Supplementary Material

Chapter 6: The Civil War and Reconstruction—Individual Rights/Property/Due Process/Test Oaths

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Ex parte Garland, 71 U.S. 333 (1867)

Augustus Garland (1832–99) was a prominent lawyer who served in both the Confederate House of Representatives and the Confederate Senate. In the summer of 1865, President Andrew Johnson pardoned Garland for his past support of the Confederacy. Garland was nevertheless unable to practice law in federal courts because he was unable to take the Ironclad Oath. That oath required that he swear that he had "neither sought nor accepted nor attempted to exercise the functions of any office whatever under any authority or pretended authority hostile to the United States." Eager to resume his legal practice, Garland asked the Supreme Court to rule that the oath unconstitutionally deprived him of his constitutional right to practice a profession.

The Supreme Court by a 5–4 vote ruled that Garland had a constitutional right not to take the Ironclad Oath. Justice Field claimed that the oath imposed a punishment inconsistent with the constitutional prohibition of bills of attainder and ex post facto laws. His opinion emphasized that attorneys do not hold their positions by "grace and favor." What was the constitutional foundation of that claim? To what extent was Garland *based on the claim that an otherwise qualified person has a constitutional right to be an attorney? Was this a constitutional property right or some other kind of constitutional right? To what extent do the dissenters dispute that claim? What oath could Congress require after* Garland*? What oath do you believe constitutionally permitted?*

JUSTICE FIELD delivered the opinion of the court.

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The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and, instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified which were not punishable at the time they were committed, and, for other of the acts, it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law. . . .

The profession of an attorney and counselor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counselors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. . . .

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The attorney and counselor, being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the pleasure of the court or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in the case is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. . . .

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

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JUSTICE MILLER, on behalf of himself and THE CHIEF JUSTICE, and JUSTICES SWAYNE and DAVIS, delivered the following dissenting opinion, which applies also to the opinion delivered in *Cummings v. Missouri* (1867).[1]

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It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who make the laws, both state and national, will find in the conduct of the persons affected by the legislation just declared to be void sufficient reason to repeal, or essentially modify it.

. . .

The right to practise law in the courts as a profession is a privilege granted by the law under such limitations or conditions in each state or government as the lawmaking power may prescribe. It is a privilege, and not an absolute right. . . .

Every State in the Union, and every civilized government, has laws by which the right to practise in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license of practise law, but the continuance of the right is made by these laws to depend upon the continued possession of those qualities.

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[1] *Cummings* is also excerpted on the website.

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The act which has just been declared to be unconstitutional is nothing more than a statute which requires of all lawyers who propose to practise in the national courts that they shall take the same oath which is exacted of every officer of the government, civil or military. This oath has two aspects, one which looks to the past conduct of the party and one to his future conduct, but both have reference to his disposition to support or to overturn the government in whose functions he proposes to take part. In substance, he is required to swear that he has not been guilty of treason to that government in the past, and that he will bear faithful allegiance to it in the future.

That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation are among the most essential qualifications which should be required in a lawyer seems to me to be too clear for argument. The history of the Anglo-Saxon race shows that, for ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. From among their numbers are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked is to permit the stream on which the life of the nation depends to be poisoned at its source.

. . .

Bills of attainder . . . or acts of attainder, as they were called after they were passed into statutes, were laws which declared certain persons attainted, and their blood corrupted so that it had lost all heritable quality. . . .

. . . I think it will be found that the following comprise those essential elements of bills of attainder. . .

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel, and no recognized rule of evidence governed the inquiry.

It is no cause for wonder that men who had just passed successfully through a desperate struggle in behalf of civil liberty should feel a detestation for legislation of which these were the prominent features. The framers of our political system had a full appreciation of the necessity of keeping separate and distinct the primary departments of the government.

. . .

It is not claimed that the law works a corruption of blood. . . .

. . .

No person is pointed out in the act of Congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practise law, and, as a prerequisite to the exercise of the functions of the lawyer or the officer, it is demanded of all persons alike. It is said to be directed, as a class, to those alone who were engaged in the Rebellion, but this is manifestly incorrect, as the oath is exacted alike from the loyal and disloyal under the same circumstances, and none are compelled to take it. Neither does the act declare any conviction either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence or inflict any punishment. . . .

A statute, then, which designates no criminal, either by name or description—which declares no guilt, pronounces no sentence, and inflicts no punishment—can in no sense be called a bill of attainder.

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Ex post facto laws relate to penal and criminal proceedings, which impose punishment and forfeiture, and not to civil proceedings, which affect private rights retrospectively.

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Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offence committed before its passage or the punishment of any person for such an offence.

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It is true that the act requiring an oath provides a penalty for falsely taking it. But this provision is prospective, as no one is supposed to take the oath until after the passage of the law. . . . As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an *ex post facto* law.

. . .

A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. . . . His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

. . .

But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment in its application to this law and in its relation to the definitions which have been given of the phrase *ex post facto* laws.

The law in question does not in reality deprive a person guilty of the acts therein described of any right which he possessed before, for it is equally sound law as it is the dictate of good sense that a person who, in the language of the act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the government, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practise before it, and to strike his name from the roll of its attorneys if it be found there.

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I maintain that the purpose of the act of Congress was to require loyalty as a qualification of all who practise law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.

In pressing this argument, it is contended by the majority that no requirement can be justly said to be a qualification which is not attainable by all, and that to demand a qualification not attainable by all is a punishment.

The Constitution of the United States provides as a qualification for the offices of President and Vice-President that the person elected must be a native-born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The constitutions of nearly all the States require as a qualification for voting that the voter shall be a white male citizen. Is this a punishment for all the blacks who can never become white?

Illustrations of this kind could be multiplied indefinitely, but they are unnecessary.

. . . If I am right on the questions of qualification and punishment, that discussion disposes also of the proposition that the pardon of the President relieves the party accepting it of the necessity of taking the oath, even if the law be valid.

I am willing to concede that the presidential pardon relieves the party from all the penalties, or, in other words, from all the punishment, which the law inflicted for his offence. But it relieves him from nothing more. If the oath required as a condition to practising law is not a punishment, as I think I have shown it is not, then the pardon of the President has no effect in releasing him from the requirement to take it. . . .

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