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MURMURS IN THE ADMINISTRATIVE STATE

*Richard Martin Lyon**

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist, No. 51 (Hamilton or Madison)¹

In his recent book, *The Language of Dissent*, former Federal Trade Commissioner Lowell Mason tells us that in private practice, he never told his clients what the law was. Instead he told them "what the bureaucrats thought the law was." In other words, "by anticipating and observing the rule of man, by sensing the bureaucratic trends, I saved my 'ordinary citizen' from being the hero who died financially on the ramparts of liberty."²

Louis J. Hector, who recently resigned as a member of the Civil Aeronautics Board, seems to indicate that Mason's procedure, sensible as it may appear to practitioners, may not be a safe one. The reason is that anticipating and observing the rule of man and sensing bureaucratic trends is impossible where the administrative agency has no set policy and lacks standards to support its decisions. In his 75-page Memorandum to the President, attached to his letter of resignation, Attorney Hector observes that the CAB "has actually almost no general policies whatever. . . . In almost all fields of economic regulation the Board proceeds on a pure case by case basis, with policies changing suddenly, without notice, and often with no explanation or any indication that the Board knows it has changed policy."³ When this happens parties are given no opportunity for argument on the prospective change in policy, nor a chance to present new evidence in relation to the new policy. In some cases, before the CAB, airlines which "had prepared and applied their cases on the basis of a policy applied consistently in route cases for three years, suddenly found that the rules had been changed in the middle of the game."⁴ Aware of the transmutation of agency decisions, staff members charged with the actual writing of CAB opinions "consciously avoid statements of general principle as much as possible in the opinions they write, because they must be able to write an opinion justifying an opposite conclusion the next day, and hence must not be hampered by prior statements of general principles."⁵

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1 FRANK, *IF MEN WERE ANGELS—SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY* (1942).

2 MASON, *THE LANGUAGE OF DISSSENT* 20-21 (1949).

3 HECTOR, *MEMORANDUM TO THE PRESIDENT—PROBLEMS OF THE CAB AND THE INDEPENDENT REGULATORY COMMISSIONS*, at 24-25 (1959).

4 *Ibid.*

5 *Id.* at 26.

This state of affairs is not characteristic of one particular agency. The Federal Communications Commission, for example, has certain guides for choosing between rival applicants for a TV license. The law requires that a license should be granted to one of the applicants if "public convenience, interest, or necessity" will be served thereby.⁶ The standards applied in making the choice are imprecise and general. Professor Louis L. Jaffe notes that "they are capable of infinite manipulation. They can become . . . spurious criteria, 'used to justify results otherwise arrived at.'" ⁷ Professor Bernard Schwartz writes that analysis of some sixty television cases involving comparative hearings of mutually exclusive applications "indicates a most disturbing inconsistency on the part of the Commission in applying its criteria. Whim and caprice seem to be the guides rather than the application of settled law to the facts of the case. In effect the [Federal Communications] Commission juggles its criteria in particular cases so as to reach almost any decision it wishes and then orders its staff to draw up reasons to support the decision."⁸

No longer does it appear to be practical then to find solace in the tranquillizing slogan that ours should be a government of laws and not of men. Woodrow Wilson considered this formula outdated back in 1908. "There never was such a government," he wrote. "Constitute them how you will, governments are always governments of men, and no part of any government is better than the men to whom that part is intrusted."⁹

More recently Charles Horsky observed that ours "is emphatically a government of men, not of laws; a kinetic force which permeates every aspect of business, and encroaches more and more on our personal lives."¹⁰

Realization, if not acceptance of these naked facts may explain why writers on administrative law and process have tended uniformly to title their books, *The Administrative State*.¹¹

6 48 STAT. 1082, 47 U.S.C. 303 (1934).

7 Jaffe, *The Scandal in TV Licensing*, Harpers, Sept. 1957, p. 79.

8 SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* 151 (1959).

9 WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 17 (1908). In his book, *IF MEN WERE ANGELS — SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY* (1942), the late Judge Jerome Frank looked into the historic meaning of the concept "government of laws and not of men" and asked that we:

. . . remember that its first author, Aristotle, was not talking of rigid, inflexible rules administered by trained officers appointed to 'determine matters which are left undecided by' general rules, and to determine them 'to the best of their judgement.' Why? Because 'the decision of such matters' in particular cases 'must be left to man.' And this was his conclusion, despite his awareness that men are fallible and despite his assertion that 'passion must ever sway the heart of man.'

Writing in a period when criticism of administrative law and of the administrative process was not altogether indistinguishable from disapproval of governmental regulation of business, Frank exclaimed:

Thus Aristotle, the father of the phrase 'a government of laws and not of men,' far from being an opponent, was a lucid advocate of the thesis that discretion and individualization of cases are desirable and necessary elements of any practicable system of government. If, today, he were a citizen of these United States, he would be defending the SEC against the diatribes of those who agree with Roscoe Pound's recent strictures.

10 HORSKY, *THE WASHINGTON LAWYER* 67 (1952).

11 WALDO, *THE ADMINISTRATIVE STATE* (1948); MARK, *THE ADMINISTRATIVE STATE* (1957); and with slight deviation: DIMROCK, *FREE ENTERPRISE AND THE ADMINISTRATIVE STATE* (1951).

The Administrative State has been subjected to frequent investigation by the executive and legislative branches of the government in recent years, and the judiciary has provided continuous review of many of its actions.¹² The most recent insight into the workings of the federal government's independent regulatory agencies, the Hector Memorandum to the President (September 10, 1959), however, provides the most shocking revelations of the administrative process from the viewpoint of a "participant observer." It deserves close attention coming from an insider. In view of "the inability of Congress to control the policies of the agencies it has created and the inability of the Executive to coordinate their policies, all because of the failure of the agencies to make any explicit consistent policy," the Hector Report calls for "a substantial change in the machinery for government control of business."¹³

The Report had the distinction of receiving serious consideration by the Administration within two weeks of its receipt by the President.¹⁴ Several statements by agency heads and by the Attorney General calling for a reappraisal of the economic regulatory agencies followed submittal of the Report. The Attorney General went on record stating that the "entire field of administrative law and of government regulation may require a searching re-examination."¹⁵ Perhaps the Report puts undue blame on the agencies themselves and too little on the national legislature which established them without more than vague declarations of policy. Congress is not unaware of its responsibility here.¹⁶ But at a time when the Harris committee in the House and the Carroll committee in the Senate are investigating the practices and procedures of federal administrative agencies,¹⁷ the heart murmurs from within the regulatory body cannot but foreshadow drastic changes in the structure and procedures of the regulatory agency branch of government. The Hector Report within a very short time has become a milestone on the road to such changes. It may turn out to be a landmark.

The Report makes three points:

1. Planning and policy-making . . . when entrusted to an independent commission are often accomplished with appalling

12 See REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937); FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. No. 8, 77th Congress, 1st Sess. (1941); Commission on Organization of the Executive Branch of the Government, *Task Force Report on Legal Services and Procedure* (1955); Commission on Organization of the Executive Branch of the Government, *Legal Services and Procedure—A Report to the Congress* (1955).

13 HECTOR, *op. cit. supra* note 3 at 29.

14 N.Y. Times, Sept. 21, 1959, § 1, p. 23, col. 1.

15 Wall Street Journal, Oct. 9, 1959, p. 22, col. 2.

16 "Congress in its legislation has placed an impossible burden upon the regulatory body." STAFF OF SUBCOMMITTEE No. 5, HOUSE COMM. ON THE JUDICIARY, 85th CONG., 1st Sess., REPORT OF THE ANTITRUST COMM. ON AIRLINES p. 53 (1957).

17 Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, created pursuant to House Resolution 99, as amended by House Resolution 197 and House Resolution 316, 85th Congress (Chairman: Rep. Oren Harris, D. Ark.); Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, established pursuant to Senate Resolution 61, 86th Congress (Chairman: Sen. John A. Carroll, D. Colo.).

- inefficiency¹⁸ and frequently there is no policy in existence at all in support of quasi-judicial decisions.
2. The formulated policies of one regulatory agency, where such come into being, are not coordinated with those of other commissions or agencies of government.
 3. Petitioners or litigants before the commissions are not given a proper judicial hearing, due to lack of known policies and standards, and lack of familiarity on the part of decision-rendering top agency personnel with the voluminous facts and findings assembled by hearing examiners.

Lack of Policies

The economic regulatory commissions are generally expected to engage in policy-making and planning so that the regulated industries operate in the public interest. Yet it is well-nigh impossible for "regulated" litigants before the commissions to prepare their case on the basis of adhered-to policies or governing standards. There is no known "common law," and adherence to precedent is meticulously avoided. Agencies operate on an *ad hoc* basis and are reluctant to cite their own prior opinions in support of present rulings.¹⁹

The lack of agency policies was attributed by the Task Force of the First Hoover Commission to the fact that top commission personnel were bogged down by secondary executive and administrative functions within their own agencies. The Task Force consequently urged that members of commissions "devote more attention to developing standards and objectives and to planning the regulatory program."²⁰ Hector believes that making basic policy should have precedence even over agency adjudication of specific litigated cases. He attributes inefficient and ineffectual planning to two principal factors: (1) the preoccupation of agency members with minor administrative details, and (2) the reluctance on the part of members to delegate to the commission chairman such administrative responsibilities for fear that in adding to his responsibilities they would be deprived of an equal voice in the operations of the agency.

¹⁸ HECTOR, *op. cit. supra* note 3 at 4.

¹⁹ The position could be taken that this is administrative law "at its best." Professor Milton Konwitz observed:

The law is built on tradition and the concept of system informs every part of it. Administrative law, in intention, is personal, or, if you prefer a harsher term, arbitrary: it is more liquid, can flow more easily into new channels, and fill the crevices and interstices which the common law could never reach. The law is not amenable to what Holmes described as the 'intuition of experience which outruns analysis and sums up many unnamed and tangled impressions.' Case law, rule of law, or the doctrine of *stare decisis*, is both the letter and spirit of the common law; the spirit whereby it lives, and paradoxically, the letter that killeth the spirit. Administrative law, on the contrary, was intended to be free of the chains of tradition; cases were to be decided by administrators, by means which the common-law lawyer considers extra-legal, and, in some instances, even illegal. Konwitz, *Administrative Law and Democratic Institutions*, 3 JOURNAL OF SOCIAL PHILOSOPHY 150, Apr., 1938.

²⁰ FIRST HOOVER COMM., TASK FORCE REPORT ON REGULATORY COMMISSIONS, p. ix (1949); HECTOR, *op. cit. supra*, note 3 at 43.

Lack of Inter-Agency Coordination

In the absence of policies it is not surprising to find that the actions of the regulatory commissions lead to inconsistent results. The CAB, for example, has the power to suspend the anti-trust laws under the authority vested in it by the Federal Aviation Act.²¹ "It does not make sense," Hector states, "for the Federal Government to be diligently enforcing the anti-trust laws through two agencies whilst a third agency on the basis of no coordinated policy is busy exempting an important segment of industry from these laws."²²

The same inconsistency may prevail within a single agency. Lowell Mason referring to his responsibilities under the Robinson-Patman Act, described himself as "an administrator of two anti-trust laws diametrically opposed to each other."²³

Taking the position that Congress will not legislate regulatory policy so as to provide more detailed guides for administrators, Hector insists that coordination, to be effective, must come from the Executive but "within the framework of Congressional policy determination."²⁴ Since agencies are carrying out the delegated functions of the legislature, however, Executive leadership is apt to impair the agency's independence, particularly with respect to its quasi-judicial functions. Under the circumstances, Hector sees no way out but to split the dual personality of the agency. The Executive branch would be charged with direction, coordination and supervision of economic regulatory policies, and a separate administrative court would handle the adjudicatory task of the agency.

21 72 Stat. 770, 49 U.S.C. § 1384 (1958). The Attorney General's National Committee to Study the Antitrust Laws took notice of the problem of exempting private actions approved by regulatory agencies from antitrust coverage. The Committee cites several examples of such statutory exemptions:

For example the Interstate Commerce Act provides that "any carriers . . . participating in a transaction approved or authorized . . . are relieved from the operation of the antitrust laws . . ." 49 U.S.C., § 5 (11) (1952), and see 49 U.S.C. § 5(b)(9) (1952) pertaining to relief from liability for rate-making agreements. Similarly, the Shipping Act states that "every agreement . . . lawful under this section shall be excepted from the provisions of Sections 1-11 and 15 of Title 15 . . ." 46 U.S.C. § 814 (1952). Then follows a reference to the Civil Aeronautics Act, 49 U.S.C. § 494 (1952). Finally the Federal Communications Act provides that "the Commission shall enter an order approving . . . such consolidation . . . and thereupon any . . . laws making consolidations . . . unlawful shall not apply . . ." 47 U.S.C. § 222 (1952). ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 262 n.4. See also pages 270-76 of the same Report relating to regulatory statutes immunizing certain private rate agreements, on agency approval from antitrust coverage. The Committee, however, did not take a position on the wisdom of such legislative exemptions from antitrust attacks. Professor Louis B. Schwartz, a member of the Committee, considered the "proliferation of exemptions from the law" to be "one of the most disturbing phenomena in the antitrust field." *Id.* at 288. He dissented from the "Majority's diffidence" in failing "to advise the administration whether the exemption process had gone too far." *Id.* at 288-89, and adding: "Much of the legislation passed in this part of the Report . . . was passed during the Depression of the Thirties. It was a time of desperation when we nearly abandoned free competition entirely in favor of industry self-regulation under NRA. Surely it is time for a fresh look at policies born in this atmosphere. Congress may wish to change its intent."

Id. at 289.

22 HECTOR, *op. cit. supra* note 3 at 43.

23 MASON, *op. cit. supra* note 2 at 27.

24 HECTOR, *op. cit. supra* note 3 at 49.

Absence of Due Process

The absence of substantive agency law and policy inevitably leads to procedural unfairness. In preparing his case a litigant finds it "almost impossible to examine and weigh policies of the agencies because it is almost impossible to find out what they are. They must be deduced from a string of disconnected, particular decisions conflicting and seldom articulate."²⁵

When a case is decided by members of a commission, this is often done on the basis of summaries or abstracts of the examiner's findings, rather than the mastery of the often voluminous record by the commission member. The final opinions, although prepared by the agency staff and supported by facts and figures in the record, are written to conform to the results already reached by Board members. When the desired end result is communicated to the actual opinion-writers "an attorney [goes] through every brief and [makes] a list of every point raised by every party. Each point of any significance is mentioned in the opinion, often by the formula: 'We have considered the contention of _____ to the effect that _____, but we find that this does not alter our conclusion.'"²⁶

This is not to say that the members of the agencies should be required to digest personally each exhibit tendered. Nor should agency members be required to have expert knowledge of the many facets of the segment of the economy which they regulate. To so presume would not be realistic, although legislation creating an administrative agency sometimes appears to make such a presumption. A former CAB member, testifying before Congress, noted for example that "the Civil Aeronautics Act implies that a commission of five men can be found who are experts in political science, military science, the business of transportation, corporation finance, and experts in legislation and the law."²⁷

Since great reliance on the expert staff of an agency is thus unavoidable, commission employees should at least have the benefit of formulated and communicated statements of policy. This would eliminate the present state of affairs in which due to lack of guides, according to Hector, "any resemblance between an examiner's recommended decision and the final decision of the [Civil Aeronautics] Board . . . is almost coincidental."²⁸

Special Administrative Court

To permit the independent regulatory agencies to concentrate on policy formulation and to provide true judicial disposition of litigated cases, the Hector Report recommends the establishment of a special administrative court to handle litigation before all economic agencies. An obvious inconsistency exists between

²⁵ *Id.* at 28.

²⁶ *Id.* at 37, n. 29; Professor Bernard Schwartz, erstwhile Chief Counsel to the House Special Subcommittee on Legislative Oversight, confirmed that agency:

. . . commissioners themselves tend to be too remote from the trial and evaluation of the evidence. The cases are tried before examiners. The commissioners do not hear the evidence at the hearing. They are not required to read the record. They do not write the opinions explaining their decisions. In fact, the only concrete legal obligation imposed upon them is that of voting on a case. SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* 189 (1959).

²⁷ REPORT OF THE ANTITRUST COMM. ON AIRLINES, *supra* note 16, at 53.

²⁸ HECTOR, *op. cit. supra* note 3 at 33.

the policy-making function of administrators, requiring frequent consultative and administrative contacts with representatives of regulated interests, and the quasi-judicial role of the same officials, which should call for judicial seclusion from the parties. Congressional committees have occasionally condemned the practice of behind-doors discussions with interested parties as violating the basic principles of fair quasi-judicial procedure. The Hector proposal would eliminate the inherently contradictory role forced on commission members. The establishment of a separate administrative court, furthermore, would bring to an end the combined judge-prosecutor role of the commissions, which likewise engenders conflict.

To the administrative court would be referred major litigated cases and appeals from administrative actions. Hector advances the proposal that jurisdictional standards be set, so that the court will not be overloaded with minor cases. These would be disposed administratively, but with some right of appeal.

The judges of the administrative court would be appointed for a fixed term and would be given the true independence now enjoyed by the judges of the Court of Claims and the Tax Court. Hector believes that a separation of adjudicatory and policy-making functions "would in effect compel active policy-making. No longer could policy statements be mere vague generalities in opinions prepared by professional staffs to justify particular results in particular cases."²⁹ To satisfy the administrative court the regulatory agency would be forced to rule and decide on the basis of declared policy and definite standards. Predictability rather than surprise would characterize the end result.

The Attorney General's Committee on Administrative Procedure in Government Agencies in 1941 recognized that the proposal had been frequently made that "the deciding powers of Federal administrative agencies should be vested in separate tribunals which are independent of the bodies charged with the functions of prosecutor and perhaps other functions of administration."³⁰ The majority, while recognizing that the "commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable,"³¹ was unwilling to recommend such a step. The problem, it was felt, could be solved within an agency "by appropriate internal division of labor."³² More succinctly: "impartiality can be achieved without separation."³³ The dissenting minority called for "complete segregation into independent agencies" of investigation-prosecution and hearing-deciding functions in the regulatory process.³⁴

²⁹ *Id.* at 72.

³⁰ Attorney General's Comm. on Administrative Procedure in Government Agencies, *Administrative Procedure in Government Agencies*, p. 55 S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

³¹ *Id.* at 56.

³² *Ibid.* The majority stated:

Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. A similar result can be achieved at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them.

³³ *Ibid.*

³⁴ *Id.* at 209.

The Commission on Organization of the Executive Branch of the Government (the Hoover Commission) in 1955 renewed the proposal that an Administrative Court of the United States be established.³⁵ Commenting on this recommendation, Professor Charles Nutting observed that the proposal represents "a basic desire to restrict administrative action and correspondingly to extend the function of courts in the administrative area."³⁶ Whether the establishment of such a court is desirable, Nutting suggested, depends on whether an administrative court, if created, will "bring about desirable control over the administrative process without substantially affecting the advantages of that process. . . ."³⁷ The "fundamental question" which Nutting asked in 1955 — whether the separation of adjudication from the other functions of a regulatory agency may not jeopardize the effectiveness of administration because of the very interrelatedness of regulation and adjudication³⁸ — is not asked by Hector. This may be due to Hector's apparent conviction that the worst way to hamper an administrative program is to operate it without stated and ascertainable policies and standards.

That the present structure of federal administrative agencies is closely intertwined with the ethical problems which have attracted the attention of the House Subcommittee on Legislative Oversight and of other investigating committees in Congress is all too apparent.³⁹ The proposed change in the structure of the regulatory agencies might form the basis for attracting and keeping capable and honorable men on governmental boards. As the situation stands now, Hector observes the multiplication of inherently inconsistent functions vested in commission members "inevitably raises suspicions of *ex parte* influence"⁴⁰ and occasionally such influence is successfully exerted.

It is difficult to overlook in all this the responsibility which Congress must bear for the difficulties facing the nation as a result of the apparent near-breakdown of government by delegation. Congress has perhaps taken too literally Woodrow Wilson's assertion that the "gauge of excellence is not the law under which officers act, but the conscience and intelligence with which they apply it, if they apply it at all."⁴¹ Only a combined effort by the Legislative and Executive branches of government can provide a much-needed reorientation in thought and action as regards public policies toward business and business regulation.

The Hector Report deserves the close scrutiny of lawyers insofar as it reiterates the need for basic procedural improvements in the conduct of affairs by federal regulatory agencies. But far more importantly, its essential value lies in its questioning the adequacy of the federal administrative agency as a tool in accomplishing the highly complicated task of formulating and executing national economic policy. Milton Konvitz, writing "In Defense of Administrative Law"

35 Commission on Organization of the Executive Branch of the Government, *Legal Services and Procedure* 87-88.

36 Nutting, *The Administrative Court*, 30 N.Y.U.L. REV. 1384 (1955).

37 *Ibid.*

38 *Id.* at 1387.

39 Special Subcommittee on Legislative Oversight, *Independent Regulatory Commissions*, H.R. No. 2711, 85th Cong., 2d Sess. (1959); *Hearings Before the Subcommittee of the Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1959); STAFF REPORT TO SUBCOMMITTEE NO. 5 OF THE HOUSE COMM. ON THE JUDICIARY, 85th Cong., 2d Sess. (Comm. Print 1958).

40 HECTOR, *op. cit. supra* note 3 at 64.

41 WILSON, *op. cit. supra* note 9 at 17.

in 1938, noted that "underlying a large part of the unfriendly criticism of the administrative process is a frequently patent intent to hit the end for which that process is a means, namely, governmental control and regulation of economic forces and institutions. Superficially the criticism may be directed at administrative tribunals and the manner in which they discharge their functions. Really the intent is often to strike at the programs which these tribunals are set up to achieve."⁴² Even the passage of years has not mellowed the attitude of the business community toward the administrative process.⁴³ The Hector Report, however, does not question the inevitability, under present-day conditions, of governmental regulation of business. Indeed it recognizes the need for a regulatory process, but one geared to the economic complexity of our times.

The Herculean task of global leadership assumed by the United States rests upon agreed and defined national and international economic policies and objectives. Speaking of a business enterprise, Peter Drucker once observed that objectives "are needed in every area where performance and results directly and vitally affect the survival and prosperity of the business."⁴⁴ The Hector Report is a plea for management by objectives on a national scale.

42 Konuitz, *In Defense of Administrative Law*, 72 U.S.L. Rev. 567.

43 F. Trowbridge von Baur, stating that the reviewing courts have been more willing to upset administrative action which interferes with personal liberty than administrative decisions interfering with property rights only, concludes:

This relative indifference to what a government official may do with private property has kept public confidence in the administrative process, so far as the business community is concerned, at least, close to the law of the nineteen-thirties. And the comment may be made in passing, that while there is much more to law and life than property rights, most so-called 'human rights' are subtly but indisseverably bound up with property rights so that an extinguishment of one of the latter is necessarily an interference with the other. von Baur, *The Administrative Process: Public Confidence and the Judicial Tradition*, 41 A.B.D.J. 23, (1955).

One is reminded of Daniel Webster's speech delivered in the Massachusetts constitutional convention of 1820 in defense of the distribution of representation in the Senate on the basis of property. Webster proclaimed:

Life and personal liberty are no doubt to be protected by law; but property is also to be protected by law, and is the fund out of which the means for protecting life and liberty are usually furnished. We have no experience that teaches us that any other rights are safe where property is not safe.

BEARD, *THE ECONOMIC BASIS OF POLITICS AND RELATED WRITINGS*, p. 38 (1958); MINOR, *The Administrative Court: Variations on a Theme*, 19 OHIO ST. L.J. 339 (1958): "[T]he distrust of many members of the law of the administrative process is no less now than it was when, in 1887, the then president of the American Bar Association condemned the embargo Interstate Commerce Commission as unconstitutional."

44 DRUCKER, *THE PRACTICE OF MANAGEMENT* 63 (1954).