



Department of Justice

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" 'FAST-TRACKING' THE RULE OF LAW:
OUR MOST VALUABLE EXPORT"

AN ADDRESS

BY

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TO THE

DEAN'S WEEKEND SYMPOSIUM

ON CHALLENGES TO DEMOCRACY AT HOME AND ABROAD

AT THE

JOHN F. KENNEDY SCHOOL OF GOVERNMENT

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It is almost three years since I departed Cambridge for the Department of Justice -- not without many good memories of my service at the Institute of Politics, I might add. Tonight I'm particularly pleased to have this opportunity to take up with you a subject that has, quite frankly, increasingly occupied my time ever since I left. That subject is the rule of law -- the great bulwark of our American democracy, and the essential scaffolding for those emerging democracies on the rise everywhere in the world today.

Of late, we find that all we have done to build democracy here over the past two centuries is fast gathering partisans -- by rumor, by example, by hope -- across the reach of the previously denied world. What we have long worked to protect and sustain in these United States has now become our potentially most valuable export to those who seek to establish freedom and democracy throughout previously dispirited human ranks.

And those ranks are many, as yesterday's upheavals and today's hostilities remind us. Early during the conflict with Iraq, the President said we must act to guarantee "a world where the rule of law, not the law of the jungle, governs the conduct of nations." The brutality of Saddam Hussein's retained tyranny only re-emphasizes that point. But we could as easily turn today to Colombia -- where, after a valiant attempt by the government to re-assert the rule of law against drug violence, the narco-

terrorists are ruthlessly edging closer to re-imposing their own law of the jungle.

Yet, despite such setbacks, growing hope bespeaks the determination that laws, not tyrants, will yet rule over human society. So tonight I want to explore with you the depth of our own determination -- that faith we sustain in the rule of law -- and what we must do to protect and preserve it, if we expect, in fact, effectively to export that precious commodity. And make no mistake, it is our most valuable export -- one that carries no tariff, that only dictators declare contraband, and that always brings new freedom with its every free entry into closed societies.

I.

The timing for such an exploration is surely appropriate. This year marks the 200th anniversary of our Bill of Rights, that synthesis of individual liberties which stands as such a beacon of hope in the midst of today's world tumult. Over the last year and a half, I have come to learn from personal experience how important its shining guarantees are to other peoples, especially in the Soviet Union and Eastern Europe. Our Bill of Rights -- and the interlocking protection those first ten amendments provide for religious freedom, free speech, a free press, due process and equality before the law, and other guarantees of

individual liberty -- is the primary source document for any declaration of human rights and a true exemplar of what it means to live under the rule of law.

But declarations alone can never guarantee human rights. We are still waiting, for example, for the Supreme Soviet to pass a free travel and emigration law, which they say they are ready to enact but not prepared to implement. And earlier on, the Supreme Soviet passed a new law to establish press freedom, only to repudiate it when Gorbachev abruptly faced press criticism over Soviet tanks pointing their guns at the Lithuanian parliament. This only reminds us how barren and futile any new recognition of right must remain without an underlying culture of adherence to the rule of law.

That rule of law has a long and still evolving history over the political course of Western Civilization. But its three main principles were set forth by a 19th-century British jurist, Arthur Venn Dicey, who is also credited with first use of the term itself. At the risk of stating the obvious, let me review them for you briefly.

First, the rule of law means the absolute supremacy of the law over any exercise of arbitrary power. Philosopher John Locke defined liberal democracy by saying that government must be by "settled, standing laws," not by "Absolute Arbitrary Power."

Second, the rule of law means equality before the law, so that all people -- and classes -- obey the same law administered by ordinary courts. This is nothing more than Aristotle's wise directive that before the law's commands, all men stand equal.

Third, the rule of law means that the rules more generally expressed in a constitution are not the source but the consequence of the rights of individuals. And that brings us full circle once again to our Bill of Rights and its relationship to today's world.

II.

Let me share with you some specifics of our own experience at the Department of Justice over the last year and a half during which we have been more or less "on call" to advise and assist in a variety of democratic experiments.

Beginning in October of 1989, we paid a first visit ever to our Soviet counterparts in Moscow for a full-ranging discussion of the rule of law. Mikhail Gorbachev had said he aspired to "a law-based state," and his Ministers of Justice and the Interior, his Prosecutor General, even his head of the KGB were on hand to hear us out. These week-long, intense discussions in Moscow were followed by exchange visits from Soviet jurists, police, and lawyers to our country. And we've since made further visits to

Hungary and Bulgaria, met with leaders of the Soviet Republics, and sent delegations to Poland and Czechoslovakia -- all to open up this free and fair trade in ideas, if you will, on the rule of law, as we understand it in the West.

This month, for example, we are sending our anti-trust lawyers to Eastern Europe to help in restructuring their command economies to make room for free markets. Hardly a day goes by that we are not tasked with advising representatives of some Eastern European country about the very basics of our democracy. And I really mean the basics: our federal system, the separation of powers and our system of checks and balances; the absolutely indispensable need for an independent judiciary; the two-party political system; and, most important of all, our Bill of Rights.

Most, if not all, of these are, of course, unknown in societies only now throwing off the shackles of totalitarianism, still fearful of what the Poles call ciemnogord -- "the city of darkness," in which backwardness and superstition continue to reign. So we are greatly pleased by the eagerness participants have shown in responding to wholly new systems of law, or politics, or economics. And also by a real change in the air, in, for example, their attitude toward an independent judiciary. In the Soviet Union judges' salaries have been doubled, their stature enhanced, and political interference in their courts prohibited by law. So-called "telephone justice" -- with party

leaders dictating and transmitting decisions in particular cases to the court -- is hoped to be at an end.

But as with most cataclysmic changes that occur in monolithic societies, the process has lately become more one of "two steps forward and one step back" -- simply to keep everything from disintegrating. Gorbachev sadly observed last December: "Our society is not ready for the procedures of a law-based state." Perhaps in the future, he proffered, but "the important thing in the meantime is not to smash each other's bones." And out of the four major so-called "new thinkers" with whom we met in Moscow back in 1989, three of them are gone. The only remaining one, ominously enough, is the chief of the KGB.

Such backsliding inevitably causes me to reflect upon something I often asked myself during our early discussions in Moscow: what would all these reforms really mean to the average Soviet citizen? Or to the newly enfranchised Pole or Hungarian? How specifically would these people enjoy a better status in a system that has been so repressive for so long? Are these changes, in short, really necessary, really essential?

I can point to some obvious pluses. The rule of law would inevitably, to be sure, mean greater human rights. It is also absolutely necessary to the development of their economy. These countries must impart a stability and predictability to their

commercial law, so as to insure potential investors against expropriation, and to assure those who enter into contracts that their provisions will be honored. The rule of law will also help with law enforcement, since major crimes -- such as drug-trafficking, organized crime and terrorism -- have become truly international in scope, and require collaborative policing efforts by both East and West.

But the major important change that the rule of law would bring, I'm convinced, is the betterment of people's quality of life. And that would happen because the rule of law always produces governmental mechanisms -- indigenous to whatever form their democracy may take -- which allow people publicly to raise and discuss fundamental questions about that quality of life.

III.

Let me give you an exact case-in-point -- one that I happen to know very well. Let it be this evening's brief case study in comparative political systems: Three Mile Island versus Chernobyl.

Three weeks ago today was the fifth anniversary of the nuclear accident at Chernobyl, which occurred on April 26, 1986. That date always brings back memories for me of March 28, 1979, when another such accident occurred at Three Mile Island -- only

72 days into my newly elected governorship of the Commonwealth of Pennsylvania. Those were very rough days, as we faced the first nuclear crisis that had ever touched an American community. And I can tell you that a very young administration was sorely taxed to deal with the immediate crisis and its demanding aftermath.

But we got through it, thankfully reasonably unscathed. And, as things turned out, nine months later, I was in the Soviet Union meeting with governmental and scientific leaders to discuss -- or so we thought -- the lessons we'd learned from Three Mile Island, or what they call Five Kilometer Island. We assumed they might want to hear about emergency crisis management, but instead, we ran up against an utterly smug Soviet bureaucracy. They already had superior technology, better-trained plant operators, so plant safety was, in their view, "a solved problem." I shall never forget the head of the Soviet Academy of Sciences being cited to us as stating that "our reactors are so safe we could build one in Red Square"!

Seven years later, that false bravado rang very hollow when news of the far greater tragedy at Chernobyl reached the world -- first from the Scandinavians, and then via satellite photos, and then, finally, from the Soviets themselves. And that is when I was most deeply struck by the contrast between our two systems: how we each chose to handle such unforeseen but potentially devastating crises.

Here, the accident at Three Mile Island was followed up by extensive legislative inquiry, a Presidential commission chaired by the then-president of Dartmouth College, Dr. John Kemeny, and probings into the Nuclear Regulatory Commission itself. There were numerous other hearings, protests, citizen activist movements, investigations --all to the incessant drumfire of commentary and criticism from a free press, and all within that very mosaic of democratic practices we foster in this country under the rule of law and our Bill of Rights. The process was painful but lawful, and left us rueful but grateful, because we ended up better informed -- and better able to cope with the continuing challenges of nuclear technology.

And what happened within the Soviet Union while a far more serious nuclear accident was brewing? Nothing happened. Nothing happened before the disaster -- during those seven years following Three Mile Island, when the Soviet nuclear engineers might well have taken heed of our own mishaps. And very little of use happened immediately following the Chernobyl explosion -- as you can learn from a chilling new book called The Truth About Chernobyl by Grigori Medvedev, the nuclear engineer who helped build the Soviet nuclear capability.

Nothing happened because there was no independent legislative branch to oversee the nuclear bureaucracy. Nothing

happened because there was no mechanism of free elections to hold those in charge accountable. Nothing happened because the drumfire of the press was absolutely muffled. Nothing happened because the right of citizens to be heard, to protest, to litigate if need be, was non-existent. All of these shortcomings were summarized in the lament of the late Andrei Sakharov over "the lack of open communications" during the period leading up to Chernobyl.

And Medvedev himself describes the consequences of what he characterized as a "conspiracy of silence" within the industry:

"Mishaps were never publicized; and as nobody knew about them, nobody could learn from them. For thirty-five years people did not notify each other about accidents at nuclear power stations, and nobody applied the experience of such accidents to their work."

And today no one can even begin to estimate the final death toll from this catastrophic event.

That is a practical reason why the rule of law is so valuable an export -- especially for a people caught in such dreadful circumstances -- because the rule of law guarantees an open society. And it is that very openness that allows people to engage in constructive dialogue about the problems they daily

face, to take up bravely those fundamental questions that affect their quality of life.

We do not yet know what "a law-based state" may mean within former communist societies, but I am certain that pressures must be mounting toward a favorable outcome. The tragic lessons of Chernobyl say as much about the failure of totalitarian rule as about the failure of nuclear engineering. The tough solutions always lie -- even in the face of great human catastrophe -- in open inquiry, under the rule of law, such as was pursued after the Three Mile Island incident.

IV.

But let us, finally, be well aware that, effectively to export the rule of law, we must practice and preserve its tenets ourselves. And on that score, I don't want to raise any legal points, but only point to the continuing example we must strive to set.

First, we must stay committed to the notion that the rule of law must govern societies around the world. That is exactly what President Bush not only preached but practiced during the crisis in the Gulf. He did not seek first to counter force with force. He turned first to the rule of law -- initially to the United Nations, advocating cooperative and allied resolves under the UN

Charter. That would have been color enough of law for sending our troops into battle, his lawyers argued, but the President went well beyond their legal advice. He went to Congress and asked for the approval of both houses, and Congress, voting its conscience, backed the UN resolves to repulse the Iraqi invaders and liberate Kuwait. That was the rule of law at work. And by this exemplary stance, we have made ourselves more credible advocates for the rule of law in those countries moving, even surging today toward a new democratic identity.

In addition, our belief in the rule of law and those liberties embodied in our Bill of Rights must remain evident in every aspect of our domestic self-governance. Legislative, executive, and judicial branches must continue scrupulously to apply these principles at home so that we can, indeed, credibly urge their emulation abroad.

Finally, we must always remember how unique an enterprise democracy, under the rule of law, remains even in this day and age. Donald Kagan, the Dean of Yale College, recently authored a book entitled Pericles of Athens and the Birth of Democracy. In his book, Dean Kagan offers the following observation on the subject I've chosen to address this evening:

"The recent rejections of despotic Communist regimes all over Eastern Europe and the widespread demand for its

replacement by some form of democracy have led many observers to think that the victory liberal democracy has won is permanent. Most of the nations seeking democratic government, however, have little or no experience with such a polity, and few people understand how difficult a system it is to create and maintain. Meanwhile, the modern champions of democracy seem unable to provide the intellectual and spiritual support it needs because they have lost sight of its first principles."

Providing that intellectual and spiritual support for those first principles embodied in the rule of law and our Bill of Rights remains our foremost challenge in these exciting 1990s. Shame on us if we fail to take full advantage of this magnificent opportunity -- truly to cherish our principles at home and boldly to export them abroad.