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**Congressional-Executive Commission on China Roundtable on
"The End of Reeducation Through Labor? Recent Developments and Prospects for Reform"**

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Mr. Chairman and distinguished Members of the Commission, thank you for the invitation to participate in this Roundtable. I would like to acknowledge the importance of the Commission's efforts to enhance American understanding of China and the contributions the Commission has made to the improvement of the Rule of Law and human rights situation in China.

The opinions I express here today are my own but I am also proud to represent the U.S.-Asia Law Institute at New York University School of Law. Our Institute was founded by Professor Jerome A. Cohen who has been a strong, consistent voice for human rights and the Rule of Law and an untiring advocate of engagement with China. Our mission is to promote the Rule of Law in Asia and to promote mutual understanding between the United States and Asian countries, especially China, on legal issues. We do that through constructive engagement, research and exchanges with legal experts. Our goal is to be educated observers of Asian legal systems and, when appropriate, honest, fair and well-informed critics as well. It is in that spirit that I provide these remarks.

With respect to our topic today, "The End of Reeducation Through Labor? Recent Developments and Prospects for Reform," I am going to focus my remarks on the topics I have been asked to cover: to provide an overview of the Reeducation Through Labor System ("RTL"), including its history, the purpose behind RTL, how it is currently used, and a summary of the current debate over RTL reform, as well as recommendations for U.S. policymakers.

The institution of RTL has been around for 60 years. Its precise use has shifted over time but it seems to be chiefly valued by the government because its flexibility allows police to incarcerate individuals and members of groups they consider troublesome without having to go through formal judicial processes. It is currently used mainly to detain drug addicts and members of the banned Falun Gong sect, but it is also used to detain political dissidents. The new leadership has recently said it is reexamining RTL with an eye to reforming it. This is a very welcome development.

An Overview of Reeducation Through Labor

At the outset, allow me to emphasize the importance of today's discussion. The issue of RTL reform is important because what happens in China is important. It is important to China's 1.3 billion citizens, one fifth of the world's population, and it is important to the world because of China's growing influence in the world.

RTL allows the police, on their own, to confine someone for one to three years, with the possible addition of a fourth year, for any conduct that falls within one of six vaguely defined categories of conduct. According to Article 10 of the "Trial Methods for Reeducation Through Labor," issued by the Ministry of Public Security ("MPS") and approved by the State Council on January 21, 1982, the following persons may be sent to RTL:

1. Those counterrevolutionaries and elements who oppose the Chinese Communist Party or Socialism, where their offenses are minor, but do not merit criminal punishment;
2. Those who are members of gangs who commit crimes of murder, robbery, rape and arson, but whose acts do not merit criminal punishment;
3. Those who repeatedly commit minor offenses such as hooliganism, prostitution, theft, or fraud and who do not mend their ways despite repeated admonition but whose acts do not merit criminal punishment;
4. Those who gather to fight, cause trouble, disturb social order, and instigate turmoil but whose acts do not merit criminal punishment;
5. Those who have a job but repeatedly refuse to work, disrupt labor discipline, complain endlessly, disrupt production order, work order, school and research institute order and the people's normal life, but whose acts do not merit criminal punishment;
6. Those who instigate others to commit crimes, but whose acts do not merit criminal punishment.

A mere reading of these categories shows how vague and open to abuse they can be. One could question the legitimacy of this type of system during any era, but these "trial" RTL regulations from 1982 read like pages of history. RTL would seem to have no place in modern Chinese society in the year 2013.

Perhaps in recognition of how dated the original rules read, in 2002, the MPS issued new regulations, changing the reference to "counterrevolutionaries and elements who oppose the Chinese Communist Party or Socialism" to those who commit acts of "endangering state security." The 2002 regulations also modified the definition of the other categories and expanded the list from six to ten categories but did not cure their vagueness.¹

¹ The definition of these categories was modified in Article 9 of the 2002 regulations issued by the Ministry of Public Security as follows:

Persons aged 16 years or older who committed one of the following acts shall be sent to RTL in accordance with the law:

1. Acts of endangering state security that are clearly minor in nature, wherein criminal punishment is not yet warranted;
2. Membership in a criminal gang formed to murder, rob, rape, commit arson, kidnap, set explosions, or traffic women and children, wherein criminal punishment is not yet warranted;
3. Subsequent commission of one the [following] illegal criminal acts, wherein criminal punishment is not yet warranted, either within five years of completing a criminal penalty, sentenced in accordance with the law, [for the one of following acts] or subsequent commission of one the [following acts] within three years of being lawfully fined by police or completing administrative detention, custody and education, or RTL issued by police: compulsory indecency; humiliating women; indecency with children; group promiscuity; luring juveniles to engage in group promiscuity; illegal detention; theft; fraud; forgery or resale of invoices; resale of train or boat tickets; forgery of price tags; sale of forged price tags; forcible seizure; group robbery; extortion; swindling; forgery; alteration; trafficking in official documents, credentials, or chops; or the harboring, transfer, purchase, or sale of stolen property;
4. Endangering public safety by creating an atmosphere of terror or causing the public to panic; organizing or using a secret society or cult or use of superstition to undermine implementation of national laws; mass brawling; creating a serious disturbance; instigating turmoil; forcing purchases or sales to dominate the market; or disrupting social order through deeply engrained bad habits such as bullying, engaging in mischief, or oppressing the masses, wherein criminal punishment is not yet warranted;

Moreover, in terms of process, RTL is still administered solely by the MPS. A decision to incarcerate someone under RTL is made by the MPS without any judicial review.²

China has committed itself to establishing a society under the Rule of Law. To the extent China maintains the authority to detain individuals outside the formal legal system and under such a vague set of standards, with very little in the way of due process, such a system undermines China's own goal of establishing a society under the Rule of Law.

A Brief History of RTL

The history of the RTL system also suggests that it is long overdue for reform. The RTL system was initially created in the 1950's during the early years of Chairman Mao's rule and it was used to suppress "counterrevolutionaries" and others who the Party determined did not support the new socialist regime in China. As such, the maximum level of flexibility, or one could say, arbitrariness, served that type of system well.

Fast forward to 1979, the end of the Cultural Revolution and the beginning of Deng Xiaoping's policy of Reform and Opening Up. In 1979, China opted to develop a formal legal system with predetermined rules and procedures that would limit arbitrariness. Thus, in 1979, China promulgated a new Criminal Law and a new Criminal Procedure Law. However, at that time, China maintained the RTL system as well. The Criminal Law and Criminal Procedure Law have been amended repeatedly, each time introducing new procedural protections for individuals.

Over the years, there have been many efforts by legal reformers to abolish or substantially reform RTL. To date, those efforts have not succeeded. However, the role RTL has played during this period of time has shifted away from suppressing "counterrevolutionaries" to, according to its supporters, "maintaining social stability."

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5. Deliberate provocations that disrupt the order of production, work, education or research, or daily life, as well as rejection or obstruction of state employees' [efforts] to carry out their duties in accordance with the law but without the use of violence or threats;
 6. Instructing others to commit crimes, wherein criminal punishment is not yet warranted;
 7. Introducing or allowing others to engage in prostitution or solicit prostitutes; enticing others to engage in prostitution; gambling or providing conditions for gambling; or producing, reproducing, selling, renting, or disseminating pornography, in which the acts are of a rather serious nature but do not yet warrant criminal punishment;
 8. Engaging in prostitution or soliciting prostitutes after being lawfully warned, fined, or given administrative detention by the public security authority for engaging in prostitution or soliciting prostitutes;
 9. Taking or injecting drugs after having been sent to compulsory drug treatment for addiction to taking or injecting drugs;
 10. Other circumstances for which there is statutory basis for RTL.

Individuals who have committed offenses of endangering state security, endangering public safety, infringement of civil rights, infringement of property, or obstruction of social order management but whom, because the offense was minor in nature, a people's procuratorate has opted not to prosecute or a people's court has exempted from criminal punishment may be sent to RTL, in accordance with the law, where they meet the conditions for RTL. I am grateful to the Duihua Foundation for providing links to these 2002 regulations and the 2005 opinion on their website, as well as English language translations. The link to those materials at the Duihua website is: <http://www.duihuaresearch.org/2013/01/police-updated-rtl-rules-in-2005-but.html>.

² A person subject to RTL may challenge the RTL decision in court after the fact through the Administrative Litigation Law. Such review may not take place until the individual has served a substantial portion of their RTL sentence.

As noted above, in 2002, the Ministry of Public Security issued new “Regulations on the Handling of Reeducation Through Labor Cases by Public Security Organs.” The MPS has the authority to issue departmental regulations and guidance about how to implement national rules and regulations provided they do not contradict those laws and regulations. Of course, MPS regulations can be changed by the MPS at any time and do not have the same status as State Council regulations or National People’s Congress legislation. In the 2002 MPS regulations, the MPS provided more details concerning how RTL should be administered. The rules provided for RTL hearings in some cases, but excluded from the hearing requirement any cases involving drug addicts and ‘those involved in organizing or using a cult to undermine the implementation of national laws,” an apparent reference to followers of Falun Gong. The MPS also provided for non-custodial RTL in some cases.

In 2005, China’s National People’s Congress promulgated a Public Safety Administrative Punishments Law, which provides for a maximum punishment of fifteen days in jail for minor offenses. This seemed to presage the abolition of RTL because RTL’s supporters had claimed it was a more lenient alternative for minor offenses. With the Public Safety Administrative Punishments Law providing for a maximum punishment of fifteen days detention for minor offenses, RTL’s maximum sentence of four years seemed even more out of step with the rest of Chinese law.

However, in the same year, 2005, the MPS issued an “Implementation Opinion Regarding Further Strengthening and Improvement of Reeducation Through Labor Review and Approval Work.” The 2005 Opinion provided for police hearings for all those subject to RTL, removing the exclusion for drug addicts and cult members, expressly limited the maximum RTL sentence to two years and provided that legal counsel could participate in RTL proceedings.

Has Reeducation Through Labor served the purpose of maintaining social stability? The system is not very transparent but it appears that RTL is primarily used for involuntary drug rehabilitation for drug addicts, for compulsory reform for those engaged in prostitution, and to confine followers of Falun Gong as well as some political dissidents.

The point is that the standards for RTL are so vague and ambiguous and the decision-making process so lacking in due process and transparency that it seems that RTL could be used, or in the view of some, abused, to incarcerate a whole host of people the police simply find to be annoying or obnoxious. A system such as this can also be used and appears to have been used to stifle the freedom of expression and dissent.

In addition, to the extent that China has made important strides in improving the rights protections in its formal criminal justice system, the existence of an alternative, much more flexible and arbitrary police-friendly system like RTL, undermines those reforms. The police can completely avoid the criminal justice system and its small but growing protections for individuals’ rights simply by sending someone to RTL.

Chinese legal Scholars Debate RTL Reform

Since even before the 18th Party Congress, rumors began to circulate that China’s new leaders might take up RTL reform as one of their first tasks after assuming power. In January, we learned that Mr. Meng Jianzhu, Chair of the powerful Political-Legal Committee of the Communist Party had directed that the use of RTL be terminated this year. On March 17, 2013, after the annual meeting of the National People’s Congress, Premier Li Keqiang told a press conference that with respect to RTL reform, “the relevant departments are working intensively to formulate a plan, and it may be laid out before the end of this year.”

The leadership's public support for RTL reform has reopened the public debate about RTL and Chinese experts are publicly debating whether it should be abolished and whether something should be enacted to replace it. One of the bright spots of the debate is the use of legal norms, as expressed in domestic Chinese law and the Chinese Constitution, as well as international human rights norms and concepts of the Rule of Law to support various arguments. Under all of these norms, RTL falls short. Chinese scholars are debating whether providing judicial review, substantially shortening the maximum period of incarceration and changing the name can save the system.

For example, Professor Liu Renwen of the Chinese Academy of Social Sciences advocates for the abolition of RTL and argues that all punishments that involve the loss of liberty should be handled under the criminal justice system and be subject to judicial review. He argues forcefully that RTL is inconsistent with Article 9 of the Legislation Law, passed in 2000, because the Legislation Law requires that all laws restricting the liberty of citizens be enacted as legislation by the full National People's Congress. He further argues that RTL is inconsistent with the Chinese Constitution, apparently referring to Article 37, which provides that "no citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court" and "unlawful detention or deprivation or restriction of citizens' freedom of the person by other means is prohibited." He further argues that many punishments permitted by the Criminal Law are less severe than RTL and therefore it does not make sense to have an administrative system of punishment that can provide for more severe punishments than the Criminal Law itself.

On the other hand, Professor Chu Huizhi of Beijing University argues that there is still a social need to deal with habitual offenders and he suggests that a new law titled: "Unlawful Behavior Corrections Law" be enacted to provide for up to two years confinement for habitual drug addicts, those engaged in prostitution as well as juveniles who are not subject to criminal prosecution. Professor Chu also proposes that the process be modified to make it a judicial or quasi-judicial process to ensure some neutrality in the decision-making process. There are many other opinions that fall somewhere between complete abolition, as advocated by Professor Liu, and the type of reform suggested by Professor Chu.

There does appear to be consensus among Chinese legal scholars that the legal basis for RTL is questionable, the lack of judicial review is problematic, and that RTL's vagueness and lack of due process does not comport with China's own commitment to governance according to law.

However, while legal scholars will no doubt have input into the decision about what to do with RTL, the final decision will be made by political leaders. China's new leaders deserve credit for publicly committing to reforming RTL at a very early stage in their administration. They did not have to put this pressure on themselves. There are also hopeful signs that the reform may be meaningful. There have been reports of local governments issuing rules to stop the use of RTL this year and we have also heard reports that the number of people in RTL has been reduced dramatically. It may also be that some of those held in RTL, specifically juveniles, drug addicts and those involved in prostitution, may have been sent to other forms of administrative confinement. At this point, it would be mere speculation to predict what the final outcome will be.

Recommendations for U.S. Policymakers

This brings us to the question of what U.S. policy makers should do. First, let me congratulate the Commission on bringing attention to this issue. Bringing these issues out in the open and discussing them is always helpful. Second, while there are limits to what anyone outside of the Chinese system can do to affect the final outcome I do believe there are many positive steps that the U.S. government can take.

Before I go into those, however, I want to suggest that the U.S. government expand the scope of its interest in this issue beyond RTL to encompass all forms of extra-legal, extra-judicial detention in China. This would include so-called “black jails” used to detain petitioners and “soft detention (*ruanjin*)” used to keep some people deemed to be troublemakers under some form of house arrest. To my knowledge there is no legal basis in legislation or publicly available regulations for either of these forms of limitations on the liberty of individuals.

Moreover, there are other specific forms of administrative confinement and involuntary treatment and education for drug addicts, for those engaged in prostitution and for juveniles who are too young to be subject to the juvenile criminal justice system. These include custody and education (*shourong jiaoyu*), used for those involved in prostitution and custody and cultivation (*shourong jiaoyang*), used for juveniles under the age of 16, who are exempt from criminal punishment. While RTL gets most of the attention, I would urge the United States government to also take note of these other forms of detention and include them in its efforts to engage with the Chinese government.

What can the United States do? First of all, China is an independent, sovereign nation that has the right to make its own decisions and its own laws. However, China is also a prominent member of the international community, and, as such, engages with the rest of the world through various multilateral and bilateral processes. China is a permanent member of the United Nations Security Council. China has ratified many international human rights documents. While China has not yet ratified the International Covenant on Civil and Political Rights, which prohibits arbitrary detention, China has signed it and has repeatedly committed to ratifying it in the near future.

My own view is that all countries, as well as all individuals have an interest in upholding international human rights standards and the Rule of Law and that there is a constructive role for sovereign nations to play with regard to human rights and the Rule of Law in other countries as well as within their own. We are all imperfect and we all benefit from mutual exchange and oversight.

The first order of business, however, is to get one’s own house in order and lead by example. This is not the time or the place to go into how the United States could improve its own adherence to international human rights standards and the Rule of Law but I think it is fair and appropriate to make that a part of the larger discussion. The better we do at home the more credibility we have overseas.

Second, the United States government has many tools at its disposal which it can use to voice its concerns to the Chinese government, foremost among them the diplomacy conducted on a regular basis by our excellent career diplomats. The government can also raise these issues during the visits of high level officials and members of Congress, and at periodic human rights and legal experts' dialogues, and other high level dialogues. Each of these is an opportunity to communicate the United States' concern about these issues.

Third, the United States can support research to help us understand the actual situation in China. The government has provided some support for research but, speaking very frankly, support for research is not robust.

Fourth, the United States government should continue to support expert legal exchanges between non-government actors, including academics, practitioners and students. My own view is that those programs have been highly valuable in enhancing mutual understanding and in improving the Rule of Law and human rights situation in China. It is hard to imagine where China would be now had it not welcomed the support of the rest of the world, including the United States, or had the rest of the world not provided it.

Every country borrows ideas from other legal systems and China has been very active in studying the legal systems of other countries as a way to improve its own system. As noted, RTL is a form of arbitrary detention. But the reform of RTL raises legitimate questions about how to deal with social problems such as minor offenses, drug addiction, prostitution and juvenile delinquency in a fair and effective way. These are challenges common to many countries, including the United States, and we could all benefit from sharing our experiences and best practices.

I should say here that U.S. government support for such exchanges is critical. Institutes like the U.S.-Asia Law Institute rely upon grant support, including U.S. government grants, to be able to maintain our expertise and to engage constructively and productively with Chinese partners. Without that support it would be difficult, if not impossible, to carry on this work. Our Institute and other organizations also commit their own resources to this work but the extent of such work is dependent, in part, on the level of government support.

The real question though is how to use these tools effectively. To be effective, we need to be persistent, consistent and focus on the long term as well as whatever short term goals may be within reach. There is a tendency in government to demand short term deliverables and outcomes from each meeting, each dialogue and each legal reform project. That is understandable from the point of view of accountability to taxpayers. However, legal reform and social change do not necessarily work on the schedule of diplomats and grant makers. Progress takes time and requires a process of exchanging ideas, opening minds to new ways of thinking, and assuring policymakers in other countries that improving the rights protection of their citizens can enhance social stability rather than undermine it.

Sometimes, in the pursuit of concrete outcomes that we can claim as successes we overemphasize the short term at the expense of persistence, consistency and the pursuit of long term goals. Our long term goal should be to help China meet its own objectives of creating a

society under the Rule of Law and meeting the obligations China has undertaken under international human rights instruments.

In conclusion, I thank you for the opportunity to share these thoughts and I hope you will continue to support efforts to improve the Rule of Law and human rights protections in China and in the United States.