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PROCEDURAL DUE PROCESS IN ADMINISTRATIVE LAW: SOME THOUGHTS FROM THE FRENCH EXPERIENCE

Richard L. Herrmann*

It results from the general principles of law applicable even in the absence of legal provisions that an administrative sanction cannot be lawfully pronounced . . . unless the individual concerned has been given an opportunity for an effective defense.

*Aramu, Council of State [1945]

Notice and opportunity to be heard are fundamental to due process of law.

*Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 178 (1951) (Mr. Justice Douglas, Concurring)

Introduction

Administrative law is a fact of American life. When and how it began is a moot question; yet few would disagree with Mr. Justice Jackson that "the rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."¹ To Judge E. Barrett Prettyman, the field of the law that we characterize as administrative law "is today the most important of all the categories of the law."²

As administrative law has grown so have the suggestions for change and reform. During the last thirty years a recurrent proposal has been that Congress create a federal administrative court. The first such bill was introduced in 1933 by Senator George Norris.³ In the same year the American Bar Association also championed the creation of such a court.⁴ Bills advocating an administrative court were again introduced in the

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Unless otherwise indicated in the footnotes all translations are the writer's.

³ S. 1835, 73d Cong., 1st Sess. (1933).
⁴ A.B.A. Report of the Special Committee on Administrative Law (1933).
Prospectus

Central to any question of change, be it in administrative, civil, or criminal law is a concern for the preservation of the rights of procedural due process. As Judge Prettyman has put it: "the thrust of every program for administrative reform is towards a full and fair hearing." The fear that the creation of a special tribunal to review all administrative actions would deny these procedural rights found its most eloquent champion in A. V. Dicey.10

These fears continue to the present. After the American Bar Association Proposals to establish an administrative court and the introduction of the Logan-Celler bill in 1934,11 Robert Cooper undertook to rebut the arguments in favor of such a court.12 He argued that:

determinations of these controversies [tax disputes in the district courts and proceedings by extraordinary process in District of Columbia courts] is not suited to the judges of a specialized legislative tribunal. Such specialization and experience as they would acquire in time would be too one sided; it would undoubtedly tend to make them oblivious to the considerations which affect important questions in the private law field.13

In 1949 a critic of the McCarran bill14 felt that an administrative court:

would neglect general principles and social policies applicable in all litigation. . . . Ultimately . . . no judicial tribunal would remain having a broad perspective of the law relating to all of our business

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7 S. 916, 76th Cong., 1st Sess. (1939); H.R. 4235, 76th Cong., 1st Sess. (1939). This bill was proposed by Senator Logan and Congressman Celler. It provided for an Article III court with eleven judges. It would have a general power of review of questions of law from most federal agencies including, inter alia, the F.T.C., F.C.C., N.L.R.B., S.E.C., C.A.B. Review would be to the Supreme Court by certiorari.
9 PRETTYMAN, supra note 2, at 57.
10 A. V. DICEY, LAW OF THE CONSTITUTION (9th ed. 1952). A typical passage is found at 203: "There can be with us nothing really corresponding to the 'administrative law' (droit administratif) or the 'administrative tribunals' (tribunaux administratifs) of France. The notion which lies at the bottom of the administrative law known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs."
13 Id. at 591.
and social and governmental activities and enabled thereby to develop and apply judicial principles consistently in respect to all cases and controversies of whatever variety.\textsuperscript{15}

Such criticisms no doubt have validity; but perhaps Americans have not looked far enough for the solution — at least as concerns the protection of procedural rights.

For more than one hundred and fifty years the French have restricted judicial review of administrative actions to the \textit{Conseil d'Etat}.\textsuperscript{16} The present day Council of State, the supreme administrative organ in modern France was born Christmas day, 1799.\textsuperscript{17} Its origins, however, lie deep in history for many trace its genesis to the King's council of royal advisors of the \textit{ancien régime}. Today it is probably the most important contribution of France to the art of government. "Its most significant achievement," in the eyes of one distinguished observer, "has been the creation of a system of administrative law which is outstanding as a protection of the individual citizen against the illegality, the indifference, the inaptitude, and even in some instances the insolence of office."\textsuperscript{18}

Review by the Council does ensure a full measure of justice to the citizen. The fears spawned by Dicey's writings lose much of their force when we observe the Council of 1968. The French study our concepts of due process of law;\textsuperscript{19} we would do well to study theirs. "Notice and opportunity to be heard," Mr. Justice Douglas has said, "are fundamental to due process of law."\textsuperscript{20} During the last fifty years and especially since the liberation the Council has assumed the role of guardian of the individual against improper administrative actions. In exercising its control over administrative procedure and its power to annul improper actions, the Council has demanded that the administration not violate a person's \textit{droits de défense} — best translated by the Anglo-American concept of notice and a fair hearing. The evolution of this concept furnishes an objective correlative with which we can evaluate the arguments that administrative courts cannot adequately protect an individual's procedural rights.

In the early stages of its jurisprudence the Council merely required that the administration conform to the written law. The concept of \textit{droits de défense}, however, goes far beyond this. Relying often on the general principles of law, the Council has required that the administration conform to principles not expressed by any written law. This is all the more striking

\textsuperscript{16} Hereinafter Council of State.
\textsuperscript{17} B. Schwartz, \textit{French Administrative Law and the Common Law World}, 23 (1954) [Hereinafter cited Schwartz].
\textsuperscript{18} H. Yntema, Book Review, 2 AM. J. COMP. L. 409 (1953).
\textsuperscript{19} G. Tixier, \textit{La Clause de "Due Process of Law" et La Jurisprudence Récente De La Cour Suprême des États-Unis}, REVUE DU DROIT PUBLIC (1961) at 795.
\textsuperscript{20} Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 178 (1951) (Concurring Opinion).
in a country where the written law is supreme and courts are without the power to declare a law unconstitutional. In any proceeding before the Council, if a party asserts that a law is unconstitutional, he will be met by the statement: "in the present state of French public law a defense drawn from the unconstitutionality of the law is not susceptible of discussion before the Council of State."\(^2\)

In theory the Constitution may have a legal authority superior to any parliamentary enactment, but since there is no means to ensure control of constitutionality it is "a principle without any sanction. Such a sanction cannot in reality be held to be a legal principle."\(^2\)\(^2\) As much as the French development may seem like the American constitutional concept of due process of law, we must remember that the Council has never questioned the constitutionality of any governmental action. Nonetheless, the French experience:

... goes far towards demonstrating that the relationship between public law and natural law does not depend upon the existence of an enforceable constitution in which specific natural law principles like that of "due process of law" are declared to be part of the supreme law of the land.\(^2\)\(^3\)

As Mr. Justice Frankfurter has said, "the history of liberty has largely been the history of the observance of procedural safeguards."\(^2\)\(^4\) This is largely the history of the Council of State.

I. No Annulment When There Is Substantial Compliance With the Law

Before we turn to the development of annulment without formal illegality, we must first mention those areas where the administration has not complied with the written law but the Council has nonetheless refused to annul the act. One of the four grounds of annulment of administrative acts is that called *vice de forme* (failure to comply with a procedure required by law).\(^2\)\(^5\) The Council is pragmatic and adopts a flexible approach. If the failure to comply can be shown not to have had any adverse effect, the action will stand. Thus, where the law required a hearing to be conducted over a period of three days and it was terminated at the end of the second day, the Council refused to annul the action taken pursuant to the hearing when it could not be shown anyone was denied

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\(^{23}\) B. Schwartz, Administrative Procedure and Natural Law, 28 N.D. LAW. 169, 174 (1953).


\(^{25}\) SCHWARTZ, supra note 17 at 203. The other three are (1) Lack of Jurisdictions, (2) Abuse of Power, and (3) Error of Law. See also M. WALINE, TRAITE DE DROIT ADMINISTRATIF pp. 389-396 (7th ed. 1957).
a chance to be heard.\textsuperscript{26} Likewise, the American courts have not required needless formalism. Normally before one can be held to have notice of a federal regulation it must be published in the Federal Register, but when a person has actual knowledge of the regulation he is subject notwithstanding the failure to publish.\textsuperscript{27}

If the Council held the administration to every formality, the administration would soon come to a halt or at best continue at a snail's pace. There are more than thirty formalities to be gone through merely to repair a bridge on a national highway.\textsuperscript{28} The Council looks to substance, not form, when it decides whether the interests of good administration are more important than meaningless procedural formalities.

\section*{II. Annulment Despite Compliance With the Law}

\textbf{A. The Background: The Civil Service Law of 1905}

If formal compliance may be dispensed with in some instances, what of the situation where the law is silent as to procedure? We are concerned with the obverse of the problem in section one: the annulment of an act that cannot be said to be tainted with any formal illegality. The law has said nothing about the proper procedure. In 1920, Alibert, a leading French scholar on administrative law, called the procedural defect in administrative actions the defect that arises from a failure to follow the procedure prescribed by statute or regulation.\textsuperscript{29} In 1940, Berlia, another authority, stated that annulment of an administrative act for failure to comply with the written law "should insure the respect of that outer legality which is the legality of procedure and which results from the forms and procedure imposed by legal provisions touching the performance of administrative acts."\textsuperscript{30}

American administrative law, on the other hand, starts with an entirely different point of view:

The dominant factor in the development of the procedural aspects of American administrative law has been the provisions of federal and state constitutions that no person may be deprived of his life, liberty, or property without "due process of law." While the consideration of whether an administrative body must give notice and an opportunity to be heard to the interested individuals frequently involves difficulties of statutory interpretation, the ultimate legal problem is whether the procedure utilized satisfies the guarantee of due process of law.\textsuperscript{31}

\textsuperscript{26} M. Waline, \textit{Traité de Droit Administratif} 398 (7th ed. 1957).
\textsuperscript{27} United States \textit{v.} Aarons, 310 F.2d 341 (2d Cir. 1962).
\textsuperscript{28} See Waline, \textit{supra} note 26, at 398 for other examples.
\textsuperscript{29} R. Alibert, \textit{Le Contrôle Jurisdictionnel de l'Administration}, 221 (1926).
\textsuperscript{30} G. Berlia, \textit{Vice de Forme et le Contrôle de la Légalité des Actes Administratifs}, \textit{Revue du Droit Public} 370, 371 (1940) [Hereinafter cited Berlia].
As we shall see, the French experience has come more and more to resemble the American notion of "due process of law" and has moved away from simple inquiry into whether the formalities of the law have been carried out.

The basis for the droits de défense is undoubtedly a 1905 law dealing with the civil service. Article 65 of that law specified that before any civil servant could be subject to a disciplinary measure or to any delay in his normal advancement, he must be given a copy of his dossier and a chance to appear before the disciplinary body to present his defense.

The history of this law before the Council furnishes an excellent example of how the Council — much in a common law manner — evolves a body of law from the statutory skeleton. Berlia posited a hierarchy of methods of interpretation used by the Council. The least startling in his view was the method by which the Council interpreted the statute. The Council required the dossier to be complete and no decision to be taken on facts not communicated to the individual. To make an Algerian postmaster come to Paris to see his file was considered an unreasonable burden that violated the intent of the act. Giving the dossier to a man suffering from a temporary breakdown was equally improper.

The Council also began to apply the 1905 law to those linked to the administration by contract but not part of the regular civil service. Any disciplinary measure must be preceded by communication of the dossier.

The second level of Berlia’s hierarchy was reasoning by analogy. In Scornet, an honorary title was withdrawn from a judge (a person subject to the law) for reasons seemingly motivated by a desire for punishment. In proposing to the Council that it annul the decision, the Government Commissioner stated that the growth of the law indicated the Council was opposed to arbitrary decisions.

We believe [he stated] that the law of 1905 whose applicability has already been greatly extended could be the legal foundation for this guarantee (the right to see the dossier). You would be correct in deciding that an action whose reasons give it a penal quality cannot be carried out without first allowing the interested party to present his defense.

These applications of civil service law did not strike Berlia as excessive. He said of the law as it stood in 1940: “one has seen simply the application of the text to situations that the legislature did not foresee.”

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39 Berlia, supra note 30, at 397.
None of these cases talk of general principles of law applicable even in the absence of a text. These cases rest on the Council's interpretation of what was the probable intention of the legislature. But these cases contain the essence of what later will become a general principle of law.

B. The Establishment Of The Principle Of Required Notice And Hearing

In May, 1944, just before the Allies debarked on the Normandy beaches, the Council handed down what many consider the landmark case in the area of procedural due process.\(^{40}\) The widow Trompier-Gravier had been licensed by the Prefect of the Seine to operate a newspaper kiosk on the Boulevard St. Denis in Paris. The Prefect, discovering she had extorted money from the woman employed to run the stand, summarily revoked the widow's permit. No notice was given and no hearing held. Such summary procedure had always been the law. The widow challenged the decision and the Council, accepting the conclusions of the Government Commissioner, annulled the act. Its decision is worth quoting at length:

Since it is established that the challenged decision was based on a misdeed of the petitioner; since, in consideration of the significance that revocation of the permit carries in the circumstances and of the gravity of that penalty, such a measure could not be taken legally without the widow Trémpier-Gravier having been given an opportunity to be heard. . . . Petitioner can validly contend that the challenged decision was rendered without the proper procedure. . . .\(^{41}\)

The widow was not in any way part of the civil service, and there was nothing in the relevant law that required either notice or a hearing. What is more, it is almost certain she was guilty of extortion.

What precedent there was for such a seeming departure from traditional law was inconclusive. The civil service cases (notably Scornet, supra), indicated a "penal" action ought not to be taken in an arbitrary fashion; the election case intimated that the Council required consideration of the individual facts of each case. Outside the civil service the cases were few and far between, and constituted exceptions to the general rule that, in the absence of a statutory command, notice and hearing were immaterial.

A 1903 decision held that under a law that permitted the President of the Republic to retire certain officers after thirty years of service without a hearing and without giving reasons, the President "could not base his decision on reasons that give the decision the character of a penalty when the litigant has not been called to present his means of defense."\(^{42}\)

\(^{40}\) Trompier-Gravier, [1945] D.P. 110. Translation SCHWARTZ, supra note 17, at 398.


In 1930 the Council had held that one could not have a state scholarship revoked without notice and a hearing.\textsuperscript{43} In 1936 the Council held exclusion from a civil service examination without notice or hearing was improper.\textsuperscript{44} Only in retrospect do these cases help establish a “precedent” for Trompier-Gravier. All the above mentioned cases (including Trompier-Gravier) merely held that the law required annulment. But Trompier-Gravier crystallized the law. The Government Commissioner claimed to be restating the law and nothing more. However, it is clear that the 1944 decision is one of the major supports for the postwar development of the concept of procedural due process. What later became the generally accepted definition of the \textit{droits de défense} as one of the general principles of law was embodied in the conclusions of the Government Commissioner. He stated:

When an administrative decision assumes a penal quality and has sufficiently serious adverse effects on the situation of an individual, your jurisprudence requires that the individual be given an opportunity to present his point of view on the measure affecting him. . . . The administration sought to punish a fault; it sought to accomplish a penal end. It could not, in our opinion, disallow a provision that governs all penal procedure.\textsuperscript{45}

In contrast to Trompier-Gravier, American licensing cases seem to show a general disregard for the rights of the individual. American state courts have become muddled over the problems of privilege versus right. If an act can be constitutionally prohibited (i.e., the sale of liquor), then the granting and revocation of the license may be at the whim of the authorities. A typical case is \textit{Walker v. City of Clinton}.\textsuperscript{46} Several citizens of Clinton complained that Walker was selling liquor on Sundays and to minors. Walker requested a hearing and a chance to rebut the evidence. This was denied, and the town fathers revoked his license. The Supreme Court of Iowa held that the sale of liquor was a privilege not a property right, and not protected by the Due Process Clause. This argument has been advanced in areas other than liquor licensing.\textsuperscript{47} Such an approach makes little sense. Once an occupation is licensed it becomes legal; there is no rational basis for such a gross denial of fair play. In France, presumably it is illegal to sell newspapers without a permit, but the Council will no longer tolerate \textit{ex parte} summary decisions. Some American state legislatures, following the Federal Administrative Procedure Act\textsuperscript{48} have adopted similar statutes. The Massachusetts statute reads “no agency shall revoke or refuse to renew any license unless it has first afforded the

\textsuperscript{43} Ribeyrolles, [1930] D.H. 120.
\textsuperscript{44} Hoaran, [1936] Rec. Cons. d’Et. 743.
\textsuperscript{45} Trompier-Gravier, [1945] D.P. 110.
\textsuperscript{46} Walker v. City of Clinton, 244 Iowa 1099, 59 N.W. 2d 785 (1953).
\textsuperscript{47} See Davis, 1 Administrative Law § 7.11 (1959) for other examples.
\textsuperscript{48} Administrative Procedure Act, 60 Stat. 237 (1945), 5 U.S.C. 551 (1964)
licensee an opportunity for a hearing . . . ." The Massachusetts Supreme Court has held that this applies even to the initial application for a license.50

C. The Collaborationist Cases

In 1945 the most important "épuration" cases were decided by the Council. These dealt with the expulsion from the civil service of all who had collaborated with the enemy. In 1943 and 1944 the Free French Government passed a series of laws designed to remove and punish those civil servants who had collaborated.51 These laws dealt only with the civil service; by express legislative mandate, the law of 1905 was made inapplicable. The purge could be carried out "in spite of all prior legislative, regulatory, statutory, or contractual dispositions."52 Any procedural requirements must be found outside the traditional civil service law. The "épuration" laws authorized the Minister of each branch of the civil service, either himself, or through appointed commissions, to examine the wartime activities of any person in his bureau. The statutes did not expressly authorize notice and a hearing. They merely said the commissions must "hear" the accused. Aramu, a police officer in Algeria, had been removed without having been informed of the pending action against him or been given a chance to explain his actions. The Council annulled the action holding that:

The communication of the dossier is not one of the required formalities . . . but because of the regulations (that the commission must hear the parties) and from the general principles of law applicable even in the absence of any text, a penalty cannot be legally pronounced unless the interested party has been able to present his defense. . . . [H]e must first receive, if not the text, at the least the essentials of the complaint against him.53 (Emphasis added)

This is the first time the concept of a general principle of law applicable even in the absence of any text appears in French administrative jurisprudence.

In stating his case the Government Commissioner stressed the unique nature of the "épuration" laws in their political context but believed that they raised no new legal problems:

49 Mass. GEN. LAW ANN. 30A § 13A.
You are on a solid judicial ground . . . of more than half a century of
constant jurisprudence. The notion of a penalty implies the necessity
of a quasi-judicial procedure and consequently an adversarial one; it
also corresponds to a very practical need of administrative morality;
the obligation of the administrative authority to hear the litigants and
to receive their explanations, thereby reducing both the risk of error
and the possibility of an arbitrary decision.54

The requirement of notice and a hearing can readily be inferred from the
law itself. It would make the hearing Kafkaesque to require the com-
missions to hear a man but not tell him until he was before the examiners
why he was there and then ask him if he had a defense. But even if the
law had said nothing about requiring a hearing it seems clear the Council
would have arrived at the same conclusions. If such notice and a hearing
is a general principle of law then only if the statute had expressly pro-
hibited such procedures would the Council have sustained Aramu’s
expulsion.

The “épuration” laws were sui generis, and the Council handled each
case with the utmost care. In other cases decided the same day the Coun-
cil held that when the essence of the charge was made known when the
party was called before the magistrate, but was of such a nature as could be
immediately answered after a brief hearing, the law had been followed.55

The right to know the names of one’s accusers was not essential. The
Government Commissioner felt nothing would be served by automatically
requiring the right of confrontation. Such confrontation should be allowed
at the discretion of the investigator if he felt justice would be served.
Otherwise it would only exacerbate already hostile feelings. Being denied
a right of confrontation did not mean that one went before the commis-
sion uninformed. The right to know the “essential of the complaint” was
required. All relevant facts must be given in sufficient detail; no decision
could be taken on any fact not made known to the accused.

The Council’s handling of the “épuration” cases did much to ease the
transition from occupied territory to the Fourth Republic. To a certain
degree the Council was according the alleged collaborationist the same
treatment it gave French civil servants dismissed under the Vichy laws of
July, 1940. These laws gave the Council the power to suspend most civil
servants without a hearing.66 The Council subjected these laws, as well as
the laws dealing with the Jews, to close scrutiny. There were many appeals
but few criticisms of the treatment accorded the collaborationists before the
Council. The Council was able to give each case a sober second thought,
and serve as guardian of the individual’s rights.

54 Conclusions of the Government Commissioner, 1 CONS. D’ET. ETUDES ET DOC.
48 (1947).
1 CONS. D’ET. ETUDES ET DOC. 65 (1947).
There has been nothing similar to the "épuration" laws in America, but the cases dealing with discharge from government employment are good analogies. As in the licensing cases, American courts have been beset by the problems of privilege. As we saw earlier, the right to a hearing does not, in France, turn on whether one has a right or a privilege to government employment. The Supreme Court of the United States has recognized that a government job may not be taken away for political or religious reasons.\(^{57}\) When one is dismissed for security reasons, only in the face of explicit congressional intent will the court deny notice and a hearing. Such was the decision in *Greene v. McElroy*\(^ {58}\) and *United Cafeteria and Restaurant Workers v. McElroy*.\(^ {59}\) The latter case has been soundly condemned. Professor Davis states that confrontation and a right to meet the evidence is essential in every case unless the court finds that "disclosure of the identity [of the informant] would be detrimental to the interests of national security."\(^ {60}\)

Applying the above test to the *Cafeteria Workers* case, it is clear that the dismissed short order cook can hardly be considered essential to our national security. A recent Supreme Court case indicates that the Court may be limiting the exceptions to the right of confrontation and cross examination. Nathan Willner had been excluded from the practice of law in New York since 1938 for failure to be of good moral character. Twenty-four years later the Supreme Court, distinguishing the *Cafeteria Workers* case as involving "only the opportunity to work at one isolated and specific military institution," stated:

> We have emphasized in recent years that procedural due process often requires confrontation and cross examination of those whose word deprives one of his livelihood.\(^ {61}\)

In France, cases such as *Willner* would cause no problem. The professions are largely self-regulating, but still under the watchful eye of the Council. No disciplinary action may be taken in camera. There must be prior notice and a hearing; otherwise the action will be annulled.\(^ {62}\)

In determining the proper procedure before an administrative body, the Council has found analogies in criminal and civil judicial proceedings. Its attitude towards secret evidence before an administrative court is revealing. The case of *Secrétaiire de l'Etat à la Guerre Contre Coulon*\(^ {63}\) is much

\( ^{57} \text{E.g., Slochower v. Board of Higher Education, 350 U.S. 551 (1956).} \)
\( ^{58} \text{Greene v. McElroy, 360 U.S. 474 (1959).} \)
\( ^{59} \text{Cafeteria and Restaurant Workers Union Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961).} \)
\( ^{60} \text{K. C. Davis, *Requirement of a Trial Type Hearing*, 70 Harv. L. Rev. 193, 243 (1962).} \)
\( ^{61} \text{Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1962).} \)
\( ^{63} \text{Secrétaiire de l'Etat à la Guerre contre Coulon, [1955] D.S. Jur. 555.} \)
like our own case of *Greene v. McElroy*. Coulon was employed in a government weapons factory as an engineer. His security clearance was revoked, and he was denied access to the factory. When his case came before the lower administrative court, the judge told the Secretary to give Coulon his file. When the Secretary invoked executive privilege, claiming the file contained secret matter, the judge then demanded to be shown the file in chambers, but agreed not to make it known to Coulon. On appeal, the Council ruled that the plea of executive privilege was valid. But more important, it held that no decision could be based on evidence unknown to the individual.

**III. Post War Developments**

*A. Decisions Taken In Consideration Of The Person*

The essence of the *Trompier-Gravier* decision is identical to the case law developed around the 1905 Civil Service Law. The party must have notice; he must have time to prepare a defense; no decision can be based on evidence not made known to the accused. In applying the principle, the Council has been strict but fair. A person cannot escape the consequences of administrative action by disappearing and leaving no forwarding address. Just as our Supreme Court has required good faith efforts to notify a litigant of a pending suit, the Council has held that the administration must take all reasonable steps to find the party. Since 1944 an ever-growing number of areas have been held to be covered by this general principle of law. Cases such as expulsion from a state school and removal from a hospital for disciplinary reasons are within the principle.

In 1965 the Council reaffirmed the importance of the droits de défense. Article 16 of the 1958 Constitution gives the president of the republic extraordinary power in certain circumstances. Acting under authority conferred upon him by this article, President De Gaulle authorized the minister of war to retire certain army officers. In the directive nothing was said about a right to see the dossier. Captain D'Oriano was placed on special leave. Although "the institutions of the Republic" may have been threatened "in a grave and immediate manner" (the words are in the Constitution), the Council annulled the action. The directive to the minister said the retirement could be carried out "despite any other legislative action." Nevertheless, the Council held that:

there was no law excluding the observation of those formalities that must precede any decision taken in consideration of the person and which constitute one of the essential guarantees of the interested party.

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64 Note 58 supra.
Considering also that at the time of the decision there existed no exceptional circumstances that made such compliance by the administrative officials impossible.\(^6\)

One inference that can be drawn from the failure to require that the dismissed see his dossier is that the principle is so well established that it is presumed to be a part of the law.

Writing in 1950, urging the passage of a bill creating an administrative court, one attorney hoped that:

the court will become expert in the problems of due process and of practice and procedure before administrative agencies and find ways and means of reconciling the government's needs for efficiency with the individual's rights to justice, in broad terms and not simply in terms of one agency.\(^6\)

The Council of State, in decisions like *D'Oriano*, goes far to realizing this goal.

The last mentioned decision, although taken in consideration of the person, had, nonetheless, a penal character. The *Trompier-Gravier* decision has been extended to decisions taken in consideration of the person when there was no disciplinary intent. The law of 1905 dealt only with disciplinary cases. In 1949 the Council closed this exception. M. Nègre, director of the national publicity agency, *Agence France Presse*, who admittedly held his job at the discretion of the executive, was dismissed following a policy dispute. The Council held that the 1905 law required that M. Nègre be shown his dossier.\(^7\) Just what good this would do is debatable since it seems unlikely that the Council would question such policy decisions.

However, Nègre has created a jurisprudence of its own. Nègre has been applied to the entire spectrum of the civil service. In *Garysas*,\(^7\) a postal employee was retired because he was physically incapable of completing his appointed rounds. Being a decision "taken in consideration of the person" the carrier was entitled to see his file and to have a sufficient time to present his defense. The policy behind *Garysas* seems clear. Procedural due process is no doubt an element of any notion of the rule of law. In France the civil service is an essential part of the state. It has fallen to the Council to be the champion of the procedural rights of the civil servant. The Council, in the words of one authority, has "to a great degree eliminated arbitrary, *ex parte*, politically motivated treatment."\(^7\)

\(^7\) Nègre, [1949] D.P. 570.
\(^7\) WALINE, *supra* note 26 at 100.
In protecting the procedural rights of the individual, the Council is imposing an increasingly higher level of administrative morality on those with the power to hire and fire. The Council might well be echoing Mr. Justice Jackson's belief that due process of law is not for the sole benefit of the accused: "It is the best insurance for the government itself against those blunders which leave lasting stains on a system of justice, but which are bound to occur in ex parte consideration."

### B. The Requirement of Reasoned Decisions

The Council has evolved during the last fifty years an ever expanding concept of the droits de défense. Closely related, but of a much more recent origin, is the requirement that the administration give reasoned decisions. Traditionally, reasons were given only when the law required them. The absence of a reasoned decision did not mean one could not appeal for excès de pouvoir, but it made the Council's task far more difficult, and put a heavy burden on the appealing party.

In 1950 the Council handed down its first decision requiring a reasoned decision. A landowner claimed his land was exempt from a land reorganization scheme being carried out by the Prefect. The Prefect rejected the owner's claim and took the land. On appeal the Government Commissioner argued that it was the legislative intent that the administrator give his reasons. The law was so structured that the hearing before the Prefect greatly resembled a trial. If a trial-type hearing were conducted, it would defeat its purpose if no reasons were given for the decision. Without a statement of reasons, the control of an administrator acting within the scope of his authority but for improper motives (détournement de pouvoir) would be illusory.

The Council held that "the duty to give reasons is essential in order to enable the reviewing court to be able to determine whether the directions and prohibitions of the law have been followed." There have not been a great number of cases dealing with the requirement of reasoned decisions for many statutes provide for them; the Billard doctrine has not become a "general principle of law."

Nonetheless, it is a fair assumption that when cases similar to Billard come before the Council, it will most probably require reasoned opinions. The Council has available a perfect analogy in the civil service law of 1959. This law requires all disciplinary measures to be followed by reasoned decisions. As with the Civil Service Law of 1905 the Council can interpret broadly this new law, and then extend it to areas outside the civil service.

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In its first decision involving the 1959 law, the Council stood firmly for the individual. Mme. Riffault, a part time economics instructor, was dismissed pursuant to a law that allowed such action to be taken after an investigation by a joint committee of faculty and administrators. The Committee gave its reasons in a report which was then signed by the minister of education, and Mme. Riffault was dismissed. The Government Commissioner urged annulment. The original findings may have been a reasoned decision, but when the minister ratified the findings he did not give a reasoned decision. The goal of such reasoned decisions is the protection of both the individual and the administration:

If the reasons must be found in the findings of the disciplinary council, the administration will, in the event of litigation, be forced to refer to a contradictory and often poorly written report. To interpret reasons given by a single administrator is easier than interpreting reasons rendered by a collegiate body, and the administration will be penalized in future proceedings.

This decision shows how the Council will "distinguish" "precedent" to arrive at the solution it desires. In a 1946 "épuration" case, Mme. Coulon, also a schoolteacher, was removed. The law required reasoned decisions, but in Mme. Coulon's case the minister merely signed the report of the investigating body. The rule prior to 1946 had been that such a decision was improper. Had Coulon overruled the earlier cases? The "épuration" cases were admittedly sui generis; in Riffault the Government Commissioner, citing the conclusions of the Government Commissioner in 1946, pointed out, and rightly so, that the collaborationist cases were exceptions to the rule and should not be considered as precedent. By requiring the minister to state the exact reasons for punishment, the Council is doing more than protecting the individual; it is protecting the image of the administration and the belief of the people that they are contending, not with an inscrutable and capricious body, but with a reasoning and rational one.

The American Administrative Procedure Act requires that "all decisions . . . shall include a statement of (A) findings and conclusions and the reasons or basis therefore. . . ." This would seem to place the American law in about the same position as the French law. Although Morgan I held that "If the one who determines the facts which underlie the order has

78 Id.
81 Conclusions of the Government Commissioner, 1 CONS. D'ET. ETUDES ET DOC. 48 (1947).
not considered evidence or argument, it is manifest that the hearing has not been given."\(^{83}\) In light of later Morgan cases this rule would seem of doubtful value. French law clearly allows another to hear the evidence. Since Morgan IV\(^{84}\) precluded an inquiry into the decision-maker's mind, it is clear that unless a statute requires that he who decides must hear the evidence, a "rubber stamp" decision will satisfy the requirements of due process.

**IV. When Notice And A Hearing Are Not Required**

One commentator has stated that the general principle of law known as the *droits de défense* has now reached the stage where "no penalty may be imposed without the guarantee of a prior adversary proceeding."\(^{85}\) This is not quite accurate. There is one large area of the law where the principle does not apply. A "police measure" that is not penal, despite the gravity of the consequences, need not be preceded by any formal hearing. A police measure is an administrative action — although it need not be taken by the police department — for the protection of the public interest, health, or safety, and not primarily to punish the individual. The object of the act is implementation of a public policy. The state acts on the individual only indirectly. Review is after the fact, either by the legislature or by the judge.

What may seem adequate in theory is difficult to administer in practice. Police measures do act directly on the individual and often have severe economic consequences. The line between penal and police measures is indeed fine. The Council has been able to distinguish between the revocation of a liquor license for selling liquor in violation of a law (a penal sanction), and closing the bar because it had become a "place of debauche" (a police measure — no hearing required).\(^{86}\) The case of Mme. Crozic-Savoure is a perfect example. Her permit to operate a pharmacy was summarily revoked. The Council said no hearing was required because "the withdrawal of the permit did not have as its motive any personal fault, and therefore, in the absence of any statute, no prior hearing was required."\(^{87}\)

If the operation of the pharmacy constituted an immediate threat to public health, then such action would be justified. This distinction has been made in French law. For example, a driver's license may be suspended temporarily without a hearing, but it may not be permanently suspended without a hearing before an official board. In Forestier\(^{88}\) the Council rec-

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\(^{83}\) Morgan v. United States, 298 U.S. 468, 480-481 (1936).

\(^{84}\) United States v. Morgan, 313 U.S. 409 (1941).


\(^{86}\) Dame Hubert, [1946] Rec. Cons. d'Et. 300.

\(^{87}\) Crozic-Savoure, [1953] Rec. Cons. d'Et. 86.

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ognized the right of temporary suspension in order to keep dangerous drivers off the roads. Since the official board must be convened within thirty days, a suspension for any longer period would resemble a penal sanction. (Note that the suspension by the board is the "final" suspension, but it need only be for a limited time.) In Forestier, the Council stressed the preventive effect of the temporary suspension stating, *inter alia*, "no general principle of law requires the litigant to present his defense." This implies that had the suspension been for more than thirty days, and hence a penal sanction, the general principles of law would require a prior hearing. American law recognizes the right of preventive police actions without a prior hearing.89

*Forestier* seems a rational way to handle the problem; but cases such as *Croizic-Savoure* have been much criticized.90 A 1960 decision indicates that the Council is limiting still further the area of police measures not subject to the rights of notice and a prior hearing.91 A law enacted in 1900 and still in force in Alsace-Lorraine allowed the Prefect to prohibit those who did not present "sufficient guaranties" of character from practicing certain professions. Rohrmer was a business agent and held himself out as an architect — both professions subject to the law.

In 1922 the Council had held that an action taken under this law did not require a hearing.92 When Rohrmer's case came before the Council, the Government Commissioner first stated that in view of the evolution of the concepts of the *droits de défense*, the 1922 case was no longer good law. There are three areas he argued: the clearly police area such as removing such as a dangerous drug from the market, the clearly penal area such as license revocation for infraction of the law, the third area being in between. Whether a given act is police or penal depends on the motives of the administration.93 In *Rohrmer* the Prefect based his decision on three grounds: (1) Rohrmer's prior criminal record, (2) unlawful business practices such as charging for services not rendered, and (3) holding himself out as an architect when in fact he had not been fully licensed. To the Government Commissioner, only the first ground justified the appellation "police measure." The other two did not have as their primary goal the protection of the community, but rather the desire to punish Rohrmer. Had such disciplinary action been taken by a professional association, Rohrmer would have been entitled to notice and a hearing.

Accepting the Commissioner's argument, the Council annulled the action. "Having regard to the gravity of the measure, the sanction could not

be invoked until Rohrmer had a chance to present his case." Rohrmer again illustrates the Council's evolutionary approach to the development of the law. The Prefect had argued that any decision taken under the 1900 law was a police measure when its purpose was to remove a threat to the public welfare. The lower administrative court, on the other hand, held all such actions were in reality penal sanctions and must be preceded by notice and a hearing. The Government Commissioner proposed an intermediate solution which seems to point to greater protection of the individual. The Council is saying that given the gravity of all "police measures", whenever there is a doubt as to motive, the Council will find for the individual.

It is in this area of police measures that the procedural rights of the citizens are least developed. Some commentators believe that, except for emergencies, nothing justifies denying a person the rights of notice and hearing. Even if review is available, it is time-consuming (although not expensive) and often insufficient. As one writer has put it, errors of law are easy to spot, but errors of fact are not. Errors of fact are often the result of simple ignorance on the part of the administration. It is in the best interests of good administration, public confidence, as well as the protection of the rights of the citizens, that the Council broaden the definition of penalty and reduce the number of actions that may be taken without hearing the affected party.

V. The General Principles Of Law

Since 1946 the requirement that one must be given notice and a hearing has been called a "general principle of law". The droits de défense is but one of several such principles; in some ways it may be the most important. The development and application of all these principles is beyond the scope of this paper, but something must be said of these principles in the limited context of administrative procedure. The general principles are drawn from the Declaration of the Rights of Man of 1789, the Preamble of the 1946 Constitution, the Preamble of the 1958 Constitution, and analogies to civil and criminal jurisprudence.

When the Council applies the general principles it attempts to reflect the will of the people as expressed by the legislature. The general principles never rise to the level of constitutional limits on the administration. They

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94 Id.
95 Morange, supra note 90, at 125.
96 Id. at 121.
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are at best an unwritten equivalent to legislative law, but preferred to the extent that the Council will not readily assume that the legislature intends to disregard them. Letourneur has called these principles a restatement of the current social, political, and economic theory of the day.99

American law is no different. In 1896, separate but equal was Constitutional.100 Fifty-eight years later it was not.101 As Mr. Justice Douglas has said, "in determining what lines are unconstitutionally discriminatory we have never been confined to historic notions of equality . . . notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."102

What is more surprising than the creation of a natural law concept is the Council's open reliance on the general principles of law. Trompier-Gravier did not mention these principles. The Government Commissioner felt he was merely restating the law. The need to express openly the general principles of law is found in history. In the eyes of many,103 the four years of Vichy rule brought into being the general principles of law. Before France fell, there had been sixty-five years of democratic government. The four years under Pétain "threatened the very basis of the traditional French government, and after the liberation the Council totally transformed its methods and set about building the general principles which had already impregnated its jurisprudence."104

The birth of the general principles has not gone uncriticized. Professor Rivero has accused the Council of becoming a supreme court à la Amér-
cain:

Is there not in general principles of law an element of serious un-
certainty, a temptation to judicial arbitrariness? Is there not more security, more stability for the individual in the reign of statute law, even poorly made, than in the action of the judge however benevo-
lent?105

This reads much like Mr. Justice Black's criticism of the recent "natural law" approach of the Supreme Court in cases such as Griswold v. Connecticut.106

Rivero directs his criticism to all the general principles. His criticism is valid; the judge must "create" the principles he imposes on the admin-
istration. However, in the area of administrative procedure his objections lose much of their validity. It may be improper to create judicial natural

99 Letourneur, supra note 97, at 29.
100 Plessy v. Ferguson, 163 U.S. 537 (1896).
103 See Letourneur, supra note 97 at 19.
104 Id.
law principles in the realm of economic regulation; it is another thing to look to the substance of procedure. If there are certain principles of justice, then it must be for the courts to see that they are followed.

VI. Conclusion

For all those who must deal with the administrative side of the federal government—to some a hybrid, headless fourth branch the protection given by the Council, if not a paradigm, is a model for Americans. The critics of the McCarran bill feared that a court manned by personnel with faith in the administrative process would tend eventually to accept the doctrine that "what the administrator does is the law." This need not be. In France the Council of State is staffed with men equally imbued with a belief in administrative expertise; they are trained for a lifetime career with the lower administrative courts or with the Council. Their decisions do not reflect a belief that the law is as the administration says it is.

An administrative court like that proposed by Senator McCarran or Congressman Celler would soon develop an expertise that would cut across the administrative spectrum. Licensing cases, for example, would no longer be seen as a single case but rather as part of the larger problem of licensing regulated industries.

At the moment there is little enthusiasm for such a court. The proposals of the second Hoover Commission have urged the creation of separate administrative courts in only three areas: taxes, trade regulation, and labor. The Commission recognized that "a plain, simple, and prompt judicial remedy should be made available for every legal wrong resulting from agency action or inaction." Nonetheless, it felt that outside of these three areas review should be left to the established court system. The Commission's general suggestion that the imposition of money penalties and the issuance of cease and desist orders be transferred to the court cannot be disputed. Yet the Hoover Commission proposals do not work a substantial change. These new courts would no doubt be expert in their field and no longer could one complain that the rulemaking and adjudicative functions were in the same person. Yet judicial myopia might still develop.

The Task Force report urged the creation of a trade regulation court because the present system leads often to "inconsistent and disparate interpretations of common statutory language, inefficient administration of the law,

108 Scheppe, supra note 15, at 612.
111 Id., Recommendation 43 at 75.
and inadequate protection of private rights." The creation of an expert tribunal might lead to greater knowledge of the field of trade regulation law but at the expense of knowledge in other areas.

Those who would benefit from the Commission proposals would be the large corporations, the labor unions, and those individuals wealthy enough to afford tax litigation. Those whose problems are of a more humble nature—social security recipients, civil servants, etc.—would have no access to these expert courts.

A court modeled after the McCarran-Cellar proposals would be open to all. As the world grows more specialized the need for men with both the expertise of the specialist and the breadth of vision of the generalist becomes more and more important. Even were we to create a court at the start identical to the Council, it would lack the judicial esprit de corps, the tradition of independence, and the respect of the people. Yet a court with full power of review over the administration would, it is hoped, soon come to look at the administration "not only with the judicial eye of those trained to suspect government but with the administrative eye of those charged with maintaining it."