The Right to Petition

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HISTORIC CONTEXT

> *Congress shall make no law ... abridging ... the right of the people ... to petition the government for redress of grievances.*

The right of the people to petition the government for redress of grievances, as guaranteed by the First Amendment, is rooted in the 1215 Magna Carta. *Source of Our Liberties* 228 (R. Perry ed. 1972). The language has been changed but the principle has remained for hundreds of years.

In essence, the principle is one that guarantees to all persons - without exception - access to the policy-making political authorities in the land for the purpose of stating a grievance and of seeking relief.

The Magna Carta guaranteed access to a council of twenty-five barons. If "the wrong shall have been shown to four barons" of the council, then those four could bring the petition to the king or his personal representative. Following the "laying before us of the transgression," the king or his personal representative had opportunity to correct the wrong done. Failing that the baronial council could take action. *Id.* at 20-21 (Section 61 of the Magna Carta).

This original right of petition smacked of a legal claim, albeit one presented to the king in his political capacity. A classic example was the petition signed by seven bishops asking James II to withdraw his second Declaration of Indulgence of 1688 on the grounds that the king had no authority to force the leaders of the Church of England to declare religious toleration for Catholics. The king responded with criminal charges of seditious libel, but the bishops were acquitted. *Id.* at 228.

Following James II's abdication of the British throne, the right to petition the king was enshrined in the 1688 Bill of Rights, agreed to by the English Parliament in 1689. The guarantee read:

> *That it is the right of the subjects to petition the King, and all committments and prosecutions for such petitioning are illegal. Id.* at 246.

The English Bill of Rights afforded no protection, however, to persons filing a petition of grievances with the English Parliament. While such a right had been recognized by legislative resolution in 1669, Parliament reserved to itself the power to define how it should be exercised and to punish those who violated the rules. Punishment included prosecutions for seditious libel or for contempt, even though such penalties could not be imposed if a person petitioned the king. *Id.* at 229.

In 1765, the American colonists exercised their right of petition as Englishmen, seeking the repeal of the hated Stamp Tax. *Id.* at 271. They repeated this petition process over the next decade. By 1774, the colonists complained that their petitions had not been received by the King and the Parliament, but met by "prosecutions, prohibitory proclamations, and commitments" which the colonists declared were illegal. *Id.* at 288.

Thus, in the Declaration of Independence, America's patriots concluded that the king had "answered [their petitions] only by repeated injury," and, hence, that he was a tyrant "unfit to be ... ruler of a free people." *Id.* at 321.

Following the Declaration, the people of various states decided to include in their constitutions a specific guarantee of the right of the people to petition their legislature for redress of grievances. On August 16, 1776, the people of Pennsylvania led the way:

> *That the people have a right to apply to the legislature for redress of grievances, by address, petition, or remonstrance. Id.* at 331.

Other states followed suit, each time specifying that the people had a right to petition their Legislature. *Id.* at 339 (Delaware), 347 (Maryland), 356 (North Carolina), 366 (Vermont), 377 (Massachusetts), and 385 (New Hampshire).

While the language of the Petition Clause of the First Amendment is clearly derived from these earlier state constitutions, James Madison made sure that the people's right of petition would not be limited to their legislative representatives. He substituted "government" for "legislature," thereby opening up the question whether the right to petition extended to all government officials. *Id.* at 424.

In order to answer this crucial issue, one must first understand that the Petition Clause was definitely not designed to guarantee any right to petition any non-government person or entity.

POLITICAL REDRESS

Without question, the right of the people to petition must be aimed at grievances that they have with the government. That is the plain meaning of the text. And it is consistent with the historical development of the right.

Parallel with the origin of the right of the people to petition for the king for redress of grievances, the Magna Carta also recognized a right to seek legal redress for wrongs. Section 40 of the Magna Carta read:

> *To no one will we sell, to no one will we deny, or delay right or justice. Id.* at 17.

This right to obtain justice is not to be confused with the right to be free from government actions depriving a person of his life, liberty, or property without due process of law. That right was protected by Section 39 of the Magna Carta. *Id.* at 5-6. By express language, the due process clause was limited to actions by the government denying certain rights. The right to a legal remedy was one that extended to a private party as well. See Linde, "Without 'Due Process,'" 49 *Or. L. Rev.* 125, 136-38 (1970).

In the early history of the nation, a number of state constitutions guaranteed the right to a legal remedy, separate and independent of its guarantees of due process of law and of the right to petition.

The 1776 Maryland Constitution was typical. By Article XI the right of the people to petition their legislators was secured. By Article XXI the right to life, liberty and property by due process of law was protected. In addition, Article XVII guaranteed:

> *That every freeman, for any injury done him in his person or property, ought to have*

> *remedy by the course of the law of the land, and ought to have justice and right freely without sale, fully without denial, and speedily without delay, according to the law of the land.* *Id.* at 348. See also *Id.* at 339 (Delaware), 356 (North Carolina), 376 (Massachusetts), and 384 (New Hampshire).

The separate development of the right to petition and the right to a remedy is very significant. First, the right to petition, being political in nature, cannot apply when the petitioning party is seeking redress from a nongovernment person or entity. For example, in the battle over abortion in America, the people have no right to petition an abortion doctor to redress their grievance that the government is not protecting the lives of innocent preborn babies. The abortion doctor, by definition, does not have civil power to change the government policy with respect to abortion. The right of petition must, therefore, be directed to a legislative, executive, or other appropriate government official to influence the government to exercise its political authority to protect innocent human life.

Consistent with this understanding, the United States Supreme Court has upheld a city ordinance prohibiting the targeting of any residence for the purpose of picketing, recognizing that a private home is not the seat of government authority. Hence, the home of an abortion doctor was not the proper place for a political petition for redress of the pro-lifers' grievances. *Frisby v. Schultz,* 487 U.S. 474 (1988).

For similar reasons, labor picketing cannot be justified as an exercise of the right to petition. Labor disputes, while they may raise other First Amendment issues, are not governed by the Petition Clause. *Thomas v. Collins,* 323 U.S. 516, 539-43 (1945) (Right to assemble extends to associations and meetings for purpose of forming a union). Otherwise, governments could not prohibit such unfair labor practices as secondary boycotts, that is, picketing designed to persuade consumers from patronizing a business that does business with the company with which the union has a labor dispute. See *NLRB v. Retail Store Employees Local 1001,* 447 U.S. 607 (1980).

Given the political nature of the right protected by the Petition Clause, government officials could be protected from citizens' seeking to petition for redress of grievances at their private residences. Thus, in *Carey v. Brown,* 447 U.S. 455 (1980) the Court suggested that an "evenhanded" statute that did not discriminate on the basis of subject matter, but was designed to preserve the tranquility of residential neighborhoods, could be applied in such a way as to protect the residential privacy of a city mayor. *Id.,* 447 U.S. at 470-71.

The right to petition, then, must be directed to an appropriate government official, not to a non-government person or entity, and must be presented at an appropriate government place, not on the private property even of a government official.

POLITICAL DISCRETION

It would be a mistake to assume from these precedents and from the text of the Petition Clause, itself, that <u>all</u> government officials and <u>all</u> government places may be targeted by people seeking redress of their grievances.

On the one hand, a petition brought by a group of people onto the state legislative grounds is clearly

a petition of the government for redress of grievances. In *Edwards* v. *South Carolina,* 372 U.S. 229 (1963), 187 black high school and college students walked to the South Carolina State House grounds, an area open to the general public, parading in an orderly manner carrying placards denouncing segregation. For this action, the marchers were convicted of the common law crime of breach of the peace.

Writing for an almost unanimous court (one justice dissenting), Justice Potter Stewart ruled that the prosecution and conviction violated the demonstrators rights to "free speech, free assembly, and freedom to petition for redress of their grievances":

> *The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. Id.,* 372 U.S. at 235.

On the other hand, the High Court split five to four on the constitutionality of a conviction for violating a statute prohibiting picketing before a courthouse arising out of a similar demonstration. *Cox* v. *Louisiana,* 379 U.S. 536 and 559 (1965).

Writing for the majority of five, Justice Arthur Goldberg acknowledged that the state of Louisiana could prohibit picketing in front of the courthouse for the purpose of protecting the administration of justice:

> *There is no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Id.,* 379 U.S. at 562.

On this point there was unanimous agreement among all of the justices. Their difference was one of application, not of principle. Justice Goldberg concluded on the facts of this case that the demonstrators had been given permission by the police to stage their protest. Justice Hugo Black, in dissent, was convinced that no police officer could, by granting such permission, undermine the public interest.

Justice Black claimed that the purpose of the statute and its application in the case was to see to it that the courts and court officials were insulated from "the intimidation and dangers that inhere in huge gatherings at courthouse doors and jail doors to protest arrests and to influence court officials in performing their duties":

> *The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures. Justice cannot be rightly administered, nor the lives and safety of prisoners secure, where throngs of people clamor against the processes of justice right outside the courthouse or jail house doors. The streets are not now and never have been the proper place to administer justice. Id.,* 379 U.S. at 583.

Three years later, Justice Black successfully persuaded a five-man majority to agree with him that marchers staging a protest against the arrests of some civil rights demonstrators were constitutionally convicted for trespass. *Adderly* v. *Florida,* 385 U.S. 39 (1966).

This time, the dissenters did not disagree on the facts, but upon principle. Justice William O.

Douglas began his opinion with the claim that a "jailhouse" like "an executive mansion, a legislative chamber, a courthouse, or the statehouse itself [is] one of the seats of government":

> *The right to petition for redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. Id.,* 385 U.S. at 49-50.

Justice Black did not attempt to refute these claims, but simply stated that the jailhouse grounds where the demonstration took place were dedicated exclusively to "jail uses." *Id.,* 385 U.S. at 47. Even Justice Douglas conceded that there were certain government places where there would be no right of the people to petition:

> *No one ... would suggest that the Senate gallery is the proper place for a vociferous protest rally. Id.,* 385 U.S. at 54.

But the more significant issue in *Adderley* was not the place of protest, but the government officials to whom a petition may be directed. One could argue that the purpose of the right to petition is to present one's grievance before officials with the power to do something about that grievance. This means, at a minimum, that petitions cannot be directed to ministerial government officials who are just doing their duties, but must be directed to those government officials who have discretion to do something about the alleged grievance.

A jailer, for example, cannot do anything about a complaint that a person has been illegally charged or arrested, but a prosecutor, or a governor, or some other executive official does have the discretionary power to do something. A jailhouse may be off limits for a petition of the kind presented in *Adderly* for that reason alone.

As noted above in the historical introduction, the heart of the right to petition is to seek a political remedy for an alleged grievance against the government. Hence, the meaning of government should be commensurate with the purpose of the right, namely, to seek redress from a person with the power to redress the grievance. As for persons who do not have any power to provide any redress, then the right of petition would not extend to them at all.

In other words, government does not mean any government official, but only those government officials with discretionary power and authority to deal with the grievance being presented.

LEGAL REDRESS

Historically, there is little evidence that the right of the people to petition was considered a right to be exercised in relation to the judicial branch. It is true that a petition placed before Parliament could ultimately appeal to the Parliamentary authority to exercise its ultimate power to determine the constitutionality of a matter. It is also true that one could petition the Lord High Chancellor, invoking the equity jurisdiction to redress an alleged grievance with a government policy. *Sources of Our Liberties, supra,* at 229.

Nevertheless, a petition for redress of grievances in its "pristine and classic form" was one directed

to the king or to the House of Commons. It was quintessentially a political petition, not a legal one, even though the alleged grievance might very well have been legal. It was a request for discretionary action, not action that the petitioned official was obliged by law to grant.

It would be a mistake, therefore, to confuse the right of the people to petition for a redress of grievances, with the right of a person to seek legal redress in a court of law. The latter right to seek a legal remedy for a violation of law, as contrasted to the former to seek a political remedy for such a violation, developed separately and was, consequently, independently recognized.

As pointed out above, the early state constitutions contained separate and independent guarantees for the right of the people to petition and the right of the people to obtain a legal remedy from a judge. See Constitution of Maryland Articles XI and XVII, *Sources of Our Liberties, supra,* at 347, 348.

And as the Supreme Court, itself, has acknowledged, a right to petition a court exercised in the manner that would be appropriate if addressed to a legislature or a chief executive would risk corrupting or perverting the judicial process. As Justice Goldberg put it in the *Cox* case:

> *Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly .... [Therefore], a state may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. Cox v. Louisiana, supra,* 379 U.S. at 562.

The very nature of a petition for redress of grievances is to bring political pressure from the outside to influence the ordinary legislative and executive processes. That is suitable because such decision-makers are supposed to take into account the special political interests of different groups of people in making their decisions.

By definition, however, judges are supposed to make their decisions impartially and independently of such political considerations. The right to petition then appears not only unsuited, but antithetical, to the judicial process.

These considerations, however, have not kept the Supreme Court from flirting with the notion that the Petition Clause extends to access to the courts. In *NAACP v. Button,* 371 U.S. 415 (1963) Justice William J. Brennan observed:

> *In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country .... [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances. Id.,* 371 U.S. at 429-30.

Brennan's Petition Clause point did not reappear later in the *Button* opinion which rested primarily upon the people's right of association or assembly. But the idea that the Petition Clause applied to the judicial process reappeared four years later in *United Mine Workers* v. *Illinois Bar Association,*

389 U.S. 217 (1967).

This time there was no question that the litigation promoted by the UMW concerned private disputes between workers and their employees, albeit over workmen's compensation claims administered by the state. Without hesitation, the Court stated that "the grievances for redress which the right of petition was insured ... are not solely ... political ones ...." *Id.,* 389 U.S. at 223.

If this statement is taken seriously, then the Court has discarded the plain meaning of the word, government, as it appears in the Petition Clause. Moreover, it has completely ignored the historical context in which that clause was developed. This comes as no surprise for the Court has long abandoned the text, the context, and the historical framework of the First Amendment, substituting therefor its own notions of liberty more suitable to "the conditions of modern government."

CONCLUSION

As already demonstrated in this introductory series to the Speech, Press, Assembly, and Petition Clauses, the Court's efforts to modernize the First Amendment has not led to liberty, but to license on the one hand and to increased government control on the other. This theme will be developed further in a number of essays dealing with current First Amendment issues.

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