

HISTORICAL RECORD OF THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES

by

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“On every question of the construction of the Constitution, let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.”

Thomas Jefferson,

Letter to William Johnson, Supreme Court Justice (1823)

It is instructive to review the history of the Right to Petition in order to determine its meaning.

The following are the highlights of the historical record of the Right to Petition:

Chapter 61 of the Magna Carta (the cradle of Liberty and Freedom from wrongful government, signed at a time when King John was sovereign) reads in relevant part:

“ 61. Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, **to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter**, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, **or shall have broken any one of the articles of this peace or of this security**, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, **petition to have that transgression redressed without delay**. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) **within forty days**, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall, **together with the community of the whole realm**, distrain and distress us in all possible ways, namely, by **seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit**, saving harmless our own person, and the persons of our queen and children; and **when redress has been obtained, they shall resume their old relations towards us...**” (emphasis added by the People).

Chapter 61 was a procedural vehicle for enforcing the rest of the Charter. It spells out the Rights of the People and the obligations of the Government, and the procedural steps to be taken by the People and the King, in the event of a violation by the King of any provision of that Charter: the People were to transmit a Petition for a Redress of their Grievances; the King had 40 days to respond; if the King failed to respond in 40 days, the People could non-violently retain their money or violence could be **legally** employed against the King until he Redressed the alleged Grievances.¹

The 1689 Declaration of Rights proclaimed, “[I]t is the Right of the subjects to petition the King, and all commitments and prosecutions for such petitioning is illegal.” This was obviously a basis

¹ See Magna Carta Chapter 61. See also William Sharp McKechnie, Magna Carta 468-77 (2nd ed. 1914)

of the “shall make no law abridging the right to petition government for a redress of grievances” provision of our Bill of Rights.

In 1774, the same Congress that adopted the Declaration of Independence unanimously adopted an Act in which they gave meaning to the People’s Right to Petition for Redress of Grievances and the Right of enforcement as they spoke about the People’s “Great Rights.” Quoting:

“If money is wanted by rulers who have in any manner oppressed the People, they may retain it until their grievances are redressed, and thus peaceably procure relief, without trusting to despised petitions or disturbing the public tranquility.” "Continental Congress To The Inhabitants Of The Province Of Quebec." Journals of the Continental Congress 1774, Journals 1: 105-13.

In 1775, just prior to drafting the Declaration of Independence, Jefferson gave further meaning to the People’s Right to Petition for Redress of Grievances and the Right of enforcement. Quoting:

“The privilege of giving or withholding our moneys is an important barrier against the undue exertion of prerogative which if left altogether without control may be exercised to our great oppression; and all history shows how efficacious its intercession for redress of grievances and reestablishment of rights, an hour improvident would be the surrender of so powerful a mediator.” Thomas Jefferson: Reply to Lord North, 1775. Papers 1:225.

In 1776, the Declaration of Independence was adopted by the Continental Congress. The bulk of the document is a listing of the Grievances the People had against a Government that had been in place for 150 years. The final Grievance on the list is referred to by scholars as the “capstone” Grievance. The capstone Grievance was the ultimate Grievance, the Grievance that prevented Redress of these other Grievances, the Grievance that caused the People to non-violently withdraw their support and allegiance to the Government, and the Grievance that eventually justified War against the King, morally and legally. Thus, the Congress gave further meaning to the People’s Right to Petition for Redress of Grievances and the Right of enforcement. Quoting the Capstone Grievance:

“In every stage of these Oppressions We have Petitioned for Redress in the most humble terms. Our repeated Petitions have been answered only by with repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is thus unfit to be the ruler of a free people....We, therefore...declare, That these United Colonies...are Absolved from all Allegiance to the British Crown...” ***Declaration of Independence, 1776***

Though the Rights to Popular Sovereignty and its “protector” Right, the Right of Petition for Redress have become somewhat forgotten, they took shape early on by government’s *response* to Petitions for Redress of Grievances.²

² See A SHORT HISTORY OF THE RIGHT TO PETITION GOVERNMENT FOR THE REDRESS OF GRIEVANCES, Stephen A. Higginson, 96 Yale L.J. 142(November, 1986); "SHALL MAKE NO LAW ABRIDGING . . .": AN ANALYSIS OF THE NEGLECTED, BUT NEARLY ABSOLUTE, RIGHT OF PETITION, Norman B. Smith, 54 U. Cin. L. Rev. 1153 (1986); "LIBELOUS" PETITIONS FOR REDRESS OF GRIEVANCES -- BAD HISTORIOGRAPHY MAKES WORSE LAW, Eric Schnapper, 74 Iowa L. Rev. 303 (January 1989); THE BILL OF RIGHTS AS A CONSTITUTION, Akhil Reed Amar, 100 Yale L.J. 1131 (March, 1991); NOTE: A PETITION CLAUSE ANALYSIS OF SUITS AGAINST THE GOVERNMENT: IMPLICATIONS FOR RULE 11 SANCTIONS, 106 Harv. L. Rev. 1111 (MARCH, 1993); SOVEREIGN IMMUNITY AND THE RIGHT TO PETITION: TOWARD A FIRST AMENDMENT RIGHT TO PURSUE JUDICIAL CLAIMS AGAINST THE GOVERNMENT, James E. Pfander, 91 Nw. U.L. Rev. 899 (Spring 1997); THE VESTIGIAL CONSTITUTION: THE

The Right to Petition is a distinctive, substantive Right, from which other substantive First Amendment Rights were *derived*. The Rights to free speech, press and assembly originated as *derivative* Rights insofar as they were necessary to protect the *preexisting* Right to Petition. Petitioning, as a way of holding government accountable to natural Rights, originated in England in the 11th century³ and gained recognition as a Right in the mid 17th century.⁴ Free speech Rights first developed because members of Parliament needed to discuss freely the Petitions they received.⁵ Publications reporting Petitions were the first to receive protection from the frequent prosecutions against the press for seditious libel.⁶ Public meetings to prepare Petitions led to recognition of the Right of Public Assembly.⁷

In addition, the Right to Petition was widely accorded greater importance than the Rights of free expression. For instance, in the 18th century, the House of Commons,⁸ the American Colonies,⁹ and the first Continental Congress¹⁰ gave official recognition to the Right to Petition, but not to the Rights of Free Speech or of the Press.¹¹

The historical record shows that the Framers and ratifiers of the First Amendment also understood the Petition Right as distinct from the Rights of free expression. In his original proposed draft of the Bill of Rights, Madison listed the Right to Petition and the Rights to free speech and press in two separate sections.¹² In addition, a “considerable majority” of Congress defeated a motion to strike the assembly provision from the First Amendment because of the understanding that all of the enumerated rights in the First Amendment were separate Rights that should be specifically protected.¹³

HISTORY AND SIGNIFICANCE OF THE RIGHT TO PETITION, Gregory A. Mark, 66 Fordham L. Rev. 2153 (May, 1998); DOWNSIZING THE RIGHT TO PETITION, Gary Lawson and Guy Seidman, 93 Nw. U.L. Rev. 739 (Spring 1999); A RIGHT OF ACCESS TO COURT UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT: DEFINING THE RIGHT, Carol Rice Andrews, 60 Ohio St. L.J. 557 (1999) ; MOTIVE RESTRICTIONS ON COURT ACCESS: A FIRST AMENDMENT CHALLENGE, Carol Rice Andrews, 61 Ohio St. L.J. 665 (2000).

³ Norman B. Smith, “Shall Make No Law Abridging...”: Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153, at 1154.

⁴ See Bill of Rights, 1689, 1 W & M., ch. 2 Sections 5,13 (Eng.), reprinted in 5 THE FOUNDERS’ CONSTITUTION 197 (Philip B. Kurland & Ralph Lerner eds., 1987); 1 WILLIAM BLACKSTONE, COMMENTARIES 138-39.

⁵ See David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, at 115.

⁶ See Smith, *supra* n.4, at 1165-67.

⁷ See Charles E. Rice, *Freedom of Petition*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 789, (Leonard W. Levy ed., 1986)

⁸ See Smith, *supra* n4, at 1165.

⁹ For example, Massachusetts secured the Right to Petition in its Body of Liberties in 1641, but freedom of speech and press did not appear in the official documents until the mid-1700s. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463 n.47 (1983).

¹⁰ See *id.* at 464 n.52.

¹¹ Even when England and the American colonies recognized free speech Rights, petition Rights encompassed freedom from punishment for petitioning, whereas free speech Rights extended to freedom from prior restraints. See Frederick, *supra* n6, at 115-16.

¹² See *New York Times Co. v. U.S.*, 403 U.S. 670, 716 n.2 (1971)(Black, J., concurring). For the full text of Madison’s proposal, see 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834).

¹³ See 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS at 1089-91 (1980).

Petitioning government for Redress of Grievances has played a key role in the development, exercise and enforcement of popular sovereignty throughout British and American history.¹⁴ In medieval England, petitioning began as a way for barons to inform the King of their concerns and to influence his actions.¹⁵ Later, in the 17th century, Parliament gained the Right to Petition the King and to bring matters of public concern to his attention.¹⁶ This broadening of political participation culminated in the official recognition of the right of Petition in the People themselves.¹⁷

The People used this newfound Right to question the legality of the government's actions,¹⁸ to present their views on controversial matters,¹⁹ and to demand that the government, *as the creature and servant of the People, be responsive to the popular will.*²⁰

In the American colonies, disenfranchised groups used Petitions to seek government accountability for their concerns and to rectify government misconduct.²¹

By the nineteenth century, Petitioning was described as “essential to ... a free government”²² – an inherent feature of a republican democracy,²³ and one of the chief means of enhancing government accountability through the participation of citizens.

This Interest In Government Accountability Was Understood To Demand Government Response To Petitions.²⁴

¹⁴ See Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations* 10-108 (1971) (unpublished Ph.D. dissertation) (Univ. Microforms Int'l); K. Smellie, Right to Petition, in 12 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 98, 98-101 (R.A. Seiligman ed., 1934).

¹⁵ The Magna Carta of 1215 guaranteed this Right. See *MAGNA CARTA*, ch. 61, reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra* n.5, at 187.

¹⁶ See *PETITION OF RIGHT* chs. 1, 7 (Eng. June 7, 1628), reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra* n5 at 187-88.

¹⁷In 1669, the House of Commons stated that, “it is an inherent right of every commoner in England to prepare and present Petitions to the House of Commons in case of grievances, and the House of Commons to receive the same.” Resolution of the House of Commons (1669), reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra* n5 at 188-89.

¹⁸ For example, in 1688, a group of bishops sent a petition to James II that accused him of acting illegally. See Smith, *supra* n4, at 1160-62. James II's attempt to punish the bishops for this Petition led to the Glorious Revolution and to the enactment of the Bill of Rights. See Smith, *supra* n15 at 41-43.

¹⁹ See Smith, *supra* n4, at 1165 (describing a Petition regarding contested parliamentary elections).

²⁰ In 1701, Daniel Defoe sent a Petition to the House of Commons that accused the House of acting illegally when it incarcerated some previous petitioners. In response to Defoe's demand for action, the House released those Petitioners. See Smith, *supra* n4, at 1163-64.

²¹ See RAYMOND BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 43-44 (1979).

²² THOMAS M. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 531 (6th ed. 1890).

²³ See *CONG. GLOBE*, 39th Cong., 1st Session. 1293 (1866) (statement of Rep. Shellabarger) (declaring petitioning an indispensable Right “without which there is no citizenship” in any government); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 707 (Carolina Academic Press ed. 1987) (1833) (explaining that the Petition Right “results from [the] very nature of the structure [of a republican government]”).

²⁴ See Frederick, *supra* n7 at 114-15 (describing the historical development of the duty of government response to Petitions).

American colonists, who exercised their Right to Petition the King or Parliament,²⁵ expected the government to receive *and respond* to their Petitions.²⁶ The King's persistent refusal to answer the colonists' grievances outraged the colonists and as the "**capstone**" grievance, was a significant factor that led to the American Revolution.²⁷

Frustration with the British government led the Framers to consider incorporating a people's right to "instruct their Representatives" in the First Amendment.²⁸ Members of the First Congress easily defeated this right-of-instruction proposal.²⁹ Some discretion to reject petitions that "instructed government," they reasoned, would not undermine government accountability to the People, as long as **Congress had a duty to consider petitions and fully respond to them.**³⁰

Congress's response to Petitions in the early years of the Republic also indicates that the original understanding of Petitioning *included a governmental duty to respond*. Congress viewed the receipt and serious consideration of every Petition as an important part of its duties.³¹

Congress referred Petitions to committees³² and even created committees to deal with particular types of Petitions.³³ Ultimately, most Petitions resulted in either favorable legislation or an adverse committee report.³⁴

Thus, throughout early Anglo-American history, general petitioning (as opposed to judicial petitioning) allowed the people a means of direct political participation that in turn demanded government *response* and promoted accountability.

²⁵ See DECLARATION AND RESOLVES OF THE CONTINENTAL CONGRESS 3 (Am. Col. Oct. 14, 1774), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 199; DECLARATION OF RIGHTS OF THE STAMP ACT CONGRESS 13 (Am. Col. Oct. 19, 1765), reprinted in *id.* at 198.

²⁶ See Frederick, *supra* n4 at 115-116.

²⁷ See THE DECLARATION OF INDEPENDENCE para. 30 (U.S. July 4, 1776), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 199; Lee A. Strimbeck, The Right to Petition, 55 W. VA. L. REV. 275, 277 (1954).

²⁸ See 5 BERNARD SCHWARTZ, *supra* n15, 1091-105.

²⁹ The vote was 10-41 in the House and 2-14 in the Senate. See *id.* at 1105, 1148.

³⁰ See 1 ANNALS OF CONG. 733-46 (Joseph Gales ed., 1789); 5 BERNARD SCHWARTZ, *supra* n15, at 1093-94 (stating that representatives have a duty to inquire into the suggested measures contained in citizens' Petitions) (statement of Rep. Roger Sherman); *id.* at 1095-96 (stating that Congress can never shut its ears to Petitions) (statement of Rep. Elbridge Gerry); *id.* at 1096 (arguing that the Right to Petition protects the Right to bring non-binding instructions to Congress's attention) (statement of Rep. James Madison).

³¹ See STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 4, 1789 TO DECEMBER 15, 1975, at 6-9 (Comm. Print 1986) (including a comment by the press that "the principal part of Congress's time has been taken up in the reading and referring Petitions" (quotation omitted)).

³² See Stephen A. Higginson, Note, *A Short History of the Right to Petition the Government for the Redress of Grievances*, 96 YALE L. J. 142, at 156.

³³ See H.J., 25th Cong., 2d Sess. 647 (1838) (describing how petitions prompted the appointment of a select committee to consider legislation to abolish dueling).

³⁴ See Higginson, n34 at 157.

To determine “[t]he proper scope and application of the Petition Clause ... **Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty.**” *Guarnieri* at 394-395. (Emphasis added). *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011).

“The First Amendment’s Petition Clause states that ‘Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.’ The reference to ‘the right of the people’ indicates that the Petition Clause was intended to codify a pre-existing individual right, which means that **we must look to historical practice to determine its scope.** (See *District of Columbia v. Heller*, 554 U.S. 570, 579, 592 (2008).” *Guarnieri* at 403. (Emphasis added).

“**There is abundant historical evidence that ‘Petitions’ were directed to the executive and legislative branches of government.**” *Guarnieri* at 403. (Emphasis added).

“Petition, as a word, a concept, and an **essential safeguard of freedom, is of ancient significance in English law and the Anglo-American legal tradition.**” *Guarnieri* at 394-395. (Emphasis added).

“[P]etitions have provided a vital means for citizens ... **to assert existing rights** against the sovereign.” *Guarnieri* at 397. (Emphasis added).

“Rights of speech and petition are not identical. Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, **requests action** by the government to address those concerns.” *Guarnieri* at 388-389. (Emphasis added).

“One of the advantages of popular government, of which Jefferson was distinctly aware, was that it afforded a means of **redressing grievances against the government without the resort to force**; it provided, as he would later put it in his First Inaugural Address, ‘a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceful remedies are unprovided.’” (Emphasis added). David N. Mayer, “*The Constitutional Thought of Thomas Jefferson*,” University Press of Virginia, 1994, at 107. See also Thomas Jefferson, *First Inaugural Address*, 4 March 1801, L.C.