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THE FRENCH CONSEIL D'ETAT: A CASE STUDY IN BOUNDARY MAINTENANCE

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Very little is known about the role that courts play in the total political system of a nation. In two recent works Professors Walter Murphy and Joseph Tanenhaus have centered attention on this question and have isolated some of the major functions of courts and developed several working hypotheses concerning these functions.[1] They suggest that one of the major functions of constitutional courts consists of "defining the rules of the political game and determining the boundaries of authority between competing public officials as well as the boundaries between governmental authority and individual liberty."[2] In approving or disapproving the acts of governmental bodies, the court performs the additional function of legitimizer.

> When it validates official decisions which may at first blush seem to many to violate the rules, a constitutional court thereby gives sanction to regime changes which authorities deem necessary in enabling a system to cope with stress. In refusing to validate such a decision, a court denies them its imprimatur of legitimacy.[3]

This article considers the performance of this boundary maintenance function by the French Conseil d'Etat, an administrative court not authorized by constitution, statute, or tradition to perform judicial review over acts of the French administration or the National Assembly. We suggest that the Conseil d'Etat, normally considered to have very limited powers, has expanded its own powers to the point where it presently exercises many of the functions commonly ascribed only to

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[1]Murphy & Tanenhaus, Constitutional Courts, Public Opinion, and Political Representation, Department of Political Science Report No. 15, University of Iowa (Nov., 1967); and Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Change, A paper delivered to the 1967 Shambaugh Conference on Judicial Behavior, University of Iowa.

[2]Murphy & Tanenhaus, Constitutional Courts at 16.

[3]Murphy & Tanenhaus, Public Opinion and the United at 2.

constitutional courts. The vehicle for exploring this thesis is the Canal case. No suggestion is made that the Canal case is indicative of the typical case handled by the Conseil; but, the Canal controversy demonstrates vividly the power, prestige, and expansive role of the Conseil d'Etat in the French political system.

I. The Origins of the Conseil d'Etat

Originally created by Napoleon in 1799 as an administrative organ with purely advisory functions, the Conseil has evolved to be the apex of the French administrative system. Most students agree that the political ancestry of the Conseil can be traced to the Conseil du Roi which existed under the Ancien Régime.[4] Like the modern Conseil d'Etat, it was both a technical councilor to the government and an administrative court.

While today the Conseil d'Etat is still the most powerful and prestigious adviser to the French government, in more recent years its judicial functions have overshadowed its administrative functions. The judicial function of the Conseil resulted from the French conception of separation of powers which precluded the regular courts from adjudicating the acts of the administration or trying governmental officials for any acts connected with their duties.[5] This meant that the regular courts had jurisdiction only over civil suits and criminal cases. To handle cases in which the state or an administrative official was a party, a separate structure of administrative courts was established in 1800 with the Conseil d'Etat at the top. Thereafter a citizen could seek legal action against the administration by instituting suit with the Conseil or one of a number of inferior administrative courts known as Councils of Perfecture.

II. The Structure of the Conseil d'Etat

1. Division of Labor. The Conseil d'Etat is divided into five sections, four of which are administrative and one judicial. The Judicial Section is as large as all the administrative sections put together, and its membership composes over one-half of the total members of the Conseil d'Etat (See Appendix I). Until the reform of 1963 the Judicial Section was divided into eleven subsections, five of which were independent decision-making units with jurisdiction over less important cases. Since, however, the number of subsections has been reduced to nine and the practice is for two or more subsections to unite for the conduct of business.

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[4] See, e.g., B. SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 23 (1954).

[5] "The Law August 16-24, 1790, prohibited the ordinary courts from trying cases in which the public administration or its agents were involved." C. FREEDEMAN, THE CONSEIL D'ETAT IN MODERN FRANCE 4 (1961).

For cases considered particularly important there are two additional levels of judgment. These cases may be carried, first, to the full Judicial Section, which is composed of the presiding officers of the nine subsections, plus two members of the subsections in which the report on the case involved was prepared. The presiding officer may be either the Vice-President of the Conseil or the President of the Judicial Section. Cases of the highest importance are referred, second, to the Plenary Assembly. This section is composed of the Vice-President (who presides), the President of the Judicial Section, the presiding officers of the subsections, and four additional Councilors of State, one from each of the administrative sections elected each year by the General Assembly. Only a small proportion of cases ever reach these two levels. "Of the 4,446 cases dealt with in 1959-1960 . . . only 178 were handled in the Judicial Section as a whole and only 45 in Plenary Assembly."[6]

2. The Decision-Making Process. The formulation of a report is the first step in the Conseil's consideration of any matter, whether it be legislative, administrative, or judicial. The presiding officer of the section or subsection assigns a member to submit a report bringing out all the facts which may have a bearing on the disposition of a particular problem. Normally this report will be written out. In the administrative sections the reporter has the prerogative of presenting his solution to the matter in question. In the Judicial Section a solution is required.

On the day the matter is to be considered, the section or subsections assemble and the reporter presents his report orally. The report is followed by discussion, after which the presiding officer gives a summary. The matter is then submitted to majority vote. The reporter embodies the decision in a final report which is submitted to the presiding officer for expedition to the proper ministry. Some matters, such as bills and regulations of public administration, must be submitted to a higher echelon of the Conseil after the initial decision. Normally this is the General Assembly which consists of all the personnel of the Conseil d'Etat as well as the Councilors of State in special service and the ministers. If this is the case the reporter presents his subsequent report to the Assembly, defending the solution of the lower section or subsections as his own.

The procedure in the Judicial Section varies to some extent. In addition to the regular reporter there is a Government Commissioner who also formulates and presents a report to the decision-making body. The Commissioner, one of the members of the Conseil, is not considered a representative of the state; his presence is designed primarily to add weight to the deliberations. Not

[6]G. CARTER & J. HERZ, MAJOR FOREIGN POWERS 587 (1962).

infrequently his position is rejected. In important cases his report may be published. Unlike the administrative sections which keep their decisions private, the Judicial Section meets in public session to render its decisions.

III. The Judicial Function of the Conseil d'Etat

The Judicial Section of the Conseil d'Etat serves almost exclusively as an appellate court, and views its function more "as the development of an organized system of rules and principles rather than the decision of cases on their individual merits."[7] Original jurisdiction in most cases is invested in the twenty-four Tribunaux Administratifs centered in twenty-three regions and Paris.[8] Petitions by private individuals come to the Judicial Section in two basic groups: those seeking determination that an administrative act is ultra vires, and those claiming recours de pleine jurisdiction.[9] A petition for ultra vires may be brought against any administrative act except acts of state (an act which deals with the defense of the country, the relations between the executive and the legislature, diplomatic acts and treaties), the decisions of judicial authorities, and acts of management (those which anyone can perform in the administration of an enterprise or of private property).[10] At one time the review of the Conseil was severely restricted by the "acts of state" principle. In more recent years, however, the Conseil "is more and more restricting the list of acts considered to be acts of [state]."[11]

Petitions seeking declaration of excès de pouvoir are made to the Judicial Section on stamped paper and may either be mailed or personally delivered. The petitioner explains why he thinks a certain act that has affected him personally is illegal and why it should be annulled. The services of a lawyer are not required but the petitioner may hire one if he wishes. If the petitioner's claim is upheld by the Conseil no costs are involved; if not, a small fee is charged.

Originally excès de pouvoir was invoked only for "lack of jurisdiction," but the Conseil has extended its authority in more recent years to include "improper exercise of jurisdiction."[12]

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[7] R. DAVID & H. P. DE VRIES, THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS 128 (1958).

[8] The Conseil d'Etat still has original jurisdiction in all cases involving petitions of exces de pouvoir directed against the central authorities.

[9] Crabb, French Concept of the Abuse of Rights, INTER-AMERICAN L. REV. 1 (1964).

[10] C. FREEDEMAN, THE CONSEIL D'ETAT IN MODERN FRANCE 115 (1961).

[11] B. SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 23 (1954).

[12] Id. at 202.

The grounds on which the Conseil may annul an act as excès de pouvoir can be classified under four headings: (1) lack of authority; (2) failure to observe procedures required by law; (3) abuse of power; and (4) violation of the law. Annulment for lack of authority results from an agent making a decision which lies outside the powers of his office. Similarly, an act can be annulled for failure to observe procedures required by law if the administrative authority omits required legal formalities. Abuse of power is caused by an administrative agent using his power for a purpose other than that for which it exists. Violation of law originally meant that a constitutional provision or a statute had been violated in the process of decision-making.[13] Recently violation of the law has been extended to "include the violation of a general principle of public law or custom which is not necessarily written, such as equality before the law of all persons, [or] the equality of all persons using a public service."[14] If the Conseil finds an act excès de pouvoir the act is annulled. If the scope of the act is general, it is annulled for everyone.[15]

Recours de pleine jurisdiction involves actions in which damages are sought by a party injured by an administrative act. The petitioner brings action on behalf of himself only and may claim a restitution or a sum of money. The decision of the Conseil may reform the original administrative action or require the administration to pay damages. Here the services of a lawyer are required. The most important cases under this category are petitions relating to the responsibility of the public powers, and petitions relating to administrative contracts. A large number of cases under this jurisdiction concern taxation, election, and pensions and salaries of public employees.

Although every regime since 1800 has had a Conseil d'Etat, its role, prestige and power has varied according to conditions in the political environment. De Tocqueville describes a low point:

> I tried to explain to them [the Americans] that the Conseil d'Etat is not a judicial body in the ordinary sense of the word, but an administrative body whose members are dependent on the king so that the king, after having ordered one of his servants, called a prefect, to commit an injustice, can order another of his servants, called a Councilor of State, to prevent the former from being punished.[16]

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[13]Letourneur, The Rule of Law As Understood in France, 7 AM. J. COMP. L. 107 (1958).

[14]C. FREEDEMAN, supra note 10, at 135.

[15]Letourneur & Hemson, The Control of Discretionary Executive Power in France, 11 Cambridge L. J. 258-79 (1952).

[16]ALEXIS DE TOCQUEVILLE, DEMOCRATIE EN AMERIQUE, 1 OEUVRES COMPLETES, pt. 1, at 106 (Meyer ed. 1951).

In more recent years the status of the Conseil has steadily increased, as have its powers. Through such famous cases as Casanova,[17] Chabot,[18] and Richemond[19] the Conseil has greatly expanded the categories under which petitions for excès de pouvoir can be brought before the Conseil. Through cases such as Compagnies du Chemin de fer de l' Est[20] and Maurel,[21] the Conseil has interpreted and expanded its jurisdiction. In similar fashion through such cases as Cames,[22] Auxerre,[23] Therond,[24] Lemonnier,[25] Brunet,[26] and Colas,[27] the Conseil has developed extensive legal doctrine recognizing the pecuniary responsibility of the state for its sovereign acts, and has required the application of the principle of equity to administrative contracts.

One author summed up this aggrandizement by stating that "the Council of State has been consistently expanding the scope of reviewing power, until the scope of review in France today is far broader than in the common-law world."[28] The Canal decision, to which we now turn, is an obvious vehicle for demonstrating just how much power and prestige the Conseil has today.

IV. The Andre Canal Decision: Background

In 1962 Algeria became a free and independent nation, and the bitter struggle between France and the Algerian rebels came to an end. Although the end of the Algerian war lifted a substantial burden from the shoulders of the French statesmen,

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[17] Held that a taxpayer had standing to contest a decision of the municipal council (1901).

[18] A voter could attack a decision of a departmental council which dealt with the apportionment of electoral districts (1903).

[19] Held that a taxpayer had standing to contest a decision of a department (1911).

[20] Held that regulations of public administration were not delegations of legislative power, and could be reviewed as administrative acts (1907).

[21] Held that colonial decrees issued by the President were not delegations of legislative power, and could be reviewed as administrative acts (1933).

[22] Held that state responsible for injury that an individual might incur because of the inherent risks of his job (1895).

[23] Held the state responsible for its acts overruling the "irresponsibility doctrine" (1905).

[24] Extended review to suits precipitated by administrative contracts for the communes and departments (1910).

[25] Held the state responsible for double fault which resulted from negligence on the part of the state employee and the state (1918).

[26] Held that the state was responsible for failure to act with due speed (1919).

[27] Extended the responsibility of the state to third parties (1920).

[28] B. SCHWARTZ, supra note 11, at 321.

it left in its wake considerable problems for the French administrators of justice. For throughout the Algerian war there had been numerous attempts by private citizens and by army chieftains to obstruct or to force alterations in the Government's Algerian policy. Most of these attempts had been not only illegal actions but also violent acts of treason. Thus, the cases were of a nature not often handled by the regular courts of justice. There was a sizable number of such cases in the spring of 1962, and the government was concerned that they be handled speedily and with a minimum of procedural due process.

On June 1, 1962, the Gaullist National Assembly passed a law instituting a special military court of justice to handle these above mentioned "special" cases. This new military court was granted the authority to impose the death sentence, and no appeal was permitted beyond its final judgment. The authority to institute such a court was supposedly conferred upon the Government in a special referendum approved by the French people on April 8, 1962. The referendum was designed to provide the Gaullist government with a broad mandate of power to deal with emergency situations arising out of the Algerian war.

During the summer of 1962 Mr. Andre Canal was brought before this military court, tried for his crimes against the French people, and duly sentenced to death. Since Canal could not legally appeal his sentence to a higher court, his only recourse was to appeal to the Conseil d'Etat on the grounds that the military court was an illegal institution, that is, the act setting up the military court was excès de pouvoir.

In light of the authority possessed by the Conseil d'Etat in declaring governmental acts excès de pouvoir, the audacity of Mr. Canal's appeal is astounding. First, only administrative acts may be declared excès de pouvoir:[29] The law setting up the military court appeared to be a legislative act -- not an administrative action. Second, a petition pour excès de pouvoir may be brought against only those administrative acts which are not "acts of state."[30] Admittedly, the Conseil had established the precedent of deciding for itself the boundaries of "acts of state," but, within the context of French jurisprudence, this case appeared unquestionably to fall into that category. Thus, even if the law setting up the military court of justice were an administrative act, the Conseil still would not have jurisdiction. Normally, only by a constitutional review could a question of this nature be adjudicated. At best, Canal's appeal to the Conseil d'Etat seemed to rest on very questionable legal grounds.

Nevertheless, the Conseil d'Etat agreed to consider his appeal, and on the 19th of October 1962 the Plenary Judicial Assembly handed down its landmark decision. The Assembly held, first of all, that

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[29]C. FREEDEMAN, supra note 10, at 115.

[30]Id.

> the ordinance of June 1, 1962, instituting a military court of justice, conserved the character of an administrative act and was thus susceptible to a declaration of excès de pouvoir.[31]

Refusing to regard this "administrative act" as an act of state, the Assembly went on to declare that the ordinance of June 1 had "violated the general principles of penal law"[32] and was null and void. With one quick stroke the Conseil d'Etat had set aside an act of the French National Assembly, an act which had been based on a grant of power derived from a referendum of the French people, and an act which was closely tied to the prestige and authority of the President of the Republic. Obviously the Conseil was exercising its boundary-defining prerogative to the utmost degree.

V. Reactions to the Canal Decision

1. The Government's Reaction. The Conseil's decision came as a severe blow to the Gaullist government, which immediately expressed its great displeasure. The Government's main contention was that the Conseil d'Etat had exceeded its legitimate authority. This contention was expressed in the following statement issued by the Council of Ministers on October 24th:

> The President of the Republic and the Government have determined that the intervention of the Conseil d'Etat seeking to render inoperative an ordinance taken on an essential point, in the spirit and in application of a law voted by the country on last April 8th, went beyond the Conseil's legal administrative domain; and in addition, the conditions and the moment of this intervention was of such a nature as to compromise the action of the public powers with regard to the criminal subversion which has not yet been reduced.[33]

The statement went on to note that

> the next Council of Ministers will have to take cognizance of the means which ought to be taken, conforming to the Constitution, in spite of all incidents, notably that justice continue to be assured in the present and in the future.[34]

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[31] Le Monde, October 26, 1962, at 6.

[32] Drago, Autour de la réforme du Conseil d'Etat, 19 ACTUALITE JURIDIQUE 525 (October 2, 1962).

[33] Le Monde, October 26, 1962, at 6.

[34] Id.

The Government's spokesman, Mr. Christian Fouchet, Minister of Information, voiced another expression of official anger. Fouchet also cast doubt on the legitimacy of the Conseil's decision.

> The Government takes note of the existence of the judgment of the Conseil d'Etat but considers that this judgment has no validity. The Conseil d'Etat went outside its domain in trying to make this into a judicial matter . . . .[35]

President De Gaulle was particularly irked because he felt that the Conseil had not acted in accordance with its proper role; that role was to "serve the state" and not to take independent positions vis-à-vis the State.[36] According to De Gaulle, the Conseil d'Etat was not a separate branch of government, but rather an institution designed to carry out the wishes, or at least not to obstruct the will, of the Government.

2. Reactions to the Government's Irate Position. Never before in the memory of most Frenchmen had the Government been so outspokenly incensed at a decision handed down by the Conseil d'Etat. Many persons could remember the irritation expressed by an administrator or by an under-secretary when the Conseil had declared one of his actions excès de pouvoir; but no one could recall a situation where the Conseil had been roundly criticized by so many important governmental spokesmen -- from the Chief of State on down. But then, most Frenchmen could not recall when the Conseil had set itself in opposition to such an array of authority.

The influential newspaper Le Monde took note of this popular reaction to the Government's indignation in an article on October 31st:

> These declarations and the menace which they seem to portend for the Conseil d'Etat have solicited numerous commentaries, indeed lively emotion, in all the milieux which know what they represent in France and abroad for the high administrative jurisdiction.[37]

Professor Roland Drago of the Faculty of Law and Economic Sciences of the University of Lille noted that there was a fear among many persons that "radical measures would be taken against the High Assembly . . . given the vigor of the governmental reactions."[38]

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[35] Id.
[36] Le Monde, January 4, 1963, at 1.
[37] Le Monde, October 31, 1962, at 1.
[38] Drago, supra note 32, at 525.

VI. The Institution of the Governmental Study Group

The Government's first official action aimed at the Conseil d'Etat was the institution of a special study group which was to "propose modifications to the organization and functioning of the Conseil d'Etat."[39] This study group was installed on January 4, 1963, by the Minister of Justice, Mr. Foyer.[40]

Normally the proceedings of such a study group are secret; only top government leaders are privy to its findings. Nevertheless, its conclusions were somehow leaked to the press.[41] In addition to several minor technical modifications, the study group proposed certain radical reforms regarding the legal jurisdiction of the Conseil d'Etat, its consultative function and the status of its members. According to Le Monde, the proposed reforms were as follows:

(1) A Superior Judicial Commission was instituted, composed of the vice-president and five section presidents, to which the Government could decide to submit all disputed matters by a decision made by the Council of Ministers.

(2) Beside the General Assembly provided for by the ordinance of July 31, 1945, there would be constituted a Restricted Assembly designed to proceed to a more rapid and efficient examination of the texts submitted by the Government.

(3) Finally, the councilors of state who normally reach the retirement age of 70 years (article 18 of the ordinance of July 31, 1945) ought to, at sixty and at sixty-five years old, solicit from the Government the renewal of their positions, the decision of the Government conforming to the opinion of the consultative commission which was proposed by the study group.[42]

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[39] Le Monde, January 4, 1963, at 1.

[40] By all outward appearances it was a blue-ribbon panel. The chairmanship of this group was given to Mr. Leon Noel, President of the Constitutional Council and former member of the Conseil d'Etat. The group comprised three former ministers, M. M. Guillaumat, Jeanneney and Chenot, himself a member of the Conseil d'Etat. The other members were M. Jean Rivero, professor at the Paris Faculty of Law and Economic Sciences, Mr. Toutée, section-president, M. Odent, council of state and assistant-president of the Judicial Section, and, finally, four maîtres des requêtes: M. M. Lasry, Belin, Grevisse and Boitreaud. See Drago, supra note 32, at 525.

[41] Le Monde, May 18, 1963.

[42] Id. at 525-526.

VII. Reaction of the Attentive Public to the Proposed Reforms

1. A Partial Description of the Conseil d'Etat's Attentive Public. An examination of the diffuse and specific support given the Conseil d'Etat by its attentive public first requires a determination of who and what this attentive public was. Some insight into this matter is provided by Professor Groshens of the Faculty of Law and Economic and Political Sciences at the University of Strasbourg:

> The first question that one can ask himself is whether the Conseil d'Etat is known by the citizens as the protector of their liberty. An inquiry into this topic would be quite welcome; perhaps it would reveal what certain opinion samples have hinted at: the Conseil d'Etat is known by only a very restricted number of citizens, the political class, the legal profession, and certain categories of civil servants. Outside these circles, to a very limited degree, the Conseil d'Etat is unknown or in any case is not considered as being the organ before which everyone may defend his rights and his liberty.[43]

Thus the scant evidence we have would tend to indicate that the Conseil d'Etat's attentive public is select and by no means representative of a cross-section of the French population. Despite the small size of this public, however, its influence and political weight are considerable. Few governments would risk pursuing any policy which might incur the organized and vocal opposition of this community of political influentials. Its reactions to the proposed Conseil d'Etat reforms demonstrate the impact of this intellectual community.

2. The Attentive Public Reacts in Support of the Conseil d'Etat. The first rumble of opposition to the proposed reforms came from the highly respected and influential newspaper Le Monde, a paper read by nearly all students, civil servants, lawyers, and intellectuals in France. In a front page article entitled "The Report of the Study Group Risks Modifying the Role of the Conseil d'Etat," the editor noted that:

> The intention of the reformers appears clearly in the exposition of motives. If it is true that the mission of the Conseil d'Etat is to safeguard the necessary equilibrium between the protection of liberties and the authority of the State, it in effect reproaches the Conseil for having throughout the years attached itself more to the defense of liberties than to the State.

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[43] Groshens, Réflections sur la dualité de juridiction, 19 ACTUALITE JURIDIQUE 538 (October, 1963).

> In substituting a hierarchial structure for a liberal organization, in entrusting to five or six persons the upper hand over the Conseil, and even over the career of its older members, the report risks creating a means of pressure, an instrument which a power less respectful of liberties could use and even abuse.
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> In this regard the proposed reform poses a problem more political than judicial.[44]

Thus Le Monde saw the reform as nothing more than an attempt by the Government to impose its political will on members of the Conseil d'Etat who would take an independent stand in the interest of civil liberties.

During May and June of 1963 a bitter but articulate debate raged throughout the French intellectual community concerning reform of the Conseil d'Etat. This debate was carried on in part through a series of articles by prominent jurists, political scientists, and governmental officials in Le Monde.

One of the most vocal critics of the proposed reforms was Mr. Pierre Marcilhacy, a French legislator and authority on civil and administrative law. His somewhat impassioned defense of the integrity of the Conseil d'Etat began with a historical summary of attempts to reform the Conseil and ended with these remarks:

> It is necessary to recall here that the public services have slowly but surely seen, through carefully considered judgments, a definition of their powers and their roles, that the liberty of the citizens and of the collectivities have been defended by several resounding decisions, finally, that aside from the grave crises of the separation of Church and State and the Liberation, it is the High Administrative Assembly which has noiselessly but efficiently contributed to re-establish public order . . . .
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> Shall we also say that perhaps the best of our statesmen and important civil servants have come from this elite corps? Those who are in power, would they be what they are if they had not been nourished on the very principles for which their institution is now being reproached for having defended to the end?
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> The signer of these lines is familiar with the disciplines of civil and administrative law. As his peers, he knows the perils of the double nature of judicial responsibility. As a legislator, as a former elector, he has the right,

[44]Le Monde, May 18, 1963, at 1.

after having spoken his acknowledgment and his admiration for the High Administrative Assembly, to ask the Government not to lead us back to the notions of the Ancien Régime which are not compatible with man's progress.[45]

Shortly after Mr. Marcilhacy's article, a second and more devastating critique appeared in Le Monde. Its author was Professor Maurice Duverger, perhaps France's most eminent political scientist. Duverger questioned not only the specific provisions in the proposed reforms, but also the manner in which the reform was being carried out and the dire consequences which would result from it. There is no doubt that Duverger saw the Conseil d'Etat as an important factor in the total political process and not simply as a judicial agency isolated from the political world. For this reason Duverger's perceptive remarks have a special interest for American students of political behavior:

> In the eyes of the public, in any case, this creation of an exceptional jurisdiction at the interior of a common law jurisdiction would have a very simple meaning. The public would think that the Government is throwing out the rightful judges in order to choose some others because the latter are more favorable to the Government's position and more susceptible to its pressure. Even if that is false, everyone will think that it is true. Confidence in the judges will be diminished in the eyes of those who come before the courts, and without such confidence there can be no justice. As Caesar's wife put it, the magistrates ought to be above suspicion. The proposed reform encloses them in an atmosphere of permanent suspicion.
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> At the same time it would also place them in an impossible situation. Imagine the practical development of the following hypothetical situation. A decision of the Council of Ministers results in a matter which is brought before the Superior Judicial Commission. Immediately, the press, the Parliament, the public would all be aware of it at the same moment. The court proceeding is transformed into a political affair, into a spectacular conflict between the executive and the judiciary, into a struggle for power against the judges. If the Commission were to say the State is right, everyone would think that the members gave way to pressure, that they lacked courage and impartiality, that they didn't do their duty. If the Commission says it was wrong, then it is the Government which loses face, which is reprimanded by the stalwart judges.[46]

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[45]Le Monde, May 24, 1963, at 6.
[46]Le Monde, June 6, 1963, at 6.

Then Duverger gets to the heart of his critique: the reform proposals are bad enough in themselves, but the circumstances under which the reform was inaugurated leave the reformers' good intentions open to grave doubt. He argues that:

> the Government wants to reform the Conseil d'Etat because it was displeased with one of the Conseil's decisions. Under such circumstances any Conseil reform, as good as it might be from a technical standpoint, will appear as an attack on its independence and will risk the destruction of confidence for those who appear before the court, without which the institution no longer has a reason for being. Certainly the study commission has undertaken courageous efforts to limit the damage. It has striven to lessen the consequences of the anger of the prince [De Gaulle]. But the fundamental error is having suggested that the administrative jurisdiction ought to be adjusted, even ever so slightly. There can be a Conseil d'Etat only when each successive holder of political power is willing to submit himself to it, just as the citizens do to the rules under its jurisdiction. To allow one of them to change these rules following a judgment which angered him is to transform the Conseil d'Etat into a Conseil du Roi [the Conseil d'Etat's antecedent under the Ancien Régime].[47]

Though nearly all spokesmen on the topic of reform were critical of the Government, there were a few who defended the report of the study commission. One such defense appeared in the May 21 issue of Le Monde by an author who -- interestingly enough -- wished to remain anonymous. He said nothing about the circumstances surrounding the initiation of the reform, but rather limited himself to defending the specific proposals on their own merits. He contended (1) that certain reforms in the Conseil were long overdue, (2) that the proposed reforms would be beneficial to the Conseil, and (3) that the dire consequences for the Conseil predicted by some persons were greatly exaggerated.[48]

Despite these arguments, the views of this anonymous author appear to have been held by only a small minority of the Conseil d'Etat's attentive public. It was clear that the Government's proposed reforms had aroused the united and vocal opposition of the French community of political influentials.

VIII. The Government's Withdrawal

The effect of this support for the Conseil became apparent when the Council of Ministers met on July 3, 1963. The Government

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[47] Id.

[48] Le Monde, May 21, 1963, at 11.

decided to abandon both of the following controversial proposals: the institution of a Superior Judicial Commission and the modification of the age limits of the councilors of state. It appeared that these indignant cries from the Conseil's attentive public had forced the Government to back down. Professor Drago noted in a journal article a month later that "perhaps the very vigor of these reactions must have prompted the Government not to adopt the more revolutionary aspects of the study group propositions."[49]

The reforms which were decreed by the Government on July 30th, were moderate in nature -- a far cry from the initial proposals of the study commission. These reforms, most of which came to be praised by the Conseil's attentive public, were discussed in summary fashion in a July fifth edition of Le Monde.[50]

The first of these texts concerns the organization and functioning of the Conseil d'Etat. It applies itself to three principles.

> UNITY OF THE COUNCIL - The two functions of administrative judge and of governmental councilor exercised by the members of the Conseil are henceforth made more unified. The decree sets forth the rule of dual participation by the members of the Conseil in the administrative and the judicial formations. The research goal is that the legal section be more familiar with the problems of the administration and that the administrative councilors of the government be forewarned in case of future annulments.
>
> REDUCTION OF THE FORMATIONS - Along side the General Plenary Assembly a Restricted General Assembly of twenty-nine members was created. The other formations were likewise reduced. It is thus so with the Judicial Assembly, with the Judicial Section and with the judicial subsections.
>
> CLOSER COLLABORATION WITH THE ACTIVE ADMINISTRATION, notably in the form of missions close to the Ministers.

The second decree concerns the status of the members of the Conseil d'Etat. A consultative commission will give its opinion on measures relating to the administration of personnel. Different

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[49]Drago, supra note 32, at 526.

[50]There were numerous appeals for reform of the Conseil d'Etat prior to the Canal decision. See Drago at 525. Many of these proposals were subsequently adopted in the study group's "revised" report. This fact is important because it allowed the government to proceed with the reform movement -- and thereby save face -- even though the heart of its original reform proposals had been cut out. Had the Government not had this face-saving opportunity, it is perhaps doubtful whether the Government would have backed down so readily.

cases are envisioned, notably in that concerning councilors who have become legislators. The status of councilors in extraordinary service was modified: they could be named for a non-renewable term of four years.[51]

IX. Response to the New Reform Decrees

1. The Response of the Attentive Public. In general, response by the Conseil's attentive public to the "revised" reforms was neutral to somewhat favorable. According to Professor Pierre Sandevoir, Course Chairman at the Faculty of Law and Economic Sciences at the University of Lille, the heart of the reform deals with the desire to create a closer working relationship between the Conseil d'Etat's legal section and its administrative sections. In an article in the Revue Administrative, he notes that a number of "mixed" commissions were created for this purpose, and that members of each section were placed on commissions in the other sections, that is, members of the administrative sections now have a voice in what is done in the judicial section and vice versa.[52] Sandevoir contends that these changes are not at all revolutionary but rather they are in line with the historical purpose and functions of the Conseil d'Etat.[53]

In Professor Drago's concluding paragraph on the reform, he, too, sounds a note of cautious optimism about the nature and probable effect of the reform decrees.

> It is difficult to give a snap judgment about the reform set in motion by the decrees of July 30th. The most talked about parts of the project having been put aside, the reform has happily not been of the revolutionary character which it otherwise would have been. Certain modifications which it anticipates will undoubtedly remain debatable, others are of a more happy nature. The main thing is that the High Assembly will not be disfigured and may continue its work.[54]

2. The Government's Justification of the Reform. In explaining and justifying the reform decrees, the Government took great care to assure the public that the purpose of the reform was not to change the Conseil d'Etat, but rather to enable the Conseil to better discharge its historical and traditional functions. The notion that one must "reform to conserve" was the heart of the Government's line.

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[51] Le Monde, July 5, 1963, at 9.

[52] Sandevoir, Le Conseil d'Etat et la réforme de 1963, REVUE ADMINISTRATIVE 574-583 (1963).

[53] Id. at 578.

[54] Drago, supra note 32, at 536.

In commenting on the reform decrees, Mr. Peyrefitte, the new Minister of Information, assured the public that the Government was attempting

> not to create a rupture in the tradition of the Conseil d'Etat, but on the contrary to restore that tradition. The Conseil d'Etat is at the same time a governmental council and an administrative tribunal, and, in order to be in a position to fully exercise its role, ought not to be isolated from the Administration, but on the contrary associated as much as possible with the life of the Administration, in such a way as to know its needs and its difficulties.[55]

Speaking before the General Assembly of the Conseil d'Etat, Mr. Jean Foyer, Minister of Justice, also spoke in rather conciliatory tones of diffuse support as he explained the Government's position:

> If the Conseil d'Etat has rendered some regrettable decisions, it is none the less a precious institution capable of rendering some great services. It is for this reason that it has been made a corps of free and independent men, having their freedom of speech, but also a corp which does not set itself up as a judge of the Administration and as its inner conscience.[56]

X. Concluding Observations

The Conseil d'Etat is indeed an institution of considerable power and prestige in the French political process, perhaps much more so than most foreign observers have heretofore imagined. It is not a mere appendage of the French administrative leviathan: rather, it is a powerful and independent institution having considerable influence vis-à-vis the several legislative, executive, and administrative organs in France.

Certainly this power and independence was well illustrated by the case study of l'affaire Canal. The failure of the Government to put through its radical reforms of the Conseil, the more and more delicate and deferential manner in which the Government was forced to move against the Conseil, and the substantial support given the Conseil by the French intellectual community all demonstrate the stature and esteem of the Conseil d'Etat in French political life.

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[55]Le Monde, July 5, 1963, at 9.

[56]Le Monde, August 1, 1963, at 5.

Furthermore, the Canal crisis bears striking similarity to the Roosevelt court packing incident of 1937. First, both crises began when the will of the executive was thwarted by a judicial decision, or series of judicial decisions. In both cases the judicial body's offending decision(s) dealt with a boundary question, and in both instances the decisions were based on logic which was open to question. A second similarity is that in both situations the executive took action only when he felt it had sufficient support among the populace and among the legislators to assure his success. Third, in both instances strong opposition came from the community of political influentials which saw the proposed reform as an attempt by the executive to undermine the prestige and authority of the offending judicial body. Finally, in both situations the executive was forced to back down although not to the point of completely losing face. (The Supreme Court did an about-face at the last moment, and the French government did put forth a weak reform measure.)

Perhaps the Canal decision may well have laid the groundwork for other, more important decisions in the future -- decisions which might further expand the already prestigious role of the Conseil d'Etat in the French political process. The fact that such decisions have not been forthcoming during the past several years should not belie this assumption. One should recall that the momentous decision of Marbury v. Madison,[57] which set forth the American doctrine of judicial review, was not followed up until the Dred Scott[58] decision fifty-four years later. Nevertheless, the groundwork for Dred Scott had been laid years before: there could well be a similarity between the Canal and the Marbury decisions.

One may suggest a more specific conclusion: that the Conseil d'Etat appears to perform the function of rule definition and boundary maintenance in the French political system. Admittedly, this conclusion is weak and will remain so at least until two inquiries are subsequently undertaken: First, there must be a more precise investigation, using modern techniques of opinion sampling, which seeks to answer the following questions: how visible is the Conseil d'Etat to the French public? who is the Conseil's truly attentive public? and what kind of, and how much, support do these publics give the Conseil d'Etat? Secondly, there must be a systematic investigation which puts the Canal decision into the over-all perspective of a Conseil d'Etat which has gradually been expanding its jurisdiction since the founding of the Third Republic. Only then can one determine how revolutionary the Canal decision was in terms of rule definition and boundary maintenance.

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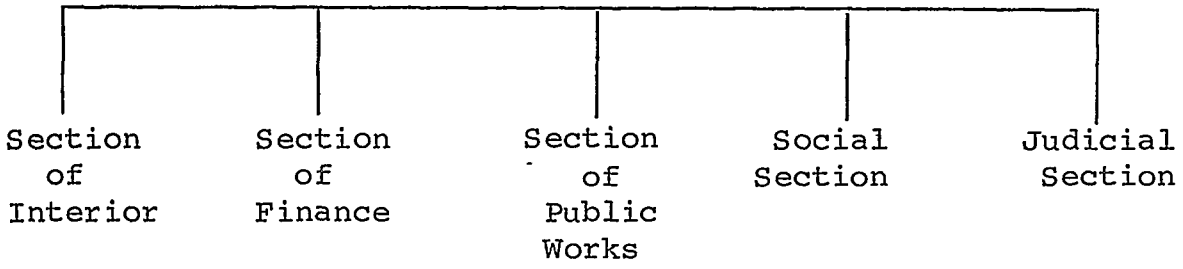
[57] 1 Cranch 137 (1803).

[58] Dred Scott v. Sandford, 19 How. 393 (1857).

An equally important point is that the Conseil has long been considered a very effective institution for providing the French citizen with protection against illegal administrative acts. But this has always been considered a very circumscribed role, limited to pedestrian matters, and not the great political issues of the day. In truth the Conseil may be capable of performing the much greater role of constitutional court, much like the United States Supreme Court. This hypothesis also warrants further investigation.

APPENDIX I

(A) The Structure of the Conseil d'Etat



(B) The Structure of the Judicial Section