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TITLE: CONSTITUTIONAL EVENTS IN  
YUGOSLAVIA, 1988-90: FROM  
FEDERATION TO CONFEDERATION  
AND PARALYSIS?

AUTHOR: ROBERT M. HAYDEN, J.D., Ph.D.

CONTRACTOR: UNIVERSITY OF PITTSBURGH

PRINCIPAL INVESTIGATOR: ROBERT M. HAYDEN

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## EXECUTIVE SUMMARY

Yugoslav constitutional development since 1988 has produced a problematical stalemate: while the constitutional basis of the one-party socialist state has been or is being removed through the elimination of most restrictions on political and economic activity, the liberating potential of this development is threatened by assertions of a doctrine of confederation that would deny that the various republics are bound by the federal constitution. This doctrine, which has now been asserted in Slovenia and Croatia and is increasingly cited in Serbia, holds that republican laws and constitutions take precedence over those of the federation, and would deny enforcement power over federal laws to federal institutions. The advancement of this doctrine seems based on a combination of old-fashioned nationalist chauvinism aggravated by mistrust of the implications of "centralism" under the four decades of communist rule. Yet the potential success of the confederalists has disturbing implications for the development of democracy anywhere in Yugoslavia, since it would block needed changes and also deny the rights of local minorities. Indeed, it is possible that the confederal doctrine could produce a constitutional crisis that would lead to the breakdown of the country, an event which would almost certainly be accompanied by massive violence and forced population transfers, and probably lead to civil war. In light of these dangers, it is incumbent on the United States and the dominant powers of western

Europe to encourage a federal resolution to the Yugoslav constitutional crisis.

This report describes and analyzes the massive changes in the constitutional structure of Yugoslavia that have occurred in the last three years, and that are continuing as this report is being written. True to its identity as a non-conformist socialist state in Europe, Yugoslavia began to reform its state-socialist system years before the collapse of communism in the East-bloc countries in 1989-90. Official Yugoslav sources had identified the causes of the country's economic and political "permanent crisis" in the 1980s as lying in the unworkable institutions of Yugoslav self-management socialism, and serious efforts to reform the constitutional structures that both mandated and supported that system began in 1987. In November 1988 a massive set of constitutional amendments removed much of the underpinning of the economic institutions of self-management, but left the political system and the system of relations within the Yugoslav federation largely untouched. These limits were due primarily to the weakness of the existing federal structure, which permitted a veto of any change by any republic or autonomous province.

This cumbersome consensual structure had itself long been criticized as one of the factors contributing to the crisis, since it had so often thwarted needed changes. The political environment between the republics, however, was becoming increasingly tense throughout 1988, which led to decreasing cooperation between them. Indeed, by mid-1988, news media throughout the country were

referring to a "verbal civil war" between the various republics. The initial impetus for this hostility seems to have been a reaction to assertions of Serbian national identity by a new (October 1987) leadership of Serbia.

In 1989, the several republics and autonomous provinces of the Yugoslav federation began to amend their own constitutions, following the federal amendments. At this point, however, political pressures concomitant to increasing hostility between several of the republics produced a constitutional crisis when the Slovenian parliament passed amendments to the republican constitution that were clearly contrary to the federal constitution. Despite a provision in the latter that republican constitutions could not be contrary to the federal one, the Slovenes persisted, and in fact propounded a doctrine of republican supremacy over the federation. This effort to revise the basic structure of the federation is still under dispute. While the Constitutional Court of Yugoslavia has ruled against the Slovenian doctrine, politicians in other republics, notably Croatia but increasingly in Serbia, are also endorsing it.

As this report is being written, the structure of the Yugoslav federation may be seen as being in flux. The central government continues to assert what it sees as its constitutional powers, while political actors in several republics deny that the federation has any power. This conflict of principles has become even more pronounced following the victory of nationalist parties, which asserted republican sovereignty as the bases of their

respective platforms, in the republics of Croatia and Slovenia in the Spring of 1990. At the same time, however, the most popular politician in the country is the federal prime minister, largely because of his attempts to reform the country's economy. Attempts are continuing to revise the constitutional structure of the federation, and a formal process for amending the federal constitution is well underway. The amendments may be vetoed by any of the republics, however.

At the time of writing (June 1990), a constitutional stalemate existed between those republican governments that asserted their complete sovereignty (but not secession from Yugoslavia) and the federal government. The stalemate can exist indefinitely but is likely to be unstable, for several reasons. First, the doctrine of confederation serves to paralyze the federal government at a time when systemic changes throughout the country are essential. Second, adherence to the concept of the supremacy of nationality-defined polities is likely to lead to oppression of local minorities (e.g. Serbs in Croatia, Bosnians in Slovenia, Croats in Vojvodina), a development which would further increase tension between republics. In this situation, international support for the federation, and pressure for restraint on the republics, may be needed to avoid the breakup of Yugoslavia.

## A NOTE ON SOURCES AND THE TIME-FRAME OF THIS REPORT

This report is largely based on materials published in the Yugoslav press, and the reader will notice particularly heavy use of the daily newspaper Borba. Both the use of the press and the reliance on Borba deserve some comment. On the first subject, the constitutional debates in Yugoslavia have been extraordinarily public, with all of the newsmedia publishing reports, news analyses and essays by political, academic and other public figures. For an American reader, the Yugoslav press since 1988 has been strongly reminiscent of the American press at the time of the debate over the adoption of the Constitution, and reminds one of the fact that the Federalist papers were also written for newspapers, as contributions to current political debate. Thus I rely on the newspapers because that's where the action is.

As for Borba: since late 1987, the major newspapers and magazines in Yugoslavia have almost without exception become increasingly strident organs for nationalist politics within their home republics. The major exception has been Borba, the only paper in Yugoslavia that has maintained an orientation toward Yugoslavia as a whole, without primary loyalty to any republic. Further, Borba has continued its long tradition of printing government documents: constitutional drafts and texts, and statutes. For these reasons, Borba has seemed to me to be the most objective source of information on day to day Yugoslav politics.

Finally, in regard to the time frame of this report: like all other writers working on what has until now been known as Eastern



## INTRODUCTION

The decade of the 1980s produced what Yugoslavs came to view as a permanent crisis (stalna kriza): a falling standard of living, with high inflation, high unemployment, a massive foreign debt, periodic shortages of consumer goods and essential commodities such as medicines, and increasing nationalist tensions. After a protracted period of prevarication concerning the causes of these problems (see Mencinger 1989), by the late 1980s virtually all political actors had come to recognize them as being manifestations of a systemic failure, the failure of the economic and political structures of the famed self-management socialism which had been institutionalized in the 1974 constitution. As a result, even before the collapse of East European communism in late 1989, Yugoslavia had begun the task of seriously reforming a failed socialist system. On November 29, 1988, a massive set of constitutional amendments was promulgated, which scrapped some of the most cumbersome elements of self-management, such as the system of fragmenting economic enterprises into "basic organizations of associated labor," and began to increase opportunities for economic activities by economic actors outside of the social sphere.

While the economic reforms begun by the 1988 constitutional amendments were generally seen as useful, virtually all political figures recognized them to be stop-gap measures, pending the complete reworking of the constitutional structure.<sup>1</sup> In particular, changes were seen as being necessary in regard to the political structure, with calls for secret ballots in multiple

candidate (but not, then, multi-party) elections. Furthermore, changes in the structure of relations within the Yugoslav federation were seen as necessary, although the reasoning behind this assessment varied. On one side, some political actors saw the federation as being institutionally so weak that it could not carry out basic administrative activities, to say nothing of reforms. On the other hand, political figures in Slovenia enunciated a fear that the federation was in danger of being dominated by the largest republic, Serbia, under Slobodan Milosevic, its charismatic leader since 1987. These politicians wanted the federation weakened, rather than strengthened, to protect their own independence (see, e.g., Ribicic and Tomac 1989).

While constitutional debates in 1987 and 1988 centered largely on economic issues, by mid-1989 the major focus of constitutional argument and analysis was on the nature of relations within the Yugoslav federation. This issue has become of overriding concern because it is really the key to the implementation of systemic reforms throughout the country. To put the matter bluntly, if the federation is incapacitated, prevented from effective action by institutional (constitutional) structure, whatever reforms it might attempt are likely to be meaningless. Further, the incapacitation of the federation is both symptom and cause of inter-republican discord which may threaten the continued existence of Yugoslavia as a state.

This report will analyze the rise of the issue of the structure of the federation as the central focus and key question

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This report will analyze the rise of the issue of the structure of the federation as the central focus and key question

of Yugoslav constitutional reform, concentrating on the concrete steps taken by various political actors and the justifications that they have provided for their actions. In doing so, I believe that I am reflecting the dominance of this issue in the Yugoslav public political discourse from summer 1989 up to the beginning of June, 1990. It will be seen that one of the major developments has been an attempt to achieve the de facto confederalization of the country, with a corresponding decline in the rôle of the central government, a process that has been advanced by the elections in Croatia and Slovenia in Spring, 1990. At the same time, however, proposals for further formal revision of the constitutional structures have been raised by several major political entities, notably the Federal Executive Council ("FEC") and the Yugoslav State Presidency, and these proposals are also discussed. The paper concludes with an assessment of the implications of the constitutional developments for the continued functioning, and perhaps even the continued existence, of the Yugoslav federation.

The Yugoslav constitutional debate can not be dismissed as simply another chapter in the political history of one of the more unusual states of post-war (or perhaps cold-war) Europe, of concern only to specialists on Yugoslavia. The positions taken by those who advocate a confederal Yugoslavia are of more general interest for reasons both theoretical and practical. At the level of theory, these constitutional arguments echo certain modern western political scientists in their view of the ideal structure for a multinational federation, notably Lijphart (1977; 1984). They

thus provide the opportunity to examine these theoretical positions in the light of a concrete situation, providing a test case of sorts. Nor is this examination merely an academic exercise. At a time when Europe is trying to find greater unity than it has ever before achieved, actual political arguments concerning the viability of a multinational European state are clearly relevant, the more so since, as will be seen, the confederal position bears overtones of a darker side of the European political culture.'

#### FEDERAL RELATIONS AS A CONSTITUTIONAL ISSUE IN THE LATE 1980s

Since its inception in its present form with the constitution of 1974, the Yugoslav federation has been a loose one, with little power at the center (see Burg 1983; Ramet 1985). Indeed, the federation has long appeared to some observers to be more of a confederation (see, e.g., Nikolic 1989); in 1982, a Yugoslav constitutional lawyer told the author that the federal structure most resembled that of the American Articles of Confederation, which had preceded the present Constitution of the United States. Since the start of the economic and political "permanent crisis" that characterized the country in the 1980s, Yugoslav authors have discussed the confederal elements of Yugoslavia under the 1974 constitution (see, e.g., Miric 1984:14-32; Stanovcic 1986:195-218), while a mixed group of Yugoslav and American scholars have seen the federation as "fractured" (Rusinow, ed., 1988). The debate within Yugoslavia has been particularly heated since about 1987, with some

politicians and scholars, originally mainly from Slovenia and more recently (1990) from Croatia, arguing in favor of even less central control, while others, mainly from Serbia but also from other parts of the country, oppose the creation of an even more confederal state. The issue seems to have been brought first to the forefront of national (Yugoslav) political debate by the publication in 1987 of a "Slovenian national program" which many non-Slovenes viewed as separatist,<sup>1</sup> since it called for the creation of new constitutional structure for a sovereign Slovenian state, linked at most with the rest of Yugoslavia in a weak confederation.

In 1987 and 1988, constitutional issues over the nature of the Yugoslav federation were discussed primarily in regard to questions raised by Slovenian writers and political actors.<sup>4</sup> The debates were primarily theoretical, however, without immediate implications for the structure of the federation, except insofar as their existence served to preclude unanimity on revising the federal structure. Yet this was a crucial limitation, because by 1988 it had become apparent to most political actors that the relationship of the federal units (republics and autonomous provinces) to the federation was both a cause of the economic and political crisis and one of the main stumbling blocks to reform of the economic and political institutions of the country. That is, the requirement of unanimous approval by the federal units of most federal legislation meant that little real reform could be undertaken, while the devolution to the federal units of responsibility for

enforcing federal acts meant that, often, there was little enforcement (see Nikolic 1989 and 1989a). In the absence of unanimous agreement on the form that the federation should take, however, it was not possible to change the structure of relations within the federation when the constitution was amended in November, 1988. Thus that first set of major amendments to the federal constitution left the (con)federal structure of 1974 almost untouched, and still a matter of political and intellectual debate.

Events in 1989-90, however, turned the debate over federalism in Yugoslavia from a matter of polemics over definitions to one of concern over the consequences of concrete political and constitutional acts. In particular, the actions of the Slovenian Assembly in late 1989 rendered the question of confederalism real: if certain acts of the Slovenian legislature are valid, then Yugoslavia is a confederacy, regardless of the terminology employed. Yet the formal structure of the Yugoslav federal state has not changed since the adoption of the 1974 Constitution, at least not in regard to relations between and among the Republics and the Federation.<sup>1</sup> Thus the debates over federalism in 1989-90 have been over interpretations of a document that had been in effect for fifteen years. In essence, the actions of the Slovenes constituted an attempt to transform the structure of the Yugoslav state unilaterally, amending the Constitution without seeming to do so. While incremental change in constitutional structures through their reinterpretation is a familiar enough process, particularly to Americans, the changes in Yugoslavia are hardly

incremental. Instead, they represent an attempt to transform completely the structure of the federation -- and it is possible that the federation can not survive such a change.

#### FEDERALISM/CONFEDERALISM: A CONCEPTUAL DISTINCTION

It is necessary to deal more precisely with some conceptual issues in regard to the nature of federal entities. The basic idea is clear: a federal state is one composed of two or more constituent polities, each of which has sovereignty over at least some aspects of life, but each of which is also subject to, and bound by, the claims of a central authority over other areas of concern. This is a vague definition, but for good reason: a federation can not be defined in isolation, but rather only in contrast with two other political forms for a single state containing more than one administrative division, confederation and the unitary state. These last two forms are polar opposites, hence ideal types, yet indispensable for considering federalism, which can only be found between the poles, and thus encompasses a range of specific divisions of power between the center and the constituent units.

The polar opposites can be defined more precisely. In a unitary state, territorial divisions are purely administrative, with no implication that a territory might have a legitimate claim to political power of its own. One might easily envision such a unitary state, and perhaps find it in practice if not in formal structure in, for example, the USSR under Stalin. At the other

end of the pole, a pure confederacy would be a multi-polity entity in which all claims to legitimate power lie with the constituent units of the confederation and the center having no coercive power, though it might be expected to serve as a coordinating body through the exercise of moral suasion. This type of polity is also easy to envision, although it is less easy to find examples of it in recent practice, for reasons which may become clear as its implications are considered further below.

These polar opposites are actually opposite sides of the logic of sovereignty, which is a basic concept of modern western political thought. The unitary state is one in which the center is a sovereign power over the components, and the confederation is one in which the components are each sovereign and subject to no claims either by the center or by other components. Phrased in this way, the logic of the opposition is clear, and in fact there can be no logical structure between them. Yet practical politics has its own logic, which may overrule the dictates of formal reasoning. Federation may well be a logical impossibility, but it is in the same category as constitutionality, which Bentham saw as "nonsense on stilts" precisely because it, too, is contrary to the logic of sovereignty. Bentham was right in logic but wrong in practice, an epitaph which may also be applicable to those who would deny the validity of federal structures on logical grounds.

In fact, by viewing the federal form as lying between the poles of unitarism and confederalism, the federation becomes endowed with its own logic. If a component of a multiparty polity

claims complete power for itself, it abandons the federal form for confederacy; while if the center claims complete power for itself, it also abandons the federal form for unitarism. Thus the logic of a federation requires the recognition of the claims of sovereignty of both center and constituent units, while denying full authority to both. Inevitably, this illogical logic must mean that there are tensions inherent in the federal form, but their existence is not a detriment. Instead, as the American federalists recognized, the existence of tension, of room for legitimate claim and counterclaim, gives both opportunity and incentive for creative politics.

If these presuppositions are granted, then it can be seen that federations may be nearly infinite in their variation between the two poles of unitarism and confederation. They can be graded on the strength of the central power within its spheres of competence, however: a strong federation is one in which the central power is unquestioned in those spheres, while a weak federation would be one in which the central government's power to act even within its areas of competence is limited by the powers of the constituent units. On these criteria, it can be seen that the American federation is a strong one, due to the federal supremacy clause and the necessary and proper clause of the U.S. constitution.

When we look at the question of federation as a question of competing sovereignty, a corollary principle becomes clear as well: a constituent unit of a federation must be bound by the legitimate acts of the central power. The constituent unit can not avoid

this obligation by asserting its own sovereignty without rendering the federation a nullity by moving to the confederal pole. This of course was the issue that plagued American constitutional affairs from 1832 until the outbreak of the Civil War: the claim of full sovereignty of each state produced the claim to a state right of nullification of federal acts (see Ellis 1987), and also made secession conceivable (see Bestor 1964). The Civil War can be seen as finally solving a constitutional question, whether states in the Union still retained absolute sovereignty. As Lincoln understood, the definitional logic of state sovereignty negated the practical logic of a federation, which is why the major epitaph attached to his name in the 19th Century was not that he freed the slaves, but rather that he preserved the Union.

From the above discussion, it appears that a federation may be weak or strong, but the sine qua non of its existence is that neither center nor constituents may exercise full sovereignty. In turn, this precludes the possibility of secession by a constituent unit, and also precludes nullification of a properly adopted federal act by a constituent unit. However, once these criteria are met, a federation may take any number of forms. Whether it is thereby an efficient or effective unit is a different kind of question, separate from the basic one: whether it is indeed an entity endowed with political power.

## YUGOSLAVIA AS WEAK FEDERATION, 1974-1989

By the criteria discussed above, Yugoslavia under the 1974 constitution has been a weak federation, but a federation nonetheless. The federation does have jurisdiction over the governance of certain areas (Const. 1974, art. 281), apart from the powers of the federal units, and is thus a sovereign power in its own right. On the other hand, the federation under the 1974 constitution, even as amended in 1988, is extraordinarily weak, dependent on the federal units for the exercise of many federal powers and even for the execution of many federal responsibilities (see Nikolic 1989:146-179): any federal unit can veto the adoption of any legislation that it wishes to obstruct, and many federal laws and regulations are to be enforced by the federal units rather than by federal agencies.

Despite the center's structural weakness, however, until 1989 the federation was in practice a political actor, able to participate in and influence events even when it could not dictate a result. For example, in his study of Yugoslavia as an international political system, Pedro Ramet (1984) was able to view the federal government as a participant in political machinations along with (but not superior to) the various republics and provinces, and thus perhaps first among equals. But the strength of the federation could be seen in another way: it could not openly be ignored. That is, until the Slovenian amendment crisis of 1989, the federal constitution and federal laws had to be given at least lip service, and political actors had to at least make an attempt

to justify their actions by reference to these federal instruments. The import of the Slovenian amendments, however, was to bring this principle into question: if certain of the Slovenian positions are valid, then the federation is irrelevant, and no longer exists de facto if not de jure.

#### THE SLOVENIAN AMENDMENT CRISIS, 1989-90

##### The Initial Presumption of Federal Constitutional Supremacy

The Slovenian amendment crisis began in a very non-dramatic, even mundane, fashion. Following the amending of the federal constitution in November, 1988, it became necessary for the various republics and provinces to amend their own constitutions, since the federal constitution specifies that "Republican constitutions and provincial constitutions may not be contrary to the SFRY constitution" (art. 206). This article and the one immediately following it, which provides that "republican and provincial laws and other regulations ... may not be contrary to federal laws" (art. 207, as amended 25 Nov. 1988), are the closest parallels that the Yugoslav federal constitution has to the so-called Federal Supremacy Clause of the United States Constitution (U.S. Const. art. VI, § 2), but they had seemed to be sufficient. Professor Jovan Djordjevic described the "principle of the supremacy and priority of the Constitution of Yugoslavia" in the following terms:

"If a republican (or provincial) constitution differs from the Constitution of the SFRY, the Constitution of the SFRY will be accepted" (Djordjevic 1986:355).

The republics and provinces had in the past amended their own constitutions to reflect changes in the Federal constitution, and this pattern was continued immediately following the 1988 federal amendments. Thus when the Assembly of the Republic of Serbia passed amendments to the republic's constitution in February, 1989, the Assembly President noted that these changes followed on the federal amendments, which were seen as enabling the republican action (Borisav Jovic, in S.R. Serbia 1989:6-7). When the Slovenian Assembly began the process of amending the republic's constitution in the Spring of 1989, it also apparently operated under the assumption that its amendments were necessitated by the federal ones and must not be contrary to the federal constitution. The materials accompanying the first publicly circulated draft (osnutek [hereafter, Draft])' of the proposed amendments noted that the amendments had been prepared with two goals in mind: first, to coordinate with the recently passed amendments to the federal constitution, and second, to shape some "original solutions" which expressed sentiments concerning constitutional amendments that arose in discussions concerning the amendments to the SFRY constitution and concerning parts of the amendments on the Slovenian constitution (Draft, Introduction). In fact, the second goal was plainly seen by some if not all of the drafters as the more important of the two; yet the need to describe the amendments

as not contradictory to the federal constitution was clearly recognized, and addressed through the use of several techniques of presentation and argument.

One major tack taken was to phrase provisions that were arguably not in accordance with the federal constitution as it had itself been amended in terms of basic principles stated in the introductory parts of the Federal constitution (though not necessarily in the operative parts of that document).<sup>7</sup> For example, the highly controversial amendment providing that the Republic of Slovenia possessed the "complete and unalienable right" to "self-determination, including the right of secession," which was arguably contrary to the operative parts of the federal constitution,<sup>8</sup> echoed some of the language used in the first line of the Basic Principles at the beginning of that document, perhaps in an effort to achieve unimpeachable moral and political, if not legal, authority.

A second tactic was to describe a controversial amendment as either a "supplement" or "completion" of a federal constitutional provision. Thus, for example, an amendment on the right to organize independent labor using private property (draft amend. 23) was described in the "explanation" following it as being "equal in wording to Amendment XXI of the Constitution of the SFRY." However, the "explanation" went on to state that certain elements of the proposed Slovenian amendment did differ from the federal constitutional amendment: "In contrast to the wording of the corresponding amendment to the constitution of the SFRY, however,

there are more full examples of different forms of association, which make the regulation more clear and better illustrated as well for practical execution" (Draft, "explanations" for Amend. 23). The explanation then mentioned that there were potential conflicts between the federal constitution and the proposed amendment to the republican one, and that this could present difficulties:

there were warnings in the constitutional commission, that these provisions in the republican constitution would be in direct conflict with the federal constitution and would consequently violate the first section of article 206 of the constitution of the SFRY, by which a republican constitution may not be in conflict with the constitution of the SFRJ.

Recognizing this possibility, the Draft stated that the provisions that were potentially in conflict with the federal constitution should be examined, and kept if they were not found to be such (Draft, "explanation" for Amend. 23).

A third means of including provisions potentially in conflict with those of the federal constitution was to justify them on the basis of international agreements to which Yugoslavia was a signatory. Thus an amendment asserting Slovenian economic sovereignty, arguably in conflict with the Federal Constitution's provisions mandating a unified Yugoslav market (articles 251 and 253), was justified on the basis of article 1 of the International Covenant on Economic, Social and Cultural Rights, the first article of which provides that "all peoples have the right of

self-determination. By virtue of that right they ... freely pursue their economic ... development." The legal argument implied by this justification is that Yugoslavia's acceptance of the international covenant served to incorporate its terms into the organic law of the country, an argument that is given some support by the provision of the federal constitution's article 210, that "international treaties which have been promulgated shall be directly applied by courts of law" (i.e., that treaties once ratified are applicable without the need for any legislative or administrative order authorizing their use). However, the definition of "peoples" in this context is obviously problematic, as is the concept of "economic sovereignty."

All of these approaches recognized, implicitly or explicitly, the supremacy of the federal constitution, in that provisions of the republican constitution that were contrary to the federal constitution could not stand. Even attempts to counter federal constitutional provisions did so by invoking other elements of the same document. By mid-summer, 1989, however, this recognition of federal authority disappeared. Instead, Slovenian political actors virtually uniformly asserted a theory of confederal interpretation that would serve effectively to deny any meaning to the federal constitution, and any power to the federation. This approach was necessitated by the inclusion of new amendments which were plainly contrary to the federal constitution and would thus run afoul of that document's article 206, referred to above.

### Amending the Amendments: Summer, 1989

The proposed new provisions, described by Borba as "Amendments that Divide Yugoslavia,"<sup>11</sup> entered the Slovenian political process during the public discussion of the Draft, in the late spring and early summer of 1989. These revised amendments were published in Slovenia in July, 1989 as "proposed amendments" (rather than merely "drafts"),<sup>11</sup> and became (in)famous throughout the rest of the country when a Serbo-Croatian version of them was published by Borba on August 7.<sup>11</sup> Essentially, the new version (hereafter, Proposed Text) incorporated a series of new provisions and amended some of the ones already present in the draft, with both kinds of changes serving to reorient the meaning of the document as a whole.

Some changes were innovative in post-war Yugoslav political life, yet not particularly controversial, since they served to liberalize politics in accordance with principles proclaimed in various international human rights documents. Thus a new amendment 41a would guarantee the right of free, peaceable assembly; article 42 would prohibit the death sentence and torture, and guarantee a long list of freedoms derived from international human rights agreements: freedom of movement, the right to judicial process before being sentenced, and the right to privacy. Amendment 43 provided for freedom of religion and guaranteed rights to children. None of these provisions were questioned at the national level.

Other amendments, however, have some potentially disturbing implications. A new Amendment 8a, on the right to free participation in politics, transformed the "Basic Principles" of

the republican constitution by stating that "SR Slovenia is the state of the sovereign Slovenian nation and citizens of the SR Slovenia;" that "the social order of SR Slovenia is based on respect for the rights and freedoms of man and citizen;" that "social, collective and private property are equal;" removing many standard phrases of communist jargon; and by providing that "All organizations and movements may freely participate in political life," provided that they support "humane relations between peoples, respect for the rights and basic freedoms of man, democracy and a higher quality of life, the principles of a legal order [pravna drzava, or rechtsstaat], the sovereignty of the Slovenian nation and the people of Slovenia and their equal position in the establishment of the joint interests of the nations and nationalities of Yugoslavia," [emphasis added], among other things. While much of this amendment is liberal in implication, the phrases emphasized in the above quote could easily be used to stifle political participation by certain individuals or groups. For example, it takes no stretch of the imagination to envision a regime that defines "democracy" in its own unique way -- and then tries to suppress all those who define it differently. Perhaps more likely, the provision that freedom of political participation is afforded all those who support "the sovereignty of the Slovenian nation" could easily be used to ban anyone who wished to espouse an all-Yugoslav position. Largely because of these potential difficulties, this amendment was included in a group of amendments which came to be known as "controversial" (sporni amandmani) in

political discourse in the rest of Yugoslavia in the late summer and early fall of 1989.

Another controversial amendment, new in the Proposed Text, was 41b, proclaiming the obligation of federal authorities to respect the languages of Yugoslavia and to use Slovenian in Slovenia. On the one hand, this provision was congruent with art. 246 of the federal constitution, guaranteeing the equality of the languages of the Yugoslav peoples; but the Slovenian amendment also went on to provide that "acts [by federal agencies] in violation of this provision lack legal effect" -- a provision apparently attempting to allow the republican constitution to invalidate federal acts, an assertion of republican power not to be found in the federal constitution. A further assertion of republican sovereignty to the exclusion of the federation was a new amendment 48, proclaiming, first, that "when ... organs of the federation violate or infringe on the rights of the SR Slovenia, [the Republic's] organs must undertake measures to defend the republic's position and tights" (amendment 48a); and second, that only the Republican authorities may declare a state of emergency in Slovenia.

Another controversial amendment, liberal on its face but not, perhaps, in implication, granted the Italian and Hungarian minority populations in Slovenia, as "autochthonous minorities," the right to use their own language and other cultural rights (amendment 43c). This amendment seems progressive, but potential difficulties arise because of the addition of the qualifying term

"autochthonous," which is new to the constitutional discourse. By specifying that only these "autochthonous minorities" possessed cultural rights, the amendment potentially precludes such rights for the largest minority populations in Slovenia, the other Yugoslav nationalities, in violation of articles 154, 246 and 247 of the federal constitution."

Another controversial amendment provided that when the Republic of Slovenia was called upon to fulfill financial obligations in connection with the functioning of the federation, the Slovenian Assembly would respect "the material capabilities of the Republic and the requirements of its development" (Proposed Text, Amend. 56). The implication of this provision was that the republic would decide for itself which federal functions it would support, even when those functions had been properly authorized or mandated at the federal level.

The major theme unifying these additions to the Draft amendments was Slovenian sovereignty, as stated in the additions to the Basic Principles of the Slovenian Constitution provided by proposed amendment 8a. Yet the provisions of many of these amendments would be open to challenge under article 206 of the Federal constitution, as the Draft had recognized. The response of political figures in Slovenia to this potential weakness of the amendments was to argue for a new interpretation of the basics of the federal constitutional structure, which would in effect transform what even they had seen in spring, 1989 as a federation into a confederacy.

## The New Doctrine of Republican Supremacy

In part, the attempted transformation of the federal structure exploited ambiguities in the federal constitution itself in order to deny any jurisdiction to federal judicial or governmental institutions for the determination of the validity of republican constitutions in terms of the federal constitution. At the same time, a new theory of the basic structure of the federation was used to color interpretations of all provisions, including those not previously seen as ambiguous, and not previously seen as fostering confederation.

Ambiguities in the text of the 1974 Constitution were in any event not hard to find. That instrument, long criticized for its length, complexity and prolixity, proved on close examination to be even more confusing than had previously been thought. For present purposes, the complications surrounding article 206 may best serve as an example. At first glance, there seems to be little ambiguity: the article states clearly that "Republican and provincial constitutions may not be contrary to the SFRY Constitution." The difficulties come when the mechanisms for implementing this unambiguous provision are examined. First, who decides whether, in fact, a republican/provincial constitution is contrary to the SFRY Constitution? Article 378 of the Federal Constitution provides what seems to be an answer: "The Constitutional Court of Yugoslavia gives its opinion to the Assembly of the SFRY as to whether a republican or provincial constitution is contrary to the Constitution of the SFRY." But

this provision is more ambiguous than it may seem, particularly in English translation, because the word "opinion" (misljenje) is used, in connection with the Constitutional Court, only in this Article and only regarding this issue. In other kinds of cases, the court is authorized to give "decisions" (odluke) and "rulings" (resenja) by majority vote of all of its members (Article 391), but "opinions" and the means of arriving at them are never mentioned.

It is possible to solve this problem by arguing that since the Court is only authorized to make decisions and rulings, the "opinion" must take one of those forms; and since a "ruling" is not a final order and a "decision" is, the "opinion" must take the form of a "decision" and must reflect, at a minimum, the votes of a majority of the Court.<sup>14</sup> Even so, however, the force of the Court's "opinion" remains unclear. While a "decision" by the court is binding and enforceable (Article 394), the "opinion" of the Court on a question of conflicting federal and republican/provincial constitutions is reported to the Federal Assembly, which is only obligated to "discuss opinions and proposals of the constitutional Court of Yugoslavia concerning the protection of constitutionality and legality by this Court" (art. 285, § 11).

Despite the ambiguity in the text of the constitution, however, this problem is resolvable if the necessary logic of a federal system is taken into consideration. That is, by the logic of a federal system, the provisions of the federal constitution must override conflicting provisions in the constitutions of constituent units of the federation. If this rule does not hold,

then the federal constitution becomes, literally, meaningless, since its provisions can be overridden, and hence effectively repealed, by any of the constituent parts of the federation. Further, if the federal constitution is not superior, it can in effect be amended by unilateral action of the federal constituents, in disregard of the express provisions contained within it for its amendment. This logic was set out in its essentials in the famous American constitutional decision in Marbury v. Madison (1803), a fact that was pointed out in the Yugoslav debate in an article in Borba (Lilic and Hajden 1989), although not, apparently, with much impact. The argument cannot be inverted to support republican supremacy on the grounds that otherwise the republican constitution is meaningless, because the federal constitution is bound, restricted in its applicability by its own terms, in ways that the republican constitutions are not; which means that any strictures that the federal constitution imposes on those of the republics are narrowly defined, while the reverse would not be true.

Despite this logic, however, and the earlier assumption of federal supremacy, there seemed general acceptance in 1989-90 of the position that the Yugoslav system does not involve the supremacy of the federation, because the constitutional structure does not specify how to resolve a conflict between the provisions of the federal constitution and those of a federal unit. This was an opinion shared not only by Slovenes, but also by Dr. Miodrag Jovicic, who appears to have been the constitutional theorist most

in favor in official circles in Serbia, judging from the number and prominence of his appearances in NIN:

The entire text of the proposed amendments to the Constitution of the SR Slovenia teems with provisions contrary to the Constitution of the SFRY. If such amendments were to be passed, the Constitutional Court of Yugoslavia would have to work for years to determine the instances of contradiction between the Slovenian Constitution and the federal one. But that would be a fruitless task because, by the provisions of the existing [federal] constitution, and unlike the situation in the rest of the world, there is no establishment of a hierarchical relationship between the republican and federal constitutions, with the requirement that in case of inconsistency the provisions of the republican constitution must be brought into alignment with the federal constitution (Jovicic 1989:18).

Despite the professional prominence of Dr. Jovicic, however, this seems an implausible construction of the federal constitution, both because of the necessary logic of a federation and even in view of the express wording of that document. Article 206 specifies that republican and provincial constitutions "may not be contrary to" (ne mogu biti u suprotnosti) the provisions of the federal constitution (§ 1), while "statutes and other regulations ... must be in conformity (moraju biti u saglasnosti)" with the federal constitution (§ 2). As Professor Djordjevic noted in his

constitutional law text, the difference in wording was not accidental; and while statutes are put in a hierarchically inferior position by the requirement of conformity, the expression non-contradiction only expresses the principle of application of otherwise equal acts (Djordjevic 1986:356), or paramountcy. The question is one of validity: if a provision of a republican constitution is not in conformity with the federal constitution, the republican provision is not valid, and hence has no legal effect. The republic may then either let the question lapse, or try to reframe the impugned provision so that it passes constitutional muster, but may choose for itself which course to follow. American constitutional history, for example, is littered with state acts that are plainly unconstitutional yet continue to exist in the lawbooks, unenforceable. This type of primacy in application reflects hierarchy in the sense of "the principle by which the elements of a whole are ranked in relation to the whole" (Dumont 1980:66) (the whole being, here, the constitutional order of Yugoslavia), but removes the implication of command that is often implied by the term "hierarchy," and which was implied by Djordjevic.

The view that the republican constitution need not be subordinated to the federal one is logical only if one assumes that the sovereignty of a component of the Yugoslav federation is complete. This latter position was, in fact, the one taken by politicians and commentators in Slovenia, particularly at the time of the controversy surrounding the passage of the "disputed

amendments" in September, 1989. In the two weeks prior to the scheduled passage of the amendments in the Slovenian Assembly on September 27, federal authorities and bodies warned that several amendments were contrary to the federal constitution and thus contrary to article 206, and requested that the Slovenian assembly postpone and passage of the disputed amendments. Thus the Presidency of the SFRY, on 15 September, warned of "grievous negative consequences which would follow for the constitutional order of the country, relations within the federation, and for respect for the principles of constitutionality and legality" if the disputed amendments were passed, and expressed confidence that the Slovenian Assembly would not pass them; and on September 26, the Presidency of the SFRY asked the Slovenian Assembly to postpone the amendments, accompanying this request with the warning that "in case of a collision between the constitutional provisions of any member of our federation and the Constitution of the SFRY, [the Presidency] will ensure the application of the provisions of the Constitution of the SFRY on the entire territory of Yugoslavia."<sup>14</sup> The Presidency of the League of Communists of Yugoslavia also warned of negative consequences. Similarly, the Federal Executive Council, on September 16, pointed out the provisions of the Slovenian amendments that were potentially in conflict with the federal constitution, emphasized that in case of a constitutional conflict, the federal constitution would be applied, and asked for reconsideration of the amendments.

The Slovenian Presidency rejected these messages on 26 September, saying that such "pressure" on it was "unacceptable constitutionally and politically." On 27 September, the Slovenian Assembly passed the entire set of amendments, with minimal changes. In regard to the question of conflict with the federal constitution, and the problem of that document's article 206, the position enunciated by virtually all Slovenian political actors was that expressed by Miran Potrč, President of the Slovenian Assembly and its Constitutional Commission, at the start of the session that passed the amendments: that only the Slovenian Assembly was entitled to enact amendments to the republican constitution, and that

by the Constitution of the SFRY, not one federal organ has the authority to participate with its advice in the procedure for amending the republican constitution.... It is only when the constitution has been adopted that the Constitutional Court has the authority to give its opinion on the question of whether the republican constitution is contrary to the Constitution of the SFRY or not. That opinion does not have the effect of a decision of the Constitutional Court on the basis of which the provisions of the republican constitution would cease to be valid.... Neither does the Federal Assembly have the authority to confirm that a republican constitution is contrary to the federal constitution. The Federal Council only discusses the opinion of the

constitutional Court and decides its [i.e., the Federal Council's] political opinion. (Borba, 28 September, 1989:1)

The Slovenian position thus enunciated took off from an unquestionable truth -- that only the Slovenian Assembly could pass amendments to the republic's constitution -- proceeded to a non sequitur -- that no one other than the Slovenian Assembly could voice an opinion on proposed republican constitutional amendments -- and then to an interpretation of the federal constitution that is not at all impossible but is also not at all the only possible interpretation of the power and authority of the Constitutional Court and the Federal Executive Council on this type of issue. It is, however, an interpretation that vitiates the ability of the federal constitution to bind republican constitutions, since it would leave the responsibility for assessing the constitutionality of a republican constitutional provision with the same people who enacted that provision, who would then be perfectly free to ignore the federal constitution by the simple expedient of denying that they were doing so. By taking this position, the Slovenian politicians sought to overturn the original assumption of federal constitutional supremacy by making the federal constitution non-binding on the republics.

Response from the Center: The Constitutional Court of Yugoslavia

Following the passage of the Slovenian amendments, the Constitutional Court of Yugoslavia, the only body authorized by the constitution of the SFRY to give an opinion on whether the republican constitution was contrary to the federal one, was called into action. On September 28, the Federal Council, which is one of the bodies authorized to initiate proceedings in the Constitutional Court of the SFRY by article 387 of the federal constitution, first passed a motion to begin proceedings before the constitutional Court of Yugoslavia to assess the constitutionality of the Slovenian amendments; and then, following what the newspapers called a "bitter debate," broadened the action to include the determination of the constitutionality of all of the amendments to all of the constitutions in Yugoslavia (Borba, 29 Sept. 1989:1). The Court, for its part, began the procedures for examining the constitutionality of the various amendments on October 4, 1989 (Borba, 5 October 1989:5). The novelty of the situation was reflected in the newspaper accounts of the Court's actions. Borba spelled out in some detail the Court's procedures, which it had not done in reporting on the Court's activities in the past. Further, Borba felt the need to correct some public misconceptions concerning the Court's authority to determine the constitutional question, pointing out the misconception that the Court was a "power" that could resolve the constitutional conflict, saying that it was only clear, at that moment, that the court could give its "opinion" on the matter to the Federal Assembly. On the

same page, however, the president of the Court was quoted as saying that "The Constitutional Court of Yugoslavia is the only authorized organ which can authoritatively determine whether the constitution of a republic or province is contrary to the Constitution of the SFRY" (Borba, 5 October 1989:5).

The court's procedure for determining its opinion was then announced, and explained as being its regular procedure. First, the task of executing a preliminary assessment of the situation for each constitution was assigned, according to a pre-established order; to individual judges. That the order was pre-established, standard operating procedure, was stressed, because a Serbian judge was given the task of assessing the Slovenian amendments, and Slovenia and Serbia had been engaged in increasingly bitter political conflict since the previous February. The procedure was then explained by Borba, on the basis of "unofficial sources" as most likely to be one in which the judges would hear from the officials of the various republics/provinces behind closed doors, and would not venture any comments until their official opinion was determined and announced; and that this procedure would take at least one month.

As it happened, however, the court chose instead to proceed by scheduling public arguments (javna rasprava) on each of the constitutions, to be informed initially by the preliminary opinion of the judge who had been charged with examining the particular constitution in question. Accordingly, the court scheduled these arguments, notified each republican/provincial assembly, and

invited participation by each of them. The Slovenian amendments were scheduled first, for discussion on December 5, 1989. On November 21, however, the Presidency of the Slovenian Assembly announced that there would not be any Slovenian participation in the discussion scheduled for December 5, on the grounds that the Constitutional Court's actions were themselves unconstitutional. The Slovenian argument was as follows: that the Constitution only empowers the Constitutional Court to give its opinion on the question, but that the Federal Assembly had asked the Court for a judgement on that question; further, that the Federal Council could only propose the consideration of acts that had been passed in final form, and that the proposal must list the particular sections questioned, providing the name and page of the official document in which the material was published, but that the Federal Council had acted on drafts of the amendments rather than on the official published versions (Borba, 22 November 1989:3).

Despite this announcement from the Slovenian Assembly, the Constitutional Court met as scheduled to consider the Slovenian amendments on December 5. At this meeting, however, yet another complication arose, in that no representative of the Federal Council came to the public discussion. Since the Federal Council had been the initiator of the review process, and the Slovenes, true to their word, had also not come, the Court was faced with the prospect of holding a public discussion without the participation of either the initiating party or the other interested party to the dispute. After some discussion and examination of its own rules

of procedure, the Court decided to proceed. The judge who had been charged with examining the Slovenian amendments reported his findings: that some of the amendments were "identical" to the corresponding sections of the federal constitution, that some were similar, and that a third group raised novel questions in Yugoslav constitutional law, concerning the structure of the constitutional system (Borba, 6 December 1989:4).

The investigating judge did not view all of the variances from the provisions of the federal constitution as "contrary" to the latter. Some, he said, actually advanced the societal concepts that were introduced and developed in the 1988 amendments to the federal constitution. Others, however, did cause concern. He mentioned specifically the question of whether a republic could secede, thus changing the borders of the country unilaterally, or whether the agreement of all republics and provinces was required; the question of whether a republic could limit the ability of the federal authorities to declare a state of emergency in the republic; and whether a republic could mandate that the representative from that republic in the Presidency of the SFRY act only in accordance with the specific instructions of that republic. (Borba, 6 December 1989:4). Having announced this concern, and in the absence of presentations by representatives from either the Federal Assembly or the republic, the public discussion was closed.

Over the next several weeks, the Court held similar public discussions about the amendments to all of the constitutions of the republics and autonomous provinces. The Federal Assembly did not

send a representative to any of these discussions, though the republics and provinces were represented at them.

In its final analysis, the Court decided that the constitutions of all of the republics and provinces, except that of Montenegro, contained provisions contrary to the federal constitution (Borba, 9 February 1990:9). Most of the controverted provisions were relatively technical and not openly politically dangerous, at least at that moment; thus the most common flaws were provisions in the constitutions of Croatia, Bosnia & Herzegovina, Macedonia, Slovenia and Vojvodina that implied or stated exclusive republican/provincial control of "large systems" (the power grid, rail system and postal service); provisions in the constitutions of Serbia and the provinces requiring the use of Cyrillic; and a provision in the Serbian constitution limiting private land holdings.

The Court had more to say about the Slovenian amendments. On the crucial question of secession, the Constitutional Court of Yugoslavia came down against unilateral decisions on that topic. While it found that the republics do have the right to secede, the arrangements and procedures for exercising that right were found to be the concern of the federal constitution. Since that document says nothing on the subject, the provisions of the Slovenian constitution giving itself the right to make its own arrangements and procedures for secession, were held unconstitutional. Further, recognizing the validity of the principle that the external boundaries of Yugoslavia can only be

changed with the consent of all of the republics, the Court held that the question of secession can only be decided jointly, with the agreement of all of the republics.

The court also found against the republic in regard to the attempt to limit the federal government's power to declare a state of emergency in Slovenia. The court reasoned that the Presidency of Yugoslavia would have both the right and the obligation to declare a state of emergency in Slovenia if some general danger threatened the existence or constitutional order of that republic, on the grounds that such a condition would also threaten the whole of the country. It also ruled unconstitutional the provision of the same amendment that provided for the automatic recall of any member of the federal presidency from Slovenia who voted for the imposition of a state of emergency in the republic without the consent of the republican assembly, on the grounds that such officials were bound only by the federal constitution and laws. Similarly, the Court also ruled against a provision that the republican assembly could issue binding instructions to the Slovenian members of the federal assembly. Thus the Constitutional Court of Yugoslavia ruled against the Republic of Slovenia in regard to some of the most important elements of the disputed amendments to the republican constitution.

The decision of the Constitutional Court was reported to the Federal Assembly, which let the matter lie for two months. On 27 March 1990, however, the Federal Assembly passed, by majority vote, a resolution mandating that the provisions of republican and

provincial constitutions that had been determined by the Court to be contrary to the federal constitution must be brought into agreement with the latter document within three months. Concurrently, the Federal Assembly also passed resolutions establishing that it was itself responsible for ensuring the consistent application of the federal constitution and federal laws, and that the Federal Executive Council was responsible for ensuring the consistent administration of these federal instruments (Borba, 28 March 1990:1). These actions were opposed by representatives of Slovenia, who asserted that the federation did not have the power to so act.

#### A CONSTITUTIONAL STALEMATE?

##### A Clash of Principles

Stripped to its essentials, the decision of the Constitutional court of Yugoslavia upholds the logic of federalism over the confederal stance taken by the Republic of Slovenia. In regard to the current constitutional situation, the position is stalemated: the Constitutional Court has rejected Slovenia's claims to confederation, but that republic rejects the Court's jurisdiction to decide the question, using reasoning that also precludes action by any other federal institution. Such a situation may continue indefinitely, but could erupt into a full-fledged confrontation over virtually any issue on which neither side feels able to compromise.

Continued Movements on the Constitutional Chessboard,  
Winter 1989-90

It is presumably this danger of falling into conflict and chaos that has induced continued movements in the constitutional arena. In late 1989 and early 1990, virtually all political players in Yugoslavia called for revisions of the constitutional structure, and no less than four concrete proposals for constitutional revisions were put forth.<sup>16</sup> First off the mark was the Federal Executive Council, which put forth proposals for constitutional amendments as part of a package of measures announced on December 18, 1989 (see Borba, 19, 20, 21 Dec. 1990). These proposed amendments were aimed at rationalizing the economy by removing the special status of "social property" and the limits on land holdings. But the proposed amendments would also have strengthened the power of the federal government to enact and enforce legislation. For this reason, the Slovenian assembly rejected the proposed amendments even before the end of December, as an attempt to effect changes in the "basic structure of the federation" and to increase the authority of the central government, specifically the Federal Executive Council (Borba, 29 Dec. 1989:3).

In the next several months, four proposals for changes in the Federal constitution were put into political play.<sup>17</sup> On January 21, 1990, the Presidency of the SFRY sent a proposal for changes in the federal constitution to the Federal Chamber of the Federal Assembly (Borba, 28 January 1990:1). The Presidency's

proposals, really a draft of a complete new constitution, maintained some of the language from the 1974 Constitution that had been drawn upon by the Slovenes in fashioning their confederal reinterpretation of that document: for example, a reference in the basic principles to the right of the nations of Yugoslavia to "self-determination, including the right to secession" (Borba, 28 January 1990:2). Further recognition of the Slovenian position on this basic point was provided in a proposal that the new constitution "work out precisely the procedures for an eventual secession" (Borba, 28 January 1990:8). However, the proposal also recognized a federal competence: "The Federation ... has full legal and political capacity within its jurisdiction as defined by the Constitution of the SFRY, and likewise the rights and obligations, which means that it possesses the legislative, administrative and judicial authority with which to assure the effective and efficient establishment of these rights and obligations" (Borba, 28 January 1990:8). And the areas of federal competence would be wide: the protection of human rights and freedoms, national defense, the basics of the economic and political systems, assuring a unified Yugoslav market and equal economic competitive atmosphere throughout the country, the credit and monetary systems, and other fields (Borba, 28 January 1990:8). Changes in the judicial system to assure the establishment of these obligations were also proposed (Borba, 28 January 1990:4). Specifically, the proposal recognized the need "to make more precise the character and legal effect of an assessment by the Constitutional Court of Yugoslavia about

contradictions between republican or provincial constitutions and the constitution of the SFRY."

It was because of these provisions for clarifying and increasing federal power that the Presidency's proposal was unacceptable to Slovenia. The Presidency of that republic issued its own propositions for new relations within the federation almost simultaneously with the constitutional proposals of the federal Presidency. The Slovenian proposals were located at the confederal end of the spectrum, proclaiming that the jurisdiction of the federation should be limited to only "foreign affairs, defense, the joint basis of the economic and political systems, the unified market, and the financing of jointly agreed functions." All other matters would remain within the sole jurisdiction of the republics and provinces (Borba, 28 January 1990:11). Further, the federation would have little authority to fulfill even the functions assigned to it. An indicator of this minimal status for the federation was a provision that the establishment of the economic functions of the federation must be based on the position that "the federation is not a legal subject with its own economic interest, but the republics are the authentic and sovereign possessors of economic interests in their own development and for joint development as defined by agreements" (Borba, 28 January 1990:11). Another indicator of the weakness of the federation in this scheme was the provision that even when acting within the areas of its competence, the Federal Assembly may be required to act only with the consent

of all components of the federation if demanded to do so by any republic (Borba, 28 January 1990:11).

The FEC had not given up its own proposals, however. At its meeting of February 2, 1990, the FEC decided to submit to the republics and provinces a revised proposal for the introduction of changes to the federal constitution (Delegatski Vjesnik, 8 Feb. 1990:2). The introduction to this proposal recognized the contradictory nature of power in creating a democratic state:

Regarding the changing role of state organs, it is above all necessary, on the one hand, to reduce their authority in accordance with accomplishing de-statification [deetatizacija] in the nation's economy, while on the other hand, establishing the authority necessary for guaranteeing and protecting the mechanisms of the market economy and the stability of commerce.

The solution to this problem was sought in the establishment of a system that would: operate a market economy, free of the intrusions of the former self-management institutions, which would be removed; guarantee democratic politics through free, secret elections without recognition of any special role for any party; affirm the independence of the judiciary and remove the self-management courts of the old system; and finally, which would grant the federal authorities authority sufficient to guarantee these basic provisions. On this last point, the proposal was clear: in order to

establish the uniform and efficient application of federal laws, and to strengthen the principles of constitutionality and legality and legal security, it is necessary to simplify the very complicated mechanism for assuring the application of federal laws, so that the Federal Executive Council and other federal organs receive the authority with which to ensure the efficient and uniform administration of the Constitution of the SFRY, federal laws and other federal regulations over the entire territory of the SFRY.

Following this announcement of its aims in amending the constitution, the FEC submitted a draft of proposed amendments for consideration by the parliaments of the several republics and provinces.

Of the four drafts of constitutional amendments in circulation after mid-February 1990, the two most important ones were plainly those of the Presidency and of the FEC. The Slovenian proposals were only concerned with relations within the federation, and seem to have served primarily as a warning of the depth of Slovenian resistance to federal power, since no one could ever expect a polity structured under those terms to be able to do anything of substance, or even to exist for very long. The proposal from Bosnia and Hercegovina, which was apparently not published in the general news media, became subordinated to the proposal by the FEC.

Perhaps because of its seemingly more limited changes, as further amendments to the existing structure, the FEC proposal

gathered support while the Presidency's document, which proposed an essentially new constitutional structure, did not. February saw a protracted debate between the FEC, supported by Serbia, which tried to insist that its amendments be accepted as a package, and Slovenia, which demanded that they be considered individually; Slovenia won. By the end of February most republics, and both provinces, had accepted the FEC proposals in principle though not the details, and Slovenia explicitly rejected the FEC's suggestions for provisions regarding relations within the Federation (Borba 8 March 1990:1). At the beginning of March, the FEC announced that the Federal Assembly was entitled to draft proposed new amendments to the constitution, because all of the republics and provinces had agreed to the general proposition that there should be new amendments, even though some of the specific proposals were explicitly rejected (see Borba 9 March 1990:1; and 14 March 1990:1).

#### Drafting Amendments, March-May 1990

The Constitutional Committee of the Federal Assembly, which had been charged with drafting the amendments, produced a working version of them in short order; it was published in Borba on 4 April 1990, and scheduled for discussion in the Parliament on 12 April. At that discussion, the Committee explained that it had drawn up the working version in just four days, beginning with the FEC's proposals and the comments they had generated, then

distributing the first version and doing a second one on the basis of comments received from the FEC, the Committee on Human Rights of the federal parliament, the parliaments of the republics and provinces, and other political actors (Borba, 13 April 1990:3). The Committee explained its goals. The first aim was to change the identity of the "basic subject" of the constitutional order from the "work collective" of the 1974 constitution, in which individuals were included only as members of the group, to the individual citizen. Further, this citizen was to be invested with basic economic and democratic political rights: a right to privacy, the right to be protected from torture and "inhuman conduct," the right to free political organization and action, "and so forth" (Borba, 13 April 1990:3). The Committee had not worried overly much as to whether particular provisions could be classified as socialist or capitalist, being more concerned to establish a system based on "considerations of the modern world, civilized values and limitations" (ibid.). Thus the amendments would make the (in)famous social property of the 1974 constitution lose its privileged position in the economic sphere, as would the idea of self-management itself, although the latter might remain as an option for individual work organizations.

In regard to the touchy topic of relations within the federation, the Committee said that the working draft created some new economic functions, but did not widen the federation's existing authority. Indeed, the Committee's main spokesman that day, Dr. Mijat Sukovic, said that the new federal structure would not

be a hierarchical one, because "every republic at every moment can independently remove the basis for the exercise of federal authority on its territory .... [A republic] may [do this] as the sole guarantor of the execution of federal laws, which it has in any event voted for" (ibid.). On the other hand, the working draft itself, in a proposed Amendment 68, seemed to give the FEC the authority to execute federal statutes and regulations by itself, if the "authorized organs" failed to do so after receiving a warning and order to execute them. Similarly, the same amendment would give the FEC the power to prevent the execution of any regulation or other legal act that would "damage the unified Yugoslav market" or which would infringe on rights guaranteed by the constitution of the SFRY, or which would damage the constitutional order (Borba, 4 April 1990:5). A further potential expansion of federal authority could be found in amendment 64: "Revenues for the federation consist of customs duties, taxes and other sources of revenue established by federal statute" (emphasis added), a provision that could be seen as granting an unlimited power of taxation to the federation. On the other hand, the problem of republican constitutional provisions contrary to those of the federal constitution remained untouched. Proposed amendment 69, however, did tighten some of the language in regard to the jurisdiction of the constitutional Court of Yugoslavia, which would now "determine" whether statutes and other legal acts were in conformity with the federal constitution or contrary to federal statutes. The original language of article 375 had said only that

the Court would "assess" constitutionality in these circumstances, and a decision is enforceable while an assessment may not be.

Virtually none of the proposed amendments was accepted by all parties, even as parts of a working draft. In an introductory note to its publication of the text, Borba noted that it was "interesting" that the working draft contained twenty-four amendments -- and twenty-seven alternative proposals. In fact, virtually the only amendments to receive universal support were the normative ones, ensuring human rights, political freedoms and the equality of all forms of property.

Nor was the Constitutional Committee united in its views of either its task or of the future of Yugoslavia. Sukovic proposed that the amendments could be accepted in several phases, beginning with those on which unanimity had been reached, then proceeding to those that were necessary for solutions of the economic crisis, and finally dealing with the structure of the federation. Yet even this approach could not attain consensus. A Slovenian delegate announced that his republic would not consider any of the amendments on which alternative drafts existed until after the scheduled multi-party elections and the formation of a new republican assembly, a position also taken by Croatia. Further, the Slovenian delegate said that Slovenia would not in any event accept any amendments that altered the existing structure of relations within the federation, because the Slovenian assembly had decided on March 8 that that republic would only accept a future confederation or at least a confederal relationship for Slovenia.

On the other hand, representatives from Serbia demanded that the new federal structure be based on the principle of "one man, one vote," a position that would clearly benefit Serbia and Serbs outside of Serbia at the expense of the smaller nationalities. Thus the working draft went back to the Committee, but its publication and the parliamentary debate had facilitated discussion by both the public and other political forces.

A revised draft of proposed amendments was reported out of the Committee on 15 May 1990 (Borba, 16 May 1990:3). The revised version still contained twenty-four amendments, of which six had the unanimous approval of the Committee, while the other eighteen were proposed along with alternative variants of them. Eleven of these "alternatives," however, would simply maintain the status quo, by not effecting any change. In the face of this manifest disagreement within the committee, Mijat Sukovic took pains to point out that of all the disputed amendments, only two (unspecified) had led to division on geographic (i.e., republican) principles, while the other alternative versions were simply the result of "the arduousness of the search for better solutions." Interestingly, Sukovic reported that there had been no real argument over the relations within the federation, and that the most important issues had concerned the retention of the concept of "social property" in the constitution.

The draft amendments themselves (published in Borba, 21 May 1990:6) continued the deconstruction of the socialist self-management edifice of 1974. The first amendment in the new set

(Amend. 49) would remove virtually all of the complex verbiage of the Introductory Part of the constitution, including the provisions establishing the League of Communists of Yugoslavia as the "prime mover and guiding force of political activity." Some references to "socialist self-management society" would remain, but only as hortatory phrases; and a proposed alternative to the amendment would remove even those sections. The next amendment (50) would remove the special status of social property, making all forms of property equal. Other amendments would: further simplify the social system by removing many of the categories of self-management institutions from the constitution; guarantee human rights and social and political rights (i.e., a right to privacy); remove the self-management courts (i.e., the Courts of Associated Labor [see Hayden 1990]) and the "social attorney of self-management;" and remove the role of the Socialist Alliance in the selection of the federal presidency. These reforms were agreed to more or less without exception. On the other hand, amendments aimed at unifying the Yugoslav market or at strengthening the position of the federal government were each accompanied by an "alternative" proposal: that the particular amendment be eliminated! Amendments accompanied by such a nullifying option would: establish a unified tax system as the basis for the unified Yugoslav market; give the National Bank of Yugoslavia a role in executing federal financial laws; give the federation authority to execute federal laws pertaining to taxation; grant authority to the FEC to execute federal laws, if the responsible republican authorities would not do so; give the

constitutional court clearer authority to "decide" whether republican/provincial statutes were in accordance with the federal constitution; and give the federal parliament authority to determine monetary and foreign currency policies for the entire federation.

Despite these considerable reservations on the amendments within the text itself, the Federal Assembly accepted the draft amendments from the committee, with no negative votes but with four abstentions (Borba, 17 May 1990:1). This vote set into motion what are supposed to be the next-to-final stages of the amendment process: public discussion. First, the draft amendments as accepted by the Federal Council were sent for comment to the assemblies of the various republics, which were obligated to give their opinions on them by 18 June 1990. Further, the Federal Council mandated that the constitutional committee of the Federal Parliament hold an "expert discussion" on all amendments for which alternatives had been suggested. Citizens and other interested parties were also invited to send comments directly to the Constitutional Committee. Finally, that Committee was charged with presenting to the Federal Assembly, no more than fourteen days after the conclusion of the "public discussion," a report on that discussion, along with a final revised text of amendments.

Despite the best efforts of the Constitutional Committee, however, and the long and vociferous debates over the amendments, the key problem remains the doctrine of republican supremacy adopted by the Slovenes in November 1989, and since accepted by

some other political actors. The nullifying alternative to any expression of federal authority in the amendments is proof of the continued influence of this doctrine. And as long as it exists, it is difficult to envision any effective substantive change to the federal constitution. Hence the constitutional stalemate.

#### AN UNSTABLE STALEMATE?

##### Political Developments, Winter-Spring 1990

There is a bitter irony in this constitutional impasse, because it cuts both ways: the economic reforms desired by, e.g., Slovenia, will be meaningless if they cannot be enforced throughout the country, but the doctrine of republican supremacy precludes such enforcement. Yet there are many reasons why all parties to the Yugoslav constitutional debate have reasons to be more or less satisfied with the status quo, in the short term. A stalemate avoids overt confrontation with its threat of military or other physical sanction, and thus avoids the risk of unacceptable losses. The stalemate can not last forever, however, for two reasons. One is that the paralysis of central governmental institutions makes more difficult coordination of economic activities between the various parts of the country, and increases the chance of conflict between republics over economic issues. But a more important reason is that the asserted option of secession is likely to be a tempting theme for certain kinds of nationalistic politicians to use, a course of political action that can have a snowball effect. And as claims to the "sovereign rights" of one or more republics

increase, the chances also escalate for confrontation with the center, or for the central government to feel compelled to step between quarrelling republics.

Political developments seem in fact to be increasing the likelihood of a confrontation between nationalist forces, either between republics or between a republic and the center. The first event, both symptom of the depth of divisions and potential cause of a loss of institutional restraints on extremist national politics, was the collapse of the League of Communists of Yugoslavia with the indefinite suspension of its oddly (but aptly) named "14th Extraordinary Congress" in January 1990. While the Congress was finally resumed and completed in May (see Borba, 28 May 1990:1), the dissolution of the federal League was manifest in that there were no formal representations from Slovenia, Croatia or Macedonia (although individuals from the last two republics did attend). At the institutional level, it had long seemed to most analysts that the disciplined federal party was the only political body that was positioned to hold together the loosely structured federation under the 1974 constitution (see Rusinow 1978: ch. 8). In its absence, the means of coordinating conflicting interests and perhaps "encouraging" compromise (if not outright pronouncing it) are few.

Yet it was clear to all that this removal of the potentially coercive institutional structure was necessary if truly open and democratic political processes were to begin. Unfortunately, what has resulted from the initial manifestations of these forces is not

encouraging. In free elections in the republics of Slovenia and Croatia, the former communist parties of those republics have lost power to nationalist forces, the multi-party Demos coalition in Slovenia, and the right-wing Croatian Democratic Union in Croatia. Political leaders of both of these new governing forces have spoken openly about their desire to secede from Yugoslavia. And nationalist sentiment is such that at the times that the elections were held in both republics, virtually no political figure spoke in favor of the continuation of a federal Yugoslavia. Instead, all espoused a confederal doctrine, basically the one developed during the Slovenian amendment crisis: Yugoslavia as a "consensual union" of totally sovereign republics, with the federation having literally no authority.

At the same time, the FEC under the leadership of Ante Markovic has managed not only to function, but actually to bring about reforms of the country's economic systems, despite the dissolution of the League of Communists and the increasing national tensions. Polls indicate that Markovic is the most popular politician in all parts of the country, including those republics which have just elected strongly nationalistic parties (see Borba, 21 May 1990:7). This result seems to reflect a kind of political schizophrenia in Yugoslavia, with many people wanting to have simultaneously a strong sovereign republic within a (con)federal Yugoslavia.

These recent political events in fact point out a central problem of both political theory and political practice for

transforming East European socialist systems. As the FEC had recognized (see above, p. 39), it is necessary for legitimate authority to guarantee and enforce market mechanisms, and this need will be particularly pronounced in federal systems." Yet there is a strong mistrust of centralized political authority in societies that have been under socialism for over forty years. This sentiment means that any proposal for the extension of authority faces particularly severe problems of theoretical justification and political marketing. This problem was brought home to me in a discussion of the American constitution's commerce clause with a Slovene political leader and intellectual in August 1989. A practicing politician in what was still a one-party communist political system, he expressed the view that American-style federal trade mechanisms would not work in Yugoslavia, because the politicians would abuse the power thus afforded to them.

#### Confederation and Paralysis

Despite the apparently widespread desire for confederation, however, the idea seems as unwieldy as anything in the political repertoire of the old communist system. It is clear that the logic of a confederation, of fully sovereign republics, precludes the existence of any overarching government. If any republic can choose to ignore federal laws, there is little reason for any republic to honor them. Thus even political or economic reforms

that are desired by republics such as Slovenia will be made impossible.

The practical effect of the confederal school can be seen by looking at the events surrounding and producing the dissolution of the "14th Extraordinary Congress" of the League of Communists of Yugoslavia in January 1990. Before the congress, the Slovenian delegation had demanded that the League cease to be a federation and that it instead become a "league of leagues": in effect, a loose confederation of independent Leagues of Communists for each republic and autonomous province, none of which would be bound to each other or subject to any authority from the federal League. During the Congress, the central body in fact did follow many of the suggestions made by the Slovenian League of Communists. However, the failure of the federal body to follow all of the Slovenian demands led to the walkout of the Slovenian delegates, since they refused to be bound to anything to which they had not agreed. Thus the intransigence of this one delegation, asserting a confederal principle that allowed absolutely no room for authoritative action by a central power, led to paralysis of the confederal entity.

The current political paralysis is a constitutional failure, in that it is the result of the failure of the constitutional system to provide mechanisms for achieving a resolution of important political issues. This failing became particularly pronounced after the Slovenian actions of 1989, because the effect of those actions was to begin to remove the Federal Constitution

as a source of authoritative norms and binding (albeit loosely) standards for conduct by political forces in all parts of Yugoslavia.

Of course, it may be that the confederal position in regard to Yugoslavia is disingenuous; that it is meant to prepare the way for secession by those advancing it by creating a constitutional stalemate. Certainly the idea of a confederal structure has been used in the past as part of an attempt to destroy the Yugoslav state, in fact, since the very beginning of that state (see Banac 1984:231-237). In that case, the arguments used to promote confederation could be viewed as something of a red herring, and an analysis of it would be much ado about very little.

Yet the idea of confederation, or some other form of "consociational" union, has been promoted by political scientists as the way to solve the problems of multi-national states (see, e.g., Lijphart 1977 and 1984), including, specifically, Yugoslavia (Banac 1990:157). Intentionally or not, this solution is rather ironic, because the constitutional stalemate of Yugoslavia seems to be due to its adoption of many of the features of the consociational model. The paralysis of the Yugoslav (con)federation is due to the less than clear hierarchical relationship between the center and the constituents. But that complicated structure is itself due to concerns for maintaining the Yugoslav nations as sovereign entities even as they are also meant to be in some way bound to each other. Or rather, connected but not bound.

Is such paralysis of a confederal system inevitable? The Yugoslav experience argues that it is. While theorists may argue that it is possible to create a "consensus" democratic system, that "emphasizes consensus instead of opposition, that includes rather than excludes, and that tries to maximize the extent of the ruling majority instead of being satisfied with a bare majority" (Lijphart 1984:23), the Yugoslav attempt to do just that does not augur well for the model.

#### Confederation and Human Rights for Minorities

The principle of confederation raises yet another problem in regard to Europe, and particularly Yugoslavia: it is ultimately anti-democratic. When all units are equal in voting power despite disparities in population size, the more populous units are subject to the rule of the less populous. This situation is different in kind from the philosophical problems raised by devices to check majority rule in regard to certain kinds of issues (e.g., through "affirmative action," or the over-representation of certain groups in some electoral bodies), since such mechanisms are expressly conceived as exceptions to the general principle of majority rule. In contrast, confederation negates majority rule.

The Slovenian response to this problem has been to define democracy as a matter of majority rule in single-nation states, and consensus in multi-nation states. The Slovenian Presidency's

Proposal on the Federation and Relations within the Federation makes this position clear:

The principle of majority decision in single-nation communities is the democratic way of decision making. However, this is not valid for decision-making in multi-national communities, particularly in multinational federal communities. The modern development of democracy demands the consideration of nationality and the protection and assurance of the minorities through inclusion of the principle of agreement of the members in decision making in the Federation.

This position, however, would effectively preclude the existence of multi-national states, because of the requirement of unanimity and the threat of secession. As Namier said in regard to the events of 1848, national "[s]elf-determination ... contests frontiers, negates the existing State and its inner development, and by civil and international strife is apt to stultify constitutional growth" (Namier 1944:26-27). Yet much of the world consists of just such mixed polities, and multi-national states are inevitable unless we wish to contemplate, and condone, the homogenization of regions that have never before been homogenous, either through the extermination or expulsion of large numbers of members of minority groups from areas where their people have lived for generations. That the history of 20th century Europe has been in part a history of such homogenization is hardly promising.

The principle of confederation of nationality-defined states is troubling for another reason: it seems likely to foster majoritarian policies that are based on the active oppression of minorities. One of the least savory aspects of democratic politics is a tendency to appeal to national majorities by scapegoating minorities for either economic ills or some asserted "degradation" of the dominant culture. This strategy was not only the one pursued by Hitler; it has been seen more recently in Sri Lanka, where Sinhalese electoral majorities have been based since the 1950s on systematic discrimination against Tamils (see Tambiah 1986; Tiruchelvam & Coomaraswamy 1987), and Quebec, where one of the first acts of the province under the repatriated constitution was to pass laws discriminating against the minority English-speaking population, to say nothing of the American south (and some other parts of America) from Reconstruction through the 1960s. The principle of confederation in nationality-defined states abets this tendency because of its insistence on the sovereignty of the national group. In the absence of some overarching power, local politics are unlikely to lead to inclusion of minorities. In this context, Americans might remember that segregation was ended only by the extension of federal power into recalcitrant states, and recall the utilization of the National Guard by Presidents Eisenhower and Kennedy.

In Yugoslavia, some new political forces and figures in Slovenia, Croatia and Serbia are irredentist and hostile to minorities in their respective republics. The first two republics

already have proclaimed their sovereignty; significantly, Serbia seems to be following the same line. Thus a member of the presidency of Serbia, when questioned about the provisions of a draft of a new constitution of the republic which would sharply reduce the rights of the largest minorities, said "The federal constitution exists only on paper. If the Slovenes can do it [ignore the federal constitution], so can we" (Borba, 16 May 1990:6 [interview with Mihalj Kertes]). In other words, if we are sovereign, we can oppress whomever we please.

#### FUTURE PROSPECTS: YUGOSLAVIA AND "EUROPE"

In 1988, a joke in Yugoslavia was that "in 1992 there will be eight countries in Europe: Western Europe, Eastern Europe and the six countries of Yugoslavia." By 1990, the joke had changed: there will be seven countries: Europe and the six countries of Yugoslavia. But perhaps the joke is too optimistic about Europe, and too pessimistic about Yugoslavia.

First, Europe: the idea that Europe can finally unite is an attractive one. Whether it is a realistic one is another question. Certainly the other countries of Europe have historical traditions of hostility that are at least as deeply rooted as any in Yugoslavia." At some point the interests of "Europe" are likely to conflict with what the government of one or more of the countries chooses to view as being in that country's "interest."

At that stage, when local politicians attempt to make political capital by playing against other European nations, the efficacy of the various European Community mechanisms may turn out to be lacking. The recent experience of Yugoslavia suggests the inherent weaknesses of confederal structures; and if the European nations are not willing to surrender elements of their sovereignty, the capacity of the institutional machinery of the Community to function may be compromised.

Second, Yugoslavia: it seems likely that public sentiment in regard to the continued existence of Yugoslavia as an entity is still in the process of formation. Polls from most parts of the country indicate support for the continued existence of some kind of Yugoslav state; and even in Slovenia and Croatia after the elections, as mentioned earlier, the most popular politician in public opinion polls is Ante Markovic, the head of the FEC, rather than the just-elected heads of nationalist governments (see Borba, 21 May 1990:7). Further, the unsavory implications of extreme nationalist positions are becoming apparent to many Yugoslavs. The same polls show that the most unpopular politicians throughout the country are those seen as extreme nationalists: Franjo Tudjman, Slobodan Milosevic, and Vuk Draskovic.

Finally, the rise of nationalist parties in Yugoslavia is accompanied by a political discourse that reveals anti-democratic tendencies. For example, the demand of right-wing parties in Slovenia and Croatia that abortion be banned, not on grounds of morality or an asserted right to fetal life but rather because it

should be the duty of women of those groups to produce new Slovenes or Croatians (Borba, March 3-4, 1990:4; NIN, March 4, 1990), is reminiscent of the excesses of practitioners of the worst elements in the European political tradition: Hitler, Stalin and Ceausescu. Further, it is possible that the racism implicit in this position on abortion is deeply European, symptomatic of the contradiction between the European ideological fixation on individualism yet at the same time seeing "nations" as sovereign (cf. Dumont 1977:12; 1986:149-179). From this perspective, the threatened fracturing of Yugoslavia into nation-states, each struggling to achieve ethnic purity at all costs, may be a harbinger of the revival of a politics that had supposedly been buried, if not the forerunner of similar movements in other European countries.

Thus it is possible that the recent experience of Yugoslavia may be symptomatic of some of the negative tendencies of the European political tradition: Europe may yet fracture. Or, conversely, it may be that Yugoslavia itself does not fracture, but rather discovers first, political, and then institutional mechanisms for preserving a multi-national entity. But if Yugoslavia does not succeed in the latter task, its failure may be a warning to the rest of Europe.

#### CONCLUSIONS AND IMPLICATIONS FOR U.S. POLICY

1. The confederal position, or assertion of absolute supremacy by a Yugoslav republic, is a new interpretation of the constitution of 1974, which draws on some elements of that document but ignores

other parts of it. It is a departure from all previous understandings of Yugoslav constitutional law.

2. The confederal position must lead to stalemate in regard to reform of the Yugoslav economic and political systems, since it renders the federal constitution meaningless. Accordingly, in so far as the confederal position obtains, reforms will be in jeopardy.

3. The confederal position is both caused by nationalist feelings and serves to promote them. In so far as it frees local majorities of supervision by any overarching federal power, it enables them to oppress local minorities, and there are signs that such oppression is occurring in Croatia, Serbia and Slovenia.

4. The confederal position threatens the continued existence of Yugoslavia as a state. Yet most Yugoslavs still seem in favor of the country's continued existence, and the disintegration of Yugoslavia would very likely be disastrous. The United States should discourage adoption of the confederal doctrine and encourage the development of a truly federal system in Yugoslavia.

5. Recognizing the tendency of local majorities to oppress local minorities, the United States should press all of the Yugoslav republics which declare their sovereignty to respect the human rights of their minority populations. In particular, the United States should insist that members of local minorities not be discriminated against, and that the asserted sovereign rights of national groups not be used to justify the oppression of minorities within their territories.

## NOTES

1. The major arguments on the need for systemic changes following the constitutional amendments of 1988 are contained in the various contributions to a "scientific conference" on "Conceptions for a New Constitution" (Marxist Center of the City of Belgrade, 1989), held at the Belgrade University Law Faculty on 29 May, 1989.
2. The federal question in Yugoslavia is also interesting because of the potential parallels and contrasts it affords with similar issues in the Soviet Union. However, consideration of the Soviet case is beyond the scope of this paper.
3. The "Slovenian National Program" appeared in the journal Nova Revija, no. 57 (1987). Further elaborations of that program can be found in Hribar (1989).
4. The polemical debate on this subject has been a staple of the Yugoslav mass media and of professional journals since at least 1987. It is therefore hard to canvas, but a the contours of the debate up through the beginning of 1989 can be traced and documented in a major Slovenian-Croatian contribution to it by Ciril Ribičic and Zdravko Tomac (1989), provided that one remembers that these writers advance their own polemic, and are thus not neutral reporters of the words of others.
5. On the other hand, the relationship of the two Autonomous Provinces of Kosovo and Vojvodina within the republic of Serbia has changed, following the November 1988 amendments to the Constitution of Yugoslavia and the March, 1989 amendments to the Constitution of the Republic of Serbia. The thrust of the amendments has been to increase Republican control over the Provinces, though the latter still maintain considerable formal autonomy. More recently, a draft of a new constitution for the republic of Serbia would eliminate most of the autonomy still retained by the two provinces (see Borba, 16 May 1990:7). These changes need not concern us at present, however, as they do not impinge directly on the federalism/confederalism debates at the center.
6. The first draft of the Slovenian amendments that was circulated for public discussion was entitled Osnutek amandmajev k ustavi SR Slovenije; it was prepared by a committee of the Slovenian Assembly and was discussed by the full assembly in March and April of 1989. This draft was released for public discussion, and published in Delo, later that spring.
7. The Yugoslav Constitution, like most national constitutions, contains material that is prefatory to the operative parts of the Constitution, or the Constitution proper. In law, such prefatory materials are not considered to be enforceable in the same way as

the provisions of the constitution, but rather are considered primarily as aids to interpretation of the constitution proper. This is the position taken by the dean of Yugoslav constitutional theorists, Jovan Djordjevic (1982:129-130). The distinction is important in regard to the issue of whether the republics of Yugoslavia possess the right under the federal constitution to secede; see below, Note 8.

8. The constitutional difficulty in this regard is that the right to secession is only mentioned in the introductory part of the Constitution, while the stipulation that the external boundaries of Yugoslavia can be changed only with the consent of all republics (art. 5) is in the operative text. This discrepancy is one reason why the Yugoslav constitutional situation in regard to secession is less clear than that of the USSR. In the soviet constitution, art. 72 clearly grants each republic the right "freely to secede."

9. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by vote of the General Assembly of the United Nations, General Assembly Resolution 2200 A (XXI) of 16 Dec. 1966; entered into force on 3 January 1976.

10. Borba, specijalno izdanje: "Amandmani Dele Jugoslaviju." Beograd, October 1989.

11. "Delovno Besedilo Predloga Amandmajev k ustavi SR Slovenije," Porocevalec, (Ljubljana), July 17, 1989.

12. "Amandmani na Ustav SR Slovenije" (specijalni dodatak). Borba, August 7, 1989.

13. Lest this seem too extreme an interpretation, it should be noted that in the climate of nationalist fervor in 1990, even these specifically protected national minorities came under attack. In an interview in Delo in June, 1990, the new Slovenian Minister for External Affairs, Dr. Dimitrije Rupel, was quoted as saying that he was concerned by "certain actions" of the Italian ethnic minority in Slovenia and that he warned them not to continue. This "warning" prompted a protest by Slovene-Italian members of the newly elected Slovenian assembly. (Borba, 13 June 1990:6).

14. I am indebted to Professor Stevan Lilic for this formulation of a solution to the definitional problem.

15. Borba Special edition, "Amendments that Split Yugoslavia," p. 3.

16. In what follows, it is necessary to keep in mind the cumbersome nature of the process of amending the Yugoslav constitution of 1974. The FEC, among several other bodies, can propose proceedings to initiate amendments (art. 399), which was the step taken here.

This step must be approved by the parliaments of all of the republics and provinces before concrete steps can be taken to draft amendments (art. 400). The amendments themselves are drafted by the Federal Assembly, then submitted for discussion to the several republics and provinces (art. 401). So what the Presidency, the FEC and other proponents of amendments did was to issue detailed proposals for initiating amendments, stating the general goals (or, in the case of the Presidency's proposal, detailed drafts of amendments). Consent to the proposal could thus not be seen as consent to any actual substantive change, although, as will be seen, some of the republics expressly rejected specific kinds of changes suggested in these proposals.

17. One of these proposals, submitted by the assembly of the Republic of Bosnia and Hercegovina, received little attention in the national press and seems not to have been of great importance in the constitutional debates. For these reasons, it is not discussed here any further.

18. Indeed, there is strong evidence that the creation of the lower federal judiciary in the United States was due largely to the need to have a federal power available to enforce contractual claims in locations where local authorities and courts were hostile to non-natives (see Freyer 1979).

19. It is perhaps necessary to stress that the Yugoslav constitutional stalemate cannot be ascribed to a "Balkans mentality" with its corresponding "Byzantine politics," as suggested by some elements of the Western press (and the press from the western parts of Yugoslavia)(see, e.g., "Bullying in the Balkans" [editorial], New York Times, April 18 1989:18). Unfortunately, the Orientalist tone of much of the popular and even scholarly writing on Yugoslavia is beyond the scope of this paper (see, however, Bakic-Hayden 1990). However, readers should note the irony that the Balkanization of Yugoslavia has been promoted most by those republics that are not physically in the Balkans!

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