# FOTP\_Part 1.mp3

**Archival from case:** [00:00:01] The case, of course, raises important.

[00:00:05] Difficult problems about the constitutional right of free speech and free press.

**Hannah McCarthy:** [00:00:15] June 13th, 1971, New York Times subscribers wake up to a story about U.S. entanglement in Vietnam. Now, at this point, we've been involved in the Vietnam War for about a decade.

[00:00:27] It was the first televised war, the first time Americans could witness the violence in real time.

**Archival from Vietnam War:** [00:00:33] Someone dead over there, Sergeant.

[00:00:35] Where? Hit in the crater, sir. This is the worst way to go, everyone agrees.

**Hannah McCarthy:** [00:00:42] And this New York Times article reveals that the Pentagon has done a study into three decades worth of U.S. involvement with Vietnam.

**Archival from case:** [00:00:49] On Monday, the attorney general sent a telegram to The New York Times asking them to stop and to return the document. The New York Times refused.

**Nick Capodice:** [00:00:59] Oh, [00:01:00] the Pentagon Papers.

**Hannah McCarthy:** [00:01:01] Yeah. The infamous Pentagon Papers, which revealed that the executive branch had lied to both Congress and the American people about the extent of its involvement in Southeast Asia.

[00:01:13] The report was leaked in The New York Times, wrote about it and published some of its contents.

[00:01:18] The attorney general is like, you can't do that. You have to give those papers back and stop writing about them on time said no.

**Archival from case:** [00:01:25] And on Tuesday, the United States uh started this suit.

**Hannah McCarthy:** [00:01:31] You're listening to Civics 101. I'm Hannah McCarthy.

**Nick Capodice:** [00:01:33] I'm Nick Capodice.

**Hannah McCarthy:** [00:01:34] And today we are talking about the civilian job that was so important to our framers, they enshrined it in the Bill of Rights, the free press, the very thing that hung in the balance of this Pentagon Papers case.

**Nick Capodice:** [00:01:48] Hold on before we take a step further. And maybe this is glaringly obvious to everyone, but what is the press?

**Hannah McCarthy:** [00:01:56] The press is a little hard to define these days, [00:02:00] in part because anyone can publish or broadcast anything online. But ideally, the press are people who seek out research and verify the truth and then share that truth with others, people who work for newspapers, radio stations, magazines and television networks, people who learn as much as possible about a subject and then pass all of that information on to news consumers. So those are, you know, readers, listeners and viewers who want information about the country.

**Nick Capodice:** [00:02:33] Ok, take me back to the Pentagon Papers.

**Hannah McCarthy:** [00:02:36] All right. The New York Times says, no, we are not giving these papers up and we are going to keep writing about them. It is our First Amendment right.

[00:02:44] This case went from district court to the Supreme Court in 12 days.

**Nick Capodice:** [00:02:49] What was the United States arguing in the case?

**Archival from case:** [00:02:52] On the claim, as I understand it, that the disclosure of this information would result in an immediate grave threat [00:03:00] to the security of the United States. However, it was acquired and however it's classified.

[00:03:05] Yes, Mr. Justice.

**Nick Capodice:** [00:03:06] An immediate grave threat to the security of the United States.

[00:03:10] That is something I feel like we hear a lot when it comes to executive privilege, that the president can keep certain conversations and events private because they're protecting national security.

**Hannah McCarthy:** [00:03:21] Which is exactly what the president was claiming in this case.

**Melissa Wasser:** [00:03:25] President Nixon claimed that he had executive authority to basically force the Times to not publish this classified information. And so the court had to kind of wrestle with the question of whether the constitutional freedom of the press by the First Amendment was less of a need than the need of President Nixon in the executive branch to maintain secrecy.

**Hannah McCarthy:** [00:03:53] This is Melissa Wasser.

**Melissa Wasser:** [00:03:54] I am a policy analyst for the Reporters Committee for Freedom of the Press.

**Hannah McCarthy:** [00:03:58] Nixon claims he can [00:04:00] basically suspend the Times' his First Amendment right to freedom of the press.

**Melissa Wasser:** [00:04:05] And that dealt with what's called a prior restraint.

[00:04:09] And so basically, the court said if you want to exercise a prior restraint on information, you want to stop it before it comes out. If you want to exercise that prior restraint, you have to make sure that there's evidence that you show that by publishing that information would cause a grave and irreparable danger.

**Nick Capodice:** [00:04:30] Prior restraint, by the way, means preventing somebody from publishing or saying something. So in this case, preventing The New York Times from continuing to publish about the Pentagon Papers. And also, I want to point out that grave and irreparable danger, it's not anywhere in the Constitution. That idea comes from Schenck v United States, a 1919 Supreme Court case that established that First Amendment rights could be restrained, but only and this is a big but only if their expression resulted in a, quote, clear [00:05:00] and present danger to the country.

**Hannah McCarthy:** [00:05:03] And in this case, New York Times, the United States, the court ruled that it was on the Nixon administration to show strong evidence of that clear and present danger.

[00:05:14] And that it had not sufficiently done so.

**Melissa Wasser:** [00:05:18] And so at least in that case, the Supreme Court held that The New York Times had the right to print the materials, and that's how we got the Pentagon Papers out into the world.

**Interview with NYT post-case:** [00:05:28] Well, my reaction was very simply one of joy, one of delight, and one of the now we'll go back to business as normal

[00:05:37] at the Times.

**Hannah McCarthy:** [00:05:40] The important thing to take from this case is that the Supreme Court really came at it from a strong defense of the freedom of the press clause like they can. I just have you read this quote from Justice Hugo Black's opinion?

**Nick Capodice:** [00:05:53] Sure let me try my best Hugo Black here...

[00:05:56] The press was to serve the governed, not the governors. The [00:06:00] 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 bear the secrets of government and inform the people.

[00:06:14] So Justice Black makes no buts about it does he, the press needs to be protected.

**Hannah McCarthy:** [00:06:18] And he gives us the reason why, he says it right there in the opinion, the press was protected to expose the secrets of government and inform the people. If you think about the checks and balances that keep everybody honest and on track in U.S. government, the press acts as this additional check from the outside.

**Melissa Wasser:** [00:06:39] It's up to the press to be that accountability measure to keep the government transparent and make sure that people are always aware of what the government does. And so, I mean, the press is so vitally important, especially today, when there's been a lot of protests around racial justice. There's [00:07:00] been a full pandemic that we're currently living and working in. And people want information. People want to know what Congress does and how that affects them, especially when it comes to additional unemployment benefits or, you know, the stimulus check in the first round of the Cares Act, you know, people were really concerned.

**Hannah McCarthy:** [00:07:19] We know what we know about the daily workings of government because reporters ask questions, they investigate. They track bills and budgets. They keep a finger on the pulse of government, and then they pass it on to the people.

**Nick Capodice:** [00:07:34] I think we should point out to Hannah that a good journalist or news organization doesn't just hear about something and pass it on. They do their research. They make sure it's true before they share it. And if they can't verify it, they don't share it. And if it doesn't serve their audience, they don't put it out there.

**Hannah McCarthy:** [00:07:53] Yeah, that's one important thing about the Pentagon Papers to The New York Times spent weeks reading [00:08:00] that report before they decided what were the most necessary and responsible pieces of information to share with the public. They didn't just release the whole thing without context at a much lower stakes level. When I was making this episode, I didn't just speak with people and share what they said. I researched freedom of the press before and after these interviews. I even researched what our guests talked about to make sure that I could talk about it in a way that made sense. And I fact checked.

[00:08:30] And this episode went through multiple rounds of editing before it went out into the world,

**Nick Capodice:** [00:08:34] Because the whole point of journalism ideally is that it's serving the people. And again, I say ideally because a lot of the information that's out there is not researched, it's not fact checked or edited, but in a government that's supposed to be by and for the people, access to true information about the government is a necessity.

[00:08:54] Thus, the freedom of the press clause.

**Hannah McCarthy:** [00:08:57] Which is just sitting there in the middle of the First [00:09:00] Amendment right, it goes, 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. The press both have a First Amendment right and disseminate the information that allows us to exercise our First Amendment rights before we go any further.

**Nick Capodice:** [00:09:31] And I think we should point out that you and I are beholden to this.

[00:09:37] We are members of the press, and it's not just about rights, it's about responsibility. We are supposed to find and tell the truth so people who listen to us know the truth.

**Michael Luo:** [00:09:50] So. So the Hutchins' Commission report is kind of considered responsible for the idea of social responsibility as [00:10:00] a notion in the press.

**Hannah McCarthy:** [00:10:02] This is Michael Luo.

[00:10:03] I'm the editor of newyorker.com, which means I run the online editorial operation of The New Yorker. And when I can, I try to write. Usually about politics and media.

**Hannah McCarthy:** [00:10:18] Michael recently wrote about this thing called the Hutchins' Commission.

**Michael Luo:** [00:10:21] Which was a group that met in the 1940s and produced this little book called A Free and Responsible Press. And one of the things that they talked about in the book that I think is a good summary of the importance of the press and democracy is it talks about how a free society depends on the consumption of ideas and the press is an essential component of that traffic of ideas.

**Hannah McCarthy:** [00:10:50] Now, this is a moment in history where publishers were huge, powerful entities and many members of the public viewed the press as self-interested [00:11:00] and corporate, you know, just trying to commercialize and get bigger. And in the 1940s, fascism was booming in Europe and Americans feared that it could infiltrate the U.S.. So you've got this existential threat and mistrust of the information being spread to the American public. So the publisher of Time and Life Magazines commissioned this inquiry into how the media can best serve democracy. This group gets together to figure out whether the press is doing its job of keeping everyone informed in order to keep democracy alive.

**Michael Luo:** [00:11:35] They kind of laid out a bunch of key functions of the press, things like providing a daily accurate account of the of the day's events, providing a forum for common discussion, being accessible to everyone, providing a representative picture of society. And just across the board on all of these things, [00:12:00] they were just saying that the press fell short.

**Nick Capodice:** [00:12:03] That doesn't sound too dissimilar to today. People are worried now about democracy being threatened and people are dissatisfied with the press, which is part of the reason why Michael wrote about this 1940s report today in 2020.

[00:12:16] And a lot of what the commission found wrong with the press are things that we still hear today.

**Michael Luo:** [00:12:22] A lot of the things actually they found sound familiar today, like they blame sort of the rush to scoops and sort of novelty, they called it. They blamed business interests. They blamed being the press, being vulnerable to manipulation and things like that.

**Hannah McCarthy:** [00:12:38] At the end of the book, the commission offered some solutions and the focus was on social responsibility. The press had a lot of power, so they had to wield that properly, give citizens the information they needed to foster a healthy, strong democracy.

**Michael Luo:** [00:12:54] The ultimate conclusion and the one that the one that I think is [00:13:00] still really relevant today was that it called upon the press to that the burden was upon the press itself to fix itself and to improve itself.

**Nick Capodice:** [00:13:08] I'm always down with self-improvement, but how does the press fix itself, especially when good journalism is often drowned out by a flood of misinformation?

**Michael Luo:** [00:13:18] You know, we're kind of swimming in information. We're constantly encountering information. A lot of people actually do not on social media, not go on looking for news, but they kind of bump into it. And the question is like, how much news can you actually absorb like that?

**Hannah McCarthy:** [00:13:33] Michael has thought a lot about what would help us be more informed citizens. And for him, one potential answer is journalism with more context that goes more in-depth and that is consumed more slowly, which is tricky. Right, because how do you convince people to basically eat their vegetables when there's so much candy out there? How do you convince news organizations to grow vegetables when candy is [00:14:00] the thing that sells and selling is what supports the news?

**Nick Capodice:** [00:14:05] First off, roasting vegetables instead of boiling them. That's a good start, but really making them more enticing.

**Hannah McCarthy:** [00:14:14] What I find really fascinating about all of this is that our understanding of freedom of the press and how it's tangled up in social responsibility, that is something that happened over centuries of journalism. We can't know for sure what the framers meant. Right. But we created a very weighty freedom and obligation out of that clause in the Bill of Rights. I want to introduce you to one more guest here.

**Erin Coyle:** [00:14:37] Hello, I'm Erin Coyle. I am an associate professor at Temple University in Philadelphia. And I teach journalism, law and ethics and journalism, writing and reporting. My research focuses on freedom of expression.

**Hannah McCarthy:** [00:14:54] I asked Erin, you know, we know, for example, what Justice Hugo Black thinks [00:15:00] the framers meant by not abridging the freedom of the press. But what did the framers say they meant?

**Erin Coyle:** [00:15:05] They were probably thinking more about the word liberty and freedom at that time. From what my reading shows. And the press was different then than it is now. So scholarship really indicates that at that time they were thinking about printers and there was a history of having government censorship of printers, meaning that to be able to print and distribute information, people would have to get permission from some government authority to be able to print and distribute the information.

**Hannah McCarthy:** [00:15:47] And that, of course, is an easy way to control what citizens are allowed to learn. If the government can say something cannot be printed, then it cannot be distributed. And that means any number of things [00:16:00] will never come to be known by the public.

**Nick Capodice:** [00:16:02] It was actually a pretty vulnerable choice for the framers to make when you think about it, preventing ostensibly for all time the people in charge from limiting what gets said about them. But then again, those same men had recently printed an attack on their own government by way of the Declaration of Independence when they wrote this amendment.

[00:16:20] So our nation really began with a form of press freedom.

**Hannah McCarthy:** [00:16:24] That's both really important and pretty basic freedom of the press and journalism means a lot more today. It means journalists are protected from certain retaliation. If they report on the government, it means a reporter can request information from and about the executive branch. It even means that a news team should be allowed to determine what they report on without the business interests of their organization getting in the way. I asked Erin where all of that came from.

**Erin Coyle:** [00:16:56] So some of this comes from journalists. The notion of [00:17:00] independence and financial independence comes from journalists. We can't have something like that coming from the government because of the First Amendment. But the discussion of press freedom is really different today than it could have been in the eighteen hundreds. For one thing, the Supreme Court really addressed press freedom as something that could be applied to protect journalists against state laws as well as federal laws.

[00:17:35] For the first time in the early 1960s.

**Nick Capodice:** [00:17:38] It seems like, as freedom of the press has been strengthened in the courts, so too has the responsibility of the press to exercise itself responsibly. Like, if you're demanding access and protection, you have to do it in part on the basis of serving democracy.

**Hannah McCarthy:** [00:17:58] I talked earlier about journalism [00:18:00] being about not simply publishing or sharing a piece of information, but about sitting with that information, making judgment calls, about whether it's a helpful, safe thing to share journalism, freedom of the press, social responsibility to support an informed citizenry. It's not just about what we do print or broadcast.

**Erin Coyle:** [00:18:22] It's also about what we don't is one point that isn't often talked about with New York Times versus the United States.

[00:18:32] Well, journalists from The New York Times took weeks to carefully go through those documents and took their time to find out are these valid? Is this real information? And they didn't just put everything online like we would today. They didn't print an entire classified report. They [00:19:00] selected the information that was most important for information. No, journalists make really important decisions and we trust journalists to be working for the public's interest. And there are times that means that we have to consider people's safety.

**Hannah McCarthy:** [00:19:25] I think my biggest takeaway from all of these discussions is that the press is powerful.

[00:19:30] The framers made the press powerful by giving it the freedom to print without requiring permission. And the press and the courts over time made the press even more powerful. And such as that, power grew, so did our responsibility.

[00:19:45] We taught our readers, listeners and viewers to expect certain things from us. So what does that mean in an era of widespread protest, fake news and a worldwide pandemic? [00:20:00] Check out part two of freedom of the press to see if I can rise to that responsibility.

[00:20:19] This episode of Civics 101 was produced by me, Hannah McCarthy, with Nick Capodice. Our team includes Jacqui Fulton. Erika Janik exercises a lot of prior restraint when it comes to dealing with our shenanigans. We have long-planned to find a way to answer listener questions directly, and we have finally done it. We've got a new thing called Ask Civics 101. It's broadcast here in New Hampshire every Monday and goes into our podcast feed every Friday. It's simple, you email or tweet us a question and we find the answers and make you an episode. We're all just trying to figure out how things work around here. Civics 101 is supported in part by the [00:21:00] Corporation for Public Broadcasting and is a production of NHPR, New Hampshire Public Radio.