49TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 3184.

JOHN W. CHICKERING.

JULY 1, 1886.—Laid on the table and ordered to be printed.

Mr. STEELE, from the Committee on Military Affairs, submitted the following

REPORT:

[To accompany bill H. R. 5948.]

The Committee on Military Affairs, to whom was referred the bill (H. R. 5948) for the relief of John W. Chickering, report it back and recommend that it lie upon the table.

In support of this view the committee print a letter from the War Department, indorsed by the Adjutant-General's Office March 26, 1886; a report made June 14, 1878, in the Forty-fifth Congress, by Mr. Bragg, the present chairman of the Committee on Military Affairs, and a report made February 21, 1877, in the Forty-fourth Congress, by Mr. Cockrell, which not only give the facts in the case, but present constitutional objections, to which special attention is invited.

WAR DEPARTMENT,
Washington City, March 26, 1886.

SIR: In returning herewith House bill 5948, Forty-ninth Congress, first session, to provide for the restoration of John W. Chickering to the Army, as a first lieutenant of cavalry, referred by you for the views of this Department thereon, I have the honor to invite attention to the inclosed report of the 24th instant, from the Adjutant-General, and also to a report of the Senate Committee on Military Affairs, dated February 21, 1877 (Senate Report No. 679, Forty-fourth Congress, second session), upon a similar bill for the restoration of Mr. Chickering to the Army. This last-mentioned report contains, besides the views of the committee on the bill, the report of this Department covering the record of the officer in the Army, and the order for his dismissal.

Attention is also invited to the numerous reports and documents referred to by the Adjutant-General in his report, and published by both houses of Congress, relating to the matter of the proposed restoration of this officer.

Very respectfully, your obedient servant,

S. V. BENÉT,
Brig. Gen., Chief of Ordnance, and Acting Secretary of War.

Hon. E. S. BRAGG,
Chairman Committee on Military Affairs, House of Representatives.

[First indorsement.]

ADJUTANT-GENERAL'S OFFICE,
March 24, 1886.

Respectfully returned to the Secretary of War with the suggestion that the attention of the committee in this case be invited to a report of the Senate Committee on Military Affairs of February 21, 1877 (Senate Report No. 679, Forty-fourth Congress, second session), upon a bill contemplating the restoration of Mr. Chickering to the Army, which report contains, besides the views of the committee on the bill, the report of this Department covering the record of the officer in the Army, the order for his dismissal, &c. The House Military Committee (by Mr. Bragg) also reported ad-

versely on a similar bill for the restoration of Mr. Chickering (House Report No. 985, June 14, 1878, Forty-fifth Congress, second session). Besides these, the following described published reports and documents relate to the matter of the proposed restoration of the office:

Senate Report No. 644, Forty fifth Congress, third session.
Senate Report No. 148, Forty-sixth Congress, second session.
Senate Report No. 419, Forty-sixth Congress, second session.
Senate Ex. Doc. No. 119, Forty-sixth Congress, second session.
Senate Ex. Doc. No. 212, Forty-sixth Congress, second session.

R. C. DRUM,
Adjutant-General.

[House Report No. 985, Forty-fifth Congress, second session.]

Jonn W. Chickering, late first lieutenant Sixth Cavalry, United States Army, was dismissed the service of the United States on the 27th day of January, 1875, by the finding and judgment of a general court-martial, which judgment and sentence were formally approved by the proper reviewing authority.

This committee has held heretofore that it is not in the province of Congress, within the proper discharge of its functions as a legislative body, to constitute itself a judicial body to review the proceedings of a court-martial and annul the same, where the court was properly constituted and the party arraigned had an opportunity to be heard in his defense before his peers, and the sentence was properly approved.

But in extreme cases, where the sentence or the method of proceeding was so contrary to law and justice as to shock at a glance the moral sense, this committee have recommended the exercise of the extraordinary power of Congress by directing a disregard of the sentence and proceedings, and by giving the party aggrieved a qualified relief.

This case presents nothing calling for such intervention, as it is presented to this committee. It was presented to the Forty-fourth Congress, second session, and was rejected. (See Senate Rep. No. 679, Forty-fourth Congress, second session.)

But, independent of the question of the propriety of a legislative body assuming judicial functions, this bill proposes that Congress shall take to itself the power of appointment to the Army, and delegate such power to the Secretary of War, by authorizing him "to restore to his former rank and place and relative grade" the person dismissed. This leads us to inquire the effect of the judgment of dismissal properly approved. The effect of the judgment has been declared by law, so that there can be no cavil over it:

"No officer of the Army of the United States who has been or shall hereafter be cashiered or dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, *shall ever be restored to the military service, except by a reappointment, confirmed by the Senate of the United States.*"

(See vol. 15, Statutes at Large, 125, re-enacted Revised Statutes, sec. 1228, page 215.)

The power of appointment is vested solely in the President of the United States, and we cannot by any law of Congress take it away from him and confer it upon ourselves or upon any one else.

It is submitted, then, that the effect of this bill, in relation to an attempt at the exercise of the appointing power, is not too strongly stated.

The committee have not sought to inquire into the merits or demerits of this officer, but rest their opinion upon the inexpediency, if not impropriety, of any interference by Congress as an appellate court in court-martial proceedings, and thereupon report adversely.

[Senate Report, No. 679, Forty-fourth Congress, second session.]

This bill passed the House of Representatives July 3, 1876, and is in the following words, to wit:

AN ACT for the relief of John W. Chickering.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and is hereby, directed to amend the record of the said John W. Chickering so that he shall appear on the rolls and records of the Army for rank as if he had been continuously in service: *Provided,* That nothing shall be paid to him for the interval of time from the twenty-seventh day of January, eighteen hundred and seventy-five, until the passage of this act.

Passed the House of Representatives July 3, 1876.

Attest: GEO. M. ADAMS, *Clerk.*

From the memorial of said Chickering, filed in this case, it appears that John W. Chickering was a first lieutenant in the Sixth United States Cavalry, and was tried before a court-martial on the charge of drunkenness while on duty, and was convicted and sentenced to be dismissed the service. This sentence was duly executed, and said Chickering ceased to be an officer in the Army.

Upon the execution of this sentence, said Chickering became a civilian—a citizen of the United States, nothing more, and now is such civilian and citizen—a mere ex-officer of the Army, without any of the rights, privileges, or powers of an officer of the Army.

The effect of this bill is to reinstate the said Chickering in the same position, in the same office in the Army which he would now occupy had he never been dismissed the service.

Has Congress the constitutional power to enact such a law—to exercise such power? Under the Constitution it is the exclusive right of the Chief Magistrate—the President—to appoint all officers, as declared in the following language:

"He shall nominate, and by and with the advice and consent of the Senate, shall appoint, all ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments.

"The Congress shall have power to make rules for the government and regulation of the land and naval forces."

Under these clauses of the Constitution the Congress has the power to provide by law for the appointment of officers, and to designate the classes from whom the President may appoint. Congress has for a long series of years designated the classes of persons from whom the President may appoint officers in the Army, until this provision established by law has come to be known as "promotion."

Section 1204, Revised Statutes United States, page 213, provides that—

"Promotions in the line shall be made through the whole Army, in its several lines of artillery, cavalry, and infantry, respectively."

Thus Congress has prescribed that the appointment to fill a vacancy in the office of colonel of infantry shall be made by the nomination of the senior lieutenant-colonel, and so in all grades of that line.

This constitutional power and right in the Congress cannot carry with it the power of appointment. This is an exclusive Presidential or Executive power and right. There can then be no such thing, under the Constitution, as the restoration or reinstatement of an ex-officer of the Army—a mere private citizen—to or into an office of the Army by Congressional enactment. There is and can be but one avenue to an office in the Army of any grade or rank whatsoever, and that is by appointment of the Executive.

This question is not a new one, though it may have been overlooked in some cases.

Section 1228, Revised Statutes United States, page 251, provides:

"No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a reappointment confirmed by the Senate."

This section is merely declaratory of what the law was and for a long time had been and now is, and declares no new principle or rule.

Under the regulations prescribed by Congress, the President can only appoint from civil life to a second lieutenancy in the Army, and to all other offices must appoint from the next highest in rank or senior.

In November, 1843, Attorney-General John Nelson gave an opinion to the Secretary of War (see Opinions of the Attorneys-General, vol. 4, page 274) in regard to the proceedings of courts-martial in cases of Lieutenant Whitney and others, saying:

"No case has been brought to my notice in which an officer once dismissed *has ever been restored* to the service *otherwise than* by *nomination* by the Chief Magistrate and *confirmation* by the Senate, where the grade was within the control of their joint action; and if such a case has occurred, I should not hesitate to declare it to be in direct repugnance to the Constitution and laws, and to every principle applicable to their just and safe construction."

On January 23, 1844, Attorney-General Nelson, in an opinion to the President (same volume, page 306), says:

"I know of no power by which an officer *once out of the service* can be brought back to it other than that of appointment."

In 1864, Attorney-General Edward Bates, in a written opinion to the President, decided that after the trial and conviction of an officer of the Navy by a general court-martial, and the approval of the sentence of dismissal by the President, and the execution of the sentence, the President cannot reconsider his approval and revoke the

entence, which is irrevocable. Yet the President may by *pardon* remove the guilt of dismissal.

January 22, 1869, Attorney-General William M. Evarts in his opinion to the President, in deciding the effect of a pardon upon the rank of an officer whose rank had been reduced by sentence of court-martial, says:

"A pardon by the President will restore an officer whose rank has been reduced by sentence of a court-martial to his former relative rank according to the date of his commission.

"The case of an officer who has been thus reduced in rank, differs *essentially* from that of an officer who has been dismissed from the service by sentence of a military court. After the latter is duly confirmed and executed, the *dismissed officer cannot be re-instated* by means of a *pardon or in any other manner* than by a new appointment and confirmation by the Senate. (See 12 Opinions, 547.)

The same views have been sustained by Attorneys-General Cushing, Wirt, Butler, Crittenden, Clifford, Johnson, and others.

In 1874 the following act was passed by Congress:

[PRIVATE—No. 244.]

AN ACT for the relief of A. H. Von Luettwitz, late lieutenant Third United States Cavalry.

Whereas A. H. Von Luettwitz, late a first lieutenant in the Third United States Cavalry, who was cashiered from the United States service by sentence of a general court-martial on the eighth day of July, eighteen hundred and seventy, having established his innocence of the charges upon which he was so cashiered the United States service: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Secretary of War be, and is hereby, directed to amend the record of the said A. H. Von Luettwitz so that he shall appear on the rolls and records of the Army for rank as if he had been continuously in service: *Provided*, That nothing shall be paid him for the interval of time from the eighth day of July, eighteen hundred and seventy, until the passage of this act.

Approved, June 23, 1874.

The bill in this case seems to be a copy of the above act, and is doubtless predicated upon it. This act was referred to Attorney-General George H. Williams, who, in vol. 14, Opinions Attorneys-General, pages 448, 449, and 450, says:

"I take it to be the duty of the Secretary of War under this act to erase from the rolls and records of the Army any entry or statement showing that Von Luettwitz was cashiered; but there is a *grave question* as to the *legal effect* of that action when taken. It is a fact that cannot be controverted that Von Luettwitz is out of the Army as much as if he had never been in it. Congress refers to him as a late first lieutenant, and declares that he was cashiered from the United States service, &c.; but the act in question seems to proceed upon the idea that the obliteration of the Army records, as therein provided for, will *ipso facto* restore Von Luettwitz to the office from which he was dismissed.

"This idea is in conflict with the Constitution of the United States. Von Leuttwitz, in pursuance of the sentence of a duly organized court-martial, was discharged from the Army in 1870; and since that time his relations to it have been like those of any other private citizen. Any mistake by this tribunal, not involving its jurisdiction, does not affect the validity of its proceedings. Congress cannot *annihilate a fact* by causing the record-evidence of *its existence* to be destroyed; nor can Congress constitutionally appoint a private citizen a lieutenant, colonel, or general in the Army. The appointing power is vested by the Constitution "in the President, by and with the advice and consent of the Senate," except where it is vested by law in the courts or the heads of Departments. * * * Considering the meaning of this act, rather than what it says, and the duty of the Executive to execute as far as practicable the *will* of Congress, no matter how inapposite the words in which it is expressed, my opinion is that the act under consideration confers upon the President the power to appoint Von Luettwitz a first lieutenant in the usual way, with pay to commence from the 23d of June, 1874."

General Williams refers to 4 Opinions, 274, 306; 7 Opin., 98; 8 Opin., 223, 235; 13 Opin., 99, 209.

This act of improper legislation shows the *torturing* of language and the evident meaning of words resorted to in deference to the *will of Congress*, or rather, the unconstitutional usurption of the functions of the Executive. This act was, beyond question, unauthorized by the Constitution, and could have been properly ignored by

the President; and yet, to avoid a seeming intention to violate a supposed law of Congress, the President appointed Von Luettwitz to a first lieutenancy.

In legislation, safety can be found only in strict obedience to the Constitution, and in leaving every department of the Government perfectly free in the exercise of its constitutional functions. Congress can no more assume the power of appointment, vested exclusively in the Executive, by and with the advice and consent of the Senate, than the Executive can assume legislative functions vested solely in Congress, subject only to the veto power of the Executive.

Your committee consider the act referred to them a mere unauthorized, unconstitutional attempt on the part of Congress to assume and usurp the functions of the Executive, and to wrest from him his constitutional power to appoint officers.

Your committee addressed a letter to the Secretary of War, and received through him the following reports, to wit:

ADJUTANT-GENERAL'S OFFICE, *February* 17, 1877.

SIR: I have the honor to return herewith the communication of Hon. F. M. Cockrell, of the Senate Committee on Military Affairs, dated the 1st instant, inclosing a bill (H. R. 1909) for the relief of John W. Chickering, late first lieutenant Sixth Cavalry, and requesting information as to the military record of Mr. Chickering and the rules concerning action on court-martial proceedings, &c.

John W. Chickering served as an officer of volunteers from August 27, 1862, to November 17, 1865. He was appointed second lieutenant, Thirteenth Infantry, May 11, 1866; transferred to the Twenty-second Infantry September 21, 1866; promoted first lieutenant February 1, 1868; left unassigned, on consolidation of the infantry regiments, May 15, 1869; assigned to Sixth Cavalry January 1, 1871, and dismissed by sentence of court-martial January 27, 1875. (Copy of order annexed, A.)

The communication above referred to, from the committee, was referred to the Judge-Advocate-General, a copy of whose remarks, in answer to certain of the inquiries contained therein, and in reference to the legal questions involved in the proposed legislation, is annexed, B. A copy of the review by the Judge-Advocate-General of the court-martial proceedings in Chickering's case is annexed, C.

The views of Mr. Secretary of War Taft, touching the general subject of legislation by Congress to reinstate dismissed officers, were set forth in a communication to the House of Representatives May 13, 1876. (Copy of extract annexed, D.)

Attention is also invited to the remarks of Judge-Advocate-General Holt, in a case precisely like the one now under consideration, as follows:

* * "Without intending criticisms on any matured action of Congress, it is thought that upon this bill, which is but a proposal for action, it may be well observed that the result of its adoption would seem to involve a disregard of one of the first principles of law, viz, that a record should '*import absolute verity.*' The bill, in requiring the Secretary of War to amend Thompson's record [Thompson had been dismissed by sentence of court-martial, and the bill was for his reinstatement in the manner proposed in Chickering's case], so that he shall appear to have been continuously in service, requires that a statement shall be officially made upon the records of the War Department which is not true, and which could not at this time possibly be made true."

In addition to the foregoing, it may be added that Mr. Chickering's record as an officer and an honorable man is not such as to render his reappointment to the Army desirable. He has been reported to the Department on a number of occasions for his failure to account for public property in his charge; for not paying for commissary stores furnished him, and for his failure to pay private debts to merchants and others, contracted by him as an officer of the Army.

Very respectfully, your obedient servant,

E. D. TOWNSEND,
Adjutant-General.

The Hon. SECRETARY OF WAR.

A.

[General Court-Martial Orders No. 10.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
Washington, January 27, 1875.

I. Before a general court-martial which convened at the camp of the Indian Territory Expedition on the Washita, Texas, December 2, 1874, pursuant to Special Orders No. 164, Headquarters Department of the Missouri, Fort Leavenworth, Kansas, October 12, 1874, and of which Assistant Surgeon W. E. Waters, United States Army, is president, was arraigned and tried First Lieut. John W. Chickering, Sixth Cavalry.

Charge.—"Drunk on duty, in violation of the 45th Article of War."

Specification.—"In that First Lieut. John W. Chickering, Sixth Regiment of United States Cavalry, having been detailed and on duty as officer of the day of the First Cavalry Battalion of an expedition against hostile Indians, was found drunk. This at or near the camp of the First Cavalry Battalion, on the Canadian River, near Oasis Creek, Texas, on or about the 26th day of September, A. D. 1874.

To which charge and specification the accused, First Lieut. John W. Chickering, Sixth Cavalry, pleaded "Not guilty."

FINDING.

The court having maturely considered the evidence adduced, finds the accused, First Lieut. John W. Chickering, Sixth Cavalry, as follows:

Of the specification, "Guilty."

Of the charge, "Guilty."

SENTENCE.

And the court does therefore sentence him, First Lieut. John W. Chickering, Sixth Cavalry, "To be cashiered."

II. In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case of First Lieut. John W. Chickering, Sixth Cavalry, have been forwarded to the Secretary of War for the action of the President of the United States.

The proceedings, findings, and sentence are approved.

III. First Lieut. John W. Chickering, Sixth Cavalry, ceases to be an officer of the Army from the date of this order.

By order of the Secretary of War.

E. D. TOWNSEND,
Adjutant-General.

Official:

THOMAS M. VINCENT,
Assistant Adjutant-General.

B.

BUREAU OF MILITARY JUSTICE,
February 9, 1877.

* * * * * *

The record of trial in this case was never printed; records of courts-martial very rarely are.

The proceedings upon this trial, as in all similar cases, were reviewed in the usual manner by the Judge-Advocate-General, a copy of whose report of January 9, 1875, with the approval of the Secretary of War indorsed thereon, is herewith furnished. [C.]

No further legislation should be deemed, in my opinion, to be required in this class of cases.

The act of July 20, 1868 [entitled to be declaratory of the existing law], positively provided that an officer dismissed the service by sentence of court-martial, formally approved by the proper authority, should never be restored to the military service, except by a re-appointment confirmed by the Senate. This enactment is now contained in section 1228 of the Revised Statutes, page 215. The indirect mode proposed in the within bill of restoring the party named to the Army, is necessarily as illegal as if a more direct form of words was employed.

W. M. DUNN,
Judge-Advocate-General.

C.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE, *January* 9, 1875.

To the SECRETARY OF WAR:

The record of the proceedings of a general court-martial in the trial of First Lieut. John W. Chickering, Sixth Regiment Cavalry, are herewith respectfully submitted.

The court convened at the camp of the Indian Territory Expedition, on the Washita River, on the 2d ultimo, when Lieutenant Chickering was arraigned on the following charge and specifications:

Charge.—Violation of the 45th Article of War.

Specification.—In that having been detailed and on duty as officer of the day of the First Cavalry Battalion of an expedition against hostile Indians, he was found drunk. This at or near camp on the Canadian River, near Oasis Creek, Texas, on or about the 26th day of September, 1874.

He pleaded "Not guilty;" was found "Guilty," and is sentenced to be cashiered.

Three out of the five members who composed the court recommend him to clemency, in view of his honorable record during the late war.

Brigadier-General Pope approves the proceedings, findings, and sentence; and states that he does not concur in the recommendation to clemency.

The evidence is quite positive. Three officers, including Major Compton, the commander of the battalion to which accused belonged, who saw him after he had reported for duty as officer of the day, testified to his maudlin condition on that occasion. Opposed to this is only the negative testimony of two enlisted men and the accused's servant, who observed, as they declared, no indications of intoxication at the several times they saw him during the period in question.

The defense also urges that he was not regularly on duty at the time to which the evidence for the prosecution refers, inasmuch as the guard had not been turned over to him with proper formalities. It is, however, thought sufficient to have placed him on duty within the meaning of the 45th Article of War, that after being notified of his detail, he reported to his commanding officer for duty. But in addition to this fact the adjutant of the battalion deposes that the guard had been actually turned over to accused before his arrest.

The evidence as to recent character is confined to a period of less than a month, and simply shows that during that short time the accused performed his military duty in a satisfactory manner.

His gallant service during the war is set forth in copies of testimonials attached to the record.

It is noted that this officer's conduct has been the subject of a comparatively recent report from this office in connection with complaints from his creditors of a dishonorable negligence of their claims.

The proceedings being regular and the findings warranted by the evidence, the approval of them, together with the sentence, must be advised.

In view of all the facts in the case, and the explicit dissent of his department commander, General Pope, from the recommendation of the members of the court, this bureau is unable to advise against the full enforcement of the sentence.

J. HOLT,
Judge-Advocate-General.

Sentence approved.

WM. W. BELKNAP,
Secretary of War.

JANUARY 26, 1875.

D.

WAR DEPARTMENT, *May* 13, 1876.

* * * * * * *

It would seem that the attention of Congress is unnecessarily taken up in the consideration of this class of cases. When an officer has been tried by general court-martial, sentenced to be cashiered or dismissed from the service, and the sentence formally approved by the proper reviewing authority, he becomes a civilian, and can only reenter the military service as an officer by reappointment by the President and confirmation by the Senate. [See act of July 20, 1868, 15 Stat. p. 125 ch. 185.] * * * The officer is tried by his peers, and may appeal to the Secretary of War, and finally to the President. The custom which is growing up of appealing to Congress after the final decision of the President is injurious to the service, and can be of no benefit to the party; for if a bill should be passed by both houses of Congress to restore a dismissed officer to the Army, it would certainly appear to be attempting to effect by the action of Congress alone that which can be affected only by the Executive, acting freely in the first instance as the appointing power, seconded by the consent of the Senate.

ALPHONSO TAFT,
Secretary of War.

The foregoing reports and records show the facts in this case as they appear of record.

It is wholly unnecessary to consider the facts in this case on the merits. The record stands, and it is only the record-evidence of the existence of certain facts. The destruction, cancellation, obliteration, change, modification, or amendment of this record cannot destroy, cancel, obliterate, change, modify, or amend the *facts*. If error, injustice, or wrong has been done, the President in the exercise of his clemency—his pardoning power—can pardon and wipe out the stain of crime.

Without considering the facts or the merits of Chickering's claim to clemency, your committee recommend the indefinite postponement of the bill and the adoption of this report.

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