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SENATOR O'MAHONEY DISCUSSES "FEDERAL INCORPORATION BILL" OVER COLUMBIA NETWORK

(Following is a copy of an address by Senator Joseph C. O'Mahoney, Democrat, of Wyoming, over the Columbia Broadcasting System, Wednesday, December 9, at 10:30 p.m., EST. Senator O'Mahoney introduced a Federal Incorporation measure in the Senate and his topic is "National Charters for National Commerce". He spoke from the studios of WJSV, Columbia's station for the nation's capital.)

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Through the courtesy of the Columbia Broadcasting System of which I am an appreciative guest this evening, I am enabled to undertake this nationwide discussion of the bill I have introduced in the United States Senate to provide a system of Federal incorporation and licenses for the regulation of commerce among the states. I begin, therefore, by making this public acknowledgment of my indebtedness to the Columbia System.

As a preliminary let me say that the peace, happiness and prosperity of the people of this nation depend upon the justice and wisdom with which their economic affairs are ordered. We have learned by sad experience that these affairs do not order themselves and, I think, we all accept the proposition that it is a responsibility of government to provide the rule whereby the recurrence of economic chaos shall be prevented. It is my contention that this responsibility rests principally upon the Federal government because this nation is an economic unit and the states do not have the constitutional power to do the things which must be done if our fundamental institutions are to endure and national prosperity is to be firmly established.

Five facts we must recognize if we are to comprehend the problem with which we are confronted:

First, our economic security is inextricably bound to national commerce.

Second, practically ninety percent of that commerce is carried on by corporations.

Third, corporations are artificial entities which exist only by virtue of public grants.

Fourth, the Federal constitution gives to Congress the power to regulate commerce among the states.

Fifth, the continuous efforts of the American people over almost half a century to suppress monopolistic practices have been defeated because a few states have been permitted to create interstate corporations under indefensible charters the primary purpose of which has been the evasion of the national anti-trust laws.

Inasmuch as I did not invent the idea of Federal incorporation as a means of regulating national commerce, it is permissible for me to say that it is one of the most important proposals ever considered by Congress. It offers a perfectly constitutional method of curing many, if not most of our economic ills and of laying the basis of a new and all inclusive prosperity such as this or no other nation has ever enjoyed.

The proposition is simply this: Since the Federal Constitution gives Congress the power to regulate commerce among the states and since that commerce is carried on principally by corporations, then let Congress regulate commerce by writing into the charters of the corporations which carry it on the requirements which are deemed necessary to secure social justice and prosperity.

Why has this not been done before, you ask? Because Congress and the Courts have not perceived the difference between corporations and natural persons when drafting laws and handing down decisions. Also because it was not perceived, in the beginning, the extent to which corporations would monopolize commerce, and Congress, recognizing the complete

supremacy of the national power in the fields assigned to it, was fearful that a national corporation law would somehow prove injurious to the states. But the failure to adopt the idea has been terribly injurious both to the states and to the people. Corporations, created, but not controlled by the state of origin have preyed upon all the other states, and for fifty years, the people of the entire nation have been made the victims of unfair and outrageous practices which can be employed only through the corporate form.

If the electorate of the United States gave any mandate to the government at the last election, it was to put an end to monopoly. Both parties declared against it. Both presidential candidates proclaimed their purpose to protect the people from it. I say to you, the platforms and the pronouncements will turn out to be empty words unless the Federal government exercises the power it unquestionably has to prescribe the conditions under which corporations may engage in any branch of interstate commerce. Of what avail is it to fulminate against monopoly and monopolists in time of political campaign, if we continue to permit a few states to create corporations to carry on interstate commerce with the corporate powers that enable them to victimize the public?

We shall understand this question the more readily if we first recognize the fact that there is no such thing as the <u>right</u> to create a corporation. Authority to form a corporation is a special privilege which may be granted or withheld by government as it pleases. Charters may be granted by special law or by general law and for any purpose. The abuse of special charters in the early issued only by general law.

The anomaly in our system is that we permit the states to create corporations which actually do things forbidden to the states by the Federal constitution. Then we have allowed ourselves to become so involved in legal metaphysics, that we listen with straight faces while

brilliant lawyers and judges say that though Congress has the constitutional power to regulate interstate commerce and the states have no such power and indeed cannot constitutionally delay, hinder or impede such commerce, it would be unconstitutional for Congress to impose licenses upon the corporate agencies of the states which operate in the field assigned by the constitution to the Federal government.

It is easy to understand how this came about. When the Federal constitution was adopted and the power to regulate commerce was granted to the national government, practically all commerce was in the hands of natural persons. When cases involving commercial rights reached the courts, lawyers and judges talked in terms of the rights of natural persons. In course of time, when commerce was taken over by corporations, they were clothed in the judicial mind with the privileges and immunities of natural persons. Even today you will find the highest courts using the personal pronoun when dealing with the rights of very impersonal corporations.

Once we recognize that a corporation is impersonal, that it has only the powers government chooses to give to it, then the principle which is at the heart of my bill becomes clear. We propose to say to the natural persons who have organized or propose to organize a corporation to engage in commerce among the states:

"Very well, if you desire to engage in this commerce the regulation of which is the constitutional right and duty of Congress, and you desire to do so as a corporation, you must agree to accept a charter which will give you no corporate power to do certain things which all experience shows are inimical to public welfare. You may not employ infants, exploit labor, impose on women, deceive and cheat your stockholders, crush competition, rob the consumer. In short, you may not as a corporation in interstate commerce practice the vices of monopoly."

Now if anybody thinks there is no legal basis for this procedure, I can quote chapter and verse. But more than that I can urge common sense, and all good law is common sense. There is the principle announced by Justice Bradley in the Central Pacific case (127 U. S. 1):

> "A franchise is a right, privilege or power of public concern which ought not to be exercised by private individuals at their mere will or pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security."

This is nothing new. This is old and sacred like the Constitution, because it is just. Long before our government was founded, old Matthew Hale, one of the doctors of the common law, announced the principle. When society grants a privilege, society may impose the condition on which it may be exercised. The Federal government, by grant of the Constitution has the right, in the regulation of commerce among the states to say with respect to any corporation engaging in such commerce that labor shall be properly treated, that capital shall not be exploited by management groups or money lenders and that consumers shall not be victimized.

Has the Federal government the right to create corporations? Certainly it has done so from the very beginning. The Bank of the United States was given a charter by Congress in 1791. The second Bank of the United States was incorporated by Congress in 1816. In 1819 John Marshall, the great chief justice upheld the validity of this charter as a proper exercise of the power of Congress to pass any law "necessary and proper" to carry out its powers. In 1864, Congress passed the national bank act under which thousands of private banking corporations have been created. These were in furtherance of the power to control money.

In 1922 Congress passed an Act drafted by the late Senator Thomas J. Walsh for the incorporation of companies to engage in the China trade. This was in furtherance of the power to regulate foreign commerce. The power to regulate interstate commerce is exactly the same.

Very well, someone says, but the courts, not Congress, must define interstate commerce. Manufacture and distribution have been excluded from the field of Congressional power by judicial decision and that's an end of the matter we are told. But if any person undertakes to determine what the Supreme Court definition of interstate commerce is, he will have some difficulty.

Take, for example, the history of the supreme Court and the Sherman Antitrust law. You will find the interesting and illuminating experience of Justice Harlan. In 1895, he dissented from the opinion of the Supreme Court in the sugar trust case which held that a combination though it had gained control of 90% of the sugar business of the country was not within the power of Congress to prohibit, because the combination was of manufacturers, and so not interstate commerce. In 1904, he wrote the majority opinion in the Northern Securities case. What a few years before was merely a dissent, now became the law and the court held that the purchase of stock in a corporation though just as local as the manufacture of sugar was interstate commerce and so within the power of Congress to prohibit. Diametrically opposite definitions! In this case, Justice Harlan said that contracts in restraint of trade whether reasonable or unreasonable were prohibited. And that was the law - or it was the law until 1912 when, without any alteration of the statute by the law-making body, it was superceded by the Standard Oil case with its famous "rule of reason". Justice Harlan once again found himself writing a dissenting opinion. If ever there was a case of "Off again, on again, gone again, Finnegan," Justice Harlan had it with the Supreme Court and its definition of interstate commerce.

What security can there be in depending upon the courts for a stable definition of what as a matter of fact is a variable quantity?

Commerce among the states is that commerce which Congress, the legislative body, says it is at any particular time, not what the Supreme Court happens to say it is in any particular case. If there is any mind-changing to be done let it be done by the body that is authorized by the Constitution to change its mind, the body that is responsible to the people, in other words the law-making body, not by the Court, a body that is removed by the appointive power and by life-tenure from public responsibility, a body that is empowered by the Constitution not to make law, but only to decide cases under the law.

The power of Congress under the commerce clause was correctly stated by Chief Justice Hughes in the famous Schechter case, when he said:

"The power of Congress extends, not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intra-state operations."

It is a proposition of purely elementary law that it is the function of Congress in its legislative judgment to declare how far the conduct of intrastate operations must be regulated to protect interstate commerce from injury. The rule asserted by the Supreme Court, attempting by judicial discretion, to draw the line between direct and indirect effects upon interstate commerce is a rule founded chiefly on the repudiated sugar trust case and not upon any word or comma in the Constitution.

Let Congress, asserting its responsibility to the people, define commerce among the states in a Federal incorporation and licensing bill and I venture the prediction that the Supreme Court will not be found to be an obstacle to the march of social justice.

I cannot make it too emphatic that this is not a fight to regiment business, business men or even corporations. It is the culmination of a struggle which has been going on in the United States since before most of us now living were born, to prevent a comparatively few persons of great ability and skill but little conscience to manipulate the corporation laws of a few states to the disadvantage of the entire nation.