

## THE FOUNDERS' CONSTITUTION



# Amendment I (Speech and Press)

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## Document 5

### James Burgh, Political Disquisitions 3:246--52

1775

#### *Of the Liberty of Speech and Writing in Political Subjects*

In an inquiry into public abuses no one will wonder to find punishment inflicted by government upon complainers, reckoned as an abuse; for it certainly is one of the most atrocious abuses, that a free subject should be restrained in his inquiries into the conduct of those who undertake to manage his affairs; I mean the administrators of government: for all such are undertakers, and are answerable for what they undertake: but if it be dangerous and penal to inquire into their conduct, the state may be ruined by their blunders, or by their villanies, beyond the possibility of redress.

There seems to be somewhat unnatural in attempting to lay a restraint on those who would criticise the conduct of men who undertake to do other people's business. It is an offense, if we remark on the decision of a court of law, on the proceedings of either house of parliament, or of the administration; all whose proceedings we are immediately concerned in. At the same time, if a man builds a house for himself, marries a wife for himself, or writes a book, by which the public gets more than the author, it is no offence to make very severe and unjust remarks.

Are Judges, Juries, Counsellors, Members of the House of Commons, Peers, Secretaries of State, or Kings, infallible? Or are they short-sighted, and perhaps interested, mortals?

In a petition to parliament, a bill in chancery, and proceedings at law, libellous words are not punishable; because freedom of speech and writing are indispensably necessary to the carrying on of business. But it may be said, there is no necessity for a private writer to be indulged the liberty of attacking the conduct of those who take upon themselves to govern the state. The answer is easy, viz. That all history shews the necessity, in order to the preservation of liberty, of every subject's having a watchful eye on the conduct of Kings, Ministers, and Parliament, and of every subject's being not only secured, but encouraged in alarming his fellow-subjects on occasion of every attempt upon public liberty, and that private, independent subjects *only* are likely to give fair warning of such attempts; their betters (as to rank and fortune) being more likely to conceal, than detect the abuses committed by those in power. If, therefore, private writers are to be intimidated in shewing their fidelity to their country, the principal security of liberty is taken away.

Punishing libels public or private is foolish, because it does not answer the end, and because the end is a bad one, if it could be answered.

The Attorney General *De Grey* confessed in the House of Commons, A.D. 1770, "that his power of filing informations *ex officio* is an odious power, and that it does not answer the purpose intended; for that he had not been able to bring any libeller to justice." Mr. *Pownal* shewed that power to be illegal and unconstitutional; for that, according to law, no *Englishman* is to be brought upon his trial, but by presentment of his country; a few particular cases excepted.

When the lawyers say a libel is criminal, though true, they mean, because it is, according to them, a breach of the peace, and tends to excite revenge. They allow, that the *falsehood* of the charge is an aggravation, and that, therefore, the person libelled has no right to damages, if the charges laid against him be *true*. But by this rule it should seem, that the *truth* of the libel should take away all its criminality. For if I have no right to damages, I have no pretence to seek revenge. Therefore to libel me for what I cannot affirm myself to be innocent of, is no breach of the peace, as it does not naturally tend to excite revenge, but rather ingenuous shame and reformation.

Let us hear on this subject the excellent Lord *Chesterfield*, on the bill for licensing the stage, *A.D.* 1737.

"In public, as well as private life, the only way to prevent being ridiculed or censured, is to avoid all ridiculous or wicked measures, and to pursue such only as are virtuous and worthy. The people never endeavor to ridicule those they love and esteem, nor will they suffer them to be ridiculed. If any one attempts it, their ridicule returns upon the author; he makes himself only the object of public hatred and contempt. The actions or behaviour of a private man may pass unobserved, and consequently unapplauded and uncensured; but the actions of these in high stations, can neither pass without notice nor without censure or applause; and therefore an administration without esteem, without authority, among the people, let their power be ever so great or ever so arbitrary, will be ridiculed: the severest edicts, the most terrible punishments cannot prevent it. If any man, therefore, thinks he has been censured, if any man thinks he has been ridiculed, upon any of our public theatres, let him examine his actions he will find the cause, let him alter his conduct he will find a remedy. As no man is perfect, as no man is infallible, the greatest may err, the most circumspect may be guilty of some piece of ridiculous behavior. It is not licentiousness, it is an useful liberty always indulged the stage in a free country, that some great men may there meet with a just reproof, which none of their friends will be free enough, or rather faithful enough to give them. Of this we have a famous influence in the *Roman* history. The great *Pompey*, after the many victories he had obtained, and the great conquests he had made, had certainly a good title to the esteem of the people of *Rome*. Yet that great man by some error in his conduct, became an object of general dislike; and therefore in the representation of an old play, when *Diphilus* the actor came to repeat these words, *Nostrâ miserîâ tu es magnus*, the audience immediately applied them to *Pompey*, who at that time was as well known by the name of *Magnus* as by the name *Pompey*, and were so highly pleased with the satire, that, as *Cicero* tells us, they made the actor repeat the words one hundred times over. An account of this was immediately [Volume 5, Page 121] sent to *Pompey*, who, instead of resenting it as an injury, was so wise as to take it for a just reproof. He examined his conduct, he altered his measures, he regained by degrees the esteem of the people, and then he

neither feared the wit, nor felt the satire of the stage. This is an example which ought to be followed by great men in all countries."

Even the cruel *Tiberius*, when in good humour, could say, In a free state, the mind and the tongue "ought to be free." *Titus* defied any one to scandalize him. *Trajan* published absolute liberty of speech and writing. *Constantine*, when he was told that some ill-disposed persons had battered his head and face, meaning those of his statue, felt himself all about those parts, and told his courtiers, he found nothing amiss; desiring that they would take no trouble about finding out the violators of the statue.

Mr. *Gordon* allows the maxim, that a libel is not the less a libel for being true. But this holds, he says, only in respect of *private* characters; and it is quite otherwise, when the crimes of men affect the *public*. We are to take care of the public safety at all adventures. And the loss of an individual's, or a whole ministry's *political* characters, ought to be despised, when put in competition with the fate of a kingdom. Therefore no free subject ought to be under the least restraint in respect to accusing the greatest, so long as his accusation strikes only at the *political* conduct of the accused: his private we have no right to meddle with, but in so far as a known vicious private character indicates an unfitness for public power or truth. But it may be said, this is a grievous hardship on those who undertake the administration of a nation; that they are to run the hazard of being thus publicly accused of corruption, embezzlement, and other political crimes, without having it in their power to punish their slanderers. To this I answer, It is no hardship at all, but the unavoidable inconvenience attendant upon a high station, which he who dislikes must avoid, and keep himself private. *Cato* was forty times tried. But we do not think the worse of *Cato* for this. If a statesman is liable to be falsely accused, let him comfort himself by recollecting, that he is well paid. An ensign is liable to be killed in war; and he has but 3 s. 6 d. a day. If a statesman has designedly behaved amiss, he ought to be punished with the utmost severity; because the injury he has done, is unboundedly extensive. If he has injured the public through weakness, and without wicked intention, he is still punishable; because he ought not to have thrust himself into a station for which he was unfit. But, indeed, these cases are so rare (want of *honesty* being the general cause of maladministration), that it is scarce worth while to touch upon them. If a statesman is falsely accused, he has only to clear his character, and he appears in a fairer light than before. He must not insist on punishing his accuser: for the public security requires, that there be no danger in accusing those who undertake the administration of national affairs. The punishment of political satyrists gains credit to their writings, nor do unjust governments reap any fruit from such severities, but insults to themselves, and honour to those whom they prosecute.

A libel is in fact (criminally speaking) a *non entity*, i.e. there is no such offence as scandal. For if the punishment was taken away, the whole of the evil would be taken away, because nobody would regard scandal; but people would believe every person's character to be what they knew it.

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### The Founders' Constitution

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