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Constitutional "Refolution" in the Ex-Communist World: The Rule of Law

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SYMPOSIUM
CONSTITUTIONAL “*REFOLUTION*”
IN THE EX-COMMUNIST WORLD:
THE RULE OF LAW
September 26, 1996

FOREWORD*

Since the collapse of communist power in the early 1990s, Eastern Europe and the rest of the former Soviet-dominated world have experienced significant and unprecedented changes. Although potentially revolutionary in impact, the economic, political, and legal transitions have been achieved through reform of existing institutions rather than violent revolution. Timothy Garton Ash has called this process “*refolution*.” This symposium will focus on the development and promotion of the rule of law in the context of this “*refolution*” now underway in the former communist world. The panelists, each an experienced and renowned specialist, will present their views in a roundtable format that will include extensive audience questions.

Welcome and Introduction

Dean Claudio Grossman

Dean and Raymond I. Geraldson Scholar in International and Humanitarian Law,
Washington College of Law, American University

Professor Herman Schwartz

Professor of Law, Washington College of Law, American University

Panel I: The Constitution-Making Process and the Rule of Law

The Honorable Lloyd Cutler

Wilmer, Cutler & Pickering; former Counsel to Presidents Bill Clinton and Jimmy Carter

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Professor A.E. Dick Howard

White Burkett Miller Professor of Law and Public Affairs, University of Virginia

Professor Robert Sharlet

Chauncey Winters Professor of Political Science, Union College

Professor Eric Stein

Hessel E. Yhntema Professor Emeritus, University of Michigan Law School

Special Presentation: Promoting the Rule of Law in the Former Soviet Bloc

Mr. Aryeh Neier

President, Open Society Institute

Panel II: Constitutional Courts and the Rule of Law

Professor Herman Schwartz

Professor of Law, Washington College of Law, American University

Mr. Mark Brzezinski

Hogan & Hartson, Washington, D.C.

Professor Kim Lane Scheppele

Professor of Law, University of Pennsylvania; Co-Director, Program on Gender and Culture, Central European University

Professor Herbert Hausmaninger

Professor of Law, University of Vienna

Panel III: The Role of Foreign Experts in Establishing the Rule of Law

The Honorable Patricia M. Wald

Judge, United States Court of Appeals for the D.C. Circuit

Mr. Mark Ellis

Executive Director, American Bar Association, Central and East European Law Institute

Ms. Dimitrina Petrova

Executive Director, European Roma Rights Center (Budapest, Hungary)

The Honorable Richard Schifter

Special Assistant to the President for National Security Affairs

WELCOME AND INTRODUCTION

DEAN CLAUDIO GROSSMAN: Good morning, I am Claudio Grossman, Dean of the Washington College of Law of American University. I want to welcome you and thank you for your presence in the conference. This conference is part of our program to celebrate the Law School's Centennial.

We were created 100 years ago by two women. And we are, I would say, the only law school in the country and in the world created by women. And that is why we are very proud.

Ms. Gillett and Ms. Mussey, as a matter of fact, 100 years ago decided to create a law school because women were excluded from the legal profession in most jurisdictions. And they understood something else that was very important and has continued through our tradition. They understood that there was not a possibility or a chance to promote important values of human dignities if women themselves could not be empowered by the knowledge of the legal field.

They realized that the law in the legal system played a role as an important instrument of social engineering. However, without empowering those who would like to advance their positions in the legal system, without empowering themselves with the skills and values and the knowledge necessary in the legal field, it would not be possible to achieve a society without discrimination and where people could develop themselves to their limit or potential.

There was another interesting aspect to Ms. Mussey and Ms. Gillett when they created this law school. Since the beginning, they had a strong universalist approach. One was working for the Red Cross, the other was an advisor of the Kingdom of Sweden. And they were promoting values in the global arena at the same time. They understood that it was not possible to advance the position of women in the country and the expansion of democracy and human rights if, in their world, those values would not be advanced.

They thought that the best way to consolidate and expand a rule of law in their country was also to achieve a world where the rule of law and human rights and dignity would be achieved for all. That is why we are very happy to receive you in the spirit of the tradition of the founding mothers of the Washington College of Law with this very important conference.

Many of our professors and, in particular, Professor Herman Schwartz, have had a strong interest in Eastern Europe. As a matter of fact, I suspect sometimes that Herman has a brother that looks like him because I don't know how he can, at the same time, be in the Czech Republic, in Russia, and here teaching a class and, in addition to that, creating an exciting environment that motivates our students and us, his colleagues, to continue to pursue the values of our founders. So, at the same time that I open this conference today, I want to express my recognition for the type of role model that Herman represents here in the Washington College of Law.

Thank you very much for your presence here. We are honored to have you all, and I wish you a very good conference and deliberations. Thank you very much.

PROFESSOR HERMAN SCHWARTZ: Thank you. As you can tell, without paying any attention to the content of what has been said, we are truly an international law school. Claudio's accent from South of the Border and mine from South Brooklyn assure you that we present you with a world-wide view.

We are really very pleased to have you here and to have this really quite splendid list of panelists today. I am sure many of you have wondered about the title of the conference and whether it is a typographical error: the use of the word "refolution" with an "F" instead of a "V". We really do know how to spell "revolution."

The fact is, it is not an error. Back in mid-1989, the noted English journalist, Timothy Gartin Ash, wrote an article about the massive changes taking place in Poland and Hungary. And these were clearly not traditional revolutions, and yet they were so much more than simply reforms. They were transformations of some kind or another. And he gave them the name of "refolution," creating a new word that combined the notions of reform and revolution. Of course, within months after he wrote that, more and more countries have gotten involved in that process, this largely, except in one or two places like Romania, bloodless transformation, ignoring of course, Bosnia. And although he has since reverted to using the word "revolution" for what has occurred in places like Prague and East Germany and the like, the fact remains that these still have been relatively bloodless transitions rather than the kind of traditional revolutions, such as one which occurred in America, France, Russia, China and the like, that we all read about in history.

Now the extensible goal, it is not clear how true it has been, of all these has been the creation of some kind of constitutional democracy governed by the rule of law and devoted to freedom and protection of individual rights. All of those countries profess that. Back in 1990, Ralph Darndorf, the great social scientist now at Oxford, wrote a little book that he modeled on Edmund Burke's "Reflections on the Revolution in France." He entitled it "Reflections on the Revolution in Europe," a letter intended to be sent to a Polish gentleman. Burke's was a letter intended to be sent to a French gentleman.

And he suggested that there are three stages to this kind of revolutionary change, revolutionary whatever you want to call it: constitutional, economic, and social. And he said, the first canon should be done immediately. The second will take at least six years, and, as we have seen in many places, far more than six years. The third, the creation of some kind of social institutions, that might take as many as sixty years. Now, the second and third stages are really not our business here. We are a law school, and our focus is indeed, on the first. But none of us are so naive or foolish as to think that first can take place without the second and third.

And, indeed, the fact that, partly by accident and because of who they were, if you look down the list of our nine panelists, in every case we have two lawyers and one social scientist in each group. This reflects the interrelationship between law, civil society, and the economy. Darndorf noted, when referring to the first stage, the constitutional stage, "This is the hour of the lawyers." But he did not, obviously, mean all lawyers, just the lawyers around here when he said, "Those

who have the imagination and comparative experience to find a way out of the monopoly of the party and all subordinate monopolies."

Today, we are going to talk about that hour of the lawyers, the three facets of it. First, the process of actually making a constitution, a process that has proceeded smoothly in some areas and surprisingly bumpily in other areas; surprising because the place where they seem to be having the most trouble is where it all started, Poland.

The second panel will deal with one of the key props of this new order, the constitutional courts. Because in almost all of these countries, this new and strange institution has become an essential part of the effort being made, often a very controversial part.

And in the third panel, in recognition of the fact that lawyers, political scientists, and others from outside this area from the West have played a very significant role, we have decided to have a discussion of what kind of role this has been, how useful it has been, how effective it has been, what the shortcomings have been, and the like.

And to deal with these, we have assembled a set of experts, all of whom have had extensive experience working in these areas. I think that at least all the panelists and at least some of the moderators fit Darndorf's description of imagination and comparative experience.

The first panel will be moderated by Lloyd Cutler, and I will introduce the panelists and Mr. Cutler, and then we will turn to Mr. Cutler. Lloyd Cutler, I would say, is almost a household name to those people who spend a few minutes in front of the nightly news. We have worked together for some six years now, and to me he exemplifies one of the great American traditions of the lawyer, statesman, and scholar that goes back to Madison and Hamilton and Jay and Jefferson. As a lawyer, he has created, really from scratch, one of the major law firms in America and has represented and been involved in some of the major causes of our time in every court, and has argued numerous Supreme Court cases.

As a statesman, as you probably know, he has been counsel to two Presidents, both of whom were in a good deal of need at the time: President Bill Clinton recently and President Jimmy Carter back in 1979.

And, of course, he has been involved, if only through that, in some of the great events of the day. But he has also recently been counsel to Secretary Christopher as a member of the Balkan Commission at Dayton.

Some years ago, he headed a Commission on Violence in America at President Kennedy's request. He helped found the Lawyer's Committee for Civil Rights under Law, one of the major civil rights groups of America.

As a scholar, he has studied deeply and written frequently, spending time at Oxford studying the science of government. And, most relevant to this conference, on constitution making, he co-chaired a committee of a group of us—five of us, actually, are here today—who were probably the first group of foreigners to come and try to work with the countries in Europe on constitutional reform, as early as

December 1989.

And, during this period and before, he has also been chairman of the Salisbury Seminar, an institution which has introduced and trained hundreds of European and Latin American and African and other young people in what it takes to have a decent constitutional democracy and rule of law.

I will simply tell you that at the last session which I was privileged to attend, which was a very exciting time, Judge Goldstone was there, and others. I turned to one of the staff people and asked, "Tell me, are all of these sessions like this?" And she paused and said, "When Lloyd runs it." So, that is our moderator, Lloyd Cutler.

Since I am up here, I may as well introduce the rest. And these are all not only distinguished, not only among the very, very best in their field, but also the most experienced in working in that area.

Immediately to Lloyd's right is Professor Eric Stein of the University of Michigan, truly one of the great men in the world of international law. Eric is Professor of Comparative Law at the University of Michigan emeritus.

He was working with us in Czechoslovakia. He is originally from Czechoslovakia, and his personal story, which will be incorporated in a really quite wonderful, comprehensive book on the Czechoslovakian effort of constitution-making, will be published soon by the University of Michigan Press.

The weaving together of his personal experiences and what has happened subsequently makes the book a treat to read as well as practically a textbook in the difficulties of trying to put together a constitution between nations which are unhappy with each other, which do not have a lot in common with each other.

He has been an advisor to the State Department, to the European Union, has taught all over Europe, has received umpteen honors from all over, and we are very fortunate to have Eric here.

Next to him is one of the odd fish we have imported into this law school, Professor Robert Sharlet, who has just been made, actually, the Chauncey Winters Professor of Political Science at Union College.

Bob, it is not too much to say, is one of the two or three leading experts on Russia and the former Soviet Union in the world today. He has written extensively, producing numerous books and articles. He has advised the American Bar Association's Central and East European Law Initiative ("CEELI") Project on a lot of the work they do, and, for two years, he worked intensively here in Washington with the Rule of Law Consortium, which has been working on trying to introduce and facilitate judicial reform in the former Soviet Union. That has involved judicial training, legal reform, and the like, and he has gone back to Union college but continues to work with the Rule of Law Consortium.

And on the end is Professor A. E. Dick Howard, The Whiteburk and Miller Professor of Law at the University of Virginia. I think I can say without the slightest fear of contradiction that there is no more outstanding constitutionalist in America than Dick Howard.

Dick knows constitutional law, has participated in making constitutional law, in writing constitutions at virtually every level, from the state level, where he was the key figure in revising the Virginia Constitution, to working all over Europe.

Dick listed for me at my request some of the places he has worked, and, clearly, this particular setting is too small to encompass Dick's experience: Brazil, Hong Kong, the Philippines, Hungary, Czechoslovakia, Poland, Romania, Russia, Albania, and, most recently, South Africa.

Dick has written widely. He has most recently given the very distinguished Tanner Lectures and has published them in a wonderful little book about the effort toward a rule of law.

We are very, very fortunate to have Dick and all the others here. I think you have heard more than enough from me. Let me turn it over to Lloyd.

PANEL I

THE CONSTITUTION-MAKING PROCESS AND THE RULE OF LAW

MR. LLOYD CUTLER: Thank you, Herman. My favorite introduction story about the kind of introduction that was just given to all three of us involves Senator John Sherman Cooper. I hope some of you remember him.

He was a very distinguished, lovable Senator from Kentucky, and he was at some Yale function where three or four people of his ilk, like Dean Acheson, were all introduced in glowing terms. He said it reminded him of his first campaign for Congress back in 1940, when he and his opponent, in order to save money, rented one car together and went around from one county seat to another within their district in Eastern Kentucky.

And they arrived at one little town where there was a great crowd in front of the courthouse as they drove up. And the county judge said to them, as they marched up the steps, "I would be mighty pleased to introduce you to the crowd," and they accepted.

I won't try to imitate the judge's accent, but he said, "The man who is about to speak to you is a great friend of the farmer. He knows the problems of the working man. He knows what it is like to go down into a coal mine. He is a keen student of foreign affairs, and he understands the problems of the housewife. And if we send him to Congress, he is going to be the best representative we ever had." And Senator Cooper said that the judge then turned to me and my opponent, and he said, "Now which one of you fellows want to speak first?"

I guess I get to speak first. And there is a certain amount of overlap, as you can see, among these three conference topics, but this first one, on constitution making, asks two key questions.

One is can the constitution-making process itself help to advance the establishment of the rule of law in newly-emerging democracies? The second is how much have rule of law considerations entered into the political aspects of constitution-making?

You will hear from our three panelists. I hope I can hold them down to twenty minutes or less. And that should leave us a half an hour or so for comments and questions at the end.

Let me make just a few preliminary observations. It is obvious, I think, that it takes more than a constitution to create a workable democracy. The constitutions of virtually all of the Latin America states are identical to the United States' Constitution, at least they were in the beginning. And look what happened to most of them.

The constitution in the Philippines was identical to the American Constitution. And look at how many upheavals occurred in the Philippines. And, of course, the constitution of the Soviet Union has a bigger list of enforceable human rights than any constitution in the world, I would say, and yet it turned out to be a Potemkin village.

There is a true shaggy dog story that fits the point I want to make about constitutions. It is about two retired gentlemen who would walk their dogs together every morning in Central Park. One day around noon they arrived at the Tavern on the Green, a big restaurant in Central Park. And one of them said, "I am getting hungry, let's go in and have lunch." And the other said, "They won't let us in with the dogs." And the first one said, "Well, you just watch me. Do whatever I do."

So, the first man, who had a nice German shepherd, walks up to a waiter and asks for a place for lunch. The waiter says, "We can't take you in with the dog." He says, "Don't you realize I am blind, and this is my seeing eye dog?" And the waiter was so embarrassed he put him at a table.

And then the second fellow came up. Same scene, "We can't let you in with the dog." "Don't you realize I am blind, this is my seeing eye dog?" And the head waiter said, "But that is a Chihuahua." And the poor fellow thought for a minute, and said, "Do you mean they actually gave me a Chihuahua?"

And the question it presents, the point I am trying to make is, depending on the customs of the country, its traditions, its past experience with democracy, what it really wants to achieve for itself, your constitution can either be a big, robust German shepherd or, as in many countries, it can turn out to be a Chihuahua.

The great virtue, of course, of a written constitution is that it helps to record a consensus of the country, a broad consensus on basic principles, usually principles, at least, in the post-communist world, based on what we call the rule of law. It is very important in many countries to have that kind of consensus in the beginning, so there is a standard against which the actions of the government can be judged.

It is a very different task to write a constitution at the end of the 20th century than it was at the end of the 18th century. Our little, short, ten-, twenty-page constitution, even with all of its amendments, survives and exists in that form

largely because, as Herman has pointed out many times, we have some 200 years of interpretation of these few, broad, general terms that have helped us to interpret that constitution over the years.

If you try to write a modern constitution, let's say we convened a new constitutional convention to rewrite the constitution, even if the substance did not change one wit, I dare say the text would be 20 or 30 times larger than the text of this very brief constitution we have today.

And that is what has happened to most of the Central European constitutions that you are going to hear about. Because they have to record not only these few, concise, pithy words of the bill of rights, they also have to record the way in which it has been interpreted by other democracies with constitutional bills of rights. The best example, of course, is that in most of Europe, modern Europe, the bill of rights, every single provision of the bill of rights, whether it is freedom of the press, freedom of religion, freedom from arrest, whatever, always says, "except to the extent necessary to maintain order in a democratic society," or words to that effect.

And that is meant to cover shouting fire in a crowded theater and many, many other things that we would not allow here. For example, in most of Europe, it would be quite constitutional—in fact, it amazes them that we did the opposite—it would be quite constitutional in most of Europe to ban the Skokie Nazi parade.

Why does the rest of the world look to the West? I suppose the only way we can answer that is, first, that with modern communications—I am going far beyond blue jeans, records, and such things—but, with modern communications, television programs, the rest of the world sees the society of the United States, or, at least, part of that society, at first hand. And in most of Central Europe, at least, large segments of the population have relatives in the United States and have had heard a great deal about the United States, in places as diverse as Bosnia, I would say, the former Soviet Union.

People think of the United States of America, with all the imperfections that we recognize, as the place they would like to be or the system under which they would like to live.

And much of that comes down to a yearning for some sort of rule of law. And the last point I want to make is that, while it is too late for most of us to be the James Madison of our own country, it is a great satisfaction to play a little bit of the role in being the James Madison of another country.

And now, Dick Howard.

PROFESSOR A.E. DICK HOWARD: Good morning. The first opportunity I had actually to work with the making of a constitution was in Virginia, during the drafting of that state's constitution. I must tell you that, after you have worked with a state legislature, there is nothing in Prague or Budapest that holds any terrors. I have cut my teeth with experts.

Of course, we in Virginia would like to think we invented the idea of a constitution, with perhaps a little help from Massachusetts. You will forgive us for that

conceit.

In the Western liberal, democratic tradition, much centers around the making of constitutions, but I think one is bound to be struck by the range of ideas and insights that you find even within that liberal democratic ideal.

It is, therefore, not surprising that, as we begin to push the frontiers of constitutionalism further in places like Central and Eastern Europe and the former Soviet Union, the new constitutions do not turn out to be carbon copies of the kinds of constitutions we might know in this country or Western Europeans might recognize.

In my thoughts on the subject this morning, I will confine myself largely to what I would call Central and Eastern Europe, i.e., not the former Soviet Union and the republics which are part of it. The part of the world on which I will focus includes the states running from the Baltics down to the Balkans.

At the outset, I should comment on some of the things which countries in this region have in common, and also on some of the things which are not shared characteristics.

As to the things that these countries of the former communist world do share: most of them, at least in the Eastern European scene, are small countries; they are also countries all of which share the unhappy experience of having lived for a half a century under communism.

All of them have some legacy of European institutions, though they may differ in kind. All of them are either on the road to, or at least purport to be on the road to, some kind of democratization and pluralistic electoral system. And all of them are on, or at least talk about being on, the road to market economies, to some kind of economic reform.

So, there are in these countries shared characteristics which would affect any search for the rule of law. But, as soon as you get close to these countries, you begin to sort them out as not simply being entities on a map.

One realizes how strikingly different in some very fundamental ways they are. For example, there are the historic traditions that separate some from others. It is hard to overlook the difference of having lived, let's say, under the Austro-Hungarian influence for centuries or, on the other hand, as some countries did, under the Ottoman Empire.

Those historical legacies still have their impact. There are also differences, as we know, of religion—the Catholic, or Orthodox or, in some cases, a more secular kind of tradition.

There are obviously differences of nationality and ethnicity. The idea of the rule of law may be seen rather differently through the lens of a country which is relatively homogenous. For example, Poland or Hungary, states which, as countries in the region go, are fairly homogenous ethnically.

There are other countries which, of course, have large, and often rather restless ethnic minorities. The Hungarians in Romania, Slovakia, and Serbia would be

good examples.

The countries differ in their democratic experience. Czechoslovakia from 1918 to 1938 was a thriving, vibrant democracy. There are other countries in the region which have simply never had that kind of experience.

Finally, of course, there are striking differences in economic development. Poland, Hungary, and the Czech Republic are well on their way to being relatively prosperous countries. They are moving in the direction of the kind of standard of living one finds in the West, whereas other countries in the region are either struggling or, indeed, are downright poor. Albania, for example, is a country whose standard of living is not much above that of Ethiopia.

Let me turn to constitution-making itself. If you are trying to take an abstraction like constitutionalism or democracy or the rule of law, and apply it to the making of an actual, written constitution, one thing that interests me is: where do the drafters get the ideas they use? Do they take out a yellow pad and write at the top, "We the people of," and say, "the Czech Republic." And then do they make it up as they go?

One doubts that very much. A student in a class in first-year contracts doesn't say simply, "Well, what *is* a contract?" You look at one, don't you? You look at a model and work from there.

What one finds in the post-communist world is a great deal of synthesizing, the borrowing of ideas from one place or another. Now, the people of these countries do make an attempt at retrieving—at least there is often a hope that one can retrieve—as much of the indigenous constitutional experience as possible.

There was a lot of talk in Poland, for example, about reviving the ideals of the great May 3, 1791 Constitution. And they had hoped to do it in time for 1991. That deadline, however, has passed.

The Hungarians are very proud of the fact that they have carried over a great deal of their pre-communist Hungarian rule of law legacy into the post-communist world. They have sought to deal with the problem of transition.

The indigenous experience is, of course, not the whole story. Drafters then look to other models. I remember one of my friends on the Romanian constitutional drafting commission bragging to me that he had read twenty-six different constitutions. I reckon that was about 20 too many; half a dozen of the best ones would have done very nicely. The point, however, is that drafters do, in fact, borrow a great deal.

From the American perspective, I am bound to say that the amount of direct textual borrowing from the U.S. tradition is limited. Recall Lloyd Cutler's mention of our 18th century document.

To understand American constitutionalism, one begins, of course, with the text, but then you have to reckon with five hundred volumes of the U.S. Reports. There is no way a draftsman can distill all of that into a document.

The fact is that the Central and Eastern European drafters look much more

closely at Western European models. One finds that it is the German and French constitutions which are especially influential, and, to a lesser extent, Spain, Italy, Scandinavia, and some of the others.

The reasons for European influence are fairly obvious. Not only are these models readily available, but there is a powerful wish on the part of Europeans who lived under communism once again to be part of the family of Europe.

That is partly tradition, a sense of affiliation. There is, of course, an economic incentive. They want trade and investment. They would like to be admitted to European institutions. What better way to show how European you are than to draft a European-style constitution?

So the result is that it is the parliamentary system, not the American congressional system, that is adopted. If drafters decide they want a strong presidency, it is the French model, not the American model, that they use.

If they decide to have judicial review of the *Marbury v. Madison* kind, it is not a U.S.-style supreme court they set up, it is a European-style constitutional court.

So you find a thoroughly European kind of influence which has obvious implications for thinking about rule of law. Take something as simple as the principle of free speech. You will recall Lloyd Cutler's mention of the Skokie march, of the problem of hate speech.

A European thinks very differently about the metes and bounds of free speech than does an American. We are so infused with our First Amendment notion that we tend to have much more expansive ideas of what free speech is all about than is true in Western Europe and, therefore, is true in Eastern Europe.

You will find in Poland, for example, a willingness to prosecute people for defamation of the nation or its leaders. These prosecutions are still being brought in the post-communist era for the kind of speech which an American would assume was bound to be protected by the First Amendment.

Thus, when you think about rule of law in Central and Eastern Europe, it doesn't translate quite as crisply and neatly from the Western or the American concept as one might have thought.

One of the basic problems that I see in this era of constitution-making in Eastern Europe is how one goes about establishing a legitimate basis for constitutional government.

There is an assumption in the liberal democratic tradition that it results in the making of a written constitution; therefore, each of the post-communist countries has set out on the road of writing a constitution.

Herman Schwartz mentioned the fact that it has been a very rocky road. Some countries still haven't gotten the final constitution in place. Poland, for example, is still limping along with its so-called "little constitution."

The writing of a constitution is only part of the constitutional project. One still has to ask the question: wherein lies legitimacy, the basis for the citizen's obligation to obey the laws passed under that constitution? This is the search in political

theory for consent or legitimacy.

In this country, during the early state constitutional period, Massachusetts gave us, in 1780, the American model of the constitutional convention—the election of delegates to a convention whose job it was to write a constitution and whose product in turn was then presented to the people in referendum. That completed the circle, and, from the standpoint of American constitutionalism, it offers a fairly satisfying answer to the question of what is the legitimate basis for the constitution.

I find myself searching for the way that Central and Eastern Europeans have tackled this particular question. What you find in that region is a very indistinct, uncertain popular basis for the new constitutions.

The device of the constitutional convention or constituent assembly is not used. Referenda are really quite rare. I think Estonia used the referendum. Russia, of course, had one, but most countries don't do that.

What you have is the parliament passing the new constitution, typically by a two-thirds vote. So, you have the body which is meant to live under the new constitution being the one that enacts it, and, obviously, if they can get the two-thirds vote, amends it.

To an American way of thinking about constitutions, this presents something of a paradox. It is one made all the more difficult by the rather piecemeal and episodic quality of constitution-making in much of Central and Eastern Europe.

I mentioned Poland, still debating after all these years what constitution they will finally adopt. The Czechs and Slovaks did get together on a Charter of Freedoms, but they couldn't agree on a division of competencies, and, finally, the two countries went their own ways.

Now, before one passes too ready a judgment and says, "Well, they just can't get it right," it would be well to remember that, in the American experience from 1776 to 1787, much of the time we didn't get it right, either.

The first American state constitutions were very flawed documents. They were rather primitive efforts at constitution-making, and they were soon abandoned or changed. The Articles of Confederation, our first attempt at a national constitution, were woefully inadequate and had to be abandoned in favor of the document that was worked out at Philadelphia in 1787.

From those fits and starts and half efforts and flawed beginnings came finally the distinctive features of American constitutionalism—federalism, separation of powers, checks and balances, judicial review, the benchmarks that we now associate with our system.

If I were to attempt to suggest the most striking single phenomenon that has emerged on the constitution-making scene in Central and Eastern Europe—and in this I anticipate the next panel this morning—I would nominate the emergence of the constitutional court.

This is the one most remarkable thing that is happening, in constitutional terms,

in Central and Eastern Europe, and is striking for two reasons. The first is that the idea of a constitutional court is such a total break with the communist tradition.

Under Leninist/Marxist philosophy, one had a unity of party and state. The law was simply an instrument of party policy. The idea that the law or courts or judges could be independent was an anathema. Thus, to have constitutional courts with the capacity to strike down even acts of parliament as unconstitutional is a world apart from communism.

Constitutional courts are also a break with, or at least undermine, the traditional European adherence to popular sovereignty and legislative supremacy. Europe has been very reluctant to come to the judicial review table.

Judicial review is not an idea that takes comfortably in Europe. The French, in particular, are slow to adopt the idea of full-blown judicial review. Early efforts in Europe came because of the influence of Hans Kelsen in Austria and Czechoslovakia in 1920. Even more influential has been the court created by the Basic Law in Germany in 1949.

It is the German experience which, I think, has set so much of Central and Eastern Europe on the same path. Since you don't find in post-communist Europe constitutional conventions and referenda and other American notions of how one puts the constitution on a legitimate basis, I raise the question whether the work of the constitutional courts might begin to supply some of that sense of legitimacy. This might be especially true in Hungary, where there is such open access to citizen petitions. Consider also that because these courts have been brought into being as part of the constitutional transition, that itself may add an air of legitimacy.

Recall the experience of the American civil rights movement in the 1960s, when it was the courts that proved to be the only effective forum for American blacks in the American south. Blacks went to court when the legislatures and other bodies were closed to them, and when the U.S. Supreme Court in the 1958 *Button* case, recognized litigation itself as a protected form of First Amendment expression. That is, of course, an American example, but, it seems to me, perhaps something like that might take place in Central and Eastern Europe.

One final note. I have talked mainly about the making of constitutions, but let me not leave the platform without a further thought. Even if Central and Eastern Europe does a wonderful job of adopting impressive constitutions, and even if it puts into place institutions like constitutional courts to implement those constitutions and make them effective, there is something else that has to happen if the rule of law is to become a fact in the post-communist world.

That something goes under different names. You might call it a legal culture. You might call it civic education. You might call it civil society. What it requires is overcoming the disrespect, the distrust, the cynicism that citizens naturally felt about law and lawyers and courts and judges in the communist world, precisely because the law was seen to be an instrument of party policy. That legacy is deep and bitter, I think, in many of the people of the region. You can't expect they will suddenly abandon those assumptions overnight.

What is needed ultimately is what might be called civic education. I am struck by the fact that the Poles in 1774 were the first nation in Europe to have a national commission on education.

Three years later, in Virginia, Thomas Jefferson wrote what he called the "Bill for the More General Diffusion of Knowledge." If adopted, it would have established a system of public education in Virginia. In talking about his bill, in his *Notes on the State of Virginia*, Jefferson called for, and I quote Jefferson's language, "Rendering the people safe as they are the ultimate guardians of their own liberty."

That says it pretty well. That sums up what I would offer to you this morning as the key to establishing the rule of law, not only in Virginia and America, but in Central and Eastern Europe. Thank you very much.

PROFESSOR ROBERT SHARLET: My task this morning is to talk to you about the politics of constitution-making in Russia and the Newly Independent States ("NIS").

Yesterday was a banner day for constitutional politics in Russia, as you probably noted from the press here. Dr. DeBakey, a cardiovascular specialist and constitutional surgeon of the first order, gave a positive prognosis for Yeltsin's heart, and, by inference, Russia's political stability. Simultaneously, the *Wall Street Journal* (9/26/96) concluded that a consensus has formed on the constitution within Russia, and therefore, pronounced the country safe for foreign investment.

I would like to share with you several of the premises which shape my perception of the contemporary constitutional landscape in Russia and the NIS of the former USSR.

First, the primacy of politics in the making, and the somewhat more desultory implementation of new constitutions in Russia and the NIS. For instance, as a political scientist who studies law, the most compelling query for me has been how extensively have political considerations affected constitution-making and implementation.

Second, the predominance of constitutions as the new rules of the political game in Russia and the NIS. By way of example, former Russian Foreign Minister Kozyrev recently observed that people in Russia will no longer accept any authority but an elected one. Similarly, the new political elites do almost nothing of consequence without at least a reference to the constitution, if not a relevant constitutional citation.

And third, the new post-Soviet constitutions tend to be perceived, by elites and publics alike, along a spectrum from the constitution as "text" to a constitution as "metaphor." Within the concept of text is Walter Murphy's distinction between the authority a constitutional text *asserts*, and the authority it *exerts*, while the metaphoric end of the spectrum affords, of course, much greater license in constitutional usage and interpretation.

To illustrate further, all three premises can be seen at work framing the following examples:

It was Gorbachev in the *perestroika* period of the late USSR who introduced the idea of a constitution as the source of legitimacy and authority in the political game, an idea, and now a full-blown vocabulary, which today informs public discourse in nearly all of the post-Soviet states with a few Central Asian exceptions.

Gorbachev was fond of the symbolic uses of a constitution. In political debate he would figuratively hold up the constitution as if it were the conch in Lord of the Flies to invest his words with greater authority. Towards the end of the Soviet Union, as his troubles mounted, Gorbachev would sometimes envision the new Soviet Constitution, then being drafted but never completed, as a kind of magic carpet that would whisk him and his very troubled Soviet society to a brighter future. Of course, it did not happen.

While Gorbachev's frequent constitutional references were generally sincere and indeed intended to move the Soviet system towards deeper reform, the constitutional games of the current president-dictator of Uzbekistan, Karimov, are an exercise in political cynicism designed primarily to furbish his international image before a recent visit to the United States. In contrast, as a measure of Gorbachev's success in changing the tenor of public dialogue during the last days of the Soviet system, even the coup conspirators of August 1991 felt compelled in their initial proclamation, to justify their actions by constitutional reference.

Subsequently, in the post-Soviet period, the violent end of the First Russian Republic in October 1993, was preceded by thunderous constitutional volleys between President Yeltsin and then parliamentary speaker, Khasbulatov. Ironically, given the internally contradictory nature of the by then heavily amended RSFSR Constitution of 1978, both constitutional warriors were able to find appropriate ammunition in the text. That constitutional dispute, however, masking as it did a fierce personal and political conflict, was finally resolved only by gunfire.

In Russia since ratification of its post-Soviet constitution in 1993, constitutional language continues to suffuse the discussion of public issues. Witness just three recent instances from the Russian political arena:

1. Parliament's constitutional challenge to Yeltsin's Chechen policy in the Constitutional Court during spring and summer of 1995.
2. More recently, following the June 1996 presidential election, when Yeltsin's erstwhile National Security Advisor, Lebed, publicly demanded the dismissal from the cabinet of the Minister of Internal Affairs whom he held responsible for much of the carnage in Chechnya, General Kulikov, not heretofore known for his legal acumen, cited the constitution in defense of his office.
3. The third instance most vividly illustrates the three premises at work in Russian public life: the primacy of politics, the constitutional nature of discourse, and the actual and symbolic uses of constitutional writ. Reference is to the current discussion in Russia of the politics of surgical and constitutional bypass. In one of many gaps in the Russian Constitution, Article 92.2 provides for the permanent transfer of power, among several eventualities, in the event of the president's irreversible incapacitation due to health problems. Left unclear, however, is how such a circumstance would be determined and who would make the final judgment. If

one adopts a narrow reading of the clause, one might conclude that, by default, the president, as patient, could himself make the judgment call.

Avoiding direct comment on what he surely hoped would be a hypothetical situation, Yeltsin initially responded to public concern by invoking Article 92.3 which provides for the temporary transfer of power should the president be unable to carry out his constitutional duties for a limited period of time. To this end, Yeltsin announced that, prior to heart surgery, he would temporarily transfer partial control of governmental operations to the prime minister, his constitutionally designated surrogate or interim successor, while himself retaining possession of the so-called nuclear suitcase. Yeltsin's compromise evoked the bizarre image of the nuclear suitcase at the foot of the operating table and, in the unlikely event of nuclear conflict, of a surgical nurse or perhaps even the anesthetist with a free hand, launching a retaliatory strike.

In the end, it was Zhirinovsky, the court jester of Russian politics, who helped clear up this bit of constitutional nonsense. The irrepressible Zhirinovsky sardonically mocked Yeltsin publicly, suggesting the reason he would not part with the nuclear button, even when under the ether, was that the nuclear suitcase was in fact a sham, containing only the president's underwear, his toothbrush, and a bar of soap, standard luggage a presumptive political prisoner of the Stalinist era would have had ready under the bed while awaiting his inevitable arrest.

Not long after, on September 19th, Yeltsin resolved the constitutional issue with a decree which would temporarily transfer all power to Chernomyrdin, including the nuclear luggage, during his then pending surgery and the immediate post-op recovery period. The decree, along with Dr. DeBakey's upbeat prognosis for the president's health, in no small measure, stilled some of the concern in Moscow that Russia would be rudderless for months.

While Russian constitutional development appears troubled when measured by Western standards, Russia is, in fact, doing exceptionally well when compared with other former Soviet republics, excluding the three Baltic states. Several of the Central Asian states remain mired in authoritarianism, while constitutional politics in Armenia and Belarus are becoming increasingly regressive. By contrast, Russia is the most progressive of the Newly Independent States in constitutional, political, legal, and economic reform.

Finally, I would like to suggest several of the next generation of constitutional problems which lay ahead for Russia:

First, there remains the fundamental problem of resolving the tension between presidential decrees and parliamentary laws. The constitution does not specify a clear hierarchy of laws, and conflicts have already arisen. Most notably, the president's 1994 anti-crime decree, which is still in force, preempts legislation, not to mention sections of the constitution and parts of the Code of Criminal Procedure.

There is also the problem of constitutional transparency, especially in regard to the executive staff of the president. Yeltsin had steadily created within his presidential apparatus a miniature government which to some degree duplicates functions of the cabinet and parliament, while its operations are largely concealed be-

hind Kremlin walls. Chubias, Yeltsin's new chief of staff, has announced that an effort will be made to let more light into Kremlin deliberations. He intends that the presidential administration try to better explain executive policies and actions and the reasons behind them—in effect, a better information policy letting in more sunshine. The new policy remains to be implemented.

Then there is the question of paraconstitutionalism and its relationship to the constitution as text. Although the Federation Treaty was dropped from the draft constitution in 1993 and demoted to sub-constitutional status, the Russian Federation since 1992 has steadily moved from a unitary state, in fact if not in name, in the direction of a more federal structure, albeit an asymmetrical one. To quiet several restive republics and regions, Yeltsin began in early 1994 to negotiate a series of bilateral power-sharing and revenue-sharing treaties which tend to supplement and soften paraconstitutionally the centrist tone of the constitution. The devolution by treaty of the center's authority over the periphery continues, and is generally regarded as a positive trend towards a more democratic system. It does, however, represent a selective process of *de facto* constitutional amendment, without, as required by constitutional amending procedures, participation by parliament or the public at large.

Finally, there is the long term problem not just for Russia, but even more so for many other post-Soviet states, of building, or, to be more accurate, "growing" a legal culture supportive of Rule of Law institutions. While in Russia a constitutional infraculture as well as a legislative subculture are emerging, no one there or in the West has a clear understanding of how a mass legal culture is fostered in a long-time authoritarian society, how long such a process might take, or what the intermittent consequences of its absence or weakness along the way to the future might be.

To conclude, while Russia may be the most advanced of the NIS in constitutional development, the new political system remains a work in progress with much still to be done.

Thank you very much.

PROFESSOR ERIC STEIN: Lloyd Cutler and I are at an age where we look back. And his mention of John Sherman Cooper made it irresistible to tell my own story about John Sherman Cooper, one of the most attractive and appealing American politicians I was privileged to work with.

I was assigned to him when he was appointed by President Truman as a member of the United States General Assembly delegation to the meeting of the United Nations General Assembly in Paris, a very important meeting at the time, when Tito broke away from Stalin. No one knew what Stalin would do.

When the Assembly adjourned for the Christmas recess, Sherman Cooper was invited by John McCloy and the German government to come for an official visit to Bonn. The State Department made the arrangements. The Germans rolled out the red carpet a mile long, but Sherman Cooper did not arrive.

There was a frantic three or four days where the United States Government

made a worldwide search for a missing Senator, until a story came from Belgrade that John Sherman Cooper, at the invitation of the Foreign Minister of Yugoslavia in Paris, went to Belgrade.

Actually, he forgot that he was supposed to go to Bonn.

I should like to make three more or less general points, all pertaining to post-communist Europe. My first observation is this: When we think about constitution-making in that part of the world, we tend to focus on the specific negotiation process, and we tend to overlook that it is just one thread in the unique, simultaneous processes of transformation at the political, economic and societal levels.

In fact, no precedent or theory exists for a transition from a Communist regime to a free market economy, from Marx to markets as my colleague Michael Heller has put it. It is no exaggeration to think of natural or man-made disasters: floods, earthquakes, famines or wars, as the closest parallel.

In academic discourse, at any rate, the interaction between constitution-making and multiple transformation has raised questions of priorities in the allocation of human and material resources.

Bruce Ackerman of Yale felt that in Eastern Europe constitution-writing should precede, and provide conditions for, the free market, while others argued that a certain level of economic stability was an indispensable precondition for democracy.

For example, Judge Richard A. Posner had no doubt that the priority for Eastern Europe should be economic rather than political. Vaclav Havel, at the time President of the Czech and Slovak Federation, "did not agree," I quote, "with the view that the constitution is not the principal matter and that it can wait."

Bulgaria and Romania adopted their constitutions as early as 1991. In the Czech-Slovak case, where the difficulty of the transformation was compounded by still another transformation directed at the form of coexistence between the two people, the Slovaks saw to it that constitution making be tackled along with, if not before, economics.

But Poland and Hungary, after years of transformation, even today still do not have constitutions in the formal sense, and the Ukrainian Parliament adopted one as late as last June, only after the President threatened to call a popular referendum.

The reality is that these countries have adopted a veritable multitude of so-called constitutional laws amending the Communist constitutions, with the effect that in Hungary for instance, as I understand it, almost all of the vital components of a new basic document have been in place for some time, with the post-Communist Constitutional Court undertaking to provide some coherence within the system. Even the defunct Czech-Slovak Federal Assembly adopted some 43 constitutional laws before it went out of business at the end of 1992.

So in the real world, as I see it, priority has never been a real issue: constitution-making has been pursued after the fall of the old regimes with vigor but, as an eminently political process, it has been subject in different countries to widely dif-

ferent forces and outcomes which call for discriminating empirical inquiry. This is my first point.

My second point is to illustrate the validity of the generally acknowledged link between constitution making and the changing political structures—and to do so in a case where the interaction appeared in a particularly dramatic variant, marked by a richness of constitutional and international law issues—the case of the late Czechoslovakia.

This in a sense may sound like a coroner's post-mortem report but we might keep in mind that, if nothing else, a historic record of a singularly peaceful solution of an ethnic conflict through "legal" discourse is of some value. Moreover, the former Prime Minister of the Czech Republic, Petr Pithart, is invited to Brussels and to Quebec to consult with local separatists, and Umberto Bossi of the Italian Northern League invokes the peaceful dissolution of Czechoslovakia as a model of his "Padania." Are we facing a new trend toward further fragmentation of the international system, this time through a non-violent process?

I have already mentioned that in Czechoslovakia—unlike in the unitary states of Poland and Hungary—the constitution makers were faced with an ethnic conflict within an asymmetric, two-component federation: about twice as many people live in the Czech Republic as in Slovakia. Tension between the two groups surfaced already within the unitary First Republic in the 1930s. It culminated in the brief existence of the separate Slovak state under Nazi sponsorship. It led to the creation of a Soviet-type federation in 1968. And it re-emerged with vengeance after the collapse of the Communist straight-jacket in 1989.

In the early phase of the negotiations starting in 1990, the two basic issues were the transfer of powers from the center to the two Republics and "strengthening national symbolism" such as the change of the name from the "Czechoslovak" to the "Czech and Slovak" Federal Republic. The outburst of Slovak national feelings in connection with the symbolic issues of the name and flag of the state came as a real surprise to the Czechs.

The constitutional negotiations encompassed the entire spectrum of issues of federalism, constitutionalism and democracy, and led to the adoption of the Federal Assembly of the Charter of Basic Rights and Freedoms (which, incidentally was in substance taken over in the constitutional orders of both successor Republics) and a host of other constitutional and "quasi-constitutional" legislation. The primary focus, however, was the devolution discourse.

The Czech side believed that a solution should be found in the form of "a moderate, enlightened centralism," which would preserve a uniform economic and foreign policy, while the Slovaks signaled a growing, albeit not articulated, dissatisfaction. Nevertheless, the parties engaged in an essentially cooperative interaction. While seeking their own "pay-offs" on the basic issues of power distribution and other aspects of the successive drafts of the federal constitution, they were prepared to cooperate in a solution that would preserve the federal state.

The phase ended with the Federal Assembly adoption, under strong Slovak pressure, of the 1990 devolution law which restored, in effect, the allocation of

powers between the federation and the two Republics as it was originally made in the 1968 federal Constitutional Law, before the "re-centralization" ordained in 1970 as an aspect of the Soviet-imposed "normalization."

These positive moves toward a constitutional solution were made possible because the Federal Assembly was dominated by the two broad political movements that emerged victorious in the 1990 first free national elections: the Civic Forum in the Czech lands and its ally, Public Against Violence, in Slovakia. These were broad, undifferentiated agglomerations held together by little more than opposition to the Communist order.

The seeds of disintegration inherent in their very origin began sprouting during the next phase of the negotiations, in which the Slovak side pressed beyond devolution and symbolism for a new contractual foundation of the state in the form of a "treaty" between the two "sovereign" Republics. The idea obviously originated in the post-Soviet treaty for a Commonwealth of Independent States.

The Slovak-proposed "treaty" would determine both the power allocation and the institutional structure, and the powers of the center would be limited to foreign affairs, defense and the "single" market. The treaty would legally bind both Republics and would oblige the Federal Assembly to incorporate it in the new federal constitution. The hardest bargaining centered on the newly introduced issues regarding the legal nature of the treaty.

The treaty, the Slovaks first argued, should be binding under international law. The Czech side branded this as unconstitutional and revolutionary, but after the initial shock, a compromise was reached, with the majority of the Czech spokesmen accepting the treaty idea and the Slovaks conceding that the treaty would be an internal rather than an international instrument. However, the first question of the status of the treaty remained highly controversial.

First, the Slovaks insisted—and this appeared to be the point closest to their hearts—that the "sovereign" Republics must as such be the parties to the treaty while the Czechs considered that absurd since the Republics were components of the federation. Only the Republic Parliaments, acting on behalf of "the people", could be the contracting parties.

Although formulated in terms of a compromise, the Czech position, based on strict adherence to the 1960-1968 Constitution, ultimately prevailed. This, in reality again a largely symbolic issue, turned out to be a major reason, or at least a pretext, for the ultimate defeat of the draft treaty.

Second, the Slovaks claimed that the new constitution embodying the treaty, after adoption by the Federal Assembly must be ratified by the two Republic's respective parliaments, a demand that the Czechs reluctantly accepted, although they viewed it as an inappropriate "confederative element." They emphatically refused, however, to agree that any subsequent constitutional amendments would likewise be subject to such ratification. The advice that the United States Constitution, for instance, contains such a requirement did not make an impression.

Finally, as regards the issue of "international visibility," so close to Slovak

hearts, a compromise solution reached after extensive talk about "indivisible sovereignty," recognized an independent treaty-making power of the Republics to send their own representatives abroad and receive foreign representatives, both to be exercised "in harmony" with federal foreign policy.

The fragile agreement reached in a "block-buster" meeting held in a snowbound Moravian village in February 1992, collapsed in the Slovak Parliament's Presidium. That, for all practical purposes, ended the negotiations for a new constitution.

Parallel to the Republic-to-Republic negotiations on the treaty, the Federal Assembly debated proposals for the core parts of the constitution which defined the three branches of the central government. The prevailing constitutional provisions for the protection of the Slovak minority and the guarantees of Czech and Slovak parity representation were to be retained or strengthened, and consociational elements added to assure the participation of Slovak representatives in central decision making. The bill, based in part on President Havel's draft, failed in the Federal Assembly by four votes.

Why this double failure? The answer again lies in the mutation of the political system. On the Czech side, the fragmentation within the dominant Civil Forum brought to the fore strong right-of-center groupings pressing for rapid completion of the free market as a first priority, while in Slovakia the pro-federalist Public Against Violence was rapidly losing support. This trend culminated in the second national election in June 1992.

In the Czech lands, the strong federalist, moderate left-of-center was virtually eliminated with the victory of the center-right coalition which by now was organized in the form of more or less traditional political parties. In the Slovakian electoral "earthquake," the former pro-federalist Public Against Violence was also practically obliterated in favor of the populist-national new Movement for Democratic Slovakia, which was organized by Vladimir Meciar's skill at manipulating crowds with a platform promising both the continuation of the "common state" in some undefined, loose form and relief from the hardships of the "Prague-imposed" economic reform. This platform proved irresistible to the Slovak electorate.

When the constitutional negotiations resumed after the elections the principal actors were the newly appointed Czech Republic Prime Minister Vaclav Klaus and, of course, again, Vladimir Meciar, restored to his former office in Slovakia. Their political power bases were in the Republics as there was no federation-wide party of any significance.

For a brief period, a face-off persisted between the Slovak demand, now formulated in terms of a "union," modeled vaguely on the 1991 Maastricht Treaty for the European Union, and a Czech insistence on a "functional federation" or nothing. The deadlock came to an abrupt end in the early autumn of 1992 with the two leaders quickly agreeing on the division of the federation into two successor states.

An entirely new phase of negotiations based on newly defined common interests turned on two sets of issues. The first set concerned the modalities of the separation including: (1) the date of the split (December 1, 1993) and budgetary implications for the period preceding it; (2) the dismantling of the federal estab-

lishment; (3) the division of the Army and of federal property estimated at some \$730 million, of 53 embassies, archives and other rights and obligations of the federation, and questions of citizenship; (4) the constitutionality and legitimacy of the separation process, including a possible referendum, and the role of the Federal Assembly and of the Republic Parliaments; and, (5) the stance toward the outside world, recognition of the two successor states by other states, status of treaties concluded by the federal Republic, and admission to international organizations.

The second set of issues in this stage of negotiations dealt with the forms of the future co-existence of the two states. The Slovaks, eager to salvage as much as possible of the "union" scheme, pressed for a joint coordinating organ, but the Czechs were ready only for a dense network of bilateral international treaties between independent states. The Czechs prevailed and some forty treaties or agreements were negotiated, including one for a customs union. The negotiations at this stage proceeded with surprising speed under the Damoclean sword of the imminent date set for the split and in the new realization of their mutual interest in an orderly, peaceful separation.

As my last point, I propose to discuss the extra-legal, extra-constitutional solution as an option in case of a deadlock in constitutional negotiations. Invoking Kelsen, Hart and Schauer, a writer proclaimed recently that the questions of amending or abolishing the basic norm are not legal questions and cannot become objects of legal argument. The Czech-Slovak debate illustrates how mercilessly the reality intrudes into the normativist-positivist constructs. There was no end to legal argument.

In fact, one interesting aspect of the Czech-Slovak negotiations was the dogged Czech insistence on legal continuity and on a strict adherence to the letter of the prevailing constitutional order, based still on the 1960-1968 Communist constitution. One may think of several explanations for this stance: the positivist orientation of their legal education, the negotiated, "non-revolutionary" revolution of 1989 and an effort at a disassociation from the arbitrary, extra-legal ways of the Communist regime. But it was clearly more than a coincidence that the opposition to extra-constitutional solutions coincided conveniently with the Czech objective of retaining the status quo of a federal system as against the Slovak "unconstitutional" proposals for a radical change.

Professor Ackerman has evoked George Washington's decision to lend his immense prestige to breaking the then existing confederate Constitution in order to save the Constitutional Convention from certain failure. Ackerman adds, "If Mr. Havel had President Yeltsin's courage, he would have broken with the Communist Constitution and used his prestige to call a constitutional convention and a subsequent referendum, in which a national majority could have expressed its will."

Ernest Gellner, a distinguished English scholar with a Czech background, has strongly disagreed, pointing to the fundamental differences in the relevant conditions. As I see it, there may have been a magic moment in the autumn of 1990 at the latest, when President Havel might have had enough influence to force an extra-constitutional way toward the adoption of a new constitution, such as the call-

ing of a constitutional convention.

Actually, the then federal Prime Minister Calfa, the astute, professional politician in a sea of amateurs, raised this alternative in one of the President's confabs but abandoned it promptly as unrealistic since the Assembly never would have agreed to surrender its constitutional power.

With the Federal Assembly functioning and the regular constitution-making process just gearing up in late 1990, I believe there was no apparent reason to foresee the eventual deadlock and to embark on a revolutionary route so foreign to the local tradition. In fact, Havel never managed to translate his great prestige into decisive political influence. Apart from his lack of political experience, Havel's power position, in a civilized proto-democratic environment stressing "continuity" and legality as against Communist arbitrariness, was not comparable to Boris Yeltsin's.

In my forthcoming book—if you allow a brief commercial—I have explored in some detail the interaction of the constitution-writing with a wide range of contextual factors, not only the changing political structure. I even took the risky chance of speculating about the causes for the breakup of the federation, including cultural differences, the economic and external factors, the media, the role of heroes or villains, depending on where you stand. But this is a story for another day.

I had two or three points of a more general nature. And I'm not sure that I'll be able to talk to you about more than two of these points. To that, Vaclav Havel, president of the Czech and Slovak Federation, said—and I quote— "I did not agree with the view that the constitution is not the principal matter and that it can wait."

So you have these two views. In the Czech-Slovak case, there was no problem, because the Slovaks insisted on the constitutional problem right from the beginning. There, unlike in Poland and Hungary, the transformation process included a fundamental change, as far as the Slovaks were concerned, in the coexistence of these two peoples. So the Slovaks insisted that the constitution question be tackled, if not before economics and before democratization, at least at the same time.

Now, what conclusion do we draw in this context, from the situation in Poland and Hungary, where after years of transformation, even today we do not have a final formal constitution? And, of course, in the Ukraine, the Parliament adopted the constitution only last June, after the president threatened to put the problem before the people in a referendum.

But the reality is that, in all these countries, the parliament has adopted a multitude of constitutional amendments through so-called constitutional laws.

So that in Hungary, for instance, as I understand it, you really have now a full tapping of a constitutional system with a constitution caught trying to bring some coherence into the constitutional pattern in the country.

So it seems to me, in the real world, the priority of constitution-making has never been a problem. It has always been tackled very vigorously. But because it's an extremely complicated process, the progress and the outcomes, of course,

are very different.

So that's the first point I wanted to make. The second is that, I wanted to show briefly the validity of the political science proposition that there is a very close link between constitution-making and the changing political structure. And this was shown very dramatically in the Czech and Slovak picture.

I want to talk briefly about that, even though you might have a feeling that it's like a coroner's post mortem, because the country doesn't exist anymore. But I think it's important to have a historic record of this fairly unique fiscal resolution of an ethnic conflict through legal and constitutional discourse. Moreover, the early prime minister of the Czech Republic is now being invited to go to Brussels by the Flemish Separatists to talk to them about how to do it.

He was invited to Quebec for the same purpose. And now, last week, I understand—I have seen that—that Umberto Bossi, the famous leader of Padania, is it? Padania. He actually cites the Czechoslovak pattern. And that raises the question that worries international lawyers and international politicians: whether we now have here a new virus for further fragmentation of the international system?

Let me just say a few words about what actually happened. If you look at it from a constitutional point of view—and I assume that, Lloyd, you won't add to that—what you have in Czechoslovakia, unlike in Poland and Hungary, is that—the constitution makers were faced with an ethnic conflict within and without a largely dysfunctional Federation. As you probably know, there are twice as many Czechs as there are Slovaks. And a tension existed between the Czechs and the Slovaks.

Ever since the 1930s, under the First Republic, it culminated with the brief existence of a separate Slovak state under the Nazi sponsorship during the Second World War. And it led to the creation of a Soviet type of dysfunctional federation, really, in 1968, under the Slovak pressure. The tension reemerged with vengeance after the collapse of the Communist regime in 1989. And I think one can think of three phases of the constitutional discourse and development since late 1989 and beginning 1990.

The first phase—really included two basic issues. One, the transfer of powers from the Federal Center to the component Republics, and what I would describe as the strengthening of national symbolism—for instance, the change of name from the Czechoslovak Republic to Czech and Slovak Federation, are extremely important from the viewpoint of the Slovaks, as symbols invariably are.

And this phase, which involved every conceivably constitutional issue of democracy and federalism, led to adoption, for instance, of a charter on basic human rights by the Federal Assembly, which, in turn, was taken over more or less into the constitutional orders of the—Independent Czech Republic and Independent Slovak Republic.

Anyway, this phase ended in December of 1990, with the Federal Assembly adopting—again, under strong Slovak pressure—a revolution law which transferred powers from the Center to the Republics, essentially to return to the original

1968 text before the Soviet-imposed re-centralization in 1970, until after the suppression in the spring.

So that was the first phase. And Lloyd and Herman Schwartz and (inaudible) were involved essentially in that first phase, mostly.

The first positive development really was made possible because the political scene and the Federal Assembly were dominated by the civil movement, which was a very broad aggregate movement in the Czech Republic, and its ally, the so-called Public Against Violence comparable movement, which really helped people to gather more or less only by a strong rejection of the Communist Regime. And that constellation began to disintegrate very quickly and became quite manifest during the second phase of the negotiations. And the second phase also started with the Slovak proposal for a treaty between the two republics that would put an entirely new foundation to the coexistence of the two peoples. And, clearly, this idea was inspired by the Russian experience with a Treaty for the Commonwealth of Independent States.

This idea, that there should be an international type of a treaty between two component federal states, shocked the Czechs and created waves all over the media. Eventually, a compromise was used. The Slovaks agreed that it would not be an international treaty; it would be an internal agreement.

But the nature of this agreement, which involved the most esoteric and complicated constitutional problems—the nature of this agreement has really never been resolved. The idea of who the parties of the treaty really would be was not resolved. And actually, in the final preliminary agreement, the Czech view prevailed.

The agreements would not be between the independent two republics, but rather between two parliaments, sort of acting on behalf of the people of the two countries. This essentially was one of the points that led to the final breakdown, involving a legal, in a way unreal point, that was used at least as a pretext on the Slovak side for the final breakdown.

There were fascinating questions of, for instance, the Slovaks' interest that the new constitution that would incorporate this proposed treaty must be ratified by the parliaments of the two Republics. Well, that, the Czechs said, brings in a confederate element—it's unheard of. So, then, we tried to point out that the states in the United States have the authority to ratify constitutional amendments. That didn't make any impression whatsoever.

So, finally, the agreement ended up in a compromise, that in this particular case, when the adoption of the first constitution would be subject to ratification by the two Republics, any further constitutional amendments would not be. This is an example of the type of problem that was faced.

There was a blockbuster meeting in a snowy Moravian village known as Mlada (phonetic), to which the federal ministers had to use a helicopter to, where these issues were finally put down into a draft. And a very broad agreement really was reached on the basis of a compromise.

The interesting thing, as far as constitution making, is, again, that it was much

easier to agree on the transfer of powers from the center to the Republics, than on these symbolic constitutional issues of who is the party to the treaty and what the legal effect of the treaty would be in terms of impact on the constitution-making power of the Federal Assembly. That was much more important. And actually, when this draft agreement came before the Slovak Parliament Presidium, it was voted down.

And when I talked to some of the people, Slovaks, who voted against it, they told me that they voted against it because of these symbolic things, which, of course, indicates clearly the idea that nothing short of independence really was acceptable on the Slovak side.

Well, the third phase, I would mention only briefly, is really fascinating from the viewpoint of both international law and new constitutional law. At that time, the political structure governed or controlled by these broad political movements completely changed already. On the Czech side, we have the emergence of the right-of-center parties, with absolute priority for economic reform. And on the Slovak side, the pro-Federalist movement was breaking down rapidly. And this was confirmed by the 1992 elections, which brought forth the fact that the two Republics have entirely different power bases.

On the Czech side, it was Vaclav Klaus' party of the right of center, again with absolute priority for economic reform. On the Slovak side, the Federalist Movement, Public Against Violence, broke down completely. It was practically eliminated. And Mr. Meciar's Movement for Democratic Slovakia, which he organized after he was dismissed from the prime ministry, had a very substantial plurality.

And so there existed a situation in which there was no federal type of political party and completely different political bases of the two new prime ministers, Vaclav Havel in the Czech Republic and Vladimir Meciar, who was restored to his official prime ministry out of the elections in Slovakia.

And, then, you have the third phase, which, as I said, was particularly interesting from the viewpoint, of both constitutional and international law, and involved essentially two parts. In the first part, there was a brief period of talk about salvaging the common state. But the Slovaks came up with the idea of a union in the image of the European Union's Maastricht Treaty.

And the Czechs said "functional federation," whatever that meant, or nothing. And there was a deadlock for a couple of weeks, at the end of which those two men and their parties decided to break up the state.

So in this last phase, you had, in the first place, a cluster of problems: setting up the date for the breakup; division of the army; division of the federal property, which was estimated to something like \$750 million; division of fifty-three embassies, the federal embassies, Czechoslovak embassies, archives; and all the rights and obligations in international organizations.

And so, then, the problem—a very important problem of the constitutionality and legitimacy of the separation process itself, who decides and should there be a referendum or not? And finally, the stance, the position toward the outside world,

the recognition by the outside world of those two successive states, their treaty obligations, and so on.

And the second cluster was the problem of future coexistence between these two new states. And that was all negotiated in the autumn of 1992, with an immense speed and intelligence, I think.

The Slovaks wanted to salvage as much as possible from the Union treaty. They wanted to have a coordinating organ between these states. And the Czechs didn't want to have anything to do with it at all.

So that is it: they drew up some forty international treaties on a variety of subjects being negotiated and included a customs union, but no indication of any coordinating factor.

Well, I think my time is up. I would have liked to have talked about the last problem, and that is, why didn't these two negotiators forget about the constitution and do what George Washington did by actually breaking the mandate of the Constitutional Convention and writing a new Constitution, and thus saving, actually, the Constitution.

PANEL I—AUDIENCE QUESTIONS

MR. LLOYD CUTLER: We'll move directly to questions. I just want to make a couple of quick points. Professor Sharlet pointed out to you how much higher Gorbachev's status is in the West, or outside of the Soviet Union, than it is within the Soviet Union. In the Soviet Union, he has descended about to the status of, let's say, Harold Stassen.

And I never quite understood that until I had a Russian taxi driver one day in New York, listening to us talking about Gorbachev, who said, "Why do you like him so much?" And we explained we admire him. And his answer was: "We hate him. He's the one who stopped the vodka." And you may remember that at some point he did stop the production of vodka in the Soviet Union. And that showed he had little, if any, experience in democracy.

There are three points that haven't been developed that I just want to mention. And maybe they can come up in the questions. One is that constitution-making in Central Europe has to deal with this unresolved problem of self-determination.

The U.N. Charter refers to "self-determination" as a basic right, a human right. And at the same time, it refers to the inviolability of borders and the impermissibility of a state interfering in the domestic affairs of another state. There is virtually no way to reconcile those principles.

And every politician and every ethnic group exploits its version of what self-determination means, going, in many cases, as in Bosnia, to absolute sovereignty. The same thing is true in Croatia and Slovenia.

Something has to be done about that, as to whether we need some international tribunal like the World Court telling us what "self-determination" really means in

case-by-case situations. But that is the heart of civil war and armed conflict in Central Europe that we must try to avoid, if possible.

The second is the difficulty within Europe of entrenching a constitution, of having it actually approved by some sort of referendum of the people or of regional or local legislatures, or whatever.

The German Constitution, for example, one of the most important in Europe, has never been ratified by the German people. It is simply an act, a so-called basic law of the legislature. And that's something that also plagues how you go about building a constitution in that part of the world.

And the third is the remarkable degree—certainly untrue here in America—to which the national constitutions and laws of European countries have to take into account the transnational institutions that have been developed, such as the European Union and the European Court of Justice and, even more importantly, the European Commission and Court of Human Rights, where a citizen of a country can bring a complaint against his own government for denial of his personal human rights. It's something that at least the Republican conservative elements of our legislature would never stand for.

True, we have joined the U.N. True, we've joined the Organization of American States Convention on Human Rights. But I imagine it will be decades before we would even consider the idea that an American citizen could go before a multinational tribunal to condemn his own government's actions in denying him his human rights.

And with that, let's go directly to questions. Yes, sir. Please identify yourself when you speak.

MR. BORATLEY VISCOSKY: Boratley Viscosky (phonetic), Catholic University of America. I would direct my question to Professor Howard, first of all, but maybe to the whole panel. You mentioned that drafting a constitution is just one full step. But the second is just to implement by constitution to see how it will look in real life.

I believe that a lot of research was done as far as the drafting process is concerned. We raised a generation of people who know how to draft, these new engineers—constitutional engineers. But not much work was done just to check how the products really work.

Let me be more specific. We know that these first constitutions in East Central Europe were either adopted hastily by new democratic governments or will be adopted by these new teams of Communist—post-Communist regimes.

Now, the question is—a number of questions come to mind. Will these two types of constitutions be pretty much the same? Will they be different? Will the new constitutions—let's say we can expect that (inaudible) will adopt a new constitution. Now, for the (inaudible) constitution and if that a new post-Communist, Communist team will adopt this constitution, will this constitution—will it have this Communist flavor? Well, if the answer is yes, how it will operate in the circumstances created before? Will the new access be functional or dysfunctional for

market mechanisms? Where the constitutions are expected to legitimize governments, will the old constitution—old new constitutions legitimize Communist regimes?

MR. LLOYD CUTLER: May I interrupt for a moment? You have asked about six or seven questions.

MR. BORATLEY VISCOSKY: Oh, yes. I know. Well, I—

MR. LLOYD CUTLER: Can we limit ourselves to one question—

MR. BORATLEY VISCOSKY: Okay.

MR. LLOYD CUTLER: —and, at most, one minute of comment?

MR. BORATLEY VISCOSKY: Okay. Well, but my question, let's combine it in two questions, actually. The first one: How do you hope all these constitutions will be? The second: How they will be implemented and when we can comment on it?

MR. LLOYD CUTLER: Thank you.

PROFESSOR A.E. DICK HOWARD: Should I give one answer or six? It seems to me that those who write constitutions in post-Communist Central and Eastern Europe are as much at sea about what they're doing as were the framers of the first American state constitutions.

The drafters in post-Communist countries have launched an enterprise of which they have an abstract understanding. Some very good people, lawyers, law professors, and others, are doing the work. But they're doing it against an abstract template, the idea of a constitution.

For example, I think they're not clear on who they're talking to when they write a constitution. Are they writing it for the lawyers and judges to implement in a court, as in the constitutional courts? Are they writing them as instructions to legislators and administrators who must live under those constitutions? Or are they writing them as charters of aspirations for the new peoples, in terms of a picture of the kind of society they would like to achieve? In a sense, they're doing all of those things in a single document. That makes those documents, it seems to me, sometimes cumbersome.

Add to that the fact that the drafters are looking in several directions at one time about what the purpose of the document finally is. Are they trying to achieve a transition to pluralistic, multi-party democracy and free market economies, or are they trying to preserve, at least in some measure, the legacy of the socialist era?

Reading a typical constitution, you may find in one place the declaration, "We are a market economy." Then, you find at another place a long laundry list of social and economic rights, all the sort of things the state is supposed to do for people, the entitlements that we call affirmative rights. Drafters may try to have it lots of different ways in a single document.

My last point. What makes this further complicated is the fact that judicial review of the kind being exercised by the constitutional courts is a new thing. It recalls the fact that, in *Marbury v. Madison*, John Marshall had to imply judicial re-

view into a constitution that didn't expressly give the Supreme Court that power.

Equally, I think, drafters are drafting new constitutions in which courts will have to interpret in a society where judicial review really has no tradition. I think it is a problematical chore which is going to take a lot of time to sort out.

MR. LLOYD CUTLER: The woman in the back.

MS. SUSAN BENDER: Hello, I am Susan Bender with the National Democratic Institute for International Affairs. We are an organization funded principally by the Agency for International Development to help promote democratic development abroad, and I work primarily with our programs with legislatures. And so, the question I have is, and we have worked with varied degrees in Georgia, Malawi, South Africa, and Palestine with the constitution development process, the question I have is a follow-up to a point Professor Howard made about whether or not the legislature is an appropriate body to take on this task. And you sort of implied that it was problematic, and the suggestion of self-dealing, if they can write the rules themselves and amend them themselves, is that a good place?

And I have just raised the question of whether, indeed, it is a good place for this to take place in many situations where those are people who have been elected in a process that is deemed free and fair; and the legislature is in part faced with the task of becoming a serious body and governing the country and, therefore, why wouldn't it be appropriate as opposed to, for example, a referendum which, if not carefully managed, can be an executive's wish list and perhaps also a more legitimate place than a constituent assembly or some other—another that would require another election, another group of people? So, I wonder whether, indeed, you think that there is—that it—is not all bad for legislatures to task? From my perspective, it has been part of the process of legislatures developing a role in governments.

MR. LLOYD CUTLER: All right, Eric, go ahead.

PROFESSOR ERIC STEIN: I am rather doubtful about referenda. You could put what happened in Yugoslavia after the referendum, and in the Czech-Slovak picture, for instance, the federal assembly spent days debating what questions should be put before the people and never agreed on the issue. So I don't see any reason why the concept of representative democracies would not cover even constitution-making. That would be my feeling. And I think it is based on the experience in Eastern Europe. Could you show me an instance where a referendum really was a successful solution to the problem? And look at Quebec, of course, and on the Western side of it. Moreover, if you look at Czechoslovakia, the whole idea of referendum is not part of the political culture.

MR. LLOYD CUTLER: This really relates to the entrenching problem. If the legislature is the final word, the legislature can always change the constitution. And even if the constitution they pass says it takes a super majority to change it, that is not necessarily so in that kind of a system. You still do not have a true legitimization of the constitution. What the South Africans have done is really very interesting and, I think, unique. As you know, they negotiated the principles of a constitution among the various interest groups. They then elected the equivalent of a

constituent assembly to write the real constitution.

But they provided that the real constitution then had to go to the constitutional court for a determination as to whether it went beyond or violated these pre-negotiated constitutional principles that had been worked out.

Professor Schwartz wants to exercise his *droit du seigneur*.

PROFESSOR HERMAN SCHWARTZ: Well, there is one additional reason why the legislature—there are quite a few—should not be the vehicle. And that is, the electoral system in many of these countries, as a result of which, in places like Poland and Hungary and, I think, in some of—I am not sure about Czechoslovakia—because of the threshold requirement of five percent, a great many people are disenfranchised and do not have any representation in the legislature.

For example, in Poland, I think the entire, certainly in Hungary, the entire far right was excluded from the parliament. And so, you have a hugely top-heavy and distorted parliamentary picture in which a party with thirty percent, and this has happened again and again, thirty to thirty-five percent, winds up with fifty-five percent of the seats, so that you have a question of legitimacy that results in part from that kind of thing, which, I think, you would not have if you had some kind of constituent thing.

I agree with Eric that with the referendum, you spend God knows how much time just worrying about the language or the question, and the other problem is that, if you have a referendum, if you have a long, complex constitution—remember Schwarzenburg argued this in Czechoslovakia—it gives somebody something to shoot at.

So that, although an awful lot of people will find ninety percent of it, they will find ten percent anathema, such as abortion or something like that, and the net result will be rejection when, basically, there is a general agreement.

MR. LLOYD CUTLER: The gentlemen in the left rear.

MR. FRED QUINN: A question for Professor Howard. I am Fred Quinn from the Federal Judicial Center. The constitutions of many of these newly-emerging states have separation of powers as a pillar, but the constitutional balance is sometimes upset by fairly easily invocable provisions for war powers, emergency powers, or the use of decrees.

If you were sitting working with colleagues from those countries, would you downplay this problem as one in the evolution of the constitutional state, or would you, in Professor Sharlet's medical imagery, recommend prompt surgery?

PROFESSOR A.E. DICK HOWARD: Having been brought up in the American tradition of separation of powers, I have to try to wean myself away from that. It is interesting that you hear a lot of talk about separation of powers in the Central European setting. What they are typically talking about, I think, is really separation of functions, rather more like the British parliamentary system. I mentioned earlier that one simply finds nowhere in this part of the post-communist world an American-style congressional/presidential system. That is simply unknown, indeed, I would say, unimaginable. A parliamentary system assumes from the outset

a very different kind of play on the idea of separation of powers from the one that we are familiar with.

I am troubled, and you put your finger on one of the problems, by the way in which new constitutions—this is not confined to Eastern Europe—often have fairly generous assumptions about emergency powers, the powers of crisis, or that sort of thing. Latin America is an area where that kind of tradition operates rather freely. In Central and Eastern Europe, it is going to take some time to work out the problem. I think they are going to have to experiment with some kinds of allocations. I think the key will be a notion—recalling Montesquieu or Madison—that, even if the final product doesn't look like an American separation of powers, there has to be some kind of dispersion of power. One way I would achieve that—and this outruns your question, if I may be permitted—is not only dispersing power among the branches or functions of the national government, but some dispersement of power among levels of government.

Partly because of European traditions and partly because of socialist or Leninist philosophy, the idea of local governments or regional governments having any significant autonomy is almost unknown historically in Central and Eastern Europe. When it has been proposed, it has run up against a lot of resistance. In Poland, for example, I think the proposal to energize local government has really been at a standstill. There are a lot of reasons why those in power don't like to let it go, even if they were democratically elected.

All in all, I think the problem of centralized power is still very much a problem in the post-communist world.

MR. LLOYD CUTLER: The German basic law has a very narrowly defined set of emergency powers, and they are very short in time, within sixty days, one hundred days, whatever. The legislature must be convened to ratify what was done during the emergency period.

The woman in the rear row in the shades.

MS. MADELEINE CRONE: Yes, I apologize for the shades, eye surgery. Madeleine Crone, I am senior advisor with the National Center for State Courts, International Programs.

In some of the work that we have done, particularly I am thinking of Latin America and the Caribbean or Haiti, I think that we have witnessed, in terms of legal culture or constitutional framework, a sort of sometimes awkward blending of principles that relate to common law and principles that relate to civil law. And I think that a sort of hybrid is emerging in terms of that kind of thinking. So I was wondering whether you think that kind of attempt to embrace different types of traditions is also taking place in Central and Eastern Europe?

And the second part of the question is, to what extent will this affect also the more traditional common law or civil law systems here or in France, etcetera?

MR. LLOYD CUTLER: Professor Sharlet, would you deal with that?

PROFESSOR ROBERT SHARLET: Thank you, Mr. Chairman. I will comment briefly on the basis of my experience with the Rule of Law Consortium here in

Washington and in the former Soviet Union, as well as my involvement during the summer in an Agency for International Development conference where a number of presentations were made on the subject by European and American lawyers and representatives of international organizations.

What I have heard discussed in these venues is a gradual merging of selected aspects of the civil and common law systems, especially in the area of civil and commercial law. Conversely, I have not detected a similar blending in Western efforts to assist the NIS in the sphere of criminal jurisprudence. Russian and Ukrainian prosecutors are interested in U.S. prosecutor training techniques, but they are still wedded, to some extent, to the inquisitorial systems, although it now functions within a more adversarial framework.

MS. ERICA SLAUGHTER: Thank you, I am Erica Slaughter from the Commission on Security and Cooperation in Europe. I have been particularly interested in the little debate this morning between whether it is better to put a constitution to a legislature for approval or to a body of citizenry.

But one of the issues that no one has really touched on, and I would like to throw it on the table to make things a little bit more complicated, is the question of how you determine what is your initial body of citizenry.

And I recall that nineteen of the post-communist countries that I think form the subject of discussion this morning, are newly-independent states—some of which have adopted very exclusionary citizenship laws. I think in particular, of the Czech Republic, Macedonia, and some of the others. And I was just wondering if you had any comments on that?

PROFESSOR ERIC STEIN: I would not call the Czech citizenship law exclusionary. It is quite comprehensive. The only problem was to facilitate the Slovaks, who decided to stay in the Czech Republic, to get the citizenship quickly.

And there were some delays because of the original requirement. I don't want to go into detail. And the other problem is with the gypsies, with the roamers, there are some—nobody knows how many. It is like our illegal immigrants. I think there are 600,000 of these roamers, and they are not interested in these problems.

And, as a result of it, there is some discrimination, but it is not a matter of legislation. It is a matter of practice obligation.

MS. ERICA SLAUGHTER: May I follow up?

MR. LLOYD CUTLER: Professor Sharlet wanted to say one word.

PROFESSOR ROBERT SHARLET: Let me just add a word. I tend to see the problem from the other side, looking in particular at Russia, Ms. Slaughter. In this sense, the exclusionary aspects of some of the Latvian and Estonian legislation—which is perfectly understandable politically, demographically, and historically, but does not sit well with international lawyers—has stimulated some discussion in Russian legal circles of possibly conferring citizenship on all Russians in the diaspora.

That would be a very serious problem for some of the smaller states which have antagonized Russia in the sense that the Russian Constitution, Chapter Two, provides for protection of Russian citizens living abroad, and there are twenty-five million people in the Russian diaspora.

This in some future scenario could serve as a pretext for some type of aggressive action, so I think that is the greater concern. If I were a Latvian or an Estonian legislator, I would curb my inclinations and come to some agreement.

MR. LLOYD CUTLER: Very quick follow-up.

MS. ERICA SLAUGHTER: Just to press you a little bit more about how you think this question relates to the drafting of constitutions, if at all?

PROFESSOR ERIC STEIN: Well, it is a question of defining the citizenship of the so-called nationality principle and civic principle. Anybody who is within the territory and has been living within the territory of the country has the right to become a citizen. Some of the constitutions have it.

MR. LLOYD CUTLER: And all the Bosnian Croats are Croatian citizens as well as Bosnian citizens.

PROFESSOR ERIC STEIN: The Slovaks advocated strongly dual citizenship, and the Czechs said absolutely no way. That was one of the issues during the final stages.

MR. LLOYD CUTLER: Last question.

MR. CRAIG BABB: My name is Craig Babb, and I've worked in some of the countries that you are discussing here. Most of these countries, in fact, undergoing these transitions are in varying degrees of rather substantial economic distress. In response, donor countries worldwide and particularly multilateral lending institutions are providing very substantial assistance. And in most cases, they are also providing very substantial conditions.

My question is, do you think that this influence, really an economic influence in all of these countries, is providing any kind of a deleterious influence on the constitution-making and, in Mr. Cutler's terms, a "constitution entrenching"?

PROFESSOR ROBERT SHARLET: I would say yes, very briefly. The fact that economic reform got underway first in the lead country, in this case, in Russia has had a very adverse effect on legal reform.

Those of us who have tried to help some of those countries are hoping that the two reform processes can be more in tandem elsewhere, in places that have been slower to start.

As Oleg Rumyantsev said here in Washington a couple of years ago at a conference that Dick Howard, Herman Schwartz and I were at with the Russian Constitutional Commission, the economic changes, the creation of great pools of legal and illegal private wealth was crushing the law and was crushing attempts at legal reform.

So, it is too late now in many cases. But, if you could start from scratch and create an ideal scenario, you would want to have the legal reforms well prepared

before you launch the demonopolization of property.

MR. LLOYD CUTLER: An interesting historical aspect of this is that the breakup of Yugoslavia at the moment it happened was attributable, at least in part, to the fact that the International Monetary Fund ("IMF") had been urging the government in Belgrade to establish a strong central bank so that it could exercise monetary control over the entire Yugoslavia.

And the Slovenian politicians and then, the Croatian politicians, those at the richest parts of the area, took advantage of that to say that they weren't going to submit to that kind of dictation from Belgrade.

And that contributed—it wasn't decisive, but it did contribute—to the breakup and all the constitutional problems that that has led to.

PROFESSOR A.E. DICK HOWARD: Lloyd, may I add one anecdote to your answer? And that is, twenty-five years ago, when we were writing Virginia's constitution, it was pretty much a home-grown product; we thought we were sophisticated enough to write our own constitution.

But the one exception regarded provisions of the constitution dealing with bond issues. We had to ship off our draft provisions to bond counsel in New York to be sure that the New York lawyers were satisfied with what we were doing before we dared put them in the Virginia constitution.

So, we had a little taste of colonialism there, I have to tell you. And so when constitution-makers enter the economic sphere, apparently others—investment counselors, economists, and the like—decide that they have the ability to preempt the local decision in that respect.

What this opens up, if I may add one final comment, is a debate that you hear a lot in another context in this country. And that is whether there is some essential connection in constitutionalism between the kinds of political freedoms that we assume are part of our constitutional democracy and something like a market economy. In other words, is the idea of a socialized or nationalized economy antithetical to individual freedom? We debate that a lot.

There are a few sections of our federal constitution which set out economic purposes. You can't take property without compensation; you can't violate the obligation of contracts.

But, by and large, the framers left the economic outcome to the political process, and I think it would be very wise if, by and large, the framers of Eastern and Central European constitutions permit the same kind of latitude.

MR. LLOYD CUTLER: And on that wise note, let me thank the panel. Thank you in the audience for your very, very, good questions.

SPECIAL PRESENTATION

PROMOTING THE RULE OF LAW IN THE FORMER SOVIET BLOC

PROFESSOR HERMAN SCHWARTZ: When the record of the somewhat stumbling, uneven—but, I think, forward—march of freedom in our time is written, there will be several glowing pages devoted to the man who's next to speak to us.

Aryeh Neier has done more than almost anybody I know of in the world today to move both this country domestically and, beyond that, the world. Now that we know there may be life on Mars, it boggles the mind as to what his next phase may be.

What Aryeh has done in this country and abroad, I think, is unmatched. He originally was born in Hamburg, Germany, left Germany in 1938, 1939, living an even more dangerous life. Went to college here in 1966, 1967, took over the New York Civil Liberties Union and, shortly thereafter, the American Civil Liberties Union ("ACLU") around 1969, 1970. At that time, those of you who are old to remember these things know that the ACLU was a nice, good organization. It played a modest but important role in America.

Aryeh transformed it, adding a whole range of projects that really revolutionized this country: women's rights—the first head of that was Ruth Bader Ginsburg—prisons, Vietnam veterans, children. In one area after another, new projects were started. And in the important events of the time, with the many other efforts to oppose repression of one kind or another, Aryeh was the leading spokesman.

Then sometime in the late 1970s, early 1980s, Aryeh moved into the area of international human rights. He joined Human Rights Watch; again, then a very small organization built essentially around Helsinki Watch. When he left it a few years ago, it had become a huge organization as human rights organizations go, an organization that had offices throughout the world, whose reports were distinguished by accuracy, precision, and courage.

And throughout this time, Aryeh was not just some gray eminence behind the scenes, but was speaking out again and again. And throughout this time, not only was there the brilliant organizational work going on, but scholarly work as well.

Aryeh is the author of a good many books, as well as a soon-to-be-published, somewhat misguided effort pushing the notion of war crimes trials, but even Homer nodded.

In any event, Aryeh is now involved in another tremendous opportunity. I don't know if his strength will hold out for this one. I don't know if there's enough jet fuel to cover his travels. But now he's head of the Open Society Institute, which one of the other great people of our time, George Soros, has set up. Great things have been happening with them, and great things will continue to happen.

So we're very fortunate today—very fortunate indeed—to have Aryeh Neier.

MR. ARYEH NEIER: Thank you very much.

When Herman catalogued my achievements, he left out my failures. And one of my failures has ever been to be persuasive—with Herman himself, especially—on the question of war crimes trials. But I haven't given up. Herman, there is still hope for your salvation, and I'm going to continue working on it. I will write it up as a continuing failure.

Yesterday, there was a very significant judicial decision in Croatia. It was a case before the Zagreb municipal court. It was a prosecution of journalists associated with a newspaper, the *Ferrall* (phonetic) *Tribune*.

The *Ferrall Tribune* is a muckraking, satiric newspaper, and it is virtually the only medium of expression in Croatia, that has not been either taken over by the Tudjman government or closed down by that government that has remained critical of that government. The prosecution of the journalists at *Ferrall Tribune* was based on a law recently adopted in Croatia that made it a crime to disparage the President of the country. In essence, they were being prosecuted for "*laissez majeste*," and the Zagreb municipal court acquitted the journalists.

In essence—and I haven't seen the decision yet—the court found that the journalists had not engaged in defamation because clearly what they had published was satiric, and therefore this could not possibly constitute the crime of defamation. This seems to me enormously important, both in protecting freedom of the press in a country where that has been under very significant attack for an extended period, but also in helping to establish the independence of the judiciary.

What I'm now going to say constitutes speculation. I don't know why the court came to that decision, but my speculation is that it has to do with the climate that has been created in Croatia, not from above, but from below. That is, the constitutional process and the process of forming a constitutional court in Croatia have a lot less to do with this significant development with respect to judicial independence.

And the fact that there is a significant, aroused citizenry within the country; that substantial human rights organizations have developed in Croatia; that journalists themselves—even though most of their media have been shut down or taken over—constitute a significant group in the country, attempting to exercise freedom of speech; and that a civil society has developed in Croatia, despite the authoritarian character of the government, all combined to help to create a climate in which it is possible for a Zagreb municipal court to defy the President of the country and to make a significant contribution to freedom of the press and to independence of the judiciary.

It seems to me, that as one tries to promote the rule of law in the countries of the former Soviet Bloc, it is essential that efforts should not be focused exclusively on top-down efforts dealing with constitution writing and constitutional courts and legislation. Instead, the effort to promote the rule of law should also be a bottom-up effort.

The need for a bottom-up effort, I think, is great anywhere. But perhaps it's es-

pecially great in countries where the judicial system is based on a civil code, in which the role of precedent is by no means comparable to its significance in systems that are based on common-law traditions. Even, however, in systems like our own, I think it is hardly possible to promote the rule of law unless one is simultaneously engaged in efforts that are bottom-up as well as efforts that are top-down.

Herman mentioned that I had a long background in domestic civil liberties in the United States. Perhaps if I could just refer to the most famous experience in the United States in trying to establish, or to make effective, the rule of law at a point that it was seriously challenged.

The most significant decision in the history of the United States Supreme Court, I think, is *Brown v. Board of Education* in 1954, holding that segregated education violated the Constitution. That was a top-down effort to change the way in which all of life was organized in a large part of the United States. And the Supreme Court decision in *Brown* actually preceded the emergence of a significant bottom-up movement for desegregation in the South.

The civil rights movement in the United States was, in many ways, a product of the decision rather than the cause of the decision. And the civil rights movement, as we came to know it in the United States, effectively emerged the following year with the Montgomery bus boycott led by Martin Luther King, Jr.

But the Supreme Court decision, *per se*, did not achieve the desegregation of the schools in the United States. It took the emergence of the civil rights movement and it took an enormous amount of effort from the bottom-up throughout the region in order to desegregate the schools, the libraries, the voting booths, all of the institutional elements of segregation. It also took, of course, firmness by the judiciary, in maintaining their dedication to desegregation, to accomplish the transformation of the region.

Looking back on that, it's hard to imagine that the judiciary would have demonstrated the firmness that it did unless there had been, simultaneously, a significant citizen effort to effectuate the rule of law and actually to accomplish the desegregation that had been ordered by the judiciary.

At the time of the civil rights struggle in the United States, a book by a social-Darwinist sociologist of the turn of the century used to be cited quite a lot. It was by a man named William Graham Sumner, and he had written a book that was once famous, called "Folk Ways."

The line from the book that was cited all the time in those days was, "State ways can't change folk ways." The defenders of segregation argued that the "folk ways" that were expressed by segregation were not susceptible to alteration through legal process. The folk ways themselves would have to change before the desegregation could be accomplished. On the other side, it was argued that, in fact, the folk ways that were expressed by segregation were themselves a product of state ways—that segregation itself had been ordered and thereby had become a folk way.

As one thinks back on that argument, it seems to me that both sides had a cer-

tain degree of merit to their possession. The ways of the state, by themselves, cannot change the way in which people practice their lives. But it's also the case that state ways can change a lot and, over time, can change the ways in which people live and that, at the same time, the process of transforming a society from below also becomes the method for transforming the legal system of any country.

I would argue that, in order to promote the rule of law in the former Soviet Bloc, it is necessary to pursue a broad approach from the bottom-up, to accompany the constitution-making and the establishment of constitutional courts, and that it is a broad effort that includes a need to instill a sense of personal responsibility and accountability in everyday life.

It is an effort that requires the establishment or the acceptance of a rule of law culture that permeates all institutions of a society. It's necessary to encourage people to see rights as meaningful in their everyday lives and to demand, therefore, of the state and of the judicial system, that they should uphold and express the values that are inherent in the rule of law.

I think that there are ways in which it is possible to approach those issues fairly directly through legal education in the various countries of the region. The reform of legal education is an arduous effort; arduous because there are not the law teachers in the region who are familiar—or most of the countries of the region—who are familiar with the rule of law as I think those of us in this room understand it.

There are not the textbooks that are adequate to the task. And very often there are not the students who have been produced by the secondary schools and the universities who are ready for the kind of legal education that is required in order to promote the rule of law.

I believe the question can also be approached directly through the establishment of local government institutions that are responsible to the citizenry. To a very large extent, the local government institutions of the countries of the former Soviet Bloc feel accountability to central government, rather than to the citizens of the communities they serve. They derive their budgets from the central government, rather than from the local taxing authority. Sometimes, or very often, they are appointed by central government, rather than elected on a local basis, and one can encounter story after story of episodes in which local government officials have figured out ways to reduce the expenditures on various public services. And the consequences of that is a reduction in their budgets. Therefore, the incentive to reduce those expenditures is simply nonexistent.

So the distribution of powers, the distribution of responsibility between local government and central government, and the need for the creation of a sense of accountability to the local electorate, I believe, is a critical component of the effort to establish the rule of law within the region. I believe that the question of the rule of law can be promoted fairly directly by the establishment of citizen's organizations that engage in legal advocacy on behalf of rights.

Fortunately, in the countries of the former Soviet Bloc, there are now significant human rights organizations that have emerged in most of those countries.

There are still not organizations in some countries which actually use the legal process in order to try to protect rights. In some countries, there is simply a sense that it is not possible to use the legal process to effectively attempt to protect rights.

But the very fact that there are such human rights organizations, which, in a variety of ways, try to create a consciousness of rights and engage in the protection of rights, is, I think, a significant part of the process of creating the rule of law. And there needs to be a significant development of the capacity of those organizations to actually use the legal process in their struggles to promote rights.

But quite aside from such efforts that I think fairly directly help to promote the rule of law, I believe that the effort has to be embedded in a broader effort to try to transform the countries of the former Soviet Bloc. In countries where schools continue to operate on an authoritarian basis, where the teacher is the font of all knowledge, and in which critical thought is not valued and not encouraged, it is very difficult to promote the rule of law.

When I look at the various programs that our foundations are engaged in, in the countries of the region, if I had to pick a single one which I would consider the most valuable in the entire region, it is our effort to establish and sponsor debate programs in the high schools and universities of the region, because the very idea of a debate program suggests there is more than one point of view that ought to be considered with respect to any issue. It suggests that controversial issues ought to be discussed. It suggests that the quality of the information and the quality of the arguments that can be mustered in dealing with an issue is going to be the determinant of the outcome of the process.

That is, it's not going to be the position of authority that is occupied by someone who is presenting a point of view. Rather, it is going to be how well the argument is going to stand up against arguments that are marshaled and information that is marshaled in opposition to it.

I think all of these ways of trying to transform societies have to be considered when one is trying to promote the rule of law. And I think it's also important to recognize the limitations of efforts which proceed from a top-down basis, how subject they are to political developments which are beyond the capacity of outsiders to influence.

There was a first-rate study that the Carnegie Endowment published earlier this year of democracy assistance in the countries of the former Soviet Bloc. It was a study that focused on democracy assistance to Romania, written by Thomas Carothers. And looking at the question of judicial reform, Carothers suggested that there were a number of limitations that had been apparent in the effort to secure judicial reform in Romania.

Distilling his findings, he said: "It's futile to provide judicial reform assistance if the Ministry is not committed to reform." He argued that "judicial independence and integrity are more related to basic structural and contextual features, such as low judicial salaries and systematic political interference, than lack of understanding by judges or than the absence of appropriate judicial values." Finally, he

Carothers stated that "the effort to secure judicial reform is inevitably related to politics more than to any question of technical capacity or technical assistance that may be available in the effort to establish an independent judiciary."

Now, I think these are difficulties that are encountered and that will continue to be encountered through the region. It doesn't mean that it is hopeless or futile to engage in the effort to secure judicial independence or the rule of law. It does mean that the process is extremely difficult, that it cannot be limited to the effort to draft the appropriate language in a constitution or in a law. It cannot be limited to the effort to provide training. It has to be an ongoing effort, an effort that will persist at times of political difficulties, but an effort that is also flexible enough to take into account the variety of obstacles that stand in the path and that simultaneously proceeds through the broader effort to change the context, as well as the effort to specifically address the issues or the institutions that are directly related to the rule of law.

I mentioned earlier the case in which it seemed to me there had been a significant advance for judicial independence in Croatia. Let me mention, then, a contrary case in another Balkan country. And that is the removal several months ago of the chief judge of Albania, Zeff Brose (phonetic), by the government of President Sali Berisha. That, it seemed to me, was an example of the most severe problem that is faced in the effort to establish the rule of law in the region. And the removal of Brose indicates the weakness of civil society in Albania, as compared to the relative strength of civil society in Croatia.

As between Tudjman and Berisha, I would not want to choose in suggesting who is the more authoritarian figure of the two. But Tudjman operates in a context in which there has been this quite substantial development from below. And unfortunately, in Albania, there has not been comparable development.

There is a human rights organization in Albania, but it is very weak, has little capacity to organize, to be able to speak out and make its voice heard within the country. There are independent media in Albania, but they have been very subject to manipulation by the government and have not been able to stand up effectively when the government has acted against them. None of the kinds of institutions of civil society have effectively emerged in Albania that have emerged in Croatia. And so the removal of the chief judge, when he displeased the president politically, was something that was accomplished relatively easily.

And it even became necessary for the chief judge to leave the country because under Albanian law, the only basis for removing him was that he had committed a crime that was punishable by law. Therefore, there was a significant possibility that the removal would be followed by a criminal prosecution in order, retroactively, to justify the fact that he had been removed from office. It's very difficult to imagine how the rule of law can develop in a country where a judge or a chief judge can be removed so blatantly on political grounds, as happened in that instance. And I think the manner in which the recent elections were conducted in Albania reflects the same set of problems that was manifest in the way in which the chief judge was removed.

In the countries of the former Soviet Bloc, there has been significant headway that has been made in a number of them in establishing the rule of law, principally in the countries of Central Europe. The least headway has been made in the Balkan countries and the countries of the former Soviet Union, and the countries further east in Eastern Europe. Those countries remain essentially countries where the rule of law is not established and where enormous efforts are required and efforts that have to be extended over many years before one could effectively say that the rule of law has been established. But in my view, it is an effort that must proceed from the bottom-up, as it proceeds from the top-down.

Thank you very much.

PANEL II

CONSTITUTIONAL COURTS AND THE RULE OF LAW

PROFESSOR HERMAN SCHWARTZ: One of the things those of us who work on constitutions come to realize very quickly is that things never turn out the way we expect. That is, the dice come out differently. We plan it one way, things are written to produce one result, and often they produce results which are quite different.

One almost perfect example which we've seen just in the last few months, not in Eastern Europe, but in Israel, is that the change in their electoral system, whereby they were adopting this unique system of direct election—popular election of the prime minister, was supposed to shrink the number of small parties. Instead, it enhanced their power.

Constitutional courts, in a way, are the same thing. This strange creature roamed the constitutional landscape, really rarely seen anywhere prior to World War II. Austria and Czechoslovakia were the only two.

And perhaps Herbert Hausmaninger should mention something about the Austrian experience. But I know the Czech-Slovak experience was minuscule. I don't think they even dealt with a single statute during this period, just with some administrative decrees.

So that in a sense this creature, this constitutional court, which is very different from the American model, this creature which started to be developed in Italy and Spain and Germany in the 1950s, has turned out to be a remarkable creature. And it has turned out to be remarkable even in places where one did not expect it to be at all.

Mark Brzezinski will talk about the Polish Tribunal. But I doubt very much that those who decided to adopt it back in 1982 had much of an idea of the way it was going to work out.

I am told—Kim Scheppele can talk about this more knowledgeably—but a Hungarian friend tells me that the Hungarian constitutional court was put through

because the Communists, who were then running the government, didn't know what it was and therefore didn't much care. And the opposition figured this was something brand new; they may as well try to load it with as much power as they could.

PROFESSOR KIM LANE SCHEPPELE: That's not what happened.

PROFESSOR HERMAN SCHWARTZ: That's what Pozali (phonetic) told me. But in any event, these institutions have turned out to be, I think, far, far different from what was imagined. And what we're going to talk about in this first session this afternoon are three examples of these. And we're going to talk about them in the order essentially in which they were created. The first one went into effect in Poland in 1986. The second one in Hungary, I think in January 1989.

PROFESSOR KIM LANE SCHEPPELE: 1990.

PROFESSOR HERMAN SCHWARTZ: 1990. January—that's right, January 1, 1990. And the third one in Russia—I think it was late 1990, was it?

PROFESSOR KIM LANE SCHEPPELE: 1991.

PROFESSOR HERMAN SCHWARTZ: Well, actually, it went into operation in January 1992, I think. Wasn't that right? Yes, in January 1992.

These three, though they are not necessarily typical, are and have been immensely prominent in various ways. To talk about them, we have three people who are about as knowledgeable about each of these as much as anybody in the world, except perhaps some of the judges who've been there themselves.

And I'm not even sure that given the somewhat limited perspective of somebody sitting in an institution, whether even they would have the perspective and knowledge about these courts that our three people here have today.

Our first speaker will be Mark Brzezinski. And although he's the youngest of our panelists, he has already made a reputation for himself and has insight and wisdom about what he has been working on.

He left the University of Virginia, where he was a student of Dick Howard's, where he wrote an exceptionally fine student note on the Polish constitutional court. Then, we spent several years in Poland, working closely there with the court on various fellowships, the Fulbright, a National Foreign Foundation.

From there, he went on to Oxford, to St. Anthony's College, where he obtained a doctorate. And his doctoral dissertation has the distinction of having been accepted for publication by MacMillan. It will be published in 1997, I think. And, obviously, it will be a major contribution to the literature.

Our second panelist is Kim Scheppele, and it's an illustration of the fact that on each of our panels we have a nonlawyer who is as knowledgeable and as—and this is not said condescendingly—who knows as much law as those of us who burn the midnight oil over the more traditional kinds of law materials. Kim is a sociologist by training from the University of Chicago.

Her first book, which is a book entitled "Legal Secrets," which I think was her Ph.D., "Legal Secrets, Equality, and Efficiency in the Common Law," won a series

of major prizes, including the Corwin (phonetic) Prize from the American Political Science Association.

She then went to Michigan as a member of the political science faculty, published numerous articles. Then, a few years ago, went to Hungary, mastered that incredibly difficult language, and worked very, very closely with the Hungarian constitutional court during this period. So much so that the court has asked her to give lectures on behalf of the court to those high-level groups who come and need lectures in English.

She has just moved to the University of Pennsylvania, where she's a professor at the law school and simultaneously is director of—it's called, I think, the Program on Gender and Culture at the Central University in Budapest—Central European. And she's currently working on a book about the Hungarian constitutional court.

Our third speaker, Herbert Hausmaninger, is one of the most distinguished scholars in Europe today. He's a member of the faculty—and I think has been for some 29 or 28 years—at the University—maybe I shouldn't say that, that date —

PROFESSOR HERBERT HAUSMANINGER: Makes me very old.

PROFESSOR HERMAN SCHWARTZ: Right. Right. At the University of Vienna, one of the most distinguished institutions in Europe. And, in addition, has been a steady visitor at the University of Virginia every fall—for some six or seven weeks, I think it is, and, very often at Cornell.

He was one of the first to write about what was happening in Russia with Gorbachev's efforts to introduce some kind of rule of law, and wrote a landmark article on the predecessor of the Russian constitutional court. The Russian Constitutional Committee it was called. And he has since continued to write about the court and the Committee.

He was one of those who, together with Lloyd Cutler and Eric Stein and Dick Howard and myself, were involved very intimately with efforts to try to put together some kind of—help put together some kind of constitution for Czechoslovakia, which, as Eric detailed so vividly this morning, I'm afraid foundered. Although some of what we did I think did survive, particularly in the bill of rights portions, parts of which were adopted by both.

Herbert Hausmaninger has also been involved in Polish reform and has stayed in this field quite (inaudible). So, let's start first with Mark.

MR. MARK BRZEZINSKI: Thanks, Herman. Eleven years ago this month in Warsaw, the Polish Communist regime was busily assembling a room in the basement of the Polish Parliament, a room that would house a unique judicial institution in the Soviet Bloc. A twelve judge constitutional court, called *Trybunał Konstytucyjny*, or Constitutional Tribunal, was being created because the democratic opposition had increased its pressure on the regime for some form of constitutional review of state action. But it was with mixed motives that the regime set up the Tribunal in 1986. They wanted to create an institution that looked like a real constitutional court but which could be prevented from overstepping politically

acceptable limits. The result was a tribunal with substantive and procedural limits on its judicial review power. It couldn't review laws more than five years old, which, of course, precluded the Tribunal from reviewing the Martial Law Decree of 1981. It couldn't review laws for conformity with international agreements. And, of course, Communist Poland was a party to numerous human rights agreements.

The most significant limitation was that a Tribunal decision finding a Parliamentary statute unconstitutional had to be submitted to Parliament, which would consider it within six months, and by a two-thirds vote could reject the Tribunal's ruling, and the Parliament's decision would be final and binding. This limitation applied only to statutes. A substitutory regulation found unlawful would become null and void. The Tribunal began to consider cases in 1986 after its twelve judges were elected by Parliament. And over the last ten years, it has issued over two hundred decisions.

Today, I'm going to provide a general survey of the Tribunal's jurisprudence to give you an idea of how its role has changed dramatically over the last decade. I divide the Tribunal's work into two distinct periods. First, from 1986 to 1989, when the very existence of the Tribunal conflicted with the fundamental assumptions of the Communist regime. During this period, the Tribunal was relegated to resolving issues of little constitutional importance. Even during this early period, the Tribunal established important limits on the lawmaking powers of the executive branch. And this case law wasn't without political significance.

The second period is from 1989 to the present. After the collapse of the regime, the Tribunal assumed an active role in constitutional matters. While the limitations on its review remained, the Tribunal has since 1989 played a defining role in forging post-Communist constitutionalism.

This institutional evolution that I have just described can be paralleled in certain ways with its physical evolution. When I first visited the Constitutional Tribunal in 1990, it was still operating out of the dingy room in the basement of the Polish Parliament given to it by the regime. There were no judicial chambers. There was no support staff. There wasn't even a room where the Tribunal could hear cases. When they wanted to hear a case, they had to borrow a room from Parliament, schedule it ahead of time, and eventually hear the case.

By 1991, the Tribunal was given its own wing of the Parliament building. So, whereas it did have some kind of infrastructure, it wasn't a physically autonomous institution. And only last year did the Tribunal move out of the Parliament building across Warsaw to a grand building formerly occupied by the Department of the Army, which, as you might imagine, during the Communist regime was a very important institution. So the Tribunal has a grand building with big rooms. And that finally symbolized the complete separation of the Tribunal from the National Legislature.

During its first three years, the Tribunal was an unwanted child of the regime and existed in a political culture which still aspired the principle of legislative supremacy and unity of state power. During this period, the Tribunal didn't focus on

the review of Parliamentary statutes. Only three of the thirty-three cases the Tribunal reviewed between 1986 and 1989 concerned Parliamentary statutes. And of those three, only one was found unconstitutional.

Instead, the Tribunal focused on reviewing regulations issued by executive agencies. And while the Tribunal's cases involved politically unimportant matters, it did manage, through its case law, to control the often arbitrary lawmaking practices of executive agencies. Executive agencies were technically allowed to issue regulations only on the basis of Parliamentary statutes. But Communist governments, including Poland's, were notorious for their bureaucratic arbitrariness. And this is what the Tribunal sought to curb.

From its very first case in 1986, the Tribunal began to strike down executive acts which lacked sufficient statutory basis. It adopted a narrow construction of an executive agency's right to issue regulations and held that only explicit statutory delegations authorize the executive branch to issue regulations. For example, a 1986 case involved a statute passed by Parliament to combat alcoholism that limited consumer access to alcohol. The statute authorized the government to decrease the number of state-owned liquor shops in Poland. And implementing the statute, the Council of Ministers issued regulations that reduced by ten percent the number of liquor shops in the country.

But in an action not provided for by the statute, the Council of Ministers, in a sub-delegation of authority, empowered the Minister of Trade to further reduce the number of liquor shops in regions with a high incidence of alcoholism. And that sub-delegation of authority was struck down by the Tribunal.

This decision was one of almost thirty decisions between 1986 and 1989 in which the Tribunal voided an executive regulation for exceeding the scope of a statute.

While legislative supremacy wasn't challenged during this early period, the Tribunal managed to limit the well-established lawmaking practices of state bureaucrats, while gaining acceptance, or at least tolerance, of other political actors. And that initial success laid the foundation for more important work later on.

After 1989, the Tribunal's practice of judicial review blossomed. It became much more aggressive in reviewing Parliamentary statutes and abandoned its reluctance to address controversial issues. Practically every separation of powers question, every socio-economic issue, issues of lustration, de-Communization, has come before the Tribunal. And the Tribunal has played a prominent political role adjudicating these cases, a dramatic change from its role before 1989.

The Tribunal's self-confidence was enhanced by the change of regime. But two other factors made 1989 a real beginning for judicial review in Poland. First, the composition of the Tribunal changed. Half of the justices completed their terms of office and were replaced by six new ones in November 1989. Solidarity took advantage of this opportunity and packed the court with its own candidates. Among the new justices were scholars like Janina Zakrzewska, who was an early advocate of a strong constitutional court in Polish political life. As a member of the opposition, she frequently demanded that the regime create this constitutional court.

Second, the new political elite signaled its expectation of a stronger role for the Tribunal by expanding its jurisdiction to include the review of legislation passed by Parliament but not yet signed by the President, as well as the review of the aims and activities of political parties. The most obvious sign of the Tribunal's new role was that it became more aggressive in its review of Parliamentary statutes. In 1989 alone, it found unconstitutional seven of the eight statutes it reviewed. And this trend has continued since then.

From 1990 through the first half of 1994, of fifty-two statutes the Tribunal reviewed, forty were found unconstitutional, which is a large percentage if compared to any European constitutional court, or even the American Supreme Court's disposition of statutes.

As a side note, let me say here that this aggressive review of Parliamentary statutes made political elites—including members of Parliament—practically instantly more sensitive to constitutional arrangements. By 1991, the Sejm Legislative Council, the Parliamentary body which receives all new legislation, began reviewing for the first time pending legislation not only from a political and economic standpoint, but from a constitutional standpoint, because they were sick and tired of having what they were producing going before the Tribunal and getting declared unconstitutional.

But the most auspicious development in the Tribunal's practice of judicial reviews after 1989 is similar to what the German constitutional court has done since the 1970s. And that's to develop and protect substantive rights on the basis of general constitutional clauses. The constitution's *Rechtsstaat* clause is a particularly important tool for the Tribunal in this area.

The *Rechtsstaat*, or state rule by law, principle, is rooted in German legal culture. It's roughly equivalent to American substantive and procedural due process. *Rechtsstaat* jurisprudence maintains that positive law should be consistent with both written and unwritten rules of justice, fairness, and equity.

Article I of the Polish Constitution now contains the Polish *Rechtsstaat* clause. It reads simply that the Republic of Poland is a democratic state ruled by law implementing principles of social justice. That very general language, based on the German Constitution's *Rechtsstaat* clause, has been used by the Tribunal as it develops principles of super-positive law and constitutionalizes them in Polish law. The Polish Constitutional Tribunal frequently looks to German *Rechtsstaat* jurisprudence for guidance as it constitutionalizes norms and principles it sees as essential in a state of law.

This judicial activism became very apparent in 1990, when the Tribunal held that legislative enactments infringing the principle of nonretroactivity of law violate the *Rechtsstaat* clause. The case involved then-President Jaruzelski's challenge to a new pension law which had reduced the pensions of former high-ranking Communist officials. While the Tribunal found that law to be constitutional, it emphasized in that case that nonretroactivity of law is one of the basic components of the *Rechtsstaat* and thus has constitutional rank.

Since that decision, the Tribunal has developed and constitutionalized other due

process principles through the limited language of the *Rechtsstaat*. These include judicial review of service-related dismissals of state employees, judicial review of alien deportations, and judicial review for individuals defending unemployment benefits.

I asked several Tribunal judges where they feel they get the prerogative to engage in such dramatic judicial activism. They responded that in the static political circumstances of Poland today, where constitutional reform has been slow, they have a special role in introducing new principles which political elites would not otherwise get to.

Surprisingly, Polish political elites have not objected to this activism. While political elites disagree with many Polish Tribunal decisions, they haven't complained about the Tribunal going beyond the written text of the Polish Constitution to develop principles of super-positive law. They see this, also, as responding to the necessities of the post-Communist transition.

Another area where the Tribunal has been willing to develop normative principles from the limited language of the Constitution is in the area of equal protection. The Polish Constitution's equal protection clause states simply that equal rights are guaranteed irrespective of sex, education, nationality, race, and religion. But this provision and its general language has become one of the most oft-cited clauses in the Tribunal's case law and has provided the basis for more than fifty decisions.

In developing its equal protection jurisprudence, the Tribunal first held that this list of forbidden classifications—sex, race, religion—isn't exhaustive, and that equality should be enforced wherever the rights of individuals belonging to the same category are impacted. Accordingly, the Tribunal has found unconstitutional laws differentiating pension privileges according to whether unemployment occurred before 1945 or after 1945 (in communist Poland) classifications imposing regionally disparate tax burdens.

In its case law, however, the Tribunal has not found the principle of equality to be absolute and has permitted differential treatment of otherwise similarly situated individuals if it found a compelling social interest or human right to do so. In gender-discrimination cases, the Tribunal has even required differential treatment to ensure "equality in the law." In a 1989 case, the Tribunal found unconstitutional a law that permitted male and female miners to retire with full pension only after having worked for at least twenty-five years. Previous statutes had distinguished between men and women, establishing a lower twenty year minimum for female miners.

The Tribunal held that for purposes of equal protection, a mechanically equal application of the laws would not always be sufficient. It wrote that female miners should be allowed to retire at an earlier age because the physical and biological differences between the sexes amount to "objective and fair criteria justifying differential treatment." But in a subsequent gender-discrimination case, the Tribunal held that when physical differences between men and women do not justify unequal treatment, both genders should be treated alike.

In 1991, the Tribunal invalidated a provision of the 1990 Universities Act which had required retirement at the age of sixty for female instructors and sixty-five for male instructors. In its decision, the Tribunal emphasized that the law could not make an earlier retirement age an obligation where biological and physical differences between the genders are irrelevant.

Although in its early stages, the Tribunal's equality jurisprudence is remarkably progressive. And as in *Rechtsstaat* jurisprudence, the Tribunal has shown itself willing to develop normative principles on the basis of the limited language of the constitution.

Before I close, let me say a few words about the Parliament's power to overrule the Tribunal's decisions. When Parliament is deciding whether or not to uphold a Tribunal decision, its consideration is inevitably distorted by explicitly political issues. After the Tribunal sends its cases to Parliament, the debate in Parliament often pits political blocs against one another. It frequently degenerates into wrangling over compromise solutions, with Parliamentary caucuses offering to uphold one part of the decision in exchange for the rejection of others. It's not uncommon for the Government itself, even if it might have been a party in the case, to weigh in at the Parliamentary level to press its own case. And various ministers have threatened to resign if Parliament didn't overturn the Tribunal's decision.

It's remarkable that the Parliament has overruled the Tribunal only five times in the last ten years, despite the many times a Tribunal decision has had drastic political or fiscal consequences. But the limited validity of the Tribunal's decisions allow its jurisprudence to become diluted by nonconstitutional considerations, and this threatens the Tribunal's legitimacy.

A positive development can be seen in the new draft constitution. While there has been a lot of disagreement in the debate on the draft constitution over a wide variety of constitutional areas—such as whether to include positive or just negative rights and the future relationship between the Church and the state—it is important that there is unanimity across the political spectrum on the future powers of the Tribunal.

For example, all sides of the political spectrum agree that the Tribunal's decisions, including those on statutes, should be final and binding. All sides support the expansion of the Tribunal's jurisdiction to review laws for conformity with international agreements.

Let me close by saying that this year marks the eleventh anniversary of the Polish Constitutional Tribunal, the pioneer court in the former Soviet Bloc. The Tribunal has evolved from a body forced on the Communist regime, and inevitably marginalized by it, to become an institution that's playing a central role in defining post-Communist constitutionalism.

But its judicial review power, as restricted as it is, continues to reflect the days of "enlightened Communism" and Parliamentary supremacy and has yet to be transformed to reflect the new era of liberal democracy and decentralized state power.

Thank you.

PROFESSOR KIM LANE SCHEPPELE: My role today, I think, is to be both an informant and a provocateur in talking about the Hungarian constitutional court. The Hungarian constitutional court has the well-deserved reputation of being one of the most activist courts in the world and certainly the most activist court in the former Soviet world.

For the last two years, I've had the great fortune of working day in and day out at the constitutional court on a grant from the National Science Foundation to study its operation.

And the court has given me access to all of its files, and I've been a participant in a lot of conversations around the court about both its role and about concrete cases. I went there without intent to advise, and so I report today as a kind of constitutional anthropologist—to add to the idea of a constitutional surgeon from this morning—to talk about what the court does and how it is that it thinks of its role. And I would like to end today by making what I think are some provocative comments about the role of a judiciary in what I call a conception of judicial democracy.

But, first, that remarkable Hungarian constitutional court. This is a court that opened for business on January 1, 1990. And for those of you who keep track of dates, you will notice that that's five months before the first elections occurred in Hungary. The constitutional court was a creature of the revised Hungarian Constitution, which is a highly amended version of the State Socialist Constitution of 1949.

The amendments of 1989 grew out of the roundtable process. If I had been a member of this morning's panel, what I would have told you is that they didn't set out to do this. In some ways, this was a kind of accidental constitution, where all the parties agreed actually not to revise the constitution and then wound up adopting the constitution anyway.

The idea for the constitutional court itself came actually from the last State Socialist Justice Minister, Kalman Kolchar (phonetic), who actually got the idea from the horse's mouth.

In the early 1960s, he had been a student for a year at Berkeley, and he listened to some of Hans Kelson's (phonetic) last lectures on the idea of a constitutional court. And he claims that he had gotten the idea at that time.

In any event, there was actually a draft law prepared to set up a constitutional court in 1988, which was really before all of the changes had become quite apparent. And, in fact, Kolchar's Justice Ministry had also introduced a new plan for a constitution at the beginning of 1989. So, when the roundtable process started in the summer of 1989, there were already on the table some proposals for starting these institutions.

However, the idea for a constitutional court came very late in the roundtable process. In fact, some of the participants in the process have told me that the idea came up on a Friday afternoon when the Parliament was supposed to vote on the

constitution on Monday.

And so, in fact, the Constitutional Court Act was drafted over a weekend in a little room on the third floor of the Justice Ministry, working from this first draft that had been prepared by Kolchar and Kelaney (phonetic) and the staff at the Justice Ministry. The Constitutional Court Act was thrown together reasonably quickly as a result. And as a result, the Act gave the court a number of powers that at the time, I think, no one really understood—at least no one understood exactly what an activist court would make out of these powers.

So, for example, the constitutional court, like most constitutional courts, has the power of abstract review of laws, power to nullify already existing laws. The court went on to use this power in a quite expansive way, to the point where, out of all of the laws that have been challenged—and this includes both the laws enacted before 1990 and laws enacted after 1990—the court has declared roughly one challenged law in three unconstitutional.

So it interprets its powers very broadly. It does this by adopting the interpretive principle that if there is any unconstitutional interpretation of a challenged law, then the whole law has to be declared unconstitutional. So, rather than trying to come up with interpretations that will save laws, the court, in fact, looks for interpretations that are likely to lead to unconstitutional results and nullifies them on that basis.

The court also has the power to issue advisory opinions, both in concrete cases—and there were some cases early on when, for example, the prime minister—the first elected prime minister—in an elected government, Jozsef Antall, asked the court for an advisory opinion on the reprivatization law that his government was thinking about enacting. The court at that time actually did issue an advisory opinion. It has since backed off issuing advisory opinions in concrete cases, even though it actually has the power to do so.

But the court will frequently take advantage of any opportunity it's given to issue abstract interpretations of constitutional clauses. So, for example, if the Parliament asks the court, "What does the right to property mean in the Hungarian constitution?" they will write a sort of abstract opinion that lays this kind of thing out.

But perhaps the most remarkable power of the Hungarian constitutional court is to declare that Parliament is acting unconstitutionally by omission, which is to say that if Parliament has failed to enact a law on a subject that, in the view of the court, requires a law because of constitutional provisions, the court can order the Parliament to pass a law within certain parameters, looking kind of like this by a certain date. And the court has done this on 260 occasions between 1990 and the end of 1995, so it's actually a fairly common practice. On average, the court declares a law or an omission about once a week, and it does this week in, week out. So, it's a very, very aggressive constitutional court. And in its first five and a half years, six years of operation, it has published more than 1,500 decisions.

By the way, for those of you who read Hungarian, a group of counselors from the court and I put together an edited collection of Hungarian case law—

constitutional case law—which just has been published and distributed to all judges in Hungary. We are now running some workshops to try to educate ordinary court judges about constitutional jurisprudence in Hungary.

The range of topics that the Hungarian constitutional court has dealt with is truly broad. In fact, some people claim that there is nothing that is not a constitutional question in Hungary. So, starting with some relatively obvious cases, like the death penalty, which the court struck down. Retroactive justice, which the court was not allowed in a *Rechtsstaat*. A series of cases about data protection in which the court held that what they call, borrowing from the Germans, “the right of informational self-determination”—it’s one of the most fundamental principles of Hungarian constitutional law—the court struck down a whole series of data collection practices of the old and current regime.

The court has issued a series of extremely broad decisions on reprivatization, which required that any property—any restitution that was made be made equally to groups, not just in the form of—the Antall government had simply wanted to give, basically, farmers their land back. The court said, “No, you can’t do that, because it singles out a certain form of property for special treatment.” So, all forms of property had to be treated equally.

And what’s more, the court said, “You can’t just begin in 1949, because the constitution says nothing specific about regimes. You have to go back to property that was seized in the 1930s”; which meant that if the current government wanted to compensate farmers, they had to go back and compensate Jews whose property was seized in the 1930s. So, the court presided over this very broad reconsideration of restitution.

The court has not backed off from pronouncing the powers of other branches, so it has a very big decision outlining what the powers of the president are. It has a number of separation-of-powers cases in which, for example, the budget for the ordinary courts was constitutionally required to come out from under the Justice Ministry. And similarly, the budget for the state-run media had to come out from under the Prime Minister’s Office. And there’s a series of state functions cases of that kind.

Last summer, the court, in a series of fourteen decisions, struck down large parts of the IMF-mandated austerity program and outlined a very complex system of social rights and protections. The court has also announced one of the most sweeping gay rights decisions of any court in the world.

And just to give you a sense of how everything is a constitutional question in Hungary, right before the court shut down for the summer last spring, it issued a decision holding unconstitutional a regulation of the City of Budapest which allowed cars with outstanding fines to have those little boots attached so that the cars couldn’t be moved. The court held this was a violation of the property rights of car owners. So, virtually everything is a constitutional question.

Now, what the court has done is to establish what I think is a really quite innovative jurisprudence and way of imagining constitutional questions. Borrowing from the German constitutional court, but using it in a quite different manner, the

court takes the principle of the right to life and human dignity as the most fundamental and central principle of the constitutional order. But like the Polish court, the constitutional court of Hungary has also made a great deal out of its antidiscrimination clause. And, in fact, the antidiscrimination clause, which, in the Hungarian constitution, says that discrimination may not be made on the basis of—it was about fourteen categories—and then it says “or any other reason.”

So, in fact, the court didn't have to go beyond the text to hold almost any legislative distinction unconstitutional. That's the most frequently cited provision of the Hungarian constitution for striking down claims. And it's also one of the most fundamental in the court's thinking about constitutional principles, that basically one of the fundamental ways in which rights can be violated in a state is for classes of citizens to be singled out for unequal treatment.

The court has also elaborated a very broad principle of what they call “legal security,” which is something akin to due process in American constitutional jurisprudence. And by “legal security”—the most substantive part, according to the court, of the rule of law principle—the state may not destabilize citizens' expectations through the use of law. So, it, in some senses, says the government must be held accountable not only to the law itself but to citizens, to make sure that they don't use the law as a weapon against them in a way to destabilize their expectations.

Now, one of the most remarkable things about this court is who gets to access it and how the court is mobilized. The constitution says literally anyone may file a petition with the court. It doesn't say “any citizen,” “any person with standing,” “any person with a legally redressable interest.” It says “anyone,” which means that anyone in this room, if you thought a law, a legal regulation, or a decree in Hungary was unconstitutional, could file a petition with the Hungarian constitutional court. And the court has no power of discretionary jurisdiction. That is to say, any legitimately framed challenge to any legal regulation in the state must be answered by the court. So, it doesn't have the power to turn these things away.

In most years, the court receives between 1,000 and 1,500 letters. Most of them are from ordinary citizens and most from ordinary citizens with no specialized legal training. I've been spending a lot of the last couple of years reading these letters, because I was interested precisely in the question that Aryeh Neier mentioned over his lunch speech, which is this kind of bottom-up picture of constitutionalism. I was curious: If anyone can write to the court, what do they say? And there are quite remarkable arguments that get made there, like the widow from Szeged who writes in and says, “The government may not unilaterally modify a contract,” and other arguments of quite a fair degree of legal sophistication.

What I want to say about this court is that it is an extraordinarily activist court. And in fact—and here's the provocateur part—I would like to claim that actually Hungary is not really, as all the transitologists say, a parliamentary democracy. Instead, I think what Hungary is doing is creating a different shape and form of democracy, something we might call a juridical democracy. If there are presidential and parliamentary forms of democracy, why not a juridical one, as well? From

an American perspective, the Hungarian court looks impossibly, unadvisedly activist. And, in fact, most foreign advisers who have passed through have urged the court to cut it out. The court doesn't listen to this particularly.

And so, one of the questions that I'd like to ask at the very end to try to provoke us into thinking about the role of constitutional courts and their appropriate role in a democratic system: Is a constitutional court that exercises these extraordinary functions undemocratic?

Now, the American constitutional literature cautions us about the counter-majoritarian difficulty, that the reason why courts should not have so much power is precisely because they will be striking down the outcome of the duly elected branches of government, and that this is a problem in a democracy because democracy is equated with elections.

But if you look at how parliamentary regimes are structured and you think about what the democratic pedigree is of parliamentary regimes, the agendas for them are typically set by a prime minister, council of ministers, by the so-called government, which has exactly the same democratic pedigree as constitutional court judges. That is to say that they're elected by the Parliament for a fixed term.

And so in some ways the judges of the Hungarian constitutional court actually have in some ways a bigger democratic majoritarian check on their elections. Because, at least in Hungary, you need not only a two-thirds vote of the Parliament, which comes second, but you need, first, to be screened by a constitutional committee in which every political party gets one vote. So, in order to be elected as a judge in Hungary, you need a majority of the political parties and two-thirds majority of the Parliament itself to go onto the court.

What that has meant is that judges hardly ever get elected in groups of one. They typically get elected in more groups, because it takes actually more open judgeships before all the political parties can strike a deal that gives everybody somebody on the court.

And so the court represents, in fact, a broader spectrum of political opinion at any given moment than a particular coalition in the Parliament. So, I begin to wonder, if you look at the sort of democratic electoral pedigree of the constitutional court, whether it's really that different or that much worse than a prime ministerial system.

In addition, the constitutional court in Hungary is the most popular institution in the government, with the exception of the presidency. Hungary has a cosmetic sort of presidency, without very many powers. And the current occupant of that job, who's the only president that has been in existence since 1990, is a very, very popular, charismatic figure. So, I'm not so sure that poll results are about the institution or the person.

But the Hungarian constitutional court routinely gets sixty percent or above popular approval in public opinion polls despite the fact that it's doing all of this. The Parliament and the government routinely hover between twenty and thirty percent in their popularity ratings. And so here, again, it's hard to make the

counter-majoritarian difficulty argument stick against a court that has that level of popular approval.

Also, people worry that judges who have this much power are sort of loose cannons. "And while you might like a particular set of judges," people tell me, "you won't like the next set that comes along." What the court has actually done, I think, is to constrain itself not within the democratic system of Hungary alone, but against what we might call the shadow of Europeanism.

The Hungarian constitutional court is extremely aware of human rights jurisprudence elsewhere in the world, and particularly elsewhere in Europe. It is extremely common practice on the court, whenever the court gets a major human rights question, to go out and look at the international human rights literature and see what that literature says, and really primarily to be guided by that.

That's how the court got to this gay rights decision. They did a sort of literature review of the literature on gay rights, and they discovered that nobody writing in the human rights literature is ever against gay rights. If people are against it, they write in other kinds of periodicals. So, when they did their literature review and found this kind of consensus, it was an easy decision for the court. If the court actually finds itself constrained by European human rights norms, my guess is that it's not going to look very dangerous.

Finally, I think one of the things we might do, in thinking about what democracy and the rule of law mean in this part of the world, is to ask whether our conception of democracy, as simply being tied to elections, is really sufficient, particularly in areas where elections are new, where people are new voters, and where the political parties are simply sorting themselves out.

The view of the constitutional court of Hungary is basically that a democratic regime will invariably, if the democracy is working well, develop certain kinds of substantive policies. For example, they would see a country which had a death penalty as having some failure of democratic process because democratic governments don't do that kind of thing. They always ask me about the United States in this regard.

But if they have the view that basically a lot of experience in democratic regimes has produced some consensus over actual substantive policies and that it's quicker to just say that's what the law is than to go through the trial-and-error process of creating it, the court actually has in its mind, in some sense, a picture of substantive democracy that runs counter, I think, to the view of procedural democracy that we typically have in the United States.

That said, one might say—and people always do say—about the Hungarian constitutional court, "Well, this a temporary phenomenon. This is just a transitional arrangement, and that eventually the Parliament will strike back and cut back the powers of the court and something will happen that will make this court not the aggressive activist court that it is now."

And to that, I say it certainly seems to have become the case in Hungary that the constitutional court in Hungary is rather like Social Security in the U.S., which

gets referred to as the kind of "third rail of politics." When politicians touch it, they die. And in Hungary, when politicians attack the constitutional court, their ratings go very, very far down. And so, as I've talked to members of Parliament about this and said to them, "Why—you know, why are you putting up with this?"—they all look at me like I've lost my mind. And they say, "We're a constitutional rule-of-law state, and that's just how they operate."

Thank you.

PROFESSOR HERBERT HAUSMANINGER: Well, I wish I could be as upbeat as my colleagues. But my topic is the Russian constitutional court. Established in 1991, one could say it was off to a fairly promising start. But all too soon it became involved in a terminal political confrontation between President Yeltsin and Hezbollahtov's (phonetic) Congress of People's Deputies. And the result of that is well-known.

Suspended and threatened with abolition in September 1993, it was subsequently given a new lease on life in the constitution and a new law on the constitutional court. After a protracted selection process of six additional justices, bringing the number from thirteen to nineteen, the Court was able to resume its work in March of 1995. Not surprisingly, it has become a chastened court with reduced legal functions in an entirely different political environment.

The 1993 constitution and the 1994 law on the court reacted strongly against perceived mistakes of the Zorkin (phonetic) court. The constitutional court was demoted from its previous position at the apex of the judicial pyramid and placed on an equal footing with two other supreme courts. It was deprived of functions that had encouraged its excessive politicization; for instance, the right to examine cases on its own initiative, to play a substantial role in impeachment proceedings against the president, or the duty to accept requests for constitutional review from single deputies of Parliament. The court may no longer review the constitutionality of political parties. And its function to decide jurisdictional disputes among organs of state power has been relegated to a subsidiary role, behind a conciliation procedure conducted by the president.

Most of these restraints seems justifiable as an attempt to refocus the court on the traditional task of constitutional review under the European model—that is, to examine the constitutionality of statutes at the request of other organs of state power. The framers of the new Russian constitution, however, for no apparent reason, chose to add a new function that appears to be as political as it is superfluous, the right of most of these other state organs, supreme courts excepted, to ask for authoritative interpretations of the constitution. They also modified the rights of individual citizens to bring complaints before the court in cases of violation of their constitutional rights. And they opened a new access route to the constitutional court by providing for the referral of constitutional questions from the ordinary judiciary.

I will briefly discuss these three new areas of jurisdiction in the light of the court's practice, pointing out problems and concluding with a personal appraisal. First, the authoritative interpretation of the constitution. According to the consti-

tution, the president, the Federal Council, the State Duma, the government, and any legislative organ of any of the more than eighty subjects of the Russian federation may ask the constitutional court for an authoritative interpretation of the constitution.

The law on the court declares this interpretation to be binding on all state organs. It requires a decision of the plenum of the court, that is thirteen out of nineteen justices, and it has to be adopted by a two-thirds majority. Neither the constitution nor the law on the constitutional courts subject this request to any procedural or other requirements.

But the court, clearly sensing the dangers of political entrapment, has refused to accept requests for interpretation when other avenues of access were available, such as a request for examination of constitutionality of a statute under the respective article of the constitution that was asked to be interpreted. The court will also grant a request for interpretation only when it directly concerns the fulfillment of constitutional functions or duties of the requesting organ.

In another context, but in terms capable of generalization, the court has signaled that it will not admit requests that would involve it as an immediate participant in an ongoing political process. Between March 1995 and July 1996, the court issued five interpretations, mostly at the request of the Duma in some sort of confrontation with the president. It has also rejected two requests of the Council of Federation as inadmissible, unfortunately without publishing them. But they are referred to in a commentary that has just appeared written by justices of the court and thus making clear what their position was.

Point two involves citizen complaints. The new constitution reads: "The constitutional court examines on the basis of complaints of citizens concerning the violation of constitutional rights and freedoms and, at the request of courts, the constitutionality of a statute applied or to be applied, in the specific case, in a procedure determined by federal law."

Under the previous law of the old constitutional court, citizens could, after exhausting remedies in the ordinary court system, lodge complaints against the violation of their fundamental rights by an unconstitutional court practice. The old court interpreted the word "practice" liberally, never rejecting a request because the petitioner could only point to a single violation in his own case and not to an established practice.

Today, petitioners may no longer contest unconstitutional court decisions, but only unconstitutional statutes that have been or are about to be applied to them on any level of the judicial hierarchy, trial or appeals court. And they have also lost the right to contest the application of unconstitutional substatutory regulations.

Thus, protection of constitutional rights has become easier on the one hand, because one no longer has to exhaust an appeals hierarchy. But this is a heavy price to pay for what has been lost, namely standing in the constitutional court concerning unconstitutional court decisions on the one hand and unconstitutional presidential decrees and government regulations on the other hand, because these are obviously the two areas where constitutional law is most frequently violated. The

framers of the constitution apparently tried to strengthen the executive branch and the regular court system vis-à-vis the constitutional court that had lost their trust.

It is less clear that they were conscious of three serious problems that would result from this approach: First, although the courts are not bound to apply unconstitutional or illegal statutory regulations, they have no power to nullify them. Thus, they remain on the books. And one judge will observe them; the other will ignore them.

A second point, the Russian constitutional court has lost one big opportunity to teach ordinary courts modes of constitutional interpretation in a case-by-case approach involving the balancing of conflicting values.

And the third observation would be that there is ample reason to believe that ordinary judges in the Russian system will be slow, if not reluctant, to uphold citizens' rights against the state.

In an interview with *Gusudastre Klava* (phonetic), the leading Russian law journal, edited by the Institute of State and Law of the Academy of Sciences, Court Chairman Tumanov (phonetic), formerly a professor at that institute, reported that, in its first five months, the Russian constitutional court received no fewer than 3,100 citizens' petitions, of which eighty percent were rejected out of hand by the Court Secretariat for formal reasons, such as obvious lack of jurisdiction by the court. The remaining 600 were examined by legal specialists in the Court Secretariat and reported to the Chairman of the Court within two months after registration. The Chairman then assigns one or several justices as reporters to each case, and their task is to verify the conclusions of the Secretariat and report the case to the plenary meeting of the nineteen justices within one month. The Plenum, then, either accepts the case for oral argument in a plenary meeting or assigns it to one of two panels, one of nine and the other of ten members, or, with much higher frequency, rejects the request as inadmissible.

This process appears to be somewhat short on both legitimacy and efficiency. On the one hand, the screening of petitions by the court staff and a single judge may provide insufficient substantive exploration of constitutional issues. On the other hand, it seems wasteful to involve the Plenum of nineteen justices in pro forma rejection of hundreds of cases.

The constitutional court heard the first citizen's complaint in April 1995. In the meantime, seventeen out of a total of thirty-five published decisions of the court have been devoted to citizens' complaints. The concern alleged violations of citizenship, housing, labor, health protection, pension rights, judicial independence, and a number of provisions of the criminal—and criminal law and criminal procedure codes. Virtually all of these decisions were taken in the panels and not by the Plenum of the court.

It may be argued that the forerunner of the Russian constitutional court, Gorbachev's Committee of Constitutional Supervision of the USSR, wisely chose to concentrate its endeavors in the civil rights area, where it could acquire legal recognition and popular profile without running into serious trouble with the executive and legislature. The Zorkin court largely ignored this opportunity. Among

the twenty-seven cases it decided in 1992 and 1993, we find only eight concerning citizens' rights. The present constitutional court seems to have realized that a shift of focus to that area may be a good way of regaining institutional prestige and legitimacy.

Let me briefly address the third point: judicial referral. Article 101 of the law on the constitutional court provides: "When examining a case at any level and concluding that the statute applied or due to be applied in the said case does not conform to the constitution, the court shall ask the Constitutional Court of the Russian Federation to verify the constitutionality of the statute in question." Unfortunately, the Article says, "the court asks" (sic), and not "shall ask" (sic) or "may ask."

On October 31st of last year, the Supreme Court Plenum sent a decree, or, as it is also called, "a guiding explanation," to all lower courts concerning the application of the constitution in the judicial process. There was a heated discussion preceding the adoption of this decree, some of which is clarified by an article written by the Supreme Court President Libyadeau (phonetic), who explains that the Plenum took the position that judges are to approach the constitutional court only in case of doubt concerning the interpretation of a clause of the constitution, and that this judicial reference was a right and not a duty. Tamara Marshakova (phonetic), Vice President of the Constitutional Court, comments on this Article of the law and takes, not surprisingly, a much different view.

On the one hand, she claims, doubt on the part of a judge is not sufficient. He must be convinced that the constitutional provision has been violated by the statute he is about to apply. But if he is convinced, he cannot simply ignore the statute, but he has an obligation to certify the question to the constitutional court.

Among the constitutional court's published decisions, we find only three judicial referrals. This is regrettable and will hopefully improve over time, for judicial referral of constitutional questions to specialized constitutional courts has been an important part of European systems of constitutional review.

It is an important teaching tool of constitutional awareness and is, in several variations, practiced very successfully in countries like Austria, Germany, Italy, and also by the Court of Justice of the European Communities.

Given the legal and political culture in Russia today, we can hardly expect judges in the regular court system to assume the stature and qualities of an American role model. In the light of their training and exercise of ordinary judicial functions, they will not be fully responsive to the challenges of a liberal democratic constitution without receiving guidance from a special constitutional court. It will be difficult enough for them to uphold their independence in statutory interpretation vis-à-vis daily interference from executive law-making bodies.

Russian legislators seem to have been misguided when they reduced the centralized function of constitutional review by the constitutional court. And it is even more deplorable that the present distribution of jurisdiction will inevitably leave gaps on the one hand and lead to conflicts between the Supreme Court and the constitutional court on the other hand.

Let me conclude with two brief observations of a broader type. In a way, the Russian constitutional court seems to have adjusted all too quickly to the new political realities. It avoids being drawn into political contexts which might force it to take legal decisions that appear to be harmful to the president. The Chechnya decision and the electoral law decision clearly demonstrate this point.

According to some Russian critics, the court has been bribed into submission to the president. And indeed, the prudent majority opinion in the Chechnya case seems to have been instantly rewarded by a presidential *oucaz* (phonetic) of September 15, 1995, showering a full complement of *nomenclatura* privilege, ranging from cars to travel grants, vacation opportunities, expense accounts, medical care, and shopping benefits on the members of the court and their families.

It will not be easy for the constitutional court to dispel the unfortunate impression that it has been bought. And sooner or later, it will not be able to shirk addressing questions that include political aspects if it will maintain—and I suppose it has to—its function in building a constitutional culture that involves the constructive interaction of all players in the game.

Yet, for the immediate future, a low profile of the court may indeed make sense. Avoiding political conflict with a powerful executive and sidestepping jurisdictional rivalry with a strengthened Supreme Court, the constitutional court could gain that window of opportunity that seems, to me, to be most important, namely to intensify the dialogue with scholars and undertake a serious effort in developing a cohesive body of constitutional doctrine.

Several promising beginnings have been made. Scholars and justices are publishing articles of improving quality. The court has just produced a useful commentary on its own law. There have yet to appear critical notes on individual court opinions in leading law journals. The future prestige and impact of the court will primarily depend on the plausibility of legal arguments supporting its decisions and the persuasive force they radiate.

And, here I chime in the chorus of all other observers of Eastern Europe. The process will obviously be longer than all of us have expected at the outside, yet there is some hope for ultimate success.

Thank you.

PANEL II—AUDIENCE QUESTIONS

PROFESSOR HERMAN SCHWARTZ: We have about a half hour for questions. Please use the microphone and identify yourself.

PROFESSOR ROBERT SHARLET: Bob Sharlet, Union College. A fascinating panel. A quick general question to the whole panel, especially to the two rapporteurs on the East European courts. Did you find that the justices engage in extensive extrajudicial commentary before, during, and after cases? As we have

found with both versions of the Russian court, Tumanov and Zorkin seem to be cut from the same cloth in that respect.

But specifically, if I may, Herman, just ask a broader question of Kim, since she challenged the audience with this fascinating question, this interesting concept of juridical democracy. I'm absolutely intrigued. We have to rush right out and call Robert Dole or somebody. But it would seem that Hungary, whatever it may be, does not meet either the criterion of representative democracy or a constitutionalist system, in the sense that the representative institution, the normal one, can be directed by the court to produce certain legislation and, on the other hand, in the sense that it fails on the constitutionalist side because the court itself appears to be exempt from any control.

Are the judges recallable? Can you think of any situation which may deflate the reputation of the court? Are we looking at a kind of extraordinary historical bubble which won't be around after the year 2000? But excellent panel. Thank you.

PROFESSOR HERMAN SCHWARTZ: Could we turn to the question which is easier and quicker answered about the extrajudicial statements. I think that's an easier —

MR. MARK BRZEZINSKI: Well, in the Polish case—shall we go —

PROFESSOR HERBERT HAUSMANINGER: Yes, please.

MR. MARK BRZEZINSKI: No, well —

PROFESSOR HERMAN SCHWARTZ: It's easier this way.

MR. MARK BRZEZINSKI: Okay. Yes. In the Polish case, there isn't as much commentary on specific cases pending before the Tribunal, but at times there has been commentary from the justices generally in terms of legislation the Parliament is considering. At times, Tribunal justices have suggested in press that if a particular piece of legislation is passed, it would be inconsistent with the constitution. Also, the Tribunal's justices have been very vocal about the restrictions on their power of judicial review. For example, the president of the Tribunal has been pushing Parliament for years to make the Polish Tribunal a legitimate constitutional court, with its decisions on parliamentary statutes final and binding. And that has been interesting.

The process of judicial selection in Poland has gone from a very apolitical process to an extremely politicized process. In 1989, when the court's justices were replaced, the process of putting new justices into the office was rather pro forma, with not too much political overtones.

In 1993, there was much pressure on the parties leading the parliamentary coalition to accept the candidates for the Tribunal bench offered by parties outside the coalition. By then every one had learned of the Tribunal's political potential.

PROFESSOR KIM LANE SCHEPPELE: Yes, I liked your judicial statements. The court has typically refrained from this. President Shoyum (phonetic) often gives interviews in which he refers to the court as if it's this thing quite separate from him, "The court does this. The court does that."

And so I think that all the sort of public pronouncements coming from individual judges have been very judicial. They are very similar to the kinds of statements you'd hear from American Supreme Court judges, who will give speeches on the Court and its role and nothing personally critical and nothing like Zorkin's kind of external criticism.

Now, one thing the court has done, which is quite interesting, is that the court—and you can fault—one of my big criticisms of the court's operations that I didn't say in my remarks is that they get these petitions and there's no procedure through which the court ever announces what its docket is. So you don't actually know the court is reviewing the law until it comes out with it. Now, there are a few cases, particularly in abortion, and now in the euthanasia case which the court is considering, where there has been a kind of public pronouncement from the court that they are considering this question.

And members of the court staff will organize sort of public fora at which leading academics will present papers, academic papers on the subject in question. There was just one on euthanasia last fall. And that generates a kind of public debate. And the Court waits for the public debate to settle down before they actually issue a decision.

So, while they don't make a kind of judicial pronouncement about the case, they will announce in some cases that they're considering a topic. And they want there to be other pronouncements on the case coming from politicians and from interested groups, and particularly from academic experts. So, in that way, the Court has been very professional, I think, certainly by norms of West European and North American courts.

Now, on the broader question about juridical democracy. What controls there are on the court, in particular, I think is a very important question. This court is like courts everywhere, which is to say it has no enforcement powers. There's a sense in which the court is powerful only by virtue of its public status. And if the court were to act in such a way that undermined the public status, then it would cease to be this third rail of Hungarian politics, where politicians couldn't attack it. And so really what the court has to do in order to maintain this status is to maintain its good image as a professional body in the general public. So that's really the constraint.

The other constraint is something which I think a lot of people have criticized about—because we heard it this morning—about these East European constitutions, which has to do with their ease of amendment. The Hungarian constitution can be amended by a single-time two-thirds vote of the Parliament, which means that any decision of the court can be overridden by an amendment to the constitution.

Now, the fact is the Parliament has only done that once, and that was in a case before the first election. So, it was the outgoing Hungarian Socialist Workers Party Parliament that did that. There has been no constitutional amendment that has overridden a court decision since. But those are actually reasonably decent checks, I think, on the court. There's also a procedure for removing judges for

malfeasance in office, but not for something like decisions with which the Parliament disagrees. So, in fact, in the system, there are these checks kind of built into it, I think, already.

PROFESSOR HERMAN SCHWARTZ: Kim, isn't there also the check—as I recall the Hungarian system, it allows a renewability of one term.

PROFESSOR KIM LANE SCHEPPELE: Yes. Yes.

PROFESSOR HERMAN SCHWARTZ: And I remember, in Czechoslovakia, Abner Mikva—Judge Mikva saying, "You know, politics is always a part of the appointment process, but it needn't affect independence once they're there." On the other hand, it's the renewal—it's the reelection that really can have a deleterious influence on independence. And I think Hungary allows one renewal.

PROFESSOR KIM LANE SCHEPPELE: Yes, it allows renewal. But all of the judges

PROFESSOR HERMAN SCHWARTZ: Now, whether it's—that's exercised, whether that's pro forma, as it is in a lot of American states —

PROFESSOR KIM LANE SCHEPPELE: Yes.

PROFESSOR HERMAN SCHWARTZ: —that may be, I don't know.

PARTICIPANT: What's their term?

PROFESSOR KIM LANE SCHEPPELE: It's a nine-year term, once renewable. But there's a mandatory retirement age of seventy.

PROFESSOR HERMAN SCHWARTZ: Yes.

PROFESSOR KIM LANE SCHEPPELE: And most of the judges hit that before they hit the nine-year, once renewable.

PROFESSOR KIM LANE SCHEPPELE: Although the president of the court will be an interesting case —

PROFESSOR HERMAN SCHWARTZ: Yes.

PROFESSOR KIM LANE SCHEPPELE: —because he was very young when appointed.

PROFESSOR HERMAN SCHWARTZ: Yes.

PROFESSOR KIM LANE SCHEPPELE: He was forty-seven —

PROFESSOR HERMAN SCHWARTZ: Yes, forty-seven.

PROFESSOR KIM LANE SCHEPPELE: —or something. And, in fact, what's now happening is everybody thinks the president of the court wants to be the president of the country, and they think he's got his sights—they think his sights are set higher by being president. I said, "Well, wait a second. The president of the country has no power. The president of the court actually"—well, anyway. So, there is this renewable power. And it's also the case that the judges have been appointed in these staggered terms. So, that means that when the Parliament, as I think is currently the case, has gotten annoyed with the court decisions but can't publicly attack it, it has made the appointments more contentious.

PROFESSOR HERMAN SCHWARTZ: Are there any other comments on Bob Sharlet's—Herbert—Mark—on the second question, about are we seeing a sort of juridical democracy?

It's my impression, by the way—and perhaps you might comment on this—that this has been said, to some extent, of Germany, that the German constitutional court has been so powerful and influential that the German Parliament, if there is a hint of unconstitutionality in the enactment process, they will work very hard to avoid that danger. But, Herb, you may know that far better than I.

PROFESSOR HERBERT HAUSMANINGER: The Austrians are even more cautious. There, the executive that introduces a bill has a special constitutional law service that checks every bill for unconstitutionality. And these are constitutional law scholars of high reputation sitting there and performing that job.

Now, just one word about legitimacy and democracy deficit of courts. In a West European perspective, there is, of course, this question concerning the European Court of Justice in Luxembourg. And very interestingly, this court is defending its position. It's affected by this deficit.

There's the Intergovernmental Conference reviewing the Maastricht Treaty and all that. And some of the defensive positions taken by the Luxembourg court would be interesting to use as a comparison.

The justices go out and write articles about this and give speeches, say, "Well, democracy isn't just decision-making by Parliament. Democracy is also upholding civil rights. And look what we have done. We may have been deficient first, and the German court had to tell us, 'You better watch it, or we'll not defer to your jurisdiction.'" But now they are spearheading European human rights in a sense, and they claim that this is one argument of democratic legitimacy in their favor. They upgrade the role in their decisions of the European Parliament, which is also a potential democratic ingredient.

And they say, interestingly, "The big number of requests for preliminary rulings by national courts and the willingness of national courts attest to the fact that we're accepted. And that's what democracy is all about."

PROFESSOR HERMAN SCHWARTZ: Other questions? Yes, sir.

MR. MITTLEBEELER: My name is Emmett V. Middlebeeler. I'm a professor emeritus of the American University. I have a question for all three of the participants. If there is a claim that the court has no jurisdiction—which I can see how that would happen on occasion—who makes the final determination there, the court itself?

MR. MARK BRZEZINSKI: The Tribunal has refused to hear cases concerning political questions from the government agencies and government actors that have the right to send cases to the Tribunal. And so, on jurisdictional questions like that, the Tribunal has been very forthright in setting its own parameters.

PROFESSOR KIM LANE SCHEPPELE: And actually the Hungarian process is identical to the current Russian process, which is there's a secretariat that screens the cases. And in fact, when I first went to the court and they gave me the full amount

of—reading all the letters, the first thing I wanted to see was how the Secretariat screened things.

And really, most of these are quite uncontroversial judgment calls. Somebody writes in and they have a personal complaint about a decision in an individual case. The court has no jurisdiction over administrative decisions in individual cases. And that's the kind of thing they're screening out typically.

PROFESSOR HERMAN SCHWARTZ: Other questions? Yes?

MR. POMERANZ: Will Pomeranz, from the National Endowment for Democracy. I just have a quick question for Professor Hausmaninger. You mentioned in your talk that you foresee potential conflicts between the supreme court and the constitutional court. I'm just curious if you could clarify a little bit more the separate jurisdictions that these courts have and where you foresee potential conflict.

PROFESSOR HERBERT HAUSMANINGER: Yes. They're both in the European tradition of having a centralized and specialized constitutional court for the purpose of reviewing basically the constitutionality of statutes. The ordinary courts—that is, a system of appeal that culminates in a supreme court—have jurisdiction in civil and criminal matters. And they usually must take the statute as they find it and certify constitutional questions to constitutional courts.

But the Russians modified this now. They created a mix of the American and the continental systems. And it is my claim that this mix is not going to work well. Because what's going to happen is that given the authoritarian structure of the regular Russian court system and the role traditionally played by the Supreme Court not to teach by precedent even if it's only *de facto*, but by generalized instructions to the lower courts, the burden of constitutional interpretation will be readily assumed by the regular supreme court. And this is an inroad into the jurisdiction of the constitutional court which the latter will not put up with.

So, this is the conflict I see arising, and it has already arisen. And it's almost impossible to avoid if, in this guiding instruction, the regular supreme court says if the constitution says right to work, this is to be understood in such-and-such a way. Well, this is clearly up to the constitutional court to say.

PROFESSOR HERMAN SCHWARTZ: Mark, did you want to comment?

MR. MARK BRZEZINSKI: Yes. Herbert mentioned earlier, during his talk, this symbiosis that's supposed to work within the judiciary in these East European court systems. When regular courts come across a constitutional case, they are supposed to send that case to the constitutional court, and how that's not happening in the case of Russia.

In the case of Poland, that's been the same, and I wanted to highlight that. Regular court judges have been very reluctant to send cases on to the Constitutional Tribunal.

And I've heard that that's the case in other Central European courts, in part because they have as their heritage a training that regular court judges are supposed to stay away from constitutional matters.

And that has affected the jurisprudence of the Constitutional Tribunal, because there are quite a few cases involving judicial procedure that never actually get to the constitutional court.

PROFESSOR HERMAN SCHWARTZ: Kim?

PROFESSOR KIM LANE SCHEPPELE: Yes. I wanted to say something about this, also. Because I think the problem here isn't actually the legacy of Communism. The problem is the legacy of positivism and this is the same problem that happened in Germany. It has happened in other countries where you've tried to impose a constitutional court framework on a very positivist judiciary.

What you have to imagine that ordinary court judges will do is to say that there's a possibility that a duly enacted law could be unconstitutional. Now, that requires a kind of thinking about the law that says the process of enactment, the positivist pedigree, isn't enough to make a law legitimate.

And that's exactly the second step, where you say, "And there's another requirement for a law to be valid, and that is its correspondence with the constitution is something that no positivist-trained judge will have ever encountered absent a constitutional framework."

So, in this way, I think, actually, the prior experiences of civil law countries that have grafted constitutional courts are very relevant, and that the countries in this part of the world are not unique in this fashion.

There have been turf battles in Hungary between the supreme court and the constitutional court, where the supreme court has taken the very positivist view and the constitutional court was surprised.

And there were a couple of counselors on the court—in fact, including Jerry Parmalee (phonetic), who was supposed to be initially on this panel but couldn't attend—who wrote very stinging attacks against supreme court judgments even though they worked at the constitutional court.

And what just happened last year, since they had asked the Parliament to pass a law that sort of specified the jurisdictional conflicts and Parliament didn't act, so the president of the supreme court came over to the constitutional court and they made a deal. They sort of figured out a division of labor, and they presented this to the Parliament as a draft of a proposed law, which the Parliament has not yet acted on. So, they're just acting as if it's a law until the Parliament tells them otherwise.

PROFESSOR HERBERT HAUSMANINGER: May I add just one observation? The system, strange as it may seem to Americans, seems to work quite well in Germany and in the European Economic Union ("EEU").

In Germany, because due to the leading role of the constitutional court, the regular court system has been constitutionalized in a sense of absorbing the values very readily, so that there is a decreasing need for the regular judiciary to certify questions. But that's a different situation. This court has been operative for so many years and has adjudicated so many questions.

And with EEU, we see, of course, differences from country to country, but particularly from Germany there have been hundreds of those questions submitted and, perhaps surprisingly, from England, too. England follows EEU law painstakingly. The English judiciary has made a turnaround which has been surprising and has absorbed this very well. And it's this collaborative effort which can be a model, but it takes a long time working up to that.

PROFESSOR HERMAN SCHWARTZ: On the other hand, although the English judiciary may have, partly because of some new appointments that are rather surprising given the government, the EEU's jurisprudence has become a major political battle in England, as a great many of the Euro-skeptics in the Tory Party have used the power of the European court to tell the British what to do as an argument for curbing the power of that court. And they have been trying to drum up with, I think, Turkey and Greece and some other countries an effort to curb the European courts.

Yes?

MR. QUINN: Fred Quinn, Federal Judiciary. I wanted to ask the three panelists—in many of these constitutions, international law has precedence over domestic law. Now, how do you see this playing out in the jurisprudence of your three courts? Is it going to be strict constructionist? Broad constructionist? Where is this headed?

MR. MARK BRZEZINSKI: In Poland, the Law on the Constitutional Tribunal doesn't allow the Tribunal to review the conformity of domestic legislation with international treaties. Despite that, the Constitutional Tribunal has begun to highlight in its case law whenever domestic legislation it is reviewing doesn't conform with international conventions. But the Tribunal suggests that those international treaties are binding. They always back their decisions with domestic legislation as the binding doctrine.

Poland is a member of the European Convention on Human Rights. And the European Convention assumes that a member state's judiciary is going to be one of the first lines of defense for human rights. But as we were just discussing earlier, the regular judiciary hesitates in sending constitutional cases to the constitutional Tribunal, and it certainly hesitates to send any cases to Strausburg.

So, Fred, the role of international law domestically in the case of Poland is still *de minimis*, despite the best efforts of the EU and the Council of Europe, to send people to train the judiciary of Poland to begin to refer to the European Convention.

And on the streets of Warsaw sometimes there are people handing out copies—in Polish, of course—of the European Convention on Human Rights, so that people see that they have these rights. But, still, there isn't that nexus. There's a real dissonance between international treaties and domestic action.

PROFESSOR HERMAN SCHWARTZ: Kim?

PROFESSOR KIM LANE SCHEPPELE: Well, in Hungary, Article 8 of the constitution requires that domestic law be brought into conformity with international treat-

ties, and the constitutional court has the power to make those rulings. It hasn't been very frequently invoked. But where it has been, the court has interpreted international treaties—international law very broadly, and it has tended to strike down domestic legislation.

That said, there's another way in which the Hungarian constitutional court at least uses these international law provisions. And that is the court typically uses international law as a device for interpreting the domestic constitution. That is to say, if they have a question about what it means, they look at the usage of terms of that sort in international practice and cite other constitutional courts and international bodies for authority on the question of what the Hungarian constitutional provision means.

And just one footnote on the institutionalization of this. The court recently hired, in its general Secretariat, a man who had been a counselor at the European Court of Human Rights. And his job, when any case comes in that bears on European human rights norms, is to write a memo for the court on European law on that subject. And that's his full-time job within the court. So, it's considered very important.

PROFESSOR HERMAN SCHWARTZ: Yes?

PROFESSOR HERBERT HAUSMANINGER: The Committee of Constitutional Supervision under Gorbachev made a very bold move in looking at the international covenants and applying them directly, although they were—it was a question of whether that was permissible under the constitutional doctrine.

The Constitutional Court of Russia has followed in this tradition. They have a very progressive bill of rights. And in their human rights decisions, they still make an occasional reference to the international covenants. But there is less of a need to because this has, for large part, been written into the Russian constitution.

Now, they have signed the European Convention in February of this year. And once they have ratified this, it becomes law of the land. And certainly the jurisprudence of the Strausburg courts will be guiding, as it has to be, for all the others.

PROFESSOR HERMAN SCHWARTZ: Well, I think the last two questions.

MR. FISHMAN: David Fishman, George Washington University, Institute of European, Russian, and Eurasian Studies. A panel this morning discussed the interrelationship between economic transformation stresses and the development of the rule of law. Would each of the panelists care to comment on that with respect to their own countries?

PROFESSOR KIM LANE SCHEPPELE: Well, last summer, when the Hungarian constitutional court declared the IMF austerity program unconstitutional, it was a big deal. The IMF had been threatening to shut down its office in Budapest and move out unless the government passed a program that brought transfer payments under check. And the government had resisted this for a long time and then finally caved and passed the budget.

And in my view, although this is—I don't have very good evidence for this, but my view is that the Parliament passed this austerity plan in such a way that it was

maximally unconstitutional. It practically had things written on it like "President Shoyum's (phonetic) pet right, 'Here's the budget cut.'" And so it was not surprising, after this was passed, that the constitutional court got this and within two weeks issued a decision basically freezing the cutting of transfer payments.

And, then, the court came out with a whole series of decisions in which they, like I said, developed—actually, a reasonably fiscally responsible way for Hungary to maintain a kind of social safety net by subjecting transfer payments to means tests and so forth.

When that happened, it generated a huge debate in the popular press about the clash of economic expertise versus constitutional expertise. And in Hungary, this debate is now very far along about their—a lot of people said, "Well, wait a second. That's not a constitutional question. That's an economic question"—including people who had previously been defenders of the court. And constitutional lawyers were writing by saying, "Well, this is a matter of social rights."

It's too long to go into now, but there's a series of fourteen decisions in which the court really lays out what's a rights question and what's a legitimate question in which economic expertise has some play.

And now we're waiting to see when the empire strikes back.

PROFESSOR HERMAN SCHWARTZ: Herbert and then Mark. Okay.

PROFESSOR HERBERT HAUSMANINGER: Well, unfortunately, I wasn't here to follow the course of the morning's discussion, so I may be well off track. When looking at Russia and the relationship of rule of law and the economic system, looking at the past, you had two economic systems, the official economy exploitation by *nomenclatura*, which means service, feudalism, nobility-type exploitation. And you had the underground economy, a Mafia-type exploitation.

Now we have three economies, the two old ones firmly in place and a small sliver of legitimate economy in the middle. And unless this considerably expands, I don't see much of a chance for rule of law, for judicial independence, and all that. They will be wavering from one to the other. They will be crushed in the middle.

MR. MARK BRZEZINSKI: One of the things that the Polish Tribunal focused on since 1989 is a line of jurisprudence it calls "vested rights jurisprudence." And the Tribunal's reasoning is that, in the post-Communist era, one of its principal roles is to prevent the new government from taking away pension rights, social security rights, unemployment benefits that were legally "vested" during the Communist era. And through this vested rights jurisprudence, the Tribunal has struck down a number of state budgets that were in keeping with IMF guidelines but weren't continuing pensions that had been legally vested in the communist era. And so there has been this collision on socioeconomic issues between the Tribunal and the government.

PROFESSOR HERMAN SCHWARTZ: Last question.

MR. BABB: For my first question, I would not like to identify myself. Professor Scheppele, would you please give us a cite for that case striking down the auto-

mobile boot law?

PROFESSOR KIM LANE SCHEPPELE: This case hasn't been translated yet. I have to look up the official publication number. And I just haven't —

MR. BABB: I'll give you a call on it.

PROFESSOR KIM LANE SCHEPPELE: Okay. That's fine.

MR. BABB: My name is Craig Babb. Would you please give us a quick review, all of you, of the gender and ethnic makeup of the courts; and whether, either in fact or in perception, there is any impact of that on decisions of the courts?

PROFESSOR HERMAN SCHWARTZ: That's easy enough. Why don't we just start at that end?

MR. MARK BRZEZINSKI: In Poland, there is one woman on the Tribunal. And there is essentially a seat on the Tribunal that is considered "the woman's seat" in the sense that when the justices were replaced in 1989, the seat that was vacated by a woman justice was filled by another new woman justice. And when that woman justice, Janina Zakrzewska died last year, she was replaced, in a special session, with a regular female court judge who's now on the Tribunal. And in this sense, the diversity is not that great. But I think that, with its gender discrimination cases and other equality cases, the Tribunal is trying to compensate for inequality that exists in Poland through its jurisprudence.

PROFESSOR HERBERT HAUSMANINGER: Of the original 13 members of the Russian court, there was one woman and two people with ethnic background. Today, this has imperceptibly changed. There's another woman, and there may be another—well, another justice that may be considered someone with an ethnic background. It's so difficult to say because many of those identify with the Russian culture. And I don't think there is anyone on the court who, for instance, in the Chechnya decision or in any other ethnically colored problem, would project himself as a defender of an ethnic against the Russian culture.

PROFESSOR HERMAN SCHWARTZ: Does that mean, Herbert, that basically—just to clarify what you're saying, they're all essentially Russian?

PROFESSOR HERBERT HAUSMANINGER: Yes, I would say so.

PROFESSOR HERMAN SCHWARTZ: Right. Following through on what has been happening even before this period?

PROFESSOR HERBERT HAUSMANINGER: Mm-hmm.

PROFESSOR HERMAN SCHWARTZ: Kim?

PROFESSOR KIM LANE SCHEPPELE: Well, in Hungary, there are no women. There is a woman who is the director of the Institute of State and Law of the Hungarian Academy of Sciences who is mentioned as a constant possible nominee. But so far there have been no women. And there has been no ethnic diversity of any particular note.

The most striking thing on the Hungarian court is that there are no Jewish judges, despite the fact that there are a substantial number of Jewish constitutional

law experts who would have been in the pool that would have been considered.

But there is diversity of another sort, and that is the nominations process has guaranteed in some ways diversity of political parties. So, every political party in the Parliament, save one, has at least one person on the court who is kind of the judge they talk to, even though judges weren't allowed to be party members before they were put onto the court.

PROFESSOR HERMAN SCHWARTZ: Thank you very much. Mark?

MR. MARK BRZEZINSKI: Well, I was just going to add that in Poland there are no Jewish judges on the Polish court, despite the fact that there are eminent Polish jurists who are Jews. And there are also no ethnic Lithuanians, ethnic Ukrainians, and so forth. So, it's a very homogenous body.

PROFESSOR HERMAN SCHWARTZ: And I take it that's true in Russia as well?

PROFESSOR HERBERT HAUSMANINGER: I'm not sure. I couldn't answer that question.

PARTICIPANT: No Chechnyans, for sure.

PROFESSOR HERMAN SCHWARTZ: Thank you very much.

PANEL III

THE ROLE OF FOREIGN EXPERTS IN ESTABLISHING THE RULE OF LAW

PROFESSOR HERMAN SCHWARTZ: Although it may look like a somewhat truncated panel, it really isn't. Dimitrina Petrova will be up in a second. She is trying to disprove all the anti-tobacco advertising downstairs.

And I gather that Ambassador Schifter is caught in what has become one of the worst traffic jams in America, which is a problem on Massachusetts Avenue, on his way up here. So, I assume he will be here. And when he comes, we'll just fit him in.

Our last panel deals with a matter that is of special concern to many of the people in this room, many of the people we have worked with for many years. And that is this remarkable sort of pilgrimage of Westerners moving into Central Europe, often at the request of the people there who are looking for models. And in many cases that has involved an almost bizarre mix of cultures, different legal systems, civil law, common law, different ways of thinking, different mind-sets.

Those of us who have been involved in this realize that it's a very difficult process. The same word doesn't mean to a common law background what it means to a civil law background, what a "judge" means, or the like. And so we thought, as our final panel today, we would discuss that from differing perspectives. The one thing that all of the people on the panel have in common is that

they all have been involved in this process.

And I'm sure you sort of heard all of the superlatives you need for today. But the truth is the moderator of this panel, Judge Patricia Wald, really is entitled to them as much as anybody else who has appeared today. Judge Wald is one of the most distinguished judges in America. Many of us think that there are very, very few peers for her. She has been a lawyer in almost every branch of government—I guess maybe not the legislative branch, except her work has brought her in contact with that.

When she graduated from law school, in a way she served her first apprenticeship with one of the great legal minds of the century, Judge Jerome Frank of the Second Circuit Court of Appeals.

In the 1960s, she was a member, as I recall, of the D.C. Crime Commission. And after attending to the raising of five children, became a litigator, did public interest work for a lot of the public interest groups in town. Then, when President Jimmy Carter was filling his slots, one of the easiest slots to fill was to ask Patricia Wald to become assistant attorney general in charge of legislation, where she did a superb job. I know because I was on the other end. I was working on the Hill at the time. I remember one night Pat was at my house for a dinner party, and it was about 11 o'clock on a Saturday night. And the phone starts ringing, and phone calls start taking place. That was then.

And then, in 1979, Patricia Wald was appointed to the bench on the D.C. Circuit, the second most important court in the United States. And her performance there has been extraordinary. Again and again—often, I'm afraid, in the minority—she has spoken out for human rights, for constitutional government, for playing by the rules. She was Chief Judge during much of this period. And, then, when she retired from being the Chief Judge, she went back to being a member of the Court, which, of course, she had always been. During this entire time, there was a steady stream of really quite penetrating, insightful scholarship on a whole range of topics.

And starting around, I guess, 1990 or 1991, she was called on by many of us and by many others to participate in the process of talking and trying to help create an independent judiciary in Central and Eastern Europe. She has been back and forth to Europe on this, has given many lectures, workshops, and the like, has written about this. So, I can't think of a better person to moderate this panel.

JUDGE PATRICIA M. WALD: That introduction was awesome, Herman. As you said, for the last panel of the day, we're going to treat the intriguing subject of the appropriate role of foreigners in establishing the rule of law in newly emerging democracies.

Some of the questions we're going to explore are, do we foreigners have a contribution to make, and what is it? When do we overstep our bounds or not do enough? How does our inevitable ignorance of native culture, language, mores, and history impede our efforts, and what can we do to mitigate it?

In the case of the United States, as the participants in the prior panel mentioned,

does the pervasiveness of our own common law background make much of our experience and orientation irrelevant for civil law countries?

Now, today, we've got three battle-scarred—two so far, but I hope a third battle-scarred veteran will appear soon—examples of activist intervention with us to discuss their experiences and perspectives.

And the format we're going to use is that each one of the speakers will open for ten to fifteen minutes, telling us their most basic observations on this topic of the appropriate role, the up side, the down side of out-of-country experts in the democracy-building process. Then, I hope we'll cross-connect between us for a bit. And, finally, we'll take questions from the floor.

So, our first speaker will be Mark Ellis. Now, I might mention one connection here, in the interests of full and fair disclosure, that Herman didn't. Mark Ellis, who's our first speaker, is the executive director of CEELI, a project of the American Bar Association. Actually, I'm on the Executive Board, and many, many of my trips to Eastern Europe have been made on CEELI's behalf.

And in his capacity as executive director of CEELI, Mark serves as special counsel to the Coalition for International Justice. That's a project which provides technical assistance to the International War Crimes Tribunal in The Hague.

He's also an adjunct professor at Catholic University. He's been a consultant to the World Bank and the International Finance Corporation. He's got degrees in economics and law, and was twice a Fulbright Scholar at the Economic Institute in Zagreb, Croatia.

He's also a recipient of grants to the European Union. And he has represented the United States on three separate lecture series in Central and Eastern Europe, sponsored by the United States Information Agency; and has—as they always say at the bottom of these resumes—publications too numerous to mention. Mark?

MR. MARK ELLIS: Pat, thank you. I will keep my comments brief in order to hit on some of the important points that we were asked to talk about. I remember, when we first started CEELI five years ago, I had no idea what we could do, what we should do. We were being besieged with requests, primarily on constitutional drafting, because that was the first area of importance for many of the countries in Central and Eastern Europe.

As I was calling around, before I got to Herman, I contacted a professor out in California, a well-known professor who I had read about when I was in law school. And I told him my dilemma, that we had been requested—by, I think at that time, Bulgaria—to assist on some constitutional drafting. He said not to worry, he would help. And I hung up the phone, very relieved by his commitment.

Two days later I received by mail a suggested model constitution. And in it, I looked on page 15, and it said "The Constitution of the Republic of 'blank.'" And so, therefore, all we needed to do was to fill in the name of the country and we were pretty well set. And I thought to myself, well, I don't know much about Bulgaria, but I don't think that's the way to do it. I've thought about that experience many times since that was the first time I asked a fundamental question: How do

you go about providing technical legal assistance? I assure you CEELI has gone through a lot of trials and tribulations. But I think we've learned a lot, and, hopefully, I will now be able to impart some of those lessons to you.

The first question was could we provide the assistance? And if so, what were the basic tenets that were important when going forward to provide, perhaps naively, technical legal assistance to these countries? So we set down these tenets, and I still believe them to be the basic foundation for providing technical assistance in any developing country.

Number one, we felt it was important to be responsive. Now, you may say that this tenet is fairly basic, and should be a part of any technical assistance project. But I assure you that's not the case in many of the experiences I've seen.

Ideally, what CEELI wanted to do was to secure representatives of the programs they wanted to implement, and then to work with them in designing the program. This started a partnership, and that was absolutely essential for a successful technical assistance program from the United States or anywhere else.

A second tenet was to utilize a comparative approach. And I give credit to Herman for this, because the first project we ever did in then-Czechoslovakia, he suggested bringing in some West Europeans to insure that the views were not just from the American perspective. And this was absolutely correct. From that moment on, we've never initiated a project where we didn't include West Europeans. Having West Europeans involved was essential, because it brought credibility to our program and what we were trying to accomplish.

The third tenet adopted by CEELI—one I still feel very strongly about—is the *pro bono*/conflict-of-interest aspect of the program. CEELI has very strict conflict-of-interest guidelines, and it's a *pro bono* project. I believe it has brought us a significant degree of credibility. We've seen and we've read instances where consulting firms have not been as sensitive to those issues, and I think that has some very negative consequences on U.S. assistance programs. Hopefully, CEELI has been able to balance that perspective.

With the basic tenets now adopted, we set forth to design several modes of assistance. In designing the programs, we felt that one of the most important things for us was long-term commitment. We did not believe it was sufficient to have a series of programs, or seminars, or conferences; you had to be there, you had to commit long-term. Therefore, CEELI started the Liaison Program, where U.S. attorneys volunteer to live in-country for a period of one or two years. The liaisons direct the project and this element of our project is the most important

We have a number of other modes of assistance—workshops, draft law assessments, U.S.-based training law and sister law school programs. Without the long-term presence of liaisons living day-to-day, not at the Sheraton, but among the people whom we are partnered with, CEELI would not have gained credibility, nor would the program been successful.

With the modes of assistance now in place, you have to design a substantive program that will have an impact for this. And that gets back to what Pat asked

and what Herman asked earlier, about whether the United States can play a role in providing legal assistance in a civil law system. And the answer is yes, but you have to do it carefully. And you have to select the comparative advantage that the United States has that is consistent with the civil law system in the particular country that you're working in.

Let me give you an example: judicial restructuring. Now, the judiciary is quite different, as you would imagine, between the common law and civil law systems. And so, at first breath, you might say, "Well, we have very little to offer in that regard." But that is wrong. We have a great deal to offer. We designed a program based on the principles of an independent judiciary as defined by the U.N. principles.

So, when CEELI talked about creating an independent judiciary, the need to have protections in the constitution and in the judicial laws, CEELI was able to provide this type of assistance by working with the countries on the drafting of a constitution, and new laws focused on the judiciary. This was the first step.

Another U.N. principle on the independence of the judiciary is judicial associations. And so, rather than attempt to assist these countries in every aspect of creating an independent judiciary, we selected an aspect that had a comparative advantage: judges' associations. We have now helped create these associations in roughly six countries. Another area which we thought we could assist was (inaudible) training. In this way we could bring together continuing legal education programs within the association building.

And finally, we have tried to assist in improving the issues of tenure and discipline. We were not as successful because these issues are really the responsibility of the government, and primarily the Ministry of Justice.

And although we frequently talked about the importance of these issues, it was much more difficult to convince the government or the Ministry of Justice to implement reforms in those areas. Fortunately, judges' associations have picked those issues and have moved them forward, and I think that's absolutely crucial.

The last question I would like to address is whether foreign lawyers can continue to make a significant contribution through the provision of technical legal assistance? And I say, yes, if we follow four conditions: First, we have to know our place when we provide assistance to these countries. There's a lot of "isms" that we face in these countries: *Socialism*, *Communism*.

There is also the "I-ism." That is when I hear U.S. and West European professors, and lawyers as well say, "Well, am I really responsible for drafting the Bulgarian Constitution or the Constitution of Albania?" And I cannot tell you how many times I hear individuals here in the United States and elsewhere take credit for drafting legislation in a foreign land. That is the surefire way of ruining one's credibility.

The second condition is the long-term, on-the-ground commitment. And I believe any program that has its premise on creating a long-term commitment in a country can be successful. The short-term fly-in, fly-out programs do not work

unless it's consistent with and part of the long-term objectives that you have established. Workshops and seminars that are frequently used—and CEELI certainly uses them—can be successful if they are part of a long-term program. For instance, CEELI worked closely in the creation of the Bosnian Constitutional Court.

So, we've created a series of programs, including workshops and seminars that were integrated with CEELI's on-ground liaisons. And that, to me, was absolutely crucial for the success of the project.

Third, know your limitations, including problems with the language. One of the questions you might have is, can Americans be successful in an environment in Central and Eastern Europe, and the former Soviet Union where they do not have the language ability?

I think the answer is definitely yes. I wasn't certain about this question five years ago, when I started with this program. But it clearly works. Some of the best people we've had on the ground did not have the language ability, but they were extremely successful. And so, yes, it's helpful if you have language capabilities, and we certainly seek individuals who have foreign language knowledge. But it is absolutely not essential, and I'm convinced on that.

And, finally, it's important that technical assistance programs not turn into a large taxpayer program to subsidize lawyers and law professors.

I'll finish with a letter that I received from a person who had been providing technical legal assistance with a consulting firm. We talked to her about the possibility of doing some work for CEELI in Bulgaria. So she sent me a letter saying: "I've reviewed the facts, but the figures, the *pro bono* figures that we talked about, seem to be incorrect. The right figures for my involvement in this project are as follows: Four and a half months' work at \$14,000 a month, plus travel and lodging expenses, plus office and translator; Or one week residence in Bulgaria each month at \$4,000 a week for the week and the four days' travel time back and forth from Indianapolis for as long as needed. Travel expenses, first-class hotel, office and translator are also to be provided. One week expenses and \$3,000 for a stay in Washington to review the management of the Patent Office."

And so, she goes on to describe that. That was not quite the way CEELI does business.

And I don't think that should be the model for the technical assistance program. Because you'll note, when you're working in Central and Eastern Europe and the former Soviet Union, that one of the biggest criticisms echoed by our hosts is the high-paid consultants that are running around with cars and living in luxurious homes. And, hell, if a third of that money was reallocated to actual programs, imagine the success of the programs.

Those are some of the lessons I've learned. I'll be glad to answer questions at the end of the panel.

Thank you.

JUDGE PATRICIA M. WALD: Thanks, Mark. Our next participant is Dimitrina

Petrova who is the executive director of the European Roma Rights Center, which is an international human rights organization that defends the legal rights of the Roma, more colloquially known as "the Gypsies," in Europe. Her center is based in Budapest. And before she became director there, she directed the Human Rights Project in Bulgaria, which also provided legal services for the Roma minority in that country.

She received the Human Rights Award of the Litigation Section of the ABA in 1994. She has also been a coordinator in Southeastern Europe for the International Helsinki Federation for Human Rights. She also teaches philosophy, law, human rights, and, I'm sure, various other subjects. Dimitrina?

MS. DIMITRINA PETROVA: Thank you. I was only on the receiving end of assistance provided from the West, and particularly from the United States, on establishing and consolidating the rule of law in Eastern Europe.

Then my life turned in such a way that I am now in a position where the success of my organization, which is an international human rights organization, crucially depends on what strategy I will adopt on exactly this issue that is discussed in this panel, namely how the expertise of foreign lawyers will be provided.

My really shocking discovery, some time ago, was that there was a need for a staff attorney to be employed in my organization, and I published a job advertisement. I ran it once in *The Economist* and once in *The Chronicle of Higher Education*, and I did not expect that many Western lawyers would show interest. In reality, before I stopped counting, just in the four weeks that followed the publication of this ad, I had about four hundred applications from the United States only. I was really surprised.

I shared this with Herman, who happened to be in Budapest at that time. And he said, "You should not be surprised." There are so many people, like free-floating lawyers in the United States or lawyers who are mid-career, very good public law litigators who would be very happy to come and spend some time in Central Europe and devote their work to the most threatened minority, the truly transnational European minority, the twelve million strong Roma minority. Actually, it's estimated at twelve million in the world. It's ten million in Europe only. That was a real discovery for me. So now, I understand that there is a potential for foreign assistance.

And, then, the problem is, what should be the strategy? How should these lawyers—how should their willingness to be exploited, be used, so that public interest law for Roma can be—can make headway in Europe?

However, the more general issue of foreign assistance provided by foreign lawyers, to Central and Eastern Europe, I see as a question which cannot be answered simply. It's not just the question of whether foreigners who are coming to our part of the world can make a contribution. It's also the question of the various ways in which Western lawyers have influenced the rule of law in Central and Eastern Europe.

I, for example, would argue that there is a stronger exposure to rule of law val-

ues when the East European lawyers are brought to this country in particular for terms of, like, one month or more, placed at law firms or at public interest law groups, and observe the daily work of their American colleagues. This approach has the limitation that very few people can be selected and brought over to the United States, or to West European countries, to learn in this way. And here, probably, everything would depend on who is selected, whether opinion-makers are selected, whether people who have a potential when they return to their countries, and if they return to their countries, to spread their experience among colleagues and to address realities there.

As to lawyers being invited in various forums as consultants, or as employed persons, or as lecturers, visitors, etcetera, to Eastern Europe, this is a strategy which has this advantage: that it exposes broader audiences—broader as, in this foundation's jargon, "the target groups" are much larger. Because, then, the Western lawyer who visits our region comes in contact in one way or another not only with lawyers, who are colleagues, in the very strict sense of the word, who work in the same area of law, but also with politicians, NGOs, and very often with disadvantaged groups of people.

And the effect of the presence of the Western lawyers in Eastern Europe has to be estimated not only as an effect on colleagues, including practicing attorneys and judges, and prosecutors and constitutional justices-court justices, but also they have a much broader influence.

It's the same issue whether we, when we discuss the role of foreigners in establishing and consolidating the rule of law in Eastern Europe, talk about things like assistance in the constitution-making or in the legislative process, or whether we're talking about curriculum development in law schools, or whether we are talking about litigation, in helping litigation, or the development of public interest law in Eastern Europe, or whether we are talking about commercial law, or whether we are talking about different areas.

For example, there are areas in which the potential of Western lawyers to influence processes in Eastern Europe is much bigger, such areas like the oversight and the accountability of the security services. This is one issue where the expertise of some Western lawyers is indispensable in Eastern Europe.

This has to be very strongly highlighted, because there is nobody—there is no force, no political force, even in the political opposition in many countries, which has the standards—which has been ever in contact with the standards that have been developed in this respect in Western countries, especially in some Western European countries such as the Netherlands.

I would like to point out, answering Herman's questions for the panel, very briefly, what are the areas in which Western lawyers participating in programs, be it people who come to our region or people who are involved in contacts with Easterners who come here to this country, what are the strongest points of influence that Western lawyers have on Eastern lawyers and on the public generally?

And then, I want to say a few things about whether foreign lawyers could have achieved more.

On the first question, I think that, first of all, I should say nobody expects the foreign lawyers, in interaction in some way with Eastern Europe, to help in those areas of law which involve knowing in detail the substance and procedure of the East European legal systems. This is not really the help that is needed by the local lawyers.

In fact, what really makes a difference, and what justifies dollars invested into this effort, is the fact that Western lawyers reveal for us a very different attitude to law. I would specify this argument in two ways. One is that, for Eastern European lawyers, it is a real discovery to see that the Western lawyers do not regard their own work as something which is a historical solving of a problem, of a life crisis, or anything that can happen in the 19th century model of a workshop, where somebody can walk in and have all problems solved, starting from shaving and dental services and everything at once. There's a lot of this mentality among East European lawyers, that they can be approached for everything. Contact with Western lawyers, first of all, demonstrates the very high specialization of law, and, therefore, brings responsibility into the way in which Eastern European lawyers see themselves.

Secondly, and much more importantly, I think that what our lawyers generally lack is a vision of law as a tool of social change, or progressive social change. They see law much more in the old Communist tradition. They still do, and it will take generations to change this. They still see law as a tool of political expediency. I have observed this. And even though there are heroic attempts by individual courts, or individual lawyers to overcome this Communist assignment to law, this is not generally the case in the region.

Western lawyers just provide a very different perspective on what law is. Western lawyers give a sense of social responsibility. They give a sense of how law can participate in progressive social change, especially in areas such as human rights law, or, more generally, public interest law, environmental law, and consumer law.

These are, especially for me, the areas where Western lawyers bring their—not so much their expertise and their concrete knowledge of exactly how to litigate a case—but they bring a very different attitude to the role that law has to play in society. This may sound too general to justify expanding, but I think that exposure to this other attitude of law, non-Communist attitude to law, is more important in the end than any concrete expertise, which, by the way, as time goes, will more and more be needed.

For example, more and more Eastern European lawyers will need help, in the form of briefs and comparative legal analysis on concrete issues, especially in the area of nondiscrimination law. In Eastern Europe, nondiscrimination legislation is really very limited. And, insofar as it exists, it's very rarely a subject of litigation. So, this is, for me, the focus, the most important role that Western lawyers have played.

Together with this goes a totally different attitude that Western lawyers seem to have to the limitations to law reform rooted in politics, in current politics, and in

the state structures, in the machine of the state. Under Communism, the principle of statism was overwhelming. In post-Communism, there is a strong inertia to regard everything, even such things as success in life, as connected, closely connected, to a career in the state.

The dignity of the independent lawyer is still to be built. The judge does not have the aura of honor, of dignity, of honesty, that a judge in the United States has, somehow, almost by definition, because of a long history of tradition. There was nothing respectable about Communist-time judges, who were really tools of political will. And this is part of this first argument.

And then there's something else which should be mentioned as well. Western lawyers, when they interact with East European lawyers, reveal a healthy skepticism toward majority rule and an emphasis on the rule of law, as opposed sometimes, to majority rule. For East European lawyers, majority rules. Despite what Kim said about Hungary—and I'm sure that what she said is true about the constitutional justices, but not about the judiciary in general—lawyers themselves do not dare oppose majority rule. They do not dare see themselves as guardians of lasting values. And they do not see themselves as a container of morality. Lawyers are not an exception of the general public, which held this—or used this cynicism to all—which was typical of Communism. Lawyers shared this cynicism to all.

And when they are confronted, challenged by a Western colleague, and when they see how seriously a Western lawyer takes herself or himself, that's a problem for them to solve. That's a personal problem about their place in the world.

Another positive aspect of the influence of Western lawyers that I would like to point out is that Western lawyers—and this is specifically in public interest law, and especially in public interest litigation—bring a number of approaches to public interest litigation which do not exist, but can be introduced, in Eastern Europe.

For example, they bring a number of ideas of how to liberalize the standing to sue, which is extremely limited in Eastern Europe. They bring a number of ideas, approaches, on the right to legal counsel—on access to justice, especially for the indigent; a number of ideas about the role of judicial review. These are ideas, the exchange of which is revolutionizing for litigators in Eastern Europe. Because, as I said, the problem is not so much legal expertise. The problem is that post-Communism, very much like Communism, is still a closed society. And the problem is how to open society, how to broaden the horizons.

So that if I have to generalize about the role of foreign lawyers in Eastern Europe, I should say that their very presence relativizes the views, the certainties of East European lawyers, broadens their horizons, so that what had seemed normal and universal in the domestic law, now starts to look, to the local lawyer, strange and arbitrary; and therefore, open to change.

I would like to have —

JUDGE PATRICIA M. WALD: About five minutes more?

MS. DIMITRINA PETROVA: Okay. So, I would also like to say a few words about what could be done, more into this direction of positive influence by foreign

lawyers, areas which have been relatively less exploited in terms of foreign assistance. In the first place, as I mentioned, there are limitations to litigation that come from the limitations of standing.

Western lawyers should be mobilized to think, together with Eastern lawyers, about class action suits. Nobody really, to my knowledge, has come to Eastern Europe with this very ambitious idea of how to, at least, imitate class action.

One finds in the Eastern Europe of today so many disadvantaged groups. Roma is one example, but also other disabled people, gays, women, and ethnic minorities. Some ethnic minorities are more disadvantaged than others, of course. But generally, ethnic minorities throughout the region are also a special group. These groups do not have venues to remedy when their rights are violated. I'm speaking about individuals belonging to these groups, in the language of this, (inaudible) on political rights. I am not talking about collective rights at the moment.

But in any case, there has been no attempt yet in Eastern Europe to introduce class action. Procedural possibilities for these do exist, but there is no strategy to achieve this. This is one area which I would like to think about and to have somebody good from this country as well. And I hope I do have already. Out of the hundreds that did apply, I really think I chose somebody good to do this.

Then, another in which more could be done is the question about the procuracy throughout Eastern Europe. Procuracy has no counterpart in the institutional arrangement of the United States or Western Europe. It's a specific phenomena which differs from country to country. But it's a part of the judiciary, and it's part of the judiciary by law.

It has very, very strong powers. The problem with the procuracy, if I am allowed to put it not in legal terms, because these are different in the different countries. But the general problem is that the procuracy in Eastern Europe symbolizes, expresses, in an absolutely monopolistic way, public interest. And public interest, at that, is considered to be identical with state interest. And it's the procuracy that owns opinion about what is the state interest. That is the public interest.

And this has, again, a historic tradition in Communism, where the very idea of privately organized public interest law is an absurdity. In the Communist mind-set, this is a contradiction in objective. Because, by definition, it is the state that expresses the public interest, and there is a hierarchy of interest. The state—that is, the state of the totality—comes first, in its interest. And then, the group interest has to be subjected to the whole, and the individual interests come as third. So, therefore, any attempt to express group interest threatens the whole.

And the procuracy was, under Communism, and still is that institution which concentrates too much power. Plus, it has conflicting roles in the criminal procedure. It has, at the same time, the role of a party to the case, and of executive supervisor of the proceedings, in most countries. Probably Ukraine is the extreme case, where even the new procuracy law repeats the same attitude to this institution which was introduced by Peter the Great, and then reinforced by Lenin.

A third area, which I think Western lawyers have a lot to bring into Eastern

Europe, is the way in which cases can be solved at the pre-court level. Allow me put it this way: lawyers in Eastern Europe are identified apart from judges and prosecutors. "A lawyer"—as Herman said, words mean different things—"the lawyer" is the attorney. This is the person who goes to court.

We do not have the whole class, the whole professional class which exists here, of lawyers who deal with cases that may be solved prior to the courtroom. This whole field does not exist. And I know of many attempts now, at least two very good attempts, one in the Czech Republic and one in Poland, where attorneys come together and start to fund-raise in order to create something like—they call it "arbitration" probably, not wrongly, but in a way that does not easily translate. But what they mean is they want to have a way to reduce the enormous caseload on the courts. So this is also one thing that is very important.

And one last thing I want to say is that we, all of us—repeatedly, all the time, at all conferences, we keep making, very obstinately, the same mistake of talking about one in the same region when we refer to Eastern Europe and the former Soviet Union. Even each of those, Eastern Europe and the former Soviet Union, inside is not, I think, one region. The need for reinforcing the rule of law is different in all these places.

And unfortunately, countries like Hungary, where I also live now, are packed with Westerners. You have as many Western experts as you want to find. The problem there is to find jobs for them sometimes. Because, very often, I don't mean just lawyers, but experts of all sorts, tend to go to beautiful cities like Prague and Budapest, where living is, as it was said, closer to the Western standard. But if you move to the East, where the need is really great—for example, if you go to Ukraine, yes, there are efforts, also by the ABA, there are projects.

But this is really very significant, but it's not enough. It's not enough for a country like Ukraine, where there are at least twenty law schools, where the problem is not so much the capital city, but the provinces.

Russia is also a huge problem, let alone Central Asia, where, as it was mentioned this morning, we have dictatorships, and one doesn't see many lawyers there. There is no rush of Western lawyers to go there.

Thank you.

JUDGE PATRICIA M. WALD: Our third speaker, the Honorable Richard Schifter, is special assistant to the President, and counselor on the staff of the National Security Council. He has previously served as Assistant Secretary of State for Human Rights and Humanitarian Affairs, Deputy U.S. Representative in the U.N. Security Council with the rank of Ambassador, and U.S. Representative to the U.N. Human Rights Commission. In 1992, Dick was awarded the State Department's Distinguished Service Medal.

But perhaps one his most outstanding achievements is that he and I were in the same Yale Law School class of 1951.

AMBASSADOR RICHARD SCHIFTER: Yes, indeed, it was in 1951 that we left New Haven. Let me start out by telling you a story that just came to mind, that is

somewhat illustrative of the problems that we have in Eastern Europe. When I served as Assistant Secretary of State for Human Rights, I had the opportunity of getting to know well my Soviet counterpart, a deputy foreign minister with whom I became very friendly. And my wife and I got to know his wife, as well. And he once came to Washington. And I remember driving the wife of this deputy foreign minister around town.

And as we started talking, somehow, in the course of our conversation, I mentioned the case, if you remember it, if anyone remembers it, *Coplon v. United States*. If you don't remember it, Judy Coplon was an employee of the United States Mission to the United Nations, in late 1940s, early 1950s. And, as it turned out, she had fallen in love with a member of the Soviet Mission, who was, as it turned out, connected with the Special Services of the Soviet Union. She began turning quite a bit of information—documents over to him and was, in due course, arrested, tried, and convicted.

An appeal was taken. And when the case went up to the Second Circuit, one of the points that was made was that the initial information that reached the FBI about Judy Coplon was a result of an illegal wiretap. Under the doctrine of the tainted fruit of the poison tree, the conviction was reversed, she married her lawyer and lived happily ever after.

I explained all of this to my friend from the Soviet Union, who, by the way, had always been suspected by our embassy of being a closet Democrat. And when Gorbachev came along, she indeed came out of the closet and is well-known as a Democrat.

Her response was: "How awful. She betrayed your country." And, then I had to explain to her that, as far as our country was concerned, it was more important to stick with the rule that the Justice Department has to go to court to get a court order for a wiretap, rather than having the FBI just put a wiretap on.

Well, I'm just suggesting that this, indeed, is one of those clear divides with somebody who really genuinely believes in democracy and freedom. This was something she just couldn't quite grasp. And that now takes me back to the general proposition that we are discussing here.

Having left Yale, I spent quite a number of decades in the private practice of law. And like all of us, I thought I understood the importance of an independent judiciary of a system based on the rule of law. But it was only when I became involved in international human rights work that I really fully appreciated what it meant. Let me tell you how it first really grabbed my attention. And that was in the context of Latin America.

During the 1980s, Latin America basically began to turn from these military dictatorships to democracy. And one country after another would have genuine, free elections, in which the executive and the legislature of the country in question would be chosen.

But there was something missing. And what was missing was an independent court system that could really discharge the functions that Dimitrina Petrova men-

tioned, of assuring the general public of its—of the fact that the government was not beyond the law, that there was a law that would be governing, and that it would govern everyone, including officials of the government, and would assure the general public and the individual citizen of his safety and her safety.

The first case that came to mind that we really paid attention to was El Salvador. El Salvador had a genuine free election in 1954, in which the incumbent leadership was basically voted out, and the Christian Democrats, under Jose Napoleon Duarte, took over. The president was the Christian Democratic Party. They had a majority in the Parliament. But what was missing was an independent judiciary that could really be relied upon to deliver justice to the general public in the country. So, this is when I became alerted to this particular problem, more so than I would be alerted to when one just thinks of it abstractly.

So that when things began to turn in Eastern Europe and the Soviet Union, in the first instance, we began to pay a great deal of attention to what it is that we could do there. And as a matter of fact, it was in 1988, as things starting warming up in the Soviet Union toward democracy, that we began our first exchanges of judges. And what I want to say is that, again, apropos of what Dimitrina Petrova had to say before, it is really extremely important to think, not only of giving lectures and seminars, but for the kind of personal contact to be established in that part of the world with lawyers, judges, prosecutors to get them to understand what it is that the rule of law really means.

As was pointed out, in the Soviet Union, and in the Soviet Bloc generally, judges have, across the decades, essentially been functionaries that would preside over what were reported to be trials, but which really were a matter of essentially rubber-stamping courtroom decisions made by the prosecutors. And it was, indeed, the procurators, a procuracy, and prosecutors that made the decisions on the basis, essentially of what their view was of the public interest, the public interest being the interest of the Communist Party. And then, the decision was made there. And you, then, went through the process of getting all of this into the courts. And the judge was really a glorified clerk.

For that particular group of people, judges, to be elevated to the position that they hold in a Western democratic system, would necessarily take effort. But it is, as I say, not the kind of thing that you can just read in books and get in lectures. It is really personal contact that was important.

I remember, at one of the very early occasions in which we had an exchange of thoughts between American judges and Soviet judges, one of my friends, an American judge, explained that once he was elevated to the bench—this happened to be a circuit court judge in Rockville, Maryland—that he decided no longer to go to the place where he usually had lunch because he would encounter the lawyers who practiced before him. And he thought it just wasn't a good idea to become, at that particular point, involved in situations where people who might, the next day or so, appear before him—that he would be seen with them essentially in a social situation.

I'm saying this is not something that you read in books. This is something that

you get out of contact of this kind, to see whether one can, indeed, begin to transplant some notions as to what it is not only that the state can do, that a legal system can do to elevate the judge, but what judges themselves need to do in order to be able to acquire the position of recognition and respect that is needed in order for the rule of law to be effectively practiced. So, this is one of the points that I would like to make in that context.

I also believe that what is very important is, in countries in which people are used to essentially letting bureaucrats make day-to-day decisions for them, for somebody to acquire the understanding that there is a way of protesting against that. Again, so as to simplify the process, a system somewhat like our administrative procedural system would be appropriate to be introduced in a good many of these countries, so that rather than saying "Da" to what a bureaucrat has just decided, they may say, "Nyet. I'll try to go and get you reversed." This is something that is simply not common in parts of the world, and needs to be done. And, again, for that, we have happily introduced necessary systems. I'm told that the Poles have a system like that, but it's missing in other places.

The judicial review of administrative actions becomes, then, of course, very important. And also, the importance of being able to get injunctive relief from the courts against executive action. This is, again, something that simply is not even part of the thought process of people in a good many of these countries.

As a matter of fact, what I have done in lectures that I've given in that part of the world, I start to speak also of how long it took for all of these things to evolve in our own country. What I like to do is to start out by telling people about the decision of the Supreme Court in *Wooster v. Georgia* in which two Episcopal ministers in Georgia were prosecuted under the Georgia state law that prohibited any kind of interaction between non-Indians and the Cherokee Indians. The Supreme Court held that the state law was in violation of the federal principle with regard to treatment of Indian reservations and that, under the circumstances, the conviction was invalid, and was reversed. And the two ministers were ordered set free. Well, Georgia did not abide by that particular decision. This matter led to a famous quote by Andrew Jackson, who was President of the United States at the time, who said, "The Chief Justice made his decision. Now let him enforce it."

My point is that in 1952, in *Youngstown Sheet & Tube Co. v. Sawyer*, what was at issue was that during the Korean War the steel industry had gone on strike. President Truman had, under the auspices of executive War Powers, ordered the steel mill seized, put the Army in charge, and everybody was ordered back to work. That was ultimately taken to the Supreme Court of the United States. And the Supreme Court decided that the President had exceeded his authority. And that is the point that I've made in my talk.

On the next day, the Army of the United States, which is really the power of the government, on the basis of the decision of five members of the Supreme Court against three others, including the Chief Justice, pulled out of the steel mill because this is what the majority of the Supreme Court had told them to do.

Again, this whole idea that the U.S. Army, having gone into the steel mill—and

this is still actually being, in the exercise of the War Powers, during the middle of a war—withdrew, for the Court's judgment to be respected. By the way, since then, it has been discovered that President Truman, before he issued that order, consulted with the Chief Justice, which he should not have done. But the Chief Justice, who should not have done it either, gave him advice, and he was saying it was okay. And, well, the Court's vote was five to three. And as I say, the Court's order was obeyed.

I want to tell you, when I first delivered this analogy—this was still during the days before Gorbachev—and I gave a talk—I remember it was in Sri Lanka, of all places, that I gave that talk. And a Soviet representative was there, and he was sort of taken aback as to what he could say about how the legal system works in his country. And I remember he got up and he said, "We have executed five ministers of interior." These are the people who are responsible for the secret police.

Well, the point that I want to make is that what is important—for all these countries, where they really genuinely do want to move from the system that they've had in place, to a more open democratic society—is not only for them to hold free elections, but for them to really begin to understand how an independent judiciary, an independent legal system, and the rule of law, can effectively operate. And, in order for them really to learn it, the kind of direct contact that has been provided by organizations like CEELI and others, that is really very important.

And it is critically important, also, for the relationships afterwards, to be maintained, so there can be a back-and-forth that stretches across the years as one tries to instill, really, a new way of thinking about the law and the operation of the court system in countries of this kind.

Thank you.

JUDGE PATRICIA M. WALD: The program—before everybody leaves, the program said that I was a "moderator/commentator." I want to leave plenty of time for questioning, so I'm going to make my remarks very brief. I'll give you a guarantee that they won't go over seven minutes, and the rest of the time we'll give to questioning.

I'm probably the only part-timer here because while all of the other people have been devoting full-time to this very important mission, I've been trying to run a steady course on our own domestic jurisprudence, most of the time. But, I have managed to get to Eastern Europe probably a dozen times, to eight or nine countries, plus host numerous delegations of judges from those countries here in Washington. They go to the Supreme Court, and if the Supreme Court is not in session, they go straight down the Hill, and they end up spending a lot of time with us.

So, let me just share with you some of my observations. All of my work has been primarily with the judiciaries of some of the emerging democracies in Eastern Europe and, interestingly enough, not always with the highest level of constitutional court judges we heard so much about before, and, who the scholars are primarily interested in. If the rule of law is going to prevail in a country, it has to not just trickle down, it has to be infused in the judges down the line.

And so I think some of the programs we've had that involve judges, not just at the highest constitutional level, not even at the supreme court level, but sometimes the municipal judges, the provincial judges, the judges in the intermediate courts, I think may be, even though they're not dealing with the great constitutional questions of our time, just as important to concentrate on if you really want to have a rule of law prevail where the ordinary citizen, most of whom don't get concerned with the big constitutional questions, will see and feel it.

Okay. Number one is sort of background—and you all know it—that an independent judiciary is, I think, widely considered a *sine qua non* of a rule of law regime. But the fact is that for more than four decades in most of Eastern Europe—and in some countries long before that—there has never been an institution called “an independent judiciary” that exists in practice or even in theory.

As we've heard again and again, judges in most of the countries we are dealing with now, at least for the last several years in Eastern Europe, the last several decades, were basically adjuncts to the party or the administration in power, subservient to its will, dominated by the ministries of justice who determined judicial appointments, placements, salaries, working conditions, assignments, transfers, removals, as well as, in cases of any importance to the party, the actual outcome of many of the decisions. Herman has written about “telephone justice.”

The interesting thing is the tradition in most of the countries for young men and women to emerge from the universities or the law schools and choose the judicial tract. Now, it's the least desirable legal career placement, or at least it was right after the revolutions in most of the countries I went to. The young law graduates served apprenticeships, probationary periods in the judiciary and then became judges—ordinary judges, not constitutional court judges—in their twenties and early thirties, with basically no other experience. It's a low-paying, nonprestigious job.

In one survey in the 1980s in Poland, eighty-six percent of parents said they would not want their children to become judges. Ironically—and one interesting question from the last panel provokes this—in several of these countries, women judges predominate. The first time I was in Czechoslovakia for one of these programs, I looked around the room, and it was all women. And I got up, and I said, “You people must be way ahead of us, in America. Less than twenty percent, or maybe ten percent, of our judges are women.”

Somebody took me aside and talked about, you know, the naive America and explained that there were so many women judges because it was absolutely the bottom layer. Promising young, male law graduates went out into state enterprises or into the very embryonic private kinds of law.

Okay. That's number one: Now number two: You know, interestingly enough, most of the constitution-makers and reform legislators in the countries right after the “refolution,” however you pronounce it, saw the concept of independent judiciary in the United States, and in parts of Western Europe, as one of the most appealing parts of a democratic regime. An independent judiciary means working at every level of judges in countries or traditions for independence for judges.

And they were attracted by the relatively high prestige of judges in our country and decent wages, at least, good working conditions, immunity from retaliation by the executive, or the legislature for their decisions, and the power to declare the acts of the other two branches void for nonconformity with the constitution. So, in a majority of the countries I'm familiar with, these kinds of expanded powers—most notably in the case of the constitutional courts, but some of the others coming down the line as well, were written into the new constitutions or into their new judiciary laws. And I think distinct improvements in the selection processes, and guarantees against arbitrary removal, were legislated for judges at many levels.

And as we've heard in the prior panel, constitutional courts started flexing their muscles in some of these countries and behaving independently, many times to the consternation of the appointing authorities. In a few cases I know about, the newly liberated judges actually suffered retaliation, some, in one case at least, having to flee the country.

And I don't think anything like that would happen to us. But the reason is that we, here in America, have 200 years of experience under our belts and probably a citizenry and free press that wouldn't stand for it. They may stand for us being criticized in the newspapers, but I think if we got exiled and run out of the country, there might be a fuss. But the judges abroad have no such traditions to fall back upon.

My third and final simple-minded point, which follows from the first two, is, in terms of the role of foreign experts or interventionists, it probably is not enough to help draft those sound and high-sounding constitutional or legal provisions about judicial independence. Like Herman, I think one out of every two lawyers I've talked to in the Washington metropolitan area helped draft the Czechoslovakian constitution.

I wasn't there at the time, so I'm the other—one of the two that didn't. But I think that the need and the responsibility is often much greater than talking and writing—I'll stick, again, to what I know a little bit about—especially in the judicial independence area. Now, what we found is creating an independent judiciary—and Mark touched on this—is that it must be an exercise in institution-building, not in legislative drafting. Based on trips that I've taken and the judges I've talked to here and there, anything approaching the reality of an independent judiciary, who will administer a rule of law in any of the senses that we think about it here, requires certain physical stamina.

One or the would-be access to the laws that are supposed to be the rule of law. Now, that may sound kind of silly, but it isn't; in actuality, in many of these countries, the judges don't even have copies of the laws. They have to ask the counsel who appear before them, or they have to get it by word of mouth. But they literally don't have access to the laws they're supposed to abide by and administer.

A lot of them don't have typewriters or secretarial assistants. They need facilities to implement some kind of a decent filing system. You've got to be a judge to know how important that clerk's office is. And if you can't even get access to the folder with the information in it, I don't care how many constitutions you read.

Another thing is facilities for distributing and receiving the opinions of higher courts or of peer courts up and down the judicial line. Finally, a salary that, at least, allows you to survive.

But getting past that, and a bit more subtlety, I think it means, for most of these countries, that there's got to be an accepted code of conduct for judges that the citizens and the judges' peers themselves expect them to abide by. Because in many of these countries, bribery and corruption, and undue influence from above, is still cynically accepted as the judicial way of life.

I think, too, the rule of law in an independent judiciary, means there has to be educational opportunities for the judges to learn about the changes in the law, and the implications of their new constitutions, treaties, and laws. Before they can be expected to put their lives and careers on the line, and oppose executive and legislative violations of the rule of law, they have to be—and I think this is what Dick Schifter was saying—they have to be imbued with a sense of their own competence, their own professionalism, and, more difficult but fundamental, a sense that public opinion, and maybe even the press, will support their efforts at independence, not abandon them to whatever fate the political powers decide to inflict.

The judges also need regular contact with one another inside their country. That sounds like nothing to us, but it's a great deal to them. And they need it across national borders, in many cases, in regions. Different judiciaries, in different countries, are anticipating and meeting some of the same problems, and they need some chance to—the wherewithal to network through their own organizations and professional groups. They need, again, as Dick said, one-on-one contact with judges from other countries, outside their region, who do function independently.

Now, in our country, academic and bar support for judges' independence is pretty well assured. But in many of these countries, my impression is the academics are not that much involved with the courts, and sometimes, they're not even, themselves, reform-oriented. Lawyers' organizations are fledgling, to say the least, and without the political clout to counter public retaliation. The press is erratic, and it's often, itself, the subject of threatened suppression.

So, where does the outsider's efforts fit into all of this? This is point four: CEELI and other organizations have pursued a strategy of trying to help the judges down the line organize themselves in order to pursue their needs for better working conditions, better operating courts, better administered courts, and codes of conduct, as well as continuing education in their new constitutional and statutory responsibilities. I think most on-the-spot observers now concede that judicial independence is a task for long-distance runners, not sprinters. It may take generations, if we're lucky.

Because, until these judges have more stature in the eyes of the public, and more confidence in themselves, they can't win the perennial fighting going on in almost all of these countries to extricate themselves from the tentacles of ministries of justice—even democratic ministries of justice—like power, just as much as their socialist predecessors, understandably they want to control judges through control

of their salary, their placement, their working conditions.

And ironically, sometimes our own reform efforts meet up with the law of unintended consequences. Indeed the drive to get judges to adopt codes of ethics, codes of conduct which will enhance their stature, their impartiality, have met with some resistance in some countries, because the judges are afraid of instituting any kind of formal code of conduct because they're afraid that the code of conduct, once it's there, will be used as a weapon by the ministry of justice to remove them or to intimidate them if they come down with unpopular decisions.

Point five: Judges in many of these countries don't have any experience at all in mobilizing themselves, running organizations and programs, in pressing their demands, lobbying in the executive or parliament. This is an area in which Americans especially, and maybe other Westerners as well, can be useful; and it may be just as critical to the intent of law as critiquing draft laws is.

Of course, if we can provide some tangible resources for these efforts, it's even better. Because, you know, how realistic is it to provide a management plan for running a court when there are no funds for buying case folders; or where you find all the records have been thrown in a soggy, mildewed pile in the basement, as was actually true in one case? Of what use is a guarantee of counsel in criminal proceedings if there's no organized system of legal aid?

Establishing the rule of law, like it or not, costs money. You need advice and money. One without the other is no good. In one country, the one computer provided by the government for every single court lay unused because no one figured out how to use it constructively.

Number six: Out-of-country judicial experts quickly become aware of the need for continuity in relationships with in-country judges. As we've said innumerable times, the three-day seminar of talking heads—here today and gone tomorrow—is of limited help. It's the judge or judges from out-of-country who come back to check a few months later, see how things are going, who can stay for a time to get new innovations started, who invite the foreign judges back to their own country, take them into their offices for a week or a month, play host to them, who provide the better model by far.

While we can never entirely overcome our ignorance of traditions, culture, or experience in any country, you know much more on the third than on the first visit. For instance, why Bosnian judges would cringe at the notion that we have in our country that, in a code of conduct, judges should be allowed to identify themselves with public parties, or at least be members of a political party. The Bosnian judge experience was that most major parties were ethnically and religiously related, and to have a judge be identified in any way with those parties would be the antithesis of impartial justice.

Finally, all of us know that the first commandment is don't try to impose our systems or mores on other cultures. And actually, most of the Eastern European countries have soundly rejected most of our prized justice concepts, like our particular brand of separation-of-powers system. And they're somewhat dubious of what they consider our politically laden judicial selection procedures as well. We

must be humble. Our own judges didn't get budget independence until a few decades ago. And we didn't have a disciplinary mechanism, short of impeachment, for errant judges until a little over a decade ago.

That all said, we do have many benefits to bestow, as the speakers before me have emphasized. We have a few centuries of experience on how constitutional verbiage works in practice, albeit in a different culture. We can bestow international acclaim or disapproval on the efforts and halting steps forward on new democracies. Most of these countries, I think, want eventually to enter either the European Union or be part of bona fide international organizations.

I think, too, that we can contribute to an international academic community which will give many of these struggling judges in these countries more international support when they do try to exercise independence in controversial situations.

On the opposite side—I'll end on a little bit of an edgy note here—I think we have to worry sometimes whether all of our platitudinous talk will be discounted when we do nothing, for our own reasons, when executives in some of these new countries flout the rule of law and retaliate against the exercise or fledgling independence by hesitant but helpful judges.

Thank you.

PANEL III—AUDIENCE QUESTIONS

JUDGE PATRICIA M. WALD: I think we'll now entertain questions from the floor. If you'd come to microphone and then tell us who you are and ask your question.

Thank you.

MS. MADELYN CRONE: I already said who I was. I'm Madelyn Crone (phonetic). I'm a senior adviser with International Program at the National Center for State Courts. Two very brief comments, because I've been a little bit concerned by this last panel.

The first one is that, for example, in Western Europe, there is no class action suit to speak of either. And the notion of access to justice and public defense are notions that you'll need a lot of work on.

But the broader issue, I guess, is that the issues that were raised—and I'm thinking, for example, of the list that Judge Wald just gave us—are the same lists that I have found in Latin America, I found in the Caribbean, I find in Africa, in the Middle East. And it's the same issues everywhere. The notion of three branches of government which are totally independent is the exception. It's not the rule. And in every country, the judiciary continues to be basically dominated by the executive.

So, I'm raising those issues, because I think that when we go and we try to be sensitive to the culture and to their tradition, at the same time I think that we still

have quite a bit of unease in trying to figure out what will be an independent judiciary in a system that is so different from ours and that is still struggling to find its own balance. That's the kind of issue that I think we have to do a lot of work on still.

JUDGE PATRICIA M. WALD: Thank you, Madelyn. Now, let's see if we have some reactions from our panel members. Go down the line. Mark?

MR. MARK ELLIS: I, in fact, have an example of what I think is a pretty solid case that the independence of the judiciary is beginning to take root. I got word yesterday from our liaison in Croatia that the Zagreb municipal court judge, Maureen Marcela (phonetic), today acquitted two Croatian journalists accused of violating a new restrictive criminal defamation law, publishing articles critical of President Tudjman. Although I don't suggest a direct correlation here, but this judge was brought to the United States by CEELI for a three week program. If this type of decision is being made in the depths of Zagreb by this judge, I would have to say that there is some hope there. And I believe that's a positive step.

JUDGE PATRICIA M. WALD: Dimitrina, do you have some thoughts?

MS. DIMITRINA PETROVA: No, I don't have thoughts. I just have one sort of wishful thinking strategy. I think that wherever there is a need, there will be a procedural forum in which this need will be expressed. There is a need for legal representation somehow of a group. And if you look at the history of Indian—of how India developed class action—it contains many lessons for Eastern Europe, I think.

When I said that there are procedural opportunities, I don't want to go into this discussion, because it would be very boring for most people here. But there are such simple formal abstract possibilities, like, for example, to file a collective complaint, just a joint complaint by a number of individuals.

At this stage, we do not have yet the opportunity to replace one client by another. But this can develop somehow. I'm sure about this, that this can somehow work out in the future. That what I am saying, it was not so much the importance of class action as such, but I wanted to stress that there are needs that have to be addressed other than this.

JUDGE PATRICIA M. WALD: And just as add-on to that, we do have some, I'm told, promising experiments with jury assistance with juries in Russia. Dick, do you have something to say on this one?

AMBASSADOR RICHARD SCHIFTER: Yes. I want to say that in dealing with the question of spreading information and understanding of our system and the rule of law, we ought to make a distinction between, let's say, the most recent decisions of the United States Supreme Court refining Fifth Amendment—or First Amendment rights, on the one hand, and the basis of our democratic system.

And I, for one, am not going to make any apologies for the proposition that the democratic system and the rule of law works for individual human beings, wherever they may be, better than a good many of the alternatives do. I have really no problem with that.

And let me simply say, as far as culture is concerned, if I think back, the fact that my grandparents and anyone preceding them was not part of this Anglo-Saxon culture that we are part of. As far as I'm concerned, I am happy that my children and my grandchildren, will have the benefits of this Anglo-Saxon culture that I, at least as far as my part of the ancestry is concerned, was not part of.

So, let me simply say I think it's great that we are in the position of making available—we're not forcing anyone, we're making available—to people throughout the world an understanding of how this system that developed initially in England, and that we have certainly carried forward quite significantly, how it works and how it can work for the benefit of individuals and the life of a society.

JUDGE PATRICIA M. WALD: Yes? If you'd tell us who you are and what you'd like to ask us?

MR. ROSENTHAL: My name is Eric Rosenthal. I'm the director of Mental Disability Rights International, which is a human rights project based here at this law school, a joint project of the Center for Human Rights and the Bazelon Center for Mental Health Law, a civil rights organization that works for the rights of people with mental disabilities in the United States that Judge Wald was associated with many years ago.

I'm interested, based on your experience training judges, promoting legislative reform, your thoughts in particular on promoting public interest advocacy and, on that note, the role of lawyers versus non-lawyers.

I ask, in part, out of the frustrations that we have experienced promoting advocacy for people with mental disabilities in Central and Eastern Europe, where the concept of the role of the lawyers is beyond many people's understanding; and a frustration with the legal profession's feeling of noninvolvement, of the lack of a public interest culture among the legal profession, which, in part, underscores the importance of all your work in promoting that culture.

But, in part, because the real strengths that we see are among the citizen advocacy groups, the family members of people with mental disabilities, the professionals, who have really been leaders—and wondering whether we can make better use—in terms of public education, using international law as a model for policy reform in promoting human rights and the rule of law by going beyond kind of the turf that we think of as that of lawyers in promoting human rights.

JUDGE PATRICIA M. WALD: Any volunteers on this one?

MS. DIMITRINA PETROVA: May I?

JUDGE PATRICIA M. WALD: Yes.

MS. DIMITRINA PETROVA: If you look at the composition of the human rights lobby in Eastern Europe, and if you look at the origin of this quite limited group of people, you will notice that the lawyers are newcomers in this group. The human rights activists under Communism had many sociologists, philosophers, actors, writers, intellectuals of various sorts, physicians, physicists, all sorts of scientists, and very, very few lawyers. In some countries, very few journalists as well.

Especially in my country, Bulgaria, the lawyers and the journalists were the two pillars of the Communist regime. Counter selection in these groups, moral counter selection was particularly strong. Control of their education was particularly strong. Liberal values developed outside these groups.

And the lawyers joined later somehow in the human rights movement, if we assume that there was such a thing as human rights—more broadly speaking, the human rights or pro-democracy or anti-regime movement in the 1980s in Eastern Europe. This led to very complicated relationships immediately after 1989 and all the way to the present moment.

It continues to be the case that lawyers have very strong challenges to overcome in order to join a human rights group. First of all, because lawyers now have much more opportunities, especially in business and commercial law, with privatization, with the restitution of property, with the fledgling of the first—and the only—because you said a private firms' lawyers have much prospects for enrichment and, even as they understand it, for a role to play in society, than to seek a career in human rights law.

And it has been my conviction that here the approach of the human rights leaders should be not to try to convey to the lawyers that this is their or duty anything. But to, rather, present the human rights career as an attractive way of life because it's their life, because they will be doing something meaningful. In fact, the very reason for which Western lawyers turn to human rights law, to public interest law, because, as Herman told me, when I had all those applications, he said, "But, of course, this is their life."

And there are many people in the United States, lawyers, who would come to Central Europe simply because it's their life. And I think this should be stressed, what benefits they have from working for causes, rather than assuming that it's their duty or accusing lawyers that they been obedient under Communism and profiteers now in the first years after this. I think that would be the better strategy.

JUDGE PATRICIA M. WALD: Dick?

PROFESSOR HOWARD: Dick Howard, University of Virginia. Having in mind the title of the panel's discussion, "The Role of Foreign Experts," I wonder if the members of the panel might sharpen our appreciation of the difference it makes if the visiting expert, whether a lawyer, or some other, is, on the one hand, an American or he is, on the other hand, a Western European—German, French, whatever.

I have in mind specifically, first, whether those two groups of people, American and Western European, respectively, would have different expectations or different agendas when they make these visits?

And secondly, whether there is some difference in the way in which these visitors are viewed or received once they're there?

JUDGE PATRICIA M. WALD: Mark, you must have some thoughts?

MR. MARK ELLIS: Sure. Briefly, Dick, I have a bias in favor of West European participation, even to the exclusion of U.S. participation.

And I have to admit, although Keith Henderson from AID has left, that there have been times when I've allocated funding to bring a West European over to provide some requested assistance. And I've had no Americans on that team, except for our liaison, because I have just become a convert to this idea that so much of what is being offered and what is being requested is set in the West European perspective.

Now, having said that, I think there's a very nice approach of having a combination of both the U.S. and West European perspective, and that's what we've tried to do. And I think that has generated a dynamic program. But, I admit, I'm biased in favor of the West European.

JUDGE PATRICIA M. WALD: Do you want to say something, Dick?

AMBASSADOR RICHARD SCHIFTER: Yes.

JUDGE PATRICIA M. WALD: And then Herman, I know, wants to say something, I guess.

AMBASSADOR RICHARD SCHIFTER: I'm very much biased the other way. And let me just tell you, my impression is that, by and large, there's something unique about American volunteer spirit.

And there's also perhaps a missionary aspect to what it is that Americans want to do in going abroad. They're more enthusiastic, more committed to making personal sacrifices in order to be able to function in some of these societies.

What I think goes hand in hand with that is the greater effectiveness in reaching out to people, as distinct from societies that make contacts with countries of this kind usually in a quasi-colonial relationship. It's one aspect—if I may add a few words—that the—it is also, I believe, the case that, at the end of the day, greater attention is paid to American than to others.

I remember talking at one point to the chief prosecutor after the revolution—after the change in Hungary. And what he was saying to me was that a good many people say, well, what he ought to do is follow the French and the British model.

But he said, "You know, the fact of the matter is that the French and the British ultimately—the West Europeans generally—will, in many of these situations, look to you. So, why should I have to look to them and they look to you? Might as well look to you directly."

MS. DIMITRINA PETROVA: May I, very briefly, add a word?

JUDGE PATRICIA M. WALD: Yes.

MS. DIMITRINA PETROVA: I cannot speak for all East Europeans, but if I now look back at what has been the difference in the way West Europeans and Americans operate, the difference has been, to me at least—it's an accumulated perception of six years—that Western Europeans come and organize conferences and seminars and give lectures.

And Americans are much more oriented toward programs that bring Europeans to America, or sending, like CEELI sending, for long-term periods, lawyers. That it's much more interactive approach.

MR. MARK ELLIS: Okay. But —

MS. DIMITRINA PETROVA: All the differences follow.

MR. MARK ELLIS: —you might change your opinion.

MS. DIMITRINA PETROVA: All the differences follow.

JUDGE PATRICIA M. WALD: Okay. All right. You're next, Herman.

PROFESSOR HERMAN SCHWARTZ: Not so fast. Well, even after the experience I had precisely of something that Dick Schifter talked about, handing prosecutors. He mentioned, I think—oh, or maybe Dimitrina mentioned, or somebody—the problem of the procuracy in the Ukraine, which is really quite dreadful. Back in around 1992, 1993, there was a then-procutor who was very reformist minded, a fellow named Shiskin (phonetic), Victor Shiskin. And I got involved with him. And he said he would like to bring over some Western prosecutors to talk to all of his prosecutors. He was hoping to go on from there to get some legislation to change the system they had, which, in the event that, as Dick pointed, it failed.

And I said, "Fine. What do you want? Whom do you want?"

And he said, "Well, I don't want any Americans," he said, "because your system is so different from ours." He said, "Your whole prosecutorial system is so different."

And, frankly, I think our prosecutorial system is terrible, particularly on the state level, with elected district attorneys, so I wasn't about to disagree with him.

But I said, "Look, this is an American project. We've got to have a least one American."

So, he said, "Okay." So, I said, "Well, what do you want?" So, we had a Belgian, a French, a German, and an Italian—Italian partly because Italy is in the forefront of procedural reform.

Now, they came. There was, as Dimitrina says, the two-day lecture. But they set up arrangements to continue the relationship afterward, with hoped-for visits. I don't now what happened, but they offered to do this.

And the only American who came, just as a—how life sometimes works out—I asked—some of you may know Joseph di Genova, who is a former U.S. prosecutor here, and really a very, very capable charming guy. The day he was supposed to leave, he developed an inner ear infection, and his doctor told him he couldn't fly.

Well, I had once spent eight weeks as an assistant district attorney just to see what it was like. So, I'm afraid I did not give a typical impression of what American prosecutors are like.

But the point is, they wanted the others. They wanted a different thing. Now, I think it would have made sense, honestly, to have a mix. But their system is so close to the civil law system. So, it seems to me it depends a lot on the particular area of law.

In some areas, I think it makes a lot of sense. But in other areas, just if one is

talking solely of knowledge—and I don't know about the follow-up, I think that could be worked out. And I think some of these European Commissions are doing more follow-up and having people there.

JUDGE PATRICIA M. WALD: I think once you get out of the realm of the rule of law, that if you get into anything like—I note Kurt Muhlenberg is in the audience and he has worked on engaging us in the new democracies—you get like anything into reforming your criminal law system —

PROFESSOR HERMAN SCHWARTZ: Yes.

JUDGE PATRICIA M. WALD: —using technology for strike forces, federal communications kind of law, then they gravitate toward one expert and they really want us.

PROFESSOR HERMAN SCHWARTZ: Yes.

JUDGE PATRICIA M. WALD: We represent the highest specialization.

PROFESSOR HERMAN SCHWARTZ: Right.

JUDGE PATRICIA M. WALD: When you get down to separation of powers, their traditions are closer to the civil law on the continental side.

The last comment I have, though, is that a lot of Eastern European judges are slightly schizophrenic. They would eventually like to be like American judges, but they think it's too much to hope for, now. They keep talking about our marble chambers and that sort of thing, but they'd love to be like we are, but they think it's probably more realistic to aim for something a little less than that.

Okay.

More—oh, I'm sorry, Professor. Yes, go ahead.

PROFESSOR STEIN: I just wanted to support—Eric Stein is my name, University of Michigan—what Herman said. I think the ideal combination is Mark Ellis' type of a group, having Americans and some Western Europeans, for two reasons.

The first reason is that many of these countries have a parliamentary system corresponding more or less to one of the Western European models, so that the continental experience is quite relevant when it comes to institutional problems.

The second most important reason is that most of these countries want to be a part of the European Union. So, when you get to areas where the European Union counts—which are steadily expanding—then, it is natural that these governments would talk to their prospective partners and adjust their systems to be compatible with the European Union. But I also agree that American experience is extraordinarily important.

There is a real contribution Americans can make, exactly as regards the ideological principals that Ambassador Schifter has mentioned, access to justice, judicial independence, etcetera.

I think there are certain things that are unique to Americans, and at the same time, extremely desirable and attractive to Eastern Europeans. One thing I remember, for instance, a Minister of Justice working on the code of criminal proce-

ture that was an inquisitorial code. Aspects of the American-type system were appealing to him, even if he said, "I can't get this thing through." So there is a set of ideals and objective which ought to be stressed, and if nothing else, that ought to be a function of Americans in this group.

I should mention one instance where the Europeans are in good position to offer continuing help. The Council of Europe has a separate section that provides continuing advice on constitutional problems, human rights problems, by very competent people, both academics and bureaucrats. So they offer quite a bit on that score, too.

JUDGE PATRICIA M. WALD: Did you want to say something?

AMBASSADOR RICHARD SCHIFTER: Yes, I just want to say that the distinction, the first one you have just made, is the one that I fully agree with. In other words, when it comes to matters that are essentially related to civil law and where purely technical advice ought to be given, yes, obviously the West Europeans are qualified to work in that context.

When it comes to really transmitting a feel for the rule of law, and basically transmitting an ideological approach to the rule of law, this is where Americans can do the missionary work much more effectively than anyone else.

JUDGE PATRICIA M. WALD: Okay. Any more questions? No? We've questioned you all out. Well, then, I'll turn it over to Herman.

PROFESSOR HERMAN SCHWARTZ: You've been here long enough, so there aren't any. I just want to put in one plug for our school, the Washington College of Law. It's our centennial, and so we're entitled to that.

And that is that the program that Dimitrina talked about, namely bringing over European lawyers to see how we do these things and to spend time, with Dimitrina's help and thanks to the Open Society, we've started that program.

We have two people here, one from Bulgaria and one from Hungary, who will spend a year with us, three months doing course work, and eight or nine months working with public interest firms, other groups, where they will be working directly with people doing this kind thing. We've been doing it for some thirteen years with Israeli lawyers, and we have expanded it to Eastern Europe. And so that may make a small contribution.

So, thank you all for coming. You've been a wonderful audience. And I hope it has been a useful day.

Thank you.