

**Remarks of FCC Commissioner Michael O’Rielly
Media Institute “Free Speech America” Gala
October 24, 2018**

Thank you, Chairman Wiley, for that exceptionally kind introduction, and let me extend my deep appreciation to Rick Kaplar for his current leadership of the Media Institute, a premier organization defending the protections afforded by the First Amendment to the U.S. Constitution.

Eminent guests, communications law practitioners, and friends, it is a distinct honor to be here this evening as part of “Free Speech Week” to discuss certain core American principles and to rightfully honor deserving award recipients.

The First Amendment

Like most in this room, I proudly stand before you as a staunch defender of the First Amendment and affirm all its parts — freedom of assembly, religion, speech, press, and petition for redress of grievances. I whole-heartedly believe that a fully-functioning First Amendment epitomizes what it is to be an American. These Constitutionally-protected rights etched in a few phrases provide a rock-hard foundation of a government based on the willing grant of limited authority by collective individuals. In this nation, power ultimately rests with the people.

Far better men and women have been more eloquent in praise of the First Amendment than I ever will be. It is worthy of the strongest defenses against any enemy near or far, as our lands are dotted with headstones of those brave military warriors who gave their lives to protect our unique freedoms.

Of the Press

With your indulgence, I would like to focus a few moments on the press clause of the Amendment, since it has generated significant and proper attention in recent months.

Constitutional scholars, Supreme Court precedent, as well as recent filings by the Media Institute and others, outline two main justifications for the protections afforded to the press. First, a fully-functioning press provides the general public with information about our government. In other words, it serves to educate people about current events and circumstances, including the daily outpouring of information from government officials. This incredibly valuable function provides a sharp and accurate picture of the government and the activities it carries out on our behalf. From the mundane to the exceedingly important, the press – and I intentionally use that term very widely here – reports the details of our government and allows the public to use such information to make critical democratic decisions.

The second function of the press clause is to “serve as a powerful antidote to any abuses of power by governmental officials.” Indeed, the press scrutinizes governmental activities and exposes instances where employees have exceeded their authority, used their positions for their own riches, caused harm to the public by failing to take necessary actions, and so much more. Granted, most federal departments and agencies have inspector generals to examine these abuses, but those entities rarely have the impact of a well-timed exposé by a serious journalist examining corruption or improper behavior, or a live video or picture of a governmental official trying to defend questionable practices. The media provides a vital check on the government on behalf of the American citizenry.

Having been in this town for the entirety of my professional life, I must admit that it is occasionally difficult to applaud the press' record in serving this function. I have been on the receiving end of some of those stories, both personally and while representing others, and it can be emotionally and professionally trying to defend legitimate actions and decisions. The image of being rapidly and repeatedly kicked in the head by a mule comes to mind. Certainly, working in the government is not for the faint of heart, especially in the current environment where certain pejorative words are spewed out so carelessly. But the value of such efforts by the press are immeasurable, and, even if quantifiable, would far exceed any downsides.

As a contrast, these two working purposes of the press do not exist worldwide. In fact, the world's jails contain many individuals who were trying to perform these exact functions, but were not protected by a similar First Amendment. Worse yet, we are all too familiar with the physical safety risks experienced by press members. Too many have paid for their life's profession with their very being.

The First Amendment and the FCC

While not on the same scale as the freedom of the press, the First Amendment permeates my world at the FCC. I'll mention three policy matters under our purview where threats to free communications have been raised: children's television, pirate radio, and municipal broadband. These are smaller issues but First Amendment precedent, nonetheless, often comes from these types of cases.

Kid Vid

As many of you know, the FCC distributes and regulates radio and television broadcast licenses in accordance with statutory requirements, including the public interest, convenience, and necessity. At the same time, the Commission is prohibited under the Communications Act, and the First Amendment, from censoring broadcast stations based on viewpoint, and interfering with licensees' right to free speech.

On this basis, it has been argued that the FCC's children's programming requirements imposed on our nation's broadcasters, better known as Kid Vid, raise legitimate First Amendment concerns. Despite tremendous competition and options in children's programming, the Commission still maintains extensive requirements that broadcasters must adhere to related to children's television, including programming schedules, three-hour requirements, label burdens, and 30-minute minimum segments. In addition to the fact that these rules create asymmetrical burdens for broadcasters, many legal scholars have argued quite convincingly that the rules, and perhaps the underlying statute, are content-based restrictions not narrowly tailored to further a compelling governmental interest, and therefore run afoul of the First Amendment.

I am grateful that in July, the Commission issued a Notice of Proposed Rulemaking seeking comment on revising our current Kid Vid regulations to take into account the dynamic changes in the video marketplace for children's programming and provide broadcasters with greater scheduling flexibility. Further, it solicits comment on the Constitutional aspects of the rules and whether the Commission even has the right to impose such requirements in the first place. Those fighting high and mighty against any changes to Kid Vid may want to reconsider their approach, lest they end up with the rules being struck down altogether on First Amendment grounds.

Pirate Radio

While I am a firm supporter of removing illegitimate restrictions on broadcasters' speech, I also believe that individuals who use the public airwaves must play by the rules, meaning that, at the most basic level, they must have an authorization. For this reason, I have pushed for the FCC to use all of its tools – and have advocated for expanded authority – to combat illegal pirate radio stations. These entities flaunt our requirements and undermine free speech by interfering with authorized stations' ability to reach their audiences – not to mention their subversion of emergency communications systems.

This brings me to a more personal story about the First Amendment. Earlier this year, I noticed an article in an uber-small Colorado publication discussing the existence of a local pirate radio station operating nearby and advocating that townspeople listen to it while it's still in operation, at least until the federal government shuts it down. In response, I wrote a letter to the editor raising concerns regarding their publication's approach and arguing it should notify the local FCC office of illegal activities rather than romanticize these "broadcasts" or provide the "station" with some type of legitimacy.

The publication took great umbrage with my criticism and eventually used my letter in an op-ed campaign as an example of its resistance to efforts to curtail the First Amendment rights of a free press. At no point in my letter, however, did I suggest that the government had a right to stop any further publications or impose a penalty on the publication, especially given that the FCC has no authority whatsoever over newspapers. I didn't even suggest that people stop reading the publication, withhold advertising, or cancel their financial support memberships.

Merely criticizing a publication for having little discretion and promoting illegal behavior is not an infringement of the First Amendment, even if I am a government official. Consider if the publication promoted the locations of nearby buildings or schools where dealers could sell drugs, favored looting of a local grocery store that lost its power, or published detailed instructions on how to steal from the local bank when it upgraded its software in the middle of the night. The Colorado publication has a First Amendment right to state what it did, either in paper or electronic form, but such protections don't preclude me from criticizing what I see as a misguided or wrongheaded story – particularly without any suggestion of government interference to end or penalize the publication.

The First Amendment does not make those who enjoy its protections immune from criticism. It should never be viewed as a shield against challenges of facts, style, or substance. While it protects the right of everyone, especially press officials, to state what they would like to state, it does not protect these same individuals from being called out for their inaccuracy, inappropriateness, or lunacy – depending on the circumstances – even if done so by government officials.

Municipal Broadband

Back to the FCC, I would be remiss if my address omitted a discussion of a lesser-known, but particularly ominous, threat to the First Amendment in the age of the Internet: state-owned and operated broadband networks.

One of the previous Commission's projects under Chairman Wheeler was to promote government-owned broadband networks, or certainly remove barriers to their creation. In particular, it attempted to preclude the state governments of Tennessee and North Carolina from limiting the geographic scope of their own municipal broadband programs. Thankfully, the courts did not agree, highlighting that

Congress had not given the Commission authority to enact such preemptive measures, certainly under the weak provisions the Commission used for its defense.

In addition to creating competitive distortions and misdirecting scarce resources that should go to bringing broadband to the truly unserved areas, municipal broadband networks have engaged in significant First Amendment mischief. As Professor Enrique Armijo of the Elon University School of Law has shown in his research, municipalities such as Chattanooga, Tennessee, and Wilson, North Carolina, have been notorious for their use of speech codes in the terms of service of state-owned networks, prohibiting users from transmitting content that falls into amorphous categories like “hateful” or “threatening.” These content-based restrictions, implicating protected categories of speech, would never pass muster under strict scrutiny. In addition to conditioning network use upon waiver of the user’s First Amendment rights, these terms are practically impossible to interpret objectively, and are inherently up to the whim of a bureaucrat’s discretion. How frightening.

But, that’s enough from my soapbox this fine evening.

* * *

In closing, it’s important to realize that despite any divisions, despite any disagreements, and despite any turmoil, we are all part of the greatest country that has ever existed on the face of the Earth. The experiment that is the United States provides us with the strongest, most imaginative, and immensely capable nation to test all time.

Many of you know I have a new daughter, and in talking to her, as any dad would and as I did with her older sister, I express to her how blessed she is to be born here on these lands and how that would forever change her life for the positive. Simply by being born in America, her fortunes were set on a different trajectory than babies elsewhere in the world. May I humbly suggest that before picking up that next proverbial axe or slinging that contentious Tweet, which are certainly protected by the First Amendment, that we remember this simple point and thank our lucky stars for such a gift.

I thank you so much for allowing me to join you this lovely evening to share some views. Now on to the real reason you are here.