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"The End of Reeducation Through Labor? Recent Developments and Prospects for Reform"
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Mr. Chairman and distinguished Members of the Commission, I am privileged to be invited to participate in this roundtable and greatly appreciate the Commission's efforts to improve American understanding of China and the specific issues at hand.

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 prospects for reform of reeducation through labor (RTL). In particular, I have been asked to discuss Taiwan's experience in abolishing its RTL analog, how that experience could inform the People Republic of China's (PRC) own efforts to reform RTL, and recommendations for US policymakers.

Today, I get to be the optimist and deliver the hopeful story for reform. Taiwan's system of reformatory training for people deemed "hooligans" (or "*liumang*" using the Romanization of the Chinese term) was gradually reformed in order to restrict police power and to offer greater procedural protections before its ultimate abolition in January 2009. Reformatory training was formerly a non-criminal sanction—though more accurately understood as a quasi-criminal sanction—that allowed police to lock up vaguely described hooligans for up to three years.

By way of general background, from shortly after President Chiang Kai-shek's Nationalist Party (Kuomintang or KMT) took refuge on Taiwan in 1949 until the mid-1980s, the police wielded tremendous power. Throughout the martial law period, the police easily found support for their actions in suppression-friendly laws and regulations. Although outwardly aimed at hooligan behavior such as gang participation and gambling activities, the relevant legal framework also proved itself to be expedient for silencing political opponents who did not fit the conventional description of hooligans. As with RTL, police unilaterally made the decision to condemn hooligans. The punishment imposed on hooligans at the time was an extraordinarily harsh military-administered punishment that could be used to detain perceived troublemakers indefinitely.

Consequently, despite the fact that the KMT had brought with it to Taiwan the Republic of China's 1928 Criminal Procedure Code, police could easily avoid the judicial process required by the Code. Although the KMT's tight grip on the judiciary during the years of martial law virtually guaranteed desired outcomes if it chose to invoke the formal criminal process, in many cases—especially politically charged ones—it was more convenient to bypass the judicial system by resort to administrative punishments. This experience echoes in the PRC today.

Following the end of martial law in the late 1980s came a crucial transition in Taiwan whereby police powers diminished and judges, prosecutors, and lawyers were no longer under tight political control. In contrast to the entrenched police repression in the PRC, the past twenty years have witnessed a startling transformation of Taiwan's criminal justice system. Perhaps the most immediately notable shift was the transformation of the draconian, military-run punishment into the Ministry of Justice's "reformatory training," a more conventional form of imprisonment for which judicial approval, albeit truncated, was required in every case and incarceration was limited to three years.

The waning years of martial law in Taiwan had seen the beginnings of judicial involvement in decisions that had formerly been left exclusively to the police. Legal reforms introduced the use of special "public security tribunals" within the district courts to determine whether alleged hooligans should be incarcerated, but those courts provided little check both because of daunting procedural barriers to

mounting a defense and the courts' general pro-KMT/police propensity. Even reforms after the end of martial law changed little with regard to procedures with, for example, the tribunals continuing to rely heavily on secret witnesses. It was not until Taiwan's constitutional court—the Council of Grand Justices (the Council)—stepped in that important changes began to occur.

In a series of judicial interpretations, the Council increasingly declared unconstitutional portions of the legal regime for dealing with hooligans. In the final interpretation issued in 2008, the Council was persuaded by several constitutional arguments but called for only targeted repeal of unconstitutional provisions rather than requiring wholesale repeal of the law. The last interpretation apparently persuaded Taiwan's political elite that the special law aimed at hooligans was proving to be more trouble than it was worth. After President Ma Ying-jeou took office in May 2008 the executive branch recommended its abolition. In January 2009, the legislature took the unexpected step of repealing the law in its entirety. Four years since abolition, I have heard no reports that the public security situation in Taiwan has deteriorated because of the law's repeal. In part this is because gradual reforms leading to abolition meant that the number of people undergoing reformatory training had dwindled. People who formerly would have been treated as hooligans were increasingly being channeled through the standard criminal process. A sudden shock to the system would similarly be politically difficult to accept in the PRC and, thus, Taiwan's experience suggests that incremental reforms to RTL might allow for a smoother transition than abrupt repeal.

The gradual decline in the previously unfettered punishment powers of Taiwan's police must be viewed within the broader context of reforms to the criminal justice system that had gathered strong support. Beginning in the late 1990s, Taiwan's Criminal Procedure Code underwent seismic changes, even while further reforms to the procedures for hooligan cases appeared to stall and those cases remained largely behind closed doors without any prosecutorial involvement and using heavily truncated judicial proceedings.

As reforms to the criminal justice system progressed, the judiciary, legislature and executive gradually recognized the untenable gap between the new procedures applied to "criminal" cases and those used for "hooligan" cases. Likewise, the PRC's newly revised Criminal Procedure Law includes a number of reforms that are unavailable to people facing RTL. Taiwan's experience also underscores that merely involving an entity called a "court" is insufficient to guarantee a fighting chance for the suspect to contest the possible imposition of RTL. What is needed is not just more process but rather more meaningful process. I am certainly not expecting anything resembling the judicial independence we enjoy in the United States to blossom overnight in China. Nonetheless, even modest judicial review can encourage the police and prosecutors to be more cautious in how they use their powers. For example, after Taiwan voided the prosecutorial power to detain people without judicial approval in 1997, the courts approved the vast majority of detention applications. At first glance, it might appear that judicial review served little purpose. However, the advent of judicial review also quickly saw a considerable decline in prosecutors' applications for detention. In other words, prosecutors in Taiwan sought detention far less once they had to go through the courts even though the courts rejected few applications.

Given existing political constraints and other distorting influences upon PRC courts, which significantly diminish prospects for independent judicial action, it would be unfortunate if the PRC should establish the equivalent of Taiwan's "public security tribunals." That would impose further restrictions on fair court procedures while misleading the public into thinking that adequate court review was being granted. It would be far better for the PRC's judicial resources to be expanded to assure that, at a minimum, all decisions imposing or recommending RTL would receive in practice the same judicial review as currently available in principle under the Administrative Litigation Law. Giving full force to the

procedures provided for in the Administrative Litigation Law would be an initial step. A more significant step short of abolition would be to recognize that RTL is criminal in nature and require that all cases follow the procedures laid down in the Criminal Procedure Law.

In highlighting the ways that Taiwan's past might be helpful in charting the PRC's path forward with respect to RTL, I recognize that, despite shared historical and cultural ties, Taiwan's recent experience is far from a perfect blueprint for the future of RTL. Most glaringly, since the late 1980s, Taiwan has transitioned to a vibrant multi-party democracy and the story of criminal justice reforms are embedded in the larger story of this political transition. Moreover, Taiwan's constitutional court played a critical role in both drawing attention to the human rights abuses involved in reformatory training and forcing the legislature to respond. Sadly, the Council has no counterpart in the PRC, where the Standing Committee of the National People's Congress has the exclusive power to interpret the Constitution but, in practice, does not exercise it.

That said, Taiwan's reform path still has much to offer despite the PRC's current political reality. Taiwan's judicial reforms did not flourish until the political climate changed. Nevertheless, reforms during the martial law era—such as the establishment of the public security tribunals—helped lay a foundation for future reforms even though the tribunals were heavily flawed from a human rights perspective. Likewise, Taiwan's revision to its Criminal Procedure Code in 1982 that allowed defense counsel to participate in the investigation stage made little difference at the time but was seized upon by lawyers in the 1990s as they began to vigorously expand their roles in the criminal process.

Even if it is unlikely that the PRC will directly and swiftly follow Taiwan's path by abolishing RTL, Taiwan's experience might at least stimulate new thinking and begin to assuage concerns that reforming RTL will lead to a deterioration in social order. As a possible intermediate step towards abolition, the Taiwan precedent of classifying hooligans into two categories and subjecting only those in the second, more serious category to incarceration may reduce the number of people subject to RTL detention, numbers that have been far larger in the PRC than in Taiwan.

In light of this background, what steps should US policymakers take? The US's ability to influence the path of RTL reform is, of course, limited. Reform will only happen when the government bodies in the PRC that have a vested interest in RTL—particularly the Ministry of Public Security—are willing to budge. What the US can do is both offer our own experience and serve a coordinating role in helping to introduce people in the mainland to Taiwan's experience. As an added benefit, although there are differences in legal terminology, the shared language between Taiwan and the Mainland allows for a more fluid, efficient discussion than is possible through translation.

The current relatively warm cross-strait relations have opened up opportunities for legal exchanges unthinkable in the past. In addition to bilateral cross-strait exchanges of scholars and personnel involved directly in administering the criminal justice system, I have also been involved in successful multilateral conversations that included the PRC and Taiwan, along with participants from the US, Hong Kong, Japan, and other jurisdictions. These meetings are relatively easy to arrange with participants from academia and other non-governmental positions. There remain challenges for government personnel from both Taiwan and the PRC to physically travel across the strait, though indications are that these restrictions are starting to relax. For example, Taiwan's Ministry of Justice recently established an Office of International and Cross-Strait Affairs. Alternatively, sometimes a third location, like Hong Kong, can serve as an easier meeting point. Another option is to make greater use of video conferencing capabilities.

A lack of accurate information regarding our bail system is an illustration of how not only cross-strait but also US-PRC meetings of legal practitioners and scholars can at least take the concrete step to dispel

misconceptions regarding our criminal justice system that can serve as barriers to reform. I have on several occasions cleared up the mistaken belief that, only because the US has advanced technology to track people, it is rare for US defendants to fail to appear in court and, in contrast, the PRC is not ready for broader use of bail. In reality, the US bail system is quite low-tech and failure to appear rates are still very low: a recent study by the New York City Criminal Justice Agency (CJA) found that, using 2005 data, the failure to appear rate in New York City was 16%.[1] However, CJA found only 7% failed to return within thirty days: many defendants miss court dates "because of forgetfulness, illness, inability to find child care or transportation, or some other reason related to a disordered life rather than a willful attempt to evade justice."

Careful screening for risk factors at the time of bail determinations, not use of high-tech tracking methods, is largely responsible for New York's ability to release approximately 78% of non-felony defendants on their own recognizance without dire consequences for public security. I am convinced that the PRC could take steps to expand its system of release pending trial, which is at present seldom used. Similarly, there is room for creative thinking regarding how the prison-like RTL might be converted into a system akin to the US probation system that involves a much less severe deprivation of liberty. Reform efforts in the US to change our current practice of using administrative detention for unwanted immigrants offers another interesting point of comparison to the PRC's discussions regarding possible changes to RTL.

This is all to say that both the US's and Taiwan's experiences could help the PRC chart a reform path that, while it might not immediately abolish RTL, could gradually lead to significant reforms. And the time is ripe for these discussions. President Ma Ying-jeou has even proposed that the subject of human rights be placed on the cross-strait agenda. It is increasingly clear that stronger cross-strait relations cannot be built on economic ties alone. A meaningful discussion of how each side treats people who face criminal, or quasi-criminal, sanctions is an important next step in exploring prospects for the greater mobility of people between the PRC and Taiwan. Although the PRC has generally been careful not to impose RTL on visitors from Taiwan, the PRC's abolition of that administrative punishment would send the island's people a strong signal of legal progress. It would be especially comforting to business personnel and other Taiwanese who reside on the Mainland.

Finally, US policymakers can continue to draw attention to the PRC's stated goal of ratifying the International Covenant on Civil and Political Rights (ICCPR). Although the PRC signed the ICCPR in 1998, it has thus far failed to ratify it. RTL stands as a notable barrier to ratification because it is difficult, if not impossible, to square the lack of judicial procedures for an RTL sentence with the ICCPR's requirement that people charged with crimes be afforded a "fair and public hearing by a competent, independent and impartial tribunal established by law" and that they be allowed to examine witnesses against them (Art. 14). Even if not labeled by domestic law as a criminal charge, a jurisdiction cannot skirt ICCPR protections by calling a proceeding "administrative" in nature.

As Xi Jinping and his cohorts begin their terms, I hope that the new PRC leadership has the wisdom to see that RTL, like Taiwan's reformatory training, should become a relic of the past. Surely there are many legal experts across the strait and from the US who are willing and able to provide valuable advice on charting a path to an RTL-free future. I hope that the US government will support those efforts.

Thank you for the opportunity to present a few thoughts. I look forward to our discussion with the Commission.

[1] New York City Criminal Justice Agency, Inc., A Decade of Bail Research in New York City (August 2012).