Commanding Legality

THE JURIDIFICATION OF IMMIGRATION POLICY MAKING IN FRANCE

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ABSTRACT

The emergence of constitutional review in France has attracted substantial attention from scholars of public law. Yet little has been written about the political implications of the expansion of rights-based review on the part of France's highest administrative jurisdiction, the Conseil d'Etat. The argument is made in this article that repeat litigation by French lawyers defending the cause of immigrants is an important site for observing the symbolic power of legal forms. The analysis focuses on cases challenging immigration-related administrative regulations and shows how the process of repeatedly adjudicating these issues has focused attention away from litigants and their claims at the same time that it has reinforced the centrality of the Conseil d'Etat and its formalist jurisprudence in administrative governance. This detailed examination of the practical operation of France's highest administrative jurisdiction leads to the surprising conclusion that this distinctly nonadversarial form of adjudication has contributed over the long term to institutionalizing a juridification of immigration-related administrative policy making.

INTRODUCTION

Viewed from the perspective of an American public law scholar, the engagement of France's Conseil d'Etat with immigration questions has the fascination of appearing familiar in some ways and strangely unfamiliar in others. The familiarity arises from the fact that immigration issues have become the subject of a form of legal activism on the part of French civil society groups that is reminiscent of US public interest law. Immigration is high politics in France, and, for more than 3 decades, a small network of activ-

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ist lawyers has used litigation to defend the cause of foreigners in immigration policy making. The strangeness resides in the legal procedures and processes through which judicial oversight of immigration policy making is exercised. Planned litigation mainly involves challenging administrative texts before France's highest administrative law jurisdiction, the Conseil d'Etat, which has no parallel in the Anglo-American legal tradition.

Studies of judicial politics in France have focused not on the activity of the Conseil d'Etat but rather on the role of the Constitutional Counsel, an institution that is not technically a court but rather a "third body" of the legislature that possesses the authority to review the constitutionality of legislation before its enactment. The assertive role played by the French Constitutional Counsel since the early 1970s has been the subject of several book-length treatments (Stone Sweet 1992; François 1997; Schnapper 2010). Although the Constitutional Council's review of pending laws cannot be invoked by individual litigants, its impact on legislative politics is unmistakable.[1]

The political implications of administrative review by France's Conseil d'Etat are less obvious. For one thing, although it is accessible to individual litigants, the Conseil d'Etat lacks the authority to review the legality of legislation. Governments may opt to ignore the Conseil d'Etat's criticisms, so long as they have the votes to enact policies legislatively rather than administratively. Indeed, scholars of immigration politics have contended that the primary effect of administrative review of immigration policy making has been to shift the institutional locus of policy making from the administration to the legislature (Guiraudon 2000).

Moreover, the degree to which the Conseil d'Etat has elaborated a rights-oriented jurisprudence in the area of immigration is open to debate. Broadly speaking, the Conseil d'Etat has a reputation for "respecting the liberty of the administration" rather than placing obstacles in the way of the programs pursued by the sitting government (Lafon 1994, 138). Certainly, at the level of conceptual innovation, the Conseil d'Etat since the 1970s has made important declarations of principle in cases concerning immigration matters (Genevois 2009). Yet some legal scholars have argued that the Conseil d'Etat has opted for a narrow application of these principles in subsequent cases, allowing the government to enact restrictionist policies with minimal or purely cosmetic modification. French law has no equivalent to the plenary power doctrine that has stymied the development of a constitutionally based immigrant rights jurisprudence in the United States. Nevertheless, as in the United States, a restrictionist policy framework arguably remains dominant in France's immigration policy making. From this perspective, immigrant rights litigation has resulted in short-term victories but has posed little long-term obstacle to the government's restrictionist agenda (Lochak 2009).

1. The Constitutional Council's review generally has been invoked only by legislators. Since 2010, its advisory opinions on questions of law may also be sought by the Conseil d'Etat and the Cour de Cassation as they identify constitutional issues in pending individual cases.

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How precisely has this recent but important involvement with immigration issues on the part of France's Conseil d'Etat altered (or failed to alter) the politics of immigration in France? And how has it influenced the broader terrain of administrative governance? Moving beyond doctrinal analysis, this article offers a detailed empirical exploration of the practice of judicial review of immigration administration in France. It explores the discursive possibilities that have been opened up and closed off by a system of administrative review operating with a high degree of formalism in both process and mode of reasoning. Indeed, the study's surprising finding is that the formalism of French administrative review has exerted a subtle but powerful influence over immigration administration. The process of repeatedly challenging immigration policies before France's highest administrative jurisdiction has propelled a transformation of administrative governance in the realm of immigration away from the discretionary logic of policing and toward a performance of bureaucratic formalism reminiscent of Weberian legal authority. The austere and formalistic logic of French administrative legality (see Lasser 2004), the operative language of the Conseil d'Etat, has come to be mirrored in the language and processes by which immigration regulations are formulated by bureaucratic agents. From the perspective of immigrant advocates, however, this process of juridification has produced disappointing results for the development of immigrant rights. The lesson for scholars of law and courts from this somewhat "exotic" example of governing with judges is that juridification can shift the language of governance, thus contributing to the legitimation of state institutions, even when its impact on the substantive rights of subordinated groups is limited.

GOVERNING WITH JUDGES

Legal frameworks and processes have come to occupy an increasingly central place in contemporary politics across a range of national settings, according to a now well-established body of public law scholarship. Beginning in the early 1990s, political scientists identified the "judicialization of politics"—defined in terms of the expansion of the province of the courts and the spread of juridical processes—as an important dimension of contemporary political life (Vallinder 1994, 91). As this body of scholarship expanded, scholars offered different accounts of the causes of this phenomenon (Hirschl 2004; Woods and Hilbink 2009). Moreover, judicialization came to be understood not as an accomplishment but rather as a multilayered phenomenon whose future development is both historically and culturally contingent (Couso, Huneeus, and Sieder 2010; Ginsburg 2012). Nevertheless, the basic approach unifying the judicialization literature remains one of framing inquiry in terms of the judiciary's institutional empowerment vis-à-vis other state institutions

A related line of research has been similarly focused on the expansion of legalized politics but has moved away from an institutionally bounded conception of law in order to study how legal frames and discourses expand across state institutions. This is a subject taken up by Gordon Silverstein in his exploration of the causes and consequences

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of what he terms the "juridification" of politics (Silverstein 2009).[2] Rejecting the notion of an imperial judiciary imposing its will, Silverstein's study contextualizes US Supreme Court decisions in the second half of the 20th century within iterated patterns of interactions between the Court and other branches of the state in various areas of policy making. Silverstein argues that this "spiraling of precedent" between courts and other branches of government has shaped the course of American politics and American public policy by substituting legal concepts and forms of argumentation for ordinary politics (3).

Even before the introduction of the term "juridification" into public law scholarship, Alec Stone Sweet's pioneering work on the judicialization of European politics had theorized judicial lawmaking in terms of its discursive feedback effect on the decision making of state officials (Stone Sweet 1999). According to Stone Sweet, judicialization should be understood as a "cyclical" and "collaborative" transfer of juridical "systems of communication" from courts to other institutions within the state (2000, 28). By way of illustration, his study shows that the French Constitutional Counsel's application of abstract review powers has not only affected lawmaking directly, by constraining the scope of major legislative initiatives, but also led French lawmakers to incorporate the terms of constitutional discourse into legislative debates. The Constitutional Counsel's review powers are limited since until recently it could only review legislation before its enactment. Nevertheless, like the spiraling of precedent observed in the American case, the phenomenon of the constitutionalization of French legislative politics has operated through repeated interactions between lawmaking and law-interpreting institutions.

In a subsequent study of the judicialization of international regimes, Stone Sweet and Brunell (2013) further refine this methodological point regarding the importance of measuring "governing with judges" in terms of the propagation of argumentation frameworks across a political regime. According to the authors, judicialized governance is likely to emerge so long as three conditions are met: political disputes are routinely brought to courts, judges produce defensible rulings in these case, and public officials treat the reasons the court gives to justify rulings as having precedential effect (62). Thus, even when governments argue that they are exempted from legal obligations for measures that are "necessary" to achieve important public interests, the fact that they are engaging with the court and presenting their position in terms of a distinctly juridisprudential framework effectively provides fuel for the construction of governance through law (86). In other words, under the right conditions, routinized litigation of public policy issues holds the potential to propel a diffusion of juridical interpretive frameworks across state institutions within a given policy domain.

2. Silverstein emphasizes that "judicialization" captures only one part of the broader phenomenon of judicial decisions and legal formality coming "to dominate, structure, frame, and constrain political debate and the product of that debate" (2009, 4). His use of the term "juridification" takes inspiration from the work of Jürgen Habermas and signals a heightened empirical attention to the domain of language, process, and frames of argumentation (Habermas 1986). It is in this sense that I use the term in this article.

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Might a comparable process be observable in the world of French administrative law? My analysis suggests that litigation of immigration issues before France's Conseil d'Etat has indeed fueled a juridification of administrative governance in this area. Through qualitative analysis of official ministerial archives, media coverage of administrative responses to adverse court rulings, and interviews with administrative officials, I document the traces left on France's administrative world by routinized judicial engagement with immigration issues. As I show, the propagation of juridical frameworks for good administration takes place not only when administrative policies are challenged through litigation but also at early stages of the administrative process, when judges and administrators work collaboratively to revise draft regulations. One contribution of the French case study is therefore to remind scholars of law and courts that the practice of routinized litigation in a given domain has the potential to indirectly propel a diffusion of implicit rules and principles from courts to other state institutions, even without the need for activists to litigate all relevant policy questions.

In addition, the case study of the Conseil d'Etat's involvement with immigration issues calls into question a tacit assumption of comparative public law scholarship, namely, that governing with judges produces an inevitable expansion of individual rights.[3] The evidence suggests that has been no "rights revolution" in French immigration politics, even as juridification processes have penetrated deeply within immigration administration. Although the Conseil d'Etat's 1978 *GISTI* decision (holding that noncitizens have a right to a normal family life) continues to affect family reunification policies, French administrative officials claim that they do not feel themselves on the whole to be substantively constrained by judicial decisions.[4] Similarly, activists seeking to expand immigrant rights have expressed disappointment with the limited extent to which the Conseil d'Etat has asserted rights for noncitizens in its jurisprudence. The French case study therefore suggests that, in the case of the juridification of immigration policy administration, construction of governance through law has resulted in the development of principles of good administration more than the development of individual rights.

In sum, intensive judicial engagement with immigration policy making is both a relatively recent phenomenon in France and a marked departure from prior practice. For these reasons, a case study of the interaction of the Conseil d'Etat and administrative agencies in the realm of immigration policy questions offers a window to observe the construction of administrative governance through the language of law. I begin my analysis by briefly outlining the distinctive institutional and conceptual features of the French system of administrative justice that differentiate it from judicial review in the Anglo-

3. In the literature on judicialization, rights jurisprudence, judicial review, and judicial intervention have traditionally been associated with the expansion of judicial power, although scholars differ in how they demonstrate the relationship between these variables, and as Woods (2009) points out, a lacunae remains regarding specific means for measuring the link between assertions of constitutional rights, on the one hand, and increased judicial power vis-à-vis other state institutions, on the other.

4. Conseil d'Etat, 8 Décembre 1978, *GISTI*, Recueil Lebon, 67.

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American tradition of administrative law. Next, I offer a brief historical overview of postwar immigration governance in France, against which the juridification of this area of policy making may be assessed. I then present a detailed exploration of the discursive and symbolic possibilities that have been constructed and diffused through this distinctly French mode of engagement between administrators, litigants, and judges.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN FRANCE

The specific patterns of interaction that characterize the interplay among the Conseil d'Etat and the administrative entities that it supervises are governed by a set of interlocking norms and institutions embedded within France's civil law tradition. Before turning to the empirical evidence concerning judicial engagement with immigration policy administration, I provide a brief overview of how this system is organized normatively and institutionally. I focus in particular on the specific juridical avenue of petitions for abstract review of regulatory texts since this is the means of bringing immigration cases that has been used most extensively by French immigrant rights legal activists.

In France's civil law tradition, the Conseil d'Etat is a mixed administrative-legal authority that is technically located within the executive branch. It is staffed by a corps of elite civil servants who are selected through an elaborate system of examinations and trained as specialists in principles of proper administrative behavior. Originally created by Napoleon, the Conseil d'Etat counsels the government on the drafting of laws and regulations through a formal advisory process. Its members are also routinely seconded to advisory positions within the administration. These advisory functions of the Conseil d'Etat are combined with an adjudicatory authority over all government acts.

In all of its functions, the guiding principle that defines the mandate of the Conseil d'Etat is the maintenance of *Etat de droit*. This concept, to a greater extent than the Anglo-American notion of "rule of law," focuses on the link between well-functioning governance and the state's mandate to serve the people and sustain ordered liberty. Jurisprudentially, the concept has traditionally been interpreted as providing four causes of action for challenging government acts: lack of competence, infringement of an essential procedural requirement, violation of the law, or misuse of powers. According to French principles of administrative legality, *Etat de droit* is preserved through strict adherence to the hierarchy of norms, meaning that regulations and controls enunciated by administrative authorities must remain within the avenues permissible under legislation (interpreted through the lens of fundamental principles of legality).[5] Although it cannot review the legality of legislation, the Conseil d'Etat is authorized to review all applications of the law, from ministerial decrees to decisions of street-level bureaucrats.

5. Starting in the late 19th century, the Conseil d'Etat has deduced a set of "Fundamental Principles Recognized by the Laws of the Republic," which guide its interpretation of the legal avenues within which the administration may act.

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A few generalized points about procedure also deserve emphasis in advance. In the civil law tradition, in comparison to the Anglo-American common law tradition, judicial decisions are generally brief, collegial, and unsigned. Specially assigned reporting judges, rather than the parties, play the dominant role in researching the relevant facts and law. In France, the judicial decisions produced by this inquisitorial system are notable for their austere and formulaic aesthetics, typically taking the form of a single-sentence judicial syllogism that offers no explanation of the interpretative process by which a given conclusion was reached. Decisions of the Conseil d'Etat generally do not refer to prior decisions, nor do they explicitly lay out binding rules of general application. Jurisprudential frameworks are instead developed in the conclusions drafted by the court's internal judicial advisor, the *commissaire du gouvernement*,[6] and in the postdecision commentary of legal scholars.

As we shall see, the formal and formalist aesthetics of French administrative justice have been particularly apparent in the Conseil d'Etat's handling of litigation brought by immigrant rights legal activists.[7] Starting in the 1970s, a network of Left-leaning activists repeatedly organized litigation against immigration-related regulatory texts using the legal avenue of the *recours pour excès de pouvoir* (appeal on the grounds of excessive power). Unlike ordinary petitions, which are heard by administrative tribunals of first instance, petitions challenging the abstract legality of ministerial decrees and circulars are adjudicated directly by the Conseil d'Etat. In their petitions for judicial review, legal activists have repeatedly invoked fundamental principles such as the right to social protection, the right to asylum, and the right for migrants settled in France to work and to enjoy a family life. The landmark 1978 *GISTI* decision, in which the Conseil d'Etat enunciated a right to family life for noncitizens, serves as a symbolic touchstone and exemplar of what this style of adjudication might achieve.

FRENCH IMMIGRATION POLICY MAKING, 1945–75: "A ZONE OF NONLAW"

To understand more concretely why it was that French immigration policy making became the target of organized litigation efforts, it is helpful to look at the postwar history of immigration governance and the logics that directed its administration. Immigration policy during France's 30 "glorious years" of postwar economic growth was made by the executive rather than the legislative branch. Between 1945 and 1975, the legislature took no official action on immigration; rather, government ministries made immigration law via unpublished memoranda that were not considered in the National Assembly. Statist

6. As of February 2009, this position has been renamed the *rapporteur public*.

7. Comparative law scholarship has argued that the formalism and formulaic external features of French judicial deliberations have been designed and maintained in order to create a space for frank internal judicial discussions, insulating them from political pressures and reflecting a long-standing governmental belief in the capacity of the state to manage disputes through trained, experienced, and expert administration (Lasser 2004).

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institutions protected political elites and encouraged them to approach immigration policy making in a technocratic manner (Togman 2001, 81). Formulated primarily by technocratic elites within the Ministry of Labor and the Ministry of Interior, immigration policy making prioritized the dual logics of centralized labor planning and policing.

In terms of fulfilling a labor-planning agenda, immigration policies aimed to furnish French postwar industry with foreign workers, while at the same time protecting the position of French nationals within the labor market. Ultimately, expediency trumped preferences for a primarily European immigrant workforce, which was presumed to be more racially assimilable, and France turned to its colonial subjects as an available labor force to power its economic recovery. Starting in the mid-1950s, the state worked informally with employers to issue work and residency permits to any immigrant who had found stable employment, turning a blind eye to legal entry requirements. Following a model established during the Third Republic, postwar state elites aimed to disperse immigrants to departments across the metropole where their labor was most needed (Noiriel 2001).

So long as it contributed to France's economic prosperity, immigrant labor was welcomed, but it was also heavily policed. Workers lived in specialized dormitories or in "bidonville" shantytowns, and no serious efforts were made at social insertion; the assumption was that guest workers were unassimilable and would one day go home (Lochak 1985, 157). Although colonial subjects had formal access to social services, many metropolitan social welfare offices used the existence of segregated services for North Africans to shift this population out of their purview, even when in fact the workers qualified for support (Lewis 2007). Similarly, local prefectures systematically found ways to deny naturalization to colonial subjects who were unwanted as permanent members of the community (Spire 2005). Immigrant workers were formally denied the right to form legally recognized associations, and their residence was tightly controlled using an elaborate system of identity checks and police files developed during the Third Republic (Noiriel 2001).

This system of control reached unprecedented proportions during the period of the Algerian struggle for independence, when the administration created an entirely separate governance apparatus for Algerian colonial subjects inside France. Nominal efforts were made to win over the loyalty of Algerian migrant workers through the creation of a separate system of social services. In practice, however, these services maintained close links to the police and stood aside as auxiliary police units, operating outside of the normal judicial or police hierarchies, were given free rein to control the North African immigrant population (Viet 1998, 188–89). Governance of the migrant worker population operated as a zone of absolute nonlaw (Hervo and Charras 1971).[8]

8. The bitterness of the continuing debate over the nature of the dramatic protests on October 17, 1961, involving France's Algerian-born population, and their violent suppression, demonstrates the

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Moreover, when their labor was no longer needed, immigrant workers came to be seen by state planners as a dispensable commodity. In the 1970s, as France's period of postwar economic growth drew to an end, the government abruptly suspended all worker recruitments and made it more difficult for immigrants to bring family members to France. Policy makers attempted to use immigration as an economic "shock absorber," reducing the population of immigrant workers so as to buffer French workers from unemployment (Hollifield 2004). Framed by technocratic elites as a "problem" that needed attention, immigration was subordinated to labor market concerns. The secretary of state for immigration, Lionel Stoléru, and his counselors within the Ministry of Labor openly discussed enacting a policy of forced returns for immigrant workers and generally demonstrated a marked "disdain for legality" in their attempts to reduce the immigrant population through administrative decrees (Laurens 2009). Similar measures had been taken during prior economic downturns; during both the recession of the early 1920s and the depression of the 1930s, French administrative policy makers had directed their services to make every effort to "persuade" immigrant workers to return home (Weil 2004; Lewis 2007).

The organized litigation efforts that developed in France starting in the 1970s aimed to challenge this absence of law from immigration policy making. The turn toward immigration restrictionism via administrative decree was the immediate motivation for petitioning the Conseil d'Etat to overturn government policies. But legal activism during this period also aimed to support protests by immigrant workers, who protested restrictionist policies and also demanded a halt to police repression and the use of arbitrary power against immigrants more generally (Ginesy-Galano 1984; Siméant 1998). Beginning in the 1980s, the polarization of French immigration politics and increased legislative activity on immigration (and hence increased administrative actions) likewise propelled organized litigation activity. The goal of legal activist efforts, for almost 40 years, has been to defend the immigrant cause by asking the Conseil d'Etat to extend and then apply fundamental principles of law to immigration policy making.

THE CONSEIL D'ETAT'S COMMANDING PERFORMANCE OF FORMALISM

In the United States, one of the most striking features of immigration-centered legal activism over the past 40 years has been its capacity to amplify conflict between those who advocate on behalf of the rights of noncitizens and the administrative agencies charged with enforcing immigration laws. Public trials were an opportunity for US cause lawyers to attract media attention to immigrant causes, particularly through dramatic witness testimony (Coutin 1993). Large class action lawsuits against the Immigration

extent to which French society continues to struggle with these historical conjunctures between migration and colonial governance (Cole 2003).

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and Naturalization Service and its successor, the Department of Homeland Security, inspired administrative officials to actively lobby Congress to limit the jurisdiction of courts to hear such cases (Martin 2002). The "adversarial legalism" that Kagan associates with judicial intervention in administrative affairs (Kagan 2001) is an accurate representation of the relationship that developed between US administrators and immigrant rights legal activists.[9]

In France, the adjudication of legal challenges to immigration policies had the opposite effect. The mobilization of law by legal activists certainly set in play a quasi-ritualized interaction that positioned French judges, administrators, and litigants as juridical subjects and thus effected a juridification of immigration policy making. Yet the nature of this process of juridification was distinct to its legal context. The formalistic, formulaic, and inquisitorial practices associated with the Conseil d'Etat's system of administrative review effectively prevented adversarial legalism and its associated features from making an entrance onto the French political stage. Rather than performing the parts of attacker and defender, advocates and administrators were cast in more passive roles. In short, the adversarial relationships cultivated by the pattern of organized immigration litigation in the United States have not materialized in France.

This is not to say that French legal activists, like their US counterparts, did not seek to use law to constrain the restrictionist tendencies of immigration policy making. Indeed, immigrant advocates in France continue to view action from the Conseil d'Etat as one of the few means of breaking into the "impermeable fortress" of administrative governance.[10] In their position statements to the media and the general public, immigration legal activists are openly critical of official immigration policies and repeatedly express their solidarity with extreme-Left political mobilizations.

Yet, while advocates may talk of storming the citadel of administration, this adversarial tone has been almost entirely absent from the aesthetics of petitioning the Conseil d'Etat. Legal activists are keenly aware that their petitions to the Conseil d'Etat must conform to the formal language and condensed style of argumentation characteristic of French administrative law. As one seasoned practitioner of immigration reform litigation put it, "If you want the Conseil d'Etat to exercise control, the key is to go slowly. Above all, one should not be disagreeable."[11] Another advocate recalled that younger members of the immigrant rights practice community are sometimes frustrated when

9. Class action litigation campaigns coordinated by US immigrant rights legal activists, which have strongly colored the tone of judicial-administrative relations, represent only a small subset of the judiciary's sizable immigration docket. Most immigration cases in federal court are brought by individual litigants and have provoked little in the way of explicit administrative hostility. While the impact of individual appeals on legal doctrine is limited, these cases are often effective in providing individuals with reprieve against harsh immigration laws (Law 2010).

10. Interview with Philippe Waquet, June 12, 2007, Paris.

11. Interview with Philippe Waquet, June 12, 2007, Paris.

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those with more litigation experience insist on dropping audacious arguments from their petitions on the grounds that they would not be received well by the Conseil d'Etat.[12]

As a rule, immigration advocates' petitions have avoided combative language and have maintained a moderate tone. Take as an example a 1991 petition submitted by the immigrant rights organization ELENA (European Legal Network on Asylum) against a ministerial circular that instructed prefectures to cease issuing work authorizations to asylum seekers. The text of the petition begins in a typically deferential and solicitous tone: "The association here before you defers to the censure of the Conseil d'Etat the circular which causes it harm. It solicits the Clerk of the Conseil d'Etat to assemble a dossier of all relevant elements concerning the promulgation of this circular. It asks to be notified of the public hearing at which the Conseil d'Etat will examine this complaint."[13] The remainder of the two-page petition includes a brief discussion of formal and substantive legal avenues by which the circular might be found illegal. The substantive arguments are gestural, with references to jurisprudential principles encompassed in a few paragraphs. They explain why, according to the petitioners, the circular violated the right to work contained in the preamble of the 1946 constitution, a right which the Conseil d'Etat recognizes as a fundamental principle of law. The primary role of the petition was to demonstrate that the legal challenge had sufficient substance to merit the Conseil d'Etat's adjudicatory efforts. Jurists have learned to keep their submissions short. As one advocate explained, "ten pages with ten different points is too long since the Conseil d'Etat just needs one good '*moyen*' [legal avenue] and they will consider the case."[14] Overall, I did not come across any written submissions by the parties to immigrant rights litigation that exceeded a dozen pages, and most were five to six pages in length.

This form of bringing immigration to the law is notable not only for its deferential tone but also for the way in which it has focused debate at the level of abstract principles as opposed to concrete administrative behavior. In a *recours pour excès de pouvoir* challenging the legality of a regulatory text immediately after its enactment and before it has been applied, evidentiary submissions on the part of advocates are minimal if not absent altogether. The document "stockpiling" characteristic of the class action litigation favored by US immigrant rights advocates and wielded as a weapon against administrators has not been a feature of French legal activism. Instead of discovering patterns and practices of street-level administrative illegality, French advocates in their submissions to the Conseil d'Etat have invoked a substantive vision of republican social incorporation. In line with the hierarchical ontology

12. Interview with Danièle Lochak, March 2, 2007, Paris.

13. "Recours Sommaire pour l'Association ELENA France contre une circulaire de Madame le Premier Ministre en date du 26 Septembre 1991," Records of André Legouy, Group d'Information et de Soutien des Immigrés, Paris.

14. Interview with Gerard Sadik, senior staff, CIMADE (*Comité inter-mouvements auprès des évacués*), July 2, 2009, Paris.

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of French legal formalism, the aim has been to demonstrate that the regulatory texts at issue were not logically in keeping with these basic principles.

Rather than being combative, petitions to the Conseil d'Etat have been explanatory in tone, suggesting the ways in which administrative policies "misrecognize" fundamental legal principles, such as security of residence and social inclusion. For example, when challenging regulatory texts in the mid-1980s establishing procedures for family reunification for resident foreign workers, the immigrant rights association GISTI (Groupe d'information et de soutien des travailleurs immigrés) opened its petition to the Conseil d'Etat with an invocation of what it identified as essential principles for the politics of immigration: "guaranteeing foreigners their fundamental rights against the risks of arbitrary practices, and improving the juridical and material situation of foreigners already installed in France or authorized to reside there."[15] The petition urged the Conseil d'Etat to undertake a rights-based reading of existing law, arguing that it embodied a recognition of preexisting and timeless legal norms. The government's attempts to place conditions on family reunification was argued to violate not only relevant legislative authority but also the spirit of *Etat de droit*.

Fundamental principles of security of residence and social inclusion have also been read by advocates into the legal regime governing asylum. For example, GISTI's 1992 petition challenging the adequacy of asylum procedures argued that the right to work, to social protection (including access to medical care), and to free legal aid must be guaranteed to all those seeking asylum in France. Taking away the possibility of employment for those seeking asylum was argued to misrecognize the "signal characteristic" of the refugee regime (GISTI 1992). French legal activists similarly took issue with the fact that asylum seekers applying through the new territorial asylum procedures, unlike those applying through the regular asylum process, were required to pay the cost of their own interpreters.[16] They argued that fragmenting the asylum regime through a diversity of procedures would result in an overall dilution of rights. Here again, lawsuits focused debate at the level of abstract principle rather than highlighting the shortcomings of particular administrative entities.

The increasing alignment of French law with European norms has not fundamentally altered the abstract and generalized mode of argumentation favored by French immigrant rights advocates, who continue to generate their claims deductively from a principled vision of the full incorporation of foreigners in an *Etat de droit*. Although they do occasionally bring cases before the European Court of Human Rights, it is the ECHR's substantive norms that are seen as most useful. Advocates have invoked European and international conventions to bolster their arguments for the recognition

15. "Requête et Memoire contre le decret 84-1078 du Ministre de l'Intérieur du 4 décembre 1984," February 4, 1985; Records of André Legouy, GISTI President, Paris.

16. "Requête et Mémoire pour France Terre d'Asile et Amnesty contre la circulaire du 25 Juin 1998," GISTI, http://www.gisti.org/doc/argumentaires/2000/asile.

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of a right to social protection as well as meaningful procedures for its realization.[17] In the words of one experienced litigator, "The ECHR is like a nuclear weapon; it is much stronger if you don't use it, but you always put European Convention arguments into the Conseil d'Etat petitions."[18]

Thus, it is not particular administrators or particular administrative agencies who have been exposed to criticism when advocates challenged immigration policies. Instead attention focused on the normative content of the texts themselves, which were argued to "misrecognize the law" by placing conditions on the exercise of rights and creating the potential for precariousness of residence. While US immigrant rights litigation has frequently targeted the specific administrative agencies charged with immigration enforcement, exposing individual public officials to scathing criticism, in France it has been the rules that were singled out rather than those who drafted them.

Not only were administrators not the target of judicial activity in France, but advocates and their causes also receded out of focus. Once a petition had been filed and a response from the administration had been received, juridical agency was wholly assumed by the Conseil d'Etat. The process of ascertaining facts and interpreting the meaning of existing norms took place outside the view of the parties. Experts working within the Conseil d'Etat searched out the law, taking the legal avenues identified by the parties only as a point of departure. It was also their prerogative to request evidentiary materials, such as statistics from the relevant minister about the subject in question. In this judicial process, wedded to the assertion of formalistic neutrality, advocates were relegated to a passive role.

The slowness and lack of transparency of the Conseil d'Etat's procedures has had the effect of sapping the urgency from disputes over immigration policy. In a number of cases, by the time the reporting judges completed their investigations into the relevant facts and legal issues and a date for the audience was finally set, several years had passed since the petition was initially submitted. In 1992, the vice president of the Conseil d'Etat wrote to GISTI acknowledging that it had come to his attention that "a certain number of your petitions are in process before the Conseil d'Etat for five years and I have asked the Secretary General to find out where we are with these cases. The first request for judgment deposed in May 1987 was judged in May 1992. For the three others, Monsieur Errera, the reporter, has just turned in his report. They will likely be judged before the end of the year."[19] The interesting part about the letter is that not only had the cases been "in process" for many years but neither the vice president of the Conseil d'Etat nor those who had submitted the petitions had any sense in the interval of when the dossiers would eventually be made ready for judgment. The signature of the

17. See, e.g., Conseil d'Etat, Section, 23 Avril 1997, *GISTI*. Also, Conseil d'Etat, 14 Janvier 1998, *GISTI*.

18. Interview with Jean-Eric Malabre, attorney, January 2, 2012, by telephone.

19. Letter from Marceau Long, Vice-President du Conseil d'Etat, to Danièle Lochak, GISTI President, September 10, 1992.

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letter, "very cordially," gives some indication of the banality of this inscrutable process that was driven entirely by the Conseil d'Etat rather than by the parties.

Not only does the lengthy period of instruction significantly dilute any oppositional dynamic between the parties, but there is also no opportunity for adversarial relations to be openly manifested once an immigration-related petition is eventually scheduled for a brief public audience before members of the Conseil d'Etat. In the French system of administrative justice, the audience occurs after the instructional evidence-gathering phase is completed, and it is the only moment when the parties actually meet formally in person. However, the audience is more similar in appearance to a business meeting than a trial: adjudicators dress in suits rather than robes, and the room has an overall air of courteous ennui while the reporter and *commissaire du gouvernement* read out their reports.[20] In general, after hearing from the reporter, the conseiller d'état who presides over the audience may ask short clarifying questions to the representatives of the two parties. Outside of these brief interrogatories, the parties have no opportunity to speak, and they do not address each other directly at any point during the audience. There are no opening or closing statements, and the drama is also dampened by the fact that the audience will examine not just one but a series of petitions in a single sitting. When the Conseil d'Etat issues its decision, usually several weeks after the date of the audience, the parties are not present.

Moreover, the text of the decision is itself thoroughly imbued with the trappings of formalism's deductive logic. Take as an example the Conseil d'Etat's decision of April 21, 1997, issued in response to GISTI's challenge to a circular applying provisions of the Second Pasqua Law allowing expulsion of foreigners for specific violations of immigration law, criminal law, or a combination of the two. The minister of interior's circular had sought to familiarize prefects with the various infractions contained in the law and informed them of their authority to issue a removal order to any foreigner whose presence posed a threat to public order. GISTI had made a number of substantive arguments about why the circular exceeded the bounds of the law. The Conseil d'Etat decision responded to these allegations with a single paragraph as follows:

> Whereas by the terms of [the law as amended in 1993], a removal order may be issued "if a foreigner's residence permit has been retracted or not renewed, if this retraction or refusal has been pronounced, by application of existing legislative and regulatory dispositions, by reason of a threat to public order." Whereas the power thereby conferred to the administration cannot be legally exercised with regard to a foreigner except when his residence permit has been retracted or not renewed by application of a statutory or regulatory provision; whereas in declaring

20. The procedure for hearing a *référé* (injunction) is more informal, with a single member of the Conseil d'Etat sitting at the head of a table at which representatives of the parties and the reporter are also seated.

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> [in the circular] that these measures could be taken "for reason of public order" and that the retraction of a residence permit *should not occur* [emphasis mine] "except when the title has been delivered in error, because the foreigner has a record that must lead to the refusal of the permit demanded," the Minister of Interior has not enunciated dispositions that exceed the field of application of [the legislation] and which [GISTI] would be receivable in requesting the annulment.[21]

As the text of this decision illustrates, the immigration decisions of Conseil d'Etat adhere to the cryptic and formulaic style that is a general feature of judicial decision writing in France. The decision at first seems to reject GISTI's claim, but on close reading it becomes apparent that the Conseil d'Etat has interpreted the circular so as to limit its application. The Conseil d'Etat is saying that prefects may only retract a residence permit if it had been issued in error. The last sentence signals that issuing a removal order by virtue of a discretionary administrative decision that the individual's removal would benefit public order, as a literal reading of the circular would seem to allow, would indeed render the circular illegal. However, from the text of the decision alone, we cannot know the legal reasoning by which the Conseil d'Etat deduced this result. The decision simply gives a clear ruling that can be adopted by the administration. It is precise and technical, eschewing dramatic flourish and rigidly adhering to the image of dispassionate expertise.

Moreover, the legal solutions favored by the Conseil d'Etat offer scant opportunity for accusing these judges of taking policy making into their own hands. While it is certainly possible to find differing assessments of the Conseil d'Etat's immigration doctrine, no one could plausibly classify its mode of argumentation as legal instrumentalism. One favored method used by the Conseil d'Etat to align immigration-related administrative policies with legal principles without criticizing administrators involves "emptying a regulatory text of its venom." This means that the terms of the regulatory text are interpreted in a way that is, from the perspective of immigrant rights advocates, "clearly more favorable than a literal reading of the text" (GISTI 1988, 51). This is an established way by which the Conseil d'Etat saves a text, "patching things together," rather than explicitly ruling against the government, and it has been used with notable frequency in immigration cases.

Yet even when overturning immigration regulations, the language of the Conseil d'Etat decisions has tended to be terse and dispassionate, gesturing at formalistic principles of good administration rather than asserting individual rights. For example, the same circular discussed above also instructed prefects on how to implement another provision of the Pasqua Law of 1993, which allowed for a foreigner given an order to depart from the territory to be assigned to his residence if he could demonstrate that it was impossible to immediately travel to his own country or to another country. The Conseil d'Etat interpreted and pronounced on the legality of this section of the ministerial circular with

21. Conseil d'Etat, 21 Avril 1997, *GISTI*.

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the following paragraph: "Whereas in permitting prefects to place under house arrest a foreigner with an order to depart the territory who could not 'for an objective reason, be placed in immigration retention (for example, by reason of lack of space)' [the circular] has the effect of extending the field of application of the house arrest provision [of the statute]; whereas the association bringing the appeal is, thus, receivable and founded in demanding its annulment."[22] The regulatory text was thus overturned, limiting the authority of prefectures to place foreigners under house arrest. Yet the phrasing of the decision did not let it appear as if one of the parties had won and the other lost. The law had simply been corrected. One practitioner of immigrant rights litigation referred to the members of the Conseil d'Etat as "good intellectual mechanics" who see themselves as the "bridges of the Republic," facilitating a well-run state, and thus the general interest of all, by maintaining standards of good administrative practice.[23]

In the United States, immigration reform litigation has inspired hostility on the part of administrative officials. Immigration and Naturalization Service officials actively encouraged legislators to address "the problem with judicial review as it had come to be exercised" (Martin 2002, 322). During the early 1990s, government criticisms of immigration reform litigation centered squarely on lawyers, with administrative officials arguing that restricting class action litigation was "critically important" to the functioning of the agency (Cooper 1997, 1510). Attempts to foreclose immigration lawsuits, which had been unsuccessful in the early 1980s, produced a series of laws restricting judicial review of immigration and demonstrating the extent to which legality in immigration had moved from an ancillary theme to a major debate in the US politics of immigration.

No similar dynamic appears to have been at work in France. Immigrant rights decisions of the Conseil d'Etat, when they did get reported in the media, were very rarely characterized by controversy. Indeed, government responses to Conseil d'Etat pronouncements overturning immigration-related regulatory texts have offered nothing more than acknowledgment. "The Minister will conform to the decisions of the Conseil d'Etat" was the only response to the Conseil d'Etat decision overturning multiple provisions of a circular on asylum procedures (Zappi 2000). Similarly, "Justice has spoken the law, and we must take it into account. But the Prime Minister asks his services to study the margin for maneuver permitted by the decision" was the response to a decision on access to social assistance programs (Zappi 2002). In some instances, the minister announced the same day the decision was issued that he had ordered a new regulation to be drafted "with modifications precisely as directed" (Bissuel 2007). French political life has not been immune to polemics against judges, particularly in the context of the activities of Left-leaning investigating magistrates (Roussel 2002), but these have not reached the institution of the Conseil d'Etat even in the aftermath of its most far-reaching immigration decisions.

22. Conseil d'Etat, 21 Avril 1997, *GISTI*.

23. Interview with Philippe Waquet, June 12, 2007, Paris.

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A similar absence of controversy is notable in the way that administrators responded to questions about how immigration reform litigation affected their work. The themes invoked were drawn from the ideals of the French legal tradition. "The associations are doing their job by raising problems for the government to fix," was how one former director of juridical affairs described immigration reform litigation.[24] He went on to muse dispassionately about whether the decision of the Conseil d'Etat requiring the translation of asylum hearings would be extended to other administrative procedures, saying that it was "an interesting question." Another longtime public official involved in immigration administration offered a similarly intellectualized analysis of the benefits of litigation, declaring, "Juridical combat to have the hierarchy of norms respected is always necessary" (Moreau 2009, 245). This register of talking about immigration reform litigation invokes a strongly professed belief in the hierarchy of norms and *Etat de droit*. The recuperation of these themes by administrators who must repeatedly defend their policies against legal challenges demonstrates the power of legal formalism in the French system of administrative justice to transform adjudication from a potential opportunity for amplifying political conflict into a ritualized performance of law's authority.

FROM POLICING TO PROCEDURALISM: JURIDIFYING FRENCH ADMINISTRATIVE POLICY MAKING ON IMMIGRATION

An examination of the formulation of immigration texts in the wake of the Conseil d'Etat's engagement with these issues suggests that administrative review has effected a "juridification" of immigration policy making within the French administrative state. At the same time that it has blocked opportunities for confrontation between advocates and administrators, the recurrent adjudication of immigration policies has reinforced the presence of the Conseil d'Etat, along with its distinct mode of reasoning, in an immigration policy-making process that previously had operated as a zone of nonlaw. In doing so, the immigration jurisprudence of the Conseil d'Etat has played an important part in what might be termed a "makeover" of French immigration administration. More than ever before, immigration rule making mirrors the distinct procedural requirements and formalistic modes of justification associated with French administrative legality.

Those responsible for formulating the regulatory texts governing immigration enforcement now pay serious attention to juridical pronouncements. Administrators, while preparing drafts of regulatory texts, routinely compile and analyze immigration-related decisions of the Conseil d'Etat as well as the legal commentary that accompanies these decisions. Particularly when adjudication has signaled a divergence between the position of the government and that of the Conseil d'Etat, administrators have invested extra effort in developing legal rationales for government policies. For example, when legal

24. Interview with Jean-Marie Delarue, former director, Direction des Libertés Publiques et Affaires Juridiques, Ministry of Interior, February 21, 2007, Paris.

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advisors in the Ministry of Social Affairs began the process of drafting regulations to implement the family reunification provisions of the 1984 Immigration Law, they were keenly aware of the need to align their actions with existing jurisprudence on family reunification, explaining to their superiors, "Taking into account the litigation which marked earlier attempts in this domain . . . it is necessary to proceed with an in depth juridical analysis which we will undertake incessantly."[25] That they did so is evidenced by the substantial accumulation of these juridical documents within their archival files. On occasion, the government has even brought in additional "seconded" members of the Conseil d'Etat to redraft administrative texts with an eye toward identifying novel legal avenues that would make policies less likely to incite criticism on jurisprudential grounds (Weil 2004).

In addition, government officials have moved away from the disdain for legality characterizing prior periods of immigration policy making and have acted to maximize the Conseil d'Etat's involvement at earlier stages of the process by seeking out its advice through the formal advisory procedure. For example, administrators preparing texts implementing immigration legislation in the mid-1980s found it "particularly opportune" to present not only a draft decree but also several circulars affecting the situation of migrant families officially to the Conseil d'Etat.[26] Even though only the decree required an advisory opinion, the "significant jurisprudence" concerning family rights signaled that this was an area of policy making on which the Conseil d'Etat had staked a claim.

The government has an incentive to request and follow advisory opinions closely, although they are nonbinding. As a member of the Conseil d'Etat explained it, "The immigration texts are always contested and the government knows this."[27] From the perspective of administrators, the involvement of the Conseil d'Etat in giving advice on decrees is the primary mechanism by which they experience the "very alert, very precise, and very searching" supervision of the administrative judge.[28] But this process is far preferable to having their regulations annulled as a result of litigation, since the advisory opinions are not made public and the administration is free to adapt the advice as it sees fit. It is still possible that a decree or circular will be annulled because different sections of the Conseil d'Etat handle advice and adjudication and because petitions may call adjudicators' attention to previously unseen legal avenues. Moreover, the government

25. Note from Jean Duliège, Direction de la Population et des Migrations, to Christian Nguyen, Conseiller Technique au Ministre des Affaires Sociales, September 22, 1984; Box 26; Papers of Patrick Weil; Archives d'Histoire Contemporaine, Centre d'Histoire de Sciences Po; Paris.

26. Note from Christian Nguyen, Conseiller Technique au Ministre des Affaires Sociales, to Georgina Dufoix, Ministre des Affaires Sociales, September 22, 1984; Box 26; Papers of Patrick Weil; Archives d'Histoire Contemporaine, Centre d'Histoire de Sciences Po; Paris.

27. Interview with senior member of the Conseil d'Etat, May 23, 2007, Paris.

28. Interview with senior jurist, Direction des Libertés Publiques et Affaires Juridiques, Ministry of Interior, March 8, 2007, Paris.

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retains the option to enact immigration policy via legislative means, thereby avoiding the coercive power of administrative review altogether. The important point to make, however, is that immigration adjudication has contributed to routinizing consultation of the Conseil d'Etat and its jurisprudence within the administrative process.

Over the past 4 decades, the territory on which the Conseil d'Etat has asserted its involvement through jurisprudential development has grown to include almost all areas of immigration policy making. It has developed an entirely new jurisprudence on extradition, which previously was considered a political matter. It has also declared itself capable of adjudicating the meaning of international accords governing migration, a prerogative that previously belonged exclusively to the minister of foreign affairs. Indeed, some commentators suggest that immigration issues have provided one of the avenues by which the Conseil d'Etat has maintained its normative relevance when faced with juridical competition from European jurisdictions (Lochak 1993; Abdelgawad and Weber 2008).

Yet, while the immigration jurisprudence of the Conseil d'Etat has maintained its influence relative to other jurisdictions, its involvement has not radically shifted the substance of French immigration policies. In principle, a jurisprudence that enunciates fundamental rights for noncitizens may constrain the policy options available to public officials. The Conseil d'Etat's 1978 ruling that noncitizens have a right to a normal family life has certainly exerted a strong and continuing influence over policies concerning family regroupment (although it technically does not bind legislative lawmaking). In addition, there is some evidence that the jurisprudence of the Conseil d'Etat has on occasion influenced policy-making debates within the administration, by equipping administrative critics of restrictionism with arguments to counter the positions of their enforcement-minded colleagues (Weil 2004). However, in other instances, the addition of legality has served a primarily cosmetic purpose, enhancing the opportunities for administrative lawyers within the bureaucracy to invent creative ways to justify restrictionist government policies. Internal administrative correspondence has on occasion celebrated "ingenious" juridical rationales allowing policies to survive the Conseil d'Etat's scrutiny. Moreover, even when policies are struck down by the Conseil d'Etat, the judicial pronouncements generally have little to say about the content of immigration policy. As we have seen, the Conseil d'Etat's immigration decisions often invoke general principles of administrative legality without any explicit discussion of immigrant rights.

Indeed, the Conseil d'Etat's immigration jurisprudence is a source of disappointment to immigrant rights advocates. After more than 30 years of persistent litigation, French legal activists lament that they have been unable to convince the Conseil d'Etat to adopt their vision of republican inclusion, which holds that long-term resident foreigners should be entitled to the same legal rights as citizens (Lochak 2009). Like other defenders of immigrant rights, legal activists are dismayed by the rightward shift in French immigration politics, influenced by the rise of the Far Right in the early 1980s. As documented by comparative studies of immigration politics, a restrictionist and control-

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oriented paradigm remains dominant in France, with the major political parties debating the appropriate degree of border control rather than disagreeing over the merits of border closure (Dauvergne 2008; Schain 2008). In the assessment of one veteran litigator, "the cause of legality advances," even if the decisions are not always favorable to the cause of immigrants.[29]

This raises a key point of divergence between the juridification that public law scholars have identified within American politics, which is seen as shaping both the form and the substantive content of policy making (Silverstein 2009, 83) and the juridification of immigration policy making in France. The principal impact of the Conseil d'Etat's involvement with immigration issues has been felt at the level of administrative processes. Juridification is visible in the formalization of the protocols used by administrators to develop regulations as well as in their greater attentiveness during the drafting process to formal and conceptualist modes of argumentation. This increased emphasis on legality has been accompanied by few new substantive civil or political rights for foreigners in either the jurisprudence of the Conseil d'Etat or the policies formulated by administrators. The Conseil d'Etat has shown little interest in exposing itself to criticism by challenging the dominant restrictionist immigration policy paradigm, preferring instead to exert its influence within the administration. Some commentators suggest that it has treated repeated opportunities to adjudicate immigration issues as a means to enhance its prominence among European adjudicative bodies through the development of juridical categories associated with traditional French notions of good administration. Regardless of whether it has been successful in this ongoing attempt at supranational doctrinal influence, the Conseil d'Etat's engagement with immigration issues has contributed to the transformation of a domain of French administrative governance that, well into the 1970s, resembled a form of colonial policing and thus operated as a blatant exception to the ideal of *Etat de droit*.

CONCLUSION

What does the increased presence of formal law in French immigration policy making add to our understanding of legal politics more broadly? Throughout France's first 3 postwar decades, immigration policy making operated as a zone where the principles and values of *Etat de droit* were much less visible than in other areas of social democratic policy making. The juridification of immigration politics, propelled since the 1970s by sustained litigation before the Conseil d'Etat, has brought the language and procedures of formal law into this administrative sphere. Through the process of juridification, French administrative institutions have become a relatively more legalistic, and thus publicly acceptable, apparatus for the exercise of state authority over immigration and

29. Letter from Claire Waquet, attorney, to André Legouy, senior staff, GISTI, July 6, 1990; Records of André Legouy, Group d'Information et de Soutien des Immigrés, Paris.

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immigrants. Yet these developments have occurred through engagement with France's distinctly formalistic system of administrative justice. The judicial appropriation of ministerial functions that some have associated with the "rights revolution" (Epp 1998) is noticeably absent from this civil law context.

It is important to emphasize that the civil law's tradition of austere formality does not necessarily mean that the power of law is not at work. In his study of the contribution of the European Court of Justice (ECJ) to the project of European integration, Joseph Weiler points to the importance of formalism as an explanation for the "compliance pull" of that jurisdiction (Weiler 1994). Legal formalism's power, in this analysis, lies in its language of reasoned interpretation, systemic and temporal coherence, and logical deduction, as well as in the appearance of a judicial process resting above politics. National courts responded to ECJ decisions by willingly cooperating in the administration of community law, while the political branches of national governments adopted a relatively deferential posture toward the ECJ and its output, in part due to the performance of a neutral and apolitical judicial process. Regardless of whether legal outputs in reality conformed to formalistic ideals, it was the performance of formalism that contributed to the ECJ's power to impose its terms of discourse on policy making by national governments, who could have easily acted to reduce its powers, curtail its jurisdiction, or control its personnel but did not do so.

This article has highlighted the pull of formalism in the context of the French system of administrative justice. Rather than amplifying adversarialism, repeated interactions between administrators, litigants, and judges enact conflicts over immigration policy in an abstract and dispassionate legal register. Challenges to government policies are channeled into a system that offers no opportunity for confrontation and where those petitioning the court are relegated to a background role. The association of judicial activity with partisanship, so prevalent in the immigration law reform in the United States, has not taken place in the French system of administrative review, whose formalistic register is materially and theoretically distanced from policy implementation and where decisions are framed as a correction of administrative legality rather than a victory for activist litigators.

At the same time that formalism has minimized the visibility of litigants, it has nevertheless encouraged administrators to explain, justify, and defend their policies in juridical terms. The highly stylized deductive logic of the Conseil d'Etat's decisions, with their scrupulous adherence to the vocabulary of the hierarchy of norms, has infused the regulatory drafting process with a heightened sensitivity to aesthetic and rhetorical conventions of legal form. The political impact of this juridification of immigration at the level of substantive immigration policy making is less apparent than the marked shift in the forms and processes through which administrative rule making is effected. Thus, despite its minimal impact on immigrants' substantive rights, the juridification of immigration policy making reinforces the centrality in administrative governance of the Conseil d'Etat's commanding mastery of formal law.

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