

More Bad Legal Advice for Donald Rumsfeld?

Will the public ever see all the photos of Abu Ghraib scandal? Not if Secretary of Defense Donald H. Rumsfeld has anything to do with it.

Mr. Rumsfeld is claiming his lawyers will not let him release the photos. Without access to them, the public will not be able to vindicate its right to know under the First Amendment.

It is important to see all the photos so that the full extent of the scandal will be known. They may contain evidence of those involved beyond the seven bad apples the administration has said are solely responsible. It is also important to know the full reach of the abuses so that they will not happen again.

Are Donald Rumsfeld's claims valid? Or is he just hiding behind questionable legal advice to avoid further political embarrassment?

Generally, his legal track record on prisoners' rights has not been good. He has taken three cases to the U.S. Supreme Court regarding treatment of prisoners in this country, including Guantanamo. They did not receive a warm reception.

His lawyers' advice on the Geneva Conventions, which cover the rights of prisoners, has been attacked right and left as the work of neo-conservative ideologues.

The Red Cross, which administers the Conventions, has disputed the Administration's view as to how they apply to Abu Ghraib. The Association of the Bar of the City of New York has issued a report which disputes the administration's view that the Conventions do not apply in Afghanistan.

The City Bar issued the report after an unprecedented secret visit by a handful of Judge Advocate General's officers. They were concerned that the administration was un-doing 50 years of interpretation and compliance with the Conventions.

Scott Horton, chair of the committee issuing the report said the administration's violations of the Conventions were "a deliberate policy cast at the highest levels of the Pentagon—and I think at the highest level of the administration."

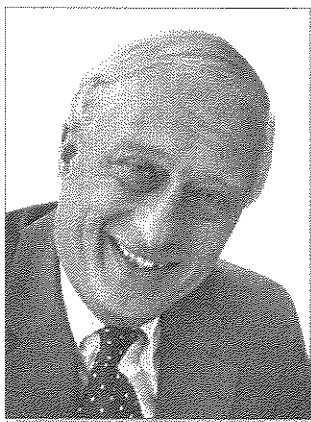
The legal heat is so hot, that recently the administration back-tracked on the nomination of William J. Haynes, general counsel to the Department of Defense, as a federal judge. Critics of Mr. Haynes blame him for an ideological misinterpretation of the Conventions.

The administration placed his nomination on hold with six other lawyers described by The New York Times as "conservative ideologues." It was part of a deal to gain approval for 25 other nominees.

With this background, it is hard to believe that Mr. Rumsfeld cites the Conventions as a principal reason for not releasing the photos.

But according to press reports, Mr. Rumsfeld told reporters at the time of the recent congressional hearing that the "release of the photos would violate a Geneva Convention stricture against presenting images that could be construed as degrading."

He said further, "as far as I'm concerned, I'd be happy to release them all to the public...But at the present time



"I don't know anyone in the legal shop in any element of the government that is recommending that."

Indeed, the Geneva Conventions do prevent captors from parading prisoners in front of TV cameras to degrade them, but a general release of the photos would hardly do that. The purpose of such a release would be to inform the public what had transpired, not to degrade Iraqis. If needs be, the photos could be edited to protect individual privacy. There is little, if any, merit to the argument that the Geneva Conventions prevent release of the photographs. Indeed, for the administration to take comfort in the Conventions after marginalizing them

takes more than a little chutzpah.

Protection under the Geneva Conventions is not Mr. Rumsfeld's only argument for withholding the photos. In his recent testimony to Congress, he maintained that he should not be seen as commanding inappropriate influence over the case. In military cases, if a commander unduly influences a case, the trial is considered "tainted" and the defendant can go free.

This is the argument Lt. William Calley made in his court-martial involving the My Lai massacre in Vietnam. Lt. Calley said President Nixon's comments about his alleged guilt inappropriately influenced the command structure under the president.

The military appeals court rejected this argument. It pointed out that the president was meeting a demand to provide the public with general information, not to influence subordinates to "get" Lt. Calley. Reliance on this concept as a reason to keep information from the public is misplaced.

Mr. Rumsfeld even went so far to say that if he had merely sought information on the seven cases involving Abu Ghraib, it would prejudice them. With 3,000 court-martials in the system, he said he did not want to show interest in only a special few. This misguided view of the law may explain why he did not see the offending photos until the day before his testimony and why he kept them from the president.

Mr. Rumsfeld also said release to the public of the photos would prejudice the trial of the accused. This is another argument made in the case of *U.S. v. Calley*, and rejected.

In all high publicity cases, defendants typically argue the First Amendment rights of the press make a fair trial impossible. Lt. Calley argued that Seymour Hersh's Pulitzer Prize winning articles about My Lai prejudiced his right to a fair trial.

Lt. Calley's court pointed out that as long as his jurors were questioned before trial on "voir dire" and found to be uninfluenced by publicity, he had a fair trial. So too with Abu Ghraib.

It is a mistake not to release all the photos now. They are leaking out piece by piece anyway. Former detainees are giving inflammatory interviews. It is hard to resist the conclusion that the information is being held for political purposes. Certainly, the release of more photos will not drive up the president's ratings.

It would seem therefore to be another case of more bad, or at least questionable, legal advice for the Secretary of Defense. Such advice directly impinges on the public's ability to know and discuss what happened at Abu Ghraib as the First Amendment commands.