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COMMON MARKET, COMMON SENSE, COMMON LAW

*Talbot D'Alemberte**

My remarks reflect my recent experiences with the organization and operation of an American Bar Association project. The project involves working with the Agency for International Development, the Department of State, and the United States Information Agency to give technical assistance to the countries of Central and Eastern Europe. The project is based on the concept that lawyers in the United States have something to contribute to the people of Central and Eastern Europe as the displacement of totalitarian systems and Marxist economies and the development of the laws and institutions of a free society and a market system occur.

In titling these remarks "Common Market, Common Law and Common Sense," my intention is to seize the moments of this spring which I think will forever be known to history as the spring of the revolution in Central and Eastern Europe. When I say "revolution," I use that word principally in the Jeffersonian sense; to Jefferson, a revolution was a natural event. He thought of it almost as an engineer would — things do revolve, human events do turn over. It is this turning over in Central and Eastern Europe which is so fascinating. After all, we have seen very little violent rebellion. We observed resistance as well as the gradual impact that men and women of courage had as they insisted on their individual rights of free speech, assembly, and self-determination. Open rebellion was rather uncommon. The transformation of Central and Eastern Europe occurred because of the courage of many individuals and the vision of some leaders — the surprising vision of leaders in surprising places — in the Soviet Union as well as its former satellites.

People who resisted in this region, generally known as dissidents, have received much attention. However, remarkable people who,

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though Communists and in power, pressed for change, are also worthy of recognition. Recently I attended a small dinner party with the Justice Minister of Hungary, Karman Kulcsar. He resigned a position on the Supreme Court of Hungary in 1972 because he opposed the death penalty. He returned to the government several years ago to join the reform movement within the Hungarian Communist Party. Just yesterday, the second of the series of Hungarian elections was held reminding us that these elections were the result of a very remarkable movement led by people who were members of the Communist Party. The change to free elections was not coerced by street demonstrations or by violence. Furthermore, the individuals who determined that there would be free elections knew that the change would mean their loss of power. When the Communists last stood for election, they garnered approximately fifteen percent of the vote. They knew that they could do no better now.

Ambassador Richard Schifter, the Assistant Secretary of State for Human Rights, gave a toast saluting the minister and the other leaders of the reform movement in Hungary for initiating free elections despite their own certain defeat. The Justice Minister responded that he had no sense of regret, because he was privileged to have served his country in the movement toward democracy. The Justice Minister stated that he and his colleagues understood the Bible and that their mission was the mission of Moses — to lead the people of Israel out of their captivity, but not to enter the promised land.

A political evolution is occurring. Those countries that we so recently regarded as hostile are now seeking to change into open societies. These nations are moving away from what the new leader of Czechoslovakia calls a post-totalitarian system. They are trying to change from a centrally-planned economy to one that adopts some aspects of a market economy. The second election in Hungary, shows the triumph of a party that has pledged to restore the economic and political systems to their precommunist state and to seek a relationship with the West.

Several weeks ago, Abraham Sofaer, a former federal judge and the current legal advisor to the Department of State, observed that although the people who arrive in the United States from Central Europe talk about Madison and Jefferson, it would be well to advise them to start thinking of Hamilton first. My first reaction to this statement was hostile. However, after reflecting on it, I accepted Judge Sofaer's point.

These two ideas, the idea of a open economic society and the idea of an open political society, have traveled very closely together. As these nations change, emerging, as Vaclav Havel says, "from under the boulder," and trying to forge a new society, they seem very eager

to look to the United States. We should acknowledge that we have been cast in a flattering role. Central Europe reminds us that we are the descendants of Paine, Franklin, Jefferson, Madison, and Lincoln and, yes, of Hamilton.

With this background in mind, what then can we offer to these people who look to us with such admiration? The title of my remarks, "Common Markets, Common Law and Common Sense," indicates my answer. I will examine the idea of common markets first, because the first objective of American government and our American constitutional system is political unity. In turn, that unity is designed to create commercial unity — a common market.

In 1789, two great events occurred in the world, and the contrast between these events illustrates the point. The first event was the adoption of the American Constitution, and the second event was the French Revolution. Conservatives forged the American Constitution whereas liberal radicals precipitated the French Revolution. Where the French masses sought political enfranchisement, the American forefathers sought commercial unity, a common market.

Think about what is going on today as Western Europe attempts to forge a European Common Market. Their objectives are open borders, free trade between countries, respect for contracts made in various countries, rules prohibiting discrimination against goods from other countries, rules prohibiting discrimination against people from other countries, a uniform monetary system, and other details such as a uniform system of patents and copyrights.

A study of the American Constitution reveals that this basic charter contains these principles. These principles are known as the Commerce Clause, the Contract Clause, and the Privileges and Immunities Clause. This collection of principles is called the Constitution, and a primary purpose of that Constitution is to provide the charter for a vast continental common market.

This charter also provides a system of dispute resolution in the federal judicial system and a method for enforcing its decisions in the Supremacy Clause. The states accepted this common market, this new unity, because they understood that prosperity might follow. Indeed, this system encouraged commerce. I do not mean to imply that the conditions that brought about American success are present in Central and Eastern Europe. However, clearly, the principles of this charter have sustained American growth and commerce. Perhaps, we should urge the people of Central and Eastern Europe to consider a similar set of principles.

This suggestion is both economic advice and legal advice. The important legal principles which prevent discrimination against people and goods will be valuable contributions to our new friends from Cen-

tral and Eastern Europe. I do not mean to say our whole economic system is the perfect model or that our particular mix of capitalism and socialism is appropriate for other countries.

Indeed, as the reconstruction of these societies takes place, some marvelous ironies appear. An interesting contrast exists between the agricultural economies of Poland and Hungary. In Poland, the farmers resisted collectives. Yet Poland does not produce enough food to feed its people. However, in Hungary there was a wide movement towards collective farms, which have become very efficient. The Hungarians export about thirty percent of the food they produce, and the people in the collectives will probably continue with that form of organization. An examination of the developing politics of the region shows that the Polish farmers who have not been involved in collectives are inclined to support an economy built on central planning — which they have come to associate with stability and guaranteed profits. On the other hand, in Hungary, the farmers who have been in efficient collectives believe very much in a free market economy.

We can suggest an economic system which does not discriminate and which gains some benefits of scale through the device of a common market. However, it must not be forgotten that we are addressing a region which includes many potential ethnic and language divisions. The American experience is a limited example of how states can pull together in an economic unit; other examples are near at hand in Western Europe.

Next, let me examine the idea of common law. In Washington, D.C., where I have resided for the past several months, there is a steady stream of visitors from Central and Eastern Europe. One visitor recently remarked that he enjoyed what he saw in this country very much, and while he had some doubts about various aspects of our society, he was sure about one thing. He said, "I love the common law." That remark made me reflect on the legal principles which we inherited from England, improved upon by placing them in our written Constitution through our Bill of Rights, and guaranteed through our uniquely American institution, judicial review.

Our written Constitution, which is so frequently cited as the greatest achievement of American political thought, is on its own not such a great contribution. An examination of the written constitutions of countries around this world is not inspirational. For instance, the first mention of free speech or political rights in the constitution of Yugoslavia is well into a third of that thick document. Much of that document resembles a labor contract, spelling out the rights of workers in the work place.

The grand ideas of Madison and Jefferson do not spring from these documents. Missing from most of these documents are the great rights

which we inherited from the common law: the right to counsel, the right against self incrimination, the right to public trial, and the right to a jury trial. These documents do not include reference to anything like the writ of habeas corpus or the power through court action to challenge even the government itself.

It is not just that these grand traditions are written in our Constitution. Rather, a mechanism, called judicial review, exists for the enforcement of these great rights. Even in those countries with which we share some heritage of the common law, their constitutions read a little strangely. In Barbados or Trinidad, for example, imposition on the right to free speech is permissible if the restraint is reasonable. These words give great deference to the legislature, and, thereby detract from the judiciary's ability, through judicial review, to bring about a result based on the circumstances of the time.

As Americans, we profess great pride in the tradition of judicial review. However, many of the rights for which America is admired do not come from a lengthy tradition. Many of the rights we hold most dear are not rights which were held dear in the early days of this country. For instance, when I entered law school, very few women and no people of color were enrolled. At that time, the University of Florida had yet to make good on the full promise of the Declaration of Independence. Many of the best features of our society were not achieved until the 1960s and the developments resulting from the Civil Rights movement. Thus, one of the great treasures we have to offer is the common law.

Some people may find the idea of offering the common law and our constitutional system to the people of Eastern Europe a bit strained. After all, our system is foreign to theirs, and the system which was known to these countries before the socialist system was the civil law, the Napoleonic Code. The Civil Code is orderly and largely academic, distant in application from our common law.

Some people have said that our law has all the weaknesses derived from a system developed by the English. Moreover, someone once said that in order to reach the truth different people act in different ways: "The Germans add, the French subtract, and the English change the subject." In some respects our constitutional development has been chaotic. Yet if we are to credit the words of the visitor who said, "I love the common law," we ought to think about the experiences in these countries that makes our common law appealing to them. The appeal is rooted in the differences between civil law and common law. Once again common law was derived largely from experience. Recall Justice Holmes' great aphorism: "The life of the law has not been logic: it has been experience."

By contrast, the civil law developed originally from Roman law. In Roman law, judges were bureaucrats. They were not distinguished officials, rather they were minor, petty officials within the system. In the modern formulation, civil law comes largely from France, developing after the French Revolution swept away the Bourbon kings. In the popular zeal to replace the old order, France established a judicial system which was not subject to the prerogatives of royal power. The very idea of the Napoleonic Code was to develop easily applied rules and to displace the lawyers and judges who were profoundly conservative.

After Napoleon's Empire succeeded the French Revolution, much of the rhetoric of that revolution was retained. Napoleon sought to leave a system of law which was logical and well conceived. This Napoleonic Code was to be a law so clear that judges would not have to interpret it — they would simply apply it. Later, Bismarck asserted that the Napoleonic Code was not sufficient in length or detail. By the time Bismarck turned to the project, a much lengthier law was needed to cover all the different circumstances in modern society.

To a common lawyer, the suggestion that a judge is not going to shape or interpret the law seems utter nonsense. To the common lawyer, a judge will always play a creative role, at least by applying one set of rules rather than another to a given circumstance. That creative role is important to the common lawyer.

The crucial point of distinction between the civil and common law systems is the perception of the judiciary. As previously stated, the judiciary was important in establishing the common market. However, the judiciary is equally or more important in preserving the grand traditions of common law. The complaints of the people who have so recently emerged from the control of Communist dictatorships provide some assurance of the significance of this distinction. The distinguished leader of Czechoslovakia, the playwright Vaclav Havel, commented on legal processes prior to any revolution. He noted the following flaws in the Czechoslovakian legal system in 1978:

The hidden political manipulation of the courts and of public prosecutors, the limitations placed on lawyers' abilities to defend their clients, the closed nature, *de facto*, of trials, the arbitrary actions of the security forces, their positions of autonomy over the judiciary, the absurdly broad application of several deliberately vague sections of the code, and of course the State's utter disregard for the positive sections of that code, the rights of citizens.

All this would remain hidden from any outside observer who merely looked at the laws and did not look at judicial administration. Havel's

list of grievances against the system, illustrate a fundamental complaint about the system's failure to have an independent judiciary and independent lawyers.

Havel is also interested in principles guaranteed by our Bill of Rights, largely matters which have been drawn into our system through adaptation from the common law. Our system provides the answers to Havel's complaints about his system. Our right to a public trial and a trial by jury and our right to due process guaranteed by a written constitution and protected by an independent judiciary, are the principles for which Havel was crying out.

There is now some objection that, in large part, socialist countries were built on the foundation of civil law. Our concept of a free and independent judiciary is very distant from the system described by Havel where security forces have "autonomy over the judiciary." The civil law concept of judges as functionaries is not so different. There is also in these newly freed people a distaste for abstraction. Havel, in his great essay, "The Power of the Powerless," states that, "[T]he central concern of political thought is no longer abstract visions of self redeeming positive models, but rather the people who have so far merely been enslaved by those models and their practices." Havel's ideas seem to mirror Justice Holmes' view that the life of the law is not logic, but experience.

Finally, I will make a few remarks on common sense. As previously stated, we have reason to be proud of our constitutional system. However, I wonder if we will feel the same kind of pride when we examine some specific instances of the operation of our government and our business in this country.

What would we, as proponents of our system, say to a group of Central and Eastern European citizens who asked about our public policy on specific issues. What would we say to answer questions about how we provide housing for our people? How do we explain the plight of the homeless in this very wealthy country? How do we explain the failures of the Department of Housing and Urban Development?

What would we tell people who wanted to look at our banking system? How would we explain the Savings and Loan crisis? There is talk in Eastern Europe of establishing a stock exchange. Who should we send to give them advice? Michael Milken is not employed today, so perhaps he could lecture on the benefits of junk bonds.

If we turn from business and business regulation to government and politics, again a considerable number of failures exist. These new countries will probably have increased problems with drugs and crime. Do we have something useful to say to them? They want to establish new systems of education. Should we tell them how well we educate?

Should we tell them about our dropout rates? Should we tell them about the pride we have in our system of higher education? What would we say?

On a more fundamental level, they may ask us about our political systems, how to run for office, how to establish traditions of public service. What do we offer? Political action committees? A thirty second commercial — Michael Dukakis riding around in a tank or George Bush wrapped in a flag telling people to read his lips? In political life, what help can we give to these people? What inspiration or example are we? Do any of us believe that the enthusiastic citizens of Central and Eastern Europe, who stand in line to go to polls look to this country as an example of involved citizenry?

Do we provide models of statesmanship to leaders like Lech Walesa and Vaclav Havel who have made great personal sacrifices and who now are calling on their countrymen for further sacrifice? What would we tell the Polish people who are making very hard choices in a very poor land, where the political leadership is demanding further sacrifices? How do we advise them, when we continue down the easiest possible course robbing from our trust funds, borrowing through vast bond issues, and very callously casting a burden on our children and grandchildren?

At one point in Vaclav Havel's marvelous essay, "The Power of the Powerless," he says,

People's interest in political matters naturally dwindles [in the system he is describing] and independent political thought insofar as it exists at all is seen by the majority as unrealistic, far fetched, a kind of self-indulgent game, hopelessly distant from their everyday concerns, something admirable perhaps, but really quite pointless.

How sad it is to recognize that these words, apply equally to us when they were intended for a society which we have despised for years. As I ask myself these questions, I must tell you that I have a great sense of inadequacy and a little bit of shame at how we have allowed some of our grand traditions of public service to evaporate.

At a critical time in our history, Thomas Paine wrote "Common Sense," which brought together the many grievances against the British crown. In that marvelous essay, he concluded " 'tis time to part"; that the time had arrived for Americans to summon the political will to draw apart from Britain. He spoke to a country which possessed many frontiers and primitive conditions but which was also a cosmopolitan and well educated community.

Paine told Americans something that we still believe today, something which has been schooled into us. He said, "The cause of America is in a great measure the cause of all mankind." He made the common sense argument that no island could govern a continent, and he urged Americans to summon the political will to separate from Britain.

Today, we again need to summon this political will to reform our political systems, to bring ourselves out of debt, and to establish a just economic order. The political will we require today is one which will allow us to reestablish purpose in our institutions. If we have the opportunity to exchange ideas with these people from Central and Eastern Europe, we will have much to teach them about a common market and the common law, but we have much to learn about common sense.

We need the will which has been shown by the people of Central and Eastern Europe — the political will to shape our own destinies and the will to sacrifice if necessary to redeem ourselves from a course of deep indebtedness. We need the willingness that is expressed to us by Vaclav Havel to take personal responsibility for our plight. We need the common sense to bring our institutions back to order and revive our political sense before we squander our great heritage. Without this common sense we will not enjoy the prosperity of our common market and our children will not know the protection of our common law.

