Women in Protest*, *supra* note 52 (women Standing Committee delegates petition NPC Standing Committee for greater female representation in the Plenary Session).

182. See Liu & Cheng, *supra* note 1, at 195.

183. See Cai, *supra* note 4, at 152. In Beijing, local regulation requires that the Party may nominate no more than 20% of Beijing’s delegates to the NPC. See *id.*

delegates on this second list "should" exceed the number of remaining unfilled delegate slots by between 20% and 50%. These nominees are generally picked from among the unconfirmed nominees from the first ballot.¹⁸⁴ The delegates then vote a second time. As with the first time, the nominees must be confirmed by affirmative votes of more than half of the voting delegates and are selected on the basis of the highest total of affirmative votes received.¹⁸⁵

2. Selection to the Standing Committee

Currently, the Standing Committee consists of 156 delegates.¹⁸⁶ Terms of service on the Standing Committee are coterminous with those for the Plenary Session. According to practice, about half of the slots on the Standing Committee are allocated according to province; the other half are at-large.¹⁸⁷ A number of these at-large slots are traditionally reserved for representatives from particular interests and/or organizations (such as the All-China Women's Federation) thus giving the Standing Committee a certain degree of constituency and geographical representation.¹⁸⁸ Under the constitution, delegates to the Standing Committee may not coterminously hold office in either the State Council, the Supreme People's Court, the Supreme People's Procurate, or the Presidency.¹⁸⁹

Delegates to the Standing Committee are selected at the beginning of each new NPC term, and are nominated by the outgoing Standing Committee.¹⁹⁰ Since 1988, these nominations have exceeded the number of slots available by a small number (9 in 1988; 7 in 1993).¹⁹¹ The

184. *See id.* The procedures do not say how it is to be determined which of the unconfirmed nominees are to be selected to participate in the run-off election. Presumably, the choice is left to the provincial congress' standing committee.

185. The voting procedures are unclear as to what happens should these nominees all continue to fail to receive a majority of affirmative votes. No one interviewed for this article is aware of any instance in which a second ballot was necessary.

186. *See* Records, *supra* note 8, at 782.

187. Interview (General Office Research Department).

188. *See, e.g.,* Tanner, *supra* note 1, at 63, 86; *Cf. Women in Protest, supra* note 52 (Women Standing Committee delegates petition NPC Standing Committee for greater female representation on the committee).

189. *See* PRC CONSTITUTION, art. 65. There is no similar constitutional restriction placed on delegates to the Plenary Session. In practice, the same exclusion principle applies. Interview (CSRC).

190. *See* PRC CONSTITUTION, art. 66.

191. *See* Cai, *supra* note 4, at 210 (1988 elections); Records, *supra* note 8, at 531 (1993 elections).

nominee list is submitted to the Presidium during the first session of the new NPC. The list is then distributed among the delegate groups for informal discussion. Based on the results of these discussions, the Presidium then draws up the official list of nominees. Each nominee is voted on separately, and those 156 nominees receiving the highest number of affirmative votes are chosen to serve on the Standing Committee. As with delegates to the Plenary Session, delegates to the Standing Committee must be confirmed by more than half those casting ballots. The procedures do not say what happens if those receiving majority support are fewer than the number of slots to be filled.¹⁹²

The same procedures are used by the Plenary Session to nominate and confirm the Standing Committee's Chairmen, Vice-Chairmen, and General Secretary, except that the number of nominees submitted for these positions is equal to the number of slots available.¹⁹³

C. *Support Services*

The development of the NPC's support services has been a major factor in the NPC's institutional emergence.¹⁹⁴ In fact, these support services continue to play a more instrumental role in the NPC's operations than does the delegate body itself. Currently, the NPC supports ten distinct support services, each with its own research staff.¹⁹⁵ The two most important of these services are the General Office Research Department¹⁹⁶ and the Commission of Legislative Affairs ["CLA"].¹⁹⁷ The General Office Research Department and the CLA specialize in the strategic aspects of legislative development and the technical aspects of legislative drafting, respectively. These two bodies have been the principal engines driving the institutional development of the NPC's legislative competence. In addition,

192. See Cai, *supra* note 4, at 210.

193. See *id.* Some provincial people's congresses have begun instituting multi-candidate nominations for these positions as well.

194. See notes 13-36 and accompanying text *supra*.

195. But see also note 202 and accompanying text (noting that CLA and the Law Committee share research staff).

196. Several members of that staff translate the title of this office as the "Congressional Research Office of the NPC." It is not clear whether this translation is official.

197. "Fazhi Gongzuo Weiyuanhui." Some people translate this as Legislative Affairs Works Committee.

eight special standing committees assist the NPC in various aspects of policy development.¹⁹⁸

1. Commission for Legislative Affairs ["CLA"]

The CLA, a part of the Standing Committee, is the support organ which is principally responsible for the NPC's legislative drafting. At present, the CLA has a research staff of over 200, distributed among five research offices. These include four departments specializing in particular substantive areas of law — economic law, civil law, criminal law, and public law (administrative and constitutional law), as well as a non-specialized "Research Office."¹⁹⁹ Most of the research staff in these offices possess law degrees.²⁰⁰ The CLA also has its own general office, which oversees the CLA's staffing needs. The CLA is not subject to the CCP's nomenklatura system, and thus is generally able to control its own hirings.²⁰¹ This gives the CLA a more professionalized and higher quality staff than those found in many other Chinese governmental or political organs. According to one NPC staffer (from another department), the quality of the CLA's research staff is one of the major reasons the NPC has been able to seize control over legislative development from the State Council.²⁰² Additionally, the CLA also has its own law library, which it administers independently of the NPC's main library.²⁰³

198. Special Committees, unlike the three bodies mentioned above, are technically independent from the Standing Committee, although some report that the Chairmen's Group is responsible for setting their work priorities. *See, e.g.,* Tanner, *supra* note 1, at 80. Others within the NPC dispute this characterization. Interviews (Economic and Finance Committee; General Office Research Department).

199. *See* Tanner, *supra* note 1, at 83; Cai, *supra* note 4, at 416.

200. Interview (General Office Research Department).

201. Interview (General Office Research Department). *See also*, Tanner, *supra* note 1, at 90 n. 21.

202. For example, the scholarly publication produced by the CLA and its staff are far superior to those emanating from its State Council counterpart, the Bureau of Legislative Affairs ["BLA"]; the CLA also plays a much more active role in legislative drafting than does the BLA. In fact, there is much evidence that the BLA has basically lost control of much of the State Council's drafting activities. Interviews (CSRC; Ministry of Justice).

203. Interview (CLA). The NPC's main library is administered by the General Office Research Department. According to the CLA, their library is the "Law Library," whereas the library run by the General Office Research Department is the "General Library." The General Office Research Department disputes this characterization, claiming instead that the CLA's library is merely a departmental collection of materials.

The entire research staff of the CLA also serves as the research staff for the Law Committee (see below).²⁰⁴ However, the leadership of each organ remains distinct, as do their normative roles within the NPC. Thus, the two bodies evince distinct institutional personalities.²⁰⁵

The CLA has a number of distinct institutional functions within the NPC's legislative process. In addition to drafting legislative proposals for the Standing Committee and Chairmen's Group,²⁰⁶ it also evaluates legislative drafts submitted to the NPC from other drafters. The CLA also summarizes and reports to the Chairmen's Group the opinions of the various special standing committees regarding legislative proposals. The CLA also promulgates "legal interpretations" under its own name²⁰⁷ and is frequently consulted by the Supreme People's Court regarding particular interpretive problems.²⁰⁸

Obviously, there is significant conflict of interest among these various roles. In particular, staffers from other organs have publicly complained that the CLA does not always adequately represent their concerns and opinions, particularly when the CLA's own legislation is involved.²⁰⁹ This problem is exacerbated by the fact that the Chairmen's Group attaches considerable weight to the CLA's evaluation of particular proposals. In fact, until very recently the CLA was the only support service which could communicate directly to the Chairmen's Group. While this appears to be changing, the Chairmen's Group's continued reliance on the CLA gives the

204. See Cai, *supra* note 4, at 417.

205. For example, in reviewing the 1995 draft amendments to the Air Pollution Prevention and Control Law as drafted by the Environmental Protection Committee, the CLA showed significantly more institutional concern over certain provisions than did the Law Committee. See Liebman Correspondences, *supra* note 66.

206. According to CLA staffers, this now includes all basic laws, the highest source of legislation other than the constitution. Interview (CLA). See also, Tanner, *supra* note 1, at 83 (stating that CLA staffers also told him the same thing). This may be a normative principle, but it is frequently abrogated in practice. The National Defense Law, for example, was included as a basic law on the agenda for the NPC's 1997 Plenary, but was drafted by the PLA and the State Council's Ministry of Defense. See *National Defense Law*, *supra* note 148, at 3. See also, Tanner, *supra* note 1, at 83 (noting examples of other basic legislative drafted by the State Council).

207. See notes 450 and accompanying text *infra*. These "interpretations" are in fact a form of supplemental legislation, not judicial interpretations.

208. See Finder, *supra* note 171, at 153.

209. See, e.g., Li Xuxing, *Jiaqiang Zhuanmen Weiyuanhui Zai Lifa Shenyi Zhong de Zuoyong* [Enhance the Role of Special Committees in Legislative Deliberation], *ZHONGGUO FAXUE*, No. 3, 1993, at 51 (staffer from special committee discussing how NPC's internal procedures prevent special standing committees from fulfilling their constitutional role) [hereinafter *Special Committees*].

CLA a kind of de facto veto over the legislative drafts of other drafting organs.²¹⁰

Because of the CLA's central position in the NPC's legislative process, it is increasingly the target of lobbying efforts by diverse pluralist interests, who try to win in the CLA what they lost in the earlier stages of drafting. With regard to the 1995 amendments to the Air Pollution Prevention and Control Law, for example, the CLA became the target of intensive lobbying efforts by the industrial ministries and by high-sulphur coal producing provinces (such as Sichuan) after that legislation's drafter, the Environmental Protection Committee, imposed tough standards on the use of high-sulphur coal.²¹¹

The CLA, for its part, encourages this lobbying, seeing its role as one of providing a voice to interests that it believes have not been adequately considered by the drafters of the legislation.²¹² With regard to the 1995 amendments to the Air Pollution Prevention and Control Law, for example, the CLA pushed the interests of the coal ministry and coal producing provinces, ostensibly because they believed that neither NEPA nor the Special Standing Committee for Environmental Protection had given these interests adequate opportunity for input during the original drafting process.²¹³ Obviously, this is a major development in China's political environment, which has traditionally revolved around an ideology that regarded any overt recognition of the existence of differing social interest in China as heresy. The CLA not only allows divergent political interests to do battle over legislative development, it actively encourages them to do so. The CLA's drafting and review procedures are the first at China's central level to openly acknowledge the value of pluralist political dynamics.²¹⁴

210. See *id.* See also interview (General Office Research Department).

211. See Liebman Correspondences, *supra* note 66.

212. See Cai, *supra* note 4, at 416 (noting that one of the responsibilities of the CLA is to ensure that differing viewpoints are adequately represented in the legislative process). See also Interview (CLA) (same); Liebman Correspondences, *supra* note 66 (same). See generally, notes 334-432 and accompanying text *infra* (discussing how the CLA is involved in legislative process).

213. See Liebman Correspondences, *supra* note 66. Given the fact that the CLA is increasingly targeted for lobbying by various interests, it is unclear whether the CLA is in fact acting as a 'loyal opposition' or whether they are acting as agents for successful lobbyists. See *id.* However, persons familiar with the negotiations surrounding the securities law, which has also met with significant CLA opposition, do not believe that the CLA's opposition to that draft is due to any lobbying by external sources. Interview (CSRC).

214. See generally, Putman, *supra* note 27, at 86-91 (discussing the importance of such dynamics to the effectiveness of public institutions).

There are negative aspects to this development, however. Not only is this advocate role inconsistent with the CLA's role as impartial advisor to the Chairmen's Group, but in trying to diversify the sources of legislative input, the CLA is in danger of venturing beyond the core of its institutional competence — that of legislative drafting — into the area of policy development, which is supposed to be the responsibility of the special standing committees.²¹⁵ For example, the CLA tried to hold up the draft 1995 amendments to the Air Pollution Prevention and Control Law, as drafted by the Environmental Protection Standing Committee of the NPC, on the grounds that the pollution licensing scheme adopted in that draft was too restrictive and would thus inhibit economic development.²¹⁶ With regard to the current draft securities law, CLA objections reportedly involve such matters as trading and settlement requirements in the secondary market, thresholds for tender offers, and the structure of over-the-counter markets.²¹⁷ The CLA is not intended or designed to be an expert in such policy matters, and thus its understanding of the policy preferences and balancing of interests is open to question.

The CLA's increasingly skeptical scrutiny of legislative drafting also slows the pace of legislative development in China. Major policy differences between the CLA and the drafting group have resulted in substantial delay and uncertainty over when, if ever, important legislative proposals will reach the floor of the Standing Committee. Negotiations between the drafting group for the draft securities law and the CLA have delayed that draft from reaching the floor of the Standing Committee for over two years, with still no resolution in sight.²¹⁸ The Environmental Protection Standing Committee's dispute with the CLA over total load measuring also significantly delayed the passage of the 1995 Amendments to the Air Pollution Prevention and Control Law.²¹⁹

The NPC is aware of the problem of the Chairmen's Group's over-reliance on the CLA.²²⁰ Its principal response so far has been to develop means by which the special standing committees can communicate directly with the Chairmen's Group. This allows the CLA to continue focusing on its pluralist-enhancing function, while at the same time bringing more

215. See *Special Committees*, *supra* note 209. See also notes 243-244 and accompanying text *infra* (discussing role of special standing committees).

216. See *Special Committees*, *supra* note 209.

217. Interview (drafting group).

218. Interview (drafting group).

219. See Liebman Correspondences, *supra* note 66.

220. Interview (General Office Research Department).

diversified sources of objective information to the Chairmen's Group's attention. This does not address the legislative backlog created by the CLA's time-consuming review, however. But legislative viscosity is a problem inherent in most mature legislative systems. It is the price that the NPC and China will probably have to pay in switching from a legislative process founded on political command to a more constitutional one founded on political bargaining.

2. General Office and the General Office Research Department

The General Office of the Standing Committee is responsible for administering the daily activities of the Standing Committee.²²¹ The General Office has a "Research Department,"²²² which has been a major intellectual force behind the NPC institutional development. The Research Department, like the CLA, reports directly to the Chairmen's Group.²²³ The Research Department has about 70 research staff, divided into four research sections.²²⁴ Like the CLA, the Research Department also has its own general office,²²⁵ and its hiring is not subject to the CCP's nomenklatura system.²²⁶ Thus, it enjoys significant independence with regard to hiring and staffing, which allows it to field a particularly educated and professional staff.

The responsibilities of the General Office Research Department are two-fold. First, it is responsible for refining the NPC's structure and

221. See Tanner, *supra* note 1, at 80.

222. "Bangongting Yanjuishi." See also note 196.

223. Interview (General Office Research Department). Prior to 1995, the Research Department reported to the Chairmen's Group only indirectly, through the Standing Committee Secretariat. The rest of the General Office continues to report to the Secretariat.

224. These sections include the political section (zhengzhi ju), economic section (jingji ju), international section (guoji ju), and the jurisprudence section (lilun ju). One staffer in the Research Department suggests that there is little relationship between the title of the department and the research projects assigned to it by the NPC leadership. Interview (General Office Research Department). For example, the General Office Research Department researchers principally involved in the development of the supervision law, see notes 629-635 and accompanying text *infra*, are from the international section, not from the political section as one might expect. Interview (General Office Research Department).

225. "Bangongshi." This office should not be confused with the General Office of the Standing Committee (bangongting).

226. Interview (General Office Research Department). See also, Tanner, *supra* note 1, at 90 n.21.

procedures. This involves researching ways to better effectuate the NPC's constitutional authority and to further rationalize the NPC's internal rules and process.²²⁷ The Research Department also occasionally drafts legislation dealing with the NPC's constitutional operations.²²⁸

Second, the General Office Research Department is responsible for overseeing the rational coherence of the statutory system.²²⁹ This includes, for example, investigating whether the principles contained in proposed legislation are consistent with the existing legal framework as a whole;²³⁰ determining when older statutes have been superseded or should otherwise be consolidated;²³¹ and determining which particular organ should properly be given administrative or drafting jurisdiction over which particular area of regulation.²³² The Research Department also oversees the overall development of China's statutory corpus, assisting the Secretary's Group in drafting the NPC's one-year and five-year legislative plans.²³³

Several other departments of the General Office also play significant roles in the NPC's constitutional operations. These include the Letters Department, which handles complaints, petitions and inquiries from both delegates and citizens.²³⁴ The NPC receives over 70,000 of such letters

227. This includes, for example, determining effective distributions of legislative powers between national and local jurisdictions, as well as between different constitutional bodies at the national level. It also includes recommending which laws should be handled as "basic laws" and which should be handled as ordinary laws. Interview (General Office Research Department).

228. Under the 8th NPC's five-year legislative plan (drafted in 1993), the General Office Research Department was assigned drafting responsibility for the proposed Supervision Law (see text *infra*); and proposed amendments to the NPC Organization Law, Procedural Rules for the Plenary Session, and Procedural Rules for the Standing Committee. As of the 1997 Plenary, none of these proposals have made it to the floor of the NPC. See Ba Jie Chuanguo Renda Changweihui Lifa Guihua [Legislative Plan for the Standing Committee of the 8th NPC].

229. This particular responsibility was added to the Department's portfolio in 1992. Interview (General Office Research Department).

230. This is particularly important with regard to developing statutory frameworks for activities which cut across a number of laws and regulatory jurisdictions. One such example would be the legal framework for issuing treasury bills, which is governed in part by the banking Law and the Budget Law and effects the People's Bank of China, the Ministry of Finance, and the China Securities Regulatory Commission; and which is governed in part by the Banking Law and the Budget Law. Interview (General Office Research Department).

231. Interview (General Office Research Department). For example, the General Office was instrumental in the NPC's decision to draft a combined contract law.

232. During the drafting of the State Enterprise Law ("Guoyou Qiye Fa"), for example, the Research Department was called upon to decide whether enterprises should be supervised by the party cell or by a supervisory committee. Interview (General Office Research Department).

233. Interview (General Office Research Department). See notes 313-329 and accompanying text *infra* (describing formation of these plans).

234. See Cai, *supra* note 4, at 415.

each year,²³⁵ some of which result in NPC investigations.²³⁶ The Information Department oversees information flow both within the NPC and between the NPC and outside parties. For example, it organizes and distributes preparatory materials to the delegates prior to the convening of the Plenary Session and the Standing Committee.²³⁷ The General Office also administers the Library of the NPC Standing Committee.²³⁸

3. The Special Standing Committees

The special standing committees are the only NPC support organs to have independent constitutional status.²³⁹ As such, they are the only support service to exist independently of the Standing Committee, although their respective agendi are still largely determined by the Chairmen's Group.²⁴⁰ There are currently eight such committees. Seven focus on particular policy areas.²⁴¹ These "substantive"²⁴² special standing committees include the National Minorities Committee; the Economic and Finance Committee; the Foreign Affairs Committee; the Overseas Chinese Committee; the Education, Science, Culture and Health Committee; the Internal and Judicial Affairs Committee; and the Environmental Protection Committee. A ninth special standing committee, focusing on agricultural policy, is scheduled to be added during the 1998 Plenary Session. The other special standing committee, the Law Committee, reviews and revises draft legislative proposals and resolutions after consideration by the Standing Committee or Plenary Session floor.

235. See *Renda Gongzuo Qude Xin Jinzhen [NPC's Work Undergoes New Development]* FAZHIBAO [LEGAL SYSTEM DAILY], Jan 18, 1997, at 1 (citing figures given by NPC General Secretary Cao Zhi).

236. See notes 602-619 and accompanying text *infra* (discussing NPC supervision of the judiciary).

237. See Cai, *supra* note 4, at 415.

238. But see note 208 *supra* (noting that CLA also maintains its own, independent collection of legal materials). The General Office's Library is estimated as containing some 200,000 volumes as of 1995. Interview (General Office Research Department).

239. See PRC CONSTITUTION, art. 70.

240. See Cai, *supra* note 4, at 211. This claim is disputed by some special standing committee staff. Interview (Economic and Finance Committee).

241. In effect, the role of these substantive standing committees is similar to that of the standing committees in the United States Congress.

242. This is the author's terminology. It is not used by Chinese scholars or by the NPC itself.

a. The Substantive Committees

In contrast to the CLA, whose function is to provide technical expertise in the drafting of legislation, the role of the seven (soon to be eight) substantive special standing committees is oriented more towards assisting the NPC in matters of policy development.²⁴³ These committees have both legislative and supervisory responsibilities. In helping the NPC carry out its legislative work, these committees recommend specific legislation for inclusion in the legislative plan; draft and report out to the Standing Committee and to the Plenary Session proposed legislation and draft resolutions; and evaluate relevant legislative drafts, or relevant portions of legislative drafts, submitted to the NPC by organs outside the Standing Committee.

The substantive special standing committees also assist the NPC in supervising other constitutional actors. In this capacity, they evaluate and report upon those work reports of other constitutional actors (or parts thereof) that fall within their technical competence, as well as relevant parts of the budgetary reports and state planning reports. The special standing committees also conduct special investigations at the behest of the NPC or the Standing Committee.²⁴⁴ Technically, these committees are also responsible for insuring that relevant provincial and administrative regulations, or parts thereof, do not conflict with the constitution or existing legal framework, but as yet there are no procedures in place for exercising this type of activity.²⁴⁵

The special standing committees also provide an important channel of communication between the NPC and China's executive organs.²⁴⁶ Special standing committees frequently work in partnership with particular executive organs in drafting legislation, to a much greater extent than does the CLA. This was the case, for example, with the 1995 amendments to the Air Pollution Prevention and Control Law (jointly drafted by the National Environmental Protection Agency of the State Council and the Environmental Protection Committee of the NPC) and the draft Securities

243. See PRC CONSTITUTION, art. 70.

244. See *id.* at 219-220.

245. See Cai, *supra* note 4, at 219-220.

246. See *id.* at 217 (noting that one of the important roles of the special standing committees is to provide a link between the NPC and the executive organ); Liu & Cheng, *supra* note 1, at 267 (same). See also Murray Scot Tanner, *supra* note 1, at 81-82 (noting close connection between special standing committees and their parallel administrative organs); See also notes 356-361 and accompanying text *infra* (discussing drafting process of special standing committees).

Law (jointly drafted by the China Securities Regulatory Commission and the Economic and Finance Committee). In both these cases, the standing committees proved to be more cooperative with their partner state council organ than did the CLA,²⁴⁷ and served as the principal means through which the State Council partner represented its concerns to the NPC.²⁴⁸

Each of the substantive special standing committees has between ten and thirty members.²⁴⁹ Members are drawn from among the NPC delegates, with the majority of members serving on the Standing Committee.²⁵⁰ The members of each committee are selected by the Chairmen's Group and ratified by the Plenary Session.²⁵¹ Increasingly, many of these members also have had previous experience working in relevant organs of the State Council.²⁵² As noted above, a Vice Director from each committee also serves on the Secretary's Group.

Each committee also has its own research staff.²⁵³ Like the other support services mentioned above, committees all have their own general office, and their staffing is not controlled by the CCP's nomenklatura system,²⁵⁴ thus giving these committees relative independence in meeting their staffing needs,²⁵⁵ and allowing a fairly independent and professional staff.²⁵⁶ However, resource limitations have prevented the special standing

247. Interview (CSRC). One scholar has suggested the possibility that the cross-pollination between the special standing committees and their parallel executive organs may allow these administrative organs to capture the particular committee charged with supervising them. See Tanner, *supra* note 1, at 81. However, with regard to the drafting of the draft securities law, the Economic and Finance Committee has no CSRC alumni in its ranks. Interview (CSRC).

248. Interview (CSRC). As noted above, however, the CLA is often more responsive to concerns of non-drafting executive organs. See note 212 and accompanying text *supra*.

249. For the 8th NPC, the breakdown is as follows: the National Minorities Committee, 25 members; the Finance and Economics Committee, 29 members; the Foreign Affairs Committee, 15 members; the Overseas Chinese Committee, 21 members; the Education, Science, Culture and Health Committee, 31 members; the Internal and Judicial Affairs Committee, 19 members; and the Environmental Protection Committee, 17 members. See Records, *supra* note 8, at 826-830.

250. See Cai, *supra* note 4, at 219 (107 of the 175 special standing committee members are delegates to the Standing Committee). Note that the Standing Committee itself only has 157 members, of whom 21 occupy executive positions in the Chairmen's Group.

251. See *id.*

252. See *id.* For example, the current Director of the Environmental Protection Committee, Cao Geping, was the previous head of the National Environmental Protection Agency of the State Council. Upon joining the NPC's Environmental Protection Committee, he brought along some of this former staff at NEPA. Liebman Correspondences, *supra* note 66.

253. The Finance and Economics Committee, for example, has around 30 research staff as of 1994. Interview (General Office Research Department).

254. See Tanner, *supra* note 1, at 90 n.21.

255. See Cai, *supra* note 4, at 407.

256. See Tanner, *supra* note 1, at 90 n.21.

committees from developing the institutional competence or effectiveness of the CLA or the General Office Research Department.

In addition to research staff, special standing committees may formally appoint outside experts as “advisors,” who may attend and contribute to committee meetings as non-voting committee members.²⁵⁷ Advisors may be dismissed by either the special standing committee on which they serve or by action of the Standing Committee.²⁵⁸

For most of their history, the role of the substantive special standing committees within the NPC has been overshadowed by that of the CLA.²⁵⁹ In particular, NPC legislative procedures allowed the CLA to effectively delay or kill those legislative proposals from these committees with which it did not agree,²⁶⁰ and allowed these committees to communicate to the Chairmen’s Group only indirectly – through the CLA.²⁶¹ However, this appears to be changing. Staffers in both the Economic and Finance Committee and the Environmental Protection Committee report that these committees are now able to communicate their concerns directly to the Chairmen’s Group.²⁶² The Environmental Protection Committee was even able to direct its 1995 draft amendments to the Air Pollution Prevention and Control Law through the Chairmen’s Group and onto the NPC floor over the strong opposition of the CLA.²⁶³ The special standing committees could thus be assuming their rightful role in the NPC’s institutional hierarchy.

b. The Economic and Finance Committee

Of the substantive special standing committees, one — the Economic and Finance Committee — is developing into a first among equals. Among NPC organs, the drafting and reviewing responsibilities of that committee are second only to the CLA.²⁶⁴ More importantly, that committee is

257. “Guwen.”

258. See Cai, *supra* note 4, at 219.

259. See notes 209-211 and accompanying text *supra*.

260. See notes 367-377 and accompanying text *infra*.

261. See notes 367-377 and accompanying text *infra*.

262. See Liebman Correspondences, *supra* note 66. Accord interview (Economic and Finance Committee).

263. See Liebman Correspondences, *supra* note 66.

264. According to the 8th NPC’s legislative plan (covering the years 1993-1997), the CLA was responsible for developing 19 pieces of legislation, the Economic and Finance Committee was responsible for drafting 9 pieces of legislation. The other special standing committees combined were only responsible for 4 pieces of legislation.

quickly becoming the institutional locus of the NPC's "supervisory" activities. As discussed in Part III below, the NPC has constitutional authority to "supervise" the activities of other governmental actors and organs at the central and regional levels. Because the NPC lacks a functional contempt power, budgetary audits are currently the principal window through which the NPC can gain meaningful insight into the operations of other governmental organs.²⁶⁵ The Economic and Finance Committee is the NPC department most adept at conducting financial audits. For that reason, it appears to be developing a special institutional competence within the NPC for leading supervisory investigations — even investigations into matters that would appear to fall more appropriately under the direction of other special standing committees, as in the case of recent investigations into the enforcement of environmental protection laws and the education law.²⁶⁶

c. The Law Committee

The other special standing committee, the Law Committee serves a different function from that served by the substantive special standing committees. The Law Committee's principal responsibility is to revise draft legislation in accordance with concerns expressed by the delegates and the other special standing committees after floor vettings.²⁶⁷ Unlike the other special standing committees, the Law Committee does not draft its own legislation, it does not formulate policy, and it does not engage in supervisory activities.

As of the 8th NPC, the Law Committee has 18 members.²⁶⁸ It is the only special standing committee that does not sport its own dedicated research staff.²⁶⁹ Rather, as noted above, it shares the research staff of the CLA. However, the leadership and members of the Law Committee remain distinct from the CLA and its positions on particular drafting issues

265. Interview (Economic and Finance Committee). Budgetary activities are the only aspect of administrative behavior that is routinely documented, and since most budget transactions are documented twice (once by the giver and once by the receiver), they can be cross-checked.

266. See notes 549-550 and accompanying text *infra*.

267. See Cai, *supra* note 4, at 200. See also Part IIIA (description of drafting process). In a sense, the Law Committee functions as a kind of alter ego to the CLA, whose research staff it shares.

268. See Records, *supra* note 8, at 827.

269. See note 202 and accompanying text *supra*.

are strongly influenced by the earlier floor deliberations.²⁷⁰ For this reason, the Law Committee's institutional interests and preferences can be distinct from those of the CLA.²⁷¹

4. Outside Advisors

More so than most other governmental or political organs in China, the NPC enjoys a particularly close relationship with academic institutions, law faculty and other outside advisors. The Standing Committee frequently enlists the efforts of academics and professionals in drafting and reviewing new legislation. The initial drafting for many of the CLA's drafting projects, for example, is generally delegated to academics or academic institutions.²⁷² This includes much of the NPC's most significant legislation, including the Administrative Litigation Law, the Company Law, the 1996 amendments to the Criminal Procedure Code, the 1997 amendments to the Criminal Code, and the draft legislation law.²⁷³ Academic advisors also have been very active in the drafting of a supervision law.²⁷⁴ Outside review by academics and professionals is now a standardized component of the drafting review processes of both the CLA and the special standing committees. All this is in sharp contrast to the standard drafting practice of most administrative organs which still prefer to draft legislation in-house, perhaps with the assistance of one or two outside advisors.²⁷⁵ As noted above, outside experts are frequently invited to serve on special standing committees as non-voting members.²⁷⁶

270. Cf. Tanner, *supra* note 1, at 82, noting that the Law Committee "works closely with the NPC leadership in summarizing the NPC delegates' comments." Since the NPC's revisions are drawn from these comments, this suggests that the NPC leadership is more intimately involved in this stage of the legislative process than in earlier stages. See Part III.

271. Interviews (Economic and Finance Committee; General Office Research Department).

272. See also notes 337-348 and accompanying text *infra* (discussing academics role in legislative drafting).

273. Interviews (drafting groups; CLA).

274. See note 634 and accompanying text *infra*.

275. For example, in contrast to the NPC's draft of the Company Law, the State Council's earlier draft was drawn up primarily by administrative actors. Interview (CSRC). The Lawyer's Law, drawn up by the Ministry of Justice, also seems to have received little professional input. Interview (All-China Lawyers Association). In fact, that law was opposed in the NPC by the All-China Lawyers Association in the NPC, due primarily to its mandatory legal aid provisions. Interview (Western diplomatic officials). NPC drafters frequently float controversial proposals in academic publications in order to garner support whereas administrative drafters appear to do so very rarely if at all. Interview (drafting group).

276. See notes 257-258 and accompanying text *supra*.

D. Departmentalism

The NPC suffers from the same departmentalism that plagues all organizational structures.²⁷⁷ There are, for example, significant institutional redundancies between the CLA and the General Office Research Department. Both have their own "law library," and both have engaged in separate but redundant research programs aimed at developing structures and procedures for supervising other governmental organs.²⁷⁸ Similar redundancies, as noted above, are developing between the CLA and the substantive special standing committees. Nevertheless, departmentalism appears to have a significantly less paralyzing effect within the NPC than it has within other political organs in China, due to the relative ease with which these various departments can resolve differences through horizontal bargaining.²⁷⁹

III. CONSTITUTIONAL OPERATIONS

The NPC's constitutional powers are generally conceived of as falling into two categories, called legislative powers and supervisory powers. This distinction comes from the fact that the NPC, like the national parliaments in most parliamentary systems, is not only the country's supreme legislative body but also its supreme constitutional body. Of these two types of powers, the NPC's legislative powers are most developed at present. However, the NPC's supervisory powers are also becoming increasingly formidable, due in large part to the development of delegate independence.

A. Overview of China's Constitutional System

China's system is a constitutional system which, while significantly different from that of the US, strongly resembles that of many Western countries. China's parliamentary system revolves around the principle of parliamentary supremacy rather than the principle of separation of powers. Under such a system, the national legislature is not only the supreme

277. See, e.g., Tanner, *supra* note 1, at 59-60.

278. Interviews (CLA; General Office Research Department).

279. See Putman, *supra* note 27, at 86-116 (discussing how horizontal communications between a wide variety of segments of the community decrease departmental isolation).

legislative body it is also the highest constitutional body. Therefore, the NPC wears two constitutional hats. As China's highest legislative body, the NPC sets the legislative agenda and enacts and amends the laws and the constitution. As China's highest constitutional body, it appoints and recalls people from major constitutional office, reviews and comments upon the national budget, reviews and comments upon "work reports" from other central-level constitutional actors, and conducts investigations into the constitutional operations of other governmental organs. Moreover, since China's constitutional structure is unitary, rather than federal, the constitutional authorities of the NPC (including its legislative jurisdiction) are plenary and are not limited as in the American system.

In addition to the NPC, China's constitutional structure includes five other constitutional organs. These are the State Council; the presidency; the judiciary; the procuracy (an independent branch whose responsibility is to prosecute criminal cases); and the Central Military Commission.²⁸⁰ The State Council is China's principal executive body,²⁸¹ and is the constitutional organ most closely affiliated with the CCP (the State Council Standing Committee members are typically among the most influential of Party members). The State Council has relatively broad legislative powers which allow it to draft and promulgate regulations on a wide variety of matters without requiring a parliamentary grant of legislative authority.²⁸² As in every parliamentary system, the executive also has the authority to submit draft bills directly to the parliament. Prior to the 1990s, almost all legislative proposals considered by the NPC originated from the State Council.²⁸³

280. Some commentators in China also regard the CCP as a constitutional organ, because its role in China's political operations is articulated in the PRC constitution. This argument is frequently used to support the argument that the NPC may "supervise" the party. See notes 636-644 and accompanying text *infra*.

281. China also has a second executive institution called the presidency. In China, however, the president has traditionally been a ceremonial position (as it was in the Weimar Republic) with no real influence over political operations. However, it is interesting in this regard to note that the current president, Jiang Zemin, is also currently the CCP general secretary, and that much of the formal authority of the president — namely the power to nominate persons to high office — coincides with the CCP's de facto oversight of government personnel placement. Thus, Jiang's dual service could forebode the development of an institutional linkage between the office of the presidency and the CCP, particularly now that both the State Council and the NPC are escaping their CCP orbit. If this linkage develops, it would obviously greatly increase the influence of the presidency as an independent constitutional office, perhaps resulting in a true dual-executive system similar to that set up by the French constitution.

282. The French Cabinet has similar constitutional authority. See FRENCH CONSTITUTION, art. 37.

283. See note 32 and accompanying text *supra*.

In addition to being a parliamentary system, China is also a civil law jurisdiction, in which the constitutional powers of the judiciary are more restricted than those of the American judiciary. As in most civilian jurisdictions, the judiciary does not have inherent authority to issue binding interpretations of law (which in civil law jurisdictions is regarded as a form of legislation). The role of the courts, therefore, is much more focused on applying the law, rather than developing it. Given the developmental needs of China's legal system, this limitation is not as strict as it is in other legal systems (i.e. France). The Supreme People's Court has been granted delegated authority to issue binding legal interpretations. Nevertheless, the scope of this delegation is limited and the constitutional role of China's judiciary still more closely resembles that of a civilian judiciary than that of the American judiciary.²⁸⁴

Related to this issue is that of constitutional review. In many civilian jurisdiction, the power to annul legislation is regarded as a form of legislative act and therefore inappropriate for the regular judiciary. The same is true in China. In China, the power to annul legislative acts, including legislative acts of the executive, vests in the NPC and not in the courts.²⁸⁵ However, at present there is no effective constitutional review in China, either by the NPC or by any other organs. The judiciary does not have the power to review even executive regulations for illegality (including unconstitutionality), and the NPC has yet to develop procedures for exercising its own powers of constitutional and legislative review.

284. Moreover, in contrast to both the State Council and the NPC, China's judiciary has yet to benefit significantly from the CCP's receding authority. Even in Western systems, the judiciary is naturally a decentralized body, relying primarily on a diffuse string of regional and local-level courts for its effectiveness. However, the emerging constitutional and professional development evident at the central level has yet to permeate much into China's lower levels of governance and as a result, lower-level courts remain particularly susceptible to unconstitutional interference. This prevents the judiciary from undergoing the same levels of institutional development as more centralized constitutional bodies such as the NPC and the State Council.

285. Numerous commentators — particularly in the US — find this confusing, thinking it highly unlikely that a legislature would void its own legislation. But the real issue is not the constitutional pedigree of the reviewing organ, but how the branch and its reviewing organ are organized and how they interact. Just as the judiciary is rendered effective by keeping it independent from the other constitutional organs within the constitutional system, so can an administrative or legislative organ of constitutional review be rendered effective by keeping it independent from the other organs within the executive or parliament. In France, for example, administrative courts, operating under the constitutional authority of the executive, are solely responsible for voiding administrative acts and legislative. Their organizational structure, however, isolates these courts from the influence of other administrative organs. In fact, despite their administrative pedigree, the French administrative courts are actually more willing to question the legality of administrative acts than are American courts. See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW*, 131-139 (1993).

The procuracy is an independent constitutional organ whose responsibilities are to represent the State in criminal proceedings before a court. It is, in effect, a national district attorney. Prior to the promulgation of the 1996 amendments to the criminal procedure code, however, most of the procuracy's principal responsibilities had been usurped by the public security organs, leaving little incentive for the procuracy to develop professionally. These new amendments have restored the procuracy's institutionally distinctive responsibilities. When and if the procuracy will be able to shoulder these new responsibilities is one of the most crucial questions confronting China's legal and constitutional development.

The other major constitutional organ in China, the Central Military Commission, exercises its not insignificant power primarily within and through the CCP. Its direct effect on the NPC is limited, in large part because the PLA and the Central Military Commission largely operate outside the current constitutional structure²⁸⁶ and thus there is little opportunity for institutional conflict.

B. *Legislative Powers of the NPC*

The NPC uses four types of legislative instruments through which it exercises its legislative authority. These include statutes,²⁸⁷ resolutions,²⁸⁸ declarations,²⁸⁹ and CLA legislative interpretations.²⁹⁰ Statutes, which include both "basic laws [jiben fa]" passed by the Plenary Session and ordinary laws passed by the Standing Committee, are the highest source of law in China other than the constitution.²⁹¹ Resolutions have only

286. The PLA enjoys a form of extra-territoriality, being subject to its own set of laws which are passed by the Central Military Commission rather than to ordinary domestic legislation. It also has its own court system, which operates largely independently from the Supreme People's Court.

287. "Falu."

288. "Jueding."

289. "Jueyi."

290. "Jieda."

291. See PRC CONSTITUTION, art. 67(7), 67(8) (authorizing the Standing Committee to void any provincial or administrative legislative instrument that conflicts with either the constitution or an NPC statute).

Although statutes are the highest source of law, the courts do not have the power to void conflicting administrative regulations. See Administrative Litigation Law, art. 52 (requiring courts to give full juridical effect to certain forms of administrative regulations). This has led some analysts to conclude that law, particular statutory law, is of little if any significance to society in China, particularly with regard to regulating governmental behavior. Most of China's current legal edifice is built on administrative regulations, not statutes, and many of these regulations seem to contradict the legislation that supposedly enables them. See Tanner, *supra* note 1, at 65, 71.

discretionary juridical effect²⁹² and are used primarily to promulgate legislative "interpretations" (a form of supplemental legislation that attaches to existing statutes) and non-justiciable political measures such as those creating and/or delegating authority to governmental bodies or those approving major political initiatives.²⁹³

Declarations and CLA legislative interpretations have no juridical effect. They are not considered by the courts to be official sources of law. The CLA's legislative interpretations are a form of supplemental interpretive legislation issued by the CLA under its own name. Since the CLA has no independent legislative competence, these interpretations are not considered authoritative by the judiciary. Nevertheless, these interpretations do occasionally influence the legislative interpretations promulgated by the Supreme People's Court, which are considered binding sources of law.²⁹⁴ Declarations are used for non-justiciable matters, primarily those relating to the NPC's efforts to supervise the other constitutional organs. They will be discussed in conjunction with the NPC's supervisory powers.²⁹⁵

1. Bill Procedures

The bill procedure used by the NPC can be divided into three stages. The first stage is the development of the legislative plan, which sets out the legislative agenda for the NPC. The second stage is the development of the legislative proposal, which may be undertaken by the NPC itself or by an

One should not confuse juridical effect with legal effect. English courts do not have power to void legislative or administrative acts that are contrary to the British constitution, but this does not mean that the constitution has no effect on the political environment in Britain. The American courts have disclaimed authority to question the foreign policy actions of the American president, but this does not mean that constitutional restraints on these actions are meaningless.

292. It is, in effect, a form of "persuasive precedent." A resolution may be cited by a judicial opinion as a source of law, but its authority is not regarded as binding. See Zuigao Renmin Fayuan [Supreme People's Court], *Guanyu Yinfa 'Quanguo Jingji Shenpan Gongzuo Zuotan hui Jiyao' de Tongzhi* [Notice Concerning the Distribution of the Minutes for the 'National Economic Adjudication Work Conference'] in 9 SIFA WENJIAN XUAN (1993), at 36-48 (discussed in Finder, *supra* note 171, at 189); see also Cai, *supra* note 4, at 269.

293. For example, resolutions have been used to approve the State Council's Three Gorges Dam Project, see Cai, *supra* note 4, at 280; to delegate legislative authority to the State Council and the Supreme People's Court, and are used to create of special economic zones, see *id.* at 275; *id.* at 277-278.

294. See notes 450-451 and accompanying text *infra*.

295. See generally Part IIIB (discussing various NPC supervisory procedures).

outside body, as determined by the legislative plan. The third stage is the vetting and amending of the proposal by the NPC.

Similarly, the NPC's legislative process involves three distinct types of actors: the sponsor, the drafter (or drafting organ), and the drafting group. The 'sponsor'²⁹⁶ is an organ with legal authority to submit legislative proposals²⁹⁷ and other bills²⁹⁸ to the NPC. At present, there are 11 such organs: the State Council, the Supreme People's Court, the Supreme People's Procurate, the Central Military Commission, and the special standing committees may submit bills to either the Plenary Session or the Standing Committee; The Chairmen's Group and Standing Committee delegates may submit bills to the Standing Committee only; the Standing Committee itself, the Presidium, and the Plenary Session delegates may submit bills to the Plenary Session only.²⁹⁹

Frequently, the actual development of a legislative proposal is delegated to subordinate agents.³⁰⁰ Legislative proposals sponsored by the State Council, for example, are invariably developed by a ministry or subordinate executive organ. Legislative proposals sponsored by the Chairmen's Group or by the Standing Committee are usually developed by the CLA or, less frequently, by the General Office Research Department. These agents are called the "drafting organs"³⁰¹ (or just "drafters"). Sometimes, a number of drafting organs will work together on a single proposals.³⁰² In that event, one organ will sometimes be designated as the "lead drafter."³⁰³ The others are called "co-drafters." As discussed below, it is the (lead) drafter, rather than the sponsor, who actually presents the

296. "Faluan de tian ren."

297. "Falu caoan." Legislative proposals are a form of bill.

298. "Anli."

299. See NPC Organization Law, art. 32. Of these, the only organs guaranteed standing to submit bills in the Constitution are the Standing Committee delegates (which would also include the Chairmen's Group), see PRC CONSTITUTION, art. 72; the special standing committees, see PRC CONSTITUTION, art. 70; and the State Council, PRC CONSTITUTION, art. 89(2).

In actual fact, the role of sponsor is increasingly irrelevant to the legislative process. As discussed below, the actual development and presentation of a legislative proposal is undertaken by the drafter, acting under the delegated authority of the sponsor. However, the drafter is not determined by the sponsor itself, but by the legislative plan.

300. As discussed below, it is the plan, not the sponsor, which determines who will actually develop a particular legislative proposal. See notes 312, 317-319 and accompanying text *infra*.

301. "Qicao ren."

302. See notes 317-319 and accompanying text *infra*.

303. "Qiantou qicao danwei."

legislative proposal to the floor of the NPC.³⁰⁴ There are no legal regulations as to who may serve as a drafting organ.³⁰⁵

Drafting organs will often delegate the actual drafting of the legislative proposal to specially composed bodies called drafting groups.³⁰⁶ Composition of the drafting group is wholly at the discretion of the lead drafting organ³⁰⁷ and the group will frequently include persons (even whole institutions) from outside that organ. For example, the drafting group for the 1997 amendments to the Criminal Code (which was developed for the Standing Committee by the CLA) was comprised of the criminal law faculties of Beijing University, Zhengfa University, Renmin University, and the Law Institute of the Chinese Academy of Social Science.³⁰⁸ The members of the drafting group cease to have any institutional role in the legislative process once their draft is formally submitted to the NPC by the drafting organ.

The legislative proposal also goes through a number of distinct stages. The first stage is the initial draft, as developed by the drafting group. This draft is then amended by the drafting organs, resulting in the "preliminary draft"³⁰⁹ which is formally submitted to the NPC as part of the legislative proposal. The NPC then vets the drafter's legislative proposal, after which it creates a "revised draft."³¹⁰ The NPC will often vet a proposal several times, resulting in a "second revised draft,"³¹¹ "third revised draft," and so on.

a. The Legislative Plan

The development of statutory legislation in China is governed by the NPC's legislative plan. That plan, which is promulgated by the Standing Committee at the beginning of each new NPC term, details the pieces of

304. See Cai, *supra* note 4, at 255.

305. See *id.* Drafters can include quasi-governmental bodies, such as the Xinhua News Agency. Use of non-governmental drafters was quite prevalent in China prior to 1993, see *id.*, but has virtually disappeared since then. Out of the almost 150 legislative projects contained in the five year legislative plan for the 8th NPC (1993-1998), only two were assigned to non-constitutional bodies, (both to the Xinwen Chubanshe).

306. "Ticao xiaozu" or "xiao caozu."

307. See Cai, *supra* note 4, at 255.

308. Interview (drafting group).

309. "Caoan." A more literal translation would be "draft" rather than "preliminary draft." This article uses "preliminary draft" in order to promote clarity.

310. "Caoan (xuigaigao)."

311. "Caoan (di er xuigaigao)."

statutory legislation that are to be developed or otherwise considered by the NPC during that 5-year term. The plan also designates which particular organs shall serve as drafter, co-drafters, and/or lead drafters for each particular piece of legislation.

The plan is divided into two tiers. The first tier lists the proposals that the NPC most fully intends to bring to the floor during the current term.³¹² The second tier lists other statutory proposals that the NPC might consider if time allows.³¹³ For the legislative plan developed for the 8th NPC (1993-1998), the first tier included 115 items, the second tier included 37 items. None of the second-tier items reached the NPC's floor.

Updated editions of the plan are issued each year by the Chairmen's Group. Unlike the original plan, these yearly editions are promulgated under the name of the Chairmen's Group itself and not that of the Standing Committee. These editions list which statutory proposals are scheduled to be brought to vote for that year and detail the current status of various other statutory proposals included in the original plan. These editions may also introduce amendments to the original plan, but such amendments are rare.³¹⁴

Both the original plan and its yearly editions are drawn up by the Secretary's Group, with assistance from the General Office Research Department and the CLA.³¹⁵ When drawing up the original plan, the General Office Research Department first solicits other governmental and quasi-governmental organs as to their legislative needs and the priority of these needs. Working with the Secretary's Group and the CLA, the General Office Research Department then culls these responses into a proposed list. In making the five-year plan for 1993-1998, the Research Department received over 500 legislative recommendations from various governmental bodies, selecting 115 for inclusion in the first tier of the draft plan.³¹⁶

As noted above, the legislative plan also assigns a drafter for each item included in the plan. The drafter is generally the organ who recommended the item to the General Office Research Department.

312. This section is entitled "Ben jie nei shen yi de falu caoan [Bills to be vetted this NPC]."

313. This section is entitled "Yanjiu qicao, Chengshu shi anpai shen yi de falu caoan [Bills to be developed and vetted when ready]."

314. Interviews (General Office Research Department).

315. Interviews (CLA; General Office Research Department). The CLA's role in the process seems to be more limited than that of the General Office Research Department's.

316. Interview (General Office Research Department). No such polling accompanies the drafting of the yearly editions, however.

Frequently, however, a particular piece of legislation will be recommended by or otherwise strongly affect more than one governmental body. In such cases, the Plan will generally designate a particular organ as lead drafter.³¹⁷ If the Plan designates a particular "lead drafter", it does not designate additional co-drafters³¹⁸ — thus, co-drafters serve at the discretion of the lead drafter. In the alternative, the Plan might assign joint drafting responsibility to two or three named organs, without designating which should serve as lead drafter.³¹⁹

The plan is then submitted to the Chairmen's Group for approval. Once approved, it goes to the floor of the Standing Committee for final consideration and vote. For the 1993-1998 plan, neither the Chairmen's Group nor the delegates appear to have introduced significant changes to the Secretary's Group's original draft.³²⁰ As noted above, subsequent yearly editions of the plan are promulgated by the Chairmen's Group without going to the Standing Committee floor.

Many legislative proposals included in the legislative plan, including many included in its first tier, do not reach the floor of the NPC.³²¹ However, the NPC will not consider legislative proposals that are not included in the legislative plan, nor will it consider legislative proposals that emanate from drafters other than those assigned by the plan. In 1994, for example, the NPC refused to consider a draft securities law submitted to it by the China Securities Regulatory Commission. The NPC's plan did include a draft securities law (in its first tier), but named the Economic and Finance Committee, not the CSRC, as the lead drafter. Despite the fact that the CSRC had begun drafting work on that law well before the NPC's plan was formed, the CSRC was forced to withdraw its draft from NPC consideration and develop a new draft with the Economic and Finance Committee. The year before, a similar fate befell the State Council's draft Company Law, which the plan had assigned to the CLA.

The advent of NPC legislative planning has been a crucial factor in the NPC's ability to gain control of legislative development in China. Legislative planning in China dates back to early 1980s, but prior to 1993,

317. "Qiantou."

318. Except through the generic title of "relevant organs [youguan bumen]."

319. For example, the 1993-1998 legislative plan assigned drafting responsibility for the tax law jointly to the Economic and Finance Committee, the Ministry of Finance, and the National Bureau for Taxation. In these cases, the participating NPC organ will generally serve as the lead drafter.

320. Interview (General Office Research Department).

321. See *Reflections*, *supra* note 162, at 34.

these plans were issued by the State Council rather than the NPC.³²² In the late 1980s, the NPC began to develop independent drafting capability, with a corresponding increase in input over legislative development.³²³ But the State Council was still able to produce more legislative proposals faster than the NPC. Combined with its control over legislative planning, this allowed the State Council to cherry-pick important legislative initiatives for itself. The legislative plan this situation. As evidenced by the NPC's treatment of both the Company Law and the draft Securities Law, the State Council now must seek prior approval from the NPC in developing legislative initiatives, rather than the other way around.

The NPC's legislative planning is not just the product of strategic competition among constitutional organs, however. It also plays a vital role in rationalizing China's legislative development. China's legislative needs are great, but its legislative resources, both in the NPC and the State Council, are limited.³²⁴ Evidence suggests that despite the State Council's legislative planning, by the early 1990s it had lost control of its own legislative activities. Internal rivalries among competing administrative organs increasingly delayed legislative development.³²⁵ In some cases, such as that with the Company Law, multiple competing versions of a single legislative proposal were issued to the NPC from different administrative bodies.³²⁶ The NPC's legislative plan thus provided a means by which China's statutory development could again be subject to rational forethought. In addition, by assigning drafting responsibilities to particular

322. See Provisional Regulations on the Drafting of Administrative Regulations, art. 5. See Zhou Wangsheng, *Lifa Guihua de Quanxian Huafen he Bianzhi Guicheng* [Jurisdictional Distinctions and Drafting Processes for the Legislative Plans], ZHENGZHI YU FALU, No.1, 1993, at 8 [hereinafter *Jurisdictional Distinctions*]; Zhou Wangsheng, *Lun Lifa Guihua de Jiben Yuance* [On the Fundamental Principles of the Legislative Plans], FAXUE PINGJUN, No. 2, 1993, at 1, 22. See also Tanner, *supra* note 1, at 68, 87. The State Council still maintains legislative plans, but they have no effect on the NPC.

323. See, e.g., Tanner, *supra* note 1, at 60 (noting erosion of State Council's power over NPC legislative agenda); *id.* at 78 (noting that by the early 1990s, the increased resources and abilities of the NPC's support organs meant that the NPC could now develop a large number of legislative initiatives on its own).

324. This was the original rationale for developing the legislative plan in the early 1980s. See *Jurisdictional Distinctions*, *supra* note 322, at 40. The limited floor time available for discussing legislative items is currently the principal factor limiting the NPC's legislative capacity. Interviews (CLA; General Office Research Department).

325. See Tanner, *supra* note 1, at 65. See also *id.* at 78 (noting NPC's increasing concern in the early 1990s over the fact that the State Council had been "dragging its feet" in drafting economic legislation). Accord interviews (CSRC, CLA).

326. See *Unfinished Business*, *supra* note 34.

organs, the plan reduces redundant drafting efforts caused by inter-organ competition.

The NPC's reliance on legislative planning is not without its problems, however. Most significantly, it effectively prevents legislative proposals issued by the Plenary or Standing Committee delegates from receiving NPC consideration. The Secretary's Group does not solicit or consider delegate proposals in drawing up the Legislative plan.³²⁷ Thus, such proposals have no hope of receiving floor time. At present, two ways have been developed to help circumvent this problem. One is to increase the drafting powers of the special standing committees. Since these committees are comprised of NPC delegates, this gives at least some delegates greater opportunity to contribute to the drafting process.³²⁸ The other is to allow delegates to submit — in lieu of formal legislative proposals — legislative recommendations asking the Secretary's Group and Chairmen's Group to consider the inclusion of a particular legislative initiative in an upcoming edition of the legislative plan.³²⁹

b. NPC Drafting Procedures

As noted above, draft legislation may be drawn up by any number of organs and organizations, as well as by the NPC delegates themselves. However, the principal drafters of statutory legislation are the CLA, the special standing committees, and the State Council's ministries and commissions. Sometimes a particular legislative proposal will involve a number of drafters, including drafters from different constitutional branches. The Marriage Law, for example, had over 10 drafting organs, including the CLA, the Supreme People's Court, the Supreme People's Procuratorate, the All-China Women's Federation, and several administrative organs from the State Council.³³⁰ In such a case, the CLA

327. Interview (General Office Research Department).

328. See note 250 and accompanying text *supra*.

329. See Cai, *supra* note 4, at 261. Interview (CLA). See, e.g., *Euthanasia Helps Terminal Patients Die with Dignity*, *supra* note 46 (suggesting that several delegates' efforts to legalize euthanasia was by means of a recommendation rather than a formal legislative proposal). Unlike formal legislative proposals, these recommendations need not include preliminary drafts of the recommended legislation. See Cai, *supra* note 4, at 261. See also *Chairman Qiao Shi Interviewed by "European Times"*, *supra* note 149, at 1 (noting that some delegates recommendations have been included in the legislative plan). Since no new legislative proposals have been added to the first tier of the legislative plan, any such proposals introduced on delegate initiative must have been added to the second tier.

330. See Cai, *supra* note 4, at 256-57.

will normally serve as the lead drafter.³³¹ As noted above, the lead drafter chooses its co-drafters: co-drafters are not named in the legislative plan. The lead drafter also sets the drafting procedure.

The principal drafting organs in the NPC are the CLA and the special standing committees (particularly the Economic and Finance Committee). Of these, the CLA's drafting procedures are the most developed, and the most discussed.³³² Procedures used by the special drafting committees generally follow those used by the CLA, but are more likely to involve greater cooperation with particular administrative organs and are less likely to include outside members in their drafting groups. Special standing committee also hold a series of meetings with the CLA to discuss a draft before sending it to the NPC for formal consideration.³³³ The NPC also occasionally forms special drafting committees, primarily to draft constitutional amendments and other quasi-constitutional legislation like the Basic Law of Hong Kong. Such committees are rare, and this have developed no formalized set of drafting procedures.

(1) Drafting procedures of the CLA

Almost all legislative proposals issuing to the NPC in the name of the Chairmen's Group or the Standing Committee are drafted by the CLA.³³⁴ The CLA has been the lead drafter for most of the NPC's more progressive, controversial, and/or high-profile legislative initiatives. These include the

331. See, e.g., *id.* at 257 (noting that the Marriage Law was sponsored "through an NPC organ").

332. They are not, however, formally codified. See *id.* at 255.

333. For reasons of space, description of the drafting procedures used by the State Council are not included in this article. The procedures are outlined in the Provisional Regulations on the Drafting of Administrative Regulations. See also Tanner, *supra* note 1, at 65-71 (discussing the State Council's formal drafting process). The procedures formally outlined by the State Council do not always work as planned, however, and the State Council's statutory drafting efforts appear increasingly chaotic and uncoordinated. See *Unfinished Business*, *supra* note 34 (noting State Council's uncoordinated involvement in the development on the Company Law). Accord Interviews (General Office Research department, CLA, CSRC (all noting State Council's increasing difficulties in coordinating drafting efforts)).

334. A very small number of legislative proposals are drafted by the General Office Research Department or by special drafting committees. The legislative plan for 1993-1998 assigns only two drafting assignments to the General Office Research Department, and none to special drafting committees. General Office Research Department drafting procedures are identical to those used by the CLA. Interview (General Office Research Department). The General Office Research Department generally works very closely with the CLA in developing that Department's own drafts. Interviews (CLA; General Office Research Department).

Company Law, the Administrative Sanctions Law, the 1996 amendments to the Criminal Procedure Code, the 1997 amendments to the Criminal Code, and the proposed "legislation law."³³⁵

The CLA's drafting process has not been codified in law,³³⁶ but a normative practice governing that process has developed nevertheless. The first step in the CLA's drafting process involves forming a "drafting group" to research and formulate the initial draft of the legislative proposal.³³⁷ The drafting group need not necessarily be comprised of CLA staffers. Frequently, in fact, it is comprised principally of selected academics. The Administrative Litigation Law, for example, was initially drafted by a drafting group headed by scholars from the China University of Politics and Law.³³⁸ The drafting group for both the 1996 amendments to the Criminal Procedure Law and the 1997 amendments to the Criminal Law consisted of selected legal academics from the China University of Politics and Law, Beijing University, the Law Institute of the Chinese Academy of Social Sciences, and People's University.³³⁹ Outside drafters are not always legal scholars. An earlier draft of a proposed securities law, for example, was drafted by an economic research group at Beijing University.³⁴⁰

The drafting group not only draws up the initial draft of the legislative proposal, it also helps set the particular policies that inform that draft. For this reason, the drafting group often engages in a sometimes extended period of pre-drafting research before developing its rough draft.³⁴¹ The drafting group responsible for developing the administrative litigation law, which was submitted to the NPC in 1989, for example, was formed in

335. See notes 624-628 and accompanying text *infra* (discussing proposed Legislation Law); notes 629-633 and accompanying text *infra* (discussing proposed Supervision Law).

336. See Cai, *supra* note 4, at 255.

337. See *id.*, at 257.

338. See Xingzheng Faxue Shi Nian Huigu yu Zhanwang [Review and Predictions After 10 Years of Administration Law Jurisprudence], FAZHI RIBAO [LEGAL SYSTEM DAILY], February 8, 1996 at 7 (giving brief history of the development of the Administrative Litigation Law) [hereinafter *Review and Predictions*].

339. Interview (drafting group). With regards to the Amendment to the Criminal Law, the actual composition of the drafting group was determined by the participating academic institutions themselves.

340. Interview (CSRC).

341. The General Office Research Department also engages in pre-drafting research for legislative proposals that have significant political implications. The Research Department's research often precedes the actual formation of the drafting group, and may continue researching particular policy questions well after the group has formed. Interview (General Office Research Department).

1986;³⁴² the group responsible for drafting the 1996 amendments to the Criminal Procedure Law was formed in 1990.³⁴³ Controversial proposals being considered by a drafting group are often first floated in academic articles³⁴⁴ and/or even in the popular press.³⁴⁵ Floating ideas in this way not only helps the drafting group gauge the strength of the CCP's possible opposition to the proposal, it also can help rally support to overcome such opposition.³⁴⁶ Persons involved in the drafting of the 1997 amendments to the criminal code, for example, believe that those amendments would have been much more "progressive" had they been given two years to develop the draft instead of just one.³⁴⁷ They claim that the extra year would have allowed the group more time to promote and develop consensus for the more controversial of the amendments it was considering.³⁴⁸

After the drafting group's draft is completed, the CLA circulates it for comment. Copies are sent to the Economics and Finance Committee and other relevant substantive special standing committees, each of which

342. See *Review and Predictions*, *supra* note 338.

343. Interview (drafting group).

344. Interviews (various drafting groups). See, e.g., Liu Renwen, *1996 - 1997 Nian Zhongguo Shehui Zhian Xingshi de Fenxi yu Yuce* [Analysis and Forecast of the Public Security Situation in China for 1996-1997], Jiang Liu, Chen Xueyi & Shan Tianlun, eds., 1996-1997 NIAN ZHONGGUO SHEHUI FAZHAN ZHUANGKUANG YU QUSHI (1997) (articles published by scholar involved in the drafting of the 1997 amendments to the criminal law); Ying Songhua & Liu Shen, *Xingzheng Chufa Lifa Tansuo* [Discussion on an Administrative Sanctions Law], ZHONGGUO FAXUE, 1994, at 63 (discussing ideas for an administrative sanctions law; this law was ultimately passed by the 1996 Plenary); Wang Dexiang & Mo Jihong, *Difang Renda Jiandu de Ruogan Qingkuang he Jianyi* [Several Conditions and Ideas Regarding Supervision by Provincial People's Congresses] FAXUE YANJIU, 1992, at 72 (article published by scholars involved in the drafting of the Supervision Law); Mo Ji & Zheng Li, *Renda Jiandu Falu Zhidu Yantaohui Zongshu* [Summary of the Seminary on Congressional Supervision Law System], XUESHU DONGTAI, 1993, at 121 (same); *Dui Difang Lifa "Buxiang Dichu Yuance" de Tansuo* [Discussion on the Principle That Provincial Legislation Must Be Consistent with the Constitution and National Laws], XUESHU DONGTAI, 1993, at 122 (discussing ideas for a draft legislation law).

345. See, e.g., Liu Zhigang, *Wanshan Wo Guo Pochan Fa de Ji Dian Jianyi* [Several Suggestions for Perfecting Our Nation's Bankruptcy Legislation], FAZHI RIBAO [LEGAL SYSTEM DAILY], February 8, 1996, at 7 (discussing ideas for developing draft bankruptcy legislation). Cf. *Shiji Mo, Tengqi de Baoxian Dazhan* [At the End of the Century, A Coming Insurance War], ZHONGGUO XUEWU BAO, March 3, 1995, at 4 (discussing issues arising in the initial drafting of a draft insurance law; the insurance law was drafted by the State Council).

346. Interview (drafting group).

347. The NPC originally planned to give them two years. But the strong international acclaim for the 1996 amendments to the criminal procedure code convinced the NPC leadership to advance the drafting of the criminal law amendments, which was seen as companion legislation to the procedural amendments.

348. Interview (drafting group). This included, for example, several proposals to restrict use of capital punishment.

replies with its own written evaluations. Comments on the draft are also invited from a wide range of governmental, political and social organizations; from selected members of the academic community; and increasingly from foreign consultants. The CLA also convenes a series of meetings with other governmental officials and outside experts to discuss the draft. There will always be at least three such meetings: one with representatives from the Economics and Finance Committee, other relevant special standing committees, and affected administrative organs and constitutional organs; one with selected academics; and one with representatives from affected professional and social interests. Frequently, multiple meetings with one of more of these groups is held.³⁴⁹

Other governmental organs will sometimes organize meetings or conferences in an attempt to influence the CLA's drafting decisions. In 1994, for example, when the CLA was considering draft Arbitration Law, the China International Economic Trade and Arbitration Commission sponsored an international arbitration conference in Beijing in order to try to convince the NPC to combine jurisdiction over international and domestic arbitration in one commission.³⁵⁰

After these group discussions, the CLA itself will then modify the drafting group's initial draft. If these modifications are substantial, the CLA will again circulate the now modified draft for comment and may convene additional meetings to discuss the draft.³⁵¹ Once the CLA comes up with a suitable draft, called the preliminary draft, it also produces a "drafting report" detailing the main points and purposes of the law, as well as the main points and concerns raised by the special standing committees and other sources in the course of the drafting process.³⁵² The CLA then submits that report and the preliminary draft to the Chairmen's Group for inclusion on the NPC's legislative docket.

As noted above, with one important exception, there is no evidence of systemic intervention in the CLA's drafting process by the CCP itself. Drafters associated with both the 1995 amendments to the Air Pollution Prevention and Control Law and the current draft of the securities law

349. Interview (CLA; Economic and Finance Committee). Cf. Cai, *supra* note 4, at 258, 416 (noting that the CLA holds meetings to collect views on legislative drafts).

350. Interview (China International Economic Trade Arbitration Commission). The NPC ultimately kept the two-commission format.

351. Interview (CLA).

352. See Cai, *supra* note 4, at 263. Some staffers in the special standing committees complain that the CLA's compilations of opposing concerns are not always sufficiently comprehensive. See notes 373-374 and accompanying text *infra*.

report no CCP involvement in the development of the legislative proposal.³⁵³ The CCP itself does not even have internal procedures for reviewing these activities.³⁵⁴ The one exception is the 1997 amendments to the criminal law. But as noted above, this is the exception that proves the rule. Drafters associated with the drafting of these amendments, in which there was clear CCP intervention, report that a new step had to be introduced into the normal drafting process in order to accommodate CCP oversight.³⁵⁵

(2) Drafting procedures of the special standing committees

The drafting procedures used by the special standing committees vary according to committees, and like the CLA's procedures, are not codified in law. These procedures roughly parallel those used by the CLA,³⁵⁶ with several significant deviations. Special standing committees frequently work more closely with particular administrative organs in drafting legislative proposals.³⁵⁷ Moreover, the special standing committees, together with their administrative partners, are generally more directly involved in the research and drafting of the preliminary draft. Drafting groups formed by such drafters are generally dominated by committee staffers and by representatives of partner governmental agencies, rather than by outside academics as preferred by the CLA. In drafting the 1995 amendments to the Air Pollution Prevention and Control Law, for example, the Environmental Protection Committee appears to have worked primarily with NEPA.³⁵⁸ The current draft of China's national securities law,

353. See Liebman Correspondences, *supra* note 66; *accord* interview (drafting group).

354. See Tanner, *supra* note 1, at 61 (noting that as of 1993, the CCP is supposed to monitor the development of legislative drafts); *id.* at 61, 64, 74 (stating that as of 1993, copies of legislative drafts are sent to the CCP for review, but the CCP seldom responds with comment).

355. Interview (drafting group).

356. See, e.g., interview (Economic and Finance Committee) (description of drafting process used by the Economic and Finance Committee parallels that used by CLA).

357. See Cai, *supra* note 4, at 217 (noting that one of the important roles of the special standing committees is to provide a link between the NPC and the executive organ); Liu & Cheng, *supra* note 1, at 267 (same). See also Tanner, *supra* note 1, at 81-82 (noting close connection between special standing committees and their parallel administrative organs).

358. See Liebman Correspondences, *supra* note 66. Mr. Liebman notes, however, that his investigations are not conclusive with regards to this point.

prepared by the Economics and Finance Committee, was drafted by a drafting group dominated by staffers from that committee and the CSRC.³⁵⁹

Special standing committee drafters also hold a series of special consultation meetings with the CLA before submitting a legislative proposal to the NPC. As discussed below, the CLA evaluates for the Chairmen's Group all legislative proposals coming from outside the Standing Committee, and the Chairmen's Group generally gives great weight to the CLA's evaluations. Negative evaluations will inevitably delay and can even kill a proposal.³⁶⁰ By consulting with the CLA before formally submitting a particular proposal, a special standing committee can help insure smoother passage of that proposal through to the NPC floor.³⁶¹

(3) Special drafting committees

The NPC occasionally forms special drafting committee to prepare legislative proposals.³⁶² Special drafting committees have been most commonly used to prepare draft constitutional amendments. They were also used to prepare the draft basic laws for Hong Kong and Macau. A special drafting committee was recently formed to revive the NPC's dormant draft supervision law (see below). Drafting and operation procedures used by such committees do not appear to be standardized, and the infrequent use of such committees would lead one to suspect that these procedures are generally ad hoc. According to one legal scholar, such committees allow for greater oversight by the NPC and CCP leadership over the development of the legislative draft.³⁶³ However, at least so far as the CCP leadership goes, its influence over the product of these committees appears far from complete. In developing the 1993 amendments to the PRC Constitution, for example, the CCP leadership saw need to try to circumvent the final product of a special drafting committee by trying to

359. Interview (drafting group).

360. See notes 210-211 and accompanying text *supra*.

361. Of course, in the event that the drafting special standing committee finds the CLA's demands during these meeting unacceptable, it may always choose to submit the draft as is to the Chairmen's Group.

362. See Huang Shuhai, *Guanyu Qicao Falu Caoan de Ruogan Wenti [Several Problems Related to Developing Legislative Drafts]* in LIFA—YUANCE, ZHIDU, JISHU 227, 230 (Guo Daojun, Zhou Wangsheng & Wang Zhenguang eds. 1993).

363. Interview. The particular scholar interviewed has not participated in any such committees, but has participated in a number of drafting groups formed by the CLA.

introduce its own draft amendment directly to the floor of the Plenary Session.³⁶⁴

(4) Drafting procedures for resolutions

Drafting procedures for NPC resolutions are not standardized. NPC resolutions are generally drafted by either the CLA or the special standing committees. The submission of resolution proposals is not subject to the NPC's legislative plan, allowing more flexibility in their development than that for statutes. As a general matter, draft resolutions are not as widely circulated and discussed as are statutory drafts. For example, in drafting resolutions interpreting particular laws, the CLA consults primarily with the Supreme People's Court – it does not circulate these drafts for public comment as it does for draft statutes. Drafting groups for resolutions, even those developed by the CLA, are generally comprised exclusively of staffers from the drafting organization.³⁶⁵

c. Submission and Vetting

Once received by the NPC, the legislative proposal (which included both statutory proposals and proposed resolutions) is first evaluated by the CLA and by the special standing committees. These evaluations are referred to the Chairmen's Group, which then decides if and when to send the proposal to the floor for preliminary vetting. After preliminary vetting, the proposal is sent back to the Law Committee for revision. The revised proposal is again vetted by the NPC, after which the Chairmen's Group decides whether to further revise the proposal or to send it up for vote. A proposal may be revised any number of times, although proposals appearing before the Standing Committee are more likely to undergo multiple revisions than those going to the Plenary Session. Proposals for basic legislation are vetted by the Standing Committee at least once before going before the floor of the Plenary Session for additional vetting and vote.³⁶⁶

364. See *Handling Amendments*, *supra* note 63 (discussing this incident).

365. Interview (CLA).

366. See note 413 and accompanying text *infra*.

(1) Preliminary evaluation

If a proposal is submitted to the NPC by some organ other than the Chairmen's Group or the Standing Committee (in other words, if the proposal was prepared by anyone other than the CLA, the General Office Research Department, or a special drafting committee), it first goes to the Secretary's Group for preliminary evaluation.³⁶⁷ The Secretary's Group then decides whether to place that bill immediately on the Chairmen's Group's docket, or to first send it to the special standing committees for evaluation and comment. As a practical matter, the Secretary's Group always sends proposals originating from outside the NPC to the special standing committees for review.³⁶⁸ In the past, the Secretary's Group has also sent bills originating from the special standing committees down for review.³⁶⁹ Some members of these committees claim that this is no longer always the case.³⁷⁰ However, staffers in the CLA disagree.³⁷¹

When seeking the preliminary evaluation of the special standing committees, copies of the proposal are distributed to the Law Committee, the Economic and Finance Committee, and to any other relevant special standing committees for evaluation.³⁷² Responses are collected by the CLA, who summarizes them in a report to the Chairmen's Group.

Note that under these procedures, the substantive special standing committees do not communicate their opinions and concerns directly to the Chairmen's Group. The Chairmen's Group only sees the summary report of the CLA. As noted above, there has been much criticism of this procedure by NPC staffers, who feel it gives inordinate control over the legislative process to the Law Committee/CLA at the expense of the

367. See Procedural Rules of the NPC Standing Committee, art. 12. See generally Cai, *supra* note 4, at 261-62, chart opposite 266.

368. See Cai, *supra* note 4, at 262.

369. Cf. *id.* (noting that the Secretary's Group always sends proposals to the special standing committees for evaluation).

370. Interviews (Economic and Finance Committee).

371. Interview (CLA). Note that beginning in 1993, representatives from each of the special standing committees have included in the Secretary's Group. The changing practice may reflect the greater influence of the special standing committees in that Group's decisions. The CLA is not represented in that Group, and thus might not be aware if that Group has adopted new but tacit normative guidelines.

372. Interviews (CLA; Economic and Finance Committee; General Office Research Department).

substantive special standing committees.³⁷³ Such institutional jealousies may be exacerbated by the CLA's conflicting mandates, requiring it to both objectively relay the concerns of these committees and serve as advocate for interests otherwise dispossessed in the drafting process.³⁷⁴

As with other aspects of the CLA's power, the CLA's monopoly over access to the Chairmen's Group appears to be receding, however. Staffers in both the Economic and Finance Committee and the Environmental Protection Committee report that they are now able to communicate their concerns directly to the Chairmen's Group, without having to go through the CLA.³⁷⁵

Once preliminary evaluation by the special standing committees is completed, the Secretary's Group places the legislative proposal on the Chairmen's Group's docket, and forwards the CLA's evaluative report to the Chairmen's Group.³⁷⁶ The Secretary's Group may not decide on its own to kill a bill, regardless of how unfavorable the evaluations are, except in one instance. The Secretary's Group can kill on its own initiative any legislative proposal submitted by NPC delegates, provided that proposal has first been sent to the special standing committees for preliminary evaluation. If the Secretary's Group does decide to kill such a proposal, it must provide a written explanation of its decision to the submitting delegates.³⁷⁷

Once a legislative proposal reaches the Chairmen's Group, the Chairmen's Group decides when and whether to include it in the meeting

373. See *Special Committees*, *supra* note 209, at 51-52. Accord interview (General Office Research Department). See also Liu & Cheng, *supra* note 1, at 264-65 (arguing for increased status and responsibilities for special standing committees).

374. See note 217 and accompanying text *supra*.

375. See Liebman Correspondences, *supra* note 66; Interview (Economic and Finance Committee). At least with regard to the Economic and Finance Committee, this might be a product of the special stature that committee is developing within the NPC. See notes 264-266 and accompanying text *supra*. In fact, there are already procedures in place allowing that Committee to communicate directly to the Chairmen's Group regarding budgetary matters, see notes 482-487 and accompanying text *infra*, and so that Committee's increased access may be a product of mere expansion of this existing channel. It is not clear whether the other committees enjoy the same level of access. With regards to the Environmental Protection Committee, a very new committee, they seem to feel that they do.

376. Liu & Cheng, *supra* note 1, at 232. One commentator reports that the Secretary's Group also sends its own recommendations as to whether or not to include the bill on the Standing Committee's agenda. See Cai, *supra* note 4, at 261.

377. See Procedural Rules for the Standing Committee, art. 12.

agenda for the Standing Committee.³⁷⁸ The Chairmen's Group is not obligated to include the proposal on that agenda. Alternatively, it may decide to send the proposal to the CLA for revision.³⁷⁹ Moreover, the Chairmen's Group can effectively kill the draft by sending it repeatedly down to the CLA for revision.³⁸⁰ When vetoing a proposal in this way, the Chairmen's Group will informally inform the bill's sponsor that the bill will not be considered, and "recommend" that the organ submitting the bill withdraw it from NPC consideration.³⁸¹

The Chairmen's Group began using this type of veto in 1993, and it has been instrumental in the ability of the NPC to gain control of legislative planning. As noted above, the first two casualties of this practice were the State Council's early drafts of the Company Law and Securities Law, the drafting of which the NPC legislative plan retroactively assigned to the CLA and the Economic and Finance Committee respectively.³⁸² The development of this veto has also forced administrative drafters to pay more respect to and closer attention to the concerns of the NPC, and particularly those of the CLA, in preparing draft legislation.³⁸³

In addition to deciding when and if to send a legislative proposal to the NPC floor, the Chairmen's Group also decides whether that proposal will be treated as a basic law, to be ultimately considered the Plenary Session, or as ordinary legislative to be passed by the Standing Committee. Even if the law is to be treated as a basic law, it will always be vetted at least once by the Standing Committee before being sent on to the full Plenary for final deliberation and vote.³⁸⁴ The Chairmen's Group may also wait until later in the process to decide to treat a proposal as a basic law. For example, the Chairmen's Group decided to treat the draft National Defense Law as basic legislation only after the preliminary vetting before

378. The Chairmen's Group also decides at this time whether the proposal will be regarded as a basic law to be approved by the Plenary Session. See notes 410-412 and accompanying text *infra*.

379. See Cai, *supra* note 4, at 261.

380. The Procedural Rules for the Standing Committee do not explicitly give the Chairmen's Group power to kill a bill outright (except for delegates' bills). See Procedural Rules for the Standing Committee, art. 12. The Chairmen's Group's power, in this regard, is similar to that enjoyed by a committee chair in the US Congress.

381. Interview (General Office Research Department).

382. See note 34 and accompanying text *supra*.

383. Interview (CSRC). For this reason, most drafters have now added to their standard drafting process a series of meetings with the CLA.

384. See Cai, *supra* note 4, at 262. See also notes 408-422 and accompanying text *infra* (discussing processes for basic legislation).

the full Standing Committee.³⁸⁵ As noted above, there is some suggestion that all basic laws should be drafted by the CLA, but Chairmen's Group's decisions frequently do not follow this rule.³⁸⁶

(2) Vetting procedures of the Standing Committee

Once the Chairmen's Group finds the legislative proposal acceptable, it will place that proposal on the Standing Committee's docket. The Standing Committee vets all legislative proposals, including basic laws and constitutional amendments (which are also vetted by the Plenary Session) and resolutions (which may or may not be vetted by the Plenary Session) at least once. It vets legislative proposals for ordinary statutory legislation (which are not vetted by the Plenary) at least twice. Particular processes for vetting vary according to the type of legislative instrument under consideration.

(a) Statutes

After the Chairmen's Group approves a statutory legislative proposal, it places that proposal on the Standing Committee's docket for "preliminary vetting."³⁸⁷ At the preliminary vetting, the preliminary draft of the bill is reported-out before the floor of the Standing Committee by the bill's drafter or lead drafter. In addition to the legislative draft, the drafter also provides an "explanation"³⁸⁸ of the draft, which sets out the general purpose of the draft legislation, notes particularly important provisions contained in the draft, and notes any important issues that arose during drafting.³⁸⁹ The delegates then retire into groups to discuss the draft. representatives from the bill's drafter(s) also attend these discussions.³⁹⁰ Delegates also receive copies of the CLA's summary report of the special standing committees' evaluations. Group discussions are recorded by the General Office.

385. See *National Defense Law*, *supra* note 148, at 3.

386. See note 199 *supra*.

387. "Chubu shenyi."

388. "Shuoming."

389. See Procedural Rules of the Standing Committee, art. 15. See also Cai, *supra* note 4, at 263.

390. See Procedural Rules of the Standing Committee, art. 15. See also notes 653-658 and accompanying text *infra* (discussing delegate groupings in the Standing Committee).

Following the preliminary vetting, the Chairmen's Group sends the proposal to the Law Committee for revision.³⁹¹ The revision process used by the Law Committee is similar to the drafting process used by the CLA, albeit frequently abbreviated. The Economic and Finance Committee, and other relevant special standing committees prepare reports suggesting changes to that draft in line with the major points raised in the Standing Committee's preliminary vetting. Once it receives the committees' evaluations, the Law Committee prepares a "revised draft," a rough draft of which — if the revisions are substantial — may be circulated for comment among governmental bodies, scholars, representatives from selected public interests.³⁹² The Law Committee also prepares a "report"³⁹³ detailing the various issues that arose during the preliminary vetting and in the revision comments obtained from the other special standing committees, why it made the various revisions it did it, and why it rejected other recommended revisions.³⁹⁴ The Law Committee then forwards the revised draft and accompanying report to the Chairmen's Group, which — if it approves — schedules a second vetting on the Standing Committee floor. Alternatively, the Chairmen's Group may return the draft to the Law Committee for further revision.

At the second vetting, the revised draft and its accompanying report are read out by the Law Committee (not by its original drafter).³⁹⁵ The delegates again discuss the revised draft in groups also attended by representatives of the bill's drafter. If this vetting does not reveal significant dissension among the delegates, the Chairmen's Group will send the bill up for vote at the end of the session.³⁹⁶ Otherwise, the Chairmen's Group will *move* that the bill be sent down for further revision.³⁹⁷ If the delegates approve that motion, the bill is again sent down (resulting in a "second revised draft"), otherwise, bill *must* be put up for

391. See Procedural Rules for the Standing Committee, art. 16. See also Cai, *supra* note 4, at 263.

392. Interview (CLA).

393. "Baogao." This report is similar in form and function to the "explanation" presented during the preliminary vetting by the bill's sponsor.

394. See Procedural Rules of the Standing Committee, art. 16. See also Cai, *supra* note 4, at 264.

395. See Procedural Rules of the Standing Committee, art. 16.

396. See Cai, *supra* note 4, at 264.

397. See Procedural Rules of the Standing Committee, art. 20. Cf. *Wo You Butong Yijian [I Have a Different Opinion]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], March 16, 1996, at 1 (reporting on how similar procedures operate in the CPPCC).

vote. A bill may be sent back for revision any number of times,³⁹⁸ but each time (other than that following the preliminary vetting), the decision to send the bill back to committee must be approved by the delegate body.

Legislative proposals are passed by affirmative vote of more than half of the total number of delegates to the Standing Committee.³⁹⁹ If voted down, a proposal is killed: it may not be put up for vote again in subsequent sessions (unless it is re-introduced to the Standing Committee as a new legislative proposal).⁴⁰⁰ Since 1990, voting machines have been used to take and tabulate votes.⁴⁰¹

(b) Resolutions

The Standing Committee's legislative procedures for considering draft resolutions are generally similar to those used for statutory proposals.⁴⁰² Draft resolutions may be introduced by anyone with standing to introduce draft legislation.⁴⁰³ As with statutory proposals, draft resolutions not originating from the CLA will be forwarded by the Secretary's Group to the special standing committees for evaluation and comment before being placed on the Chairmen's Group's docket (with delegates' drafts subject to possible rejection by the Secretary's Group).⁴⁰⁴ Once it reaches the floor of the Standing Committee, the draft resolution together with an "explanation" outlining the rationale, purpose, methodology and the important points of the resolution is read out to the floor of the Standing Committee by its drafter, after which the delegates retire into groups to discuss the draft.

398. Procedures for second revision are the same as those for the first revision.

399. See Procedural Rules of the Standing Committee, art. 30. Thus, an abstention has the same effect as a nay vote. Cf. Cai, *supra* note 163 (arguing that NPC should adopt a new rule under which proposals pass upon receiving approval of one-half of votes cast rather than one-half of total members).

400. See *Inside Information*, *supra* note 28 (indicating that an acting chairmen's failure to adequately understand this point appears to have resulted in the only instance on record in which the NPC voted down a legislative proposal).

401. See Liu & Cheng, *supra* note 1, at 240; Cai, *supra* note 4, at 265. See also THE GENERAL OFFICE OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 16 (1996) (containing a picture of a delegate voting).

402. In fact, aside from requiring that all statutory proposals undergo two vettings, the Procedural Rules of the Standing Committee does not distinguish between draft resolutions and statutory proposals. The term "anyi [bills]" as used by those rules covers both forms of legislation.

403. See Cai, *supra* note 4, at 278.

404. See Procedural Rules of the Standing Committee, art. 12.

Unlike statutory proposals, however, there is no mandatory revision stage for draft resolutions: a draft resolution is most commonly voted on in the same session in which it is introduced. At the same time the delegates retire into groups to discuss the proposal, the proposed resolution is also sent to the Law Committee, Economic and Finance Committee, and other relevant special standing committees for evaluation and report. After the discussion are concluded and the special standing committee have issued their reports, the Law Committee prepare a report summarizing the various issues and concerns raised by the delegates and the special standing committees. This report is then sent to the Chairmen's Group.

The Chairmen's Group then decides whether to send the proposal up for a vote at the end of that same session, or to send it to the Law Committee for revision and re-consideration at subsequent sessions.⁴⁰⁵ If the Chairmen's Group decides to send the draft up for vote that session, it will nevertheless commonly request the Law Committee make minor revisions to the draft in line with the more important points outlined in that Committee's summary report.⁴⁰⁶ Near the end of the session, the Law Committee will then report out to the whole floor its revised draft, and along with its revision report, and the revised draft is vetted once by the delegates meeting in full committee. If no major disagreements arise, the resolution is put to vote at the end of that session. Otherwise, the Chairmen's Group can move that the draft be returned to the Law Committee for further revision. If the floor approves that motion, the proposal goes back to committee — otherwise, the proposal must go to vote.

While sending proposed resolutions down for revision and subsequent vetting is the exception rather than the rule, the Chairmen's Group will not hesitate to do so if the vetting reveals significant problems or disagreements over the draft. A draft resolution authorizing the Three Gorges dam project was sent back to committee for revision four times due to opposition from the delegates from the affected regions of the country.⁴⁰⁷ Once a resolution is sent back to committee for revision, the subsequent procedures are the same as those for statutory proposals.

405. See Cai, *supra* note 4, at 275.

406. See *id.* at 280.

407. Interview (General Office Research Department). Cf. Cai, *supra* note 4, at 280 (noting that delegates opposition forced Three Gorges dam project resolution down for revision "several times").

(3) Vetting procedures of the Plenary Session

(a) Basic Laws

As noted above, the Plenary Session has limited but exclusive legislative jurisdiction to enact "basic laws." As with all statutory legislation, development of basic laws is governed by the NPC's legislative plans. Anybody with standing to submit legislative proposals to the Standing Committee also has standing to submit legislative proposals to the Plenary Session, with two minor exceptions. The Chairmen's Group can not submit a legislative proposal directly to the Plenary Session in its own name. Statutory proposals issuing from inside the Standing Committee must be submitted in the name of (and with the approval of) the Standing Committee itself.⁴⁰⁸ Nor can 10 Standing Committee delegates submit delegate proposals directly to the Plenary. Instead, delegate proposals submitted to the Plenary must be sponsored by either 30 or more plenary delegates or by one or more Plenary Session delegate groups.⁴⁰⁹ In addition, the Presidium may also submit its own legislative proposals, but it rarely if ever does so.

Theoretically, the Presidium has authority to directly receive legislative proposals and to include those proposals on the Plenary Session agenda.⁴¹⁰ However, in practice, all legislative proposals are submitted to the Standing Committee, not the Presidium,⁴¹¹ and it is the Standing

408. Such drafts are prepared by the CLA, using the same drafting process used for preparing drafts for consideration by the Standing Committee. All draft legislation sent to the Plenary Session by the Standing Committee goes through at least one preliminary vetting in the Standing Committee before being submitted to the Plenary Session for consideration. The decision whether or not to submit the draft to the Plenary Session is made by the Chairmen's Group and approved by the Standing Committee.

409. See Procedural Rules of the Plenary Session, art. 21.

410. See Procedural Rules of the Plenary Session, art. 12. See also notes 130-133 *supra* (discussing delegate groupings in the Plenary Session). The rules themselves suggest that the Presidium MUST include such proposals on the agenda unless the proposal is submitted by the delegates or by a delegate group, in which case the Presidium may also decide to kill the proposal after seeking the advice of the special standing committees.

411. See Cai, *supra* note 4, at 262. Since the docket for the Plenary is already completely filled before the Presidium is formed, see notes 661, 665 and accompanying text *infra*, it would be practically impossible for the Presidium to add an item even if it wanted to.

NPC delegates will sometimes submit legislative proposals directly to the Plenary. The Presidium invariably kills these proposals using the procedures outlined in article 12 of the Procedural Rules of the Plenary Session. See Cai, *supra* note 4, at 261.

Committee — namely the Chairmen's Group — who decides whether the proposal shall be treated as basic or ordinary legislation.⁴¹²

Regardless of who submits the proposal, all proposals for basic laws are vetted at least once by the Standing Committee before being sent to the Plenary Session. After this vetting, the Chairmen's Group then decides whether to place the proposal on the agenda for the next Plenary Session, or send the proposal back to the Law Committee for further revision and further vetting by the Standing Committee. If the Chairmen's Group wishes to send the proposal to on to the Plenary Session, that decision must be ratified by vote of the Standing Committee.⁴¹³ Basic legislation, once is it slated for Plenary Session consideration in the legislative plan, generally goes to the Plenary Session on schedule.

Draft basic laws are always voted on in the same Plenary Session in which they are introduced. The initial legislative procedure for considering these bills is similar to that used by the Standing Committee for vetting draft resolutions. The draft proposal is first read-out to the delegates by its lead drafter,⁴¹⁴ together with an explanation like that which accompanies legislative proposals read before the Standing Committee. The delegates then retire to vet the proposal in group meetings, which are attended by representatives of at least one of the bill's drafter. At the same time, the draft is also sent to the special standing committees for evaluation and comment.⁴¹⁵ The Law Committee records the major points raised during the vettings, and in the comments of the special standing committees, and working under the guidance of the Presidium's Standing Chairmen, draws up a revised draft of the bill.⁴¹⁶

The Law Committee then reports out the revised draft (together with it revision report), before a special meeting of the Presidium, which includes — in addition to the Presidium's normal members — the chairs

412. *See id.*

413. *See id.* at 264. *See, e.g., Renda Changweihui Juxing Weiyuanzhang Huiyi [NPC Standing Committee Convenes Chairmen's Group Meeting], FAZHI RIBAO [LEGAL SYSTEM DAILY], February 14, 1997, at 1* (detailing items to be considered by Standing Committee Session in preparation for upcoming Plenary).

414. This is the organ that originally submitted the bill to the Standing Committee. Even if the bill was revised by the Law Committee, it is still introduced before the Plenary Session by its drafter.

415. *See* Procedural Rules of the Plenary Session, art. 24.

416. *See* Procedural Rules of the Plenary Session, art. 24. While delegate input during the Plenary Session would appear to be significantly less than that for the Standing Committee, sufficient delegate voice can still inspire meaningful amendment of draft legislation. *See, e.g.,* notes 44 and accompanying text *supra*.

of each of the delegate groups.⁴¹⁷ That body (rather than the full Plenary) then vets the revised draft (and may meet several times in doing so). Further revisions to that draft may be effected through majority vote of that body.⁴¹⁸ Once that meeting approves the draft, it sends that draft to the full delegate body for vote.⁴¹⁹ Alternatively, the Presidium may elect to send to the Plenary Session in lieu of that bill a draft motion that the bill be sent back to the Law Committee for further consideration, thus tabling the bill until the next Plenary.⁴²⁰

The proposal (or motion) is then voted upon. The full delegate body does not have opportunity to vet either the revised draft or the motion before vote. A bill must receive a simple majority of the full delegate body to pass.⁴²¹ Votes are conducted and tabulated by machine.⁴²²

(b) Resolutions

The procedures used by the Plenary Session for considering draft resolutions are almost identical to those used for basic laws.⁴²³ The only differences are that there is no second vetting of the Law Committee's revised draft by an expanded meeting of the Presidium. Instead, the normal Presidium body immediately decides whether to send the proposed resolution to the floor of the Plenary Session for vote, or to send in its stead a motion recommending that the resolution be referred to the Standing Committee.⁴²⁴ If the Plenary Session were to refer the resolution to the Standing Committee, the Standing Committee would revise and vote upon that resolution using its own procedures.⁴²⁵ If the resolution were

417. See Procedural Rules of the Plenary Session, art. 24; See also Cai, *supra* note 4, at 264.

418. Group chairs have voting privileges. See Cai, *supra* note 4, at 264.

419. See Procedural Rules of the Plenary Session, art. 24.

420. See Procedural Rules of the Plenary Session, art. 28. See also Cai, *supra* note 4, at 265. There is no evidence that the Presidium has ever exercised this option. Obviously, if the Plenary Session were to vote down this proposal, then the draft itself must be sent to the floor for vote.

421. See Procedural Rules of the Plenary Session, art. 51. Abstentions, therefore, have the same effect as nay votes. See also Cai, *supra* note 163 (criticizing this rule).

422. See sources cited in note 401 *supra*.

423. See generally Cai, *supra* note 4, at 278-281.

424. See *id.* at 280. Obviously, if the Plenary Session votes down such a motion, the Presidium must send the draft resolution to the Plenary floor for vote.

425. See Procedural Rules of the Plenary Session, art. 28. See also Cai, *supra* note 4, at 280. There is no evidence that this alternate procedure has ever been used by the Presidium, however.

ultimately passed by the Standing Committee⁴²⁶, the resolution as passed must be reported⁴²⁷ to the next Plenary Session.⁴²⁸ As with all other bills and motions, the draft resolution must receive a simple majority of the full delegate body to pass.⁴²⁹

(c) Constitutional Amendments

The procedures for passing constitutional amendments are the same as those for passing basic laws except that proposed constitutional amendments may only be introduced to the Plenary Session by either the Standing Committee or if sponsored jointly by 1/5th or more of the total delegate body.⁴³⁰ Constitutional amendments must receive affirmative vote of at least 2/3rd of the total delegate body to pass.⁴³¹ Interestingly, the only recorded instance of delegates successfully introducing draft legislation onto the floor of the Plenary Session involved a constitutional amendment. During the 1993 Plenary, the CCP sought to introduce a draft constitutional amendment, but that amendment was rejected by the Presidium because the CCP lacked standing to introduce such amendments. The CCP then arranged for 1/5th of the delegates to sponsor the proposal. The reason the CCP did not seek the sponsorship of the Standing Committee was because the Standing Committee had already placed a competing version of the amendment already before the Plenary Session floor. The two competing versions of the amendments were then reconciled in the revision process.⁴³²

2. Legislative Interpretations

Of all the NPC's constitutional powers, the power to "interpret the laws and the constitution" is the most misunderstood by Western

426. Resolutions are not divided into "basic " and "ordinary". Therefore, the Standing Committee has competence to consider and pass any resolution presented to the Plenary Session.

427. "Huanbao."

428. This is supposed to give the Plenary Session opportunity to overturn the Standing Committee's action. However, at present, there are no procedures in place for "reporting" items, either in the Plenary Session or in the Standing Committee, so this requirement remains moot. See notes 624-628 and accompanying text *infra*.

429. See Procedural Rules of the Plenary Session, art. 51.

430. See PRC CONSTITUTION, art. 64. As noted above, constitutional amendments issuing from the Standing Committee are traditionally drafted by special drafting groups, rather than by the CLA. See notes 362-364 and accompanying text *supra*.

431. See PRC CONSTITUTION, art. 64.

432. This event is described in *Handling Amendments*, *supra* note 63.

commentators. Many Western commentators seem to assume that this power gives the NPC the power to act as a court.⁴³³ China possesses a civil law system, not a common law system, and in civil law systems, the power to issue binding interpretations of law is regarded as a legislative or administrative function rather than a judicial function.⁴³⁴ China's treatment of this matter is thus consistent with that advocated by many civilian legal theorists.⁴³⁵

The power to interpret the laws and the constitution⁴³⁶ thus works to give the Standing Committee power to pass supplemental legislation to fill in interstices in the constitutional and legal framework. This particular form of interpretation, called "legislative interpretation" by many Chinese constitutional scholars,⁴³⁷ involves abstract interpretations addressed to a lacunae in the positive law rather than to particular legal disputes.⁴³⁸ The

433. In fact, the NPC does have authority to supervise a court's handling of individual cases, but that authority comes from its supervisory powers, not its interpretive powers. In any event, however, the NPC has disavowed any authority to substitute its own judgement for that of a courts. *See generally*, notes 602-618 and accompanying text *infra*.

434. *See, e.g.*, Brown & Bell, *supra* note 285, at 124.

435. *See, e.g.*, HANS Kelsen, A PURE THEORY OF LAW, 355-56 (M. Knight, trans., 1967). *See generally*, JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA, 136-139 (2d. ed. 1985)

436. *See* PRC CONSTITUTION, art. 67(1), 67(4).

437. NPC commentators distinguish between three types of interpretation, which they refer to as "legislative interpretation," "juridical interpretation" and "administrative interpretation." *See* Guo Daohui, *Lun Guojia Lifaquan [On National Legislative Power]*, ZHONGGUO FAXUE, No. 4, 1994, at 9 (analyzing three different forms of interpretation) [hereinafter *On National Legislative Power*]. *See also* Teng Wei, *Lun Xingfa de Lifa Jieshi [On Legislative Interpretation of the Criminal Law]*, FAXUE YANJIU, No. 1, 1992, at 13, 13 (describing the three types of interpretation) [hereinafter *Criminal Law*]; Zhou Zhenshao, *Ye Lun Lifa Jieshi [On Legislative Interpretation]*, ZHONGGUO FAXUE, No. 1, 1995, at 30 (same) [hereinafter *Legislative Interpretation*]. Western scholars, in complaining that the NPC's power to interpret the laws interferes with the judicial function, are confusing legislative interpretation with juridical interpretation. The NPC itself has disavowed any power to issue juridical interpretations. *See* note 613 and accompanying text *infra*.

438. *See Legislative Interpretation*, *supra* note 437; Cai Dingjian & Liu Xinghong, *Lun Lifa Jieshi [On Legislative Interpretation]*, ZHONGGUO FAXUE, No. 6, 1993, at 36, 37-38 (describing the uses of "legislative interpretation") [hereinafter *On Legislative Interpretation*].

The NPC uses a wide variety of terms to designate its legislative interpretations (although today all are handled as resolution). *See* Yang Yafei, *Lifa Jieshi Zingshi Bianxi [Differentiating Forms of Legislative Interpretations]*, DANGDAI FAXUE, No. 1, 1992, at 10, 22 [hereinafter *Differentiating Forms*]. Intensifying the confusion is the fact that interpretations are sometimes called "supplemental regulations [Buchong Guiding]" or "supplemental amendments [Xiugai Buchong]," thus inviting confusion with "administrative regulations [xingzheng guiding]" and "statutory amendments [xiuzhengan]" (which are amendments passed as statutory legislation). The constitution, however, only distinguishes between "interpretations" and "laws," so technically, any non-statutory legislative instrument purporting to effect the content of enacted statute is by

Constitution assigns power to issue these interpretations to the Standing Committee, in part to allow that body to issue supplemental legislation for even basic laws. The alternative to this, *i.e.* to require the Plenary Session to supplement such regulations, would be impractical given the institutional limitations of that body.⁴³⁹

Theoretically, Standing Committee interpretations should not contravene the existing text of the law or the fundamental principles underlying the law. Nor should they significantly remake the law being interpreted.⁴⁴⁰ Nevertheless, some laws have been substantially effected by the aggregate weight of Standing Committee interpretations.⁴⁴¹ Prior to the enactment of the 1997 amendments, over 30% of the articles in the Criminal Law had been subject to Standing Committee interpretations.⁴⁴² Although none of these "interpretations" by itself was particularly excessive, some scholars and NPC researchers suggest that such extensive, aggregate interpretation is itself something to which the Standing Committee needs to be more sensitive.⁴⁴³

As legislative acts, Standing Committee interpretations must be promulgated through legislative instruments. Interpretations are generally promulgated as resolutions,⁴⁴⁴ since the statutory process is too time consuming and cumbersome for the more modest matters addressed by these interpretations. Prior to 1991, this created a problem, however. In principle, Standing Committee interpretations enjoy greater legal authority than interpretations issued by the State Council (or by the Supreme

definition an interpretation. That is how the term is used in this article.

439. Cf. Tanner, *supra* note 1, at 58-59 (crediting the 1982 PRC Constitution's grant of legislative authority to the Standing Committee as a crucial factor in the development of the NPC).

440. See *On Legislative Interpretation*, *supra* note 438, at 37-38; *Criminal Law*, *supra* note 437, at 13-14. Significant changes to laws should be accomplished through statutory amendments ["xuizheng'an"], passed as a statute by the body that promulgated the original law. See *Id.*

441. See *Legislative Interpretation*, *supra* note 437, at 32.

442. See *id.* See also *Criminal Law*, *supra* note 437, at 15 (discussing these interpretations).

443. See, e.g., Cai, *supra* note 4, at 238; Yuan Jiliang, *Lun Lifa Jieshi Zhidu Zhi Fei* [On Insufficiencies in the Legislative Interpretation System], *ZHONGGUO FAXUE*, No. 4, 1994, at 24 (discussing abuses of legislative interpretation); Li Cheng & Wan Qigang, *Luelun Wo Guo Dangqian Lifa Zhong Cunzai de Wenti* [Discussing Continuing Problems in Current Legislation], *ZHONGWAI FAXUE*, No. 2, 1996, at 43, 43 (same).

444. See Cai, *supra* note 4, at 274, 277; *Differentiating Forms*, *supra* note 438, at 21-22. During the 1980s, before the distinction between a "resolution" and a "declaration" had been standardized, NPC interpretations were also frequently promulgated as "declarations [jueyi]." Today, all interpretations are handled as resolutions.

People's Court, for that matter).⁴⁴⁵ However, prior to 1991 administrative interpretations actually enjoyed greater *juridical* effect did interpretations issuing from the Standing Committee. This was because the Administrative Litigation Law requires the courts to give discretionary juridical effect to State Council interpretations, while at the same time, the judiciary refused to give explicit juridical effect to either NPC resolutions (or other forms of NPC interpretation).⁴⁴⁶ This problem was compounded by the fact that the legislative interpretations of administrative organs frequently contravened the intent — and even the text — of the statute they purported to interpret.⁴⁴⁷

In 1991, however, the Supreme People's Court announced that courts would henceforth give discretionary juridical effect to NPC resolutions,⁴⁴⁸ thus putting them on a juridical par with State Council interpretations. In fact, the Supreme People's Court now seems to regard at least some NPC statutory interpretations as having even greater weight than administrative interpretations. Recently, for example, the Supreme People's Court issued its own interpretation on an earlier legislative interpretation promulgated by the Standing Committee. In doing so, the Supreme People's Court is effectively suggesting that the prior NPC interpretation has statutory force, since the court's own legislative authority is limited to interpreting statutes.⁴⁴⁹

Two other forms of NPC interpretation deserve mention. First, the CLA issues legislative interpretations under its own name. These have no

445. See *Baizheng Xingzheng Jieshi de Falu Weizhi* [Arranging the Correct Status for Administrative Interpretations], FAZHI RIBAO [LEGAL SYSTEM DAILY], February 10, 1997, at 1 (acknowledging that NPC interpretations are of higher authority than administrative interpretations). The power of both the Standing Committee and the Supreme People's Court to issued legislative interpretations comes from specific grants of delegation made by the NPC in the early and middle 1980s. See notes 453-455, 463-469 and accompanying text *infra*.

446. See Finder, *supra* note 171, at 189.

447. See *On National Legislative Power*, *supra* note 437, at 14; See Tanner, *supra* note 1, at 71.

448. See Zuigao Renmin Fayuan [Supreme People's Court], *Guanyu Yinfu 'Quanguo Jingji Shenpan Gongzuo Zuotan hui Jiyao' de Tongzhi* [Notice Concerning the Distribution of the Minutes for the 'National Economic Adjudication Work Conference'], SIFA WENJIAN XUAN, No. 9, at 36-48 (1993), discussed in Finder, *supra* note 171, at 189.

449. See, e.g., *Zuigao Renmin Fayuan Guanyu Shenli Zhipian Anjian Juti Yingyong Falu de Ruogan Wenti de Jieshi* [Interpretation by the Supreme People's Court on Several Questions Involving Specific Uses of Law in Deciding Cases of Fraud], FAZHI RIBAO [LEGAL SYSTEM DAILY], January 26, 1997, at 2 (Supreme People's Court interpretation of an earlier Standing Committee interpretation). See also notes 465-469 and accompanying text *infra* (discussing Supreme People's Court's power to issue its own legislative interpretations). The Supreme People's Court affords its own legislative interprets as binding juridical effect. See Finder, *supra* note 171, at 153.

juridical effect, and their impact on the development of the legal corpus is questionable.⁴⁵⁰ In addition, the Supreme People's Court will sometimes consult informally with the CLA regarding particular interpretive matters. While the product of these informal consultations obviously have no juridical or legal effect, it can influence that Court's own legislative interpretations, which do have juridical effect.⁴⁵¹

3. Delegations of Legislative Authority to Other Constitutional Organs

The NPC can delegate legislative authority to other constitutional bodies, and it has done so on a number of occasions and to a number of organs. In fact, the bulk of China's current legal corpus is composed of regulations promulgated under delegated legislative authority from the NPC, by the State Council and the Supreme People's Court.⁴⁵²

During the 1980s, the Standing Committee passed three resolutions delegating relatively broad authority to the State Council to legislate on various economic matters. The first of these, passed in 1982, authorized the State Council to enact regulations on matters involving the resignation and retirement of workers.⁴⁵³ The second, passed in 1984, authorized the State Council to enact temporary taxation regulations.⁴⁵⁴ The third, passed in 1985, the broadest and most significant of the three, authorized the State

450. See *On Legislative Interpretation*, *supra* note 438, at 41. See also Finder, *supra* note 171, at 164 n.84.

451. See *id.* at 153. See generally notes 464-469 and accompanying text *infra* (discussing Supreme People's Court's limited legislative jurisdiction).

452. Both the Supreme People's Procuratorate and the Central Military Commission have also been given authority by the NPC to draft legislation, but neither have had much effect on legal development in China. The Supreme People's Procuratorate only exercised its drafted authority jointly with the Supreme People's Court. See, e.g., Yang Zhihong, Wang Shouan & Li Jihua, *Lun Jiaqiang Zuigao Renmin Jianchayuan de Sifa Jieshi Quan [On Strengthening the Juridical Interpretation Powers of the Supreme People's Procuratorate]*, 1993(6) FAXUE YANJIU, No. 6, 1993, at 52. The jurisdiction of the Central Military Commission's regulations are limited to military personnel.

453. See Guanyu Shouquan Guowuyuan dui Zhigong Tuixiu Zhi Banfa Jinxing Bufen Xiugai he Buchong de Jueding (1982).

454. See Guanyu Shouquan Guowuyuan Gaige Gongshangshui Shi he Fabu Shixing Youguan Xhuishou Tiaolie (Caoan) Jueding (1984).

Council to enact temporary regulations related to China's economic reform.⁴⁵⁵

Because of the breadth of these grants, and because there is no concrete guidance as to what the particular statute of limitations is for "temporary" as distinguished from ordinary administrative regulations,⁴⁵⁶ some have concluded that the State Council's legislative authority is basically unlimited. However, limiting the State Council's competence to one of "temporary legislation" has effectively preserved some aspect of NPC oversight. Even though there are no set temporal restrictions on what constitutes "temporary legislation," the fact that these regulations are labeled "temporary" nevertheless impacts their effectiveness. For example, the CSRC has lobbied very hard for a national securities law, even though the regulatory framework it has constructed out of temporary regulations is generally regarded as quite complete.⁴⁵⁷ The CSRC believes that the mere label of "temporary" that attaches to those regulations thus weakens their effectiveness, and lessens investor confidence in the stability of the market's legal framework.⁴⁵⁸ Similar concerns motivated the State Council to seek a national Company Law rather than just relying on and supplementing existing temporary regulations.⁴⁵⁹

The PRC Constitution also gives the State Council independent legislative competence to regulate economic, cultural and educational activities, public security, or national defense. In these areas, the Constitution allows the State Council to enact administrative regulations even in the absence of any prior "enabling legislation" by the NPC.⁴⁶⁰

But the NPC also enjoys some measure of oversight even in these areas. Administrative regulations standing without explicit statutory

455. See Guanyu Shouquan Guowuyuan Gaige he Dui Wai Kaifang Fangmian Keyi Niding Zhanxing de Guiding huozhe Tiaolie de Jueding (1985). See generally Xu Anbiao, *Falu he Xingzheng Fagui de Tiaozheng Jiexian* [Adjusting the Line Between Law and Administrative Regulations], LIFA-YUANCE, ZHIDU, JISHU, *supra* note 362 at 145, 149 (1994) (discussing these three delegations) [hereinafter *Adjusting the Line*].

456. See Tanner, *supra* note 1, at 59.

457. In 1994, while serving as a consultant for an Asian Development Bank project to help develop capital markets in China, Mr. A. A. Sommer, former Chairman of the US SEC, noted that China's regulatory framework was already "quite comprehensive." See A. A. SOMMER, "COMMENTS ON NATIONAL REGULATORY FRAMEWORK" 3-4 (1993).

458. Interview (CSRC). Many professionals in China's securities industry echo this view.

459. Interview (CSRC). Cf. Gao Xiqing, *The Perceived Unreasonable Man - A Response to Fang Liufang*, 5 Duke Int'l & Comp. L. Rev 271, 272 (1995) (suggesting that the Company Law should have just enacted the existing administrative regulations).

460. PRC CONSTITUTION, Art. 89 (6). See also *Adjusting the Line*, *supra* note 455, at 148 (discussing this constitutional delegation).

support from the NPC are of lesser legal effect (even though authorized by the Constitution itself) than those promulgated under explicit NPC delegation.⁴⁶¹ This is why, for example, the State Council and CCP found it useful to have the NPC expressly delegate to the State Council authority to legislate in matters relating to economic reform, even though the Constitution gives the State Council independent legislative authority in that area.⁴⁶² In spite of the bothersome temporal limitations that attach to the NPC's delegation, the State Council nevertheless seems to prefer to legislate under its delegated legislative authority rather than under its own independent legislative authority.

In 1981, the NPC also delegated to the State Council and to the Supreme People's Court and to the Supreme People's Procurate⁴⁶³ power to issue legislative interpretations on matters "involving the specific application of laws and decrees in adjudication work."⁴⁶⁴ The principal beneficiary from this grant has been the Supreme People's Court,⁴⁶⁵ who uses it to issue what are generally labeled "opinions."⁴⁶⁶ Like NPC's legislative interpretations, these "opinions" (which have juridical effect)⁴⁶⁷ are supposed to be used to fill in interstices in the existing statutory framework — they are not supposed to go exploring into uncharted

461. See, e.g., Zhou Wangsheng, *Guowuyuan Lifa de Jige Wenti [Several Questions on Administrative Legislation]*, in LIFA-YUANCE, ZHIDU, JISHU, *supra* note 362, at 131, 133 (1994) (explicit delegations of legislative authority from the NPC provides a firmer foundation for State Council legislation than does the constitutional's independent grant).

462. See *id.*

463. This power only vests in the Supreme People's Court, it does not vest in any of the lower or the special courts. The Supreme People's Court has, on occasion accepted binding interpretations issuing from the special military courts. See Finder, *supra* note 171, at 170, 186. However, the Court has also made clear that lower civilian courts may not issue such interpretations. See Finder, *supra* note 171, at 170, 186.

464. Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law (June 10, 1981), translated in *THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982* 251 (1987).

465. This grant adds little to the State Council's legislative jurisdiction, given its much broader grants of legislative authority discussed above. The Supreme People's Procurate refrains from exercising its legislative powers except in conjunction with the Supreme People's Court. See note 452 *supra*.

466. "Yijian."

467. See, Finder, *supra* note 171, at 188-189. See, e.g., JIANG MINGAN, XINGZHENG SUSONG ANLI PINGXI 43 (1993) (reprinting case citing interpretation by Supreme People's Court as source of law).

legislative terrain.⁴⁶⁸ But the Court is not always so conscientious, and there are a number of instances in which judicial legislation appears to venture significantly beyond the text it claims to be interpreting.⁴⁶⁹

In addition to these dedicated delegations of legislative authority, individual statutes commonly delegate to relevant regulating organs limited legislative authority to legislate “implementing regulations” filling out the statutory framework. However, statutes generally do not designate a particular administrative organ as its specific proxy (the determination of which particular lower organ may issue such implementing regulations is most commonly made by the State Council). This is probably because the organizational structure of the State Council has traditionally been quite fluid. By allowing the State Council to designate the organ responsible for implementation, the statute avoids enshrining a particular organ’s responsibilities in law, and thus allows the law to survive future changes in the State Council’s administrative structure.

Like the 1981 delegation to the Supreme People’s Court discussed above, these statutory-specific delegations only authorize the implementing authorities to promulgate legislative interpretations filling in the interstices of the statute. They do not authorize the implementing organs to design regulations for matters not framed by statutory principle. However, like the “opinions” of the Court, administrative “implementing regulations” often venture much farther in practice than they are supposed to in theory, sometimes to the point of contradicting explicit statutory command.⁴⁷⁰

Legislative delegation has played a key role in the development of China’s corpus of legislative law. The vast majority of legal instruments now in effect in China have been promulgated under color of delegated

468. In effect, this grant gives the Supreme People’s Court powers similar to, albeit more limited than, those enjoyed by common law courts.

469. See Finder, *supra* note 171, at 168, 188-89.

The NPC has one at least one instance sought to use the Supreme People’s Court’s legislative authority as a counterweight to the the State Council’s. In 1989, the NPC directed responsibility for developing the implementing regulations for the Administrative Litigation Law be given to the Supreme People’s Court rather than to the State Council, who had sought this responsibility for itself. See Tanner, *supra* note 1, at 71, 91-92 n. 40. See also Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Guanche Zhixing ‘Zhonghua Renmin Gongheguo Xingzheng Susong Fa’ Ruogan Wenti de Yijian (Shixing) [Opinion by the Supreme People’s Court concerning several questions in thoroughly implementing the ‘Administrative Litigations Law of the PRC (for trial implementation)], discussed in Finder, *supra* note 171, at 188-89.

470. See Tanner, *supra* note 1, at 71. This problem was one of the main incentives for the NPC to develop the Administrative Litigation Law. See notes 619-623 and accompanying text *infra*.

authority.⁴⁷¹ The effect has been mixed. On the one hand, this may have impeded both the institutional development of the NPC and the development of law in China. As noted above, both the standard opinions issued by the Supreme People's Court and the implementing regulations issued by administrative organs frequently exceed the theoretical scope of their authority, often conflicting with the intent and even the text of the statutes they purport to interpret. Technically, the NPC has constitutional authority to review and revoke these opinions and regulations (including those passed under the State Council's independent legislative powers). But at present it has no procedures in place by which to exercise such review.⁴⁷² Administrative un-accountability is further encouraged by the tendency of the NPC to frame statutes in broad, general language, thus giving great leeway to implementing organs. Not only does this weaken the impact of NPC legislation on the development of the legal corpus, it also erodes internal consistency within that corpus, thus affecting the ability of the corpus to structure social behavior.

On the other hand, the legislative needs of China far outpace the institutional capabilities of the NPC. It is probably better to have administrative organs acting according to some form of codified legal norm than to have them acting according to arbitrary whims of persons inside and outside the organ. For this reason, China's continued legal development will need to be fueled primarily by administrative and judicial legislation well into the foreseeable future.⁴⁷³

C. *Supervisory Powers of the NPC*

The NPC's supervisory powers, which grow out of its status as China's paramount constitutional organ, include power to vet and approve reports relating to the state plans and the national budget, power to vet and approve various "work reports" of other constitutional organs, power to conduct investigations, power to appoint and remove persons from public office, and power to supervise the enforcement of the laws and the constitution. In general, the NPC's exercise of these powers has benefitted far less from

471. See Tanner, *supra* note 1, at 65. For example, the Senlin Fa (forestry law) and the Yesheng Dongwu Baohu Fa (Wild animal protection law) together have spawned over 10 administrative regulations, over 50 departmental rules, and over 300 regional regulations. See Zhifa Jianchazu Jiang Fu Gan Min Dian [Investigatory Group to Visit Gansu, Fujian and Yunnan], FAZHI RIBAO [LEGAL SYSTEM DAILY], April 4, 1997, at 1.

472. See notes 624-628 and accompanying text *infra*.

473. See Finder, *supra* note 171, at 171; See Tanner, *supra* note 1, at 65.

the NPC's institutional development than has its legislative powers. This is reflected in the vague and incomplete character of the procedures that attach to most of these powers. Nevertheless, the NPC's exercise of these powers has recently become much more robust, mainly because the delegate body shows itself to be increasingly unwilling to blindly acquiesce to the claims and manipulations of the CCP and the State Council.⁴⁷⁴

1. Budgetary Supervision

In China, the national budget is set by the State Council. The NPC only reviews the a draft version of that budget and offers recommendations.⁴⁷⁵ The NPC (specifically the Standing Committee) also monitors the implementation of that budget. The procedures for the NPC's budgetary oversight are among the most developed of those for the NPC's supervisory powers. Nevertheless, for a number of structural reasons, NPC oversight over the budget remains far from satisfactory, according to many staffers.

The NPC's budgetary supervision revolves around two reports issued each year to the Plenary Session by the State Council: the "state budget report"⁴⁷⁶ and the "state planning report"⁴⁷⁷ (collectively referred to in this article as the "budgetary reports"). The state budget report, which is governed in part by the PRC Budget Law, provides an overall accounting of China's income and expenditures for that last fiscal year, and a forecast of State income and expenditures for the upcoming fiscal year. The state

474. See, e.g., Tanner, *supra* note 1, at 88. See also notes 37-50 and accompanying text *infra* (noting party and State Council recent more cooperative response to delegate dissension).

475. See PRC CONSTITUTION, art. 62(9); see also Procedural Rules of the Plenary Session, ch. 3.

476. The state budget report is actually comprised of two reports: a report on the implementation of the last years budget and a draft budget for the upcoming year. See, e.g., *Guanyu 1993 Nian Guojia Yusuan Zhixing Qingkuang he 1994 Nian Guojia Yusuan Caoan de Baogao* [Report on the Implementation of the State Budget for 1993 and Draft State Budget for 1994], ZHONGGUO RENMIN GONGHEGUO GUOWUYUAN GONGBAO, April 13, 1994, at 245. The same is true with regards to the state planning report.

477. See, e.g., *Guanyu 1993 Nian Guomin Jingji he Shehui Fazhan Jihua Zhixing Qingkuang yu 1994 Nian Guomin Jingji he Shehui Fazhan Jihua Caoan de Baogao* [Report on the Implementation of the Plan for China's National Socio-economic Development in 1993 and the Draft Plan for 1994], ZHONGGUO RENMIN GONGHEGUO GUOWUYUAN GONGBAO, April 13, 1994, at 231.

planning report, which is not yet governed by formal legal strictures,⁴⁷⁸ provides data about China's economic and infrastructure development for the last fiscal year, and details the State's planned developments (and their costs) for the coming fiscal year.⁴⁷⁹ Together, these two reports provide a general overview of the economic condition of the country, the execution of the last year's budget, and the general shape and goals of the upcoming year's budget.⁴⁸⁰ But as noted above, these reports only describe a preliminary draft of the budget for the upcoming year, they do not describe the final version of the budget.⁴⁸¹

One month prior to the Plenary Session, the State Council sends a summary description of the draft budgetary reports to the Economic and Finance Committee, and to the other substantive special standing committees, for preliminary analysis.⁴⁸² After the start of the Plenary Session, the full budgetary reports are reported-out before the full Plenary Session by the Minister of Finance (for the state budget report) and the Chairman of the State Planning Commission (for the state planning report).⁴⁸³ At that time, copies of these reports are also distributed to the delegates, along with corresponding financial statements.⁴⁸⁴ In contrast to legislative drafts, which are received by the delegates a minimum of two weeks before the start of the Plenary Session, delegates do not receive advanced copies of the budgetary reports.⁴⁸⁵

After the budgetary reports are read out before the Plenary Session, the delegates retire into delegate groups to vet the reports. Group meetings are also attended by representatives from the Ministry of Finance and the State Planning Commission, to whom the delegates may direct questions and opinions. The main points and concerns raised in these meetings are recorded by the Economic and Finance Committee. At the same time as

478. In 1951, the central government issued a statement of general principles governing its handling of the budget and state plans. See YUSUANAN JUESUAN CANXING TIAOLIE (1951). State Council practice still tends to conform to these standards. See Wang Min, *Quanguo Renmin Daibiao Dahuo Shencha Guojia Jihua he Yusuan Caoan de Jige Wenti* [Several Problems Regarding the NPC's Deliberations and Approval of the State Plan and National Budget], ZHONGGUO FAXUE, No. 2, 1991, at 15, 15 [hereinafter *Several Problems*].

479. See Lui & Cheng, *supra* note 1, at 109-110.

480. Each of these reports is also supplemented by a financial statement summarizing the financial data provided in the report. See *id.*

481. See notes 492-495 and accompanying text *infra*.

482. See Budget Law, art. 37; Procedural Rules of the Plenary Session, art. 31.

483. See, e.g., 1994 State Budget Report, *supra* note 476; 1994 State Planning Report, *supra* note 477.

484. See Procedural Rules of the Plenary Session, art. 32.

485. See *Several Problems*, *supra* note 478, at 16.

these group meetings are being held, the Economic and Finance Committee and other special standing committees also evaluate the full drafts of these reports, and record their respective comments and recommendations in committee reports. These committee reports are then sent to the Economics and Finance Committee.⁴⁸⁶ After the group vetting have concluded and the committee reports received, the Economic and Finance Committee drafts two evaluative reports, one for the budget and one for the plan, outlining the major concerns raised in the vetting and in the various committees' reports, and proposing various recommendations. These evaluative reports are then sent to the Presidium, where they are discussed and voted upon.⁴⁸⁷

The Presidium itself does not have authority to reject the State Council's budgetary reports. Those reports it must send to the Plenary Session for vote. The Presidium thus prepares two draft declarations approving the state budget report and the state planning report. If the Presidium has approved the Economic and Finance Committee's recommendations, the draft declaration will incorporate by reference the relevant draft resolution.⁴⁸⁸

The Presidium's draft declarations are then distributed to the delegates for vote.⁴⁸⁹ If the Economic and Finance Committee's evaluative reports have been incorporated into these declarations, they, too, are distributed to the delegates with the draft. The Plenary Session then votes, in separate votes, on each declaration. There is no vetting prior to vote,⁴⁹⁰ and delegates have no opportunity to sever their approval of the reports from their approval of the Finance and Economic Committee's recommendations the Presidium may have incorporated in the draft declaration.⁴⁹¹

Even if the Economic and Finance Committee's recommendations are approved by the NPC, the State Council is still free in fact to adopt or

486. See Procedural Rules of the Plenary Session, art. 32; Liu & Cheng, *supra* note 1, at 109-110.

487. See Procedural Rules of the Standing Committee, art. 32; Liu & Cheng, *supra* note 1, at 110.

488. See, e.g., Di Ba Jie Quanguo Renmin Daibiao Dahui Di Er Ci Huiyi [2nd Session of the 8th National People's Congress], *Guanyu 1993 Nian Guomin Jingji he Shehui Fazhan Jihua Zhixing Qingkuang yu 1994 Nian Guomin Jingji he Shehui Fazhan Jihua de Jueyi* [Resolution Approving the Implementation of the Plan for China's National Socio-economic Development in 1993 and the Plan for China's National Socio-economic Development in 1994], ZHONGGUO RENMIN GONGHEGUO GUOWUYUAN GONGBAO, April 13, 1994, at 230.

489. See Procedural Rules of the Plenary Session, art. 32.

490. This is common for draft declarations.

491. See Liu & Cheng, *supra* note 1, at 110.

ignore them as it wishes. In fact the State Council is even free to ignore the prescriptions contained in its own reports. As noted above, the State Council's budgetary reports only describe a preliminary version of the budget. The final draft is not completed until after the Plenary adjourns. Moreover, even once finalized by the State Council, neither the budget nor the state plan are regarded as legally binding. The State Council may and often does decide to deviate significantly from the original budget and/or plan in the process of implementation.⁴⁹²

If the State Council's budget as finalized or as implemented deviates significantly from what was described in the budgetary reports approved by the NPC, the State Council must first submit a "supplemental report" outlining the contemplated deviation to the Standing Committee for discussion and approval before supplementing the deviation.⁴⁹³ If time is of the essence, however, the State Council may deviate first and report after.⁴⁹⁴ But in no case may the State Council increase the national debt without prior approval from the NPC Standing Committee.⁴⁹⁵

The State Council is also required to submit several follow-up reports to the Standing Committee on the implementation of the budgetary plans. In the third quarter of the fiscal year, the State Council provides to the Standing Committee a report detailing the progress of the implementation of the national budget and state plans.⁴⁹⁶ Also, at the end of the fiscal year, the State Council submits an accounting of the year's budgetary operations to the Standing Committee.⁴⁹⁷ Both third-quarter reports and year-end reports follow the same vetting and approval procedures as do other "work reports" brought before the Standing Committee.⁴⁹⁸

492. See Cai, *supra* note 4, at 323 (noting that the State Council's budgetary reports do not have legal effects and that the State Council is quite willing to deviate from these plans as approved by the NPC).

493. See Procedural Rules of the Plenary Session, art. 32. See also Budget Law, art. 15.

494. See Cai, *supra* note 4, at 324.

495. See Budget Law, art. 55. If the State Council does seek to raise the national debt without NPC approval, the Standing Committee may cancel or annul the State Council's actions. Obviously, even without juridical enforcement, the simple threat of NPC annulment could well be sufficient to prevent the State Council from seeking unapproved borrowing, since investors would be extremely reluctant to purchase bonds or debt overshadowed by such a risk.

496. See Liu & Cheng, *supra* note 1, at 109; see also Budget Law, art. 59.

497. See Budget Law, art. 59. China's fiscal year begins on January 1st. See Budget Law, art. 10.

498. See notes 507-516 and accompanying text *infra*.

In addition to these one-year plans, the State Council also reports its draft five-year economic plans to the Plenary Session.⁴⁹⁹ These reports are vetted and approved using the same procedures as those used for the budgetary reports. However, the State Council is not required to report any subsequent deviations, its implementation of the five-year plan, nor does it provide the Standing Committee with any progress reports on this implementation.⁵⁰⁰

Obviously, the current procedures for handling the State Council's budgetary reports to the Plenary Session and follow-up reports to the Standing Committee do not provide the NPC much opportunity or ability to directly affect the development and implementation of the national budget.⁵⁰¹ But the biggest problems facing the NPC in its efforts to supervise the national budget are at present structural, not procedural. Due to China's planned-economy heritage, a significant portion of national spending is still off-budget.⁵⁰² China also lacks both standardized accounting procedures and rigorous auditing practices. This limits the amount of financial information the budgetary reports are able to convey even with regards to on-budget expenditures and income.⁵⁰³ In addition, most of the delegates are unfamiliar with basic economic and accounting concepts, and thus lack the means to adequately evaluate the reports they are asked to review.⁵⁰⁴

Nevertheless, these reports do provide enough information to allow the Standing Committee and the Economic and Finance Committee to monitor the State Council's budgetary activities, and give these committees real opportunity to detect when these activities might not conform with legal mandates.⁵⁰⁵ Recently, the Standing Committee has shown that it will not hesitate to form special investigation committee to investigate

499. As with the budgetary reports, what the NPC delegates vet and approve is not the plan itself, but a report describing a preliminary version of that plan.

500. See Cai, *supra* note 4, at 334.

501. See *Several Problems*, *supra* note 478 (discussing problems with the budgetary procedures circa 1991). Delegates also try to influence budgetary policies by direct lobbying of State Council officials. *see, supra* note 170, at 6.

502. See *Several Problems*, *supra* note 478, at 20; Interview (Economic and Finance Committee). One NPC staffer estimated that over half of total national spending was off-budget. Interview (General Office Research Department).

503. Cf. Interview (CSRC) (noting CSRC's difficulties in monitoring financial activities of listed companies due to lack of standardized accounting practices); *Danger and Opportunity*, THE ECONOMIST, April 12, 1997, at 29 (noting China's difficulties in regulating banking activity due to lack of accounting standards).

504. See *Several Problems*, *supra* note 478, at 17.

505. Interview (Economic and Finance Committee).

situations in which the State Council appears to have flaunted NPC concerns regarding China's economic policy. These investigations have indeed captured the attention of the State Council.⁵⁰⁶ The real strength of reports is not that they allow the NPC to control the budget directly, but rather that they inform the NPC when special disciplining measures, such as special investigations, might be in order.

2. Work Reports

Work reports, which also include the budgetary reports discussed above, are the principal means by which NPC monitors the activities of the other constitutional bodies. Constitutional practice now requires annual work reports be given to the Plenary Session by the State Council, the Supreme People's Court, the Supreme People's Procurate, and the NPC Standing Committee.⁵⁰⁷ Like the budgetary reports, these other work reports both review the organ's past year's activities and outline the organ's major policy initiatives for the upcoming year. Of these, the Premier's work report is the most important, functioning like the President's State of the Union Address under the American constitutional system.⁵⁰⁸

The Standing Committee also hears work reports.⁵⁰⁹ These include yearly, "specialized work reports" on education, criminal law enforcement, rationalization of the State-owned sector, and corruption given by selected ministries and the Supreme People's Court, as well as "interim work reports" provided by the State Council, ministries or other constitutional organs in the event of important developments or major policy changes.⁵¹⁰

Procedures for approving the work reports of other constitutional offices are similar for those used to approve the State Council's budgetary reports, albeit somewhat abbreviated. Unlike the budgetary reports, no summary descriptions of these reports are sent to Standing Committee for review being read out to the floor of the Plenary Session or Standing Committee. After this reading, delegates vet the draft report in delegate groups, attended by representatives from the presenting organ. During this

506. See sources cited in note 561 *infra* (discussing special investigation committee formed to investigate educational spending).

507. See Procedural Rules of the Plenary Session, art. 30.

508. See Cai, *supra* note 4, at 344.

509. See Procedural Rules of the Standing Committee, art. 22-24. See also Cai, *supra* note 4, at 344.

510. See Procedural Rules of the Standing Committee, art. 22-24. See also Cai, *supra* note 4, at 344.

time, the Chairmen's Group or Presidium (depending on whether the report is being presented to the Standing Committee or the Plenary Session) may seek comments from the special standing committees, but special standing committee review is not mandated as it is for the budgetary reports. Practice has developed, however, in which the opinions and recommendations of the special standing committees are always solicited for the work reports presented at the Plenary Session, but not necessarily for reports presented before the Standing Committee.⁵¹¹ After the vetting, the Chairmen's Group or the Presidium prepares a draft resolution approving the report, and incorporating any recommendations emanating from the special standing committees and/or delegate vettings. This declaration is then submitted to the delegates for approval.⁵¹²

As with the budgetary reports, the principal function of these other work reports is to provide the NPC (and in particular the Standing Committee) information with which to plan future legislative and supervisory actions.⁵¹³ The Standing Committee has conducted special investigations into many of the areas addressed by specialized reports. These include the areas of education, corruption and the problems facing state-owned enterprises.⁵¹⁴ The vetting of these reports also gives delegates some opportunity to affect national policy. For example, the "Strike Hard" anti-crime campaign of 1996 was apparently occasioned in significant part by a particular harsh vetting in the Standing Committee of the Ministry of Public Security's 1995 specialized work report on criminal law enforcement.⁵¹⁵ As noted above, delegate dissent during the vetting of the Premier's work report at the 1997 Plenary convinced Premier Li Peng to add particular policy goals to that report, and high delegate opposition of the Supreme People's Court's work report that same year encouraged that Court to begin paying more attention to the problem of juridical corruption.⁵¹⁶

511. Interview (Central Office Research Department). As noted above, normative practice also requires that the Economic and Finance Committee always has opportunity to review supplemental budget reports and the 3rd Quarter Budgetary Report (both of which are considered work reports) submitted to the Standing Committee by the State Council.

512. See Liu & Cheng, *supra* note 1, at 233, 235.

513. See Cai, *supra* note 4, at 334.

514. See notes 561-567 and accompanying text *infra*.

515. Interview with legal scholar.

516. See notes 43-45 and accompanying text *supra*.

3. Congressional Interrogatories

Supplementing the function of these work reports is the power of delegates from both the Plenary Session and from the Standing Committee to submit interrogatories to other governmental organs.⁵¹⁷ Plenary Session delegates may only submit interrogatories to the State Council and its subsidiary organs.⁵¹⁸ Standing Committee delegates may also submit interrogatories to the Supreme People's Procurate and the Supreme People's Court.⁵¹⁹

Interrogatories from the Plenary Session must be sponsored by one or more delegate groups or by 30 or more individual delegates.⁵²⁰ The interrogatory must be in written form and addressed to a specific State Council organ. It must clearly identify the object of the inquiry.⁵²¹ The interrogatory must be approved by the Presidium before it may be sent to the recipient organ.⁵²² The Presidium also decides the form of the recipient organ's response,⁵²³ which may be either oral or in writing. If it is to be an oral response, the Presidium may direct the response be given either before a meeting of the Presidium, before the petitioning group, or before one or more (meeting in joint session) of the special standing committees. If an oral response is to be given before either the Presidium or the special standing committees, the sponsors of the petition may participate in that meeting. When the sponsor is a delegate group, only the Chair of that group need participate.⁵²⁴ If the oral response is given before a meeting of either a delegate group or a special standing committee, that group or committee report the results of that meeting in writing to the Presidium.⁵²⁵ The Presidium may decide to distribute copies of either the respondent's written response or, in the event of an oral response, the receiving group's written report to the full NPC.

517. See PRC CONSTITUTION, art. 73; NPC Organizational Law, art.17 (Plenary Session), art. 33 (Standing Committee); Procedural Rules of the Plenary Session, ch. 5; Procedural Rules of the Standing Committee, ch. 4.

518. See Procedural Rules of the Plenary Session, art 42.

519. See Procedural Rules of the Standing Committee, art. 25.

520. See Procedural Rules of the Plenary Session, art. 42.

521. See Procedural Rules of the Plenary Session, art. 42, 43.

522. See Procedural Rules of the Plenary Session, art. 44.

523. See Procedural Rules of the Plenary Session, art. 44.

524. See Procedural Rules of the Plenary Session, art. 45.

525. The law does not specify to whom a written response is to be sent. Presumably, it is sent to the Presidium, who then forwards it to the petitioners.

If the petitioning delegates or groups are not satisfied with the respondent's response, they may request that the Presidium allow them to submit a follow-up interrogatory.⁵²⁶

Procedures for submitting interrogatories in the Standing Committee are somewhat different. A draft interrogatory may be jointly proposed by 10 or more delegates, or may be proposed by the Chairmen's Group.⁵²⁷ The proposed draft interrogatory is then vetted by either a relevant special standing committee or the full Standing Committee, depending on the decision of the Chairmen's Group.⁵²⁸ If the proposal is vetted before a special standing committee, the proposal's sponsors may participate in the discussion. After vetting, the Chairmen's Group then decides whether or not to present the interrogatory to the appropriate governmental organ.

The Chairmen's Group also decides in what form and to whom the respondent should address its response.⁵²⁹ The response may be in either written or oral form. If in oral form, it may be presented before either the full Standing Committee or before a special standing committee. If the response is given before a special standing committee, the rules do not require that the sponsors of the petition participate in that meeting. The rules do require that the special standing committee prepare a report of that meeting, and send it to "either the Chairmen's Group or the Standing Committee."⁵³⁰ If the response is in writing, it must be distributed to the Standing Committee and the relevant special standing committees. The Standing Committee's procedures provide no appeal for petitioners unsatisfied with the answers given by the respondent.

Interrogatories appear to be the least used and least developed of the NPC's supervisory powers.⁵³¹ The impotency of this particular power is well evidenced by the incomplete nature of its attendant procedures.⁵³² In fact, given the tight scheduling of both the Plenary Session and the Standing Committee, it is difficult to conceive how such a petition could actually result in a "hearing" of any sort. Interrogatories, particularly written interrogatories, are sometimes used by the Standing Committee

526. See Procedural Rules of the Plenary Session, art. 44. The law is silent as to whether delegates may get a third bite of the apple if they are still dissatisfied after the respondent's second round of responses.

527. See Procedural Rules of the Standing Committee, art. 24.

528. See Procedural Rules of the Standing Committee, art. 27.

529. See Procedural Rules of the Standing Committee, art. 28.

530. This is probably decided by the Chairmen's Group, but the rules themselves do not say.

531. See Cai, *supra* note 4, at 336.

532. See *id.*

leadership.⁵³³ But these have been far from effective, due in part to the fact that other constitutional actors have not been particularly cooperative.⁵³⁴

The NPC is seeking to flush out these procedures in a yet-to-be-drafted "supervision law."⁵³⁵ Judging from the current research focus of several NPC staffers, the NPC appears especially interested in developing procedures for conducting congressional hearings.⁵³⁶ The focus of this research, however, appears to be aimed principally at promoting executive compliance. The NPC's unresponsiveness to delegate petitions does not seem likely to be addressed in the foreseeable future.⁵³⁷

This is not to say that such delegate petitions are wholly useless. Delegate petitions do provide a means through which delegates can effectively express particular concerns to NPC and/or CCP leadership. For example, during the 1996 Plenary Session, the Beijing delegate group apparently sought to petition the State Council for information on the handling of former Beijing Mayor Chen Xitong's corruption case.⁵³⁸ Although this petition was not acted upon by the Presidium, the petition did give notice to the CCP leadership that there was sizeable and organized interest in this matter, and the CCP shortly thereafter did begin to pay more attention to this issue.⁵³⁹

4. Investigations

The investigatory committee is currently the most potent weapon in the NPC's supervisory arsenal. Its development has been sinking. As of the early 1990s, the NPC could only conduct one or two such investigations per year.⁵⁴⁰ By 1996, the NPC had over 30 special investigation committees in operation.⁵⁴¹

533. Interview (CLA).

534. See Cai, *supra* note 4, at 336.

535. See generally notes 629-633 and accompanying text *infra*.

536. Interviews (CLA, General Office Research Department). See also note 47 and accompanying text *supra* (noting impromptu hearing organized by Sichuan delegates).

537. See Chairman Qiao Shi Interviewed by "European Times", *supra* note 149, at 1 (suggesting some NPC responsiveness to delegate initiatives in general).

538. Interview with Western diplomatic personnel.

539. See *Graft Trials Loom Over Plenum*, HONG KONG STANDARD, June 26, 1996 (Internet edition).

540. See Tanner, *supra* note 1, at 93 n.55.

541. See QIAO SHI, WORK REPORT TO THE 1997 PLENARY SESSION.

The 1982 Constitution gives both the Plenary Session and the Standing Committee power to form investigation committees.⁵⁴² At present, only the Plenary Session has codified procedures for the formation and operation of such committees.⁵⁴³ According to these procedures, the formation of such a committee may be proposed by either 10% of the delegate body, three or more delegate groups, or the Presidium.⁵⁴⁴ If the proposal originates from the delegates, the Presidium decides whether to forward this proposal to the Plenary Session for vetting and approval. If the proposal is forwarded to the Plenary Session, the Presidium also includes with that proposal a list of nominees for that committee. Committee members must be selected from among the NPC delegates. Committees are comprised of a director, several vice directors, and several members. The committee also has authority to hire its own research staff.⁵⁴⁵

The Standing Committee may also form investigatory committees.⁵⁴⁶ Its procedures for doing so are not yet codified, but internal guidelines for forming and administering such committees do exist.⁵⁴⁷ Despite lack of formally codified procedures, the Standing Committee has in fact been very active in this area, forming some 46 such committees from 1994 through 1996.⁵⁴⁸

Regardless of who forms the special investigatory committee is authorized by the Plenary Session or by the Standing Committee, responsibility for carrying out the actual investigation will most likely be delegated by that committee in large part to the Economic and Finance Committee,⁵⁴⁹ which appears to be gaining a special competence over NPC investigations. In fact, Economic and Finance Committee investigations are becoming increasingly involved. Its recent investigation into provincial enforcement of environmental protection legislation, for

542. See PRC CONSTITUTION, art. 71. See also NPC Organization Law, art. 38.

543. See Procedural Rules of the Plenary Session, ch. 6.

544. There is no report of delegates ever having successfully submitted a such a proposal. Interview (General Office Research Department).

545. See Procedural Rules of the Plenary Session, art. 46.

546. See PRC CONSTITUTION, art. 71; NPC Organization Law, art. 38.

547. See Chuanguo Renda Changweihui Guanyu Jiaqiang Dui Falu Shishi Qingkuang Jiandu de Ruogan Guiding (1993). See also Qiao Shi Jieshou Meiguo "Zhongguo Xinwen" Yuekai Jizhi Caifang [Qiao Shi Interviewed by American reporters from "China News"], FAZHI RIBAO [LEGAL SYSTEM DAILY], Jan. 17, 1997, at 3.

548. *Id.* at 3.

549. See notes 264-266 and accompanying text *supra*.

example, included telephone "hot lines" that people could call to anonymously report environmental violations.⁵⁵⁰

After it completes its investigation, the investigatory committee issues a final report to the Plenary Session or, if the Plenary Session so delegates, to the Standing Committee.⁵⁵¹ The final report is then vetted by the delegates in group meetings. The investigating committee may also attach to that report draft declarations recommending particular actions.⁵⁵² After vetting, delegates will vote on these draft declarations. If an investigatory committee formed by the Plenary Session has been authorized to issue its final report to the Standing Committee, and if its report contains draft declarations that have been approved by the Standing Committee, those approved declarations must be ratified by the Plenary Session.⁵⁵³

An investigatory committee may also issue interim reports, either on its own initiative or at the request of either the Standing Committee or the Plenary Session.⁵⁵⁴ These reports may be issued either to the Plenary Session or to the Standing Committee. Unlike final reports, the Standing Committee does not need an explicit grant of delegated authority in order to hear and vet interim report of a committee formed under the auspices of the Plenary Session. Interim reports may also contain attached draft declarations. As with draft declarations contained in final reports, the Plenary Session must approve or otherwise ratify all draft declarations emanating from a committee it forms.⁵⁵⁵

In addition to its power to issue draft declaration, an investigatory committee may also subpoena testimony and materials. If the committee

550. See Liebman Correspondences, *supra* note 66.

551. See Procedural Rules of the Plenary Session, art. 47.

552. See PRC CONSTITUTION, art. 71; Procedural Rules of the Plenary Session, art. 43.

553. See Procedural Rules of the Plenary Session, art. 47.

In actual fact, however, there is little procedural distinction between being approved by the Plenary Session and being approved by the Standing Committee and ratified by the Plenary Session, because the Standing Committee always vets and approves all items appearing on the Plenary Session's docket. The only real procedural distinction involves reports not containing draft resolutions. The Standing Committee is only required to forward the draft resolution to the Plenary Session for ratification. Therefore, if the Standing Committee is delegated authority to hear a final report, and that report does not contain a draft resolution, or the draft resolution included in that report is not approved by the Standing Committee, then the act of delegation would deny the Plenary opportunity to hear the report itself. But since the Standing Committee has power to form such committees under its own name, which avoids the need to report to the Plenary Session altogether, this limited avoidance of Plenary review offered by such delegation is of little real utility.

554. See Procedural Rules of the Plenary Session, art. 47.

555. See also note 553 *supra* (noting that Plenary Session has no opportunity to review interim report heard by Standing Committee that are not accompanied by approved resolutions).

subpoenas testimony or material from an individual, that person can demand his or her participation in the investigation to be kept confidential.⁵⁵⁶ But he or she cannot demand that the content of the subpoenaed materials or testimony to be kept confidential. That decision is up to the committee itself.⁵⁵⁷

The 1982 Constitution gives the NPC the power to subpoena the State Council,⁵⁵⁸ but the courts at present lack procedures for enforcing such subpoenas (their authority to enforce such procedures is also open to question, since there is no "contempt of congress" crime in China's criminal laws). If an organ refuses to comply with a committee subpoena, that committee's only real recourse is to introduce a draft resolution to the floor of the NPC calling for the NPC itself to discipline the offending organ or actor in some way.⁵⁵⁹ Despite the hortatory nature of this power, persons involved in such investigations report that gathering necessary materials and information is not an overwhelming problem.⁵⁶⁰

As noted above, the investigatory committee is currently the most effective one among the NPC's supervisory activities. Recent investigations have brought to public attention issues of political performance that otherwise would have avoided scrutiny. For example, in May of 1996, the NPC formed an investigatory committee to look into the implementation of the recently passed Education Law, and in particular, into the Standing Council's educational spending.⁵⁶¹ The low level of educational spending provided for by that law (which had been drafted by

556. It is unclear whether such a request protects against possible prosecution.

557. This can be requested by the subpoenaed entity, but not demanded.

558. See PRC CONSTITUTION, art. 73; Procedural Rules of the Plenary Session, art. 47; Chuanguo Renda Changweihui Guanyu Jiaqiang Dui Falu Shishi Qingkuang Jiandu de Ruogan Guiding (1993).

559. See Cai, *supra* note 4, at 339.

560. Interview (Economic and Finance Committee). According to these staffers, if a subpoenaed organ is not particularly cooperative, such committees can generally get the information they need from other sources. In investigating local compliance with environmental protection legislation, for example, the NPC's investigatory committee set up and publicized a hot-line number through which persons could anonymously report polluters. See Liebman Correspondences, *supra* note 66. This was to allow investigators to circumvented protectionist efforts by local officials to obstruct that committee's investigations.

561. See Jiaoyu Fa Zhifa Jiancha Chuanmian Zhankai [Investigation into Implementation of the Education Law Fully Underway], FAZHI RIBAO [LEGAL SYSTEM DAILY], May 31, 1996, at 1. One of the tasks charged to that committee was to investigate why state spending on education fell to 2.68% of GNP in 1994 to 2.4% in 1995, despite the State Council's stated aim of increasing educational spending to 4% by the year 2000. See *id.* See also *Abuse of Education Cash Sparks Inquiry*, SOUTH CHINA MORNING POST, June 1, 1996, at 8 [hereinafter *Abuse of Education Cash Sparks Inquiry*].

the State Council) had been of major concern to the NPC delegates during vetting that law at the 1995 Plenary Session.⁵⁶² In order to allay these concerns, the State Council agreed to increase educational spending from 2.68% of GNP to 4% of GNP by 2000.⁵⁶³ By 1996, however, evidence suggested that educational spending had actually fallen to 2.4% of GNP.⁵⁶⁴ The investigatory committee's interim report to the Standing Committee was particularly critical of the State Council's educational spending policies, and this encouraged the Chairman of the State Education Commission to publicly to criticize public fiscal policy in this area.⁵⁶⁵

Other investigations conducted by the NPC have produced similar effects. For example, the NPC's investigation into implementation of the Agriculture Law resulted in a public vetting by the 1997 NPC Plenary Session of the State Council's failure to protect rural farmers from illegal taxes and fees imposed by local governments. The 1997 Plenary Session also called on the State Council to draft implementing regulations protecting peasants from these taxes and fees.⁵⁶⁶ As in the case of the education investigation, this investigation brought significant press coverage to this issue. Ultimately, the delegates' articulated concerns persuaded Premier Li Peng to amend his work report to include specific actions that the State Council would undertake in 1997 to address this matter.⁵⁶⁷

The NPC's ability to successfully pursue such investigations also has important implications for China's overall constitutional development. Such investigations are the first in China to focus on investigating and

562. See *Education Gradualism*, SOUTH CHINA MORNING POST, March 18, 1995, at 6.

563. See note 561 *supra*.

564. *Abuse of Education Cash Sparks Inquiry*, *supra* note 561, at 8. This drop in educational spending was latter acknowledged by the State Council. See *Education Budget Still on the Decline*, SOUTH CHINA MORNING POST, Sept. 28, 1996, at 6.

565. See *Rare Protest Made Against Slipping Education Budget*, SOUTH CHINA MORNING POST, January 16, 1997 (Internet edition).

566. See *Renda Wu Ci Huiyi Zhuxituan Juxing Di San Ci Huiyi [Presidium for the 5th meeting of the NPC Holds its Third Meeting]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], March 14, 1997, at 1 (noting vetting of investigatory committee's report); *Respect for Law Urged in Country*, SOUTH CHINA MORNING POST, February 28, 1997, at 9 (same). The problem of peasants' tax burdens has indeed been publically recognized in China even prior to the NPC's investigatory report. However, the NPC's report was the first to specifically blame the State Council and to demand specific action. See *Report condemns state for poor farming effort*, SOUTH CHINA MORNING POST, March 10, 1997 (Internet edition) (noting reports direct criticism of the government); *Legal System for Economy "Top Priority"*, SOUTH CHINA MORNING POST, March 11, 1997 (Internet edition) (same).

567. See *Prime Minister's Work Report Amended*, SOUTH CHINA MORNING POST, March 15, 1997 (Internet edition).

disciplining coordinate political institutions that are not subordinate to the investigating institution. Traditionally, investigations of institutional behavior have been conducted by the CCP, and relied on vertical relationships within the party structure for information-gathering and discipline. NPC investigations, by contrast, do not depend on such relationships. Instead, they use adverse publicity to stimulate horizontal coalition-building within the political and constitutional environment. The disassociation of political power from vertical dependencies is an essential precondition of constitutional government.⁵⁶⁸ And in this aspect— as in many other aspects of China's constitutional development — the NPC seems to be leading the way.

5. Appointment and Removal Procedures

Placement of persons to and removal of persons from high constitutional office are the constitutional functions over which the NPC has the least control. This is because these are the NPC functions that most overlap with the CCP's core institutional responsibility: overseeing the nomenklatura system.⁵⁶⁹ For this reason, the procedures governing this function are extremely vague and ill-formed.⁵⁷⁰ Nevertheless, delegate development has left its mark in this area as well, and has caused the CCP to consider modifying its own selection procedures to give NPC delegates more input into its choice of candidates.

The PRC Constitution describes two processes by which the NPC Plenary Session places persons in high constitutional office: election and confirmation. The distinction is based on who formally nominates the candidates:⁵⁷¹ candidates for elected position are formally nominated by the NPC Presidium;⁵⁷² candidates presented for confirmation are nominally nominated by organs outside the NPC.⁵⁷³

568. See Putman, *supra* note 27, at 174 (noting how dependency on vertical relationship inhibits the development of social trust and cooperation).

569. See Tanner, *supra* note 1, at 60.

570. See Cai, *supra* note 4, at 301-302.

571. This list is actually drawn up by the CCP, the Presidium's role in the creating of this list is negligible. See *id.* at 306-307; Liu & Cheng, *supra* note 1, at 177-179.

572. See generally NPC Organization Law, art. 13; Procedural Rules of the Plenary Session, art. 34.

573. See generally NPC Organization Law, art. 14.

Positions elected by the NPC include the President and Vice-President of the PRC;⁵⁷⁴ the Chair of the Central Military Commission;⁵⁷⁵ the Chairman, General Secretary and members of the Standing Committee;⁵⁷⁶ the directors of the NPC's special standing committees;⁵⁷⁷ and the presidents of the Supreme People's Procurate and Supreme People's Court.⁵⁷⁸ These positions are elected at the first Plenary Session of each new NPC term. At the beginning of that session, the Presidium releases an informal list of proposed nominees, along with background information on each candidate, to the Plenary Session for vetting.⁵⁷⁹ NPC commentators have publically complained that this background information is generally inadequate to allow the delegates to make informed judgements.⁵⁸⁰ Reportedly, many delegates rebelled against the nomination of Jiang Chunyun to Vice Premier primarily because they were not satisfied with the quality of background information they received.⁵⁸¹ After this preliminary vetting, the Presidium then may then revise this list before submitting its formal nominations to the Plenary Session in the form of a series of draft declarations.⁵⁸² These declarations are submitted directly for vote. There is no follow-up vetting. Delegates may vote for or against a nominee, or may vote to abstain.⁵⁸³ A nominee is elected by affirmative vote of a simple majority of the full delegate body.⁵⁸⁴

The other method through which the Plenary Session places persons in high office is through confirmation proceedings. During confirmation proceedings, the nominee is presented to the NPC not by the Presidium but by an organ outside the NPC. Positions requiring confirmation include the

574. See PRC Const, art. 62(4).

575. See PRC CONSTITUTION, art. 62(6).

576. See NPC Organizational Law, art. 13.

577. See NPC Organization Law, art. 13.

578. See PRC CONSTITUTION, art. 62 (7), (8).

579. See NPC Organization Law, art. 13; Procedural Rules of the Plenary Session, art. 34.

580. See, e.g., Cai, *supra* note 4, at 311.

581. Interview with Sarah Lawrence, reporter for US News & World Report.

582. See generally Cai, *supra* note 4, at 301-302; Liu & Cheng, *supra* note 1, at 172-173. With the exception of delegates to the Standing Committee, the Presidium only nominates one candidate for each position available. Some regional congresses have started holding competitive elections for the position of Standing Committee chairman and other high offices within the region. See generally Cai, *supra* note 4, at 301-302.

583. See Cai, *supra* note 4, at 301-302. Write-in votes are not allowed. See Liu & Cheng, *supra* note 1, at 172-73.

584. See Procedural Rules of the Plenary Session, art. 36. For this reason, an abstention has the same effect as a nay vote.

Premier and Vice Premiers (nominated by the President of the PRC),⁵⁸⁵ the members of the Central Military Commission (nominated by the Chair of that Commission),⁵⁸⁶ and the members and ministers of the State Council (nominated by the Premier).⁵⁸⁷ The Standing Committee also confirms appointments to a variety of other, lesser constitutional offices.⁵⁸⁸ The procedures for confirming a candidate are the same as those for electing a candidate.⁵⁸⁹ As with elections, nominees are confirmed by a simple majority of the full delegate body.

As NPC commentators and staff have publically acknowledged and criticized,⁵⁹⁰ regardless of whether the formal nomination is placed before the NPC by the Presidium for election or by some other constitutional organ for confirmation, the actual selection process is dominated by the

585. See PRC CONSTITUTION, art. 62(4).

586. See PRC CONSTITUTION, art. 62(6).

587. See PRC CONSTITUTION, art. 62(5). See also generally NPC Organizational Law, art. 14; Procedural Rules of the Plenary Session, art. 34.

588. These include the Vice Presidents and judges of the Supreme People's Court and the President of the military courts, as nominated by the President of the Supreme People's Court, see PRC CONSTITUTION, art. 67(11); and the Vice Presidents and procurators of the Supreme People's Procurate, and the Military Procurator-General, as nominated by the President of the Supreme People's Procuratorate, see PRC CONSTITUTION, art. 67(12). The Standing Committee may also confirm State Council nominations for ministers and vice-ministers for vacancies occurring when the Plenary Session is not in session. See PRC CONSTITUTION, art. 67(9). See also generally, NPC Organizational Law, art. 32.

589. See Cai, *supra* note 4, at 301-302; Liu & Cheng, *supra* note 1, at 173. There are some minor differences, however. In contrast to the procedures for elections, the procedures for confirmations are not codified. See, e.g., NPC Organizational Law, art. 14. Also, if a candidate for confirmation is not approved, the submitting organ may submit another candidate for that same position during the same NPC session. If a candidate for election is not elected, however, that position goes vacant until the next NPC Plenary Session. See Cai, *supra* note 4, at 302. This difference would appear to be moot, however, it is unforeseeable at present that a candidate would be rejected. See *id.*

One commentator also reports that delegates may not vote to abstain during confirmation proceedings. See Cai, *supra* note 4, at 302. This is contradicted, however, by a report in the South China Morning Post. See, e.g., *NPC Vote Snub for Jiang Ally*, *supra* note 40, at 1 (noting that 391 delegates "lodged abstention ballots" on vote confirming Jiang Chunyun as Vice Premier).

Standing Committee confirmation procedures are set out in Changweihui Renshi Renmian Banfa. These procedures are functionally identical to those used by the Plenary Session. See, e.g., Cai, *supra* note 4, at 304-305. The only major difference is that the Standing Committee will in certain circumstances confirm nomination in slates (unless the delegates object), whereas the Plenary Session always confirms nominations individually. See *id.* at 305.

590. See, e.g., *id.* at 300-301, 306-311; Liu & Cheng, *supra* note 1, at 177-179.

CCP.⁵⁹¹ Nevertheless, as evidenced by the confirmation difficulties of Jiang Chunyun, NPC delegates are showing increasing independence in this area,⁵⁹² and this has caused the CCP to reconsider the way it makes its selections.⁵⁹³ Traditional practice, as noted above, has been for the CCP to introduce its nominee choices at the same NPC session in which they are to be elected or confirmed. Because these choices have already been formalized by the party apparatus before they can be vetted by the NPC delegates, the CCP's ability to take into account delegate concerns is limited. Following the large NPC opposition to the nomination of Jiang Chunyan for Vice-Premier in 1995,⁵⁹⁴ the CCP considered releasing to the 1997 Plenary (for informal discussion) a list of some of the persons it was considering for nomination in 1998. This would have allowed NPC delegates to vet potential candidates *before* these candidates were formally selected by the party apparatus.⁵⁹⁵ The death of Deng Xiaoping, and the resulting in-fighting, appears to have prevented this experiment from taking place, however.

With regards to the removal of persons from constitutional office, only the Plenary Session has such power.⁵⁹⁶ The officers subject to this power include the President and Vice President of the PRC; any member of the Standing Committee, the State Council, or the Central Military Commission; and the Presidents of the Supreme People's Court and Supreme People's Procurate. Motions to remove may be sponsored by the Presidium, by three or more delegate groups, or by 10% or more of the

591. Candidates for both elections and confirmations are determined by the CCP and then forwarded to formal nominating organ. See Cai, *supra* note 4, at 300-301. With the exception of candidates for the NPC Standing Committee, the party tenders only one candidate is tendered for each position. Some provincial and lower level People's Congresses, however, are beginning to employ competitive elections for top legislative and executive posts. See *id.* at 302.

592. See *id.* at 302. See, e.g., *Deputies Accuse Party*, *supra* note 52, at 1 (strong delegate opposition to Jiang Chunyun vote); *NPC Vote Snub for Jiang Ally*, *supra* note 40, at 1 (same)

593. At the provincial level and lower, the regional party apparatus's internal selection process frequently involves significant consultation between that apparatus and the local congress. Disagreements between the two are resolved not by the local party organ itself, but by the party apparatus at the next higher level, meaning that the local party apparatus can no longer dictate a particular candidate to the local congress. Similar consultations occur at the central level with regards to the CCP's selections to the NPC Chairmen's Group and to the Standing Committee. See generally Cai, *supra* note 4, at 300-301.

594. See *NPC Vote Snub for Jiang Ally*, *supra* note 40, at 1.

595. See *Beijing to Replace 20 Ministers in Reshuffle*, SOUTH CHINA MORNING POST, January 14, 1997 (Internet edition). Interview with former Senator John Danforth.

596. See PRC CONSTITUTION, art. 63; NPC Organizational Law, art. 15; Procedural Rules of the Plenary Session, art. 39. Many provincial standing committees have power of removal, but the Standing Committee of the NPC does not. See Cai, *supra* note 4, at 341.

delegate body.⁵⁹⁷ Motions must provide reason for removal, but commentators are in disagreement over whether removal need be for cause.⁵⁹⁸

Removal motions are submitted to the Presidium. The Presidium decides whether to reject the motion, include the motion on the current session's agenda, or request instead that the Plenary Session form an investigatory committee to evaluate and report upon the proposed removal. If the Presidium decides to forward a request to either remove or investigate to the delegate body, it draws up a draft declaration detailing that request, which is then vetted by the delegates in group meetings (attended by representatives of the motion's sponsors). After this vetting, the draft declaration is voted upon. The declaration passes with the affirmative vote of more than half of the full delegate body. If the Presidium forms an investigatory committee to investigate the proposal for removal, that committee must issue a report discussing its findings to the next Plenary Session. After receiving and vetting that report, that session will then vote on the removal. Removal is effected upon affirmative vote of over half of the full delegate body.⁵⁹⁹

There is no record of the NPC ever having even considered a proposal to remove. However, numerous provincial people's congresses have developed more robust procedures for removal, which include providing the Standing Committee with the power of removal, and extending the power of removal to a wider array of governmental officials.⁶⁰⁰ On at least one occasion, a provincial people's congress (that of Hubei) has in fact removed persons from high office on its own initiative.⁶⁰¹

6. Supervising the Courts

The 1982 Constitution also gives the Standing Committee the general power to "supervise" other constitutional organs.⁶⁰² At present, the only constitutional organ subject to such supervision on a systemic basis is the judiciary. The power to supervise the courts has been interpreted as giving

597. See NPC Organizational Law, art. 15; Procedural Rules of the Plenary Session, art. 39.

598. See Cai, *supra* note 4, at 314. In fact, the only report case of a People's Congress removing a governmental official involved removal without cause. See *id.* at 314 n.1.

599. See NPC Organizational Law, art. 15; Procedural Rules of the Plenary Session, art. 39. See generally Cai, *supra* note 4, at 340-341; Liu & Cheng, *supra* note 1, at 175-176.

600. See Cai, *supra* note 4, at 341.

601. See *id.* at 341 n.1.

602. See PRC CONSTITUTION, art. 67 (6).

the NPC the authority to supervise the courts' handling of particular cases.⁶⁰³ However, this does not allow the Standing Committee to substitute its decision for that of the court (as has been suggested by some Western commentators). Rather, it allows the Standing Committee to petition the Supreme People's Court, or some lower court, to review the handling of a particular case for procedural errors or errors of legal interpretation.⁶⁰⁴

The NPC actually "supervises" thousands of such cases each year. Most of the time, such "supervision" consists simply of asking a particular court to look into a complaint sent to the NPC by a delegate or an ordinary citizen. Each year the NPC receives over 10,000 complaints alleging improper judicial handling of particular cases.⁶⁰⁵ These complaints are routinely forwarded by the NPC's Internal and Judicial Affairs Committee to the Supreme People's Court.⁶⁰⁶ According to the Supreme People's Court, the vast majority of these complaints are unfounded.⁶⁰⁷

The NPC has developed guidelines for court supervision. These guidelines derive from two cases in the late 1980s in which a higher-level people's congress successfully corrected an improper criminal conviction. In the first case, the NPC Standing Committee organized an investigatory committee to look into a complaint regarding the handling of a case in Liaoning in which three attorneys had been convicted of "concealment"⁶⁰⁸ and sentenced to imprisonment. That committee concluded that there was no evidence that those lawyers had in fact done anything outside the normal course of their duties. The NPC Standing Committee then asked a Liaoning court to review the matter, and the sentences were ultimately overturned by the court.⁶⁰⁹

603. The same power allows the Standing Committee to investigate the procuracy's handling of particular cases as well. See Cai, *supra* note 4, at 325; Liu & Cheng, *supra* note 1, at 113. Procedures for supervising the procuracy have not been developed.

604. The Standing Committee's power in this area is thus somewhat akin to that enjoyed by the British House of Lords, except that the NPC may not actually try cases, as may the House of Lords. See E.C.S. WADE & A.W. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 369-70 (11th ed. 1993).

605. See Liu & Cheng, *supra* note 1, at 113.

606. See notes 614-615 and accompanying text *infra*.

607. See Finder, *supra* note 171, at 152-53.

608. "Baobi fanzui."

609. See Liu & Cheng, *supra* note 1, at 113. The year of this case is not given, although the procedures used suggest it occurred prior to the formation of the Internal and Judicial Affairs Committee in 1987.

The second case occurred in Shanghai in the late 1980s. It involved a Mr. Yu, who in 1987 had been sentenced to a two-year suspended death sentence by a lower Shanghai court for an intentional murder. Mr. Yu tried to appeal his conviction, but all his petitions for appeal were returned unopened. Through his relatives, he petitioned the Shanghai People's Congress to look into the case.⁶¹⁰ The Shanghai People's Congress investigated the case, concluded that the evidence was insufficient to justify conviction, and asked the Shanghai Intermediate Court to review the case. In 1989, Mr. Yu was retried, and found innocent.⁶¹¹

From these precedents, the Standing Committee in 1989 codified guidelines for its juridical supervision.⁶¹² These guidelines articulate three fundamental limitations of the NPC's power in this area. First, the NPC must wait until a case is completed before beginning its own investigations: it may not intervene or seek to influence ongoing judicial proceedings. Second, the NPC's supervision is limited to supervision over a court's handling of judicial procedure and legal interpretation: it may not intervene behavior merely because it feels the court came up with the wrong verdict. Finally, if the NPC finds that the trial involved procedural irregularities, or that the decision was founded on a misreading of the law, it may only ask that the court or one of its superior courts retry or review the case: it may not substitute its own judgement for that of the courts by issuing pardons or bills of attainder.⁶¹³

These 1989 guidelines also set out the procedures to be followed in supervising judicial activity. All complaints regarding legal cases are forwarded to the Internal and Judicial Affairs Committee. If that committee feels the complaint has possible merit, it will forward a copy of the complaint to either the offending court or one of that court's superior courts, along with a request that the matter be looked into. The Internal and Judicial Affairs Committee may also issue such requests *sui sponte*.⁶¹⁴

If the Internal and Judicial Affairs Committee feels that the behavior complained of is particularly serious, it may also request that the petitioned court reports the finding of its review and any corrective responses to the committee. If the Internal and Judicial Affairs Committee is not satisfied

610. The petition, which was delivered by one of his relatives, consisted of one word, "injustice" ["yuan"] written in blood on a scrap of paper. See Liu & Cheng, *supra* note 1, at 113.

611. See *id.*

612. See Qi Jie Quanguo Renda Changweihui Gongzuo Youdian (1989), discussed in Liu & Cheng, *supra* note 1, at 113.

613. See generally Liu & Cheng, *supra* note 1, at 113-14; See also Cai, *supra* note 4, at 327-28.

614. See generally Cai, *supra* note 4, at 325. See also Finder, *supra* note 171, at 152-53.

with the court's report or response, it may subpoena additional materials and/or testimony from court personnel. It may also ask one of that court's superior courts to review, correct and report on the lower court's handling of the case.⁶¹⁵

If still unsatisfied, the Judicial Affairs Committee may then conduct its own investigation into the courts' handling of the case. Alternatively, it may ask the Standing Committee to form an investigatory committee to investigate the handling of that case. Regardless of who conducts the investigation, the results of that investigation are reported to the Standing Committee. If the investigation reveals serious, unaddressed errors, the investigating body may attach to its report a draft declaration demanding that a particular court review or retry the case and reports its actions to the Standing Committee. That draft declaration would then be considered and voted upon by the floor of the Standing Committee.⁶¹⁶ If the Standing Committee passes the declaration, and the petitioned court or courts fail to address the error to the satisfaction of the Standing Committee, the Standing Committee — acting either on its own or on recommendation from the Internal and Judicial Affairs Committee — may institute removal proceedings against uncooperative judicial personnel.⁶¹⁷

In addition to such case-specific supervision, the NPC also supervises the courts by requiring that the Supreme People's Court (and the Supreme People's Procurate) issues interim work reports to the NPC whenever a major anti-crime campaign is undertaken, a particularly influential case is decided, or an important problem arises involving the judicial process or judicial system. The Internal and Judicial Affairs Committee and other special standing committees may also request reports from the Supreme People's Court on any other "matter of public concern."⁶¹⁸

7. Other Issues

As noted above, one of the biggest obstacles to the greater institutional effectiveness of the NPC has traditionally been the ability of the State Council to ignore with laws and resolutions passed by the NPC.

615. See generally Cai, *supra* note 4, at 325. The appeal need not be to the *direct* superior of the offending court. The Committee may, if it chooses, skip levels, appealing the handling of a court case, for example, directly to the Supreme People's Court.

616. See also notes 542-560 and accompanying text *supra* (discussing procedures for conducting special investigations).

617. See generally Cai, *supra* note 4, at 325.

618. See *id.* at 325. This form of supervision was instituted in the early to mid 1990s.

This problem is exacerbated by the fact that the overwhelming bulk of China's legal corpus derives from administrative and regional regulations. Developing greater and more effective supervision of executive behavior is thus one of the top institutional priorities of the NPC. The NPC's efforts in this area have focused primarily on four issues. These include developing a set of laws rationalizing administrative behavior, developing procedures for reviewing provincial and administrative legislation for conformity with statutory or constitutional norms (a "legislation law"), creating a comprehensive legal framework rationalizing and strengthening the NPC's own supervisory procedures (a "supervision law"), and clarifying the extent to which the NPC might be able to supervise the activities of the CCP.

a. Rationalizing administrative behavior

The NPC's principal response to date to the problem of administrative non-compliance has been to develop laws giving private right of action to persons injured by executive transgressions. These include the Administrative Litigation Law, passed in 1989, and the State Compensation Law, passed in 1994. In addition, the NPC has been working to codify various aspects of administrative procedure. These include the Administrative Sanctions Law, passed by the 1996 Plenary Session which sets the parameters under which administrative organs could impose monetary sanctions, and the "Administrative Supervision Law," which regulates internal investigations by executive organs.⁶¹⁹

The effectiveness of this response is hindered, however, by China's weak court system, whose scales are frequently more sensitive to political and financial influence than to matters of justice (particularly at the lower levels).⁶²⁰ Nevertheless, this framework can and does have effect. The public interest law center of Wuhan University reported that in 1996 it won over 60% of the administrative litigation cases it handled.⁶²¹ Moreover, the

619. See *Chuanguo Renda Falu Weiyuanhui Xiang Changweihui Baogao You guan Falu Caoan Shenyi Jieguo he Xiugai Yijian* [NPC Law Committee Reports to Standing Committee on Results of Deliberations and Opinions on Revision of Draft Laws], FAZHI RIBAO [LEGAL SYSTEM DAILY], December 25, 1996, at 2; See also *Anti-Graft Law Delayed by Row on Name*, SOUTH CHINA MORNING POST, December 31, 1996 (Internet edition) (discussing some of the debate surrounding this law).

620. See, e.g., Chen Youxi, *supra* note 144 (discussing the obstacles to the administrative litigation law's effectiveness).

621. Interview (Wuhan University).

threat of litigation also appears to discipline administrative behavior somewhat.⁶²²

b. Supervising provincial and administrative legislation: the draft "Legislation Law"

Even with the administrative procedure and litigation laws discussed above, the courts do not have authority to annul administrative or provincial regulations. That power vests with the Standing Committee.⁶²³ However, the NPC still lacks procedures for realizing that power.⁶²⁴ The NPC is currently working on a draft of "Legislation Law [Lifa Fa]" setting out specific procedures for reviewing and annulling administrative and provincial legislation. One of the more common suggestions in this area involves establishing a special work commission, with status equal to that of the CLA, to review such legislation.⁶²⁵ Since 1990, at least two drafts of a legislation law have been developed, but neither reached the floor of the Standing Committee (due in part to significant political opposition from the State Council, the provinces, and their allies in the CCP).⁶²⁶ Since 1995, the NPC's efforts to produce a legislation law per se appear to have lost steam. Instead, the NPC seems to be folding the principal elements of that law into a broader draft of "supervision law" discussed below.⁶²⁷

622. Interview (CSRC); interview with legal scholar. Cf. *Dissident Gets 7 Years for 'Hooliganism,'* SOUTH CHINA MORNING POST, October 7, 1996, at 7 (stating that "authorities were keen to clear up cases concerning political dissidents before the amended Criminal Procedural Law . . . require[s] both the police and prosecution to follow more stringent procedures in detaining and charging activists . . .").

623. See PRC CONSTITUTION, art. 67 (7), (8). Cf. note 435 *supra* citing precedents for this view in Western legal thought.

624. See Cai, *supra* note 4, at 331-32; Liu & Cheng, *supra* note 1, at 110-13.

625. See Liu & Cheng, *supra* note 1, at 119-20 (proposing a constitutional court under the Standing Committee). See generally Cai, *Constitutional Supervision and Interpretation in the People's Republic of China*, 9 J. CHINESE L. 219, 238-243 (1995) (recounting history of this proposal).

626. One was drafted by a drafting group at China University of Politics and Law, and the other by a drafting group at the Chinese Academy of Social Sciences. Interviews (drafting groups).

627. Interview (General Office Research Department). In fact, the distinction between these two legislative proposals has always been somewhat blurred. See, e.g., Cai, *supra* note 409, at 242-243. In 1994, when the draft legislation law seemed likely to reach the floor of the Standing Committee, the drafting group incorporated into that draft numerous provisions from the then stalled draft supervision law. Interview (consultant to legislative law drafting group).

c. Rationalizing the NPC's own supervisory procedures: the draft "Supervision Law"

The incomplete and ill-formed nature of many of the NPC's supervisory procedures obviously limits the implementation of the NPC's various supervisory powers. Many provincial congresses have adopted "supervision laws [jiandu fa]" to strengthen and rationalize the scope and exercise of their own supervision over the provincial executive.⁶²⁸ Since 1989, the NPC has been working on similar legislation, generally using these provincial laws as a model.⁶²⁹ The anticipated rational Supervision Law is intended to reinforce and rationalize many of the NPC's existing supervisory processes, and could also introduce new procedures, such as those for holding investigatory hearings.⁶³⁰

As might be expected, however, this legislative initiative has faced considerable opposition from the State Council and its allies in the CCP. At least two drafting groups for this law have been formed, but neither was able to get a draft to the floor of the Standing Committee. Political momentum for such legislation appeared to peter out in the early 1990s, but since 1995 NPC delegates have been increasingly vocal in calling for such legislation.⁶³¹ In fall of 1996, the Chairmen's Group forms a drafting committee to help jump start the development of this law. This committee is comprised primarily of department heads from the General Office Research Department and the CLA, and thus has more political weight

628. These include Shandong, Heilongjiang, Hunan, Anhui, Henan, Gansu, Zhejiang, Jiangsu, Shanghai and Guangdong. According to staffers in the General Office Research Department, that of Gansu is the most developed. Interview (General Office Research Department).

629. See, e.g., Gu Dezu, *Dui Renmin Jiqi Changweihui Ji Zhong youxiao Jiandu Xingshi de Tanta* [Inquiry into Several Effective Methods of Supervision by People's Congresses and Their Respective Standing Committees], FAXUE YANJIU, No. 1, 1991, at 20 (suggesting particular provincial practices that might be profitably adopted by the NPC); sources cited in note 88 *supra*.

630. Interviews (CLA; General Office Research Department).

631. See, e.g., Wei Yifa Zhiguo Jianshe Fazhi Guojia Xianji [Suggestions for Establishing a National Legal System for a Nation of Law], FAZHI RIBAO [LEGAL SYSTEM DAILY], March 17, 1996 at 1 (reporting on suggestions from 8 NPC delegates on developing NPC supervision); *Nuli Tansuo Jiaqiang Falu Jiandu de Xin Tujing* [Effectively Exploring New Means for Increasing Supervision of the Laws], FAZHI RIBAO [LEGAL SYSTEM DAILY], March 12, 1996, at 8 (reporting on several delegate proposals for developing more effective NPC supervision); *Deputies Accuse Party*, *supra* note 52, at 1 (Guangdong deputies launch "scathing attack" on NPC leaders in part for failing to develop a supervision law). Cf. *Renzhen Luxing Zhineng, Jiji Canzheng Yizheng* [Conscientiously Carry Out One's Duties, Enthusiastically Participate and Contribute to Government], FAZHI RIBAO [LEGAL SYSTEM DAILY], March 9, 1996, at 2 (summary of several CPPCC delegates' calls for greater 'democratic' supervision).

behind it than did the earlier drafting groups (which consisted primarily of academics).⁶³²

However, as discussed above, even without such a comprehensive legal framework, considerable piecemeal development of procedural and legal standards for supervision has already occurred.⁶³³ The NPC's increasingly professional and assertive delegate body has also begun to pay dividends in this area.⁶³⁴ For these reasons, the need for such a supervision law is probably not as great now as it once was, and its passage could well have only ancillary effects on the continued development of the NPC's supervisory competence.

d. Supervising the CCP

Related to the NPC's general supervision over the executive branch is the question of whether and to what extent it has authority to also supervise the CCP.⁶³⁵ Technically, the NPC's supervision is limited to supervision over constitutional organs.⁶³⁶ However, NPC scholars and other commentators have argued that since the CCP's role in constitutional operations is articulated in the 1982 Constitution itself, this makes the CCP a quasi-constitution organ subject to the NPC's supervision.⁶³⁷ According to these proponents, while the NPC cannot supervise CCP policy decisions or its nomenklatura system, it may and should supervise the CCP's compliance with national laws and regulations.⁶³⁸

632. Interview (special drafting committee).

633. These include, for example, reporting provisions the National Budget Law, development of internal procedures for conducting investigations, and refinements on procedures for vetting nominations for high public office.

634. See notes 37-52 and accompanying text *supra* (noting effects of development of delegate body).

635. See, e.g. Pu Cengwan, *Lun Qianghua Renmin Daibiao Dahui Zhidu Yishi [Ideas on Strengthening the People's Congresses]*, ZHENGZHI YU FALU, No. 6, 1994, at 12, 14-15 (discussing supervision implications caused by close relationship between the party and the State Council).

636. The Chinese term is "guojia jiguan [state organs]."

637. See, e.g. Yu Ziqing, *Yetan Dang Lingdao Renmin Yu Renmin Jiandu Dang [On the Party Leads the People and the People Supervise the Party]*, FAXUE, No. 5, 1996, at 5, 5.

638. See, e.g., Liu & Cheng, *supra* note 1, at 121-123. Cf. *Qiao Stresses Need for NPC to be Subordinate to Party*, SOUTH CHINA MORNING POST, December 16, 1996 (Internet edition) (misleadingly entitled interview of Chairman of the NPC Standing Committee in which he discusses the general jurisdictional boundaries between the CCP and the NPC and noting that even the party must obey the laws and the 1982 Constitution) [hereinafter *Qiao Stresses Need for NPC to Be Subordinate to Party*].

While this discussion has yet to progress beyond the realm of speculative theory (no one has suggested as to how such supervision might be effectuated in practice), it nevertheless has provoked some public debate in China.⁶³⁹ Many see such supervision as a means to check efforts by CCP officials to illegally interfere in the decisions or activities of other constitutional entities. The notion that the legitimate authority of the CCP is subject to constitutional limits is universally recognized even by the CCP itself.⁶⁴⁰ As a normative matter, it is clear that the Party cannot, for example, legitimately tell a court how to decide a particular case or demand that a governmental organ abrogates legal procedures.⁶⁴¹ On at least two occasions, a people's congress has successfully reminded the CCP of the 1982 Constitution's limits on party authority when the party sought to trespass on that congress's own constitutional mandate. One such occasion occurred in 1993, when the CCP sought to introduce a constitutional amendment directly to the floor of the NPC.⁶⁴² The other occurred in 1992, when the CCP sought to transfer three provincial governors without seeking approvals from the respective provincial people's congresses.⁶⁴³

D. Meeting Procedures

1. Meeting Procedures for the Standing Committee

The Standing Committee meets in session once every two months. Prior to each session, a draft agenda for that session is drawn up by the Secretary's Group (with assistance from the General Office Research

639. See, e.g., Liu & Cheng, *supra* note 1, at 121-123; Cai, *supra* note 4, at 319, 354; Yu Ziqing, *supra* note 638; Xiao Li, *Dang Lingdao Renmin Yu Renmin Jiandu Dang [The Party Leads the People and the People Supervise the Party]*, FAXUE, No. 12, 1995, at 2; Wei Yifa Zhiguo Jianshe Fazhi Guojia Xianji [Suggestions for Establishing a National Legal System for a Nation of Law], FAZHI RIBAO [LEGAL SYSTEM DAILY], March 17, 1996 at 1. Most commentators seem to support the NPC's authority to supervise the party.

640. See Qiao Stresses Need for NPC to Be Subordinate to Party, *supra* note 639 (Chairman of NPC Standing Committee noting legal and constitutional limits on party's authority).

641. This principle has been explicitly recognized in the CCP on many occasions, and it even contained in the CCP's own constitution. See Pu Cengwan, *supra* note 636, at 14.

This is not to say that CCP officials do not in fact engage in such activities. Clearly they do (hence the need for NPC supervision). But it is to say that such interventions are universally regarded as wrong, as it belied by the CCP's own response to such acts, which is always to either cover them up or denounce them.

642. See note 432 and accompanying text *supra*.

643. See Andrew Nathan, China's Constitutional Option, 24. (1996) (Unpublished manuscript)

Department)⁶⁴⁴ and then approved by the Chairmen's Group.⁶⁴⁵ At least seven days in advance of the session, delegates to the Standing Committee receive a copy of the draft agenda. At that time, delegates also receive copies of drafted legislation to be considered at the session. If the legislation is being vetted for the first time, delegates will also receive copies of the drafter's explanation and the CLA's report on the special standing committees' evaluations. Otherwise, the delegates will receive a copy of the Law Committee's revision report.⁶⁴⁶ Preparatory materials for other items to be vetted (such as draft work reports and committee reports) may also be dispersed to the delegates at that time at the discretion of the Secretary's Group.⁶⁴⁷

A session of the Standing Committee requires a quorum of greater than 50% in order to convene.⁶⁴⁸ The session is presided over by the Chairman or, at his or her designation, one of the vice-chairmen.⁶⁴⁹ The first order of business is to approve the draft agenda as tendered by the Chairmen's Group.⁶⁵⁰ Next, the various legislative proposals on the meeting agenda are reported to the floor. New legislative proposals being presented for first reading are reported by their drafter or lead drafter. In the event the legislative plan designates a number of drafters without designating a lead drafter, the Secretary's Group, with assistance from the General Office Research Department, decides which drafter will present the proposal.⁶⁵¹

After all the proposals have been read to the full Standing Committee, the delegates retire into four "groups"⁶⁵² to vet the proposals. Each delegate group is chaired by a Vice Chairman.⁶⁵³ Delegate group meetings are also attended by representatives from the organs who drafted or otherwise

644. Interview (General Office Research Department).

645. See Procedural Rules of the Standing Committee, art. 5; See Secretary's Group Procedural Rules, art. 2(3). See also Cai, *supra* note 4, at 374; Liu & Cheng, *supra* note 1, at 229.

646. See Cai, *supra* note 4, at 263.

647. See Procedural Rules of the Standing Committee, art. 6.

648. See Procedural Rules of the Standing Committee, art. 4.

649. See Procedural Rules of the Standing Committee, art. 3.

650. See Procedural Rules of the Standing Committee, art. 5. This appears to be a simple formality, the procedural rules provide no mechanism through which the delegate body may amend this draft, and provides no guidance in the event this draft were ever rejected.

651. Interview (General Office Research Department). See also notes 317-319 and accompanying text *supra* (on multiple drafters in the legislative plan).

652. "Fenzu huiyi."

653. See Procedural Rules of the Standing Committee, art. 15; see also Cai, *supra* note 4, at 375.

presented the proposals to be discussed at that particular meeting.⁶⁵⁴ Group meeting discussions are recorded. If these meetings reveal particularly severe concerns or disagreements among the delegates, the Chairmen's Group may request presenting and/or other drafting organs issue supplemental reports and/or provide additional representatives or particular officers to answer delegate inquiries.⁶⁵⁵ After a legislative proposal has been vetted in the delegate group, the Standing Committee reconvenes in plenary session and again vets each proposal on the whole floor. This vetting, too, is recorded by the Law Committee.⁶⁵⁶

As noted above, statutory proposals must be sent down for revision following preliminary vetting. Other items are sent down or voted upon at the discretion of the Chairmen's Group.⁶⁵⁷

2. Meeting Procedures for the Plenary Session

Plenary Sessions are always held in the first quarter of each calendar year, by tradition in March.⁶⁵⁸ They require a quorum of two-thirds in order to convene.⁶⁵⁹ At least one month prior to the commencement of a Plenary Session, the Standing Committee meets in a special meeting to prepare for that session. At that meeting, the Standing Committee sets the beginning date for that session, and approves a proposed draft agenda (drawn up by the Secretary's Group) and a proposed draft list of Presidium members. Both lists will be submitted to the Plenary Session for final approval.⁶⁶⁰ During the same meeting, the Standing Committee also approves a proposed draft list (drawn up by the Chairmen's Group) of other persons who will be invited to participate in the Plenary Session discussions as non-

654. *See id.*

655. *See* Procedural Rules of the Standing Committee, art. 15; *see also* Cai, *supra* note 4, at 375.

656. Interview (CLA).

657. *See* Procedural Rules of the Standing Committee, art. 16; *see also* Cai, *supra* note 4, at 281.

658. *See* Procedural Rules of the Plenary Session, art. 2.

659. *See* Procedural Rules of the Plenary Session, art. 4.

660. *See* Procedural Rules of the Plenary Session, art. 6. According to this rule, this meeting is supposed to occur at least one month prior to the convening of the Plenary Session. In practice, it generally occurs some two to three weeks prior to the convening of the Plenary Session.

voting attendees (drawn up by the Chairmen's Group) and assigns the Plenary Session delegates to their respective delegate groups.⁶⁶¹

The date of the session and major items on the draft agenda (included copies of all legislative proposals and their accompanying drafting and/or evaluative reports) must be announced and distributed to the delegates at least one month prior to the starting date.⁶⁶²

One day prior to convening the Plenary Session, the delegate groups hold a "preparatory group meeting [yubei huiyi]." At this meeting, the delegate groups elect their Group Chair and Vice Chair,⁶⁶³ and vet and vote on the draft session agenda and draft Presidium name list (as submitted by the Standing Committee).⁶⁶⁴ A group may also decide (by majority vote) to submit its own proposals and recommendations regarding these items to the Presidium for consideration by the full Plenary.⁶⁶⁵

Once the nominees to the Presidium are confirmed, the Presidium takes control of the Plenary Session.⁶⁶⁶ Its first order of business is to elect its Standing Chairmen, and to approve the draft list of non-voting attendees as submitted by the NPC Standing Committee.⁶⁶⁷

The day after the Presidium holds its first meeting, the Plenary Session meets in full-session for its opening meeting. The docket for the Plenary Session then generally runs as follows. The first order of business is the reading and vetting of the State Council's draft work report and the State Council's draft reports on the budget and state plans. Next, the Plenary Session hears and vets draft basic laws and major draft resolutions. Third, it hears and vets the work reports of the Standing Committee, the Supreme People's Court, and the Supreme People's Procurate, respectively. Finally, the Plenary Session hears and vets proposals concerning the election,

661. See Cai, *supra* note 4, at 357-59. Delegates are always grouped according to province (or appointing entity in the case of delegates appointed by the PLA). See Procedural Rules of the Plenary Session, art. 7.

662. See Procedural Rules of the Plenary Session, art. 6.

663. See NPC Organization Law, art. 4. The Group Chair is generally the Party head for the particular jurisdiction represented by the Group. Interview (General Office Research Department).

664. Article 6 of the Procedural Rules of the Plenary Session suggest that the Standing Committee may amend these proposals if it wishes in the course of this vetting. But it is difficult to see how this would be possible, given the dispersed nature of the vetting and the short vetting period of one day.

665. See NPC Organization Law, art. 5; Procedural Rules of the Plenary Session, art. 8. See also Cai, *supra* note 4, at 361. There is no record of Plenary Session delegates ever effecting a change in the meeting agenda.

666. NPC Organizational Law, art. 6; Procedural Rules of the Plenary Session, art. 9.

667. See Procedural Rules of the Plenary Session, art. 10.

confirmation and removal of persons to and from constitutional office. All work reports and legislative proposals are voted on at the end of the session.⁶⁶⁸

As with the Standing Committee, agenda items are first read out before a full meeting of the Plenary Session, and are then vetted in delegate group meetings attended by representatives from the item's drafter or presenter.⁶⁶⁹ Results of the vetting are recorded and passed on to the Presidium, who may decide to amend the item accordingly (if the item is a legislative proposal) or to incorporate the major points or concerns in a draft declaration to accompany approval of the item (if the item is a work report or investigatory report). Regardless of the nature of the item, it is invariably voted on in the same session in which it is introduced, although an option exists to refer an item to the Standing Committee for further study.⁶⁷⁰ There is no follow-up vetting of any item by the whole floor after the delegate group vettings. However, as noted above, in some cases — such as when considering draft basic legislative or the budgetary reports — a follow-up vetting may be done by the Presidium.⁶⁷¹

E. A Note on Transparency

Obviously, the institutional effectiveness of the NPC is impeded by the closed nature of its constitutional environment. Public view is an important component of parliamentary effectiveness. A parliament's ability to expose questionable activities to public scrutiny is its most effective means for disciplining other constitutional actors. Procedural openness also promotes delegate development, since acting on a more public stage encourages delegates to behave more professionally. The public image of independent and professional parliamentary operations can also enhance the reputation of that body among the polity.⁶⁷²

668. See Cai, *supra* note 4, at 367-69.

669. See Procedural Rules of the Plenary Session, art. 21; Cai, *supra* note 4, at 365-366.

670. See Procedural Rules of the Plenary Session, art. 28.

671. See, e.g., notes 417-418 and accompanying text *supra* (noting follow-up vetting by Presidium of revised draft basic legislation); note 487 and accompanying text *supra* (noting follow-up vetting by Presidium of Economic and Finance Committee's budgetary recommendations).

672. Mr. William Proctor, Clerk of Standing Committees for the House of Commons, credits greater public openness of British parliamentary operations in the late 1980s, particularly the advent of televised proceedings, for significantly promoting the effectiveness of that institution. In particular, it encouraged (or compelled) MPs to show greater initiative, and greater independence from their respective parties, meaning that the Prime Minister could no longer rely on party discipline to dictate terms to the House of Commons. As a result, parliament is according to him, now much

Measured by practices of more developed parliaments, the NPC's procedures are not particularly transparent. Only meetings of the Plenary Session are technically open to the public, but this is by invitation only such invitations are not easily obtained (they are generally given only to the press and the foreign diplomatic personnel).⁶⁷³ These meetings, along with full meetings of the Standing Committee, and some of the Plenary Session's group meetings, are reported in the domestic press. But, for the most part these reports are little more than recitations of that meeting's agenda items, perhaps with a brief accounting of the explanations/reports accompanying the reading out of a bill. The content of whatever discussions occur in these meetings is generally not reported. Voting results (i.e. pass/not pass) are reported, but not voting tallies. The low rate of delegate approval for Jiang Chunyun, for example, was never reported in the domestic press (although it appears to be widely-known among educated classes). Everything else, including committee reports, investigative findings, and the pre-floor phases of the legislative process, are not generally reported at all.

Nevertheless, the NPC has been able to open its own and governmental operations in China to greater public scrutiny. Since 1994, the NPC has unveiled its own operations and problems to an extent unprecedented in the Chinese government. Its staffers have produced numerous scholarly publications that provide fairly detailed accounts of disputes that have arisen and continue to arise within the NPC. Many of these are critical of the NPC's own handling of these issues.⁶⁷⁴ Articles in the *Fazhi Ribao* [China's national law journal] have also been increasingly candid about the disagreements and criticisms coming out of the NPC and its delegates.⁶⁷⁵

more able to resist executive pressures than it was previously. The public sight of individual MPs going up against ministers of their own party has also increased the public reputation of Parliament. Interview with William Proctor.

673. Interview with Steve Mufson, Washington Post reporter; and Western diplomatic personnel.

674. See, e.g., *Handling Amendments*, *supra* note 63 (CLA staffer criticizing the NPC's handling of a CCP attempt to introduce a constitutional amendment directly to the floor of the Plenary); *Special Committees*, *supra* note 209 (criticizing the CLA's ability to prevent dissenting opinions from the special standing committees from reaching the floor of the Chairmen's Group and the NPC). Both Cai Dingjing, *supra* note 8, and Cheng & Liu, *supra* note 1, devote considerable space to criticizing various limitations in NPC procedure. Both these books were authored by staffers from the General Office Research Department.

675. See, e.g., sources cited in note 632. This trend has reversed somewhat since Fall of 1997, at least with regards to popular press coverage provided by the *Fazhi Ribao*, probably in response to Jiang Zemin's efforts to increase party control over the press.

The NPC has also exposed the operations of other government organs to increasing scrutiny. Governmental work reports are increasingly candid about the mistakes and limitations of their respective departments.⁶⁷⁶ Although much of this is not reported in the domestic press, such "internal openness" is nevertheless able to focus political and public attention on issues of political performance that would have otherwise avoided scrutiny. The response of both the Supreme People's Court and the State Council to delegates' censure at the 1997 Plenary Session is an example of such dynamics.⁶⁷⁷ While it is not as effective as Brandeis's sunlight, the "moonlight" of the NPC supervision nevertheless exerts a disciplining effect on governmental actors that would not be there otherwise.

On the other hand, too much transparency could have a detrimental effect on the NPC's present institutional development.⁶⁷⁸ At least some of the NPC's lack of transparency is the by-product of efforts to insulate itself from CCP meddling. It also encourages delegates to vote and speak their minds.⁶⁷⁹

In addition, China's post-1949 political establishment has generally been uncomfortable with open political disagreement, and thus the party might not wish to continue its "benign neglect" of the NPC's institutional development if the NPC were to start piercing the veil of democratic centralism too blatantly.⁶⁸⁰ The privacy afforded by closed operations may also be useful in eliciting compromises from competing political interests,

676. See, e.g., *Stability Put Before Need to Balance Budget*, SOUTH CHINA MORNING POST, March 3, 1997, at 8 (Finance Minister admits that China will not be able to balance budget by 2000); *Education Funding Goal Long Way Off*, HONG KONG STANDARD, March 6, 1997 (Internet edition) (Qiao Shi announcing the State Council is unlikely to meet its stated promise of increasing educational spending to 4% of GNP in 2000); *Rare Protest Made Against Slipping Education Budget*, SOUTH CHINA MORNING POST, January 16, 1997 (Internet edition) (NPC investigation inspires public protest of governmental budget); *China's Premier Cites "Mistakes," Pledges to Fight Inflation, Abuses*, THE WASHINGTON POST, March 6, 1995, at A11. See also articles by Liu Renwen cited in note 344 *supra* (article critical of effectiveness of "strike hard" anti-crime campaign adapted from a presentation before an NPC investigatory committee).

677. See notes 43-45, 51 and accompanying text *supra*.

678. Interviews (General Office Research Department; drafting group; legal scholar).

679. See *Delegates Accuse Party*, *supra* note 52, at 7 (noting delegate fears that they might be "investigated" if they vote against the party).

680. It is notable in this regard that the possible crackdown on public reporting of NPC operations, see note 676 *supra*, have not been accompanied by any corresponding crackdown on delegate independence. The 1997 delegates have been allowed to be just as critical of governmental operations as they were in 1996. See notes 42-45 and accompanying text *supra*.

particularly with regards to controversial political decisions.⁶⁸¹ This may be particularly important in a political environment like China's, which has historically had difficulties in distinguishing between pragmatic compromise and political betrayal.⁶⁸²

CONCLUSION: THE LIMITS OF CONSTITUTIONALISM

It is surprising to many how well the NPC's basic structural features compare to those of many Western parliaments. Most of the standard complaints leveled against NPC operations are just as easily leveled against many Western parliaments. For example, in most parliamentary systems, including those of the UK, Canada, and Japan, top legislative and constitutional posts are determined by the controlling party, and are merely "rubber-stamped" by the party-controlled parliament. Party platforms also have great, and in many instances controlling effect on legislative development. If the NPC has rarely voted down an executive- or party-sponsored bill, the same can be said for the UK, Japan, and many other Western parliamentary systems.

In fact, in comparison with many Western parliamentary systems, one of the most striking features of the NPC is its relative independence from the executive, and even from the controlling party. The NPC plays a much more active institutional role in China's legislative development than does the Japanese Diet or the British House of Commons. Between 1955 and 1993, the NPC actually voted down more pieces of executive sponsored legislation (1) than either of these two parliaments (0). Since 1995, the CCP has suffered 25% or more defection rates among NPC delegates in seven instances. By contrast, as noted above, no similar breakdowns in party discipline have occurred in any contested parliamentary vote in either Britain or Japan since the Second World War.

No doubt, many will dispute this. Critics will point out, for example, that political operations in China are nowhere near as enlightened as are those in the developed West. They will note China's continued persecution

681. In Canada, for example, the national budget is negotiated in strictest secrecy, both to prevent strategic bargaining among various political interests and to facilitate a minister's ability to make politically-unpopular concessions.

682. See, e.g., Tang Tsou, *The Tiananmen Tragedy: The State-Society Relationship, Choices, and Mechanisms in Historical Perspective* in *THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM* 213, 213-221 (Jon Elster, ed., 1996) (noting difficulties China's political culture has in arriving at stable compromise positions).

of political dissidents and its continued disregard for human rights. These arguments, however, miss a crucial point. Constitutional government is not synonymous with “liberal” government. At its core, constitutionalism is a form of political operation: one that provides hopefully stable and hopefully efficient means for making political decisions and resolving political disputes. Most of the time, these goals are compatible with, and even furthered by, political liberalism. But this is not always the case. For example, in its early stages, the survival of the American constitutional system depended on a tolerance of the practice of slavery, and the American constitutional system actively defended that practice. In that case, the interaction of our core constitutional components — federalism, democratic decision-making, checks-and-balances and judicial review — worked to obstruct, rather than to promote, the development of a more liberal and enlightened polity.

The distinctions and tensions between liberalism and constitutionalism is most clearly manifested in the parliament. On one hand, parliaments embody the democracy that is the key to liberal political legitimacy. On the other hand, parliaments also embody the excesses of democracy that are among liberalism’s greatest threats.

Parliaments are also not particularly conducive to efficient or even enlightened government. Legislatures are inherently amateur bodies. Even in the best of political environments, its members are selected, not on the basis of expertise, technical training, or liberal values, but on the basis of how well they represent their constituents. In times of constitutional or social crisis, they are thus often less informed, less prepared, and generally less “competent” than their sister branches of government.

This is clearly the case in China. In some aspects, such as promotion of more democratic means of decision-making and wider distributions of political power, the NPC is clearly in the forefront of efforts to liberalize Chinese political society. But in many other aspects, the NPC is one of the more conservative political organs in China. Indeed, the principal factor for the initial development of the NPC during the late 1970s and early 1980s was that its leader at that time, Peng Zhen, needed an institutional vehicle through which to oppose the liberal reforms of Deng Xiaoping. More recently, NPC delegates derailed attempts to liberalize the criminal code and lobbied for more protectionist trade policies. Delegates’ complaints about crime were a motivating force behind China’s on-going “Strike Hard” anti-crime campaign that has attracted the concern of the international human rights community.

Thus, while the constitutional development of the NPC is real, it also bears a sobering tale about the limits of constitutionalism. The development of democratic or constitutional structures will not immediately or automatically cure all political, social or economic ills. It may even exacerbate some of those ills. Constitutionalism is merely one piece in the larger puzzle of good governance.

But if constitutionalism is not synonymous with liberal government, it is clearly its yoke mate. Many, perhaps most, of the core techniques of liberalism also work to promote the goals of constitutionalism. For example, freedom of expression promotes effective pluralist decision-making, and effective pluralist decision-making is a key feature of constitutional stability. Constitutional development thus provides a more fertile soil for liberal growth. Therefore, even if the NPC itself will not promote Jeffersonian solutions for many — perhaps most — of China's various political problems, its constitutional development will nevertheless make it easier for such solutions to evolve — perhaps from other sources — in the future.⁶⁸³

683. It is interesting to note in this regard that one of the most open forums for political debate is on the floor of the NPC. Even in 1989, when a number of delegates actively supported the student demonstrators in Tiananmen, not one was ever subject to criminal sanction (in stark contrast to the State Council and the CCP). *See generally* Tanner, *supra* note 1, at 64.

