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P R O C E E D I N G S

MR. LINN: Good afternoon, and welcome to Brookings, everybody. It's great to see such a larger number of interested colleagues and friends. We are very happy to host this event today jointly. That's the event that's being jointly hosted by Transparency International USA and the Wolfensohn Center for Development at Brookings. And indeed, we are very pleased to organize this very exciting discussion I think today of Transparency International's Global Corruption Report for 2007 which is on the special topic this year of Corruption in Judicial Systems.

My name is Johannes Linn. I am the Executive Director of the Wolfensohn Center for Development. Let me just mention briefly that the center was set up by Jim Wolfensohn just under a year ago here at Brookings. Our work is focused on the issues of how you effectively implement relevant programs and interventions, that's projects, policy, or institutional reforms, and we have a special focus on the question of how to scale up and sustain such interventions for maximum impact. One of the areas we are specifically focused on is institutional and political aspects of development of interventions and of course these include things like governance, transparency, accountability, and these are all issues that

have great interest to Transparency International and are covered in various forms in its international reports.

There are also two specific reasons why we are very happy to co-host this event with Transparency International today. One is that Jim Wolfensohn has of course long focused on issues of good governance and anticorruption when he was at the World Bank. In particular, you may recall his quite well-known speech of 1995 where he took the so-called C word out of the closet. He actually would have been liked to have been here today. Unfortunately he could not make it, but he sends everybody his very best personal greetings and is delighted to have this event hosted here by the Wolfensohn Center. I might also mention here that he recently joined the Transparency International USA Board of Advisers.

The second example of the kind of work we do actually is that we are working with Judge Cynthia Baldwin of the Supreme Court of the State of Pennsylvania in a study of judicial corruption in Uganda. Judge Baldwin would have liked to have been here today, but she is as it happens just now in Uganda in connection with the work she is doing there.

So we are very, very pleased to welcome you all here. I was personally just delighted when Nancy Boswell, the President and CEO of T.I. USA asked us to co-host this event. Nancy will actually introduce the reports and our distinguished speakers, so I would like to welcome her to the podium. Nancy?

MS. BOSWELL: Thank you, Johannes, and good afternoon everyone. I'm very pleased to be here co-hosting with the Wolfensohn Center. As Johannes indicated, it has a special meaning for T.I. Our mission of fighting corruption and reducing its impact on the poorest got a special boost when, as Johannes said, Jim Wolfensohn took the C word out of the closet and said that the Bank had to address the issue because it was the major impediment to development and poverty alleviation. His leadership gave great credibility to what we were trying to do particularly in the early days when this was not widely accepted as an issue that needed attention.

Clearly since then the issue has gained great prominence and T.I. has grown. We have chapters in over 90 countries, and I think we are recognized for being a provider of tools and research on the issue of struggling against

corruption and the Global Corruption Report that we're here to talk about today is the latest in that body of tools.

This is an annual publication. It provides an evolving picture of corruption in countries around the world. Each year it has a main focus. It has focused in the past on political corruption, corruption in the health system, and other issues of universal concern. This year we chose judicial corruption for obvious reasons. It undermines the effectiveness of the institutions that we rely on to maintain the rule of law. And when we are talking about corruption in this book, we are taking not just of outright bribery, but political bias or interference, the influence of money which can have a profound impact on us, undermining our trust in public institutions and their capacity to deliver fair and impartial outcomes.

The report has 28 essays on different aspects of corruption and 37 reports on how judicial corruption manifests itself in different countries. Clearly we could have put over 100 country studies in, but we picked those that gave a sense of the wide variety of problems that are involved and I think underscore that this is not just a problem in the developing world, it is a problem that corrodes our systems in all our countries.

The report underscores the impact on ordinary citizens who are denied a fair trial or even access to the courts because they cannot afford the bribes. It talks about the impact on business and investors who when confronted with corrupt legal systems find business unpredictable and in many cases either withdraw from countries or avoid them altogether with consequent impact on development in those countries.

It also discusses the impact on the rule of law in the international arena and that is something of course of great concern to those of us who have worked very hard to get international legal agreements concluded such as the OECD Convention on Foreign Bribery or the U.N. Convention. The potential of these agreements to have a practical impact on reducing corruption is clearly dependent on their enforcement by judges and prosecutors. And we have a prime example recently on how things can go array in the U.K. where the Executive stepped in to terminate an investigation into allegations of bribery.

The report goes beyond looking at judges and prosecutors, to examine the impact of corruption on all sorts of people working in the judicial system including court officials, police, and lawyers. In other words, all those who should be gatekeepers for the public.

In brief, it is an attempt to pull together a wide range of information looking specifically at corruption. As many of you from the development community who are here today know, there has been a lot of work on judicial reform but relatively done specifically on corruption in the judicial system. The report also provides some recommendations for dealing with the problem, so I think it has an important contribution to make.

We hope it is a useful resource for many of you here today and for other practitioners, donors, and researchers working in this field.

We are very privileged not only to be here at Brookings and co-hosting with the Wolfensohn Center, but also to have been able to gather such an eminent group of experts who are going to share their insights and experience with us. David de Ferranti who is a valued member of the T.I-USA Board of Directors and directs the Transparency and Accountability Program here at Brookings will formally introduce our principal speaker Aryeh Neier, the President of the Open Society Institute.

But I would like to take advantage of being at the mike to say a word about the important role and he and OSI and of course George Soros have all played in energizing the governance and anticorruption agenda. T.I. has

enjoyed many years of fruitful support from OSI, financial, technical, and moral support in some fairly challenging countries and I would to add a note about the important role they are playing in helping civil society build capacity for monitoring revenue transparency in the extractive industry arena. Civil society capacity is a very serious concern for all of us and their work is really very welcome.

I would also like to welcome out other distinguished speakers who have taken time to join us here for the discussion today. Each of you has their complete bios, so I just want to add a few thoughts. Dr. Susan Rose-Ackerman, a Yale law professor, is widely recognized for her leadership in the field of anticorruption research. She has been working on this issue since long before T.I. even was formed. Susan is less well known as a member of the T.I.-USA board and an adviser to T.I. since our earliest days. Her expertise has gone into many of our tools including our Source Book and our survey work, and we were honored to have her contribute an article to the Global Corruption Report as well as serve on our Editorial Advisory Board.

I first met Judge Noel Hillman when he was Chief of the Justice Department's Public Integrity Section and a member of the U.S. negotiating team

for the U.N. Convention Against Corruption. He has been a great ally of T.I.'s and the fight against corruption since then and was recently named to the federal bench as U.S. District Judge for the District of New Jersey, and we are very fortunate to have Noel here bringing his experience as a prosecutor and as a judge dealing with corruption.

We recently discovered Dr. Philip Bond's important research on the impact of judicial corruption on the enforcement of contracts in the business environment, so we were particularly pleased that Professor Bond could join us today to talk about the impact in the private sector. They are a key player whether they are a participant in or a victim of corruption, so we are looking forward to his comments.

And finally a special welcome to our colleague Eduardo Bertoni, the Executive Director of the Due Process of Law Foundation. As many of you know, DPLF works on the administration of justice particularly in Latin America. And in addition to his deep expertise in the issue on our agenda today, Eduardo I learned in preparing for this event was on the other side facing Noel Hillman in a case. So they have extensive experience as litigators and can bring it to this discussion.

Before I close, I just want to thank all those who provided advice and articles that went into this report. We were particularly honored to have former Justice Sandra Day O'Connor reviewing our recommendations and providing her insights. And I believe we have a few other authors here in the audience today. If you are here, I hope you will raise your hands during the Q and A part of our discussion so that we can recognize you then as well.

With that, let me turn over the microphone to David to move the program along. Thank you.

MR. DE FERRANTI: Thank you, Nancy. In addition to being on Nancy's board at T.I.-USA, I also direct a program of research on transparency and accountability here at Brookings.

Our keynote speaker today, Aryeh Neier, is well known to many here, but for those who are not completely familiar with his very distinguished career, he is the President of the Open Society Institute and the Soros Foundation and has been for many years since September 1993. Before that he was the Executive Director of Human Rights Watch of which he was a founder. And before that, National Executive Director of the American Civil Liberties Union.

He has many honorary doctorates. He has been Adjunct Professor of Law at New York University, author of six books, extensively recognized and written, and he has conducted investigations of human-rights abuses in more than 40 countries around the world, and has been a leading voice in the quest for better governance and better treatment of human rights. So if you have anything in your closet here, be careful because here comes a speaker how might find out. Aryeh?

(Applause)

MR. NEIER: Thank you very much. About a month after I started at the Open Society Institute, I had a visit from Peter Eigen to tell me that he was starting a new organization to be called Transparency International and seeking our support. I must say that I did not estimate properly what might be achieved. I had no idea in talking to Peter at that time that Transparency International would evolve into the influential institution that it has become. And still less did I know that this was an early moment in the launch of what has become a significant international movement in which people all around the world have tried to mobilize to deal with corruption. The extent of consciousness-raising about corruption during the past 14 years has been truly extraordinary. As has already been said, there were those like Susan Rose-Ackerman who were addressing the

issue of corruption before the establishment of Transparency International, but I think they were relatively lonely voices at the time, and today there really is an international civil society movement that is focused on the issue of corruption.

I am especially pleased that this year's report by Transparency International focuses on the question of judicial corruption. I think it's an enormously important issue, and at least in the work that I have engaged in I have found an extremely difficult issue, an intractable issue. The Open Society Institute tries to promote transitions to more open societies, more evolution toward more open societies in many countries around the world. We currently work in more than 70 countries worldwide and in a great many of them the people whose work we support and who collaborate with us call on us to address the problem of judicial corruption. And though I feel that there are other areas in which we often make quite a lot of headway, my sense is that we have little to show for any efforts that we have devoted to dealing with the problem of judicial corruption.

I think it is a crucial problem. Aristotle wrote more than 2,000 years in the "Nicomachean Ethics" that the duty of a judge is to embody justice and if judges do not embody justice, I think it is inevitable that citizens in any

country will seek alternative means for trying to deal with their grievances. All the other means available to them probably involve gaining power, and while it is possible to gain power democratically, it is also possible to gain power by the use of force. In many countries I think that the problem that judges do not embody justice is part of what turns those with grievances toward ways of trying to resolve those grievances that can cause a great deal of harm.

I want to study this report closely to get ideas and insights and I want my colleagues in the Open Society Institute to do the same. A lot of the countries, the great majority of the countries, that we work in have jurisprudence or legal systems that derive from civil-law traditions rather than common-law traditions. One of the essays in this report is by Susan Rose-Ackerman and it deals specifically with the difficulties or the problem both in the civil-law systems and in the common-law systems which are quite different. But it is the civil-law systems that we run into most of the time, and reading through Susan's essay it seemed to me that she touched on just the kinds of difficulties that we encounter.

To take one example, she pointed out that in civil-law systems it is often the case that lower-level judges have to share bribes with the higher-level judges who control their appointments, and there is a story that George Soros

likes to tell which illustrates the point. He had said something a number of years ago when he was visiting Georgia—that is the former Soviet Republic of Georgia, not Georgia in the United States—about the problem of judicial corruption. Thereafter he got a request for a grant which was somewhat different from anything he had received previously. A judge asked for a grant and said that he was very eager not to behave corruptly, he did not want to take bribes, but he would still have to pay a share of the bribes he was supposed to get to the higher-level judges and would the Open Society Institute give him a grant so that he could continue to pay the higher-level judges, and I don't think he intended this humorously. I think he actually thought that this was a way of overcoming the corruption that he engaged in. It seems to me to reflect the deep entrenchment of systems of that sort and the immense difficulty of trying to deal with those problems.

One of the countries on which I am particularly focused and have been focused for a number of years is China. Of course, everyone is aware of the spectacular economic growth in China. There may have been nothing comparable to it in human history. Yet with all of the tremendous economic growth, Chinese leaders tend to be very nervous about public attitudes and this is because there are

an enormous number of protests in China many of which turn violent. The government annually issues statistics on these protests and they report something in the range of 90,000 such protests that they record as significant during the course of a year.

Those protests are inspired very often by land seizures, that is, the cities in China are expanding rapidly, the infrastructure is unable to support the tremendous growth and the city takes a great new territory to build a new urban center, or factories that are doing a booming business take land, or land is taken for some other purposes, and great numbers of peasants are displaced by these land seizures. Or another factor in these protests is China is suffering from tremendous pollution, air pollution, water pollution, and often it affects the crops that farmers grow and causes them great difficulty. Or there are protests over labor issues.

But time and again these turn violent, and I think the difficulty is that Chinese peasants and Chinese workers do not have any confidence in the judicial system as a means of dealing with their grievances. The only avenue they see is protest. One hears a certain amount in the West about Chinese interference with the circulation of information on the Internet or with interference with what

the media can publish. My impression is that the sensitive issue from the standpoint of the Chinese authorities is these protests because it's very important to the authorities that those protests should be localized, that they should not inspire wider protests that will cause more serious difficulty.

But since there is not an effective mechanism for dealing with grievances because of the extent of judicial corruption in China, a country which is in certain respects doing so well and whose citizens ought to be tremendously happy with the great economic progress that is being made which is improving their lives tremendously, nevertheless feel that only these kinds of protests, and that is often violent protests, are a way to deal with their grievances.

The Chinese leadership I think is well aware of this. If one reads the speeches of the Prime Minister Wen Jaibao, he devotes a very large part of the various speeches he makes to the People's Congress or to other bodies in China to the problem of judicial corruption and the urgent need to deal with the problem. But even somebody like the Prime Minister seems to have difficulty actually tackling the problem in a manner that would enable the Chinese government to get control of the problem.

I think it is not out of line for him to worry about the potentially revolutionary consequences of the inability to deal with the problem of judicial corruption. If one thinks of the American Revolution, one only has to look at the Declaration of Independence, and Jefferson wrote in the Declaration of Independence as one of his foremost complaints against King George III that he has obstructed the administration of justice. His judges are dependent on his will alone. The understanding of the problem goes back a very long way, but we are very far from being able to deal with this problem of judicial corruption.

I think therefore that this report by Transparency International, shining the spotlight on the problem of judicial corruption is potentially an enormously important development. It is potentially important because in order to realize its importance it will be necessary for those in many countries who are concerned with the problem to actually pay attention to the kinds of recommendations that are made in this report and to try to see to it that there is action taken to make advances in this area. Again, based on my own experience, it is anything but an easy task, it is an enormously difficult task, but I think it is an urgent task and I am grateful to Transparency International for producing this outstanding report. Thank you very much.

(Applause)

MS. ROSE-ACKERMAN: Aryeh said, I am one of the contributors to this very excellent book. I urge you to go look at it. It is particularly interesting in a really wide range of cases from different countries, a broad selection of experiences that you can take a look at. I am going to talk a little bit about my essay, my contribution to that report which is sort of trying to unpack the idea of judicial independence and corruption as it is related to the judiciary a little bit as guidance to help you think about corruption and where it could arise in different kinds of judicial systems.

You've got some sort of very broad cross-country results in social science suggesting that countries that score high on some kind of measure of rule of law do better in terms of economic development and legitimacy of government and other kinds of good things that you might like and that one part of that, of the ability to establish a rule of law, has to do with the independence and the competence of the judiciary. But if you try to understand what that cross-country research really means, things start getting a little more difficult. What is an independent judiciary and why should it have some good results?

Jennifer Widner who has written extensively about the judiciary in Africa has a definition which is I think a reasonable place to start, the installation of judges and judicial process from partisan pressure to influence the outcomes of individual cases and particular focus on individual cases and distortions of individual cases. But remember that independence itself isn't valuable just on its own because you could certainly have independent judges who acted with impunity, who are lazy, who are corrupt, but were completely independent, they could do whatever they want, nobody can control them. So we have to realize that it's a necessary not a sufficient condition here, and there is no judiciary in the world that doesn't have some kind of constraint on their behavior and we need to think about which of those might make some sense.

Of course, there is the problem raised in the earlier talk about the relationship between politics and the selection of judges. We are familiar with this in the United States context for sure. But you can also get some good examples in the "Global Corruption Report" from the Czech Republic, Georgia, Pakistan, Russia, Sri Lanka, Turkey, and those are just the ones they've happened to write about. So it is important that we think about the relationship between

political pressures and the operation of the judiciary and think about what independence really means.

I am going to suggest that the way in which the judiciary is created so that it operates independently depends upon the nature of the judicial system as Aryeh Neier was suggesting, and I want to have you think about two stylized models of a judicial system which map roughly into the common-law countries like the United States and the U.K. on the one side, and on the other side onto civil-law countries such as most of Continental Europe on the other side, and of course, many of the developing countries because of their colonial background have borrowed heavily from one or another of those legal systems.

I just want to make these contrasts a little starker than they are in reality, but I think it helps in our thinking. One is in most civil-law countries, it's a long-term civil service job to be a judge. I have a student from Taiwan who had just graduated from law school and had become a judge. This is common in Germany and all the rest of Europe. It's something that you can go into as a young person as a career, just as the way you might join the bureaucracy of the state. So there are career civil servants, with the one exception being the Constitutional Courts in many of these cases.

This of course limits problems of conflict of interest. You don't have judges who have become wealthy dealing with all kinds of people in the private world, but on the other hand, their salaries are likely to be relatively low in civil service terms, they are not likely to be independently wealthy. So you are controlling political influence and corrupt influence through a bureaucratic method of selection by trying in the ideal case to insolate the judges from politics.

The common-law model also in a very stylized way deeply involves politics in the selection of judges and tries to use the constraints of the political system as a way of constraining judges. You will use lay juries to counteract the impact of the judges which you don't have much used in civil-law systems. Of course, the extreme is many of the U.S. states and local governments which actually elect judges sometimes in partisan political elections clearly raising the question of where are they getting their financing from that has led to some debate and discussion in the U.S. And also to the extent judges are appointed when they have already had a career in which they may have made quite a bit of money, the problems of conflict of interest are going to be much more acute in a common-law system.

So you can see that if you have a very different method by which judges are selected and promoted in one set of countries compared to the other, the whole question of judicial independence and then of the incentives for corruption are going to really be fairly different problems. You may still have motivation from litigants to pay people off, but the particular places to look for problems are going to be different. So it may be as Aryeh Neier mentioned that there is a hierarchically organized corrupt system and if you have an insulated bureaucracy that in its good form is a very professional bureaucracy that promotes people on merit, fine, but if it gets captured and taken over by a corrupt system, then its very insulation is something that can preserve and maintain the corruption within it, whereas a more permeable system would be harder to have that established.

On the other side, in the common-law system we have as I was already suggesting the problem both of excessive politicalization and of corruption that comes either through individual bribes that is related to conflicts of interest, related to the fact that the people have had a career before they came into the judiciary.

Of course, there are some common problems with both systems. Any system that does not pay people enough, that has terrible working conditions, is going to be susceptible to corruption. A common form of corruption doesn't even involve judges at all, but it involves simply the case-management process. I think in the U.S. cases are usually assigned randomly and if you do not do that it gives clerks and low-level people a lot of ability to be gatekeepers and we should not forget that aspect of the system.

Some of the research on the judicial systems says don't just look at the courts, look at service of process on the one side, look at the enforcement of judgment on the other side. Those can be where the real bottlenecks are in terms of delay and corruption, that is, you get a fine judgment but you can't collect on it, and in order to collect you've got to pay somebody off to do it.

And of course, finally, the role of the prosecutors can be very important. Prosecutors are located all over the place around the world. Some of them are in the judiciary, some of them are independent, some of them as in the U.S. are in the Department of Justice, and maintaining a system in which they may face some of the same corruption incentives as judge. So it's an important piece of the puzzle since judges can't do anything unless they get cases.

To conclude, I think it is important to understand the background of the institutional structure within which corruption is happening if you want to worry about solving it, and also to recognize that judicial corruption isn't going to do much good if it just happens in isolation. It just a piece of the whole puzzle.

I will end with a very nice U.S. example here from the early days. There was a famous case called *Fletcher v. Peck*. What was *Fletcher v. Peck*? The legislature of the State of Georgia was entirely bought off except for one guy in some big land deal in the early years of the Republic and in the next election all the guys lost their seats because of this. It became a Supreme Court case which stood for the proposition that we are going to uphold the contract. So this is a perfect thing for corruption, I pay everybody off, the politicians are deterred because they might not get elected, you pay everybody off and then the contract will be enforced by this independent, noncorrupt court. So it is just an example about how this problem which is an important and difficult one, but is only a piece of the bigger puzzle of creating a system of government that tries to minimize the corrupt pressure points around the system. I'll end on that. Thank you.

(Applause)

JUDGE HILLMAN: I first want to thank Nancy and Martha and the other folks at T.I. for having me here today to be part of this distinguished panel, and without intending to slight the other participants, it is especially nice to see Eduardo again. He was in fact a defense lawyer in Buenos Aires and I was once a federal prosecutor in New Jersey and we met when I indicted his client about 10 years ago in a case that was a major corruption scandal in Argentina called the Mafia de Oro, one of the many dust clouds that followed Carlos Memen during the time that he was in power down there. Eduard was a very worthy adversary. He knew U.S. sentencing law better than most U.S. defense lawyers, but alas his client was guilty and he pled as such. It's nice to see Eduardo working to prevent corruption rather than defending it.

(Laughter)

JUDGE HILLMAN: Now that I'm a judge we need good defense lawyers.

Nancy suggested that I spend a few minutes to talk about the U.N. convention against corruption. I'm happy to do it. It was during the negotiations in Vienna and later in Mexico that I was able to observe first-hand as a member of the U.S. delegation the very effective way that T.I. works, gently but respectfully

and persistently prodding bureaucrats like me to do the right thing. I think T.I. has had and will continue to have a great deal of influence on how this important convention is ultimately implemented, and I want to talk a little bit about the convention and why I think this new book from T.I. on judicial corruption is especially timely.

The convention was negotiated over the course of several years under the auspices of the U.N. Office on Drugs and Crime. It is an outgrowth of several regional multilateral treaties dealing with corruption, the OAS treaty, the European Union and Council of Europe, the OECD Conventions from the late-1990s and the African Union Convention. It is also in very real terms an extension of the success of the U.N. Convention Against Transnational Organized crime. The beauty of the corruption convention is that it takes the substantive provisions of these various regional agreements, incorporate important contributions from U.S. law like the Foreign Corrupt Practices Act, and foreign and domestic laws, and then graphs them onto a structural framework of technical assistance, information sharing on a law-enforcement level, mutual legal assistance, and asset tracing, seizure, forfeiture, and sharing. In sum, it's the whole package, from measures designed to prevent corruption, detect it, prosecute

it, and follow and seize the proceeds. It's a classic roadmap for, if I may use the phrase, following the money.

It's like the whole world studied Watergate or maybe Jack Abramoff and devised a strategy to deal with it. It's not only the world's first global anticorruption treaty, but it does a fairly credible job in my view of incorporating some of the world's best thinking on these issues both on a theoretical level and on a real-world practical level.

It also happens to have the virtue of being consistent with U.S. policies in recent years and current political will. I think the current administration has been a world leader in tying continued foreign assistance to effective anticorruption programs, integrity controls, and achieving benchmarks not only in direct aid situations but in exerting influence over the World Bank and other development funding efforts.

I think it's fair to say that no one likes the idea of money meant to raise people out of poverty or improve basic infrastructure or combat devastating diseases ending up hidden in some bank's secrecy jurisdiction, and sadly that's been the case as we all know for many, many years.

From the standpoint of self-interest, it seems to me that we as Americans have better things to do with our money than pour it down a black hole, and certainly post-9/11 the world can no longer tolerate funding regimes that perpetuate their power through corruption. It's so much easier of course to confront and neutralize an overtly hostile foreign power than it is to identify and deal with the threat posed by regimes so riddled with corruption that they become vulnerable to terrorist and criminal organizations.

Another point factor was the convention's requirement that member states adopt an analogue to our Foreign Corrupt Practices Act which I think for some 40 years now has outlawed bribery of foreign officials by U.S. nationals and corporations. This law as laudatory and important as it is put U.S. businesses at a competitive disadvantage to corporations domiciled in foreign countries that not only did not criminalize such conduct but allowed these foreign bribes to be tax deductible. It is not surprising that the convention would be promoted by the U.S. government, supported by a wide coalition of diverse interests, signed by Attorney General Ashcroft in December 2003, within months of its adoption by the U.N. General Assembly and ratified by our U.S. Senate with very little debate this past year.

The irony of it is at least from my perspective that it almost didn't happen, least U.S. participation didn't happen, because of all things the McCain-Feingold bill known as BICRA, our own campaign finance law. Virtually all of the European delegations took the position that the convention had to have a mandatory provision regulating and even restricting the financing and spending by political parties and candidates. At the time we had pending in our Supreme Court *McConnnell v. FEC* which was a direct attack. Judge Starr had just come from the Supreme Court arguing that our system of campaign finance laws was unconstitutional despite what the Supreme Court had said many years ago and it was simply impossible for us at that point to engage in a treaty that would bind us to enact laws at the federal level that would be in fact unconstitutional.

I got the phone call to be sent to Vienna to try to fix this. It probably happens to diplomats all the time, but in my mind you haven't lived until you get off a plane in Vienna, the head of the U.S. delegation tells you that we are about to pull out of these important negotiations, and not to put any pressure on you, but you're here to fix it. The bad news is that all the world's major democracies are aligned against you on this issue, but don't worry, China and Vietnam are squarely in our corner. Not to beat up on China, but I see that they

eventually ratified the convention and that Vietnam has not yet, but in any event we fixed it. We fixed it in case you're wondering by shifting it away from the mandatory provisions to the discretionary ones.

The brilliant utility of this convention is that it compels member states to enact domestic and foreign bribery laws, to establish effective anticorruption bodies, and mandates international cooperation in the easing of bank secrecy law in corruption cases. There are really just a few of the main provisions. But what do all these things have in common? A prominent role for the judiciary. It will naturally fall to the courts to hear cases brought to remedy corruption, to consider requests for international cooperation, to compel that cooperation, and to approve the lifting of bank secrecy laws. Indeed, next to the role of legislatures will play in bringing member states' domestic laws up to the convention standards, it is really the judicial branch or judges that will have the major role in seeing that the functional enforcement-related and cooperative aspects of the convention are implemented.

It goes without saying that unless those judges of those member states are up to the task and free of corruption themselves, then all of the virtues of the convention will be frustrated and will be useless platitudes.

I think of the time in 1998 when I went to Ukraine and as part of a DOJ delegation we met with the Supreme Court there and they had not been paid in 4 months. I don't think you have to go much further than a major police force in a major U.S. city to know what happens when a public official with substantial responsibility is not paid a fair wage. It's a very slippery slope from the Christmas tip to the cop on the beat from the storefront merchants to monthly protection of a substantial racket that's being run upstairs. Think about the temptation of a judge who hasn't been paid for months when he is faced with the choice of feeding his children or exposing the corruption executive who made him a judge in the first place.

With the important and I think indeed critical role that judges will have in implementing the U.S. convention, surely the convention itself deals extensively with standards of judicial conduct, but sadly it doesn't. In fact, Article 3 which is the provision I've mentioned dealing with judicial integrity is very short. I can read it. It says, "The member state shall take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary." That's it. Maybe that's a good thing. I heard Justice

Alito speak a week or two ago and he talked about the beauty of our own U.S. Constitution which is remarkable for its brevity. One of the lasting contributions of the Founding Fathers was to restrict our Constitution to only those things as he says that were truly necessary and fundamental. Things that were merely and not necessarily fundamental were left to be decided later by the political branches. I think maybe that's a little bit of what's going on here. The really fundamental stuff is there. Judges have to have integrity, we have to have a clear code of conduct, and the mechanism to prevent corruption in judicial office.

But how do you make those things reality? It tells us what, but it really doesn't tell us how. Even the legislative guide that's now been promulgated to promote the convention adds really little more to this other than to urge clear rules regarding judicial immunity. And it is here that I see the utility and the important impact of this book and really the role of T.I. itself as the convention goes forward.

As Susan's remarks I think highlight, there is really no country that has a monopoly on what is the best way to deal with corruption or judicial integrity. Read the article in here about the corruption at the state level with judges. I myself prosecuted judges in Mississippi for taking bribes. It's really

only an organization like T.I. that can gather together all of the world's knowledge and expertise, and the convention itself recognizes the important role of NGOs like T.I. in moving it forward.

I urge you if you read nothing else in this report to read the recommendations for best practices regarding preventing judicial corruption on page 25 of the introduction. What you will find here are those things that are merely important, specific, precise, yet flexible measures that can be adopted by and adapted to member states in achieving the objectives of the convention in Article 11. As Susan's remarks also indicate, this is a complicated problem and there are many different approaches. From the appointment of judge, the terms and conditions of their employment, accountability and discipline, the meaningful transparency of all aspects of judges and the judicial process, you will find in this book in its recommendations a clear roadmap to a strong independent judiciary with the best chance of staying corruption-free. I commend T.I. for putting this important work together. I hope that those who are charged with implementing the U.N. convention and the member states will examine it carefully and apply its lessons liberally. It is really only through the establishment of truly corruption-

resistant judicial branches that we will see the full implementation of the other substantive aspects of this very important convention.

(Applause)

MR. BOND: Let me begin by saying what a pleasure it is to be here today. Transparency International as we all know has for many years now been a tremendously important force for publicizing and combating some of the problems of corruption.

I am an economist by training and I currently teach at the business school. I think I scarcely need to say that within my discipline there is a widely held view that government intervention is typically undesirable and the thinking behind people who espouse this fear is that politicians and bureaucrats and members of the government are maybe at best lacking in expertise and at worst self-interested. If we wanted to be blunter about this, we would call these two characteristics stupidity and corruption.

According to the same view, individuals and companies will if left to themselves contract among themselves in an effective way. So the argument is on the one hand government bureaucrats can't just get it right, they're either stupid

or corrupt, on the other hand, if we just let people contract among themselves they're going to get it right.

My own interest in this topics extends from an observation, and I am certainly not by any means the only person who has made this, that this view, this view of the world that government intervention is so ineffective contains an important consistency, namely, that private contracts are of course only effective if they actually can be enforced, if we actually courts that will enforce them, but that the court is itself part of the government, part of the bureaucracy, and the people who staff those courts are drawn from the same population of politicians and bureaucrats who elsewhere economists have tended to dismiss as being either self-interested or lacking in expertise.

The policy consequences of this observation, I think it is fairly clear that the kind of market-based reforms which were so fond of suggesting as a solution to all sorts of problems around the world are only going to be effective if at least one part of the government is actually free of these problems of self-interest dealing with the problem of corruption and that is of course the judiciary. So these market-based reforms clearly depend on some idea that the judiciary itself is well functioning. Sadly, as Transparency International's report this year

makes all too clear, in many, many countries, maybe the majority of countries, this condition is not satisfied, that the judiciary is not some magical part of the bureaucracy that functions well while the rest of the government functions badly. This is all by way of a preliminary observation to try to outline why I think this is such an important topic.

I want to use the rest of my time here to try to spell out some of what I think are the main consequences of court corruption in private contracting. So I'm going to draw on the work of a number of people including Susan Rose-Ackerman. Since this is not an academic talk I will not have a chance to credit them in the way they deserve.

The first thing I want to talk a little bit about is why corruption matters at all. Why does corruption matter for private contracting given as all know hardly any contracts actually end up being litigated in court? So the contract is there, in principle one can go to court to try get its terms enforced, but in practice that hardly ever happens. Why is it that corruption would affect private contracting in the first place?

For this I need to go back a little bit and for this I really need to wear my economist hat. Most economists view the main object of a private

contract as providing incentives. So I'm going to use several times a very simple example of a contract which is a debt contract. In a debt contract, part of what the debt contract stipulates is if a debtor doesn't repay, the lender, the creditor, is typically able to seize some collateral from the debtor. The contract provides incentives to do something, in this simple case for the debtor to repay, by threatening the debtor with some consequence if he does not repay, in this case threatening him with taking his collateral. This is obviously all very simple.

Corruption undercuts this role of the contract in two different ways, and let's be clear about these two different ways. The first effect is that if our debtor does not repay his loan, he is meant to be punished, he is meant to lose his collateral, but the debtor was able to escape that punishment by paying a bribe to hold onto his collateral. So that's the first way in which corruption undercuts the incentives that we want the contract to provide.

The second way is that even if the debtor does repay, the lender can attempt to bribe the judge to do just the opposite. So the debtor has now repaid, he is meant to keep his collateral, but the lender can attempt to pay a bribe and have it both ways. So the lender here can attempt to pay a bribe and say I am going to get -- from the debtor but I'm also going to take the collateral from the

debtor. This undercuts incentives because it means that the benefit of actually doing what the debtor is meant to do, namely, repaying. So the first effect is the debtor is punished less than he should be if he doesn't repay, the second effect is if a debtor does not receive the benefits he is meant to receive if he complies with the contract in the first place.

In talking about this, I have talked only about the debtor and the lender trying to bribe the judge to get collateral or not get collateral, but there is a second form of bribe paying which is often referred to as extortion. So bribe paying we might think of as paying a bribe to get something I don't deserve, the debtor in my example has been paying a bribe to get to keep his collateral when he deserves to lose it. But a second form of corruption we might refer to as extortion. Extortion would be if a judge says unless you pay me a bribe, I'm going to take away from you something you deserve. Extortion here would be even if the debtor does repay, the judge says unless you pay me a bribe, I'm going to take your collateral anyway.

Many people including me instinctively feel there is something worse about extortion than bribery, that there is something ethically worse about extortion where the judge is threatening to take away something that someone

deserves. But a surprising consequence of thinking through where the problems of corruption do and don't lie in this context is there is at least once sense in which extortion is actually the less damaging fault. Let me say a little bit about that. To see why extortion is less damaging at least in terms of incentive provision, think about for example a debtor who hasn't repaid. So the debtor hasn't repaid, he is meant to lose his collateral, so a bribe in this case consists of the debtor paying a bribe to hold onto his collateral. Suppose he has posted $100 of collateral. Maybe the judge will let him keep his collateral in return for a $20, $30, or $50 bribe. On the other hand, extortion in this case, extortion in the case where a debtor hasn't repaid consists of the judge going to be lender and says I know the debtor hasn't repaid but I'm not going to actually deliver his collateral to you unless you pay me a bribe. So as long as the lender pays that bribe though, the debtor still ends up being punished. So under extortion, provided the judge doesn't get too greedy and extort a "reasonable amount," provided the judge doesn't get too greedy, the debtor is still punished in exactly the way the contract intends him to be. So from this view that the primary object of private contracts is to provide incentives, extortion undercuts incentive provision in a way that is not as bad as bribery does. So the consequence of this is that the total punishment

we would want to inflict on the two harms would actually be less in extortion than bribery because, again, extortion at least in this one dimension is in fact less serious in terms of the damage it does to the incentive provision.

So far I've talked about judicial corruption affects business by allowing reduction in the incentives provided by private contracts. I think there is at least one obvious countermeasure that contracting parties can take to try to mitigate some of the effects of this reduction in incentives. That is just to increase the mandated penalty for breach of contract in the first place. To stick with my simple debt contract example, increasing the incentive to repay is just an increase in the collateral the debtor has to post. If we ask the debtor to post more collateral, that's automatically a way to provide the debtor with bigger incentives to pay the contract.

However, corruption not only reduces the incentives provided by the contract, it also reduces the effectiveness of increasing the level of collateral and it does so in a particularly severe way because think about what happens as we increase the level of collateral associated with the contract. If we increase the level of collateral, the bribe a dishonest judge could collect goes up. As we increase the collateral, the bribe a dishonest judge goes up and because of that,

more judges will be willing to take the risk, because there are surely are risks in collecting bribes, of collecting the bribe now that the bribe itself is a more lucrative object. So if we try to increase the level of collateral to restore the incentives that corruption has taken away, what we do is we're actually going to increase corruption anyway because again more collateral leads to bigger bribes, bigger bribes lead to more corruption, and more corruption reduces the incentives. So this sort of feedback can mean that increasing collateral is not at all effective in restoring incentives, so private contracting does not in fact have the easy remedy I started out by suggesting that they might have.

Finally, I want to talk a little bit about the ways in which a corrupt judiciary can be self-reinforcing. Aryeh Neier has already touched on one of these where he talked about this collusion among judges whereby judges can collude so tightly they can insist that one another take bribes. This is in some sense similar to collusion in many other professions where we might fear that doctors collude to cover up one another's mistakes, or dare I say that you might fear that professors collude to not teach classes too well in the fear they'd show one another up.

But another way in which corruption may be self-reinforcing is that corruption is after all a crime and there is a lot of evidence from many different crimes that crime per se is self-reinforcing. This is a trivial example of this, one which I'm sure we're almost all guilty of, when we're driving on the freeway and many other people are speeding, we feel safer speeding. That's a somewhat trivial example of self-reinforcing crime. But there is at least one way in which judicial corruption is self-reinforcing which is more tightly linked to the fact that it is judicial corruption we're talking about here as opposed to speeding or collusion per se among any professional class, and I want to finish up by trying to articulate this.

The argument is as follows, and it going to build on several things I've said already. If many judges are corrupt for the reasons I've already mentioned, contracting parties will need to employ large contractual incentives because remember with corruption in my view the primary damage is that it undercuts the incentives provided by a contract so contracting parties will try to respond by increasing the mandated penalty. So in my debtor example, that's an increase in the collateral level.

As I have already mentioned, again, high collateral levels tend to increase the bribes that a dishonest judge can extract. So you will be able to note now that when the bribes get higher, then what that does is it makes the profession of judging relatively more attractive to dishonest individuals. So now think about who wants to become a judge in the first place. In a system where the bribes are relatively high we are going to get relatively dishonest people, people who we might say are skilled in collecting bribes, skilled in the art of corruption will be come judges. So what we're left with is a vicious circle that a country can get caught in. If the judiciary is already corrupt, then the debt contract within my example will need to involve a lot of collateral, the high level of collateral will in turn engender high levels of bribes, but those high bribes will attract even more corrupt individuals into the profession of judging in the first place, so there is this vicious circle.

Then the final thing I want to say to just build on this is to say a little bit more about something which a couple of people have touched on already which is the role of paying judges a decent salary in the first place. This is widely touted as a way to combat corruption, but I think a lot of times we're not very clear on exactly why paying judges more might help. Obviously there is a level,

and Judge Hillman alluded to this, where if we pay judges so little, then they almost have to take a bribe just to support themselves. But once we're outside a sort of subsistence track we might for judges, and I think very often we are, for example, I think in the U.S. not really worried about whether judges can afford to feed their families and it is less clear why paying judges more would be helpful, but the argument I have just outlined sort of gives an indication of why that might be the case.

When we pay judges little, the potential bribes they might get if they were to collect bribes constitutes a large fraction of the total compensation package of becoming a judge. So when official wage income is relatively small compared to the potential bribe, we can expect relatively dishonest judges to outnumber relatively honest judges in terms of who seeks to become a judge, whereas if we pay judges a better salary so that there is no longer such a big discrepancy between the potential bribing and the official wage salary, we wouldn't expect that imbalance per se. It is true of course that some people will seek to become judges solely to collect those bribes, but now we can expect most judicial applicants to be people who really just want to be judges and they view that wage as sufficient. Out of time, so let me finish with that.

(Applause)

MR. BERTONI: I would like to start my brief presentation thanking Nancy Boswell, Mark and all the T.I. people for the invitation to participate on this panel. It is very nice to see Judge Hillman again after many years and not to have to argue with him again, so we are on the same side of the panel now. I think that that was one of the last cases that I took as a defendant in Argentina, so now maybe you are one of the reasons that I changed and now am working in the civil society.

Let me start saying that the Due Process of Law Foundation, the DPLF, is a nongovernmental organization based here in the U.S. in Washington, D.C., that seeks to promote the reform and modernization of national justice systems particularly in Latin America and the Caribbean. DPLF was founded in 1996 by Thomas Buergenthal, now a Judge at the International Court of Justice, and his former colleagues from the United Nations Truth Commission for El Salvador. Under our Judicial Accountability and Transparency Program area, DPLF focuses its work on judicial independency, transparency in the judicial sector, access to judicial information, judicial corruption, mechanisms for the

appointment, evaluation, and removal of judges, institutional control mechanisms, and civil society monitoring.

Today I have been asked to talk about the strategies that civil society could put into practice in order to prevent judicial corruption. At DPLF we consider that civil society can play an important role in monitoring judges' activities and as a consequence prevent judicial corruption. We recognize however that some may be skeptical of a civil society role. Many may believe that external control from civil society negatively affects a judiciary's independence and that the only possible control of judges should come from within the judiciary itself, what is called internal control. Regman in his essay for this T.I. report explores these themes.

DPLF strongly believes that the independence of the judiciary is one of the pillars of democracy and we know that corruption erodes its independence. But a variety of studies show that internal control is insufficient and might be complemented by external control to prevent corruption. Let me give you some examples that come from our 2-year study that we call Assessing the Reality of Judicial Corruption and Programs to Combat it in Central America.

The design of internal control mechanisms follows in Central America and probably in most of the countries in Latin America an old model driving from Napoleonic institutions where the "prestige" of the judicial institution must be defended at all costs. Judges will cover for each other and public scrutiny was impossible. This is a cultural problem that pervades Latin America and explains to an extent why mechanisms to prevent corruption are lacking in the region.

Another difficulty is that the disciplinary process often violates the rule of law. Procedures lack transparency and offenses are poorly defined. As a result, very few judges are actually sanctioned. Even more problematic, as Carla Saldieto, our Guatemalan consultant writes in an article published last month in our newsletter -- DPLF, we put some of these newsletters outside, she pointed out that in many cases crimes are considered to be more a disciplinary problem, criminal prosecutions of judges then are rarely carried out. Another structural problem is the operation of judicial oversight bodies. Many judges after serving on the body return to judicial duties. The consequence is that members hesitate to establish rigorous standards, as those standards will soon apply to them as well. Moreover, in Central America, we have found that supreme courts have a very

important role in internal control mechanisms including in the designation of judges. This is troubling, as many supreme courts in the region are highly politicized. Only El Salvador has an independent Judicial Council that is not supervised by the Supreme Court.

Since internal control is not adequate, we at DPLF propose a balance between external and internal control, not mutual exclusion. Our belief is that civil society can make a valuable contribution to enhance judicial transparency and prevent judicial corruption through the systematic observation of the performance of the courts. As my colleagues Katia Salazar and Jackie Negromon explain in their essay included in the T.I. book, the Citizens Alliance for Justice of Panama created a Website where the general public could obtain information on corruption cases and anticorruption efforts. The purpose of the Website is to promote accountability among public officials including judicial officials and to involve citizens in the fight against corruption.

Another instructive experience comes from Peru where Utica Riba is a joint project of the Legal Defense Institute and the Law School of the Pontifical Catholic University of Peru to evaluate the situation of administration of justice in Peru. Utica Riba publishes the curriculum vitae of the Supreme

Court magistrates to apprise of their professional backgrounds. The organization also prepares technical and institutional critiques and monitors how the Judicial Branch handles corruption cases.

Public awareness of judicial decisions is an essential tool for transparency. Decisions should be made public and distributed on a regular basis through the initiative of the judicial system itself. This is not very common in many Latin American countries. However, when the judiciary does not take the responsibility for this task, civil society can perform important roles. In Peru for example, again, the Andean Commission of Jurists reached agreement with several judges to publish their professional backgrounds on the organization's Website. They also published the judges' decisions. Formal citizen participation and engagement can do a great deal to enhance judicial transparency. Participation can take many forms, professional, academic, trade unions, or gender-based groups can monitor judicial appointments or the application of disciplinary sanctions, to offer just a few examples.

In Honduras, for instance, reforms established civil society representation on a board that nominates candidates for the Supreme Court. The National Congress consequently makes selections from these nominees. The bar

association, representatives of business associations and trade unions, law schools and others participate in the nomination process. Yet despite these reforms, observers in Honduras still find that Supreme Court justices are overly loyal to the political party that selected them.

In 2003, the National Congress of Peru passed a law which opened up the judicial disciplinary process to external actors such as representatives of judge's associations, bar associations, and universities. Lastly, during 2001 and 2002, a group of civil society organizations in Argentina produced a series of papers that they called "A Court for Democracy" to enhance the transparency of the judiciary. They were received favorably by the Supreme Court of Justice, the legislature, and Executive Branch. As a result for example, the Executive Branch now consults the public regarding its candidates for Supreme Court judges and gives opportunities to present objections.

In conclusion, I reiterate that internal controls on the judiciary have been insufficient. On the other hand, the growing involvement of civil society has been a very promising development. Yet civil society monitoring provides only one means of external control. To improve judicial accountability we must also look to another primary source of external control, the formal mechanism

established by our laws and constitution. All institutions of government have the responsibility to ensure integrity in the judiciary. If they haven't already, Latin American legislatures should establish judicial committees with completely transparent and public procedures to confirm judicial selections and monitor corruption. Inspectors General offices can be established independently to investigate fraud and abuse. Of course, the legislature must also criminalize all impermissible judicial actions including corruption.

Finally, criminal enforcement agencies cannot yield to political and cultural pressures and consider judicial crimes merely disciplinary matters. Judges accused of crimes should be promptly investigated, and if justified prosecuted. Such external governmental control may perhaps seem evident to a U.S. audience. Nevertheless, they are viewed with suspicion in Latin America since judges are often subject to the whims of powerful individuals in the Executive and Legislative Branches. However, I am referring to legitimate and transparent governmental actions to reform inadequate judiciaries. Of course, legislative and executive initiatives must always respect the checks and balances set out in the constitutions. In Latin America we are experiencing an important period with democratically elected governments. We could say that we have

recovered democracy. Still we need to recover our republican system with separation of power and with strong institutions that play their roles under the rule of law. Thus DPLF advocates fashioning a critical balance of internal and external controls to ensure that no one, not even a judge, is above the law. Thank you.

(Applause)

MR. LINN: Thank you very much indeed for this wonderful painting that you've put together of different aspects of the problem that has been so well covered and described also of course in this great report that Transparency International has put out.

I think what we've heard, and as you read the report as I'm sure you will, you will also find there of course how many different dimensions come together in trying to deal with, create, or sustain an effective judicial system that is not corrupt. We heard a few of these elements whether it's in terms of balance between independence and accountability, whether is how the conventions can help in an external sense internationally to push forward the agenda, how the incentives from an economist's perspective work in this complicated area, and finally, how internal and external controls are necessary. I myself when I was at

the World Bank was responsible for the World Bank's world in the former Soviet Union and I recall we supported a judicial reform process in Georgia, actually it is briefly described also in the George case study in the report. The Georgians at the time and we in supporting them were quite successful in getting rid of ineffective judges and putting in place carefully vetted younger and actually professionally selected. But then over time it all got wasted because the budget wasn't there to actually sustain the court system, so within a couple of years it was basically back to square one. So I just show an example of the complexity, you can't just deal with one of the levels, you have to really work on many levels and differently in different contexts to achieve progress and achieve reform or in cases where you start in a good place, maintain the good situation that you have.

Let me now open it up. We have at least 30 minutes to have good questions, comments, and discussions with our panelists, of course including also our keynote speaker Aryeh Neier. We are thankful for his opening intervention. So let's see who would like to break the ice. There's a question in the very back. If you would introduce yourselves, please, that would be great and then we know who we all are.

MS. CAMERER: My name is Marianne Camerer. I am with Global Integrity and I enjoyed all of the interventions. Susan Rose-Ackerman's point of stressing the complexity of these systems and how they all interact is a good reminder, and Eduardo's point about the internal and external dynamics in the role of civil society were very useful.

This is really just a question to T.I. I'm just wondering about the relationship between this important work in the Global Corruption Report which focuses on judicial systems and corruption in them, and the other flagship product of T.I., the Corruption Perception Index which as we know attempts to measure perceptions of levels of corruption and whether there is any possibility of any type of correlation in terms of understanding how countries might rate on the Corruption Perception Index and some of the insights and ideas which have come through in the Global Corruption Report.

I am aware that it is not an empirical tool, the Global Corruption Report, but just the type of relationship if one can try and respond to that.

MR. LINN: Thank you very much. Nancy? Why don't you go ahead, Nancy, and then I suggest that I stand up there and direct traffic while you

come to my seat. Then if there are any more questions about the report, you can be among the respondents. I think that's actually what is going to work better.

MS. BOSWELL: The Corruption Perception Index that Marianne mentions is exactly that, perceptions, and it's based on surveys that are out in the public domain and it reflects perceptions of public corruption more generally. What T.I. has done is create what are called National Integrity Surveys which are in-depth assessments of different aspects of the system in any particular country, and the judicial system would be part of what the National Integrity Survey would look at. So I think the correlation that's going to be useful really is between the work in this book and the work that comes out of those National Integrity Surveys.

There are something like 60 I think that have been done so far, they are up on the T.I. Website, and I refer you to www.transparency.org if you're interested in getting greater depth than this Global Corruption Report provides.

MR. LINN: I was wondering how we were going to bring Nancy into this picture. We have a comment right there or a question?

MS. PASA: Carmina Pasa from American University. I am researching corruption in the judiciary for my thesis dissertation. I have found in

particular in Latin American countries that it is not only a problem with corruption in the decisions of judges, but it's also a problem of the administration itself. If you go just take an example, Peru, most of the judges are experts in the law. They know the law of course because they are supposed to know that. But they are not well performing in the administration itself. If you see who are the administration managers in the judiciary you will find that all of them are lawyers or judges and they are not having the preparation for the administration itself, so the lack of effectiveness and efficiency. This is one point.

The other point for the panelists is I have not heard about the external factors that affect corruption in judiciary. One is the civil law system for example in most of Latin American countries. There are so many laws that usually it's impossible to apply them so that's the reason the bribery is very common there. And they tend to criminalize every other activity so there is a huge trend in these countries to do for the depenalization of certain activities. Just one example, contraband and smuggling. When the amount is for example 100 cigarette boxes, less than $100, but it's not the amount, just the criminal code establishes that it has to deal in the judiciary just for this amount. So that the

amount of cases file is huge, so the judges are overwhelmed with so many cases. So I would like to hear from the panel about this, please.

MR. LINN: Why don't we take a few more questions and then revert to the panel?

MR. FULLER: My name is Robert Fuller. My background is in law and economics. I had the honor of working with Mansur Olsen at the IRA Center at the University of Maryland.

I wanted to say something or ask some questions about common law versus civil law. It seems to me there is much more that could be said about it. We have just heard part of it, particularly on the role of judges vis-à-vis legislators. What I wanted to ask about is federalism because it seems to me that federalism and decentralization have some advantages in terms of federal prosecutors prosecuting state judges for example. And even the diversity jurisdiction in this country, I had a case in front a very biased state judge which we removed to the federal courts and massacred the plaintiffs in federal court. It seems to me those kinds of checks and balances and decentralization are helpful things.

MR. LINN: Thank you.

MS. MULLEN: My name is Mary Mullen. I work with the Bosnia Support Committee. I just wanted you to explain to me right here in the United States how our system is not political if for instance President Clinton renamed all the U.S. Attorneys, they name the Supreme Court judges, they name the federal court judges, and they do it as a political party. I guess I just don't understand how that -- maybe you can explain to me how it is still as free as you say it is and as independent as you say it is.

MR. LINN: Thank you. Let's take a couple of questions here and then I'll turn back to the panel.

MR. SMITH: My name is Bruce Smith. I'm retired from Brookings and I'm now at George Mason University. I edited or co-edited a volume in the early 1990s on the rule of law in Russia with a Russian colleague, a very gifted individual. It was a great pleasure working with him. This was in the early idealistic phase. I think we have had some interesting contributions, but what do you do with a regime now in the case of Russia that invokes the machinery of the state to put Khodorkovsky in jail and then slap him again with another 8 years. I guess the regime contended that there were tax violations and

sort of a *Fletcher v. Peck* case in our situation and you have to correct the injustices and so on and so forth.

How do you contend with determined opposition and political from the top of an administration effort to turn the judicial system to political ends? Are you totally powerless? Does the international community and Transparency International or whatever a convention means in a total sense, does this have any significant where a government is determined to use the justice system for its own political ends?

MR. LINN: Thank you. A comment there and then we'll go back to the panel.

MR. DAVIDSON: My name is Ken Davidson. I'm a consultant on development. One of the things that I would have hoped that there would have been some discussion about is arguments in favor of what everybody is talking about on the podium today. It's nice for those who are convinced to put together plans that say be honest, be good, go and do right. But it seems to me that there are arguments in development who are saying that development, honesty and an effective judicial system is beneficial, it's a win-win proposition for a large portion of society, yet the World Bank can threaten not to give loans unless they

sign a piece of paper saying that they're going to be honest. But it seems to me that there's a lot more to convincing a country and a culture that honesty helps.

I've spent time in -- countries and I think for many of those countries they simply don't understand what the difference is between having a society in which the rule of law prevails and they have no faith in the system. What can we do to change that?

MR. LINN: Thank you very much. Let me maybe go in the opposite order here and start with Eduardo. Just to remind us, issues of administration and external factors, federalism, decentralization as advantages, the U.S. system is too political, how do we deal with the state taking over the government in Russia, and finally sort of how do we convince people that honesty pays. Those were the questions, so maybe each of you can pick, but I think there is sort of a natural distribution and we might even end up with Nancy passing her experience on the last item.

MR. BERTONI: Going back to the question related to the administration of the judiciary, I think that you are absolutely right. In the last 20 years we spent a lot of time and money reforming the judiciary in Latin America, but there is a specific institution that is not there which is the administrator of the

courts. Anytime that you just raise the issue about the need of an administrator of the court for the court, that is a tremendous problem because all the judges say that that kind of institution will affect their independence.

It's very interesting because at the same time as you say that the judges are in their courts deciding on individual cases, at the same time they are deciding on the amount of paper that they need for the court or the amount of computers or some things that are not proper to be decided by the judges. This kind of maintenance of the power of the budget of the judiciary is still in the mind of many judges a way to control their independence.

We at DPLF are now doing a project that we call Transparency in the Judiciary and one of the things that we are looking at is how transparent are the budgets of the judiciary because it's all part of the same argument. The judges one day they complain because they have a lot to do in terms of decisions of individual cases, but at the same time they say we have a lot to do in the decision of administrative issues. But when you say we are going to make a reform, we are going to reform the legislation and you are not going to deal anymore with administrative issues, they say, no, no, no, please don't do that because that will

affect our independence. So it's a crazy way to deal with two things at the same time.

And one last point. In terms of how politics plays here in the U.S., probably my colleagues here have more expertise to talk about that, but I think in some way politics matters, but politics with a capital letter. I am not making a comparison because the Assistants here in the U.S., the prosecutors, are within the Executive Branch, the minister of justice here in the U.S. is the chief of the prosecutors, and this is not the case in many Latin American countries. But the way that the judiciary committees in the Congress are dealing with the problem of the prosecutors is something that we have not seen in Latin America. So in some way when I say politics matter, what I am trying to say is that it will be good for Latin America to strengthen institutions to have judiciary committees and to have a transparent process within those judiciary committees that can monitor the activities of the judges, the designation of the judges, and the corruption activities of judges. So I not seeing too bad the situation that politics are being involved in control if we have transparent procedures and if the procedures are not intended by political goals with a capital letter.

MR. LINN: Thank you. Philip?

MR. BOND: I actually also wanted to say a few things about the same question, although the other half of the first question. The first question had two parts. The first part was about the distinction between judges and are they court administrators. Just very briefly on that, I agree completely that other court administrators are very important and I know that I myself both in speaking and writing get lazy and refer to anyone who works for the court as a judge, but that's not what I think, it's just laziness, and the corruption among those other court officials is of course also extremely and maybe even more important.

The other half of the question which I wanted to say a little bit more about was this connection between the level of corruption and laws. One of the things I mentioned in my earlier comments is that I think that the level of corruption, and I'm going to go back to being lazy and just talk about judges, but I mean judges plus administrators, so the level of corruption among judges and other court administrators reflects -- the same thing is true with respect to law. So if the legislature is passing laws which as you say are very complicated, that gives rise and gives potential for there to be a lot of corruption.

I think the reverse effect is worth bearing in mind which is both private contracts and laws have to be written somewhat realistically in a way

which respects the judiciary of that country. So there is no point in writing a very complicated law or contract if you think the judiciary is just not up to enforcing it either because of expertise issues or more in line with the topic of today's panel because they're just too self-interested, too corrupt to do so.

In private contracting, I think private contracting in part as least provided they are relatively well educated will tend to do that fairly automatically, that if we are in a country where we don't trust the judiciary, we'll just shy away from writing very complicated contracts or contracts which give the judiciary a lot of power over us. But the legislature, the government, doesn't necessarily have the same interest in staying away from those laws. It's going to be less on the legislature's mind that the laws it passes might not be enforced properly, and in the worst case, and this clearly happens where sometimes you can have situations where the legislature is actually passing laws precisely they will lead to corrupt opportunities for the judges who are after all their close cousins within the government.

I just one other very brief thing to say which is I thought that the last couple of questions about what can we do to stop states taking over and what can we do to convince people that corruption is a bad idea, were both excellent

questions but unfortunately ones which I myself has nothing useful to say on, but they are great questions.

MR. LINN: Maybe Aryeh Neier, on the question regarding Russia in particular, what would be your response? Sorry to put you on the spot.

MR. NEIER: I don't think there's any simple answer to that question. I think one could discuss it at great length. But I do think that one of the things that contributed to the authoritarian system that has developed in Russia today is the enormous corruption that existed during the Yeltsin period when state assets were being privatized by a lot of people who became enormously rich in very short order. And it's not that the authoritarian system that has emerged is less corrupt than what existed during that period, but I think that it helped to legitimize the emergence of a strongman leadership in Russia, and how to do with it today is immensely difficult because those who try to monitor and criticize within Russia itself run enormous risks or they are silenced. Most of the independent media have been silenced. Journalists continue to be killed in Russia. Civil society groups have come under new legal regulation which makes it immensely difficult for them to operate. There have been efforts to dry up their sources of funds by delegitimizing foreign support for civil society groups. One

of the things in Khodorkovsky's case of course is that he had established a foundation, the Open Russia Foundation, which was emerging as a major source of support for civil society in Russia and it has been essentially driven out of existence by the regime in Russia.

Obviously the authoritarian system that existed during the Communist period was even more controlling than the system that exists today, but as a sort of consequence of the Cold War hostilities there was international condemnation of those kinds of abuses in Russia to an extent that does not significantly take place today. The United States occasionally is critical of Russia, but the United States speaks with a diminished voice today because the United States credibility in speaking out on human-rights matters is substantially diminished by Abu Ghraib, Guantanamo, and a host of related matters, and the current administration has many priorities in the world and those priorities don't include having a hostile relationship with Russia. It is important for the United States for many reasons to have a friendly relationship.

From the standpoint of Europe, there is great dependence on Russian energy and Europe has difficulty in finding its voice in speaking out about Russia. Angela Merkel has done better than other European leaders, but

unless she gets significant backing from Sarkozy in France from the new administration in the United Kingdom, unless there is some unity within the European Union on such matters which is possible with the kinds of changes of leadership that are taking place in important European countries, but it is no means certain, but unless there is some united voice by Europe, Russia will not have much to be concerned about in terms of international criticism. And again, Russia is using its power as a supplier of energy and the immense wealth it is accumulating from the sale of that energy to increase its power and to loom larger in a number of the countries of the former Soviet Union than it did for some significant period.

So I think it's one of the most significant problems in international affairs today. There doesn't seem to me to be any very ready solution to the problem. We continue to work in Russia, but we are always worried that those we help, those we support, will suffer reprisals precisely because we provide them with help and we provide them with support, and that has to make us very restrained, very cautious about what we do, and we have to be very sure that the people who get some of our support do so in full awareness of the potential of reprisals they could suffer.

There are some other Western donors, the Ford Foundation is still active in Russia, the MacArthur Foundation is still active in Russia. They have the same difficulties that we do and there aren't Russian resources of funds other than what Khodorkovsky was providing to support efforts by civil society within Russia. And again, the Putin government has dried up the support that Khodorkovsky's foundation was providing.

MR. LINN: Thank you very much. Judge Hillman would you like to maybe address the U.S. system and its political nature or any other question you'd like to deal with?

JUDGE HILLMAN: Thank you, I would. Russia just for one minute.

MR. LINN: Sure.

JUDGE HILLMAN: I noted in my own notes that the Russian Federation ratified the U.N. convention just about a year ago and I know that this will be a small fix and will take a long, long time, but T.I. is very much interested in the notion of incorporating into the implementation of the U.N. convention effective monitoring provisions that will allow teams of anticorruption experts to do surveys of member states and to provide technical assistance, and to shine a

bright light, frankly, on how they operate. And to the extent that the criminal law process in that country is being used as a tool of tyranny, perhaps this monitoring mechanism will be able to discourage that kind of conduct.

I have to tell you the story that I just heard from Justice Souter in a speech he gave recently about a Russian lawyer. I would not discount the powerful corrosive effect that democracy once unleashed has on tyranny. Justice Souter tells a story of being asked to entertain a Russian lawyer and give him a tour of the Supreme Court. He brings him to the room where they conference and vote on their cases and the Russian lawyer touches the table as if it were something sacred. He turns to Justice Souter and says tell me what you think the most important case of the U.S. Supreme Court is and Justice Souter without hesitation went into the discussion of *Brown v. Board of Education* and its importance as a watershed case and reversal of prior Supreme Court precedent and how it opened the floodgates to our society examining race and other things. As he was telling the story and looking at the Russian lawyer, he can just tell that this Russian lawyer completely disagrees with him and is trying to figure out a very polite way to say to him you're completely wrong. So he says, tell me, I take it you think I'm wrong. And he says, yes, I do, most respectfully. As a young

lawyer in Russia we were precluded from reading decisions of the U.S. Supreme Court and we would photocopy them and you've heard these stories of people passing these things around. It was illegal to even have them.

The one opinion that we valued most and we shared most and discussed most was the *United States v. Nixon*, the tapes case, and for us as Russians it was remarkable to us that nine men of the Supreme Court could not only say that there was no man in the United States who was above the law, but that they're saying it alone would make it happen, and that gave us great comfort to fight tyranny in Russia. So I think that that's still there and I think where the bright spotlight from the international community that things still can get better.

With regard to federalism, it is certainly the case that our federalist system helps us in anticorruption efforts. There are many state prosecutors who are just willing to go after party bosses in their neighborhood and it has been part of the Department of Justice's efforts and the FBI's efforts to bring in outside people from the Justice Department, from agents from around the country, to tackle very significant corruption problems in the state legislatures around the country. So federalism helps us here tremendously.

I think it also helps on this issue of do we have a political system or not. There is a very good article in here about the problems we have at the state level where judges are elected and the corruption that flows from that, and obviously that is the most political version of how we select judges. On the other hand, the recommendations in here talk about the selection of judges through some independent body divorced from the political branches, from the Legislature and the Executive. We have a hybrid system where the Executive chooses judges and chooses U.S. Attorneys, but they have to be confirmed by another political branch and often scrutinized by the loyal opposition. It's in that crucible of the political process that I think we have developed one of the best federal judiciaries in the world. And, yes, it is a political process, but the level of corruption in the United States at the federal level at the judicial level is very, very low and I think it's because it's both responsive to the people in the sense that it's indirectly a product of the political process, but there is also the merit-based part of it that comes from civil society, the American Bar Association, the efforts of the fourth estate, the press, the people who review the financial disclosure forms, all of that outside scrutiny which ensures in our own system I think a selection of very highly qualified people of integrity to decide cases like the *United States v. Nixon*.

MR. LINN: Thank you very much. Unfortunately, the tyranny of time is driving us to give the last words to the two last speakers on my right. So if I could ask Susan Rose-Ackerman perhaps to pick up any of the issues, and then have Nancy close us up with perhaps actually responding to that last question we had and with apologies to all of you who wanted to ask some more questions. I would have loved to hear more, and maybe we have to organize a follow-up event, Nancy.

MS. ROSE-ACKERMAN: Let me just say a couple of things. First of all, your first question I thought was very important. It's not just the number of laws, it's the relationship between the judicial system and the laws. There are a lot of things where we have to go to the court to get them to stamp something or approve something. There is evidence in Latin America about the high proportion of cases that are brought to court and are simply abandoned. In 70 to 80 of the courts, if you go look, these cases just have never been decided. So there is something the matter there where we don't want to just poke our finger at the judges, it has to do with the way the system is producing cases for people to decide.

Just a final thing not directly about Russia but about the role of the judiciary in difficult situations. I think there are a couple of things to say. One example is the Supreme Court in South Africa or the Supreme Court in Hong Kong where they're operating, South Africa under apartheid, where they are operating within a repressive system and can't themselves change it but can sometimes make clever decisions on the margin that are deciding individual cases and then making broader claims or acting as a kind of goad.

The second thing is the way in which some states have created as I think Russia has sort of boutique courts, courts that are separately set up over here for business, or particularly for international business. That might work for the international business, but of course it has a great risk, business is quite happy, everything is happening nicely for their courts, but it's not doing anything for anybody else. So that is a solution that is not going to have this sort of catalytic effect that you're hoping is still possible in the Russian case.

MS. BOSWELL: All good questions. On the one about how do you convince people, if that's the question, that the rule of law has value or that anticorruption has value, I'm not going to speak from my own personal experience because I think we breathe the rule of law in this country, but from the experience

of my colleagues in T.I. chapters around the world in every region, I would say that they would argue that there is a difference between the elites who have power who understand the value of rule of law and if they can distort it for their own purposes they will, and the ordinary citizen who very much understands the value, it's just that they have very little power to do anything about it. So the lessons that we've put forward or the recommendations we've made is, one, work with champions of reform. To the extent there are any in the various branches of government, find them and support them. Two, empower civil society. I think Aryeh Neier spoke for what I deeply believe, civil society is under threat in those countries where rule of law is weakest, financially, politically, physically under threat. So empowering them, and I'm talking about civil society writ large, academics, think tanks, professional associations.

And three, insisting on transparency. Eduardo mentioned transparency of budgets, transparency of political finance, transparency of judicial decisions. It's only if we push those forward, taking all these together we might be able to push back against those forces that don't appreciate the value of the rule of law.

Having said that, again I return to what Aryeh mentioned and that is this notion that the World Bank and other international financial institutions, bilateral donors, foundations, are all finding their capacity to influence change increasingly limited by contrary pressures from countries like Venezuela, Russia, China, and so forth. So I think we have our work cut out for us.

On that happy note, if I may, just let me thank all our panelists for taking time to join us and share their views with us. It's been tremendously enriching for me and I hope for all of you. If you do want to order this, unfortunately we do not have copies here in Washington, D.C., but you can find them on the Transparency International Website. There is a way to link on from our Website to order these books, so please do. And again, thank you all for coming.

MR. LINN: Thank you very much.

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