THE CONSTITUTIONAL CONVENTION AND EU INSTITUTIONAL REFORM

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The writer, an American, lives in a country where a Constitutional Convention, as such, has not been on the calendar for over 200 years, and was not even held in the aftermath of the great Civil War. This is because, while we in the United States argue and debate vigorously over policy matters, we rarely argue over what I would call institutional "first principles." This is not necessarily a good thing, for there are times, I think, when we would be aided, even in debating current policy issues, by having a collective discussion – or at least engaging in a collective reminder – of our established first principles. Indeed this may be just such a time.

But if holding a Constitutional Convention is a great luxury , it would also be a luxury *not to have to do so* every few years, that is to say, not to have to question every few years the legitimacy, democracy, accountability or suitability of the EU's most basic institutions. The substantive policy issues that the EU faces in the contemporary age, like those facing the US, are sufficiently difficult that they warrant being considered against the background of firmly established understandings of the polity's first principles, as well as against the background of institutions about whose legitimacy, democracy, accountability and suitability we have achieved a firm sense of confidence.

I. Simplicity: A Recipe for Constitutional Longevity

The decision to hold a Constitutional Convention for the European Union in 2002 and 2003 was driven not only by a belief that the imminent accessions and resulting enlargement absolutely necessitated it, but also by what I would dare to call a case of intergovernmental conference (or IGC) "fatigue." With each intergovernmental conference that has come and gone, it has been fairly obvious (and occasionally publicly announced) that this was not to be the last. But the product of a Constitutional Convention (once it is itself, in turn, endorsed by an intergovernmental conference and subscribed to by the Member States) is presumably "for keeps" or "largely for keeps."

The peculiar challenge of a Constitutional Convention, as distinct from a mere intergovernmental conference, is to acknowledge the anticipated longevity and durability of the product, without being unduly daunted by that very prospect. If we assume that the durability of constitutional arrangements is among the objectives of a Constitutional Convention, and that this is what distinguishes the current Convention exercise from previous intergovernmental conferences, what does that imply about the spirit with which the exercise should be approached?

In this connection, I find myself – and I am by no means original in saying so – strongly biased in favor of simplicity. From this I draw the inference that every piece of institutional complexity within a Constitution needs to be specifically justified. Some such elements will

be justified, and easily so. I think that we would, for example, jeopardize values of "institutional balance" if we were to pursue institutional simplicity with single-mindedness. Other elements of complexity will be justified precisely because, while injecting complexity into the system, they nevertheless ultimately promote much the same flexibility that simplicity ordinarily pursues. Such complexity thus may be described as teleologically justified. I regard the Treaty provisions on "closer cooperation" as a prime example of complexity inspired precisely by a desire to enhance the system's flexibility, and thereby its durability. But not all constitutional complexities have a principled, much less a compellingly principled, justification.

II. The "Justice and Home Affairs" Example

If one were to identify a feature of the current "constitution" that represents a major failure in this regard, it would have to be the treaty provisions on justice and home affairs. It may have been understandable, in the context of an intergovernmental conference that would clearly not be the last, to have placed the matters that we call justice and home affairs under its own "third pillar," with its own peculiar ground rules.

It may have been similarly understandable, in a subsequent intergovernmental conference, to have transferred large pieces of justice and home affairs to the traditional "communitarian" first pillar, while leaving the rest where it was. But even those matters that were transferred from pillar three to pillar one were not simply integrated into the workings of the first pillar. Instead, they were made subject to a more or less idiosyncratic set of ground rules destined to ensure that the matters transferred would be handled differently from those matters standing right beside them in that first pillar. Notwithstanding the progress that this transfer might be thought to represent, it has thus also compounded the complexity of the treaty system, without any substantial showing that the added complexity was justified, much less the inevitable price of progress.

In retrospect, it seems quite unnecessary as a policy matter for cooperation in civil justice to have been relegated to the third pillar. I have even long thought it odd to have so assiduously broken down internal borders on the free movement of persons as a core Community purpose, while at the same time regarding immigration and asylum – merely due to their long association with national sovereignty – as matters of a purely intergovernmental nature. Now that we know the commonness of the threat of terrorism or of the need to combat trade in drugs and international crime, as well as the commonness of the instruments that we are prepared to bring to bear in combating them, it seems almost equally anomalous to have so positioned these issues in the treaty text that a further treaty amendment will be necessary in order for a truly binding common policy ever to be adopted.

The agonizingly incremental, and ultimately incomplete, fashion in which justice and home affairs has been integrated into the Community law system may have represented a politically sensible strategy for intergovernmental conferences that we know in advance will be overtaken by subsequent ones. But it is less suitable for a Constitutional Convention worthy of its name. Something bolder and surer is called for, and I strongly suspect that, so far as justice and home affairs is concerned, the Constitutional Convention will give us that.

III. The Presidency of the European Union

As of this writing, no constitutional issue presents higher stakes in this regard than the Presidency of the European Union. As is well known, within the EU's executive branch only the Commission has at present a true "President" with clear authority and a serious term of office. The prerogatives of the Council's Presidency are less well defined, and the Presidency itself is a short-term affair, the position rotating at six-month intervals among the Member States. The European Council Presidency, such as it is, has been assumed to pass, in parallel fashion, from head of state or government of one Member State to head of state or government of another, so as to pass as and when the Council Presidency does.

If clarity and simplicity are to be achieved at this level of the EU's constitutional architecture, the current situation cannot continue, and no one expects that it will. The EU is in dire need of a more clearly designated political leadership than the current "triangular" (Parliament/Council/Commission) arrangement provides. While a European Union has indubitably been created – and has sought to achieve a certain visibility both to the peoples of Europe and to the outside world – its own leadership is well-nigh impossible to identify. Surely this is due in large part to the fact that, while each of these institutions has its own President (as in a sense does the European Council itself), it is unclear which, if any, among them constitutes the Presidency of the Union and thereby embodies the political leadership expected of such an office.

Of course, simplicity is by no means the supreme, much less the only, value to be pursued in the course of constitutional re-design. Thus, for example, the urge to have the Commission President named by the European Parliament (presumably from the political grouping then dominant in that democratically elected branch) has been driven by considerations, not so much of simplicity as democratic legitimacy pure and simple . It is not yet established whether the Convention will propose such an "indirectly elected" Commission President, but it very likely will. Every proposal on the table at least purports to want to strengthen the Commission Presidency and this seems a sure way to do that.

Given the undeniable political paramountcy of the European Council within the European Union polity, attention has understandably turned to the strengthening of its Presidency as well. We have seen – and other contributions to this volume confirm – that numerous "Presidential" designs are on the table. Each of these seeks to enhance not so much the legitimacy of the European Council (whose "intergovernmental legitimacy" is really very much intact) as its continuity and efficiency.

If, as I would urge, constitutional simplicity is to be taken at all seriously at this level, then current proposals for a "team" or "joint" Presidency of the European Council must be regarded with deep skepticism. Just as European citizens and the outside world are bewildered by the quick-succession rotation of Council and European Council Presidencies, so will they be bewildered by a fragmented or shared European Council Presidency, which can only exacerbate the problem of "locating" political authority and accountability within the European Union. With some ingenuity, the drafters of the Constitution would prove themselves capable of devising rational ways of structuring the presidential "team" or the "joint presidency." But it remains doubtful that any such design will permit the political

leadership, or the appearance of political leadership, that is required and that, after all, is among the stated objectives of the current Convention.

The current strong support for a single Presidency of the European Council – and one whose mandate would largely exceed the current six-month term – seems clearly justified from every relevant point of view. But how shall the Presidency of the European Council be determined? Most voices insist that the Presidency be held by someone other than the Commission President. Some favor election of the European Council President from *among* the heads of state or government who constitute the European Council at any given moment. Other voices favor a requirement that the President be selected from *outside* the current heads of state or government – perhaps a prior head of state or government or some other "eminent" European. The very tension between these two Presidential solutions reflects a fear that a long-term Presidency of the European Council, far from maintaining the European Council's profoundly intergovernmental character, actually risks disturbing it, as it necessarily privileges one head of state or government over all others, or one "eminent" European from "eminent" Europeans of another EU nationality.

The assumption among these schools of thought – including the recent Franco-German "dual presidency" proposal – is that the strengthened President of the European Council must be someone other than the President of the European Commission. The underlying idea seems to be that a dual presidency is essential to the institutional balance in the EU and that this value overrides the simplicity that would flow from a "single presidency."

But the assumption that a dual presidency is essential to the institutional balance in the EU seems to me to be mistaken, since, irrespective of the identity of its President, the composition of the European Council will ensure a dominant role within that body for intergovernmentalism, and an opportunity for the distinctive voices of the Member State governments to be heard in a decisive fashion. That very composition thus ensures maintenance of the EU's fundamental institutional balance and places the European Council's all-important intergovernmental legitimacy beyond risk. I predict that, with enlargement, the profoundly intergovernmental character of the European Council (like the Council of Ministers) will only become more solidly entrenched.

Nor does the European Council's continuity require that it be presided over by someone other than the Commission President. Now that European Council meetings will take place increasingly in Brussels (and eventually exclusively in Brussels), rather than in the national capitals, there are much more abundant opportunities than in the past for the European Council to enjoy efficiency and continuity. Thus, just as there is little to be lost by way of institutional legitimacy in combining the presidential functions in the same person who presides over the Commission, so there is also little to be lost in terms of the efficiency or continuity of the European Council in doing so.

The principal drawback to the dual presidency is the sacrifice in constitutional simplicity – the constitution-drafting value with which I began this contribution. For the European citizen, the EU will seem more confused and confusing than ever, while for the outside world, the EU will have unprecedented difficulty in speaking with "one voice." In addition, the EU will court – both internally and externally – the risk of serious disagreement and tensions between its two "Presidents" in a regime prone to "cohabitation." Already it is

assumed (rightly or wrongly) that the "small" states will find their champion in the Commission President and the "large" states in the President of the European Council. The current sharp divisions among the Member States over the confrontation between the US and Iraq, though arising in the unique sphere of the common foreign and security policy, show us how likely it is that two presidents within the EU may well pursue different, even irreconcilably different, policies. Regrettably, the serious costs associated with such high-profile dissension will have been incurred without any apparent gains in democratic legitimacy or accountability, and with no palpable gains whatsoever in real EU leadership.

Thus, unless and until a serious disturbance of institutional balance can be shown, the fragmentation of political leadership in the EU between a Presidency of the European Council and a Presidency of the European Commission is to be avoided. Indeed, the values that the Laeken Declaration set out for the Constitutional Convention – enhanced democratic legitimacy, enhanced efficiency, and enhanced leadership – all point in the direction of a more fully integrated Presidency. If a Commission President were to be chosen through indirect election by the European Parliament (with the approval of the European Council) and were then to serve as President of an essentially intergovernmental body such as the European Council, all of those values would be served.

IV. Conclusion

Constitution-makers can and will err. But if there is anything that the American experience suggests in this regard it is that simplicity need not means simple-mindedness. The experience also suggests that it may be easier to add useful elements of complexity and nuance to the constitutional text over the life of a Constitution than to eliminate complexities that have proved to render the Constitution less flexible or adaptive than had been hoped. In conducting a Constitutional Convention, rather than just another in a series of intergovernmental conferences, it is better to err – if err you must – on the side of simplicity and thereby flexibility. It is a mistake, in my view, to confuse short-term politically expedient complexity for the simplicity and flexibility that really count from a constitution-building and polity-building point of view.