



Department of Justice

"THE RULE OF LAW IN EASTERN EUROPE"

OPENING ADDRESS

BY

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I am honored to address another gathering of the Federalist Society -- this time here in New Orleans, to bring federalism to the Delta -- and to have this opportunity to talk once again about an abidingly important topic: the rule of law. After freedom, it is, as Margaret Thatcher says, "the essential underpinning of democracy," but it is also what invariably marks the final break with tyranny. The rule of law is what shears any rising democracy clean from the rule of men -- which so easily becomes the overrule of dangerous men. During these next two days, you will be examining that shearing-away of Eastern Europe from Communist rule, and judging how realistic are its chances for a clean break from past tyranny.

To say that chances vary from country to country -- and, overall, with the yet undecided fate of democracy in the Soviet Union -- is to state the obvious about a disequilibrium that has long plagued East-Central Europe. And I hasten to say that I do not come here posing as any kind of country expert, since two of those countries -- Bulgaria and Hungary -- I will be visiting for the first time myself next week. Rather, what I hope to offer comes out of my own direct experience expounding the rule of law within the Soviet Union. And what I hope further to add are lessons we at the Department of Justice have learned by continuing to explore these vital questions with our Soviet counterparts, as well as with many other legal officials inside the former Eastern bloc.

On that basis, I believe I can offer one initial generalization -- actually, by way of a joke that the Poles have been telling on themselves. After this week's election for their presidency, I'm sure we all recognize the dilemma that Poland faces. Lech Walesa -- the populist leader of Solidarity -- must face off against a free-market capitalist of Peruvian/Canadian citizenship. That election saw the free exercise of the franchise, but it leaves the country even more ill-ordered. Whoever now wins must still face the daunting task that Polish wits have defined as distinguishing between an aquarium and fish soup. You can always make fish soup out of an aquarium, they will tell you in Warsaw, but it is much harder to make an aquarium out of fish soup.

In these Polish terms, you might say that most, if not all, of Eastern Europe is one big bowl of fish chowder.

In varying degrees, freedom has been precariously won, but democracy has yet to be established. Or re-established. Somewhere, in Mittleuropa's historical memory bank, records of democratic institutions -- such as free and representative parliaments -- must exist, but they are exceedingly hard to access. Even now, the nomenklatura tries to hide the code, after their tyranny has all but dismantled the legal culture that once gave these institutions their living context, their Western

grounding. Years of oppression have taught Eastern Europeans what Adam Michnik calls "an acquired helplessness." So that despite new freedom, some political movements among the peoples of Eastern Europe tend to be irredentist -- not a leap forward, but a harkening back, particularly to nationalism and religion.

Such longings are understandable, and neither, I hasten to say, are necessarily in error. Democracy can abide a strong commitment to nationalism, even regionalism, and religion has often inspired democratic belief. But joined narrowly as one, nationalism and religion have together formed some of the great terrors of this century. The worst of Nazism, for example, had its grotesque foreshadowings in the post-World-War-One politics of Eastern Europe.

Indeed, one function of the rule of law is to keep nationalism and religion safely separate and distinct from government. The rule of law protects basic human rights against everything from arbitrary government to mob persecution. It assures that society does not sink to the show trial or the pogrom or the concentration camp.

But more than that, the rule of law guarantees the process whereby democratic institutions can rise, grow strong, and flourish. Due process of law underpins such differing

institutions as the free marketplace and the representative legislature, the fair tax roll and the uncensored newspaper, the privacy of conscience and the sanctity of domicile. All of these, and more of ordinary commerce, are protected by the rule of law, and its ultimate arbiter, the independent judiciary.

That is why -- midst the struggles of inchoate democratic institutions to be born, or reborn, since 1989 -- the call so often goes up for "the rule of law." We first heard it from Mikhail Gorbachev in his early demand for a "law-based society," now somewhat debased by his own compromise and arbitrariness. We heard it most recently during the Polish election -- usually from Lech Walesa's opponents. Sometimes for any law, even discredited Communist law, so long as precedent might rule over incipient anarchy. The call for "the rule of law" is both desperate and inspiring because, as wiser heads understand, it the only way out of the soup.

I

Let me take a first rough cut at the countries in question. If we leave East Germany to the Germans, Albania as one of the last, run-down Communist theme parks, and Yugoslavia as an aging Comintern expatriate since 1948, there are five prospects for the rule of law in Eastern Europe. Three of them -- Hungary, Poland,

and Czechoslovakia -- have already experienced genuine political revolution, both in the streets and at the polls, and offer viable political choices to their electorates. The other two -- Romania and Bulgaria -- I would have called coup states, still dominated by their nomenklatura -- until only yesterday the Bulgarians forced the supposedly "Socialist" government out of office.

And this holds great promise. Back in September, I met at the Department of Justice with President Zhelyu Zhelev of Bulgaria, who leads the Union of Democratic Forces opposition and who has now called upon the Bulgarian National Assembly to take up anew the drafting of a new constitution. President Zhelev's visiting party came to talk with us about the rule of law. They now have before them a draft constitution, prepared by Professor Bernard H. Siegan of San Diego. The Seigan draft contains a most impressive bill of "personal rights" -- all of Article X, including a prohibition against politics organized as religion in section 1(3) and a lock-solid guarantee of property rights throughout Section 5. And this may be a good omen for the future of Bulgarian democracy. But, while I will gather my own impressions when I visit Sofia next week, I am still inclined to believe that much of the interest in property rights, for example, derives from more immediate self-interests behind legal reform, such as we first found among the Soviets.

Let me explain. The Soviets face one great, dire urgency -- besides growing nationalistic unrest -- and that is their economy. To survive, they must enter the free world marketplace. To do that, they realize they must position themselves to recognize -- and take advantage of -- the rules of free commerce. The rule of law is a fundamental prerequisite for turning away from a command economy -- to a market economy. Soviet leaders now comprehend that without meaningful structural changes, their nation cannot be competitive with other powerful global economies.

To achieve this, the Soviets realize they must display the predictability and stability that can only emerge from a body of commercial law -- which, in turn, respects the sanctity of contracts and, yes, recognizes property rights as well. Fear of abrogation of contract rights or expropriation of investments, they realize, can stunt otherwise attractive commercial and industrial initiatives.

So the Soviets' principal reason for their great interest in the rule of law, in my view, is their immediate and pressing need to stabilize their economy, to establish something approximating a "normal economy." They also understand, as a corollary, they must respect human rights if Jackson-Vanik restrictions on trade are to be lifted. They must do so in order to jump-start their

participation in the world economy and to attract foreign know-how and investment.

Likewise, only more so, with these Eastern European countries. They too are broke. They too must find ways to attract Western investment and compete in the world economy. That is why it is entirely understandable that the other surviving Polish candidate for president should be a challenging, entrepreneurial Westerner. Again, the rule of law is understood as the necessary pillar for commercial progress, and the deeper a country becomes involved in East-West commerce, the farther you will find that society has come in developing the rule of law.

I will also be visiting Hungary next week, where supporters of "goulash Communism" just lost an election to the proponents of a more advanced capitalism. More than any other Eastern European society -- and over a longer period -- Hungary has been entering into joint ventures with the West. So I consider it no surprise that Hungary is also the only polity that has established a committee for constitutional review of its laws. Like a similar committee in the Soviet Union, this Hungarian committee's opinion is only advisory, not binding. But setting up even some form of judicial review is a giant step toward guaranteeing the rule of law over the rule of men.

We at the Department of Justice have been encouraging such developments, wherever we can, responding to every legitimate request. We are heartened by Eastern European interest in our anti-trust laws. Both Poland and Hungary have sought our advice on how to keep their struggling markets commercially free of private monopoly and price-fixing. Also, we have joined the Soviets in discussions on environmental law, and now see how we might help Eastern Europe curb the environmental pollution that is the heavy, gray, death pall over their cities. We believe economic incentives are the best means to end industrial pollutants, and are preparing to argue that case through the Budapest Regional Environmental Center for Central and Eastern Europe.

But committed as we are to this democratizing course, I cannot deny that atavistic forces still work against the rule of law. Eastern Europe's acquired helplessness is backed by xenophobia, ingrained by Communist rule, and deepened by narrow, but often fanatic, ethnic loyalties. Many diverse peoples express their root longings in a nostalgia for the rule of men, in hero worship for past leaders, some of dubious glory.

In Poland, for instance, Marshal Jozef Pilsudski is revered as an early socialist who restored Polish independence after World War One and defeated the Red Army in 1920. But he also

seized power as dictator in 1926, and nowadays is often embraced for Solidarity by Lech Walesa.

Among the other countries, the Slovaks, the Hungarians, the Bulgars, and other nationalistic groups all have their empathetic heroes. But only Romania has officially resurrected the memory of Marshal Ion Antonescu, its wartime dictator. Antonescu first supported the antisemitic Iron Guard, until its hoodlums turned on him. He crushed them, but then oversaw some of the war's worst atrocities, mostly against Jews in Russia and the Ukraine. Now he is lauded as "a great patriot," who preserved Great Romania, by virtually all present political elements.

We should take the deep emotions tied to these inauspicious ghosts of the 30s as a cautionary sign. We must be aware that the fate of Eastern Europe remains ambiguous, and that continuing democratization is no foregone conclusion. We must stoutly proclaim our adherence to the rule of law, our faith in the free market, and not shrink from stating the social consequences that both may entail.

Too often, democracy is grasped as simply an add-on to previous entitlements. People do not understand that a new birth of freedom may mean the surcease not only of tyranny but also of

subsidy. Confusion mounts out of the daily shortfall, turning to nativist bitterness and resurgent political anger.

The Poles again have a word for it -- ciemnogrod. It means "the city of darkness," a place where backwardness and superstition reign. It has been a recurrent fear since the 19th Century, and our great hope must remain that democratic enlightenment -- the torch of freedom, trimmed by the rule of law -- will force back the shadows that still threaten to spread this "city of darkness" across Eastern Europe.

II

How then do we presently help further this democratic enlightenment? How do we, so to speak, spread the rule of law?

First, we should start by recognizing that such rejuvenations of democracy have occurred successfully elsewhere in Europe. The recent examples of Spain and Portugal should not be overlooked, nor the grand lesson learned from the postwar democratization of Germany. These conquered people -- in economic extremis, at a moment of deep disillusionment with their own society -- managed, with our help, to overcome the considerable obstacles of their totalitarian past. I believe we tend to worry less about East Germany's future because we feel we

can count on the West Germans to pass along these very same early lessons in democracy.

Second, we must do all we can to help Eastern Europe cultivate a legal culture. And that will have to be done at the expense of what remains of the nomenklatura, who have been politically adroit at exploiting the post-1989 vacuum of power. For once, one can speak of too few lawyers, or worse, lawyers trained solely as aparatchiks, to serve as paralegals to the secret police.

From our own history, we sometimes forget how well grounded our revolutionaries were in the rule of law. In 1775, Edmund Burke warned the British parliament -- in arguing our grievances -- what George III was up against: "lawyers, and smatterers in the law." Blackstone was an American bestseller, and these colonials displayed a "fierce spirit of liberty." In other countries, Burke noted, people "judge of an ill principle in government only by an actual grievance." But not these crazy Americans. "Here they anticipate the evil, and judge the pressure of the grievance by the badness of the principle. . . they augur misgovernment at a distance, and sniff the approach of tyranny in every tainted cloud."

Something of that same fierce, and informed, spirit of liberty -- buried in the liberal traditions of the academies in Prague and Warsaw, and even in the vaults of Sofia -- must rise again for the principled cause of the rule of law.

Third, we must continue to help -- by patience and example, and even some advocacy -- all those who seek to establish the rule of law. In trade negotiations, on environmental matters, in international criminal investigations, and on international drug control -- now operative under a United Nations treaty -- we should do all we can to ground our Eastern European partners in a new respect for the rule of law.

And let me emphasize, above all else, that property rights are key both to the revival of their fragile economies and the survival of their new-found freedoms. We should be speaking out, as did our own Sons of Liberty on the eve of the Revolution, for "Liberty and Property."

And finally, we must understand that, like everybody else's experiment in democracy, theirs must be achieved within their own societies. Each can only hold back "the city of darkness" through its own democratic enlightenment. And we cannot count upon such enlightenment simply to arise as virtue triumphant from the totalitarian ruins of Eastern Europe. Such ruin has left

their societies too weakened and vulnerable. Remember, in October it only took a taxi strike across the bridges between Buda and Pest to bring all of Hungary to a halt.

Even where democratic enlightenment seems likely to prevail, the rule of law will be formalized differently by the Czechs, or the Poles, or the Hungarians -- and most certainly, by the Romanians and Bulgars. Nobody else but their own lawyers, ministers, judges, and citizens can evolve the judicial fairness and institute the legal restraint that underpin any rule of law. And it is only inherent respect for the law -- such as their people have demanded in the open squares and open parliaments and newly open societies -- that will finally shear away the last vestiges of Communist tyranny.

In sum, only the rule of law can provide a sturdy bridge over the yawning political chasm between upheaval and democracy.

And we will know it when, and if, it appears. By the human rights the rule of law protects, by the governmental powers the rule of law limits, by the judicial independence the rule of law preserves. We will know it, constitutionally, when we see it. After more than two hundred years of experience and experiment on our own -- who better to judge its emergence elsewhere?