

IN THE COUR D'APPEL DE PARIS
TRIBUNAL DE GRANDE INSTANCE DE PARIS

Case No. 2275/05/10

JOINT EXPERT OPINION by:

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I. INTRODUCTION

The Center for Constitutional Rights (“CCR”) and the European Center for Constitutional and Human Rights (“ECCHR”) present this dossier containing key information regarding the criminal role played by **WILLIAM J. HAYNES II**, the former General Counsel of the Department of Defense (“DoD”) under Secretary of Defense Donald Rumsfeld, in the torture and other serious abuse of detainees held in U.S. custody in Guantánamo. With this dossier, we seek to assist the ongoing investigations by the honorable *Tribunal de Grande Instance de Paris* (file no. 2275/05/10).

As the chief legal officer of the Department of Defense and the legal advisor to Secretary of Defense Donald Rumsfeld, HAYNES was one of the primary architects of the Bush Administration’s interrogation and detention policies. This dossier sets out the role played by HAYNES in formulating and approving the list of interrogation techniques that led directly to torture and abuse at Guantánamo, allowing the torture and abuse to continue by silencing objections to the interrogation techniques from the military and other government departments, and further facilitating the torture and abuse in various ways.

Founded in 1966, CCR has a long history of engaging in litigation and advocacy related to the respect and enjoyment of international human rights.¹ In 1980, lawyers from CCR opened U.S. federal courts to international human rights claims through its victory in the land-mark case, *Filártiga v. Peña-Irala*.² CCR has litigated cases on behalf of survivors of human rights abuses from numerous countries, including Nicaragua, Haiti, Guatemala, Bosnia-Herzegovina, Burma, Iraq and Palestine brought against U.S. and foreign officials as well as multi-national corporations.³ CCR staff or board members have authored a number of leading books and articles on international human rights, and CCR is recognized as an authority on the subject.⁴ This expertise extends to the area of universal jurisdiction.⁵

¹ The Center for Constitutional Rights (CCR) is a legal and educational organization based in New York. For more information on CCR, see: www.ccrjustice.org.

² 630 F.2d 876 (2d Cir. 1980).

³ For more information, see: <http://www.ccrjustice.org/home/what-we-do>.

⁴ See e.g., B. Stephens, J. Chomsky, J. Green, P. Hoffman & M. Ratner, *International Human Rights Litigation in U.S. Courts* (Martinus Nijhoff, ed., 2nd ed. 2008); J. Green, R. Copelon, P. Cotter & B. Stephens, *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 *Hastings Women’s Law Journal* 171 (1995); K. Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 *Journal of International Criminal Justice* 745-767 (2010); B. Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith’s Power and Constraint*, 45 *Case Western Res. J. Int’l L.* 23 (2012); S. Kadidal, *Confronting Ethical Issues in National Security Cases: The Guantánamo Habeas Litigation*, 41 *Seton Hall L. Rev.* 1397 (2011).

⁵ See e.g., Reed Brody & Michael Ratner, eds., *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000); W. Kaleck, M. Ratner, T. Singelstein & P. Weiss, eds., *International Prosecution of Human Rights Crimes* (2007); K. Gallagher, *Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and*

ECCHR is an independent, non-profit legal and educational organization dedicated to protecting civil and human rights.⁶ Founded in Berlin in 2007, ECCHR pursues litigation – under international, European and national legal frameworks – to enforce human rights standards and hold state and non-state actors accountable for grave crimes.

CCR and ECCHR have long-standing expertise on the factual and legal questions at issue in this case. On 10 January 2013, both organizations were accepted as parties (*acusación particular*) in an investigation by the Spanish *Audiencia Nacional* into “an approved systematic plan of torture and ill-treatment on persons deprived of their freedom without any charge and without the basic rights of all detainees,” perpetrated by U.S. government officials against persons detained in Guantánamo and other locations (Preliminary Investigation No. 150/09-N).⁷ CCR and ECCHR have submitted numerous legal and factual expert opinions in a second, related, criminal case in Spain brought against six former U.S. officials, including William HAYNES.⁸ CCR and ECCHR have also sought accountability for the criminal violations committed by U.S. officials against specific individuals by initiating proceedings in several countries, including Canada, Germany, Spain and Switzerland.⁹ Additionally, since 2002, CCR has represented plaintiffs who have been subjected to many different facets of the United States’ torture program, from Guantánamo detainees, to Abu Ghraib torture survivors, and victims of extraordinary rendition and CIA ghost detention. CCR has represented (and continues to represent) detainees in U.S. federal courts in habeas corpus proceedings and former detainees in civil actions, seeking habeas relief, injunctions or damages.¹⁰ ECCHR has

Other High-level United States Officials Accountable for Torture, 7 *Journal of International Criminal Justice* 1087-1116 (2009).

⁶ For more information on ECCHR, see <https://www.ecchr.eu/en/home.html>.

⁷ See Decision (27 April 2009), available at:

www.ccrjustice.org/sites/default/files/assets/files/Unofficial%20Translation%20of%20the%20Spanish%20Decision%2004-27-2009_0.pdf. The investigation is to examine alleged acts of torture by the “possible material and instigating perpetrators, necessary collaborators and accomplices.” As *Acusación Particular* in that proceeding, the CCR and the ECCHR seek to assist the investigating magistrate by *inter alia* gathering and analyzing information about specific persons believed to have ordered, directed, conspired, aided and abetted, or otherwise participated directly, indirectly or through command responsibility in the torture and other serious mistreatment of persons detained at U.S. run detention facilities. Select filings available at:

<https://www.ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain>.

⁸ Preliminary Procedure 134/2009 (*Audiencia Nacional*, Court Six). Expert Opinion (26 April 2010), available

at: www.ccrjustice.org/sites/default/files/assets/files/FINAL%20EXPERT%20OPINION%20ENG_0.pdf;

Supplemental Expert Opinion (11 December 2010), available at:

www.ccrjustice.org/sites/default/files/assets/files/Spain%20Supplemental%20Final_English%20-%20EXHIBITS.pdf;

Expert Opinion on Lawyers’ Responsibility (4 January 2011), available at:

www.ccrjustice.org/sites/default/files/assets/files/FINAL%20English%20Lawyers%20Responsibility%20Submission.pdf.

⁹ See e.g., www.ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-canada,

<http://www.ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-switzerland> (discussing cases in

Canada and Switzerland against George W. Bush); www.ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-germany (discussing cases in Germany against Donald Rumsfeld and others);

see also M. Ratner, *The Trial Of Donald Rumsfeld: A Prosecution By Book* (The New Press, 2008).

¹⁰ See, e.g., *Al-Zahrani v. Rumsfeld* (legal pleadings and background information about the case available at:

www.ccrjustice.org/home/what-we-do/our-cases/al-zahrani-v-rumsfeld-al-zahrani-v-united-states); *Celikogous*

represented a victim of extraordinary rendition and CIA secret detention before German courts.¹¹

It is recalled that CCR and ECCHR have made previous submissions in this case, including *inter alia* a joint expert opinion setting forth key information regarding the criminal role played by Geoffrey Miller, who served as Commander of the Joint Task Force Guantánamo, in the torture and other serious abuse of detainees held in Guantánamo, dated 26 February 2014.¹²

II. POTENTIAL DEFENDANT: WILLIAM J. HAYNES II

A. Background

William James HAYNES II was born on 30 March 1958 in Waco, Texas and is a citizen of the United States. After graduating from Harvard Law School in 1983, HAYNES served as General Counsel of the Department of the Army from 1990-1993.¹³ Between 1993 and 2001 he worked for the companies Jenner & Block and General Dynamics Corporation. From May 2001 to March 2008, HAYNES was the General Counsel of the Department of Defense, serving under Secretary of Defense Donald Rumsfeld until November 2006, and under Secretary of Defense Robert Gates beginning in December 2006.¹⁴ In this role, as the “chief legal officer of the Department of Defense,”¹⁵ HAYNES was responsible for *inter alia* “[P]rovid[ing] advice to the Secretary and Deputy Secretary of Defense regarding all legal matters and services performed within, or involving, the Department of Defense” and “[E]stablish[ing] DoD policy on general legal issues, determin[ing] the DoD positions on specific legal problems, and resolv[ing] disagreements within the DoD on such matters.”¹⁶

v. Rumsfeld (legal pleadings and background information about the case available at: www.ccrjustice.org/home/what-we-do/our-cases/celikgogus-v-rumsfeld-allaithi-v-rumsfeld); *Rasul v. Rumsfeld* (legal pleadings and background information about the case available at: www.ccrjustice.org/home/what-we-do/our-cases/rasul-v-rumsfeld); *Arar v. Ashcroft* (legal pleadings and background information about the case available at: www.ccrjustice.org/home/what-we-do/our-cases/arar-v-ashcroft-et-al); *al Qahtani v. Obama* (legal pleadings and background information about the case available at: www.ccrjustice.org/home/what-we-do/our-cases/al-qahtani-v-obama); *Al Shimari v. CACI* (legal pleadings and background information about the case available at: www.ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al).

¹¹ For more information, see: www.echr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/el-masri-case.html.

¹² See Joint Expert Opinion: Miller Dossier, available at: http://ccrjustice.org/sites/default/files/assets/MILLER-DOSSIER-FINAL_en_20140226_public.pdf; Miller Supplemental Submission (March 2015), available at: http://ccrjustice.org/sites/default/files/attach/2015/05/CCR_EECHR_France%20Submission_Guantanamo_Miller%28March2015%29.pdf.

¹³ *William J. Haynes II, General Counsel*, Department of Defense, available at: www.dod.mil/dodgc/gc/gcbio.html.

¹⁴ *Id.*

¹⁵ 10 U.S.C. § 140.

¹⁶ *Department of Defense, Office of the General Counsel, About Us*, available at: www.dod.mil/dodgc/about.html. In this position, Haynes oversaw 10,000 lawyers. See Mark Mazzetti & Scott Shane, *Notes Show Confusion on Interrogation Methods*, New York Times (18 June 2008), available at: www.nytimes.com/2008/06/18/washington/18detain.html.

Notably, HAYNES advised President George W. Bush's administration in its effort to create military commissions to try individuals held at the Guantánamo Bay detention camp.¹⁷ These commissions were deemed unconstitutional by the U.S. Supreme Court in 2006.¹⁸ As will be set out in more detail below, in 2002 HAYNES was directly involved in the commissioning and drafting of the infamous "Torture Memos," which authorized the use of so-called "enhanced interrogation techniques" against persons detained after September 11th.¹⁹ Along with certain administrative, military and political officials, HAYNES integrated such interrogation techniques, which amount to torture, into Department of Defense interrogations.

In 2006, Bush's nomination of HAYNES for a judgeship in a federal appeals court was blocked by the Senate Judiciary Committee.²⁰ In 2008, HAYNES resigned from his position at the Pentagon amidst controversy surrounding the October 2007 resignation of the Chief Prosecutor of Guantánamo's military commissions, Colonel Morris Davis, who reported that HAYNES had improperly politicized the process at the expense of due process and fair trials.²¹

HAYNES was Chief Corporate Counsel of Chevron Corp. from 2008 to 2012, served as the General Counsel and Executive Vice President of pharmaceutical company SIGA Technologies, Inc. from 2012-January 2016, and currently serves as Executive Vice President and General Counsel of CSRA Inc, a Virginia-based company providing technology for government, military and intelligence services.²²

¹⁷ See, e.g., *Memorandum from William J. Haynes II to the Secretary of Defense on the President's Order on Military Commissions* (19 November 2001), available at: <http://library.rumsfeld.com/doclib/sp/2459/2001-11-19%20from%20William%20J%20Haynes%20re%20Presidents%20Order%20on%20Military%20Commissions.pdf>; see also Ross Tuttle, *Pentagon General Counsel Resigns*, *The Nation* (26 February 2008), available at: www.thenation.com/article/pentagon-general-counsel-resigns/.

¹⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557, 625 (2006).

¹⁹ See John Yoo and Robert Delahunty, *Memorandum Draft to William J. Haynes on the Application of Treaties and Laws to al Qaeda and Taliban Detainees*, (9 January 2002) available at: <http://nsarchive.gwu.edu/torturingdemocracy/documents/20020109.pdf> ; William J. Haynes II, *Memorandum to the Secretary of Defense Re: Counter-Resistance Techniques* (27 November 2002) with Donald Rumsfeld approval and addendum re: standing 8-10 hours a day (2 December 2002), available at: <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.12.02.pdf>; see also Tuttle, *supra* n. 17.

²⁰ See Charles Lane, *GOP Senator Criticizes Appeals Court Nominee*, *The Washington Post* (12 July 2006), available at: www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071101026.html; see also Bloomberg News, *Letter Criticizes Judicial Nominee*, *The New York Times* (11 July 2006), available at: www.nytimes.com/2006/07/11/washington/11haynes.html (reporting that twenty retired military officers signed a letter to the Congressional Senate Judiciary Committee opposing Haynes' nomination as a federal judge).

²¹ See Ross Tuttle, *Rigged Trials at Gitmo*, *The Nation* (20 February 2008), available at: www.thenation.com/article/rigged-trials-gitmo/. HAYNES told Col. Morris Davis, "Wait a minute, we can't have acquittals. If we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals. We've got to have convictions." See also *The Great Guantánamo Puppet Theater*, *Harper's Magazine*, 21 February 2008, available at <http://harpers.org/blog/2008/02/the-great-guantanamo-puppet-theater/>.

²² *William Haynes Joins CSRA as EVP, General Counsel; Larry Prior Comments*, 11 January 2016, available at www.govconwire.com/2016/01/william-haynes-joins-csra-as-evp-general-counsel-larry-prior-comments/; *William J. Haynes II*, www.csra.com/about/leadership/william-j-haynes-ii.

B. Role and Functions of William J. HAYNES II as Department of Defense General Counsel from 2001 to 2008

i. Overview of HAYNES' Roles and Responsibilities

William J. HAYNES was appointed by President George W. Bush to serve as General Counsel of the Department of Defense on 24 May 2001 and remained in this position until March 2008²³ — a time period during which all three plaintiffs in these proceedings (Nizar Sassi, Mourad Benchellali and Khaled Ben Mustapha) were detained at Guantánamo. As General Counsel, HAYNES was responsible for providing advice on “all legal matters and services performed within, or involving, the Department of Defense,” and overseeing all lawyers in the DoD, setting standards of conduct for personnel in the DoD, establishing DoD legal policies, and representing the DoD in all its international negotiations.²⁴ Specifically, HAYNES was responsible for, *inter alia*:

- Providing legal advice to the Secretary and Deputy Secretary of Defense, to Office of the Secretary of Defense organizations and, as appropriate, other DoD Components;
- Overseeing, as appropriate, legal services performed within the DoD including determining the adherence by attorneys in the DoD to appropriate professional standards;
- Providing advice on standards of conduct involving personnel of Office of the Secretary of Defense and, as appropriate, other DoD components;
- Developing the DoD Legislative Program and coordinating DoD positions on legislation and Executive Orders;
- Providing for the coordination of significant legal issues, including litigation involving the DoD and other matters before the Department of Justice in which Department of Defense has an interest;
- Establishing DoD policy on general legal issues, determine the DoD positions on specific legal problems, and resolve disagreements within the DoD on such matters;
- Performing such functions relating to the DoD security program (including surveillance over DoD personnel security programs) as the Secretary or Deputy Secretary of Defense may assign;
- Acting as lead counsel for the Department in all international negotiations conducted by Office of the Secretary of Defense organizations; and

²³ *William J. Haynes II, General Counsel, supra* n. 13.

²⁴ *Department of Defense, Office of the General Counsel, supra* n. 16.

- Maintaining the central repository for all international agreements coordinated, negotiated, or concluded by Department of Defense personnel.²⁵

As General Counsel, HAYNES also directed the Defense Legal Services Agency, a Department of Defense agency that “provides legal advice and services for the Defense Agencies, DoD Field Activities, and other assigned organizations.”²⁶

Post-September 11th, HAYNES was a member of the self-selected “War Council,” a group of five senior government lawyers (HAYNES; White House Counsel, Alberto Gonzales; Counsel and Chief of Staff to the Vice President, David Addington; Deputy Assistant U.S. Attorney General, Department of Justice Office of the Legal Counsel (OLC), John Yoo; and Deputy White House Counsel, Timothy Flanigan) who met regularly at the White House or in HAYNES’ office²⁷ and crafted the legal strategy for the so-called “war on terror.”²⁸

ii. **Role of HAYNES in the Torture of Detainees and other Serious Violations of International Law**

As the chief legal officer of the DoD and the legal advisor to Secretary of Defense Donald Rumsfeld, HAYNES was one of the primary architects and ardent defenders of the Bush Administration’s policies regarding the treatment of military detainees. In particular, HAYNES:

- Advocated for and defended the military’s policy of indefinitely holding detainees as “enemy combatants,” rather than as prisoners of war entitled to Geneva Convention protections;
- Advised on, supported and implemented the use of interrogation techniques amounting to cruel, inhuman and degrading treatment and/or torture, including through the provision of a list of “counter-resistance techniques” for use at Guantánamo to Secretary of State Donald Rumsfeld in a 27 November 2002 memorandum;

²⁵ *Id.*

²⁶ *Id.*

²⁷ P. Sands, *Torture Team* (Palgrave Macmillan, 2008), p. 16.

²⁸ See J. Goldsmith, *The Terror Presidency* (W.W. Norton & Company, 2007), pp. 22-23; J. Mayer, *The Dark Side* (Doubleday, 2009), p. 66, in which the War Council is described as an “insular, unelected, self-reinforcing group, with virtually no experience in law enforcement, military service, counterterrorism, or the Muslim world” with the power to make “many of the most fateful legal decisions in the post 9/11 era.” See also *Report of the Committee on Armed Services United States Senate, Inquiry into the Treatment of Detainees in U.S. Custody, 110th Cong.* at n. 224 (2nd Sess. 20 November 2008) (“*Senate Armed Services Report*”), available at: <http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment>; Report of the Constitution Project’s Task Force on Detainee Treatment, available at <http://www.detainee-taskforce.org/read/>, pp. 36, 120.

- Led a DoD working group and ensured that it ultimately advocated circumventing detainee treatment safeguards;
- Intervened to quash concerns raised about the legality of the techniques; and
- Resisted efforts to make it official Pentagon policy to ban the cruel, inhuman and degrading treatment of detainees.

a. Role of HAYNES in the Design and Use of Harsh Interrogation Techniques

William HAYNES was a principal architect of the Bush Administration’s policies of using so-called “enhanced interrogation techniques,” which amount to cruel, inhuman and degrading treatment, or torture, against military detainees at *inter alia* Guantánamo Bay.

Through his role advising on the legal regime under which to hold and charge U.S.-held detainees and determining the interrogation techniques to be applied to individuals held in U.S.-run detention facilities, including at Guantánamo Bay where the three plaintiffs in this case were detained, HAYNES can be found responsible for authorizing, aiding, conspiring, ordering, directing and facilitating torture, cruel treatment and other violations of international law, and/or as a member of a joint criminal enterprise or conspiracy to commit the same against individuals held in U.S.-run detention facilities.

1. Legal Classification of Detainees as “Enemy Combatants” and Inapplicability of Geneva Conventions

In anticipation of the commencement of U.S. military operations in Afghanistan and the detention of individuals post-September 11th, and “with the understanding that the Defense Department had established a long-term detention site at the U.S. Naval Base, Guantanamo Bay, Cuba (GTMO)”²⁹, HAYNES requested the Deputy Assistant Attorney General in OLC John Yoo to draft a legal opinion on the applicability of international treaties to al Qaeda or Taliban militia.³⁰ (HAYNES and Yoo were both members of the War Council, but only Yoo, as a member of the OLC, could issue legal opinions which were binding throughout the Executive Branch.³¹) Yoo’s opinion for HAYNES concluded that the Third Geneva Convention did not apply to the conflict in Afghanistan, and thus, the detainees should not receive the protection afforded to prisoners of war.³² This finding became official U.S.

²⁹ *Senate Armed Services Report, id.* p. 1.

³⁰ See Yoo Memorandum Draft to Haynes on the Application of Treaties and Laws to al Qaeda and Taliban Detainees, *supra* n.19. The memo begins: “You have asked for our Office’s views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia.”

³¹ J. Goldsmith, *The Terror Presidency, supra* n. 28 p. 23.

³² Yoo Memorandum Draft to Haynes on the Application of Treaties and Laws to al Qaeda and Taliban Detainees, *supra* n. 19. Yoo’s 9 January 2002 memorandum analyzed the application of all four Geneva Conventions, including the Fourth Geneva Convention applicable to civilians, to Al Qaeda and Taliban Detainees. The final memorandum focused its analysis on the Third Geneva Convention relevant to Prisoners of

policy, with significant legal implications for the detainees and the U.S. officials involved in detention and interrogation. Indeed, available memoranda trace the evolution of the positions developed through the War Council, where HAYNES was an active participant, to official OLC legal opinions, to a memorandum issued by the Secretary of Defense following HAYNES' guidance and with his support setting forth policy across the DoD, and ultimately official presidential policy.³³ Notably, these memoranda also included discussions of the legal immunity from domestic criminal prosecutions that would follow from a determination that the Geneva Conventions did not apply to Al Qaeda and the Taliban.³⁴

Accordingly, as DoD's General Counsel throughout the period of the Bush Administration, HAYNES advanced the Administration's claim that it had unfettered power to designate detainees as "enemy combatants," deprive them of the protections of the Geneva Conventions guaranteed to prisoners of war (or civilian detainees), and hold them indefinitely without affording them any meaningful opportunity to challenge their detention or treatment. HAYNES has publicly defended these policies. For example, in a 17 October 2002 speech to the Washington, D.C. chapter of the Federalist Society, HAYNES asserted that the government "submitted ample factual evidence supporting its determinations that [Yaser] Hamdi and [Jose] Padilla [U.S. citizens] are enemy combatants."³⁵ When the American Bar Association Task Force found that the detention of Hamdi and Padilla "raise[d] troublesome and profound issues"³⁶ regarding the rights to counsel and due process, HAYNES wrote that

War. See Jay S. Bybee, OLC, *Memorandum for Alberto R. Gonzales and William J. Haynes II re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (22 January 2002), available at: <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf>.

³³ Yoo *Memorandum Draft to Haynes on the Application of Treaties and Laws to al Qaeda and Taliban Detainees*, *supra* n. 19; Bybee *Memorandum for Gonzales and Haynes re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*, *supra* n. 32 (substantially the same as Yoo's 9 January 2002 draft); Secretary of Defense Rumsfeld, *Memorandum for Chairman of the Joint Chiefs of Staff* (19 January 2002) (instructing combatant commanders that "[t]he United States has determined that Al Qaida and Taliban under the control of the United States are not entitled to prisoner of war status for the purposes of the Geneva Conventions of 1949), available at: http://www.pegc.us/archive/DoD/docs/rumsfeld_order_20020119.pdf; and Alberto R. Gonzales, *Memorandum for the President, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, (25 January 2002), available at: http://www.washingtonpost.com/wp-srv/politics/documents/cheney/gonzales_addington_memo_jan252001.pdf (observing that "[t]he Office of Legal Counsel of the Department of Justice has opined that, as a matter of international and domestic law, GPW [Geneva Convention III] does not apply to the conflict with al Qaeda" and declaring "OLC's interpretation of this legal issue is definitive" and finding that "this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners" and that provisions and protections of the Geneva Conventions are "quaint"). It is recalled that Gonzales, like Yoo and Haynes, was a member of the five-person War Council.

³⁴ *Id.*

³⁵ See *DOD Responds to ABA Enemy Combatant Report*, Department of Defense (2 October 2002), available at: <http://www.freerepublic.com/focus/news/765425/posts> (describing letter from William J. Haynes to American Bar Association President Alfred P. Carlton, Jr. on 23 September 2002).

³⁶ American Bar Association, Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8 2002, available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/enemy/enemy_combatants_authcheckdam.pdf.

the Task Force was making “legal errors that I am sure [it] will want to correct before the ABA considers whether to endorse the Report.”³⁷ As will be set out below, HAYNES also played a key role in giving practical effect to the legal and policy decision that the Geneva Conventions did not apply to “war on terror” detainees, through his direct and significant role in designing the interrogation techniques applicable at Guantánamo, including during the time the plaintiffs in this case were held and interrogated there.

2. Introduction of SERE Techniques

In December 2001, HAYNES’s office began seeking information from the Joint Personnel Recovery Agency (JPRA) on potential “exploitation” techniques to be used in the course of detainee interrogations.³⁸ The JPRA is a Department of Defense agency that trains U.S. military personnel in Survival Evasion Resistance and Escape (SERE) techniques to help them should they fall into enemy hands. As part of their resistance training by JPRA, soldiers are taught how to survive and resist the interrogation techniques used by enemies who do not abide by the Geneva Conventions. The techniques used at SERE schools included stress positions, sleep deprivation, face and abdominal slaps, isolation, degradation (including treating the subject like an animal), walling (placing a rolled up towel around the subject’s neck to form a collar, grasping the collar and slamming the subject into a wall to create a whiplash effect) and waterboarding.³⁹

Less than a month after HAYNES had requested information about the SERE techniques, he commissioned the legal opinion from OLC lawyer and fellow War Council member, John Yoo, regarding the applicability of international treaties to al Qaeda or Taliban detainees.⁴⁰ Yoo’s finding that the Third Geneva Convention did not apply, and that detainees should not receive prisoner-of-war protections allowed HAYNES to claim legal cover so that he could begin integrating techniques which fell outside the legal parameters of the Geneva Conventions into use by branches of the DoD.

In early 2002, as the first detainees were arriving at Guantánamo, HAYNES personally sought more information from the JPRA in order to “reverse engineer” the techniques for

³⁷ See *DOD Responds to ABA Enemy Combatant Report*, Department of Defense (2 October 2002), *supra* n. 35.

³⁸ See *Senate Armed Services Report*, *supra* n. 28 pp. 3-4.

³⁹ *Id.* See also *Joint Personnel Recovery Agency, Physical Pressures Used in Resistance Training and Against American prisoners and Detainees* (undated) attached to Memo from Lt Col Daniel Baumgartner to Office of the Secretary of Defense General Counsel (July 26, 2002), included in Annex A (2) of *The Treatment of Detainees in U.S. Custody, Hearings before the Committee on Armed Services United States Senate, One Hundred Tenth Congress, Second Session, June 17 and September 25, 2008*, available at https://fas.org/irp/congress/2008_hr/treatment.pdf.

⁴⁰ See *Yoo Memorandum Draft to William J. Haynes on the Application of Treaties and Laws to al Qaeda and Taliban Detainees*, *supra* n. 19.

offensive use on the detainees – a radical change in the U.S. policy on detainee treatment;⁴¹ the JPRA had until then only used the techniques “defensively” to train soldiers to resist techniques that countries that violate the Geneva Conventions might use on U.S. prisoners of war.⁴² Through his subordinate, DoD Deputy General Counsel for Intelligence Richard Shiffrin, HAYNES urgently sought a specific list of SERE exploitation and interrogation techniques in summer 2002.⁴³ In response to HAYNES’ request, Lieutenant Colonel Baumgartner, JPRA’s Chief of Staff, provided HAYNES with two memos, one on 25 July 2002,⁴⁴ and a second one on 26 July 2002.⁴⁵

The first memo included several lesson plans, including on interrogation techniques that had previously been used on American prisoners and detainees. The second memo, which was provided to answer questions arising from a meeting between HAYNES and the JPRA the previous day,⁴⁶ included a number of documents, including a list of physical pressures used in JPRA resistance training, including waterboarding, walling, shaking and manhandling, immersion in water, cramped confinement (subject is placed in “a small box in the kneeling position with legs crossed at the ankle”), facial and abdomen slaps, stress positions, isolation, induced physical weakness and exhaustion, sensory deprivation, sensory overload, sleep disruption, and degradation.

Notably, a senior army SERE psychologist warned personnel at Guantánamo against using SERE techniques against “real detainees.”⁴⁷ Indeed, even when providing HAYNES with the information he sought about using SERE techniques on the “exploitation” of detainees, JPRA warned that the physical deprivation techniques were not particularly effective and led to less reliable information, and that should the use of such techniques be “discovered,” there would be “intolerable public and political backlash.”⁴⁸ Furthermore, reliance on JPRA officials “with no training or experience in intelligence collection” undercut or short-circuited the

⁴¹ *Senate Armed Services Report*, *supra* n. 28, pp. xiv, 26. See also *The Treatment of Detainees in U.S. Custody, Hearings before the Committee on Armed Services United States Senate, One Hundred Tenth Congress, Second Session, June 17 and September 25, 2008*, testimony of Richard Shiffrin, former Deputy General Counsel for Intelligence, Department of Defense, *supra* n. 39, pp. 26-28.

⁴² *Id.*

⁴³ *Senate Armed Services Report*, *supra* n. 28, pp. 24-26.

⁴⁴ *Memorandum from Headquarters JPRA Chief of Staff to Office of the Secretary of Defense General Counsel, Subject: Exploitation*, Annex A (1) of *The Treatment of Detainees in U.S. Custody, Hearings before the Committee on Armed Services United States Senate, One Hundred Tenth Congress, Second Session, June 17 and September 25, 2008*, *supra* n. 39.

⁴⁵ *Memorandum from Headquarters JPRA Chief of Staff for Office of the Secretary of Defense General Counsel, Subject: Exploitation and Physical Pressures*, Annex A (2) of *The Treatment of Detainees in U.S. Custody, Hearings before the Committee on Armed Services United States Senate, One Hundred Tenth Congress, Second Session, June 17 and September 25, 2008*, *id.*

⁴⁶ The memo states: “The purpose of this memorandum is to answer follow-on questions resulted from the meeting between JPRA and OSD GC on 25 Jul 02.”

⁴⁷ *Senate Armed Services Report*, *supra* n. 28, p. 6.

⁴⁸ *Id.*

efforts of experienced intelligence officers to make recommendations for improving intelligence collection at Guantánamo.⁴⁹

HAYNES relayed the information he had received from the JPRA to the DOJ to further the process of putting these interrogation procedures into practice. HAYNES recalled that he “asked that information [from the JPRA memos] be given to the Justice Department for something they were working on,” which he said related to a program he was not free to discuss even in the classified setting of the Senate Armed Services Committee investigation.⁵⁰ As the Senate Armed Services Report observed, “[o]n August 1, 2002, less than a week after JPRA sent the DoD General Counsel’s Office its memoranda and attachments, the Department of Justice issued two legal opinions signed by then-Assistant Attorney General for the [OLC] Jay Bybee”⁵¹ – i.e., the most infamous “torture memo.”

As the Senate Armed Services Committee concluded, through the incorporation of JPRA advice and SERE techniques requested by HAYNES, Guantánamo Bay became a “battle lab” for new interrogation techniques⁵² – techniques which fell outside the bounds of legality set by the Geneva Conventions.

3. Interrogation Techniques at Guantánamo: 27 November 2002 Memo

Throughout 2002, HAYNES attended meetings with fellow War Council members, Alberto Gonzales and David Addington, in which they discussed and agreed upon specific interrogation techniques, including waterboarding, to be used against U.S.-held detainees.⁵³ After the meetings, the OLC sought to provide legal cover for these decisions taken regarding interrogation techniques by producing memoranda signed by Assistant Attorney General Jay Bybee.⁵⁴ Bybee’s 1 August 2002 memorandum defined torture extremely narrowly, stating that it was limited to the infliction of pain commensurate with “death, organ failure or serious impairment of bodily function.”⁵⁵ Justice Department officials briefed HAYNES on the contents of the memo while it was being drafted.⁵⁶

⁴⁹ *Id.* pp. 13-14.

⁵⁰ *Id.* pp. 28, 34. Haynes also admitted that he had discussed the techniques with other people in the administration. *Id.* p. xvi.

⁵¹ *Id.* p. 31.

⁵² *Id.* pp. 38ff.

⁵³ *Id.* p. 32, see n. 224. See also M. Hirsh, *et al.*, *A Tortured Debate*, Newsweek (21 June 2004), available at: <http://www.newsweek.com/tortured-debate-128593>.

⁵⁴ Jay S. Bybee, *Memorandum for Alberto Gonzales Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, at p. 6 (1 August 2002), available at: <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>.

⁵⁵ *Id.*

⁵⁶ R. Jeffrey Smith & Dan Eggen, *Gonzales Likely Set the Course for Detainees; Justice Nominee’s Hearings Likely to Focus on Interrogation Policies*, The Washington Post (5 January 2005), available at: <http://www.washingtonpost.com/wp-dyn/articles/A48446-2005Jan4.html>.

On 25 September 2002, HAYNES travelled to Guantánamo Bay along with Counsel to the President Alberto Gonzales, Counsel to the Vice President David Addington, Acting CIA General Counsel John Rizzo and other senior administration officials.⁵⁷ During the September visit, HAYNES participated in discussions of adopting new – and harsher – interrogation techniques. HAYNES was briefed on “policy constraints’ affecting interrogations,” and according to the official trip report, HAYNES responded by “opin[ing] that JTF-170 [Joint Task Force at Guantánamo] should have the authority in place to make those calls [regarding use of certain incentive techniques].”⁵⁸

On 11 October 2002, following HAYNES’ trip to Guantánamo and the issuance of the 1 August 2002 Bybee memorandum, Lieutenant Colonel Jerald Phifer of the U.S. Army sent a joint task force memorandum to Major General Dunlavey seeking approval for harsher interrogation techniques because “[t]he current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance.”⁵⁹ Phifer proposed a set of coercive interrogation techniques in three escalating categories. Many of these techniques amounted to torture and/or cruel, inhuman or degrading treatment under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT). They included the use of stress positions, the placing of a hood over a detainee’s head during transportation and questioning, removal of clothing, forced grooming (shaving off facial hair, etc.), and using detainees individual phobias (such as fear of dogs) to induce stress.⁶⁰

In response to memoranda on harsh interrogation techniques from Lt. Col. Phifer and General James T. Hill, Commander of the U.S. Southern Command,⁶¹ HAYNES issued a memorandum on counter-resistance techniques on 27 November 2002 (attached as Annex 1).

⁵⁷ *Senate Armed Services Report*, *supra* n. 28, p. 49.

⁵⁸ *Id.* See Col. Terrence Farrell, Trip Report – DoD General Counsel Visit to GTMO (27 September 2002), available at: <http://nsarchive.gwu.edu/torturingdemocracy/documents/20020927.pdf>.

⁵⁹ *Memorandum for Commander, Joint Task Force 170, Re: Request for Approval of Counter-Resistance Strategies*, par. 1 (11 October 2002), available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. See generally, *Senate Armed Services Report*, *supra* n. 28 pp. 61-70.

⁶⁰ *Memorandum for Commander, Joint Task Force 170, Re: Request for Approval of Counter-Resistance Strategies* (11 October 2002), *id.*

⁶¹ Before reaching Haynes, the request passed through the hands of several other members of the military. Lieutenant Colonel Diane E. Beaver, Staff Judge Advocate for United States Southern Command of the US Army, reviewed Phifer’s requested interrogation techniques. In a memorandum to Major General Dunlavey, Beaver concluded that the proposed techniques were legal, although she made many important qualifications, including recommending further legal review. See Diane E. Beaver, *Memorandum for Commander, Joint Task Force 170, Re: Legal Brief on Proposed Counter-Resistance Strategies* (11 October 2002), available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. In response, Dunlavey sent a memorandum to General James T. Hill, Commander of U.S. Southern Command, in which he stated that the techniques “do not violate U.S. or international laws,” and requesting that they all be approved. See Dunlavey, *Memorandum for Commander, United States Southern Command, (11 October 2002)*, http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. Hill sent a memorandum to Richard B. Myers, Chairman of the Joint Chiefs of Staff, in which he concluded that the proposed Category I and II

In the memo, HAYNES recommended that Secretary Rumsfeld approve 15 of the listed techniques for use on detainees at Guantánamo Bay.⁶² The recommended techniques were:

- Yelling at the detainee
- Deception (including having the interviewer identify himself as an interrogator from a country with a reputation for harsh treatment of detainees)
- Stress positions (up to four hours)
- The use of falsified documents/reports
- Isolation (for up to 30 days)
- Interrogating the detainee in different environments
- Light and sound deprivation
- Hooding
- 20-hour interrogations
- Removal of all comfort items (including religious items)
- Switching the detainee from hot rations to pre-packaged meals
- Removal of clothing
- Forced grooming (including shaving of facial hair)
- Using detainee phobias (including fear of dogs) to induce stress
- Grabbing, poking, and “light pushing”.

HAYNES also indicated that three further techniques did not at that time warrant blanket approval but that they “may be legally available.” These techniques were:

- Use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for him and/or his family
- Exposure to cold weather or water
- Use of a wet towel and dripping water to induce the misperception of suffocating (waterboarding).

HAYNES forwarded his recommendation on the techniques to Secretary Rumsfeld with a note saying “good to go”.⁶³ HAYNES failed to advise Rumsfeld that the techniques represented a major deviation from long-standing US military practice, and indeed, as discussed below, that Legal Counsel to the Joint Chiefs of Staff had significant concerns with the legality of certain of the proposed techniques that she conveyed directly to HAYNES.

techniques were “legal and humane.” See Hill, *Memorandum for Chairman of the Joint Chiefs of Staff*, 25 October 2002, available at <http://news.findlaw.com/hdocs/docs/dod/hill102502mem.html>. He questioned whether the Category III techniques were legal and recommended additional legal advice by the Department of Defense and Department of Justice lawyers. *Id.*

⁶² William J. Haynes II, *Memorandum to the Secretary of Defense Re: Counter-Resistance Techniques* (November 27, 2002), attached as Annex 1.

⁶³ J. Mayer, *The Dark Side*, *supra* n. 28, p. 221.

A week after HAYNES delivered his memorandum to Rumsfeld, on 2 December 2002, Rumsfeld approved all of HAYNES' recommendations for use at Guantánamo.⁶⁴

The authorization by Rumsfeld, at the very top of the military chain of command, sent a clear message to personnel at Guantánamo about how interrogations were to be conducted.⁶⁵ The U.S. Senate Armed Services Committee has confirmed that the abusive techniques used on al Qahtani came to define the conduct of future interrogations at Guantánamo.⁶⁶ In the days following Rumsfeld's authorization, senior staff at Joint Task Force Guantánamo began developing standard operating procedures to implement the techniques HAYNES had recommended, including the use of stress positions as well as stripping and pushing detainees.⁶⁷ Interrogation plans were drawn up that included what were referred to as "degradation tactics" and which included shoulder slaps, insult slaps, and stomach slaps, forceful stripping, "physical debilitation tactics" aimed at punishing detainees, and other tactics including manhandling and walling.⁶⁸

Rumsfeld's actions were in direct response to a specific request by Guantánamo interrogators who sought greater "flexibility" in interrogating detainee Mohammed al Qahtani.⁶⁹ Rumsfeld, enacting HAYNES' proposed counter-resistance techniques, authorized the interrogation plans against al Qahtani, which included the use of "enhanced" interrogation techniques and suggested shipping al Qahtani to another country for further torture.⁷⁰ General Hill confirmed that al Qahtani was subjected to SERE techniques,⁷¹ the same techniques HAYNES had solicited less than a year earlier to "reverse engineer" for use on detainees.

It is widely acknowledged, including by U.S. officials,⁷² that al Qahtani was subject to abuse rising to the level of torture while at Guantánamo. Al Qahtani was held in segregation from

⁶⁴ Haynes, *Memorandum to Secretary of Defense Re: Counter-Resistance Techniques*, *supra* n. 62. See also Murphy, *Rumsfeld OK'd Dog Scares, Strips*, CBSNEWS.COM (23 June 2004), available at: <http://www.cbsnews.com/news/rumsfeld-okd-dog-scares-strips/>. Rumsfeld did, however, rescind blanket support for use of all of the techniques on 15 January 2003, and instead required requests for use of all Category II and the Category III technique to go through him before such techniques could be employed. Donald Rumsfeld, *Memorandum for Commander USSOUTHCOM, re: Counter-Resistance Techniques* (15 January 2003), available at: <http://nsarchive.gwu.edu/torturingdemocracy/documents/20030115-1.pdf>.

⁶⁵ The Criminal Investigation Task Force Special Agent in Charge at GTMO, Timothy James, "said that when he saw the Secretary's authorization, he was 'in shock' and that it 'told us that we had lost the battle'." *Senate Armed Services Report*, *supra* n. 28, p. 97.

⁶⁶ *Senate Armed Services Report*, *supra* n. 28, p. 135.

⁶⁷ *Senate Armed Services Report*, *supra* n. 28, p. 97.

⁶⁸ *Senate Armed Services Report*, *supra* n. 28, pp. 98-99.

⁶⁹ See J. Mayer, *The Memo*, *The New Yorker* (27 February 2006), available at: <http://www.newyorker.com/magazine/2006/02/27/the-memo>.

⁷⁰ *Senate Armed Services Report*, *supra* n. 28, p. 77.

⁷¹ *Senate Armed Services Report*, *supra* n. 28, p. 88.

⁷² *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, *The Washington Post*, 14 January 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.

other detainees for 160 days.⁷³ On 48 days over a 54 day period, he was subjected to 18- to 20-hour interrogations.⁷⁴ He was generally permitted to sleep only four hours or fewer per night during this period.⁷⁵ He was prevented from sleeping by having to move cells in the night and having 24 hour lighting in his cell.⁷⁶ If he began to fall asleep during interrogations, military police or interrogators would pour water on him, force him to stand or sit or otherwise physically abuse him.⁷⁷ He was hooded,⁷⁸ yelled at,⁷⁹ and subjected to very cold temperatures.⁸⁰ He was subjected to sexual and religious humiliation techniques, including forced nudity, sometimes for prolonged periods of time and in stress positions,⁸¹ and in some instances in the presence of female interrogators.⁸² His beard was forcibly shaved on several occasions.⁸³ He was subjected to “invasion of space by female interrogator”;⁸⁴ this sometimes involved female interrogators straddling him.⁸⁵ He was forced to pray to an idol shrine.⁸⁶ Interrogators insulted his mother and sister, telling him they were “prostitutes and whores.”⁸⁷ On one occasion he was forced to wear a bra and had a thong placed on his head during the course of the interrogation.⁸⁸ A dog was brought into his interrogation cell numerous times, and ordered to growl, bark and show its teeth at him.⁸⁹ He was put on a leash and made to act like a dog, performing dog tricks.⁹⁰ HAYNES also approved the interrogation plan for detainee Mohamadou Walid Slahi. An initial interrogation plan was drawn up by the Joint Task Force at Guantánamo on 16 January 2003.⁹¹ It mirrored the interrogation plan for al Qahtani⁹² and included hooding Slahi, using 20 hour interrogations, pouring water on his head, using dogs to agitate and shock him, degradation, getting him to bark and perform dog

⁷³ The Schmidt-Furlow Report: AR 15-6 Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, available at https://www.thetorturedatabase.org/files/foia_subsite/pdfs/schmidt_furlow_report.pdf, p. 20.

⁷⁴ *Id.* p. 20. See also *Interrogation Log for Detainee 063*, available at <http://content.time.com/time/2006/log/log.pdf>.

⁷⁵ See *Interrogation Log for Detainee 063*, *id.*

⁷⁶ Declaration of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, available at https://ccrjustice.org/sites/default/files/assets/Gutierrez%20Declaration%20re%20Al%20Qahtani%20Oct%202006_0.pdf, p. 10.

⁷⁷ *Id.* p. 10.

⁷⁸ See *Interrogation Log for Detainee 063*, *supra* n.74, at 04/12/2002, 0130.

⁷⁹ See e.g. *Interrogation Log for Detainee 063*, *supra* n.74, at 10/12/2002, 0600, 1615.

⁸⁰ Declaration of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, *supra* n. 76, p. 21.

⁸¹ *Id.* p. 22.

⁸² *Id.* p. 16.

⁸³ *Interrogation Log for Detainee 063*, *supra* n.74 e.g. on 12/03/2002, 12/18/2002, 12/20/2002, 01/11/03.

⁸⁴ *Interrogation Log for Detainee 063*, *supra* n. 74 on 06/12/2002, 1930.

⁸⁵ Declaration of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, *supra* n. 76, p. 18.

⁸⁶ *Senate Armed Services Report*, *supra* n. 28, p. 88.

⁸⁷ *Interrogation Log for Detainee 063*, *supra* n. 74, on 12/17/02 at 2100.

⁸⁸ Schmidt-Furlow Report: AR 15-6 Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, *supra* n. 73, p. 19.

⁸⁹ *Id.* p. 15, see also *Senate Armed Services Report*, *supra* n. 28, p. 90.

⁹⁰ Schmidt-Furlow Report: AR 15-6 Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, *supra* n. 73, p. 19.

⁹¹ *Senate Armed Services Report*, *supra* n. 28, p. 135.

⁹² *Id.*

tricks, shaving his head and beard, making him wear a burka, strip searching him “to reduce [his] ego by assaulting his modesty”, having a female interrogator touch him, and using noise and strobe lights to disorient and stress him.⁹³ In July 2003, Joint Task Force Guantánamo submitted a final interrogation plan for Slahi for approval by the United States Southern Command (SOUTHCOM). It included many of the techniques in the memo of 16 January listed above.⁹⁴ HAYNES’ office approved the plan⁹⁵ and Secretary Rumsfeld gave his approval on 13 August 2003.⁹⁶

Mohamadou Walid Slahi was subjected to a series of interrogation techniques in sessions that sometimes went on for over 20 hours.⁹⁷ These techniques included the use of strobe lights,⁹⁸ playing one rock song at extremely high volume all through the night,⁹⁹ sleep deprivation,¹⁰⁰ light deprivation,¹⁰¹ extreme cold,¹⁰² being doused with iced water,¹⁰³ sexual degradation and physical sexual abuse,¹⁰⁴ and forced standing for hours.¹⁰⁵ Slahi was also subjected to a number of what were known as “fear up harsh” approaches; he was told that he could be killed, that he would disappear, and he was presented with a forged letter stating that his mother had been detained and might be transferred to Guantánamo, with interrogators stressing how she would be the only female detained at the all-male prison.¹⁰⁶

HAYNES’ 27 November memorandum to Rumsfeld constituted practical assistance because it gave Rumsfeld the green light to authorize forceful interrogation methods. The memorandum supplied Rumsfeld with legal authority with which Rumsfeld could defend his actions. Without the memorandum, Rumsfeld would have been acting on his own; with HAYNES’ memorandum in hand, Rumsfeld could insist that he had cleared his actions with DOD lawyers. Thus, HAYNES’ 27 November 2002 memorandum provided Rumsfeld with the legal and moral support to authorize the use of torture and cruel, inhuman, and degrading treatment against Guantánamo detainees.

4. Involvement in torture outside Guantánamo

⁹³ *Senate Armed Services Report*, *supra* n. 28, pp. 135, 136.

⁹⁴ *Id.* pp. 136, 137.

⁹⁵ “A handwritten note on the memo stated that ‘OGC [Office of the General Counsel] concurs that this is legal. We don’t see any policy issues with these interrogation techniques. Recommend you authorize,’” *id.* p. 138.

⁹⁶ *Id.*

⁹⁷ Mohamedou Ould Slahi, *Guantanamo Diary*, Canongate, Edinburgh, 2015 [hereafter *Guantanamo Diary*] at 235, 236.

⁹⁸ *Senate Armed Services Report*, *supra* n. 28, p. 139, *Guantanamo Diary*, *id.* p. 235.

⁹⁹ *Senate Armed Services Report*, *supra* n. 28, p. 139, *Guantanamo Diary*, *id.* p. 235.

¹⁰⁰ *Guantanamo Diary*, *id.* pp. 236, 237.

¹⁰¹ *Senate Armed Services Report*, *supra* n. 28, p. 140.

¹⁰² *Guantanamo Diary*, *supra* note 97, p. 242.

¹⁰³ *Id.* p. 244.

¹⁰⁴ *Id.* p. 230.

¹⁰⁵ *Senate Armed Services Report*, *supra* n. 28, p. 139.

¹⁰⁶ *Id.* pp. 139, 140.

HAYNES was also involved in facilitating the torture of detainees detained in other detention centers and CIA blacksites in other parts of the world.

For instance, HAYNES advised on the interrogations of John Walker Lindh, seen as Detainee 001 in the “war on terror”, captured in Afghanistan in early December 2001 and accused of fighting with al Qaeda. When an army interrogator sought high-level guidance on which rules applied to the interrogation of Lindh, HAYNES responded by telling him to “take the gloves off” and that normal procedures did not apply.¹⁰⁷ Navy records show that Lindh was often kept “blindfolded, naked and bound to a stretcher with duct tape” during the time of these interrogations.¹⁰⁸ Lindh was subjected to sleep deprivation, cold and hunger and was kept in a pitch-dark steel shipping container.¹⁰⁹

HAYNES was also involved in devising interrogation techniques for Abu Zubayda, who was captured by the CIA in Pakistan. Zubayda was the first “high-value” detainee taken into U.S. custody in the “war on terror”. His treatment set an example of abusive interrogations that spread from the CIA to the military.¹¹⁰ HAYNES, Yoo and other members of the War Council convened to determine what kind of pain could be inflicted on Zubayda and which techniques could be used.¹¹¹ Over the course of his interrogations, Zubayda was waterboarded at least 83 times.¹¹² Other techniques used on him included walling, slapping, prolonged stress standing positions, confinement in a box, prolonged nudity, sleep deprivation, forced shaving, beating and kicking.¹¹³

b. Role of HAYNES in Undermining or Circumventing Detainee Treatment Safeguards

HAYNES actively blocked attempts to set up safeguards for the detainees at Guantánamo and other U.S.-run detention centers. After learning that a legal review of the techniques was underway that would reveal grave concerns held by several sections of the military, HAYNES intervened to bring this review process to a halt.

As part of a legal review process undertaken by the legal adviser to the Joint Chief of Staff Captain Jane Dalton in regard to the 11 October 2002 Guantánamo interrogation request and

¹⁰⁷ J. Mayer, *The Dark Side*, *supra* n. 28, p. 94.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* p. 140.

¹¹¹ *Id.* p. 150.

¹¹² See the judgment of the European Court of Human Rights in *Husayn (Abu Zubaydah) v Poland*, Judgment, Strasbourg, 24 July 2014, available at [http://hudoc.echr.coe.int/eng?i=001-146047&{%22itemid%22%3A\[%22001-146047%22\]}#{%22itemid%22:\[%22001-146047%22\]}](http://hudoc.echr.coe.int/eng?i=001-146047&{%22itemid%22%3A[%22001-146047%22]}#{%22itemid%22:[%22001-146047%22]}), at par. 88.

¹¹³ *Id.* at par. 103, per Abu Zubayda’s declaration.

proposed interrogation techniques, the Air Force,¹¹⁴ Navy,¹¹⁵ Marine Corps,¹¹⁶ Army,¹¹⁷ FBI, and the DoD Criminal Investigation Task Force (CITF)¹¹⁸ voiced serious concerns that the techniques might constitute torture and/or violate federal or international law or the Uniform Code of Military Justice.¹¹⁹ Each of these military branches recommended that the DoD provide further legal analysis to verify that these techniques were not torture or would not leave the military open to prosecution.¹²⁰ HAYNES was made aware of these concerns through different channels, including in a briefing by Captain Dalton's staff.¹²¹ HAYNES responded by having the review process shut down to ensure that these objections were not made known. Captain Dalton was advised that HAYNES wanted her to stop conducting the review because of concerns that "people were going to see" the military services' analysis of the techniques.¹²² "According to CAPT Dalton, Mr. Haynes 'wanted to keep it much more close hold.'"¹²³

Rumsfeld's decision to approve HAYNES' 27 November 2002 recommendations created controversy and concern among the FBI, as well as Pentagon officers at the Judge Advocate General's Corps (JAG), the legal branch of the U.S. military. Both before and after HAYNES' 27 November memorandum, the Criminal Investigation Task Force, U.S. Department of Defense (CITF), and the FBI directly voiced their numerous concerns about the legality of al Qahtani's interrogation to HAYNES and the Office of General Counsel.¹²⁴ On 20 December 2002, General Counsel for the U.S. Navy Alberto Mora confronted HAYNES, arguing that Rumsfeld's 2 December 2002 memo permitted torture; Mora expected that HAYNES would encourage Rumsfeld to revoke authorization for the techniques.¹²⁵ On 9 January 2003, upon being informed that the detainee mistreatment was continuing at Guantánamo, Mora had a second meeting with HAYNES to express his concern that Rumsfeld's memo authorized unlawful conduct.¹²⁶ Mora continued to press for changes in the interrogation policies, culminating in his delivering a draft memorandum to HAYNES on 15 January 2003, in which he stated that "the majority of the proposed category II and all of the proposed category III techniques were violative of domestic and international norms in

¹¹⁴ *Senate Armed Services Report*, *supra* n. 28, p. 67.

¹¹⁵ *Id.* p. 68.

¹¹⁶ *Id.* p.68.

¹¹⁷ *Id.* p.68.

¹¹⁸ *Id.* pp. 68, 69.

¹¹⁹ *Id.* pp. 70.

¹²⁰ *Id.* pp. 67-69.

¹²¹ *Id.* p. 71.

¹²² *Id.* p. 71.

¹²³ *Id.* p. 71.

¹²⁴ *Id.* pp. 84-86. Similarly, the FBI expressed concerns over the legality of the interrogation techniques used against Mohamedou Ould Slahi. *Id.* p. 141.

¹²⁵ *Id.* pp. 106-07 (citing Alberto J. Mora, *Memorandum to Inspector General, Department of the Navy, Re: Statement for the Record: Office of General Counsel Involvement in Interrogation Issues* (7 July 2004) ("Mora, Statement for the Record")).

¹²⁶ *Id.*, p. 107.

that they constituted, at a minimum cruel and unusual treatment, and, at worst, torture.”¹²⁷ It was in response to Mora’s draft memo and the threat of it being issued that Rumsfeld ultimately rescinded blanket approval of Category II and the Category III technique.¹²⁸

In response, HAYNES was directed by Secretary Rumsfeld to establish a Department of Defense Working Group (hereafter “Working Group”) on legal, policy and operational issues related to detainee interrogation.¹²⁹ The Working Group was to include HAYNES’ office as well as military lawyers who had been critical of the administration’s approach to detainee interrogation, including Mora. The purported purpose of the Working Group was to provide new guidelines for interrogation that were grounded in international and domestic U.S. law.¹³⁰

However, HAYNES undermined the Working Group in order to arrive at his desired, pre-determined end result, i.e. the minimum possible level of restrictions on interrogations.¹³¹

HAYNES “outflanked [Mora,] . . . solicit[ing] a separate, overarching opinion” from the DOJ’s OLC¹³² that “negated almost every argument [Mora] had made.”¹³³ The memo, ultimately adopted on 14 March 2003, was authored by HAYNES’ fellow War Council member, OLC lawyer John Yoo.¹³⁴ Yoo’s memo provided that torture was the “equivalent in intensity to that accompanying ‘serious physical injury, such as organ failure, impairment of bodily functions or even death.’”¹³⁵

As the Senate Armed Services Committee found, “[a]mong the Working Group members there was a ‘great deal of disagreement’ with the OLC analysis and ‘serious concerns and objections over some of the legal conclusions reached by OLC.’”¹³⁶ HAYNES, however, directed that the Working Group “consider the ‘OLC memorandum as authoritative’ and directed that it ‘supplant the legal analysis being prepared by the Working Group action

¹²⁷ *Id.* p. 108.

¹²⁸ *Senate Armed Services Report, supra* n. 28, p. xxi.

¹²⁹ Memorandum from the Secretary of Defense for the General Counsel of the Department of Defense, 15 January 2003, available at <http://nsarchive.gwu.edu/torturingdemocracy/documents/20030115-2.pdf>. *See also Senate Armed Services Report, supra* n. 28, p. 110.

¹³⁰ *Senate Armed Services Report, supra* n. 28, p. 110.

¹³¹ *Senate Armed Services Report, supra* n. 28 pp. 110-128; *see* J. Mayer, *The Dark Side, supra* n. 28, pp. 228-233.

¹³² J. Mayer, *The Dark Side, supra* n. 28 p. 229; *see also Senate Armed Services Report, supra* n. 28, pp. 118, 121.

¹³³ J. Mayer, *The Dark Side, supra* n. 28, p. 229.

¹³⁴ John Yoo, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Military Interrogation of Alien Unlawful Combatants Held outside the United States* (14 March 2003), available at <https://fas.org/irp/agency/doj/olc-interrogation.pdf>.

¹³⁵ *Senate Armed Services Report, supra* n. 28, p. 120, quoting Yoo, *id.* p. 45.

¹³⁶ *Id.* at 119; *see also* Dana Priest & Bradley Graham, *Guantanamo List Details Approved Interrogation Methods*, THE WASHINGTON POST (10 June 2004), available at: <http://www.washingtonpost.com/wp-dyn/articles/A29742-2004Jun9.html>.

officers.”¹³⁷ According to Mora, this was a “travesty of the applicable law.”¹³⁸ The Working Group was told “what their legal opinion had to be,” and thus members of the Working Group felt that this “severely constrained [their] ability to do an adequate job” and ensured that it would not introduce restraints on interrogation policy.¹³⁹

Likewise, HAYNES disregarded serious concerns raised by JAG officers by forcing them to accept the Justice Department’s justifications for torture “over objections from top lawyers of every military service, who found the legal judgments to be extreme and wrong-headed.”¹⁴⁰ According to the *Washington Post*, a senior Pentagon official stated that “[e]very flag JAG lodged complaints.”¹⁴¹ HAYNES avoided dissent by allowing internal critics like Mora “to think that they were engaged in a meaningful process” while HAYNES worked with his own allies to make official policy that ignored expressed concerns¹⁴² – and largely adopting the same legal reasoning through the Working Group as had been advanced in the heavily criticized 1 August 2002 memo, as well as with protections from criminal prosecution, in that the memo asserted that general criminal statutes (i.e., the anti-torture statute) were inapplicable to the military during an armed conflict.¹⁴³

HAYNES ensured that those who were most critical of this approach, including Mora, were secretly excluded from the further work of the Working Group.¹⁴⁴ In February 2003, under HAYNES’ direction, the remainder of the Working Group recommended 36 interrogation techniques, including hooding, dietary manipulation, environmental manipulation, sleep adjustment, threat of transfer and false flag,¹⁴⁵ The Working Group also determined that under certain circumstances the following techniques were permissible: isolation, prolonged interrogations, forced grooming, prolonged standing, sleep deprivation, face and stomach slaps, removal of clothing, increasing anxiety by use of aversions, and waterboarding.¹⁴⁶ A final version of the Working Group’s report was issued in April 2003. It included the

¹³⁷ *Senate Armed Services Report*, *supra* n. 28, p. 120.

¹³⁸ *Id.* p. 121.

¹³⁹ *Id.* p. 122.

¹⁴⁰ Dana Priest & Bradley Graham, *U.S. Struggled Over How Far to Push Tactics; Documents Show Back-and-Forth on Interrogation Policy*, *The Washington Post* (24 June 2004), available at: <http://www.washingtonpost.com/wp-dyn/articles/A756-2004Jun23.html>; see also *Memos Reveal Military Lawyers’ Anger over White House Interrogation Policy*, *Human Rights First* (25 July 2005), available at: <http://www.humanrightsfirst.org/2005/07/25/Memos-Reveal-Military-Lawyers-Anger-Over-White-House-Interrogation-Policy>.

¹⁴¹ Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, *The Washington Post* (8 June 2004), available at: <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>.

¹⁴² J. Mayer, *The Dark Side*, *supra* n. 28, p. 235.

¹⁴³ *Senate Armed Services Report*, *supra* n. 28, p. 120.

¹⁴⁴ *Senate Armed Services Report*, *supra* n. 28, p. 131.

¹⁴⁵ *Senate Armed Services Report*, *supra* n. 28, p. 124. Under the “false flag” approach, detainees are given the impression that they are being interrogated by nationals of a different country, usually one with a reputation for abusive treatment to inflict fear.

¹⁴⁶ *Senate Armed Services Report*, *supra* n. 28, p. 125.

techniques recommended in February with the exception of waterboarding, stress positions, deprivation of light and sound, and water immersion.¹⁴⁷

By ignoring concerns expressed by a number of JAG lawyers and undermining the opinions of dozens of highly qualified DoD lawyers, HAYNES controlled the production of the Working Group report – a document that authorized torture and other cruel, inhuman and degrading treatment of detainees. Signed by Rumsfeld, the final Working Group Report was given the weight of a military order and subsequently informed the DoD’s official policies on interrogation. The Working Group Report gave the green light to interrogators at Guantánamo to use otherwise prohibited interrogation methods, while at the same time seeking to serve as legal cover for those who engaged in such prohibited conduct. As such, the Working Group Report constituted practical assistance to interrogators who seriously abused and tortured detainees; the high-level weight of the document also provided perpetrators with encouragement and moral support to commit their criminal acts. HAYNES’ role in silencing dissent and concerns expressed by top military lawyers led directly to the production of a document that legitimized torture.

HAYNES was unwavering in his support for an interrogation and detention regime that was largely untethered from domestic or international law. In late 2005, Deputy Secretary of Defense Gordon England called a meeting with the Secretaries of the Army, Navy and Air Force, the highest ranking uniformed officers of each service, several military lawyers, and other top DoD officials to consider a proposal “making it official Pentagon policy to treat detainees in accordance with Common Article Three of the Geneva Conventions, which bars cruel, inhuman, and degrading treatment, as well as outrages against human dignity.”¹⁴⁸ HAYNES was one of only two officials to oppose the proposal, which was subsequently dropped.¹⁴⁹

III. CONCLUSION

The above information indicates that William J. HAYNES bears individual criminal responsibility for the development, planning, approval and continued use of aggressive interrogation techniques that lead directly to the torture and abuse of detainees in U.S. custody at Guantánamo during his tenure as General Counsel of the Department of Defense. HAYNES played a key role in arranging for illegal interrogation techniques amounting to torture and cruel, inhuman, and degrading treatment to be exported to Guantánamo for aggressive use on detainees. He solicited and obtained deeply flawed legal advice in an attempt to provide legal cover for the acts of torture and abuse. He actively silenced the

¹⁴⁷ *Senate Armed Services Report*, *supra* n. 28, pp. 130, 132.

¹⁴⁸ J. Meyer, *The Memo*, *The New Yorker*, 27 February 2006, available at

<http://www.newyorker.com/magazine/2006/02/27/the-memo>.

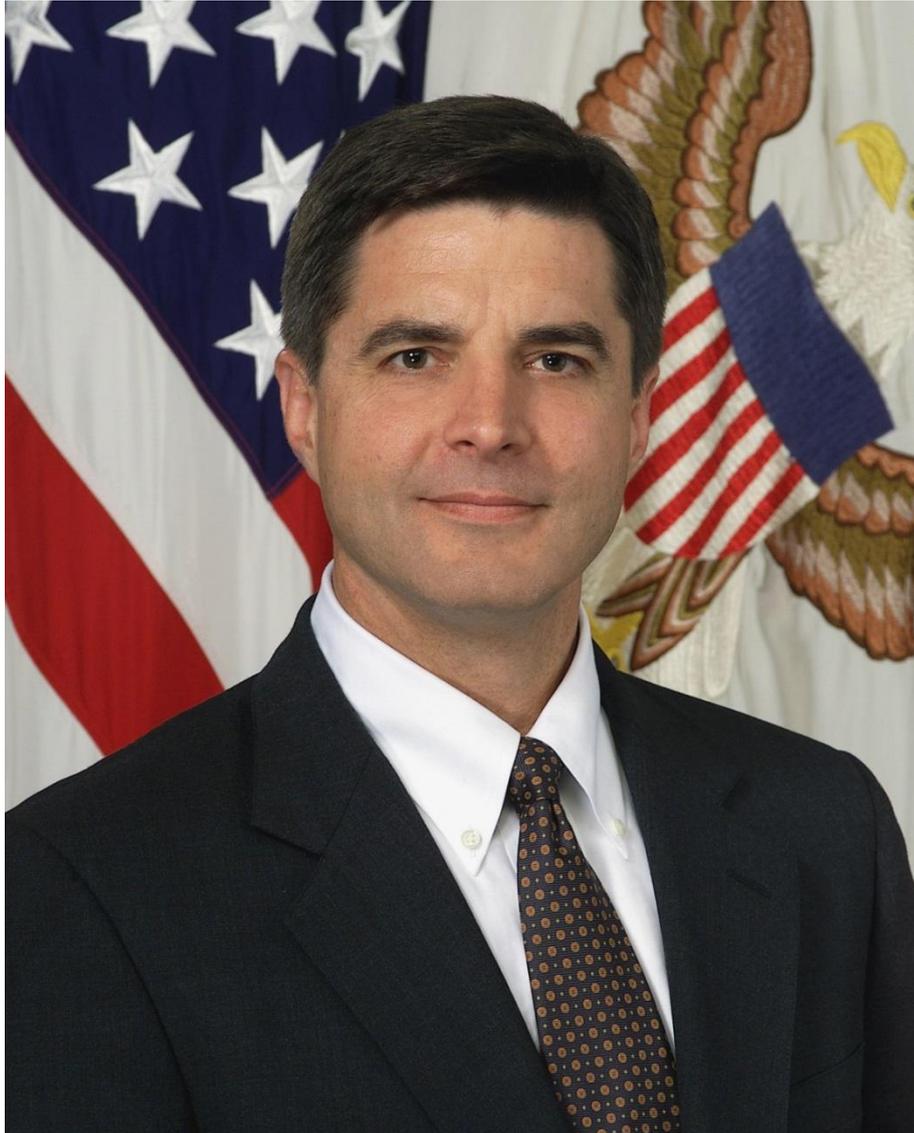
¹⁴⁹ *Id.*

strong dissent from the military and other parties concerning the administration's radical move away from the Geneva Conventions and domestic U.S. law and the obligation to treat detainees humanely, thus allowing the torture and abuse at Guantánamo to continue.

HAYNES has not been held accountable for his actions, and the United States has no intention to hold him accountable. There is a close connection between **WILLIAM J. HAYNES II** and the pending torture investigation before your Court that warrants issuing a **SUBPOENA TO HEAR THE TESTIMONY OF WILLIAM J. HAYNES II** as it relates to the allegations under investigation regarding an authorized and systematic plan for the torture and ill-treatment of persons detained at Guantánamo.

ANNEX 1

William “Jim” HAYNES II



ANNEX 2

Action Memo from William J. HAYNES to Donald Rumsfeld

November 27, 2002

UNCLASSIFIED

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1800 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1800

2002 DEC -2 AM 11: 03

ACTION MEMO

OFFICE OF THE SECRETARY OF DEFENSE

November 27, 2002 (1:00 PM)

DEPSEC _____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel *[Signature]*

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).
- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B).
- I have discussed this with the Deputy, Doug Feith and General Myers. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").
- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of those counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF DECISION

Approved *[Signature]* Disapproved _____ Other _____

Attachments As stated

cc: CJCS, USD(P)

However, I stand for 8-10 hours a day. Why is stand, limited to 4 hours?

D.A. DEC 0 2 2002

Action Memo from William J. HAYNES to Donald Rumsfeld (plain text)

Unclassified

General Counsel of the Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600
(Stamp) 2002 Dec - 2 AM 11:03
(Stamp) OFFICE OF THE SECRETARY OF DEFENSE

ACTION MEMO

November 27, 2002 (1:00 PM)

DEPSEC: _____

FOR: SECRETARY OF DEFENSE

FROM: William J. HAYNES II, General Counsel (*Signature*)

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (Now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).
- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B)
- I have discussed this with the deputy, Doug Feith and General Myers. I believe that all join in my recommendation that, as a matter of policy, you authorize the commander of USSOUTHCOM to employ, at his discretion, only Categories I and II and the fourth technique listed in Category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").
- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of those counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF Decision:

Approved____ (*Signature of Rumsfeld*) Disapproved _____ Other _____

(*Handwritten note by Rumsfeld*) However, I stand for 8-10 hours a day. Why is standing limited to 4 hours? - DR

Attachments as stated

cc: CJCS, USD(P)

(Stamp) Dec 02 2002

Declassified under authority of Executive Order 12958

By Executive Secretary, Office of the Secretary of Defense

William P. Marriott, CAPT, USN

June 18, 2004

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UNCLASSIFIED

ANNEX 3

William J. Haynes II is believed to be reachable via 

Index of Relevant Documents

1. [Patrick Philbin and John Yoo, Memorandum for William J. HAYNES II, General Counsel, Department of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* \(28 December 2001\)](#)
2. [John Yoo and Robert J. Delahunty, Memorandum for William J. HAYNES II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* \(9 January 2002\)](#)
3. [Jay Bybee, Memorandum for William J. HAYNES II, General Counsel, Department of Defense, *Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan* \(26 February 2002\)](#)
4. [William J. HAYNES II, *Memorandum to the Secretary of Defense Re: Counter-Resistance Techniques* \(27 November 2002\)](#)
5. [Donald Rumsfeld, Memorandum for William J. HAYNES II, General Counsel, Department of Defense, *Detainee Interrogations* \(15 January 2003\)](#)
6. [William J. HAYNES II, *Memorandum to Mary L. Walker, General Counsel, Air Force, Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism* \(17 January 2003\)](#)
7. [John Yoo, Memorandum for William J. HAYNES II, General Counsel, Department of Defense, *Military Interrogation of Alien Unlawful Combatants Held outside the United States* \(14 March 2003\)](#)
8. [Department of Defense, Working Group Report on Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations \(4 April 2003\)](#)
9. [Report of the Committee on Armed Services United States Senate, *Inquiry into the Treatment of Detainees in U.S. Custody*, 110th Cong. \(2d Sess. 20 November 2008\)](#)

Glossary of Terms

CAT	Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment
CITF	Criminal Investigation Task Force, U.S. Department of Defense
DoD	U.S. Department of Defense
FBI	Federal Bureau of Investigation, U.S. Department of Justice
JAG	Judge Advocate General's Corps
JPRA	Joint Personnel Recovery Agency
JTF-170	Joint Task Force at Guantánamo
OGC	Office of General Counsel, Department of Defense
OLC	Office of the Legal Counsel, U.S. Department of Justice
OSD	Office of the Secretary of Defense, U.S. Department of Defense
SERE	Survival Evasion Resistance and Escape
SOUTHCOM	U.S. Southern Command, Department of Defense