DEFENCE

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649192588

Defence by Charles Wilkes

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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CHARLES WILKES

DEFENCE

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DEFENCE

OF

COM. CHARLES WILKES, U. S. N.,

LATE ACTING REAR ADMIRAL,

IN COMMAND OF THE

WEST INDIA SQUADRON,

READ BEFORE A

GENERAL COURT MARTIAL,

ON CHARGES PREFERRED BY

THE SECRETARY OF THE NAVY.

WASHINGTON, D. C.:
McGILL & WITHEROW, PRINTERS AND STEREOTYPERS.
1864.

HON. O. H. BROWNING,
BRITTON A. HILL, Esq., } *Counsel for Com. Wilkes.*

DEFENCE.

I am called to answer before you to charges preferred against me by the Honorable Secretary of the Navy. He is my accuser and prosecutor. The time when, and the circumstances under which the prosecution was inaugurated very clearly indicate that the honorable Secretary conceives his official reputation to be, to some extent, involved in the issue.

The events involved in the first and second charges had their inception more than a year ago, and were fully terminated on the 13th of June, 1863. On the 26th of February, 1863, I hoisted my flag on board the United States steamship Vanderbilt, and on the same day addressed an official dispatch to the Secretary of the Navy, dated on board that vessel, informing him fully and frankly of what I had done, and foreshadowing, as far as I then could, my intended future movements. This dispatch was received at the Navy Department on the 10th day of April, 1863. Between the 26th of February and the 13th of June, when I transferred my flag to the United States steamship Alabama, and placed the Vanderbilt under the command of Lieutenant Baldwin, I addressed to the honorable Secretary over thirty other dispatches, all dated on board the Vanderbilt, giving from time to time the details of my operations with her, and all which were in due time received at the Navy Department. During the same period I received communications from the Secretary of the Navy, written after he was fully apprised that I had taken the Vanderbilt under my command; of the service to which I had devoted her; and the cruises I had made with her; but neither then, nor subsequently—neither whilst I was in command of her, nor since my retirement from the active service—did I ever hear one word of complaint, one murmur of dissatisfaction, regarding my conduct.

During all this time the rebel cruisers have been roving unrestrained upon the seas, terrifying our merchant ships, and committing fearful havoc upon our commerce. The just expectations of the country have not been met by their capture or destruction. It seems to be supposed, and perhaps truly, that for this failure somebody is to blame, and the honorable Secretary on his part seems to have supposed it was necessary to give to a disappointed and dissatisfied public some explanation of the failure. Accordingly, the honorable Secretary in his report, dated December 7th, 1863, and laid before Congress at its present session, attributed to me the grave offense of having "wholly defeated the plans of the Department for the capture of the Alabama, Florida, and Georgia." This report was published, and sent abroad to the world. I felt that I was most unjustly assailed, nay condemned, without having been called upon by the Secretary for an explanation of my conduct in taking possession of the Vanderbilt, and using her temporarily, for the protection of our commerce; in breaking up the contraband trade of the rebels, and rendering other valuable and important services to the Government; and if this report was permitted to go without contradiction from me, it could not but be very damaging to my character. My reputation, earned by forty-five years of arduous, perilous, and incessant toil in the service of my country, is as dear to me as the Secretary's can be to him. I owed it not only to myself, but also those who sustain to me the nearest, dearest, and tenderest relations in life, to protect that reputation from being unjustly tarnished. The instinct of self-defense is universal.

I was not willing to bear the erroneous accusations of the Secretary in his annual report, and be held up to the country as the cause of the failure of the Navy Department to capture the rebel pirates, of which I was entirely innocent. Indignant that I should have been selected and, as I conceived, unjustly assailed in the most public manner, as soon as the attack upon me was brought to my notice, on the 11th of December, 1863, I addressed a frank, firm, and entirely respectful letter to the Secretary of the Navy in vindication of myself.

It was not till after this had occurred that it was discovered that the good of the public service required that I should be brought before a court-martial to answer for my action in regard to the Vanderbilt. Every incident connected with my use of her had long been in the possession

of the Department; but I had not been rebuked for my conduct, not even called upon for an explanation. But now an issue was made directly between the Secretary and myself. It was of his seeking, not mine. Plans had failed, and somebody had to bear the responsibility of the failure. If I made good my defense, that responsibility must fall upon the Secretary. He cannot, therefore, but feel deep solicitude as to the issue of this trial. It can be doing him no injustice to suppose him agitated with a sensitive anxiety to secure my conviction. His reputation, as well as mine, is put at hazard. But we do not meet on equal ground; he being my accuser and prosecutor has claimed and exercised the prerogative of selecting and appointing the judges who are to try me. I do not allow myself to question the perfect honor, and inflexible integrity of the Court, or to doubt that it will accord to me a patient hearing; give to the case that seriousness of consideration which its importance demands, and be guided to its conclusions by conscientious convictions of duty. But for public as well as private reasons, it would have been better had the Court been otherwise nominated. It was hardly just to the members of the Court that my accuser should designate them, and enforce upon them the responsible, and doubtless unpleasant, duty they have to perform. However pure their purposes, however unbiased their feelings, however impartial their proceedings, however just their decision, it will be difficult for that decision to give the satisfaction, and win the perfect and acquiescent confidence, which it is always desirable to secure to the judgments of judicial tribunals. I complain of the organization of the Court as illegal, and in violation of every principle of right, and of fair and even-handed justice. On the threshold of these proceedings I objected to the jurisdiction of the Court to try me, because it was illegally constituted, having been as I then contended, and now again contend, appointed by a person who had no lawful authority to appoint it. My objection was overruled, and the trial proceeded; but that does not give the Court jurisdiction, if the objection was well taken.

If appointed by a person without lawful and competent authority, no consent or acquiescence can give it jurisdiction, or validate its judgments. All its proceedings are *corum non judice* and void, and ought now to be dismissed.

The fact of an objection to the jurisdiction having been overruled in the earlier stages of the trial, does not preclude

me from renewing it now, and I proceed respectfully to present very briefly the reasons in support of the objection.

I do not anywhere find an enactment in relation to the Navy, which, in express and direct terms, declares that an accuser or prosecutor shall not appoint the court to try the charges he brings; but I do find the *principle* which forbids it, pervading all laws, rules, and regulations. The law-making power probably did not imagine that so wide a departure from the plain and universally recognized principles of right and justice would ever practically occur, and, therefore, did not expressly provide for it. The provision of law with respect to the Army, is, "that whenever a general officer commanding an army, or a colonel commanding a separate department, shall be the accuser or prosecutor of any officer of the Army of the United States under his command, the general court-martial for the trial of such officer shall be appointed by the President of the United States."—*4th Stat. at Large*, 417.

In respect to the Navy the provision is, that "General courts-martial may be convened as often as the *President of the United States*, the Secretary of the Navy, or the Commander-in-chief of the fleet, or commander of a squadron, while acting out of the United States shall deem it necessary."—2 *Stat.*, 45.

There can be no reason for the application of a different principle to the organization of a naval court-martial from that which governs the organization of a military court-martial; and the law above cited unquestionably means that when the Commander-in-chief of the fleet is the accuser the court shall be appointed by the Secretary, and that when the Secretary is the accuser the court shall be appointed by the President. There is no other imaginable contingency in which it could become necessary for the President to act at all.

In all other cases a court could be properly constituted without resort to him, without his interference. But in such a case as this, where the Secretary is the accuser, it could not be. No officer of inferior authority could order it, and Congress, therefore, provided for the precise condition of things which has now arisen, by enacting that the President should have power to order the court.

If this is not the true construction of the act, it has no definite and precise meaning at all. It could not have been intended that the President, Secretary, and Commander-in-chief should have concurrent jurisdiction, and in all cases

exercise, or be entitled to exercise the power in common, and indifferently. This might lead to very embarrassing conflicts of jurisdiction. Clearly each was to have his appropriate sphere, his separate jurisdiction, not to be encroached upon by the others. In certain contingencies the Commander-in-chief was to act, in certain other contingencies the Secretary was to act, and in yet another the President. The contingency in which the President was to exercise his power had arisen in this case, but he did not act. The Secretary invaded his jurisdiction, usurped his authority, and appointed a court under circumstances which take from his act all legal validity, and render the whole proceeding absolutely null and void.

Will it be contended that if a general in the Army should appoint a court martial to try an officer of whom he was the accuser, the proceedings of the court would be of the least legal efficacy or force? Would it be any better if the Secretary of War should appoint a court for the trial of an officer of whom he was the accuser? Such a proceeding would not only shock the sense of mankind, but outrage the most common principles of justice. What would be said of a proposition, in the ordinary judicial forums of the country, to allow the prosecutor in an indictment for libel, or other personal grievance, to select the jury to try the party against whom he had brought the accusation? It would be scouted from the halls of justice, and would deserve to be; and yet I can perceive no difference in the principle of that case and this.

True, there is some slight difference in the verbiage of the laws above cited, relating to army and navy courts-martial, but none at all in their spirit and meaning. They mean the same thing; but, being passed at different times, they are differently worded. What is expressed in the one is necessarily and plainly implied in the other. Why should safeguards be thrown around the officers of the Army which are withheld from the officers of the Navy? Why should these be left exposed to an injustice from which those are protected? It could not have been intended to make a distinction, and the law makes none. In the one case no more than in the other, has the prosecutor the right of appointing the court. In this case having assumed to do so without authority, and in violation of law, his act is null and void, and this Court has no jurisdiction, and can pronounce no judgment.

I further objected to the authority of the Court to proceed