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Property Rights and the New Legal Order (panel discussion)

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PANEL I

PROPERTY RIGHTS AND THE
NEW LEGAL ORDER

EDWIN MEESE III*

It is a pleasure for me to have the opportunity to serve as moderator of this opening panel this afternoon.

Our topic is property rights and the new legal order. I think it’s particularly appropriate that we consider property rights at the start of our examination and discussions of the development of new legal structures and principles that are being developed for the emerging democracies of Eastern and Central Europe. The concept of property and the rights pertaining to it were fundamental to those who drafted our Constitution in the United States and who developed the legal system that flowed from it. In 1787, there was no question in the minds of our founders that the right to acquire, hold, and dispose of property was a critical component of individual liberty. That fact was such a vital premise of the Constitution that it didn’t need to be explicitly set forth, although references to it and applications of it are found in provisions of the Constitution, as well as in the Bill of Rights.

Today the concept of property has the same importance as it did over 200 years ago, but now on a global scale. Dave McIntosh told you and Dick Thornburgh himself mentioned how he, as attorney general, had traveled to the Soviet Union to talk about individual rights, freedom of contract and property rights under the overall theme of the rule of law in democratic societies. Indeed, in his very well chosen remarks he emphasized several times the importance of the sanctity of contracts and respect for property rights as essential elements of a system that embodies the rule of law. You heard him say with a great deal of emphasis that property rights are the key to the revival of the economies of Eastern and Central Europe and the protection of individual freedom. The question before this conference today, as we

start to explore the development of new legal orders, is how to establish a legal system that encompasses this concern for property rights where there are minimal foundations for these concepts, or perhaps no foundation at all.

**PAVEL BRATINKA***

It is a great honor for me to be able to address such a distinguished audience. Property rights should indeed form an integral part of the legal system of any country which deserves to be called a free country. In this respect, the former situation in Czechoslovakia was extremely bad.

With the exception of the Soviets, the Czechoslovak communists had been the most fanatical enemies of private ownership in the whole of Eastern Europe. They had carried out several waves of ever more sweeping nationalizations, the last one occurring in 1959, by which they had stolen almost every piece of property in private hands. They had not even tolerated private ice cream stands. This approach represented a big difference with the approaches taken by neighboring countries. The methods of nationalization included not only outright confiscation, but also punitive taxation, supply discrimination, and rent control, combined with strict enforcement of maintenance duties, including the use of physical force. By the early 1960s, only two percent of the land was privately owned, and a tiny portion of apartment houses remained in private hands.

Under the Czechoslovak Communist regime, a person could legally own only one house of up to 120 square meters and one so-called object for recreation or recuperation of his capability to work for the government. Any house of more than 120 square meters was declared an apartment house and the owner was obliged to rent it to tenants. In addition, people's savings, stocks, bonds, life insurance policies, and similar property interests were wiped out by the 1953 currency reform. Finally, relentless propaganda and indoctrination denigrated private ownership as something pernicious and socially destructive. The communists recognized only so-called personal ownership or, rather, personal belongings. Even cooperative types of ownership in the area of agriculture, where farmers technically remained

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owners of the land, was held under constant suspicion and under vigilant supervision, lest it should become private ownership in disguise.

Although ideological tenets have certainly played a role in the nationalization drive, there has always been one rational and finally domineering motive behind it. When the state becomes the sole employer, it wields such power over human life that all other classical tools of oppression are almost unnecessary. There are millions of witnesses to this truth in my country. Really, right-wing dictatorships did not compare to communist dictatorships in terms of thoroughness of social control. But ultimately the communists destroyed property rights. When everything was owned by everybody, there was practically no legal basis or possible definition from which to derive the rights of management or of a particular government ministry to administer the property or the enterprises under its control.

Thank God this nightmare passed away and we are now on the way back to normality. Last June the people of Czechoslovakia voted overwhelmingly in favor of the notion of private property as the rule and state property as the exception. I feel pride at informing you that Czechoslovakia is the only country of the formerly communist ones that decided, not only to privatize the state property, but also to redress past injustices and robberies. Former owners of the land are going to be compensated either by physical restitution of the objects they owned or by what we call gilt-edged means, i.e., money, stock, or various vouchers which will give them the property rights. We are, of course, aware that 100% restitution or compensation is beyond the capacity of our impoverished country. Nevertheless, we think that the idea of the inviolability of private property wouldn't take sufficient roots without some solemn bow to the goddess of justice. So we have already adopted a restitution law, which will give back immediately the small pieces of property like pubs, hotels, and small workshops. Further, we are in the process of preparing a major restitution law which will give back all other property, provided restitution is feasible and the objects exist, and there are not complications to prevent it. After those goals are accomplished to the extent feasible, the compensation will be financial.

We have also adopted a law which empowers the state to
sell at auctions small businesses which were not confiscated but which were built by the state. Everybody who was a Czechoslovak citizen by February 25, 1948, the date of the communist takeover, will be eligible. Foreigners will be eligible in second round auctions to buy anything not sold in the first sale.

The biggest problem will be the privatization of the medium and large enterprises, since there is a very little capital in private hands. Total savings in my country represent about two-thirds of the annual gross national product. Even more importantly, nobody knows the market prices of objects to be sold; there is no market. Therefore, we shall have to use an untested method of vouchers. Each citizen of Czechoslovakia will receive one voucher for some very small fee with which he or she will be able to purchase shares issued by state enterprises that have been turned into joint stock companies. Since everybody will have a right to opt for any company he thinks promising, the final outcome of this giant auction will be some rough would-be market pricing. This pricing will provide an important guide for those who would like to buy additional issues of shares that will bear nominal value in money terms, and there we think even foreign companies or foreign investors will be allowed to make their bids. The great significance in this process is that every citizen in my country will get a stake in private ownership and an incentive to learn more about enterprising and markets.

The hottest issues today are the following: First, how far should the physical restitution go? There is a clash between the technocratic free marketeers and the spiritual free marketeers. For technocratic free marketeers the restitution of property is just an unnecessary complication. It only slows down the process of privatization. But for those who see in the market societies something much more important and spiritual, this restitution process is a "must" we have to pass through.

The second problem is how to prevent monopolies from using their dominance and raising their prices without infringing upon market mechanisms. We are now employing some price control mechanisms which constitute an intervention in property rights. But given that most of the industry still remains in the hands of the completely irresponsible
bureaucrats, the government must play the role of an invisible hand.

The third problem is how to stave off attempts to impose by law so-called "decision sharing" of employees in the management of companies. This pernicious idea is peddled by trade unions which seem not to know what they are doing. Generally speaking, the devils of socialism and lawlessness were banished from my country, but the struggle of creating a free society based upon the rule of law will be a lengthy one and we need all the help available.

RICHARD EPSTEIN*

When I arrived here in New Orleans, I originally thought that I would talk about some fine points of monetary theory, namely, the importance of a stable system of money for a stable system of property rights. But after listening to the speech of Attorney General Thornburgh, and the remarks of Mr. Bratinka, I wrote a different speech on the back of an envelope that I shall deliver instead. The title of this speech is "Do as I Say, Not as I Do." The theme of the speech is that the actions of public officials are often inconsistent with their words. That is the impression left to me by Mr. Thornburgh, who in his speech showed a great deal of nostalgia for the early heroes of American constitutionalism, especially James Madison, the intellectual figure behind the Federalist Society. We hear speeches that speak about the sanctity of property and the sanctity of contract. I agree with both of these positions, and think that I have defended them as forcefully and faithfully as anyone possibly could do. I think that it is a great social tragedy that these principles are not followed in the United States today, but are instead disregarded systematically by Republicans and Democrats alike. Having heard Mr. Thornburgh's speech, my advice to Mr. Bratinka is simple and to the point: listen to our rhetoric, but do not take our advice on any concrete issues, lest you mess up your own internal situation beyond all recognition.

It might help to be a bit more specific about how far we have strayed from our basic principles. There was a supreme irony in the Attorney General's speech when he

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noted that Professor Bernard Siegan had been asked to write the constitution for Bulgaria. I want you to recall that in 1987 and 1988, shortly after the Bork nomination, Siegan was nominated for an appointment to the United States Court of Appeals for the Ninth Circuit. He could not gain confirmation in the Senate (indeed, could not even get reported out of Committee), largely because he had written a book called Economic Liberties and the Constitution. That book generally advocated, in a rather tempered and moderate form (one far less rigorous and systematic than I would advocate) constitutional protection for economic liberties, including the right to hold property and to contract. The very positions that have de facto disqualified him from public office in the service of the United States are the positions that ought to commend him to everyone in Bulgaria and elsewhere in Eastern Europe as an expert on American constitutionalism.

Let me go beyond this particular case and talk about the question of constitutional orientation as a substantive matter. The Attorney General referred to the fact that we as a nation believe in the rule of law. But before we congratulate ourselves on our beliefs, we have to be extraordinarily careful in distinguishing between two senses of the rule of law: first, as a procedural device, calling for notice, hearing and publication, and, second, as a substantive device to which just laws should comply. Everyone here believes in the rule of law in the first sense of that term. But the definition is capacious, for you can believe in the rule of law in this procedural sense even if you are in favor of rent control, minimum wage, and antidiscrimination laws. It might be possible, for example, to exhibit great clarity in the enforcement of such laws, as by specifying the maximum rent that can be charged or the minimum wages that can be paid. It is clear, however, from the remarks of the Attorney General that his support for the rule of law is far more than a procedural system. The rule of law is also a set of substantive norms. It is a system that embraces, as we were told, the defense of private property and freedom of contract. It is a particular view of the limits on state power and of the special importance of free association and voluntary exchange in ordering human relationships.

Given the Attorney General's speech, you might think that
the rule of law both is and should be the paramount constitutional value in the United States. But since 1937, if not before, all the principles for which the rule of law stands and which the Attorney General defended have been repudiated under the dominant interpretations of the Constitution. Mr. Bratinka was astute enough in his remarks to remind us of the social ravages that follow from the adoption of any system of rent control, and to explain why that system would not be adopted in a free Czechoslovakia. Yet the United States Supreme Court, first in the 1920s and later in the 1940s, sustained the constitutionality of rent control statutes, including some that are more pernicious than any which he described. How, with our history, can we tell him and his fellow citizens to organize their constitution in accordance with our working conception of the rule of law?

Then we could turn to the question of labor relations. What Mr. Bratinka said in that context makes eminent good sense as well. He is right to insist that you cannot have a sensible system of co-determination that keeps markets operative, unless you also insure that where labor unions function, they are organized on consensual and not coercive principles. Yet in the United States our courts have repudiated that proposition since 1937 by sustaining the constitutionality of the National Labor Relations Act. The key feature of that Act is mandatory collective bargaining that operates to enhance the monopoly power of labor, on the one hand, and to destroy the ability of firms to operate in competitive markets, on the other hand.

To continue down the list, there are other major inroads into freedom of contract and private property that we have managed to sustain notwithstanding our ostensible belief in the principle of the rule of law. My envelope is short so I ran out of space when I started to list the types of restriction on freedom of contract that are routinely accepted today by Republicans and Democrats alike. Workmen's compensation laws often contain restrictions of questionable constitutionality. Now there is nothing wrong with the liability rules and the compensation called for under such statutes if they are voluntarily adopted by management and labor. The moment these terms are imposed by the state from without, however, then the statute is just another unwarranted state interference with freedom of contract. Of course we go be-
yond the mere compensation laws to statutory mistakes of major proportions like OSHA, which has been rigorously enforced by both Democratic and Republican administrations. These examples illustrate the tension between freedom of contract and state control that was missed by the Attorney General.

We also have minimum wage restrictions under the Fair Labor Standards Act and other provisions of the Act that impose restrictions on the rights of individuals to dispose of their labor as they see fit. In addition, there are the antidiscrimination laws, many of which are actively championed by this administration, which promise little tangible benefit to any group in the long run. The present administration takes the lead in the passage and enforcement of the Americans With Disabilities Act, an ill-conceived and vague statute that has as its raison d'être massive interference with private property (i.e., the right to exclude) and freedom of contract.

My basic point is really very simple. If the people and new governments of Eastern Europe are to follow our advice and institute in their countries the legal regimes that we have in place in our country, then, given their small capital bases, they will essentially guarantee their own economic self-destruction. Having fought the decay wrought by the socialist system, it would be sheer folly for them to adopt concrete positions that return them to the very fore of central government regulation from which they are now fighting so desperately to escape. They should heed our general rhetoric about the importance of freedom of contract and private property, but, unlike the Attorney General, they should understand that these principles are routinely violated in the United States, even by those who at some abstract philosophical level regard themselves as their defenders.

The only reason America will survive at least another generation even if it adheres to its present policies is that we have a sufficiently large accumulation of capital (physical and human) to insulate us from the short term effects of social policies that erode and destroy our capital base. The countries of Eastern Europe do not have the luxury of mistake that we have in this country. We have forgotten the importance of private autonomy; they must not. We have forgotten the principles that justify regulation—the control of force, fraud, and common pool problems; they must not.
We have passed, incredibly, a complicated tax code complete with special interest provisions and 26 different types of interest deductions; they must remember the importance of simplicity and equity in the formation of a tax code. We have a set of environmental restrictions that rely excessively on command and control devices of numbing complexity; they must remember that multiplication of bureaucratic structures is not the end of regulation, but its unfortunate risk.

So on the concrete issues that lie before Eastern Europe, I have only one piece of advice to cover all future occasions. When delegations of American Constitutional law professors (Bernard Siegan excepted) start to migrate to Eastern Europe, then Mr. Bratinka (if he grants them a visa at all) should listen politely to most of what they have to say and promptly ignore their advice. He should ignore the clever stratagems that are defended in the name of freedom of contract, private property and the rule of law. Instead he should open up his copy of the Federalist papers, and take his own advice from there.

ALEX KOZINSKI*

I was amazed and surprised and pleased to hear from our first speaker about developments in Czechoslovakia. It is a system that, if they keep going in that direction, will surely outpace ours in a very short time. The prognosis isn’t quite as good elsewhere in the Eastern bloc. I know mostly about Romania, but I believe some of the same problems exist elsewhere, and perhaps even Czechoslovakia will run into them. I hope they can overcome them.

The problem is that, unfortunately, the inconsistency between what we do and what we say is based upon a certain philosophy that is not constrained to the United States; it exists elsewhere, and particularly in the minds of people who have lived under communism for 40 years, 70 years, and more. It poses a very, very difficult problem, a difficult political problem, and a difficult economic problem. How do you get from here to there? Everybody thinks, believes, says that property rights are the way to go, that capitalism is the wave of the future. But how do you move from commu-

* Judge, United States Court of Appeals for the Ninth Circuit. Judge Kozinski was born in Romania and emigrated to the United States at the age of 11.
nism, a system owned entirely by the government, to a system where private property and private ownership is the principal, and perhaps the only, means of economic organization?

The way I would phrase the question for Romania is how do you get 23 million people to take their hands out of each other's pockets all at the same time? For better or worse, the 23 million people in Romania, whom I know most about, have lived under communism for the last 40 years. Everyone has a small or large stake in the system. The stake may be a job in a factory. It may not be a particularly well-paying job, but it gives them life security. It gives them a pension.

They may also have their own particular channels to the black market. They have the butcher who will sell them meat under the counter. They have friends in the West who will occasionally send them jeans, cigarettes and what not. They have established, or eked out, a way of life that is sometimes very difficult to dismiss. It's really a question of the mind. It's a question of how, after having lived in a system that has a state-controlled economy, do you suddenly change to a system based on a belief that market actors individually acting according to their own impulses will lead to as good a result or a better one?

Let me give you an example. One of the most impressive figures I met while I was in Romania was an economist by the name of Dan Daianu. He has recently finished spending some time at Harvard at the Kennedy School. When I was in Romania last year, I had a talk with him about the economics of farming. I said, look, why don't you just give it all away? Pick a day in the year and whoever happens to be standing on the piece of land, just give it to them. Don't sell it; don't try to auction it off. Just give it to them and then let them do whatever they want with it. He was intrigued by that idea, but he was concerned about a government study four years earlier which indicated that Romania needs 18 million metric tons of wheat in order to survive. How could they be certain that all these farmers, acting individually, would come up with exactly 18 million metric tons? They might come up with too much or too little. He viewed it as a very substantial risk for Romania to take. It might cause a famine.

This was one of the most educated people in Romania—
someone who had studied Western economies, who understood how a free economic system works—and still he had that gut reaction. That reaction is multiplied 80 million times by every little individual in the factory who thinks, "Gee, I have a job. It may be in a factory that doesn't produce very much. It may not be a particularly satisfying job. It may be part of an economy that doesn't produce very much, but at least it is my foothold. It is a thing that I'd have to give up to face the reality of the market."

The problem is, people like this have never seen anybody succeed. They have never seen a neighbor make it big by investing in McDonald's or really succeed in a grand way by opening a new business. In the United States, we have a very great advantage. We really believe that one can make it in the market. Some of us do make it; others don't. But we believe it is possible. The Romanians have no such role models.

The problem is further complicated because the government, which has done such a poor job up to the present, must make many decisions. Again, I take my hat off to the Czech government for having made truly enlightened decisions. By contrast, let me tell you of a Romanian experience that was related to me last summer by the head of the stock exchange in Budapest. The government planned to go ahead and privatize some of the businesses and sell stock. They thought that a good way of doing it would be to under-price their first series of stock issues so that people would buy them and would quickly make a profit. The stock would rise and then everybody else would see how well the initial investors had done. The next issue could then be sold for higher prices. Everything went according to plan. They did sell the stock low, and it quickly went up. Unfortunately, there was a big uproar in parliament that the property was being given away for nothing. The consequence was that they were not allowed to issue more stock. So they wound up taking the loss on the first issue, and then the political process got in the way of cashing in on the benefits they'd gotten by selling low initially.

Finally, let me talk about the almost intractable problem of competing property rights. Most of us here are lawyers and understand property in this country has come to be defined to include a lot of things. Property sometimes means
the right to your job. Sometimes it means a right to your pension. Sometimes it means a right to a certain position. The definition of property rights is very significant in a country like Romania because of seriously competing property rights. First, there are the original landowners; the people who owned the farms, the factories, and the stores 10, 20, 40, or (in the case of the Soviet Union) 70 years ago. A genuine need exists to recognize their interests in this property. But there are intervening property rights as well, or at least property rights as we would define them. There are vested pension rights; there are rights in various government enterprises; there are rights that workers have to particular positions or jobs, which either by law or tradition, cannot be taken away from them. This leads to a very difficult situation where, following one principle of property, one must give away the factory to its prior owners, but if following the other principle of property, one must pay off the people who have been relying on the property and have developed vested property rights. The transitional problems of the next ten or twenty years, how these problems are handled, and by what principles they are handled will really determine the success or failure of the movement to a capitalist system in some of these countries.

I am greatly heartened by the way things are going in Czechoslovakia. I think progress may occur more slowly and with a good bit more uncertainty in some of the other countries. A conference like this where we can offer ideas and help to budding capitalists is certainly welcome.

As United States citizens we need to guard against offering one type of help, however. In Romania, I kept hearing people say, "If only we could get America to underwrite us for the next 20 years; if only they could help us so that people will not be out of work." Unfortunately, the lesson that must be learned is that transitions are hard. There is no easy way; there is no free lunch; there is no cheap way out of this dilemma. In order for an economic system to work, it has to hurt; it has to bite. We can help by sending our dollars in forms of investment; that’s certainly a positive thing to be done. But we should not yield to the silent call to send over gifts.
I think it's suicidal for a speaker to take on Judge Kozinski, but I want to begin by doing this. It seems to me that his final comment about not helping the countries of Eastern Europe by outright giveaways is a very mistaken idea. Part of the reason the countries of Eastern Europe are in such a desperate shape is that during the past 20 years or so, their governments have borrowed enormous amounts of money from Western banks. These loans were guaranteed by Western governments in the name of detente. That is, we hoped to buy some sort of political concessions, which in fact we did not buy.

What was achieved by this orgy of lending to regimes that were completely unable to use the money that they were getting was, in reality, a total disintegration of the economic system of Eastern Europe. Part of the reason communism collapsed in Eastern Europe is that the economies totally collapsed due partly to the burden of debt which they could not service. Now if these countries are forced to pay back that debt, many of them, certainly Poland and quite likely Hungary, will end up bankrupt. This could very well lead to some form of authoritarian dictatorships in the future. To think that a country like Poland can pay $40 billion, which is mostly accumulated interest on loans that shouldn't have been made, is insane. These loans will not be paid. The question is whether the debts will be forgiven in some intelligent fashion or whether they will be allowed to bring down the economy and the budding democracy of the whole region. It is worth remembering that in one case of a true economic miracle, that of Western Europe after World War II, the rebirth did not come because the United States said, "You have to learn the hard lesson; the transition from a war and destruction to a market economy and reconstruction is something very painful, so let's ask you to pay off all your debts and all the war reparations that you owe us and so on." No, the Western European powers had done this to Germany after the First World War and the result was rather tragic. After World War II, on the other hand, unprecedented help was extended to Western Europe and to Germany in particular. That was what allowed the West

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German economic miracle, not just intelligent capitalist policies. Unless something like that is done with respect to Eastern Europe, I don't think there is very much hope.

Now, I'm sorry for this introduction, it's really not part of what I intended to say. I intended to say a few words about the problem of privatization. One thing that has to be understood about privatization in Eastern Europe, is that it is a very different phenomenon from what passes under that name in Western Europe and some other parts of the world. Britain had privatized a few companies over the years. It was touted as a great achievement. A rather small fraction of the economy has been transferred from state to private hands, with great state subsidies in the process to make the companies attractive, and all of this was done within the framework of an existing market economy. One could put a price on the enterprises and find underwriters for them. One could find people with a lot of capital who could buy them. Furthermore, one did not face any serious political problems. In fact, privatization turned out to be quite popular. Privatization in Poland and in other Eastern European countries is something quite different. It is not merely a transfer of ownership from the state to private hands. It is, instead, the creation of property rights or of the institution of property as we understand it in the first place. It is also the creation of an infrastructure of the market capitalist system in the first place. So it's a qualitatively different process.

When I say that what is occurring is a creation of property as such rather than a transfer of ownership from one hand to another, I have the following in mind: There are two ways in which you can deal with the problem of what the economists call the commons. When you have a piece of land that nobody owns, there are certain goods that are going to be underproduced and certain "bads" that are going to be overproduced. If you cannot reap what you sow, you're not going to put a lot of work in that soil. On the other hand, if you can take something from it and not pay the full cost of it, then you will take more than you otherwise would. There are two ways of dealing with this problem. One way is to have a government that administers everything and regulates everything and assigns obligations to people and then rewards them. So one way is to administer
socially available resources. The other way is not to rely on powers of the government but rather to give people specific entitlements to various resources and rely on the fact that when they use it in their own best interest, in an uncoordinated way, somehow the good of everybody is going to be served as well.

Now, all economies, in fact, regulate somewhat and they regulate much more than Professor Epstein would like and I'm sure much more than most of us in this room would like. But still, the case of Eastern Europe and the Soviet Union, until recently, has been quite unique: Except for the agricultural sector in Poland, all of the resources were politically administered. Businessmen didn't really exist. State functionaries were put in place and an administrative structure was instituted to produce and distribute socially available resources. It is therefore no wonder that nobody knows who owns what in these countries. It is amazing.

A theater director whom you might know, Andrej Wajda, who is very interested in the future of Polish theater, asked me sometime ago to find out who owns the theaters in Warsaw because he would like to save them. "They're all failing," he said, "but we don't know what to do. We don't know how to take them over; it's not clear to whom we should go to. Who is the person who has any rights to them?" And it's indeed unclear because many of these theaters are in a beautiful modern palace that is called Stalin's Gothic Palace in the middle of Warsaw, which was a gift from the people of the Soviet Union to the people of Poland. And who are the people of Poland? It is virtually impossible to give a meaningful answer to this question in Poland.

So the meaning of privatization in such countries is the institution, for the first time in many years, of genuine property relations. And because of the absence of the market, nobody even knows how much anything is worth. The standard valuation methods do not help much because no accounting method ever used will tell you what something is going to be worth in two years. A company's assets on the books are completely unreliable because they were all done when the prices were regulated and therefore don't reflect what the real revenues were or what the real expenditures were. Moreover, about 40% of the assets of most compa-
panies in Poland come from so-called inter-factory debt, which means that these factories served each other as a banking system. They opened credit for each other and they transacted mostly on credit. One would have to know the solvency of all the enterprises in the country to know what the value of the debt held by everyone is or what the outstanding assets are. Neither can you use the price/earnings ratio to value companies because no one knows what the price/earnings ratio is in Poland. It is ridiculous to talk about price/earnings ratios when companies are not bought or sold. If you want to know what businesses are going to be doing in five years, you either have to be God or the minister of finance.

Now, if you solved all these problems and you actually knew what the companies were worth, you would still face the following problem if you tried to sell them. In Poland, the whole volume of savings, including “under the mattress” savings, is worth between two and six percent of the book value of all Polish corporations. So if you wanted to sell them, even if you knew what the value was, nobody could buy them unless you discounted prices in such a way that it would be a giveaway. It would be a particularly unjust form of giveaway at that, because all the existing wealth disparities would be magnified immediately the next day. And you have to remember that the existing differences in wealth are completely illegitimate. They’re not perceived as well-founded by the people. They’re viewed as the remnants of the old system. So it’s a paradox in a way. To get where the Western countries are, you cannot follow the models of privatization that have been worked out in the West. Instead, some new method of jumping ahead must be found. You cannot have the state prepare the companies for privatization because if the state knew how to run them, you wouldn’t have to privatize. You cannot sell them because you do not know how much they’re worth and there is no one in the country who can buy them. If you try selling to foreigners you have to discount the price so much (because of insecurity) that a lot of political problems are created; immediately people begin to scream that you are giving away the store to foreigners, and not without some justification.

So privatization in Eastern Europe has to find some other method which must satisfy four conditions. First of all, the
method must be quick because the longer the present state persists, the greater the likelihood of a total economic collapse in the future. Second, the privatization method has to be socially acceptable. For example, to give something back to an heir of somebody who 40 years ago lost some property is fine, so long as it doesn’t turn out that there are 50 or even 1000 people, who suddenly receive gifts from heaven and who, at the end of the process, own the whole country. I think many people would have difficulties with viewing this kind of procedure as legitimate. Similarly, selling all of the assets to foreigners at discount prices may, from an economic point of view, make sense. However, such an approach will also be politically unacceptable. Moreover, privatization is definitely going to bring various hardships as people restructure these companies. High levels of unemployment are very likely and people have to be able to accept it politically. So they must perceive the process as legitimate.

The next problem arises from the popular proposal that we should just give it away to everybody. Every citizen should get a voucher; give everybody a little share in our national economy. The communists told them, “It’s yours.” This approach would make good on that rhetoric and, at the same time, get rid of the problem very quickly. Well, it’s a good start, but the problem is that if an average company has 100,000 shareholders, each of whom holds one share, very little has been accomplished. Privatization is basically designed to assure a rational system of supervision. The state has to be replaced by somebody who can supervise the management, with the result that the management and the workers don’t run the enterprises for their own benefit, which is the case in Poland and in Hungary at this moment. There must be ways of concentrating control. The main question is how to reconcile the concentration of control with widespread distribution of ownership. That is technically the most difficult issue of privatization.

Finally, a way must be found for foreigners to come in (not as advisors because that does no good to anyone—Western capitalism was not built by advisors, but by businessmen) without doing what is politically unacceptable at this point, namely allowing them to own the country as a
whole. So you have these four requirements and the challenge for a privatization plan is to meet them all.

RESPONSE AND REPLY

EPSTEIN: I wanted to talk a little bit about what Professor Rapaczynski said because I think that he has been influenced too much by his former colleague, Bruce Ackerman, and not enough by the hard realities of the time. To spend your time worrying about a "fair" redistribution when "fair" distribution means starvation for everybody, strikes me as being an idle quest. You have to worry at this point about maximization of aggregates and let the distribution take care of itself. I know it sounds heartless but the alternative is to say the following: We will insist upon doing something which is socially or politically acceptable; that task will so constrain the available options to us that we will end up doing nothing at all. The way in which you have to play this game today is to educate in order to change the politics, and to push hard against the grain if that's what it takes. The moment you let sentiments of equity dominate in this particular situation, then you have set yourself on a course of action that is a dead loser. There are simply so many constraints that the set of feasible solutions turns out to be zero.

Now, the second thing that I think is wrong with Rapaczynski's proposal is that it underestimates the power of the after-market. There are two ways in which that mistake is made. The first is with respect to the Western debt given by American banks to Poland and other Eastern European countries with, of course, Western government guarantees. The savings and loan crisis is not the only place in which the guarantee has been misused. In principle you don't forgive those debts; you renegotiate. You "work out" one way or another. With bankrupt firms in a domestic situation, you just don't walk away from 100% of the debt. Instead you try to figure out various kinds of extensions, debt/equity swaps, or some other deal.

Second, a "give away" of state assets may not be a bad idea. I don't much care who gets what because I think the importance of the distribution question is wildly overblown. But what you want to do is make sure that those shares, once distributed, are freely alienable. It has to be more clear to
everyone that once you sell it or you take your consideration, it's over. Thereafter you don't have to worry so much about control blocks, because they'll have formed naturally as entrepreneurs enter the market.

The third essential is to kill all forms of xenophobia. The only way that nations will survive in Eastern Europe is to get infusions of Western capital. If states start to announce that outsiders are welcome only on limited terms, the outsiders are not going to come, and if they come initially, they are not going to stay. So in times of real crisis, Eastern European countries do not have the luxury of as much big government as we do in the West. First, they have to step up production—quick and dirty. But after mismanaging an economy for forty years, the thought that now it is possible to observe all the constraints of equity, most of which are misguided anyhow, in order to reach some sort of promised land seems to me to be the recipe for disaster. So I'm going to call Professor Rapaczynski back home and tell Mr. Bratinka to go it alone.

RAPACZYNSKI: I think that Professor Epstein is living in a world of dreams. The hard reality is that we already see what happened in Poland in the last election. And what happened is that a man from nowhere, a Martian, descended upon Poland and suddenly won 25% of the vote and may, in a week, become the President. And God knows what this man stands for. Xenophobia in Eastern Europe — root out xenophobia. Easier said than done. It can't be done. The only way in which it can be done is if the economy is set on the right footing. And I think we have a little bit of a vicious circle. But don't despair, the set of solutions is not zero. Here's one. Debt renegotiation is a form of forgiveness, okay. And it has to be renegotiated right away and the Western bankers should not believe that they're going to get more than 17 cents on the dollar. As to Professor Epstein's claim that control will come naturally: no, control will not come naturally. If you have an economy, if you're trying to privatize corporations that employ 200,000 people, it will take a very long time for people to buy up enough shares to exercise control.
EPSTEIN: 24 hours?

BRATINKA: I want to speak first about the help. Czecho- slovakia is owed more than $1 billion by Iraq, which is equal to one-sixth of our yearly exports. We have lost it by joining the world in cooperating against Iraq. So we really need some money. The second is about the problem of too wide distribution of ownership among people, when you give away the state properties. I think we can reasonably count on the fact that about half of the population is not interested in any long-term ownership. They are going to sell the shares they are going to obtain. Second, we wish that the foreign companies or foreign investors would come to our country and buy shares, and there is a reasonable hope that although their ownership will not be the majority one, they will exert a lot of pressure on this company, as sort of an outside, reasonable control. And I think there will be a political willingness to accept this control because we know very well that it would be a very sound influence.

KOZINSKI: I think the question of external debt is kind of a red herring. Just like any other debt, the reason it will be forgiven or renegotiated is not some act of generosity on our part, it is just because it is bad debt. This is not a subsidy. This is just like the S&L crisis. You know, you face reality and you deal with reality where the debt was extended foolishly and will be repaid on the same basis, if at all. So the analogy keeps being made and Professor Rapaczynski made this to the Marshall plan. I've never been entirely convinced by that and perhaps we can discuss it a little more. These are fundamentally different situations.

What you have here are malfunctioning economies. Economies where people actually have jobs; they happen to be the wrong jobs. They actually have factories; they happen to be doing the wrong thing. They have a formal social organization, they have an economy of sorts, it just doesn't work. And what you have to do is wean them off that particular form of organization and into a different system. And there is no easy way of doing it. You have to have transitional employment. You have to have those factories shut down because they're inefficient. You're going to have to reorganize the method of agriculture. And those are painful processes. And what I kept hearing and what worries me
and what I hear whenever I speak to many people from the Eastern bloc, Eastern bloc economists — fortunately not all, but many — is well, you need basically some sort of formal employment insurance. Something to feed our people while we’re making this transition. As if we can take people from a communist system and build a capitalist system over here and then they can move in like into a new house. It just doesn’t work that way.

QUESTIONS AND ANSWERS

QUESTION: Professor Rapaczynski and Judge Kozinski both spoke about some of the political and economic problems of the transition from a socialist regime to a private property regime. It strikes me that there’s another dimension to that problem that I’d like to hear the panelists address. Property is not a self-defining concept. In this country we have an elaborate set of rules that define the contours of property rights, even after we’ve identified who the holders are. We also have an evolved, elaborate set of rules dealing with the protection and disposition of property. I’m wondering how well developed the private law regimes are in the Central and Eastern European nations and how that might affect the possibility of leaping to a property regime.

RAPACZYNSKI: Well, insofar as traditional forms of property, such as land ownership and ownership of various tangibles, that’s not such an enormous problem. In some of the countries at least, there is the old legal system that is easy to purge of the communist insertions. The problem is the one I mentioned before and that is the absence of a legal infrastructure of a developed market economy. Things like company laws, security laws — they are nonexistent or woefully old fashioned: you can do various kinds of things that are rather hair-raising. The same is true about banking laws. Do you want to have banks that are universal banks, banks that exercise control over companies or not? These are not property rights, property rights in a very narrow sense, but they are the legal framework within which a modern economy operates. And that is not only absent there, but nobody knows which one would be the best, and also nobody knows even what they don’t know.
EPSTEIN: Since I’m an “expert” with detailed knowledge on Eastern Europe, I will make a few observations. First, I suspect that the solution to many of the problems of transition does not rest on the development of some local or internal situation. It is far better to borrow a code from some other place and make marginal adjustments in order to fit the local situation. There is precedent for this action in the pattern of lawmaking in the United States during the revolutionary law period. New York State, for example, did not jettison the English common law at Independence. Quite the contrary, it announced that the common law as it existed on July 1, 1776, or some such date, was the common law of New York. The solution could be tried in Eastern Europe. There is of course no necessity to adopt American codes, and in certain areas that might be inadvisable. I think that the Uniform Commercial Code might be a plausible candidate for Eastern Europe, but the complex corporate laws in the United States probably are not. But further and more detailed study is surely warranted.

Second, no matter where the law is taken from, one substantive modification will usually be in order. The most important words in any business or commercial setting is “unless otherwise agreed.” For an all-purpose across the board reform, I would therefore recommend the removal of mandatory terms. Again, it is important not to be too concerned with the distributional niceties, and far more important to push hard on improving overall output.

Third, in dealing with the formation of a corporation, it is a mistake to assume that privatization of existing state enterprises is the only way to proceed. It is also possible to form new corporations, and many of these can be formed even if none of the incorporators have cash. It is permissible to allow each party to contribute labor or services to the firm in exchange for shares. The effective use of the corporate form does not presuppose the availability of physical or financial resources.

BRATINKA: Well, I have to admit that our commercial law is still at its very beginning.
EPSTEIN: The UCC's pretty good.

BRATINKA: It was practically destroyed by the economy because it did not need it. Any disputes among companies were settled by the power apparatus or there was a process of arbitration where quite arbitrary decisions were made. And as far as I know there's almost no law of tort. I mean, when . . .

EPSTEIN: You should count your blessings.

BRATINKA: Well, but I think — although I know your problems with, for example, patients suing various doctors for damages, my country's on the other end of the extreme. The pendulum swings too much to the other side. But we are now trying to do our best and we know we need the basics of commercial law nowadays.

QUESTION: When I was in Bucharest in March, I saw one law professor at the law school there leafing through the commercial code from the 1930s. It was the only copy in the library and it was extremely out of date. It is something that has also been lost entirely in the historical memory of the people teaching there now. My question is for Professor Rapaczynski. I want to go back to your introductory remarks in response to Alex, the remarks which you said you had not intended to make. After listening to them I can understand why. It seems to me that there are two points I would make here. First of all, not on the debt issue, but on the Marshall plan, it strikes me that there are a large number of people who say that Western Europe survived and prospered notwithstanding the Marshall Plan for the very reasons that Ed Meese cited earlier, namely that they simply did away with all of the advice they were getting from the West and Western economists in particular and simply freed up the market. But I think what Alex had in mind in addition to the debt issue was also the kind of aid that is coming from such organizations as the World Bank, the IMF and of course they are lining up in Washington right now to send all that money over there in spades. The World Bank and IMF have had a history of perverse loans, of absolutely reckless government to government loans which have created all the kinds of perverse incentives that not only do not help a market, but frustrate a market from coming up. A market
will come up if a legal structure is in place. If we, on the other hand, try to pick and choose winning industries or winning governments, we're going to frustrate that natural process from ever coming about.

RAPACZYNSKI: It might well be that the Marshall Plan killed off Western Europe. It's very nice to be among the group of people who love controversial statements. But there is — I have recently been to Hungary, for example, and the whole privatization process in Hungary is now geared to getting money, to sucking out available capital from private individuals who can open small businesses and to pay it back to Citibank. Now, some people in this room may think that this is a great idea and that this will really help Eastern Europe and that following this line will put East Germany in a situation that will be advantageous as compared to Western Germany after the war. But it seems to me that to state this claim is to refute it.

EPSTEIN: I must say I am torn about the forgiveness issue with respect to the past debt. I mean I'm not quite sure what the optimal strategy is on renegotiation and so forth. And I think that all people can agree that on that transitional problem, if you take a new enterprise, for example, a corporate reorganization today, and subject it to a lien which is in excess of its market value, the new managers are essentially going to be in foreclosure before they start. But I think the really important part of the question is the other half of it. I think what the United States ought to do is forthwith announce that it will never give another dime to the World Bank or to the International Monetary Fund for investment. The government will cease being in the banking business. That is, once you have state to state loans, the only way that your loan covenants will work is to make sure that the state agency will have some kind of a local monopoly so it can pay back the fund. Thus, you get foreign capital going in there to establish state owned monopoly industries on the other side. That's not a transitional issue where Rapaczynski may well be right and the doubters like myself and Kozinski may be wrong. That is just a sheer, outright, complete, and total intellectual blunder. And it seems to me that on that point we ought to be emphatic, even if on the other point we admit perhaps the United States or the West-
ERN EUROPEAN COUNTRIES OUGHT TO EAT SOMETHING ON THE GUARANTEE IN ORDER TO SECURE A WORK OUT. SO ON ONE THING I'M GOING TO BE CATHOLIC AND OPEN AND ON THE OTHER THING I'M GOING TO BE AS NASTY AND AS VICIOUS AS I CAN POSSIBLY BE. IF THE STATE DEPARTMENT GETS INVOLVED IN THIS — ARE YOU HERE MS. SCHWARTZ? — THEN WE CAN BE SURE IT'S GOING TO BE DOOMED, AND DON'T FORGET IT.

QUESTION: THERE IS ANOTHER SECTOR OF THESE ECONOMIES THAT IS GOING TO HAVE TO GET BACK INTO PRIVATE HANDS AND THAT'S THE CHARITABLE SECTOR: CHURCH BUILDINGS, HOSPITALS, AND OTHER ORGANIZATIONS THAT IN OUR COUNTRY ARE RUN BY PRIVATE ENTITIES. IN MOST CASES THE BUILDINGS AND THE PROPERTIES HAVE BEEN SEVERELY DAMAGED AND HAVE DETERIORATED OVER TIME. I WONDERED IF, IN YOUR EXPERIENCE, YOU HAVE COME UP WITH ANY IDEAS AS TO HOW THESE PROBLEMS MIGHT BE ADDRESSED. HOW DO YOU GET THESE THINGS BACK INTO PRIVATE HANDS?

EPSTEIN: I'VE GOT A SUGGESTION: TRY TO WORK BUDDY ARRANGEMENTS WITH OTHER INSTITUTIONS. YOU GO TO CHURCHES AND TO OTHER ORGANIZATIONS AND YOU TRY TO GET AMERICAN INSTITUTIONS ON A PRIVATIZED BASIS TO GO OVER TO EASTERN EUROPE. IT SEEMS TO ME THAT ONCE IT IS CLEAR THAT THEY COULD ENTER AND LEAVE, YOU COULD GET SOME MOVEMENT IN THAT PARTICULAR DIRECTION. I WOULD SIMPLY SAY THAT RELIGIOUS ORGANIZATIONS SHOULD FIND THEIR NATURAL AFFINITIES IN OTHER RELIGIOUS ORGANIZATIONS. BUT AGAIN, KEEP THE STATE OUT OF IT BECAUSE WE'VE MANAGED TO WRECK OUR CHURCH AND STATE RELATIONS AND THERE'S NO REASON WHY THEY OUGHT TO DO IT TO THEIRS.

BRATINKA: I THINK THIS IS MORE A PROBLEM OF THE PEOPLE. IF THESE ORGANIZATIONS ARE VOLUNTARY INSTITUTIONS AND MANAGE TO GET ENOUGH PEOPLE WHO WOULD WORK FOR THEM, I THINK WE WILL SEE VERY SPEEDY BLOSSOMING OF THESE THINGS. ALTHOUGH OFFICIALLY GIRL SCOUTS WAS FORBIDDEN, MY DAUGHTER WAS PARTICIPATING IN AN UNDERGROUND SCOUT ORGANIZATION, AND IT WAS THRIVING. SO I SAW, AND ALSO IF YOU WALK THROUGH THE REGIONS OUTSIDE OF PRAGUE, YOU WILL SEE THAT ON FREE DAYS, ALL THE VILLAGES ARE BUSTLING WITH THE ACTIVITIES OF PEOPLE WHO ARE BUILDING THEIR HOUSES. SO THERE IS TREMENDOUS POTENTIAL IN PEOPLE'S ACTIVITIES. AND I THINK ONCE THIS POTENTIAL IS TAPPED, YOU WILL SEE A SMALL MIRACLE AGAIN IN EASTERN EUROPE.
QUESTION: I make no claims as to how to solve the overall economic conversion, but I spotted one thing in the discussion that might help clear some of the undergrowth. There is the problem both of debts owed by the Eastern European countries to the United States and the EC nations, and the lesser problem of Iraqi debts owed to Czechoslovakia. Could there be—pardon the word—a collectivization of debts in which through negotiation the debts owed to Eastern European countries are assigned to the West, which might have a better way of collecting them.

EPSTEIN: You go into a voluntary market right now and sell it. You don’t have to do collectivization. Put it up for bid.

MEESE: Suppose there are no bidders?

EPSTEIN: We should never use disguised subsidies. Because what happens is you start getting back into the mess. You think that that’s worth 20 cents on the dollar and so what you’re doing is you’re paying 50. Nobody will know how much of a subsidy it is or why it is. You want to make friends with someone from whom you’ve taken money, don’t lose it at the table, make a side transaction, just give it back to them afterwards. Keep the two processes distinct. Don’t muddy the waters.

KOZINSKI: This external debt problem just seems to be such an overhang. You know, they could walk away from these debts tomorrow and it wouldn’t be the end of the world. Argentina did it. How external debt gets handled is a side show. The real question is how do you deal with an organization of the economy within the country. What you suggested might work if you get a market for it. If not, it might not. But the external debt is our problem, yours and mine. It’s not their problem.

QUESTION: I would like to address this question to Mr. Bratinka. It’s about a matter that seems like we have a little bit of similarity in Louisiana with Czechoslovakia. We have in Louisiana some land that was expropriated by the state years ago called the Bohemias Spillway. And the legislature, in its infinite wisdom, decided to give it back to the heirs and decreed that that be done. That was a couple of years ago.
The problem is there's no mechanism for doing it really effectively and everybody's claiming to be an heir. And the result has been where the land previously was in commerce and productive in the sense that, though it wasn't used to build a spillway to protect New Orleans, it was valuable oil producing land and there were mineral leases that were being given to private oil companies which could go in and exploit for oil. But now that the privatization has been adopted without an effective mechanism rapidly to get the land back into commerce, there's no leases being let and drilling's being held back. So I'd like to ask what kind of mechanism do you see for privatizing, getting back to the original heirs. How do you keep the land in commerce at the time and what would be wrong with the alternative of letting people bid on it for a share of the profits to come and then if the government wants to compensate the former owners to go ahead and compensate them monetarily rather than in kind.

BRATINKA: I cannot give you a ready answer because there is now a fierce discussion in Czechoslovakia. In fact there are going to be two completely different laws being submitted to the parliament to solve the problem. As I told you technically, farmers never cease to be the owners of the land which was collectivized. But the same people thought that a collective farm was hiring other workers who have been working there for thirty years without owning a piece while many original owners moved to the city and now there's a danger that, first of all, the workers who didn't own anything will claim their share. They're already doing that. And on the other hand, the people who in fact practically said goodbye to their ownership will come back and claim it back. So there's no ready solution and although some of the land is destroyed because there are buildings on it, there is no small machinery suitable for the smaller lots than those huge, almost endless collective farm plots, etc. It is a problem to which I cannot give you any answer.

KOZINSKI: You point out a very important issue and that is that whatever the rule is in resolving these conflicting interests, it's got to be simple, it's got to be clear, even if you lop off a few fingers. I've thought about it a little bit. And let me offer a rule. If it's a life in being, if it's property that
was owned by somebody who's still alive, even if it was collectivized 70 years ago, and they can prove the ownership by some objective means, then they have priority. If the person is dead, anything within the last 10 years, anything nationalized within the last 10 years, there has to be compensation or return of the property. Where you have a conflict between current users and past title owner, the current user gets the property and the title owner gets monetary compensation. Simple as that. Will it always work? No, it's a simple rule. It makes sure that people who are actually on the property now are using it and who have somehow gotten vested rights to it will not be displaced and it also assures the equity rights of prior title holders.

EPSTEIN: I agree with Alex and I want to take it one step further, which is that in general the last thing you want is to have unintended joint tenancies with respect to small parcels of land. You don't want six people all having a 1/6th interest in anything because then you have modest little pieces of socialism. Whenever I teach property and I teach joint tenancy, I say if you think socialism can work, watch when four siblings squabble over land, you will discover that it doesn't do very well. I think the other thing, in addition to monetization, is the following rule: that you will allow unilaterally, without cause, without justification, without explanation, anybody who has a joint ownership interest to force a public auction and a sale. Immediately. So that one guy could put it up for sale and that way get it back into the stream of commerce. And the strategy's identical in some sense to Alex's because that means that what you're saying to people is you don't own land, you own an interest in a fund and you're basically through the market and the resale market monetizing the interest. If you have joint ownership of productive assets that's going to be a dead loss, then maybe the occasional loss of equity, but it's a small price to pay for getting stuff back into the stream of commerce.

QUESTION: I have to suggest three models from our past that might offer some dynamic for use and ask your comment. The first model would be as in the Oklahoma land rush. One of you mentioned you're not sure you would object if you give the land to whoever happens to be standing on it. Well, there was a slightly more organized thing in our
past where I don’t know if our visitors from abroad know about it, but they had a starting line and then they all rushed to the land they wanted and what they found they got. And they had some set of rules, but minimal. Another model would be an employee stock ownership plan, which is a way of moving towards ownership by the workers in an industry. A third model is what we have seen over the post-World War II years with American and probably European investment in third world countries where the country needed the foreign investment and they was prepared to have it. They were prepared to offer incentives. And yet, xenophobia otherwise, they wanted to keep control. So agreements were worked out where the local ownership, very often a somewhat dictatorial government, would retain a measure of control and the foreign corporation would have that measure of control which it needed to run a profitable enterprise.

RAPACZYNSKI: I want, anticipatorily, to agree with Professor Epstein. That is about one thing at least. First, this is a terrible idea. The structure of central control over industry in Poland has been basically destroyed. What does this mean? The manager is nominally in control. There is, however, one constituency that he has to satisfy and that’s his workers’ council. In fact, the workers’ council at this moment is running the enterprise. What do they care about? They care about maintaining employment and not lowering the workers’ wages while production is falling down. Production in Poland fell between 30 and 40 percent within the last year, but there have been practically no layoffs. There is a “statistical” unemployment, mostly because of a generous unemployment compensation policy that the government has been following. Only between 100 and 200,000 people have been laid off work, in a country of 35 million where production fell between 30 and 40 percent. Now, obviously restructuring will mean a very large increase in unemployment. You can deal with this phenomenon in a manner of ways. You may want to open public works so as to have some peace or you can subsidize failing enterprises. However, I agree with Professor Epstein that it is a bad idea to subsidize failing enterprises. Let them shed labor, then you do with the unemployment whatever you want. But the worst thing would be to have the workers decide who is going
to be fired because the answer is nobody, until the enterprise is run into the ground.

EPSTEIN: I disagree with Professor Rapaczynski in one regard. I'm not sure whether your second alternative is worse than your third or your third is worse than your second. I mean it's a tough battle. That is, the model of joint foreign and domestic ownership, of course, is the Union Carbide plant which went up at Bhopol. The local government kept 51%, but the foreign firm was supposed to operate it; then by a combination of regulatory change and stock ownership, the Indian government wrested control from Union Carbide, ran the plant itself, had an Indian saboteur blow up the plant and Union Carbide was forced to pay hundreds of millions of dollars in damages. You don't want state owned enterprises. That proposal is a classic illustration of doing something badly by insisting that transitions have to be slow. I'm a cold turkey guy. I want that turkey to be frozen because I think it's the only way new businesses will start off on a sound footing. The effort to make transitions gradual often leads to more dislocations that it avoids.

Finally, I think that the analogy to the Oklahoma land rush and the Sooners is misplaced. The Sooners, of course, cheated by starting too soon on the race, which is why they earned their name. But more to the point, we are not dealing with vacant land for which the race might properly go to the fittest. We are dealing with complex capital structures and the problems of entrenched mismanagement. While the great case of *Pierson v. Post*\(^1\) may have a lot to say about the ownership of wild foxes, that problem is not the one facing Eastern Europe. The relevant metaphor is not the fox: it is bankruptcy and reorganization.

MEESE: I can't help but put in a comment that the idea of a phased transition is a little bit like the case of if the United Kingdom decided to change from driving on the left side of the road to driving on the right side of the road phase by phase: trucks one year, buses the next year and cars the next. It would, indeed, be chaos. Let me read one an-

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nouncement that is important to some of you and that is that any lawyers who are present who wish to earn CLE, continuing legal education credit, in Louisiana, must sign in for every panel, each one of these. There is a sign-up sheet just outside the doors, along with copies of written remarks required by the Louisiana Bar Association. If there are any questions, ask Debbie or Darlene who will be there to help you. Any of you who are not licensed to practice in Louisiana and wish to sign up for the Louisiana bar, I'm sure they'll take your applications as well.

EPSTEIN: Another piece of regulation which you would do well not to emulate in Eastern Europe.

MEESE: In summary, let me thank our panelists. I think Mr. Bratinka certainly gave us an excellent start by indicating the challenges that this transition will meet in his country and inferentially in the other countries as well. Professor Epstein, I think, gave a dramatic example of what not to do in making these changes.

Judge Kozinski certainly gave some practical advice in terms of not letting the political system get in the way of sound economic practices and also the problems that we would encounter if indeed there was a widespread underwriting of the new economic systems and I think there was, in discussion, considerable concern expressed about underwriting either ourselves or letting some of the international monetary-type organizations into it.

Professor Rapaczynski, voicing some disagreement with that concept, indicated that there needs to be some way in which we can provide assistance. He indicated the importance, the seriousness and the differences in the problems of privatization in these countries where they don't have the infrastructure that has been present in other countries that have been more successful in this regard, and indicated the necessity of socially and politically acceptable solutions.

I think if we had to draw one thing out of at least a majority of the conversation, including the questions, it would be that when we talk about property rights, and it is important that there be a system of property rights, that it should be a system of private property and to the absolute extent possible, far beyond what we have done in our country, that we keep the government out of it. And with that bit of advice, I
thank you all for being here. I thank our panelists, and I particularly appreciate, Mr. Bratinka, your being with us and presenting your views. Thank you.