

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Separation of Powers

Thomas Jefferson, **Letter on Cabell Case** (1797)¹

In the spring 1797, Justice James Iredell rode circuit in Virginia and presided over a federal grand jury in Richmond. That grand jury, composed of many prominent Federalists, recommended an indictment of U.S. Representative Samuel Cabell. Cabell represented a Virginia district that was a hotbed of opposition to Federalists and newly elected President John Adams. Cabell had circulated a series of letters to his constituents denouncing the actions of the federal government and implying that Adams's election would subvert American independence from Britain. Cabell was denounced by the grand jury for "at a time of real public danger, [disseminating] unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and [increasing or producing] a foreign influence, ruinous to the peace, happiness, and independence of these United States."

The grand jury's action came just over a year before the passage of the Sedition Act of 1798, which supported the prosecution of several Jeffersonian politicians and newspaper editors. In the spring 1797, Adams was just assuming the presidency and tensions with France were high. Vice President Thomas Jefferson was among Cabell's constituents and wrote a petition directed to the Virginia state legislature protesting the grand jury. Jefferson's formal protest was echoed in the complaints of many other Jeffersonians, and Cabell denounced the grand jury as "a band of political preachers." Jefferson's petition called on state government officials to intervene on Cabell's behalf, either by prosecuting anyone who attempted to arrest or punish Cabell or by impeaching the members of the grand jury. In the end, no further action was taken in Cabell's case.

In mounting his defense of Cabell, Jefferson elaborated on the requirements of representative government. Jefferson's petition foreshadowed some arguments in favor of unfettered political speech that Jeffersonians advanced in the Sedition Act controversy, but his argument also focused on the specific freedom of communication between legislators and their constituents. Jefferson did not specifically reference the speech and debate clause of the U.S. Constitution, but this petition is often viewed as articulating the same principles embodied in that clause.

Are legislators freer than the average citizen when engaging in political speech? Are there constraints on the scope of this legislative privilege? Are constituents similarly protected when communicating with their representative? Do legislators enjoy any special protections when speaking at home in their districts or publishing newspaper articles? Do legislators have a special responsibility to exercise more restraint in their speech (and in their criticism of the government) than the average citizen? Does Jefferson leave open the possibility of the legislature punishing its own members for their speech? What form might such a punishment take?

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That by the Constitution of this State, established from its earliest settlement, the people thereof have professed the right of being governed by laws to which they have consented by representatives chosen by themselves immediately: that in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common

¹ Excerpt taken from *The Writings of Thomas Jefferson*, ed. Albert E. Bergh, vol. 17 (Washington, D.C.: Thomas Jefferson Memorial Foundation, 1907), 355-365.

law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches . . . and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any

That when circumstances required that the ancient confederation of this with the sister States, for the government of their common concerns, should be improved into a more regular and effective form of general government, the same representative principle was preserved in the new legislature, one branch of which was to be chosen directly by the citizens of each State, and the laws and principles remained unaltered which privilege the representative functions, whether to be exercised in the State or General Government, against the cognizance and notice of the co-ordinate branches, executive and judiciary; and for its safe and convenient exercise, the inter-communication of the representative and constituent has been sanctioned and provided for through the channel of the public post, at the public expense.

. . . Samuel Jordan Cabell accepted the office, repaired at the due periods to the legislature of the General Government, exercised his functions there as became a worthy member, and as a good and dutiful representative was in the habit of corresponding with many of his constituents, and communicating to us, by way of letter, information of the public proceedings, of asking and receiving our opinions and advice and of contributing, as far as might be right, to preserve the transactions of the General Government in unison with the principles and sentiments of his constituents; that while the said Samuel J. Cabell was in the exercise of his functions as a representative from this district, and was in the course of that correspondence which his duty and the will of his constituents imposed on him, the right of thus communicating with them, deemed sacred under all the forms in which our government has hitherto existed . . . was openly and directly violated at a Circuit Court of the General Government. . . .

That the grand jury is a part of the judiciary . . .; that for the judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties toward each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the judiciary if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the judiciary, is to leave, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business; is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the executive; that they are exposed to influence from the judges who are nominated immediately by the Executive

That independently of these considerations of a constitutional nature, the right of free correspondence between citizen and citizen on their joint interests . . . is a natural right of every individual citizen, not the gift of municipal law, but among the objects for the protection of which municipal laws are instituted. . . . [S]o far as it is an infraction of our individual rights as citizens by other citizens of our own State, the judicature of this commonwealth is solely competent to its cognizance, no other possessing any powers of redress. . . .

Your petitioners further observe that though this crime may not be specifically defined and denominated by any particular statute, yet it is a crime, and of the highest and most alarming nature. . . .