

A US geologist's conviction reflects deep failures in the mainland's legal system, writes **Jerome A. Cohen**

Justice denied

Whether in the United States, China or elsewhere, the struggle for fairness in the administration of criminal justice is never-ending. The challenge is especially daunting when prosecuting "state secrets" cases. China's July 5 sentencing of naturalised American citizen Xue Feng (薛峰) to eight years' imprisonment for helping his American employer purchase a commercial database on Chinese oil resources is the latest example of how not to meet that challenge.

Xue was convicted of "gathering intelligence" and "unlawfully sending abroad state secrets". Since it was first publicly revealed in November last year, the case, which has just been appealed, has unsettled not only the international business community but also Sino-US relations. During his China visit, US President Barack Obama mentioned it to President Hu Jintao (胡锦涛).

Xue, a University of Chicago PhD in

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geology, disappeared in Beijing on November 20, 2007. Three weeks later, after two US diplomatic notes, China's Ministry of Foreign Affairs admitted Xue was in the custody of the Ministry of State Security, an institution modelled on the Soviet KGB. It was subjecting Xue to "residential surveillance" – illegal, incommunicado detention in a secret facility.

Beijing's failure to notify the US of Xue's detention within four days violated the US-China consular agreement. It denied him his rights under the agreement to promptly meet American officials and have them arrange defence counsel. Not until the 32nd day of Xue's detention was an American official allowed to see him. This unlawful delay, not unusual in such cases, gave the Ministry of State Security exclusive, round-the-clock access to Xue for the crucial first month of investigation – every interrogator's dream.

The American consul who finally did

meet him told Xue's wife that monitors had not allowed them to discuss the case and that Xue seemed "in bad shape". No wonder. In blatant violation of Chinese law, he had already been tortured. Xue managed to show subsequent consuls cigarette burns on his arm that his captors had inflicted when he refused to confess. He also said that the secret police ultimately coerced him into signing false documents.

On February 4, 2008, Xue was transferred to a Beijing State Security Bureau detention house. Yet, in violation of the Criminal Procedure Law, he was not formally arrested until April 11 that year. Although his wife retained an experienced defence lawyer the next month, the security ministry prohibited the lawyer from meeting Xue until December, after it had completed its investigation and sent the case to prosecutors. Thus, for over a year, Xue was denied access to counsel.

Throughout 2008, Xue was held in substandard, overcrowded conditions and regularly interrogated. In May 2008, when he refused to sign an investigation report, one investigator threw a glass ashtray at his head, injuring Xue when the glass shattered. Psychological torture intensified. To release the stress, Xue often openly howled until restrained.

Prosecutors were dissatisfied with the case developed by the security ministry and twice sent it back for further investigation. They took an extraordinary six months before indicting Xue and three Chinese associates in May last year.

Beijing's No 1 Intermediate Court had even more difficulty with the evidence than the prosecutors. After holding a two-day trial last July, it could not reach a decision. Because the court apparently found their evidence of guilt unpersuasive, prosecutors requested two extensions of the trial, their legal maximum, to produce supplemental evidence. The court held only a brief hearing at year's end. As winter turned to spring, it ran out of legal grounds for further delays and no longer attempted an explanation. Perhaps it was awaiting instructions from Communist Party leaders, as is common in sensitive cases.

By international standards, the trial was a farce. It was closed not only to the public and Xue's family but also to American officials, in violation of both the consular agreement and Chinese law. The defence was not allowed to summon witnesses. Prosecution witnesses' pre-trial statements were simply read out in court. There was no opportunity to cross-examine secret police about Xue's claims of torture and



coercion. Nor could defence counsel question representatives of the State Secrets Bureau about its vague definitions of "secrets" or "intelligence", and why the oil database that Xue had obtained for his company had not been declared protected information prior to his detention. And there was no meaningful way to clarify the line between common, commercial information and state secrets.

When the court finally rendered its decision – one year after trial began – its lengthy opinion cast little light on these issues. Most interesting was what the opinion did not discuss. It did not explain why the charges against Xue – who has never been charged with spying for the US government but only facilitated his company's purchase of industry data – were not reduced to illegally obtaining commercial secrets. That would have been consistent with the treatment of Australia's Stern Hu in the similar but much more publicised Rio Tinto case decided several months ago.

Nor did the opinion explain why IHS Energy, the oil information company that

employed Xue at the time of the alleged offence, was not prosecuted, even though it had purchased the database, and reportedly continues to offer the data as part of its commercial information services. Like Rio Tinto, IHS emerged unscathed.

Will Xue Feng's appeal be successful? Such appeals rarely are. But, in addition to other serious issues raised, a recently promulgated guideline calling for the exclusion of illegally obtained criminal evidence offers the appellate court an opportunity to reverse the conviction. Will the Communist Party allow an independent review of the case? Otherwise, it may be a long time before Xue can rejoin his long-suffering family, and this festering wound to international business and Sino-American relations can heal.

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