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On the Relief of Capt. Foulk

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45TH CONGRESS, 2d Session. | SENATE. | REPORT No. 117.

IN THE SENATE OF THE UNITED STATES.

MARCH 5, 1878.—Ordered to be printed.

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

REPORT:

[To accompany bill H. R. 3296.]

The Committee on Military Affairs, to whom were referred S. 356 for the relief of Capt. William L. Foulk, and H. R. 3296 for the relief of same, have duly considered the same and submit the following report:

A bill for the relief of Capt. William L. Foulk passed the House of Representatives of the Forty-fourth Congress, and was referred to this committee, and amended and reported back to the Senate, and as amended passed the Senate, and failed in the House for want of time at the close of that Congress.

S. 356 was referred to this committee, and, since its reference, the House Bill 1567 was passed and sent to the Senate, and also referred to this committee.

The two bills differ very little.

The Committee on Military Affairs of the House made the following report to accompany said H. R. 1567:

The Committee on Military Affairs, to whom was referred the bill (H. R. No. 1567) for the relief of Capt. William L. Foulk, late of the Tenth Regiment United States Cavalry, having considered the same, would respectfully report thereon as follows:

Capt. William L. Foulk entered the volunteer service April 23, 1861, as second lieutenant Seventh Regiment Pennsylvania Volunteer Infantry—three months' service—and served in General Patterson's command until August 5, 1861, when he was mustered out as first lieutenant, having been promoted June 11, 1861; re-entered the service August 26, 1861, as captain Forty-sixth Pennsylvania Volunteer Infantry, and was promoted lieutenant-colonel June 9, 1863.

Service: With regiment in Maryland and Shenandoah Valley of Virginia, and in Eastern Virginia until wounded in action and taken prisoner at Cedar Mountain August 9, 1862; in the hands of the enemy to October 22, 1862; on parole and under medical treatment to June, 1863; with regiment in the Army of the Potomac to September 25, 1863, and in the army of the Cumberland to January 26, 1864; on detached duty, recruiting, &c., at Pittsburgh and Erie, Pa., to December 11, 1864; in command of Exchange Barracks, Nashville, Tenn., to July 29, 1865, when honorably mustered out of the service. When with his regiment he participated in all its battles (including Gettysburg), marches, &c. He is strongly indorsed by Major-Generals A. S. Williams and John W. Geary (the latter afterward governor of Pennsylvania), under whom he served during the war.

May 11, 1866, he was appointed second lieutenant Eighteenth Infantry, Regular Army; September 21, 1866, transferred to Thirty-sixth Infantry; promoted to first lieutenant March 1, 1867; December 15, 1870, assigned to Tenth Cavalry, and afterward promoted to captain of same regiment.

Service: In Nebraska, and Utah and Fort Potter, New York, with infantry regiments; Indian Territory and Texas until January 4, 1874, when he was dismissed by the court-martial proceedings held at Fort Griffin, Texas, September 19, 1873.

The following is the Judge-Advocate-General's review of the trial;

"WAR DEPARTMENT, BUREAU OF MILITARY JUSTICE,
June 25, 1876.

"SIR: In compliance with your direction, conveyed through the indorsement of the Adjutant-General of the 23d instant, I have the honor to report as follows upon the application for reinstatement of W. L. Foulk, late captain Tenth Cavalry, dismissed the service in December, 1873. (See General Court-Martial Orders, No. 58, of that year.)

"Captain Foulk was brought to trial—

"First. For an assault, accompanied by threatening words, committed (on August 3, 1873) upon his superior officer, Capt. C. D. Viele, of the same regiment, by striking him on the neck with his saber. Of this offense, presented under different charges, he was convicted, and sentenced to be dismissed.

"Upon the conclusion of this trial, Captain Foulk was at once arraigned a second time before the same court upon a charge of having preferred false and malicious charges against Captain Viele, in charging him—

"First. With having (on April 25, 1873) been intoxicated, and while in that condition applying insulting and unjustifiable language to him, Captain Foulk.

"Second. With having (on April 28, 1873) improperly arrested and confined a female servant of Captain Foulk and deprived his family of her services, to their great inconvenience.

"Third. With having taken the aggressive and assaulted him, Captain Foulk, on the occasion of the altercation which was the subject of the charge at the first trial.

"Of these three specifications, the accused was acquitted of the two first, and convicted of the third, and upon this conviction was sentenced again to be dismissed.

"The proceedings and sentences in both cases were approved by the President, as indicated by the general order already referred to.

"The second trial of this officer appears to have been resorted to because the additional charges did not arrive at the department headquarters in time to be consolidated with the originals. Its effect has been, no doubt, to prejudice, and, in the view of this bureau, to prejudice unfairly the case of this officer. It was valuable, however, as presenting facts without which the merits of the entire case could scarcely be comprehended.

"Upon a careful review at this time of the testimony comprised in the two records of trial, the case of this officer presents itself to this bureau in brief as follows:

"In the first place, the evidence is deemed to furnish good ground for believing that when Captain Foulk reported for duty to Captain Viele, on April 25, 1873, the latter was, somewhat at least, under the influence of liquor, and did in fact improperly and offensively receive and address Captain Foulk, who was naturally incensed at his treatment. He is thus deemed to have been justified in preferring a charge against Captain Viele founded upon this interview. As to his charge against the latter for improperly depriving him of his servant, this was without foundation, since Captain Viele is shown to have acted by the orders of a common superior. It was natural enough, however, that Captain Foulk should connect the act of Captain Viele on this occasion with his hostile and rude conduct three days before, and the court was clearly correct in finding that the second charge was preferred without malice or improper intent. As to the third accusation, though that is not deemed to have been sustained by the testimony, there yet was, in my opinion, enough ground for it to have relieved the accused from a conviction for having preferred it falsely and maliciously. In my judgment, therefore, he should have been wholly acquitted at the second trial.

"As to the main offense—that which was the subject of the first trial—the evidence was conflicting. It was admitted by accused that he struck Captain Viele with his saber, but it was claimed by him that he did so practically in self-defense. The altercation between the two officers arose as follows: Captain Viele had been detailed to take command of a scouting-party, to consist of a detachment from his own company and a smaller one from the company of the accused. A certain number of pack-mules had been furnished to attend the party, and their disposition was of course under the control of its commanding officer. One of these mules, which had been tied to the picket-line of accused's company, was supposed—and with some reason—by accused to be intended for the use of the detachment from his own company, and he sent a corporal to lead it away to be packed. Captain Viele, proposing to use this mule for his own detachment, ordered the corporal to leave it, and, on his hesitating, took it from him by the halter. Captain Foulk then approached and apparently remonstrated with Captain Viele, who thereupon, as accused asserts, and three of the witnesses at the trial positively declared, struck at, or made motions as if to strike at, the accused with his clenched fists, at the same time, as was stated by these witnesses, using angry and opprobrious words. That Captain Foulk thereupon struck Captain Viele a violent blow on the neck with his sheathed saber, which he had been carrying under his arm as officer of the day, is, as has already been noticed, admitted; but that the latter

first struck at or threatened Captain Foulk is denied by himself and by the other witnesses on the part of the prosecution, who claim to have seen what occurred. From all the evidence, however, taken together, there is deemed to be good ground for the inference that Captain Viele probably did in fact assume a menacing attitude toward the accused before the latter struck him, and that the accused had some reason, at least, for believing that he was about to be attacked. So, though the blow inflicted by the accused was certainly without sufficient justification and constituted a grave offense, yet when it is considered that the officer struck was one of his own rank, and his superior only by seniority of commsision ; that he had on a previous occasion treated him with contumely and refused to have any but official relations with him; and that on the occasion of the assault he had, in a degree, at least, provoked him, it must be admitted that there were in the case such palliating circumstances as would have justified some mitigation of the sentence.

"Mr. Foulk has filed, in connection with his present application, and on previous occasions, a large number of testimonials, both from military men and civilians, which ascribe to him a high character for efficiency and fidelity as an officer both in the volunteer and the regular service, and an excellent reputation as a citizen. Among these persons are Governors Hartranft and Geary, Senators Cameron and Scott, Hon. Mr. Negley, Messrs. F. R. Brunot, Samuel Harper, James Park, and others, of Pennsylvania, and by the Commissary-General and Paymaster-General of the Army, Lieutenant-Colonel Hardie, Majors O. H. Moore and William Myers, A. Q. M., Captains R. E. Johnston and L. Catlin, &c. Brigadier-General Auger, by whom the court in this case was convened, writes as follows :

"'I should be glad to have the record of the proceedings of the court examined again by the Judge-Advocate General of the Army, and if anything is found therein to confirm Captain Foulk's impression, that it be corrected. My wish has been, and is now, that full justice should be done both to him and to the service. I have known the captain since 1867, when he first joined his regiment, and during that time I have never heard his integrity questioned, and, so far as I know and believe, or have heard, he is entirely free from habits of dissipation.'

"Although this bureau has on previous occasions declined to make a favorable recommendation in this case, yet now, after a thorough re-examination of all the testimony, and in view of the impressions derived therefrom, as above expressed, I am induced to conclude that a reappointment of the applicant may well be acceded to by the President. As already remarked, the second dismissal of this officer is regarded as unwarranted, while the first is deemed to have been a proper subject for mitigation. Mr. Foulk has now suffered under his sentence for two years and a half, and his personal worth as a gentleman and a soldier is, as has been seen, most fully vouched for.

"It may be added that if the views here expressed are approved, and the President determines to reappoint Mr. Foulk, his authority—if the opinion of Attorney-General Williams, in the case of Major Baird (14 Opinions, 164), be followed—will be limited to an appointment to the grade of second lieutenant. Congress, however, may, of course, by a special act, authorize the President to reappoint him to his former rank of captain, upon the occurrence of a vacancy.

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

"Hon. J. D. CAMERON,
"*Secretary of War.*

"ADJUTANT-GENERAL'S OFFICE, *July* 17, 1876.

"Official copy.

"THOMAS M. VINCENT,
"*Assistant Adjutant-General.*"

The Secretary of War in transmitting the foregoing letter, says that his "department is in favor of a bill for the relief prayed for by the petitioner."

From the foregoing it is evident that the provocation was very great, and Captain Foulk had good reason to believe, from the menacing attitude of Captain Viele at the time, and from his previously insulting conduct toward him, that he was about to be assaulted, when he struck the blow. The sentence of the court, therefore, was wholly unwarranted.

The record fails to show that the finding of the court-martial was approved by the President of the United States. Doubtless if the evidence and the findings had been submitted to the President he would have unhesitatingly declined to give his approval thereto. The previous good character of Captain Foulk as a soldier and a gentleman should be considered now, and the severe punishment that this officer has suffered by being out of the service so long and under the odium of the sentence should not be forgotten.

The testimonials furnished by Captain Foulk are very strong, coming as they do from the best and most influential citizens of Pennsylvania, as well as from many of the highest and most distinguished officers of the Army.

Your committee, feeling that great injustice has been done to a gallant and efficient officer, report back the accompanying bill as substitute for the bill referred to the committee, with a recommendation that it do pass.

In the Forty-fourth Congress, in this case, your committee in its report used the following language:

Under section 1228 Revised Statutes United States, page 215, "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 was first enacted by Congress as a law July 20, 1868 (see vol. 15 United States Statutes at Large, page 135), and is merely declaratory of the law as it then was and had been declared for a long series of years by the unbroken opinions of the Attorneys-General of the United States. Under the Constitution it is the exclusive right of the President, the executive department of the government, to appoint all officers. "He shall nominate, and by and with the advice and consent of the Senate, shall appoint all embassadors, 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 provisions of the Constitution, the Congress has the constitutional power to provide for the appointment of officers by law, and to designate the classes of persons from whom the President may appoint.

In regard to the Army, Congress has uninterruptedly for a long series of years designated the classes of persons from whom the President might appoint, 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. Promotions in the staff of the Army shall be made in the several departments and corps respectively."

Under these provisions it is universally conceded that the President can only appoint a civilian to a second lieutenancy in the United States Army, and must fill all vacancies above that grade by appointment of the officer next in rank, which appointment is known as a promotion.

To enable the President to appoint any person in civil life to a position in the line of the Army above the grade of second lieutenant, there must be an enabling act passed by Congress repealing or suspending the operation of the general law regulating appointments in that particular case. This must be the effect of the enabling act; otherwise the President would be bound to follow the mode of appointment provided and established by law.

What is the effect in law of a dismissal of an officer of the Army?

Unquestionably when an officer is dismissed the service or resigns he is thenceforth a civilian—a mere private citizen; nothing more. In a case of dismissal, after execution or promulgation of sentence, a pardon by the President cannot restore the officer to his former rank. Even Congress has absolutely no authority or power under the Constitution to restore an ex-officer to his former rank. Such an act would be an appointment, which can only be made by the President. Congress can only regulate the appointments; cannot make them.

Attorney-General John Nelson, in November, 1843 (see volume 4, Opinions of the Attorneys-General, page 274), decided that "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." In same volume, page 306, on January 23, 1844, he further 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."

January 22, 1869, Attorney-General William M. Evarts, in volume 12, Opinions of Attorneys-General, page 547, 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 reduced in rank differs essentially from that of an officer who has been dismissed from service by sentence of a military court. After the latter is duly confirmed and executed, the dismissed officer cannot be reinstated by means of a pardon or in any other manner than by a new appointment and confirmation by the Senate."

These decisions are in full accord with the settled principles of the Constitution and laws, sanctioned and adhered to by all departments of the government in all well-considered cases.

The full extent of the power of Congress, then, by legislative enactment, is to untrammel the discretion of the Chief Executive by suspending for the time being and in the given case the operation of the laws of the land, so that he can, if he desire, appoint an exofficer, a civilian, to a rank and grade in the line of the Army above that to which he could otherwise appoint—to a vacancy above the grade and rank of second lieutenant.

To preserve inviolate the balance of power intended by our Constitution, and to discountenance encroachments of one department upon another, Congress, in such legislative enactments, should not direct or attempt to influence or control the sound discretion of the President.

With these views briefly expressed, as guiding your committee in the discharge of its duties, your committee have fully considered the case of Captain Foulk, and in view of the letter of the Secretary of War and the recommendations of the Secretary of War and Judge-Advocate-General, and the long and valuable services of this officer and his very high character for efficiency, sobriety, and integrity, and the very strong palliating circumstances in his case, your committee consider this case justifies legislative action by Congress, within the limits and for the purposes hereinbefore stated, and have prepared and report the accompanying bill to the Senate, with the recommendation that it do pass.

Your committee adhere to the correctness of the law and conclusions as stated in the foregoing extract.

After a careful review of this case, and with the law and conclusions so expressed, your committee report back to the Senate the House bill 1567 without amendment and recommend the passage of the same.

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