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Rule of Law Symposium

The History of CEELI, the ABA's Rule of Law Initiative, and the Rule of Law Movement Going Forward.¹

Panel Members: Homer E. Moyer, Jr., Mark S. Ellis, & Talbot "Sandy" D'Alemberte*

Moderated by Robert Stein**

ROBERT STEIN: We're now going to move into our first panel, which I have the pleasure of introducing and moderating. These are individuals who have so much to say and so they've said to me, if we get too bogged down in talking about one area, just cut in and move us to the new areas. So we'll see whether that becomes necessary and they want to hear what you have to say as well. So we do want to leave some time for comments and questions from the audience.

First of all, I'd like to introduce Sandy D'Alemberte. Sandy is a former president of the American Bar Association. Before that, he was long active in the American Bar Association. Our friendship goes back, I think, to the 1970s. As a practicing lawyer in Florida, Sandy was very active in the Section of Legal Education. As a lawyer he cared about what law students were learning and so he was active there. He later became dean of the

1. The following is an edited transcript of the featured panel at the Minnesota Journal of International Law's Rule of Law Symposium on November 14, 2008.

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**Professor Robert Stein, Everett Fraser Professor of Law, University of Minnesota Law School.

law school at Florida State University. Then subsequently he became president of the American Bar Association. Serendipitously, it was at the time of the fall of the Berlin Wall and the staff told him to prepare some rule of law, law day talks, and to go out and give the traditional talks about how important the law is and he decided rather than go speak to the Rotary Clubs and other institutions in America, it would be important to try to advance the rule of law in these new countries that have come into existence. So he happened to be there at that time, and is a co-founder of CEELI (Central and East Europe Law Initiative). Sandy has received so many awards; most recently he has served as president of the American Judicature Society.

His co-founder is Homer Moyer, a Washington D.C. lawyer who started out at Covington & Burling, moved to the Department of Commerce, where he served as General Counsel of the Department of Commerce under both a Democratic administration and Republican administration. And then moved to the law firm of Miller & Chevalier where he continues to practice. Homer practices in the corrupt practices area—the Foreign Corrupt Practices Act. He is clearly one of the leaders in the world on the meaning of that statute and the effort to root out official corruption throughout the world. Homer Moyer was becoming chair of the section of international law at the time of the fall of the Wall. And so these two individuals, who I guess had known each other slightly—they may get into that a little bit. Sandy said yesterday that he actually tried to hire Homer in his law firm and Homer refused, but Sandy didn't hold that against him and they began this concept that became known as CEELI.

And then they met a young man—then a young man, still a young man, always a young man—Mark Ellis who had graduated from Florida State, who I think was known to Sandy D'Alemberte. He had a great passion for this kind of work and had gone to Yugoslavia on a Fulbright Fellowship. And so they thought they could involve him in this work. The three of them, starting in 1990, created the most formidable rule of law program in the world. It spun off so many other programs since that time, as I said, more than 5,000 American lawyers and judges have participated in that program. It's been a legal Peace Corps. It's had tremendous effects. I've been present when presidents of several countries, some with great emotion, have said that their nation would not be the effective democracy it is

without the work of American lawyers and judges who come in to assist in developing those structures in the country.

So with that introduction, let me turn first to Sandy D'Alemberte to begin the discussion and the subject is the rule of law work, beginning with CEELI in 1990, continuing up to the present time and their views about rule of law work now and into the future. Because it's time now for all of us to pass the mantle onto many of you who will take this up, take this work to new heights in the years to come. So Sandy, let's begin.

TALBOT "SANDY" D'ALEMBERTE: Thank you and thanks to all who put together this program. I've always enjoyed seeing Bob who's been a mentor for me because he was a dean long before I was. When I became a law school dean, Bob came to inspect my law school and gave me instructions which I carefully followed throughout my deanship. So, we've been friends for a long time and I've always been grateful for what he's done, including the work he's done for the ABA and now for the International Bar Association. Bob was one of the people who really introduced American legal education to the possibility that we'd bring in significant numbers of foreign students into the law schools. And so the early successes of bringing international students to American law schools occurred at the University of Minnesota.

So I'm here as a great fan of Robert Stein and a friend. But I'm also very delighted to have a chance to get together with Mark and Homer. We actually see each other fairly often, stay in pretty good contact, email, and we have a great friendship. A friendship I greatly value.

Let me go back if I can just quickly and paint for you a picture, which I will try to paint using Bob's analysis of rule of law. I'd like you to think about Bob's list of items,² and think for a second about the old Soviet bloc countries. Think about the Eastern bloc countries. To what extent were these elements that Bob has gone through in existence in those countries? And I think if you go down his list, I think you'd probably have to concede that law was superior. That clearly was true in these countries, but then start looking at quality of law. Every one of the elements that Bob listed, if you judge the Soviet bloc countries, you'd have to say they simply did not have rule of law in those countries.

2. See Robert Stein, *Rule of Law: What does it Mean?*, 18 MINN. J. INT'L LAW 293 (2009).

And so when the American Bar Association was confronted with this idea that we have the world divided into East and West back in the '50s during the Eisenhower Administration, the American Bar Association started talking about the rule of law. Very few people in this room will remember the May Day parades in Red Square with battalions of troops, tanks and artillery roaming through the square and military aircraft doing flyovers. This was May Day. It was the day of great solidarity of socialist countries, and celebrated in most socialist countries.

Well, the American Bar Association came up with the idea, not for parades, particularly not military parades, but instead we would go to high schools and bar associations and we'll give speeches about the rule of law. And what we'll do is we'll contrast what happens in our society, with what happens in these Soviet bloc countries. And this was a very successful program for years and years.

I told the story yesterday in Robert Stein's class about when I was about to become president-elect of the ABA. I was told that Law Day was such an enormous enterprise that I'd have to get started about a year and a half before the day, develop some canned speeches to hand out to lawyers and judges to give them some ideas about how they might speak about the rule of law.

[Comment from the audience about the nature of May Day not recorded.]

There may be people who dispute my characterization of May Day celebration in the Soviet bloc, but let me say that at least in the United States the wide perception was that this was a demonstration of military might. And May 1st was typically the day that if Russia had developed a new aircraft that you'd learn about the new aircraft by seeing the flyover of the new aircraft. At least as it was communicated to the western world, I think there was a strong military element to it. Clearly it was not the idea that there was some discussion about the rule of law.

The point I wanted to make was when the fall of the Berlin Wall occurred in 1989, just before I was getting this briefing from ABA staff, it seemed to me pretty preposterous that we were going to go out and merely talk about the rule of law again. Instead we could actually provide technical assistance and start doing something to help move toward the implementation of the rule of law. And at that point, I went to a number of ABA people, talked about it, and after getting approval from my predecessor, Jack Curtain, I then went to Homer Moyer. At that

time Homer was the chair-elect of the international law section and we engaged in a conversation about several topics. I'm going to quit talking and let Homer take the story from there.

HOMER E. MOYER, JR.: Good morning, it's a great pleasure to be here and thank you for the opportunity and occasion for reunions with Sandy and Mark. Sandy's reference to that lunch underscores the point that there's always risk if you have a meeting or a meal with Sandy D'Alemberte that you may end up painting a fence of some sort at the end of that lunch. Sandy has always been just a wonderful source of creative ideas. And out of that discussion ultimately emerged this idea of CEELI and I want to emphasize that, at the time, that's truly what it was. It was a notion, an idea viewed as quite a radical one at the time. And there was a great deal of suspicion within the American Bar Association about this kind of extraterritorial adventure. There was great skepticism in the U.S. State Department about what this group of lawyers would really be up to going to these countries. It took probably a year to convince both of those bureaucracies, which were more or less equivalently intimidating.

To get this idea off the ground, one of the first things we did was take a couple of trips because this could be seen as a presumptuous idea with these countries that were establishing their independence. Would they have any interest in hearing from American or even West European lawyers about the law reform process? Would anyone have an interest, would they think it was inappropriate? So we went and we asked that question. Those were quite extraordinary trips because you got an immediate sense; you have to think back that this was on the heels of the Cold War. These countries were being liberated in a way that generated enormous public enthusiasm and exuberance. People were in the street, people were having meetings, and they were organizing. It was a very heady time in these countries. And the reception we got was uniformly positive. We would love to have that kind of assistance.

Let me mention one or two of the founding principles before I turn to Mark because I think in hindsight they proved to be enormously important to us. Probably much more important than we realized at the time. One was if we were going to do this project, it was going to be responsive. That is to say we should go where this type of assistance or expertise was wanted rather than to march in and say, "Hello, we're here from the U.S. and we're here to help." And a second principle was that

this should be policy neutral. What I mean by that is that what we could offer was expertise. We could make available people who had wonderful experience and expertise in different areas of the law and make them available as resources. But to do that, not by way of handing a recipe or a plan to any of these countries, but to facilitate the process of their making their own decisions about how they wanted to structure their own governments, legal systems and laws. And finally we decided at this time this should be purely a pro bono activity. This should not be a subterfuge for American lawyers to go and try to develop business. So we developed fairly draconian conflict of interest rules. That if you wanted to participate in this project, you really had to avoid conflicts and have a cooling off period afterward in terms of any business activities.

And I think those initial parameters made an enormous difference and gave us a type of credibility. Eventually—this is a project that started very modestly—as the project grew, American lawyers had a great deal of credibility because they were there without an agenda. They were not there to tell people what to do or how they should do it, they were not there to advance a policy, they were there to facilitate and if a country said “we would like expertise in criminal law” we would turn and reach into the American legal community and get some of the best criminal law experts in the country and have them go and sit down and serve as a resource for these countries. Mark, you may want to add to that, or differ from that, but those principles, which we probably came to less thoughtfully than it may sound in hindsight, I think served this project very well.

MARK ELLIS: Yes, I know. Following on Homer’s thoughts, I was thinking of this issue because the transitional process of the reform effort taking place after the fall of the Berlin Wall actually became a fundamental principle, and CEELI’s ultimate legacy. In fact, the impact affected technical assistance programs, not just in Eastern Europe, but throughout the world. The process of reform came first and foremost through what the emerging democratic countries were seeking from CEELI. They wanted assistance on constitutional drafting; all of these countries were in the process of drafting new constitutions after 1989. CEELI was relatively new and, thus, we were uncertain about the exact approach we should adopt in providing the assistance. We were, in fact, overnight inundated with requests from eight, nine, ten countries that were asking CEELI for assistance. So the first step we took was to establish a

procedural approach for the assistance. Even today I think this is the most important decision we made and it set the foundation for how CEELI conducted technical legal assistance in the future. It was actually a funny insight for me. I had just been hired as CEELI's Executive Director; I had certainly never been involved with drafting any country's constitution, so I called a colleague of mine from one of the Ivy League schools in Boston and asked if he could give us any insight on what we needed to do for the first country that had asked for assistance on drafting its constitution. It was Bulgaria actually. The professor said, "Mark, not a problem, I'll get back to you in a couple of days with some thoughts." And two days later, I received in the mail at my office a draft constitution and the headline was "The Republic of _____". And throughout the 20 pages—perfectly written, I suspect within the context of constitutional law—was a document that had many blanks; CEELI would just simply have to fill in the blanks with the name of the country we were assisting. I said to myself, "I don't know much about constitutional drafting, but this is probably not the way we should go about it."

HOMER MOYER: Sort of a cereal box kind of constitution.

MARK ELLIS: Yes, exactly. And this gets back to what Homer said about this being a process that needed to involve those in the countries that we were assisting. Thus, in the end we decided CEELI's constitutional assistance program would incorporate two principles. First, we would never draft a constitution; we would require each country to provide us with a first draft of their constitution. This would not be difficult because all of these countries had established drafting committees. Second, we would put together teams of constitutional experts who would come to the targeted country, for instance Bulgaria, and sit down for a week with the relevant drafting committee. The CEELI team would simply be a sounding board. This ensured the true origins of the country's constitution. Yet, the CEELI team was able to sit there and comment on critical issues such as the independence of the judiciary and separation of powers. And, an important side note to this process, which became a hallmark for CEELI, is that we knew the CEELI "voice" needed to be a voice that included non-U.S. expertise. And so we did an extraordinary thing, at least at that time. We went out and brought in Europeans as part of the CEELI team. This was extraordinary because we were being funded at that time by the U.S. government. They were not too

keen on CEELI using U.S. taxpayers' money for supporting European participation. But we were absolutely adamant that in order to gain credibility for this new process for providing technical legal assistance, we needed the European voice. And so this entire process created in the very early days of CEELI became a hallmark of CEELI and has stayed with CEELI for these many years.

ROBERT STEIN: Homer can you fill in one other part of this? As I think will become clear throughout the morning, another figure who was very important in the history of CEELI was Justice Sandra Day O'Connor. You might talk about how she was brought to this if it's appropriate in a large setting like this to tell the story. Homer had met her just after she moved to Washington, having been appointed by President Reagan and living in a rented place with rented furniture. You made sort of an inauspicious introduction to her that was so embarrassing you later felt comfortable asking her to get involved. So why don't you run through that, and talk about what she's meant to CEELI.

HOMER MOYER: Bob encourages me to tell this embarrassing story before larger and larger groups of people. The short version is that we met at a dinner party soon after Justice O'Connor arrived in town. Her clerk had a birthday and she had a small dinner party in her honor and they were in an apartment, as Bob says, with rented furniture—rickety furniture, in hindsight. Soon after we arrived I was sitting next to Justice O'Connor. It was summer and I had a gin and tonic in my hand. We chatted and she stood up to go check on the chicken. Just as a gesture, there was quite enough room for her to get by, but as gesture I moved my chair just a bit backwards and heard the sound of cracking wood. The leg of the chair snapped completely off and I did a perfect reverse summersault into the middle of the floor. Lime, ice cubes, all over the floor. John O'Connor rushed right over and said, "not a problem, just sign right here." We had two friends, a partner and his wife, who were on the couch opposite to me and as I rose up, I will never forget their ashen faces at having known this person who had just committed this extraordinary faux pas in front of the newest Justice on the Supreme Court.

But that incident did embolden me when Sandy and I were talking after the ABA said "you may start this project and you may start it with a special committee of the ABA." That was insufficiently elegant to us so we simply renamed it the

executive board and we were brainstorming about who we might get on the board. I said, well I may know Justice O' Connor well enough to call and ask. I did and she listened to the description of the project and uncharacteristically, I now know, said, "I think that's something I'd like to do." And she came on the executive board from day one; I think she did not miss a meeting the first decade of this project. I don't think she brought a great deal of international expertise at the outset, but she became not only a wonderful symbol and wonderful source of credibility for us, but she became a passionate proponent of the rule of law and she was an inspiration for all of the volunteers, whom we'll talk about some more. And vice versa, they were a great inspiration to her and to the rest of us in terms of people who dropped what they were doing and went to Slovakia, or Kyrgyzstan, or some other non-garden spot for a year or more, to serve on a pro bono basis, without pay. So between Justice O'Connor and Ambassador Max Kampelman, we covered the political spectrum. But they were wonderful assets and great judgment and really made a big difference, Bob, as your question suggests.

ROBERT STEIN: So we're going to throw it back to Sandy. You've got now an executive board, you got a request for a lot of constitutions from these new countries, what happened next Sandy?

SANDY D'ALEMBERTE: Well money makes a difference, you have to figure out where the money is and I had had a little bit of experience working with USAID. Homer just blanches every time I mention the Caribbean Law Institute because central Europe is not the Caribbean, still I'd had some experience working with USAID and I knew that USAID was doing an awful lot of rule of law work, advancing the interest of judicial systems, independent judiciary and so forth throughout large parts of the world.

Up until the fall of the Berlin Wall, they were not at all in this region that we're now dealing with, but it was pretty clear that we were going to have to go there. So what we did was a process of getting to know the people who were going to be handling the funding for central and eastern Europe and we did that in a couple of ways. We walked the halls of Washington; we got people to help us out. Senator Bob Graham from Florida was very helpful, Jimmy Leach who's just now attending the world economic forum but was a Republican Congressman from Iowa was very helpful to us in the early days. Mark and I got

ourselves invited to go to a meeting of a congressional caucus on Russia and Central Europe and it was something sponsored by the Aspen Institute. And they were holding their first meeting after the fall of the Berlin Wall in Eastern Europe and it was actually in Prague, so Mark and I got to be there with about. . .

MARK ELLIS: Twenty, twenty-five. . .

SANDY D'ALEMBERTE: Twenty congressmen, senators, both parties and we had a three or four day shot at talking to them. They couldn't walk out to have a cup of coffee without Mark or me hanging on their shoulder trying to convince them that we ought to be introduced to their committee staff or whatever else. About that same time, Homer was going to Poland with the Department of State people to do a first assessment. To go with government officials to look in the region and find out what the people in the region wanted done, so really our next process was trying to engage the funding resources. We had a little bit of private money but most of the money from the beginning came from federal government funding.

ROBERT STEIN: Well these days earmarks are sort of a dirty word, but my understanding is you were encouraged to proceed that way. Who could address that subject?

SANDY D'ALEMBERTE: It really was not so much, by the time we finished this process, I don't know whether we ever got a hard earmark, did we, Mark?

MARK ELLIS: You know it's funny because thinking back then, at the end of the ten years, I think CEELI's annual budget was 18 or 19 million dollars. It's much more now. In CEELI's first year, we received a grant from the National Endowment for Democracy, which was a congressionally mandated entity. There must have been sufficient support from Congress, and perhaps the Department of State, to instruct the National Endowment of Democracy to grant CEELI some start-up funding. The amount was 400,000 dollars. I remember thinking that it was the most significant amount of money I could ever imagine in starting this type of program. And that's how CEELI started.

ROBERT STEIN: That's the soft earmark that I remember. How did you then get to the point where you put somebody on the ground . . . who wants to take that? You want to take that Mark?

MARK ELLIS: I'm sure all of you have been involved with programs, whether domestically or internationally, where there are moments in the journey that become defining moments. For

CEELI, one of those moments was when a lawyer from Boulder, Colorado called the office. We were about one year into the CEELI program. Until then, we had been conducting our technical assistance programs by flying individuals in and out of countries for short visits. And this attorney from Boulder said, "I come from a law firm that is allowing me to take a sabbatical, a paid sabbatical for a year, and I've heard about your program and I'd like to participate, and I'd like to go overseas to work for CEELI wherever you want to send me." Well I remember thinking "that's just odd to me, a guy from Boulder, Colorado wanting to do this" and I put him off a bit but he kept calling me and badgering me. And I told Homer about it and said we've got this guy who wants to do a long-term stay, what do you think? And we finally decided, what the heck, let's just let him do it. I was eager because I didn't want him to continue to call me! So we sent him to Bulgaria, thinking that would take care of him fairly quickly! So he and his wife Jane headed off to Bulgaria. And within a period of 30 days, we experienced a defining moment that would transform the way we operated CEELI. We knew then that we would have to alter the entire CEELI program and find a way to station people on the ground for long stays because of the significant advancement Bill Meyer made in a period of 30 days. He had created this remarkable rapport and successful program which ultimately transformed CEELI into a program that attracted lawyers who were no longer going to participate for just a week or two weeks. Still following Sandy's mandate of pro bono service, we were now going to ask attorneys to take a year, and sometimes more, out of their lives, and go overseas to work for CEELI pro bono. And amazingly, attorneys lined up and made this new approach to technical legal assistance work.

SANDY D'ALEMBERTE: It's worth noting that in the process of getting the American Bar Association board of governors to approve this project, there was a great deal of concern that the ABA would expose itself to liability by having offices in foreign countries. And Homer and I, particularly Homer, gave a solemn pledge that it would never think about doing that. Bill Meyer turned us around.

HOMER MOYER: It took some careful lawyering to understand that putting Bill Meyer in Bulgaria was not really inconsistent with the commitment we had made to the American Bar Association not to send anyone overseas.

MARK ELLIS: And your pledge never to create an office

haunted me when Russia required that foreign organizations doing work would have to be incorporated. We actually had to create a corporation and I was hoping not to lose my job!

ROBERT STEIN: Homer, talk about where the program went next, you've got Bill Meyer on the ground in Bulgaria and how many countries did you move into . . . ?

HOMER MOYER: Well, we began in six countries in Eastern Europe. Expanded a little bit gradually and really within the first year, year and a half of the program, the Soviet Union began to dissolve. And so we had a policy question of whether this little fledgling project would extend its offer to assist to countries such as the Baltics and other countries that were emerging from the former Soviet Union and the board decided to do that. If you jump to the end of the process and the function that Bill Meyer served on the ground as coordinator came to be termed "CEELI liaisons". By the end of the first decade I think we had had over 500 lawyers go from the United States and Canada as CEELI liaisons or long term legal advisors to live in various countries without pay and ultimately CEELI operated in 29 or 30 different countries. But it was an extraordinary group of people and liaisons came in all shapes and sizes. We had lawyers who were relatively young, who'd spent four or five years practicing law. We had mid-career lawyers, like Bill Meyer that simply stopped and took a year. We had retired lawyers that picked up and went to the Ukraine or went to Lithuania and those were on our side of the ledger, the CEELI side of the ledger, the heroic figures. I mean they did remarkable, remarkable things and they were working with heroic figures on the other side of the ledger and have created a unique kind of chemistry and exuberance.

ROBERT STEIN: I think we have in the audience someone who went to one of the countries. Bob Bayer, you went to Moscow, didn't you?

AUDIENCE COMMENT: [Inaudible.]

ROBERT STEIN: What were you doing before you got involved in CEELI, if you could speak up a little bit, we don't have a microphone there.

AUDIENCE COMMENT: Well, I have an undergraduate background in Soviet Studies. . . I was sort of their liaison into the Minneapolis area and then I taught a Soviet Law class at William Mitchell for a few years and then the opening came up to go to Ukraine. I had been a partner at Dorsey and quite frankly I was looking to do something different. So that's how I

wound up going overseas.

ROBERT STEIN: They're amazing stories, each one is a wonderful story in and of itself of people who went and made a big difference. Mark, how would you assess the work that was going on during this period of time? Can you talk about some of the triumphs?

MARK ELLIS: Well, I think there were many triumphs, there's no doubt about that. There were also failures because what we were doing was all new. It was a blank page that we were working from and we had to create a program very quickly because of the remarkable speed of transformation after the fall of the Berlin Wall. All of us involved were facing demands for things to be done, including unrealistic demands. I recall in the early days of CEELI, the State Department and USAID were saying the process of democratization occurring throughout Central and Eastern Europe would last maybe one, perhaps two or three years at tops. The expectations were that these countries would find their way and that CEELI too would be a short-term project. Well, as we all know, those expectations were unrealistic considering the struggles that these countries were facing. Looking back at the process we adopted—I already mentioned the constitutional drafting assistance as the first CEELI program—there is a logical progression in the approach to technical legal assistance. But one aspect that would be interesting to debate, even today, would be whether or not one should focus on institution building at the initial stage of technical assistance in countries facing the type of reform that we witnessed in Eastern Europe. I have some thoughts on that issue, having reflected on it over a number of years. But at that time, institution building was not necessarily the top priority. However, now when you look at the life span of CEELI you quickly see how CEELI started moving toward supporting institutional development, such as creating judicial training centers, bar associations, media centers. This focus of institution building became an important focus for CEELI towards the mid-1990s and represented an interesting progression.

ROBERT STEIN: It might be easy for the audience to have this progression in mind. You can probably divide rule of law work into many, many phases. Some writers have divided it into three phases. The first being the phase of writing statutes, constitutions—zipping in to get a specific thought. "We need a law to permit stock to transfer," and various things that frankly can be accomplished in a short period of time. That's the easy

part of the rule of law. Often times we can look back and see successes.

The next phase might be, in this particular categorization, the institution-building. Within the country strengthen the judiciary so that it becomes independent and can carry out its responsibilities. Strengthen the legislature to help its legislative staff research the way to be an effective, functioning legislative body. Strengthen the law schools to train the next generation of lawyers. Help add curriculum, help the faculty and so on. Institution building is not a race for the short win. It takes a long time to get strong and effective institutions in countries that have not had those institutions, some of them, ever in their existence.

And the third would be creating a change of culture. This is by far the hardest part of rule of law because it might not happen in a life time. To change it to a situation where the norm is that people expect the law to be followed. The norm is that judges don't expect to be instructed on how to decide a particular case. The norm is that people don't expect corruption to be part of everyday life. The norm is you don't have to pay a bribe to the person who grants a license. And so it requires a continual effort over a period of time to get there and I think it's fair to say in many places that third phase is still a phase that is a work in process. I saw a hand up over here.

MARK ELLIS: May I just respond to Bob as he's getting ready to ask the question? I think one of the interesting debates should occur, perhaps in Bob's classes, is what he discussed between points one and two. It is the issue of the drafting process versus institution building and the question as to whether or not institution building should be, in fact, at the initial stage of the process. At least there should be a parallel track for institution building with the more direct legal reforms. The reason is that civil society should be involved with the process of constitutional drafting or legislative enactments. During CEELI's early days, there were no judicial centers or bar associations or other civil society organizations. So one of the issues of debate is should we have focused on institution building at the very start of the technical legal assistance process? Or should we have waited for a more natural progression into institution building? It's an interesting question for us.

AUDIENCE QUESTION: You mentioned democracy and democratization as a very important part in this process, so I

want to know to what extent do you consider free markets and capitalism as part of the concept of democracy? And which leads me to another question. If you think it essential to have free markets in a democracy, what role did you play in setting the ground work or the legal framework for the bunch of free market reforms that happened in the region during that time?

SANDY D'ALEMBERTE: You know the person who really ought to respond here is Homer, but I want to work in a quick story. Quite early on, I think in 1990, Mark and I were meeting with the Chief Justice of Czechoslovakia. He had been [Václav] Havel's defense attorney when Havel had been convicted and sent to prison. At the point when we were meeting, of course Havel was president of Czechoslovakia. We asked the defense attorney what he did to defend Havel and he said, "I didn't do anything to defend him. He couldn't be defended; all you could do is argue in litigation. I brought him cigarettes and he appreciated that. And now I am the Chief Justice." Mark and I asked where do you think we ought to start? The whole idea is we want to find out from the people there what the starting point is. He said we've got to get our economy going. He said this government cannot survive unless we can have a strong economy. So Mark and I responded, "Oh, so we should start with the commercial code?" He said, "Oh no, you've got to start with the criminal law." We asked, "Start with the criminal law in order to get the market economy going?" He says, "Yes, because what you call entrepreneurship, we call speculation and we prosecute it. And until you let people know that they are not going to be prosecuted for the kinds of things that are necessary in order to make a market economy work, you know you're not going to get the energy that you need to have in the economy."

There is a discussion that Homer and I have been having, we were always determined that we should get the agenda from the countries but we were both speculating about what our principle work would be, I always thought it would be on the human rights side. And Homer, who was far more experienced in international commercial transactions, was pushing the other way. The truth of the matter was we both came to understand that these have to be developed together. But Homer, you have more sophisticated thoughts about that.

HOMER MOYER: First, I think that's an excellent question and I think the answer may be different looking back on the CEELI experience from what the answer should be. The second hour we're going to be talking about what's the future on law

reform going forward. Because I think it's a very interesting question, the extent to which rule of law is different from democratization, which is different from free markets and Bob touched on this in his comments and I think it's a fascinating question going forward. At the time, the vignette that I remember was being in Poland and it was the brand new minister of justice who was across the table and I asked some naïve question I'm sure about commercial law reform. I probably suggested lowering its level of priority. He leaned across the table and he said you have to understand that if our economic reforms fail, our political reforms fail. And I'm sure that that was a very common view at that time. I think looking back on it, it's a very different and interesting question. Economists talk about or talked about the J curve. The J curve was the notion that before things get better, they'll get a little worse and then they'll start getting better. I'm not sure that's the right shape. It may look more like one of those horns where they advertise the lozenges. Getting better takes a much longer period of time. When we come to more recent times I think we're going to see that there has been a blurring of lines, some confusion and some abuse of the term. By melding all of those concepts together and indeed the term democratization, which is associated often with the rule of law work, itself being abused and expanded to cover things that create a great deal of baggage for the rule of law.

MARK ELLIS: May I just add something? Because it's again a fascinating question. I remember one issue as not being a positive aspect of the legal reform process and that was organized crime. I remember this issue because of the rush for embracing economic and market reforms. These countries were very eager to rid themselves of losing assets, generally state companies. They were also being pushed by international players, such as the World Bank and the IMF to accelerate this transformation process; the countries did so by selling assets at bottom basement prices without much transparency. That was the start of the growth of the oligopolies that emerged in many of these countries and that I think was also the catalyst for much of the organized crime that sadly became synonymous with many of these same countries. So this too is an interesting lesson to review. I don't think there has been much discussion or writing on the issue. But it's an interesting process when you look at economic reform.

ROBERT STEIN: As we talk about going forward, let me just save this topic for a little bit. I think we should return to this in

the second hour. Let me just say this to key it up. Many of the commentators on the rule of law say that it is certainly an important, if not essential, condition for economic progress. Justice Breyer has in all of his speeches identified economic progress as one of the important indicia of the rule of law. And certainly there is a strong correlation in many nation states between seeing their economic well-being improve and seeing the conditions we've identified as rule of law begin to manifest themselves. But there are contradictions that make it hard to explain. China is the big perplexity right now with the fastest growing economy in the world for the past decade, but most people would not consider China to have a very robust rule of law. Certainly in terms of that content element that I described as of having respect for human rights and human dignity. And so as this whole subject has begun to move into the school of management right now, there's a lot of writing beginning to emerge on this subject and a dichotomy has developed between a so called thin rule of law and a thick rule of law. A thin rule of law is, you might say, a system that has many manifestations of important enforceable laws, like enforcement of contracts, certainty of contracts, respect for private property, those kinds of conditions. And arguably you can begin to have economic progress if you have a thin rule of law. But the thick rule of law would be more robust and would involve these moral components and I suggest, again we're speculating about the future here, that ultimately in order for those economic gains to be sustained, as they create a middle class that has certain expectations of their government and expect to be treated in particular ways, this will cause demands for a more robust rule of law that becomes thicker as the economic gains continue. But China bears watching as we go forward into the future to see whether or not that hypothesis is correct. Bob, did you have a comment?

AUDIENCE COMMENT: Yes, I wanted to comment. One of the continuing problems when people talk about free market economy is that often times they have in mind the collapse of the Soviet Union and the seizure of all the assets by the oligarchs and there really wasn't a legal framework to control that. But they started seizing it before the Soviet Union collapsed. There's a book called "The Oligarchs" that traces their rise and history. Another issue was USAID, which was a principal funder for all American rule of law programs, which in the mid to early '90s had an emphasis still on economic

development rather than rule of law. Our country director for USAID in Ukraine and programs were constantly getting cut, reinstated, cut, programs get dropped, you plan things, you can't do them. The budget was being cut. The USAID director said he was going to zero out all of the rule of law programs; only economic programs are going forward. But the ambassador who had a law background took him aside, basically took him to the woodshed and said, "no, you will not do that, look what happened in Russia. We will not do that in other countries." So that is why it got better after the Russian experience.

AUDIENCE QUESTION: Thank you, I am from Ethiopia and I do remember during the early nineties, '94, '95, when the Ethiopian Constitution was being drafted in Ethiopia and we used to have American professors coming to some of those drafting meetings and we see them on the media, state media, technically saying that we are having the expertise of American professionals in helping us drafting this Constitution and the meaning behind it is legitimizing the process also it is not democratic in a sense. What do you think of your contribution in terms of the failures that you see today when you reflect back now, on some of those countries where you might have been involved? And the challenge that those countries are facing because the foundations of some of those things, the constitutional drafting and the whole institution building processes were not that democratic or that legitimate in a sense? And it amounted to the current failures, particularly in terms of rule of law building, respect for human rights, and democratic institutions? Thanks.

ROBERT STEIN: Mark, I think that's a good one for you because you talked about the process, this particular program CEELI dealt with central Europe and Eurasia and the former Soviet Union, although work like this was going on in other parts of the world such as Ethiopia. But in these particular countries you talked about the process earlier Mark. Why don't you return to that.

MARK ELLIS: I think it's an excellent point. Going back to the discussion about process. It's the approach of simply providing and acting as a sounding board, rather than being involved in the actual drafting process. Even countries that were eager to have CEELI play a much more active role in the drafting process; we just refused to do so. Actually, I recall instances where I thought the ultimate decision by the drafters would cause problems in the future for the particular country. I

remember that very well in Romania. They had failed to engage civil society in the drafting process. They didn't have a referendum on the Constitution, which I thought caused real concerns because citizens were not able to truly say that the Constitution was theirs. And sure enough they did have problems. The one saving grace that I saw regarding the constitutional process was when a number of these countries created constitutional courts. Bulgaria, Hungary and the Czech Republic were certainly successful in creating these new institutions that became exceedingly important in working out some of these constitutional issues vis-à-vis the rights of citizens. I think these countries were much more successful in getting over the hurdles because of the early establishment of the constitutional courts.

HOMER MOYER: I think your question touches on another point as well, which is the distinction between what's written on paper and what the reality is. The title of this symposium refers to the global rule of law culture. And that's something that we've come to appreciate much more than we did originally. If you went back and read some of the communist constitutions, some of them read quite well. There were things there that would resonate and you would say, well that's laudable, that's the right kind of objective. But it didn't reflect the reality. I listened very closely to Bob's thoughtful definition of the rule of law and I think one of the trickiest parts of the definition is that so many of the definitions, particularly some of the earlier ones that Bob alluded to, say that the rule of law is a function of an institution or government's structure on paper. When, in fact, the rule of law really is a pattern of governmental conduct. And so the question is not whether you have courts, it's how those courts operate day to day. It's not what the constitution necessarily says, but whether it is honored. I think an excellent litmus test is whether the laws of a country in fact control the behaviors of the government. And that question is not a question of whether or not a document or constitution says that. The question is whether that's reality. Whether courts overrule, turn back, or stop overreaching by the government. And so I think, it's one reason you can have abuses that reflect failure of the rule of law in democracies. We may be exhibit A in that respect in certain ways. And so I think that one thing that makes this elusive is whether you have a functioning rule of law depends on your system, whatever it is in practice.

ROBERT STEIN: Sometimes some argue that because the

rule of law is so hard to define, maybe the best way to define it is negatively. We think we know when it's not there and it's a progressive idea.

SANDY D'ALEMBERTE: I think it might be worthwhile to insert the role of the European Union at this time. I've said publicly several times that I was disappointed with the European bar associations and others who should have been stepping forward and doing more during this very dynamic time. And we made earlier efforts to get organizations involved. This is before Mark Ellis was executive director of the International Bar Association and before people like Robert Stein were on its board. And so we simply did not get the kind of buy-in by other bars that we had wanted. But I do want to observe that since we were working in the areas of Central and Eastern Europe the idea that these countries wanted to become part of the European Union became a very important dynamic because you can't be in, you can't even aspire to be in the European Union until you've joined the Council of Europe. And when you join the Council of Europe, you have to agree to the European Convention on Human Rights and you have to submit to the jurisdiction of the European Court of Human Rights. So now we have nations newly merged into a system trying to figure out what their system is. But they have at least a pretty good model, really almost a constitutional model for the European Court of Human Rights. You'll find some places (Mark mentioned Romania) actually adopted the European Convention on Human Rights as its bill of rights. It's incorporated into the constitution. And so this play of European judicial power, where you have a real bill of rights and you have real courts enforcing that bill of rights, helped move this process quite nicely. And Mark reminded us yesterday that at one point CEELI conducted programs to train people to bring cases before the European Court of Human Rights. Suing your own government? You can go to a European court and sue your own government! Good God, this is radical stuff. But I think it was a very important dynamic.

ROBERT STEIN: Is there a question over here? Charlie?

AUDIENCE QUESTION: Thank you. First of all I just wanted to thank each of you for coming. It's a great honor to have you here and we appreciate the efforts you made to come here to our university. My question is kind of a follow up to some of the comments that were made a few minutes ago. Specifically I am referring to an article that the Economist had last spring that I

think it's safe to say kind of cast out the importance of the rule of law for economic development. They even suggested perhaps that economic development leads to the rule of law and not vice versa. And I'm wondering to what extent you agree with that or disagree with that and if it is true or if we find it's really economic development that leads to the rule of law, how that changes the role or the work of CEELI and ABA, IBA and other organizations involved in this movement?

HOMER MOYER: One of the questions we faced was to what extent are economic liberalization and free markets engines of political reform? And for quite a long time I think that the view of many commentators was that this is the path for China. As China opens up economically, that will lead to political reforms. We don't know the long term answer to that yet, but the short term answer is that in China and Russia and some other countries, an alternative model is emerging. Strong arm political control together with certain market reforms is an alternative path to prosperity. This has been buoyed by the price of oil. And so you have countries that have not had the kind of rule of law political reform that we would espouse as part of the rule of law, that are doing very well right now economically. And if you are a country with autocratic rules, as is the case in many African countries, you can now look and see a different model and indeed there's some proselytizing by the Chinese or by the Russians on exactly that. So it's a very interesting question, I think. I told you the answer we got in Poland a couple of decades ago. But beyond that I think it's still a good question. It certainly is true that economic reform in terms of international business, as opposed to exploiting your own natural resources, really is dependant on a functional legal structure in rule of law. Trade, investment, and the like will be retarded by the absence of legal structure. But selling your own minerals or oil or natural gas is something that can take place without regard to political reforms. You guys want to add to that at all?

ROBERT STEIN: Why don't I try to move us forward and let that stay? Very good answer. A little bit closer to the present, along about eight, ten years ago the type of work CEELI did began to change in terms of how it was carried out. We talked earlier about this era of thousands of American lawyers and judges becoming resident liaisons in all of these countries. And then the funders began to think, apparently, there must be a better model to accomplish this. Homer, can you talk about that

a little bit. What happened?

HOMER MOYER: Sure, initially CEELI was driven by volunteer, pro bono activities. It was lawyers, it was within the first two or three years we had volunteers from every state in the United States. There were specialists and experts in particular areas of law, but the liaisons (the in-country coordinators) were not necessarily. And there developed within USAID some question about the relative value of volunteers as opposed to paid experts. Paid experts are obviously a lot more expensive. Ironically a program with paid experts funded by USAID gave USAID more control over the program than a program of volunteers. And I think our bias, having seen the extraordinary results from volunteer lawyers and judges, our bias tips that way. But there is an industry, there are commercial firms, that are in this business. And if one of those firms wanted Bob Stein to go to Uzbekistan, they would offer to pay him an hourly rate. And these firms have hired a lot of former CEELI volunteers.

SANDY D'ALEMBERTE: Not to work in the countries where they served necessarily.

HOMER MOYER: That's right. Bob's used the term Peace Corps and that's apt in some sense in the excitement that the process generated. If you were not there doing business, you were there wanting to help a historic process move forward. It was quite a different dynamic and one of the serendipitous aspects of this program was the impact it had on lawyers who participated. It caused you to think differently about your own country, ask questions about issues you had taken for granted, whether there's a different or a better way to do what we do. Someone might turn and say should we appoint judges or elect judges? Well that's a terrific question. We do both and that's a pretty lively topic. But one of the unexpected consequences of this was it very often became a formative if not a life-changing experience for the volunteers who went and spent a year doing this.

MARK ELLIS: I think the pro bono part of CEELI was the singularly most impressive and moving aspect of the entire program. In fact, it was suggested last night at dinner that perhaps we're facing that time again where there's an opportunity to seek out the service of lawyers to spend time to assist in a reform process occurring in new countries. That's what CEELI did in 1989 and lawyers lined up row after row to participate in this historic mission. I want to make two points.

Even though CEELI was a pro bono project, we still had to deliver a first-rate product. It wasn't sufficient for CEELI to simply go out and praise itself for the fact that all of its lawyers were out there doing good deeds. We had a job to do and we had to accomplish that task at the same level as a for-profit firm would do. That was the challenge we faced, and I think we met that challenge. I'm highly critical of the U.S. government, particularly USAID, for shifting its support toward for-profit firms. It has diminished the unique part of service that lawyers bring to these types of legal assistance programs and today's approach simply does not have the magic that it did when we were calling on lawyers to serve pro bono. I hope all of you will have the opportunity to serve in this type of role, somehow and at sometime during your career.

SANDY D'ALEMBERTE: I agree with your remarks. Let me also isolate one development. At some point, while CEELI was going forward, Mark and Homer dealt with the attorney general and convinced Janet Reno that she should start a program in which she would send federal prosecutors and others who were paid. And there was a little bit of tension there but overall my sense is that, out in the field that worked out pretty well.

MARK ELLIS: Yes, that to me was very different. The Department of Justice participated in these programs by having their own people working in the field and we did work very well together. What I'm critical of are the for-profit firms that used this opportunity to enrich themselves. And essentially doing the same work that CEELI was doing, and that CEELI had been doing for years pro bono at an exceedingly high level. And the fact was that these same for-profit firms would ultimately go and hire the CEELI representatives that had just spent a year working pro bono for CEELI. It was frustrating and it was the wrong decision made by the USAID and I hope this new administration reverses this policy. I think the new administration has an opportunity to once again do something quite unique in history by supporting pro bono service.

HOMER MOYER: One thing this project did was tap into a public service impulse that I think is part of the DNA of our profession. Lawyers have not always had good press and don't always get good press. But there was an outpouring of assistance and willingness to go and do something that would really make a difference. For those of us who saw that up close, it was. . . it was inspiring. And that gets submerged from time to time in the profession and the busyness of billable hours, CLE,

contingent fees and all the rest. But it's an enormous asset of our profession and of our country. As Sandy said, it's distinctively American in many ways, this public service/charitable instinct, and is important for us to preserve.

ROBERT STEIN: Well it's an interesting time for those of you who have in mind possibly choosing this area after you finish your studies as a career direction. It bears watching what the direction will be. The argument that the funders have made is that by doing this by contract rather than by grant they can control the quality of it somewhat more by specifying certain contractual commitments that must be made, and certain expertise that must be brought to bear.

MARK ELLIS: That is absolutely a bogus argument. Absolutely.

ROBERT STEIN: And this has been the dominant form of funding this work now and for a number of years. In a paradoxical way, perhaps the difficult economic times we are in will provide an incentive to go back to an earlier model where you can leverage the volunteer work of American lawyers and judges and involve them on that basis.

Can I ask you to react to some articles that have been somewhat critical of rule of law projects that have said a variety of things such as that these projects are not well-coordinated, that they're people just rushing over to do things and this is to some extent a wasted effort? That there's no common understanding among the people that are engaged in this work about what rule of law really actually is, or what are the key things really necessary to change the culture of a country. And those sorts of things need to be understood in order to carry this work out more effectively. The whole movement just began because of the dramatic change in the world's situation 18 years ago and really, for a body of law to develop, there needs to be better assessment and analysis of the success or non success of various approaches. And therefore all of these things are lacking in the series of projects we have been talking about and calling the rule of law movement. What sort of reaction do you have to those kinds of arguments?

SANDY D'ALEMBERTE: We should start with Mark and his efforts to coordinate among all the people in the field. Because Mark invented something called the International Legal Assistance Consortium (ILAC). He cleverly figured out how to get the Swedish government to pay for it, necessitating a number of trips to Stockholm—Mark is willing to take on any

burden he has to take on. And actually that was one of the two things that I hoped we'd be able to talk about before we end this was ILAC and I hope at some point Homer will talk about the incredible work that he did in organizing the CEELI Institute going forward. But ILAC, I think is Mark's domain.

MARK ELLIS: This is a criticism that has been raised on occasion and I think it's always good to question the effectiveness of your work. I would say from CEELI's perspective, our work spoke for itself, at least for the ten years we were all involved. USAID did an extensive review of the CEELI program in 1998. The review concluded how effective the program was and I think this is an exceedingly important legacy for CEELI. There are always issues regarding coordination and the duplication of programs and projects. I saw this throughout my years at CEELI in countries like Kosovo, struggling in a post-conflict environment, where assistance providers came from the United States and other developed countries to essentially conduct the same work that I felt had already been done. We were reinventing the wheel and the concept of ILAC—the International Legal Assistance Consortium—was to try to bring together some of the main players throughout the world who did this type of technical assistance work focused primarily on post-conflict environments. Rather than 25 assistance providers rushing in to compete with each other, the concept of ILAC is to send a team represented by the consortium of these technical assistance providers. The team would then set out a blueprint of what needs to be done in order to kick start the process of legal reform. Subsequently, the members of ILAC would agree to take on certain projects identified in the assessment stage; this would lead to better coordination at the beginning of the reform efforts. This approach by ILAC has worked in a number of places like Iraq, Haiti, and Afghanistan. So at least in the legal field this type of coordination does work and I think ILAC has proven that. However, I do understand that coordination is a big challenge that will always be faced by the international community, particularly in these types of post-conflict environments.

SANDY D'ALEMBERTE: Mark, talk about a specific project like Rwanda or Haiti, about what ILAC did and what the consequences were.

MARK ELLIS: Well, for instance in Iraq, ILAC sent in an assessment team. I was part of that mission into Baghdad which

took place quite early after the fall of Saddam Hussein. It was an opportunity to identify some of the needs for legal reform and to set out a blueprint. Subsequently, members of ILAC would adopt certain projects. For example, the International Bar Association accepted the responsibility to train judges, prosecutors and defense attorneys on international humanitarian law and we created a very extensive program. The CEELI Institute undertook another aspect of legal reform. The Danish and Swedish Bars undertook other parts of the program and so within the period of time in Iraq where it was relatively safe and calm (of course that quickly deteriorated) there was coordination. And this approach has been repeated by ILAC in other post-conflict environments. So I'm encouraged by this approach and by ILAC. Fortunately, because of ILAC's leadership in Stockholm, where it is headquartered, they have done a remarkable job.

ROBERT STEIN: In introducing the panel I was trying to touch a lot of bases in a short time but I'm not sure I fully covered everything. But after leaving the executive directorship of CEELI after ten years, Mark accepted the position of executive director of the International Bar Association and has worked with leaders around the world to develop programs that are multinational programs. Do you want to say just a word about that?

MARK ELLIS: I think multinational technical assistance programs are critical and it's an approach that should receive greater support from the new administration to reengage with the international community. That has been one of the most difficult challenges that the U.S. has faced over the past eight years. How do you now reengage the leadership that we held so readily back in 1989? The world embraced American leadership in bringing forth technical assistance then. You wonder whether CEELI would have been successful during the last eight years. I doubt it. So by necessity, you need international collaboration and participation. That is the cornerstone of the International Bar Association. It works hard to advocate this type of multilateral approach to legal reform.

ROBERT STEIN: Homer, do you want to respond further to this, or I think it would be good to talk about another outgrowth of CEELI, which is something you've put a great deal of your heart and soul into and that's the creation of the CEELI Institute in Prague.

HOMER MOYER: I'd be delighted to. I wonder if I could take

a minute though still on your last question, which I think is so important, and take just a minute to contrast the circumstances that we faced in 1990 and the circumstances that we face today and what the implications are for the rule of law. Because the question you teed off and Mark asked is: could it happen today? There are some big differences. If you look back in 1989, 1990, we had within these countries a very strong, deep reaction to what had been authoritative repressive regimes. So within these countries you had huge pressure that had built up for reform. With the fall of the Wall there was an excitement, there was euphoria, there was a hunger to move forward and change and reform.

And at that time, the U.S. was held in quite high regard. Incidentally, the American Bar Association is held in quite high regard, particularly I'd like to say outside the United States. The American Bar Association label was really quite important to us, then. That was a big plus. We also had at that time what I would characterize as an unsullied concept of rule of law. That is to say it was a new phrase, in terms of a popular phrase, and had not been misused or abused at that time and there was sort of uniform excitement about it. And in the United States there was just this grand swell of enthusiasm and idealism to try and help. We saw it as a historic watershed global event, which it was.

So what happened in the second decade of this? We had in that period a sense that sort of the newness is gone, the bloom was off the rose, the easy reforms had been done, the low hanging fruit has been picked, the hard cases remained and it is uneven and untidy necessarily. And we've seen some of the disappointments and delays and sort of seeing the benefits of reform. And we have come to appreciate that the change in culture, the change in attitudes takes a lot longer than they or we appreciated at the time. There are these competing models now of China and Russia and the prestige of the US has nose-dived internationally. Probably unfair to compare it to the stock market but it is certainly the case that the way we are regarded as a country now is very different from the way it was at the time and that our values are not trusted in the same way. And there are lots of reasons for that. And I think as a result the rule of law is less universally embraced. There are other types of questions like, how this fits with democratization because democratization has been applied to the war in Iraq. Democratization has been an explanation for terrorism

initiatives and the curbing of individual rights. And so as the lines blur, I think that has complicated the picture. If we reflect on all of that and everybody can assess that in your own way. We're plainly at a very different place now, looking forward.

If you ask about rule of law initiatives and reform now and in the next decade how should it be done? I think a fair question is whether the rule of law needs to be delinked from democratization. We're here in the sanctity of academia; we can ask that kind of question. And to what extent is, or should, free market liberalization be a part of it or is that different? Is rule of law an independent value that we should pursue? What about free elections that produce results that we don't like? What should our position be on that, should we promote free elections in those circumstances? But most of all, should we try to prioritize? Should we look for countries where there is some internal pressure for reform? I mean, it's very different in countries in Latin America or Africa than it was in Central America and Eastern Europe in 1990. That's the reality. Should we be selective in terms of our substantive priorities? Should the first order of business in terms of the rule of law be to deal with the grossest abuses, namely genocide, war crimes, crimes against the people? Is that more important than notice and comment and administrative rule making? That's an unfair comparison but if you go across the substantive spectrum, you can make an argument for why each one of those areas is important to reform. But I don't know that we can do all those things. But I think those are types of the question that are teed up. If you just stop and say all right, if we start right now in this troubled environment, how would we do it? Do we have a new window of opportunity with the new administration and a different international reaction to what we had in the United States over the last seven years?

AUDIENCE QUESTION: I heard about work done with leaders around the world, I've heard about institutions, I've heard about judicial systems around the world, business and I'm wondering have you done, or what do you think about the idea of working at a grassroots level just to promote and facilitate the access to the courts? Because if people do not access the courts then this makes no sense at all. I'm basically referring to places like Africa, Latin America, Eastern Europe where there is not that culture of bringing problems to the court system. I'm from Argentina, that's why I'm saying this. We just have this idea of solving problems in our own way, not using the court systems.

So I'm wondering if you've ever done anything at a grassroots level in educating people in how to access the courts and why they should be accessing the courts and not doing it another way?

ROBERT STEIN: Who wants to take that one?

MARK ELLIS: I think that's an excellent point. The issue of access to justice is fundamental to every country, certainly in countries going through a legal transformation process or in post-conflict environments. I think CEELI came to this realization a little late in the process, but I think this was understandable because we were inundated with hundreds of other urgent requests. But when CEELI did start focusing on issues such as legal aid clinics, they became a central focus for us and ultimately became very successful programs. So often in these countries the opportunity for citizens to gain access to affordable legal services is a critical issue. I look back now at the CEELI map and to where CEELI worked on legal aid clinics, and I really think it was the right thing to do.

SANDY D'ALEMBERTE: Also Mark has some public relations campaigns for public education, that's worth mentioning too.

MARK ELLIS: Yes, that's another important point. Sandy reminds me of the media campaigns, media programs and legal resource centers that we created in the former Soviet Union to simply educate citizens on how to protect their rights. This significant knowledge gap in many of these countries was quite apparent and so programs aimed at increasing the citizens' awareness of their own rights became a focus for CEELI.

ROBERT STEIN: There's another CEELI initiative for education of the public about election laws. Some of this was after you left Mark. An interesting thing happening through the early '90s was a number of the oppressive leaders were involved in votes in which the eyes of the world were watching and election observers went and so it became important for the citizens to understand what their rights were to participate in the election. And CEELI had a number of programs, largely in the "Stans," to do media outreach about the new election laws and how citizens could participate and what to do if their rights were denied. Interestingly in Uzbekistan when the leader decided it was more difficult now than before, all of the NGOs were kicked out of the country, including eventually CEELI, and have not been brought back in yet because of objections to this public education outreach.

HOMER MOYER: Well, I was going to say there's another

dynamic which we did not anticipate. Which I think goes to your point of creating the right public culture instead of expectations and that is official corruption. Early in the law reform process, this was really not on the radar screen, but it has emerged as one of the greatest threats to that process. And among the things that it breeds is public cynicism. In places in Latin America it has infected the judiciary. Well, if you believe that you cannot get a fair shake by going to court, you're not going to take advantage of the quote "independent judiciary." And so official corruption really can corrode the rule of law and all of the branches of government. It's something that we have begun to pay more and more attention to, but it's enormously important I think in terms of public expectations, the culture, and public attitudes. Because if you are in a democratic government, you expect to interact with your government in certain ways. You may believe that you can go to court to hold your government in check if it overreaches. If official corruption perverts all of that, it has the potential of nullifying all of the reforms. So I think that is something that emerged during the process and is a very significant dynamic.

ROBERT STEIN: Let me repose that question to you and throw it open to encourage more questions in just a minute but I want to be sure that you have an opportunity to talk about the CEELI Institute, which is an outgrowth of the program we've been discussing.

HOMER MOYER: Thank you Bob, I'll do the short version. In the course of all this, Mark, Sandy and I had had discussion about the fact that we had already broken the barrier of sending people abroad and the question then was wouldn't it be a valuable resource to have a facility in the region that we could use for training, for conferences, and the like. This led over time to ignition of what has become known as the CEELI Institute. The CEELI Institute is really a postgraduate training and educational center for judges and lawyers and legal scholars. After tromping around in many countries looking for the right home for the Institute, we ended up in Prague, in a wonderful old villa that had fallen into disuse. And that has become the home of the CEELI Institute and our lease obligation was to renovate the building, which we have done. And it has residential capacity for nearly 50. We have trained judges from 30 countries already. Mark mentioned 140 Iraqi judges that have been trained at the Institute as well as judges from the Afghan Supreme Court. But it's an institution that is unique in

that its mission is the rule of law. And it is potentially a very nimble institution in that it can focus on whatever issues are most urgent and pressing at the time. And we're pretty excited about the potential of this place and what it can do over the next half century in terms of the rule of law.

SANDY D'ALEMBERTE: If I can just say a word about the CEELI Institute because Homer gives me more credit there. We were involved in the discussion and then he did everything. He found the place, he had some help—Bill Meyer showed up on the scene for another sabbatical. And we had some other people over there, but Homer found the place, negotiated with the city government, raised the money and continues to raise money from an incredible group of lawyers and citizens. And just every day I keep hearing about new gifts he's gotten. It's a wonderful facility, if you're in Prague, be sure to go see it. If you go in the entrance way you'll find that it's dedicated to Homer. It's called the Moyer Foyer.

ROBERT STEIN: Okay, and comments or question stimulated by the remarks?

AUDIENCE COMMENT: I wanted to go back to the question from the man from Argentina. I'm going to speak to the experience of the former Soviet Union because that's where my experience and my expertise lies, but it was a chicken and an egg problem of access to the courts. The Soviet Union's court system was not independent because it was under the authority of the authorities so no one wanted to use the courts. Over a period of years, what they actually did in Ukraine, they become more independent. They liked what they saw of the American judiciary and they understood under a democratic constitutional government they would enhance their status and assume a more important role in the country. And as they started ruling against administration agencies, it encouraged the civil society sector and then we used that to make promotional videos that aired on national TV that sort of had a rolling effect. And we made them understand that an independent judiciary needs a free press to report any information from its opponent. It needs a civil society to support it because an independent judiciary ultimately depends on the public opinion. And each of those other two factors also needs the courts. So over time it did build up access to the courts and more and more people began using the courts to vindicate their rights.

SANDY D'ALEMBERTE: Can we ask Bob [Bayer], we probably should have done this earlier, to tell us what a typical

day was like for you when you were on your CEELI assignment?

AUDIENCE COMMENT: Well it was just a full time job. I usually left the house about 8:30 in the morning and got back about 8:30 at night. But it was, it's hard, I lived in Moscow, I lived away from the embassy in both Ukraine and Russia I actually lived in the economy and the culture and listened. I lived apart from the American diplomatic community, which is a totally different experience. You know you do your shopping locally, you go to the restaurants locally, and you work with the Russian staff on programs. You're just always busy, you have someone who wants something, a report that has to be filed, there's an incredible amount of paper work. Not just ABA CEELI but the private firm I worked for in Ukraine, plus USAID. Plus you have extraneous requests from USAID wanting to come in and find out something they don't know or wanting to repeat something that you've said three times already to somebody else. You have to keep in mind it was enormously helpful to me that I had 15 years experience as a civil litigation lawyer in the U.S. And also I spoke fluent Russian and studied Soviet Law. So I was able to sort of blend the two systems and when American experts came in, usually from the Ohio Supreme Court and law schools there, we worked with them. I was able to say this remark doesn't make sense to your audience because you have to put it in context. But, that's just living in a different culture.

ROBERT STEIN: I saw another comment.

AUDIENCE QUESTION: Thank you, thank you very much I'm Jane Stromseth from Georgetown and I just want to thank all four of you, this has been just a marvelous panel, I feel so fortunate to have been here to hear your reflections. And the question I have is this. In the last 15 years we've seen a very important development in the rule of law and that's the development of international criminal tribunals to prosecute people for war crimes, crimes against humanity and genocide. So we have the international criminal tribunals in the former Yugoslavia, Rwanda, and we now have the ICC. In many countries we've had hybrid courts on the ground that combine local or national judges, prosecutors or internationals in East Timor, in Sierra Leone, I guess there's a hybrid court in Bosnia. And I'm just interested—I know Mark you have worked on these issues—what impact has this development had on your work for the rule of law? I often think that the sort of war crimes, processes and the domestic legal reform processes are more

separate than they ought to be. And there ought to be ways to try to use the presence of these tribunals in innovative ways to build capacity in domestic systems. And I'm wondering if you've thought about that, if it was something you were able to focus on at all in your work through ABA, CEELI? Thank you.

ROBERT STEIN: As Mark prepares to answer that let me just introduce a little further. Mark actually spends a lot of his time in The Hague these days, that's where his family is, although he also is in London with the International Bar Association. But he began serving as a commentator for CNN International during the Saddam Hussein trial and I think did daily reports about that. And since then he has been called upon on a regular basis—wherever he is in the world he's got to run and find a studio someplace to be in however many hundred countries CNN International is in to talk about some issue. So this is an issue Mark has thought about a lot. Indeed he's begun to do some writing about it. What do you think about the permanent international criminal court as a way of doing this? Or having specialized courts relating to war crimes in a specific part of the county? Or letting it be tried in domestic courts?

MARK ELLIS: Yes, well Jane Stromseth is exceptionally well versed in this area so I'm a little intimidated to answer this question, but I shall try. It's interesting; CEELI was involved with this area of law because of the international war crimes tribunal for the former Yugoslavia. It's a fascinating story, and I'll keep it short. I went to The Hague for a meeting with Justice Richard Goldstone, who was the prosecutor for the ICTY at that time. Homer and Sandy had given me permission to go there to see what CEELI might do to assist the tribunal. And we were quite eager to support prosecutions for war crimes and accountability for those who had committed these atrocities. I met with Justice Goldstone in his chambers for about an hour. It was quite remarkable and I explained to him about CEELI and how we wanted to help his office. He listened. At the end he said, "Mark, I really appreciate you coming over here and I accept your offer to provide assistance to the court with one caveat. I think you need to help the defense of the first trial that will take place." The Tadić trial. And I thought "oh Lord what am I going to do when I go back to the ABA, and to the CEELI board and say, well we're going to be providing assistance to the defense?" But Richard Goldstone said something I'll never forget. He said that in this first trial it would be absolutely essential that it not be judged by whether or not Mr. Tadić is

convicted, but by whether or not he gets a fair trial. Justice Goldstone was concerned that the defense team for Tadić did not have sufficient support. And so once again the CEELI Board gave support to a new initiative and we entered into a major program providing direct assistance to the ICTY and to the Tadić case. I believe, and Richard Goldstone said in his memoirs, that because of CEELI's assistance, the Tadić trial was deemed fair.

My last point about the importance of international justice is that it has a huge impact on the legal structure of nation states. Because of the introduction of the International Criminal Court (ICC), states who become signatories to the ICC Statute must implement legislation to support the court. And this implementing legislation is broad and expansive and ensures that those who have committed genocide, war crimes and crimes against humanity, are held accountable by nation states. And of course this new supporting domestic legislation must have all the fair standards that are required under international law. This process, still in motion right now, will have a significant impact on domestic legal systems. We are already seeing domestic courts emerge to undertake the responsibility to try individuals. I think the most significant growth area in international law is this area of international humanitarian and human rights law.

AUDIENCE QUESTION: I'm from the University of Minnesota law school, so apologies, I came in a little late. My question may have been directed and answered already but let me ask it anyway. It is one of my concerns working in this area is the issue of legal imperialism and the extent to which societies that are fragile, in transition, or facing rule of law deficits ultimately experience not a celebration, or a genuine ability to capacity-build, but a form of late, new century legal colonialism. And so I wondered whether you have addressed that specifically in relation to the CEELI Institute? Many of these societies have long standing legal traditions, a good example is the former Yugoslavia. Despite the outbreak of really deadly conflict in the 1990s, this was a very sophisticated legal society. It was probably one of the societies that had the highest absorption of international law norms. And that certainly didn't detract from the violence that took place, but it means that in terms of rule of law rebuilding, this wasn't a blank slate. I spent a year in Yugoslavia as Richard Goldstone's representative and I was particularly concerned by a number of international

organizations' lack of fundamental respect to those pre-existing legal traditions. They were essentially treating the society as if it were a blank slate and so I ask this if you have not addressed this already.

ROBERT STEIN: We did touch on that briefly, but it is a very good question. And I think it's an important question to answer is this a form of imposition of western procedures and values on other societies. But specifically with regard to Yugoslavia, why don't we respond to that, Homer do you want to lead us off?

HOMER MOYER: Sure and we like questions we've touched on before, we can maybe do a better job this second time around. One of our principles, which I think CEELI tried to honor goes directly to your point, which is that the purpose of the project was not to provide answers or direction but to facilitate deliberations and discussions in countries that were working their way through their own questions about how they wanted to structure their system. One of the early questions was, what about the fact that most of these countries, to the extent that they have legal traditions, they're civil law traditions, not common law traditions? What we found was that most of the issues we dealt with really didn't create a problem in that respect. At the Institute, two of the core courses are judging in a democratic society and justice in a market economy. Well those tend to be more about independence of the judiciary, judicial ethics, than about any substantive application of substantive law.

I'd mention two other things that make this less of a problem than we thought it might be. There are some topics, intellectual property law, for example, that don't raise the same questions of conflicting legal traditions because it's a new area of law. Environmental law is a little bit the same. The other thing that I would note is the eagerness of many of these countries to embrace international laws. And so many of these discussions will focus on what are the internationally accepted principles in a particular area of law. Sandy alluded to the fact that accession to the European Union is quite an incentive for some of these countries, so we did training in EU law. These are obviously different substantively than U.S. laws or Canadian laws or other laws. But I think being sensitive to the point that you raised is essential, because I think the right role is not to come in and say how to do it. The right role is to talk about models, frankly talk about alternatives, and mistakes and pros and cons of everything from judicial review to private rights of

action.

MARK ELLIS: May I just say one point? Because I think the Yugoslav experience is such a unique experience and it reminds me that these countries were keenly interested in the European Union. There came a point where their focus was solely on joining the EU. That's what was on their minds. And actually it became a challenge for CEELI because the countries we were assisting were interested in simply adopting EU legislation as required by the EU. Our concern was whether they had a basic understanding about what they were adopting. There was clearly a sense that the countries were simply doing what was required from Brussels in order to facilitate their joining the EU. That was quite apparent in many of the countries where CEELI was working—just one anecdote on Yugoslavia. What was fascinating to me was that Yugoslavia had this rich heritage of law, much of it very good. But it was interesting, when Yugoslavia broke apart, the new countries like Bosnia and Croatia, and certainly Slovenia and Macedonia, struggled because they did not want to adopt any of the federal laws from the former Yugoslavia. They wanted to create their own base of law because they simply wanted a clean break from their Yugoslavian history. So even though these new countries had very solid legislative grounding in the former Yugoslavia, they wanted nothing to do with it. It was a fascinating development to witness.

ROBERT STEIN: Professor Stromseth in her book *Can Might Make Right?* has a very interesting discussion of the very problem you're talking about in Kosovo when they had to figure out what law to apply. So the temporary administrators said, well, let's apply Yugoslavian law, and the Kosovars said absolutely not. That was very objectionable to them.

AUDIENCE QUESTION: I had a couple questions but in fact they were both answered. One of them was about the obstacles presented by different legal systems, like civil law, common law and Islamic law for that matter. And the other one was about assuring the fairness of these, going back to your point, assuring the fairness of these tribunals and again I was bringing my own experience in the Argentine tribunal, the ad hoc way that was set up for crimes committed against humanity during the dictatorship, during the 1970s. And I'm not sure to what extent did that help the rule of law take into consideration that the tribunal was not implemented according to the constitution. And actually, it was an abomination of what a tribunal should

be and for that reason I don't think it would help with the rule of law. Even though the message sent by the government was good, which is putting these military people on trial, I don't think it was done the right way and by that I'm saying they did not respect the rule of law.

MARK ELLIS: Could I just respond, you raised an important issue that all of you should consider because you're the next generation who will address these challenges. You mentioned Islamic Law. We heard Bob talk about the universality of the rule of law and the underlying issue of democracy. I think that's an interesting issue when you talk about Islamic Law or Sharia law because there's some real doubt in my mind on whether or not Islamic countries would see the rule of law, at least the way we define it, as universal. And that is an important challenge for all of us because finding a common ground between the concepts that we're talking about today and Islamic law, that incorporates 1.2 billion people, is a new challenge. We are talking about universal concepts but actually from the perspective of many who practice Islamic Law, the rule of law concept is not universal. I raise this issue because it will certainly be a challenge for the next generation.

ROBERT STEIN: We're getting close to the concluding time here, but I'd like to go around and have each of you offer a concluding comment about where we've been, where we are, and where you think we're going. And what's your view about the future of the rule of law.

SANDY D'ALEMBERTE: Well first of all, I'd like to spend just a couple of minutes to talk about what we did wrong. What did we not succeed in doing? And each of us will probably have our own list of things that we didn't get done. Bob, regretfully, despite some good early starts I don't think that we had very much impact on legal education and I think that's unfortunate. If you look at the landscape of law schools in this region now you'd find that in Ukraine there would be 50 law schools, not many of them are places that would look like this, would have this kind of faculty or would have ethical standards for the faculty. They might not be real law schools.

I think we failed and I'm sad that we failed because think about where we were when we started out. In 1990 how many of the people we were dealing with had ever had, in their law school, a course in property rights or in business associations or in human rights? What were these law schools like? We have lawyers who have graduated from law school with a handful of

places that taught some international law and through that process were exposed to international norms, not only human rights, but even commercial norms. There really weren't many places that we would think of as law schools. Walk through one of the great law school libraries, go to Charles University, and look and see what their library looked like. All the collected works of Marx and Lenin and you know you wouldn't find much that really was real law.

My personal feeling about our greatest failure was we failed to really do much to advance education. And our excuse is we could not get our funding sources to buy into projects to the extent that the three of us wanted to have a buy in. Or the four of us wanted to buy into it, because Bob was very much involved in the early stages when we were making some efforts. But we couldn't get the Department of State or USAID to have this long term look. That's my nomination for our greatest failure.

ROBERT STEIN: Mark concluding comments about where we are and where you see the future of this work?

MARK ELLIS: I said this yesterday in Bob's class, so I'll just repeat it. The analogy I use about the rule of law is an old antique pocket watch. The hands of that pocket watch represent a functioning rule of law society, in sync and timely. But if you open the back of that pocket watch you'll see the multitude of small wheels, springs and various mechanical fixtures. Each represents a principle of the rule of law. We can debate about what exactly the principles are, but we agree that they exist. And all you have to do is to damage or manipulate one of those springs, or wheels or mechanical fixtures and the hands of the watch slow, and if manipulated to harshly, the hands of the watch will actually stop. So for me the focus should always be on the mechanism inside the back of the watch. And even if the face of the watch indicates that the country adheres to the rule of law, you realize that it doesn't take much in the way of altering international legal norms, such as condoning torture or creating a Guantanamo Bay, to weaken the face of the rule of law. So keep your eyes on the back of the watch, on the small but important principles that make up of the rule of law. If we can do that, we will all do a better job at adhering to the rule of law.

HOMER MOYER: I have two concluding thoughts. The first relates to our profession. There has been, I think, in the last few years some discussion that I had not heard before about the commonality of the profession, sort of across borders and nation

states and what the legal profession worldwide might do or stand for—what principles it might stand for. I mean there are still places in the world we can tell you where bribes are paid to get into law schools and bribes are paid even for grades. It's hard to expect those graduates to be pillars of the legal community and proponents of the rule of law, but I think there may be great potential in developing the notion that lawyers worldwide have a common stake in the rule of law. And that within our own countries we should stand for those principles, and we should stand with others across boundaries in support of that. I think that could be quite an important political dynamic.

My other thought is that it's essential that we apply this standard to ourselves, and that we not betray our own values because I think that you can make the case that what we do as opposed to what we say, let alone what we try to do in technical legal assistance is so much more powerful in the message that it sends to the world. And when we do things that conspicuously fall short of the rule of law standard, we send an enormous message that's harmful to the principles that we want to espouse. And it is an ideal, as Bob said at the very beginning, and we need to hold our own feet to the fire.

ROBERT STEIN: What a fine note to conclude on. It's interesting, as much has been accomplished in the program that these giants brought into being, their focus is on what we didn't get done as well as we should have and where the shortcomings are and how can we do better in the future. We can all learn from that attitude. This is a historic occasion to bring together the trio that created and led this wonderful organization. We thank you for being here today to do this. It has been video recorded and the remarks will be part of the journal in its symposium issue. So please join me in thanking our panel for this remarkable presentation.