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The Commission: The Key to the Constitutional Treaty for Europe

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John Temple Lang

Abstract

Political inventions are so rare that when they do arise they are not recognized—we try to fit them into traditional classifications, or criticize them for not being something that they were never intended to be. The European Commission (“Commission”) was a genuinely new political invention, created to solve a problem. The problem was that the European Community (“EC”) had to have majority voting. That meant that from time to time minorities would be out-voted. Majority voting—an old idea, but never before used in an international organization—had to be made acceptable.

ESSAY

THE COMMISSION: THE KEY TO THE CONSTITUTIONAL TREATY FOR EUROPE

*Dr. John Temple Lang**

“It would be irrational, and contradictory, to suppose that things that have never yet been done could be done, except by means not yet tried.”¹

“The human understanding more easily invents new things than new words.”²

“There is nothing more difficult to handle, more doubtful of success, and more dangerous to carry through than initiating changes in a State’s constitution. The innovator makes enemies of all those who prospered under the old order . . . men are generally incredulous, never really trusting new things unless they have tested them by experience.”³

INTRODUCTION

Genuinely new political inventions are rare. In fact, it is hard to think of more than one in the last century. The idea of a general assembly of all the countries in the world, or of a world court, had been suggested long before the League of Nations set them up. The idea of a European Council with weighted voting and Turkish membership had been suggested by William Penn in 1693.

In fact, political inventions are so rare that when they do arise they are not recognized — we try to fit them into traditional classifications, or criticize them for not being something that they were never intended to be. The European Commission (“Commission”) was a genuinely new political invention, created to solve a problem. The problem was that the European Community (“EC”) had to have majority voting. That meant that

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1. FRANCIS BACON, *NOVUM ORGANUM* (1620).
2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).
3. NICCOLÒ MACHIAVELLI, *THE PRINCE* (1514).

from time to time minorities would be out-voted. Majority voting — an old idea, but never before used in an international organization — had to be made acceptable.

I. THE COMMUNITY METHOD

The best way, perhaps the only way, to do this was to discuss *only* proposals that had been carefully drawn up by a body equally independent of all the Member States, whose job would be to devise every proposal in the best interests of the Community as a whole, reconciling conflicting interests as far as possible. This body would *not* adopt or decide policy — that would be done by the Council and the European Parliament. The new body, in other words, was only a mediator and a think-tank for developing and proposing new policies. This mediation technique has come to be called the “Community method.”⁴ It is *not* a supranational method — the policy decisions are all made by representatives of Member States in the Council and the European Parliament. This is the Rome Treaty equivalent of the “checks and balances” in the United States Constitution.

Once this new body, the Commission, was envisaged, it was seen that it could be given other tasks. Because it would be equally independent of all the Member States, it could be trusted to negotiate treaties on behalf of the EC. It could also enforce rules already adopted by States, bring States that failed to fulfil their obligations before the Court of Justice, and make legally binding decisions in certain areas involving State aid or State enterprises.

But decision-making complicated the role of the Commission — or rather, gave it a second, distinct, role. Insofar as the Commission is a think-tank proposing policies, its proposals go nowhere unless they are accepted by the Council (and the Par-

4. See JOHN TEMPLE LANG & EAMONN GALLAGHER, *THE ROLE OF THE COMMISSION AND QUALIFIED MAJORITY VOTING* (1995) (describing current role of Commission and advocating that enhanced role is necessary to ensure that future Member States' rights are respected). See also JOHN TEMPLE LANG, *IS THERE A RATIONAL EUROPEAN CONSTITUTION NOW?* (1998) (providing history of origins of Commission and assessing current method of operation). See also JOHN TEMPLE LANG, *THE ROLE OF THE COMMISSION AND THE EUROPEAN PARLIAMENT* (2000) (discussing role of Commission and European Parliament). See also John Temple Lang, *The Commission and the European Parliament after Nice* (2001), at <http://www.europeaum.org/events/lectures.html> (discussing how events surrounding Treaty of Nice have called into question role and functions of Commission).

liament, in an increasing number of cases). Insofar as the Commission is taking legally binding decisions, however, based on already existing rules, it is subject to judicial review, but not to political approval. It needs to be equally independent of all the Member States for both tasks, but they are very different — one is policy-forming, the other is quasi-judicial.

Two tasks may have been understood by commentators — even superficial or ill-disposed ones. But gradually, the situation became more complicated. The Commission was given funds to allocate and administer, and a variety of other executive tasks for which it had not been designed and for which it was not particularly well-suited. This gave rise to several problems. The first was that the Commission did not always perform its new additional executive tasks very well. The second, more subtle and more serious problem was that many people forgot why the Commission was originally created, and what it was primarily designed to do. People started to refer to the Commission, quite wrongly, as an executive, a government, a secretariat, or a civil service. Thus, upon attempting to, quite wrongly, force the Commission into a traditional classification, people then criticized it for not having the characteristics appropriate for that classification. It now seems that the *sui generis* “Community method,” in which the Commission is a representative, independent, policy-proposing think-tank, is becoming better understood and more widely approved. Yet, it is still controversial in some quarters.

The question now arises whether the Commission should be changed or adapted in some way, to better fulfill its future role. Since the Commission is the key institution in the European Union (“EU”) structure, questions about the Commission are fundamental. The larger and more diverse the EU becomes, the more necessary it is to have new policies proposed by an independent and fully representative mediation body — however human and fallible — responsible for trying to reconcile all the interests affected by each new policy.

A. *Why is the “Community Method” Still Controversial?*

Once the connection between majority voting and policy-proposals by an independent body is understood, why is it still controversial, especially in the United Kingdom (“UK”)? There seem to be several reasons:

- The reasons for it are not understood (Europe has so far no *Federalist Papers*, and the Community method has had no Montesquieu);
- Majority voting, regarded as a loss of sovereignty, is disliked;
- The Commission's decision-making role, in which it has power to apply already existing rules, is confused with its task of suggesting new policies for consideration;
- The Commission has considerable influence, and is comprised of foreigners;
- Some European politicians, including some British ones, would still prefer nineteenth century balance-of-power politics;
- After one strong Commission President, Jacques Delors, there has been a deterioration in the Commission's reputation;
- The Murdoch press and television in the UK are influential, and they are extremely and persistently anti-European;
- A mediator institution like the Commission does not fit into Montesquieu's classification of legislative, executive, and judicial bodies — the Council and the Commission are hybrids, and the Parliament has no right of initiative;
- "Brussels," usually associated in the public mind with the Commission, is blamed for decisions taken by the Council, and governments are happy to let the Commission take the blame;
- In a multi-State group, the will of all the peoples can be expressed only by structures different from those within States.

One advantage of the "Community method" has been greatly underestimated. Since only proposals made by the Commission can be considered by the Council and the Parliament, it is impossible for lobbyists to get Members of the European Parliament to propose legislation. The "Community method" is a tremendous constraint on excessive legislation, and a valuable limitation on the powers of big business and vested interests. One has only to look at the United States to see how easily lobbyists can get Senators and Congressmen, anxious for re-election, to propose Bills on every conceivable subject. If the power of the Commission to influence policy is sometimes resented, its value as a safeguard against pressure groups should also be welcomed.

B. *What Would be the Alternatives to the "Community Method"?*

The "Community method" applies only to policy formulation, not to decision-making. For this purpose, there are essentially only four other possibilities:

- Unanimous voting, which does not seem to need safeguards, given that States in a minority have a veto. But they could be bullied, especially if they are small States, and unanimity would often lead to deadlock;
- Common policies only for whichever States happen to agree easily on the policies in question. But with this, the EU would hardly be necessary, and it could not be effective since each policy might involve different States, and each policy would be devised without enough efforts to make it acceptable to the other States;
- No safeguards for minorities — majority voting, on the assumption that the EU is so homogenous and so imbued with solidarity that safeguards are as unnecessary as they would be for Yorkshire or Devon. But clearly, the EU is not like that, and it will be even less like that after its enlargement to twenty-five States;
- An independent body of some kind which would veto any new policy that did not safeguard minority interests. Such a body would be obstructive, negative, and unpopular — and probably ineffective, because minority interests are best protected by well designed compromises, not by crude vetoes.

So what might a large Member State, like the UK, want to see if consensus could not be easily found? If there was no mediator institution, or if the mediator was not involved in all the new policies, a large Member State could envisage two possibilities: it could act together with the other large States, and disregard the small States, or it could bully the small States. That seems to exhaust the alternatives.

C. *Intergovernmentalism or the "Community Method"?*

As the other possibilities are all clearly unsatisfactory, the basic choice is between the "Community method" and intergovernmentalism. All of the current controversies revolve around this basic issue. The choice between the "Community method" and intergovernmentalism will ultimately determine

the relative influence of the different Member States. The “Community method” assures a certain equality between Member States, in that they are all “represented” in all the institutions, even if they have different voting rights. Intergovernmentalism seems likely to lead to the EU being dominated by Germany and, to a lesser extent, by France. The key issues in the choice between the “Community method” and the intergovernmental approach relate to the Commission.

1. How many Commissioners?

The first issue is whether the number of Commissioners should be reduced, so that there would no longer be one Commissioner from each Member State at all times. Reducing the size of the Commission from twenty-five or more to, say, twelve or fifteen would make it less representative, introduce inequality between the States with nominees and those without, and lead States without nominees to question both the Commission’s proposals for policy and its legally binding decisions. Commissioners do not represent the States that nominated them, but every State must have confidence in the Commission at all times, and having a nominee ensures this.

Rotation of Commissioners would *not* provide equality between States — a large State with no Commissioner is still in a strong position; a small State with no Commissioner is not. To say that a smaller Commission would be stronger is to confuse its tasks. A smaller Commission would be a more efficient executive, but a weaker policy-forming and decision-making body. The proposal, therefore, would sacrifice the more important tasks that are the Commission’s *raison d’être* to the less important, and less necessary, tasks.⁵

In its December 2002 document,⁶ the Commission pro-

5. See John Temple Lang & Eamonn Gallagher, European Action Centre, *What Sort of European Commission Does the European Union Need?*, available at <http://www.actioncentreeurope.org.uk/publications/whatsortofcommission.html>. See also John Temple Lang, *How Much Do the Smaller Member States Need the European Commission?*, 39 COMMON MARKET L. REV. 315 (2002).

6. See Commission Communication, *For the European Union: Peace, Freedom, Solidarity*, COM (2002) 728 Final (Dec. 2002) (hereinafter *For the European Union*). The Commission’s previous institutional communication was Commission Communication, *A Project for the European Union*, COM (2002) 247 Final (May 2002). There is also a draft treaty, produced on the instructions of Mr. Prodi, referred to as “Penelope.” See European Commission, *Feasibility Study: Contribution to a Preliminary Draft, Constitution of the*

posed giving the Council and the Parliament “equivalent rights both for the appointment and for monitoring the action of the Commission” and declared that “the Commission would be accountable to both the Parliament and the Council.” The Commission then said that it “follows” from what it had said that the size of the Commission should be restricted, as envisaged by the Nice Treaty. But the conclusion that the Commission should be reduced in size does not “follow” from anything that had been said. Second, the Commission failed even to mention the (probably insoluble) problem left unresolved by the Nice Treaty, of how to create a “representative” Commission if a substantial number of Member States have no right to nominate a Commissioner for five years at a time. It is a serious failure of responsibility by the Commission that it has not faced this issue.⁷ Third, the Commission says that it “would assert its governmental role.” But the Commission is not a government, and it was never intended to be a government. Moreover, the Commission’s proposals would not make it into a government for it is a policy-proposing think-tank. Its decision-making powers and its executive responsibilities are much less important than its policy-forming powers. It would be a mistake of the highest magnitude to sacrifice the Commission’s independence and representative composition essential for its policy-forming role, to the less important “executive” tasks that it has accepted in recent years. Furthermore, the Commission is badly equipped to carry them out.

2. Should the President of the Commission (or Even the Whole Commission) be Elected (not Merely Approved) by the Parliament?

This would strengthen the position of the President or the Commission politically — he would be democratically elected. The latter would also involve some risks. It would *reduce* the in-

European Union Working Document (Apr. 2002), *available at* http://europa.eu.int/futurum/documents/offtext/const051202_en.

7. The suggestion that the President of the Commission would choose the other members of the Commission does not solve this problem, and is open to the objections that the Commission would be unrepresentative and that the President would have too much power. An insoluble problem so crucial to the Constitution of the EU should not be dealt with merely by trusting in an infallible President. *See generally For the European Union, supra* n.6.

dependence of the Commission *vis-à-vis* the Parliament. Currently, the independence of the Commission is assured because it is appointed by one body, the Council, and removed (except individually for misconduct or incapacity) by another body (the Parliament). Under this proposal, the body with the power to elect the President would have power to remove the whole Commission. Because the Parliament had elected the President and might re-elect him, it would be inclined to give him orders. And the independence of the Commission is essential if it is to develop genuine common policies or to enforce common rules. This suggestion would mean that the President would be elected by some majority of the Parliament, and would be dependent on a majority of the Parliament for re-election. Candidates would have to make themselves acceptable to a majority, and would be likely to disregard the interests of the minority, who would most likely not vote for them. This would also inevitably lessen the independence of the Commission *vis-à-vis* the Parliament. It certainly could not increase its independence. The President would be regarded as a political appointee of the political majority (e.g., socialist, centrist, or conservative) in the Parliament, and would no longer be politically independent or neutral. This would weaken the Commission, not strengthen it.

It is true that the President might be elected by a two-thirds or a three-fifths majority of the Parliament, and this would mean that the main political parties in the Parliament would have to agree on a candidate. That would make the President less closely associated to any one political party, but more politically, subject to the instructions of the majority in Parliament. It is also true that election by Parliament should end the undesirable tradition of choosing Commission Presidents from among former Prime Ministers, which is far too limited a group.

Depending on the powers of the President, there might be other undesirable effects. Elections would further strengthen the power of the President over the rest of the Commission — he already has power to make Commissioners resign, without cause and without judicial review (but with the assent of the other Commissioners, apparently by a majority). The extraordinary suggestion has been made that the President would choose the other Commissioners, which would destroy the representative and independent nature of the Commission, and lead it to represent only the political views of the President. If the Presi-

dent had been elected by the Parliament, he could come under pressure to dismiss a Commissioner whose policies displeased a majority in the Parliament. The solidarity and collective responsibility of the Commission would be weakened.⁸ It is easy to see that a majority (perhaps a temporary, or temporarily enraged majority) of the Parliament might be found for a resolution calling on the President to dismiss, say, a Competition Commissioner who was regarded as too strict on State aid issues, even if a majority of the Commission had previously approved all of his proposals. There is a risk that the election of the Commission President by the Parliament may be advocated for the wrong reasons:

- To try to strengthen a weak President;
- To increase the powers of the Parliament;
- To discourage the creation of a "President of the Council." The proposal is an aspect of the rivalry between the two institutions *and* the rivalry between the large and the small Member States.

Certainly, having the Parliament elect the President would be undesirable if it led to removal of the Commission's exclusive right to propose new policies. Apparently, strengthening the President of the Commission might in fact weaken the Commission as a whole. The President is a member of the Commission over whose appointment each Member State has at present a veto. If unanimity continues to be required, (which is not yet decided), this means that a State can weaken the Commission by preventing the appointment of a strong President. The more powerful the Presidency, the more reluctant the large Member States will be to give up this veto. States might be particularly anxious to prevent the emergence of a strong President if being elected by the Parliament would reinforce his position.

However, if the President of the Commission was selected by

8. The Commission repeats the suggestion that the President should have power "to oppose any initiatives he judges inopportune," that is, he should have a veto over any "initiative" of the Commission. This power, which would destroy the equality of Commissioners, would make it undesirable for the President to be elected by Parliament, because it would give Parliament another way of interfering with the independence of the Commission. It would also give the President power to veto any initiative to which he was politically opposed. This would also make it harder for any candidate whose Member State was opposed to further EU initiatives to be elected President. *See generally For the European Union, supra* n.6

some kind of Electoral College of the national parliaments and the European Parliament voting together from a list of nominations by several national governments, these objections would be reduced, depending on how the Electoral College was composed.

3. Should the Council Have Power to Remove the Commission?

At present, the independence of the Commission is assured because it is appointed by one institution and is removable by another, i.e., the Parliament. If the same institution could remove and reappoint,⁹ the Commission would be essentially under the control of the Council. The Council could at any time dismiss the Commission and appoint a Commission more to its liking. So the idea that this proposal would strengthen the Commission is simply wrong — it would weaken it. It is naïve to believe that the Commission would be strengthened by being made subject to the control of its principal institutional rival.

It may be said that the Commission has, wisely or unwisely, accepted “executive” tasks, so it must be accountable for them. This sounds reasonable, but is misguided. The independence of the Commission is essential to the “Community method.” The Commission cannot be independent of the Council for some purposes but not for others. Independence is essential for the Commission’s policy-proposing and decision-making tasks. These are much more important than its executive tasks, and the independence needed for its more important tasks should not be sacrificed to obtain accountability for its less important ones. The independence of the Commission makes it necessary that it should not be subject to “censure” on specific issues, whether legal decisions or political proposals, by either the Parliament or

9. The Commission proposed, in December 2002, that the Council and Parliament should have equivalent rights for appointing and monitoring the Commission, and that the Council should have “the right to censure the Commission’s action.” This proposal was not clearly written, and it does not seem well considered. It does not seem to refer merely to the Parliament’s power to remove the whole Commission. Neither the Parliament nor the Council now have the right to “censure the Commission’s action.” Parliament has no power to give the Commission instructions and no right to criticize specific actions of the Commission. Specific Commission actions are matters for the Community courts, not the Parliament or the Council, if they have legal effects. If Parliament dislikes the Commission’s political proposals, they can be rejected without “censure.”

the Council. If that means giving up the Commission's "executive" tasks, so be it.

In fact, there is another fundamental objection. An institution like the Commission should be responsible to *one* other body, not two. Control by two other bodies is either superfluous (if they agree) or a cause of conflict (if they do not). The same objection applies to the idea of the President of the Commission, or a European "Minister for Foreign Affairs" being responsible to both the Commission and the Council.¹⁰

In short, at least two of the three principal proposals for altering the rules concerning the Commission are open to question. They would all weaken it, not strengthen it. It is therefore worrying that supporters of the Commission, by a majority, have seen it fit to support all three proposals. But there is a much more serious suggestion being made, which would affect the Commission, although it primarily concerns the Council.

4. Should the Council Have a "President" and who Should a President be Responsible to?

This is a political proposal, not a legal one. It is not clear what powers, if any, a Council "President" would have. Essentially, it seems that he would be some kind of a chairperson or a spokesperson of the EU on foreign policy, acting on the instructions of the Council, and implementing Council decisions. What is clear is that a President-spokesperson, whatever precisely he did, would substantially diminish the role of the Commissioners responsible for external relations, and of the Commission as a whole, which is intended to represent the EU in all international trade negotiations.

Even if the present position of High Representative was abolished and one Commission Vice President for foreign policy was appointed, having both a Council President and a Commissioner for foreign policy would recreate the difficulties already caused by having both Mr. Solana and two Commissioners all representing the EU in external matters. The German view that

10. There is one change that would certainly make sense — the Parliament should have the same powers as other institutions to start the procedure to remove an individual member of the Commission for misconduct or incapacity. If Parliament had had this power in 1999, it would have been able to have any individual Commissioner removed if there were sufficient reasons to do so.

spokesperson, he will do nothing to develop a common foreign policy. If he is full time (and not a head of government) and his job is to develop and execute policies, he would need an independent and representative body to help him — exactly what the Commission already is — unless, of course, he relies merely on the large Member States. If his institution is not independent and representative, its proposals will inspire less confidence than those of the Commission.

But if the proposals are not approved by the Parliament, they will inspire less popular support too. The economic policy of the EC may have been left to technocrats; foreign policy will certainly not be. Those who propose a common foreign policy for the EU do not seem to have understood this. Under the present proposals, the Parliament may discuss foreign policy, but it can decide only on trade agreements. Foreign policy will not, and probably cannot, be subject to judicial review. But it certainly ought to be subject to democratic control. It is hard to imagine a worse basis for a foreign policy or one more likely to become unacceptable or easily exploited by adversaries, than two heads, two institutions, majority voting without safeguards, and autocracy with inadequate democratic control and without accountability or transparency. Legitimacy concerns the process as well as the result.

A. *So, Should the Scope of the "Community Method" be Widened?*

If the "Community method" is accepted, two questions arise — should it apply to Common Foreign and Security Policy or to Justice and Home Affairs, the second and third EU "Pillars"? Foreign policy has so far been subject to unanimity, and the mediator role of the Commission is different if every State has a veto — the mediator can help find compromises, but is not primarily needed to safeguard minorities. It is an honest broker, not a protector. But with twenty-five Member States, unanimity will be rare and the scope for a dissident to threaten a veto unless it gets a concession on some wholly unrelated issue would greatly increase. But it is clear on the basis of experience with the Third Pillar (Justice and Home Affairs) that negotiations are more efficient and successful when based on a single balanced proposal made by a representative and independent mediator. Hidden agendas and secret deals are less likely.

a President of the Council would increase the intergovernmental element in the EU is certainly correct. The proposal would strengthen the Council and diminish the Commission; perhaps that is one reason why the UK, France, and Spain suggested it.

The proposal for a President of the Council is *not* an adjustment of the “checks and balances” within the EU. It is the result of the institutional rivalry between the Council and the Commission and the contest between inter-governmentalism and the “Community method.” The EU does not need a two-headed executive. The Franco-German proposal has provoked strong criticism. One individual cannot be satisfactorily responsible to two (or even three) institutions.

A version of this idea, with certain advantages, is that the President of the Commission would also be the President of the Council. This would entirely change the relationship between the two institutions. But it would *not* strengthen the Commission because its independence would be weakened. A joint President would have to be elected by the Council and the Parliament, *not* the Council alone. The UK opposes the idea of one person being President of both bodies on the grounds that he would have too much power. But the principal objection to one person holding both Presidencies is that it would entirely confuse the roles of the two institutions. And it is curious to object to the two Presidencies being held by one person because it would give him too much power, but not to object to a common foreign policy without democratic control, which would give all the governments too much power.¹¹

II. A COMMON FOREIGN POLICY WITH MAJORITY VOTING AND WITHOUT DEMOCRATIC CONTROL?

Nobody has suggested that the President of the Council should be approved by the European Parliament or by national parliaments. A new and more serious “democratic deficit” would arise, whatever the exact powers and functions of the President were. If the Council President, however appointed, is merely a

11. The Danish Prime Minister, Anders Føgh Rasmussen, has suggested a variation of this plan under which the Council President would be chosen in rotation from three groups of the small, medium, and large States. This would certainly make the plan more acceptable to the smaller States. But it would make the system even more complicated, and it would do nothing to reconcile the Council and the Commission, or the intergovernmental method with the Community method.

It is clear, of course, that large Member States think of foreign policy and security matters as important to their “sovereignty,” and that they are unlikely to allow the Commission or anyone else to influence them. It is also clear that if the Commission were to exercise its mediator task in this area, it would need additional and differently qualified officials. Let us be frank about the other difficulties of a common foreign and security policy:

- There are considerable differences between the reach and the areas of interest of the Member States in different parts of the world (France in Africa, Spain in South America, and Germany in Central Europe);
- There are considerable differences in military strength, and willingness to use it, among Member States;
- Discussion of a common defense policy is sensitive for countries that have regarded themselves as neutral (Austria, Finland, Sweden, Ireland);
- Some issues are much more important to some Member States than to others;
- There is a widespread impression that the UK would prefer to share a foreign and defence policy with the United States than with the rest of Europe;
- A consistently applied and comprehensive EU foreign policy would raise the question of replacing the UK and French seats in the United Nations (“U.N.”) Security Council with one EU seat;
- There is a fear, especially in the smaller Member States, of being caught up in something that they would not be able to opt out of or to control. Ireland is not the only State whose nightmare is conscription into a foreign army.

These are all reasons why a common foreign and security policy is difficult. But they are *not* reasons why the Commission cannot perform its mediator role. Nor are they reasons why the Parliament should be kept out. The objection is simple — the large Member States do not want to share power with the Commission or the Parliament. This is not democracy.

There is another difficulty. It is not clear how many of the EU Member States today really have a considered and comprehensive foreign policy that they could hope to carry out effectively *on their own*. Apart from the astonishingly frank and wise

Christian Democratic Union (“CDU”)/ Christian Social Union (“CSU”) policy statement in 1994 on Germany’s interest in a prosperous and stable Central Europe (the conclusion of which was precisely that Germany could *not* ensure this on its own), it is not easy to think of an up-to-date, comprehensive and realistic foreign policy statement by any EU government in recent years. Before refusing to contemplate majority voting on foreign policy issues on the basis of the “Community method,” most EU Member States would be wise to consider how far such foreign policy notions are based on nostalgia, self-deception, dislike of “foreigners,” or on sacred cows (not clearly thought out), such as “sovereignty” or “neutrality,” or on wholly imaginary and irrational fears of “superstates,” or on merely saying “no.” Repeating that Europe must be based on Nation States does not amount to a policy, even on European affairs, since that phrase is neither operational, constructive, nor precisely correct.

One thing seems clear — a common foreign and security policy for an EU of twenty-five or more States needs majority voting. Majority voting, if it is to be acceptable in the long run, needs the Community method. Majority voting on an unbalanced proposal pushed through by the large Member States would not lead to popular acceptance. The situation would be still worse if the foreign policy, however formulated, was not subject to democratic control either. It is clear that two entirely different ways of managing policy, with entirely different powers and procedures, would be thoroughly undesirable in an already loose group of States.

In the fields of Justice and Home Affairs (immigration, organized crime, terrorism, and so on), the common interests of Member States are clear, and many of the issues are technical. The basic difficulty is how to reconcile human rights with effective enforcement and how to ensure that due process is provided by frustrated policemen. These issues are difficult, but they do not obviously or necessarily cause conflict between large and small States, or between the EU institutions. So the Community method should be used.

B. *The European Parliament*

The “Community method” is also under pressure as a result of the Parliament’s efforts to increase its powers in two ways: the

right to initiate policy proposals and the co-decision procedure. The Commission's exclusive right to initiate EU policies, which will be even more necessary to safeguard the interests of minorities in a Union of twenty-five States, means that the Parliament cannot initiate them. Members of the Parliament who do not seem to understand the reason for this limitation have complained about it. But it does not seem possible to give the Parliament power to initiate policy without abandoning the safeguard for minorities (quite apart from the flood of lobbyists' proposals which would result). It should be enough that the Parliament can call on the Commission to make proposals.

The co-decision procedure has created a less clear-cut problem. It arises essentially because the Council's and the Parliament's texts need reconciliation, and majorities in both bodies reach agreement on a text, which the Commission does not consider to adequately protect the minority interests involved. In practice, the Commission produces compromise texts in accordance with its mediator role. If these are ultimately accepted, no problem arises. Conciliation is confined to reconciling positions taken by the Parliament and the Council, so the Commission could act at an earlier stage to protect minority interests, if necessary. In theory, the Commission could withdraw its proposal and stop the proceedings. However, the interplay between the three institutions tends to give rise to something approaching instructions to the Commission on the timing and the content of future proposals that, if taken literally, would be inconsistent with the independence to which the Parliament pays lip service, but which it sometimes seems not to understand. Some of this is procedural technicality, but the safeguards for minority interests are not. All three institutions need to be acutely aware of the need to protect minority interests as far as possible. They also need to be aware of the need to avoid the time-wasting processes of reconciling similar texts, which is such a regrettable feature of the U.S. Congress.

C. *Where are We Going?*

Are we therefore going to have two parallel Unions, one intergovernmental, the other based on the "Community method," as Joschka Fischer feared?

There would obviously be risks in having a foreign policy

devised and conducted by a majority of the Council without the safeguard of a mediator, when the EU's economic policies are subject to a different and democratically controlled institution producing more carefully designed policies. The two sets of policies might conflict, there would be different priorities, there would be demarcation problems, and much time would have to be spent on coordination. Having two Presidents, elected by different institutions, is certain to lead to confusion, if not to conflict.¹² The more effective and powerful the Council President becomes, the greater the risk of conflict. Each of the two current proposals for elected Presidents are open to objection on institutional grounds. The combination is open to the further objection that it would institutionalize rivalry, and add another difficulty to the problems of having one foreign policy for twenty-five States. The reality is that the inter-governmental conception of Europe (leading to the idea of a President of the Council) is not compatible with the Community method, which has led, wisely or otherwise, to the idea of the Parliament electing the President of the Commission. The Franco-German proposal is not a compromise. It is a mixture of incompatibles, which would make the EU more complex instead of simpler. It does nothing to resolve the incompatibility between the inter-governmental and the Community approaches.

But the even more fundamental objection to strengthening the Union's foreign policy without using the "Community method" is that policies developed by and between governments would not be subject to effective democratic control. An EU with an effective foreign policy would be profoundly undemocratic, unless the Community method is used. The large Member States are not immune to hypocrisy and they have an obvious interest in promoting a more inter-governmental EU.

Maybe we must accept that a lasting or satisfactory document will not emerge from the European Convention, the inter-

12. Andrew Duff MEP has called the Franco-German proposal "a potentially disastrous recipe for internal confusion and external cacophony." Peter Sutherland has said that it would undermine Europe's greatest achievement — "the delicate balance between the interests of sovereign States and the overall European interest." See Peter Sutherland, *A second EU president would be divisive*, *FIN. TIMES*, Jan. 20, 2003, at 13. The recent proposals for a Council President are not the first time that France, Germany, and the UK have tried to impose an intergovernmental regime over the Community. See generally GARRET FITZGERALD, *REFLECTIONS ON THE IRISH STATE* 166-69 (2003).

governmental conference, and afterwards. The Convention is probably trying to move too fast — perhaps a constitution for an entire continent cannot be completed in six months. Certainly, a Union with two Presidents built on two mutually inconsistent principles of intergovernmentalism and the Community method would be neither democratic nor lasting. However, that may be all we can get at this time. If so, we will have to recognize that the 1787 Convention in Philadelphia (“Philadelphia Convention”), which drafted the U.S. Constitution, did a better job. The Philadelphia Convention would never have suggested two executives for foreign policy, with the more influential one not subject to checks and balances or to democratic control.¹³

III. THE ADVANTAGES OF THE CONVENTION IN PHILADELPHIA IN 1787

Those lawyers who wrote the EC Treaties set out to do something that nobody had done before — to write a treaty that would turn into a constitution. This was more difficult than the task of the Philadelphia Convention. The members of the Philadelphia Convention realized, almost at once, that they were writing a new constitution. They had several other advantages, in comparison with the present European Convention:

- First, the Constitutional Convention consisted entirely of a relatively homogenous group (all white European male landowners, no Black or Native American peoples). The members were all Christians or Deists or from one of those traditions, they had all read Montesquieu and Blackstone, and shared the same common law tradition. In addition, they all spoke the same language, had all recently succeeded in a war of independence, and were not prejudiced against one another by nationality, race, or class;
- Second, the members were starting with a virtually blank page. They were unencumbered by governments or institutions with vested interests or rivalries, or by States accustomed to having their own foreign policies;
- Third, unlike Schengen and Euroland, they did not have to

13. See Alexander Hamilton, *The Federalist No. 75*, in *THE FEDERALIST* 475-80 (B.F. Wright ed., 1961) (stating that under U.S. Constitution, President has power to make treaties with advice and consent of Senate, provided that two-thirds of the Senators who are present concur).

deal with groups of States, which had already made arrangements of their own;

- Fourth, they knew that they were in a time of great change, and on the threshold of a new period of history;
- Fifth, none of the members needed to hold referenda on the new constitution in their States (nine of the new Member States in Europe and several of the present Member States will have referenda on accession or on the new constitutional treaty);
- Sixth, there was no substantial body of opinion at the Philadelphia Convention that was opposed to the whole exercise and anxious to reverse what had already been done;
- Seventh, the Philadelphia Convention had George Washington.

Above all, the thirteen states were relatively similar in size, population, and income *per capita*, as population was calculated in those days (none were relatively as large as Germany).¹⁴ This fact made their job much easier. The aftermath of the Philadelphia Convention also obtained one advantage which the Europeans have not yet created — the *Federalist Papers* thoroughly explained the reasons for each provision in the new U.S. Constitution with surprising objectivity.

The European Convention, however, has one important advantage. It has more than forty years of experience with the “Community method,” a tried and proven technique for reconciling differences and developing policy¹⁵ and the most successful mechanism for conflict prevention in the history of the world. However, this is not an undiluted advantage. It is not clearly understood, even by key people, and is not defended by

14. Virginia was about fifteen times as populous as Delaware. Germany, with some eighty million inhabitants, has about 240 times the population of Luxembourg or Malta. See *The Member States of the European Union—Germany*, available at http://europa.eu.int/abc/eu_members/germany/index_en.htm (stating that Luxembourg’s population is 429,200 people). See also *Department of Information — Malta*, available at <http://www.foreign.gov.mt/embfiles/default.htm> (stating that Malta’s population is approximately 352,835 people). Of the twenty-five EU States, six States with over forty million inhabitants will represent 74% of the EU population; eleven States with less than five million will represent only 7%; and eight other States (each with eight to sixteen million inhabitants) will represent 19%.

15. See J.T. FLEXNER, *WASHINGTON: THE INDISPENSABLE MAN* 208 (1969) (stating: “the [Constitutional] Convention was trying to establish a government altogether new under the sun, there were no precedents to violate — but also none to steer by.”).

governments who are looking for someone to blame for unpopular policies. Additionally, there is institutional rivalry between the Council and the Commission.

In spite of all the difficulties, however, this is a historic time. Nobody has ever written a constitution for a continent before. The last time anyone tried to write a constitution for England was under Cromwell's Instrument of Government in 1653.

CONCLUSION

In this Essay I have essentially argued that there is no satisfactory alternative to the "Community method" based on an independent and fully representative Commission. That method is sound, and should not be substantially altered. It certainly should not be altered by the ill-considered mixing of different concepts, or by institutionalising the struggle between them. The existing treaty provisions are well thought out, but unfortunately, the reasons for them are not well understood. I have also suggested that recent proposals about the Commission's composition and powers are badly drafted, ill considered, and if adopted, would seriously damage the Commission itself. Even supporters of the Commission do not seem to understand its *raison d'être*, and have poor judgment when they try to assess the consequences of these proposals.

Unfortunately, the Commission seems likely to be weakened just as the EU is being enlarged to receive ten new Member States. This is precisely the time at which the Commission needs to be strengthened the most. This enlargement is much more difficult than any previous enlargement.

The UK is unlikely to become the third member of a triumvirate with France and Germany, dominating Europe on an intergovernmental basis. Recent events concerning Iraq have pushed that prospect into a very distant future indeed, if it ever had any substance at all.¹⁶ If that were right, the UK would be

16. There are a number of reasons why it was never likely that the UK could obtain influence equal to that of France or Germany. The UK has always felt itself to be closer to the United States than to Europe. Instinctively, the UK has always been a reluctant participant in the EC and the EU. It has consistently discouraged further integration, but without ever having an alternative policy, either for itself or for Europe as a whole. The UK's policy on Europe for the last forty years has been nothing more constructive than a wish not to be left out. It has never been clear whether the UK approves or disapproves of the European Parliament. It has neither joined Schengen nor adopted

wise to join with the smaller Member States in extending the Community method. This method protects minorities, and from time to time in a Union of twenty-five States, the UK will be in a minority. Certainly, a new treaty based on the Community method would be more lasting than what is now being suggested.

the Euro. In the past, it got away with this reluctance because it was making an important military contribution to NATO by keeping an army in Germany. But this is no longer necessary, or indeed relevant. The principal opposition party sounds, at least, opposed to the EU. The Murdoch press, which is very vocal and which certainly seems influential, is violently opposed to the UK's involvement in Europe. Until at least some of these things change, the UK cannot expect to be as influential as France, let alone Germany, in an intergovernmental system in Europe. And if the UK got into the driving seat and then began to put on the brakes, it would lose whatever influence it had obtained. The French and Germans meet regularly; they apparently never invite the UK to join them. But they have met regularly with the Poles for some years. The draft constitutional treaty proposed semi-officially on behalf of the UK Government is a cautious document. See Alan Dashwood, *et al.*, *Draft Constitutional Treaty of the European Union and Related Documents*, 28 EUR. L. REV. 3 (2003).