Supplementary Material

Chapter 6: The Civil War and Reconstruction—Democratic Rights/Voting/Test Oaths

The Congressional Debate over the Ironclad Oath[1]

Republicans insisted that all members of Congress swear that they had always been loyal to the Union. 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]

Controversy broke out when the Thirty-Eighth Congress was seated in December 1863. Senator James Bayard of Delaware refused to take the oath. The Senate by a 28–11 vote refused to budge. Bayard took the oath and then resigned his seat.

The conflict over the test oath intensified when the Thirty-Ninth Congress met in December 1865. Buoyed by President Andrew Johnson's modest Reconstruction goals, many former slave state voters elected former confederate office holders to the House and Senate. Republicans in Congress refused to seat them. Taking advantage of several procedural rules, the Republican majority in the House examined the past record of persons elected to Congress and determined who could take the oath in good faith. With rare exceptions, all persons elected from the former slave states were excluded.

The ironclad test oath remained controversial during Reconstruction. Johnson Administration officials insisted that most southerners be asked to swear only to their future allegiance. This mild oath was necessary, in their view, for the federal government to operate in the South. Treasury Secretary Hugh McCulloch asserted, "It is impossible to procure the services of competent revenue officers to assess and collect taxes who can take the test oath." Republicans in Congress insisted that Reconstruction required a complete transformation of the southern political elite. Senator Charles Sumner of Massachusetts responded to McCulloch's practice by declaring, "The Administration, in defiance of Congress, is determined to employ rebels in reconstruction."

Prodded by the Johnson Administration, the House Judiciary Committee considered whether the test oath should be modified. On April 23, the committee by a 2–1 vote counseled against modification. Those test oath laws that survived judicial scrutiny were not officially repealed until 1884.

The materials below are from the 1863 Senate debate on the test oath (the 1865 House of Representatives reports on the test oaths are excerpted in Vol. II). What were the most important constitutional and political arguments for requiring government officials to swear they have always been loyal to the Union? What were the

[1] *Congressional Globe,* 38th Cong., 1st Sess., App. (1863), 31–37; ibid., 275–78.
This introduction relies extensively on Harold Melvin Hyman, *Era of the Oath: Northern Loyalty Tests During the Civil War and Reconstruction* (University of Pennsylvania Press: Philadelphia, 1954).
[2] 12 U.S. Stat. 502, 502-03 (1862).

most important constitutional and political arguments to the contrary? Suppose Mississippi elected Jefferson Davis to the Senate. Should he have been seated?

SENATOR JAMES BAYARD (Democrat, Delaware)

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This act of July 2, 1862 [the ironclad test oath act], is repugnant to at least three, I think four, provisions of the Federal Constitution. It is invalid because it prescribes a further qualification for a member of Congress before entering upon the performance of his duties. . . .

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[T]he oath prescribed in the first clause of the act of 1862 varies in substance from that required by the Constitution. It is no longer a question of form; it is not a promissory oath relating to the present and the future; but it is an expurgatory test oath retrospective in its character, and covering the events of the affiant's past life. The Constitution authorizes an oath appealing to the conscience alone for the future performance of duty. This oath embodied in the first portion of this act of 1862 is retrospective as to his acts, and makes it a necessary qualification that he shall purge himself as to his past conduct under a penalty.

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The evil here lies in the precedent which will be made by sanctioning the law as constitutional. If the power exists in Congress to pass a law of this nature, to require an oath of this character, an expurgatory test oath relating to the offense of treason, then the power is without limits as to any crime or offense whatever, and Congress may require every member elected to purge himself by oath not only from some other particular offense but from all offenses of any kind against the laws of the United States. Indeed, the power is without limit, except by the very slender one that a religious test cannot be required. An existing majority would have the authority, if this power be vested in Congress, to exclude by the oath which they prescribed every one who different from them in opinion as to any particular subject, or any particular proclamation of the existing Executive. They might make the oath promissory alone by requiring the part to swear that he would support the particular law though he believed it unconstitutional and void; or to swear that he would support the particular proclamation of the President though he believed it an excess of executive power; and thus a mere majority of the Legislature might exclude all who differed in opinion from them in reference to any subject whatever. Or they might go further, on the principle of this law, if it be sound, and require that the member elected should swear not only as to the future, but as to the past that he had always supported a particular act of Congress from the time of its passage or a particular proclamation of the Executive from the time of its promulgation.

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The second objection to the constitutionality of this act is that it is in conflict with the fifth article of the amendments to the Constitution of the United States. . . .

By the act of 1862 every one who is required to take the oath it prescribes is "held to answer" for a capital crime; and if he refuses, whether guilty or not guilty, the law assumes for its own purposes his guilt, and punishes him by disqualification and a refusal of his rights. He is deprived of those rights without due process of law. The legal presumption of innocence is reversed as to every citizen, and this law, without accusation, without trial, without proof, and without conviction, inflicts punishment as a consequence of silence. It seeks to ascertain facts in a peculiar manner unknown to the common law, and prohibited by the Constitution, not by the judgment of a court of competent jurisdiction, but by a forced confession of the offender, and holds his silence as evidence of guilt. No matter how legitimate or desirable the object to be attained—the exclusion of powers guilty of treason from Congress—such means effecting it are repugnant to the Constitution, and cannot, therefore, be lawfully used.

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. . . The act is repugnant to the second section of the second article of the Constitution. By the second section of the second article of the Constitution the pardoning power is vested exclusively in the President of the United States. . . .

. . . Suppose a southern citizen who has voluntarily borne arms against the United States during the revolt, becoming convinced of his error while the war continues, should return to his allegiance, and be pardoned by the President, and be elected to the Senate by a Legislature whose authority to elect you recognized. He certainly could not take this oath without being guilty of perjury, and therefore, in effect, this law impairs and abrogates the pardoning power of the President to that extent. Is that constitutional? Can you obstruct by legislation of this kind, direct or indirect, the legal effect of a power which is vested in the executive branch and not in the legislative branch of the Government? The law punishes the member-elect, in defiance of the executive pardon, by disqualification for the office or trust to which he has been legally and constitutionally elected.

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There is a still further and fourth object to the validity of this law. By the Constitution of the United States no ex post facto law may be passed; and yet by the imposition of this oath you prescribe the penalty for a crime committed before the passage of the law, though it was subject to no such punishment at the time of its commission.

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. . . It has been asked, "Would you admit a disloyal person, a traitor, into the Senate?" The answer is, there is no authority in a majority to refuse admission to his seat if the person duly chosen is qualified. The Senate may judge and decide whether the election is by competent authority, whether the credentials are sufficient, and whether the party is possessed of the requisite qualifications. When it assumes by a majority the right to refuse a seat on other grounds, it violates a fundamental principle of the Constitution and of representative government. The sovereignty is in the people, and the right of choice is with them. . . .

But it is said that the body must have power to protect itself against traitors or infamous persons. The answer is, the power of expulsion gives full protection, and that power is vested in the Senate in absolute discretion, with no other than that it requires two-thirds of the body to exercise it—a limitation of numbers. . . .

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SENATOR JACOB COLLAMER (Republican, Vermont)

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The honorable Senator from Delaware seems to suppose all the way through his remarks that we have undertaken to create new disabilities by the form of the oath which we have prescribed, and all his argument has been confined to that, leveled to the form of the law, as if that law created, made, defined new qualifications or disqualifications. There is the great mistake. I will undertake to show that that statute does not contain any provision for a disqualification or disqualification, never was made for any such purpose, that the disqualification which exists of which that statute speaks was created by entirely an independent and different law, passed at the same session, and therefore *in pari material* on this subject of treason, and that the statute in regard to the oath is merely ancillary, auxiliary, aiding the body in the carrying into effect of the other independent law which was created by the disability. . . .

[Senator Collamer then pointed to legislation, passed in July 1862, which declared that "every person guilty of [treason or participating in "any rebellion or insurrection against the authority of the United States"] shall be forever incapable and disqualified to hold any office under the United States."]

. . . A disaffected State which would send a traitor here would not be likely to convict him; and if we could not be disabused and freed from persons of that kind to confound our councils, it is clear that the Constitution and this Government must go to ruin. Hence the law was drawn, intentionally drawn, in that way. . . .

. . . Since the early day of 1790 we have had upon our statute book a law that a man guilty of bribery in our courts should be disqualified from holding any office under the Government. In 1853 we passed a law that if a man was found guilty of bribery not merely in court, but in regard to any matter connected with the Government anywhere, he should be disqualified from holding office under the

Government. . . . I know of no prohibition upon the power of Congress in the making of laws for the punishment of crime except the restriction that cruel and unusual punishment shall not be inflicted.

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Now, sir, what is the true character of the law requiring the oath? It is nothing but a mode practically to aid the body in carrying into effect the previously existing declaration in relation to disqualification, not creating a disqualification. . . .

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The next objection is that it is contrary to the fifth amendment to the Constitution. The winding up and the substance of that amendment is, that no person shall be deprived of life, liberty, or property without due process of law, meaning, without trial or conviction. Now I ask, does this law deprive a man of life, liberty, or property. It tells the State, "You must not send traitors here; they are not entitled to hold seats in the Senate:" and it says to such men, "You had better not come here: you cannot occupy a place in the Senate."

But the gentleman says further, this is an ex post facto law. You require of the man to swear that he has not borne arms against the Government, &c; that is to say, you require him to say not only that he has not borne arms against the Government since the passage of this act which I have read, but at no previous time. That would go back of the act on which and by which I say, the disqualification exists. I declare to speak of this argument with all candor and fairness. If today there is a statute law which makes the punishment of larceny four years' imprisonment, and a man commits larceny under it, and the next day afterwards, and before he is convicted, a law is passed that the punishment for larceny shall be two years' imprisonment, and he is tried, which of those sentences is to be passed upon him, the one that was in force when he committed the offense, the four years, or the two years? Clearly the two years and that only; and it is not for him to say, "That sentence was ex post facto, after I had committed the larceny." As it is the most favorable, as it is the mildest, he should not complain of it.

Ex post facto laws are those which create that a crime which was not so before, or which operate on acts previously committed, or increase the punishment, but here you diminish the punishment. Now sir, let us take a case under the Senator's argument. A man comes here under this law, this disqualification, and the question arises. He at once tells us, "You must not ask me about this as you proposed, nor under that law which you are carrying into effect, because that law was passed after some of the acts which you are asking me about had been committed. Now, what is that put into plain English? It is simply this: "The law formerly was that I should be disqualified by being hung for something that I did; now you are going to disqualify me under this law passed since the commission of the act without hanging me; and that is ex post facto, unconstitutional." That is all there is of that.

. . . [The Senator from Delaware] says the man must be convicted; the Constitution requires that he shall be convicted, before he suffers anything. Sir, the law we are now trying to execute by the administration of this oath is not a matter of punishment. It is merely calling on us as judges of the qualifications of Senators to obtain evidence and pass practically upon that provision of the law. But the Senator says he must be convicted. That was one of the very troubles we had to encounter at the start. Disaffected States sent those Senators here, and the States that sent them, knowing their sentiments, knowing their conduct, and understanding their purposes, would not convict them, nor could they be convicted in them. The moment you admit that you must admit that your Constitution is so framed that if a man is guilty of treason and his State prefers to have him commit more, and do it in the Senate of the United States, it shall have the right to send him here, and you cannot prevent it.

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. . . [T]he Government, according to the view of the Senator, with all the admiration he expresses for the Constitution, is a Government of inherent imbecility; it has within it germs of self-destruction; it is hedged around with provisions of the Constitution which, as he construes them, must make you receive a traitor on the floor because they will not convict him at home, and they sent him here because he was one, and you must keep him here; and this Chamber is by the very forms of your Constitution a great arena in which the traitors are to perform their gladiatorship. . . .

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