



Department of Justice

"THE RULE OF LAW:
HOW DEMOCRACY HAPPENS"

ADDRESS

BY

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BEFORE MEMBERS OF PARLIAMENT
HOUSE OF COMMONS
UNITED KINGDOM

5:00 P.M. (LOCAL TIME)
WEDNESDAY, DECEMBER 13, 1989

I am deeply honored to be here in the House of Commons--the Mother of Parliaments--at a moment in history when you could be well said to be parenting again. All across Eastern Europe, representative democracy is rising anew in old parliaments--too long closed to freedom--in Warsaw, Budapest, and now Prague. As Western democracies, we can only shake our heads in amazement and in renewed hope and fervent prayer. It seems that parenting--as those of us who have lived through the experience know--is never done. For four decades, we tried to warn the leaders of the Soviet bloc about their mistakes, arguing the principles of liberty and equality and justice, wondering if they would ever see the light. Suddenly, many appear to be doing so. Their citizens are turning homeward toward democracy--in a brave rush that keeps them barely ahead of their own former oppressors. And we are being asked, with surprising candor, how do you manage freedom?

Always at great risk, we would tell them. I remind you how President Reagan spoke in Moscow about freedom and opportunity and change in terms of the movie Butch Cassidy and the Sundance Kid. He retold that great scene where Butch and Sundance are cornered at the edge of a cliff and must jump into the roaring rapids below to escape a posse. Sundance balks, says he can't swim. Butch laughs: "You crazy fool, the fall will probably kill you." They both leap, and of course, survive. Sometimes it takes that kind of faith, President Reagan was saying, to embrace

freedom. Eastern Europe must have overheard him. Half of Berlin just joined the Hole-in-the-Wall Gang.

This evening, I want to discuss with you some of the ways Western democracies might answer the pleas from those suddenly thrust into newfound freedom, how we might speak to them out of our own democratic experience. Specifically, I will focus on the rule of law, since the rule of law, I believe, is the essential bulwark, and proof, of any living democracy. As Attorney General of the United States, the rule of law is also my immediate, national responsibility and, as it happens, that area where I was most often asked for advice during my own recent encounters with Soviet leaders, as they struggle with their democratic reforms.

But before setting out, I want to pay tribute to that powerful heritage of democracy which our two peoples have so long shared. It is a working heritage that stretches across the Atlantic, back four centuries--twice our own national existence. It has endowed us mutually with the desire, even the sense of obligation, and the self-knowledge to help other experiments in democracy, many of which have already met with great success around the world. So let me start with the most enduring of those experiments--the one upon which, two hundred years ago, you might be said to have launched us.

There is some question whether you ever intended to let things go quite this far. And it did take a revolution to get Thomas Jefferson's few initial points across to George III. But in these halls of Parliament, I remember not our complaints against George III, but those remarkable members who defended us here, who spoke so eloquently on behalf of our fledgling democracy, and so tolerantly for the lawful spread of liberty throughout the British Empire.

I think, above all, of Edmund Burke, then member from Bristol. Burke, who so early understood us, and tried, in 1775, to warn that we would depart if the House failed to respect our "fierce spirit of liberty." Burke went on to describe, among our other odd traits, our stubborn adherence to the rule of law. He was among the first to note that we were already a nation of lawyers--before we were even a nation. "All who read, and most do read, endeavor to obtain some smattering in that science." And these "lawyers, and smatterers in the law," he noted, took an unusual approach to government. In other countries, "the 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 breeze." In other words, we could spot a bad law a mile away.

But Burke then went on to explain how these Americans came by their love of freedom. "You cannot, I fear, falsify the pedigree of this fierce people," he told the House, "and persuade them that they are not sprung from a nation in whose veins the blood of freedom circulates." You would have to tell them this lie in English, Burke pointed out, and "your language would betray you. An Englishman is the unfittest person on earth to argue another Englishman into slavery."

This is what I mean by a heritage. Alas, the House did not heed Burke's warning, and the result was a violent upheaval giving birth to our continuing experiment in democracy, the United States of America. Since then, your own course of empire has wisely followed the far more accommodating route that Burke recommended. You established the Commonwealth, still an enviable family of democratic nations, admired the world over. We, in turn, have been your staunch ally and wartime partner in furthering freedom through two world wars and a stressful peace that now remarkably promises to become real. That imminent prospect is what we need to examine together, in light of the rising respect for the rule of law, among those reviving European parliaments--and perhaps even by the Supreme Soviet itself.

To turn to Burke again for guidance, he drew a famous distinction between the two great upheavals of his own day. He

understood, and favored, our American independence but he predicted, and abhorred, the tyranny of the French Revolution. We regard Burke as the soul of political common sense, precisely because he so accurately foresaw what consequences each revolution would bring. From the one, the rule of law and independence and freedom. From the other, abstract theory and isolation and terror. During the Cold War, we drew a like distinction ourselves between the free alliance among the Western democracies and the Soviet subjugation of the Eastern bloc nations. The great news is, of course, how right we were, as "The Wall comes tumbling down."

But, in the process, we tend to overlook the several tasks we ourselves actually undertook in that immediate post-war period to protect freedom, beyond the grander achievements of the alliances reflected in the European Community and NATO. The plain truth is there occurred two early and highly successful experiments in democratization that have realigned the present world order. And they both say something, I believe, about how we might now respond to those seeking our advice about how to manage freedom.

One of these experiments, both Great Britain and the United States undertook to share on January 1, 1947, when we jointly set up the bizonia within the future Federal Republic of Germany. The

French soon joined us, and together we embarked on the effort toward democratization of West Germany. Work on a new constitution--built upon the old Weimar constitution--soon set up democratic safeguards and individual rights guaranteed by law. Out of the ashes of the Reichstag rose the Bundestag and a new parliamentary democracy.

This experiment in democracy went far beyond "de-Nazification." It restored truly representative political parties to electoral government. In 1949, Konrad Adenauer became Chancellor for the Christian Democrats, but the Social Democrats later contended successfully for power. The German economic miracle ensued, along with a political diversity that has stretched from Willy Brandt to Franz Joseph Strauss, even to the Greens. Perhaps the best indicator of early democratic stability is the efficient way the Federal Republic managed that first influx of refugees in the wake of World War II. We watch today with some trepidation the swelling human traffic across re-opened German borders. But do you recall how many people entered West Germany, without a country or a future, to be absorbed or otherwise relocated by this resurrected democracy?

Eight million. Eight million Germans expelled from the Sudetenland and Poland, as well as the Balkans. In addition, tens of thousands of additional refugees fled every year from the

tyranny of the German Democratic Republic. All were taken in, to become repatriated contributors to this German "economic miracle."

The other experiment in democratization, of course, was Japan. That experiment fell to the United States after the war in the Pacific, and sought to follow our own American model of democratic government. It provides an equally instructive lesson in the politics of turnaround.

Again in 1947, General Douglas A. MacArthur cannily demanded that the Japanese discard their old, feudal Meiji constitution in favor of democratic constitutional reform. The new constitution abrogated imperial divinity, the peerage, and the state religion. It also set up representative government, an independent judiciary, universal suffrage (Japanese women voted for the first time), and a Bill of Rights grounded in the "supreme consideration" for "life, liberty, and the pursuit of happiness," Jefferson's words lifted right out of our Declaration of Independence. Even as the imposition of an occupying power, this constitution quickly gained, and has kept, widespread, popular support. General MacArthur's victorious insistence on democratization coincided, it would appear, with deeply felt, if long hidden, desires of the Japanese people.

And where have we been hearing that up-from-the-depths refrain lately?

That Japanese Constitution of 1947 brought forth an egalitarian vitality that contributed immeasurably to the resurgence and growth of that nation. Another economic miracle ensued--far larger than Germany's upsurge--and though the conservative Liberal Democratic Party has long held dominance, earlier this year, the Socialist Party gained control of the Diet's lower house. One other, seldom-noticed indicator of increased democracy was the land reform so often put forward as the real key to Asian democratization. Again under an Allied plan, two thirds of the cultivated acreage of Japan was redistributed, all but ending rural poverty. This, in fact, has created a powerful "farm vote" that now insists on raising trade barriers against our American agricultural exports.

So we have two recent experiments in democracy, both out of our mutual democratic heritage, that have proven astoundingly, even embarrassingly, successful. Of course, there were other social and economic forces at work. Also unique elements of both the German and the Japanese character are still endlessly debated and even disapproved as the "real" causes of their stunning national revival. But in both cases, every effort was made to

expunge a brute past, to end the totalitarian error, and final horror, of a "government of men, not of laws."

And in both cases, the primary commitment was to re-establish the rule of law constitutionally as a protection against any such future wrongs in their societies.

These experimentations in democracy are important to remember because we now have whole nations behind the falling iron curtain seeking a similar restitution of the rule of law after an equally brute past. We even have the Soviets coming to us and declaring they are open to such an experiment in democratization themselves.

That last is bound to be a particularly bold exercise in political science. Like many of you, we have already had them as visitors--only last week, in my offices--and we have been to visit them. Earlier this fall, we met with Soviet leaders in the legal and law enforcement fields--ministers, jurists, law students, even the head of the K.G.B.--specifically to discuss the rule of law. Our agenda was a full American one: our Bill of Rights, the principle of separation of powers, our system of checks and balances--all culled from that menu of liberties we teach (but don't always learn) in our basic high school civics courses.

One of the first, most insistent questions I was asked by nearly everyone was, inevitably, a constitutional one: how does your federal system work? How did you weld together the separate states as the United States, and keep things from falling apart through incessant struggles between the national government and 50 different state governments?

Obviously, they are worrying about the unrest among their own Republics, seeking some solution before the consequences we see enlarge every hour further overtake them. They are also looking to us for ways, if you will, to deal with their own diversity. We gave them, I'd say, a very Burkean answer. We did our best to explain, "Look, this is the way we do it, but the central thing about our system is its accommodation to change. Most of the mechanisms and components of our government are designed to accommodate change. But mastering that process is going to require far more than just the passage of new laws by the Supreme Soviet."

I'm sure you remember that old political chestnut that all we needed to do to start a revolution in Russia was to drop them copies of the Sears Roebuck Catalogue. Well, the upheaval has begun and if, as President Bush has said, we want perestroika to succeed, we'd better start dropping them copies of The Federalist

Papers. Or the Magna Carta. Or the writings of Edmund Burke. Or other seminal works of our Anglo-American democratic heritage.

They are simply that far behind in comprehending the daily workings of a democracy. Meanwhile, they have yet another urgency--besides national unrest--and that is their economy. As we all now know, it is a basket case. To survive, they realize they must enter into the free world marketplace, and to do that, they must begin to recognize and incorporate a framework for free commerce.

In other words, one principal reason for their great interest in the rule of law is that they have an immediate and pressing need to jump-start their participation in the world economy, to attract foreign know-how and investment. To do that, they 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.

That is why property rights are now being debated in the Soviet Union, in fact, on the very day we visited the Supreme Soviet--a semi-democratically elected legislature, and a developing seat of power. That debate went on seemingly endlessly, and with very good cause. The Soviet Constitution

says that property belongs to the state alone. But might such state property be legally leased to cooperative, joint ventures? And how does a Russian "act like an owner," as Gorbachev has instructed, without ownership? As we watched, Dr. Andrei Sakharov, among others, rose to voice his objections to the Government's bill. Finally, two bills, partially in conflict, were sent off for further massaging by committee. Our host, the Minister of Justice, suffered agonies over this mauling of his finely crafted legal reforms by the people's representatives. I did my best to tell him--as twice governor of Pennsylvania-- "That's representative democracy." After several tries, a slight twinkle in his eye told me he might finally be getting the point.

But they still have a long distance to go. Yes, Gorbachev was trained as a lawyer, but so was Lenin. Their political society has never been through the evolutionary process of the common law, as we know it. From 1917 to 1921, there literally was no body of law, and only your Prime Minister Lloyd George, for the sake of British business interests, forced one on them. Judges are paid worse than the average worker, and have grown used, often, to dispensing what is known as "telephone justice"-- responsive only to the party boss at the other end of the line. When we went to see the chairman of their Supreme Court, the highest judge in their land, he pulled down his one code book.

It had little pieces of typed paper pasted in, where Soviet law had been hastily recodified.

We should also keep in mind that our two nations achieved the rule of law, under far more amenable circumstances. You developed your unwritten Constitution over eight centuries. We could call on that English heritage, and our American abundance of legal "smatterers", to create our written Constitution, even in crisis. We were then only four million Americans, mostly of English descent and concentrated on the Atlantic Coast, not 280 million Russians of various ethnic strains, spread across eleven time zones. Moreover, our Constitutional Convention deliberated in secret--not under glasnost. Imagine, if you will, George Washington on worldwide television, announcing troop withdrawals from the Maine territory, letting Vermont and New Hampshire pursue Yankeeism in their own way, negotiating with Quaker Solidarity, while trying to cut an arms deal with your Cabinet to put a cap on heavy frigates. George Washington, you will recall, did not say one word while presiding at Philadelphia.

So the Soviets suffer the drawbacks of history, including their own, most recent, flawed history. But do they now recognize these flaws, particularly in law, and do they sincerely want to counter them by establishing an independent judiciary--an institution they have never known, from Czarist times forward?

The ultimate answers to those questions are unknown, but there are a few signs of an incipient legality. They are actively discussing a doubling of judicial salaries. They are also allowing lawyers to charge what they will--instead of a scale of fixed fees (plus money under the table)--and are taking steps to allow them, actually, to defend their clients.

They are also evolving a concept of judicial review--perhaps a committee to rule on the constitutionality of their laws--and instituting penalties and sanctions to stop interference in judicial deliberations. When their Helsinki delegation was in my office recently, I was told a bill covering many of these guarantees of judicial integrity has already had its first reading in the Supreme Soviet.

So there appears to be a will to a rule of law, if still much wandering in pursuit of untried, democratic ways. It is far too early to determine their chances of success. But I do remind you of this. If they are two hundred years behind our democracy --and many centuries behind your own--they are only forty years behind those two post-war, democratic experiments: Germany and Japan. Again, there are large differences in national circumstances--whole histories, wartime sufferings, other relevant factors. But we have seen the political adaptability of West German democracy overcome many obstacles from their

totalitarian past, and witnessed--sometimes to our chagrin--the Japanese experiment's continuing, modern triumph over centuries of chauvinistic emperor-worship. And both experiments were undertaken in similar adversity: by an undone people--even a conquered people--in economic extremis, at a moment of deep disillusionment with their own society. Could something far different, yet much alike, happen again? We shall see.

One final, encouraging observation. Ten years ago, when I first visited the Soviet Union as a governor, I found each official session invariably opened with an almost obligatory denunciation of the United States and our system of government. Ten years later, nearly every meeting with our counterparts began with a litany of woes--their recitation of the shortcomings of their system--and an almost wistful yearning for more knowledge about how our democracy works.

So I come away from my most recent visit to the Soviet Union--and my subsequent contacts with their legal delegations--well aware that Soviet justice does not yet embody the rule of law, but convinced that patience and example and even some advocacy--such as Burke's on our behalf--might help certain determined Soviet officials to establish the rule of law. Like everybody else's democratic experiment, it will have to be attempted and achieved within their own society. It really comes

down, if you will, to a very Burkean proposition. As Burke once said to you about us, you will have to let those fierce Americans go their own way about their own affairs--with your sympathy and encouragement. Likewise with the Russians--or the Poles, or the Hungarians, or the Czechs. Nobody else but their own judges, lawyers, ministers and citizens can evolve the judicial fairness and institute the legal restraint that underpin our rule of law--that respect for law that people are, even tonight, crossing through those holes in the wall to seek elsewhere.

But we will know it when, and if, it appears. By the human rights the rule of law protects, by the governmental powers it limits, by the judicial independence it preserves. We will know it, constitutionally, when we see it. After eight centuries of experience on your part--if only a mere two hundred years of experiment on our own--who better?