

**REMARKS OF
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DEFENDING THE FIRST AMONG OUR FREEDOMS

AS PREPARED FOR DELIVERY

Thank you, Rod, for being here tonight to deliver those terrific remarks. And congratulations on your amazing career. Rod Smolla is as brilliant, energetic and charismatic today as when I took his Bill of Rights course more than 20 years ago. Professor Smolla, or now President Smolla, is one of those rare academics who not only publishes prolifically but radiates an engaging passion during class as well. He creates an electric atmosphere of learning that makes it impossible for even the most narcoleptic of students to fall asleep. Most importantly, he cares deeply whether his students are *learning*. It is no wonder that his classes at William & Mary were always oversubscribed. Furman University is lucky to have him as its President.

When it comes to matters of speech, it is safe to say that even though he and I do not necessarily endorse every idea the other has said or written over the years (in fact, we have no way of even knowing everything the other has said or written) we agree on the paramount right to express those thoughts. But more about that in a minute.

Patrick and Dick, congratulations on the Media Institute's continued success. When Patrick told me that I would receive this prestigious award, he said it was for my work advancing the freedom of speech. He invited me to make a few remarks about how I believe that freedom is essential to our democracy's survival and integral to the sovereignty of the individual. He emphasized that it should *not* be abridged. And in the same breath he said, "But we have a strict limit of 10 minutes, so don't run over!" So even the Media Institute has time, place and manner restrictions on speech ... and for good reason.

The last time I spoke to this group was in early 2009. I recognize some of you from that day because you left one by one as I was speaking. You see, after he turned out the lights in the empty hotel ballroom and told me I had to stop talking and leave, the janitor suggested that my speech might have been just a bit too long. But that's what happens when you get me started talking about the similarities between the Fairness Doctrine and net neutrality regulations.

Senator Warner, it is great to have you here tonight. It is always good to be able to get some constituent face time with my home state senator.

Many thanks to Benjamin Jealous for being here tonight and delivering those stirring and inspiring remarks. And Professor Jealous, it has been a pleasure meeting you this evening.

And congratulations to Randall Stephenson on receiving the Institute's American Horizon Award. Jennifer and I wish you and Mrs. Stephenson our best.

I'm also honored to have one of my FCC colleagues here tonight, the gentle lady from South Carolina, Commissioner Mignon Clyburn.

And I would be greatly remiss if I didn't recognize my beautiful bride of 15 years, Jennifer. She graciously weathers all of the consequences of being married to an FCC commissioner, and the kids and I couldn't get anything done without her.

So, after all of those introductory remarks, under Patrick's time, place and manner restrictions on my "free" speech, I now have, let's see ... 32 seconds to wrap up.

In all seriousness, I am quite humbled to accept the Media Institute's Freedom of Speech award this evening. In preparing for tonight, I have been reviewing various authors' works on the freedom of speech. I've read through books and articles about colonial Americans' long quest for freedom and independence, starting with risking – and sometimes losing – their lives to emigrate from oppressive, top-down regimes.

One book that I recently re-read was written by perhaps my favorite author, my father. As many of you know, he was raised on a ranch on the Tex-Mex border without running water, electricity or phone service. Yet with smarts, hard work and a bit of good fortune, he went on to become one of *National Geographic's* best-selling authors.

Among my favorite books is the first I witnessed him research and write: *The Revolutionary War, America's Fight for Freedom*. When I was 3 and 4 years old, Mom, Dad, and we four kids all piled into our 1960s-era station wagon and relived the Revolutionary War up and down the Eastern seaboard as Dad researched his book. Those trips made our nation's struggle for freedom so vivid to me in my 4-year-old mind that I once asked Dad if he had been friends with George Washington. I vaguely remember an evasive answer.

With tonight in mind, however, something my father wrote more than 45 years ago caught my eye. He described how the early colonists lived their lives far removed from any government benefit or encumbrance. He went on to underscore that, at the start of the Revolution, most colonists considered themselves to be British despite very little contact with any form of the King's power. Even during the early hostilities that eventually led to the war, the colonists, in my father's words, "were not begging for new

liberties or for independent nationhood. Instead, they feared the loss of freedoms they had already long enjoyed.”¹

A giant ocean that took two months to cross, plus a wild frontier, protected the early European settlers from many state intrusions. It wasn’t until the imposition of the Stamp Act of 1765, as well as subsequent crackdowns against the freedom to peaceably assemble and speak out against the sovereign, that thoughts of independence germinated.

Despite fighting to preserve individual liberties “endowed by our Creator,” 25 years passed from the signing of the Declaration of Independence until the Framers were able to codify the Bill of Rights in 1791. Part of the delay stemmed from the belief by many that such rights were “self-evident.” Fears abounded that an enumeration of rights in a government document would actually result in limitations on liberty, or the eventual elimination of rights altogether. And we should never forget that, shamefully, the Bill of Rights originally did not apply to African Americans or women until subsequent amendments were added decades later.

Nonetheless, the most sublime of the first 10 amendments is, of course, the First. Instead of limiting rights, the Framers intended the Bill of Rights to act as a bulwark protecting the sovereignty of the individual from state intrusion. Perhaps it is the First Amendment’s prominence atop the pile of all others, or the fact that it preserves an anti-majoritarian right to dissent against those wielding political power, that has made it such a target for attack over the years.

It is the First Amendment’s role in protecting core political speech that often generates the most controversy. In its nearly 220 years of existence, judicial interpretations of its plain black and white words, “Congress shall make no law ... abridging the freedom of speech, or of the press ...”² have undulated on a jurisprudential sea of swirling grays. What seemed so simple and clear on the parchment of 1791, became complicated by ever-evolving facts before the ink was dry. Such is the virtue – and vice – of American constitutional jurisprudence.

The nature of the right to speak freely appears to confuse some. There are those involved in policy debates before the FCC, and elsewhere, who contend that a private individual who restricts another private individual’s speech violates the First Amendment. This argument is wrong as a matter of constitutional law. The Supreme Court has held that a *bona fide* claim of “censorship” must include “proof of state [or federal] involvement.”³ How to deal with speech deemed by a government to be “unsavory” is what can lead to incremental erosion in this arena. All forms of government have attempted to bring “balance,” “fairness” or “neutrality” to speech all in the name of serving some variation of the “public interest.” As columnist George Will

¹ BART MCDOWELL, *THE REVOLUTIONARY WAR, AMERICA’S FIGHT FOR FREEDOM* 20 (4th ed. 1967).

² U.S. CONST. amend. I.

³ *United Bhd. of Carpenters Local 610 v. Scott*, 463 U.S. 825, 832 (1983).

once wrote, “For several decades in America, the aim of much of the jurisprudential thought about the First Amendment’s free-speech provision has been to justify contracting its protections. Freedom of speech is increasingly ‘balanced’ against ‘competing values.’ As a result, it is whittled down, often by seemingly innocuous increments, to a minor constitutional afterthought.”⁴

Too often, those controlling the power of government seem all too eager to use the state to “referee” conflicts between private speakers. Interestingly, those in government who exercise more control over speech, especially political speech, never seem to want to relinquish *their* political power while they are muting *others’* voices. State power is too frequently accompanied by its sinister twin: arrogance. They grow larger together.

With that in mind, if you look around the globe, it is not private parties who are causing crises by infringing on individuals’ speech rights. It is governments. Yet nearly every country on earth “guarantees” the freedom of speech. In fact, out of about 196 countries in the world, 173 of them have written laws ostensibly “protecting” the freedom of speech.

For instance, in Myanmar, or Burma, its constitution ensures, “freedom of speech, expression and publication to the extent that the enjoyment of such freedom is not contrary to the interests of the working people and of socialism.”

Article 67 of the North Korean constitution states, “Citizens are guaranteed freedom of speech, the press, assembly, demonstration and association.” By the way, North Korea’s free speech guarantee is virtually identical to China’s – a “coincidence” to be sure. China is so much in favor of free speech that it has proposed expanding its version of freedom to the Internet in a white paper chapter entitled “Guaranteeing Citizens’ Freedom of Speech on the Internet.”⁵

Given this written guarantee, what’s all this fuss over China and Internet freedom? Well, it seems to be a law of jurisprudential physics that the volume of fine print following an enumerated right is inversely proportional to the strength of that right. Case in point: the Chinese government goes on to say that while all of this talk of Internet freedom is important, “no organization or individual may produce, duplicate, announce or disseminate information” on the Internet that could have the effect of “subverting state

⁴ George F. Will, *Less Freedom, Less Speech*, WASH. POST, Feb. 26, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/24/AR2006022401800.html>.

⁵ INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, *THE INTERNET IN CHINA, III. GUARANTEEING CITIZENS’ FREEDOM OF SPEECH ON THE INTERNET* (June 8, 2010), http://www.china.org.cn/government/whitepaper/2010-06/08/content_20207994.htm (last visited Oct. 17, 2011). The full contents of the white paper can be found at http://www.china.org.cn/government/whitepaper/node_7093508.htm (last visited Oct. 17, 2011).

power,” “damaging state honor and interests,” “jeopardizing state religious policy,” “spreading rumors” or that is “forbidden by laws and administrative regulations.”⁶

This Chinese version of the public interest standard resulted in a visit in late August by Liu Qi to the parent company of the Weibo microblogging service. Mr. Liu is Secretary of the Beijing Municipal Party Committee and a member of the Communist Party’s powerful Politburo.

It seems that 2-year-old Weibo’s phenomenal growth to well over 200 million users has alarmed the government because it has become an easily accessible platform for Chinese citizens to express their political opinions. Such expressions could “subvert state power.” According to the *Wall Street Journal*, an anonymous source who attended the meeting between Mr. Liu, his entourage and Weibo executives said, “recent major events ... have made the government a little bit nervous about Weibo,” adding that Mr. Liu seemed “unsatisfied when told it typically takes Weibo censors two hours to identify and remove ‘fake news.’”⁷ Ultimately, it is the government that determines what constitutes “fake news.” Currently, the Chinese government is considering requiring the company “to hire more human censors to take down controversial content.” Word has it that Weibo has been, shall we say, somewhat subdued by Mr. Liu’s visit. But that’s just a rumor and I may be violating Chinese law at this very moment.

Of course, my point is that written guarantees of individuals’ rights are meaningless in practice when governments have an expansive ability to turn the one-way ratchet of state power tighter and tighter. Regulation only seems to grow. Speech regulation can come with many justifications, some of which are noble, such as protecting children. Nonetheless, we should remain especially vigilant and battle-ready when it comes to arguments for the “reasonable” regulation of political speech. Why is it that governments never sell new rules as being “unreasonable”? As Rod Smolla wrote in his 1991 article with a title shamelessly designed to pique the interest of Virginia history buffs such as myself, “A Conversation with James Madison,” President Madison “says,” “Only in the United States have we embraced the rule that laws restricting freedoms of speech and press may *not* be passed merely because they seem reasonable to the majority. We stand alone in our radical commitment to freedom of speech and press.”⁸

And in that vein, I’d like to add: Thank you, but journalism does not need the government’s “help.”

⁶ INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, THE INTERNET IN CHINA, V. PROTECTING INTERNET SECURITY (June 8, 2010), http://www.china.org.cn/government/whitepaper/2010-06/08/content_20207978.htm (last visited Oct. 17, 2011).

⁷ Josh Chin & Loretta Chao, *Beijing Communist Party Chief Issues Veiled Warning to Chinese Web Portal*, WALL ST. J., Aug. 24, 2011, <http://online.wsj.com/article/SB10001424053111904279004576526293276595886.html>.

⁸ Rodney A. Smolla, *A Conversation with James Madison*, 77 A.B.A. J., Aug. 1991, at 50, 52.

As we leave here tonight, I hope you will remember the words of three historic figures. The first is none other than one of the most quotable Americans of all time, Benjamin Franklin. On this topic he wrote, “Whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech.”⁹

The second is from Senator Warner’s and my fellow Virginian, and my favorite President, my father’s friend, George Washington: “If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter.”¹⁰

The third is from someone I’ve never quoted before, and I may never do so again: “When one makes a Revolution, one cannot mark time; one must always go forward – or go back. He who now talks about the ‘freedom of the press’ goes backward, and halts our headlong course towards Socialism.”¹¹ That’s Vladimir Ilyich Lenin. Ol’ Vlad, the ultimate statist, apparently was quite serious. And evidently he had read Franklin and Washington.

We should heed all three of these warnings. Otherwise, by seemingly innocuous increments our freedoms may be led to the slaughter. And don’t be duped. As Rod Smolla can attest, sometimes the act of defending the freedom of speech can be confused with endorsing a terrible message or odious messenger. It is a tortuous dilemma for many to protect the rights of those with whom we disagree profoundly. Yet it is the sacred nature of the First Amendment that this right be *for all*, including our adversaries. Let us remain eternally vigilant and never take our liberty for granted.

Thank you again for your generosity in presenting me with this award. Jennifer and I are honored and humbled. Good night.

⁹ *Quotations: First Amendment, Censorship, and the Freedom to Read*, AM. LIBR. ASSOC., <http://www.ala.org/ala/aboutala/offices/oif/ifissues/issuesrelatedlinks/quotations.cfm> (last visited Oct. 17, 2011).

¹⁰ *Our Mission*, GEORGE WASHINGTON SOC’Y, <http://www.georgewashingtonsociety.org/Mission.html> (last visited Oct. 17, 2011).

¹¹ *Vladimir Ilyich Lenin Quotes*, DICTIONARY.COM, <http://quotes.dictionary.com/author/vladimir+ilyich+lenin> (last visited Oct. 17, 2011).