

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

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

Test Oaths

Republicans insisted that persons occupying vital offices take loyalty oaths. The first loyalty oaths were demanded the week after Fort Sumter. That summer, Congress passed a statute requiring every federal employee to take the following oath.

I do solemnly swear (or affirm, as the case may be) that I will support, protect and defend the Constitution and Government of the United States against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same, any ordinance, resolution, or law of any State Convention of Legislature to the contrary notwithstanding. . . .¹

In 1862, Congress expanded the scope and depth of loyalty oaths. New federal statutes required that all federal government officeholders, elected or appointed, and all jurors in federal trials, take an oath. The oath was rewritten to include past conduct as well as future allegiance. The “Ironclad Test Oath” of 1862 required persons to declare,

I, A.B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel or encouragement to persons engaged in armed hostilities thereto; that I have 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; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States, against all enemies, foreign and domestic.²

In 1865, Congress required all attorneys practicing in federal courts to take that oath. Many northern states demanded similar oaths. California required all litigants in state courts to swear past, present and future allegiance to the United States. The Missouri test oath act required members of all professions to swear that they had not committed one of nearly a hundred acts. Congress and cabinet officials conducted separate loyalty investigations. Many government officials were fired or resigned. Fistfights occurred on the streets of Washington, D.C., when persons suspected of disloyalty chose methods other than litigation to confront their accusers.

The Supreme Court in *Ex parte Garland* (1867) and *Cummings v. Missouri* (1867) by 5 to 4 votes declared unconstitutional the ironclad oaths for attorneys practicing in federal courts and for members of various professions. Justice Field’s majority opinion in *Cummings* emphasized the constitutional right to practice a profession. He wrote,

¹ 12 U.S. Stat. 326, 326-27 (1861).

² 12 U.S. Stat. 502, 502-03 (1862).

The theory upon which our political institutions rest is, that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that, in the pursuit of happiness, all avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law.

Field insisted, "Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined." Test oaths as punishment, he concluded, violated both the constitutional prohibition on bills of attainder and the ex post facto clause.

Ex parte Garland and *Cummings v. Missouri* were less controversial than other Supreme Court decisions during Reconstruction imposing constitutional limits on federal power. Many Republicans who championed loyalty oaths during the Civil War were less enthusiastic by 1867. Republicans in the 1860s used test oaths to exclude southern representatives from Congress. Neither *ex parte Garland* nor *Cummings v. Missouri* directly challenged the constitutionality of those test oaths.



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