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Shock to the System

With the fairness of the Guantánamo tribunals under fire, a maverick Marine enters the fray; TWO MASTERS; A DIFFERENT PATH

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He's defended Marines convicted of murder and spared them death row. He's championed gay rights and fought to keep the Ten Commandments off public property. He even spent six years working for the American Civil Liberties Union.

With a background like that, Marine Corps Col. Dwight Sullivan might be the Pentagon's best hope for demonstrating to the world that it can give suspected terrorists a fair trial.

Last week the 43-year-old Sullivan stepped into the post of chief defense counsel for the Pentagon's military commissions. Given his reputation as a maverick and an aggressive advocate, critics of the commission process hope Sullivan will push from within to reform the controversial tribunal system.

"The perception is that there could not be a better choice," says retired Navy Cmdr. Mary Hall, who worked with Sullivan as a military defense lawyer in the early 1990s. "He's that tenacious. He's that smart. He's got that much commitment to justice."

Sullivan's appointment comes at a time when the credibility of the military commissions is at a low point. In early August, e-mails alleging misconduct by commission prosecutors were made public. The e-mails were written in March 2004 by military lawyers assigned to the prosecutor's office. They seemed to reinforce critics' claims that the process, designed by political appointees in the Bush administration, is weighted in favor of the prosecution.

But given the confines of the military commission system, any expectation that Sullivan will dramatically boost the firepower available to defendants being tried by the Guantánamo Bay, Cuba, tribunals may not be realistic. The wartime courts offer fewer protections for defendants than the traditional military justice system. Despite Sullivan's defense counsel title, his role is more like that of an administrator than a member of the defense team.

And there may be other problems inherent in Sullivan's role. Maj. Michael Mori, who represents military commission defendant David Hicks, an Australian, says that political pressure on the chief defense counsel, who answers to top Defense Department officials, gives rise to a conflict of interest.

"When the Pentagon created this position, it didn't create any obligation to make decisions in the best interest of clients," Mori says. "I think that's one of the big problems in the system."

As for whether Sullivan's arrival will make a positive difference, Mori says it may already be too late: "You can give us a great, brand-new engine, but if three-quarters of the race is over, it's not going to have a real big impact."

Sullivan has had little time to adjust to his new role. On his second day, lawyers for Salim Ahmed Hamdan, an accused al Qaeda driver and bodyguard facing war crimes charges, petitioned the U.S. Supreme Court to take up his case challenging the legality of the military commissions.

"We're engaged in a huge federal court battle," says Navy Lt. Cmdr. Charles Swift, Hamdan's lead military lawyer, who now works under Sullivan. "It's an enormous asset to have someone like Colonel Sullivan here in the office."

So far, four individuals have been charged before military commissions. The first hearings took place in a makeshift courtroom in Guantánamo Bay in August 2004. In November a federal district judge in Washington ruled that the commissions were illegal, bringing the process to a halt. Last month, after a panel of the U.S. Court of Appeals for the D.C. Circuit reversed the lower court, Pentagon officials said trials would soon resume.

Under commission rules, the chief defense counsel facilitates the legal representation of individuals facing military commission charges but does not represent clients directly or have the final say on staffing issues. For example, at the moment, Sullivan's defense team consists of just one full-time lawyer, with four more who represent commission clients while juggling other duties.

In what some critics see as a troubling arrangement, the chief defense counsel, like the lead prosecutor, reports to a lawyer on the staff of William Haynes II, Pentagon general counsel, whose office made the rules for military commission proceedings.

"The chief defense counsel has some obligations that simply do not comport with traditional defense lawyer functions," says Kevin Barry, a Virginia lawyer and retired Coast Guard judge.

For Sullivan's predecessor, Air Force Col. Will Gunn, the inherent tensions in his role as chief defense counsel became clear as he prepared to leave the office and retire.

Several weeks before his departure, Gunn obtained copies of confidential e-mails from Pentagon prosecutors that seriously questioned the integrity of the military commissions. Gunn initially agreed not to share the e-mails with the lawyers under his watch, and filed them away. Later, as he cleaned out his office, Gunn says he came across the e-mails and read them closely for the first time.

What he read alarmed him. The e-mails raised concerns that evidence favorable to the defense had been covered up by prosecutors and that commission members were being handpicked to ensure convictions. In an eight-page missive, John Carr, an Air Force captain, wrote that allegations of abuse made by one individual charged before a military commission might have been destroyed and that the process "appears to be rigged."

Ultimately, the Defense Department inspector general investigated the prosecutors' claims but found no evidence of misconduct. The report has not been released.

Gunn felt that his team should be aware of the issues raised in the e-mails so that they could look into them independently, and he appealed to the military commission administrator, retired Gen. John Altenburg Jr., to release the inspector general's report. When Altenburg declined to help, Gunn went back to the person who gave him the memos and received approval to turn them over.

"I was unsuccessful in having them released through official channels, and since they had come into my possession unofficially, I decided to release them on my own," Gunn says.

He acknowledges that he could have acted sooner, but says that Pentagon officials had assured him the materials would be released to the defense "at an appropriate time."

"My obligation was to ensure that defense counsel were able to do their job to the best of their ability," Gunn says. "It was only at the point that I read the memos in their entirety that I felt an obligation to release them."

He adds: "The chief defense counsel has to act in the best interest of the [defense] process. . . . Can there be a conflict between that obligation and what is in the best interest of a specific client? Sure there can."

Swift, the military lawyer for Hamdan, says he was satisfied with how Gunn handled the situation.

"I think he's always tried to work within the system," Swift says. "When the system wouldn't work, he responded appropriately."

For his part, Sullivan insists he knows who he works for. "I work for my clients. My job is to ensure the zealous representation of those individuals," Sullivan says without hesitation.

"You could say that's a case of divided loyalty," he continues. "I really don't think it is, because to be loyal to the mission that was given to me . . . I have to provide zealous representation. The way to be loyal to my boss is to do my job well."

But Sullivan also defends Gunn's delay in releasing the memos: "If Colonel Gunn had not initially accepted the memos in confidence, would we know about them today?"

A native of Silver Spring, Md., and a graduate of the University of Virginia School of Law, Sullivan began his military career as a prosecutor in Okinawa, Japan, in 1987. After just one year, he was reassigned to the appellate defense division of the Navy and the Marine Corps, where he took on the case of a Marine Corps clerk convicted of murdering his supervising officer and murdering and sexually assaulting the officer's wife.

When Sullivan came onto the case in 1989 with another junior military lawyer, the defendant, Lance Cpl. Ronnie Curtis, had already been sentenced to death. The first thing Sullivan and his co-counsel did was prepare a motion arguing that they were not qualified to provide representation in a capital case. The motion resulted in the appointment of experienced death-penalty defense lawyer Robert Morin. Now a judge on the D.C. Superior Court, Morin helped win the release of the first death row inmate in the nation exonerated by DNA evidence.

Sullivan put in roughly four years on the case -- a long measure by military standards. Ultimately, in 1997, the U.S. Court of Appeals for the Armed Forces set aside Curtis' death sentence because his trial lawyer hadn't raised mitigating factors in his defense.

Military lawyers look back on the case as a turning point in death-penalty litigation, when the standards for representation in military capital cases began to move closer to those of the civilian justice system.

Sullivan handled other interesting cases as an appellate defense lawyer. In one, he successfully challenged the legality of sentencing a sailor to confinement with only bread and water for sustenance. In another he fought a Marine's conviction for engaging in consensual sex with a potential female recruit. He got that charge dismissed, but lost on a second count that the man had oral sex with the same woman, apparently a strict no-no under military law. "They said Article 125, which is the military sodomy offense, makes it a crime just to have oral sex," Sullivan says. He appealed, but lost. "It would have come out differently after *Lawrence v. Texas*," Sullivan argues.

The unusual nature of some of Sullivan's cases drew interest from regional ACLU chapters, and he got to know the organization.

In 1997, Sullivan was teaching evidence law at the Naval Justice School in Newport, R.I., and saw an advertisement for an opening at the Maryland ACLU. Ready to leave active duty after 10 years and interested in returning to Maryland, he applied for the job. Despite a warning from his management consultant wife that "no one gets a job from answering an ad," Sullivan was hired.

Deborah Jeon, legal director for the Maryland ACLU, recalls that the Marine Corps lawyer at first seemed like an unlikely candidate.

"Frankly, I was very skeptical that he was our guy, but within 10 minutes he had completely won me over," Jeon says. "His passion for civil liberties issues of all kinds is so clear."