

Video Transcript: First Amendment Speech and Press Part I

[NARRATOR]

Hello, I'm Leah, and we are here today at the National Constitution Center in Philadelphia to talk about the First Amendment. Today's topic? You could say it's the most fundamental of our rights, the right to free speech.

What the clause says is simple: Congress shall make no law... abridging the freedom of speech, or of the press...

But what it really means is a whole lot more complicated. Since shortly after the founding of our country, politicians and the Courts have been arguing over what can and cannot be said. For a broader perspective let's go to an expert, Supreme Court Justice Elena Kagan.

[KAGAN]

You know it's just not true that "sticks and stones can break your bones, but words will never hurt you." Sometimes words can hurt you. But what we've said in our Constitutional law is, if the speech is true it doesn't matter how much it hurts you, and that's because we think, you know, essentially, people deserve to know the truth.

But even if the speech is not true, we provide protections to speakers. The idea is we want a free and unfettered debate about certain matters, about matters of public policy, about matters relating to public figures, certainly about matters relating to government officials.

[NARRATOR]

Since the Bill of Rights was ratified in 1791, there have been many cases about what we can and cannot say.

Here is a simple question for you, do you think you can be thrown into jail for criticizing the President? Seems simple, right? But that hasn't always been the case! Let's talk to Jeff Rosen, the President and CEO of the National Constitution Center, for a little more backstory.

[JEFF]

To understand this crucial Constitutional story, let's go back to 1798.

The Federalists, led by President John Adams, are worried about criticism from their Democratic-Republican opponents, led by Thomas Jefferson.

So, Congress under Federalist control passes the Alien and Sedition Acts of 1798, which make it a crime to criticize the Federalist President John Adams, but not the Republican Vice President Thomas Jefferson. And in fact, Democratic-Republicans including the Vermont Congressman Matthew Lyon actually served jail time, four months in jail for criticizing Adams of ridiculous pomp.

So, Thomas Jefferson and James Madison are not happy. They are the great founders. They're also Republican-Democratic opponents of Adams and they anonymously draft the Virginia and Kentucky Resolutions.

Madison in his Virginia Resolution calls the Sedition Act a most palpable and alarming violation of the First Amendment, which he says expressly and positively forbids that sort of ban.

And here is Madison's language which is really interesting, so I'm going to read it to you to make sure I get it right.

Madison says that "the Sedition Act is particularly alarming because it is leveled against that right of freely examining public characters and measures, and of free communications among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."

So, there you have it. That's the core theory of the First Amendment. The only way that you can protect all your other rights is if you have the freedom to criticize the government freely. And although the Supreme Court never ruled on the Alien and Sedition Acts expressly, when Thomas Jefferson became President it was allowed to expire.

[NARRATOR]

Here's the shocking part: in the World War I Era, in some of the first cases in which the Supreme Court was interpreting what free speech meant, it went against this understanding and ruled against people who were being punished for criticizing the government and the war. In 1917, Congress had passed the Espionage Act and the Sedition Act, and many states also passed "criminal syndicalism" laws which made it a crime to interfere with the draft or speak negatively about the government, because of how it might affect the war effort.

[KAGAN]

In World War I, there was a fair amount of protesting going on about the United States' participation in that war. Many radicals, Communists, Socialists, thought it was a kind of capitalist war, illegitimate. And there were many efforts to prevent the United States from going into the war, and indeed many efforts to persuade people not to show up when they were drafted for the war. So essentially efforts to persuade people to engage in unlawful conduct, unlawful conduct that, if it had been engaged in, would have severely damaged the war effort.

[JEFF]

Lots of people were tried and convicted under the Espionage Act of 1917, including Eugene V. Debs. This is an amazing story. He was a labor leader, a socialist candidate for President, who ran for President in 1920 from a jail cell because he'd been convicted for making a very mild speech criticizing American involvement in World War I. And the Supreme Court upheld his conviction under the theory that any speech that might have a bad tendency to lead to lawbreaking can be criminalized. So, Debs saying, "Don't enlist in the draft," might lead some people not to enlist and that therefore could be punished.

Now, it's our modern understanding of free speech – which was really Jefferson and Madison's understanding – was resurrected by a series of heroic dissenting opinions by two of the greatest Justices in Supreme Court history; Justice Oliver Wendell Holmes, and one of my great heroes, Justice Louis Brandeis. So, when you read Supreme Court opinions it's always really important to read the concurrences and the dissents.

[KAGAN]

Really, when you think about First Amendment law, you have to look back to these two justices. Everything came from these two justices of the Supreme Court. And what's quite striking is that everything came from their dissenting opinions.

This was not the law as people understood it at the time, but two justices in dissenting opinions said, "This is what we think should be the law."

When somebody criticizes the government, even to the point of saying that people should engage in unlawful conduct, and should protest government activities and government choices by that means, even when that's so, you can only punish them for that instigation of unlawful conduct if the conduct is very likely to happen and is going to happen right away. And if that's not true, the remedy is more speech. As long as there's time for debate and for discourse and for discussion, that's how we should counteract bad ideas. We shouldn't counteract bad ideas by putting people in prison, by fining people, by preventing them from saying what they think.

Justice Holmes had a kind of marketplace metaphor that he used when he was thinking about the First Amendment. Essentially he said that the way to get to truth is to allow everybody to say what they wanted – to have a full marketplace of ideas... And people could then listen to all of that and all of these ideas would compete with each other, and out of that would come the best ideas, the truest ideas. So that was, that was his basic idea. The freedom of speech and why it was important. It was to get to truth in the end, and it was to get to truth by means of a kind of competition among various ideas.

[JEFF]

And that metaphor of the marketplace of ideas has been embedded in our free speech jurisprudence. And the idea is that strong ideas should be tested against weak ones in the market and basically, the good ones will triumph. Now, Holmes had no special faith that the good ideas actually would triumph. He said things like, "I loathe the thick-fingered clowns we call the people. And if the people want to go to hell, I'll help them. That's my job." So, this is not someone who's idealistic about the ability of truth to triumph, but he does say that complete freedom for what he called "the thought we hate" is necessary to allow an unregulated marketplace of ideas or else violence will result. That is the dark but powerful vision of Justice Oliver Wendell Holmes.

[KAGAN]

When you look at First Amendment cases over our history, usually the speech is not speech that we love. You know, the great landmarks of First Amendment law mostly is of speech that we find wrong, maybe even a little bit crazy, possibly very harmful.

[NARRATOR]

Let's recap. In some of the early free speech cases, the Court ruled in favor of laws that criminalized criticizing the government – but over time some of the justices began to think differently.

Even though he wrote the opinion in the Schenck case and initially voted to uphold Debs's conviction in the Debs case, Justice Oliver Wendell Holmes, along with Justice Brandeis, would later dissent from decisions restricting free speech.

In *Abrams v. United States* – both justices dissent, and in Brandeis's *Whitney v. California* opinion – both justices began to envision a broader more robust understanding of free speech rights.