Department of Justice

"THE RULE OF LAW IN THE SOVIET UNION:
A NECESSARY FRAMEWORK FOR DEMOCRATIC REFORM"

REMARKS

BY

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Whether or not the present 28th Communist Party Congress in Moscow is, as some predict and more hope, a true precursor to the "withering away of the party," the extraordinary debate which is taking place in that forum parallels in important ways President Gorbachev's stated desire to create a "law-based state" -- a Soviet Union founded on the rule of law.

Heritage Analyst Leon Aron has identified the creation of "a government vested with authority and having enough legitimacy to administer the very bitter pill of radical economic reform. . .as the central and most urgent issue of Soviet politics today."

It is my view, in the context of recent exchanges between the Department of Justice and our Soviet counterparts, that the rule of law is the only basis upon which such a government can eventuate from the upheaval presently under way in the Soviet Union and Eastern Europe.

Our October 1989 trip to the Soviet Union -- the very first by a sitting United States Attorney General -- occurred at the very beginning of the Supreme Soviet's effort at institutional reform -- and enabled us to open an historic, and continuing, dialogue on the rule of law and human rights.

It was a remarkable experience. At the invitation of Soviet Minister of Justice, Venyamin F. Yakovlev, we met for a week with Soviet leaders in the fields of law enforcement and the

administration of justice -- ministers, jurists, law students, even the Chief of the K.G.B., Vladimir Kryuchkov. Our agenda was a full one, devoted to topics central to what makes our democracy work: our Bill of Rights, our federal system, the principle of separation of powers, with its checks and balances, our two-party political process -- all from that curriculum of liberties we teach (but don't always learn) in our basic high school civics courses.

And I have to credit our Soviet hosts, even at that early juncture, with a bold exercise. Our political discussions were open and free-ranging, covering everything from our mutual interest in stopping international terrorism to their obligation -- as we see it, and they increasingly recognize it --to allow freer emigration of Soviet Jews. But our talks still took place within an historical legal context that must be understood, if their present difficulties are to be fully recognized, or ever surmounted.

To summarize abruptly a great deal of history, Soviet justice derives from three legal traditions: customary law among the peasantry, the imperial law of the Czars, and, much later, the Romanist law of civil codes. Customary and imperial law have had by far the overwhelming impact, creating a government of men above the law, from the Mongols to the boyars to the Czars and

beyond. Various formal codifications of imperial law did appear. But the operative legal power was still vested in what we commonly know as the ukase. "A proclamation of a Russian Czar," as Webster's says, "having the force of law."

This violently changed -- yet did not really change -- when the Bolsheviks came to power. Initially Lenin abolished imperial law, along with private property, and set up the people's courts. Judges were instructed to follow the decrees of the revolution -- or their "socialist conscience." Later, Lenin and his successors moved to keep authoritarian sway over the courts by what became known as "telephone justice." Party officials frequently rang up judges, who then ruled in particular cases according to what the party told them to do. The ukase had been reduced, by 20th century technology, to a phone call. The legalistic way was prepared for Stalin's Moscow show trials during the Great Terror and, thereafter, the habitual subordination of the law to party interests.

Against this unpromising background, so-called "new thinkers" in the Soviet Union have now embarked upon what appears to be a truly idealistic and laudable attempt to establish the rule of law -- or in Gorbachev's words, a "law-based state." Could it actually happen? So often you hear it optimistically

said: remember that Mikhail Gorbachev was trained as a lawyer. Yes, but so was Lenin.

The chances are certainly there -- as we saw during that week, and continue to see as we visit with Soviet officials and lawyers, both here and in the Soviet Union. Indeed, we are presently preparing for a return visit by Minister Yakovlev next month to extend our dialogue on democracy. But chances of success in this endeavor must always be measured against the long fatigues of history -- the institutional neglect and political disrespect for what we know as the rule of law.

What is really missing is what might be called a "legal culture." Time and again, for example, we found an almost naive belief that all that was needed was to pass the correct statutes, to get the right laws on the books to create a "rule of law." We did our best to try to disabuse them of this legalistic and somewhat simplistic notion. Laws on the books, we explained, must be conscientiously obeyed and impartially enforced within a structure, and through a process, recognized and acknowledged by all. . .citizen and bureaucrat alike.

The rule of law works in a democracy, we pointed out, because of the supremacy of the judiciary, because men adhere to

a government of laws, and act to see that the laws are enforced, in such ways that no man is above -- or below -- the law.

Happily, the very things the Russians found most curious about our democracy let us discuss those practices in our law that really make our democratic process work. Our Ambassador to the U.S.S.R., Jack Matlock, reports this phenomenon is common -- as Soviet citizens seek him out to gain insight into the functioning of the most basic of American institutions. Soviets quiz him on remarkably practical questions. If the Russians are writing a law on the press, they might query, for example, "How do Americans treat libel law? What can your press say? What can it not say?"

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? How do you 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. You only need look at the independence movements in Lithuania and the other Baltic states -- as well as similar secessionist rumblings in the Republic of Russia, under Boris

Yeltsin, and most recently, in Uzbekistan -- to understand their anxiety. They are also looking to us for ways, if you will, to deal with their own diversity.

We gave them a very pragmatic 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. And mastering that process is going to require far more than just the passage of new laws by the Supreme Soviet." It is going to take a commitment to the lawful, democratic process, and we tried to emphasize legal process -- due process of law -- even over substantive rights, as the true safeguard of the people's liberties.

Again, they asked us often, and in much confusion, about the separation of powers. The idea of <u>deliberately</u> building in a tension between separate branches of government -- our concept of checks and balances -- was extremely puzzling to them and, to some, incomprehensible. Accustomed to their own monolithic system, they would have to struggle hard to understand, for example, Justice Brandeis' observation that we adopted the separation of powers in 1787 "not to avoid friction, but by means of the inevitable friction incident to the distribution of

government powers among the [branches], to save the people from autocracy."

We called attention to their own guarantees of civil rights under the Soviet constitution. There they are, all fully documented, like our own Bill of Rights. Only there is also the carefully worded escape clause: "Civil rights shall be protected by law --" Just as our rule of law would hold -- but with this kicker. "-- Except as they are exercised in contradiction to their purpose in socialist society in the period of communist construction."

That, of course, admits the ubiquitous specter of party tyranny. Attempts are being made to toss this offensive language off the train by the new thinkers. But it's not litter down the tracks of history yet. And still to come is the <u>real</u> test as to whether the Soviet courts themselves can and will act to protect the people's rights. In short, will respect for legal process eliminate the prior abuses of "telephone justice"?

True reform must reach down into the legal culture itself, and create an inherent respect not only for individual rights, but for legal procedure and due process. In a statement before the Communist Party Congress last Monday, K.G.B. Chief Kryuchkov affirmed this elemental truth:

> We cannot speak in favor of the universal development of democracy and at the same time refrain from speaking in favor of law and order, and the supremacy of the law. A society which allows the law to be mocked is a diseased society. . . .

Fine words indeed, but one problem is that much of the motivation for legal reform is coming from a different direction altogether.

The Soviets face one great, dire urgency -- besides national 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 the fundamental prerequisite for turning away from a **command** economy -- to a **market** economy.

One of the Soviets' principal reasons for their great interest in the rule of law is **just** 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. Fear of abrogation of

contract rights or expropriation of investments can stunt otherwise attractive commercial and industrial initiatives.

This is one reason why property rights have been so hotly debated in the Soviet Union. A young reformer, whom my wife and I met last year, Ilya Saslavski, is involved in a property battle which typifies the disputes taking place on a local level across the Soviet Union. Saslavski, an elected member of the Congress of Peoples' Deputies, who is visiting here this week, has announced the take-over -- for ordinary families -- of an apartment building built for the party elite. Though the controversy will be settled in court, such a confrontation would never have been attempted were Saslavski not assured of a favorable hearing from a pro-reform judge. The action taken by Saslavski is but one manifestation of the myriad crises arising as local leaders vie for power in the Communist system which has an endemic antagonism to property rights reform.

On the very day we visited the Supreme Soviet -- a semi-democratically elected legislature, and a developing seat of power -- debate on the subject of property rights 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 Soviet citizen without ownership "act

like an owner," as Gorbachev has instructed, or even enjoy "something close to ownership" as espoused by Boris Yeltsin? As we watched, the late Dr. Andrei Sakharov, among others, rose to voice his objections to the Government's bill. Finally, two bills, partially in conflict, were sent off to a commission for a further massaging ... which continues to this day.

Adept legal accommodation can also be seen in the liberalization of their emigration policies. We are convinced they are now doing their legal utmost to facilitate the issuance of emigration visas -- as a new exodus follows hard upon a rise in anti-semitism in Russia -- but, here again, their interest is not wholly altruistic. They would like to meet the strictures of our Jackson-Vanik legislation in order to secure the most-favored nation status that would much enhance their prestige in world markets.

Still, we must be convinced -- as in so much else undertaken in the name of Soviet legal reform -- that not just the letter, but the spirit, of the law has taken root in the Soviet Union. That is the essence of the agreement reached between Presidents Bush and Gorbachev during the recent summit, that any trade agreement remains contingent upon legislative action by the Supreme Soviet in support of free emigration. We are, in short, watching to see that opportunities to emigrate are

institutionalized in law and practice, and are not just episodic, in the present uncertain flux of Soviet democratization.

All that being said, at the same time, I do not want to downplay their efforts to achieve the rule of law, or underestimate the modern-day difficulties of democratization. Two hundred years ago, we could call upon our English, common law heritage, and an American over-abundance of legal talent, to create our written Constitution, even in crisis. Also, we were then only four million, relatively homogeneous Americans, mostly concentrated on the Atlantic Coast -- not 290 million multi-cultured Soviet citizens, spread across eleven time zones. Moreover, our Constitutional Convention deliberated in secret -- not under glasnost. Imagine, if you will, George Washington on worldwide television, in the midst of a currency crisis, trying to suppress Shay's Rebellion, letting Vermont and New Hampshire pursue Yankeeism in their own way, negotiating with Quaker Solidarity, while trying to cut an arms deal with the British and French to put a cap on heavy frigates. George Washington, you will recall, said not one single word while presiding at Philadelphia.

The Soviets suffer all the drawbacks of history, including their own, most recent, flawed history. But <u>do</u> they now recognize these flaws, particularly in law, and <u>do</u> they sincerely

want to counter them by establishing, for example, 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 have doubled judicial salaries, formerly below the average wage. And -- good news to the Soviet law students I addressed at Moscow State University -- they are allowing lawyers to charge real fees -- instead of a scale of meagre fixed fees (plus money under the table) -- and are taking steps to allow them, actually, to represent their clients.

They have also been struggling to establish a rudimentary mechanism for judicial review -- not unlike our Supreme Court, but far less august and lawfully empowered. A constitutional oversight committee is to review the constitutionality of Soviet law -- in a sharp break with the past. But there are strict limitations upon their powers. The committee is advisory only, and it can rule on Soviet federal law, but not on the laws of the separate republics. In one curious anomaly, if any Soviet law is found to violate human rights -- presumably as defined by the United Nations Charter -- the committee is empowered to declare said law unconstitutional. There is much confusion over how the constitutional oversight committee will actually operate -- let alone, legally prevail. What is needed -- as Professor John

Hazard of Columbia Law School says -- is another John Marshall to arrive on the scene and guide their deliberations.

So there appears to be a will to a rule of law, if still much wandering in pursuit of untried, democratic ways. Going for such high stakes means that it is far too early to determine their chances of success. But I do remind you of two highly successful, post-war experiments in democratic reformations: 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 the totalitarian German past, and witnessed -- sometimes to our chagrin -- the Japanese experiment's continuing, modern triumph over centuries of 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 alike, happen again? For the sake of world harmony, we can hope so, while also providing whatever encouragement is possible.

One final, positive observation. In 1979, when I visited the Soviet Union as a state 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 our subsequent contacts with their legal delegations -- well aware that Soviet justice does not yet embody what we know as the rule of law, but convinced that patience and example, and even some advocacy, might help certain determined Soviet officials to establish their rule of law.

Like everybody else's democratic experiment, it will have to be attempted and achieved within their own society. If ever we needed dramatic reinforcement of that truth, it has come from the recent elections in Eastern Europe. On the one hand, East Germany has all but reunited with West Germany after its first free parliamentary election in four decades. On the other hand, Romania seems to have reverted to a government-sponsored vigilantism in the streets following the electorate's return to office of former Communists.

We cannot count upon constitutionalism simply to arise as virtue triumphant from the totalitarian ruins of Europe. Even

where constitutionalism 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 Russians. Nobody else but their own judges, lawyers, ministers 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 we have seen people steadfastly demanding in the open squares and open parliaments and newly open societies -- that will bring to a tolerable end the last vestiges of tyranny in these formerly closed Communist monoliths.

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 it limits, by the judicial independence it 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?