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# Civil Liberty Comparative Study Between the United States and France

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**GOLDEN GATE UNIVERSITY SCHOOL OF LAW**

**Scientiae Juridicae Doctor Program in International Legal Studies**

**CIVIL LIBERTY**

**COMPARATIVE STUDY BETWEEN THE UNITED STATES**

**AND FRANCE**

A dissertation submitted in partial fulfillment of

The requirements for the degree of

Scientiae Juridicae Doctor

**By**

**Gustave A. Lele**

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**Professor: Jon H. Sylvester**

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**Professor Sylvester practiced law in Washington, D.C., with two major New York-based law firms. Professor Sylvester was a tenured member of the law faculty at Texas Southern University and at Loyola Law School in Los Angeles. Professor Sylvester has taught and traveled in Africa as a Fulbright Scholar. Professor Sylvester has taught and directed legal education programs in many countries, such as China, Indonesia, Kenya, Malta, Panama, Turkey, and Costa Rico.**

## INTRODUCTION

Civil Liberty is the individual's basic right under their country's Constitution. Civil Liberty can also be defined as the "universal declaration of Human rights." This presentation will present and analyze the French and the United States' System of "freedom and Civil Rights ." You are going to be the judge, who will decide in which system your "Civil Liberty" Rights are endangered.

The French System was created by Louis IV and the Civil Liberty remains in the power of the Executive. Under the United States System, (a system of "checks and balances") the Civil Liberty remains under the power of the United States' Supreme Court.

This presentation will outline the history of each country's Legal System, and their Constitutions. It will define the differences between the Executive Branch, Legislative Branch, and Judicial Branch of each country. It will compare each Country's ideology, philosophy and ways of thinking due to the history of their own Democracy. The Presentation will analysis and compare each country's Civil Liberties, Court Systems, and Counterterrorism Laws recently enacted. It will make an in-depth analysis of the way each country "negotiates," which affects their international relations and affairs, as well as their Legal Systems. It will analyze the current affairs in each country and how their Legal Systems impact international law with each new crisis occurring in the world today.

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## **CHAPTER I**

### **I. DEMOCRACY.**

Both France and the United States are considered democratic forms of Government. Democracy means “the common people rule” in Greek. This simple concept has been interpreted and applied in various ways throughout history. Various mechanisms have been developed through which the people control (or supposed to control) the Government. There are several distinctions between important kinds of Democracy.

The word “Democracy” has acquired a highly positive connotation over the second half of the Twentieth Century,<sup>1</sup> to such an extent that even widely acknowledged dictators regularly declare their support for “Democracy” and often hold pre-arranged show elections. Nearly all of the world’s Governments claim to be democratic. Most contemporary political ideologies include at least nominal support for some kinds of Democracy, no matter what they do support.

#### **A. HISTORY OF DEMOCRACY.**

The earliest forms of Democracy were used by republics in ancient India.<sup>2</sup> These republics were known as “Maha Janapadas.” During the time of Alexander the Great, the Greeks wrote about the Sabarcase and Sambastai states (now Pakistan and Afghanistan) whose “form of Government was democratic and not regal.”

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<sup>1</sup> Path to Democracy: Fateful Lessons of the 20<sup>th</sup> Century, Rasul Gouliev, 1997.

<sup>2</sup> Democracy in Ancient India, Steve Muhlberger, February, 1998.

Athenian Democracy<sup>3</sup> is seen as one of the earliest examples of a system corresponding to some of the modern notions of democratic rule. All Athenian citizens were free to vote and speak in the Assembly. Ancient Athenian citizens made decisions directly, rather than voting for representatives. This form of Democracy is known as Direct Democracy (or pure Democracy).

The Twentieth Century expansion of Democracy has not taken the form of a slow transition in each country, but as successive “waves of Democracy,” some associated with wars and revolutions. There was an explicit imposition of Democracy by external military force. This is viewed as a form of liberation. World War I resulted in the creation of new nation-states in Europe, most of them nominally democratic. In the 1930’s, the rise of fascist movements and fascist regimes in Nazi Germany, Italy, Spain and Portugal, limited the extent of Democracy. This was the “Age of Dictators.”

In the decades following World War II, western democratic nations had a predominantly free-market economy, reflecting a general consensus among their electorates and political parties. By 1960, the vast majority of nation-states were democracies.

Subsequent waves of democratization brought substantial gains toward true Liberal Democracy for many nations. Economic malaise in the 1980s, along with resentment of communist oppression, contributed to the collapse of the Soviet Union, the associated end of the Cold War and the democratization and liberalization of the former Soviet bloc

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<sup>3</sup> Classical Athens and the Delphic Oracle: Divination and Democracy, Hugh Bowden, May, 2005.

countries. The most successful of the new democracies were those closest to Western Europe and they are now members of the European Union (EU).<sup>4</sup>

Much of Latin America, Southeast Asia, Taiwan, South Korea and some Arab and African states moved towards greater Liberal Democracy in the 1990s and 2000s. The number of Liberal Democracies stands at an all-time high and has been growing without interruption for some time. It has been speculated that liberal democratic nation-states become the universal standard form of human society. This prediction forms the core of Francis Fukayama's "End of History" theory.

The essential elements of a Democracy<sup>5</sup> are:

(a). There is a "demos," which is a group which makes political decisions by some form of collective procedure. Non-members of the demos do not participate.

(b). There is a "territory" where decisions apply and where the demo is resident. In modern Democracies, the territory is the nation-state. Colonies of democracies are not considered democratic by themselves if they are governed from the colonial motherland.

(c). There is a "decision-making procedure," which is either direct (such as a referendum) or indirect (the election of a Parliament).

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<sup>4</sup> Democracy in the European Union (EU), Dimitris Chrysochoou, September, 2000.

<sup>5</sup> From Pluralist to Patriotic Politics: Putting Practice First, Charles Blattberg, Oxford University Press, 2000.

(d). The procedure is regarded as “legitimate” by the demos, implying that its outcome will be accepted. Political legitimacy is the willingness of the population to accept decisions of the state, its Government and Courts, which go against personal choice or interests. It is especially relevant for Democracies, since elections have both winners and losers.

(e). The procedure is “effective” in the minimal sense that it can be used to change the Government, assuming that there is sufficient support for that change. Showcase elections, pre-arranged to re-elect the existing regime are not democratic; and

(f). In the case of nation-states, the state must be sovereign democratic elections are pointless if an outside authority can overrule the result.

There are four conceptions of Democracy:

(a). **Minimalism**. Democracy is a system of Government in which citizens give teams of political leaders the right to rule in periodic elections. Citizens cannot and should not “rule” because they have no clear views or their views are not very intelligent.<sup>6</sup>

(b). **Aggressive Conception of Democracy**. A good democratic Government is one that produces laws and policies that are close to the views of the median voter, with half to his left and half to his right.<sup>7</sup>

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<sup>6</sup> Capitalism, Socialism and Democracy, Joseph Schumpeter, 1984.

<sup>7</sup> An Economic Theory of Democracy, Anthony Downs, 1957.

**(c). Deliberative Democracy.** Democracy is Government by discussion and reasons that all citizens can accept. The political arena should be one in which leaders and citizens make arguments, listen and change their minds, and

**(d). Participatory Democracy.** Citizens should participate directly, not through representatives, in making laws and policies. Citizens do not really rule themselves unless they directly decide laws and policies.

All forms of Government depend on their political legitimacy and their acceptance by the population. Without that, they are little more than a party since their decisions and policies will be resisted. Most people are prepared to accept their Governments as necessary. Failure of political legitimacy in modern states is usually related to separatism and ethnic or religious conflicts, rather than political differences.

In a Democracy, a high degree of political legitimacy is necessary because the electoral process divides the population into “winners” and “losers.” A successful political culture implies that the losing parties and their supporters accept the judgment of the voters. This acceptance allows for a peaceful transfer of power, the concept of a “loyal opposition.”

Voters must know that the new Government shares common fundamental

values. Voters must know that new Government will not introduce policies they find totally abhorrent.

Free elections are not sufficient for a country to become a true Democracy, the culture of the country's political institutions and civil service must also change. This is especially difficult where transitions of power have historically taken place through violence.

## **B. TYPES OF DEMOCRACY.**

### **(a). Liberal Democracy.**

Liberal Democracy<sup>8</sup> is a form of Representative Democracy where the political power of the Government is moderated by a Constitution which protects the rights and freedoms of individuals and minorities (Constitutional liberalism). The Constitution places constraints on the extent to which the will of the majority can be exercised.

It is common to include aspects of society among the defining criteria of a Liberal Democracy.<sup>9</sup> The presence of a middle class and a broad and flourishing civil society are often seen as pre-conditions for

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<sup>8</sup> Passions and Constraint: On the Theory of Liberal Democracy, Stephen Holmes, June, 1997.

<sup>9</sup> Liberal Democracy and Its Critics: Perspectives in Contemporary Political Thought, April Carter, Geoffrey Stokes, October, 1998.



Liberal Democracy. Market economics is a precondition but will ultimately ensure the transition to Democracy. The Liberal Democratic Constitution defines the democratic character of the state. The purpose of a Constitution is seen as a limit on the authority of the Government. There is a separation of powers, an independent Judiciary and a system of checks and balances between branches of Government.

Liberal Democracy<sup>10</sup> is defined by universal suffrage, granting all citizens the right to vote regardless of race, gender or property ownership. Many countries regarded as democratic have practiced various forms of exclusion from suffrage or demand further qualifications to be allowed to vote.

The criterion for Liberal Democracy<sup>11</sup> is:

**“Right to life and security of person; freedom from slavery; freedom of movement; equality before the law and due process under the rule of law; freedom of speech; freedom of the press and access to alternative information sources; freedom association and assembly; freedom of education; freedom of religion; an independent Judiciary and the right to own property, buy and sell the same.”**

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<sup>10</sup> Liberal Democracy and the Social Acceleration of Time, William E. Scheuerman, 1997.

<sup>11</sup> Liberal Democracy and Political Science, James W. Ceaser, September, 1992.

**(b). Social Democracy.**

Social Democracy<sup>12</sup> is derived from socialist and communist ideas. Many social democratic parties in the world are evolutions of revolutionary parties that came to embrace a strategy of gradual change through existing institutions or a policy of working for liberal reforms prior to more profound social change. It may involve progressivism. Most of the parties calling themselves social democratic do not advocate the abolishment of capitalism, but instead that it should be heavily regulated.

The hallmarks of Social Democracy<sup>13</sup> are:

**“Market regulation; social security, also known as the welfare state; subsidized or Government-owned public school and public health services and progressive taxation.”**

**(c). Dissent.**

Anarchists<sup>14</sup> oppose the actually existing Democratic States as inherently corrupt and coercive. Most anarchists support a non-hierarchical and non-coercive system of Direct Democracy within free associations. Individualist anarchists are vocal opponents of Democracy.

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<sup>12</sup> In the Name of Social Democracy: The Great Transformation from 1945 to the Present, Gerassimos Moschonas, Gregory Elliott (translator), April, 2002.

<sup>13</sup> Economic Reforms in New Democracies: A Social-Democratic Approach, Luiz Carlos Bresser Pereira, April, 1993.

<sup>14</sup> Anarchism: From Theory to Practice, Daniel Guerin, 2003.

Pierre-Joseph Proudhon stated:

**“Democracy is nothing but the Tyranny of Majorities, the most abominable tyranny of all, for it is not based on the authority of a religion, not upon the nobility of a race, not on the merits of talents and of riches. It merely rests upon numbers and hides behind the name of the people.”<sup>15</sup>**

**(d). Illiberal Democracy.**<sup>16</sup>

An Illiberal Democracy is a political system where democratic elections exist and the Government is elected by a democratic majority. Some critics of illiberal regimes now suggest that the rule of law should take precedence over Democracy, implying a “de facto” western acceptance of what are called “liberalized autocracies.”

**(e). Direct Democracy.**

Direct Democracy,<sup>17</sup> also called “Pure Democracy,” is a political system where people vote on Government decisions, such as questions of whether to approve or reject various laws. It is called “direct” because the power of making

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<sup>15</sup> Demokratie und Republik, Pierre-Joseph Proudhon, 1992.

<sup>16</sup> The Future of Freedom: Illiberal Democracy at Home and Abroad, Fareed Zakaria, 2001.

<sup>17</sup> Referendums Around the World The Growing Use of Direct Democracy, David Butler, May, 1999.

decisions is exercised by the people “directly,” without intermediaries or representatives. This form of Government has been rare, due to the difficulties of getting people of a certain territory in one place for the purpose of voting. All Direct Democracies<sup>18</sup> have been relatively small communities, usually city-states. Ancient Athens<sup>19</sup> is an example of Direct Democracy, and

**(f). Representative Democracy.**

Representative Democracy<sup>20</sup> is a political system where the people vote on Government members, who are then expected to make decisions in accordance with the interests of their voters. It is called “representative” because the people do not vote on Government decision directly, but elect representatives to decide for them. This form of Government has been increasingly common in recent times. The number of Representative Democracies had an explosive growth in the Twentieth 20<sup>th</sup>) Century and the majority of the world’s population now lives under Representative Democratic Regimes (which are referred to as “Republics”).

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<sup>18</sup> Direct Democracy: The Politics of Initiative, Referendum & Recall, Thomas E. Cronin, June, 1999.

<sup>19</sup> Pericles of Athens and the Birth of Democracy, Donald Kagen, October, 1998.

<sup>20</sup> The Decline of Representative Democracy, Alan Rosenthal, November, 1999.

A Government is “the organization that is the governing authority of a political unit, the ruling power in a political society, and the apparatus through which a governing body functions and exercises authority.” “Government with the authority to make laws, to adjudicate disputes, and to issue administrative decisions, and with a monopoly of authorized force where it fails to persuade, is an indispensable means, proximately, to the peace of communal life.” Statistic theorists maintain that the necessity of Government derives from the fact that the people need to live in communities, yet personal autonomy must be constrained in these communities.

## **CHAPTER II**

### **II. THE CONSTITUTIONS.**

#### **A. The United States’ Constitution.**

The United States’ Constitution<sup>21</sup> is the supreme law of the United States of America. It provides the framework for the organization of the United States Government. The document outlines the three main branches of the Government. The Legislative Branch is embodied in the bicameral Congress. The Executive Branch is headed by the President. The Judicial Branch is headed by the Supreme Court. Besides providing for the organization of these branches, the Constitution carefully outlines which powers each branch may exercise. It also reserves numerous rights for the individual states, and establishes the United States’ Federal System of Government.

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<sup>21</sup> National Archives Article on the Constitution.

The United States' Constitution<sup>22</sup> was adopted on September 17, 1787, by the Constitutional Convention in Philadelphia, Pennsylvania, and later ratified<sup>23</sup> by conventions in each state in the name of "the People"; it has since been amended twenty-seven (27) times, the first ten (10) amendments being known as the Bill of Rights. The Constitution has a central place in United States law and political culture. The United States' Constitution is the oldest Federal Constitution of any existing nation. The handwritten or "engrossed", original document is on display at the National Archives<sup>24</sup> and Records Administration in Washington, D.C.

### 1. History.

In September, 1786, commissioners from five (5) states met in the Annapolis Convention to discuss adjustments to the Articles of Confederation that would improve commerce. They invited State Representatives to converse in Philadelphia to discuss improvements to the Federal Government. After debate, the Congress of the Confederation endorsed the plan to revise the Articles of Confederation on February 21, 1787. Twelve (12) states, Rhode Island being the only exception, accepted this invitation and sent delegates to convene in May, 1787. The resolution calling the Convention<sup>25</sup>

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<sup>22</sup> Library of Congress, Primary Documents in American History: The United States' Constitution.

<sup>23</sup> *The Debate on the Constitution: Federalist and Antifederalist Speeches, Article and Letters During the Struggle for Ratification*, Part Two: January to August, 1788 (The Library of America, 1993), Bailyn, Bernard.

<sup>24</sup> National Archives Article on the Entire Constitutional Convention, retrieved December 16, 2007.

<sup>25</sup> The Avalon Project: Notes on the Debates in the Federal Convention, Yale Law School, January 20, 2008.

specified that its purpose was to propose amendments to the Articles, but the Convention decided to propose a rewritten Constitution. The Philadelphia Convention voted to keep the debates secret, so that the delegates could speak freely. They also decided to draft a new fundamental Government design, which eventually stipulated that only (9) nine of the thirteen (13) states would have to ratify for the new Government to go into effect. Our knowledge of the drafting and construction of The United States' Constitution<sup>26</sup> comes primarily from the diaries left by James Madison, who kept a complete record of the proceedings at the Constitutional Convention.

The Virginia Plan was the unofficial agenda for the Convention; and was drafted chiefly by James Madison, considered to be “the Father of the Constitution” for his major contributions. It was weighted toward the interests of the larger states, and proposed among other points:

- (a). A powerful bicameral Legislature with House and Senate;
- (b). An Executive chosen by the Legislature;
- (c). A Judiciary, with life-terms of service and vague powers; and
- (d). The National Legislature which would be able to veto state laws.

An alternative proposal, William Patterson's New Jersey Plan, gave states equal weights and was supported by the smaller states. Roger Sherman of Connecticut brokered

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<sup>26</sup> *Encyclopedia of the American Constitution, 5 Vol., Levy, Leonard W., 1992.*

“The Great Compromise,” whereby the House would represent population, the Senate would represent states, and a powerful President would be elected by elite electors.

As a result, the original Constitution<sup>27</sup> contained four (4) provisions tacitly allowing slavery<sup>28</sup> to continue for the next twenty (20) years. Section 9 of Article I allowed the continued “importation” of such persons. Section 2 of Article IV prohibited the provision of assistance to escaping persons and required their return if successful, and Section 2 of Article I defined other persons as “three-fifths (3/5ths)” of a person for calculations of each state’s official population. Article V prohibited any Amendments or legislation changing the provision regarding slave importation until 1808, thereby giving the States then existing twenty (20) years to resolve this issue. The failure to do so led to the Civil War.

Contrary to the process for “alteration” spelled out in Article 13 of the Articles of Confederation, Congress submitted the proposal to the states and set the terms for representation. On September 17, 1787, the Constitution<sup>29</sup> was completed in Philadelphia at the Federal Convention, followed by a speech given by Benjamin Franklin who urged unanimity, although they decided they only needed nine (9) states to ratify the

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<sup>27</sup> Amar, Akhil Reed (2005). “In the Beginning”, *America’s Constitution: A Biography*, New York.

<sup>28</sup> Smith, Jean Edward; Levine Herbert M. (1988). *Civil Liberties & Civil Rights Debated*. Englewood Cliffs, New Jersey; Prentice Hall.

<sup>29</sup> Edling, Max M. (2003). *A revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State*. Oxford University Press.



Constitution<sup>30</sup> for it to go into effect. The Convention submitted the Constitution to the Congress of the Confederation, where it received approval according to Article 13 of the Articles of Confederation, but the resolution of the Congress submitting the Constitution to the states for ratification and agreeing with its provision for implementation upon ratification by nine (9) states is contrary to Article 13, though eventually all thirteen (13) states did ratify the Constitution,<sup>31</sup> after it took effect.

Once the Congress of the Confederation received word of New Hampshire's ratification, it set a timetable for the start of operations under the Constitution.<sup>32</sup> On March 4, 1789, the Government under the Constitution began operations.

Several of the ideas in the Constitution<sup>33</sup> were new, and a large number of ideas were drawn from the literature of Republicanism in the United States, from the experiences of the thirteen (13) states, and from the British experience with mixed Government. The most important influence from the European continent was from Montesquieu, who emphasized the need to have balanced forces pushing against each other to prevent tyranny. (This in itself reflects the influence of Polybius' Second (2<sup>nd</sup>) Century B.C. treatise on the checks and balances of the Constitution of the Roman

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<sup>30</sup> *American Constitutional Law; Introductory Essays and Selected Cases*, (14<sup>th</sup> Edition) Mason, Alpheus Thomas and Donald Grier Stephenson (2004).

<sup>31</sup> *Beyond Confederation; Origins of the Constitution and American National Identity* Beeman, Richard R. Botein, Stephen and Carter, Edward C.(University of North Carolina Press, 1987).

<sup>32</sup> *What Did the Constitution Mean to Early Americans*, Bedford/St. Martin's, Countryman, Edward, 1999.

<sup>33</sup> *The Dynamic Constitution: An Introduction to American Constitutional Law*, Fallon, Richard H., 2004. Cambridge University Press.

Republic). John Locke is known to have been a major influence, and the due process clause of The United States' Constitution<sup>34</sup> was partly based on Common Law stretching back to the Magna Charta of 1215.

The English Bill of Rights (1689) was an inspiration for the American Bill of Rights. For example, both require jury trials, contain a right to bear arms, and prohibit excessive bail as well as "cruel and unusual punishments." Many liberties protected by State Constitutions and the Virginia Declaration of Rights were incorporated into the United States Bill of Rights.

## **2. Articles of the Constitution.**

The Constitution<sup>35</sup> consists of a preamble, seven original articles, and twenty-seven (27) amendments and a paragraph certifying its enactment by the Constitutional Convention.

The Preamble stated:

**"We the People of the United States, in Order  
to form a more perfect Union, establish Justice,  
insure domestic Tranquility, provide for the**

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<sup>34</sup> *The American Constitution; Its Origins and Development*, Kelly, Alfred Hinsey, Harbisdon, Winfred, Audif, Belz, Herman, 7<sup>th</sup> Edition, New York; Norton & Co.

<sup>35</sup> *Representing Popular Sovereignty; The Constitution in American Political Culture*, Levin, Daniel Lessard, State U. of New York Press, 1999.

**and secure the Blessings of Liberty to ourselves  
and our Posterity, do ordain and establish this  
Constitution for the United States of America.”**

The Preamble does not grant any particular authority to the Federal Government and it does not prohibit any particular authority. What it does, is establish the fact that the Federal Government has no authority outside of what follows the Preamble as amended, “We the People”, is one of the most quoted sections of the Constitution.<sup>36</sup> It was thought by Federalists during this time, that there was no need for a Bill of Rights and they thought that the Preamble spelled out the people’s rights.

The Articles are as follows:

**(a). Article One (1): Legislative Power:**

Article One (1) establishes the Legislative Branch of Government, the United States Congress, which includes the House of Representatives and the Senate. The Article establishes the manner of election and qualifications of members of each House. For the House, a representative must be twenty-five (25) years of age, have been a citizen of the United States for seven (7) years and live in the state they represent. For the

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<sup>36</sup> “*The Constitution; A Living Document*,” Thurgood, Marshall, Howard Law Journal, 1987.

Senate, a representative must be thirty (30) years of age, have been a citizen for nine (9) years and live in the state they represent.

Article One (1) provides for free debate in Congress and limits self-serving behavior of Congressmen outlines legislative procedure and indicates the powers of the Legislative Branch. These powers may also be interpreted as a list of powers, formerly either executive or Judicial in nature that has been explicitly granted to the United States Congress. This interpretation may be further supported by a broad definition of both the Commerce Clause and the Necessary-and-Proper Clause of the Constitution.<sup>37</sup> The argument for enumerated powers can be traced back to the 1819 *McCulloch v. Maryland* United States Supreme Court ruling. Article One (1) establishes limits on Federal and State Legislative Power.

**(b). Article Two (2): Executive Power:**

Article Two (2) describes the presidency (the Executive Branch), procedures for the selection of the President, qualifications for office, the oath to be affirmed and the powers and duties of the office. It also provides for the office of Vice President of the United States and specifies that the Vice President succeeds to the presidency if the President is incapacitated, dies or resigns. The original text (“the same shall devolve”)

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<sup>37</sup> *A Community Built on Words: The Constitution in History and Politics*, U. of Chicago Press, Powell, Jefferson H., 2002.

leaves it unclear whether this succession was intended to be on an acting basis (merely taking the powers of the office) or permanent (assuming the presidency itself).

After the death of William Henry Harrison, John Tyler set the precedent that the succession was permanent and this was followed in practice; the Twenty-Fifth (25) Amendment explicitly states that the Vice President becomes President in those cases. Article Two (2) also provides for the impeachment and removal from office of civil officers (the President, Vice President, judges and others).

**(c). Article Three (3): Judicial Power:**

Article Three (3) describes the Court System (the Judicial Branch), including the Supreme Court. The Article requires that there be one (1) Court called the Supreme Court.<sup>38</sup> Congress, at its discretion, can create lower Courts, whose judgments and orders are reviewable by the Supreme Court. Article Three (3) also requires trial by jury in all criminal cases defines the crime of treason and charges Congress with providing for a punishment for it. It also sets the kinds of cases that may be heard by the Federal Judiciary, which cases the Supreme Court<sup>39</sup> may hear first (called “Original Jurisdiction”), and that all other cases heard by the Supreme Court are by appeal under such regulations as the Congress shall make.

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<sup>38</sup> *The Supreme Court and Myth: An Empirical Investigation,* Law & Society Review, Casey, Gregory, Vol. 8, (1974).

<sup>39</sup> *A People's History of the Supreme Court,* Irons, Peter, 2000.

**(d). Article Four (4): States' Powers and Limits:**

Article Four (4) describes the relationship between the states and the Federal Government and amongst the states. It requires states to give “full faith and credit” to the public acts, records and Court proceedings of the other states. Congress is permitted to regulate the manner in which proof of such acts, records or proceedings may be admitted. The “Privileges and Immunities” Clause prohibits State Governments from discrimination against citizens of other states in favor of resident citizens (i.e., having tougher penalties for residents of Ohio convicted of crimes within Michigan).

Article Four (4) also establishes extradition between the states, as well as laying down a legal basis for freedom of movement and travel amongst the states. Today, this provision is sometimes taken for granted, especially by citizens who live near states near state borders. In the days of the Confederation, crossing state lines was often a much more arduous (and costly) process. Article Four (4) also provides for the creation and admission of new states. The Territorial Clause gives Congress the power to make rules for disposing of Federal Property and governing non-state territories of the United States. The Fourth (4<sup>th</sup>) Section of Article Four (4) requires the United States to guarantee to each state a republican form of Government and to protect the states from invasion and violence.

**(e). Article Five (5): Process of Amendments:**

Article Five (5) describes the process necessary to amend the Constitution.<sup>40</sup> It establishes two methods of proposing Amendments by Congress or by a National Convention requested by the states:

(1). Congress can propose an Amendment by a two-thirds (2/3rds) vote (of a quorum, not necessarily of the entire body) of the Senate and of the House of Representatives; and

(2) Two-thirds (2/3rds) of the State Legislatures may convene and “apply” to Congress to hold a National Convention, whereupon Congress must call such a Convention for the purpose of considering Amendments. As of 2008, only the first method (proposed by Congress) has been used. Once proposed, whether submitted by Congress or by a National Convention, Amendments must then be ratified by three-fourths (3/4ths) of the states to take effect.

Article Five (5) gives Congress the option of requiring ratification by state Legislatures or by special conventions assembled in the states. The convention method of ratification has been used only once (to approve the Twenty-First (21<sup>st</sup>) Amendment). Article Five (5) currently places only one (1) limitation on the amending power which is

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<sup>40</sup> *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?*, Bernstein, Richard B., (New York Times, 1993) (University Press of Kansas, 1995).

that no Amendment can deprive a state of its equal representation in the Senate without that state's consent (limitations regarding slavery<sup>41</sup> and taxation having expired in 1808).

**(f). Article Six (6): Federal Power:**

Article Six (6) establishes the Constitution and the laws and treaties of the United States made in accordance with it, to be the supreme law of the land and that “the judges in every state shall be bound thereby, anything in the laws or Constitutions of any state notwithstanding.” It also validates national debt created under the Articles of Confederation and requires that all federal and state legislators, officers and judges take oaths or affirmations to support the Constitution.<sup>42</sup> This means that the States’ Constitutions and laws should not conflict with the laws of the Federal Constitution, and that in case of a conflict; state judges are legally bound to honor the federal laws and Constitution over those of any state. Article Six (6) also states “no religious<sup>43</sup> Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

**(g). Article Seven (7): Ratification:**

Article Seven (7) sets forth the requirements for ratification of the Constitution. The Constitution would not take effect until at least nine (9) states had ratified the

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<sup>41</sup> *Slavery and the Founders: Race and Slavery in the Age of Jefferson*, Finkelman, Paul, (M.E. Sharp, 1996).

<sup>42</sup> *American Constitutional Law*, Tribe, Laurence H., (1999).

<sup>43</sup> *A Government of Laws: Political Theory, Religion, and the American Founding*, Sandoz, Ellis, Louisiana State U. Press, 1990.



Constitution in state conventions specially convened for that purpose and it would only apply to those states which ratified it.

### **3. Provisions for Changing the Constitution:**

The Constitution<sup>44</sup> provides for direct modification through the Amendment Process. Soon after the Constitution was passed, a key Court case provided a way for the Supreme Court to modify the interpretation of the Constitution without formal amendments through the process of Judicial review as follows:

#### **(a) Amendments:**

The authors of the Constitution were clearly aware that changes would be necessary from time to time if the Constitution was to endure and cope with the effects of the anticipated growth of the nation. They were also conscious that such change should not be easy, lest it permit ill-conceived and hastily passed amendments,. Balancing this, they also wanted to ensure that an overly rigid requirement of unanimity could not block action desired by the vast majority of the population. Their solution was to devise a dual process by which the Constitution could be altered.

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<sup>44</sup> Reflections on Constitutional Law, Anastaplo, George, 2006.

Amending the Constitution is a two-part process:

- (a). Amendments must be proposed and then they must be ratified.

Amendments can be proposed one of two ways. The only way that has been used to date is through a two-thirds (2/3rds) majority vote in both Houses of Congress; and

(b). Two-thirds (2/3rds) of the legislation of the States can call a Constitutional Convention to consider one (1) or more Amendments. This second (2<sup>nd</sup>) method has never been used and it is unclear exactly how, in practice, such a Constitutional Convention would work.

Regardless of how the Amendment is proposed, the Amendment must be approved by three-fourths (3/4ths) of states, a process called "ratification." Depending on the Amendment, this requires either the State Legislatures or Special State Conventions to approve the Amendment by simple majority vote. Amendments<sup>45</sup> generally go to State Legislatures to be ratified, only the Twenty-First (21<sup>st</sup>) Amendment called for Special State Conventions. Unlike many other Constitutions, Amendments to The United States' Constitution<sup>46</sup> are appended to the existing body of the text without altering or removing what already exists. There is no provision for deleting either obsolete text or rescinded provisions.

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<sup>45</sup> Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995, Kyvig, David E., (Lawrence: University Press of Kansas, 1996).

<sup>46</sup> The Constitution and American Foreign Policy, Mazzone, Jason, St. Paul. MN. (West Publishing Company, 2005).

The Constitution has a total of twenty-seven (27) Amendments. The first ten (10), collectively known as the Bill of Rights, were ratified simultaneously. The following seventeen (17) were ratified separately.

**(a)(1). The Bill of Rights.**

It is commonly understood that the Bill of Rights<sup>47</sup> was not originally intended to apply to the states, though except where Amendments refer specifically to the Federal Government or a branch thereof (as in the First (1<sup>st</sup>) Amendment under which some states in the early years of the nation officially established a religion). There is no such delineation in the text itself. A general interpretation of inapplicability to the states remained until 1868 when the Fourteenth (14<sup>th</sup>) Amendment was passed which stated, in part, that:

**“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”**

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<sup>47</sup> The Bill of Rights: Creation and Reconstruction, Akil Reed Amar, 2006.

The Supreme Court has interpreted this clause to extend most, but not all, parts of the Bill of Rights to the states. The balance of state and Federal power has remained a battle in the Supreme Court. The Amendments<sup>48</sup> that became the Bill of Rights were actually the last ten (10) of the twelve (12) Amendments proposed in 1789. The second (2<sup>nd</sup>) of the twelve (12) proposed Amendments, regarding the compensation of Congress, remained unratified until 1992. The Legislatures of enough states finally approved it and, as a result, it became the Twenty-Seventh (27<sup>th</sup>) Amendment despite more than two centuries of pungency, the first of the twelve (12) still technically pending before the state Legislatures for ratification, pertains to the apportionment of the United States House of Representatives after each decennial census. The most recent state whose lawmakers are known to have ratified this proposal is Kentucky in 1792, during that commonwealth's first (1<sup>st</sup>) month of statehood.

The Amendments are as follows:

The **First (1st) Amendment** addresses the rights of freedom of religion (prohibiting Congressional establishment of a religion over another religion through Law and protecting the right to free exercise of religion), freedom of speech, freedom of the press, freedom of assembly and freedom of petition;

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<sup>48</sup> Constitutional Amendments: From Freedom of Speech to Prohibition, The Gate Group, April, 2001.

The **Second (2<sup>nd</sup>) Amendment** declares “a well regulated militia” as “necessary to the security of a free state” and as explanation for prohibiting infringement of “the right of the People to keep and bear arms;”

The **Third (3<sup>rd</sup>) Amendment**<sup>49</sup> prohibits the Government from using private homes as quarters for soldiers without the consent of the owners. The only existing case law regarding this Amendment is a lower Court decision in the case of *Engblom v. Carey*;

The **Fourth (4<sup>th</sup>) Amendment** guards against searches, arrests, and seizures of property without a specific warrant or a “probable cause” to believe a crime has been committed. Some rights to privacy have been inferred from this Amendment and others by the Supreme Court;

The **Fifth (5<sup>th</sup>) Amendment**<sup>50</sup> forbids trial for a major crime except after indictment by a grand jury; prohibits double jeopardy (repeated trials), except in certain very limited circumstances; forbids punishment without due process of law; and provides that an accused person may not be compelled to testify against himself (this is also known as “Taking the Fifth” or “Pleading the Fifth”). This is regarded as the “rights of the

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<sup>49</sup> The 3<sup>rd</sup> Amendment (American Heritage History of the Bill of Rights), Holmes, Burnham, June, 1990.

<sup>50</sup> The Fifth Amendment (American Heritage History of the Bill of Rights), Hawxhurst, Joan C., Holmes, Burnham, Force, Eden, 1991.

accused” Amendment. It also prohibits Government from taking private property without “just compensation,” the basis of eminent domain in the United States.

The **Sixth (6<sup>th</sup>) Amendment** guarantees a speedy public trial for criminal offenses. It requires trial by a jury guarantees the right to legal counsel for the accused and guarantees that the accused may require witnesses to attend the trial and testify in the presence of the accused. It also guarantees the accused a right to know the charges against him. The Sixth (6<sup>th</sup>) Amendment<sup>51</sup> has several Court cases associated with it, including *Powell v. Alabama*, *United States v. Wong Kim Ark*, *Gideon v. Wainwright*, and *Crawford v. Washington*. In 1966, the Supreme Court ruled that the Fifth (5<sup>th</sup>) Amendment prohibition on forced self-incrimination and the Sixth (6<sup>th</sup>) Amendment clause on right to counsel were to be made known to all persons placed under arrest and these clauses have become known as “The Miranda Rights.”

The **Seventh (7<sup>th</sup>) Amendment** assures trial by a jury in civil cases.

The **Eighth (8<sup>th</sup>) Amendment** forbids excessive bail or fines and cruel and unusual punishment.

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<sup>51</sup> The Constitution and Criminal Procedures: First Principles, Amar, Akil Reed, March, 1998.

The **Ninth (9<sup>th</sup>) Amendment** declares that the listing of individual rights in the Constitution and Bill of Rights is not meant to be comprehensive and that the other rights, not specifically mentioned, are retained elsewhere by the people; and

The **Tenth (10<sup>th</sup>) Amendment** provides that powers that the Constitution does not delegate to the United States and does not prohibit the states from exercising, are “reserved to the States respectively, or to the people.

**(a)(2). Subsequent Amendments.**

Amendments<sup>52</sup> to the Constitution subsequent to the Bill of Rights cover many subjects. The majority of the seventeen (17) later Amendments stem from continued efforts to expand individual civil or political liberties, while a few are concerned with modifying the basic Governmental structure drafted in Philadelphia in 1787. Although The United States’ Constitution has been amended a total of twenty-seven (27) times, only twenty-six (26) of the Amendments are currently used because the Twenty-Fifth (25<sup>th</sup>) Amendment supersedes the Eighteenth (18<sup>th</sup>) Amendment.

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<sup>52</sup> Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1955, Journal Article by Vile, John, Constitutional Commentary, Vol. 14, 1997.

The Amendments to the Constitution<sup>53</sup> subsequent to the Bill of Rights are:

The **Eleventh (11<sup>th</sup>) Amendment** (1795) clarifies Judicial power over foreign nationals and limits ability of citizens to sue states in Federal Courts and under Federal Law;

The **Twelfth (12<sup>th</sup>) Amendment** (1804) changes the method of presidential elections so that members of the Electoral College cast separate ballots for President and Vice President;

The **Thirteenth (13<sup>th</sup>) Amendment** (1865) abolishes slavery and grants Congress power to enforce abolition;

The **Fourteenth (14<sup>th</sup>) Amendment** (1868) defines a set of guarantees for United States citizenship; prohibits states from abridging citizens' privileges or immunities and rights to due process and the equal protection of the law; repeals the Three-Fifths (3/5ths) compromise and prohibits repudiation of the federal debt caused by the Civil War;

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<sup>53</sup> Declaration of Independence and Constitution of the United States, Homeland Security Department, 2007.



The **Fifteenth (15<sup>th</sup>) Amendment** (1870) forbids the Federal Government and the states from using a citizen's race, color or previous status as a slave as a qualification for voting;

The **Sixteenth (16<sup>th</sup>) Amendment** (1913) authorizes unapportioned federal taxes on income;

The **Seventeenth (17<sup>th</sup>) Amendment** (1913) establishes direct election of senators;

The **Eighteenth (18<sup>th</sup>) Amendment** (1919) prohibited the manufacturing, importing and exporting of alcoholic beverages. It was repealed by the Twenty-fifth (25<sup>th</sup>) Amendment;

The **Nineteenth (19<sup>th</sup>) Amendment** (1920) prohibits the Federal Government and the states from forbidding any citizen to vote due to their sex;

The **Twentieth (20<sup>th</sup>) Amendment** (1933) changes details of Congressional and presidential terms and of presidential succession;

The **Twenty-First (21<sup>st</sup>) Amendment** (1933) repeals the Eighteenth (18<sup>th</sup>) Amendment<sup>54</sup> and permits states to prohibit the importation of alcoholic beverages;

The **Twenty-Second (22<sup>nd</sup>) Amendment** (1951) limits the President to two terms;

The **Twenty-Third (23<sup>rd</sup>) Amendment** (1961) grants Presidential Electors to the District of Columbia;

The **Twenty-Fourth (24<sup>th</sup>) Amendment** (1964) prohibits the Federal Government and the states from requiring the payment of a tax as a qualification for voting for federal officials;

The **Twenty-Fifth (25<sup>th</sup>) Amendment** (1967) changes details of presidential succession, provides for temporary removal of the President and provides for replacement of the Vice President;

The **Twenty-Sixth (26<sup>th</sup>) Amendment** (1971) prohibits the Federal Government and the states from forbidding any citizen of age eighteen (18) or greater to vote simply because of their age; and

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<sup>54</sup> The Amendments to the Constitution: A Commentary, Anastasio, George, September, 2008.

The Twenty-Seventh (27<sup>th</sup>) Amendment<sup>55</sup> (1992) limits Congressional pay raises.

**(a)(3). Unratified Amendments.**

Over ten thousand (10,000) Constitutional Amendments have been introduced in Congress since 1789. In a typical Congressional year, in the last several decades, between one hundred (100) and two-hundred (200) are offered. Most of these concepts never get out of the Congressional Committee and far fewer get proposed by the Congress for ratification. Backers of some Amendments have attempted the alternative, and thus-far never utilized, method mentioned in Article Five (5). In two instances, reapportionment in the 1960's and a balanced Federal Budget during the 1970's and 1980's, these attempts have come within just two (2) state legislative "applications" of triggering that alternative method.

Of the Thirty-Three (33) Amendments that have been proposed by Congress, six (6) have failed ratification by the required three-quarters (3/4) of the State Legislatures and four (4) of those six (6) are still technically pending before state lawmakers (see *Coleman v. Miller*). Starting with the Eighteenth (18<sup>th</sup>) Amendment, each proposed Amendment (except the Nineteenth (19<sup>th</sup>) Amendment and the still-pending Child Labor Amendment of 1924) has specified a deadline for passage.

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<sup>55</sup> The Constitution's 27 Amendments: The Ways We Embrace Their Spirit Every Day, U. S. News, November, 2002.

The following are the unratified Amendments:

The **Congressional Apportionment Amendment** proposed by the First (1<sup>st</sup>) Congress on September 25, 1789, defined a formula for how many members there would be in the United States House of Representatives after each decennial census. Ratified by eleven (11) states, the last being Kentucky in June, 1792, (Kentucky's initial month of statehood), this Amendment contains no expiration date for ratification. In principle, it may yet be ratified, though as written, it became moot when the population of the United reached ten million (10,000,000);

The so-called missing **Thirteenth (13<sup>th</sup>) Amendment**<sup>56</sup> or "**Titles of Nobility Amendment**" (TONA), proposed by the Eleventh (11<sup>th</sup>) Congress on May 1, 1810, would have ended the citizenship of any American accepting "any title of Nobility or Honor" from any foreign power. Some maintain that the Amendment was actually ratified by the Legislatures of enough states and that a conspiracy has suppressed it, but this has been thoroughly debunked. Known to have been ratified by lawmakers in twelve (12) states, the last in 1812, this Amendment contains no expiration date for ratification. It may yet be ratified;

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<sup>56</sup> Final Freedom, the Civil War, the Abolition of Slavery and the Thirteenth Amendment, Voenbery, Michael, Brown University, Cambridge University Press.

The Corwin Amendment,<sup>57</sup> proposed by the Thirty-Sixth (36<sup>th</sup>) Congress on March 2, 1861, would have forbidden any attempt to subsequently amend the Constitution to empower the Federal Government to “abolish or interfere” with the “domestic institutions” of the states (a delicate way of referring to slavery). It was ratified by only Ohio and Maryland lawmakers before the outbreak of the Civil War. Illinois lawmakers, sitting as a State Constitutional Convention at the time, likewise approved it, but that action is of questionable validity. The proposed Amendment contains no expiration date for ratification and may yet be ratified. However, adoption of the thirteenth (13<sup>th</sup>), Fourteenth (14<sup>th</sup>) and Fifteenth (15<sup>th</sup>) Amendments after the Civil War likely means that the Amendment would be ineffective if adopted; and

A Child Labor Amendment proposed by the Sixty-Eighth (68<sup>th</sup>) Congress on June 2, 1924, which stipulates: “The Congress shall have power to limit, regulate and prohibit the labor of persons less than eighteen (18) years of age.” This Amendment is now moot, since subsequent Federal Child Labor Laws have uniformly been upheld as a valid exercise of Congress’ powers under the Commerce Clause. This Amendment contains no expiration date for ratification. It may yet be ratified.

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<sup>57</sup> Edwin S. Corwin’s Constitution and What It Means Today: 1978 Edition, Edward S. Corwin, Edited by Chase, Howard W. and Ducat, Craig R., Princeton University, 1978.

Properly placed in a separate category from the other four (4) Constitutional Amendments that Congress proposed to the states, but which no enough states have approved, are the following two (2) offerings which, because of deadlines, are no longer subject to ratification:

**The Equal Rights Amendment**,<sup>58</sup> (or ERA, which reads in pertinent part “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”) Proposed by the Ninety-Second (92<sup>nd</sup>) Congress on March 22, 1972, it was ratified by the Legislatures of thirty-five (35) states and expired on either March 22, 1979, or on June 30, 1982, depending upon one’s point of view of a controversial three-year extension of the ratification deadline, which was passed by the Ninety-Fifth (95<sup>th</sup>) Congress in 1978. Of the thirty-five (35) states ratifying it, four (4) later rescinded their ratifications prior to the extended ratification period which commenced March 23, 1979.

There continues to be diversity of opinion as to whether such reversals are valid; no Court has ruled on the question, including the Supreme Court. But a precedent against the validity of rescission was first established during the ratification process of the Fourteenth (14<sup>th</sup>) Amendment when Ohio and New Jersey rescinded their earlier

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<sup>58</sup> The Politics of the Equal Rights Amendment: Conflict and the Decision Process, Boles, Janet K., Longman Group, United Kingdom, February, 1979.

approvals, but yet were counted as ratifying states when the Fourteenth (14<sup>th</sup>) Amendment was ultimately proclaimed part of the Constitution in 1868; and

**The District of Columbia Voting Rights Amendment**<sup>59</sup> was proposed by the Ninety-Fifth (95<sup>th</sup>) Congress on August 22, 1978. Had it been ratified, it would have granted to Washington, D.C., two Senators and at least one member of the House of Representatives as though the District of Columbia were a state. Ratified by the Legislatures of only sixteen (16) states, less than half of the required thirty-eight (38), the proposed Amendment expired on August 22, 1985.

There are currently only a few proposals for Amendments which have entered mainstream political debate. These include the proposed Federal Marriage Amendment, the Balanced Budget Amendment and the Flag Desecration Amendment.

**(b) Judicial Review:**

Aside from the direct process of amending the Constitution, the way the Constitution is understood is also influenced by the decisions of the Court System, and especially the Supreme Court.<sup>60</sup> These decisions are referred to, collectively, as precedents. The ability of the Courts to interpret the Constitution was decided early in the history of the United States, in the 1803 case of *Marbury v. Madison*<sup>61</sup>. In that case,

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<sup>59</sup> D.C. Voting Rights, The Washington Times, May, 2006.

<sup>60</sup> The Supreme Court at the Bar of History: A Bibliographic Essay. D. Grier Stephenson, Jr., Organization of American Historians, Magazine of History, Vol. 13. 1998.

<sup>61</sup> *Marbury v. Madison and Judicial Review*, Clinton, Robert Lowry. University Press of Kansas.

the Supreme Court established the doctrine of Judicial Review,<sup>62</sup> which is the power of the Court to examine legislation and other acts of Congress and to decide their “Constitutionality.” The Doctrine also embraces the power of the Court to explain the meaning of various sections of the Constitution as they apply to particular cases brought before the Court. Over the years, a series of Court decisions, on issues ranging from Governmental regulation of radio and television to the rights of the accused in criminal cases, has affected a change in the way many Constitutional clauses are interpreted, without amendment to the actual text of the Constitution.

Legislation, passed to implement provisions of the Constitution<sup>63</sup> or to adapt those implementations to changing conditions also broadens and in subtle ways, changes the meanings given to the words of the Constitution. Up to a point, the rules and regulations of the many agencies of the Federal Government have a similar effect. If the actions of Congress or Federal Agencies are challenged as to their constitutionality, however, it is the Court System that ultimately decides whether or not they are allowable under the Constitution.

### **B. The French Constitution.**

France uses a Civil Law System; that is, law arises primarily from written statutes. Judges are not to make law, but merely to interpret it (though the amount of

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<sup>62</sup> The Doctrine of Judicial Review, Corwin, Edward S., 1914, Reprinted, 2000, The Law Book Exchange.

<sup>63</sup> Processes of Constitutional Making, Siegel, Reva B., Balkin, Jack M., Brest, Paul, and Amar, Akhil Reed, May, 2006.



judge interpretation in certain areas makes it equivalent to case law). Many fundamental principles of French Law were laid in the Napoleonic Codes. Basic principles of the rule of law were laid in the Napoleonic Code.<sup>64</sup> Laws can only address the future and not the past (ex post facto laws are prohibited). To be applicable, laws must have been officially published.

In agreement with the principles of the Declaration of the Rights of Man and of the Citizen, the general rule is that of freedom and law should only prohibit actions detrimental to society. As Guy Canivet,<sup>65</sup> first President of the “Cour d’ Cassation” (Court of Cassation), said about what should be the rule in French Law:

**“Freedom is the rule, and its restriction is the exception;  
any restriction of freedom must be provided for by Law  
and must follow the principles of necessity and proportionality.”**

Law may lay out prohibitions only if they are needed and if the inconveniences caused by this restriction do not exceed the inconveniences that the prohibition is supposed to remedy. France does not recognize religious beliefs as a motivation for the enactment of prohibitions. As a consequence, France has long had neither blasphemy laws nor sodomy laws (the latter being abolished in 1789).

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<sup>64</sup> The Napoleonic Codes, The Age of Napoleon, Horne, Alistair, May 9, 2006.

<sup>65</sup> UCLA Graduation Ceremonies, Chief Justice Guy Canivet, 2004.

## **1. History of the French Constitution.**

There have been many changes to the French Constitution beginning with:

(a). **Ancien Regime (Ancient Regime)**<sup>66</sup> refers primarily to the aristocratic social and political system established in France under the Valois and Bourbon Dynasties<sup>67</sup> (Fourteenth (14<sup>th</sup>) Century to Eighteenth (18<sup>th</sup>) Century). The term is French for “Former Regime,” but rendered in English as in “Old Rule,” “Old Order,” or simply “Old Regime”. As defined by the creators of the term, the Ancien Regime (Ancient Regime)<sup>68</sup> developed out of the French Monarchy of the Middle Ages and was swept away centuries later by the French Revolution<sup>69</sup> of 1789. Europe’s other Ancien Regimes (Ancient Regimes) had similar origins, but diverse ends; some eventually became Constitutional Monarchies, whereas others were torn down by wars and revolutions.

Power in the Ancien Regime (Ancient Regime) relied on three (3) pillars:

- (a). The **Monarchy**,
- (b). the **Clergy**, and
- (c). the **Aristocracy**.

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<sup>66</sup> The Ancien Regime (Ancient Regime) and the French Revolution, Tocqueville, Alexis, August, 2008.

<sup>67</sup> From Valois to Bourbon. Dynasty, State and Society in Early Modern France, Cameron, K., 1989.

<sup>68</sup> The Ancien Regime (Ancient Regime), A History of France 1610-177, Le Roy Ladurie, Emmanuel, November, 1998.

<sup>69</sup> Short History of the French Revolution, Popkin, Jeremy D., October, 2002.

Society was divided into three (3) Estates of the realm:

- (a). The First (1<sup>st</sup>) Estate, **the Roman Catholic clergy**;
- (b). the Second (2<sup>nd</sup>) Estate, **the nobility**, and
- (c). the Third (3<sup>rd</sup>) Estate, **the rest of the population**.

Ancien Regime (Ancient Regime) means any Regime which shares the formers' defining features. The Ancien Regime (Ancient Regime) retained many aspects of a feudal system that had existed since at least the Eighth (8<sup>th</sup>) Century, in particular, noble and aristocratic privilege and supported by the Doctrine of the Divine Right of Kings. It differed from that earlier feudal order in that political power had increasingly become concentrated in an absolute Monarch. The term dates from "The Age of Enlightenment"<sup>70</sup> (first appearing in print in English in 1794) and was originally pejorative in nature. Similar to other sweeping criticisms of the past, such as the consciously disparaging term "Dark Ages" for what is more commonly known as the "Middle Ages," the concept of Ancient Regime is layered onto the past as an expression of disapproval for the way things were done, and carries an implied approval of a "New Order." The term was created by the French revolutionaries to promote a new cause and discredit the existing order, and was not a neutral historical descriptor of the past.

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<sup>70</sup> The Age of Enlightenment: The 18<sup>th</sup> Century Philosophers, Berlin, Isaiah, March 10, 1984.

For some authors, the term came to denote certain nostalgia. Talleyrand famously quipped that “those who have not known the Ancien Regime (Ancient Regime) will never know how sweet life can be (*“ceux qui n’ont pas connu l’Ancien Re’gime ne pourront jamais savoir ce qu’e’tait la douceur de vivre.”*).

(b). **The French Revolution**<sup>71</sup> (1789-1799) was a period of political and social upheaval in the political history of France and Europe as a whole, during which the French Governmental structure, previously an Absolute Monarchy with feudal privileges for the aristocracy and catholic clergy, underwent radical change to forms based on enlightenment principles of nationalism, citizenship and inalienable rights.

These changes were accompanied by violent turmoil, including executions and repression during the Reign of Terror and warfare involving every other major European power. Subsequent events that can be traced to the Revolution include the Napoleonic Wars,<sup>72</sup> the restoration of the Monarchy and two (2) additional revolutions as modern France took shape.

In the following century, France would be governed variously as a Republic, Dictatorship, Constitutional Monarchy and two (2) different Empires. Historians disagree

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<sup>71</sup> The Days of the French Revolution, Hibbert, Christopher, 2001.

<sup>72</sup> Napoleon, Ellis, Geoffrey, 2005.

about the political and socioeconomic nature of the Revolution,<sup>73</sup> Traditional Marxist interpretations, such as that presented by Georges Lefebvre, described the Revolution<sup>74</sup> as the result of the clash between a feudalistic noble class and the capitalist bourgeois class. Some historians argue that the old aristocratic order of the Ancien Regime (Ancient Regime) succumbed to an alliance of the rising bourgeoisie, aggrieved peasants and urban wage-earners.

Another interpretation asserts that the revolution resulted when various aristocratic and bourgeois reform movements spun out of control. According to this model, these movements coincided with popular movements of the new wage-earning classes and the provincial peasantry, but any alliance between classes was contingent and incidental.

Adherents of most historical models identify many of the same features of the Ancien Regime (Ancient Regime) as being among the causes of the Revolution.

Economic factors included:

(a). Louis XV<sup>75</sup> fought many wars, bringing France to the verge of bankruptcy, and Louis XVI supported the colonists during the American Revolution, exacerbating the precarious financial condition of the Government,. The national debt amounted to almost Two (2) Billion *livres*. The social burdens caused by war included the huge war debt, made worse by the Monarchy's military failures and ineptitude and the lack of social services for war veterans;

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<sup>73</sup> Citizens, Schama, Simon, March, 1990.

<sup>74</sup> The Ancien Regime (Ancient Regime), Doyle, William, November, 1986.

<sup>75</sup> Great Nation: France from Louis XV to Napoleon, Jones, Colin, October, 2000.

(b). An inefficient and antiquated financial system unable to manage the national debt, both caused and exacerbated by the burden of a grossly inequitable system of taxation;

(c). The Roman Catholic Church, the largest landowner in the country, which levied a tax on crops known as the “dime” lessened the severity of the Monarchy’s tax increases; it worsened the plight of the poorest who faced a daily struggle with malnutrition;

(d). The continued conspicuous consumption of the noble class, especially the Court of Louis XVI<sup>76</sup> and Marie-Antoinette at Versailles, despite the financial burden on the populace;

(e). High unemployment and high bread prices, causing more money to be spent on food and less in other areas of the economy;

(f). Widespread famine and malnutrition, which increased the likelihood of disease and death and intentional starvation in the most destitute segments of the population in the months immediately before the Revolution<sup>77</sup>. The famine extended even to other parts of Europe and was not helped by a poor transportation infrastructure for bulk foods. Some researchers have also attributed the Widespread famine to an “El Niño” effect, or colder climate of the little ice age combined with France’s failure to adopt the Potato as a staple crop; and

(g). No internal trade and too many customs barriers.

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<sup>76</sup> Louis XVI, Hardman, John, December, 2005.

<sup>77</sup> The Cultural Programmes of the 1789 Revolution, Pillorget, Rene, University of Picardie France, 1989.

There was also social and political factors, many of which involved resentments and aspirations given focus by the rise of Enlightenment ideals:

- (a). Resentment of royal absolutism;
- (b). Resentment by the ambitious professional and mercantile classes towards noble privileges and dominance in public life, many of whom were familiar with the lives of their peers in commercial cities in The Netherlands and Great Britain;
- (c). Resentment by peasants, wage-earners and the bourgeoisie toward the traditional seigniorial privileges possessed by nobles;
- (d). Resentment of clerical privilege (anti-clericalism) and aspirations for freedom of religion and resentment of aristocratic bishops by the poorer rural clergy;
- (e). Continued hatred for Catholic control and influence on institutions of all kinds by the large Protestant minorities;
- (f). Aspirations for liberty and republicanism;
- (g) Anger toward the King for firing Jacques Necker<sup>78</sup> and A.R.J. Turgot<sup>79</sup> (among other financial advisors), who were popularly seen as representatives of the people; and
- (h). The almost total failure of Louis XVI and his advisors to deal effectively with any of these problems.

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<sup>78</sup> The Banker Who Brought Down the Old Regime: Rediscovering Jacques Necker, Rosenblatt, Helena, *Eighteenth-Century Studies*, Vol. 39, 2006.

<sup>79</sup> *Memoires Sur La Vie et les Ouvrages de M. Turgot, Ministre D'Etat*, Turgot, A.R.J. (Dupont de Nemours, Samuel, Pierre), Paris, 1782.

On June 10, 1789, Abbe Sieyes<sup>80</sup> moved that the Third (3<sup>rd</sup>) Estate, now meeting as the *Communes* (“Commons”), proceed with verification of its own powers and invite the other two (2) Estates to take part, but not to wait for them. They proceeded to do so two (2) days later, completing the process on June 17, 1789. Then, they voted a measure far more radical, declaring themselves the National Assembly, an assembly not of the Estates but of “the People.” They invited the other orders to join them, but made it clear they intended to conduct the nation’s affairs with or without them.

In an attempt to keep control of the process and prevent the Assembly from convening, Louis XVI ordered the closure of the “*Sale des Etats*” where the Assembly met, making an excuse that the carpenters needed to prepare the hall for a royal speech in two (2) days. The Assembly moved their deliberations to a nearly indoor real tennis Court, where they proceeded to swear the Tennis Court Oath (June 20, 1789), under which they agreed not to separate until they had given France a Constitution. Majority of the representatives of the clergy soon joined them, as did forty-seven (47) members of the nobility. By June 27, 1789, the royal party had overtly given in, although the military began to arrive in large numbers around Paris and Versailles. Messages of support for the Assembly poured in from Paris and other French cities. On July 9, 1789, the assembly reconstituted itself as the National Constituent Assembly.

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<sup>80</sup> A Rhetoric of Bourgeois Revolution: The Abbe’ Sieyes and What is the Third Estate?, Sewell, Jr., William H., Durham, North Carolina and London, Duke University Press, 1994.



Necker<sup>81</sup> had earned the enmity of many members of the French Court for his support and guidance to the third Estate. Marie Antoinette, Louis XVI's younger brother, the Comte d'Artois and other conservative members of the King's Privy Council urged Louis XVI to dismiss Necker. On July 11, 1789, after Necker suggested that the royal family live according to a budget to conserve funds, Louis XVI fired him and completely reconstructed the finance ministry at the same time.

Many Parisians presumed Louis XVI's actions to be the start of a "royal coup" by the conservatives and began open rebellion when they heard the news the next day. They were also afraid that arriving royal soldiers had been summoned to shut down the National Constituent Assembly, which was meeting at Versailles and the Assembly went into nonstop session to prevent eviction from their meeting place once again. Paris was soon consumed with riots, anarchy and widespread looting. The mobs soon had the support of the French guard, including arms and trained soldiers, because the royal leadership essentially abandoned the city.

On July 14, 1789, the insurgents set their eyes on the large weapons and ammunition cache inside the Bastille Fortress, which also served as a symbol of tyranny by the Monarchy. After several hours of combat, the prison fell that afternoon. Despite ordering a cease fire, which prevented a mutual massacre, Governor Marquis Bernard de Launay was beaten, stabbed and decapitated; his head was placed on a pike and paraded

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<sup>81</sup> *Une Singuliere Famille: Jacques Necker, Suzanne Necker et Germaine de Stael*, Bredin, Jean-Denis, 1999.

about the city. Although the Parisians released only seven (7) prisoners, the Bastille served as a potent symbol of everything hated under the Ancien Regime (Ancient Regime). Necker<sup>82</sup> was recalled to power, but his triumph was short-lived. An astute financier, but a less astute politician, Necker<sup>83</sup> overplayed his hand by demanding and obtaining a general amnesty, losing much of the people's favor.

On August 4, 1789, the National Constituent Assembly abolished feudalism, in what is known as the "August Decrees,"<sup>84</sup> sweeping away both the seigniorial rights of the Second (2<sup>nd</sup>) Estate and the tithes gathered by the First (1<sup>st</sup>) Estate. In the course of a few hours, nobles, clergy, towns, provinces, companies and cities lost their special privileges. Looking to the Declaration of Independence of the United States for a model, on August 26, 1789, the Assembly published the Declaration of the Rights of Man and of the Citizen.<sup>85</sup> Like the United States Declaration of Independence, it comprised a statement of principles rather than a Constitution with legal effect. The National Constituent Assembly functioned, not only as a Legislature, but also as a body to draft a new Constitution.

On October 5, 1789, crowds of women began to assemble at Parisian markets. They marched to Hotel de Ville, demanding that the city officials address their concerns.

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<sup>82</sup> *Les Ide'es de Necker*, Grange, Helen, 2002.

<sup>83</sup> Necker, *Reform Statesman of the Ancien Regime (Ancient Regime)*, Harris, Robert D., 2005.

<sup>84</sup> *The Night the Old Regime Ended: August 4, 1789, and the French Revolution*, Censer, Jack R., 2003.

<sup>85</sup> *The French Idea of Freedom: The Old Regime and the Declaration of Rights of 1789*, Van Kley, Dale, Stanford University Press, 1994.

The women were responding to the harsh economic situations they faced, especially bread shortages. They demanded an end to Royalist efforts to block the National Assembly and for the King to move to Paris as a sign of good faith in addressing the widespread poverty. The Monarchy relocated to Paris on October 6, 1789 from Versailles under the protection of the National Guards, thus legitimizing the National Assembly.

The Revolution brought about a massive shifting of powers from the Roman Catholic Church to the state. Under the Ancien Regime (Ancient Regime), the Church had been the largest landowner in the country. Legislation enacted in 1790, abolished the Church's authority to levy a tax on crops, known as "*dime*", cancelled special privileges for the clergy and confiscated church property. The Government introduced a new paper currency, "*assignats*", backed by the confiscated Church lands. On February 13, 1790, further Legislature abolished monastic vows. The Civil Constitution of the Clergy, passed on July 12, 1790, turned the remaining clergy into employees of the State and required that they take an oath of loyalty to the Constitution. The ensuing years saw violent repression of the clergy, including the imprisonment and massacre of priests throughout France. The Concordat of 1801 between Napoleon and the Church ended the "Dechristianisation Period" and established the rules for a relationship between the Catholic Church and the French State that lasted until it was abrogated by the Third (3<sup>rd</sup>) Republic via the separation of Church and State on December 11, 1905.

In the winter of 1791, the Assembly considered, for the first time, legislation against the *émigrés* (immigrants). The debate pitted the safety of the State against the liberty of individuals to leave. Mirabeau<sup>86</sup> carried the day against the measure, which he referred to as “worthy of being placed in the Code of Draco.” Mirabeau died on April 2, 1791. In Mignet’s<sup>87</sup> words, “No one succeeded him in power and popularity” and before the end of the year, the new Legislative Assembly would adopt this “draconian” measure.

(c). **The French Constitution of 1791** was the very first written Constitution of France that would be representative of the nation. One of the basic aspects of the Revolution was adopting Constitutionality and establishing sovereignty, following the steps of the United States of America. The previously adopted Declaration of Rights was implemented as its Preamble.

The Constitution adopted the preferred idea among reformists at that time, the creation of a French Constitutional Monarchy. The main controversy was the level of power to be granted to the King of France in such a system. Gilbert de Montier proposed a combination of the American and British systems, introducing a bicameral Parliament, with the King having the suppressive veto power in the Legislature, modeled to the authorities of the United States President. This proposal failed.

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<sup>86</sup> *Mirabeau, Honore' Gabriel Riquette, Catalogue des Livres de la Bibliotheque de Feu M. Mrabeau l'Aine.*

<sup>87</sup> Mignet, M., *Vita de Franklin*, Brigola, Gaetano, Milano, 1870.

**d). The French Constitution of 1793 (“Acte Constitutionnel du 24 juin 1793”)**

was the French Constitution which instated a Republic during the French Revolution. Following a referendum, it was ratified by the National Convention on June, 1793. Due to the external and internal state of war, legal dispositions of the Constitution were suspended on October 10, 1793.

The Constitution was inspired by the Declaration of the Rights of Man and of the Citizen of 1789, to which it added several rights. It proclaimed the superiority of the popular sovereignty over national sovereignty; various economic and social rights (right of association, right to work and public assistance, right to public education, the right of rebellion (and duty to rebel when the Government violates the right of the people) and the abolition of slavery.

It was eventually supplanted by the French Constitution of 1795, which established the Directory. The revolutionaries of 1848 were inspired by this Constitution and it passed into the ideological armory of the Third (3<sup>rd</sup>) Republic<sup>88</sup> (founded in 1870). It represents a fundamental historical document that contributed much to the later democratic institutions and developments.

**(e). The French Constitution of the Year VIII** was a National Constitution of France adopted December 24, 1799, which established the form of Government known as

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<sup>88</sup> The Third Republic of France” The First Phase 1871-1894, Chapman, Guy, 1962.

“the Consulate.” The Coup of Eighteen (18) Brumaire (November 9, 1799)<sup>89</sup> effectively gave all power to Napoleon Bonaparte<sup>90</sup> and ended the French Revolution. After the Coup, Napoleon<sup>91</sup> and his allies legitimized his position by creating the “short and obscure Constitution of the Year VIII.” The Constitution tailor-made the position of First Consul to give Napoleon<sup>92</sup> most of the powers of a dictator. It was the First Constitution since the Revolution without a Declaration of Rights.

The Executive Power was vested in three (3) Consuls, but all actual power was held by the First Consul, Bonaparte. This was no longer Robespierre’s<sup>93</sup> Republic, but the Roman Republic, which reminded the French of stability, order and peace. To emphasize this, Napoleon<sup>94</sup> used classical Roman terms in the Constitution: Consul, Senator, and Tribune.

The Constitution of Year VIII established a Legislature with three (3) houses: a Senate of thirty-one (31) men over the age of sixty (60), a Tribune of one hundred (100) men and a Legislative Body of three-hundred (300) men. The Constitution also used the term “notables.” The term “notables” was a common usage under the monarchy, which was understood by every Frenchman. The term “notables” referred to prominent, “distinguished” men landholders, merchants, scholars, professionals, clergymen, and

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<sup>89</sup> *The Coup D’Etat of 18-19 Brumaire, The Genesis of Napoleonic Propaganda* Afterword, pp: 1-5.

<sup>90</sup> *Napoleon: A Political Life*, Englund, Stephen, 2003.

<sup>91</sup> *Napoleon: The Immortal Emperor*, Gengembre, Gerard, 2001.

<sup>92</sup> *The Age of Napoleon*, Herold, Christopher, 2003.

<sup>93</sup> *Fatal Purity: Robespierre and the French Revolution*, Scurr, Ruth, May, 2006.

<sup>94</sup> *Great Nation: France from Louis XV to Napoleon*, Jones, Colin, 2002.

officials. The people in each district chose a slate of “notables” by popular vote. The First (1<sup>st</sup>) Consul was appointed by the Senate, and the Senate then appointed the Tribune and *Corps Legislatif* from these slates.

Napoleon held a plebiscite on the Constitution in December. The vote was not binding, but it allowed Napoleon to maintain a veneer of Democracy. The vote was verified as 3,000,000 in favor of the Constitution and 1,500 against the Constitution. This Constitution was succeeded by the Constitution of the Year X, which made Napoleon First Consul for Life.

**(f). The French Constitution of the Year X** was a national Constitution of France adopted during the Year X (1802) of the French Revolutionary Calendar. It superseded the Constitution of the Year VIII, revising the Consulate to augment Napoleon Bonaparte’s authority by making him First Consul for Life.

**(g) The French Constitution of Year XII** was a National Constitution of France adopted during the Year XII (1804)<sup>95</sup> of the French Revolutionary Calendar. It established the First French Empire with Napoleon Bonaparte, previously First Consul for Life, with wide-ranging powers, as Emperor of France.<sup>96</sup>

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<sup>95</sup> Religion and Revolution in France 1780-1804, Sepinwall, Goldstein, Alyssa, Jewish Quarterly Review, Vol. 95, 2005.

<sup>96</sup> Napoleon is Crowned Emperor of the French: December 2<sup>nd</sup>, 1804, Cavendish, Richard, History Today, Vol. 54, December, 2004.

**(h). The Charter of 1814** was a Constitution granted by King Louis XVIII<sup>97</sup> of France shortly after his restoration. The Congress of Vienna<sup>98</sup> demanded that Louis bring in a Constitution of some form before he was restored. It guaranteed many of the rights that most other countries in Western Europe had at that time. For example, some of the rights were “Frenchmen are equal before the law, whatever their titles and ranks,” as well as everyone may profess his religion with equal freedom, and shall obtain for his worship the same protection.”

There was a special provision made for the Roman Catholic Church as the official state religion. It ended with the words “Given at Paris, in the year of grace 1814, and of our reign the nineteenth (19<sup>th</sup>).” This would put the reign of Louis XVIII beginning in 1795, and the death of the only son of Louis XVIII’s brother, Louis XVI.

The position of the King was not as central as it had been in the time before the French Revolution;<sup>99</sup> however, the ministers were responsible to the King. The King was the head of state, with command of the armed forces vested in him. He also declared war and made peace treaties and appointed all people of public administration. The King alone could propose laws and could send them to either of the two (2) chambers (the Chamber of Peers and the Chamber of Deputies). Finance bills must be sent to the Chamber of Deputies.

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<sup>97</sup> Louis XVIII, Hansel, Philip, 1999.

<sup>98</sup> The Correspondence of Prince Talleyrand and King Louis XVIII During the Congress of Vienna, Talleyrand, Prince, June, 2005.

<sup>99</sup> The Perilous Crown: France Between Revolutions 1814-1848, The Oxford Journal, 2008.



(i). **The Charter of 1830** instigated the July Monarchy to France. It was considered a compromise between Constitutionalists and Republicans. After three (3) days of protests in July, 1830, the July Revolution, also called the “Three (3) Glorious” (*les trios glorieuses*)<sup>100</sup>, by the merchant *bourgeoisie*, who were outraged to be ousted from limited voters list, Charles X<sup>101</sup> of France was forced to abdicate. Charles X’s chosen successor was his young grandson, Henri, Comte de Chambord (1820-1883), but Henri never received his throne. The line of natural hereditary succession was abolished and a member of the Cadet Orleans line of the Bourbon family<sup>102</sup> was chosen, Louis Philippe of France<sup>103</sup>.

On August 7<sup>th</sup>, the Charter of 1814 was revised, and its preamble evoking the Ancien Regime (Ancient Regime) was eliminated. When voted on in the Chamber, it was passed by two-hundred and forty-six (246) votes to twelve (12). The new Charter was imposed on the King by the nation and not promulgated by the King. On August 9, 1830, Louis-Philippe d’Orleans<sup>104</sup> swore to uphold the Charter and was crowned King of the French” (*roi des Francois*), and not “King of France” (*roi de France*). The “July Monarchy” was to last until February 24, 1848, when the Second Republic was established.

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<sup>100</sup> James Welwood: *Physician to the Glorious Revolution*, Furdell, Elizabeth Lane, 1998.

<sup>101</sup> *Charles X, Dernier Roi de France et de Navarre*, Vivent, Jacques, Paris, 1958.

<sup>102</sup> *The Fortunes of the Bourbons*, Rowland, Kate Mason, Harper’s Magazine, January, 1895.

<sup>103</sup> Louis Philippe Orleans, Duc D’ Joseph, *The Columbia Encyclopedia*, 2004.

<sup>104</sup> Paris, Louis-Philippe-Albert d’Orleans, Comte de (1838-1894), Dodd, Anna Bowman, Harper’s Magazine, February, 1882.

The Charter of 1830 removed from the King the power to instigate legislation; Royal Ordinances were henceforth to concern only the application of laws. Hereditary peerage was eliminated, but not the institution of peerage. The census suffrage system was modified and the poll tax (*cens*) was reduced to two-hundred (200) francs, permitting individuals twenty-five (25) years old or older to vote, and to five hundred (500) francs for individuals thirty (30) years old or older to be elected to the Chamber of Deputies. The Law of the Double Vote was abolished, and the number of electors was thus doubled, without significantly increasing the size or characteristics of the electoral body. One (1) out of one-hundred and seventy (170) Frenchmen participates in the elections with the electorate at one-hundred and seventy thousand (170,000), which increased to two-hundred and forty thousand (240,000) by 1846. Catholicism was no longer the state religion, but only the “religion preferred by the majority of the French,” censorship of the press was abolished, and the French tricolor flag was reinstated.

(j). **The French Constitution of 1848** is the Constitution that was passed in France on November 4, 1848, by the National Assembly, the constituent body of the Second (2<sup>nd</sup>) French Republic. It was repealed on January 14, 1852, by the promulgation of the Constitution of 1852, which profoundly changed the face of the Second (2<sup>nd</sup>) Republic and served as the basis for the Second (2<sup>nd</sup>) French Empire.

(k). **The French Constitution of 1852** was enacted on January 14, 1852, by Charles Louis Napoleon Bonaparte (Napoleon III).<sup>105</sup> On December 25, 1852, the Constitution became the basis for the creation of the French Second (2<sup>nd</sup>) Empire. Louis Napoleon<sup>106</sup> brought an end to the Second (2<sup>nd</sup>) French Republic by the *Coup d'Etat* of December 2, 1851.<sup>107</sup> The same day, he had posters issued that proclaimed to the French people (*Appel au peuple*) his desire to restore the “system created by the First (1st) Consul.”

His coup was ratified by plebiscite on December 22 and 23, 1851. Backed by his strong success, he encouraged counselors Rouher, Baroche and Troplong to quickly write the new Constitution which enacted on January 14, 1852. The Constitution was modified by the French Senate (by a “*Senatus Consulte*”) on November 7, 1852, to permit the re-establishing of the title of “Emperor”, which was granted to Louis Napoleon. The Second (2<sup>nd</sup>) Empire was proclaimed on December 2, 1852, and the Imperial Constitution was enacted on December 25, 1852, without any significant change to the January Fourteenth (14<sup>th</sup>) Constitution.

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<sup>105</sup> Napoleon III: A Life, Bresler, Fenton, 2003.

<sup>106</sup> Napoleon III and His Regime”: An Extravaganza, Baguley, David, 2000.

<sup>107</sup> The Coupo d'Etat of 1851, “Letter to Mrs.Grote. December 8, 1851” Tocqueville Alexis de, Politics and Views, 1998.

**(l). The French Constitutional Laws of 1875.**

The Constitutional Laws of 1875 are the laws passed in France by the National Assembly between February and July, 1875, and such laws established the Third (3<sup>rd</sup>) French Republic.<sup>108</sup> The Constitutional Laws are roughly divided into three (3) laws:

- (a). The Act of February 24, 1875 (**organization of the Senate**);
- (b). The Act of February 25, 1875 (**The organization of Government**); and
- (c). The Act of July 16, 1875 (**The relationship between Governments**).

**(m). The French Constitutional Laws of 1946**

The Fourth (4<sup>th</sup>) Republican Constitution was a revival of the Third (3<sup>rd</sup>) Republic, which was in place before World War II, and suffered many of the same problems. France adopted the Constitution of the Fourth (4<sup>th</sup>) Republic<sup>109</sup> on October 13, 1946. Some attempts were made to strengthen the Executive Branch of Government, to prevent the unstable situation that had existed before the war, but the instability existed and the Fourth (4<sup>th</sup>) Republic saw frequent changes in Government. Although the Fourth (4<sup>th</sup>) Republic<sup>110</sup> saw economic growth in France and the rebuilding of the nation's social institutions and industry after the war, and although it is largely responsible for the development of the institutions of European unity which changed the continent

<sup>108</sup> Democracy in France: The Third and Fourth Republic, Thompson, David, 1952.

<sup>109</sup> France Under the Fourth Republic, Goguel, Francois, Cornell University Press, 1952.

<sup>110</sup> Locust Years, The Story of the Fourth Republic, Giles, Frank, 1994.

permanently, it is best remembered for its constant political instability and inability to take bold decisions regarding decolonization.

**(n). The French Constitutional Laws of 1958**

The Fifth (5<sup>th</sup>) Republic is the fifth (5<sup>th</sup>) and current Republican Constitution of France was introduced on October 5, 1958. The Fifth (5<sup>th</sup>) Republic emerged from the collapse of the French Fourth (4<sup>th</sup>) Republic, replacing a Parliamentary Government with a semi-presidential system.

The trigger for the collapse of the French Fourth (4<sup>th</sup>) Republic was the Algiers crises of 1958. Still a colonial power, conflict and revolt had begun the process of decolonization. French West Africa, French Indochina, and French Algeria still sent representatives to the French Parliament under systems of limited suffrage in the French Union. Algeria, in particular, the colony with the largest French population, saw rising pressure for separation from the “*Metropole*”. The situation was complicated by those in Algeria who wanted to stay part of France, so the Algerian War became not just a separatist movement, but had elements of a civil war. Further complications came when a section of the French army rebelled and openly backed the “*Algerie Francaise*” movement to defeat separation.

Charles de Gaulle, who had retired from politics a decade before, placed himself in the midst of the crisis, calling on the nation to suspend the Government and create a Constitutional system. De Gaulle<sup>111</sup> was carried to power by the inability of the Parliament to choose a Government, popular protest, and the last Parliament of the Fourth (4<sup>th</sup>) Republic choosing to vote for their dissolution and the convening of a Constitutional Convention. De Gaulle<sup>112</sup> condemned militant attacks committed in both Algeria and mainland France, but angered the rebel section of the army and “*Algerie Francaqise*” supporters, including the latter-the-day Front National leader, Jean-Marie Le Pen,<sup>113</sup> by arranging a peace with the nationalist rebels. Algeria became independent on July 5, 1962.

The Fourth (4<sup>th</sup>) Republic suffered from little political consensus, a weak executive, and Governments forming and falling in quick succession since the Second (2nd) World War. With no party or coalition able to sustain a Parliamentary majority, Prime Ministers found themselves unable to risk their political position with unpopular reforms. De Gaulle<sup>114</sup> and his supporters proposed a system of strong executive presidents elected for seven (7)-year terms. The President under the proposed Constitution would have executive powers to run the country in consultation with a Prime Minister whom he would appoint from each elected Parliament. These plans were

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<sup>111</sup> De Gaulle, Jackson, Julian, May, 2005.

<sup>112</sup> The Complete War Memoirs of Charles De Gaulle, De Gaulle, Charles, May, 1958.

<sup>113</sup> *Le Proces De Jean-Marie Le Pen*, Mathieu, Lindon, 1998.

<sup>114</sup> De Gaulle, Statesmanship, Grandeur, and Modern Democracy, Mahonney, J, and Manent, Pierre, August, 2000.

approved by 79.2 percent (79.2%) of those who voted in a referendum on September 28, 1958. Since each New Constitution establishes a New Republic, France moved from the Fourth (4<sup>th</sup>) to the Fifth (5<sup>th</sup>) Republic.<sup>115</sup>

## 2. Articles of the Constitution.

The French Constitution<sup>116</sup> of 1958 states as follows:

### (a). The PREAMBLE states:

**“The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946.”**

**“By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories that express the will to adhere**

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<sup>115</sup> Government and Politics in France, Knapp, Andrew, 2002.

<sup>116</sup> *This English translation was prepared by the European Affairs of the National Assembly. The French original is the sole authentic text.*

**to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic development.”**

**(a)(1). Article One (1).**

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

**(b). SOVEREIGNTY:**

**(b)(1). Article Two (2).**

The language of the Republic shall be French. The national emblem shall be the blue, white and red tricolor flag. The national anthem shall be “*La Marseillaise.*” The motto of the Republic shall be “*Liberty, Equality, Fraternity,*” Its principle shall be: “*Government of the people, by the people and for the people.*”

**(b)(2). Article Three (3).**

National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum. No section of the people or any individual



may arrogate to itself, or to himself, the exercise thereof. Suffrage may be direct or indirect as provided by the Constitution. It shall always be universal, equal and secret. All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute.

**(b)(3). Article Four (4).**

Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They must respect the principles of national sovereignty and Democracy.

**(c). THE PRESIDENT OF THE REPUBLIC:**

**(c)(1). Article Five (5).**

The President of the Republic shall see that the Constitution is observed. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of State. He shall be the guarantor of national independence, territorial integrity and observance of treaties.

**(c)(2). Article Six (6).**

The President of the Republic shall be elected for seven (7) years by direct universal suffrage. The manner of implementation of this Article shall be determined by an Institutional Act.

**(c)(3). Article Seven (7).**

The President of the Republic shall be elected by an absolute majority of the votes cast. If such a majority is not obtained on the first ballot, the second ballot shall take place on the second following Sunday. Only the two candidates who received the greatest number of votes in the first ballot, account being taken of any withdrawal of candidates with more votes, may stand in the second ballot. Balloting shall be begun by a writ of election issued by the Government.

The election of the new President shall be held not less than twenty (20) days and not more than thirty-five (35) days before the expiry of the term of the President in office. Should the Presidency of the Republic fall vacant for any reason whatsoever, or should the Constitutional Council on a reference from the Government rule by an absolute majority of the members that the President of the Republic is incapacitated, the duties of the President of the Republic is incapacitated, the duties of the President of the

Republic, with the exception of those specified in Articles Eleven (11) and Twelve (12), shall be temporarily exercised by the President of the Senate or, if the latter is in turn incapacitated, by the Government.

In the case of a vacancy, or where the incapacity of the President is declared permanent by the Constitutional Council, the ballot for the election of the new President shall, except in the event of a finding by the Constitutional Council of force "majeure", be held not less than twenty (20) days and not more than thirty-five (35) days after the beginning of the vacancy or the declaration that the incapacity is permanent.

If, in the seven (7) days preceding the last day for lodging presentations of candidatures, any of the persons who, less than thirty (30) days prior to that day, have publicly announced the Constitutional Council may decide to postpone the election. If, before the first ballot, any of the candidates dies or becomes incapacitated, the Constitutional Council shall declare the election postponed.

In the event of the death or incapacitation of either of the two candidates in the lead in the first ballot before any withdrawals, the Constitutional Council shall declare that the electoral procedure must be repeated in full, the same shall apply in the event of the death or incapacitation of either of the two (2) candidates remaining standing for the second (2<sup>nd</sup>) ballot.

All cases shall be referred to the Constitutional Council in the manner laid down in the second (2<sup>nd</sup>) paragraph of Article 61 or in that laid down for the presentation of candidates in the Institutional Act provided for in Article 6.

The Constitutional Council may extend the time limits set in the third (3<sup>rd</sup>) and fifth (5<sup>th</sup>) paragraphs, provided that polling takes place not later than thirty-five (35) days after the decision of the Constitutional Council. If the implementation of the provisions of this paragraph results in the postponement of the election beyond the expiry of the term of the President in office, the latter shall remain in office until his successor is proclaimed.

Neither Articles 49 and 50, nor Article 89 of the Constitution shall be implemented during the vacancy of the Presidency of the Republic or during the period between the declaration that the incapacity of the President of the Republic is permanent and the election of his successor.

**(c)(4). Article Eight (8).**

The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government.

**(c)(5). Article Nine (9).**

The President of the Republic shall preside over the Council of Ministers.

**(c)(6). Article Ten (10).**

The President of the Republic shall promulgate Acts of Parliament within fifteen (15) days following the final adoption of an Act and its transmission to the Government. He may, before the expiry of this time limit, ask Parliament to reconsider the Act or sections of the Act. Reconsideration shall not be refused.

**(c)(7). Article Eleven (11).**

The President of the Republic may, on a proposal from the Government when Parliament is in session or on a joint motion of the two assemblies, published in either case in the "*Journal Officiel*," submit to a referendum any Government bill which deals with the organization of the public authorities, or with reforms relating to the economic social policy of the Nation and to the public services contributing thereto, or which provides for authorization to ratify a treaty that, although not contrary to the Constitution, would affect the functioning of the institution.

Where the Referendum decides in favor of the Government Bill, the President of the Republic shall promulgate it within fifteen (15) days following the proclamation of the results of the vote.

**(c)(8). Article Twelve (12).**

The President of the Republic may, after consulting the Prime Minister and the Presidents of the Assemblies, declare the National Assembly dissolved. A general

election shall take place not less than twenty (20) days and not more than forty (40) days after the dissolution.

The National Assembly shall convene as of right on the second (2<sup>nd</sup>) Thursday following its election. Should it so convene outside the period prescribed for the ordinary session, a session shall be called by right for a fifteen (15) day period.

**(c)(9).Article Thirteen (13).**

The President of the Republic shall sign the ordinances and decrees deliberated upon the Council of Ministers. He shall make appointments to the civil and military posts of the State.

*Conseillers d'Etat, the grand Chancelier de la Legion d'Honneur, ambassadors and envoys extraordinary, senior members of the Audit Court, prefects, Government Representatives in the overseas territories, general officers, recteurs des academies and heads of central Government shall be appointed in the Council of Ministers.*

An Institutional Act shall determine the other posts to be filled in the Council of Ministers and the manner in which the power of the President of the Republic to make appointments may be delegated by him to be exercised on his behalf.

**(c)(10). Article Fourteen (14).**

The President of the Republic shall accredit ambassadors and envoys extraordinary to foreign powers, foreign ambassadors and envoys extraordinary shall be accredited to him.

**(c)(11). Article Fifteen (15).**

The President of the Republic shall be Commander-In-Chief of the armed forces. He shall preside over the higher national defense councils and committees.

**(c)(12). Article Sixteen (16).**

Where the Institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the Constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Assemblies and the Constitutional Council. He shall inform the Nation of these measures in a message.

The measures must stem from the desire to provide the Constitutional public authorities, in the shortest possible time with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures.

Parliament shall convene as of right. The National Assembly shall not be dissolved during the exercise of the emergency powers. The National Assembly shall not be dissolved during the exercise of the emergency powers.

**(c)(13). Article Seventeen (17).**

The President of the Republic has the right to grant pardon.

**(c)(14). Article Eighteen (18).**

The President of the Republic shall communicate with the two assemblies of Parliament by means of messages, which he shall cause to be read and which shall not be the occasion for any debate.

**(c)(15). Article Nineteen (19).**

Acts of the President of the Republic, other than those provided for under Articles 8 first (1<sup>st</sup>) paragraph, 11, 12, 16, 18, 54, 56 and 61, shall be countersigned by the Prime Minister and, where required, by the appropriate ministers.



**(d). THE GOVERNMENT:**

**(d)(1). Article Twenty (20).**

The Government shall determine and conduct the policy of the Nation. It shall have at its disposal the civil service and armed forces. It shall be responsible to Parliament in accordance with the terms and procedures set out in Articles 49 and 50.

**(d)(2). Article Twenty-One (21).**

The Prime Minister shall direct the operation of the Government. He shall be responsible for national defense. He shall ensure the implementation of legislation. Subject to Article 13, he shall have power to make regulations and shall make appointments to civil and military posts.

He may delegate certain of his powers to ministers. He shall deputize, if the case arises, for the President of the Republic as Chairman of the Councils and Committees referred to in Article 15. He may, in exceptional cases, deputize for him as Chairman of a meeting of the Council of Ministries, by virtue of an express delegation of powers for a specific agenda.

**(d)(3). Article Twenty-Two (22).**

Acts of the Prime Minister shall be countersigned, where required, by the Ministers responsible for their implementation.

**(d)(4). Article Twenty-Three (23).**

The duties of members of the Government shall be incompatible with the exercise of any Parliamentary office, any position of occupational representation at national level, any public employment or any occupational activity. An Institutional Act shall determine the manner in which the holders of each offices, position or employment shall be replaced. The replacement of Members of Parliament shall take place in accordance with the provisions of Article 25.

**(e). PARLIAMENT:**

**(e)(1). Article Twenty-Four (24).**

Parliament shall comprise the National Assembly and the Senate. The Deputies of the National Assembly shall be elected by direct suffrage. The Senate shall be elected by indirect suffrage. The representation of the territorial units of the Republic shall be ensured to the Senate. French nationals settled outside France shall be represented by the Senate.

**(e)(2). Article Twenty-Five (25).**

An Institutional Act shall determine the term for which each assembly is elected, the number of its members, their allowances, the conditions of eligibility and the terms of disqualifications and of incompatibility with membership. It shall likewise determine the manner of election of those persons who, in the event of a vacancy, are to replace deputies or senators whose seats have become vacant, until the general or partial renewal by election of the assembly to which they belonged.

**(e)(3). Article Twenty-Six (26).**

No Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the exercise of his duties. No Member of Parliament shall not be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the assembly of which he is a member. Such authorization shall not be required in the case of a serious crime or other major offense committed "*flagrante delicto*" or a final sentence.

The detention, subjection to custodial or semi-custodial measures, or prosecution of a Member of Parliament shall be suspended for the duration of the session if the assembly of which he is a member so requires. The assembly concerned shall convene as of right for additional sittings in order to permit the preceding paragraph to be applied should circumstances so require.

**(e)(4). Article Twenty-Seven (27).**

Any binding instruction shall be void. The right to vote of Members of Parliament shall be personal. An Institutional Act may, in exceptional cases, authorize voting by proxy. In that event, no member shall be given more than one proxy.

**(e)(5). Article Twednty-Eight (28).**

Parliament shall convene as of right in one ordinary session which shall start on the first working day of October and shall end on the last working day of June. The number of days for which each assembly may sit during the ordinary session shall not exceed one hundred and twenty (120). The sitting weeks shall be determined by each assembly. The Prime Minister, after consulting the President of the Assembly concerned or the majority of the members of each assembly may decide to meet for additional sitting days. The days and hours of sittings shall be determined by the rules of procedure of each assembly.

**(e)(6). Article Twenty-Nine (29).**

Parliament shall convene in extraordinary session, at the request of the Prime Minister or of the majority of the members of the National Assembly, to consider a specific agenda. Where an extraordinary session is held at the request of members of the National Assembly, the decree closing it shall take effect once Parliament has dealt with the agenda for which it was convened, or twelve (12) days after its first sitting, whichever

shall be the earlier. Only the Prime Minister may request a new session before the end of the month following the decree closing an extraordinary session.

**(e)(7). Article Thirty (30).**

Except where Parliament convenes as of right, extraordinary sessions shall be opened and closed by decree of the President of the Republic.

**(e)(8). Article Thirty-One (31).**

Members of the Government shall have access to the two (2) assemblies. They shall address either assembly whenever they so request.

**(e)(9). Article Thirty-Two (32).**

The President of the National Assembly shall be elected for the duration of the term for which the Assembly is elected. The President of the Senate shall be elected after each partial renewal by election.

**(e)(10). Article Thirty-Three (33).**

The sittings of the two (2) assemblies shall be public. A verbatim report of the debates shall be published in the *Journal Official*. Each assembly may sit in camera at the request of the Prime Minister or of one-tenth (1/10) of its members.

**(f). RELATIONS BETWEEN PARLIAMENT AND THE GOVERNMENT:**

**(f)(1). Article Thirty-Four (34).**

Statutes shall be passed by Parliament. Statutes shall determine the rules concerning:

(a). "Civic rights and the fundamental guarantees granted to citizens for the exercise of their public liberties; the obligations imposed for the purposes of national defense upon citizens in respect of their persons and their property;

(b). "Nationality, the status and legal capacity of persons, matrimonial regimes, inheritance and gifts;

(c). The determination of serious crimes and other major offences and the penalties applicable to them, criminal procedure; amnesty' the establishment of new classes of Courts and tribunals and the regulations governing the members of the Judiciary;

(d). The based rates and methods of collection of taxes of all types, the issue of currency;

(e). Statutes shall likewise determine the rules concerning:

(1). The electoral systems of Parliamentary assemblies  
and local assemblies;

(2). The creation of categories of public establishments;

(3). The fundamental guarantees granted to civil and  
military personnel employed by the State; and

(4) .the nationalization of enterprises and transfers of ownership in enterprises from the public to the private sector.

(f). Statutes shall determine the fundamental principles of:

- (1). The general organization of national defense;
- (2). the self-Government of territorial units, their powers and their resources;
- (3). education;
- (4). the regime governing ownership, rights "*in rem*" and civil and commercial obligations; and
- (5). labor law, trade-union law and social security.

(g). Finance Acts shall determine the resources and obligations of the State in the manner and with the reservations specified in an Institutional Act

(h) Social Security Finance Acts determine the general conditions for the financial balance of social security, and, in the light of their revenue forecasts, shall determine expenditure targets in the manner and with the reservations specified in an Institutional Act;

(i). Program Acts shall determine the objectives of the economic and social action of the State; and

(j). The provisions of this Article may be enlarged upon and complemented by an Institutional Act.

**(f)(2). Article Thirty-Five (35).**

A Declaration of War shall be authorized by the Parliament.

**(f)(3). Article Thirty-Six (36).**

Martial law shall be decreed in the Council of Ministers. Its extension beyond twelve (12) days may be authorized only by Parliament.

**(f)(4). Article Thirty-Seven (37).**

Matters other than those that fall within the ambit of statute shall be, matters for regulation. Acts of Parliament passed concerning their matters may be amended by decree issued after consideration with the "*Council d'Etat.*" Any such Acts which are passed after this Constitution has entered into force shall be amended by decree only if the Constitutional Council have declared that they are matters for regulation as defined in preceding paragraph.

**(f)(5). Article Thirty-Eight (38).**

In order to carry out its program, the Government may ask Parliament for authorization, for a limited period, to take measures by ordinance that are normally a matter for statute. Ordinances shall be issued in the Council of Ministers, after consultation with the "*Council d'Etat.*" They shall come into force upon publication, but



shall lapse if the bill to ratify them is not laid before Parliament before the date set by the enabling Act. At the end of the period referred to in the first (1<sup>st</sup>) paragraph of this Article, ordinances may be amended only by an Act of Parliament in these areas which are matters for statute.

**(f)(6). Article Thirty-Nine (39).**

The Prime Minister and members of Parliament alike shall have the right to initiate statutes. Government bills shall be discussed in the Council of Ministers after consultation with the “*Council d’Etat*” and shall be introduced in one (1) of the two (2) assemblies. Finance bills and social security finance bills shall be presented first to the National Assembly.

**(f)(7). Article Forty (40).**

Bills and amendments introduced to members of Parliament shall not be admissible where their adoption would have as a consequence; either a diminution of public resources, or the creation or increase of an item of public expenditure.

**(f)(8). Article Forty-One (41).**

Should it be found in the course of the legislative process that a member’s bill or amendment is not a matter for statute or is contrary to a delegation granted by virtue of Article 18, the Government may object that it is “inadmissible.” In the event of

disagreement between the Government and the Parliament of the Assembly concerned, the Constitutional Council, at the request of one or the other, shall rule within eight (8) days.

**(f)(9). Article Forty-Two (42).**

The discussion of Government bills shall pertain, in the assembly which first has the bill before it, to the text introduced by the Government. An assembly which has before it a text passed by the other assembly shall deliberate upon that text.

**(f)(10). Article Forty-Three (43).**

Government and members' bills shall, at the request of the Government or of the assembly having the bill before it, be referred for consideration in committees specially set up for this purpose. Government and members' bills concerning which such a request has not been made shall be referred to one of the standing committees, the number of which shall be limited to six (6) in each assembly.

**(f)(11). Article Forty-Four (44).**

Members of the Parliament and the Government shall have the right of amendment. Once the debate has begun, the Government may object to the consideration of any amendment which has not previously been referred to the committee. If the Government

so requests, the assembly having the bill before it shall decide by a single vote on all or part of the text under discussion on the sole basis of the amendments proposed or accepted by the Government.

**(f)(12). Article Forty-Five (45).**

Every Government or members' bill shall be considered successively in the two (2) assemblies of Parliament with a view to the adoption of an identical text. If, as a result of a disagreement between the two assemblies, it has proved impossible to adopt a Government or members' bill after two (2) readings by each assembly; or, if the Government has declared the matter urgent, after a single reading by each of them, the Prime Minister may convene a joint committee, composed of an equal number of members from each assembly, to propose a text on the provisions still under discussion.

The text drafted by the joint committee may be submitted by the Government to both assemblies for approval. No amendment shall be admissible without the consent of the Government. If the joint committee does not succeed in adopting a common text, or if the text is not adopted as provided in the preceding paragraph, the Government may, after a further reading by the National Assembly and by the Senate, ask the National Assembly to make a final decision. In that event, the National Assembly may reconsider either the text drafted by the joint committee, or the last text passed by it, as modified, if such is the case, by any amendment or amendments adopted by the Senate.

**(f)(13). Article Forty-Six (46).**

Acts of Parliament that the Constitution characterizes as intuitional shall be passed and amended as provided in this Article. A Government or members' bill shall not be debated and put to the vote in the assembly in which it was first introduced until fifteen (15) days have elapsed since its introduction.

The procedure set out in Article 45 shall apply. Nevertheless, in the absence of agreement between the two (2) assemblies, the text may be adopted by the National Assembly on final reading only by an absolute majority of its members. Institutional Acts relating to the Senate must be passed in identical terms by the two (2) assemblies. Intuitional Acts shall not be promulgated until the Constitutional Council has declared their conformity with the Constitution.

**(f)(14). Article Forty-Seven (47).**

Parliament shall pass finance bills in the manner provided by an Institutional Act. Should the National Assembly fail to reach a decision on first reading within forty (40) days following the introduction of a bill, the Government shall refer the bill to the Senate, which must rule within fifteen (15) days. The procedure set out in Article 45 shall then apply. Should Parliament fail to reach a decision within seven (7) days, the provisions of the bill may be brought into force by ordinance.

Should the finance bill establishing the resources and expenditures for a financial year not be introduced in time for promulgation before the beginning of that year, the

Government shall as a matter of urgency ask Parliament for authorization to collect taxes and shall make available by decree the funds needed to meet the commitments already voted for. The time limits set by this Article shall be suspended when Parliament is not in session. The Audit Court shall assist Parliament and the Government in monitoring the implementation of finance acts.

**(f)(15). Article Forty-Eight (48).**

Without prejudice to the application of the last three (3) paragraphs of Article 28, precedence shall be given on the agendas of the assemblies, and in the order determined by the Government, to the discussion of Government bills and of members' bills accepted by the Government. At one (1) sitting a week, at least, precedence shall be given to questions from members of Parliament and to answers by the Government. At one (1) sitting per month precedence shall be given to the agenda determined by each assembly.

**(f)(16). Article Forty-Nine (49).**

The Prime Minister, after deliberation by the Council of Ministers, may make the Government's program or possibly a statement of its general policy an issue of its responsibility before the National Assembly. The National Assembly may raise an issue of the Government's responsibility by passing a "motion of censure." Such a motion shall not be admissible unless it is signed by at least one tenth (1/10<sup>th</sup>) of the members of

the National Assembly. Voting may not take place within forty-eight (48) hours after the motion has been introduced. Only the voters in favor of the “motion of censure” shall be counted; the “motion of censure” shall not be adopted unless it is voted for by the majority of the members of the Assembly. Except as provided in the following paragraph, a deputy shall not sign more than three (3) “motion of censures” during a single ordinary session and more than one (1) during a single extraordinary session.

The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a bill an issue of the Government’s responsibility before the National Assembly. In that event, the bill shall be considered adopted unless a “motion of consent,” introduced within the subsequent twenty-four (24) hours, is carried as provided in the preceding paragraph. The Prime Minister may ask the Senate to approve a “statement of general policy.”

**(f)(17). Article Fifty (50).**

Where the National Assembly carries a “motion of censure,” or where it fails to endorse the program or a statement of general policy of the Government, the Prime Minister must tender the resignation of the Government to the President of the Republic.

**(f)(18). Article Fifty-One (51).**

The closing of ordinary or extraordinary sessions shall be postponed by right in order to permit the application of Article 49, if the case arises. Additional sittings shall be held by right for the same purpose.

**(g). TREATIES AND INTERNATIONAL AGREEMENTS:<sup>117</sup>**

**(g)(1). Article Fifty-Two (52).**

The President of the Republic shall negotiate and ratify treaties. He shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification.

**(g)(2). Article Fifty-Three (53).**

Peace treaties, commercial treaties, treaties or agreements relating to international organization, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that

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<sup>117</sup> *Traites et Conventions en Vigueur Entre la France et les Puissances Etrangeres*, (Treaties in Force in France Since 1918), Paris, 1982.

involve the cession, exchange or addition of territory, may be ratified or approved only by virtue of an Act of Parliament.

They shall not take effect until they have been ratified or approved. No cession, exchange or addition of territory shall be valid without the consent of the population concerned.

**(g)(3). Article Fifty-Three-One (53-1):**

The Republic may conclude, with European States that are bound by commitments identical with its own in the matter of asylum and the protection of human rights and fundamental freedoms, agreements determining their respective jurisdiction in requests for asylum submitted to them. However, even if the request does not fall within their jurisdiction under then terms of these agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France for some other reason.

**(g)(4). Article Fifty-Four (54).**

If the Constitutional Council, on a reference from the President of the Republic or from the Prime Minister, from the President of one (1) or the other assembly, or from sixty (60) deputies or sixty (60) senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the



international commitment in question may be given only after amendment of the Constitution.

**(g)(5). Article Fifty-Five (55).**

Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.

**(h). THE CONSTITUTIONAL COUNCIL:**

**(h)(1). Article Fifty-Six (56).**

The Constitutional Council shall consist of nine (9) members, whose term of office shall be nine (9) years and shall not be renewable. One-third (1/3) of the membership of the Constitutional Council shall be renewed every three (3) years. Three (3) of its Members shall be appointed by the President of the Republic, three (3) by the President of the National Assembly and three (3) by the President of the Senate.

In addition to the nine (9) members provided for above, former Presidents of the Republic shall be "*ex officio*" life members of the Constitutional Council. The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie.

**(h)(2). Article Fifty-Seven (57).**

The office of members of the Constitutional Council shall be incompatible with that of minister or Member of Parliament. Other incompatibilities shall be determined by an Intuitional Act.

**(h)(3). Article Fifty-Eight (58).**

The Constitutional Council shall ensure the proper conduct of the election of the President of the Republic. It shall examine complaints and shall declare the results of the vote.

**(h)(4). Article Fifty-Nine (59).**

The Constitutional Council shall rule on the proper conduct of the election of deputies and senators in disputed cases.

**(h)(5). Article Sixty (60).**

The Constitutional Council shall ensure the proper conduct of referendum proceedings and shall declare the results of the referendum.

**(h)(6). Article Sixty-One (61).**

Institutional Acts, before their promulgation, and the rules of procedure of the Parliamentary assemblies, before their entry into force, must be referred to the Constitutional Council, which shall rule on their conformity with the Constitution, to the same end, acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or sixty (60) senators.

In the cases provided for in the two (2) preceding paragraphs, the Constitutional Council must rule within one (1) month. However, at the request of the Government, if the matter is urgent, this period shall be reduced to eight (8) days. In these same cases, reference to the Constitutional Council shall suspend the time limit for promulgation.

**(h)(7). Article Sixty-Two (62).**

A provision declared “unconstitutional” shall be neither promulgated nor implemented. No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all Courts.

**(h)(8). Article Sixty-Three (63).**

An Institutional Act shall determine the rules of organization and operation of the Constitutional Council, the procedures to be followed before it, and, in particular, the time limits allowed for referring disputes to it.

**(i). JUDICIAL AUTHORITY:**

**(i)(1). Article Sixty-Four (64).**

The President of the Republic shall be the guarantor of the independence of the Judicial Authority. He shall be assisted by the High Council of the Judiciary. An Intuitional Act shall determine the regulation governing the members of the Judiciary. Judges shall be irremovable.

**(i)(2). Article Sixty-Five (65).**

The High Council of the Judiciary shall be presided over by the President of the Republic. The Minister of Justice shall be its Vice President "*ex officio*." He may deputize for the President of the Republic. The High Council of the Judiciary shall consist of two (2) sections, one with jurisdiction for judges, and the other for public prosecutors.

The section with jurisdiction for judges shall comprise, in addition to the President of the Republic and the Minister of Justice, five (5) judges and one (1) public prosecutor, one (1) *Conseiller d'Etat* appointed by the *Conseil d'Etat*, and three (3) prominent citizens who are not members either of Parliament or of the Judiciary, appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate.

The section with jurisdiction for public prosecutors shall comprise, in addition to the President of the Republic and the Minister of Justice, five (5) public prosecutors and

one (1) judge, and the *Conseiller d'Etat* and the three (3) prominent citizens referred to in the preceding paragraph.

The section of the High Council of the Judiciary with jurisdiction for judges shall make nominations for the appointment of judges in the "Cour d' Cassation" (Court of Cassation), the first presidents of the Courts of Appeal and the Presidents of the "*Tribunaux de Grande Instance*." Other judges shall be appointed with its assent. It shall act as the disciplinary council for judges. When acting in that capacity, it shall be presided over by the first President of the "Cour d' Cassation" (Court of Cassation).

The section of the High Council of the Judiciary with jurisdiction for public prosecutors shall give its opinion on the appointment of public prosecutors, with the exception of posts to be filled in the council of Ministers. It shall give its opinion on disciplinary penalties with regard to public prosecutors. When acting in that capacity, it shall be presided over by the Chief Public Prosecutor at the "Cour d' Cassation" (Court of Cassation). An Institutional Act shall determine the manner in which this Article is to be implemented.

**(i)(3). Article Sixty-Six (66).**

No one shall be arbitrarily detained. The Judicial Authority, guardian of individual liberty, shall ensure the observance of this principle as provided by statute.

**(k). CRIMINAL LIABILITY OF MEMBERS OF THE GOVERNMENT:**

**(k)(1). Article Sixty-Eight-One (68-1).**

Members of the Government shall be criminally liable for acts performed in the exercise of their duties and classified as serious crimes or other major offences at the time they were committed. They shall be tried by the Court of Justice of the Republic. The Court of Justice shall be bound by such definition of serious crimes and other major offences and such determination of penalties as are laid down by statute.

**(k)(2). Article Sixty-Eight-Two (68-2).**

The Court of Justice of the Republic shall consist of fifteen members. Twelve (12) of these are Members of Parliament elected in equal number from among their ranks by the National Assembly and the Senate after each general or partial renewal by election of these assemblies, and three (3) judges of the “Cour d’ Cassation” (Court of Cassation), one (1) of whom shall preside over the Court of Justice of the Republic.

Any person claiming to be a victim of a serious crime or other major offence committed by a member of the Government in the exercise of his duties may lodge a complaint with a petition committee. This committee shall order the case to be either closed or forwarded to the Chief Public Prosecutor at the “Cour d’ Cassation” (Court of

Cassation) for referral to may also make a reference “*ex officio*” to the Court of Justice of the Republic with the assent of the Petitions committee. An Institutional Act shall determine the manner in which this Article is to be implemented.

**(k)(3). Article Sixty-Eight-Three (68-3).**

The provisions of this title shall apply to acts committed before its entry into force.

**(l). THE ECONOMIC AND SOCIAL COUNCIL:**

**(l)(1). Article Sixty-Nine (69).**

The Economic and Social Council, on a reference from the Government, shall give its opinion on such Government bills, draft ordinances or decrees, and Members’ Bills as have been submitted to it. A member of the Economic and Social Council may be designated by the Council to present, to the Parliamentary Assemblies, the opinion of the Council on such bills or drafts as have been submitted to it.

**(l)(2). Article Seventy (70).**

The Economic and Social Council may likewise be consulted by the Government on any economic or social issue. Any plan or program bill of an economic or social character shall be submitted to it for its opinion.

**(l)(3). Article Seventy-One (71).**

The composition of the Economic and Social Council and its rules of procedure shall be determined by an Institutional Act.

**(m). TERRITORIAL UNITS:**

**(m)(1). Article Seventy-Two (72).**

The territorial units of the Republic shall be the communes, the departments and the overseas territories. Any other territorial unit shall be established by statute. These units shall be self-governing through elected councils and in the manner provided by statute. In the departments and in the territories, the delegate of the Government shall be responsible for national interests, administrative supervision and the observance of the law.

**(m)(2). Article Seventy-Three (73).**

Measures may be taken to adapt the legislative system and administrative organization of the overseas departments to their particular situation.



**(m)(3). Article Seventy-Four (74).**

The overseas territories of the Republic shall have a particular form of organization which taken account of their own interests with the regard for the general interest of the Republic. The bodies of rules governing the overseas territories shall be established by Institutional Acts that define, "*inter alia*," the jurisdiction of their own institutions; they shall be amended in accordance with the same procedure after consultation with the territorial assembly concerned. Other provisions concerning their particular form of organization shall be defined and amended by statute after consultation with the territorial assembly concerned.

**(m)(4). Article Seventy-Five (75).**

Citizens of the Republic who do not have ordinary civil status, the only one referred to in Article 34, shall retain their personal status so long as they have not renounced it.

**(n). ASSOCIATION AGREEMENTS:**

**(n)(1). Article Eighty-Eight (88).**

The Republic may conclude agreements with States that wish to associate themselves with it in order to develop their civilization.

**(o). THE EUROPEAN COMMUNITIES AND THE EUROPEAN UNION (EU):**

**(o)(1). Article Eighty-Eight-One (88-1).**

The Republic shall participate in the European Communities and in the European Union (EU) constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of these powers in common.

**(o)(2). Article Eighty-Eight-Two (88-2).**

Subject to reciprocity and in accordance with the terms of the Treaty on European Union (EU) signed on February 7, 1992, France agrees to the transfer of powers necessary for the establishment of European Economic and Monetary Union and for the determination of rules relating to the crossing of the external borders of the Member States of the European community.

**(o)(3). Article Eighty-Eight-Three (88-3).**

Subject to reciprocity and in accordance with the terms of the Treaty on European Union (EU) signed on February 7, 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither exercise the office of mayor or deputy mayor nor participate in the designation of Senate electors or in the election of senators. An Institutional Act

passed in identical terms by the two (2) assemblies shall determine the manner of implementation of the Article.

**(o)(4). Article Eighty-Eight-Four (88-4).**

The Government shall lay before the National Assembly and the Senate any proposals for Community instruments which contain provisions which are matters for statute as soon as they have been transmitted to the Council of the Communities. Whether Parliament is in session or not, resolutions may be passed under this Article in the manner laid down by the rules of procedure of each assembly.

**3. Provisions for Changing the Constitution.**

**(a). The Amendment of the Constitution:**

**(a)(1). Article Eighty-Nine (89).**

The President of the Republic, on a proposal by the Prime Minister, and Members of Parliament alike shall have the right to initiate amendment of the Constitution. A Government or a Members' Bill to amend the Constitution shall be passed by the two (2) assemblies in identical terms. The Amendment shall have effect after approval by referendum.

A Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is adopted by a three-fifths (3/5ths) majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly. No Amendment Procedure shall be commenced or continued where the integrity of the territory is jeopardized. The Republican Form of Government shall not be the object of an Amendment.

### **CHAPTER III**

#### **III. THE EXECUTIVE POWER.**

##### **A. The United States.**

All Executive power in the Federal Government is vested in the President of the United States, although power is often delegated to the Cabinet members and other officials. The President and Vice President<sup>118</sup> are elected as “running mates” for four (4)-year terms by the Electoral College, for which each state, as well as the District of Columbia, is allocated a number of seats based on its representation in both houses of Congress.

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<sup>118</sup> A Vice President with Unprecedented Power, Rutten, Tim, September, 2008.

The Executive Branch consists of the President and delegates. The President is both the head of state and Government, as well as the military commander-in-chief, Chief Diplomat and Chief of Party. The President, according to the Constitution, must “take care that the laws be faithfully executed.” The President presides over the Executive Branch of the Federal Government, a vast organization numbering about four million (4,000,000) people, including one million (1,000,000) active-duty military personnel.

The President may sign legislation passed by Congress into law, or may veto it, preventing it from becoming law unless two-thirds (2/3rds) of both houses of Congress vote to override the veto. The President may, with the consent of two-thirds (2/3rds) of the Senate, make treaties with foreign nations. The President may be impeached by a majority in the House and removed from office by a two-thirds (2/3rds) majority in the Senate (for treason, bribery, or other high crimes and misdemeanors). The President<sup>119</sup> may not dissolve Congress or call special elections, but does have the power to pardon, or release, criminals convicted of offenses against the Federal Government (except in cases of impeachment), enact executive orders, and (with the consent of the Senate) appoint Supreme Court Justices and Federal Judges.

The Vice President is the second-highest executive official of the Government. As first (1<sup>st</sup>) in the United States’ presidential line of succession, the Vice President becomes

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<sup>119</sup> The Cult of the Presidency: America’s Dangerous Devotion to Executive Power, Healy, Gene, May, 2008.

President upon the death, resignation, or removal of the President, which has happened nine (9) times in the history of the United States. His or her only other constitutional duty is to serve as President of the Senate and break any tie votes in the Senate. The Vice President has been seen as an unofficial adviser to the President.

The relationship between the President and the Congress reflects that between the English Monarchy and Parliament at the time of the framing of The United States' Constitution. Congress can legislate to constrain the President's Executive Power, even with respect to his command of the Armed Forces. This power is used only rarely. While the President can directly propose legislation, he must rely on supporters in Congress to promote and support his legislative agenda. After identical copies of a particular bill have been approved by a majority of both houses of Congress, the President's signature is required to make these bills law. The President has the power to veto Congressional legislation. Congress can override a presidential veto with a two-thirds (2/3rds) majority vote from both houses.

The ultimate power of Congress over the President is that of impeachment or removal of the elected President through a House vote, a Senate trial, and a Senate vote (by two-thirds (2/3rds) majority in favor). The President makes around two thousand (2,000) executive appointments, including members of the Cabinet and Ambassadors, which must be approved by the Senate. The President can also issue Executive Orders and Pardons, and has other Constitutional duties, among them the requirement to give a "State of the Union Address" to Congress from time to time (usually once a year).

Although the President's Constitutional role may appear to be constrained, the Office carries enormous prestige that typically eclipses the power of Congress.

The Vice President<sup>120</sup> is first in the line of succession, and is the President of the Senate "*ex officio*", with the ability to cast a tie-breaking vote. The members of the President's Cabinet are responsible for administering the various Departments of States, including the Department of Defense, the Justice Department, and the State Department.<sup>121</sup> These departments and department heads have considerable regulatory and political power, and it is they who are responsible for executing Federal Laws and regulations.

The day-to-day enforcement and administration of Federal Laws is in the hands of the various Federal Executive Departments, created by Congress to deal with specific areas of national and international affairs. The heads of the fifteen (15) departments chosen by the President and approved with the "advise and consent" of the United States Senate, form a council of advisors generally known as the President's "Cabinet." In addition to departments, there is a number of staff organizations grouped into the Executive Office of the President. These include the White House staff, the National Security Council, the Office of Management and Budget, the Council of Economic Advisers, the Office of the United States Trade Control Policy and the Office of Science and Technology Policy.

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<sup>120</sup> The Enhanced Role of the Vice President, Murphy, John M., Stuckey, Mary E., September, 2008.

<sup>121</sup> Dangerous Diplomacy: How the State Department Threatens America's Security, Mowbray, Joel, 2006.

There are also independent agencies, such as the National Aeronautics and Space Administration (NASA), the Central Intelligence Agency (CIA),<sup>122</sup> and the Environmental Protection Agency. There are Government-owned corporations, such as the Federal Deposit Insurance Corporation, the National Railroad Passenger Corporation and the United States Postal Service. By law, each agency must submit an annual Section three-hundred (300) Report to President's Office of Management and Budget. The details on how agencies collect and share information and how they are upgrading and improving their information technology decisions are becoming increasingly important.

**B. France.**

Since the referendum of October, 2000, the term of the presidential office was reduced to five (5) years. The President is elected by the direct vote and the majority poll with two (2) terms, since the Constitutionally revision of 1962. In the French Executive Power,<sup>123</sup> the President of the Republic<sup>124</sup> is not a Governmental institution, its role is:

(a). To take care of the respect of the Constitution;

(b). To ensure by the arbitration the regular operation of the authorities as well

as the continuity of the State;

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<sup>122</sup> Inside the CIA: revealing the Secrets of the World's Most Powerful Spy Agency, Kessler, Ronald, October, 2006.

<sup>123</sup> The Government and Politics of France, Knapp, Andrew, Wright, Vincent, April, 2006.



(c). To guarantee national independence, the integrity of the own territory and the respect of international engagements;

(d). It has the capacity to name and put an end to the functions of the Prime Minister, and, on proposal of this one;

(e). It names the Ministers;

(f). It chairs the Council of Ministers;

(g). Signs the ordinances and the decrees deliberated at the time of this authority;

(h). He promulgates the laws adopted, in the fifteen (15) days of their transmission;

(i). He has the capacity to dissolve the French National Assembly, after consultation of the Prime Minister and the Presidents of the two (2) rooms;

(j). He has the right to reprieve; and

(k). He has a capacity of nomination (ambassadors, consuls, etc.).

The President of the Republic<sup>125</sup> can ask for a new deliberation of the law voted by the Parliament, which cannot be refused to him. The President of the Executive Power is also the chief of the armies; however, it is the Prime Minister who presides over the armed forces and who is responsible for national defense. The

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<sup>125</sup> The Government and Politics of France, Third Edition, Stevens, Anne, November, 2003.

President of the Republic represents the State abroad and directs the foreign politics. The negotiation and the ratification of the international treaties are the President's concern. The President can take full power when the nation is threatened. This prerogative was applied by General de Gaulle of April 23<sup>rd</sup> to September 30, 1961, at the time of the attempt at putsch of the Organization of the Secret Army (OAS),<sup>126</sup> favorable to French Algeria.

The Prime Minister represents in the French Executive Power, with the President of the Republic, the Executive Power of the French State. The Prime Minister is responsible for the following:

- (a). Directs the action of the Government;
- (b). Determines and leads the general policy of the Nation;
- (c). He has the possibility of imposing his views on the Government and the public administration;
- (d). Carries out the civil servant nomination;
- (e). Gives his orders to the prefects;
- (f). The Prime Minister ensures the execution of the laws;
- (g). Adopts by the Government the bills which are subjected to the vote of the Parliament;

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<sup>126</sup> Challenging De Gaulle: The O.A.S. and the Counter-Revolution in Algeria, 1954-1962, Harrison, Alexander, November, 1954.

(h). He possesses the regulatory capacity, which includes all that does not enter expressly the field of the laws;

(i). The Prime Minister can work out simple decrees with the only counter-signature of the Ministers in charge of their execution; and

(j). The Prime Minister can seize the Constitutional Council and ask for the convocation of the Parliament in extraordinary session.

## **CHAPTER IV**

### **IV. THE LEGISLATIVE POWER.**

#### **A. The United States.**

The United States Congress<sup>127</sup> is the Legislative Branch of the Federal Government. It is bicameral, comprising the House of Representatives and the Senate. The House of Representatives consists of four hundred and thirty five (435) voting members, each of whom represents a Congressional district and serves for a two (2)-year term. In addition of the four hundred and thirty-five (435) members, there are five (5) non-voting members, consisting of four (4) delegates and one (1) resident commissioner. There is one (1) delegate each from the District of Columbia, Guam, Virgin Islands, and American Samoa, and the resident commissioner is from Puerto Rico.

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<sup>127</sup> U. S. Government: The Congress, Fitzpatrick, Anne, January, 2004.

House seats are apportioned among the states by population. Each state has two (2) Senators regardless of population. There are a total of one hundred (100) Senators, who serve six (6)-terms (one-third (1/3<sup>rd</sup>) of the Senate stands every two (2) years. Each Congressional chamber (House or Senate) has particular exclusive powers. The Senate must give “advice and consent” to many important Presidential appointments. The House must introduce any bills for the purpose of raising revenue.

The consent of both chambers is required to make any law. The powers of Congress are limited to those enumerated in the Constitution;<sup>128</sup> all other powers are reserved to the states and the people. The Constitution also includes the “necessary-and-proper clause”, which grants Congress the power to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” Members of the House and Senate are elected by first-past-the-post voting in every state, except Louisiana and Washington, which have runoffs.

The Constitution<sup>129</sup> does not specifically call for the establishment of Congressional Committees. As the Nation grew, so did the need for investing pending legislation more thoroughly. The 108<sup>th</sup> Congress (2003-2005) had nineteen (19) standing committees in the House and seventeen (17) in the Senate. It had four (4) joint permanent committees with members from both Houses overseeing the Library of Congress, printing, taxation, and the economy. Each House can name special, or select,

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<sup>128</sup> The United States Constitution, Currie, David P., Stevos, Joyce, 1985.

<sup>129</sup> The Invisible Constitution, Tribe, Lawrence, September, 2008.

committees to study specific problems. Because of an increase in workload, the standing committees have also spawned some one hundred and fifty (150) subcommittees.

The Constitution<sup>130</sup> grants numerous powers to Congress. These include the following powers:

- (a). Levy and collect taxes;
- (b) Provide for common defense and promote the pursuit of liberty;
- (c) Coin money and regulate its value;
- (d). Provide for punishment for counterfeiting;
- (f). Establish post offices and roads;
- (g). Promote progress of science;
- (h). Create Courts inferior to the Supreme Court;
- (i). Define and punish piracies and felonies;
- (j). Declare war, raise and support armies;
- (k). Provide and maintain a Navy, make rules for the regulation of land and naval forces;
- (l). Provide for, arm, and discipline the militia;
- (m). Exercise exclusive legislation in the District of Columbia; and

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<sup>130</sup> How Democratic is the United Constitution, Dahl, Robert A., March 28, 2002.

(n). Make laws “necessary and proper” to execute the powers of Congress.

Congressional oversight is intended for the following:

- (a). Prevent waste and fraud;
- (b). Protect civil liberties and individual rights;
- (c). Ensure executive compliance with the law;
- (d). Gather information for making laws and educating the public; and
- (e). Evaluate executive performance.

Congressional oversight applies to cabinet departments, executive agencies, regulatory commissions, and the presidency. Congress’s oversight function takes many of the following forms:

- (a). Committee inquiries and hearings;
- (b). Formal consultations with and reports from the President;
- (c). Senate advice and consent for presidential nominations and for treaties;
- (d). House impeachments proceedings and subsequent Senate trials;
- (e). House and Senate proceedings under the Twenty-fifth (25<sup>th</sup>) Amendment in the event that the President becomes disabled or the Office of the vice President falls vacant;
- (f). Informal meetings between legislators and executive officials; and
- (g). Congressional membership.

Each state is allocated a number of seats based on its representation in the House of Representatives.<sup>131</sup> Each state is allocated two (2) Senators regardless of its population. At the present time, the District of Columbia elects a non-voting representative to the House of Representatives along with American Samoa, the United States Virgin Islands, and Guam.

**B. France.**

The Legislative Branch in France<sup>132</sup> is vested in a Parliament called "*Le Parlement*," which is comprised of two (2) bodies:

1. *L'Assemblée Nationale* or *National Assembly*, which is directly elected by the French people; and
2. *Le Sénat*, which is indirectly elected by the citizenry.

As the Legislative Branch of Government, Parliament is engaged primarily in the debate and adoption of laws. Legislation relating to the Government revenues and expenditures is especially important. The other principal duty of Parliament is to oversee the French Government's exercise of executive authority, although the oversight capacity was restricted somewhat by the 1958 Constitution.

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<sup>131</sup> The House (History of the House of Representatives), Remini, Robert V., April 25, 2006.

<sup>132</sup> The French Legal System, Elliott, Catherine, Jeanpierre, Eric, Vernon, Catherine, July, 2006.

The five-hundred and seventy-seven (577) members of the National Assembly are directly elected for five (5)-year terms. Candidates for the National Assembly are elected by majority vote in single-member electoral districts. Runoff elections are required if no candidate receives more than fifty percent (50%) of the vote. Candidates who win at least twelve and one-half (12.5%) of the first (1<sup>st</sup>) round vote are eligible to run in the second (2<sup>nd</sup>) round. The three hundred and twenty-one (321) members of the Senate are elected indirectly by an electoral college. A law introduced a number of reforms and was approved in July, 2003. The law specified that Senators would be elected to six (6)-year terms, with one half (1/2) of the Senate elected every three (3) years.

The Constitution of the Fifth (5<sup>th</sup>) Republic introduced two (2) distinctive measures intended to streamline the legislative process. The first measure granted the Government the authority to demand an up-or-down vote on an entire bill or any portion of a bill in either chamber. In 1995, the Constitution<sup>133</sup> was amended to provide a nine (9)-month Parliamentary session to run continuously from October to June. In addition, the Constitution permits the National Assembly to censure the Government in a motion passed by an obsolete majority of assembly members. Sponsors of failed motions of censure are barred from introducing similar motions during the same session.

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<sup>133</sup> "Droit Constitutionnel et Institutions Polique," Prelot, 1990.



As provided in Title V, Article 34, of the Constitution,<sup>134</sup> the Legislature's power to enact laws is limited to the following areas:

- (a). Civil rights;
- (b). Nationality;
- (c). Status;
- (d). Capacity of persons;
- (e). Crimes and criminal procedures;
- (f). Currency;
- (g). Inheritance; and
- (h). Taxes.

Laws on all other subjects are considered regulatory in nature and are promulgated by the Executive, pursuant to Title V, Article 33, of the Constitution.<sup>135</sup>

The Official Gazette for France is the Official Journal, or "*Journal Officiel*," commonly referred to as the "JO." Laws come into force upon the publication in the "JO." Regulations, from the executive, also appear in the "JO," as do ratified treaties. The "JO" has a long history, beginning with as a semi-official journal in 1789, and then evolving in the "JO" in 1880.

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<sup>134</sup> "*Les Constitutions et les Principales lois Politiques de la France Depuis 1789*," Berlia, G., Paris, 1952.

<sup>135</sup> "*Liberteés Publiques et Droits de l'Homme*," Lebreton, A., 1999.

The International Legal Studies section of the Harvard Law School Library has the *Journal Officiel de la Republique Francais: Edit de Matin* at Moody call number FRA 202 JOU. As the Library maintains this collection in microfiche, it is located in the microfiche room on the second (2<sup>nd</sup>) floor of Langdell, in drawers 944-946. For previous versions of the "JO" copies are available at FRA 201 in the ILS stacks.

Before a law is officially enacted, there are draft bills generated by *L'Assemblee Nationale* and *Le Senat*, which are also published in the JO. A search of the debates of *Le Senat* and *L'Assemblee Nationale*, as well as *Le Senat's* and *L'Assemblee Nationale's* other Parliamentary materials are of assistance when looking for pending, very recently enacted legislation or the legislative history.

Legislation in France consists of the treaties, Constitution, codes, statues and regulations. The term "legislation" refers to Parliamentary Statues as opposed to regulations. Since the Constitution of 1958, the domain of Parliamentary Statues is restricted to a limited number of matters.<sup>136</sup> Parliamentary Laws shall establish the rules concerning civil rights, nationality, status and capacity of persons, inheritance, crimes and criminal procedures and taxes and currency. They shall also determine the fundamental principles of education, property rights, labor law, and social security. All other legislation can be enacted by the executive by means of regulations, which can be

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<sup>136</sup> Article 34, The French Constitution of 1958.

autonomous<sup>137</sup> or taken to implement a statute.<sup>138</sup> In addition, the Government can legislate within the legislative field of competence via ordinances<sup>139</sup> and presidential decisions.<sup>140</sup>

Since the Constitution of 1958 and the creation of "*Conseil Constitutionnel*," the Constitutionality of Parliamentary Statutes can be reviewed before they are enacted, but not a "*posterirri*." The "*Conseil Constitutionnel*" has now developed a growing body of Constitutional cases, which has led to the "Constitutionalization" of French Law. This marks a fundamental change in French Law. This is accompanied by the "Europeanization" of French Law because the European Union (EU) Law is immediately applicable in French Law.

## **CHAPTER V**

### **V. THE JUDICIAL POWER.**

#### **A. The United States.**

The Supreme Court is the highest Court in the Federal Court System. The Court deals with matters pertaining to the Federal Government, disputes between states, and

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<sup>137</sup> Article 37, The French Constitution of 1958.

<sup>138</sup> Article 21, The French Constitution of 1958.

<sup>139</sup> Article 38, The French Constitution of 1958.

<sup>140</sup> Article 16, The French Constitution of 1958.

interpretation of The United States' Constitution, and can declare legislation or executive action made at any level of the Government, as well as unconstitutional, nullifying the law and creating precedent for future law and decisions. Below the Supreme Court, is the Court of Appeals, and below them, in turn, is the District Courts, which are the general trial Courts to the Federal Law. Separate from, but not entirely independent of, this Federal Court System are the individual Court Systems of each state, each dealing with its own laws and having its own Judicial rules and procedures.

The Supreme Court of each state is the final authority on the interpretation of that state's laws and Constitution. A case may be appealed from a State Court to the United States Supreme Court only if there is a Federal question. The relationship between Federal and State Laws is quite complex, and together they form the United States Law. The Federal Judiciary consists of the United States Supreme Court, whose justices are appointed for life by the President, and confirmed by the Senate, and various "lower" or "inferior Courts," among which are the Courts of Appeals and District Courts.

The first Congress divided the Nation into Judicial Districts and created Federal Courts for each district. From that beginning has evolved the present structure of the Supreme Court, thirteen (13) Courts of Appeals, ninety-four (94) District Courts, and two (2) Courts of Special Jurisdiction. Congress retains the power to created and abolish Federal Courts, as well as to determine the number of judges in the Federal Judiciary System. It cannot abolish the Supreme Court.

There are three (3) levels of Federal Courts with “general jurisdiction,” meaning that the Courts handle criminal cases and Civil Law suits between individuals. The other Courts, such as Bankruptcy Courts and the Tax Court, are specialized Courts handling only certain kinds of cases. The Bankruptcy Courts are branches of the District Courts, but technically are not considered part of the “Article III” Judiciary because their judges do not have lifetime tenure. Similarly, the Tax Court is not an Article III Court.

The United States’ District Courts are the “trial Courts” where cases are filed and decided. The United States Courts of Appeals are “appellate Courts” that hear appeals of cases decided by the District Court, and some direct appeals from administrative agencies. The Supreme Court hears appeals from the decisions of the Courts of Appeals or State Supreme Courts, as well as having original jurisdiction over a very small number of cases.

. The Eleventh (11<sup>th</sup>) Amendment removed from Federal Jurisdiction Cases in which citizens of one (1) state were the plaintiffs and the Government of another state was the defendant. It did not disturb Federal jurisdiction in cases in which a State Government is a plaintiff and a citizen of and some direct appeals from administrative agencies. The Supreme Court hears appeals from the decisions of the Courts of Appeals or State Supreme Courts, as well as having original jurisdiction over a very small number of cases. The Judicial Power extends to cases arising under the Constitution, an Act of Congress, or a United States Treaty. It also extends to cases affecting Ambassadors, Consuls of foreign countries in the United States, and Ministers. It also includes

controversies, in which the United States Government is a party, controversies between states and foreign nations, and bankruptcy cases.

The power of the Federal Courts extends both to civil actions for damages and other redress, and to criminal cases arising under the Federal Law. Article III has resulted in a complex set of relationships between State and Federal Courts. Ordinarily, Federal Courts do not hear cases arising under the laws of individual cases; however, some cases over which Federal Courts have jurisdiction may also be heard and decided by State Courts. Both Court Systems have exclusive jurisdiction in some areas and concurrent jurisdiction in others.

The Constitution safeguards judicial independence by providing that Federal Judges shall hold office “during good behavior.” This usually means they serve until they die, retire, or resign. A Judge who commits an offense while in office may be impeached in the same way as the President or other officials of the Federal Government. United States Judges are appointed by the President, subject to confirmation by the Senate. Another Constitutional provision prohibits Congress from reducing the pay of any judge. Congress is able to set a lower salary for all future judges that take office after the reduction, but may not decrease the rate of pay for any judges already in office.

**B. France.**

In law,<sup>141</sup> the Judiciary, also known as the Judicial System or Judicature, is the system of Courts which administer justice in the name of the sovereign or state, a mechanism for the resolution of disputes. It usually consists of a Court of a final appeal called the Supreme Court or Constitutional Court, and other lower Courts. The term is also used to refer collectively to the judges, magistrates and other adjudicators, who form the core of a Judiciary (sometimes referred to as a “bench”), as well as the support personnel who keep the systems running smoothly. Under the doctrine of the separation of powers, “the Judiciary is the branch of Government primarily responsible for interpreting the law.” It construes the laws enacted by the Legislature as follows:

(a). In **Common Law Jurisdictions**: Courts, interpret law, including Constitutions, statutes, and regulations. They also make law based upon prior case law in areas where the Legislature has not made law. The tort of negligence is not derived from Statue Law in most Common Law Jurisdictions. The term “Common Law” refers to this kind of law.

(b). In **Civil Law Jurisdictions**: Courts interpret the law, but are, at least in theory, prohibited from creating law. Still in theory, Courts do not issue rulings more general than the actual case to be judged. In practice, jurisprudence plays the same role as Case Law.

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<sup>141</sup> French Legal System, West, Andrew, Desdevisia, Yvon, Fenet, Alain, Gaurier, Dominique, Heussaff, Bruno, October, 1998.

(c). In **Socialist Law**: The primary responsibility for interpreting the law belongs to the Legislature.

In France, the final authority on the interpretation of the law is the *Conseil d'Etat* for administrative cases, and the "Cour d' Cassation" (Court of Cassation) for civil and criminal cases.

It is said that the famed Byzantine Emperor Justinian had the "*Corpus Juris Civilis*" compiled and all other decisions by jurists burned to create certainty in the law. In the Nineteenth (19<sup>th</sup>) century, French legal scholars at the time of the development of The Code Napoleon advocated the same kind of approach. It was believed that since the law was being written down precisely, it should not need interpretation; and if it did need interpretation, it could be referred to those who wrote the Code. Napoleon, who was an advocate of this approach, felt that the task of interpreting the law should be left with the elected Legislature, not with "unelected judges." This contrasted with the pre-revolutionary situation in France, where unelected "Parliaments" defending the interests of the nobility would often slow the enforcement of royal decisions, including much needed reforms.

This idea was found difficult to implement in practice. In France, along with other countries that Napoleon had conquered, or where there was a reception of the Civil Code approach, judges once again assumed an important role. In Civil Law Jurisdictions, judges interpret the law to about the same extent as in Common Law Jurisdictions. It



may be acknowledged, in theory, in a different manner than in the Common Law tradition, which directly recognizes the limited power of judges to make law. In France, the “*Jurisprudence Constante of the Cour de Cassation*” or the “*Conseil d’Etat*” is equivalent in practice with Case Law.

In the French Law Tradition,<sup>142</sup> a judge does not make new law; he or she merely interprets the intents of the “Legislator.” The role of interpretation is traditionally approached more conservatively in Civil Law Jurisdictions than in Common Law Jurisdictions. When the law fails to deal with a situation, doctrinal writers and not judges call for legislative reform. These legal scholars sometimes influence Judicial decision-making. So-called “Socialist” Law adopted the status of Civil Law, but added to it a new line of thought derived from Communism. The interpretation of the law is ultimately political, and should serve the purposes of Communism, and should not be left to a non-political organ.

## **CHAPTER VI**

### **VI. CIVIL LIBERTIES.**

#### **A. The United States.**

In 1787, delegates from thirteen (13) states convened in Philadelphia and drafted a remarkable blueprint for self-Government, the Constitution of the United States. The first

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<sup>142</sup> “*Introduction au Droit Francais,*” Guimezanes, Nicole, 1999.

draft set up a system of checks and balances that included a strong Executive Branch, a Representative Legislature, and a Federal Judiciary. The Constitution was remarkable, but deeply flawed. It did not include a specific declaration, or bill, of individual rights. It specified what the Government could do, but did not say what it could not do. It did not apply to everyone. The “consent of the governed” meant “white “men only.

The absence of the “Bill of Rights” turned out to be an obstacle to the Constitution’s ratification by the states. It would take more than four (4) years of intense debate before the new Government’s form could be resolved. The Federalists opposed including a Bill of Rights on the ground that it was “unnecessary.” The Anti-Federalists, who were afraid of a strong centralized Government, refused to support the Constitution without one.<sup>143</sup>

In the end, popular sentiment was decisive. Recently freed from the despotic English Monarchy, the American people wanted strong guarantees that the new Government would not trample upon their right to be free from warrantless searches and seizures. The Constitution’s framers heeded Thomas Jefferson who argued “A Bill of Rights is what the people are entitled to against every Government on earth, general or particular, and what no just Government should refused or rest on influence.” The American Bill of Rights, inspired by Thomas Jefferson and drafted by James Monroe, was adopted and in 1791, the Constitution’s first (1<sup>st</sup>) ten (10) Amendments became the law of the land.<sup>144</sup>

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<sup>143</sup> American Civil Liberties Union, March 4, 2002.

<sup>144</sup> American Civil Liberties Union, March, 2002.

The United States has always been a “nation of immigrants.” When the framers met to form a Constitution, they saw little reason to restrict the relatively small number of Europeans, who arrived periodically and contributed to the nation’s wealth. They could not imagine that in a land as large as the United States, immigration would ever constitute a problem or a source of concern. Statements regarding immigrants appear in the Constitution as follows:<sup>145</sup>

**“the Congress shall have the power to ‘regulate  
Commerce with foreign nations, and....to  
establish an uniform rule of naturalization.”<sup>146</sup>**

Section Nine (9), Clause One (1), begins as follows:

**“the migration or importation of such persons  
as any of the states now existing shall think  
proper to admit, shall not be prohibited by  
Congress prior to the year one thousand eight  
Hundred and eight.”**

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<sup>145</sup> The United States’ Constitution, Section 8, Clauses 3 and 4.

<sup>146</sup> The Authority to Decide Who May Enter into the United States and Under Which Conditions They May Remain: The Supreme Court and the Rights of Aliens, Dinnerstein, Leonard, University of Arizona, 2005.

The latter section, now obsolete, served to permit the importation of slaves for twenty (20) years after the adoption of the Constitution.

From these brief statements and from the Supreme Court's assumption of the power to interpret the meaning of the Constitution, in *Marbury v. Madison*, (1803), there has developed an elaborate body of Immigration Law, which gives Congress practically unlimited authority to decide who may enter the United States and under what conditions they may remain. The Supreme Court has consistently allowed Congress and the Executive Branch of the Federal Government the right to admit, exclude or banish noncitizens on any basis they chose, including race, sex, and ideology. Congress regularly makes rules that would be unacceptable if applied to citizens.<sup>147</sup>

Any regulations in regard to immigrants and aliens have been tolerated if made by the Federal Government, but similar activities by the State Governments have been scrutinized and frequently rejected by different majorities of the Supreme Court.<sup>148</sup> The United States Supreme Court, an institution not oblivious to the political ramifications of its decisions, responds to the Immigration Laws in a way agreeable both to the public and the Congress.

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<sup>147</sup> *Matthews v. Diaz*, 1976.

<sup>148</sup> The Supreme Court and the Rights of Aliens, Dinnerstein, Leonard, University of Arizona, 2005.

The following cases are proof of Civil Liberty<sup>149</sup> triumph in the United States:

(a). *Brown v. The Board of Education of Topeka, Kansas.*

In the states where slavery was practiced prior to the passage of the Thirteenth (13<sup>th</sup>) Amendment outlawing slavery in 1865, a variety of laws had prohibited the education of slaves based on the theory that education might make them less tractable and encourage rebelliousness. In all parts of the country, public education was far from universal in the mid Nineteenth (19<sup>th</sup>) Century for children of any color, but tax-supported education was rare in the South.<sup>150</sup>

In the late Nineteenth (19<sup>th</sup>) and Twentieth (20<sup>th</sup>) Centuries, state and local Governments gradually accepted the responsibility of offering all children some free public education, but education standards in the South lagged far behind the rest of the Nation.

Black plaintiffs challenged legally imposed segregation in the Courts, contending that state laws imposing segregation violated the rights to equal protection of the laws guaranteed them under the Fourteenth (14<sup>th</sup>) Amendment of the Constitution. In 1896, the Supreme Court upheld a Louisiana Law mandating separate but equal accommodations on passenger trains.<sup>151</sup> Three (3) years later, the Court unanimously

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<sup>149</sup> The Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts from the Black Struggle, Clar, D., 1990.

<sup>150</sup> Simple Justice; the History of Brown v. Board of Education, University of Missouri Press, 1968.

<sup>151</sup> *Plessy v. Ferguson*. 1896.

upheld segregation in the public schools, declaring that education was a matter left to State Jurisdiction and that Federal interference could not be justified.<sup>152</sup>

In 1908, the Court gave further sanction to Jim Crow<sup>153</sup> education, when it upheld a State Law requiring segregation in private educational institutions.<sup>154</sup>

The National Association for the Advancement of Colored People (NAACP)<sup>155</sup> formulated in the early and mid-1930's, a strategy for legally challenging school segregation on the grounds that separate education was never equal. The organization began by state universities in Border States, such as Missouri and Maryland that maintained law schools for whites, but not for blacks. In a critical 1938 decision, the Court ruled that the state of Missouri had to admit a black applicant to the state-supported law school since it failed to provide a law school for black residents of the state.

The NAACP's goal was to abolish all forms of segregation in public schools, but initially its legal drive focused on obtaining support in Federal Courts for "absolute equality," rather than challenging the Courts to reverse the separate but equal doctrine laid down in "*Plessy v. Ferguson*"<sup>156</sup>. The organization's legal strategists believed that the South would find the support of two absolutely equal parallel educational systems too expensive to sustain. Pursuing this strategy, the NAACP<sup>157</sup> won case after case forcing

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<sup>152</sup> *Cumming v. Richmond County Board of Education*. 1899.

<sup>153</sup> From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality, Klarman, Michael J.

<sup>154</sup> *Brea College v. Kentucky*. 1908.

<sup>155</sup> The NAACP's Legal Strategy Against Segregated Education: 1926-1950, Tushnet, Mark V., 1998.

<sup>156</sup> *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, 1896.

<sup>157</sup> Unfinished Business: Racial Equality in American History, Klarman, Michael J., 1996.

school districts to pay teachers in black schools exactly what they paid teachers in white schools, state law schools to admit black students, and state universities to admit black undergraduates.

This strategy was painstakingly slow. In each case, the plaintiffs had to establish that separate educational facilities offered blacks were inferior in some way to those, the judges declared would take generations to equalize the thousands of school districts in the South.

By 1950, the NAACP decided that it would have to develop cases that would force the Supreme Court to address the issue of whether segregated schools were unequal, and a violation of the equal protection of the laws guaranteed all Americans regardless of race or color. The decision known as "*Brown v. Board of Education*"<sup>158</sup> dealt with not one (1) case, but five (5) separate cases that raised similar issues, and that the Court decided to hear together and decide together.

*Brown v. Board of Education of Topeka, Kansas* was a case challenging the very concept of segregation, since the facilities provided to black and white students were essentially comparable. The case was heard by a three (3)-judge panel of district judges, who decided unanimously against the plaintiffs on the basis that the Supreme Court had

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<sup>158</sup> Brown v. Board of Education and the Civil Rights Movement, Klarman, Michael V., 1995.

yet to overturn the separate-but-equal doctrine. In the “Findings of Fact” attached to the opinion:

**“Segregation with the sanction of law....has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially-integrated school system.”**

This statement, as one (1) NAACP lawyer remarked, would clearly put the Supreme Court “on the spot.”

**(b). Gebbart, et al v. Belton, et al.**

A Delaware Case<sup>159</sup> sought to overturn a decision by the State’s Chancery Court that segregation in the schools created inequality and violated the plaintiff’s constitutional rights.

**(c). Davis et al v. County School Board of Prince Edward County.**

A Virginia Case<sup>160</sup> framed the issue of whether segregation had to be eliminated despite rapid and substantial efforts by the school district to improve the quality of black

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<sup>159</sup> *Gebbart et al. v. Belton et al.*,

<sup>160</sup> *Davis et al v. County School Board of Prince Edward County.*



schools. A three (3)-judge District Court Decision declaring that segregation had been “for generations been a part of the mores of her people” ruled in favor of the state of Virginia and simply ordered the Prince Edward School District School Board to continue to equalize its facilities for black students “with diligence and dispatch.”

(d). *Bolling v. Sharp.*

In the District of Columbia<sup>161</sup> a case, heard by a United States District Judge, was ruled that no claim of inequality had been made and given that the constitutionality of the segregation had been upheld , there was no basis upon which relief could be granted.

In the deliberation that the arguments regarding the issue demanded that the Court speak with a single, resolute voice and settle the issue once and forever. Warren read the Court’s opinion on May 17, 1954. Warren stated:

**“We conclude that in the field of education the doctrine of ‘separate but not equal’ had no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated... are by reason of the segregation complained of; deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”**

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<sup>161</sup> *Bolling v. Sharp.* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, 1954.

Finally, on May 31, Warren delivered a unanimous seven (7) paragraph opinion on the implementation of the brown decision directing the District Courts to monitor the “good faith” of local schools boards in planning and implementing desegregation plans. The Lower Courts, warren said, should be guided by “equitable principles” and a “practical flexibility.” In the most famous phase of the case, Warren said that the District Courts should see that the parties to the cases be admitted “to public schools on a racially nondiscriminatory basis with all deliberate speed.”

The phrase “all deliberate speed” proved subject to varying interpretations. It would take nearly a quarter century and hundreds of Lower Court decisions before the Supreme Court’s edit in “*Brown*” had been fully implemented throughout the South. Even then, North and South terms of residential segregation and concentration of blacks in urban areas and whites in suburban areas were reflected in school enrollments.

**(e). *Bush v. Gore: The Hanging Chad Case***

During the Presidential election between George W. Bush and Albert Gore, Jr., the State of Florida encountered difficulty with its election process.<sup>162</sup> After the votes had been tabulated in the various counties of the State of Florida, Bush had received more votes but his margin of victory was less than one-half (1/2) of one (1) percent. Because of the small margin of victory, the Florida election rules provided for an automatic

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<sup>162</sup> Rules, Standards and *Bush v. Gore*; Form and Law of Democracy, Overton, Spencer, 37 Harvard Civil-Rights-Civil Liberties Law Review 65, 2002.

machine recount. The result of the machine recount still indicated victory for bush, but by an even smaller margin. Gore then sought manual recounts in several counties. Due to these recounts, the Florida Supreme Court extended the deadline by which the countries had to submit their elections returns to the Florida Secretary of State. The United States Supreme Court reviewed this decision and vacated it, but upon return of the case to the Florida Supreme Court, the extended deadline was reinstated.

Bush was declared “the winner” of Florida’s twenty-five (25) electoral votes. Gore filed a lawsuit contesting the certification of the election results. Upon appeal, the Florida Supreme Court ordered a manual recount of all under votes, votes that when counted by the machines did not register a vote for President. Bush and Richard Cheney filed an application in the United States Supreme seeking to have the Florida Supreme Court’s Order to recount “stopped.” The Supreme Court granted the application and granted review of all issues.

George W. Bush and Richard Cheney argued that the Florida Supreme Court’s decisions to have a “manual” recount violated The United States’ Constitution,<sup>163</sup> and conflicted with the Constitution.<sup>164</sup> Bush also argued that the Florida Supreme Court’s decision violated the Equal Protection Clause and the Due Process Clause.

Albert Gore, Jr., argued that The United States’ Constitution<sup>165</sup> did not give the Supreme Court a basis to override the Florida Supreme Court’s decision. Gore also

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<sup>163</sup> Article II, The United States’ Constitution.

<sup>164</sup> 3 United States Constitution, Section 5.

<sup>165</sup> Article II, The United States’ Constitution.

argued that the Florida Supreme Court's decision was consistent with The United States' Constitution.<sup>166</sup> Finally, Gore argued that the Fourteenth (14<sup>th</sup>) Amendment provided no basis for the Supreme Court to disregard Florida's statutory rules and proceedings for determining the outcome of the Presidential election.

The Court indicated that individual United States' citizens do not have a "constitutional right to vote for electors for the President of the United States, unless and until the State Legislature chooses a statewide election." As way in which it will appoint the Electoral College Members. Article II of the United States' Constitution provides that the State Legislatures will select how electors are appointed. However, the states have selected that the individual citizens will vote for the electors, making the right to vote a fundamental right.

The Court found that the Florida Supreme Court had ordered the recount to determine the intent of the voters with respect to under votes. The Court found the procedures used to perform the Florida Supreme Court ordered recount were not "uniform." Some of the counties counted a "punch" ballot, where a "chad", a piece of the ballot, was merely "dimpled," whereas other counties required the "chad" to be separated from the ballot on several corners to be counted. Therefore, an unequal evaluation of the ballots occurred in violation of the Equal Protection Clause.

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<sup>166</sup> 3 United States Constitution, Section 5.

The Court also found that the “manual” recount in some counties was extended to over votes; ballots that contained more than one (1) vote for President, and the Florida Supreme Court’s Order did not specify who was to recount the ballots. The Court found the whole recount process to be inconsistent and unable to be conducted so as to comply with equal protection and due process standards, without additional standards. The Court found that any recount able to meet the December 12<sup>th</sup> deadline for appointing electors to the Electoral College would not be conducted in a Constitutional manner, thus the Court reversed the Florida Supreme Court’s Order to Recount.<sup>167</sup>

George W. Bush ultimately was declared the “winner” of the 2000 Presidential Election. The significance of this case resides in the media attention the election received and the worldwide pause that ensued as all waited for the outcome of the election. Given the economic and foreign policy whirlwinds, the current presidency was thrust into almost immediately. One might wonder if the election fiasco was a sign of times to come. The dispute was unexpected and suggested that when an issue is of national importance, the Court will find a Federal question so that it may control the outcome.

**(f). Swann v. Charlotte-Mecklenburg Board of Education.**

In the United States’ District Court for the Western District of North Carolina, an action<sup>168</sup> was brought for the purpose of requiring the defendant, a North Carolina county

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<sup>167</sup> Florida State Review, Volume 29, 2001.

<sup>168</sup> Swann’s Way: the School Busing Case and North Carolina, Schwartz, Bernard, Oxford University Press, 1986.

school board, to cease maintaining a racially segregated, dual public school system. The District Court approved a desegregation plan, but several years later the school system, which included approximately twenty-nine (29) percent black students and seventy-one (71) percent white students, remained substantially segregated.

The District Court found the school board's further proposals for desegregation inadequate and appointed an expert who provided additional desegregation proposals. The District Court ordered:

(a). The faculty members be reassigned so that the ratio of black and white faculty members in each school was approximately the same as the ratio of black and white faculty members throughout the school system;

(b). The new attendance zones be created for secondary schools, and some inner-city black students be transported to outlying, predominately white schools, so that the percentage of blacks would range from seventeen (17) percent to less than thirty-six (36) percent in each high school and would range from about nine (9) percent to about thirty-three (33) percent in each junior high school; and

(c). The new attendance zones and pairing and grouping of schools be used for elementary schools, and the amount of busing of elementary schools, and the amount of busing in elementary school' students be substantially increased so that the percentage of blacks in each elementary school would range from about nine (9) percent to about thirty-eight (38) percent.

The Court of Appeals for the Fifth (5<sup>th</sup>) Circuit affirmed the orders, pertaining to faculty desegregation and secondary school rezoning and busing, but vacated the order pertaining to elementary school' students on the ground that the amount of additional busing would be unnecessary extensive. On remand from the Court of Appeals, the District Court requested the school board to adopt a new plan for elementary school' students, but after the school board failed to do so, the District Court "reinstated" the expert's plan.

The United States' Supreme Court affirmed the District Court's Order reinstating the expert's plan for elementary school students. The "unanimous" views of the Court were as follows:

(a). In default of the school authorities of their obligation to proffer acceptable remedies, the District Court had broad power to fashion a remedy that would assure a unitary school system, and such power was not restricted by public education provisions of the Federal Civil Rights' Act of 1964;

(b). The District Court's Order reassigning teachers in order to achieve faculty desegregation was proper;

(c). Although the Constitutional command to desegregation school did not mean that the number of students in every school in every community always had to reflect the racial composition of the school system as a whole, the use of racial ratios as a starting point in the process of shaping a remedy was within the District Court's equitable discretion;

(d). In order to achieve truly nondiscretionary assignments of students, the District Court could properly take affirmative action in the form of remedial altering of attendance zones, including pairing or grouping of schools and use of non compact or noncontiguous zones; and

(e). Under the circumstances of the instant case, the District Court's orders requiring additional busing of elementary and secondary school students as a means of school desegregation were within the Court's power to provide equitable relief.

In this case, the Court discussed in more precise terms the scope of the duty of school authorities and District Courts to fashion an end to racially segregated school systems. A Federal Court is not empowered to take any action or to require the school authorities to take any action until there has been a showing of "de jure" segregation. The Court has preserved the "de jure-de facto" distinction. "De jure" segregation is that required by law, whereas "de facto" segregation is that which is caused not by state action, but by socioeconomic factors. Only if there is a showing of purposeful discrimination in a substantial portion of a school district is there a presumption of "intentional" discrimination in the rest of the district. The presumption can be rebutted only by showing that no such intent existed.

Even when the Court finds there has been purposeful discrimination, school authorities are given the opportunity to submit a plan for desegregation. Only when the school authorities are found to be engaged in "de jure" segregation and also fail to submit



an adequate desegregation plan, does the District Court have the authority to order specific steps to desegregate the schools.

**B. France.**

Under the Ancien Regime (Ancient Regime), Judicial Office was venal and transmittable position. After a passing phase during the Revolutionary Period when judges were elected, the Constitution of Year VIII (1799) marked the move to a Judiciary made-up of publicly appointed officials. Despite the principle of “irremovability”, the main political crises of the Nineteenth (19<sup>th</sup>) Century saw waves of purges.

The “irremovability” of Ordinary Court Judges is now enshrined in the Constitution.<sup>169</sup> The Constitutional Council is very strict in its application of the principle of “irremovability” during its monitoring of the Institutional Laws concerning the status of judges. This principle is opposed to a judge being suspended, dismissed or removed but also to him being moved from one (1) Court to another without his agreement. The Judicial Authority has a Constitutional status, which has been well established and which guarantees its independence.

The public prosecutors, who constitute the decisions of justice, come under the authority of the Minister of Justice who may give them instructions. The separation

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<sup>169</sup> The Birth of Judicial Politics in France, Bell, New York, 1992.

between the Ordinary Court Judges (the bench) and the public prosecutors (State Counsels Office) is nonetheless not impenetrable, as judges may move from one (1) to the other, even several times during their careers.

So that such independence would not lead to irresponsibility, a monitoring body for the Judiciary was set up by the Constitution of 1946. This body is the High Council of the Judiciary and its make-up and powers are set out in Article 65 of the 1958 Constitution. The High Council of the Judiciary is entrusted with both making proposals and giving its opinion regarding the appointment of judges, as well as carrying out a disciplinary role for them. It is made up of two (2) district groups:

(a). The first has five (5) Ordinary Court Judges and one (1) public prosecutor, is empowered to deal with Ordinary Court Judges; and

(b). The second, which has five (5) public prosecutors and one (1) Ordinary Court Judge, is empowered to deal with public prosecutors.

The other members of the High Council of the Judiciary belong to each of the two (2) groups. They are the President of the Republic (the Chairman), the Minister of Justice, one (1) State Councilor, and three (3) personalities appointed respectively by the President of the Republic, the President of the National Assembly, and the President of the Senate. A majority representation for judges is ensured. This is even more the case as the President of the Republic and the Minister of Justice do not attend the disciplinary groups and are replaced depending on the circumstances, by the First President or the Principal Public Prosecutor of the "Cour d' Cassation" (Court of Cassation).

## **CHAPTER VII**

### **VII. THE COURT SYSTEM.**

The independence of the Judiciary is a basic condition of a state truly governed by the rule of law. In France such independence is laid down in the Constitution,<sup>170</sup> which entrusts the President of the Republic with being its guarantor. A High Council of the Judiciary assists him in this task and is also the monitoring body with power over appointments and discipline. Its prerogatives are more significant concerning the judges of the Ordinary Courts, whose irrevocability is Constitutional, than the public prosecutors who come under the responsibility of the Minister of Justice.

The organization of the French Judiciary is characterized by its pyramidal nature and its strict separation between the ordinary Court System and the administrative Court System. Within the Ordinary Court System, civil matters are heard the first instance by specialized Courts while criminal matters, which have an inquisitorial type procedure, are heard by District Criminal Courts, according to the seriousness of the crimes.

At the top of the Ordinary Court pyramid stands the "Cour d' Cassation" (Court of Cassation). It is the judge of judges' decisions. It may also give its opinion upon the request of other Courts of law, contributes to the drawing-up of jurisprudence and is the guarantor of the application of the law by the Courts.

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<sup>170</sup> *Institutions Politiques et Droit Constitutionnel*, "Lavroff, D., 1996.

The French concept of the separation of powers makes the Ordinary Court System a real authority, distinct from both the Legislative Power and the Executive Power. The Courts, which decide in the case of disputes by applying the law, are in this way one of the essential guarantees of the existence of a state governed by the rule of law.

The Judicial Authority was set up by Title VIII of the 1958 Constitution. This Title establishes the President of the Republic as the guarantor of its independence and makes provision for the irrevocability of judges of the Ordinary Courts (Article 64). In addition, the Constitution sets up the Judicial Authority as the guardian of individual liberty (Article 66).

The Ordinary Court System has nearly seven thousand eight hundred (7,800) judges of whom five thousand seven hundred (5,700) are Ordinary Court Judges and two thousand one hundred (2,100) are Public Prosecutors, helped by almost nine thousand nine hundred (9,900) Clerks of the Court. Although it is independent, the Judiciary still comes under a form of scrutiny. The French Judicial Organization is structured in a hierarchy and very often guarantees a double degree of jurisdiction. The "Cour d' Cassation" (Court of Cassation) is the highest Court in the French system of Ordinary Courts and it ensures the unity of this system and its jurisprudence.

Under the Ancien Regime (Ancient Regime), Judicial Office was a venal and transmittable position. After a passing phase, during the Revolutionary Period when

judges were elected, the Constitution of Year VIII (1799) marked the move to a Judiciary made up of publicly appointed officials. Despite the principle of “irremovability”, the main political crises of the Nineteenth (19<sup>th</sup>) Century saw waves of purges.

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The Public Prosecutors, who constitute the Public Ministry and who are responsible for defending the interests of society and implementing the decisions of justice, come under the authority of the Minister of Justice who may give them instructions. The separation between the Ordinary Court Judges (the bench) and the Public Prosecutors (State Counsel’s Office) is not impenetrable, as judges may move from one to the other, even several times during their careers.

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<sup>171</sup> French Constitutional Law, Debbasch, New York, 1983.

Constitution. The High Council of the Judiciary<sup>172</sup> is entrusted with both making proposals and giving its opinion regarding the appointment of judges as well as carrying out a disciplinary role for them. It is made up of two (2) District Groups.

(a). The first (1<sup>st</sup>) has five (5) Ordinary Court Judges and one (1) Public Prosecutor; and

(b). The second has five (5) public prosecutors and one (1) Ordinary Court Judge and is empowered to deal with public prosecutors.

The other members of the High Council of the Judiciary belong to each of the two (2) groups. They are the President of the Republic (the Chairman), the Minister of Justice, one (1) State Councilor and three (3) personalities, appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate. A majority representation for judges is ensured. This is even more the case, as the President of the Republic and the Minister of Justice do not attend the disciplinary groups and are replaced, depending on the circumstances, by the First President or the Principal Public Prosecutor of the "Cour d' Cassation" (Court of Cassation).

The present organization of the French Judiciary stems from the Revolutionary Period. Its principles are a hierarchical structure (with several levels of Courts), the elimination of most Courts of limited jurisdiction and the separation of the Ordinary Court System. The two (2) levels of Civil Courts<sup>173</sup> are those of "first instance" and of

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<sup>172</sup> Researching the Law of France, University of Minnesota Law School, January, 2007.

<sup>173</sup> "Traité de Droit Civil," Weill, A., Paris, 1996.

“appeal.” In the case of “first instance,” offences competent Court is the “*Tribunal d’Instance*” (Magistrate’s Court) or the *Tribunal de Grande Instance* (County Court). Certain cases may be heard by specialized Courts, partly made up of non-professional judges. These Courts include commercial<sup>174</sup> and bankruptcy Courts for commercial law matters, industrial arbitration, Courts for labor law affairs, agricultural land tribunals for rural law questions, social security appeal tribunals to deal with social security law issues. Until 1958, stipendiary magistrates were responsible for hearing petty disputes. The setting-up in 2002 of local Courts was a reflection of the desire to re-establish a community-based level of Courts to deal with certain petty disputes both in civil and criminal matters.

The judgments of Courts of First Instance are given, according to the seriousness of the dispute, either with or without recourse to appeal. In the former case, they can be appealed before a Court of Appeal. In criminal matters, there are three (3) types of Courts:

- (a). **Police Courts**, which deal with petty offences punishable by fines;
- (b). **Criminal Magistrate’s Court**, which handles indictable offences; and
- (c). **The Court of Assizes**, which judges serious offences.

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<sup>174</sup> “*Manuel de Droit Commercial*,” Juglart & Ippolito, Paris, 1992.

The jurisdiction of one (1) of these Courts is determined by the gravity of the offence to be judged, and by the legal consequences it entails (for petty offences, the penalty is a simple fine; for indictable offences, it is a fine plus up to ten (10) years imprisonment; and for serious offences, it is a fine and a prison sentence which can be as much as life).

Appeals against judgments handed down by Police Courts and Criminal Magistrate's Courts are heard before a Court of Appeals; as for civil matters, Courts of Assizes have the specificity of being made up of a jury. This is the last trace of the existence of popular justice. The judgments of Courts of Assizes can be appealed before another Court of Assizes<sup>175</sup> in accordance with the law of June 15, 2000. In addition to three (3) judges, the Court of Assizes of First Instance is made up of nine (9) jurors (citizens of more than twenty-three(23) years old, (drawn by lots) and the Appeal Court of Assizes is made up of twelve (12) jurors.

French Criminal Law<sup>176</sup> procedure is based on the "inquisitorial system." This explains the position of the examining Magistrate, whose responsibility is to examine the most serious offences and the most complex matters, taking into account all incriminating and exonerating evidence. The Public Prosecutors, may, under the authority of the Minister of Justice, carry out a criminal law policy, since they have the power of discretionary prosecution and this enables them to close a matter; or on the contrary,

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<sup>175</sup> Minutes of the Supreme Court of Judicature, New York Supreme Court of Judicature, 1913.

<sup>176</sup> "Droit Penal," Pradel, J., 1995.



prosecute. So as to ensure, not only the equality of the citizens before the law, but also the equality of access to justice, legal aid can be provided to those who do not possess sufficient resources, in order to obtain the free help of a lawyer during proceedings. Decisions on merits made by the Courts have the status of "*res judicata*" and judgments made in criminal matters<sup>177</sup> have absolute authority over the Civil Judge. This is expressed by the saying "*le penal tient le civil en l'etat*" or "criminal proceedings take precedence over civil proceedings."

This separation (justified by principle that the only legitimate Judge of the Administration is the Administration itself) can sometimes lead to conflict of jurisdiction. This can be either because each of the authorities sends the ruling of a dispute to the other (negative conflict of jurisdiction) or because the Ordinary Court Judge considers his Court to have jurisdiction while the Administration believes the Administrative Court is competent (positive conflict of jurisdiction). In order to avoid such conflicts of jurisdiction, a Jurisdictional Disputes Tribunal, presided over by the Minister of Justice and is made up of four (4) representatives of the Ordinary Court Authority and four (4) representatives of the Administrative Court Authority, and is responsible for passing a ruling. Since 1960, the highest Courts of the two (2) legal authorities may refer for resolution to the Jurisdictional Disputes Tribunal matters of high complexity, which call into question the separation of the Administrative and Ordinary Court Authorities.

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<sup>177</sup> "*Les Grands Systemes de Politique Criminelle*," Delmas-Marty, Mireille, Paris, 1992.

Decisions handed down in the last instance by Courts of the First (1<sup>st</sup>) Degree and decisions of the Appeal Courts can be appealed before the “Cour d’ Cassation” (Court of Cassation). Such a final appeal must be for a very serious reason relating to the application of the rule of law by the Court concerned. With the exception of criminal cases and litigation in professional elections, the aid of an “*avocet aux conseils*” or “accredited lawyer” (member of the legal profession with a practice who alone can represent parties before the “Cour d’ Cassation” (Court of Cassation), the *Conseil d’Etat*, and the Jurisdictional Tribunal, is obligatory.

The “Cour d’ Cassation” (Court of Cassation) <sup>178</sup> does not judge the substance of the cases, but solely the decisions of the judges. This is why, if the “Cour d’ Cassation” (Court of Cassation) quashes the contested decision, it will send the matter back to a lower Court for a decision on the merits. Rescinding, without appeal, takes place when the decision, which is quashed, does not involve a new decision on the merits or when the evidence heard and assessed by the original judge enables the application of the appropriate rule of law.

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<sup>178</sup> The Guest-Plaintiff, *The Code Civil and the “Cour d’ Cassation” (Court of Cassation)*, *International & Comparative Law Quarterly*, 1976.

The “Cour d’ Cassation” (Court of Cassation)<sup>179</sup> is made up of six (6) divisions, each of which is specialized in particular types of disputes. There are three (3) civil divisions:

- (a) One (1) **Commercial**;
- (b) One (1) **Social**; and
- (c) One (1) **Criminal**.

In the “Cour d’ Cassation” (Court of Cassation), the State Counsel’s Office is represented by a Principal Public Prosecutor and a number of counsels for the prosecution. In each case, both civil and criminal, the State’s Counsel’s Office provides its opinion so as to inform the judges of the Bench.

Cases before the “Cour d’ Cassation” (Court of Cassation) are heard by a body of judges (in plenary, branch or smaller unit) of each of the six (6) divisions. When a case raises an important question of principle, when it leads to differences of opinion between the divisions of the Court or when a vote is equally divided between the judges, two (2) other bodies of judges are possible:

- (a). A **Mixed Division** (made up of members of, at least, three (3) different divisions); and
- (b). The **Plenary Assembly** (the most formal body, which includes the presidents as well as the members of all six (6) divisions).

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<sup>179</sup> “*Le Besoin de Justice*,” Slama, Alan-Gerard, June, 1997.

When a decision, which has already been quashed in the “Cour d’ Cassation” (Court of Cassation), is handed down by a judge in a lower Court and is brought again before the “Cour d’ Cassation” (Court of Cassation), the latter must sit in Plenary Assembly. In addition, every Court of Appeal is obliged to apply decisions handed down by the Plenary Assembly.

Since 1991, the “Cour d’ Cassation” (Court of Cassation) may also be led to provide its opinion, upon request of the lower Courts, in both civil<sup>180</sup> and criminal matters, on new questions of law of great complexity raised in numerous disputes. The opinion given by the “Cour d’ Cassation” (Court of Cassation) is not binding on the lower Courts, but is communicated to the parties involved.

During the Revolutionary Period, judges had to limit themselves to the application of the law or in the case of there being no applicable law, to addressing lawmakers through legislative appeal. The abolition, from 1804, of this procedure has provided judges with the power to interpret the law. Through its judgments and through its “opinions,” the “Cour d’ Cassation” (Court of Cassation) ensures unity of interpretation and the symbolic unity of the French Ordinary Court System. By sometimes basing judgments on pre-established unwritten principles, the “Cour d’ Cassation” (Court of Cassation) is a vector for the role played by jurisprudence in the “creation” of laws.

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<sup>180</sup> Origins and Impact of the French Civil Code, Delplanque, Catherine, *Association Francaise Pour L’Histoire de la Justice*, July 7, 2004.

In France, in virtue of the Constitutional Rights of 1789 and of the Declaration on the Rights of Man:

**“...every man is presumed innocent until declared guilty.”**

This cornerstone of the French Criminal Justice System is also the prey of a dichotomy between philosophy and legislative practice, and of the balance between an apparent liberalism and authoritarian practice. This paradox appears during all the successive phases of the procedure, starting with the role of the police.

The most flagrant example resides in the Law of 1981 entitled “*Securite et Liberte*” (Security and Liberty). As a result of increased feeling of insecurity in France due to a variety of factors, but concentrated on immigration issues, the Legislation enacted a law authorizing arbitrary police checks of identification and working visas. It extended police practice outside the limits of Judicial Investigation, creating a huge political and social controversy centered on Human Rights issues.

As a consequence, the “*Conseil Constitutionnel*” declared, in 1993, that the practice of generalized and discretionary control of identifications was incompatible with the respect of “individual” freedom. A law in August, 1993, circumvented the “*Conseil Constitutionnel’s*” decision and enacted that one could be controlled regardless of behavior, provided that sufficient guarantees were provided.<sup>181</sup> The level of guarantee was not determined in the text of the law, which confirmed the discretionary power of the

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<sup>181</sup> “*Code de Procedure Criminelle*,” Article 72-2.

police in terms of arrests. The most controversy was that looking like an immigrant was a presumption of "guilt" itself.

Further ambiguity on the "principle of the presumption of innocence" is apparent during the phase of "instruction" (Pre-Trial Phase). The Pre-Trial Phase has received the "harshest" criticism from Civil Rights' proponents. As a consequence, reforms and new legislation have attempted to promote a more liberal perspective, insisting on the respect of "individual" rights. A 1993 Law has introduced the right for someone brought in custody to call family, be seen by a doctor, talk with a counsel, and to have the service of an interpreter.

Most of the changes have focused on terminology and very little has happened on substance. It is clearly illustrated in the Pre-Trial Detention, as the "inculpation" or indictment of the person accused. The French word derives from the Latin word "*culpa*" or guilt, which created a biased confusion in the mind of the public opinion. The Law of January, 1993, attempted to remedy the problem by changing the terminology. The interpretation of "*Inculpation*" became under the new law "*Mise en Examen*" or Examining Phase.

After reading Article Eighty-One (80-1) of the French Civil Code in its revision in August, 1993, "*Mise en Examen*" (Examining Phase) continues to affect the presumption of innocence. The "*Juge d'Instruction*" (Presiding Judge) has the power:

**"To indict anyone against who exist clues leading to  
assume that he/she has participated, as the author, or  
as an accomplice, to the fact for which he/she is apprehended."<sup>182</sup>**

The terminology change from "*Inculpation*" to "*Mise en Examen*" is an "illusion." Citizens and media still consider a person "*Mise en Examen*" as being "*inculpee*." Former President Jacques Chirac described the presumption of innocence as a:

**"...right that is daily disregarded in France. I am not talking  
about businesses, but also about people, small delinquents,  
or presumed delinquents, who every day see their rights  
trampled, their life put upside down, and for things which  
in reality do not exist."<sup>183</sup>**

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<sup>182</sup> Boubee, Page 40.

<sup>183</sup> Former President of France, Jacques Chirac, 1999.

As a consequence, the person indicted is likely to feel that the Pre-Trial Detention is the beginning of penalty, objectively because of the detention, and subsequently because of the attack on his/her reputation. The problem lies not in the Pre-Trial Detention itself, but in the fact that it is often perceived and used as a beginning of the sanction or as a way to condition confession. This last aspect is even more crucial that French Law does not disregard confession as evidence.

The secret of instruction compounds this problem. The instruction is in the principle secret, in order to guarantee the independence of the decision to go to trial, as well as to protect the reputation of the person indicted should there be a "non-lieu." Procedure during the preliminary investigation is secret. Anyone participating in the procedure is bound by professional secrecy.

This complete secrecy is inconceivable in a modern society, where media and communication are everywhere. The dilemma, present in all modern democracies, lies between individual rights and freedom of the press. This impasse was embodied in the January 1993 Law, which reiterated both principles "presumption of innocence," but also "freedom of the press," without offering a solution. The "Truche" Commission and the rapport tried to regulate some publicly surrounding trials. In spite of its ambiguous title of "Justice and Presumption of Innocence," it does not go very far in changing the existing application. Most instructions are not secrets, attacking that much more the true meaning of presumption of innocence.



French Law is very ambiguous, its rhetoric and terminology are liberal, but in its interpretation it does not hide persisting elements of “authoritarianism.”

American politicians deride an undefined “Judicial Activism,” but political scientists study a more precise phenomenon that reflects the growing expansion of Judicial Power, the “Judicialization of politics.”<sup>184</sup> Judicialization occurs in either of the two (2) following fashions:

(a). The Judiciary expands its powers into new arenas, at the expense of politicians and administrators and

(b). More political activities outside of the Judicial realm assume Judicial-like qualities.

Either strand of Judicialization conflicts with notions that Courts and judges should be apolitical. Hans Kelsen pointed out in 1926, judges can never simply declare the law or enunciate legislators’ will; every Judicial Decision is a choice among competing values.<sup>185</sup> Judges exercise political power, not just in the annulment of a Legislative Act, but also in every Courtroom where a Criminal Case is heard, a divorce granted, a piece of property seized, custody awarded. A written treatise protected, or damages ordered. In

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<sup>184</sup> When the Courts Go Marching In the Global Expansion of Judicial Power, Vallinder, Torbjorn, 1995.

<sup>185</sup> The General Theory of Law and the State, Kelsen, Hans, 1949.

every case, some societal value is favored over another, and the essence of politics consists in authoritatively allocating values for society.<sup>186</sup>

Judicial independence and Judicial impartiality are flip sides of the same coin; neither can survive without the other. The twin concepts have been defined as having “some degree of freedom from one (1) or more competing branches of Government or from the centers of private power.<sup>187</sup> The more specific components of judicial independence involve the belief that judges can decide on their own, even in conflict with what others, political or Judicial, may wish, particularly if a potential for retribution, either personally or institutionally, exists.<sup>188</sup>

“Judicial independence is not a simple absolute, either present or absent.”<sup>189</sup>

Between the poles of total insularity and significant bias and interference lie an almost infinite number of points. The chief characteristic distinguishing the Courts from the political institutions is independence:

- (a). Independence from **Government** and from political leadership;
- (b). Independence from **political parties** and latest political fashion; and
- (c). Independence from **popular feelings**.<sup>190</sup>

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<sup>186</sup> A System Analysis of Political Life, Easton, David, 1965.

<sup>187</sup> The Impact of Political Change Upon Law, Courts and Judicial Elites, Schmidhauser, John R., 1992.

<sup>188</sup> Comparative Judicial Politics, The Political Functioning of Courts, Becker, Theodore L., 1970.

<sup>189</sup> Judicial Misconduct, Volcanser, 1996.

<sup>190</sup> Courts and Political Institutions, A Comparative View, Koopman, Tim, 2003.

The idea of a Judiciary that can only serve as the “mouth of the law”<sup>191</sup> would logically lead to the evolution of a Judiciary that could not meddle in the affairs of the law-making bodies. This view was institutionalized in France in 1790 and remained in force through all of the latter Constitutions.

## **CHAPTER VIII**

### **VIII. COLUNTERTERRORISM LAWS.**

#### **A. France.**

Over the past thirty (30) years, France has relied primarily on the Criminal Justice System to combat terrorism. In 1981, the Government of President Francois Mitterrand abolished the State Security Court, a special tribunal that had tried all national security cases since 1963. The Court composed of three (3) civilian judges and two (2) military officers had conducted its proceedings in secret with no right to appeal. The year after it was abolished, the French Parliament modified the Code of Criminal Procedure to enshrine the principle that in times of peace, crimes against the “fundamental interests of the nation” are to be dealt with in the Ordinary Criminal Justice System.<sup>192</sup>

Although the French preemptive approach is grounded in the Ordinary Justice System, terrorism investigations and prosecutions are subject to exceptional procedures, and managed by specialized prosecutors and judges. Since the mid 1980’s, all terrorism

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<sup>191</sup> Judicial Selection Volcansek & Lafon, 2002.

<sup>192</sup> Ibid., Article 702 (as amended by Law No. 82-621 of July 21, 1982).

cases have been centralized in Paris among specialized prosecutors and investigating judges, who work in close cooperation with National Intelligence Services.

The basic Counterterrorism Statute, adopted in 1986, fashioned the centralized Judicial System for terrorism-related offenses that today defines the French model. Law “86-1020” of September 9, 1986, created a specialized corps of investigating judges and prosecutors based in Paris called “The Central Counterterrorism Department of the Prosecution Service”, otherwise known as the “14<sup>th</sup> Section” to handle all Terrorism Cases.

The 1986 Law also instituted trials by panels of professional judges for serious terrorism-related felonies in the Court of Assize in Paris, an exception to the rule of trial by jury in these Courts.<sup>193</sup> The Law extended maximum police custody to ninety-six (96) hours (four (4) days in terrorism-related cases. The ninety-six (96) hour period of police custody is also applicable to drug trafficking and organized crime suspects.

The centerpiece of the French Judicial counterterrorism approach is the broadly defined charge of “criminal association in relation to a terrorist undertaking” (*“association de malfaiteurs en relation avec une entreprise terroriste”*). The charge, introduced by Law 96-647 of July 22, 1996, gives the authorities the ability to take preemptive action well before the commission of a crime. The vast majority of terrorism suspects are detained and prosecuted on this charge. According to Government statistics,

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<sup>193</sup> “The Constitutional Court ruled that replacing a popular jury by professional judges in terrorism-related cases was a legitimate means of avoiding pressure and threats.” Decision No. 86-213 DC, September 3, 1986.

three hundred (300) of the three-hundred and fifty eight (358) individuals in prison for terrorism offenses in September, 2005 (both convicted and those awaiting trial) had been charged with association "*de malfaiteurs*" in relation to a terrorist undertaking.<sup>194</sup>

As Christophe Chaboud, the head of the Special Anti-Terrorism Unit of the Ministry of Interior stated in mid-October, 2005, "Our strategy is one of preventive Judicial neutralization." "The anti-terrorism laws...put in place in 1986 and 1996 are our strength." "We have created the tools to neutralize operational groups before they pass to action".<sup>195</sup>

The offense is defined as "the participation in any group formed or association established with a view to the preparation, marked by one (1) or more material actions, of any of the acts of terrorism provided for under the previous articles."<sup>196</sup> In most cases, this charge is a minor felony offense tried in the Correctional Court, and is punishable by up to ten (10) years in prison. A 2006 Law made the offense a serious felony punishable by up to twenty (20) years in prison when criminal association was formed with the purpose of preparing attacks on life and physical integrity, as well as abduction, unlawful detention, and hijacking of planes, vessels, or any other means of transport.<sup>197</sup> The

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<sup>194</sup> The term "*Association de malfaiteurs*" can be used with respect to numerous crimes. Ministry of Justice, Smolar, Piotr, "*Les Prisons Francaises Comptent 358 Detenus Pour Activisme*," Le Monde (Paris), September 9, 2005.

<sup>195</sup> Durant, Jacky, Tourancheau, Patricia, "*La Menace Terroriste Contre la France est Elevee*," Liberation (Paris), October 18, 2006.

<sup>196</sup> Criminal Code (CC), Article 421-2-1.

<sup>197</sup> Criminal Code (CC), Article 421-1.

**it functions according to laws voted by Parliament  
and can react faster.”<sup>203</sup>**

Flexibility and adaptability may be critical elements in an effective counterterrorism strategy, but they must not stretch the rule of law to breaking point. An appropriate criminal justice approach must be based on fundamental procedural guarantees ensuring the right to a fair trial, which are engaged from the outset of a criminal investigation.

The role and power of the specialized Counterterrorism Investigating Judges, referred to by one (1) analyst as “informed, independent and pitiless adversaries of terrorism in all forms,” cannot be underestimated.<sup>204</sup>

There are currently seven (7) Investigating Judges specialized in Terrorism Cases.<sup>205</sup> Bruguiere was the best known among them. He was head of the pool of specialized Counterterrorism Judges, when he stepped down in 2007 after twenty (20) years.<sup>206</sup> During his tenure, Bruguiere earned a reputation for uncompromising

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<sup>203</sup> Human Rights Watch interview with Jean-Louis Bruguiere, former Investigating Judge, Paris, February 26, 2008.

<sup>204</sup> Shapiro, Jeremy, Suzan, Benedicte, “The French Experience of Counter-Terrorism, Survival,” Vol. 45, No. 1., 2003.

<sup>205</sup> There are eight (8) positions in the division of Specialized counterterrorism Investigating Judges at the time of this writing. There were only seven (7) active judges. Human Rights interview with Philippe Maitre, Counterterrorism Prosecutor, Paris, February 27, 2008. The judges tend to further specialize in different types of terrorism (i.e. international, Islamist, nationalist or separated).

<sup>206</sup> In early March, 2008, the European Commission designed Bruguiere to undertake a review of implementation of a Cooperation Agreement between the European Union (EU) and the United States in the fight against financing of terrorism. “European Union (EU) review of the United States,” “Terrorist Finance Tracking Programme,” European Commission press release, March 7, 2008.

dedication to his work. Known by nicknames, such as “sheriff” and “the admiral,” Bruguiere claimed in 2004 that he had arrested over five hundred (500) people in the previous decade.<sup>207</sup>

The significant authority of the Investigating Judge in the French System is magnified with respect to Terrorism Cases. The logic is that a security-cleared, specialized and experienced judge will, on the basis of all relevant information, including sensitive intelligence material, be able to connect the dots, discern the existence of a terrorist network, even where the material acts demonstrating this existence are limited to common crimes and determine the identities of the members of the network.<sup>208</sup>

Defense lawyers complain that the way in which Judicial Investigations in Terrorism Cases are conducted seriously undermines the right of each defendant to an effective defense.<sup>209</sup> This right is a cornerstone of the right of the right to a fair trial. The International covenant on Civil and Political rights (ICCPR) and The European Convention on Hyman rights (ECHR) stipulate the minimum guarantees necessary to ensure the right to a fair trial to all persons accused of a criminal offense. These include timely and confidential access to counsel, and adequate time and facilities to prepare the defense. Another key element is respect for the principle of “equality of arms,” which requires that the prosecution and the defense have equal opportunity to prepare and

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<sup>207</sup> “French Push Limits in Fight on Terrorism,” Whitlock, Craig, Washington Post, November 2, 2004.

<sup>208</sup> Shapiro, Jeremy, Suzan, Benedicte, “The French Experience of Counterterrorism, 2003.

<sup>209</sup> Human Rights Watch interviews with Sebastien Bono, Paris, June 21, 2007; Henri de Beauregard, Paris, July 6, 2007; Fatouma Metmati, December 13, 2007; Bernard Dartevelle, Paris, June 21, 2007; Nicolas Salomon, Paris, July 5, 2007; Sophie Sarre, Paris, July 6, 2007; Antoine Comte, Paris, May 10, 2007; and Dominique Tricaud, Paris, December 7, 2007.

present their cases, including the obligation on the prosecution to disclose all material information.<sup>210</sup>

Almost all Defense Attorneys we spoke with complained that Investigating Judges routinely deny their requests for investigative steps to be undertaken in the course of the Judicial investigation.

The experience of Sebastien Bono during his defense of Christian Ganczarski is only slightly extreme. Only one (1) of his twenty four (24) requests for investigative steps was accepted.<sup>211</sup> Ganczarski is a German national alleged to be a significant “al Qaeda” figure. He was arrested in France in June, 2003, after being expelled from Saudi Arabia in what his lawyer called a “disguised extradition.” He faces charges before the Paris Court of Assize for involvement in a 2002 suicide attack on a synagogue in Tunisia that left twenty one (21) people dead. Among the twenty three (23) motions denied was a request by Ganczarski’s lawyer for an actual copy, and not just a transcript, of the tape of a conversation on the morning of the synagogue bombing between Ganczarski and Nizar Naouar, the suicide bomber who carried out the attack.

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<sup>210</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, March 23, 1976, ratified by France on November 4, 1980, Art. 14; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, September 3, 1953, as amended by Protocols No. 3, 5, 8 and 11, September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998. See also European Court of Human Rights Judgments: *Dombo Beheer B. V. v. the Netherlands*, October 27, 1993; *Ankeri v. Switzerland*, October 23, 1996; *Ruiz Mateos v. Spain*, June, 1993; *Niderost-Huber v. Switzerland*, February 18, 1997 and *Beer v. Austria*, No. 30428/96.

<sup>211</sup> Human Rights Watch interview with Sebastien Bono, Paris, February 28, 2008.



The lawyer for a young man accused of association “*de malfaiteurs*,” who asked not to be identified because the case is still in the Judicial investigation phase, said all three (3) motions he has filed, thus far, have been denied. These included two (2) motions for a joint deposition between defendants, and the extradition of an individual from Algeria whose alleged confession is pivotal in the case against his client.

Also denied, were requests for the return of a relatively small amount of money confiscated at the time of the client’s arrest (his client is “out of jail” under Judicial supervision after spending over a year in pretrial detention), as well as for the authorization to give a copy of the case file to his client, who was still in pretrial detention at the time. Without such authorization, defense attorneys are not allowed to give copies of any elements of the case file to their clients; they can only show, read or summarize the documents. The Investigating Judge denied the request on the grounds that there was a risk of his client using the information to pressure others involved in the case.<sup>212</sup> The inability to share the case file with the accused has a negative impact on the lawyer’s ability to mount an effective defense, according to this attorney, because “the case file is so big, there are details that we [lawyers] can miss, but the client could consider important.”<sup>213</sup> The Parliamentary Commission that conducted an inquiry into the “*Outreau Affair*” recommended that all suspects under Judicial investigation,

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<sup>212</sup> Code of Criminal Procedure (CC), Article 14.

<sup>213</sup> Human Rights Watch Interview (defense attorney, who requested anonymity), Paris, February 28, 2008.

including those in pretrial detention, have an unrestricted right to their case files.<sup>214</sup> The requests described here are not technically motions for investigative steps.

Lawyers can appeal against any decisions by an Investigative Judge to the Investigating Chamber. The President of the Chamber has the authority to reject the appeal in a reasoned judgment or transmit the appeal for examination by the full Chamber; this decision cannot be appealed.<sup>215</sup> All of the motions discussed above were rejected by the President of the Chamber.

Defense attorneys argue that the length and complexity of Judicial investigations in Terrorism Cases considerably obstruct their ability to mount an effective defense. Investigations into Islamist terrorism are often protracted, complicated inquiries into alleged networks of like-minded individuals, leading often to voluminous case files tracing the phone calls, travels, meetings, as well as opinions, of a large number of people. According to Lawyer Dominique Tricaud, this means case files built on an idea, a movement, and not on the accused, then makes the defense impossible.”<sup>216</sup> Henry de Beauregard, a Court-Appointed Attorney for one (1) of the defendants in a major

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<sup>214</sup> National Assembly, Rapport No. 3125, June 6, 2006.

<sup>215</sup> Criminal Code (CC), Article 186-1.

<sup>216</sup> Human Rights Watch interview with Dominique Tricaud, Paris, December 10, 2007.

terrorism trial involving eight (8) defendants, complained at the trial that he had been unable to effectively defend his client:

**“There are seven and one-half (7.5) meters of case file, seventy eight (78) volumes....three hundred and twenty five (325) kilos of paper. That represents five hundred and forty one (541) hours of reading time, in other words three and a half (3-1/2) months. The lawyer’s fee for Mr. Charouali [his client] is four hundred and fifty (450) euro. So when you do the math, I have the right to seventy five (75) cents per hour to guarantee his defense. And I did not have two (2) to three (3) months to prepare my case like the prosecutor did, but one and a half (1-1/2) months. The defense lawyer cannot do his job.”<sup>217</sup>**

In mid-2007, de Beauregard filed a complaint against France before the European Court of Human Rights for violation of Article 6(1) (the right to a fair trial) and Article 6(3) (right to necessary time and facilities to prepare the defense.). At this writing, the Court has not made a decision on admissibility of the complaint.

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<sup>217</sup> *“Extraits d’un Procès Antiterroriste des Presumes Membres de la ‘Cellule Française’ de GICN” (Groupe Islamique combattant Marocain) et Presumes soutiens Financier et Logistique aux Attentats de Casablanca,”* January 28, 2008.

While the investigation is ongoing, lawyers may consult the case file at the “*Palais de Justice*,” or request paper copies at the expense of the state. Lawyers complained that even if they were to obtain these copies, they would not have enough room in their offices for the entire case file in the major terrorism investigations. Lawyers are entitled to receive a copy of the entire file on CD-ram once the investigative phase is completed, because electronic copies allow for conducting keyword searches and cross-referencing information with relative ease, access to an electronic copy at an earlier stage would facilitate proper and timely preparation of the defense.

#### **B. The United States.**

On October 9, 2007, the President issued an updated National Strategy for Homeland Security<sup>218</sup> which will serve to guide, organize and unify our Nation’s Homeland Security efforts. It complements both the National Security strategy for Homeland Security issued in July, 2002. It complements both the National Security Strategy issued in March, 2006, and the National Strategy for Combating Terrorism issued in September, 2006. This includes calling on Congress to make the Foreign Intelligence Surveillance Act (FISA) reforms in the Protect America Act of 2007 permanent.<sup>219</sup>

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<sup>218</sup> The Myth of Homeland Security, Bradley, Tony, 2005.

<sup>219</sup> Department of Homeland Security, Washington, D.C., February 8, 2007.

Since September 11, 2001, our concept of securing the homeland has evolved, adapting to new realities and threats. The Strategy incorporates:

(a). Acknowledging that while we must continue to focus on the persistent and evolving terrorist threat, we also must recognize that certain non-terrorist events that reach catastrophic levels can have significant implications for Homeland Security; and

(b). Emphasizing that as we secure the homeland, we cannot simply rely on defensive approaches and well-planned response and recovery measures. We recognize that our efforts also must involve offensive at home and abroad.

The Strategy provides a common framework through which our entire Nation (Federal, State, Local and tribal Governments, the private and non-profit sectors, communities and individual citizens), should focus its Homeland Security efforts on the following goals:<sup>220</sup>

- (a). Prevent and disrupt terrorist attacks;
- (b). Protect the American people, our critical infrastructure and key resources;
- (c). Respond to and recover from incidents that do occur; and
- (d). Continue to strengthen the foundation to ensure our long-term success.

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<sup>220</sup> The White House, President George W. Bush, February, 2007.

The United Congress should take bold steps to fulfill its responsibilities in the national effort to secure the homeland and protect the American people in the following ways:

(a). Congress should help ensure that we have the necessary tools to address changing technologies and Homeland Security threats while protecting privacy and civil liberties;

(b). Both Houses of the Congress should take action to further streamline the organization and structure of those committees<sup>221</sup> that authorize and appropriate Homeland Security-related funds and otherwise oversee Homeland Security missions; and

(c). The Congress should fully embrace a risk-based funding approach so that we best prioritize our limited resources to meet critical Homeland Security goals and objectives first.

Since September 11, 2001, the Federal Bureau of Investigation (FBI) has been transforming itself into a National Security Agency. It has expanded its mission, overhauled its intelligence programs and capabilities and has undergone significant personnel growth.<sup>222</sup>

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<sup>221</sup> The White House, George W. Bush, February, 2007.

<sup>222</sup> Statement Before the Senate Committee on Homeland Security and Governmental Affairs, September 10, 2007.

The FBI has disrupted several terrorist attack plans using their Joint Terrorism Task Force (JTTF). The FBI played an important part in the drafting of the National Intelligence Estimate (NIR). The FBI produces its yearly National Threat Assessment (NTA) for international terrorism which is tailored to the FBI's specific counterterrorism mission. The FBI's Terrorist Screening Center (TSC) also plays a crucial role in providing actionable intelligence to state and local law enforcement. The TSC makes its records available to the National Crime Information Center for access by Government investigators, screeners, agents and state, local and Federal Law Enforcement Officers. The FBI has developed multiple initiatives to counter particular threats and realigned its organization to enhance its ability to succeed in its overall national security mission.<sup>223</sup>

The United States' Constitution was framed with the explicit purpose of strengthening the Federal Government in order to protect, among other things, the integrity of the Union. In the debates<sup>224</sup> that ensued before the ratification of the new Constitution, the anti-Federalists pressed for the inclusion of the Bill of Rights in order to protect individuals and states from the leviathan that would emerge from the new Constitution. We all know the history of the American Constitution, the social contract "par excellence."

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<sup>223</sup> Robert S. Mueller, III, Director, Federal Bureau of Investigation, September 10, 2007.

<sup>224</sup> The Immigration Debate: Remaking America, 1996.

Since the September 11<sup>th</sup> terrorist attacks, United States, Iraq and Afghanistan have been rapidly hurtling in the opposite direction on the highway of freedom. Some of the new legal measures taken to preempt further attacks on United States are unfortunately clipping away at the Bill of Rights. Every new legal measure seems to raise a new Civil Rights concern; the following will explain how the new measures affect the Bill of Rights:<sup>225</sup>

**(a). Amendment IV.**

**“The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”**

The new Terrorism Bill<sup>226</sup> not only allows law enforcement officers to secretly search homes and offices of people (with collusion of judges); it also permits Federal Agencies to hold people without charges for seven (7) days. These new provisions nullify each and every safeguard in Article IV.

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<sup>225</sup> The New York Times, Schmitt, Eric, November 28, 2007.

<sup>226</sup> Terrorism and U.S. Policy, Richelson, Jeffrey, Evans, Michael L., National Security Archive Electronic Briefing Book No. 55, September 21, 2001.



**(b). Amendment V.**

**“No person shall....be deprived of life, liberty.....  
without due process of law.”**

The Executive Order that allows the Government to try and punish suspects using military-style tribunals, a legal term for kangaroo Courts and even executed them using very low standards of evidence is an assault on an important clause of the Fifth (5<sup>th</sup>) Amendment.

**(c). Amendment VI.**

**“In all criminal prosecutions, the accused shall enjoy  
the rights to a speedy and public trial, by an  
impartial jury....and to be informed of the nature  
and cause of the accusation; to be confronted with  
the witnesses against him;”**

The Terrorism Act of 1996<sup>227</sup> had permitted the use of “secret” evidence to prosecute and deport terrorists. The idea of secrecy was incorporated in that law to safeguard the intelligence sources of the evidence, such as a “mole” in a terrorist cell. But, in few cases, it was used. Almost all judges threw the cases out after perusing the

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<sup>227</sup> The First Terrorist Act, Beck, Harold Thomas, 2001.

evidence as “insufficient.” The FBI and the INS were using the term “secret” in secret evidence as a substitute for evidence itself.

The case of Mazen Najjar, a Palestinian from Florida, who was detained for three (3) years from 1997-2000, and then set free when a judge ordered his release after finding “no evidence” against him, adequately illustrates how this law could and was abused. The “secret evidence” act that still remains in the law books and is being used by the present administration, violates many of the provisions of the Sixth (6<sup>th</sup>) Amendment.

**(d). Amendment IX.**

**“The enumeration in the Constitution, of rights  
shall not be construed to deny or disparage  
others retained by the people.”**

The American Constitution does not safeguard the rights of citizens alone, it also safeguards the rights of all those who are subjects of United States laws (i.e., those who reside within the territorial borders of the United States). The tendency of the new administration and the new Terrorism Bill to differentiate between “citizens and non-citizens” with regard to Civil Liberties is a gross violation of the Ninth (9<sup>th</sup>) Amendment, which protects the unremunerated right of permanent residents and legal as well as illegal aliens.

A little-noticed provision in the Counter-Terrorism bill approved by the Congress would drastically reduce the rights and protections of aliens<sup>228</sup> with claims to remain in the United States. Under the Bill, people who say they are fleeing persecution and who arrive in the United States without valid travel documents, would have their asylum claims decided by a “single” Immigration and Naturalization Service border officer. Current law requires a hearing before an Immigration Judge.

The provision says anyone who has illegally entered the United States in the past may be summarily deported without Judicial Review.<sup>229</sup> Currently, these immigrants are entitled to a “Deportation Hearing,”<sup>230</sup> which guarantees Constitutional rights, like legal representation, and places the burden of proof on the Government to show why the alien should not be allowed to stay in the country.

This change could affect hundreds of thousands of immigrants, including those who had lived here for years, married American citizens or had children who are citizens.

**Why are we legislating against refugees in a Terrorism Bill? They are not “terrorists;” they are victims of terror!**

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<sup>228</sup> American Libre, Simmons, Chris, May 11, 2007.

<sup>229</sup> Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling, Hussen, Murad, Yale Law Review, Vol. 117, 2008.

<sup>230</sup> The Soft Cage, Parenti, Christian, May, 2007.

## **VIII. CONCLUSION.**

The following will state some of the many differences between France and the United States, both in a legal and a cultural perspective:

### **(a). Legal Differences.**

The French Legal System<sup>231</sup> belongs to the Civil Law Tradition, and like most European countries, it has a rich history. France is often classified as part of the “Romano-Germanic” family of law. From the Thirteenth (13th) Century, the Northern part of France was under the influence of “*Droit Ecrit*” (Roman Law influence). During the period from the Sixteenth (16<sup>th</sup>) Century to the Revolution, known as “*the Ancien Regime (Ancient Regime)*,” France emerged as a nation state, under the strong influence of royal authority. The sources of law of that period included “*Coutumes Locales*” (local customs), Roman Law, Cannon Law, Royal Ordinances, the case law of the Parliaments, and doctrinal writing (“doctrine”).

Law was taught in the universities. Academic writers exercised an important influence on the development of a “*Droit Commun*” (Common Law) through systematic expositions of the law. Charles Doumolin, in the Nineteenth (19<sup>th</sup>) Century, wrote an

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<sup>231</sup> The French Legal System: An Introduction, Farran, Christian and Susan, 1996.

influential commentary on the Custom of Paris (1559) and synthesized Roman Law with contemporary practice. In the Seventeenth (17<sup>th</sup>) Century, Jean Domat, in his seminal work "*Les lois Civeles dans leur Ordne Naturel*," (1689) systematically expounded principles of Roman Laws, holding them out as a coherent body of legal rules in accordance to principles of natural law. Robert Joseph Pointer wrote several treaties on the whole of private law, and exercised an immense influence on the drafters of the Civil Code,<sup>232</sup> especially in the area of obligations. The natural law movement of the Seventeenth (17<sup>th</sup>) and Eighteenth (18<sup>th</sup>) Centuries led to the concept of law systemized and founded "on reason." These influences led to the codification movement.

The period of *Droit Intermediaire*" (1789-1803, between the Revolution and Napoleon), saw a period of tumultuous and violent alteration to the social order. In the midst of much bloodshed, it abolished ancient privileges, established equality before the law, the guarantee of individual liberties and the protection of private property. It introduced a fundamental break with regard to Constitutional Law,<sup>233</sup> with the introduction of a written Constitution separating Legislative, Executive, and Judicial Powers, and establishing a dual-Court structure (regular and administrative Courts). Napoleon's major achievement was the drafting of the Code "*Civil des Francais*" (The

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<sup>232</sup> "*Procedure Civeles*," Vincent, J., Guinchard, S., 1994.

<sup>233</sup> "*Code Constitutionnel*," 1995.

French Civil Code), as well as four (4) other codes, which unified private law, while public law developed in the Nineteenth (19<sup>th</sup>) Century.

The crisis in the French Legal System is symptomatic of the ongoing contradiction of providing “old” responses to “new” challenges. The Judicial System is not only the victim of that approach; the political and economic organization seems to follow the same path. Alain-Gerard Slama stated:

**“Our old French culture staggers under the attacks of globalization.”**

It is unfortunate that French society seems to hang on to that “old culture.” There is in France a strong resistance to adaptation. Instead of transforming itself, the French society prefers to change its Government or the content of its laws. The problem of the Justice System is by far the most fundamental problem facing France. The French Legal System represents an outdated conception of justice. The French Penal Code<sup>234</sup> is conceived on a Nineteenth (19<sup>th</sup>) Century codification, instead of a Twenty-first (21<sup>st</sup>) Century codification.

The special part of the Penal Code<sup>235</sup> does not include any specific references to Europe. This is bound to lead to conflicts, as several supranational norms are part of French Law in virtue of the direct applicability of the European Convention.

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<sup>234</sup> “Code Penal,” Tulkens, Francois and Beernaert, Marie-Aude, Brussels, 1995.

<sup>235</sup> “Droit Penal Compare”, Pradel, Jean, Paris, 1995.

Globalization has also put the Nation under attack. The weakening of the state is leading to the increasing strengthening of “inner circles,” where social relationships still work. Allegiance to the Nation is being replaced by allegiance to ethnic or religious communities. The old “universalism,” on which French Law was based is heading toward a progression of “particularism.”

France is weaker internationally, but on the internal level, there is an increase of the role of the state in public affairs. Citizens expect an increased protection from the State and its institutions. If the system fails, they blame the elected officials in charge of the country. The officials and leaders are tempted to multiply the rules, norms and codes devoted to the protection of their own function. The constant reforms are defeating their purpose. The law has started to appear like a fluctuating element, a politicized caricature of what it should be. About a recent reform, Pierre Chanbon (Counsel for the Appeal Court in Versailles) stated:

**“Justice, which is a serious thing, should not be changed every six (6) months by the Legislation. The new law is unlikely to change any of my positions, since in that Domain Laws are lasting no longer than roses.”<sup>236</sup>**

As a result, the reforms themselves are not trusted, and there is increased dissatisfaction in the French Legal System. There is an increasing demand for justice,

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<sup>236</sup> “*Le Droit, Mal Aime de Notre Histoire,*” Garapon, Antoine, Figaro Magazine, June, 1997.

bringing on yet another level of contradiction. The French society is becoming a place where law has been rendered “commonplace.” There is an intensification of an American-like “Judiciarization” of the social exchanges. Every social exchange has become a legal one and justice has started to encompass moral. Law has become omnipresent under the pressure of a social demand, increasingly insecure and impatient. The ongoing trial against corruption, privileges, political scandals, and malpractices cannot be interpreted as a maturing of a system. Regarding this, Antoine Garapon stated:

**“...the symptom of a decline in responsibility and an increase of intolerance.”**

In France, the growing need for justice overloads the system, which creates anger, frustration, and exacerbates social tensions. It is further heightened by the “gap” existing between the instantaneousness of the information given by the media and the length of the procedure. In France, the increased need for justice does not represent a sign of progress, but a regression of the idea of justice. The constant reforms and revisions to the Legal System cannot hide the contradictions of an outdated system trying to solve modern issues.

Today, France is a Republic and a Unitary State, with a tradition of a strong centralized state. Decentralization Laws in the 1989’s have introduced true local Government structures, with a transfer of power from centrally-appointed Government to



a locally-elected representatives of the people, within the twenty-six (26) regions and four (4) overseas ones (Martinique, French Polynesia, Wallis, and Futuna) and territorial collectives (Mayotte, in the Comoro Group, and St. Pierre and Miquelon, in the Gulf of St. Laurence).

The Fifth (5<sup>th</sup>) Republic's Constitution invests great power in the President, as Head of State (all but total power in foreign and military affairs), but the Prime Minister is expected to be figure of independent authority who sets his own Legislative Program in National matters and chooses his own Cabinet. The Prime Minister serves at the pleasure of the President, but the President traditionally has kept a distance between himself and the Government, which actually is to his advantage because it provides insulation and space for maneuver when the Government is in trouble. The President can dismiss a Cabinet in difficulties and name a new Prime Minister to launch the Government onto a different course.

The Fifth (5<sup>th</sup>) Republic has always been criticized for excessive Presidential Power, .as being a kind of elected Monarchy, without "the checks and balances" among Judiciary, Legislature, and President that in principle saves American Government from the abuses of power. In view of the events of the last six (6) years, Americans need diffidence in making what in the past was the proud claim that our system of divided powers "works." It has failed to save American Government from a drift towards an "unaccountable" Government and an "undermined" Bill of Rights.

**(b). Court Procedures and Lawyer Protocol.**

The United States Congress tries to control abusive Class-Action Lawsuits that many argue have spiraled out of control, the French are proposing measures that would allow consumer groups to sue on behalf of consumers in France. Class Action Lawsuits are not excessive in France because of the following:

(a). France's Legal Code does not provide for strict product-liability rules. French defendants can be found "not liable" by showing evidence of negligence by the plaintiff resulting in injury;

(b). France prohibits "contingency fees." This discourages lawyers who sue just to "clean up." The French Legal System does allow limited "success fees;" and

(c). French Judges are permitted to order the losing side of a lawsuit to pay some or all of the winner's legal costs, which also dampens lawyers' incentives for frivolous suits.

Unlike France, lawyers in the United States have little restraint when it comes to milking large settlements from Class-Action Lawsuits.<sup>237</sup> One example is a recent Lawsuit involving Citibank, whereby lawyers received Nine (9) Million, while consumers, who were supposedly treated unfairly, received mere pennies. France is adopting American-style "tort" practices. The United States could learn something from France by adopting some of their legal restraints that would end the redistribution of millions dollars of wealth from businesses and consumers to lawyers."

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<sup>237</sup> Class Action Lawsuits: A United States Import Europe Should Do Without, Kern, William, June 23, 2008.

France has a different legal system than the United States. France's legal system is based on the Napoleonic Code, and the United States' legal system is a predominately "Common Law" System of evolving and changing interpretations of previous case law and statutes, under the overarching protection of the Constitution and the Bill of Rights. The differences are not "subtle." They are "major," reflecting profound differences in the attitudes of each country towards justice, its citizenry, society, and, in particular, the value and desirability of "freedom of speech." In a defamation lawsuit in France, "the burden of proof" falls on the defendant. The defendant, who made the defamatory statement must "prove" to a three (3)-judge panel (not a jury, which reflects the fact that the French have far less trust in the decision of its "ordinary" citizen than the United States does) that the defamatory statement was "true." If the statement concerned a matter of public importance, the defendant is required to "prove" that he/she conducted a serious investigation before making the statement, and that the statement was measured and objective and without a trace of personal hostility. The word "prove" means what it says, not "indicate the defendant had reason to believe it was true" or "suggest that it might be true," or even "prove it was most likely true." It places "the burden of proof" in defending against a libel suit unconscionably, almost ludicrously, high.

Accordingly, the United States' standard for "defamation," particularly for public figures, "the burden of proof" is entirely on the plaintiff to prove the statement was

defamatory, false, and malicious. In *New York Times v. Sullivan*, 1964, the Supreme Court established:

**“the First Amendment protected ‘inhabited, robust, and wide-open’ criticism of public officials, at least unless it could be proved that the critic was deliberately lying or showed ‘reckless disregard’ for the truth.”**

The United States is serious about protecting the First (1<sup>st</sup>) Amendment “Freedom of Speech” Rights. It is also less concerned than France about the practice of “insults” or with the need to prevent “slurs” on one’s honor. The United States is more concerned with the right to “free speech.” For France, the most import is that society be Courteous at all costs, even to public figures. In making accusations against public figures, even a “private” citizen must make sure he has conducted a thorough investigation. This practice does not apply to public people of power because they are above the law. The French Press cannot be successfully challenged by its citizenry. France is owned and run by the Government.

The relationship between politics and religion<sup>238</sup> has never been more pressing importance than today. The events of September 11, 2001, dramatically highlighted within the United States<sup>239</sup> the pertinence of religious forces in both national and global matters. In France, immigration from Muslim<sup>240</sup> countries has generated major debates, including a recent public inquiry on the century-old law separating the French State from the Catholic Church and the introduction of a new law banning selected religious insignia in French public schools. While the official discourse of both nations is that of “secular republicanism,” this is interpreted in very different ways in France and the United States.<sup>241</sup>

An example of the need for reform in the French Legal System is a case annulling a marriage of a Muslim couple because the wife was “not a virgin.” A senior cabinet member of North African Muslim origin was responsible for the decision. The Imam of the largest Mosque in Paris was among the fiercest critics of the marriage annulment, He stated: “The Judicial System of a modern country cannot hold to these savage traditions,” and he likened the Court decision to “equating marriage to a commercial transaction.” In the ruling there was no word “Muslim,” there was no word “religion,” and there was no word “custom.” The word of “virginity” was referred to “a lie.” In 2004, France passed a

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<sup>238</sup> Islam in France: The French Way of Life is in Danger, Gurfinkiel, Michael, March, 1997.

<sup>239</sup> Beyond Separation of Church and State, Murphy, Andrew B., July, 2002.

<sup>240</sup> Muslims in France, Ramadan, Tariq, 2005.

<sup>241</sup> History of the Separation of Church and State in America, Price, R.G., March, 2004.

law against wearing Muslim headscarves or “hijabs” in the public schools. The French Courts can rule as they please, much different than the United States’ Court System.

The riots in France of the minority groups are “proof” that the French Court System is not working.<sup>242</sup> With French judges working overtime to convict, and in some cases, deport the troublemakers, it is worth recalling a more “positive” use of the Judicial System. The role of the judges need not be limited to punishment. Courts assume a more constructive social role when they act to redress wrongs and relieve grievances. They can be a safety valve, serving to channel and ease some of the pent-up pressures that exist in every society. France’s Courts fail to fulfill the role for the following:

- (a). A dominating Executive Branch;
- (b). A divided and weak legal profession;
- (c). A Judiciary that is a civil service and, hence, bureaucratic; and
- (d). A lack of financial resources.

The French Legal System is honest, competent, accessible in terms of cost and relatively “quick” compared to other Legal Systems. It has no history of providing redress for the kinds of social problems that France is currently undergoing. By failing to use its Judicial System as a pressure valve, France neglects a useful tool of “social control.” Even if France takes the steps necessary to mend the problems, it will take decades for those problems to be resolved.

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<sup>242</sup> “*La Procedure Penale: Bilan des Reformes Depuis 1993*,” de Boubee, Roujou, Paris, 1995.

The French Government could act to encourage its minorities to seek Judicial redress of their grievances and encourage the Courts to grant it, despite the fact that some of the financial redress would undoubtedly be against the Government itself. The Ministry of Justice could actively prosecute discriminators, as well as troublemakers. It could encourage and finance Friend-Of-The-Court (“*amicus curiae*”) Briefs by interested parties, and require the Courts to accept them. This would raise the level of legal representation, and could push for higher damages to be awarded.

An example of the American experience is when the West Coast received waves of Chinese immigrants<sup>243</sup> in the second (2<sup>nd</sup>) half of the Nineteenth (19<sup>th</sup>) Century, which resulted in anti-Chinese sentiment.<sup>244</sup> In the 1880’s, San Francisco passed a City Ordinance requiring Chinese laundries to close, but allowing non-Chinese laundries to remain open. The case ended up in the Supreme Court, which held that the City had violated the “Equal Protection” Clause, and that the Constitution protected all persons, and not just citizens.

Some of the achievements in the racial equality movement in the United States are as follows:

- (a). City zoning on racial grounds was struck down in 1917;
- (b). Discrimination in interstate commerce in 1941; and
- (c). Racial covenants in deeds for sale of land were declared “unlawful” in 1948.

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<sup>243</sup> Driven Out: The Forgotten War Against Chinese Americans, Pfaelzer, Jean, July, 2007.

<sup>244</sup> The Chinese in America, Chang, Iris, 2003.

There are many more examples, but beginning in the 1960's. private organizations like the National Association for the Advancement of Colored People (NAACP) the American Civil Liberties Union, and the American Bar Association, as well as the Justice Department played significant roles in assisting minorities to assert their rights to obtain damages in cases where they were appropriate.

The Courts played a vital role, not only in implementing rights that were part of the National Mythology, but not available in minority individuals. With persistence and good legal counsel, it was possible to prevail. Many people failed to get the benefits of rights to which they were legally entitled, but enough did so to make many minority citizens believe that they could prevail through the Justice system, rather than by trashing the Nation's institutions and private property.

In France, minorities<sup>245</sup> have access to the French Courts. They get the benefit of French Law and the European Convention on Human Rights. They can get legal aid if they are too poor to retain counsel. To a limited extent the access is used, but not enough to provide a real safety valve. The reason for that is that the redress is too feeble, and the access is not simple. There are few organizations to help. There is much that France could do to improve the situation.

There is talk of different social models, but the United States is not that different from France. The United States has done much better in giving access to minorities to

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<sup>245</sup> Negotiating Identities: States and Immigration in France, Kastoryano, Riva, 2004.



rise to the highest levels. In France, there are no “blacks” or people of the North African origin in the French Supreme Court or as Ministry Heads or Mayors of large cities or Chief Executives of major French companies. While there is much mythology in the United States’ proclamation of “equal opportunity, it remains an active quest. The quest is totally absent in France, and until it occurs, the current social problems can only get worse.

**(c) Methods of Negotiating.**

Although the histories of the United States and France differ, they maintain similar perception of international responsibilities. France and the United States have been allies for over two hundred (200) years, yet in the last sixty (60) years differences between the two have grown increasingly visible. Despite the longevity of close relations, the bilateral relationship lacks “density.” Although France and the United States are allies, most of the “Cold War” was marked by French efforts to find an alternative to the duality of the bipolar international system. Friction remains a constant part of bilateral relations, although history has proven France to be a good ally in times of crisis.

France frequently challenges the United States, contributing to the French reputation as a spoiler in international affairs. France seeks international positions in

opposition to the United States. It prefers not to passively accept the United States' positions or unilateralism, but rather to achieve its ends by occasionally allowing negotiations to fail or by making what it perceives as an independent decision rather than acting out of loyalty to the United States.

The strength of France's economy, the French nuclear deterrent, France's role in peacekeeping and military intervention, its residual interests in Africa and elsewhere, and the continuing attraction that France has to the Third (3<sup>rd</sup>) World as a land of political asylum, all contribute to its high international profile. These factors also justify French participation in major international institutions, such as G-8<sup>246</sup> (the Group of eight (8) leading industrialized nations), and the United Nations (UN), where it is a permanent member of the Security Council. Such membership ensures interaction with the United States and a place at the global decision-making table.

Like the United States, France has an official position on virtually every international issue. Yet France lacks the influence and resources to effectively promote its position in the international arena outside of Europe. It is within this context that France maneuvers to retain its independence in international affairs. French Governmental institutions and the Country's political environment have a large impact on French foreign policy. The role of the President and the nature of the French Parliament are important institutional factors influencing French negotiating behavior.

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<sup>246</sup> Arguments Against G-8, Miller, David, Hubbard, Gill, May, 2005.

The French Constitution is ambiguous in assigning responsibility for foreign affairs to either the President or the Prime Minister. In spite of this, Presidents of the Fifth (5<sup>th</sup>) Republic has successfully reserved for themselves primary responsibility for defense and foreign policy issues. The Prime Minister maintains a role in foreign affairs, attending European Union (EU) and G-8 Summits with the President. The Prime Minister typically plays a less forward role in such forums. When the President and the Prime Minister are from different parties (a situation known as “cohabitation”), differences on foreign policy issues can be a source of tension within the Government.

Unlike the United States Congress, which has authority to ratify or reject international treaties, the French Parliament lacks the authority to “veto” presidential foreign policy priorities. The French President has great leeway in international affairs, without fear of parliamentary micro-management. In difficult negotiations, it is not uncommon for the French President to provide direct guidance to the negotiating team, behavior which is highly unlikely from a United States President, except on the most sensitive issues.

French public opinion is an important variable influencing that Country’s negotiating behavior. This can be particularly enlightening with respect to the United Nations (UN).<sup>247</sup> The UN is not a matter of much public concern in France and there is no polarization on UN issues like there is in the United States. This has given France

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<sup>247</sup> The UN Security Council and the Politics of International Authority, Cromin, Bruce, Hurd, Ian, March, 2008.

flexibility on United States issues that the United States has not had. France can be more flexible than the United States because it lacks many of the domestic restraints that force United States' positions.

Compared to training for American Foreign Service Officers and other Government officials, the French program of training and education is far more homogenous. This training of foreign policy practitioners affects French negotiating behavior. The French educational system remains intrinsically elitist, and many National Advisors have graduated from either the National Administrative School, "*L'Institut d'Etudes Politiques*," or "*Ecole Polytechnique*." It is common for French diplomats to descend from the aristocracy. The training and personal characteristics of French negotiations<sup>248</sup> cannot be discounted as potentially important when explaining France's negotiating power.

**(a). Principle;**

France does not sign declarations on many occasions because it is the "principle" of France. Although French interests would not be damaged by signing, "principle" is paramount.

The idea that there has been a change in France's international position since World War II remains undigested and there is a constant reference to history, a fact that

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<sup>248</sup> French Negotiating Behavior: Dealing With LA Grande Nation, Cogan, Charles, 2005.

frequently offends France's European neighbors. While the United States is seen as unilateralist and hegemonic in its diplomacy, French bargaining positions often result from failure to adjust to the postwar reality that influence in the world has greatly diminished, France has a long tradition of being involved in international affairs, and this is a role it is unwilling to relinquish.

**(b). Burden of Being Right.**

The French Government's positions frequently have merit, but France lacks the influence to implement them. Despite public disagreements on policy issues, the United States' officials acknowledge that the French position in some cases is the right one. The United States in many cases adopts the French position because it is thought to be the right one, not because France has the power to force acceptance of its views.

In France, a small group of officials arrives at bargaining positions. The United States negotiates with itself first, through interagency and intergovernmental debates, sometimes for weeks. This results in inflexible United States' positions. Despite their flexibility, the French take language more seriously than most Americans. They do this as the result of what is the conflict between French "abstractionism" and American "pragmatism."<sup>249</sup> As a global power, the United States can ultimately decide to relent on language without feeling it has lost anything of importance. The French are more likely

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<sup>249</sup> Classical American Pragmatism: Its Contemporary Vitality, Rosenthal, Sandra, Anderson, Douglas, 2002.

to take a hard line and not concede until they have no option but to back off. When misused, such tactics can damage France's ability to obtain its strategic goals. Whether its positions are principled or pragmatic, stubborn or flexible, France adopts negotiating positions that seek to protect its interests, both hard and soft.

The French are often more aggressive and confrontational than other European negotiators. France attaches importance to language and political issues, and will fight long and hard to attain its objectives. The French will take a slightly extreme position and stick to it until the last moment. France "takes issues hostage and do this until late in the game and turn it into a game of chicken." The French seem to regard the potential dangers of being isolated as worth it. They fight hard for perceived issues and do not apologize for its instructive for understanding different components of the French approach to international diplomacy. France recognizes the value of working in a multilateral context to constrain the behavior of more powerful nations. The French are also skilled at developing a multifaceted approach to complex problems. The results can be an irritant to relations with other countries, particularly the United States, but there is a degree of begrudging respect for French willingness to identify its true interests and to pursue them without hesitation.

Principles and pragmatism both have a place in French negotiating behavior. How and when these characteristics present themselves is the result of complex international dynamics, the dominant role of the United States in the international arena within which

France operates, and a seemingly sense of nostalgia for the days of great French power. The realities of France's international position lead the French to adopt bargaining tactics that seek to maximize their influence, often frustrating their interlocutors and sometimes resulting in unsuccessful negotiations even with friends and allies.

The difficulty with which the United States negotiates with France has become almost a "*cliché*" in international politics. In the United States' view, the French have developed a reputation for being difficult partners in times of peace, yet reliable allies in times of crisis. With better understanding of French motivations in the conduct of international affairs, the United States and other interlocutors can work more constructively with France, ensuring cooperative, multidimensional relations in both bad times and good times.

While the differences between France and the United States are great, they are beginning to look quite similar in a "cartoonist" version. The United States "bailed out" Wall Street<sup>250</sup> from the bankers they can no longer trust. The United States is about to quasi-nationalize the Detroit auto companies<sup>251</sup> via massive loans because they are a source of American "pride." The United States' Social Security System is going broke and the country is heading for a future with few workers and many retirees. It will not be too long before the United States has "nationalized" health care like France. In France, in

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<sup>250</sup> Bailout Nation: How Easy Money Corrupted Wall Street and Shook the World Economy, Richoltz, Barry, 2008.

<sup>251</sup> Should we Bail Out Detroit?, The New York Times, November 26, 2008.

1982, the banks and insurance companies were “nationalized” so that the bankers, who did not want to lend money, became controlled by the State.

The United States bailed out Fannie Mae and Freddie Mac, turning the United States into the largest subsidized housing project in the world. France does not have the “mortgage crisis” like the United States has because the bulk of French homeowners are free of sub-prime mortgages. France has its “*banlieues*,” (housing projects) where it likes to warehouse people who are not French enough.

United States has dismissed the French as Federal “wards” of their welfare state. The French work twenty-seven hours (27) a week, and have nineteen (19) holidays in a month, while the average American works two (2) jobs, and gets two (2) weeks off for vacation. Twenty-five (25) percent of the population of France work for the Government. They retire before their kids finish high school, and do not have to save for college tuition because college is free for their children.

The tax rate in France is one-hundred and three (102) percent, and their Labor Laws are so restrictive that they have not had a net gain in jobs since the time of Napoleon. It does not seem possible that France can pay for this lifestyle forever, but it does.

The United States is facing the prospect of Government intervention in the automobile industry, as France had done with Renault earlier. Today, Renault is a private company in France, but still has to pay fifteen (15) percent of its shares to the French



Government. The French would have interfered with the market forces of the automobile industry, not like the United States.

The nationalization program and other economic reforms failed, as the development of the European Market made a “centrally-planned” economy obsolete. In the United States and France, nothing is more sacred as the farmers. They get whatever they demand. The farmers in the United States are the most “special interest” groups in all the United States’ history. The United States consumers pay twice as much as the French for their products, because of price guarantees.

The French were elated when Barack Obama <sup>252</sup>was elected President-Elect in November, 2008. This is the best example of “Democracy” working in the United States and of “Civil Liberty” advancement. President elect Barack Obama’s views<sup>253</sup> on international affairs are as follows:

**(a). National Security.**

“...if Pakistan is unable or unwilling to hunt down bin Laden and take him out, then we should.”

**(b). International Environmental Regulation.**

“The first commitment that I’ll make today is setting a goal of an eighty (80) percent reduction in greenhouse gas emissions by 2050.”

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<sup>252</sup> The Keys to the White House, Lichtman, Allan, Social Education, Vol. 72, 2008.

<sup>253</sup> The American Society of International Law, Ward, Sheila, November 6, 2008.

**(c). Nuclear Non-Proliferation.**

“We cannot allow Iran to get a nuclear weapon. It would be a game-changer in the region.....and I will do everything that’s required to prevent it. And we will never take military options off the table. And it is important that we don’t provide veto power to the United Nations or anyone else in acting in our interests.”

**(d). Humanitarian Intervention.**

“So, when genocide is happening, when ethnic cleansing is happening somewhere around the world, and we stand idly by, that diminishes us. And so I do believe that we have to consider it as a part of our interests, our national interests, in intervening where possible.”

**(e). International Security.**

“[W]e need to work with Russia to take U.S. and Russian ballistic missiles off hair-trigger alert’ to dramatically reduce the stockpiles of our nuclear weapons and material; to seek a global ban on the production of fusil material for weapons; and to expand the U.S.-Russian ban on intermediate-range missiles so that the agreement is global.”

**(f). Trade Agreements.**

“...what I’ve called for is a loosening of the restrictions on remittances from family members to the people of Cuba, as well as travel restrictions for family members who

want to visit their family members in Cuba. I think our goal has to be ultimately normalization.”

**(g). International Trade.**

“The only trade agreements I believe in are ones that put workers first-because trade deals aren’t good for the American people if they aren’t good for working people. That’s why I opposed CAFTA. That’s why I oppose the Korean Free Trade Agreement. That’s why I voted to block Mexican trucks from entering this country. And that’s why we need to amend NAFTA.”

**(h). Human Rights.**

“I will make the United States a signatory to the U.N. Convention on the Rights of Persons with Disabilities-the first human rights treaty approved by the U.N. in the 21<sup>st</sup> century and a critical step toward respecting the rights of people with disabilities worldwide. I will close the prison of Guantanamo Bay and put the rest of the remaining prisoners on trial.”

Due to his election, the French are taking up a new challenge of breaking down barriers in French politics. France has set up a “blog” in the City of Lyon called “the Movement” to track progress in getting visible minorities into positions of power and to speak out against discrimination. France is the home to one (1) of Europe’s biggest black

communities and the largest Muslim minority. One (1) out of ten (10) of its inhabitants is of Arab or African origin. France's political establishment remains white, despite the appointment of two (2) women of North African descent and a black Human Rights' Minister in President Nicolas Sarkozy's Government. In the United States, there are approximately ten thousand (10,000) black-elected officials.

Barack Obama's<sup>254</sup> French disciples are also training their sights of boosting diversity in the media, the entertainment industry and the top echelons of business. Since Barack Obama's victory, there has been a clamor for change from dozens of anti-racism associations, black advocacy groups and prominent figures from France's rich ethnic and racial mix. The French System prides itself on being a "meritocracy" because it offers free education for all, but by being based on color-blind national competitive exams, it fails to help disadvantaged minorities to "rise-up."

France abolished slavery in 1848, nearly twenty (2) years before the United States and prides itself as a color-blind nation that welcomes anyone who wants to be French and blend into the mainstream. The French political has become more "archaic." France has only experienced non-European immigrants until recently. In the past two (2) centuries, France has absorbed more immigrants than any other European country. African and Arab immigrants only started coming to France in the 1960's. The country still needs to figure how to politically integrate its recent non-European settlers.

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<sup>254</sup> Barack Obama for President, Granes, Earl J, Jr., Black Enterprise, Vol. 38, January, 2008.

Promoting diversity in politics is a minefield with politicians from both the right and left opposed to the idea of special treatment for minorities through affirmative action or quotas. Last year, Sarkosky had floated the idea of French-style “affirmative action” early on in the election “affirmative action,” notably from the left-wing Liberation daily which said France’s much-vaunted equalitarianism would remain “an unapplied principle” without measures to promote minorities.

For affirmative action to be possible and effective, data collection on ethnic backgrounds should be allowed as is the case in the United States. Without this data, little can be done to promote diversity. This will be politically difficult, but since Barack Obama’s victory, dozens of French black advocacy groups and antiracism associations are rising and asking for change. Of course, a French Barack Obama will not emerge soon, but France can embrace change and when it does, it will finally become a country of “real” equal opportunity for the millions of African and Arab citizens.

In France, a manifesto was published subtitled “**Oui. Nous Pouvons.**” (Yes, We Can!) It urges affirmative action-like policies and other steps to turn French ideals of equality into reality for millions of blacks, Arabs and other alienated minorities. The President’s wife, Italian-born, Bruno-Sarkozy said she “could not sign the appeal because of her “status” as First Lady,” but that she fully supported it. She was quoted in the “*Journal du Dimanche*” as calling Barack Obama’s election “an immense joy.”

Countries like France and the United States are always evolving throughout history, and trying new procedures to better their nations and this never-ending process will continue. ***“Long Live America!”*** and ***“Viva La France!”***

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