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Hearing on Civil Liberties and National Security
(Revised Testimony)

Testimony of Ambassador Thomas Pickering
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Chairman Nadler and distinguished members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, thank you for affording me the opportunity to testify before you today on the very important topics of civil liberties and national security.

I come before you at a time of uncertainty around the world; a time when fear and politics contest strongly with reason and the rule of law. I also come before you, I realize, at a time when changes in the Congress as a result of the recent election await this subcommittee. But, most importantly, I come before you as a former diplomat, with over 45 years of service to this country, with a single message—I do not believe that our national security and protection of our civil liberties are mutually exclusive. In fact, I believe that they are intimately tied together. The key task is to work together to find ways to assure both priorities in the interest of our people and their government.

Let me point out that I am not a lawyer and not qualified to address legal questions. I appear before you today to provide insights into how the decisions that will be faced by the next Congress and by this Subcommittee will have an impact on our foreign affairs and national security.

For nearly 50 years I have served this country in the military, in diplomacy overseas, and as a senior official at the Department of State. As a career foreign service officer who retired with the rank of Career Ambassador, I believe how we today handle our national security challenges and align these efforts with our own civil liberty interests is vital to America's future. To be clear, this effort is vital to our country's security, to its standing in the world, and to our collective commitment as a people, which honors, respects, and remains committed to our founding ideals in all that we do.

What we do as a nation in this area determines whether we have the support and backing of our friends around the world and the respect of all who look to us for leadership. Failure to follow our principles regarding civil liberties loses that respect. Even more it sets an example for others that either we don't care or that we have made expediency and compromises with our principles an overriding necessity. Once we do that, others will follow. The limits on their actions will not be set by us or others, but by what they believe they can and need to do to meet their immediate needs with little or no respect for human rights. We will then be in a position where our own citizens, from whatever walk of life, will be fitted into their construct and held for indefinite periods, subject to trials which do not assure the

high standards we aspire to and left with little for our diplomats to use to assist them in these conditions. All of this reflects on our role as a state which leads in the field of human rights, which is looked to by many to do so, and where the role we play deeply impacts on our own interests, including our security, at home and abroad.

Trial of Terrorism Suspects

I would first like to address the trial and detention of suspected terrorists and the implications for our national security and American foreign policy in our support for human rights and the rule of law. The rule of law and human rights are central tenets of American foreign policy. It is axiomatic that our ability to be effective in promoting human rights and the rule of law depends on our own performance. Countries around the world are tired of being told, "Do as I say, not as I do." To ensure that our standards are effective and that we are effective in promoting them, we have to have exemplary performance by the United States.

The recent Ghailani terrorism prosecution in New York, despite the disappointment of many that the conviction was not more sweeping, is an example of the United States pursuing the right procedures in the correct court in trying terrorism suspects. Admittedly, the verdict on a large number of counts demonstrates many of the difficulties of an Article III jury trial. But, the result was that the trial ended in a conviction on a significant charge. We will, of course, just have to wait and see what happens during the appeals process. I am not competent to discuss the details of the trial or rulings made by Judge Kaplan because, again, I am not a lawyer. What I can say, however, is that the Ghailani verdict demonstrates to the world that the American criminal justice system is capable of handling complex terrorism cases, while upholding our Constitution and the Rule of Law. The Ghailani trial has reinforced the legitimacy of our traditional criminal justice system. It has shown to the world that America can try terrorism suspects in a manner consistent with our Constitution, with our values, and with our treaty obligations.

The Ghailani trial is only one out of over 400 terrorism related trials that demonstrate that we can use Article III courts. I have already explained why I believe the use of our traditional criminal justice system has helped us to preserve and protect our foreign policy interests.

Additionally, the Geneva Conventions regulating warfare require, in cases of violation of the laws of war, the use of "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The wording makes clear that the use of an Article III court would fulfill this obligation. There has been a long and divisive debate over whether the Guantanamo military commissions meet these standards. I am not an expert on this issue, but it is clear that without exception, Article III courts meet the treaty requirement. It also seems clear to me that were the Guantanamo military commissions empowered in a

way to meet these same standards they would, in effect, become fully parallel to Article III courts.

The American justice system is the established standard, maybe even the gold standard, around the world. An effort on the part of the United States to strengthen and preserve the use of alternative methods specifically for terror related crimes has appeared to the rest of the world to detract from, rather than strengthen, our system of justice. Within our own judicial arrangements during the last review of the United States Supreme Court of military commissions, it appears they failed to meet constitutional standards. I understand the Military Commissions Act of 2009 has not yet been tested in that regard. The closer military commissions come to meeting Article III standards, which is what the world expects of us, then the less point there is, in my view, of employing military commissions. The issue here is that small differences, which do not go to making major changes in the rights and obligations of all parties under military commissions, have few if any benefits to those who would like to use military commissions as a device further to ensure convictions of terrorism suspects being held under the laws of war.

Detention of Terrorism Suspects

Recently, there have been increased calls for the use of indefinite or preventive detention, instead of trying suspected terrorist detainees at all. I believe that indefinite detention of individuals without charge under any guise short of prisoners of war in traditional state to state military conflict, either declared or undeclared, raises all of the problems of abuse of state power to the detriment of individual rights. In my view, a system of indefinite detention without charge contravenes the central principles of our own Constitution and national standards of a right to notice of the charges and to trial. The detention issue presents a central conundrum of what to do when we believe all of the information at our disposal indicates that the detainee is guilty, but we cannot put him or her through a federal trial for one or more reasons.

One such reason is that the information to be used at trial has been obtained by illegal or unacceptable methods. One example is the information found to be inadmissible in the Ghailani trial. We have a treaty obligation not to engage in torture or cruel, inhuman or degrading treatment. These practices also contravene domestic laws. Although all now agree that torture must be prohibited, the value of information obtained through so-called "enhanced interrogation techniques" is widely debated in the intelligence world. The preponderance of evidence, in my view, is against the utility of such practices based on a reading of the materials discussing it. In addition to the moral and legal issues, many studies have found that evidence obtained through coercion is inherently unreliable. That then raises the question of what to do with defendants in this category. The options are stark and challenging. They can be tried on the admissible evidence. They can be sent to jurisdictions which may have more evidence or different charges against which to try them. They can in the end be released. The danger there is they will once again

attempt to attack our country. That danger has to be balanced against the fact that the high level leadership of al Qa'eda – bin Laden and al Zawahiri and others - also remain at large. These are not easy choices. But the shorter term, tactical, considerations need also to be balanced against the longer term strategic issues.

The second reason is that the information was derived through intelligence collection where the tradition and the national interest are to protect the sources and methods of collection. The government has developed a practice of clearing and briefing judges and attorneys for use of this protected evidence in courts. Under the Classified Information Procedures Act (CIPA) of 1980 there are also ways to protect sources and methods while making the principal elements of the evidence clear to the defendant. This seems to be a respectable and responsible way to proceed.

Unfortunately, the issue of whether to try and/or indefinitely detain without charge the detainees in Guantanamo has become a highly politicized issue. However, I have joined a bipartisan group of nearly 140 prominent Americans who signed *Beyond Guantanamo: A Bipartisan Declaration*, a copy of which I would request be placed in the record. *Declaration* signatories, convened by the Constitution Project, include former U.S. federal judges, prosecutors, intelligence experts, former members of Congress, former diplomats, military leaders, and families of victims of terrorism. The *Declaration* supports the use of our traditional criminal justice system to try Guantanamo detainees, and opposes the use of indefinite detention without charge. We believe that "establishing a system of detention without charge would damage the ability of the United States to promote respect for human rights around the world, embolden human rights violators, and tarnish our Nation's reputation and credibility with its international allies." I believe it will have the same negative impact on our efforts to promote wider use of the Rule of Law. Further, a system of indefinite detention would raise a serious divergence on a major issue of principle with our international allies and other communities around the world. This would tend to discourage critical cooperation, especially in the fight against terror, by those allies and others whose assistance is important in our joint fight against terrorism.

Safeguarding Privacy and Avoiding Unnecessary Secrecy

It is self evident that the Rule of Law requires appropriate safeguards to protect individuals' right to privacy. States traditionally, for fiscal and security purposes at their borders, have exercised the right to examine persons and goods entering their territory on an absolute basis with exceptions only for diplomatic and state immunity. It is obvious that this needs to be done for the purpose of protecting the country and carrying out its laws on trade and commerce, but such searches must be conducted in a manner that minimizes the intrusion into individual privacy.

In addition, we use the issuance of visas that permit people to present themselves at our borders for admission into the country in a way that, *inter alia*,

reduces security risks. We should avoid a blanket selection of everyone from one or a number of countries for special treatment and review wherever possible their background. Instead, we should rely on actual intelligence and the application of standards of reasonable suspicion to determine which individuals pose threats. Ethnic, racial, and national profiling have brought growing antagonism to the United States on the part of the many innocent people who have been affected by these practices. This, in turn, has fostered resentment against our country, which terrorists and others have used to recruit individuals to act against the United States.

These are not, obviously, easy issues. But, over a period of time, incorporating protections for civil liberties can help us to restore our reputation as a welcoming nation, while we continue to deal with the international security problems posed by the terrorist threat to the United States. It is also clear that such an approach can only be effective if we continue to strengthen and refine our systems for gathering intelligence information and analyzing it appropriately. Similarly, we should focus our inquiries on actual threats - both current and potential - to help us more effectively and more selectively to conduct searches at our borders. This means that both increasing foreign trade and the number of visitors to the United States are kept more carefully in balance with assuring our security. Smarter visa issuances and smarter and better informed security inspections save time and effort and allow us to concentrate on areas where the threat is greatest and our security processes can be most effective.

The application of the state secrets doctrine is also an area of growing concern, particularly as it affects the rights of citizens and aliens to seek redress in court for actions of the government which negatively impact them or their interests. Blanket efforts to block all such claims seeking redress are both unfair and improper. Any doctrine that leaves the Executive Branch entirely immune, on its own say so, from all claims for redress against mistakes, errors, or bad or improperly applied policy seems overly broad and peremptory. We need to look carefully at how to assure the right to redress while fully protecting the government's responsibility to keep its legitimate secrets secure.

Perhaps there is a parallel here in the way we treat classified material in connection with criminal and civil actions in the judicial system under CIPA. The state secrets privilege should be restored to its proper role as an evidentiary privilege, safeguarding particular pieces of evidence against disclosure. The privilege should not be used as an immunity doctrine, completely blocking challenges to government actions. Judges should independently examine the evidence asserted to be secret to determine whether the privilege applies, and should assess whether there is sufficient non-privileged evidence for the case to proceed. This would help to assure the executive branch is not left to police itself. The judiciary would be playing its proper role in assuring that individual rights are carefully looked at in light of executive branch interests and requirements. It is

within the ambit of this approach that solutions to the question of the state secrets privilege and state protection of citizens' rights should be found.

Thank you, Mr. Chairman, for this opportunity to testify. I look forward to your questions.