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EXCHANGE OF VIEWS ON THE DRAFT CONSTITUTION OF THE RUSSIAN FEDERATION (17 February 1993)

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The Draft Russian Constitution and the Presidency

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The two most recent drafts of the Russian Constitution (March 24, 1992 and November 13, 1992) establish a political system based on the idea of presidentialism. I wish to comment on the theory and practice of presidentialism from the viewpoint of western experience. The essence of any presidential system is that the Head of State is involved in the actual guidance of government and is independent of the legislative branch by virtue of the separation of powers. Constitutional lawyers speak of the "irresponsibility" of the president but the notion must be taken with a grain of salt. I say this because when a country has a presidential form of government the natural mode of election is by popular vote. If the President may be reelected it is clear that he is responsible to the people at the end of his mandate. Additionally, there are other forms of responsibility that may sanction a president other than a parliamentary vote of no-confidence, the chief of which is impeachment.

In the west, presidentialism is known under two main forms: the presidential system that exists in the United States and the semi-presidential system practiced in France. Both of these varieties share common features but there are significant differences between them. They are alike in that the President of both countries is not only the Head of State but also plays an active role in the conduct of the government, though of course to a degree that differs from one case to the other. The main difference lies in the way in which presidential power is balanced against the other powers of government. Presidentialism calls for a constitutional balance of powers yet this balance can be achieved in various ways. A sketch of the U.S. and French presidential systems and a comparative analysis will be useful to see if, and how, the Russian constitutional design fits within the western models of presidentialism.

The U.S. Model of Presidentialism

The U.S. presidential model, the longest standing in history, is characterized by two essential features. Fundamentally, it has its historical origins in the late eighteenth century which was the dawn of modern constitutionalism. The lockean doctrine of separation of powers was written into the U.S. Constitution which is the

first rigid -- meaning that the constitution has supremacy over ordinary law -- ever established. The second key aspect of U.S. presidentialism is that it is interwoven with federalism. The federal principle is so rooted in the U.S. constitution that the popular election of the President is tied to a vote by states through an electoral college. The lockean influence stems from the fact that English political thought was well known to the framers who borrowed from English constitutionalism the idea that the Chief Executive should be the sole organ to have a constitutional monopoly of executive power. In this sense, the figure of the U.S. President derives from that of the English monarch theorized by Locke as a power separate both from the legislature and the judiciary.

In the U.S., balance of power means separation of power. Yet, separation was conceived in a manner which doesn't preclude reciprocal checks. For example, laws are made by Congress but the President has the power to initiate legislation. Whereas it falls within the domain of Congress to approve or disapprove presidential bills and to control the budget through the power of the purse, the President possesses the veto power. And, while the President has the power to appoint federal officials and judges, as well as to make treaties, he can perform these functions only with the consent of the U.S. Senate.

In the U.S., Congress and the Supreme Court have always proved independent of the President. In the English tradition bar and bench merge to form an aristocracy of the robe. Conversely, one of the distinguishing characteristics of the U.S. form of government is a Supreme Court which exercises judicial review of legislation and acts as the authorative interpreter of the Constitution.

The U.S. presidential system has survived for over two centuries. What is the secret of its viability? Its seeming weakness is that powers are divided as due to the two-party system a President of one party may be forced to work with a Congress dominated by a maiority of the other party. Foreign observers have taken pains to point out that when the executive and legislative branches are controlled by different parties political stalement may result. However, the balances inherent to the U.S. system have not prohibited the government from functioning. The rigidity of

separation has been qualified and tempered by the flexibility of the political process.

It is well known that political parties in the U.S. are not ideologically based to the extent heretofore thought to be typical of their European counterparts. The pragmatic strand running through both U.S. parties allows for the possible emergence of either a bi-partisan policy (particularly in the field of foreign affairs) or a floating majority in Congress which may support the President across party lines.

It should also be emphasized that with the rise of the U.S. as a superpower, federalism has not thwarted presidential power in the field of foreign affairs. The states in the federal system have little external relevance as they hardly ever carry weight in the conduct of foreign policy. However, if the domestic scene is considered, the picture changes markedly. Internally, presidential powers, like all central powers, may run into the obstacle of states' rights. This was the case with President Roosevelt's social policy during the New Deal. Should constitutional disputes arise between the center and periphery the Supreme Court acts as the ultimate arbiter.

The method used in the United States to remove the President from office is that of impeachment, a procedure inherited from English law. Removal of a U.S. President requires a formal accusation by a majority vote of the House of Representatives to be followed by an adversary trial before the U.S. Senate with the Chief Justice of the Supreme Court presiding. A vote of conviction by at least two-thirds of Senate members present is necessary to remove the President from office. Should a President be impeached and removed from office he may also be tried in a court of law on criminal charges. The U.S. President possesses the power of pardon except in cases of impeachement. However, should a President who is implicated in an impeachment proceeding resign his office, a future President may issue a pardon on the ex-President's behalf. The only instance of this latter case was President Gerald Ford's pardon of Richard Nixon.

The U.S. system has adapted well to the age of mass democracy. The presidential primaries are an indispensable means for the democratic selection of presidential

candidates. Presidential appointment power, particular at the cabinet level, is increasingly becoming a vehicle to open the government to individuals expressive of social pluralism as well as to technocrats. The opinion polls which go hand in hand with mass democracy can oblige the president to change his policy to adapt to the public's assessment of his performance.

The French Model of Presidentialism

The French system of government can be classified as a form of semi-presidentialism. The Head of State does not exercise an unqualified monopoly of executive power as in the U.S. case. Rather, the highest echelon of executive power is a duality, split between the President and the Prime Minister. Based on the constitutional amendments of 1962, the French President is directly elected by the people. He has two sets of responsibilities. On the one hand he acts as the custodian of institutions, and on the other he is the organ of high policy which includes primarily the areas of foreign affairs and defense. He is elected for a term of seven years and cannot be removed from office by the Parliament. He can, however, be tried by a high court composed of members drawn from both houses of Parliament on charges of high treason. Even though the high court is formed as a parliamentary body it acts as a judge (Article 68).

The French Prime Minister is the head of the government which determines and directs national policy, and disposes of public administration and the armed forces. The Prime Minister and Government members are appointed by the President and together must enjoy the confidence of the National Assembly. The Prime Minister and his Government may be dismissed from office on a vote of no-confidence passed by an absolute majority of the members of the National Assembly.

The semi-presidential system rests on a balance between the powers reserved for the President and those reserved for the Prime Minister. This balance, however, may shift depending on whether or not the President and the Prime Minister belong to the same majority. Since the respective terms of office are staggered it may happen that the presidential and

the parliamentary majorities differ. Should this occur, as it did in 1986, the Prime Minister is chosen from a political grouping other than that to which the President belongs.

The French system is such that the President may be omnipotent when parliamentary and presidential majorities coincide. Where these majorities differ, the President is compelled to coexist with the Prime Minister in a regime known as cohabitation. This so-called cohabitation compels the President to retreat into his own reserved domain thus permitting the Prime Minister to exercise his own powers without presidential interference.

The French constitution carefully draws a dividing line between the decisions that the President can adopt single-handedly, and those that call for the countersignature of the Prime Minister. The President can also dissolve the Parliament. The power of dissolution has proven an effective instrument to change the composition of Parliament so as to realign it closer to the President's political position.

Another important factor of French semi-presidentialism is that the electoral system used for both legislative and presidential elections is the double ballot with a run-off election used if on the first ballot none of the candidates obtains more than fifty-percent of the popular vote. The pluralism of political parties has thus been corrected by the double ballot, even though it has not produced the clear cut two party system found in the U.S., which owes its existence in part to the single member district majoritarian system used to elect congressional representatives.

The essence of the French version of presidentialism is that within their respective spheres the Prime Minister and the President resemble two monocrats. The overall trend of the French system has favored a strengthening of the executive at the expense of the legislature. In accordance with this underlying tendency, spurred by the gaullist French Constitution, Parliament is competent to regulate only certain areas which are enumerated in the Constitution, while residual powers are left within the competence of the executive and can be regulated by decree. The Government may even be permitted to legislate within Parliament's

domain through a special enabling act on condition that the rule enacted is ratified by the legislature at a later stage.

Other provisions of the Constitution tend to favor the stability in office and the efficiency of the executive in relation to the Parliament. Two examples of this balance of power in favor of the executive are: 1) no parliamentary amendments to a bill are permitted in the full assembly which have not been previously approved in committee; and 2) any bill on which the Government decides to invoke its responsibility by posing the question of confidence automatically becomes law except where a majority in the Assembly rejects the measure thereby voting the Government out of office.

The French type of presidentialism is new -- at least relatively so as the constitutions of Weimar Germany and present day Finland are roughly of the same kind -- and has been working reasonably well. As with the U.S. system, the apparent weakness of French presidentialism, in this case the dual executive is a check on presidential power. However, without the check provided by the dual executive, the French President's power would exceed that of any elected leader operating under a legitimate constitutional regime. French style cohabitation did not lead to government paralysis but rather to balanced and shared responsibility between the two executive organs involved.

The French system emerged unscathed from the trial by fire of cohabitation because the President possesses his own sphere of powers, whatever may be the parliamentary majority on which the Prime Minister relies. The Head of State guarantees the normal operation of institutions, national independence, the integrity of French territory and the observance of treaties and international obligations. His role as the guarantor of the constitutional order is a powerful one and is underlined by Article 16 according to which the President can, after consulting with the Prime Minister, the Constitutional Council, and the Presidents of both Houses of Parliament, declare and establish a state of emergency and adopt all measures made necessary by the circumstances. Such measures are in their entirety entrusted to the discretion of the President and conditioned only on formal guarantees: a message to inform the nation, and the

need to reestablish normalcy in the shortest possible time after consulting with the Constitutional Council. Parliament is automatically convened if a state of emergency is established and the National Assembly cannot be dissolved during the exercise of exceptional powers. The President can, on the initiative of the Government or on the joint proposal of the two Houses of Parliament, call a referendum on any bill of constitutional importance (Article 11). If the result of the referendum is in favor of the adoption of the bill the President must promulgate it. Otherwise, he has a power of veto on all bills although his veto can be overriden by the repeated approval of the measure in question.

The Russian Model of Presidentialism

Though the Russian draft constitution is based on the idea of presidentialism, it differs from both the presidential models summarized above in certain important aspects. In order to highlight the differences and analogies it is best to approach the position of the Russian president from three general perspectives which shall be outlined below: 1) the mode of presidential election; 2) the removal of the President from office; and 3) presidential powers.

1. Presidential Election

The Russian President is to be elected by a direct popular vote which applies also to the Vice President. What remains to be seen is how candidacies are to be put forward and decided upon. Will the Presidential nominee be chosen by a convention held by a political party? To what degree will the choice of the President be effected by party politics? The answers to these questions matter if we want to determine to what extent the President is viewed as a Head of State whose involvement in party politics is not a necessary condition or as the head of a majority that must prevail in the Supreme Soviet as well.

One factor favoring the President's independence from party politics is that elective terms are staggered as the President is elected for five years and Deputies of the Supreme Soviet for four years. Nevertheless, the laying

down of appropriate constitutional rules for the selection and the election of the President would lend certainty to an otherwise undefined process. In addition, one may question what the point is of the popular election of the Vice-President if, in cases where the President is unable to continue in office, the Vice-President completes the presidential term only if less than one year remains. If more than one year remains off-year elections are held to elect a new President. The logic of joint election would seem to be that when the President ceases to hold office the Vice President should step in to replace him without the exceptions provided for in Article 98. Paragraph (6).

2. Presidential Removal

The procedure layed down in Article 96, Paragraph (2) for removal of the President should be read in conjunction with the principle of the separation of powers established in Article 6. The President is independent of the legislature and his tenure of office cannot be terminated by a parliamentary vote of no-confidence. From this point of view the present text improves on the previous draft, which contained a provision (Article 104. Paragraph (4) of the French translation dated March 2, 1992) that contemplated the dismissal of the President on political grounds by a majority vote of members of the Supreme Soviet. The clause in Article 96. Paragraph (D) concerning removal of the President from office must be assumed to refer exclusively to the case envisaged in Article 96 which can be brought under the notion of impeachment. The President can be removed if he makes a deliberate serious breach of the Constitution. The procedure must be initiated in the State Duma. If the Constitutional Court establishes the grounds for removal, the Federal Assembly may remove the President by a vote of no less than two-thirds of its members.

The novelty of the removal procedure is that it blends judicial appreciation of the grounds for removal with what seems to be a political vote in the Federal Assembly. The Assembly could conceivably excuse the President even if the Court had established that he was guilty of having violated the Constitution. Two doubts arise: 1) what is the significance of involving a judicial body such as the Constitutional Court in the impeachment process if its

ruling can be disavowed by the Federal Assembly?; and 2) a serious breach of the Constitution is not a clearly defined crime. How will it be determined that a breach of the Constitution is serious? In the other presidential systems reference is always made to crimes such as treason or bribery the exact definition of which is provided for by statutes on criminal law. Therefore, there is the danger that impeachment may be used as an oblique way of censuring the President politically under the guise of his having perpetrated a serious breach of the Constitution. If the whole process were to be rationalized into some kind of judicial proceeding then the judgement should be left to the Constitutional Court or to a High Court of Parliament. In the U.S., the final word on impeachment is that of the Senate, but impeachment is not viewed as a criminal proceeding. It must be questioned why the new draft drops a provision (article 99, Paragraph (3)) contained in the March 24, 1992 text which established that removal of the President from office would not preclude the institution of proceedings against him by way of general procedure. As it exists, the Russian answer to the problem of presidential removal lacks a consistent internal logic.

Presidential succession hinges on the Vice President's role. It is difficult to account for the exclusion made in Clause (b) of Article 98, Paragraph (1) which stipulates that should the President resign his office the Vice President assumes presidential powers for the remainder of the term even if it should exceed one year, with no off-year election being held. One may reasonably question why a President's resignation would absolutely prohibit an off-year election when this is not the case in other instances of cessation of the President's powers.

3. Presidential Position and Powers

The position of the President in the political system and his powers are the crux of Chapter 16 of the Russian draft Constitution. The President does not possess a constitutional monopoly of executive powers since provision has been made for a separate government headed by a Chairman who is in a sense responsible to the Supreme Soviet. The Russian constitutional model, however, cannot be defined as semi-presidential along the lines of the French system. The

Russian President not only appoints the Chairman and other members of the Government, but he can also remove government ministers from office. The President, among his enumerated powers (Article 93), directs the activity of the Government as well as exercising general guidance of all other executive bodies, guides the security of Russia and acts as Commander in Chief of the Armed Forces.

An examination of the President's powers yields the conclusion that the duality inherent to French semi-presidentialism does not exist in the Russian case. The Russian Chairman, the members of the Government, and all federal executive officers would seem to be nothing but subordinate organs that must carry out categorically presidential directives. The Russian Constitution contains nothing like the constitutional guarantees of autonomy enjoyed by the French Government. Rather, the appointment of ministers approximates the practice in the United States whereby presidential appointments require the consent of the Senate. The Russian Constitution calls instead for consent of both houses of the legislative body to presidential appointments. A simpler procedure for securing consent to appointments may be useful to reduce what may prove to be a lengthy and difficult process of selecting a Government. Some flexibility in the appointment procedure does however exist. The President is required to gain the consent of the Supreme Soviet only for certain categories of ministers which means that he can otherwise freely manipulate the composition of his cabinet. Similarly, the President must submit to the Supreme Soviet only certain types of international agreements for ratification (Article 86, Paragraph 1).

Under Article 93, Paragraph (2) the President is given the power to issue decrees and orders that have the force of by-laws which are binding throughout the territory of the Russian Federation. Three questions may be raised concerning this presidential power: 1) does the ordinance making power of the President extend beyond the competence of federal organs?; 2) does it reach into the concurrent domain of the federation and the members thereof?; 3) is the article to be read as if the by-law making power is exclusively that of the President and cannot in any instances be exercised by the Government?

It is possible that although the Russian President is by law, and may well be in practice the exclusive head of the executive, he may find himself in a weaker position than his U.S. counterpart vis-à-vis the legislature. Perhaps all the traces of the old Soviet insistence on the sovereignty of the "people's branch" of government have not been entirely erased. And, notwithstanding the fact that under the Communist regime the legislature was a paper tiger, a strong Russian Supreme Soviet may accord well with presidentialism. Everything depends on whether a true and proper balance is struck between the executive and legislative organs of government.

The fact of the matter, however, is that the removal of ministers falls under a procedure which tilts the scales of power toward the Supreme Soviet. The Russian President is not endowed with the power to dissolve the legislature, as is the French Head of State. Neither does the Russian President seem to fit the description of an institutional custodian after the French model. Indeed, his powers in emergency situations have been attenuated in the most recent constitutional draft. It is the Supreme Soviet that has the final word on guaranteeing the constitutional order with the exception of the presidential power to invoke martial law pursuant to a suprise attack on the Russian State or the urgent need to meet international treaty obligations relating to collective defense against aggression (Article 130).

The presidential position has been further weakened by the parliamentary power to remove ministers which the President can override only be substantiating before the Supreme Soviet the reasons why he disagrees with his opponents. And it is the Supreme Soviet, [illegible] refute the President's arguments on a two-thirds vote in each chamber, which has the last word. This procedure is peculiar to the draft Russian Constitution. It doesn't exist in the United States. In France, to be sure, the National Assembly may issue a vote of no-confidence. However, the vote of no-confidence is one that concerns the Government as a constitutional organ which is separate from the President and headed by a Prime Minister who represents the Executive in confrontations with the Parliament. In France, when the Prime Minister falls so does his Government. According to the Russian draft Constitution each member of the Government

may be subjected to a parliamentary petition demanding that the President remove the officer in question.

Uncertainty surrounds Article 103, Paragraph (B), Clause (B) which stipulates that the Constitutional Court may draw a conclusion on the grounds for the removal of an official from office acting on its own initiative. It is important to define more clearly what classes of officials are envisaged by the article. It would seem not to refer to the President but does it mean to include reference to government members?

The difference between the French and Russian models is clear and concerns the fact that in the Russian case the President himself is drawn in to the government removal process (Article 99, Paragraph 4). As stipulated, removal of government ministers is the way in which the President can be forced to change his policy by changing the men who carry it out. Yet, how can one distinguish between the President's policy and the Government's policy if the Government is but an instrument of the President's will? The procedure of the parliamentary petition functions as an indirect sanction of the President himself. Although it is tempered by the obvious formality of the qualified majority needed to force the resignation of a government member against the President's will, it ill-accords with the principle of presidentialism.

Under a presidential system, the power of the legislature to issue a vote of censure calls for a dual executive. But, as I have stressed, dualism has not been introduced into the Russian Constitution. It may be that the kind of Parliamentary oversight over the Executive created by the Russian constitutional model is needed to establish the balance called for by the country's political climate. Nevertheless, from a comparative law perspective one must raise the point as to how this particular oversight role of the Supreme Soviet fits with the essence of presidential government.

Articles of the U.S. Constitution Relevant to Impeachment

Article I, Section 2., Paragraph 5

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article I, Section 3., Paragraph 6

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Article I, Section 3, Paragraph 7

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Article II, Section 1., Paragraph 6

In Case of Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

Article II, Section 2., Paragraph 1

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article II, Section 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III, Section 2., Paragraph 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

A Brief Analysis of Impeachment in the United States

Sources:

Berger, Raoul. Impeachment, The Constitutional Problems, New York: Bantam Books, Inc., 1974.

Huckshorn, Robert J. "Gerald Rudolph Ford", contained in Encyclopedia Americana, pp. 564-566, New York: Americana Corporation, 1976.

Libovitz, John R. Presidential Impeachment, New Haven: Yale University Press, 1978.

Text of U.S. Constitution contained in Encyclopedia Americana, New York: Americana Corporation, 1976.

A brief review of material on presidential impeachment in the United States reveals the following fundamental points: 1) The impeachment procedure necessary to remove a president from office involves a formal accusation by a majority vote of the House of Representatives followed by an adversary trial before the U.S. Senate and a vote of conviction by at least two-thirds of the high body of the Congress. 2) A president who is impeached and thus removed from office may also be tried on criminal charges in a United States court of law. 3) A president who resigns his office in the midst of impeachment proceedings is, ipso facto, no longer subject to removal from office. However, impeachment proceedings may continue in the case of presidential resignation with the scope of disqualifying the former president from future federal office. Disqualification requires only a majority of the U.S. Senate and is in all cases, including removal from office on impeachment charges, discretionary. In reference to the "Nixon case", once President Nixon resigned his office, no serious consideration was given to proceeding with the Nixon impeachment for the purpose of insuring his disqualification from future federal office (Libovitz). 4) The President, who is not immune under the U.S. Constitution, is criminally triable while in office (Berger) 5) Concerning the issue of Presidential Pardon, the U.S.

Constitution gives the President the "...Power to grant Reprieves and Pardons for Offences against the United States, except in cases of Impeachment." On September 8, 1974 President Gerald Ford granted a "full, free and absolute pardon" to former President Nixon "for all offenses against the United States which he...has committed or may have committed or taken part in" while he was president (Huchkshorn). President Ford's pardon ended any possibility of pursuing an indictment on criminal charges brought against the person of former President Nixon. The Nixon case brings up a question concerning Presidential Pardon and removal from office: If Richard Nixon had ~~he~~ been removed from office following a conviction by the U.S. Senate on impeachment charges brought by the House would he have been unpardonable and subject to possible indictment under federal criminal statutes?

Important Points Concerning Impeachment and the U.S. Constitution

1. Constitution provides for impeachment for Treason, Bribery or other High Crimes and Misdemeanors (this latter phrase is generally interpreted by constitutional scholars to mean High Crimes and High Misdemeanors)

2. Framers of Constitution divorced impeachment from indictment for criminal offense. According to Raoul Berger, impeachment is civil in essence and indictable crimes are not a prerequisite to impeachment. Once impeached, the president may be further subject to a trial at law. With regard to the impeachment proceedings against former President Nixon Libovitz writes, "The decisions by the House Judiciary Committee on the proposed articles of impeachment left no doubt that a majority believed that the relevant standards were constitutional, not criminal..."

3. The doctrine of "no federal common law of crimes" would imply that to constitute "a High Crime or Misdemeanor" there must be a statute which creates an indictable crime. Whatever the merits of the aforementioned doctrine, writes Berger, the Senate, the tribunal for impeachments, has not embraced it as the body has issued guilty verdicts in the absence of statutory offenses.

4. At the time of the Constitutional Convention James Wilson argued that the problem of double jeopardy is met by reading impeachment in noncriminal terms. The separation of removal (from office) from criminal prosecution poses the problem of double jeopardy unless the removal proceeding is read in non-criminal terms. The Constitution adds a saving clause allowing for criminal indictment and punishment in addition to removal from office through impeachment proceedings.

5. According to Berger, impeachment does not necessarily have to precede indictment. Immunity is denied to the President and he can theoretically be indicted on criminal charges before being impeached.

6. The purpose of the indictment proviso contained in Article I, Section 3 is, again according to Berger, to preclude the argument that the doctrine of double jeopardy saves the offender from the second trial. The "nevertheless" clause seeks to preserve the right to a subsequent criminal prosecution, not to presribe that it must be preceded by impeachment. James Wilson wrote, "Impeachment...come not...within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects; for this reason, the trial and punishment of an offense in the impeachment, is no bar to a trial of the same offense at common [criminal] law.

7. Framers rejected the idea of suspending the president from office prior to conviction. It may be noted that the Brazilian constitution does provide for the suspension of the president while he is judged by the Federal Assembly

The Russian Draft Constitution and International Law

It is an interesting point that under the Russian draft Constitution the rights and freedoms of man and citizens are secured according to both constitutional provisions and recognized principles and norms of international law [Article 2, Paragraph (2)]. This provision must be read in conjunction with Article 3, Paragraph (4) according to which the recognized rules and principles of international law and international treaties form part of Russian law. Treaty provisions shall apply even in the face of incompatible national laws. Nothing, however, is said about general principles of international law. Do these principles override inconsistent internal legislation only when their object is to secure man's rights and freedoms? Article 11 does not answer the query raised by this last point since it merely states that the Russian Federation, as a full-fledged member of the world community, shall observe both treaties and general international law and may participate in international organizations. This is not tantamount to saying that internal legislation conflicting with principles and rules of international law shall be held as null and void.

Article 43, Paragraph (4) is an important addition to individual guarantees. It assures that international protection is secured to anyone who has been refused protection of his rights by internal courts. Does "refusal" mean a denial of justice or could it be interpreted to mean an adverse decision? If it means "any adverse decision" then the protection offered by this article becomes a new and important one. It would entail that any internal law and any act of the Russian legislature designed to limit or qualify the international protection of individual rights must be regarded as unconstitutional.

With respect to Article 78, it is important to know its actual field of operation. It says that, "Republics, territories, regions and autonomous areas shall be independent participants in foreign economic relations and agreements with other Republics, territories, regions and autonomous areas unless this runs counter to the Constitution and federal laws." It is not clear whether this article refers to internal agreements between

constituent units of the Russian Federation or external relations between these autonomous bodies and their foreign counterparts.

Article 103, Paragraph (7) stipulates that the recognition of an international treaty as unconstitutional shall entail consequences provided for by international law. Must it be assumed that treaties declared unconstitutional [or federal laws that ratify such treaties] cease to be applied internally and Russia is thereby relieved of international responsibility on the strength of this constitutional provision, if we read it to mean that the declaration of unconstitutionality amounts to a denunciation or a termination of the agreement under international law?

Clauses (c) and (d) contained in Article 103, Paragraph (4) provide the keys to understanding where international law -- concerning both treaties and general principles -- ranks in the Russian legal system. Treaties cannot contradict the Constitution and the Constitutional Court can judge whether they are compatible with the Constitution prior to their ratification or approval. Therefore, the Constitutional Court can pronounce itself on the constitutionality of treaties both before and after the treaty has been ratified [cross reference to Article 6, Paragraph 2 which establishes that if an international treaty or agreement contains provisions running counter to the Constitution its ratification is possible only after the introduction of relevant amendments to the Constitution]. Article 103, Paragraph (4), Clause (d) enables the Constitutional Court to rule on the contradiction between federal laws and generally recognized principles and norms of international law. The same applies to ratified international treaties. It is clear that in the draft Russian Constitution international law ranks higher than federal law. Yet one important question remains: how are inconsistencies between principles of international law and the Constitution to be treated.