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EXECUTIVE POWER IN THE NEW EUROPEAN CONSTITUTION

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Paul Craig is certainly correct when he states that the prospective constitutional allocation of executive authority under the new constitutional settlement, as captured by the Draft Treaty Establishing a Constitution for Europe which finally emerged in June 2004,¹ does not give a simple answer to the question of the location of executive or administrative power within the European Union. Even leaving aside the plethora of advisory bodies² and independent agencies on the EU landscape, no fewer than three institutions can and do lay claim to exercising executive and/or administrative authority within the EU: the Commission, the Council and the European Council. (To this, we might add the Minister of Foreign Affairs, who, although associated with the work of the European Council and the Council, and himself or herself a vice-president of the Commission, would have a distinctive executive profile.)

If we were to try to reconstruct in a simple and non-historical way the thought processes that appear to have guided the constitutional convention in matters of institutional design, we

¹ Conference of the Representatives of the Governments of the Member States, *IGC 2003 – Meeting of Heads of State or Government, Brussels, 17-18 June 2004*, CIG 85/04, PRESID 27, Brussels, 18 June 2004.

² Draft Treaty Establishing a Constitution for Europe, art. I-31.

would find (leaving external relations aside) that creating a unified, coherent executive or administrative power was not a very important consideration, perhaps not a consideration at all. To place the ultimate shaping of EU executive and administrative authority under the Draft Constitution in perspective, it may be useful to identify the institutional impulses B i.e. the sense of imperatives B that did in fact take priority and that, once decided upon, inevitably constrained the architecture of the executive and administrative function that would follow.

Reading the Draft Constitution, one is tempted, again thinking non-historically, to de-construct the shaping of the executive power in the new constitutional settlement in the following way:

A first decision that the drafters appear to have made was to retain the three institutions that I have identified, both in name and in general profile. The drafters renamed many things in the Draft Constitution, but not the institutions. This strategy unquestionably capitalizes on the benefits of public familiarity with the institutions as such. It also, perhaps deceptively, left in place a definition of the Commission that, at least superficially, corresponds closely to the functions of the executive in traditional separation of powers terms. Consider the executive-branch-sounding language of the Draft Constitution's Article I-25(1):

The Commission shall ... ensure the application of the Constitution, and measures adopted by the Institutions under the Constitution. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union's external representation.

A second decision that the drafters appear to have made was to redesign the composition of those executive bodies which seemed to be at the greatest risk dysfunctionality, particularly in

the wake of enlargement. Of these, the body most in need of “slimming down” appeared to be the Commission. To this, the Draft Constitution originally responded by establishing a “restrained” college of 15 Commissioners, comprising the Commission President, the Minister of Foreign Affairs and 13 voting Commissioners.³ Unfortunately, the drafters would not thereby necessarily have solved the problems of Commission deliberation that they set out to solve. In fact, they might actually have managed to ignite new tensions among Commissioners, particularly when matters falling within the portfolio of a non-voting Commissioner would come up for consideration and vote. As Paul Craig points out, the participation in Commission activity of non-voting Commissioners would also have raised a host of operational issues. In my view, and in Paul Craig’s as well, it would appear, the drafters began by greatly exaggerating the dysfunctionality of a 25-member Commission, and then compounded that error by failing to consider the possibility of more nuanced structural solutions, such as groups or teams of Commissioners being empowered to act on behalf of the full Commission. In the end, the IGC abandoned the “voting/non-voting Commissioner” distinction, without however abandoning the effort to “slim down” the Commission. The IGC achieved this by providing that, following the end of the term of the first Commission appointed under the Constitution, the Commission (including the President and the Minister for Foreign Affairs) would consist of a number of members corresponding to two-thirds of the then-number of Member States, subject to the principle of equal rotation among Member States.⁴

³ The Commissioners from the other States would have been “non-voting,” a breach in the traditional principle that every Member State name at least one voting Commissioner.

⁴ Draft Treaty Establishing a Constitution for Europe, art. I-25 (5), (6). However, the European Council could unanimously decide to change the two-thirds figure.

A third decision the drafters appear to have made was to enhance the democratic character (hence the legitimacy) of the most impersonal of these bodies (viz. the Commission), by allowing its President to be chosen by the European Parliament.⁵ Of course, this is not to be the robust democratic political process we associate with parliamentary systems at the national level for, as Paul Craig points out, not only is the Commission President elected indirectly by the European Parliament (rather than directly by the European people),⁶ but the European Parliament can only elect as President of the Commission an individual whom the European Council (that is, the Member State governments themselves) will have specifically put forward for this purpose.⁷ Still, at least a limited indirect democratization of the Commission quickly emerged as an imperative.

Fourth, the drafters surely recognized the necessity of the European Union having a single visible face and a single audible voice on the world scene. Whoever might be the person to whom that face and voice would belong would necessarily be an “executive.”

It is of course at this point in my idiosyncratic reconstruction that considerations of institutional balance clearly enter the picture. Thus, the drafters also appear to have made a decision that the Commission President -- whose already considerable resources and presumed agenda as head of the EU’s traditional engine of integration would now be enhanced by his or her more or less democratic pedigree -- should face a political counterweight in the form of a greatly enhanced President of the European Council. That enhancement would stem from various factors:

⁵ Id., art. I-26(1).

⁶ Id., art. I-19(1).

⁷ Id., art. I-26(1).

(a) this President enjoying a decidedly longer term in office,⁸ (b) his or her enjoyment (unlike all prior Presidents of the Council or of the European Council, who by definition were either heads of state or government or members of a Member State government) of independence from the governments of the Member States, and (c) his or her entitlement to the support and assistance of the General Secretariat of the Council of Ministers.⁹ This, as Paul Craig points out, is a president who can hope to “leave a mark.” Thus, while the Draft Constitution ostensibly lodges “executive authority” as such in the Commission, the Commission President is by no means the only or even the most important “chief executive.” (It is more apt therefore to speak of a “double-headed” than a “double-hatted” presidency, though the two terms have in fact sometimes been used interchangeably.)

Thus, if I am correct, the drafters followed a structural strategy based on a combination of efficiency, democracy, external relations visibility, and institutional balance. Pursuing a structural strategy fueled by this combination of impulses is by no means a radical or revolutionary strategy, and it has much to commend it. But it is not a strategy that is likely to yield a simple or powerful configuration of either executive or administrative power.

This result may be a largely comfortable one because it resonates with the fact that the structure of the European Union has *never* been based as much on notions of separation of powers (even in modified form) as it has been on notions of institutional balance. The result has always been greater clarity and prominence of structure than clarity or prominence of function. Thus, executive power can be shared between a body representing the Community interest and bodies

⁸ Id., art. I-21.

⁹ Id., arts. III-244(4), 247(2).

representing the Member States. This is no more shocking, really, than allowing legislative power to be shared between a body representing the European people and a body representing the Member States -- the only difference of course being that the line separating the Parliament's and the Council's participation in the legislative function is infinitely easier to discern than the line separating the Council's, the European Council's and the Commission's participation in executive and administrative functions, which is just another way of saying that however messy the legislative process may be, executive and administrative processes are a whole order of magnitude more messy.

But there is more to relations between the Presidencies of the Commission and Council than "sharing" of executive power. There are also elements of hierarchy. We can start precisely with the activity that Paul Craig calls "a," if not "the," hallmark of the executive function, namely "planning the overall priorities for legislation." Unlike the current system under which the European Council merely "provides the Union with the necessary impetus for its development and defines the general political guidelines,"¹⁰ the Draft Constitution emphasizes the European Council's role in establishing EU "priorities" as well as the EU's general political directions.¹¹ The Draft Constitution enables the European Council to influence the workings of the Council in all the many ways that Paul Craig indicates, such as requiring the General Affairs Council, in liaison with the Commission and President of the European Council, to prepare and follow up on meetings of the European Council,¹² and deciding by itself the formations in which the Council

¹⁰ Treaty on European Union, art. 4.

¹¹ Draft Treaty Establishing a Constitution for Europe, art. I-20(1).

¹² Id., art. I-23.

may sit, thus to that extent harnessing the Council to the European Council's vision.¹³ Even so, there is not only a sharing -- and thus a clear potential for competition with the Commission's continuing responsibility for annual and multi-annual programming¹⁴ -- but also a powerful suggestion of hierarchy, even if the term used in the Draft Constitution to identify the European Council's pronouncements is the deceptively "soft law" term of "guidelines."

A similar pattern is replicated in other areas: (a) the area of freedom, security and justice,¹⁵ where the European Council is called upon to define the strategic guidelines for legislative and operational planning within the area of freedom, justice and security; (b) the EU's external action, where the European Council by "decision" identifies the EU's strategic interests and objectives;¹⁶ and (c) the Common Foreign and Security Policy (CFSP), for which "[t]he European Council shall define the general guidelines for the common foreign and security policy, including for matters with defence implications."¹⁷ It is only subject to conformity with these "guidelines" that the Council retains the right to adopt decisions and other implementing acts both in the area of

¹³ The Draft does not, as Paul Craig observes, go as far as the January 2003 UK Paper, which would have given the President of the European Council radically important coordinative powers and prerogatives, such as heading (and potentially appropriating) the Council Secretariat, chairing the meetings of the General Affairs and External Relations Council, setting the agendas of Council formations, and chairing tripartite meetings of the European Council, Parliament and Commission.

¹⁴ Draft Treaty Establishing a Constitution for Europe, art. I-25(1).

¹⁵ Id., art. III-159.

¹⁶ Id., art. III-194.

¹⁷ Id., art. III-196. In the same vein, the European Council, in collaboration with the Minister for Foreign Affairs, assures the Union's "external representation" in matters of CFSP.

freedom, security and justice¹⁸ and in the CFSP.¹⁹

One consequence is the Draft Constitution's diminution in many ways of the Council. At one time, the European Council might have been, and often was, thought of as a "political extrapolation" of the Council (as the Council "writ large"), an impression aided of course by the fact that their presidencies rotated together from member state to member state in unison according to the same six-month calendar.

¹⁸ Id., arts III-158-178.

¹⁸ Id., art. I-39.

But the Draft Constitution shatters that relationship in several ways. Organizationally alone, while the Presidency of the European Council has a 2 1/2-year once-renewable term, the term of the Presidency of the Council is not fixed in the text. However, the Member States reached political agreement on a draft European decision that the Council Presidency term should be 18 months, with three Member States in succession occupying the chair for six-month periods.²⁰ These two Presidencies will therefore no longer be congruent, either geographically or temporally, much less in identity of the occupant of the office. More importantly, functionally-speaking, the locus of intergovernmental Member-State-driven negotiations will have shifted importantly to the European Council, with the Council looking more and more like the European Council's appendage, rather than *vice versa*, especially in CFSP where the Council merely takes the decisions required to implement the CFSP guidelines of the European Council. If we set to one side its strictly legislative role, the Council begins to look very much like the "executive's executive." In the original Draft Treaty, this was especially troubling, since acts of the European Council as such were not among the acts subject to review in the European Court of Justice.²¹ The Draft Treaty, as finally agreed upon in June 2004, eliminated this uncomfortable feature, by expressly numbering the European Council among the institutions whose acts would indeed be subject to judicial review in the Court of Justice, provided such acts were intended to produce legal effects vis-a-vis third parties.

²⁰ Annex 8 to the Draft Treaty Establishing a Constitution for Europe. In the July 2003 version of the Draft Treaty, Article I-23(4) had stated that the term of the Council Presidency should be "at least one year." As noted, the Draft Treaty, as agreed upon in June 2004, mentions no term of years.

²¹ *Id.*, art. III-270(1).

I want to tread carefully here. Hierarchy is not fashionable, but some elements of hierarchy may be salutary in a polity in desperate search of a perceptible public identity, particularly where a heightening of that identity has itself come to be regarded as desirable for the polity's health and public acceptance. That is also what makes the creation of the position of Minister of Foreign Affairs so attractive. While the Minister's structural situation is admittedly confused (to say the least), its functionality is greatly enhanced.²²

It is for this reason also that I hail the introduction of what to students of national constitutional structure may seem banal, namely a fundamental distinction between exercises of legislative authority (defined as the enactment of EU laws and EU framework laws),²³ on the one hand, and exercises of administrative authority (defined as the adoption of non-legislative acts of general application,²⁴ on the other. As to the latter (which is basically delegated legislation bearing the name of "regulations"), the Commission would be broadly empowered, but only within the limits set by primary legislation, to "supplement" or "amend" certain non-essential elements of any given European law or framework law,²⁵ subject however to revocation by

²² The Minister of Foreign Affairs is appointed (and removable) by the European Council acting by qualified majority voting, with the approval of the Commission President art. I-27(1)). The Foreign Minister is empowered to conduct the CFSP under guidelines of the European Council, in whose activities he or she takes part (art. I-20(2)). At the same time, the Foreign Minister chairs the Foreign Affairs Council and serves as Commission Vice-President (art. I-27(3)). Still, the Draft Constitution clearly places the locus of CFSP authority in the hands of the Council and, ultimately, the European Council (art. I-27(2)).

²³ Id., art. I-33.

²⁴ Id., art. I-35.

²⁵ Id., art. I-35(1).

Parliament or the Council to the extent provided for in that legislation.²⁶

It is not clear from the Draft Constitution whether and to what extent the practice of comitology, as we know it, would continue.²⁷ There is good reason to think it would, especially since the Draft Constitution provides that “European laws shall lay down in advance the rules and general principles for mechanisms for control by Member States of the Commission’s exercise of implementing powers.”²⁸ But in any event, these provisions of the Draft Constitution would reflect a healthy and long overdue recognition that the EU is in large measure a modern administrative rulemaking regime that needs to be shaped by, and whose regulatory determinations need to be acceptable to, the political branches, whether the Council, the European Council or the Parliament. And while the Draft Constitution largely ignores the existence of the independent agencies, it is to be hoped that these too will be made subject to comparable disciplines as and when they acquire independent regulatory authority.

Paul Craig persuasively disaggregates the EU executive and administrative power “blur” into a series of linked specific questions. But, from the point of view of simplicity, transparency and public acceptability, the EU will be in trouble if it is still going to take a Paul Craig to explicate, intelligibly and coherently, what the constitution-makers have put together by way of EU executive and administrative apparatus, not to mention what the nature of the relations among the component parts of that apparatus is meant to be. The new configuration needs to speak a little bit more clearly for itself.

²⁶ Id., art. I-35(2).

²⁷ On this point, Article I-35(2) of the Draft Constitution is ambiguous.

²⁸ Id., art. I-36(3).

It is certainly the case, as Paul Craig suggests, that clarity about the locus of executive power within the nation State itself tends to be exaggerated, and that in assessing the EU scene from this point of view, we should avoid setting unrealistic and unattainable goals. Nor do I want to exaggerate the degree of clarity that hierarchy, or any other feature of the Draft Constitution, brings to the constitutional and administrative landscape of the European Union. We need to bear in mind, for example, that the Commission, once in place, remains “completely independent” of, and takes no instruction from, any other body including the European Council,²⁹ and that the Council of Ministers is by definition not removable at all.

But it remains profoundly necessary that the public have some essential and non-technical understanding of the relations among these sometimes contending, sometimes cooperative executive institutions. The Draft Constitution makes a subtle and modest contribution in that direction. This contribution deserves to be underlined and encouraged and, now that it has made its way into the Constitution, needs to be widely understood.

²⁹ Of course, as before, the Commission remains subject to parliamentary censure.