

Tigar's Stripes

Famed UT Law School Professor Enlists in Military Court to Win 'Don't Ask, Don't Tell' Case

by JANET ELLIOTT

Michael Tigar, having described himself simply as a law professor and father of three, faced the panel of high-ranking Air Force officers who would determine the outcome of his client's court-martial and inquired whether they had heard anything about him that might prejudice the case.

Tigar, in an interview after winning an Aug. 15 acquittal for Maj. Debra Meeks on charges of sodomy and conduct unbecoming an officer, says he had in mind his representation of one of the

men charged with blowing up the Oklahoma City federal building. But he also could have been remembering his early career, when he successfully challenged the Selective Service for putting Vietnam War protesters at the top of its induction lists.

But the nine panel members being questioned during voir dire shook their heads, clearing the way for an old student radical to transform himself for his first court-martial into a folksy, pro-military advocate.

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Air Force Court-Martial Acquittal Leaves Tigar in Tears

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He quoted the Bible and referred to his childhood Southern Baptist preacher and his brief stint in the Navy. He praised the profession of being a soldier, and had a catch in his throat when he talked about watching the flag pass by.

Tigar says he wasn't just posturing for the military jury and meant every word of his summation. He says the conscientious objectors he represented in the '60s just wanted to "serve out of uniform."

But more important than any stirring words Tigar spoke was his effectiveness in attacking the credibility of the prosecution's complaining witness.

"This was a reasonable doubt case if ever there was one," says Tigar, who holds the Joseph D. Jamail Centennial Chair at the University of Texas School of Law. A key theme for the defense was that officers are potential targets for extortion by accusers who understand their vulnerability to allegations of homosexuality.

In fact, several of the officers raised their hands when Tigar asked if they had ever been the subject of any kind of unjustified charge during their military careers.

"I think the kinds of arguments the [court] members found compelling were the ones based on their own experience as military officers," Tigar says.

Don't be misled by Tigar's posturing for the military jury, admittedly something any good trial lawyer does. He also was aware of another audience in the courtroom, an elbow-to-elbow crowd of journalists who would carry the story to the court of public opinion.

Tigar's fiery question-authority persona never stayed far behind. But it emerged only outside the presence of the court panel, such as when he chastised prosecutors for eliciting testimony from their key witness that Meeks may have been involved with a female Air Force major who carries the "football," or nuclear trigger, for the vice president. At times like these, the presence of the media wasn't lost on Tigar, who looked over to see the effect of his words as reporters scribbled in their notebooks energetically.

Tigar's co-counsel, former military lawyer and judge Peter Held, says he was in awe of Tigar's cross-examination of Pamela Dillard, Maj. Meeks' accuser and former roommate. Held says Tigar risked creating sympathy for Dillard, who was presented as a victim of domestic violence, if he had been too tough on her.

"He was the fatherly professor," says Held. "He was very smooth and before the witnesses realized it the noose was around their neck and being tightened."

Tigar was the largest presence in the small courtroom at San Antonio's Lackland Air Force Base. The judge, Lt. Col. Mary Boone, was an imposing figure in her own right. But it was Tigar, with his ramrod-straight posture and rich voice, who commanded attention.

He overshadowed the prosecutors, called trial counsel in the military system. The lead trial counsel, Maj. James Flannery, was a short, balding man whose high-pitched voice squeaked at times and who always maintained a respectful demeanor. Assistant Trial Counsel Capt. Vance Spath showed the most spark and willingness to go head-to-head with



Maj. Debra Meeks and defense attorney Michael Tigar (above) during a break in Meeks' court-martial.

defense accusations that the military lawyers had thwarted discovery and skirted ethical rules. Spath's flat-top and quick temper reminded several observers of a young Sgt. Vince Carter from the Gomer Pyle show. The other assistant trial counsel, Capt. James R.A. Byrne, played a minor role in the proceedings.

Test Case Evaporates

For a lawyer who has reveled in representing some of the most notorious clients of his times, including black militant Angela Davis, accused Nazi war criminal John Demjanjuk and bombing suspect Terry Nichols, Tigar had an unusually sympathetic client in Meeks.

A squadron training officer who helped match recruits to jobs, Meeks' 19-year military career was in jeopardy. She had been offered a deal to plead to the charge of conduct unbecoming an officer, which stemmed from Dillard's claim that Meeks threatened her with a gun. Meeks would have avoided a federal conviction but would have lost the retirement benefits that had been scheduled to begin this past February.

Tigar says he agreed to represent Meeks because he was outraged that the Air Force added the sodomy charge after Meeks declined the plea offer involving the gun charge.

He says he also thought the case might help clarify President Bill Clinton's "don't ask, don't tell" policy designed to allow homosexuals to serve in the military. Meeks, who maintained throughout the trial that her sexual life is private, had faced a similar investigation 10 years ago, her lawyers said.

Meeks was provided a free military defense counsel, Maj. Dawn Efein. Meeks hired civilian counsel in the form of Held, who had worked in the military legal system for 18 years before retiring, and sought out Tigar after learning of his reputation.

Tigar agreed to take the case for his expenses. Efein says it was clear that Tigar would serve as lead counsel during the trial and would make all tactical decisions. Held and Efein researched and pre-

pared all the pretrial motions, which took up the first two days of the court-martial.

In many ways, the pretrial motions were more interesting than the actual testimony. The motions involved questions about whether Meeks had been selectively prosecuted and whether the sodomy charge violated the 1994 "don't ask, don't tell" policy.

The defense unsuccessfully fought to look at all Air Force files on consensual sodomy prosecutions to support Tigar's contention that "not in the history of the Republic" had a case similar to that against Maj. Meeks been pursued. The military's legal definition of sodomy would allow prosecution for a married couple who engaged in oral or anal sex.

Adding to the intrigue was a suggestion that the general who had reopened the investigation into the assault charge against Meeks and expanded it to include homosexual conduct had himself been asked to retire after making inappropriate comments about the commander-in-chief and women during a speech. Held told the judge he had received such information and wanted time to investigate it because it could affect the defense claim of selective prosecution. The prosecution called the request a "fishing expedition" and the judge agreed.

Although Held was handling the pretrial motions, Tigar couldn't resist getting involved. It was during this phase that he got to cite two of his more famous cases. He mentioned *Gentile v. State Bar of Nevada*, a case involving pretrial publicity, when the trial counsel asked for a gag order. And he referred to *Demjanjuk v. Petrovsky* on the issue of a prosecutors' duty to provide exculpatory evidence. Tigar also got in a reference to his representation of Republican Sen. Kay Bailey Hutchison, who won a pretrial dismissal of ethics charges.

But the defense arguments didn't sway the judge, who denied the motions and called the panel into the courtroom.

The Accuser's Diary

The nine lieutenant colonels and colonels who indicated they had no ani-

mosity toward Tigar also expressed little negativity about homosexuals. Most said they believed homosexuality was a lifestyle that exists in today's society, and all but two said they had served with people they believed to be gay.

One female panel member was excused by the judge because she said she had a relative who was gay and could not fairly consider the sodomy charge. The defense struck another panel member, leaving a group of five men and two women to hear the evidence.

Tigar began his opening remarks by quoting Job: "Would that my adversary had written a book." Maj. Meeks' adversary had, Tigar said, explaining that Pamela Dillard had kept a diary in which she spoke of hating Meeks, calling her a "monster" and "Ivan the Terrible." The reference was an ironic twist given Tigar's former representation of Demjanjuk, the retired Cleveland autoworker accused of being the infamous Nazi concentration camp guard known as Ivan the Terrible.

Dillard had turned the diary over to the prosecutors, apparently believing that it corroborated her accusations about the sodomy and gun threat. But the diary proved to be Dillard's undoing, as it also contained confessions that she planned to forge a friend's name to a letter of recommendation for medical school and recently had submitted an insurance claim for a car radio that actually had been stolen three years earlier. It also allowed Tigar to expose minor inconsistencies in her testimony, although he didn't shake her on the key issues.

Speaking confidently on direct examination, Dillard told of meeting Meeks at a gay disco in Alexandria, Va., in late 1991. She said the two had their first sexual encounter in January 1992, and three months later, Meeks proposed marriage to her at a party attended by about 20 people.

After Meeks was transferred to San Antonio in May 1992, Dillard testified that they continued their relationship long-distance until she moved to San Antonio in July 1993. Letters and sexually themed cards Dillard said she received from Meeks were introduced into evidence, although a handwriting examiner could positively identify only some of the writing as being that of Meeks.

Dillard said the relationship deteriorated and that Meeks told her she wasn't being physically intimate enough. By June 1994, Dillard testified, Meeks told her to move out of the house.

"I had allowed myself to become financially dependent on Debbie," Dillard testified, and said she tried contacting lawyers to see if she had any legal right to remain in the house.

On Sept. 26, 1994, Dillard testified, she was cooking dinner when Meeks came home, grabbed a loaded pistol from a night stand drawer and said: "If you talk to any more lawyers about our relationship, I will have someone seek you out and kill you."

A close friend of Dillard's, Jonie Isner of Reston, Va., testified that she received a frantic call from Dillard that night and advised her to call the police. A San Antonio police officer came to the house the next day and made a report.

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But Tigar pointed out that Dillard continued to stay in Meeks' home for several days after the alleged incident and later returned to spend a few more nights and pack up her belongings. He repeatedly referred to a diary entry where Dillard wrote that one of her motivations in talking to a lawyer was "to scare Debbie."

In the end, Tigar painted a picture of Dillard as an opportunistic freeloader who wanted to stay in San Antonio so she could attend a Texas medical school.

Tears of Relief

After deliberating about four hours, the court members wanted to hear the instructions again. After Judge Boone read them the directions concerning direct and circumstantial evidence, accomplice testimony, reasonable doubt and repeated the phrase that they should "vote their conscience," the jury again retired.

After jurors sent out for pizza and talked for about another three hours, a verdict was reached at 10:30 p.m. Aug. 15.

In the military system, a two-thirds vote is required for conviction. Court members only vote one time, a safeguard designed to prevent a member being influenced by a higher-ranking officer.

Meeks had maintained her confidence throughout the trial, telling a courtroom artist to draw her smiling because she planned on winning. But once the not-guilty verdict was announced, the strain of the four-day proceeding became evident.

Meeks began weeping, and after the court members left the room, she hugged Tigar, who also was crying.

Outside the Lackland Law Center, Tigar made appropriate comments to media representatives, declaring the verdict "empowering to all sorts of people in the Air Force." He praised Meeks' courage but the resolve Meeks had displayed all week dissolved before the television camera's blinding lights.

Meeks appeared disoriented at the shouted questions and said she just wanted to go home and see her dog. Held gently took her elbow and guided her away from the glare, saying "We need to get out of here."

The bright lights of the cameras followed her to the van. ■■

Military Justice System Strives to Keep Independent Defense

Dawn Efein's voice shook with anger as she stood in the courtroom and accused military trial counsel of failing to give the defense evidence that might help them prove an Air Force major was being singled out for prosecution of consensual sodomy.

Efein had just discovered a letter the Air Force general counsel sent to Congressman Barney Frank giving details of the sodomy cases prosecuted by the Air Force in 1995. Efein and the two civilian lawyers on Maj. Debra Meeks' defense team had been trying to get such information to argue a motion that Meeks was being selectively prosecuted on the sodomy charge. Meeks also was charged with conduct unbecoming an officer for allegedly threatening her roommate with a gun.

The fact that Efein, an Air Force major, was wearing the same uniform as the lawyers she was accusing of lacking candor didn't cause her any hesitation. Efein knew her advocacy wouldn't affect her military career because of steps the Air Force has taken to make its public defender system as independent as possible.

Area defense counsel like Efein are outside the normal chain of command. They answer not to the commander of the base where they are stationed but to a higher-ranking defense lawyer.

"There are no generals to worry about making angry with something I do," says Efein, who returned to Lackland Air Force Base for Meeks' court martial from the University of Virginia, where she is furthering her legal education. "Our job performance is evaluated on how well we do for our clients."

Military System

The unusual court martial of Meeks cast a rare public spotlight on the military justice system.

Meeks' acquittal is evidence that the system is fair, says Peter Held, a former military lawyer and judge who served as one of her civilian lawyers along with University of Texas law professor Michael Tigar.

"It is a very good system. It works," Held says. "This case is an obvious example."

Efein, a former Air Force nurse, began her military legal career on the prosecution side. All defense counsel are required to have prosecuted a certain number of cases before moving to defense.

"They don't want you cutting your teeth on people's careers," she says.

Efein says she "went to law school to put people in jail" and wasn't sure about being tapped for defense work. But she says she found it fascinating, although, like most defense

counsel, not something she wanted to do beyond her two-year rotation.

Efein is working toward an advanced degree in international law and wants to put it to use in military operations.

Lt. Col. Larry McRel is chief circuit defense counsel for a 13-state area that covers the central United States. He was Efein's boss when she was stationed at Lackland, and says her two-year stint is typical.

"They start needing a break. The pace is very hectic," McRel says.

Chain of Command

The decision to remove the defense lawyers from the chain of command came about 22 years ago, McRel says. Before that, a military lawyer might be prosecuting one day and defending the next, he says.

"At the least, it created the appearance of, if in fact it didn't result in, a conflict," he says.

McRel supervises 25 area defense counsel from his office at Randolph Air Force Base. He and five other senior lawyers serve as circuit defense counsel, traveling where they are needed to help the area defense counsel represent military personnel charged with more serious felony crimes.

There are three area defense counsel stationed at Lackland, where most Air Force recruits receive their basic training. Because the recruits come from all different backgrounds and aren't used to the military, the Lackland defense lawyers "constantly are in the role of counseling and assisting" the trainees, McRel says.

Held says that although he thinks the military justice system is superior to its civilian counterpart in many ways, he would like to see changes in selecting the officers who serve as jurors or court members, as they are called in the military. They are selected by the same officer — often the installation commander — who authorizes the court martial.

The court members are subject to voir dire and can be stricken for cause or with the one peremptory strike each side gets. During Meeks' court martial, two members were stricken for cause, leaving seven colonels and lieutenant colonels to hear the evidence.

Two-thirds of the court members have to agree on a verdict. As a safeguard against court members being influenced by higher-ranking members, they are instructed to cast only one secret ballot.

Held likes the voting system.

"It encourages them to have a full, open discussion about everything," he says. "Then you vote and that's it."

— Janet Elliott