

The French *Constat*: Discovering More Efficient Discovery

By

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In France and some other Civil Code nations, the *constat* is a written report relating facts likely to lead to legal consequences. This report, prepared by a legally trained *huissier*, may be either ordered by a judge or requested by an individual. The *constat* has no American counterpart, but there are immense benefits to introducing it into the American legal system.

Introduction

The profession exercised by French jurists known as *huissiers de justice* has no American equivalent and, fittingly, there is no simple English translation for the word *huissier*. According to Martin Weston, the Senior Translator at the European Court of Human Rights in Strasbourg, the only reasonably precise translation is “court usher and bailiff,” though *either ‘court usher’ or ‘bailiff’ will usually suffice when the text is clearly referring to only one function or the other.*¹ Therefore, the traditional English translation of “bailiff” is not necessarily comprehensive or exact to encompass the multiple roles that the *huissiers de justice* serve in the French legal system.² This last function, the execution of *constats* (translated as “findings” from the French “*constatations*”), has no American counterpart,³ and its potential benefits if introduced into the American legal system are the focus of this Article.

¹ MARTIN WESTON, AN ENGLISH READER’S GUIDE TO THE FRENCH LEGAL SYSTEM 107–08 (2d ed. 1991)(citing O’Rooney, *Notes on the Criminal Laws and Related Matters in Certain Countries*, U.N. Office of Conference Services, English Section, n.d. (1962)). Weston’s work has been hailed as superb, providing deft, lucidly reasoned translations that highlight the difficulties of translating French legal terms into English and gives excellent explanations for the “preferred version” of a term’s meaning. Bernard Rudden, *Publication Review: English Reader’s Guide to the French Legal System*, 40 INT’L & COMP. L.Q. 755, 756 (1991).

² See generally THIERRY GUINOT, L’HUISSIER DE JUSTICE: NORMES ET VALEURS 73–81, 165–223 (2004) (a *huissier*’s discussion of his profession’s history, education, practices, and values, especially as they relate to prime *huissier* duties, such as authenticating legal documents, recovering property, executing judicial orders, and drafting sworn reports).

³ However, according to a current survey, 29 of 52 responding countries indicate that they have judicial officers who carry out statements of fact which function as proof (i.e., establish the facts). Le grand questionnaire de l’Union Internationale des Huissiers de Justice (The Grand Survey of the International Association of Judicial

Some *huissiers* provide service within the courts and tribunals by attending hearings, announcing the cases to be heard, and keeping order; in this role, they are known as *huissiers audienciers*,⁴ functioning the same as the British “usher.”⁵ *Huissiers* are also responsible for serving process and executing judicial decisions,⁶ like the British “bailiff.”⁷ The American definition of “bailiff” encompasses both the British roles of “usher” and “bailiff”; however, it remains an insufficient translation of *huissier*, as French *huissiers* perform functions above and beyond those assigned to American bailiffs. The *Chambre Nationale des Huissiers de Justice* (“National Chamber”) lists such additional functions of the *huissiers* on its website, which include the collection of debts, drafting of documents, legal consultations for businesses, administration of buildings, sales at public auction, and performing *constats*.⁸

The *constat* is a (usually written) report relating “a certain number of [factual elements] likely to lead to legal consequences” in order to preserve them as evidence.⁹ The report may be ordered by a

Officers) (hereinafter, “UIHJ Survey”), at Question 16, http://questionnaire2011.uihj.com/index.php?ID=1011971&questUIHJ_page=16. In other words, they have constats—descriptions by a *huissier*, or like official, of material facts he/she witnesses play a role in establishing proof (evidence). *Id.* Those 29 of the 52 responding nations saying “yes” to the *constat* are Algeria, Belgium, Benin, Bulgaria, Burkina Faso, Cameroon, Chad, Congo, Cote D’ivoire, Czech Republic, France, Gabon, Haiti, Latvia, Lithuania, Luxembourg, Mali, Morroco, Moldavia, Niger, Norway, Russia, Senegal, Slovakia, Slovenia, Switzerland, Thailand, Togo, and Uganda. . Eight other nations, out of the 52, state that under some conditions they use constats developed by *huissier*-like persons to establish proof. *Id.* (Albania, Estonia, Georgia, Hungary, Mauritius, Romania, Scotland, and Spain).

⁴Christian Cointat, Commission of Laws, Report No. 345, *annexed to Sénat, séance du 3 juillet 2002* [hereinafter *French Senate Report*], available at <http://www.senat.fr/rap/r01-345/r01-3451.pdf>. The French word for hearing is *audience*, explaining the “*audiencier*” distinction. LAROUSSE CONCISE DICTIONARY: FRENCH ENGLISH/ENGLISH FRENCH 249 (1st ed. 1993).

⁵ ROBERT FRANKS ET AL., WHAT TO EXPECT WHEN You Go to COURT 39 (2002).

⁶ *French Senate Report*, *supra* note 4; Ordonnance n° 45-2592 du 2 novembre [Order No. 45-2592 of November 2, 1945], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Nov. 3, 1945, p. 7163 [hereinafter *Order*].

⁷ *Bailiff Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/bailiff> (last visited July 2, 2015).

⁸ *Conseil d’entreprise*, LES HUISSIER DE JUSTICE – A VOTRE SERVICE, <http://www.huissier-justice.fr/conseils-57.aspx> (last visited May. 14, 2016); *Recouvrement amiable*, LES HUISSIER DE JUSTICE – A VOTRE SERVICE, <http://www.huissier-justice.fr/recouvrements-amiables-des-petites-creances-44.aspx> (last visited May 14, 2016).

⁹ Natalie Fricero, Professor of Law and Director of the Institute of Judicial Studies, Univ. of Nice (Fr.), Address at the Institutes of the National School of Procedure of Paris (Fr.), *A Propos du Constat d’Huissier de Justice* [About the Report of the Huissier de Justice] 1 (Sept. 9, 2008) (transcript on file with author).

judge or requested by an individual¹⁰ and is used in varying situations that range from recording the state of a building before it is rented¹¹ to documenting a misrepresentation on a website.¹² As a rule, the *constat* only possesses the value of “simple information”¹³ in court,¹⁴ but, in practice, evidence contrary to the *constat* is not easily admitted.¹⁵ The *constat* is thus a powerful tool for private parties anticipating litigation due to the evidentiary value it holds in the eyes of the presiding judge.

If a new practice, modeled after the *constat*, were introduced into the American legal system, it might contribute to a more efficient discovery process thereby reducing the time and money spent on many lawsuits and perhaps even preventing the filing or continuance of some cases, particularly when the case is meritless. However, some changes to both the current American system and the *constat* would be necessary to facilitate its execution and acceptance in the United States. Such changes would include introducing a variation of the *constat* where reports take into account American rules of evidence; as well as creating a limited master¹⁶ with powers and constraints more similar to those of the *huissier* than of the current master who would perform the reports

I. Introducing the Huissier and his Report, the Constat

¹⁰ *Id.*; *Order, supra* note 6. For an example of a judge ordered *constat*, see Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Nov. 15, 2005, on file with author (armed with a court order and accompanied by the landlord and a police officer, the *huissier* entered an apartment, took numerous photographs and wrote his observations).

¹¹ That would be done both for private apartments (Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, May 31, 2010 (on file with author)), and for retail spaces (Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, April 30, 2010 (on file with author)).

¹² Chardon Constat, Xavier Bariani, Jean-Michel Bobin & Mathieu Chardon, Versailles, France, June 13, 2008 (on file with author) (statement of *huissier* Chardon as to observations of what he observed on the website of a company that co-edited a book with Chardon’s publisher client - Arthéléna Editions - but now, as observed in the *constat*, describes itself online as the sole editor of that book about a popular French singer, rather than being the co-editor with Arthéléna Editions) (on file with author).

¹³ *Order, supra* note 6.

¹⁴ *Id.*

¹⁵ Fricero, *supra* note 9, at 11.

¹⁶ BLACK’S LAW DICTIONARY 1123 (10th ed. 2014) (a master is “[a] parajudicial officer(such as a referee, an auditor, an examiner, or an assessor) specially appointed to help a court with its proceedings . . . usu[ally] with a written report to the court. Fed. Civ. P. 53.”).

A. The *Huissier* Profession

1. Introduction

As mentioned above, *huissiers* have multiple functions that include and even exceed those of the American bailiff. The *huissier* is simultaneously an “auxiliare de justice,”¹⁷ an “officier ministériel”¹⁸ and a “professionnel libéral.”¹⁹ Some such officials/professionals are required to take on the *huissier audiencier* role and provide service at court hearings²⁰; and, when necessary, some *huissiers* may also perform consultations and interrogate witnesses on a case-by-case basis.²¹ Additionally, the *huissiers* enjoy a monopoly on the service of process and the execution of judicial decisions.²² They are authorized to collect any debt, even without a judicial order, to carry out *constats*, and to act as public auctioneers when needed.²³ Varying client demands dictate the frequency at which *huissiers* perform their duties.²⁴ Private clients, ranging from large companies to individuals, most frequently request *constats*, while judges . . .[something that judges request to illustrate the range of functions].²⁵ Thus, a *huissier* serves not only a far-reaching function in the French legal system but one unique to the profession.

Another difference between French *huissiers* and American bailiffs is the level of education and training required. Bailiffs are required to have a high school degree or equivalent and, at some

¹⁷ As an *auxiliare de justice*, the *huissier*’s role is exactly what it seems: he is an auxiliary of justice who facilitates its administration and proceedings. Alexander Mathieu-Fritz, *Les représentations sociales de la profession d’huissier de justice [The Social Representations of the Huissier de Justice Profession]*, 54 Droit et Société 491, 494 (2003).

¹⁸ *Huissiers* also benefit from their status as ministerial officers who are given a “piece of the public power” after being appointed by the Minister of Justice. *Id.*

¹⁹ The *huissier* is considered to be a *professionnel libéral* because he manages his own practice and is paid based on the volume of the services he performs, although his fees are set by the government. *Id.* *Huissiers* must also purchase an “*étude*,” a practice, which is bestowed for life and becomes part of their inheritable assets. *Id.*

²⁰ Mathieu-Fritz, *supra* note 17, at 507.

²¹ Interview with Christine Hugon, Professor, Univ. of Montpellier Law School (June 10, 2015).

²² *Order*, *supra* note 6.

²³ *Id.*

²⁴ Interview with Christine Hugon, *supra* note 21; interview with Mathieu Chardon, *Huissier*, Versailles, France, and Secretary of the UIHJ, Paris, France (Jan. 27, 2016).

²⁵ Interview with Christine Hugon, *supra* note 21.

locations, they must also have some college education or prior work experience.²⁶ An aspiring *huissier*, on the other hand, must be of French nationality, obtain a Master degree (4 years of university studies) of law, complete a two-year trainee's program at the practice of a *huissier*, follow specialized courses organized by the profession, and successfully pass a professional examination."²⁷ Under these standards, *huissiers* are required to possess the same level of university education as French lawyers and judges.²⁸

The *huissier* profession is, for the most part, self-regulated, with significant roles played by a National Chamber as well as regional and departmental chambers of *huissiers*.²⁹ The most local of the three, the departmental chambers, consider third party complaints against *huissiers*, promulgate regulations about professional customs and the *huissier-client* relationship, propose disciplinary measures for *huissiers*, and decide jurisdictional disputes between *huissiers*.³⁰ The regional chambers are made up of multiple departmental chambers, which are charged with settling jurisdictional disputes, giving opinions on the departmental chambers' regulations and the abolition of *huissier* offices in the jurisdiction, and verifying the bookkeeping of the *huissier* practices under its jurisdiction.³¹ The National Chamber is empowered to settle jurisdictional disputes, opine on the internal regulation of the lower

²⁶ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, CORRECTIONAL OFFICERS 2 (2014-2015 ed. 2014), available at <http://www.bls.gov/ooh/protective-service/correctional-officers.htm> (last visited July 2, 2015).

²⁷ *The Judicial Officer in the European Union: France*, INTERNATIONAL UNION OF JUDICIAL OFFICERS, 1 <http://www.uijj.com/en/ressources/10148/54/france-en.pdf> (last visited July 2, 2015) [hereinafter *French Judicial Officer*]. Interestingly, Chinese notaries are required to possess almost exactly the same qualifications as French *huissiers*, but are responsible for the duties assigned French notaries and registrars as well as those assigned to *huissiers*. Sylvain Guillaud-Bataille, *Des étudiants français à la découverte du Notariat chinois* [*French Students Discovering the Chinese Notary Profession*], La Semaine Juridique Notariale et Immobilière n° 21, 23 Mai 2008, at 473.

²⁸ Mathieu-Fritz, *supra* note 17, at 513.

²⁹ *Order*, *supra* note 6.

³⁰ *Id.*

³¹ *Id.*

chambers when requested by the Minister of Justice, and settle questions of general order of the profession (education, training, admission of aspiring *huissiers*, working conditions, etc.).³²

2. Negative Social Image of the *Huissiers*

Despite the high level of education required of *huissiers* and the chambers that serve as a check on their profession, *huissiers* suffer from a negative social image at odds with their social utility.³³ Conscious of their image problem, the National Chamber has requested multiple opinion polls in the past few decades and collected information from newspapers, radio and television.³⁴ A survey conducted by IPSOS (a French market research company) in 1995 and 1996 revealed almost equally divided public opinions regarding the *huissiers* that were split between “somewhat good” (46.8%) and “somewhat bad” (27%) or “very bad” (13.5%).³⁵ The profession was shown to be misunderstood with only 36.7% of respondents knowing that *huissiers* have *professionnel libéral* status;³⁶ whereas most participants associated the words “*huissier de justice*” with seizures, [debt] recoveries, or enforcing the law;³⁷ and only 8.7% associated them with performing *constats*.³⁸ Over one-half of the individuals surveyed by IPSOS agreed that one cannot converse or come to agreements with *huissiers*, that *huissiers*

³² *Id.*

³³ GUINOT, *supra* note 2, at 17 (noting the negative image of *huissiers*); Mathieu-Fritz, *supra* note 17, at 492. In films, *huissiers* are portrayed as racist, unscrupulous, and opinionated. *Id.* at 495. In literature, they are the subject of “intense criticism,” *id.*, and “enjoy[] a negative image with which intrusion and death are constantly associated.” *Id.* at 496. The written press does its part with articles about violence, both by and against *huissiers*, articles discussing *huissiers* accused of committing illegal acts, and articles describing how to resist the seizure or eviction actions of a *huissier*. *Id.* See also, Irène Inchauspé & Muriel Motte, *Comme avec Dieudonné, les huissiers sont souvent en première ligne*, L’Opinion (Jan. 23, 2014), available at <http://www.lopinion.fr/23-janvier-2014/dieudonne-huissiers-sont-souvent-en-premiere-ligne-8502> (describing how *huissiers* are often greeted with insults, intimidations, weapons, and dog bites when attempting to perform their functions in the wake of France’s financial crisis).

³⁴ Mathieu-Fritz, *supra* note 17, at 493.

³⁵ *Id.* at 498-99 (citing IPSOS, *L’image des huissiers de justice*, 4 (Mar. 1996)).

³⁶ *Id.* at 498 (citing IPSOS, *L’image des huissiers de justice*, 4 (Mar. 1996)).

³⁷ *Id.*

³⁸ *Id.* at 498 n.21.

do not inspire trust, that *huissiers* do not treat debtors humanely, and that *huissiers'* fees are high.³⁹

However, the majority of individuals also agreed that the profession is socially useful and its members effective.⁴⁰ The IPSOS survey further found that, unsurprisingly, people who had voluntarily encountered a *huissier* were more likely to possess a favorable opinion of *huissiers* than those whose encounter was involuntary.⁴¹

All of these horrible numbers apparently have continued to the present. For example, a November 2012 public opinion survey found that despite evictions representing 1% of the documents drawn up by *huissiers*, half of the French public think that evictions are the core business for *huissiers*.⁴² Furthermore, the second highest number of French respondents, nearly 30%, spontaneously assert that the *huissier*'s job is to recover unpaid debts, when actually—according to the President of the French National Chamber of *Huissiers*—9% of what they do is gather proof, such as through constats.⁴³

The reason for the overall negative image of *huissiers* is complex. The fact that *huissiers* usually have a social status and standard of living higher than the debtors they pursue may fuel the public distaste.⁴⁴ Other causes include the *huissiers'* power to violate the privacy of the home⁴⁵ and the strong association between them and the “coercive dimension of seizure or forced [debt] recovery.”⁴⁶ Finally, the historical vilification of *huissiers* in written form certainly “tend[s] to explain the negative character

³⁹ *Id.* at 499.

⁴⁰ *Id.*

⁴¹ *Id.* at 500 (citing IPSOS, *L'image des huissiers de justice*, 19 (Mar. 1996)). Farmers, [office] workers, and retirees were more likely to have positive opinions of *huissiers* while shopkeepers, commercial artisans, heads of companies, factory workers, and intermediaries were more likely to have negative ones. *Id.*

The survey further showed that favorable opinions of *huissiers* decrease as the rate of urbanization increases. *Id.* at 501 (citing IPSOS, *L'image des huissiers de justice*, 19 (Mar. 1996)). A possible explanation is that the interactions of a rural *huissier* with debtors “have a greater chance of being and appearing more personalized.” *Id.*

⁴² Catherine Rollot, *Les huissiers veulent améliorer leur image* [“The *huissiers* would like to improve their image”], LE MONDE, April 2, 2013, available at http://www.lemonde.fr/societe/article/2013/04/02/les-huissiers-veulent-ameliorer-leur-image_3151857_3224.html.

⁴³ *Id.*

⁴⁴ Mathieu-Fritz, *supra* note 17, at 503.

⁴⁵ *Id.* at 505.

⁴⁶ *Id.* (quoting IPSOS, *L'image des huissiers de justice*, 10 (Mar. 1996)).

of the representations associated with the profession.”⁴⁷ Legal texts and press articles during the *Ancien Régime* (1453-1789) related the numerous complaints filed against *huissiers* for extortion and illegal procedures and the “public clamor” raised by such offenses.⁴⁸ This created a stereotype of “the dishonest *huissier* who abuses the power that is given to him,” an image kept alive even today by the media attention over cases involving *huissiers*.⁴⁹

One infamous example is that of Bernard Marche, a Lyonnais *huissier* found guilty of “aggravated abuse of trust”, ‘scam’, ‘forgery and use of forgery’, and ‘fraudulent organization of bankruptcy’ for his activities within a “phantom” practice.⁵⁰ Marche fled to France after his hearing, taking another 1 million francs on top of an embezzled 1.7 million, and was on the run for 6 years until he was finally caught in the United States.⁵¹ More recently, Lyon experienced another financial *huissier* scandal when a criminal court convicted two local *huissiers* of embezzlement, reporting that the two men, Henri Leroy and Bruno Rosnelont, embezzled a total of 120,000 euros.⁵²

⁴⁷ *Id.* at 504.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ [Michel Noir, L'huissier lyonnais en cavale, arrêté aux Etats-Unis \[The Lyonnais Huissier on the Run, Arrested in the United States\]](http://archives.leprogres.fr/progres/rep/michel-noir/michel-noir-4.html), LE PROGRES, Mar. 4, 2000, <http://archives.leprogres.fr/progres/rep/michel-noir/michel-noir-4.html> [hereinafter *Huissier on the Run*].

⁵¹ *Id.*

⁵² Pierre Gandonnière, *Scandale financier: deux huissiers Lyonnais saisis par la justice* [Financial Scandal: Two Lyonnais *Huissiers Seized by Justice*], LE POST, Apr. 25, 2009, http://www.lepost.fr/article/2009/04/25/1509678_scandale-financier-deux-huissiers-lyonnais-saisis-par-la-justice.html . In Toulouse, a *huissier* and his business partner were tried for fraud in running an auction house. *Correctionnelle. Un huissier comparaît pour une vente aux enchères truquée* [Courts. A *Huissier* on Trial for a Rigged Auction], LA DEPECHE, Oct. 9, 2008, <http://www.ladepeche.fr/article/2008/10/09/480632-Correctionnelle-Un-huissier-comparait-pour-une-vente-aux-encheres-truquee.html> [hereinafter *Rigged Auction*]. Goods entrusted to be sold there were allegedly let go at prices below their market value and customers complained that they were not paid the full amount awarded to them. *Id.* An entire office of *huissiers* received a pecuniary sanction from the *Commission nationale de l'informatique et des libertés* (“CNIL.” a French administrative authority that protects personal data and privacy) after not complying with its order regarding personal data collected in the files of debtors. Délibération n° 2006-173, CNIL.FR (June 28, 2006), <http://www.cnil.fr/en-savoir-plus/deliberations/deliberation/delib/115/>. The order was made after a CNIL delegation discovered that the office was using an area in its electronic files meant for notes to store very personal information on debtors such as their mental or physical health history, amount of governmental support received, and whether the *huissier* or employee found them to be pleasant. *Id.* The comments contained in the files included: “ ‘HIV-positive for 23 years’, ‘ex-police officer accused of theft then discharged’, ‘depressed’, ‘cancer of the intestines operation’, ‘incarcerated Baumettes awaits conditional release’, ‘suicide attempt’, ‘odious’, ‘stupid bitch’, etc.” *Id.*

It is not surprising that *huissiers* are viewed as a “necessary evil” by many⁵³ and despised by some, especially in their capacity as debt collectors.⁵⁴ Still, *huissiers* more strongly resemble lawyers in the United States than repo men who haul away automobiles in the middle of the night. They are highly educated in the law of their country⁵⁵ and are governed by professional organizations as well as the courts.⁵⁶ Although some *huissiers* break professional rules and laws, drawing negative attention to themselves and the profession,⁵⁷ the same may be said for American lawyers.⁵⁸ Ultimately, the *huissier* profession, especially the *constat* function, merits a closer look as a possible solution to American procedural problems.

B. The Constat

To understand the role of the *constat*, it is necessary to distinguish between the three main functions that *huissiers* serve: the *constat*, the consultation, and the expertise. As described already, the *constat* is a compilation of factual findings and situations, which omits opinions on matters of fact or law.⁵⁹ The consultation is usually an oral statement of expert facts to the court, which does not require complex investigation.⁶⁰ The expertise, the most complicated of the three, which requires experts to research and draft a discussion on a specific issue for the court.⁶¹ As the *constat* is an effective technique to supplement and accelerate the discovery process in the U.S., the *huissier’s* *constat*-creating

⁵³ Mathieu-Fritz, *supra* note 17, at 499.

⁵⁴ *Id.* at 500.

⁵⁵ French Judicial Officer, *supra* note 27.

⁵⁶ Order, *supra* note 6.

⁵⁷ See *Huissier on the Run*, *supra* note 50; Gandonnière, *supra* note 52; *Rigged Auction*, *supra* note 52.

⁵⁸ Karen H. Rothenburg, *Recalibrating the Moral Compass: Expanding “Thinking Like a Lawyer” into “Thinking Like a Leader”*, 40 U. TOL. L. REV. 411, 411 (2009).

⁵⁹ Robert W. Emerson, *The French Huissier as a Model for U.S. Civil Procedure Reform*, 43 U. MICH. J.L. REFORM 1043, 1080 (2010).

⁶⁰ *Id.* at 1082 (“The consultation serves as a middle ground between the constatation, which is only useful in relatively simple fact-finding matters, and the expertise, which requires complex formalities: ‘When a purely technical question does not require complex investigation, the judge may instruct the person he/she shall appoint to provide him/her with a simple opinion.’”).

⁶¹ *Id.* The expertise can be separated into three different categories: expertise aimable (friendly expertise), expertise officieuse (informal expertise), and expertise judiciaire (judicial expertise). *Id.*

function is recommended for implementation into the American legal system rather than the consultation or expertise reports.

There are two different types of *constats*: those ordered by a judge and those requested by a private citizen.⁶² Both types of constats are authorized by Senate order that further assigns them their value of “simple information.”⁶³ Although the report in either situation is limited to “purely material findings,” considerable differences exist between a *constat* backed by a judicial order and one that is not.⁶⁴

Judicially-ordered *constats* are governed by the *Nouveau code de procedure civile* (“NCPC”) which allows a judge to “commission any person of his choice to [inform the judge] in the form of findings, consultation or an expertise on a question of fact . . .”⁶⁵ The judge may appoint the *huissier* either of his own will during a court session or at the request of a party.⁶⁶ General provisions covering consultations, expertise, and *constats* state that the official appointed by the judge must complete the “duties” given to him “conscientiously, objectively and impartially.”⁶⁷ Moreover, the expert must report all information pertaining to the questions at hand but may not reveal other information discovered during his mission.⁶⁸ The judge ultimately controls the mission and is not bound by the findings of the expert.⁶⁹ The NCPC provisions specific to *constats* further limit the expert by prohibiting him from giving

⁶² Fricero, *supra* note 9.

⁶³ *Order*, *supra* note 6.

⁶⁴ *Id.*; MARIE-PIERRE MOURRE-SCHREIBER, LA PREUVE PAR LE CONSTAT D’HUISSIER DE JUSTICE 45-83 (2014).

⁶⁵ NOUVEAU CODE DE PROCEDURE CIVILE [N.C.P.C.] art. 232, translated in LEGIFRANCE.GOUV.FR, <http://195.83.177.9/upl/phttp://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070716&idArticle=LEGIARTI00000410362> (Sep. 30, 2005) [hereinafter Legifrance] (“Even though the judge is not legally obliged to choose a judicial officer [*huissier*] to perform statements of facts [*constats*], it is always [*a huissier*] that he appoints.”).

Interestingly, the provisions governing the judicial *constat* apply to all French courts, including courts of commercial litigation. French commercial litigation is characterized by its speediness and informality. JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 2 (2d ed. 2008). Indeed “[c]ommercial disputes are rapidly resolved by law administered by commercial men and women, rather than by professional judges.” *Id.* The *constat*’s availability in that realm can attest to its speediness, reliability, and cost efficiency.

⁶⁶ N.C.P.C. art. 232, translated in Legifrance, *supra* note 65.

⁶⁷ N.C.P.C. arts. 237, 238, translated in Legifrance, *supra* note 65.

⁶⁸ N.C.P.C. art. 244, translated in Legifrance, *supra* note 65.

⁶⁹ N.C.P.C. arts. 236, 246, translated in Legifrance, *supra* note 65.

his opinion on the possible “factual and legal consequences” of the facts.⁷⁰ They also enable the judge to order a *constat* “at any time including at the conciliation stage or during the deliberation.”⁷¹

Despite the number of limitations placed on them as observers, when huissiers execute a *constat* by order of a judge, they “act as an auxiliary of justice and [have] wider powers at [their] disposal.”⁷² For example, they may perform *constats* in places that are privately owned but “open to the public” (subway, airport, restaurant, etc.) without the permission of the owner, which they would need if working for an individual.⁷³ They may also enter private spaces without consent of the person who has use of the premises, whereas a *huissier* working for an individual must obtain either consent or a judicial order.⁷⁴ Additionally, a *huissier* has the power to request documents from parties or third parties, with the support of the judge if necessary.⁷⁵

On the other hand, the “large majority” of *constats* are done at the request of private individuals or companies and do not fall under the above-mentioned NCPC provisions.⁷⁶ All that is necessary for one to obtain such a *constat* is a telephone call to a *huissier* explaining the situation and expressing the desire for a report to be made.⁷⁷ The mission of the *constat* is therefore set by the individual requesting it. This aspect of the individual-requested *constat* requires certain safeguards to protect the non-requesting opponent’s rights. Typically, in France, the right of *contradictoire* (“contradiction”) allows one to examine the *huissier* in his findings and to challenge various findings of fact, conclusions, or analyses of the *huissier*,⁷⁸ ensuring that evidence will not be entered and considered

⁷⁰ N.C.P.C. art. 249, translated in *Legifrance*, *supra* note 65.

⁷¹ N.C.P.C. art. 250, translated in *Legifrance*, *supra* note 65

⁷² Fricero, *supra* note 9, at 3.

⁷³ *Id.* at 6.

⁷⁴ *Id.*

⁷⁵ N.C.P.C. art. 243, translated in *Legifrance*, *supra* note 65.

⁷⁶ MOURRE-SCHREIBER, *supra* note 64, at 68-78.

⁷⁷ Interview with Christine Hugon, *supra* note 21; interview with Mathieu Chardon, Huissier, Versailles, France, and Secretary of the UIHJ, Paris, France (Jan. 27, 2016).

⁷⁸ Emerson, *supra* note 59, at 1119.

against an individual, unless he has been given an opportunity to contest it.⁷⁹ This right is similar to the confrontation rights given to criminal defendants in the American legal system, guaranteeing them the ability to confront all witnesses and evidence brought against them.⁸⁰ The principle of contradiction requires “full disclosure of all facts, including documents and depositions, used as the basis for oral arguments.”⁸¹ However the principle of contradiction does not apply when the *constat* prepared at an individual’s request was created at a time when litigation is not even pending.⁸² For the *constat* at the request of an individual to be admitted to judicial proceedings, it must be “communicated to the adversary in due course, like other papers and documents,” since the principle of contradiction did not apply to its creation.⁸³

There are some restrictions on privately demanded *constats*, including situations when the *huissier* must refuse to execute it. When the *huissier* faces a physical or legal obstacle, such as illness or illegal mission, he has a duty to refuse.⁸⁴ *Huissiers* are also prohibited from carrying out *constats* concerning their relatives or those relatives of their spouse.⁸⁵

No matter who orders a *constat*, the *huissier* must always respect “fairness, the rights of the defense, professional ethics, dignity, [and] privacy . . .”⁸⁶ This means he may not engage in any “schemes which put him outside of his mission as an impartial and objective ministerial officer.”⁸⁷ For

⁷⁹ Under the N.C.P.C., “La contradiction” means that “[a] party may not be judged without having been heard or called”, the parties “must disclose in due time to one another factual arguments supporting their claims, the means of evidence they produce and the legal arguments they rely upon”, and the judge may only consider arguments or documents in making his decision if “the parties had an opportunity to discuss them in an adversarial manner.” N.C.P.C. arts. 14-16, *translated in Legifrance, supra* note 65.

⁸⁰ RIGHT OF CONFRONTATION, Black's Law Dictionary (10th ed. 2014).

⁸¹ Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 TEX. INT'L L.J. 181, 188 (1996).

⁸² Fricero, *supra* note 9, at 8.

⁸³ Fricero, *supra* note 9, at 8.

⁸⁴ Fricero, *supra* note 9, at 3.

⁸⁵ Order, *supra* note 6.

⁸⁶ *Id.*

⁸⁷ *Id.*

instance, the *Conseil d'État*, the “supreme administrative court,”⁸⁸ held that a *constat* prepared at the request of an employer is not a “clandestine process of surveillance” that requires prior notice be provided to an observed employee.⁸⁹ It is acceptable for a *huissier* to simply record the actions of an employee at work who is not aware of his presence;⁹⁰ however, having an employee shadowed is an “illicit means of proof, since it necessarily implies an attack on [his] private life,” and therefore a *constat* made for the purpose of authenticating observations made during such a shadowing is inadmissible as proof.⁹¹ A *huissier* employing third persons in hopes of provoking certain actions from an employee is also unacceptable,⁹² except in cases of discrimination.⁹³

A court will also reject a *constat* as evidence if the information that it contains is somehow inaccurate. One example of an inaccurate report involved a *huissier* who measured the disputed distance from some trees to one side of a wall rather than to the middle of the wall as he should have; this inaccurate measurement caused his report to be deemed worthless.⁹⁴ Another example where the *huissier* gave a different square footage in his *constat* than was reported by an expert lead the *Cour de Cassation* (French Supreme Court) to call his report “an opinion from a person who is not an expert in calculation of surfaces and which as a result cannot be accepted.”⁹⁵

⁸⁸ WESTON, *supra* note 1, at 87.

⁸⁹ Fricero, *supra* note 9, at 9; Conseil d'Etat [CE][highest administrative court], June 7, 2000, Rec. Lebon, available at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008064343&astReqId=2027407960&fastPos=34>.

⁹⁰ *Id.*

⁹¹ Cour de cassation, chambre sociale [Cass. soc.][social chamber of highest judicial court], Dec. 6, 2007, not published in bulletin (no. 06-43392 on Legifrance), available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020483771&fastReqId=1424527368&fastPos=1>.

⁹² Fricero, *supra* note 9, at 9; Cass. soc., Mar. 18, 2008, Bull. civ. V, No. 65 (no. 06-40852 on Legifrance), available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000018397675&fastReqId=1024162024&fastPos=10>. A *huissier* had multiple third parties make cash purchases from a saleswoman and then inspected her sales register and cashbox after she had left. *Id.*

⁹³ Fricero, *supra* note 9, at 9.

⁹⁴ Cass. 3e civ., Apr. 1, 2009, Bul. civ. III No. 79 (no. 08-11876 on Legifrance)

⁹⁵ Cass 3e civ., Mar. 31, 2009, not published in bulletin (no. 07-21900 on Legifrance)

Moreover, the information in the *constat* other than the observations (the date and the assertion of the existence of the request or order) “may not be disputed.”⁹⁶ However, the findings of the *constat*, even when collected properly, theoretically “only have the value of simple information.”⁹⁷ *Constats* are not binding on either the opposing party⁹⁸ or the judge.⁹⁹ The opposing party “may freely bring evidence to the contrary.”¹⁰⁰ If a party brings a *constat* into the proceedings, the judge must at least look at it;¹⁰¹ however, he may then evaluate “with supreme power the scope and meaning” of the *constat* and either admit or reject it.¹⁰² Regardless, the *constat* seems to have a greater value than is indicated by these rules. In practice, the *huissier’s* status as ministerial officer gives greater credibility to the *constat*, and “evidence to the contrary, even though it can result from any means, is not easily admitted.”¹⁰³ Additionally, the *Cour de Cassation* has held that for a court to “denature” a *constat* either by “distorting [its] clear and precise words”¹⁰⁴ or by omitting its relevant findings is a violation of the *Code civil*.¹⁰⁵

1. The Requirements of the Constat

As the written report of a *huissier*, the *constat* is subject to certain NCPC provisions requiring it to contain the “date, identity of the complainant, indication of the possible judicial decision having

⁹⁶ Fricero, *supra* note 9, at 12; MOURRE-SCHREIBER, *supra* note 64, at 25.

⁹⁷ *Order*, *supra* note 6.

⁹⁸ Fricero, *supra* note 9, at 11.

⁹⁹ N.C.P.C. art. 246, *translated in Legifrance*, *supra* note 65.

¹⁰⁰ Fricero, *supra* note 9, at 11.

¹⁰¹ *Id.* (citing Cass. 3^e civ., Sep. 25, 2002 (pourvoi n° 01-03129 on Legifrance)).

¹⁰² Fricero, *supra* note 9, at 11 (citing Cass. 2^e civ., Jul. 3, 2008 (pourvoi no. 07-16693 on Legifrance)).

¹⁰³ Fricero, *supra* note 9, at 11. Talinn even asserts that “[i]n France, [the huissiers’] credibility is undisputed.”

TOMAS TALINN, LES CONSTATS 5 (2002)..

¹⁰⁴ Fricero, *supra* note 9, at 11 (citing Cass. 3^e civ., Apr. 3, 2001, (pourvoi no. 99-14541 on Legifrance)). A court of appeal held that there were 5 television outlets and 5 telephone jacks although the *constat* stated that there were 6 television outlets and 7 telephone jacks. *Id.*

¹⁰⁵ Cass. 3e civ., Jan. 20, 2009 (no. 07-20922 on Legifrance). Despite one *constat* stating that the premises contained debris and furniture after the end of a lease and another stating that the keys had not been returned as of the day of the report, the lower court found that it was not proven that the tenant remained in the premises after the end of the lease. *Id.*

ordered the *constat*, [and the] full name and signature of the *huissier*.¹⁰⁶ The body of the *constat* contains two parts: the “genesis of the mission” and the “operations.”¹⁰⁷ The first part simply states who requested or ordered the *constat* and why he/she did so.¹⁰⁸ The operations portion contains written physical observations often accompanied by visual proof such as photos or computer screen prints.¹⁰⁹ The *huissier* may only record what he observes with his five senses;¹¹⁰ he must keep his observations “purely material” by avoiding any explanation or interpretation of the facts.¹¹¹ No one may tell the *huissier* which facts to record and if a judge does so, it “amounts to a delegation of the power to judge.”¹¹² Similarly, if the facts permit a deduction to be made, as in a *constat d'adultère*, it must be made by the judge, not the *huissier*.¹¹³ This same principle applies beyond the *constat d'adultère* to any *constat* that may involve some sort of logical deduction, such as when a *huissier* is to report a misrepresentation made on a website. The judge determines if there was, in fact, a misrepresentation, and the *huissier* will be required to disclose and assist in any fact-finding that the judge needs. Under NCPC provisions, *huissiers* are required to provide this assistance even if it results in personal ramifications against the *huissier* because they are prohibited from giving opinions on the possible “factual and legal consequences” of the facts.¹¹⁴

The *huissier* must also be careful not to interrogate parties or third persons while performing the *constat*.¹¹⁵ If one of the parties is present and makes spontaneous declarations to the *huissier*, he

¹⁰⁶ Fricero, *supra* note 9, at 10.

¹⁰⁷ *Id.*

¹⁰⁸ See Fricero, *supra* note 9, at 10. See generally MOURRE-SCHREIBER, *supra* note 64, at 284-85 (example of a *constat*).

¹⁰⁹ See Fricero, *supra* note 9, at 11. See generally GUILLAUME DUBOS & JEROME TASSI, GUIDE DES SAISIES-CONTREFAÇONS ET DES CONSTATS 353-363 (2016).

¹¹⁰ TALINN, *supra* note 103, at 8.

¹¹¹ Fricero, *supra* note 9, at 4.

¹¹² *Id.*

¹¹³ *Id.* The *constat d'adultère* (of adultery) “never records the adultery but an ensemble of related, neighboring facts which permit an adulterous relation to be deduced. . . .” *Id.*

¹¹⁴ N.C.P.C. art. 249, translated in Legifrance, *supra* note 65.

¹¹⁵ Fricero, *supra* note 9, at 4, 5.

may record them but may not make comments or ask questions.¹¹⁶ When it comes to third persons, a *huissier* making observations at the request of an individual “may conduct examinations [ask questions] for the sole purpose of clarifying his observations.”¹¹⁷ After a *huissier* gathers the appropriate information, *constats* are presented in written form unless the rare circumstance arises where the judge asks for the findings to be presented orally.¹¹⁸ When in written form, the *huissier* himself must have authored the *constat*, with the exception of any information verified and prepared by another ministerial officer.¹¹⁹ Moreover, the *huissier* must produce two identical original copies of the *constat*: one to be left with the court or other administrator, and the other to be kept by the *huissier*.

The subjects of *constats*, especially those ordered by private parties, vary widely.¹²⁰ *Huissiers* may be called to examine everything from an inherited piece of property to a woman’s breasts after plastic surgery.¹²¹ Owners of retail or private properties may wish to have a *huissier* document the condition of the space before a renter moves in,¹²² or the new tenants may wish to do so.¹²³ *Constats* can also document conditions of buildings before or after renovations.¹²⁴ A husband may even wish to document the state of the conjugal home after a wife has left.¹²⁵ Other observations found in *constats*

¹¹⁶ *Id.* at 4. However, the force of the statements as evidence is questionable as the *Cour de Cassation* has stated that “he to whom the *huissier*’s *constat* attributes statements may bring back evidence of their falsity by the simple production of his own documents to contradict them, without having to prove particular steps undertaken to make recognized the erroneous character of these declarations” Cass. 1e civ., Mar. 25, 2009, not published (pourvoi no. 07-21980 on Legifrance).

¹¹⁷ Fricero, *supra* note 9, at 5. (citing Cass. soc., Dec. 6, 2007 (pourvoi no. 06-43392 on Legifrance)).

¹¹⁸ N.C.P.C. art. 250; Fricero, *supra* note 9, at 10.

¹¹⁹ *Order*, *supra* note 6.

¹²⁰ TALINN, *supra* note 103, at 9.

¹²¹ *Id.* at 10.

¹²² See *supra* note 10.

¹²³ Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, April 1, 2010 (documenting a cash register, conveyor belt, and other objects left by previous tenant).

¹²⁴ See, e.g. Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, March 11, 2010 (before neighbors began work on adjoining wall); Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, August 24, 2010 (after masonry company abandoned unfinished project).

¹²⁵ Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Aug. 9, 2010 (an example of such a *constat*).

include: a misrepresentation on a website, a house before construction began on neighboring lots, a stock of grocery products ruined by power failure and to be destroyed, the receipt of the rules of a game run by a beer company, the receipt and delivery of ballots for a company's internal election, a broken trailer hitch block on a train, damage and flooding in one store after a fire in another, a new fence that might encroach onto neighboring property, and the posting of a building license notice.¹²⁶

In the family law context, French *huissiers* are called upon to create *constats* for a variety of reasons. Before a lawsuit has begun or during its course, the *huissier* is often employed to collect evidence of spousal misconduct and prepare a *constat* detailing text messages, e-mail transcripts, and other electronic correspondence.¹²⁷ This is an important function as these types of evidence are commonly erased or no longer available when needed by the court in later proceedings. These communications can be used to demonstrate an agreement entered into between the spouses that has been breached, or to show that one of the spouses has begun a new romantic relationship.¹²⁸ The recordation and collection of this private information may come as a shock to some, but the *Cour de Cassation* has found this intrusion to be lawful, as long as obtainment is not accompanied with fraud or violence.¹²⁹ The *constat* is also used to inventory the property of the marital home, which can be beneficial if one spouse is claiming an item did not exist or to show the couple's standard of living.¹³⁰ However, there are limits on the *huissier's* fact-finding abilities in cases regarding family-relations; for example, when a husband requested that a *huissier* obtain evidence of his wife's insanity, the French court denied the request, reasoning that it exceeded privacy limitations and failed to respect human

¹²⁶ Chardon, *supra* note 11.

¹²⁷ *Le constat d'Huissier de Justice utilisé comme mode de preuve dans le conflits familiaux*, Chambre des Huissiers de Justice de Paris [hereinafter "Family Law Publication"] (2012), available at <http://www.huissiersdeparis.com/le-constat-dhuissier-de-justice-utilise-comme-mode-de-preuve-dans-les-conflits-familiaux/>.

¹²⁸ *Id.*

¹²⁹ See Cassation 1st Civ: June 17, 2009 No. 07-21796.

¹³⁰ See Family Law Publication, *supra* note 127.

dignity.¹³¹

Similarly, a *huissier*, at the request of an employer, is allowed to prepare a *constat* describing e-mails and text messages an employee receives and sends at his work email address or on his work phone.¹³² The only limitation the *Cour de Cassation* has placed on the *huissier's* power to delve into these communications is that the files or messages cannot be marked "personal."¹³³

Another interesting role for the *huissier* and his *constat* is to document the selling of counterfeit goods, or infringement cases. Typically, a victim who has unknowingly purchased a counterfeit product, but later discovered its flaw, will employ a *huissier* to stake out the public shop where the counterfeit product was sold and record in a *constat* when a third party goes into the shop empty handed and exits with the alleged counterfeit good.¹³⁴ This evidence is important, as France requires the plaintiff prove that the counterfeiter's shop is accessible to the public and visible from a public highway in order to establish the defendant is running an illegal enterprise. The *huissier* can also be used if the counterfeit good was sold over the Internet—and the *constat* will describe the IP address the alleged counterfeiter operates, how the *huissier* was able to find and access the website, details regarding the electronics the *huissier* used, etc.¹³⁵

The *constat* is clearly a valuable tool for judges presiding over civil lawsuits and individuals or companies facing or anticipating legal action. When prepared correctly, the factual statements in the *constat* are generally taken as true, and certain elements are unchallengeable. By covering a wide range

¹³¹ Wallace R. Baker & Patrick de Fontbressin, *The French Réfééré Procedure – A Legal Miracle?*, 2 MIAMI Y.B. INT'L L. 1, 21 (1993). For a general discussion, see Wallace R. Baker & Patrick de Fontbressin, *The French Réfééré Procedure and Conflicts of Human Rights*, 25 SYRACUSE J. INT'L L. & COM. 69 (1996).

¹³² Xavier Berjot, *Droit: l'employeur peut consulter les SMS du téléphone professionnel du salarié*, Les Echos (Feb. 22, 2015), available at

¹³³ See Cassation Soc. June 19, 2013, No. 12-12.138.

¹³⁴ Coraline Favrel & Nicole Bondois, *Feu le constat d'achat d'huissier en matière de contrefaçon?*, BRM Avocats (April 11, 2011) (evaluating the legality of this use of the *huissier* in proving infringement), available at <http://www.brnavocats.com/avocats/2011/04/feu-le-constat-d'achat-d'huissier-en-matiere-de-contrefacon>.

¹³⁵ See *Contrefaçon et constat d'huissier*, Réseau d'avocates d'affaires (August 30, 2012), available at <http://www.le-droit-des-affaires.com/contrefacon-et-constat-d-huissier-article67.html>.

of topics, *constats* allow judges to inform themselves on many non-complex situations, and allow private parties to record almost any state of affairs.

II. Adopting the *Constat*: How and Why?

A. Inefficiency of the American Legal System as Compared to the French

Although the *constat* (or an equivalent report) is unknown in the United States, it could help ameliorate two of the greatest problems within the American justice system: the cost and time required to reach a resolution. “In the eyes of many, ‘[d]elay is the most significant single problem affecting the [United States] civil justice system.’”¹³⁶ A survey of distinguished American trial lawyers conducted in 2008 showed that 69% of the responding lawyers “said the civil justice system . . . took too long to resolve cases.”¹³⁷ A similar survey conducted in 2010 by the Association of Corporate Counsel and the Institute for the Advancement of the American Legal System found that 90% of those surveyed agreed that litigation takes too long.¹³⁸ This viewpoint is not limited to those working in the legal profession, as it is also held by the general public; the ADR Institute conducted a study in 2003 in which 64% of the public surveyed stated they would prefer to arbitrate a dispute than go through litigation, and 67% thought that litigation is too lengthy.¹³⁹ Most of the delay occurs before trial; American civil trials are typically very short when compared to the time that elapses between the filing of the suit and the final decision by the judge or jury. For civil cases that went to trial in state courts in 2005, the average length

¹³⁶ Richard L. Marcus, *Malaise of the Litigation Superpower*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 71, 88 (Adrian A. S. Zuckerman et. al., eds., 1999).

¹³⁷ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1 n.1 (2008) [hereinafter TRIAL LAWYER REPORT], available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650.

¹³⁸ See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO ASSOCIATION OF CORPORATE COUNSEL (2010), available at <http://iaals.du.edu/initiatives/rule-one-initiative/research/civil-litigation-survey-of-chief-legal-officers-and-general-counsel>).

¹³⁹ RoperASW, 2003 Legal Dispute Study (Apr. 2003).

of a jury trial was 3.9 days and that of a bench trial was only 1.7 days.¹⁴⁰ However, the average time from filing to disposition for those same cases was 26.6 months for the cases tried by jury and 20.8 months for the ones tried by a judge.¹⁴¹ A contributing factor to this issue is that it usually takes over 10 months after a court case is initially filed for the court to impose its first discovery date cut off.¹⁴² According to a 1991 survey, the vast majority of the French people think that delay is a problem in their justice system as well.¹⁴³ However, it is suggested that litigants and their attorneys are often the cause of the delay, which transpires during the preparation stage in France as well.¹⁴⁴

Moreover, the cases that are considered to be the least expensive are those that do not involve formal discovery.¹⁴⁵ The American trial lawyer survey from 2006 revealed that 85% of the respondents agreed that “litigation in general and discovery in particular are too expensive.”¹⁴⁶ The excessive cost is “a matter of serious concern” because it “could enable those with unjustified claims or defenses to club their opponents into submission” or “preclude a considerable number of claimants from ever reaching court.”¹⁴⁷

¹⁴⁰ LYNN LANGTON AND THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS, 2005 8 (2008), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&id=242>.

¹⁴¹ *Id.* Various factors may contribute to this delay (e.g. delay tactics, incompatible schedules between attorneys and witnesses, continuances, and litigations over pre-trial motions). While incorporating the *constat* as suggested below may not act as panacea to all litigation delays, it may alleviate the problem by diminishing discovery time.

¹⁴² INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY, SUMMARY OF THE EMPIRICAL RESEARCH OF THE CIVIL JUSTICE PROCESS 2008-2013 (2014) [hereinafter SUMMARY REPORT], available at

http://iaals.du.edu/images/wygwam/documents/publications/Summary_of_Empirical_Research_on_the_Civil_Justice_Process_2008-2013.pdf.

¹⁴³ Loïc Cadet, *Civil Justice Reform: French Perspective*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 291, 307 (Adrian A. S. Zuckerman et. al., eds., 1999). “97 per cent of the persons surveyed saw justice as being too slow” *Id.*

¹⁴⁴ *Id.* at 309. “Cases are delayed ‘for preparation’ for long periods when no preparation actually occurs. This means that, in spite of long delays to prepare, the judge is not actually in any better situation to assess the dispute presented to him than if the case had come on more quickly.” *Id.*

¹⁴⁵ SUMMARY REPORT, *supra* note 142, at 47.

¹⁴⁶ TRIAL LAWYER REPORT, *supra* note 137, at 4.

¹⁴⁷ Marcus, *supra* note 136, at 94.

In the French legal system, on the other hand, “restrictions on the scope of [lawyers’] activities tend to keep the fees much lower than in the United States.”¹⁴⁸ Although surveys from 1991 and 1997 showed that a majority of the French citizens “[found] the justice system too costly”,¹⁴⁹ a lawyer who has practiced law in both France and the United States asserts, “when viewed from an American perspective, the French system of civil justice is cheap. It is quick. It produces judgments that overall seem to be satisfying.”¹⁵⁰ The most recent statistics from both countries seem to confirm the claim that French civil justice takes less time than American civil justice. The average time from filing to disposition of terminated civil cases in U.S. district courts from September 2006 to September 2007 was 8.6 months.¹⁵¹ In France, the average duration of terminated civil cases among the courts of first instance was 6.33 months in 2006.¹⁵² The median time from filing in the lower court to disposition of civil cases in U.S. courts of appeal was 32.16 months,¹⁵³ whereas French civil appeals, on average, took 13.3 months from the date the court of appeal was “seized” to the date of its decision.¹⁵⁴ When this figure is added to the average amount of time a case spends in the court of first instance, the total amount of

¹⁴⁸ ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 102 (2001) (quoting Doris Marie Provine, *Courts in the Political Process in France, in Courts, Law and Politics in Comparative Perspective* 239 (Herbert Jacob et. al., eds., 1998)).

¹⁴⁹ Cadet, *supra* note 143.

¹⁵⁰ KAGAN, *supra* note 148, at 105 (quoting Richard Hulbert, *Comment on French Civil Procedure* 45 Am. J. Comp. L. 747, 747 (1997)).

¹⁵¹ ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 175 (2008) [hereinafter 2007 ANNUAL REPORT], available at <http://www.uscourts.gov/statistics-reports/judicial-business-2007>. This figure includes all terminated cases, whether or not they went to trial.

¹⁵² See SECRETARIAT GENERAL, ANNUAIRE STATISTIQUE DE LA JUSTICE: ÉDITION 2008 30-41 (2009)[hereinafter ANNUAIRE STATISTIQUE], available at http://www.justice.gouv.fr/art_pix/1_stat_anur08_20090317.pdf. The number given in the text is the weighted average taken from the total terminated civil cases and total average duration of cases from the *tribunaux de grande instance*, the *tribunaux d'instance*, and the *conseils de prud'hommes*.

¹⁵³ See 2007 ANNUAL REPORT, *supra* note 151, at 108-10. The average of 32.16 months is for the 8,085 civil appeals (not including prisoner petitions) and bankruptcy appeals that were resolved on the merits (again taking a weighted average of the figures given). *Id.* at 112. The remaining 7,542 civil appeals and bankruptcy appeals were disposed of by consolidation or terminated procedurally but, unfortunately, no data is given on their average duration. *Id.* at 86.

¹⁵⁴ ANNUAIRE STATISTIQUE, *supra* note 152, at 28–29.

time from filing in the lower court to resolution in the court of appeal is 19.63 months—still considerably less than that required in the U.S. court system.¹⁵⁵

In contrast to its civil justice system, the French criminal justice system appears to be less speedy than its American counterpart. The time from the infraction to judgment in French courts of first instance averaged 11.32 months in 2006.¹⁵⁶ In U.S. district courts from September 2006 to September 2007, the average time from filing to disposition of a criminal case was 7 months,¹⁵⁷ and a major contributing factor to a longer case life in the United States, as inferred from a case study analyzing factors that increase or decrease the duration of a case, is whether a litigant is *pro se* or if the litigant is represented by more than one attorney.¹⁵⁸ The total process from lower court filing to judgment on appeal took 31 months in French courts of appeal¹⁵⁹ but only 26.12 months in U.S. courts of appeal.¹⁶⁰ It is interesting to note that in criminal cases, *huissiers* may serve process but do not perform *constats* or otherwise participate in the fact-finding¹⁶¹ - It sounded as if they *did* perform *constats* for criminal cases from one huissier's response: "Whenever it is necessary during *constats* or during police or civil investigations." Indeed, the lack of *constats* in French criminal cases may contribute to the significantly longer procedural process, which may indicate even the more the reason to incorporate *constat-like* mechanisms into American civil procedure.

¹⁵⁵ For the U.S. figure to be less than the French one, the average duration of the 7,542 unaccounted-for appeals would have to be less than 6.2 months. However, a *constat*-like document, a fact-finding document, would figure less heavily in appellate procedure.

¹⁵⁶ See ANNUAIRE STATISTIQUE, *supra* note 152, at 126–35. The number given in the text is the weighted average taken from the total decisions and total average duration of the procedure from the *cours d'assises*, the *tribunaux correctionnels*, the *tribunaux pour enfants*, the *tribunaux de police* and the *tribunaux aux armées*.

¹⁵⁷ 2007 ANNUAL REPORT, *supra* note 151, at 256.

¹⁵⁸ Teresa Dalton & Jordan M. Singer, *Bigger Isn't Always Better: An Analysis of Court Efficiency Using Hierarchical Linear Modeling*, 34 PACE L. REV. 1169, 1184 (2014).

¹⁵⁹ ANNUAIRE STATISTIQUE, *supra* note 152, at 136–37.

¹⁶⁰ See 2007 ANNUAL REPORT, *supra* note 151, at 108–09. The weighted average of 26.12 months is for the 14,461 prisoner petitions and criminal appeals terminated on the merits. The remaining 16,229 prisoner petitions and criminal appeals were disposed of by consolidation or terminated procedurally but, again, no data is given on their average duration. *Id.* at 86.

¹⁶¹ WALTER CAIRNS & ROBERT McKEON, INTRODUCTION TO FRENCH LAW 172, 176 (1995).

B. Inefficiency in the American Discovery Process

One particular area that would benefit from introducing the *constat* into the American legal system is the discovery process. Adopting the *constat* would help eliminate the high costs and delays associated with discovery, thereby creating a more effective and cost efficient means of fact-finding. Discovery is an expensive and lengthy process, which is responsible for delaying cases by months or even years. Not only is the discovery process responsible for many delays in both civil and criminal cases, but discovery fees also account for approximately 90% of litigation costs.¹⁶² Between 2006 and 2008, the average company involved in litigation paid discovery costs ranging from \$621,880 to \$2,993,567 per case.¹⁶³ Much of these expenses are allocated to the defendant.¹⁶⁴ Thus, defendants have a strong incentive to settle “even meritless” claims to avoid the costly discovery process.¹⁶⁵ Plaintiffs have taken advantage of defendants’ willingness to settle in the face of long delays and high costs associated with discovery by filing frivolous claims in hope of a settlement.¹⁶⁶ This discovery abuse is a problem that has plagued litigation for decades and a successful remedy has been called for repeatedly.¹⁶⁷

¹⁶² Brief for Petitioner at 8, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2474078, at *8 (citing Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rule of Practice & Procedure 4 (May 11, 1999)). This brief quotes dicta from *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 117 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007), which was reversed for an unrelated issue. Although this statement does not carry the same authority as a holding, it does represent a court’s acknowledgement of the issue.

¹⁶³ 2010 Conference on Civil Litigation, *Litigation Cost Survey of Major Companies*, Duke Law School, 3 (May 10-11, 2010), <http://www.uscourts.gov/file/document/lawyers-civil-justice-et-al-survey-litigation-costs-major-companies-2010>. See also Daniel B. Garrie, *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393, 398 (2010) (stating that experts have “estimated that in 2007, litigants would spend more than \$2.4 billion on electronic discovery services and there is no end in sight to this growth. Only two years later, this expense had increased.”).

¹⁶⁴ See *Brief for Petitioner*, *supra* note 162, at *7 (referencing antitrust discovery).

¹⁶⁵ *Id.* (representing the opinion of one litigator).

¹⁶⁶ *Id.*

¹⁶⁷ Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(A) – “Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 683–84 (1995).

Furthermore, the extensive document production and lengthy depositions involved in the discovery process do not always benefit either party to litigation.¹⁶⁸ Of the 4,980,441 discovery pages produced on average in major cases in 2008, only 4,772 pages were marked as exhibits at trial.¹⁶⁹ Such document production is responsible for “thousands of hours of attorney’s fees, and increasingly, millions of dollars.”¹⁷⁰ The discrepancy between the number of pages produced and those actually used at trial accompanied by exorbitant legal expenses illustrates the inefficiencies that result from the discovery process currently in place.

C. Benefits of Adopting the *Constat*

Adopting the *constat* may help to rectify these shortcomings by, in some instances, replacing the current practice of obtaining numerous statements and documents from various sources with a single written document drafted by a trained professional. If judges were able to send credible legal officers (say, a modified version of the master)¹⁷¹ on fact-finding missions, at least a portion of the factual disputes could be settled outside of discovery. This would reduce the amount of time and effort required by the parties and their lawyers for discovery, and would even cost less when the avoided discovery expenses exceed the cost of the *constat*. Costs would also be distributed more evenly among

¹⁶⁸ See *Litigation Cost Survey of Major Companies*, *supra* note 163 (“Inefficient and expensive discovery does not aid the fact finder.”)

¹⁶⁹ See *id.*

¹⁷⁰ *Id.* The massive amount of discovery documents to be produced has only increased with the advent of e-discovery techniques. See Milberg LLP, Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules . . .*, 4 FED. CTS. L. REV. 131, 137 (2011) (“Today, a lawsuit between corporations may involve ‘more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space.’”). In fact, a 2008 survey of Fortune 200 companies revealed that a vast majority of discovery documents produced are not used at trial. See LAWYERS FOR CIVIL JUSTICE ET AL., CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, *Litigation Cost Survey of Major Companies* 3-4 (May 10-11, 2010) (describing how in cases with total litigation costs exceeding \$250,000, the ratio of the average number of discovery pages produced to the average number of pages used at trial was 1,044 to 1) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%C20Survey%C20of%C20Major%20Companies.pdf>.

¹⁷¹ See discussion *infra* Part II.E.2.

the parties since courts apportion payment for the master's services among the parties.¹⁷² Thus, by providing for these changes to the American system, these benefits could be achieved without significant changes to the rules governing discovery.

In the French system, the *constat* carries much evidentiary weight and the facts it contains are hard to refute in court.¹⁷³ If the American version were to carry this type of weight, it would reduce attorneys' incentives to perform discovery concerning the subject matter contained within the report due to the futility of presenting evidence contrary to the observations therein. Of course, a lawyer could still obtain discovery regarding any matter relevant to a client's claim or defense,¹⁷⁴ however, the hard-to-refute report prepared by a skilled court-appointed professional would deem such discovery requests excessive, and therefore an undesirable waste of time and money.

Additionally, adoption of the *constat* would help lower electronic discovery costs. In France, *constats* documenting Internet infractions such as libel and plagiarism can be ordered from *huissier*-run websites for 190€, or \$248.53, for 1 to 4 screenshots.¹⁷⁵ Such documentation provides an effective and cost efficient alternative to obtaining Internet records from site operators or witness statements, which would be necessary in the American system. As professionals, *huissiers* are trained to recognize important facts and observations to be included in commissioned reports.¹⁷⁶ This centralized expertise would benefit the American legal system, which currently relies on many different parties of varying educational backgrounds and training to piece together potentially straightforward matters, such as Internet plagiarism.

¹⁷² FED. R. CIV. P. 53(g)(3). This distribution is based on means, the amount at stake, and whether one party caused the need for the master more than the other. *Id.*

¹⁷³ Fricero, *supra* note 9, at 11.

¹⁷⁴ FED. R. CIV. P. 26(b)(1).

¹⁷⁵ Constat-Huissier, *Présentation du service*, CONSTAT-HUSSIER.NET, <http://www.constat-huissier.net/> (last visited July 2, 2015).

¹⁷⁶ See generally *Code de déontologie des huissiers de justice* [Code of Ethics of Huissiers de Justice], http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FH_4_1%2FH_4_1R3.htm (last visited July 2, 2015).

Finally, adapting the private version of the *constat* could reduce time and cost for private parties in ways similar to those discussed above. By having observations made before an incident, after it, or both, individuals could begin any subsequent lawsuit a step ahead or perhaps even avoid it altogether.¹⁷⁷ Moreover, almost any situation could be prospectively recorded and preserved as protection for any future dispute as *constats* can encompass a broad range of subjects.¹⁷⁸ Such reports could also be useful in the context of insurance claims. The French *huissiers'* National Chamber asserts that insurance companies recognize *constats* in the same way as courts.¹⁷⁹ In this context, if the *constats* had the same effect in the United States, both the claims adjuster employed by an insurance company and individual policyholders would have the advantageous capacity to obtain a credible account of the situation from a neutral observer.

D. Adapting the *Constat*: Uses and Limitations

1. Specific Uses of the *Constat*

How would the *constat* fit into the American pretrial process? Under Rule 16 of the Federal Rules of Civil Procedure ("FRCP"), a judge may order a pretrial conference, during which she manages the case by making rulings about discovery, pleadings, evidence, and other matters necessary for the disposition of the case.¹⁸⁰ One goal of the pretrial conference is to "discourag[e] wasteful pretrial activities" and "expedit[e] disposition of the action."¹⁸¹ Rule 16(c)(2) lists actions the judge can take toward this goal, and gives her discretion to "facilitat[e] in other ways the just, speedy, and inexpensive disposition of the action."¹⁸² The addition of the *constat* as an optional judicial tool would simply and

¹⁷⁷ For example, when a contractor neglects to finish a job, *see, e.g.* Chardon Constat, August 24, 2010, *supra* note 124, or when one receives nonconforming goods. Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Aug. 18, 2010 ; Chardon Constat, *Huissier de Justice*, member of *la société professionnelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Aug. 24, 2010 (after masonry company abandoned unfinished project).

¹⁷⁸ Chardon, *supra* note 11.

¹⁷⁹ *Le constat, LES HUISSIER DE JUSTICE – A VOTRE SERVICE*, <http://www.huissier-justice.fr> (last visited Dec. 20, 2015).

¹⁸⁰ FED. R. CIV. P. 16(c)(2).

¹⁸¹ FED. R. CIV. P. 16(a).

¹⁸² FED. R. CIV. P. 16(c)(2)(P).

effectively strengthen the judge's ability to encourage efficiency. While the judge would be able to order a *constat* at any time during the pretrial process, the pretrial conference would be the ideal time because it would let attorneys know which matters the report would target, so they could plan discovery accordingly. A simple addition could be made to Rule 16(c)(2) identifying the *constat*-equivalent as an available tool for the judge.

The judge would have discretion in deciding whether to order a *constat*, as well as what subject matter it would contain. But which matters *should* the report target? French *huissiers* perform *constats* on an almost limitless range of subjects, but they only perform basic observations of fact, not complex investigations.¹⁸³ The American *constat* would be similarly used to establish basic facts that do not require discovery, while subject matter requiring more extensive evidence gathering could be left to the traditional discovery process. A minor addition to the FRCP could identify suggested uses for the report while giving judges discretion to use it in novel ways. As judges experiment with the *constat*-equivalent, the best and most efficient uses for it would become clear in time.

Huissiers often interrogate witnesses in French civil actions,¹⁸⁴ but this function would probably need to be limited in the American adversarial system, which values live witness testimony.¹⁸⁵ In American civil trials, allowing parties to cross-examine witnesses is the norm,¹⁸⁶ though not necessarily guaranteed by due process under the Fifth or Fourteenth Amendments.¹⁸⁷ Further, the American system recognizes the necessity of live testimony for jurors to evaluate witness veracity.¹⁸⁸ However, in some situations it might be appropriate for the American *constat*-performer to do basic interviews with witnesses. For example, rather than conducting a formal deposition of a witness who is not essential for

¹⁸³ Robert W. Emerson, *supra* note 59, at 1082.

¹⁸⁴ *Id.* at 1081.

¹⁸⁵ Though the *constat* could also find use in the realm of depositions.

¹⁸⁶ Charles Hobson, *The Minimalist Privilege*, 1 N.Y.U. J.L. & LIBERTY 712, 713, 715 & n.43 (2005).

¹⁸⁷ Emerson, *supra* note 183 at 1121 n.475.

¹⁸⁸ *Id.* at 1125.

examination at trial, simple changes to Title V of the FRCP (governing “Disclosures and Discovery”)¹⁸⁹ could enable a huissier to provide the court with substantially the same information as a formal deposition of that witness, at a fraction of the cost. Rule 28 requires that depositions be conducted in front of an officer authorized to administer an oath or a person appointed by the court.¹⁹⁰ Rules 30 and 31 provide further requirements for oral and written depositions regarding leave of court, service of process, and notice.¹⁹¹ Finally, Rule 32 details when depositions may be used at trial.¹⁹² An additional rule providing for the use of a *constat* or modifications to Rules 28–32 might allow the parties to more quickly acquire information substantially similar to that obtained in a formal deposition, without incurring any costs.

As discussed above, the credibility of the American *constat* and the professional who prepares it would make the report hard to refute in court. However, procedures could be developed to allow parties to challenge an erroneous report.¹⁹³ As in the French system, the judge would have discretion to reject a *constat* if it was clearly flawed.¹⁹⁴ Parties would be free to bring evidence contrary to the observations contained in the report but, like the French *constat*, this evidence would often be insufficient to counteract the observations it contained.¹⁹⁵ As an added safeguard, a lawyer seeking to challenge a *constat* could be given the option to pay to have an additional *constat* performed, with costs divided or assessed to the loser if the original report was overturned. In addition, a judge's decision to accept the facts contained in a *constat* despite contrary evidence could be reviewable under an abuse-of-discretion standard.

¹⁸⁹ FED. R. CIV. P. 26–37.

¹⁹⁰ FED. R. CIV. P. 28(a)(1)–(2).

¹⁹¹ FED. R. CIV. P. 30–31.

¹⁹² FED. R. CIV. P. 32.

¹⁹³ For example, N.C.P.C. art. 234, *translated in Legifrance, supra* note 54, allows for parties to challenge experts on the same grounds as judges.

¹⁹⁴ N.C.P.C. art. 246, *translated in Legifrance, supra* note 65.

¹⁹⁵ Fricero, *supra* note 9, at 11.

Is the *constat* compatible with American conceptions of due process? Lawyers might be tempted to argue that it is not, and that taking evidence gathering out of the hands of the parties denies their right to a fair trial. Adopting the *constat* would represent a slight move toward a more inquisitorial model of jurisprudence, and there is an assumption by some in the legal community that inquisitorial forms of procedure are foreign to the American conception of due process.¹⁹⁶ However, this issue is not likely to be insurmountable considering the relatively limited procedural scope of the *constat*, as well as a historical receptiveness to inquisitorial procedures in American jurisprudence.¹⁹⁷

Given all the aforementioned benefits and considerations, the *constat* would prove itself to be the most useful in three commonly litigated areas in the United States: trademark infringement, copyright infringement, and the procurement of government contracts. These suits often require extensive discovery and lengthy litigation making them the perfect candidates for reform through the adoption of the *constat*.

2. Trademark Infringement

The adoption of the *constat* or a *constat*-like practice would protect both trademark owners and consumers by providing an impartial statement of facts to promote efficient litigation. Trademark infringement claims brought under The Lanham Act¹⁹⁸ are evaluated under a standard of “likelihood of confusion.” There are many factors to consider in determining potential confusion such as: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the similarity of marketing channels used; (6) the degree of caution exercised by the typical purchaser; and (7) the defendant's intent.¹⁹⁹ One of the primary ways that a *constat* would assist litigation in trademark infringement cases is that it would be particularly adept at documenting a

¹⁹⁶ Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1261 (2005).

¹⁹⁷ See Emerson, *supra* note 183 at 1123; Kessler, *supra* note 196 at 1198–1210.

¹⁹⁸ 15 U.S.C. § 1051 et seq.

¹⁹⁹ [Polaroid Corp. v. Polarad Elect. Corp.](#), 287 F.2d 492 (2d Cir.), cert. denied, 368 U.S. 820 (1961).

“harmful effect” which is typically required to prove copyright infringement for a cause of action under the Lanham Act. A *constat* would document lost sales, lost customers, or delays in the placement of orders to demonstrate irreparable harm suffered by the owner of the mark. Furthermore, *huissiers* can deliver “cease and desist” orders including a *constat* which documents the infringement. This function would be particularly useful in cases of infringement via the Internet. *Huissiers* can use screenshots to document infringing material before it is deleted or otherwise taken offline. Such documentation provides an effective and cost efficient alternative to obtaining Internet records from site operators or witness statements, as would be necessary in the American system.

If a trademark’s validity comes into question due to an alleged lack of secondary meaning, a *constat* can provide evidence about the aforementioned indicia of secondary meaning. *Constats* may document the first use of a mark and its subsequent uses, as well as advertising that includes the mark. A *constat* may also document attempts at infringement to be used in later litigation.

A *constat*’s usefulness would most likely shine in its ability to provide reliable documentation of the facts concerning an alleged infringer’s use of an infringing mark in commerce.²⁰⁰ This can include both physical and digital infringements. Since a complaint becomes “more effective when it is accompanied by persuasive exhibits bolstering the plaintiff’s claim . . . [the] plaintiff should consider appending a copy . . . of its mark . . . and of the defendant’s infringing mark . . . [and] plaintiff should not hesitate to submit as exhibits to a complaint the actual products on which the respective marks are used.”²⁰¹ A *constat* can fill this role nicely. Going beyond mere photographs of the two marks side by

²⁰⁰ A huissier may be limited by law in undertaking investigatory activities without the consent of the person about whom he reports. For example, even upon the decision of a judge instructing the huissier to proceed to a private location and develop findings of fact regardless of the consent of the person at that location, the huissier can only act between the hours of 6:00 am and 9:00 pm. Chambre Nationale des Huissiers de Justice [French National Chamber of Judicial Officers], Les Huissiers de Justice à Votre Service: Le Constat, <http://www.huissier-justice.fr/constat> (last visited July 2, 2015). Surely there would be little or no such limitations for a huissier who simply conducts his investigation on the Internet—seeking to find and document trademark violations or other problems there, not in person.

²⁰¹ INTELLECTUAL PROPERTY COUNSELING & LITIGATION (Lester Horwitz & Ethan Horwitz, gen. eds., 2015), at § 65.04.

side, a *constat* can detail a mark's use in actual commerce, providing photographs and detailed descriptions of the product being sold.

The strong factual details of a *constat* make it particularly well suited to use in ex parte proceedings, as the burden is higher to protect the rights of the opposing party. Additionally, a *huissier* may be requested to accompany federal law enforcement officers when conducting a seizure of goods to protect the parties' rights and preserve relevant facts.

Other important evidentiary issues in trademark cases include priority of use, chronology of use, and the relationship between multiple parties.²⁰² The mark holder can request a *constat* documenting a mark's first use and subsequent uses in preparation of potential future litigation. If infringement is suspected, a *constat* documenting an adversary's infringing mark can be made in anticipation of litigation. *Constats* demonstrating licensing, quality control, and marketing schemes can establish a mark's strength and rebut abandonment, or vice-versa.

A *constat* can also bolster claims concerning the various factors of the Lanham Act's standard of "likelihood of confusion," especially for preliminary injunctions that require showing a high likelihood of success. A *constat* examining the appearance, function, and appeal of products can help create a factual basis for the proximity and similarity of the plaintiff's product and the infringing product. Likewise, a *constat* can also record instances of returns the plaintiff receives from the infringing product; as well as complaint letters about the infringing product in instances where the consumer believes the infringer to be the actual mark holder. Moreover, a *huissier* can observe and record consumers who purchase infringing products and interview them about the product. Finally, actual confusion can be recorded through surveys.²⁰³ A trained *huissier* (whose finding of facts are difficult to dispute) could be beneficial

²⁰² *Id.* at § 71.01.

²⁰³ Survey evidence may be disputed. "Not all surveys are of equal value, however. The weight accorded a survey depends upon the soundness of the survey methodology. Nonetheless, survey practices are more pertinent to the weight accorded the survey, rather than admissibility into evidence." *Id.* at § 3.02.

in conducting surveys, assuming the surveys are formed according to, and conducted to meet, proper survey methodology.

3. Copyright Infringement

Copyright law seeks to protect for a limited time “original works of authorship fixed in any tangible medium of expression.”²⁰⁴ The term “works of authorship” is interpreted broadly by courts to include the more traditional “arts,” such as literary and musical works, and more modern additions, such as audiovisual and architectural works.²⁰⁵ Although the originality requirement presents a low threshold to authors,²⁰⁶ both constitutional and statutory law proscribe copyright protection to such things as facts or ideas.²⁰⁷ However the use of public domain material does not necessarily preclude copyright protection, as the expression or compilation can possess originality.²⁰⁸ A valid copyright vests several rights in the author or owner, including the right to reproduce or distribute the copyrighted work, to create derivative works based on the copyright work, and license to third parties the right to use the copyrighted work.²⁰⁹ Copyright infringement thus poses the potential of significant loss of income to copyright owners, and a *constat* that demonstrates an infringing product of inferior quality can help solidify a plaintiff’s claim of irreparable harm to his reputation.

To establish a valid claim of copyright infringement, a plaintiff must demonstrate (1) ownership of a valid copyright and (2) that copyrightable elements of that work were copied.²¹⁰ A plaintiff can establish a copyright infringement either directly with proof of actual copying or indirectly through proof of access and substantial similarity of copyrighted material.²¹¹ Copyright infringement also extends to

²⁰⁴ 17 U.S.C. § 102(a).

²⁰⁵ *Id.*

²⁰⁶ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (“a minimal degree of creativity”).

²⁰⁷ *Id.* at 346; 17 U.S.C. § 102(b).

²⁰⁸ *Feist Publ’ns*, 499 U.S. at 348.

²⁰⁹ INTELLECTUAL PROPERTY COUNSELING & LITIGATION, *supra* note 201, at § 59.01.

²¹⁰ *Feist Publ’ns*, 499 U.S. at 361.

²¹¹ *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (2d Cir. 1982).

secondary liability where one infringes contributorily by encouraging direct infringement or where one infringes vicariously by profiting from another's direct infringement.²¹²

As in the case of trademark law, the *constat* can interact beneficially with copyright law at various stages. Although federal law no longer requires notice, placing copyright notice on a work under 17 U.S.C. § 401 can prove beneficial. As an example, a *constat* can record the placement of notice on the works or even record the lack of notice on a work. A *constat* could even offer proof normally covered by notice, such as the year of publication. Additionally, joint authors could record their separate contributions through a *constat* before compiling them into one work.

Similar to the *constat* in the trademark context, the *constat* in the copyright context can mainly help in recording the facts of a physical or digital infringement. This is especially significant in the Internet context where websites can be modified or removed almost instantly, denying plaintiffs their proof of infringement. A *huissier* can take a screenshot of a website and describe in the *constat* the legally significant facts found on the website thereby preserving the information for litigation.²¹³

4. Government Contracts

Public—that is, governmental—contracts require review, regulation, and occasional lawsuits. Among the tools at hand to combat corruption or other tribulations is the statement of fact (the *constat*). Indeed, while many Civil Law nations are reluctant to consider letting private parties hire a judicial officer (*huissier*) to conduct a *constat*,²¹⁴ very few would not authorize a *constat* if requested by

²¹² *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

²¹³ *Id.*

²¹⁴ Questionnaire of the Union Internationale des Huissiers de Justice, para. 16, question 2, at http://questionnaire2011.uihj.com/index.php?ID=1011971&questUIHJ_page=16 (last visited July 2, 2015) (a number of nations, especially in Europe and Africa—including Algeria, Belgium, Benin, Cameroon, Canada, Chad, Chile, Czech Republic, France, Gabon, Haiti, Ivory Coast, Latvia, Lithuania, Luxembourg, Mali, Mauritius, Moldavia, Netherlands, Niger, Poland, Romania, Senegal, Slovenia, Switzerland, and Togo—provide that a judicial officer can carry out statements of fact (constats); a smaller number of countries would bar such actions. *Id.* (Bulgaria, Estonia, Finland, Georgia, Germany, Greece, Hungary, Italy, Kazakhstan, Macedonia, Norway, Portugal, Slovakia, Spain, Sweden, Thailand, and Uganda).

a judge.²¹⁵

Before considering a remedy, though, one must understand the problem. Government contracts, from inception to litigation, pose a variety of difficulties. Perhaps the most glaring dilemma is how to confront corruption or other improprieties in the granting of government contracts. Corruption and fraud in the contract procurement process can lead to wasted funds and sometimes sub-par services and goods for the public.²¹⁶

Countless United States statutes and regulations work towards deterring government procurement fraud. Despite studies and laws seeking to expose government contract fraud, the issues in rectifying the losses sustained by the government, as well as the public, continue from the moment fraud is discovered through, if need be, trial and appeal. In litigation, whistleblowers that bring suit are faced with and thwarted by high costs and constitutional defenses.²¹⁷ Meanwhile, defendants may also be pressured by whistleblowers or the government to settle, or be subject to multiple punishments for one act.²¹⁸ Thus, because government contracts affect a wide range of businesses and individuals, the need for solutions is magnified.

²¹⁵ *Id.*, para. 16, question 14 (authorizing a judicially-requested statement of facts in Algeria, Belgium, Burkina Faso, Cameroon, Canada, Chad, Chile, Congo, France, Gabon, Ivory Coast, Latvia, Lithuania, Mali, Mauritius, Moldavia, Netherlands, Niger, Poland, Romania, Senegal, Slovenia, Switzerland, and Togo, while only Germany, Haiti, and Latvia do not so authorize).

²¹⁶ See FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, 54 (2005).

²¹⁷ Evan Caminker, *The Constitutionality of Qui tam Action*, 99 YALE L.J. 341 (1989).

²¹⁸ See U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 527–562 (1943) (involving a qui tam lawsuit brought against engineers contracted by a local municipality. The engineers, respondents, argued the lawsuit could not properly be brought when the respondents were already criminally punished for their actions. The court upheld the qui tam action).

In the United States (and internationally), public contract (government procurement) law is aimed at ensuring a system of integrity²¹⁹ and transparency.²²⁰ Despite these efforts, public contracts are often subject to criticism about a lack of transparency or control. Using the statements of fact (the *constat*), a judicial officer (the *huissier*) could avoid these pitfalls by providing real “security” or aid in this area due to their neutrality, authority, and legal expertise.²²¹ The judicial officer can investigate and issue findings (statements) of fact that could ensure transparency and security in the process of awarding public contracts.²²²

Various statutes and regulations, such as the Federal Property and Administrative Services Act (FPASA) and Federal Acquisition Regulation (FAR) govern public contracts in the United States.²²³ These statutes and regulations give bidders uniform rules in the process of obtaining government contracts.²²⁴ Furthermore, before the rules are promulgated, the public has an opportunity to read and comment on

²¹⁹ See 48 C.F.R. § 3.101-1 (“Government business shall be conducted in a manner above reproach and . . . with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. . . .”).

²²⁰ Transparency is maintained in a number of ways, including the posting of all bidding opportunities and requirements in the FebBizOps (FBO), see <http://www.cbd-net.com>, and providing a detailed protest procedure for actual or potential government contractors. 28 U.S.C. § 1491 (2011).

²²¹ The expertise may mean that no one else, even an agent of the *huissier*, may investigate and draft the statement of facts. Questionnaire of the Union Internationale des Huissiers de Justice, *supra* note 214, at para. 16, question 5 (noting that the *constat* needs to be personally performed by the judicial officers in these 12 nations: Algeria, Canada, Chile, Congo, Gabon, Haiti, Latvia, Lithuania, Luxembourg, Mauritius, Romania, and Switzerland). On the other hand, in at least 13 countries, the *huissier’s constat* activities can be conducted not just personally by the *huissier* but by an assistant operating under that judicial officer’s responsibility. *Id.* (nations stating that position: Belgium, Benin, Cameroon, Chad, Czech Republic, France, Ivory Coast, Mali, Netherlands, Niger, Poland, Senegal, and Togo).

²²² For a discussion of the French *huissier* and the potential for applying some of his practices, particularly the *constat*, in the United States, see Emerson, *supra* note 59,

²²³ See FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 25 (2005).

²²⁴ *Id.*

the law, which is published on the *Federal Register*.²²⁵ Unless justified by some compelling reason, the rules require agencies to grant an open competition for a contract.²²⁶

A government agency's acceptance of bids is based on ordinary contract law, and an official accepting a bid is presumed (1) to have acted in conformance with the applicable local, state, or federal rules; (2) to not have prejudiced the rights of any other bidder; (3) to have selected the lowest responsible and responsive bidder; (4) to have acted honestly and equitably during the course of the bid procedures; and (5) to not have acted arbitrarily or capriciously during the course of the bid-award process.²²⁷ Officials have broad discretion to choose which bid to accept, and courts will generally not interfere unless the discretion is exercised "arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence."²²⁸

While giving government officials such broad discretion does have its benefits,²²⁹ it undoubtedly adds to both actual corruption and the perception thereof. The use of judicial officers, such as *huissiers*, in the public contract arena would go a long way towards minimizing these problems; that is, *huissiers* could help prevent actual or perceived corruption in government procurement contracts. *Huissiers*, acting as neutral judicial officers, can use their extensive knowledge of the law²³⁰ in order to show findings of violation. A *huissier's* requirements of impartiality and objectivity, coupled with the

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See Am. Jur. 2d, Public Works and Contracts § 63.

²²⁸ *Vinson Guard Serv., Inc. v. Retirement Sys. of Ala.*, 836 So. 2d 807, 810 (Ala. 2002).

²²⁹ For example, allowing officials that discretion allows them to take into consideration factors other than price, such as likelihood of completion, timeliness, and quality.

²³⁰ Huissiers are required to "have a Master degree (4 years of university studies) of law, have completed a trainee's program of 2 years' duration at the practice of a [huissier], have followed special[z]ed courses organi[z]ed by the profession, and have successfully passed a professional examination." *The Judicial Officer in the European Union: France*, International Union of Judicial Officers, <http://www.uijj.com/en/ressources/10148/54/france-en.pdf> (last visited July 2, 2015).

neutrality inherent in the position,²³¹ would make the *huissier* advantageous in preventing fraud in public contracts. To assist in this understanding it is helpful to consider examples of the discovery and reporting processes in public contract law.

The False Claims Act²³² (the “FCA”) is one of the more contentious federal statutes²³³ regarding public contracts. Congress enacted the FCA in 1863 in response to frauds perpetrated in connection with Union military procurement during the Civil War.²³⁴ To address the problems latent in government procurement, the FCA sought “to indemnify the government—through its restitutionary penalty provisions—against losses caused by a defendant's fraud.”²³⁵ Congress amended the FCA in 1986 to encourage qui tam enforcement of the statute.²³⁶ Qui tam actions allow a private citizen, also known as

²³¹ *Huissiers* are essentially third-party judicial officers, and as such will have no interest in the case. In instances where a *huissier* may have an interest, such as where a spouse or relative is involved, the *huissier* has a duty to refuse a *constat* request. *Order, supra* note 6.

²³² 31 U.S.C.A. § 3729.

²³³ In addition to the federal act, most states have adopted their own versions of the False Claims Act that mirror the federal version. See James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks & Marc S. Raspani, *States, Statutes, and Fraud: An Empirical Study of Emerging States False Claims Acts*, 80 TUL. L. REV. 465 (2005).

²³⁴ Act of Mar. 2, 1863, ch. 67, §1, 12 Stat. 696, 696-99 (1863). See also Daniel C. Lumm, *The 2009 "Clarifications" to the False Claims Act of 1863: The All-Purpose Antifraud Statute with the Fun Qui Tam Twist*, 45 WAKE FOREST L. REV. 527, 528-29 (2010).

²³⁵ *Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001).

Specifically the FCA creates liability for any person who:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

31 U.S.C.A. § 3729(1)(A)-(G). Under 31 U.S.C. § 3730(b)(2), the informer can file a FCA action, but has to provide the supporting evidence to the Justice Department, which ultimately has 60 days in which to intervene and take exclusive control of the suit.

²³⁶ Lumm, *supra* note 234, at 529.

a “relator,” to bring suit on behalf of the government for violations of the FCA for collection of statutory forfeiture.²³⁷ A relator or informer is the person who pursues the action and potentially receives a portion of any amount recovered on the government’s behalf.²³⁸

While allowing qui tam actions have undoubtedly led to stricter enforcement of the FCA, those actions come at a cost as well. First and foremost, qui tam actions are a huge risk to private citizens, who must expend a significant amount of time and money to bring suit on the government’s behalf.²³⁹ Thus, not only would the use of *huissiers* help with oversight and enforcement of the FCA, it would also help reduce some of the risk to relators,²⁴⁰ which would in turn lead to stricter enforcement of the FCA.

In order to establish a *prima facie* claim under the FCA, a relator must prove three things: (1) the defendant presented or caused to be presented a claim for payment to an agent of the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent.²⁴¹ Under the FCA, there are two categories of false claims: factually false claims and legally false claims.²⁴² A factually false claim involves misrepresentation of what goods or services were provided to the government; a legally false claim occurs when an individual or business “knowingly falsely certifies that it has complied with a statute or regulation the compliance with which is a condition for Government payment.”²⁴³ These categories are further divided into either express or implied “false certification”²⁴⁴ as

²³⁷ 31 U.S.C. § 3730(b) (2011).

²³⁸ See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 263 (1765). See also James Roy Moncus III, *The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy?*, 55 VAND. L. REV. 1549, 1551–52 (2002) (defining a relator as a modern translation of the Latin qui tam phrase, meaning one “who pursues this action on our Lord the King’s behalf as well as his own”).

²³⁹ However, relators stand to make significant gains from a successful action, as they are entitled to receive between 15% –25% of the proceeds of a successful action or settlement. 31 U.S.C.A. § 3730(d).

²⁴⁰ The *constat* would render it unnecessary for the relator to complete a large portion of the discovery process, thus reducing the time and money involved.

²⁴¹ United States ex rel. Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

the basis for a legally false claim.²⁴⁵

The process for bringing a claim under the FCA is extremely fact intensive, and the benefits, which would be provided from the use of *huissiers* and *constats*, should be obvious. The use of a *constat* in these instances could be used to replace the traditional discovery process, which is subject to extensive cost and delays, with one written document drafted by a trained professional. While the *constat* would provide these cost and timesaving benefits in almost any instance, this would be even truer in the context of FCA claims because they are so dependent on the facts. Using a factually false claim as an example, a *constat* would simply outline the goods or services actually provided to the government as well as the goods or services that were represented as being provided to the government. A *constat* would also be useful in dissolving a common criticism of informers that they are tempted to file false or unfounded accusations in hopes of misleading the court or intimidating the defendant into settlement.²⁴⁶ Accordingly, the *constat* would go a long way towards either reaching settlement or dropping the suit because the *huissier* would discover whether there was a misrepresentation or a fraudulent claim for payment.²⁴⁷ Equally a *constat* could monitor and prevent informers from purposefully encouraging favorable settlement by filing qui tam litigation in a location that makes defense impossible and inconvenient.²⁴⁸ Not only would the use of the *constat* lead to greater efficiency through its facilitation of settlement, it would do so at a lessened cost to the parties

²⁴⁵ See Rodriguez v. Our Lady of Lourdes Med. Ctr., 552 F.3d 297, 303 (3d Cir. 2008); the department of justice reports that as of September 1999, 2959 qui tam actions have been filed since the FCA amendment has been enacted.

²⁴⁶ See generally Jonathan H. Gold, *Legal Duties That Qui Tam Relators and Their Counsel Owe to the Government*, 20 GEO. J. LEGAL ETHICS 629, 631–33 (2007) (discussing the ability of the relator to structure a retaliation claim to grant a favorable payout to the relator and make broad allegations that he will likely not litigate).

²⁴⁷ While a prima facie case would still require proof that the defendant knew the claim was false or fraudulent, more often than not this knowledge would be inferred from the facts and circumstances of the case and thus would be addressed in the *constat*.

²⁴⁸ See Margaret Gay Davies, *The Enforcement of English Apprenticeship: A Study in Applied Mercantilism*, 1563–1642, at 18–19 (1956).

involved.²⁴⁹ Additionally, as the *constat* is given great evidentiary weight in court and its facts are hard to refute,²⁵⁰ it would provide a disincentive to lawyers to engage in extensive discovery.

Another aspect where the *huissier* could be useful is in investigating initial allegations. Currently the FCA requires that the Attorney General (or a Department of Justice attorney) investigate any allegations of violations.²⁵¹ Essentially the Department of Justice has three choices: intervene in the action, decline to intervene,²⁵² or move to dismiss the relator's complaint.²⁵³ The investigation may consist of subpoenas for documents or electronic records, witness interviews, compelled oral testimony from one or more individuals or organizations, among other things.²⁵⁴ This would be an excellent place for the *huissier* to become involved because, as it stands now, we essentially have one government agency investigating another agency's action. The use of a neutral *huissier* would effectively eliminate any perceived improprieties with the investigation, thus leading to a system with greater trust from the public. Use of a *constat* or factfinder like a *huissier* could therefore make the litigation process for a FCA cause of action more standardized or cost-effective.

²⁴⁹ See generally Moncus, *supra* note 238, at 1587-88 (discussing, in part, the prohibitive cost of bringing a qui tam lawsuit); Tipton F. McCubbins, Tara I. Fitzgerald, *As False Claim Penalties Mount, Defendants Scramble for Answers Qui Tam Liability*, 62 Bus. LAW. 103, 103-04 (2006) (discussing the rising costs of litigation and penalties for defendants in a qui tam lawsuit).

²⁵⁰ Fricero, *supra* note 9, at 11.

²⁵¹ Department of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, <http://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20update.pdf> (last visited July 2, 2015).

²⁵² When the DOJ declines to intervene it usually results in the relator dismissing the action. *See id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

E. Who Will Perform the American *Constat*?

1. Survey of potential *Huissier* Analogues in the American System

The American justice system uses bailiffs to keep order within the courts, enforce writs, and serve process.²⁵⁵ Debt collection is completed by lawyers, collection agencies, and companies in the business of purchasing debt.²⁵⁶ However, no profession focuses on producing statements of facts exactly like the *constats* produced by *huissiers*. Police officers are public officials that prepare factual written reports, but their reports are generally focused on crimes and traffic infractions rather than civil matters, and the officers usually lack extensive legal education.²⁵⁷

Perhaps the closest equivalent to the *constat* in the United States, at least the private version, is the report prepared by insurance claims adjusters. Adjusters combine their observations and other forms of information, including photographs and witness statements, into reports.²⁵⁸ Adjusters are often employees of insurance companies, though the subset known as public adjusters, who make their services available to private individuals, are closer to *huissiers*.²⁵⁹ When filing a claim (usually for property insurance), an individual can hire a public adjuster to prepare an independent report and negotiate with the insurance company to both maximize and speed up recovery.²⁶⁰ Unlike a *huissier*, who does not represent a client as an agent, a public adjuster is authorized to actively represent the

²⁵⁵ BLACK'S LAW DICTIONARY, *supra* note 80.

²⁵⁶ Federal Trade Commission, *Debt Collection FAQs: A Guide for Consumers*, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.shtm> (last visited July 2, 2015). Public auctions are conducted by career auctioneers sometimes required to be licensed by the state. National Auctioneers Association, *Auctioneer Licensing Summary*, <http://auctionlaw.wordpress.com/state-auction-laws-auctioneer-licensing-requirements/> (last visited July 2, 2015).

²⁵⁷ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, POLICE AND DETECTIVES 1 (2014-2015 ed. 2014) available at <http://www.bls.gov/ooh/protection-service/police-and-detectives.htm> (last visited July 2, 2015).

²⁵⁸ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, CLAIMS ADJUSTERS, APPRAISERS, EXAMINERS, AND INVESTIGATORS 1 (2014-2015 ed. 2014), available at <http://www.bls.gov/ooh/business-and-financial/claims-adjusters-appraisers-examiners-and-investigators.htm> (last visited July 2, 2015) [hereinafter CLAIMS ADJUSTERS].

²⁵⁹ *Id.*

²⁶⁰ *Id.*

client's interests in dealing with the insurance company.²⁶¹ Also unlike *huissiers* and more like American lawyers, public adjusters often charge a contingency fee based on a percentage of the recovery they obtain from the insurance company.²⁶² The report prepared by adjusters is similar to the *constat* in that adjusters are trained to record their objective observations and to focus on facts that have legal significance.²⁶³ Like *huissiers*, adjusters are ethically bound to be objective, and can have their license revoked for falsifying information.²⁶⁴ However, adjusters undoubtedly have more incentive to be biased in their reports than do *huissiers*. Adjusters who work for insurance companies represent primarily the interests of their employer.²⁶⁵ The contingency fee received by public adjusters gives them a strong incentive to exaggerate the client's entitlement to recovery. Adjusters also differ significantly from *huissiers* in their educational requirements. While *huissiers* require extensive legal training, adjusters are not required to have law degrees and are not even always required to have college degrees, though they are usually required to be licensed in their state.²⁶⁶ So, while claims adjusters perform a function roughly analogous to the private *constat* performed by *huissiers*, adjusters differ by the much narrower scope of the circumstances in which they are called upon, their close association with the interests of their employer, and their limited educational requirements.

²⁶¹ *Id.*

²⁶² Gina Roberts-Grey, *Should you hire a public insurance adjuster?*, INSURANCE.COM (January 19, 2011), available at <http://www.insurance.com/home-and-renters-insurance/home-insurance-basics/hire-a-public-insurance-adjuster-.html> (last visited July 4, 2015).

²⁶³ CLAIMS ADJUSTERS, *supra* note 258, at 1. An insurance adjuster is only required to have a high school diploma or its equivalent, although greater qualifications may be required in certain situations. For example, auto damage adjusters are usually required to have a postsecondary non-degree award or extensive work in the field. If an adjuster is working in a highly specialized area or at a higher level of practice, his employer may require him to have a bachelor's degree or more extensive training. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, HOW TO BECOME A CLAIMS ADJUSTER, APPRAISER, EXAMINER, OR INVESTIGATOR (2014–2015 ed. 2014), available at <http://www.bls.gov/ooh/business-and-financial/claims-adjusters-appraisers-examiners-and-investigators.htm#tab-4> (last visited July 4, 2015).

²⁶⁴ John J. Pappas, *Adjuster's Code of Ethics*, MEALEY'S LITIG. REPORT: INSURANCE BAD FAITH, Vol. 19, Issue 12 (2005).

²⁶⁵ Cook, *supra* note 252.

²⁶⁶ CLAIMS ADJUSTERS, *supra* note 258, at 2.

Educational requirements are one of the most significant differences between *huissiers* and the professions mentioned above who perform *huissier*-like functions, and it is clear that a law degree contributes to the *huissier's* credibility as an objective and credible public official. If an American version of the *constat* were to carry the same weight as it does in the French legal system, the profession tasked with performing it would need to be one requiring a law degree. It is not surprising that members of the legal profession would most appropriately perform the new American *constat*, but what is the best way to incorporate this new role into the framework of the Federal Rules of Civil Procedure? The solution may be found in an adapted version of the master.

2. Adapting the Master to Perform *Constats*

The current function of masters originally evolved from a “rather limited role and purpose . . . focusing primarily on the use of trial masters who heard trial testimony and reported recommended findings of fact.”²⁶⁷ The 2003 amendments to the Federal Rules of Civil Procedure that governs masters expanded their role to encompass pre-trial and post-trial matters and allowed them to be appointed “on an as-needed basis with the parties’ consent, or when exceptional conditions require, by court order.”²⁶⁸ As a result, “[j]udges now appoint pre-trial masters to undertake an active, managerial role in the discovery process” and delegate tasks to post-trial masters that require them to play an investigatory role.²⁶⁹ This expanded role played by masters is closer to that of a French judge than that of a French *huissier*, especially the managerial and investigatory functions. Moreover, the use of masters seems to be reserved mainly for complex cases or those requiring difficult computations.²⁷⁰ Indeed, it is suggested that the appointment of masters should be reserved for “[c]omplex cases involving multiple

²⁶⁷ Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 348 (2008).

²⁶⁸ *Id.* at 352.

²⁶⁹ Kessler, *supra* note 196 at 1195.

²⁷⁰ Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1301 (2005).

parties, multidistrict litigation . . . proceedings, and class actions . . . [involving] parties and lawyers with the resources to pursue and defend these cases.”²⁷¹ Since the current master has broader powers than necessary to perform the *constat* and has been banned from the “common, routine cases”²⁷² in which the *constat* would be most useful, it would therefore be essential to create a limited version of the master, more similar to the *huissier*, which we will call the “limited master.”

Although contemporary masters do not fit the bill for performing simple reports of facts, the rule providing for their appointment is as close as the FRCP has come to replicating the French NCPC provisions authorizing judges to request the assistance of *huissiers* and other experts.²⁷³ It is therefore appropriate to craft a framework for a new legal career in order to make an American version of the *constat*. To begin with, masters are usually lawyers but a law degree would be a requirement for the limited master just as it is for a *huissier*.²⁷⁴ This requirement would hopefully give the new American officer credibility similar to that enjoyed by the *huissier*; but if not, a mandatory training program and a national or jurisdictional certification program could also be implemented.²⁷⁵

The new limited masters would practice independently, as do current masters, rather than becoming state employees.²⁷⁶ This is said to increase their efficiency and would allow the members of the profession to support themselves with other legal pursuits as well.²⁷⁷ The limited masters would only be empowered to record their purely material observations, supplemented with photographs and

²⁷¹ Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1271 (2005).

²⁷² *Id.*

²⁷³ Compare Fed. R. Civ. P. 53, with N.C.P.C. arts. 232–255.

²⁷⁴ BLACK’S LAW DICTIONARY (from We103stlaw, under “Master”) (10th ed. 2014). A master is a “parajudicial officer specially appointed to help a court with its proceedings. A master may take testimony, hear and rule on discovery disputes, enter temporary restraining orders, and handle other pretrial matters, as well as computing interest, valuing annuities, investigating encumbrances on land titles, and the like.” *Id.*

²⁷⁵ Fricero, *supra* note 9, at 11; TALINN, *supra* note , at 5.

²⁷⁶ See Fed. R. Civ. P. 53(g).

²⁷⁷ Jacques Isnard, President of the International Association of Judicial Officers, Opening Remarks at the 19th Congress of the UIHJ (26–28 April 2006), *in THE HARMONIZATION OF ENFORCEMENT PROCEDURES IN AN AREA OF JUSTICE WITH NO BOUNDARY*, 142 (2007).

video, and any voluntary statements made by persons present during the recording.²⁷⁸ The current rule providing for the use of masters requires that the appointee's duties and any limits on his authority be stated in the order by which he is appointed.²⁷⁹ It also requires time limits and information on how the master will be compensated to be included in the order.²⁸⁰ These conditions should also be applied to the limited master when his services are requested by a judge and are similar to the NCPC provisions governing the fact-finding process behind the *constat*.²⁸¹

Of all the modifications necessary to craft an American version of the *huissier*, the most drastic one would be allowing and even requiring the limited master to accept missions from private individuals and companies.²⁸² The tasks could include, *inter alia*, reports about the condition of property,²⁸³ observations as to what a website contained at a particular time,²⁸⁴ or reviews of, and limited reports about (redacted and restricted due to privacy concerns), the hiring and other employment practices of the employer related to employees similarly situated to the ex-employee complainant. Indeed several *constats* cited and annexed to this paper demonstrate their usefulness in such situations.²⁸⁵ Masters are currently only authorized to act when appointed by a judge, but in order for the new report to be as useful as in France, it would have to be available to private parties.²⁸⁶ However, as with the *constat*, a

²⁷⁸ Just like *huissiers* performing *constats*. Fricero, *supra* note 9, at 4.

²⁷⁹ Fed. R. Civ. P. 53(b)(2).

²⁸⁰ *Id.*

²⁸¹ See N.C.P.C. arts. 236–39, 249–51, 255.

²⁸² See N.C.P.C. arts. 236-39, 249-51, 255 – one may perform a *constat* with one of a few accepted reasons. See Fricero, *supra* note 9, at 3. When the *huissier* faces a physical or legal obstacle, such as illness or illegal mission, he has a duty to refuse to perform the *constat*. *Id.* A *huissier* is also not permitted to perform a *constat* on a family member. *Id.*

²⁸³ E.g., for real estate, concerning a dispute about a commercial or residential lease, or, for goods, a report about their utility and appearance. Cf., e.g. *constats* *supra* notes 10 and 177.

²⁸⁴ E.g., for a case of alleged intellectual property infringement, breach of contract, or any number of other claims.

²⁸⁵ E.g., *constats* cited *supra* notes 10 and 147.

²⁸⁶ See generally Fed. R. Civ. P. 53.

master working on the order of a judge would have more power than one working at the request of an individual.²⁸⁷

F. How the *Constat* Would Fit into the American Evidence System

The last matter of concern with introducing an American *constat* is how it would fit into the adversarial legal system. In France, emphasis falls primarily on the finished report, which serves as the official document for the court and must be preserved by the *huissier* for a number of years; the notes and other materials used in its creation are of little or no interest to the French judge.²⁸⁸ However, U.S. courts will have a different perspective based on the American rule of evidence prohibiting hearsay.²⁸⁹

This potential conflict between the American evidentiary rule prohibiting hearsay and using a French *constat* in litigation was demonstrated in a dispute between McDonald's Corporation and a French franchisee.²⁹⁰ In *Dayan I*, an Illinois court was asked to consider whether several *constats* performed in Paris by French *huissiers* were admissible into evidence.²⁹¹ After hearing the *huissiers'* testimony regarding the facts they recorded, the trial court admitted portions of their reports, as well as supporting photographs, as evidence.²⁹² The admissible sections were those transferred directly to the reports from the notes the *huissiers* made at the time of their observations.²⁹³ On appeal, the franchisee challenged the statements from the *constats* allowed into evidence as violating the hearsay prohibition.²⁹⁴

²⁸⁷ Fricero, *supra* note 9, at 3. In keeping with the French model, the limited master would have greater rights to access privately-owned property and request documents when executing the order of a judge. See *id.* at 6; N.C.P.C. art. 243. This protects the privacy of the public from the requests of individuals.

²⁸⁸ See *Dayan v. McDonald's Corp.*, 466 N.E.2d 958, 970 n.3 (Ill. 1st Ct. App. 1984) [hereinafter *Dayan I*].

²⁸⁹ Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801.

²⁹⁰ *Dayan I*, 466 N.E.2d at 968.

²⁹¹ *Id.*

²⁹² *Id.* at 969–70.

²⁹³ *Id.* at 970.

²⁹⁴ *Id.* at 969.

The appellate court, however, found that the selected facts were properly admitted because they met the past recollection recorded exception.²⁹⁵ There are four requirements for the past recollection recorded exception:

- (1) the witness must have had firsthand knowledge of the event recorded;
- (2) the written statement must be an original statement made at or near the time of the event;
- (3) the witness must lack any present recollection of the event; and
- (4) the witness must vouch for the accuracy of the memorandum.²⁹⁶

Since the French *constats* involved in the McDonald's case were not performed with hearsay or the above exception in mind, only certain parts of the reports were admissible as evidence.²⁹⁷

Nonetheless, the American report could be precisely designed to fit into the past recollection recorded exception. The new, legally educated judicial officer would easily meet the first and fourth requirements. The third requirement, the lack of a present recollection, does not seem to be absolute because the reports of the *huissiers* in the McDonald's case were admitted even though they testified about their recollections as well.²⁹⁸ On the other hand, the second requirement appears to be essential.²⁹⁹ The reason for requiring an original recording made during or shortly after the event observed is to ensure the reliability of the evidence.³⁰⁰ The second requirement could be satisfied and its underlying purpose fulfilled simply by mandating that the new limited masters record their observations in an acceptable format as they are made. The judicial officers could either take down the observations in full written form and use that original document as the report or videotape the entire process with oral commentary. Additionally, the legal education and experience of the judicial officers

²⁹⁵ *Id.* at 970.

²⁹⁶ *Id.* (citing *Johnson v. City of Chicago*, 431 N.E.2d 1105 (Ill. 1st Ct. App. 1981)).

²⁹⁷ *Id.* 466 N.E.2d at 969–70.

²⁹⁸ *Id.*

²⁹⁹ See *id.* at 970–71. The second requirement was the most disputed one in the McDonald's case because the *huissiers'* reports were made after the actual observations, based on field notes that were later destroyed. *Id.*

³⁰⁰ *Id.* at 970.

would bolster the credibility of either form of report, as that of the *huissiers* augmented the trustworthiness of their reports.³⁰¹

III. Conclusion

Constats and the *huissiers* that perform them are currently foreign to the American legal system. However, if introduced with a few alterations, they could help solve two of the system's greatest problems: cost and delay. *Huissiers* are French judicial officers with an extensive legal education.³⁰² They suffer from a negative public reputation, but their reputation seems to be largely connected to their function as debt collectors.³⁰³ However, their (undeniable, as some would say) credibility gives the reports they prepare a high value as proof for two primary reasons.³⁰⁴ First, the reports themselves, which can be created for a variety of factual situations, are available to both judges and individuals, but have more force behind them when ordered by a judge;³⁰⁵ and second, the execution of a *constat* is always governed by rules designed to protect privacy and fairness³⁰⁶ and is limited to the objective observations of the *huissier* without any opinion.³⁰⁷ Consequently, *constats* are valuable investigatory tools for judges and almost a form of insurance for individuals and companies. With the creation of a new, limited American master to fill the *huissier* role and some limitations on its performance to avoid the hearsay prohibition, the *constat* could provide similar benefits in the United States as it does in France. The option to order this simple, credible report would add to judges' ability to encourage efficiency by allowing them to perform a portion of the fact-finding process outside of discovery. In

³⁰¹ See *id.* at 969–71.

³⁰² French Judicial Officer, *supra* note 27.

³⁰³ Mathieu-Fritz, *supra* note 17, at 499.

³⁰⁴ TALINN, *supra* note 103, at 5; Fricero, *supra* note 9, at 11.

³⁰⁵ Fricero, *supra* note 9, at 1,3.

³⁰⁶ *Id.* at 8.

³⁰⁷ *Id.* at 4.

doing so, potentially wasteful discovery practices and abuses would decrease,³⁰⁸ and further enable the achievements that these benefits provide without significant changes to the rules governing discovery.

³⁰⁸ In effect, as discussed previously (*supra* notes 171-172 and accompanying text), there is the added benefit of reducing the time and expense of American litigation.