

The Carl Beck Papers

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No. 908

Regime Transition in a Disintegrating Yugoslavia:

The Law-of-Rule vs. The Rule-of-Law

Lenard J. Cohen

**University of Pittsburgh Center for
Russian and East European Studies**

Lenard J. Cohen is Professor of Political Science at Simon Fraser University. His previous books include: *Communist Systems in Comparative Perspective* (1974); *Political Cohesion in Communist Systems: A Fragile Mosaic: The Yugoslav Experience* (1983), and; *The Socialist Pyramid: Power in Yugoslavia* (1989). He is currently working on the book, *Broken Bonds and Fall of Yugoslavia* (forthcoming, 1992).

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Preface

Democratic transition -- that indeterminate phase between the end of an authoritarian regime and the consolidation of democratic rule -- is always a difficult and challenging period for the members of a society. In the case of Yugoslavia, problems of democratization during the early 1990's were complicated by particularly intense ethnic and inter-regional conflicts, leading eventually to an armed struggle with a very high loss of life, and widespread societal disruption. Indeed, by early 1992 the "Yugoslav crisis" had led to the disintegration of the country, and the emergence of a number of successor states.

This study explores some of the difficulties connected with democratic transition in the turbulent Yugoslav context by focusing on issues of legal and judicial change. A number of orienting questions have motivated the research focus. What impact did the legacy of communist legal and judicial development have on the process of post-communist transition? Did Yugoslavia's federal Constitutional Court established in the mid-1960's assist in the management of regional and ethnic disputes? How did the recent quest for political independence and sovereignty on the part of various ethnic groups and regions in Yugoslavia -- which stimulated, and was in turn accelerated, by the collapse of the League of Communists -- influence the process of democratization and the rule-of-law? In what manner did civil strife between Serbs and Croats during 1991 and 1992 affect the prospects for the establishment of independent judiciaries and law-governed regimes in various regions of the disintegrating Yugoslav state? Although this study does not comprehensively examine all the constituent units within the former Yugoslav federation, and was completed at an especially fluid period in Balkan political development, it endeavors to shed some light on what promises to be a protracted and difficult process.

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Lenard J. Cohen

"Today in Yugoslavia we have a condition of state anarchy....Ten or twenty years ago we were dissatisfied with the legal state, but at least we had one...."

Srdja Popović, Yugoslav human rights lawyer (November, 1990)

"We now practically have six separate legal systems.... The present situation is characterized by the strengthening of political power over the law. It seems that everyone is talking about democracy, but there is very little real democracy."

Milovan Buzadžić, President of the Constitutional Court (May 6, 1991)

Introduction: The Elections of 1990

During 1990 Yugoslavia underwent a radical political transformation which ended 45 years of single-party rule, but also seriously threatened the unity of the country. Failure to resolve the serious economic and political crises that beset Yugoslavia during the second half of the 1980's, together with the "demonstration effect" of the fall 1989 democratic revolutions in East Central Europe, were the two most important factors finally frustrating the ability of the communist regime to perpetuate its novel admixture of one-party monopoly and workers "self-management." In several regions of the country (Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia) the communists were defeated by non-communist center-right parties in free multi-party elections. In other areas (Serbia, Vojvodina, and Montenegro) former communist elites and party organizations -- reconfigured and sometimes newly labelled as socialists -- managed to retain power, but were now faced with substantial parliamentary and extra-parliamentary opposition from non-communist parties (Table 1). By the fall of 1990, the country's

Table 1
Party Representation in Republican Legislative
Elections April-December, 1990 (percentage)

| Political Parties and Coalitions | Republics | | | | | |
|---|-----------------|----------------|------------------|-------------------|---------------------------|-------------------------|
| | <u>Slovenia</u> | <u>Croatia</u> | <u>B-H</u> | <u>Maced</u> | <u>Serbia^a</u> | <u>Monte- negro</u> |
| Communists (reconfigured) | 15.8 | 20.5 | 7.9 ^c | 24.1 ^d | { <77.6 | 66.4 |
| Socialists | 6.7 | 7.3 | 0.4 | 4.1 | { | |
| Reformists (federal party) ^a | | | 5.4 | 15.0 | 0.8 | 13.6 |
| Liberals ^b | 15.8 | 3.1 | | | 2.8 | |
| Democratic United Opposition of Slovenia (DEMOS) | 52.5 | | | | | |
| Croatian Democratic Alliance | | 58.7 | 18.3 | | | |
| (Moslem) Party of Democratic Action | | | 35.8 | | 1.2 | 10.4 ^f |
| Internal Macedonian Revolutionary Organization-DPMNU | | | | 30.8 | | |
| Serbian Democratic Party | | 1.4 | 30.0 | | | |
| Serbian Party of Renewal | | | 0.4 | | 7.6 | |
| (Montenegrin) National Party | | | | | | 9.6 |
| (Albanian) Party for Democratic Prosperity for Macedonia | | | | 19.1 | | |
| Democratic Alliance of Vojvodina Hungarians | | | | | 3.2 | |
| Others | <u>9.2</u> | <u>9.0</u> | <u>1.6</u> | <u>7.6</u> | <u>6.8</u> | <u>--</u> |
| TOTAL | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| (Number of Seats in Legislature) | (240) | (356) | (240) | (120) | (250) | (125) |

intrinsic diversity and newly liberated associational impulses had resulted in the formation of over 200 political parties, most of which were small regionally-based organizations, striving to advance specific ethnic interests.

Whether born-again communists or non-communists, both the newly elected political authorities and the bulk of the opposition forces in all regions of Yugoslavia were committed to programs of regional and ethnic nationalism that seriously challenged the power of the federal system and federal decision-makers. Thus, the impressive pluralization of the Yugoslav political landscape during 1990 was accompanied by the rapid erosion of federal authority, a situation which, by the end of the year, left the future of Yugoslavia seriously in doubt. Prime Minister Ante Marković, who had skillfully reoriented federal government policy along post-socialist reformist lines, made an admirable effort to implement country-wide economic and

Notes for Table 1

- a** **The Alliance of Reform Forces formed by Prime Minister Marković after the Slovenian and Croatian elections.**
- b** **Slovenia: ZSMS-Liberal Party; Croatia KNS (Coalition for National Understanding); Serbia: The Democratic party.**
- c** **Five Seats were won in a coalition with the Socialists.**
- d** **In the second round of voting the Communists were in coalition with the Reformists.**
- e** **The 250 electoral units in this republic include 56 from the Province of Vojvodina and 34 from the Province of Kosovo. Protesting Serbian policy in Kosovo, Albanian parties boycotted the election.**
- f** **The Democratic Coalition including the (Moslem) Party of Democratic Action, and 2 smaller groups committed to Moslem and Albanian minority rights.**

political changes during 1990, but his ability to fully accomplish such measures was stymied by the autarkic policies of contending ethno-regional elites. Marković's formation of a federally-oriented party in mid-1990 -- the Alliance of Reform Forces -- in an attempt to garner support for the unity of the country looked initially promising, but the Alliance did poorly against ethnically and regionally-oriented parties in the republican elections. Thus, the Reform Alliance was only able to win 50 out of 735 seats in the four republican elections contested by the party. Although buttressed by international support for his pragmatic reform policies, as well as by the loyalty of the central military establishment, the prime minister and the federal government lacked the cross-regional legitimacy necessary to slow the vortex of centrifugal pressures tearing the country apart. Strong animosity and nationalist rivalry between members of the country's largest ethnic group (the Serbs), and three other ethnic groups (the Croats, Slovenes, and Albanians) was particularly intense and damaging to the cohesion of the federation. Committed to various alternative notions of state restructuring -- centered around schemes for either a remodelled federation, or some type of loose confederation -- the regional elites elected in 1990 quickly supplanted federal authorities as the major actors in Yugoslav political development.

As Yugoslavia's inter-ethnic and inter-regional conflicts intensified, many Yugoslav citizens and decision-makers viewed the country's judiciary as a crucial sector for conflict management and the maintenance of state cohesion. Indeed, from the mid-1960's onward, foreign observers had optimistically argued that Yugoslavia was establishing itself as a *rechtsstaat*, or law-governed state, that could both protect citizens' rights and adjudicate conflicts among different institutions, groups, and regions (Fisk, 1971). Moreover, during the last 25 years of the communist federation (1965-1990), significant advances had occurred with respect to the professionalization of Yugoslav judges (e.g., educational training and occupational identity formation), and also the judiciary's role as an independent institutional sector within the overall "socio-political" framework of the state. Political influence on the judiciary remained quite pronounced under the one-party

communist regime -- especially with respect to the adjudication of political cases -- but respect for constitutional norms, the judiciary's growing self-confidence, and the elimination of arbitrary justice were substantial strides forward, particularly when compared to the other East European states (Cohen, 1989: 257-296).

In view of such unique and promising developments, how did Yugoslavia's judicial sector respond to the country's deepening ethno-regional cleavages and general crisis during the late 1980's, and what impact did the profound political transformation of 1990 have on judicial development? This study will examine two aspects of the recent linkage between Yugoslav political and judicial development: 1) the role of the federal legal system, and particularly the Constitutional Court of Yugoslavia, in dealing with challenges to the preservation of the federation, and; 2) the impact that political changes in key republics have had on the administration of justice.

Sovereignty Asunder: Nationalism and Judicial Impotence

The death of Tito in May 1980 marked the beginning of a decade-long political and economic crisis in Yugoslavia which led to a gradual weakening of bonds among the country's various regions and ethnic groups. In the absence of a powerful federal authority figure such as Tito, and utilizing provisions of the 1974 Constitution which gave substantial power to the republics and provinces as sovereign units in the Yugoslav federation, ethno-regional political and bureaucratic elites were able to substantially advance their autonomy and power during the 1980's. In some respects this situation was a repetition of a general pattern of inter-regional and inter-ethnic fragmentation which had occurred in the late 1960's, but which Tito had sharply quashed through the "surgical" use of military police power

and political purges of the regional party machines. As the Yugoslav economy and the country's living standards deteriorated in the second half of the 1980's, however, and as Tito's heirs at the apex of the party and state hierarchies proved unable to find a way out of the crisis, centrifugal trends in the country markedly accelerated. In most regions, but particularly in Serbia and Slovenia, a younger generation of regional communist leaders elaborated their own strategies for crisis-management and reform.

In Serbia, a relatively new figure on the political scene, Slobodan Milošević, was able to quickly mobilize strong political support by capitalizing on Serbian discontent over both the issue of Albanian nationalism in the province of Kosovo and the position of Serbia in the Yugoslav federation. Deftly engineering the removal of regional Serbian political and media leaders considered "soft" on the issue of Albanian nationalism, Milošević called for new constitutional provisions reasserting the control of Serbian republican authorities over the autonomous provinces of Kosovo and Vojvodina (the latter, although predominantly Serbian in ethnic composition, has tended to protest the hegemony of officials in Belgrade). In effect, Milošević exploited a backlash of Serbian nationalism in order to build a cross-regional alliance of ethnic Serbs unprecedented in Yugoslavia since the formation of Tito's World War II Partisan movement. When Serbs and Montenegrins began to regularly engage in mass protest demonstrations during 1987 and 1988, "Slobo" Milošević emerged as a hero to the crowds. By November 1988, when Milošević addressed a Belgrade rally estimated at between 800,000 and 1.3 million Serbs, it was apparent that he enjoyed more popular support (albeit regionally concentrated) than any other Yugoslav political leader since Tito, and that he had transformed the character of Yugoslav political life.

While the Albanian issue and also the country's serious economic problems were certainly important catalysts for the sharp upsurge of Serbian nationalism during the late 1980's, the Milošević phenomenon also related to the Serbs' more general and long-standing dissatisfaction with the course of Yugoslav political development. For example, many Serbs viewed the regime's decentralizing policies and constitutional initiatives as having

seriously weakened the influence of both their republic and ethnic group in the Yugoslav federation. The 1974 constitutional arrangements providing parity representation for each of the six republics in the Yugoslav federation also gave Serbia's two autonomous provinces a voice in federal decision-making, thereby reducing Serbia to one player in an eight-sided political game. As the core nationality in the 1918 creation of the original Yugoslav state, the nationality that predominated in the ranks of the wartime communist movement, and the largest ethnic group in the country, the members of Milošević's ethnic constituency felt that their interests were insufficiently recognized under the 1974 constitutional framework, and that they had legitimate grounds for expressing their strong dissatisfaction.

Momentum among Slovenian communists for greater republican and ethnic autonomy in Yugoslavia developed partially in reaction to the Milošević phenomenon, but also reflected internal developments within Slovenia that preceded the rise of the new Serbian leader. Briefly, while Tito's mechanisms for balancing regional representation in Yugoslavia's collective leadership structure allowed Slovenia to enjoy considerable influence in federal political life, many Slovenes felt that their economically productive republic (in 1986 providing 18 percent of total GNP and 23 percent of total exports) was paying an unnecessarily high price for the operation of the federation. Particularly irksome to Slovenes was the fact that each year their republic, with about 8 percent of Yugoslavia's population, contributed over 25 percent of the total federal budget and between 17 and 19 percent of the Federal Fund for Underdeveloped Regions. The Slovenian public and elite were particularly enraged by revelations that federal funds transferred to the less-advantaged regions of the country were wasted as a result of economically unprofitable investments, corruption, and the financing of bloated bureaucratic structures. Federal defense expenditures also seemed excessive to many Slovenes, particularly since Yugoslavia was not facing any imminent military threats, and also because citizens of their republic played an extremely small role in the leadership of the armed forces. Such grievances became an important facet of the growing

political ferment among students and Slovene intellectuals during the first part of the 1980's (Kovač, 1988).

In terms of Yugoslavia's political architecture, Slovenia's reform communist leadership during the late 1980's was generally supportive of the federal organization and principles elaborated in the 1974 Constitution, that is, the model of parity regional representation and "consensus" decision-making that Milošević and his Serbian communist allies found so objectionable. Slovene leaders agreed that federal authorities needed to be adequately empowered in order to deal with major issues of economic policy. In their opinion, however, such policy could not properly be established by the principle of majority voting (*majorazacije*), or what the Slovenes interpreted as the "outvoting" that would result from the Serbs' demographic predominance in the federation. In the Slovene view, the requirement for unanimity of republican positions in federal decision-making under the 1974 Constitution provided a safeguard against the potential subordination of the smaller republics and ethnic groups by the majority. Moreover, Slovenian writers pointed out that while Milošević might endorse the principle of "one man, one vote" for voting in federal level institutions, the Serbs would never permit such a principle to determine political decision-making in Kosovo, where Albanians are numerically dominant. The stated preference of Slovene communist reformers was for the principle of "one unit, one vote" in federal decision-making with regard to the country's most important economic and political issues, a view that Serbian leaders denounced as a denial of democratic fair play.

During 1989, anxious to forestall the possibility that Belgrade decision-makers might one day wish to impose unacceptable policies on their republic, the Slovene Assembly adopted provisions that required its agreement before federal authorities could declare an "emergency" situation as a pretext for intervention in Slovenian affairs. The president of the Slovenian Assembly conceded that this step was taken in light of the federal presidency's declaration of emergency measures for Kosovo in late February 1989. No one had to ask the Kosovo assembly for permission, the Slovene official asserted, because the Kosovo constitution was silent on the matter

of a provincial role in such a situation (Potrc, 1989:12). Although Slovenia's adoption of the new constitutional provision on state emergencies, and an equally controversial amendment giving the republic the formal right to secede from Yugoslavia, were declared to be unconstitutional by the country's collective state presidency, the Slovenian assembly proceeded to promulgate the measures at the end of September 1989. The amendments immediately triggered negative commentaries by Serbian observers who claimed that the Slovene elite had launched a "torpedo directed at the bow of Yugoslavia," and were interested in Slovenia becoming a "small Switzerland" (*Belgrade Domestic Service*, September 28, 1989 [Foreign Broadcast Information Service, hereafter FBIS]).

Faced with strong pressures for autonomy and the adoption of regionally oriented constitutional initiatives in both Serbia and Slovenia during 1988 and 1989, Yugoslavia's federal decision-makers turned to the judicial sector in order to reassert the authority of federal governmental institutions and the federal constitution. Many Yugoslav leaders were particularly hopeful that the country's structure of "constitutional courts" -- unique among the communist regimes for their active role in the judicial review of legislation -- might be used to prevent major regional deviations from federal laws and constitutional principles (Sržentić, 1984: 16). Established in 1963 as part of a new emphasis on "socialist legality," the constitutional courts organized on both the federal and republican/provincial levels were designed to play a quasi-political role through their powers to assess the constitutionality of laws, and to resolve conflicts among various territorial and institutional sectors. Composed of judges who had been prominent politicians and legal experts, and who had also amply demonstrated their "moral-political suitability" and commitment to regime values, the constitutional courts were conceived as an auxiliary component of the legislative system rather than as a part of the conventional judicial sector. For example, mandatory time limits on office-holding -- the well-known Yugoslav rotation principle utilized for most political positions -- also applied to the constitutional courts, but not to courts of general jurisdiction. Thus, the 14 members of the federal-level Constitutional Court

of Yugoslavia (a president and 13 judges) were elected for the typical judicial term of eight years, but unlike other judges could not be re-elected to the same office.

According to new constitutional amendments adopted in 1981, the president of the Constitutional Court of Yugoslavia was elected from among the members of the Court for a one-year term. The amendments provided that these elections would be based on a rotational principle, with each new president being selected from a different republican or provincial representative on the Court. In a technical sense, judges serving on the constitutional courts could not easily be removed from office, but their sensitivity to the changing political climate and political pressures derived from their limited terms and also from the importance accorded to political criteria in their recruitment. Yugoslav legal specialists and judges typically stressed that the independence of the constitutional courts "does not mean, by any means, that the Court stands beyond and outside the socio-political system, or above the system." The independence of the courts "presumes the right and duty also to socio-politically appraise the role of the courts" (Fira, 1980: 23).

During 1989, the federal Constitutional Court, for the first time in its history, was asked by the federal legislature to rule on conflicts which might exist between the federal constitution and various constitutional amendments adopted by the republics and provinces. The politically most sensitive facet of the Court's assignment was how to deal with 1988 and 1989 amendments to the Serbian constitution, which substantially strengthened Belgrade's control over the province of Kosovo. Equally contentious were the 1989 amendments to Slovenia's constitution empowering that republic to exercise the right of secession from the federation and also to decide upon any declaration of emergency measures pertaining to its territory. After undertaking a comprehensive review of 346 republican and provincial constitutional amendments, the Court concluded in January 1990 that 18 of the provisions were contrary to the federal constitution. Only the Constitution of Montenegro was ruled to be fully in accord with the federal constitution. The amendments deemed unconstitutional included the

controversial Slovenian provisions on secession and emergency measures, as well as sections of Serbia's constitution banning the sale of land in Kosovo and mandating the use of the Cyrillic alphabet in the province's state agencies. Provisions of the Kosovo constitution permitting the use of the Albanian flag in that province were also among the amendments ruled to be unconstitutional.

Although the Court had impressively carried out the most delicate task of its 27-year existence, it relied entirely on federal legislative and governmental power to implement its ruling. Unfortunately, by the spring of 1990, political power had already gravitated so far into the hands of the republics -- particularly in the cases of the regionally popular Slovenian and Serbian political leaderships -- that federal authorities could do little to enforce the Court's decision. Indeed, Slovenia did not even bother to send representatives to the Court's public deliberations concerning the constitutionality of that republic's amendments. In March the federal assembly, in a majority vote, accepted the decision of the Court and instructed the republics that they had three months to bring the republican constitutions in line with the federal constitution.

Dissenting Slovenian federal delegates maintained, however, that the opinion of the Court was not binding, but could only be offered to the republics and provinces for their consideration. Only the republics, argued one Slovenian representative, were sovereign in Yugoslavia, whereas the decision of the federal legislature upholding the Court's ruling treated the republics as "administrative departments" (Bujošević, 1990a). Although the Constitutional Court was vested with authority to request that the federal government impose legal sanctions against republican and provincial officials for non-compliance with its rulings, such a course of action would have precipitated a major constitutional and political crisis. Fearing such a backlash and lacking any other enforcement mechanism to require compliance with the decisions of the Court or the Federal Assembly, federal authorities could only reiterate that the Court's decision on the unconstitutional amendments was not an "advisory" opinion, but rather had

an "imperative character," plaintively adding that the Court's "opinion should be treated seriously" (Djurković and Kusar, 1990; Bujošević, 1990 a). For his part, the president of the Constitutional Court disappointedly admitted that the failure of the republics to appropriately modify their constitutions illustrated "the domination of the political over the legal sectors" (Štrbac, 1990).

Republican challenges to federal sovereignty intensified sharply during mid-1990s, particularly after the country's first multi-party elections since before World War II. Political leaders of Slovenia's and Croatia's new non-communist governments, elected in April and May, acted quickly on their campaign promises to begin transforming their republics into "sovereign" units on the road to Yugoslavia's transformation into a "state of states." In Croatia, for example, the victory of Franjo Tuđman's Croatian Democratic Alliance over the ruling League of Communists was followed by the adoption of new amendments to the republican constitution designed to lay the foundation for Croatian sovereignty in a post-federal state. The new amendments made specific reference to the republic as the sovereign state of the Croats and to other nations and national minorities living in Croatia, but no longer explicitly mentioned the republic's minority Serbian community (about 12 percent of Croatia's population). The amendments also provided for the adoption of traditional Croatian ethnic symbols (a coat of arms, flag, and national anthem), as the official insignia of the republic, and explicitly identified the Latin script as the republic's official alphabet (use of Cyrillic and other alphabets would be regulated by law).

While the new ethnic symbolism was itself offensive to many of Croatia's Serbs, their deeper fear was that Tuđman planned to sever Croatia from the Yugoslav state -- either through creation of a loose confederation or outright secession -- thereby leaving the Serbs at the political mercy of a Croatian majority and nationalistically oriented government. The anxiety of the Serbian minority was particularly intense within the dozen communes of Croatia (regionally clustered in northern Dalmatia, Lika, the Kordun, and Banija) where Serbs constituted a majority of the population. Efforts by Tuđman and his more moderate colleagues to reassure the republic's Serbs

that their rights would be protected were deeply distrusted in the Serbian community and seemed to be contradicted by the nationalist and anti-Serb rhetoric frequently emanating from Tudjman and certain quarters of his party's leadership. Distrust and anxiety among Serbs was also fuelled by the steady and sensational campaign of anti-Croatian propaganda orchestrated by Serb nationalists within and outside Belgrade media and government circles. Thus, during this period, the leaders of the Serbian minority in Croatia not only enjoyed the strong support of an ethnically self-conscious and relatively territorially compact population, but also the backing of their ethnic brethren and the Milošević leadership in the Serbian republic.

Developments in Croatia assumed crisis proportions in the period from the end of July to the end of August 1990, following a mass meeting of between 100,000 and 150,000 Serbs in the Serbian majority region of Dalmatia. At that rally the Serbian community leadership -- newly organized into a Serbian National Council -- adopted a formal "Declaration on the Sovereignty and Autonomy of the Serbian People." According to the Declaration, the Serbs in Croatia "on the basis of their geographical, historical, social, and cultural specificities, are a sovereign people with all the rights that constitute the sovereignty of peoples" (*Politika*, July 26, 1990: 7 [FBIS, July 31, 1990: 72]). In view of Yugoslavia's unsettled future, the Declaration left the precise nature of Serbian autonomy open. If the country remained a federation, then the areas in Croatia having a Serbian majority would only need to enjoy the rights necessary for cultural autonomy. If however, Croatia formed a confederation without Serbia, the Serbs of Croatia reserved their right to assert political autonomy. Leaders of the Serbian minority in Croatia also announced that they would hold a referendum on Serbian autonomy in Croatia. Tudjman's government reacted by announcing that it would prohibit the Serbian referendum on autonomy scheduled for August and also by banning the operation of the "intercommunal" association formed by the Serbian-majority communes in Croatia. "Territorial autonomy for the Serbs is out of the question," observed Tudjman, "we will not allow it" (*Borba*, July 3, 1990: 5 [FBIS, August 6, 1990: 53]).

Notwithstanding Tudjman's injunction, Serbian plans for the referendum proceeded. The voting rules for the referendum, which was held on August 18, stipulated that every Serb over the age of 18 who was either a resident of Croatia, a Serb born on the territory of the republic of Croatia, or a Serb holding Croatian citizenship, but living outside the territory of the republic had the right to vote. The over 45,000 Croats living in the 12 Serbian majority communes of Croatia, however, were denied any franchise in the referendum. According to Serbian leaders, the referendum attracted a "100% turnout" of those eligible to vote, and resulted in a near unanimous outpouring of support for the "Declaration of Sovereignty and Autonomy." For his part, Tudjman described the referendum as an event that "had no legal basis whatsoever" and "will mean nothing for the Croatian republic" (*Tanjug*, August 22, 1990 [FBIS, August 22, 1990: 48]). "We kept our cool, we did not let ourselves be involved in bloodshed, in a civil war," Tudjman told the Croatian legislature on August 24 (*Zagreb Domestic Service*, August 24, 1990 [FBIS, August 27, 1990: 5]), placing the major blame for the crisis on the failure of Serbian leaders to co-operate in the elaboration of sensible provisions to protect the rights of their minority community, as well as pressure from Serbian nationalists in Belgrade (including the leadership of the Serbian Orthodox Church). In the weeks following the referendum, inter-ethnic tensions subsided somewhat in Croatia, although efforts by the Croatian authorities to disarm Serbian vigilante groups met with little success. Tudjman's government wisely eschewed any direct confrontation with the Serbian minority, preferring instead to let the republic's court system invalidate "the usurpation of power" by the leadership of the Serbian majority communes.

Meanwhile in July, the recently elected Slovene non-communist regime also proceeded with the adoption of a new republican constitution. Anxious to flesh out a firmer legal basis for its new sovereignty initiatives, the Slovene leadership began preparations for the drafting of a new constitution. Slovene state President Kucan made it clear, however, that the new legal framework would be the constitution of a "sovereign state" within a planned confederation, and not the constitution of a "Yugoslav federal

unit" (*Tanjug*, July 24, 1990 [FBIS, July 24, 1990: 68]). On July 2, 1990, in an initial step in constitutional engineering, the Slovene legislature adopted a "Declaration on the Sovereignty of the State of the Republic of Slovenia" by a vote of 178 to three, with two abstentions. Beyond proclaiming the sovereignty of the republic on the "basis of the Slovene nation's right to self-determination," the six-article Declaration's most important features included assertions of the primacy of the Slovenian legal system, constitutional provisions, laws and regulations over similar federal provisions; a call for the preparation of a new republican constitution within a year specifying which federal laws were still valid in the republic; and provisions for the republic's government to assume full control over the units of the Yugoslav Army stationed on Slovenian territory (*Tanjug*, July 2, 1990 [FBIS, July 3, 1990: 62]).

The Slovenian sovereignty declaration naturally provoked instant rhetorical opposition on the part of those political forces seeking to obstruct any further devolution of authority in the Yugoslav federation (most notably the Serbian political leadership and the federal military high command). Yugoslavia's federal presidency demanded the repeal of the declaration, and initiated proceedings in the Constitutional Court of Yugoslavia in order to determine the constitutionality of the Slovenian action. Slovene sovereigntists, however, appeared to have little fear of the federal judiciary. Even the Court itself recognized its political weakness: "Everything is now in the hands of the politicians," observed the President of the Constitutional Court. The "Court might officially confirm that the proclamations of Slovenian sovereignty is not in accord with the Constitution of Yugoslavia, but this would not be binding on anyone" (Bujošević, 1990: 1). Despite fierce criticism from the Serbian political leadership and other enthusiasts of a strong federal system, Slovenia's government continued to press ahead with their plans for complete political sovereignty. In early October, the Slovenian legislature adopted a draft constitution asserting that "Slovenia will become an independent state which will take on and exercise all the sovereign rights including those which it had transferred -- either upon the foundation of federal Yugoslavia or later -- to the Socialist Federal Republic

of Yugoslavia (Gerdina, 1990: 10). This move was followed by a plebiscite in the republic on December 23, in which approximately 95 percent of the citizens voted in favor of Slovenia's secession from Yugoslavia should that step be deemed necessary. Only two days earlier, Croatia had adopted a new constitution which made it possible for the republic to secede from the Yugoslav federation if two-thirds of Croatia's legislature supported such a decision.

Developments in Croatia and Slovenia stimulated other regions and ethnic groups that were also eager to assert their sovereignty as Yugoslavia tottered on the brink of disintegration. The same day that Slovenia's assembly issued its July sovereignty declaration, 114 ethnic Albanian delegates to the Kosovo assembly met in the street outside their legislature in the province's capital of Priština, and adopted a declaration proclaiming Kosovo to be an independent unit within Yugoslavia, having equal status with Serbia and the other republics. The July declaration characterized the Albanian population of Kosovo and Yugoslavia as having the status of a "nation" -- not just the politically inferior Yugoslav status of "nationality," or "national minority" -- and thereby entitled to its own republic and right of determination (*Belgrade Domestic Service*, July 2, 1990 [FBIS, July 3, 1990: 64-65]). The Albanian delegates also voted to annul a decision of the Provincial Assembly made in March 1989 that had approved amendments to the Serbian constitution diminishing Kosovo's autonomy as a province within the Serbian republic. The unusual venue of the meeting (outside the assembly building) was prompted by the Serbian government's decision, only 10 days earlier, to forestall Albanian political and constitutional demands by arranging for the adjournment of the Kosovo assembly (through its Serbian president), thus effectively locking out the elected legislators.

On September 7, ethnic Albanian delegates of the dissolved Kosovo assembly met secretly and drafted an 140-article constitution of the "Sovereign Republic of Kosovo." The Serbian government labelled the "so-called" constitution as an illegitimate action on the part of "a movement directly and exclusively targeted at the breaking up of the territorial integrity of Serbia and Yugoslavia" (*Tanjug*, September 13, 1990 [FBIS, September

14, 1990: 54]), and began steps to criminally prosecute those Albanian constitution-makers it could apprehend. Many of the rebel Albanian legislative deputies fled to the relatively more liberal environment of northwestern Yugoslavia, or abroad, while others urged their ethnic brethren to begin "Ghandian" type resistance to the Serbian authorities.

Meanwhile, near the end of September -- after four months of discussion -- the Serbian Assembly adopted a new constitution which in many respects amounted to a sovereignty declaration for Serbia. Under the new constitution (*Ustav Republike Srbije*, 1990), Serbia became "a sovereign, integral, and unified" state with the authority of its republican governmental bodies extending to the entire territory of Serbia, including its two "autonomous provinces." Under the new constitution the two provinces were permitted to exercise what is referred to as "territorial autonomy," but "cannot have the jurisdiction of a state." Moreover, if provincial or local authorities failed to implement regulations and laws adopted in Belgrade, republican organs of authority were empowered to ensure their implementation. For the moment at least, the new constitution essentially allowed Milošević and his political team to implement a strong-handed approach to Kosovo, and take independent action with respect to broader inter-regional issues.

Thus, while constraining Kosovo within some vague and bounded "autonomy," Article 135 of the new Serbian constitution provided republican authorities in Belgrade with wide latitude to "adopt acts seeking to defend the interests of the Republic" should Serbia face threats to its "rights and duties" from either the federation or "other republics." In a separate constitutional provision (Article 72) pregnant with political implications for the entire country, the Serbian republican government was also empowered to "maintain connections with the Serbs who live outside the republic of Serbia, working to guard their national and cultural-historical independence." One of the Serbian government's leading legal advisers explained that his republic's divergence from the federal constitutional structure was a natural reaction to the general fragmentation of sovereignty in the country.

Proclaiming their sovereignty, Slovenia and Croatia have changed their constitutions in which they have adopted a series of provisions contrary to the federal constitution, violating federal constitutionality in an obvious way. Slovenia has even challenged the primacy of the federal legal order. By this conduct they have liberated the other members of the federation from their [federal] constitutional obligations and opened the way to their independent conceptualization of their constitutional organization. Serbia is the first among the republics to adopt a new constitution, realizing the reality that the federal constitution practically no longer exists...(Jovičić, 1990: 22).

Having laid the constitutional groundwork for Serbian sovereignty, Milošević strengthened his position in December 1990 by winning a landslide victory (65 percent of the votes cast) for the presidency of Serbia. His newly formed Socialist Party of Serbia -- a fusion of the former Serbian League of Communists and its auxiliary Socialist Alliance -- also won 78 percent of the seats in the Serbian assembly. The fact that Albanians in the troubled province of Kosovo completely boycotted the Serbian election, however, cast a shadow on Milošević's otherwise impressive regional success.

Nationalism and the Courts: The Rise of Ethno-Political Justice

While Yugoslavia's "constitutional judiciary" proved unable to stem the disintegration of the country's federal system, the splintering of sovereignty and erosion of federal authority had a significant impact on the administration of justice. Perhaps most important in this regard were the changing locus and character of political influence on the Yugoslav judiciary, as well as new obstacles to the development of an independent and depoliticized political sector.

Political interference in Yugoslavia's judicial sector was, of course, not a new phenomenon and had been quite pronounced throughout the entire history of the communist regime (Čavoški, 1991; Trajković, 1987: 242-244). Thus, evaluations concerning the political suitability of individuals was a major criterion in the initial selection and re-election of judges, and also enabled officials in the League of Communists to wield considerable influence over judicial decision-makers. Despite the communist regime's novel self-management ideology and formal mechanisms for citizen participation, the judiciary remained an integral component of the one-party power structure, and judges constituted an important political sub-elite (Cohen, 1989: 257-296). Although party interference in judicial matters operated in a rather subtle and indirect manner during the last 25 years of communist rule (the purge of Interior Minister Aleksander Ranković and secret police apparatus in 1966 was a major benchmark in the liberalization of the justice system), and Yugoslav judges became more professionalized in terms of their qualifications, the legal system, nevertheless, continued to function as an instrument for the suppression of political dissidence, including ethno-political protest against the regime's nationality policies. During the 1970's and 1980's, for example, provisions of the criminal code designed to stifle "nationalistic propaganda" and "counter-revolutionary activities" were used to prosecute and convict hundreds of individuals alleged to have exceeded the boundaries of acceptable political non-conformism. Thus, convictions for "political criminality" increased noticeably following Tito's crack-down on the Croatian nationalist "mass movement" in the early 1970's, and again after the upsurge of Albanian nationalism which occurred about one year after Tito's death (Mrkić, 1984).

As the legitimacy and power of the League of Communists waned throughout Yugoslavia during the 1980's, conventional ideological considerations and the influence of ruling party officials diminished considerably within the judicial sector. In some localities judges were even emboldened to publicly attack communist authorities for excessive meddling in judicial matters.¹ During the late 1980's, the degree of interference in judicial decision-making by the League of Communists depended in large

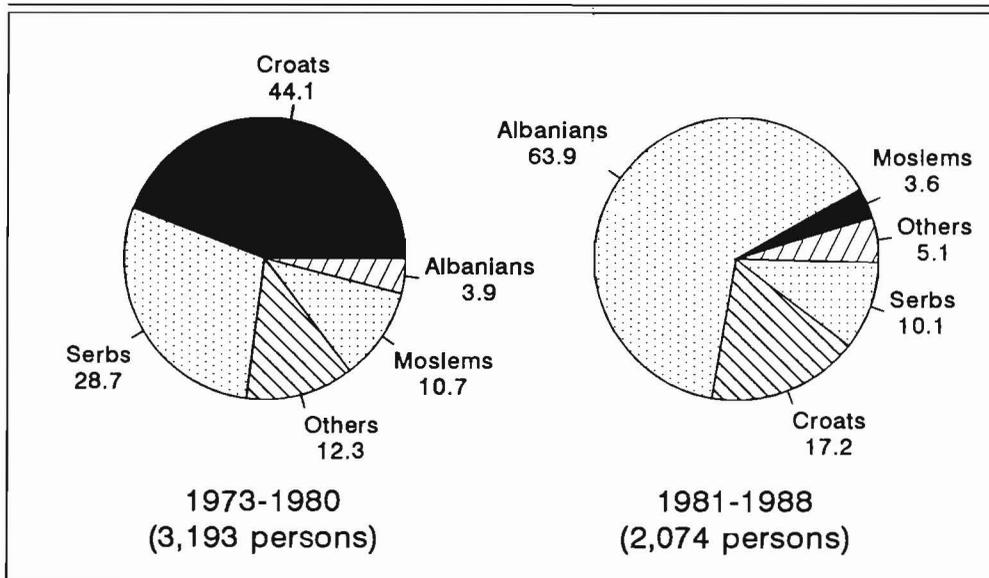
measure on that organization's power in particular regions and municipalities, and perhaps to an even greater extent on the personal "courage" of individual judges to maintain their professional independence (Ilić, 1990). By the fall of 1989, this situation led the Croatian republican Secretary of Justice and Administration to claim that Yugoslavia did not have "a unified legal system, nor a unified application of laws, nor unified action by judicial and other organs, which reflects upon the unity and future of Yugoslavia" (*Vjesnik*, September 10, 1989: 7 [FBIS, September 20, 1989: 54]).

The diminished grip of traditional Yugoslav communist ideology and officialdom on the judicial sector did not, however, mean an end to political interference in the administration of justice (Vasiljević, 1990). Thus, during the late 1980's and early 1990's, the judicial sector in the individual republics and provinces increasingly became another instrument with which emergent regional political elites could advance their nationalist strategies. In Serbia, for example, the political loyalty of judicial personnel no longer was assessed in terms of moral-political commitment to the principles of the Titoist regime, but rather by support for Milošević's amalgam of renovated socialism and ethnic populism. Indeed, Milošević took a special interest in ensuring the selection of judges who supported his views (Brkić, 1991). This new pattern of regime control over the judiciary led to the depoliticization of legal matters in terms of traditionally emphasized communist ideological criteria. At the same time, however, the administration of justice was repoliticized owing to regime pressure for adherence to the Milošević-inspired view of Serbian ethnic interests. Surveys of 206 communal and district judges in Serbia, conducted in 1988 and 1989, revealed considerable political intervention in the judicial sector, and an essentially "frightened" judiciary that was far from operating as an independent governmental sector (Mršević, 1991).

One of the most obvious consequences of this new pattern of control was the accelerated repression of Albanians in the province of Kosovo, and political interference in Kosovo's judicial sector. An illustrative case occurred in early 1988, when the Kosovo assembly removed a district court

judge from the bench because of his participation in Albanian nationalist demonstrations, and because he "remained silent when counter-revolutionary events which took place in 1981 were being assessed" (*Tanjug*, February 2, 1988 [FBIS, February 4, 1988: 59]). The same year, two Albanian deputy prosecutors were expelled from the League of Communists in Serbia (now under Milošević's control) for not "involving themselves" in activities to suppress Albanian nationalism and separatism (*Borba*, September 13, 1988 [FBIS, September 16, 1988: 47]). Harsh measures taken by Serbian and central government authorities to curtail Albanian protests following the abrogation of Kosovo's autonomy in March 1989 resulted in the deaths of more than 60 Albanians by mid-1990, as well as the imprisonment of hundreds of Albanian activists, and also led to the sharp polarization of the already very strained pattern of inter-ethnic relations within the province. Data on the ethnic composition of persons convicted for political criminality from 1973 to 1988 (Figure 1) also demonstrate the disproportionately high

Convicted Political Criminals Ethnic Composition, 1973-80 and 1981-88



(Savezni Zavod za Statistiku, 1989)

representation of Albanians among those prosecuted for anti-state dissidence during the 1980's (approximately 8 percent of Yugoslavia's population, but routinely two-thirds of all convictions for political crimes). While ethnic Croats constituted the principal target of the regime's effort to quash political nationalism in the 1970's, Albanian political criminality assumed the highest profile over the next decade.²

The most notorious case of political interference in Kosovo's judicial sector was the 1989 arrest and indictment of the popular Albanian communist political official, Azem Vlasi, on charges of "counter-revolutionary activity" in connection with his statements allegedly made to striking Albanian miners in Kosovo. Observers had little doubt that Milošević's public promise to an angry group of Serbian demonstrators in Belgrade that those responsible for the situation in Kosovo would be "punished and arrested" was behind the Vlasi affair. A member of the Serbian Academy of Sciences, Ljubomir Tadić, remarked for example, that "Milošević announced to the embittered crowd in that rally what had already been chart adopted in the [political leadership] forums, he announced what had already been decided" (Kelmendi, 1989). The incarceration and drawn-out trial of Vlasi and 13 other Albanian co-defendants during 1989 and 1990 proved to be a major political blunder by Serbian political authorities. Thus, Vlasi's ordeal and subsequent acquittal not only stimulated Albanian political mobilization and self-confidence, but also won the Albanians increased support in Yugoslav circles outside Serbia and in the international community.³

Albanian alienation and political dissidence intensified in Kosovo after Serbian authorities strengthened their administrative grip over the province in July 1990 by first taking control over the local security organs and militia, and then -- after the clandestine declaration of Kosovo's sovereignty by Kosovo legislators in July -- complete management of the region's governmental structure. Serbian officials undertook a widespread purge of Albanian officials who allegedly had shown support for Kosovo's separatism, including the dismissal of over 170 judges and judicial officials (along with the Albanian judge who had acquitted Azem Vlasi). Many

Albanian judges and lawyers also resigned their posts both in protest against the measures taken by the Serbian authorities, and in order to assist other Albanians accused of crimes. By April 1991, Albanians comprised only 51 percent of Kosovo's 240 judges, while Serbians and Montenegrins together constituted 46 percent of this sector, in a province that was approximately 90 percent Albanian in terms of its ethnic origins (Milošević, 1991; Barjaktarević, 1991).⁴

The rise of ethno-political justice was also at work in other regions of the country. In both Croatia and Slovenia, the 1990 electoral victory of center-right nationalistic political leaders committed to the political sovereignty of their republics had a significant and rapid impact on the administration of justice. The fact that a large number of the newly elected Croatian and Slovenian political leaders were disillusioned communists and former political dissidents who had been persecuted and imprisoned by the earlier communist regime, made changes in the judicial sector a particularly high priority for the post-communist leadership. Less than six months after taking power in Croatia, for example, the government of Franjo Tudjman had already replaced 280 judicial officials, including 14 presidents of district courts, 87 presidents of communal courts, the presidents of the Economic Court and the Administrative Court of Croatia, seven presidents of district economic courts, 13 district prosecutors, and 58 communal public prosecutors.

In October 1990 the Croatian legislature adopted a controversial new law which gave Tudjman's Minister of Justice wide latitude over the appointment and removal of personnel in the judicial sector. Judges and public prosecutors no longer were required to demonstrate their political suitability in terms of the regime's ideological perspectives, but under the new laws the top officials of the new regime would be able to decide whether judicial officials had the proper "human, working, civil and moral qualities" to fulfil their responsibilities. Some members of the legal community in Croatia objected that the broad discretionary power given to the Minister of Justice, as well as the vagueness of the new laws, threatened the independence of the Croatian judiciary in a manner similar to the

communists' former use of ideological criteria in judicial appointments and removal. One observer noted, for example, that the new law would result in the creation of a "state judiciary" in which judicial appointments were based on "newly devised" and "flexible criteria" (Nikolić, 1990: 26). Such concerns were soon heightened when new provisions were adopted making it illegal for judicial personnel to be card-carrying members of political parties. The new law clearly appeared to have as its aim the termination of former communist judges and prosecutors, while allowing their replacement by new judges supportive of the Tudjman government (although not necessarily members of his Croatian Democratic Alliance). Reservations were also expressed concerning the lack of parliamentary debate prior to the adoption of the new legislation, as well as about the centralization of future judicial recruitment and the inability of Croatian judges to appeal personnel decisions made by the Minister of Justice (Gregović, 1990; Crnjaković, 1990). One former reform communist leader also suggested that empowering President Tudjman to appoint judges to the republican Constitutional Court, as well as to a judicial council that would select (together with the Minister of Justice) judges and prosecutors, had the potential of creating a new one-party state (Tripalo, 1990).⁵ In their defense, members of the Tudjman government claimed that the new legislation was simply designed to strengthen judicial professionalism and independence, as well as to improve the public perception of the courts by eliminating ideological pressures on judges (Babac, 1990).⁶

The decision of the Tudjman government to purge judicial officials from the old regime was designed to achieve both political and ethnic goals. Thus, the disproportionately high representation of ethnic Serbs in Croatia's justice system during the communist regime made the judiciary an attractive target for post-communist nationalist forces in the Zagreb government who wished to reduce the influence of the Serbian minority in the republic. Indeed, as tension escalated between the republic's government and the Serbian community during the summer of 1990, Tudjman and other Croatian officials publicly reiterated the unacceptability of maintaining a republican police force that was approximately 60 percent Serbian when Serbs

constituted only 12 percent of Croatia's population (*Vjesnik*, August 15, 1990: 3 [FBIS, August 25, 1990: 37]). Meanwhile, in those regions of Croatia where Serbs constituted a majority, police and judicial officials of Serbian origin expressed strong opposition to new constitutional provisions mandating the use of traditional Croatian insignia on uniforms, police equipment, and in the courts (for many Serbs bringing back memories of the Independent State of Croatia that was allied to Nazi Germany).

By the fall of 1990, inter-ethnic relations had "stabilized" somewhat in the Serbian majority areas, but local Serbian officials continued to challenge the sovereignty of the Zagreb government. Fearful that the new republican laws governing the appointment and removal of judicial officials would lead to a purge of Serbian personnel, members of the communist opposition in the Croatian legislature (whose caucus included a substantial contingent of ethnic Serbs) lobbied successfully for a temporary halt to the replacement of judicial officers in "nationally mixed regions" of the republic. The lull in Serbian-Croatian tension, however, proved only temporary. When the Tudjman government proceeded with the proclamation of Croatian sovereignty, and adopted a new constitution for the republic in December, political leaders in the Serbian majority areas of Croatia responded by proclaiming a statute which purported to establish a new inter-communal governmental unit, the "Serbian Autonomous Region." The Constitutional Court of Croatia moved quickly to invalidate the Serbian act, just as the Court had done with respect to the earlier Serbian Declaration of Sovereignty adopted during the summer. In the spirit of Yugoslavia's disintegrating and regionalized legal system, however, the Serbian communes of Croatia exhibited the same disdain for the republican Constitutional Court's rulings as the Croatian government persistently demonstrated toward the decisions of the federal Constitutional Court.

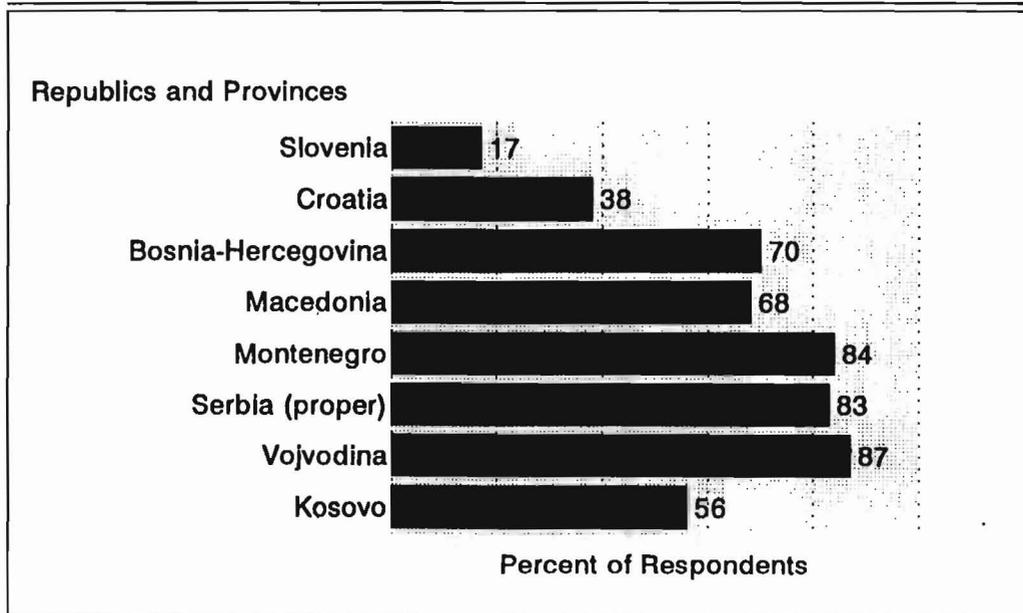
Conclusion: Post-Federalism's "Marvelous Chaos"

At the end of 1990, Yugoslavia's major republics had become self-contained political units that were constitutionally equipped -- in stark contravention of rulings by the highest judicial and legislative bodies -- to challenge, or indeed completely scrap, the enfeebled federal system. Thus, Serbia and Croatia, the two largest republics and traditionally the principal influences on Yugoslav cohesion, were governed by nationalistically oriented and popularly legitimated leaders devoted to sharply conflicting visions of the country's future political and economic organization. Slovenia, the economically most affluent republic in Yugoslavia, sympathized with Croatian demands for the establishment of a "confederation of sovereign states," but its leaders were also poised for unilateral secession from the existing federation should inter-republican negotiations on a new state end in failure.⁷ At this point, it remained unclear whether regional leaders would use their enhanced sovereignty to strike a bargain and preserve a restructured, but unified state, or alternatively, if they would pursue strategies making state dissolution inevitable. Federal Prime Minister Marković valiantly endeavored to maintain a semblance of state cohesion as the country drifted apart, but he remained unable to secure support for either the holding of multi-party federal elections (Slovenia was most strongly opposed), or the adoption of long-proposed amendments to the federal constitution that might re-legitimize federal governmental institutions. In late December, Marković called a meeting of government leaders from all the republics in order to "reach an agreement on minimum assumptions for the functioning of the federal state until the final agreement on the future state structure." He added that: "Yugoslavia must decide whether it will stop the current erosion of the functioning of the legal and economic systems and create normal conditions for reaching an agreement on new options for the future or continue with practices which inevitably lead to anarchy and chaos" (*Federal Executive Council*, 1990).

There was some evidence that elite-led regional nationalism during 1990 stimulated, and was in turn supported by trends in the general population. For example, a country-wide public opinion survey of 4,230 citizens conducted between May and July 1990, revealed very low levels of public support in Slovenia (17 percent) and Croatia (38 percent) for the notion that federal constitutional provisions should have precedence over republican constitutions (Figure 2). The percentage of those individuals surveyed from Croatia who supported the supremacy of the federal constitution dropped even lower -- from 38 to 28 percent -- when only ethnic Croats in that republic were considered separately. In contrast, citizens of

Federal vs. Republican Constitutions

Percent of Sample Agreeing the Federal Constitution Must Be Paramount, 1990



Source: *Sta Misli Jugoslavija*
Belgrade: Savezno Izvršno Veće, 1990;31

Bosnia-Hercegovina (70 percent), Montenegro (84 percent), Serbia (83 percent), and especially in the very Yugoslav-oriented province of Vojvodina (87 percent), were more supportive of the principle of federal constitutional supremacy. Interestingly, although citizens in Serbia were in the top rank of those supporting federal control, in actual practice, Milošević and the Serbian regime behaved similarly to the leaders of Slovenia and Croatia when it came to adopting constitutional provisions and policies at variance with the federal constitution (Oprijan-Ilić, 1992).

As the struggle to maintain Yugoslav state unity entered a critical stage in 1990, the country's "constitutional judiciary" which had been a pillar of "socialist legality" within the Titoist and self-management legal order, proved helpless to prevent the collapse of the federal system. Indeed, the Yugoslav case is a vivid illustration of just how contingent judicial authority is upon regime legitimation. Courts can assist political leaders in preserving a federal union, but the authority of judges and judicial sanctions ultimately depends on political will and political support. Near the end of 1990 -- months after the deadline had expired for republican and provincial compliance with federal judicial decisions regarding the repeal of unconstitutional amendments -- the new president of the Constitutional Court could only lament the depleted authority of his institution, and what he called the "constitutional-legal confusion" in his country:

...the decisions of the Constitutional Court are obligatory, their implementation is secured by the Federal Executive Council, and we can demand that measures are taken against the responsible people if they do not implement them. That opinion goes so far, reality is something else....The problem is the different conceptions of the legal nature of [Court] opinions. In one view it has the force of a decision, but according to others it is only an evaluation, that is "information," but the elimination of contradictions is a question of political mediation. In place of the elimination of contradictions, we see the adoption of new amendments to the republican and provincial constitutions...and these amendments and the constitution

of Serbia contain provisions which are in contradiction to the constitution of Yugoslavia (Buzadžić, 1990).

While the inherent murkiness of constitutional provisions relating to the actual paramountcy of the Constitutional Court over inter-regional matters undoubtedly assisted those political forces in the country seeking to ignore the Court's decisions, it was the political polarization of the country which fatally undermined the rule-of-law and the authority of federal institutions. In November, for example, Prime Minister Marković once again requested the federal Constitutional Court to assess the constitutionality of the various sovereignty-seeking legal provisions adopted by Serbia, Croatia, and Slovenia during 1990. Given the steady decline in the legitimacy of federal judicial and political authorities, however, there was little expectation that the three republics would pay heed to the Court's rulings.⁸

As the constitutional system fractured, the country's legal system reverted toward the "marvelous chaos" which had been the hallmark of public law and legal administration prior to (and even immediately after) the creation of the Yugoslav state in 1918 (Beard and Radin, 1929: 275). Moreover, the administration of justice was increasingly subject to political pressures from recently ascendant nationalist parties which, although programmatically committed to the rule-of-law, and also to the "depoliticization" of the judiciary, were nevertheless all too prepared to utilize the judicial sector and legal system for their own political goals. Particularly among Albanians in Serbia, and also Serbs in Croatia, there was warranted apprehension that ethno-political justice had replaced "socialist legality" as the ruling ideology of the judicial system. Communist political control over the courts had largely been eliminated, but Yugoslavia as a whole, and its nascent successor states, were still a long way from the creation of an independent judiciary, let alone a post-communist *rechtsstaat*.

Epilogue:

State Disintegration, Ethnic War, and Legal Regression

"We said [before the elections of 1990] that neither the secret nor regular public police will be permitted to become involved in political intrigue. We will not judge people for political crimes....But you know that many dubious cases occur in areas of military operation where at this moment it is very difficult to arrive at the truth."

*Josip Manolić, President of the Croatian Bureau for
Defense of the Constitutional Order (January 7, 1992)*

"At that moment when the [Constitution of Yugoslavia] practically ceases to exist, then there is no Constitutional Court....Does the Constitution exist today? -- For me it clearly no longer exists."

*Milovan Buzadžić, President of the Yugoslav Constitutional
Court (January 25, 1992)*

During the first six months of 1991 the Yugoslav federation virtually ceased to function as a unified state. An extensive round of negotiations among regional and federal leaders failed to reconcile proposals by Slovenia and Croatia for a loose confederation, with calls by Serbia and Montenegro for a reconstructed, but essentially centralized federation. Efforts to find a compromise in the confederation-federation debate were made by Ante Marković's federal government, and also by the leaders of Bosnia-Hercegovina and Macedonia, but they did not succeed in resolving the sharp disagreements among their increasingly polarized colleagues about the state's future shape. In mid-March inter-regional disputes reached a boiling point when the representatives of Serbia and Montenegro in the

federal presidency temporarily resigned, and indicated they would not participate in the break-up of Yugoslavia. Although those representatives soon returned to their posts, federal political institutions, including the Constitutional Court, no longer enjoyed country-wide legitimacy.⁹ Two months later -- when the Croatian representative in the federal presidency was scheduled to assume the annual chairmanship of that body -- the previously automatic rotation to the post was blocked by a pro-Serbian coalition comprising half of the presidency's members. Explaining this transparent political ploy that had enabled them to circumvent the rules of the presidency, the Serbian representative observed: "The Constitution is one thing, but practice is something else" (Loza and Šarac, 1991).

By late spring, the stalemated elite-level negotiations, and the bleak outlook for future inter-regional cooperation had seriously exacerbated inter-ethnic tensions in various parts of the country. In the heavily Serbian populated communes of Croatia, for example, ethnic friction and citizen anxiety were heightened by the possibility that Croatia's achievement of some kind of confederal status, or even outright independence, would leave the republic's minority Serbs at the political mercy of the majority Croats. The Croatian government's decision to sever its legal ties with the federation was especially disconcerting to the republic's Serbian community. As a local Serbian police officer in Croatia's militant Serb-majority enclave of Knin remarked in mid-April 1991 with regard to the jurisdiction of the Croatian authorities: "If they don't respect federal laws, its our right not to respect their [republican] laws" (Crawshaw, 1991). Such views were quite common among members of Croatia's Serbian minority, and were used as justification for sporadic armed resistance to the control of the Zagreb government throughout much of 1990 and the first half of 1991.

Ethnic polarization elsewhere in the country also tended to fracture the unity of the legal system, and undermine the rule-of-law. In Bosnia-Herzegovina, for example, a striking case of ascendant ethno-political justice derived from the tripartite (Moslem/Serb/Croat) coalition of ethnic parties that had been governing the republic since the election of 1990. Leaders of the three dominant ethnic parties in the coalition government --

the [Moslem] Party of Democratic Action (SDA), the Serbian Democratic Party (SDS), and the Croatian Democratic Alliance (HDZ) -- not only controlled the selection of personnel in the police, judiciary, and legal administration (an ethnic "quota" system similar to the ethnic "key" operating in the former communist period), but were also able to intervene in the legal process on behalf of their ethnic constituents and ethnic interests. In mid-June 1991, Bosnia-Herzegovina's Minister of the Interior, Alija Delimustafić, publicly admitted that the operation of his ministry was completely stalemated by the "Lebanonization" of the police, and that the leaders of the three ethnic parties enjoyed influence which placed them above the law. He pointed out, for example, that if someone "interesting" happened to be arrested, the top party leaders "Izetbegović (SDA), or Karadžić (SDS), or Kljuić (HDZ) depending on the case, say: 'don't keep him, he is a good Moslem, or Serb, or Croat, (depending on the case), he gave 10,000 Marks to our party.'" Delimustafić also claimed that the intervention of ethnic parties in the allocation of jobs in Bosnia-Herzegovina exposed the administration of justice to "classic corruption," weakened the professional standards of the police, and reduced the authority of his ministry over police recruits who had essentially become segmented "party police" (Pusonjić, 1991; Tomić, 1991; Habul, 1991).

The decision by Slovenia and Croatia to unilaterally proceed with their plans for full sovereignty and independence at the end of June 1991, opened an entirely new phase in the "Yugoslav crisis." In the Slovenian case, the republic's assertion of independence precipitated a short war between Slovenian forces and the Yugoslav People's Army (JNA). The war in Slovenia ended in a debacle for the federal military forces; a cease-fire; and finally the JNA's decision to withdraw entirely from Slovenia. During the seven-month period from the cessation of hostilities in mid-July 1991 to the international recognition of Slovenian independence in mid-January 1992, the Slovenes skillfully concentrated on the further "disassociation" of their internal political institutions from the disintegrating Yugoslav state. The disassociation process included the development of a judicial branch and legal system completely autonomous from the Yugoslav federation, albeit

still not entirely politically independent in relation to other political actors within the new Slovenian state. The Croatian quest for state independence was far more difficult. Thus, the Zagreb government's decision to depart from the Yugoslav federation quickly led to an armed conflict between Croatian police and military forces on the one side, and forces from both the Serbian-led JNA and local Croatia-based Serbian militia on the other. By early 1992, the war in Croatia had taken the lives of approximately 10,000 persons, and resulted in nearly one million refugees from the various war zones.

The Serbo-Croat war not only intensified the trend towards regionalized and ethno-political justice discussed earlier in this study, but was also a major setback to the establishment of the rule-of-law and democratic transition in regions either directly or indirectly connected to the armed struggle. In Croatia, for example, the government headed by President Franjo Tudjman took a number of steps which had the effect of at least temporarily curtailing the maintenance of civil liberties and democratic competition. Some measures, such as bans on the reporting of news from selected frontline areas, and passage of a "Law on Information Under Wartime Conditions" constituted forms of censorship not atypical for a state involved in a struggle for military survival. As the war progressed, however, the Tudjman government also adopted a broadened package of wartime decrees that gave his regime considerable authority to take legal measures against any individual or group identified as seditious. While the new legal provisions were primarily initiated in response to acts of alleged anti-state "terrorism" by the rebellious segments of the Serbian minority, the same measures would also be utilized by the regime against allegedly disloyal and seditious members of the ethnic Croatian political opposition. Indeed, during the fall of 1991, Croatian authorities took advantage of their broader legal powers to enhance the political position of President Tudjman's Croatian Democratic Alliance, which together with a number of allied parties, made up the "Government of Democratic Unity."

The most egregious use of state legal authority by the Tudjman regime against political enemies was the November 1991 arrest by Croatian

police of the Croatian ultra-nationalist leader, Dobroslav Paraga, and his deputy, on charges of "attempted armed rebellion." Paraga, President of the Croatian Party of Rights (HSP), who also directed a paramilitary group known as the Croatian Defense Association (HOS), had severely criticized the government for its conduct of the war, and attacked the communist background of President Tudjman and several leading members of the regime. Paraga and other leading HOS figures were apprehended under a new Croatian law which empowered the police to arrest and detain suspects without pressing charges for six days.¹⁰ As Croatia lost larger and larger portions of its territory to the Serbian-led JNA and Serbian irregular forces, Tudjman found Paraga's criticism both increasingly embarrassing and politically threatening. Moreover, the participation of thousands of ultra-nationalist followers of Paraga in the Croatian military and police forces -- who openly supported the record of the wartime Independent State of Croatia allied to the Axis powers -- exposed Tudjman to international charges of encouraging pro-fascist elements in the new Croatian state.

A spokesman for Paraga's Democratic Party of Rights claimed that the arrest of their leader and his colleagues by the Tudjman government signalled "the end of legal rights for citizens in this [Croatian] state" (Tanner, November 23, 1991). Other members of the Croatian opposition also claimed that the regime's wartime edicts, and especially the crackdown on the HSP and HOS, revealed a "return to totalitarianism," and the formation of a "police state" in Croatia (Budak, 1992). A member of the Croatian government responded that while the new laws did provide President Tudjman with considerable potential power to repress sedition, he had no intention of abusing such powers, and in any case, would be subject to the restraint of other "constitutional factors" (Seks, 1992; see also, Vekić, 1991). However, another member of the government, Croatia's Minister of Justice, acknowledged that the danger of undue police and political influence was very real, although the example he gave as a standard for improving the situation was somewhat worrisome with regard to the future of the new state:

We inherited a [communist] structure that included the horrible restraints of exercising sanctions over the internal operation of the judiciary and police. Bolshevism isn't membership in a party. Bolshevism is a mindset. Bolshevism is a hierarchy and a pyramid of obedience. Many people can't extricate themselves from the protective armour of their past and [former] mindset of Bolshevism....It would be inadmissible [today] for someone from one ministry to intervene in the work and jurisdiction of another [ministry]. These same people from the secret police must realize that even the Gestapo respected judicial directions. Disregard of legal decisions is the first step toward abandoning a legal state, and a transition into anarchy (Mišetić, 1992).

While the Serbo-Croat war clearly impeded the process of democratic transition, and the establishment of the rule-of-law in Croatia, the general atmosphere of ethnic polarization and military struggle also accentuated the anti-pluralistic and authoritarian features of the Milošević regime in neighboring Serbia. Having successfully cast himself for many years as the spokesman of Serbian interests, Milošević politically benefitted -- at least in the initial stages of the war -- from his outward enthusiasm for the Serbian cause in Croatia. Thus, as a wave of popular and elite support for that cause swept Serbia in the fall of 1991, the sharp differences between Milošević's ruling Socialist Party and various segments of the weak Serbian political opposition were temporarily overshadowed by the same kind of "defensive homogenization" that was taking place among political forces in Croatia (Lukić and Vuković, 1992).

Having intimidated and somewhat neutralized Serbia's fragmented political opposition through the use of tanks against protest demonstrations in March 1991, Milošević was relatively well-positioned to claim the mantle of wartime ethnic leader, defender of Yugoslavia, and protector of the Serbian minority in Croatia. While popular support for the war would rapidly evaporate in Serbia as its human and material toll became more apparent, the general wartime atmosphere of tension, anxiety, and nationalist fervor was hardly conducive to orderly pluralist development and a transition

to democratic rule. The wartime atrocities and other acts of "wild justice" committed by some forces on both sides during the Serbo-Croat war also undermined the establishment of the rule-of-law in a disintegrating Yugoslavia during this period, but is a topic which goes beyond the scope of the present study. Thus, many who opposed the war, and particularly an ever-larger proportion of Serbian men who evaded federal military service, did so through self-exclusion from the political process, rather than through active participation in the political system.¹¹ Meanwhile, Milošević and his ruling Socialist Party used their large majority in the Serbian parliament (194 out of 250 seats), to exercise unencumbered tutelage over government agencies, including the judiciary and police. In the view of one critical Serbian observer:

Power in Serbia is only formally divided into executive, legislative and judicial [branches]. In essence, it is unified power, which is subordinated to the executive, or more precisely to Mr. Milošević personally. The laws adopted have more of a party than a state character. What else could be expected when the [legislative] committees initiating them consist of people from only one party? After all, judicial authority is still under firm control, the only difference being that [communist] committees are replaced by committees of the SPS [Socialist Party of Serbia]. The best indicator of the judiciary's loyalty is that the SPS and its power-holders have not yet lost a single court case (Prokopijević, 1991).

A Belgrade specialist on the Serbian judiciary, the criminologist, Dr. Vladen Vasilijević, has also pointed out that the nearly three thousand judges in his republic, who are scheduled for re-election during 1992, have been operating in conditions of "great insecurity."

The authorities can dispose of them as they wish, not only because of the re-election, but also because of the announcement that the number of judges will administratively be decreased by 20 percent.

The pressure of the SPS on the judiciary is evident, particularly in matters of political crime, where it is even greater and unconcealed. The supreme farce is the fact that in the election of judges the Ministry of Justice will have the decisive word, and that means the government of Serbia. So paradoxically, 'the rule-of-law' works in our midst so that he who needs to be controlled elects precisely the one who controls him. The final decision belongs to the legislature, in which the opposition is powerless, and that means the entire re-election of judges transpires as a symbolic act of obedience and suitability, as in all party states....Because of that it is completely possible, that, as, prior to ten years ago, the best judges 'who are not considered reliable' abandon their profession to make place for obedient and unspecialized people (Stefanović, 1992: 21).

As the propaganda battle between Serbia and Croatia accelerated during the last months of 1991, Milošević also utilized his party's strong influence over the established press and the electronic media in Belgrade to whip up support for the government's views. A lively free press was able to express alternative perspectives, but problems of access to television, radio, and the larger newspapers severely limited the opposition's ability to either effectively compete with the ruling decision-makers, or to hold the Milošević government accountable. Through its media outlets the regime sought to take credit for any Serbian victories in the ongoing struggle in Croatia, while simultaneously promoting "Serbian patriotism," and the need for "all-Serbian unity" (Radovanović, 1991). The war also provided Milošević with a further pretext for tightening Serbian military and police control over the Albanian population in Kosovo, particularly in view of contacts between the Croatian government and various Albanian opposition forces. Belgrade's repressive hold over Kosovo may have temporarily prevented the Albanians from opening an anti-Serbian "second front" in sympathy with Zagreb, but vocal and non-nationalist members of the Serbian opposition warned that Milošević's heavy-handed policy was short-sighted: "If Belgrade continues to stifle Kosovo with its military rule and political lawlessness, all Albanians will unite against it....Nothing can be done in

Kosovo until Belgrade lifts its emergency status and police anarchy" (Veselinov, 1992).

Publicly, Milošević claimed that the Serbian regime was only offering humanitarian and moral assistance to Croatia's Serbian minority. While the war was not fought in the republic of Serbia, the citizens of Serbia were, nonetheless, deeply affected by the war through the presence of thousands of Serbian conscripts serving in the JNA; by Serbian volunteer forces that crossed over into Croatia; and by the arrival in the republic of thousands of Serbian refugees from Croatia. By the end of 1991, as Serbian casualties in Croatia mounted, and as the political and economic costs of the war also intensified (in terms of Serbia's international and economic isolation, disrupted productivity, military expenditures, and the costs of caring for refugees), "Milošević's war" became highly unpopular in Serbia. It was at this juncture that Milošević agreed to a United Nations monitored cease-fire in Croatia, and also abandoned his support for leaders of Croatia's Serbian minority who were urging a continued struggle against the Zagreb regime. Thus, while the war had initially strengthened the authoritarian hold of the Belgrade regime, and also impeded the emergence of a strong political opposition in Serbia, the aftermath of the struggle threatened to shake the foundations of Milošević's control over the Serbian community both within and outside his own republic. Milošević's weakened political position also made it more difficult for him to manipulate the judicial process against political opponents. For example, while Milošević successfully engineered the laying of criminal charges in early 1992 against opposition party leader, Vuk Drašković -- for the latter's alleged role in the deaths and injuries that occurred during the March 1991 protest demonstrations in Belgrade -- the regime decided not to proceed with what would have been an essentially political trial, and which might have had the effect of turning Drašković into the "Dreyfus of Serbia" (Bujošević, 1992b). Despite such limitations on regime control, however, Milošević's defeat by the squabbling Serbian opposition appeared unlikely, nor did he appear ready to unilaterally relinquish control. As his wife revealingly told a newspaper interviewer: "No wisdom, education, imagination or talent seems as important as wielding

political power in the Balkans. This order of things is older than ideology and politics. It is almost universal" (Marković, 1992).

The recognition of Slovenia's and Croatia's independence in mid-January 1992 by the 12-member European Economic Community and other countries, together with the agreement of political authorities in both Zagreb and Belgrade to permit a United Nations contingent to enter the territory of the former Yugoslav state as a peace-keeping force, contributed to a temporary lull in the Serbo-Croat war.¹² The problems that had originally motivated the struggle in Croatia, however, and especially the troublesome "Serbian question" remained unresolved. Until some solution is found to the problem of Serbian minority communities outside Serbia, and particularly in the very diverse ethnic environment of Bosnia-Herzegovina (43% Moslem, 32% Serb and 17% Croat), any sustained cessation of violent conflict, and establishment of the rule-of-law, within and among the successor states of the Yugoslav federation, remains highly doubtful.*

* As the United Nations prepared to dispatch peace-keeping troops to Croatia and Bosnia-Herzegovina in late February 1992, both Serbian and Croatian ultra-nationalist hardliners reiterated their strong opposition to such external intervention. In the Serbian minority enclave of Knin, many nationalist leaders were particularly worried that UN troops would be used by Zagreb to re-establish Croatian control over predominantly Serbian communities. Serbian fears were heightened by Croatian government requests to have a voice in the composition of local police forces in Serbian minority areas, contrary to the provisions of the UN brokered agreement. Meanwhile in Zagreb, Croatian nationalists bitterly criticized President Tudjman for acquiescing in UN and Serbian minority police control over large portions of their newly sovereign state that had fallen under the control of the local Serbian forces and the essentially Serbian JNA during the war in Croatia. Peace-keeping efforts were also threatened by the strong opposition of Bosnia-Herzegovina's Serbian community to Croatian and Moslem efforts at transforming that region into an independent state.

Notes

1. For example, in 1986 three judges in the Serbian town of Čuprija went on a two-day public hunger strike to protest party interference in their work. The municipal assembly dismissed the judges from their posts and they were subsequently expelled from the League of Communists. Although all three judges were refused reentry into the party, their dismissal from the bench was set aside by a higher court and they subsequently all returned to work (Tomić, 1990).
2. In February, 1991 Yugoslavia officially claimed to have 91 individuals in prison for political crimes, of whom 85 were Albanians, in addition to two Moslems, two Serbs and two Croats.
3. One hopeful development in Yugoslav law during 1990 was new federal criminal legislation ending prosecution for so-called "verbal misdemeanors" under the notorious Article 133 of the federal criminal code. Unfortunately, judicial authorities in Serbia continued to utilize similar provisions of their republic's criminal code to intimidate members of new political parties opposed to Slobodan Milošević (Popović, 1990).
4. Extensive interviews in Serbia and Kosovo during October 1990 by a delegation of the Committee on International Human Rights of the Association of the Bar of the City of New York concluded that "the politicized judiciary makes application of the rule-of-law in Kosovo virtually impossible. The high degree of polarization along the lines of ethnic and national allegiances has led to the perception that it is impossible to receive a fair trial, simply because an ethnic Albanian judge would favor an Albanian, just as an ethnic Montenegrin judge would favor one of his kinsman" (Galligan *et al*, 1991: 246).
5. In Slovenia, the new government's gradual removal of judges from the old regime prompted one former communist official to suggest that republican authorities were utilizing an "ideological approach" to judicial recruitment that amounted to "an attempt to introduce a new totalitarianism in the judiciary" (Smole, 1990: 50-51).
6. A decision by the Croatian government in December to eliminate so-called "Courts of Associated Labor" connected with the former regime's self-management structure proved less controversial than the changes in judicial recruitment. In early 1991, the Croatian government adopted new rules which required that judges elected to the republic's Constitutional Court be lawyers with at least 15 years of legal experience. The adoption

of this entirely new provision was purported to replace the communist notion of political "suitability" for judicial appointment with the criterion of "capability" (Crnjaković, 1991).

7. On October 4, 1990, the presidencies of Croatia and Slovenia published a draft model of a confederal agreement designed to replace the current Yugoslav federation. The model included provisions for a "confederal court" to be chosen by the "member states of the alliance" and composed of judges serving for six-year terms. The model envisioned that any member state could file a grievance with the court against another member state for not fulfilling its duties in accordance with the confederal "Treaty." If the court found that a member state had not fulfilled its obligations, the Confederation's Council of Ministers would be responsible for implementing the ruling.

8. In January 1991 the federal Constitutional Court ruled that key elements of Slovenia's July 1990 declaration of sovereignty were unconstitutional and also annulled several pieces of legislation which had been adopted by the Croatian and Serbian legislatures. The court rulings had little effect, however, on the political assertiveness of the offending republics. For example, in February Slovenian and Croatian lawmakers voted overwhelmingly to formally annul the validity of all federal laws affecting their republics. Slovenia (February) and Croatia (May) also indicated their intention to leave the Yugoslav federation by the end of June, 1991 if no new arrangements were decided upon among the various republics to establish a new confederative form of regime organization, positions which were overwhelmingly supported by referendums held earlier in those two republics.

9. During the last six months of 1991, the representatives of Slovenia and Croatia in the Constitutional Court stopped attending meetings of that body, explaining that their two republics were now independent. However, because the two former judges did not formally tender their resignation to Yugoslavia federal legislature, the president of the Court argued as late as the end of January 1992, that all of the republics were still technically represented. He also suggested, that he would personally only consider resigning from the Court if it would begin to adhere to, or come under the influence of one "political line" (Oprijan-Ilić, 1992).

10. In addition to jailing Paraga and his deputy, Milan Vuković, Croatian authorities also arrested Mile Dedaković, an HOS member and popular former chief of defence in Croatia's eastern Slavonian city of Vukovar which fell to Serbian forces at the end of November. President Tudjman accused Dedaković of having "sabotaged the defence of Vukovar," having ties with the Yugoslav counter-intelligence service, and attacked the Party of Rights and the HOS for "using fascist symbols and references to the Ustashe." Meanwhile, Dedaković and other HOS figures placed blame for the fall of Vukovar on Tudjman and

claimed that the Croatian President used the loss of the city as a pretext for settling his accounts with right-wing critics (Lebor, 1992). When a Croatian judge from the Zagreb district court allowed Dedaković to go free, ruling that there was insufficient evidence against him, the independent-minded judge received mobilization orders within hours for military service with the Croatian armed forces. The judge was demobilized three weeks later, and returned to his regular court duties.

11. A weak, but growing and organized anti-war movement did emerge in Serbia during the fall of 1991, but opposition political parties kept their distance from the movement until the war became highly unpopular near the end of the year (Bujošević, 1992a).

12. In evaluating applications for recognition by successor states of the Yugoslav federation, the European Community established an arbitration panel of five judges attached to its "Conference on Yugoslavia," headed by French jurist Robert Badinter (along with a Spaniard, a Belgian, a German, and Italian), to determine if applicant states were ready to guarantee the rights of minorities, and implement human rights agreements. The Badinter group had no difficulties with Slovenia's application, but indicated that Croatia's constitutional treatment of Serbian minority rights was still not fully acceptable. Just prior to EC recognition of Croatia, however, President Tudjman gave written assurances to Badinter and the EC Presidency that Zagreb would take measures to correct matters. Tudjman's commitment would require that Croatia accord a "special status" for areas where the Serbian ethnic minority is in a majority, allow those Serbian communities to use their own national emblems, to have their own regional police forces, and their own educational systems (Crawshaw, 1992).

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