Ex Parte Garland

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Ex parte Garland - 71 U.S. 333 (1866)
U.S. Supreme Court Ex parte Garland, 71 U.S. 4 Wall. 333 333 (1866)

Ex parte Garland

71 U.S. (4 Wall.) 333

SYLLABUS

1. The act of Congress of January 24th, 1865, providing that, after its passage, no person shall be admitted as an attorney and counselor to the bar of the Supreme Court, and, after March 4th, 1865, to the bar of any Circuit or District Court of the United States, or Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed to the oath prescribed in the act of July 2d, 1862 -- which latter act requires the affiant to swear or affirm that he has never voluntarily borne arms against the United States since he has been a citizen thereof, that he

has voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto, that he has neither sought nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States, and that he has not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto -- operates as a legislative decree excluding from the practice of the law in the courts of the United States all parties who have offended in any of the particulars enumerated.

2. Exclusion from the practice of the law in the Federal courts, or from any of the ordinary avocations of life for *past conduct* is 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.

3. The act being of this character partakes of the nature of a bills of pains and penalties, and is subject to the constitutional inhibition against the passage of bills of attainder, under which general designation bills of pains and penalties are included.

4. In the exclusion which the act 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 within the inhibition of the Constitution against the passage of an *ex post facto* law.

5. Attorneys and counselors are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character.

6. The order of admission is the judgment of the court that the parties possess the requisite qualifications and are entitled to appear as attorneys and counselors and conduct causes therein. From its entry, the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and

declared by the judgment of the court *after opportunity to be heard has been afforded.* Their admission and their exclusion are the exercise of judicial power.

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7. The right of an attorney and counselor, acquired by his admission, to appear for suitors and to argue causes, is not a mere indulgence -- a matter of grace and favor -- 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.

8. The admitted power of Congress to prescribe qualifications for the office of attorney and counselor in the Federal courts cannot be exercised as a means for the infliction of punishment for the past conduct of such officers, against the inhibition of the Constitution.

9. The power of pardon conferred by the Constitution upon the President is unlimited except in cases of impeachment. 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. The power is not subject to legislative control.

10. A pardon reaches the punishment prescribed for an offence and the guilt of the offender. 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 gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property of interests vested in others in consequence of the conviction and judgment.

11. The petitioner in this case, having received a full pardon for all offences committed by his participation, direct or implied, in the Rebellion, is relieved from all penalties and disabilities attached to the offence of treason, committed by such participation. For that offence, he is beyond the reach of punishment of any kind.

He cannot, therefore, be excluded by reason of that offence from continuing in the enjoyment of a previously acquired right to appear as an attorney and counselor in the Federal courts.

On the 2d of July, 1862, Congress, by "An act to prescribe an oath of office, and for other purposes," [Footnote 1] enacted:

"That hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, take and subscribe the following oath or affirmation:"

"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*

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persons engaged in armed hostility thereto; that I have neither sought nor accepted, not attempted to exercise the functions of *any office whatever, under any authority or pretended authority in hostility to the United States;* that I have not yielded a voluntary support to any pretended government, authority, power, or constitution with 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; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God;"

&c.;

"Any person who shall falsely take the said oath shall be guilty of perjury, and, on conviction, in addition to the penalties now prescribed for that offence, shall be

deprived of his office, and rendered incapable forever after of holding any office or place under the United States."

On the 24th of January, 1865, [Footnote 2] Congress passed a supplementary act extending these provisions so as to embrace attorneys and counselors of the courts of the United States. I t is as follows:

"No person, after the date of this act, shall be admitted to the bar of the *Supreme Court of the United States,* or at any time after the fourth of March next, shall be admitted to the bar *of any Circuit or District Court of the United States, or of the Court of Claims,* as an attorney or counselor of such court, or shall be allowed to appear and be heard in any such court, by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed in 'An act to prescribe an oath of office and for other purposes,' approved July 2d, 1862. And any person who shall falsely take the said oath shall be guilty of perjury, and, on conviction,"

&c.;

By the Judiciary Act of 1789, the Supreme Court has power to make rules and decide upon the qualifications of attorneys.

At the December Term of 1860, A. H. Garland, Esquire, was admitted as an attorney and counselor of the court, and took and subscribed the oath then required. The second rule, as it then existed, was as follows:

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"It shall be requisite to the admission of attorneys and counselors to practise in this court that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, *and that their private and professional character shall appear to be fair.* "

"They shall respectively take the following oath or affirmation, viz.:"

"I, A. B., do solemnly swear (or affirm, as the case may be) that I will demean myself as an attorney and counselor of this court, uprightly, and according to law, and that I will support the Constitution of the United States."

There was then no other qualification for attorneys in this court than such as are named in this rule.

In March, 1865, this rule was changed by the addition of a clause requiring an oath, in conformity with the act of Congress.

At the same term at which he was admitted, Mr. Garland appeared, and presented printed argument in several cases in which he was counsel. His name continued on the roll of attorneys from then to the present time. but the late Rebellion intervened, and all business in which he was concerned at the time of his admission remained undisposed of. In some of the cases alluded to, fees were paid, and in others, they were partially paid. Having taken part in the Rebellion against the United States by being in the Congress of the so-called Confederate States from May, 1861, until the final surrender of the forces of such Confederate States -- first in the lower house and afterwards in the Senate of that body as the representative of the State of Arkansas, of which he was a citizen -- Mr. Garland could not take the oath prescribed by the acts of Congress before mentioned and the rule of the court of March, 1865.

The State, in May, 1861, passed an ordinance of secession, purporting to withdraw herself from the Union, and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States.

In July, 1865, Mr. Garland received from the President

a pardon, by which the chief magistrate, reciting that Mr. Garland, "by taking part in the late Rebellion against the government, had made himself liable to heavy pains and penalties," &c.;, did thereby

"Grant to the said A. H. Garland a FULL PARDON AND AMNESTY for all offences by him committed, arising from participation, direct or implied, in the said Rebellion, conditioned as follows: this pardon to begin and take effect from the day on which the said A. H. Garland shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865, and to be void and of no effect if the said A. H. Garland shall hereafter at any time acquire any property whatever in slaves, or make use of slave labor, and that he first pay all costs which may have accrued in any proceedings hitherto instituted against his person or property. And upon the further condition that the said A. H. Garland shall notify the Secretary of State in writing that he has received and accepted the foregoing pardon."

The oath required was taken by Mr. Garland and annexed to the pardon. It was to the purport that he would thenceforth

"faithfully support, protect, and defend the Constitution of the United States and the union of the States thereunder, and that he would in like manner abide by and faithfully support all laws and proclamations which had been made during the existing Rebellion with reference to the emancipation of slaves."

Mr. Garland now produced this pardon, and, by petition filed in court, asked permission to continue to practise as an attorney and counselor of the court, without taking the oath required by the act of January 24th, 1865, and the rule of the court. He rested his application principally upon two grounds:

1st. That the act of January 24th, 1865, so far as it affected his status in the court, was unconstitutional and void, and,

2d. That, if the act were constitutional, he was released from compliance with its provisions by the pardon of the President.

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Mr. Justice FIELD delivered the opinion of the court.

On the second of July, 1862, Congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, except the President, before entering upon the duties of his office, and before being entitled to its salary, or other emoluments. On the 24th of January, 1865, Congress, by a supplementary act, extended its provisions so as to embrace attorneys and counselors of the courts of the United States. This latter act provides that, after its passage, no person shall be admitted as an attorney and counselor to the bar of the Supreme Court, and, after the fourth of March, 1865, to the bar of any Circuit or District Court of the United States, or of the Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney,

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unless he shall have first taken and subscribed the oath prescribed by the act of July 2d, 1862. It also provides that the oath shall be preserved among the files of the court, and if any person take it falsely, he shall be guilty of perjury and, upon conviction, shall be subject to the pains and penalties of that offence.

At the December Term, 1860, the petitioner was admitted as an attorney and counselor of this court, and took and subscribed the oath then required. By the second rule, as it then existed, it was only requisite to the admission of attorneys and counselors of this court that they should have been such officers for the three previous years in the highest courts of the States to which they respectively belonged, and that their private and professional character should appear to be fair.

In March, 1865, this rule was changed by the addition of a clause requiring the administration of the oath in conformity with the act of Congress.

In May, 1861, the State of Arkansas, of which the petitioner was a citizen, passed an ordinance of secession which purported to withdraw the State from the Union, and afterwards, in the same year, by another ordinance, attached herself to the

so-called Confederate States, and by act of the congress of that confederacy was received as one of its members.

The petitioner followed the State, and was one of her representatives -- first in the lower house and afterwards in the senate of the congress of that confederacy, and was a member of the senate at the time of the surrender of the Confederate forces to the armies of the United States.

In July, 1865, he received from the President of the United States a full pardon for all offences committed by his participation, direct or implied, in the Rebellion. He now produces his pardon, and asks permission to continue to practise as an attorney and counselor of the court without taking the oath required by the act of January 24th, 1865, and the rule of the court, which he is unable to take by reason of the offices he held under the Confederate government.

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He rests his application principally upon two grounds:

1st. That the act of January 24th, 1865, so far as it affects his status in the court, is unconstitutional and void, and,

2d. That, if the act be constitutional, he is released from compliance with its provisions by the pardon of the President.

The oath prescribed by the act is as follows:

1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;

2d. That he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;

3d. That he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States;

4th. That he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and,

5th. That he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same.

This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts. Some of these acts constituted, when they were committed, offences against the criminal laws of the country; others may or may not have been offences according to the circumstances under which they were committed and the motives of the parties. The first clause covers one form of the crime of treason, and the deponent must declare that he has not been guilty of this crime not only during the war of the Rebellion, but during any period of his life since he has been a citizen. The second clause goes beyond the limits of treason, and embraces not only the giving of aid and encouragement of a treasonable nature to a public enemy, but also the giving of assistance of any kind to persons engaged

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in armed hostility to the United States. The third clause applies to the seeking, acceptance, or exercise not only of offices created for the purpose of more effectually carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order. The fourth clause not only includes those who gave a cordial and active support to the hostile government, but also those who yielded a reluctant obedience to the existing order, established without their co-operation.

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. In the case of *Cummings against The State of Missouri,* just decided, we have had occasion to consider at length the meaning of a bill of attainder and of an *ex post facto* law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here

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what we there said. A like prohibition is contained in the Constitution against enactments of this kind by Congress, and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of Congress under consideration in this case.

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. It has been the

general practice in this country to obtain this evidence by an examination of the parties. In this court, the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry, the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. [Footnote 3] Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of

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judicial power, and has been so held in numerous cases. It was so held by the Court of Appeals of New York in the matter of the application of Cooper for admission. [Footnote 4] "Attorneys and counselors," said that court,

"are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

In *Ex parte Secombe,* [Footnote 5] a mandamus to the Supreme Court of the Territory of Minnesota to vacate an order removing an attorney and counselor was denied by this court on the ground that the removal was a judicial act. "We are not aware of any case," said the court,

"where a mandamus was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act and within

the scope of its jurisdiction and discretion."

And, in the same case, the court observed that

"it has been well settled by the rules and practice of common law courts that it rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counselor, and for what cause he ought to be removed."

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

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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. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of *Cummings v. The State of Missouri,* and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.

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." [Footnote 6]

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

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him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment. [Footnote 7]

The pardon produced by the petitioner is a full pardon "for all offences by him committed, arising from participation, direct or implied, in the Rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the

exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted.

The case of R. H. Marr is similar in its main features to that of the petitioner, and his petition must also be granted.

And the amendment of the second rule of the court, which requires the oath prescribed by the act of January 24th, 1865, to be taken by attorneys and counselors, having been unadvisedly adopted, must be rescinded.

AND IT IS SO ORDERED.

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[Footnote 1]

12 Stat. at Large 502.

[Footnote 2]

13 Stat. at Large 424.

[Footnote 3]

Ex parte Heyfron, 7 Howard, Mississippi 127; *Fletcher v. Daingerfield,* 20 California 430.

[Footnote 4]

22 New York 81.

[Footnote 5]

60 U. S. 19 Howard 9.

[Footnote 6]

Article II, 2.

[Footnote 7]

4 Blackstone's Commentaries, 402; 6 Bacon's Abridgment, tit. Pardon; Hawkins, book 2, c. 37, 34 and 54.

Mr. 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.* (*See supra,* p. 71 U. S. 316 .)

I dissent from the opinions of the court just announced.

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.

For the speedy return of that better spirit which shall leave us no cause for such laws all good men look with anxiety and with a hope, I trust, not altogether unfounded.

But the question involved, relating, as it does, to the right of the legislatures of the nation and of the state to exclude from offices and places of high public trust, the administration of whose functions are essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force can never cease to be one of profound interest.

It is at all times the exercise of an extremely delicate power for this court of declare that the Congress of the nation, or the legislative body of a State, has assumed an authority not belonging to it, and, by violating the Constitution, has rendered void its attempt at legislation. In the case of an act of Congress, which expresses the sense of the members of a coordinate department of the government, as much bound by their oath of office as we are to respect that Constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it, the incompatibility of the act with the Constitution should be so clear as to leave little reason for doubt before we pronounce it to be invalid.

Unable to see this incompatibility either in the act of Congress or in the provision of the constitution of Missouri upon which this court has just passed, but entertaining a

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strong conviction that both were within the competency of the bodies which enacted them, it seems to me an occasion which demands that my dissent from the judgment of the court, and the reasons for that dissent, should be placed on its records.

In the comments which I have to make upon these cases, I shall speak of principles equally applicable to both, although I shall refer more directly to that which involves the oath required of attorneys by the act of Congress, reserving for the close some remarks more especially applicable to the oath prescribed by the constitution of the State of Missouri.

The Constitution of the United States makes ample provision for the establishment of courts of justice to administer her law and to protect and enforce the rights of her citizens. Article III, section 1 of that instrument, says that

"[t]he judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish."

Section 8 of article I closes its enumeration of the powers conferred on Congress by the broad declaration that it shall have authority

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department thereof."

Under these provisions, Congress has ordained and established circuit courts, district courts, and territorial courts, and has, by various statutes, fixed the number of the judges of the Supreme Court. It has limited and defined the jurisdiction of all these, and determined the salaries of the judges who hold them. It has provided for their necessary officers, as marshals, clerks, prosecuting attorneys, bailiffs, commissioners, and jurors. And, by the act of 1789, commonly called the Judiciary Act, passed by the first Congress assembled under the Constitution, it is, among other things enacted that,

"[i]n all the courts of the United States, the parties may plead and manage their causes personally, or by the

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assistance of such counsel or attorneys at law as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein."

It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counselors, solicitors, proctors, and other terms of similar import. The enactment which we have just cited recognizes this body of men, and their utility in the judicial system of the United States, and imposes upon the courts the duty of providing rules by which persons entitled to become members of this class may be permitted to exercise the privilege of managing and conducting causes in these courts. They are as essential to the successful working of the courts as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

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. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause and the right of another to appear and defend for him. The one, like the right to life, liberty, and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions.

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.

Attorneys are often deprived of this right upon evidence of bad moral character or specific acts of immorality or dishonesty

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which show that they no longer posses the requisite qualifications.

All this is done by law, either statutory or common, and whether the one or the other, equally the expression of legislative will, for the common law exists in this country only as it is adopted or permitted by the legislatures or by constitutions.

No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of Congress to the same extent that they are under legislative control in the States or in any other government, and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to congressional legislation. Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers, and prescribe their functions, can it be doubted that Congress has the full right to prescribe terms for the admission, rejection, and expulsion of attorneys,

and for requiring of them an oath, to show whether they have the proper qualifications for the discharge of their duties?

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

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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.

In illustration of this truth, I venture to affirm that if all the members of the legal profession in the States lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of the Rebellion. If, then, this qualification be so essential in a lawyer, it cannot be denied that the statute under consideration was eminently calculated to

secure that result.

The majority of this court, however, do not base their decisions on the mere absence of authority in Congress and in the States to enact the laws which are the subject of consideration, but insist that the Constitution of the United States forbids, in prohibitory terms, the passage of such laws both to the Congress and to the States. The provisions of that instrument relied on the sustain this doctrine are those which forbid Congress and the States, respectively, from passing bills of attainder and *ex post facto* laws. It is said that the act of Congress and the provision of the constitution of the State of Missouri under review are in conflict with both these prohibitions, and are therefore void.

I will examine this proposition in reference to these two clauses of the Constitution in the order in which they occur in that instrument.

1. In regard to bills of attainder, I am not aware of any judicial decision by a court of Federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English Parliament, that we may learn so much of their

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peculiar characteristics, as will enable us to arrive at a sound conclusion as to what was intended to be prohibited by the Constitution.

The word attainder is derived, by Sir Thomas Tomlins, in his law dictionary, from the words *attincta* and *attinctura,* and is defined to be

"the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law on the pronouncing the sentence of death."

The effect of this corruption of the blood was that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.

This attainder or corruption of blood as a consequence of judicial sentence of death continued to be the law of England in all cases of treason to the time that our Constitution was framed, and, for aught that is known to me, is the law of that country on condemnation for treason at this day.

Bills of attainder, therefore, 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. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the Constitution were directing their prohibition, for, after having, in article I, prohibited the passage of bills of attainder -- in section nine to Congress and in section ten to the States -- there still remained to the judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in section three of article III, concerning the judiciary, that, while Congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

This, however, while it was the chief, was not the only, peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an attentive

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examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

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. [Footnote 2/1]

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.

Mr. Hamilton, in the seventy-eighth number of the Federalist, says that he agrees with the maxim of Montesquieu that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And others of the ablest numbers of that publication are devoted to the purpose of showing that. in our Constitution. these powers are so justly balanced and restrained that neither will probably be able to make much encroachment upon the others. Nor was it less repugnant to their views of the security of personal rights that any person should be condemned without a hearing and punished without a law previously prescribing the nature and extent of that punishment. They therefore struck boldly at all this machinery of legislative despotism by forbidding the passage of bills of attainder and *ex post facto* laws, both to Congress and to the States.

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It remains to inquire whether, in the act of Congress under consideration (and the remarks apply with equal force to the Missouri constitution), there is found any one of these features of bills of attainder, and, if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills.

It is not claimed that the law works a corruption of blood. It will, therefore, be conceded at once that the act does not contain this leading feature of bills of attainder.

Nor am I capable of seeing that it contains a conviction or sentence of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description when their names were unknown. But, in such cases, the law leaves nothing to be done to render its operation effectual but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to. The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise, and all that was required to insure their punishment was to prove that association.

If this were not so, then the act was mere *brutum fulmen,* and the parties other than the earl could only be punished, notwithstanding the act, by proof of their guilt before some competent tribunal.

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

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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. If by any possibility it can be said to *provide* for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence and pronounce his own sentence. It is not, then, the act of Congress, but the party interested, that tries and condemns. We shall see, when we come to the discussion of this act in

its relation to *ex post facto* laws, that it inflicts no 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.

2. Passing now to consider whether the statute is an *ex post facto* law, we find that the meaning of that term, as used in the Constitution, is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself.

All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of Justice Story, in the case of *Watson v. Mercer,* [Footnote 2/2]

" *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. [Footnote 2/3]"

The first case on the subject is that of *Calder v. Bull,* and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded. The court divides all laws

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which come within the meaning of that clause of the Constitution into four classes:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2d. Every law that aggravates a crime, or makes it greater than it was when committed.

3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

4th. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offence to convict the offender.

Again, the court says, in the same opinion, that "the true distinction is between *ex post facto* laws and retrospective laws," and proceeds to show that, however unjust the latter may be, they are not prohibited by the Constitution, while the former are.

This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all:

1st. That they contemplate the trial of some person charged with an offence.

2d. That they contemplate a punishment of the person found guilty of such offence.

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. 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. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a civil proceeding.

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It is simply an oath of office, and it is required of all officeholders alike. 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.

No trial of any person is contemplated by the act for any past offence. Nor is any party supposed to be charged with any offence in the only proceeding which the law provides.

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. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defence of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. 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.

Where, then, is this *ex post facto* law which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the Federal government when they are to be exercised in certain directions, and enlarges them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the Constitution of the United States is held to confer no power on Congress to prevent traitors practising in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the State of Missouri relating to a qualification required of ministers of religion.

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.

Webster's second definition of the word "punish" is this:

"In a loose sense, to afflict with punishment, &c.;, with a view to amendment, to chasten." And it is in this loose sense that the word is used by this court as synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of crime.

And so, in this sense, it is said that, whereas persons who had been guilty of the offences mentioned in the oath were, by the laws then in force, only liable to be punished with death and confiscation of all their property, they are, by a law passed since these offences were committed, made liable to the enormous additional punishment of being deprived of the right to practise law!

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.

I have already shown that this act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that, even if the right of the court to prevent an attorney guilty of the acts mentioned from appearing in its forum depended upon the statute, that still it inflicts no punishment in the legal sense of that term.

"Punishment," says Mr. Wharton in his Law Lexicon, "is the penalty for transgressing the laws," and this is perhaps as comprehensive and at the same time as accurate a definition as can be given. Now what law is it whose transgression

is punished in the case before us? None is referred to in the act, and there is nothing on its face to show that it was intended as an additional punishment for any offence described in any other act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for a crime whose penalty already was death and confiscation of property.

In fact, the word "punishment" is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore *ex post facto.*

A law, for instance, which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath would result in his punishment in this sense if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court in *Watson v. Mercer* as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity heretofore deemed harmless shall be found all at once to be dangerous to the lives of persons with whom they associate. The State, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is it an *ex post facto* law? And, if not, in what does it differ from one? Just in the same manner that the act of Congress does, namely, that the proceeding is civil, and not criminal, and that the imprisonment in the one case, and the prohibition to practise law in the other, are not punishments in the legal meaning of that term.

The civil law maxim, " *Nemo debet bis vexari, pro un a et eadam causa,* " has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the Constitution incorporates

this

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principle into that instrument so far as punishment affects life or limb. It results from this rule that no man can be twice lawfully punished for the same offence. We have already seen that the acts of which the party is required to purge himself on oath constitute the crime of treason. Now if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason.

Yet if the applicant here should afterwards be indicted for treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial nor punishment within the legal meaning of these terms.

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?

Again, it was a qualification required by some of the State constitutions for the office of judge that the person should not be over sixty years of age. To a very

large number of the ablest lawyers in any State, this is a qualification to which they can never attain, for every year removes

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them farther away from the designated age. Is it a punishment?

The distinguished commentator on American law, and chancellor of the State of New York, was deprived of that office by this provision of the constitution of that State, and he was thus, in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again, by a law passed after he had accepted the office.

This is a much stronger case than that of a disloyal attorney forbid by law to practise in the courts, yet no one ever thought the law was *ex post facto* in the sense of the Constitution of the United States.

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

The history of the time when this statute was passed -- the darkest hour of our great struggle -- the necessity for its existence, the humane character of the President who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defence, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offences.

I think I have now shown that the statute in question is within the legislative power of Congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an *ex post facto* law.

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. If it is a qualification which Congress

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had a right to prescribe as necessary to an attorney, then the President cannot, by pardon or otherwise, dispense with the law requiring such qualification.

This is not only the plain rule as between the legislative and executive departments of the government, but it is the declaration of common sense. The man who, by counterfeiting, by theft, by murder, or by treason is rendered unfit to exercise the functions of an attorney or counselor at law, may be saved by the executive pardon from the penitentiary or the gallows, but is not thereby restored to the qualifications which are essential to admission to the bar. No doubt it will be found that very many persons among those who cannot take this oath deserve to be relieved from the prohibition of the law, but this in no wise depends upon the act of the President in giving or refusing a pardon. It remains to the legislative power alone to prescribe under what circumstances this relief shall be extended.

In regard to the case of *Cummings v. The State of Missouri,* allusions have been made in the course of argument to the sanctity of the ministerial office and to the inviolability of religious freedom in this country.

But no attempt has been made to show that the Constitution of the United States interposes any such protection between the State governments and their own citizens. Nor can anything of this kind be shown. The Federal Constitution contains but two provisions on this subject. One of these forbids Congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is that no religious test shall ever be required as a qualification to any office or public trust under the United States.

No restraint is placed by that instrument on the action of the States, but on the contrary, in the language of Story, [Footnote 2/4]

"the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions. "

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If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permoli. [Footnote 2/5]

An ordinance of the first municipality of the city of New Orleans imposed a penalty on any priest who should officiate at any funeral in any other church than the obituary chapel. Mr. Permoli, a Catholic priest, performed the funeral services of his church over the body of one of his parishioners inclosed in a coffin in the Roman Catholic Church of St. Augustine. For this, he was fined, and, relying upon the vague idea advanced here that the Federal Constitution protected him in the exercise of his holy functions, he brought the case to this court.

But hard as that case was, the court replied to him in the following language:

"The Constitution (of the United States) makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States."

Mr. Permoli's writ of error was therefore dismissed for want of jurisdiction.

In that case, an ordinance of a mere local corporation forbid a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief.

In this case, the constitution of the State of Missouri, the fundamental law of the people of that State, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions unless he will show by his own oath that he has borne a true allegiance to his government. This court now holds this

constitutional provision void on the ground that the Federal Constitution forbids it. I leave the two cases to speak for themselves.

In the discussion of these cases, I have said nothing, on the one hand, of the great evils inflicted on the country by

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the voluntary action of many of those persons affected by the laws under consideration, nor, on the other hand, of the hardships which they are now suffering much more as a consequence of that action than of any laws which Congress can possibly frame. But I have endeavored to bring to the examination of the grave questions of constitutional law involved in this inquiry those principles alone which are calculated to assist in determining what the law is, rather than what, in my private judgment, it ought to be.

[Footnote 2/1]

See Story on the Constitution 1344.

[Footnote 2/2]

Calder v. Bull, 3 Dallas 386; *Fletcher v. Peck,* 6 Cranch 87; *Ogden v. Saunders,* 12 Wheaton 266; *Satterlee v. Matthewson,* 2 Peters 380.

[Footnote 2/3]

33 U. S. 8 Pet. 88.

[Footnote 2/4]

Commentaries on the Constitution 1878.

[Footnote 2/5]

44 U. S. 3 How. 589.