

The People's Right to Know

Overview

In this lesson, students explore various Supreme Court rulings on the public's right to know information about the government's actions (aka the right to know). They will learn about the key concept of prior restraint in discussing freedom of the press. First, students read and discuss an article on the right to know. Then in small groups, students hold a moot court on *The Progressive* case, in which the government sought to stop a magazine from publishing an article on the hydrogen bomb.

Standards and Topics

- CCSS.ELA-LITERACY.SL.11-12.4 Present information, findings, and supporting evidence, conveying a clear and distinct perspective, such that listeners can follow the line of reasoning, alternative or opposing perspectives are addressed, and the organization, development, substance, and style are appropriate to purpose, audience, and a range of formal and informal tasks.
- CCSS.ELA-LITERACY.RH.11-12.2: Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.
- CCSS.ELA-LITERACY.RH.11-12.4: Determine the meaning of words and phrases as they are used in a text, including analyzing how an author uses and refines the meaning of a key term over the course of a text (e.g., how Madison defines *faction* in *Federalist* No. 10).

TOPICS: freedom of the press, prior restraint, U.S. Constitution, Pentagon Papers, media, censorship, First Amendment

Objectives

Students will be able to:

1. Define *prior restraint*.
2. Determine when it is appropriate, if ever, for the government to censor the press.
3. Decide a case of prior restraint and give reasons for their decision.

Materials

Handout A - The People's Right to Know (one per student)

Handout B1 - The H-Bomb Case: Lawyers for the U.S. Government (one for each attorney for the U.S. government)

Handout B2 - The H-Bomb Case: Lawyers for *The Progressive* (one for each attorney for *The Progressive*)

Handout B3 - The H-Bomb Case: Supreme Court Justices (one for each justice on the U.S. Supreme Court)

Procedure

I. Focus Discussion

Ask students: Is it important for people in a democracy to know what the government is doing? Hold a brief discussion.

- A. Accept any reasonable response. Students may answer: *No, this is a representative democracy, so we entrust the government to make decisions and take actions on our behalf. If we paid attention to everything the government did, we wouldn't have time for anything else, and the government would not be able to function due to constant interference.* Or students may answer: *Yes, if government isn't accountable for its actions, then this is no longer a democracy in which the people govern. Governments should not do illegal actions, and so the people have a right to know what the government is doing.*
- B. Explain that today, the class will learn about the limits of what government can do to prevent the public from obtaining information about what the government is doing.

II. Reading and Discussion

Ask students to read **Handout A: The People's Right to Know**. Conduct a class discussion using the **Writing & Discussion** questions.

1. Why do you think the Supreme Court has interpreted the First Amendment to ban censorship under most circumstances? In what circumstances, do you think censorship should be allowed?
2. Do you think the public should know everything any government is doing? Why or why not?
3. Should the Supreme Court's analysis in *Near v. Minnesota* about censoring military information in wartime apply to Chelsea Manning's case? Why or why not?
4. In your opinion, does the Constitution give the people a "right to know"? Cite at least three examples from the reading in your answer.

III. Activity: Moot Court -- The H-Bomb Case

Step 1. Remind students that the H-bomb case never reached the Supreme Court. Tell students that people have different opinions on what the court would have decided. Inform students that they are going to hold a moot court and decide the case. Write this question on the board: Should *The Progressive* be allowed to publish the H-bomb story? This is the question that justices must decide on and give reasons after hearing arguments from attorneys for each side in the case.

Step 2. Divide the class into triads. Assign each student in each group one of three roles: government lawyer, lawyer for *The Progressive*, and a Supreme Court justice. (Depending on your class size, you may need to have one or more groups of five. In each, there would be two students as government lawyers, two as lawyers for *The Progressive*, and one as a Supreme Court justice.)

Step 3. Regroup the class so that students can consult with one another while preparing for the moot court. Put government lawyers on one side of the room, lawyers for *The Progressive* on the

other, and Supreme Court justices in front. Distribute **Handout B1** to the government lawyers, **Handout B2** to the lawyers for *The Progressive*, and **Handout B3** to the justices. Tell the lawyers to think up their best arguments in addition to what is on their handout and the justices to think up questions to ask each side in addition to what is on their handout. Tell everyone to refer to the article to develop arguments and questions.

Step 4. Regroup into triads (and any groups of five) and begin the moot court. Tell government lawyers to present their cases first. Each side will have two minutes to present (in groups of five, each attorney will have one minute, but there are two per side). The justice can interrupt to ask questions.

Step 5. After both sides present, have the justices come to the front of the room to participate in a fishbowl activity. Justices deliberate in front of the class by discussing the arguments they heard. Justices share with each other the most persuasive and least persuasive arguments they heard and provide reasons for their opinions. After justices deliberate, ask them who will vote in favor of *The Progressive* magazine and who will vote in favor of the U.S. government.

Step 6. Poll the whole class:

- Who would vote in favor of *The Progressive*? Why?
- Who would vote in favor of the U.S. government? Why?
- What were the strongest arguments you heard for each side?
- Was there any argument you heard that caused you to change your mind about something? What was it that changed your mind?
- To the justices: Was it hard to make a decision in this case? Why or why not?

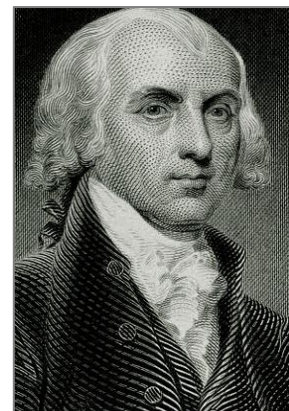
IV. Assessment

1. No longer in their role for the moot court, students write a one-paragraph answer to the following question: *When, if ever, should the government be able to censor the press?*
2. Students should refer to information in the reading and moot court activity to support their position.

The People's Right to Know

In 2009, U.S. Army intelligence analyst Chelsea Manning (then known as Bradley Manning) was assigned to a unit in Iraq where the U.S. was still fighting a war. In 2010, Manning leaked classified documents to the publishing organization WikiLeaks. The documents included a video of U.S. Army personnel shooting from a helicopter at a small group of mostly unarmed Iraqi civilians and international war correspondents. Twelve men were killed, including unarmed journalists, and two children were wounded. This video went viral. It stirred public controversy over U.S. involvement in the Iraq War.

Manning was later arrested and tried for violating the Espionage Act and other laws. She was convicted of 17 charges and sentenced to 35 years in federal prison. In 2017, President Barack Obama commuted her sentence to seven years so that she was released in May 2017. Manning's leak resulted in notoriety — and infamy — for WikiLeaks and its founder Julian Assange, who continued to publish leaked materials in the interest of the public's absolute right to know almost everything any government or powerful person is doing. But does the public have a right to know so much?



Bureau of Engraving and Printing

James Madison, fourth president of the United States, believed that democratic governance required an informed citizenry.

The First Amendment says, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." The words "right to know" are not mentioned in the First Amendment or anywhere else in the Constitution. But James Madison, the author of the First Amendment, recognized that a government of the people (what he called "popular government") needed information to reach the people ("popular information"). Without information, people couldn't make informed decisions. In Madison's words, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."

In its many rulings interpreting the First Amendment, the U.S. Supreme Court has recognized that a democratic society needs a free flow of information. In a series of cases, the court has interpreted the First Amendment to bar censorship except in extreme situations.

Vocabulary

classified documents (or classified information)(adj.): documents or information kept secret from public, usually for purposes of national security.

commute (v.) - to ease a punishment for a criminal conviction, usually by shortening a prison sentence.

Espionage Act (n.) - a law enacted in 1917 that prohibits interfering with U.S. war efforts and recruitment.

hacktivism (n.) - an informal term for the activities of activist groups that use technology to promote a political or social agenda.

libel (n.) - a published false statement that defames or harms someone's reputation.

prior restraint (n.) - government suppression of speech or expression before the speech occurs.

Near v. Minnesota

In 1931, the Supreme Court decided a landmark censorship case — *Near v. Minnesota*. Minnesota officials had shut down *The Saturday Press*, a weekly newspaper. Produced during Prohibition, the paper often made wild accusations about officials taking bribes to let liquor flow into the country. It also regularly included anti-Semitic diatribes about gangsters and officials. The newspaper upset many people. After nine issues, the authorities went to court to shut the paper down under a public nuisance law, which allows citizens to sue to stop activities that seem harmful or unsafe for the public. The court ordered the newspaper not to publish any more "malicious, scandalous and defamatory articles."

On appeal, the Supreme Court held unconstitutional the public nuisance law as applied in this case because it allowed a *prior restraint* on the press. The court declared that one of the main purposes of the First Amendment's freedom of the press was to prevent "previous restraints or censorship." It emphasized the importance of newspapers exposing official wrongdoing, especially in the 20th century, by which time the government had grown more complex and more difficult for citizens to monitor. The court recognized that anyone falsely accused by *The Saturday Press* could file a lawsuit for libel.

The court stated that prior restraint was inappropriate in this case, but it did not rule out censorship in all cases. It said, for example, that in wartime, no "one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops."

The Pentagon Papers

In 1971 during the Vietnam War, another prior restraint case arose. The *New York Times* had received top-secret government documents about the Vietnam War and started publishing excerpts. The documents, known as the "Pentagon Papers," were a 7,000-page history of America's involvement in Vietnam up to 1968. Members of the Defense Department had written the papers. One of the authors, Daniel Ellsberg, had grown disillusioned with the war and turned the documents over to the *Times*.

The government immediately went to court to stop publication. A federal judge in New York issued a temporary order for the *Times* to stop publishing the excerpts. Meanwhile, the *Washington Post* received copies of the Pentagon Papers and started publishing passages. A trial and an appeals court in Washington refused to issue an order stopping the *Post*. With such critical First Amendment and national security issues at stake, the case reached and was decided by the Supreme Court in two weeks. This process would normally take more than a year.

In a 6 – 3 decision in *New York Times Co. v. U.S.*, the court ruled that the government had not met the "heavy burden of showing justification" for censorship. Two justices felt that a prior restraint of the press should never be allowed. Four others took the position that prior restraint should be used only when publishing the information would *immediately and clearly harm* the security of the nation, which they did not believe would happen in this case. The three dissenters feared that publishing the Pentagon Papers could harm American soldiers fighting in Vietnam as well as prolong the war by making negotiations with the enemy more difficult.

The H-Bomb Case

A few years later in 1979, the government went to court again to censor a publication. *The Progressive*, a small-circulation magazine, was going to publish a story on how to make a hydrogen bomb, the most powerful weapon of mass destruction known to humans. Under the Atomic Energy Act, the federal government had for years classified as "restricted data" any information, regardless of source, about the design, manufacture, or use of atomic weapons.

With about 20 nations on the verge of developing nuclear weapons, the government had a strong interest that secret information not fall into foreign hands.

The Progressive article had begun as part of a series informing readers about nuclear weapons so they could better understand such public issues as the nuclear arms race and underground testing. When the author Howard Morland started researching, he ran into a wall of official secrecy. So he attempted to find what he could without government help. He spent months reading physics books and magazine articles in libraries and museums. He interviewed scientists and weapons experts. All the information for the article came from sources open to every citizen.

The U.S. government sued *The Progressive* in federal court. The government argued that the source of the information didn't matter. The Secretary of State warned that publishing the article would "substantially increase the risk that thermonuclear weapons would become available at an earlier date to those who do not have them now." Specifically, the government charged that the article would disclose the most effective way to trigger an H-bomb. *The Progressive* responded that scientists all over the world knew about the trigger, as Morland had studied information readily available.

The federal trial court ordered *The Progressive* not to print the article. The judge stated that he believed "publication of the Restricted Data in the . . . article will result in direct, immediate and irreparable damage to the United States" *The Progressive* appealed the order, but before the appeals court could hear the case, the government dropped it. Another publication had printed an article with much the same information. *The Progressive* ran its article, and the courts never decided whether prior restraint was constitutional in this case.

Wikileaks and the even more elusive "hacktivist" group Anonymous seem to bypass any consideration of prior restraint. They are private entities that publish leaked information often before the government can even know it has been leaked. This leaves the courts to handle matters after the fact through criminal prosecution, as in Manning's case, or through defamation lawsuits by those whose private information may be exposed. But by the time court proceedings begin, the public already knows a lot.

Writing & Discussion

1. Why do you think the Supreme Court has interpreted the First Amendment to ban censorship under most circumstances? In what circumstances, do you think censorship should be allowed?
2. Do you think the public should know everything any government is doing? Why or why not?
3. Should the Supreme Court's analysis in *Near v. Minnesota* about censoring military information in wartime apply to Chelsea Manning's case? Why or why not?
4. In your opinion, does the Constitution give the people a "right to know"? Cite at least three examples from the reading in your answer.

The H-Bomb Case: Lawyers for the U.S. Government

You are an attorney for the U.S. government. The facts of this case are stated in “The H-Bomb Case” section on Handout A (“The People’s Right to Know”). In addition, you know that the Atomic Energy Act prohibited information to be published that was deemed “born secret.” That means that any information related to the development of nuclear weapons was automatically classified, or secret. The government partly intended the born-secret doctrine to prevent non-nuclear nations in the world from acquiring the powerful hydrogen bomb. The author Howard Morland claimed, however, that the born-secret doctrine was an unconstitutional prior restraint after *Near v. Minnesota*. “If you related a dream about nuclear weapons,” he wrote, “you were breaking the law.”

The issue that the court must decide in this case is this: Should *The Progressive* be allowed to publish the H-bomb story?

As lawyers for the government, your answer to this question is NO. You need to develop arguments in support of your answer. For example, one argument you can make is that the born-secret doctrine is intended to prevent non-nuclear nations in the world from acquiring the powerful hydrogen bomb.

Come up with at least two other arguments and have reasons ready to explain those arguments using information from “The People’s Right to Know.”

The H-Bomb Case: Lawyers for *The Progressive*

You are an attorney for *The Progressive* magazine. The facts of this case are stated in “The H-Bomb Case” section on Handout A (“The People’s Right to Know”). In addition, you know that the Atomic Energy Act prohibited information to be published that was deemed “born secret.” That means that any information related to the development of nuclear weapons was automatically classified, or secret. The government partly intended the born-secret doctrine to prevent non-nuclear nations in the world from acquiring the powerful hydrogen bomb. The author Howard Morland claimed, however, that the born-secret doctrine was an unconstitutional prior restraint after *Near v. Minnesota*. “If you related a dream about nuclear weapons,” he wrote, “you were breaking the law.”

The issue that the court must decide in this case is this: Should *The Progressive* be allowed to publish the H-bomb story?

As lawyers for *The Progressive*, your answer to this question is YES. You need to develop arguments in support of your answer. For example, one argument you can make is that the born-secret doctrine was an unconstitutional prior restraint after *Near v. Minnesota*.

Come up with at least two other arguments and have reasons ready to explain those arguments using information from “The People’s Right to Know.”

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins or other markings on the paper.

The H-Bomb Case: Supreme Court Justices

You are a Supreme Court justice. The facts of this case are stated in “The H-Bomb Case” section on Handout A (“The People’s Right to Know”). In addition, you know that the Atomic Energy Act prohibited information to be published that was deemed “born secret.” That means that any information related to the development of nuclear weapons was automatically classified, or secret. The government partly intended the born-secret doctrine to prevent non-nuclear nations in the world from acquiring the powerful hydrogen bomb. The author Howard Morland claimed, however, that the born-secret doctrine was an unconstitutional prior restraint after *Near v. Minnesota*. “If you related a dream about nuclear weapons,” he wrote, “you were breaking the law.”

The issue that you must decide in this case is this: Should *The Progressive* be allowed to publish the H-bomb story?

As a Supreme Court justice, your answer to this question is either YES or NO. You need to develop questions to ask each side that will argue in front of you. For example, one you could ask both sides is this: When, if ever, should the government censor the press?

Come up with at least two other questions for one or both sides using information from “The People’s Right to Know.”

[illegible]