

Prior Restraint

What is Prior Restraint?

Free expression is an important part of our U.S. democracy. Thomas Jefferson once said: “Our liberty depends on freedom of the press, and that cannot be limited without being lost.”¹ Prior restraint limits this right to free speech and press and censors speech protected by the Constitution.

Prior Restraint is a form of censorship where speech or expression is stopped before it occurs.² For student journalists, prior restraint happens when a school administrator limits or bans student speech from being published. This usually happens after an administrator reviews the student journalist’s writing (see page on Prior Review) and decides that the material will not be published, or that parts of it have to be removed before it can be published.

One of the earliest and most famous Supreme Court cases that talks about prior restraint is *Near v. Minnesota* (1931).³ In the *Near* case, the future governor of Minnesota tried to stop the publication of an independent newspaper that had printed articles that were critical of Minneapolis city officials, including the future governor. The future governor argued that this newspaper’s content was breaking the law. A Minnesota state court agreed and said that the paper could no longer be published. However, the Supreme Court reached the opposite conclusion, finding that the government **cannot** restrict speech before it is published, even if what is being published may turn out to be illegal. *Near v. Minnesota* protected our freedom of the press. This case, along with others, asserts that prior restraint is an unconstitutional practice which must be avoided.

Another famous Supreme Court decision about prior restraint involved a lawsuit by President Richard Nixon’s administration to stop the *New York Times* and *The Washington Post* from publishing U.S. Defense Department documents (the “Pentagon Papers”) that described the history of United States activities in Vietnam.⁴ While President Nixon’s administration argued that publishing these documents would threaten national security, the Court found that the government did not meet its burden to show that the security risk was high enough to justify blocking publication. As a result, the *New York Times* and *The Washington Post* were permitted to publicly share the “Pentagon Papers” by printing parts of them, and describing other parts, in the newspaper.

Although *Near v. Minnesota* was decided back in 1931 and the “Pentagon Papers” case was decided in 1971, prior restraint is still a topic that’s talked about, and litigated, today. More recently, in 2005, the Supreme Court said that banning all future speech about a public figure is a form of prior restraint and is therefore unconstitutional.⁵ In *Tory v. Cochran*, attorney Johnnie Cochran sued his former client, Ulysses Tory, for libel and invasion of privacy. The trial court ordered that Tory could never again engage in speech about Cochran, but on appeal, the Supreme Court reversed this holding, emphasizing that prior

¹ See Thomas Jefferson, Quotes by and about Thomas Jefferson: Extract from Thomas Jefferson to James Currie (Jan. 28-29, 1786), <https://tjrs.monticello.org/letter/2141>.

² See Daniel Baracskey, The First Amendment Encyclopedia: Prior Restraint (2009), <https://www.mtsu.edu/first-amendment/article/1009/prior-restraint>.

³ See *Near v. Minn.*, 283 U.S. 697, 733 (1931) (“every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint”).

⁴ See *New York Times Co. v. U.S.*, 403 U.S. 713 (1971).

⁵ See *Tory v. Cochran*, 544 U.S. 734 (2005).

restraint should not be tolerated because it violates First Amendment rights.⁶ Additionally, in 2020, courts once again prevented prior restraint by allowing the publication of two books that included insiders' critiques of former President Donald Trump and his administration: one by former national security advisor John Bolton, and one by President Trump's niece, Mary Trump.⁷

If Prior Restraint is unconstitutional, why does it happen in schools?

Although prior restraint is unconstitutional outside of the school context, the Supreme Court allows for some prior restraint in schools.

In *Hazelwood School District v. Kuhlmeier* (1988), the Supreme Court said that school administrators are allowed to censor student speech in school-sponsored forums, such as school media or a school play, as long as the administrators have a valid educational reason (i.e., a "legitimate pedagogical concern") for doing so.⁸ Courts give school officials a lot of leeway in deciding what amounts to a valid educational reason. This means that students who work on school-sponsored newspapers, literary magazines, yearbooks, and other forms of school media may have their speech restricted by school administrators before publication without creating a First Amendment violation, if the restriction has a valid educational reason. This also means that school officials should not censor a student journalist for subjective, non-educational reasons such as dislike or discomfort with the subject matter that the student is writing about or the viewpoint that the student is expressing.

Prior restraint can happen in a couple of different ways. Administrators might say that a certain topic is completely off limits for student journalists to write about. Or, administrators might review material that has already been written and refuse to publish it. However, state and local governments, as well as school districts themselves, are free to put in place laws or policies that prohibit prior restraint of student journalism in school-sponsored media. There are currently fourteen states with a law on the books that aims to give student journalists the freedom to publish what they choose: California, Massachusetts, Iowa, Colorado, Kansas, Arkansas, Oregon, North Dakota, Maryland, Rhode Island, Illinois, Washington, Vermont.⁹ And in 2021, the New Jersey legislature passed a similar law that is waiting for a signature by the governor.¹⁰

What should you do if your school bans the publication of your work?

If you have experienced censorship or other forms of prior restraint in your school, you can ask your school officials to tell you what, if any, valid educational reason they have for prohibiting publication.

You can also remind them that if they are allowing publication of speech on a particular topic, they must allow for publication of *all* viewpoints on that topic – not just the viewpoints that the school officials

⁶ *Id.* at 738 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973)).

⁷ See Anjali Berdia, *Trump's efforts to block publication of books highlights concerns about prior restraint orders*, REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS (July 30, 2020), available at: <https://www.rcfp.org/rcfp-fights-prior-restraint-orders/>.

⁸ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

⁹ See *New Voices*, STUDENT PRESS LAW CENTER, available at <https://splc.org/new-voices/>.

¹⁰ See *New Voices in New Jersey*, STUDENT PRESS LAW CENTER, available at <https://splc.org/?s=new+jersey+new+voices>.

agree with or endorse. This is because the First Amendment does not allow the government (in this case school officials) to suppress speech based on the viewpoint expressed. So, for example, if the school paper has published an article on why it's a good thing that marijuana use is illegal, school officials could not then later refuse to publish an article on why marijuana use should be legalized.

Additionally, if you don't already have a teacher-adviser, you may want to find a teacher at your school who is willing to supervise you and your classmates in developing media content that meets ethical and professional journalism standards. Schools will be more likely to publish your work when it meets these professional standards. Bear in mind, teacher-advisers who stand up for students against prior restraint by school officials can also face negative employment consequences, like a bad performance evaluation, disciplinary action, or even termination. This is why, as mentioned above, laws intended to protect freedom of speech and press in the high school context are so important. In the fourteen states that have implemented these laws, students – and in some states, advisers - benefit from the protection they ensure. To learn more about the national “New Voices” movement visit <https://splc.org/new-voices/>, as well as “Georgia New Voices” at <https://www.ugagspa.org/new-voices-ga>.

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