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Rumsfeld and Abu Ghraib

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A year ago, when the first photos appeared of U.S. soldiers beating and sexually humiliating detainees at Abu Ghraib prison in Iraq, President George W. Bush expressed horror and disgust. Recognizing the damage that the abuses had done to the image of the U.S. abroad, he promised, in an interview broadcast to the Arab world via the Pentagon-funded TV station Al-Hurra, that the crimes would not go unpunished.

In the coming months, he affirmed, "those mistakes will be investigated, and people will be brought to justice."

And, indeed, investigations have been conducted, court martials have been held, and a few perpetrators have been convicted. One soldier, army reservist Charles Graner, Jr., was sentenced to a ten-year term of imprisonment, the heaviest penalty to date.

But these results represent partial justice, at best. Notably, with the exception of one major personally implicated in abuse, only low-ranking soldiers -- privates and sergeants -- have been held to account.

Thanks to the Abu Ghraib photos, Graner became the smiling face of American brutality. Yet there is no ignoring the fact that while he and other underlings have faced prosecution, those beyond the camera's frame -- those who made policies, gave orders, and condoned or ignored abuses -- have not.

If this is justice, in President Bush's view of things, it comes awfully close to scapegoating. For the evidence shows that the abuses at Abu Ghraib were not isolated and aberrant acts and that, in fact, the worst perpetrators may not have been those whose faces were captured on camera.

As Human Rights Watch described yesterday, in an important new report, the abuses at Abu Ghraib are part of a broader picture. They fit a pattern of brutality and mistreatment, evident at Guantanamo, in Afghanistan, and in dozens of U.S. detention facilities worldwide, that "did not result from the acts of individual soldiers who broke the rules. It resulted from decisions made by the Bush administration to bend, ignore, or cast rules aside."

Rumsfeld's Possible Legal Responsibility

Human Rights Watch's exhaustively-documented report names the top officials, both civilian and military, that it believes should be investigated for crimes against detainees. Its list starts with Secretary of Defense Donald Rumsfeld, and goes on to include George Tenet, the former CIA director; Lt. Gen. Ricardo Sanchez, U.S. military commander in Iraq from June 2003 to July 2004; and Gen. Geoffrey Miller, the U.S. military commander at Guantanamo.

While the report does not reach any conclusions as to the ultimate guilt or innocence of these officials, it argues that abundant evidence exists to justify their investigation. Under both U.S. and international law, it explains, civilian officials and military commanders may be held criminally liable if they order, induce, instigate, aid, or abet in the commission of a crime. In addition, under the doctrine of "command responsibility," individuals who are in positions of civilian or military authority may be criminally liable for the crimes of those under their command.

Secretary Rumsfeld, the report asserts, may well be liable under both of these theories. He may have directly instigated abuses when, on December 2, 2002, he approved a list of inhumane interrogation techniques for use at Guantanamo.

These techniques -- which include the use of hoods, stress positions, isolation, stripping, deprivation of light, removal of religious items, forced grooming, and dogs -- violate not only the Geneva Conventions but also legal prohibitions on torture and other ill-treatment. The techniques later "migrated" to Iraq and Afghanistan, where they figured prominently in abuses against detainees there. In Iraq, moreover, Rumsfeld approved the hiding of detainees from the International Committee of the Red Cross, a practice likely to facilitate abuse.

Journalist Seymour Hersh has alleged, in addition, that Secretary Rumsfeld approved a secret program that encouraged the physical coercion and sexual humiliation of Iraqi prisoners.

Rumsfeld may also bear command responsibility for abuses against detainees. To be liable under the doctrine of command responsibility, a superior must have known, or have had reason to know, that a subordinate was committing a crime, and the superior must have failed to take reasonable steps to prevent the crime or to punish the perpetrator.

Rumsfeld clearly had the necessary knowledge. In Afghanistan, Iraq, and Guantanamo, Secretary Rumsfeld had access to military briefings, ICRC reports, human rights reports, and press accounts that would have put him on notice that U.S. troops were committing war crimes, including torture. Yet, despite receiving abundant warning of abuses, there is no evidence that Rumsfeld ever exerted his authority to protect prisoners from mistreatment.

The Need for an Independent Counsel

Yet while soldiers like Charles Graner, Jr. and Lynndie England are put on trial, Rumsfeld is not. Indeed, if there were any doubts as whether legal liability for Abu Ghraib abuses might eventually be traced up the chain of command, a high-level Army investigation whose findings were announced last Friday probably put them to rest.

Conducted by the Army Inspector General, a subordinate to Secretary Rumsfeld, the new investigation exonerated four of the five top Army officers in charge of detention policies and operations in Iraq. To Human Rights Watch, the American Civil Liberties Union, and other groups that have documented military abuses, it provided further proof of the need for an independent counsel to look into allegations of abuse.

For when President Bush told the world that the perpetrators of crimes at Abu Ghraib would be brought to justice, he didn't not qualify his claim. He didn't say that a handful of low-level perpetrators would be brought to justice.

And we shouldn't, in retrospect, have to say it for him.

Joanne Mariner is an attorney with Human Rights Watch in New York. Her piece is based on a just-released Human Rights Watch report, "Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees," written by Human Rights Watch special counsel Reed Brody.