

Concept Paper:
Rule of Law Strengthening and
Anti-Corruption in Ukraine

Recommendations for USAID Assistance

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I. Introduction

Background

This concept paper outlines a strategy for developing a Rule of Law program that reflects the conditions in Ukraine in 2005. There are three key assumptions about Rule of Law conditions in the Ukraine that set the context for this assessment . First, that the Yushchenko government has the political will, and the political capital, to undertake significant, and no doubt, controversial reforms of the judicial system. Reforms are a requirement of various European Union agreements, and will become important benchmarks for a closer relationship with the EU in the future. Second, the Yushchenko government will welcome the active engagement of the USG, along with the EU and other donors, in providing material support, and where relevant, access to external technical assistance to the reform process. Third, that nearly 15 years of training, assistance, and exposure to the West has made a difference, in that Ukraine today has a small but growing number of experts and leaders who understand what is needed and how to prepare the basic laws and organizations to realize reform objectives. Technical assistance may still be requested, but of a very focused and specific nature, rather than the broad brush approach of the mid 1990s.

Two assumptions about the USAID context are also important. First: this will be a **three-year program, with emphasis on specific critical results** within first year. Second: funding will be available from existing and supplemental appropriations to permit quick engagement with the Government of Ukraine on the issue of Rule of Law reform.

In developing the recommendations in this assessment, the team developed certain criteria or principles that were used to guide our analysis, conclusions and recommendations. Unless the political situation changes dramatically, we believe these principles should serve as a basis for further development of an new USAID Rule of Law program.

Key Principles in Expansion of USAID ROL Strategy Acceleration and Expansion

1. **Direct causal linkage with Strategic Objective 4, IR 4.3, Adherence to the Rule of Law.** USAID's existing strategic plan includes room for substantial acceleration of the USAID program. This expansion also conforms to the more comprehensive interest of the Embassy and EUR/ACE in promoting Rule of Law.
2. **Design – Implement.** The new assistance project should rely in large part on a design-implement approach. Three reasons underlie this principle: the situation is unstable; initial 2 week assessment too quick to make detailed appraisal of problems, needs, current actors; other donors still formulating own programs so USAID niche and comparative advantage may change.

Quick assessments in priority areas must be completed preliminary to interventions.

3. **Speed:** Although the situation appears chaotic, there is some evidence that government is moving now to develop a vision and conceptual framework/strategy for guiding rule of law and judicial reform. USAID needs to engage quickly, even before a formal project is activated.
4. **Use Existing USAID developed assets:** where possible and where rapid expansion/scale up can occur without substantial project management reorganization or initial institution building. This is especially possible on the “Demand-Realization” side outlined below in Section C.
5. **Flexibility in project implementation;** a rapidly evolving situation may create new needs and opportunities critical to overall success. As noted below, targets of opportunity may emerge that offer potential for quick results.
6. **Focus:** rule of law is a vast and complex arena, with many problems and requirements. USAID will focus on several key interventions that have strong forward and backward linkages to other problem areas.
7. **Anti-Corruption:** Reducing the level of perceived and actual corruption in the courts is a lynchpin for other anti-corruption initiatives. The focus for this program, to a great extent, will be on those areas of Rule of Law that support the following principles:
 - a. **That citizens expect government to exist to serve society.**
 - b. **That citizens have a right to expect and demand a rule of law, not rule by laws.**
 - c. **That the legal system must serve as the honest, fair and impartial arbiter, interpreter, and implementer of the Rule of Law.**
 - d. **That the legal system must be independent and self governing, but also accountable to the body politic.**
 - e. **That the Rule of Law must be transparent, widely accepted, and its basic principles clearly understood by all.**
 - f. **That without an honest, fair and effective judicial system, other efforts to control or eliminate corruption will fail.**
8. **Coordination with European institutions:** integration with Europe is a powerful underlying policy behind rule of law and judicial development for Ukraine. EU/TACIS, Council of Europe, OSCE, International Court of Human Rights, and specific European bi-lateral programs will play a dominant role. The Acquis Communautaire, though not yet activated, sets out specific requirements for acceptance. USG foreign policy is to support Ukraine integration with Europe.

9. **Coordination within USG:** USAID ROL programs need to have strong interface with programs developed through INL, DOJ, and others focusing on law enforcement and procuracy. At the same time, possibilities for joint programming in some areas should be exploited.
10. **Build on Ukrainian Competence/Experience:** The 2005 situation is vastly different than 1992. Ukrainian knowledge, understanding and competence have developed and must be appreciated and utilized to the fullest extent possible.

Changing the Relationship Between Citizens and the State

What follows is the outline of a strategy for renewed USAID support for development of Rule of Law and, closely linked, efforts to bring under control and significantly reduce the rather high level of corruption that now exists. Overall this strategy proposes to focus on a theme of changing the relationship between citizens and the state. Building on a number of opportunities afforded by the Orange Revolution, such as greater press freedom and increased political will to address corruption, this strategy highlights the important role of the judiciary not only as the guarantor of rule of law, but also as a primary means for citizens to hold government accountable. Implementation of administrative law reforms and establishment of the new administrative courts will be key in this sense. But the strategy also highlights the need for other means for citizen interaction with state, through civil society, public oversight, the media, and greater awareness of citizens' rights and the responsibilities of government

Three Dimensions of Rule of Law Assistance

There are three dimensions to this proposed strategy. The first is a **public policy dimension**, highlighting the need to forge consensus on and maintain momentum for finalizing and implementing a conceptual framework or architecture of a reformed judicial system. This framework would establish priorities for and identify areas where USG could support new legislation needed to carry out a comprehensive judicial reform strategy. The second is a **structural dimension**, identifying a limited set of potential technical programs that, if USAID provided assistance, would have substantial positive impact on the overall efficiency and effectiveness of the judicial system as well as on reducing corruption. Extensive USAID involvement in many, though not all, of these technical areas would be conditional on the Government's substantial progress on part one, the development of a strategy and new legislation. These areas represent a new opportunity for USG to assist on the "supply side" of the Rule of Law equation. Finally, the third is a **demand and realization dimension**, addressing citizen expectations, knowledge, and attitudes toward the effectiveness and fairness of the judicial system, their ability to access justice, and the realization of those rights. USAID has remained active in the "demand side" of rule of law development following the conclusion of its earlier ROL strengthening program in 1999, and it is important that the demand side continue to receive attention and support, but in a manner that goes beyond simple awareness raising and informing citizens of their rights. What is needed now is effective realization of those rights.

Of these three dimensions, the first is the most urgent and most important. It will nonetheless require fewer resources than the other two dimensions. The assessment team estimates that the total funding for the activities in this proposed strategy will break out as roughly 20-30-50 for the three dimensions respectively. This does not reflect the prioritization of each dimension, rather simply the relative allocation of resources needed for each.

Format of This Concept Paper

The three dimensions of rule of law development noted above are discussed below using a common format for each. First, we describe the current situation and identify what we have found to be the main **problems**. Second, we make specific **recommendations** as to what kind of program might be developed to address those programs, keeping in mind the design criteria outlined in part one above. Next, we identify areas of **action**, where steps may be taken now, or where additional research may be needed to develop a more detailed scope of work, followed by **illustrative activities**. Finally, we list the key **expected results** that USAID should expect as a result of the actions. This format is intended to facilitate the process of starting a new assistance program, so the text in these sub-sections is written to be used “as is” in a SOW or RFP for a future program.

II. Assessment Findings and Proposed Actions

A. The Public Policy Dimension

Problem: Lack of Consensus on ROL Reform Strategy and Inadequate Legislative Framework Inadequate to Support Reforms:

USAID Rule of Law programs in many countries have suffered from lack of political will and commitment to real reform. USAID’s major program in Ukraine during the 1990s was terminated for this reason.

Political will, however, must be organized to be effective. In this section, we identify issues and a possible approach to assisting the new government with a means to organizing the political will for reform so it may be translated in action.

- Although there is nearly universal agreement on the need to undertake broad judicial and legal reform, the current landscape is crowded with many competing initiatives by existing state bodies, foundations, think tanks, and other NGOs.
- There is no official strategy in place that lays out the basic conceptual and programmatic parameters, priorities, sequences, and time frames for action. Institutional authorities are unclear and overlapping. There are too many institutions, each eager to take the lead and blocking the initiatives of others. While a certain amount of competition is healthy, at some point it becomes dysfunctional unless there is a process by which good ideas and initiatives are organized within a strategic framework which delineates objectives, priorities,

and the overall system of authorities and competencies necessary to make the system work.

- Nearly every law relating to the establishment of the judicial system, e.g., Law on the Judiciary, as well as the Normative and Procedural laws fundamental to the corpus juris, Civil/Economic and Criminal law are in need of substantial revision. The most recent law establishing the jurisdiction of the Administrative Court was vetoed by the President while the team was in Kyiv. (See Annex B: list of laws identified by Ukrainian respondents as needing substantial revision)
- The process of preparing draft laws and amendments is akin to an Egyptian souk. For example, at least 20 competing sets of draft amendments to the Law on the Judiciary are reported to be in the legislative hopper, and the Law on the Advocacy is five years old and needs revision to reflect the growth of a more progressive advocacy.
- It is repeatedly reported that the Constitution will need amendment if new laws reflecting certain reform propositions are to be put into place.
- There are at least two tentative plans by the government to establish a working group to take the lead on this process, suggesting competition for control and direction of reform at the very highest level of government. Secretary of the National Security and Defense Council, Petro Poroshenko, reportedly plans to establish a working group on judicial reform, but many believe that this is an inappropriate role for the Council. The assessment team also learned of a draft presidential decree to establish a National Commission for Strengthening Democracy and Rule of Law to function under the auspices of the Deputy Prime Minister for European Integration, Oleh Rybachuk.

Recommendation #1: That the Ambassador make representations to President Yushchenko regarding the need for a comprehensive strategy or concept for judicial reform, the desirability of putting this in place sooner, rather than after the parliamentary elections, and the US interest in supporting the speedy development of the National Commission for Strengthening Democracy and Rule of Law as the most appropriate vehicle for this purpose. (NB: This recommendation has already been conveyed to Ambassador Herbst during the team’s exit briefing April 25, at which were Mission Director Crowley, Mike Scanlan, Necia Quast, and several others. Crowley and Scanlan supported the recommendation.)

The initiative for a National Commission for Strengthening Democracy and Rule of Law appears to be the more attractive course for four reasons: first, it has already been approved by the full cabinet, second, it has the engagement of the more reform minded legal thinkers and jurists, third, it would have greater durability than the working group currently being formed under Mr. Poroshenko, and fourth, it is inappropriate for the executive body in charge of national security to be in charge of court reform. It is much more appropriate for this initiative to fall under the purview of PM Rybachuk given the need to adopt reforms consistent with European norms.

Actions: It is critical for Mission to form quickly its independent reading on the National Commission proposal and the prospects for its going forward to the President, especially in the light of the Poroshenko ‘working group’. More needs to be learned about this initiative as well before Amb. Herbst pays a visit to the President.

Recommendation #2:

Assuming that the government establishes the National Commission for Strengthening Democracy and Rule of Law or an equally acceptable mechanism for building consensus on key legal reforms, it is recommended that the Mission support the process of consensus-building and legislative and regulatory drafting. USAID should build on the model well established under the former ROL Consortium project which Ukrainian counterparts will cite as a very good example of effective donor assistance. Furthermore, USAID should consider including in the scope of work for its new ROL implementing partner the role of facilitating donor coordination efforts in the ROL sphere.

Actions :

The USAID implementing partner shall support the work of the National Commission for Strengthening Democracy and Rule of Law (or other similar body or working group as determined by USAID) in the process of reaching consensus on key judicial and related reforms and subsequent legislative and regulatory drafting. The contractor will also facilitate the process for building political consensus on key concepts and draft legislation to expedite adoption and implementation, while at the same time facilitating the involvement of relevant members of academia and civil society. (The contractor might also provide similar assistance in the development of national anti-corruption policies or strategies, although the Council of Europe plans to provide such assistance so USAID involvement may not be necessary.)

Illustrative Activities

Illustrative Activity # 1

Based on a model previously implemented by USAID and other donors to support Ukrainian working groups drafting the Constitution, Civil Code, Administrative Law reforms, and other key legislation, the contractor will establish close working relations with the Commission or Working Group on Judicial Reform and provide it with technical and logistical support. For example, the contractor will help coordinate donor assistance to the Commission or Working Group, provide it with Ukrainian translations of comparative laws and legal frameworks, and arrange for outside expert legal opinions of drafts of Ukrainian laws or concepts and translate them into Ukrainian. With USAID concurrence, the contractor may procure the services of a Ukrainian or third country legal expert to work full time with the Commission or Working Group, arrange for a study trip to Europe for key drafters, or award sub grants to Ukrainian NGOs with relevant expertise on the topic to partially cover the cost of their participation in the Commission or Working Group.

Illustrative Activity # 2

Using the same model previously implemented by USAID and other donors to support important legislative working groups, the contractor will help the Commission or

Working Group on Judicial Reform make logistical arrangements and pay for costs related to one or more legislative drafting “retreats” outside of Kyiv. Participants would include key drafters such as MPs, staff of the Ministry of European Integration, academics, judges and members of think tanks. An important role for the contractor will be to help identify the relevant participants and ensure their participation. The contractor will also help organize and pay for administrative logistics such as bound copies of translated resource materials, tables for easy comparison of competing draft laws/amendments, and translation services. The contractor will help facilitate consensus building and ensure timely publication and dissemination of subsequent drafts for their immediate consideration by the public and the Rada.

Illustrative Activity # 3

The contractor will organize and convene regular donor coordination meetings on the topic of rule of law assistance.

Expected Results

- An official judicial reform concept paper and/or strategy endorsed by the president and/or prime minister as the government’s road map for judicial reform starting immediately.
- Clarification of key government and judicial system decision making authorities and roles necessary to implement the reform strategy.
- Consensus draft legislation or amendments presented in the current Rada convocation in priority order necessary to effect the judicial reform road map.
- Adoption of key legislation by the Rada.
- Buy in and support for court reform concept and supporting legislation from key civil society groups as a result of their inclusion in the drafting process.
- Faster implementation of key elements of the reform strategy

B. The Structural Dimension

Problem: The Judicial System is Inefficient, Ineffective, and Perceived as/is Corrupt:

While similar problems relate to other aspects of the judicial system, this assessment does not include prosecutorial and investigative functions. Mike Scanlan of the US Embassy has been actively engaged in developing an approach to providing assistance to these functions. USAID planning for ROL needs to coordinate closely with these efforts.

Based on the quick assessment research conducted by the team, the following problems and issues affect the capacity of the Judicial System to provide efficient, effective and fair judicial services to the Ukraine society.

- Judicial personnel system is in crisis. 1400 vacancies, widespread accusations of judicial corruption, judges not competent to protect right human rights, judges unable to keep abreast of constantly changing legislation.
- Appointment system akin to feudal satraps. Court presidents have enormous authority in selection of judges at rayon and oblast level. Requirements of law

degree and 2 years experience inadequate to ensure quality appointments. Many judges are transfers from the procuracy and military courts. It was reported by one respondent that the new Administrative Courts would be staffed in part by judges from the soon to be eradicated Military Tribunals.

- Training of judges is totally ad hoc and inadequate. Academy of Judges in State Judicial Administration barely underway, with insufficient funding. Funding for other state training institutes, e.g., prosecutors, customs, tax, many times that available for judicial training. Efforts by NGOs, donors, and others to fill gaps is laudable, but falls far short of systematic approach to judicial training.
- Assignment of cases is done by court presidents, a practice considered by many to lead to abuse.
- Working conditions for most courts, especially first instance courts, continue to be inadequate. A computer network has been established by SJA, but most judges lack computers or bring in their own. Recording of hearings does not meet international standards.
- Many courts lack sufficient budget for the most basic requirements, light, heat, paper, files.
- Courts are by no means user friendly, inadequate security, insufficient space for litigants, brusque treatment, altogether an experience not conducive to enhancing respect for the law.
- Organizational location and accountability relationships of SJA are unclear. SJA was moved from MoJ earlier, and established nominally under the Council of Judges, but also under the Cabinet of Ministers, making it an instrument of the executive branch. Many respondents said that SJA was set up as an instrument of executive control, rather than an administrative service organization for an independent judiciary. Now the question of who should set policy and oversee the work of SJA is under debate. The Minister of Justice wants it back, the Council of Judges acts like SJA reports to them, but many interlocutors said a decision had been made to put in under the Supreme Court.
- The map of relevant policy guidance and oversight institutions for the judiciary is extremely complex. The High Judicial Council is a cumbersome body and appears to be ineffective as a policy body for the judiciary, in part because of its size, the participation of the procuracy (a feature found elsewhere), and because leadership was associated with the previous regime. The HJC claims authority over the judicial appointment process and has asked for assistance in introducing an examination system, either for entry, or for promotion to life tenure after the 5 year probationary term.
 - Elements of a complex Judicial System
 - The Council of Judges, which is the ‘executive arm’ of the College of Judges, is possibly subordinate to the HJC, but in fact seems to exercise greater authority over the SJA than the HJC, and acts rather independently. .
 - Qualifying Commissions, tasked with assessing the qualifications of judicial nominees, are reported to generally make decisions

based on political reasons or bribes paid, rather than on merits of the candidates.

- The Verkhovna Rada Legal Committee is an important component of the system, being the source of oversight and legislative drafting for the judicial system, including substantive and organizational laws.
- The Office of the Ombudsman is staffed with judicial and prosecutorial personnel, but most respondents consider it lacking any real power to investigate and follow up on complaints from citizens.
- The Ministry of Justice is very active under the current Ministry, seeking to take the initiative in judicial training, human rights protection, provision of legal defense for indigent and poor persons, and many other functions now, theoretically carried out by the SJA.

Recommendation

That the new USAID program address certain elements of judicial reform with the following caveats: (a) do so only if the government and Rada are moving swiftly and decisively on judicial reform and have adopted a reform road map and/or have begun to adopt or amend key laws, and (b) focus on a few aspects of court reform that will improve court efficiency as well as reduce corruption in the judiciary.

Actions

Court reforms

The contractor will assess the judicial system with the aim of **quickly** identifying a limited set of structural problems that (a) can be addressed by USAID assistance, and (b) will have noticeable quick impact on reducing corruption and/or improving court performance. The contractor should seek to identify problems that can be addressed immediately without changes to legislation, if such changes are likely to remain in effect. For example, it may be possible to introduce a new procedure for random assignment of cases in Oblast courts, or introduce a new test procedure for judicial candidates, without the adoption of new legislation, and such reforms are likely to remain in effect in some form regardless of the final court reform concept. Other examples include, publishing of court decisions, eliminating ex parte communications, expanding public and media access to court hearings, and improving court recording.

At the same time, the contractor should identify the most urgent problems that are likely to be among the first addressed in newly adopted or amended legislation. Although some legislation may not be adopted until after the 2006 parliamentary elections, it should be possible to determine certain reforms emerging from consensus in the Court Reform Working Group or in legislation adopted in first reading. Based on this assessment, the contractor should identify opportunities for technical assistance to prepare for the most

urgent imminent reforms. These are likely to include the process for nominating judicial candidates, improving disciplinary procedures for judges, and improving enforcement of judgments.

Upon identifying immediate- and likely medium-term court reforms, the contractor shall provide technical assistance to assist Ukrainian partners implement and prepare for implementation of the reforms. Assistance might include mini assessments and recommendations for implementing quick-fix and short-term reforms that don't require new or amended legislation.

Partners

The selection of Ukrainian partners will depend on the reforms to be implemented, but will likely include one or more of the following: Council of Judges, High Council of Justice, Academy of Judges, State Judicial Administration, Ministry of Justice,

Illustrative Activities

These activities have been identified by the team as having high potential for forward and backward linkages to other parts of the system, and which meet the criteria set out at the beginning of this report. While “illustrative”, they have been selected with some care.

Illustrative Activity # 1

To improve financial management, cooperate with the Council of Judges to introduce modern budget planning and fiscal management techniques, procure budget management software, and train select officials in budget management. Later, assist with pilot roll out to one or more Oblast level courts.

Illustrative Activity # 2

In cooperation with the High Council of Justice and/or Council of Judges, advise on design of software for new system of testing qualifications of judicial candidates; ensure new system includes sufficient security to eliminate opportunities for corruption.

Illustrative Activity # 3 (target of opportunity)

In cooperation with the Ministry of Justice, conduct an assessment of execution of court decisions to determine measures the MOJ can undertake to improve enforcement of decisions. Provide technical assistance to MOJ to implement recommended measures.

Expected Results

- Adoption of more transparent, fair and merit-based procedures for nominating, qualifying, disciplining and appointing judges. As a result, new judges will be better qualified and better prepared for their positions, new procedures will reduce opportunities for corruption and paying of bribes to obtain a nomination or position.
- More transparent and efficient management of budgets for the courts and improved system for remuneration of judges and court staff. As a result, budget

information will be publicly available, courts will be better equipped and staffed, and means for influencing judges through arbitrary awarding of promotions and benefits will be eliminated or reduced.

C. The Demand-Realization Dimension

Problem: Justice is Undermined by Citizens' Inability to Navigate the Court System, Incompetent or Unobtainable Legal Counsel, and Inadequate Oversight and Protection of Human Rights

There is a close relationship between the capacity of citizens to understand, support and use the judicial system and the integrity, effectiveness and quality of justice delivered by that system. USAID and other donors have invested with some success in raising citizen knowledge and awareness of legal rights. However, preliminary evidence suggests that serious constraints remain to the realization of those rights. These constraints and problems are set out below:

- There is considerable evidence that Ukraine citizens are prepared to assert rights and claims against the state. Demand for USAID supported legal counseling is high, written complaints to the President, the Ombudsman, and other visible points of access are overwhelming.
- There is also considerable evidence to suggest that citizens do not know how, nor does the state make it easy, to access government for the satisfaction of claims and problems.
- Akin to the role of public health and preventive medicine, the Government needs to do all it can to constrict the “corruption industry”, by consolidating the regulatory regime, clarifying and simplifying the interface with citizens, and the processes by which citizens do business with government.
- This principle can be applied to various aspects of the judiciary, beginning with the notaries, continuing through the criminal, civil, and administrative justice, and including the way citizens are served by court administrative personnel.
- Preventive measures will not eliminate wrongdoing and litigation. In areas of civil, administrative and criminal law, citizens will need a system of access to professional assistance in pursuing their defense, or their claims, whether against the state or other persons, legal or otherwise. Legal advice is needed on two broad fronts:
 - Advice on how to make claims or redress actions short of going to court. Several USAID programs have built “one stop” access centers into their local government strengthening programs (see Macedonia, for example). In Bulgaria, first instance courts are opening windows where citizens can get forms, directions and referrals. These efforts are further enhanced by non-profit centers for providing, among other things, legal advice on how to access the bureaucracy and on legal matters generally short of preparation and defense in a court of law.

- A more specialized area of legal consultation involves cases which have a high probability of ending up in court. Here preliminary counsel can be provided, and subject to available expertise, legal defense counsel for trials as well.
- Remedies for these last two needs have been slow in developing. Donors support development of legal clinics in Law Schools, NGO Legal Counseling and Defense Centers and Networks, and work with government sometimes to reform and make more effective State support for a citizen's constitutional right to be represented by competent defense.
- In practice, the demand for legal services is outstripping the supply, especially among low income or indigent people who cannot afford highly skilled defense counsel. NGO supported programs are growing, but cannot by themselves, meet the demand. State requirements that all persons be represented are not met, as the stipend available to pay advocates is far too low, as are the appropriated funds available to courts for this purpose.

Recommendation:

That the new program include substantial focus on the citizen/demand dimension, including access to justice and citizens holding government accountable. This dimension not only complements the other dimensions, but it essential to their success. Experience has shown that good legislation and institutional reforms can easily be undermined or skirted without informed citizen participation and adequate non-government oversight. Given the concerns among many interviewees that the reform process is not proceeding apace, this dimension should be considered an integral part of any new ROL programming. It should be noted, however, that the recommended actions below assume that at least moderate progress will be made on advancing judicial reform. If this assumption fails to materialize, the new program should adjust the focus of this dimension accordingly, i.e., focus less on access to justice and more on advocacy for legal reform, protection of human rights.

Actions

While the principle focus of USAID's efforts in the ROL area should be on supporting the Government of Ukraine to design, adopt and implement reforms, USAID should simultaneously intensify efforts to support the "demand" side of reform. In fact, if there is a long delay or only limited success in the public policy dimension, then the demand-realization dimension should focus primarily on advocacy for reform. In that case, the program will look similar to previous USAID programs. However, assuming that there is sufficient political will for reform and demonstrated progress in that area, this dimension should build on previous activities that support(ed) advocacy, monitoring, legal aid, and public education. New activities will likely focus on three areas: Access to Justice; Participation and Government Accountability; and Legal Education.

Access to justice activities should include support for free legal advice centers and law school legal clinics; public advocacy and human rights CSOs; improvements to the system of public defenders; and other means for improving human rights protection and

increasing citizen access to justice. These activities would naturally build on or expand some of the existing ABA/CEELI activities supporting legal aid centers and law school clinics. -- The latter have proven to be very popular and students who experience this practical teaching approach are better prepared and more desirable in the legal job market. However, legal clinics have not been fully integrated into the required curriculum, and therefore are not part of the regular academic budget. Mainstreaming clinical education is the logical next step in USAID's demonstration program.

Participation and government accountability activities should include support for investigative journalism; CSO monitoring (e.g., of courts, public procurements, corruption); and public education and awareness. The contractor will likely undertake a small grants program to support these initiatives and/or to promote public-private partnerships to address corruption, perhaps modeled on the former USAID-funded DAI anti-corruption program but with greater emphasis on national-level issues.

Legal education might be considered a target of opportunity, and here any program would have to be very focused on one or two critical issues. For example, the proliferation of law schools has led to a reduction in the quality of education and the production of poorly prepared law graduates. It may be that market forces will eventually produce a much needed reduction in the number of these institutions. However, the state does have a responsibility to set and ensure international standards of education and training for law graduates, a responsibility not now being met by the Ministry of Education.

The assessment team recommends that activities in this dimension in particular proceed using a design-implement approach, given the complexity of this dimension as well as the very limited time the team had to research this area. The contractor should be asked to do brief assessments of, for example, the effectiveness of private-public partnerships, demand for free legal aid, and public awareness. Of course, many activities in this dimension should complement, or perhaps be implemented under, existing USAID-funded media and civil society strengthening programs.

Illustrative Activities

Illustrative Activity #1

The contractor shall support a program of public-private partnerships, involving CSOs, media, business associations, and an array of government officials to address anti-corruption, focusing on national and/or local issues of greatest resonance with citizens. The program will include grants to support a combination of research, workshops, public awareness, investigative journalism, hotlines, or documentaries. The contractor shall first conduct a brief assessment of the impact and lessons learned from previous USAID-funded public-private partnerships and then implement its program accordingly.

Illustrative Activity #2

The contractor shall work with an association of advocates, in conjunction with other relevant Ukrainian counterpart (e.g., MOJ, Rada Committee, Bar Association), in proposing and implementing changes to the public defender system.

Illustrative Activity # 3

The contractor shall assist an informal association of law schools and the Ministry of Justice in establishing a system for accrediting law schools.

Expected Results

- Active oversight of judicial proceedings by non-partisan non-government civil society organization.
- An increase in the percentage of citizens who take advantage of free legal consultations.
- Improved legal defender program that clarifies responsibilities of advocates, provides appropriate compensation, and ensures that citizens accused of crimes who cannot afford legal counsel can obtain services of a public defender.
- An increase in the amount of investigative journalism of corruption.
- Visible and measurable steps are taken to expose or reduce corruption as a result of USAID-funded public-private partnerships.
- Fewer judges and advocates with low qualifications entering the legal profession as a result of the establishment of accreditation standards for legal education. “The process of accreditation is meant to insure a level of national uniformity in legal education and practice.”

D. A Unifying Theme: Administrative Law

The three dimensions of this strategy require substantial reform and create an agenda that is far too broad for any one donor. Operating under the supplemental appropriation, USAID must identify needs that will have reasonably quick results as well as broadest possible impact on developing Rule of Law. One way to achieve this is to have the strategy focus on the area of **administrative law**, or that body of laws that deals with the interaction of government and the public. Ukraine is in the early stages of establishing **Administrative Courts** and accompanying normative and procedural legislation. Administrative law governs the relationship among state entities and, more importantly, the relationship between the citizen and the state in those areas where state services and regulatory structures come into play. In a country undergoing change from a socialist to an open market economy, the relationship between the state and the citizen is changing dramatically, raising many issues of administrative law. Moreover, as private ownership of land and other resources expands, the regulatory and public interest protection role of the state faces new challenges. At bottom, issues of administrative law will affect more citizens than criminal law, and will certainly rival claims arising in the civil/commercial code.

Focus on assisting in the development of the Administrative Court would provide the USAID program an integrative structure that would tie together the issues identified in part B of the structural issues outlined above. Because the Administrative Court is new, there are fewer vested interests to resist reform, and it may be easier for the government to use the Court to demonstrate the positive effect of reform, and to move more quickly

toward that end. Administrative law could also be a useful unifying theme for the problems and activities outlined in part C above. For example, civil society advocacy and oversight could focus on key administrative laws, such as the law on access to information, and legal aid could focus on citizens' access to justice in the new administrative courts. (See Annex D for an illustration of this unifying theme within the broader strategy.)

III. Problems Beyond the Scope of USAID's Manageable Interests (Targets of Opportunity, Other Priorities, Lower Priorities)

USAID should be aware of the following needs and problem areas which are important aspects of ROL development and reducing corruption in Ukraine. However, given competing priorities, limited funding, limited project time frame, other donor/partner involvement, sufficient indigenous capacity to achieve success without donor assistance, etc., this new project cannot address all ROL and corruption-related problems. Some of these should fall outside this project's scope of work, whereas others may be targets of opportunity, to be addressed if opportunities arise and if the project has sufficient financial and management capacity to respond.

- a. Territorial and Administrative Reform
- b. Civil service and public administration reform
- c. Rada Accounting Chamber; Other/new GOU internal audit bodies
- d. Advice on national anti-corruption concept, laws
- e. Civil service code of ethics
- f. Targeted anti-corruption effort in one ministry/sector
- g. Court Automation
- h. Institution-building of judicial management organs, e.g. State Judicial Administration, High Council of Judges, Congress of Judges, Association of Judges
- i. Ombudsman of Ukraine
- j. Training in legislative drafting, e.g. Rada Institute
- k. Arbitration (*treiteski*) "courts"
- l. Notaries
- m. New system of community/local police

ANNEX A

LIST OF PERSONS INTERVIEWED April 2005

KYIV, UKRAINE MEETINGS

US Government

US Embassy, Law Enforcement section

Ambassador John E. Herbst
Sheila Gwaltney, DCM
Michael Scanlan, Law Enforcement Section
Necia Quast, Economic Section
Aubrey Carlson, Political Section
Anzhela Green, Public Affairs Section/ Cultural Affairs Office
Tom Firestone, Department of Justice Attorney
Oksana Klymovych, Law Enforcement Section

USAID/Ukraine

Chris Crowley, Mission Director
Karen Hilliard, Deputy Mission Director
Kathryn Stevens, Director, Office of Democracy and Governance
Assia Ivantcheva, Deputy Director, Office of Democracy and Governance
Gary Linden, Director, Office of Economic Growth
Rick Gurley, Chief of Private Enterprise Division
Gleb Krivenko, Commercial Law Specialist

USAID Implementing Partners and Other Donors in Ukraine

EC Delegation to Ukraine, Moldova, Belarus

Andrey Spivak, Project Manager JHA
t: 462 00 10; fax: 462-0920

International Renaissance Foundation

Roman Romanov, ROL Activity manager
t: 246 83 63; fax: 216 76 29
e-mail: romanov@irf.kiev.ua

Canadian International Development Agency (CIDA)

Jason Hollman, First Secretary
t: 464-11-44; fax: 464-0248

Swiss Embassy

Urs Kluser, Deputy Country Director
t: 238 62 50; f: 238-6251
e-mail: urs.kluser@sdc.net

UNDP Ukraine

Petro Pavlychenko, Governance Cluster Coordinator
t: 254-0491; fax: 253-2607

ABA/CEELI

Robert Heuer, Chief of Party
Dennis Hawkins, Regional Anticorruption Advisor
t: 492-9904
e-mail: robert_heuer@abaceeli.kiev.ua

Eurasia Foundation

Erick Boyle, Director
t: 246-8355; 246-9961

Indiana University Parliamentary Development Project

Edward Rakhimkulov, Deputy
t: 254-3691

U.S.-Ukraine Foundation

Marta Kolomayets, Chief of Party
t: 537-6230; fax: 537-6231

Open World Leadership Center at the Library of Congress

Lewis Maidanick, Head
t: 246-8221/22

Government of Ukraine

Supreme Court

Judge Vasyl Malyarenko, Chairman
Judge Mykola Mykolayovytch Tsytovykh, Criminal Panel, Chairman; t: 253-9429
Judge Ivan Bohdanovytch Shytsky, Commercial Panel; t: 253-5028
Judge Victor Kryvenko, Council of Judges/Head; t: 253-01-30
Victor Potapenko, Head of International Department; t: 253-00-16
Judge Natalia Naprienko; t: 253-6308

Constitutional Court

Volodymyr Yevhenovych Dubrovsky, Head of the Secretariat of
Constitutional Court
t: 238-1031;
e-mail: idep@ccu.gov.ua

High Administrative Court

Pasenyuk Oleksandr, Head
t: 244-1647; fax: 229-8450

Ministry of Justice

Roman Zvarych, Minister of Justice of Ukraine; t: 279-3206; t: 244-1625

High Council of Justice

Mykola Anatoliyovych Shelest, Chairman of the High Council of Justice of Ukraine

Lidiya P. Izovitova, Deputy Chairman of High Council of Justice

Valentyna M. Paliy, member of the High Council of Justice, Judge, Supreme Economic Court

Yuriy P. Poltavets, Adviser to the Chairman of the High Council of Justice of Ukraine

Ivan M. Pyzhyk, Head of the Department for international cooperation and relations with state administration bodies

t: 238-6874,

e-mail: inter@vru.gov.ua

Kyiv Oblast Appellate Court

Nechyporenko Yuriy Arkadiyovych, the President of Kyiv Oblast Appellate Court

t: 278-2923

Academy of General Procuracy

Gryhoriy Sereda, Rector of Kyiv Mohyla Academy

Volodymyr Sushchenko, First Deputy Rector, former Dean of the Law School of Kyiv Mohyla Academy

t: 206-00-51/52/53; fax: 206-0052

Office of the Ombudsman

Eduard Ivanovych Pavlenko

Valeriy Mykolayovych Terets

t: 2537506

Institute of Legislation of the Parliament of Ukraine

Oleksandr Kopylenko, Director

t: 235-9617; 235-9601

High Council of Justice

Professor **Anatoliy Oleksandrovytch Selivanov**, MP, Representative of the Parliament at the at the Constitutional Court

t: 255-9160; 255-92-37

State Judicial Administration

Volodymyr Karaban', Head

t: 536 0505

Academy of Judges of Ukraine

Voytuk Iryna, President

t: 230-31-46; cell: 8-067-2335521

Parliament

Volodymyr Stretovyvh, Chairman, Committee on Combatting Organized Crime and Corruption

t: 255-3318; 255-35-03; fax:255-33-20

Serhiy Sobolev, Representative of the President of Ukraine in the Parliament

t: 255-2880

Vasyl Onopenko, MP/Head of the Committee on Legal Policy

t: 255-3582

General Prosecutor Representative

Oleksandr Ivanovych Medved'ko, Deputy General Prosecutor

Grygoriy Mykolayovych Titarchuk, Dep. Head, Organizational and Legal Guarantee Dept.

Olga Litvinchuk, Prosecutor of International Legal Department

t: 254-31-80

Ukrainian NGOs, Media and Associations

"Justinian" Edition

Journalist **Svetlana Maksimova**, Editor-in-Chief

t: 8-067-2470630; maximova@justinian.com.ua

All-Ukrainian Independent Judicial Association (AUIJA)

Judge **Oleksiy Kasian**, President

Vitaliy Fedorovych Boyko, Deputy, former chairman of the Supreme Court, judge in retirement

t: 5015417

Center of Non Profit Law in Ukraine

Anatoliy Tkachuk, former Member of Parliament, currently the Chairman of Civil Society Institute and a representative of the International

t: 269 0732; 269 7394;

e-mail: taficn@ukrpactnet; csi@ukrpactnet

Social Legal Foundation "Chynnist zakonu" (eng. "Rule of law").

Oleg Spornykov, Project Director

Lydia Gusina, Project Coordinator

t: 538-03-83

e-mail: info@rol.org.ua

www.rol.org.ua

NGO Laboratory of Legislative Initiatives

Ihor Kohut, Chairman

t/fax: 238 24 69

Yaroslav the Wise Institute of Legal Information

Oleksiyenko Michaylo Georhievych, Deputy Director

t/fax: 254-00-00

e-mail: ili@ili.kiev.ua

Freedom of Choice Coalition

Vlad Kaskiv, Head
t/fax: 461-9022
e-mail: info@coalition.org.ua

Ukrainian Law Students Association

Ihor Cherednyk, Head
t: 239-3322; cell: 8-050-487-2604

Center for Political and Legal Reform

Igor Koliushko, Head (former MP, member of Committee on Legal Reform)
t: 230-35-93 <http://www.pravo.org.ua>

Advocates, Associations, Arbitrators

Kyiv Arbitral Court

Pavlo Kuftirev, Head
t: 536-5707; f: 536-1277 f: 238-6101

Ukrainian Bar Association

Ihor Shevchenko, President
t: 230-6000; fax: 230-6001

Council of Judges

Supreme Court Judge **Victor Kryvenko**, Head of Council of Judges
t/f: 253-01-30

Ukrainian Legal Foundation

Serhiy Holovatyy, MP
t: 227-2236/52

KHARKIV, UKRAINE MEETINGS

National Law Academy

Vyacheslav Vasyliovytch Komarov, Deputy Rector on International Relations of Kharkiv
t: 8(057)704-1155

Prosecutor

Vladimir Sergeyevytch Sukhodubov, Chief Prosecutor of Kharkiv
t: 8 (057) 704-1515

NGO “Journalist Initiative” Association

Oleksiy Soldatenko, Programs Director
t: 8 (0572) 654-324 cell: 8(050) 323-1430
e-mail: aleksey.soldatenko@ji-association.org

Institute of Applied Humanitarian Research

Mikhail Vsevolodovytsch Buromensky

t: 8 (057) 714-0367; cell 8-050-3002902

Ukrainian American Bureau for the protection of Human rights

Maryanovskiy Hrygoriy Abramovytsch Coordinator

cell: 8 (050)302-8126; h: 8(057)636-311

Kharkiv Group for Human Rights Protection

Evgeniy Zakharov, Co-Chairman

cell: 8(050)-402-4064

Arkadiy Buschenko, Lawyer, Expert in Criminal Procedure and European Convention Law

t: 8(057) 700-6771; 757-51-66; cell: 8(067)272-0155

e-mail: root@khpg.org

LVIV, UKRAINE MEETINGS

Lviv Court of Appeal

Taras Mykolayovytsch Maritchak, Judge + 2 rayon judges

t: (0322) 72-2542; cell 8-067-397-6015

Prosecutor of Lviv

Andriy Igorevytsch Palyukh, Prosecutor

t: (0322) 72-3008 (direct); 72-3007

Advocates

Mikhailo Iosipovytsch Burdyuk

Stephan Stephanovytsch Petlevytsch

Lviv Law Institute

Volodymyr Lvovytsch Ortynskiy, Rector (founder of law magazine)

t: 8(0322) 33-1119

Vyacheslav Oleksandrovytsch Navrotskiy, Dean

t: 8(0322) 72-2723

Lviv State University/ Lviv Law School, Law Faculty

Andriy Mykolayovytsch Boyko, Dean

Vitaliy Myroslavovytsch, Professor

8(0322) 96-4537(direct); 96-4102

NGOs

Tax Payers Association of Lviv Oblast

Teodor Diakiv, Head

t: 8(0322) 72-5601
Institute of Political Technologies
Mykhailo Komarnytskyi, Head
t: 8(0322) 72-0647
Association of Employers of Lviv Oblast
Zenoviy Bermes, Head
t: 8(0322) 97-0962
Institute for Strategic Studies
Stepan Filipovych, Head
t: 8(0322)52-8580
Center of Educational Policy
Oleh Protsak, Head
cell 8-050-519-2006; 8(0322) 72-0647; 72-2861
Politics and Law
Volodymyr Druchek, Head

WASHINGTON, DC MEETINGS

ABA/CEELI

Michael Maya
Gavin Weise
Mary Greer

International Republican Institute

Stephen Nix

Dept. of State

George Frowick
Wolodymyr Sulzynsky

Dept. of Justice

Chris Lehman

USAID

Claudia Dumas, EE/DG

Other

Judge Bohdan Futey, US Court of Federal Claims

ANNEX B

LIST OF LAWS AND CODES RELATED TO ROL & ANTI-CORRUPTION THAT NEED TO BE ADOPTED OR AMENDED

Law on Cabinet of Ministers
Law on Central Bodies of Executive Branch
Law on Local Bodies of State Administration
Territorial and Administrative Law
Civil Service Law
Conflict of Interest Law for elected politicians
Law on Corruption
Administrative Justice Code (just vetoed by President)
Administrative Procedure Code

Law on Judiciary
Law on Status of Judges
Law on High Qualification Committees
Law on Discipline of Judges
Law on Publishing Court Decisions
Law on Advocates
Law on Public Defenders
Law on Legal Assistance

Law on Access to Information
Law on Confidentiality of Sources (for journalists)
Regulations (or amendments to law) on classification of information
Witness protection law
Whistleblower protection law
Amendments to Laws/Regs to rationalize criminal sentencing (introduce alternative punishments, probation, fines)
Laws/regulations addressing rights of prisoners, penitentiary system
Amendments to Criminal Procedure Code (adopted in 1st reading)

Amendments to Constitution:
 General Oversight and Pre-trial investigation by Procuracy
 Other competencies of Procuracy
 Composition of High Council of Justice

ANNEX C

OTHER DONOR AND USG ROL ASSISTANCE PROVIDERS

The assessment team did not have time to meet with all donors providing ROL assistance. USAID/Kyiv should find out more about current and planned other donor assistance prior to finalizing the SOW for its new program.

OTHER DONORS

Council of Europe – (1) Support Good Governance: Assist with development of a national anti-corruption action plan. 250,000 Euros; (2) International Cooperation in Criminal Matters: Fulfilling international treaties on cooperation on criminal matters. 1.8 million Euros.

CIDA – (1) Model Court Automation; (2) Juvenile Justice project

International Renaissance Foundation—

OSCE –

Swiss – Penitentiary Reform

UNDP – “Integrity in Action: Governance Program” Law on Public Oversight, Ombudsman, Rada Accounting Chamber, Legislative Oversight, Citizens Bureaus

World Bank - [From Interfax Ukraine, 5/16/05]. Possible new program to start in 2005 to provide assistance in reform of the legal system, including judicial reform and anti-corruption. The bank's practical aid may involve the organization of training courses in the application of European legal standards in Ukraine. The main directions of the bank's assistance may also be programs for the support of democratic reforms in such areas as independence, public information and transparency, legal education and retraining of judges, court management, administrative support and personnel, strategic and budgetary planning, construction and reconstruction of court premises, allied professions, alternatives for settling disputes and access to justice.

OTHER USG ASSISTANCE

FBI training for Ministry of Interior and SBU on anti-trafficking and cyber crime.

Regional Security Officer training for Ministry of Interior on security issues, e.g. investigative techniques.

Treasury Dept training for GOU officials on anti-money-laundering.

Most of the non-USAID USG assistance is funded by the State Department **Bureau of International Narcotics and Law Enforcement Affairs (INL)**. The INL activities in Ukraine include:

- Creation of a national migration system (in coop with IOM and EC TACIS) , and transformation of State Border Guard Service into an institution in conformity with European norms (in coop with EC TACIS).
- Advice on the draft Criminal Procedure Code
- With the Academy of Judges, training of judges on anti-trafficking
- With ABA/CEELI regional training seminars for judges and defense attorneys on general judicial independence, then specifically on the criminal procedure code, and possibly on development of defense attorney bar association.
- With the Coordinating Committee on Combating Corruption and Organized Crime (yet to be created) under the National Security and Defense Council, policy advice and TA with respect to law enforcement aspects of corruption and organized crime.
- With Ministry of Interior, internal communications and internal control mechanisms
- With State Penitentiary Service, defense attorneys and judges, on pre-trial detention.

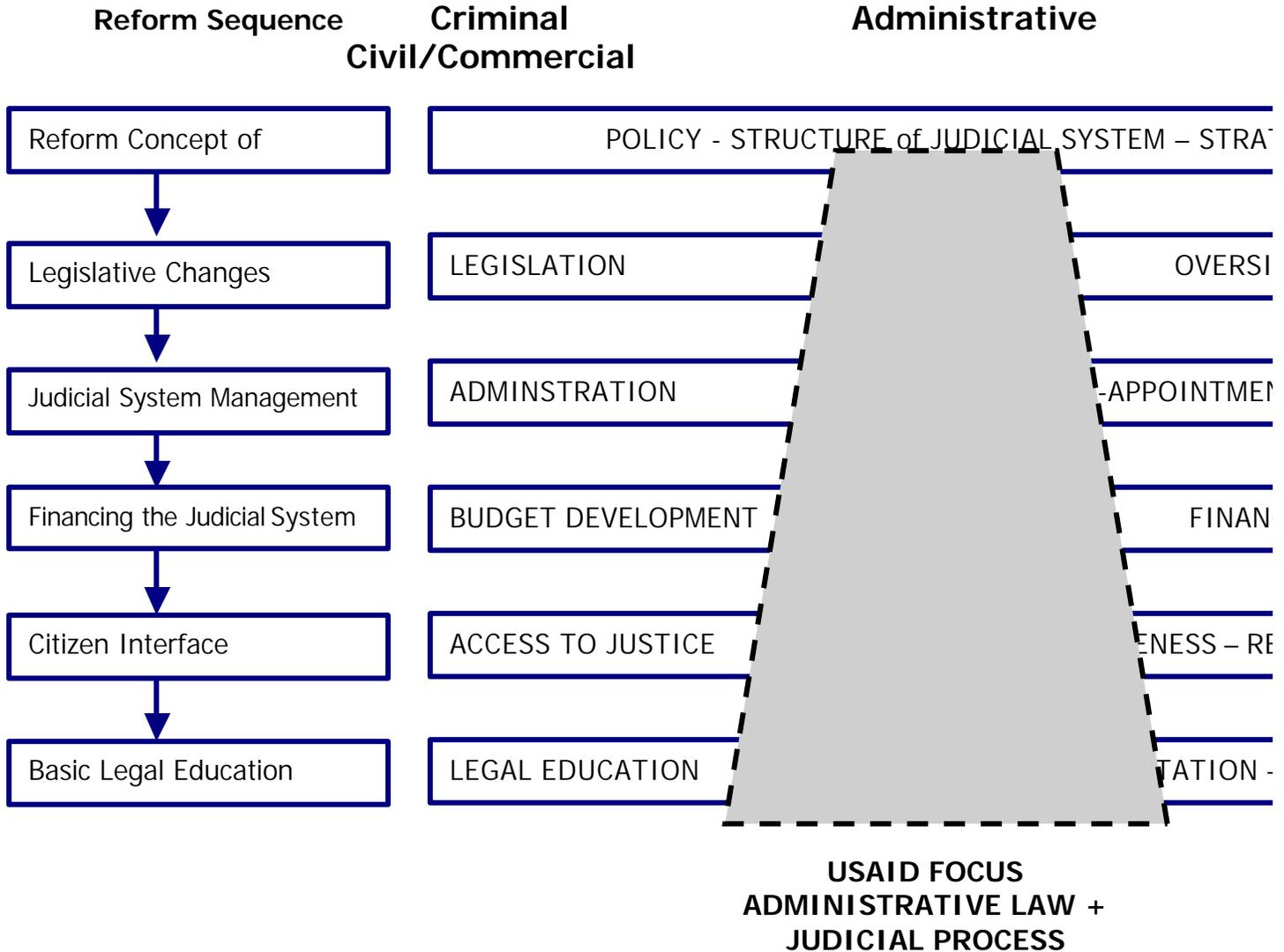
Possible/supplemental:

- Witness protection, expand all of above.

In addition to the above INL activities managed by the INL advisor in Kyiv, the INL-funded **DOJ Regional Legal Advisor** (scheduled to arrive to Kyiv in May 2005) will oversee training and other assistance focused on the procuracy (prosecutors). Work with the procuracy will include a focus on anti-corruption and anti-money-laundering.

ANNEX D

USAID ROL PROGRAM
 PROPOSED
ELEMENTS OF JUDICIAL REFORM



Prepared by USAID ROL + Anti Corruption Assessment Team, April 2005

ANNEX E

PARTIAL LIST OF REFERENCED RESOURCES

UNDP Blue Ribbon Commission Report: *Proposals for the President: A new Wave of Reform.* 2005.

***Regional Anti-Corruption Action Plan.* Anti-Corruption Network for Transition Economies. January 2004.**

Cabinet of Ministers Program of Action: *Towards People.* February 2005.

***Strengthening EU-Ukraine Cooperation Towards Enhancing the Rule of Law in Ukraine.* Policy Paper and Policy Recommendations. (Preliminary Working Paper. Final version to be released in April 2005.) International Renaissance Foundation.**

***Developing the Rule of Law in Ukraine: Achievements, Impacts, and Challenges.* MSI. June 2002**