

"Que le pouvoir arrête le pouvoir" - From Montesquieu to Battistelli

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Charles de Secondat, Baron de Montesquieu knew it all as early as 1748: "Experience teaches that every human being who has the power tends to abuse it. Therefore, it is necessary that the power sets limits to the power. There are three things in every state authority: the legislature, the executive and the judiciary. There is no freedom, if they are not separated from each other."

Okay, why should a French President in 2014 bother about what one of his learned countrymen wrote in a book in the baroque times? Perhaps because it still matters. On 3 December 2014 the President of the EPO had one member of the Boards of Appeal escorted out of the Office by his "Investigation Unit" and imposed a "house ban" on him. These events have been reported at some length in the blogs of IPKat, EPLAW, WIPR and in JuVe online. It has also been reported that the President seems to interfere with the functioning of the Boards of Appeal by not reappointing Board Members since decision R 19/12 where the Enlarged Board found for the first time that its own Chairman was too much involved in the internal administration of the Office not to be concerned about his judicial independence. What a tragedy to see this view confirmed and elevated to the next level by the President's most recent actions! One examiner who wanted to stay anonymous spoke of an atmosphere of "fear and terror" at the EPO. When I read it for the first time a while ago, I thought this must be an exaggeration. I am no longer so sure.

Of course, the President has no power to suspend a member of the Boards of Appeal from the Office. Art. 23 EPC is quite clear on that, stating under the Heading "Independence of the members of the Board of Appeal":

(1) The members of the Enlarged Board of Appeal and of the Boards of Appeal shall be appointed for a term of five years and may not be removed from office during this term, except if there are serious grounds for such removal and if the Administrative Council, on a proposal from the Enlarged Board of Appeal, takes a decision to this effect.

That sounds reasonable, whereas the latest actions of Mr. Battistelli raise doubts. If Montesquieu knew of them, he would turn around in his grave.