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**The Suit Against Secretary of Defense Donald Rumsfeld on Behalf of Former Detainees in Iraq and Afghanistan**

## I. INTRODUCTION

Human Rights First filed suit on March 1, 2005 against Secretary of Defense Donald Rumsfeld in federal district court – on behalf of eight Plaintiffs (four from Afghanistan and four from Iraq) each of whom suffered serious abuse while in U.S. custody. The American Civil Liberties Union (the ACLU) is co-counsel with us in the case.

The allegations by our clients are specific and detailed; they include death threats and mock executions; severe and repeated beatings; sexual humiliation and assault; forcible sleep deprivation; deprivation of food and water; and restraint in contorted and excruciating positions. Each of our clients was released from U.S. custody without being prosecuted for wrongdoing – and without receiving compensation for any of their injuries.

We are asking the court to find that Secretary Rumsfeld violated the U.S. Constitution as well as international laws that prohibit torture and cruel, inhuman or degrading treatment or punishment. We are seeking redress for our clients under the principle that a commander is legally responsible for unlawful conduct which he directly ordered – as well as for unlawful conduct committed by his subordinates which he knew about or should have known about, but failed to take corrective action.

The Complaint charges that Secretary Rumsfeld:

- **Authorized and ratified the unlawful treatment of detainees in U.S. custody**. He had the power to formulate policies relating to the treatment and interrogation of detainees in Iraq and Afghanistan. He was directly and personally involved in setting interrogation rules and exercised his power to allow illegal practices.

- **Knew that torture and abuse were taking place but failed to stop or prevent it**. Through his actions and his failure to act, Secretary Rumsfeld expressly and tacitly authorized his subordinates' unlawful conduct. He exercised effective command over these individuals.

The suit is a civil suit – not a criminal action – and as such, is concerned with establishing the limits of lawful government policies and creating a record about what happened. Our aims are: (1) to achieve some basic redress for our clients; (2) to ensure that senior leadership is held accountable for the decisions that opened the door to abuse; and (3) to make certain that the abuse of detainees is stopped. The remedies that we are seeking include declaratory relief (a declaration from the courts that the policies pursued by Secretary Rumsfeld are illegal) and compensatory damages (some basic recompense for the injuries our clients suffered).

## II. THE PROCESS OF FILING SUIT

### A. Introduction

Before I talk in more detail about the substance of the suit, I want to give you a little background on how the suit was brought. I know that one of the most important issues we are considering today is the mechanics of public interest litigation. I'll talk both about the internal process within Human Rights First – and the external process of working with our clients.

### B. The Decision to File Suit

Human Rights First's decision to file suit was in some sense reluctantly made. Although we have a long history of challenging government policies – both in our own country and around the world – we have always looked for ways to engage in constructive debate and dialogue with government officials. For two years before filing the suit – long before the Abu Ghraib photographs were first brought to light[1] – we attempted to engage with members of Congress and the Administration in the hopes of spurring reform. We relied on this approach, even after the scope of the abuses became clear. We campaigned

[1] The Abu Ghraib photographs were leaked in April 2004.

vigorously for the creation of an independent commission, appointed by Congress, with broad powers to investigate U.S. detention practices and the treatment of security detainees. Two years on – as new stories continued to emerge and the architects of abusive policies were promoted throughout the government – it became clear that our traditional approach was not yielding the desired results. It was in this context that we decided to file suit.

Recourse to the courts was in many ways a natural next step. In our system of checks and balances, the courts are intended to serve as the ultimate check on government action – a role that the federal courts were already beginning to wield more freely in the broad context of the "global war on terrorism." Over the same two-year period, the courts had begun to take an increasingly active role in limiting the Executive's expansive interpretations of its own powers. In *Hamdi v. Rumsfeld*, for example, the Supreme Court held that a U.S. citizen, designated as an enemy combatant, is entitled to an evidentiary hearing in federal court to challenge the basis of his detention. In another Supreme Court case, *Rasul v. Bush*, the Court (over heavy government objection) held that the federal courts have jurisdiction to consider legal challenges by non-citizens incarcerated at Guantanamo Bay, Cuba – thereby upending the Executive's attempts to keep these detainees in a legal black hole.

### C. Our Partners and Funders

In deciding to file suit, we worked closely with two retired military lawyers who had collaborated with us in our efforts to engage Congress and the Executive on the issue of interrogation practices. These two lawyers are part of a larger group of retired military leaders with whom we have worked (and continue to work) in this regard.

These two retired military lawyers joined the suit as "of counsel" to Human Rights First. They are Rear Admiral John D. Hutson, formerly the Judge Advocate General of the U.S. Navy, and Brigadier General James Cullen, former Chief Judge of the U.S. Army Court of Criminal Appeals. Like us, both Admiral Hutson and General Cullen thought that this case was essential because of policy and leadership failures that led directly to Secretary Rumsfeld.

Human Rights First's work on the case has been funded primarily through the support of private foundations. The private bar has also played an integral role. Lieff Cabraser, a large private law firm, worked closely with us in preparing the complaint and has devoted many pro bono hours to the suit – under the direction of Bill Lann Lee, a partner at the firm and a former Assistant Attorney General for Civil Rights at the Department of Justice. My own firm – the Dontzin Law Firm – has also devoted countless hours and resources to the suit. My firm has underwritten the entire cost of my work on the suit – and has allowed me to maintain a split position – working both as an associate at the firm and as Senior Counsel at Human Rights First.[2]

## III. THE CLIENTS

In preparing the suit, we also worked closely with trusted human rights and humanitarian organizations in both Afghanistan and Iraq to identify individuals who had been detained by the U.S. government. Two joint Human Rights First and ACLU missions traveled to the region to interview the individuals who now appear on the complaint. Many of them still had papers confirming their detention and the circumstances of their release; a few still bore physical signs of the abuse they suffered while in U.S. custody. Drawing on the expertise of human rights field researchers, we used techniques such as comparing the stories they told us to publicly reported information about U.S. detention operations and detainee treatment, and compared each person's story with the experiences of other detainees held in the same locations at the same time.

At the time we filed the Complaint, the eight plaintiffs were between 19 and 48 years-old. They had been detained in facilities all over Iraq and Afghanistan under the exclusive control of the U.S. military. After being interrogated and subjected to horrifying abuse, all were released without charge.

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[2] Human Rights First is co-counsel with the ACLU on the Rumsfeld case, but there are also 3 parallel ACLU cases against military commanders, which were filed at same time – against Lt Gen. Ricardo Sanchez (who served as head of U.S. forces in Iraq 2003-2004); Brig. Gen. Janis Karpinski (who was head of the Military Police in Iraq, including those pictured at Abu Ghraib); and Col. Thomas Pappas (who was head of intelligence gathering operations in Iraq, including at Abu Ghraib).

Each of our clients told us that he had been arrested by mistake – on a tip from a jealous neighbor, for example, which was not at all an uncommon story. Indeed, at the time we were preparing the Complaint, the International Committee of the Red Cross (the "ICRC") was citing estimates by military intelligence that 70-90% of those detained in Iraq were arrested by mistake. Similarly, the Army Inspector General had estimated that 80% of detainees "might be eligible for release" if their cases had been properly reviewed. Internal military report cited estimates from field that 85-90% of detainees at Abu Ghraib were "of no intelligence value."

The clients have all emphasized that they were willing to come forward in order to seek accountability for what happened and most importantly, to ensure that it can never happen again. So far, two of the Iraqi clients have been granted visas to come to the United States, where they will hopefully have the opportunity to share their stories more broadly.

## IV. THE ALLEGATIONS IN THE COMPLAINT

### A. Focus on Secretary Rumsfeld, the Policy-Maker

The Complaint, itself, meanwhile focuses much-needed attention on Secretary Rumsfeld, the policy-maker – and underscores that none of military's numerous investigations have effectively explored his role in the abuse (or the role of other senior Department of Defense officials). Indeed, over the last couple of years, despite the prosecutions of low-level soldiers (including those pictured in the Abu Ghraib photographs), the high-level officials responsible for unlawful interrogation policies have not been held accountable.

### B. Domestic Law Claims

The Complaint alleges that these policies violated both U.S. law and law of nations. The domestic law claims are brought pursuant to a 1971 Supreme Court case – *Bivens v. Six Unknown Fed. Narcotics Agents* – which allows individuals to sue federal officials in their individual capacity for constitutional violations committed under color of federal law. The Complaint alleges that Secretary Rumsfeld bears both supervisory and policy-making liability under *Bivens* for violations of the Fifth Amendment to the

U.S. Constitution (which prohibits abusive practices that shock conscience) and the Eighth Amendment to the U.S. Constitution (which forbids cruel and unusual punishment).

The Complaint alleges that Secretary Rumsfeld is liable as a policymaker because he authorized a string of abusive practices that led directly and predictably to our clients' injuries.

- On December 2, 2002, for example, Secretary Rumsfeld approved a list of unlawful interrogation techniques for Guantanamo – including stress positions, removal of clothing, exploiting individual detainee phobias (such as fear of dogs), deception to make the detainee believe he was in country that permits torture, and 20 hour interrogations. These techniques were contrary to the established military standards governing detention and interrogation as set forth in Army Field Manuel 34-52.
- In the act of approving these techniques, Secretary Rumsfeld undercut our nation's longstanding (and deeply-rooted) prohibition on the use of torture. That message was heard loud and clear down the chain of command.
- Within the month, many of the same illegal techniques were also being used in Afghanistan. In January 2003, the U.S. commander in Afghanistan reported the new techniques they were using to a Working Group in D.C. established by Secretary Rumsfeld (including stress positions, the use of dogs to incite fear, and sensory deprivation). Officials in Secretary Rumsfeld's Working Group never expressed any objections to these techniques (although they fell outside of accepted protocol) – and thus, military commanders back in Afghanistan considered the techniques to be "approved policy."
- Many of these techniques later spread to Iraq – because military intelligence officers who had been stationed at Bagram were transferred to Iraq in the summer of 2003. These officers implemented the Afghan techniques at Abu Ghraib. Around the same time, Secretary Rumsfeld deployed General Miller (the Guantanamo commander) to Abu Ghraib

to "gitmo-ize" its interrogation and detention procedures (according to the head of Military Police operations in Iraq). Among other techniques, Miller recommended the use of dogs.

- By this point, Secretary Rumsfeld had modified his original December 2002 Guantanamo policy, to a new policy (April 2003), which rescinded some of earlier methods but still permitted techniques such as false flag; prolonged solitary confinement; sleep manipulation, dietary manipulation; and environmental manipulation. Even harsher techniques could also be used with his authorization. We know that Secretary Rumsfeld did approve harsher techniques for individual cases.

The Complaint also alleges that Secretary Rumsfeld is liable as a supervisor because although he knew that guards and interrogators were deployed to Iraq and Afghanistan without adequate training, he placed intense pressure on the military to deliver actionable intelligence. He (and his commanders) also had countless indications over a lengthy period that things were going very wrong. But he failed to take corrective action. For example:

- In December 2002, the Washington Post reported on the systematic abuse of detainees at the U.S. Air Base in Bagram, Afghanistan, including use of stress and duress techniques. That same month, 2 detainees were brutally beaten to death at the Bagram base. Their deaths were classified as homicides. Those responsible for the killings were part of the same military intelligence unit that was subsequently transferred to Abu Ghraib.
- By March 2003, prominent papers (such as the New York Times, Wall Street Journal, and the Atlanta Journal-Constitution) were publishing articles on persistent reports of violations against detainees in Guantanamo and Afghanistan
- Starting in May 2003, the ICRC began sending reports to US officials on the abuse of detainees in Iraq (noting that there was physical evidence to back up the detainees' claims). Another ICRC report (detailing 50 incidents of abuse) was submitted in July

2003. Secretary of State Colin Powell has said he kept Secretary Rumsfeld apprised of their contents.

### C. International Law Claims

The international law claims, meanwhile, are brought pursuant to Alien Tort Claims Act, a 1789 statute which creates a cause of action over torts committed against non-citizens in violation of international law. Here, Secretary Rumsfeld is sued under the Third and Fourth Geneva Conventions and the Convention Against Torture – under theories of both direct and indirect command responsibility. He is liable as direct commander because he formulated abusive policies. He is liable as indirect commander because he had actual and effectual command over soldiers who committed the abuses. Despite being warned of their actions, he failed to take corrective action.

## V. CONCLUSION

The suit is currently pending in the U.S. District Court for the District of D.C. (before District Judge Thomas Hogan). We anticipate that the next development in the case will be a motion to dismiss from the government. Meanwhile, we are still pursuing our efforts to engage directly with Congress and the Administration. We are still campaigning for the creation of an independent commission to investigate the detention abuses. We are also actively campaigning in support of two recent legislative proposals by Senator John McCain, a former prisoner of war, to bar the "cruel, inhuman, and degrading treatment" of detainees – and to limit interrogation techniques to those approved by the U.S. Army's own Field Manuel. Both measures are being actively opposed by the Administration.