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*United States Senate*

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## THE LAWYER, THE CONSTITUTION AND THE MODERN WORLD

JOSEPH C. O'MAHONEY\*

My theme tonight is that industrial organization in the modern world has outrun the formulae by which, under law, the individual rights and opportunities of men are preserved, and that the lawyer of this age is presented with a task comparable to the one which confronted the framers of the Constitution. They knew how to preserve human rights and liberty while setting up a new and powerful national government. They wrote the immutable principles of freedom into the Constitution at a time when the clashing interests of thirteen discordant states threatened the orderly development of society.

It has been said that this too is a time for greatness. Surely that is true for the members of this learned profession who know that the law is not only a rule by which commerce and industry may be carried on, but also a rule of democratic order under which people may live in security, and, in an atmosphere of freedom, make the most of the personal attributes of spirit, mind and body with which they have been endowed.

As lawyers we know that, according to our tradition and our most sacred beliefs, the law springs from the people themselves, and that there is no higher authority than the people. They are the source of all political power, but in this age we have seen the people lose control over their own

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\* U. S. Senator, Wyoming. An address delivered before the Annual Meeting of the Indiana State Bar Association, September 1, 1944.

affairs. We have seen an age of chaos, a chaos that has produced the most terrible war of all time, and all, primarily because leadership in business, in industry, in politics, has not understood how to adjust individual, human rights to the complexities of the modern world. To make this adjustment is the opportunity, and indeed the duty, of those who are members of our profession.

Consider for a moment the times in which we live. We have established a marvelously efficient national industrial organization operating on a national scale.

We have, through the national government, coordinated these industrial groups into the most superlative technical organization for the production, transportation and delivery of military power that was ever imagined.

Even before the government stepped in to achieve this national organization of industrial might, we saw national economic organizations make gigantic strides in wealth and power. The great units which were created to carry on commerce and industry throughout the country were accompanied by the appearance of other national organization. A national chamber of commerce came into being and a score of national trade associations; organized labor formed itself into national groups; agriculture the only occupation in the modern world still carried on for the most part by individuals in their individual capacity, was also organized on a national basis. Then followed national consumer groups, and national educational groups, and national organizations of practically every calling to which men turn.

This emphasis of the national scope of our existence has turned our attention away from the needs of the purely individual and local side of our natures. This side of society has been, as it were, overwhelmed by national and international development. Yet, as lawyers, we know that the principles of human freedom which lie at the root of all our political and legal concepts must lie also at the root of our economic concepts. We can not have political freedom unless we preserve economic freedom. The two concepts are, as it were, opposite sides of the same shield. Capitalism and democracy are identical. Capitalism, basically, is the right of private property and by "private" property we mean individually owned property. Democracy, basically, is the right of the individual to control and direct the means by

which he makes his livelihood, as well as the means by which he preserves order in the village, the county, the state, the nation, yes, the whole world.

This is indeed a time for greatness, because this is no ordinary time. It is the most extraordinary time the human race has experienced in perhaps a thousand years. In such times as these it is the duty of the lawyer to devote all his energies, all his learning, all his spiritual understanding, to the great task of adjusting the concepts of law to the needs of the people in the complexities of national and international economic organization by which we are surrounded.

He is shortsighted, who imagines that this world crisis is only a military interlude after which law and living will revert to what they were before Hitler moved into Poland. The past is dead. We race forward toward a new world in which there will have to be a new adjustment of the people and the law. All through the history of mankind the basic duty of the lawyer has been to understand the relationship between the individual and the authority which governs him. Having understood that relationship, it has always been the lawyer's duty in times of crisis like this to help frame the law so as to preserve for the individual the maximum freedom consistent with good order and public welfare.

It would not be too much to say that this war is being fought because the lawyers of the last fifty years have not understood that the times were out of joint, and have not undertaken the task of protecting local and individual rights from the new authorities that were being called into existence by the astounding advances of science, engineering and industry.

What I am saying is that in the modern world the scientist, the engineer and the industrialist have taken leadership, but the lawyer has lagged behind. In the world of physics and chemistry, of science and invention, there has been almost unimaginable progress. But the law has not coupled human freedom to that progress. The achievements of science have been used by ambitious, power-hungry, and emotionally unstable men to crush mankind, to deprive the individual of liberty, and to establish arbitrary control. The lawyers, who as a class have not carried out their task of preserving the balance between men and authority, can not

escape their share of responsibility for the conditions that exist.

Does that sound like an exaggerated statement? Tell me then how did it come to pass that an Austrian paper-hanger whose writings and speeches marked him by every standard of intelligence and culture as a man of mean attributes and gross philosophy almost made himself the master of the world? How did this impossible thing happen? It happened because people all over this globe, in their local communities, in their states, their nations, their empires, were unable to solve the personal problems of daily livelihood in a world in which science and invention, while creating new luxuries, had brought about such concentration of economic authority and such a lack of local and individual power, as to open wide the door to the political demagogue. It was the failure of business and political leadership to preserve a stable opportunity for the masses to earn a living that brought the authoritarian state into existence. The authoritarian state brought the war.

It could not have been otherwise, for once the principles of popular government were overthrown, and arbitrary power was established in Italy and Germany, the war of world conquest was inevitable, because the authoritarian state could not be safe until the principle of democracy had been utterly uprooted everywhere else.

As a profession, we lawyers did not comprehend what was happening and we took no steps to preserve the principles upon which our Constitution was founded, though they were being undermined before our very eyes. Now that victory in the war is certain, we can no longer postpone consideration of the problem of authority and the individual in the modern world. It is the very basis of post-war reconstruction. While maintaining all the gains of industrial organization, we must develop the formula by which we preserve in economic as well as political organization, the principle of popular sovereignty that is the heart of the Federal Constitution.

We have the example of the men who drafted that instrument. It was the lawyers in the Constitutional Convention who planned and wrote that charter of individual freedom. There were thirty-four of them among the fifty-five delegates who attended. Ten of them had been judges. They

were chosen not as representatives of the commercial class, but as representatives of the public. They were selected in the states by farmers, land-owners, and traders in the colonial legislatures, who believed them to be the men best qualified to represent all groups and all interests. They were known as men of public spirit, rather than as the spokesmen of class interest.

I emphasize this aspect of their service because so many lawyers in our time are regarded as the spokesmen of special groups, and because there is so great a tendency nowadays to classify men, not as citizens of the republic, but according to their economic interest—business, agriculture, labor, and so on through all the pressure groups which on a national scale serve special interests instead of public interest. The men who drew the preamble of the Constitution were not thinking in terms of special classes or of class government. They were thinking of the people as a whole. They were thinking of “justice”, of “domestic tranquility”, of the “common defense” and “general welfare”. They were trying to erect a government that would ‘secure the blessings of liberty to themselves and their posterity’, that is to say for all the individuals who then constituted, and in the days to come, would constitute the people of this great nation.

Then, when the first Congress assembled, this objective was made even more clear by the adoption of the Bill of Rights. This again was the work of lawyers who understood the deep public significance of the new government and how important it was for the preservation of freedom to leave no doubt that the people were the source of authority, that the new government was being created to serve but not to rule them.

These men who gave us the Constitution knew from intimate experience precisely what they were trying to do. They had seen a king attempt to rule by the exercise of arbitrary central authority, authority they were expected to obey but which they were not permitted to direct. The lawyers of 1789, animated by a patriotic public spirit, labored to erect a government which derived its sanction from the will of all the people, not from any part of them. It is true, of course, that the business interests of the colonies were enthusiastically active in the campaign for ratification, but that was not because they thought the new Constitution

would set up a business man's government. They knew better because they had joined in the promise that a bill of rights would be adopted. They worked for ratification because they knew it would be good for business and for all vocations to have a stable government designed to safeguard the public welfare by protecting fundamental human rights.

The Bill of Rights was an assertion of the sovereignty of the people as individuals over the organizations they create. It was an unmistakable declaration of their authority over government. It could not have been otherwise, therefore, than an assertion of their authority over every subordinate organization as well. But more of that later.

Let me here invite attention to another lesson that may be drawn from the Constitution. One of its greatest virtues is to be found in the delicate balance it established between the local and the national powers of government. It is true, as Charles Warren, the distinguished modern authority on the Constitution points out in his book, "The Making of the Constitution," that the members of the convention were filled with the purpose of forming a strong central government. "One cannot fail to be impressed," he writes, "with the fact that the burning desire and insistent determination pervading them was that the union of the states must be preserved and that all legislative or other conditions prevailing in the states which were impeding or undermining this possibility of union must be remedied in any new form of government that might be developed."

It was also true, however, that the advocates of a strong central government joined the opponents of that idea in defense of the rights of the individual as against the government. "The desire to protect individual rights (whether of property or otherwise, whether of the rich or poor) against governmental injustice was shared by leaders of thought on both sides," Warren tells us.

The lawyers of the Constitution convention saw both sides. Knowing that they were building a national government for people who nevertheless lived and earned their livelihood in local communities, they drafted an instrument that was designed to preserve to the states and to the people full authority over local and state concerns, while vesting in the national government full authority over those concerns which affect the nation as a whole. This elementary distinction

between state and federal power is known, of course, to every lawyer, but it cannot be said that every lawyer nowadays applied the cold logic of that distinction to the economic problems of his time. It was that great Chief Justice himself who declared the scope of the commerce clause as embracing even wholly intrastate business transactions when they "affected more states than one," a doctrine which many a briefholder for national business would like to toss aside if possible, in our time.

The expansion of the Federal power which we have witnessed during this century has not been the result primarily of the efforts of those who would create a stronger central government than that created by the framers of the Constitution and later perpetuated by judicial construction and by force of arms. The expansion of Federal power in our time has been due almost exclusively to the expansion of national commerce. That expansion, in turn, has been due to the fact that science and invention have utterly altered our world and have completely eradicated the geographical boundaries by which business was confined when the Constitution was written.

The devastating speed with which science has advanced is scarcely comprehended even by those of us who have witnessed its greatest strides. Certainly we have not clearly perceived the dislocations of local and individual economic authority it has caused. Thirty-five years ago, when I went West, the airplane was still in the experimental or demonstration stage. It was not an instrument of commerce. At the beginning of this century there was no such thing as an automobile highway. The traveler who would venture 100 miles from home in the motor car of that year was an intrepid adventurer. Radio was undreamed of and though the telephone was a thriving success and in constant use for local business, the coast-to-coast and international phone conversations of our time never entered even the dreams of the average person.

During the less than three years since we entered this war, science has leaped forward again. We made the landings in Normandy and we are sweeping the Germans back to their own frontiers, because our engineers have accomplished physical wonders beyond even the capacity of the scientific Teutons. Tojo, who in December, 1941, felt certain that

Tokyo was beyond all possibility of danger from the enemy he dared to challenge, has fallen from power because the American B-29 has almost abolished distance.

These are the things that have built up central power. Science has extended the radius through which men can exercise their influence. Measured in terms of transportation and communication, the globe today is, in size, only a fraction of the globe into which every man in this room was born.

More than that, the instruments that we use, the services we demand, even the entertainment upon which we insist can be produced and supplied only by huge organizations of men and capital.

Consider the invasion of Normandy. There were 13,000 sea-going craft in the English Channel that memorable 6th of June, and 17,000 aviators were overhead, in I know not how many aircraft, furnishing an air-umbrella for the tens of thousands of boys who went ashore with other thousands of jeeps and tanks and even bull-dozers. They tell me that the paper on which were drawn the countless maps that were needed for the operation weighed more than 100 tons.

All of this was the product of organization of which the 18th century had no conception. It tells the story of the coordinated activities of literally millions of men. It was possible only because before the war we had industrial and business organization that was completely beyond the scope and jurisdiction of merely local governing authority. To perform this miracle of science and industry by which we are overwhelming Hitler, we had to have the central coordinating power of government in a degree never before conceived, save by the totalitarians. It was possible here and in Britain only because a high degree of central power had already been developed in industry before central government itself had begun to grow.

This is the modern world of which I speak, the modern world of highly concentrated economic power in which it is the task of the lawyer to preserve the constitutional right of the individual to live freely and pursue his own happiness in his own way. This is the world in which is posed again the delicate problem of adjusting necessary government authority in such a manner as not to destroy or impair either the economic or the political freedom of the individual citizen.

Members of the profession of law will miss the whole

meaning of the modern crisis if they fail to realize that local business has been submerged by national business. It is this submergence of our purely local and individual economy in the organized national economy that is the most vital factor of the modern crisis.

The State of New York is the richest and most powerful state in the Union. Its gross revenues in 1942 amounted to a little more than \$720,000,000. Yet that same year the Pennsylvania Railroad took in more than \$838,000,000, the General Electric Company more than \$913,000,000, the Great Atlantic and Pacific Tea Company more than \$1,378,000,000, the American Telephone and Telegraph Company almost \$1,500,000,000, U. S. Steel almost \$1,900,000,000 and General Motors \$2,250,548,859.

Each of the last three has in excess of 300,000 employees. If you were to count their stockholders also and take into consideration the families of the employees, you would realize that each of these giants is an economic state with a population of more than a million. Every one of a hundred national corporations is more wealthy and powerful than most states and practically all cities. Only the Federal government can cope with them.

Yet when you read the law books, you will find the courts using the simple personal pronoun in referring to these gigantic economic entities as though they were flesh and blood persons instead of collectivist organizations. Here, for example, is a sentence taken from an opinion of Justice Holmes in a case involving two wealthy corporations engaged in the manufacture of chewing gum. They were litigating an accounting arising from a patent infringement. "It would be unjust," writes the great justice of the corporate litigants, "to charge an infringer with the gross amount of *his* sales without allowing him for the materials and labor that were necessary \*\*\* but it does not follow that *he* should be allowed what *he* paid for the chance to do what *he* knew that *he* had no right to do." The same habit of personalizing the huge corporate organizations of the day is followed in Congress. The debate on the surplus property bill now under consideration is full of "hes" and "hims" that refer not to persons, but to the huge corporate units which outfitted the nation for this the greatest war of all time.

It is this fantastic confusion of the corporate person

with the natural person which has made it so difficult for many a legal mind to comprehend what has been happening to our local and individual economy. If we insist upon thinking of an economic state as a natural person it will be difficult if not impossible for us to preserve the balance which the constitutional fathers established. When they performed their monumental public service, most business and commerce was purely local and purely personal. The people who inhabited the original states supported themselves working with or for their neighbors, and communities were economically independent. This was the foundation of democracy. Economic authority and political authority were co-extensive. But we have lived to see a great change. Economic authority has moved out of the local community to the financial centers of the nation.

When the managers of a billion dollar corporate giant alter a production policy millions of people in thousands of communities all across the country are affected. Jobs are made and unmade not only for the thousands employed by the giants, but by other thousands employed by other businesses in affected communities. Grocers and haberdashers, doctors, and even lawyers in every state experience a change of economic status when a board of directors sitting in New York decided, for example, to curb expenditures, for reasons that are good and sufficient for the corporation. Yet, they can do nothing about it. If they try through the state legislature or the city council, it is not unlikely that they will find that the best local lawyers have been retained by the foreign corporation, and are appearing before the local lawmakers to protect the corporate rather than the community interest. It is not at all unusual to run across the lawyer, who, in all sincerity talks of personal rights and individualism, while serving the modern collectivist economic state.

It is this disappearance of local economic independence that is destroying the foundations of democracy much more than the machinations of agitators or politicians. If there had been no economic instability in Germany, Hitler could not have overthrown the Weimar republic.

This is not to say that the huge corporate organization is an evil, for it is not. It is absolutely essential in the modern world, but so also is the independent local community, so also, above all, is the economically independent individual

citizen. It was he the authors of the Bill of Rights had in mind where they wrote that charter of personal liberty. When they made the people masters of the government, surely they did not intend that the people should not also be masters of those national economic organizations, corporate and unincorporated, which, after all, though they dominate the economic destinies of the people, are, nevertheless, mere creatures of man.

As we move now toward the complete collapse of our enemies in this war, we do so bearing a national debt that amounts at this moment to more than two hundred and eight billion dollars, or \$1,540 for every man, woman and child of our 135,000,000 people. The income of our people has, it is true, reached unprecedented heights—140 billions—but it is based on government expenditures. The Federal government has been buying with deficit dollars fifty per cent of all goods and services produced in the country. These purchases are for purposes of war. When peace comes and war purchases stop, production will cease, with consequent disaster to us all unless we find a new market for our tremendous productive capacity.

Where is this new market to be found? It will be found in the revitalization of our local communities, in the stimulation of renewed local and state pride, in the re-establishment of the local economy, and above all in the maintenance of a high standard of living for all. The expanded purchasing power of the masses alone can take the place of government spending—if we want to maintain a democratic economy and the institution of private property.

We dare not rely on big national business alone. These organizations are not so constituted as to serve the general public interest except in the narrow field of their own operations. They are concerned with their own success in interstate commerce rather than with the success of all commerce or with the success of any purely local business.

We must develop the formula by which national commerce and local commerce may exist side by side, each performing its own function. The development of this formula is distinctly a task for the lawyer, for it will be a rule of law. It cannot be found in a test-tube in the chemist's laboratory. The engineer cannot calculate it on a slide-rule. The businessman cannot find it in his ledger. But the lawyer can

find it if only he will cast aside his prejudices, and in his local community, emulating the example of his predecessors of the 18th century, seek again in his books those immutable principles of human justice which in every crisis of the past have helped mankind forward.

Make no mistake about it, the people will prevail. Nothing can stop their onward sweep.

Who did not feel a tightening of the throat when he read of the liberation of Paris? The jubilation on the streets, the wild joy with which our soldiers were greeted, the embraces and kisses that were showered upon them were all the manifestation of a people who knew that once more they were free, that once more they were at liberty to handle their affairs without constraint from any outside authority.

We set them free—we and our allies. Here, indeed, do we see again “a new birth of freedom,” for all the peoples of the world. To make it live and thrive and spread—that is a problem of government and of law. Let the lawyer then take up his task. Let him go back to his own community and there among his neighbors in every walk of life, seek to build anew the foundations of democracy. Let him realize that the victory of organized might in this global war will not be complete until individual economic freedom has been established in every state, city and county in which people live. Let him absorb anew that spirit of public service which filled the hearts of the lawyer who wrote the Constitution, and he will open new horizons of freedom for all mankind.