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## NOTE

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Date: 24 September 2020  
To: Asian Academy of International Law  
From: Davis Polk & Wardwell  
Re: The National Security Regime of the United States

This note seeks to provide an overview of the US national security regime, and is divided into two parts: (I) the judicial process in the handling of national security cases, and (II) the substantive national security offences.

### I. The judicial process

In the US, there is no special court to deal with prosecutions of national security cases, but there is a special court that authorizes investigative actions for foreign intelligence purposes.

On national security matters, the US Foreign Intelligence Surveillance Court deals with applications submitted by the US government for approval of electronic surveillance, physical search, and other investigative actions for foreign intelligence purposes. Its judges consist of 11 federal district court judges designated by the Chief Justice of the US, which must be drawn from at least 7 of the US judicial circuits.<sup>1</sup>

### II. The substantive offences

This part makes a comparison between the four HK NSL offences with existing US law, and seeks to identify some of the key substantive provisions under US law that may be analogous to the HK NSL offences.

#### a. Secession

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<sup>1</sup> Foreign Intelligence Surveillance Court website at <https://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court>

The US does not criminalize secession. Article IV, Section 3 of the US Constitution specifies how a state can gain admission to the United States, but is silent on the reverse, i.e., how can a state leave the union. The Constitution is also silent on whether an exit is possible, though it is interesting to note that secessionist movements have continued till this day (e.g., TEXIT).

**b. Subversion**

Title 18 of the US Code, which is positive law, criminalizes 'rebellion or insurrection' (section 2383), 'seditious conspiracy' (section 2384) and 'advocating overthrow of government' (section 2385).

Section 2383

"Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."

'Rebellion' and 'insurrection' may be analogous to, or at least, overlap with, 'overthrowing' and the reference to the use of force in Article 22 of the HK NSL. 'Undermining' in the HK law differs more in extent and less in nature of the activity.

A comparison of the scope of section 2383 and Article 22 may fall on the definition of 'the basic system of the [PRC]' and 'the body of central power of the [PRC] and the [HKSAR]' on one hand, and that of 'the authority of the United States (or the laws thereof)' on the other.

Arguably, the 'laws' of a country (the wording used in section 2383) could constitute part of the 'basic system' of the country (the wording in Article 22).

Both laws also provide for accessory or secondary liability.

Section 2384

"If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both."

Conspiracy requires that at least two persons be involved in the activity, which is not present in Article 22 of the HK NSL, and restricts the scope of overlapping between the two laws.

Conspiracy in the sense of preparation also overlaps with the use of 'plans' in Article 22.

However, to the extent two or more persons are involved, there are a few areas that potentially overlap:

- (i) between 'overthrow, put down, or to destroy by force' the US Gov and subsections (1) and (2) of Article 22, on 'overthrowing (or undermining) the basic system of the PRC or the body of central power of the PRC or the HKSAR'; and

- (ii) between 'prevent, hinder, or delay the execution of any law' of the US, and subsection (3) of Article 22, in that the performance of duties and functions by the body of power of the PRC or the HKSAR would be seriously interfered, disrupted or undermined if the execution of any of its laws were prevented, hindered or delayed

Section 2385 (excerpted)

"[w]hoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government"

A parallel may be drawn between the overthrow or destruction of the US 'government' or that of any State, and the 'body of central power' of the PRC or that of the HKSAR in subsection (2) of Article 22.

Both laws also provide for accessory, or secondary, liability.

**c. *Terrorist Activities***

The US has much more extensive and comprehensive anti-terrorism laws than HK, especially post 9-11, and especially in comparison to the 5-article long part under the HK NSL on terrorist activities. Chapter 113B of the US Code alone contains over 20 sections on crimes related to terrorism. However, it should be noted that the HK NSL contains a catch-all provision in Article 24 subsection (5), which criminalizes 'other dangerous activities which seriously jeopardize public health, safety or security'. Thus, in relation to a terrorist activity that is not specified by the HK NSL, but is criminalized in one of the numerous US offences, Article 24 subsection (5) serves to extend the scope of overlap between the HK and US provisions.

The specific terrorist activities contained in Articles 24 to 28 are also at least mostly covered by the US regime. For example, section 2332a of the US Code on the use of weapons of mass destruction, section 2332h on radiological dispersal devices, and section 2332i on acts of nuclear terrorism, overlap with Article 24 subsection (2), which concerns the 'dissemination of poisonous of radioactive substances, pathogens of infectious diseases or other substances'; section 2332f, on bombings of places of public use, government facilities, public transportation systems and infrastructure facilities, may be analogous to Article 24 subsection (3), on sabotaging 'means of transport', 'transport facilities', and 'electric power or gas facilities'.

**d. *Foreign Collusion***

The HK NSL provisions on foreign collusion concerns the following areas: (1) state secrets (Art 29); (2) war or force (Art 29(1)); (3) formulation and implementation of laws (Art 29(2)); (4) elections (Art 29(3)); (5) sanctions (Art 29(4)); and (6) hatred towards the gov (Art 29(5)). There are limited provisions in US law which overlap or are analogous with the provisions on some of these areas.

State secrets; and war or use of force

Under Title 18 of the US Code, section 2381: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not

less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.”

There are two distinct branches of treason: ‘levying war’ and ‘adhering to their enemies, giving them aid and comfort’, and it has been held that the following specific acts fall within the latter, among others (C. Warren, 1918, Yale Law Journal):

- (i) Communication of intelligence to the enemy in an attempt to aid him in his acts of hostility – this instance of giving aid and comfort may overlap with the provision on unlawfully providing State secrets or intelligence concerning national security under Article 29 of the HK NSL; and
- (ii) Acts which, if performed by domestic insurrectionaries, would constitute levying of war, and performed in connection with or for the assistance of a foreign enemy waging war against the US – this instance of giving aid and comfort may overlap with subsection (1) of Article 29, where the foreign party is waging war against the country

### Elections

Under section 319 of the US Federal Election Campaign Act of 1971, as amended, foreign nationals are prohibited from directly or indirectly making ‘a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election’. It is also an offence for a person to ‘solicit, accept, or receive’ such a contribution or donation from a foreign national.

There is potential overlap here with subsection (3) of Article 29 of the HK NSL in relation to requesting, conspiring or receiving instructions, control, funding or other kinds of support from a foreign party to rig or undermine HK elections. One point of potential interest is that a parallel might be drawn between ‘other thing of value’ in the US provision, and ‘other kinds of support’ in the HK provision. An example of such may be information that would incriminate the other candidates in the election. For example, a Russian lawyer offering Trump Jr incriminating information re Hillary Clinton.