COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CA No.

Stephen Behnke; L. Morgan Banks, III; Debra L. Dunivin; Larry C. James; and Russell Newman;	)
Plaintiffs,	)
v.	)
Stephen Soldz; David H. Hoffman; Sidley Austin LLP; Sidley Austin (NY) LLP; American Psychological Association; and JOHN AND/OR JANE DOES 1-50	)
Defendants.	)

COMPLAINT AND JURY DEMAND

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I. NATURE OF THE ACTION

1. This action is brought by Colonels (Ret.) L. Morgan Banks, III, Debra L. Dunivin, and Larry C. James and Drs. Russell Newman and Stephen Behnke (collectively, the Plaintiffs) against Dr. Stephen Soldz, a Massachusetts psychologist (Soldz), attorney David H. Hoffman (Hoffman) and his law firm Sidley Austin LLP and Sidley Austin (NY) LLP (Sidley),[1] and the American Psychological Association (APA) (Hoffman, Sidley, and the APA collectively, the Institutional Defendants). It asserts claims of defamation *per se*, defamation by implication, and false light.

2. The lawsuit arises from an internal investigation commissioned from Hoffman and Sidley by the APA in 2014. The investigation was prompted by allegations by Soldz, among others, that the APA colluded with the Bush administration, the Central Intelligence Agency (CIA), and the Department of Defense (DoD) to support torture in the aftermath of 9/11. Specifically, the review resulted from the 2014 statement of those false claims in the book *Pay Any Price: Greed, Power and Endless War* by James Risen, a *New York Times* reporter.

3. According to the APA Board of Directors' resolution authorizing Hoffman and Sidley's investigation, it was to focus on three specific allegations in Risen's book. Hoffman did not find evidence to support those allegations. As his review proceeded, however, it became a fishing expedition spanning decades of events within the APA and the government, DoD, and CIA. It eventually cost $4.1 million, five times the original estimate. At its end, Hoffman produced a report (the Report or Hoffman Report) making a series of false and defamatory allegations against the

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[1] Sidley Austin LLP comprises a group of limited liability partnerships practicing in affiliation. It presents itself publicly through its website and elsewhere as a single firm. Sidley Austin (NY) LLP encompasses the firm's Boston office, where Hoffman conducted at least two of the several interviews he conducted with Massachusetts residents.

Plaintiffs and other APA psychologists.[2] To increase the allegations' plausibility, he wrapped them in an overarching narrative of a collusive enterprise that, he asserted, was designed to prevent the APA from restraining psychologists' ability to participate in abusive interrogations. These false allegations irreparably damaged Plaintiffs' professional and personal reputations and cost two of them their jobs.

4. When the Report was published, Hoffman and APA officials had in their possession documents and facts that proved his allegations to be false and that demonstrate those allegations were made with the knowledge they were false. In addition, other documents and facts contradicting Hoffman's allegations were easily available to him if he had not purposefully avoided following obvious leads, rather than hunting for "facts" to support his conclusions. Moreover, members of the APA Board who agreed to the Report's publication had been directly involved in the events it described. They therefore knew Hoffman's conclusions to be false or acted in reckless disregard of their truth.

5. Since the Report's publication, many APA members and officials with first-hand knowledge of the events, including members of the Board, have acknowledged that it got its facts wrong and that Hoffman ignored or purposefully avoided evidence that contradicted the narrative he was constructing. Plaintiffs now have 15 affidavits from witnesses interviewed by Hoffman that demonstrate he mischaracterized, distorted, or omitted material from his interviews with them or refused offers to discuss information that would have been relevant to his conclusions. Plaintiffs

[2] The Report was revised once. The Institutional Defendants, Soldz, and others published or republished the draft, Final, and Revised versions of the Report on multiple occasions by e-mail, on public websites, and through the media. For ease of reference, all three versions will be referred to collectively as the Report or Hoffman Report. Page references will be to the July 2, 2015, Final version. Each of these documents is hereby incorporated by reference. Upon request, Plaintiffs will provide the Court with a printed copy of each and the over 6,000 pages of exhibits.

have nine statements to the same effect from others he interviewed; several will become affidavits, although some APA members are reluctant to provide affidavits because, upon information and belief, APA's general counsel, Deanne Ottaviano, has threatened those who provide affidavits with expulsion from governance activities. In addition, Plaintiffs have three statements from top-ranking military generals with responsibility for interrogation sites whose names were widely known, but whom Hoffman failed to interview. If he had, they would have corrected his false description of the relevant interrogation policies.

6. Yet the Institutional Defendants have done nothing to correct the record or address the damage they have done to Plaintiffs. Despite Board members having acknowledged in a meeting with former Board presidents that the Report contains "many inaccuracies," it remains uncorrected on the APA website. And Soldz continues to make false and defamatory allegations against the Plaintiffs despite having been given evidence that demonstrates his allegations are meritless.

7. Throughout and after Hoffman's investigation, Hoffman, Risen, and Soldz formed an unacknowledged collaboration in support of their attacks against the Plaintiffs. According to evidence Plaintiffs possess, that collaboration culminated in Hoffman and Soldz leaking advance copies of the Report to Risen to drum up publicity for it.

8. For the substance of his book's allegations, Risen had relied heavily but anonymously on Plaintiffs' critics who had joined with Soldz in attacking APA and the Plaintiffs (collectively, "the Accusers"). When Hoffman began his investigation, he also relied heavily and repeatedly on these sources, promising Soldz and others confidentiality and treating them as allies. In turn, Soldz hoped the Report would achieve the Accusers' goal of overcoming what they perceived as statute-of-limitations obstacles to prosecuting Plaintiffs for their alleged complicity in torture. As Soldz

and other Accusers publicly acknowledged, they urged Hoffman to expand his investigation in part to overcome those obstacles.

9. Unsurprisingly, the Hoffman Report constructed a false narrative that aligned perfectly with that goal. After the Report was issued, Soldz said he believed the goal had been achieved.

10. According to Hoffman's narrative, from 2005 to 2014 Plaintiffs and others "colluded" to block the APA from taking any effective steps to prevent psychologists' involvement in abusive interrogations and from acting on ethics complaints against military psychologists. Although Hoffman acknowledged privately to the APA Board that he had found no criminal wrongdoing, his Report used the language of Racketeering Influenced and Corrupt Organizations Act (RICO) charges to link events taking place over many years, well into the period not yet affected by statutes of limitation. The Report describes Plaintiffs' actions with terms such as "collusion," "joint venture," "joint enterprise," and "deliberate avoidance." (The joint-enterprise theory is used not only by U.S. courts but also by the International Criminal Court (ICC) in its prosecution of war crimes, and one of Plaintiffs' critics has now referred the Report to the ICC.) As a former federal prosecutor and Chicago Inspector General, Hoffman knew full well the importance of using RICO-like terminology when prosecutions might be blocked by statutes of limitation.

11. This unacknowledged collaboration among the Institutional Defendants, Soldz, and Risen continued after the Report's completion, with the goal of giving Hoffman's conclusions as much publicity as possible before those attacked could respond. At Hoffman's urging, within 24 hours of receiving the Report on June 27, APA's Board gave Soldz and Dr. Steven Reisner, another prominent Accuser, online access to it, although Hoffman and members of the Board knew Soldz had been a source for Risen's reporting. On information and belief, as described in detail in Section VIII-A below, over the next several days both Hoffman and Soldz separately leaked the Report to

The New York Times before the APA Board had authorized its release and before Plaintiffs had had an opportunity to present APA with the evidence that contradicted the Report's falsehoods.

12. As was entirely predictable, the leaking of the Report to Risen began a media firestorm in the U.S. and elsewhere that engulfed the Plaintiffs. Because Hoffman's engagement letter and the Board resolution authorizing his engagement specified that the Report would be made public without changes, he was fully aware that his defamatory statements would be republished in the echo chamber of the press. But the leak ensured that the initial story would have a high profile, that it would be published before the Plaintiffs could rebut the accusations, and that the APA would be forced to act before having time to review the Report carefully.[3]

13. In fact, a tidal wave of media coverage ensued, sweeping away Plaintiffs' reputations. On July 10, when the *Times* published Risen's front-page article about the Report (see below), its editorial board also gave Soldz's desire for criminal charges a broader and more credible platform, calling for a criminal investigation under the headline *"Psychologists Who Greenlighted Torture."*[4]

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[3] https://www.sidley.com/en/newslanding/newsachievements/2015/10/internal-probes-during-emerging-scandals; https://www.sidley.com/-/media/uploads/bloomberg-bna-corporate-law--accountability-report-101715.pdf

[4] https://www.nytimes.com/2015/07/11/opinion/psychologists-who-greenlighted-torture.html

The New York Times

Kind Hero of 'Mockingbird' Is Cast as Racist in New Book

Greece's Parliament Approves Prime Minister's Bailout Plan

Background Check Missed Charleston Suspect

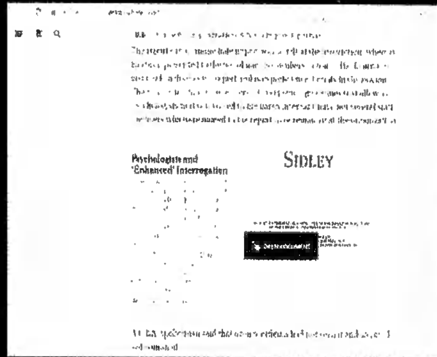
Bush Takes His Place at Family's Maine Retreat

TORTURE EFFORTS WERE PROTECTED BY PSYCHOLOGISTS

ASSOCIATION APOLOGIZES

The report, completed this month, concludes that some of the association's top officials, including its ethics director, sought to curry favor with Pentagon officials by seeking to keep the association's ethics policies in line with the Defense Department's interrogation policies...

Digital Version Providing Report:



14. Similar articles and newscasts followed around the world. The sample headlines below make clear how the press and the public understood the Report's allegations.

15. The media attacks against Plaintiffs were further fueled by Dr. Nadine Kaslow, an APA Board member and chair of the Board's Special Committee overseeing Hoffman's investigation. In media interviews, including one with WBUR in Boston, she threw Plaintiffs under the bus, labeling them a "small underbelly" of the APA and leaving open the possibility of referring the Report for criminal charges. This despite having been intimately involved in events Hoffman described and thus knowing that, in many cases, his description of them was false.

16. Soldz's years-long campaign of false accusations against the Plaintiffs compounded the damage done to them by the Report. Not only did those accusations undergird Risen's reporting and Hoffman's version of events but, once the Report was issued, Soldz continued the campaign of false claims through publications, media appearances, and other public appearances, as the Complaint will describe, despite being given evidence of the claims' falsity.

17. Plaintiffs turn to this court for redress of the damage done to their reputations and careers by Hoffman, Sidley, APA, and Soldz. The Report expressly identifies each Plaintiff by name as an active partner or participant on behalf of the APA or the Department of Defense in the allegedly collusive joint enterprise (for examples, see Hoffman Report, pp. 9, 10, 12, 36, 43, 65, 340, 363, 386, 388, 429, 446). Generally, under the legal doctrine of a joint enterprise, each party may be held liable for the foreseeable wrongdoings of the other participants in the enterprise, regardless of their individual acts or locations or whether they were part of the enterprise at the time an act was committed. Hoffman's language intentionally creates the greatest degree of risk, therefore, for everyone he named – APA and the DoD as well as individuals – if the Plaintiffs' critics continue to push for criminal or war-crimes prosecutions (Hoffman Report, pp. 65-68).

18. This Complaint will provide concrete examples of the documents and other facts that demonstrate each of the Institutional Defendants and Soldz knew their allegations to be false or

acted in reckless disregard of their truth when they published the allegations. It will also show that, as is apparent from statements by those Hoffman and his team interviewed as well as from the Report's language, he assumed the worst about the Plaintiffs' motives from the start and viewed the facts through the distorting lens of the preconceived narrative supplied by Soldz and the other Accusers.

19. Consequently, for example, the normal back-and-forth among members of an organization who are strongly committed to a point of view becomes "collusion." A rational disagreement about the APA guidelines governing its members' participation in the interrogation process – should the guidelines be detailed about specific interrogation techniques or, consistent with how the APA ethics rules are written, leave that specificity to the military policies the guidelines incorporated? – becomes an effort to allow abuses to continue. APA officials' communication with military psychologists becomes "currying favor" with the DoD, rather than fulfilling the officials' responsibility to serve each of the APA's constituencies.

20. At the same time, Hoffman nowhere presents a coherent, much less truthful, description of the Plaintiffs' version of the events he investigated or of the documents and facts that support that version.

21. The military Plaintiffs had worked for years in difficult circumstances, often at detention sites, to prevent abuses of the kind that followed 9/11. Soon after news of those horrific abuses emerged, they became directly and energetically involved in helping to draft policies and implementing training and oversight to prohibit and, as far as possible, prevent future abuses. They could have played it safe in positions where no one could have falsely accused them of countenancing torture. But they did not. They stepped up, and for that Hoffman, Soldz, and their professional organization, the APA, have – shamefully – set out to punish them.

22. Throughout his investigation, Hoffman avoided asking questions, following up on suggestions, or interviewing other witnesses to create an accurate description of the military Plaintiffs' actual behavior at interrogation sites. If he had, he would have found information such as that provided in an affidavit from an officer in the Judge Advocate General's Corps who served with Col. Banks, at Bagram Airfield, Afghanistan. According to his affidavit:

> I am personally aware that Colonel Banks stopped the abuse of at least one detainee. The detainee had some of his blankets taken away during the night, and had been slapped in the stomach by a guard. Colonel Banks was incensed and immediately had the offending individual permanently removed from the facility. … Colonel Banks continued to make sure that no abuse occurred ….

23. As the APA's Psychological Ethics and National Security Task Force (PENS) was debating guidelines for psychologists involved in interrogations, the military and APA Plaintiffs worked to ensure that the guidelines were drafted so that military psychologists could use them within the military to support efforts to prevent abuses, rather than having the military rebuff them as interfering with its ability to set policy for its own officers. As a result, the PENS guidelines incorporated then-current local military interrogation guidelines, which were far more restrictive than Hoffman claims, as well as the relevant U.N. and Geneva conventions.

24. Hoffman nowhere allows that true story to be told. Instead, from the Report's Executive Summary onwards, Hoffman consistently confines the Plaintiffs to the position of rebutting the attacks against them, just as a prosecutor would in an indictment designed to make a case against a defendant. As a result, Hoffman failed to follow his charge from the Board to investigate "all the evidence" and "to go wherever the evidence leads." To make the specific allegations described below fit his pre-determined narrative, Hoffman cherry-picked evidence, ignored and omitted contradictory evidence, mischaracterized facts, relied on inferences the facts did not support, and failed to follow obvious investigatory leads which would have produced evidence that undercut

his false narrative. As he acknowledged in a meeting with the APA's Council, he set out to "make [the] case" to support his conclusions.

25. So egregious is this pattern, and so obvious to those with first-hand knowledge of the underlying facts, that on July 18, 2015, shortly after the Report was released, one of the most vocal advocates for a ban on the participation of psychologists in national security settings – and thus no fan of the Plaintiffs' position on that issue – sent Dr. Behnke an unsolicited letter that stated:

> Over the past week, I have had the opportunity to read the Hoffman Report. I am stunned by the misinformation, mischaracterization, and biased presentation of this Report .... I'm struck with how efforts to navigate complex policy waters became characterized as "collusion" or "manipulations." .... Our conversation and process is presented but then totally misrepresented .... The Hoffman Report totally disregarded some events and took other events and bent them to fit a destructive narrative.

26. Because none of the Plaintiffs was a public figure, limited public figure, or public official before the Report was published, they need not prove actual malice to sustain a defamation claim. As this Complaint will demonstrate, however, the facts amply demonstrate that the Institutional Defendants and Soldz repeatedly made statements of fact with the knowledge that they were false or in reckless disregard of whether they were false. Moreover, the Institutional Defendants' conduct of the investigation demonstrates that, at a minimum, they acted in reckless disregard of the truth. So do their actions and Soldz's at the time of the Report's publication and afterwards.

Unprivileged, False, and Defamatory Statements in the Report Made with Actual Malice

27. The APA and Sidley engagement letter specified that the Report would be made public and that both it and "the work [Hoffman and Sidley] do to gather facts and evidence" would not be covered by the attorney-client privilege, except as to documents with a pre-existing privilege. The APA had no legal duty to commission the Report or make it public, and Plaintiffs have affidavits from two former Board members that the APA was not under any threat of litigation when it hired Hoffman and Sidley.

28. The Report makes three primary allegations, each of which is false. It asserts that Plaintiffs and others colluded over many years by:

- in 2005, ensuring that the recommendations issued by the PENS Task Force issued for psychologists involved in the interrogation process (the PENS Guidelines or Guidelines) were no more restrictive than "existing" military guidelines which, Hoffman falsely asserts, were too loose to constrain abuses that amounted to torture;
- from 2006 to 2009, preventing the APA from banning psychologists' participation in national-security interrogations; and
- from 2001 to 2014, mishandling ethics complaints to protect national-security psychologists from censure.

29. Each allegation is contradicted by documents that were in Hoffman's possession, or by information he obtained during his witness interviews but omitted from his Report, or by information that would have been available to him if he had not purposefully avoided the truth. Many of the relevant documents were known to APA officials and some are still available on the APA's website. The allegations rest, therefore, on the intentional and purposeful omission, distortion, and avoidance of evidence that shows them to be false.

30. For example, among the many other intentional omissions and distortions specified in this Complaint, the Report:

- Omits documents showing that, by 2005, "existing" military interrogation policies contained rigorous prohibitions against abusive interrogation methods, including methods that Hoffman asserts were permitted. These policies, some of which the military Plaintiffs helped to draft, were incorporated by reference into the APA Guidelines. The documents

make nonsense of the Report's allegation that the Plaintiffs set out to avoid constraining abuses.

- Ignores documentary evidence, and distorts and mischaracterizes testimonial evidence, that the proposed ban against psychologists' participation in the interrogation process was debated openly, vigorously, and repeatedly during and beyond the relevant years.
- Excludes evidence in his possession about the investigation of the ethics complaints. That evidence included, for example, a statement by Dr. Kaslow, the then-APA President and later the Chair of the Special Committee, that the most prominent complaint was closed only after "as complete and careful a review of the available evidence … as possible."

31. In addition to its false and defamatory primary accusations, the Report is rife with other false statements that also show, at best, a reckless disregard for the truth. They are listed in Exhibit A and fully incorporated herein by reference. Plaintiffs are prepared to provide the Court with at least one credible document (and in some cases several) that directly contradicts each of those statements and that was in Hoffman and/or the APA's possession when each of the false statements set forth in Exhibit A was made.[5] These documents provide additional proof that the Institutional Defendants intentionally published or made each false and defamatory statement with knowledge of its falsity or with reckless disregard for its truth.

Evidence of Actual Malice from the Conduct of the Investigation

32. The foundation for Hoffman's skillfully destructive one-sided brief was laid during the investigation. Among other practices that demonstrated at best a reckless disregard for the truth:

[5] Plaintiffs are prepared to provide this information to the Court on request. Inclusion with the Complaint would result in more than 1500 additional pages of exhibits.

- Hoffman collaborated with and gave preferential treatment to long-time critics of the Plaintiffs, including Soldz, promising them confidentiality, relying extensively on them for material, adopting their basic narrative of the events at issue, and aligning with their desire to expand the investigation's original scope to provide the framework for criminal and war-crimes prosecutions.
- Hoffman was told by at least one witness that one of his key witnesses, Jean Maria Arrigo, was unreliable: she had alleged that the PENS meetings were covertly conducted by the CIA and she had fabricated her notes of the meetings. But Hoffman nevertheless relies on those notes extensively in writing his Report, omitting any concerns about her reliability.
- In direct and clear violation of their ethical and fiduciary duties, as those duties are stated in DC Bar Ethics Opinion 269, APA's general counsel, Hoffman and Sidley failed to warn Plaintiffs, all then-members of the APA, that the investigation could be adverse to their interests – even after Hoffman knew that it would be.
- In contrast to Hoffman's statements to Soldz about his expanded investigation, Hoffman, Sidley, and the APA failed to inform Plaintiffs of the issues the expanded investigation was exploring, even in response to direct questions. That failure made it impossible for them to rebut the allegations Hoffman was forming.
- Hoffman purposefully avoided obvious lines of inquiry, including lines suggested by the Plaintiffs that would have provided direct exculpatory information undercutting his allegations.

Evidence of Actual Malice from the Institutional Defendants' Conduct After the Report's Completion

33. The Board's actions when it received the Report constituted at best a reckless disregard of the truth, as has its ongoing failure to correct what Board members themselves acknowledged to be the Report's "many inaccuracies."

34. Five members of the APA Board – including Dr. Kaslow, the Chair of the Special Committee overseeing the investigation – had been directly and substantially involved in many of the events Hoffman mischaracterized, and therefore knew facts that contradicted his assertions about those events. Consequently, when the APA Board voted to republish the Report, they either knew those assertions were false or acted in reckless disregard of their truth.

35. In the days following the receipt of the Report by the Board, one of whose members was located in Massachusetts, it continued to give preferential treatment to Soldz and Reisner, while keeping Plaintiffs in the dark and giving them no effective opportunity to respond to the attacks against them.

36. On June 28, the day after the APA Board received the Report, it gave electronic access to Soldz and Reisner and then met with them on July 2. In the following days, Soldz published in several places his July 2 comments to the Board, comments that exaggerated and misstated the Report's conclusions.

37. Conversely, throughout the period between receiving the Report and republishing it, neither Hoffman, Sidley, nor the Board gave the Plaintiffs – including Dr. Behnke, an employee, and Col. James, then a member of the APA Council – adequate opportunity to respond to the Report's accusations. Plaintiffs Banks, Dunivin, and Newman, all APA members at the time, realized they had been attacked only when they read *The New York Times* article on July 10.

38. Almost immediately after the Report's publication, APA members – by no means only the Plaintiffs – began to identify its factual omissions and distortions, provide documents and other evidence Hoffman ignored, and point out that their statements in interviews had been misrepresented.

39. In a June 2016 open letter, nine former APA presidents said the concerns expressed by four APA divisions and others included – among other failings – "an apparent failure to properly vet" the Report. When the former presidents met with current Board members in August 2016, the current members admitted that "the report contains many inaccuracies" and that the Board's response to it had been "impulsive and not thought through."

40. Yet for almost three years, despite having been given direct evidence of the falsehoods in the Report, Soldz, Hoffman, Sidley and the APA have taken no effective steps to correct their false statements. Nor have the Institutional Defendants made any statement that would mitigate the damage done to Plaintiffs' reputations by repeated, ongoing false allegations by Soldz and his colleagues, despite Plaintiffs' counsels' request to do so.

41. Although the Institutional Defendants issued an errata sheet in September 2015 that corrected some factual inaccuracies, it corrected none of the serious falsehoods the Plaintiffs have pointed out. Instead, the Institutional Defendants have circled the wagons to protect themselves from blame. In the process, as former chairs of the APA Ethics Committee pointed out in an open letter, Hoffman, Sidley, and the APA have ignored potential conflicts between their interests and the interests of the APA as an organization.

42. In its one significant attempt to address the Report's problems, in February 2016, the Board decided to re-hire Hoffman to review his assertions about military interrogation policies, assertions that were critical to his first conclusion. So clear was the conflict, however, that the APA Council

advised the APA Board not to rehire him. The Board ignored that advice, engaging Hoffman to produce a "supplemental" report that was due by June 8, 2016. It has still not emerged, and the Institutional Defendants have failed to make any public statement regarding its status for over two years.

43. As a result of the Institutional Defendants' sustained failure to correct the Report's false statements, despite credible evidence in their possession of those falsehoods, the damage to the Plaintiffs' reputations and livelihoods has not only continued, it has increased. The Institutional Defendants' inaction manifests a clear and continued purposeful avoidance of the truth.

Evidence of Actual Malice in Soldz's Statements

44. Soldz's years-long series of false and defamatory attacks against Plaintiffs has continued since the Report's release. The public attacks include statements made with knowledge they were false or in reckless disregard of their truth, and they continue despite his having been provided with evidence that the statements are false. For example:

- On July 13, 2015, he published on the Counterpunch website the text of his remarks to the APA Council on July 2. The text asserts that "[t]he Report documents … a years long conspiracy to engage in collusion between senior leadership in the APA and the intelligence community, including the CIA …." In fact, while the Hoffman Report wrongly asserts that "collusion" with the Department of Defense affected the PENS Task Force's work, it found no evidence "that the relationship with the CIA contributed to the outcome …." (Hoffman Report, p. 10) Yet Soldz's later public statements continue to focus on that alleged collusion with the CIA. For example, in a statement to the North Carolina Commission on Torture (NCCIT) published on its website in late

2017, he again asserted that the Report "raised questions about potential CIA influence on the PENS report …."[6]

- Soldz continues to assert that the PENS Guidelines failed to prohibit psychologists' involvement in interrogations that amounted to torture, despite proof to the contrary. For example, in his North Carolina statement, he asserted that the PENS report "based its statements on US law, leaving psychologists free to participate in the interrogation activity deemed legal by the United States government, as was both CIA and DoD torture." As he has been repeatedly informed, that assertion is false in two respects. First, the PENS Guidelines explicitly incorporated then-current military regulations governing interrogations in Afghanistan, Iraq, and Guantanamo, regulations that specifically prohibited abusive interrogations. Second, the Guidelines also explicitly incorporated the United Nations Convention Against Torture and the Geneva Convention governing the treatment of prisoners of war.[7]

45. Despite admitting in public statements that he has no direct evidence for and cannot prove his allegations that military psychologists participated in torture, he persists in those claims. In the text of his remarks to the Board on July 2, and then again in an article he published online, he asserted that the Report documents: 1) "a strategic decision to turn heads away from increasing evidence on torture and other detainee abuse, including homicides, and on psychologist involvement in that abuse"[8] and 2) that the goal of APA officials was to "enable military

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[6] https://drive.google.com/file/d/1VpjoFS4RWpQKoDSavVch-tE5zvnKsTuR/view
[7] http://www.hoffmanreportapa.com/resources/pens%20(2).pdf
[8] https://www.counterpunch.org/2015/07/13/opening-comments-to-the-american-psychological-association-apa-board-of-directors/

psychologists who participated in sometimes torturous interrogations."[9] Those claims go beyond even the Report's false assertions. In fact, evidence presented to Soldz by Plaintiffs' counsel and the APA demonstrates that the military Plaintiffs helped draft and implement policies to prevent abuse.[10]

46. In the face of repeated credible proof of the falsity of his factual statements, he continues to make them without modification or qualification.

Damages to Plaintiffs

47. The Report's accusations immediately cost two Plaintiffs their jobs. As Soldz called for, the APA fired Dr. Behnke as the director of the APA Ethics Office, a position he had held for almost 15 years, without notice and without severance. Dr. Newman was forced to resign his positions as Provost and Senior Vice President of Academic Affairs of Alliant International University. Neither has been able to find full-time employment.

48. The Report's false accusations also caused severe damage to what had been the stellar professional and personal reputations of all the Plaintiffs. That damage has been public and sustained, and it continues because of the Institutional Defendants' refusal to correct the Report and Soldz's continued use of the Report to attack the Plaintiffs. Moreover, the Report's use of terms implying criminal liability to characterize its years-long overarching narrative created an ongoing threat that Plaintiffs will be prosecuted. Plaintiffs' critics – of whom Soldz, working from Massachusetts, has been one of the most prominent and vocal – have relied on the Report to urge

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[9] https://qz.com/462911/when-american-psychologists-use-their-skills-for-torture/

[10] http://www.hoffmanreportapa.com/resources/RESPONSE%20TO%20STEPHEN%20SOLDZ.pdf

criminal prosecutions in the U.S. and war-crimes prosecutions by the United Nations Committee Against Torture and the International Criminal Court.

II. THE PARTIES AND RELEVANT THIRD PARTIES

49. Plaintiff Dr. L. Morgan Banks, III is an individual residing at 880 Barber Road, Southern Pines, North Carolina 28387. Dr. Banks is a retired Army Colonel with over 37 years of service to the nation, for which he was awarded the Legion of Merit. His service included tours in Germany, Iraq, and Afghanistan. He served as a staff advisor and consultant, culminating with his service as the Director of Psychological Applications for the United States Army's Special Operations Command. In that position he provided ethical as well as technical oversight for all Army Special Operations psychologists. In a mid-level military position within the DoD hierarchy, Dr. Banks was not in a position to make public or military policy, and he was retired from the military at the time of the Hoffman Report. Dr. Banks participated in the APA events described by Hoffman as a private citizen, not in his capacity as a member of the military. He was not named in James Risen's book that sparked the Hoffman investigation, did not voluntarily interject himself into the controversy surrounding that book, and has no access to broad media channels to defend his reputation. Consequently, he is not a public figure, limited public figure, or public official.

50. Plaintiff Dr. Stephen Behnke is an individual residing at 624 Maryland Avenue, NE, Apt. 8, Washington, District of Columbia 20002. Dr. Behnke received training in law from Yale Law School, in clinical psychology from the University of Michigan, in divinity from the Harvard Divinity School, and in ethics at the Harvard University Program in Ethics and the Professions. Dr. Behnke served as Chair of the Board of Directors of the Saks Institute for Mental Health Law, Policy, and Ethics at the University of Southern California Gould School of Law, has an appointment in the Harvard Medical School Department of Psychiatry, and served as director of

the American Psychological Association Ethics Office from 2000 until he was terminated on July 8, 2015. Plaintiff Behnke was not in a position as an employee to make APA policy (that is the responsibility of the APA Council). Although Dr. Behnke was named in James Risen's book, Risen admitted he did not interview him. Dr. Behnke did not voluntarily interject himself into the controversy surrounding that book, and he has no access to broad media channels to defend his reputation. Consequently, Plaintiff Behnke is not a public figure, limited public figure, or public official.

51. Plaintiff Dr. Debra L. Dunivin is an individual residing at 5265 Cromwell Court, San Diego, California 92116. Dr. Dunivin is a retired Army Colonel with 20 years of military service to the nation, for which she was awarded the Legion of Merit. She served as Chief of the Departments of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center. She has consulted with commanders in Guantanamo, Iraq, and the Army Medical Command. She served in the Army Inspector General's inspection of detention facilities. In a mid-level position within the DoD hierarchy, Dr. Dunivin was not in a position to make public or military policy, and she was retired from the military at the time of the Hoffman Report. Dr. Dunivin participated in the APA events described by Hoffman as a private citizen, not in her capacity as a member of the military. Although she is named in James Risen's book, Risen did not interview her. She did not voluntarily interject herself into the controversy surrounding that book, and she has no access to broad media channels to defend her reputation. Consequently, Plaintiff Dunivin is not a public figure, limited public figure, or public official.

52. Plaintiff Dr. Larry C. James is an individual residing at 3931 White Spruce Circle, Dayton, Ohio 45424. Dr. James is a retired Army Colonel with 23 years of military service to the nation. He served as Chief of the Department of Psychology at Walter Reed Army Medical Center and

Tripler Army Medical Center, and as Director of Behavioral Science at Guantanamo and Abu Ghraib, Iraq. For his service in Iraq, Dr. James was awarded the Bronze Star. In a mid-level position within the DoD hierarchy, Col. James was not in a position to make public or military policy, and he was retired from the military at the time of the Hoffman Report. Dr. James participated in the APA events described by Hoffman as a private citizen, not in his capacity as a member of the military. He was not named in James Risen's book that sparked the Hoffman investigation, he did not voluntarily interject himself into the controversy surrounding that book, and he has no access to broad media channels to defend his reputation. Consequently, Plaintiff James is not a public figure, limited public figure, or public official.

53. Plaintiff Dr. Russ Newman is an individual residing at 5265 Cromwell Court, San Diego, California 92116. From 1994 to 2007, Dr. Newman was employed in Washington, DC, as Executive Director for the APA Practice Directorate, working on behalf of the nation's practicing psychologists and the patients they serve. In that role, he implemented legislative, legal, public education, and marketplace strategies to support psychology practitioners and to increase access to psychological services. Most recently, Dr. Newman was Provost and Senior Vice President for Academic Affairs at Alliant International University, primarily a graduate school with nine APA-accredited clinical psychology doctoral programs. Plaintiff Newman was not in a position as an employee to make APA policy (that is the responsibility of the APA Council). Although Dr. Newman was named in James Risen's book, Mr. Risen did not interview him. He did not voluntarily interject himself into the controversy surrounding the book, and he has no access to broad media channels to defend his reputation. Consequently, Plaintiff Newman is not a public figure, limited public figure, or public official. Dr. Newman has family members residing in Massachusetts who have read the contents of the Hoffman Report.

54. At the investigation's outset, four of the Plaintiffs became targets because they had been involved in the APA Psychological Ethics in National Security (PENS) Task Force formed in 2005 to create guidelines for psychologists involved in interrogations. Col. Banks and Col. James were asked to join the task force as subject-matter experts in the psychology of interrogation. Both joined it in their individual capacity, not as representatives of the DoD, and attended in civilian clothes. Dr. Behnke was asked to staff the task force. Dr. Newman was not a member of the task force or a participant in its listserv but was asked to be a non-voting observer, serving as a resource on professional-practice issues. All were serving in their roles at the request of the APA.

55. Col. Dunivin was not a member of the task force and did no more than propose members for it, all of whom had been proposed by others as well. She was targeted primarily because she is married to Dr. Newman, a fact Hoffman wrongly claims was not adequately disclosed and created a conflict. Because of Hoffman's description of her involvement, especially a phrase that appears to make her a member of the Task Force ("Some of the key DoD officials on the task force, principally Banks and Larry James, as well as Dunivin ....") (Hoffman Report, p. 66), APA members and others have wrongly portrayed her as a member.

56. Defendant David H. Hoffman is an individual residing in Chicago, Illinois, with an office at One South Dearborn, Chicago, Illinois 60603. He is a partner of Sidley Austin LLP and a former federal prosecutor and Inspector General of the City of Chicago. At the time of the research, drafting, delivery, and revision of the Hoffman Report, Hoffman was the lead partner on the matter for Sidley Austin LLP and the Report's primary author. At all times during that work, he was acting in his capacity as an agent and member of the Sidley partnerships and an agent of the APA.

57. Defendant Sidley Austin LLP is a national law firm comprising a group of affiliated partnerships operating as and representing itself as one entity via the internet at www.sidley.com.

Sidley Austin LLP's principal place of business is One South Dearborn Chicago, Illinois, 60603 and it is organized under the laws of Illinois. Sidley Austin (NY) LLP has a usual place of business at 60 State Street, 36th Floor, Boston, Massachusetts 02109, where interviews in furtherance of the investigation were conducted by Hoffman. Sidley Austin (NY) LLP is organized under the laws of Delaware and registered in Massachusetts as a foreign limited liability partnership, with a designated agent for the service of process in Massachusetts. Sidley Austin LLP and its affiliated partnerships are vicariously liable for all the actions taken by Hoffman arising out of the events described in this Complaint.

58. Defendant APA has more than 115,000 members and 54 divisions in subfields of psychology. Volunteer governance members play a key role in the direction of the APA's work. The governance groups include the APA's Council of Representatives, which has the sole authority to approve policy and appropriate the association's revenue; the Board of Directors, the administrative agent of the Council of Representatives; the APA President, elected annually by the membership to serve as the face of the association; and committees and task forces which focus on particular issues in the field. The current APA president is a resident of Massachusetts, and its Council, committees, and task forces have Massachusetts resident members who regularly conduct business on behalf of the APA in Massachusetts. The APA has over 500 staff members and is incorporated as a non-profit in the District of Columbia. Its main office is located at 750 First St., NE, Washington, District of Columbia 20002. The APA has an affiliate located in Massachusetts that regularly conducts business on behalf of the APA in Massachusetts.[11]

59. Defendant Dr. Stephen Soldz resides in Suffolk County at 531 Beech Street Roslindale, Massachusetts 02131. He is a psychologist on the faculty of the Boston Graduate School of

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[11] https://www.masspsych.org/page/MPAGovernanceStruc?

Psychoanalysis and a consultant for Physicians for Human Rights, which has an office in Massachusetts. When the Board gave him access to the Report, he was not a member of the APA, although his membership was rushed through over that weekend. Dr. Soldz has made numerous false attacks against the Plaintiffs over the last ten years, including a racial attack on one Plaintiff, and thus was known publicly to be an unreliable source. Although he was interviewed by Hoffman and contributed what he describes as "extensive research" to the Report, the Report did not identify information he provided. Dr. Soldz is now a member of the APA Council. In that capacity, he has received confidential and privileged information concerning Plaintiffs' claims, although APA members and Plaintiffs' counsel have notified the APA that his participation in Council discussions is a clear conflict of interest given his role in the attacks that prompted the investigation and his continuing public attacks against the Plaintiffs.

60. Defendants John and/or Jane Does 1-50 are individuals whose names are unknown to the Plaintiffs and could not reasonably be ascertained prior to the filing of this Complaint.

61. Non-party Dr. Nadine Kaslow is a psychologist who was the President of the APA and Chair of the Board of Directors when it voted to hire Hoffman in 2014. She was also Chair of the Special Committee that spearheaded the Hoffman investigation for the Board and was charged with overseeing it. Dr. Kaslow's actions were undertaken at all times within the scope of her official duties as an APA officer, Board member, or member of the Special Committee with the full authority to act on the APA's behalf. Her statements to WBUR Boston Radio about the Report's findings were made on behalf of the APA.

62. Non-party Dr. Susan McDaniel is a psychologist who was president-elect of the APA at the time Hoffman conducted his review. Dr. McDaniel is a Past President of the APA and a member of the Board of Directors. Dr. McDaniel's actions were undertaken at all times within the

scope of her official duties as an APA officer, Board member, or member of the Special Committee with the full authority to act on the APA's behalf.

63. Although Drs. McDaniel and Kaslow were involved in many of the events Hoffman investigated, they were not named in the Report – unlike others with similar involvement – and therefore were not recused from participating in the response to it. Despite the conflict of interest caused by that involvement, they continued to be among the Board members who acted on the Report, even after their conflict was made clear to the Board and the APA's outside counsel. They failed to apprise fellow Board members of settlement offers made by Plaintiffs to the APA.

64. Non-party James Risen was a reporter for *The New York Times*. The publisher of his book that sparked the investigation, Houghton Mifflin Harcourt Publishing, is headquartered at 125 High St, Boston, Massachusetts, 02110. Risen's work has previously been criticized by major publications and journalistic "watch-dogs" for his questionable reporting techniques in the case of government scientist Wen Ho Lee. Sidley represented Mr. Lee in those allegations against Risen. As a result, he was well known publicly, and more specifically to Hoffman and Sidley, to be an unreliable source.[12]

65. Non-party Nathaniel Raymond is a resident of Massachusetts and the director of a human rights program at Harvard. He was formerly employed as director of the "Campaign Against Torture" by Physicians for Human Rights, an organization with an office in Massachusetts that has served as a clearing house for accusations against the APA. Mr. Raymond has made numerous false attacks against Plaintiffs over the last ten years and, in collaboration with James Risen, he has tried without success to persuade the Federal Bureau of Investigation (FBI) and Department of Justice to open criminal investigations into events discussed in the Report, a fact Hoffman omits

[12] http://ajrarchive.org/article.asp?id=32

from his Report. He served as a frequent source for Risen, making allegations that government investigations failed to substantiate. He therefore was also publicly known to be an unreliable source.

66. Non-party Dr. Steven Reisner is a psychologist who is self-employed. He is a consultant for Physicians for Human Rights. At the time of the Report's release, he was a member of the APA Council. In collaboration with Soldz, Dr. Reisner has made numerous false attacks against the Plaintiffs over the last ten years and thus was known publicly to be an unreliable source. He was interviewed by Hoffman but, in contrast to Hoffman's treatment of the Plaintiffs, the Report did not identify information drawn from his interview or disclose its date. Dr. Reisner has stated publicly that he was promised confidentiality by Hoffman.

67. Non-party Dr. Trudy Bond is a psychologist who is self-employed. Dr. Bond has made numerous false attacks on the Plaintiffs over the course of the last ten years, including filing formal ethics complaints against Col. James in Ohio, Louisiana, and Guam and with the APA, none of which resulted in findings against him. She was thus known publicly to be an unreliable source. Dr. Bond submitted the Hoffman Report and its contents as further evidence of war crimes to the United Nations. She has collaborated with a Harvard public interest professor to accuse Dr. James, among others, of torture; those accusations remain on the Harvard website, where they are read by Massachusetts residents.[13]

68. Non-party Dr. Jean Maria Arrigo is a social psychologist and oral historian who was a member of the PENS Task Force. Her notes and archives related to the events in question were relied on extensively by Hoffman and partially presented in his Report. She had previously

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[13] See, *e.g.*, http://hrp.law.harvard.edu/wp-content/uploads/2014/10/CAT-Shadow-Report-Advocates-for-US-Torture-Prosecutions.pdf

submitted her notes, with the help of Raymond, to the Department of Justice and the Senate Armed Services Committee, neither of which found any basis in them for action – facts that Hoffman omits from his Report. She was thus publicly known to be an unreliable witness.

III. JURISDICTION[14]

69. This Court has personal jurisdiction over the Institutional Defendants pursuant to the Massachusetts Long-Arm Statute, M.G.L. c. 223A, Section 3: Transactions or conduct for personal jurisdiction.

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's
> (a) transacting any business in this commonwealth;
> (b) contracting to supply services or things in this commonwealth;
> (c) causing tortious injury by an act or omission in this commonwealth;
> (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth; ....

70. This Court has personal jurisdiction over each Institutional Defendant and Soldz because each committed the tort of defamation in Massachusetts by intentionally publishing in the state

[14] Plaintiffs bring this suit in Massachusetts, the only state in which they believe it is safe to assume they can obtain jurisdiction over Soldz, because Soldz continues to defame them in Massachusetts and elsewhere and because Plaintiffs have new evidence of Soldz's role in leaking the Report to *The New York Times*. Given the common nexus of facts relevant to Plaintiffs' claims against both the Institutional Defendants and Soldz, including Soldz's close collaboration with the Institutional Defendants while they were acting in and committing the tort of defamation in Massachusetts, proceeding in Massachusetts against all defendants would best serve the interests of judicial efficiency. Plaintiffs' suit against the Institutional Defendants in Ohio has been dismissed solely on jurisdictional grounds by the Ohio Court of Appeals, without its merits having been reached. After the suit's initial dismissal at the Ohio trial level, as a protective measure Plaintiffs sued the Institutional Defendants in the District of Columbia, their acknowledged jurisdiction of choice. They have moved to dismiss that suit, attempting to use the D.C. Anti-SLAPP Act to block Plaintiffs' First Amendment access to redress in the courts. The D.C. action has been stayed at the Institutional Defendants' request pending the outcome of the appeal of the jurisdictional issue in Ohio, and the stay remains in place as of this date. Soldz is not a defendant in either the Ohio or D.C. case.

false and defamatory statements of and concerning each Plaintiff, knowing that those statements were false when made or making them with reckless disregard of their falsity, including purposefully avoiding the truth.

71. As a direct result of Soldz's false and defamatory statements made with the assistance of Risen and *The New York Times* while the investigation was taking place,[15] the APA vowed to take an "aggressive" approach to disseminating the Report.[16] That distribution intentionally included distribution in Massachusetts, with the intention that the statements would be read by Massachusetts residents, thereby intentionally causing harm to each of the Plaintiffs in Massachusetts.

72. Each of the Institutional Defendants and Soldz was aware that the Report would be read in Massachusetts by Massachusetts residents, including but not limited to APA members to whom the APA published the Report. Each of the Institutional Defendants and Soldz intended for the libel of the Plaintiffs to be felt in Massachusetts.

73. As more fully set forth below, each of the Institutional Defendants directed and targeted the findings in the Report and their statements to Massachusetts residents, and intended for the Report and their additional false and defamatory statements to be distributed and read by Massachusetts residents (including Raymond and Soldz). Drs. Kaslow and McDaniel each gave interviews to WBUR in Boston concerning the findings in the Report.

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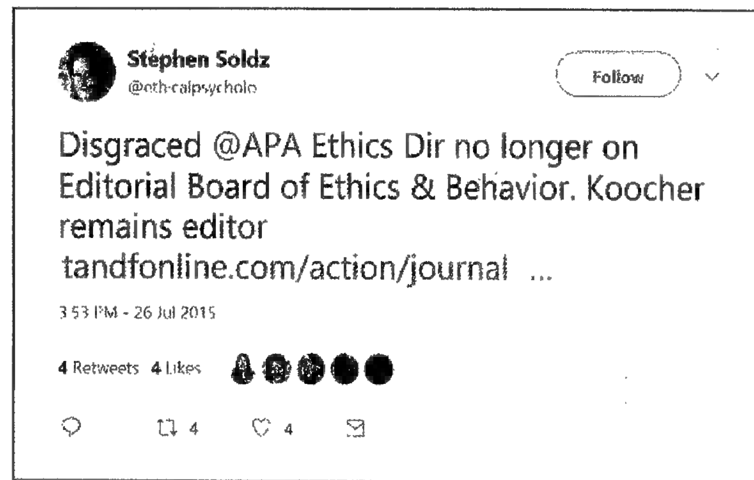
[15] https://www.nytimes.com/2015/05/01/us/report-says-american-psychological-association-collaborated-on-torture-justification.html; https://www.thenation.com/article/how-worlds-largest-psychological-association-aided-cias-torture-program/; http://www.scra27.org/files/9614/3777/1227/Soldz_Raymond_and_Resiner_All_the_Presidents_PsychologPsychologists.pdf

[16] http://www.apa.org/news/press/response/new-york-times.aspx

74. Soldz directed and targeted his statements to Massachusetts residents, including to his followers on Twitter, who include at least 20 Massachusetts residents (see the tweet below) and through many statements to the press, some of which are listed with links in a news release on the Boston Graduate School of Psychoanalysis website.[17] Dr. Soldz continues to target publicly Dr. Behnke, who holds an appointment at Harvard, and Dr. Koocher, a Massachusetts resident.



75. Each of the Institutional Defendants and Soldz intentionally and purposefully exploited Massachusetts channels of distribution and media to disseminate their false and defamatory messages as widely as possible (*e.g.*, through newspapers such as the *Boston Globe*, radio stations such as WBUR Radio Boston, online publications, and Twitter).

76. As a result of this repeated publication and intentional widespread distribution in Massachusetts, Plaintiffs were each injured by the defamatory statements in Massachusetts, in addition to their domiciles. Thus the tort of libel was committed in Massachusetts by each of the Institutional Defendants and Soldz against each of the Plaintiffs. The Massachusetts residents who read those false and defamatory statements were harmed by reading the falsehoods.

77. Additionally, this Court enjoys personal jurisdiction over each Defendant because:

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[17] https://www.bgsp.edu/psychoanalysis-and-social-justice/

Soldz

- Dr. Soldz is a Massachusetts citizen and resident and a psychologist licensed by the State of Massachusetts. His principal places of employment are in Massachusetts. As a member of the APA Council of Representatives,[18] he regularly undertakes business on behalf of the APA in Massachusetts and, as a result of his position, the APA has claimed privilege over its communications with him. Dr. Soldz also made false and defamatory allegations concerning the Plaintiffs in the Massachusetts media.

Hoffman

- A significant part of Hoffman's investigation took place in Massachusetts, one of the ten states he lists as having visited for in-person interviews (Hoffman Report, p. 7). Among the nine residents of Massachusetts he interviewed, two – Soldz and Nathaniel Raymond, with both of whom he collaborated extensively – are named in the Report among four witnesses who provided him with "numerous helpful documents" (Hoffman Report, p. 7). He used information from his Massachusetts interviews in the Report and also intentionally omitted documents and evidence collected in Massachusetts that he knew rendered the Report's allegations false.
- He purposely availed himself of the laws of Massachusetts by engaging in the practice of law in Massachusetts, as an agent of Sidley and the APA, to conduct the interviews. He has asserted attorney-client privilege and work product protections over the notes of those interviews on behalf of APA as their attorney and agent.
- The Report describes in detail many significant activities undertaken in Massachusetts, on behalf of the APA and in furtherance of the alleged "collusive" joint enterprise, by

[18] http://www.apa.org/about/governance/council/members/stephen-m-soldz.aspx

APA governance members who were Massachusetts residents. These residents included, among others, Drs. Alice Carter, Jaime Darwin, Robin Deutsch, Jessica Henderson Daniel, Elena Eisman, Robert Fein, Sharon Gordetsky, Norine Johnson, Robert Kinscherff, Gerald Koocher, Olivia Moorehead-Slaughter, Bonnie Strickland, Sandford Portnoy, and Susan Whitbourne (Hoffman Report, pp. 7, 42, 86, 95, 99, 168, 177, 187, 189, 198, 214, 244, 252, 261, 313, 334, 344, 355, 380, 387, 391, 396, 405, 411, 420-21, 426-427, 443, 448, 450-451, 460, 462, 465, 478, 495). The activities included, for example, crucial decisions by chairs of the ethics committee who resided in Massachusetts about the ethics cases that, in the Report's third major conclusion, Hoffman states were handled improperly to protect psychologists involved in national security interrogations from censure.

- The Report also described activities at an APA Convention in Boston in 2008 and articles sent to the *Boston Globe* on behalf of the APA.
- Three of the four APA officials the Report names as the key players in the "collusion" have significant Massachusetts connections and reputations. Gerald Koocher, a former APA president, is a Massachusetts resident and a psychologist licensed by the Commonwealth. Ronald Levant, also a former president, was a Massachusetts resident when he taught at Harvard and Boston Universities. Both are past presidents of the Massachusetts Psychological Association as well as of the APA. Plaintiff Behnke has an appointment in the Harvard Medical School Department of Psychiatry.
- According to fn.1 and p. 6 of the Report, Mr. Hoffman published the Report to the APA Board, as required by the terms of his engagement. Among the Board members who acted on the Report in June and July 2015 was Emily A. Voelkel, a post-doctoral fellow

at the Boston Veteran's Hospital who resided in Cambridge, Massachusetts. Thus, in that initial publication and the publications of the Report's later versions to the Board, Hoffman and Sidley committed the tort of defamation in Massachusetts on behalf of their client, the APA.

- On information and belief, Hoffman gave an advance copy of the Report to *The New York Times.* He could predict with near-certainty that, as a result, the *Times* would distribute the Report widely, including to its more than 30,000 subscribers in Massachusetts.
- It was also entirely foreseeable by Hoffman that, given the *Boston Globe's* historical coverage of the matter, it would echo the *Times'* false and defamatory coverage, as it did on July 11 and July 20, 2015.[19] The July 20 article contains a still-active link to the July 2, 2015, Final version of the Report on the APA website. Those articles are targeted to Massachusetts and its residents.

[19] https://www.bostonglobe.com/news/nation/2015/07/10/psychologists-colluded-interrogations-report-says/3usbtaQdxmobWwIPtOpUYL/story.html; https://www.bostonglobe.com/news/nation/2015/07/19/psychology-association-worked-with-defense-officials-loose-interrogation-guidelines/DsPxSETzHmc4QsSjLjR9mN/story.html

Sidley LLP and Sidley (NY) LLP

- Sidley (NY) LLP is a foreign limited liability partnership with an office in Massachusetts and a designated agent for service of process in Massachusetts. Sidley (NY) LLP has at least 30 attorneys listed in the Boston office, of whom at least 25 are admitted to practice in Massachusetts and many of whom, on information and belief, reside in Massachusetts.
- Sidley conducts substantial, systematic, and continuous business activities in Massachusetts through its place of business in the state. Sidley holds itself out as a national law firm, including through its website, without explicitly stating that it practices through a separate partnership in Massachusetts, with a usual place of business in Boston. Through Sidley (NY) LLP, which includes Sidley's Boston-based partners, Sidley regularly practices law in the state. Hoffman and Sidley are therefore "at home" in the state of Massachusetts.

APA

- Hoffman and Sidley's activities in Massachusetts during their investigation were conducted on behalf of the APA, with its full knowledge, consent, and subsequent ratification.
- The APA has an affiliate in Massachusetts, the Massachusetts Psychological Association, which received the Report from the APA, published it repeatedly in Massachusetts, and acted on it within Massachusetts on behalf of the APA.
- The APA's President, Jessica Henderson Daniel, is a resident of Massachusetts who was interviewed for the Report. She continues to conduct business regularly on behalf of the APA in Massachusetts, as do other members of APA's Council, its governing body, of which Soldz and five other members are Massachusetts residents.

- The APA has 1,987 Massachusetts members. Many of them read the false and defamatory allegations in the Report when it was published to them by e-mails from the APA. The Board resolution authorizing Hoffman's investigation stipulated that such widespread distribution would occur, as the Institutional Defendants' engagement letter also contemplated.
- The APA is registered as a charity in Massachusetts. In its report for the Attorney General for 2017, it specifically represents that it conducts solicitations for contributions and members via the internet as well as by e-mail. The APA has a highly interactive website where it regularly solicits and interacts with its Massachusetts members, including in relation to the Report.
- The APA conducts substantial, systematic, and continuous business activities in Massachusetts, by and through residents who include its current President, members of its governing Council and other APA members, as well as by and through its Massachusetts affiliate. The APA is "at-home" in the state of Massachusetts.
- At all relevant times Hoffman was acting as an agent of the APA. The APA subsequently published the Report and Revised Report with the full knowledge and assistance of Dr. Kaslow, the head of the Special Committee, and other Board members. Thus, APA ratified Hoffman and Sidley's conduct in Massachusetts.

78. For the reasons set forth above, Massachusetts is the state with the most significant interest in the timeliness of this matter's adjudication. Each of the Institutional Defendants and Soldz committed the intentional tort of defamation in Massachusetts by publishing false and defamatory statements of and concerning the Plaintiffs in Massachusetts, thereby injuring in the state the Plaintiffs and the residents of Massachusetts who read the false statements. Moreover, many of the

activities on behalf of the APA that furthered the alleged collusion were undertaken from Massachusetts. Two of the most vocal critics of the Plaintiffs and the APA whose campaign led to Hoffman's investigation – Soldz and Nathaniel Raymond – are Massachusetts residents, and Hoffman lists them among his four key sources. Hoffman collaborated extensively with Soldz in order to conduct his investigation and produce the defamatory Report.[20] Finally, Hoffman and Sidley, acting on behalf of their client the APA, undertook significant activities in Massachusetts to conduct interviews and collect material, including from Dr. Soldz. These activities constituted the practice of law in collaboration with, and on behalf of Sidley LLP, in Massachusetts.

79. Massachusetts's interest in this matter is further strengthened by the Report's impact on legislation in the state. After the Report was released, the legislature acted on calls made by Massachusetts residents to introduce legislation regarding its contents.[21] That legislation was sent to committee in 2015 but continues to be the subject of new testimony from Massachusetts residents, with a new bill recently proposed.[22]

IV. FACTUAL BACKGROUND

A. Psychologists' Participation in National Security Interrogations

80. Following 9/11, the military faced an increased demand for intelligence from human sources. That need created an ongoing requirement for psychologists and other behavioral-science consultants ("BSCTs") to consult about and observe the interrogation of detainees. This was a relatively new area of practice for military psychologists, but it was very similar to behavioral-

[20] https://www.youtube.com/watch?v=i9u1EOgeEqw
[21] https://malegislature.gov/Bills/189/H1921; https://malegislature.gov/Bills/189/S1143
[22] https://www.mounttobyfriends.org/organizational/peace-and-social-concerns/letter-writing/s-1143/; http://www1.wne.edu/law/law-review/posts/2018/05/miller-05.2018.pdf; https://malegislature.gov/Bills/190/S1194

science consultation provided by psychologists and others in law-enforcement activities and correctional facilities.

81. The BSCT consultants, including the military Plaintiffs, were not conducting interrogations. Among other responsibilities, they were charged with drafting and implementing policies to ensure humane treatment, prevent abuses, and report any abuses that occurred. Their role was described in the March 28, 2005, policy governing BSCT personnel at Guantanamo, which was drafted in part by Plaintiffs Dunivin and Banks (see Exhibit B):

> Use psychological expertise to … to assist the command in ensuring humane treatment of detainees, the prevention of abuse, and the safety of U.S. personnel. …. it is the responsibility of all BSCT personnel to familiarize themselves with and adhere to the UCMJ [Uniform Code of Military Justice], Geneva Conventions, applicable rules of engagement, local policies, as well as professional ethics and standards of psychological practice. All BSCT personnel will be expected to: … Immediately report any suspicions of abuse of detainees or misconduct by U.S. personnel ….

B. The PENS Task Force

82. Amid the growing press coverage of the role of psychologists and psychiatrists in interrogations, on November 30, 2004, *The New York Times* published an article regarding the possible involvement of psychologists in abusive interrogations, based upon a report of the International Red Cross. Dr. Behnke, as Director of the APA Ethics Office, forwarded the article to members of the APA Executive Management Group who had regular contact with the APA Board.

83. During its December 10-12, 2004 meeting, the Board voted to fund a task force to "explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." This task force became known as the PENS Task Force, "PENS" standing for Psychological Ethics and National Security ("Task Force" or "PENS"). Two Task Force members are Massachusetts residents, as is one member of the Board (Dr. Jessica Henderson Daniel, the current President of the APA) that approved the Task Force's work.

84. The Board's charge to the Task Force was not to consider "if" psychologists should participate in national-security investigations, but "how." This is a critical distinction: much of Hoffman's Report, including its discussion of the Task Force's work, focuses on an alleged "collusion" among the Plaintiffs and others to block the APA from banning its members from participating in any way in the interrogation process.

85. The Task Force consisted of 10 members: three military officers who had experience consulting to national security interrogations, including Plaintiffs Banks and James; three civilians who had previous military experience; and four members who had experience in ethics, human rights, and related issues. The military members of the task force participated as private citizens and not in their capacities as members of the military. Dr. Behnke was to provide staff support.

86. Several observers, including Dr. Newman, were also named for the Task Force. They could not vote, and Dr. Newman did not have access to the Task Force listserv. Although Hoffman claims that Newman "led much of the task force discussions throughout the weekend" (Hoffman Report, p. 271), that assertion is directly contradicted by detailed, contemporaneous notes of the proceedings, which show that Newman spoke less frequently than many others. Hoffman relies on those notes extensively for other purposes, describing them as providing the most "complete picture" of what occurred at the meeting (Hoffman Report, p. 264).

87. The Task Force met via e-mail from April 22, 2005, to June 26, 2006, with two members acting from Massachusetts. The Task Force met in person only once, in Washington, DC on June 24-26, 2005. At the conclusion of those meetings, it recommended twelve statements about the ethical obligations of APA members (the PENS Guidelines).

88. Early during the week of June 27, 2005 the APA Ethics Committee approved the PENS Guidelines "as appropriate interpretations and applications of the American Psychological

Association Ethical Principles of Psychologists and Code of Conduct (2002)." The PENS Guidelines do not represent changes to the Ethics Code.

89. The PENS Guidelines were then sent to the Board, including Dr. Daniel, the Board member resident in Massachusetts. Faced with new articles in the press, on July 1, 2005, then-APA President Dr. Ron Levant asked the Board to declare an emergency that would allow it to vote on the recommendations immediately, and asked it to approve them without modification. The Board approved the PENS Guidelines over e-mail the same day, and they were released to the public the next day.

90. On August 29, 2005, after the APA Council, including its Massachusetts members, endorsed the PENS Guidelines, it issued a press release calling the PENS Guidelines "strict" and not open to exceptions. That release, which contradicts Hoffman's claims about the Guidelines' motivation and effect, was available to him but omitted from his Report. It is still available online (emphases added):

AMERICAN PSYCHOLOGICAL ASSOCIATION

August 29, 2005

APA Council Endorses Ethical Guidelines for Psychologists Participating in National Security-Related Investigations and Interrogations

WASHINGTON - The American Psychological Association (APA) Council of Representatives, the Association's governing body, has endorsed a Task Force Report on Psychological Ethics and National Security today that sets forth **strict ethical guidelines** for psychologists' participation in national security-related investigations and interrogations.

Following the recommendations of the Task Force, the APA Council of Representatives reaffirmed an Association resolution against torture and other cruel, inhuman, or degrading treatment. **The Task Force Report prohibits psychologists from any participation whatsoever in such abusive behaviors and places an ethical obligation on psychologists to be alert to and report abusive behaviors to the authorities. The Council of Representatives stated that there are no exceptional circumstances whatsoever, whether induced by a state of war or a threat of war, internal political instability or any other public emergency, that may be invoked as a justification for torture, including the invocation of laws, regulations, or orders.**

Based upon its ethical analysis, the Task Force stated that psychologists are bound by the Association's Ethics Code in all their professional activities, regardless of whether they identify themselves as 'psychologists,' 'behavioral scientists' or some other term. The Council of Representatives directed the Ethics Committee to review a proposed change to the Association's Ethics Code, which would assure that psychologists faced with a conflict between ethics and law follow only those laws that are 'in keeping with basic principles of human rights.' The APA Council of Representatives also voted that credible evidence of unethical behavior should be referred to the APA Ethics Committee, the body charged with investigating and adjudicating ethics complaints.

C. The Critics on Whom Hoffman Relied

91. In addition to Risen's book and other reporting, Hoffman relied heavily on three long-time critics of the APA and the Plaintiffs: Soldz, Dr. Steven Reisner, and Mr. Nathaniel Raymond

(collectively with Dr. Trudy Bond, and others, the Accusers). Soldz and Raymond are Massachusetts residents. The first interview Hoffman conducted after being engaged was with Raymond. The collaboration between Hoffman and Soldz became so close that, according to a video made by Soldz, whenever Hoffman could not locate a document, he turned to Soldz for assistance.[23] As the Complaint will describe and as Hoffman was aware, Soldz, Reisner and Raymond also worked closely with Risen and other journalists over the years in a coordinated series of attacks. Soldz authored over 100 articles, from some of which Hoffman draws. The direction in which Hoffman took his investigation was prompted by a sustained multi-year campaign, largely directed from Massachusetts by Soldz and others, that culminated successfully in the Hoffman Report.

[23] https://www.youtube.com/watch?v=i9u1EOgeEqw

V. HOFFMAN AND SIDLEY'S THREE PRIMARY CONCLUSIONS ARE FALSE AND DEFAMATORY *PER SE*

92. Documents and other facts prove that Hoffman's three primary conclusions are false, and that he knew they were false or acted with reckless disregard of whether they were false when he published the three versions of the Report to the Special Committee, Board, APA members, and the public. Those factual statements are defamatory *per se* because each alleges behavior that is incompatible with the Plaintiffs' continued practice of their professions and, taken together, they allege the criminal activity of colluding to enable torture.

93. Far from "present[ing] as many facts as we were able to discover" (Hoffman Report, p. 8) as the Report claims, "or following all the evidence wherever it may lead," as was his charge from the APA Board, the Report omits key documents, quotes selectively from others, and misstates key facts.

94. The most relevant omitted documents were in Hoffman's possession, seen by his team during its investigation, or referenced in other documents from which Hoffman quotes. In fact, as specified below, some of these documents were included or referred to in the Report's voluminous supporting binders (6,000-plus pages) but purposely omitted from the text of the Report itself. Still others would have been easily found if Hoffman had followed leads provided by Plaintiffs Dunivin and James, as specified below.

95. Moreover, as several of those interviewed by Hoffman have stated, he quoted selectively and misleadingly from their interviews or misstated their views. As the Complaint previously described, Plaintiffs now 15 affidavits and nine other statements from witnesses interviewed by Hoffman and his team that attest to these facts.

96. This pattern of selective inclusion, distortion, avoidance, and omission does not result because Hoffman simply forgot a relevant point, overlooked a few documents, or omitted an

important fact. Rather, it is a clear and intentional pattern of obfuscating the truth by selecting only those facts which support his false conclusions and consciously omitting or intentionally avoiding contradictory evidence that would not fit into the false and defamatory narrative provided by Soldz and the other Accusers.

97. The following paragraphs specify the documents and facts that demonstrate the Institutional Defendants knew that each of the Report's three primary factual conclusions was false or that they acted with reckless disregard of whether it was false. The documents and facts that demonstrate that Soldz knew his factual statements were false or made them with reckless disregard of whether they were false are set forth in Section I above under the heading "Evidence of Actual Malice in Soldz's Statements."

A. Material in Hoffman and Sidley's Possession Demonstrates They Knew His First Conclusion Was False or Acted in Reckless Disregard of Its Truth

98. The Report's first and most prominent false conclusion alleged the following:

> "...key APA officials, principally the APA Ethics Director [Dr. Behnke] joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." (Hoffman Report, p. 9)

This summary conclusion was supported by the following false factual assertions:

> "... then-existing DoD guidance ... used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation ...." (Hoffman Report, p. 12)

> "... it was well known to APA officials at the time of the [PENS] report that the Bush Administration had defined 'torture' in a very narrow fashion ...." (Hoffman Report, p. 12)

The paragraph containing the sentence above clearly and falsely leads the reader to conclude that this narrow definition remained relevant in 2005, when it had it fact been withdrawn long before the PENS Task Force met.

> "... abusive interrogation techniques had occurred in the past and that there was a substantial risk that they were continuing ... [there was] an intentional effort not to dig into these concerns and allegations to try to determine whether they had occurred or were still

occurring. … there was a deliberate and strategic attempt not to inquire …." (Hoffman Report, pp. 66-67)

99. At its core, the conclusion falsely asserts that existing military interrogation policies in June 2005 were too loose to constrain abusive interrogations and permitted such techniques as abusive sleep deprivation and stress positions. On that foundation of sand, Hoffman then falsely asserts that the Plaintiffs, among others, wanted the PENS Guidelines to be just as loose to allow for ongoing abuses and turned a blind eye to whether abuses were continuing.

100. In fact, the then-existing military policies – some of which the military Plaintiffs helped to draft – were restrictive and were incorporated by reference into the PENS Guidelines. And the PENS participants were fully aware of the history of abusive interrogations, which were discussed in documents circulated at the PENS meetings. Hoffman reviewed those documents but omits them from his Report. Hoffman's false and defamatory conclusion turns truth on its head.

101. In particular, the Report:

- Distorts and omits key pieces of the history of governmental and DoD policies governing military interrogations. First, although Hoffman fleetingly acknowledges on a page far into the Report (p. 153) that the Bush Administration memoranda narrowly defining "torture" had been withdrawn well before the time of PENS, throughout the Executive Summary and elsewhere he incorrectly emphasizes the outdated policies as the context for the PENS Task Force's work. Second, the Report consistently conflates military and CIA policies at a time when they had dramatically diverged, with military policies becoming increasingly restrictive, and omits policy statements from late 2003 to early 2005 that applied specifically to the Department of Defense and therefore to military psychologists.

- Omits the updated regional military policies that contained even more restrictive prohibitions against abusive interrogation techniques, including techniques that Hoffman claims were permitted, and instead analyzes outdated regional policies.
- Fails to disclose that the most recent policies, which would have included the regional policies in Afghanistan, Iraq, and Guantanamo, were expressly incorporated by reference into the PENS Guidelines, along with the relevant Geneva conventions.
- Fails to describe the role the military Plaintiffs played in writing the regional policies, as well as taking other steps to prevent abuses at the sites to which they were posted.
- Omits articles and other documents passed out during the PENS meeting that focused on the abuses that had occurred at interrogation sites, and omits the prominent role that one of the Task Force members, Michael Gelles, played in calling abuses to the attention of the then-General Counsel to the Navy, Alberto Mora.

102. The Report's pattern of intentional omissions, purposeful avoidances, and mischaracterizations is fatal to its first conclusion. It represents the "deliberate avoidance" of which Hoffman accuses the Plaintiffs: a "deliberate and strategic" effort to avoid information – the full and accurate history of the military policies and the role the Plaintiffs played in drafting and implementing them – that would have destroyed his argument.

1. U.S. Policy Governing National Security Interrogations 2003-2005: Department of Justice and DoD Policies Became Increasingly Restrictive

103. The events Hoffman was hired to investigate took place in the context of a history of shifting military policies governing interrogations. In the years 2002-2005, these policies were changed a number of times, and those changes ultimately led to increasingly strict policies that prohibited the very techniques Hoffman claims were permitted by the "existing DoD guidance" (Hoffman Report, p. 12).

104. Prior to 9/11, Army interrogators had relied on the guidance of the Army Field Manual (FM 34-52), which contained specific and explicit directions as to which interrogation techniques were allowed and which were prohibited because they were considered abusive or cruel, inhuman, or degrading treatment.

105. After 9/11, memoranda issued in late 2002 and early 2003 by the Department of Justice Office of Legal Counsel (OLC) expanded the range of interrogation techniques that would not be regarded as "torture" beyond those expressly permitted in FM 34-52. On the basis of those memoranda, on December 2, 2002, Secretary of Defense Rumsfeld authorized an expanded set of techniques for the DoD. Those techniques, however, were different from the "enhanced interrogation" techniques approved for use by the CIA, which operated under separate legal guidance. (Hoffman did not conclude that the APA colluded with the CIA to affect the PENS Report (Hoffman Report, p. 9).)

106. Rumsfeld's December 2002 authorization was rescinded in part on January 15, 2003. From January 16, 2003, until the time of PENS, the authorized techniques did not include the abusive techniques that Hoffman falsely claims were allowed in June of 2005. Moreover, on April 15, 2003, Rumsfeld put in place additional restrictions that further limited the allowable techniques.

107. In late 2003, in response to the reports of abuses in Iraq, Afghanistan and Guantanamo, the Armed Forces began what would become a series of investigations into military detention facilities. Beginning in early 2004, these investigations were followed by numerous public government hearings. The reports of two of those investigations, the Church and Schlesinger investigations, unequivocally stated that none of the abuses that occurred were "authorized" because of the temporary expansion in allowable techniques. Instead, they were the result of

behavior that went beyond the authorized interrogation techniques. Each of those reports was in Hoffman's possession and included in the supporting documents provided with the Report.

108. As a direct result of these events, starting in late 2003 policies governing interrogations became increasingly specific and rigorous. The Hoffman Report fails to describe these changes accurately. Instead, it obscures or distorts the relevant history and leads the reader to believe that the Bush Administration's temporary expansion of permitted techniques was still in place by the time of PENS – even though the later developments were discussed and reported on extensively in the media beginning in late April of 2004, a full year before the PENS meetings.

109. As the Armed Forces investigations began, the OLC separately began to reconsider the legal guidance given to support the interrogation program in both the DoD and CIA. In late 2003, the OLC withdrew orally the early-2003 memorandum on which the DoD had primarily relied for an expanded definition of legal interrogation techniques. (In June of 2004, it withdrew the late-2002 memorandum that provided legal guidance for the CIA.)

110. Then, in December of 2004, the OLC issued another memorandum affirming that interrogations were again governed by a broader definition of torture and by the United Nations Convention Against Torture (CAT), which is incorporated into 18 US Code Section 2340 and therefore governs the conduct of interrogations.

111. Finally, on February 4, 2005, five months before the PENS Task Force meetings, the OLC issued an additional legal opinion confirming its withdrawal of its 2003 guidance and also confirming the strict and authoritative guidance provided in the Philbin testimony described below. That OLC opinion and its attachments are attached hereto as Exhibit C and fully incorporated herein by reference.

112. Despite this clear history, the Report's Executive Summary asserts that the Bush Administration's narrower definition of torture contained in the withdrawn memos was the relevant reference point for the "existing" military guidelines of which Hoffman writes, and was in place at the time of PENS (Hoffman Report, pp. 3-4, 12).

113. On July 14, 2004, Associate Attorney General Patrick Philbin's testimony for the House Permanent Select Committee on Intelligence analyzed the relevant statutes, treaties, and constitutional provisions as applied to the 24 techniques then allowed for use at Guantanamo Bay (and, by incorporation, the 17 techniques then allowed for use in Iraq and Afghanistan). While those techniques included sleep adjustment (sleeping during the day rather than at night, for example), they did not include sleep deprivation or stress positions. Philbin made it clear that abuses, or techniques that fell outside the parameters he described, were punishable under a number of statutes and treaties as well as under the U.S. Constitution. This testimony became the legal guidance for the DoD in late summer of 2004 and remains to this day a foundation for the legal underpinnings of the new Army Field Manual, which has been lauded by Senator John McCain and human rights groups as well as the APA as the appropriate bulwark against abusive interrogations. See Exhibit C.

114. Soldz's continued false statements deny the existence of these policies, despite his having been given direct evidence of them.[24]

115. At various points in this timeline, the DoD guidance for interrogations diverged significantly from the CIA guidance. DoD was governed by its own policies. By the time of the Philbin testimony at the very latest, those policies clearly did not authorize abusive techniques and

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24 http://www.hoffmanreportapa.com/resources/RESPONSE%20TO%20STEPHEN%20SOLDZ.pdf

were certainly not "loose." As Hoffman states he was told by one of the architects of the CIA program, Dr. James Mitchell, "DoD was genuinely interested in adhering to the Ethics Code and was seeking clarity about its guidelines, whereas the CIA would not have changed its operational decisions based on the ethical statements of a professional association" (Hoffman Report, p. 144).

116. Hoffman inexplicably fails to describe accurately these developments in late 2003, 2004 and early 2005 (Hoffman Report, p. 153). Instead, he purposefully omits critical details of the history. This is no accident: the Report cites a number of materials that reference Mr. Philbin's testimony, the approval of the specific 24 techniques, and the timeline of policy changes in detail, as well as other materials that either discuss or refer to a discussion of the strict limitations in place by 2004.

117. For example, in his discussion of the outdated OLC memoranda on which he relies, Hoffman cites extensively from *The Terror Presidency* by Jack Goldsmith and *The Dark Side* by Jane Mayer. Each book describes the correct timeline of policy changes, at times within pages of information Hoffman does cite. But Hoffman intentionally omits references to the pages containing the accurate timeline. These books and other reporting about this period make it clear that, by the end of 2003, and certainly by the time of Philbin's public testimony, only the 24 techniques discussed in his testimony were authorized. They did not include the abusive techniques of sleep deprivation and stress positions that Hoffman falsely claims were allowed in June of 2005 (Hoffman Report, p. 12). If Hoffman had included this information, he would have had to tell a much different story, a story that contradicted the claim by the Accusers, including Soldz, that the Plaintiffs wanted guidelines that permitted torture and turned a blind eye to whether it was occurring.

118. In addition, the Schlesinger Report, the Report of the Independent Panel to Review DoD Detention Operations which was publicly released in August of 2004, listed exactly which interrogation methods were approved for use in Iraq, Afghanistan, and Guantanamo. As stated previously, the Schlesinger Report was contained in Hoffman's supporting documents, but Hoffman, again inexplicably, failed to mention the list in the text of his Report. The Schlesinger Report makes it clear that the techniques Hoffman claims were authorized were not authorized in June 2005.

119. Thus, the relevant information about the interrogation policies actually in place in June 2005 was in Hoffman's possession and was also pointed to by other documents in his possession. He purposefully omitted the critical facts in order to claim that out-of-date policies withdrawn over a year earlier, as the media reported in May and June of 2004, were still relevant at the time of PENS in June of 2005.

120. In what amounts to clear additional evidence of the purposeful avoidance of the truth, even after having been pointed to these documents and policies Hoffman and the APA refuse, after almost two years, to acknowledge and correct the Report's distortions, omissions, and mischaracterizations. This has allowed the media and the Accusers led by Soldz to continue to defame Plaintiffs, causing irreparable damage to their careers.

121. Similarly, Soldz, after being pointed to clear evidence that his allegations about Plaintiffs' participation in or enabling of abusive interrogations or torture were false and defamatory, continues to make them. Over the last year, he has done so while being a member of the APA's governing Council and with the full knowledge of the APA's counsel, whose attention was drawn to this fact in August 2017.

2. The Regional Military Policies Were Even More Specific and Restrictive

122. From March to May 2004, the Army Field Manual (FM 34-52) restrictions against abusive interrogations were reinforced by a series of more restrictive local policies governing detention operations in Iraq, Afghanistan, and Guantanamo. Generals in each of those locations issued firm and clear public (non-classified) orders restricting interrogation methods that were reported on by the media. Military policy allows local and regional orders to be more restrictive than DoD Pentagon-level policy. By the time of PENS this was indeed the case, in part due to the efforts of the military Plaintiffs in drafting and implementing the local rules and regulations that would implement on the ground the policies created by those senior in command.

123. By June of 2005, when the PENS Task Force met, the DoD interrogation policies in force at each of those locations were even more specific and forceful in their prohibitions against abusive interrogations than the already restrictive DoD policy. They also clarified that the relevant Geneva Conventions applied, although the DoD continued to debate the formal legal applicability of the Geneva Conventions until June of 2006.

124. On May 6, 2004, the general in command for Iraq and Afghanistan, General John Abizaid, issued an order clarifying that only the 17 interrogation techniques in FM 34-52 were authorized for use in all DoD facilities under his command. This order was memorialized in the Church Report, a report on the interrogation of detainees completed by Vice Admiral Albert T. Church, the Navy Inspector General, in March 2005. Hoffman cites that report for other purposes.

125. Numerous media reports, some citing a Pentagon announcement on May 14, 2004, refer to the strict prohibitions and limitations then put on interrogation methods. These reports appeared in *The New York Times* and *Chicago Tribune* and on CNN, among other places.[25]

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[25] http://www.cnn.com/2004/WORLD/meast/05/14/iraq.abuse/

126. In March 2004, after General Jay Hood arrived at Guantanamo, he issued a policy prohibiting, among other techniques, stress positions and sleep deprivation, which Hoffman claims were still permitted in June 2005. This policy was referred to in the Schmidt Report on interrogations at Guantanamo, released in April 2005. Hoffman includes that report in his supporting documents, and he also interviewed an interrogator who would have told him about the very restrictive Guantanamo policy had he asked.

127. The March 28, 2005, Guantanamo SOP governing BSCTs (drafted by Col. Dunivin in consultation with Col. Banks) obligated them not only to abide by the Geneva Conventions and local policies, but also to report any interactions that were considered unsafe, unethical, illegal or in violation of applicable policies and procedures. See Exhibit B which is fully incorporated herein by reference.

128. This SOP was actually contained in the Report's voluminous document binders, but not indexed there or referred to in the text of the Report. It was also contained in files for an APA ethics investigation that Hoffman's team reviewed at least twice. In one of those files, the policy's date had been circled with a handwritten annotation reading "Note," making it impossible to ignore that the policy was in effect at the time of PENS and was drafted at a time when, as the Report noted, Col. Dunivin was serving at Guantanamo.

129. In the text of his Report, however, Hoffman instead analyzed extensively an outdated SOP (Hoffman Report, p. 214). As is evident from footnote 923, he retrieved that SOP from at least two sources that actually also included the updated SOP. Hoffman questioned Col. Dunivin extensively about the outdated SOP. But he repeatedly refused to give her the questions she would have had to provide the DoD to receive clearance to discuss other policies that she had drafted during her time at Guantanamo.

130. As just one example of the amount of evidence amassed by Plaintiffs showing actual malice on the part of the Institutional Defendants, Plaintiffs can demonstrate that Hoffman and his team had the updated SOP in their possession five times. Although it and other documents render the Report's first conclusion demonstrably false, Hoffman and Sidley omitted it from the Report. Despite having been rehired by the APA to analyze this and other omitted documents, he has not done so.

131. Soldz has also been pointed to this SOP on multiple occasions and to the fact that it and similar policies were expressly incorporated into Statement Four of the PENS Guidelines. Yet he continues to falsely assert that the Plaintiffs and the APA were complicit in enabling torture.

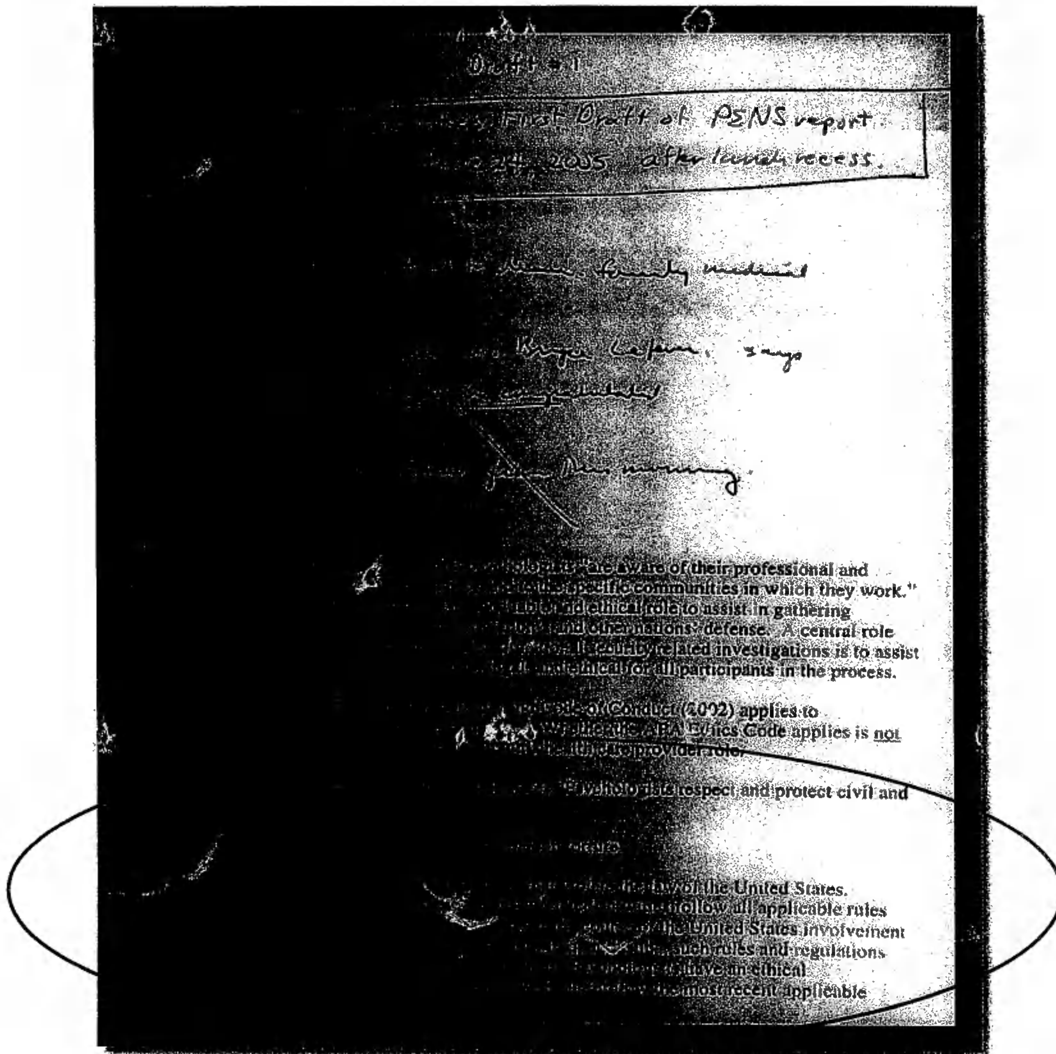
3. The PENS Guidelines Incorporated the Updated and Restrictive Policies

132. Given the role of Plaintiffs Banks and James in helping to put local policies in place, it is no surprise that those policies, along with the relevant United Nations and Geneva conventions, were incorporated by reference into Statement Four of the PENS Guidelines (emphasis added):

> Psychologists do not engage in behaviors that violate the laws of the United States, although psychologists may refuse for ethical reasons to follow laws or orders that are unjust or that violate basic principles of human rights. Psychologists involved in national security-related activities follow all applicable rules and regulations that govern their roles. ***Over the course of the recent United States military presence in locations such as Afghanistan, Iraq, and Cuba, such rules and regulations have been significantly developed and refined. Psychologists have an ethical responsibility to be informed of, familiar with, and follow the most recent applicable regulations and rules. The Task Force notes that certain rules and regulations incorporate texts that are fundamental to the treatment of individuals whose liberty has been curtailed, such as the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the Geneva Convention Relative to the Treatment of Prisoners of War.***

133. Hoffman had to have reviewed Statement Four because he cites other language from it. So important was the language incorporating the local policies that it appears in the first draft of the original nine principles of the PENS Guidelines. That draft was created by noon on the first day of the PENS meetings. Hoffman references the draft twice on page 273 of the Report and includes

it in his supporting materials. But he ignores the language that expressly creates an obligation to "follow the most recent applicable regulations and rules" – including the regional policies in Afghanistan, Iraq, and Cuba. That language directly contradicts his false assertions that psychologists in regional facilities were not bound by the United Nations conventions (Hoffman Report, p. 305). (See below for an excerpt from Jean Maria Arrigo's notes of the first morning of the PENS meeting, as contained in Hoffman's source material binders and referred to on page 264 of his Report as providing "the most complete picture of what occurred during at the meetings." (Hoffman Report, p. 264))



First Draft of PENS report
2005 after lunch recess.

are aware of their professional and
communities in which they work."
ethical role to assist in gathering
and other nations' defense. A central role
security related investigations is to assist
ethical for all participants in the process.

of Conduct (2002) applies to
Ethics Code applies is not
provider role.

Psychologists respect and protect civil and

the law of the United States.
follow all applicable rules
United States involvement
such rules and regulations
have an ethical
the most recent applicable

134. In what amounts to clear and unequivocal evidence of actual malice under relevant case law, even when Hoffman was hired to fix the Report's statements regarding these military policies, and with his attention called specifically to the relevant language, neither he nor the APA have taken any steps to fix his false and defamatory statements. The APA continues to prominently display the Final and the Revised Report on its website, where it continues to support the ongoing defamation of Plaintiffs by Soldz and others.

135. During the PENS meetings, Banks and James were highly vocal about their belief that the relevant Geneva Conventions unquestionably applied to interrogations, despite disagreements at higher levels of government. Even Dr. Jean Marie Arrigo, one of the Plaintiffs' most vocal critics, noted that James and Banks both stated that position. In an e-mail to Hoffman on March 1, 2015, Banks reiterated his belief that the Geneva Conventions had always applied to interrogations, despite disagreements at higher levels of government.

136. These facts are omitted from the Hoffman Report. Instead, he leads the reader to believe that the DoD task force members did not want the Geneva Conventions to apply (Hoffman Report, p. 274), and he omits the actual text of Statement Four that makes it clear they did apply.

137. In addition, in a transcript of an audiotape Dr. Arrigo made contemporaneously with her arrival home on the last night of the PENS Task Force, she repeatedly mentions that the military members of the Task Force were adamant about their desire to curtail abuses and to have military standard operating procedures (SOPs, such as the one in Exhibit B) serve that purpose. That audiotape and transcript, which provide a different narrative of the PENS meetings than the one Hoffman creates, was omitted from his Report, although he relies on other material in her archives (Hoffman Report, p. 7). That contemporaneous audiotape directly also contradicts portions of her later story of what happened during the PENS meetings.

4. The Military Plaintiffs Took a Leading Role in Creating Policies and Procedures to Prevent Abusive Interrogations

138. In the aftermath of the abuses at interrogation sites after 9/11, BSCTs, including Plaintiffs Banks, Dunivin, and James, were called upon to help put in place policies to prohibit abuses and to report any of which they became aware.

139. As the abuses at Abu Ghraib began to emerge, Col. Banks was ordered to work with the Army's Inspector General to investigate and decide how to prevent future abuses. He then asked Col. James to serve in Iraq, with the role of drafting policies and instituting procedures to prevent abusive interrogations. Col. Dunivin volunteered to play a similar role at Guantanamo.

140. Hoffman provides none of that contextual background, nor did he ask the military Plaintiffs about it during their interviews. They could not have known that it would become so relevant because the investigation's focus had changed without their knowledge, and, therefore, they did not know enough to insist on volunteering the information.

141. *Col. Banks* became an author of the Army Inspector General's report, issued in July of 2004, on detainee operations in Iraq and Afghanistan. The report listed all of the provisions of the Geneva Conventions that applied to interrogations and detainee operations, including, for example, "[n]o degrading treatment." And, at the time of PENS, Col. Banks was consulting to the Army on a revision to the Army Field Manual that, as a *New York Times* article reported, was to contain even more specifics about prohibited interrogation techniques.

142. In stark contrast to Hoffman's allegations about the military Plaintiffs' intentions, Senator Levin, in his remarks when releasing the Senate Armed Services Committee Report in April of 2009, noted that military psychologists – including Col. Banks – warned against the use of harsh techniques as early as 2002: "On October 2, 2002, Lieutenant Colonel Morgan Banks, the senior

Army SERE [Survival Evasion Resistance and Escape] psychologist, warned against using SERE training techniques during interrogations in an e-mail to personnel at GTMO ...."

143. *Col. James*, while on a plane to Iraq, outlined the beginnings of a SOP to prevent abuses. The first restrictive Iraq SOP was put in place in May of 2004, expressly prohibiting sleep deprivation and stress positions and incorporating the Geneva Conventions. While in Iraq, Col. James trained staff on appropriate interviewing techniques that were consistent with those documents.

144. Col. James noted at least twice on the PENS listserv that restrictive policies were in place at the time of PENS that prohibited the abuses alleged to have occurred in earlier years. Although Hoffman had the listserv communications, and although Col. James mentioned the policies in his interview, Hoffman did not ask the obvious and important question: what did the policies say?

145. *Col. Dunivin* was involved in drafting the Guantanamo SOP that instructed BSCTs to ensure interrogation policies were followed and to report violations. As she stated in an e-mail to the then-APA President-Elect, Col. Banks helped consult on the language in that SOP. Col. Dunivin's e-mail is not referred to in the Report but is available in Hoffman's supporting materials.

B. Material in Hoffman and Sidley's Possession Demonstrates They Knew His Second Conclusion Was False or Acted in Reckless Disregard of Its Truth

146. The Report's second primary conclusion stated:

> ...in the three years following the adoption of the 2005 PENS Task Force report as APA policy, APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad. The principal APA official involved in these efforts was once again the APA Ethics Director, who effectively formed an undisclosed joint venture with a small number of DoD officials to ensure that APA's statements and actions fell squarely in line with DoD's goals and preferences. (Hoffman Report, p. 9)

147. Not only in the three years following the PENS report but up until 2016, the APA repeatedly discussed the possibility of a total ban on its members' participation in the national-security interrogation process. The issue was openly debated on Council floor and in numerous meetings, including a mini-convention on the topic. The APA stated this emphatically in a letter to the *Boston Globe* in 2008 responding to an article by Soldz.[26] After the Report's publication, the Council voted in favor of the ban but then, in August 2016, it rejected the inclusion of a ban in the Ethics Code, which would have rendered it enforceable. Soldz continues to falsely claim that the policy ban is enforceable against military psychologists.[27]

148. The claim that the Plaintiffs colluded to defeat the ban over a decade is contradicted by the clear evidence of an open and ongoing debate, as described in the APA letter to the *Boston Globe* and elsewhere. Hoffman had that evidence in his possession, including evidence he obtained from Soldz. Transcripts of those debates still exist and other documents online refer to them. Hoffman failed to include this exculpatory documentation in his Report – although it was easily available on the APA website, among other locations.

149. Here as throughout the Report, Hoffman repeatedly and intentionally mischaracterizes as malign and collusive the communications that are a normal part of the exchanges about issues within an organization and between an organization and its constituent interest groups. If Hoffman had not used those inaccurately described communications as ammunition to make the case for his conclusions, but had instead described and viewed them objectively by comparison to other policy debates within the APA and other organizations, his "collusion" theory would have collapsed. (Hoffman Report, pp. 446-449)

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[26] http://www.apa.org/news/press/response/globe.aspx

[27] https://psychcentral.com/blog/american-psychological-associations-new-torture-policy-is-unenforceable/

C. Material in Hoffman and Sidley's Possession Demonstrates They Knew His Third Conclusion Was False or Acted in Reckless Disregard of Its Truth

150. Ethics complaints against Col. James and one of his mentees at Walter Reed Medical Center, Major John Leso, had been filed with the APA. The complaint against Col. James was closed in 2007 due to lack of sufficient documentation for a cause of action, and the Leso complaint was closed, after years of investigation, in 2013.

151. The Report's third conclusion asserts that these and other ethics complaints were handled in an "improper fashion by the APA in an attempt to protect these psychologists from censure" (Hoffman Report, p. 10). This conclusion leads the reasonable reader to believe that there was some merit to the underlying ethics complaints and that Behnke used his position to ensure that the complaints were not properly handled.

152. In a continuation of the pattern of misleading and obfuscatory reporting, Hoffman fails to identify any conduct by Col. James that would deserve censure or any substantive procedure not followed by Dr. Behnke. Instead, to make his claims Hoffman once again omits or distorts key facts that were in his possession.

153. *First*, Hoffman fails to state that the same complainant who filed the APA complaint against Col. James filed multiple complaints against James with two state licensing boards (with the help of a Harvard Law clinical faculty member), and that no board, and no court reviewing any of those state board decisions, had found those allegations to have any merit. At this point, Col. James' conduct has been the subject of at least seven actions, none of which has been upheld. Nevertheless, Soldz continues to suggest that the licensing boards did not investigate James' actions, despite clear evidence to the contrary.

154. Moreover, the Martinez-Lopez Report, the report of an investigation for the Army Surgeon General into detainee medical operations that covered the periods when Col. James was working

in Iraq and at Guantanamo, states unequivocally that there was "no indication that BSCT personnel participated in abusive interrogation practices" and "clear evidence that BSCT personnel took appropriate action and reported any questionable activities when observed." That report is still available online.

155. Although Hoffman references the Martinez-Lopez Report for his own purposes, as Soldz and his colleagues have done for years, he ignores those exculpatory findings. Instead, he employs a tactic of inferring the worst used throughout the Report. Quoting directly from the Accusers' allegation, he states that Col. James was present at Guantanamo when the "most serious abuses" were occurring, thus coaxing readers who do not know the facts to conclude falsely that Col. James was involved in those abuses.

156. *Second*, Hoffman never describes policies or procedures for handling ethics complaints that were ignored or violated. In fact, contradicting statements at the beginning of the Report, he acknowledges towards its end that the handling of James' case was technically permissible under the rules and procedures governing the APA ethics adjudication program (Hoffman Report, pp. 59 and 522).

157. In October of 2016, nine former ethics chairs issued a statement noting that Hoffman did not identify a single procedure (except for a document possibly being placed in a wrong file) or Board policy that had been violated. By using the word "improper," Hoffman leads the reader to believe there was untoward behavior on the part of Dr. Behnke to protect military psychologists. In fact, the word "improper" appears to mean that Hoffman, after the fact, merely finds fault with the process that the APA Board had adopted as policy.

158. *Third*, as to the complaint against Major Leso, Hoffman implies that the staff of the Ethics office took little investigatory action beyond "conducting internet searches" (Hoffman Report, p.

60). However, Hoffman and Danielle Carter, a second Sidley partner involved in the investigation, had information in their possession that showed this statement to be false.

159. When Ms. Carter and an associate traveled to Michigan to review the Leso file, she found a long list of the voluminous evidence the Ethics Office had gathered and analyzed.

160. That list had been given to the Board members as part of its review of the Leso matter in February 2014. At that time, the Board received two substantive and detailed briefings from the immediate past Ethics Committee Chair, Dr. James N. Bow, assisted by the Ethics Office director (Dr. Behnke) and deputy director. These briefings not only provided the Board members with a substantive overview of the ethics process in relation to the decision in the Leso matter, but also allowed them (and APA executive leaders who attended the second briefing) to ask questions about the process, the subject matter of the Leso complaint, and the decision to close it. The Leso case file was made available to the Board.

161. No one on the Board objected to the closing of the complaint on the grounds that the Ethics Committee should have proceeded against Major Leso, and none suggested at any time that the complaint was handled improperly under the Ethics Committee Rules and Procedures. As the Board stated at the time, it found the closing to be completely appropriate. This decision was also reviewed by the Associate General Counsel of the APA, Ann Springer.

162. On January 23, 2014, Dr. Kaslow (head of the Special Committee overseeing the "independence" of Hoffman's investigation) issued a communication to the APA membership about the Leso matter. That communication, which is still available on the APA website, stated:

> Each ethics complaint filed with the APA Ethics Office is individually and thoroughly reviewed based on the available evidence. In keeping with the committee's rules and procedures, and based on its commitment to due process, the committee moves to open a specific case against a member only if certain conditions are met. Specifically, the Ethics Committee bears responsibility for proving any charges of unethical behavior. Further, the committee must base its actions on specific evidence of individual wrongful behavior that

> can be shown to be directly attributable to the accused. In the matter related to Leso, the committee did not proceed with formal charges against Leso because it was determined that the allegations could not be proven consistent with the committee's burden of proof. The review process continued for an extended period of time (seven years) in order to include additional information as it was released into the public domain. In other words, as complete and careful a review of the available evidence was undertaken as possible. The review consisted of evidence (as opposed to supposition) and was conducted in a manner to ensure that the ethics process was kept insulated from political pressures.

163. On February 20, 2014, the Board, headed by Dr. Kaslow, released another statement, which is also still available on the APA website. It states:

> Due to the gravity of this case and the fact that the complaint was held open to allow for the introduction of new information should it become available, rather than one committee chair reviewing the file, two chairs reviewed it (in its entirety during their tenure). In addition, rather than one individual from the ethics office reviewing the file, four individuals did so: the ethics office director, the head of the office's adjudication program, an ethics investigator and the former director of the ethics office. All six came to the same conclusion. That based on the requirements set forth by the Ethics Committee Rules and Procedures, the record in this matter, read in its entirety, did not support bringing formal ethics charges against Dr. Leso.

164. Hoffman omitted this information in his Report, and his list of attempted interviews indicates that he did not even attempt to contact Major Leso to allow him to defend himself.

165. In addition, as former chairs of the Ethics Committee, including two Massachusetts residents, noted in an October 24, 2016 letter, Hoffman failed to examine how the handling of other matters compared to the handling of the matters on which he focused. If he had done so, he would not have been able to conclude that those matters received improperly different treatment. At most, the "flaws" he identifies – such as a too-limited approach that favored those accused – were flaws in the processes created by the APA Board, not an attempt by Dr. Behnke to protect specific military psychologists from censure.

166. The facts above and the contents of the Leso file, or either alone, demonstrate that Hoffman's conclusion, the third of the Report's main affirmative conclusions, is intentionally false and defamatory and made with actual malice.

167. Moreover, Hoffman failed to note that Dr. Kaslow, the head of the Special Committee that oversaw Hoffman's work, was involved in the Leso ethics decision. Because of that omission, Dr. Kaslow was not named in the Report and therefore not recused from further involvement – and left free to support the recommendation that Dr. Behnke be fired.

168. In total, five of the seven non-recused 2014 Board members, including Drs. Kaslow and McDaniel, remained on the Board in 2015. Because of their extensive involvement in the Board's review of the Leso matter, they knew this third conclusion to be false, or acted with reckless disregard of whether it was false, when the Board voted to republish the Hoffman Report.

169. In sum, the credible material Hoffman had in his possession as he wrote the Report demonstrates that he knew his three primary conclusions and the factual statements on which they are based were false, or acted in reckless disregard of whether they were false. If he had done no more than include the facts he intentionally omits from the Report, each of those conclusions would have been directly contradicted and readers would have drawn very different conclusions.

170. In addition to the Report's false content, the facts about the conduct of the investigation, the manner in which the Report was written, and the Institutional Defendants' and Soldz's conduct since the release of the Report all demonstrate actual malice.

VI. THE INSTITUTIONAL DEFENDANTS' CONDUCT OF THE INVESTIGATION DEMONSTRATES EVIDENCE OF ACTUAL MALICE

A. The Appointment of the Special Committee: The Roles of Drs. Kaslow and McDaniel

171. When Hoffman was hired in 2014, Dr. Kaslow was President of the APA and chair of the Board. Dr. McDaniel was a member of the Board. They became two of the three members of the Special Committee, with Dr. Kaslow as chair.

172. The initial third member of the Special Committee was removed at the request of the Accusers, led by Soldz. His replacement was forced to recuse herself when the Report was published because she was named in it, although she had far less involvement in the underlying events than Dr. Kaslow.

173. During the investigation, Drs. Kaslow and McDaniel had full control over the actions of the Special Committee. They agreed to the investigation's expanded scope, which resulted in Hoffman receiving at least five times more compensation than originally contemplated by the Board.

174. At the time Dr. Kaslow became chair of the Special Committee, the Board had reason to question whether she had the requisite judgment to undertake such a sensitive role. Once she became chair, it had reason to exercise more oversight than it did.

175. For example, in e-mails to Dr. Behnke between October 2013 and March 2014, Dr. Kaslow expressed distress over allegations made by a patient that she had engaged in a sexual-boundary violation with him. (None of her exchanges with Dr. Behnke were confidential, as Dr. Behnke explicitly informed her.) A sexual-boundary violation is one of the most serious allegations that can be made against a psychologist. Dr. Kaslow stated that she was working with her attorneys to prepare for a March 2014 mediation to settle the patient's claims.

176. In a later e-mail, Dr. Kaslow expressed relief that the mediation concluded with a settlement, towards which she paid $100,000 of her private money. Dr. Kaslow reportedly informed Dr. Norman Anderson, the APA's Chief Executive Officer, and gave him a letter of resignation in case the matter became public. She stated that the public disclosure of the allegation or settlement would require her to resign as the APA president. Dr. Kaslow stated to Dr. Behnke that she had not informed her state licensing board of this settlement.

177. Given this history, Dr. Kaslow should never have agreed to serve on, much less lead, a committee formed to oversee potential ethical misconduct by APA members.

178. Nor should the Board have allowed her to assume that role. Clearly, Dr. Anderson, a key member of the APA Board and Executive Management Group, knew Dr. Kaslow's judgment was questionable when the Board put her in charge the investigation, especially when it covered events in which she had been directly and substantially involved. Similarly, other members of the APA Board requested a meeting with Dr. Behnke to discuss Dr. Kaslow's lack of judgment and professionalism.

179. As the investigation progressed, and as Hoffman and his team repeatedly violated the acknowledged norms for conducting an investigation, Drs. Kaslow and McDaniel failed to exercise effective oversight. Hoffman obscured the investigation's scope and the questions he began to pursue, misled the Plaintiffs about its goals, failed to warn them when the investigation had clearly become adverse to their interests, and purposely avoided following leads that would have produced facts that contradicted his narrative. The Special Committee allowed what was to have been an independent investigation to "determine the facts" to become instead an investigation designed to clear them of responsibility, instead placing responsibility for the internal APA controversy on a few key APA members who could easily be expelled.

180. Once the Special Committee received the Hoffman Report, Dr. Kaslow knew that it covered events in which she had been involved. At that point, she should have immediately recused herself and explained to the Board the reasons for her recusal.

B. Obscuring the Investigation's Expanded Scope and Direction

181. In an e-mail to some of those whom Hoffman would interview, Dr. Kaslow stated that the investigation's "sole objective" was to ascertain the truth of Risen's allegations. The relevant time period was specified as the Bush Administration. Hoffman did not find evidence to support Risen's allegations.

182. Early in his review, however, Hoffman met with Soldz and Reisner and Nathaniel Raymond. As Hoffman and the Special Committee knew, these critics had collaborated closely with Risen and served as sources for his reporting.

183. By the first week of January 2015, Hoffman had broadly expanded the scope of the review beyond the context of the allegations made by Risen, in part at the urging of Soldz. Ultimately the investigation even encompassed events into 2014, far beyond the Bush Administration. This expansion directly aligned with the Accusers' agenda, and in particular their publicly acknowledged goal of overcoming what they wrongly perceived to be statute-of-limitations obstacles to holding the Plaintiffs and others criminally liable for acts in earlier years. Soldz acknowledged that alignment in an interview shortly after the Report was first made available.

184. Thus, what had begun as a "review" with a specific purpose became a full-blown "investigation" of the Plaintiffs' conduct and motives over the course of ten years, conducted within the framework of a narrative constructed by their Accusers led by Soldz, who by his own admission has written over 100 articles on the topic.

185. The investigation's new direction was not disclosed to anyone other than the Accusers, including Soldz, and the Special Committee. The Plaintiffs were kept in the dark and told not to speak to each other or anyone else about the investigation. Even in response to direct requests to explain the investigation's focus, Hoffman repeatedly refused to clarify its scope adequately or to inform the Plaintiffs what questions, beyond those initially posed by the Board, he was exploring.

186. For example, prompted by another *New York Times* article by Risen (April 30, 2015 (online)/May 1, 2015 (print)) that restated the Accusers' previous false allegations, Behnke asked about the scope and questions being pursued no fewer than five times by e-mail over the next 24 hours. The most substantive reply he received stated only that "We are determining the scope of our investigation such that it is consistent with what is outlined in the Board's resolution, public statement, and our communications with the Special Committee." This exchange took place five months into the investigation and two months before the Report was delivered to the Board. At no later point did Dr. Behnke receive any greater clarity.

187. Similarly, on May 21, 2015, a little more than a month before he delivered the Report to the Board, Hoffman interviewed Col. Banks in his home. Col. Banks asked if Hoffman could confirm the answers to the three questions about Risen's allegations posed by the Board. Hoffman confirmed that the answers were "no," but then said only, in effect, "we are looking at other things," without providing more clarity about the new scope.

188. Because of Hoffman's and the APA's failure to clarify the investigation's expanded scope or the questions on which Hoffman was focusing, the Plaintiffs could rely only on Dr. Kaslow's initial description of the investigation's limited scope (for those who received it) and Hoffman's letter to those interviewed stating that he was "conducting the review in a completely independent

fashion . . . ." They were unable to take steps to protect themselves and, eventually, were blindsided by false assertions without having been able to provide contradictory evidence.

C. Lack of Independence: Hoffman and Sidley's Over-Reliance on the Accusers and Alignment with Their Goals

189. Far from treating the Plaintiffs and Accusers even-handedly and neutrally, as required by his ethical duties, and public statements, Hoffman collaborated closely with the Accusers, led by Soldz, while keeping the Plaintiffs at arm's length and in the dark.

190. As a result of that undisclosed collaboration, Hoffman failed to take an independent approach, maintain the objectivity of the investigation, or present a neutral and objective review of the evidence. Instead, Hoffman used the Accusers' perspective and the documents provided by Soldz and other Accusers to construct a narrative into which he fit cherry-picked pieces of distorted evidence. While the Accusers worked together to help Hoffman build his case, Hoffman told the Plaintiffs not to speak to each other.

191. Documents, e-mails, and other evidence demonstrate Hoffman's overreliance on the Accusers:

- He acknowledged publicly, but not in his Report, that he set out to win their trust.
- He promised the Accusers confidentiality, something not offered to the witnesses supporting the Plaintiffs' accounts of the events in question. At the same time, he failed to prevent the Accusers from selectively leaking information from their conversations with him.
- So close did the relationship between Hoffman and the Accusers become that, according to one Accuser, they joked that when Hoffman needed a document, he called Dr. Soldz.[28]

[28] https://www.youtube.com/watch?v=i9u1EOgeEqw

- Hoffman knew that many of the Accusers' allegations were to be published by Risen in a *New York Times* article while his investigation was taking place. Shortly after that article was published, Reisner stated publicly that he and Soldz had given "detailed updates" about the document on which the article was based to Hoffman "every step along the way." But Hoffman omits this fact from his Report.

192. Despite knowing about the close, undisclosed collaboration between Risen, whose allegations sparked the investigation, and Soldz and the other Accusers on whom Hoffman relied, he did not disclose, much less explore, those facts. Instead, he investigated the actions and motives of only one side of the controversy. If he had turned his prosecutorial zeal to examining the Accusers' "collusion," he would have had to tell a very different story about the genesis of the charges he was investigating.

193. In late 2006, Drs. Reisner and Soldz, with the help of other psychologists, founded the "Coalition for an Ethical Psychology" and several other organizations, such as "Withhold Your Dues," an organization whose goal was to effect change in APA policy by having members withhold membership dues. They were joined in these efforts by Raymond.

194. Over the course of the next nine years, Drs. Soldz and Reisner and Raymond repeatedly made false and defamatory allegations about the Plaintiffs and the APA. At times, they also worked to file ethics complaints against psychologists who were involved in national security interrogations.

195. A close examination of their actions and relationships shows that most of the accusations against the Plaintiffs over the last decade originated with the three of them. They collaborated with several national journalists, including Katherine Eban of *Vanity Fair*, Jane Mayer of the *New Yorker* (who is married to James Risen's former editor at *The New York Times*), Mark Benjamin

of *Salon*, and ultimately, James Risen. Hoffman relies on reporting from all these journalists to support his allegations against the Plaintiffs, but never discloses their relationships with the same Accusers on whom he was relying, including Soldz.

196. Because Risen and some of the other reporters did not reveal their sources' identities, readers were unaware that the same few sources – sources who had no first-hand knowledge – were providing most of the information for articles accusing the APA and Plaintiffs of misconduct. Thus, when Soldz or Raymond spoke to the press to accuse the APA and Plaintiffs of colluding to enable torture, they could point to Risen's book or other media articles as proof they were correct, creating the impression of similar accusations from many independent sources. In fact, the articles relied largely on information from the same unreliable sources: Raymond, Soldz and Reisner.

197. Predictably, given Hoffman's collaboration with the Accusers, the Report aligns with their agenda: to have the APA ban psychologists' participation in the interrogation process, and to have the Plaintiffs and others prosecuted domestically under the RICO statute and internationally for war crimes. As previously noted, that alignment is demonstrated not only through the facts Hoffman selectively chose to include or exclude but also by his use of language such as "collusion," "undisclosed joint venture," and "joint enterprise" that is typically applied to criminal activity, as Hoffman, a former federal prosecutor, knew.

198. No reasonable reader could see the repeated use of those terms without assuming that criminal activity had taken place. And, indeed, press coverage of the Report reflected that assumption. It was further reinforced by public statements from Soldz and other Accusers that the Report directly supported their long-standing efforts to generate criminal and war-crimes prosecutions.

199. The use of this language reflecting the Accusers' goals is particularly reprehensible because, after the Report's publication, Hoffman acknowledged privately in a meeting with the APA that he had found no criminal activity.[29] It is revealing that, at another closed-door meeting with the Council, Hoffman acknowledged that terms such as "behind-the-scenes communication" would have been more accurate than "collusion."[30] And, as he knew but does not reveal in the Report, the FBI and Department of Justice had found no criminal wrongdoing after reviewing much the same material that he reviewed.

D. Lack of Independence: Hoffman and Sidley's Alignment with the Interests of Drs. Kaslow and McDaniel, the Non-Recused Members of the Special Committee

200. The Board Resolution authorizing the review outlined the role of the Special Committee:

> [to] ensure that the independent review is completed in a thorough and independent manner.... It is the intent of the Board that this review will be thorough and fully independent. The sole objective of the review is to ascertain the truth about the allegations described above, following an independent review of all available evidence, wherever that evidence leads, without regard to whether the evidence or conclusions may be deemed favorable or unfavorable to APA. The SC shall provide this instruction to the independent counsel.

201. Despite that language, at the beginning of the investigation members of the APA Board suggested (although unsuccessfully) that at least one of the Accusers should be part of the Special Committee.

202. As they stated in public interviews, the lone non-recused members of the Special Committee, Drs. Kaslow and McDaniel, wanted to use the Hoffman Report to "unite" psychology. Their strategy was to blame a "small number of officials" or "small underbelly" of psychologists or "small part of APA" who had been "involved in abusive interrogation techniques" – terms Dr.

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29 http://www.hoffmanreportapa.com/resources/Former%20APA%20President%20Says%20Stephen%20Behnke%20Was%20'Terminated'.mp4

30 http://www.hoffmanreportapa.com/resources/David%20Hoffman.pdf

Kaslow used in an interview with the media – to deflect accountability from them and from the APA's flawed governance procedures.

203. As early as February 2015, Dr. Kaslow discussed having the APA issue an apology. In other words, she had reached a conclusion about the validity of the Accusers' allegations months before the investigation was complete, and she was already fashioning a response.

204. As soon as the Report was received, Drs. Kaslow and McDaniel's agenda was served by the hasty firing of Dr. Behnke, before he had been given adequate opportunity to respond to the attacks against him, and by their public comments about the Report.

205. As they took these steps, Drs. Kaslow and McDaniel were not disinterested parties. As a result of the investigation's expansion, it covered events – such as the ethics reviews and the debate about banning psychologists' participation in the interrogation process – in which they and other members of the Board had been significantly and directly involved. Kaslow and McDaniel had a stake, therefore, in how their roles in those events would be portrayed in the Report. Even Soldz has stated that APA governance officials – not only a "small underbelly" – knew and approved of what was occurring within the APA during the entire period described in the Report.

206. Yet, despite their involvement in the underlying events, they were improperly not named in the Report, as were others with equivalent involvement, and therefore were not recused from the Committee's or the Board's work. As a result, they were protected by a Report they had been intimately involved in overseeing, including approving the expansion of its scope that resulted in payments of more than $4 million to Hoffman's firm.

207. Moreover, they had substantial control over the actions of the Board and the APA in response to the Report. Dr. McDaniel was President-Elect in 2015, when the Report was republished, and President and chair of the Board in 2016 when, against the advice of the Council,

it agreed to pay Hoffman $200,000 to produce a "supplemental" report. Plaintiffs have a statement from a Board member to a third party that other Board members were instructed they could not vote against re-hiring Hoffman.

E. Failure to Follow All the Evidence: Exculpatory Leads

208. The Report ignores entire areas of inquiry that, if presented in the Report, would have fundamentally changed its narrative for a reader. Hoffman failed to interview key witnesses and to explore Plaintiffs' exculpatory evidence because he knew the information would undercut the false narrative he had adopted from Soldz and his colleagues. Yet his obligation was not to "build a case" or present one side of the story, nor was his investigation constrained by time or cost as a journalist might be. As the Board resolution authorizing his investigation stated, he was to undertake "an independent review of all available evidence …."

209. The Report asserts that Hoffman interviewed "individuals from virtually every perspective," including "all the principal APA critics" and "numerous former government officials including key individuals from the CIA and Defense Department." In fact, while he interviewed "all the principal APA critics" (more than 30, according to the Report's list of interviewees), he interviewed far fewer military or former military officials. In spite of his charge to follow all the evidence, he failed to interview others who could have provided evidence critical to his false assertions about the military Plaintiffs' actions and the "existing DoD interrogation guidelines," about which he makes false and extremely damaging factual assertions.

210. Two of the witnesses interviewed, one a former member of the military and the other a civilian working for the Defense Intelligence Agency, have told the Plaintiffs that Hoffman's team focused on issues largely irrelevant to their substantive work and did not focus on their first-hand experience related to the subject of the investigation. One has stated in an affidavit obtained by

Plaintiffs that, as early as December 2014, Hoffman was clearly targeting Dr. Behnke. She has also stated that the interviewer inquired inappropriately into the nature of her personal relationship with Dr. Behnke. In fact, she and Dr. Behnke were only social acquaintances who had met at church and whose work was related.

211. This witness had been honored twice by DoD for her exceptional achievements in conducting and supervising humane interrogations. Had Hoffman's team asked her, she would have given him definitive information about "existing DoD interrogation guidelines" (Hoffman Report, p. 9) and whether "enhanced interrogation techniques were occurring at Guantanamo at the time of PENS" (Hoffman Report, p. 66). She would also have told Hoffman's team that, by the time of PENS, interrogation plans were computerized: interrogators had to choose from a list of permissible interrogation techniques displayed in a drop-down menu, and the list included only techniques listed in the Army Field Manual. None were the "enhanced interrogation" techniques that Hoffman accuses the Plaintiffs to have colluded to allow in June of 2005.

212. Another military witness, Dr. Gelles, has stated in an affidavit obtained by Plaintiffs that, when he asked if Hoffman wanted to discuss the ethics complaint lodged against him, Hoffman asserted it was not relevant. But Hoffman then wrote 10 pages on the subject in the Report, slamming Gelles for unethical conduct in line with the Accusers' prior written accusations against him.

213. Col. Banks strongly suggested that Hoffman speak with Lt. Gen. (Ret.) Eric Schoomaker, a former Army Surgeon General, who would have provided directly relevant information, based on his first-hand involvement, about the ethical analysis that supported the definition of BSCTs' role in the interrogation process. Hoffman acknowledged that was "a good idea" but did not follow up.

214. In addition to failing to pursue questions and conduct further interviews he knew would provide additional credible information directly undercutting his false narrative, Hoffman failed to ask Plaintiffs questions that would have elicited information about their efforts to halt abuses, and failed to follow up adequately when they suggested relevant information. Those failures were especially destructive because they did not know enough about the investigation's new direction to insist on providing that information in the face of his apparent indifference.

215. In his interview, Col. James referred to policies governing interrogations repeatedly and suggested that Col. Dunivin could provide them. Hoffman did not inquire further with Col. James and did not follow up with Col. Dunivin.

216. Col. Dunivin asked Hoffman no fewer than six times by e-mail to provide questions that would allow her to ask for clearance to provide relevant information, including information relevant to regional policies. Despite focusing on an out-of-date policy in her interview, he never provided those questions. Instead, he provided questions designed to get clearance only for discussing the Army Medical Command's BSCT training course, a topic that fit into his pre-determined narrative because he intended to falsely infer that Dr. Behnke inappropriately accepted payment for teaching in that course.

217. At one point, Hoffman told Col. Dunivin in an e-mail that the only relevant facts were about her interactions with the APA. In light of the Report's focus on interrogation policies and conduct, and of his questions about the 2004 BSCT policy as a reference point for APA's allegedly collusive activities, that statement was profoundly misleading. Similarly, Hoffman told Behnke, in response to Behnke's inquiry in a meeting with Hoffman, that the Bush interrogation policies were not relevant. That representation was clearly false given what Hoffman went on to write in the Report.

218. Taken as a whole, this pattern demonstrates actual malice, including purposeful avoidance of lines of inquiry that would have undercut the tale Hoffman spun in the Report.

F. Failure to Provide Standard *Upjohn*-Type Warnings or to Warn Plaintiffs When the Investigation Had Become Adverse to Their Interests

219. When a lawyer conducts an investigation commissioned by an organization, it is standard best practice to give *Upjohn* warnings (the corporate equivalent of *Miranda* warnings). Although *Upjohn* warnings appear most often in interviews with a company's employees as a means of clarifying the client relationship, the principle behind them applies more broadly to any person who might be confused about the interests the lawyer serves.

220. In this investigation, APA members reasonably assumed that a lawyer hired by the APA had some duty towards its membership, especially those who were asked by the APA Board to undertake the work being investigated by Hoffman, and especially to members who are or have been employees (Drs. Behnke and Newman) or who serve in a governance capacity (Colonels James and Dunivin are former members of the APA's governing body, the Council).

221. DC Bar Ethics Opinion 269 describes the scope of a lawyer's obligation to clarify his or her role in an investigation. That opinion is particularly relevant because Plaintiffs Behnke and Dunivin were interviewed in DC, where Hoffman's client is incorporated and where Sidley and the APA have repeatedly (and falsely) asserted that the majority of the investigation took place (emphases added):

> A lawyer retained by a corporation to conduct an internal investigation represents the corporation only, and not any of its constituents, such as officers or employees. Corporate constituents have no right of confidentiality as regards communications with the lawyer, ***but the lawyer must advise them of his position as counsel to the corporation in the event of any ambiguity as to his role.*** ... The corporate constituent being interviewed by a lawyer for the corporation, however, may consider the lawyer as also representing the employee's personal interests, absent a warning to the contrary. ***The employee could understandably conclude that, since he is employed by the corporation and the lawyer has been retained to serve the interests of the corporation, the lawyer would not be pursuing interests***

adverse to those of the employee. Rule 1.13(b) specifically addresses this ***potential for misunderstanding by the corporate constituent by requiring the lawyer to explain the identity of the lawyer's client "when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing."*** Comment [8] to Rule 1.13 advises the lawyer in such a situation to advise any constituent . . . of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain separate representation. ***Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide representation for that constituent individual, and that the discussions between the lawyer for the organization and the individual may not be privileged.***

Disclosure is required not just when an actual conflict exists between the interests of the corporation and those of the employee (for example, when the corporation has already confided to the lawyer that it will concede wrong-doing by the employee but will attempt to avoid corporate responsibility for any illegality). ***Disclosure is also required when there "may be" an adversity between the interests of corporation and employee. There "may be" an adversity when the corporation has not yet irretrievably committed itself to a position in the matter, but where one such position might be adverse to the employee. Such a possible adversity would almost always arise, then, when the corporation is able to take a position adverse to the employee.*** On the other hand, Rule 1.13(b) applies only when the possible conflict is "apparent," which we interpret to mean ***actually apparent to the lawyer or apparent to a reasonable lawyer under the circumstances***. As so interpreted, the obligation of disclosure would not arise in those situations where the lawyer had no reason to believe that there was any possibility of adversity between corporation and employee when the interview was conducted.

222. Hoffman never advised the Plaintiffs that, despite representing the APA, he had no obligation to serve the interests of its individual "constituents." Nor did he advise them that the investigation might be adverse to their interests, even when it had become clear to him that its results would severely damage their careers and reputations.

223. To compound this misdirection, several months into the investigation, the APA's General Counsel advised employees being interviewed that it would "look bad" for them to engage their own lawyers. That advice benefited the APA and Hoffman, but its consequences turned out to be destructive for Dr. Behnke.

224. The Plaintiffs thought Hoffman and Sidley were acting as a neutral, objective third party to determine the facts of their actions, all of which had been undertaken in their roles as APA

employees or persons who were appointed by the APA to become involved in its activities. Several others interviewed by Hoffman's team have stated that they initially had the same belief. However, witnesses have also stated that by the time they were interviewed, as early as one month into the investigation, it was clear that Hoffman had an agenda to attack the Plaintiffs.

VII. HOFFMAN AND SIDLEY WROTE THE REPORT IN A MANNER THAT FURTHER DEMONSTRATES ACTUAL MALICE

A. The Report Conflates DoD and CIA Policies

225. Hoffman repeatedly ignored the critical distinction between DoD and CIA policies at the time of PENS. Those policies had dramatically diverged and were governed by different OLC memos as well as by differing organizational policies. However, instead of analyzing the DoD policies in place at the time that prohibited abusive techniques, Hoffman cites the CIA policies that allowed for abusive interrogation methods. Because his conclusion dealt solely with the DoD, his focus on the irrelevant CIA policies to support his false conclusions is additional evidence of actual malice.

226. This conflation of policies has resulted in ongoing damage to the Plaintiffs in the media. It has enabled the Accusers, including James Risen in *The New York Times*, to continue to contend that the APA did in fact "collude" with the CIA and to attribute the CIA's attitude towards acceptable interrogation techniques to military psychologists (and therefore the Plaintiffs). These claims persist despite the Report having found no evidence that the CIA had any effect on the PENS debate.

B. The Report Relies Repeatedly on Over-Statements, Misstatements, and Unsupported Inferences

227. Throughout the Report, Hoffman not only constructs a false narrative upon the facts, but also engages repeatedly in forms of over-statement, misstatement, unsupported inference, and loaded and misleading terminology to falsify what actually happened. Where the facts may be open to more than one explanation, he consistently chooses the one that portrays the Plaintiffs in the worst light and provides the most support for his and the Accusers' narrative.

228. This pattern constitutes actual malice. Here are a few examples:

229. *Example One*: Hoffman makes much of the fact that Banks and Behnke communicated frequently, and that some of their e-mails had headings such as "for your eyes only." In the pre-determined context of Hoffman's narrative, those exchanges are portrayed as collusion for bad purposes. In the real world, they are exchanges between an APA official who could not set APA policy and a military officer who had no authority to speak for the DoD.

230. In particular, Hoffman cites a few e-mails from Col. Banks that he asked Dr. Behnke to delete after reading. Col. Banks had no authority to speak outside the chain of command or take positions that might be construed as representing the DoD's position, especially at a time when the debate over interrogations was so heavily politicized. His concern about the e-mails demonstrates only concern for military protocol.

231. Hoffman ignores this correct and innocent explanation in favor of his false and defamatory interpretation.

232. Even more unjustifiably, he builds upon these exchanges a tower of speculative inference: the two agreed "to destroy the records of their conversations" and "Banks began instructing Behnke to delete their messages …." He then says that the facts "strongly" suggest that "records were destroyed in an attempt to conceal the collaboration" (Hoffman Report, p. 396).

233. Hoffman knew the facts indicated that his inference was false. First, Dr. Behnke archived all of his e-mails and placed them in a folder on the APA server to which Hoffman had access. Second, in early February 2015, over two months into the review, Hoffman hired a third-party vendor to image Dr. Behnke's hard drive. If there were deleted e-mails, the vendor (which touts its forensic capabilities in internal investigations on its webpage) could have retrieved them. Hoffman omits this information from his methods section (Hoffman Report, pp. 6-7).

234. Given these facts, and the absence of any evidence that Col. Banks and Dr. Behnke wished to hide their ongoing communications for an improper purpose, Hoffman's inference is intentionally false, reckless, and damaging.

235. *Example Two*: Hoffman discusses payments by the DoD for ethics workshops conducted by Dr. Behnke, suggesting that Dr. Behnke may have been improperly compensated by the DoD directly. He states:

> The evidence (on file with Sidley) appears to show that the payments, ranging from $1250 to $5,000 per class, were made to APA, not Behnke, except for two instances when Behnke said he received the payments directly and wrote APA a check for the payment amount less his expenses, although there is some contracy [sic] evidence as DoD had Behnke's bank account information, presumably for direct deposits. Our investigation was still receiving evidence from APA on this issue at the time of our report. (Hoffman Report, p. 37, footnote 22)

236. Had Hoffman asked Dr. Behnke for documentation regarding these mistaken payments, Behnke would have provided photo copies of the cancelled checks reimbursing APA. If Hoffman had requested information about the payments from the persons at the APA who were in charge of administering that DoD training contract, he would also have been confronted with the facts. But his team never interviewed them, despite his stating that he performed an "in-depth analysis" of the financial issues.

237. By leaving open the inference that Dr. Behnke took money from the DoD, Hoffman has caused significant damage to Behnke's reputation. In August of 2016, the inference was picked up by a blogger, Jeffrey Kaye, and tweeted to over 3,000 people: "Recently I found former APA Ethics Director Behnke received $10,000s [sic] for consulting for & teaching Guantanamo BSCTs."

Invictus

"Sole judge of truth, in endless error hurl'd"

Psychologist Association Ethics Chief Paid $10,000s f[...] Training Advisers to Guantanamo Interrogations

Back in May 2015, I broke the story that the American Psychological Association's "long-time Ethics Director Stephen Behnke worked directly with Department of Defense officials in creating a training curriculu[...] working with interrogators [...] elsewhere." The issue was [...] July 2015 "independent review" on APA collaboration with the Department of Defense, CIA, and FBI on national security interrogations released by David Hoffman and co-workers at the law firm Sidley Austin (see PDF for full report).

The Hoffman report did a decent job looking at Behnke's work with the Department of Defense on the establishment and training of

238. Moreover, despite Hoffman's assertion that the Board did not know about Dr. Behnke's DoD workshops (Hoffman Report, p. 38), Hoffman had in his possession at least one e-mail that clearly showed the APA CEO, a Board member, was made very aware of the ethics workshops. Hoffman was directed to that e-mail, in fact, by the APA's COO, Michael Honaker, after his interview with Hoffman discussing the Board's knowledge of the workshops. Hoffman omits this information from his Report, instead claiming the CEO was unaware of the workshops.

239. *Example Three*: In order to create collusion between two organizations, the DoD and the APA, Hoffman overstates the ability of the Plaintiffs to control events and to speak for their organizations. For example, he states that Dr. Behnke "regularly sought and received pre-clearance

from an influential, senior psychology leader in the U.S. Army Special Operations Command before determining what the APA's position should be, what its public statements should say, and what strategy to pursue on this issue."

240. All of the military Plaintiffs were mid-level DoD personnel, with no ability to commit the DoD to policy positions, to speak for it, or to give "pre-clearance" on its behalf. Banks, the "senior" leader to whom Hoffman refers, could have been accurately described as an informal liaison between the APA and one of its important constituencies, military psychologists. He could not speak for that constituency, of course, without taking into account military protocols, hierarchies, and preferences.

241. If Hoffman had wanted to pursue the truth about the military Plaintiffs' role, he would have easily found it. Two former Army Surgeon Generals, Maj. Gen. (Ret.) Kevin Kiley (whom Hoffman interviewed) and Lt. Gen. (Ret.) Eric Schoomaker (to whom Col. Banks pointed Hoffman), have told Plaintiffs' counsel that Banks, Dunivin, and James could not set policy or speak on behalf of the DoD. Reflecting that fact, DoD has taken the position that the military Plaintiffs were not acting in their official capacities when they participated in PENS.

242. Likewise, Dr. Behnke was in a mid-level APA staff role without a vote on any governance body. He was thus in no position to "determine" the APA's position. He had no more influence over decisions made by the Council and the Board, and no more ability to influence the course of their debates, than any other APA staff member whom the APA leadership chose to consult.

243. *Example Four*: The Hoffman Report accuses Dr. Newman of having an "obvious" and "classic" "conflict of interest" that was not adequately disclosed with regard to his participation on the PENS Task Force because of his marriage to Col. Dunivin (Hoffman Report, pp. 13-14).

244. Dr. Newman had disclosed the marriage to his Board and his superiors as well as to many others. In October 2002, in fact, a news item in the *Monitor*, the official publication of the APA which is sent to all members, reporting Col. Dunivin's recent promotion identified her as Dr. Newman's wife and listed his position with the APA.[31] Many members of the Task Force were aware of the relationship, and the APA had no conflict of interest policy at that time or at the time of PENS which prohibited Dr. Newman's participation in the Task Force as an observer.

245. Moreover, in 2004, before the PENS Task Force was approved by the Board, Ms. Nathalie Gilfoyle, then the APA General Counsel, requested an opinion from PricewaterhouseCoopers about whether the marriage constituted a conflict that would prevent Col. Dunivin from serving on a different APA committee. The opinion concluded that the marriage did not in itself create a conflict, that potential conflicts could be dealt with on a case-by-case basis, and that full disclosure would minimize the risks.

246. In a footnote, the Report notes that the conflict issue had been raised previously and cites, but does not describe, a document buried in the Report's binders that summarized the PricewaterhouseCoopers opinion's guidance. Although the opinion was requested before the PENS meetings to address a different situation, it was clearly relevant, especially since the General Counsel was aware of it at the time of PENS and could have objected if she believed there was an actual conflict.

247. There was no actual conflict, despite Hoffman's claims. Col. Dunivin was not a member of the PENS Task Force, did not attend the Task Force meetings, and did not participate in its deliberations at all. Although she proposed members for it, the decisions about whom to include were made by others.

[31] http://www.hoffmanreportapa.com/resources/Reference%2014.pdf

248. As a non-voting observer, Dr. Newman was not a member of the Task Force or of its listserv and did not help to draft its report. A review of the notes of the Task Force meetings finds that he spoke less frequently than many others, and his comments were appropriate for his position as the Executive Director for Professional Practice and for his duty of loyalty to his employer. A review of Dr. Arrigo's notes, on which Hoffman relies extensively to create his false narrative, shows that Dr. Newman spoke only 22 times over the course of three days, less than others in attendance. For example, Dr. Robert Fein, whom Hoffman characterizes as having "offered few comments during the PENS meetings," spoke 27 times in the two days for which he was present (Hoffman Report, p. 251).

249. *Example Five:* Hoffman is so far removed from neutrality that he explicitly takes sides on a critical policy issue: can military psychologists help both to make interrogations effective and to prevent abuses? The Accusers and the head of the Special Committee said "no," and Hoffman agrees (Hoffman Report, p. 27). On the basis of no evidence except his intuition, he thus accepts a core assumption that drove the Accusers' most damaging claims: military psychologists were necessarily complicit in abuses and so were the APA officials who failed to disagree with them.

VIII. THE INSTITUTIONAL DEFENDANTS' AND SOLDZ'S ACTIONS SURROUNDING AND AFTER THE REPORT'S PUBLICATION PROVIDE FURTHER EVIDENCE OF ACTUAL MALICE

A. On Information and Belief, Hoffman and Soldz Leaked the Report to *The New York Times* Before the APA Board Authorized Its Publication and Before Plaintiffs Had Reviewed It

250. Evidence in the Plaintiffs' possession strongly indicates that Soldz and Hoffman separately leaked the Report to James Risen of *The New York Times* before the APA Board had authorized its release and before Plaintiffs had had time to review and respond to it. In fact, two Plaintiffs discovered that the Report had been completed and was attacking them only when they read Risen's article about it in the *Times*. Soldz's and Hoffman's intention was to create as much publicity as possible for the Report, with the result that Plaintiffs would be convicted in the press before being able to defend themselves against its false accusations.

251. *Soldz:* Within a day of receiving the Report on June 27, at Hoffman's suggestion the APA Board gave Soldz and Reisner online read-only access to it before it had been distributed even to the Council, APA's governing body. At that point, Hoffman and members of the Board knew that Soldz had been an ongoing source of documents and information for Risen's reporting. It was entirely foreseeable, therefore, that he would give Risen the Report. Even before the Report's completion, Soldz had led a drive to petition the APA to release it as soon as it was completed, without waiting for it to be reviewed within the APA.[32]

252. Soldz and Reisner met with the Board on July 2. According to an article by Ghislaine Boulanger, one of the Accusers who worked with Soldz and Reisner, "Originally the APA had claimed that they would release the report after the Board of Directors had had an opportunity to

[32] https://www.facebook.com/Ricardo.Rieppi.PhD/posts/835537553166573

review it, but when it was not forthcoming, it was leaked to and released by the *New York Times*."[33] According to a tweet from James Risen's son, Risen was working on his article during his family beach vacation over the July 4 weekend, by when he had online access to the Report. Plaintiffs have oral testimony from a third-party APA member that Reisner told him that Soldz was the person who leaked the Report to Risen.

253. *Hoffman:* The form of electronic access that, on information and belief, was given to Risen by Soldz did not allow the Report to be printed, transferred into a .pdf, or otherwise downloaded. Nevertheless, on July 10, a copy of the Report was published on the *Times'* website as a .pdf. The metadata within that document point directly to Hoffman as the source.

The data show the following:

- On July 7, a Word file of the Report was put into the *Times'* .pdf file, using a different program than the program used by the APA when it put the Report into the .pdf ultimately posted on its website. Between July 2 and July 7, according to several representations made by APA's counsel, only Hoffman and APA's outside attorney had access to a Word file that could be printed or saved into another document. APA's outside counsel has also represented that the document, during this time, "was not e-mailed to anyone."
- Metadata which remain in the *Times'* .pdf version demonstrate that the underlying Word document was repeatedly revised on July 1 and 2 by David Hoffman and a Sidley project assistant and paralegal also based in their Chicago office.
- The metadata also indicate that the Word document was not printed or saved by anyone between July 2 and July 7, and no changes were made to it in that period.

[33] https://onlinelibrary.wiley.com/doi/full/10.1002/aps.1518, fn 1

254. The leaks not only gave the *Times* an exclusive of which it was sure to make the most, as it did by giving Risen's article the lead position in its July 11 edition. Predictably, other media raced to catch up, with the focus on speed rather than careful reporting. The leaks also ensured that the APA would not have time to review the Report before being forced to release it, and that the Plaintiffs would be overwhelmed by the media firestorm without having an opportunity to respond to Hoffman's false accusations.

B. Drs. Kaslow and McDaniel Knew that Two of the Report's Primary Conclusions Were False or Acted with Reckless Disregard of Whether They Were False

255. As previously noted, Drs. Kaslow and McDaniel and four other members of the Board who voted to republish the false and defamatory allegations in the Hoffman Report held significant leadership positions in the APA throughout the period between 2005, the time of the PENS meetings, and 2014, when the Board reviewed the Leso ethics matter. Drs. Kaslow and McDaniel were on Council or the Board from 2006 through 2014. Dr. Kelly served on Council or the Board for the entire period of 2005 through 2014. Dr. Douce served on Council from 2006 through 2011 and on the Board in 2013 and 2014. Drs. Prescott and McGraw served on Council or the Board from 2008 and 2010, respectively, through 2014. (Drs. Douce, Kaslow, McDaniel, Kelly, Prescott, and McGraw collectively, the "Interested Directors."

256. Their participation in underlying events gave the Interested Directors first-hand knowledge of many of the events the Report described. When they republished the Report, they knew that many of the underlying events in which they had participated were distorted, mischaracterized, or omitted in order to create a false and destructive narrative to attack the Plaintiffs. That knowledge establishes that, at a minimum, the Board acted with reckless disregard on each occasion when it republished the Report's defamatory contents.

257. The Interested Directors were under a duty to disclose to other Directors who did not have such knowledge their participation in those underlying events, and the impact of the Report's distortions, mischaracterizations, fabrications, and omissions on its conclusions. Additionally, those Directors' knowledge made the APA's reliance on Hoffman and Sidley unwarranted.

258. As the APA Board knew, the majority of the material in Hoffman's Report had previously been reviewed or adjudicated by other credible entities, including the Senate Armed Services Committee, the FBI, the Department of Justice, the Ohio Board of Psychology, and the New York Board of Psychology. None of those entities had ever found any wrongdoing by Plaintiffs or any others mentioned in the Report. Hoffman and Sidley omit that history in the Report, and the Board was aware of those exculpatory findings by other entities and Hoffman and Sidley's omissions when it republished the Report.

259. In sum, given Board members' significant and material involvement in many of the events Hoffman investigated, the Board knew of the Report's distortions, fabrications, and omissions when it republished three versions of the Report on multiple occasions.

260. For example, the second of the Report's three primary conclusions was that the Plaintiffs and others engaged in "a pattern of secret collaboration" to prevent the APA from banning psychologists from participating in national security interrogations (Hoffman Report, p. 9). Because of Drs. Kaslow and McDaniel's involvement in APA governance in 2006-2014, they were intimately involved in the series of open debates about this issue that took place in Council meetings, at an APA convention, and in other forums over the years.

261. Moreover, from 2008 to 2010, Dr. McDaniel was on the Committee for the Advancement of Professional Practice, which opposed the moratorium on psychologists' participation in national

security interrogations that was proposed in 2007. Dr. Kelly was chair of the Board of Professional Affairs when that body voted that the Council should not adopt the 2007 moratorium resolution.

262. These Board members also knew that, given the APA's governance structure, the Plaintiffs could not have determined the outcome of these debates. They knew that Dr. Behnke did not speak on behalf of the APA. And they knew of the APA's previous and unequivocal statements that specifically contradict Hoffman's second conclusion, as well as his other major factual assertions.[34] Those statements were issued with their approval and still sit today on the APA's website. They therefore knew the Report's second conclusion to be false or acted with reckless disregard of whether it was false.

263. The third primary conclusion was that "ethics complaints against prominent national security psychologists [were] handled in an improper fashion, in an attempt to protect these psychologists from censure" (Hoffman Report, p. 10).

264. As described earlier in the Complaint, in January and February 2014, because of renewed controversy over the handling of the complaints and in particular the complaint against Major John Leso, the Board received two special briefings about the closing of the Leso complaint. Dr. Kaslow, the 2014 president of the APA, then asked the APA staff to draft a statement from the Board that listed the voluminous evidence that had been considered, the care taken with the complaint's handling, and the sound reasons for its dismissal. She was further personally involved in revising that document and the preparation of an additional statement.

265. As a result of the 2014 review, Drs. Kaslow and McDaniel, along with three other members of the 2014 Board who were also members in 2015, possessed knowledge that demonstrated the Report's conclusion about this matter to be false when they republished it on each occasion.

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[34] http://www.apa.org/news/press/response/globe.aspx

C. The APA Board Republished the Report Hastily and Without Adequate Review

266. At the August 2016 meeting between former Board presidents and current Board members, current members acknowledged that their actions had been impulsive and not thought through, and that the Report contained many inaccuracies. In sum, the Board abdicated its duty of care in its rush to accept, act on, and republish the Report.

267. Within 24 hours of receiving the draft Report on June 27, 2015, the Board, on the advice of Hoffman, republished it to two of the most vocal and active Accusers (Drs. Soldz and Reisner) under a promise of confidentiality.

268. The Board then met with Soldz and Reisner on July 2 in Washington, DC, and listened to a presentation by them about how the APA should respond to the Report. On July 4, Soldz and Reisner took to social media, using the hashtag "torture" and claiming they had been "consulted" by the Board.

269. The Board knew about the Accusers' animus towards the Plaintiffs over the course of nine-plus years. For example, Dr. Soldz had publicly expressed racial animus toward James in an online interview, stating that he got his job partly because he was "black," that "he doesn't show up for work," and that he "can't write an English sentence."

270. The Board also knew about the Accusers' active engagement with the press during the course of the investigation. For example, Hoffman, the Special Committee, and the Board knew that Soldz and Reisner had worked closely with James Risen just two months earlier to produce a front-page article.[35]

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[35] https://www.nytimes.com/2015/05/01/us/report-says-american-psychological-association-collaborated-on-torture-justification.html;http://www.apa.org/news/press/response/new-york-times.aspx;https://www.nytimes.com/2015/05/02/opinion/the-psychologists-and-the-torturers.html

271. Upon information and belief, the Report was given by Soldz to James Risen on or before the July 4 holiday weekend, almost immediately after Drs. Soldz and Reisner met with the Board in Washington, DC, where Risen worked in the Washington Bureau of *The New York Times*.

272. On July 2, 2015, Hoffman and Sidley sent a copy of the final Report to the APA Special Committee and the Board, including to a recused Board member, Dr. Bonnie Markham.

273. On information and belief, between July 2, 2015 and July 7, 2015, David Hoffman provided a Word file of the Report to Risen.

274. Risen wrote about the Report in the *Times* in an on-line article on July 10, 2015, and in a front-page article in print on July 11. A copy of the Report itself was republished in full on the paper's website, where it could be downloaded and republished repeatedly, on July 10. Mr. Risen was the first journalist to report the story.

275. Also on July 10, 2015, as a reaction to that publication, the Board immediately voted to republish the full Report on the APA website to the general public. At that point the Council, the APA's governing body, which had received the "final" Report only on July 8, had had less than two days to review it. Until the evening of July 9, it did not have access to the 6,000-plus pages of exhibits, many of which included information that contradicted the Report's conclusions.

276. So hasty was the Board's review and release of the Report that, as many have noted, the APA ignored its own policies that prohibit making deliberations about ethics investigations public.

D. The Institutional Defendants Failed to Give Plaintiffs an Opportunity to Respond to Allegations

277. None of the Institutional Defendants gave any of the Plaintiffs adequate opportunity to respond to the Report's accusations before publishing or republishing it and acting on its conclusions.

278. After having been given approximately 24 hours to respond to the Report's contents, Dr. Behnke registered his objections in writing on July 2, 2015. His attorney, who had been prohibited from participating in a meeting with the APA's acting CEO and Assistant General Counsel regarding a personnel action against Dr. Behnke, voiced similar complaints on July 7, 2015. On July 8, 2015, the APA fired Dr. Behnke, who had worked for it for almost 15 years, without a notice period and without a severance payment, and without allowing him to meet with the Board before it acted.

279. While the Board considered the Report, senior members of the APA staff – including Dr. Behnke – who had information that could have countered its false allegations sat waiting in their offices to be called to speak to the Board. They were never summoned.

280. Col. James received online, read-only access on July 7, 2015, only the day before the Report's release to the APA's 160-plus member Council. Even if that had given him adequate time to respond, which it clearly did not, he was given no forum for lodging his objections.

281. Plaintiffs Banks, Dunivin, and Newman were never even notified that the Report was complete or that it was about to be published.

282. Much later, on October 2, 2015, Jesse Raben, in-house counsel for the APA, sent an e-mail to the Council stressing that the APA wanted those named in the Report to be able to contact Hoffman to contribute to an errata sheet. But the Institutional Defendants never notified the Plaintiffs that the errata sheet was in the works, although the Plaintiffs had objected on multiple occasions to the Report's contents, including to the APA's outside counsel.

283. Despite these failings, the Board repeatedly claimed that it gave those named in the Report full opportunity to respond. In October 2015, for example, Dr. McDaniel asserted in writing to Council that they had had a chance to object to its accuracy.

284. Those claims are false. At the time of the Report's delivery and after its hasty publication, Plaintiffs were given no significant opportunity to respond to its allegations. In their August 2016 meeting with former Board presidents, current members of the Board admitted that to have been the case.

E. Dr. Kaslow's Statements Bolstered the Report's False Conclusions

285. After the Report was published, Dr. Kaslow, in her capacity as the head of the Special Committee, made her views about the allegations against the Plaintiffs clear to the media, including Massachusetts media, thus greatly compounding the damage to Plaintiffs.

286. *First*, on July 11, 2015, in a video interview still online, Dr. Kaslow refers viewers to the Report, which mentions each Plaintiff by name. Dr. Kaslow specifically named Dr. Behnke in that interview, and the video displays Dr. Behnke's name and picture prominently.

287. In the interview, Dr. Kaslow says, "Well, I think that the report which is over 500 pages speaks for itself and there are actually quite a bit of detail regarding Dr. Behnke's involvement with the DoD in ways that were collusive and that unfortunately, very unfortunately, enabled psychologists to be involved in abusive interrogation techniques."[36]

288. Any reasonable person would assume that someone who "enabled psychologists to be involved in abusive interrogation techniques" had a direct role in allowing behaviors that are likely illegal. As Chair of the Special Committee, Dr. Kaslow knew or should have known that accusing military psychologists of involvement in abusive interrogations was tantamount to accusing them of acts that were criminal under military and U.S. law. And, in fact, the video of the interview was titled in some versions *Psychologists May Face Charges for Torture Program.*

[36] https://www.onenewspage.com/video/20150713/3079902/Former-APA-President-Says-Stephen-Behnke-Was-Terminated.htm

289. In order to reach other audiences, the videotape was repackaged and rebroadcast online under the same title. In all, the tape was repackaged at least four times and made available on multiple websites, where it was viewed by Massachusetts residents.

290. *Second*, in another interview, on July 11, 2015, Dr. Kaslow stated publicly to *The Guardian* that the APA had not ruled out referring the Report to the FBI, although Hoffman had said his investigation found no criminal wrongdoing. The article stated:

> … Kaslow said the APA would deliver the Hoffman report to the Senate armed services and intelligence committees and the inspectors general of the Pentagon and the CIA. But she stopped short of committing to referring it to the FBI for potential criminal inquiry, saying Hoffman drew a line short of that in internal discussions. "The issue with the FBI is something we're continuing to discuss," she said.
>
> Stephen Soldz, a longtime critic of the APA's involvement with torture, urged the APA to make such a referral in a meeting the APA held with its dissidents on 2 July in Washington. "We must refer this report and its findings to the FBI and we must cooperate fully in any ensuing investigation," Soldz urged, according to a presentation acquired by the Guardian.[37]

291. In that interview, Dr. Kaslow also stated her opposition to the participation of psychologists in national security interrogations. As Chair of the Special Committee and former president of the APA, her statement inappropriately took sides in an ongoing debate and reinforced the credibility of Hoffman's conclusion that there was collusion to defeat such a ban.

292. Finally, Dr. Kaslow used the Report to scapegoat the Plaintiffs as members of a "small underbelly" of the APA. In interviews and other public forums, she apologized for "horrific" acts on the part of a "small group."

293. Dr. Kaslow's attacks against Plaintiffs in the media included two radio interviews with WBUR in Boston.

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[37]https://www.theguardian.com/us-news/2015/jul/11/cia-torture-doctors-psychologists-apa-prosecution

294. In the first interview on July 11, 2015, headlined ***Leading U.S. Psychologists Secretly Aided CIA Torture Program,*** she said: "The most disturbing finding, to me, was that there was collusion between a small group of APA representatives and government officials, specifically people in the Bush administration and the Department of Defense."

295. In the second interview on July 21, 2015, headlined ***Report Reveals Close Ties Between Psychologists' Association and Pentagon***, she said: "I think it was a small part of the APA that strayed from that mission. And much of APA was very firm and clear in saying that torture was absolutely unacceptable. So I think that unfortunately we didn't realize that there was sort of an underbelly, a small underbelly, that was having, as you said, loose ethical guidelines that may have allowed for psychologists to engage in enhanced interrogations." "I think the report was clear and that the facts of the report speak for themselves on this matter." "In terms of the issue of Dr. Behnke being a scapegoat, I think that the report goes into exhaustive detail about Dr. Behnke's role and the facts really do speak for themselves." [38]

296. Dr. Kaslow and the APA treated other APA staff members also implicated in the Report very differently than they treated Dr. Behnke. The CEO, Norman Anderson, who was also directly implicated, was given a severance payment of $1.375 million and a farewell party attended by Dr. Kaslow. The General Counsel of the APA and other staff members who were also personally implicated in the Report were not fired, but were offered the chance to correct inaccuracies.

F. The Institutional Defendants Made False Claims of Privilege and Work Product

297. Sidley's engagement letter with the APA specifically states that the documents gathered for the Report would not be covered by attorney-client privilege (emphasis added):

> We and the APA agree as follows with regard to the application of privileges to this Representation. **First, except as provided in the sentences in parentheses that follow**

[38] http://www.wbur.org/radioboston/2015/07/21/apa-pentagon

this sentence, the Final Report, and the work we do to gather facts and evidence in order to conduct our independent review and prepare the Final Report (the "Fact Finding Work") will not be covered by, and the APA does not expect to assert a claim of, the attorney-client communication privilege as to those matters. (However, our review of documents with a pre-existing privilege will be covered by the attorney-client communication privilege and will not constitute a waiver of the privilege as to those documents, unless the Board or the Special Committee on behalf of the Board waives the privilege as to specific documents. If we decide that our Final Report should include, quote, describe or cite any such privileged documents, we will let the Special Committee know and request that the privilege be waived so that we can use the document in the Final Report.)[39]

298. However, in a letter to the Council after the Plaintiffs had requested the notes and documents on which Hoffman relied, the Board stated that Hoffman and counsel for the APA had now opined that his notes and other documents are protected by privilege as well as by the work-product doctrine.

299. Even if the engagement letter had not made it clear that privilege would not be claimed, it would still not be available.

300. First, of the 148 interviewees listed in the Report, fewer than 20 could be considered current employees or officers of the APA at the time of their interviews and therefore arguably Sidley and Hoffman's clients.

301. Second, the Institutional Defendants claimed the sole objective of the "independent" review was to determine the truth, and their after-the-fact claims of giving legal advice to the APA (not the Special Committee whose purpose it was to oversee the investigation) are contrary to the facts. Hoffman was hired to find the truth, not to provide legal advice, and the Report states that he made no recommendations (Hoffman Report, p. 72). Moreover, if he had been providing legal advice, as the DC Ethics Opinion referenced above makes very clear, he had an obligation to inform the Plaintiffs, who were constituent members of the corporation to which he was giving

[39] http://www.hoffmanreportapa.com/resources/Sidleyengagementletter.pdf

advice, that he was engaged for that purpose, that he had a fiduciary obligation to act in the APA's best interest, and that the investigation might be adverse to Plaintiffs' interests.

302. Third, the Report relies upon Hoffman's assertions about the content of his team's interviews. As the Complaint has previously described, those assertions that have been contradicted in affidavits from many of those interviewed. In certain places, the Report actually refers the reader to "See" an interview the notes of which he and the APA now refuse to disclose (Hoffman Report, pp. 88, 89, 114, 223, 240, 349).

303. By relying on witness statements and other documents that they withhold from the Plaintiffs, the Institutional Defendants are engaged in an intentional attempt to shield from the Plaintiffs and the public evidence that will directly contradict Hoffman's conclusions and that could allow the Plaintiffs to further demonstrate the Institutional Defendants' actual malice in publishing and republishing their false statements.

304. Moreover, those documents are not protected by the work-product doctrine. There was no threat of litigation, and no legal advice was expected or provided at all, much less in anticipation of litigation. (Plaintiffs have two affidavits from APA Board members attesting to those facts.) Even if the doctrine applied, the protection has been waived: Hoffman relies heavily not only on assertions about what witnesses said, but also at times on his direct sharing of his impression of their credibility.

305. Finally, and most importantly, the Plaintiffs cannot fully or adequately rebut Hoffman's claims without access to the documents, which would further demonstrate that he acted with actual malice. They are being wrongly withheld by Hoffman, Sidley, and the APA on the basis of false claims of privilege and work product protections, in order to further purposefully avoid the truth.

G. The Institutional Defendants Failed to Respond to Evidence of the Report's Falsity

306. Since the Report's publication, documents and other evidence put forward by the Plaintiffs and others within the APA have led many of its members – by no means only the Plaintiffs – to conclude that the Report got the facts wrong, that Hoffman was far from objective or reliable in his conduct of the investigation, and that the Report's conclusions are false.

307. Soon after the Report was published, the Plaintiffs pointed to facts that contradicted those conclusions.

308. Plaintiffs Banks, Dunivin, James and Newman objected to the contents of the Report in a post on the APA's website on July 31, 2015. On August 3, their counsel contacted the APA's outside counsel about those objections. Documents that Hoffman ignored or that otherwise undercut his false conclusions have been posted on a public website since October 25, 2015.[40]

309. On October 26, 2015, David Ogden, the APA's outside counsel was specifically directed to material that undercut the majority of the Report's findings, including the facts outlined in the Department of Justice, Office of Professional Responsibility Report that chronicled the timing and substance of the OLC memoranda, including the relevant DoD legal guidance.[41] In his role as Deputy Attorney General of the United States from 2009 to 2010, Mr. Ogden was one of only a handful of people initially privy to the Department of Justice, Office of Professional Responsibility Report and the facts surrounding the timing and the issuance of the relevant memoranda. Mr. Ogden's knowledge of facts directly contradicting the Report may be imputed to his client, the APA.

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[40] www.hoffmanreportapa.com

[41] http://www.hoffmanreportapa.com/resources/RESPONSETODAVIDHOFFMAN1026.pdf at p. 5.

310. In a June 8, 2016, open letter, the APA's division for psychologists in independent practice (not military psychologists), one of its largest, passed a vote of no confidence in the Board based on the Board's response to the Report.

311. In a June 11, 2016, open letter, eight former APA presidents summarized the concerns expressed by four of the APA's divisions and others as including "an apparent failure to properly vet [the Report], failure to protect the rights and reputations of those portrayed negatively, lack of due process for employees who were forced to resign, and more."

312. In the former presidents' August 2016 meeting with then-current Board members involved in the investigation, the current members made the following admissions:

- The Board acknowledged that the report contains many inaccuracies.
- Board members seemed to acknowledge there was no evidence that APA officers colluded with the government.
- While former presidents were repeatedly and erroneously accused of supporting or suborning torture and seeking to weaken the ethics code, the Board never attempted to correct those impressions and remained silent.
- Those named in the report had no meaningful opportunity to correct or respond to those allegations.

313. Since the Report's publication, however, neither Hoffman nor the APA Board (led until the end of 2016 by Dr. McDaniel, one of the two non-recused members of the Special Committee) has taken any effective steps to correct its demonstrated factual distortions, omissions, and fabrications, or to adequately address the Plaintiffs' objections. Hoffman's sole response has been the incomplete errata sheet issued on September 4, 2015, with the corrections incorporated into a revised Report published on the same day. Hoffman and Sidley refuse to correct the Report's inaccurate portrayal of military policy despite having been given clear and direct evidence of Hoffman's purposeful distortions, omissions, and fabrications.[42]

[42] http://www.hoffmanreportapa.com/resources/RESPONSETODAVIDHOFFMAN1026.pdf

314. The APA continues to display two versions of the Report prominently on its website, despite the Board members' admissions that it contains inaccuracies and despite repeated requests from Plaintiffs' counsel, most recently in September 2017, to remove them.

315. Although the APA asserts it cannot and has no obligation to remove either version of the Report from its website, Plaintiffs' counsel has provided the APA's and Sidley's outside counsel with clear, specific precedent that holds unequivocally, as does hornbook law, that continued display of the Report with knowledge of its falsity can be considered evidence of actual malice, including purposeful avoidance of the truth.

316. On January 30, 2017, in a conversation with a leader of the APA's military psychology division to which the three military Plaintiffs belong, APA President Dr. Antonio Puente admitted that the Board had gone overboard in its actions responding to the Report. He also stated that, after the Plaintiffs' litigation ends, the division would receive what he described as a favorable response to its detailed and thorough critique of the Hoffman Report, a critique that clearly demonstrated the Report's falsehoods.[43] At the same time, however, he threatened the division with adverse consequences if it helped the Plaintiffs.

H. The APA Rehired Hoffman Despite Conflicts

317. On April 15, 2016, the APA Board announced that Hoffman had been re-engaged – for additional compensation – for the limited purpose of reviewing only the military policies the Plaintiffs provided, rather than all the evidence that contradicts the Report's conclusions.[44]

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43 http://www.hoffmanreportapa.com/resources/TF19%20Response%20to%20the%20Hoffman%20Report.pdf

44 http://www.apa.org/news/press/releases/2016/04/independent-review.aspx

318. The re-hiring flew in the face of a "straw" vote at the February 2016 Council meeting that advised the Board not to re-hire Hoffman because of the obvious conflict in asking the Report's author to review its errors.

319. Since the re-hiring, in an open letter to the Board, ten former chairs of the Ethics Committee stated that the re-hiring raises significant concerns about a potential conflict among the interests of the APA Board, the APA membership, Hoffman and Sidley. The potential conflict arises from the tension between objectively assessing the Report's accuracy and protecting the reputation and other personal interests of those involved in the investigation and Report – including the APA Board members as well as Hoffman and Sidley.

320. Despite this potential conflict, throughout 2016, her tenure as APA president, Dr. McDaniel continued to be one of only two APA Board members in charge of matters related to announcements concerning the Report and important Board deliberations about its contents. According to statements from APA Board members to third parties, the full APA Board was not informed for many months as to the status of discussions with the Plaintiffs, including their settlement offers.

321. Through early 2017, the APA continued to assert that Hoffman would produce a "supplemental" report that had been due on June 8, 2016. There has been no public explanation of its absence. In a court filing, however, Hoffman and Sidley have asserted that, although Plaintiffs first contacted Sidley directly and this litigation was commenced only after the supplemental report was due, the prospect of litigation inhibited "further speech" that presumably included correcting acknowledged errors and omissions.

IX. ONGOING DAMAGES TO PLAINTIFFS

322. All Plaintiffs have lost employment opportunities as a result of the Report's false and defamatory allegations. The accusations also caused severe damage to the professional and personal reputations of all the Plaintiffs, damage that has been public and sustained.

323. The damage has continued to this day. Dr. Trudy Bond, one of the Accusers, has repeatedly submitted information to the United Nations Committee Against Torture, mentioning Col. James specifically in those documents and encouraging prosecutions. On June 27, 2016, Dr. Bond, relying on the Hoffman Report, again asked the Committee to move forward with the prosecutions. She has also submitted the Report in support of war crimes prosecutions to the International Criminal Court (ICC).

324. The damage done by these submissions has been increased because the Institutional Defendants have taken no steps to acknowledge or correct the false statements in the Report, misstatements that its Board members have acknowledged and for which Plaintiffs and others have provided documentary evidence. Although the Institutional Defendants are aware of the submissions to the U.N. Committee and the ICC, the two versions of the Report on the APA's website carry no warning labels nor any indication that Hoffman was rehired to fix them, leading the uninformed to conclude incorrectly there is no question about their reliability.

325. Meanwhile, Soldz has continued to make false and defamatory statements in the media about military psychologists in general and Plaintiffs specifically. In those statements, which go beyond even the false allegations in the Report, he continues to press for prosecutions. While the APA has excluded other Council members from participating in Council activities if they publicly support Plaintiffs, and has threatened retaliation for that support, it continues to allow Soldz to participate in the Council's activities despite his ongoing stream of false attacks.

326. In February 2018, the APA's counsel falsely represented to members of the APA that the APA is working diligently to attempt to settle the matter with Plaintiffs and that Plaintiffs are unwilling to settle. Plaintiffs have publicly documented their offers to settle the matter,[45] including most recently through a request to mediate, each of which the APA has ignored or expressly rejected. Sidley did not respond to Plaintiffs' request to mediate.

327. The Institutional Defendants and Soldz have repeatedly refused to take any steps to repair or mitigate the damage to Plaintiffs. Plaintiffs' claims are not based on the exercise of the Institutional Defendants or Soldz's First Amendment rights, or asserted in order to "chill" any of their rights to legitimate petitioning activities. Plaintiffs' primary motivation in making each of the claims set forth herein is to seek damages for the personal harm to each of them from the Institutional Defendants' and Soldz's legally transgressive acts.

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45 http://www.hoffmanreportapa.com/resources/Open%20Letter%20to%20APA%20Membership%20.pdf

X. COUNTS 1-19

<u>COUNT 1</u>

(Defamation *Per Se* for the False and Misleading Statements in the Draft Hoffman Report Published by Hoffman and Sidley on June 27, 2015, to the APA Special Committee and Board, Including a Board Member in Massachusetts) All Plaintiffs against Hoffman and Sidley

328. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

329. On June 27, 2015, Hoffman and Sidley published a draft of the Hoffman Report, without the exhibits, to the Special Committee and the Board of Directors of the APA (including recused members).[46] The Board included a member resident in Massachusetts. The Report was subsequently republished to additional parties as detailed below.

330. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

331. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

332. These statements are false.

333. By publishing the statements, Hoffman and Sidley intended to cause harm and, in fact, did cause harm to the Plaintiffs' reputations.

334. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

335. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

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[46] See fn 1 of the Report: "We [Hoffman and Sidley] are providing our report to the APA Board…."

336. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

337. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

338. At all times, Hoffman was acting on behalf of the affiliated Sidley partnerships. Hoffman was the only partner of Sidley referenced in public materials about the Report, and he signed the cover letters publishing the Report on each occasion where a letter was included with the Report.

339. Hoffman and Sidley had no privilege to publish the false and defamatory statements or, if they did, Hoffman and Sidley abused that privilege.

340. At the time of publication, Hoffman and Sidley knew these statements were false or recklessly disregarded the truth.

341. At a minimum, Hoffman and Sidley had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false.

342. Hoffman and Sidley purposefully avoided the truth, and purposely avoided interviewing sources and following fundamental investigative practices in order to avoid the truth.

343. Hoffman and Sidley's conduct amounts to actual malice.

344. These defamatory statements have been repeated and republished in major media outlets. That republication was reasonably foreseeable, because the engagement letter between the Institutional Defendants provided that the Report would become public without modification.

345. Hoffman and Sidley's false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

346. Hoffman and Sidley are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

347. Hoffman and Sidley are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 2

(Defamation *Per Se* for the False and Misleading Statements in the Draft Hoffman Report Published by the APA Special Committee and Board on June 28, 2015, to Drs. Soldz and Reisner) All Plaintiffs against the Institutional Defendants

348. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

349. On June 28, 2015, within 24 hours of receiving a draft of the 542-page Hoffman Report, the Special Committee and Board, at Hoffman's urging, published a "draft" of the Report to Drs. Soldz and Reisner, with knowledge they were collaborating with a *New York Times* reporter.

350. At the time he received the Report, Dr. Soldz was not a member of the APA.

351. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

352. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

353. These statements are false.

354. By publishing and republishing the statements, the Institutional Defendants intended to cause harm and, in fact, did cause harm to Plaintiffs' reputations.

355. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

356. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

357. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

358. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

359. The publishing of the Report by the members of the Special Committee and Board to Drs. Soldz and Reisner was carried out by those individuals in their official capacities as members of the Special Committee and the APA Board. The APA published the Report in advance to Drs. Soldz and Reisner on the advice of Hoffman.

360. The Institutional Defendants had no privilege to publish or republish the false and defamatory statements or, if they did, the Institutional Defendants abused that privilege.

361. At the time of publication, the Institutional Defendants knew these statements were false or recklessly disregarded the truth.

362. At a minimum, the Institutional Defendants had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republishing them.

363. The Institutional Defendants' conduct amounts to actual malice.

364. These defamatory statements have been repeated and republished in major media outlets. That republication was reasonably foreseeable, because the Institutional Defendants knew Soldz had collaborated with *The New York Times* reporter whose allegations had sparked the investigation.

365. The Institutional Defendants' false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

366. The Institutional Defendants are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

367. The Institutional Defendants are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 3

(Defamation Per Se for the False and Defamatory Statements Published by Soldz to the APA Board on July 2, 2015, and Republished Extensively by Soldz on Publicly Accessible Websites) All Plaintiffs against Soldz

368. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

369. Sidley and Hoffman published a draft of the Hoffman Report on June 27, 2015, to the Special Committee and Board of the APA (including recused members). At Hoffman's urging, the Institutional Defendants republished it on June 28 to Dr. Soldz (at that time not an APA member).

370. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

371. Soldz made additional false and defamatory statements to the Board that went beyond the Report's findings.[47]

[47] https://www.counterpunch.org/2015/07/13/opening-comments-to-the-american-psychological-association-apa-board-of-directors/

372. Soldz published those statements widely through the media, intending for them to be read in Massachusetts by Massachusetts residents, in order to harm the reputations of the Plaintiffs in Massachusetts.

373. These defamatory statements by Soldz were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

374. These statements are false.

375. By publishing and republishing the statements, Soldz intended to cause harm and, in fact, did cause harm to Plaintiffs' reputations.

376. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

377. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

378. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

379. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

380. Soldz had no privilege to publish or republish the false and defamatory statements or, if he did, he abused that privilege.

381. At the time of publication, Soldz knew these statements were false or recklessly disregarded the truth.

382. At a minimum, Soldz had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore was required to investigate their veracity before publishing or republishing them.

383. Soldz's conduct amounts to actual malice.

384. Soldz's false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

385. Soldz is liable to the Plaintiffs for compensatory damages arising out of his defamation of Plaintiffs.

386. Soldz is liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 4

(Defamation *Per Se* for the False and Misleading Statements in the Draft Hoffman Report Published on or about July 2, 2015, to James Risen and *The New York Times*)
All Plaintiffs against the Institutional Defendants and Soldz

387. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

388. Sidley and Hoffman published a draft of the Hoffman Report on June 27, 2015, to the Special Committee and Board of the APA (including recused members). At Hoffman's urging, APA republished it on June 28 to Dr. Soldz (at that time not an APA member).

389. On information and belief, according to statements to third parties and the public, electronic access to a true and correct copy of the Report was given to James Risen of *The New York Times* by Soldz on or about July 2, 2015.

390. Soldz provided further false information to Risen that caused him to write a false and defamatory article accompanying the *Times'* full publication of the Report on the website on July

10, 2015, and an article that appeared in print on July 11, 2015.[48] Based upon Soldz's false information, Risen's article included false information linking the APA and the Plaintiffs to abusive CIA interrogations and to torture, claims not supported by the Report itself.

391. Soldz employed the Report to continue to make these false allegations in the media.

392. The Report and Soldz's statements to the Board and press following the Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.[49]

393. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

394. These statements are false.

395. By publishing and republishing the statements, the Institutional Defendants and Soldz intended to cause harm and, in fact, did cause harm to Plaintiffs' reputations.

396. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

397. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

398. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

399. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

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[48] https://www.nytimes.com/2015/07/11/us/psychologists-shielded-us-torture-program-report-finds.html
[49] https://www.counterpunch.org/2015/07/13/opening-comments-to-the-american-psychological-association-apa-board-of-directors/

400. Hoffman and other individuals who were members or employees of an Institutional Defendant were at all times acting on behalf of their respective organization or firm.

401. None of the Institutional Defendants nor Soldz had any privilege to publish or republish the false and defamatory statements or, if they did, the Institutional Defendants and Soldz abused that privilege.

402. At the time of publication, the Institutional Defendants and Soldz knew these statements were false or recklessly disregarded the truth.

403. At a minimum, the Institutional Defendants and Soldz, had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republishing them.

404. Sidley and Hoffman purposefully avoided the truth, and purposely avoided interviewing sources and following fundamental investigative practices in order to avoid the truth. The APA Special Committee charged with overseeing the investigation and led by Dr. Kaslow failed ensure Hoffman was following appropriate practices and was conducting a thorough investigation.

405. The Institutional Defendants' and Soldz's conduct amounts to actual malice.

406. The defamatory statements have been repeated and republished in major media outlets. That republication was reasonably foreseeable, because the Institutional Defendants provided an advance copy to Soldz, whom they knew to be collaborating with *The New York Times* reporter whose book sparked the investigation, and because the engagement letter between the Institutional Defendants and the Board resolution authorizing Hoffman's engagement provided that the Report would become public without modification.

407. The false statements by Hoffman, Sidley, the APA, and Soldz have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have

prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

408. The Institutional Defendants and Soldz are liable to the Plaintiffs for compensatory damages arising out of their defamation of Plaintiffs.

409. The Institutional Defendants and Soldz are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 5

(Defamation *Per Se* for the False and Misleading Statements in the Final Hoffman Report Published by Hoffman and Sidley on July 2, 2015, to the APA Special Committee and Board, Including the Board Member Resident in Massachusetts)
All Plaintiffs against Hoffman and Sidley

410. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

411. Hoffman and Sidley published the final version of the Hoffman Report to the Special Committee and Board of the APA on July 2, 2015, including the Board member resident in Massachusetts. The Report was subsequently republished to additional parties as detailed below.

412. A true and correct copy of the Final Report, which has been superseded by a Revised Report, is still available online without any notation that it has been revised or that Hoffman was rehired by the APA to fix it (at http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf).

413. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

414. The defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

415. These statements are false.

416. By publishing the statements, Hoffman and Sidley intended to cause harm and, in fact, did cause harm to Plaintiffs' reputations.

417. The statements so harm the Plaintiffs as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

418. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

419. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

420. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

421. At all times, Hoffman was acting on behalf of the affiliated Sidley partnerships. Hoffman was the only partner of Sidley referenced in public materials about the Report, and he signed the cover letter publishing the Report that was included with the Report.

422. Hoffman and Sidley had no privilege to publish the false and defamatory statements or, if they did, Hoffman and Sidley abused that privilege.

423. At the time of publication, Hoffman and Sidley knew these statements were false or recklessly disregarded the truth.

424. At a minimum, Hoffman and Sidley had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing them.

425. Hoffman and Sidley purposefully avoided the truth, and purposely avoided interviewing sources and following fundamental investigative practices in order to avoid the truth.

426. Hoffman and Sidley's conduct amounts to actual malice.

427. These defamatory statements have been repeated and republished in major media outlets. That republication was reasonably foreseeable, because the engagement letter between the Institutional Defendants provided that the Report would become public without modification.

428. Hoffman and Sidley's false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

429. Hoffman and Sidley are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

430. Hoffman and Sidley are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 6

(Defamation *Per Se* for the False and Misleading Statements in the Hoffman Report Published by Hoffman and Sidley between July 2, 2015 and July 7, 2015, to *The New York Times*)
All Plaintiffs against Hoffman and Sidley

431. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

432. On information and belief, Hoffman gave a Word file of the Report to James Risen of *The New York Times* between July 2 and July 7, 2015. That copy of the Report was made available online by the *Times*: http://www.nytimes.com/interactive/2015/07/09/us/document-report.html

433. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

434. The defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

435. These statements are false.

436. By publishing the statements, Hoffman and Sidley intended to cause harm and, in fact, did cause harm to Plaintiffs' reputations.

437. The statements so harm the Plaintiffs as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

438. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

439. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

440. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

441. At all times, Hoffman was acting on behalf of the affiliated Sidley partnerships. Hoffman was the only partner of Sidley referenced in public materials about the Report, and he signed the cover letter publishing the Report that was included with the Report.

442. Hoffman and Sidley had no privilege to publish the false and defamatory statements or, if they did, Hoffman and Sidley abused that privilege.

443. At the time of publication, Hoffman and Sidley knew these statements were false or recklessly disregarded the truth.

444. At a minimum, Hoffman and Sidley had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing them.

445. Hoffman and Sidley purposefully avoided the truth, and purposely avoided interviewing sources and following fundamental investigative practices in order to avoid the truth.

446. Hoffman and Sidley's conduct amounts to actual malice.

447. These defamatory statements have been repeated and republished in major media outlets. That republication was reasonably foreseeable, because the engagement letter between the Institutional Defendants provided that the Report would become public without modification.

448. Hoffman and Sidley's false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

449. Hoffman and Sidley are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

450. Hoffman and Sidley are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 7

(Defamation *Per Se* for the False and Misleading Statements in the Final Hoffman Report Republished by the APA to the APA Council, Including Council Members in Massachusetts, on July 8, 2015)
All Plaintiffs against the Institutional Defendants

451. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

452. The Special Committee and Board of the APA republished the final version of the Hoffman Report to the Council of Representatives of the APA (approximately 170 persons) on July 8, 2015. The Report was subsequently republished to additional parties as detailed below.

453. A true and correct copy of the Report is available online here: http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf

454. The publications and republications were part of an "aggressive" distribution effort by the APA and designed to reach a new and wider audience, including members of Council who were Massachusetts residents.

455. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

456. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

457. These statements are false.

458. By publishing or republishing the statements, the Institutional Defendants intended to cause harm and, in fact, did cause harm to Plaintiffs' reputations.

459. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

460. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

461. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

462. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

463. The republishing of the Report by the members of the Special Committee and the APA Board was done by those individuals in their official capacities as members of the Special Committee and the APA Board.

464. The Institutional Defendants had no privilege to publish or republish the false and defamatory statements or, if they did, the Institutional Defendants abused that privilege.

465. At the time of publication, the Institutional Defendants knew these statements were false or recklessly disregarded the truth.

466. At a minimum, the Institutional Defendants had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republishing them.

467. The Institutional Defendants' conduct amounts to actual malice.

468. The Institutional Defendants' false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

469. The Institutional Defendants are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

470. The Institutional Defendants are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 8

(Defamation *Per Se* for the False and Misleading Statements in the Hoffman Report and in the Accompanying Article Published to the World on July 10, 2015, by *The New York Times* and James Risen)
All Plaintiffs against the Institutional Defendants and Soldz

471. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

472. The Institutional Defendants published and republished both a draft of the Hoffman Report and the final version of the Report a combined total of at least six times, prior to the publication by *The New York Times* of a copy of the full Report. By publishing and republishing those two versions of the Report to multiple parties, including to Soldz who was collaborating with the *Times*, the Institutional Defendants excessively and recklessly distributed the Report, foreseeably causing harm to Plaintiffs' reputations.

473. Soldz provided false and defamatory statements to Risen, including that the military Plaintiffs participated in or shielded torture and that they and the APA colluded with the CIA to enable torture. Those statements were reflected in both Risen's July 10, 2015, online article (https://www.nytimes.com/2015/07/11/us/psychologists-shielded-us-torture-program-report-finds.html) and his July 11, 2015, print article.

474. As set forth more fully in this Complaint, in Risen's article the APA apologized for the actions described in the Report, despite knowing those allegations were inconsistent with over 10 years of the APA's statements on the topic and highly improbable, and despite knowledge possessed by Board members that demonstrated their falsity.

475. A true and correct copy of the Report was made available online at *The New York Times* website here: http://www.nytimes.com/interactive/2015/07/09/us/document-report.html.

476. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

477. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

478. These statements are false.

479. By publishing or republishing the statements, the Institutional Defendants and Soldz intended to cause harm to, and did in fact harm, the Plaintiffs.

480. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

481. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

482. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

483. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

484. Neither the Institutional Defendants nor Soldz had any privilege to publish or republish the false and defamatory statements or, if they did, the Institutional Defendants and Soldz abused that privilege.

485. At the time of publication, the Institutional Defendants and Soldz knew these statements were false or recklessly disregarded the truth.

486. At a minimum, the Institutional Defendants and Soldz had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republishing them.

487. The Institutional Defendants' and Soldz's conduct amounts to actual malice.

488. The republication of the Report's defamatory statements was reasonably foreseeable, because the engagement letter among the Institutional Defendants provided that the Report would become public without modification and because Hoffman urged the APA to provide an advance copy of the Report to Soldz, whom they knew to be collaborating with the *Times* as a source.

489. The Institutional Defendants' and Soldz's false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

490. The Institutional Defendants and Soldz are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

491. The Institutional Defendants and Soldz are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 9

(Defamation *Per Se* for the False and Misleading Statements in the Report Published on July 11, 2015, by *The Guardian* to the World)
All Plaintiffs against Hoffman and Sidley

492. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

493. On information and belief, Hoffman gave a Word file of the Report to James Risen of *The New York Times* between July 2 and July 7, 2015. That copy of the Report was made available online here: http://www.nytimes.com/interactive/2015/07/09/us/document-report.html

494. Foreseeably, a full version of the Report that, on information and belief, is identical to the copy published by the *Times* was subsequently published in full by *The Guardian* with the intention of reaching a new and wider audience: https://www.theguardian.com/law/2015/jul/11/american-psychological-association-torture-report

495. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

496. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

497. These statements are false.

498. By publishing or republishing the statements, Sidley and Hoffman intended to cause harm to, and did in fact harm, the Plaintiffs.

499. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

500. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

501. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

502. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

503. Sidley and Hoffman had no privilege to publish or republish the false and defamatory statements or, if they did, they abused that privilege.

504. At the time of publication, Sidley and Hoffman knew these statements were false or recklessly disregarded the truth.

505. At a minimum, Sidley and Hoffman had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republishing them.

506. Hoffman and Sidley's conduct amounts to actual malice.

507. At all times, Hoffman was acting on behalf of the affiliated Sidley partnerships.

508. The republication of the defamatory statements was reasonably foreseeable, because, on information and belief, Hoffman gave the full Report to *The New York Times* and because the engagement letter among the Institutional Defendants and the APA Board resolution authorizing the engagement provided that the Report would become public without modification.

509. Sidley and Hoffman's false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

510. Sidley and Hoffman are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

511. Sidley and Hoffman are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 10

(Defamation *Per Se* for the False and Misleading Statements in the Final Hoffman Report Republished by the Board of the APA on the APA Website on July 10, 2015) All Plaintiffs against the Institutional Defendants

512. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

513. The Special Committee and Board of the APA republished the Hoffman Report on the APA website on July 10, 2015. The Report was subsequently republished to additional parties.

514. A true and correct copy of the Report is available online here: http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf

515. In an attempt to reach a new and larger audience, including in Massachusetts, on the same day the APA published a link to contents of the Report on Twitter: https://twitter.com/APA/status/619605997485719553. APA has over 2,096 Twitter followers who are Massachusetts residents.

516. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

517. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

518. These statements are false.

519. By publishing or republishing the statements, the Institutional Defendants intended to and did in fact cause harm to Plaintiffs' reputations.

520. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

521. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

522. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

523. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

524. Hoffman and other individuals who were members or employees of an Institutional Defendant were at all times acting on behalf of their respective organization or firm.

525. The Institutional Defendants had no privilege to publish or republish the false and defamatory statements or, if they did, the Institutional Defendants abused that privilege.

526. At the time of publication, the Institutional Defendants knew these statements were false or recklessly disregarded the truth.

527. At a minimum, the Institutional Defendants had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republishing them.

528. The Institutional Defendants' conduct amounts to actual malice.

529. These defamatory statements have been repeated and republished in major media outlets. That republication was reasonably foreseeable, because the engagement letter between the Institutional Defendants provided that the Report would become public without modification.

530. The Institutional Defendants' false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

531. The Institutional Defendants are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

532. The Institutional Defendants are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 11

(Defamation *Per Se* for the False and Misleading Statements in the Final Hoffman Report Published by the Board of the APA in an E-mail to Its Membership, Including Its Massachusetts Members, on July 11, 2015)
All Plaintiffs against the Institutional Defendants

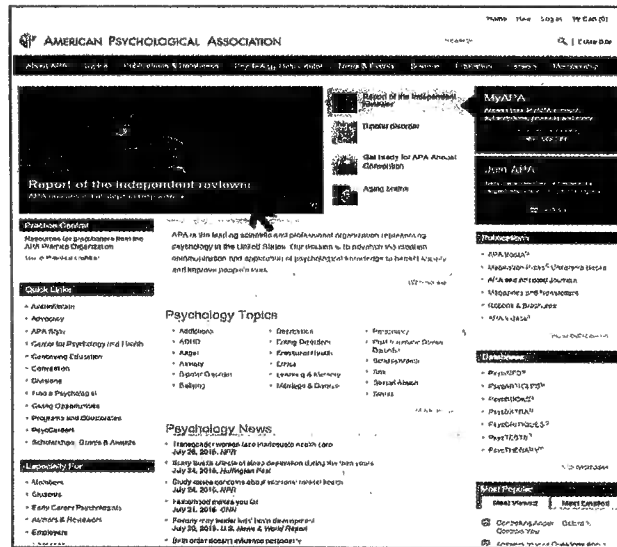
533. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

534. The Special Committee and Board of the APA published the Hoffman Report on the APA website on July 10, 2015. The Report was subsequently republished to additional parties.

535. A true and correct copy of the Report is available online here: http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf

536. The APA published the Report by e-mail to APA members on July 11, including to its members in Massachusetts, directing them to the website where the Report was immediately accessible. A true and correct copy of the e-mail sent to all members is available here: http://www.apa.org/independent-review/final-report-message.aspx. It was read by Massachusetts residents.

537. A true and correct picture of the website as it existed at that time is set forth below:



538. From July 11, no password was needed to access the Report at any time by any member of the public or APA member. Members of the public, including citizens of Massachusetts, continue to refer to this outdated version of the Report on the APA website due to new links provided by the APA and others to new statements in the press intended to reach readers in Massachusetts.

539. The republication of the Report was intended to reach a new and wider audience and was in fact read by Massachusetts residents. APA continues to publish the Report with new commentary in order to reach a new and wider audience. For example, in March of 2017, in the Council Agenda Book provided to all APA members, the APA Policy and Planning Board in its Annual Report discussed the impact of the Hoffman Report on APA . The authors provided a link to both the Revised Report and a false and defamatory article concerning the Report: https://psychcentral.com/blog/the-hoffman-report-after-years-of-lies-who-holds-the-apa-accountable/

540. The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

541. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

542. These statements are false.

543. By publishing or republishing the statements, the Institutional Defendants intended to cause harm, and in fact did cause harm, to Plaintiffs' reputations.

544. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

545. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

546. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

547. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

548. Hoffman and other individuals who were members or employees of an Institutional Defendant were at all times acting on behalf of their respective organization or firm.

549. The Institutional Defendants had no privilege to publish or republish the false and defamatory statements or, if they did, The Institutional Defendants abused that privilege.

550. At the time of publication, the Institutional Defendants knew these statements were false or recklessly disregarded the truth.

551. At a minimum, the Institutional Defendants had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republishing them.

552. The Institutional Defendants' conduct amounts to actual malice.

553. These defamatory statements have been repeated and republished in major media outlets. That republication was reasonably foreseeable, because the engagement letter between the Institutional Defendants provided that the Report would become public without modification.

554. The Institutional Defendants' false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

555. The Institutional Defendants are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

556. The Institutional Defendants are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 12

(Defamation *Per Se* for the False and Misleading Statements in the Final Hoffman Report Republished by *The Boston Globe* on July 11 and July 20, 2015)
All Plaintiffs against the Institutional Defendants

557. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

558. The Special Committee and Board of the APA republished the Hoffman Report on the APA website on July 10, 2015. The Report was subsequently republished to additional parties.

559. A true and correct copy of the Report is available online here: http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf

560. *The Boston Globe* published two articles concerning the Reports. The second article provided significant new commentary connecting the controversy to Massachusetts and linked to the contents of the Report on the APA website.

561. Those articles are available here:

https://www.bostonglobe.com/news/nation/2015/07/10/psychologists-colluded-interrogations-report-says/3usbtaQdxmobWwIPtOpUYL/story.html

and here: https://www.bostonglobe.com/news/nation/2015/07/19/psychology-association-worked-with-defense-officials-loose-interrogation-guidelines/DsPxSETzHmc4QsSjLjR9mN/story.html

562. Those links are still active and can be accessed by new readers.

563. On July 24, the *Boston Globe* printed a letter datelined Boston from Physicians for Human Rights, calling for a criminal investigation of the allegations in the Report.

https://www.bostonglobe.com/opinion/letters/2015/07/23/nothing-less-than-federal-criminal-probe-warranted-over-interrogation-tactics/11dONNo0FRTAvRpdMxKyUM/story.html

564. Soldz tweeted the article directly to his followers on Twitter, including at least 20 Massachusetts residents, again calling for a federal criminal probe.

Stephen Soldz

Follow

Nothing less than a federal criminal probe is warranted over interrogation tactics - Letters - The Boston Globe - bostonglobe.com/opinion/letter ...

4 Retweets 1 Like

565. The articles and the Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A.

566. Those publications and republications of the false and defamatory statements were reasonably foreseeable, given the APA's "aggressive" efforts to distribute the Report, including in Massachusetts, and given that the Institutional Defendants' engagement letter and the APA Board resolution authorizing the engagement provided for publication to the public. Each of those articles and the Report were read by Massachusetts residents. Those articles and links were published in order to reach a wider audience for the false and defamatory allegations.

567. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

568. These statements are false.

569. By publishing or republishing the statements, the Institutional Defendants intended to cause harm, and in fact did cause harm, to Plaintiffs' reputations.

570. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

571. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

572. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

573. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

574. Hoffman and other individuals acting on behalf of an Institutional Defendant were doing so within their capacities on behalf of their respective organization, company, or firm.

575. The Institutional Defendants had no privilege to publish or republish the false and defamatory statements or, if they did, the Institutional Defendants abused that privilege.

576. At the time of publication, the Institutional Defendants knew these statements were false or recklessly disregarded the truth.

577. At a minimum, the Institutional Defendants had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republishing them.

578. The Institutional Defendants' conduct amounts to actual malice.

579. These defamatory statements have been repeated and republished in major media outlets. That republication was reasonably foreseeable, because the engagement letter between the Institutional Defendants provided that the Report would become public without modification.

580. The Institutional Defendants' false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

581. The Institutional Defendants are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

582. The Institutional Defendants are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 13

(Defamation *Per Se* for the False and Misleading Statements made by Dr. Nadine Kaslow on behalf of the APA to the Public)
All Plaintiffs against APA

583. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

584. Dr. Kaslow made a number of false and defamatory statements to the media, as set forth in this Complaint, on behalf of the APA in her capacity as the head of the Special Committee.

585. Dr. Kaslow acted with actual malice because she knew her statements were false, or acted in reckless disregard of their truth, at the time she made them, given: 1) her involvement in significant underlying events described in the Report that gave her knowledge that contradicted the Report's conclusions, and 2) that she had been told by Hoffman that he found no criminal activity as a result of the investigation.

586. Dr. Kaslow's singling out of Dr. Behnke in those defamatory statements and her participation in the APA's disparate treatment of him, including his wrongful discharge, has caused and continues to cause grave personal, financial, and emotional damage.

587. Dr. Kaslow's defamatory statements were reasonably understood by those who heard them to be statements of fact of and concerning each of the Plaintiffs.

588. These statements are false.

589. By publishing or republishing the statements, the APA intended to cause harm, and in fact did cause harm, to Plaintiffs' reputations.

590. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

591. Each of the statements impeaches the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

592. Each of Kaslow's statements was subsequently distributed by WBUR and the *Huffington Post* via Twitter. WBUR (Radio Boston) has 12,735 Twitter followers who are Massachusetts residents (approximately 2,096 of those are in Boston), and *Huffington Post*'s social-media consultant tweeted the video to 60 Massachusetts residents who are her followers.

593. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

594. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

595. Dr. Kaslow's statements were made in the course and scope of her position as head of the Special Committee and member of the Board of the APA.

596. The APA had no privilege to publish or republish the false and defamatory statements or, if it did, the APA abused that privilege.

597. At the time of publication, the APA knew these statements were false or recklessly disregarded the truth.

598. At a minimum, the APA had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore was required to investigate their veracity before publishing or republishing them.

599. The APA's false statements have injured Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused Plaintiffs to suffer damages in an amount to be determined at trial.

600. The APA is liable to the Plaintiffs for compensatory damages arising out of its defamation of Plaintiffs.

601. The APA is liable to Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 14

(Defamation *Per Se* for the False and Misleading Statements in the Revised Report Published by Hoffman and Sidley on September 4, 2015, to the Special Committee and Board of APA, Including the Board Member Resident in Massachusetts)
All Plaintiffs against Hoffman and Sidley

602. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

603. Hoffman and Sidley published the Revised Report to the Special Committee and Board of the APA on September 4, 2015.

604. A true and correct copy of the Revised Report is available online here: http://www.apa.org/independent-review/revised-report.pdf

605. The Revised Report contained false and defamatory statements concerning the Plaintiffs. Plaintiffs had objected to those statements in writing before its release, providing several detailed examples of verifiable falsehoods.

606. However, Plaintiffs were not told the Report was being revised. In the cover letter accompanying the Revised Report and in subsequent statements by the APA Board, it was falsely asserted that Plaintiffs had a full opportunity to object to the Report's contents and their objections were given full consideration in drafting the Revised Report.

607. The defamatory statements in the Revised Report were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

608. These statements are false.

609. By publishing the statements, Hoffman and Sidley intended to cause harm to, and in fact did cause harm to, Plaintiffs' reputations.

610. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

611. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

612. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

613. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

614. At all times, Hoffman was acting on behalf of the affiliated Sidley partnerships. Hoffman was the only partner of Sidley referenced in public materials about the Report, and he signed the cover letters publishing the Report on each occasion where a letter was included with the Revised Report.

615. Hoffman and Sidley had no privilege to publish the false and defamatory statements or, if they did, Hoffman and Sidley abused that privilege.

616. At the time of publication, Hoffman and Sidley knew these statements were false or recklessly disregarded the truth.

617. At a minimum, Hoffman and Sidley had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing them.

618. Hoffman and Sidley purposefully avoided the truth, and purposely avoided interviewing sources and following fundamental investigative practices in order to avoid the truth.

619. Hoffman and Sidley's conduct amounts to actual malice.

620. On June 27, 2016, Dr. Trudy Bond, a psychologist who had repeatedly filed multiple ethics complaints against Col. James, used a copy of the September 4, 2015, Report to encourage the United Nations Committee Against Torture to seek prosecution of the persons named in the Report for authorizing, acquiescing, or consenting to acts of torture. She has also submitted the September 4, 2015, Report to the International Criminal Court.

621. These actions were reasonably foreseeable because Dr. Bond had previously filed multiple unsuccessful complaints with numerous organizations, including the APA, seeking censure or prosecution for Col. James' conduct. Hoffman and Sidley interviewed Dr. Bond during the investigation but intentionally omitted from the Report the failure of her previous attempts to have the Plaintiffs censured or prosecuted.

622. Hoffman and Sidley's false statements, and failure to correct their false statements, have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused Plaintiffs to suffer damages in an amount to be determined at trial.

623. Hoffman and Sidley are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

624. Hoffman and Sidley are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights, including their continued refusal to correct the false allegations in the Revised Report.

COUNT 15

(Defamation *Per Se* for the False and Misleading Statements in the Revised Report Republished by the Board of APA on the APA Website on or about September 4, 2015) All Plaintiffs against the Institutional Defendants

625. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

626. The Special Committee and Board of the APA republished the revised Hoffman Report on the APA website on or about September 4, 2015.

627. A true and correct copy of the Revised Report is available online here: http://www.apa.org/independent-review/revised-report.pdf

628. The Revised Report contained false and defamatory statements concerning the Plaintiffs. Plaintiffs had objected to those statements in writing before its release, providing several detailed examples of verifiable falsehoods.

629. However, although Plaintiffs' counsel was in direct contact with APA's counsel during the time of the revision, and although APA was on notice that Plaintiffs objected to easily disprovable false statements in the Report, Plaintiffs were not told the Report was being revised. In the cover letter accompanying the Revised Report and in subsequent written statements by the APA Board, it was falsely asserted that Plaintiffs had an opportunity to object to the Report's contents and their objections were given consideration in drafting the Revised Report.

630. The Revised Report's defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

631. These statements are false.

632. By publishing or republishing the statements, the Institutional Defendants intended to cause harm, and in fact did cause harm, to Plaintiffs' reputations.

633. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

634. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

635. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

636. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

637. Hoffman and other individuals who were members or employees of an Institutional Defendant were at all times acting on behalf of their respective organization or firm.

638. The Institutional Defendants had no privilege to publish or republish the false and defamatory statements or, if they did, the Institutional Defendants abused that privilege.

639. At the time of publication, the Institutional Defendants knew these statements were false or recklessly disregarded the truth.

640. At a minimum, the Institutional Defendants had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republish them.

641. The Institutional Defendants' conduct amounts to actual malice.

642. On June 27, 2016, Dr. Trudy Bond, a psychologist who had repeatedly filed multiple ethics complaints against Col. James, used a copy of the September 4, 2015, Report to encourage the United Nations Committee Against Torture to seek prosecution of the persons named in the Report for authorizing, acquiescing, or consenting to acts of torture. She has also submitted the September 4, 2015, Report to the International Criminal Court.

643. These actions were reasonably foreseeable because Dr. Bond had previously filed multiple unsuccessful complaints with numerous organizations, including the APA, seeking censure or prosecution for Col. James' conduct. Hoffman and Sidley interviewed Dr. Bond during the investigation but intentionally omitted from the Report the failure of her previous attempts to censure or prosecute the Plaintiffs.

644. The Institutional Defendants' false statements, and failure to correct their false statements, have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused Plaintiffs to suffer damages in an amount to be determined at trial.

645. The Institutional Defendants are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

646. The Institutional Defendants are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights, including their continued refusal to retract the false allegations in the Revised Report.

COUNT 16

(Defamation *Per Se* for the False and Misleading Statements in the Revised Hoffman Report Republished by the Board of APA to APA Governance Members, Including Massachusetts Residents, by E-mail on or about September 11, 2015)
All Plaintiffs against the Institutional Defendants

647. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

648. The Special Committee and Board of the APA republished the revised Hoffman Report on the APA website on September 4, 2015.

649. A true and correct copy of the revised Report is available online here: http://www.apa.org/independent-review/revised-report.pdf.

650. The APA sent an e-mail directing governance members, including residents of Massachusetts, to read the Revised Report. That e-mail contained a link to the Revised Report, a copy of the Revised Report, and a copy of the errata sheet.

651. That e-mail was intended to provide wider distribution and a new audience for the Revised Report.

652. That e-mail and the Revised Report were read by Massachusetts residents.

653. The Revised Report contained false and defamatory statements concerning the Plaintiffs. Plaintiffs had objected to those statements in writing before its release, providing several detailed examples of verifiable falsehoods.

654. However, Plaintiffs were not told the Report was being revised. In the cover letter accompanying the Revised Report and in subsequent statements by the APA Board, it was falsely asserted that Plaintiffs had an opportunity to object to the Report's contents and their objections were given consideration in drafting the Revised Report.

655. The APA's e-mail containing the Revised Report was an attempt to reach a new and wider audience for the false and defamatory allegations in the Report.

656. The Revised Report contained false and defamatory statements concerning the Plaintiffs.

657. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

658. These statements are false.

659. By publishing or republishing the statements, the Institutional Defendants intended to cause harm, and in fact, did cause harm to Plaintiffs' reputations.

660. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

661. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

662. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

663. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

664. Hoffman and other individuals who were members or employees of an Institutional Defendant were at all times acting on behalf of their respective organization or firm.

665. The Institutional Defendants had no privilege to publish or republish the false and defamatory statements or, if they did, the Institutional Defendants abused that privilege.

666. At the time of publication, the Institutional Defendants knew these statements were false, or recklessly disregarded the truth.

667. At a minimum, the Institutional Defendants had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing or republish them.

668. The Institutional Defendants' conduct amounts to actual malice.

669. The Institutional Defendants' false statements, and failure to correct their false statements, have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused Plaintiffs to suffer damages in an amount to be determined at trial.

670. The Institutional Defendants are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

671. The Institutional Defendants are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights, and the continued refusal to retract the false allegations in the Revised Report.

COUNT 17

(Defamation Per Se for the False and Defamatory Statements by Soldz to the North Carolina Commission of Inquiry on Torture and Republished on its Website)
All Plaintiffs against Soldz

672. The Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

673. Soldz made false and defamatory statements to the North Carolina Commission of Inquiry on Torture (NCCIT) in November 2017 that went beyond the findings made by Hoffman and Sidley in the Report with the intent to reach a new audience, including Massachusetts residents, to

whom he "tweets" regarding updates on NCCIT's work.[50] Soldz has over 20 Massachusetts residents who follow him on Twitter.

674. In those statements as well as elsewhere, Soldz asserted that the Report "raised questions about potential CIA influence on the PENS report …." But the Report states that, although APA officials interacted with the CIA between 2002 and 2004 – that is, before the PENS Task Force was formed – "we did not find evidence that the relationship with the CIA contributed to the outcome of the PENS Task Force …."

675. In the North Carolina statements as well as elsewhere, Soldz asserts that the PENS Task Force based its guidelines on "US law, leaving psychologists free to participate in the interrogation activity deemed legal by the United States government, as was both CIA and DoD torture." By the time of PENS, however, there was no remaining doubt that torture was illegal under U.S. law. Moreover, the PENS Guidelines explicitly incorporated the then-restrictive local policies permitting only a limited number of interrogation techniques, none of them abusive. The Guidelines also make clear that United Nations Convention Against Torture and the Geneva Convention governing the treatment of prisoners of war applied to interrogations. Despite having been pointed to that language, Soldz continues to make his false assertions.

676. Soldz intended his North Carolina false and defamatory statements, which included a link to the Hoffman Report, to be heard by a new audience, including residents of Massachusetts, beyond the audience that had previously received or heard about the contents of Report.

677. These defamatory statements by Soldz were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

678. These statements are false.

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[50] https://drive.google.com/file/d/1VpjoFS4RWpQKoDSavVch-tE5zvnKsTuR/view

679. By publishing and republishing the statements, Soldz intended to cause harm and, in fact, did cause harm to Plaintiffs' reputations.

680. The statements so harm the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

681. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

682. The statements are defamatory *per se* because they accuse the Plaintiffs of unlawful conduct.

683. The statements are defamatory *per se* because they impugn the Plaintiffs' fitness for and conduct in their professions.

684. Soldz had no privilege to publish or republish the false and defamatory statements or, if he did, he abused that privilege.

685. At the time of publication, Soldz knew these statements were false or recklessly disregarded the truth.

686. At a minimum, Soldz had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore was required to investigate their veracity before publishing or republishing them.

687. Soldz's conduct amounts to actual malice.

688. Soldz's false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused the Plaintiffs to suffer damages in an amount to be determined at trial.

689. Soldz is liable to the Plaintiffs for compensatory damages arising out of his defamation of Plaintiffs.

690. Soldz is liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

COUNT 18

(Defamation by Implication or Libel Per Quod)
All Plaintiffs against Hoffman and Sidley

691. Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

692. Plaintiffs plead in the alternative that Hoffman and Sidley's statements described herein constitute defamation by implication for the following reasons:

693. By the use of the terms "joint venture," "joint enterprise," "deliberate avoidance," and "collusion," Hoffman and Sidley deliberately or intentionally implied that the Plaintiffs had engaged in criminal conduct.

694. At various points throughout the Report, Hoffman repeats the false and defamatory statements of the Accusers without supplying contradictory information in his possession and thus allows the reader to infer a false and defamatory meaning from the one-sided narrative. See, *e.g.* Hoffman Report, p. 4: "Some label APA's actions 'criminal,'...with a request they be prosecuted."

695. Hoffman omits from the Report the details of the crucial history of military policies in late 2003, 2004 and early 2005 and the development and implementation of strict and clear "DoD interrogation guidelines. That omission causes the reader to conclude that the out-of-date guidelines and OLC opinions presented by Hoffman were still in effect and allowed for abusive interrogations. Had Hoffman and Sidley included the facts he intentionally omits from the Report, each of his primary conclusions and a majority of his false statements would have been directly

and substantially contradicted by those intentionally omitted facts. A reader would have been able to reach non-defamatory conclusions of and concerning the Plaintiffs.

696. Despite acknowledging to the APA that he found no criminal activity, Hoffman makes no such statement in the Report.

697. Hoffman knew that the Accusers had submitted much of the information he relied on to the Senate Armed Services Committee and FBI, but neither of those organizations had found any actionable conduct. He omits those facts from the Report, and such deliberate and intentional omission damaged Plaintiffs' reputations.

698. Hoffman knew the Accusers wished to overcome what they perceived to be a statute of limitations problem in order to resubmit the Report to the FBI to support criminal prosecutions against the Plaintiffs.

699. It was reasonably foreseeable that the Accusers would use the Report to renew their calls for criminal prosecution, and that the media would infer the possibility of criminal liability.

700. On June 27, 2016, Dr. Trudy Bond, a psychologist who had repeatedly filed multiple ethics complaints against Col. James, used the revised Report to encourage the United Nations Committee Against Torture to seek prosecution of those named in it. This action was reasonably foreseeable given her previous persistence in filing complaints against Col. James. Although Hoffman and Sidley interviewed Dr. Bond during the investigation, Hoffman omitted her history of attacks against Col. James from the Report.

701. All publications of the Hoffman Report contained the false and defamatory language implying criminal conduct and the deliberate (or intentional) omission of the facts damaged Plaintiffs' reputations.

702. True and correct copies of the Reports are available online here: http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf and here: http://www.apa.org/independent-review/revised-report.pdf

703. Those Reports contained the false and defamatory statements concerning the Plaintiffs.

704. These defamatory statements were reasonably understood by those who read them to be statements of fact of and concerning each of the Plaintiffs.

705. These statements are false.

706. By publishing the statements, Hoffman and Sidley intended to cause harm, and in fact did cause harm, to Plaintiffs' reputations.

707. Hoffman and Sidley's false statements have injured Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented Plaintiffs from obtaining employment as psychologists, despite their qualifications; and have caused Plaintiffs to suffer damages in an amount to be determined at trial.

708. The false statements have so harmed the Plaintiffs' reputations as to lower those reputations in the estimation of their communities or to deter others from associating or dealing with them.

709. The statements impeach the integrity and virtue of the Plaintiffs, thus exposing them to hatred, contempt, and ridicule.

710. The statements are defamatory because they accuse the Plaintiffs of unlawful conduct.

711. The statements are defamatory because they impugn the Plaintiffs' fitness for and conduct in their professions.

712. Hoffman and Sidley had no privilege to publish the false and defamatory statements or, if they did, Hoffman and Sidley abused that privilege.

713. Hoffman and Sidley's conduct amounts to actual malice.

714. Hoffman and Sidley are liable to the Plaintiffs for compensatory damages arising out of their defamation of the Plaintiffs.

715. Hoffman and Sidley are liable to the Plaintiffs for punitive damages because of the willful, wanton, and outrageous nature of the defamation and evidence of conscious disregard for the Plaintiffs' rights.

716. The Plaintiffs have suffered lost employment, emotional distress, and severe personal and professional humiliation and injury to their reputations in the community as a direct and proximate result of Hoffman and Sidley's false and defamatory statements.

717. Col. James has experienced an exacerbation of his post-traumatic stress disorder symptoms as a direct and proximate result of the false and defamatory statements made by Hoffman and Sidley.

COUNT 19

(False Light Invasion of Privacy)
Plaintiffs Behnke and James against the Institutional Defendants

718. Plaintiffs repeat and re-allege each of the foregoing paragraphs as if set forth fully herein.

719. The defamatory statements alleged herein constitute false light invasion of privacy in that they have subjected Plaintiffs Behnke and James to unreasonable and highly objectionable publicity by falsely attributing to them characteristics, conduct or beliefs that place them in a false light before the public.

720. The false light in which the Plaintiffs Behnke and James have been placed would be highly offensive to the reasonable person.

721. The Institutional Defendants had knowledge of the falsity of the defamatory statements or acted in reckless disregard as to their falsity and the false light in which the Plaintiffs would therefore be placed.

722. Plaintiffs Behnke and James have been damaged by the Institutional Defendants' publication of the defamatory statements because, among other accusations, they impute criminal conduct and unethical practice regarding their personal and professional character as psychologists.

723. Publication of the defamatory statements has caused and will continue to cause Plaintiffs Behnke and James and members of their families to suffer great mental anguish and emotional distress.

724. Publication of the defamatory statements has caused Plaintiffs Behnke and James to suffer severe personal and professional humiliation and injury to their reputations in the community – reputations they have built over many years.

725. Consequently, Plaintiffs Behnke, Dunivin, and James' standings in the community have been damaged by publication of the defamatory statements.

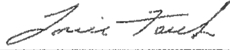
XI. REQUEST FOR RELIEF ON COUNTS 1-19

WHEREFORE, Plaintiffs demand judgment jointly and severally against the APA, Hoffman, Sidley and Soldz for (1) compensatory damages in an amount to be proven at trial; (2) punitive damages in an amount to be proven at trial; (3) all costs, interest, attorneys' fees, and disbursements to the highest extent permitted by law; and (4) such other and further relief as this Court may deem just and proper.

PLAINTIFFS DEMAND TRIAL BY JURY ON ALL ISSUES PRC [illegible] LY SO TRIED.

Dated: June 25, 2018

Respectfully submitted,



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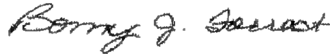

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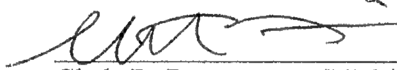

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Exhibit A

EXHIBIT A
List of False Statements (Exact Quotations) from Three Versions of the Report

Statement Number	Page NYT-Guardian Versions	Page 7/2/2015 Draft-Final Versions	Page 9/4/15 Revised Version	False Statement from the Hoffman Report (HR) Per Se Defamatory Statements in Bold
1	1	1	1	**APA made these ethics policy decisions as a substantial result of influence from and close relationships with the U.S. Department of Defense (DoD), the Central Intelligence Agency (CIA), and other government entities, which purportedly wanted permissive ethical guidelines so that their psychologists could continue to participate in harsh and abusive interrogation techniques being used by these agencies after the September 11 attacks on the United States. Critics pointed to alleged procedural irregularities and suspicious outcomes regarding APA's ethics policy decisions and said they resulted from this improper coordination, collaboration, or collusion. Some said APA's decisions were intentionally made to assist the government in engaging in these "enhanced interrogation techniques." Some said they were intentionally made to help the government commit torture.** Allegations along these lines had been most recently and most prominently made in a book by *New York Times* reporter James Risen, published in October 2014, based in part on new evidence he had obtained.
2	2 & 4	2 & 4	2 & 4	**Among other things, the critics have charged that the policy set few meaningful limits on the participation of psychologists in interrogations, despite widespread concerns about abusive conduct in such interrogations, and must therefore have been closely coordinated with the government (perhaps principally the Defense Department and the CIA) and motivated by a desire to curry favor with the government .(p.2)....They describe APA's apparent motive and intent in different ways, from a desire to curry favor with the government to an intent to help government officials engage in torture. (p.4)**
3	3-4	3-4	3-4	This information establishes that in the months following 9/11, the President authorized the CIA to engage in "enhanced interrogation techniques." These techniques were not methods of asking questions of a detainee, but were rather ways of attempting to break the will of uncooperative detainees so that they would answer the interrogators' questions and provide intelligence information. These "techniques" included waterboarding, harsh physical actions such as "walling," forced "stress positions," and the intentional deprivation of necessities, such as sleep and a temperature-controlled environment. **The Secretary of Defense authorized the Defense Department to**

False Statements

				Defense Department report. In addition, numerous detailed allegations and accounts of abusive interrogation practices had been made public, including from the International Committee for the Red Cross, which monitored activity at Guantanamo Bay, and from media reports, which quoted military interrogation logs and government officials who described abusive interrogation practices at CIA "black sites."
4	8	8	8	We are cognizant that our report and its findings cannot and will not resolve all the intense disputes on this issue; but it is not meant to. **We provided conclusions where the evidence allowed us to reach them, but otherwise we described the evidence thoroughly so as to present as many facts as we were able to discover. In this way, we attempted to stay true to our task to go where the evidence would lead us.** Sometimes it led us to answers, but sometimes it led us to more questions. As a result, our report and its findings will not be considered satisfying or sufficient to all who read it. But we are also confident that it represents conclusions about what happened, and why, that are based on and squarely supported by the extensive evidence we have reviewed.
5	9	9	9	**… key APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines.**
6	9	9	9	**We also found that in the three years following the adoption of the 2005 PENS Task Force report as APA policy, APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad.**
7	9	9	9	**We did not find evidence to support the conclusion that APA officials actually knew about the existence of an interrogation program using "enhanced interrogation techniques." But we did find evidence that during the time that APA officials were colluding with DoD officials to create and maintain loose APA ethics policies that did not significantly constrain DoD, APA officials had strong reasons to suspect that abusive interrogations had occurred. In addition, APA officials intentionally and strategically avoided taking steps to learn information to confirm those suspicions.**
8	9	9	9	**[I]n colluding with DoD officials, APA officials acted (i) to support the implementation by DoD of the interrogation techniques that DoD wanted to implement without substantial constraints from APA; and (ii) with knowledge that there likely had been abusive interrogation techniques used and that there remained a substantial risk, that without strict constraints, such abusive interrogation techniques would continue; and (iii) with substantial**

False Statements

				APA staff and DoD personnel, an important conflict of interest that was intentionally ignored; as a result, —powerful executive leaders—who [sic] was married to one of the military's lead psychologists who supported interrogations at Guantanamo Bay— became involved in important ways in the development of both the task force itself and the ethical guidelines it issued.
14	11	11	11	**The evidence supports the conclusion that APA officials colluded with DoD officials to, at the least, adopt and maintain APA ethics policies that were not more restrictive than the guidelines that key DoD officials wanted, and that were as closely aligned as possible with DoD policies, guidelines, practices, or preferences, as articulated to APA by these DoD officials.**
15	11	11	11	**Notably, APA officials made their decisions based on these motives, and in collaboration with DoD officials, without serious regard for the concerns raised that harsh and abusive techniques were occurring, and that they might occur in the future. APA chose its ethics policy based on its goals of helping DoD, managing its PR, and maximizing the growth of the profession. APA simply took the word of DoD officials with whom it was trying to curry favor that no such abuse was occurring, and that future DoD policies and training would ensure that no such abuse would occur. APA officials did so even in the face of clear and strong indications that such abuse had in fact occurred (and APA did not even inquire with CIA officials on the topic, despite public allegations that the CIA had engaged in abusive interrogation techniques). Based on strategic goals, APA intentionally decided not to make inquires [sic] into or express concern regarding abuses that were occurring, thus effectively hiding its head in the sand.**
16	11	11	11	**APA remained deliberately ignorant even in light of obvious countervailing concerns that counseled in favor of crafting clear policies.... Being involved in the intentional harming of detainees in a manner that would never be justified in the U.S. criminal justice system could do lasting damage to the integrity and reputation of psychology, a profession that purports to "do no harm." And engaging in harsh interrogation techniques is inconsistent with our fundamental values as a nation and harms our national security and influence in the world. These countervailing concerns were simply not considered or were highly subordinated to APA's strategic goals.**
17	11-12	11-12	11-12	**...key APA officials were operating in close, confidential coordination with key Defense Department officials to set up a task force and produce an outcome that would please DoD, and to produce ethical guidelines that were the same as, or not more restrictive than, the DoD guidelines for interrogation activities.... guidance (which used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation)....**

False Statements

				show support for national security psychologists and help end the uncertainty by declaring that psychologists' participation in interrogations (with some then-undefined limits) was ethical. Others, like military officers Banks and Dunivin, reacted to APA's movement toward the creation of the task force with concern that **APA could head in a negative direction if the task force was not properly set up and controlled, and with awareness that this was an opportunity for DoD.**
24	13-14	13-14	13-14	**Newman had an obvious conflict of interest, since his wife, Debra Dunivin, was highly interested in the outcome of this policy decision by APA and was one of the DoD psychologists who would be most affected, positively or negatively, by the ethical position about which APA was supposed to be deliberating. Newman owed a duty of loyalty to APA, which was in the midst of determining its ethical position on this critical issue. In doing so, APA needed to determine how to balance at least two important values: (i) the importance of psychologists assisting the government in getting accurate intelligence information about potential future attacks in order to protect the public; and (ii) the importance of psychologists not intentionally doing physical or psychological harm to individuals, perhaps especially in the situation in which the individual is in custody and is outside the protections of the criminal justice system. In determining its position, APA also needed to balance the views and positions of military and national security psychologists with the views and positions of those outside the military, and national security systems.**
25	14	14	14	**Because of Dunivin's obvious and strong interest and bias on these points, Newman had a classic conflict of interest. It was therefore incumbent upon him and APA to keep him out of the discussions and deliberations on this topic, and to disclose the conflict. In fact, the opposite occurred. No disclosure was made. Newman and Dunivin were included at many of the key points of the process, including the task force selection process and the task force deliberations; and both Newman and Dunivin inserted themselves and influenced the process and outcome in important ways. The various APA officials who were aware of the conflict and of all or some of Newman's and Dunivin's involvement—including principally Ethics Director Behnke, Deputy CEO Michael Honaker, APA President Ron Levant, and APA President-Elect Gerald Koocher, and also including to a lesser extent CEO Norman Anderson and General Counsel Nathalie Gilfoyle—took no steps to disclose or resolve the conflict.**
26	14	14	14	**The very substantial benefits APA obtained from DoD help explain APA's motive to please DoD…**
27	15	15	15	**The only solution that met all these goals was an outcome that allowed them to take a public position that pleased DoD, that did not significantly restrict an important group of psychologists, and**

False Statements

				by the other members of the task force, and was therefore rejected in the Behnke-drafted task force report.
36	23	23	23	**As a result of this opposition the report rejected the use of or reference to international law, except to the extent it was incorporated into and consistent with U.S. law (as then defined, including through the DOJ memos).** Premise to *preceding* false statement - Some say that this conclusion shows the automatic impact that selecting a majority of DoD officials had on the task force's conclusion. But we think that it actually shows an even more intentional decision by the APA task force leaders and the DoD psychologists not to voluntarily commit psychology as a profession to a more robust set of ethical limitations. To do so would have shown leadership on the issue in a way that likely would have put APA at odds with DoD and the Administration. This may have caused a conflict that would have caused DoD to employ fewer psychologists or to write policy that subordinated the role of psychologists in interrogation and detention matters; and it may have prompted some DoD psychologists to leave APA membership (although Banks was already outside the APA).
37	25-26	25-26	26	**Adding to this dynamic was the participation of Koocher (on the first day) and Newman (throughout the meeting) who both spoke up forcefully in opposition to some of the key points of the non-DoD task force members. Banks and the DoD task force members had allies in Koocher, Newman, and Behnke. These APA officials agreed with the strategy of deferring to DoD's preferences and shared the goal of ensuring that the result of the meeting was a document that APA could use for positive PR purposes, which "calm[ed] the issues," avoided "rekindling the fires," and "clarified" and "simplified" the message that press accounts had "messed up." In their view, APA needed a clear, straightforward, public statement—without delay—that would solve the PR problem by portraying APA as a professional association that was taking action to set ethical guidelines rather than sitting on the sidelines, while keeping DoD psychologists as involved and unconstrained as possible.**
38	25-26 FN10	25-26 FN10	26 FN10	**Newman…told us that when he spoke up at the task force meeting, he was doing so with the clear purpose of trying to strongly influence the outcome.**
39	27	27	27	Premise to false statement below: Their theory is therefore that when psychologists are involved in an interrogation of a non-cooperative foreign detainee considered an "unlawful combatant" suspected of knowing important information, in an environment of intense pressure to produce actionable intelligence to protect the American public and in which the protections of the criminal justice system do not apply, psychologists should be playing two roles at the same time: (1) strict monitor of the interrogator, including promptly telling the interrogator (or telling his supervisor or commander) that he is going too far and

False Statements

				'physically coercive,' or 'intentionally inflicting physical pain or mental suffering other than mental suffering incidental to lawful sanctions.' **The decision not to do so reflects an intentional decision to keep the PENS report at a high level of generality at Banks' request.**
44	31	31	31	**Behnke and the APA's position on this issue therefore fits the pattern we saw in this investigation regarding PENS: positions were taken to please DoD based on confidential behind-the-scenes discussion and with an eye toward PR strategy.**
45	35	35	35	**The day of the *Times* story, Behnke drafted a response letter to the editor for Levant, which was published in the *Times* over Levant's name on July 7. In the letter, Levant claimed that the PENS report contained 'strict ethical guidelines' and then repeated some of the statements in the PENS report. From this point on, the media strategy was clear: emphasize that PENS said that psychologists could not engage in torture or cruel, inhuman or degrading treatment and claim PENS as a strong, pro-human-rights document. The principal purpose of PENS – to state that psychologists could in fact engage in interrogations consistent with the Ethics Code – was relegated to the sidelines, since any message seen as pro-DoD or permissive regarding the involvement of psychologists in interrogations was deemed bad media strategy in light of the intense and quick criticism of PENS. And of course, the principal motivation for Behnke and other APA officials in drafting PENS the way they did – pleasing DoD – remained fully concealed.**
46	36	36	36	<u>Premise for false statement below</u>: *B. Conclusions Regarding Secret Joint Venture Between APA and DoD Officials In Years After PENS….* From the time of the PENS Task Force through at least the next three years, and through the end of the Bush Administration, Behnke led the extensive efforts by APA to defend the PENS report, to beat back criticisms on the issue through public statements and interviews, and to defeat efforts by the APA Council of Representatives to pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad. **In these efforts, Behnke effectively formed an undisclosed joint venture with Banks – sometimes joined by Dunivin and some of the DoD officials who had served on the PENS Task Force – to ensure that APA's statements and actions fell squarely in line with DoD's goals and preferences.**
47	36	36	36	<u>Premise for false statement below</u>: In numerous confidential email exchanges and conversations, Behnke regularly collaborated and coordinated with Banks to determine what APA's position should be, what its public statements should say, and what strategy to pursue on this issue. Before responding to an APA Board member, before

				negative for DoD, the best strategy was not to oppose it directly but to create an alternative that could be seen as a middle ground with enough credibility to attract support from a substantial percentage of the people who would have otherwise supported the aggressive action. And through the mechanisms set out above, he was confident he could manipulate the "middle ground" alternative to make it positive or tolerable for DoD.
53	43	43	43	**Behnke engaged in his usual highly confidential communications with Banks (as well as Dunivin and James, and sometimes Gelles) in order to jointly determine what strategy or position was best for DoD, to seek pre-clearance of specific language, and to work on drafts of key documents together.**
54	48	48	48	**We know that some of the most significant critics of APA—who have had access to the emails of the RAND employee and CIA contractor (Scott Gerwehr, now deceased), which revealed frequent emails with Hubbard, Mumford, and Brandon—have posited that there must have been significant CIA influence regarding the outcome of the PENS Task Force in light of the substantial APA-CIA interactions shown in these emails and the highly suspect content of the PENS report. Without the same access we had to APA emails and documents showing extensive APA–DoD collaboration in and after the time of the PENS Task Force, this is an understandable inference, once one reaches the conclusion that the PENS Task Force could only be explained by some sort of governmental influence.**
55	55-56	55-56	55-56	**APA critics have alleged that the revisions to Standard 1.02 were the product of collusion with the government and had the effect of providing psychologists with a defense to torture. Specifically, they allege that the revised language in Standard 1.02 was developed with the government to permit psychologists' participation in interrogations and that it created a loophole that allowed psychologists to ignore their ethical obligations when these obligations conflicted with law, regulations, or other governing legal authority.... Given what we now know about the role some psychologists played in designing the enhanced interrogation program, the government's narrow definition of "torture" during the early years of the war on terror, and the way in which the military used psychologists as members of the behavioral science consultation teams at Guantanamo, the critics' argument is understandable.**
56	59	59	59	**Although the way in which the Ethics Office handled the James matter was technically permissible under the Rules, it demonstrates just how little effort the Ethics Office expends in its "investigation" of ethics complaints, the way in which the Ethics Offices stretches to construe the Rules in a way that is favorable to the accused, and how much the Ethics Office falls back on the rationale that standards in the Ethics Code were too vague to put psychologists on proper notice that certain interrogation**

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62	66-67	66-67	66-67	**They therefore intentionally did [sic] make any effort to seek out more information that might corroborate or contradict the DoD assurances, strategically emphasizing that they were unlikely to get definitive details regarding potential interrogation abuses because the information would be classified.**
63	67	67	67	***"Deliberate avoidance"***...**The approach that Behnke and Koocher (principally) recommended and that APA took was to deliberately avoid probing or inquiring into the widespread indications that had surfaced about harsh interrogation techniques being conducted by the CIA and DoD, even though they knew that psychologists were involved in CIA and DoD interrogations.**
64	67	67	67	**...if one compared the reports of harsh interrogation techniques to internationally- accepted definitions of torture, such as in the UN Convention Against Torture, rather than the bizarrely narrow definitions set out by the Justice Department in its memos, one would have been suspicious that some of the harsh interrogation techniques allegedly being conducted by the CIA and DoD constituted torture.**
65	67	67	67	**And given their contacts in the CIA and DoD, they may well have been able to learn some significant information that would have helped them assess the likelihood that the problem had occurred or was still occurring, and the risk that it would occur in the future.**
66	68	68	68	**A more accurate description is that the collusion was done to support the implementation by DoD of the interrogation techniques DoD wanted to implement, without substantial constraints from APA; with knowledge that there likely had been abusive interrogation techniques used and that there remained a substantial risk that without strict constraints, such abusive interrogation techniques would continue; and with substantial indifference to the actual facts regarding the potential for ongoing abusive interrogation techniques. The collusion relating to PENS and the post-PENS period—and the actions in protecting national security psychologists from disciplinary sanctio [sic]—reflects a clear intent to take actions in order to please and curry favor with DoD.**
67	68	68	68	**Further, the APA officials who led the PENS Task Force process pursued an ethics policy that intentionally sought to please DoD and not place specific ethical constraints on it beyond the general formulations DoD was comfortable with. The position was intentionally pursued to allow DoD to have discretion, subject to its own internal constraints, to determine what interrogation techniques to pursue under the individual circumstances.**
68	68	68	68	**These APA officials took this position while intentionally avoiding an effort to gather information about whether "enhanced" interrogation techniques were still occurring—although they would have had every reason to believe that stress positions and sleep deprivation (among others) were still being used at the time**

				mandates used as a defense in the Nuremberg Trials. While those involved with the revision claimed that the 1998 legal analysis applied to 8.03, at that point, 8.03 covered correctional and military psychologists.
75	134	134	134	<u>Premise to false statement below</u>: However, it seems likely that Banks's condemnation of the techniques listed in the BSCT memo is less sweeping than it first appears. Banks explained that, in the SERE community, "physical pressure" is a term used in contrast to "psychological pressure." He added that, by using the term physical pressures, he was not approving of the use of psychological pressures.[463] However, his explanation seems odd, given that he identified the vast majority of the techniques identified in the BSCT memorandum as psychological pressures.[464] Banks went on to explain that it is more difficult to define when psychological pressures are impermissible because a psychologist would need to assess whether such a technique would be safe, legal, ethical, and effective. For example, Banks thought that the use of stress positions might or might not be permissible depending on whether it was safe under the circumstances.[465] **Therefore, Banks's email, when read in context, recommends against the use of only those few techniques that qualify as "physical pressures," and could have been read as an implicit endorsement of the majority of the techniques listed in the BSCT memo.**
76	153	153	153	On June 13, the *Washington Post* published copies of the memoranda. **Shortly after, Assistant Attorney General for the Office of Legal Counsel Jack Goldsmith, withdrew the 2002 and 2003 memoranda at issue.**
77	186	186	186	**Even at this early stage in APA's consideration of ethical issues in the national security context, the APA's internal discussions suggest that a primary issue of importance to APA was messaging and publicity. Though it is likely that APA staff were motivated by the goal of providing substantive guidance to military psychologists as well, their initial internal communications turned on the opportunity to take the lead on an issue that was drawing public attention. Throughout the APA's consideration over the next several years of the ethical issues raised by psychologists working in national security, considerations of messaging and public image would continue to dominate the conversation.**
78	191	191	191	<u>Premise to false statement below</u>: The APA's response to Kimmel's task force demonstrates that, by 2004, the APA was guided by political considerations to obstruct member initiatives that were critical of Bush administration policies in the war on terror. There might have been legitimate concerns about the scientific basis of the report, as Farberman described, or those concerns might have been pretextual; regardless of the validity of the scientific concerns, however, it is clear from internal communications that APA's motivation in discouraging

				recommended pursuing research related to interrogations without addressing the obvious concerns.
82	209	209	209	**Behnke also articulated this strategy of avoiding the difficult questions by playing up the lack of perfect knowledge regarding both facts and "context" in a similar exchange with Farberman in the same group email...**
83	210	210	210	**Behnke's comment that "much thinking and development needs to take place" on the issues before ethical declarations could obviously be considered a fair substantive point. But APA ended up pursuing its course of action not based on additional "thinking and development" on ethics issues, but on strategic and PR considerations. If Behnke and APA had declined to issue ethical guidance or take an ethical position on the issue for (say) 12 months while they carefully studied issues of torture, interrogation practices, the role of health care practitioners in interrogations, and ethical issues relating to war and capture, and publicly explained that they were not issuing guidance because this study was taking place, that would be one thing. But APA did the opposite.**
84	210	210	210	**As set out below, in order both to address perceived PR concerns (that APA's silence on these issues was costly from a perception standpoint because it showed an absence of leadership and relevance), and to please the Defense Department (which wanted both timely action from APA that would reflect positively on DoD, and ethical guidelines that gave DoD substantial flexibility and were as close as possible to existing or draft DoD policies on the topic), APA issued a task force report that evaded the difficult questions that APA knew inevitably needed to be answered if psychologists were to be authorized to engage in interrogation activities. Simultaneous with its PENS report, APA claimed that (1) the report was not evasive but was in fact a clear, strong, pro-human rights statement against torture; (2) the report was evidence of APA acting as a "leader" on this issue; (3) the report provided "clear guidance" on this issue; and (4) it was unfair to label the report as evasive because (a) the issue was complicated (so they needed more time), (b) they needed more facts (even though the contemporaneous emails show they expected to never obtain meaningful facts because of the activity's classified nature), and the report should be seen as merely an "initial step" with the promise of a more detailed "casebook" (which never occurred).**
85	210	210	210	**But as set out below, the evidence shows that what explains the PENS report is a desire to please DoD by following its requests about how to proceed, and the desire to create a positive-sounding policy statement in a short time frame in order to respond to the pressure of negative press reports.**
86	215	215	215	**The conflict of interest on this issue resulting from Russ Newman, the head of the Practice Directorate, being married to Debra Dunivin, the lead Army BSCT psychologist at Guantanamo Bay,**

				weighted in favor of the military and Defense Department (a critical factor in its outcome), the initial staff-recommended task force members were more equally divided.
94	243	243	243	Some APA officials and staff involved in the selection process claim that the ultimate breakdown between military and non-military members ignores the diversity within the DoD members of the task force. But there is no documented discussion in the first part of 2005 about the diversity of the DoD members. On the contrary, Behnke's handwritten notes indicate he grouped all of the DoD members together in his categorization of potential task force members.
95	243	243	243	These importantly-timed and confidential consultations with Banks and Dunivin appear to have been unique—we did not find evidence of APA having similar consultations with other individuals or constituencies. And they were highly influential.
96	243	243	243	Premise to false statement below: While some APA officials and staff involved in the selection process claim that the 6-4 majority did not matter because the eventual report was a "consensus document," the discussions in the first part of 2005 indicate an awareness and importance about members who could vote. **The consensus argument made today appears to be a post-hoc response to the critique about the composition of the task force and, as seen below, was not an argument raised at the time when this criticism first arose. In short, it would have been clear to everyone involved in early 2005 that selecting six voting, DoD members would be a dominant voting bloc within the task force, and would send a very strong positive message to DoD about APA's support.**
97	249	249	248	**Behnke's staunch handling of Moorehead-Slaughter's communications, coupled with Moorehead-Slaughter's lack of experience in national security issues, signal that Moorehead-Slaughter was used primarily as Behnke's agent during the PENS process.**
98	255 FN 1140	255 FN 1140	255 FN 1140	**Gravitz made a point of speaking to Behnke about the case and warning him that action against Gelles could harm national security. Behnke said that this had no effect on him, but he later took over the investigation from the assigned investigator (who strongly believed that Gelles had committed an ethical violation) in an unusual fashion during her temporary absence, causing the investigator to say that Behnke was manipulating the situation and taking advantage of her absence. After Behnke's involvement, the APA Ethics Committee voted unanimously to find no violation against Gelles.**
99	256	256	255	**Both Gravitz (who was there for days two and three of the meeting) and Newman spoke during the meeting in ways that supported the military/DoD psychologists. And, as discussed more below, Newman spoke forcefully about the importance of achieving APA's PR goals in a manner that was inconsistent with**

				recommended by Behnke (through Moorehead-Slaughter) as a good framework for the Task Force.
107	262-263	262-263	262	**The framework—the interrogation practices must be "safe, legal, ethical and effective"—was touted by Banks as a safeguard that would somehow ensure the humane treatment of detainees, when in reality it was (as discussed more later) a malleable, very high-level formula that easily allowed for subjective judgments to be made, including by people such as Banks who interpreted the formula to permit stress positions and sleep deprivation in some circumstances.**
108	263	263	263	**The meeting group was expanded in a careful way by adding two "observers" who were affiliated with the military and intelligence community. After several days of internal staff consultation and planning about how to add observers to the task force meeting, Behnke (through Moorehead-Slaughter) posted an email on the listserv inviting observer recommendations. In a coordinated fashion, APA Practice Directorate chief Russ Newman was added as an observer, despite Newman's conflict of interest because of his marriage to the Army's lead interrogation-support psychologist at Guantanamo. Michael Gelles subsequently recommended long-time CIA contractor/ psychologist Melvin Gravitz, and he was quickly "confirmed" by Moorehead-Slaughter. As discussed later, both Gravitz and Newman spoke during the meeting in ways that supported the military/DoD psychologists. And Newman spoke forcefully about the importance of achieving APA's PR goals in a manner that was inconsistent with the efforts by some of the non-DoD psychologists to push for stricter, more specific ethical guidelines.**
109	263-264	263-264	263	DoD members, however, did have differences of opinion on the best use of psychologists in these settings and whether psychologists could ever play a more direct role in interrogations. Several members appear to show an openness to using the Geneva Conventions as a guiding principle in outlining what psychologists can do in interrogation settings, though not necessarily as an ethical requirement as seen during the PENS meetings.
110	264	264	264	**Banks came into the task force with a concrete idea of what the task force report should say and should not say, as he and Dunivin had already drafted what would become Army (and therefore DoD) policy regarding the details and limitations on using psychologists in interrogations,** a confidential internal Army document that he distributed at the meeting.
111	265	265	264	**The evidence shows that at the meeting, Banks was "persistent" about his agenda, in the words of a DoD task force member. His agenda was, according to the same DoD task force member, to get APA's "good housekeeping" seal of approval for the involvement of psychologists in interrogations and to otherwise keep the status quo and to avoid limits or constraints beyond the ones the Army or DoD had in place or would decide to put in place in the future.**

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117	271	271	271	**Newman led much of the task force discussions throughout the weekend. He often appeared to limit discussion on issues outside the perceived scope of the task force's mandate.**
118	274	274	274	**Ultimately, the PENS report included language that did not ethically bind psychologists by human rights standards, but did state that psychologists should review the Geneva Convention Relative to the Treatment of Prisoners of War and the U.N. Convention Against Torture since they were "fundamental to the treatment of individuals."**
119	274	274	274	**Wessells told Sidley that he pressed his point several times to add binding language from the Geneva Conventions and the U.N. Convention Against Torture but that it was a "complete loser" with the DoD people in the room. He noted that the DoD members were "passionate" about upholding the existing military regulations at the time, which permitted what he called " torture-lite."**
120	274-275	274-275	274	**While several DoD PENS members expressed an openness to abide by the Geneva Conventions or the U.N. Convention Against Torture, none appeared comfortable mandating that psychologists in detainee interrogation settings follow them at all times.**
121	277	277	277	**Some say that this observation about avoiding international law shows the automatic impact that selecting a majority of DoD officials had on the task force's conclusion. But we think that it actually shows an even more intentional decision by the APA task force leaders and the DoD psychologists not to voluntarily commit psychology as a profession to a more robust set of ethical limitations. To do so would have shown leadership on the issue in a way that likely would have put APA at odds with DoD and the Administration. This may have caused a conflict that would have resulted in DoD employing fewer psychologists or to writing policy that subordinated the role of psychologists in interrogation and detention matters; and it may have prompted some DoD psychologists to leave APA membership (although Banks was already outside of APA membership).**
122	277	277	277	**By going along with the "simply follow U.S. law" position of the DoD task force members, the APA task force leadership was making an explicit choice to follow what DoD wanted rather than making an independent decision about what were the appropriate ethical rules for psychologists in these situations (other than the decision that was best for DoD was best for APA).**
123	286-287	286-287	285-286	**So after one day of task force deliberations, Behnke drafted a document that would largely become the final PENS report's twelve statements....Behnke's draft also created a novel second limitation...**
124	288-289	288-289	288	**When asked why he removed the full paragraph instead of only the statement citing Standard 8.07 (or refine the "legitimate purpose test" another way), Behnke responded that he likely viewed the paragraph as one unit; once the research sentence was**

				this was not consistent with Banks's and DoD's preferences (and therefore Behnke's and APA's) that the role of psychologists not be limited beyond whatever constraints DoD itself had in place.
129	298	298	297	**Instead, the PENS report banned participation in torture and CID but avoided defining these terms at a moment where precision and explanation were crucial for the psychologists working in these interrogation settings.**
130	299-300	299-300	299	**Behnke also claimed that prohibiting specific techniques at the time would have raised concerns that the group may unwittingly exclude a technique and, therefore, provided an explicit loophole for interrogators to exploit. It was not until March 2007, Behnke argued, when he attended an event at the Wright Institute with Professor Alfred McCoy, that he realized that there was a fairly consistent list of techniques that interrogators used consistently and he incorporated this thinking into what ultimately became the 2007 APA Resolution that banned the use of specific techniques.[1331] This assertion, too, is incorrect. Behnke and Banks engaged in a dialogue as early as October 2006 about adding specific techniques as part of a substitute motion in response to Neil Altman's moratorium resolution, discussed further in the next section of this report. What is more, Behnke's worry that a non-listed technique could be used had an easy resolution—to insert language that the list was not exhaustive and that the underlying principle was about not inflicting abuse or harm upon individuals.**
131	301	301	300	**In the end, the report was general enough that it gave the DoD the flexibility to make more specific calls on what was permissible despite troubling institutional pronouncements on what constituted torture and what protections detainees ought to receive.**
132	301	301	300	**Sidley separately posed to both Behnke and Banks whether interrogations involving certain kinds of stress positions would run afoul of the "safe, legal, ethical, and effective" analytical framework or the PENS report in general. Neither could provide a clear answer based on these two sources alone.[1336] Behnke struggled to respond to which types of stress positions, each with varying levels of pain to the detainee, would be considered "safe." His response shifted to the effectiveness point—technically an incorrect approach since a psychologist was supposed to have gone [sic] the four terms in order—where he noted that, even if a particular position was safe, it likely was not effective. When asked how he knew that, Behnke believed that studies about interrogations would dictate that rapport-building was the best way to interrogate a detainee.[1337] If this was true and others agreed, then the PENS report could have explicitly mentioned that rapport-building was the best way to handle detainee interrogations—it did not.**

				psychologists could arguably participate in waterboarding sessions since they did not violate the way the law was interpreted at the time.
138	305	305	304	Premise to the false statement below: Both Behnke and Banks contended that the statement referred to all U.S. civil and criminal laws as well. So while slapping or waterboarding may have been permitted under certain OLC pronouncements at the time, it would violate assault provisions in the U.S. Code, the Uniform Code of Military Justice, or Army Regulation 190-8. **The report does not make this point immediately obvious, however.**
139	305	305	304	**The statement also makes reference to, at Wessells's behest, the Geneva Convention Relative to the Treatment of Prisoners of War and the U.N. Convention Against Torture. But as discussed earlier, these provisions are not made binding on psychologists in these detainee settings.**
140	307	307	306	**For instance, Banks's view was that some stress positions were "safe" and therefore might be properly used as interrogation techniques. (He cited the "push up" stress position to us as an example.) Similar (sic), the PENS report refused to take a position on sleep deprivation despite being asked to do so.**
141	307	307	306-307	**Whatever organizational or personality dynamic led to APA allowing him to play this remarkably expansive role, well beyond the expected duties of APA Ethics Director, the result was a highly permissive APA ethics policy based on strategy and PR, not ethics analysis.**
142	315	315	314	**Behnke separately emailed Koocher and Anton about Halpern's recommendation and again showed that his primary goal was to stay completely aligned with DoD. After citing to Statement Ten of the report on effectiveness, Behnke concluded, "which means that if a technique or method is not effective, PSYCHOLOGISTS SHOULD NOT BE DOING IT."[1411] Behnke then stated he was "concerned about making an absolute empirical statements," especially since the task force "may not have felt entirely comfortable" making such a "clear, blanket, statement."[1412] In other words, because at least some of the DoD members were not ready to agree that torture was effective (e.g., Lefever told the group that his experience with SERE was that waterboarding was often effective at getting U.S. soldiers in the program to reveal accurate information that was supposed to be secret),[1413] Behnke wanted to block this Board member's suggestion.**
143	318	318	318	**This key question was not addressed in the PENS report, despite two of the most influential participants' understanding its importance. As noted earlier, the draft language that referenced "psychological distress" was removed, as was a serious discussion about what kinds of interrogation techniques may be unethical. This exchange adds further support to the idea that Banks,**

				psychologist on one hand serving as a "safety officer," but on the other hand playing a key role in the "effectiveness" of an interrogation. Here and during the PENS meetings, Newman did not hone in on this conflict since he wanted to maximize the role that BSCT psychologists could play—both because of his wife and because of his general outlook at growing the profession of psychology.
149	331	331	331	**Also on August 12, Behnke sent a response to the mid-July letter from the PHR regarding their concerns with the PENS report, but only after coordinating and pre-clearing the response with Banks.**
150	336	336	335-336	<u>Premise to false statements below</u>: The document then cited to the casebook project as an [sic] another reason to delay any finding from the Ethics Committee. And it further stated that there were "several provisions in the Ethics Code to sanction psychologists" who engaged in abusive actions, without ever citing any standards in the PENS Report (perhaps the document thought of Standard 3.04, but as discussed before, there is flexibility in how this standard is interpreted). These assurances of deeper analysis in to amending Standard 1.02, however, were hollow. **There is little evidence that Behnke or the Ethics Committee ever took concrete steps to fully address these concerns over the standard until the entire Ethics Code was revised by 2010.** **In fact, Behnke engaged in various delay tactics for years after to obstruct efforts to amend Standard 1.02, discussed in a later section of this report.**
151	340	340	340	**Behnke's discretion comment is revealing. It implies that he asked Banks to keep secret Behnke's practice of pre-clearing issues and statements with Banks (a practice that continued in the years ahead, as discussed in later sections of this report). The message shows an understanding that these kinds of missives to Banks were atypical compared to messages with others —that he was using Banks in a unique way different from other task force members. The joint venture relationship between Banks, a key DoD official, and Behnke is presented plainly here (and amplified more in subsequent years, as discussed below).**
152	341-342	341-342	341-342	**Ultimately, Behnke did virtually nothing to pursue a casebook for years, effectively abandoning an essential element of his (disingenuous) claim that APA's development of ethical guidance on the issue would be a multi-step process. Behnke made the argument to us during his interviews that a casebook was on hold because they lost the subject-matter experts from the PENS Task Force and because the Council began passing resolutions in 2006 that provided more specific guidance for psychologists.[1587] We do not think this is true, since as set out below, Behnke was the lead APA strategist in attempting to manipulate and water down Council resolutions to minimize the effect on DoD. The real reason**

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				Behnke's work relating to the interrogation issue, especially with regard to official statements by Behnke or APA to the media, APA members, or prominent critics. As part of the growing partnership, Banks and Dunivin brought Behnke into the newly-created DoD training program for BSCT psychologists at Fort Huachuca, Arizona as a paid instructor.... DoD paid Behnke for these trainings, although Behnke said that the payments went to APA (less reimbursement to Behnke for travel expenses), and were used by the Ethics Office for educational purposes. **...And in fact, it appears that APA's Board was never made aware of his participation, his status as a DoD contractor, or these payments from DoD to APA.**
158	363	363	363	Premise to false statement below: This single exchange reveals clearly that Behnke viewed Banks as a partner in their joint enterprise of coordinating APA and DoD policy and messaging on interrogations. Behnke both shared a presumably private communication from a high-ranking APA governance member with DoD personnel, and relied on Banks, as an advisor in DoD, to assist him in crafting a mutually acceptable response. **...it is clear from the "Eyes Only" subject line that Behnke purposely concealed his consultation with Banks from Brehm and other APA governance members, keeping secret the strategy of close coordination he intended to pursue.**
159	364	364	364	Premise to false statement below: In May of 2006, the American Psychiatric Association ("ApA") released a position statement on psychiatrists' participation in the interrogation of detainees, concluding that "[n]o psychiatrist should participate directly in the interrogation of persons held in custody by military or civilian investigative or law enforcement authorities."[1701] In yet another instance in which Behnke showed that his primary goal in developing APA messaging was to support DoD's policy goals, Behnke and Kelly sent a description of the statement to Banks and asked if there was "anything on your end you can share in the way of a reaction or what it might mean for conducting business." Banks responded that he thought the ApA's position was "poorly informed on several issues" and "inaccurate in [its] depiction of several facts." Behnke encouraged the group to review the statement itself and then speak again.[1702] It is clear that Behnke was aware that the positions taken by professional associations, including APA, had a direct impact on DoD policy decisions, and that he was motivated to ensure that APA did nothing to interfere with DoD's preferred mode of "conducting business."
160	366	366	366	**It is clear from Behnke's broad outreach to his contacts in DoD that he was concerned about the public backlash to Winkenwerder's comments regarding DoD's preference for using**

				relations strategy in a way that supported DoD's continued use of psychologists in interrogation roles. Behnke continued to share APA's media strategies, presumably intended to be confidential, with his advisors in the DoD, and to implement the suggestions of those advisors in his statements on behalf of APA.
164	370	370	370	**The points developed by Behnke and Farberman demonstrate that they were highly attuned to the defenses Banks and other military psychologists had been offering for years. Whether APA turned to DoD for assistance or, more rarely, DoD turned to APA, the evidence clearly shows that APA and DoD worked as partners to ensure that they presented a unified public message.**
165	371	371	371	Premise to false statement below: It is clear that during this period, Behnke saw himself, and APA, as teammates with Banks, Dunivin, and DoD. He continually turned to his partners in DoD to closely coordinate strategy and policy in direct opposition to peace and social justice critics, ... **...and he shaped APA's message in a way that suited the military's needs.**
166	371-372	371-372	371-372	Premise to false statement below: *C. Manipulation of the August 2006 Council Meeting: June 2006 - August 2006....* Having reached out to Banks and Dunivin for guidance, Behnke emailed Van Hoorn and Okorodudu on June 22, stating that the "climate may have changed," and suggesting that their original plan for expedited treatment of their resolution now made sense, such that the resolution would go before the Council in August.[1739] Behnke claimed in a later email to them that the "changing climate" referred to "the attention that the Council was giving to this issue and the Board's desire to ensure that Council has the opportunity to discuss this issue when it meets at Convention."[1740] But the emails leading up to this exchange show that, in fact.... **Behnke had become concerned that more aggressive action by Council—including a potential prohibition on psychologists being involved in interrogations at Guantanamo—was become increasingly likely, and that it was strategically important to provide a more moderate alternative that would keep DoD officials happy (by not requiring any change) while appearing sufficiently "pro human rights" so that peace psychologists would also be satisfied. As an additional step in pursuing this strategy, Behnke sought to co-opt the Division 48 proponents by adding representatives from the military psychology division, Division 19, to the team.**
167	374	374	374	**Wanting to maximize the appearance that this was purely a Division 48 resolution, and not one managed and watered down by him, Behnke suggested a response that acknowledged contact with APA staff, but falsely implied that the contact was merely procedural: "The Movers would like to move the Resolution forward as expeditiously as possible, and have asked staff to**

				communication strategy with Banks in an effort to manipulate the Board into approving his visit to Guantanamo. Behnke reached out to Hoofman to see if she could draft an invitation letter directed to him that stated specifically: (1) current DoD policy explicitly references the PENS report and the request was for a consultation on the application of the PENS report and other relevant APA positions; (2) the purpose of the consultation was to discuss how psychologists could remain within the proper, ethical bounds of their work; and (3) on-site consultation was requested out of necessity.
175	387	387	387	Premise to false statement below: The next day, Banks wrote to Behnke that he hoped the process had not been "too destructive," to which Behnke responded: "Morgan, you know the enormous respect I have for you and your work. Nothing could diminish that, nor my commitment to continue to support all of your efforts, and the efforts of the great men and women who protect our country and our freedoms."[1821] **This show of support is yet another example of the strong personal friendship between Behnke and Banks that served as a foundation for their joint efforts to shape APA and DoD policy in a mutually reinforcing manner.**
176	388	388	388	**The discussions demonstrate that Behnke was highly attuned to the way that APA's public message could affect military activities, and that he was motivated to ensure that APA did not hinder the military's mission in any way.**
177	389	389	389	**Behnke's discussion with Levine and comments to Levant, Koocher, and Banks demonstrate that he was becoming more defensive and paranoid regarding media criticisms of APA and military psychologists. From this point forward, he increasingly turned to his partners and friends in DoD to craft a unified response to critics and to ensure that the APA and military media strategies aligned in message and theme.**
178	391	391	391	**As Banks's flippant comment regarding safety demonstrates, DoD's "framing" rested on using public safety and the fear of future attacks as a public relations tool. His comments also demonstrate that he spoke not only on behalf of himself, but also as an authoritative voice on how to construe DoD policy. Indeed, it seems likely that Behnke viewed Banks as a critical touchstone in DoD, given Banks's connections to highly-ranked individuals in the medical and operational commands.**
179	392	392	392	**Banks's response shows the close collaboration and joint purpose between APA and DoD on the vital issue of psychologists' involvement in interrogations.**
180	393	393	393	**It is clear that Behnke and Banks were, by this point, acting as a true partnership: not only did Behnke lean on Banks for guidance, but Banks also requested advice and assistance from Behnke in drafting statements and talking points for DoD. Moreover, it is**

				Sidley's records at precisely the same time that Banks began instructing Behnke to delete their messages strongly suggests that their discussions continued, but that records were destroyed in an attempt to conceal the collaboration.
185	400	400	400	The concept of listing and restricting specific interrogation techniques is something Behnke had staunchly resisted a year earlier during PENS. In a sharp turnaround, it appears Behnke became comfortable proposing and supporting a resolution prohibiting particular techniques only after the Army adopted a Field Manual restricting certain harsh techniques and Banks pre-cleared his proposed strategy.
186	402	402	402	Banks and Behnke worked together to ensure that the Ethics Committee did not take any positions that undermined the policies adopted by the military.
187	405	405	405	However, it is clear that Behnke ghostwrote a letter in direct opposition to the Altman resolution to pursue his own agenda.
188	424	424	424	Premise to false statement below: On August 13, Behnke emailed Banks the newest draft of the motion, with the message: "If you could look these over that would be great--it's the Board's motion, plus amendments."[2011] Later that day, Behnke sent Banks an email titled "How does this sound" with the following text: "...at detention facilities operated by the United States government where there are extra-judicial proceedings and where no due process of law is afforded..." Banks responded by asking Behnke the best number to reach him, stating "I just finished it, and have some thoughts."[2012] Sidley was not able to find any additional email communications on this point. **However, it is clear that Behnke once again turned to Banks, his trusted partner in DoD, for pre-approval of APA policy.**
189	426	426	426	It seems clear then that, regardless of whether it was publicly announced, James and Behnke, and some portion of Division 38 leadership coordinated prior to Convention to ensure that James would be able to speak as an official representative of Division 38.
190	428	428	428	Premise to false statement below: On January 9, 2008, Behnke consulted with Dunivin and Banks regarding APA's response to a resolution before the California Senate Business and Professions Committee. The Committee was considering significant action that would have deemed psychologists working in BSCT roles as in violation of their professional ethical responsibilities. **Perceiving this proposed action as a disastrous threat to the position that he had worked with DoD to defend for so many years, Behnke immediately turned to his partners in DoD to help craft a response he could use in lobbying on APA's behalf.**
191	429	429	429	Premise to two false statements below: On the same day, a SERE psychologist working with Banks sent three sets of documents to Behnke, including the DoD Directive and Instruction that Banks had referenced, and a number of other policies relating to BSCTs and

False Statements

				Thus, even before any APA governance bodies or the APA membership considered the petition on its merits, APA staff had already subverted the clear intent of the petitioners and rendered the resolution toothless.
196	432 & 433	432 & 433	432 & 433	Premise to false statements below: In the first few days after the Board directed the inclusion of pro and con statements in the circulation of the petition, APA staff rushed into action to both identify an author and shape the substance of the statement. Despite Anton's assurances that he would select the author of the con statement, it was Behnke who, on June 18, reached out to Joel Dvoskin to invite him to write the statement.2046 Although Sidley could not find any record of staff discussions regarding who to select, it appears likely that Dvoskin was chosen because he was viewed as an "incrementalist," based on an address he gave as President of Division 41.[2047] By June 20, Dvoskin had already prepared a draft con statement. After speaking with Dvoskin, Behnke became concerned that he would not present a forceful enough opposition to the petition. In an email to Honaker, Strassburger, Gilfoyle, Farberman, Garrison, and Anderson, Behnke raised a concern regarding the tone of Dvoskin's statement. **Although Behnke's explanation for sidelining Dvoskin's draft statement was based entirely on procedure, it was clear that his real concern was with the "conciliatory" tone and substance of the statement Dvoskin had prepared. Clearly, Dvoskin's endorsement of the "intent behind the petition" would have been unacceptable to Behnke's partners in DoD, who wanted to continue to use psychologists as BSCTs at Guantanamo and elsewhere. Therefore, Behnke conveniently fell back on the Board's instruction that Anton select the con statement writer.** **Had Behnke truly been concerned with the procedural niceties, he would not have asked Dvoskin to work on the statement prior to Board approval in the first place. Internal communications clearly indicate that Behnke regretted the selection he had made because Dvoskin would not provide a vigorous defense of the position.**
197	433	433	433	**Behnke had staked out with his partners in DoD, and that he turned to procedural considerations to provide cover for a second attempt at choosing an author who would strike the right tone in strongly opposing the petition.**
198	434	434	434	**As the Council member intuited, APA staff's handling of the pro and con statements was disingenuous all the way through.**
199	437	437	437	**Behnke's elaborate responses to the con authors' questions belie his earlier promise that the author could "write the statement in whatever manner he/she chooses." Instead, it is apparent that Behnke labored to craft the language himself, to the extent possible, all while studiously assuring that he had gone through the**

False Statements

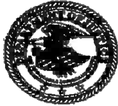
206	448-449 FN 2133	448-449 FN 2133	448 FN 2133	Premise to false statement below: James referenced a *New York Times* article that had recently been published and reported that the review of Guantanamo that President Obama requested had been completed and had concluded that Guantanamo "more than complies with United Nations Standards/guidelines." During his interview with Sidley, Behnke claimed that the term "unlawful" had not been of practical significance because at the time that Council acted, Obama had not yet declared Guantanamo to be lawful. Behnke interview (June 8, 2015). Factually, Behnke was incorrect: As James noted in his email, the *New York Times* reported two days before Council met that Guantanamo was in compliance with the Geneva Conventions. *See* William Glaberson, *Guantanamo Meets Geneva Rules, Pentagon Study Finds*, New York Times (Feb. 20, 2009), *available at* http://www.nytimes.com/2009/02/21/us/21gitmo.html?_r=0. Regardless, Behnke's explanation is disingenuous because, based on his email to Garrison only days before the Council meeting, he clearly understood that military psychologists would interpret the term "unlawful" as placing Guantanamo outside the scope of the report.
207	449	449	449	**Even at this late date [2/2009], as the political climate changed and the DoD's use of psychologists in interrogation roles became less critical, Behnke's "big picture" still focused on the bottom line needs of his partners in DoD.**
208	450	450	449	**Although demands for a revision to Standard 1.02 began immediately after the PENS Task Force issued its report, APA's clear strategy, devised by Behnke, was to delay taking any action to revise the Ethics Code for as long as possible. APA, through Behnke, consistently issued statements that made it appear as though he was giving serious consideration and deep thought to the proposed revisions, but it was not until late 2008, three years later, that the association began to seriously engage with APA members and Council representatives about adding the relevant modifying language.**
209	455	455	454	**Although Sidley has found no documentary evidence proving that Behnke influenced COLI's position, it seems likely that he swayed COLI to take the stance that it did. Behnke engaged in a pattern of using COLI, among other governance committees, to obstruct member-initiated actions that he opposed,[2159] recognizing that COLI as a body was generally risk-averse and staffed by individuals who complied with the APA agenda. Given COLI's generally protective attitude and the strong similarities between COLI's objections to the proposed revisions and those raised by the Ethics Committee in its initial response in September 2005, it seems extremely likely that Behnke influenced both Committees in their stances against the proposed Standard 1.02 revision.**
210	455-456	455-456	454-455	Premise to false statement below: In January 2007, Behnke responded to criticism from Steven Reisner regarding the slow pace of the revision, which Reisner understood had been directed by Council more

False Statements

				principles, was important to psycholog[illegible] orking in national security, and that he opposed any revision [illegible]o the Standard for so many years out of a desire to protect these psychologists.
215	465	465	464	**Thus, Behnke made education and consultation the primary focus of the Ethics Office; adjudication was relegated to a "tertiary focus."**
216	475	475	474	Nevertheless, there are some who believe that the Ethics Office does play a role in protecting the public by taking disciplinary action against psychologists who engage in unethical behavior. Former Board member Carter told Sidley that her understanding was that the Ethics Office was very much involved in "protecting the public."[2282] **Behnke did not share this view. During his interview, he told Sidley that the role of the Ethics Office is not protection of the public and that protection of the public is a function for state licensing boards.**
217	485	485	484	**The evidence shows that Behnke was reluctant to proceed with charges against Gelles and that he actively looked for ways to avoid sending the case to the full Ethics Committee. It is unclear what motivated Behnke, but the evidence suggests that he may have been influenced by a prominent APA member.**
218	522	522	521	**The complaint alleged that James was the "commander of the Guantanamo Behavioral Science Consultation Teams (BSCTs) from January 2003 to mid-May 2003, during a time when the International Committee of the Red Cross (ICRC) reported the most serious abuses at Guantanamo." Bond stated that under James's "command and supervision," psychologists from the military's SERE program were "instructed to apply their expertise in abusive interrogation techniques conducted by the DoD in Guantanamo." In the complaint, Bond also stated that she was "aware that Colonel James has denied the use of SERE techniques but the facts speak to his knowledge and military command of [BSCTs] who utilized SERE techniques."[2259]**
219	523	523	522	Sidley conducted an analysis of APA's finances to assess whether any payments to APA from relevant parts of the government may have influenced APA's actions relating to the PENS Task Force, revisions to APA's Ethics Code, or its positions on national security interrogations. This analysis began broadly by reviewing summary financial information, before conducting an in-depth analysis of areas of possible interest. As part of this analysis, Sidley collected financial records from APA and interviewed APA Finance Office personnel.

Exhibit C

EXHIBIT C



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

February 4, 2005

Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20101-1600

Re: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003) ("March 2003 Memorandum")

Dear Jim:

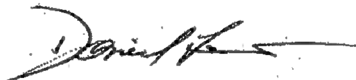
In December 2003, then-Assistant Attorney General Jack Goldsmith advised you that the March 2003 Memorandum was under review by this Office and should not be relied upon for any purpose. Assistant Attorney General Goldsmith specifically advised, however, that the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees at Guantanamo Bay Naval Base were authorized for continued use as noted below. I understand that, since that time, the Department of Defense has not relied on the March 2003 Memorandum for any purpose. I also understand that, to the extent that the March 2003 Memorandum was relied on from March 2003 to December 2003, policies based on the substance of that Memorandum have been reviewed and, as appropriate, modified to exclude such reliance. This letter will confirm that this Office has formally withdrawn the March 2003 Memorandum.

The March 2003 Memorandum has been superseded by subsequent legal analyses. The attached Testimony of Patrick F. Philbin before the House Permanent Select Committee on Intelligence, July 14, 2004, reflects a determination by the Department of Justice that the 24 interrogation techniques approved by the Secretary of Defense mentioned above are lawful when used in accordance with the limitations and safeguards specified by the Secretary. This also accurately reflects Assistant Attorney General Goldsmith's oral advice in December 2003. In addition, as I have previously informed you, this Office has recently issued a revised interpretation of the federal criminal prohibition against torture, codified at 18 U.S.C. §§ 2340-2340A, which constitutes the authoritative opinion of this Office as to the requirements of that statute. See Memorandum for Deputy Attorney General James B. Comey from Daniel Levin,

Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (copy attached).

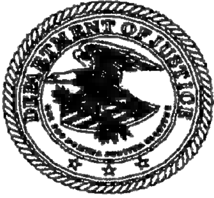
Please let us know if we can be of further assistance.

Sincerely,



Daniel Levin
Acting Assistant Attorney General

Attachments



Department of Justice

STATEMENT

OF

PATRICK F. PHILBIN
ASSOCIATE DEPUTY ATTORNEY GENERAL

BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

TREATMENT OF DETAINEES IN THE GLOBAL WAR AGAINST TERRORISM

PRESENTED ON

JULY 14, 2004

TESTIMONY OF PATRICK F. PHILBIN BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE JULY 14, 2004

Mr. Chairman, Ranking Member Harman, and Members of the Committee, it's a privilege to be here today as a representative of the Department of Justice to address the legal standards that govern treatment of detainees in the global war on terrorism.

Let me begin by describing the various statutes, treaties and constitutional provisions that are potentially relevant. Then I'll discuss the application of these legal standards, with particular reference to the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees held at the Guantanamo Bay Naval Base. As I'll explain, each of these techniques is plainly lawful.

General Criminal Statutes

First, there are a number of general criminal statutes potentially relevant in cases of mistreatment of detained persons. These may include, for example, the general crimes of assault, maiming, and, in cases where a death has resulted, murder and manslaughter. These offenses are federal crimes when committed within the "special maritime and territorial jurisdiction of the United States," which includes Guantanamo in most cases.

Even in locations beyond the reach of the special maritime and territorial jurisdiction, conduct that would constitute a felony under these same criminal statutes can be prosecuted under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267, when committed by certain persons employed by or accompanying the Armed Forces, which includes employees and contractors of the Department of Defense and their dependents. In addition, of course, members of the Armed Forces are subject at all times to the Uniform Code of Military Justice, which applies everywhere. The UCMJ

also proscribes various potentially relevant offenses, including murder, manslaughter, maiming, assault, cruelty and maltreatment, and dereliction of duty. As you know, a number of military personnel are currently being prosecuted by the Defense Department under the UCMJ in connection with mistreatment of prisoners overseas.

Prohibitions on Torture

Second, let me turn to the treaty and statutory prohibitions on torture. The United States is a party to the U.N. Convention Against Torture, which prohibits official acts of torture and requires the United States to ensure that torture is a crime under U.S. laws when committed anywhere by a U.S. national or by persons who are present in territory under our jurisdiction and who are not extradited.

The Convention defines torture to mean the intentional infliction of "severe pain or suffering" by a person acting in an official capacity. The Senate attached the following understanding to its resolution of advice and consent to the Convention:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding is part of the United States instrument of ratification and thus controls the scope of U.S. obligations under the treaty. Pursuant to this understanding imposed by the Senate, the offense of torture requires

specific intent, and "severe . . . mental pain or suffering" for purposes of the Convention requires a specific intent to cause prolonged mental harm.

To carry out United States obligations under the Convention Against Torture, Congress enacted the federal torture statute, 18 U.S.C. §§ 2340-2340A, in which Congress defined the crime of torture as: "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." Congress further defined "severe mental pain and suffering" by incorporating the language that the Senate included in the understanding attached to the Convention. Thus, the prohibition on torture that Congress codified in the federal torture statute tracks precisely the prohibition in the Torture Convention, as defined by the U.S. understanding.

Congress also defined a limited territorial reach for the torture statute. Congress limited the prohibition to apply solely "outside the United States," which is defined in the statute to mean outside both the sovereign territory and the special maritime and territorial jurisdiction of the United States. Conduct that occurs within those areas is already generally subject to existing federal and state criminal statutes, which include those I have discussed earlier.

As I have noted, for most cases, the Guantanamo Bay Naval Base is within the special maritime and territorial jurisdiction. The precise interaction of the torture statute and the special maritime and territorial jurisdiction is complex, however, and I do not intend to parse the details here for three reasons. First, any mistreatment amounting to torture committed in Guantanamo would likely violate the UCMJ, if committed by a

member of the Armed Forces, or some other statute that applies within the special maritime and territorial jurisdiction. Second, the Convention Against Torture, which mirrors the torture statute in substance, forbids the United States from taking any official actions at Guantanamo that constitute torture. As the President has made clear, the United States stands by its obligations under the Torture Convention. Third, as explained below, none of the 24 interrogation techniques approved by the Defense Department for use in Guantanamo would even remotely constitute torture, nor would the use of these measures as approved violate other potentially applicable criminal statutes.

Laws of War

Next, I'll discuss the statutory and treaty provisions related to the laws of war. These include the War Crimes Act, 18 U.S.C. § 2441, and the related provisions of the Geneva Conventions. In the War Crimes Act, Congress made it a crime for U.S. nationals, including members of the Armed Forces, to engage in acts that constitute certain grave breaches of the Geneva Conventions and related treaties. Where these treaties do not apply or the alleged acts do not constitute a grave breach as defined by the Conventions, there can be no violation of the War Crimes Act.

The Geneva Conventions protect prisoners of war and many of the other detainees held in Iraq as a result of Operation Iraqi Freedom. Generally speaking, the Geneva Conventions require humane treatment of prisoners, and grave breaches of the Conventions include "wilful killing," "torture or inhuman treatment," and "wilfully causing great suffering or serious injury to body or health." The Department of Defense and the various branches of the Armed Forces have decades of experience with the

Geneva Conventions, including as they relate to the legal standards governing interrogations.

I will address more particularly the al Qaeda and Taliban detainees held at Guantanamo. By their express terms, the Geneva Conventions apply only to armed conflicts between signatory States or Powers that accept and apply the provisions of the Conventions. Al Qaeda is a global terrorist network that does not recognize or respect international law or the customs of war; it is not a State that is or could ever be a Party to the Geneva Conventions. Accordingly, the Geneva Conventions do not apply to members of al Qaeda. Afghanistan, however, is a Party to the Geneva Conventions, and in February 2002 the President determined that the Geneva Convention Relative to the Treatment of Prisoners of War (the Third Geneva Convention) applies to the conflict with the Taliban. The Third Geneva Convention, however, protects only captives who fulfill a number of well-defined requirements for "prisoner of war" status. The President conclusively determined that Taliban forces did not meet the qualifications necessary for "prisoner of war" status under the Third Geneva Convention. The only court to consider this issue, in the case of John Walker Lindh, upheld the President's determination that Taliban detainees do not qualify as prisoners of war under the Third Geneva Convention. *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002).

Taliban fighters also do not have "protected person" status under the Geneva Convention Relative to the Treatment of Civilians in Time of War (the Fourth Geneva Convention). "Protected persons" under the Fourth Geneva Convention include certain persons detained by an occupying power in occupied territory and certain persons held by a party to the conflict within its own home territory. The Taliban detainees are neither.

Although the United States has undertaken military operations there, under well-settled legal authorities, the United States is not and has never been an occupying power in Afghanistan for purposes of the laws and customs of war. And Guantanamo is not part of the home territory of the United States.

In any event, the President has ordered that all prisoners held at Guantanamo, including the Taliban, be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions.

Constitutional Protections

Finally, I will address two constitutional provisions that could have potential relevance to the treatment of persons in detention—the Fifth and Eighth Amendments. The Supreme Court has held that the Fifth Amendment does not apply to aliens outside the United States. *See Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950). Even if it did apply, however, the Due Process Clause of the Fifth Amendment, in its substantive, as opposed to procedural, aspects, protects against treatment that, in the words of the Supreme Court, "shocks the conscience," meaning (again in the words of the Court) "only the most egregious conduct" or "conduct intended to injure in some way unjustifiable by any government interest." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998).

The Eighth Amendment forbids cruel and unusual punishments. As the term "punishment" implies, the Cruel and Unusual Punishments Clause "was designed to protect those convicted of crimes," *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977), and has no application to the treatment of detainees where there "ha[s] been no formal

adjudication of guilt," *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). *See Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979). In any event, where the Eighth Amendment applies, its protections, too, are roughly comparable to those provided by the Fifth Amendment.

It's appropriate here to mention one aspect of the U.N. Convention Against Torture that I did not discuss earlier. Under Article 16 of the Torture Convention, the United States has agreed to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment." Fearing that this undefined phrase was vague and might be applied in unanticipated ways, the Senate included a reservation to Article 16 when it gave its advice and consent to ratification of the Convention. The Senate defined this phrase to mean only "the cruel, unusual and inhumane treatment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments" to the U.S. Constitution. S. Exec. Rep. No. 101-30, at 36. This reservation is part of the United States instrument of ratification. Thus, to the extent Article 16 may be relevant, it concerns only conduct that would violate these same Amendments.

Application of Legal Standards to Interrogation Practices

Let me now turn to the 24 specific interrogation techniques approved by the Secretary of Defense for military interrogations at Guantanamo. It's readily apparent that each of these techniques, when used according to the safeguards specified by the Secretary, is well within the legal standards I've just described.

Seventeen of the 24 techniques have long been approved for use by the U.S. military on those who have status as prisoners of war under the Geneva Conventions, and these techniques are included in the *Army Field Manual for Intelligence Interrogation*

(1992). The *Army Field Manual* reflects the military's historical practices toward the treatment of prisoners of war in compliance with all requirements of the Geneva Conventions and the UCMJ. Under that long-standing tradition, then, none of these 17 established interrogation techniques, properly used, is contrary to the legal standards and prohibitions discussed earlier.

That leaves seven techniques not already included in the *Army Field Manual*. The *Field Manual* itself expressly contemplates that additional interrogation techniques may be approved for use with prisoners. The seven additional techniques approved by the Secretary for Guantanamo are: (1) placing the detainee in a less comfortable setting, but without any "substantial change in environmental quality"; (2) altering his diet, for example by giving him military MREs, but without depriving him of food or water, harming him medically, or offending him culturally; (3) changing his environment to cause "moderate discomfort," for example by "adjusting the temperature or introducing an unpleasant smell," but with the significant caveat that the interrogator would have to remain with the detainee "at all times" and thus largely subject himself to the same conditions; (4) adjusting his sleep cycle, for example by requiring him to sleep days instead of nights, but without depriving him of sleep; (5) convincing him that he is being held by a country other than the United States; (6) physically isolating him from other detainees, but not for longer than 30 days; and (7) questioning him with a "Mutt and Jeff" team, where one interrogator asks questions in a harsh manner and the other is friendly. The last technique, the "Mutt and Jeff" or "good cop/bad cop" routine, is really just a combination of other techniques already included in the *Army Field Manual*.

The Secretary strictly limited the use of four of the techniques, including two that come from the *Army Field Manual* (supplying rewards/removing privileges and insulting the ego) and two of the additional seven techniques ("Mutt and Jeff" and isolation). None of these four techniques may be used with any detainee unless a determination is first made by a commanding officer that "military necessity requires use" of the technique with that particular detainee, and then not until notice is first given to the Secretary of Defense.

In authorizing these 24 interrogation techniques, the Secretary of Defense reiterated the President's stated policy "that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions." In addition, the Secretary specified that all of the approved techniques must be applied in accordance with General Safeguards, under which no technique could be used unless "there is a good basis to believe that the detainee possesses critical intelligence."

Moreover, the General Safeguards require that all interrogators must be "specifically trained for the technique(s)" used and must develop and follow a "specific interrogation plan," which must include "limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel." The Safeguards also require the interrogators to "take into account . . . factors such as . . . a detainee's emotional and physical strengths and weaknesses" and to proceed with a technique only if "the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination)." More generally, the Safeguards specify that the purpose of the interrogations is "to get the most information

from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators."

The proper use of each of these 24 techniques, in accordance with the General Safeguards, is lawful under any relevant legal standard. None of them, as approved, would amount to a crime under the torture statute or any other potentially relevant criminal statute. And far from "shocking the conscience" or being "unjustifiable by any government interest" within the meaning of the Due Process Clause or Article 16 of the Torture Convention, they are justified by a valid government interest of the highest importance—the collection of critical intelligence potentially vital to the Nation. Finally, they are fully consistent with the historical standards of treatment of detainees followed by the U.S. military. For all these reasons, I have no hesitation in concluding that these interrogation techniques, when properly applied as authorized, are lawful.

That concludes my prepared remarks, Mr. Chairman, and I would be happy to respond to any questions the Committee may have.

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

December 30, 2004

MEMORANDUM FOR JAMES B. COMEY
DEPUTY ATTORNEY GENERAL

Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT")[1]; customary international law[2]; centuries of Anglo-American law[3]; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.[4]

This Office interpreted the federal criminal prohibition against torture—codified at 18 U.S.C. §§ 2340-2340A—in *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) ("August 2002 Memorandum"). The August 2002 Memorandum also addressed a number of issues beyond interpretation of those statutory provisions, including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340-2340A. *See id.* at 31-46.

Questions have since been raised, both by this Office and by others, about the

[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. *See also, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[2] It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (*i.e.*, a peremptory norm) under international law. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

[3] *See generally* John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (1977).

[4] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right . . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also Letter of Transmittal from President Ronald Reagan to the Senate* (May 20, 1988), *in Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at iii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.").

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appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that "severe" pain under the statute was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1.[5] We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety.[6] Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.[7]

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340-2340A. For example, we disagree with statements in the August 2002 Memorandum limiting "severe" pain under the statute to "excruciating and agonizing" pain, *id.* at 19, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," *id.* at 1. There are additional areas where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below.[8]

The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.

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[5] *See, e.g.*, Anthony Lewis, *Making Torture Legal*, N.Y. Rev. of Books, July 15, 2004; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Wash. Post, July 4, 2004, at A12; Kathleen Clark & Julie Mertus, *Torturing the Law; the Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97 (2004).

[6] This memorandum necessarily discusses the prohibition against torture in sections 2340-2340A in somewhat abstract and general terms. In applying this criminal prohibition to particular circumstances, great care must be taken to avoid approving as lawful any conduct that might constitute torture. In addition, this memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees (for example, the Geneva Conventions; the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq.; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267; and the War Crimes Act, 18 U.S.C. § 2441, among others). Any analysis of particular facts must, of course, ensure that the United States complies with all applicable legal obligations.

[7] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.").

[8] While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

I.

Section 2340A provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."[9] Section 2340(1) defines "torture" as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[10]

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[9] Section 2340A provides in full:

> (a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
>
> (b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—
> (1) the alleged offender is a national of the United States; or
> (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
>
> (c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2000).

[10] Section 2340 provides in full:

> As used in this chapter—
>
> (1) "torture" means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
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> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
>
> (3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

In interpreting these provisions, we note that Congress may have adopted a statutory definition of "torture" that differs from certain colloquial uses of the term. *Cf. Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004) ("[I]n other contexts and under other definitions [the conditions] might be described as torturous. The fact remains, however, that the only relevant definition of 'torture' is the definition contained in [the] CAT. . . ."). We must, of course, give effect to the statute as enacted by Congress.[11]

Congress enacted sections 2340-2340A to carry out the United States' obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States.[12] Conduct constituting "torture" occurring within the United States was—and remains—prohibited by various other federal and state criminal statutes that we do not discuss here.

The CAT defines "torture" so as to require the intentional infliction of "severe pain or suffering, whether physical or mental." Article 1(1) of the CAT provides:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate attached the following understanding to its resolution of advice and consent to ratification of the CAT:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain

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[11] Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

[12] Congress limited the territorial reach of the federal torture statute, providing that the prohibition applies only to conduct occurring "outside the United States," 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." *Id.* § 2340(3).

> or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct. 21, 1994), and thus defines the scope of the United States' obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32-33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340-2340A generally tracks the prohibition in the CAT, subject to the U.S. understanding.

II.

Under the language adopted by Congress in sections 2340-2340A, to constitute "torture," the conduct in question must have been "specifically intended to inflict severe physical or mental pain or suffering." In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering"; (3) the meaning of "severe mental pain or suffering"; and (4) the meaning of "specifically intended."

(1) The meaning of "severe."

Because the statute does not define "severe," "we construe [the] term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common understanding of the term "torture" and the context in which the statute was enacted also inform our analysis.

Dictionaries define "severe" (often conjoined with "pain") to mean "extremely violent or intense: *severe pain*." *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992); *see also* XV *Oxford English Dictionary* 101 (2d ed. 1989) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "Of circumstances . . . : Hard to sustain or endure").[13]

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[13] Common dictionary definitions of "torture" further support the statutory concept that the pain or suffering must be severe. *See Black's Law Dictionary* 1528 (8th ed. 2004) (defining "torture" as "[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure") (emphasis added); *Webster's Third New International Dictionary of the English Language Unabridged* 2414 (2002) (defining "torture" as "the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone") (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining "torture" as "the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion") (emphasis added).

This interpretation is also consistent with the history of torture. *See generally* the descriptions in Lord Hope's lecture, *Torture*, University of Essex/Clifford Chance Lecture 7-8 (Jan. 28, 2004), and in Professor Langbein's book, *Torture and the Law of Proof: Europe and England in the Ancien Régime*. We emphatically are not saying that only such historical techniques—or similar ones—can constitute "torture" under sections 2340-

The statute, moreover, was intended to implement the United States' obligations under the CAT, which, as quoted above, defines as "torture" acts that inflict "severe pain or suffering" on a person. CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

> The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .
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> . . . .
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> . . . The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S. Exec. Rep. No. 101-30 at 13-14. *See also* David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 Nova L. Rev. 449, 455 (1991) ("By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.").

Further, the CAT distinguishes between torture and "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT art. 16. The CAT thus treats torture as an "extreme form" of cruel, inhuman, or degrading treatment. *See* S. Exec. Rep. No. 101-30 at 6, 13; *see also* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) ("*CAT Handbook*") (noting that Article 16 implies "that torture is the *gravest form* of [cruel, inhuman, or degrading] treatment [or] punishment") (emphasis added); Malcolm D. Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. 365, 369 (2002) (The CAT "formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.").[14] The Senate Foreign Relations Committee emphasized

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2340A. But the historical understanding of "torture" is relevant to interpreting Congress's intent. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952).

[14] This approach—distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment—is consistent with other international law sources. The CAT's predecessor, the U.N. Torture Declaration, defined torture as "an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Res. 3452, art. 1(2) (Dec. 9, 1975) (emphasis added); *see also* S. Treaty Doc. No. 100-20 at 2 (The U.N. Torture Declaration was "a point of departure for the drafting of the [CAT]."). Other treaties also distinguish torture from lesser forms of cruel, inhuman, or degrading treatment. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 221 (Nov. 4, 1950) ("European Convention") ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. at 370 ("[T]he ECHR organs have adopted . . . a 'vertical' approach . . . , which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are

this point in its report recommending that the Senate consent to ratification of the CAT. *See* S. Exec. Rep. No. 101-30 at 13 ("'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture. . . . The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to 'other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* . . . .'"). *See also Cadet*, 377 F.3d at 1194 ("The definition in CAT draws a critical distinction between 'torture' and 'other acts of cruel, inhuman, or degrading punishment or treatment.'").

Representations made to the Senate by Executive Branch officials when the Senate was considering the CAT are also relevant in interpreting the CAT's torture prohibition—which sections 2340-2340A implement. Mark Richard, a Deputy Assistant Attorney General in the Criminal Division, testified that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 16 (1990) ("*CAT Hearing*") (prepared statement). The Senate Foreign Relations Committee also understood torture to be limited in just this way. *See* S. Exec. Rep. No. 101-30 at 6 (noting that "[f]or an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering, and be intended to cause severe pain and suffering"). Both the Executive Branch and the Senate acknowledged the efforts of the United States during the negotiating process to strengthen the effectiveness of the treaty and to gain wide adherence thereto by focusing the Convention "on torture rather than on other relatively less abhorrent practices." *Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan* (May 10, 1988), *in* S. Treaty Doc. No. 100-20 at v; *see also* S. Exec. Rep. No. 101-30 at 2-3 ("The United States" helped to focus the Convention "on torture rather than other less abhorrent practices."). Such statements are probative of a treaty's meaning. *See* 11 Op. O.L.C. at 35-36.

'degrading' to those which are 'inhuman' and then to 'torture'. The distinctions between them is [*sic*] based on the severity of suffering involved, with 'torture' at the apex."); Debra Long, Association for the Prevention of Torture, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights* 13 (2002) (The approach of distinguishing between "torture," "inhuman" acts, and "degrading" acts has "remained the standard approach taken by the European judicial bodies. Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment."). *See also CAT Handbook* at 115-17 (discussing the European Court of Human Rights ("ECHR") decision in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (concluding that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention)). Cases decided by the ECHR subsequent to *Ireland* have continued to view torture as an aggravated form of inhuman treatment. *See, e.g., Aktas v. Turkey*, No. 24351/94 ¶ 313 (E.C.H.R. 2003); *Akkoc v. Turkey*, Nos. 22947/93 & 22948/93 ¶ 115 (E.C.H.R. 2000); *Kaya v. Turkey*, No. 22535/93 ¶ 117 (E.C.H.R. 2000).

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") likewise considers "torture" as a category of conduct more severe than "inhuman treatment." *See, e.g., Prosecutor v. Delalic*, IT-96-21, Trial Chamber Judgment ¶ 542 (ICTY Nov. 16, 1998) ("[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.").

Although Congress defined "torture" under sections 2340-2340A to require conduct specifically intended to cause "severe" pain or suffering, we do not believe Congress intended to reach only conduct involving "excruciating and agonizing" pain or suffering. Although there is some support for this formulation in the ratification history of the CAT,[15] a proposed express understanding to that effect[16] was "criticized for setting too high a threshold of pain," S. Exec. Rep. No. 101-30 at 9, and was not adopted. We are not aware of any evidence suggesting that the standard was raised in the statute and we do not believe that it was.[17]

Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.[18] We are, however,

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[15] Deputy Assistant Attorney General Mark Richard testified: "[T]he essence of torture" is treatment that inflicts "excruciating and agonizing physical pain." *CAT Hearing* at 16 (prepared statement).

[16] *See* S. Treaty Doc. No. 100-20 at 4-5 ("The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.").

[17] Thus, we do not agree with the statement in the August 2002 Memorandum that "[t]he Reagan administration's understanding that the pain be 'excruciating and agonizing' is in substance not different from the Bush administration's proposal that the pain must be severe." August 2002 Memorandum at 19. Although the terms are concededly imprecise, and whatever the intent of the Reagan Administration's understanding, we believe that in common usage "excruciating and agonizing" pain is understood to be more intense than "severe" pain.

The August 2002 Memorandum also looked to the use of "severe pain" in certain other statutes, and concluded that to satisfy the definition in section 2340, pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1; *see also id.* at 5-6, 13, 46. We do not agree with those statements. Those other statutes define an "emergency medical condition," for purposes of providing health benefits, as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)" such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define "severe pain" even in that very different context (rather, they use it as an indication of an "emergency medical condition"), and they do not state that death, organ failure, or impairment of bodily function cause "severe pain," but rather that "severe pain" may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting "severe pain" in the very different context of the prohibition against torture in sections 2340-2340A. *Cf. United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase "wages paid" has different meaning in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (term "employee" has different meanings in different parts of Title VII).

[18] Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

> Pain is a complex, subjective, perceptual phenomenon with a number of dimensions—intensity, quality, time course, impact, and personal meaning—that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient's pain depends on the patient's overt communications, both verbal and behavioral. Given pain's complexity, one must assess not only its somatic (sensory) component but also patients' moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

aided in this task by judicial interpretations of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000). The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines "torture" to include:

> any act, directed against an individual in the offender's custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental*, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind . . . .

28 U.S.C. § 1350 note, § 3(b)(1) (emphases added). The emphasized language is similar to section 2340's "severe physical or mental pain or suffering."[19] As the Court of Appeals for the District of Columbia Circuit has explained:

> The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."
>
> The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92-93 (D.C. Cir. 2002) (citations omitted). That court concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning "the severity of plaintiffs' alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out," did not suffice "to ensure that [it] satisf[ied] the TVPA's rigorous definition of torture." *Id.* at 93.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), the D.C. Circuit again considered the types of acts that constitute torture under the TVPA definition. The plaintiff alleged, among other things, that Libyan authorities had held her incommunicado and threatened to kill her if she tried to leave. *See id.* at 232, 234. The court acknowledged that "these alleged acts certainly reflect a bent toward cruelty on the part of their

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Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define "severe" pain or suffering.

[19] Section 3(b)(2) of the TVPA defines "mental pain or suffering" similarly to the way that section 2340(2) defines "severe mental pain or suffering."

perpetrators," but, reversing the district court, went on to hold that "they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA]." *Id.* at 234. Cases in which courts have found torture suggest the nature of the extreme conduct that falls within the statutory definition. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a "suffocatingly hot" and cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette," constituted torture); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of "physical torture, such as cutting off . . . fingers, pulling out . . . fingernails," and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).

(2) The meaning of "severe physical pain or suffering."

The statute provides a specific definition of "severe mental pain or suffering," *see* 18 U.S.C. § 2340(2), but does not define the term "severe physical pain or suffering." Although we think the meaning of "severe physical pain" is relatively straightforward, the question remains whether Congress intended to prohibit a category of "severe physical suffering" distinct from "severe physical pain." We conclude that under some circumstances "severe physical suffering" may constitute torture even if it does not involve "severe physical pain." Accordingly, to the extent that the August 2002 Memorandum suggested that "severe physical suffering" under the statute could in no circumstances be distinct from "severe physical pain," *id.* at 6 n.3, we do not agree.

We begin with the statutory language. The inclusion of the words "or suffering" in the phrase "severe physical pain or suffering" suggests that the statutory category of physical torture is not limited to "severe physical pain." This is especially so in light of the general principle against interpreting a statute in such a manner as to render words surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Exactly what is included in the concept of "severe physical suffering," however, is difficult to ascertain. We interpret the phrase in a statutory context where Congress expressly distinguished "physical pain or suffering" from "mental pain or suffering." Consequently, a separate category of "physical suffering" must include something other than any type of "mental

pain or suffering."[20] Moreover, given that Congress precisely defined "mental pain or suffering" in the statute, it is unlikely to have intended to undermine that careful definition by including a broad range of mental sensations in a "physical suffering" component of "physical pain or suffering."[21] Consequently, "physical suffering" must be limited to adverse "physical" rather than adverse "mental" sensations.

The text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended separately to include as "severe physical suffering." Indeed, the record consistently refers to "severe physical pain or suffering" (or, more often in the ratification record, "severe physical pain *and* suffering"), apparently without ever disaggregating the concepts of "severe physical pain" and "severe physical suffering" or discussing them as separate categories with separate content. Although there is virtually no legislative history for the statute, throughout the ratification of the CAT—which also uses the disjunctive "pain or suffering" and which the statutory prohibition implements—the references were generally to "pain *and* suffering," with no indication of any difference in meaning. The *Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which appears in S. Treaty Doc. No. 100-20 at 3, for example, repeatedly refers to "pain *and* suffering." *See also* S. Exec. Rep. No. 101-30 at 6 (three uses of "pain and suffering"); *id.* at 13 (eight uses of "pain and suffering"); *id.* at 14 (two uses of "pain and suffering"); *id.* at 35 (one use of "pain and suffering"). Conversely, the phrase "pain or suffering" is used less frequently in the Senate report in discussing (as opposed to quoting) the CAT and the understandings under consideration, *e.g.*, *id.* at 5-6 (one use of "pain or suffering"), *id.* at 14 (two uses of "pain or suffering"); *id.* at 16 (two uses of "pain or suffering"), and, when used, it is with no suggestion that it has any different meaning.

Although we conclude that inclusion of the words "or suffering" in "severe physical pain or suffering" establishes that physical torture is not limited to "severe physical pain," we also

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[20] Common dictionary definitions of "physical" confirm that "physical suffering" does not include mental sensations. *See, e.g.*, *American Heritage Dictionary of the English Language* at 1366 ("Of or relating to the body as distinguished from the mind or spirit"); *Oxford American Dictionary and Language Guide* at 748 ("of or concerning the body (*physical exercise; physical education*)").

[21] This is particularly so given that, as Administration witnesses explained, the limiting understanding defining mental pain or suffering was considered necessary to avoid problems of vagueness. *See, e.g.*, *CAT Hearing* at 8, 10 (prepared statement of Abraham Sofaer, Legal Adviser, Department of State: "The Convention's wording . . . is not in all respects as precise as we believe necessary. . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering."); *id.* at 15-16 (prepared statement of Mark Richard: "The basic problem with the Torture Convention—one that permeates all our concerns—is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States."); *id.* at 17 (prepared statement of Mark Richard: "Accordingly, the Torture Convention's vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.").

conclude that Congress did not intend "severe physical pain or suffering" to include a category of "physical suffering" that would be so broad as to negate the limitations on the other categories of torture in the statute. Moreover, the "physical suffering" covered by the statute must be "severe" to be within the statutory prohibition. We conclude that under some circumstances "physical suffering" may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve "severe physical pain." To constitute such torture, "*severe* physical suffering" would have to be a condition of some extended duration or persistence as well as intensity. The need to define a category of "severe physical suffering" that is different from "severe physical pain," and that also does not undermine the limited definition Congress provided for torture, along with the requirement that any such physical suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is "severe" considering its intensity and duration or persistence, rather than merely mild or transitory.[22] Otherwise, the inclusion of such a category would lead to the kind of uncertainty in interpreting the statute that Congress sought to reduce both through its understanding to the CAT and in sections 2340-2340A.

(3) The meaning of "severe mental pain or suffering."

Section 2340 defines "severe mental pain or suffering" to mean:

> the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *Id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory

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[22] Support for concluding that there is an extended temporal element, or at least an element of persistence, in "severe physical suffering" as a category distinct from "severe physical pain" may also be found in the prevalence of concepts of "endurance" of suffering and of suffering as a "state" or "condition" in standard dictionary definitions. *See, e.g., Webster's Third New International Dictionary* at 2284 (defining "suffering" as "the endurance of or submission to affliction, pain, loss"; "a pain endured"); *Random House Dictionary of the English Language* 1901 (2d ed. 1987) ("the state of a person or thing that suffers"); *Funk & Wagnalls New Standard Dictionary of the English Language* 2416 (1946) ("A state of anguish or pain"); *American Heritage Dictionary of the English Language* at 1795 ("The condition of one who suffers").

list of the four "predicate acts" in section 2340(2)(A)-(D) is exclusive. We conclude that Congress intended the list of predicate acts to be exclusive—that is, to constitute the proscribed "severe mental pain or suffering" under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. We reach this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or any other language suggesting that additional acts might qualify (for example, language such as "including" or "such acts as").[23] Congress plainly considered very specific predicate acts, and this definition tracks the Senate's understanding concerning mental pain or suffering when giving its advice and consent to ratification of the CAT. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate's understanding, and with the fact that it was adopted out of concern that the CAT's definition of torture did not otherwise meet the requirement for clarity in defining crimes. *See supra* note 21. Adopting an interpretation of the statute that expands the list of predicate acts for "severe mental pain or suffering" would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to adopt its understanding when giving its advice and consent to ratification of the CAT.

Another question is whether the requirement of "prolonged mental harm" caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such "prolonged mental harm" is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute's reference to "*the* prolonged mental harm caused by or resulting from" the predicate acts as creating a statutory presumption that each of the predicate acts always causes prolonged mental harm, we do not believe that was Congress's intent. As noted, this language closely tracks the understanding that the Senate adopted when it gave its advice and consent to ratification of the CAT:

> in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30 at 36. We do not believe that simply by adding the word "the" before "prolonged harm," Congress intended a material change in the definition of mental pain or

[23] These four categories of predicate acts "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g.*, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any "contrary indications" that would rebut this inference. *Vonn*, 535 U.S. at 65.

suffering as articulated in the Senate's understanding to the CAT. The legislative history, moreover, confirms that sections 2340-2340A were intended to fulfill—but not go beyond—the United States' obligations under the CAT: "This section provides the necessary legislation to implement the [CAT]. . . . The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S. Rep. No. 103-107, at 58-59 (1993). This understanding, embodied in the statute, was meant to define the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we do not believe that Congress intended the definition to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we believe that Congress intended this phrase to require mental "harm" that is caused by or that results from a predicate act, and that has some lasting duration. There is little guidance to draw upon in interpreting this phrase.[24] Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First, the use of the word "harm"—as opposed to simply repeating "pain or suffering"—suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental *damage: injury*," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological *injury or damage*," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time" or to "extend in duration," or to "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must continue for a "prolonged" period of time.[25] Finally, under section 2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts.[26]

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[24] The phrase "prolonged mental harm" does not appear in the relevant medical literature or elsewhere in the United States Code. The August 2002 Memorandum concluded that to constitute "prolonged mental harm," there must be "significant psychological harm of significant duration, e.g., lasting for months or even years." *Id.* at 1; *see also id.* at 7. Although we believe that the mental harm must be of some lasting duration to be "prolonged," to the extent that that formulation was intended to suggest that the mental harm would have to last for at least "months or even years," we do not agree.

[25] For example, although we do not suggest that the statute is limited to such cases, development of a mental disorder—such as post-traumatic stress disorder or perhaps chronic depression—could constitute "prolonged mental harm." *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369-76, 463-68 (4th ed. 2000) ("DSM-IV-TR"). *See also, e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); *see also* Metin Basoglu et al., *Torture and Mental Health: A Research Overview*, *in* Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48-49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners*, *in* Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 77 (1992) (referring to findings of post-traumatic stress disorder in torture survivors).

[26] This is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. Early occurrences of the predicate act could cause mental

Although there are few judicial opinions discussing the question of "prolonged mental harm," those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic*, the court explained that:

> [The defendant] also caused or participated in the plaintiffs' mental torture. Mental torture consists of "prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . ." As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of "Russian roulette." *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question: One plaintiff "suffers from anxiety, flashbacks, and nightmares and has difficulty sleeping. [He] continues to suffer thinking about what happened to him during this ordeal and has been unable to work as a result of the continuing effects of the torture he endured." *Id.* at 1334. Another plaintiff "suffers from anxiety, sleeps very little, and has frequent nightmares. . . . [He] has found it impossible to return to work." *Id.* at 1336. A third plaintiff "has frequent nightmares. He has had to use medication to help him sleep. His experience has made him feel depressed and reclusive, and he has not been able to work since he escaped from this ordeal." *Id.* at 1337-38. And the fourth plaintiff "has flashbacks and nightmares, suffers from nervousness, angers easily, and has difficulty trusting people. These effects directly impact and interfere with his ability to work." *Id.* at 1340. In each case, these mental effects were continuing years after the infliction of the predicate acts.

And in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), the individual had been kidnapped and "forcibly recruited" as a child soldier at the age of 14, and over the next three to four years had been forced to take narcotics and threatened with imminent death. *Id.* at 597-98, 601-02. The court concluded that the resulting mental harm, which continued over this three-to-four-year period, qualified as "prolonged mental harm." *Id.* at 602.

Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an "ordeal," the court concluded that they had failed to show that their experience caused lasting damage, noting that "there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation." *Id.* at 1294-95.

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harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. For example, in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003), the predicate acts continued over a three-to-four-year period, and the court concluded that "prolonged mental harm" had occurred during that time.

(4) The meaning of "specifically intended."

It is well recognized that the term "specific intent" is ambiguous and that the courts do not use it consistently. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). "Specific intent" is most commonly understood, however, "to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 354; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime"). As one respected treatise explains:

> With crimes which require that the defendant intentionally cause a specific result, what is meant by an "intention" to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

1 LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted).

As noted, the cases are inconsistent. Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least "[i]n a general sense," *id.* at 405, "specific intent" requires that one consciously desire the result. *Id.* at 403-05. The Court compared the common law's *mens rea* concepts of specific intent and general intent to the Model Penal Code's *mens rea* concepts of acting purposefully and acting knowingly. *Id.* at 404-05. "[A] person who causes a particular result is said to act purposefully," wrote the Court, "if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'" *Id.* at 404 (internal quotation marks omitted). A person "is said to act knowingly," in contrast, "if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *Id.* (internal quotation marks omitted). The Court then stated: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *Id.* at 405.

In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have "knowledge or notice" that his act "would have likely resulted in" the proscribed outcome. *Id.* at 1273. "Notice," the court held, "is provided by the reasonable foreseeability of the natural and probable consequences of one's acts." *Id.*

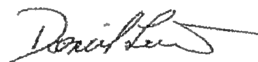
We do not believe it is useful to try to define the precise meaning of "specific intent" in section 2340.[27] In light of the President's directive that the United States not engage in torture, it

[27] In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's "precise objective" and that it was not enough

would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture. Some observations, however, are appropriate. It is clear that the specific intent element of section 2340 would be met if a defendant performed an act and "consciously desire[d]" that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g., Bailey*, 444 U.S. at 405, nor to have "knowledge or notice" that his act "would likely have resulted in" the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

Two final points on the issue of specific intent: First, specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a "good reason." Thus, a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute. *See Cheek v. United States*, 498 U.S. 192, 200-01 (1991). Second, specific intent to take a given action can be found even if the defendant will take the action only conditionally. *Cf., e.g., Holloway v. United States*, 526 U.S. 1, 11 (1999) ("[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose."). *See also id.* at 10-11 & nn. 9-12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.[28]

Please let us know if we can be of further assistance.



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that the defendant act with knowledge that such pain "was reasonably likely to result from his actions" (or even that that result "is certain to occur"). *Id.* at 3-4. We do not reiterate that test here.

[28] In the August 2002 Memorandum, this Office indicated that an element of the offense of torture was that the act in question actually result in the infliction of severe physical or mental pain or suffering. *See id.* at 3. That conclusion rested on a comparison of the statute with the CAT, which has a different definition of "torture" that requires the actual infliction of pain or suffering, and we do not believe that the statute requires that the defendant actually inflict (as opposed to act with the specific intent to inflict) severe physical or mental pain or suffering. *Compare* CAT art. 1(1) ("the term 'torture' means any act by which severe pain or suffering, whether physical or mental, *is intentionally inflicted*") (emphasis added) *with* 18 U.S.C. § 2340 ("'torture' means an act . . . *specifically intended to inflict* severe physical or mental pain or suffering") (emphasis added). It is unlikely that any such requirement would make any practical difference, however, since the statute also criminalizes attempts to commit torture. *Id.* § 2340A(a).

Exhibit B

EXHIBIT B

SECRET

Behavioral Science Consultation Team
Joint Intelligence Group, Joint Task Force-GTMO
Standard Operating Procedures (U)

28 March 2005

1. (U) **Purpose.** The purpose of this document is to establish Standard Operating Procedures (SOP) for the daily operation and administration of the Behavioral Science Consultation Team (BSCT), Joint Interrogation Group (JIG), Joint Task Force-Guantanamo Bay, Cuba (JTF-GTMO).

2. (U) **Scope.** This SOP applies to all personnel assigned to the BSCT and supersedes the previous BSCT SOP.

3. (U) **BSCT Personnel.**

a. (U) **BSCT Chief** (BSCT1). Clinical Psychologist, USA, 73B. Chief, responsible for all issues relating to BSCT operations. Develops detailed BSCT policies and operating procedures. Reports to the Director, JIG; coordinates with the Commander, Joint Detention Operations Group (JDOG); and, as directed, provides special staff officer functions to the Commander, JTF-GTMO. In the event that the USAF 42P3 is senior in rank to the USA 73B, JIG Director will designate team chief based on experience and training in interrogation support.

b. (U) **Assistant BSCT Chief** (BSCT2). Clinical Psychologist, USAF, 42P3. Assumes duties of BSCT1 in his/ her absence. Provides consultation and interrogation support to the Interrogation Control Element (ICE). Works with JDOG-S2 (Counter-Intelligence) to identify trends in detainee behavior [redacted] b(2) [redacted] may support Deployment Cycle Support program by providing training on Posttraumatic Stress and Anger Management for personnel departing JTF-GTMO.

c. (U) **BSCT NCOIC** (BSCT3). Mental Health Specialist, USA, 91X. Provides consultation and interrogation support to the ICE. Assesses camp climate and provides feedback to BSCT1 on issues and trends. May provide training in behavioral principles/ management to ICE and JDOG personnel; may support Deployment Cycle Support program by providing training on Posttraumatic Stress and Anger Management for personnel departing JTF-GTMO.

4. (U) **Mission.** Provide psychological consultation in order to support safe, legal, ethical, and effective detention and interrogation operations at JTF-GTMO.

5. (U) **Objectives.**

a. (U) Provide psychological expertise to assess the individual detainee and his environment; provide recommendations to enhance the effectiveness of interrogation operations.

b. (U) [redacted]

CLASSIFIED BY: JTF-GTMO Classification Guide dated 10 June 2004
REASON: 1.4(C) or Intelligence Activity, Source, or Methods
DECL ON: 28 March 2030

SECRET

6. (U) Mission Essential Tasks.

a. (U) Provides consultation to interrogation staff in support of the intelligence collection mission.

(1) (S)

(2) (S)

(a) (U//FOUO)

(b) (S)

(3) (S)

b. (U) Monitors interrogations and other staff-detainee interactions; provides consultation on policies and strategies for ensuring the safety of detainees and JTF-GTMO personnel; provides direct feedback to command on issues involving psychological risk factors affecting detainee operations.

(1) [illegible]

(2) [illegible]

(3) (U//FOUO)

c. (U) Monitors behavioral trends in the detainee population and integrates findings into consultation in support of interrogation and detention operations.

(b)(1) (1) (S) [redacted]

(b)(1) (2) (S) [redacted]

(b)(1) (3) (S) [redacted]

d. (U) Provides selected JIG and JDOG personnel with training on behavioral, psychological, and cultural issues pertaining to the detainee population.

(b)(2) (1) (U//FOUO) [redacted]

(b)(2) (2) (U//FOUO) [redacted]

(3) (U//FOUO) Provides training to facilitate the maintenance of a stable and secure detention environment, such as appropriate ways to respond to detainee misbehavior, recognition and reporting of behavior patterns, minimizing transfer of information from guard staff to detainees, and strategies for increasing pro-American sentiment.

(4) (U) Provides training to increase awareness of religious and cultural issues unique to the detainee population, such as proper handling of Qur'ans, ways to demonstrate respect for religious practices, and special practices during religious holidays (e.g., Ramadan).

e. (U) Advises JIG and JDOG on use of materials for the Detainee Library and sits on the Library Advisory Board.

(1) (U) Participates on Library Advisory Board to review library materials and advise JIG and JDOG on future acquisitions.

(2) (U) As a member of the Board, reviews library operations and forwards recommendations to the JIG Director and JDOG commander

f. (S) [redacted] (b)(1)

(1) (S) [redacted] (b)(1)

(2) (S) [redacted]

(b)(1) (3) (S) [redacted]

g. (U) Assists in the development of detention facility behavior management plans.

(1) (U) Consults with JDOG S-3, JDOG S-2, Medical, Behavioral Health, and ICE personnel to develop camp-wide strategies for improving behavioral levels of detainees.

(a) (U) Provides input into the development of strategies for reducing unwanted behavior, such as re-location or movement of detainees, disciplinary actions, structural or procedural changes within the camp.

(b) (U) Provides input into the development of strategies for increasing positive behavior, such as implementation of incentive programs, reinforcement programs for positive behavior, and increasing access to recreational and social activities.

b(1) (2) (S) [redacted]

h. (U) Consults with JTF Commander on detainee issues, staff issues, and camp dynamics, and provides recommendations on ways to improve camp operations. BSCT personnel have full and direct access to JTF Commander to consult on all aspects of JTF mission.

i. (U) Other duties as assigned.

7. (U) Mental Health and Medical Services.

a. [illegible] ensure that they are not perceived as the health care providers for detainees or JTF-GTMO personnel.

(1) (U) The Joint Medical Group (JMG) provides all medical treatment, including mental health evaluation and treatment, for detainees and JTF-GTMO personnel. Services for detainees are provided through the Detention Hospital, Detention Clinic, and Detainee Behavioral Health Service. Services for JTF-GTMO personnel are provided through the Combat Stress Control, Joint Aid Station, and U.S. Naval Hospital, GTMO.

(2) (U) The JMG is responsible for advising JIG personnel (i.e., BSCT and ICE Operations) if there are any known physical, psychological, or medical conditions; limitations to functioning; or restrictions to usual activities that one is required to consider in order to ensure the safety of the detainee and U.S. personnel, e.g., diabetes, heart condition, special diet, psychological instability, contagious conditions.

b. (U) BSCT personnel will function as Medical Liaison Officers for the intelligence unit based on procedures established in conjunction with Joint Medical Group. When concerns about health status or medical condition of detainees are raised through observation by BSCT personnel, inquiries

raised by interrogators or other reporting mechanisms, BSCT will convey these concerns to appropriate medical personnel for evaluation, treatment, and disposition.

(1) [redacted]

(2) [redacted]

(3) (U) The kind of information shared will generally fall into two categories. The first is that of physical or medical conditions, or functional limitations, that one is required to consider in order to ensure the safety of the detainee and U.S. personnel, e.g., diabetes, heart condition, special diet, or contagious conditions. The other category of information shared is whether medical personnel were aware of the condition, if it had been evaluated and treated, or if an appointment is pending to address the concern.

(4) (U) The BSCT will meet on a regular basis with the Director, Joint Medical Group; Director, Medical Plans and Operations; OIC, SMO, and other staff from the Detention Hospital and Detainee Behavioral Health Service in order to discuss any issues related to policies and procedures.

8. (U) Intelligence Collection with Juveniles. JTF-GTMO does not normally detain Juvenile Enemy Combatants, however, in order to deal with this possibility, special procedures must be established. Juveniles are defined as any person below the age of 16. Gathering intelligence from juveniles will require special precautions and extra care because juveniles are often more vulnerable with less developed coping skills than adults. In order to ensure proper care for the juvenile detainee, the following procedures will be followed:

a. (U) For any person under the age of 16, a BSCT personnel will be present for the entire time of interrogation. A medical provider will evaluate the juvenile prior to and after the interrogation. The interrogation plan must be reviewed by the BSCT psychologist, ICE Regional Team Chief, ICE Chief, and the JIG Director.

b. (S) [redacted] (b)(1)

c. (S) [redacted] (b)(1)

(1) (S) [redacted] (b)(1)

(2) (U) Since many juvenile detainees have come from deprived environments, special effort will be made to ensure their protection, to provide necessary emotional support, and to provide education as available.

(3) (U) Transportation and the security of the detainees will be organized and implemented by the JDOG personnel. [redacted] (b)(2)

9. (U) Other Operational Procedures. The following procedures apply to the daily BSCT operations.

a. (U) OPSEC. All operations of the BSCT must conform to guidance set forth in JTF-GTMO General Order Number 2. Specific considerations for BSCT personnel are as follows.

(1) (U) Ensure that classified material (files, papers, photos, disks) are properly secured in the safe designated for BSCT use; at no time shall classified materials be left unattended in BSCT offices.

(2) (U) Do not discuss detainee operations or other classified information over unclassified phone lines.

(3) (U//FOUO) Sanitize uniforms by placing tape over the name when working in or visiting areas where contact with detainees is possible, including detainee blocks, interrogation buildings, and medical facilities.

(4) (U//FOUO) Use a courier bag when transporting classified or sensitive documents. Do not use courier bags for transportation of unclassified or prohibited materials.

(5) (U) Do not discuss detainee operations in areas where individuals without appropriate clearance or need to know could overhear information.

(6) (U) Do not discuss operations, current events, or personal information in the presence of detainees.

(7) (U) Ensure BSCT offices are locked at the end of the day and that the security checklist is completed. The last person leaving the building must also complete the security checklist for the building and ensure the front door is secured using the combination lock.

b. (U) Vehicle Operations. Ensure the BSCT vehicle is taken to motor pool for reassignment and routine maintenance NLT the end of each month.

c. (U) Supplies. Required office/administrative supplies can be obtained through the ICE Admin office. Other supplies and equipment can be ordered through ICE Admin office by completing the appropriate purchase order request.

10. (U) Battle Rhythm. Successful execution of day-to-day mission requirements requires flexibility, self-discipline, and ability to multi-task and prioritize in all BSCT personnel. There are often competing urgencies. Many tasks are self-directed; many demands are made with little or no notice while others are scheduled in advance. Assessments typically require a series of observations in different settings and hours of research. Many day-to-day activities are determined by response to requests for consultation and observation; often, rapid response is required. Some committee meetings and working groups follow established schedules while others are generated by the BSCT for specific purposes.

[illegible] found in this document, it is the responsibility of all BSCT personnel to familiarize themselves with and adhere to

(3) (U) Consult with colleagues and their chain of command regarding any conflicts that may arise between professional requirements and performance of their duties.

b. **(U) Referral process for consultations.** Interrogators may request consultation to support interrogations or other requirements by contacting any member of the BSCT. This will most typically occur in person at BSCT offices, by telephone, or by email.

c. **(U) Committee Membership.** BSCT personnel participate in the following committees, working groups, and meetings.

(1) (U) Interrogation Strategy Meeting (ISM, BSCT1): weekly in the JIG conference room.

(2) (U) JIG Command and Staff Meeting (BSCT1): weekly in the JIG conference room.

(3) (U) JIG pre-ISM (BSCT1/2): weekly in the JIG conference room.

(4) (U) ICE Coordination Meeting (BSCT1/2): weekly in the ICE Conference Room.

(5) (U) JDOG Coordination Meeting (BSCT1/2): weekly in the ICE Conference Room.

(6) (U) JDOG Company Training (BSCT1/2/3): Camp America Chapel as convened by JDOG.

(7) (U) ICEbox Review Committee (BSCT1/2/3): ICE Conference Room; convened by BSCT as needed.

(8) (U) Library Advisory Board (BSCT1/2): Meetings as convened by chair.

(9) (U) Other committees/ roundtables/ working groups, as appropriate.

11. (U) Point of Contact. The point of contact for this SOP is BSCT Chief at

Attachments:

Annex A – BSCT Assessment: Guidelines & Format (U)
Annex B – BSCT Observation Report: Guidelines & Format (U)
Annex C – BSCT Risk Assessment: Guidelines & Format (U)