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The Scope of Judicial Review in French Administrative Law

GEORGE A. BERMANN*

I. INTRODUCTION

The arguments that may be raised in support of a claim of abuse of discretion must go to the legality, not just the wisdom or advisability, of administrative action. Though the judge is responsible for seeing to it that the government acts in conformity with law, he may not put himself in its place or interfere in its functioning. His job is not to determine whether in a given case a certain administrative official ought to have acted and, if so, in one particular way. He has neither the means nor the materials for judgments of this sort, nor does he have responsibility for administrative action. Should he undertake to control its wisdom or advisability, he would risk impairing the normal flow of government.¹

These are nearly the words an American court might use in declining to rule on the merits of administrative action.² To be more exact, the language has the ring of a dissenting opinion in which a judge accuses his brethren of venturing beyond the domain of the law into that of policy, where they have no business being.³ The

* Assistant Professor, Columbia University School of Law. This article is based in large part on the author's *stage*, or internship, at the Conseil d'Etat in Paris from February through July 1975.

1. M. LETOURNEUR, J. BAUCHET, & J. MERIC, *LE CONSEIL D'ETAT ET LES TRIBUNAUX ADMINISTRATIFS* 137 (1970) [hereinafter cited as M.LETOURNEUR].

2. The American reader should bear in mind that the French terms *administration* and *gouvernement* do not have exact equivalents in our usage and are, above all, not to be confused with their English look-and-sound-alikes. When a Frenchman refers to *administration*, he means government in its broadest sense, excluding however the French legislature [*parlement*] and judicial authority generally. On the other hand, the term *gouvernement* is reserved for the national executive—the chief of state and his cabinet. Oddly enough, the French identify as the *gouvernement* what we might think of upon hearing the term, *administration*. See generally A. DE LAUBADÈRE, *TRAITÉ DE DROIT ADMINISTRATIF* 217-18 (6th ed. 1973)[hereinafter cited as A. DE LAUBADÈRE].

3. *E.g.*, *Florida Power & Light Co. v. International Bd. Elec. Workers*, 417 U.S. 790,

words actually come from three members of the Conseil d'Etat, France's closest analogy to a supreme administrative court, attempting to describe one aspect of that institution's important, yet delicate, role in French public life.⁴

The apparent similarity in attitude to judicial review of administrative action by American and French courts is not surprising, considering the common cultural heritage of the two countries. Both nations ask the government to act within the limits of the law and give to an independent professional judiciary major responsibility for ensuring that it does. At the same time, they both rely on the notion that judicial, like administrative, institutions function best when they confine themselves to the task given them and decline to take on those assigned to other branches of government.

Concededly, French law and tradition subject the government to special administrative courts, generally the *tribunaux administratifs* in the first instance and the Conseil d'Etat on appeal,⁵ rather than to the *tribunaux judiciaires*, which resolve dis-

816 (1974) (White, J., dissenting); *Udall v. FPC*, 387 U.S. 428, 454 (1967) (Harlan, J., dissenting); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 327-28 (1951) (Frankfurter & Douglas, JJ., dissenting).

4. For a discussion of the Conseil d'Etat and *tribunaux administratifs*, as well as French administrative law generally, see L. BROWN & J. GARNER, *FRENCH ADMINISTRATIVE LAW* (2d ed. 1973) [hereinafter cited as L. BROWN & J. GARNER]; C. FREEDEMAN, *THE CONSEIL D'ETAT IN MODERN FRANCE* (1961) [hereinafter cited as C. FREEDEMAN]; C. HAMSON, *EXECUTIVE DISCRETION AND JUDICIAL CONTROL* (1954); F. RIDLEY & J. BLONDEL, *PUBLIC ADMINISTRATION IN FRANCE* (1964); B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD* (1954) [hereinafter cited as B. SCHWARTZ]. Among the leading articles on aspects of French administrative law are Alibert, *The French Conseil d'Etat*, 3 MOD. L. REV. 257 (1940); Berthélemy, *The Conseil d'Etat in France*, 12 J. COMP. LEGIS. & INT'L L. 23 (1930); Brewster, *The Tribunaux Administratifs of France: A Venture in Adjudicative Reorganization*, 11 J. PUB. L. 236 (1962); Brown, *DeGaulle's Republic and the Rule of Law: Judicial Review and the Conseil d'Etat*, 46 B.U.L. REV. 462 (1966); Brown, *The Reform of the French Administrative Courts*, 22 MOD. L. REV. 357 (1959); Déak & Rheinsteint, *The Machinery of Law Administration in France and Germany*, 84 U. PA. L. REV. 846 (1936); Drago, *Some Recent Reforms of the French Conseil d'Etat*, 13 INT'L & COMP. L.Q. 1282 (1964); Evans, *French and German Administrative Law*, 14 INT'L & COMP. L.Q. 1104 (1965); Lagrange, *The French Council of State*, 43 TUL. L. REV. 46 (1968); Langrod, *The French Council of State: Its Role in the Formulation and Implementation of Administrative Law*, 49 AM. POL. SCI. REV. 673 (1955); Letourneur, *Control of Governmental Action to Prevent the Violation of Individual Rights*, 21 OHIO ST. L.J. 559 (1960); Letourneur, *Reflections on the Role of the French Administrative Judge*, 26 U. CHI. L. REV. 436 (1959); Letourneur & Drago, *The Rule of Law as Understood in France*, 7 AM. J. COMP. L. 147 (1958); Letourneur & Hamson, *The Control of Discretionary Executive Powers in France*, 11 CAMBRIDGE L.J. 258 (1952); Lobingier, *Administrative Law and Droit Administratif*, 91 U. PA. L. REV. 36 (1942); Razi, *The French Contentieux Administratif*, 13 AM. U.L. REV. 154 (1964); Remington, *The Tribunaux Administratifs: Protectors of the French Citizen*, 51 TUL. L. REV. 33 (1976); Riesenfeld, *The French System Administrative Justice: A Model for American Law?*, 18 B.U.L. REV. 48 (1938); Weil, *The Strength and Weakness of French Administrative Law*, 1965 CAMBRIDGE L.J. 242.

5. Until 1953, nearly all formal complaints arising out of administrative action in

putes between private citizens. What is more, the principle of separation of powers has been interpreted in France to forbid the *tribunaux judiciaires* to "interfere in any way whatsoever with the performance of administrative functions."⁶ As a technical matter, the Conseil d'Etat and the *tribunaux administratifs* are composed of civil servants rather than magistrates, which means that their members do not enjoy a formal guarantee of tenure in office.⁷ It may not be surprising that the great majority of French administrative judges are trained at an elite professional school of public administration, l'Ecole Nationale d'Administration (l'E.N.A.), designed to train those who will occupy high public office.⁸ More surprising, however, is the fact that, while most administrative judges have already studied law before entering l'E.N.A., a legal education is not a prerequisite for a seat on an administrative court.⁹

Further blurring the line between civil servant and judge in France is the practice of reserving a small number of seats on the administrative courts for persons who have had distinguished careers in active government service and who, for the first time, are asked to serve as judges and share the practical insights that their long years of experience have given them.¹⁰ Even those who become judges directly upon graduation from l'E.N.A. are permitted, indeed encouraged, to give a small portion of their time to non-judicial public service and to take occasional leaves of absence throughout their career in order to serve the government in one high administrative capacity or another.¹¹ They do so secure in the knowledge that

France were filed directly in the Conseil d'Etat in Paris for decision by its judicial section [*section du contentieux*], in contrast to the four *sections administratives* which serve important advisory functions for the government. Since 1953, the bulk of administrative litigation in France is brought before the local *tribunaux administratifs* whose decisions are appealable to the Conseil d'Etat. An excellent outline of these institutions may be found in L. BROWN & J. GARNER, *supra* note 4, at 18-29.

6. Law of Aug. 16-24, 1790, art. 13. Similar language is also found in CONST. tit. 3, ch. 5, art. 3 (Fr. 1791); Law of Oct. 7-14, 1790, art. 3; Decree of 16 fructidor, an III (1795).

7. L. BROWN & J. GARNER, *supra* note 4, at 41. As a practical matter, members of the administrative courts are virtually irremovable. *Id.*

8. L'E.N.A. offers a rigorous training in varying aspects of public administration. Administrative court judges, especially those entering the Conseil d'Etat, have excelled in their studies at that institution. *See generally id.* at 39.

9. *Id.*

10. Recruitment of "outsiders" is described as "*au tour extérieur*" when it brings members of the administration into the courts permanently, and as "*en service extraordinaire*" when they are to serve for only a limited period of time. The pool from which the latter are drawn is much the larger of the two. *Conseillers en service extraordinaire* may include such categories of persons as legal scholars and union leaders, as well as public servants generally. *Id.* at 39-40; B. SCHWARTZ, *supra* note 4, at 30-31.

11. C. FREEDEMAN, *supra* note 4, at 37-38.

their seats on the bench are waiting for them when they return, and that they will suffer no loss of seniority in the judicial hierarchy.

More significant still, most members of the Conseil d'Etat serve concurrently in its judicial section, which operates as a court, and in one of its four administrative sections, which furnish legal advice to the government and which in fact must be consulted by the government before it introduces bills in parliament or issues its most important administrative rules and regulations.¹² Recent reforms in the structure of the Conseil d'Etat¹³ have strengthened the requirement that the members of the Conseil serve in this dual capacity. Underlying all these efforts toward integrating judicial and administrative activities is the belief that judges who possess a real familiarity with public administration are better able to give governmental action the intelligent examination that sound judicial review requires.

Nevertheless, the apparent peculiarities of French administrative law (*droit administratif*) can easily be overstated, for there are fundamental similarities between the French and American systems. Judges on the French administrative courts appear to believe, no less than their American counterparts, that judicial and administrative functions are distinct and should remain so. This belief has gained even greater support, both in France and the United States, as administrative action penetrates further into aspects of social and economic life that defy traditional judicial analysis. And it is significant that in analyzing review by the courts of administrative action, both systems distinguish between *légalité*, the conformity of administrative action to law, and *opportunité*, the wisdom and advisability of that action.

Rather than foreclose comparative analysis, this broad agreement on basic principle in French and American administrative law is the starting point. Comparing the way in which two systems translate into practice a shared notion of the judge's role in the administrative process can be at least as rewarding as comparing systems with widely divergent premises.

12. On the division of the Conseil d'Etat into a single judicial section and four administrative sections, see L. BROWN & J. GARNER, *supra* note 4, at 32-36; B. SCHWARTZ, *supra* note 4, at 12-13.

13. Decree of July 30, 1963, [1963] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] 7107, [1963] Dalloz, Legislation [D.L.] 245; Decree of July 30, 1963, [1963] J.O. 7113, [1963] D.L. 250; Decree of Sept. 9, 1968, [1968] J.O. 8691, [1968] Dalloz-Sirey, Legislation [D.S.L.] 272.

II. SCOPE OF REVIEW IN AMERICAN ADMINISTRATIVE LAW: A BRIEF OVERVIEW

Generalizing about the scope of judicial review in American administrative law is a hazardous undertaking. Where an adjudicatory proceeding before an administrative agency is concerned, the substantial evidence rule¹⁴ is probably the best guide to judicial review of findings of fact, despite uncertainty as to how it should be applied in concrete cases. According to that rule, in the absence of express statutory authorization to examine agency findings more critically,¹⁵ the courts should limit their review to verifying whether the agency's record, taken as a whole, contains substantial evidence on the basis of which the facts that have been found may reasonably be supported.

When a court does not have an adequate evidentiary record before it—as might be the case when it reviews the legality of certain administrative rules and regulations,¹⁶ or of decisions reached with-

14. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715-17 (1963); *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943); *Mississippi Valley Barge Co. v. United States*, 292 U.S. 282, 286-87 (1934); *Florida East Coast Ry. v. United States*, 234 U.S. 167, 185 (1914); K. DAVIS, *ADMINISTRATIVE LAW TEXT* 525-27 (3d ed. 1972) [hereinafter cited as K. DAVIS]; W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 379 (6th ed. 1974) [hereinafter cited as W. GELLHORN & C. BYSE]; L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 596 (abr. 1965) [hereinafter cited as L. JAFFE]; B. SCHWARTZ, *ADMINISTRATIVE LAW* 582 (1976) [hereinafter cited as B. SCHWARTZ]. Section 706 of the Administrative Procedure Act provides that, unless a statute precludes judicial review or commits action to administrative discretion, "[t]he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (E) unsupported by substantial evidence." Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1967). Cf. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(f),(g). For tests both broader and narrower than the substantial evidence rule, see K. DAVIS, *supra* at 535-38. On the somewhat less deferent position of state courts toward administrative fact finding, see B. SCHWARTZ, *supra* at 601-03. More state than federal decisions employ a so-called "clearly erroneous" test under which an agency finding may be overturned when the reviewing court has the definite conviction that a finding, though supported by some evidence, is erroneous. *Id.* at 599-600. The REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(g) combines the two tests. Under it, a court may set aside "administrative findings, inferences, conclusions or decisions [that] are . . . (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." On the differences, if any, between the substantial evidence and the "clearly erroneous" tests, see K. DAVIS, *supra* at 528-30; L. JAFFE, *supra* at 615-16, 620; B. SCHWARTZ, *supra* at 599-603, and cases cited therein.

15. Cf. *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967) (action to review comptroller of currency decision to approve two mergers). For examples of such authorization, see L. JAFFE, *supra* note 14, at 619-21.

16. See B. SCHWARTZ, *supra* note 14, at 603. For cases where the Supreme Court refused to allow judicial interference with the rule-making authority of federal commissions because it considered the latter to be in a better position than the courts to design those rules, see *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973); *FCC v. Schreiber*, 381 U.S. 279, 292 (1965); *American Trucking Ass'n v. United States*, 344 U.S. 298, 314-15 (1953);

out a formal hearing¹⁷—it must adopt a different approach.¹⁸ To afford effective review of such informal administrative action, the court may be forced to play a more active role in compiling the factual record than the substantial evidence rule alone would suggest.¹⁹ For example, in mandamus actions brought to compel the government to take action it has allegedly wrongfully withheld, the courts may have to take fresh evidence themselves,²⁰ unless they choose, as is often the case, to remand to the relevant agency for further findings of fact.²¹ However, once the courts have before them what they consider an adequate record, they still seem to favor some

Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 134 (1936). Unless a statute otherwise provides, administrative rule-making may be informal, resembling legislative committee hearings more than judicial trials. The agency is not confined, in formulating its rules, to materials produced at such a hearing. *Id.* 163. See, e.g., *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 317-19 (1933); *Pacific Coast European Conference v. United States*, 350 F.2d 197, 205 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965). Of course, a statute may require rule-making proceedings to be formal trial-type hearings, and in such cases reviewing courts will normally apply the substantial evidence rule. *Federal Security Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 227-28 (1943).

17. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). See generally B. SCHWARTZ, *supra* note 14, at 603.

18. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 700 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968); K. DAVIS, *supra* note 14, at 527; B. SCHWARTZ, *supra* note 14, at 603. In the *Overton Park* case, the Court held that the substantial evidence rule could not apply and that the test of validity is whether the action challenged was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 401 U.S. at 415-16 (quoting the Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1967)).

19. In *Overton Park*, the Supreme Court observed:

[I]t is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision-makers is usually to be avoided. . . .

But here there are no . . . formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). See also *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 700-01 (2d Cir. 1975).

20. K. DAVIS, *supra* note 14, at 460; e.g., *Ingalls v. Zuckert*, 309 F.2d 659 (D.C. Cir. 1962); *Poirier v. St. James Parish Police Jury*, 372 F. Supp. 1021, 1026 (E.D. La. 1974), *aff'd*, 531 F.2d 316 (5th Cir. 1976).

21. *Camp v. Pitts*, 411 U.S. 138, 140-42 (1973); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099-1100 (D.C. Cir. 1970); L. JAFFE, *supra* note 14, at 186-92, and cases cited therein.

form of a "reasonableness" standard in reviewing issues of fact;²² whether that standard is significantly different in basic outline from the substantial evidence rule is not clear.²³

Even assuming that some variant of the substantial evidence rule is appropriate, the rigor of judicial review inevitably depends upon the importance of the facts in dispute and upon the interests at stake.²⁴ The Supreme Court, which has fashioned the basic guidelines on the appropriate scope of review, has warned that "the precise ways in which courts interfere with agency findings cannot be imprisoned within any form of words."²⁵ The freedom of the American judge is reinforced by the fact that nothing in the substantial evidence rule prevents him from attempting to convert what may appear to be a pure question of fact into one of law over which (and here there is little theoretical quarrel) his powers of review may be total.²⁶

The judicial response to so-called mixed questions of fact and law is more difficult to describe. The question of whether a statutory

22. *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973); *FCC v. Schreiber*, 381 U.S. 279, 292 (1965); *Associated Indus. v. Dep't of Labor*, 487 F.2d 342, 349 (2d Cir. 1973), *cert. denied*, 416 U.S. 942 (1974). A reasonableness test also seems prevalent in state courts for review of administrative action in the absence of an agency record. *E.g.*, *Pell v. Board of Educ.*, 34 N.Y. 2d 222, 231, 313 N.E. 2d 321, 325, 356 N.Y.S. 2d 833, 839 (1974); N.Y. Crv. PRAC. LAW § 7803 (McKinney 1963) ("arbitrary and capricious or an abuse of discretion"); REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(g)(6) ("arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion").

23. *Associated Indus. v. Dep't of Labor*, 487 F.2d 342, 349 (2d Cir. 1973), *cert. denied*, 416 U.S. 942 (1974); *Wood v. Post Office Dep't*, 472 F.2d 96, 99 (7th Cir.), *cert. denied*, 412 U.S. 939 (1973); *Jordan v. Silverman*, 294 F.2d 916 (D.C. Cir. 1961). *But see* *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1975). In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Supreme Court described the applicable judicial inquiry as "a thorough, probing, in-depth review." *Id.* at 416. But it went on to make clear that "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* In one case, the Supreme Court grouped together the tests of "arbitrary, capricious [or] abuse of discretion" and "unsupported by substantial evidence"; it cited its own definition of substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Federal Maritime Comm'r.*, 383 U.S. 607, 619-20 (1966) (quoting *Consolidated Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938)). *See generally*, K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 649-54, 677-83 (1976) [hereinafter cited as K. DAVIS]; L. JAFFE, *supra* note 14, at 187-92; B. SCHWARTZ, *supra* note 14, at 606; Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORN. L. REV. 375, 391 (1974).

24. *See generally* L. JAFFE, *supra* note 14, at 618. Naturally, too, judges may well disagree on whether the substantial evidence test is satisfied in a given case. *E.g.*, *Richardson v. Perales*, 402 U.S. 389 (1971).

25. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951).

26. K. DAVIS, *supra* note 14, at 533, (discussing *Radio Officers' Union v. NLRB*, 347 U.S. 17, 46 (1954)); B. SCHWARTZ, *supra* note 14, at 644, (discussing *FTC v. Gratz*, 253 U.S. 421, 427 (1920)).

term has been properly applied to the facts of a given case raises both factual and legal issues, in that the answer tells us more about both the character of the facts and the meaning of statutory language. The dominant approach, illustrated by a series of leading Supreme Court decisions,²⁷ would have the courts exercise independent judgment—at least as far as reliable methods of statutory interpretations allow—over issues that significantly implicate the content of legislative policy. As guarantors of governmental lawfulness, the courts may determine whether administrative action is consistent not only with the Constitution, but also with the intentions of the legislature that enacted the law on the basis of which the action has been taken. On the other hand, how statutory language, its meaning once clarified, ought to be applied to the unique circumstances of a case is a matter on which the courts should have less to say. Assured that the agency correctly understands the legislative purpose, the courts should defer to the sound discretion of that body and accept its legal characterization of the facts as long as it has a rational basis.²⁸

Still, what constitutes limited review inevitably varies with the administrative body in question. For example, the day-to-day decisions of general administrative officials probably do not receive the same deference that is paid to the conclusions of specialized agencies on matters within the scope of their expertise. A judge is not only influenced by his notions of limited review, but also by such considerations as his faith in the administrative body whose decision is before him, the consistency of that body's decisions, the thoroughness and fairness of its inquiry, the importance of private and governmental interests at stake, the judge's assessment of the comparative qualifications of the court and the agency in the matter, and at times even his personal preference on the merits.²⁹ Recent

27. *Atlanta Ref. Co. v. FTC*, 381 U.S. 357 (1965); *FCC v. RCA*, 346 U.S. 86 (1953); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402 (1941). For criticism of this approach, see L. JAFFE, *supra* note 14, at 560, 575.

28. See *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 307 (1974); *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236-37 (1963); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). This approach is not affected by the Administrative Procedure Act. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). The "rational basis" test has not always been followed, even by the Supreme Court. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Red Ball Motor Freight, Inc. v. United States*, 377 U.S. 311 (1964); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944). A theoretical variant of the dominant approach was proposed in *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590-91 (2d Cir. 1961).

29. *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 8-9 (1968); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325-26 (1951); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275,

decisions of some courts reflect impatience with limited review altogether.³⁰

Thus, one danger in approaching a foreign system of administrative law is the tendency to underestimate the diversity of one's own practices. Judicial techniques developed for reviewing administrative action taken after quasi-judicial proceedings are sometimes assumed to be valid for all administrative action, no matter what kind of body takes it or how that body operates. In reality, the courts' role in fact-finding can vary widely with the case. Even if a judge accepts the distinction between clarification of legislative policy and its application to individualized circumstances, his review of mixed questions of law and fact depends on where he draws the frontier.³¹

It is hazardous even to attempt to identify the French and American institutions that are counterparts of each other, largely because neither system draws a sharp line between administrative and judicial functions. The hearing examiner within a large federal agency (or, as he may now be called, the administrative law judge) may appear to be just another part of agency machinery, but he is

290 (1946); *Barrett Line v. United States*, 326 U.S. 179, 197 (1945); *Dobson v. Comm'r*, 320 U.S. 489, 494-98 (1943); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); K. DAVIS, *supra* note 14, at 530, 551-55; L. JAFFE, *supra* note 14, at 576; B. SCHWARTZ, *supra* note 14, at 580-81; Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U.L. Rev. 201 (1970).

30. The Court of Appeals for the District of Columbia seems particularly influenced by whether or not the agency took "a hard look" at the issues. *E.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Many of the opinions rendered by judges of that court suggest an intensive, as well as a thoughtful and reasoned, look at findings of fact and applications of the law to the facts. *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); *International Harvester Co., v. Ruckelshaus*, 478 F.2d 615, 647-48 (D.C. Cir. 1973); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597-98 (D.C. Cir. 1971).

Judge Leventhal has remarked that "[o]n issues of substantive review, on conformance to statutory standards and requirements of rationality, the judges must act with restraint. Restraint, yes, abdication, no." *Ethyl Corp. v. EPA*, 541 F.2d at 69 (Leventhal, J., concurring). In *Environmental Defense Fund*, Chief Judge Bazelon suggested that we may be past the time when "courts . . . treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedures . . . [and] regularly upheld agency action, with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise." Judge Bazelon hastens to add, however, that courts should demand procedural safeguards for "enhancing the integrity of the administrative process." 439 F.2d at 597-98. These would include, for example, requiring an agency to provide a hearing to interested persons or to furnish a thoughtful opinion, containing findings of fact and statements of reasons, in support of its decisions.

31. *E.g.*, *Comm'r v. Tellier*, 383 U.S. 687 (1966); *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402 (1941). For a sampling of different views, see the excerpts of articles and cases cited in W. GELLHORN & C. BYSE, *supra* note 14, at 427-85.

in fact charged with the quasi-judicial task of impartially evaluating the evidence before him.³² His role has been aptly described as semi-independent.³³ The presence of formal rule-making or adjudication at the heart of the administrative process may explain why the idea of limited judicial review is so central to American administrative law.

In France, however, administrative decisions are less often preceded by formal proceedings before independent or even semi-independent officers. As a rule, governmental action comes under full scrutiny only when it is challenged before the administrative courts, typically the *tribunaux administratifs*. Thus, most governmental decisions in France resemble the informal varieties of American administrative action for which more active judicial review may be appropriate. Not surprisingly, the French administrative courts have developed patterns of review that appear to be quite searching when compared to the usual practices of American courts in reviewing agency decisions reached upon a formal record. Normally, the *tribunal administratif* itself compiles the record upon which it reviews the relevant findings of fact, and it is only when its decision is appealed to the Conseil d'Etat that the case is in roughly the same shape as an agency action before an American court. Indeed, one important difference between the two legal systems is that the Conseil d'Etat offers a petitioner not so much a right of appeal with limited review of issues of fact as a second opportunity to make out his case.³⁴ In theory, rightness rather than reasonableness is demanded of the *tribunaux administratifs*, but of course, in practice, some measure of deference to the judgment of the lower court is inevitable.

Since the French administrative judge is neither simply an administrator nor simply a judge, comparison based exclusively on either an American administrative or judicial model cannot help but lead to the erroneous impression that review of administrative action in the United States is somehow incomplete. While the difference in the protection provided by the two systems against

32. B. SCHWARTZ, *supra* note 14, at 291-99.

33. *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 132 (1953); Williams, *Fifty Years of the Law of the Federal Administrative Agencies—and Beyond*, 29 *FED. B.J.*, 267, 270-71 (1970).

34. A. DE LAUBADÈRE, *supra* note 2, at 554. The United States Supreme Court has stated that it normally accepts, unless unreasonable, the conclusions reached by lower federal courts in their review of administrative findings. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-10 (1974); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 409-10 (1952); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951). *But see O'Keefe v. Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359 (1965); *Dickinson v. United States*, 346 U.S. 389 (1953).

wrongful administrative behavior is much less dramatic than a cursory examination of the problem might suggest, *droit administratif* still offers an instructive pattern of judicial review. This article considers closely the ways in which French courts draw upon and enforce the distinction between the *légalité* and the *opportunité* of administrative action.

III. THE SCOPE OF REVIEW IN FRENCH ADMINISTRATIVE LAW

At one time, French legal thinkers looked upon judicial review of administrative action as limited to pure questions of law. Proceeding from the assumption that, by definition, an error of fact could never amount to an error of law, the courts treated the administration as virtually sovereign so far as factual issues were concerned.³⁵ As long as it did not plainly violate or misconstrue applicable statutes and regulations, its decisions satisfied what the French call *légalité administrative*.³⁶ Specifically, action that was taken by the proper official, according to prescribed procedures, and in conformity with binding texts was assured of judicial approval. The Conseil d'Etat eventually developed a doctrine known as *détournement de pouvoir* forbidding the use of administrative authority for purposes other than those the legislature contemplated.³⁷ But this doctrine had no further role to play once the government was found to have pursued an authorized purpose. Unreasonable, even senseless, administrative behavior could escape censure so long as it was properly motivated.

Ultimately, the Conseil d'Etat acknowledged that drawing a rigid distinction between questions of law and fact was arbitrary. It essentially took the position that if action based on a mistake of fact is as erroneous and prejudicial to the individual as action based on a mistake of law, then the same relief should be afforded him against each.³⁸ It accomplished this by enlarging the notion of *excès de pouvoir*, or excess of authority, to include not only the disregard

35. M. LETOURNEUR, *supra* note 1, at 143; G. VEDEL, *DROIT ADMINISTRATIF* 593-94 (5th ed. 1973) [hereinafter cited as G. VEDEL].

36. A. DE LAUBADÈRE, *supra* note 2, at 239.

37. According to doctrine, an act taken for unauthorized purposes is illegal even though proper in every other respect. For discussion of *détournement de pouvoir*, see R. ALIBERT, *LE CONTRÔLE JURIDICTIONNEL DE L'ADMINISTRATION AU MOYEN DU RECOURS POUR EXCÈS DE POUVOIR* 236-37 (1926); Auby, *The Abuse of Power in French Administrative Law*, 18 AM. J. COMP. L. 549 (1970); Gazier, *Essai de Présentation Nouvelle des Ouvertures du Recours pour Excès de Pouvoir*, 5 CONSEIL D'ETAT ETUDES & DOCUMENTS [CONS. D'ET. E. & DOCS.] 77, 82 (1951); JÈZE, *La Jurisprudence du Conseil d'Etat et le Détournement de Pouvoir*, 60 REVUE DU DROIT PUBLIC [R.D.P.] 58, 59 (1944).

38. G. VEDEL, *supra* note 35, at 594.

of applicable norms, but also their application to incorrect or improperly characterized facts. The Conseil d'Etat offered its familiar remedy for such errors: independent judicial examination.

This is not to suggest that the French administrative courts are unmindful of the difference between simple questions of fact and mixed questions of fact and law. The term *exactitude matérielle des faits* refers to the correctness, in the most literal sense of the word, of the simple facts underlying administrative action. Whether those facts have been characterized properly in the light of applicable norms raises considerations of a different order, known as *qualification juridique des faits*. But, though they recognize that establishing the actual occurrence of disputed but verifiable events is not the same thing as assessing their sufficiency in meeting statutory or regulatory conditions, the courts act upon the belief that administrative error should be remedied wherever it occurs in the complex process by which legal texts are applied to concrete cases, and they therefore treat the two operations very similarly for purposes of judicial review. For Raymond Odent, former president of the judicial section of the Conseil d'Etat, any other response would be "paradoxical."³⁹ According to another authority, "case law today is settled and almost banal in this respect: each time the author of an administrative decision cites in its support a reason which is factually incorrect . . . that alone is enough to invalidate the decision."⁴⁰ The following analysis will first touch very briefly on the Conseil d'Etat's approach to pure questions of fact before turning to the knottier problems known to us as mixed questions of fact and law.

A. *Error of Fact*

The case in which the Conseil d'Etat first acknowledged giving full review of the facts underlying administrative action could hardly have been more picturesque. The mayor of Hendaye was dismissed for "offending public decency" when he allegedly directed a funeral procession through a hole in the cemetery wall, rather than through the main gate, out of animosity toward the deceased. "Even if the Conseil d'Etat cannot evaluate the *opportunité* of measures

39. R. ODENT, *CONTENTIEUX ADMINISTRATIF* 1538 (1970-71) [hereinafter cited as R. ODENT]. President Odent has been succeeded only recently by Claude Heumann, formerly vice-president of the judicial section. As noted previously, the Conseil d'Etat consists of a judicial section and four administrative sections. Only in the first capacity does it function as an administrative court; the administrative sections perform strictly advisory functions. See note 5 *supra*.

40. A. DE LAUBADÈRE, *supra* note 2, at 543.

brought before it," the Conseil held, "it can verify the physical correctness of the facts underlying them."⁴¹ Finding that the procession had not in fact passed through the wall, the Conseil d'Etat set aside the dismissal as in excess of authority. The decision went on to suggest that "should the facts be established, [the judge must] examine whether they could legally justify application of the sanctions provided by statute;"⁴² that question, however, was never reached.

The relevant statute in the case required the government to give its reasons for dismissing a mayor;⁴³ and that requirement, the Conseil d'Etat reasoned, implies both an obligation on the part of the government to rely upon correct facts and an obligation on the part of the judge to verify their correctness. One might have wondered, in view of this rationale, whether the Conseil d'Etat would examine the accuracy of factual findings in the absence of an express requirement that the government explain its action. In a decision rendered shortly thereafter,⁴⁴ the Conseil d'Etat ordered the reinstatement of a prefect who had been retired, allegedly upon his request, when it found that he had never offered his resignation. Neither the fact that under applicable law the prefect could have been removed without having resigned nor the fact that the government was not expressly required to give its reasons in the first place deterred the Conseil d'Etat from looking into whether the alleged request had ever been made.

One can hardly imagine more classic and reasonably uncomplicated issues of fact than whether a mayor led a funeral cortege through the wall of a cemetery, or through its main gate, and whether or not a prefect submitted his resignation. In cases such as these the Conseil d'Etat plainly promised to verify the *exactitude matérielle* of the facts upon which the government bases its decisions, however simple these facts might be. Countless cases may be cited to show that the promise has been taken seriously.⁴⁵ President

41. Camino, [1916] Recueil Conseil d'Etat [Rec. Cons. d'Et.] 15, [1922] Sirey, Jurisprudence [S. Jur.] III 10, [1917] R.D.P. 460.

42. *Id.*

43. Law of July 8, 1908, [1908] Dalloz Périodique et Critique [D.P.] IV 64; [1908] Gazette du Palais [Gax. Pal.] 619.

44. Trépont, [1922] Rec. Cons. d'Et. 65, [1922] R.D.P. 81; *accord*, Terracher, [1946] Rec. Cons. d'Et. 185.

45. See, e.g., *Ministre de l'Intérieur v. Mony*, [1966] Rec. Cons. d'Et. 280 (whether the victim of internment during the Algerian crisis belonged to a certain clandestine group); *Ministre de l'Intérieur v. Loeb*, [1965] Rec. Cons. d'Et. 575 (whether one whose driver's license was suspended suffered from a certain physical disability); *Zanoni*, [1962] Rec. Cons. d'Et. 334 (whether a civil servant had ever received notice of his appointment to office before being suspended from it on account of his continuing absence).

Odent concludes that "every administrative decision based upon incorrect facts constitutes *excès de pouvoir*, whatever the subject matter in which it might arise."⁴⁶

Still, the formula of full review over findings of fact should not be taken literally. First, the petitioner bears the burden of proving that a finding is incorrect and, if in doubt, the judge normally sustains the finding. Since in France, no less than in America, doubt rarely consists of a single, precise point of uncertainty, a judge nearly always has latitude in determining whether the burden has been discharged. Second, the record the government has compiled in the case may carry greater weight with the administrative judge than the petitioner's counter-assertions. No formula, not even one of unmitigated full review, can erase either the natural presumption that the government acts fairly and properly or the belief that its findings should not be set aside lightly. Third, the petitioner simply may lack the time, money, knowledge, or energy needed to disprove the government's findings.

These remarks, however, are not meant to suggest that the judge reviews the basic facts under little more than the substantial evidence rule. In order to prevail, the petitioner does not have to prove that an administrative finding is without any foundation in the record. Indeed, burdens of proof begin to lose some of their significance when judges regard rightness, not reasonableness, as the standard by which to exercise their reviewing authority.

Moreover, the weight the judge gives to government assertions naturally varies from one issue to another. It is difficult to ascertain precisely how the objectivity of the French administrative judge is affected by the fact that he specializes in litigation with the government, is familiar with the realities of public administration, or belongs formally to the executive rather than the judicial branch of government. If in some respects he is more sympathetic to the administration than he would otherwise be, in other respects he is more skeptical. Those who have examined the question conclude unanimously that, on balance, French administrative law judges are more demanding of the government than their counterparts in the judicial courts on the occasions in which administrative law disputes come before them.⁴⁷

46. R. ODENT, *supra* note 39, at 1538.

47. See Borchard, *French Administrative Law*, 18 IOWA L. REV. 133, 135 (1932); Duguit, *The French Administrative Courts*, 29 POL. SCI. Q. 385, 392-93 (1914); Letourneur, *Le Contrôle de l'Administration par le Juge Administratif*, 1964 PUB. LAW 9, 18 (1964); Weil, *The*

Most important of all, the inequality of the parties, so common in suits against the government, is offset considerably by the investigative procedures of the French administrative judge.⁴⁸ From the moment suit is brought, one member of the court is appointed reporter (*rapporteur*) and charged with the process of assembling information relevant to the action from all possible sources (*instruction*). By tradition, the *rapporteur* collects evidence such as personal testimony or expert opinion in written form, giving each party the opportunity to comment on and to contradict what has been submitted. In addition, it is the *rapporteur* who gives structure to the inquiry: he poses questions of his own, orders the production of documents, and calls for such details or elaboration as he deems useful. He may use his discretion—though probably only after consulting with the president or vice-president of the panel of the Conseil d'Etat to which he belongs—to institute certain more formal measures. These measures include taking oral testimony during special hearings (*enquêtes*), securing independent expert opinion (*expertises*), personally inspecting the premises that may be at issue (*visites des lieux*), or verifying the authenticity of documents (*certification*). Resort to these techniques is not routine, especially in the Conseil d'Etat.⁴⁹ On the other hand, should new issues arise in the course of the panel's deliberations, it may ask the *rapporteur* to conduct further inquiries (*suppléments d'instruction*). Thus, though the record (*dossier*) upon which decision is rendered consists chiefly of materials produced by the parties, it reflects above all the *rapporteur's* own organization, line of inquiry, and choice of techniques. Except in the case of certain quasi-judicial administrative organs,⁵⁰ the *rapporteur* does not consider himself confined to the administrative record, even on pure questions of fact.

The fact that the investigation is managed by the judge rather than by the parties themselves reduces the significance of the burden of proof. The government cannot merely sit back and wait until the petitioner has met his burden in order to respond, when the questions come not from the petitioner but from the judge. It has been said that under these circumstances "[the government's] silence and reticence do not play in its favor."⁵¹ In fact, the judge may

Strength and Weakness of French Administrative Law, 1965 CAMB. L.J. 242, 243 (1965). See note 5 and accompanying text *supra*.

48. On procedures in the administrative courts, see generally A. DE LAUBADÈRE, *supra* note 2, at 494; G. VEDEL, *supra* note 35, at 520-21; Denoix de St. Marc & Labetoulle, *Les Pouvoirs d'Instruction du Juge Administratif*, CONS. D'ET. E. & DOCS. 69 (1970).

49. L. BROWN & J. GARNER, *supra* note 4, at 47-48.

50. See note 94 and accompanying text *infra*.

51. G. VEDEL, *supra* note 35, at 521.

require the administration to account for a decision even though the petitioner has little or no formal evidence of his own. Especially in recent years, the administrative courts have taken to shifting the burden of proof where justified by "serious and grave presumptions," a practice which allows them to rule in favor of the petitioner when the government's failure to cooperate effectively prevents him from establishing a case at all.⁵² For example, in the noted *Barel* case,⁵³ the Conseil d'Etat set aside the decision to exclude certain candidates from a competitive state examination when the Minister responsible refused to answer the charge that they were excluded because they were allegedly communists. The case established the principle that even where vested with discretionary authority, the government must respond meaningfully to allegations that are serious and supported by some showing; if the government fails to do so, the allegations will be assumed to be true. In a later case,⁵⁴ the Conseil d'Etat demanded a precise response even where the petitioner made no charge of discrimination. A company had challenged the government's denial of tax relief for an acquisition on the basis of a finding that the acquisition would not provide enough benefit to the community to justify so substantial a loss of tax revenue. Although applicable law appeared neither to limit the government's discretion in granting or denying relief, nor to compel it to explain its decision, the Conseil d'Etat ordered the *tribunal administratif* to conduct further inquiries: "The justification (*motif*) is formulated in terms far too general for the administrative court to exercise judicial review over the legality of the denial. . . ."⁵⁵

Still another reflection of the independence of the French administrative judge is the widespread assumption that his decisions should depend less upon such formalities as presumptions or burdens of proof, as do the decisions of the ordinary courts, than upon his personal belief (*intime conviction*) as to the truth.⁵⁶ Even allowing for the fact that "full" review by a judge of the findings of

52. *Id.* Adjustments in burden of proof serve a similar function in American law. See, e.g., *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643, 648 (D.C. Cir. 1973). See generally Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 535-36 (1974).

53. [1954] Rec. Cons. d'Et. 308, [1954] Dalloz, Jurisprudence [D. Jur.] 594, [1954] S. Jur. III 97, [1954] R.D.P. 509, [1954] Actualité Juridique Droit Administratif [A.J.D.A.] 396. See also Vicat-Blanc, [1960] Rec. Cons. d'Et. 877, [1961] D. Jur. 421.

54. *Société Maison Genestal*, [1968] Rec. Cons. d'Et. 62, [1969] D. Jur. 456, [1968] Jurisclasseur Périodique [J.C.P.] I 2203, [1968] J.C.P. II 15581, [1968] A.J.D.A. 102.

55. *Id.*

56. A. DE LAUBADÈRE, *supra* note 2, at 495.

an administrative body generally means something less than full review, and that some deference to the conclusions of a more or less expert authority is only natural, review of pure questions of fact by the French administrative judge appears to be remarkably independent.

B. Error in the Legal Characterization of Fact

However it assigns authority over fact-finding in administrative disputes, each of the two legal systems must also distribute responsibility between the active administration and the administrative judge for seeing to it that the law is properly applied to the facts. The French solution to this problem reflects its complexity.

1. Contrôle normal

All authorities seem to agree that the administrative courts scrutinize the application of the law to the facts as closely as they review the findings of fact themselves.⁵⁷ The case most often cited for this proposition is the *Gomel* decision,⁵⁸ in which the Conseil d'Etat set aside a prefect's denial of permission for a construction project on the ground that the proposed site, the Place Beauvau in Paris, was a "monumental perspective" within the meaning of a statute protecting such sites from development deemed harmful.⁵⁹ The prefect had not merely made a simple finding of fact, but had resolved an abstract issue with direct legal consequences. The Conseil d'Etat proposed to exercise full review over such a determination:

It is for the Conseil d'Etat to verify whether the project's site falls within an existing monumental perspective and, if so, whether the project would tend to impair it.⁶⁰

The Conseil then substituted its own judgment for that of the administration.⁶¹

The kind of decision the court faced in the *Gomel* case is sometimes described in France in much the same terms as might be used in the United States:

57. R. ODENT, *supra* note 39, at 1541.

58. *Gomel*, [1914] Rec. Cons. d'Et. 487, [1917] S. Jur. III 25.

59. Law of July 13, 1911, art. 118, [1911] D.P. IV 166, [1911] Bulletin des Lois 1370.

60. *Gomel*, [1914] Rec. Cons. d'Et. 487, [1917] S. Jur. III 25.

61. In other rulings, it agreed with the government that Parc Monceau, Parc de la Muette, Avenue Gabriel, and the Palais Royal gardens constituted monumental perspectives, but found that Place Clément in Montmartre did not. See cases cited in M. LETOURNEUR, *supra* note 1, at 147.

Characterizing the facts which are at the basis of a decision is a *mixed* operation with both factual and legal components, since it means determining whether the facts fall within a given legal category [emphasis added].⁶²

Such questions arise frequently in both French and American administrative law, and countless decisions since *Gomel* find the courts reviewing the interpretation of undisputed facts in the light of statutory or regulatory norms.⁶³ Because this phase of the administrative process is thought to raise issues of law, the French courts subject it to the full and independent judicial review which they call *contrôle normal*.⁶⁴

On occasion, judicial review in French administrative law is described in much less familiar terms. For example, three members of the Conseil d'Etat have suggested that "[t]o accomplish his task, the judge must purely and simply substitute his personal assessment of the facts for that of the official who took the action."⁶⁵ One of these judges has remarked elsewhere that, "since the legality or illegality of a decision depends on the merits of the judgment on which it rests . . . the judge cannot uncover the illegality without examining the merits himself, and this means substituting his judgment for that of the government."⁶⁶ Finally, President Odent states in his treatise that the judge "undertakes the same evaluations as the administration, which amounts to replacing its characterization of the facts with his own."⁶⁷

While they may on occasion use language like this to criticize how some of their colleagues decide cases, American judges rarely use it to describe their own behavior. The fact is that our judges sometimes take just as searching a look at administrative action as their French counterparts profess to take,⁶⁸ though at other times,

62. G. VEDEL, *supra* note 35, at 594.

63. See, e.g., Durand, [1968] Rec. Cons. d'Et. 657, [1970] D. Jur. 291 (whether there exists such dissension within a municipal council as to justify its dissolution); Préfet de Police v. Chambre Syndicale Patronale des Enseignants de la Conduite des Véhicules à Moteur, [1968] Rec. Cons. d'Et. 14, [1968] R.D.P. 905, [1968] A.J.D.A. 222, [1968] J.C.P. II 15529 (whether a threat to public safety or order justified a mayor's restrictions on civil liberties); Thibault, [1956] Rec. Cons. d'Et. 463, [1957] D. Jur. 20 (whether a publication was "licentious" and therefore could be censored).

64. M. LONG, P. WEIL, & G. BRAIBANT, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE* 127 (6th ed. 1974) [hereinafter cited as M. LONG].

65. M. LETOURNEUR, *supra* note 1, at 146-47.

66. Letourneur, *L'Etendue du Contrôle du Juge de l'Excès de Pouvoir*, 16 CONS. D'ET. E. & DOCS. 51, 59 (1962).

67. R. ODENT, *supra* note 39, at 1552.

68. See *Comm'r v. Teller*, 383 U.S. 687 (1966).

primarily when the administrative agency is peculiarly qualified to make the final decision,⁶⁹ they do not. Other considerations which might persuade an American judge to defer to the government's characterization of the facts have already been mentioned.⁷⁰

However, the review given by the French administrative courts to the legal characterization of facts is more complex than the analysis to this point would indicate. Even in theory, the courts review such characterizations only to the extent that the government's authority to act is made subject by law or regulation to the existence of certain "legal conditions."⁷¹ For these purposes, the French distinguish between the government's obligation to act (*compétence liée*) and its discretionary authority (*pouvoir discrétionnaire*).⁷² In an extreme case of *compétence liée*, a government official has no choice in the matter before him, since the applicable law compels him to draw a specified inference and act in a specified way, once certain facts are found to exist. Because the law gives such facts a fixed legal effect, not only is the official's behavior preordained, but so is the judge's. He need only examine whether the official has acted and, if so, whether he has acted in the prescribed fashion. Failure in either respect means reversal.⁷³

On the other hand, *pouvoir discrétionnaire* refers to the freedom of an administrative official to draw the inferences he will from the facts he finds to exist. Since the facts do not dictate his response, he may in effect act as he pleases, or not at all. And the judge, having no standards by which to test the official's characterization of the facts, is reduced in his scope of review to what French scholars call *contrôle minimum*.⁷⁴ Under *contrôle minimum*, the judge can still sanction external violations of law, including non-compliance with jurisdictional rules (*incompétence*) or procedural rules (*vice de forme*). Nor is he precluded from inquiring whether the official based his decision upon inaccurate facts (*erreur de fait*), violated substantive rules of law (*violation de la loi*), or used his authority for purposes other than those for which it was given to him (*détournement de pouvoir*).⁷⁵ The *Barel* case⁷⁶ proves that, even in

69. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

70. See note 29 and accompanying text *supra*.

71. M. LETOURNEUR, *supra* note 1, at 161.

72. A. DE LAUBADÈRE, *supra* note 2, at 261.

73. Letourneur, *supra* note 66, at 56.

74. See subsection III(b)(3) *infra*.

75. See notes 35-40 and accompanying text *supra*.

76. [1954] Rec. Cons. d'Et. 308, [1954] D. Jur. 594, [1954] S. Jur. III 97, [1954] R.D.P. 509, [1954] A.J.D.A. 396.

the face of its apparently unfettered discretion, the government may find its decisions set aside for *excès de pouvoir* on both factual and legal grounds.

Until certain changes of the past fifteen years,⁷⁷ however, *contrôle minimum* was thought to preclude any review at all of the legal characterization of fact. Judicial activity under this standard was actually described as "reduced, so far as the facts are concerned, to its minimum, to a review of their sheer physical correctness."⁷⁸ The courts supposed that if a statute or regulation were meant to limit an official's characterization of the facts, the draftsmen would have included appropriate legal conditions. In their absence, the statute or regulation was presumed to leave officials free to characterize the facts and draw inferences as they saw fit. Moreover, even if the courts wanted to confine administrative discretion, they simply could not, since they were not given criteria for doing so. If they were to impose restraints of their own creation, they would have to abandon *légalité* for the forbidden reaches of *opportunité*.

Thus, the traditional bench mark of the French administrative judge was the notion that he should review the legal characterization of fact only *to the extent* that the law subordinates the government's exercise of authority to the fulfillment of certain legal conditions. Put simply, his scope of review was said to "depend upon the respective dosages of *pouvoir discrétionnaire* and *compétence liée* which that authority entails."⁷⁹

The problem of disciplinary action in the civil service illustrates the logic of *contrôle normal*. When a civil servant has been disciplined for fault in the performance of his duties and goes to court, the judge inquires whether the acts alleged actually took place and whether they amount to punishable fault. The judge may not, however, consider whether it was advisable under the circumstances to impose a sanction or whether the sanction selected was in proportion to the fault.⁸⁰ If he were meant to review such questions, the legal conditions would have been worded accordingly.

The theory of *contrôle normal* has always been subject to several important qualifications. First, despite appearances, a legal

77. See subsection III(b)4 *infra*.

78. R. ODENT, *supra* note 39, at 1543.

79. G. VEDEL, *supra* note 35, at 594.

80. R. ODENT, *supra* note 39, at 1544. However, the Conseil's recent decision on an analogous problem, S.A.F.E.R. d'Auvergne et Ministre de l'Agriculture v. Bernette, Cons. d'Et. [1976] A.J.D.A. 328, suggests that it may be very close to modifying its approach to disciplinary action against civil servants. See note 86 *infra*.

condition may be construed to run in one direction only. The point may be illustrated by article L 571 of the Public Health Code, which provides that the maximum number of pharmacies in a given locale shall be fixed according to population and that excess licenses may be granted only "if public needs so require."⁸¹ Under the Conseil d'Etat's original construction of the statute, the administrative courts examined population needs in a suit challenging the grant of an exception,⁸² but not in one challenging a refusal.⁸³ Essentially, the Conseil read the statutory language as implying that excess licenses *would not* be issued unless required to satisfy a public need, but not that they *would* be issued just because an unsatisfied need existed. At the same time, the courts examined, in cases of denials as well as in grants of licenses, whether the government had correctly determined "the territory whose population a proposed pharmacy would most likely be expected to serve."⁸⁴ After all, how well the government drew its map determined how well it set its quotas in the first place. Only recently, the Conseil d'Etat abandoned its interpretation of the statute and told the administrative courts to take a close look at population needs, whether an excess license has been granted or withheld.⁸⁵ In effect, it turned the legal condition from a protection of existing pharmacies alone into a protection of applicants as well. Since no statutory reform preceded the change, this new approach must be read as a case of judicial reinterpretation of legislative intent.⁸⁶

81. Law of Sept. 11, 1941, art. 37, [1941] J.O. 4018, [1941] D.A.L. 468.

82. *Demoiselle Suzanne et Sieur Amic*, [1960] Rec. Cons. d'Et. 207; *Dame Cozic-Savoure*, [1953] Rec. Cons. d'Et. 86.

83. See *Demoiselle Magnin et Ministre des Affaires Sociales v. Lutz*, [1969] Rec. Cons. d'Et. 139; *Bergounhoux*, [1953] Rec. Cons. d'Et. 263.

84. *Rabelle*, [1948] Rec. Cons. d'Et. 369.

85. *Dame Comiti-Bouillin*, [1970] Rec. Cons. d'Et. 720.

86. An even more striking example of the Conseil's creativity with regard to legal conditions is *S.A.F.E.R. d'Auvergne et Ministre de l'Agriculture v. Bernette*, Cons. d'Et. [1976] A.J.D.A. 328, overruling a decision as recent as *Ministre du Travail, de l'Emploi et de la Population v. Société des Professionnels du Bâtiment et des Travaux Publics*, [1975] Rec. Cons. d'Et. 241, which had applied *contrôle minimum*. In *Bernette*, the Conseil made the Labor Inspector's otherwise discretionary authority to grant or deny permission for an employer to dismiss an employee serving as union representative depend on whether the latter's faults are "sufficiently serious to warrant his dismissal." *Id.* The Conseil directed the Inspector to take such factors into account in reaching his decision as the terms of the labor contract and the representative's needs in carrying out his duties. But the test is to be slightly different depending upon whether the Inspector grants or denies authorization. The Inspector may not grant it *unless* the employee's fault is "sufficiently serious to warrant his dismissal." On the other hand, he may deny it, *even if* dismissal would have been proper, by relying on "considerations of the general interest," but *only so long as* a denial would not "excessively impair" the more specific interests at stake. *Id.* See generally Nauwelaers & Fabius,

Second, though petitioners generally bring an action (*recours*) for *excès de pouvoir* when they seek to challenge the legality of an administrative act, they must bring a different kind of suit, a *recours en cassation*, if that action happened to be taken by certain specialized administrative organs operating through quasi-judicial procedures.⁸⁷ Putting aside the adage that the *recours pour excès de pouvoir* is directed against an administrative decision, while the *recours en cassation* is directed against an administrative judgment,⁸⁸ as well as the fact that the former normally start in the *tribunaux administratifs*, while the latter are brought directly in the Conseil d'Etat,⁸⁹ the real difference is that in *cassation* the scope of judicial review is somewhat reduced. In narrowing his review of administrative action of a quasi-judicial character, the French judge reacts much like the American judge, who likewise tends to show greater deference to the determinations of specialized quasi-judicial organs than to other administrative organs. The fact that a narrow review is more common in American than in French administrative law may only reflect the relatively greater extent to which the United States has turned to specialized agencies that operate along quasi-judicial lines: if *cassation* remains exceptional in French practice, it is because trial-type administrative procedures are themselves exceptional.

Actually, the difference in scope between the two types of review in French administrative law is much less pronounced today than it once was. At one time, the Conseil d'Etat declined to review either the existence or the legal characterization of the facts when it sat in *cassation*, in the belief that the findings of a quasi-judicial body were entitled to special respect and that their review would constitute an unwarranted duplication of effort. While the Conseil d'Etat examined the decisions of quasi-judicial bodies for *incompétence*, *vice de forme*, and *violation de la loi*, much as if they were lower court rulings,⁹⁰ its deference toward their conclusions of

Chronique Générale de Jurisprudence Administrative Française, [1976] A.J.D.A. 304, 306 [hereinafter cited as Nauwelaers & Fabius].

87. Among the administrative bodies subject to review in *cassation* are the Court of Accounts, the Court of Budgetary Discipline, the High Council for National Education, the Central Welfare Commission, the High Commission for Military Grants, the War Pensions Commission, the High Council for Confiscation of Illegal Profits, as well as a series of professional organizations responsible for the discipline of their members. A. DE LAUBADÈRE, *supra* note 2, at 400-02; G. VEDEL, *supra* note 35, at 481-83.

88. G. VEDEL, *supra* note 35, at 623.

89. A. DE LAUBADÈRE, *supra* note 2, at 394.

90. Interestingly, though, the Conseil d'Etat still refuses to examine the decisions of specialized administrative bodies from the point of view of *détournement de pouvoir*. Their

fact was extreme.⁹¹

As specialized bodies have multiplied in France, chiefly since the Second World War, the traditional scope of review in *cassation* began to strike the Conseil d'Etat as inadequate. Some of the new and inexperienced bodies wielded considerable power. For example, the national medical board was given authority to fix professional standards and to revoke licenses to practice medicine.⁹² The Conseil d'Etat noticeably expanded its control over such specialized administrative bodies. To begin with, the Conseil assumed the right to verify the correctness of the facts upon which their decisions rested,⁹³ just as it does under the *recours pour excès de pouvoir*. This right, however, is subject to an important qualification: while the *rapporteur* is free in a *recours pour excès de pouvoir* to conduct whatever independent inquiries might strike him as appropriate, he confines himself to the administrative record established below when he sits in *cassation*.⁹⁴

More recently, the Conseil d'Etat has strengthened its "rather relaxed" review over the legal characterization of fact in *cassation* cases.⁹⁵ In a leading decision, it reversed a ruling of the national medical board which had suspended an ophthalmologist from practice for having entered into a contract which allegedly denied to the patients of a clinic the right to choose their own doctor, and thus "affronted the dignity and general interest of the medical profession."⁹⁶ After examining the relationship among the doctor, patients, and clinic in question, the Conseil found that the contract impaired neither the free choice of a doctor nor the interests of the medical profession; it therefore reversed the suspension order.⁹⁷

use of authority for improper purposes is thought to be inconsistent with their "judicial" character and, in any event, so finding would be viewed as an impermissible affront to their integrity. Abbé Giloteaux, [1953] Rec. Cons. d'Et. 117, [1953] S. Jur. III 88, [1954] Dalloz-Sirey Jurisprudence [D.S. Jur.] 148. See L. BROWN & J. GARNER, *supra*, note 4, at 135.

91. A. DE LAUBADÈRE, *supra* note 2, at 557.

92. *Id.* at 555; M. LONG, *supra* note 64, at 274-77.

93. One of the earliest of such cases is Farman, [1924] Rec. Cons. d'Et. 829. See generally, A. DE LAUBADÈRE, *supra* note 2, at 555.

94. Union Commercial de Bordeaux-Bassens, [1951] Rec. Cons. d'Et. 19, [1951] D. Jur. 335; *accord*, Bordereau, [1957] Rec. Cons. d'Et. 529.

95. G. VEDEL, *supra* note 35, at 625.

96. Teyssier, [1947] Rec. Cons. d'Et. 205.

97. To determine whether the board properly characterized the facts in reaching its decision, the courts need not only a record, but also a statement of the legal and factual bases for the board's action. The Conseil d'Etat has required bodies whose decisions are subject to *cassation* to furnish such information. Dubois, [1948] Rec. Cons. d'Et. 87, [1948] D. Jur. 558.

Though the distinction between review in proceedings in *cassation* and in *excès de pouvoir* is less dramatic today than it once was, judges are still inclined to give greater weight, both as to the correctness and the legal characterization of the facts, to the findings of specialized quasi-judicial bodies than to those of individual administrative agents with general grants of authority. Even among such quasi-judicial bodies, the courts have drawn distinctions. For example, it has been suggested that certain professional associations like the national medical board occasionally succumb to bias or unfairness in their disciplinary functions, resulting in what appears to be a closer examination of their findings than those of the older and better established agencies.⁹⁸

Ultimately, *contrôle normal* is only a formula that provides a notion of the frame of mind, in the loosest sense of the term, with which the judge approaches his work. Theoretical discussions sometimes leave the impression that the administrative courts exercise a wholly objective review of the legal characterization of fact, and one that is identically rigorous in every case. It is easy to lose sight of the fact that the government generally benefits from a presumption that its legal characterizations of fact are correct and of the fact that the strength of that presumption varies from one subject matter to another. Where fundamental liberties are at stake, the administrative courts have shown themselves as exacting as possible;⁹⁹ where difficult and delicate issues are concerned, their *contrôle normal* seems to slacken.¹⁰⁰ The terse and highly stylized drafting of administrative court decisions, coupled with the absence of dissenting opinions, can give the false impression that they result from a vigorous and relentless application of logic, in which policy and other "subjective" considerations have no place.

The weekly sessions, (*séances d'instruction*), during which the *rapporteur* presents his analysis of the case and a panel, or *sous-section*, of the Conseil d'Etat reaches a preliminary decision, show that an administrative court opinion in France is something of a facade, certainly a great deal more of a facade than are either judicial or administrative opinions in the United States. At these *séances*, such concerns as the individual or societal interests at stake, the good faith of the parties, and the judge's own capacity for independent judgment play a leading role, though a final opinion may make no mention of them. The flexibility of the investigative

98. A. DE LAUBADÈRE, *supra* note 2, at 555, 557.

99. See notes 122-25 and accompanying text *infra*.

100. G. VEDEL, *supra* note 35, at 319.

procedures discussed earlier¹⁰¹ enables the judge to adapt his review as these and other considerations may dictate.

Of equal significance is the fact that the courts themselves ultimately determine the scope and meaning of a legal condition, subject of course to any legislative redrafting that may follow. On occasion they go so far as to impute to the draftsmen of legal texts the intention to impose a condition that is nowhere expressly stated. For example, though a statute places certain formal, but no substantive conditions upon the government's right to dissolve municipal councils,¹⁰² the Conseil d'Etat has made that right equally dependent on whether the council is so paralyzed by internal dissension that it can no longer function properly.¹⁰³ The Conseil's creative statutory interpretation helps reduce the breadth of the government's discretion by increasing the number of legal conditions that its action must meet.¹⁰⁴

Inferring legal conditions permits the judge to confine administrative discretion without appeal to so-called "general principles of law" (*principes généraux du droit*), i.e., unwritten procedural and substantive ideals that the Conseil d'Etat over the last thirty years has recognized as binding legal norms.¹⁰⁵ Some of these principles are assumed to have legislative rank and can only be excluded by express statutory (or of course constitutional) language; others are deemed constitutional and cannot be avoided by the legislature at all, though the very limited possibility of constitutional review of statutes in France often puts a legislative violation of general principles of law beyond judicial reach.¹⁰⁶ Since inferring legislative or regulatory intent with respect to a single text is a more modest

101. See note 48 and accompanying text *supra*.

102. Law of Apr. 5, 1884, art. 43, [1884] D.P. IV 40, [1884] Gaz. Pal. L.4.

103. Thibault, [1952] Rec. Cons. d'Et.394.

104. For a very recent case in which the Conseil went well beyond the applicable statute and actually made policy by creating and enforcing legal conditions, see S.A.F.E.R. d'Auvergne et Ministre de l'Agriculture v. Bernette, [1976] A.J.D.A. 328; Nauwelaers & Fabius, *supra* note 86.

105. Among these norms are the principles of equality of citizens before the law; *les droits de la défense* (akin to procedural due process); freedom of speech, press, assembly, as well as commerce; non-retroactivity of administrative acts; *l'autorité de la chose jugée* (akin to notions of *res judicata*); and prevention of unjust enrichment. For discussions of the general principles of law, see A. DE LAUBADÈRE, *supra* note 2, at 245-49; M. LETOURNEUR, *supra* note 1, at 149-54; Rivero, *Le Juge Administratif Français: un Juge qui Gouverne?*, [1951] DALLOZ CHRONIQUE 27.

106. Constitutional review of a statute may be had only before the statute has been promulgated, only in the Conseil Constitutionnel, and only at the request of a limited category of persons: the President of the Republic, the Prime Minister, the presidents of either house of the legislature, and sixty members of one house or the other. CONST. art. 61 (Fr. 1958, amended 1974).

enterprise than establishing a general principle of law, it is the more common means by which courts confine administrative discretion when they strongly believe that the draftsmen should have done so.

Finally, the fact that the government relies on incorrect or improperly characterized facts does not necessarily mean that its decisions will be set aside in court. The courts generally sustain a decision when it could not have been any different under law, even if all factual error had been corrected. If the government's *compétence liée* would oblige it to reenact precisely the same decision, setting the decision aside would serve no practical purpose, even though it might have educational value. Under these circumstances, the courts tend to overlook the error and, in effect, to substitute the correct and compelling ground for the incorrect one offered.¹⁰⁷

In the more common situation in which administrative action is based on several grounds, none of which is compelling, but one of which is incorrect in fact or in law, the judge's task is more delicate. Traditionally, he sought to identify the ground that was "determinative" and upheld or set aside the action depending upon whether that ground alone was based on correct and properly characterized facts.¹⁰⁸ Where he was unable to ascertain which of several grounds was determinative, he would normally annul the action if any one of them was without basis, on the assumption that every ground mentioned was determinative.¹⁰⁹ Over time, the Conseil d'Etat realized how poorly that assumption corresponded to reality and how many of its annulments served no practical purpose. In a 1968 ruling,¹¹⁰ the Conseil d'Etat directed the administrative courts to consider whether the government would have taken the same action if it had relied only upon those grounds that were valid. In order to avoid annulment of its decision, it is now necessary and sufficient for the government to persuade a court that, under proper application of the law to the facts, the outcome would not have been any different. Of course, the courts may in such a situation refer the matter back to the government for reconsideration, but in practice they often decide for themselves, on the existing record, what the government would do on remand. Actually the practical significance of the distinction is negligible, largely because the *rapporteur* is in

107. A. DE LAUBADÈRE, *supra* note 2, at 547.

108. On this problem of *pluralité des motifs*, see Sauvignon, *La Pluralité des Motifs dans l'Exercice d'un Pouvoir Discrétionnaire devant le Judge de l'Excès de Pouvoir*, [1971] A.J.D.A. 200.

109. A. DE LAUBADÈRE, *supra* note 2, at 540.

110. *Ministre de l'Economie et des Finances v. Dame Perrot*, [1968] Rec. Cons. d'Et. 39, [1968] A.J.D.A. 179.

regular contact with the parties throughout the *instruction*, and he can hardly help but be aware of the government's probable reaction. Still, the courts do not seem troubled by their opportunity to second-guess the government. Accustomed as they are to exercising *contrôle normal* over the legal characterization of fact, they probably do not find the task too great. For an American judge, however, the task might well be too great, perhaps even unconstitutional.¹¹¹

The Conseil d'Etat's recent shift in position demonstrates that judicial independence is not necessarily measured by the frequency with which the judge disagrees with the active administration. Although the new approach calls for a more active and penetrating judicial role than did the previous one, it results in fewer annulments.

Contrôle minimum aside, the traditional review of administrative action by the French courts seemed bolder than the judicial review to which we in the United States are accustomed. But while they appeared unwilling to accept the government's legal characterizations of fact just because they were not arbitrary or unreasonable, the French administrative courts lacked independence of a very basic sort. Though they occasionally took liberties in interpreting the legal conditions imposed by law or in inferring conditions where none were stated, they did not generally review the characterization of the facts at all unless statute or regulation had made it a legal condition for administrative action. For the most part, *pouvoir discrétionnaire* meant no review at all. In this sense, the French judge was a great deal more deferential to legislative and administrative will than his American counterpart, who would review virtually all government action, if only under a standard of minimal rationality.¹¹² Whereas arbitrary and unreasonable action by the

111. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). See also *Camp v. Pitts*, 411 U.S. 138, 143 (1973). See generally, *Federal Radio Comm'n v. General Elec. Co.*, 281 U.S. 464 (1930); K. DAVIS, *supra* note 14, at 542-43. In the United States, remand to the agency for preparation of a more adequate record or for further findings or statements of reasons is common in such situations. *E.g.*, *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976); *Natural Resources Defense Council Inc. v. Nuclear Regulatory Comm'n*, 539 F.2d 824 (2d Cir. 1976).

112. See *Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Lennon v. United States*, 387 F. Supp. 561, 564 (S.D.N.Y. 1975). According to a widely accepted view, both federal and state standards entitle the courts to intervene, even when discretionary authority is involved, to prevent abuses, or unreasonable uses, of that authority. One scholar suggests that abuses may include taking action for improper purposes (*e.g.*, *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973)), upon erroneous considerations (*e.g.*, *NLRB v. Brown*, 380 U.S. 278, 292 (1965)), upon

government in the United States enjoyed precious little legal immunity, however broad the delegation of power under which it was taken, the Conseil d'Etat's highly literal approach to judicial review left the French without a remedy in many such situations. The Conseil d'Etat's recent rethinking of the problem of controlling discretionary authority is discussed below.¹¹³

2. A Review of *Opportunité*

When a legal condition is expressed precisely, the courts generally have some idea of the kind of inquiry necessary to ensure that the condition has been satisfied. On the other hand, imprecision in statutory or regulatory language gives the courts leeway in deciding what a stated condition really means and how to determine whether it has been met. The evolution in recent years of the Conseil d'Etat's approach to reviewing exercises of eminent domain illustrates the flexibility that vagueness affords.

When presented with a challenge to the taking of private property for a public purpose, the administrative courts traditionally did no more than examine whether the taking would serve some purpose that might be called public.¹¹⁴ Since almost any project for which the government proposes to condemn property can be said to promote some public good, the review afforded in the courts was not very extensive. Except to discover a possible *détournement de*

extraneous considerations (e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)), upon a failure to give considerations their due weight (e.g., *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 612 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966)), in the absence of any substantial evidence (e.g., *First Girl, Inc. v. Regional Manpower Admin.*, 499 F.2d 122 (7th Cir. 1974)), or failing to take action even after an unreasonable period of time has passed (e.g., *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970)). B. SCHWARTZ, *supra* note 14, at 606-07, 610-13. Statutory support for the proposition that courts may under certain circumstances set aside action committed to administrative discretion has been found in the Administrative Procedure Act § 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (1967); REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15 (g)(6); N.Y. CIV. PRAC. LAW § 7803(3) (McKinney 1963). On the possibility of shielding discretionary government action from any judicial review whatsoever, see the Berger-Davis debate. Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559 (1950); Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Berger, *Administrative Arbitrariness: a Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Davis, *Administrative Arbitrariness: a Postscript*, 114 U. PA. L. REV. 823 (1966); Berger, *Administrative Arbitrariness: a Sequel*, 51 MINN. L. REV. 601 (1967); Berger, *Administrative Arbitrariness: a Synthesis*, 78 YALE L.J. 965 (1969).

113. See subsection 2, "A Review of *Opportunité*," and subsection 4, "*Erreur manifeste*," *infra*.

114. See *Groupeement de Défense de l'Îlot Firminy-Centre*, [1964] Rec. Cons. d'Et. 299, [1964] A.J.D.A. 432, [1965] R.D.P. 264; *Cambiéri*, [1938] Rec. Cons. d'Et. 962. See generally R. ODENT, *supra* note 39, at 1558.

pouvoir, the courts had virtually nothing to say about the merits of a taking.

In 1971, after trying its hand at more rigorous standards of review,¹¹⁵ the Conseil d'Etat rendered its landmark *Ville Nouvelle Est* decision,¹¹⁶ which unveiled a new approach. In that case, the *commissaire du gouvernement*¹¹⁷ suggested that the Conseil "could no longer limit its inquiry to the question of whether a project in itself serves a public purpose, but had to weigh its advantages and disadvantages, cost and benefit or, as the economists put it, utility and disutility."¹¹⁸ Evidently persuaded by these remarks, the Conseil d'Etat held that "a project serves a public purpose [*utilité publique*] only if the infringement on private property, the financial cost, and the disadvantages of a social character that it would entail are not excessive in relation to the project's advancement of the general welfare."¹¹⁹ A major redevelopment program for the eastern environs of Lille, including the creation of a university complex for 30,000 students and a planned city of 25,000, was found to meet the test, even though it meant demolishing eighty-eight apartment buildings, some of which had just been completed.

Though *Ville Nouvelle Est* represents a sharp break with traditional judicial practice, the magnitude of the change is still debated

115. *Commune de Cassis*, [1968] Rec. Cons. d'Et. 189.

116. *Ministre de l'Equipeement et du Logement v. Fédération de Défense des Personnes Concernées par le Projet actuellement dénommé "Ville Nouvelle Est,"* [1971] Rec. Cons. d'Et. 409, [1972] D. Jur. 194, [1971] J.C.P. II 16873, [1971] A.J.D.A. 421, [1972] R.D.P. 454, 142 *REVUE ADMINISTRATIVE* [REV. ADM.] 422 (1971).

117. Two *commissaires du gouvernement* are assigned from the membership of the Conseil d'Etat to each panel of the Conseil d'Etat's judicial section. They attend the weekly sessions at which the subsection's cases are discussed and a tentative solution reached, and then present their independent views when the cases come up for final decision. Despite his title, the *commissaire du gouvernement* in no sense represents the administration as party to the dispute. On the contrary, he undertakes to clarify for the benefit of the court the relevant issues in an objective and impartial manner, to synthesize past decisions on the problem, and to recommend a result that does justice to the parties and promotes the public interest. He may well propose a change in the Conseil d'Etat's case law and often disagrees with the solution proposed by the *rapporteur* and tentatively adopted by the subsection. The *conclusions* of the *commissaire du gouvernement* may become more influential than the Conseil's decision itself since they alone discuss the facts, law, precedents, and arguments in the extended fashion of Anglo-American judicial opinions. *Conclusions* in only the very leading decisions of the Conseil d'Etat are published in full in the law reviews and, less often, as lengthy footnotes to decisions in the official reporter, the *Recueil des Arrêts du Conseil d'Etat*, also known as *Recueil Lebon*. There are *commissaires du gouvernement* on the *tribunaux administratifs* as well, performing much the same function as those on the Conseil d'Etat. On the office generally, see L. BROWN & J. GARNER, *supra* note 4, at 50.

118. *Conclusions of commissaire du gouvernement Braibant*, [1971] A.J.D.A. 463, 466. See also M. LONG, *supra* note 64, at 567.

119. [1971] Rec. Cons. d'Et. 409, [1972] D. Jur. 194, [1971] J.C.P. II 16873, [1971] A.J.D.A. 421, [1972] R.D.P. 454, 142 *REV. ADM.* 422 (1971).

at the Conseil d'Etat. According to the *commissaire du gouvernement* in the case, the decision did no more than establish finally a workable formula for enforcing the legal condition of *utilité publique*. According to a stricter view, the Conseil d'Etat very nearly asserted the right to examine the *opportunité* of the government's use of eminent domain.¹²⁰ Whichever view one adopts, the Conseil d'Etat plainly departed from its tradition of literal textual reading by developing a balancing test nowhere mentioned in the relevant provisions of law.¹²¹ Henceforth, in eminent domain cases, the administrative courts were to ensure not only that the project served a public purpose, but also that, viewed as a whole, its benefits outweighed its costs.

Ville Nouvelle Est was not the first time the Conseil d'Etat had imposed a proportionality requirement on the government. For example, when administrative action abridged certain fundamental civil liberties, it would examine whether the abridgment was truly necessary, in relation to the gravity of the situation. In a leading 1933 decision,¹²² the Conseil d'Etat held that the government could not legally ban a political meeting if less restrictive means were available at the time to cope with anticipated threats to public order. Similarly, in a 1975 case, the Conseil extended its practice of setting aside excessive limitations on freedom of speech, press, and assembly to the area of film censorship, indicating that the Minister of Information must weigh "the general interest for which [he] is responsible . . . [against] the respect owed to civil liberties, particularly freedom of expression."¹²³ The first approach to restrictions on fundamental freedoms calls to mind a "least drastic means" test¹²⁴ and the second, a balancing test,¹²⁵ both of which have a place in American constitutional law. While the *Ville Nouvelle Est* decision required no more than balancing, it appears to have been the first occasion on which the Conseil d'Etat applied a proportionality test of its own making outside a narrow category of preferred freedoms.

120. The term "*super-contrôle*" has been used informally at the Conseil by some who interpret the *Ville Nouvelle Est* approach as a review of *opportunité*.

121. See Decree of June 6, 1959, [1959] J.O. 5724, [1959] D.L. 509.

122. Benjamin, [1933] Rec. Cons. d'Et. 541, [1933] D.P. III 354, [1934] S. Jur. III 1.

123. *Ministre de l'Information v. Société Rome-Paris Films*, [1975] Rec. Cons. d'Et. 57, [1975] A.J.D.A. 144. On the merits, the court ruled that "neither the situation depicted in the film nor the conduct of the characters justified the general ban that was imposed." *Id.* at 58, [1975] A.J.D.A. 145.

124. See, e.g., *NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939).

125. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949); *Thomas v. Collins*, 323 U.S. 516, 536 (1945).

In a decision rendered shortly after *Ville Nouvelle Est*, the Conseil d'Etat permitted the government to condemn property for a new autoroute linking Nice with the Italian border, in spite of the fact that the project would necessitate partial demolition of the only psychiatric hospital in the region. However, the Conseil could not justify the construction of ramps and interchanges that would deprive the hospital of its open spaces and parking facilities, subject it to severe traffic congestion, and rule out the possibility of future expansion.¹²⁶ The decision plainly included in the cost-benefit analysis certain considerations only remotely related to the purpose of the project. Other controversial applications of the balancing test followed,¹²⁷ leaving the impression that, while the active administration had traditionally been responsible for deciding the wisdom of public works, the courts were assuming that function.

The Conseil d'Etat was not long in drawing the outer limits of judicial involvement in eminent domain cases. In a 1974 decision,¹²⁸ it declined to choose between alternate routes for a new expressway, once it was satisfied that each of them separately met the *Ville Nouvelle Est* balancing test; the government's choice of the cheaper route was sustained, even though it meant a greater loss of agriculture acreage. According to the *commissaire du gouvernement*, the court's preference for one fully justifiable route over another goes to the *opportunité* and not the *légalité* of administrative action,¹²⁹ a view that the Conseil d'Etat has since reaffirmed.¹³⁰ For the moment, then, the Conseil d'Etat has stopped short of applying to eminent domain cases the stricter "least drastic means" test used

126. *Société Civile Ste.-Marie de l'Assomption*, [1972] Rec. Cons. d'Et. 657, [1973] J.C.P. II 17470, [1972] A.J.D.A. 576, [1973] R.D.P. 843.

127. In a recent decision, the Conseil d'Etat set aside plans for a new airfield on the grounds that the project did not respond to the real economic needs of the region, given its high cost in relation to local revenues, the meager volume of air traffic and the availability less than thirty miles away of the Poitiers airport. *Grassin*, [1973] Rec. Cons. d'Et. 598, [1973] A.J.D.A. 586, [1974] A.J.D.A. 34.

128. *Adam*, [1974] Rec. Cons. d'Et. 145, [1974] A.J.D.A. 212.

129. *Franc & Boyon*, *Chronique Générale de Jurisprudence Administrative Française*, [1974] A.J.D.A. 192, 198.

130. In a later case, a group of landowners challenged a prefectoral order fixing the course of a major electric energy line, the construction of which had been declared to be of *utilité publique*. According to the Conseil d'Etat, the question whether

the choice of [petitioners'] property imposes an excessive burden on them which other courses might have avoided . . . affects the validity of the order only if the burden it imposes is not justified by the benefit to the public, . . . and here the disadvantages of the course selected . . . are not excessive in comparison with its advantages.

Gorlier et Bonifay, [1975] Rec. Cons. d'Et. 54, [1975] A.J.D.A. 141. For prior case law, see *Groupement de Défense des Riverains de la Route de l'Intérieur*, [1961] D. Jur. 663, [1961] S. Jur. III 344, [1961] A.J.D.A. 646.

to review alleged abridgments of certain civil liberties. While its reluctance to go that far shows that there are varying degrees of close supervision of administrative action, the margin of judgment left to the administration in selecting sites for public works should not be exaggerated. It is not, after all, a major concession for the judge to sustain the government's preference among several sites, each of which meets the Conseil d'Etat's delicate balancing test.

However, the Conseil d'Etat has not rushed to impose a balancing standard in all categories of cases. In the six years since *Ville Nouvelle Est*, the Conseil has extended the test explicitly to only one other area: variances from city planning regulations.¹³¹ According to the leading decision, variances must not only serve a public interest, as required by statute, but "the prejudice caused by the variance to the public interests that the planning regulation was meant to protect [must not be] excessive in relation to the benefits to the public that the variance would offer."¹³²

It has already been suggested that the Conseil d'Etat's decision to strengthen judicial review in eminent domain cases may have been due to its belief that *contrôle normal* over the application to the facts of a concept as broad as *utilité publique* amounted to very little review at all.¹³³ Since massive highway and urban renewal projects were uprooting whole communities on a scale never before known, and since in some instances the real beneficiaries of the projects seemed to be their promoters, the inability of the courts to provide meaningful review acquired a new significance.

The decision to make a similar cost-benefit analysis in the case of variances from city planning regulations reflected different fears. Planning officials were thought to be issuing variances so casually as to jeopardize the coherent urban development that the regulations were meant to promote,¹³⁴ a risk heightened by the fact that

131. The Conseil also seems to have introduced highly complex balancing considerations into a third area—dismissals from work of employees serving as union representatives—by imposing legal conditions of a balancing type on the otherwise fully discretionary authority of the government. *S.A.F.E.R. d'Auvergne et Ministre de l'Agriculture v. Bernette*, [1976] A.J.D.A. 328, discussed in Nauwelaers & Fabius, *supra* note 86.

132. *Ville de Limoges*, [1973] Rec. Cons. d'Et. 530, [1973] J.C.P. II 17575, [1974] R.D.P. 259, [1973] A.J.D.A. 481, 494. The Conseil had declined to take this step only the previous year. Espanol, summarized at [1972] Rec. Cons. d'Et. 1204, 1257. In the *Ville de Limoges* case, the Conseil held that a variance permitting a builder to provide less open space and fewer parking facilities than required by Limoges' city planning regulations was "not based on a public interest justifying the prejudice to those interests the plan was meant to protect." A recent challenge to the issuance of a variance that employed this analysis was also successful. *Association S.O.S. Paris*, [1976] Rec. Cons. d'Et. ____ (May 26, 1976).

133. See note 114 and accompanying text *supra*.

134. See Cabanes & Leger, *Chronique Générale de Jurisprudence Administrative Française*, [1973] A.J.D.A. 476, 480.

existing law construed the government's failure to act upon a variance application within a stated period of time as tacit approval.¹³⁵ The lack of standards was also held to account for alleged favoritism in the granting of variances.¹³⁶

It is doubtful that the Conseil d'Etat expected litigation under its balancing test to weed out every ill-advised taking of private property or every ill-considered variance. The Conseil may have meant simply to call the legislature's attention to the need for remedial action. It most certainly hoped that the threat of judicial scrutiny would prod the government into more serious, principled, and even-handed decision-making in areas where alleged abuses had become a matter of grave public concern.¹³⁷

While the Conseil d'Etat may be asked in the years ahead to introduce a balancing test into other areas of the law, more recent cases suggest that it will not necessarily agree to do so. One illustration is the Conseil's 1975 decision expressly declining to weigh the advantages and disadvantages of classifying property as an historic or aesthetic site.¹³⁸ A 1967 statute authorizes classification of "natural monuments and sites whose conservation or preservation would have artistic, historic, scientific, cultural or picturesque value for the community."¹³⁹ Classification of a site protects it from physical alteration without prior government approval. A group of landowners attacked a government decree classifying as a "picturesque site" 20,000 acres of vineyard, forest, and other vegetation in the southwest of France, by arguing that the region did not constitute a "site," that it was in any case not a "picturesque site," and that even if it were, the disadvantages of such a classification to thousands of landowners outweighed any attendant advantages to the community. The Conseil d'Etat rejected the first two contentions, but not before examining them closely not only in the light of the facts, but also with reference to its own on-site inspection, to legislative history, and to prior administrative and judicial practice.¹⁴⁰

Petitioners' third claim, however, received short shrift, as the Conseil d'Etat refused "in its judicial capacity to weigh the disad-

135. *Id.* at 480-81.

136. *Id.* at 481.

137. As to the preoccupations that led the Conseil d'Etat in *S.A.F.E.R. d'Auvergne et Ministre de l'Argiculture v. Bernette*, [1976] A.J.D.A. 328, to introduce balancing elements into judicial review of decisions authorizing employers to fire employees serving as union representatives, see Nauwelaers & Fabius, *supra* note 86, at 306-07.

138. *Dame Ebri et Union Syndicale de Défense des Propriétaires du Massif de la Clape*, [1975] Rec. Cons. d'Et. 280, [1975] A.J.D.A. 311.

139. Law of Dec. 28, 1967, art. 3, [1967] J.O. 12856, [1968] D.S.L. 42.

140. Unpublished conclusions of *commissaire du gouvernement* Guillaume.

vantages to landowners that the classification of their property might bring.”¹⁴¹ The Conseil gave no reason for its refusal, but it can be assumed that it shared the view of its *commissaire du gouvernement* that extension of the *Ville Nouvelle Est* balancing test to this domain was “neither necessary nor even possible.”¹⁴² According to the *commissaire*, standards in site classification had not become as vague as those in cases of eminent domain, and conventional judicial review was still adequate. He added that even if the Conseil were willing to adopt the test, it could not be applied, since the hardships which would result from classification under the statute would not be known until the administrative policies on permitting alteration of the landscape had evolved.

3. *Contrôle minimum*

Theoretically, the courts do not review those determinations that have been left to the government’s *pouvoir discrétionnaire*. If applicable law does not tie government action to the existence of certain legal conditions then, unless the courts see fit to infer conditions of their own, they have no choice, according to theory, but to limit their review to *contrôle minimum*.¹⁴³

But even if the minimum, such review is scarcely minimal. In the *Barel* case,¹⁴⁴ the *commissaire du gouvernement* suggested that “the minimum scope of review to which the administrative judge can be reduced is one that ensures that administrative action has been taken for a proper public purpose, is consistent with applicable rules of law, and rests on accurate basic facts.”¹⁴⁵ The Conseil d’Etat expressly adopted his view by holding that no grant of discretion can deprive the judge of his authority to review for *incompétence*, *vice de forme*, *détournement de pouvoir*, *violation de la loi*, or *erreur de fait*.¹⁴⁶ But neither the *commissaire* nor the Conseil was prepared to suggest that *contrôle minimum* could reach the administration’s application of the law to the facts, for judicial review of such an issue was considered incompatible with *pouvoir discrétionnaire*.

Rarely is a government official wholly free of statutory or regulatory constraints in determining whether, when, and how to act. However, the draftsmen of statutes and regulations do occasionally

141. [1975] Rec. Cons. d’Et. 280, 281.

142. Unpublished conclusions of *commissaire du gouvernement* Guillaume.

143. See note 74 and accompanying text *supra*.

144. [1954] Rec. Cons. d’Et. 308, [1954] D. Jur. 594, [1954] S. Jur. III 97, [1954] R.D.P. 509, [1954] A.J.D.A. 396.

145. [1954] R.D.P. 509, 521.

146. [1954] Rec. Cons. d’Et. 308, 309, [1954] D. Jur. 594.

refrain from imposing legal conditions on an official's *pouvoir discrétionnaire* in such matters as the granting of favors or subsidies,¹⁴⁷ or the choice of persons with whom the government shall do business.¹⁴⁸ More often, a decision is subordinated only in part to legal conditions, as the example of civil service sanctions shows: the decision to discipline a civil servant depends on the existence of fault and is therefore subject to *contrôle normal*; the choice of sanctions is discretionary and subject to *contrôle minimum*.¹⁴⁹

In fact, the Conseil d'Etat, for prudential reasons, sometimes exercises *contrôle minimum* even where legal conditions are stated. The two broad categories of decisions in which it has instructed the administrative courts to curtail their review have a familiar ring to American ears, for they echo considerations that we, too, hear in this connection: first, the concern that judicial intervention may compromise national security interests, and second, the concern that sound judicial review may at times require special technical knowledge that the judge lacks. When the courts turn to *contrôle minimum* for reasons like these, they do so not out of respect for statutory or regulatory language, but out of a sense of their own limitations.

(a) National Security Cases

Reduction in the review of national security matters seems to be episodic, partly because national security matters themselves tend to be episodic. For example, the Conseil d'Etat refrained from full review over internments imposed under a 1944 regulation effective during the period between the liberation and the end of hostilities.¹⁵⁰ It took the same position in connection with restraints imposed during the 1955 Algerian state of emergency¹⁵¹ and the subsequent Algerian war.¹⁵²

147. See Mouvement Régional des Intellectuels Français pour la Défense de la Paix, summarized at [1956] Rec. Cons. d'Et. 633, 734; Verdeil, [1950] Rec. Cons. d'Et. 256. Included in this category have been decisions giving ranks within the Resistance their equivalents in the French military hierarchy. Chillou de Saint-Albert, [1952] Rec. Cons. d'Et. 162.

148. See *Ministre de l'Education Nationale v. Rousset*, [1969] Rec. Cons. d'Et. 532 (establishment of the list of candidates for a government post); Reboul, [1969] Rec. Cons. d'Et. 156 (decision not to fill a vacant government position); Mirambeau, [1967] Rec. Cons. d'Et. 272 (removal of an administrative official for non-disciplinary reasons); Ballanger, [1931] Rec. Cons. d'Et. 160, [1931] D.P. III 11 (exclusion of bidders from competition for government contracts).

149. See note 80 and accompanying text *supra*.

150. Frocrain, [1948] Rec. Cons. d'Et. 97, applying Ordonnance of June 27, 1944, [1944] J.O. 536, [1944] J.C.P. III 8786.

151. Dame Bourokba, [1955] Rec. Cons. d'Et. 590.

152. See, e.g., *Ministre de l'Interieur v. Livet*, [1964] Rec. Cons. d'Et. 534, [1965]

More recently, the Conseil d'Etat has shown greater interest in reviewing the application of the law to the facts in national security matters, at least when the law gives it a reasonably precise legal condition to enforce. In a noted 1965 decision,¹⁵³ the Conseil upheld the government's dissolution of the Committee of Friendship for French Algeria, but not before reviewing for itself the question of whether that body had "manifested solidarity [with groups] actively resisting the reestablishment of order in Algeria."¹⁵⁴

Even in calmer times, however, the Conseil d'Etat has invoked *contrôle minimum* in its review of certain routine administrative decisions related to national security, such as refusals to issue or renew a passport,¹⁵⁵ restrictions on travel,¹⁵⁶ and denials of "good morals certificates" to candidates for sensitive government positions.¹⁵⁷

The national security exception seems to apply most regularly, however, to restrictions imposed upon aliens. These restrictions have included orders barring the entry of foreigners into France,¹⁵⁸ refusals to renew a *carte de séjour*,¹⁵⁹ denials of permission to foreigners to reside in certain areas,¹⁶⁰ expulsions from French soil,¹⁶¹

D.S. Jur. 668; Grange, [1959] Rec. Cons. d'Et. 856.

153. Association Comité d'Entente pour l'Algérie Française, [1965] Rec. Cons. d'Et. 73.

154. Ordonnance no. 60-1856 of Dec. 22, 1960, issued pursuant to law of Feb. 4, 1960, [1960] J.C.P. III 25366. The *commissaire du gouvernement* had urged the Conseil to exercise full review:

However broad, this definition . . . is clearly distinguishable from those formulas over which we exercise limited review, since it characterizes the punishable activity both in terms of its object (manifesting solidarity with a banned group) and its means (public declaration or action). . . . This is precise enough to prevent our review over the legal characterization of fact from becoming a control of *opportunité*.

Conclusions of *commissaire du gouvernement* Galmot, [1965] Rec. Cons. d'Et. 73, 80. The Conseil also adopted his view, on the merits, that the Committee had shown "solidarity" by issuing declarations of support for the dissolved Front for French Algeria, had proclaimed itself its representative in metropolitan France and had recruited on its behalf. *Id.* at 81-83. Of course, the Conseil d'Etat decided as matters of law whether the statute was limited in scope to groups banned for activities in connection with the Algerian crisis and whether it contemplated dissolution based on solidarity shown toward a group even before it had been dissolved. *Id.* at 75-77.

155. See Car, [1960] Rec. Cons. d'Et. 319, [1960] A.J.D.A. 353; Imbach, [1948] Rec. Cons. d'Et. 215, [1949] D. Jur. 226.

156. See Matarasso, summarized at [1971] Rec. Cons. d'Et. 920, 1138, 1153; Douzon, [1968] Rec. Cons. d'Et. 517; Manville, [1964] Rec. Cons. d'Et. 118; Pradines, [1960] Rec. Cons. d'Et. 1078.

157. See Haddad, [1952] Rec. Cons. d'Et. 483.

158. See Markon, [1952] Rec. Cons. d'Et. 524.

159. See Epoux Bonjean, [1964] Rec. Cons. d'Et. 73, 74.

160. See Salières, summarized at [1960] Rec. Cons. d'Et. 1071; Dame de Savitch-Ritchgorsky, [1953] Rec. Cons. d'Et. 281.

bans on associations of foreigners in France,¹⁶² and prohibition of the sale and distribution of foreign periodicals.¹⁶³ The Conseil d'Etat apparently bases the scope of its review over some of these measures entirely upon whether or not the persons involved are French. For example, the administrative courts have never thought it beyond their competence to decide whether an association of French nationals may be banned,¹⁶⁴ or whether the sale and distribution of a domestic publication may be prohibited in the interest of national security.¹⁶⁵ Indeed, in view of the fact that the courts are now prepared to use a "least drastic means" test in reviewing restraints on fundamental liberties, even without statutory authority,¹⁶⁶ the application of *contrôle minimum* to the dissolution of foreign associations and the censorship of foreign publications is particularly striking. The foreign element, as such, would not seem to render judicial review technically or legally more difficult, but it may be thought to make review unwise. The *commissaire du gouvernement* in a leading 1955 case¹⁶⁷ explained that in national security cases "we are in a domain where the safeguard of national interests or of Frenchmen's rights abroad requires the government to bring subversive activities to an end and to respond to hostile acts committed against the person or property of Frenchmen abroad."¹⁶⁸

161. See Hamon ben Brahim, [1955] Rec. Cons. d'Et. 168; Eckert, [1952] Rec. Cons. d'Et. 467; Meyer, [1952] Rec. Cons. d'Et. 312.

162. See Association Franco-Russe dit Rousky-Dom, [1955] Rec. Cons. d'Et. 202, 43 Rev. ADM. 404 (1955); Delannoy et Geiger, [1943] Rec. Cons. d'Et. 74.

163. See Monus, [1973] Rec. Cons. d'Et. 527, 528; *Ministre de l'Intérieur v. Girodias et Société The Olympia Press*, summarized at [1958] Rec. Cons. d'Et. 968, [1959] S. Jur. III 69; Joudoux et Riaux, [1954] Rec. Cons. d'Et. 346.

164. See, e.g., Krivine et Frank, [1970] Rec. Cons. d'Et. 499; Boussel, [1970] Rec. Cons. d'Et. 504, [1970] D. Jur. 633, [1970] J.C.P. II 16672, [1970] A.J.D.A. 607; *Association Parti National Populaire*, [1936] Rec. Cons. d'Et. 1040, [1937] D.P. III 14.

165. See, e.g., Schroedt, [1970] Rec. Cons. d'Et. 501; *Association Enbata*, [1968] Rec. Cons. d'Et. 28; Hernandez, [1963] Rec. Cons. d'Et. 947; *Société Nouvelle d'Imprimerie d'Édition et de Publicité*, [1951] Rec. Cons. d'Et. 553.

166. See note 122 and accompanying text *supra*.

167. *Association Franco-Russe dit Rousky-Dom*, [1955] Rec. Cons. d'Et. 202, 43 Rev. ADM. 408 (1955).

168. Conclusions of *commissaire du gouvernement* Heumann, current President of the Conseil d'Etat, section du contentieux, 43 Rev. ADM. 404, 408 (1955). In the case, an organization formed to aid Russian refugees in France challenged a dissolution order issued by the Minister of the Interior. The Conseil d'Etat dismissed the claims of *incompétence* and *détournement de pouvoir*, and accepted the findings of fact that the organization had hung a portrait of Stalin in its premises, had kept books on the Communist Party in its library, had maintained contacts with the Soviet Red Cross, and had harbored suspected communists. However, with respect to the allegation that these facts had been improperly characterized, the Conseil replied that "it is for the Minister of the Interior to determine, as he has done, whether the organization's activities may compromise national security, and his judgment may not be reviewed by the Conseil d'Etat." [1955] Rec. Cons. d'Et. 202, 203, 43 Rev. ADM. 404, 408 (1955).

One recent decision, however, indicates a change in this category of cases. A 1945 ordinance permits the Minister of the Interior in cases of "absolute urgency" to deprive a foreigner of the hearing to which he is otherwise entitled before deportation on national security grounds.¹⁶⁹ *Contrôle minimum* was traditionally applied to the question of whether such urgency existed.¹⁷⁰ In 1970, following some indications of change,¹⁷¹ the Conseil d'Etat set aside a deportation order on the ground that the minister had not made the showing of urgency required to justify his failure to provide a hearing.¹⁷² Not unlike American courts, the Conseil is somewhat more ready to step in where the government's alleged misconduct consists of disregarding the requirements of fair procedure designed to give the individual an opportunity to be heard.

(b) *Technical Judgments*

When the administrative courts relax the scope of review over highly technical matters, they do so neither because a statute or a regulation says so, nor because they find the subject too sensitive for judicial intervention, but because in their view they are incapable of doing otherwise. "It is more honest," suggests President Odent, "for the judge to admit that he is incapable of providing effective review, and to step aside, than to give the illusion of review."¹⁷³

In timid hands, modesty in technical matters could mean chronic judicial abdication, for nearly every modern-day decision of the government has a greater or lesser technical component. In fact, most of the cases in which the courts disqualify themselves from reviewing the legal characterization of the facts on this ground fall into a few well-defined categories.¹⁷⁴

Medical questions form one such group. For example, the courts have applied *contrôle minimum* to the question whether the

169. Ordonnance of Nov. 2, 1945, [1945] J.O. 7225, [1946] S.L. 81.

170. See Eckert, [1952] Rec. Cons. d'Et. 467.

171. See generally Franc & Boyon, *Chronique Générale de Jurisprudence Administrative Française*, [1973] A.J.D.A. 577, 580.

172. Mihoubi Mohand Tayeb, [1970] Rec. Cons. d'Et. 25. For another example of greater activity by the Conseil d'Etat in the area of national security, see Société Union Africaine de Presse, [1966] Rec. Cons. d'Et. 276, [1966] J.C.P. II 14805.

173. R. ODENT, *supra* note 39, at 1563-64. Certain American judges would seem to take a similar view of the matter: "Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably." *Ethyl Corp. v. EPA*, 541 F.2d 1, 69 (D.C. Cir.) (Leventhal, J., concurring), cert. denied, 426 U.S. 941 (1976).

174. M. LETOURNEUR, *supra* note 1, at 164; Letourneur, *L'Etendue du Contrôle du Juge de l'Excès de Pouvoir*, 16 CONS. D'ET. E. & DOCS. 51, 59-60. (1962).

exercise of osteopathy and chiropractice should be reserved to licensed medical doctors,¹⁷⁵ or whether a professor of hydrology and climatology is qualified to serve as an authority on therapeutics on an academic examining board.¹⁷⁶ The courts have seldom reviewed the merits of decisions to deny licenses for the manufacture of pharmaceutical products¹⁷⁷ or to forbid their advertisement.¹⁷⁸ Examples could be multiplied of cases in which the Conseil d'Etat has concluded that a medical determination "rests on facts which have not been shown to be incorrect and whose characterization . . . is not subject to debate before the Conseil d'Etat."¹⁷⁹

Problems of rural land redistribution (*remembrement rural*) have also struck the Conseil d'Etat as particularly inappropriate for judicial review. Legislation stemming from the time of the German Occupation during the Second World War authorizes local boards to impose compulsory exchanges of agricultural holdings in order to produce a more rational and efficient use of land.¹⁸⁰ It provides that each property owner shall receive land equivalent, in terms of real productivity for each type of cultivation, to the land that he has been asked to give up. The sharp differences of opinion aroused by these exchanges soon produced a spate of litigation. The Conseil d'Etat decided to curtail review by the *tribunaux administratifs* of decisions of the local boards on the number and type of land catego-

175. See Belig, [1962] Rec. Cons. d'Et. 376.

176. See Debray, [1968] Rec. Cons. d'Et. 610.

177. See Société des Laboratoires Conan, [1952] Rec. Cons. d'Et. 133.

178. See Société des Laboratoires du Bac, [1948] Rec. Cons. d'Et. 100. The Conseil d'Etat rendered two decisions on the same day with respect to the same drug manufacturer, one declining jurisdiction and the other agreeing to examine the merits of an advertising ban. In the first case, the court observed that "no legal text . . . limits the power of the administration to refuse an advertising permit in the interest of public health . . . and the technical committee's evaluation of the risks presented by the proposed advertisement is not subject to review by the Conseil d'Etat." Société des Laboratoires du Bac, [1948] Rec. Cons. d'Et. 100. In the second, it held that "in not citing the risks to public health which the advertisement poses, the technical committee made it impossible for the Conseil d'Etat to see whether or not withdrawal of the permit was legally justified." Société des Laboratoires du Bac, [1948] Rec. Cons. d'Et. 101. As is its custom, the Conseil made no effort to reconcile the cases. But there was a difference: in the first, the administration merely denied petitioner's application for an advertising permit, while in the second it withdrew permission previously granted. See R. ODENT, *supra* note 39, at 1564.

179. Société des Laboratoires Conan, [1952] Rec. Cons. d'Et. 133, 134 (denial of a license to manufacture a drug). Other examples include Ischlondsky et Société Laboratoires Bidyne, [1971] Rec. Cons. d'Et. 14 (withdrawal of a license to manufacture a drug because the licensee failed to perform clinical studies that had been contemplated); Fédération Nationale des Syndicats Pharmaceutiques de France, [1967] Rec. Cons. d'Et. 180, [1967] A.J.D.A. 401 (assessment of risks in making medicine containing poisonous substances available without prescription); Société Toni, [1951] Rec. Cons. d'Et. 236 (evaluation of the toxicity of hair lotion).

180. Law of Mar. 9, 1941, [1941] J.O. 1658, [1941] D.A.L. 206.

ries to be established,¹⁸¹ on how to classify individual parcels among these categories,¹⁸² on whether certain property forms part of a "center of farming operations" and is therefore immune from compulsory exchange,¹⁸³ and, above all, on whether the land given up and the land received by a farmer are equivalent in real productivity.¹⁸⁴ Undoubtedly, several considerations lay behind the Conseil d'Etat's preference for *contrôle minimum*: the vast number of claims, the existence of specialized local boards, the availability to the boards of impartial experts, the possibility of appeal to higher officials, and not least, the confusion that would be caused by setting aside a redistribution plan years after it has gone into effect.¹⁸⁵ Still, the sheer complexity of the problem was an important factor.

The Conseil d'Etat has in the meantime decided to bring some of the issues connected with *remembrement rural* under full judicial review,¹⁸⁶ while still leaving many outside. The Conseil's practice of singling out certain aspects of a technical matter for *contrôle normal* is not limited to the land redistribution cases. In other areas, too, it has overruled precedent selectively, permitting the courts to resume full review over those aspects of a problem that no longer strike it as too difficult or too complex for them to handle.¹⁸⁷

A third area in which the courts restrict judicial review on technical grounds includes cases calling into question the operational requirements of the administration and the capacity of indi-

181. See *Ministre de l'Agriculture v. David*, summarized at [1963] Rec. Cons. d'Et. 819.

182. See *Demoiselle Vaunereau*, summarized at [1963] Rec. Cons. d'Et. 817; *Lavefve-Orbinot*, [1960] Rec. Cons. d'Et. 730, [1961] A.J.D.A. 108.

183. See *Dame Huard*, summarized at [1959] Rec. Cons. d'Et. 906, overruled in *Dame Veuve Pinon*, [1963] Rec. Cons. d'Et. 79.

184. See *Pinet*, [1959] Rec. Cons. d'Et. 254. *But see* note 216 and accompanying text *infra*.

185. *Vincent, L'Erreur Manifeste d'Appréciation*, 142 REV. ADM. 407, 410 (1971).

186. See *Dame Veuve Pinon*, [1963] Rec. Cons. d'Et. 79, overruling *Dame Huard* [1959] Rec. Cons. d'Et. 906, by making fully reviewable the determination that property is or is not a "center of operations"; *Levrier*, [1969] Rec. Cons. d'Et. 374, [1969] A.J.D.A. 633-34, overruling *Secrétaire d'Etat à l'Agriculture v. Jocquart*, [1959] Rec. Cons. d'Et. 395, by making fully reviewable the question whether the distance separating farm lands from the center of operations has been reduced.

187. For example, the Conseil d'Etat exercises only *contrôle minimum* over the question whether a young man is physically fit for military service. *Ministre des Armées v. Bachex*, [1968] Rec. Cons. d'Et. 628, [1969] A.J.D.A. 20, 21, [1969] R.D.P. 709, 22 REV. ADM. 314 (1969), cited in *Dewost & Denoix de Saint-Marc, Chronique Générale de Jurisprudence Administrative Française*, [1969] A.J.D.A. 20, 21. This may represent a retreat in the scope of review as compared to prior case law, e.g. *Hermann*, [1967] Rec. Cons. d'Et. 394. *See* note 276 *infra*. However, the Conseil d'Etat exercises *contrôle normal* over whether a draftee and sole family support "is in a serious social situation" entitling him to an exemption from military service. *Gardarein*, [1969] Rec. Cons. d'Et. 55, [1969] A.J.D.A. 157.

vidual civil servants to meet them. Such matters are thought to call for judgments which "only those who know the practical working conditions of the particular office or the merits of the individual official under consideration can bring to bear."¹⁸⁸ Thus, the Conseil d'Etat has declined to review the evaluation of a civil servant's record by his superiors for purposes of appointment or promotion,¹⁸⁹ the decision whether a post entails such risks to health as to entitle its occupant to early retirement,¹⁹⁰ or a finding that a given ministry is or is not so understaffed as to justify eliminating leaves of absence.¹⁹¹ While disputes frequently arise under legislation requiring the government to provide a civil servant whose position has been abolished an "equivalent post" for which he is qualified, or if none is available, just compensation,¹⁹² the Conseil d'Etat has time and again limited its review on the equivalence issue to *contrôle minimum*.¹⁹³

The following samples provide an idea of the range of controversies the Conseil d'Etat is said to have avoided on account of their technical character: a secondary school principal's recommendation that a pupil be placed on a different academic track,¹⁹⁴ the maritime administration's refusal to approve an oyster-culture concession,¹⁹⁵ a rating by the National Institute of Appellations d'Origine of the quality of wines,¹⁹⁶ a prefect's finding that the network of agricultural cooperatives in a certain sector satisfies the needs of local farmers,¹⁹⁷ the rejection by the Comédie Française of a certain theatrical piece,¹⁹⁸ and the government's veto of a municipal council resolution changing a local street name.¹⁹⁹ Not all of these decisions could have been predicted. Moreover, while deference to adminis-

188. R. ODENT, *supra* note 39, at 1566.

189. See Corbellini, [1970] Rec. Cons. d'Et. 551; Demoiselle Jacob, [1966] Rec. Cons. d'Et. 580; Lack, [1961] Rec. Cons. d'Et. 511.

190. See Association Amicale des Ingénieurs du Corps de l'Aéronautique, [1935] Rec. Cons. d'Et. 18; Association des Officiers des Eaux et Forêts, [1934] Rec. Cons. d'Et. 1133.

191. See Chauveau, [1967] Rec. Cons. d'Et. 128.

192. Law of Apr. 28, 1952, art. 83, 84, [1952] J.O. 4349, [1952] D.L. 167.

193. See Gayrard, [1970] Rec. Cons. d'Et. 181; Picq, [1966] Rec. Cons. d'Et. 1069; Demoiselle Cavaignac, summarized at [1961] Rec. Cons. d'Et. 319; Mélamède, [1951] Rec. Cons. d'Et. 226, [1951] D. Jur. 453.

194. See Neher, [1965] Rec. Cons. d'Et. 648; Gauthier, [1969] Rec. Cons. d'Et. 21.

195. See Guintini, [1968] Rec. Cons. d'Et. 353.

196. See Syndicat Agricole et Viticole de Lalande et de Pomerol, [1960] Rec. Cons. d'Et. 529.

197. See Coopérative des Propriétaires Récoltants de la Champagne Délimitée, [1969] Rec. Cons. d'Et. 514.

198. See Palaprat, [1954] Rec. Cons. d'Et. 118, [1954] J.C.P. II 8205, [1954] A.J.D.A. 277, [1954] R.D.P. 1072.

199. See Ville de Lisieux, [1953] Rec. Cons. d'Et. 8, [1953] D. Jur. 391.

trative expertise may explain the wine decision, for example, others surely stem from very different considerations: the decision in the oyster-culture case derived from the notion that a concession is more of a privilege than a right, while the street name case can be attributed to the sheer absence of objective criteria.

Still, there are a greater number of more or less technical issues that the administrative courts do in fact decide. To illustrate, in one case an optician sought to be exempted from certain professional licensing procedures on the basis of a statutory exemption for those opticians who could establish to the satisfaction of the authorities that they had practiced the profession for a minimum period of time before the procedures went into effect.²⁰⁰ Petitioner's application was denied because, although he had sold eyeglasses for the requisite period of time, he allegedly lacked sufficient experience in their manufacture. The *tribunal administratif* of Limoges, finding the optician's experience adequate, set aside the earlier administrative ruling, and the government appealed on the ground that the court should not have substituted its own judgment for that of the board. The Conseil d'Etat adopted the view of the *commissaire du gouvernement* to the effect that "the board's findings are not too technical in character for the court to review," and sustained the lower court's right "to verify whether the legal condition for practicing the profession . . . was met by the interested party."²⁰¹ On the merits, the *commissaire* agreed, in the light of the legislative history, with the board's view that the profession had both commercial and technical aspects. However, upon examining petitioner's practice in some detail, the *commissaire* found that he had had adequate experience in each,²⁰² and the Conseil d'Etat so held.²⁰³

200. Law of June 5, 1944, [1944] J.C.P. III 8626, [1944] Gaz. Pal. 192.

201. Lalo, [1964] Rec. Cons. d'Et. 435, 436, [1965] A.J.D.A. 127, 128. In another example, petitioners challenged a redistribution of forest lands for greater productivity on the grounds that the government improperly included certain non-forest property, notably two ponds, in the exchange. The *commissaire du gouvernement* urged the Conseil d'Etat to intervene on the merits despite their technical character; since "[a]n important aspect of the legality of the decision, [viz.] the boundaries of forest groups, does not present insurmountable technical difficulties." Conclusions of *commissaire du gouvernement* Rigaud, [1968] A.J.D.A. 18, 23. The Conseil d'Etat decided not only the conditions under which ponds could legitimately be included in forest groups, but also whether the two ponds in question met them. Epoux Dommée, [1967] Rec. Cons. d'Et. 382, [1967] A.J.D.A. 673. While the first question involved matters of legislative history and common sense, the second required a close analysis of the facts of the case.

202. Conclusions of *commissaire du gouvernement* Braibant, [1965] A.J.D.A. 126, 127-28.

203. Lalo, [1964] Rec. Cons. d'Et. 435, 436, [1965] A.J.D.A. 127, 128.

4. *Erreur manifeste*

Within the last ten to fifteen years, commentators began to notice that errors were occurring in administrative decisions less often as mistakes of law or of fact than as mistaken applications of the law to the facts.²⁰⁴ But it was in precisely this aspect of decision-making that *contrôle minimum* most restricted judicial review.²⁰⁵ Considering that the increasing delegation of discretionary authority and the growing number and importance of technical decisions were driving the courts more than ever to the use of *contrôle minimum* in place of *contrôle normal*, the gap in judicial review took on great practical significance.

It may be assumed that misjudgments in applying the law to the facts are most often innocent. However, in certain areas governed by *contrôle minimum*, it appeared that the government might have a special interest which could prevent it from acting fairly. For example, a civil servant whose position had just been abolished might be offered a plainly inferior post, prompting a refusal and thus permitting the government to avoid its obligation to pay compensation. In another area, the land redistribution boards, which are composed of local farmers, have occasionally been suspected of hostility toward nonresident landowners.²⁰⁶ The courts could not correct abuses like these without a meaningful form of review; neither could they deter them. While justice might still be served in individual instances by straining the meaning of the terms "error of law" or "error of fact," such efforts were subject to criticism as a matter of logic and principle.²⁰⁷ Vague notions of unreasonableness or arbitrariness would have allowed the courts to provide at least some measure of review over the legal characterization of fact, but they had little basis in French legal thought or practice. It was in this setting that the Conseil d'Etat developed the theory of *erreur manifeste*.

In an otherwise unexceptional 1953 decision, the Conseil d'Etat first raised the possibility that, even in an area governed by *contrôle minimum*, error in applying the law to the facts might be

204. M. LETOURNEUR, *supra* note 1, at 148.

205. See note 146 and accompanying text *supra*. President Odent suggests that the administrative courts "were not unaware of the fact that their review of the facts was very superficial and therefore very ineffective when reduced to the minimum of review over their sheer physical correctness." R. ODENT, *supra* note 39, at 1569.

206. See Vincent, *L'Erreur Manifeste d'Appréciation*, 142 REV. ADM. 407, 410 (1971) [hereinafter cited as VINCENT].

207. See Desjardins (June 13, 1951) (unpublished opinion of Cons. d'Et.). See VINCENT, *supra* note 206, at 411.

"*manifeste*" and subject to review and reversal by the administrative judge.²⁰⁸ The question was a classic one: could a position be found in the Ministry of Overseas Territories that was equivalent to the recently abolished office of "administrator for Indochina"? But, instead of declining to address the issue, the Conseil d'Etat concluded that "the absence of an equivalent post appears manifestly from the Ministry's rules of organization."²⁰⁹ The use of language was intriguing, since just two years earlier the Conseil had adopted the *commissaire du gouvernement's* categorical view that in such cases, "what is at stake is simply the organization and operation of the public service, a matter for which the Minister alone is responsible, and one that he alone should decide."²¹⁰

Over the next several years, the Conseil d'Etat referred to *erreur manifeste* in only a handful of cases, practically all of which dealt with the issue of job equivalence in government service, and none of which resulted in a finding that such an error had been committed.²¹¹ In 1962, for the first time, the Conseil granted relief to a civil servant whose position had been abolished, when the government failed to offer him a vacant and "manifestly equivalent" post.²¹² Soon thereafter, the Conseil extended the idea of *erreur manifeste* to certain issues in the area of rural land redistribution, such as whether two parcels of land were equivalent in real productivity,²¹³ in size,²¹⁴ or in category of use.²¹⁵

The notion of *erreur manifeste* lends itself especially well to questions of equivalence, since it enables the judge to look at concrete data and reverse administrative action in cases of obvious disparity, without becoming too deeply enmeshed in complex and technical material. It is probably significant that in its earliest deci-

208. See Denizet, [1953] Rec. Cons. d'Et. 489.

209. *Id.*

210. Mèlamède, [1951] Rec. Cons. d'Et. 226, [1951] D. Jur. 453.

211. See Association des Fonctionnaires Chérifiens du Cadre Supérieur de l'Administration Centrale du Maroc, [1963] Rec. Cons. d'Et. 294; Carpentier, [1962] Rec. Cons. d'Et. 17; Lagrange, [1961] Rec. Cons. d'Et. 121.

212. See Commune de Montfermeil v. Foittier, [1962] Rec. Cons. d'Et. 304, [1962] A.J.D.A. 571.

213. See, e.g., Guyé, [1970] Rec. Cons. d'Et. 652, [1971] A.J.D.A. 54, [1971] R.D.P. 517; Ministre de l'Agriculture v. Peyron, [1966] Rec. Cons. d'Et. 592; Demoiselle Achart, [1961] Rec. Cons. d'Et. 476.

214. See Gindre, [1968] Rec. Cons. d'Et. 669.

215. See, e.g., Ministre de l'Agriculture v. Quiniou, [1968] Rec. Cons. d'Et. 850; Ministre de l'Agriculture v. David, [1963] Rec. Cons. d'Et. 819; Demoiselle Achart, [1961] Rec. Cons. d'Et. 476. The Conseil also began reviewing under this standard the determination that the net distance separating a farmer's fields from his center of operations was no greater after than before the exchange of lands. Boursier, [1963] Rec. Cons. d'Et. 487. But, as noted, the Conseil later shifted to *contrôle normal* over this issue. See note 186, *supra*.

sions the Conseil d'Etat used the word "*manifeste*" to describe the equivalence, not the error: it meant to set aside administrative action, not so much because a serious error had been committed, but because the error that was committed was physically, perhaps even mathematically, unmistakable. In one case,²¹⁶ a farmer had surrendered land valued at 21,963 productivity units in exchange for land valued at 21,735, sustaining barely over a one per cent loss. The fact that the Conseil d'Etat ruled in his favor suggests that the magnitude of error was not its primary consideration. Because it appeared to ask the courts to do no more than note the obvious, the doctrine of *erreur manifeste* did not seem likely to draw them too far into areas where they did not belong.

However, the idea of *erreur manifeste* had great potential for expansion. Interpreted liberally, it could reach flagrant misjudgments in the legal characterization of fact in every field where previously the judge did not review the issue at all. So construed, *erreur manifeste* might begin to correspond in breadth to the notion of unreasonableness in American law. Despite early doubts about the value and universality of the doctrine,²¹⁷ *erreur manifeste* has since been invoked by the Conseil d'Etat in just about every area of the law where the courts exercise *contrôle minimum*. The Conseil first extended it to issues of government employment other than job equivalences: for example, the question whether a civil servant had shown sufficient professional aptitude to earn a promotion.²¹⁸ The doctrine was also applied to a number of medical determinations, including a conscript's physical fitness for military service.²¹⁹

216. Charton, [1960] Rec. Cons. d'Et. 901; *accord* Secrétaire d'Etat v. Gesbert, [1960] Rec. Cons. d'Et. 162. See generally Galabert & Gentot, *Chronique Générale de Jurisprudence Administrative Française*, [1962] A.J.D.A. 552, 553 [hereinafter cited as GALABERT & GENTOT]; Galabert, *Le Remembrement Foncier*, [1961] A.J.D.A. 62, 67.

217. Kornprobst, *L'Erreur Manifeste*, DALLOZ CHRONIQUE 121, 122 (1965) [hereinafter cited as KORNPROBST]. See also GALABERT & GENTOT, *supra* note 216, at 552.

218. See Maurel, [1963] Rec. Cons. d'Et. 119. In other rulings, the Conseil d'Etat reviewed for *erreur manifeste* the evaluation made by public hospital authorities of one of its therapists in deciding whether to renew her contract, Dame Gontarbert, [1964] Rec. Cons. d'Et. 431, [1965] D.S. Jur. 9, and the decision whether a member of a *tribunal administratif* had been compensated adequately for special services he had been asked to render, Boufrioua, [1966] Rec. Cons. d'Et. 317.

219. See *Ministre des Armées v. Bachex*, [1968] Rec. Cons. d'Et. 628, [1969] A.J.D.A. 20, [1969] R.D.P. 709, 711, 22 Rev. ADM. 314 (1969). The Conseil also applied the doctrine of *erreur manifeste* to the decision by which a doctor is or is not placed on the *liste départementale de notoriété*, entitling him to charge higher medical fees than otherwise permitted, because of his exceptional professional qualifications. Rougemont, [1967] Rec. Cons. d'Et. 240, [1968] D. Jur. 201, [1968] A.J.D.A. 48; See also Villard, [1964] Rec. Cons. d'Et. 256, [1965] D.S. Jur. 494, [1964] S. Jur. III 172, [1964] A.J.D.A. 294, 314. See also Sieri, [1976] Rec. Cons. d'Et. — (Mar. 3, 1976) (whether an individual made a sufficient showing of

To this point, the Conseil d'Etat had applied the doctrine only in cases where it, and not the legislature, had imposed *contrôle minimum* on the courts. It is understandable that the Conseil would feel free in that situation to reassert a measure of review as soon as it found a suitable judicial tool for doing so. A more delicate problem would arise if the courts applied *erreur manifeste* to areas in which an absence of legal conditions indicated legislative intent to confer unfettered discretion on the administration. In such areas, the courts presumably cannot review the legal characterization of the facts—even by the modest standard of *erreur manifeste*—without thwarting legislative purpose. Understandably, the Conseil d'Etat had more serious reservations about reaching into these areas.²²⁰

Nonetheless, the Conseil d'Etat was soon invoking *erreur manifeste* as a standard for reviewing what had been considered purely discretionary acts of the government.²²¹ A few examples

training and experience in fitting artificial eyes to exempt him from certain licensing procedures.

Judge Leventhal has made a similar analysis:

A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

220. KORNPROBST, *supra* note 217, at 123. But see GALABERT & GENTOT, *supra* note 216, at 552.

221. Among the more recent extensions of the doctrine of *erreur manifeste*, two have received considerable attention. The Conseil has agreed to review under that standard the government's apparently discretionary authority to license a nuclear reactor. Herr, [1975] Rec. Cons. d'Et. 162. The courts now also review for *erreur manifeste* the percentage fixed for mandatory payments [*taxes parafiscales*] imposed on importers or producers of certain goods. In its first such ruling, it upheld the rate of taxation on beef, pork, and lamb products, Société Anonyme "Quiblier et Fils" et Fédération Nationale de l'Industrie et des Commerces en Gros des Viandes, [1975] Rec. Cons. d'Et. 191, [1976] A.J.D.A. 213, but thereafter it set aside as "manifestly excessive" the fixed monthly finance charge imposed for delay in payment of the tax on importing and processing prunes, Centre Technique des Conserves de Produits Agricoles v. Etablissement Grégori, [1976] Rec. Cons. d'Et. ____ (May 28, 1976).

Other recent decisions of the Conseil recognize the applicability of the doctrine of *erreur manifeste* to the government's otherwise discretionary decisions, including: ordering the consolidation of a town with adjacent towns, Association pour la Protection des Intérêts des Habitants d'Anthy-sur-Léman, [1975] Rec. Cons. d'Et. 255; selecting a certain design for the new Pompidou Center of Art and Culture at Plateau Beaubourg in Paris, Bergerioux, [1976] Rec. Cons. d'Et. ____ (Jan. 23, 1976), [1976] A.J.D.A. 420; and refusing a mutual benefit society authorization to establish a pharmacy for its members, Ministère de la Santé v. Union Départementale des Sociétés Mutualistes de la Gironde, [1976] Rec. Cons. d'Et. 52, [1976] A.J.D.A. 255. See also Société Distillerie Brabant, [1969] Rec. Cons. d'Et. 264, [1970] D. Jur. 762, [1969] A.J.D.A. 645, [1969] R.D.P. 1127 (application of anti-dumping

should suggest the wide range of these decisions. In one, the Conseil applied the test to denials by prefects of the permission required by law to demolish existing structures, even though the prefects seemed to have been given unfettered discretion in the matter.²²² In a 1970 ruling, the Conseil d'Etat characterized as *erreur manifeste* the denial of financial aid under a law authorizing the government, but not obliging it, to assist the "most disadvantaged" among French repatriates,²²³ where the applicant was a poor, ill, sixty-nine year-old widow who was without relatives and lived in an apartment needing major renovations.²²⁴

The application of the *erreur manifeste* idea that aroused the greatest interest was in the area of the issuance of building permits. The Conseil d'Etat's practice had been to exercise *contrôle normal* over the government's decision to deny a permit because the proposed structure would impair public health, safety, or environmental interests, but to exercise *contrôle minimum* over the decision to grant one.²²⁵ The assumption was that permit applications could not be rejected unless the proposed construction would endanger health, safety, or environmental interests, but that they could be granted even in the face of such dangers. Naturally, this view of the law discouraged environmental interest groups and even neighbors from challenging the issuance of a building permit, no matter how negative its impact on the surrounding area. The 1968 *Plage de Pampelonne* case²²⁶ introduced the idea of *erreur manifeste* to this area. In that case, neighbors had complained that a massive apartment complex, for which the prefect had granted a permit, would destroy the beauty of a beach near St. Tropez. When the Minister of Construction reversed the decision to issue the permit, the developer of the complex sought relief in the administrative courts. Though it continued to apply *contrôle minimum*, the Conseil upheld the Minister's action on the theory that, in view of the incongruity between the proposed structure and the landscape in which it was to be built, the issuance of the permit was clearly erroneous and the Minister had no choice but to revoke it. In subsequent

legislation); Société Maison Genestal, [1968] Rec. Cons. d'Et. 62, [1968] J.C.P. I 2203, [1968] J.C.P. II 15581, [1968] A.J.D.A. 102, [1969] D. Jur. 456 (denial of tax relief for certain acquisitions of property).

222. Compagnie Electro-mécanique, [1963] Rec. Cons. d'Et. 167.

223. Law of Dec. 26, 1961, [1961] J.O. 11996, [1961] D.L. 28-29.

224. Dame Veuve Camilleri, [1970] Rec. Cons. d'Et. 190.

225. See Canton, [1962] Rec. Cons. d'Et. 23.

226. Société du Lotissement de la Plage de Pampelonne, [1968] Rec. Cons. d'Et. 211, [1968] A.J.D.A. 341, [1969] R.D.P. 320, 330.

rulings, the Conseil d'Etat described as *erreur manifeste* the government's approval of a plan to build an open-air sanatorium in an area that failed to meet certain health standards,²²⁷ but had no such objection to the construction of a stable whose doors would open directly on a village square.²²⁸

As late as 1973, the Conseil d'Etat had still not applied the *erreur manifeste* doctrine to national security cases, and doubt was expressed that it ever would.²²⁹ But in the *Librairie François Maspéro* case of that year,²³⁰ the Conseil took the remaining step. The Minister of the Interior had forbidden the sale or distribution of the French edition of the *Tricontinental Review*, a publication of the Havana-based Organization for Solidarity of the Peoples of Africa, Asia, and Latin America. The *tribunal administratif* dismissed the action and the Conseil d'Etat affirmed, noting that "so long as it is not based upon *erreur manifeste*, the Minister's judgment about the impact of the review on public order may not be re-examined by the administrative courts."²³¹ Relief, however, was granted on grounds of *erreur manifeste* in a 1975 decision setting aside an order for the deportation of a Bulgarian refugee who had entered and remained in France illegally and had neither a job nor financial means.²³² The *commissaire du gouvernement* suggested that these facts alone did not make the petitioner "a threat

227. See Mendelssohn, [1968] Rec. Cons. d'Et. 442.

228. See Commune de Bozas, [1970] Rec. Cons. d'Et. 139, [1970] J.C.P. II 16340, [1970] A.J.D.A. 225.

229. Before 1973, one authority suggested: "Nothing at present would indicate that *erreur manifeste* must one day be extended to all cases of *contrôle minimum*, and especially to national security matters: the doctrine seems to be confined to decisions taken on the basis of technical considerations." KORNPROBST, *supra* note 217, at 123. For a contrary prediction see GALABERT & GENTOT, *supra* note 216, at 553: "As soon as we place it on the same level as the other elements of *le contrôle minimum*, *erreur manifeste* should be extended automatically to all cases where this *contrôle minimum* applies."

230. Société Librairie François Maspéro, [1973] Rec. Cons. d'Et. 611, [1974] J.C.P. II 17642, [1973] A.J.D.A. 557, 603.

231. *Id.* at 612, [1974] J.C.P. II at 17642, [1973] A.J.D.A. at 604. In recommending that the Conseil d'Etat review the ban for *erreur manifeste*, the *commissaire du gouvernement* said:

Judicial review is the necessary counterpart of such exceptional authority. Of course, we cannot review . . . the *opportunité* of the measure, since the legislature made this power discretionary. But we should not be confined to enforcing procedural rules, which are almost nonexistent, or to discovering *détournement de pouvoir*, which is always difficult to prove. The way out . . . is supplied by the notion of *erreur manifeste*.

Conclusions of *commissaire du gouvernement* Braibant, [1974] J.C.P. II 17642, quoted in Franc & Boyon, *Chronique Générale de Jurisprudence Administrative Française*, [1973] A.J.D.A. 557, 580.

232. *Ministre de l'Intérieur v. Pardov*, [1975] Rec. Cons. d'Et. 83, [1975] A.J.D.A. 143.

to public order," within the meaning of the deportation law, unless it could be shown that they "had driven him to commit or attempt to commit acts likely to disturb our social organization."²³³ The Conseil d'Etat agreed that "when he concluded that the facts . . . justified considering petitioner's presence a threat to public order, the Minister committed *erreur manifeste*."²³⁴

The doctrine of *erreur manifeste* seems to have given the courts a means of ensuring that the government's application of the law to the facts in discretionary and technical matters is always reasonable, even if not always right. With its recent extension to national security matters, the doctrine appears to have eliminated the last vestige of unfettered administrative discretion. Nothing now would seem to prevent the courts from applying the notion of *erreur manifeste* to such questions as whether the disciplinary sanctions imposed on a civil servant are appropriate under the circumstances,²³⁵ and many members of the Conseil d'Etat expect the court to do so on the first suitable occasion. Of course, the merits of certain decisions may always be difficult to review, even for *erreur manifeste*, if only because of their inherent subjectivity. The selection of a street name²³⁶ or the decision by the Comédie Française not to perform a particular theatrical piece²³⁷ come quickly to mind;²³⁸ but with some imagination abuses of discretion are conceivable there as well.

As it has evolved, the idea of *erreur manifeste* is plainly a compromise.²³⁹ Its purpose was to enable the courts to exercise a modest

233. Unpublished conclusions of *commissaire du gouvernement* Grévisse, quoted in [1975] A.J.D.A. 131.

234. *Ministre de l'Intérieur v. Pardov*, [1975] Rec. Cons. d'Et. 83, [1975] A.J.D.A. 143. The same month, the Conseil d'Etat reviewed for the first time the denial of a passport, though it held in that case that the government committed no *erreur manifeste* in concluding that petitioner's travel abroad might endanger public safety. *Fouéré*, [1975] A.J.D.A. 143. For prior case law, see cases cited note 155 *supra*.

235. See notes 80, 149 and accompanying text *supra*. The Conseil's refusal to review the proportionality of sanctions was reaffirmed as recently as 1967, despite the suggestion of *commissaire du gouvernement* Kahn that review at least for *erreur manifeste* be available. *Administration Générale de l'Assistance Publique v. Demoiselle Chevreau*, [1969] D. Jur. 51. The argument for extension of *erreur manifeste* to such an issue was made again in *Labetoulle & Cabanes, Chronique Générale de Jurisprudence Administrative Française*, [1971] A.J.D.A. 33, 36 [hereinafter cited as *LABETOULLE & CABANES*].

236. See *Ville de Lisieux*, [1953] Rec. Cons. d'Et. 8, [1953] D. Jur. 391.

237. See *Palaprat*, [1954] Rec. Cons. d'Et. 118, [1954] J.C.P. II 8205, [1954] A.J.D.A. 277, [1954] R.D.P. 1072.

238. It should be remembered that such decisions are still reviewable in terms of their external legality, for pure errors of law and for *détournement de pouvoir*.

239. G. VEDEL, *supra* note 35, at 600. See also *Franc & Boyon, supra* note 231, at 580; *VINCENT, supra* note 206, at 419. According to de Laubadère, "the judge is making up for his traditional abstention from review, by now reviewing a decision when the error seems to him

measure of review over the legal characterization of fact in those cases where previously they exercised none at all.

However, while the purpose of the *erreur manifeste* idea may be clear, its meaning is not. The best description we have comes from one *commissaire du gouvernement*:

Our condemnation of *erreur manifeste* is meant to require the government to show respect for a minimum of logic and common sense. . . . Even when they have the authority to do as they see fit, government officials may not do just anything. . . . *Erreur manifeste* is a palpable error that is raised by the parties, recognized by the judge, and about which no enlightened person can have doubt.²⁴⁰

The *commissaire* also defined *erreur manifeste* as "an error so serious and patent that even a layman can see it."²⁴¹ Formulas such as these are certainly no more precise than the "arbitrary, capricious, or abuse of discretion" standard in American administrative law. In fact, the exact equivalents of some of our terms have entered the vocabulary of *erreur manifeste*, which now, for example, is sometimes said to occur "when the administration, willingly or not, abuses the discretion vested in it, or exceeds the limits of reasonableness in the judgment that it makes on the basis of the information available."²⁴² But as in American administrative law, so in *droit administratif*, the real significance of notions such as these lies in the uses to which they are put.

5. Unreasonableness in *Droit Administratif*: the Limits of Comparative Law

Little is to be gained by comparing France's *erreur manifeste* with our "abuse of discretion" if the comparison is to be made on a purely verbal level. We can, without great risk, assume that as formulas they mean much the same thing. In practice, however, *erreur manifeste* seems to be something other than its nearest ana-

to be manifest." A. DE LAUBADÈRE, *supra* note 2, at 546. President Odent describes the doctrine as "designed to impose on administrative authorities a minimum of good sense and logic, censuring gross errors and unreasonable conclusions." R. ODENT, *supra* note 39, at 1570.

240. Unpublished conclusions of *commissaire de gouvernement* Braibant in Lambert, [1970] Rec. Cons. d'Et. 665, [1971] A.J.D.A. 53, quoted in LABETOULLE & CABANES, *supra* note 235, at 35. See also conclusions of *commissaire du gouvernement* Baudouin in Société Beauregard et Compagnie, [1968] Rec. Cons. d'Et. 1088, [1968] A.J.D.A. 417, 419.

241. Unpublished conclusions of *commissaire du gouvernement* Braibant, *supra* note 240.

242. *Id.*

logues in American administrative law. The difference itself probably reflects a more basic contrast in the climate of judicial activity in the two legal systems, as well as the kind of change that often occurs when a home-grown idea is transplanted to foreign soil.

In fact, foreign law did provide the French administrative courts with a model for strengthening judicial review. One *commissaire du gouvernement* suggested to the Conseil d'Etat that if the courts were to set aside administrative action on grounds of *erreur manifeste*, they would only be doing what "British courts do [when they] annul discretionary acts of the administration that they find unreasonable."²⁴³ The Conseil d'Etat was also aware of the Swiss Federal Court's practice of reviewing whether the government's discretionary judgments are "obviously false or arbitrary, or rest upon an obvious oversight"—a practice based on a liberal interpretation of article 4 of the Swiss Constitution which provides simply that "[a]ll Swiss are equal before the law."²⁴⁴ Finally, a member of the Conseil d'Etat, Maxime Letourneur, had sat on the administrative court of the International Labor Organization alongside British and Swiss judges whose notions, respectively, of "unreasonableness" and "obvious inadvertence" were at work.²⁴⁵ That court occasionally set aside decisions in which "plainly incorrect conclusions were drawn from the record" or "essential factual elements had not been taken into account."²⁴⁶ The Conseil d'Etat was drawing on all these sources when it adopted the view that, even in highly technical matters or in areas in which the administration had received broad delegations of power, the courts might forbid the government to act in absurd or irrational ways.

Despite its need for a doctrine such as *erreur manifeste*, the Conseil d'Etat did not seize upon it at once. In fact, it is probably fair to say that the doctrine's full value was appreciated only after the Conseil d'Etat had already begun to invoke it.²⁴⁷ Not only was the Conseil's use of the *erreur manifeste* idea "discreet" and "unexpected,"²⁴⁸ but it passed at first largely unnoticed by legal scholars other than those who also sat on the Conseil d'Etat.²⁴⁹ Even after it had begun to mention *erreur manifeste* on a regular basis,

243. *Id.*

244. See VINCENT, *supra* note 206, at 411, and cases cited therein.

245. *Id.*

246. *Id.*

247. KORNPROBST, *supra* note 217, at 121.

248. *Id.* at 121-23.

249. See, e.g., M. LONG, *supra*; note 64, at 124; R. ODENT, *supra* note 39, at 980; GALABERT & GENTOT, *supra* note 216, at 552; LETOURNEUR, *supra* note 66, at 51.

observers wondered just how serious the Conseil d'Etat was about finding it. Letourneur himself, writing in 1962, described the notion as but "a novel idea . . . the development of which will be interesting to follow."²⁵⁰

Even today, *erreur manifeste* is seldom proven. It is certainly far more often invoked by litigants than found to exist by the courts; and while the number of suits in which a claim of *erreur manifeste* eventually prevails has risen steadily since 1962, the ratio of successful to unsuccessful claims has not.²⁵¹ To a certain extent, this is due to the fact that unlawful administrative action often can be set aside on less controversial grounds, for example, *incompétence* or *vice de forme*. Finding *erreur manifeste*, like finding *détournement de pouvoir*, is a sensitive operation that implicates the content itself of public administration, and the courts prefer to avoid it if they can find some other basis for granting relief.²⁵²

However, the availability of alternatives cannot alone account for the infrequency with which administrative action has been challenged successfully on grounds of *erreur manifeste*; there are too many cases on record in which the courts had no other basis for affording relief against what would seem to be a misjudgment in the legal characterization of fact, but still are not prepared to call it *erreur manifeste*.²⁵³ The fact is that the Conseil d'Etat has demanded an unusually strong showing before concluding that the government has plainly erred in applying the law to the facts. It would appear that the government's judgment must be more than implausible; it must be almost egregious. In this light, there is more sense in President Odent's observation that "the government would rarely commit so blatant an error and refuse to correct it."²⁵⁴ One scholar aptly reminds us that "since, after all, the doctrine of *erreur manifeste* is only meant to reach gross errors of the government, we

250. LETOURNEUR, *supra* note 66 at 57.

251. R. ODENT, *supra* note 39, at 1571. According to one count, in the judicial years 1967-68, 1968-69, and 1969-70, six, four, and three administrative acts were annulled, respectively, by the Conseil d'Etat on the basis of *erreur manifeste*. In the period between 1961 and 1971, approximately one out of eight claims of *erreur manifeste* before the Conseil d'Etat succeeded. VINCENT, *supra* note 206, at 419. Among the Conseil's rulings on *erreur manifeste* between February 1975 and May 1976 that have been made available to the author, only four granted relief on that ground. Even more telling is that of the six lower court findings of *erreur manifeste* that were appealed, five were overturned by the Conseil d'Etat.

252. See Cauchard, [1967] Rec. Cons. d'Et. 442; *Ministre de l'Agriculture v. Demoiselle Durant*, [1967] Rec. Cons. d'Et. 2, [1967] J.C.P. II 15001; *Ministre de l'Agriculture v. Luciani*, [1964] Rec. Cons. d'Et. 306. See R. ODENT, *supra* note 39, at 1565.

253. See G. VEDEL, *supra* note 35, at 600.

254. R. ODENT, *supra* note 39, at 1572.

should not be too greedy.”²⁵⁵

One pair of cases gives an idea of the threshold that must be crossed before *erreur manifeste* is reached. In the first, the petitioner challenged the validity of a building permit that entitled his neighbor to construct a silo without maintaining a minimum distance between the silo and private residences already standing on adjacent lots.²⁵⁶ The absence of such a provision meant that the silo could have been built less than a yard from the petitioner's home, a fact which explains why the government twice before had refused to issue an unconditional permit. The petitioner contended that issuance of the permit violated applicable law under which a permit “may only be refused, or issued subject to special conditions, if the proposed structure, on account of its size or location, would endanger public health or safety.”²⁵⁷ As noted,²⁵⁸ the courts exercise only *contrôle minimum* in reviewing the issuance of such a permit, on the theory that the law may authorize the administration to deny a permit when public health or safety is endangered, but does not compel it to do so. The petitioner's arguments persuaded the *commissaire du gouvernement* to recommend that the Conseil d'Etat void the permit on grounds of *erreur manifeste*:

The permit made it possible to construct a silo on the border of the two lots, that is, at a distance of between .70 and 1.45 m. from petitioner's home. Now everyone knows that, except for the forests of the south of France, nothing catches fire as easily as a silo. Petitioner cites numerous examples of the risk [of fire]. All that is needed is that a child play with matches, that a careless smoker toss a lit cigarette, or that a tractor spit a spark. Indeed, it can happen that, under certain conditions of heat and dryness, hay or straw will catch fire spontaneously.²⁵⁹

The Conseil d'Etat did not decide the question of *erreur manifeste*; rather, it found that issuance of the permit was a *détournement de pouvoir*, a suggestion the *commissaire du gouvernement* had ex-

255. LABETOULLE & CABANES, *supra* note 235, at 36.

256. Lambert, [1970] Rec. Cons. d'Et. 665, [1971] A.J.D.A. 53.

257. Decree of Nov. 30, 196., art. 2, [1961] J.O. 11169, [1961] D.L. 359.

258. Société du Lotissement de la Plage de Pampelonne, [1968] Rec. Cons. d'Et. 211.

259. Unpublished conclusions of *commissaire du gouvernement* Braibant in Lambert, *supra* note 240, quoted in LABETOULLE & CABANES, *supra* note 235, at 35. The *commissaire* also cited a 1943 circular of the Minister of Agriculture, no longer in effect, prescribing a minimum distance of thirty meters between silos and any other structures, to reduce the destructiveness of fires.

pressly considered and dismissed.²⁶⁰ It is unclear whether the Conseil d'Etat would have found *erreur manifeste* if no other ground for annulment had been available. The opinion reads as if the evidence of *détournement de pouvoir* were tenuous: instead of referring to specific facts in support of its conclusion, as is its usual practice, the Conseil cited nothing more than the government's "unexplained change of mind and the *ensemble* of circumstances."²⁶¹ That the evidence of *détournement de pouvoir* appears to have been rather thin would suggest that the Conseil may have found the evidence of *erreur manifeste* even thinner. It is still more significant that the Conseil d'Etat selected as the basis for its decision a ground which it is not only reluctant to use, but which it considers to be strictly a last resort.²⁶² According to two commentators and members of the Conseil d'Etat, the case "shows without much doubt that the [Conseil] meant to reject the claim of *erreur manifeste*."²⁶³

In the *Librairie François Maspéro* case,²⁶⁴ the Minister of the Interior justified his ban on the sale and distribution of the *Tricontinental Review* on the ground that its circulation would prejudice French foreign relations and domestic order. The *commissaire du gouvernement* considered that judgment clearly wrong, in that the *Review* contained "nothing original, nothing particularly virulent,"²⁶⁵ nothing that would impair France's national or international interests. He failed to see a sufficient connection between it and either the May 1968 student revolt in Paris or the rise in urban guerrilla warfare to justify an absolute ban reaching "every single issue of the review, past and future, irrespective of its individual content."²⁶⁶ The *commissaire* found particularly telling the fact that the government seized only a few issues of the review, when under the law it could have confiscated every issue, and surely would have done so, if they all contained material as inflammatory as the sweeping ban implied. The Conseil d'Etat nonetheless sustained the measure.

The belief that, by definition, *erreur manifeste* should be obvious from the face of an administrative decision has procedural implications as well. If courts are too quick to look beyond the

260. LABETOULLE & CABANES, *supra* note 235, at 34.

261. Lambert, [1970] Rec. Cons. d'Et. 665, [1971] A.J.D.A. 53.

262. See M. LETOURNEUR, *supra* note 1, at 158; G. VEDEL, *supra* note 35, at 603.

263. LABETOULLE & CABANES, *supra* note 235, at 34.

264. Société Librairie François Maspéro, [1973] Rec. Cons. d'Et. 611, [1974] J.C.P. II 17642, [1973] A.J.D.A. 603.

265. Conclusions of *commissaire du gouvernement* Braibant, [1974] J.C.P. II 17642, quoted in FRANC & BOYON, *supra* note 231, at 581.

266. *Id.*

decision itself in search of *erreur manifeste*, they may end up calling an error "manifest" when it is not manifest at all. Actually, the Conseil d'Etat has not taken so orthodox a view of the matter, primarily because it prefers to give the *tribunaux administratifs* latitude in deciding what kind of investigation each case warrants. Still, the Conseil does not endorse indiscriminate use of formal means of proof in *erreur manifeste* cases. Such measures may be out of order if the petitioner has not yet shown that an ultimate finding of *erreur manifeste* is probable. In one case, the Conseil d'Etat reversed as "without purpose" the decision of a *tribunal administratif* ordering that an *expertise* be held to determine whether action by a local land redistribution board was clearly erroneous.²⁶⁷

The difficulty for the Conseil d'Etat with the idea of *erreur manifeste* stems in part from its vagueness. It is true that, while they are obviously vague, terms like "reasonableness" are valued in American law precisely for the flexibility and apparent consistency that they give to the law.²⁶⁸ Indeed, so mindful are we of how terms of breadth enable our institutions to meet shifting standards of fair and sound government that we can easily fail to appreciate that finding a fundamental legal concept "not devoid of the equivocal and, though very convenient, hardly rigorous on a logical level"²⁶⁹ may be quite disagreeable to a foreign legal culture.²⁷⁰

It should also be kept in mind that, until it adopted the doctrine of *erreur manifeste*, the Conseil d'Etat had preserved the illusion that courts have only two options with respect to the legal characterization of fact: to reexamine the matter fully, or not at all. While judicial practice was not quite that simple, the Conseil d'Etat had never suggested so clearly that judicial review might be a matter of degree.²⁷¹

267. *Ministre de l'Agriculture v. Peyron*, [1966] Rec. Cons. d'Et. 592 ("It appears from the record . . . that petitioner has made no showing that the board's decision . . . rested on *erreur manifeste* or incorrect basic facts, and, under these circumstances, the *expertise* ordered is without purpose and the [government] properly asks that the order be set aside."); *accord*, *Ministre de l'Agriculture v. Epoux Pasquier*, [1969] Rec. Cons. d'Et. 466; see VINCENT, *supra* note 206, at 420.

268. See generally L. BROWN & J. GARNER, *supra* note 4, at 156-57; B. SCHWARTZ, *supra* note 14, at 663-64.

269. FRANC & BOYON, *supra* note 231, at 580.

270. See generally KORNPROBST, *supra* note 217, at 123.

271. The Conseil d'Etat's current formula for *contrôle minimum* makes this perfectly clear: external illegality aside, the judge examines whether there has been "error of fact, error of law, manifest error in the legal characterization of fact or misapplication of power," (emphasis added). *Société Maison Genestal*, [1968] Rec. Cons. d'Et. 62, [1969] D. Jur. 456, [1968] J.C.P. I 2203, [1968] J.C.P. II 15581, [1968] A.J.D.A. 102.

Perhaps most serious of all, by adopting the doctrine of *erreur manifeste*, the Conseil d'Etat proclaimed its willingness to tolerate error, provided of course that it was not too egregious. While bringing the doctrine into *contrôle minimum* reduced the probability that administrative error might pass unnoticed by the courts, the Conseil had never before so plainly acknowledged that possibility.²⁷² It is hardly surprising, given certain lingering illusions about the nature of the judicial process, that the doctrine of *erreur manifeste* sounded "bold and irritating."²⁷³ or constituted "something of a revolution at the Palais Royal."²⁷⁴ These illusions may account for the reluctance with which the courts turn to *erreur manifeste* and the fact that they reserve it for government action that they find truly outrageous.²⁷⁵

The doctrine of *erreur manifeste* raised doubts of a different order among those who favored the elimination by the courts of all unfettered administrative discretion. One writer observed that the doctrine "can either play the part of Zorro, . . . deterring the improper characterization of fact, . . . or it can, like the villain Iago, play the traitor and usher in a reduction in judicial authority."²⁷⁶ What the writer feared was that the courts might begin exercising limited instead of full review, now that the former had become a more attractive alternative. There was less concern that the Conseil d'Etat might actually retreat to *contrôle minimum* in areas where *contrôle normal* had been the rule, than that the Conseil would simply cease upgrading its standards of review. After all, why should the courts ever reconsider their technical competence in a given area or infer legal conditions for the use of a discretionary power where none had been supplied? The doctrine of *erreur manifeste* enabled them to reach the worst cases without having to go to these lengths.

In fact, it appears that no category of cases has slipped back from full to limited review.²⁷⁷ On the contrary, despite the availabil-

272. One observer suggests that the doctrine "signifies no more and no less than that there is a zone where the government can commit serious blunders which a judge will not correct, unless they strike him as flagrant." VINCENT, *supra* note 206, at 418.

273. *Id.*

274. *Id.* at 413. The Palais Royal in Paris is the seat of the Conseil d'Etat.

275. LABETOULLE & CABANES, *supra* note 235, at 35.

276. KORNPBST, *supra* note 217, at 124; accord, GALABERT & GENTOT, *supra* note 216, at 553.

277. LABETOULLE & CABANES, *supra* note 235, at 36; VINCENT, *supra* note 206, at 414-15. There is some uncertainty as to the issue of physical fitness for military service. In a 1968 decision, *Ministre des Armées v. Bachex*, [1968] Rec. Cons. d'Et. 628, [1969] A.J.D.A. 20, [1969] R.D.P. 709, [1969] REV. ADM. 314, the Conseil expressly held the issue to be subject to *contrôle minimum*, including *erreur manifeste*, whereas in a ruling of the previous year,

ity of *erreur manifeste*, the Conseil d'Etat has frequently decided to begin exercising full review over the legal characterization of fact in areas traditionally considered too delicate for that kind of review.²⁷⁸ Formerly, the courts looked upon military discipline as such an area, but in 1973 the Conseil d'Etat expressly adopted *contrôle normal* as its standard and set aside the suspension of an air force captain because his alleged misdeeds "were not in themselves sufficient to justify imposing a disciplinary sanction."²⁷⁹ Similarly, the courts had always recognized the unqualified discretion of mayors in issuing permits for public performances, requiring at most that permit refusals rest on something having to do with the maintenance of public order.²⁸⁰ When a popular music enthusiast challenged the refusal by the mayor of Aix-en-Provence to permit him to stage a music festival in that city, the *commissaire du gouvernement* persuaded the Conseil not just to begin reviewing for *erreur manifeste*, but to bypass that stage and to move directly to full review.²⁸¹

IV. CONCLUSION

For all their acceptance of legal categories, few French jurists believe that formulas decide concrete cases. The administrative judge knows that, try as he may, he cannot give to all issues the same fresh evaluation that *contrôle normal* prescribes. Acceptance of the *erreur manifeste* idea is, above all, a frank recognition of

Hermann, [1967] Rec. Cons. d'Et. 394, full review had been exercised. According to commentators and members of the Conseil d'Etat, this change of policy had nothing to do with the availability of review for *erreur manifeste*. In view of the speed with which military orders are executed, if the judge were to exercise full review, he would grant relief long after it could serve any useful purpose. The *commissaire du gouvernement* predicted that the judge would always be "one war behind" and that the remedy would be "totally vain." Dewost & Denoix de Saint-Marc, *Chronique Générale de Jurisprudence Administrative Française*, [1969] A.J.D.A. 20.

278. *E.g.*, Société des Ciments Lafarge, [1974] Rec. Cons. d'Et. 628, [1975] A.J.D.A. 237 (whether the Minister of Agriculture properly considered the denial of a deforestation permit "necessary for the biological equilibrium of the region"); Chereau, [1970] Rec. Cons. d'Et. 732 (whether rural land redistribution has made farming conditions more favorable).

279. Massot, [1973] Rec. Cons. d'Et. 359, [1973] A.J.D.A. 353, 366. Typical of prior case law is Jacquot, [1958] Rec. Cons. d'Et. 225.

280. *See, e.g.*, Commune de St. Genest-de-Contest, [1969] Rec. Cons. d'Et. 29; Société du Cirque Pinder, [1955] Rec. Cons. d'Et. 382; Hubert de Ternay, [1953] Rec. Cons. d'Et. 66.

281. Clément et Association pour la Défense de la Culture et de la Musique Contemporaine, [1975] Rec. Cons. d'Et. 427, [1975] A.J.D.A. 581. The *commissaire du gouvernement*, eager to show that full review could be meaningful, suggested that a case might well arise in which the government's claim of danger to public safety would be exaggerated, and that in such a case a decision to deny permission would be annulled. Unpublished conclusions of *commissaire du gouvernement* Denoix de Saint-Marc.

something the Conseil d'Etat must have known all along: that there is simply no such thing as a single measure of review, unless it is defined so loosely as to deprive it of real meaning.²⁸² The fact is that a judge cannot help but feel more competent in certain areas than in others. Inevitably, he will find some fields of administrative activity especially appropriate for his intervention, others less so. Moreover, being human, he will bring vigor to the defense of those private interests he regards as particularly worthy. In fact, the reality that the judge administers his review by degrees rather than fully, not at all, or even at some fixed intermediate level, is clearer today than ever; for just as the *erreur manifeste* standard seemed to be the perfect compromise between full review and no review, the Conseil d'Etat began to talk, in selected areas, of a cost-benefit analysis,²⁸³ yet another new way of looking at administrative decisions.

If we were to judge the value of examining a foreign law strictly by the number of problems which it will solve for us, French administrative law might not deserve quite the attention it receives from Anglo-American legal scholars. In much of what it says, the Conseil d'Etat departs from the notion that administrative courts should review factual issues to the fullest extent technically and legally possible. This premise draws strength from the fact that administrative judges in France are an unusual breed. They are officially civil servants²⁸⁴ who have studied at a specialized school of public administration and need not even be lawyers.²⁸⁵ Their position allows them ample opportunity for first-hand administrative experience before, after, and even during their judicial careers,²⁸⁶ and they are engaged daily in giving the government legal and political advice.²⁸⁷ The investigative procedures adopted by the French courts reflect an active involvement in administration as such that we do not routinely expect or even ask of our courts.²⁸⁸ Perhaps the most influential factor of all is the modest extent to which the French government operates along the quasi-judicial lines that are so common among American administrative agencies. It has only strength-

282. According to two members of the Conseil d'Etat, the doctrine of *erreur manifeste* "has a solid basis in the psychology of the administrative judge, who tends to think, even in cases where his review theoretically is total, that he should not substitute his judgment for the government's, unless the latter is plainly enough in error." GALABERT & GENTOT, *supra* note 216, at 553.

283. See note 119 and accompanying text *supra*.

284. A. DE LAUBADÈRE, *supra* note 2, at 391-92.

285. See note 9 and accompanying text *supra*.

286. See note 11 and accompanying text *supra*.

287. See note 12 and accompanying text *supra*.

288. See note 48 and accompanying text *supra*.

ened the belief that if government action in France is to be scrutinized at all, the administrative courts are the ones to do the job.

Droit administratif has not left this American observer with the impression that its decisions or even its institutions are somehow superior to our own. Some statements of the Conseil seem to go too far, others not far enough, in telling the government what and what not to do; in either case some of what it tells them may be bad policy. We have noted too that court opinions as such are a great deal less candid in France than they are in the United States in that they seldom tell the lay reader why the court ruled as it did, yet often leave the impression that it could not have ruled any other way.

But even after all this has been said, it is difficult not to admire the shape and structure that the Conseil d'Etat is attempting to give to French administrative law. Of course, certain external factors favor the Conseil in its efforts. France traditionally has had a highly unified and centralized system of government, which means, for example, that the number of statutes and regulations that the courts are called upon to construe are much fewer in number than would be the case in a federal system. In addition, the cases that reach the Conseil d'Etat on appeal come from a small number of lower courts²⁸⁹ and are not so numerous as to prevent it from reviewing every one of them. The contrast between such an institutional setting and the one in which our Supreme Court does its work is plain, as are its implications for the unity of the law. Apart from this, the tradition of logical analysis in French legal scholarship contributes an extra measure of coherence to the law that it might otherwise lack.

Still, to all this, the Conseil d'Etat has added unifying elements of its own, the best example of which is the institution of *commissaire du gouvernement* whose analysis of the issues and synthesis of past decisions help the courts keep an eye firmly on the law as a whole as they decide the individual cases before them. Certain other institutional aspects of the Conseil d'Etat might also be mentioned,²⁹⁰ but no factor is as important as the capacity of its

289. There are at present twenty-five *tribunaux administratifs* in metropolitan France.

290. One such arrangement is the Conseil d'Etat's practice of freeing two of its younger members from active judicial duty for a year or two in order to maintain a *Centre de Documentation* that enables the entire Conseil d'Etat, and the *tribunaux administratifs*, as well as legal scholars and lawyers who appear before the administrative courts, to keep abreast of the decisions handed down by the Conseil's various panels. They pay special attention to the rulings of the *Section* or *Assemblée*, which include representatives from all the panels and decide those cases in which the Conseil d'Etat considers introducing important changes in its case law or otherwise rendering a critical decision. The same two judges also

membership to build a principled body of law and its will to do so. This article has related the Conseil's recent efforts to refine some of the prevailing generalizations about the scope of judicial review in France.

Certain of our most eminent scholars rightly call for more "integrity"—more analysis and principle—in American administrative law.²⁹¹ Yet others are suggesting that the scope of review has already received too much attention.²⁹² The problem with the latter view is that it rests on the assumption that scope of review may not be worth discussing at all unless it can be reduced to one or two meaningful generalizations. We, like the French, have had considerable experience with across-the-board generalizations on the scope of review of administrative action whose predictive as well as intellectual value seems to be minimal.²⁹³ Again like the French, we may have to content ourselves in the future with what might be called a differentiated scope of review: an assortment of tests, each one tailoring judicial review to the particular substantive area of the law it is meant to govern. Considering the variety of ways in which government touches our lives, we cannot realistically expect that a few general formulas for defining the scope of review can continue to serve us adequately. It may of course be comforting to be told by our courts that they review both the issuance of a zoning variance and the decision to classify a site as picturesque by a unified "arbitrary and capricious" standard. But if we must choose between that kind of unity and the unity that comes from having developed a set of meaningful criteria by which courts may determine the validity of all variances or of all site classifications, we should have little hesitation in preferring the latter.

write a column entitled *Chronique Générale de Jurisprudence Administrative Française*, which appears in the monthly journal, *Actualité Juridique Droit Administratif*, a scholarly publication devoted entirely to French administrative law, and which analyzes administrative case law on subjects of particular interest.

291. L. JAFFE, *supra* note 14, at 589-90; J. LANDIS, *ADMINISTRATIVE PROCESS* 146 (1938). According to Kenneth Davis, the Supreme Court has ceded to lower federal courts, notably to the Court of Appeals for the District of Columbia, its traditional leadership in developing standards for judicial review of administrative action. K. DAVIS, *supra* note 23, at 656-58, 688-93, and cases cited therein. For a recent plea for greater attention to the scope of review, see Schotland, *Federal Judicial Review*, 26 *AD. L. REV.* 119, 124-25 (1974).

292. Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 *COLUM. L. REV.* 771, 779-80.

293. Gellhorn and Robinson suggest, for example, that terms such as "arbitrary and capricious" or "substantial evidence" are "virtually devoid of practical content" and at best "little more than convenient labels attached to results reached without their aid." They conclude in fact that "the rules governing judicial review have no more substance at the core than a seedless grape." *Id.* at 780.