

IN THE SENATE OF THE UNITED STATES.

APRIL 2, 1878.—Ordered to be printed.

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

REPORT:

*The Committee on Military Affairs, to whom was referred the petition of Charles J. Whiting, late lieutenant-colonel of the Sixth United States Cavalry, praying that he be restored to his former rank, respectfully submit the following report:*

The military history of Colonel Whiting, as furnished by the Adjutant-General, is as follows:

ADJUTANT-GENERAL'S OFFICE,  
February 4, 1874.

Respectfully returned to the Secretary of War.

Charles J. Whiting graduated from the Military Academy July 1, 1835, and entered the Army as brevet second lieutenant of the Second Artillery; was promoted to second lieutenant September 10, 1835, and resigned May 31, 1836. He accepted appointment as captain Second Cavalry May 9, 1855, and was promoted major July 17, 1862.

By General Orders No. 356, November 5, 1863, this officer was summarily dismissed the service for disloyalty, and for using contemptuous and disrespectful words against the President of the United States.

The disability for holding office resulting from this dismissal was removed by Special Orders No. 252, May 28, 1866, this office, which also directed that he be restored as major of cavalry, to fill the first vacancy. He was reappointed major Third Cavalry August 2, 1866, and nominated to the Senate December 12, 1866. On March 2, 1867, the Senate negatived the appointment. His name was again submitted and confirmed April 20, 1867. He was promoted lieutenant-colonel of the Sixth Cavalry May 6, 1869.

On the recommendation of Col. J. J. Reynolds, Third Cavalry (then commanding the Department of Texas), approved by General Halleck, he was transferred to the list of supernumeraries, and honorably mustered out of service January 1, 1871, under section act of July 15, 1870.

E. D. TOWNSEND,  
Adjutant-General.

A letter is placed by Colonel Whiting before the committee, as follows:

WAR DEPARTMENT,  
Washington City, July 17, 1877.

SIR: Acknowledging the receipt of your petition, dated 8th June last, for the revocation of the order placing you on the supernumerary list, and a reappointment to your former rank of lieutenant-colonel, I have the honor to inform you that, upon investigation of your case, it is found that you cannot be restored to your former rank without a special act of Congress authorizing the President to nominate you.

Very respectfully, your obedient servant,

GEO. W. MCCRARY,  
Secretary of War.

Col. C. J. WHITING, Omaha, Nebr.

Colonel Whiting, feeling himself aggrieved by the action of the President, first, in transferring him to the list of supernumeraries, and, second, in his discharge, as claimed under the twelfth section of the act approved July 15, 1870 (vol. 16 U. S. Stat. at Large, p. 318), presented his petition to the Senate, and the same having been referred to this committee, the case is properly before the committee for investigation and report.

It is, of course, a constitutional right of Colonel Whiting to petition for redress. The questions, then, are: 1st. Has wrong or injustice been done the petitioner? 2d. Has Congress the constitutional power to apply a remedy? 3d. Is there anything in the case rendering it inexpedient to exercise the power, if it exists?

It will be observed that Colonel Whiting was not dismissed the service by sentence of a general court-martial, formally approved by the President. It will also be noted that he was *honorably discharged* January 1, 1871, under section 12 act of July 15, 1870. He could not have been thus honorably discharged unless the facts justified. Hence, the committee conclude there was nothing against his honorable character as an officer. At the request of the committee the Adjutant-General, under date of February 8, 1878, furnishes a fuller statement of the history of Colonel Whiting than the short statement quoted in the outset of this report.

Exhibit D, accompanying said communication from the Adjutant-General, is an extract from an official letter from Col. J. J. Reynolds, United States Army, then commanding Department of Texas, dated November 2, 1870, which appears to be a reply to a telegram from the commander of the Military Division of the South, calling on him to suggest or recommend officers for transfer to the list of supernumeraries, under section 12 of the act of July 15, 1870, and the material part of Exhibit D is the recommendation to place the following officer, and no other, so far as the extract goes, on said list of supernumeraries: "Sixth Cavalry, Lieut. Col. Charles J. Whiting." This communication is indorsed:

HEADQUARTERS MILITARY DIVISION OF THE SOUTH,  
*Louisville, Ky., November 10, 1870.*

Respectfully forwarded to the Adjutant-General of the Army approved.

H. W. HALLECK,  
*Major-General, Commanding.*

The committee extract from General Orders No. 126, War Department, December 15, 1870, so much as bears on this case:

By direction of the President the following transfers and assignments of commissioned officers are made to fill vacancies to the present date:

TRANSFERS.

\* \* \* Lieut. Col. Charles J. Whiting, Sixth Cavalry, to the list of the supernumeraries. \* \* \*

Next is General Orders No. 1, War Department, January 2, 1871, as follows:

[Extract.]

By direction of the President, the following officers of the Army are transferred, assigned, or mustered out of service, to take effect from the 1st instant. \* \* \*

Unassigned officers whose commissions have expired under section 12 of the act of Congress approved July 15, 1870, and who are honorably mustered out of the service: Lieut. Col. Charles J. Whiting. \* \* \*

So that up to the 15th of December, 1870, Whiting was lieutenant-colonel of the Sixth Cavalry, actively performing the duties of his office.

On that day he was assigned to the list of supernumeraries, and very soon after (January 2, 1871) he was discharged, the government having no further use for him.

It will be observed that Colonel Reynolds assigns no reason whatever for his recommendation that Lieutenant-Colonel Whiting be transferred to the list of supernumeraries, nor is any given by Major-General Halleck for his approval. He simply forwards "approved," and the order follows from the War Department, by direction of the President, based upon this recommendation and approval. Lieutenant-Colonel Whiting states that while in the Department of Texas he was placed by Colonel Reynolds in command of the post at Greenville, Texas, and afterward at Fort Griffin, Texas, and that no complaint was ever made by Colonel Reynolds or any one else against him, and that he was in fact at Fort Griffin, in command, when he received the General Orders, 126, of December 15, 1870, notifying him that he was transferred to the list of supernumeraries. Section 12 of the act of July 15, 1870, authorizes the President to transfer officers from the regiments of cavalry, artillery, and infantry to the list of supernumeraries. So far as that law goes, these transfers are under the uncontrolled discretion of the President, yet it would seem but an act of simple justice that the reasons for the exercise of this discretion should be assigned. Nothing in the letter of the law prevented him from transferring the most capable officers to that list and then mustering them out on the 1st of January following (1871), if they were on that day unassigned. The fate of every officer was absolutely at his discretion, and practically at the discretion of department commanders. Still, thus is the law written, and the committee recognize the principle of law which, it submits, is applicable, "That, in the absence of proof to the contrary, credit should be given to public officers who have acted, *prima facie*, within the limits of their authority for having done so with honesty and discretion." (Broom's Legal Maxims, 94-5.)

The act of March 3, 1869 (vol. 15 U. S. Stat. at Large, p. 318, sec. 2), made provision for the reduction of infantry regiments to twenty-five, and undoubtedly the act of July 15, 1870, had in view, among other things, the getting rid of the surplus officers left by this reduction. It was further the design, no doubt, to retain the most efficient and capable officers in the service to the extent of officering the regiments still retained. Whether the plan adopted in the bill was the best that could be devised is not a question before the committee. Three ways of accomplishing the object are set out in the act:

1st. Voluntary, by section 3, which authorizes the President, at his discretion, to honorably discharge those who applied therefor on or before January 1 next after the date of the act.

2d. Section 11 provides for what is known in the Army as the "Benzine board." This section provides that the General of the Army and Department commanders shall forward to the Secretary of War a list of officers deemed by them unfit for the proper discharge of their duties from any cause except injuries incurred or disease contracted in the line of their duty, '*setting forth specifically in each case the cause of such unfitness.*' But that section further provides that the Secretary of War shall constitute a board of one major-general, one brigadier-general, and three colonels, to pass upon the cases presented, and on their recommendation the President is directed to muster out any officers recommended by the board to be mustered out, with one year's pay, '*but such muster-out shall not be ordered without allowing such officer a hearing before such board to show cause against it.*' This is simple justice.

3d. Section 12 declares that the President is authorized to transfer

officers from the regiments of *cavalry, artillery, and infantry* to the list of supernumeraries; second, that vacancies, either at the date of the law or occurring prior to January 1, 1871, shall be filled in due proportion by the supernumerary officers, having reference to *rank, seniority, and fitness*, as provided in existing law regulating promotions; third, "and if any supernumerary officers shall remain after the first day of January next, *they shall* be honorably mustered out of the service, with one year's pay and allowance."

A careful examination of this twelfth section leaves (the committee submit) the question of transfer to the supernumerary list wholly to the discretion of the President, and the committee submit that it is not within their province to revise this discretion upon anything developed in the case; second, it is mandatory to fill vacancies existing or occurring prior to January 1, 1871, from the list of supernumeraries; third, it is mandatory to honorably discharge all remaining on the list January 1, 1871, with one year's pay and allowances. So that the placing of officers on the supernumerary list is *discretionary with the President*, but the discharge, after January 1, 1871, of those not selected to fill vacancies, is *mandatory*.

The difference between the 11th and 12th sections is quite apparent, and it may so happen, or rather might have happened, that the capable and deserving officer, without a hearing, might lose his place, while the officers regarded by the General of the Army and department commanders as of questionable worth might, with slight skill, manage to have themselves retained. The officer against whom nothing is brought might go out without a hearing. The officer against whom causes may be assigned, though not sufficient to justify a court martial, remained in the Army if he had skill enough to continue his case till after January 1, 1871, managing in the mean time to steer clear of the 12th section.

While the committee are not responsible for the policy of the law or its consequences, it is not improper to point them out, so they may be guarded against in the future.

Colonel Whiting presents excellent testimonials, which, it seems to the committee, would have had great weight with the President had they been presented along with Colonel Reynolds's recommendation. One, from Col. and Bvt. Brig. Gen. William N. Grier, is as follows:

WASHINGTON, D. C., February 11, 1873.

COL. CHARLES J. WHITING:

In a casual conversation held with you to-day you requested me to state in writing such knowledge as I might have of the duties performed by yourself while in the Army, and my opinion of the manner in which these duties were performed. To this request I proceed to reply with pleasure.

My first period of service with or near you was in the spring and summer of 1862, in the Army of the Potomac, from Yorktown to Gaines's Mill, where you were taken prisoner, in a bold, daring, and gallant charge at the head of your regiment, which you commanded at that time. I then lost personal knowledge of your military service until the summer of 1868, when I found you serving as major in my regiment (the Third United States Cavalry) in New Mexico, until you were promoted, in 1869, as lieutenant-colonel of Sixth United States Cavalry. I recollect very well that, while in New Mexico, you were intrusted with the important and delicate duty of removing several thousand Navajo Indians from one reservation to another some two hundred miles distant. The manner in which that responsible duty was performed I regarded as very commendable and satisfactory, and, in my judgment, there was no other officer then in the Territory who could have performed that duty as well. Afterward, for some months, until your promotion, you served at regimental headquarters under my own immediate command.

To conclude, it gives me pleasure to say that I have always, when serving with or near you, regarded you as an able, intelligent, and efficient cavalry officer, performing your military duties with zeal and discretion.

Yours, truly,

WM. N. GRIER,  
Col. and Bvt. Brig. Gen., U. S. A., Retired.

General George B. McClellan wrote to him as follows :

ORANGE, November 12, 1877.

MY DEAR COLONEL : Your letter of the 11th is received. It affords me pleasure to state that your service under my command with the Army of the Potomac was always most creditable and satisfactory, and of such a nature that it should have insured you against the action of the law which subsequently was applied in mustering you out of service. I sincerely trust that you may succeed in the effort to regain your commission.

And am, most truly, yours,

GEO. B. MCCLELLAN.

Col. CHARLES J. WHITING,  
*Late Sixth U. S. Cavalry.*

A letter from Capt. Charles McClure, United States Army, is as follows :

WASHINGTON, D. C., February 3, 1873.

COLONEL : It affords me pleasure to state that I have been acquainted with you for some years ; that while I was on the staff of the general commanding the district of New Mexico, you were part of the time in command of Fort Marcy, and afterward in command of Fort Sumner, New Mexico, and subsequently commanded the troops accompanying and were charged with the removal of the Navajo tribe from Fort Sumner back to its own country ; that your reputation was very high as a skillful and excellent officer, and that the confidence reposed in you was evidenced by the important commands intrusted to you.

Very respectfully, your obedient servant,

CHAS. MCCLURE,  
*Captain and C. S., U. S. A.*

Col. CHAS. J. WHITING, *Present.*

The letters appearing in this report and the expressions of Colonel Whiting's former comrades-in-arms satisfy the committee that he is a worthy and capable officer ; but it is also apparent that, with so large a reduction in the number of officers as was made necessary by the act of 1869, many capable officers would by necessity be left out of the service.

That the blow might fall as lightly as possible, the law made it mandatory that, first, vacancies existing July 15, 1870, and those occurring between then and January 1, 1871, should be filled from the list of supernumeraries ; and, second, that such as remained unassigned after January 1, 1871, should be honorably discharged with one year's pay. The Army has been reorganized, and promotions required to be by seniority to the rank of colonel. The committee do not feel justified in recommending a departure from this fixed policy, unless in special and exceptional cases it might be made manifest by proof that great injustice has been done.

In view of the premises, the committee recommend that the petition be not allowed.

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