

TOWARD AN ADMINISTRATIVE STATE?
THE CONSTITUTIONAL LEGITIMACY OF EU ADMINISTRATIVE POWER

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NOTE IN ADVANCE

This brief, reflective paper is little more than a first attempt to carve out an area of future study. No extensive, substantive research could yet be conducted for it. For my doctoral dissertation (to be defended next January 13) I have studied the meaning of the so-called ‘politics-administration dichotomy’ – the principle (as I describe it) that politics and administration are and should be kept apart in modern government not merely to improve the functioning of either but, more importantly, to protect constitutional values such as liberty for its citizens. This research has led me to the importance of constitutionalism and constitutional thinking for the study of public administration. Having concentrated in my PhD research on a long-standing debate in American Public Administration, in the future I want to turn my attention to the current European context. It is my aim eventually to submit a research proposal about the issues presented in this paper at NWO or other funding institutions. Comments and suggestions are most welcome.

“My opposition to administrative power has been interpreted into opposition to all government. This, however, is not true. I oppose only violence and the view that might makes right.”
(Tolstoy 1909)

1. THE PROBLEM OF ADMINISTRATIVE POWER

In his short and sweeping ‘A comparison of America and Europe,’ published one hundred years ago, the great Russian writer Leo Tolstoy also ventured to offer some half-baked but nonetheless fascinating reflections on the modern state. Among other things, he drew a distinction between administration and government, and expressed his particular concern about the rapidly increasing power of the former. Administration, for him, was not just a loyal executor of predetermined laws and policies, let alone a friendly (‘client-oriented’) provider of public services, but a bearer of vast power and a potential perpetrator of self-legitimated violence. The extent to which Tolstoy’s fears have proven justifiable in the century that has followed them may be a matter of debate. It is undeniable, though, that both in America (the US) and in Europe (the nation-states, but also the EU) the subject of administrative power raises important questions.

Now legitimizing power is a difficult issue in its own right. ‘What gives, say, a government the right to exercise power over its citizens?’ is the type of question that cannot be answered without fundamental consideration of the *condition humaine* and it is, therefore, a central issue in modern political philosophy.¹ The legitimacy of *administrative* power, specifically, or of public administration per se, unfortunately does not receive much attention from political philosophers, but is a subject of ongoing reflection and debate among theoretically inclined students of public administration itself (McSwite 1997). What is the source of legitimacy of public servants? Do they acquire the right to prepare policies, make decisions, execute laws, or otherwise exercise power from their political superiors, from their legal status, from their professional expertise, or from some other source? Is theirs a free-standing, independent kind of legitimacy or is it derivative and dependent upon the legitimacy of another institution? And what is the legitimate extent and scope of administrative power? These are questions that do allow for simple and uniform answers, but require complex and subtle argumentation tailored to different situations.

One way to narrow down the subject matter is to concentrate on *constitutional* legitimacy as one particular type of legitimacy only. This has in fact been the main focus in the (predominantly American) public administration literature. More importantly, in both the US and the EU it is this kind of legitimacy of administrative power that seems particularly problematic. Yet it must be noted that the problems on both sides of the Atlantic have a different, even opposite form. Whereas the US first adopted the Constitution and then saw ‘the rise of administration,’ the EU has first seen the establishment and expansion of administrative power and subsequently attempts to build a constitutional order around it. So in the former the evolving public

¹ MacIntyre has argued that it is one of the ills of modern political thought that it is mainly concerned with the legitimation of political power or coercion and not (like classical political thought) with the justification of political authority (1998: 241; cf. Murphy 2003: 153). This is an important point, but it cannot be dealt with in the scope of this paper.

administration had to be given a place under the constitutional sun, while in the latter the established regime has been highly administrative in character from the outset and is currently ‘constitutionalized’ (and ‘politicized’). No matter how different these situations are in fact and principle, they both create challenging constitutional legitimacy questions for public administration.

In this paper, I want to explore how this shared problem of the constitutional legitimacy of administrative power has been and can be addressed. In section 2, I will go somewhat deeper into the question why the question of the constitutional legitimacy of EU administrative power is important at all. Next, I give a brief introduction to the so-called ‘the Constitutional School’ that has developed in American public administration since the late 1970s (section 3). In section 4 I offer three critical comments and adaptations to strengthen this American body of thought and make it more applicable elsewhere. In section 5, then, I briefly explore why we make hope that the American arguments and concerns about the constitutional legitimacy of administrative power can be applied fruitfully in the context of the EU as well. Finally, in section 6 I try to put the endeavor in its proper perspective and point out what we can and cannot reasonably expect from such an application.

In the paper, I will mainly draw on literatures of administrative and political (in particular constitutional) theory. For reasons of brevity and coherence, the intellectual history of the ideas treated here will be left out of consideration.

2. TOWARDS AN ADMINISTRATIVE STATE?

For many, the (constitutional) legitimacy of EU administrative power is not at all obvious. In the common image of citizens and journalists, ‘Brussels’ is highly synonymous with bureaucratism. The EU is believed to be dominated by technocrats and interest groups and characterized by overregulation, red-tape, and waste. However justifiable or unjustifiable these popular impressions may be, they are an important part of the public discourse about Europe. The EU tends to be regarded as overly complex and unaccountable, and hence illegitimate. Attempts to strengthen the emergent polity with state-like institutions such as a constitution, a flag, and an anthem, do not succeed to take away suspicions and skepticism. To the contrary, they rather seem to strengthen fears that the EU is on the way to become a ‘superstate’. Put in scholarly jargon, there is a widespread concern that in the process of further integration and constitutionalization the EU is developing into an administrative state.

What is an administrative state? Dwight Waldo, who has done much to give the concept currency through his public administration classic *The Administrative State* (1948), has argued elsewhere that “a strong case can be made that ‘administrative state’ is a redundant expression: that a state by its nature is administrative else it is not a state” (1984: 191). Although this view might seem plausible at first sight, it robs the concept of administrative state of a specific meaning it does bear in most discussions, including Waldo’s own. The concept of administrative state should be distinguished from the concept of public administration. Public administration is an institution within the state – any state, perhaps, as Waldo suggests – but an administrative state is something different.

According to Van Riper, who has written an extensive discussion of the concept, the term ‘administrative state’ originated in the 1940s and has been “used most commonly to characterize the expanding structures and functions of the administrative mechanism of modern governments. Specific emphases differ widely, but most typically the term connotes great size and complexity, and some recent usage implies such institutional power and discretion as to threaten constitutional arrangements” (1998: 71). This circumscription concurs with several other definitions of the concept that are on offer. To give some examples:

- “[The administrative state is t]he political state when it has taken on heavy responsibilities (...) especially those that deal with economic life. The administrative state is the civil service state. (...) Administration threatens to overshadow policy making and politics. It is an interventionist state” (Dimock 1951: viii-ix; quoted in Van Riper 1998: 72).
- “The ‘administrative state’ should be thought of not as a state devoid of legislative and judicial organs but as a state in which administrative organisation and operations are particularly prominent at least in their quantitative aspects” (Morstein Marx 1957: 2n.).
- “[A] political-administrative system which focuses its controls and renders its services through administrative structures but includes also the interaction of political structures through which these are sustained, directed, and limited” (Redford 1969: 4).
- “[T]he political order that came into its own during the New Deal and still dominates our politics. (...) Its hallmark is the expert agency tasked with important governing functions through loosely drawn statutes (...) [it is] in reality the welfare/warfare state we know so well” (Rohr 1986: xi).
- “A state wherein political authority and mandate for policy actions are contained in the political leadership of the country and where the leadership is characterized by technocratic and bureaucratic competence. In an administrative state, the political arena thus shifts from the citizenry to the bureaucracy” (Bhatta 2006: 23; Singapore is mentioned as an example).

In sum, there is a strong consensus among students of public administration that an ‘administrative state’ is not a mere institution, such as the public service, but a particular type of state or regime, namely one that is strongly influenced, even dominated by administration. Tellingly, the administrative state is often associated with the description Max Weber gives of the modern bureaucratic state. Van Riper, for instance, circumscribes the administrative state as a state that has six characteristics he derives from Weber (classical form of organization; recruitment by merit; rational decision making, rule of law; written procedures and records; and a well developed money economy) and four additional characteristics (a base in quantitative techniques, supporting technology, especially in communications; enforcement of responsibility and ethical standards; and finally, all of these characteristics in a well-developed system) (Van Riper 1987; quoted in Van Riper 1998: 76). To use another of Weber’s concepts, one could say that an administrative state is a state with *Beamtenherrschaft*, i.e. domination of bureaucratic officials.²

² The concept of administrative state also bears resemblances with the concept of bureaucracy in its oldest usage. We now understand bureaucracy as a particular type of organization, but one of the first

As these definitions and the association with Weber suggest, an administrative state can hardly be a constitutional (in the sense of limited) state. This goes in two senses. First, there is practically no limit on the power of administration within the state itself. There is no functioning system of separation of powers with checks and balances and rightful political leadership is driven out of its place. Even the rule of law becomes more of an (enabling) source of administrative power than a (disabling) check on it. Second, and perhaps even more importantly, in an administrative state there is practically no limit on the administrative power of the state in society. It expands so much in size and takes on so many responsibilities that the political rights and social duties of citizens may be threatened (cf. Tocqueville 2000 [1835-40]). In this understanding a police state is only a specific, though (even) less sympathetic type of the administrative state. In short, in an administrative state the public administration dominates the state so heavily that the scope for political leadership (a Weberian concern) and political freedom (a constitutionalist concern) becomes very small indeed. Administrative power cannot be constitutionally legitimate if it is not constitutionally limited.

So far, the concept of administrative state has been applied mainly to the US, notwithstanding the traditionally weak sense of 'stateness' that exists in America as compared to Continental Europe (Stillman 1990, 1997; Dyson 1980). Perhaps this is in fact quite understandable: when there is no strong sense of 'stateness,' the rhetorical force of a pejorative expression like 'administrative state' is much greater.³ But this consideration, added to the fact that the EU is, at least in the popular image, often so strongly associated with bureaucratism, makes it surprising that the concept is almost never used for that polity (Bignami 1999 is an exception). Let me be understood correctly: I do not say or think that the EU can now (already) be adequately depicted as an administrative state. I only say that many people fear that the EU is sneakily developing in that direction, and that therefore the constitutional legitimacy of EU administrative power should be a subject of serious attention. The dystopia of administrative state can serve as an analytically useful extreme and as a practically important reference point. Even those who have more sympathetic expectations of the EU and do not think the administrative state as very imminent or unattractive should be able to argue the (constitutional) legitimacy of much administrative work the EU is doing. Let us see what kind of arguments American public administration theorists have made to their disposal.

3. THE CONSTITUTIONAL SCHOOL

During the greater part of the twentieth century, constitutionalism and constitutional thinking did not receive much attention by students of public administration. Their attitude is well expressed by that single literary *topos* that has so often embellished the otherwise prosaic literature of our field:

For Forms of Government let fools contest

meanings of bureaucracy was a type of government: rule not by one (monarchy), not by the best (aristocracy), but by bureaus (in other words: 'bureau-cracy') (cf. Albrow 1970).

³ In any case, those who have serious objections to the administrative state tend to use the concept with no more hesitation than its proponents (Lawson 1994).

Whate'er is best administer'd is best.

This line from Alexander Pope's *Essay on Man* (1963 [1733-4]: 535) has had an interesting reception in the history of political thought, where it has been commented upon by Kant, Hamilton, Paine, and others (Anter 1995: 88 n. 197), but while most political philosophers have rejected the view expressed in it, students of public administration have generally been much more sympathetic. Woodrow Wilson, for one, who is often regarded as the founder of the American study of public administration and who was still quite familiar with the tradition of political philosophy, substantially at least in large degree affirmed Pope's words. In 'The Study of Administration' (1887) he defended a distinction between administrative and constitutional questions, arguing that the time of constitutional debates was over and attention should now be turned to administrative issues instead ("It is getting harder to *run* a constitution than to frame one"; 1887: 200). Unbothered by the fact that the position of public administration within the state is obviously a fundamental constitutional issue itself, most students of public administration in the twentieth century have followed Wilson on this point – very few exceptions notwithstanding.⁴

This situation has changed, however, since the late 1970s with the emergence of a self-conscious constitutional approach in (American) public administration. The main contributor to this approach is undoubtedly John Rohr from Blacksburg, Virginia. Rohr was a student of Herbert Storing, and several of Rohr's most important ideas can be found in the Storing's writings already (Storing 1995c). Both scholars were, in turn, students of the well-known political philosopher Leo Strauss and, though not Straussians in the strict sense of the word, their writings often show traces of Strauss's typical predilection for classical political philosophy (cf. Pangle 2006: 115-117). After Rohr's ground breaking work, several other colleagues have further developed the constitutional approach (e.g. Kirwan 1981, 1987; Lawler 1988, 1998; Lawler, Schaefer, and Schaefer 1998; Morgan 1988, 1990, 1998; Morgan and Rohr 1982; Rosenbloom 1983, 1984, 2006; Schaeffer and Schaeffer 1979). By now the constitutional approach is established so securely among the theoretical perspectives on public administration that some even speak of a Constitutional School (Spicer and Terry 1993: 239ff.).

The main concern in this literature is the proper place of public administration within the American constitutional order, or, in my terms, the constitutional legitimacy of US administrative power. As the approach emerged, especially in the work of Rohr, in response to Reaganite bureaucrat bashing, it often tends to elevate public administration to a status of high responsibility and respectability. The constitutional approach was an important ingredient of the so-called Blacksburg Manifesto, an initiative of Rohr and his colleagues to restore the legitimacy of public administration in the US (cf. Wamsley et al. 1990; Rohr 1990). The approach is, however, much more than an outcry of political opposition to the New Right. In fact, Storing stated in the 1960s already that "administration is the heart of modern government precisely to the extent that public administration is not mere administration, but the main field in

⁴ One exception is Norton Long, who in an essay titled 'Bureaucracy and Constitutionalism' stated that "[a]n assessment of the vital role of bureaucracy in the working American constitution seems to be overdue" (1952: 810; cf. 1954: 30). Elsewhere he wrote: "Attempts to solve administrative problems in isolation from the structure of power and purpose in the polity are bound to prove illusory" (1962: 62-63).

within which political and constitutional problems now move” (1965: 48; cf. pp. 45-46).

Now what is meant with ‘constitutional legitimacy’? Rohr is quite explicit that constitutional legitimacy is not to be understood merely as legality; an organization or institution may be quite legal but still illegitimate (1986: x). Having a place in laws, treaties, and constitutions is not sufficient for constitutional legitimacy. On the other hand, having constitutional legitimacy is also not the same as enjoying popular consent (popularity) or political support. Approval from the mass of citizens or from the ruling elite may of course be an important source of power and even provide a certain kind of political legitimacy, but this is not the same as having constitutional legitimacy.⁵ But if constitutional legitimacy is neither purely legal nor purely political, then what is it? In the constitutional approach the concept seems to involve two aspects. The first concerns what Rosenthal (1990) has called the ‘incumbent level’ (the level of individual officials) and the second the ‘regime level’ (the level of the constitutional order).

The first aspect of constitutional legitimacy is mainly developed in Rohr’s book *Ethics for Bureaucrats* (1989a). There he connects the concept of constitutional legitimacy to that of *regime values*: the actions of bureaucrats are constitutionally legitimate if (and to the extent that) they contribute to and promote the maintainance of central values of the regime of which they are part. In an attempt to identify core values of the US regime, Rohr arrives at liberty, equality, and property. Their meaning can best be understood (and explained to students), he further asserts, by the study of major Supreme Court cases in which these values are contested. Whether this particular source is really the best place to look for regime values or not need not bother us now. What is important is that the responsibility to promote regime values is ultimately one that falls on individual public servants. They have sworn to uphold the Constitution and should therefore know what it implies to keep that oath, particularly when they have considerable discretion to make their own decisions. Therefore, Rohr stresses the importance of imbuing civil servants with an awareness of their constitutional context and position and calls upon them to adopt a role of administrative “statesmanship” (Rohr 1986: 185; cf. Lawler, Schaefer, and Schaefer 1998).

The second aspect of constitutional legitimacy is more institutional and mainly developed in Rohr’s book *To Run a Constitution* (1986). Here an institution such as public administration (as a whole) has constitutional legitimacy when it is granted its rightful place in the constitutional order. The institution may be thought to function ineffectively, to have too much power, or even to be fraught with corruption, but at least its right to be a part of the polity should not be contested. To make his case that the US public administration is constitutionally legitimate in this sense, Rohr adopts several lines of argumentation. Among other things, he argues that the public administration heals a constitutional defect of representation in the US Constitution and he develops the argument (earlier suggested by his mentor Storing) that the public administration currently plays the role the Founding Fathers had originally devised for

⁵ Rohr makes the concept unnecessarily subjective when he says that legitimacy “suggests at least confidence and respect and, at times, even warmth and affection” (1986: x). To enjoy the kind of constitutional legitimacy both he and I are after, this emotional attachment does not seem strictly necessary. Calm or cool approval can be enough.

the Senate (1986: ch. 3; Storing 1995a: 419 and 1995b: 302). More generally, authors in the Constitutional School present public administration as a “balance wheel” between the traditional constitutional powers (Rohr 1986: 182; Morgan 1988). Long had already argued that public administration should act as “a constitutional check on both legislature and executive” (1952: 817), adding: “It is high time that the administrative branch is recognized as an actual and potentially great addition to the forces of constitutionalism” (1952: 818). And Rohr argues that it is precisely their subordinate position within the constitutional order which allows and even obliges public administrators to choose which of their three constitutional masters they are going to serve (1986: 181-185). Functioning as the keel of the ship of state, public administration should constantly assess and actively seek to maintain the equilibrium between the governmental powers.

Taking these two aspects together, one could perhaps say that for scholars in the Constitutional School the constitutional legitimacy of public administration is ultimately a matter of *justice*: of acting justly by civil servants themselves and hence also granting them their just place within the regime. Ultimately, their aim is to develop what Rohr has called ‘a constitutional theory of public administration’ (1986: 181-186; cf. Cook 1996).

4. THREE POINTS OF QUALIFICATION

Rohr and his fellow constitutional theorists have made a rich and important contribution to the study of public administration. They offer serious attempts to elaborate and operationalize the concept of constitutional legitimacy of administrative power. Nevertheless, before exploring how their ideas can be applied to the case of the EU, I want to qualify and adapt their approach on three points.

First of all, because of the particular time and place in which the Constitutional School emerged (neo-liberalism under Reagan and new managerialism under Gore’s Reinventing Government initiative) it has too often been a defensive and one-sided approach. In particular, in the context of bureaucrat bashing and cutbacks the distinction between the ‘administrative state’ and mere ‘public administration’ has often been blurred. Thus in *To Run a Constitution* Rohr claims to defend ‘the [constitutional] legitimacy of the administrative state,’ as the subtitle of his book says, but in fact he remains quite ambivalent about the constitutional legitimacy of the particular regime (the ‘welfare/warfare state’) developed by Progressives and New Dealers in the early twentieth century and strongly expanded since the 1960s. What he has succeeded in, though, is in arguing the constitutional legitimacy of public administration as an institution and of the exercise of administrative power. This is surely a great achievement, particularly in the US, but it is decidedly something different. More generally, it is not always easy to understand how the lofty idea of public administration of the constitutionalists can be matched with their Tocquevillean orientations (Lawler 1998) and their concomitant aversions to “big government” (Storing 1995b). Of course, an elevated view of public administration does not logically exclude a wish to keep it small, but both politically and theoretically the combination is certainly odd. If the constitutional approach is to be applied to the EU, it has to be dissected from this typically American background and be founded more solidly on a general theoretical basis.

A second point is that the constitutional approach so far has largely neglected the value of the ‘art of separation’ (Walzer 1984) for establishing the constitutional legitimacy of administration. By this I mean that the authors of the Constitutional School are needlessly ambivalent or even negative about ideas that separate public administration from other government powers. The idea known as the ‘politics-administration dichotomy,’ for instance, has not only a bad reputation among (American) students of public administration in general, but constitutional theorists have not assessed it with much sympathy either. Yet, as I argue in my dissertation, it is possible to defend a conception of the dichotomy as a constitutional principle that suits their approach quite well (Overeem Forthcoming). A similar problem can be encountered with the distinction between the executive and public administration. Executive power (which has some inherent legitimacy problems in its own right; Mansfield 1989) has been a focal point in American thinking about the constitutional legitimacy of administrative power (Rohr 1989b; Rabkin 1998). Although some have pointed to the important “constitutional function” of the separation between the executive power and public administration (Merry 1978; cf. Schaffer 1973; Rabkin 1998), this idea has not been further developed.⁶ More generally, the separation of powers structure of US government is still too much regarded as either an obstacle for establishing the constitutional legitimacy of public administration (because it does not recognize public administration as a ‘power’ among the others) or as an institution that creates opportunities for furtive administrative ‘statesmanship’ (allowing civil servants to choose their own constitutional masters). It is, however, rare to find truly positive appraisals of the meaning of the separation-of-powers doctrine for public administration, or of the constitutional ‘art of separation’ in general. This is also a point that should certainly be adapted if we want to import the approach in Europe.

Third, the European approach cannot and should not be an exact copy of the American example. In so far as constitutionalism is a matter of practical reasoning and prudence, different solutions have to be found in different circumstances. Thus it is very likely that the balance of power between the Union and the member states, or among the branches of government, must be struck differently in the EU than in the US. Moreover, it should be remembered that the US Constitution was the outcome of spirited exchanges between the Federalists and Anti-Federalists (cf. Storing 1981). For the constitutionalization of the EU, we should therefore not exclusively orient ourselves on the American Federalists, however important they of course are (Siedentop 2000). The Anti-Federalist contributions may be just as relevant, especially when it comes to avoiding the fate of the EU developing into an administrative state. This makes our task in a way more difficult than Rohr’s: whereas he had to find room for public administration within a more or less established

⁶ In the US there is a long-standing and ongoing debate about the so-called unitary executive doctrine. According to this doctrine, the first sentence of Article II of the Constitution (“The executive Power shall be vested in a President of the United States of America”) aims to attribute not some but *all* executive power to the President (e.g. Lawson 1994: 1241-1246). He can delegate this power to lower-level executive officials (in fact, the Constitution presupposes that he does so), but he is the only directly constitutionally legitimated executive. This doctrine of the unitary executive has often been associated with the presidency of George W. Bush and neo-conservative attempts to increase the power of the White House, but it has long been adhered to by academics of other political stripes as well. Others, such as Rohr, however, interpret Article II less strictly and reject the doctrine of the unitary executive. They allow for the exercise of executive powers by branches and bodies that are not hierarchically subordinated to the President (cf. Rohr 1989b).

constitutional order, we face a situation in which the type of regime and the regime values with respect to which administrative power must be legitimated are still far from clear. (And as scholars we cannot hope to have much influence on the process of EU constitutionalization ourselves.) Simply taking ‘the oath to uphold the Constitution’ as a starting point, as Rohr did, is therefore not an option for us. Again, a more general basis has to be found in the tradition of constitutional theory.

5. APPLICATION TO THE EU

The European Union is neither a mere club of states nor a state itself. It has something of both: the whole is more than the sum of its parts, but paradoxically the parts are still more whole than the whole. The question what the EU actually is has led to long-standing debates between intergovernmentalists and supranationalists. In response, it has often been treated as a *sui generis* phenomenon, as an unidentifiable political object, but this approach has its drawback, too: it is unavoidably theoretically and conceptually barren. Before studying the EU in wholly new terms, it seems more advisable to explore the full capacity of our common concepts and arguments, including those of the Constitutional School. So far, the constitutional approach to public administration has largely remained an American affair, but there is in principle no reason why it could not also be applied to other polities, including the EU. (Wilson after all described administration as running *a* constitution, not *the* Constitution.) Nevertheless, its application to other countries and other political systems has yet to be started and it is still an open question whether transplanting the approach to Europe will be successful. There are reasons, however, to be optimistic.

One important feature of the EU, of course, is that it is currently in a process of ‘constitutionalization.’ Even when the Treaty of Lisbon is finally ratified by all 27 member states, this process will not be concluded. This feature makes it probable that there will be a European interest in the constitutional thought and practice from other regions of the world and other periods of history – not in the least that of the US, and especially the American Founding (e.g. Kinneging 2007). At the same time, the tradition of constitutional thinking is well established in Europe itself and arguably the constitutional legitimacy of public administration within the state is more obvious for Europeans than for Americans (Stillman 1997; cf. Dyson 1980). There is no unequivocal European constitutional tradition, however: for some decades now different state models have been competing for supremacy in the EU, particularly the French, German, and later also the British model (cf. Van Middelaar 2009). This makes a study of the European discourse on legitimacy difficult, but also fascinating.

More specifically, it is important that the very concepts of administrative and executive power are now finally and increasingly applied to the EU as well. Until recently, the legitimacy of EU administrative power was hardly discussed in the literature, at least not in these explicit terms, this seems to be changing (cf. Nedergaard 2006). Here the work of Deirdre Curtin is particularly important. While back in 2004 she had to note that “the Constitutional Treaty [i.e., the Treaty Establishing a Constitution for Europe] itself falls short of ‘constitutionalizing’ a framework for the administration of the European Union as a whole” (2004: 7), in more recent years she and some colleagues have done much to develop their own constitutional argumentation. In particular, they speak frankly of an ‘EU executive’

and of a European 'executive order' (Egeberg 2006; Curtin 2004, 2009; Curtin and Egeberg 2009).⁷ The adoption of these concepts in EU studies can be applauded and allows us to transfer American thinking about administrative constitutionalism to that context as well.

What can be regarded the EU's executive power? In her work, Curtin recognizes that the Council of Ministers (including the European Council and the Council Secretariat) is an important part of the EU's executive, but still she regards the European Commission as the focal point of the evolving executive. The Commission is a special case, however. If in the US, as Rohr has argued, the public administration has taken over the original role of the Senate, in the EU the Commission can even better be regarded to fulfill that role: like the original Senate, it participates in all three functions of government (legislative, executive, and judicial), it is the 'guardian of the treaties,' its members are not supposed to serve their national interests, and it has an equal representation of all the member states. The major difference, of course, is that the Commission is (still) much more a closed administrative than an openly political organ. This may, however, be changing too. In recent years, a stronger division seems to evolve within the Commission between the 'political' Council of Commissioners and the supportive administrative apparatus (Wille 2009). It seems that a dichotomy between politics and administration is emerging in the EU (and perhaps not only within the Commission but also between the Council and the Parliament on the one hand and the Commission on the other). This may indicate that the EU is acquiring a more 'normal' kind of constitutional government. It may at the same time be a threat to the unity of the executive power of the EU.⁸ As in the US, a split between the political executive and the rest of government may be developing. Quite understandably, therefore, we now see many attempts to apply the traditional doctrine of the separation of powers to the case of the EU as well (e.g. Van Bijsterveld 2007). This is another point on which the EU becomes increasingly suited for interpretations in terms of 'normal' constitutional thought.

In sum, important recent developments in European scholarship and practice seem to be shaping promising conditions for an application of the ideas of Rohr and his colleagues on the case of the EU. Of course, the EU has many unique characteristics (particularly with regard to the democratic control of the political executive, which is much more indirect in the EU than in the US) and its constitutional, political, and administrative institutions are still very much in flux, but this makes a closer look through the lens of the constitutional approach all the more interesting. This will require a closer analysis of EU constitutional and administrative law (unwritten as well as written) and European public and scholarly argument more generally. Evidently, it will also require a sharper focus and more precise and careful research design than could be offered here.

⁷ Curtin argues that the concept of the executive can serve as a bridge between those of politics and administration, encompassing both (2004: 5). Although this is partially correct, the concepts of politics and administration are also applied to functions and institutions other than those of the executive. Hence the concept of executive (or governance, for that matter) will not allow us to rid ourselves of the distinction between politics and administration (Overeem Forthcoming)

⁸ Has the EU an equivalent for the American unitary-executive doctrine? Was the Meroni doctrine, forbidding delegation by the Commission to European agencies but now now longer effective, perhaps comparable?

6. THE PROMISES AND LIMITATIONS OF EU ADMINISTRATIVE CONSTITUTIONALISM

Again, one could ask: what is the value of thinking about the constitutional legitimacy of EU administrative power? It is true that, as long as the EU is not a state, it cannot be properly called an administrative state. At the same time, the EU now already performs an amazingly large array of functions often associated with the administrative state. It legislates, regulates, provides services, subsidizes, and so on. The only reason why it is not now already an (administrative) state, lies in what it does *not* do, namely levy taxes, maintain law and order, wage wars, imprison criminals, and so on. In other words, the EU has many soft powers, but very few hard powers. This need not make American doubts and concerns about the constitutional legitimacy of the administrative power (and executive power more generally) any less justified for the EU, however. As Tocqueville so well understood, soft power can be equally pervasive as and more coercive than hard power. Perhaps the EU epitomizes a regime of what he called ‘soft despotism’? Such a regime, he argued, is both technocratic and democratic at the same time; it is a “kind of compromise between administrative despotism and the sovereignty of the people” (2000 [1835-40]: 664). Especially threatening, in his view, is not the centralization of government (that is just necessary to govern a complex, modern society), but rather the centralization of administration (2000 [1835-40]: 82ff.). When administration is *decentralized*, as it was in the US in his days or the *ancient regime* in Europe, freedom can still be found in the “lax implementation” of the law at the local level (1998 [1856]: 142). But when administration is centralized and harmonized (made uniform), political liberty may be endangered. Isn’t this what we see in the EU? While government remains very much decentralized in the national capitals, rendering the EU weak in hard power, administration is increasingly centralized in Brussels, making the EU strong in soft power. From a Tocquevillean point of view, the issue of administrative constitutionalism in the EU is highly pertinent.

Surely, becoming an administrative state is not the only danger the EU has to avoid. Redford has issued the wise warning that an escape from the administrative state “would not mean an escape from the administered society” (1969: 180; quoted in Van Riper 1998: 73). On the other extreme, there is the danger of over-politicization. To curb the danger of *Beamtenherrschaft*, Weber took recourse to strong political leadership, first in the form of ‘British’ parliamentarism and later in the form of plebiscitary presidentialism, but in either case he left little room for constitutionalism (government limited by law). Hence Weber is not the proper guide if the EU wants to avoid becoming an administrative state with soft despotism. For the preservation and protection of important constitutional values such as liberty, it is not enough to have democratic political leadership and a professional administration. Constitutional limitation of both politics and administration is at least as important. This does not simply mean the adoption of a written constitution. A written constitution is neither strictly necessary (cf. Britain) nor sufficient (cf. Singapore) for the limitation of administrative power and the prevention of an administrative state. Neither is the constitutional ‘art of separation’ a panacea. Surely, as the American Federalists were aware, a well-designed constitution can withstand the pervasion of not-so-noble human tendencies (‘ambition’) and even make good use of them. But the constitutional approach as developed by Rohr consists of two aspects: apart from

institutional solutions, such as the separation of powers, much also depends on the constitutional awareness (and moral fiber) of those who wield administrative power.

Fortunately, we need not look only to the US for these insights. European thought, no less than American thought, has the intellectual resources to provide them. It has the German *Rechtsstaat* tradition, the long tradition of British constitutionalism, and republicanism as “a shared European heritage” (Van Gelderen and Skinner 2002; cf. Pettit 1997). The challenge is to activate these resources, also in the study of EU administration, and thus to take away or at least to temper Leo Tolstoy’s fears.

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