

Freedom of the Press in the United States

Compelling Question

How free is the freedom of the press in the United States?

Learning Objectives

- Students will be able to name key components of the First Amendment and some of the major freedoms it guarantees.
- Students will be able to summarize the importance of a free press in a democracy.
- Students will be able to define the essential connection between freedom of speech and freedom of the press.
- Students will be able to outline how freedom of the press can conflict with other needs or freedoms.
- Students will be able to explain why a free press can serve as a “watchdog” on behalf of the public’s interest.

Overview

This lesson will ask students to engage with landmark freedom of press case studies exploring how the Supreme Court has ruled on First Amendment issues and has tried to balance competing values in our democracy. In this lesson, after reviewing the text of the First Amendment, students will review the case summaries of *Near v. Minnesota*, *New York Times v. Sullivan*, and *New York Times v. The United States*. Students will watch videos, read transcripts, listen to recorded arguments, and complete individual research using the *Reporters Committee for Freedom of the Press*. Finally, using the *Reporters Committee for Freedom of the Press* website, case studies, and a hypothetical prompt, students will examine the role of the free press during a public health crisis.

Context

In response to the COVID-19 pandemic, the *Reporters Committee for Freedom of the Press* is outlining recommendations for journalists, legislators, and courts to ensure the press and public’s right of access to government information and proceedings is protected while entities take necessary steps to stop the spread of the coronavirus.

Freedom of the press in the United States is legally protected by the First Amendment to the United States Constitution. Nevertheless, freedom of the press in the United States is subject to certain restrictions, such as defamation law, a lack of protection for whistleblowers, barriers to information access and constraints caused by public hostility to journalists.

In 2018, the U.S. ranked 45th in the Reporters Without Borders Press Freedom Index. This is an overall measure of freedom available to the press, including a range of factors including government censorship, control over journalistic access, and whistleblower protections. The U.S.’s ranking fell from 20th in 2010 to 49th in 2015, before recovering to 41st in 2016.

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The United States has become a less safe place for journalists, and the threats they face are becoming the standard, according to a new report by an international press freedom organization.

Reporters Sans Frontières, or Reporters Without Borders, dropped the U.S. to No. 48 out of 180 on its annual World Press Freedom Index, three notches lower than its place last year. The move downgrades the country from a "satisfactory" place to work freely to a "problematic" one for journalists.

Ten journalists were physically attacked in 2019, and 46 since 2017. In January 2019, one reporter was punched in the face and her phone stolen, while interviewing voters in California.

In June 2018, five people were killed while working at the Capital Gazette newsroom in Annapolis, Md. The man accused of shooting them had threatened the publication for years leading up to the attack.

Resources

- Cornell Legal Institute Open Source, First Amendment: https://www.law.cornell.edu/constitution/first_amendment
- Colonial Williamsburg Thomas Jefferson Question: <https://www.youtube.com/watch?v=KVZD3NFZwH0>
- Facts of the case for: *Near v. Minnesota, NY Times v. United States, NY Times v. Sullivan* (provided)
- Quimbee *NY Times v. Sullivan*: <https://www.youtube.com/watch?v=jmxIHwh-0Jc>
- Quimbee *NY Times v. United States*: <https://www.youtube.com/watch?v=G3QU9R2BkFY>
- C-SPAN: Nixon Reaction to Pentagon Papers: <https://www.c-span.org/video/?444766-1/nixon-tapes-reaction-pentagon-papers>
- Trump article: <https://www.washingtonpost.com/news/worldviews/wp/2017/02/18/trump-called-the-news-media-an-enemy-of-the-american-people-heres-a-history-of-the-term/>
- NPR article: <https://www.npr.org/2019/04/18/714625907/the-u-s-now-ranks-as-a-problematic-place-for-journalists>
- *Optional* PowerPoint (provided)
- Oyez: <https://www.oyez.org/cases/1963/39>; <https://www.oyez.org/cases/1970/1873>; <https://www.oyez.org/cases/1963/39>
- Reporters Committee for Freedom of the Press: <https://www.rcfp.org/>

Activities

1. Review the First Amendment

- Read the first amendment and allow students to use Cornell's Legal Institute webpage on the First Amendment: https://www.law.cornell.edu/constitution/first_amendment
 - **Amendment I**
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

- Play ‘Colonial Williamsburg’ Thomas Jefferson’s Response to a Question about Freedom of the Press : <https://www.youtube.com/watch?v=KVZD3NFZwH0>
- Have students engage in a conversation based on the following prompt: Thomas Jefferson wrote, “Our liberty depends on the freedom of the press, and that cannot be limited without being lost.”
 - What do you think he meant? Do you agree with him? Do you think press freedoms should be absolute, or do you think they should have limits?

2. Explore how Freedom of the Press Was Threatened: *Jigsaw Classroom*



- Students will review the facts of the court cases with provided worksheets and media
 - NY Times v. Sullivan
 - NY Times v. United States
 - Near v. Minnesota
- Students will watch the following video clips:
 - **Quimbee *NY Times v. Sullivan*:** <https://www.youtube.com/watch?v=jmxiHwh-0Jc>
 - **Quimbee *NY Times v. United States*:** <https://www.youtube.com/watch?v=G3QU9R2BkFY>
 - **C-SPAN: Nixon Reaction to Pentagon Papers:** <http://landmarkcases.c-span.org/Case/25/New-York-Times-v-United-States>

- Depending on resources available, assign students into groups for discussion using the Jigsaw Classroom model: <https://www.jigsaw.org/>
- Each group member will become an expert on **one** of the Supreme Court Cases and keep in mind the following details: **facts of the cases, issue before the court, and the court ruling.**
- Group members will share their findings on their assigned Supreme Court case. This can be done via Blackboard, Google Classroom, email, video recordings, etc.



3. Assessment

- Read the following current events article, in which the president claims “the news media is the enemy of the American people” and describes the historical significance of the phrase itself:
<https://www.washingtonpost.com/news/worldviews/wp/2017/02/18/trump-called-the-news-media-an-enemy-of-the-american-people-heres-a-history-of-the-term/>
- Read the following article describing how the United States ranks in terms of free press globally: <https://www.npr.org/2019/04/18/714625907/the-u-s-now-ranks-as-a-problematic-place-for-journalists>
- As a group, have students discuss the two articles in groups while considering the question, “Does the United States Truly Guarantee Freedom of the Press?”
- Individually, they should write a short reflection on what they have learned about press freedoms, why those freedoms need to be protected, and if the United States upholds this portion of the First Amendment.
 - Both can be done via Blackboard, Google Classroom, email, video or audio recordings, etc.

Extension Activity

1. Review the Reporters Committee for Freedom of the Press Website: COVID-19

Have students apply their insights on the freedom of the press to our current events -- in the wake of COVID-19.

- Have students individually review the Reporters Committee for Freedom of the Press website (<https://www.rcfp.org/>). Read articles, review legal resources, learn key definitions and ask them to think about the role of the media during a global crisis.
- Hypothetical situation:
 - *The governor of Alabama is being criticized daily by journalists for, in their opinion, not responding quickly enough or effectively to the rapidly spreading virus, COVID-19. One journalist has been particularly outspoken. The governor, upset that his reputation is at stake given this news, takes the journalist to court for defamation.*
 - Using the NY Times v. Sullivan case, current events, and information from The Reporters Committee for Freedom of the Press about free press in the time of a pandemic: do you think this lawsuit would hold up in court? Why or why not?
 - Respond with a short reflection via Blackboard, Google Classroom, email, audio or video recording, etc.

Additional Resources:

- Oyez Oral Arguments for each Supreme Court Case: <https://www.oyez.org/cases/1963/39>; <https://www.oyez.org/cases/1970/1873>
- Iceberg Diagram Brainstorming Map for Extension Activity or Jigsaw: <https://www.facinghistory.org/resource-library/teaching-strategies/iceberg-diagrams>
- Big Paper Activity for Mapping Ideas: <https://www.facinghistory.org/resource-library/teaching-strategies/big-paper-silent-conversation>
- New York Times v. Sullivan, Federalist Society Video: <https://www.youtube.com/watch?v=QeZ1mFTtn8s>
- Frontline PBS Interview with Earl Caldwell of *Branzburg v. Hayes on the Black Panthers and the FBI*: <https://www.pbs.org/wgbh/pages/frontline/newswar/interviews/caldwell.html>

Near v. Minnesota (1931)

Background:

After its ratification and until the early Twentieth Century, the First Amendment protected citizens from federal government censorship. State governments, on the other hand, routinely censored newspapers.

In 1925, Minnesota passed a statute, known as a “gag law,” permitting the county attorney, the attorney general, or any citizen acting in behalf of the county attorney, to begin proceedings in district court for a temporary restraining order against the publication of any periodical thought to be “obscene, lewd, and lascivious” or “malicious, scandalous, and defamatory.” Then a judge, acting without a jury, could determine if the periodical should be permanently stopped from future publication.

Key Definitions:

Prior Restraint: The government censorship of speech before publication.

Injunction: A judicial order that restrains a person from beginning or continuing an action.

Facts: In 1925 Jay Near, an editor of a Minneapolis newspaper *The Saturday Press*, was stopped from publishing the paper on the basis of the Minnesota gag law. Near had regularly printed stories devoted to sensational news and “*exposé*” reports on police and government corruption in Minnesota.

The prosecutor, Floyd Olson, sought a permanent injunction against *The Saturday Press* on the grounds that it violated the law with its malicious, scandalous, and defamatory content. He received a temporary injunction after an initial hearing. At a subsequent formal hearing, Near was required to show cause for why he should not be permanently prevented from publishing the newspaper.

The Minnesota Supreme Court upheld both the temporary injunction and the subsequent permanent injunction. Near appealed to the U.S. Supreme Court.

Issue before the Court: Does a state law prohibiting the publication of certain material violate the free press provision of the First Amendment?

Court Ruling: In a 5-4 decision, the Court issued a strong prohibition against prior restraints or government censorship. According to the majority, government officials are not allowed to regulate speech before it reaches the public. Chief Justice Charles Hughes authored the majority opinion, holding:

This statute . . . raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion of state action.

In fact, said Chief Justice Hughes, "it is the chief purpose of the guaranty [of a free press] to prevent previous restraints upon publication." Chief Justice Hughes did admit that the ban on prior restraints was not unlimited. In some situations, such as when speech is obscene, incites violence, or reveals military secrets, the government might be able to justify a prior restraint.

Speaking for the four dissenters, Justice Pierce Butler argued that the decision would put unprecedented restrictions on states, which had traditionally used their police powers to promote public welfare. Prohibiting publication of scandalous or defamatory claims such as those allegedly published by *The Saturday Press* surely fell within this scope.

New York Times Co v. Sullivan (1964)

Background: Traditionally, defendants in a defamation case were required to prove that the statements they made were true. The outcome of this case puts the burden of proof on the plaintiff.

Key Definitions

Defamation: To make false and injurious statements against a person or party.

Libel: A published false statement that is damaging to a person's reputation; a written defamation.

Punitive damages: Awarded in addition to actual damages in certain circumstances. Punitive damages are considered punishment and are typically awarded at the court's discretion when the defendant's behavior is found to be especially harmful.

Facts: In 1960, *The New York Times* ran a full-page advertisement paid for by civil right activists. The ad openly criticized the police department in Montgomery, Alabama for its treatment of civil rights protestors. Most of the descriptions in the ad were accurate, but some were false. The police commissioner, L. B. Sullivan, sued *The New York Times* in an Alabama court. Sullivan argued that the ad had damaged his reputation, and he had been libeled. The Alabama court ruled in favor of Sullivan, finding that the newspaper ad falsely represented the police department and Sullivan. After losing an appeal in the Supreme Court of Alabama, *The New York Times* took its case to the U.S. Supreme Court arguing that the ad was not meant to hurt Sullivan's reputation and was protected under the First Amendment.

Issue before the Court: Do public officials have to prove “actual malice” before they can recover damages in defamation actions against persons criticizing their official conduct?

Court Ruling: The Court unanimously ruled in favor of the newspaper. The Court asserted America’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” Free and open debate about the conduct of public official, the Court stated, was more important than occasional, honest factual errors that might hurt or damage officials’ reputations. Justice William J. Brennan, writing for six-member majority of the Court, held:

“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

In his concurring opinion, Justice Hugo Black wrote,

“I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials...An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.”

New York Times Co. v. United States (1971)

Background: By the late 1960s and early 1970s, the American public had become increasingly hostile to the ongoing U.S. military intervention in Vietnam. In 1970, analyst **Daniel Ellsberg** leaked a top-secret history of U.S. involvement in Vietnam to *The New York Times*. *The New York Times* published a front-page story with the headline, “Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement.” The subject of that article and following articles was a 47-volume history of American involvement in Vietnam suggesting that President Lyndon Johnson (who had left office in 1969) had misled Congress and the American people about the extent of U.S. military action in Southeast Asia. The study, which was classified “Top Secret-Sensitive,” was based on documents from the Department of Defense, the CIA, and the Department of State. This document became known as the **Pentagon Papers**.

Key Definitions

Prior Restraint: The government censorship of speech before publication.

Injunction: A judicial order that restrains a person from beginning or continuing an action.

Facts: On June 13, 1971, *The New York Times* published the first chapter of the Pentagon Papers. The administration of President Richard Nixon claimed the publication violated the Espionage Act and issued federal injunctions against publishing the remainder of the Pentagon Papers to both *The New York Times* and *The Washington Post*. The federal government argued that the publication of the sensitive information contained in the study would compromise relationships with other nations and would pose a threat to national security. The Supreme Court heard argument on June 26th.

Issue before the Court: Did the Nixon administration violate the First Amendment by attempting to prevent the publication of the Pentagon Papers?

Court Ruling: On June 30, 1971, the U.S. Supreme Court issued a brief per curiam, or unsigned, order stating that the government had not met “the heavy burden of showing justification for the enforcement” of prior restraint. The Court ordered the immediate end of the injunctions against publication. All nine justices wrote separate opinions to explain their views.

In his concurring opinion, Justice Hugo Black’s emphasized the role that free press plays in a democracy:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a

free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

Justice William Brennan issued his own concurring opinion, noting:

. . . Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.

In his dissenting opinion, Chief Justice Warren Burger expressed his concern for how quickly the Court ruled on this issue:

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instantly . . .

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude, without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court.