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IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	**CASE NO. 2017 CA 005989B**
Plaintiffs,	:	**Judge Hiram E. Puig-Lugo**
vs.	:	**Next Scheduled Event:** **2020 Hearing, To Be Determined**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.	:	

REPLY IN SUPPORT OF DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND DAVID HOFFMAN'S CONTESTED SPECIAL MOTION TO DISMISS UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE § 16-5502

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INTRODUCTION

Two of the five Plaintiffs in this action have been ordered to arbitrate their claims. The remaining three Plaintiffs responded to Sidley's special motion to dismiss under the D.C. Anti-SLAPP Act with a landslide of material that accomplishes only misdirection. In their 83-page Opposition brief, 34 affidavits, and hundreds of pages of attached or linked-to exhibits, Cols. (Ret.) L. Morgan Banks, Debra L. Dunivin, and Larry C. James fail to identify a single statement in Sidley's Report about them as to which a properly instructed jury could find by clear and convincing evidence that Sidley acted with actual malice—that is, that Sidley knew the statement to be false or harbored serious, subjective doubts about its falsity. More bluntly, in the words of the leading defamation treatise, Plaintiffs cannot show that "the defendant lie[d]" about them. 1 Robert D. Sack, *Sack on Defamation* § 5.5.1, at 5-79 (5th ed. 2017).

This is hardly surprising—Sidley's Report, which spanned 541 pages and included 2,577 supporting footnotes and 7,600 pages of publicly available exhibits, was the work of a team of Sidley lawyers who spent eight months on an investigation. These lawyers had a professional responsibility to provide their client, the American Psychological Association ("APA"), candid and honest information, conclusions, and opinions. *See* D.C. R. Prof'l. Conduct 2.1.[1] The investigation included reviewing more than 50,000 documents, interviewing approximately 150 witnesses, and engaging in more than 50 *follow-up* interviews of those witnesses. If there were "clear and convincing" evidence, *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016), *cert. denied*, 140 S. Ct. 344 (2019), that Sidley nevertheless had made statements about

[1] Sidley submitted a copy of its September 4, 2015 revised Report as Exhibit 2-A to its October 2017 motion to compel arbitration. For ease of reference, an additional copy of the Report is attached hereto at Exhibit 1-J. All page number references continue to be to the revised Report.

any remaining Plaintiff with actual malice, one would expect any such statements and evidence to be front and center in the Opposition. They are missing because they do not exist.[2]

Plaintiffs instead make a series of meritless arguments. In brief:

- Plaintiffs contend that the protections of the D.C. Anti-SLAPP Act do not apply to Sidley's Report, Opposition to 3/21/19 Sidley Anti-SLAPP Mot. as to Supp. Compl. Count 11 ("Count 11 Opp.") 9-17, but they disregard the statutory definition of an "act in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(a), under which Sidley's Report clearly qualifies as "involv[ing] . . . communicating views to members of the public in connection with an issue of public interest," *id.* § 16-5501(1)(B). *See* pp. 3-6, *infra*.

- Plaintiffs contend that none of them is a "public official" to whom the actual malice standard applies, Opp. 65-73, but the case law is clear that (1) even plaintiffs with far lesser ranks and responsibilities qualify as public officials, and (2) the relevant time period for determining public official status is not the time of publication but rather the time of the events discussed in the challenged publication. *See* pp. 6-10, *infra*.

- Repeatedly failing to quote the Report accurately or at all, Plaintiffs focus their defamation claims on statements about government policies regarding national security interrogations that Sidley's Report *never made*. *See, e.g.*, Opp. 10, 24-26. Thus, the Opposition's principal actual malice allegations relating to the three remaining Plaintiffs fail because they are based on things the Report did not say. *See* pp. 13-18, *infra*.

- By misstating actual malice law, mischaracterizing Sidley's Report, and relying on irrelevant factual allegations, *see, e.g.*, Opp. 17-59, Plaintiffs make "direct" and

[2] Plaintiffs are also unable to show that the Report's conclusions are based on any false statements of fact, but Plaintiffs' failure in that regard is beyond the scope of this anti-SLAPP motion, which is based on the actual malice element of Plaintiffs' claims.

"circumstantial," Opp. 5, actual malice arguments regarding statements about the remaining three Plaintiffs that necessarily fail. *See* pp. 18-39, *infra*.

- Plaintiffs contend that the Court should apply Illinois law to this motion rather than the D.C. Anti-SLAPP Act, Opposition to 10/13/17 Sidley Anti-SLAPP Mot. ("Opp.") 73-82, but they ignore the District of Columbia's overwhelming interest in protecting speech on issues of public interest made in D.C., by D.C. speakers, and about a years-long controversy centered on a D.C. association. *See* pp. 39-44, *infra*.

Sidley's Report examined what motivated the critical decisions APA officials made regarding psychologists' ethical duties when faced with abusive interrogations of national security detainees during the War on Terror. *E.g.*, Report 19-35, 206-346. The Opposition does not even attempt to dispute that this important project constituted speech on an "[i]ssue of public interest" under the D.C. Anti-SLAPP Act. D.C. Code § 16-5501(3). The District of Columbia promulgated the Act precisely to protect such speech from "the burdens and costs" of "expensive and time consuming" pretrial procedures. *Mann*, 150 A.3d at 1230, 1231 (quotations omitted). To carry out the purpose of the Act, this case should be dismissed with prejudice.

I. Sidley's Speech Qualifies for Protection of the D.C. Anti-SLAPP Act.

Before the burden shifts to Plaintiffs to demonstrate a likelihood of success on the merits, Sidley must make the threshold showing that the Report qualifies as an "[a]ct in furtherance of the right of advocacy on issues of public interest." D.C. Code §§ 16-5501(1), 16-5502; Sidley Opening Memorandum ("Sidley Mem.") 10-11. Not contesting that the Report qualifies as a matter of public interest under D.C. Code § 16-5501(3), Plaintiffs make two arguments against Sidley's threshold showing that are both wrong.

First, Plaintiffs argue that the Report does not qualify under the Act because Sidley reported facts and did not "advocate." Count 11 Opp. 10-12.[3] But Plaintiffs ignore that "the right of advocacy on issues of public interest" is a term specifically defined in the Act. The Report plainly qualifies because it constitutes an "expression . . . that involves . . . communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B); Sidley Mem. 10-11. Plaintiffs refer to this definition as a "separate 'public interest' portion" of the Act, Count 11 Opp. 11, but it is not—it is one of two alternate definitions for an act in furtherance of the right of advocacy set forth in the Act.

"[W]hen the language of a statute is plain and unambiguous, [this Court is] bound by the plain meaning of that language." *Hudson Trail Outfitters v. D.C. Dep't of Emp't Servs.*, 801 A.2d 987, 990 (D.C. 2002) (quotations omitted). And should the text be ambiguous, it should be interpreted broadly: where, as here, a D.C. Code provision "is a remedial statute, it should be liberally construed to accomplish its purpose and extend its coverage." *E.C. v. RCM of Wash., Inc.*, 92 A.3d 305, 321 (D.C. 2014) (quotations omitted).

Under a plain reading of the Act, the "publication of [a] Report" on a "topic of significant importance to the public," that has a stated goal of "providing better information" without an explicit advocacy aim "is an act in furtherance of the right of advocacy on issues of public interest." *Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l*, 2015 WL 4477660, at *1, *3 (D.C. Super. Ct. Apr. 7, 2015). Sidley's Report to APA, which communicated information on a matter of undoubted public interest to the public, easily qualifies under the Act.[4]

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[3] Plaintiffs placed their argument on this issue in their Count 11 Opposition.

[4] Plaintiffs' contention that Sidley is not entitled to invoke the protections of the Act because its lawyers were acting only on behalf of APA, and therefore not in furtherance of their own "right of advocacy," Count 11 Opp. 15, likewise fails because it ignores the statutory definition

Second, Plaintiffs argue that the Report is not protected by the Anti-SLAPP Act because submissions that Sidley made to the APA on the way to the Report being published on APA's website were not directly made to the public. Count 11 Opp. 12-14, 16-17. This argument also ignores the plain meaning of the statute. Every distribution of the Report on the way to full public release qualifies as an act of advocacy under the Act, which requires only that an expression "*involve[]* . . . communicating views to members of the public," D.C. Code § 16-5501(1)(B) (emphasis added), a definition Plaintiffs fail to quote in full, Count 11 Opp. 14.

It is undisputed that when APA retained Sidley, the understanding was that APA would make the Report public. *See* Report 6 n.1. And APA did precisely that. Sidley's submission of the Report to APA was thus a necessary first step on the way to full public release, and thus "involv[ed] . . . communicating views to members of the public." D.C. Code § 16-5501(1)(B).

Plaintiffs' contention that submitting a report to a client for review and publication is not protected by the Act also flies in the face of the Act's policy as it would chill interim steps taken in connection with providing reports, news articles, and other communications to the public. And even if Plaintiffs' argument were correct, it would not resolve the instant motion since Plaintiffs themselves concede that publishing the Report on the APA website is qualifying speech in a "public forum," D.C. Code § 16-5501(1)(A)(ii) ("[a]ct in furtherance of the right of advocacy" includes "written or oral statement made . . . [i]n a place open to the public"); Opp. 12-13, and the Complaint asserts two counts against both APA and Sidley for just such

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discussed above. Plaintiffs' non-D.C. case law is beside the point, as those cases analyze narrower anti-SLAPP statutes about the right to petition. *See, e.g.*, *Kobrin v. Gastfriend*, 821 N.E.2d 60, 64 (Mass. 2005) (questioning whether "party's exercise of its right to petition" needed to be made on its "own behalf") (quotation omitted). Count 11 Opp. 15.

publications, Compl. ¶¶ 446, 504. Even under Plaintiffs' own logic, this threshold requirement is met by those publications.

The speech at issue here plainly qualifies for protection under the Act.[5]

II. Plaintiffs Do Not Demonstrate a Likelihood of Success.

A. The Actual Malice Standard Applies Because Plaintiffs Are Public Officials.

Plaintiffs do not contest that they were colonels in the U.S. Army who, by their own admission, "'took a leading role in creating policies and procedures'" concerning national security interrogations. Sidley Mem. 12 (quoting Compl. at 36). Military officers like Plaintiffs—holding ranks *above* captain and major—easily meet the expansive standard under which certain government employees are "public officials" subject to the actual malice test. Tellingly, Plaintiffs fail to cite a single case in which a court held an officer of their rank and responsibility did *not* qualify as a public official.

Instead, the Opposition downplays Plaintiffs' responsibilities. Opp. 67-71. But Sidley's motion relies on the description of their duties and activities found in Plaintiffs' *own* Complaint. *See* Sidley Mem. 6, 12-13. These are admissions that Plaintiffs cannot escape. Banks served as the Director of Psychological Applications for the Army's Special Operations Command, where he provided "oversight for all Army Special Operations Psychologists." Compl. ¶ 39. Dunivin served as Chief of the Departments of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center and "w[as] called upon to help put in place

[5] Plaintiffs' argument that Defendants' successful arbitration motion regarding Behnke's and Newman's claims "estops" them from arguing that the Report is public is baseless. Count 11 Opp. 12. Defendants did not move to compel arbitration because Behnke's and Newman's claims were "private," but rather because their claims arose under their employment agreements. The two issues are entirely unrelated.

policies to prohibit abuses." *Id.* ¶¶ 41, 122. James served as Director of Behavioral Science at Guantanamo and Abu Ghraib. *Id.* ¶ 42. And all assert their "leading role" in policymaking surrounding the controversial issue of interrogation of prisoners and other detainees. *Id.* at 36.[6]

There is no serious argument against Plaintiffs' status as public officials. Plaintiffs instead make two meritless arguments. First, they contend that, although they were all active-duty Army colonels during the time covered by the Report, they do not qualify as public officials because they had retired from the military prior to the Report's publication and an individual's public official status is evaluated as of "the time of publication." Opp. 60-62. That is a flatly erroneous statement of the law. As the leading defamation treatise states: "Even though a person is no longer publicly employed . . . , he or she will ordinarily be treated as a public official with respect to comments about his or her past performance in that role." 1 Sack, *supra* p. 1, § 5.2.1, at 5-8. Courts have unanimously reached that conclusion. *See, e.g.*, *Lovingood v. Discovery Commc'ns, Inc.*, 275 F. Supp. 3d 1301, 1309 & n.9 (N.D. Ala. 2017) (deputy manager of NASA space shuttle projects in 1988 remained public official for purposes of 2013 broadcast about Challenger crash); *Jones v. Scripps Media, Inc.*, 2017 WL 1230481, at *8 (E.D. Mich. Apr. 4, 2017) (CEO of Detroit's Public Lighting Authority remained public official even though had left role at time of reports); *Revell v. Hoffman*, 309 F.3d 1228, 1232-33 (10th Cir. 2002) (retired associate deputy director at FBI public official for statements concerning his conduct during time at FBI). In fact, the Supreme Court's seminal decision on public officials, *Rosenblatt v. Baer*,

[6] Plaintiffs' contention that the statements they challenge in the Report are not about their official duties, Opp. 67-68, is frivolous. The Report discussed at length Plaintiffs' military service and communications as they related to APA's deliberations on interrogation issues, *e.g.*, Report 21, 131-35, 142-43, 192, 226-27, 239, 241, 249-50, 265, 303, 327, 348-49, 351-68, and the Complaint is replete with allegations about how the Report characterized their military service, *e.g.*, Compl. ¶¶ 126 (Sidley's "allegations about the military Plaintiffs' intentions"), 190 ("false assertions about the military Plaintiffs' actions and the 'existing DoD interrogation guidelines'").

383 U.S. 75 (1966), involved a plaintiff who had been discharged six months before the article at issue was published. The Court held that "[i]t is not seriously contended, and could not be" that this fact has any "decisional significance." *See id.* at 87 n.14.

None of the authority cited by Plaintiffs supports their misstatement of the law. While Plaintiffs cite language from cases observing that a plaintiff was a public official at the time of publication or stating in dicta that time of the publication is the relevant time period, *none* holds that a plaintiff failed to qualify as a public official because he or she was no longer in the government at the time of publication. *See* Opp. 60-62. Plaintiffs cite several cases involving "public figures"—a different category of actual-malice plaintiff subject to a three-part test not applicable to public officials.[7] Other cases Plaintiffs cite affirmatively show that their argument is wrong. For example, in *Worrell-Payne v. Gannett Co.*, 49 F. App'x 105, 107 (9th Cir. 2002) (cited at Opp. 61 n.186), the court explained that the plaintiff's public official status "did not change after her termination or the passage of two years." *Id*. at 107 n.1 (citing *Rosenblatt*, 383 U.S. at 87 & n.14). In *Senter v. Hatley*, 2013 WL 4647539, at *12-13 (D.S.C. Aug. 29, 2013), an invasion of privacy case, the court evaluated the plaintiff's status at the time of the underlying events ("at the time of the purchase of the gym membership"), *not* at the time of publication.[8]

Second, Plaintiffs contend that military officers whose ranks and responsibilities fall below the level of "high-level" officialdom do not qualify as public officials. Opp. 62-63. This

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[7] *See, e.g.*, *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 871 n.1 (W.D. Va. 2016) (declining to decide whether plaintiff was a public official but holding plaintiff a public figure); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154 (1967) (dicta about public figure status).

[8] Although Defendants have the burden of persuasion on public figure or public official status (and easily satisfy it), *see Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984), Plaintiffs are wrong that actual malice is an "affirmative defense." Opp. 60 n.185. Rather, actual malice is an element on which Plaintiffs bear the burden of proof. *See, e.g.*, *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

manufactured distinction also misstates the law. "The public official category is by no means limited to upper echelons of government." 1 Sack, *supra* p. 1, § 5:2.1, at 5-7 (2019). Courts have applied the "public official" designation broadly, including to:

- law enforcement personnel, *e.g.*, *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6, 11 (D.D.C. 1993) (secret service agent); *Thompson v. Armstrong*, 134 A.3d 305, 312 (D.C. 2016) (special agent at Treasury Inspector General for Tax Administration);
- correctional officers, *e.g.*, *Beeton v. Dist. of Colum.*, 779 A.2d 918, 924 (D.C. 2001);
- school administrators, *e.g.*, *Horne v. WTVR, LLC*, 893 F.3d 201, 208 (4th Cir. 2018) (county school system's director of budget and finance), *cert. denied*, 139 S. Ct. 823 (2019); *Paul v. News World Commc'ns*, 2003 WL 23899002, at *2 (D.C. Super. Ct. Sept. 15, 2003) (county school system's chief information officer); and
- members of licensing boards, *Hotze v. Miller*, 361 S.W.3d 707, 714 (Tex. App. 2012) (physician member of state medical board).

And, as noted in Sidley's opening memorandum—and not disputed by Plaintiffs—courts repeatedly have held military officers (such as colonels) to be public officials. Sidley Mem. 12 & n.5; *MacNeil v. CBS, Inc.*, 66 F.R.D. 22, 25 (D.D.C. 1975).

Plaintiffs cite a 1989 First Circuit case, *Kassel v. Gannett Co.*, 875 F.2d 935, 940 (1st Cir. 1989), for a public-official test that has never been applied in D.C. courts. Instead, the D.C. Court of Appeals directly applies Supreme Court precedent, which provides that the public official "designation 'applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.'" *Thompson*, 134 A.3d 305, 312 (D.C. 2016) (quoting *Rosenblatt*, 383 U.S. at 85). Applying this test, the D.C. Court of Appeals has held, for instance,

that a correctional officer with the rank of "corporal" was a public official. *Beeton*, 779 A.2d at 922, 924. Under this standard, it is clear that these Plaintiffs—all colonels, with supervisory authority, who drafted and implemented government policy—are public officials.[9]

B. Plaintiffs Cannot Establish Actual Malice.

Plaintiffs say they have "direct" and "circumstantial" evidence to satisfy their actual malice burden. Opp. 5. Plaintiffs are wrong about the law, wrong about the facts, and even wrong about what the Report did and did not say about them. Their actual malice case fails.

1. The Actual Malice Standard Is "Daunting" and Requires Proof Directed to Specific False Statements.

There is no dispute that under the Anti-SLAPP Act Plaintiffs face the burden of "demonstrat[ing] that [their] claim is likely to succeed on the merits," D.C. Code § 16-5502(b), and that to do so, they must establish that "a jury properly instructed on the law, including any applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented." *Mann*, 150 A.3d at 1236; Sidley Mem. 2. *Mann* makes clear that the Anti-SLAPP Act's likelihood of success standard mirrors the Rule 56 summary judgment standard. 150 A.3d at 1237.

Here, Plaintiffs do not contest that those applicable "heightened fault and proof requirements" involve the "daunting" actual malice test and the "clear and convincing evidence" standard of proof. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996) (quotations omitted); *Mann*, 150 A.3d at 1236, 1252. These two guideposts to a court's

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[9] *Kassel* is of no help to Plaintiffs in any event. There the court held that a government psychologist working at a hospital was not a public official because "[h]e did not routinely supervise, manage, or direct government operations. He did not formulate policy." 875 F.2d at 940. Here, by contrast, Plaintiffs, in their own words, "took a leading role in creating policies and procedures" concerning national security interrogations. Compl. at 36.

evaluation of actual malice show why Plaintiffs' scattershot allegations, no matter how voluminous, fail. First, establishing actual malice requires proof that the defendant *knew* that a statement he published was false, had a "high degree of awareness of probable falsity," or "in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731 (alteration and quotations omitted); Sidley Mem. 17. This is a "subjective" inquiry, "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731.

Second, Plaintiffs also do not contest they must establish actual malice by "clear and convincing evidence." *Anderson v. Liberty Lobby*, 477 U.S. 242, 244 (1986); *Mann*, 150 A.3d at 1236, 1253; Sidley Mem. 17. "This standard is significantly more onerous than the usual preponderance of the evidence standard." *Von Kahl v. BNA, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017) (quotations omitted). It is one that "[f]ew public figures" pursuing theories of actual malice have ever been able to meet, *McFarlane*, 91 F.3d at 1515, and, as emphasized in Sidley's opening memorandum, requires that "the ultimate factfinder [have] an abiding conviction that the truth of [the] factual contention [is] highly probable," *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (quotations omitted); Sidley Mem. 17-18.

Plaintiffs quote *Tavoulareas v. Piro*, 817 F.2d 762, 794 n.43 (D.C. Cir. 1987), to note that a court should engage in "'an aggregate consideration of all [Plaintiffs'] evidence to determine if their burden has been met.'" Opp. 19. But the quoted passage appears in a footnote supporting the main point *Tavoulareas* makes: Even with the consideration of aggregate evidence, "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false and defamatory statement." *Tavoulareas*, 817 F.2d at 794; Sidley Mem. 19. As one court applying *Tavoulareas* emphasized, even if a plaintiff could

establish actual malice as to "collateral falsehoods"—i.e., false statements about people other than the plaintiff—"this would not establish an inference of actual malice with respect to [defendant's] statements concerning plaintiff" because "[t]he doubt must be in conjunction with the alleged defamatory statement." *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1513 (D. Minn. 1988) (citing *Tavoulareas*, 817 F.2d at 794), *aff'd*, 881 F.2d 1426 (8th Cir. 1989).

Plaintiffs attempt two glosses on the actual malice standard that are both wrong. They first quote a footnote in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), for the proposition that actual malice "'does not readily lend itself to summary disposition,'" Opp. 20. But in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256 n.7, the Supreme Court clarified that this statement was simply an "acknowledgment" that the Court was reluctant to endorse special protections to defamation defendants as opposed to other civil litigants. The *Anderson* Court held that on summary judgment, a plaintiff "must present affirmative evidence" demonstrating actual malice by "clear and convincing evidence," *id.* at 256-57, and it is now firmly established that "the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." *Von Kahl*, 856 F.3d at 109. That is why the grant of summary judgment on actual malice grounds is the norm.[10] And in any event, *Hutchinson* had nothing to do with the D.C. Anti-SLAPP Act, which is specifically designed to ensure that "the litigation is brought to a speedy end" if plaintiffs cannot meet their burden. *Mann*, 150 A.3d at 1227.

Plaintiffs next quote a footnote in *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979), for examples of "the types of evidence" that can show actual malice. Opp. 20. But that quotation describes evidence that could be used to show malice for certain *common-law* "qualified

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[10] *See, e.g.*, *Kendrick v. Fox Television*, 659 A.2d 814, 822 (D.C. 1995) (affirming summary judgment); *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 597 (D.C. Cir. 2016) (same); *Von Kahl*, 856 F.3d at 117 (reversing denial of summary judgment).

privileges" developed "long before *New York Times* was decided." *Id*. at 163. The *Herbert* court was *not* enumerating the kinds of evidence that, after *New York Times*, prove *constitutional* actual malice. While relevant "circumstantial evidence" may support a finding of actual malice, Opp. 19, it must be evidence that demonstrates actual malice—the defendant's subjective awareness of the falsity or probable falsity of a statement published by the defendant about one of the plaintiffs. *Jankovic v. Int'l Crisis Grp.*, 72 F. Supp. 3d 284, 310 (D.D.C. 2014), *aff'd*, 822 F.3d 576 (D.C. Cir. 2016). That is the showing Plaintiffs must make by clear and convincing evidence—and cannot make here. That failure is not cured by the "evidence" in Plaintiffs' exhibits[11] or the 34 affidavits submitted with their Opposition.[12]

2. Plaintiffs' Principal Claims Are Based on Statements the Report Never Made.

The Opposition rests its central claims—what it calls the first of "three primary conclusions" in the Report, Opp. 23—on four types of statements Sidley *never made*. Plaintiffs contend that when discussing the state of affairs in 2005 at the time of the PENS Task Force, the Report (1) stated that DoD interrogation guidelines were intentionally loose so as not to prohibit torture, (2) stated that DoD policies governing interrogators were high-level and non-specific, (3) relied on outdated Department of Justice memos defining "torture," and (4) stated that

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[11] This Reply responds to arguments and evidence addressed in Plaintiffs' 83-page Opposition. The assertions of subsidiary "evidence" contained in the 60-page single-spaced chart appended as Exhibit A to the Opposition fail to meet Plaintiffs' burden under the Anti-SLAPP Act for the same reasons addressed in Sidley's opening memorandum and this Reply.

[12] The affidavits submitted with the Opposition reflect a variety of complaints about or responses to the Report, but contain no evidence of actual malice. Opp. 16. And of the 27 affidavits from interviewees, 22 concern statements in the Report about third parties, *not* any of the three Plaintiffs. *See* Bow, Beavers, Brandon, Bryson, Callahan, Cerbone, Crow, Deutsch, Gelles, Kennedy, Kinscherff, Kleinman, Lefever, Levant, H. Matarazzo, J. Matarazzo, Sammons, Shumate, Sternberg, Strassburger Fox, Swenson, Williams Affs.

Plaintiffs worked to enable abusive interrogations. Opp. 1, 10, 12, 23, 24, 27-28, 35, 36.[13] But Plaintiffs make these allegations either without quoting the Report or by misquoting it.

Before addressing what the Report actually said about government actions and policies at the time of PENS, it is important to put in context why Sidley examined them in the first place. Sidley was investigating decisions APA officials made at the time of PENS, based on the information available to those APA officials at the time, about ethical guidance for APA to give to military and CIA psychologists supporting national security interrogations. In this regard, the following circumstances are undisputed:

- APA began to form the Task Force at the end of 2004 in response to the uproar over disturbing breaking news about interrogation abuses that involved government psychologists. *See* Compl. ¶¶ 70-71; Report 206 (citing Neil Lewis, *Red Cross Finds Detainee Abuse in Guantanamo Bay*, N.Y. Times (Nov. 30, 2004) (Sidley Mem. Ex. 2-B)).

- As late as the eve of the June 2005 meeting of the Task Force, the public was still receiving breaking news about interrogation abuses involving government psychologists, in that case, a June 24, 2005 report that "[m]ilitary doctors at Guantanamo have aided interrogators in conducting and refining interrogations of detainees, including providing advice about how to increase stress levels and exploit fears." Report 33 (citing Neil Lewis, *Interrogators Cite Doctors' Aid at Guantanamo*, N.Y. Times (June 24, 2005) (Sidley Mem. Ex. 2-B)). Thus, the PENS Task Force met in June 2005 to give guidance to psychologists to prevent the types of abuses that were in the news as current events.

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[13] APA established the Psychological Ethics and National Security ("PENS") Task Force in 2004 to "explore the ethical dimensions of psychology's involvement and use of psychology in national security-related investigations," Compl. ¶ 71, and the Task Force met in 2005. Sidley Mem. 4-5.

- While "psychologists were involved in [both] CIA and DoD interrogations," Report 67; Compl. ¶ 103, Report 66-67, any DoD practices or policies restricting interrogation techniques did not apply to CIA interrogations, Opp. 8 n.20.

This is the context in which Plaintiffs assert that Sidley issued a Report making the four types of statements above. Plaintiffs argue that the proof that the purported statements were made with actual malice is that certain DoD policies at the time already prohibited specific interrogation techniques like stress positions and sleep deprivation, and that Sidley possessed documents referencing those policies. *See, e.g.*, Compl. ¶ 106; Opp. 26-31. Sidley's response is two-fold: First, the Report did not make the statements alleged, addressed here. Second, none of the evidence Plaintiffs cite supports their assertion of actual malice, addressed *infra*, pp. 10-39.

First, Plaintiffs' arguments rely entirely on things the Report never said:

1. Contrary to Plaintiffs' assertion, Sidley never called any "military guidelines . . . intentionally loose so as not to prohibit torture," Opp. 10 & n.31 (citing Report 9-12), 24, and the Opposition quotes nothing in the Report to support it.

2. Contrary to Plaintiffs' assertion, Sidley never said that DoD policies governing *interrogators* "used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation[.]'" Opp. 26 (citing Report 12). The Opposition points to reports referring to military policies governing *interrogators* that, while differing by place and time, listed certain specific prohibited techniques. Opp. 27-28, 36. But in using the term "then-existing DoD guidance," Report 10, the Report did not refer to those policies. Instead, in using this language, the Report referred to "the internal guidelines" for military *psychologists* "that were already in place at DoD or that the key DoD officials wanted to put in place." *Id.* 10.

The Report made this clear in multiple places. *See, e.g.*, Report 229, 240 (discussing chapters that became policy governing psychologists that "Banks provided to Behnke in advance of the PENS Task Force meeting"); *id.* (they were "distributed at the task force meeting and eventually became (almost verbatim) the interrogation policy of the Army Medical Command in 2006"). The Report's reference to policies the key DoD officials "wanted to put in place," *id.* 10, makes it unmistakable Sidley was referring to the draft DoD psychologist guidelines Banks distributed and the PENS Task Force discussed in June 2005. *See id.* ("Their joint objective was to, at a minimum, create APA ethics guidelines that went no farther than—and were in fact virtually identical to—the internal guidelines that were already in place or DoD or that the key DoD officials wanted to put in place."). The arguments the Opposition makes about other types of military interrogation polices, *e.g.*, Opp. 27-38, 35, do not contradict anything the Report said.

Significantly, these guidelines for military psychologists, attached at Ex. 1-A, did in fact use "high-level concepts" and did *not* mention any specific prohibited techniques, just as the Report said, Report 12, 229, 240 & n.1038. Thus, if and when DoD policies governing interrogators changed—and Plaintiffs themselves admit that "[i]n the years 2002-2005, these polices were changed a number of times," Compl. ¶ 92—the high-level nature of the DoD guidance for psychologists that Plaintiff Banks circulated at PENS meant that it would not be an independent basis for prohibiting specific interrogation techniques.

3. Plaintiffs next assert that it was false for the Report to say that in 2005 "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." Opp. 26. According to Plaintiffs, the Report erroneously relied on DoJ memos narrowly defining torture that were written by the Office of Legal Counsel ("OLC") in 2002 and withdrawn in mid-2004 before PENS. *Id.* 26 (quoting

Report 12). This assertion misstates the Report for two reasons. First, the Report accurately stated that DoJ withdrew those memos in 2004, as the Opposition acknowledges. Opp. 28 (citing Report 153). Second, Plaintiffs ignore that the Report expressly relied on the definition of torture in May 2005 OLC memos that *had not* been withdrawn at the time of PENS. "At the time, *narrower* definitions of torture prevailed through pronouncements from the OLC," which, "*at the time of PENS*" included "a series of memos *in May 2005* to the CIA permitting continued use of waterboarding and other harsh techniques" because they did not amount to torture. Report 304 (emphasis added). The claim that the Report relied on withdrawn memos is wrong.

4. Contrary to Plaintiffs' assertion, Sidley never said that APA "colluded with the Department of Defense to support and enable torture" or "to enable abusive interrogation techniques," Opp. 23, 35, and in particular never said that any of the three remaining Plaintiffs, all serving at the time as colonels in the Army, had any such goal. Sidley instead reported that "[s]ome of the key DoD officials on the task force, principally Banks and Larry James, as well as Dunivin, were assuring the key APA officials that past abuses had been stopped and the problem had been solved by deploying better personnel and by ensuring that psychologists were present to stop behavioral drift." Report 66. Although the Report cautioned that these "strong . . . assurances" were "self-serving and uncorroborated," *id.*, it never stated that these Plaintiffs sought to enable torture or abusive interrogation techniques. Indeed, the Report clearly stated that Sidley "*cannot* conclude that the collusion between APA officials and DoD officials was done with the actual intent 'to support torture.'" *Id.* 67-68 (emphasis added).

* * *

Plaintiffs' focus on statements not actually contained in the Report renders irrelevant and meritless numerous claims of actual malice throughout the Opposition, as discussed below.

3. Plaintiffs' Attempts To Show What They Call "Direct" Evidence of Actual Malice All Fail.

a. Information that Plaintiffs Did Not Support Interrogation Abuses.

The Opposition argues at length that Sidley was supplied with information that Plaintiffs did not support interrogation abuses, calling this "direct" evidence of actual malice. Opp. 2, 25-26, 35-37. This argument provides no support to Plaintiffs' actual malice case for the simple reason that the Report did not say they did. *See* pp. 13-18, *supra*. For example, Plaintiffs offer the affidavits of two witnesses, psychologists Robert Fein and Jennifer Bryson, who say they told Sidley that Plaintiffs or Behnke "worked to prevent" "abusive interrogations." Opp. 25 (quoting Opp. Exs. C-6, C-13); *see also* Opp. 2 (quoting Opp. Ex. C-33 (Taylor)). But the Report nowhere said that Plaintiffs did not do this.[14] The quoted passage of the Bryson affidavit, *id*. 25, fails to support actual malice for the additional reason that it is about Behnke, not any current Plaintiff. *See Price*, 676 F. Supp. at 1513 ("'collateral'" statements about third parties do not establish actual malice as to statements about plaintiffs).

Government reports the Opposition cites making findings about military psychologists taking appropriate action to report questionable interrogation practices, Opp. 36, are similarly irrelevant, because they too address statements the Report did not make.[15] For this reason, Plaintiffs' citation of the actual malice holding in *Mann*, Opp. 35-36, makes no sense. The factual topics that Sidley discussed in its Report were different from the topics covered in the

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[14] The same is true for the citation of a transcript of PENS Task Force member Dr. Jean-Maria Arrigo stating that task force members agreed on the principle "psychologists don't torture people." Opp. 30 (citing Ex. C-25 (Newman) ¶ 9). This responds to nothing in the Report.

[15] A 2014 email stored on former-Plaintiff Behnke's hard drive reporting information that the FBI had declined to open a criminal investigation into activities of third parties, Opp. 37 (called "FBI Memoranda" by Plaintiffs), also responds to nothing said in the Report.

reports and other documents Plaintiffs cite, Opp. 35-36, whereas in *Mann* the topic discussed in earlier investigative reports and defendants' articles (whether emails showed that the plaintiff climate scientist falsified research results) were exactly the same. 150 A.3d at 1246-47.

b. Information about the Report's "First Primary" Conclusion.

What Plaintiffs call the Report's "first primary false and defamatory conclusion," Opp. 26, is a series of purported statements in the Report that military guidelines for interrogators "'used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation,'" *id.* (quoting Report 12), and that the Report relied on outdated OLC memos for the Justice Department's narrow definition at the time, *id.* Plaintiffs' proffered actual malice evidence on these issues fail for a number of reasons.

First, Plaintiffs' evidence is directed to statements not made in the Report. *See* pp. 13-18, *supra*. The Opposition cites government policies and reports for the proposition that military guidelines for interrogators in certain places and at certain times prohibited certain specific interrogation techniques, or that the 2002 DoD memos defining torture had been withdrawn; these are irrelevant because they do not contradict anything said in the Report. *See* Opp. 27 (Senate Armed Services Committee Report, Schlesinger Report, Martinez-Lopez Report, Jack Goldsmith book), 28 (withdrawal of 2002 OLC memos), 28-29 (2014 memo to APA about timeline of withdrawal of OLC memos), 36 (Schlesinger Report), *id.* (SASC Report). Similarly, a witness's testimony that she told Sidley that as an interrogator at Guantanamo she designed interrogations from a computer menu with a limited set of interrogation techniques does not contradict anything in the Report. *See* Opp. 28 n.67, 30-31; C-7 (Bryson), ¶¶ 5-6.

Plaintiffs complain that the Report did not discuss a 2005 "Standard Operating Procedures" ("SOP") document for psychologists supporting interrogation teams at Guantanamo that was in Sidley's possession. Opp. 29. But they fail to show how Sidley's possession of the

document gave Sidley any reason to disbelieve any statement the Report made about any Plaintiff. Without such a showing, Sidley's mere possession of the document does not begin to support a finding of actual malice. Sidley Mem. 20-21; *Von Kahl*, 856 F.3d at 117. Moreover, Plaintiffs ignore that Sidley's Report *did* extensively discuss, and attach, the draft DoD guidance for psychologists that Plaintiff Banks brought to PENS, *see, e.g.*, Report 10, 229, 240, 249-50, 252, 270, 273, 275, which is in all material respects the same as the 2005 SOP Plaintiffs cite: *Both* use high-level concepts like "safe, legal, ethical and effective" interrogations. *Both* task a psychologist with being familiar with applicable law, rules, and regulations governing interrogations. *Both* require psychologists to report interrogation abuses. And *both* mention no specific interrogation techniques such as stress positions or sleep deprivation. *Compare* Ex. 1-B (2005 BSCT SOP), at 1, 6-7; Opp. 29 & n.70, *with* Ex. 1-A (DoD draft guidance discussed in Report), at 3, 6.[16]

Second, Plaintiffs' citation of DoD policies and government reports is not evidence of actual malice for another fundamental reason: Sidley's Report concerned the decisions APA officials made in 2005 about ethics guidelines for national security interrogations, based on the information they were aware of *at the time*. The Report showed that at the time PENS participants received background materials about specific interrogation techniques like stress positions and sleep deprivation and debated including specific language about banning certain

[16] For the same reason, Plaintiffs' citation of the PENS Task Force Guidelines Statement Four, Opp. 30, is unavailing. PENS Statement Four similarly directed psychologists to follow the law and be familiar with applicable rules and regulations, Sidley Mem. Ex. 2-C at 5, and also did not prohibit any specific interrogation techniques. The Report discussed Statement Four at 304-05. And Plaintiffs' citation of PENS listserv posts from 2005, Opp. 29, provides no evidence of actual malice. None of the posts discussed the existence of any military policy that prohibited specific interrogation techniques like stress positions or sleep deprivation. *See id.* & n.74.

interrogation techniques. *See, e.g.*, Report 28, 244, 285-87, 290, 295. The Opposition nowhere points to evidence that anyone—including Plaintiffs themselves—told Sidley that back in 2005 any APA officials had been told about the theater-specific DoD policies prohibiting specific interrogation techniques like stress positions or sleep deprivation on which Plaintiffs now seek to rely.[17]

Indeed, even in their first response to Sidley's Report, posted July 31, 2015, Plaintiffs did not assert that anyone said in 2005 during PENS that military policies banning specific interrogation techniques (as opposed to better training and oversight) had already solved the problem they were meeting to discuss. Indeed, Plaintiffs said the opposite. "[T]hose of us in the APA worked hard to ensure that the report issued by" PENS in 2005 "would *help* military psychologists *advocate for* explicit military prohibitions against abusive techniques." Opp. 53 n.162; Ex. 1-C (emphasis added).

And Plaintiffs cannot dispute *another* reason Sidley had no basis to believe the problems involving psychologists' support of interrogations had already been resolved by policies prohibiting specific techniques: Sidley reported that "by June 2005," APA "knew that psychologists were involved in *CIA* and DoD interrogations." Report 67 (emphasis added). No one, including Plaintiffs, claims that CIA policies at the time banned specific interrogation techniques or that Sidley was told they did. *See* p. 15, *supra*.

Third, the DoD policies and reports that Plaintiffs cite, Opp. 27, 36, are lengthy documents covering numerous topics, some obliquely. For example, Plaintiffs assert that a 126-

[17] All three Plaintiffs submitted affidavits about their communications with Sidley, and none made this claim. *See* Opp. Ex. C-2 (Banks), ¶ 8-16; C-12 (Dunivin), ¶¶ 6-16; C-17 (James), ¶ 6 (saying that he mentioned PENS Statement Four and the PENS listserv discussions, neither of which identified such policies).

page DoD Report from August 2004, the "Schlesinger Report," in Sidley's possession put Sidley on notice of "the permissible interrogation techniques in Iraq, Afghanistan, and Guantanamo on various dates." Opp. 27, 36 & n.98 (containing link to document). But Plaintiffs, who admit that at the time there was "a history of shifting military policies governing interrogations," Compl. ¶ 92, fail to demonstrate that the Schlesinger Report contained clear and comprehensive information about banned interrogation techniques that in fact put Sidley on actual notice that anything it was reporting was false. As Sidley showed in its opening memorandum, citing cases that the Opposition declines to cite or analyze, Opp. 59, the mere fact that Sidley had such documents in its possession falls dramatically short of establishing that Sidley made any statement about interrogation policies knowing it to be false or subjectively believing it to be false. *See Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971); Sidley Mem. 20-22.

Fourth, Plaintiffs concede it is their burden to proffer evidence "that Defendants actually knew their defamatory statements about Plaintiffs to be false," Opp. 21, but then fail even to attempt to show how alleged misstatements of U.S. government interrogation policies or DoJ legal memos show Sidley made any statements about Plaintiffs knowing or believing them to be false. *See Price*, 676 F. Supp. at 1513; *Tavoulareas*, 817 F.2d at 794.

c. Information about the Report's "Second Primary" Conclusion.

Sidley's Report sets forth in great detail information about confidential behind-the-scenes communications that took place between 2006 and 2009 between former Plaintiff Behnke and others, including Plaintiffs, for purposes including resisting efforts by APA to ban APA-member psychologists from participating in national security interrogations. Report 36-44, 355-462. The Opposition calls this the "second false primary conclusion[,] . . . that from 2006 to 2009, Plaintiffs engaged in a 'pattern of secret collaboration . . . with APA' to prevent the APA from banning psychologists' participation" in such interrogations. Opp. 31 (quoting Report 9).

Sidley's detailed account of this period relied largely on unchallenged reporting on the content of Behnke's own email communications with Plaintiffs and others. *See, e.g.*, Report 361-79, 384-404. Plaintiffs do not even attempt to argue that Sidley published this with knowledge of falsity or serious, subjective doubts about falsity. Instead, they assert that later-convened APA Council meetings "were completely open and transparent such that a small group of members could not collude to prevent the APA from banning psychologists' participation in national-security interrogations." Opp. 31, 32. But the Report *never said* that meetings at APA conventions were not open and transparent; its account was about Behnke's behind-the-scenes communications with Plaintiffs and others at other times. Plaintiffs' failure to challenge what the Report actually said defeats their actual malice claim.

d. Information about the Report's "Third Primary" Conclusion.

What Plaintiffs call the Report's "third primary false and defamatory allegation" is the Report's discussion of the APA Ethics Committee's and Ethics Office's handling of certain ethics complaints against national-security psychologists in connection with detainee interrogations. Opp. 33-35; Report 58-63, 463-521. Plaintiffs fail to raise a genuine issue of material fact as to actual malice for a number of reasons:

First, as noted above, the Opposition acknowledges the burden of the three remaining Plaintiffs to show that "a jury could reasonably conclude that Defendants published their defamatory *statements* about Plaintiffs with actual malice." Opp. 17-18. But this section of the Report discussed the conduct of members of the APA Ethics Committee and staff of the APA Ethics Office—not any of the remaining three Plaintiffs. Report 463-521. *See Tavoulareas*, 817 F.2d at 794; *Price*, 676 F. Supp. at 1513. For this reason alone, Plaintiffs' actual malice claim fails.

Second, the Opposition fails to identify any information Sidley was aware of during its

investigation that showed the Report's factual findings to be false. For example, Plaintiffs complain about the Report's findings regarding a complaint against military psychologist James Leso. Opp. 33. The Report found that, beyond seeking statements from the involved parties, the Ethics Office monitored the outcome of state licensing board proceedings; it "conduct[ed] internet searches to obtain additional information"; it "look[ed] at additional publicly available documents," including reviewing "media reports"; and it "did not take any affirmative steps to request information from witnesses who might have had relevant information . . . or to seek documents through, for instance, a FOIA request," although it did monitor FOIA litigation relating to Leso. Report 60, 504, 513. Plaintiffs submit affidavits of interviewees who told Sidley about APA's work on the Leso complaint, but those affidavits merely *confirm* the substance of Sidley's findings. *See, e.g.*, Opp. Ex. C-5 (Bow Aff.), ¶ 5 (noting the same type of Ethics Office review of the Leso complaint, just providing more detail).[18]

Third, the affidavits' contention that Sidley should have credited one witness's account over another's, *see, e.g.*, Opp. 9 & n.27, 34-35; Opp. Ex. C-8 (Callahan), ¶¶ 5, 10, is irrelevant. A publisher is entitled to choose among conflicting information, and the "defendants' knowledge of the existence of a contradictory source, without more, does not constitute clear and convincing evidence of actual malice." *Liberty Lobby, Inc. v. Anderson*, 1991 WL 186998, at *8 (D.D.C. 1991). And in any event, none of the witnesses who opined that Behnke acted properly had access to the voluminous documents that Sidley reviewed and therefore no basis to contradict

[18] Plaintiffs also assert that Sidley should have deferred to a statement by the APA Board of Directors defending APA's decision on the Leso complaint issued months before Sidley began its investigation. Opp. 33-34. But Plaintiffs fail to explain why Sidley should have done so after its own extensive review of the facts led it to a different conclusion, Report 493-517.

them. *See* Opp. 34-35; Opp. Ex. C-11 (Deutsch Aff.), ¶¶ 3, 9. [19]

4. Plaintiffs' Theories of Circumstantial Actual Malice Misstate the Law and Are Misapplied Here.

As demonstrated above, what Plaintiffs tout as "direct" evidence of actual malice is no evidence at all. This leaves Plaintiffs with a series of allegations of "circumstantial" evidence of actual malice of the type that courts routinely reject as insufficient, *see* Sidley Mem. 20-25, and that are insufficient here as well. They fail to meet Plaintiffs' heavy burden of showing that a properly instructed jury could find by clear and convincing evidence that Sidley knowingly made false statements about Plaintiffs or subjectively had serious doubts about such statements' falsity.

a. Alleged "Preconceived Narrative" and "Purposeful Avoidance of the Truth."

Plaintiffs allege that Sidley adopted a "preconceived plan" for the Report and then "purposefully avoided the truth" in support of that plan, Opp. 43, 39, but they do not offer any relevant evidence to support their claim. Nor do they even attempt to reconcile it with the undisputed scope of Sidley's 8-month investigation, which involved review of tens of thousands of documents, interviews of approximately 150 witnesses, and *follow-up* interviews of more than 50 witnesses, Sidley Mem. 8.

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[19] As for APA's handling of an ethics complaint against Plaintiff James, the Opposition presents no evidence that Sidley acted with actual malice in describing the conduct of the reviewers. Plaintiffs cite one interviewee saying he told Sidley, "'at no point did Dr. Behnke pressure me to reach any particular conclusion regarding the James ethics complaint,'" Opp. at 35 (quoting Ex. C-11 (Deutsch), ¶ 9), but the Report never said Behnke did so. *See* Report 59-60, 518-21. Another interviewee disagrees with the Report's characterization that closing the James complaint in one month amounted to "lightning speed," Opp. Ex. C-11 (Deutsch), ¶ 6 (citing Report 521), but does not challenge the underlying fact or say he told Sidley anything different.

1) Alleged "Preconceived Narrative."

Plaintiffs' allegation that Sidley had "conceived a story line in advance of the investigation" is wrong even as a threshold legal matter. "Evidence of . . . preconceived notions . . . does little to show actual malice." *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 597 (D.C. Cir. 2016). And courts have repeatedly found no actual malice even where—unlike here—there is "evidence that the defendant was on a mission to advance a preconceived story line." *Jankovic v. Int'l Crisis Grp.*, 72 F. Supp. 3d 284, 316 (D.D.C. 2014) (quotation omitted), *aff'd*, 822 F.3d 576; *see also Lohrenz v. Donnelly*, 350 F.3d 1272, 1283-84 (D.C. Cir. 2003).

Plaintiffs cite cases from other jurisdictions, Opp. 39, in which a plaintiff produced evidence that a defendant literally "conceived a story line in advance of an investigation" *and* "consciously set out to make the evidence conform to the preconceived story." *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 872 (W.D. Va. 2016) (quotation omitted). That is, the cases involved evidence of the defendant's stated preconception *and* evidence that the speaker *altered* source material to the contrary, *Goldwater v. Ginzburg*, 414 F.2d 324, 336-37 (2d Cir. 1969), or "rigged" the investigation, *Harris v. City of Seattle*, 152 F. App'x 565, 568 (9th Cir. 2005).

Plaintiffs do not begin to make such a showing here. They merely cite, for example, what *critics of APA*, not Sidley, hoped would come of the investigation. Opp. 39-40; *id.* 40 n.107. A defendant's investigation of even "charges . . . leveled by critics with axes to grind" does not demonstrate the defendant's *own* actual malice. *Montgomery v. Risen*, 197 F. Supp. 3d 219, 263 (D.D.C. 2016) (quotation omitted), *aff'd*, 875 F.3d 709 (D.C. Cir. 2017).

Plaintiffs misquote a statement attributed to David Hoffman, asserting that he admitted that Sidley wrote the Report to "ma[ke] their case" for collusion rather than provide a truthful account. Opp. 1 & n.3, 9; Ex. 1-D. But the full quotation says the opposite: only "*[o]nce the investigative team reached their conclusions*, they wrote the report using language that they felt

best made their case, consistent with what is done in such investigative reporting." Ex. 1-D, at 3 (emphasis added). In other words, the Report made a case only *after* an investigation and *after* conclusions were reached, the opposite of a preconceived narrative. Ex. 1-D, at 3.

Indeed, it is undisputed that Sidley in fact *rejected* many of the allegations made by critics before the investigation. For example: Sidley was asked to investigate whether "APA officials actually knew about the existence of an interrogation program using 'enhanced interrogation techniques.'" Report 9. It did not find evidence to support that allegation. *Id.* It further did not find evidence to support critics' allegations that the CIA "contributed to the outcome of the PENS Task Force," *id.* at 10; and it found that revisions to the Ethics Code in 2002 were "not influenced by an effort to help the government's interrogation efforts," *id.*

Plaintiffs argue that the Report "repeatedly draws all possible inferences against Plaintiffs." Opp. 41. But even evidence that an author resolved ambiguities against a plaintiff fails to shows actual malice. *Nader v. de Toledano*, 408 A.2d 31, 51 (D.C. 1979) ("Adoption of a rational explication of an ambiguous document, even if erroneous, does not constitute clear and convincing evidence sufficient to support a judgment of publication with actual malice."); *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984). And the one example Plaintiffs cite—the drawing of an inference regarding e-mails between Behnke and Plaintiff Banks, Opp. 41-42—fails to acknowledge that the Report accurately quoted Banks' *own* emails asking Behnke to delete their correspondence, *see* Report 394 ("PLEASE DELETE this email after you have read it."), while clearly stating "[i]t is impossible to know whether" Behnke deleted more of their emails or "their discussions tapered off naturally." Report 396. And it does not show a preconceived narrative to see emails asking a recipient to delete correspondence and believe that other similar emails may have been deleted based on similar requests.

Plaintiffs cite Sidley's alleged expansion of its "investigation beyond its initial focus" as evidence of actual malice. Opp. 45. While the allegation is not true, *see* Compl. ¶ 15, even if it were, that would only underscore Sidley's willingness to depart from any initial impressions and follow the evidence. That Sidley conducted more than 200 interviews of roughly 150 witnesses during its investigation, re-interviewing a number of witnesses, Report 7, demonstrates Sidley's willingness to critically assess—and reassess—interview responses.

Talley v. Time, 923 F.3d 878 (10th Cir. 2019), a recent case affirming summary judgment, shows why Plaintiffs' preconceived-narrative argument lacks merit. *Id.* at 898. There, *Sports Illustrated* published the findings of an extensive investigation into a college football program. *Id.* at 882. Plaintiff alleged defendants published with actual malice, as they were "pursuing an agenda," and crafting a "sensational, unfavorable narrative to get the story they wanted." *Id.* at 893 (quotations omitted). But, just as here, the defendants "conducted a long and thorough investigation" before publication, speaking to "dozens" of sources over "ten months." *Id.* at 898. The defendants "consulted their notes and each other while drafting the article, and they occasionally re-interviewed individuals." *Id.* They "fact-checked and edited their article several times." *Id.* The court held that such evidence demonstrated that defendants did not in fact seek out "a certain narrative from interviewees," let alone that defendants "doubted the truth of their publication," and therefore failed to establish actual malice. *Id.* at 904-05 (quotations omitted). The same reasoning applies with full force here.

The only evidence Plaintiffs offer, in the form of witness affidavits, Opp. 40-41, merely repeats witnesses' "impression" that Sidley had a "preconceived narrative," without providing any basis for that impression or tying such an impression to any particular statement in the Report. Opp. 40-41. Such speculation cannot establish actual malice. *McFarlane v. Sheridan*

Square Press, Inc., 91 F.3d 1501, 1508 (D.C. Cir. 1996) (affidavit cannot be basis for actual malice where no personal knowledge of conclusions in testimony).

Additionally, to the extent Plaintiffs' witnesses complain of perceived preconceptions *during* their interviews, their conversations with Sidley came months into the investigation, when Sidley had already reviewed thousands of documents and conducted dozens of other interviews.[20] An investigator is entitled to form an opinion during the course of an investigation and then interview new witnesses against this hypothesis. *See Tah v. Glob. Witness Publ'g, Inc.*, 2019 WL 4737116, at *9 (D.D.C. Sept. 27, 2019) ("That [a defendant] had arrived at its conclusion, right or wrong, by the time it reached out for comment and shortly before publication is commonplace and no surprise."). Nor is developing a point of view before or during an investigation evidence of actual malice, a point Plaintiffs do not address. Sidley Mem. 23 & n.11. There is no evidence of a "preconceived plan," let alone evidence of such a "plan" sufficient to demonstrate actual malice by clear and convincing evidence.

2) Alleged "Purposeful Avoidance."

Likewise, Plaintiffs' assertion that Sidley "purposefully avoided obtaining the truth" is meritless. Opp. 43-45. The cases Plaintiffs cite, drawing from *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989), all concern egregious and wholly inapplicable situations. Where the record reflects that defendants "conducted a long and thorough investigation," as Sidley indisputably did here, courts do not find "purposeful avoidance." *See Talley*, 923 F.3d at 898; *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999)

[20] APA formally engaged Sidley in November 2014. As for the affiants cited by Plaintiffs as demonstrating a preconceived narrative, Kinscherff was interviewed over five months later, on April 20, 2015 (Aff. ¶ 2); Deutsch was interviewed on May 11, 2015 (Aff. ¶ 3); Callahan was interviewed on June 4, 2015 (Aff. ¶ 4); and Shumate was interviewed on June 24, 2015 (Aff. ¶ 3). Sidley submitted the original Report to APA on July 2, 2015.

(this situation is "precisely the opposite of *Connaughton*" where defendant interviewed "numerous sources"); *Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 411-12 (6th Cir. 1991) (distinguishing *Harte-Hanks* because the article at issue was supported by an "overwhelming number of sources"); *Dolcefino v. Turner*, 987 S.W.2d 100, 118 (Tex. App. 1998) (where defendant "interviewed over thirty people and reviewed approximately 500 pages of probate court records" evidence negates jury finding of actual malice), *aff'd sub nom.*, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000).[21]

In *Harte-Hanks*, by contrast, the newspaper "used a single source as the basis for a highly improbable story that a candidate for judicial office had offered a bribe." *Levan*, 190 F.3d at 1243 (citing *Harte-Hanks*, 491 U.S. at 692). The newspaper declined to make any effort to interview a readily available "key witness" who could prove or disprove the accuracy of the story, and even declined to listen to key audio tapes of relevant conversations, notwithstanding the newspaper's highly improbable story. Nothing remotely similar has been alleged here.[22]

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[21] Plaintiffs claim that Sidley does not contest Plaintiffs' purposeful avoidance allegations and have therefore waived arguments on them. Opp. 45. This is frivolous. Sidley's opening memorandum made clear that it concerned the Complaint's "non-conclusory factual allegations." Sidley Mem. 17. All allegations of purposeful avoidance were conclusory. This makes sense because Plaintiffs' cited authority, *Harte-Hanks*, "turned not upon the [defendant's] failure to prove the story true but upon its deliberate decision to avoid information that might have proven the story false." *McFarlane*, 91 F.3d at 1510 (citing *Harte–Hanks*, 491 U.S. at 692). Plaintiffs have identified nothing remotely similar.

[22] Likewise, in *Aghmane v. Bank of America, N.A.*, 696 F. App'x 175, 177 (9th Cir. 2017), the lead investigator never spoke to *one of only two* individuals involved in a "'she said-she said'" conflict. In *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 900-01 (9th Cir. 1992), a fact checker removed identified inaccuracies from the draft article, but *put back* those inaccuracies in the final publication, in addition to other concerning conduct. In *Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 108 (D.D.C. 2009), the defendant wrote that plaintiff did not condemn the president of Iran holding a Holocaust conference, when plaintiff had in fact regularly criticized the Iranian government's stance on human rights and the Holocaust in particular. In *Straub v. CBS Broadcasting, Inc.*, 2016 WL 1626108, at *3 (E.D. Pa. Apr. 25, 2016), the court restated the

b. Alleged "Reliance on Unreliable Sources."

Plaintiffs charge that Sidley had "obvious reasons to doubt the veracity and reliability of the sources" on which it relied. Opp. 46. Yet, tellingly, Plaintiffs take issue with just *three* of the witnesses Sidley interviewed and *one* set of notes reviewed. In doing so, Plaintiffs again ignore sheer scope of Sidley's investigation. This is simply nothing like the example of a publisher who is alleged to have relied on a *single* "informant" whose credibility was known to be in doubt. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); Opp. 46. Plaintiffs' failure to address the difference between a case with *one* source and a case with 150 interviewees and the review of tens of thousands of documents itself reveals the lack of merit to this argument.

Moreover, even as to the three particular witnesses cited by Plaintiffs, the principal criticism is that Sidley relied upon these "vocal critics of the Plaintiffs and the APA." Opp. 46, 48. But as noted in Sidley's opening memorandum, the law is clear that relying on such allegedly "biased" sources is not evidence of actual malice. "[T]he plaintiff must establish that *even in relying upon an otherwise questionable source the defendant actually possessed subjective doubt*." *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996) (emphasis added) (quotations omitted); Sidley Mem. 23. In other words, that a source "may have been biased . . . is not evidence [the defendant] had obvious reasons to doubt [the source's] veracity or the accuracy of [his] report." *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1045 (10th Cir. 2013); *Lohrenz*, 350 F.3d at 1286 ("act[ing] on the basis of a biased source" did not demonstrate actual malice); *Reuber v. Food Chem. News, Inc.*,

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Harte-Hanks standard and provided no analysis as to why questions of fact remained as to purposeful avoidance. Finally, *Manzari v. Associated Newspapers, Ltd.*, 2014 WL 12696744, at *1 (C.D. Cal. Feb. 3, 2014), *aff'd*, 830 F.3d 881 (9th Cir. 2016) actually concluded that the plaintiff *could not* establish actual malice.

925 F.2d 703, 715 (4th Cir. 1991) (en banc) ("Actual malice cannot be proven simply because a source of information might also have provided the information to further the source's self-interest."). Here Plaintiffs point to no evidence that Sidley "actually possessed subjective doubt" about what it reported. *McFarlane*, 91 F.3d at 1508 (quotations omitted).

Regardless, Plaintiffs do not identify a single allegedly false statement about them that they claim Sidley made in reliance on any of these individuals. *See* Opp. 46-48. Plaintiffs further ignore what the Report explained to readers about how these individuals actually factored into Sidley's investigation. Sidley's Report expressly noted that two of them (Dr. Stephen Soldz and Mr. Nathanial Raymond) were "APA critics." Report 7. Soldz and Raymond were among those who made charges that Sidley *thereafter* investigated. As for the third individual, Dr. Trudy Bond, Sidley simply reported that Bond—"a member of the Coalition for an Ethical Psychology and Psychologists for Social Responsibility"—sent ethics complaints to the APA Ethics Office. Report 496-97, 518. There is no basis for claiming that Sidley "heavily rel[ied]" on Dr. Bond, Opp. 46, and the Opposition does not even attempt to provide one. In the Report's 2,577 footnotes, Dr. Bond is cited for only a single, undisputed fact—that she did not receive an acknowledgment from APA after submitting a complaint. Report 497 n.2429.

Finally, Plaintiffs' attempt to take issue with the set of "notes of the PENS meeting taken by Jean-Maria Arrigo," Opp. 47, only highlights the care and good-faith with which Sidley approached its work. Sidley's report informed readers that "[t]he veracity of Arrigo's set of notes have been questioned by some," and described how Sidley also reviewed multiple sets of additional "contemporaneous notes from Behnke, Susan Brandon, and an assortment of other task force members from the PENS meetings." Report 264. As for Arrigo's notes, Sidley reviewed not only her typed notes, but also her "contemporaneous, handwritten notes." *Id.*

Sidley compared the witnesses' sets of notes and found "consistency and accuracy across all sets of notes." *Id.* Sidley asked witnesses about Arrigo's notes. *Id.* And Sidley then appended "[a]ll sets of notes from Arrigo, Behnke, and Brandon" to the Report, so that readers could view all of them for themselves. *Id.* This is the very opposite of acting with actual malice.

c. Alleged "Motive to Defame."

Plaintiffs' rote contention that Sidley had a "motive to defame" them or were "biased against them," Opp. 48-51, likewise does not demonstrate actual malice. Plaintiffs expressly acknowledge that "evidence of bias or ill-will is not alone sufficient to sustain a finding of actual malice." Opp. 48. Indeed, Plaintiffs cannot dispute that "caselaw resoundingly rejects the proposition that a motive to disparage someone is evidence of actual malice." *Parsi v. Daioleslam*, 890 F. Supp. 2d 77, 90 (D.D.C. 2012) (collecting cases); *Lohrenz*, 350 F.3d at 1284; Sidley Mem. 23. Plaintiffs cite *Harte-Hanks*, Opp. 48-49, but there the Supreme Court specifically distinguished "actual malice" from "a showing of ill will or 'malice' in the ordinary sense of the term." 491 U.S. at 666.[23]

Regardless, Plaintiffs can point to no evidence actually showing a motive to defame or ill will on the part of Sidley. Plaintiffs instead make the wild allegation that Sidley leaked the Report to the *New York Times*, which fails for two reasons. First, even if the allegation were

[23] Plaintiffs' other cited cases are entirely distinguishable. *See* Opp. 48-49. In *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 183 (2d Cir. 2000), the credited ill will was "personal animosity" between the parties, stemming from the plaintiff having previously written newspaper articles about the defendant's daughter's criminal convictions. *Id.* (quotations omitted). In light of this longstanding personal animosity, the court held that a jury "could conclude that [the defendant] was imposing in-kind retribution on [plaintiff]." *Id.* at 186. Similarly, in *Palin v. New York Times Co.*, 940 F.3d 804, 814 (2d Cir. 2019), there existed "more than sheer political bias" because the writer "had reason to be personally biased against [plaintiff] and pro-gun positions [like plaintiff's] in general" because the writer's brother was a senator—and political opponent of plaintiff—who had been threatened by gun violence. *Id.* at 815. Plaintiffs have failed to identify any similar personal animosity of the Sidley defendants.

true, Plaintiffs cannot explain how publicizing the Report would bear on any purported bias—less alone falsehood—in the Report. Second, the allegation is not true. It is factually frivolous. The affidavit of Plaintiffs' computer forensics expert, Arman Gungor, says nothing more than that metadata in the PDF file of the Report that is hosted on the *Times* website indicates that the PDF File was created from a Word document created and edited by Sidley. Opp. Ex. C-15, ¶¶ 9-12. But *anyone* who received that PDF file in any of a number of ways, including by email, could have sent it to the *Times* and the metadata would look exactly the same. And the Opposition's characterization of the Gungor affidavit is wrong: It does *not* say that a Word version of the Report was sent to the *Times*. Attached to this Reply as Exhibit 1-E is the affidavit of computer forensics expert Christopher Racich, which explains why nothing in either the Gungor affidavit or the PDF metadata supports an assertion that Sidley emailed a Word, a PDF, or any version of the Report to the *Times*. *See* Ex. 1-E, ¶¶ 10-16.[24]

Plaintiffs' allegation that Sidley used "loaded" or what Plaintiffs consider "misleading" language in the Report does nothing to show actual malice. Plaintiffs complain about the Report's use of "collusion," for instance. Opp. 50-51 & n.150. But once again, Plaintiffs offer no genuine evidence that Sidley made any statements about the Plaintiffs with subjective awareness of probable falsity.[25] In fact, as explained in Sidley's opening memorandum, case law

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[24] Plaintiffs wrongly assert that Rule of Civil Procedure 6(c) prohibits reply brief affidavits without prior court permission. Opp. 18 n.44. That rule refers only to "affidavit[s] supporting a motion." Fed. R. Civ. P. 6(c). Under the similar Federal Rule 6(c)(2), it is well established that "reply affidavits that respond only to the opposing party's briefs are properly filed with the reply brief." *Discepolo v. Dep't of Justice*, 2018 WL 6624360, at *6 (D.D.C. Nov. 15, 2018) (quotations omitted) (collecting cases).

[25] Plaintiffs offer anonymous notes reflecting David Hoffman answering questions at an August 2015 APA Council of Representatives meetings, alleging that he said that the term "behind the scenes communication" would have been more accurate than "collusion." Opp. 50-51 & n.150. These notes are inadmissible hearsay since they were written by an unidentified person

is clear that attempting to surmise malice from the "language of the publication" is an "error of constitutional magnitude." Sidley Mem. 24 (citing *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 10 (1970); *Wash. Post Co. v. Keogh*, 365 F.2d 965, 969, 125 U.S. App. D.C. 32, 36 (D.C. Cir. 1966)).[26] "Complaints or disagreements about choice of language are editorial decisions that do not give rise to liability." *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 685–86 (9th Cir. 1990); *see also, e.g.*, *Bose Corp.*, 466 U.S. at 513 ("The choice of . . . language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella.").[27]

d. Alleged "Failure to Adhere to Proper Investigation Practices."

Plaintiffs' argument that Sidley "failed to adhere to proper investigatory practices" is wrong on the facts and the law. Opp. 51. As Sidley explained in its opening memorandum and

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and merely sent to affiant Sally Harvey. *See* Opp. Ex. C-16, ¶ 15; *(Carla) Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 760 (D.C. 2001). Even if the notes were considered, however, they provide no evidence of actual malice. Plaintiffs ignore that the Report already provided a detailed specific definition of what it meant by "collusion," Report 64-65, and Plaintiffs do not attempt to adduce evidence that Sidley thought that definition was false or doubted its accuracy. Indeed, the Complaint does not even allege that the definition is false. *See* Compl. Ex. A at 14 (not listing those passages as false).

[26] Plaintiffs' attempts to distinguish this case law, Opp. 50 n.149, 57-58, fail. For example, *Keogh* rejected an attempt to make "[a]n inference of recklessness from publication." 365 F.2d at 970. *Vascular Sols., Inc. v. Marine Polymer Techs., Inc.*, 590 F.3d 56, 61 (1st Cir. 2009) (per curiam), a product disparagement case, did not hold that the language of a publication alone supported a showing of actual malice. Similarly, *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 568 (La. Ct. App. 1980), did not clearly state that the choice of language showed *actual malice*, only commenting that the language was "incapable of an innocent construction on the facts" and that it was "false throughout."

[27] Plaintiffs attempt to attack David Hoffman by alleging he once said, "I use the media to fan the flames." Opp. 12. Putting aside that Plaintiffs cite no authority that giving publicity to a publication has any relevance to whether an author believes anything in the publication is false, Plaintiffs' assertion is inadmissible double hearsay. Indeed, former Defendant Newman's affidavit reveals that he learned of this allegation about Hoffman from Plaintiffs' counsel in this case, who did not hear it from Hoffman. Opp. Ex. C-25 (Newman), Aff. ¶ 13.

Plaintiffs do not contest, actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731; Sidley Mem. 17 n.9. It is certainly not measured by whether a law firm, engaged in an eight-month investigation involving review of tens of thousands of documents and interviews and re-interviews of 150 witnesses, met what Plaintiffs assert to be the "proper" "professional standards." Opp. 51. Again, actual malice turns on "subjective" awareness of *falsity* or *probable falsity*. *McFarlane*, 91 F.3d at 1508. Plaintiffs' argument has nothing to do with that.

As courts repeatedly have cautioned, "[t]he standard for actual malice . . . can[not] be defined as 'an extreme departure from professional standards.'" *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 45 (D.D.C. 2002) (quoting *Harte-Hanks*, 491 U.S. at 665), *aff'd*, 350 F.3d 1272 (D.C. Cir. 2003); *see also Parsi*, 890 F. Supp. 2d at 81. Actual malice may not "slip[] into an open-ended review of the reasonableness of the defendant's investigation or his compliance with professional standards," *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 50 (D.D.C. 2005), because such evidence "fails to show that [the defendant] risked writing 'lies' or was motivated to do so," *Jankovic*, 822 F.3d at 597.

Plaintiffs' citation to *Harte-Hanks* in support of their argument, Opp. 51, is misleading. While the Court noted there that "it cannot be said that evidence concerning motive or care *never* bears *any* relation to the actual malice inquiry," 491 U.S. at 668 (emphases added), the Court took pains to distinguish "an extreme departure from professional publishing standards" from "the *more* demanding *New York Times* standard" for actual malice, reiterating that actual malice requires—"at a minimum"—statements to be made with either a "high degree of awareness of . . . probable falsity" or "serious doubts as to the truth of [the] publication," *id.* at 666-67, 693 (emphasis added) (quotations omitted).

The factual allegations Plaintiffs proffer only highlight how irrelevant their argument is. Plaintiffs do not even attempt to show how any of their allegations relate to any purportedly false statement concerning any of the Plaintiffs. For instance, Plaintiffs fault Sidley for supposedly not giving Plaintiffs "Upjohn warnings" during their interviews. Opp. 52. But "[a]n *Upjohn* warning is typically given to an organization's *employees* at the beginning of an *internal* investigation or dispute to make clear that corporate counsel is not the personal counsel of the employees." *In re Grand Jury Investigation*, 2019 WL 2179116, at *16 (D.D.C. Mar. 4, 2019) (emphasis added). Plaintiffs do not allege that Banks, Dunivin, and James were *employees* of APA. In any event, the failure to give an *Upjohn* warning has nothing to do with actual malice, because—as Sidley noted in its opening memorandum, Br. 22—whether Sidley gave *Upjohn* warnings has nothing to do with whether Sidley published statements it knew to be false.[28]

Plaintiffs even go so far as to argue that Defendants wrongfully invoked privilege during a document production, Opp. 52, but Sidley's well-founded arguments in 2019 as work product immunity (not attorney-client privilege)—which Plaintiffs never challenged—are clearly irrelevant to whether Sidley published statements in 2015 with actual malice.

e. Alleged "Refusal to Retract or Correct."

Finally, Plaintiffs maintain that Sidley's "refus[al] to retract or correct" its Report in the face of Plaintiffs' post-publication demands, Opp. 53, is evidence of actual malice. But Plaintiffs do not dispute that "there is no duty to retract or correct a publication, even where grave doubt is cast upon the veracity of the publication after it has been released." *Lohrenz*, 223 F. Supp. 2d at

[28] Plaintiffs similarly allege that Sidley failed to inform interviewees that they were "potential targets," Opp. 52, but as Sidley also noted in its opening memorandum, investigators are under no duty to do so, Sidley Mem. 22 (citing *Secord v. Cockburn*, 747 F. Supp. 779, 788-89 (D.D.C. 1990)). And, of course, this again has nothing to do with actual malice.

56, *aff'd*, 350 F.3d 1272 (D.C. Cir. 2003); Sidley Mem. 25 (citing *McFarlane*, 91 F.3d at 1515). And, even more fundamentally, Plaintiffs ignore that "[t]he actual malice inquiry focuses on the defendant's state of mind *at the time of publication*." *Von Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 118 (D.C. Cir. 2017) (emphasis added). Because of this, "the inference of actual malice must necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant *prior to publication*." *McFarlane*, 91 F.3d at 1508 (emphasis added).

Thus, because the plaintiff must "establish actual malice at the time of publication," it "cannot be inferred from a publisher's failure to retract a statement" even "once it learns it to be false." *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013).[29] For the same reason, Plaintiffs cannot show that correspondence from their counsel *post-dating* Sidley's revised Report, *see* Opp. 54, bears on Sidley's state of mind at the time of publication. *See Von Kahl*, 856 F.3d at 116; *McFarlane*, 91 F.3d at 1508.[30]

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[29] The panel ruling in *Tavoulareas v. Piro*, 763 F.2d 1472, 1477 (D.C. Cir. 1985), which Plaintiffs cite for the proposition that a "steadfast refusal to retract . . . bear[s] on the issue of actual malice," *see* Opp. 53, 58, does not support a different result. First, the panel recognized the relevant question is state of mind "at the time the statement was published" and did not state failure to retract may establish actual malice in the absence of pre-publication evidence. Second, the more recent pronouncements of the D.C. Circuit on this question in *Von Kahl*, 856 F.3d at 116, and *McFarlane*, 91 F.3d at 1508, are to the contrary. Third, the en banc D.C. Circuit vacated the *Tavoulareas* panel's decision and held there was insufficient evidence of actual malice to uphold a jury verdict. *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987).

[30] Plaintiffs emphasize their allegation that in February 2016—six months after publication of the revised Report—the APA's then-president opined that Sidley "may have misinterpreted, left out or distorted" certain matters in the Report. Opp. 3, 54. This is irrelevant to Sidley's state of mind at the time of the publication. Moreover, at most, it expresses someone else's view that there "may" have been errors and, the Supreme Court has made clear that "there is a significant difference between proof of actual malice and mere proof of falsity." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984); Sidley Mem. 20.

Plaintiffs' purported "direct" and "circumstantial" evidence fails completely to meet the high bar of showing that a properly instructed jury could find by clear and convincing that Sidley made a false statement about any of them with actual malice.

III. The District of Columbia's Strong Interest in Protecting the Speech Here at Issue Requires Application of D.C.'s Own Anti-SLAPP Law.

Finally, the Court should reject Plaintiffs' self-serving attempt to escape D.C.'s stronger protections for defendants in favor of Illinois' weaker anti-SLAPP protections. Opp. 75.

In the Anti-SLAPP Act, the District of Columbia codified a strong expression of its interest in protecting speech on matters of public interest to ensure that speakers are not "intimidated or prevented . . . from engaging in political or public policy" discussions, and to "prevent the attempted muzzling of opposing points of view, and to encourage . . . civic engagement." Ex. 1-F (D.C. Comm. Rep.) at 4. Under established choice of law principles, D.C. has a far more significant interest than Illinois in seeing its anti-SLAPP protections applied to a case in which (1) two of the four Defendants are D.C. entities; (2) the Chicago and D.C. offices of a law firm submitted to APA, the firm's client, a D.C. non-profit association, an investigative report of significant public concern centering on controversies over years of activities within that association; and (3) the D.C. association promised to and did make that report available to the public at large. Exs. 1-G, 1-J.

A. The Choice of Law Legal Framework.

There is no disagreement about the legal framework for addressing choice of law on an anti-SLAPP motion, which is as follows:

1. D.C courts resolve conflicts of substantive law using the governmental interest analysis of the Restatement (Second) of Conflict of Laws § 145 (1971); Opp. 76.[31]

2. There is an actual conflict between the strong anti-SLAPP protections D.C. law provides versus the weaker protections of Illinois anti-SLAPP law, 735 Ill. Comp. Stat. Ann. 110/15. Opp. 75; *see Sandholm v. Kuecker*, 962 N.E.2d 418, 430-31 (Ill. 2012) (describing Illinois statute).

3. In the event of a conflict, D.C. courts apply the law of the jurisdiction with "the most significant relationship to the dispute," and whose "policy would be more advanced by applying its law." *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 714 (D.C. 2013); Opp. 76. Accordingly, as a general matter, courts consider the four factors from Second Restatement § 145—the place of the conduct, the domiciles of the parties, the place of injury, and the center of the relationship between the parties—to "determine which jurisdiction's policy would be more advanced by the application of its law." *Washkoviak v. Student Loan Mktg. Ass'n*, 900 A.2d 168, 180 (D.C. 2006).

4. D.C. applies the doctrine of dépeçage, meaning it assesses each issue in a case separately to determine the applicable law. *See Stutsman v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc.*, 546 A.2d 367, 373 (D.C. 1988). Although D.C. courts have not yet applied a choice of law analysis specifically to anti-SLAPP motions, other courts have held that resolving conflicts in the anti-SLAPP context focuses primarily on the first two factors: where the speech occurred and the speaker's domicile. Opp. 77; *Chi v. Loyola Univ. Med. Ctr.*, 787 F.

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[31] Plaintiffs' alternate argument that the D.C. Anti-SLAPP Act is "procedural" rather than substantive, Opp. 73 & n.211, fails in the face of the D.C. Court of Appeals holding precisely the opposite: the Act "creat[ed] substantive rights." *Mann*, 150 A.3d at 1226 (quotations omitted). Defendants address this argument in their November 15, 2019 Opposition to Plaintiffs' Motion To Declare the D.C. Anti-SLAPP Statute Unconstitutional at 3-4.

Supp. 2d 797, 803 (N.D. Ill. 2011); *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 1313, 1323-24 (D. Utah 2015). In doing so, courts aim to effect the "purpose behind an anti-SLAPP law[,] . . . to encourage the exercise of free speech." *Chi*, 787 F. Supp. 2d at 803.

B. D.C. Has by Far the Greater Interest Here.

D.C. has the strongest interest in protecting speech made in D.C., by D.C. Defendants, and focused on the activities of a D.C. association.

A "state has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens . . . [for] speech initiated within the state's borders." *Chi*, 787 F. Supp. 2d at 803. Here, Sidley lawyers performed legal services for their client, APA, a D.C. association, by investigating and reporting on a matter of indisputably significant public concern—allegations of collusion over the course of years between APA and the federal government in setting guidelines governing psychologists' involvement in detainee interrogations. As APA's lawyers, Sidley itself had a duty to submit its Report to APA, for that D.C. entity to decide whether to distribute it to the public. The Sidley-APA engagement letter explicitly expressed the "understand[ing] *that the Board of Directors* will subsequently make our final report available to the APA Council of Representatives, APA members, and the public." Opp. 53 n.160, 79; Ex. 1-G (emphasis added).

Plaintiffs' own allegations underscore that the speech in this case centers on D.C., claiming that Sidley failed to comply with *D.C.* Bar Ethics Opinions. Opp. 52 & n.157. *See C&E Servs., Inc. v. Ashland, Inc.*, 498 F. Supp. 2d 242, 255 n.5 (D.D.C. 2007) (D.C. law applies where litigant "supports the arguments made in its [filing] with D.C. law"). And Plaintiffs weighed the involvement of the lawyers at Sidley's D.C. office so seriously that it sued the D.C. partnership that operates that office. Supplemental Complaint ("Compl.") ¶ 47.

The Second Restatement factors confirm that D.C. law should apply:

Place of the Conduct. The speech at issue—the Report to APA—occurred in the District of Columbia. *See Diamond Ranch Acad.*, 117 F. Supp. 3d at 1323 (for anti-SLAPP choice-of-law analysis, the place of conduct is "where the speech occurred"). Plaintiffs assert that the majority of the claims "are based on speech that originated with Hoffman and Sidley in Illinois." Opp. 78. But Plaintiffs' only allegation is that partner David Hoffman worked on the Report in Illinois. Opp. 78. In fact, the Report was prepared and drafted by Sidley attorneys based in both the firm's Chicago and D.C. offices, as made apparent on the Report's cover page. Ex. 1-J. Filing suit in D.C., Plaintiffs themselves alleged that the "false and defamatory statements made by Defendants about Plaintiffs were intentionally published and republished *in the District of Columbia* by *each* of the Defendants." Compl. ¶ 60 (emphasis added).

Further, as noted above, only APA, not Sidley, could decide whether to distribute the Report any further. The parties contemplated that APA would make the Report public, Sidley submitted the Report to APA, and APA made the Report public via its website. Report 6 n.1; Compl. ¶ 446 (Count 7); Compl. ¶ 504 (Count 10). *Wiest v. E-Fense, Inc.*, 356 F. Supp. 2d 604, 608 (E.D. Va. 2005) ("place of the wrong" in website publication case is entity's headquarters from which website is controlled).

Domicile of the Speaker. Plaintiffs argue that because Hoffman and Sidley Austin LLP are based in Illinois, "Illinois is the domicile of the defendants whose speech forms the basis" for their defamation claims. Opp. 79. But Sidley prepared its Report for its client, APA, which Plaintiffs are suing as the publisher of the Report to its membership and to the general public. First Supp. Comp. ("Comp.") ¶¶ 251, 408, 446, 504. Plaintiffs' argument that APA's domicile should be disregarded because, although "APA is organized in D.C., the Board members

involved . . . are scattered around the country," is specious. Opp. 79. Plaintiffs have sued *APA* itself, a D.C. entity with "[i]ts principal and only place of business" in D.C. Compl. ¶ 48.

Indeed, D.C. has an especially strong interest in protecting the ability of D.C.-based entities, like APA, to commission independent investigations conducted by their lawyers. If D.C.'s protections for free speech did not apply to a law firm hired by a D.C.-based organization, such a result would chill the ability of those organizations to retain law firms to review matters of public importance and then release to the public the results of such reviews.

Plaintiffs also continue to ignore both that they have sued the D.C. partnership that operates Sidley Austin's D.C. office, which Plaintiffs acknowledge has its principal place of business in Washington, D.C, Compl. ¶ 47, and that the Sidley attorneys named as the Report's authors were based in both Chicago and D.C, *see* Report (cover).

Place of Injury. The place of injury is generally less important in the anti-SLAPP analysis because a jurisdiction's interest is in seeing its anti-SLAPP law applied to protect speakers and speech within its borders. *See Chi*, 787 F. Supp. 2d at 803; *Diamond Ranch*, 117 F. Supp. 3d at 1323. In any event, none of the Plaintiffs is domiciled in Illinois. And one of the three Plaintiffs, Col. Dunivin, lived and worked in D.C. at the time of publication and when Plaintiffs first sued over the Report. *See* Ex. 1-H ¶ 41.

Center of the Relationship Between the Parties. Although the center of the relationship between the parties is also of lesser significance in connection with an anti-SLAPP motion, *see Diamond Ranch*, 117 F. Supp. 3d at 1323, for all of the reasons discussed above, the gravitational center of this matter is unmistakably D.C. and certainly not Illinois.

To the extent Plaintiffs had a relationship with the Defendants, it was with APA, in D.C. Plaintiffs were members of the APA. Compl. ¶ 30. For example, Cols. James and Dunivin are

former members of APA's governing Council, *id.* ¶¶ 131, 201, which meets in D.C. Banks and James were members of the PENS Task Force, which met in D.C. *Id.* ¶¶ 44, 75.[32]

In short, the Restatement factors—and all other relevant considerations—uniformly favor the application of the D.C. Anti-SLAPP protections to this speech centered on D.C.

CONCLUSION

For the reasons stated here and in Sidley's opening memorandum, the Complaint should be dismissed with prejudice pursuant to the D.C. Anti-SLAPP Act.

Dated: December 13, 2019

Respectfully submitted,

/s/ Thomas G. Hentoff

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[32] An Illinois choice of law provision in Sidley's November 2014 engagement letter with APA, Opp. 79, has no relevance to this analysis. As this Court has noted, the engagement letter only applied if "any dispute arose between [APA] and Sidley Austin." Ex. 1-I (Sept. 6, 2019 Tr.), at 14. Not only were *Plaintiffs* not parties to the engagement letter, but the letter is explicit that only "[the] letter shall be governed by . . . the laws of the State of Illinois," and only in cases between "APA and Sidley," and only in litigation "brought in the state or federal courts in [Illinois]." Ex. 1-G, at 6.

CERTIFICATE OF SERVICE

I hereby certify on this 13th day of December, 2019, that a true copy of the foregoing was filed through the Court's ECF system and served upon all registered participants.

/s/ Thomas G. Hentoff
Thomas G. Hentoff

EXHIBIT 1

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	**CASE NO. 2017 CA 005989 B**
Plaintiffs,	:	**Judge Hiram E. Puig-Lugo**
vs.	:	**Next Scheduled Event: 2020 Hearing, To Be Determined**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.	:	

DECLARATION OF ALEXANDER J. KASNER IN SUPPORT OF REPLY IN SUPPORT OF DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND DAVID H. HOFFMAN'S CONTESTED SPECIAL MOTION TO DISMISS COUNT 11 OF THE FIRST SUPPLEMENTAL COMPLAINT UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE § 16-5502

I, Alexander J. Kasner, state that:

1. I submit this declaration in support of Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Under the District Of Columbia Anti-SLAPP Act, D.C. Code § 16-5502. I make this declaration based upon personal knowledge, and I am competent to testify regarding the matters stated below.

2. I am an attorney with the law firm Williams & Connolly LLP and am counsel for Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman (collectively "Sidley") in the above-captioned case.

3. An accurate excerpt of draft Chapters 1 and 2 from *Providing Psychological Support for Interrogations* is attached hereto as Exhibit 1-A.

4. An accurate copy of Behavioral Science Consultation Team Joint Intelligence Group, Joint Task Force-GTMO, Standard Operating Procedures (Mar. 28, 2005), is attached hereto as Exhibit 1-B. Plaintiffs cited and provided a link to this document in their November 15, 2019 Opposition at p. 29, n.70.

5. An accurate copy of Debra Dunivin et al., *Responses from Individuals Named in the Final Independent Report*, Disqus (July 31, 2015), is attached hereto as Exhibit 1-C. Plaintiffs cited and provided a link to this document in their November 15, 2019 Opposition at p. 53, n.162.

6. An accurate copy of Lori Foster et al., *Notes from the August 2015 APA Council of Representative Meeting*, 53 Industrial-Organizational Psychologist 143 (Jan. 2016), is attached hereto as Exhibit 1-D. Plaintiffs cited and provided a link to this document in their November 15, 2019 Opposition at p. 1, n.3.

7. An accurate copy of the Declaration of J. Christopher Racich in Support of Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502, is attached hereto as Exhibit 1-E.

8. An accurate copy of the Council of the District of Columbia Committee on Public Safety and Judiciary's Report on Bill 18-893, "Anti-SLAPP Act of 2010," is attached hereto as Exhibit 1-F.

9. An accurate copy of the November 20, 2014 Engagement Letter between Sidley Austin LLP and American Psychological Association is attached hereto as Exhibit 1-G. Plaintiffs cited and provided a link to this document in their November 15, 2019 Opposition at p. 46, n.131.

10. An accurate excerpt from Plaintiffs' February 16, 2017 Ohio Complaint, filed in the Montgomery County, Ohio, Court of Common Pleas, in case *James et al. v. Hoffman et al.*, No. 2017 CV 00839 (Ohio Ct. Common Pleas), is attached hereto as Exhibit 1-H.

11. An accurate excerpt from the transcript of the parties' September 6, 2019 Status Hearing before the D.C. Superior Court, in this matter, is attached hereto as Exhibit 1-I.

12. An accurate copy of the revised Sidley Report to the Special Committee of the Board of Directors of the American Psychological Association, Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture (Sept. 4, 2015) is attached hereto as Exhibit 1-J. Sidley also submitted a copy of the revised Report as Exhibit 2-A to its October 2017 motion to compel arbitration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 2019.

Alexander J. Kasner

EXHIBIT 1-A

Chapter 1

Purpose of Psychological Support to Interrogation and Detainee Operations

Mission Statement

> Provide psychological expertise and consultation in order to assist the command in conducting safe, legal, ethical, and effective interrogation and detainee operations.

This mission is composed of two complementary objectives:

Objective 1: To provide psychological expertise to assist the command in ensuring that the interrogation process is conducted in a safe, legal, and ethical manner.

Objective 2: To provide psychological expertise in order to maximize the effectiveness of the legal interrogation process, and to promote the overall effectiveness of detainee operations.

These two objectives contain four critical components that psychologists must manage as they operate in this arena:

Safety: The psychologist is one of many people whose presence is designed to insure the safety of both DoD personnel and detainees. This role is not unlike the role psychologists play in support of Survival, Evasion, Resistance and Escape (SERE) programs operated within DoD aimed at training DoD personnel to successfully cope with captivity.

Legal: While psychologists are not necessarily legal experts, they must be familiar with regulatory guidance and policies (i.e. Geneva Conventions, DoD regulations, etc.) that govern interrogation and detainee operations. In addition, as a commander's consultant and participant in these operations they are obligated to report any actual or suspected violations to appropriate command representatives.

Ethical: Psychologists in support of interrogation and detainee operations must regularly monitor their behavior and remain within the ethical boundaries defined by their profession (i.e. American Psychological Association), by their licensing state, and by their military ethical standards.

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Effective: Psychologists bring to the interrogation mission the ability to provide detailed psychological assessments of individual detainees, their environment, and of the interaction between interrogator and detainee. By providing their analysis to the interrogators, psychologists are able to assist in maximizing the effectiveness of the interrogation process.

Description of the Behavioral Science Consultation Team (BSCT)

Often, psychology support to interrogations is conducted by individual psychologists (73B)[1], working alone. In other situations, more common in permanent long-term facilities, a team of psychologists and one or more behavioral science Non-commissioned Officers (NCO) (91X) will be created to form what is called a Behavioral Science Consultation Team (BSCT). Although the psychologist may operate alone, the behavioral science NCO requires regular and direct supervision by a licensed psychologist.

Functions of the Psychologist Supporting Interrogations

The box to the right provides a list of the possible functions that a psychologist may perform when supporting interrogation and detainee operations.

Understanding the limits of each of these functions, and establishing clear boundaries around these functions will allow the psychologist to perform ethically in a field ripe with many potential breaches. These boundaries also assist in establishing clear and proper relationships with command and staff.

PSYCHOLOGIST'S FUNCTIONS
Interrogation Assessment
Environmental Consultant
Profiling
Training
Oversight

Interrogation Assessment

The psychologist's function in Interrogation Assessment is to evaluate the psychological strengths and vulnerabilities of the detainee, and to assist in integrating these factors into a successful interrogation process.

Environmental Consultation

Psychologists, with their expertise in human behavior, can advise interrogators, MPs, and command on aspects of the detention environment that will assist in all aspects of detainee operations. The detention environment includes: holding cells, hallways, toilet and bathing facilities, vehicles and interrogation rooms. The psychologist can provide insight into the likely effects of this environment and how changes may affect detainees. The

[1] For the sake of consistency and readability, the term psychologist will be used to refer to doctoral level psychologists who are licensed and privileged to provide mental health care by the Department of Defense. The Army job description for this is Clinical Psychologist (Medical Functional Area designation of 73B), but it can also include Counseling Psychologists. In this manual, the term psychologist is not meant to include doctoral level psychologists who are not licensed for independent practice, e.g., research psychologists, personnel psychologists.

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psychologist's goal is to assist in helping make sure that the environment maximizes effective detainee operations. The psychologist can assist in making sure that everything that a detainee sees, hears, and experiences is a part of the overall interrogation plan.

Profiling

Psychologists may be called upon to provide detailed psychological assessments of individual detainees. These profiles can be delivered in a traditional written format, but more often are verbally communicated to interrogation personnel in a more informal and timely manner. These products will routinely address both basic personality characteristics and the detainees' strengths and vulnerabilities. Profiling is usually conducted as a routine part of the interrogation assessment, but may be conducted independently of an interrogation. This assessment will usually be conducted by direct observation, not including direct interaction, and not by the administration of written psychological instruments. The assessment will not ordinarily include access to or review of medical records.

Training

Another key function for the interrogation support psychologist is training of guards and interrogators. Periodic training sessions provide the reiteration of standards, awareness of the subject matter, as well as a culture conductive to behavioral correction, peer monitoring and self-assessment. The concomitant healthy training environment can prevent "behavioral drift" that, in the long term, would be detrimental to the mission. "Behavioral drift" is the continual reestablishment of new, often unstated and unofficial standards in a certain direction.

Indeed, FM 34-52, Chapter 6 identifies one aspect training should cover as "Principles of human behavior that emphasize the social and cultural characteristics of behavior considered acceptable in the target countries." The psychologist may also conduct trainings on:

- Psychological aspects of detention.
- Psychological aspects of exploitation.
- Recognizing the use of resistance techniques in the detainee.
- Establishing and clarifying the roles of the supervisor, interrogator, guard and psychologist.
- Identifying and coping with behavioral drift.

In addition to providing training on the psychological aspects of interrogation, the psychologist should ensure that interrogation and guard supervisors are regularly conducting training on Standing Operating Procedures. The psychologist should also identify and recommend areas of training that have either been neglected or are in need of review.

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Oversight

The function of Oversight can help prevent the inclination of interrogators and detention guards to behaviorally drift from their assigned rules of engagement.

Essential to oversight is the ability for the psychologist to have direct access to, consult with, and advise, all personnel involved with detainee operations, from the commander on down. Ideally the psychologist should advise the commander directly with no intervening line of authority or administrative pressure on matters that affect mission integrity. In other words, the Psychologist should be a Special Staff Officer, with direct access to the commander. The psychologist is to be the commander's on site representative and have unrestricted access to detention and interrogation areas. In fact, the psychologist should be required to monitor as much of the detainee operation as possible.

OVERSIGHT HIGHLIGHTS

- Passive oversight reinforces inappropriate behavior.
- Drift begins in as early as 36 hours without oversight.
- Intervene at the lowest level until it does not work.
- Never compromise safety. What you tolerate will occur.
- Document issues as they arise.

Even the very best staff must be continually monitored for compliance with SOPs. Behavioral drift can occur extremely rapidly, and must be quickly corrected when it occurs. The goal is to address problems with tact and at the lowest level possible. While minor deviations can be corrected at the individual level and typically on the spot, more significant issues or a pattern of deviations should be addressed with command.

Psychological Screening

Under some circumstances, it is possible for the psychologist to provide psychological screening of personnel prior to their assignment to a role interacting with detainees. This can greatly assist, though not eliminate, the risk of inappropriate behavior.

The screening of interrogators may include an interview, objective and projective assessment instruments, and an estimate of intellectual functioning. The assessment should evaluate the suggested qualities described in FM 34-52. These qualities include, but are not limited to, motivation, alertness, patience and tact, credibility, objectivity, self-control, adaptability, perseverance, and a solid personal appearance and demeanor. They should also possess more than adequate ability for conceptualization and problem solving, situational awareness, emotional stability, integrity, a good self-concept, be open to criticism and feedback, and have self-awareness.

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Chapter 2

The Ethics of Psychological Support to Interrogation

Psychologists are bound by both legal and ethical constraints when supporting interrogations. Every psychologist who supports detainee operations must know first, the legal requirements regarding the treatment of detainees, and second, the ethical requirements established by their profession. The psychologists involved in interrogation support strive to help the government in developing informed judgments and choices concerning human behavior. Because of the particularly sensitive and dynamic nature of interrogation operations it has become important to outline the ethical standards of psychological support.

Psychologists have specific knowledge, training, and experience that can insure the ethical treatment of prisoners of war and detained persons. A clear understanding of the social psychological forces that influence power relationships is key in this environment.

Legal Requirements

The United States is a signatory to the Geneva Convention relative to the Treatment of Prisoners of War. The requirements of this convention are explicated in Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees. (This regulation is proscriptive for all US military forces, not only for the US Army.) Every psychologist who supports detainee operations must read and understand the specific requirements contained in this regulation. These requirements will not be discussed in detail here, but specifically prohibit inhumane treatment. Portions of the regulation are reprinted below.

> 1–5. General protection policy
>
> *a.* U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:
>
> (1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.
>
> (2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

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(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

RECAP ON THE POINTS OF LAW
▪ Humanitarian care and treatment from initial capture to release.
▪ Inhumane treatment is never justified and is punishable by law.
▪ Photographing and filming is prohibited apart from internment administration.
▪ Respect all persons as human beings.

Ethical Requirements

The ethical requirements for psychologists are contained in the 2002 version of the American Psychological Association's Ethical Principles of Psychologists and Code Of Conduct (Ethics Code). The principles are guidance for the professional activities of psychologists. Although interrogation support is not mentioned, forensic activities and consultation are both specifically discussed. The Ethics Code is binding on all psychologists who are members of the American Psychological Association, and all those who are licensed by a State Psychology Licensing board. All Military psychologists are required to maintain state licensure; therefore the Ethics Code is applicable to all Military psychologists. Sanctions for violations of the Ethics Code can include the revocation of a psychologist's state license, placing the psychologist's military standing in jeopardy.

The following discussion identifies several aspects of the Ethics Code that necessitate interpretation given the practice of psychological support for interrogation and detainee operations. Relevant sections of the

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Introduction, Preamble, General Principles and Ethics Code are discussed and interpreted in light of the other chapters of this pamphlet, as well as the relevant legal requirements. The review will discuss the topics in the box to the right.

POTENTIAL ETHICAL ISSUES
The balance of law, duty, and the Ethics Code.
Issues of harm and exploitation
Boundaries of Competence
Managing Multiple Relationships
Informed consent and confidentiality

The Balance of Law, Duty, and the Ethics Code

The law that governs the active duty military psychologist is the United States Constitution, Uniform Code of Military Justice (UCMJ), and applicable regulations of the branch of service. The Ethics Code is always subordinate to the law and regulations.

The Ethics Code pertains ONLY to a psychologist's activities that are "part of their scientific, educational or professional roles" pertaining to the profession of psychology. The Code does not, therefore, have purview over the psychologist's role as a soldier that is unrelated to the practice of psychology. For instance, the dictum for beneficence does not pertain to our actions against the enemy in combat. Unlike the Chaplaincy, a psychologist is not always required to be a non-combatant.

Conversely, the Ethics Code is broad in its application. It pertains to all psychologists in the performance of their profession. All U.S. state licensing boards use the Ethics Code as a standard of behavior, requiring compliance with the code to maintain licensure. As stated above, the Ethics Code does not supersede the state, federal or military laws and regulations.

Ignorance of the Ethics Code does not excuse violations. A "lack of awareness or misunderstanding of an Ethical Standard is not itself a defense to a charge of unethical conduct. (Introduction)"

The method of resolving conflicts between the law and regulations with the Ethics Code are addressed within the Code, "When the psychologists responsibilities conflict with the law, regulations, or other governing legal authority, psychologists make known their commitment to this Ethics Code and take steps to resolve the conflict in a responsible manner. If…unresolvable…, psychologists may adhere to the requirements of the law, regulations… in keeping with basic principles of human rights (Introduction; 1.02; 1.03)." The balance between maintaining adherence to the Code when it conflicts with the law and regulations is outlined below:

- Address and attempt to resolve the issue.
- If initially not resolvable, consult with a psychologist experienced in Interrogation Support.
- If the issue continues to elude resolution, adhere to law and regulations in a responsible manner.

Again, as noted above, regulation and international law require that all detainees, regardless of status, be treated humanely, completely consistent with the Ethics Code.

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Issues of Harm and Exploitation

The Ethics Code (3.04), states, "Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable."

This is consistent with the legal requirements of the GPW and of AR 190-8, which require the humane treatment of all detainees. The psychologist must make a reasonable effort to prevent unavoidable harm to detainees, and to treat all persons with dignity and respect. One function of the psychologist supporting interrogations is to assist the command in preventing abuse of detainees, and in monitoring the detainee environment. This does not preclude the psychologist from assisting in interrogations, even if these interrogations result in consequences such as long-term confinement or conviction of war crimes.

Boundaries of Competence

This pamphlet is intended to provide training, guidelines and standards for the psychological practice of supporting interrogations. The Ethics Code states that "Psychologists provide services…with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study or professional experience (2.01 Boundaries of Competence)" However, there is no certification process, to date, that exists for interrogation support. Furthermore, there is little information and research published on this practice. Often, psychologists are pushed forward on the battlefield, beyond the readily accessible supervision or consultation, or are otherwise placed in positions without access to other psychologists trained in this area.

As paragraph 2.01 of the Ethics Code states, in those emerging areas in which generally recognized standards for preparatory training do not yet exist, psychologists nevertheless take reasonable steps to ensure the competence of their work and to protect… others from harm." Therefore, the psychologist should make attempts to regularly consult with other psychologists experienced in this area. When confronted with an ethical dilemma, the psychologist must make attempts at consultation. If unable to consult because of time constraints, isolation from other psychologists, or Operational Security requirements, the psychologist will later make attempts to seek consultation. The USASOC Command Psychologist should review prior to submission all documents recommending policy on interrogations originating from the psychologist supporting interrogations, or from a BSCT. If mission requirements prevent review, any such documents should be presented to the USASOC Command Psychologist as soon as practicable.

Furthermore, the psychologist must be cognizant of changes and developments within the field of psychological support for interrogation and detainee operations. The psychologist should take every opportunity to "develop and maintain their competence (Paragraph 2.03)" in this emerging field. The psychologist has a responsibility to evaluate and improve his or her job performance. The psychologist must be aware of all current policy requirements and command guidance concerning the conduct of interrogations and detainee operations. Cultural awareness is also necessary to provide psychological support to interrogation operations.

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Multiple Relationships

While performing the duties related to interrogation the psychologist functions as a Command Psychologist. The client is the command and the U.S. government. It is not possible, in this environment, to avoid all multiple relationships. Military psychologists, like psychologists in small communities, must be keenly aware of the nature of these multiple relationships.

Except under very unusual circumstances, the psychologist consulting for interrogation operations does not conduct mental health evaluations or provide mental health treatment to detainees. All medical treatment, to include mental health evaluation and treatment, for detainees is provided by a designated medical element not involved in interrogation support. The psychologist will take all reasonable steps to ensure that he or she is not perceived as a healthcare provider for detainees.

When concerns about health care status or medical condition of detainees are raised through observation by the psychologist, through inquiries by interrogators, or other reporting mechanisms, these concerns will be conveyed to medical personnel for evaluation, treatment, and disposition.

The issue of multiple relationships is addressed in Paragraph 3.05 of the Ethics Code. "A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness… or otherwise risks exploitation or harm to the person with whom the professional relationship exists."

Only in a case of an emergency, for example, where another mental health provider or physician is not present, will the psychologist supporting interrogations break with their function and provide emergency services "to ensure that services are not denied (Paragraph 2.02)." "The services are discontinued as soon as the emergency has ended or appropriate services are available. (Paragraph 2.02)"

The Ethics Code (3.05(a)) states, "A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists." The Code goes on to say that, "Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical."

Psychologists supporting interrogations, as with all military psychologists, must always be alert to the risk of multiple relationships. For example, it would probably be inappropriate for a psychologist to conduct long-term psychological therapy with an interrogator that is working alongside the psychologist. On the other hand, brief consultation with the same interrogator might be appropriate. The psychologist, in consultation with other psychologists if possible, must evaluate each situation in order to minimize the risk of harm.

Informed Consent

Except as discussed above, psychologists supporting interrogations do not have a medical or mental health relationship with detainees. Ordinarily, they do not directly interact with detainees, they do not provide services to detainees, nor do they routinely engage in psychological testing of detainees. The Department of Defense is the identified client, the organization the psychologist is supporting. Although it is possible for exceptions to be

HC00008914

made to the above proscriptions, it should only be done after careful thought and consultation with other experienced psychologists.

The Code of Ethics (3.11(a)) states, "Psychologists delivering services to or through organizations provide information beforehand to clients and when appropriate those directly affected by the services about…."

Psychologists supporting interrogations will discuss with the organization the limits and purpose of the assessment; it is not appropriate, given the functions of the psychologist in this role and the Department of Defense, to inform the detainee that he is being assessed by a psychologist. In fact, it would increase the likelihood of misunderstanding by the detainee of the psychologist's role.

The Code of Ethics (3.10(b)) also states, "When consent by a legally authorized person is not permitted or required by law, psychologists take reasonable steps to protect the individual's rights and welfare."

Any psychologist, whether supporting interrogations or not, has a duty to ensure the humane treatment of all detainees. This duty is not diminished by the nature of the detainee's acts prior to detainment.

HC00008914

EXHIBIT 1-B

Behavioral Science Consultation Team **28 March 2005**
Joint Intelligence Group, Joint Task Force-GTMO
Standard Operating Procedures (U)

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] may support Deployment Cycle Support program by providing training on Posttraumatic Stress and Anger Management for personnel departing JTF-GTMO.

b(2)

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) Use psychological expertise to provide monitoring, consultation, and feedback regarding the entire detainee environment in order to assist the command in ensuring humane treatment of detainees, the prevention of abuse, and the safety of U.S. personnel.

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

6. (U) Mission Essential Tasks.

a. (U) Provides consultation to interrogation staff in support of the intelligence collection mission.

(1) (~~S~~) [redacted]

(b)(1)

(2) (~~S~~) [redacted]

(b)(1)

(a) (U//FOUO) [redacted]

(b)(2)

(b) (~~S~~) [redacted]

(b)(1)

(b)(1) (3) (~~S~~) [redacted]

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) (U) Provide psychological oversight to ensure that staff-detainee interactions are safe for both detainees and U.S. personnel. Immediately call attention to and appropriately report any interactions that are considered unsafe, unethical, illegal or in violation of applicable policies and procedures.

(2) (U) Provide feedback to command in verbal or written form to JIG Director, JDOG Commander, or JTF Commander, as appropriate, regarding potential risks to detainees and U.S. personnel at JTF-GTMO.

(3) (U//FOUO) [redacted]

(b)(2)

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. (U) BSCT personnel shall not conduct mental health evaluations or provide mental health treatment to detainees or JTF-GTMO personnel. BSCT personnel will take all reasonable steps to ensure that they are not perceived as healthcare 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) (U) Neither BSCT personnel nor interrogation teams have access to medical records of detainees. The BSCT acts as medical liaison between interrogation teams and medical personnel in order to maintain the separation between medical care and intelligence-collection.

(2) (U) The BSCT will direct requests for information and issues of medical concerns brought up by interrogation teams to the JTF-GTMO-JMG organizational box. From there it will be routed to the appropriate medical/ dental personnel for response to BSCT personnel who will forward to originator of the inquiry.

(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.

a. (U) Ethical and legal responsibilities. In addition to the other duties and qualifications noted in this document, it is the responsibility of all BSCT personnel to familiarize themselves with and adhere to

the UCMJ, 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:

(1) (U) Read and adhere to JTF-GTMO policy memoranda, regulations, and SOPs.

(2) (U) Immediately report any suspicions of abuse of detainees or misconduct by U.S. personnel to JIG Director who is responsible for further reporting to JTF Commander.

(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 [redacted]

Attachments:
Annex A – BSCT Assessment: Guidelines & Format (U)
Annex B – BSCT Observation Report: Guidelines & Format (U)
Annex C – BSCT Risk Assessment: Guidelines & Format (U)

SUBJECT: BSCT SOP - Annex A
BSCT Assessment: Guidelines & Format (U)

JTF- GTMO-[redacted] Date

MEMORANDUM FOR RECORD

SUBJECT: Behavioral Science Consultation Team Assessment; ISN XXX

[redacted]

4. **(U//FOUO) Physical/ medical limitations:** Include here a statement of any known physical or medical conditions, or limitations to functioning, 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.

5. **(U) Social history:** [redacted]

a. (~~C~~) [redacted]

b. (~~C~~) [redacted]

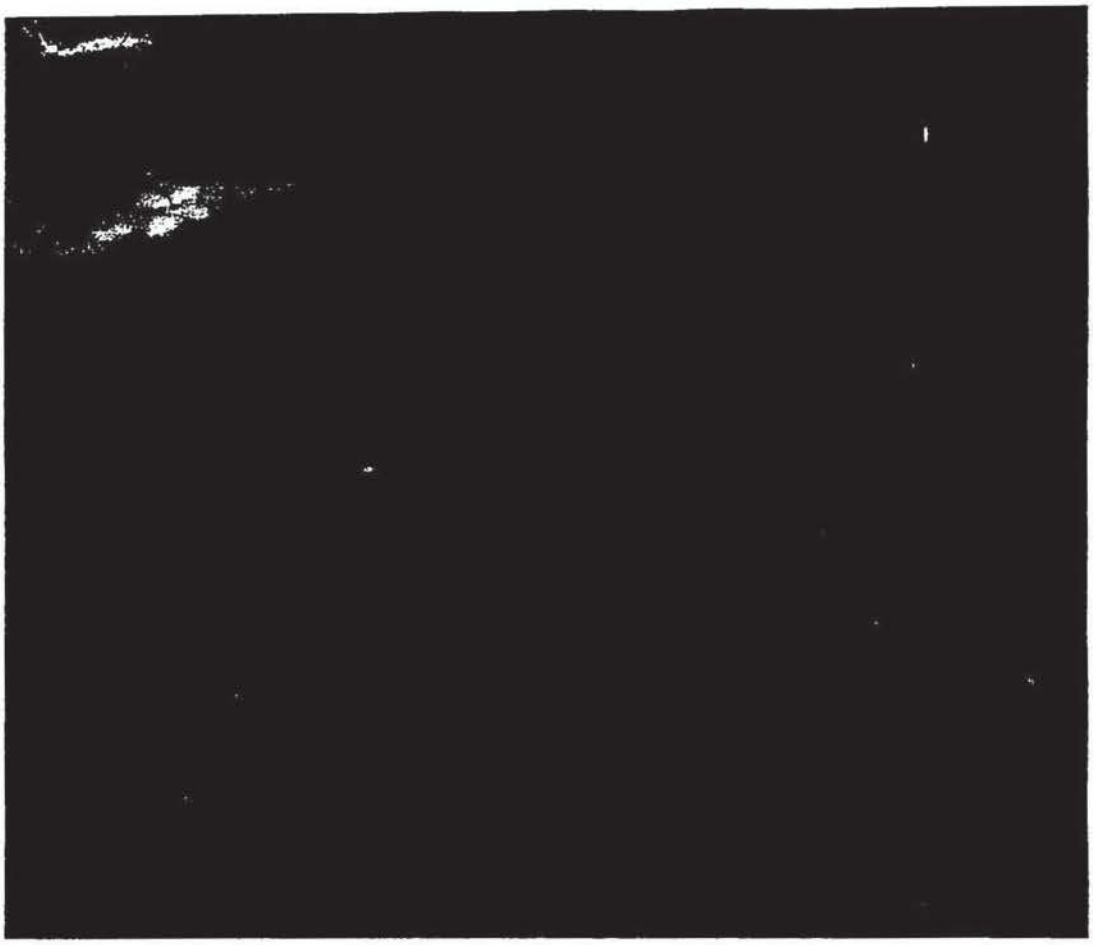
c. (~~C~~) [redacted]

d. (~~C~~) [redacted]

CLASSIFIED BY: JTF-GTMO Classification Guide dated (date of current guide)
REASON: 1.4(C) or Intelligence Activities, Sources, or Methods
DECL ON: (Future date - dependent on report content and Classification Guide noted)

WARNING NOTE: Paragraph classification markings in this document are specific to the information contained in the template. Classification makings in future generated reports must be determined by the originator (i.e., BSCT personnel writing the report) and may vary based on content and information provided in each section.

SUBJECT: BSCT SOP - Annex A
BSCT Assessment: Guidelines & Format (U)



BSCT2
X-####

Note: Sample reports may be found in electronic files.

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SUBJECT: BSCT SOP - Annex B
BSCT Observation Report: Guidelines & Format (U)

JTF- GTMO-[redacted] Date

MEMORANDUM FOR RECORD

SUBJECT: Behavioral Science Observation Report - ISN XXXXX

[redacted]

BSCT3
X-####

CLASSIFIED BY: JTF-GTMO Classification Guide dated (date of current guide)
REASON: 1.4(C) or Intelligence Activities, Sources, or Methods
DECL ON: (Future date - dependent on report content and Classification Guide noted)

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SUBJECT: BSCT SOP - Annex C
BSCT Risk Assessment: Guidelines & Format (U)

JTF-GTMO-[redacted] Date

MEMORANDUM FOR RECORD

SUBJECT: Behavioral Science Consultation Team Risk Assessment; ISN XXXXXXXXX

[redacted]

2. (U) **Sources of Information:** It is useful to identify in the risk assessment the sources used. There are many potential sources of information for these assessments including:

a. (U) [redacted]
b. (U)
c. (U)
d. (U)
e. (U)
f. (U)
g. (U)
h. (U)

b(2)

CLASSIFIED BY: JTF-GTMO Classification Guide dated (date of current guide)
REASON: 1.4(C) or Intelligence Activities, Sources, or Methods
DECL ON: (Future date - dependent on report content and Classification Guide noted)

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SUBJECT: BSCT SOP - Annex C
BSCT Risk Assessment: Guidelines & Format (U)

3. **(U//FOUO) Psychosocial History**: Provide a brief history based on information from database and hard copy files available at the time of review. Include age, place of birth, family of origin, motivations for violent jihad-travels, training/ education, capture, custody; language(s) spoken and fluency.

4. **(U//FOUO) Health Status**: Provide a brief summative statement based on medical and other reports, interviews with medical personnel, and possibly direct observation. A general statement will have been provided to DAB by medical personnel and will be used to develop the assessment as noted below. BSCT will need to use medical summary to identify the three elements of function – physical, cognitive and behavioral.

a. **(U//FOUO) History**: a brief statement of overall medical condition, provided by medical personnel.

b. **(U//FOUO) Treatment**: primary focus of this section will be on treatment provided while in custody but may include prior history if significant. This may include both medical and behavioral health treatment. Medical personnel will provide information necessary for the purposes of the DAB assessment.

c. **(U//FOUO) Function**: section is comprised of a series of three statements regarding detainee's current level of functioning – physical, cognitive, and behavioral.

(1) **(U//FOUO) Physical**: a statement of overall physical functioning, including any significant limitations.

(2) **(U//FOUO) Cognitive**: a statement of general cognitive functioning including any significant limitations or deficits, and demonstrated intellectual abilities.

(4) **(U//FOUO) Behavioral**: an observationally-based statement of behavioral functioning while in detention.

d. **(U//FOUO) Prognosis**: a statement of prognosis based on current health status.

[redacted]

WARNING NOTE: Mark-ups in this document are specific to this template. Classification markings in future generated reports must be determined by the originator and may vary based on content and information provided in each section.

SUBJECT: BSCT SOP - Annex C
BSCT Risk Assessment: Guidelines & Format (U)

[redacted]

BSCT1
x####

Note: Sample reports may be found in electronic files.

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EXHIBIT 1-C

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Responses from Individuals Named in the Final Independent Report

People who have been mentioned in or who have personal knowledge of the events discussed in the Independent Report may make comme…

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Name

Debra Dunivin • 4 years ago

Comments on behalf of Morgan Banks, Debra Dunivin, Larry James and Russ Newman:

A Response to the Hoffman Report

When the American Psychological Association (APA) announced that it had engaged a law firm to conduct an independent review of the controversies surrounding psychologists' involvement in national security interrogations, we looked forward to a thorough and careful report that would lay out the facts objectively, undistorted by the strong opinions of those involved in the controversies. Even more than others, we were eager for the full truth to be uncovered, given our unstinting opposition to torture, our efforts to eliminate abusive interrogation tactics and harsh detention conditions, and our commitment over many years to uphold the highest standards of professional practice. We were therefore shocked to read a report that, far from being objective, is written as a rhetoric-laden prosecutorial brief. It repeatedly ignores or distorts key facts, draws inferences that are contradicted by the evidence or based on guesswork about motives, fails to include contrary analyses and conclusions reported by other sources, commingles several charges on the assumption that the combination will be persuasive even when the evidence supports none of them, and imposes its own views and opinions about policy issues.

The report's prosecutorial bias and grandstanding rhetoric may not be surprising given the background of its author, David Hoffman, as a prosecutor with a past interest in holding public office. However, we were surprised and deeply disappointed by the APA's rush to judgment when it received the report. The report is dated July 2, 2015. According to Drs. Stephen Soldz and Steven Reisner, two of those who have been most vocal in attacking the APA's work in supporting psychologists' appropriate practice in areas of national security, they were invited to meet with the APA Board on that day and provided recommendations for the organization on how to proceed. However, at no time did the APA Board or the Special Committee overseeing the investigation contact any of those attacked by the report for their views. Nor could the Board or the Special Committee have meaningfully taken the time to review the report's 528 pages, plus thousands of pages of attached documents, to test its conclusions. Most of us learned about the report only when, after having been leaked to the New York Times, it was reported in its July 10th edition.

Given the report's obvious biases, some of which are detailed below, and the APA's failure to test its conclusions carefully, we urge the APA Council at its meeting on August 5th to take an approach more in keeping with due process and the standards of our profession. We ask it to allow time for those of us who devoted many years to ensuring humane conditions of confinement [illegible] tactics, at a time when many at high levels of government supported their use, to present our perspective and the facts that supp[illegible] of fact, inferences and conclusions in Mr. Hoffman's report.

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The report's bias is obvious in the opening pages of the Executive Summary. In its first two pages, the summary devotes substantial space to the attacks against the APA's actions – but no space to the views of those who contributed to APA's efforts to counter abusive interrogation methods. Instead, it reports only that we tried to rebut the critics by calling them bullies and the attacks baseless. That rhetorical tactic may be acceptable in an intentionally one-sided brief; it borders on unethical in an objective report. An investigator working as an objective judge rather than a prosecutor would have given fair treatment to our view and the facts that support it.

Those of us in the Department of Defense worked diligently, energetically and effectively – at times putting our careers at risk – to prevent abusive interrogation methods and ensure humane conditions of confinement. As the April 2005 report of the Army Surgeon General concludes, there is no evidence that military psychologists participated in abusive interrogations and clear evidence that they took appropriate action when they observed abuse. (We can speak from our knowledge only about the military, not the CIA.) We also strove to have appropriate prohibitions codified, and worked with the APA so that we could point to its guidelines to support our efforts. Our goal was, in fact, the opposite of the goal that Mr. Hoffman so cavalierly infers from the facts he chooses to present. His conclusion that we were complicit in enabling abusive methods is deeply offensive and incomprehensible to anyone who lived through these events on a daily basis. Similarly, those of us in the APA worked hard to ensure that the report issued by APA's Task Force on Psychological Ethics and National Security (the PENS report) would help military psychologists advocate for explicit military prohibitions against abusive techniques and ensure humane conditions of confinement.

These efforts succeeded: the PENS report states unequivocally that "[p]sychologists do not engage in, direct, support, facilitate, or offer training in torture or other cruel, inhuman, or degrading treatment" and that "[p]sychologists are alert to acts of torture and other cruel, inhuman, or degrading treatment and have an ethical responsibility to report these acts to the appropriate authorities." (We note that Mr. Hoffman's Executive Summary, instead of quoting the guidelines, simply characterizes them as "loose," a characterization that falls apart in the face of their actual language.) To conclude that the APA staff and others "colluded" with Department of Defense psychologists to write guidelines that purposely left wiggle room for abusive interrogations is, again, incomprehensible to those who lived through these events.

We recognize that many of those involved were strongly committed to opposing views on some key policy issues, in particular whether psychologists should have withdrawn entirely from any involvement in the interrogation process and whether the guidelines should have specified acceptable and unacceptable interrogation techniques. We believed strongly then, as we do now, that the involvement of psychologists prevented the use of abusive techniques, helped ensure humane conditions of confinement in many instances, and sped up the [illegible] We believe strongly that the PENS guidelines were well-crafted: they clearly prohibit water-boarding and other forms of physical and m[illegible] l judgment of individual psychologists about the appropriateness of non-abusive interrogation techniques in a specific circumstance. This approach t[illegible] identical to the approach taken by other professions in their guidelines, such as the American Bar Association Model Rules of

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Professional Conduct.

Psychologists on both sides of these issues were equally opposed to abusive interrogations; they differed about strategies, not goals. Mr. Hoffman picks sides, and then concludes that those on the other side must have been trying to enable abuse, not stop it. As a politician, he has the right to choose sides; as an objective investigator, he does not.

Mr. Hoffman took seven months to complete his report; it will take us some months to review it. Once that review is complete, we will issue a report that we expect to show not only that Mr. Hoffman reached unsupportable conclusions, but also that he does so in ways that violated his duty to consider the evidence in an even-handed and objective manner.

Even an initial review, however, reveals a host of factual errors, unsupported inferences, and policy opinions masquerading as fact-based conclusions. These flaws are disconcerting one by one; cumulatively, they are outrageous.

To list only a few:

- The report distorts the APA's obligation to serve all of its members, including those in the military, into an effort to "curry favor" with the military. That phrase, which the report uses repeatedly, is drawn directly from the language of those attacking the APA's actions. For an independent investigator to use such loaded rhetoric is reprehensible. In fact, the APA was attempting to give military psychologists support that would actually be effective, rather than counter-productive, for their efforts to end abusive interrogations and ensure humane conditions of confinement.

- The report repeatedly draws inferences about motives that are unsupported by concrete evidence. For example, it claims that Colonel Banks asked that e-mails be kept private because we were engaged in underhanded collusion; in fact, Colonel Banks wanted to avoid the risk that others would think he was speaking for the military, which he was not authorized to do. More generally, Mr. Hoffman's claims about the APA's motives for "currying favor" with the military are entirely implausible to anyone involved in the 2005 events.

- The report states as fact judgments about the role of APA staff that fall apart if one looks at the role of staff in drafting communications, guiding discussions and making recommendations to governance groups in other situations. Little about their role in these events differed from their roles in many other policy discussions, as Mr. Hoffman could easily have discovered.

- Although the report relies heavily on those whose attacks led to the Special Committee's creation, it slights a series of reports that reach conclusions opposed to many of Mr. Hoffman's. These reports include the April 2005 report of the Army Surgeon General (the "Martinez-Lopez report"), the November 2008 report of the Senate Armed Services Committee, and the [illegible] of Defense [illegible] President Obama (the "Walsh report").

For example, after [illegible] Behavioral Science Consultation Teams (BSCTs) in the interrogation process, the Martinez-Lopez report found "no indication that BSCT personnel participated in abusive interrogation practices" and found "clear evidence that

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BSCT personnel took appropriate action and reported any questionable activities when observed." Following President Obama's executive order in 2009 to ensure that detainees were being held in "conformity with…Common Article 3 of the Geneva Conventions," the Walsh report demonstrates both the positive impact of the PENS Report and the effectiveness of the BSCTs. The report states that BSCTs "are charged with reporting any observed or suspected abuse during the interrogation," and the "BSCT function in this operational environment is a vital resource for commanders." It concluded by strongly recommending that the Department of Defense "sustain the B[ehavioral] S[cience] C[onsultant] resource to ensure continued mission support…." The Senate report describes the initiative of a psychologist and a psychiatrist, at a time in 2002 when harsh interrogation methods were sanctioned at high levels of government, to insert language opposing the use of those methods in a memo listing some of them. (When Colonel Banks reviewed that memo, he responded that "[m]y strong recommendation is that you do not use physical pressures.") Mr. Hoffman provides a host of reasons, none convincing, to discount these reports or slight their findings.

We do not assert that, at a time of great stress and much dispute over how to handle detainees, we managed our collaboration to prevent abusive interrogations as effectively and adroitly as, with the benefit of hindsight, we might have. Nor do we assert that the APA's internal processes were ideal. But Mr. Hoffman's attack upon our motives and goals is an egregious distortion in its conclusions and irresponsible in its methods, and his recurring theme that we tried to enable rather than halt abuse turns the truth on its head. We believe, as others have stated, that the report is a "gross mischaracterization" of the "intentions, goals and actions" of those involved. We are carefully evaluating all legal options.

L. Morgan Banks, Ph.D.
Debra Dunivin, Ph.D., ABPP
Larry C. James, Ph.D., ABPP
Russ Newman, Ph.D., JD

52 | • Reply • Share ›

Joseph Matarazzo • 4 years ago

Joseph D. Matarazzo statement

James Rison and the Hoffman Report indicate my relationship with the CIA involved two issues:

1) That I was involved in torture.

2) That I provided merely my own opinion that sleep deprivation did not constitute torture.

My responses follow:

Issue 1: [illegible] issue when it first arose in a Spokane newspaper in 2009. Two weeks ago, Jeff Manning a reporter for our local newspaper, The O[illegible] ues. Only the next day, did he ask my university for a response. The following is the July 13, 2015 Oregon Health & Science University and Matarazzo response to his article which he did not publish.

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EXHIBIT 1-D

Notes From the August 2015 APA Council of Representative Meeting

Lori Foster, Deirdre Knapp, Rodney Lowman, and Deborah Whetzel

The American Psychological Association's (APA) annual convention was held on August 6-9, 2015 in Toronto, Canada. SIOP was represented on the convention program, and the sessions were well attended. Presentations by SIOP members ranged from goal setting to firefighter operations, worker well-being, and using I-O psychology to fight global poverty, to name just a few examples. SIOP's presence at APA's convention was due in no small part to APA Committee Chair **Ann Huffman** and Chair-in-Training **Tara Behrend** who worked hard to encourage and review convention submissions and organize a reception for SIOP attendees.

SIOP members were recognized at the convention in several positive ways. Consulting psychologist and APA Council member **Judith Blanton** received a Presidential Citation for her contributions to applied psychology, especially for her persistent efforts in trying to help psychology licensure be made more relevant to the needs of non-healthcare applied psychology. In addition, the following SIOP members were named APA Fellows: **Bradford Bell, Mark Bing, Wendy Boswell, Johnathon Halbesleben, Yueng-hsiang Huang, Stephanie Payne, William Shepherd,** and **Scott Tonidandel**. Congratulations to each of these individuals for the well-deserved recognition!

Preceding and during the convention, APA's Council of Representatives (COR), its major governing body, convened. This article provides a report on those meetings, which consisted of an opening plenary session on the evening of August 4, a full day meeting on August 5, and a half day meeting on August 7. SIOP's four APA Council Representatives**, Rodney L. Lowman** (who also served as chair of the APA's new Council Leadership Team), **Deirdre Knapp, Lori Foster**, and **Deb Whetzel** attended.

As many *TIP* readers are aware, the COR is a legislative body composed of representatives elected from each APA division as well as state and provincial territories. COR meetings entail discussing and voting on a variety of policy issues facing psychology. For the past few years, discussions have focused largely on determining the best structure for COR, including deliberations about its optimal size and role. These discussions were part of what was known as APA's Good Governance Project, which concentrated on how to turn COR into a more nimble governing body. This included improving the speed with which decisions and changes are made by COR without compromising decision quality. During the Good Governance Project, roles and responsibilities of COR and the board of directors were reviewed, and changes were made. One purpose of the changes was to help focus COR's time and talent on policy issues of relevance to APA members and council representatives' constituents.

The August 2015 COR meeting represented a marked change from the meetings leading up to it. Instead of focusing on COR's structure, functions, roles, and responsibilities, the August meeting focused predominantly on the "Hoffman Report." Although a full, detailed account of the many important discussions and issues raised during the meeting is beyond the scope of this article, the following provides a brief summary.

The Hoffman Report documents an independent review commissioned by APA. Former federal prosecutor and attorney David Hoffman of Sidley Austin, LLP in Chicago was selected by the board of directors based on his extensive federal and local Chicago investigative expertise. The major objective of this independent review was to ascertain the truth of allegations that had been aired in a book by *New York Times* reporter James Risen in which inappropriate actions by APA elected officials and senior staff were alleged.

The Hoffman team interviewed a wide assortment of relevant APA employees and APA governance officials, and was given unfettered access to all available APA documents, including e-mails, and had the authority to pursue the findings "wherever they might lead."

The allegations specifically concerned an APA presidential task force that issued with "emergency APA approval" a report called the PENS report, which issued pronouncements about psychologists' ability to be involved in interrogations. As stated in the Hoffman report, "The gist of the allegations was that APA made…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" (p. 1).

COR activities at the most recent APA convention kicked off with an opening plenary session held the evening before the first COR meeting. The plenary session covered several topics, including a discussion of what constituted grounds for recusal on matters in which a vote would be taken during the August APA Council meeting. This was an issue because some COR and APA Board members had been named and/or investigated in the Hoffman Report. It was determined that recusals should be decided on a vote-by-vote basis, such that COR members would only recuse themselves during votes in which there was a conflict of interest, but that Council members with conflicts also needed to declare their conflicts before speaking on related issues. The opening plenary session also provided an opportunity for one of APA's outside attorneys to describe the series of events leading to the Hoffman Report. When asked what she thought about the report, the attorney responded that people should read the document and draw their own conclusions. The full 542-page report is available online: http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf.

The official portion of the COR meeting began the morning following the opening plenary. The meeting quickly moved into executive session, which was not open to observers. At that point, Mr. Hoffman and one of his colleagues, attorney Danielle Carter, joined the meeting and briefly described the process for developing the report. They also answered advance questions that COR members had submitted. Many of the questions sought to understand what some readers had perceived as biases reflected in some of the language of the report and concerns about the protections offered to those who were interviewed and reported to have behaved inappropriately. (Although this was discussed in closed, executive session, Mr. Hoffman agreed that his answers could be publically described.) Among his main points were:

- His team did not approach this task with any preconceived notions.
- In response to the question: "Was there collusion to support torture?" his answer is no; however, there was (in his and the report's opinion) collusion to support easing the language in APA's ethics code to make it easier for psychologists to be involved in military and national security interrogations.
- There is inherent tension between the role of the psychologist as a safety monitor and that of consulting on maximizing the effectiveness of interrogations.
- Once the investigative team reached their conclusions, they wrote the report using language that they felt best made their case, consistent with what is done in such investigative reporting.

As some *TIP* readers know, the Hoffman report was provided to COR on July 10, 2015. By the next day, it had been leaked to the press, prior to its scheduled public release, resulting in the non-recused APA Board members' decisions to immediately release the report to the public in its full form. Accompanying headlines of the news reports were not always consistent with the report's conclusions. There are also some criticisms of the report that have been raised.

Regardless of one's position on the findings or tone of the report, the member outrage and media firestorm created by its release made immediate action on the part of the COR imperative. Accordingly, there was much discussion during the August 2015 COR meeting in Toronto about a motion titled: "Resolution to Amend the 2006 and 2013 Council Resolutions to Clarify the Roles of Psychologists Related to Interrogation and Detainee Welfare in National Security Settings, to Further Implement the 2008 Petition Resolution, and to Safeguard Against Acts of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment in All Settings." Briefly, the resolution states that psychologists "shall not conduct, supervise, be in the presence of, or otherwise assist any national security interrogations for any military or intelligence entities, including private contractors working on their behalf, nor advise on conditions of confinement insofar as these might facilitate such an interrogation."

An underlying assumption of the resolution is that some psychologists in such situations were engaging in unethical practice

(sometimes called "behavioral drift"). This assumption may have resulted from an overgeneralization of the activities of two psychologists who designed and executed cruel, inhuman, or degrading treatment or punishment (CIDTP). (Other psychologists, according to the report, may also have inappropriately participated in such interrogations). One of those named in the report, COR member Larry James (Division 19; Military Psychology), stated that inappropriate behavior by a small number of psychologists does not represent that of other military psychologists who work with detainees. In fact, he claimed, many military psychologists saved lives by stopping CIDTP or pointing out its failure to yield usable information. Thus, there was some concern that the proposed resolution, as worded, could accomplish the opposite of what it was intended to do. Other psychologists who have opined on these matters have felt that it is categorically inappropriate for psychologists to be involved in interrogations that do not safeguard the rights of those being interrogated and comply with international law, and believe that these safeguards do not exist.

Prior to the motion reaching the floor for discussion, some of the SIOP representatives attempted to modify the language in the resolution to focus on *behavior* (cruel, inhuman or degrading treatment or punishment; CIDTP) rather than the *setting* in which psychologists work. Thus, some SIOP council representatives' suggested revisions were that psychologists "shall not conduct or~~,~~ supervise~~, be in the presence of, or otherwise assist~~ any CIDTP related to national security interrogations for any military or intelligence entities, including private contractors working on their behalf, nor advise on conditions of confinement insofar as these might facilitate CIDTP." ~~such an interrogation~~." The alternative language was offered offline but was not accepted by the movers of the motion although other changes were made in the final version voted upon. The question was called before a SIOP representative who had stood to speak could propose modifications to the resolution's language on the floor of council.

In a roll call vote in which each COR member had to state his/her vote aloud, COR overwhelmingly voted to support the resolution prohibiting psychologists from participating in national security interrogations. The measure passed by a vote of 157–1, with 6 abstentions and 1 recusal. The final resolution can be found here. Although some of the SIOP APA representatives had concerns about specific aspects of the motion, it was apparent that a motion demonstrating a clear response from APA had to pass, and the SIOP representatives did not want Division 14 to be viewed as in any way "supporting torture." Two SIOP representatives voted yes and two abstained from the vote.

Following this vote, COR also voted to create a "blue-ribbon panel of psychologists and nonpsychologist experts to review APA's Ethics Office and ethics policies and procedures and issue recommendations to ensure APA policies are clear and aligned with the very best practices in the field." In addition, it was proposed that APA would "institute clearer conflict-of-interest

policies going forward," and APA's Council Leadership Team was assigned the task of appointing a work group to review and suggest any needed changes in the existing COI policies for Council Reps and others in APA governance, including those serving on Boards and Committees. This motion was also approved by an overwhelming majority of COR, including all SIOP representatives. Because I-O psychologists are not healthcare providers and mostly work in organizational settings, it will be important for us to be involved in determining the direction of changes in ethics-related guidelines and code enforcement.

Motions related to the Hoffman Report had been solicited from APA Council members, but a number of the motions proposed by the APA Board and by APA COR members were not discussed or voted upon due to limited time availability during the meeting. These will be further discussed by COR members and brought back to the APA Council meeting in February 2016 for council's consideration.

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EXHIBIT 1-E

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	**CASE NO. 2017 CA 005989B**
Plaintiffs,	:	**Judge Hiram E. Puig-Lugo**
vs.	:	**Next Scheduled Event: 2020 Hearing, To Be Determined**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.		

DECLARATION OF J. CHRISTOPHER RACICH
IN SUPPORT OF DEFENDANTS SIDLEY AUSTIN LLP,
SIDLEY AUSTIN (DC) LLP, AND DAVID HOFFMAN'S CONTESTED
SPECIAL MOTION TO DISMISS UNDER THE DISTRICT
OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE § 16-5502

1. My name is J. Christopher Racich and I declare under penalty of perjury that the facts stated herein are within my personal knowledge and are true and correct. I am providing this declaration voluntarily.

2. I am the President of Vestigant LLC ("Vestigant"). Vestigant is a technology and computer forensic consulting firm that assists clients with fact-finding in litigation, regulatory reviews and business decisions. I founded Vestigant in 2009 and since that time, Vestigant has been retained to provide expertise on hundreds of cases involving computer forensic and e-discovery issues.

3. I am a 1993 graduate of Cornell University where I received my Bachelor of Arts degree in Biology. I later attended law school at the Washington College of Law at American University, graduating with a Juris Doctor in 1997. I have been practicing in the field of computer forensics since 1997.

4. I have taken numerous courses and attended multiple seminars in the field of computer forensics over the past twenty two years. I have taught computer forensics courses at the High Tech Crimes Investigation Association (HTCIA). I am also an adjunct Professor of Law at the Washington College of Law at American University where I have taught a course concerning electronic discovery.

5. During my career in the computer forensics field, I have provided testimony as an expert in computer forensics in numerous courts, including the United States District Court for the Eastern District of Virginia; the United States District Court for the Southern District of Florida; the United States District Court for the Southern District of Texas; the Superior Court for the District of Columbia; the Missouri Circuit Court; the Supreme Court of the State of New York, County of New York; the Larimer County District Court in Colorado; and the Pennsylvania Court of Common Pleas. I have also provided expert deposition testimony in the area of computer forensics in connection with numerous civil claims, and also have testified as an expert witness before the National Labor Relations Board. I have been qualified at least thirty-eight times as an expert in computer forensics in a court of law or arbitration proceeding. A true and correct copy of my Curriculum Vitae which further shows my experience in the field of computer forensics is attached as Exhibit 1.

6. I have been engaged by counsel for Sidley Austin LLP. ("Sidley") to review the affidavit of Arman Gungor filed in the above case on November 11, 2019 ("Gungor Affidavit"), review documents that this affidavit references and review statements made by counsel for Plaintiff in provided pleadings.

7. In preparation for this engagement, I reviewed the following documents:

a. The Gungor Affidavit

b. A PDF document named "report.pdf" that has been represented to me to be a true copy of the same named document identified in paragraph 7 of the Gungor Affidavit.

c. A PDF document named "APA-FINAL-Report-7.2.15.pdf" that has been represented to me to be a true copy of the same named document identified in paragraph 7 of the Gungor Affidavit.

d. A PDF document named "revised-report.pdf" that has been represented to me to be a true copy of the same named document identified in paragraph 7 of the Gungor Affidavit.

e. A PDF document named "2019.11.15 – Pls' Opp to Anti-Slapp (Actual Malice, Public Officials, Choice of Law).pdf" ("Plaintiff's Opposition") that is a pleading in the above case.

Gungor Affidavit

8. In the Gungor Affidavit, Mr. Gugnor reviewed the metadata of a number of PDF files. The specifics of his finding will be described below, however, it should be clarified that the metadata that Mr. Gungor describes is only Adobe Acrobat PDF metadata, and not metadata from any original Microsoft Word document from which the various PDF files may have been created. Therefore, the statements made in Paragraph 34 of the Plaintiff's Opposition describing Microsoft Word metadata are incorrect.

9. It should also be noted that the metadata described by Mr. Gungor is only relevant to the creation or saving of the PDF documents, and that nothing in the metadata gives any indication as to if the document was emailed or by whom it was emailed, or even if the PDF files were ever emailed.

Report.pdf

10. In paragraphs 9 – 12 of the Gungor Affidavit, Mr. Gungor describes data and metadata that is found within the report.pdf file, that he identifies as a file that "is available on *The New York Times* website the following address at the time of this writing: https://www.nytimes.corn/interactive/2015/07 /09/us/document-report.html".

11. Mr. Gungor identifies that metadata of report.pdf is consistent with the document being initially created by "converting" or printing a Microsoft Word document to PDF format on or about July 2, 2015 within report.pdf. Based upon my review of the metadata of report.pdf, this appears to be accurate.

12. Mr. Gungor identifies that metadata of report.pdf is consistent with a modification of the PDF file being done on July 7, 2015 using Adobe Acrobat Pro 10.1.13 within report.pdf. Based upon my review of the metadata of report.pdf, this appears to be accurate.

13. Mr. Gungor identifies author information streams of "D. Hoffman", "jplatt01" and "Massen, Emily" within report.pdf indicating that there was some activity of the PDF file by applications registered to those authors. Based upon my review of the metadata of report.pdf, this appears to be accurate.

14. Mr. Gungor does not draw any conclusion as to whether or not a Word file was emailed to the New York Times ("Times"). In fact, based upon the metadata, the only thing that can be inferred about the PDF file report.pdf is that it was created on or about July 2, 2015 by the user registered to D. Hoffman by printing to PDF using Acrobat PDFMaker 10.1 for Word tool and was edited, <u>as a PDF</u>, not as a Microsoft Word document, on July 7, 2015 using Adobe Acrobat Pro 10.1.13.

15. On Page 11 in Footnote 34 of Plaintiff's Opposition, there appears to be a misunderstanding as to the metadata that is described by Mr. Gungor. As stated above, the metadata reflects the PDF report.pdf, not the Microsoft Word document from which it was likely printed. Therefore, the last statement in Footnote 34 "As a result, no one else could have e-mailed a Word file of the Report that the times could then transform into the .pdf on July 7" is simply incorrect. The metadata within report.pdf file only shows information about the PDF, not the Word document.

16. Accordingly, Mr. Gungor does not draw any conclusion as to whether or not a Word file was emailed to the New York Times ("Times") based upon the metadata found within the report.pdf.pdf, and in fact, that is not possible to do based upon what is found in the metadata.

APA-FINAL-Report-7.2.15.pdf

17. In paragraphs 13 – 14 of the Gungor Affidavit, Mr. Gungor describes data and metadata that is found within the APA-FINAL-Report-7.2.15.pdf file, that he identifies as a file that "is available on *American Psychological Association* website the following address at the time of this writing: https://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf".

18. In paragraphs 13 – 14 of the Gungor Affidavit, Mr. Gungor identifies metadata indicating that this version of the report was created using Aspose.pdf for .NET 8.6.0. Based upon my review of the metadata of report.pdf, this appears to be accurate.

19. Mr. Gungor also identifies metadata indicating that there is a scanned page within the first page of this version of the report. Based upon my review of the metadata of report.pdf, this appears to be accurate.

Revised-report.pdf

20. In paragraphs 9 – 12 of the Gungor Affidavit, Mr. Gungor describes data and metadata that is found within the revised-report.pdf file, that he identifies as a file that "is available on *American*

Psychological Association website the following address at the time of this writing: https://www.apa.org/independent-review/revised-report.pdf".

21. Mr. Gungor identifies that metadata of revised-report.pdf is consistent with the document being initially created by using a device identified as "Xerox WorkCentre 775".. Based upon my review of the metadata of revised-report.pdf, this appears to be accurate.

22. Mr. Gungor identifies author information streams of "egraff" and "emassen" within revised-report.pdf indicating that there was some activity of the PDF file by applications registered to those authors. Based upon my review of the metadata of report.pdf, this appears to be accurate.

J. Christopher Racich
Vestigant, LLC

12/11/2019
Date

EXHIBIT 1-F

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

2010 NOV 19 PM 12:33

OFFICE OF THE SECRETARY

TO: All Councilmembers

FROM: Councilmember Phil Mendelson,
Chairman, Committee on Public Safety and the Judiciary

DATE: November 18, 2010

SUBJECT: Report on Bill 18-893, "Anti-SLAPP Act of 2010"

The Committee on Public Safety and the Judiciary, to which Bill 18-893, the "Anti-SLAPP Act of 2010" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

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I. BACKGROUND AND NEED

Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation -- or SLAPPs -- have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantially amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

History of Strategic Lawsuits against Public Participation:

In what is considered the seminal article regarding SLAPPs, University of Denver College of Law Professor George W. Pring described what was then (1989), considered to be a growing litigation "phenomenon":

> Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[1]

These lawsuits, Pring noted, are typically an effort to stop a citizen from exercising their political rights, or to punish them for having already done so. To further identify the problem, and be able to draw possible solutions, Pring engaged in a nationwide study of SLAPPs with University of Denver sociology Professor Penelope Canan.

Pring and Canan's study established the base criteria of a SLAPP as: (1) a civil complaint or counterclaim (for monetary damages and/or injunction); (2) filed against non-governmental individuals and/or groups; (3) because of their communications to a government body, official or electorate; and (4) on an issue of some public interest or concern.[2] The study of 228 SLAPPs found that, despite constitutional, federal and state statute, and court decisions that expressly protect the actions of the defendants, these lawsuits have been allowed to flourish because they appear, or are camouflaged by those bringing the suit, as a typical tort case. The vast majority of the cases identified by the study were brought under legal charges of defamation (such as libel and slander), or as such business torts as interference with contract.[3]

In identifying possible solutions to litigation aimed at silencing public participation, Pring paid particular attention to a 1984 opinion of the Colorado Supreme Court establishing a new rule for trial courts to allow for dismissal motions for SLAPP suits.[4] In recognition of the

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[1] George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, Pace Env. L. Rev, Paper 132, 1 (1989), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1122&context=envlaw (last visited Nov. 17, 2010).
[2] *Id.* at 7-8.
[3] *Id.* at 8-9.
[4] Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). The three-prong test develop by the court requires:

> When [ ] a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the

growing problem of SLAPPs, a number of jurisdictions have, legislatively, created a similar special motion to dismiss in order to expeditiously, and more fairly deal with SLAPPs. According to the California Anti-SLAPP Project, a public interest law firm and policy organization dedicated to fighting SLAPPs in California, as of January 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures. Likewise, there are nine jurisdictions (not including the District of Columbia) that are currently considering legislation to address the issue. Also, one other jurisdiction has joined Colorado in addressing SLAPPs through judicial doctrine.[5]

This issue has also recently been taken up by the federal government, with the introduction of the H.R. 4363, the Citizen Participation Act of 2009. This legislation would provide certain procedural protections for any act in furtherance of the constitutional right of petition or free speech, and specifically incorporate a special motion to dismiss for SLAPPs.[6]

SLAPPs in the District of Columbia:

Like the number of jurisdictions that have sensed the need to address SLAPPs legislatively, the District of Columbia is no stranger to SLAPPs. The American Civil Liberties Union of the Nation's Capital (ACLU), in written testimony provided to the Committee (attached), described two cases in which the ACLU was directly involved, as counsel for defendants, in such suits against District residents.[7]

The actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots activism that should be hailed in our democracy. In one of the examples provided, the ACLU discussed the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer. When the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media."[8] Such activism, however, was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend. Though the actions

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> plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

Id. at 1369.

[5] California Anti-SLAPP Project (CASP) website, Other states: Statutes and cases, *available at* http://www.casp.net/statutes/menstate.html (last visited Nov. 11, 2010).

[6] http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdLBBX:@@@L&summ2=m&|/home/LegislativeData.php|

[7] *Bill 18-893, Anti-SLAPP Act of 2010: Public Hearing of the Committee on Public Safety and the Judiciary*, Sept. 17, 2010, at 2-3 (written testimony Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital).

[8] *Id.* at 2 (quoting from lawsuit in *Father Flanagan's Boys Home v. District of Columbia et al.*, Civil Action No. 01-1732 (D.D.C)).

of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation.

What has been repeated by many who have studied this issue, from Pring on, is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony "[*l*]*itigation itself* is the plaintiff's weapon of choice."[9]

District Anti-SLAPP Act:

In June 2010, legislation was introduced to remedy this nationally recognized problem here in the District of Columbia. As introduced, this measure closely mirrored the federal legislation introduced the previous year. Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest.

Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court. To ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish, the legislation tolls discovery while the special motion to dismiss is pending. Further, in recognition that SLAPP plaintiffs frequently include unspecified individuals as defendants -- in order to intimidate large numbers of people that may fear becoming named defendants if they continue to speak out -- the legislation provides an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for certain costs and fees to be awarded to the successful party of a special motion to dismiss or a special motion to quash.

Bill 18-893 ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates. To prevent the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by this act, the Committee urges the Council to adopt Bill 18-893.

II. LEGISLATIVE CHRONOLOGY

June 29, 2010	Bill 18-893, the "Anti-SLAPP Act of 2010," is introduced by Councilmembers Cheh and Mendelson, co-sponsored by Councilmember M. Brown, and is referred to the Committee on Public Safety and the Judiciary.

[9] *Id.* at 3.

July 9, 2010	Notice of Intent to act on Bill 18-893 is published in the *District of Columbia Register.*
August 13, 2010	Notice of a Public Hearing is published in the *District of Columbia Register.*
September 17, 2010	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-893.
November 18, 2010	The Committee on Public Safety and the Judiciary marks-up Bill 18-893.

III. POSITION OF THE EXECUTIVE

The Executive provided no witness to testify on Bill 18-893 at the September 17, 2010 hearing. The Office of the Attorney General provided a letter subsequent to the hearing stating the need to review the legislation further.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions.

V. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held a public hearing on Bill 18-893 on Friday, September 17, 2010. The testimony summarized below is from that hearing. A copy of submitted testimony is attached to this report.

Robert Vinson Brannum, President, D.C. Federation of Civic Associations, Inc., testified in support of Bill 18-893.

Ellen Opper-Weiner, Public Witness, testified in support of Bill 18-893. Ms. Opper-Weiner recounted her own experience in SLAPP litigation, and suggested several amendments to strengthen the legislation.

Dorothy Brizill, Public Witness, testified in support of Bill 18-893. Ms. Brizill recounted her own experience in SLAPP litigation. She stated that the legislation is the next step in advancing free speech in the District of Columbia.

Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital, provided a written statement in support of the purpose and general approach of Bill 18-

893, but suggested several changes to the legislation as introduced. A copy of this statement is attached to this report.

Although no Executive witness presented testimony, Attorney General for the District of Columbia, Peter Nickles, expressed concern that certain provisions of the bill might implicate the Home Rule Act prohibition against enacting any act with respect to any provision of Title 11 of the D.C. Official Code. A copy of his letter is attached to this report.

VI. IMPACT ON EXISTING LAW

Bill 18-893 adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with strategic lawsuits against public participation (SLAPPs). Specifically, the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously, to delay burdensome discovery while the motion to dismiss is pending, and to provide an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for the costs of litigation to be awarded to the successful party of a special motion to dismiss created under this act.

VII. FISCAL IMPACT

The attached November 16, 2010 Fiscal Impact Statement from the Chief Financial Officer states that funds are sufficient to implement Bill 18-893. This legislation requires no additional funds or staff.

VIII. SECTION-BY-SECTION ANALYSIS

Several of the changes to the Committee Print from Bill 18-893 as introduced stem from the recommendations of the American Civil Liberties Union of the Nation's Capital (ACLU). For a more thorough explanation of these changes, see the September 17, 2010 testimony of the ACLU attached to this report.

Section 1	States the short title of Bill 18-893.
Section 2	Incorporates definitions to be used throughout the act.
Section 3	Creates the substantive right of a party subject to a claim under a SLAPP suit to file a special motion to dismiss within 45 days after service of the claim.

Subsection (a) Creates a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (b) Provides that, upon a prima facie showing that the activity at issue in the litigation falls under the type of activity protected by this act, the court shall dismiss the case unless the responding party can show a likelihood of succeeding upon the merits.

Subsection (c) Tolls discovery proceedings upon the filing of a special motion to dismiss under this act. As introduced the legislation permitted an exemption to this for good cause shown. The Committee Print has tightened this language in this provision so that the court may permit specified discovery if it is assured that such discovery would not be burdensome to the defendant.

Subsection (d) Requires the court to hold an expedited hearing on a special motion to dismiss filed under this act.

As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal.[10] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

Section 4 Creates a substantive right of a person to pursue a special motion to quash a subpoena aimed at obtaining a persons identifying information relating to a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (a) Creates the special motion to quash.

Subsection (b) Provides that, upon a prima facie showing that the underlying claim is of the type of activity protected by this act, the court shall grant the special

[10] *See* Stuart v. Walker, 09-CV-900 (DC Ct of App 2010) at 4-5.

motion to quash unless the responding party can show a likelihood of succeeding upon the merits.

Section 5 — Provides for the awarding of fees and costs for prevailing on a special motion to dismiss or a special motion to quash. The court is also authorized to award reasonable attorney fees where the underlying claim is determined to be frivolous.

Section 6 — Provides exemptions to this act for certain claims.

Section 7 — Adopts the Fiscal Impact Statement.

Section 8 — Establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMITTEE ACTION

On November 18, 2010, the Committee on Public Safety and the Judiciary met to consider Bill 18-893, the "Anti-SLAPP Act of 2010." The meeting was called to order at 1:50 p.m., and Bill 18-893 was the fourth item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Cheh, and Evans present; Councilmembers Bowser absent), Chairman Mendelson moved the print, along with a written amendment to repeal section 3(e) of the circulated draft print, with leave for staff to make technical changes. After an opportunity for discussion, the vote on the print was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). Chairman Mendelson then moved the report, with leave for staff to make technical and editorial changes. After an opportunity for discussion, the vote on the report was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). The meeting adjourned at 2:15 p.m.

X. ATTACHMENTS

1. Bill 18-893 as introduced.
2. Written testimony and comments.
3. Fiscal Impact Statement
4. Committee Print for Bill 18-893.

EXHIBIT 1-G

SIDLEY AUSTIN LLP
SIDLEY

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ONE SOUTH DEARBORN STREET
CHICAGO, IL 60603
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BEIJING
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NEW YORK
PALO ALTO
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SHANGHAI
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SYDNEY
TOKYO
WASHINGTON, D.C.

FOUNDED 1866

November 20, 2014

Nathalie Gilfoyle, Esq.
General Counsel
American Psychological Association
750 First Street, N.E.
Washington, DC 20002

Dear Ms. Gilfoyle:

We are pleased that the American Psychological Association ("the APA" or "you") has asked us to serve as its counsel in order to conduct an independent review relating to allegations that, following the attacks of September 11, 2001, the APA colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were captured and held abroad. This letter governs the terms of your engagement of us in this matter ("the Matter").

If the terms of engagement and the other matters set forth in this letter are acceptable to the APA, please sign a copy of this letter and return it to me.

Client; Scope of Representation. The client in this Matter will be the APA, and not any APA division, affiliated organization, or individual APA director, officer, employee, or member. Sidley Austin LLP ("we" or "Sidley") will provide legal advice and assistance to the APA in connection with, and the scope of our engagement and duties to the APA shall relate solely to, this Matter (the "Representation"). We will report to the Special Committee of the Board of Directors ("the Special Committee"), whose authority and purpose is set out in the Resolution of the APA Board of Directors dated November 12, 2014.

Our Independence; Privileges; Certain Witness Communications. We understand that it is the intent of the APA that we conduct this review in a fully independent manner, and we will do so. We have been instructed that the sole objective of our review will be 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. At the conclusion of our independent review, we will present our final report to the Special Committee ("the Final Report"). We understand that the Board of Directors will subsequently make our final report available to the APA Council of Representatives, APA members, and the public.

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 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.) Decisions regarding disclosure, if any, of any non-privileged factual materials collected in connection with the review that are not part of the Final Report will be made by the APA Board of Directors. Second, internal work product prepared by us as part of this work, including but not limited to notes, memos, drafts, and internal emails, will be presumptively considered by us and the APA as covered by the attorney work product doctrine as applicable. Third, other than the Final Report and communications of a factual nature that are part of the Fact Finding Work, all communications between us and (i) the Special Committee, and/or (ii) any in-house and external counsel assisting the Special Committee with regard to this Matter, will be presumptively considered by us and the APA as covered by the attorney-client communication privilege as applicable. Any decisions about waiver of attorney-client or work product privilege will be made by the APA Board of Directors, in consultation with Sidley with respect to the work product privilege that is applicable to any work product created by Sidley other than the Final Report.

We and the APA agree as follows with regard to our communications with individuals who wish to provide information to us during our independent review while limiting our knowledge or disclosure of their identity. First, if an individual wishes to provide us with information anonymously during our independent review (an "Anonymous Witness"), we may accept that information. Second, if an individual other than an APA director, officer or employee, who identifies himself or herself to us wishes to provide us with information while keeping his or her identity confidential from the APA or other entity (a "Confidential Witness"), we are authorized to agree, and to communicate to the person, that we will not provide his or her identity to the APA or other entity, unless ordered by a court to do so. In our independent review, the information provided by an Anonymous Witness or a Confidential Witness will be given the evidentiary weight that is appropriate under all the circumstances, including the anonymity or confidentiality of the witness' identity.

Fees and Expenses. Our fees relating to this Matter will be based on the 2014 billing rate, less a 15% discount, for each attorney and paralegal (as well as any other relevant timekeeper), as applicable, devoting time to this Matter. We will continue to base our fees on our 2014 billing rates for all work through June 30, 2015; for any work in 2015 after that date,

we will base our fees on our 2015 billing rates. The principal partners working on this matter will be David Hoffman and Danielle Carter. If other partners are going to perform substantial work on this matter, we will let you know in advance, along with their billing rates. Associates and paralegals will also work on this matter. We have provided you with the billing rates for Mr. Hoffman and Ms. Carter, and the range of billing rates for our associates and paralegals.

We will include on our bills charges for performing services such as messenger and overnight courier service, actual costs of reasonably necessary long-distance telephone, facsimile and telecopy, search and filing fees, and internal litigation and practice support services. Travel costs for Sidley attorneys or staff will be billed to APA at 50% of actual costs. If applicable, and if agreed to in advance by the APA, fees and expenses of others (such as outside experts, consultants, other non-legal professionals and local co-counsel) generally will not be paid by us, but will be billed directly to the APA. More detailed information with respect to our expense recovery policies and procedures, which are an integral part of our agreement with the APA as reflected in this letter, can be accessed on our website at:
http://www.sidley.com/costrecoveryandpreadmittancebillingratepolicy/us/. These policies and procedures take into account, among other things, a number of special programs that we have entered into with certain of our vendors and independent service providers.

We will bill you monthly, and respectfully request that our bills be paid within 30 days after receipt, except as may be otherwise agreed by us.

Term of Engagement; Retention, etc. of Documents. Either the APA or Sidley may terminate this Representation at any time for any reason by written notice, subject on our part to applicable rules of professional conduct. If we terminate this Representation before it is concluded, we will take such steps as are reasonably practicable to protect the APA's interests in the Matter. Although it is not anticipated, if a court's permission were to be required for withdrawal from this Representation, we will promptly apply for such permission, and the APA will cooperate in such application and will engage successor counsel to represent the APA in the Matter.

Unless previously terminated, our Representation in this Matter will terminate upon the earlier of (i) the completion by us or abandonment by the APA of the Matter or (ii) our sending our final statement for services rendered in the Matter. Following such termination, if we have retained any otherwise nonpublic information that the APA has supplied to us in connection with the Matter, we will keep such information confidential in accordance with applicable rules of professional conduct. If, upon termination, the APA wishes to have any documents relating to this Matter and then in our possession delivered to the APA, you should so advise us. As used in this letter, "documents" means documents in any format, including hard copy documents and electronic documents (including emails). We reserve the right to retain copies of any documents delivered to the APA.

All of Sidley's work product in connection with the Representation is owned by Sidley, although all Sidley work product provided to the APA pursuant to this matter will be jointly owned by the APA and Sidley. Solely within Sidley, Sidley may use and permit others within Sidley to use such work product in whole or in part in other projects to the extent that such use is consistent with Sidley's confidentiality obligations to the APA. Such work product that Sidley provides to the APA may also be used by the APA, except to the extent that Sidley expressly states otherwise with respect to particular documents.

Upon the APA's request at the termination of the Representation, Sidley will provide the APA with Sidley's file relating to the Representation, including any documents or other property that the APA provided to Sidley in connection with the Representation. To the extent permitted by applicable law and ethical rules, the APA agrees that such file will not include Sidley's administrative records, time and expense reports, personnel and staffing materials, credit and accounting records, and internal Sidley work product (such as drafts, notes, and internal memoranda and emails), except to the extent such work product was previously provided by Sidley to the APA. The APA agrees that such file will not include any information revealing the identity of any Confidential Witness, as described above, unless ordered by a court. Sidley may make and retain a copy of the file provided to the APA.

If Sidley is required to respond to a subpoena or other formal request from a third party or a governmental agency for records or other information relating to the Representation, or to testify by deposition or otherwise concerning the Representation (a "Request"), Sidley will first, to the extent permitted by applicable law, consult with the APA as to whether it is the APA's wish that Sidley comply with the Request or resist it, to the extent that there is a basis for doing so. The APA will reimburse Sidley for its time and expense incurred in responding to any such Request, including time and expense incurred in reviewing documents, appearing at depositions or hearings, and otherwise addressing issues raised by the Request, and search and photocopy costs.

We reserve the right to transfer documents to the personnel responsible for administering our records retention program, for initial retention in accordance with our records retention procedures. For various reasons, including the minimization of unnecessary storage expenses, we also reserve the right to destroy or otherwise dispose of any documents retained by us, including documents transferred as described in the preceding sentence and documents otherwise retained by us. We may exercise the rights described in the preceding two sentences from time to time, whether or not in connection with the termination of the Representation, but our exercise of such rights will be subject to applicable rules of professional conduct and to any applicable written agreement between us and the APA. Except as otherwise described above, we have no obligation to retain or otherwise preserve any documents relating to the Matter.

After completion of this Representation, changes may occur in applicable laws or regulations that could have an impact on the APA's future rights and liabilities. Unless the APA

actually engages us after the completion of this Representation to provide additional advice on issues arising from this Representation, and we accept such engagement in writing, we will have no continuing obligation to advise the APA with respect to future legal developments.

Unless otherwise agreed to by us in writing, our Representation will not involve insurance coverage issues; if applicable, the Firm will not provide advice concerning any notification of insurance carriers, and will not be responsible for notifying such carriers or for follow-up communications with the carriers regarding the status of the matter.

Conflicts. We have numerous clients, and many of these clients rely upon us for general representation. Although we hope that it never happens, it is possible that an adverse relationship (including litigation) may develop in the future between the APA and one of our other current or future clients. If we are not representing the APA in that matter, and the matter in which the APA and another client have adverse interests is not substantially related to our representation of the APA in this Matter, the APA agrees that we may represent the other client, the APA waives any conflict arising from such representation, and the APA agrees it will not seek to disqualify or otherwise seek to prevent us from representing such other client. The APA acknowledges that it has had an opportunity to consult with other counsel (in-house or otherwise) prior to agreeing to this waiver, and has made its own decision about whether to do so.

You agree that this Representation of the APA does not give rise to an attorney-client relationship between us and any APA division or affiliated organization unless we have agreed otherwise in writing. You also agree that, during the course of our representation of the APA, we will not be given any confidential information regarding any APA division or affiliated organization. Accordingly, our representation of the APA in this Matter will not give rise to any conflicts of interest if our representations of any of our other clients are adverse to any APA division or affiliated organization.

Consent Regarding Privileged Sidley Communications. When issues arise concerning Sidley's professional duties and rights, including under applicable professional conduct rules, Sidley may seek confidential counsel from internal Sidley lawyers with responsibility or expertise in the areas in question, and in some instances from outside counsel as well. In such circumstances, some courts have concluded that a conflict of interest arises between a law firm and its clients, and have refused to recognize the law firm's communications as privileged. Sidley believes that it is in the mutual interest of Sidley and its clients that Sidley receive expert and confidential legal advice regarding its professional duties and rights in such circumstances. Accordingly, the APA consents to such consultation, waives any claim of conflict of interest that could result from such consultation, and agrees that this Representation will not be a basis for a waiver of any privilege that Sidley would otherwise have for such confidential consultation.

Privacy, Data Protection, and Confidentiality. Our applicable policies with respect to privacy, data protection and information security relating to personal information can be

accessed on our website at http://www.sidley.com/admin/onlineprivacy.asp. Subject to those policies and to applicable ethical confidentiality obligations, and unless otherwise directed by the APA, Sidley may use a variety of electronic communication systems in communicating internally with the APA and with others during the Representation, including cellular or satellite telephone calls, emails, facsimile transmissions, video conferencing and other forms of evolving electronic communications. Sidley uses outsourced nonlawyer personnel in its offices for a variety of support functions, including mailroom, photocopy, information technology and word processing, who are required by Sidley to agree to maintain the confidentiality of information relating to Sidley's clients.

Publicity. Unless instructed otherwise by the APA, Sidley may disclose that it is representing or has represented the APA in this Matter if the Matter has been publicly disclosed, such as by the APA's issuance of a press release or a filing with a court or regulatory authority. Unless the APA consents to the inclusion of additional information, Sidley's disclosure will be limited to the APA's name, the name of the other party or parties (if applicable), and a short description of the matter that contains only publicly-available information. Unless otherwise authorized by the APA, Sidley will make such disclosures only in Sidley's marketing materials, on its website, and in reports to information and ranking agencies such as Thomson Reuters and Chambers.

Governing Law and Choice of Forum. This letter shall be governed by, and construed in accordance with, the laws of the State of Illinois. Any claim arising under or relating to this Engagement Letter shall only be brought in the state or federal courts in such State, and the APA and Sidley each agree to submit to the jurisdiction of such courts.

Arbitration of Disputes. Except to the extent otherwise provided by law, any dispute or claim arising out of or in any way relating to an engagement governed by this letter or our relationship with the APA (including, without limitation, any claim of malpractice, breach of contract or relating to fees or charges for the Representation) shall be finally resolved by arbitration. The arbitration shall be conducted in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Non-Administered Arbitration (Effective November 1, 2007), except as they may be modified herein or by mutual agreement of the parties. The arbitration shall take place in Washington, D.C., or such other location as agreed to by the parties. Notwithstanding the foregoing, the parties consent to the jurisdiction of the federal or state courts having jurisdiction in the location where the arbitration is conducted as to judicial proceedings relating to any aspect of the arbitration, including motions to confirm, vacate, modify or correct an arbitration award.

The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and judgment upon the award may be entered by any court having jurisdiction thereof or having jurisdiction over the relevant party or its assets. The arbitration shall be conducted by one arbitrator, who shall be selected by agreement of the parties or, failing such agreement within 30

days after the initiation of the arbitration, by the CPR. The parties shall be responsible for paying the costs of the arbitration in accordance with CPR rules. The parties agree that the arbitration shall be kept confidential and that the existence of the proceeding and any element of it shall not be disclosed beyond the tribunal, the parties and their counsel, and any person necessary to the conduct of the proceeding. The confidentiality obligations shall not apply if disclosure is required by law or in judicial or administrative proceedings, or to the extent that disclosure is necessary to enforce the rights arising out of the award, provided that the parties agree to use best efforts to keep such disclosure confidential and agree, subject to court approval, to submit such disclosure to a court only under seal. Claims may not be brought in the arbitration proceeding by or on behalf of a purported class of claimants who are not parties to this engagement letter.

This agreement to arbitrate shall constitute an irrevocable waiver of each party's right to a trial by jury, as well as of any right to an appeal that would customarily be available in a judicial proceeding but that may be limited or unavailable in connection with such an arbitration. You acknowledge that you have had the opportunity to consult with other counsel (in-house or otherwise) prior to agreeing to this waiver, including regarding the waiver of jury trial and appeal rights, and have made your own decision about whether to do so.

Severability. If any provision of this letter is held to be unenforceable or invalid for any reason, the remaining provisions of this letter will continue in full force and effect.

We appreciate and look forward to the opportunity to work on this Matter.

Very truly yours,

David H. Hoffman

Agreed and Accepted:

By: _____

EXHIBIT 1-H

ELECTRONICALLY FILED
COURT OF COMMON PLEAS
Thursday, February 16, 2017 12:31:28 PM
CASE NUMBER: 2017 CV 00839 Docket ID: 30555815
GREGORY A BRUSH
CLERK OF COURTS MONTGOMERY COUNTY OHIO

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

Larry C. James 3931 White Spruce Circle Dayton, Ohio 45424 and L. Morgan Banks, III 880 Barber Rd Southern Pines, North Carolina 28387 and Stephen Behnke 624 Maryland Avenue, NE Apt. 8 Washington, District of Columbia 20002 and Debra L. Dunivin 437 New York Ave, NW Unit Y-20 Washington, District of Columbia 20001 and Russell Newman 5265 Cromwell Court San Diego, California 92116 Plaintiffs, v. David Hoffman c/o Sidley Austin LLP One South Dearborn Chicago, Illinois 60603 and	Case No. _____ Judge_____ COMPLAINT JURY DEMAND ENDORSED HEREON

Sidley Austin LLP :
One South Dearborn :
Chicago, Illinois 60603 :
:
and :
:
American Psychological Association :
750 First St., NE :
Washington, District of Columbia 20002 :
:
and :
:
JOHN AND/OR JANE DOES 1-50 :
Names and Addresses Unknown :
:
Defendants :
:
_____ :

37. As some of those headlines indicate, the Report's over-arching narrative and its use of terms implying criminal liability have created an ongoing threat that Plaintiffs will be prosecuted, despite Hoffman's having admitted privately to the APA that he had found no criminal activity. Plaintiffs' critics have relied on the Report to urge 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

38. 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. He was not named in James Risen's book that sparked the Hoffman investigation, he did not voluntarily interject himself into the controversy, and he has no access to broad media channels to defend his reputation. Consequently, Plaintiff James is not a public figure, public official, or limited public figure.

39. 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. He was not named in James Risen's book that sparked the Hoffman investigation, did not voluntarily interject himself into the controversy, and has no access to broad media channels to defend his reputation. Consequently, he is not a public figure, public official, or limited public figure.

40. 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. Dr. Behnke has worked with the Ohio Psychological Association, the Ohio State Board of Psychology, the Cleveland, Ohio, Veterans Administration, and educational institutions in Ohio to offer educational programs to Ohio psychologists and psychology students. 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, Mr. Risen did not interview him. He did not voluntarily interject himself into the controversy, and he has no access to broad media channels to defend his reputation. Consequently, Plaintiff Behnke is not a public figure, public official, or limited public figure.

41. Plaintiff Dr. Debra L. Dunivin is an individual residing at 437 New York Avenue, NW, Unit Y-20, Washington DC 20001. 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 was retired from the military at the time of the Hoffman Report. Although she is named in James Risen's book, Mr. Risen did not interview her. She did not voluntarily interject herself into the controversy, and she has no access to media channels to defend her reputation. Consequently, Plaintiff Dunivin is not a public figure, public official, or limited public figure.

42. Plaintiff Dr. Russ Newman is an individual residing at 5265 Cromwell Court, San Diego, California 92116. Dr. Newman began his career as a psychologist at Harding Hospital in Worthington, Ohio, and served on the Board of Directors of the Ohio Psychological Association. He then worked for the APA in Washington, DC for 20 years, working on behalf of the nation's practicing psychologists and the patients they serve. Dr. Newman served as Executive Director for the APA Practice Directorate from 1994 to 2007. 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

EXHIBIT 1-I

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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STEPHEN BEHNKE, ET AL., : Docket Number: 2017 CAB 005989

:

Plaintiffs, :

:

vs. :

:

SIDLEY AUSTIN, ET AL., :

:

Defendants. : Friday, September 6, 2019

- - - - - - - - - - - - - - - - x Washington, D.C.

The above-entitled action came on for a hearing before the Honorable HIRAM E. PUIG-LUGO, Associate Judge, in Courtroom Number 317.

APPEARANCES:

On Behalf of the Plaintiffs:

BONNY FORREST, Esquire
Washington, D.C.

On Behalf of Defendant Sidley Austin:

THOMAS G. HENTOFF, Esquire
Washington, D.C.

ALEXANDER J. KASNER, Esquire
Washington, D.C.

On Behalf of Defendant American Psychological Association:

BARBARA S. WAHL, Esquire
Washington, D.C.

19-04446

APPEARANCES CONTINUED:

KAREN ELLIS CARR, Esquire
Washington, D.C.

On Behalf of the Intervenor:

ANDREW J. SANDON, Esquire
Washington, D.C.

1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Now calling number 18,
3 Stephen Behnke, et al. versus Sidley Austin, LLP, et al.,
4 case number 2018 CA 005989, Docket Number 18.
5 (Pause.)
6 THE COURT: Okay. All right. Parties, state
7 your names for the record, beginning with the plaintiffs.
8 MS. KITTON: Fara Kitton.
9 THE COURT: I'm sorry, what did you say?
10 MS. KITTON: Fara Kitton.
11 MS. FORREST: Bonny Forrest, Your Honor.
12 THE COURT: Ms. Forrest.
13 MR. HENTOFF: Your Honor, Thomas Hentoff with
14 Alex Kasner for the Sidley defendants.
15 THE COURT: Mr. Hentoff.
16 MS. WAHL: Barbara Wahl on behalf of the
17 American Psychological Association. With me is my
18 partner, Karen Carr, and Dianno Taviano (phonetic sp.),
19 who is the general counsel of this psychological
20 association.
21 THE COURT: Okay, thank you. Who else?
22 MR. SANDON: Good morning, Your Honor. Andrew
23 Sandon on behalf of intervenor District of Columbia.
24 THE COURT: Anybody else from the District?
25 MR. SANDON: No, sir.

1 THE COURT: Okay, thank you. Where are things
2 at when it comes to litigation in other jurisdictions?
3 MS. FORREST: We're on hold in Massachusetts,
4 Your Honor. We filed, as we said in our praecipe that we
5 filed with the Court on Tuesday, we filed the motion
6 solely to supplement that complaint, come consistent with
7 the complaint here, Your Honor, and file the -- a cause of
8 action against what we allege is a republication. The
9 defendants have asked us for an extra month of time to
10 respond to that, which I, depending on the schedule today,
11 I think we're inclined to give them. But that there's a
12 stay in place. We have a status conference with that
13 judge October 29th, I believe it is, Your Honor.
14 THE COURT: When you say amended complaint,
15 that's only in Massachusetts or --
16 MS. FORREST: Supplement the complaint.
17 THE COURT: Supplement.
18 MS. FORREST: To make it consistent. If Your
19 Honor remembers, January 8th, we supplemented the
20 complaint here. We have not supplemented the complaint in
21 Massachusetts. We told the Court we were going to do
22 that, but we were trying to delay that.
23 THE COURT: All right. So, I'm simply trying to
24 determine whether there's any supplemental pleadings, as
25 far as this litigation is concerned in the District of

1 Columbia.
2 MS. FORREST: There was on January 8th.
3 THE COURT: But that's already been done?
4 MS. FORREST: Correct.
5 THE COURT: At least of --
6 MS. FORREST: As of right now, no. The next on
7 docket is the discovery.
8 THE COURT: Okay. Now, there are five pending
9 motions that have been stayed. Four of them relate to
10 ANTI-SLAPP litigation. The fifth one is a motion a motion
11 to declare the D.C. ANTI-SLAPP Act void and
12 unconstitutional. Other than Massachusetts, is there
13 litigation pending or ongoing in any other jurisdiction?
14 MS. FORREST: No, Your Honor.
15 THE COURT: And please remind me because it's
16 been a while, what happened in Ohio?
17 MS. FORREST: Ohio, the Supreme Court did not
18 take the case, Your Honor. It was only solely on the
19 issue of jurisdiction.
20 THE COURT: So what did the trial court rule in
21 Ohio?
22 MS. FORREST: The trial court ruled that the
23 plaintiffs -- because the plaintiffs -- there wasn't
24 enough contacts between plaintiffs in the jurisdiction,
25 that in fact, that this was -- and based on

1 representations of the defendants -- that D.C. was the
2 superior. That this should be -- it should be litigated
3 somewhere else, not Ohio.
4 THE COURT: Now, when it comes to choice of law,
5 what is your position, Ms. Forrest?
6 MS. FORREST: A couple things, Your Honor.
7 First of all, we believe --
8 THE COURT: Well, let me, let me focus the
9 question. Because I don't want to open it -- I don't want
10 the doors to open wide. Which law do you believe should
11 be applicable here?
12 MS. FORREST: Illinois.
13 THE COURT: Is the jurisdiction here premised on
14 diversity?
15 MS. FORREST: No.
16 THE COURT: Would the application of Illinois
17 law stem from any agreement between the parties?
18 MS. FORREST: Yes.
19 THE COURT: What would that agreement be?
20 MS. FORREST: The defendants, in their
21 engagement letter, agreed that Illinois would apply to any
22 issues with respect to the engagement between Sidley and
23 APA. I'm not quoting verbatim, Your Honor, from the
24 document. I'd have to pull it up.
25 THE COURT: Okay. Is that correct, Mr. Hentoff?

1 MR. HENTOFF: Your Honor, no. The defendants
2 have not agreed that Illinois would apply in this case.
3 THE COURT: May I see the document that you
4 maintain supports your position, Ms. Forrest?
5 (Pause.)
6 MS. FORREST: The choice of law provision in the
7 Sidley engagement letter --
8 THE COURT: May I please see the document?
9 MR. HENTOFF: Your Honor, may I approach?
10 THE COURT: Yes, sir.
11 MR. HENTOFF: Okay. I'm going to try to make
12 this easier to read. Your Honor, it's governing law and
13 choice of forum.
14 THE COURT:
15 "This letter shall be governed
16 by and construed in accordance
17 with the laws of the State of
18 Illinois. Any claim or rights
19 under and relating to this
20 engagement letter shall only be
21 brought in the state or federal
22 courts in such state, and the AP
23 and Sibley each agree to submit
24 to the jurisdiction of such
25 courts."

1 So, based on what you're telling me, it -- if your reading
2 is correct, this litigation should be in Illinois, not
3 even here.
4 MS. FORREST: We agree. That's part of the
5 reason we brought it out of the Midwest. But we did it on
6 the context based on the jurisdiction --
7 THE COURT: But you didn't -- I'm sorry, the
8 problem is that your actions are inconsistent with what
9 you maintain today. Because you file a lawsuit in Ohio.
10 You file a lawsuit in Massachusetts. You file a lawsuit
11 in the District of Columbia. And you don't go anywhere
12 near Illinois, other than Ohio. So --
13 MS. FORREST: Your Honor, if I may?
14 THE COURT: Yes.
15 MS. FORREST: The defendants asked to be sued in
16 D.C. and they said that's the place they would consent to
17 jurisdiction. And I'm happy to show you where that is.
18 Otherwise, we would have gone to Illinois as opposed to
19 Ohio. But it's the only place where we felt we could get
20 jurisdiction over the parties.
21 THE COURT: But they didn't consent to applying
22 Illinois law to jurisdiction to litigation brought to the
23 District of Columbia, did they?
24 MS. FORREST: But I don't think -- no.
25 THE COURT: No.

1 MS. FORREST: The answer is no.
2 THE COURT: Okay.
3 MS. FORREST: But I don't think that changes the
4 choice of law of what applies to interpret -- what law
5 applies to the issue.
6 THE COURT: Well, how would the -- you're
7 talking about the ANTI-SLAPP litigation, correct?
8 MS. FORREST: Correct.
9 THE COURT: So why did you file a motion
10 contesting the constitutionality of the D.C. ANTI-SLAPP
11 statute?
12 MS. FORREST: Because that's all they argued in
13 their motion. They didn't argue that Illinois -- they
14 argued in Ohio --
15 THE COURT: You're the one who filed --
16 MS. FORREST: -- that there was a choice of law
17 analysis necessary.
18 THE COURT: You're the one who filed the motion
19 to declare the D.C. ANTI-SLAPP void and unconstitutional,
20 not them.
21 MS. FORREST: Right.
22 THE COURT: Right.
23 MS. FORREST: Because that was in response to
24 their ANTI-SLAPP motion, which doesn't do a choice of law
25 analysis. Since the first document in this case was filed

1 by us on 10/18, and in the complaint, we allege that
2 Illinois law applies.
3 THE COURT: So tell me how applying the Illinois
4 law would make a difference in the outcome here.
5 MS. FORREST: Illinois has said that if you're
6 regressing your rights under the First Amendment to the
7 Constitution, that in fact, you can't apply the Illinois
8 statutes. They've already gone through the constitutional
9 analysis. They've said --
10 THE COURT: Are you saying that the courts in
11 Illinois have found their ANTI-SLAPP law unconstitutional?
12 MS. FORREST: They've modified it to withhold --
13 to make it upstand constitutionality. So it's the exact
14 argument that we're bringing here about the D.C. sector,
15 Your Honor.
16 THE COURT: But again, tell me what impact
17 Illinois law would have on litigation here.
18 MS. FORREST: SLAPP wouldn't apply.
19 THE COURT: I'm sorry?
20 MS. FORREST: SLAPP wouldn't apply to this case.
21 It would proceed through the rules of civil procedure
22 normally. We'd get full discovery. You wouldn't have a
23 motion before you which makes a claim in a truncated
24 proceeding that my folks have to prove a higher standard.
25 And you'd go through the regular process of the D.C. Rules

1 of Civil Procedure, Your Honor.
2 THE COURT: So, let me see if I got this right.
3 You're saying that the Illinois courts have held that
4 ANTI-SLAPP -- their ANTI-SLAPP statute does not apply when
5 a person's exercising their First Amendment rights?
6 MS. FORREST: You're right. That's correct,
7 Your Honor. Sand Home v. Cook Home (phonetic sp.), and I
8 cite it in our papers, Your Honor.
9 THE COURT: But that doesn't make any sense,
10 because that's what ANTI-SLAPP litigation is all about.
11 It’s the exercise of First Amendment rights. But then you
12 tell me that they're -- they still continue to have an
13 ANTI-SLAPP provision in their, in their code?
14 MS. FORREST: It's basically not used very much.
15 Same thing in Massachusetts, same thing in Maine, Your
16 Honor. Every federal circuit that's had a look at this
17 has ruled this is procedural and has a problem. Most of
18 them have ruled it conflicts with the Federal Rules with
19 the exception of the D.C. Court of Appeals. And the First
20 Circuit, which says it's procedural as well. So, a lot
21 has changed since we filed that motion. And the case law
22 has changed dramatically in our favor. Within the First
23 Circuit, Maine has found the First Amendment right to
24 petition of plaintiff's has to be considered. As has
25 Massachusetts. As -- New Hampshire has said nothing at

1 all.

2 THE COURT: Right. But what you're basically

3 saying -- let's put all that aside.

4 MS. FORREST: Yeah.

5 THE COURT: Because everything we're talking

6 about relates to what impact the law in Illinois, if we

7 use it, would have on this litigation. But you're -- what

8 essentially saying is that the parties agreed to use

9 Illinois law in litigation.

10 MS. FORREST: Illinois applies to anything

11 relating to the engagement letter, which this lawsuit

12 relates to Hoffman's engagement. They agreed in advance

13 that Illinois law applies. And if Illinois law applies,

14 their SLAPP statute, they have not argued -- they've only

15 -- they assumed in the motion here, unlike what they filed

16 in Ohio, they assumed D.C. was applying. I immediately

17 filed something with the Court that said no, that's wrong,

18 that's not what applies. That was October 18th. And

19 said, this is Sand Home v. Cook Home, Your Honor. This

20 doesn't apply.

21 THE COURT: So, your answer is yes. You're

22 hanging your hat on the fact that the engagement letter

23 provides for Illinois law to apply.

24 MS. FORREST: That's only part of the analysis.

25 This is Defacage (phonetic sp.) and that's what D.C.

1 follows. And it's a complicated analysis but that's part
2 of it.
3 THE COURT: It ain't that complicated, Ms.
4 Forrest.
5 MS. FORREST: Choice of law analysis, we, we
6 think it's a fairly complicated issue, if you think it's
7 not, Your Honor.
8 THE COURT: There's an engagement letter.
9 MS. FORREST: Okay.
10 THE COURT: And it seems to me -- like, frankly,
11 that's why I asked you all those other questions. Because
12 as far as this choice of law dispute, it's very
13 straightforward. So, what are we going to do with the
14 pending motions?
15 MR. HENTOFF: Your Honor, may I respond to a
16 couple of the points that were just discussed?
17 THE COURT: Yes, sir.
18 MR. HENTOFF: All right. First, let me just
19 back up a little bit. And there is one more proceeding.
20 The Court in the spring granted defendant's motion that
21 plaintiffs Banks and Newman must arbitrate their claims.
22 THE COURT: Correct.
23 MR. HENTOFF: And in late August, the -- those
24 two plaintiffs did serve on -- did file and serve an
25 arbitration demand. So I just wanted to note that.

1 Secondly, the choice of law provision, by contract
2 regarding two parties to the contract, does not govern the
3 choice of law either on plaintiffs' torts -- plaintiffs,
4 strangers to the contract, their tort claims against
5 Sidley and APA. And it doesn't govern a choice of law
6 under -- when ANTI-SLAPP Act applies.
7 THE COURT: So, what you're saying here is that
8 neither Banks, Dunvin, or James were parties to that
9 engagement law --
10 MR. HENTOFF: Correct.
11 THE COURT: -- I mean, the engagement letter?
12 MR. HENTOFF: That's correct.
13 THE COURT: Okay. What it seems that engagement
14 letter looks like, Ms. Forrest, is that if any dispute
15 arose between Hoffman and Sidley Austin means that any
16 dispute between them -- I know you're shaking your head,
17 but I'm letting you know what we're going to do. Okay?
18 We're going to set briefing schedules for the pleadings
19 that need to be filed. If you want to raise the choice of
20 law concern, Ms. Forrest, you can do so within the context
21 of the response that you filed regarding the motion to
22 dismiss under the D.C. ANTI-SLAPP Act. But for the sake
23 of efficiency, be concise and brief about it. Another
24 issue that you have put on the table has to do with
25 whether plaintiffs Banks, Dunvin, and James are private

1 individuals or public figures. Is that correct?
2 MS. FORREST: That's correct, Your Honor.
3 THE COURT: Now, as I understand it, all three
4 of them are -- or were, at the time, high ranking
5 officials within the Army, different aspects of the Army.
6 Is that correct?
7 MS. FORREST: That's incorrect, Your Honor.
8 THE COURT: So Banks was not Director of
9 Psychological Application for the Army's Special
10 Operations Command?
11 MS. FORREST: The relevant time is the time of
12 the publication of the report. They were all retired at
13 that point.
14 THE COURT: Okay. Did Dr. Banks ever fill that
15 position?
16 MS. FORREST: What was the title? Because the
17 title has been gotten wrong four or five times.
18 THE COURT: Director of Psychological
19 Applications for the Army's Special Operations Command.
20 MS. FORREST: Yes.
21 THE COURT: How about plaintiff Dunvin, Chief of
22 the Department of Psychology at Walter Reed Army Medical
23 Center?
24 MS. FORREST: Ten years prior to the whole
25 incident.

√ Digitally signed by Jennifer D. Pylant

ELECTRONIC CERTIFICATE

I, Jennifer D. Pylant, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of STEPHEN BEHNKE, ET AL. V. SIDLEY AUSTIN, ET AL., Case No. 2017 CAB 005989 in said Court, on the 6th day of September 2019.

I further certify that the foregoing 49 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 9th day of September, 2019.

Transcriber

EXHIBIT 1-J

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September 4, 2015

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Re: Independent Review Report

Dear Members of the Special Committee of the APA Board of Directors,

Following APA's public release on July 10 of our 542-page independent review report relating to APA ethics guidelines, national security interrogations, and torture, we received a number of comments relating to our report. After carefully considering all of these comments and reviewing our report again both for substance and typographical errors, we have decided to make certain revisions and corrections to the report. The changes are reflected in the Errata Sheet at the end of the report. Please do not hesitate to let me know if we can provide any further information on this matter.

Sincerely,

David H. Hoffman

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Re: Independent Review Report

Dear Members of the Special Committee of the APA Board of Directors,

It is my honor and pleasure to submit to you our independent review report relating to APA ethics guidelines, national security interrogations, and torture, pursuant to the November 12, 2014 resolution of the APA Board of Directors. Please do not hesitate to let me know if we can provide any further information on this matter.

Sincerely,

David H. Hoffman

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REPORT TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION

INDEPENDENT REVIEW RELATING TO APA ETHICS GUIDELINES, NATIONAL SECURITY INTERROGATIONS, AND TORTURE

==========

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July 2, 2015[+]

[+]Revised September 4, 2015

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EXECUTIVE SUMMARY

I. INTRODUCTION

In November 2014, the Board of Directors of the American Psychological Association engaged our Firm to conduct an independent review of allegations that had been made regarding APA's issuance of ethical guidelines in 2002 and 2005, and related actions. These ethical guidelines determined whether and under what circumstances psychologists who were APA members could ethically participate in national security interrogations.

The gist of the allegations was that 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. Such allegations had also been made for many years—since APA's issuance of ethical guidelines in 2005—by numerous APA critics both within and without APA.

APA engaged us to look back at these events that occurred years ago, to conduct a "definitive" and "thorough" investigation into the allegations and all relevant evidence, and to report what happened and why. The APA Board instructed us to go "wherever the evidence leads" and to be completely independent, and we have been. A Special Committee of the APA Board of Directors was formed, which stressed to us that our inquiry should be broad, so that the allegations could be addressed in a full and complete manner. We have done our best within the past seven months to fulfill that mandate.

The specific question APA has asked us to consider and answer is whether APA officials colluded with DoD, CIA, or other government officials "to support torture." The allegations we have been asked to address frame the question more broadly at times. As a result of our investigation, we can report what happened and why. And as part of that description, we answer whether there was collusion between APA and government officials, and if so, what its purpose was.

****

Fourteen years later, the attacks of 9/11 remain seared in the memories of all Americans old enough to recall them. Beyond the 2,977 killed, many others were personally and permanently affected by the attacks. All of us can remember where we were, and the horrific and shocking images of the attacks' immediate consequences.

The "+" symbol throughout this version denotes September 4, 2015 revisions, with details provided in Errata Sheet at the end

The attacks resulted in the nation going to war in Afghanistan and, later, Iraq, and at home created virtually universal feelings of anger, patriotism, and unity of purpose against those who had committed the attacks. There was a common, shared desire to help our national and local governments respond, either specifically with regard to the attacks or generally with regard to the threat of terrorism.

As we engaged in our task of looking back at important events relating to APA that occurred in the years after 9/11, we have kept firmly in mind the strong and widespread feelings and perceptions from that time regarding the attacks themselves and the threat of future harm. Certainly, those feelings and perceptions were different one week, one year, four years, and ten years after 9/11. Being appropriately sensitive to the mindset of the time would therefore require some precision about which time is at issue. But in general, we remain aware that the passage of time may cause one to forget the sharpness of the feelings immediately after 9/11. And as we have engaged in our historical task, we have done our best to remember with clarity the feelings of these times.

One critical part of the national government's response to the attacks was an attempt to obtain information about how the attacks occurred, whether future attacks were being planned, and where future threats might come from. An important part of that attempt was the interrogation of individuals who had been captured in Afghanistan and elsewhere and were in U.S. custody at Guantanamo Bay and other locations, to determine if they had relevant information. The heart of our inquiry relates to APA's issuance of ethical guidelines that determined when psychologists could ethically participate in such interrogations.

In June 2005, APA convened a task force on the topic. The task force issued a report, largely drafted during the three-day meeting by the APA Ethics Director in consultation with the task force. The report concluded that psychologists could ethically play a role in such interrogations and articulated some ethical guidelines regarding their participation. Less than one week later, the APA Board of Directors, in an emergency session, adopted the report as APA policy and publicized it.

Almost immediately, and for the next ten years, the report and APA's actions in convening the task force, selecting its members, conducting the meeting, drafting the report, and reacting to attempts to change the report's policy have created widespread and intense controversy within APA and the broader psychology community. 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.

The defenders of the task force report and APA's actions, inside and outside APA, say that the criticism is baseless, and denounce the actions of the critics as bullying and their words as false and defamatory. They have accused the critics of recklessly damaging reputations and told us that the critics must be acting out of a political and financial motivation unrelated to the merits of their position. Others have accused the critics of being automatically anti-military, such that any involvement by psychologists in national security endeavors would be considered

unethical. To these defenders, the APA staff and members who worked most closely on APA's ethics policies are (as they have told us) American heroes, and the fact that they have been attacked rather than thanked for their service to their profession and the country is a tragedy.

****

Within about a year after 9/11, information began to emerge publicly about the manner in which individuals taken into U.S. custody abroad in the war on terror were being treated. Fourteen years later, a great deal of information has become publicly available about this treatment, including from reports by the Senate Select Committee on Intelligence (2014) and the Senate Armed Services Committee (2008), although more information emerges on an ongoing basis.

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 engage in a similar set of "enhanced interrogation techniques," although waterboarding was excluded.

The Justice Department office in charge of authoritatively interpreting U.S. law, the Office of Legal Counsel, wrote memos to the CIA in 2002 defining "torture" in a very narrow way. Acts intentionally causing pain to individuals in U.S. custody abroad could only rise to the level of torture, they said, if the effect was equivalent to the pain of a "serious physical injury such as organ failure, impairment of bodily function or even death." Acts intentionally causing psychological harm to such captives would only count as torture if they caused "significant psychological harm" that lasted "for months or even years," such as the development of an actual mental disorder. The memos emphasized that understanding "the context" of the act was important, and that "it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture." The memos added that, regardless of what actions causing psychological harm were taken by interrogators, the actions could not be considered torture if the interrogator could show that he "did not *intend* to cause severe mental pain." Interrogators could show that they lacked this intent by "consulting with experts or reviewing evidence gained in past experience."

In 2003, based in part on these Justice Department memos, Defense Department attorneys wrote a report concluding that a U.S. law barring torture by military personnel was inapplicable to interrogations of detainees, and that causing harm to an individual in U.S. custody abroad could be justified "in order to prevent further attacks" on the United States by terrorists. The report, which essentially repeated the conclusions of the DOJ memos regarding the narrow definition of torture, and became the basis for an authorization to the military command at Guantanamo Bay to use certain interrogation techniques not included in the Army Field Manual. The authorization repeated that the Geneva Conventions were not applicable to the detainees held at Guantanamo.

By June 2005, much of this information had been made public, including the analysis of the Justice Department memos and the 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."

As we write this report, the CIA's use of "enhanced interrogation techniques" is well documented, including in the Senate Intelligence Committee's 2014 report. Among other things, psychologist and CIA contractor Jim Mitchell described in a recent, nationally-broadcast TV interview how he engaged in waterboarding detainees—including how he decided whether to pour water over the strapped-down and blindfolded detainee's face for 10 seconds, 20 seconds, or 40 seconds. The Defense Department's use of enhanced interrogation techniques has also been documented to some degree, including in the Senate Armed Services Committee's 2008 report.

The critics of APA's actions, decisions, and statements relating to this issue, including the 2005 task force report, say that they are horrified by the involvement of psychologists in these types of abusive interrogation methods, and find APA's actions that facilitated or allowed such involvement to be atrocious. They are most critical of the 2005 task force report, but also sharply criticize subsequent APA policy actions on this issue, its handling of related disciplinary complaints against certain members, and some of the key ethics code revisions that APA made in 2002.

Based on the evidence available to them of important interactions between APA and parts of the government, they believe that the only logical explanation for APA's action is collusion or close coordination with the government. 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. And some are convinced that a comparison of the timing of APA's actions and the timing of the Bush Administration's actions establishes that APA was acting in explicit and close coordination with high-level Administration officials. Some label APA's actions "criminal," and have called out by name the APA officials and employees most involved with this issue, with a request that they be prosecuted. They have said that APA's refusal to strictly limit—if not prohibit—the involvement of psychologists in national security interrogations on ethical grounds created an indelible stain on the entire profession, and a warped and improper definition of what it means to be a psychologist.

II. INVESTIGATION PROCESS AND LIMITATIONS

We recognize the substantial limitations on our ability to definitively inquire into this extraordinarily intense dispute. First, we are not psychologists and, until this matter, were not familiar with the people, processes, organization or history of APA. Gaining this familiarity has not been quick or easy. Psychology is a very large profession of great importance to the well being of our citizens, our nation, and the world. And APA, one of psychology's leading professional organizations, is a 122-year-old body with 54 divisions and over 120,000 members. As attorneys and members of our own professional associations, we of course appreciate the importance of what it means to be a profession, and the importance to psychology of APA as its principal professional organization. But we cannot promise that we have been able to conduct this inquiry with the same insights into human behavior that psychologists may have as a result of their professional training and experience. And it took us some time to learn and appreciate the manner in which APA operates, how it is organized, and who the key people are and were—all essential insights in order to investigate the matter.Second, we are not government investigators, and do not have the powers (such as subpoena power) or the same access to government information that such investigators typically have. Although most individuals were quite cooperative and willing to meet with us, that sentiment was not universal, and there were several individuals who declined to meet with us or did not respond to our requests. Since this topic relates in part to the activities of the military and the intelligence community, attempts to obtain information about these activities can be complicated by the fact that some information may be classified. And as non-government investigators, we do not have a security clearance. In addition, our ability to assess whether we are receiving accurate information from former government officials trained in intelligence operations may be limited, especially when combined with the limits on our ability to gather government information on this topic. Some of the best investigators in this area, from the government or otherwise, are people who have been doing so for some time and who therefore have developed sources, among other things. We are obviously not in the same position.

This inquiry is made more difficult by the amount of time that has elapsed since the important events occurred. The key events relating to the APA task force report occurred 10 to 11 years ago, and the events relating to the ethics code revision occurred 13 to 19 years ago. Both because memories fade (and change, as psychologists tell us) and because fewer documents remain available as time goes on, any investigation into events this long ago will have inherent limitations.

In addition, this report simply reflects a summary of our knowledge on this topic at a moment in time. Among other things, there is more investigative work that could be done. New information was continuing to come into our investigation up to the time of our drafting of this report, while some attempts to gather information remain pending (for instance, from witnesses who have to date refused to speak with us or have yet to respond to our request, or from government agencies with whom we still have pending document requests). Being able to call an investigation of this magnitude truly "comprehensive" would likely require many additional months. And in light of the inherent limitations described above, attempting to gather definitive information from government resources may be a very time-consuming process. Our descriptions in this report, especially of the actions and potential motives of government actors, must therefore be seen not as necessarily complete, definitive descriptions, but as a summary of

our best effort to find facts and draw conclusions based on the time we have been provided and the evidence we have been able to review.[1]

Nevertheless, after actively investigating this matter for nearly eight months with a team of six attorneys and conducting investigative activity that we think is fairly characterized as thorough, we have been able to reach conclusions about most of the key issues under dispute based on the extensive evidence we have reviewed.

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At the outset of our investigation, we established a special email address (apareview@sidley.com) and phone line that anyone could use to share information with Sidley. We received nearly 300 emails to the special email address and more than 30 phone calls to the phone line from individuals who wanted to provide us with information.

We have reviewed over 50,000 documents, the most important of which were a very high volume of emails from APA that remained from many years ago. At the beginning of the investigation, we did not know whether APA's computer systems would contain substantial email or other documentary evidence from 10 to 15 years ago. We were pleasantly surprised to learn that a very large volume of emails and other documents remained based on voluntary decisions to save emails and documents, especially from 2004 forward, although we know that we have a necessarily incomplete set because of deletions over time and the loss of data associated with departed employees.

From APA, we received an immense volume of emails, electronic files, and hard copy documents, including contemporaneous handwritten notes. These documents consisted of files collected from the Executive Management Group, the Ethics Office, the Ethics Committee, the Executive Office, the Science Directorate, the Office of General Counsel, the CFO, the Board of Directors, and the Council of Representatives. The files contained, among other things, Board meeting materials, Council meeting materials, Ethics Code Task Force materials, PENS Task Force materials, APA financial statements, information on APA grants and contracts, APA rules

[1] To be clear, APA has not placed a time limit on our investigation. On the other hand, the Special Committee of the APA Board has made it clear to us that APA has a very strong preference that it be able to send our report, along with recommendations from the Board, to the APA Council of Representatives in advance of that body's August 2015 meeting so that the matter can be considered by the Council at its meeting. And in order to meet that time frame, the Special Committee requested that we provide our report to the APA Board by late June 2015. As set out below, our extensive investigation has allowed us to reach certain clear conclusions relating to the actions, decisions, and motivations of APA and its key officials and employees on this topic. While further investigation may provide fuller information regarding these conclusions, and could conceivably lead to new conclusions regarding these APA actors or others, we are clearly able to reach the conclusions set out in this report based on the evidence we reviewed, conclusions which address the principal questions at the heart of our inquiry. Any decisions about whether to disseminate this report beyond the APA Board of Directors are being made by the Board. We are providing our report to the APA Board, and then they will take whatever actions regarding our report they believe are appropriate.

and policies, Ethics Committee Rules and Procedures, and adjudications files. In addition, we reviewed data from seven APA listservs.[2]

We have also received electronic files, hard copy files, and contemporaneous handwritten notes from a wide variety of individuals outside APA, ranging from former APA officials, to former government officials, to important APA critics who have collected a huge volume of information on this topic over the years. We sent document requests to government agencies under FOIA (some of which remain pending at the time of this report), as well as former APA Presidents, Ethics Code Task Force members, PENS Task Force members and observers, former Board members, and former APA employees. Many of these individuals searched their files and sent us relevant documents, which we reviewed. We also met with a former APA President at his home in Ohio and searched his electronic and hard copy files to collect relevant documents.

We received numerous helpful documents from the files of APA critics, including Steven Reisner, Stephen Soldz, and Nathaniel Raymond, including the collection of emails from the late RAND Corporation analyst and CIA contractor, Scott Gerwehr, which formed the basis for some of the analysis in Risen's book, and for a subsequent report issued by these three critics. In addition, we received and reviewed documents from the PENS Archives established by Jean Maria Arrigo at the University of Colorado-Boulder.

We have conducted well over 200 interviews of 148 people.[3] Many of these were in person, and we conducted interviews in 14 different cities and 10 different states, including California, Illinois, Massachusetts, Michigan, Montana, New York, North Carolina, Ohio, Oregon, and Pennsylvania. We interviewed individuals from virtually every perspective on these issues, including all the principal APA critics; many current and former APA employees, officers, Presidents, Board members, committee members, and task force members; numerous former government officials including key individuals from the CIA and Defense Department; and outside experts on ethics.

A small number of important witnesses refused our requests for an interview. One especially important witness with strong links to the CIA, prominent psychologist Mel Gravitz, declined to meet with us. Gravitz, who worked for many years with the CIA as a contractor, is nearing 90 and politely informed us by phone that he did not think he recalled anything from this time. But Gravitz, an expert in memory and hypnosis, also declined to meet with us to see if documents he either wrote or was named on would refresh his recollection. In addition, a former member of the 2002 APA task force on the revision of the ethics code (and former CEO of the APA Insurance Trust), Bruce Bennett, refused to meet with us, although he said he would make himself available for written questions. (After our third request, Bennett said he would not be

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[2] We reviewed the following listservs: PENS Task Force, COR (Council of Representatives), COLI (Committee on Legal Issues), DIV13SECURITYSIG (Division 13 - Members in National Security Settings), DIV24ETH (Discussions concerning ethics education and ethical issues), EMG (Executive Management Group), SPIN (Science Policy Insider News) (on file with Sidley).

[3] Attachment A to this report is a list of the individuals we interviewed during our investigation, as well as those individuals we attempted to interview but were unable to either because they declined our request or did not respond.

available for an in-person interview until September, and would not make himself available for a phone or video interview.) As of the date of this report, we have not received Bennett's written answers. Dr. Martin Seligman also insisted on answering only written questions, although he proactively made himself available to us and answered our questions promptly. Virtually all CIA and DoD officials for whom we have evidence of interaction with APA agreed to our requests for an interview, though some of the other CIA and DoD officials we sought to interview declined or did not respond to our interview requests.

Other witnesses significantly delayed meeting with us. Scott Shumate, an important PENS Task Force member and former CIA and DoD official (Director of Behavioral Science at DoD's Counter Intelligence Field Activity agency), refused to speak with us for months. He retained an attorney to negotiate meeting with us, and only made himself available for a grudging interview toward the very end of our investigation after numerous attempts at contacting him. And the chair of the 2002 Ethics Code revision task force, Celia Fisher, the most important witness regarding the ethics code revision, refused to speak with us for several months, slowing down our investigation on this topic substantially. Ultimately, however, she was very cooperative and answered fully and promptly all our inquiries in person and in writing.

We received complete cooperation from APA, which opened up all its electronic and hard-copy files to us, gave direct instructions to all its employees to cooperate fully with regard to interviews and documents, and acted promptly to fulfill our numerous requests. All APA employees made themselves available to us promptly and for extensive periods of time, sometimes at substantial sacrifice to personal commitments, and always acted professionally despite sometimes feeling very challenged in uncomfortable ways by our questions. Many people who formerly served in important APA positions or important government positions generously gave us much of their time, despite having no obligation to do so, including many who welcomed us into their homes to be interviewed.

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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.

III. SUMMARY OF THE INVESTIGATION'S CONCLUSIONS

Our principal findings relate to the 2005 task force, which was formally empanelled by the APA President and was called the Presidential Task Force on Ethics and National Security, or "PENS." The task force finalized a report on June 26, 2005 containing 12 ethical guidelines that were adopted as official APA ethics policy by the APA Board on an emergency basis less than one week later.

Our investigation determined that 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. We concluded that APA's principal motive in doing so was to align APA and curry favor with DoD. There were two other important motives: to create a good public-relations response, and to keep the growth of psychology unrestrained in this area.

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. 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. In numerous confidential email exchanges and conversations, the APA Ethics Director regularly sought and received pre-clearance from an influential, senior psychology leader in the U.S. Army Special Operations Command before determining what APA's position should be, what its public statements should say, and what strategy to pursue on this issue.

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. Thus, we conclude that in 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 indifference to the actual facts regarding the potential for ongoing abusive interrogations techniques.

While we found many emails and discussions regarding how best to position APA to maximize its influence with and build its positive relationship with the Defense Department, and many emails and discussions regarding what APA's messaging should be in a media environment it perceived as hostile, we found little evidence of analyses or discussions about the

best or right ethical position to take in light of the nature of the profession and the special skill that psychologists possess regarding how our minds and emotions work—a special skill that presumably allows psychologists to be especially good at both healing and harming.

We found that current and former APA officials had very substantial interactions with the CIA in the 2001 to 2004 time period, including on topics relating to interrogations, and were motivated to curry favor with the CIA in a similar fashion to DoD. But we did not find evidence that the relationship with the CIA contributed to the outcome of the PENS Task Force, apparently because APA's key CIA contact for the APA retired in 2005 before the PENS Task Force met, and perhaps because the CIA's enhanced interrogation technique program was on the wane in 2005, as reported by the Senate Intelligence Committee in its 2014 report.

With regard to the revisions of the Ethics Code in 2002—and most notably a revision to Standard 1.02, providing that psychologists who experienced a conflict between an APA ethical obligation and a law or order from a superior could follow the law or the order without committing an ethical violation, if the conflict could not be resolved (labeled a "Nuremberg defense" by critics)—we found that the meaningful changes occurred prior to 9/11 and were not influenced by an effort to help the government's interrogation efforts. We did find, however, that the "Nuremberg defense" issue was raised to APA officials during the Ethics Code revision process, but that they failed to follow up on it.

Finally, we found that the handling of ethics complaints against prominent national security psychologists was handled in an improper fashion, in an attempt to protect these psychologists from censure.

We set out a summary of the evidence and our findings below. We then turn, in Section IV of this Executive Summary, to answers to the questions presented in the charge, in light of the evidence and our findings. And in Section V of this Executive Summary, we provide some closing comments.

A. Conclusions Regarding PENS Task Force and APA/Defense Department Collusion (2005 – 2008)

The evidence establishes that the composition of the PENS Task Force, the key ethical statements in the task force report, and many related APA public statements and policy positions were the result of close and confidential collaboration with certain Defense Department officials before, during, and after the task force met. The details and level of this coordination varied over time, ranging from some coordination to a very close partnership, in which key APA officials were operating in a virtual joint venture with key Defense Department officials. Their joint objective was to, at a minimum, create APA ethics guidelines that went no farther than—and were in fact virtually identical to—the internal guidelines that were already in place at DoD or that the key DoD officials wanted to put in place. Thus, their joint objective was to create APA ethics guidelines that placed no significant additional constraints on DoD interrogation practices.

For the APA officials who played the lead role in these actions, their principal motive was to curry favor with the Defense Department for two main reasons: because of the very substantial benefits that DoD had conferred and continued to confer on psychology as a

profession, and because APA wanted a favorable result from the critical policy DoD was in the midst of developing that would determine whether and how deeply psychologists could remain involved in intelligence activities. APA's motive to curry favor with DoD was enhanced by personal relationships between APA staff and DoD personnel, an important conflict of interest that was intentionally ignored; as a result, —powerful executive leaders—who 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.

APA officials had two important secondary motives: First, APA wished to implement a media communications strategy in which APA could portray itself as very engaged in the issue and very concerned about ethical issues, as a reaction to APA's perception that it was receiving and would otherwise continue to receive negative press coverage on this issue. And second, APA wanted to foster the growth of the profession of psychology by supporting military and operational psychologists, rather than restricting their work in any way.

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. 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 into or express concern regarding abuses that were occurring, thus effectively hiding its head in the sand.

APA remained deliberately ignorant even in light of obvious countervailing concerns that counseled in favor of crafting clear policies: Strict ethics rules that clearly and specifically constrain undesirable behavior can be critical in preserving the integrity of a profession, especially in situations when other methods of constraining such behavior (e.g., consultation, adjudication) are less feasible, as here. 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.

Although APA officials insisted at the time, and for years after, that all their actions were based on independent ethics and policy judgments about how to provide appropriate ethical guidance for psychologists who worked in this area, we found that this was not the case. Instead, 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.

On the most important issue the PENS Task Force was asked to consider—where to draw the line for psychologists between unethical and ethical interrogation practices—the key APA official who drafted the report (the APA Ethics Director) intentionally crafted ethics guidelines that were high-level and non-specific so as to not restrict the flexibility of DoD in this regard, and proposed key language that was either drafted by DoD officials or was carefully constructed not to conflict with DoD policies or policy goals.

The leading ethical constraint in the report was that psychologists could not be involved in any way in torture or cruel, inhuman or degrading treatment. But it was well known to APA officials at the time of the report that the Bush Administration had defined "torture" in a very narrow fashion, and was using the word "humane" to describe its treatment of detainees despite the clear indications that abusive interrogation techniques had been approved and used. Thus, APA knew that the mere use of words like "torture," "inhuman," or "degrading" was not sufficient to provide guidance or draw any sort of meaningful line under the circumstances.

Although the relatively small number of non-DoD voting members of the task force made some efforts to push for greater specificity and for definitions based on the Geneva Conventions, their efforts were rejected by the DoD members of the task force, the APA Ethics Director, and the other key APA officials who were included in the meeting. And a key passage of an earlier draft that would have created an ethical prohibition on psychologists being involved in interrogation techniques that intentionally caused psychological distress (albeit with a big loophole) was replaced in the final version by language handwritten by the key DoD official on the panel that created no such prohibition whatsoever.

1. Key players

The APA official who led this behind-the-scenes coordination with the DoD officials was the Ethics Director, Stephen Behnke, and the key DoD official he partnered with was Morgan Banks, the Chief of the Psychological Applications Directorate for the U.S. Army Special Operations Command and a senior psychologist of the Army SERE Training program at Ft. Bragg.[+] During the task force's pre-meeting communications, during its three-day meetings, and in preparing the task force report, Behnke and Banks closely collaborated to emphasize points that followed then-existing DoD guidance (which used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation), to suppress contrary points, and to keep the task force's ethical statements at a very general level in order to avoid creating additional constraints on DoD. They were aided in that regard by the other DoD members of the task force (who, for the most part, also did not want ethical guidance that was more restrictive than existing DoD guidance), and by high-level APA officials who participated in the meeting.

Other leading APA officials intimately involved in the coordinated effort to align APA actions with DoD preferences at the time of PENS were then-APA President Ron Levant, then-APA President-Elect Gerald Koocher, and then-APA Practice Directorate chief Russ Newman. Then-APA Board member Barry Anton participated in the selection of the task force members

along with Levant, Koocher, and Behnke and in the task force meeting, but was involved substantially less than the others. Other members of the APA executive management group—namely, CEO Norman Anderson, Deputy CEO Michael Honaker, General Counsel Nathalie Gilfoyle, and communications director Rhea Farberman were involved in relevant communications, as described below.

The other DoD official who was significantly involved in the confidential coordination effort was Debra Dunivin, the lead psychologist supporting interrogation operations at Guantanamo Bay at the time who worked closely with Banks on the issue of psychologist involvement in interrogations. At times, they were coordinating their activities with the Army Surgeon General's Office. There is evidence that Banks was consulting with other military leaders, likely in the Army Special Operations Command and the Joint Task Force – Guantanamo, although this was not the focus of our investigation, in part because of our limited ability to access DoD documents and personnel. Another important DoD official involved in some coordination with Behnke was PENS task force member Scott Shumate, a former CIA official who was head of behavioral sciences for a newly-created counter intelligence unit (CIFA) within DoD, which reported to the Under Secretary of Defense for Intelligence.

For Banks, Dunivin, and others at DoD, the attention on the abusive treatment of detainees as a result of the media disclosures of Abu Ghraib, the torture memos, the DoD working group report, and other related events created uncertainty and worry about whether the involvement of psychologists in interrogations would be deemed unethical. Some in DoD, such as civilians Shumate and Kirk Kennedy at CIFA, were pushing APA to move forward with action that would 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.

2. Conflict of interest

One of the key APA officials who participated in the task force meeting was Russ Newman, the powerful head of the APA Practice Directorate, the most influential unit within APA headquarters. Newman also participated in numerous internal discussions, at the Board and staff levels, involving the creation of the task force, and had apparently consulted with Banks regarding the language of the task force proposal prior to the Board meeting at which the creation of the PENS Task Force was approved.

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.

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.

3. APA's motive to please DoD

The very substantial benefits APA obtained from DoD help explain APA's motive to please DoD, and show that APA likely had an organizational conflict of interest, which it needed to take steps to guard against. DoD is one of the largest employers of psychologists and provides many millions of dollars in grants or contracts for psychologists around the country. The history of DoD providing critical assistance to the advancement and growth of psychology as a profession is well documented, and includes DoD's creation of a prescription-privileges "demonstration project" in which psychologists were certified to prescribe psychiatric drugs within DoD after going through a two-year training course. While APA took one significant step in 1991 that disappointed many military psychologists—refusing to allow DoD ads in APA's publications because of DoD's discriminatory position regarding gays and lesbians in the military—APA had lifted its advertising ban in 2004. And by the time of the PENS Task Force, contemporaneous internal discussions show that improving APA's already strong relationship with DoD was a clear priority for those APA officials working on the PENS Task Force.

In addition, at the time of the task force's creation, DoD was in the midst of developing policy about how psychologists and psychiatrists could participate in interrogations and other intelligence-collection activities. APA wanted to positively influence DoD regarding this policy so that psychologists would be included to the maximum degree possible, and psychologists would not lose the lead role to psychiatrists. APA used the pro-DoD task force composition and report to show its strong support to DoD, with the hope or expectation that APA would be rewarded with a very prominent role for psychologists in this new policy. And in fact, the policy did provide a very prominent role for psychologists, a fact celebrated by the APA officials who had worked most closely on the task force.

4. Other motivations

The other two principal motivations of the lead APA officials—PR strategy and growing the profession of psychology—also played an important role in the way APA handled the PENS Task Force process and outcome. As some in the APA leadership group discussed candidly, well in advance of the PENS process, advancing these goals created a dilemma: on the one hand, they wanted to take a position that allowed psychologists to be as involved as possible in interrogations, including in some of the less extreme efforts to "break down" uncooperative detainees; but on the other hand, they knew that to articulate this publicly in any sort of detail would look horrible. They also worried about what they saw as negative press reports that made APA appear to be stumbling and unsure about this issue. 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 that avoided the difficult issue by keeping ethical guidelines at a high level.

5. Subordination of ethics analysis

What is also clear from the evidence is that the decisions from the key APA officials about how to proceed regarding the PENS Task Force—its composition, the substance of the report, how to adopt it as policy, what public explanations to make, and whether and how to change the policy once there was pressure to do so—were not based in any meaningful way on ethics analysis.

To advance its PR strategy, APA issued numerous misleading statements that hid its true motives, in an attempt to explain and justify its ethics policy and the PENS Task Force report in positive terms. At times, APA's statements stressed a pro-human-rights message: the task force report and APA policy were issued to provide "strict ethical boundaries" that carefully protected human rights and ensured that psychologists were not involved in harsh and abusive techniques. At the same time, the misleading public statements stressed that APA could not be expected to be more detailed than it had been: they said APA needed to respect that the issue was complicated, that they did not have all the facts or context necessary to make ethical judgments, that the issue needed more time to develop, and that the task force report was just an initial step. At other times, APA said that they were just following the will of a diverse group of task force members who had adopted the report in either a unanimous or consensus fashion.

We found that none of these explanations accurately reflected APA's true reasons for proceeding as it did. The fact that a robust ethics analysis was not part of this ethics process led by the Ethics Director was surprising to us, but is consistent with two additional observations revealed by our investigation.

First, Ethics Director Behnke often acted as APA's chief of staff on this issue, taking the lead in recommending and drafting virtually all APA decisions and statements on this issue, whether relating to Board strategy, PR, Capitol Hill lobbying, or APA Council of Representatives management and strategy, among others. As we have learned in this investigation, Behnke is a brilliant and highly educated psychologist and lawyer, a nice and charming person, a highly gifted and fast writer, and a very sophisticated and nuanced strategist and communicator. 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.

Second, APA leaders had decided in the 1990s (before Behnke's arrival at APA in 2000) that APA's ethics policies and practices had been too aggressive against psychologists, and that a more protective and less antagonistic ethics program was appropriate. They wanted a greater focus on ethics education and consultation, and much less emphasis on strict rules and robust enforcement of disciplinary complaints. Revisions to the Ethics Code focused in part on making the rules more precise to ensure that psychologists had proper notice about what behavior was considered unethical, and to minimize APA's litigation risk from lawsuits by sanctioned psychologists. A provision about how to handle conflicts between legal and ethical obligations (Ethics Code Standard 1.02) was expanded so that psychologists could follow court orders or military orders requiring them to engage in conduct otherwise prohibited by the Ethics Code, as long as they attempted to resolve the conflict first. Behnke was hired specifically to pursue an ethics program that was more "educative," and he fulfilled these goals. During his tenure, APA disciplinary adjudications plummeted, and the focus shifted to "supporting" psychologists, not getting them in trouble — a strategy consistent with the ultimate mission of growing psychology.

Thus, when the time became ripe to consider what ethical constraints to put on an important group of psychologists, two factors that could conceivably have created internal pressure in APA for those ethical constraints to be strong — an Ethics Director focused principally on an analysis of ethics, torture, and psychological distress by those in captivity, and an ethics approach that had a robust focus on the integrity of the profession and the protection of the public — were not present.

6. <u>The creation of the task force and selection of its members</u>

The idea of the PENS Task Force arose from the intersection of two forces: First, one of the CIA's lead psychologists (Kirk Hubbard), who had been working closely with the APA Science Directorate (as summarized in section III.C below), emailed APA in March 2004 to say that he and CIA contractor psychiatrist Andy Morgan had concerns that psychologists were assisting interrogations in ways that contradicted the APA Ethics Code. (There is reason to doubt whether Hubbard actually shared this concern; the more likely explanation appears to be that Hubbard was passing on a concern shared by Morgan and one of Hubbard's colleagues, Kirk Kennedy, who was undercover at the time and is now at the FBI.) This email prompted internal discussions that led to a July 2004 confidential meeting at APA for CIA, DoD, FBI, and academic psychologists and psychiatrists to discuss the issue. Second, the April 2004 media disclosure of the Abu Ghraib abuses led to intense media coverage on this issue, which led to requests from APA members to APA leadership that it address the issue. Behnke took the lead on the issue and, in internal emails and meetings in May 2004, suggested that APA take a "cautious" approach (perhaps by studying the issue through a task force), and that the approach be "forward looking, positive, [and] supportive" to national security psychologists and not "cast a shadow" on such psychologists or suggest that they were under suspicion.

Little happened after this July 2004 confidential meeting, despite some attempts by two DoD (and former CIA) psychologists, Kirk Kennedy and Scott Shumate, to push APA to take

some concrete steps on the issue. Then, on November 30, 2004, the *New York Times* published an article revealing allegations from a leaked report by the International Committee of the Red Cross that psychologists at Guantanamo had been involved in psychological and physical coercion that was "tantamount to torture."

The article prompted an immediate and sustained effort by APA executives, including Behnke, to figure out how to address the issue from a messaging perspective. Within days, the idea of a task force—suggested at that time by President-Elect Koocher, clearly in part as a reaction to the threat that a pro-human-rights division in APA would push for an aggressive resolution in the Council of Representatives that would likely be very negative for DoD and intelligence psychologists—was discussed, and internal steps were taken to implement it. The Board tentatively approved the idea at its December 2004 meeting, and work on selecting potential task force members began in early January (accelerated by another concerning article on the topic by Gregg Bloche and Jonathan Marks in the *New England Journal of Medicine*).

Although the ultimate PENS Task Force was intentionally weighted in favor of the DoD (a critical factor in its outcome), the initial staff-recommended task force members were more equally divided. By mid-January, Behnke and staffers in the APA Science Directorate had chosen ten recommended task force members and about ten to fifteen back up candidates. The ten recommended names included five non-military/government psychologists (including three who wound up on the task force—Jean Maria Arrigo, Olivia Moorehead-Slaughter, and Michael Wessells), one non-military/government psychologist who had conducted trainings for the military and FBI, and four military/DoD psychologists (including Debra Dunivin, and one who wound up on the task force—Michael Gelles).

However, things had changed by the February 2005 Board meeting. Prior to the Board meeting and vote, APA (apparently through Russ Newman) confidentially consulted with Morgan Banks about the language of the actual Board agenda item defining the task force proposal before the APA Board voted on it, and Banks provided written comments. At the Board meeting, with Levant, Koocher, and Newman participating in the discussion on this item, the Board authorized the creation of the task force but decided not to accept the staff recommendations and decided instead to solicit task force nominations from APA divisions and members.

Almost immediately, Dunivin intervened in the process, insisting to Levant and Behnke that Banks must be included in the task force, and that the composition of the task force was "critical to accomplishing its mission." Dunivin then delivered a strongly-worded letter to Behnke the day before the March 2005 meeting of the task force selection committee (Levant, Koocher, APA Board member Barry Anton, and Behnke), in which she identified all but one of the six DoD members initially chosen for the task force. This letter was the sole outside document present before the selection committee during its deliberations. The other document was a thick binder of the 111 prominent psychologists who had been nominated for the task force, about 70% of whom were non-military/government psychologists.

Nevertheless, the selection committee chose six (out of the 10) military/DoD psychologists. They were Banks, Shumate, Larry James (an Army Colonel who was deployed to Guantanamo as the lead BSCT psychologist prior to Dunivin, and was also deployed to Iraq after

the Abu Ghraib controversy to help address the problem), Michael Gelles (a Navy Criminal Investigative Services psychologist), Bryce Lefever (a Navy psychologist who previously had been a SERE instructor), and Robert Fein (a DoD contractor who worked in CIFA with Shumate, and also had been appointed by the Director of Intelligence to the Intelligence Science Board). Of the other four, one (Moorehead-Slaughter, the Vice-Chair of the APA Ethics Committee) was made the non-voting chair of the task force by the selection committee, and she later went along with the direction that the military/DoD psychologists and Behnke pursued at the meeting. The others were Jean Maria Arrigo, Nina Thomas, and Michael Wessells. The result was a task force tilted 6 – 3 in favor of DoD officials. In addition, Koocher and Anton were named Board liaisons to the task force, and Koocher, in particular, took aggressive and vocal positions against the three non-DoD members: thus, the split was effectively 7 – 3 while Koocher was at the meeting.

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.

7. Discussions before the meeting

A task force listserv for TF members and key APA officials (Behnke, Koocher, and Anton) was established in April 2005. At least four important things occurred during the discussions on the listserv between April and June, leading up to the task force meeting. First, the behind-the-scenes communications show that Behnke was actively managing the direction of the discussions on the listserv, in part by drafting emails in which decisions were made or topics suggested for the task force chair (Moorehead-Slaughter), who would then send them to the listserv verbatim. An analysis of her emails on the listserv shows that virtually all of Moorehead-Slaughter's postings were written by Behnke, which Moorehead-Slaughter and Behnke conceded to us.

Second, Banks and Behnke collaborated behind the scenes about the eventual content of the task force's report, with the result that the key high-level framework set out in the then-draft DoD policy regarding the participation of psychologists in interrogations was (i) proposed by Banks on the listserv as a good framework for the task force, and then (ii) recommended by Behnke (through Moorehead-Slaughter) as a good framework for the task force. (This draft DoD policy was written by Banks and Dunivin and later converted almost verbatim to official DoD policy.) The framework—interrogation practices must be "safe, legal, ethical and effective" ("SLEE") —was touted by Banks as a safeguard that would somehow ensure the humane treatment of detainees. In reality, however, it was a malleable, 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. The evidence shows that minutes before Behnke sent Moorehead-Slaughter a draft email from his computer laying out the argument for the SLEE framework (which she posted verbatim minutes later), Banks had made the final edits on a document on his computer highlighting some of the same arguments for the SLEE framework (a document that was then likely shared with Behnke). And the SLEE framework became one key portion of the task force's report.

Third, 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, twenty minutes after Moorehead-Slaughter's post, Barry Anton recommended APA Practice Directorate chief Russ Newman as an observer (despite Newman's conflict arising from his marriage to Dunivin, the Army's lead interrogation-support psychologist at Guantanamo, described above). Ten minutes later, Banks posted that he agreed. And a short time later, Moorehead-Slaughter declared that Newman would be included. Michael Gelles subsequently recommended long-time CIA contractor/psychologist Mel Gravitz (sometimes called the "father of operational psychology"), and he was quickly "confirmed" by Moorehead-Slaughter. Our investigation uncovered that Gravitz had played an important role inside the CIA in clearing the way for CIA contract psychologist Jim Mitchell to continue participating in CIA interrogations in 2003 after some within the CIA protested that his work was unethical, and had also attempted to influence an APA 2002 disciplinary proceeding against Michael Gelles.[4]

In contrast to the quick approval of Newman and Gravitz as observers, suggestions by others (such as the suggestion from non-DoD task force member Jean Maria Arrigo that the medical ethicist for the American Medical Association be invited) were ignored.[5] Both Gravitz (who was there for the second and third days of the meeting) 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.

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[4] In 2003, in response to an internal dispute within the CIA about whether it was ethical for CIA contract psychologist Jim Mitchell to continue to participate in interrogations, Gravitz provided a written ethics opinion to Mitchell and the CIA in which he concluded that the APA Ethics Code should be "flexibly" interpreted and important weight given to the "ethical obligation" to protect the nation from harm. As a result of Gravitz's opinion, we were informed, Mitchell was able to continue his participation in the interrogation program. This is discussed in Section III.C of the Executive Summary, below. We also learned that in 2002, when Gelles was being investigated by the Ethics Office for a disciplinary complaint (as has been publicly reported) relating to his interaction with a soldier under criminal investigation for espionage, 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. This is discussed in Section III.E of the Executive Summary, below.

[5] Behnke invited two FBI psychologists to attend as observers, but they declined. While Newman, Gravitz, Koocher, and Levant sat at the table with the task force members, other observers sat in chairs along the side of the room. These were all APA staffers, including Science Directorate staffers Mumford and Kelly, but also included former APA Science Fellow and then White House science staffer Susan Brandon. Brandon did not speak at the meeting but contributed language to part of the report, as discussed below.

Fourth, efforts by Jean Maria Arrigo to set a broad agenda for the discussion and to ask whether certain assumptions behind the task force were correct (for instance, whether it was realistic to create a system of enforceable ethical guidelines for psychologists operating in a classified environment, since enforcement by a professional association would likely be impossible), were quickly rebuffed by Koocher in aggressive listserv posts. This was an intentional effort to curb dissent to the frame of reference APA had already decided upon—that the task force would issue a report at the end of three-day meeting that would conclude that psychologists could ethically support interrogations, thus pleasing DoD, and that would be written in a manner that would provide APA with a good media statement to respond to the perceived negative press.

8. Task force meeting and report

Our understanding of what occurred at the task force meeting and the behind-the-scenes drafting of the report was aided by interviews with every task force member and all but one observer, and the review of many documents and previously-undisclosed contemporaneous handwritten notes.

The 2 ½ day meeting on June 24-26 in the APA board room resulted in a report drafted by Steve Behnke over those three days that, with two minor changes by the APA Ethics Committee a few days later, became the PENS Task Force Report. The report said that psychologists could serve as consultants to national security interrogations consistently with the Ethics Code, and articulated two high-level limitations on that activity, without further significant definition: psychologists could not be involved in torture or cruel, inhuman or degrading treatment, and psychologists should attempt to ensure that interrogation methods were safe, legal, ethical and effective.

As one of the DoD task force members who thought the report should have gone farther told us, this language was "loose" and "not defined."As he noted, key issues — whether a psychologist could cause psychological distress or physical pain to a detainee; if so, whether it was important to differentiate between "harm" and distress / pain; and if so, how one drew the line—were not addressed in the report despite the fact that an early draft of the report did attempt to cover those issues. (At Banks's request, and to a lesser extent James's, the report did not restrict psychologists from continuing to access detainee medical records, and instead prohibited psychologists from using them to the detriment of the detainee's safety and well-being.) As this DoD task force member said and a wide variety of evidence confirms, these "loose" limitations were intentionally chosen by Behnke because they reflected what Morgan Banks and key parts of DoD wanted.

a) Key DoD task force members

Of the six DoD task force members, Banks and Scott Shumate appeared to have the most prominent positions within DoD, and Banks worked integrally on interrogation support issues. (Shumate, apparently, did not, although he apparently had done so while at the CIA.) As Command Psychologist for the Army Special Operations Command and the senior Army SERE psychologist, Banks worked closely with and was involved with the Army psychologists at Guantanamo Bay and elsewhere who supported interrogations, including Dunivin. 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).

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 to get the APA's "good housekeeping" seal of approval for the involvement of psychologists in interrogations, and to otherwise keep the status quo and avoid limits or constraints beyond the ones the Army or DoD had in place (or would decide to put in place in the future).

Banks told task force members that he had consulted with his generals within his U.S. Army Special Operations Command and had already come to an agreement with his leaders that the "safe, legal, ethical, and effective" framework was the appropriate way forward. He also made a reference to "his generals" during the meeting, presumably a reference to the commanding generals of Army Special Operations Command and the Army Medical Command (the Army Surgeon General), and perhaps of the U.S. Special Operations Command, the Joint Task Force – Guantanamo, and the U.S. Southern Command. And the evidence shows that the Army Surgeon General's Office was in fact in the midst of developing DoD policy on this issue.

Banks said and gave the impression that he did not want other DoD members to deviate from the direction he was pursuing. For most of the DoD members, this was either unobjectionable or in line with what they wanted to achieve. Gelles and James both believed psychologists should continue to be involved as consultants in interrogations, and at the time this remained a significant part of Gelles's job as a criminal investigator with NCIS. And both Gelles and James indicated in the meeting, in different ways, that a high-level report would probably be preferable to a more specifically-defined one. Shumate made it clear that he was uncomfortable with public disclosure of specific examples that might provide further guidance; that he thought "coercive" was too broad a word to be used in this context; and that he wanted to manage the task force's public message by using words that softened the reality of the pressure DoD psychologists faced to help produce actionable intelligence. Fein, a DoD contractor within Shumate's unit, did not say as much but was not going to object to the positions of actual DoD officials.

Lefever, different than the other DoD members, believed the task force would accomplish little if it did not provide specific, defined guidance about when a psychologist could intentionally inflict physical pain or psychological distress, and how to determine an approximate line between pain and harm. In his desire for greater specificity, Lefever was actually in agreement with the task force's two substantial dissenters—Wessells and Arrigo—although he was in sharp disagreement with them about where to draw specific lines. Lefever said that once it became clear to him that the task force's APA leadership (Behnke, Koocher, Anton and Newman) and chair (Moorehead-Slaughter) were not going to insist that the report go beyond a high-level, loose set of guidelines, he stopped trying to push for greater specificity and accepted the result, which he saw as unobjectionable but a clear failure of leadership.

b) Efforts by non-DoD task force members

There were two very strong pushes by Wessells during the meeting that—if accepted—would have created a report with tighter, more specific ethical constraints on national security psychologists involved in interrogations, in ways that would have been inconsistent with the strong preferences of Banks and DoD. The first, an attempt to use the provisions of the Geneva Conventions or other common international law sources to define the high-level terms being discussed at the meeting, was joined strongly by Arrigo and Nina Thomas. This attempt was rejected by the other members of the task force, and was therefore rejected in the Behnke-drafted task force report. The second, a subsequent attempt to create specificity within the document in other ways, by discussing where to draw the line between permissible and impermissible interrogation techniques was primarily pushed by Wessells, and was also rejected.

First, Wessells argued strenuously during the meeting's first day that the government's explicit departure from the applicability of Common Article 3 of the Geneva Conventions was wrong, and that regardless of the government's position, psychologists should declare that they would be bound by its terms and common understandings. Wessells, a Columbia University public health and psychology professor who is an expert in the protection of children during international conflicts and who spent the vast majority of his time and work abroad in war zones, wanted to tap into established language in some of the most basic and longstanding international human-rights documents.[6] At the meeting, he argued that it was important for APA to go beyond the narrow U.S. government definitions in setting ethical guidelines for psychologists:

> What kind of damage [will be done] to APA if we say we do not support human rights as defined in the Geneva Conventions and other conventions? What about [the] damage to our national security? If we engage in human rights violations, the message that sends to other countries [is damaging to our national security]. They therefore become our enemies and attack. . . . The standards [on international human rights] are not an issue for debate at this point. . . [The] APA Code commits us to human rights. Does American law trump international law? As a professional society, do we have commitments in [the] human rights direction? If we aspire to these things, can we throw international human rights away? APA is diverse but the diversity is not represented here. . . . We would damage ourselves as an association if we support American law when it contradicts international law. DoD has defined a set of standards not congruent with international law. If we endorse that, we damage our credibility. . . . As a

[6] Common Article 3 of the Geneva Conventions provides that detainees shall be "treated humanely" and that therefore "violence to life and person, in particular . . . cruel treatment and torture," and "outages upon person dignity, in particular humiliating and degrading treatment" were prohibited. The United Nations Convention Against Torture (Art. I, § 1) defines "torture" as an act that intentionally inflicts "severe [physical or mental] pain or suffering" on someone for one of several purposes, including obtaining information or a confession, punishing him, or intimidating or coercing him or a third person. Customary international human rights law, as defined by the International Committee on the Red Cross, defines "inhuman treatment" the same way as this definition of "torture" but without the specific-purpose requirement, and defines "degrading treatment" as acts that humiliate, degrade, or otherwise violated the person's dignity. *See* https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90.

> professional association, at a moment of national panic, [we must] take a high standard.

Thomas and Arrigo spoke up in favor of this position.

The DoD members suggested that they agreed in principle with the Geneva Convention provisions but said they could not accept a position that varied from the requirements of U.S. law. ("[I] cannot take a public stand opposed to the U.S. government," said one.) In other words, as DoD officials they could not agree to be bound by constraints on their behavior that went beyond the constraints set by U.S. law.

While this position may have been understandable as a statement of U.S. governmental policy (as opposed to APA policy), APA President-Elect Koocher also attacked the idea of the APA tapping into international law definitions in crafting ethical guidance, calling it a "distraction" to draw international law into APA's ethics guidance. 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).

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).

But sometimes, leadership in this manner causes external change rather than just conflict. Thus, taking this direction (especially if the other leading health-care professional associations also took ethical positions that were less accepting of the Administration's position, as they ultimately did) may have caused, or placed pressure on, DoD or the Administration to change its position regarding the use of international-law definitions in these circumstances. 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 what was best for DoD was best for APA).

Second, Wessells argued during the meeting's second day that the report should contain sufficient specificity regarding what interrogation techniques psychologists could be involved or consult on.[7] The context for this discussion was Behnke's draft report, circulated at the

[7] Behnke told us during his interviews that the issue of where to specifically draw the line between proper and improper interrogation techniques was not one of the task force's key issues and therefore did not garner his close attention as much as other issues. We did not find this statement credible or supported by the evidence.

beginning of the day, that included a paragraph prohibiting psychologists from "consult[ing] on techniques that would cause psychological distress," with a very large loophole— "except for a clear, legitimate purpose, such as to prevent future acts of violence." The loophole was limited by the next sentence which provided, "Punishment and obtaining a confession do not constitute legitimate purposes." This language incorporated a portion of the United Nations Convention Against Torture's definition of torture, which provided that for an act to be considered torture of an individual, it must be done for one of several purposes, including obtaining "information or a confession" from a detainee, "punishing him," or "intimidating or coercing him or a third person." Behnke used the "confession" and "punishment" limitations, but left out the "obtaining information," "intimidating," and "coercing" limitations.[8] Thus, Behnke's draft allowed psychologists to recommend an interrogation technique that would cause psychological distress as long as their purpose was to get information in order to prevent future acts of violence, and was not to "punish" or obtain a "confession."

Even this fairly minimal restriction on causing psychological distress provoked opposition from several of the DoD task force members, especially Banks. And Banks ended up writing out by hand completely different language (based on an additional side concern raised by Arrigo) that created no restrictions whatsoever and became the new version of this paragraph. The language provided that psychologists who consult on interrogation techniques "are mindful that the individual being interrogated may not have engaged in untoward behavior and may not have information of interest to the interrogator."[9]

Wessells clearly recalls speaking up forcefully about the need for specific prohibitions regarding either (i) certain interrogation techniques, such as stress positions and sleep deprivation, or (ii) how to describe whether pain or distress can be intentionally inflicted. The contemporaneous notes (albeit sketchier from the second day because a note-taking blackout was imposed toward the end of the first day) corroborate him. The notes show sleep deprivation and "the disorientation techniques" being discussed, as well as concerns that "the gray areas" were not being addressed by the document and that it needed to address what "point on the dial" (regarding interrogation techniques) was too far. Wessells argued that the discrepancies between the U.S. government's position and the U.N. Convention Against Torture, arguing that the report allowed psychologists to engage in "unethical procedures," and saying, "our reputation in this profession depends on this document."

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[8] Behnke's draft also created a strange second limitation — that psychologists in these situations needed to follow the restrictions set out in a research provision of the Ethics Code, Standard 8.07, which provides that psychologists do not deceive prospective research participants about research that is reasonably expected to cause "physical pain or severe emotional distress." Behnke said he could not recall why he included this provision as a type of limitation. Brandon's contemporaneous handwritten notes record that she found this provision "disingenuous" because "distress in research is not equal to stress in interrogation." HC00017699; Brandon Notes (undated) (on file with Sidley).

[9] Banks said, "[o]ften we do try to exploit psychological distress," but added, "[w]e need the boundaries." Nevertheless, his proposal for revising this paragraph shows that he did not want the task force report to impose additional boundaries beyond any that were created by his high-level "safe, legal, ethical and effective" language. Arrigo PENS Meeting Notes (June 25, 2005).

Behnke, however, said that the task force needed to "attend to [the] level of specificity in [the] document so as not to cause difficulties." And some of the DoD members made it clear that they agreed. Thus, what was then discussed — and promised to Wessells and the other non-DoD task force members — was that the more specific prohibitions and guidance desired by Wessells would occur in a follow up "casebook"-like document that would contain examples to guide psychologists about where the ethical line was. Shumate was mostly against the idea: he said the examples "would be awful" and "would alarm people," and pointed out that APA could generate a casebook independent of the government's position, but "DoD psychologists can't" (since they inherently could not be independent of DoD). Nevertheless, Behnke promised Wessells, Arrigo, and Thomas (as they clearly recall) that the task force report was just "an initial step," and that the casebook would be issued by APA after some sort of consultation with the task force members. Wessells clearly recalls pressing Behnke to commit to a time frame for the casebook, and Behnke promising it would be completed in four to six months.

Thus, two pushes for ethics positions that would have made the task force report a very different document were explicitly made but rejected by the DoD task force members and the APA task force leadership. The three non-DoD members acknowledge that if they had firmly and officially dissented and refused to accept the task force report, this might have made a difference. And in fact, Behnke and other APA leaders have consistently cited the final sign-off on the report by the three non-DoD members as proof that the document does not merely reflect a pro-DoD position.

c) Ultimate "approval" by non-DoD task force members

The three non-DoD task force members clearly came to regret going along with the report at the end of the meeting. They insist that their failure to issue a final and overall dissent should not be taken as approval of APA's claim (made one day after the task force report was made public) that the report set out "strict ethical boundaries," since they had been told that APA only considered the report a first step and that the actual "boundaries" would be set out in a follow-up casebook. For Wessells in particular, and for Arrigo as well, the explicit promise that the report was simply an interim step to be quickly followed by a more thorough set of specific guidelines was crucial to their agreeing to sign off on the report. Wessells clearly felt duped when he was told six months later that nothing had been done on the casebook. He resigned from the task force six months later.

Arrigo and Thomas also cited a feeling of intense group pressure from the much larger group of DoD task force members and APA leaders (all men, they point out) to go along at the end, in order to enable APA to make a clear and positive public statement that APA was "against torture." Arrigo, Thomas, and Wessells all cited to us the "groupthink" psychological phenomenon as something that may have been a factor in their going along at the end, in addition to their belief that this was not—and would not be portrayed by APA—as a final, strong set of "strict ethical guidelines." In addition, many of the task force members and observers (both DoD and non-DoD) told us that there was a real "us vs. them" split in the room between DoD and non-DoD task force members, and that all the DoD members except for Banks sat on one side of the table, across from the non-DoD members.

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.[10] 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.

Based on what we have seen in our investigation, we agree with the three contributing non-DoD task force members that it is unfair for defenders of the APA task force report to use their end-of-report approval as evidence that the report simply reflected the consensus of a diverse task force rather than an intentional pro-DoD approach. The behind-the-scenes evidence squarely contradicts this, and a proper reading of the meeting proceedings is inconsistent with this as well.

d) "Safety Monitor" argument

One of the primary points emphasized by Behnke and Banks in their interviews with us was that having psychologists involved in interrogations to observe the interrogators was of critical importance in ensuring the safety of the detainee. The rationale is that psychologists' training in human behavior makes them uniquely situated to watch for and stop "behavioral drift" — the phenomenon identified in Philip Zimbardo's famous Stanford prison experiment and elsewhere that when individuals use their position of authority and absolute control over others to cause them discomfort or pain, the individuals with this power will often tend to drift toward greater and greater uses of that power unless stopped. Banks, along with Lefever and others who taught at military SERE schools say that this is a key and legitimate role for psychologists at SERE training, since without such a "safety monitor," even SERE instructors pretending to be captors of U.S. soldiers may go too far. In fact, when Air Force SERE personnel were brought to Guantanamo Bay in December 2002 to provide guidance about "employing 'SERE' techniques during detainee interrogations," the instructors' Standard

[10] Koocher's aggressive style of going on the attack against the non-DoD task force members continued after the meeting, when he attacked Wessells's resignation as meaningless because the task force no longer existed. This comment was highly disingenuous since Wessells's resignation came in reaction to an email to the task force from its chair stating that the task force's work continued in order to help consult regarding the potential "casebook." In his criticism of Wessells, Koocher also called the head of the rival American Psychiatric Association "an idiot full of sound and fury" (quoting Shakespeare), and months later attacked Arrigo for having "personal [] biases" and a "troubled upbringing" because she had revealed at the beginning of the task force meeting that her father had been involved in torture with the CIA's predecessor agency, the OSS. PENS listserv (Jan. 15, 2006); APA_0095571. Newman was known as a "bulldog," in the words of his former APA colleagues, and he 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.

Operating Procedure memo used the term "Watch Officer" as a standard position within SERE procedures (although the memo did not specify that the Watch Officer needed to be a psychologist).[11]

Psychologists ranging from the APA's leading critics to Susan Brandon and Michael Gelles have expressed doubt that psychologists are uniquely or well situated for this role, especially outside of a SERE training context. For purposes of our discussion here, we assume that having someone monitor interrogators for "behavioral drift" would be an important part of the interrogation process if the interrogator is intentionally inflicting some form of physical coercion or psychological distress (as in SERE training). And it seems reasonable that the training and experience of psychologists would make them among the best candidates for playing the role of "safety monitor" or "watch officer" by watching the behavior of the interrogators.

However, Banks, Dunivin, Behnke, and others who emphasize this role for psychologists in interrogations, and who tend to use it as the primary (and positive-sounding) justification for including psychologists in the interrogation support process,[12] are also quick to say that psychologists should be included in interrogation support because they help make the interrogations "effective." This was one of the four pillars of the Banks/Dunivin "safe, legal, ethical and effective" formula that the PENS report adopted. And the PENS report made it an ethical obligation of psychologists working on interrogations to try to rely on methods that are "effective."

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 needs to stop, and (2) partner of the interrogator in trying to engage in interrogation techniques that will be effective in getting the detainee to be cooperative and to tell the truth about what he knows.

This strikes us as either naïve or intentionally disingenuous. The pressures on the psychologist in this situation not to stop the interrogator from becoming more aggressive are very significant — both because the interrogator and psychologist are working together to make the interrogation effective and likely have a need to work together on an ongoing basis on other interrogations; and because the psychologist likely would be utilizing his subjective judgment in telling the interrogator that he has gone "too far" (a judgment that can easily be subject to criticism and second guessing) rather than an objective judgment based on clear lines drawn by

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[11] JTF GTMO "SERE" Interrogation Standard Operating Procedure, Guidelines for Employing "SERE" Techniques During Detainee Interrogations (Dec. 10, 2002), *available at* http://nsarchive.gwu.edu/torturingdemocracy/documents/20021210.pdf

[12] See PENS Report at 1 ("psychologists are in a unique position to assist in ensuring that [interrogation] processes are safe and ethical for all participants").

external sources (*e.g.*, DoD or APA guidelines). One would think that mature, confident psychologists primarily committed to the role of "safety monitor" would be able to overcome these pressures in most situations. But this would depend on the individual psychologist, and the context of the individual situation. In other words, it might work or it might not.

Just as it makes little sense to say that SERE techniques can be "reverse engineered" for detainee interrogations with little fear of lasting psychological damage because they are used safely in controlled environments on informed, consenting U.S. soldiers, so too does it make little sense to say that a "watch officer" will always be solely motivated to stop an aggressive interrogation of a detainee because it works successfully in SERE training when there is no actual concern that public safety will be compromised if the "interrogators" do not get "actionable information" from the pretend "detainee." This is especially true when the "watch officer" is also being asked to help make the interrogation as effective as possible.

If Banks and Behnke really believed that safety was the only reason a psychologist needed to be involved in interrogations, they could have written the PENS report to limit a psychologist's role in interrogations to this function. The report could have said that psychologists may support interrogations only by playing the role of safety monitor to ensure the safety of the detainee by watching the interrogator to ensure that behavioral drift does not occur. But as Gelles pointed out, this would mean that a psychologist could not consult in the way psychologists typically do in law enforcement situations, by advising on interrogations and investigations to make them effective in environments in which the protections of the criminal justice system apply. And neither Banks, Dunivin and DoD nor Behnke and APA wanted to impose such a significant limit on the involvement of psychologists in national security operations.

Similarly, some APA defenders told us that they only intended the PENS task force report to allow psychologists to support interrogations by recommending "rapport-building" techniques, not physical or aggressive ones. But the report does not say this, although it could have. Given (i) the public awareness of the Bush Administration's narrow understanding of key terms like "torture" and "inhumane" and its claim that the Geneva Conventions did not apply, (ii) the widespread media reports about abusive interrogation techniques, and (iii) the explicit discussions at the PENS meeting and the media about specific techniques like stress positions and sleep deprivation, it was obvious to everyone involved in the PENS Task Force that national security psychologists would be asked to advise on interrogation techniques that went well beyond rapport building. The PENS Task Force report could have said that psychologists may support interrogations only by recommending techniques that constitute rapport building. But as with the other limitations, this was not consistent with Banks' and DoD's preferences (and therefore Behnke's and APA's) that the role of psychologist not be limited beyond whatever constraints DoD itself had in place.

Some critics who have correctly alleged that APA-government collusion led to the PENS Task Force report further allege that APA's motive must have been based on the rationale of the Justice Department memo, under which harsh interrogation techniques are not torture if a psychologist or other relevant expert says the technique to be applied will not cause severe physical or psychological suffering. We did not find evidence that this Justice-Department-memo rationale was part of the thinking or motive of APA officials. We obviously cannot

determine whether this was an important, behind-the-scenes rationale for some government actors. But we did not see evidence that this rationale was discussed with or was an important consideration for APA officials.

9. Other issues in the task force report

a) Application of Ethics Code

At the July 2004 meeting at APA with CIA, DoD and FBI psychologists — the precursor to the PENS meeting—CIA psychologist Kirk Hubbard argued that the APA Ethics Code should not apply to work by psychologists in national security operations, such as interrogations, because a code written for the ethical treatment of patients was not a good fit for this different context.[13] The PENS report explicitly rejected this argument and noted in its introduction that the Ethics Code binds psychologists whenever they take actions as a psychologist and therefore applies to work on national security interrogations. The report also made it clear in one of its 12 ethical guidelines that the Ethics Code provision prohibiting "multiple relationships" meant that it was unethical for a psychologist to both consult on a detainee's interrogation on behalf of the government and act as the detainee's health care provider.

These were positive points in the PENS report, and the first one constituted a refusal to go along with a position previously advanced by the APA's lead contact at the CIA (although the CIA appeared be effectively unrepresented at the PENS Task Force, with the possible exception of Mel Gravitz in light of his substantial connections to the CIA). On the other hand, Behnke described these as clear and easy points to make, and we note that the DoD officials were not opposed to them.

b) Ethical obligation to detainee

The 11th PENS ethical guideline says that psychologists have "ethical obligations to individuals" who are not their clients, including "to ensure that their activities in relation to the individual are safe, legal, and ethical." In making this statement, the PENS report cites Ethics Code standard 3.04 ("Avoiding Harm"), which says that "psychologists take reasonable steps to avoid harming . . . others with whom they work, and to minimize harm where it is foreseeable and unavoidable." The PENS report statement does not specifically mention interrogations, but the statement means that psychologists consulting on interrogations have an obligation to follow standard 3.04 with regard to detainees.

However, if physical pain and psychological distress do not automatically equate to "harm," as some of these DoD psychologists said, then the failure to provide any specificity about how to determine whether interrogation techniques that intentionally cause pain or distress

[13] Former CIA colleagues of Hubbard's, Kirk Kennedy and Andy Morgan, told us that prior to this meeting, Hubbard had given them the opposite impression—that he believed the APA Ethics Code did apply and should be applied to the involvement of psychologists in interrogations. That Hubbard's belief was the one he described during the July 2004 meeting surprised and disappointed them, they said. After retiring, Hubbard wrote an article in 2007 that suggested that this was his position. Kirk M. Hubbard, *Psychologists and Interrogations: What's Torture Got to Do with It?*, Analyses of Social Issues and Public Policy (2007) at 2.

constitute "harm" means that standard 3.04 may not provide substantial protection. 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, the PENS report refused to take a position on sleep deprivation despite being asked to do so.

Furthermore, we found it highly notable that the PENS report introduction omits the "do no harm" principle from its discussion of the key Ethics Code principles. The Ethics Code sets out aspirational principles "to guide and inspire psychologists toward the very highest ethical ideals of the profession." The very first sentence in the first principle says, "Psychologists strive to benefit those with whom they work and take care to do no harm." Remarkably, the PENS report avoids this sentence and quotes instead from the next sentence: "In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons". Behnke told us he could not recall why he did not include the "do no harm" sentence but did not think its exclusion had much significance. Our conclusion is that because of the ambivalence within the DoD task force members about how to define "harm" as it relates to physical pain and distress, and the desire by Behnke and Banks not to take a hard-and-fast position that psychologists in interrogation situations can never "do harm" (despite the Ethics Code principle), Behnke intentionally left out the "do no harm" language.

Addressing this issue specifically would have been feasible in a wide variety of ways, for instance by providing a non-exclusive list of prohibited specific techniques, or by describing prohibited conduct by using words such as "abuse," "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.

c) Access/use of medical data

One allegation identified in media reports leading up to the PENS Task Force meeting was that physicians and psychologists were learning of a detainee's vulnerabilities (such as phobias) through his medical records and then passing that information to interrogators as part of the effort to try to break down non-compliant detainees. Notably, the PENS report does not deny psychologists *access* to a detainee's medical records. Instead, it prohibits psychologists from making improper *use* of the records ("to the detriment of the individual's safety and well-being"). This was based on a request from Banks, who said that having access to a detainee's medical records was important so that a psychologist would have the necessary insight to determine that a legitimate interrogation technique (such as providing a cooperative detainee with a candy bar) might cause health problems (by seeing that the detainee was diabetic, for instance). Because of Banks's request, the PENS report allowed this access.

APA critic and Georgetown psychiatrist and law professor Gregg Bloche, who knew Behnke from law school, lobbied Behnke strenuously after the PENS report to change this "no improper use" provision to a "no access" provision, because of the strong potential for abuse that could occur as a result of access to detainee records. Behnke did not change it.

However, one year later, when a Guantanamo Bay "BSCT"[14] psychologist sought a confidential ethics consultation with Behnke in order to complain that BSCT psychologists' access to detainee medical records had recently been halted, Behnke strongly urged her not to push for access to the medical records. But the rationale Behnke articulated was not exclusively an ethical one, but a PR one as well—that if the media knew that DOD psychologists supporting interrogations were pushing for access to medical records, even if for legitimate reasons, it would look horrible. However, when Banks took the same position within the confidential PENS Task Force meeting, Behnke adopted the position as part of the report.

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.

d) Research

The PENS Task Report contained several recommendations that further research be conducted. This included a paragraph "encourag[ing] . . . further research to . . . examine the efficacy and effectiveness of information-gathering techniques, with an emphasis on the quality of information obtained. . . . Also valuable will be research on cultural differences in the psychological impact of particular information-gathering methods and what constitutes cruel, inhuman, or degrading treatment." A subsequent section recommended that APA encourage psychologists to engage in research into "methods for gathering information that is accurate, relevant, and reliable. Such research should be designed to minimize risks to research participants such as emotional distress, and should be consistent with standards of human subject research protection and the APA Ethics Code."

The evidence shows that Mumford, Brandon, Newman, and Gravitz made drafting suggestions regarding the research recommendations, and at least some of Brandon's drafting suggestions made it into the final version.

Critics have pointed to some of this language as an indication that APA was intentionally attempting to provide ethical support for research on detainees at Guantanamo or elsewhere by the CIA or DoD, or was otherwise attempting to allow for research that involved harsh interrogation techniques without the proper human-subject-research protections.

On the one hand, we found two notes in Behnke's handwritten notes from the PENS Task Force meeting in which the phrase "research on detainees" or "detainees as research subjects" was noted. Behnke provided no explanation for these notes, and we found no emails or other documentary evidence relating to them. In addition, in a meeting at the Department of Homeland Security about two years earlier attended by Mumford and Brandon, one of the subjects discussed was collecting data relating to detainees. Sources have told us without corroboration that there is evidence of the CIA engaging in activity regarding detainee interrogations that would constitute improper research.

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[14] Behavioral Science Consultant Team ("BSCT") psychologists provided support to interrogation and detention operations at Guantanamo Bay and similar military sites.

Further, ethics experts have told us that the language in the PENS report quoted above was woefully deficient in terms of the language that would typically be expected in order to communicate proper protections. And the language quoted above recommending research into "what constitutes cruel, inhuman, or degrading treatment" in light of "cultural differences" is ambiguous, and so may easily be read to suggest that the research being recommended is to determine if interrogation techniques that Americans would find cruel, inhuman or degrading may not be consider so bad by other cultures.

On the other hand, we did not see evidence linking these recommendations to any actions by APA officials regarding research, or suggesting that the recommendations provided authorization or assistance to the government to conduct human-subjects research without informed consent. We noted that these recommendations are not within the PENS report's 12 ethical guidelines, and therefore do not have the force of ethical guidelines for psychologists, in a way that might be pointed to as a justification for a psychologist's actions.

We found this a topic on which it was difficult to draw clear conclusions; our discussion and analysis of the evidence continues in the detailed PENS section below.

10. "Emergency" action by the Board

After the task force report was finalized in Sunday, June 26, the Board of Directors acted in a highly unusual fashion to declare an "emergency" and to adopt the report as "APA policy," an act normally reserved for the APA Council of Representatives. The Board was not required to take any quick action with regard to the task force. Behnke had arranged for expedited approval by the Ethics Committee, and if there was a desire to formally adopt the report as APA policy, the Council of Representatives was meeting about six weeks later. But the evidence shows that the Board acted in this unusual fashion motivated principally by the desire of APA Board members Ron Levant (APA President) and Gerry Koocher (APA President-Elect) to (1) create a PR message that would be perceived as backed not just by a public statement but by actual substance (a new APA ethics policy) and that could be used in a fluid PR situation perceived as negative, and (2) curry favor with DoD which had communicated that it wanted a prompt release of the report so it could use the report for its own purposes (which were both PR and policy purposes).[15]

[15] In addition to the intensive press coverage on issues of potential abuse of detainees during this time, the Commander of the Joint Task Force – Guantanamo was testifying before the House Armed Services Committee during the week of June 27 on the issue of detention conditions at Guantanamo. Reports of the hearing make it clear that the Pentagon was attempting to provide positive answers in response to concerns about abuse and improper conditions at Guantanamo. *See* Reuters, *Democrats See "Whitewash" of Guantanamo Problems*, June 29, 2005. A report from a third party (APA) saying that psychologists could ethically be involved in interrogations at Guantanamo had the great potential to be a positive story for DoD, from its perspective, and the emails show that DoD was thrilled with the content of the PENS report. Aside from the PR issues, the Army Surgeon General's Office was in the midst of developing its policy for the involvement of psychologists and psychiatrists in interrogations, based on Banks and Dunivin's draft policy document, and this closely-aligned, highly supportive report from APA was of great assistance to that effort, as the emails between Banks, Dunivin and Behnke show. This is discussed in greater detail in the detailed PENS section below.

The *New York Times* had run an article on Friday, June 24, the first day of the task force meeting, reporting that "[m]ilitary doctors at Guantanamo have aided interrogators in conducting and refining coercive interrogations of detainees, including providing advice about how to increase stress levels and exploit fears." The article quoted both Behnke and the ethics committee chairman of the American Psychiatric Association and compared the positions of the two organizations: "While the American Psychiatric Association has guidelines that specifically prohibit the kinds of behaviors described by the former interrogators for their members who are medical doctors, the rules for psychologists are less clear. . . . [I]n a statement issued in December, the American Psychological Association said the issue of involvement of its members in 'national security endeavors' was new."[16] APA President Levant worried that the article made APA look bad because it "portrayed APA as unsure of where the ethical boundaries lie."[17] To Levant and Koocher, managing APA's image required it to show that the task force report was more than simply a set of high-level, "loose" statements that might be justified as a tentative "initial step," but was instead a clear and "strict" statement of the actual ethical boundaries. The fact that the PENS report was nothing of the sort did not stand in the way of their strategic attempt to create the best possible media response.

By the last day of the task force meeting, Behnke had received information that an in-depth article by Jane Mayer on the policy and practice of aggressive interrogation techniques would be published in the *New Yorker* as soon as Tuesday, July 5,[18] and advised Board members Koocher and Anton (along with Anderson, Farberman and Gilfoyle) of this. In response, Farberman said that if the PENS report was "fully approved" by that date, "we have very strong talking points. Without it we're not in as strong a position."[19]

In addition, Behnke was communicating to Levant, Koocher, Anton, and APA management that DoD was very eager to get a copy of the PENS report, especially with *The New Yorker* article due to come out. Banks wrote Behnke to express appreciation for APA "support[ing]" DoD in the report: "I just finished with the [Army] Surgeon General and he will be in front of the Senate soon, on this issue. (He is very supportive.) Having APA's support will mean a lot."

And on the afternoon of Thursday, June 30, Science Directorate staff Heather Kelly informed Behnke, Farberman and others that Secretary of Defense Rumsfeld was personally waiting to receive the report on an expedited basis:

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[16] Neil Lewis, *Interrogators Cite Doctors' Aid at Guantanamo*, The New York Times (June 24, 2005), *available at* http://query.nytimes.com/gst/fullpage.html?res=9400E2DA1F3BF937A15755C0A9639C8B63.

[17] APA_0040505.

[18] Behnke's handwritten notes from on or around the last day of the PENS Task Force meeting, June 26, show that he received a briefing on the article from someone (presumably from Banks or Gelles, who both had been interviewed by Mayer). His brief notes say "Mitchell" and "Jim Mitchell" and the word "SERE", among other things. HC00010682.

[19] APA_0040518.

> Rumsfeld's exec assistant will apparently be waiting by the fax for this! His super secret direct access fax line. They're just a tad interested.[20]

That same afternoon, the Board was sent the PENS report along with a note that President Ron Levant was working on a proposal to the Board. There was one significant Board comment in response: Board member Diane Halpern (APA President in 2004) had "one very strong recommendation — that somewhere we add data showing that torture is ineffective in obtaining good information." This prompted an internal staff email exchange in which Gilfoyle asked whether it was true that "torture has been demonstrated to be ineffective." Behnke's response showed once again that his primary goal was to stay completely aligned with DoD: "the Task Force did not make such a clear, blanket, statement, and my sense is that the Task Force may not have felt entirely comfortable doing so." In other words, because at least some of the DoD members were not ready to agree that torture was effective, Behnke wanted to block this Board member's suggestion. (For instance, Lefever's view from 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.) Farberman agreed: "Hopefully, Diane's suggestion is dead in the water."[21]

In this context of vigorous media coverage and intense demand from DoD, President Ron Levant suggested to the APA Board not just that it declare an emergency and act in an expedited manner regarding the report, but that it take action to actually "adopt the task force report as policy." In an email to the Board early in the morning of Friday, July 1, Levant asked for the views of the Board about "declaring an emergency to adopt" the report, "the emergency being that APA and psychology are getting pretty well trashed in the media, damaging our public image."

Barry Anton had received the draft resolution that contemplated the Board "adopting the report as policy," and emailed Behnke with a "concern": "I'm not sure it can go out as policy without [Council of Representatives] approval. The [Board] can certainly accept the report." It is likely that the plan to declare an "emergency" was in response to Anton's concern that the Board could not normally adopt something as APA policy, since this was the Council's function.

By Friday, July 1, without an in-person or phone meeting or discussion, but simply some short emails, all the Board members who responded to Levant's question had voted in favor of declaring an emergency and adopting the report as APA policy.

Some of the most long-serving Board members and APA management members confirmed to us that it was highly unusual for the Board to declare an emergency. One long-time executive said this was the only declaration of an emergency they could recall other than a time when the Board needed to taking a refinancing action swiftly in order to avoid an interest rate hike. Long-serving Board member Koocher agreed that other than emergency actions relating to financial situations requiring immediate action (such as the refinancing situation), or one

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[20] APA_0040495.

[21] APA_0040500; APA_0051185.

situation many years earlier when immediate action was required to avoid a negative government regulatory action, he did not believe the Board had ever declared an emergency in order to take a specific action.

In looking back on this Board action, it was brought to our attention that under the Washington DC law applicable to not-for-profit corporations like APA, Board votes taken outside of an in-person meeting require a unanimous, written vote from all Board members by sending in signed proxy statements. Not only are there no such signed proxy statements, but APA has no records of all Board members voting by email. Our search of APA's emails uncovered votes from 11 of the 12 Board members, but we did not find a vote or email response from Board member Jessica Henderson Daniel, who did not remember voting on this. Thus, it may be that the Board action adopting the PENS report as APA policy in 2005 was not a valid action of the Board on procedural grounds.

11. Quick transformation of PENS into strict human rights document through misleading public statements as PR strategy

When APA made the PENS report public on July 5, 2005, it issued a statement emphasizing that psychologists could in fact serve in consultative roles to national security interrogations consistent with the Ethics Code, exactly the message that was pleasing to DoD. However, the criticism was immediate, including a negative story in the *New York Times* on July 6. The article pointed out the lack of specificity in the report and said it appeared "to avoid explicit answers" on key topics.

The day before this, Banks and Behnke had anticipated that APA would get asked about the "real issue," as Banks said, which they defined as: "What is the level of psychological distress that moves it into abuse?" This was an issue PENS had intentionally avoided, as described above. Behnke told Banks he would think about "how to package" the best response to this issue.[+]

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.

These were misleading public statements and this was a disingenuous media strategy. A document that was intentionally very limited, non-specific, and evasive on the key issue in order to, principally, please DoD, now came to be described principally as a strong anti-torture and pro-human-rights document.

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. 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 drafting a statement for the APA President, before giving a news interview, before advising the APA Ethics Committee, and before crafting strategy regarding potential Council resolutions, Behnke very regularly checked with Banks first to make sure Behnke and APA were in line with what DoD wanted, as articulated by Banks. On many of these occasions, Behnke was effectively seeking, and received, Banks' pre-clearance for an APA action or statement before Behnke proceeded.

1. APA/DoD close and secret collaboration on public statements and media strategy

Virtually every time the issue of psychologists' involvement in interrogations arose publicly in an important way — when a national reporter would ask Behnke for a comment or interview for an article being prepared; when Behnke would be preparing for an interview on NPR; when Behnke was preparing a draft letter from the APA President or other APA officials to be published or sent to an APA listserv for the Council of Representatives or other groups; to cite some examples—Behnke reached out to Banks to ensure that APA's statements and positions were in line with the military's policies and preferences and to coordinate what APA should say and how it should proceed strategically. Behnke was, in effect, the lead strategist and spokesperson for APA on this issue and worked hard to stay in control of every word that APA officials uttered on the issue. Our review of the contemporaneous documents and communications makes it clear that his closest partner and collaborator in this endeavor was Banks, joined at times by other DoD officials such as Dunivin, James, and Shumate. Often there was a predictable pattern to Behnke's activity: upon observing that APA would need to make a statement or issue a response, he would email Banks within a very short amount of time to seek his guidance or to suggest that APA take a particular an approach or use specific language, and then would ask if Banks approved of, or wanted to change, the approach or language.

Behnke shared with Banks and Dunivin that APA's "media strategy" was to claim that APA's ethics position on psychologists' involvement in interrogations was very similar to the position of the American Psychiatric Association and the American Medical Association. And Behnke turned to the two of them, and Banks in particular, for assistance in crafting strategic

messages and specific language that would help advance this strategy. We saw numerous examples of Behnke partnering with Banks as a virtual joint communications strategy team for APA.

Banks, too, used Behnke to help determine what DoD officials should say on the issue of psychologists being involved in interrogations. In one instance, the Commander of the DoD Joint Task Force at Guantanamo asked Banks to draft a statement on the issue, and Banks turned to Behnke for drafting help.

In another instance, Behnke worked behind the scenes with Banks to help DoD lobby the APA President on this issue, by helping Banks write a strong letter to the APA President after the President received a strong letter from APA members concerned about reports of psychologists being involved in abusive interrogations. In effect, the APA Ethics Director was secretly drafting a letter from DoD to the APA President to help DoD influence the APA President's position on an issue.

Behnke and Banks worked to keep their collaboration highly confidential. In an email to Banks during one of the many instances in which Behnke sought his review and pre-clearance of a draft APA statement, Behnke told Banks that "discretion about prior review is essential." They titled numerous emails "Eyes Only", and we found two emails in 2007 (shortly before their email traffic diminished, based on the emails in APA's system) in which they discussed ensuring that the emails themselves were securely deleted.

Other APA officials were sometimes involved in these collaborations, such as Koocher, Levant, Farberman, and Kelly. But for the most part, the email evidence of the collaboration with Banks and other DoD officials shows Behnke as the clear leader of this effort.

Banks, Dunivin, and other DoD officials thanked Behnke profusely, called him a hero and their "knight in shining armor," and shored him up when he took criticism. They invited him in 2005 to speak at the previously closed-off small annual conference for national security psychologists with security clearances, and to provide paid[22] instruction at the confidential military interrogation-and-detention-operations two-week training course newly created in 2006 to train psychologists and psychiatrists in interrogation support, as described below.

2. *Behnke as DoD contractor providing training as part of BSCT psychologist interrogation training program*

Behnke became a DoD contractor and, from 2006 to the present, has taught ethics to BSCT psychologists (and occasionally psychiatrists) "in support of interrogation/detention operations" at Fort Huachuca in Arizona, the DoD base that houses the U.S. Army Intelligence Center. Banks and Dunivin coordinated with him about what he should tell and not tell the APA

[22] The evidence (on file with Sidley) appears to show that the payments, ranging from $1,250 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 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.

Board about these activities, wanting to conceal some aspects of the tight partnership they had created in light of the criticism within the APA community on this issue.

In fact, Behnke never informed the Board of his participation in the DoD interrogation training program for BSCT psychologists, his status as a DoD contractor, or the payments from DoD to APA. He did, however, tell his supervisor, APA Deputy CEO Michael Honaker, that he turned to Banks as an advisor from time to time, and that he was regularly giving a paid ethics lecture at an Army base as part of the interrogation training course for BSCT psychologists. Honaker did not provide this information to CEO Norman Anderson or the Board. When Anderson learned from Sidley during the investigation that Behnke had been providing this training as a DoD contractor, he appeared stunned and was visibly upset that the matter had not been discussed with the Board. Honaker said that it did not occur to him that the Board would need to know or discuss this information, because he saw it as a standard example of Behnke providing ethics training to an important group of psychologists, as he does in a variety of settings.

Honaker and Behnke claimed that the trainings were clearly revealed in the Ethics Office's publicly-available annual reports. But in 2006 and 2007, the reports only listed the trainings as "workshops" in Sierra Vista, Arizona relating to the PENS report, and beginning in 2008, they began being described as "workshops on ethics training for military psychologists." The reports do not state that the "workshops" were at a DoD facility or the U.S. Army Intelligence Center or were part of the military's official interrogation training program for BSCT psychologists. Emails between Behnke and Dunivin show that this was by design; Behnke proposed to Dunivin that he describe the trainings in his "yearly report to the Board" with "something simple" like "training on ethics and interrogations" and "Sierra Vista, Arizona." Dunivin agreed that he should "leave it Sierra Vista and simple." And in Behnke's annual reports in 2006 and 2007, he even removed the word "interrogations."

3. Actual and attempted trips to Guantanamo

In late 2006 and early 2007, when a BSCT psychologist at Guantanamo Bay reached out to Behnke and Banks to seek a confidential in-person ethics consultation at Guantanamo from Behnke about an ethics issue, it became apparent to Behnke that the APA Board might not support such a trip in light of the controversy within the APA ignited by PENS. Confidentially plotting with Banks about how to get the APA Board to agree to let Behnke travel to Guantanamo, Behnke ended up asking the BSCT psychologist to write a formal memo requesting his in-person consultation for a confidential ethics consultation. The psychologist did so and prepared a formal travel plan as well. However, at a meeting with the Board, Behnke was told that he could not travel to Guantanamo, but could provide the requested ethics consultation in the United States. Behnke therefore offered instead to consult with the BSCT psychologist in Washington if an in-person consultation was required. The Board's decision triggered a strongly worded email to three Board members from Dunivin (who had apparently heard that Behnke's inability to travel was due to a Board decision), accusing them of being not interested in providing assistance to military psychologists and questioning their ability to make sound decisions to support military psychologists in light of the PENS report. When Banks inquired whether this had been "destructive on" Behnke," Behnke assured Banks that "[n]othing could

diminish . . .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."

There had been two trips to Guantanamo by APA Presidents after the PENS report, accompanied by Behnke on one of them. In October 2005, DoD invited APA President Ron Levant as well as the President of the American Psychiatric Association and others to a half-day visit at Guantanamo, as later reported in the press. And in November 2006, APA President Gerald Koocher and Behnke went on a similar trip to Guantanamo. For the Levant trip, Behnke arranged for Banks and Dunivin to provide a phone briefing and talking points to Levant so that he would be "on message" during and after his trip. Behnke similarly had Banks brief Koocher before his 2006 trip. Both trips consisted of meetings with Guantanamo leaders who provided positive information about the facility and detainee treatment. The trips were mostly PR trips for DoD, but after the 2005 trip, Assistant Secretary of Defense Winkenwerder and Surgeon General Kiley had a dinner with the group to discuss their observations and any concerns. Koocher told us that he found the opportunity to see the actual Guantanamo facility and receive in-person briefings helpful. Upon his return, Koocher prepared an extensive power point presentation with many photos provided to him by DoD showing the detention center and detainee facilities. The presentation was very positive about the Guantanamo facility and its value, including a slide that highlighted the "interrogation yield." Koocher said that the slides simply represented what DoD had told the group, and that he would orally provide this caveat when he gave the presentation. But on its face, the presentation is an uncritical, highly positive presentation of Guantanamo.

4. Policy victory

One of the key benefits that APA sought from its close collaboration with DoD was a positive outcome regarding the official policy DoD was developing on the issue of interrogations and the involvement of psychologists, psychiatrists, and other "behavioral science consultants." And APA received exactly what it wished for, as DoD official doctrine and Medical Command policy explicitly provided a large role for psychologists (and not as much for psychiatrists) in the support of interrogation and detention operations — an outcome that clearly was due in substantial part to what was seen by DoD as the very "supportive" position taken by APA in the PENS report.

Spurred largely by the draft policy document that Morgan Banks (along with other SERE psychologists in Army Special Operations Command and Debra Dunivin) drafted in and around 2004 to provide guidance and instructions to BSCT psychologists regarding interrogations and detention operations, the Army Surgeon General's Office started a formal effort in late 2004 and early 2005 to draft an official Medical Command policy which would apply to all behavioral science consultant involved in interrogations. As the Executive Agent for the administration of DoD detainee policy, the Army Surgeon General's Office's policy would cover the entire Medical Command. The draft document that Banks had drafted by the first half of 2005 (and which he distributed at the PENS meeting) became the official Medical Command policy (almost verbatim in all key respects) in October 2006.

APA had learned of this policy development effort in early January 2005 as it was starting to put together the PENS Task Force, and it was clearly one of the lead motivating factors for APA in selecting task force members and producing a task force report that would

please DoD. In effect, APA assured that its ethics policy would be completely aligned with DoD's policy by (i) taking the key framework in Banks' draft policy document ("safe, legal, ethical, and effective") and using it as the key framework in the PENS report, and (ii) following Banks's lead in all other important policy respects in the PENS report. Banks's draft policy document thus became the basis for both the PENS report and official DoD policy, making it a foregone conclusion that APA and DoD policy were perfectly aligned. In fact, the most recent version of this DoD policy (2013) still contains the full PENS report as a formal part of its policy document.

While the Surgeon General's Office was finalizing its Medical Command policy, based on Banks's document, and getting approval from various parts of DoD, higher-level DoD doctrine documents were required before the Medical Command policy could be issued. The highest-level of these doctrine documents was a "DoD Directive," (or "DoDD"). In November 2005, the Acting Secretary of Defense issued a DoDD on "Intelligence Interrogations, DoD Debriefings, and Tactical Questioning." The eight-page document contained an explicit mention of "behavioral science consultants" assisting interrogations, an inclusion that was seen as a huge victory for SERE and other military psychologists. Right after it was issued, a SERE psychologist with the DoD Joint Personnel Recovery Agency sent a congratulatory note to the team that had helped make this a success — Behnke, Banks, and two Air Force SERE psychologists: "Thanks to all for your hard work, we are now in an official DoDD."

The next step in DoD doctrine was a "DoD Instruction" on the topic ("DoDI"). In June 2006, the Assistant Secretary of Defense for Health Affairs, William Winkenwerder, issued a DoDI that explicitly prioritized psychologists over psychiatrists in the role of "behavioral science consultants" who supported interrogations and related activities. The document provided that "physicians [i.e., psychiatrists] are not ordinarily assigned duties as [behavior science consultants], but may be so assigned, with the approval of the [Assistant Secretary of Defense], in circumstances when qualified psychologists are unable or unavailable to meet critical mission needs." And in comments to the media about the new DoDI, Winkenwerder explicitly mentioned that the "clear support" from the APA regarding the role of psychologists in interrogations (a reference to PENS) "influence[d] our thinking" because, he noted, the American Psychiatric Association had not taken a similarly supportive position.

This was a very large victory for those who were focused on growing opportunities for employment and influence for psychologists, especially compared to psychiatrists. By winning the primary position with DoD regarding which mental health professionals would provide support for DoD interrogations, APA cemented its position with DoD in a manner that is likely to produce substantial employment and other financially-beneficial opportunities for psychology.

5. Abandonment of PENS "casebook" plan

One of the key arguments made by Behnke toward the end of the PENS meeting, and for years later, was that the lack of specificity in the PENS report was necessitated by the complexity of the topic and the fact that PENS was just an "initial step" in the process. The next step — crucial, he said, in the development of meaningful guidance to psychologists — would be a "casebook commentary" that would be produced by APA with input from the PENS Task Force and the Ethics Committee. The book would provide examples and the kind of clear,

specific guidance psychologists sought, he said. Several of the DoD psychologists on the task force were highly dubious that this was feasible or desirable, including Scott Shumate, who made his views on this plain. Nevertheless, Behnke promised Mike Wessells that the casebook would be done in six months, a promise that was crucial for Wessells in signing off on the task force report.

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 because the Council of Representatives began passing resolutions in 2006 that provided more specific guidance for psychologists, he believed a casebook was unnecessary. 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 there was no casebook is that there was never a real desire to create one, because it would necessarily create the same problems that specificity within the PENS report would have had (as APA staff had identified as early as December 2004) — drawing a line that allowed psychologists substantial latitude in supporting interrogations, as DoD desired, created substantial PR problems. The only solution to this dilemma was to keep the guidance non-specific.

That this was actually Behnke's thinking is corroborated by the internal emails he sent in January 2011, when he finally created a 30-page draft document on this topic that was something well short of a book. The document contained "vignettes" and Ethics Committee responses. In sending the draft document to Anderson, Honaker, Gilfoyle, Farberman, and two others, he explained that "[o]ur primary focus was to write responses that would not cause us any problems." He expressed satisfaction that there had been almost no discussion of "this piece of the interrogation issue for some time," and said that his plan was "to post this text, quietly, very quietly on the Ethics webpage." Thus, six years after PENS, the great promise of a casebook as the proper means of providing specificity and resolving the unavoidably (said Behnke) limited nature of the PENS report had shrunk to the form of a 30-page document, intentionally created to avoid any "problems," which was snuck into a corner of the APA website with the fervent hope that it would be entirely ignored.

6. Obstruction on amending Ethics Code Standard 1.02

At the Council meeting in August 2005 following the PENS report, the Council passed a motion instructing the Ethics Committee to explore adding language to Ethical Standard 1.02 to ensure that that provision could only be used in a manner "consistent with basic principles of human rights." That provision (as revised in 2002) provided if there was a conflict between a psychologist's ethical obligations and her obligations under the "law, regulations, or other governing legal authority" (which included military orders), she had to try to resolve the conflict, but if she could not, she could follow the "law, regulations, or other governing legal authority" without committing an ethical violation. The Introduction to the APA Ethics Code (which was not binding) repeated this language of 1.02 and added the phrase, "consistent with basic principles of human rights." Council's motion required the Ethics Committee to make a recommendation about whether to revise 1.02 by adding the language in the Introduction.

Behnke drafted a document for the Ethics Committee in September 2005, which the Committee adopted, rejecting the suggestion that 1.02 be amended in this way. For the next four years, Behnke engaged in a wide variety of actions to intentionally delay and obstruct efforts to amend 1.02, despite increasingly clear calls to do so. Standard 1.02 was clearly a provision that was of importance to national security psychologists. Behnke coordinated his efforts at times with Banks and Dunivin by, for instance, having them help create "opposition" to the calls to revise 1.02.

Ultimately, it was not until Council explicitly instructed the Ethics Committee to take action resolving the discrepancy between Standard 1.02 and the language in the Introduction of the Ethics Code, and set a February 2010 deadline, that anything changed. As a result of Council's insistence, Standard 1.02 was amended in February 2010 to include the requirement that the provision not be used "to justify or defend violating human rights."

7. Behind-the-scenes attempts to manipulate Council of Representatives actions in collusion with, and to remain aligned with DoD

Finally, one of the most significant ways in which Behnke and APA secretly collaborated with DoD officials was in Behnke's extensive efforts to manipulate Council of Representatives actions from 2006 to 2009, in an effort to undermine attempts to keep psychologists from being involved in national security interrogations and to minimize the damage to DoD psychologists who might have been threatened from more aggressive potential Council actions. Especially in 2006 and 2007, but also to some extent in 2008 and February 2009, Behnke became APA's chief legislative strategist, taking a very active and sophisticated role in manipulating the resolution process and the proponents of these measures in order to achieve this goal.

Behnke was the authorized APA leader in this effort, and he was obviously taking these steps on behalf of APA. There were other APA officials involved with Behnke in these efforts, including at times Koocher, Anderson, Honaker, Farberman, Gilfoyle, and (in 2008-09) Ellen Garrison. Their involvement is discussed in the detailed section of the report. But no one was as thoroughly and consistently involved as Behnke was, and he was clearly (as one of the DoD officials said to him after he revealed some of his plans) "a superb strategist" — a compliment to which he responded with an email wink emoticon.

The pattern we saw from the evidence was that Behnke would use a sophisticated mix of strategies to either delay the passage of resolutions that would create negative implications for DoD or manage them so that the negative implications would be minimized. First, he would attempt to bring the proponents of aggressive resolutions into his fold by "working with them" on their resolutions, a gesture with the appearance of support that was almost always taken at face value and accepted by the proponents. Once he began "working with them," Behnke would act like a partner and teammate to encourage the view that he could help them achieve a good outcome. Second, Behnke would then use his very substantial language skills to wordsmith the draft resolutions in order to excise the parts that were negative for DoD and to substitute alternative language that appeared to achieve some of the proponents' original goals, but often achieved less than they thought because of nuanced drafting moves. Third, Behnke would attempt to convince the proponents that they should bring in the division of APA that represented military psychologists on the theory that the proponents should not want to be "divisive" within

APA, and that it was best to form a "consensus." Fourth, Behnke would engage in active and sophisticated behind-the-scenes lobbying in both direct and indirect ways in order to ensure passage of the more moderate alternative he had crafted and to avoid a revolt in the direction of more aggressive measures. This even extended to his micro-managing when invitations for lunch with the APA President were issued (to nip "organizing" in the bud) and where the invitees would sit for lunch during the Council meeting (to increase "visibility").

In essence, Behnke's insight was that when faced with the potential for an aggressive Council action that he viewed as 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.

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.

The Council did in fact pass resolutions in 2006 and (especially) 2007 that created additional restrictions on national security psychologists as a matter of "APA policy" (although these were not enforceable ethical standards), but they were much milder as a result of Behnke's intense behind-the-scenes manipulation, done in close coordination with DoD officials such as Banks. While these two resolutions were being drafted and prepared for Council's consideration, Behnke engaged in a two-pronged approach: (1) engage with and defer to Banks in crafting language that would not create any problems for DoD, and (2) actively gather opposition against the membership-generated resolutions by direct communications with those he knew would be against the resolution and by ghost-writing opposition letters from prominent DoD individuals such as Michael Gelles and Larry James.

In 2008, in a highly atypical action, a membership "petition resolution" received sufficient support to result in a vote of APA membership on the petition. The petition provided that "psychologists may not work in settings where persons are held . . . in violation of either International Law (e.g., the UN Convention Against Torture and the Geneva conventions) or the US Constitution." The petition passed. After this, APA formed an "advisory committee" to make recommendations to the Council on how to implement the petition. The advisory committee's report, presented to Council during the February 2009 Council meeting, was considered a highly negative action by Banks.

Banks sent a long email — largely drafted by Behnke — to a very large group of DoD and national security psychologists calling on them to oppose the advisory group's report. James was designated as the Council point person and he promptly met with Behnke to "develop a battle plan of attack" (in James's words). After the Council meeting, James reported back to the DoD group that victory had been achieved and the resolution would have no practical effect, because the word "unlawful" had been inserted in the title of the resolution, and DoD had just issued an official report (following a request from President Obama) that Guantanamo complied

with the Geneva Conventions. Thus, DoD had no such "unlawful" facilities. In his interview with us, James said with some pride that the "other side" simply hadn't done its homework.

C. Conclusions Regarding APA's and Psychology's Ties with the CIA, 2001 - 2004

1. Overview

From 2001 through 2004, there was a great deal of interaction on issues related to interrogations between key CIA psychologists and both APA staff and prominent psychologists, who were considered elder statesmen in psychology or were former or current APA Presidents. These interactions were occurring precisely during the time that the CIA was using "enhanced interrogation techniques"—including waterboarding—in vigorous fashion against certain detainees, and had given a key role in the development and implementation of the enhanced interrogation techniques to contract psychologists Jim Mitchell and Bruce Jessen. These interactions clearly raise the question whether APA was providing direct and important support to the CIA's interrogation program and the enhanced interrogation techniques.

One of the CIA psychologists who brought Mitchell and Jessen into the CIA and with whom they worked closely was Kirk Hubbard. Hubbard headed the Research and Analysis Branch of the CIA's Operational Assessment Division, a unit primarily focused on psychological assessment of spies and potential spies, and he does not appear to have been directly involved in CIA interrogations. During this time, Hubbard worked closely with two APA staffers—Geoff Mumford and Susan Brandon (who later moved to the White House Office of Science and Technology Policy)—and a CIA contractor who worked for the RAND Corporation, Scott Gerwehr, to put on confidential conferences at which academics in behavioral science could meet with national security psychologists from the CIA, DoD, and the FBI on subjects like "detecting deception." This was a vitally important concept to Mitchell and Jessen in implementing their apparent theory that harsh interrogation techniques can actually yield accurate information if the interrogators are able to determine when the interrogation subject is lying.

Also during this time, Hubbard created a "Professional Standards Advisory Committee" ("PSAC") consisting of three leading outside psychologists—former APA Presidents Ron Fox and Joe Matarazzo, and former APA Division 30 (Hypnosis) President and security-cleared CIA contractor Mel Gravitz. Mitchell and Brandon also attended at least one of the PSAC meetings, at which the focus was psychological assessment issues. Yet Matarazzo and Gravitz were also used by Hubbard and others at the CIA as consultants on a limited number of important issues to the interrogation program—for example, Matarazzo was asked to provide an opinion about whether sleep deprivation constituted torture. And following a controversy within the CIA about whether Mitchell could continue to participate in interrogations, Gravitz was asked to provide a written analysis to define the ethical boundaries for psychologists participating in interrogations. In addition, Hubbard, Mitchell and other CIA psychologists met with former APA President Martin Seligman at his home to fully understand the psychological theory of "learned helplessness," a theory that Mitchell and others at the CIA were clearly incorporating into the CIA interrogation program. Seligman and Matarazzo also spoke at the SERE training academies where Mitchell and Jessen had been instructors, with Seligman doing so at Hubbard and Mitchell's request.

It was also clear during this time that APA staff, principally Mumford, were keenly interested in establishing strong and lasting relationships with the CIA, and were intent on trying to please Hubbard and the CIA. In one 2004 email from Mumford to Hubbard in response to Hubbard's request that Mumford not disclose Mitchell and Jessen's affiliation with the CIA, Mumford emphasized that "[we] don't want to (and won't) do anything to jeopardize our harmonious working relationship."

Despite these extensive interactions and APA's clear desire to please the CIA, it appears that the actual actions that APA took during this period that may have assisted the CIA in its interrogation program were limited to putting on a small number of conferences with the CIA for academics and key national security psychologists (including Hubbard, Mitchell, and Jessen). It may be that the discussions at these conferences were of great value to CIA psychologists like Mitchell and Jessen, who were alternating between (a) interrogating and waterboarding detainees in secret CIA sites abroad and (b) having meetings and conferences in the U.S. on topics that might assist them in attempting to extract information through torture and other abusive interrogation techniques. But we did not find evidence that current APA officials like Mumford and Brandon were read into or were aware in any significant way of the CIA's interrogation program, which was classified, or had any meaningful knowledge of what Mitchell, Jessen, or other CIA personnel involved in interrogations were doing.

There were certainly important snippets of information in front of Mumford and Brandon that would have caused a reasonable person to suspect that Mitchell, Jessen, and other at the CIA might be engaging in abusive interrogation techniques, including detailed media reports about interrogation abuses at CIA "black sites"; the public disclosure of the Justice Department memos that narrowly defined "torture" and explicitly applied to CIA interrogations; particular interest by Mitchell at the "detecting deception" conference in the empirical evidence on the topic; and a 2003 email from Hubbard to Mumford and Brandon that Mitchell and Jessen are "doing special things to special people in special places, and generally are not available."

But we did not find evidence that went beyond these points, and found Mumford's and Brandon's denials that they knew about the CIA's interrogation program to be credible. CIA contract psychiatrist Andy Morgan told us that he saw no indication that APA officials were read into or received any information about the interrogation program or the interrogation activities of Mitchell, Jessen, or others. We consider Morgan a credible source of information based on his close working relationship with Hubbard and others at the CIA at the time, his knowledge of the CIA's bureaucracy and how it generally communicated internally about the interrogation program, and his opposition to the "enhanced interrogation techniques" portions of the CIA's interrogation program.

On the other hand, as with APA officials who intentionally avoided seeking more information in the face of substantial indications of psychologist involvement in abuses at Guantanamo, as described above, Mumford and Brandon took no steps to inquire about the clear concerns these pieces of information would have raised if their focus had been a concern about the involvement of psychologists in abusive conduct toward detainees. But this was not their focus. Instead, their focus was on building good relationships with the CIA and other government agencies, and successfully acting as conduits between national security

psychologists at the CIA (and elsewhere) and the academic psychology community that had potentially helpful expertise and research.

APA did not have the same close and longstanding relationship with the CIA as it did with DoD, and the potential financial advantages for psychology from a close relationship with the CIA would likely have appeared smaller than with DoD. But for APA Science Directorate and its staff, having a partnership with the CIA was of great benefit. The CIA paid tens of thousands of dollars for the expense of setting up conferences and reimbursing participants for their travel expenses, and these conferences allowed APA to showcase its relevance, visibility, and leadership on subjects of interest to psychology. Building that relationship held the promise for more CIA-funded conferences and other joint projects in the future that might similarly highlight (or suggest) APA's leadership and influence.

Although some of the details of APA's interactions with the CIA were kept secret (such as the identities of some of the people who attended the conferences), the APA Science Directorate disclosed its partnership with the CIA fairly openly in its publications to APA membership, and described the title and purpose of the conferences. The APA staff created very detailed summaries of the conferences, including the list of participants and details about who said what, and circulated them broadly to all the academics and others who attended the conferences. Thus, unlike what we saw with the APA–DoD interactions in the context of the PENS Task Force and subsequent actions, we did not see here anything close to the level of concealment, behind-the-scenes plotting, or close coordination about APA actions — other than as to the planning of the conferences. The conferences were not open to the public, but a large variety of academics and government officials from outside the CIA (including the FBI) attended the conferences and received the summaries, so we did not conclude that there was any meaningful effort to keep the existence or much of the content of the conferences secret.

As to the actions and knowledge of the former APA officials listed above (Fox, Gravitz, Matarazzo, and Seligman), some of them were clearly brought closer to the circle of knowledge through important interactions with Hubbard and Mitchell, as described further below. But we did not find evidence that there was a significant link between APA and their interactions or communications with the CIA. It is a fair question whether important interactions between these very prominent former APA officials also entailed, led to, or were connected to important interactions between APA and CIA. Except for very limited instances, we did not see any evidence of this in our examination of APA emails and other documents, and in our interviews, despite having found a very substantial amount of email and documentary evidence establishing important interactions between APA and government officials in other contexts, as set out above and below. On the one hand, this makes sense, since prominent psychologists who are former APA Presidents and Board members would not necessarily think that their interactions with the CIA about these issues would call for them to contact the APA, unless the CIA had specifically requested something from APA. On the other hand, we keenly recognize that in investigating activities involving the CIA, an agency that trains people to keep things secret for a living, we are especially limited in our ability to determine definitively what occurred, and therefore we are aware that our conclusions can only be based on the evidence available to us. This is especially true when the interactions are between CIA officials and individuals who were not APA officials or employees at the time, since their emails would not necessarily have been within APA's system.

Finally, as we got deeper into our investigation and had reviewed more evidence and had a greater understanding of what we were seeing, we observed that in 2004 and 2005, during the year leading up to the PENS Task Force, the APA's interactions with CIA officials on this issue slowed dramatically, and its interactions with DoD officials increased dramatically. As a result, the collaboration between APA officials and government officials regarding the PENS process and related follow up events was dominated by APA–DoD interactions, with no evidence of significant CIA interactions regarding PENS.

Clearly, there were important APA–CIA interactions on the topic of ethics and interrogations in 2004, including a key set of emails between Hubbard, Mumford, and Behnke in which Hubbard indicated that Andy Morgan and Hubbard (although likely just Morgan) had concerns about activities of national security psychologists that appeared inconsistent with the requirements of the APA Ethics Code. Those emails launched internal APA discussions that led to a confidential July 2004 roundtable meeting at APA on the topic for about 15 national security psychologists from the CIA, DoD and the FBI (including Hubbard, Shumate, Fein, and Gelles), and some academics and APA staffers (including Behnke)—which in turn was the precursor of the PENS Task Force.

However, after this July 2004 meeting, we saw no evidence of follow up discussions with Hubbard or the CIA on the topic, and no apparent CIA interest in the PENS Task Force, in the evidence we reviewed. Likely explanations for this are that (i) Hubbard, APA staff's main point of contact at the CIA, retired from the CIA in April 2005 (two months before PENS), leaving APA staff with no significant contact at the CIA, and (ii) the CIA's enhanced interrogation program was apparently in its waning days by late 2004 and early 2005, according to the 2014 Senate Intelligence Committee report.[23]

One potential exception to this is the participation of "observer" Mel Gravitz at the PENS Task Force meetings. Gravitz, who is approximately 90 and refused several requests for an interview, had worked as a contractor for years for the CIA. A leading expert on hypnosis and considered by some the founder of operational psychology, it is conceivable that Gravitz was at the task force in order to advance some interest of the CIA in the result of PENS, and was communicating with CIA officials in advance of and during PENS. However, we have seen no evidence of this, and it seems unlikely to us in light of what appears to be the very limited role Gravitz played at PENS and the absence of other visible APA–CIA communications — which we would expect to have been apparent to us based on our visibility into the substantial communications between Hubbard and APA. On the other hand, as set out in the detailed PENS section below, Gravitz contributed a small suggested paragraph to the draft PENS report regarding the recommendation that research be encouraged, and he had a prior relationship with Behnke.

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[23] Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, 113th Congress*, 143 (2014) ("In the fall of 2004, CIA officers began considering 'end games,' or the final disposition of detainees in CIA custody. . . . By the end of 2004, . . . [m]ost of the detainees remaining in [CIA] custody were no longer undergoing active interrogations; rather, they were infrequently questioned and awaiting a final disposition.").

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. But with the benefit of the additional information discovered in our investigation, one can understand more clearly how very substantial APA–CIA interaction in the 2001 to 2004 time period did not lead to substantial CIA interactions with APA in relation to the PENS Task Force.

2. Initial contacts and 2002 Conference

It appears that the relationship between APA staff and Hubbard began as a result of the proactive effort by the Science Directorate shortly after 9/11 to reach out and offer assistance from psychological science to government agencies involved in counter-terrorism—principally the FBI and the CIA, and eventually the Department of Homeland Security as well. Mumford, the head of government relations for the Science Directorate, asked Brandon, a relatively new Science Fellow at APA (a one- to two-year position) who had been a psychology researcher at Yale, to work on making the connections and setting up meetings. Kelly, a subordinate to Mumford who was generally in charge of government relations with DoD for the Science Directorate, was also involved.

This outreach led to discussions with Steve Band, Chief of the FBI Behavioral Science Unit at the FBI Academy in Quantico, Virginia, about organizing a counter-terrorism conference at which law enforcement and intelligence personnel would come together with academics and researchers to brainstorm and compare ideas. The result was a February 2002 conference at the FBI Academy, titled "Countering Terrorism: Integration of Theory and Practice," that was attended by about 70 people, including Hubbard, Mitchell, and other CIA personnel, FBI personnel, other federal officials, state and local law enforcement personnel, a wide variety of academics, and APA staffers including Mumford, Kelly, Brandon, and Behnke. Brandon and Mumford produced a 50-page summary that listed the participants and the different "scenarios" that were discussed by smaller groups. A small amount of the document discussed interrogation and interview techniques, but there is no reference to physical, aggressive, or disorientation techniques that might be used to get a non-compliant person to talk.

3. Martin Seligman

Interviews and emails indicate that the model for the 2002 conference was a December 2001 meeting at the home of Martin Seligman, prominent psychologist and former APA President, commonly associated with the "learned helplessness" theory among other theories. The 13-page summary of the meeting, entitled "How To Win the Peace," lists the 18 participants, including Hubbard, Mitchell, Band, and several prominent academics. The document lists six policy recommendations with a summary of the rationale for each, including "Isolate Jihad Islam

from Moderate Islam worldwide," and "Subvert the social structure of terrorist organizations." Interrogations were not referenced.

Combining the statements made to us by Seligman, Hubbard, and Mitchell, it appears that Hubbard met with Seligman at his house on two occasions—once along with Mitchell and Jessen, and once along with two other CIA psychologists or attorneys. At these meetings, learned helplessness was discussed (in substantial detail during at least one of the meetings), and Seligman was invited to speak to a SERE conference in San Diego about learned helplessness. Our evidence shows that Mitchell was very interested in the application of the learned helplessness theory to interrogations of uncooperative detainees. Hubbard and Mitchell say that they never discussed interrogations with Seligman and did not provide him information about the interrogation program. Seligman agrees and says he thought their interest in learned helplessness related to its insights for captured US personnel who are trained through the SERE program to resist providing information in interrogations. We think it would have been difficult not to suspect that one reason for the CIA's interest in learned helplessness was to consider how it could be used in the interrogation of others. But this probably depends on whether it would have seemed likely in 2002 that the CIA would use SERE techniques to conduct interrogations. A December 2002 article in the Washington Post quoting unnamed CIA officials as describing highly abusive interrogation techniques at CIA black sites would have created this suspicion, but we do not have enough information to know what Seligman knew or thought at the time. And because we do not see any evidence that this was connected with actions or decisions by or communications with APA officials, we did not spend further time investigating the matter.

4. Joseph Matarazzo

Hubbard says when he returned to CIA headquarters in 2000 from a covert assignment in London to lead a new behavioral science research unit, he believed the CIA needed to be less insular and he therefore formed the PSAC with Matarazzo, Gravitz, and Fox to enhance the access of Hubbard's unit to experts in the area of psychological assessment and related issues. Contemporaneous emails from Brandon confirm that this was his approach. Matarazzo, Gravitz, and Fox were apparently paid a small amount. Hubbard, Matarazzo, and Fox told us the meetings focused almost exclusively on understanding and applying psychological assessment models in various contexts, but that none of the contexts related to interrogations.

However, we gathered some pieces of evidence (including from Matarazzo himself, age 89, who was very responsive and proactively cooperative in our investigation) that Matarazzo was making some efforts to assist the CIA on interrogation topics, which may have been separate from the activities of the PSAC. First, Matarazzo recalled Hubbard asking him to provide an opinion about whether sleep deprivation constituted torture. After querying some psychologists with relevant expertise, Matarazzo told Hubbard that he did not believe sleep deprivation was necessarily torture. Matarazzo recalled responding to a written inquiry from Hubbard on the topic, but he did not have access to the document. Hubbard said he could not recall this. Second, the head of the APA Science Directorate at the time, Kurt Salzinger, recalls Matarazzo approaching him shortly after 9/11 to ask if Salzinger knew psychologists who worked in the area of interrogation, or "getting information from people." Salzinger said he made one inquiry that went nowhere and then he dropped it. Finally, PENS Task Force member Michael Wessells recalled Matarazzo approaching him at a 2002 psychology conference in Singapore and saying

something to the effect of, "In this environment, things are different, and the CIA is going to need some help. Things may get harsh. We may need to take the gloves off." Wessells said he was not sure what Matarazzo wanted, and could not tell if Matarazzo was asking him to help the CIA or was simply trying to persuade Wessells that harsher treatment of detainees was justified. Wessells said he told Matarazzo he disagreed and nothing further occurred.

In addition, corporate records show that Matarazzo was a 1% owner of Mitchell and Jessen's company (Mitchell Jessen & Associates), which apparently received a very large contract from the CIA, as reported in the Senate Intelligence Committee's 2014 report and various media reports. Matarazzo insists that he was not an owner of this company but was instead an owner of "Knowledge Works," which was a continuing education company run by Mitchell and Jessen, he says. The documents we have show that, at the time, "Knowledge Works" was not a separate company but was a division of Mitchell Jessen & Associates that received continuing-education accreditation from APA and conducted a relatively small number of continuing-education classes for military personnel. Mitchell and Matarazzo gave us statements describing Matarazzo's role in the company as highly limited and solely related to the continuing education portion of the company. We did not find any connection between this topic and APA actions or decisions about its ethics policies or government interrogation policies or activities, and therefore did not consider this a central part of our investigation. We therefore did not take further steps to determine what Matarazzo's role was in Mitchell Jessen & Associates.

5. Melvin Gravitz and his opinion for James Mitchell on ethics and interrogations

We learned that in about late 2002, the head of the CIA's Office of Medical Services, psychologist Terrence DeMay, complained about Mitchell's involvement in the interrogations then being conducted. This led to a substantial dispute within the CIA, which led the head of the CIA's Counterterrorism Center, who oversaw Mitchell and Jessen's involvement in interrogations, to determine that an opinion should be sought regarding the ethics of a psychologist participating in the CIA's interrogations. It was decided within the CIA to ask Mel Gravitz to provide the opinion.

Gravitz's written opinion—a very interesting document—was provided to us. Entitled "Ethical Considerations in the Utilization of Psychologists in the Interrogation Process," the version that we have was emailed from Gravitz to Mitchell on February 13, 2003, during a very active period of the CIA's enhanced interrogation program. The document says that "[r]ecently, some questions have been raised regarding the ethical implications of psychologists applying their skills by assisting in the interrogation process of certain persons who have been detained in the currently ongoing world-wide war against terrorism." It recites that it will analyze the APA Ethics Code principles as they apply to "Agency staff psychologists and contractors, all of whom are required by regulation to be licensed." At the time, Mitchell was an APA member, as described in greater detail in the "Ethics Adjudications" section below. The document states that the services rendered by psychologists in interrogation, could include consulting to, observing, or participating in interrogations. The document says that one of the Ethics Code's stated goals is "the protection of the individuals and groups with whom psychologists work, the latter including the national interest." No cite is given for this statement.

The document then quoted, and at times discussed, various Ethical Standards in the Ethics Code, including Standard 1.02 (conflict between ethics and law or orders). The document cited the provision relating to "providing services in emergencies" (Standard 2.02, which relates to providing mental health services in emergencies, even if it is not within the psychologist's area of competence) for the proposition that "there are also implications for a national security emergency where lives may be at stake." The document cited the provision that psychologists base their work on "established scientific and professional knowledge" (Standard 2.04), and added that "when there is a minimal knowledge base existing in science or practice, such services may be informed by the psychologist's prior and ongoing experience." This appears to be a reference to the relative paucity of research on the effectiveness of the "enhanced" interrogation techniques, and a suggestion that Mitchell's experience with SERE training or other detainee interrogations could be relied upon. The document closed with a reminder that "the psychologist has an obligation to [a] group of individuals, such as the Nation," and that the Ethics Code "must be flexible applied to the circumstances at hand."

We were told that as a result of Gravitz's opinion, the chief of the CIA Counterterrorism Center was satisfied that Mitchell could continue participating in and supporting interrogations.

We found no evidence that Gravitz's opinion was prepared in consultation with or with the knowledge of anyone at APA. Given our knowledge of Behnke's writing style and approach, we do not believe he had any involvement in this document, as its style and mode of analysis are very different than his.

Hubbard and Mitchell said generally that they never sought and were never aware of Behnke or anyone from APA providing information or any communications about ethics issues, interrogations or otherwise.

Mitchell described for us in general terms why he thought his involvement in interrogations (including his personal involvement in waterboarding, based on his own statements) was ethical under the APA Ethics Code. He said that it was appropriate under the Ethics Code to weigh the potential harm to the individual being interrogated (in order to gather information to prevent a terrorist attack) against the potential harm to other individuals (the public) that would be caused from a terrorist attack. He said that based on the "chatter" he was seeing, the balance of harms justified the interrogation techniques he and others used—which, he emphasized, were legal at the time.

Gravitz's opinion is notable for its emphasis on the consideration to be given to national security interests and protecting the country, well beyond anything in the actual Ethics Code. The document also emphasizes the supposed "flexibility" of the Code. Clearly, the Gravitz document would have been seen as creating a wide open, unrestricted ethical path to engage in virtually any acts a psychologist believed were appropriate to "protect . . . the national interest." It provides an excellent example of the importance of deciding whether loose or tight ethical constraints are right for a particular context. An analysis of APA ethics guidance was not an irrelevancy—even for Mitchell and the CIA. While there is no guarantee that a different ethics opinion—one with a more constraining analysis—would have stopped Mitchell or other psychologists from participating in abusive interrogations, the outcome of the analysis had the potential to affect decisions about how the government would proceed.

Mitchell, who resigned from his APA membership in June 2006, about nine months after a disciplinary complaint was brought against him and not pursued by the APA Ethics Office (as detailed below), said he could not recall why he resigned, but believed it was because he thought APA was becoming "overly political" and was taking stances that were not consistent with his beliefs.

6. Philip Zimbardo

Some of APA's critics suggested that, based on information Zimbardo provided, Seligman and Matarazzo may have tried to help Hubbard recruit Philip Zimbardo, APA President in 2002, to assist the CIA, including with its interrogation efforts. Zimbardo and Kirk Kennedy told us that Hubbard and Kennedy met with Zimbardo (although this may have been two meetings instead of one), and Zimbardo remembers meeting with Hubbard. Zimbardo says that Hubbard asked him to gave a talk on interrogations, based on his work on law enforcement interrogations. Zimbardo said he did give a talk to a small group at the CIA (apparently Hubbard's unit), but that he declined any further involvement with Hubbard or the CIA, including a suggestion from Hubbard (vaguely remembered by Zimbardo) that Zimbardo could receive a research grant. (Hubbard said he did not recall making this suggestion.) We found no evidence that these interactions between Zimbardo and Hubbard involved other APA officials or staff, or that they led to any actions by or communications with APA. This does not mean that there was no further connection between Zimbardo and the CIA, but we have no reason to believe this was the case.

Some have told us that Hubbard may have been attempting to influence Zimbardo while he was President to ensure that Ethics Code provisions governing informed consent in research (which were changed in 2002 as part of the APA's Ethics Code revision process) were changed. We saw no evidence to support this, and the meaningful changes to the relevant provision were proposed and agreed to by the Ethics Code Task Force prior to 9/11. As APA President, perhaps Zimbardo would have been in position to roll back the changes to this provision drafted by the Ethics Code Task Force before the Council of Representatives finally approved it in 2002, and in that sense, perhaps one might have had a motive to lobby him to ensure the change was not reversed before the Code was finalized. But we saw no evidence to support this. And getting involved in trying to reverse any of the changes agreed to by the Ethics Code Task Force after a five-year process (discussed below), even as APA President, seems like an unlikely endeavor to undertake.

The evidence of Zimbardo's involvement on national security issues when he was President in 2002 is that he met on Capitol Hill with Senator Daniel Inouye, chairman of the Senate Defense Appropriations Subcommittee, to generally express support (as APA typically did) for the funding of DoD behavioral science research. Zimbardo recommended to APA staff that they set up a meeting for him with National Security Advisor Condoleezza Rice, whom Zimbardo knew when Rice was Provost of Stanford University. A meeting was set up with Rice's staff that Zimbardo, Heather Kelly and Susan Brandon attended, but Rice did not. Kelly and Brandon recalled that the meeting was a relatively high-level discussion with Zimbardo doing most of the talking and the National Security Council staff saying little of interest. Contemporaneous emails reveal nothing else of interest.

7. Robert Sternberg

The 2003 APA President, Robert Sternberg, made a presentation to Hubbard's group at the CIA in December 2002, accompanied by Brandon and Mumford. The presentation related to the development of psychological assessment tools based on the theory of "successful intelligence." The Science Directorate publicized the visit in its newsletter under the headline, "APA President Sternberg Visits the CIA," and posted his power point presentation on the APA website.

Sternberg was uncooperative with the investigation; he begrudgingly and briefly spoke to Sidley and denied ever giving a presentation to the CIA or visiting the CIA.

8. 2003 and 2004 conferences

Following the February 2002 conference at the FBI, Mumford and Brandon discussed planning new conferences on topics that they thought would be of interest to Hubbard and the CIA, based on their communications with Hubbard, especially the subject of deception. As part of this effort, Brandon sent emails in May 2002 to a wide variety of researchers and academics, most of whom she did not know, soliciting ideas for research regarding this issue. One of the researchers who responded was RAND employee and CIA contractor Scott Gerwehr. Gerwehr was an expert on the topic of detecting deception. Brandon, Mumford, and Gerwehr began emailing about the topic and the possibility of creating a conference on the subject, and they brought Hubbard into the email discussions. This developed into a close and friendly working relationship between the four of them as they planned CIA- and RAND-sponsored conferences in 2003 and 2004. By this point, Brandon had left the APA and had taken a position at the National Institutes of Health. By the time of the 2004 conference, she had taken a position in the Science Division of the Office of Science and Technology Policy within the Executive Office of the President.

The 2003 conference, called "The Science of Deception: Integration of Practice and Theory," took place on July 17 and 18 at RAND's headquarters in Arlington, Virginia. About 40 people attended, including Hubbard, Mitchell, Jessen, and about ten others from the CIA (some of whom gave only their first names), Steve Band and two others from the FBI, Scott Shumate (having moved by then from CIA to DoD), a SERE psychologist who worked with Morgan Banks (Gary Hazlett), Andy Morgan, Brandon, Mumford, Gerwehr, and numerous academics and researchers. As with the 2002 conference, a detailed written summary was created describing the "scenarios" discussed, "research challenges," and the participants. One of the scenarios related to "law enforcement interrogation." After discussing three main research challenges, the written summary listed five additional research challenges, including "what pharmacological agents are known to affect apparent truth-telling behavior," and "what are sensory overloads on the maintenance of deceptive behaviors." Other than these notes, there were no strong indications that interrogation topics were discussed that are relevant to our inquiry. None of the conference participants we spoke to believed that there was any information provided about what techniques the CIA was using or considering using in interrogations or about its actual interrogation program, and we saw nothing from the contemporaneous emails that contradicted this. As with the 2002 conference, details about the

2003 conference, including its sponsorship by the CIA, were published in APA's Science Directorate newsletter.

A 2004 two-day conference on "intuition in policing" was organized and held in similar fashion. Brandon, Mumford, Gerwehr, and Hubbard organized an extra day of the conference on the "detecting deception" topic. We found nothing more relevant regarding this conference than the 2003 one.

9. Role of Susan Brandon

Some of APA's critics have suggested that Brandon, because of her position at the Office of Science and Technology Policy ("OSTP"), may have played an important role in pushing APA to support the Bush Administration and aggressive interrogation techniques. We think this likely overstates Brandon's position in the Administration, and her influence within APA.

OSTP is one of about 20 offices within the Executive Office of the President, which also includes, for instance, the National Security Advisor, the Council of Economic Advisers, the Office of Management and Budget, the Office of National Drug Control Policy, and the Office of the U.S. Trade Representative. The head of OSTP is its Director who has a Director's Staff. There are currently five divisions within OSTP, including National Security and International Affairs, Technology and Innovation, Environment and Energy, and Science. Each division is headed by an Associate Director. Underneath each Associate Director are various Assistant Directors and staff.

Brandon was an Assistant Director within the Science Division. Her title was Assistant Director for Social, Behavioral and Education Sciences. She was therefore several levels below the Director of OSTP. She said she had little contact with the Director, and we have not seen email evidence that contradicts this. Emails from the time show that she occasionally expressed her disappointment to Mumford that she was often thought of as an "education research" person within OSTP, even though this was not her area of expertise.

It is not clear that the Science Division of OSTP (or OSTP as a whole) had any significant influence at the time on the issue of detainee interrogations or related national security issues. We have not seen evidence or public reporting that suggests that OSTP was a significant player within the Bush Administration, and officials within CIA and DoD who we asked about OSTP and Brandon thought there was no influence whatsoever.

Because OSTP is part of the Executive Office of the President, Mumford jokingly referred to her as "White House Susan" and "Oval Office Susan." But we saw no evidence supporting the contention that she was a significant player within the Administration on these issues.

As set out above, Brandon was an observer at the PENS Task Force and played a role in drafting some portions of the recommendations regarding research. In that respect, she had some influence on the PENS Task Force report. But otherwise, and except as set out above regarding the conferences that APA organized with the CIA, the FBI, and RAND, we are not convinced that she played an important role in APA decisionmaking or actions.

D. Conclusions Regarding Changes to Ethics Code Task Force in 2002, Including "Nuremberg Defense"

The evidence establishes that revisions to the 2002 Ethics Code ("Code") were a response to the perception that the Code was being used as a weapon against psychologists to create liability in criminal, civil, and administrative proceedings. We did not see evidence that the revisions were a response to, motivated by, or in any way linked to the attacks of September 11th or the subsequent war on terror. Nor did we see evidence that they were the product of collusion with the government to support torture. Rather, psychologists felt that the length, breadth, and broad application of the five aspirational general principles and over 100 enforceable ethical standards in the Code provided a basis for state licensing boards, patients, and third-parties to pursue unwarranted and unjust legal action against psychologists. The 14-member Ethics Code Task Force ("ECTF"), comprised of members from a variety of practice areas, sought to revise the Code to address this issue and create protections for psychologists within the Code to insulate them from liability.

Over a six-year period, the ECTF, chaired by Celia Fisher, revised the Code to effect the desired changes and address the concerns of psychologists. The revised code ("2002 Code") became effective June 1, 2003. The most significant changes relevant to our review were the revisions to Standard 1.02 which addressed "Conflicts Between Ethics and Law." In the 2002 Code, Standard 1.02 was revised to make clear that it applied to conflicts between ethical obligations and the "law, regulations, or other governing legal authority" where the standard had previously only included the term "law." APA understood "regulations or other governing legal authority" to include military orders from a superior. In the event of a conflict, psychologists were required to make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict was unresolveable, psychologists were permitted to adhere to the requirements of the law, regulations, or other governing legal authority — a concept that was not included in the prior version of Standard 1.02. Standard 1.02, in the 2002 Code, was the first time that the Code explicitly permitted psychologists to follow the law instead of their ethical obligations when faced with a conflict between the two.

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. In this way, critics allege that the standard provided cover for psychologists to participate in or consult on interrogations that employed enhanced techniques or methods that otherwise constituted torture. These psychologists, the critics have alleged, could, and in fact did, avail themselves of the protections of Standard 1.02 and the Nuremberg Defense[24] to excuse their unethical behavior on the grounds that they were "only following orders."

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[24] The Nuremberg Defense commonly refers to one of the arguments employed by defendants charged with war crimes and crimes against humanity at the Nuremberg trials after World War II. *See The New York Times*, "Germans Disclaim Guilt Under Law," July 5, 1946 (the defense argued that "everything that

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. But the evidence does not fully support that argument. While the revisions to Standard 1.02 may have provided protection for some psychologists who were involved in abusive interrogations, the evidence shows that this was an unintended consequence of the ECTF's desire to insulate psychologists from liability in other areas — unrelated to interrogations and the way in which the government used psychologists during the war on terror. And the way in which psychologists may have used Standard 1.02 *post hoc* as cover for unethical behavior was not the focus of our inquiry. Instead we focused on the motivation, purpose, and process by which the Code was revised during the ECTF process.

The evidence shows that the primary motivation for the revision to Standard 1.02 was to protect psychologists who faced difficult choices when their ethical obligations of confidentiality conflicted with legal directives in the form of subpoenas or court orders that required disclosure of confidential patient information. ECTF members articulated two specific concerns, one raised by clinicians and forensic psychologists, and one raised by military and correctional psychologists, regarding ethical conflicts that drove the revisions to Standard 1.02. *First*, clinicians and forensic psychologists wanted to make clear that they could follow the law when they received subpoenas for treatment records (often in child custody cases) and faced the choice of complying with the subpoena and breaching confidentiality or ignoring the subpoena and being held in contempt. *Second*, military and correctional psychologists wanted to make clear that they could comply with military or other lawful orders when they received orders that required them to disclose confidential patient treatment records instead of being forced to choose between complying with the orders and disregarding them and facing a court martial or adverse employment consequences. Both groups of psychologists wanted the Ethics Code to make clear that when faced with a conflict, they could follow the law or an equivalent order or directive. The revisions to Standard 1.02 that effected this change were proposed in October 2000, nearly one year prior to the attacks of September 11th — and thus could not have been a response to or motivated by the war on terror — or the result of collusion with the government in the wake of September 11th.

Creating an avenue for psychologists to follow the law and subordinate their ethical obligations, particularly when the law included military orders, could have, and perhaps should have, been a red flag to ECTF members and prompted them to consider the Nuremberg Defense. And while we have no evidence that the ECTF considered this issue in connection with 1.02, he ECTF did explicitly discuss the Nuremberg defense in the context of the closely-related Standard 8.03 (now 1.03), which addressed "Conflicts Between Ethics and Organizational Demands." The primary concern with regard to Standard 8.03 was whether it was fair to permit psychologists working for an organization or corporation to engage in certain conduct without

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Adolf Hitler had done in Germany was legal, and therefore those who followed his orders could not be accused of criminal acts.")

ethical ramifications, while sanctioning independently practicing psychologists who engaged in the same conduct but not pursuant to their employer's directive.

Before the revisions to Standard 1.02, Standard 8.03 was the ethical standard to which military and correctional psychologists would have looked for guidance. The revisions to 1.02 provided another source of guidance — arguably guidance that was clearer with regard to conflicts. Given that the Nuremberg Defense was discussed in the context of Standard 8.03, one would have expected someone to have raised it during discussion of Standard 1.02. Yet it appears that no one did.

We have no evidence that the failure to discuss the Nuremberg Defense in the context of revisions to Standard 1.02 was in any way connected to the work of psychologists in national security settings or interrogations. The only documentary evidence that we found related to the issue of interrogations in connection with the Code revision was an inquiry from a military psychologist who was also a Council representative, in February 2002, asking whether consultation with police interrogators who were trying to "break down" a suspect, or consultation with national intelligence organizations, was covered in the general principles of the code and whether principles on consultation could clarify what activities were covered by the Code. The ECTF Chair responded that providing specific guidance on pathways psychologists could use to address the dilemma was "beyond the scope of the code."

Thus, while at least one psychologist contemplated application of the code to psychologists consulting on interrogations, albeit police interrogations, we did not see evidence that this issue was considered by the ECTF, other than the Chair. That the Nuremberg defense and interrogations were not specifically discussed in the context of revisions to Standard 1.02 may suggest that the ECTF missed certain red flags, did not consider or contemplate all issues facing military and correctional psychologists, and deemed certain issues beyond the scope of the code. And this helped create a loophole in the Ethics Code that could be used later by psychologists seeking to escape ethical sanctions for following orders to take actions that would have otherwise violated the Code. But we did not find evidence that these revisions were the product of collusion with the government. Instead, the evidence shows that the revisions were born out of a desire to protect psychologists and a willingness to subordinate ethical obligations to do so.

APA critics have also alleged that changes to Standard 8.05 — which pertains to dispensing with informed consent for research — were the product of collusion with the government to facilitate psychologists' participation in abusive interrogations that constituted torture. As revised in 2002, Standard 8.05 allowed psychologists to proceed with research without informed consent from the subject where "permitted by law or federal or institutional regulations." Critics alleged this change allowed psychologists to conduct research on detainees without their providing, or being able to provide, informed consent. As with the changes to 1.02, we did not find any evidence that the changes to 8.05 were the result of collusion with the government. Indeed, the change to the language that allowed dispensing with informed consent if the law permitted it was added to the draft Code prior to September 11, 2001, and therefore could not have been the result of collusion with the government in the subsequent War on Terror.

E. Conclusions Regarding Improper Application of APA Ethics Disciplinary System to Protect CIA and DoD Psychologists

APA's Ethics Office works jointly with the Ethics Committee in adjudicating ethics complaints against APA members.[25] The "fundamental objectives" of the Ethics Committee, among others, are to "maintain ethical conduct by psychologists at the highest professional level" and "to endeavor to protect the public against harmful conduct by psychologists."[26] Both the Ethics Office and the Ethics Committee fell short of meeting these objectives when adjudicating ethics complaints alleging improper involvement by national security psychologists in interrogations.

APA critics have alleged that the Ethics Office has been unwilling to investigate or act on complaints regarding psychologists who participated in, or were otherwise involved in interrogations. The evidence supports this allegation and shows three primary factors led to the Ethics Office's failure to properly address these complaints: (1) when conducting investigations the Ethics Office's longstanding practice is not to pursue the full investigative steps permitted by the Ethics Committee Rules and Procedures ("the Rules"); (2) the Ethics Office stretched the interpretation of its procedural rules so as to be as favorable as possible to the accused psychologist; and (3) at times the Ethics Director, Stephen Behnke, actively resisted taking any action against psychologists who participated in interrogations.

The Ethics Committee has an established set of Rules and Procedures (the "Rules") that apply to the adjudication of ethics complaints. When adjudicating complaints, the Ethics Committee and the Ethics Office are guided by these Rules, the Ethics Committee's confidential and non-confidential policies, as well as the longstanding practices of the Ethics Office, some of which are not specifically outlined in the Rules.[+] Based on the Ethics Office's practice, the adjudication process is typically a highly limited, "paper-only" review, which means that the "investigation" consists merely of examining documents that are sent to the Ethics Office by the parties to an ethics complaint. Investigators take no affirmative steps to seek documents from other witnesses, and conduct no interviews, even though the Rules explicitly permit them to do both, and suggest to outside observers that the Ethics Office will take such normal investigative actions.[27] When faced with the choice of taking more investigative steps, as permitted by the Rules, and taking fewer steps, the Ethics Office almost always chooses the latter. Indeed, the "investigations" conducted by the Ethics Office do not comport with any ordinary understanding of the term "investigation" and would be more accurately described as a document review or case file assessment.

The limited steps taken by the Ethics Office to investigate ethics complaints facilitates interpreting the Rules in a way that is most favorable to the accused psychologist, which at

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[25] *APA Ethics Office*, American Psychological Association, *available at* http://apa.org/ethics/index.aspx.

[26] APA Ethics Committee Rules and Procedures, Part I.1, American Psychological Association, *available at* http://apa.org/ethics/code/committee.aspx#overview.

[27] *See* Rules Part V, Subsections 5.3.3, 6.2 (in deciding whether to open a full "case investigation," and in conducting a case investigation, "[a]dditional information may be requested from the complainant, respondent, or any other appropriate source").

times, is antithetical to a natural reading of the Rules. This strained reading of the Rules hinders the Ethics Office's ability to conduct any meaningful investigations into allegations of unethical behavior. The limitation is evidenced by the way in which the Ethics Office "investigated" the ethics complaints filed against Colonel Larry James and Major John Leso. The complaint filed against James, in December 2007, generally alleged that under his command, psychologists participated in abusive interrogations at Guantanamo, which included isolation and techniques designed to disorient the detainee, among other things. The "investigation" of this complaint consisted of a review of the documentation physically submitted by the complainant (but not examining critical documents cited by the complainant that required slightly more than minimal effort to obtain), after which the investigator, Stanley Jones (former APA Ethics Director hired as a consultant to do work for the Ethics Office from time to time), recommended that the case be closed without further action. Jones wrote that he did not think that there was "cause for action" as defined in the Rules; that is, he thought that the alleged actions, if proved, would not constitute a breach of ethics.

In recommending that the James matter be closed as not meeting the "cause for action" standard, Jones wrote that the complainant "provide[d] no data that the respondent ever in fact employed isolation or sensory deprivation at all, much less that he did so as part of an abusive interrogation program." This seems to suggest that the complainant would have to provide evidence to show that James actually participated in an abusive interrogation in order to find cause for action. Yet a plain reading of the Rules shows that the Rules do not require this heightened level of proof. Rather, the Rules provide that a cause for action "shall exist when the respondent's alleged actions and/or omissions, if proved, would in the judgment of the decision maker constitute a breach."[28]

Jones told Sidley that, with respect to the allegations set forth in the complaint against James, he questioned whether a psychologist would have had "notice that the 2002 Ethics Code meant that they could not be involved in activities that might create a degree of disorientation, disorganization, and dependence," and that he believed what James was allegedly doing "did not appear to violate the 2002 Code." At the time he was considering the matter, Jones also questioned whether the alleged behaviors would violate the statements of APA as of 2007; he was not sure that the alleged behavior would, in fact, be unethical under these standards. Jones's view that the alleged behavior was not, per se, unethical was shared by at least one other person in the Ethics Office.

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 techniques were unethical—a rationale that was never shared with APA membership, or the general public.

[28] Rules, Part V, Subsection 5.1.

The complaints filed against Leso, in 2007 and 2008, generally alleged that as a BSCT psychologist, he established procedures for interrogating detainees and presided over interrogation sessions in which abusive techniques were used. An actual "case investigation" was never opened into the Leso matter. Instead, the Ethics Office merely opened a "preliminary investigation," which the Rules say is an investigation that may be conducted if the complaint does not provide sufficient information to determine whether "cause for action" exists—that is, whether the allegations, "if proven . . . would constitute a breach of ethics." The "preliminary investigation" into the allegations against Leso consisted of correspondence with one of the complainants to request support for the allegations and correspondence with Leso to request his response to the allegations. The Ethics Office stayed the matter when an action against Leso was pending before a state licensing board. When the licensing board did not act against Leso, the Ethics Office took the additional step of conducting internet searches to obtain additional information and kept the matter open for a total of six years (still merely as a "preliminary investigation"), with the explanation that they wanted to see if information related to Leso's actions would become publicly available. The Ethics Office did not take any affirmative steps to request information from witnesses who might have had relevant information (including individuals with whom APA had close ties, such as Banks, Dunivin, or James) or to seek documents through, for instance, a FOIA request. As the Deputy Director of the Ethics Office and the Director of Adjudication, Lindsay Childress-Beatty recommended closing the matter because she thought there was a "reasonable basis to believe that the allegations cannot be proved by a preponderance of the evidence." This was a reference to another Rule, Rule 5.5, which states that even if "cause for action" exists (that is, the allegation, if proved, would constitute a breach of ethics), the case shall be closed if the Ethics Committee Chair and the Ethics Office Director agree that "there is a reasonable basis to believe that the alleged violation cannot be proved by a preponderance of the evidence."

As in the James matter, the Ethics Office staff again questioned whether certain techniques, such as "sleep deprivation, withhold food, isolation," were actually unethical. In a memorandum to the Ethics Committee Chair, Childress-Beatty wrote, "these techniques in and of themselves may not be cruel, unusual, inhuman, degrading treatment or torture depending upon factors such as the situational context, length of time used, and intensity." Childress-Beatty's view is a departure from what Behnke told Sidley—that most of these techniques should have been prohibited, especially in light of the PENS Report. Moreover, suggesting that techniques such as sleep deprivation, withholding food, and isolation could not be proven to be unethical by a preponderance of evidence even before an actual case investigation is conducted is stretching the bounds of the Ethics Code so as to not find a violation of any standards. Notably, Childress-Beatty's statement was not based entirely on statements about insufficient evidence. She was concluding in this statement that a psychologist may be able to ethically recommend that a detainee outside the criminal justice system be deprived of sleep or food for the purpose of trying to conduct an effective interrogation. Clearly, the effect of, for instance, sleep deprivation depends on the amount of time involved. But the fact that it might ever be considered ethical for psychologists to recommend sleep deprivation against detainees in this situation is a very notable ethical conclusion by the APA Ethics Office and the Ethics Committee Chair who agreed with the recommendation to close the matter. Certainly, it is not a conclusion that we are aware APA has ever admitted making, either in the explanation to the complainant for closing the Leso matter or its public statements. In effect, the only way for APA to close this case using the Rules

was to call interrogation techniques "potentially ethical" in light of APA's supposedly vague ethical standards, when almost all APA's post-PENS statements stressed that its ethical standards (including PENS, according to Behnke) were strict and would clearly prohibit such techniques.

In short, while publicly proclaiming the strictness of their rules and their eagerness to thoroughly investigate complaints of abusive interrogations, behind closed doors, the Ethics Office crafted rationales that stressed the vagueness of their ethical standards and the highly restricted nature of their "investigations" in order to close complaints, all the while using a stretched interpretation of their procedural Rules.

The ability of the Ethics Office to conduct meaningful investigations into allegations against psychologists who allegedly participated in abusive interrogations has been further hindered by the actions of Behnke. The evidence shows that Behnke, at best, was resistant to proceeding with complaints against psychologists involved in interrogations, and, at worst, took affirmative steps to avoid presenting these cases to the full Ethics Committee. For instance, when former APA President, Ron Levant, inquired into whether an ethics investigation should be opened against Leso based on allegations against him in the media in 2005, Behnke stated blatantly, and falsely, that Leso was not an APA member. The ethics complaints filed against Michael Gelles and James Mitchell illustrate this resistance even more clearly. The complaint against Gelles alleged that he behaved unethically during a session with a Naval Petty Officer under investigation for espionage. The email evidence shows that Behnke actively looked for ways to avoid proceeding with the complaint and suggested ways to avoid presenting the complaint to the full Ethics Committee. In fact, Sidley uncovered evidence that suggests that Mel Gravitz, an influential APA member, approached Behnke and tried to dissuade him from moving forward with the Gelles ethics complaint. This was corroborated by Behnke. And despite telling Sidley that he was not improperly influenced by Gravitz, emails from Behnke's custodial files show that he actively interfered with the Ethics Office investigator's work, deputized himself as the investigator while she was on administrative leave, and tried to stop the case from proceeding.

The complaint filed in 2005 against Mitchell—while he was still an APA member—was based on allegations from news reports that psychologists, including Mitchell suggested the use of harsh interrogation techniques during the interrogation of detainees. The evidence shows that the complainant contacted the Ethics Office several times prior to filing her complaint against Mitchell and that each time Behnke or an Ethics Office staff member discouraged her from filing the complaint. When the Ethics Office received the compliant, a staff member conducted a search to determine whether James Mitchell was a member and thus whether the office had jurisdiction over the complaint. The search showed that three individuals named "James Mitchell" were APA members but no steps were taken to determine whether any of the individuals named "James Mitchell" was the James Mitchell identified in news articles. Nor were any other investigative steps taken in connection with the complaint against Mitchell. If additional steps had been taken, the Ethics Office would have learned that one of the three individuals was, in fact, the James Mitchell identified in news articles—articles that reported Mitchell had suggested the use of harsh interrogation techniques. Instead, the Ethics Office failed to take any action on the complaint—and Mitchell resigned from APA nine months later while the complaint was pending.

Despite his actions and resistance to proceeding with complaints against psychologists who allegedly participated in abusive interrogations, Behnke made numerous statements touting APA's willingness to take action against these psychologists. The evidence shows that these statements—strategically made in order to make it appear that APA stood ready to vigorously investigate ethical complaints in this area and would take strong affirmative steps to dig out the truth—were disingenuous and misleading. During the time that these ethics complaints were pending, Behnke said:

> If psychologists have engaged in any activity, and at this point the media reports are long on hearsay and innuendo, short on facts, *the [APA] wants the facts*. And when we have the facts, *we will act on them*. And if individuals who are members of our association have acted inappropriately, the APA will address those very directly and very clearly;[29]
>
> I would say that for us, the question is not whether psychologists may be involved. We believe that there is an ethical role for psychologists to play. The question is '[w]hat are the ethical boundaries within which psychologists must remain when they are engaged in these activities?' Certainly, if it is the case that individuals have behaved unethically, the American Psychological Association has an ethics committee that will respond to that situation through our process of adjudication;[30]
>
> APA will adjudicate any allegation that an APA member has engaged in unethical conduct. If you have information that a psychologist has engaged in torture, *I ask that you immediately bring this information to my attention*;[31]
>
> *[the Ethics Office] thoroughly investigate[s] the complaint* under a set of extensive procedures that apply to all complainants and to all psychologists who are subjects of a complaint;[32]
>
> [a]ny psychologist participation in a torture interrogation is absolutely prohibited. It makes no difference whether the psychologist's participation is direct or indirect, supervisory, central or peripheral: Any psychologist participation in a torture interrogation is prohibited.[33]

The reality diverged greatly from these statements. Instead of "thoroughly investigat[ing]" allegations that member psychologists had behaved unethically or participated in

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[29] *Psychological Warfare? A Debate on the Role of Mental Health Professionals in Military Interrogations at Guantanamo, Abu Ghraib and Beyond*, Democracy Now! (Aug. 11, 2005), *available at* http://www.democracynow.org/2005/8/11/psychological_warfare_a_debate_on_the.

[30] *Id.*

[31] APA_0073156 (emphasis added).

[32] APA_0093377 (emphasis added).

[33] APA_0064994.

torture, Behnke failed to proceed with and actively resisted proceeding with these complaints. The evidence shows that Behnke knew that the adjudications process was not equipped to address ethical complaints regarding psychologists' participation in interrogations—and that it would not lead to any sort of meaningful or thorough investigation.

The end result of the limited nature of the ethics investigations and the Ethics Office's purposeful unwillingness to thoroughly investigate allegations of unethical conduct by psychologists who participated in interrogations was that the Ethics Office prioritized the protection of psychologists—even those who might have engaged in unethical behavior—above the protection of the public.

IV. ANSWERS TO THE QUESTIONS POSED BY THE CHARGE

The Board of Directors' resolution asks us to report as to whether APA "colluded" with government officials "to support torture." As we embarked on our review, some APA critics expressed concern that our charge was too narrow. These critics thought that the charge, as set forth in the Board's statement, would place limits on our ability to thoroughly investigate relevant issues not specifically set forth in the charge, and was intentionally designed to lead to a "no" answer, since in their view it would be very unlikely that one would be able to establish that APA officials intended to help the government torture people. We understood this concern given the language used to define our charge, and we saw how the charge could be narrowly construed.

In contrast, some of the APA officials we interviewed have stressed for us their view that we could only reach some sort of negative finding if we concluded that APA engaged in collusion "to support torture." And some put definitions of "collusion" in front of us to purportedly show its narrow contours. One APA staff member sought to narrow the scope of our review by "confirm[ing that] the scope" of our review was defined by "three essential elements of the review: . . . 1) collusion, that is, a mutually agree upon plan of action; 2) with the Bush administration; and 3) the intended goal of advancing the Bush administration torture program." Approaching the review with these constraints would have meant that finding collusion between APA and government officials or collusion for any goal other than intentionally advancing the effort to torture people would have been outside the scope of our review.

The Special Committee rejected a narrow view of our scope and told us to understand our charge broadly, so that the scope of our review included a review of the issues specifically identified in the Board's statement, the relevant issues in Risen's book, and critics' allegations regarding the changes to APA policies and the driving forces behind those changes. The Special Committee explained that the goal was a thorough review of these issues and all the available evidence so that our report could set out our full understanding of what happened and why.

Nevertheless, we are called upon to answer the question whether APA colluded with government officials to support torture, as well as three sub-questions set out in the Board's resolution: (1) "whether APA supported the development or implementation of enhanced interrogation techniques that constituted torture"; (2) whether changes to Ethics Code Section 1.02 or the formation and/or the report of the PENS Task Force "were the product of collusion with the government to support torture or intended to support torture; and (3) "whether any APA action related to torture was improperly influenced by government-related financial considerations," including grants, contracts, or prescription-privileges policy for military psychologists.

Collusion

With regard to the PENS Task Force and subsequent policy statements and decisions by APA, there clearly was collusion between key APA officials who were acting on behalf of APA and key DoD officials. We have seen various definitions of "collusion," but common ones define it as a secret agreement, understanding, or cooperation for some harmful, improper, dishonest, or illegal purpose. (In emails to us, Behnke defined "collusion" more broadly, as a "mutually agreed upon plan of action".) In our description above, we have intentionally used

terms such as coordination, collaboration, and joint venture, which we believe capture what occurred. And we conclude that the evidence also shows that this constituted collusion.

The collusion here was, at the least, to 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. The existence and nature of this collaboration was kept confidential outside of those APA officials who worked with Behnke and others on the PENS Task Force and related matters. And this purpose could easily be described as improper or dishonest, because it constituted the development, implementation and maintenance of APA ethics policy not based solely on an independent judgment of what policy was best for APA, but in very substantial part based on what policy was best for DoD.

One might say that APA was effectively making a policy judgment that what was best for DoD was best for APA, but APA certainly did not claim that this was the policy judgment it was making. This behind-the-scenes sacrifice of APA independence largely in order to pursue and maintain policies that were pleasing to and requested by DoD officials constitutes collusion, in our view.

We are asked whether this constituted collusion "to support torture." One potentially straightforward answer is that since the PENS report said clearly that no psychologist could ethically be involved in torture, APA could not possibly have acted or intended to support torture. But this is probably too simplistic an answer since, as discussed above, the artificially narrow Justice Department definition of "torture" (known to APA and the public) meant that at the time, a mere statement prohibiting "torture" did not necessarily prohibit acts that would properly be considered torture at most other times.

We think the evidence clearly shows that the key APA officials acting on behalf of APA intentionally implemented a policy that would allow DoD officials to continue to engage in their existing practices based on the guidelines and procedures they had in place. At a minimum, this was the purpose of the collusion. The question then arises, what did APA know about or believe regarding DoD's existing interrogation practices in which psychologists might be involved?

APA's Knowledge

As summarized above and detailed further in this report, there were clear and strong indications in front of APA officials that abusive interrogation techniques (such as stress positions, sleep deprivation, threats, and playing on phobias) had occurred. There had even been substantial public reporting and congressional inquiry on about the apparent (at the time) waterboarding of two "high-value" detainees. In short, by June 2005, it would have been clear to all well-informed observers that abusive interrogation techniques had almost certainly occurred and that there was a substantial risk they were still occurring.

It is true that Banks and some of the other DoD psychologists on the PENS Task Force said that psychologists were present for interrogations in order to make them safer, by using their expertise in human behavior to watch the interrogators and stop them if they began engaging in abusive activity as a result of so-called "behavioral drift." Under this explanation, involving

psychologists in interrogations would be a positive factor, and therefore the APA's actions to adopt and maintain the PENS Task Force report as policy could not be called an attempt to support torture.

But Banks and the others also believed that psychologists had an important role to play in helping to make interrogations "effective" by, among other things, making suggestions and recommendations to the interrogators about how to proceed. Were these suggestions and recommendations to be limited to ways of asking questions or building rapport? Not necessarily, say Banks and the others. Stress positions or sleep deprivation, for instance, might be appropriate techniques under some circumstances, depending on the nature of the stress positions and sleep deprivation, they say. Banks told us that a six-week training course started in 2006 for interrogators was needed to understand how to make these decisions, but once so trained, interrogators and psychologists could make the decisions appropriately in a manner that was "safe, legal, ethical and effective." For instance, Banks told us that a "stress position" with a detainee hanging from the ceiling with his head down would not pass this test because it would not be safe, but a "stress position" in which a detainee was in the "push-up position" might pass this test. The ethics guidelines in the PENS Task Force report allow a psychologist to consult regarding an interrogation and help make it effective, although not regarding "torture or cruel, inhuman or degrading treatment." Yet at the time of PENS, neither Banks nor the other DoD psychologists were willing to list stress positions or sleep deprivation as techniques that automatically fell within those definitions. And Banks was unwilling to do so ten years later when we spoke with him.

Thus, there were clear signs from the PENS Task Force meeting that DoD officials believed that some of the "enhanced" interrogation techniques specifically described in the media were not prohibited by the ethical guidelines in PENS. This in turn would have suggested at the time that DoD may well have considered these techniques proper in some circumstances and may well have been utilizing them. When combined with the private statements to Behnke and others APA by CIA and DoD officials, and the widespread and powerful public reporting about the apparent interrogation abuse, including numerous and corroborating quotes from government officials and the Red Cross, there were very strong reasons to be concerned that abusive interrogation techniques had occurred in the past and that there was a substantial risk that they were continuing.

We have not seen evidence that Behnke or the other key APA officials knew definitively that enhanced interrogation techniques were occurring at Guantanamo at the time of PENS. But it is also clear that they made an intentional effort not to dig into these concerns and allegations to try to determine whether they had occurred or were still occurring. Some of the key DoD officials on the task force, principally Banks and Larry James, as well as Dunivin, were assuring the key APA officials that past abuses had been stopped and the problem had been solved by deploying better personnel and by ensuring that psychologists were present to stop behavioral drift. But apart from these strong but self-serving and uncorroborated assurances, the APA officials did not seek information to determine whether abusive techniques were still occurring or were likely to occur in the future. Instead, they discussed internally their desire to be "forward-looking" and supportive of military psychologists, and not to look backwards and make accusations about psychologists. They therefore intentionally did 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.

"Deliberate avoidance"

In this situation in a criminal case, one would ask whether this intentional decision not to seek more information constituted "willful blindness" or "deliberate avoidance," such that a jury instruction known as the "ostrich instruction" would be appropriate. A typical version of this instruction says that a defendant acted "knowingly" if he had a strong suspicion that a certain factual claim or statement was true and deliberately avoided learning the truth. One common legal definition of "deliberate avoidance" in this context is "cutting off one's curiosity through an effort of the will."

On the one hand, this fits the facts at hand. 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. And by June 2005, the media reports combined with the statements that had been made to Behnke and others at APA by CIA and DoD officials would have made anyone suspicious, and probably strongly suspicious, that some of these allegations were true. In addition, 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.

On the other hand, Behnke, Koocher and others at APA insisted that it would have been impossible to determine definitively whether these allegations were true, because the information relating to the interrogation programs and the specific interrogations was classified. It is very likely true that information about specific interrogations was classified. However, it is notable that APA did not make any effort in this regard. 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. But it is also appropriate to note that this is not the typical "deliberate avoidance" situation in which an individual could likely have learned the relevant knowledge by asking questions of people he had access to. Here, there was both a deliberate and strategic attempt not to inquire, and an accurate (albeit strategically convenient) claim that gathering full information would have been extremely difficult in light of the classified nature of the underlying activities.

Purpose of the collusion

Thus, even after considering how the equivalent of an "ostrich instruction" might apply in the context of this independent investigation, we think it would be difficult to conclude based on the evidence we have seen that APA officials actually knew in 2005 that CIA or DoD psychologists were participating in "torture", even as properly defined. We therefore cannot conclude that the collusion between APA officials and DoD officials was done with the actual

intent "to support torture." 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 sanction — reflects a clear intent to take actions in order to please and curry favor with DoD.

Despite the critics' concerns about the narrowness of the question asked, we are confident that APA will take no satisfaction from our answer in light of our other conclusions.

The APA Board also asked three sub-questions. The first sub-question was whether APA "supported the development or implementation of enhanced interrogation techniques that constituted torture." The discussion above largely answers this question. 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. 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 of PENS because of the reluctance of Banks and other DoD officials to declare them prohibited. We would not call this "supporting the implementation of enhanced interrogation techniques," but we would say this was supporting the implementation by DoD of the interrogation techniques it wanted to implement, without substantial constraints from APA, and with knowledge that there likely had been abusive interrogation techniques used, and there remained a substantial risk that without strict constraints, such abusive interrogation techniques would continue.

The second sub-question asks whether changes to Section 1.02 of the Ethics Code or the formation and/or the report of the PENS Task Force were the product of collusion with the government to support torture or intended to support torture. The answer regarding PENS was just covered in the preceding discussion, and the answer regarding Section 1.02 is no, as set out above.

The third sub-question was "whether any APA action related to torture was improperly influenced by government-related financial considerations," including grants, contracts, or prescription-privileges policy for military psychologists. As described above, the substantial financial benefits in the form of employment, grants and contracts that DoD provided to psychologists around the country had a strong influence on APA's actions relating to the PENS Task Force (and therefore "relating to torture"), since preserving and improving APA's relationship with DoD (including the benefits to psychology that flowed from it) formed an important part of the motive behind APA's actions. We did not find that APA was motivated by a specific contract or grant, or that APA itself actually received any substantial grants, contracts,

or other payments from DoD during this period. The financial motivations for APA related to the substantial benefits that flowed from DoD to the profession of psychology.

As for the prescription-privileges program, we found that APA believed that this program had provided a very substantial benefit to psychology and APA, because obtaining prescription privileges in order to better compete with psychiatry was one of APA's leading priorities for many years. DoD's "demonstration project," created in 1991 and in place through 1997, which was initiated principally by Pat DeLeon (APA President in 2000) and his boss, Senator Daniel Inouye (D-HI) and his Chief of Staff, psychologist Pat DeLeon (APA President in 2000), allowed psychologists to have prescribing privileges in DoD and other federal locations, and created a two-year certification program that could be recognized by a state that authorized properly-certified psychologists to have prescription privileges like psychiatrists. Approximately ten psychologists were trained and certified through the DoD demonstration project, including Debra Dunivin. The demonstration project thus served a crucial unlocking function for psychology and APA, since it established the legitimacy of a prescription-training program outside of traditional medical school, thus providing a strong answer to the traditional critique from psychiatrists that the only way to be trained in prescribing psychiatric medication was to graduate from a traditional four-year medical school.

We do not believe that by 2005, APA officials were realistically seeking or expecting anything further from DoD on the topic of prescription privileges. Nor do we believe that APA officials actually worried that a failure to curry favor with DoD would cause DoD to reverse course on prescription privileges by, for instance, disallowing previously-certified psychologists from continuing to prescribe medication when they treated DoD personnel. Thus, we do not believe that the prescription-privileges issue was a significant "financial consideration" for APA in taking the actions it took in 2005.

Nevertheless, it is clear to us that the way in which DoD had supported psychology in crucial ways in the prior years, including through the prescription-privileges program, played a fundamental role in APA feeling motivated to curry favor with DoD. This was less a function of APA seeking something concrete with regard to a specific contract or program (like prescription privileges), but more a function of APA knowing very concretely how willing and able DoD was to provide large-scale support to psychology as a profession — now and perhaps in the future in unknown ways. This was support that APA did not want to risk jeopardizing by taking a position that was at odds with what APA perceived as DoD's clearly stated preferences within the PENS process.

V. CONCLUDING COMMENTS

Through their training and experience, psychologists possess a special skill regarding how our mind and emotions work—a special skill that presumably allows psychologists to be particularly good at healing damaged psyches. As with others who possess a special skill, psychologists therefore have an enhanced ability to cause harm to the psyche as well.

One of the leading principles of the APA Ethics Code tells psychologists to "do no harm." But sometimes psychologists engage in legitimate acts that cause anxiety in a patient, or contribute to negative lawful consequences for a criminal defendant or employee if their client is a law enforcement agency or a company.

Our review has involved a very different situation—a psychologist using his or her special skill to intentionally cause psychological (or physical) pain or harm to an individual who is not the psychologist's client, who is in custody, and who is outside the protection of the criminal justice system.

By explicitly declaring it ethical for psychologists to be involved in interrogations of detainees in DoD or CIA custody, while not setting strict and explicit limits on a psychologist's involvement in the intentional infliction of psychological or physical pain in these situations, APA officials were intentionally setting up loose and porous constraints, not tight ones, on this particular use of a psychologist's skill. This was especially true in the context of the time, which included (i) the government's known legal contortions that sliced the definition of torture down to a fragment, (ii) the widespread and credible claims that this kind of abuse had occurred, and (iii) the existence of a large loophole in the Ethics Code that allowed CIA and DoD psychologists to follow explicitly unethical orders and still be considered ethical as long as they tried to "resolve" the conflict.

Adding to this system of porous constraints was the "third-party beneficence" rationalization articulated by psychologists ranging from Jim Mitchell to Gerald Koocher, which posited that harm to one individual (a detainee) must be weighed against the benefits to third parties (the public) that would result if, for instance, information from the detainee stopped a terrorist attack. Those taking this position would argue that strict ethical constraints on psychologists in this situation would therefore be inappropriate. But even if, for the sake of argument, one accepts the legitimacy of this subjective harm-balancing rationale, it is notable that no limits whatsoever were placed on it, meaning that it provided another gaping hole in the already porous wall of ethical and legal constraints that might have prohibited intentional harm to detainees.

We have heard from psychologists who treat patients for a living that they feel physically sick when they think about the involvement of psychologists intentionally using harsh interrogation techniques. This is the perspective of psychologists who use their training and skill to peer into the damaged and fragile psyches of their patients, to understand and empathize with the intensity of psychological pain in an effort to heal it. The prospect of a member of their profession using that same training and skill to intentionally cause psychological or physical harm to a detainee sickens them. We find that perspective understandable.

We assume that some of the detainees were hardened members of sophisticated terrorist organizations, were well trained to resist interrogations, and had knowledge that would have been relevant to efforts to prevent future terrorist attacks. This creates a dilemma for military and intelligence policymakers who see this resistance as a successful barrier to obtaining information that might protect the public.

But this is not the first time in the history of warfare that this dynamic has occurred, as eloquently stated by an unknown military officer who was part of a DoD email exchange in August 2003 between military intelligence officers. The email recipients were asked for recommendations about interrogation techniques because "the gloves are coming off regarding these detainees." After one recipient suggested some "harsher" techniques and commented that "fear of dogs and snakes appear to work nicely," the unknown officer (whose name has been redacted) wrote:

> We need to take a deep breath and remember who we are. Those "gloves" are . . . based on clearly established standards of international law to which we are signatories and in part the originators. Those in turn derive from practices commonly accepted as morally correct, the so-called "usages of war." It comes down to standards of right and wrong — something we cannot just put aside when we find it inconvenient . . . . [W]e have taken casualties in every war we have ever fought — that is part of the very nature of war. We also inflict casualties, generally many more than we take. That in no way justifies letting go of our standards. We have NEVER considered our enemies justified in doing such things to us. . . . BOTTOM LINE: We are American soldiers, heirs of a long tradition of staying on the high ground. We need to stay there.

This debate played out intensely within the Bush Administration. But however our government defined and will define the nation's position in this debate — as the decades proceed and as administrations and foreign policies and world conflicts change — the profession of psychology must also define for itself whether it is ethical and legitimate for psychologists to use their special skill to intentionally inflict psychological or physical harm on individuals, especially those in captivity outside the criminal justice system.

APA officials made such a decision in 2005. Their decision was to keep the limits on this behavior loose and high-level. This was apparent to many from the words of the PENS report. APA claimed that its PENS-based policy placed tight anti-torture limits on psychologists, but the APA critics saw the statements as misleading and disingenuous.

Our investigation determined that on this point, the critics' understanding of the PENS report and process was correct. And our investigation determined that keeping the limits loose and high-level was intentional, and was done in order to align APA and curry favor with the Defense Department, to create a good PR response, and to keep the growth of psychology unrestrained in this area.

Some of the subsequent efforts by APA representatives outside APA management to tighten the limits, and to make this type of intentional infliction of harm more difficult for psychologists to engage in, eventually succeeded, despite the confidential joint effort from APA

and DoD officials to defeat these efforts. The APA ethics policy on this issue is thus very different today than it was in 2005.

Nevertheless, when we have heard some say that APA's current response to this issue will help define the meaning of psychology, we find it understandable. A profession that can salve our emotional traumas and help catch a criminal while promising to "do no harm" and to maintain "the highest standards of professional ethics and conduct" is a profession that society should trust and rely on. When that profession allows for the potential that psychologists will intentionally inflict pain on an individual with no ability to resist, regardless of the individual's background or motives, faith in the profession can diminish quickly. This is why many within the profession have been so upset about APA's ethics position on this issue in 2005, its tenacious resistance to changing it, and the lack of public statements acknowledging the true motivations behind APA's actions in 2005 and afterwards.

Witnesses have asked whether we would make specific recommendations at the end of our report, but APA has asked us not to do so, a request we do not see as problematic or unusual. In investigative-report situations, the investigators are often asked to report their conclusions about the evidence but to leave to management the issue of how to respond to any problems identified. It is the province of APA governance to decide on, and take responsibility for, the proper response here.

As APA governance considers what questions to address as part of this process, we note that our investigation has uncovered serious concerns about the ability of APA officials — and APA itself — to act independently from the presidential administration in power, and from powerful government agencies that provide the profession of psychology with very substantial benefits. And this is especially true of DoD. In some ways, DoD is like a rich, powerful uncle to APA, helping it in important ways throughout APA's life. Acting independently of a benefactor like this is difficult. But APA's bylaws demand that the Association not only "advance psychology as a . . . profession" but also "advance psychology . . . by the establishment and maintenance of the highest standards of professional ethics and conduct." One question that arises from this investigation is whether APA has taken sufficient steps to ensure that, as an organization, its commitment to the highest standards of ethical integrity is sufficiently strong and independent of powerful government benefactors.

As members of a different profession who have observed in this investigation the incredible intensity of the anger, personal attacks, and highly aggressive statements that have emanated from both sides of this debate, as well as the amount of energy that has been spent on this important issue for a decade, we hope that this report and APA's response will over time allow the profession as a whole to feel that APA has properly dealt with its actions in the past, that it has properly defined the ethical obligations of psychologists on this issue for the future, and that vigorous discussions on this topic can occur in a culture of civility and mutual respect. We say this with tremendous respect for a profession we now know fairly well, and whose strength and integrity is of crucial and expanding importance to the well-being of our society.

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BACKGROUND ON PSYCHOLOGISTS AND NATIONAL SECURITY

I. THE EARLY HISTORY OF PSYCHOLOGY

Psychology began to be recognized as an independent scientific discipline in the 19th century; prior to that, it was generally considered a branch of philosophy.[34] Beginning in the 1860s, German scientists including Gustav Theodor Fechner and Wilhelm Wundt, demonstrated that the experimental scientific method could be applied to answer certain psychological questions.[35] Courses in experimental psychology were first offered in the United States in the 1870s, and by the end of the century, several psychological research laboratories had been established at American institutions of higher education, including Johns Hopkins and Harvard.[36]

Reflecting its evolution from experimental science, psychological work in the United States in the 19th century was primarily focused on research, not treatment. That focus was broadened in 1896, with Lightner Witmer's founding of the world's first psychological clinic at the University of Pennsylvania.[37] This clinic, which focused primarily on the treatment of children, became the prototype for other clinics, which were primarily located in universities; consequently, Witmer is generally recognized as the founder of clinical psychology.[38] Witmer believed that the relatively young field of psychology could be of immediate practical benefit to individuals, and wrote that his goal was "to make his scientific knowledge as great a benefit as possible to humanity."[39]

II. THE WORLD WARS

A. World War I

On April 6, 1917, the day Congress declared war on the German Empire, APA President Robert Yerkes convened a meeting of a group of psychologists to discuss how psychology could assist in the war effort.[40] On April 21, a special meeting of APA's Council established twelve committees to assist the government in addressing psychological problems, including committees on "the psychological examination of recruits," "psychological problems of incapacity, including those of shell shock," and "recreation in the army and navy."[41]

One of the largest endeavors undertaken with the assistance of psychologists in support of the war effort involved the administration of tests to assess potential recruits. Before and

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[34] Thomas C. Cadwallader, *Historical Roots of the American Psychological Association*, *in* The American Psychological Association: A Historical Perspective, 3, 8 (1992).

[35] *Id.* at 4.

[36] *Id.* at 14, 18–20.

[37] Paul McReynolds, *Lightner Witmer: A Centennial Tribute*, 51 Am. Psychologist 237, 237 (1996).

[38] *Id.* at 237–38.

[39] Paul McReynolds, Lightner Witmer: His Life and Times, 126 (2012).

[40] Robert M. Yerkes, *Psychology in Relation to the War*, 25 Psych. Rev. 85, 85 (1918).

[41] *Id.* at 92–93.

during the First World War, the U.S. Army administered a battery of tests similar to the Binet-Simon intelligence scale to more than 1.7 million recruits to attempt to differentiate between potential recruits who were unsuitable for service, those who would be suitable privates, and those who could serve as officers.[42] These tests constituted the first widespread attempt to survey the intelligence of the population of the United States.[43] As part of the effort, the Army established a Division of Psychology and a School for Military Psychology at its medical officers' training camp.[44]

APA President Yerkes personally oversaw and directed the psychological examination effort as a major in the Sanitary Corps of the U.S. Army.[45] During the war, Yerkes also served as chairman of the Psychology Committee of the National Research Council,[46] which operated during the war as the Department of Science and Research of the Council of National Defense and as the Science and Research Division of the U.S. Signal Corps, and received substantial support from the U.S. government.[47]

B. World War II

During the Second World War, the effort to assess potential recruits expanded and, by 1945, more than 13 million people had been screened.[48] Military psychologists also developed tests that were designed to identify promising candidates for specialized jobs. One such test was the Air-Crew Classification Test Battery, which was administered to over 600,000 men to identify potential pilots and navigators.[49] Psychologists also provided therapeutic services to soldiers during the war, during which over 500 psychologists served in uniform.[50]

A number of prominent psychologists also developed an intensive program designed to assess the suitability of a candidate seeking to serve in the Office of Strategic Services ("OSS"), which had been established by President Roosevelt as the agency responsible for intelligence collection, espionage, subversion and psychological warfare. Prior to the establishment of this three-day assessment program, many OSS agents who deployed overseas encountered

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[42] Shepherd Ivory Franz, Handbook of Mental Examination Methods, 166, 169–70 (1912).

[43] A. David Mangelsdorff, *The Changing Face of National Security*, *in* Psychology in the Service of National Security, 9, 17 (2006).

[44] Col. Charles Lynch, Lieut. Col. Frank W. Weed, and Loy McAfee, The Medical Department of the United States Army in the World War, 398 (1920).

[45] Robert M. Yerkes, *Psychology in Relation to the War*, 25 Psych. Rev. 85, 85 (1918).

[46] Ernest R. Hilgard, *Robert Mearns Yerkes 1876–1956*, *in* Biographical Memoirs, 385, 391 (1965).

[47] National Research Council, Organization and Members, 3 (1919).

[48] A. David Mangelsdorff, *The Changing Face of National Security*, *in* Psychology in the Service of National Security, 9, 17 (2006).

[49] *Id.*

[50] Morgan T. Sammons, *Navy Clinical Psychology: A Distinguished Past and a Vibrant Future*, *in* Psychology in the Service of National Security, 141, 142 (2006).

difficulties coping with the stress and hazards of their missions; after the assessment program was established, the rate of reported problems related to stress fell dramatically.[51]

Psychologists' participation in the war effort led directly to the creation of the modern APA. In the early years of its existence, APA was "essentially an organization of college teachers."[52] APA's constitution stated that its object "was the advancement of psychology as a science," but made no reference to promoting psychology as a profession.[53] In 1937, certain applied psychologists, frustrated by APA's focus on academia and by its failure to provide licensing and educational opportunities for applied psychologists, formed the American Association of Applied Psychologists ("AAAP"), which threatened to divorce psychology's research from its practice.[54] But opportunities from the government provided by the war led to unity among psychologists.

In 1940, after the outbreak of the war in Europe and Asia, the National Research Council sponsored a conference on psychology and government service which was attended by representatives from both APA and AAAP, as well as smaller organizations of psychologists.[55] Representatives at the conference unanimously decided to establish a central coordinating group called the Emergency Committee in Psychology, which became a "virtual war cabinet for psychology and sponsored and coordinated the varied activities of psychologists in the military services, government agencies, and volunteer organizations," in which members of the various organizations of psychologists worked collaboratively in a common enterprise.[56] Robert Yerkes, the former APA president who had taken an active role in the mobilization of psychologists during the First World War, was a member of the Emergency Committee.

Under the Emergency Committee's authority, Yerkes convened a week-long conference in 1942 to discuss long-range planning in psychology.[57] The conferees proposed creating a "central American institute of psychology . . . to provide professional services of personnel, placement, public relations, publicity and publication" and further proposed a convention among the psychology organizations to discuss the proposal.[58] That convention began on May 29, 1943, and by May 31, agreement had been reached to merge AAAP into APA and to redefine the mission of APA as advancing psychology as a science "and as a means of promoting human welfare."[59] APA and AAAP officially approved the proposal the following year, and the new

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[51] *Id.* at 85.

[52] Gilbert J. Rich, *A Code of Ethics is Needed*, 7 Am. Psychologist 440 (1950).

[53] Dael Wolfle, *The Reorganized American Psychological Association*, 1 Am. Psychologist 3 (1946).

[54] *Division 19 History*, APA, *available at* http://www.apadivisions.org/division-19/about/history.aspx.

[55] James H. Capshew and Ernest R. Hilgard, *The Power of Service: World War II and Professional Reform in the American Psychological Association*, *in* The American Psychological Association: A Historical Perspective, 149, 151 (1992).

[56] *Id.* at 151–52.

[57] *Id.* at 154.

[58] *Id.* at 156.

[59] *Id.* at 166–67.

unified APA began operations on September 6, 1945.[60] The unification proved successful, and in the decade following the war, APA grew from approximately 4,000 members to 14,000 members.[61]

In the 30 years that followed World War II, the federal government spent over $1.2 billion to fund psychological research, and much of this research was funded through the military services.[62]

III. PSYCHOLOGY AND NATIONAL SECURITY DURING THE COLD WAR

A. The CIA

After World War II, the OSS was disbanded and its intelligence functions were transferred to the Central Intelligence Agency ("CIA"), created in 1947. From its inception, the CIA took an interest in psychological research, including research into possible mind-control techniques and methods by which deception could be detected.

In the 1930s and 1940s, the Soviet Union and its satellites staged a series of show trials in which prominent individuals publicly confessed to improbable crimes.[63] The 1949 show trial of Hungarian Cardinal Jozsef Mindszenty was particularly concerning to CIA leadership and prominent psychologists working on intelligence issues. In a 1949 study for the Air Force, Yale psychologist Irving Janis argued that the transformation of Cardinal Mindszenty, previously known for his "intransigent moral stamina," into a man who confessed to treason "in a kind of monotonous mechanical chant," was the result of "a series of electroshock convulsions . . . being administered . . . to reduce resistance to hypnotic suggestion."[64] Similarly, a CIA memorandum commenting on the trial argued that "some unknown force" had been brought to bear on the Cardinal, and suggested that hypnosis had been used on him.[65] A 1950 CIA analysis of the Soviet show trials of the 1930s concluded that the defendants' public confessions could not have been coerced by physical torture, and argued that they had instead been elicited using psychosurgery, electroshock, or psychoanalytic methods.[66] In 1952, several American pilots shot down in the Korean War and captured by Communist forces made false recorded confessions that they had dropped bombs filled with germs on civilian populations.[67] By 1953,

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[60] *Id.* at 171.

[61] *Id.* at 172.

[62] Martin E.P. Seligman and Raymond D. Fowler, *Comprehensive Soldier Fitness and the Future of Psychology*, 66 Am. Psychologist 82, 83–84 (2011).

[63] John Marks, The Search for the Manchurian Candidate, 23 (1979).

[64] Alfred W. McCoy, A Question of Torture, 22 (2006).

[65] John Marks, The Search for the Manchurian Candidate, 23 (1979).

[66] Alfred W. McCoy, A Question of Torture, 23 (2006).

[67] *See* Robert A. Fein, *U.S. Experience and Research in Educing Information: A Brief History*, *in* Educing Information, at xi (Intelligence Science Board 2006).

CIA Director Allen Dulles publicly warned that the Soviet Union used drugs and electroshock to deprive individuals of the ability to state their own thoughts.[68]

Concerned that Communist countries would develop a weapon that the United States could not match, the CIA undertook a decade-long program of psychological research into potential mind control and interrogation techniques that cost several billion dollars.[69] In his 1949 report, Janis proposed that the intelligence community undertake a "systematic investigation" of potential mind-control techniques, including drugs and electroshock treatments.[70] The following year, the CIA began a project to investigate "the possibility of control of an individual by application of special interrogation techniques" and "offensive uses of unconventional interrogation techniques, including hypnosis and drugs," called Project Bluebird.[71] In 1952, the CIA began another project, codenamed Artichoke, to investigate "the application of tested psychiatric and psychological techniques including the use of hypnosis in conjunction with drugs" to attempt to improve interrogation techniques.[72] And in 1953, the CIA unified both projects under the aegis of a third project called MKUltra.[73]

These projects funneled substantial funding to nongovernmental researchers, including psychologists. In 1950, the CIA funded a contract for $300,000 to a department of psychology at an unnamed university, funneling the money through the Office of Naval Research.[74] Over the following two years, the Office of Naval Research funded 117 contracts at fifty-eight universities under its Psychological Sciences research program. Between 1953 and 1963, the CIA "dispensed $25 million for human experiments by 185 nongovernmental researchers at eighty institutions, including forty-four universities and twelve hospitals," including the Boston Psychopathic, Mt. Sinai, and Columbia University hospitals, which conducted experiments using LSD.[75]

These contracts, which were routinely routed through other federal agencies and organizations, funded the work of important psychologists. For instance, Professor Charles Osgood wrote to the CIA seeking its support for his research concerning cultural differences. Shortly thereafter, in 1959, the "Human Ecology Society," which was a conduit of CIA funds, provided a grant to Osgood in the amount of $192,975. These funds allowed Osgood to create

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[68] Alfred W. McCoy, A Question of Torture, 24 (2006).

[69] *Id.* at 25.

[70] *Id.* at 22.

[71] *Id.* at 26.

[72] *Id.* at 27.

[73] *Id.* at 28.

[74] *Id.* at 31.

[75] *Id.* at 29.

the most important work of his career, and in 1963, he was elected president of APA.[76] The Human Ecology Society also made grants to B.F. Skinner, Carl Rogers, and Martin Orne.[77]

The MKUltra program was suspended in 1963, but the information the CIA learned as part of the program was synthesized in an interrogation handbook referred to as the "Kubark Manual."[78] The Kubark Manual, which has been declassified, describes itself as "based largely upon the published results of extensive research, including scientific inquiries conducted by specialists" and states that "sound interrogation" rests "on certain broad principles, chiefly psychological, which are not hard to understand."[79] It sets forth procedures to be followed when interrogators decide that "bodily harm is to be inflicted" or "medical, chemical, or electrical methods or materials are to be used to induce acquiescence."[80] It includes extended discussions of the circumstances under which infliction of pain, hypnosis, or surreptitious administration of narcotics may assist in an interrogation.[81] The manual also quotes extensively from prominent psychologists, including Martin Orne, Margaret Brenman, and Malcolm Meltzer,[82] and includes an extensive bibliography, which cites numerous published and unpublished psychological studies, including several funded by the CIA.[83]

The Kubark Manual was used as the basis for an interrogation training program for CIA agents. CIA agents taking part in the program played the roles of both interrogators and captives, and those playing captives were subjected to harsh treatment, including sleep deprivation, unappetizing food, isolation, mock executions, and placement in uncomfortable physical conditions for long periods of time.[84] This program ran for approximately a decade before ending in the mid-1970s.

The practices set forth in the Kubark Manual were also used operationally. For approximately 30 years following the creation of the Kubark Manual, the CIA disseminated its interrogation methods to military and police organizations around the world.[85] From 1962 to 1974, the CIA worked through the U.S. Agency for International Development to train more than

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[76] John Marks, The Search for the Manchurian Candidate, 168 (1979).

[77] *Id.* at 171, 174.

[78] Alfred W. McCoy, A Question of Torture, 50 (2006).

[79] *Kubark Counterintelligence Interrogation*, 1 (July 1963), *available at* http://www.uscrow.org/downloads/Survival%20Public%20Domain/Kubark_Counterintelligence_Interrogation_torture_manual1963.pdf.

[80] *Id.* at 8.

[81] *Id.* at 82–104.

[82] *Id.* at 96–97, 101–102.

[83] *Id.* at 110–122.

[84] Alfred W. McCoy, A Question of Torture, 53 (2006).

[85] Alfred W. McCoy, *Cruel Science: CIA Torture and U.S. Foreign Policy*, 19 New Eng. J. of Pub. Pol. 209, 221 (2005).

one million policemen in 47 nations; after 1971, the CIA also disseminated these tactics through the U.S. Army's Military Advisor Program.[86]

B. The U.S. Military

Psychology had a close relationship with the military throughout the Cold War. The G.I. Bill strengthened the profession of psychology both by expanding enrollments in institutions of higher education, which improved employment opportunities for academic psychologists, and by allowing some returning soldiers to train to become psychologists and join APA.[87] In 1950, the National Science Foundation was founded as a clearinghouse for government funding of research, and by 1952, it was funding psychological research.[88] Federal expenditures for psychological research rose from $10.2 million in 1953 to $23.9 million in 1958, and though the percentage of such funding provided by the military dropped throughout the period, it never fell below approximately 25%.[89]

The military also drove a major expansion in infrastructure supporting clinical psychology. By the end of the war, the military and the Veterans Administration had created a demand for psychologists to care for soldiers and veterans with mental and emotional problems that was difficult for the universities then training psychologists to meet.[90] Concerned that this demand would lead to unqualified or incompetent individuals being hired to provide mental health services, APA embarked on a major program to ensure the quality of psychological practice.[91] It established a program of board certification, implemented criteria for accreditation of programs providing graduate education in psychology, and organized efforts to license psychologists at the state level.[92]

Psychology had an important influence on the development of military doctrine regarding interrogations. Beginning in at least 1956, the military forbade the use of tactics it deemed coercive in interrogations.[93] The primary text on interrogation for the U.S. Military during the Cold War was the U.S. Army Field Manual 34-52, Intelligence Interrogation, which served as the guide to intelligence interrogations for all of the armed forces until it was replaced in 2006.[94]

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[86] *Id.* at 223, 228.

[87] Meredith P. Crawford, *Rapid Growth and Change at the American Psychological Association: 1945 to 1970*, *in* The American Psychological Association: A Historical Perspective, 177, 208 (1992).

[88] *Id.* at 209–210.

[89] *Id.* at 210.

[90] *Id.* at 221.

[91] *Id.*

[92] *Id.* at 221–227.

[93] *See* Department of the Army, Field Manual 27-10, The Law of Land Warfare, 107 (1956) ("No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.").

[94] Randy Borum, *Approaching Truth: Behavioral Science Lessons on Educing Information from Human Sources*, *in* Educing Information, 18 (Intelligence Science Board 2006); Department of the Army, Field

The manual describes 17 interrogation techniques that remained essentially unchanged for more than 50 years.[95] The manual incorporates psychological observations, such as that "[a]n individual's value system is easier to bypass immediately after undergoing a significant traumatic experience."[96] Noting that the "circumstances of capture are traumatic for most sources," the manual states that a person is vulnerable to interrogation immediately following capture, though it cautions that "this initial vulnerability passes quickly."[97] Thus the manual, while forbidding the coercive interrogation tactics discussed in the Kubark Manual, incorporates lessons learned from psychological research.

Psychologists were and are also involved in efforts to train American soldiers to resist interrogation. Following the "confessions" of American pilots shot down in the Korean War, the U.S. Air Force established a training program to assist soldiers captured by enemy forces to resist harsh treatment.[98] The U.S. Navy and Army did the same in the 1960s and 1980s, respectively.[99] These programs became known as "SERE" schools, as they teach skills related to "survival, evasion, resistance, and escape" by training soldiers in a simulated prisoner of war environment. Psychologists participate in the SERE schools in several capacities. They identify which applicants are likely to exhibit difficulties under stress, consult regarding the capacity of students who exhibit dissociation in response to the stress of training to continue with the program, and study the impact of stress on human cognition and perception.[100]

IV. PSYCHOLOGY AND THE MILITARY AFTER THE COLD WAR

A. Ties Between Psychologists and the Military

Following the fall of the Berlin Wall in 1989 and the dissolution of the Soviet Union in 1991, psychologists have continued to work closely with the United States military and related agencies. As of 2011, approximately 600 clinical psychologists were employed by the Army,[101]

Manual 2-22.3, Human Intelligence Collector Operations, i (2006), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm2_22x3.pdf..

[95] Randy Borum, *Approaching Truth: Behavioral Science Lessons on Educing Information from Human Sources*, *in* Educing Information, 18 (Intelligence Science Board 2006).

[96] Department of the Army, Field Manual 34-52, Intelligence Interrogation at 3-1 (1992).

[97] *Id.*

[98] M. Gregg Bloche, The Hippocratic Myth, 129 (2011).

[99] *Distinguished Member of the Special Forces Regiment: Colonel James "Nick" Rowe*, *available at* http://www.soc.mil/SWCS/RegimentalHonors/_pdf/sf_rowe.pdf; Jeremy Allen, *SERE School Celebrates 50 Years of Training* (July 12, 2012), *available at* http://www.navy.mil/submit/display.asp?story_id=68336.

[100] George Steffian et al., *Code of Conduct and the Psychology of Captivity: Training, Coping, and Reintegration*, *in* Military Life: Operational Stress, 83, 89 (2006).

[101] Bridget Murray Law, *Service, In Plain Clothes*, gradPSYCH Magazine, at 22 (2011).

while the Navy employs approximately 130.[102] The number of psychologists employed by the Veterans Administration rose from approximately 1,500 in 2000 to nearly 3,400 in 2010, with the largest gains coming between 2006 and 2010.[103] The Army, Navy, and Air Force sponsor educational programs in psychology, including year-long clinical psychology internships and postdoctoral residency programs.[104] The military also makes substantial grants for psychological research. Between fiscal years 1994 and 2000, the U.S. Air Force, Army, and Navy spent over one billion dollars on research in the behavioral, cognitive, and social science fields, for an average of approximately 150 million dollars per year.[105] The funding level declined in the first decade of the 21st century, though it remained substantial. In fiscal year 2004, total DoD funding for behavioral and social sciences was $44.0 million; in 2005, $43.8 million; in 2006, $41.8 million; and in 2007, $37.6 million.[106] More recently, since fiscal year 2007, more than $730 million has been appropriated to the Department of Defense to fund research on psychological health, post-traumatic stress disorder, and traumatic brain injury.[107] While these research funds are distributed to researchers in a number of fields of inquiry, approximately $120 million in grants were awarded for research on the topic of behavioral, cognitive, and psychological therapies between fiscal year 2007 and fiscal year 2011.[108]

Within APA, there is a Society for Military Psychology, referred to as Division 19, which encourages research and the application of psychological research to military problems.[109] The Society disseminates psychological research of interest to the military community by publishing a quarterly journal, presents annual awards to students and psychologists, and organizes educational events.[110]

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[102] *Clinical Psychology*, U.S. Navy, *available at* http://www.navy.com/careers/healthcare/clinical-care/clinical-psychology.html.

[103] *Big Growth in the Number of VA Psychologists*, American Psychological Association (June 2010), *available at* http://www.apa.org/monitor/2010/06/va-psychologists.aspx.

[104] Society for Military Psychology, *Becoming a Military Clinical Psychologist*, American Psychological Association, *available at* http://www.apadivisions.org/division-19/students-careers/becoming/index.aspx.

[105] *See* Department of Defense, Behavioral, Cognitive and Social Science Research in the Military, 34 (Aug. 1, 2000).

[106] National Research Council of the National Academies, Human Behavior in Military Contexts, 11 (2008).

[107] *Congressionally Directed Medical Research Programs, Psychological Health/Traumatic Brain Injury*, Department of Defense, *available at* http://cdmrp.army.mil/phtbi/default.shtml.

[108] *Congressionally Directed Medical Research Programs, Search Awards and Outcomes*, Department of Defense, *available at* http://cdmrp.army.mil/search.aspx.

[109] *Society for Military Psychology*, American Psychological Association, *available at* http://www.apa.org/about/division/div19.aspx.

[110] *Id.*

B. APA's 1991 – 2004 Ban on Military Advertising

In 1991, the APA enacted a resolution banning advertisements from the Department of Defense and its branches in APA publications, mailings using APA mailing lists, and literature distributed in APA meetings.[111] This ban was enacted in response to the Department of Defense's policy, then in effect, of refusing to admit bisexual, lesbian, or gay individuals to military service, and was maintained after the "Don't Ask, Don't Tell" policy was implemented in 1993.

Revoking the advertising ban was a long-term goal of APA's Division 19. In January 2003, members of Division 19 submitted a resolution to the APA Council of Representatives to rescind the ban.[112] The resolution was opposed by the APA's Society for the Psychological Study of Lesbian, Gay and Bisexual Issues, referred to as Division 44.[113] Despite its opposition to rescinding the ban, Division 44 proposed that a joint task force be formed between Division 19 and Division 44 to discuss issues surrounding gay, lesbian, and bisexual people serving in the armed forces.[114] Division 19 agreed to participate in the joint task force and recommended that the task force discuss several issues in addition to the advertising ban, including proposals that APA should (1) issue a statement condemning the "Don't Ask, Don't Tell" law as discriminatory, (2) initiate a campaign aimed at repeal of the law, and (3) identify psychologists who could assist DoD in developing programs to combat prejudice against gays and lesbians and to prevent problems from arising in the event that the "Don't Ask, Don't Tell" law was repealed.[115]

During the initial meeting of the task force in February 2003, both sides agreed that APA was not doing anything effective to address the issues faced by gays, lesbians, and bisexual people in the military.[116] In January 2004, the Joint Task Force issued its final report, which recommended that APA eliminate the prohibition on advertisements from the DoD, assess opportunities for advocacy to eliminate discrimination in the military based on sexual orientation, facilitate collection of data from military psychologists who are mental health providers about the implementation of the law on homosexuality in the armed services, and develop educational materials to improve the capacity of military psychologists to provide effective services.[117] The report noted that Debra Dunivin attended the task force meeting and

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[111] *Council Policy Manual*, American Psychological Association, *available at* http://www.apa.org/about/policy/chapter-12.aspx#defense-policy.

[112] *New Business for APA Council of Representatives Meeting*, 19 The Military Psychologist 6, 6 (Winter/Spring 2003).

[113] *Id.*

[114] *Division 19 Executive Committee Meeting, March 5, 2003*, 19 The Military Psychologist 2, 4–5 (Summer/Fall 2003).

[115] *Efforts to Rescind the APA Advertising Ban*, 19 The Military Psychologist 11, 15–16 (Summer/Fall 2003).

[116] *Id.* at 16.

[117] Report of the Task Force on Sexual Orientation and Military Service, 2 (2004).

consulted with the task force regarding the effect of the advertising ban.[118] It also noted that the task force consulted with Stephen Behnke regarding the ethical issues that might arise for military psychologists.[119] In July 2004, the APA Council of Representatives adopted the resolution proposed by the Joint Task Force, thus rescinding the ban on advertisements from DoD.[120]

V. PRESCRIPTIVE AUTHORITY

The U.S. military has provided critical support for psychologists' efforts to obtain authority to write prescriptions. In a 1984 speech to the Hawaii Psychological Association, then-Senator (and decorated World War II veteran) Daniel Inouye proposed that psychologists seek prescriptive authority to address shortages in qualified prescribers of medications to individuals who suffered from mental illness. In 1989, Congress appropriated funds for a pilot program to train psychologists serving in the Department of Defense to prescribe medication.[121] This program, which was called the Psychopharmacology Demonstration Project ("PDP"), was developed with direct input from APA staff, who served on a Department of Defense panel, to create its curriculum.[122]

In 1991, the PDP began with four participants. The initial curriculum involved two years of classroom training followed by an additional year of clinical training, though the curriculum was subsequently modified to remove one of the years of classroom training.[123] Over the six-year life of the program, from 1991 to 1997, ten prescribing psychologists completed the training and were granted authority to prescribe medications.[124] Of these, four served in the Navy, three in the Army, and three in the Air Force.[125]

In 1999, the U.S. General Accounting Office ("GAO") found that PDP graduates were well-integrated into the Military Health Service, that they held positions of responsibility and treated a broad spectrum of patients, carrying patient caseloads that were comparable to those of psychiatrists. It found that most of the graduates had been granted independent status, which allowed them to operate with only the same level of review as psychiatrists at their locations.[126] The GAO further found that the graduates were evaluated as good to excellent, both by their clinical supervisors, and an outside panel of psychiatrists and psychologists, and found no

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[118] *Id.* at 1.

[119] *Id.*

[120] Draft Minutes of the Council (July 28 & 30, 2004) (on file with Sidley).

[121] Robert E. McGrath, *Prescriptive Authority for Psychologists*, 6 Annu. Rev. Clin. Psychol. 21, 23 (2010).

[122] *RxP: A Chronology*, American Psychological Association, *available at* http://apapracticecentral.org/advocacy/authority/prescription-chronology.aspx.

[123] United States General Accounting Office, Prescribing Psychologists, 3 (1999).

[124] *Id.* at 4.

[125] *Id.*

[126] *Id.* at 5.

evidence of quality problems in their credential files.[127] However, the GAO also found that the PDP program was more costly than the Department of Defense's traditional mix of psychiatrists and non-prescribing psychologists, and stated that the impact of the program on combat readiness was minimal at best.[128]

Psychologists used the generally positive findings of the GAO report and other assessments of the PDP to support efforts to obtain prescriptive authority outside the military context, with sporadic success. In 1993, two years after the PDP began, Indiana amended its licensing law for psychologists to allow those participating in a "federal government sponsored training or treatment program" to prescribe medication.[129] This revision was made specifically to allow graduates of the PDP to prescribe medications in Indiana.[130] In 1996, the APA Council of Representatives formally adopted model legislation extending prescriptive authority to psychologists.[131] In 1999, Guam allowed psychologists to prescribe medications in collaboration with a physician.[132] New Mexico granted prescriptive authority to psychologists working in collaboration with the patient's primary care physician in 2002.[133] Louisiana followed shortly thereafter, enacting legislation in 2004 that allows psychologists to prescribe medication after consulting with the patient's physician.[134] And in 2014, Illinois authorized licensed psychologists with specialized training in psychopharmacology to prescribe certain medications for the treatment of mental health disorders.[135] Psychologists continue to lobby state legislatures to grant them prescriptive authority.

At the federal level, psychologists are permitted to prescribe medications in the three branches of the military that provide healthcare services, so long as they meet the standards set independently by each branch.[136] Military psychologists who prescribe medications include those trained in the PDP, as well as those who participated in a civilian program.[137] The number of military psychologists capable of prescribing medication has grown slowly since the

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[127] *Id.* at 8.

[128] *Id.* at 9, 11.

[129] Robert E. McGrath, *Prescriptive Authority for Psychologists*, 6 Annu. Rev. Clin. Psychol. 21, 27 (2010).

[130] *Id.*

[131] Ronald E. Fox et al., *Prescriptive Authority and Psychology*, 64 Am. Psychologist 257, 263 (2009).

[132] Robert E. McGrath, *Prescriptive Authority for Psychologists*, 6 Annu. Rev. Clin. Psychol. 21, 27 (2010).

[133] *Id.* at 29–30.

[134] *Id.* at 29.

[135] *RxP: A Chronology*, American Psychological Association, *available at* http://apapracticecentral.org/advocacy/authority/prescription-chronology.aspx.

[136] Robert E. McGrath, *Prescriptive Authority for Psychologists*, 6 Annu. Rev. Clin. Psychol. 21, 30 (2010).

[137] *Id.*

conclusion of the PDP.[138] The Public Health Service Corps and the Indian Health Service (part of the U.S. Department of Health and Human Services) also permit psychologists to prescribe medication, though this permission is limited to those psychologists licensed to prescribe medications by their state of licensure. At present, therefore, only psychologists licensed in Louisiana, New Mexico, or Illinois may prescribe medications under these agencies' authorities.

[138] *Id.*

THE 2002 ETHICS CODE REVISION[139]

I. BACKGROUND

A. Participants and Process

In 1996, the Ethics Committee appointed the Ethics Code Task Force ("ECTF") to revise the 1992 Ethics Code.[140] The ECTF was made up of 14 members who, according to Chair Celia Fisher, "reflected the scientific, educational, professional, gender, ethnic, and geographic diversity of the discipline."[141] The ECTF members included Celia Fisher (Chair), Peter Appleby, Bruce Bennett (APAIT liaison), Laura Brown, Linda Campbell (Council liaison), Nabil El-Ghoroury (APAGS liaison), Jessica Henderson Daniel, Samuel Knapp, Gerald Koocher (Board liaison),[142] Marcia Moody, Peter Nathan, Thomas Oakland, Mary Quigley (public member), Julia Ramos-Grenier, Abigail Sivan, Steven Sparta (Ethics Committee liaison), Elizabeth Swenson (Ethics Committee liaison), Melba Vasquez, and Brian Wilcox (Council liaison).[143]

Observers and monitors were also invited to attend and participate in ECTF meetings. Although most ECTF participants told Sidley they were particularly attentive and felt more strongly about the Ethics Code standards that pertained to their own area of expertise, observers and monitors in particular attended the meetings to represent whatever group or constituency had sent them with respect to the revision as a whole, and were present at their constituency's own cost. Over the six year period that the ECTF met, there were a number of monitors and observers who attended ECTF meetings, including: Lenore Walker (Division 42), Marty Williams (Division 42), Jean Carter (CAPP), Brent Slife, Stuart Pizer (Division 39), Larry

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[139] Throughout this section, we reference several commentary guidebooks to the Ethics Code. The first in time is *Ethics for Psychologists: A Commentary on the APA Ethics Code* (1994) (hereinafter the "1992 Guide"), authored by Mathilda Canter, the 1992 Ethics Code revision Chair, Bruce Bennett, Stanley Jones, and Thomas Nagy. It was meant to serve as "a vehicle for providing some helpful commentary … to assist psychologists in learning and understanding the Ethics Code."[139] Celia Fisher, Chair to the 2002 revision, wrote a guidebook titled *Decoding the Ethics Code: A Practical Guide for Psychologists* (2003) (hereinafter the"2002 Guide") following the passage of the 2002 Ethics Code. We also reference the 2010 *APA Ethics Code Commentary and Case Illustrations*, by Linda Campbell, Melba Vasquez, Stephen Behnke, and Robert Kinscherff (hereinafter the "2010 Guide"). Each of these guidebooks is helpful not only for its general insight into ethics and the APA Ethics Code, but also as a reference for how its authors, many of whom had a role in the 2002 Ethics Code revision, view ethics, the APA Ethics Code, and ethical guidance that should stem from it.

[140] *See* APA_0847536; 2002 Guide at 6.

[141] 2002 Guide at 6.

[142] ECTF liaisons were full voting members. HC00008054 at 3. An August 8, 1997 Ethics Committee Plan for the revision assigned liaisons voting status.

[143] 2002 Guide at xxv-xxvi; Minutes of the Ethics Committee Task Force (on file with Sidley). The agenda and minutes record observers, monitors, and members attending the meetings. These names varied over the six years, and included individuals with varying levels of participation, even those who had never attended a meeting. We drew from Fisher's books and the minutes in compiling a list that fairly depicts the composition of the observer and monitor group, but we do not purport to include everyone who may have attended a meeting over the span of the six-year revision process.

Leitner, Stewart Cooper (Division 13), Deirdre Knapp (Division 14), and Richard Naugle (Division 40). APA staff, including Stanley Jones, Deborah Felder, Dolph Printz, and, as of the end of 2000, Stephen Behnke, also participated. Nathalie Gilfoyle served as counsel.[144]

Led by Fisher, the ECTF was "committed" to making the revisions an "open" and "collaborative" process.[145] To that end, after announcing the Code revision, the ECTF issued an open call for comments on the "adequacy of the 1992 Ethics Code" and the content and format of the draft Code revisions. The ECTF also sent out a survey to collect critical incidents from a broad range of psychologists describing ethical challenges they had faced, approaches to these challenges, and the extent to which the 1992 Ethics Code was applicable to these challenges.[146] The survey questions would also be published in the APA *Monitor* as an open call for comments to the membership.[147] Comments received in between meetings were distributed among the members as reference materials.[148] These comments were then logged into the comments database and coded according to categories that would help set the priority for discussion at the meetings.[149]

The ECTF met twice each year from 1998 to 2001, and once in 1997 and 2002.[150] During each meeting, the ECTF reviewed the full Ethics Code and discussed comments received in response to the critical incident survey, the open call to the membership, or, later on, to published draft codes.[151] The task force then revised ethical standards based on the comments received and discussion of those comments.[152] To effectuate revisions, APA staff would insert changes into a working document at the meeting so the attendees could see and comment on proposed changes in real time.[153] All meeting participants were given the opportunity to comment on proposed revisions.[154] Then members voted on proposed language. The ECTF rules for voting required that a successful vote carry two-thirds of the eligible votes cast.[155] Yet most participants could not recall the official voting requirements because almost all of the

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[144] HC00008054 at 4–5.

[145] 2002 Guide at 8; APA_0847536; HC00008054 at 3–4.

[146] 2002 Guide at 8.

[147] *Id*. at 7–8.

[148] *See*, *e.g.*, HC00007680 at 2.

[149] *Id,*

[150] APA_0245725.

[151] Fisher interview (May 6, 2015).

[152] Behnke interview (May 1, 2015); El-Ghoroury interview (Apr. 14, 2015); Fisher interview (May 6, 2015); Felder interview (May 19, 2015); Jones interview (Apr. 14, 2015); S. Knapp interview (Apr. 10, 2015); Vasquez interview (Mar. 9, 2015).[+]

[153] Fisher interview (May 6, 2015); Jones interview (Apr. 14, 2015); S. Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 24, 2015); Grill interview (May 18, 2015).[+]

[154] Fisher interview (May 6, 2015); Jones interview (Apr. 14, 2015); S. Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 24, 2015).[+]

[155] HC00007680.

Ethics Code revisions were achieved by consensus,[156] which was the stated ideal way to resolve contested issues regarding the revision.[157] When the group could not reach consensus, Fisher tabled the conversation on that standard and took it up either later that same meeting or at the next meeting.[158] This process resulted in members and observers feeling that they had the opportunity to voice their opinions and that their voices were heard. Although not all ECTF members preferred the final version of every standard, ECTF members told Sidley that they felt the process achieved as much consensus as possible, and none could remember an instance where someone attempted to block passage of a revision that was supported by the majority.[159]

Although not all draft revisions were made public for comment, starting in 2000, drafts were typically published in the APA *Monitor* and made available on the APA website.[160] Comments on the draft revisions could be submitted in hard copy or electronically.[161] At least two members were assigned to review each comment, and Celia Fisher reviewed every comment received.[162]

Fisher was the clear leader of the ECTF: She set the agenda and led meeting discussions, and prior to every meeting, she distributed preparatory materials to members, including her notes and impressions regarding suggested changes.[163] Fisher reviewed every comment the ECTF received throughout the duration of the task force.[164] Between meetings, Fisher met with different interested constituents, such as members of Divisions 13 (Society of Consulting Psychology), 14 (Society for Industrial and Organizational Psychology), and 42 (Psychologists in Independent Practice), and spoke about the ECTF's mission and progress at APA events and to APA's governance.[165] With the exception of Fisher, no other ECTF members or observers played a lead role in the meetings or discussions.[166]

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[156] Jones interview (Apr. 14, 2015); Kinscherff interview (Apr. 20, 2015); S. Knapp interview (Apr. 10, 2015).

[157] HC00007680; *see also* Fisher interview (May 6, 2015).

[158] HC00007680; Jones interview (Apr. 14, 2015); Fisher interview (May 6, 2015).

[159] [Footnote removed][+]

[160] Fisher interview (May 6, 2015); HC00004100; APA_0847528 (although this document states that drafts 4-6 were available for comment, documents show that the ECTF received comments to draft 3 of the Code as well).

[161] APA_0847528.

[162] Fisher interview (May 6, 2015).

[163] Jones interview (Apr. 14, 2015); S. Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 24, 2015); Vasquez interview (Mar. 9, 2015).

[164] Fisher interview (May 6, 2015); Behnke interview (May 1, 2015).

[165] APA_0847528.

[166] Jones interview (Apr. 14, 2015); Kinscherff interview (Apr. 20, 2015); Koocher interview (Feb. 24, 2015); Vasquez interview (Mar. 9, 2015).

APA staff members assisted the ECTF with logistical and administrative tasks, for example by: reserving the meeting room; stocking the room with notepads, writing implements, and other materials; and taking notes during the meetings.[167] APA staff also participated in the meeting discussions and answered questions.[168] Questions regarding ethics were directed to Behnke while questions regarding adjudications were directed to Jones.[169] ECTF members told Sidley that none of the staff members took over the process or were overbearing in commentary or suggestions.[170] No one felt that any person or persons dominated the meetings, except for noting that Fisher was in charge of the revision process.[171]

B. Meeting Discussions

The tone of the meetings reflected a deep concern among psychologists that the Code was being used as a weapon against them to create liability in criminal, civil, and administrative proceedings.[172] Clinicians, forensic psychologists, military psychologists, and correctional psychologists were concerned with Code language that they thought could be seized on to create unwarranted liability for psychologists in a variety of circumstances.

The ECTF debated how to address this overarching concern. Some thought the Code should be strictly aspirational and that it should not include any enforceable, proscriptive standards. Others thought that it should be simplified and reduced in length to make it similar to the codes of other professional organizations (*i.e.*, the American Psychiatric Association).[173] Still others wanted a greater level of specificity in the Code and suggested the inclusion of scenarios and guidance based on those scenarios.[174]

ECTF discussions reflected these tensions between strict ethical standards and flexibility in the Code as well as individual psychologist's concerns regarding their areas of practice. Several ECTF participants told Sidley that they focused on the revisions relevant to their field or area of practice. For example, El-Ghoroury, the American Psychological Association Graduate Student representative member, told Sidley that he focused on the standards dealing with students and teaching.[175] He remembered spending a great deal of time focused on those standards and spent less time and effort on the other sections of the Code. Forensic psychologist

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[167] *See* Behnke interview (May 1, 2015); Jones interview (Apr. 14, 2015); HC00008042 at 5.

[168] Behnke interview (May 1, 2015); Breckler interview (Dec. 23, 2014); Jones interview (Apr. 14, 2015); Fisher interview (May 6, 2015); Felder interview (May 19, 2015).

[169] El-Ghoroury interview (Apr. 14, 2015); Jones interview (Apr. 14, 2015).

[170] Behnke interview (May 1, 2015); Kinscherff interview (Apr. 20, 2015); Koocher interview (Feb. 24, 2015).

[171] *Id.*

[172] There is further discussion on this point later in the report.

[173] Behnke interview (May 1, 2015); S. Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 24, 2015); Williams interview (Apr. 30, 2015).

[174] Nightingale interview (June 9, 2015).

[175] El-Ghoroury interview (Apr. 14, 2015).

Ramos-Grenier told Sidley that she was quite focused on forensic psychology, and ensuring that standards properly addressed the dilemmas forensic psychologists faced.[176] Deirdre Knapp, an industrial organizational psychologist, said she was concerned with ensuring the Code properly distinguished between psychologists who treated patients and those who had organizational clients so that there were standards that provided appropriate guidance to psychologists who did not have patients.[177] And Grill, a military psychologist, focused his attention on standards that would address the ethical situations military psychologists faced.[178]

Some ECTF members told Sidley that Bruce Bennett's[179] interest was specifically in reducing liability for psychologists. Bennett[180] was the Executive Director and CEO of the APA Insurance Trust ("APAIT"). The APAIT, now called The Trust, provided insurance coverage and risk management for psychologists,[181] and according to Fisher APAIT's interest was in reducing liability for psychologists. Some ECTF members told Sidley that Bennett had a lot of information about insurance fraud issues and liability,[182] and that he brought to bear his perspective from APAIT and engaged in ECTF discussions with an eye toward minimizing liability for psychologists.[183] At least one person thought Bennett was at the ECTF representing the APAIT.[184]

Witnesses told Sidley that Bennett advocated for more flexibility in the Code.[185] Fisher recalled that in discussions about flexibility in the Code, Bennett was interested in keeping the Code from becoming so restrictive that good psychologists were made more vulnerable to accusations of unethical behavior.[186] Yet Fisher told Sidley that this point of view was not unique to Bennett and that the task force membership as a whole felt that way.[187] That is, ECTF

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[176] Ramos-Grenier interview (June 4, 2015).

[177] D. Knapp interview (Apr. 10, 2015).

[178] Grill interview (May 18, 2015).

[179] Witnesses told Sidley that Bennett was part of the Revision Comments Subcommittee ("RCS"), the group responsible for the 1992 revision of the Ethics Code, that he was instrumental in the drafting and passage of the 1992 Ethics Code, and that he was one of the authors of the commentary guide to the 1992 Ethics Code. Bennett's areas of expertise included professional liability and risk management, marketing and promotion of psychological services, ethics, and malpractice insurance issues. He co-edited an APA monograph titled *Professional Liability and Risk Management*.

[180] Sidley contacted Bennett and requested an interview. Bennett declined to be interviewed. He agreed to answer written questions, but as of the date of this report, he had not done so. As a result, the information regarding his participation reflects what we learned from other participants and documents.

[181] *About the Trust*, The Trust Insurance (2015), *available at* http://www.trustinsurance.com/about/.

[182] Fisher interview (May 6, 2015).

[183] *Id.*; Vasquez interview (Mar. 9, 2015).

[184] El-Ghoroury interview (Apr. 14, 2015).

[185] Bennett was an ECTF member for the full term of the revision.

[186] Fisher interview (May 6, 2015); Vasquez interview (Mar. 9, 2015).

[187] Fisher interview (May 6, 2015).

members did not want the Code revisions to expose psychologists to greater liability in any areas of practice. At least one ECTF member recalled that Bennett favored loosening the Ethics Code standards and including the concept of "reasonableness" because it decreased psychologists' liability.[188]

Bennett's role at APAIT created a clear conflict of interest that was not acknowledged during the revisions process. Fisher told Sidley that, at the time, it did not occur to her that Bennett might have a conflict in being a member of the ECTF charged with revising the Code while working for an entity with a clear interest in limiting liability for psychologists. Considering it in retrospect, Fisher acknowledged that Bennett's involvement in the revisions may have presented a conflict.[189] Fisher told Sidley that Bennett had been part of the prior revision, and that the ECTF had been composed with an eye toward trying to include some individuals who had historical knowledge based on their participation in the 1992 revision.

Fisher said that she did not get the impression that Bennett was trying to sway the task force in order to benefit the APAIT financially by reducing its costs for insuring psychologists, and if she had thought he was trying to do so, she would have found that unacceptable. General Counsel Nathalie Gilfoyle told Sidley that she thought Bennett "almost certainly had an agenda" during the ECTF meetings. She thought Bennett would have been concerned about members being charged with ethical violations and APAIT being "on the hook" for payouts. Yet Gilfoyle did not think Bennett's presence presented a conflict of interest because his affiliation with APAIT was known, he was very smart, and his contributions were respected.[190]

The tensions between including flexibility in the Code and having strict standards led the ECTF to make a concerted effort to be precise in the wording of the revised standards.[191] Specifically, they wanted to use clear, unambiguous language in the standards that would provide psychologists with fair notice of conduct that was required and conduct that was prohibited.[192] This concern was a driving force in determining whether or not standards were properly "enforceable."[193]

II. ISSUES RAISED IN ECTF DISCUSSIONS

A. Nuremberg Defense

Subsequent documents show that during the second ECTF meeting, in March 1998, the task force discussed Standard 8.03. The question raised was whether Standard 8.03 could be

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[188] Vasquez interview (Mar. 9, 2015).

[189] Fisher interview (May 6, 2015).

[190] Gilfoyle interview (May 18, 2015).

[191] Fisher interview (May 6, 2015); S. Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 26, 2015); Ramos-Grenier interview (June 4, 2015).

[192] Behnke interview (May 1, 2015); Fisher interview (May 6, 2015); Gilfoyle interview (May 18, 2015); Williams interview (Apr. 30, 2015); 2002 Guide at 8–9.

[193] Behnke interview (May 1, 2015); Fisher interview (May 6, 2015); 2002 Guide at 8–9.

construed to provide a defense for psychologists working in organizations who made attempts to comply with the Code but were precluded from doing so by their employer—the Nuremberg defense.[194]

Standard 8.03 addressed conflicts between ethics and organizational demands and provided that:

> If the demands of an organization with which psychologists are affiliated conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and to the extent feasible, seek to resolve the conflict in a way that permits the fullest adherence to the Ethics Code.[195]

In the 1992 Code, Standard 8.03 was the standard that military and correctional psychologists would have looked to for guidance when they faced a conflict between what was required by the Code and what was demanded by their organizations. Yet we did not find any evidence to suggest that the ECTF discussed the Nuremberg defense in the context of organizational demands placed on military or correctional psychologists. Rather, the primary concern with regard to Standard 8.03 was whether it was fair to permit psychologists working for an organization or corporation to engage in conduct mandated by their employer without having to face ethical ramifications, while sanctioning independently practicing psychologists that engaged in the same conduct but were not acting pursuant to their employers' directives.

Presumably prompted by the ECTF's discussion on this issue, Gilfoyle sought an opinion from outside counsel regarding 8.03. In a memorandum dated September 24, 1998, outside counsel Kit Pierson of Heller Ehrman White & McAuliffe, provided Gilfoyle the "requested comments on possible modification of Ethics Standard 8.03." The memorandum summarized Pierson's views regarding the legal impact of revising 8.03 "so that employees could no longer assert that they were complying with employer directives as a possible defense in ethics matters."[196] Pierson stated that he:

> agree[d] that there are some circumstances in which the 'Nuremberg defense' is clearly inappropriate (e.g., a psychologist is directed to sleep with patients). The commentary to 8.03 in Dr. Jones' book also recognizes this (at 158: 'in rare instances the entire employment situation might be so obviously illegal and unethical as to require withdrawal'). It seems . . . there is very little argument that 8.03 must be available as an absolute defense.[197]

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[194] HC00001888.

[195] *Ethical Principles of Psychologists and Code of Conduct*, American Psychological Association (1992), *available at* http://www.apa.org/ethics/code/code-1992.aspx [hereinafter "1992 Ethics Code"].

[196] HC00003161.

[197] *Id*.

Gilfoyle did not recall asking Pierson about the Nuremberg defense, nor did she recall any discussion that would have led her to ask Pierson about it.[198] When read in context with Pierson's other observations in the memorandum, the sentence "[i]t seems . . . there is very little argument that 8.03 must be available as an absolute defense" seems to suggest that Pierson did not believe 8.03 would or should ever serve as an absolute defense to illegal or unethical conduct. Gilfoyle did not necessarily agree with Pierson on this point, but did not pursue it further.[199] Pierson ultimately suggested that the decision of whether to revise 8.03 so that employees could not use complying with employer directives as a defense "ought to be decided on policy, not legal, grounds."[200] Pierson wrote:

> As a matter of policy, it seems odd to me that APA would permit a psychologist to violate its Code without sanction if directed by an employer, but would sanction another person engaging in the same conduct without this directive.[201]

On October 15, 1998, Gilfoyle issued a legal memorandum to the ECTF analyzing the issue.[202] In it, she stated that prior to the discussion of standard 8.03 at the previous ECTF meeting she:

> had not understood this provision to mean that a psychologist had a 'Nuremberg'-type defense that the employer or an organization with which (s)he is affiliated required or caused the unethical behavior, after unsuccessful efforts by the psychologist to change the organization's unethical practice.[203]

Gilfoyle told Sidley that the underlying concern regarding 8.03 was not whether it provided a "Nuremberg defense," but whether it was fair to permit psychologists working for an organization or corporation to engage in certain conduct without ethical ramifications, when independently practicing psychologists that engaged in the same conduct were open to sanction from APA because they had not been acting pursuant to their employer's directive. Notes from 1998 confirm that the ECTF was grappling with the notion that 8.03 could impose different ethical standards on organizational psychologists than those to which independent practitioners were held.[204]

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[198] Gilfoyle interview (May 18, 2015).

[199] *Id.*

[200] HC00003161.

[201] *Id.*

[202] *See* HC00001888.

[203] Although Pierson's and Gilfoyle's memoranda appear to be in response to questions that arose at a previous ECTF meeting, the minutes for the meeting immediately prior, which took place on March 27 – 29, 1998, simply state that "[i]n executive session, legal counsel was asked to report back to the ECTF at the October 1998 meeting regarding several questions."

[204] ECTF Meeting Agenda (Apr. 9, 1999). The notes show that the ECTF discussed the idea of imposing a requirement upon organizational psychologists to follow the Ethics Code along with the countervailing consideration that if the standard "does not require them to comply with the Code in the end, one rationale for such a policy is that this might keep psychologists who are advocating for change in such settings,

None of the ECTF participants with whom we spoke had any recollection of the discussion that led to Pierson's and Gilfoyle's memoranda, or of any discussion of their findings. In fact, ECTF participants did not recall discussing the phrase "Nuremberg defense" at any point during the ECTF meetings.

B. Dispensing with Informed Consent for Research

Critics have alleged that Standard 6.12, which addressed dispensing with informed consent in research, was revised to permit the government to conduct research on detainees. We did not find any evidence to support this allegation.

Standard 6.12, in the 1992 Ethics Code, provided that:

> Before determining that planned research (such as research involving only anonymous questionnaires, naturalistic observations, or certain kinds of archival research) does not require the informed consent of research participants, psychologists consider applicable regulations and institutional review board requirements, and they consult with colleagues as appropriate.[205]

The third draft revision of the Code, generated on March 21, 2000, contained the first revisions to 6.12 and proposed revising it to:

> Psychologists may dispense with informed consent only where permitted by law, applicable regulations and institutional review board requirements or where: (1) research is conducted in commonly accepted educational settings and involves the study of normal educational practices, instructional strategies, or effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods and that would not reasonably be assumed to create distress or harm; (2) research involving only anonymous questionnaires, naturalistic observations, or certain kinds of archival research for which participants can not be identified and for which disclosure of the participants' responses would not place them at risk of criminal or civil liability or be damaging to the participants' financial standing, employability, or reputation or that would not reasonably be assumed to create distress or harm.[206]

The draft standard dispensed with informed consent where permitted by law, applicable regulations, and institutional review board requirements and then set forth two exceptions. The

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rather than forcing the psychologist's resignation or dismissal. Whether if it does not require them to comply with the Code in the end, it is problematic that this may mean that other psychologists (such as private practitioners) must meet a higher standard. Whether to have no provision regarding such matters."

[205] 1992 Ethics Code.

[206] HC00000106.

language of the standard underwent some additional revisions between this first proposed change and what eventually became the final standard, numbered 8.05 in the 2002 Code.

In its final form, Standard 8.05 was more complex than its predecessor and established two, overarching categories of instances when psychologists were not required to obtain informed consent for research. Standard 8.05 provided that:

> Psychologists may dispense with informed consent only (1) where research would not reasonably be assumed to create distress or harm and involves (a) the study of normal educational practices, curricula, or classroom management methods conducted in educational settings; (b) only anonymous questionnaires, naturalistic observations, or archival research for which disclosure of responses would not place participants at risk of criminal or civil liability or damage their financial standing, employability, or reputation, and confidentiality is protected; or (c) the study of factors related to job or organization effectiveness conducted in organizational settings for which there is no risk to participants' employability and confidentiality is protected or (2) where otherwise permitted by law or federal or institutional regulations.

Category (1) is subdivided into three lettered subcategories that identify certain kinds of research, such as the study of educational practices or job effectiveness, naturalistic observations, and archival research, that may be conducted without informed consent. According to an Ethics Code commentary authored by Behnke, Campbell, Kinscherff, and Vasquez, allowing these subcategories of research to proceed without informed consent is based on the premise that "[w]hen data collection does not jeopardize [] protections" put in place to prevent "harm, exploitation, distress and adverse consequences of psychological activities" to individuals, psychologists may "use their professional judgment in determining the appropriate consent status of their proposed research."[207] The commentary explains that "confidentiality is maintained and secured in all cases when consent is not sought," although notably that restriction only applies to Category (1). In Fisher's Guide to the Ethics Code, she wrote that the three lettered subcategories were also all "predicated on the condition that the research will not create distress or harm."[208] Therefore, according to the Ethics Code, if research within any of the lettered subcategories would "reasonably be assumed to create distress or harm," then psychologists may not dispense with the requirement to obtain informed consent.

Yet Category (2) allows dispensing with informed consent simply "where otherwise permitted by law or federal or institutional regulations"—and is not subject to the prerequisite that the research not reasonably be assumed to create distress or harm. Nor is it subject to the requirement that confidentiality be maintained and secured in all cases where consent is not sought.

Critics allege that the changes to Standard 6.12 did away with the basic protections regarding informed consent as outlined in the Nuremberg Code. The Nuremberg Code "was an

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[207] 2010 Guide at 269.

[208] 2002 Guide at 157.

attempt to formulate a universal natural law standard for human experimentation."[209] Specifically, during the Nuremberg trials following World War II, one trial, dubbed the "Medical Case," focused on the physicians' participation. The judgment contained a 10-point code for legitimate human research and experimentation now known as the Nuremberg Code. The first of the 10 points stated that the subject's informed consent was absolutely essential, and explained informed consent more fully, to include factors such as the subject having free power of choice, not being subjected to coercion or force, and having enough knowledge and information to make an enlightened choice.[210]

Critics alleged that by creating a specific and otherwise unrestricted exception to obtaining informed consent, as articulated by Category (2), the Ethics Code allowed psychologists to obviate the basic protections of the Nuremberg Code if and when the government permitted it. The critics' concern was that this exception could allow psychologists to participate with impunity in detainee interrogations if their involvement was deemed to be research and if the government determined informed consent from detainees was not required.[211]

The outside experts Sidley spoke to agreed that the blanket exception for dispensing with informed consent simply when permitted by law was problematic.[212] The experts generally acknowledged that there were certain circumstances where informed consent was not required, including in situations where the government permits, for example, the gathering of personal health information.[213] That said, Nora Sveaass, Associate Professor of Psychology at the University of Oslo who served on the UN Committee Against Torture from 2006 through 2013, told Sidley that exceptions such as the ones outlined in Category (1) of 8.05 should be linked to specific concerns in order to highlight potentially problematic situations.[214] Janel Gauthier, President of the International Association of Applied Psychology and primary drafter of the "Universal Declaration of Ethical Principles for Psychologists," agreed that "examples of the types of research for which consent . . . may not be needed . . . is helpful. However, it is empty if such examples are given without being put into a context of underlying moral considerations and the need for case-by-case decision making."[215] But all expressed concern that Category (2) had no limiting language associated with it.[216] Sveaass noted that it was "stated as a general

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[209] George Annas and Michael Grodin, The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation, 3 (1992).

[210] *The Nuremberg Code*, U.S. Department of Health & Human Services, *available at* http://www.hhs.gov/ohrp/archive/nurcode.html.

[211] *See* below for further discussion on government research.

[212] Reverby interview (June 24, 2015). Susan Reverby is the Marion Butler McLean Professor in the History of Ideas at Wellesley College who authored *Examining Tuskegee: The Infamous Syphilis Study and Its Legacy*. *See also* Email from Sveaass to Sidley (June 24, 2015); Email from Gauthier to Sidley (June 25, 2015).

[213] Reverby interview (June 24, 2015); Email from Gauthier to Sidley (June 25, 2015).

[214] Email from Sveaass to Sidley (June 24, 2015).

[215] Email from Gauthier to Sidley (June 25, 2015).

[216] Reverby interview (June 24, 2015); Email from Sveaass to Sidley (June 24, 2015); Email from Gauthier to Sidley (June 25, 2015).

permission if [the] state or institution so decide," which was problematic.[217] Gauthier pointed out that "permitted by law does not make something ethically justifiable" and that 8.05 "(perhaps unwittingly) gives the impression that, if dispensing with consent is 'permitted' by law, no further considerations are needed."[218] Sveaass asked why the Standard did not address potential dilemmas, or at least cross-reference to standards that address dilemmas, including 1.02.[219] Sveaass summed up the concern, asking about situations where "the research may be highly controversial and unethical but despite this ordered by the state. Then what?"[220]

Although critics have suggested that the change to Standard 6.12 may have been prompted by the events of 9/11, the complained-of language was drafted prior to 9/11. Sidley asked Fisher about the post-9/11 change of the phrase to "institutional regulations," the purpose of that change, and what "institutional regulations" meant. Fisher responded she did not recall any specific reasons for those changes, and that she was not certain what "institutional regulations" meant.[221] She believed the ECTF probably thought "institutional review board requirements" was redundant because it would already be covered under "federal regulations," but she conceded that "institutional regulations" was not a good phrase to use because it was not clear what the phrase meant, it was not otherwise defined in the Code, and therefore gave no proper notice about what it permitted.[222]

Few participants had a strong recollection of discussions regarding research or informed consent as it related to research—or the reasons for the revision. Fisher stated that the motivation for the changes to 8.05 were to bring it in line with federal regulations that were much more specific than what 6.12 stated, which she described as an "afterthought" in the 1992 Code that said almost nothing. Fisher thought Category (1) created a more protective standard, since none of the identified research could be done without informed consent if it would create distress or harm. She stated that no one was that concerned with Category (2), and that the intent in including it was to catch up to federal regulations, especially dealing with HIPAA. In Fisher's Guide to the Ethics Code, the discussion regarding Category (2) focuses solely on situations under which Protected Health Information ("PHI") can be used without client/patient authorization.[223]

Because the critics' concerns regarding 8.05 focused on the usurping of subjects' informed consent, Sidley also looked at other standards in the 2002 Code dealing with informed consent, including 3.10 "Informed Consent," 9.03 "Informed Consent in Assessments," and 10.01 "Informed Consent to Therapy." Both 9.03 and 10.01 require obtaining informed consent pursuant to the terms in 3.10. In relevant part, 3.10 requires psychologists to obtain informed

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[217] Email from Sveaass to Sidley (June 24, 2015).

[218] Email from Gauthier to Sidley (June 25, 2015).

[219] Email from Sveaass to Sidley (June 24, 2015).

[220] *Id*.

[221] Fisher interview (May 6, 2015).

[222] *Id*.

[223] 2002 Guide at 160–162.

consent for various activities "except when conducting such activities without consent is mandated by law or governmental regulation or as otherwise provided in this Ethics Code." Standard 9.03 also contains an explicit exception to obtaining informed consent when "testing is mandated by law or governmental regulations." In short, it appears that the Ethics Code's standards dealing with obtaining informed consent permitted psychologists to dispense with that requirement if a law or regulation permitted or mandated it. This aspect of each of the standards was present in the Code before September 11, 2001.

We did not see any evidence to suggest that these standards were changed after September 11, 2001 to accommodate any particular agenda. Nor was there evidence that any national security or response to terrorism discussion occurred in relation to any of these standards.[224]

C. Creation of Police & Public Safety Psychology, Correctional Psychology, and Military Psychology Seat

In 1999, Edmund J. Nightingale was elected to become Council representative for Division 18, Psychologists in Public Service.[225] Division 18 represented psychologists working in the Veterans Administration ("VA"), the criminal justice system, police and public safety, state mental health systems, the Indian Health Service, and other similar settings.[226] When he joined Council, Nightingale learned about the Ethics Code revision and thought that public service, law enforcement, and correctional psychologists, who faced ethical dilemmas unlike those any psychologists faced in private practice, lacked representation on the task force.[227] Nightingale had worked in VA psychology for his entire career and knew that VA psychologists faced different challenges than private practitioners. Moreover, based on Nightingale's knowledge of work done by psychologists in law enforcement (*i.e.*, counseling officers with work issues because of family situations, assisting in hostage negotiations, and counseling on police interrogations), he thought these psychologists in particular, and public service psychologists as a group, should have more guidance from the Code—and that a representative on the ECTF from this group could further that end.[228] Therefore, Nightingale moved to add a seat on the ECTF for someone to represent public service psychologists.

Nightingale recalled that the request for the additional ECTF seat was met with general resistance.[229] Nightingale speculated that the resistance may have been due to a number of issues including that the revision process was well underway and the seat would create additional

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[224] In fact, the language in 3.10 excepting the need to obtain informed consent if non-obtainment was mandated or prescribed by law first appeared in the November 1999 draft revision. HC00000534; HC00003327.

[225] Nightingale interview (June 9, 2015).

[226] *Id.*; *Psychologists in Public Service,* American Psychological Association, *available at* http://www.apa.org/about/division/div18.aspx.

[227] Nightingale interview (June 9, 2015).

[228] *Id.*

[229] *Id.*

expense that would need to be budgeted to ECTF.[230] Nightingale also thought there was pushback because he was new to Council, and as a relatively young, brash member was "elbow[ing] [his] way" in and bucking typical protocol with his request.[231] Nightingale remembered there was "some annoyance" at his proposal, although he could not identify specific people, with one exception: Nightingale recalled a pointed exchange with Koocher that was probably related to this issue, although Nightingale conceded it was long ago, and the dispute could have been about something else. Nightingale asked Sidley if Koocher was on the ECTF and when we confirmed he was a member, Nightingale said it made sense that Koocher, as a member, would be upset about a newcomer intervening in the ECTF process.[232]

Nightingale said that Pat DeLeon (1999 APA president-elect and 2000 president) shared the view that ECTF should have a seat to represent public service psychologists and counseled Nightingale to advocate for the additional seat not only on behalf of Division 18, but on behalf of Division 19 as well.[233] According to Nightingale, DeLeon advised him that APA usually worked best in coalitions and that joining forces with Division 19, a group that faced similar ethical dilemmas to members of Division 18, would make for a better case to add a seat to the ECTF. Nightingale stated that DeLeon "knew how things worked" because he had been involved in APA governance for a long time and agreed to advocate for the additional seat on behalf of both divisions.[234]

Both the Ethics Committee and Board recommended that Council reject the resolution.[235] Despite the recommendations of the Board and Ethics Committee, Nightingale made an impassioned plea at the Council meeting to add the seat, and succeeded in garnering enough support to do so.[236] In August 2000, Council voted to approve a resolution for funding one additional seat on the ECTF to represent Police & Public Safety Psychology and Correctional Psychology (Division 18), and Military Psychology (Division 19).[237] The approved resolution stated that the Ethics Committee had no representation from these groups and no "demonstrated expertise in these areas of endeavor" and that:

> [T]he current Ethical Principles of Psychologists and Code of Conduct [are] silent on many critical issues faced by psychologists who work in these areas and look to the principles and code and to the Ethics Committee for guidance; and
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> [T]he issues they face include consultations with immediate life or death outcomes (hostage negotiations, timing of interventions in the presence of SWAT

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[230] *Id*.

[231] *Id*.

[232] *Id*.

[233] *Id*.

[234] *Id*.

[235] HC00007163; Approved Minutes of the Board (June 9 – 11, 2000) (on file with Sidley); Nightingale interview (June 9, 2015).

[236] Nightingale interview (June 9, 2015).

[237] Approved Minutes of the Council (Aug. 3 & 6, 2000) (on file with Sidley); APA_0158056.

> Teams, dual roles by regulation in prison riot situations) coaching of interrogators during investigative interrogation, development of profiles for investigative purposes, and special situations involving confidentiality and prescribed dual roles (working with military clients and their dependents).[238]

The new seat was set aside for a member from Division 18 or 19, and the presidents of those divisions were asked to submit nominations.[239] Randy Taylor, President of Division 18, nominated Gilbert Sanders and Steve Norton. Sanders submitted his resume, which showed he was a Captain for the United States Public Health Services and a Counseling Psychologist for the Immigration and Naturalization Services ("INS"), and provided a range of mental health services to INS detainees.[240] He was also a Captain with over 20 years in the military and 10 years in correctional psychology work.[241] Norton was a clinical psychologist with areas of interest in forensic and correctional psychology, and was a member of Division 18.[242] Janice Laurence, President of Division 19, nominated Robert Nichols.[243] Nichols was a retired Army Colonel who had worked in clinical and non-clinical settings in the military and civilian settings.[244] The ECTF received three other nominations: Dennis Grill, nominated by task force chair Fisher and task force member Bennett; and Jeffrey Younggren and Karl Moe, both nominated by Koocher.[245] At the time, Younggren was a Colonel in the U.S. Army Reserve, a clinical and forensic psychologist in private practice, and a consultant in risk management to the APAIT.[246] Moe was a member of Division 19 and was in the Air Force.[247] Nightingale confirmed he did not submit, nor was he asked to submit, a nominee.[248]

Grill, who belonged to Division 19, was selected to fill the seat. Documents do not clearly show how or why Grill was picked above other nominees, although internal APA staff correspondence indicates he was Fisher's choice.[249] In an October 3, 2000 email, Gilfoyle told DeLeon that "Celia strongly wanted Dennis Grill."[250] And in an October 4, 2000 email to

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[238] Approved Minutes of the Council (Aug. 3 & 6, 2000) (on file with Sidley).

[239] *See* HC00007082; Approved Minutes of the Council (Aug. 3 & 6, 2000) (on file with Sidley).

[240] HC00007120.

[241] APA_0157701.

[242] APA Membership Directory Information for Steven C. Norton (on file with Sidley).

[243] *Id*.

[244] APA_0847709.

[245] APA_0157701.

[246] APA Membership Directory Information for Jeffrey Nels Younggren (on file with Sidley); Jeff N. Younggren resume, *available at* http://jeffreyyounggren.com/resume/.

[247] APA Membership Directory Information for Karl Owen Moe (on file with Sidley).

[248] Nightingale interview (June 9, 2015).

[249] *See* APA0162593; APA0162588.

[250] APA0162593.

Koocher, with a copy to Kinscherff, Gilfoyle stated that perhaps they could explain why the Ethics Committee "went with the nominee of the ECTF chair."[251]

Fisher said she did not remember nominating Grill and that he was nominated by the divisions, not by the ECTF.[252] When asked whether Grill was her nominee, Fisher did not remember ever expressing any preference for Grill.[253] Despite nominating him, Fisher stated she would have no reason to favor Grill over any other candidate.[254] The only preference Fisher recalled was not wanting to give the seat to Younggren based on past interactions with him.[255] Otherwise, she could recall no basis for distinguishing among the nominees and speculated that if she did express a preference for Grill, it may have been based on having met Grill once or twice in the past and not having any familiarity with most other nominees.[256]

After learning of Grill's appointment to the ECTF, Sanders, who was not chosen, sent a fax to Kinscherff complaining about Grill's selection because Grill only had military experience whereas Sanders had both military and correctional settings experience.[257] Because Grill lacked experience in correctional psychology, Sanders asked that "the Ethics Committee be informed that several critical factors may not be discussed that correctional psychologists feel [are] urgent in any revision of the APA Code of Ethics."[258] Nightingale was equally displeased with the choice, and in an email to DeLeon said:

> It just goes to show that you can win one on the floor or lose it [in] the cloak rooms . . . Dennis Grill may be a fine nominee, but he has no background in Police/correctional issues. I had thought the process was one wherein the division nominees would become the selection pool from which the committee would make a selection. I was wrong. The gods were offended and they did what they pleased![259]

In an October 3, 2000 email chain between Gilfoyle and then-APA President DeLeon, DeLeon counseled Gilfoyle to communicate directly with an unnamed male individual who "got council to override everyone's recommendations" but who DeLeon and Gilfoyle expected not to be pleased with Grill's selection for the seat.[260] The email chain does not identify the "he" to whom they are referring, but presumably they are talking about Nightingale, who had moved for

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[251] APA0162588.

[252] Fisher interview (May 6, 2015).

[253] *Id*.

[254] *Id*.

[255] *Id*.

[256] *Id*.

[257] APA_0157701.

[258] *Id.* (emphasis in original).

[259] APA_0162588.

[260] APA_0168205.

the seat in Council. Nightingale confirmed to Sidley that he had been upset someone from military psychology was appointed to the seat, but that he thought Grill was selected due to the politics of his having moved for the seat. Nightingale took the whole episode as a "lesson learned" in diplomacy.[261]

Although he was upset with Grill's selection to the ECTF, Nightingale was able to communicate his concerns about the Ethics Code by making public comments and reaching out to Fisher to express his concerns and suggestions.[262] Fisher was responsive to Nightingale's correspondence, and at one point he even commented: "What a wonderfully complete reply. Thank you for your efforts on behalf of the revision, but more especially for the thoughtfulness of your reply."[263] It therefore does not appear that Nightingale was sidelined in his ability to comment or provide insight to the revision process.

Grill did not know why he was selected to fill the seat—he did not volunteer his name for consideration and did not know who did.[264] He speculated that the person most likely to have suggested his name would have been one of the other nominees—Younggren—whom Grill had known for "a very long time" and who had tried to involved Grill in ethics issues.[265] Although Grill attended ECTF meetings, Fisher and other members do not remember him being particularly vocal.[266]

It is not clear why Grill was selected over other nominees, but it is undisputed that the addition of the seat and Grill's appointment predated the attacks of September 11, 2001 and were not motivated by a response to those events. Indeed, the addition of a seat to represent public service and military psychologists was controversial and the decision was made by Council against recommendations by the Board and Ethics Committee.

D. Conflict Between Ethics and Law – Standard 1.02

The first proposed changes to Standard 1.02 appeared in the fourth draft of the revised Code, generated in October 2000[267] — which was the first draft generated after Grill's appointment to the ECTF. The proposed changes to Standard 1.02 expanded the Standard to address not only conflicts between the Code and the law but also conflicts between the Code and "regulations, or other governing legal authority." In addition, the revisions permitted psychologists to adhere to the requirements of "the law, regulations, or other governing legal

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[261] Nightingale interview (June 9, 2015).

[262] Nightingale Document Regarding ECTF Comments (on file with Sidley); APA_0030779; APA_0036265.

[263] APA_0030515.

[264] Grill interview (May 23, 2015).

[265] *Id.*

[266] Fisher interview (May 6, 2015); D. Knapp interview (Apr. 10, 2015); El-Ghoroury interview (Apr. 14, 2015).

[267] HC00005000.

authority" if the conflict was unresolvable. The comparison below shows Standard 1.02 of the 1992 Code against the proposed changes.

1.03 Relationship of Ethics and Law. If psychologists' ethical responsibilities conflict with law, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict in a responsible manner.	1.02~~3~~ Conflict Between ~~Relationship of~~ Ethics and Law, Regulations, or Other Governing Legal Authority. If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict in a responsible manner. If the conflict is unresolvable via such means, the psychologist may adhere to the requirements of the law, regulations, or other governing legal authority.

The proposed language was ultimately incorporated into Standard 1.02 in the 2002 Code, with one additional change—the deletion of the phrase "in a responsible manner," which was removed in the June 2001 draft. Critics allege that the revised language, especially the addition of the second sentence, made it permissible under the Code for a psychologist to abdicate his or her ethical obligations and follow a military or correctional facility order even when the order conflicted with the Code. As long as a psychologist made known his or her commitment to the Code and took some steps to resolve the conflict, the psychologist could follow the order and not face ethical sanctions. Perhaps the strongest criticism of this revision is that it gave psychologists cover to participate in or otherwise consult on interrogations involving enhanced techniques that were tantamount to torture.

While the revisions to Standard 1.02 may have had the effect of providing cover for these psychologists, we found no indication that the revisions were motivated by the government's interrogation program, or by a desire to protect psychologists who were involved in detainee interrogations, let alone abusive or coercive interrogations. Rather, we found that changes to Standard 1.02 were motivated by a desire to help: 1) clinicians and forensic psychologists caught between court orders and ethical obligations, and 2) military and correctional psychologists who worried about ethical conflicts with military or correctional facility orders. Specifically, psychologists were concerned that the term "law" as used in Standard 1.02 was too narrow to cover certain mandates such as subpoenas, court orders, or law enforcement or military orders, and that the Code lacked clarity with regard to what psychologists were required or permitted to do if they were unable to resolve a conflict between the law and the Code.

Fisher recalled these concerns and explained that silence in the 1992 Ethics Code on what actions psychologists could or should take when faced with a conflict between the Code and the law created confusion and anxiety about whether psychologists who attempted but failed to resolve the conflict had met their ethical obligations, or whether they were required to lose their jobs or face other consequences in order to comply with the Ethics Code.[268] Fisher said that permitting psychologists to "adhere to the requirements of the law, regulations, or other governing legal authority" was meant to make clear that the Code did not require psychologists to quit their jobs, go to jail, or face court martial in order to comply with the Ethics Code.[269]

[268] Fisher interview (May 6, 2015).

[269] *Id*.

Comments to the revised draft Code support this statement and indicate that some psychologists were "glad to see an explicit and clear statement about what one's practice should be when the law and ethics are in conflict."[270] Another comment indicated that "[t]he addition that specifies protocol for dealing with conflict between law and ethics was of critical importance. Clarifying this possibly frequent quandry [sic] helps in creating a more applicable set of ethical codes."[271]

1. Concerns from correctional and military psychologists

Fisher's notes reflect that the participants were thinking about the military in the context of 1.02 as early as 1999. Specifically, comments to the 1999 draft standard 1.02 had a typewritten entry of "[n]o changes recommended" and the following handwritten comment: "EC Statement: shd military be referenced?"[272] "EC" is a possible reference to the Ethics Committee, but the document contains no other comments or references for the standard. This was the earliest reference to the military or correctional psychologists contained in the draft revisions, but it is clear that correctional and military psychologists wanted to ensure that Standard 1.02 applied to correctional facility and military orders.[273]

Grill, the task force member representing law enforcement, correctional, public service, and military psychologists, told Sidley that his principal focus as a task force member was to enact changes to standard 1.02 that would ensure military orders were covered as a potential conflicting authority under 1.02[274] — and that he advocated for this change during the revisions process.[275] Grill stated that, for example, the regulations of the Army, the VA, or the San Antonio Police Department are not law, but they are still directives for those who work for those organizations.[276] Therefore, the language "regulations or other governing legal authority" was added to capture, among other things, military regulations that are not law but are directives.[277] For Grill, it was important to address the conflicts that military psychologists faced on a routine basis when confronted with military procedures and regulations that were not consistent with Ethics Code requirements.[278] A principal concern for Grill was the issue of non-confidentiality for military patients seen by military psychologists.[279] [280] If a military psychologist assessed and

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[270] ECTF Reference Book Part 9, comment 313 (Laxton) (June 22-24, 2001) (on file with Sidley).

[271] *Id.* at comment 375 (Paez).

[272] ECTF Meeting Agenda (Apr. 9, 1999) (on file with Sidley).

[273] Grill interview (May 23, 2015); Nightingale interview (June 9, 2015); Fisher Notes (undated) (on file with Sidley).

[274] Grill interview (May 23, 2015).

[275] *Id*.

[276] *Id*.

[277] *Id*.

[278] *Id*.

[279] *Id*.

[280] At least one other comment from a military psychologist raised the issue of confidentiality in the military setting, although not specifically tied to any standard: in comments gathered for review at the April, 1999 meeting, Patrick Harrington suggested "explicit wording in the ethical principles regarding

treated someone in the military, the psychologist was required to inform superiors of any treatment prescribed or concerns stemming from information gleaned during therapy. Military patients, therefore, were not afforded confidentiality over their assessment and treatment information.[281]

In the early 1990s, Grill and others, including Younggren, worked on a form to explain the limits of treatment confidentiality to military personnel.[282] Grill said that the form tried to inform the soldier as much as possible about the psychologists' limits on maintaining confidentiality and then the soldier could determine whether to continue with treatment. Despite that, Grill was still concerned about confidentiality and other conflicts between military regulations and ethical requirements and thought that 1.02 should provide military psychologists with guidance for those situations.[283] Sidley asked Grill why his concerns were different than those of other participants representing organizational psychology in the ECTF. Grill noted that organizational psychologists had clients not patients, and for Grill it was important to address ethical conflicts in the context of treating patients.[284]

Grill said that no one identified Standard 1.02 for him as one that needed to be changed when he was asked to participate in the ECTF, but that it was clear to him that it was a principal area of concern for his constituency.[285] He had grappled with the question of conflict between military requirements and the law while he practiced, and had discussed it with Younggren. So Grill knew when he started on the ECTF that 1.02 was a relevant standard for his concerns.[286]

Members of Division 18, Psychologists in Public Service, lobbied for the change to 1.02 as well. Gil Sanders,[287] the Chair of the Criminal Justice (Corrections) Section of Division 18, communicated with Fisher about the Division's concerns with the scope of 1.02. Specifically, he and Fisher discussed three standards: conflict between ethics and law,[288] multiple relationships,

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confidentiality for both civilian and active duty patients seen in military healthcare settings." ECTF Reference Booklet Part 5, comment 116 (Harrington) (Apr. 9-11, 1999) (on file with Sidley).

[281] Grill interview (May 23, 2015); ECTF Reference Booklet Part 5, comment 116 (Harrington) (April 9-11, 1999) (on file with Sidley).

[282] Grill interview (May 23, 2015).

[283] *Id*.

[284] *Id*.

[285] *Id*.

[286] *Id*.

[287] Sanders questioned Grill's appointment to the ECTF as the representative for law enforcement, correctional, public service, and military psychologists.

[288] At that time, the standard addressing conflicts between ethics and law was temporarily numbered 1.03 because as of draft 1 of the revision, generated in April 1999, Standard 8.01, addressing familiarity with the Ethics Code, was moved to 1.02, shifting the conflict standard to 1.03.

and dispensing with informed consent for research.[289] Regarding the conflict standard, Fisher's notes about their conversation stated that:

> Psychologists in correctional facilities are often caught between conflicting demands of their facilities and the ethics code. However, [the conflict standard] may not be adequate because 'law' is vague in these facilities and are often interpreted through 'regulations.' Would including 'government regulations' in [the conflict standard] address this issue?[290]

Although it is not possible to tell from the note if others had also proposed the language, Fisher's note shows that Sanders suggested the "government regulations" language that was eventually incorporated into the standard. Fisher's notes on the comments to draft 3 of the Code, which was generated in March 2000, also speak to this question, clearly attributing the suggestion of the phrase "law, regulations, or other governing legal authority" to Division 18.[291]

Fisher agreed with the overall concerns of military and correctional psychologists that the scope of 1.02 in the 1992 Code did not capture conflicts arising from directives in correctional and military settings.[292] Fisher recalled that "one of the lawyers" at APA, perhaps Nathalie Gilfoyle, had determined that "law" did not include orders issued by supervisors or superiors to military and correctional psychologists.[293] Fisher thought the revised, more expansive language would therefore ensure 1.02 covered directives to military and correctional psychologists, who faced legal or quasi-legal consequences from disobeying orders from their superiors. More specifically, Fisher recognized the "stakes were higher" for military psychologists, who could face court martial for disobeying a direct order.[294]

The new 1.02 language made explicit that it captured mandates other than federal or state law and therefore clarified that military and correctional psychologists should refer to 1.02 to guide them when faced with conflicts between their employer's directives and ethics. Before the revisions to Standard 1.02, correctional and military psychologists would have looked to 8.03 in

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[289] Sanders's comment on dispensing with informed consent for research was not relevant to the issues in this investigation.

[290] Fisher Notes (undated) (on file with Sidley).

[291] *See* APA Ethics Code, Draft 3 Comments (on file with Sidley).

[292] Fisher interview (May 6, 2015).

[293] In discussions with the investigative team, Gilfoyle did not think she would have interpreted "law" so narrowly as to have excluded judicial or military orders, but she did recall others' concern about ensuring that the standard cover, for example, court orders.

[294] Harrington's comment, up for consideration in April 1999, pointed out that, as to the confidentiality issue he raised, "[a] potential problem lies in the different military laws that apply (e.g., commanding officer 'orders' you to give information and if you don't obey you could have charges brought against you)." ECTF Reference Booklet Part 5, comment 166 (Harrington) (April 9-11, 1999) (on file with Sidley). As a reviewer for this comment, Koocher determined that this issue was effectively addressed in the current ethics code and added that it had been written about extensively, therefore no action in the current Code was needed. The other reviewer, Swenson, noted that the issue was already under consideration.

the 1992 Code which addressed "Conflicts Between Ethics and Organizational Demands" (1.03 in the 2002 Code). Standard 8.03 required that:

> If the demands of an organization with which psychologists are affiliated conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and to the extent feasible, seek to resolve the conflict in a way that permits the fullest adherence to the Ethics Code.[295]

The 1992 Guide to the Ethics Code explicitly contemplated ethical challenges faced by military psychologists under Standard 8.03:

> It is recognized that in some situations as, for example, in the military, the psychologist is not likely to be able to change the system. But note that failing to *resolve* the conflict is not an ethical violation. Failing to *attempt* resolution is.[296]

Fisher's Guide to the 2002 Ethics Code did not discuss military and correctional psychologists in relation to 1.03 (2002), but addressed them in the context of 1.02, noting that the standard "addresses instances in which the requirements of the Ethics Code may conflict with judicial authority, with state or federal laws, or with regulations governing the activities of psychologists working in the military, correctional facilities, or other areas of public service."[297] It therefore appears that the language in the 2002 revised Code successfully transferred coverage of ethical conflicts arising in military and correctional settings from 8.03 (1992), which dealt with ethical conflicts with organizational demands, to 1.02, which tackled ethical conflicts with law, regulations, or other governing legal authority.

With the revision to Standard 1.02, psychologists arguably no longer had to resolve ethical conflicts in a way that "permits adherence"[298] to the Code; instead, they could simply follow the law. Yet we did not see any evidence that the shift to reliance on 1.02 from 8.03 (1992 Code) / 1.03 (2002) had a practical impact on the obligations imposed upon military psychologists. Although the language differs, neither iteration of either standard imposed a requirement on psychologists to follow either the Ethics Code or the conflicting directive. Rather, both standards had the same basic affirmative requirements: that psychologists raise the conflict and attempt to resolve it. Both also left the final decision of what to do, if the conflict was unresolvable, to the psychologist. And although both 1.02 and 1.03 were amended in 2010

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[295] 1992 Ethics Code.

[296] *Id*. at 159 (emphasis in original).

[297] 2002 Guide; *see also* 2010 Guide at 26–28 (including case study regarding psychologists in correctional setting, under Standard 1.02 case studies).

[298] The 2002 Ethics Code removed the adjective "fullest" from standard 1.03, thereby requiring only that psychologists "resolve the conflict in a way that permits adherence to the Ethics Code," rather than "the fullest adherence," as the language in 8.03 required. *Ethical Principles of Psychologists and Code of Conduct*, American Psychological Association (2002), *available at* http://www.apa.org/ethics/code/principles.pdf [hereinafter the "2002 Code"].

to include language explicitly prohibiting their terms to excuse a violation of human rights, neither standard contained that explicit limitation in 1992 or 2002.

Sidley found no evidence that the Nuremberg defense arose at any point during the considerations of the revisions to 1.02. This is especially notable in light of the revisions specifically aimed at expanding the scope of 1.02 to capture ethical conflicts with military directives. We note that the 1992 Guide had contemplated that 8.03, at that time the standard that covered military and correctional psychologists, was not a universal solution for conflict situations. The 1992 Guide explained that "psychologists are not ordinarily expected to resign from their professional positions in order to comply with the stipulations of [the] Ethics Code,"[299] but recognized that there were certain "rare instances" that were "so obviously illegal and unethical as to require withdrawal, such as if the psychologist finds that he or she has been hired solely to 'develop' and sell bogus, totally unvalidated 'diagnostic' tests."[300] Neither the 1992 Ethics Code nor the 1992 Guide explained when a situation becomes one of the "rare instances" requiring withdrawal. It seems reasonable to conclude from the example provided that an interrogation involving enhanced techniques designed to cause harm to the detainee would be one of the instances that require withdrawal. But, the Ethics Code itself does not explicitly say this; indeed, it does not even state that some situations would require withdrawal; that suggestion is only found in the 1992 Guide to the Code.

Moreover, the 2002 Fisher Guide specifically recognized the difficulty of the ethical dilemma in the context of the military, highlighting it as an area where a psychologist may often be unable to resolve a conflict under 1.02. The Guide explained that:

> Standard 1.02 also recognizes that legal and regulatory authorities may not always respond to specific steps taken by psychologists. When reasonable actions taken by psychologists do not resolve the conflict, they are permitted to make a conscientious decision regarding whether to adhere to the Ethics Code or the legal or regulatory authority.
>
> For example, U.S. Department of Defense (DoD) regulations routinely require military psychologists to perform activities that place service to the military mission above those of the best interests of the individual client/patient, resulting in conflicts between DoD requirements and Ethical Standards involving confidentiality, maintenance of records, competence, and multiple relationships [].[301]

Although it is clear that ECTF participants were aware that 1.02 would cover military directives, participants again and again told Sidley that they never contemplated that the exception they were creating was the same kind of exception used in the Nuremberg trials to attempt to excuse egregious, inhumane, and immoral conduct. For example, Ramos-Grenier emphasized that the ECTF was "not even thinking of following orders in the way that we are

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[299] 1992 Guide at 158.

[300] *Id*. at 158–59.

[301] 2002 Guide at 35.

hearing some psychologists may have. It did not even occur to us at that point that that is even an issue."[302] She analogized the task force's inability to predict enhanced interrogation practices to not accounting for unforeseeable advances in technology.[303] However, Ramos-Grenier remembered that the task force discussed the idea that the Ethics Code was allowing psychologists in certain situations to set aside the constraints of the Ethics Code and that there was debate about whether that was appropriate.[304] She was one of the few ECTF participants who stated that the group considered whether the standard would allow psychologists to harm people,[305] but she said the harm they envisioned had absolutely nothing to do with interrogations of prisoners or detainees. When asked what kind of "harm" they had considered, Ramos-Grenier responded that their concerns "in hindsight … were kind of silly."[306] For example, ECTF members were worried about using outdated tests, or institutional policies that provided services to some people but not to others. She emphasized that the ECTF "did not design the Code so that it would allow psychologists to do that [engage or participate in interrogations using enhanced techniques or resulting in harm to detainees], because it wasn't going on in our heads."[307] And Grill, who was specifically at the ECTF to address military concerns, stated that he did not recall anyone ever using the phrase "Nuremberg defense."[308] Indeed, Grill asked the Sidley team for clarification of what the Nuremberg defense was, although after it was explained, he conceded that allowing psychologists to follow military orders even if they conflicted with their ethical constraints was, in essence, what they were talking about in 1.02.[309]

Despite how squarely on point the Nuremberg defense is when considering a standard that allows individuals to eschew ethical limitations otherwise binding on their peers and their profession if directed to the contrary by military superiors, ECTF participants uniformly stated that it did not occur to them that they were opening the door for psychologists to invoke the Nuremberg defense. The amendments to Standard 1.02 were added to the draft Code prior to September 11, 2001, so they could not have been the result of collusion with the government to support torture during the war on terror. And although there were two ECTF meetings after 9/11, there were no changes to 1.02 that further facilitated engaging in unethical conduct or broadened the exception for doing so.

Last, we must note that although there is evidence showing that correctional and military psychologists pushed for the expansion of 1.02 to allow it to cover correctional facility and military regulations, there is no similar evidence of their suggesting the second sentence of 1.02. As noted before, the second sentence is the language of 1.02 that explicitly permits psychologists to follow directives contrary to their ethical obligations. We cannot conclusively say that

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[302] Ramos-Grenier interview (June 4, 2015).

[303] *Id*.

[304] *Id*.

[305] Cooper also recalled a discussion along these lines. Cooper interview (Apr. 16, 2015).

[306] Ramos-Grenier interview (June 4, 2015).

[307] *Id*.

[308] Grill interview (May 23, 2015).

[309] *Id*.

military or correctional psychologists did not ask for, advocate for, or encourage the adoption of the second sentence, but Sidley found no evidence similar to what it found for their advocacy of the expansion in scope of the standard. In his conversation with Sidley, Grill was very clear on his desire to ensure 1.02 covered military directives by including language other than "law," but he did not remember with as much clarity the debate regarding the second sentence, although he eventually stated that the sentence would have been important because it would help sensitize the ECTF members to the concerns military psychologists faced.[310]

2. Concerns from private practitioners and forensic psychologists

Private practitioners and forensic psychologists were very concerned about the Code generally, which manifested itself in criticism of many of the standards, including 1.02. In general, private practitioners thought the Code was too easily turned into a weapon against psychologists and advocated for the Code to be shorter and clearer in defining aspirational versus enforceable conduct, much less vague and much more careful in its wording. For example, in August 2000, John Fleer wrote to Lenore Walker of Division 42's Ethics Task Force, providing comments on draft 3 of the Ethics Code, generated in March 2000, which sum up many of the concerns private practitioners were expressing. He stated that in his experience as a malpractice attorney having represented mental health professionals:

> The APA Code is routinely utilized in civil trials and administrative hearings to establish the standard of care for psychologists. Judges and juries refer to the Code to make decisions about psychologists' liability for civil damages and whether to revoke or suspend their licenses.
>
> Unlike most statutes and regulations, the ethical standards in the APA Code are vague as to what specific conduct is mandated or prohibited. The vagueness gives rise to interpretation by so-called experts, typically to the detriment of the psychologist whose work is under scrutiny. The standards are so overly broad that some language can be said to apply to almost anyone accused of negligence or misconduct. I do not believe the Code of Ethics ever helps in the defense of a psychologist. It is only used as a tool for attack. In my view, there are simply too many standards. . . . Given that these principles have the effect of law in many states (e.g. California), it seems to me most important that they are comprehensible to both professionals and lay people and that they are enforceable in a consistent manner.
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> . . .
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> I am certainly not the first person to note the Code's ambiguity and the difficulty which thereby arises in applying it to actual occurrences. (See, Bersoff, D.N. 1994. Explicit ambiguity: The 1992 ethics code as oxymoron. Professional Psychology: Research and Practice, 25, 382-387.)

[310] *Id.*

> Gerald Koocher and Patricia Keith-Spiegel have suggested that the "many qualifiers" in the Code provide "some flexibility in responding to different contexts." (Ethics in Psychology, 2d Ed., New York, Oxford University Press, 1998 at 29.) This is certainly correct. However, it is just such "flexibility" which I find unfair for the competent and well-intentioned psychologist who is fighting for his or her professional life. The APA Ethics Committee is likely to make good use of the Code's "flexibility" to arrive at a just and informed decision. In contrast, an administrative law judge, untrained in psychology, or a jury of laypeople, are not so likely to do so. My comments are addressed to the use of the APA Code in these latter contexts—civil litigation and licensing board disciplinary actions.[311]

Arthur Kovacs and Christie Morehead aired similar thoughts in their comments on draft 3 of the Code, stating that their suggestions "will increase the clarity and precision of the document and will better serve those who believe in the worth of clear and enforceable ethical principles while at the same time markedly reduce the risks that our constituents face from zealous plaintiffs' attorneys and from overzealous psychology board investigators and administrative law judges."[312] Specifically, their proposals were based on, among other things, "[a]n unremitting desire to make sure that the text created provided better protection to our constituents from having to be subject to inappropriate and harmful possible interpretations by plaintiffs' attorneys or by non-psychologist state psychology board investigators and/or administrative law judges."[313]

And in February 2001, Dick Saunders posted a message on the Division 42 listserv with subject line "Ethics Disaster," voicing his opinions on the revision process to date. He commented that a "professionally respectable [document] to me means clear, concise minimum standards of behavior" and that "the Code says little if anything about due process for psychologists, or any of the Constitutional protections to which we are entitled as citizens, including the right to know what we are going to be charged with—so that we can refrain from adverse behavior in the first place, or defend ourselves if necessary in the second place."[314]

Although the documentary evidence confirmed that private practitioners were concerned with the Code and unhappy with the early revisions, it did not show that their most vocal complaints were about 1.02, especially after the revised language was added to the draft in October 2000. However, Division 42 members Sidley spoke to emphasized that having clearer guidance in 1.02 was important to the group. Marty Williams, an ECTF observer for Division 42, Independent Practice, from 2000 – 2002, recalled this area of concern—and said that standard 1.02 was one of the Division's priorities in its agenda for the Ethics Code revision.[315] Division 42 was the largest Division in APA. Williams confirmed that psychologists in

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[311] HC00003496.

[312] APA_0246161.

[313] *Id*.

[314] APA_0172556

[315] Williams interview (Apr. 30, 2015).

independent practice felt under attack and were concerned about increasing liability from state licensure boards and civil litigation.[316] Williams and other Division 42 representatives, including Lenore Walker and Jean Carter, were very vocal about the risk the Ethics Code extended to them, and believed the Ethics Code had drifted from its original purpose, which was for use by the Ethics Committee to adjudicate complaints against psychologists charged with ethical misconduct. Instead, the Ethics Code had gained the force of law in many states, and psychologists were facing prosecution pursuant to state licensing laws and defending against civil suits, and in both settings, opposing parties used the Ethics Code as a weapon against psychologists. Division 42 wanted to revise the Ethics Code substantially so that independent practitioners would not continue to be hurt by it.

Although Division 42 had several areas it focused on in the revisions, Williams said ensuring that there was clear language in 1.02 that allowed psychologists to follow the law without facing "prosecution" for actions undertaken in compliance with legitimate legal mandates was one of the Division's priorities.[317] For example, Williams explained that one of the ethical rules required psychologists to withhold test data, and practitioners were "getting burned" because judges were ordering them to release data and enter it into evidence.[318] Therefore in order to comply with the Ethics Code, a psychologist was required to withhold the data and therefore disobey a court order and risk being held in contempt and jailed. Carter also recalled that most of the discussions around 1.02 centered around this kind of example situation.[319] It was therefore important to Division 42 that psychologists be free to follow legal orders, and Williams felt very strongly about this.[320]

The 1992 Guide provides a sample 1.02 conflict a forensic psychologist might face: "in a forensic matter in which records are ordered to be released without consent, the psychologist may consider requesting the judge to review the material in private and make a determination if any information should be released."[321] Fisher noted this example in a May 21, 1999 memorandum to the ECTF regarding drafts of standards[322] which supports the idea that this was an area of concern.

In an interview with Sidley on May 1, 2015, Behnke did not recall the ECTF discussions around 1.02, but he did recall that psychologists in independent practice were feeling under attack, and that there had been an enormous amount of "pushback" regarding the Ethics Code and the revision from the independent psychologists who felt under siege.[+] Generally, as seen in some of the comments included above, private practitioners felt like their concerns about the

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[316] *Id*.

[317] *Id*.

[318] *Id*.

[319] Carter interview (Apr. 17, 2015).

[320] Williams interview (Apr. 30, 2015).

[321] 1992 Guide at 33.

[322] Memorandum from Fisher, Drafts of Standards Assigned at the April 1999 ECTF Meeting (May 21, 1999).

Code being used as a tool against them were not being heard and that the revisions did not reflect the changes they were proposing. When we asked Behnke what Ethics Code revisions would have addressed their concerns, Behnke stated that changes to 1.02 could have primarily addressed their concerns.

3. Nuremberg not discussed

While military, correctional, forensic and other psychologists advocated for revisions to Standard 1.02 which would arguably make it less restrictive on psychologists and permit them to follow the law, court orders, or military directives, absent from the discussion were clear, robust voices to advance the need for a stricter ethical standard that would prevent psychologists from subverting their ethics to comply with a legal directive. This absence is remarkable given that one purpose of the Ethics Code was the "welfare and protection of the individuals and groups with whom psychologists work." And even more remarkable given what we now know about the abuses that occurred during interrogations at CIA black cites and U.S. military detention centers.

There was not complete silence on the side of the debate asking for more specificity in the standards, but those voices recognized that they were in the minority. For example, Nightingale acknowledged that his push for more specific standards ran counter to the concerns driving the majority of the membership. In July 2001, he wrote Fisher that he was "not in agreement with the move away from specificity in standards and away from guidelines toward more generalities. I suppose that this sea change may suit the needs of some constituencies who are concerned about lawsuits and overly zealous boards, but my own concern is educative … [and] those needs are better served by standards which address some of the concerns of specific groups. Isolated guidelines run the risk of being just that, isolated."[323]

Though the ECTF favored a less restrictive Code, no one that we spoke to who participated in the ECTF process thought that the motivation behind the changes to 1.02 was to provide psychologists an excuse to engage in unethical conduct or to facilitate it in any way — and none had considered the "Nuremberg defense" in the context of 1.02. ECTF member Williams did not associate 1.02 or the changes to it with national security or military settings and "never in a million years" thought that the revision had any relationship to a Nuremberg defense.[324] ECTF member Carter also stated that the discussions about 1.02 and 1.03 were not in the context of national security.[325] In retrospect, Williams recognized that the wording relieved psychologists of the responsibility to refuse to do something morally wrong, but the thought of the 1.02 language being applied in relation to national security settings or interrogation techniques did not occur to him during discussions of the revision.[326]

When we asked Gilfoyle whether she or the ECTF considered the Nuremberg defense in connection with revisions to standard 1.02, Gilfoyle stated she did not recall the Nuremberg defense ever coming up in the context of 1.02. Gilfoyle noted that prior discussion of the

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[323] APA_0030515.

[324] Williams interview (Apr. 30, 2015).

[325] Carter interview (Apr. 17, 2015).

[326] Williams interview (Apr. 30, 2015).

Nuremberg defense and her analysis as well as the analysis of outside counsel related only to standard 8.03 and not 1.02. When pressed on why they did not consider that the Nuremberg defense could present more serious and pertinent concerns in a standard that specifically addressed laws conflicting with ethics, Gilfoyle stated that 1.02 was really being looked at and interpreted in the context of addressing psychologists' obligations when dealing with, for example, turning over patient records pursuant to a court order. Moreover, Gilfoyle stated that the phrase "Nuremberg defense" is used in very casual settings to mean that "someone else made me do it," presumably indicating that the phrase did not immediately raise concerns about its potential for excusing immoral conduct.[327]

Many participants with whom we spoke could see how 1.02 could be interpreted as allowing a Nuremberg defense, although they maintained it was not discussed in the context of 1.02 during the revisions. Yet Behnke[328] stated that he did not think 1.02 provided a Nuremberg defense — which he defined as the abdication of moral agency by deferring entirely to another moral agent. Behnke said he never read the APA Ethics Code to allow such an abdication: rather Behnke stated that it affirmatively placed ethical obligations on psychologists to clarify, try to resolve, and in some cases to argue.[329] Ethicists Sidley spoke to had differing opinions on this, with some stating that the Nuremberg defense implications of the language of 1.02 should have been immediately obvious.[330] However, although Gauthier acknowledged that the Standard could certainly present that concern, he also agreed with Behnke's notion that the Standard's first sentence requiring that psychologists engage in order to resolve the conflict stands in contrast with the events at Nuremberg, where soldiers simply removed themselves from the ethical question.[331]

There was at least one person who raised a Numerberg-type concern. After the second sentence was added, which permitted psychologists to follow the law if unable to resolve an conflict, the ECTF received at least one logged comment that specifically raised a concern that the language "reads too much like the 'I was only following orders' excuse that has been used to disastrous and inhuman[e] effect in the past."[332] The reviewer for this comment was Ramos-Grenier, who classified it as "inimical to the spirit of ethics," one of the pre-formulated statements reviewers could assign to comments.[333] Ramos-Grenier was surprised that she had been the reviewer, as she did not recall this comment, and doubted she would use the term

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[327] Gilfoyle interview (May 18, 2015)

[328] Behnke did not join APA until 2000, after the 1998 memoranda were issued. The memoranda were accessible to him for review once he joined, but he stated he did not recall ever reviewing the 1998 memoranda discussing the Nuremberg defense.

[329] Behnke interview (May 5, 2015).

[330] Sherman interview (June 5, 2015). Nancy Sherman is a Professor of Philosophy at Georgetown University and a former Distinguished Chair in Ethics at the United Stats Naval Academy. *See also* Sveaass interview (June 11, 2015).

[331] Gauthier interview (June 15, 2015).

[332] ECTF Reference Book Part 9, comment 85 (Maierle) (June 22-24, 2001) (on file with Sidley) (referring to laws mandating that Jews be put in concentration camps).

[333] Approved Minutes of the Ethics Code Task Force (Oct. 24, 1997) (on file with Sidley).

"inimical"[334] absent its having been pre-composed. She agreed the phrase must have been preformulated. Although Ramos-Grenier classified the comment as needing no further review, she recalled quite a bit of discussion about the conflict standards.[335] She confirmed that the ECTF did consider whether it was allowing psychologists to "get away" with following directives they had determined were unethical. Nonetheless, the ECTF participants' view of the unethical directives was nowhere near as serious or grave as what gave rise to the term "Nuremberg defense" or as what is currently alleged this language permitted.[336] Instead, Ramos-Grenier said they debated whether psychologists working for organizations should be permitted to operate under a different ethical standard than private practitioners, who would have no choice but to step away from the situation. In the end, the ECTF determined it could not require psychologists to quit or walk away from their jobs whenever they confronted a directive they could not, after considerable required effort, reconcile with the Ethics Code.[337] Ramos-Grenier stated that the real quandary of how a psychologist should resolve a situation where he or she is mandated to do something unethical was never properly resolved, and that she was "not happy" with these standards. Fisher used the same sentiment to describe these standards, saying no one really "liked them." Both recognized that there were serious concerns on both sides of the argument that could not be fully resolved by the Standard.

To be fair, the ECTF also received comments from those who thought it problematic that the second sentence suggested psychologists did not *have* to follow the law. The APA's Committee on Legal Issues ("COLI") recommended removing it "because the words 'may adhere' seem to imply that psychologists may disregard the law."[338] Fisher's reaction was that "the last sentence is helpful and informative to psychologists." Similarly, a group from a seminar on ethics and legal issues from the University of Maryland submitted comments to draft 5 concerned that the phrase "may adhere" "might be interpreted by some as condoning not following laws, legal rulings, or precedents."[339] The group proposed alternative language that was not adopted.

Despite these countervailing opinions, it is a striking oversight not to grapple with concerns about the Nuremberg defense when drafting a sentence ostensibly to resolve confusion and uncertainty about choosing between legal or organizational mandates and ethics. This is especially the case when one or both of these standards specifically dealt with and sought to incorporate military and law enforcement commands, the very kinds of 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.

Although Gilfoyle sought outside counsel's opinion on, among other things, concerns regarding 8.03 and the Nuremberg defense, there is no evidence that Gilfoyle, Fisher, or the

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[334] Ramos-Grenier interview (June 4, 2015).

[335] *Id*.

[336] *Id*.

[337] *Id*.

[338] APA Ethics Code, Draft 6 Comments (Apr. 2002) (on file with Sidley).

[339] Letter from Strein to Tin, Ethics Code Draft 5 (Oct. 26, 2001).

ECTF consulted any outside ethicists about this concern. If they had, they would have probably learned that the concern regarding the Nuremberg defense is immediately apparent when reading the language added to 1.02.[340] And although Gauthier pointed to the first sentence in 1.02 as an indication that the psychologist was required to engage in the decision-making process in order to determine the correct path, rather than detach from it as had been the case with soldiers in Nuremberg, he did recognize the concern regarding the Nuremberg defense in the 2002 1.02 standard.[341]

E. Human Rights Standards

The ECTF published draft 5 in February 2001.[342] Fisher's notes show that at the June 2001 session, the ECTF reviewed a comment to draft 5 from the Committee on International Relations in Psychology ("CIRP"), which suggested inserting the phrase "in keeping with the basic principles of human rights" to end the first sentence of Standard 1.02. CIRP was "concerned about the use of this standard in countries with totalitarian regimes."[343] Fisher noted that she "understand[s] their concern and put that in the aspirational section" because she was "not sure whether basic principles of human rights can be operationalized in a way that can be in the specific standards."[344]

When we asked Fisher about CIRP's concern, Fisher recalled that the ECTF discussed the issue, but that they decided they could not define "human rights" in a way that would provide notice to psychologists about what conduct would be considered acceptable under the standard. For example, would a psychologist counseling someone seeking an abortion be counseling someone to violate human rights? They discussed many examples of potential disagreements about the definition of human rights. Gilfoyle agreed that "human rights" is too vague a phrase to be included in the enforceable section of the Ethics Code.[345] As stated earlier, the ECTF had been focused on creating an Ethics Code that provided psychologists with clear notice about prohibited or required conduct, and they felt that inserting a phrase like "human rights" in the enforceable section of the Code ran counter to their efforts in providing clear guidance and notice.[346]

Moreover, Fisher explained that CIRP's concern was one having to do with totalitarian regimes, which they did not at the time think was applicable in the United States.[347] Fisher

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[340] Sherman interview (June 5, 2015); Sveaass interview (June 11, 2015).

[341] Gauthier interview (June 15, 2015)

[342] APA_0847489.

[343] *Id*.

[344] *Id*. The discrepancy between the language in the aspirational section and 1.02 later led to calls to revise 1.02 to mirror the language in the aspirational section, which eventually resulted in the 2010 amendment to 1.02. Additional discussion of this issue appears later in the report..

[345] Gilfoyle interview (May 18, 2015).

[346] Behnke interview (May 5, 2015); Gilfoyle interview (May 18, 2015).

[347] Fisher interview (May 6, 2015).

stated that the lens within which the ECTF viewed this discussion was not about torture, but instead about more everyday situations like if someone could not pay his or her psychologist, was demanding payment potentially depriving that individual of human rights?[348] It did not even occur to them to grapple with whether the standard potentially sanctioned torture in the United States. Fisher stated that had they known about the EIT interrogation program, Standard 1.02 would not have remained the way it was. If she were to be dealing with the issue today, she would include compliance with "human rights" in the standard and define that phrase somewhere in the introduction, perhaps by referencing the World Health Organization or other international treatises.[349] Fisher thought the current version of 1.02, as amended in 2010, does render participation in interrogations using EITs a violation of the Code.[350]

Ethicists do not seem to find the same vagueness in the phrase "human rights" that Gilfoyle, Fisher, and Behnke identified at the time of the ECTF revisions and after, including in their discussions with Sidley. Nancy Sherman, a Professor of Philosophy at Georgetown University and former Distinguished Chair in Ethics at the United States Naval Academy, believed that the prohibition on violating human rights is not and should not be aspirational, but is rather a deontological limitation — in other words, an absolute prohibition.[351]. She agreed that "human rights" could be a vague term, but that most people have a sense of what it means, and the solution to the vagueness problem was to define it within the Ethics Code.[352] Nora Sveaass, an Associate Professor of Psychology at the University of Oslo who served on the United Nations Committee Against Torture from 2006 to 2013, was also skeptical that concerns regarding alternative interpretations of what could constitute human rights should have led to the language included in 1.02.[353]

F. Seligman comment

The ECTF received an official comment on draft 5 from Martin Seligman, 1998 APA president. Seligman's comment addressed standard 2.01(b), Boundaries of Competence, and asserted that the limitations on psychologists regarding competence were based in political considerations and not in fact, and that the standard "counfound[ed] the political leanings of many of the members, with what is known scientifically."[354] Seligman argued that there was no evidence to support engaging in different approaches with patients depending on their ethnicity, race, or socioeconomic status, and emphasized separating politics from the Ethics Code.[355]

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[348] *Id*.

[349] *Id*.

[350] *Id*.

[351] Sherman interview (May 19, 2015).

[352] Sherman interview (June 5, 2015).

[353] Sveaass interview (June 11, 2015).

[354] ECTF Reference Book Part 9, comment 74 (Seligman) (June 22-24, 2001) (on file with Sidley).

[355] *Id*.

Fisher recalled that Seligman had tried to influence her view of the standard on competence.[356] Seligman invited Fisher to meet with him during one of the APA summer functions and generally advocated for a less restrictive competence standard.[357] Fisher reported that she was annoyed at the approach and did nothing in response to his view.[358] If Seligman's conversation with Fisher was contemporaneous with his comment, he would no longer have been in governance, though still arguably was an influential member within APA. Other than the conversation with Seligman, Fisher faced no pressure regarding specific revisions from anyone at APA governance or staff, and stated that she was never unduly influenced one way or another by anyone. [359]

G. October 2001 meeting

The meeting immediately after the events of 9/11 took place in October 2001, and was facilitated as a phone conference, although some staff and at least one member met in person in Washington, D.C. Behnke commented that the meeting taking place as a phone conference cut down on "small talk" or social discussions, and therefore the October 2001 meeting was even more focused than other meetings on the standards.[360] No one recalled going back to revise standards because of the events of 9/11 or because of concerns about national security, terrorism, interrogations, or psychologists' role in any of the aforementioned. Similarly, neither Fisher nor other participants recalled discussions about national security, terrorism, or interrogations.

H. Nightingale concern

After September 11, 2001, at least one comment directed to individuals involved in the Ethics Code revision raised concerns about issues germane to this investigation. Sometime between February 17 and February 20, 2002, Edmund Nightingale wrote to Fisher[361] to reiterate a comment he had brought up "briefly" at the February 17, 2002 Council of Representatives ("Council") meeting. He stated that:

> [T]he current ethics code focuses on a number of general issues and then upon certain specific activities of psychologists such as assessment, therapy, teaching, and research. I wondered aloud whether activities such as advising a physician on psychotropics, a politician on self-presentation and 'spin' on information and events, 'psychological profiling', hostage negotiation, consultation with police interrogators in vivo who are trying to 'break down' a suspect [at this point still innocent until proven guilty], with SWAT teams, national intelligence organizations (CIA, NSA, FBI, etc) would have anything in common with each

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[356] Fisher interview (May 6, 2015).

[357] *Id*.

[358] *Id*.

[359] *Id*.

[360] Behnke interview (May 1, 2015).

[361] It is not clear on what date Nightingale wrote the email or to whom he directed it. However, Fisher responded to him on Feb. 20, 2002, and copied Deborah Felder, Jonathan Tin, Behnke, and Stanley Jones.

> other which would not be covered already in the more general principles. Perhaps the general principle of 'beneficence' covers it, but there are certainly competing views about who benefits from some of these activities… perhaps some principles on Consultation as an activity would make explicit what is already implicit in the larger picture. Perhaps another time, another place would be the venue for these issues to be considered.[362]

Although Nightingale seemed to be raising a number of different circumstances of varying ethical implications, he did refer to the concept of "interrogators in vivo who are trying to 'break down' a suspect," albeit in the context of consulting with police interrogators. Fisher responded that:

> I think that there are general standards relevant to these issues. However, providing specific guidance on alternative ethical pathways that correctional and military psychologists might select to address the complexity and contextual nature of the types of dilemmas you describe is beyond the scope of the ethics code. [363]

Fisher went on to describe the applicability of certain standards to the different examples he set out, and concluded that "[f]or all the dilemmas you describe, Standard 1.02 is also relevant, recognizing that correctional, military, and other psychologists need to make ethical decisions within the context of laws, regulations, and other legal authorities governing their work." [364]

Fisher told Sidley that she understood Nightingale to be requesting a standard for each example in his email and her response was meant to convey that the Ethics Code could not do that.[365] She said he seemed to want a section of the Code dedicated to correctional and military psychologists, but the 2002 revision had sought to minimize sections dedicated only to particular specialties, including by eliminating the section dedicated to forensic psychology.

Behnke stated that Nightingale was raising a long, laundry list of scenarios, and Fisher's response was that as a category, the list was beyond the scope of the Ethics Code.[366] At the time, despite Nightingale's description, no one imagined that interrogations would become the issue they became, and if they knew then what they know now, things might have evolved in a very different way. Behnke also pointed out that Nightingale's comment came toward the very end of the revision process and the bulk of the revisions were completed, and that people might have been reluctant at that point to reopen the entire revision process. [367]

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[362] APA_0036265.

[363] *Id*.

[364] *Id*.

[365] Fisher interview (May 6, 2015).

[366] Behnke interview (May 1, 2015).[+]

[367] *Id*.

For his part, Nightingale confirmed that he had envisioned that public service psychologists could benefit from a section or certain standards dedicated to their particular ethical concerns, similar to the section dedicated to forensic psychologists.[368] He also believed that the Code would benefit from directly addressing specific situations rather than describing circumstances generally, which is why he raised some of these scenarios in his email to Fisher.[369] He told Sidley, however, that when he stated in his email that "[p]erhaps another time, another place would be the venue for these issues to be considered," he likely meant that he understood that the Code was close to completion and that the policy decision had been to make it more general rather than more specific.[370]

ECTF members, observers, and staff recalled no changes to *any* Ethics Code standards because of national security interests or interrogations, and remembered no discussions about either topic.[371] ECTF participants overwhelmingly stated that they would never have supported any language or standard that would support or facilitate torture or cruel, inhuman, or degrading treatment, or that would have supported EITs. Moreover, participants stated that the war on terror and the EIT program were unknown to them at the time the Code was being revised, and that the Bush administration would have engaged in the EIT program was inconceivable.[372]

I. Changes to Principles After September 11, 2001

There were no relevant significant changes to the draft language post September 11, 2001.[373] We reviewed changes made after September 11, 2001 to determine whether any appeared motivated by or connected to the events of 9/11, the country's response to terrorism, and the legal framework of the Yoo/Bybee memos, which were not yet public at the time.

Between draft 5 from June 2001 and draft 6 generated in October 2001, there were two changes to principles dealing with harm and fundamental rights. First, the October 2001 version of Principle A (Beneficence and Nonmaleficence) deleted language added in June 2001 on "thoughtful and prudent conduct" and "prevent[ing] or minimiz[ing] harm to others through acts of commission or omission in their professional behavior."[374]

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[368] Nightingale interview (June 9, 2015).

[369] *Id*.

[370] *Id*.

[371] D. Knapp interview (Apr. 10, 2015); Williams interview (Apr. 30, 2015); El-Ghoroury interview (Apr. 14, 2015).

[372] Fisher interview (May 6, 2015); Behnke interview (May 5, 2015).

[373] Tri-part Comparison for Standard 1.02 (on file with Sidley).

[374] HC00007718.

PRINCIPLE A: BENEFICENCE AND NON-MALEFICENCE	PRINCIPLE A: BENEFICENCE AND NON-MALEFICENCE
Psychologists strive to have a positive effect on those with whom they work, while taking care to do no harm. By thoughtful and prudent conduct, psychologists aspire to maximize the benefits of their work and to prevent or minimize harm to others through acts of commission or omission in their professional behavior. In their professional actions, psychologists weigh the welfare and rights of their patients or clients, students, supervisees, human research participants, and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts and to perform their roles in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence.	Psychologists strive to benefit ~~have a positive effect on~~ those with whom they work, and ~~while~~ tak~~e~~ing care to do no harm. ~~By thoughtful and prudent conduct, psychologists aspire to maximize the benefits of their work and to prevent or minimize harm to others through acts of commission or omission in their professional behavior.~~ In their professional actions, psychologists seek to safeguard ~~weigh~~ the welfare and rights of those with whom they interact professionally and ~~their patients or clients, students, supervisees, human research participants, and,~~ other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts ~~and to perform their roles~~in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be sensitive to the possible negative consequences of personal impairment that might harm those with whom they work.

Also between the June and October 2001 draft, the phrase "fundamental rights" was deleted from the sentence "Psychologists accord appropriate respect to the fundamental rights, dignity, and worth of all people…" in Principle E (Respect for People's Rights and Dignity).[375]

PRINCIPLE E: RESPECT FOR PEOPLE'S RIGHTS AND DIGNITY	PRINCIPLE E: RESPECT FOR PEOPLE'S RIGHTS AND DIGNITY
Psychologists accord appropriate respect to the fundamental rights, dignity, and worth of all people. They respect the rights of individuals to privacy, confidentiality, self-determination, and autonomy, and are aware that special safeguards may be necessary to protect the rights and welfare of persons or communities whose vulnerabilities impair autonomous decision-making. Psychologists are aware of and respect cultural, individual, and role differences,	Psychologists ~~accord appropriate~~ respect ~~to~~ the ~~fundamental rights,~~ dignity~~,~~ and worth of all people~~.~~, and ~~They respect~~ the rights of individuals to privacy, confidentiality, self-determination, and autonomy~~, and~~ Psychologists are aware that special safeguards may be necessary to protect the rights and welfare of persons or communities whose vulnerabilities impair autonomous decision-making. Psychologists are aware of and respect cultural, individual, and role differences,

Participants did not recall discussions regarding these changes and did not recall the motivation behind them.[376] Although both changes make the relevant principles less protective, Sidley was not able to find any evidence that they were motivated by a desire to facilitate any conduct in response to the events of September 11, 2001.

J. Do No Harm

It is important to note that many members and staff stated that the changes to 1.02 alone could not have provided psychologists with "permission" to engage in torture or cruel, inhuman, or degrading treatment because the Ethics Code still imposed a requirement to "do no harm."[377]

The general concept of "do no harm" exists in two places in the Code: in the General Principles and in the Enforceable Standards.

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[375] *Id.*

[376] Fisher interview (May 6, 2015); Koocher interview (Feb. 26, 2015); Behnke interview (May 1, 2015).

[377] Behnke interview (May 5, 2015); Fisher interview (May 6, 2015); Walker interview (May 14, 2015); Cooper interview (Apr. 16, 2015).

"Principle A: Beneficence and Nonmaleficence," reads, in relevant part: "Psychologists strive to benefit those with whom they work, and take care to do no harm . . . When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. . . ." Although the Principles "are aspirational goals to guide psychologists toward the highest ideals of psychology . . . [and] should be considered by psychologists in arriving at an ethical course of action," they are "not themselves enforceable rules."[378] Indeed, "General Principles, in contrast to Ethical Standards, do not represent obligations and should not form the basis for imposing sanctions. Relying upon General Principles for either of these reasons distorts both their meaning and purpose."[379] Therefore, although the aspirational principles are meant to provide directional guidance and a sense of ideal conduct, they are not actionable and provide no basis by which to adjudge a psychologist's conduct with any consequence.

Standard 3.04 (2002) is titled "Avoiding Harm" and reads: "Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable."

First, 3.04 has a different mandate than General Principle A. It does not instruct psychologists to do no harm, but rather obligates them to "avoid harming" and to "minimize harm." Although it encourages psychologists to distance themselves from causing harm, it is not an absolute requirement to do no harm.

Second, according to the Ethics Office, standard 3.04 in particular is not enforceable on its own. Specifically, Behnke and Lindsey Childress-Beatty[380] stated that a psychologist would not be charged with violating standard 3.04 unless he or she was also charged with violating other standards. In other words, unless a psychologist caused harm in a way that violated a standard *other than* 3.04, that psychologist could not be charged with violating standard 3.04. Childress-Beatty explained that "harm" was too vague a concept and did not provide psychologists with proper notice about proscribed behavior.[381] For example, a psychologist who competently testified at a child custody hearing in such a way that a parent did not obtain custody could be said to be causing "harm" to that individual.[382] Because "harm" was so broad a term as to potentially capture that kind of conduct, it could not be the basis of liability on its own. Behnke and Childress-Beatty said that this understanding of 3.04 came from the General Counsel's office at APA. When asked about standard 3.04, Gilfoyle stated that it absolutely could be the sole basis for charges against a psychologist and that there was no reason for it not to be enforceable on its own.[383]

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[378] 2002 Ethics Code, at Introduction and Applicability.

[379] *Id.* at General Principles.

[380] Behnke interview (May 5, 2015); Childress-Beatty interview (May 13, 2015).

[381] *Id*.

[382] *Id*.

[383] Gilfoyle interview (May 18, 2015).

Therefore, although the Code contains both an exhortation to take care to do no harm and an explicit standard that requires avoiding and minimizing harm, the view of the APA Ethics Office is that doing harm is not a basis for an ethical violation in the absence of a violation of another standard.

APA INTERACTIONS WITH CIA AND DoD: 2001 – 2004

I. BACKGROUND: GOVERNMENT POLICY AND PRACTICE

On September 17, 2001, President George W. Bush signed a Memorandum of Notification granting the CIA authority to covertly capture and detain individuals who posed a threat of terrorist activity. Over the next several months, the CIA and DoD began capturing and interrogating individuals suspected of involvement in terrorist activity, as well as individuals believed to have knowledge of such activity even if not involved themselves. These individuals were detained at foreign military bases and CIA black sites, where they were classified as "enemy combatants"[384] and denied protected status under the Geneva Conventions.[385] President Bush also issued a policy statement directing military commanders to "treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva,"[386] but there is no evidence that a similar policy statement was directed toward non-military government agencies.[387]

On January 9, 2002, just days before the detention facility at Guantanamo Bay opened, John Yoo, Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel ("OLC"), produced a memorandum to William J. Haynes, General Counsel for the Department of Defense, regarding the applicability of international laws of armed conflict to the detention of members of al Qaeda and the Taliban at Guantanamo.[388] The memorandum concluded that the War Crimes Act, the Geneva Conventions, and customary international law do not apply to al Qaeda and Taliban detainees.

On January 11, 2002, the first detainees began arriving at Guantanamo Bay, where both the CIA and DoD had set up interrogation facilities. When the detention center at Guantanamo opened in January 2002, military and intelligence personnel were assigned to either an investigative role or an intelligence gathering role. The Criminal Investigation Task Force ("CITF"), an organization created under the auspices of the Department of Defense, functioned to maintain security and conduct criminal investigations of suspected terrorists for the purpose of

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[384] A Military Order of November 13, 2001, classified al Qaeda members and others who engaged in terrorist activities as individuals who could be detained by the Secretary of Defense and tried in military commissions. Military Order of November 13, 2001, *available at* http://fas.org/irp/offdocs/eo/mo-111301.htm. The term "enemy combatants" was not used until March 2002. Peter Jan Honisberg, *The Real Origin of the Term 'Enemy Combatant'*, Huffington Post (Jan. 9, 2014), *available at* http://www.huffingtonpost.com/peter-jan-honigsberg/the-real-origin-of-the-te_b_4562216.html.

[385] Memorandum from President Bush to Vice President Cheney et al., Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

[386] *Id.*

[387] United States Senate Committee on Armed Services, 110th Cong., *Inquiry Into the Treatment of Detainees in U.S. Custody,* 3 (2008) [hereinafter "SASC Report"].

[388] Memorandum from John C. Yoo, Deputy Assistant Atty'n Gen., Dep't of Justice, to William J. Haynes, Gen. Counsel, DoD, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002).

bringing them to trial. The CITF included members from the Army, Navy, Marine, and Air Force investigative services and divisions.[+] By contrast, the military personnel attached to the intelligence mission, dubbed JTF-170, operated at Guantanamo for the purpose of gathering intelligence to dismantle terrorist networks and prevent additional attacks.[389]

A. Origins of Enhanced Interrogation Techniques

As the CIA and DoD began their detention programs, both agencies turned to the Joint Personnel Recovery Agency ("JPRA") for assistance. The JPRA is a military agency run under the auspices of the Chairman of the Joint Chiefs of Staff to provide education and training regarding personnel recovery matters. The JPRA runs Survival, Evasion, Resistance, and Escape ("SERE") schools designed to train DoD personnel in the skills necessary to survive and evade enemy capture in hostile climates and to resist the enemy in the event of capture. The segment of the training focused on resistance exposes students to the physical and psychological methods of interrogation that might be used by an enemy who does not abide by the Geneva Conventions as a means of inoculating them against the effects of such techniques in the event of capture.[390] The physical and psychological pressures used at SERE schools include stress positions, sleep deprivation, abdomen slaps, isolation, degradation, walling, and waterboarding.[391]

Psychologists monitor the training programs at SERE schools to ensure that no harm comes to students. At the Air Force SERE school in Spokane, Washington, James Mitchell and Bruce Jessen served as psychologists in this role. Sidley's information about Mitchell and Jessen's activities at the SERE school comes from interviews with witnesses who also worked with the SERE program. One witness described Mitchell and Jessen as a "driving force" at the center of the SERE program, which originated with the Air Force school.[392] The witness said that Mitchell was "dogmatic" and introduced new "backward" methods to the curriculum, in which students would be exposed to interrogation tactics first and then receive instruction and training only after exposure.[393] Another witness who had worked with Mitchell and Jessen in the SERE school environment described a "dust up" within the ranks of psychologists around 1999 or 2000 regarding the role of psychologists at the SERE school, prompted by Jessen's desire to "play interrogator." The witness said that many psychologists in the program objected to the idea that a psychologist would "wear two hats," as both a monitor of the interrogation and the interrogator. The witness emphasized that the goal of psychologists at the SERE schools was to select the best participants and ensure a safe training environment.[394]

Bryce Lefever, a psychologist at the Navy SERE school in the 1990s, said that representatives from the different SERE schools held an annual meeting to discuss and compare

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[389] SASC Report at 12.

[390] *Id.* at 4.

[391] *Id.* Waterboarding was used as a training technique at only one of the SERE schools, and the practice ended in 2007.

[392] The witness requested that this comment not be attributed to him or her.

[393] The witness requested that this comment not be attributed to him or her.

[394] Morgan interview (May 29, 2015).

training methods. Lefever said that, during one of these meetings, he, Mitchell, Jessen, and another psychologist spent most of a week with Joseph Matarazzo, a former President of the APA, in Spokane or Colorado Springs. Lefever recalled that Matarazzo was invited by Army psychologists so that he could assess psychologists' involvement with the SERE program and ensure that it was ethical. He stated that Matarazzo's "ethical test" was whether a person would be proud of his actions if they were published on the front page of the newspaper.[395] Matarazzo did not make any specific mention of the Ethics Code, but he indicated that if he could use his skills as a psychologist to further America's cause, he would not hesitate to do so. Lefever said that he completely agreed with Matarazzo's point of view that psychologists should be proud to use their skills to defend the nation.[396]

Just weeks before the first detainees arrived at Guantanamo and more than a month before President Bush signed a memorandum denying detainees the protections of the Geneva Conventions, DoD's Office of the General Counsel began soliciting information from JPRA regarding information on detainee "exploitation."[397] In response to DoD's request, in February 2002, Jessen circulated to JPRA commander Col. Randy Moulton and other senior JPRA officers a draft exploitation plan, which incorporated heavily techniques used at the SERE schools.[398] Shortly thereafter, DoD requested additional support, in response to which Jessen and another JPRA instructor taught a two week "ad hoc 'crash' course on interrogation" for a group that would be sent to Guantanamo as interrogation staff.[399] In April, Jessen drafted and circulated to Moulton another draft exploitation plan, containing the recommendation that JPRA personnel remain involved in the detainee exploitation process, which he explained should occur at a separate facility that was "off limits to non-essential personnel, press, ICRC, or foreign observers."[400]

Meanwhile, the CIA also turned to JPRA as it began considering interrogation options for detainees it expected to hold in its custody. In January 2002, the CIA's Office of Technical Services ("OTS") commissioned a report from Mitchell and Jessen titled "Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance training Perspective,"[401] which related to the al Qaeda manual that the CIA believed to include descriptions of strategies to resist interrogations.[402]

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[395] Lefever interview (May 3, 2015).

[396] *Id.*

[397] SASC Report at 3–4.

[398] *Id.* at 7.

[399] *Id.* at 8.

[400] *Id.* at 14.

[401] Central Intelligence Agency, Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, 13 (2004) [hereinafter "CIAIG Report"].

[402] Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, 113th Congress*, 20–21 (2014) [hereinafter "SSCI Report"].

Shortly after preparing their report, Mitchell and Jessen attended a lecture given by Martin Seligman at the Navy SERE school in San Diego on May 17, 2002.[403] Seligman explained that Kirk Hubbard had invited him to the program, where he "lectured to about 100 people on how captured American personnel could use what is known about learned helplessness to resist, evade, and escape captivity and interrogation."[404] Seligman said that he was not permitted to attend any other sessions at the event, and when he asked two former police interrogators who had transferred to the DoD about their methods, he was told that they could not share any information with him because he was a civilian and lacked security clearance.[405] Hubbard confirmed that he invited Seligman to the conference during a meeting with Mitchell and Jessen on April 3, 2002.[406] Although Seligman could not independently recall any meetings with Mitchell and Jessen other than a December 2001 conference at his home and the May 2002 JPRA-sponsored lecture,[407] he said that if such a meeting had occurred, he assumed they would have discussed his theory of learned helplessness in the context of captured American personnel, but not as a means of interrogating detainees.[408] Hubbard confirmed that Mitchell expressed interest in Seligman's theories of learned helplessness and positive psychology, but that they did not speak with Seligman about interrogations directly at any point.[409]

B. The First Application of Enhanced Interrogation Techniques

On March 28, 2002, Abu Zubaydah was captured in Pakistan and subsequently rendered to a CIA black site in Thailand. Initially, Zubaydah was held in a hospital facility, where he was questioned by special agents from the FBI. Though Zubaydah appeared to be cooperating with the agents, the CIA's CTC and OTS soon began proposing more aggressive tactics, including coercive physical techniques.[410] The CIA contracted with James Mitchell to consult on psychological aspects of the interrogation and to "provide real-time recommendations to overcome Abu Zubaydah's resistance to interrogation."[411] By mid-April, the CIA had taken control of the interrogation and begun implementing a plan developed by the psychological team.[412] At the end of April, the interrogation team proposed three alternative interrogation plans to CIA Headquarters, and Headquarters approved the most coercive of the three plans, the one supported by Mitchell.[413]

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[403] Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals, 164 (2008).

[404] Email from Seligman to Sidley (May 19, 2015).

[405] Email from Seligman to Sidley (June 13, 2015).

[406] Email from Seligman to Sidley (June 21, 2015); Email from Hubbard to Sidley (June 24, 2015).

[407] Email from Seligman to Sidley (June 13, 2015).

[408] Email from Seligman to Sidley (June 18, 2015).

[409] Hubbard interview (May 5, 2015); Email from Seligman to Sidley (June 21, 2015).

[410] SSCI Report at 26; CIAIG Report at 3.

[411] SSCI Report at 25–26.

[412] *Id.* at 27.

[413] *Id.* at 30.

In July 2002, Mitchell joined Jessen, who had recently retired from the Department of Defense,[414] and other former JPRA officials to form Mitchell Jessen & Associates. The CIA soon contracted with the newly formed company to support the CIA's fledgling interrogation program.[415] Mitchell and Jessen's roles under the contract initially included conducting interrogations, assessing the detainees' fitness for interrogations, and assessing the effectiveness of particular interrogation techniques, but in May 2004 the CIA's policy changed and thereafter Mitchell and Jessen acted only as interrogators.[416] Mitchell said that he and Jessen never intended to study the effectiveness of the techniques themselves, but rather that their role was "to find and pay an independent researcher, not involved with the program, to do the work."[417] Mitchell explained that they never fulfilled the part of the contract calling for an evaluation of the effectiveness of the program, because the contract was terminated.[418]

During July, Mitchell proposed that the CIA should begin using twelve interrogation techniques derived from SERE training, including the attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, waterboard, use of diapers, use of insects, and mock burial.[419] The CIA's OTS obtained data from several psychologists and other academics with expertise in psychopathology and from JPRA on the "potential long-term psychological effects on detainees" of using the proposed techniques.[420] On August 3, CIA Headquarters formally approved the use of a set of ten techniques proposed by Mitchell, including use of the waterboard, "subject to a competent evaluation of the medical and psychological state of the detainee."[421] Over the next three weeks, Mitchell and Jessen subjected Zubaydah to the enhanced interrogation techniques on a daily basis.[422] Among other techniques, interrogators caged Zubaydah in small boxes, placed him in stress positions, deprived him of sleep, and waterboarded him several times each day.[423] FBI agents present for the interrogation objected that such techniques were "borderline torture," and FBI Director Robert Mueller subsequently ordered that FBI agents would not participate in interrogations using techniques that were not permitted in domestic investigations.[424]

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[414] SASC Report at 23–24.

[415] *Id.* at 24.

[416] Memorandum from John Brennan, Director, Central Intelligence Agency, to Sen. Dianne Feinstein and Sen. Saxby Chambliss, CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program (June 27, 2013).

[417] Email from Mitchell to Sidley (May 31, 2015).

[418] *Id.*

[419] SSCI Report at 32.

[420] CIAIG Report at 14.

[421] *Id.*

[422] SSCI Report at 40.

[423] *Id.* at 40–44.

[424] SASC Report at 19.

At the conclusion of Zubaydah's interrogation, the CIA considered it a success and recommended that the plan, in which psychologists "shape[d] compliance of high value captives prior to debriefing by substantive experts," be used as a template for future interrogations.[425] Shortly thereafter, interrogation operations based on Mitchell and Jessen's plans began expanding to other CIA black sites.[426]

Throughout the summer and fall of 2002, JPRA continued to support interrogator training efforts for both the CIA and DoD. JPRA developed a training program for the CIA that included demonstrations of the physical pressures used at SERE schools, including body slaps, face slaps, hooding, stress positions, walling, immersion in water, stripping, isolation, and sleep deprivation,[427] and on July 1 and 2, JPRA instructors facilitated a two-day training based on this program.[428] The July training also included instruction on waterboarding.[429] In June and July 2002, the Chief of Staff of JPRA also worked with Army Special Operations Command's Psychological Directorate to "develop[] a plan designed to teach interrogators how to exploit high value detainees."[430]

C. Legal Guidance

On August 1, 2002, the Office of Legal Counsel produced a pair of memoranda directed to Alberto R. Gonzales, Counsel to the President, assessing the standards for conducting interrogations under 18 U.S.C. §§ 2340-2340A[431] and applying the analysis to an interrogation plan for a specific detainee.[432] The first memorandum defined torture in narrow terms:

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.[433]

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[425] SSCI Report at 46.

[426] *Id.* at 49–53.

[427] SASC Report at 21.

[428] *Id.* at 22.

[429] *Id.*

[430] Office of the Inspector General of the Department of Defense, *Review of DoD-Directed Investigations of Detainee Abuse*, 25 (2006) [hereinafter "DODIG Report"].

[431] In combination, Sections 2340 and 2340A criminalize "an act committed by a person acting under the color of state law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control."

[432] Memorandum from Jay Bybee, Assistant Att'y Gen., Dep't of Justice, to Alberto Gonzales, Counsel to the President, Interrogation of Abu Zubaydah (Aug. 1, 2002).

[433] Memorandum from Jay Bybee, Assistant Att'y Gen., Dep't of Justice, to Alberto Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002).

The scope of the statute narrowed even further under the memorandum's analysis of specific intent, which required that, to torture, an individual must "act[] with the express purpose of inflicting severe pain or suffering." Thus, if an individual held a "good faith belief" that his conduct would not produce severe pain or suffering, specific intent was negated. This good faith belief might be shown by an individual "taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience."

Furthermore, the memorandum concluded, even if the interrogation activities violated Section 2340, the application of Section 2340A to interrogations of enemy combatants might represent an unconstitutional infringement of the President's Commander in Chief powers. At the time that the OLC prepared this memorandum, its authors Jay Bybee and John Yoo had seen an assessment of the psychological effects of military resistance training and had "used that assessment to inform" the opinion.[434]

At an August 12 meeting, shortly after the Department of Justice issued the two memoranda offering guidance on the legality of the interrogation program, JPRA created a special program to limit distribution of information related to JPRA's "sensitive activities" in support of interrogations.[435] As the CIA continued to consult with DOJ on the expanded use of enhanced interrogation techniques, a supplementary document was produced that both confirmed the OLC's previous conclusions regarding the torture statute and came to similar conclusions with respect to the federal War Crimes Act and the Fifth, Eighth, and Fourteenth Amendments. The CIA interpreted this subsequent analysis as an agreement from DOJ that the legal opinions embodied in the August 2002 memoranda extended beyond the specific conditions described in those opinions.[436]

D. Behavioral Science Consultation Teams

As Mitchell and Jessen worked with the CIA and DoD to develop exploitation plans, Maj. Gen. Michael Dunlavey, commander at Guantanamo, requested a team of psychologists and other mental health professionals to facilitate interrogations at the detention site. These teams of psychologists and psychiatrists were called Behavioral Science Consultation Teams ("BSCT").

The concept of a BSCT had originated in the Naval Criminal Investigative Service ("NCIS"). Michael Gelles, Chief Psychologist of NCIS, had developed a behavioral science consultation team to guide the CITF at Guantanamo in understanding the individuals against whom they intended to bring criminal charges.[437] Dunlavey adopted Gelles's term but significantly altered the role that such a team would play. Instead of working with a law enforcement team behind the scenes to enhance understanding of a detainee's cultural and personal background, the Guantanamo BSCT psychologists and psychiatrists would work in the interrogation room to assist interrogators in breaking through a detainee's defenses and

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[434] SASC Report at xvi.

[435] *Id.* at 38.

[436] CIAIG Report at 22–23.

[437] Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals, 195–96 (2008).

extracting information.[438] Morgan Banks, the Chief of the Psychological Applications Directorate in the Army Special Operations Command and senior Army SERE Psychologist, stated that he was not consulted when the BSCT was established.[439]

In July 2002, psychologist Maj. John Leso, psychiatrist Maj. Paul Burney, and a psychiatric technician, arrived at Guantanamo. They had expected to serve as healthcare providers to servicemen suffering from combat stress, but upon their arrival they were assigned as the first BSCT. When they landed at Guantanamo, neither Leso nor Burney had training or experience in interrogations or intelligence gathering.[440] Indeed, one witness commented that, at the time, no training programs had been developed for psychologists deployed to Guantanamo, and they were expected to get their training "on the job."[441]

Another witness described a general state of confusion at the time regarding which roles psychologists should play in interrogations. Because military psychologists had, prior to this point, primarily worked in a clinical assessment context, the witness explained that there were very few active duty psychologists with training or experience in supporting interrogations to provide guidance.[442]

The BSCT soon reached out to Banks for guidance on how to support the intelligence mission.[443] Banks said that he recognized that the Army had very little institutional knowledge regarding interrogations at that point, and he thought it was important that psychologists working to support interrogations have SERE training so that they would recognize the danger of the power differential between detainees and guards. He thought that psychologists could make significant contributions to the intelligence mission, both by preventing abuse and by enhancing the effectiveness of interrogations.[444]

Banks requested assistance from JPRA in organizing training for the Guantanamo BSCT.[445] At this point, JPRA was already developing an exploitation and interrogation training program, which included instruction on the physical and psychological pressures used at the SERE schools.[446] After JPRA agreed to modify its planned training sessions to suit BSCTs, Banks invited Leso and other interrogation personnel to attend the training.[447]

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[438] *Id.* at 196.

[439] Banks interview (May 21, 2015).

[440] SASC Report at 39.

[441] Dunivin interview (May 20, 2015).

[442] Morgan interview (May 29, 2015).

[443] SASC Report at 39.

[444] Banks interview (May 21, 2015).

[445] SASC Report at 40.

[446] *Id.* at 25–30.

[447] Larry C. James, Fixing Hell: An Army Psychologist Confronts Abu Ghraib, 22 (2008).

In August 2002, the Chairman of the Joint Chiefs of Staff completed a review of the Guantanamo interrogation program, which recommended that the FBI Behavioral Science Unit, Army BSCT, Southern Command Psychological Operations Support Element, and JTF-170 clinical psychologist "develop a plan to exploit detainee vulnerabilities." As part of this process, Dunlavey considered SERE training techniques as "possible DoD interrogation alternatives."[448]

On September 16, 2002, the Army Special Operations Command and JPRA co-hosted a SERE psychologist conference at Fort Bragg for interrogation personnel and the BSCT responsible for facilitating interrogations at Guantanamo.[449] The Director of Intelligence at Guantanamo approved the trip with the expectation that the BSCT would learn about techniques that could be used in interrogations.[450] The training program included a briefing on the exploitation techniques used to increase resistance at SERE schools.[451] Although Banks stated that he did not think that SERE resistance concepts and physical pressures were taught during this conference, Burney said that he discussed with Banks Guantanamo command's interest in obtaining a list of techniques.[452] In light of Banks's professed belief that interrogation support personnel should receive SERE training, it seems likely that Banks was aware when he organized the training that participants would become familiar with the SERE resistance training techniques, including physical pressures.

E. Guantanamo Request for Authorization to Use SERE-Based Interrogation Techniques

Shortly after Burney and Leso returned from training at Fort Bragg, Dunlavey directed his staff to draft a request to the Southern Command for the authority to use additional interrogation techniques at Guantanamo.[453] Lt. Col. Jerald Phifer instructed the BSCT team to "draft an interrogation policy that could be formally submitted up the chain of command for review."[454] Banks stated that it was his impression that Leso and Burney were under enormous pressure from their superiors to produce a memo requesting authorization for harsh interrogation methods,[455] and Burney has testified that there was pressure from the command to get "tougher" and use more coercive techniques.[456]

Leso and Burney prepared a memorandum listing proposed interrogation techniques, many of which they had learned of or observed during their Fort Bragg SERE training.[457] The

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[448] DODIG Report at 25.

[449] SASC Report at 38; DODIG Report at 25.

[450] SASC Report at 40.

[451] DODIG Report at 25.

[452] SASC Report at 40.

[453] *Id.* at 50.

[454] *Id.*

[455] Banks interview (May 21, 2015).

[456] SASC Report at 50.

[457] *Id.* at 51–52.

memo delineated three categories of interrogation techniques, as described in the Senate Armed Services Committee's 2008 report:

> Category I techniques included incentives and "mildly adverse approaches" such as telling a detainee that he was going to be at GTMO forever unless he cooperated. . . .
>
> Category II techniques were designed for "high priority" detainees, defined in the memo as "any detainee suspected of having significant information relative to the security of the United States." Category II techniques included stress positions; the use of isolation for up to 30 days (with the possibility of additional 30 day periods, if authorized by the Chief Interrogator); depriving a detainee of food for up to 12 hours (or as long as the interrogator goes without food during an interrogation); the use of back-to-back 20 hour interrogations once per week; removal of all comfort items including religious items; forced grooming; handcuffing a detainee; and placing a hood on a detainee during questioning or movement.
>
> The memo reserved Category III techniques "ONLY for detainees that have evidenced advanced resistance and are suspected of having significant information pertinent to national security." Category III techniques included the daily use of 20 hour interrogations; the use of strict isolation without the right of visitation by treating medical professionals or the International Committee of the Red Cross (ICRC); the use of food restriction for 24 hours once a week; the use of scenarios designed to convince the detainee he might experience a painful or fatal outcome; non-injurious physical consequences; removal of clothing; and exposure to cold weather or water until such time as the detainee began to shiver.[458]

Leso and Burney also included a statement reflecting their concerns that "[p]hysical and/or emotional harm from the above techniques may emerge months or even years after their use," and "[i]nterrogation techniques that rely on physical or adverse consequences are likely to garner inaccurate information and create an increased level of resistance."[459]

Leso and Burney shared the memo with Banks, who "praised the BSCT for their 'great job' on the memo," but raised concerns regarding the "physical pressures" recommended in the memo because such pressures were used in SERE training to increase rather than break down resistance to interrogation:

> The use of physical pressures brings with it a large number of potential negative side effects. . . When individuals are gradually exposed to increasing levels of discomfort, it is more common for them to resist harder. . . . Bottom line: The likelihood that the use of physical pressures will increase the delivery of accurate information from a detainee is very low. The likelihood that the use of physical pressure will increase the level of resistance in a detainee is very high. . .

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[458] *Id.* (emphasis in original).

[459] *Id.* at 52.

> My strong recommendation is that you do not use physical pressures. . . . [If GTMO does decide to use them] you are taking a substantial risk, with very limited benefit."[460]

Sidley's only evidence of additional communications and thoughts related to this memorandum, not included in the Senate Armed Services Committee's report, comes from interviews with Morgan Banks and Larry James. James said that, despite producing the memo, Leso continued to work to convince the chain of command that interrogations based on rapport-building were superior to abusive tactics.[461] Banks agreed that Leso continued to communicate with him to find ways to combat his commander's instruction to develop coercive techniques.[462]

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.

On October 2, Guantanamo staff convened a meeting with Jonathan Fredman, Chief Counsel to the CIA's Counterterrorism Center ("CTC"). The BSCT provided a briefing on the Fort Bragg training, describing psychological stressors such as sleep deprivation and isolation as "extremely effective."[466] Fredman concluded that all of the techniques listed in the BSCT memo were legal,[467] and Guantanamo staff prepared a memorandum heavily based on the BSCT memo to be submitted to the Secretary of Defense for approval.[468]

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[460] *Id.* at 53 (ellipses in original).

[461] James interview (May 1, 2015).

[462] Banks interview (May 21, 2015).

[463] *Id.*

[464] Banks did not think that any of the techniques described in the memo written by Leso and Burney, as described in the 2008 report of the Senate Armed Services Committee report, were "physical pressures," aside from the application of cold water to the point of shivering and possibly stress positions, but only under some circumstances. *Id.*

[465] *Id.*

[466] SASC Report at 54.

[467] *Id.* at 55.

[468] *Id.* at 62.

On December 2, 2002, Secretary of Defense Donald Rumsfeld authorized the use of all techniques listed in Categories I and II and one of the techniques listed in Category III, "the use of mild, non-injurious physical contact," for interrogations of detainees at Guantanamo Bay.[469]

Rumsfeld's authorization arguably permitted activities that run afoul of Army Regulation 190-8 ("AR 190-8"), made effective in 1997, which established policies and guidance for the treatment of prisoners of war and detainees. AR 190-8, which is Army policy, requires that all persons captured and held in the custody of the United States Armed Forces during an armed conflict receive humane treatment consistent with the Geneva Conventions.[470] Banks said that this policy made clear to him that the Geneva Convention protections applied to all detainees held by the Department of Defense at Guantanamo. He explained that, as soon as he realized that the Army was holding detainees, he reviewed AR 190-8 with a Judge Advocate General ("JAG"), and that they arrived at this conclusion together. However, Banks conceded that AR 190-8 is merely policy that can be superseded by an order of the Secretary of Defense, such as the authorization provided on December 2, 2002. He explained that, in the event of a conflict, individuals in the military would be required to follow an order from the Secretary in contravention of AR 190-8.[471] Thus, it is unlikely that AR 190-8 was an effective shield for detainees held at Guantanamo Bay.

F. Enhanced Interrogations at Guantanamo

In November 2002, Maj. Gen. Geoffrey Miller replaced Dunlavey as commander of the intelligence mission at Guantanamo. Miller quickly approved an interrogation plan for Mohammed al Qahtani, the alleged "20th hijacker" in the 9/11 attacks, that utilized the newly approved[472] enhanced interrogation techniques, based on the memo drafted by the Guantanamo BSCT.[473]

As the interrogation of al Qahtani began on November 23, members of the BSCT were present to observe and assist interrogators. A log of the al Qahtani interrogation reveals that Leso participated directly at several points, including by recommending that al Qahtani be placed in a swivel chair "to keep him awake and stop him from fixing his eyes on one spot in [the] booth." An unidentified BSCT also observed at various times that al Qahtani was lying or trying to gain sympathy.[474] James said that it was not clear whether this unidentified BSCT was Leso because there were around ten psychologists at Guantanamo at the time; he conceded, however,

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[469] Action memorandum from William J. Haynes, Gen. Counsel, DoD, to Donald Rumsfeld, Sec. of Dep., DoD, Counter-Resistance Techniques (Nov. 27, 2002).

[470] Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, 2 (Oct. 1, 1997).

[471] Banks interview (May 21, 2015).

[472] Guantanamo command received official approval to use the enhanced techniques described in the memo drafted by Leso and Burney on December 2, more than a week after the al Qahtani interrogation began on November 23. SASC Report at 87.

[473] *Id.* at 74.

[474] Interrogation Log Detainee 063, *available at* http://content.time.com/time/2006/log/log.pdf.

that based on the timing and the small size of the BSCT team, comprised only of Leso, Burney, and one or two psychological technicians, it was likely that Leso was the BSCT described in the interrogation log.[475] Gen. James Hill later confirmed that Guantanamo interrogators were "working with behavioral scientists," when they applied the enhanced techniques.[476]

Sidley was unable to speak with Leso, and thus our knowledge of the circumstances of this interrogation come only from the report of the Senate Armed Services Committee and witnesses who knew Leso. James said that the al Qahtani interrogation was directed by a high-ranking officer, and that Leso had no legal authority to stop the interrogation.[477] Moreover, he explained that Leso was young and inexperienced, and had no knowledge regarding how to oppose an order that had been approved by officials in the offices of the Attorney General and Secretary of Defense. By focusing on the circumstances of Leso's involvement, James attempted to absolve Leso of responsibility for his actions. This attitude echoes that of the APA staff who adjudicated the complaints filed against Leso after the al Qahtani interrogation log came to light, who also excused Leso's participation in the interrogation because of his youth and inexperience.

Throughout the fall of 2002, JPRA continued to provide training support to both DoD and CIA. In October, JPRA developed a training session for Guantanamo interrogators that was nearly identical to the agenda developed for the Fort Bragg training from September, including instruction on the use of physical pressures.[478] In November 2002, the CIA's Counterterrorism Center, with assistance from JPRA, initiated an Interrogator Training Course designed to train, qualify, and certify individuals as CIA interrogators.[479] On December 30 and 31, two SERE instructors traveled to Guantanamo to conduct enhanced interrogation technique training.[480]

G. Growing Opposition to the Enhanced Interrogation Program

As the interrogation program moved forward, FBI and CITF personnel stationed at Guantanamo began to voice concerns about the abusive tactics rumored to be inflicted on the detainees in CIA custody. These concerns intensified and moved further up the chain of command throughout the fall. On December 18, 2002, after hearing allegations that prisoner abuses were occurring at Guantanamo, Alberto Mora, General Counsel of the Navy, met with subordinates David Brant, Director of the NCIS, and Michael Gelles, NCIS's Chief Psychologist. Mora confirmed with his counterpart in the Army, which had operational responsibility for Guantanamo detainees, that the abusive practices were authorized by Secretary of Defense Rumsfeld, before confronting William Haynes, DoD's General Counsel, with his concerns. Mora initially assumed that Rumsfeld would reverse his authorization of these techniques, but

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[475] James interview (May 1, 2015).

[476] SASC Report at 66.

[477] James interview (May 1, 2015).

[478] SASC Report at 72.

[479] SSCI Report at 58.

[480] SASC Report at 103.

when Mora continued to hear reports of the abusive tactics several weeks later, he again confronted Haynes.

On January 15, 2003, Mora prepared a memorandum concluding that the majority of the tactics that had been approved by Rumsfeld constituted cruel and unusual treatment or torture. He threatened to sign and circulate the memorandum that day unless he heard that the use of the interrogation techniques would be halted. By the afternoon, Haynes had confirmed that Rumsfeld had suspended his authorization for the techniques.[481]

Following the suspension, Rumsfeld established a working group of military and civilian lawyers to review the techniques. Before the working group could draw conclusions, however, their review was circumvented by a memorandum from John Yoo in OLC that constrained the group's ability to independently assess the legality of many of the proposed interrogation techniques.[482] While strongly objecting to the restrictions imposed by the OLC memorandum, the working group nonetheless produced a draft report that concluded that many of the originally approved techniques were legal. Mora cautioned Haynes, however, that the report was deeply flawed because of its reliance on the OLC memorandum, and recommended that the report be kept in draft form.[483] Despite Mora's warning, in April 2003 Rumsfeld signed the draft report of the working group, without the knowledge of its members, and once again authorized the use of enhanced interrogation techniques at Guantanamo.[484]

Shortly thereafter, on April 16, Rumsfeld issued a DoD Directive regarding Counter-Resistance Techniques in the War on Terrorism, which approved the use of a set of twenty-four techniques in the interrogations of unlawful combatants held at Guantanamo Bay. Among the approved techniques were "sleep adjustment," which the Directive explicitly noted was "NOT sleep deprivation"; environmental manipulation, which the Directive explained could be considered inhumane in some countries; dietary manipulation; and many specific methods of questioning. Four of these techniques—incentives or removal of incentives, including religious items; pride and ego down; "Mutt and Jeff" or good cop-bad cop teams; and isolation—required that an interrogator assess whether the use of the technique is required by military necessity and give advance notification to the Secretary of Defense. These four techniques were identified as potentially inconsistent with the Geneva Convention protections applicable to prisoners of war.[485]

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[481] Memorandum from Alberto J. Mora, Gen. Counsel, Dep't of the Navy, to Inspector Gen., Dep't of the Navy Statement for the Record: Office of General Counsel Involvement in Interrogation Issues (July 7, 2004) [hereinafter "Mora Memorandum"].

[482] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Dep't of Justice, to William J. Haynes, Gen. Counsel, DoD, Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003). This memorandum reiterated much of the analysis from the August 2002 memoranda.

[483] Mora Memorandum.

[484] SASC Report at 130–32.

[485] Memorandum from Donald Rumsfeld, Sec. of Def., to the Commander, US Southern Command Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), *available at* http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/03.04.16.pdf.

After Rumsfeld's re-authorization, interrogators resumed the use of enhanced techniques at Guantanamo.[486] In June 2003, the Department of Defense issued a statement to Senator Patrick Leahy asserting that all interrogations, "wherever they may occur," are consistent with the U.S. Constitution.[487]

In the first several months of 2003, detention facilities in Iraq and Afghanistan also began developing interrogation policies that incorporated many of the enhanced techniques first approved for use at Guantanamo.[488] In August, a team from the Guantanamo Joint Task Force visited Iraq to conduct an assessment of the interrogation operations within Central Command's area of responsibility. Although the Iraq Survey Group, charged with conducting the search for weapons of mass destruction in Iraq, did not fully accept the "hard line approach" recommended by the assessment team, the Combined Joint Task Force-7, charged with coordinating all military operations in Iraq, did incorporate some of the techniques recommended by the Guantanamo assessment team into its policies and procedures.[489] In September 2003, JPRA also sent a delegation to Iraq to provide "offensive" SERE training to the Special Mission Unit Task Force, which conducted interrogations of detainees deemed to be high value targets.[490] While in Iraq, the JPRA team was authorized to participate directly in interrogations and to use the full range of SERE school physical pressures.[491] When friction began to develop between the JPRA team and the task force staff regarding whether SERE techniques complied with the Geneva Conventions, the decision was made to pull the JPRA delegation out.[492] However, the visit of the JPRA team, in combination with the dissemination of the working group report and the visit of the team from the Guantanamo Joint Task Force, was sufficient to introduce many of the enhanced tactics to interrogation operations in Iraq.

H. Continued Involvement of Mitchell and Jessen

During 2002 and 2003, as Mitchell and Jessen continued to facilitate interrogations at CIA black sites, concerns related to their dual roles as interrogators and psychological evaluators emerged. Mitchell stated that neither he nor Jessen ever performed a fitness for assessment evaluation on a detainee that they subsequently interrogated.[493] However, the Senate Select Committee on Intelligence found evidence suggesting otherwise. In January 2003, Jessen traveled to a CIA black site to assess the suitability of continuing to use enhanced interrogations against Abd al-Rahim al-Nashiri, whom two interrogators had deemed cooperative.[494] At least one person raised concerns about Jessen both conducting the psychological interrogation

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[486] SASC Report at 138, 143–46.

[487] Mora Memorandum.

[488] SASC Report at 154–58.

[489] DODIG Report at 27.

[490] SASC Report at 170.

[491] *Id.* at 174.

[492] DODIG Report at 28.

[493] Email from Mitchell to Sidley (May 31, 2015).

[494] SSCI Report at 71.

assessment and carrying out the interrogation.[495] In June 2003, Mitchell and Jessen were deployed to a black site, where Khalid Sheikh Mohammed was held, to interrogate Mohammed and "assess [his] 'psychological stability' and 'resistance posture.'"[496] During this interrogation, Mohammed was waterboarded at least 183 times over the course of fifteen separate sessions.[497] A psychologist in the CIA's Office of Medical Services ("OMS") objected to the conflict of interest presented by this dual role, and stated that "no professional in the field would credit [Mitchell and Jessen's] later judgments as psychologists assessing the subjects of their enhanced measures."[498]

Throughout 2003 and early 2004, the CIA continued to take detainees into custody at various detention facilities and to subject them to enhanced interrogation techniques, at times without authorization from CIA Headquarters or in ways that diverged from the authorization.[499] On July 29, 2003, the CIA secured oral concurrence from the Department of Justice that "certain deviations are not significant" to the analysis underlying the OLC legal opinions.[500]

In early 2003, the CIA's Office of the General Counsel began to express concerns to National Security Council, White House, and DOJ personnel that the Bush Administration's statements about the "humane" treatment of detainees might be inconsistent with the CIA's interrogation program.[501] The CIA began to discuss with personnel from DOJ, DoD, and the White House whether they could represent that the treatment of detainees complied with constitutional standards in the Fifth, Eighth, and Fourteenth Amendments, and in June the General Counsel of DoD represented to Senator Patrick Leahy that it was U.S. policy to comply with these standards.[502] In July 2003, as the White House continued to make statements indicating that detainees received "humane" treatment, the CIA asked for a reaffirmation of support for the CIA's policy of using enhanced interrogation techniques. While the request was pending, the CIA began using only "standard" interrogation techniques, which according to the CIA did not involve "significant physical or psychological pressure,"[503] rather than enhanced interrogation techniques.[504] The National Security Council did not consider it necessary to have a full Principals Meeting to reaffirm the program.[505]

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[495] *Id.* at 72.

[496] *Id.* at 65.

[497] *Id.* at 85.

[498] *Id.* at 65-66.

[499] *Id.* at 96-105.

[500] CIAIG Report at 5.

[501] SSCI Report at 115.

[502] *Id.* at 116.

[503] CIAIG Report at 30. Many of the "standard" techniques—sleep deprivation not to exceed 72 hours, use of loud music or white noise, use of diapering not to exceed 72 hours, and others—were merely less severe forms of the "enhanced" techniques.

[504] SSCI Report at 116.

[505] *Id.* at 118.

In January 2004, under pressure from the ICRC, the CIA reduced the number of detainees held in its custody by transferring 25 to the custody of the U.S. military or foreign governments and releasing an additional five detainees.[506] Several months later, Deputy Secretary of Defense Paul Wolfowitz refused to support the CIA's position that continuing to conceal detainees from the ICRC was a national security imperative, and instead believed that it was appropriate to give the ICRC full notification regarding the detainees held in CIA custody.[507]

Meanwhile, the CIA Inspector General began circulating a draft of a Special Review of the CIA's Detention and Interrogation Program, finalized in May 2004. The Special Review identified several matters of concern, including divergences between the techniques authorized and their use in practice,[508] the use of unauthorized techniques, and oversight problems.[509] The Special Review report also recommended that the CIA conduct a review of the effectiveness of the CIA's interrogation techniques. The Inspector General clarified that the recommendation did not contemplate the CIA engaging in "additional, guinea pig research on human beings. What we are recommending is that the Agency undertake a careful review of its experience to date in using the various techniques and that it draw conclusions about their safety, effectiveness, etc., that can guide CIA officers as we move ahead."[510] When National Security Advisor Condoleezza Rice posed similar questions to the CIA about the effectiveness of the enhanced techniques in November and December 2004, the CIA responded that "an effectiveness review was not possible."[511] In March 2005, the Director of the CIA's CTC proposed establishing a "blue ribbon commission" to study the enhanced interrogation technique program, but the commission concluded that there was no objective way to assess the efficacy of the interrogation techniques used by the CIA.[512]

In May 2004, at around the same time that the CIA's Inspector General issued his report and shortly after reports of abuses at Abu Ghraib became public, the Office of Legal Counsel informed the CIA that it had never formally opined on the constitutionality of the CIA's enhanced interrogation techniques, and expressed concern that the CIA's practices diverged from the techniques described in the August 1, 2002 memorandum.[513] In late May, CIA Director

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[506] *Id.* at 119.

[507] *Id.* at 120.

[508] The Special Review took particular note that interrogators were employing the waterboard technique in a manner different from the authorization provided in the OLC memoranda, which was based on SERE training. The report documented that interrogators obstructed detainees' airflow by applying large volumes of water to the detainee's mouth and nose in an attempt to make the experience "more poignant and convincing" or applied the technique a large number of times. CIAIG Report at 37, 44. The Inspector General's report did not conclude whether the waterboard technique had been effective, though it noted that the detainees subjected to waterboarding were cooperative following the experience. *Id.* at 90-91.

[509] SSCI Report at 123.

[510] *Id.* at 126.

[511] *Id.*

[512] *Id.* at 127-28.

[513] *Id.* at 134-35.

George Tenet suspended the CIA's use of both "enhanced" and "standard" interrogation techniques, pending approval from the OLC.[514]

On June 4, 2004, after DOJ refused to render a written opinion confirming that the CIA interrogation program remained legal, CIA Director George Tenet directed an immediate suspension of the use of interrogation techniques against detainees.[515] Nonetheless, the CIA continued to seek approval for the use enhanced techniques against specific detainees. In July, the National Security Council granted approval for the use of enhanced interrogation methods, with the exception of waterboarding, against a member of al Qaeda suspected to have knowledge of plans to bomb key targets during the 2004 presidential election.[516] In addition to that detainee, the CIA sought and was granted approval to use enhanced techniques against two other detainees during the remainder of 2004.[517] In 2005, the CIA continued to use enhanced interrogation techniques against detainees on an individualized basis. For example, in May 2005, CIA Director Porter Goss approved the use of enhanced interrogation techniques against a detainee suspected of holding the third most important position in al Qaeda.[518] In September, the CIA took custody of two additional detainees from the DoD, and used enhanced techniques during their interrogations.[519] However, beginning in the fall of 2004, the pace of CIA interrogations slowed as the CIA began considering an "end game" to relieving itself of detainee custody.[520] In May 2005, the CIA again suspended use of enhanced interrogation techniques, and in February 2006, the Agency informed the National Security Council that it would not seek continued use of all of its techniques.[521]

Between 2005 and January 2009, when President Obama rescinded authorization for the use of enhanced techniques, the CIA took custody of only six new detainees.[522] In early January 2006, Secretary of Defense Donald Rumsfeld made the formal decision not to accept additional CIA detainees at the Guantanamo Bay military base,[523] and by September 2006, the CIA had transferred all detainees remaining in its custody to either third party countries or DoD custody.[524] However, after that point, the CIA continued to accept custody of a small number of detainees,[525] and in spring 2007, after passage of the Military Commissions Act, the CIA developed a modified enhanced interrogation program for use on the few detainees remaining in

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[514] *Id.* at 135.

[515] *Id.*

[516] *Id.* at 135-36.

[517] *Id.* at 136.

[518] *Id.* at 147.

[519] *Id.* at 148-49.

[520] *Id.* at 143.

[521] *Id.* at 151.

[522] *Id.* at 171.

[523] *Id.* at 156.

[524] *Id.* at 154.

[525] *Id.* at 161.

its custody.[526] The CIA took custody of its final detainee in 2007, and after Mitchell and Jessen briefed Secretary of State Condoleezza Rice, in early July she granted approval for the CIA to use six enhanced techniques: sleep deprivation, dietary manipulation, facial grasp, facial slap, abdominal slap, and attention grab.[527] The interrogation of the last detainee in the CIA's detention and interrogation program ended in December 2007.[528]

In January 2009, Obama prohibited use of interrogation techniques other than those found in the Army Field Manual. Only a few months later, the CIA terminated its contract with Mitchell Jessen & Associates.[529]

I. Evolution of the BSCT Role

As the Bush Administration's counterterrorism policies continued, the DoD developed clearer boundaries and guidelines for the military personnel stationed at Guantanamo. Sidley's information about this evolution comes from Larry James and Debra Dunivin, military psychologists who were stationed with a BSCT between 2003 and 2005. Dunivin said that over time, the command structure at Guantanamo solidified to the point that psychologists stationed to Guantanamo operated in one of two chains of command, defined by the mission. Psychologists assigned to Guantanamo as healthcare providers, either to the servicemen stationed on the base or to the detainees, worked in the medical chain of command, which reported directly up through medical personnel to the Surgeon General of the Army. On the other hand, psychologists assigned to Guantanamo to assist in the intelligence mission worked in the intelligence or detention commands, which reported up through operational personnel, most of whom were not healthcare professionals. The BSCTs teams working at Guantanamo were in the latter group as of 2004, and operated outside of the medical command.[530]

However, when the first psychologists began to arrive at Guantanamo in 2002 there was no structure in place to guide them. Initially, there was no "firewall" between treatment personnel and interrogation teams, and psychologists moved in and out of both roles.[531] For example, in an interview with Sidley, Albert Shimkus, the commander of the hospital at Guantanamo, who was charged with credentialing healthcare providers, explained that several BSCT members in 2002 and 2003 came to him seeking credentials to act in a healthcare role, though he stated unequivocally that he never granted such approval.[532] It was only as the Army began to provide guidance through Standard Operating Procedures ("SOP") for the Guantanamo BSCT in November 2002, that the treatment and intelligence roles were separated. The 2002 SOP described several "mission essential tasks," including consulting on interrogation

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[526] *Id.* at 162.

[527] *Id.* at 143, 163.

[528] *Id.* at 167-68.

[529] *Id.* at 169.

[530] Dunivin interview (May 20, 2015).

[531] APA_0087334.

[532] Shimkus interview (June 10, 2015).

techniques, developing behavior management plans, and liaising between intelligence and medical personnel to describe the implications of medical diagnoses and treatments for the interrogation process.[533]

Dunivin said that as of January 2003, when Col. Larry James deployed to Guantanamo to replace Leso as a BSCT member, there was not yet any formalized training in place. James explained that when he arrived, Leso had already convinced the commanders that rapport-building techniques were superior to abusive tactics, and James was able to expand on the progress Leso had already made to end the abuses at Guantanamo.[534] James said that he remained at Guantanamo until May 2003, when he was replaced by Maj. Diane Zierhoffer.

Behavioral scientists were also used to address abusive tactics that had begun to spread to military facilities in Iraq and Afghanistan. In late 2003, military police and CIA personnel at Abu Ghraib engaged in a consistent pattern of human rights abuses against detainees. As reports of prisoner abuses filtered back to the military command, a team from JPRA was dispatched to Iraq to advise regarding interrogation policies.[535] After reports of these abuses broke to the public in April 2004, Larry James deployed to Abu Ghraib as director of the Behavioral Science Unit. He returned in November 2004 after he suffered injuries during an attack on his convoy.[536]

Dunivin said that in the fall of 2004, she deployed to Guantanamo as a BSCT psychologist, where she remained until the fall of 2005. During Dunivin's deployment, the Department of Defense issued a supplemental policy memorandum for BSCTs. The supplemental policy reiterated many of the mission essential tasks from the first SOP, but elaborated that BSCTs were not only to provide consultation to interrogation staff but also to "monitor[] interrogations and other staff-detainee interactions."[537] Dunivin said that the Army did not provide formalized training for BSCT psychologists until after her return in 2005.[538]

On November 3, 2005, the Department of Defense issued Directive 3115.09 relating to "DoD Intelligence Interrogations, Detainee Debriefings and Tactical Questioning" to consolidate existing policies that required humane treatment during all intelligence interrogations and debriefings.[539] The Directive explicitly separated the BSCT and medical provider role, stating

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[533] Memorandum from JTF GTMO, DoD, for the Record, BSCT Standard Operating Procedures (Nov. 11, 2002).

[534] James interview (May 1, 2015).

[535] In May 2004, the Inspector General of the CIA released a Special Review of the records from a number of interrogations, which concluded that interrogators were improvising new techniques and using approved enhanced techniques in ways that did not comply with the legal guidelines or the limits imposed in SERE training. CIAIG Report at 100–105.

[536] APA_0186135.

[537] Memorandum from Headquarters, Joint Task Force Guantanamo, DoD, to Joint Intelligence Group, Joint Task Force – Guantanamo, APO AE 09360 Operational Policy Memorandum # 14, Behavioral Science Consultation Team (BSCT) (Dec. 10, 2004).

[538] Dunivin interview (May 20, 2015).

[539] Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, DoD Directive No. 3115.09 (Nov. 3, 2005).

that "[t]hose who provide such advice [to personnel performing interrogations] may not provide medical care for detainees except in an emergency."[540]

Although the CIA did not utilize BSCTs, it used physicians and psychologists to support interrogations in a manner similar to the DoD. Mitchell explained that at least one, and often several, medical professionals were present for every interrogation overseen by the CIA.[541] However, the CIA did not undertake the same process of training and educating psychologists. Mitchell said that the CIA was not as concerned with training and ethics because it did not face the same set of circumstances as DoD, which oversaw many young psychologists early in their careers.[542] He stated that 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.[543]

J. Department of Defense Research Policy

Critics have argued that legal and policy changes by DoD in the period immediately after 9/11 permitted DoD to conduct human subjects research on detainees without their informed consent and without oversight from Congress or Institutional Review Boards ("IRB"). The critics allege that APA, by softening informed consent protections in the Ethics Code and encouraging research in the PENS report, permitted psychologists to take full advantage of the weakened legal protections and participate in research programs run under the auspices of DoD or the CIA. Taken together, it seems likely that the exceptions in the Common Rule and the definitional changes in the Wolfowitz Directive broadened opportunities for DoD to conduct research on detainees subjected to interrogations. However, there is no evidence that APA acted to facilitate psychologists' participation in such research, if it occurred.[544] As discussed above, the changes made to the research standards in the APA Ethics Code occurred well before the September 11 terrorist attacks, and thus could not have been intended to facilitate research on detainees held as part of the national security policies initiated in response to the attacks. Therefore, although the critics may be correct that DoD policy changes in the period shortly after 9/11 permitted DoD to conduct research on detainees, Sidley has identified no evidence that APA acted to support or conduct such research.

Our analysis on this topic confirmed that, at the same time that the CIA and DoD were developing their interrogation programs, a series of nuanced changes to domestic law and Department of Defense policy broadened the scope of permissible human subjects research. Federal policy on human subjects research is grounded in the Common Rule, a uniform set of regulations relating to the protection of human subjects in biomedical or behavioral research.

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[540] *Id.*

[541] Mitchell interview (May 15, 2015).

[542] *Id.*

[543] *Id.*

[544] As discussed above, there are at least hints in the Senate committee reports that DoD and CIA were interested in such research, but we are unable to conclude definitively whether research was conducted on detainees.

The Common Rule developed out of the 1947 Nuremberg Code and the 1978 Belmont Report, produced by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Following the release of the Belmont Report, the Department of Health and Human Services began revising and expanding the protections found in the Nuremberg Code and Belmont Report, and codifying these changes in the federal regulations.[545] In 1991, 15 federal departments and agencies, including the Department of Defense, adopted the Common Rule in their respective federal regulations.

The Common Rule applies to all research involving human subjects conducted or supported by any federal department or agency, including research conducted by federal civilian employees or military personnel.[546] It protects human subjects by requiring IRB review and approval of proposed human subjects research as part of an effort to minimize risk, ensure confidentiality, and protect vulnerable populations. It also requires informed consent from all human subjects. However, the protections of the Common Rule are not absolute: exceptions and modifications may be made to its provisions by department or agency heads, if deemed administratively appropriate,[547] and these same department and agency heads "retain final judgment as to whether a particular activity is covered" by the Common Rule at all.[548]

Generally, the informed consent component of the Common Rule requires that "[e]xcept as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative."[549] However, informed consent requirements may be waived by an IRB provided that it finds that the waiver would not be harmful to the subjects and the research could not practicably be carried out without the waiver.[550] Thus, the DoD had ample discretion to exclude certain activities from the ambit of the Common Rule, even apart from any legal or policy changes that occurred in the months after 9/11.

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[545] Critics have argued that Department of Defense Directive No. 3216.2 (the "Wolfowitz Directive") permits research activity that does not comply with the Nuremberg Code because it merely requires that investigators and researchers be "familiar" with the Nuremberg Code, rather than requiring adherence to the Code. Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research, DoD Directive No. 3216.2 (Mar. 25, 2002). The reference to the Nuremberg Code appears among other provisions describing policies that were adopted to ensure that DoD departments comply with human subjects protections, in a section that discusses the "applicability" of federal policy for the protection of human subjects research. Thus, in context, it does not seem that the language requiring familiarity with the Nuremberg Code permits deviation from the principles of the Code in activities to which the Wolfowitz Directive applies.

[546] 45 C.F.R. § 46.101.

[547] *Id.* § 46.101(a).

[548] *Id.* § 46.101(c).

[549] *Id.*. § 46.116.

[550] *Id.* § 46.116(c).

On December 28, 2001, the 2002 Defense Appropriations Act amended 10 U.S.C. § 980 to permit the Secretary of Defense to waive the informed consent requirement in experimentation on human subjects "with respect to a specific research project to advance the development of a medical product necessary to the armed forces if the research project may directly benefit the subject and is carried out in accordance with all other applicable laws."[551] Only days later, on January 10, 2002, as President Bush signed into law a supplemental appropriations act for DoD, he issued a signing statement regarding the Act's requirement for prior congressional approval before funding a special access program:

> The U.S. Supreme Court has stated that the President's authority to classify and control access to information bearing on national security flows from the Constitution and does not depend upon a legislative grant of authority. Although 30-day advance notice can be provided in most situations as a matter of comity, situations may arise, especially in wartime, in which the President must promptly establish special access controls on classified national security information under his constitutional grants of the executive power and authority as Commander in Chief of the Armed Forces.[552]

Critics have read this statement as a reservation of executive discretion with respect to notifying congressional committees regarding the initiation of military and intelligence experiments on human subjects.

On March 25, 2002, the Department of Defense issued Directive Number 3216.2 (the "Wolfowitz Directive"), relating to "Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research." The Wolfowitz Directive reissued a 1983 version of the same Directive, and incorporated many of the same provisions. The 2002 version amended the earlier version by supporting the implementation of Section 980 and 32 C.F.R. Part 219, which contains the DoD statement of the Common Rule. In many ways, the Wolfowitz Directive adopted as DoD policy a set of very broad protections for human subjects of research. For example, although many departments adopted only subpart A of the Common Rule, DoD adopted additional subparts related to research on vulnerable populations.[553] One of these subparts imposed additional protections in biomedical and behavioral research that used prisoners as subjects. The subpart defines "prisoner" as "any individual involuntarily confined or detained in a penal institution. The term is intended to encompass individuals sentenced to such an institution under criminal or civil statute, individuals detained in other facilities by virtue of statutes or commitment procedures which provide alternatives to criminal prosecution or incarceration in a penal institution, and individuals detained pending arraignment, trial, or sentencing."[554] Although no reference to other specific categories of prisoners appears in the

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[551] National Defense Authorization Act for Fiscal Year 2002, Pub L. No. 107-107, 115 Stat. 1012.

[552] President George W. Bush, Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act (Jan. 10, 2002).

[553] Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research, Directive No. 3216.2 (Mar. 25, 2002).

[554] 45 C.F.R. § 46.303(c).

Common Rule, the Wolfowitz Directive adds that "[t]he involvement of prisoners of war as human subjects of research is prohibited."[555] This addition, found only in the Department of Defense policy codifying the Common Rule, is logical in light of the fact that most of the other agencies that adopted the Common Rule would have no interaction or involvement with prisoners of war.

Some critics have alleged that this statement demonstrates that the DoD intended to exclude Guantanamo detainees from the class of people enveloped by the protections for human subjects. They argue that detainees legally were not considered prisoners of war, in light of contemporaneous orders classifying detainees as enemy or unlawful combatants, and thus would not fall within the scope of the Directive.[556] In addition, it seems that Guantanamo detainees might not qualify as "prisoners" under the Common Rule definition, which describes individuals held by statute at penal institutions; Guantanamo is not a penal institution and the detainees held there were captured during armed conflict rather than detained pursuant to federal statute. It seems fair to conclude that, had the DoD wanted to codify the broadest protections possible, it could have explicitly extended research protections to additional classes of prisoners, including detainees held as "unlawful combatants" at Guantanamo. However, it also seems unlikely that the use of the term "prisoners of war" represents an intentional choice to exclude detainees from the policy granting protections to the subjects of human research; rather, it is more likely that the DoD simply adapted the language already existing in the 1983 version of the Directive, which likewise prohibited "[t]he use of prisoners of war as human subjects of research."[557] Moreover, the specific provision relating to prisoners of war has little effect in the context of the Directive as a whole, because the Directive applies to any research "with a human being," which includes detainees regardless of their status as prisoners of war or unlawful combatants.[558] Therefore, despite its reference to prisoners of war, it seems that the overall effect of the Wolfowitz Directive was to broaden protections for human subjects of research.

Although the Wolfowitz Directive seemed on its face to extend a generally broad range of protections to human subjects of research, the Directive also subtly limited the scope of individuals who were entitled to such protections. First, the Directive broadened the set of circumstances under which the requirement of informed consent could be waived. The Common Rule itself contains many exceptions to the informed consent requirement, preserving to the heads of departments the authority to determine that an activity does not constitute research on human subjects, and thus does not fall within the policy encapsulated by the Common Rule.[559]

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[555] Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research, Directive No. 3216.2 (Mar. 25, 2002).

[556] Peter Jan Honigsberg, *The Real Origin of the Term 'Enemy Combatant,'* Huffington Post (Jan. 9, 2014), *available at* http://www.huffingtonpost.com/peter-jan-honigsberg/the-real-origin-of-the-te_b_4562216.html.

[557] Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research, Directive No. 3216.2 (Jan. 7, 1983).

[558] Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research, Directive No. 3216.2 (Mar. 25, 2002).

[559] 45 C.F.R. § 46.101(c).

The Wolfowitz Directive incorporated these exceptions when it adopted the Common Rule as policy, while also including a provision that permits the Head of a DoD Component to waive the informed consent requirement "with respect to a specific research project to advance the development of a medical product necessary to the Armed Forces if the research project may directly benefit the subject and is carried out in accordance with all other applicable laws and regulations."[560] This language is identical to that found in the 2002 Defense Appropriations Act. The reference to medical products suggests that the Wolfowitz Directive's implementation of Section 980 does nothing to expand the scope of human subjects research related to interrogations, and thus it is unlikely that this aspect of the Directive facilitated research on detainee interrogations.

Although it seems unlikely that the codification of Section 980 expanded the scope of permissible human subjects research, the Wolfowitz Directive contained a separate provision that permits the Director of Defense Research and Engineering to "grant exceptions to policy under this Directive if justified by special circumstances and consistent with law."[561] The 1983 version of the Directive contained a similar provision, which permitted heads of departments to submit requests for exceptions to the policy to the Under Secretary of Defense for Research and Engineering,[562] but the changes to the 2002 version seem to give the Director more expansive authority to carve out exceptions from the policy. It seems likely that the DoD would consider the war on terror to be a "special circumstance" that permits deviation from human research subjects protections, and that the memoranda produced by the Department of Justice later in 2002 provided the legal authority to grant an exception for research on interrogations. In combination with the many exceptions found in the Common Rule, the Wolfowitz Directive's exceptions to the informed consent requirement gave the Department of Defense sufficient leeway to dispense with informed consent and conduct research on detainee interrogation.

Another limitation on the broad protections encompassed in the Wolfowitz Directive is found in the definition of research itself. In the Common Rule, research is defined as "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes."[563] The 1983 version of the Directive parrots the definition of research found in the Common Rule. However, in the 2002 version of the Directive, the DoD made a notable change and defined research as "an intervention or interaction with a human being for the *primary purpose* of obtaining data regarding the effect of the intervention or interaction. Examples of interventions or interactions include, but are not limited to, a physical procedure, a drug, a manipulation of the subject or subject's environment, [and] the withholding of an intervention that would have been undertaken

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[560] Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research, Directive No. 3216.2 (Mar. 25, 2002).

[561] *Id.*

[562] Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research, Directive No. 3216.2 (Jan. 7, 1983).

[563] 32 C.F.R. § 219.102(d).

if not for the research purpose."[564] The requirement that collection of data be the "primary purpose" of an activity represents a notable change from the broad Common Rule definition, which contemplates that activities and programs whose principal purpose is something other than research might nonetheless present an incidental opportunity for researchers to obtain and evaluate data. It seems likely that DoD would consider the primary purpose of the interrogation program to be the extraction of information in the service of national security. Thus, even if data were collected during interrogations for the purpose of deriving generalizable knowledge, that activity might not be considered research under the Wolfowitz Directive.

It seems likely that, had DoD wished to conduct research on the interrogations of detainees held in its custody, the Common Rule, as supplemented by the Wolfowitz Directive, would have given commanders ample leeway to authorize such research. However, Sidley has identified no evidence that APA coordinated with DoD to facilitate or conduct research on detainees, or that APA amended its Ethics Code or issued policy statements permitting its members to participate in such research.

K. Public Awareness of Abusive Interrogations

In late 2002, the first reports of secret CIA interrogation centers or "black sites" began to circulate at the major news outlets. On December 26, 2002, Dana Priest and Barton Gellman reported in the *Washington Post* that the CIA was running a clandestine interrogation site near Bagram air base where detainees were "held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as 'stress and duress' techniques."[565] The article continued that detainees who cooperated were "rewarded with creature comforts," while those who did not were "rendered" to foreign countries, such as Jordan, Egypt, and Morocco, where the use of torture was well-documented.

Reports of detainees suffering physical abuse while in U.S. custody and after rendition to other nations continued to emerge over the next several months. In March, the *New York Times* reported that several individuals held in American custody claimed that they "had been made to stand hooded, their arms raised and chained to the ceiling, their feet shackled, unable to move for hours at a time, day and night," and a commander of coalition forces in Afghanistan "acknowledged that prisoners had been made to stand for long periods," though he denied that they were chained to the ceiling.[566] Several days later, another article reported that intelligence officials "acknowledged that some suspects had been turned over to security services in countries known to employ torture," and described the case of one such detainee who was "subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100

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[564] Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research, Directive No. 3216.2 (Mar. 25, 2002) (emphasis added).

[565] Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, Washington Post (Dec. 26, 2002), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

[566] Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, New York Times (Mar. 4, 2003), *available at* http://www.nytimes.com/2003/03/04/international/asia/04AFGH.html?pagewanted=1.

degrees to 10 degrees."[567] In May, the *New York Times* published another article that identified a number of detainees who claimed to have been beaten or subjected to electric shock at the hands of American and British soldiers.[568]

On November 1, 2003, the *Associated Press* published a report documenting the inhumane treatment of detainees at Abu Ghraib and other Iraqi prisons. Based on accounts by released detainees, the article reported that detainees were beaten, exposed to the sun as punishment, and deprived of water for drinking and washing. Several former detainees described a common punishment for minor infractions called "'The Gardens'—a razor-wire enclosure where prisoners were made to lie face down on the burning sand for two or three hours, hands bound."[569] The major news outlets did not pick up on the AP story, even as rumors began to swirl that American soldiers had posed for photographs with nude prisoners.[570]

On March 3, 2004, *Salon* carried a story by Jen Banbury titled "Guantanamo on Steroids," which repeated earlier reports that "[s]ome Iraqis who have been held as security detainees claim they were subjected to ill treatment, including beatings, sleep deprivation and psychological abuse." Banbury, citing a member of a faith-based peace group working with detainees and their families, described accounts from former detainees who claimed they were "hooded, handcuffed and left outside for hours on end (sometimes in the rain) at bases where they are initially taken for interrogation. Accusations of beatings during interrogations are also common." Another detainee described "psychological abuse," as "one of his interrogators threatened to take pictures of his wife, mother and sister naked and show them on satellite as a sex film."[571]

On April 28, 2004, *60 Minutes II* broadcast graphic photos of Iraqi detainees being abused and humiliated. Many of the photographs depicted guards sexually humiliating detainees, who were stripped naked and forced to simulate sex acts on other detainees. Other photographs showed the battered bodies of two detainees who had died in custody.

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[567] Raymond Bonner, Don Van Natta Jr. & Amy Waldman, *Threats and Responses: Interrogations; Questioning Terror Suspects In a Dark and Surreal World*, New York Times (Mar. 9, 2003), *available at* http://www.nytimes.com/2003/03/09/world/threats-responses-interrogations-questioning-terror-suspects-dark-surreal-world.html?pagewanted=1.

[568] Marc Lacey, *Iraqi Detainees Claim Abuse by British and U.S. Troops*, New York Times (May 17, 2003), *available at* http://www.nytimes.com/2003/05/17/international/worldspecial/17PRIS.html.

[569] Charles J. Hanley, *Former Iraqi Detainees Tell of Riots, Punishment in the Sun, Good Americans and Pitiless Ones*, Associated Press (Nov. 1, 2003), *available at* http://legacy.utsandiego.com/news/world/iraq/20031101-0936-iraq-thecamps.html.

[570] Barbara Starr, *Details of Army's Abuse Investigation Surface*, CNN (Jan. 21, 2004), *available at* http://www.cnn.com/2004/US/01/20/sprj.nirq.abuse/.

[571] Jen Banbury, *Guantanamo on Steroids,* Salon (Mar. 3, 2004), *available at* http://www.salon.com/2004/03/03/prison_3/.

Only two days later, the *New Yorker* carried the first of Seymour Hersh's articles about the abuses at Abu Ghraib.[572] In his article, "Torture at Abu Ghraib," Hersh quoted from the newly released Taguba Report, which documented that between October and December 2003, military and intelligence personnel engaged in "numerous instances of 'sadistic, blatant, and wanton criminal abuses,'" including:

> Breaking chemical lights and pouring the phosphoric liquid on detainees; [t]hreatening detainees with a charged 9mm pistol; [p]ouring cold water on naked detainees; [b]eating detainees with a broom handle and a chair; [t]hreatening male detainees with rape; [a]llowing a military police guard to stitch the wound of a detainee who was injured about being slammed against the wall in his cell; [s]odomizing a detainee with a chemical light and perhaps a broom stick, [and] [u]sing military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.

The Taguba Report quoted in the article had been completed on February 26, 2004, and included descriptions of additional abusive acts committed by military police personnel:

> Punching, slapping, and kicking detainees; jumping on their naked feet; [v]ideotaping and photographing naked male and female detainees; [f]orcibly arranging detainees in various sexually explicit positions for photographing; [f]orcing detainees to remove their clothing and keeping them naked for several days at a time; [f]orcing naked male detainees to wear women's underwear; [f]orcing groups of male detainees to masturbate themselves while being photographed and videotaped; [a]rranging naked male detainees in a pile and then jumping on them; [p]ositioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture; [w]riting "I am a Rapest" [sic] on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked; [p]lacing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture; [a] male MP guard having sex with a female detainee; [u]sing military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; [and] [t]aking photographs of dead Iraqi detainees.[573]

Throughout May and June 2004, the major media outlets turned their focus to reporting on the Abu Ghraib abuses. On May 5, 2004, the *New York Times* published a story in which Maj. Gen. Geoffrey D. Miller "defended practices like depriving prisoners of sleep and forcing them into 'stress positions' as legitimate means of interrogation, noting that they are among 50-

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[572] Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker (May 10, 2004),*available at* http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib. The article was posted online on April 30, but appeared in the May 10 print edition.

[573] Article 15-6 Investigation of the 800th Military Police Brigade, Part 1, ¶¶ 6, 8.

odd coercive techniques sometimes used against enemy detainees."[574] On May 21, 2004, the *Washington Post* identified fresh allegations of abuse at the Abu Ghraib prison, including allegations that prisoners were "ridden like animals, sexually fondled by female soldiers and forced to retrieve their food from toilets."[575] Although it is not clear that all of these abuses occurred during the course of interrogations, there was sufficient information by the summer of 2004 to put the American public on notice that a number of abusive tactics, including beating, sleep deprivation, and sexual humiliation, were being used against detainees taken pursuant to the war on terror.

On June 7, 2004, the *Wall Street Journal* published a story describing the draft report produced by the working group of military and civilian lawyers created after Mora forced Rumsfeld to rescind authorization for the use of enhanced interrogation techniques. The Journal reported:

> The draft report, which exceeds 100 pages, deals with a range of legal issues related to interrogations, offering definitions of the degree of pain or psychological manipulation that could be considered lawful. But at its core is an exceptional argument that because nothing is more important than 'obtaining intelligence vital to the protection of untold thousands of American citizens,' normal strictures on torture might not apply.[576]

The article added that the working group's report elaborated on the Bush administration's position of the president's expansive power to wage war, unbound by Congress or the courts; therefore, the report concluded, the anti-torture statute cannot be applied to acts undertaken pursuant to the president's order as commander in chief. Accordingly, the article continued, the report provides a Nuremberg defense to individuals acting under military orders, in addition to outlining defenses based on necessity and self-defense.[577]

The following day, on June 8, the *Washington Post* broke the news that the Department of Justice had produced a series of memoranda in 2002 and 2003 that advised the White House that torture of captured al Qaeda terrorists could be both legal and justified "to prevent further attacks on the United States by the Al Qaeda terrorist network." The article quoted the 2002 memoranda as stating that interrogation techniques must be similar to severe beatings, threats of imminent death, rape, or electric shocks to genitalia to constitute torture. Moreover, the memoranda stated that psychological techniques based on "purely mental pain or suffering" must "result in significant psychological harm of significant duration" to constitute torture. The article also described the analysis of specific intent contained in the memoranda:

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[574] Dexter Filkins, *The Struggle for Iraq: The Warden; General Will Trim Inmate Numbers at Iraq Prison*, New York Times (May 5, 2004), *available at* http://www.nytimes.com/2004/05/05/world/the-struggle-for-iraq-the-warden-general-will-trim-inmate-numbers-at-iraq-prison.html.

[575] Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, Washington Post (May 21, 2004), *available at* http://www.wsj.com/articles/SB108655737612529969.

[576] Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, Wall Street Journal (June 7, 2004), *available at* http://www.wsj.com/articles/SB108655737612529969.

[577] *Id.*

> Of mental torture, however, an interrogator could show he acted in good faith by "taking such steps as surveying professional literature, consulting with experts or reviewing evidence gained in past experience" to show he or she did not intend to cause severe mental pain and that the conduct, therefore, "would not amount to the acts prohibited by the statute."[578]

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.[579]

II. APA'S INITIAL COUNTERTERRORISM RESPONSE: SEPTEMBER 2001 – NOVEMBER 2001

A. The Board of Directors' Response

Sidley heard from numerous witnesses that, immediately after 9/11, APA staff and governance began to identify ways that psychologists and psychological science could contribute to efforts to cope with the aftermath of the attacks and the nation's efforts to combat terrorism. On September 19, 2001, the Board of Directors organized a conference call for the chairs of the various APA committees to discuss "psychology's role in addressing the trauma of the terrorist's [sic] attacks" and "to help identify experts who can address the research and knowledge that we have to offer in response to the decisions and actions that face our nation."[580]

Shortly after the conference call, the Board of Directors created a Subcommittee on Psychology's Response to Terrorism, with the mission of identifying the role of psychology in addressing both the threat and the impact of terrorism. The Science, Practice, and Education Directorates staffed the Subcommittee, with Science Directorate taking the lead.[581] Initial efforts in the Practice Directorate focused on the formation of a Disaster Relief Network to provide counseling services and "emotional first-aid" to families of victims, rescue workers, and others who experienced loss as a result of the terrorist attacks.[582]

The Subcommittee also began assembling lists of psychological experts who might contribute research on relevant topics and networking with government policymakers to

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[578] Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post (June 8, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html.

[579] The memoranda were brought to Goldsmith's attention in December 2003, shortly after he took office. He decided at that time that they should be rescinded, but his hope was to produce a replacement document before withdrawing the guidance. Amidst growing political pressure, Goldsmith rescinded the memoranda on June 14 without any replacement guidance, and submitted his resignation on June 16. Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration, 159-161 (2009). The OLC would not provide new guidance to the White House until December 30, under acting Assistant Attorney General Daniel Levin.

[580] APA_0033960.

[581] APA_0234428.

[582] APA_0033736.

determine what contributions might be of interest to critical government agencies.[583] Members of the Subcommittee also participated in events designed to educate APA membership on the contributions of psychological science to counterterrorism efforts. For example, in early February 2002, Ron Levant, the Chair of the Subcommittee, spoke at a continuing education seminar in Orlando, Florida titled "The Aftermath of Terror: Psychology's Role."[584]

As part of APA's outreach efforts to government personnel, staff from the Science Directorate began networking with psychologists in the government and compiling a list of psychologists who could act as consultants on topics related to terrorism.[585] Staff in the Science Directorate said that Susan Brandon, who was then a visiting Senior Scientist, worked with Geoff Mumford and Heather Kelly, staff in the Government Relations Office within the Science Directorate, to reach out to personnel at the FBI, CIA, and other executive agencies and departments regarding the ways that psychology could contribute to the missions of those respective agencies.

B. Relationships with the Department of Defense

At the time of the September 11 terrorist attacks, APA maintained a healthy relationship with DoD, under the guidance of Heather Kelly and Geoff Mumford in the Science Government Relations Office. Kelly said that she maintained APA's research and advocacy portfolio with respect to DoD, and that as part of this position she tracked DoD research programs, particularly those research activities that involve behavioral science, and lobbied for funding for those programs.[586] For example, in the summer before 9/11, Kelly facilitated APA's participation in Department of Defense Hill Day, designed to urge policy makers to strengthen the DoD's science and technology research program for the upcoming fiscal year.[587] Kelly also maintained contacts with individuals who presented testimony on behalf of APA before Congress, drafting language touting APA's science advocacy efforts as "instrumental in heading off proposed cuts to military behavioral research programs,"[588] and participated in the Coalition for National Security Research ("CNSR"), a broad-based group of universities, non-profit institutions and associations that advocated for Defense science and technology programs.[589]

Kelly explained that her interactions with DoD did not change after 9/11, as she continued to advocate for additional funding for DoD's research programs.[590] Kelly's email activity from the time period demonstrates that she continued to meet with the CNSR,[591] and to

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[583] APA_0033736; APA_0033744.

[584] APA_0056932.

[585] APA_0034321.

[586] Kelly interview (Dec. 12, 2014).

[587] DoD Hill Day (June 6, 2001) (on file with Sidley).

[588] APA_0130255.

[589] APA_0786417.

[590] Kelly interview (Dec. 12, 2014).

[591] APA_0128368.

interact with psychologists in support of the its initiatives and goals.[592] Kelly and other Science Directorate staff also worked on initiatives internal to the APA designed to demonstrate to Congress the value of psychological science and the need for adequate funding to support DOD's behavioral science research. In November, Kelly and Mumford discussed "accelerat[ing] the schedule" for the science advocacy training workshop to be held in the spring and shifting the focus to contributions psychological science could make in the aftermath of 9/11.[593] Mumford also reached out to Mahzarin Banaji at Yale to discuss holding a House Science Committee hearing on the same topic in December 2001.[594] It is apparent that APA's advocacy on behalf of DoD research and relationships with DoD personnel extended well before 9/11, and continued to grow after the terrorist attacks, with an increased emphasis on behavioral research and psychological science related to counterterrorism efforts.

C. Developing Contacts with the FBI

Though they maintained strong relationships with DoD prior to 9/11, the Science Directorate staff said that at that time they were not aware of any significant professional contacts[595] APA had with operational psychologists at the FBI or CIA.[596] Sidley's only information regarding APA's initial contacts with the FBI comes from Susan Brandon. Brandon, a visiting Senior Scientist at APA, stated that when she attempted to reach out to the FBI in the weeks after 9/11, she "cold-called" Steve Band, who was head of the Behavioral Science Unit.[597] Brandon told Sidley that Band invited her to Quantico for a meeting on October 24, 2001, and that at that meeting he said that she could be useful. Brandon added that, after this initial meeting, she arranged for a number of academics to speak to the FBI, including Ian Lustick, an expert on modeling risk and decision making from the University of Pennsylvania; George Bonanno, a psychologist who specializes in resilience and grief recovery from Columbia University; and Brendan O'Leary, an economist and political scientist from the University of Pennsylvania.[598]

Although there is no evidence to illuminate how Brandon identified these individuals to speak to the FBI, it seems likely that Brandon connected with the academics from the University

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[592] APA_0130218.

[593] APA_0128339.

[594] APA_0128342.

[595] Behnke stated that his brother served in various positions with the FBI as a special agent, and at one time he was special assistant to Louis Freeh, who was Director of the FBI until June 2001. Behnke explained that, through his brother, he had developed a relationship with the FBI and friendships in the Secret Service. Behnke interview (May 22, 2015). As early as October 2001, and likely well before, Behnke also served on an FBI Research Advisory Board that focused on issues related to violence against women and children. APA_0498683. Behnke stated that he most likely joined this Board prior to starting at APA, but he could not remember who reached out to him to ask him to participate. Behnke interview (May 22, 2015).

[596] Mumford interview (May 15, 2015); Kelly interview (Apr. 24, 2015).

[597] Brandon interview (Apr. 15, 2015).

[598] Brandon interview (Apr. 15, 2015).

of Pennsylvania through Martin Seligman, the former president of APA whose theory of "learned helplessness" inspired Mitchell and Jessen's interrogation program. Seligman was a professor of psychology at the University of Pennsylvania, where he co-founded the Solomon Asch Center for the Study of Ethnopolitical Conflict with Peter Suedfeld of the Canadian Psychological Association.

D. Broadening Relationships with the CIA

APA staff said that they also had no significant professional contacts in the CIA prior to 9/11, and it is not clear how members of the Science Directorate first met Kirk Hubbard in the Operational Assessment Division ("OAD") of the CIA. However, it seems likely that one of the current or former presidents of APA who maintained a relationship with the CIA brokered the introductions. Geoff Mumford stated that APA staff likely met Hubbard and became involved with his unit in the CIA through an introduction facilitated by Philip Zimbardo or Joseph Matarazzo,[599] and Brandon also recalled that Zimbardo was supportive of their outreach efforts.[600]

1. Professional Standards Advisory Committee

Hubbard's relationship with Matarazzo, Zimbardo, and several other prominent psychologists likely developed out of a paid Professional Standards Advisory Committee ("Advisory Committee" or "PSAC") retained by the CIA, which met several times each year beginning in 2000 to advise Kirk Hubbard's Research & Analysis Branch within the OAD.[601] Hubbard chaired the Advisory Committee, whose members included Joseph Matarazzo, a former APA president, and Melvin Gravitz, a psychologist who had helped to "revolutionize" APA during the 1970s.[602] Also involved in the Advisory Committee, likely as a member or possibly as a consultant, was Ronald Fox, another former APA president.[603]

It is likely that James Mitchell served as a consultant to the Advisory Committee on at least a sporadic basis. Although Hubbard unequivocally stated that neither Mitchell nor Jessen was ever involved with the Advisory Committee,[604] Matarazzo recalled that Mitchell was a member of the Committee, and Fox said that Mitchell attended as many as half of the meetings.[605] Mitchell confirmed that he consulted and wrote some papers for the Committee.[606] Moreover, there is documentary evidence that Mitchell attended a meeting of the Advisory Committee in January 2002, at the same time that he and Jessen were preparing a report for the CIA's Office of Technical Services regarding the al Qaeda manual presumed to be a guide to

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[599] Mumford interview (May 15, 2015).

[600] Brandon interview (May 26, 2015).

[601] APA_0329574.

[602] Matarazzo interview (May 4, 2015).

[603] APA_0329574; Matarazzo interview (May 4, 2015).

[604] Hubbard interview (May 5, 2015).

[605] Matarazzo interview (May 4, 2015); Fox interview (June 11, 2015).

[606] Mitchell interview (May 15, 2015).

resisting interrogations.[607] Therefore, Hubbard's assertion that James Mitchell had no involvement with the Advisory Committee is not credible.

That Mitchell consulted to the Advisory Committee, however, is not proof that the Committee convened to advise the CIA regarding its interrogation program. Sidley spoke with several members of the Advisory Committee, including Kirk Hubbard, Joseph Matarazzo, Ronald Fox, and James Mitchell,[608] and more than one member of the Committee explained that its purpose was to advise the CIA on the methodology for conducting operational assessments of personnel.[609] Hubbard stated that he contracted with Mitchell and Jessen to write some papers for him on topics related to assessments,[610] and Mitchell confirmed that the papers he wrote for the Advisory Committee related to surreptitious psychological profiling, intelligence and personality features, and asset identification, all subjects related to the topic of operational assessment. Matarazzo explained that the Committee continued to meet until 2004, when it "faded away" because the group had not been able to produce a good assessment tool.[611]

2. *Operational Assessment Division's role in interrogations*

Sidley's only insight into the organization and purpose of the CIA's Operational Assessment Division, where Hubbard operated as Chief of the Research and Analysis Branch, came through discussions with Hubbard, Mitchell, and other witnesses who worked with various branches of the CIA. Hubbard explained that the OAD's primary goal was to assess potential assets or informants for credibility, discretion, capability, and other performance metrics. Within OAD, the assessment branch, headed by Kirk Kennedy, conducted assessments of potential assets, while the analysis branch, headed by Kirk Hubbard, developed and improved the assessment methodology.[612]

Hubbard said that his work within OAD had absolutely no connection to interrogations, and that OAD was totally separate from the CIA's Counterterrorism Center ("CTC").[613] Hubbard was aware of only two individuals in OAD who had any involvement in interrogations: Mike McConnell, an operational psychologist in a different branch of OAD, and Judy Philipson,[614] who did work on interrogations before joining Hubbard's Research and Analysis

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[607] See *infra*.

[608] Melvin Gravitz declined an interview with the investigative team.

[609] Hubbard interview (Apr. 30, 2015); Matarazzo interview (May 4, 2015); Fox interview (June 11, 2015).

[610] Jessen, "Consulting with the Intelligence Community in Operational Settings: An Operational Model." Email from Hubbard to Sidley (May 5, 2015).

[611] Matarazzo interview (May 4, 2015).

[612] Hubbard interview (May 5, 2015).

[613] Kirk Kennedy stated that there were psychologists in three distinct divisions of the CIA: OAD was under the Office of Technology Services, CTC resided under the Directorate of Operations, and OMS resided under the Directorate of Administration. Kennedy interview (May 28, 2015).

[614] Hubbard said that Philipson was married to Jonathan Fredman, chief counsel to CTC. Hubbard interview (May 5, 2015).

Branch.[615] Hubbard explained that he was introduced to Mitchell and Jessen through McConnell, and that he later introduced Mitchell and Jessen to Jim Cotsana, the Chief of Special Missions within the CTC.[616]

Hubbard stated that there was only one time that OAD engaged in activity related to interrogations. He recalled that, soon after 9/11, the Division Chief of the Operational Assessment Division received a request from Cotsana related to ethical complaints arising from the Office of Medical Services. According to another witness, physicians and psychologists within OMS were not "on board" with what was going on regarding interrogations, and felt that they were being cut out of the discussion.[617] Hubbard and Mitchell spoke during the course of Sidley's investigation, and Hubbard then clarified that Terry DeMay, who was the Chief of Psychology at OMS, "was berating Jim Mitchell about being involve[d]" in the interrogation program. Hubbard said that Cotsana then suggested obtaining an independent opinion from Mel Gravitz to respond to DeMay's "ethical concerns."[618]

Mitchell would neither confirm nor deny that DeMay was the individual who raised concerns about his participation in the interrogation program, but he clarified that the objections related to the involvement of psychologists, as professionals adept at human behavior and manipulation, and not to the use of enhanced interrogation techniques in the interrogation program generally.[619] Mitchell said that he suggested to the division head that the CIA seek an independent opinion regarding the ethics of psychologists being involved in interrogations, and soon after, Gravitz was approached to write the opinion.[620]

On February 13, 2003, Gravitz delivered an opinion titled "Ethical Cons[id]erations in the Utilization of P[s]ychologists in the Inter[r]ogation Process" to James Mitchell.[621] The opinion recites:

> Recently, some questions have been raised regarding the ethical implications of psychologists applying their skills by assisting in the interrogation process of certain persons who have been detained in the currently ongoing world-wide war against terrorism. . . .

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[615] Email from Hubbard to Sidley (May 1, 2015).

[616] Hubbard interview (May 5, 2015).

[617] Morgan interview (May 29, 2015). Kennedy stated that he also began to voice concerns over psychologists being involved in abusive tactics when there was no science to support the techniques. Kennedy explained that when he produced a memo stating these objections, it was received poorly and thereafter he decided to transition to CIFA. Kennedy interview (May 28, 2015).

[618] Email from Hubbard to Sidley (May 1, 2015).

[619] Mitchell interview (May 15, 2015).

[620] *Id.*

[621] It is not clear whether the opinion was completed in February 2003, or whether it was completed earlier and a version merely delivered to Mitchell at that time.

> The following comments are based upon a review of the principles of the Ethical Code as they may be relevant to certain psychological services rendered by Agency staff psychologists and contractors, all of whom are required by regulation to be licensed.[622] In the interrogation of detainees, such services may include (1) acting as a consultant to officers who design and conduct interrogations, (2) acting as observers but not actually participating in the interrogations, and (3) participating in the interrogation process themselves. [623]

Gravitz identified a number of ethical standards that might be relevant to psychologists' involvement in interrogations, including conflicts between ethics and law (Standard 1.02), conflicts between ethics and organizational demands (Standard 1.03), management of alleged or possible ethical violations, boundaries of competence, providing services in emergencies (Standard 2.02), bases for professional judgments (Standard 2.04),[624] and cooperation with other professionals. He concluded:

> While the APA Ethics Code focuses primarily on concern for the individual (i.e., client or patient), it also recognizes that the psychologist has an obligation to the group of individuals, such as the Nation. The Ethics Code is in its essence a set of aspirations and guidelines, and these must be flexibly applied to the circumstances at hand. [625]

Mitchell said that Gravitz's opinion, though it did not give a definitive answer, satisfied his superior. [626]

3. Advisory Committee members' inquiries to APA members and staff

Several witnesses recalled discussions or interactions with members of the CIA Advisory Committee in the months after 9/11 that suggest that Committee members were involved in issues related to national security and interrogations. Brandon said that she observed Gravitz in a "huddle" with members of APA leadership, possibly including Kurt Salzinger, the Executive Director of the Science Directorate, to the side of a Board of Scientific Affairs ("BSA") meeting in October 2001. Brandon recalled discussing the meeting with Mumford, and coming away with the impression that the side discussion related to intelligence efforts.[627] Gravitz was not

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[622] At the time, Jim Mitchell was a member of APA.

[623] Melvin A. Gravitz, *Ethical Consideration in the Utilization of Psychologists in the Interrogation Process* (2003). Email from Hubbard to Sidley (May 5, 2015) [hereinafter "Gravitz Opinion"].

[624] The opinion stated: "Psychologists base their work on established scientific and professional knowledge. It follows that, when there is a minimal knowledge base existing in science or practice, such services may be informed by the psychologist's prior and ongoing experience." Gravitz Opinion. The statement likely references the relative paucity of research regarding enhanced interrogation techniques, and suggests that Mitchell and Jessen could draw on their prior experience with SERE training or ongoing experience applying these techniques as a basis for their work.

[625] Gravitz Opinion.

[626] Mitchell interview (May 15, 2015).

[627] Brandon interview (April 15, 2015).

listed as being in attendance at the October 2001 meeting of the BSA, and the minutes of the meeting do not include any discussion of intelligence-related activities.[628]

Salzinger said that, also in the same timeframe shortly after 9/11, Matarazzo approached him, likely during a break at an APA meeting, with the idea that psychologists ought to be able to do something on the topic of interrogations because they had knowledge regarding how to ask people questions and persuade them to provide information. Salzinger said that Matarazzo's explanation made sense to him, and after this conversation he sent a note to Morton Ann Gernsbacher, the Chair of BSA, to ask if she was aware of psychologists and researchers who worked in the area of "getting information from people." Salzinger said that Gernsbacher rebuffed his request, and he did not pursue the idea any further.[629]

Other witnesses told Sidley that Matarazzo spoke to them about interrogations as well. Michael Wessells stated that Matarazzo approached him at a conference in July 2002 to ask about assisting the CIA, saying: "In this environment, things are different, and the CIA is going to need some help. Things may get harsh. We may need to take the gloves off." Wessells said that he responded that he was committed to human rights standards at the core of all of his activities, and rejected the idea of collaborating with the CIA, though he was not certain precisely what Matarazzo wanted.[630] Patrick DeLeon also stated that Matarazzo approached him to ask if he had gotten a call from the CIA because he was getting pressure about psychologists' role in interrogations.[631]

In an exchange that might have prompted Matarazzo's inquiries to other APA members, Matarazzo said that Hubbard once asked him, apart from the Advisory Committee, whether sleep deprivation constituted torture. Matarazzo said that he consulted with other psychologists and thought about his own experience before concluding that sleep deprivation is not torture on its own. Matarazzo said that he gave his opinion to Hubbard, and that Hubbard came back to him with a questionnaire that broke down the question about sleep deprivation into several parts.[632] Hubbard said that he could not recall this exchange, and that if it had happened it would have been an aside between him and Matarazzo, and not a topic to be raised with the Advisory Committee.[633] Matarazzo said that Hubbard did not ask him about any other interrogation techniques.

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[628] APA_0234367. During the Board meeting, Salzinger reported that the Science Directorate was involved in several initiatives, including "divisional involvement in suggesting names and/or information about terrorism and its aftermath from a scientific point of view" and "volunteering scientific psychological services at various government agencies such as the FBI, Secret Service, State Department, and Federal Aviation Administration."

[629] Morton Ann Gernsbacher did not respond to several requests to meet with Sidley.

[630] Wessells interview (March 11, 2015).

[631] DeLeon interview (May 26, 2015).

[632] Matarazzo interview (May 4, 2015).

[633] Hubbard interview (May 5, 2015).

Although Sidley found no documentary evidence to support these witness statements, the collection of incidents strongly suggests that Gravitz and Matarazzo consulted with Hubbard on ethical issues related to interrogations. However, there is no evidence suggesting that either Gravitz or Matarazzo engaged in these activities with the knowledge or approval of anyone at APA. We have no reason to believe that APA staff knowingly assisted in the preparation of research or opinions for the CIA related to abusive interrogation techniques.

III. GROWING RELATIONSHIPS WITH GOVERNMENT AGENCIES: DECEMBER 2001 – FEBRUARY 2002

A. Continued Science Directorate Outreach

By December 2001, the APA Board had taken emergency action to adopt a "Resolution on Terrorism," which resolved:

> [T]hat the American Psychological Association, an organization devoted to the promotion of health and well being, calls upon the psychology community to work toward an end to terrorism in all its manifestations; BE IT FURTHER RESOLVED THAT THE AMERICAN PSYCHOLOGICAL ASSOCIATION: [a]dvocates at the congressional and executive levels for increased use of behavioral experts and behavioral knowledge in dealing with both the threat and impact of terrorism; [and] [e]ncourages increased support for behavioral research that will produce greater understanding of the roots of terrorism and the methods to defeat it, including earlier identification of terrorists and the prevention of the development of terrorism and its related activities . . . .[634]

As part of the APA's advocacy mission, it continued to build relationships in the FBI, CIA, and other executive agencies. For example, several Science Directorate staff members recalled a meeting in late 2001 or early 2002 with members of the FBI's Behavioral Science Unit. Brandon said that she arranged the meeting at the FBI for Kurt Salzinger and other staff within the Science Directorate. Merry Bullock, the Associate Executive Director of the Science Directorate, attended the meeting and recalled that their hosts at the FBI led the group from APA on a tour of a village the FBI had constructed for running behavioral simulations of terrorist attacks.[635]

At about the same time, in January 2002, John Marburger, Director of the Office of Science and Technology Policy ("OSTP"), met with APA staff to discuss a comprehensive science and technology policy for countering terrorism. The OSTP is one of about twenty offices within the Executive Office of the President that advises the administration on policy issues related to all sciences, including physical sciences and social sciences. The proposed policy discussed at the January meeting involved the preparation of research agendas, including

[634] Approved Minutes of the Board (Dec. 7 – 9, 2001) (on file with Sidley).

[635] Bullock interview (May 18, 2015).

an agenda in the key area of "behavioral, social and institutional issues," and the assessment of government research programs to identify areas for improved interagency coordination.[636]

B. Seligman Gathering

In December 2001, Martin Seligman, a former president of APA credited with developing the theories of learned helplessness and positive psychology, hosted a meeting at his home for "an international group of sixteen distinguished professors and intelligence personnel" to discuss how America could respond to Islamic Extremism. The group included "experts in terrorism and related topics from psychology, political science, history, Islam, sociology, the CIA and the FBI."[637] Seligman said that this meeting was not at the request of any government agency, and was convened because he "wanted to send to the White House unsolicited recommendations to help the nation in a time of great need."[638]

At the close of the meeting, the group had made "six policy recommendations aimed at winning a victory that will lastingly contain global terrorism":

> Isolate Jihad Islam from Moderate Islam worldwide; [n]eutralize Saudi support for jihad Islamic fundamentalism worldwide; [p]olice the Arab Diaspora in Western Europe forcefully; [s]ubvert the social structure of terrorist organizations; [b]reak the link between the terrorists and the pyramid of sympathizers; [and] [b]uild American knowledge of Arab and Muslim culture and language.[639]

Seligman denied that there was a "single mention by anyone of interrogation, captives, or torture or any related subject" at the meeting,[640] and the summary document produced by the group does not reflect that discussion of any of these topics occurred. Indeed, Seligman said that he has never worked on interrogations or held a contract with the CIA or any other entity related to interrogations.[641]

Steven Band, Chief of the Behavioral Science Unit at the FBI attended the meeting, as did Kirk Hubbard, Chief of the Research and Analysis Branch in the Operational Assessment Division of the CIA, and James Mitchell, whose only listed affiliation was "CIA."[642] After communicating with the parties who attended this meeting,[643] we cannot say with any certainty how Hubbard and Mitchell came to be present. Seligman said that he did not know who had

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[636] APA_0318979.

[637] Martin Seligman et al., *How to Win the Peace* (on file with Sidley).

[638] Email from Seligman to Sidley (June 13, 2015).

[639] Martin Seligman et al., *How to Win the Peace* (on file with Sidley).

[640] Email from Seligman to Sidley (May 19, 2015).

[641] Email from Seligman to Sidley (June 13, 2015).

[642] Martin Seligman et al., *How to Win the Peace* (on file with Sidley).

[643] Steven Band declined to speak with Sidley, but Kirk Hubbard and James Mitchell both agreed to be interviewed and Martin Seligman communicated in writing.

invited Hubbard, Mitchell, or Band, and he described all three as "almost totally silent throughout" the meeting.[644] Hubbard also said that he could not recall how he had been invited to this meeting, though he thought that Joseph Matarazzo had brokered his initial introduction to Seligman. Mitchell said that Hubbard had invited him to the meeting, though he did not know how Hubbard had received an invitation.[645] It seems most likely that Matarazzo introduced Seligman, a fellow former APA president, to Hubbard, whom he had worked with on the CIA's Advisory Committee, and that this introduction led to an invitation for Hubbard to attend the gathering at Seligman's home.

Communications between Steve Band and Geoff Mumford suggest that Band discussed Seligman's meeting with Susan Brandon and Mumford within days after it occurred, and that he encouraged them to brief Kurt Salzinger.[646] Band also seemed eager to share the report produced after the meeting, promising to show both Mumford and Brandon a copy of the "write-up" the next time he saw them, though he could not provide a copy. Band described the report to Mumford in provocative terms:

> Seligman's 'gathering' produced an extraordinary document that is being channeled on high (very high)… I did not get the impression from Seligman that it was intended for wide distribution or readership… some of the national strategies and supportive statements proposed by 'the gathering' are pretty intense; the authors may want their involvement to remain discrete.[647]

Band later confirmed, based on email traffic between Seligman and Brandon, that his "gut feeling about not releasing [Seligman's] product outside of its intended audience was on-point and . . . it may have discomforted [Seligman] to learn that Kirk [Hubbard] did."[648] Brandon assured Band that she had not distributed the Seligman paper, but indicated that it had sparked some "lively debate here."[649] During their interviews, both Brandon and Mumford stated that they did not believe they had ever seen the paper,[650] but it seems likely that Brandon did see the paper and discuss it with some of her colleagues in the Science Directorate.

Hubbard stated that Seligman met with Hubbard and his staff several more times after the initial meeting in Seligman's home. One of these meetings was with Hubbard and two psychologists on his staff, Judy Philipson and Liz Vogt, both of whom were married to attorneys in CTC.[651] Seligman confirmed that he met with Hubbard and a female lawyer at his home in April 2002, and they discussed Seligman's theory of learned helplessness at length in the context

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[644] Email from Seligman to Sidley (May 19, 2015).

[645] Mitchell interview (May 15, 2015).

[646] APA_0329396.

[647] APA_0330422 (ellipses in original).

[648] APA_0330413 (ellipsis in original).

[649] APA_0330413.

[650] Brandon interview (May 26, 2015); Mumford interview (May 15, 2015).

[651] Hubbard interview (Apr. 30, 2015 & May 5, 2015).

of how the theory might help "our people who are captured."[652] At another of these meetings, Hubbard stated that he, Mitchell, and Jessen met with Seligman in his home to invite him to speak about learned helplessness at the SERE school in Spring 2002.[653] As discussed above, Seligman said that he could not recall meeting with Mitchell or Jessen apart from the December 2001 meeting at his home. Rather, Seligman thought that he was invited to speak at the SERE school during the April 2002 meeting with Hubbard and a female lawyer.[654] However, after discussing the meeting with Hubbard during the course of the investigation, Seligman "surmise[d]" that there must have been an additional meeting in April with Mitchell and Jessen, and that it must have been at that meeting that he was invited to speak at the JPRA conference in May 2002.[655]

APA's critics have hypothesized that Seligman took a far more active role in supporting the CIA's interrogation program than the relatively tangential interactions described above. They point to the December 2001 meeting at Seligman's home and an email from Hubbard in March 2004 expressing gratitude for Seligman's help "over the past four years"[656] as evidence that Seligman was an active participant in supporting the CIA's interrogation program. Seligman and Hubbard had similar, though not identical, explanations for Hubbard's comment. Seligman explained that he had previously asked Hubbard about the email and that Hubbard had explained that he was referring to the pro bono lecture Seligman had given to the Navy SERE school in May 2002.[657] Hubbard said that he was "basically" thanking Seligman for hosting the meetings in his home in 2001.[658] Thus, both Hubbard and Seligman explained that Hubbard was thanking Seligman only for his involvement in the meetings that have become public knowledge. Critics also allege that the University of Pennsylvania's Positive Psychology Center, founded by Seligman, received a $31 million sole source contract from DoD in 2010 because of assistance Seligman provided to the government with its counter-terrorism efforts. Seligman said that this contract was awarded because there were no competing entities who had the same experience in training and research on the topic of positive psychology, and there was an urgent need for a program in positive psychology to help returning troops. Seligman clarified that during negotiations on this contract, there was never any mention that the contract related to past work he might have done for DoD or other intelligence agencies.[659]

Sidley has not uncovered evidence that Seligman had interactions with the CIA beyond the isolated meetings and lectures in the year after 9/11 that are a matter of public record. It is possible that more interactions occurred, particularly given Hubbard's comment that Seligman had provided assistance over the course of four years, but no evidence suggests that

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[652] Email from Seligman to Sidley (June 13, 2015).

[653] Mitchell interview (May 15, 2015).

[654] Email from Seligman to Sidley (June 13, 2015).

[655] Email from Seligman to Sidley (June 21, 2015).

[656] APA_0220928.

[657] Email from Seligman to Sidley (May 19, 2015).

[658] Hubbard interview (May 5, 2015).

[659] Email from Seligman to Sidley (June 13, 2015).

interrogations were ever directly discussed at these meetings, despite the fact that the scientific theories that Mitchell and Jessen later adapted to construct the CIA's interrogation program clearly were. On balance, it seems difficult to believe that Seligman did not at least suspect that the CIA was interested in his theories, at least in part, to consider how they could be used in interrogations. However, we found no evidence to support the critics' theory that Seligman was deeply involved in constructing or consulting on the CIA's interrogation program, and no evidence that such consultation would have involved APA officials even if it had occurred.

C. Meeting of the CIA Advisory Committee

In January 2002, the CIA's Professional Standards Advisory Committee invited Susan Brandon and James Mitchell to attend a Committee meeting.[660] Brandon said that Mel Gravitz and Ron Fox were her contacts in the CIA, and they asked her to come and brief the Advisory Committee. At the meeting, held on January 25, the minutes reflect that Brandon was introduced to the other members and asked to sign a "secrecy agreement," before being briefed on the function of the CIA's Operational Assessment Division and the purpose of the Advisory Committee. Brandon then discussed her role at APA, including her involvement in planning the upcoming conference at an FBI Academy to remedy the FBI's traditional disengagement from academics and scholars.[661] Following Brandon's presentation, the group discussed "collaborative efforts between OAD, PSAC, and APA," and Mitchell presented "research findings in cross-cultural assessment of personality."[662] Brandon said she could not recall Mitchell's presentation, but her general impression was that Hubbard was more interested in obtaining information from spies around the world than from detainees. She said that nobody at the meeting asked her about interviewing or interrogations, and it did not strike her that the others at the meeting were interested in that topic.[663]

After the meeting, Brandon and Hubbard communicated regarding ways that Brandon and APA could be useful to Hubbard's group.[664] Brandon explained that Hubbard subsequently provided her a list of topics that he hoped she would be able to help him explore, but that she was disappointed by how basic the questions were.[665]

Following the meeting on January 25, Brandon emailed Fox regarding an article that Terry DeMay was writing for the APA Monitor,[666] about which Matarazzo had raised some concern. Brandon commented that "[a]s far as I can tell, there is really no overlap between the work that he describes and the kinds of issues raised at our Friday meeting."[667] That the

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[660] APA_0329830.

[661] APA_0329827.

[662] APA_0329828.

[663] Brandon interview (May 26, 2015).

[664] APA_0329835.

[665] Brandon interview (May 26, 2015).

[666] The article Brandon refers to is likely *Psychologists in the CIA* published in the *Monitor* in April 2002.

[667] APA_0329836.

Advisory Committee was scrutinizing an article written by DeMay, the same person who raised ethical concerns about the interrogation program, during a meeting at which Mitchell was present could suggest that the Advisory Committee at some point addressed interrogation issues. However, Brandon's comment to Matarazzo in a different email indicates that she was concerned about the article only for its potential to "overlap with the work of [Hubbard's] group."[668] On balance, it seems unlikely that the Advisory Committee discussed ethical issues related to detainee interrogations at the meeting that Brandon and Mitchell attended.

This collection of incidents together strongly suggest that, though the Professional Standards Advisory Committee itself might not have consulted on interrogation issues, at least two of the three highly placed members of the Advisory Committee were doing work on the ethics of interrogations. Matarazzo made several inquiries on various issues related to the CIA and potentially abusive interrogation issues, including assessing whether sleep deprivation was torture and attempting to identify relevant research on how to effectively interrogate. Gravitz produced an opinion on the ethical implications of psychologists' involvement in interrogations, which suggests that he was privy to at least some background information regarding the CIA's interrogation activities, including the specific roles psychologists had been designated to fill. Thus, it seems likely that, even if the Advisory Committee as an official entity was not advising the CIA on interrogations, its members were providing consultation on this topic. However, we found no evidence that either Gravitz or Matarazzo coordinated with APA staff or governance on their consultation activities with the CIA, and thus it seems unlikely that APA knowingly facilitated the CIA's use of harsh interrogation techniques through the involvement of prominent former governance members on the Advisory Board.

D. FBI Conference: "Countering Terrorism: Integration of Theory and Practice"

In the years after 9/11, in addition to informal meetings and discussions, APA began co-hosting with the FBI, CIA, and other government entities a series of formal conferences or workshops intended to integrate theory and practice with regard to a number of topics relevant to national security settings. Susan Brandon, visiting Senior Scientist in the APA Science Directorate between August 2001 and December 2002, and Geoff Mumford, Assistant Executive Director for Government Relations in the APA Science Directorate, were at the forefront of planning these conferences.

In November and December 2001, at around the same time as the Seligman gathering, Brandon and Mumford met with members of the FBI's Behavioral Science Unit to begin organizing an invitational conference co-hosted by the FBI Academy, the National Institute of Justice, APA, and the University of Pennsylvania's Solomon Asch Center for the Study of Ethnopolitical Conflict, an academic group founded by Martin Seligman and Peter Suedfeld to advance training in ethnic-group conflict and violence. On December 20, 2001, Kurt Salzinger wrote to Mike Honaker to ask for his support in moving quickly on sponsoring the proposed FBI Academy conference. He explained that "we have been making available our list of experts to agencies of government from time to time" and that the proposed conference would be an opportunity to hold a meeting that built on the FBI's use of psychological science. Honaker

[668] APA_0329835.

forwarded the request to the rest of APA's Executive Management Group, noting that "[t]his seems to me to be an excellent opportunity and one that meets our criteria for co-sponsorship."[669]

Sidley spoke with both Susan Brandon and Geoff Mumford, the APA staff members charged with organizing this conference. Brandon explained that she began to identify potential participants for the workshop by speaking with Band and her colleagues at the APA, and then by conducting a literature search.[670] At Band's suggestion, Brandon reached out to Behnke to gauge his interest in participating in the conference, which she described as a "meeting between social scientists and 'agents' of various sorts."[671] Over the following weeks, Brandon invited a number of researchers with both academic and government affiliations. The conference report shows that, among the operational psychologists attending this conference was James Mitchell, who at that point was in the midst of designing the CIA's interrogation program.

Also present were a number of APA staff and governance individuals, including Steve Behnke, Director of the Ethics Office; Robert Kinscherff, former Chair of the Ethics Committee; and several members of the Science Directorate staff. Mel Gravitz, the long-standing APA governance member who served on the CIA's Professional Standards Advisory Committee, also participated in the workshop.

Several weeks before the conference, Brandon informed participants that there would be roughly equal numbers of scholars and field agents attending the meeting, and that they would be broken into small groups to discuss "questions and scenarios that reflect the current concerns of the FBI and associated agencies in ongoing counter-terrorism efforts." These issues included identifying individuals or communities that support terrorist networks, educating the media and the public regarding ways to communicate and cope with terrorist threats, and "interview[ing] current detainees."[672] The format of the meeting was based on Seligman's gathering from December 2001, which Band believed worked well because the academic participants freely contributed knowledge without the need for sensitive information: "[T]here was no expectation on the part of the Seligman group that we would even communicate with them . . . yet, they spoke and we listened and gained valuable assistance from them."[673] After reviewing the Seligman paper, Brandon explained that she "liked the format and the development of very concrete notions and suggestions" and thought it would be a "worthy goal" to write something similar after the upcoming conference.[674]

Each of the participants was assigned to a "scenario" and a "question," which would be considered by small groups in the morning and afternoon, respectively. The scenarios were designed to identify the issues that law enforcement personnel faced in triaging a large volume of incoming information, coaxing individuals to report on suspicious behavior and convincing

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[669] APA_0163542.

[670] Brandon interview (April 15, 2015).

[671] APA_0034984.

[672] APA_0036644.

[673] APA_0330413 (ellipsis in original).

[674] APA_0330412.

voluntary informants to provide additional and more reliable information, constructing interrogation plans in the face of media scrutiny, identifying the most effective interrogation techniques based on various situational factors, and enhancing the image and reputation of the FBI in Arab-American and Muslim-American communities.[675]

One of the groups addressed a scenario that raised the issue of psychologists' ethical requirements in the context of law enforcement needs. The scenario described a woman who contacted her psychologist to report that she believed her son was being recruited for a "martyrdom" mission. Before including this scenario in the materials for the conference, Brandon contacted Behnke on behalf of one of the FBI Academy faculty members to ask whether APA would have a concern with using the scenario because it would "be in any way considered unethical or [] raise issues of ethics that APA would want no part in."[676] Although the FBI's request suggests that it might have wanted to present only those ethical "dilemmas" that could be easily resolved in an ethical manner, it seems more likely that the communication was merely a courtesy to APA as a co-sponsor of the workshop.

The discussants on this panel, which included Steve Band, Steve Behnke, Melvin Gravitz, Heather Kelly, and Robert Kinscherff, initially "focused on the ethical code of psychologists and its apparent limitations in situations in which national security may be threatened."[677] After discussion, the group recommended that the APA consider "including statements regarding information related to national security in its code of ethics" and broadening training programs to teach psychologists how to respond in national security situations.[678]

Mitchell was assigned to a different small group focused on interrogation issues. The scenario considered by Mitchell's group described three individuals who had been arrested for trespassing and photographing a nuclear power plant facility. The group discussed several issues that arose when interrogating individuals suspected of being involved in terrorist activity. During its discussion of cross-cultural issues, the group surmised that "[i]t may be that an American simply could not develop sufficient rapport with a foreign visitor" and that it is possibly that lying "looks different" in other languages and cultures.[679]

In the afternoon, Steve Band and James Mitchell were assigned to one group, along with several academics and representatives from government agencies and departments, including one representative from the Office of Homeland Security. They discussed research related to the life problems and circumstances of Middle Eastern immigrants that might help law enforcement understand normal responses in that community and identify opportunities to acquire assets.[680] In a different group, Behnke facilitated a discussion regarding resistance to quarantines and other

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[675] APA_0231038.

[676] APA_0036339.

[677] APA_0035383.

[678] APA_0231038.

[679] *Id.*

[680] APA_0036255.

emergency measures in the face of biological terrorism.[681] Gravitz was assigned to yet another group, which discussed law enforcement campaigns or activities that might be useful to create a climate in which law enforcement can operate more effectively.[682]

The Executive Summary of the conference report identified three broad themes that weaved through the discussions: information exchange, relationships with key communities, and interrogation/interview techniques. With respect to the last theme, the report noted that "[s]uggestions were offered on how to most effectively interview community members who may have information relating to individuals that are involved in terrorist networks, either within or without the U.S. Special focus was given to instances where these people are recent immigrants."[683] It also described the challenges faced when interacting with individuals from Arab-American and Muslim-American communities, where changes in immigration and Justice Department policy had bred distrust that undermined the creation of effective relationships with law enforcement.

After Brandon prepared the conference report, Mumford shared it with Kurt Salzinger, and recommended that he circulate it to the Practice Directorate, Steve Behnke in the Ethics Office, and the Executive Management Group. Mumford explained that "there are suggestions within the report that APA might take a role in developing further clarification for clinicians should they come across information in a practice setting that could have implications for national security."[684] On January 21, 2003, Brandon and Mumford arranged a meeting with Brian Vila, the Director of the Crime Control and Prevention Research Division at the National Institute of Justice to reflect on the conference and discuss future collaborations with the FBI Behavioral Sciences Unit.[685]

IV. BROADENING AND STRENGTHENING CONNECTIONS: MARCH 2002 – MARCH 2004

A. Congressional Outreach

As the initial shock of the events of 9/11 wore off, APA continued its efforts to contribute psychological science to counterterrorism efforts, both internally and through outreach to various government entities. Internally, the APA created task forces and ran educational programming designed to study various aspects of the nation's response to the terrorist attacks. For example, in 2002, the Board allocated funds to establish a Task Force on Promoting Resilience in Response to Terrorism.[686] This task force, a joint effort between APA and the American Psychological Foundation, was intended to develop information on programs that would promote

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[681] APA_0035603.

[682] APA_0036255.

[683] APA_0037925.

[684] APA_0083207.

[685] APA_0248564.

[686] Approved Minutes of the Board (Feb. 13 & 14, 2002) (on file with Sidley).

resilience and the development of coping mechanisms that individuals could use to manage the stress and anxiety caused by terrorism.[687]

The APA also continued lobbying to congressional committees and members in an attempt to convince them of the usefulness of psychological science in combating terrorism. On March 1, 2002, APA Science Directorate staff arranged meetings between psychological scientists and staff on the House and Senate Science Committees, which ripened into additional congressional briefings later in the year. Highlights of these outreach efforts included work with Senator Kennedy's office on the inclusion of psychological services in the Bioterrorism Preparedness Act and the appointment of a psychologist advisor to the Office of Homeland Security.[688] A few months later, APA President Philip Zimbardo met with Senator Inouye to discuss funding for human-oriented psychological defense research.[689] Shortly after his meeting with Senator Inouye, Zimbardo reached out to Pat DeLeon, Inouye's chief of staff and former APA president, to discuss how he could promote "getting psychologists involved in long term psych 'warfare' propaganda on terrorism," suggesting that he might be able to chat with Condoleezza Rice, his "old provost with whom [he] had good relations."[690] When the email was forwarded to APA staff, Heather Kelly commented that "there already are psychologists on staff down at Ft. Bragg, where psyops are headquartered . . ."[691] Zimbardo said that he did not follow up on this email and that he did not think anything came of it.[692] However, as described below, Zimbardo and Science Directorate staff met with Rice's staff in the National Security Council the following month to discuss psychological science relating to counterterrorism efforts.

The following year, in September 2003, the Public Policy Office of the Science Directorate sponsored a Science Advocacy Training Workshop focused on training researchers to effectively communicate with Congress about the ways that behavioral research fits into DoD's needs.[693] The Workshop included a briefing on "Psychological Science in Support of the Soldier," co-sponsored by APA and Senator McCain's office.[694] Several months later, Behnke and Kelly met with Senate staff to again apprise them of APA's work in the national security arena and to "gauge their level of interest in APA's thinking on these matters."[695]

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[687] APA_0033736.

[688] APA_0234367.

[689] APA_0130196.

[690] APA_0130195.

[691] APA_0130195 (ellipsis in original)

[692] Zimbardo interview (June 8, 2015).

[693] When Heather Kelly invited Bill Strickland, CEO of the Human Resources Research Organization ("HumRRO"), to participate in the briefing, Strickland provided his biographical information and informed Kelly that HumRRO had received over $37.5 million from DoD sources in the last 5 years and an additional $1 million from CIA. APA_0129620. In an interview with Sidley, Strickland elaborated that HumRRO has had a number of classified contracts with government agencies, including a contract that involved behavioral modeling. Strickland interview (May 21, 2015).

[694] APA_0129578.

[695] APA_0041630.

B. Continued Interactions with Executive Agencies

In a parallel effort, the APA also continued to forge and strengthen connections with the CIA, FBI, and other executive agencies tasked with combating terrorism. As his presidential year advanced, Phil Zimbardo began to take a more active role in these outreach efforts. In June 2002, following up on Zimbardo's suggestion the previous month of contacting Condoleezza Rice, Zimbardo, Brandon, and Kelly attended a meeting with two senior staff members in Rice's National Security Council ("NSC") Office of Combating Terrorism to explore "psychological research that is germane to counter-terrorism efforts."[696] The NSC group asked APA to identify social scientists with expertise in risk perception and communication who could speak informally with NSC about "how to best communicate with the public, the media, and various infrastructure agencies regarding the level of risk of security alerts . . . and how to do this while both maintaining credibility with those who receive these messages and avoiding threat fatigue among those whom must react to these messages."[697] The APA Science Policy staff proposed modeling such a meeting on the format used for its meetings with Congress, the Department of Homeland Security ("DHS"), and the FBI Academy.[698] Kelly and Brandon both recalled that the meeting was a fairly high-level discussion and that Zimbardo did most of the talking while NSC staff said little of interest.

APA staff also started to broaden their outreach to DHS. In May 2003, Mumford and Brandon joined an advisory group to the Department of Homeland Security Science and Technology Behavioral Research Program. The group, headed by Gary Strong, Director of Behavior Research, began to meet once a month to address areas of interest for social and behavioral research within DHS, including terrorist cells, public responses to DHS activities, determination of intent, and the economic vulnerability of the United States. The advisory group members suggested a number of additional topics, including "crowd and panic behavior; suicide terrorism; determination of intent in crisis situations; vigilance problems for security officials; autonomic specificity in reactions to stress; use of electro-encephalograms for determination of intent and for detection of deception; and use of Guantanamo Bay subjects as data."[699] Mumford stated that he could not recall any discussion about research studies with detainees, either at this meeting or in other conversations with Brandon, Gerwehr or Mumford.[700] Brandon likewise stated that she did not know what this comment referred to, and assumed that any discussions on this topic would have related to attempts to discover what people were doing with research subjects when there was very little oversight. However, she stated that she recalled people wanting to observe detainees to understand the effectiveness of the interrogation program.

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[696] APA_0130183. Rice was not present at this meeting.

[697] APA_0329791.

[698] *Id.*

[699] APA_0129247.

[700] Mumford interview (May 15, 2015).

Brandon said she would characterize this kind of observation as program evaluation rather than research.[701]

C. Meetings with APA Presidents at the CIA

During his presidential year, it is likely that Phil Zimbardo met with Kirk Hubbard more than once to discuss in general terms how Zimbardo might contribute to Hubbard's work at the CIA. In August 2002, at the APA Convention in Chicago, it is likely that Zimbardo met with Hubbard after one of Zimbardo's speeches, and that Hubbard invited Zimbardo to give a talk about interrogations to his group in the CIA. Zimbardo said that he had done research on interrogations with American detectives, and that he agreed to speak with Hubbard's group even though he thought it likely that his research would not have any extension to the Guantanamo context because of differences in language and cultural values. Zimbardo gave a talk to fifteen to twenty people, who he assumed to be an insider group at the CIA, but he did not get the impression that anybody wanted to use his ideas in a concrete way.[702] Zimbardo thought that Hubbard might have asked him to be on contract or accept a research grant at that point, but Zimbardo did not want any further connection with Hubbard because he got the sense that Hubbard wanted him to do things he would not be willing to do.

Only a few months later, in October 2002, at the suggestion of Geoff Mumford and Susan Brandon, Kirk Hubbard attended a meeting in California organized by Phil Zimbardo, Bruce Bongar, and Larry Beutler.[703] This meeting was a first step toward establishing the National Center on Disaster Psychology and Terrorism,[704] a joint effort of the Pacific Graduate School of Psychology and Stanford University designed to train doctoral students to help victims of catastrophic events.

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[701] Brandon interview (May 26, 2015). As discussed above, we considered it beyond the scope of this investigation to draw conclusions regarding whether the CIA, DoD, or any other executive agency was conducting research on detainees because we found no evidence that APA had coordinated with the government to facilitate such research.

[702] Zimbardo interview (June 8, 2015).

[703] APA_0329574; APA_0028186.

[704] Zimbardo said that the National Center was focused on training clinical psychology students to treat victims of terrorist activities. Zimbardo wanted to focus on the psychology of terrorism, and he and James Breckenridge later decided to form the Center for Interdisciplinary Policy, Education, and Research on Terrorism ("CIPERT") to produce a compendium of what was known about psychological research on terrorism. Zimbardo interview (June 8, 2015). Critics allege that Brandon later forced Zimbardo to appoint Hubbard to the CIPERT board at the expense of losing Department of Homeland Security funding. Raymond interview (Dec. 2, 2014). Zimbardo said that he could not recall ever having a conversation with Brandon about involving Hubbard as any kind of consultant with CIPERT, and Brandon said that she did not know whether either Kennedy or Hubbard was on the board of CIPERT. Zimbardo interview (June 8, 2015) & Brandon interview (May 26, 2015). Given that neither Zimbardo nor Brandon recalls a conversation about Hubbard serving on the CIPERT board, it seems unlikely that the critics' theory that Brandon strong-armed Zimbardo into appointing Hubbard to the CIPERT board is correct.

It is likely that Zimbardo met with Hubbard during this conference, though the purpose of such a meeting is not clear. Sidley's only information about this meeting comes from statements given by Hubbard, Matarazzo, and Kirk Kennedy. Hubbard stated that he and Kennedy met with Zimbardo in San Francisco because Kennedy wanted to put Zimbardo on contract.[705] It is likely that the meeting was arranged by Matarazzo, who said that it was possible that he could have facilitated a meeting between Zimbardo and Hubbard if Hubbard was planning on being in San Francisco, although he did not have any specific recollection of having done so.[706] Zimbardo also thought it was conceivable that he might have met with Hubbard in his home if Hubbard had come to California.[707] However, Kennedy said that he was under cover in his role at the CIA during 2002, and he did not meet Zimbardo until after he left the CIA in 2004. At that point he was heading up research within the DoD, and he was able to leverage Hubbard's relationship with Zimbardo to arrange a meeting.[708] Sidley's knowledge of this meeting rests solely on these contradictory witness accounts, but it seems likely that Matarazzo arranged for Hubbard to meet Zimbardo during the National Center on Disaster Psychology and Terrorism meeting in October 2002, and that Kennedy met with Zimbardo at a later date.

As Zimbardo's presidential year ended, the incoming APA President for 2003, Robert Sternberg, stepped into his role to interact with the CIA. In December 2002, Brandon and Mumford accompanied Sternberg on a visit to the CIA to give a presentation to a group of operational psychologists in the intelligence community. Sternberg addressed cross-cultural assessment issues and the development of psychological assessment tools based on theories of "successful intelligence."[709] The Science Directorate publicized the visit in its newsletter under the headline, "APA President Sternberg visits the CIA," and posted his power point presentation on the APA website.[710] Despite clear evidence documenting his presentation, in the brief interview Sternberg begrudgingly agreed to grant Sidley, he denied that he ever attended a meeting at the CIA.

D. CIA Conference: "The Science of Deception: Integration of Practice and Theory"

Throughout the spring and summer of 2003, Brandon and Mumford also began planning the second workshop in the series of conferences designed to bring operational psychologists and researchers together. On January 15, 2003, Brandon and Mumford attended a luncheon meeting with Kirk Hubbard and Judy Philipson to discuss possible long-term collaboration between the APA and Hubbard's Research and Analysis Branch at the CIA. According to notes from the meeting prepared by Brandon and Mumford, Hubbard discussed his interest in expanding the input his office received beyond the clinical perspective offered by the Advisory Committee and

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[705] Hubbard interview (May 5, 2015).

[706] Matarazzo interview (May 4, 2015).

[707] Zimbardo interview (June 8, 2015).

[708] Kennedy interview (May 28, 2015).

[709] Sternberg Presentation. Email from Mumford to Sidley (May 18, 2015).

[710] APA_0248564.

into broader scientific perspectives. He suggested that he would be interested in sponsoring a meeting similar to the one sponsored by the FBI Academy the previous year.

Brandon and Mumford commented in a report to Salzinger that Hubbard's interest represented "a good opportunity to form a partnership." Such partnerships were seen as "mutually beneficial" in the Science Directorate:

> [N]ot only do we get to help APA members offer their expertise as needed, but the researchers are challenged by new and interesting questions. Our experience also has been that, despite the history of distance between academia and places like the FBI and CIA, many academics jump at the opportunity to be of service, an attitude no doubt formed by 9/11.[711]

Shortly after the lunch meeting with Hubbard, Brandon and Mumford began planning a workshop on the topic of deception detection, to be co-sponsored by the CIA and the APA. At the time, Brandon had left the APA and had joined the National Institute of Mental Health as a Program Officer.[712] In March 2003, Mumford approached Scott Gerwehr, an Associate Policy Analyst at the RAND Corporation, about participating in the upcoming workshop modeled on the 2002 conference co-sponsored by the APA and the FBI Academy. APA first made contact with Gerwehr in May 2002, when Brandon started reaching out to psychologists to develop a scientific definition of deception for a group of people working for the CIA, likely Hubbard's branch.[713] One of her inquiries was forwarded to Gerwehr, who responded to Brandon with the operational definition of deception he had been using in his work at RAND.[714] When Mumford contacted Gerwehr in 2003 regarding the upcoming deception detection workshop, he explained that Gerwehr's RAND paper, which Gerwehr had cited in his response to Brandon's inquiry, was "part of the inspiration" for the workshop.[715]

Brandon, Mumford, Hubbard, and Gerwehr would come to serve as the planning committee for a workshop on the topic of detecting deception for the summer of 2003, and a workshop on the topic of interpersonal deception in the summer of 2004. Gerwehr also invited Linda Demaine,[716] another RAND employee, to join the initial project meetings with Mumford

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[711] APA_0329574.

[712] In 2004, Brandon left NIMH to become Assistant Director of Social, Behavioral, and Educational Sciences at the White House Office of Science and Technology Policy. Brandon would later take a position in Human Factors Engineering at MITRE Corporation. She is currently the Research Unit Chief of the High-Value Detainee Interrogation Group, within the Department of Defense.

[713] APA_0220432.

[714] APA_0220434.

[715] APA_0220439. The paper Brandon refers to is a chapter from The Art of Darkness: Deception and Urban Operations.

[716] At the time, Demaine remained employed by RAND while she worked as an APA Congressional Fellow in the Senate Judiciary Committee. She would later serve as an APA Science Policy Fellow under Hubbard's supervision in the Research and Analysis Branch at the CIA between fall 2003 and fall 2004. At the outset of her Fellowship, Demaine developed eight potential areas of research in which psychology could contribute to the CIA's work. APA_0128282. From among these ideas, Hubbard asked Demaine

and Brandon in late April 2003.[717] By April 1, Brandon, Mumford, Gerwehr, and Hubbard had all met and were making preliminary decisions regarding the timing and location of the 2003 conference.[718] Hubbard agreed that the CIA would fund the conference, including travel and lodging expenses for conference attendees.[719]

On March 15, 2003, Mumford outlined the basic parameters of the meeting, and described the purpose of bringing together academics and operational psychologists to discuss deception:

> [The meeting] will provide those on the operational side with new strategies of deception to use, and an increased awareness of how others might use deception. It will provide the researchers with an opportunity to see what aspects of deception are well-described and what aspects require further systematic scrutiny.[720]

The group began circulating names of academics and agents with expertise or interest in the topic of deception, with the researchers and academics to be identified primarily by Mumford and Brandon and operational psychologists to be identified by Hubbard. Among the operational participants recommended by Hubbard were Bruce Jessen and James Mitchell, whom Hubbard initially identified only by first name and described as contractors to the CIA with "military special ops . . . background."[721] On March 29, 2003, Hubbard also identified Andy Morgan as a

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to 1) survey the "psychological literature on belief and attitude change" and to assess "what is known about instilling *long-term* changes to *fundamental* beliefs and attitudes," 2) review the literature on the "application of influence techniques cross-culturally," and 3) work with Hubbard, Mumford, Brandon, and Gerwehr to develop follow-up projects to the 2003 deception detection workshop. APA_0129845 (emphasis in original). Demaine consulted with Kelly regarding the topics of research, and Kelly met with Hubbard and Demaine for lunch shortly after the Fellowship began. APA_0129034. After the lunch, Hubbard offered to brief APA on the function of his division, and Kelly promised to keep in touch with both him and Demaine to monitor how the Fellowship was progressing. APA_0129037. Demaine did not receive security clearance until she was leaving Washington, D.C., at the end of her Fellowship, and thus she did not spend a great deal of time on the CIA campus or "gain[] any insights into the CIA." APA_0129216. In an interview, Demaine stated that her work was entirely based on publicly available information and did not relate to interrogations in any way. Demaine interview (May 6, 2015).

[717] APA_0220454.

[718] *Id.*; APA_0220473.

[719] APA_0220466. When Mumford submitted expenses to the CIA for reimbursement, he noted to Hubbard that APA had decided to pay for Hubbard's hotel room. Fax Transmittal from Mumford to Hubbard (Oct. 21, 2003).

[720] APA_0220442.

[721] HC00005133.

potential participant based on his research in the area of deception with "military special ops people."[722]

The group of organizers began inviting participants and, as they started to receive acceptances and rejections, discussing how to balance the numbers of researchers and operational psychologists. When one researcher whom the group felt could contribute significantly declined to attend, they suggested turning to APA presidents to convince the researcher to participate. Hubbard suggested "find[ing] someone like Sternberg, Zimbardo, etc. who knows [the researcher] and could cajole him. Joe Matarazzo knows him and has called on my behalf before . . . Joe loves to strong arm people."[723] Hubbard later contacted Matarazzo to request his assistance, and reported to the rest of the group that Matarazzo "loves arm twisting and I believe he is quite effective."[724]

Ultimately, at least thirty-six academics, APA representatives, and government representatives, including individuals from DHS, OSTP, the FBI, and the CIA, attended the conference. The operational psychologists whom Hubbard invited were included in the attendance list distributed to the participants, but several were identified by pseudonym or first name only. Mitchell and Jessen were among the participants who were identified by only their first names and as CIA contractors.[725]

When the group discussed whether to record the discussions during the workshop, Hubbard commented that "some of the ops guys might be a little nervous" with recording, but said that he would "let them know ahead of time and if they are uncomfortable they can decline the invite. There will be no shortage of ops people interested in attending. I may have to beat some off with a stick."[726] Mumford responded that it was Hubbard's call regarding whether to record the sessions, but he indicated that he would "hope the caveat that all recording/transcripts would be scrubbed as deemed appropriate by CIA/RAND would be sufficient to put your people at ease."[727] Ultimately, they decided that the discussions would be recorded and that APA staff would also take notes during the conference.

During the introductory remarks on the first day of the conference, the participants described the topics in which they were interested. Mitchell expressed interest in the "practical application and operation of deception. [He was] not looking for what is already in the literature or in meta-analyses, [but rather w]ants to know if we are interviewing a terrorist, how can we tell if he is lying." Jessen expressed interest in similar topics, and was "also interested in the

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[722] APA_0220463; APA_0220466.

[723] APA_0220478.

[724] APA_0220526.

[725] APA_0220633.

[726] APA_0220496.

[727] *Id.*

relationship between two people in this interrogation situation and how this affects the outcome."[728]

Following introductions, the participants split into groups to discuss one of four scenarios: embassy walk-in phenomena, law enforcement threat assessment, law enforcement interrogation and debriefing, and intelligence gathering. Hubbard had earlier developed these scenarios as examples of the kinds of situations in which agents have to deal with deception,[729] and Brandon added a list of questions to each of the scenarios before distributing them to participants.[730] Hubbard had also requested that Mitchell, Jessen, and Philipson be assigned to the embassy walk-in and interrogation and debriefing sessions. He commented that Mitchell and Jessen are "special people doing special things" and assured Mumford that he "will really like them – great guys."[731] In the grid used by the conference organizers to show the scenario assignments, Mitchell and Jessen are the only participants whose names are marked with asterisks.[732] It is likely, therefore, that Mumford and Brandon were aware that Mitchell and Jessen were of some special importance, though it is not clear that they understood why Hubbard was singling them out.

As the conference attendees broke into small groups, Mitchell and Jessen participated in the "law enforcement interrogation and debriefing" panel, along with several individuals closely affiliated with APA leadership, including Mumford, Demaine, and Kinscherff.[733] For this panel, the primary issue of concern was that "eliciting information is an evolutionary-emergent process that develops based on the real-time situation and direct[ion] by the interrogator/debriefer." The group concluded that information gathering might be facilitated by appropriate matching between characteristics of the interviewer and interviewee, but Jessen offered the "contrary view . . . that matching doesn't have much effect." The group also discussed the importance of considering cultural issues and the role of political or religious ideology in influencing emotions and motivations of interviewees, and noted that it may be more difficult to detect deception when individuals believe the lies they tell.[734] Finally, the discussants considered "research challenges" on the topic of interrogations, and raised a number of questions:

> How do we find out if the informant has knowledge of which s/he is not aware?
>
> What pharmacological agents are known to affect apparent truth-telling behavior?
>
> …

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[728] APA_0220710.

[729] APA_0220552; APA_0220581.

[730] APA_0220611.

[731] APA_0329894.

[732] HC00005133.

[733] *Id.*

[734] HC00005099; APA_0220708.

> What are sensory overloads on the maintenance of deceptive behaviors? How might we overload the system or overwhelm the senses and see how it affects deceptive behaviors?[735]

In the intelligence gathering panel, the participants discussed how best to "evaluate the authenticity of both the source of information and the information itself."[736] The participants commented that there had been relatively little progress made in methodology and tools for the field of intelligence gathering, and that any advances in asset validation had been very recent.[737] At the conclusion of the conference, Hubbard and other operational psychologists requested that the researchers submit short research proposals.

After the meeting, Brandon joined the other organizers in expressing her appreciation for their efforts. She commented to Hubbard that she "appreciated how Jim Mitchell kept saying (especially on the second day), 'this is an empirical question; we need to collect data and do studies,'"[738] and queried whether it was a "good outcome" for Hubbard that the academic participants would send research proposals to him. Hubbard responded that, while he would eventually want "practical suggestions," his main goal for the conference was to generate "specific research ideas and initiate contracts to provide practical answers."[739]

Within APA, there was also discussion regarding the positive outcome of the conference and its potential to facilitate future interactions with operational psychologists. On July 21, Mumford sent an update on the workshop to Norm Anderson, Mike Honaker and the Science and Public Policy groups: "Just a note to let you know that the APA/CIA/RAND workshop went extremely well last week. . . . Suffice to say, psychological science is likely to play a much more significant role within the intelligence community from now on and both the research and operations communities looked at this as the start of a long and potentially very fruitful collaboration."[740] Also in July, APA published a story about the conference in SPIN, the Science Directorate's newsletter. The story noted that the workshop was funded by the CIA and hosted at RAND headquarters, expressing "profound thanks to both Scott Gerwehr, Associate Policy Analyst at RAND, and Susan Brandon, Program Officer for Affect and Biobehavioral Regulation at NIMH, who jointly conceived of this project while Susan was still Senior Scientist at APA" and "[s]pecial thanks to Kirk Hubbard, Chief of the Research & Analysis Branch, Operational Assessment Division of the CIA, for generous financial support and for recruiting the operational expertise and to RAND for providing conference facilities and other logistical support."[741]

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[735] HC00005133.

[736] HC00005099.

[737] APA_0330044; APA_0220709.

[738] APA_0220679.

[739] APA_0220686.

[740] APA_0195842.

[741] American Psychological Association, *APA Works with CIA and RAND to Hold Science of Deception Workshop*, Science Policy Insider News (July 2003), *available at* http://www.apa.org/about/gr/science/spin/2003/07/also-issue.aspx.

As Brandon and Mumford began to consider possible follow-up activity, they solicited feedback from conference participants. After a month had passed, and they were still awaiting responses from several participants, including Mitchell and Jessen, Hubbard informed them: "You won't get any feedback from Mitchell or Jessen. They are doing special things to special people in special places, and generally are not available."[742]

On September 8, Hubbard hosted a meeting in his office to follow up on the deception detection conference and plan for future conferences on related topics.[743] Brandon, Gerwehr, Mumford, and two social scientists from the National Academies of Science, Faith Mitchell and Chris Hartel, attended the meeting. In addition to Hubbard, Judy Philipson, Carmel Rosal, and Jon Morris attended from the CIA. During the meeting, the group talked about cross-cultural information that might be useful for walk-in evaluations and asset recruitment, evaluation and management.[744] Brandon wrote to Hubbard, Gerwehr, Mumford, and Mitchell after the meeting to share some additional thoughts she had regarding the usefulness of developing measurements of cultural beliefs and bias.[745]

By the fall of 2003, it seems likely that some members of APA staff knew enough to be aware, had they been looking for the connection, that Mitchell and Jessen, two CIA contractors, were interested in learning about psychological science, including the science of deception detection, that could help interrogators to work more effectively, and that their interest might involve research on detainees subjected to "sensory overloads" or "pharmacological agents." As their comments at the beginning of the workshop suggest, the ability to detect deception was the linchpin of the interrogation program designed by Mitchell and Jessen. As Gregg Bloche explained in The Hippocratic Myth:

> It's indeed common wisdom among political progressives that torture doesn't work—if, by "work," we mean extraction of accurate information from hostile informants. Miming communist interrogation methods . . . yields compliance of a mindless sort: People being abused to the breaking point will say anything to get the torture to stop. . . .
>
> But this story overlooks a point Albert Biderman made fifty years earlier. If well designed and strategically sequenced to reduce captives to despair, the abuses he catalogued could "induce" a compliant state of mind. But the "shaping" of compliant behavior was another matter. It turned on the interrogator's perceived omnipotence—his monopoly power to punish and reward. He could use this power as the Chinese and Soviets did, to extract false confessions. But he could also use it to force fearful and hopeless prisoners to tell the truth—if he could detect falsehoods in real time and punish them swiftly.

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[742] APA_0220734.

[743] APA_0220738.

[744] APA_0220763.

[745] APA_0220768.

> . . . Jim Mitchell believed that the stressors they'd designed to inoculate trainees against torture could be re-mixed—and enhanced—to extract lifesaving intelligence from actors intent on doing Americans harm. But the breaking of prisoners, by itself, wouldn't be enough. Biderman's insight here was critical.[746] The interrogator would need to shape the behavior of the men he broke by distinguishing truth from invention, then rewarding the former.[747]

Thus, a conference on the topic of detecting deception would have been useful to Mitchell and Jessen, who needed this critical skill to make their program of harsh interrogation techniques effective.

E. Continued Interactions with CIA Contractors

Following the "Detecting Deception" conference, APA staff and governance members continued to have isolated contacts with the CIA and the newly-formed Counterintelligence Field Activity ("CIFA") agency within DoD. In late 2003, Heather Kelly had at least two interactions with individuals who were affiliated in some way with Mitchell and Jessen or the SERE schools. On September 24, 2003, Kelly received an email from David Ayres, CFO of Mitchell Jessen & Associates[748] and President of TATE Inc., a firm focused on providing "personnel recovery" training to the Department of Defense and other government agencies. Ayres[749] sent Kelly a "blurb" on the Special Behavioral Applications division of TATE, which specialized in applied psychological consultation,[750] and attached the resume of Bruce Jessen,[751] who he identified as

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[746] Mitchell was clearly influenced by Biderman's work: In response to an inquiry from Mumford regarding Mitchell speaking at a National Science Foundation seminar on the topic of coercive interrogations, see *infra*, Mitchell recommended that the seminar organizers reference Biderman's 1962 publication "The Manipulation of Human Behavior." APA_0028185.

[747] M. Gregg Bloche, The Hippocratic Myth: Why Doctors Are Under Pressure to Ration Care, Practice Politics, and Compromise their Promise to Heal, 135-36 (2011).

[748] Mitchell Jessen & Associates was a parent of Knowledge Works, a company formed to provide continuing education to military personnel stationed abroad. For several years, Knowledge Works was accredited by APA as a continuing education provider, but in 2008 APA denied accreditation because Knowledge Works failed to provide materials relating to the program content and schedule. In his interview with Sidley, Joseph Matarazzo said that he had 1% ownership in Knowledge Works. Matarazzo interview (May 4, 2015). However, annual reports filed by Knowledge Works do not list Matarazzo as an owner or affiliate of the company. Rather, in a 2008 annual report filed with the state, Matarazzo is listed as a partner of Mitchell, Jessen & Associates. Despite Matarazzo's affiliation with Mitchell Jessen & Associates, Mitchell and Matarazzo both independently stated that Matarazzo had no knowledge of or involvement in any activity related to interrogation. Hubbard interview (May 5, 2015) & Matarazzo interview (May 4, 2015). Indeed, Matarazzo described his involvement as limited to an hour-long meeting a few times a year, after which he was dismissed and the rest of the Board continued to meet. In hindsight, Matarazzo stated that he believes Mitchell and Jessen established Knowledge Works to provide a façade of legitimacy for their interrogation-related activities. Matarazzo interview (May 4, 2015).

[749] Kelly explained that she and Ayres are on their children's school board together. Kelly interview (April 24, 2015).

[750] APA_0129041.

one of TATE's consultants. He offered to put Kelly in contact with Jessen if she "ever wish[ed] to talk to him about ongoing research."[752] Kelly responded to Ayres that "this guy is incredible" and she would "like to follow up with you and him about some of this stuff!"[753]

Several months later, Kelly wrote to Mumford that she had spoken to a "Dad friend"[754] who "owns the company that runs the training programs out in Washington state for the military—the ones that simulate POW situations and run high-risk military personnel through them," and that "[h]e and two psychologists were the ones that did all the research that Paul Bartone from Div. 19 reports on![755] And he just got Joe Matarazzo to sit on the advisory panel. They also do tons of deception stuff."[756] Kelly suggested that she and Mumford have lunch with this friend, and Mumford agreed that it was a "nice connection" and he would like to set up a lunch.[757] Mumford said that he did not recognize that Kelly was referring to Mitchell and Jessen at the time, and he did not recall ever setting up a lunch to meet with the friend.[758]

Meanwhile, as CIFA began to expand its operations, APA began to bridge connections to behavioral science staff within the DoD agency in the same way it had to behavioral science staff in the FBI and the CIA. On February 19, 2002, DoD Directive 5105.67 established CIFA to advance the mission of developing and managing DOD's counterintelligence programs, including providing support and resources to DOD personnel and creating research and development programs. One of the directorates within CIFA was the Behavioral Sciences Directorate, which by 2005 had at least twenty psychologists on staff to support offensive and defensive counterintelligence efforts, including providing risk assessments of detainees held at Guantanamo. In 2003, Scott Shumate, who had been chief operational psychologist in the CIA's Counterterrorism Center, joined CIFA as the director of the Behavioral Sciences Directorate.[759] In April 2004, Kirk Kennedy also transferred from his position within the CIA's Operational Assessment Division to CIFA's Behavioral Sciences Directorate, where he became Chief of the

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[751] APA_0129043. Jessen's resume listed his experience as a senior psychologist in the SERE program and a consultant to the CIA, FBI, DoS, DoD, DHS, NSA, DIA, and other institutions.

[752] APA_0129041.

[753] APA_0128723.

[754] Kelly stated that the "Dad friend" to whom she referred was David Ayres, as their children went to school together. Kelly interview (April 24, 2015).[+]

[755] Paul Bartone is a military research psychologist who focused on understanding and measuring resilience to stress.

[756] APA_0028405.

[757] APA_0028742.

[758] Mumford interview (May 15, 2015).

[759] Walter Pincus, *Pentagon's Intelligence Authority Widens,* Washington Post (Dec. 19, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/18/AR2005121801006.html. In 2008, DoD disbanded CIFA when it combined counterintelligence and human intelligence functions in the Defense Counterintelligence and Human Intelligence Center, within the Defense Intelligence Agency.

National Center for the Study of Counterintelligence and Operational Psychology, reporting directly to Shumate.

It is likely that, in the summer of 2004, Phil Zimbardo met with Kirk Kennedy, who had only recently transitioned from the CIA to CIFA, to discuss serving in an advisory capacity to the DoD agency. Although Sidley is not aware of any contemporaneous documentary evidence relating to this meeting and Zimbardo could not recall having met Kennedy,[760] Susan Brandon and Kirk Kennedy both described the meeting. Brandon said that she and Kirk Kennedy traveled to California in 2004, while Brandon was employed by the National Institute of Mental Health, to discuss Zimbardo's key research priorities related to terrorism.[761] Brandon added that James Breckenridge[762] was also part of the meeting.[763] Kennedy confirmed that he met Zimbardo at his home in 2004 to discuss setting up an advisory board for CIFA similar to the one that Kirk Hubbard had engaged at the CIA.[764] Although it seems likely that a meeting between Zimbardo and Kennedy occurred, Sidley has found no evidence that APA staff facilitated, or were even aware of, the meeting or its purpose.

F. Awareness of Abusive Interrogations

By March 2004, the issue of abusive interrogations should have been apparent to any informed citizen. Although the media reports at this time generally focused on abusive techniques rather than on the reasons for such techniques, some early reports, such as the *Washington Post*'s 2002 reporting, clearly identified that such tactics were being used at interrogation centers.[765] Moreover, only a limited number of explanations for using such techniques are apparent. One potential explanation was that military and intelligence personnel were abusive towards detainees as a means of acting out their anger or sadistic impulses. But the far more likely explanation is that these personnel were abusing detainees in an attempt to break them down and then extract information from them. Therefore, a reasonably sophisticated consumer of these news reports, especially a psychologist whose training would have attuned him to the risk of serious psychological harm from such tactics, likely would have a sense that

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[760] Zimbardo interview (June 8, 2015).

[761] Brandon referenced APA_0019427 as the subject of her meeting with Zimbardo and Kennedy. Brandon interview (May 26, 2015). Another communication indicates that she and "Kirk" met with Zimbardo and Bruce Bongar in early July to discuss suicide terrorism research. APA_0028186.

[762] Zimbardo and Breckenridge launched the Department of Homeland Security-sponsored Center for Interdisciplinary Policy, Education, and Research on Terrorism (CIPERT) in 2007 to "promote the scientific understanding of the causes and effects of political violence . . . and translate this understanding into effective policy, education, and research." Center for Homeland Defense and Security, *Pacific Graduate School of Psychology and Stanford Professors Team Up to Launch Think Tank on Terrorism* (Apr. 19, 2007), *available at* https://www.chds.us/?press/display&article=cipert.html.

[763] Brandon interview (May 26, 2015).

[764] Kennedy interview (May 28, 2015).

[765] Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, Washington Post (Dec. 26, 2002), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

the harsh tactics were being used in interrogations, even if the reporting did not clarify the context.

In addition, APA staff in the Science Directorate were privy to some information suggesting that Mitchell and Jessen were involved in interrogations and that their activities might raise some concerns about potentially harsh techniques. From Mitchell and Jessen's comments at the 2003 CIA- and RAND-sponsored conference, it is likely that Science Directorate staff, particularly Geoff Mumford, knew that Mitchell and Jessen were interested in using psychological science on deception detection as it related to improving the effectiveness of interrogations and interviews of terrorists. If Science Directorate staff did not know that the research discussed at APA-hosted conferences was being used to support interrogation activities, it was due to the determinedly agnostic attitude of staff. In the face of substantial indications that the CIA was using psychologists to conduct interrogations that might include abusive tactics, Science Directorate staff intentionally avoided making inquiries that would produce more information. Therefore, although it is not likely that APA staff had been read into the CIA's interrogation program, the level of public information available and their encounters with the principals involved in the CIA interrogation program by March 2004 should have alerted them to at least the possibility that the CIA was conducting abusive interrogations and was drawing on psychologists and psychological science to do so.

V. ETHICAL RUMBLINGS: MARCH 2004 – JULY 2004

A. Ethical Inquiries from CIA

Prior to March 2004, the vast majority of interactions between APA and the intelligence community had been centered in the Science Directorate, where staff focused on building relationships in which they could demonstrate the value of psychological science to various agencies. In March, however, an inquiry from Kirk Hubbard at the CIA, pulled the APA's Ethics Office, directed by Steve Behnke, into conversations regarding the role of psychology in national security situations.

On March 11, 2004, Mumford put Hubbard in touch with Behnke and Kinscherff to "discuss some issues related to the ethics codes that govern psychologists and psychiatrists in settings where our national security interests are at stake,"[766] which Hubbard had raised. Hubbard then emailed Behnke and Kinscherff the following:

> Geoff Mumford provided your names as potential resources to provide guidance on the APA's code of ethics and some of the new and unique demands being placed on psychologists in response to countering terrorism.
>
> By way of introduction, I am the Chief of the Behavioral Sciences Staff at the Central Intelligence Agency. Our mission is to conduct applied behavioral and social science research to support the collection and analysis of human intelligence and to support special projects involving counterterrorism efforts.

[766] APA_0019174.

> One of my staff, Andy Morgan, M.D. (cc'd above) have [sic] been discussing a problem that is experienced by both psychiatrists and psychologists, alike. Both specialties are being asked to provide consultation to law enforcement, the military, and other organizations that have a role in national security.
>
> Unfortunately, some of what they are asked to do runs counter to the American Psychological Association and American Psychiatric Association's code of ethics. For example, military psychologists are often asked to assist in questioning or "interrogating" foreigners detained in Afghanistan and Iraq. Psychiatrists are often consulted by law enforcement to provide consultation on apprehending and/or questioning subjects suspected of committing major crime.
>
> Andy and I were wondering if both our APA's (Andy is a psychiatrist) shouldn't begin to examine our respective code[s] of ethics to account for these new situations where the subject is not the client/patient, and the subject's rights can arguably be subordinate to the needs of national security. Do either of you have any thoughts on this issue, and how we might pursue this in the professional community?[767]

The two individuals raising these ethical issues, Kirk Hubbard and Andy Morgan, spoke with Sidley about the issues that had prompted them to reach out to the APA. Hubbard did not think that he would have raised these ethical concerns on his own initiative; rather, he surmised that others, perhaps individuals who were working under cover, had asked him to reach out to the APA on their behalf.[768] He added that Scott Shumate had raised similar concerns after returning from a CIA black site,[769] and concluded that the inquiry was probably an attempt by some people to "cover their butts."[770]

In contrast to Hubbard's explanation that this email was intended to provide cover, Morgan thought that they needed to clarify what military psychologists were able to do to assist with interrogations.[771] Morgan remembered having discussions with Hubbard in which they agreed that when a psychologist evaluates a prisoner, the prisoner is not "the client." He was not certain that the codes of ethics of the professional associations provided sufficient guidance in this context, so he wanted to make things safe for psychologists and obtain ethical guidelines that would outline the "rules of the road" in national security contexts.[772]

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[767] APA_0084694.

[768] Hubbard interview (May 5, 2015).

[769] Shumate was present for the interrogation of Abu Zubaydah at a CIA black site in Thailand. Katherine Eban, *Rorschach and Awe*, Vanity Fair (July 2007), *available at* http://www.vanityfair.com/news/2007/07/torture200707.

[770] Hubbard interview (May 5, 2015).

[771] Morgan interview (May 29, 2015).

[772] *Id.*

Morgan was also concerned, however, that psychologists might begin to participate as interrogators, which is a role that is beyond their training and competency. He referenced Jessen's attempt to act as the interrogator at the SERE schools, and commented that he personally knew of psychologists who had been deployed to Guantanamo and been placed in roles that were different from what they had been told before deployment. Morgan said that his goal in reaching out was to clarify what psychologists would be asked to do when assisting with interrogations, and to ensure that psychologists had the authority to refuse orders if those roles extended beyond their training.[773]

In response to Hubbard's inquiry, Kinscherff explained that the Codes were likely to be applied in a "fact sensitive" way that permits "the interpretation that the 'client' is not the suspect/target individual." He also commented that there may be situations in the national security context that the code did not contemplate:

> For example, under what circumstances might a psychologists deceive a third party by identifying him/herself as the treating professional for the third party, assure the usual protections of confidentiality and privilege, and then provide otherwise protected information to law enforcement or intelligence? Permit the sessions to be secretly recorded? Use the sessions to introduce false or misleading information to the person who believes him/herself to be the patient of the psychologists? . . .
>
> Or, at what point does the advice that a mental health professional provides in consulting on coercive interrogation technique[s] begin to push the boundaries of what would be acceptable?
>
> The codes simply did not contemplate circumstances where the law enforcement/national security interests might trump the ethical/legal interests of the identified patient/third party/target individual.

Kinscherff also proposed gathering together some of Hubbard's staff with staff from APA and ApA to discuss and sharpen these issues, and prompt an "evolution of a consensus that might eventually be reflected in the professional ethics codes of the professions."[774] Kinscherff forwarded his responses to Behnke, Mumford, Anderson, and Honaker, commenting that "this is an extraordinary opportunity to actively engage with the law enforcement and national security communities regarding some very challenging issues."[775]

Morgan also forwarded Hubbard's email to two psychiatrists, with whom he had discussed holding a meeting regarding ethics and national security. Behnke and the two psychiatrists then engaged in preliminary discussions regarding a collaboration on future

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[773] *Id.*

[774] APA_0019343.

[775] *Id.*

working groups,[776] which later ripened into a meeting for government psychologists and representatives of the professional associations hosted by the APA on July 20.

After several weeks passed without further action within APA, Mumford contacted Steve Breckler, Executive Director of the Science Directorate, and urged him to "follow-up as its [sic] another 'teachable moment' and may represent an opportunity to be out front in a collaborative effort (with ApA) at a time when collaboration with CIA on other fronts carries with it a significant liability."[777] Mumford also forwarded the entire exchange to Brandon, and explained that he wanted to get a sense of whether Breckler would "champion" the effort before getting "too many people whipped up." He added that "part of the pushback might be coming from Stephen Behnke only because we've (he) just finished re-writing the ethics code and probably sees this as a can of worms."[778] Breckler followed up with Honaker and Behnke to comment that this issue "seems like a golden opportunity for APA to step up to the plate on issues that are gaining a lot of public attention and scrutiny," and Behnke agreed that "[t]his is a wonderful example of psychology being able to make a contribution regarding a pressing, high-profile issue of national importance."[779]

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 nationals security, considerations of messaging and public image would continue to dominate the conversation.

B. FBI and NIJ Conference: "The Nature and Influence of Intuition in Law Enforcement: Integration of Theory and Practice"

In September 2003, after preliminary discussions with Tony Pinizzotto from the FBI, Brandon and Mumford began considering "intuitive policing" as a topic for the next conference bringing together operational psychologists and researchers.[780] Mumford and Brandon reached

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[776] APA_0054281.

[777] APA_0019855.

[778] APA_0020155.

[779] HC00005180.

[780] APA_0220767. In the midst of planning this workshop, Brandon was appointed Assistant Director of Social, Behavioral and Economic Sciences at the White House Office of Science and Technology Policy. As Assistant Director, Brandon would have reported to an Associate Director of Science, who in turn reported to the Director of OSTP. In that role, she worked to promote the behavioral sciences as a useful tool, but she lamented to Mumford that she had difficulty gaining traction and, in her discussions about counter-terrorism with Marburger, "using behavioral science as a strategy was clearly still not on the list with him." APA_0020708. As part of her new role, Brandon contributed to a report prepared by the Subcommittee on Social, Behavioral and Economic Sciences to address how "social, behavioral, and economic sciences are immediately applicable to strategies that can enhance the Nation's capacity to

out to Bryan Vila at the National Institute of Justice for support, and they soon developed a proposal for a workshop sponsored by the FBI and the NIJ. The invitation to the workshop described its goal as "to shape a research agenda that will investigate and improve the decision-making tools that police use to direct suspicion, detect lies, and guide investigations," with a focus on intuition and "gut responses."[781]

By March 2004, the organizers had identified and secured acceptances from many operational participants and researchers.[782] In April, Hubbard emailed Mumford and Brandon to ask that Kirk Kennedy be added to the invitation list. He explained that Kennedy had recently left the CIA to become head of a research unit within CIFA that was similar to Hubbard's unit in the CIA.[783] Hubbard also suggested that Bob Mericsko, who ran Deception Detection and Analyst of the Future programs at the CIA's Intelligence Technology Innovation Center, receive an invitation.[784]

Ahead of the meeting, Brandon and Mumford shared the agenda for the break-out sessions with facilitators. The goal of the sessions was to develop and deliver research on "intuition" that might be useful to law enforcement by assessing "what is known, and what is not known about the cognitive, emotive, and action processes that we are collectively referring here to as 'intuition.'"[785]

At the meeting, Sarah Hart from NIJ, Steve Band from the FBI Academy, and Robert Kinscherff[786] gave introductory remarks before the group broke into three smaller sessions. In each of the breakout groups, the participants addressed the same set of questions relating to whether intuition exists, whether it is innate or learned, and whether it can be deliberately taught and sharpened as an intentional skill. The groups seemed to conclude that intuition is highly error-prone, but that it is a skill that can be learned and strengthened through experience. In the afternoon, the breakout groups addressed potential directions for research on intuition, such as identifying characteristics of highlight intuitive people. After the breakout sessions concluded, Kinscherff summarized the discussion from the various groups: "Most groups were

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predict, prevent, prepare for and recover from terrorist attacks." APA_0020876. Although Mumford jokingly began referring to Brandon as "White House Susan" or "Oval Office Susan" during this time period, it is unlikely that Brandon, who was several levels removed from the Director and finding difficulty implementing her agenda, had significant influence in the Bush Administration.

[781] APA_0018929.

[782] One of the operational participants asked if there might be an opportunity to speak to the members of the group with security clearance, but there is no evidence that such a discussion ever happened. APA_0220996.

[783] APA_0019360.

[784] APA_0020664.

[785] APA_0028295.

[786] As Brandon and Mumford began to prepare the agenda, Kinscherff made it clear that he did not want his affiliations disclosed to participants. APA_0029245.

uncomfortable with the word 'intuition.' However, most participants agreed that intuition or whatever it may be called is pre-conscious but based on sensory input. . . . Experience is a key component of developing the capacity for intuition, but that capacity may not transfer across contexts." [787]

On the second day of the meeting, several researchers and academics gave short presentations on their research as it related to intuition and implicit biases. Many operational psychologists also shared issues in their work that would be promising areas for research.[788] A participant in the conference stated that she could not recall any discussion about psychologists participating in interrogations, despite the fact that the Abu Ghraib photographs had only recently leaked to the public.[789] At the conclusion of the meeting, the group developed a research agenda, and the organizers urged conference participants to comment on the proposed research topics.

C. CIA Conference: "Interpersonal Deception: Integration of Theory and Practice"

While Brandon and Mumford planned the intuitive policing workshop with contacts at the FBI and NIJ, they remained interested in deception issues.[790] In March 2004, Brandon suggested to Demaine, Hubbard, Gerwehr, and Mumford that they consider asking a subset of the group to stay for an additional day of meetings focused on deception and deception detection,[791] to be funded by the CIA and RAND.[792] The workshop was designed to address the basic question of how to effectively deceive on an interpersonal level. The meeting's dual goals were to describe the current state of scientific knowledge on effective interpersonal deception and to create an agenda for further empirical research on the issue.

Invitations were extended to a subset of the participants in the previous day's intuitive policing conference, as well as some additional operational personnel and researchers with a special interest in deception. Participants included representatives from the CIA, DoD Special Operations, CIFA, DHS, the Secret Service, and law enforcement agencies in the United Kingdom, in addition to a cadre of researchers and academics.[793] Hubbard specifically suggested that Judy Philipson attend because "she works alot [sic] in the area of deception, not to mention being our terrorism guru." He added that it was "probably more important that she and Andy [Morgan] attend than me, actually."[794]

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[787] APA_0021167.

[788] *Id.*

[789] Davis interview (May 5, 2015).

[790] During this time period, the Science Directorate had also organized a briefing on the topic of "Detecting Deception: Research to Secure the Homeland." APA_0018582.

[791] APA_0018928.

[792] APA_0019242.

[793] APA_0028283.

[794] APA_0028274.

The workshop was organized into three panels, which presented on operational challenges in interpersonal deception and deception detection, technological advances and behavioral challenges, and empirical and ethical challenges. At each of the panels, a group of between three and five academics or researchers presented their research to the rest of the group.[795] One of the participants in this workshop said that the research presentations were made to a group of individuals who did not introduce themselves, whom the participant understood to be individuals from the Defense Intelligence Agency.[796]

After the pair of conferences at the end of June, Mumford and Brandon continued to collaborate on conferences throughout the fall of 2004. In October, APA and DOJ co-sponsored a conference on the topic of "Suicide Terrorism," which Robert Kinscherff moderated, and in November, APA and DHS co-sponsored a conference on the topic of "Charting a Course for Homeland Security Strategic Studies."[797]

D. The Task Force on the Psychological Effects of Efforts to Prevent Terrorism

As APA gained a growing awareness of the effects of the Bush administration's policies on interrogations, senior staff nonetheless dampened membership activity that could be perceived as opposed to the administration. In February 2003, Council allocated funds to support a newly-formed Task Force on the Psychological Effects of Efforts to Prevent Terrorism,[798] to be chaired by Paul Kimmel. Philip Zimbardo, former president of the APA, was listed as a member of the task force, as were Nina Thomas and Michael Wessells, both of whom would later be selected as members of the PENS Task Force.[799+]

In a subsequently published book, Kimmel explained that the task force produced a report designed to examine the effects and unintended consequences of strategies adopted by the U.S. to prevent terrorism. The task force concluded that the stressful environment created by the war on terror "often leads authorities to overestimate the threat and consequences of terrorist activities and to make poor decisions in trying to prevent these activities."[800] It recommended that "psychologists take the lead in providing impartial and objective information about terrorism and efforts to prevent it. We can use our knowledge about enemy images, stereotyping of other groups, and the processes of group think to open a space for debate, discussion, and interpersonal engagement."[801]

Almost from the beginning, APA staff and governance worked to undermine the task force's efforts. In April 2003, Judy Strassburger, Norman Anderson, and Robert Sternberg

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[795] APA_0028283.

[796] Davis interview (May 5, 2015).

[797] APA_0022999; APA_0023000.

[798] Draft Minutes of the Council (Feb. 14 – 16, 2003) (on file with Sidley).

[799] APA_0021063.

[800] Paul Kimmel & Chris E. Stout, Collateral Damage: The Psychological Consequences of America's War on Terrorism, xvi (2006).

[801] *Id.* at xvii.

discussed "trimming" the Task Force on the Psychological Effects of Efforts to Prevent Terrorism as a means of "getting the task force going." They agreed to deliver the request to Paul Kimmel, who chaired the task force, after the Board meeting so that they "could say the Board discussed and feels" that reducing the size of the task force is appropriate.[802]

In early May, the task force produced a report consisting of an introduction by Kimmel and a compendium of thirteen papers from the members of the task force. The report assessed the psychological effects of "living in a nation 'at war'" with terrorism, including stereotyping and bias against immigrant populations, a growing sense of fear and helplessness in traumatized populations, and a burgeoning sense of "militant patriotism."[803] By mid-July, senior staff in the APA were becoming more concerned about possible media attention devoted to the task force's report because it could do "real harm to APA's public image."[804] Farberman expressed concern with "the slant of the report (anti-Bush) and some of the specific language," including phrases such as "militantly patriotic policies" and the sentiment that the "current administration has weaponized fear in the war on terrorism." Farberman also identified "some 'science' problems" with the report, and commented that she hoped that Council would either edit or refused to accept the report. Strassburger suggested putting the issue on the agenda for a Board executive session, and Anderson agreed that the Board needed to give Farberman some "cover."[805]

At the July 27, 2004 executive session of the Board meeting, the Board requested that Board member Sandra Shullman ask Kimmel to consider postponing the presentation of his report until the February 2005 Council meeting to allow time for the Boards and Committees to review the report.[806] At the upcoming Council meeting only a few days later, Kimmel was approached by President-elect Ronald Levant, Rhea Farberman, Nina Thomas, and Sandra Shullman, who convinced him that the APA could only "receive" the report but not take action on it in its current form, and that it would be best to send the report for approval through the Boards and Committees.[807] Kimmel accepted their guidance and amended the report before submitting it to several interested boards and committees.[808]

In August 2004, Kimmel explained that he had complied with APA staff's recommendation to postpone his presentation of the report to Council only because he understood "that going through the Boards and Committees was necessary for adoption which is a stronger action [than Council receiving the report] and allows APA to do more to use and publicize our work."[809] Farberman drafted a response to explain to Kimmel that the report would

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[802] APA_0179365.

[803] APA_0021063.

[804] APA_0189542.

[805] *Id.*

[806] Approved Minutes of the Board (July 27 & 30, 2004) (on file with Sidley).

[807] Bryant Welch, *The American Psychological Association and Torture: The Day the Tide Turned*, Huffington Post (Aug. 21, 2009), *available at* http://www.huffingtonpost.com/bryant-welch/the-american-psychologica_b_242020.html.

[808] Kimmel interview (May 12, 2015).

[809] APA_0189330.

be included as an item in the cross cutting agenda at the Board and Committee consolidated meetings, and that after the report was reviewed by the full governance structure, Council could choose to receive the report. Anderson commented to staff that he "didn't get the sense from the board that we wanted to move the report toward adoption."[810]

The report was placed as an agenda item in the Fall Consolidated meetings.[811] After several months of deliberations, the Board recommended to the Council that the report of the task force should be rejected in its entirety.[812] At the following Council meeting, Council approved a motion that "thank[ed] the Task Force on the Psychological Effects of Efforts to Prevent Terrorism and refer[red] the Report of the Task Force to the Board of Scientific Affairs to provide perspective and encourage further development of these topics."[813] Kimmel said that Levant skipped over the presentation of the report in the agenda and pushed discussion back until the end of the Council meeting, when he recorded a unanimous vote rejecting the report despite several votes in favor. He explained that because of this omission, he did not have time to present any information or speak in support of the report.[814] APA never accepted the report in any form, and it was eventually published with an independent publisher under the title "Collateral Damage: The Psychological Consequences of America's War on Terrorism."

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 the acceptance of this report was at least in part based on an effort to appease the Administration. In short, APA staff used internal governance processes to hold back membership initiatives that expressed criticism of the government's counterterrorism initiatives out of fear of angering the Bush Administration.

E. Abu Ghraib Media and Internal Response

In April 2004, reports of abuses at Abu Ghraib began to receive widespread media attention. As media scrutiny of detainee abuses intensified, APA began receiving inquiries about psychologists' involvement in torture, either through designing interrogation techniques, facilitating interrogations, or "looking the other way" when abuses occurred.[815] In response to such inquiries, Behnke emailed a senior group of staff and governance members the following:

> These are, obviously, complicated issues, and psychologists working for various parts of the government are involved in investigations that implicate national

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[810] *Id.*

[811] APA_0021063.

[812] Approved Minutes of the Board (June 10 – 12, 2005) (on file with Sidley).

[813] Approved Minutes of the Council (Aug. 17 & 21, 2005) (on file with Sidley).

[814] Kimmel interview (May 12, 2015).

[815] APA_0084947; APA_0021277.

> security. In the past few months, our folks in the Science Directorate (Geoff Mumford) have been approached by people in government wanting to discuss the ethics of psychological techniques being used in government investigations. I think there are appropriate and inappropriate ways for psychology to be involved, and would suggest a cautious approach, where we, as an organization, look at the issues in a considered and thoughtful manner, perhaps by way of a task force.
>
> At the moment, there are intense feelings about this issue. I would recommend a reply that conveys our appreciation of the seriousness of the matter and our interest in identifying the ethical issues that arise when psychology is used as an investigative tool. I would recommend against a reply that casts a shadow on psychologists who work for government agencies in investigative roles, or a reply that suggests that, by virtue of recent events, such psychologists are under some sort of suspicion. Rather, I would suggest that it is in everyone's interest that as an organization we are as helpful as we can be in promoting the ethical role of psychology in investigations, including investigations to protect our national security, and that we want to do what we can as an organization to discourage investigative techniques that are not consistent with our ethics. [816]

This was the first time that Behnke raised the idea of a task force to address ethical issues raised in national security contexts. Notably, even from this early date, Behnke took the approach that it was appropriate for psychologists to be involved in national security investigations, and that it was important to support psychologists working in such roles.

Although these press reports and member inquiries do not prove that APA staff knew that psychologists were facilitating interrogations using abusive techniques, the internal APA communications as of May 2004 are sufficient to demonstrate that senior APA staff should have been on notice that psychologists were working in environments where such abuses were rampant. At that time, senior staff in the Ethics Office and Science Directorate were aware from Hubbard's earlier inquiries that psychologists were being asked to participate in activities at Guantanamo in ways that raised potential ethical issues. In May, APA staff also learned that Larry James was being deployed to Iraq "to be Chief Psychologist at that prison," presumably Abu Ghraib.[817] Therefore, it seems likely that APA staff were aware that psychologists were working in settings where detainees were being subjected to abuse, and that they were being faced with the ethical dilemmas presented by those abuses.

F. The Legal Framework

In May, as concerns about prisoner abuses at Abu Ghraib spread, Heather Kelly, Geoff Mumford, and Steve Breckler began working to put together a congressional briefing that would educate congressional staff and federal agency personnel regarding psychological science related

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[816] APA_0084947.

[817] APA_0030148. In June 2004, Anderson reached out to James to confirm that he had been assigned to this role, but then quickly retracted the question because he was sure it was "confidential even if true." APA_0189751. When James's convoy was attacked, a senior staff member in the Education Directorate notified Anderson and informed him that James had returned from Iraq. APA_0186135.

to the issue of prisoner abuse. They scheduled the briefing for June 10, and began recruiting speakers for the event.[818] By early June, they had determined that Steve Breckler would present on the topic of "How can the Science of Human Behavior Help us Understand Abu Ghraib?" and Kevin Murphy[819] would present on the topic of "How can Psychological Research in Military Contexts Help Us Prevent Another Abu Ghraib?"[820]

On June 9, the day after the *Washington Post* broke the story publicizing the contents of the OLC memoranda and the day before the scheduled briefing, Mumford began reaching out to his contacts in the government to express concern about how the story might affect the following day's briefing. He asked Gerwehr to participate in a "semi-emergency call triggered by the DOJ memo and our briefing tomorrow,"[821] and reached out to Hubbard for advice regarding questions that might arise around the memo.[822] There is no evidence showing that either Hubbard or Gerwehr discussed the memoranda with Mumford before the briefing.

In an internal discussion with APA staff and the two speakers for the briefing, Mumford expressed concern over the references to "psychological techniques" the *Post* made when discussing the OLC's definition of torture.[823] Murphy responded that "[t]he thing that makes this especially worrisome is that if the White House, DOJ, and DoD were being advised by counsel that anything goes during time of war, the admonition that everything needs to be done in a legal way does not do much good."[824]

This exchange demonstrates that APA staff were aware that the definitions used in the OLC memos rendered bare statements regarding prohibitions on torture toothless. The June 7 *Wall Street Journal* article about the report of the working group from March 2004 and the June 8 *Washington Post* article about the OLC memoranda indicated that the rules and standards regarding torture were no longer clear-cut, and that it was not feasible to rely on the legal framework to prevent activities that could amount to torture. Even had APA staff failed to understand that point, Murphy made the connection and raised the explicit concern to Behnke and other APA staff that relying on legal guidelines to prevent torture would be inadequate. Thus, it is not credible that APA would think a prohibition on "torture" was sufficient guidance during the work of the PENS Task Force the following year.

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[818] Kelly initially invited Zimbardo and Sternberg, but Zimbardo declined due to scheduling conflicts. APA_0128869.

[819] Kevin Murphy is an academic psychologist at Pennsylvania State University, and past president of APA Division 14, the Society for Industrial and Organizational Psychology.

[820] Representative Ted Strickland had also planned on delivering remarks at the briefing, but was unable to attend after a change to the congressional schedule. Heather O'Bierne Kelly, *June 10th Congressional Briefing on Abu Ghraib*, Society for Industrial and Organizational Psychology (Oct. 2004), *available at* https://www.siop.org/tip/backissues/Oct04/22kelly.aspx.

[821] APA_0028361.

[822] APA_0028813.

[823] APA_0028817.

[824] APA_0029487.

G. Requests for Ethical Guidance

After the Abu Ghraib abuses came to light, APA staff stated in internal communications that they began to field a greater number of inquiries from government personnel regarding "the ethics of psychology as a tool in national security investigations."[825] Behnke elaborated in an email to Russ Newman that "in the past few months, the Science Directorate has been approached by people in government wanting to discuss the ethics of psychological techniques being used in government investigations."[826] In an interview, Behnke stated that his reference to inquiries from the government related solely to the email from Kirk Hubbard in March 2004.[827] It seems unlikely that Behnke would write that the "tempo" of the discussions prompted "by people in government wanting to discuss the ethics of psychological techniques being used in government investigations"[828] was increasing if he were referring to only the single inquiry from Hubbard. However, Sidley found no evidence of other inquiries made to the APA during this time.

Senior staff began discussing how best to bring colleagues from the CIA into the discussion. Mumford suggested that Hubbard might be interested, though he was "more involved in recruiting assets," and that Andy Morgan "may know more about the PsyOps stuff" because of his role in training DoD personnel to resist interrogation, and was "the one who really wanted to see this be an APA/ApA collaboration."[829]

By late April, it seems likely that APA's discussions regarding the ethics of national security interrogations had reached some of their contacts in the military. At that time, Larry James reached out to Anderson to request that he be permitted to serve on a "sub-committee on terrorism" that he had heard APA was forming.[830] James's request suggests that, even before the APA formally convened a meeting to discuss the ethical issues, there might already have been internal discussion of a future task force or other working group to discuss ethical issues raised in the national security context.

In May 2004, APA staff met internally to plan a meeting that brought together individuals from the mental health professions and government agencies for a discussion of the issues. In the invitations Behnke subsequently circulated to government personnel, he emphasized that:

> The purpose of this meeting is to bring together people with an interest in the ethical aspects of national security-related investigations, to identify the important questions, and to discuss how we as a national organization can better assist psychologists and other mental health professionals [to] sort out appropriate from

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[825] APA_0242896.

[826] APA_0022593.

[827] Behnke interview (May 22, 2015).

[828] APA_0242896.

[829] APA_0020325.

[830] APA_0189751.

> inappropriate uses of psychology. We want to ask individuals involved in the work what the salient issues are, whether more or better guidance is needed, and how best to provide guidance (e.g., through ethics consultations) that may be deemed appropriate or helpful. I would like to emphasize that we will not advertise the meeting other than this letter to the individual invitees, that we will not publish or otherwise make public the names of attendees or the substance of our discussions, and that in the meeting we will neither assess nor investigate the behavior of any specific individual or group.
>
> . . .
>
> The Ethics Office and Science Directorate would like to take a forward looking, positive approach, in which we convey a sensitivity to and appreciation of the important work mental health professionals are doing in the national security arena, and in a supportive way offer our assistance in helping them navigate through thorny ethical dilemmas, if they feel the need (informal conversations with people in the field suggest the need is there).[831]

Behnke's communications with respect to the meeting at APA in July 2004 demonstrate that long before the PENS Task Force was created, Behnke's position was that the APA should be supportive of psychologists working in national security settings and should work to construct an ethical framework that allowed them to remain in those roles. In an interview with Sidley, Behnke explained that this forward looking approach is consistent with his general outlook on ethics, in which the primary focus is on education and consultation rather than adjudication. It seems fair that Behnke's general approach to his role as Ethics Director emphasized forward-looking consultation over backward-looking adjudication; however, that his preferred approach was to provide consultation and guidance does not inevitably lead to the conclusion that the ethically appropriate guidance would permit psychologists to participate in interrogations. Behnke's early communications on issues related to ethics and national security demonstrate that he assumed the appropriateness of psychologists participating in such roles, and that he and APA then constructed an ethical framework on the basis of that assumption.

Although it seems clear that Behnke arranged the July 2004 meeting in the context of Hubbard's inquiries from March 2004, other individual identified to Behnke and Science Directorate staff ethical issues associated with the potential for exploitative research on deception detection. In early May, Martha Davis responded to a request from Susan Brandon for research ideas extending into the next decade. Davis commented that "research on deception detection in real world contexts" will have developed over the years, and "[t]hat leaves the political and ethical issues surrounding a subject that is exquisitely vulnerable to distortion, oversimplification and abuse." She trusted that APA would continue to strengthen ethics guidelines in this area, but commented that "what feels well beyond my realm as a researcher are the political forces which can push the research forward, shaping and potentially exploiting it in ways that are empirically and ethically suspect."[832] Jennifer Vendemia, another researcher

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[831] APA_0058091.

[832] APA_0020261.

focusing on deception issues, raised similar points about ethical dilemmas in the area of deception research.[833] She commented that an organization "must be founded that deals exclusively! With the ethical dilemmas of [deception] research. Deception research will be applied to the theatre of war, one on one interrogations, and screening applications. . . . We are talking about a huge change in the way psychologists work with the government, and we need to not only have protection but also safe ethical guidelines." She asked Brandon who she could talk to about such an effort at APA, and Brandon forwarded her inquiry to Mumford, who then forwarded it to Behnke.[834]

These concerns mirrored the ethical concerns that had been raised by physicians and psychologists in the CIA's Office of Medical Services since the interrogation program began. One witness stated that the idea of research on the interrogation program was "alive and well" within the CIA, despite agreement within OMS that such research was unethical without informed consent. However, this witness knew of no link between APA and any research program the CIA might have conducted, and he explained that any changes in the APA Ethics Code to permit such research would have had no effect on federal law set by the Department of Health and Human Services.[835] Thus, as discussed above, regardless of whether or not DoD ran research program on detainee interrogations, Sidley has uncovered no evidence that APA facilitated such research.

However, even if APA was unaware of research programs run by the CIA and DoD or ethical concerns regarding such research raised internally within the CIA, these communications show that as of summer 2004, Behnke had been placed on notice that research on deception in the national security context raised complicated ethical issues. Despite these issues raised by researchers participating in APA-sponsored conferences, during the PENS meeting more than a year later, a group designated to consider ethical issues in precisely this context recommended pursuing research related to interrogations without addressing the obvious concerns.

H. Additional Interactions with Mitchell and Jessen

In mid-June, Hubbard and Mumford exchanged emails relating to the possibility of Jim Mitchell participating in a seminar hosted by the National Academies of Science ("NAS") on the topic of coercive interrogations. The NAS was hoping to find individuals to represent a range of perspectives on coercive interrogation, and turned to the Science Directorate for recommendations for "speakers who would SUPPORT coercive interrogation tactics."[836] In response to this same request, Mumford also reached out to Robert Kinscherff, who suggested that Behnke might have contact information for Michael Gelles or Robert Fein.[837]

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[833] APA_0084997. Vendemia, a participant in the July 2003 conference sponsored by the CIA, was a recipient of large government grants in support of her research in deception detection.

[834] APA_0020868.

[835] Morgan interview (May 29, 2015).

[836] APA_0028365 (emphasis in original).

[837] APA_0022708.

Hubbard informed Mumford that "Jim" would likely not be able to participate because "Jim and Bruce will both be in Hawaii on July 30." Hubbard added that he "would hope you could assist in ensuring that their association with my organization is not divulged [if they were to participate]. The[y] have significant prior DOD experience in this area and now have a private consulting business." Mumford assured Hubbard that "we always aim to be very discreet in making any associations with your organization and don't want to (and won't) do anything to jeopardize our harmonious working relationship."[838]

Only a few weeks later, Mumford emailed Steve Breckler about a potential meeting with two "former CIA staff psychologists (known only to me as Jim and Bruce) who have been intimately involved in setting up the protocols for interrogation in Iraq and elsewhere. It obviously wouldn't be for attribution but might be an interesting opportunity for us to have a better understanding of what goes on inside. . . ."[839] Mumford later told Brandon that Hubbard was arranging the meeting to discuss "interrogation practices," and that it was likely that she would be able to join.[840] There is no documentary evidence showing that this meeting ever occurred, and Mumford could not recall any follow up to the email.[841] It is possible that Mumford met with Mitchell and Jessen at the 2004 APA Convention in Hawaii, which Mitchell and Jessen were scheduled to attend, but the communications do not prove that such a meeting happened. Mitchell said that he could not recall having ever met with Mumford.[842]

VI. ETHICS AND NATIONAL SECURITY: JULY 2004 – NOVEMBER 2004

In July 2004, APA took its first formal step toward address the ethical issues being raised by psychologists' involvement in national security settings. APA staff explain that the purpose of this meeting was to address a broad range of issues related to psychologists working in the military and other government agencies involved in national security. They assert that abusive interrogations were only one relatively insignificant part of the issues that the meeting was designed to address. However, it seems likely that one of the primary purposes of this meeting was to address the ethical issues related to interrogations. By this point, APA staff had already communicated internally about ethical issues related to national security investigations, and had fielded at least one request for ethical guidance related to activities in which psychologists were asked to participate at Guantanamo. Moreover, APA staff members were surely aware of the many public reports of rampant human rights abuses against detainees held in the war on terror. Therefore, as APA gathered together ethics experts and representatives from the CIA, CIFA, DHS, and other government agencies serving the national security mission, it seems improbable that one of the primary issues on the agenda would not be the ethical implications of psychologists' participation in interrogations.

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[838] APA_0028185.

[839] APA_0020846 (ellipsis in original).

[840] APA_0022534.

[841] Mumford interview (May 15, 2015).

[842] Mitchell interview (May 15, 2015).

A. July 20, 2004 APA Ethics and National Security Forum

On July 20, 2004, the APA's Ethics Office hosted a forum on Ethics and National Security to bring together representatives of the FBI, CIA, and DoD for a discussion of "the ethical issues in the use of psychology in national security-related investigations" and an exploration of "how APA and other professional and scientific organizations can serve as a resource for psychologists and mental health professionals who participate in these investigations."[843]

Shortly before the meeting, Mumford invited his government contacts in various agencies, including Hubbard, Morgan, Band, Kennedy, and Brandon, to attend the meeting by forwarding Behnke's message explaining his "forward looking" approach and emphasizing that he would focus on identifying important ethical questions and offering assistance to psychologists "navigat[ing] through thorny ethical dilemmas."[844] Mumford also forwarded the exchange to Anderson to inform him that APA would be holding a meeting on this topic, and that "[t]he effort has the active and enthusiastic support of the CIA, DoD and FBI."[845]

In addition to Behnke, several APA staff and former governance members were listed as attending,[+] including Robert Kinscherff, the former Chair of the Ethics Committee who had responded to Hubbard's request for ethical advice several months earlier; Mel Gravitz, the psychologist who had served on the CIA's Professional Standards Advisory Committee; Mike Honaker, Deputy CEO of APA; Russ Newman, the Executive Director of the Practice Directorate; Steve Breckler, Executive Director of the Science Directorate; Geoff Mumford, Director of Science Policy; Heather Kelly, Senior Legislative and Federal Affairs Officer in the Public Policy Office; Sara Robinson, Legislative Assistant for Science Policy in the Government Relations Office; and Lindsay Childress-Beatty, Deputy General Counsel.[846] Rhea Farberman chose not to attend the forum "[b]ased on our decision to separate the public communications issues from the ethics issues."[847] Farberman's email reflects APA's concern with its messaging on ethical issues in the national security setting, a concern that echoed through their earlier response to Hubbard's inquiry and their later communications during the PENS Task Force.

The APA also included Jeffrey Janofsky and Robert Phillips as representatives from the American Psychiatric Association ("ApA") and Mark Frankel from the American Association for the Advancement of Science, as part of a collaborative effort to address the ethical dilemmas facing all mental health professionals asked to consult on interrogations.

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[843] APA_0229986.

[844] APA_0022593.

[845] APA_0028483.

[846] APA_0021208. Patrick DeLeon, former president and Chief of Staff to Senator Inouye was invited, but declined to attend. APA_0045377. Nathalie Gilfoyle, APA General Counsel, was also invited but ultimately did not attend.

[847] APA_0030193.

Steve Band and Anthony Pinizzotto attended the forum on behalf of the FBI's Behavioral Science Unit,[848] and Kirk Hubbard and Judy Philipson[849] attended on behalf of the CIA's Behavioral Science Unit. Scott Shumate and Kirk Kennedy were invited to attend the meeting as representatives of CIFA, a division of the Department of Defense, though only Shumate was able to do so. Also in attendance was Susan Brandon, the former APA Senior Scientist who subsequently moved to a position in OSTP. After the meeting, Behnke drafted a brief description of the meeting for Brandon to show her superiors at the White House to account for where she had been at the time.[850]

Several contractors to the FBI, CIA, or DoD were also present at the meeting. These contractors included Robert Fein and Michael Gelles, who would later serve on the APA's PENS Task Force, and Andy Morgan, the psychiatrist on Hubbard's Behavioral Science staff who had raised ethical concerns several months earlier.

It is likely that many of the operational psychologists involved in these discussions were concerned that the professional associations might in some way impede their work. Gelles explained that, at the time of the meeting, many operational psychologists from various intelligence and law enforcement agencies were meeting about once a year to discuss how to define their role in accordance with ethical guidelines. He believed that many psychologists were talking informally about how to ensure that the work they were doing would not stop.[851]

As noted above, in his invitation, Behnke assured participants that APA "will not advertise the meeting other than this letter to the individual invitees, that we will not publish or otherwise make public the names of attendees or the substance of our discussions, and that in the meeting we will neither assess nor investigate the behavior of any specific individual or group." Band responded that he appreciated being assured that the names and affiliation of attendees "will not be a media event."[852] Childress-Beatty expressed surprise that the participants would object to their names being released, and Behnke responded that "this particular group of folks is sensitive to those issues."[853]

The day before the meeting, Behnke prepared an outline of his opening remarks and shared it with Gilfoyle and Childress-Beatty to solicit their thoughts. In the outline, Behnke identified four goals for the meeting:

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[848] Kristen Beyer was also invited to attend, but was unable to do so because of a scheduling conflict. APA_0058091.

[849] Judy Philipson, a psychologist who worked in Hubbard's office at the CIA, suggested to Behnke before the meeting that he invite James Mitchell and Bruce Jessen as well because they "would be absolutely necessary for this discussion." After Behnke asked her for some background on Mitchell and Jessen, Philipson commented that she had consulted with Mel Gravitz, and that "he thought that it might be premature to bring them along for this initial meeting." APA_0045373.

[850] APA_0058032.

[851] Gelles interview (May 27, 2015).

[852] APA_0045389.

[853] APA_0058042.

> 1) identify the ethical issues that arise in the use of psychology or psychological techniques in national security-related investigations; 2) discuss how the American Psychological Association and other professional and scientific organizations can serve as a resource for mental health professionals who participate in national-security related investigations; 3) identify resources, for example journal articles that raise and address the relevant ethical issues, as well as other individuals with a particular interest or expertise in this area; and 4) determine whether ongoing contacts among the group would be useful, for example additional meetings to continue our discussion, panels or workshops at national conferences, or articles in journals or newsletters to stimulate discussion in the broader investigative and intelligence communities.

Behnke also identified a number of points he wanted to emphasize during his introduction to the forum. Many of his points focused on the "goodness of fit" between the ethics codes and the situations with which many professionals struggle during their practice in national security settings. He concluded by noting that "the risk of not addressing these issues are [sic] that mental health professionals will stay away from this work, out of a concern of exposing themselves to legal and ethical liability, or that mental health professionals who do engage in this work will become split off from their national associations, because of a feeling that the national organizations do not understand what they do. Either would be a highly undesirable outcome."[854]

When Kennedy learned that he would be unable to attend the forum, he wrote an email to Hubbard explaining his thoughts on the importance of APA creating "an entity to take on a positive consultation role to the intelligence community." He explained that the Intelligence Community ("IC") "is often ill-served by a few unethical/unprofessional psychologists" because it is sealed off from professional oversight boards and "IC management is generally insensitive to professional ethical issues, [which] sets the stage for breeding the same insensitivity in the psychologists it employs." Kennedy explained during an interview with Sidley that he was thinking about OMS officers who manipulated case officers into letting them consult on cases when he raised these points.[855] Moreover, he noted that Intelligence Community managers and early-career psychologists lack resources when they have ethical questions, and "more senior psychologists are not always the best resource especially since they may be part of the problem." Kennedy thought that, were the APA to set up an ethics consultation board for the Intelligence Community, psychologists would have a resource to turn to for addressing ethical issues, such as confidentiality and multiple relationships. Such a board might also develop professional standards and a certification program for the area of psychological consultation. Finally, Kennedy noted that "[t]he APA Ethics Code seems primarily geared for the therapeutic context" and that it could be difficult to adapt it "to provide ethical guidance for consultation in the IC."[856]

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[854] APA_0058094.

[855] Kennedy interview (May 28, 2015).

[856] APA_0028398. Although Kennedy was at that time affiliated with CIFA, he had only recently moved from the CIA where he had been Hubbard's counterpart within another unit of the Operational Assessment Division.

Although many of Kennedy's ideas related to a consultation board were not discussed at the meeting on July 20, his final point related to the Ethics Code's applicability in national security settings became an important theme of the discussion. One of the primary topics of discussion at the meeting was the "goodness of fit" between the APA's ethics guidance and the role of psychologists in national security investigations. Robert Fein commented that he had attended an FBI conference at which they "concluded that the [E]thics [C]ode was indeed a poor fit." Kirk Hubbard most strongly stated that "the current code does not apply at all [to] the national security investigation situations—it's not mental health we're concerned with, but national security; we are supposed to exploit and manipulate the interrogatees to gain crucial information." He later emphasized that "beyond [torture], we have no ethical duty to the interrogatee." Jeffrey Janofsky offered the alternative perspective that, even if the client is the interrogator, psychologists and psychiatrists still "have some duty to the detainees" and that they "can't just drop your ethical guidelines when you take off your 'psychologist hat.'"[857]

Although no record of further discussion on this point appears in the collection of notes from this meeting, several other participants said that they strongly disagreed with Hubbard. Kennedy said that Shumate and Hubbard argued over Hubbard's position. He also explained that, after this meeting, it became clear to Kennedy that he did not have the same views as Hubbard, and he did not speak to Hubbard often after this point.[858]

Another recurring theme raised during the meeting was that the traditional rules designed to fit a clinician/patient relationship did not seem to apply in national security contexts. This theme became particularly prevalent when the group discussed the identity of the client in national security contexts. At one point, Michael Gelles cautioned "it's important to remember the client is the interrogator, not the interrogatee—these are not patients." He attempted to steer the conversation towards boundaries, rather than rules and guidelines, as an attempt to cabin "how far psychologists should go."

Several participants also expressed concerns regarding the pressures psychologists felt to give advice in areas outside their expertise in "high stakes" situations. Mel Gravitz commented that "we have a responsibility to provide credible, ethical service" as both citizens and psychologists.[859] Andy Morgan elaborated that psychologists and psychiatrists were "pressured to offer consultation and opinions" even in "areas were we have no training." Gelles agreed that "psychologists get pulled into a process where our expertise is demanded" but queried how to "define our competence."[860] He identified a number of possible roles for psychologists consulting on interrogations—such as observing "behind the glass," sitting in the room, designing the strategy, or writing the script—which might raise different ethical dilemmas.[861]

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[857] APA_0229986.

[858] Kennedy interview (May 28, 2015).

[859] Mumford Notes (July 20, 2004) (on file with Sidley).

[860] APA_0229986.

[861] Mumford Notes (July 20, 2004) (on file with Sidley).

Some participants raised the idea of "relative ethics," such that there was a "continuum of coercion from benign to not at all benign, depending on how high the stakes are." Shumate invoked the "ticking bomb scenario," and queried how the ethics standards applied in practice "in the context of competing duties and oaths," such as the oath to protect and defend.[862] Behnke seemed to agree with this "relativist" position, stating that "there are exceptions to each rule in the code, where some other value or goal trumps another."[863]

Another consistent concern was the lack of empirical data available to assess risk, and the inability to conduct the necessary research because it would be unethical. The participants lamented that the y could not access a community of colleagues or experts on these issues because much of their work was classified. Robert Kinscherff commented, however, that there are "lots of naturalistic experiments going on" relating to the question "at what point does deception work."[864] Andy Morgan also made a comment about "using available venues to conduct empirical evaluations."[865]

Although the basic question of whether mental health professionals should conduct interrogations at all was raised during this meeting,[866] it was given little attention; instead, the relevant question soon became not whether psychologists should participate, but how they could do so ethically.[867] Behnke explained that he interpreted the position that psychologists cannot be involved in interrogations as meaning, through logical extension, that interrogations are unethical. He found this position unrealistic, and viewed interrogations as inherently a psychological activity where it made sense for psychologists to be involved.[868]

Behnke said that he was mindful at this time of pressures from both directions. He explained that in hindsight, all of the pressure is coming from one direction in favor of greater protections for detainees, but at the time he wanted to be cautious because of the potential for another attack that could bring pressure from the other direction. Behnke wanted APA to find a way to be anchored in the middle.[869]

B. Follow Up to the National Security Forum

After the meeting, Behnke sent an email to Honaker, Gilfoyle, and Childress-Beatty to relay the appreciation of the "investigative community" that APA had reached out on this issue. He added: "As the national organization, we should be on the cutting edge of the discussion/debate about the ethics of this issue—if we aren't, that particularly community of

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[862] *Id.*

[863] APA_0229986.

[864] Mumford Notes (July 20, 2004) (on file with Sidley).

[865] *Id.*

[866] HC00009080; Mumford Notes (July 20, 2004) (on file with Sidley).

[867] APA_0041230.

[868] Behnke interview (May 22, 2015).

[869] *Id.*

psychologists is likely to 'give up' on APA and go their own direction, as was alluded to during the discussion, which would be a very undesirable outcome for a variety of reasons."[870] Behnke explained that he meant that the APA should be on the cutting edge both in leading the discussion on these issues and in giving the best substantive guidance possible. Behnke wanted to develop "state of the art" rules to demonstrate that APA was an appropriate venue to seek ethical guidance and to have discussions on these issues.[871]

Behnke also emailed the participants to thank them for their contributions. Band responded that the "important and timely gathering was one of the most significant meetings I have attended this year. . . . During this time of war, I am drawn to part 1.02 of our (APA's) ethical principles and take comfort in my interpretation of this standard. Towards that end, I truly look forward to your leadership, guidance and future meetings as we hazard forward."[872]

Behnke also contacted Janofsky, the representative from ApA, to express the hope "that our two APAs can collaborate on this issue, to everyone's benefit."[873] In September, he attended the annual meeting for forensic psychologists, which covered the same topics as the July meeting hosted by APA.[874]

In September, Kennedy approached Mumford to follow up on a discussion they had during the June 24 interpersonal deception workshop regarding the creation of an "APA fellowship at CIFA along the same lines as was done with Kirk Hubbard at CIA." Mumford, Kelly, Shumate, and Kennedy subsequently met for lunch to discuss collaborating on the fellowships, and Kennedy also suggested that "[p]erhaps there is a way to collaborate further on ethical issues as well."[875] At the meeting, the group discussed the need for APA to re-establish ties with psychologists in national security and intelligence settings and the possibility for future collaboration on ethics issues. As concrete steps in this direction, they proposed developing summer science fellowships at CIFA, creating an APA division related to intelligence work,[876] and establishing a behavioral science advisory panel for CIFA.[877]

Aside from these small-scale meetings, APA did not immediately begin to orchestrate a more cohesive strategy to follow the July 20 forum. On September 23, Brandon emailed Behnke to offer her assistance in pursuing the issues and concerns raised at the meeting, noting that she

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[870] APA_0058042.

[871] Behnke interview (May 22, 2015).

[872] APA_0085132 (emphasis in original).

[873] APA_0058049.

[874] APA_0022045.

[875] *Id.*; APA_0020824. In the summers of 2005 and 2006, APA placed four Summer Fellows with CIFA under the supervision of Kennedy and Shumate.

[876] A few days after the meeting, Mumford inquired into starting a new division on the "use of psychological and behavioral science in devising intelligence, counterintelligence, and counterterrorism strategies to advance homeland and national security." APA_0021076. There is no evidence to suggest that this idea ever advanced any further.

[877] APA_0128910.

"met recently with two psychologists who are at DOD Counter Intelligence Field Activity (CIFA), one of whom was at that meeting (Scott Schumate [sic]). Both are looking for ways to engage good psychology—and good science—in what they and their colleagues do. Part of that is confronting some of the issues raised at that meeting."[878] In a side conversation several weeks later, Mumford emphasized that they needed to "keep the pressure on to do something," in part because "Schumate [sic] expressed some disappointment yesterday that APA wasn't more public about convening such a meeting and I'm with him on that . . . so maybe we can talk about the value of demonstrating leadership more openly."[879] Brandon added that she "heard the same from Scott [Shumate] and Kirk [Kennedy]."[880] Mumford and Brandon continued to discuss how best to motivate Behnke to push forward APA's response on this issue.

Sidley spoke to Brandon, Mumford, Shumate, and Kennedy regarding this issue, and they clarified that they wanted APA to publicly acknowledge their leadership on these issues. Brandon said that it was important to her for APA to acknowledge that psychologists were facing ethical issues, and Mumford said that he agreed that it would have been beneficial to be proactive in a more public and transparent way to demonstrate leadership on this issue.[881] Kennedy confirmed that he had pushed the APA to have these ethics discussions because he wanted to support efforts to develop ethical methods of educing information, and because he knew that information would eventually come out about psychologists' involvement in interrogations that would make them look bad.[882] Shumate also explained that it was "incumbent on the key players" to keep the ball rolling on this fundamentally important question, particularly with respect to pushing for research on these complicated issues.[883]

Even as the APA began to seriously consider the ethical issues raised by psychologists' involvement in interrogations in the latter half of 2004,[884] media pressure continued to build. On August 20, Steven Miles published an article in *The Lancet* titled "Abu Ghraib: Its Legacy for Military Medicine."[885] The article alleged that Army doctors stationed at Abu Ghraib had designed and implemented coercive interrogation techniques and deliberately covered up torture and other human rights abuses by falsifying medical records. And on November 30, 2004, Neil Lewis published an article in the New York Times that served as a watershed moment for the

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[878] APA_0022373.

[879] *Id.* (ellipsis in original).

[880] *Id.*

[881] Brandon interview (May 26, 2015); Mumford interview (May 15, 2015).

[882] Kennedy interview (May 28, 2015).

[883] Shumate interview (June 24, 2015).

[884] Although APA did not immediately follow up on the ethics and national security forum, Science Directorate staff eventually presented it as a precursor to the establishment of the PENS Task Force. In February 2005, a story in SPIN noted that Levant established the PENS Task Force as an "outgrowth" of the July 20 meeting and media attention focused on interrogation practices at Abu Ghraib.

[885] Steven H. Miles, *Abu Ghraib: Its Legacy for Military Medicine*, The Lancet (Aug 2004), *available at* http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(04)16902-X.pdf.

APA, forcing the association to take action and make a public stand on psychologists' participation in interrogations in the national security context.

THE PRESIDENTIAL TASK FORCE ON ETHICS AND NATIONAL SECURITY ("PENS") AND INITIAL AFTERMATH

This section discusses the significant aspects surrounding the development and discussions of the PENS Task Force. It recounts the formulation of the task force starting in late 2004 and early 2005, the task force exchanges and meetings through the spring and early summer of 2005, and the PENS report and its approval in late June and early July 2005. The section also covers the immediate aftermath of the report and interconnected issues that occurred one and two years after the PENS report was completed. Additional actions that followed from the PENS Task Force in later months and years, such as supplemental APA resolutions or government-related interactions, are discussed in the next section of this report.

I. CREATION OF PENS TASK FORCE AND SELECTION OF MEMBERS

Discussions were renewed and sharpened at APA in late 2004 and early 2005 about creating a task force focused on ethics and national security. It is clear from the contemporaneous emails that the cause of this renewed discussion was a late November 2004 *New York Times* article discussing psychologists' roles in interrogation settings at Guantanamo Bay and Iraq, and subsequent articles.[886]

A. November 29, 2004 – January 4, 2005: Neil Lewis's **New York Times** *Article and Early Discussions of a Task Force*

1. The November 30 article and resulting internal APA discussions and reaction

On November 30, 2004, the *New York Times* published a front-page article by Neil Lewis titled "Red Cross Finds Detainee Abuse in Guantanamo Bay," which described the findings of a recent confidential report by the International Committee of the Red Cross ("ICRC").[887] The ICRC report, according to Lewis, documented psychological and physical coercion techniques that were "tantamount to torture." The article noted that some detainees were subject to "loud and persistent noise and music," to "prolonged cold," and to "some beatings."[888] The article also

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[886] We found no evidence that APA was motivated at the time to create the PENS Task Force in order to endorse or accommodate guidance from the Department of Justice's Office of Legal Counsel ("OLC"), under which harsh interrogation techniques were not torture if a psychologist or other relevant expert says the technique to be applied will not cause severe physical or psychological suffering. Relatedly, critics have alleged that the timing of the task force coincided with an internal debate within the CIA about the role of so-called enhanced interrogation techniques and human research standards in light of a May 2005 OLC's memorandum that reaffirmed the use of interrogation tactics including waterboarding. We found evidence that APA was not involved in this debate, though, as previously mentioned, our access into DoD and CIA actions and communications during this time was limited.

[887] Neil Lewis, *Red Cross Finds Detainee Abuse in Guantanamo,* New York Times (Nov. 30, 2004), *available at* http://www.nytimes.com/2004/11/30/politics/30gitmo.html?pagewanted=all.

[888] *Id.* The article described these techniques further into the article: "one regular procedure was making uncooperative prisoners strip to their underwear, having them sit in a chair while shackled hand and foot

directly implicated psychologists who assisted with interrogations at Guantanamo Bay. It described "Behavioral Science Consultation Teams" (commonly referred to as "BSCTs" or "Biscuits") — groups composed of a psychiatrist, a psychologist and psychological support staff according to the article — that "conveyed information about prisoners' mental health and vulnerabilities to interrogators" to assist with interrogations.[889] The ICRC report also noted that BSCTs conferred with medical personnel about the "medical situations of detainees," which may have led to distrust between detainees and the treating doctor. The article cited concerns over whether health professionals, in light of their ethical codes, should be present at Guantanamo Bay while these abuses occurred. Lewis also discussed how some of the abusive techniques were possible given the guidance from the OLC on what (narrow) methods constituted torture.[890]

After seeing the article posted online on the evening of November 29, Stephen Behnke forwarded it that evening to Michael Honaker, Nathalie Gilfoyle, Lindsay Childress-Beatty, Rhea Farberman, Geoffrey Mumford, and Steven Breckler.[891] In his email, Behnke stated "there will be some fallout" from the article, but that it was "very difficult to predict what it will be."[892]

This launched an internal email discussion among top APA staff during the afternoon of November 30 about whether to issue a statement in response to the article. Farberman cautioned that "we don't want to condemn the work [of] some psychologists when we don't know all facts and we also don't want to take sides in a disagreement between the Red Cross and the White House."[893] Behnke agreed that the "information we have is limited to what is in the media" and suggested the following communications strategy on the issue:

> I think our message should be, at least in part: 1) APA has an ethics code, which its members agree to abide by; 2) The media provides few facts about very complicated situations. These situations require a full understanding of the facts before any assessment can be made regarding whether a particular behavior is ethically appropriate or problematic; 3) APA works to promote "the highest standards of professional ethics" (From APA Bylaws) in all areas of psychology

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to a bolt in the floor, and forcing them to endure strobe lights and loud rock and rap music played through two close loudspeakers, while the air-conditioning was turned up to maximum levels."

[889] *Id.* A December 10, 2004 Army Standard Operating Procedure changed this to a team of psychologists, discussed further below.

[890] Neil Lewis, *Red Cross Finds Detainee Abuse in Guantanamo,* New York Times (Nov. 30, 2004), *available at* http://www.nytimes.com/2004/11/30/politics/30gitmo.html?pagewanted=all. Lewis did not specifically use the term OLC, but referred to "a team of administration lawyers" who had "accepted a view first advocated by the Justice Department that the president had wide powers in authorizing coercive treatment of detainees."

[891] APA_0021920.

[892] *Id.*

[893] APA_0021923.

> — research, education, and practice — and has an Ethics Committee that reviews complaints concerning psychologists' behavior.[894]

Gilfoyle responded,

> [t]hat all sounds good as far as it goes but the tougher point to me is the question — which seems inevitable — of whether psychologists can legitimately/ethically work with interrogators to identify ways of 'breaking down' a prisoner that fall short of torture. I think the answer to that is probably 'yes', but that is quite tricky to get across without creating a sound bite that could be disastrous. Maybe the answer is 'no' which would be easier. But somehow the easy answer is rarely the correct one, it seems. Anyway it is a question to be ready for.[895]

In her response, Gilfoyle was candidly putting her finger on one of the fundamental problems for APA in taking a position of "engagement" — a position that psychologists could continue to engage in interrogation work at Guantanamo Bay and elsewhere. If there were circumstances in which "breaking down" an uncooperative detainee falls short of "torture" (presumably depending on how the word is defined), and if therefore APA might announce that it was ethical for psychologists to participate in this activity, then providing a public explanation of this position with the necessary level of detail could be a public-relations disaster ("quite tricky to get across without creating a sound bite that could be disastrous"). This problem would remain with APA throughout the PENS process.

Behnke's response 15 minutes later was telling, both because it reveals the strategic and PR way in which he thought about this ethics issue and because one can see how this approach (in combination with other factors) led directly to the highly and intentionally limited nature of the PENS report. Behnke responded:

> I think our ethics program has gotten pretty good at avoiding 'yes-no' type responses (except in clear cases, e.g., it's not acceptable to become sexually involved with a patient), and I think that should be our first line of approach here. I would encourage us to be mindful that we are a scientific organization, so that as an initial matter we look to the science (e.g., what data do we have to indicate that this technique is effective? Do we have data to indicate that this technique is more effective than other techniques that would present less risk of harm?) I would point out that since some of the research in this area is classified, we do not have all the information we may need for a complete ethical analysis. In any instance, we would want to understand the facts, circumstances, and context surrounding a particular behavior before we could determine whether it was ethically appropriate. . . . We need to have a context before we can determine whether a particular behavior is ethically appropriate or problematic in national security-related context.[896]

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[894] *Id.*

[895] APA_0021923.

[896] *Id.*

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:

> It seems that there are many possible variations in the facts which could lead us to very different ways of thinking about the ethics. Consider, for example: 1) A psychologist who is consultant to a [sic] interrogation team. The psychologist provides information to the team (e.g., the effects of sleep deprivation), but it is the team that makes the decision about how to proceed and use the information the psychologist has provided. [Gives two other scenarios.] One could go on at some length, but I think it's very important for us to be mindful of how dependent our ethical assessment will be on the facts and nuances. . . . What we are talking about now — investigations related to national-security — is an area of psychology in which the ethics are not well developed, and I think we need to be very respectful of the fact that much thinking and development needs to take place before we can begin to declare certain practices ethical or not.[897]

Farberman responded enthusiastically: "Steve — AMEN!! That's exactly the right response."[898]

On December 1, APA leadership held an internal meeting to discuss the article and next steps.[899] By Friday, December 3, 2004, APA had prepared a statement in response to inquiries arising out of the Lewis article, which closely followed Behnke's initial thoughts on November 30, 2004.[900] The statement said in part that evaluating the ethical nature of behaviors was "highly dependent on knowing the facts and circumstances surrounding a behavior," and that APA was "extremely limited" in its knowledge of psychologists' roles in places like Guantanamo Bay and Abu Ghraib. It closed with a reassurance that APA would continue to promote the "highest standards of professional ethics," and would confer with relevant psychologists about "whether APA had given adequate ethical guidance" in these settings.[901]

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[897] APA_0032795.

[898] *Id.*

[899] APA_0058569. In a separate email exchange, Board member Barry Anton asked Steve Behnke how the meeting went. APA_0058544. Behnke said that "we all felt comfortable in formulating a response to inquiries that makes two points," and then summarized for Anton the points discussed in the text, which, as articulated by Behnke in this email, became the actual draft statement issued by APA. In summary, Behnke said, APA can't make ethical judgments because it doesn't have enough facts to know "the context of [the] behavior," even though APA "has given less thought" to the ethics of national security investigations, APA "will continue to promote the highest standards of professional ethics and conduct *by enforcing its ethics code* and by ensuring that its ethical standards adequately speak to new areas of practice." (emphasis added) As we observed at many points in this investigation, Behnke took the lead in drafting APA's response, and his language was used virtually verbatim as APA's statement.

[900] APA_0023309.

[901] *Id.*

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.

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 (c) the report should be seen as merely an "initial step" with the promise of a more detailed "casebook" (which never occurred).[902]

In one of his interviews with Sidley, Behnke defended the PENS approach on the ground that APA was new to these issues and, thus, did not wish to go "too far in either direction" at this point in time.[903] 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.

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[902] This was occurring five months after Behnke and Mumford had convened the group of CIA, FBI, and academic psychologists and psychiatrists for a confidential discussion at APA in July 2004 on the issue. In another part of the email exchange on November 30 following Behnke's initial email about the *New York Times* article, Mumford asked Farberman and Behnke (copying the rest of the group) if the Board of Directors or Council of Representatives had been informed of the July 2004 meeting. Mumford suggested that "we might want to note that we've at least attempted to take some leadership role in initiating a dialogue on the issue," and then included a proposed statement regarding APA's initiation of a dialogue. Mumford added, "of course this begs the question 'what next?' to which I haven't got a good answer." Behnke responded that the meeting had not been brought to the attention of the Board or the Council, but that it had been discussed at an Ethics Committee meeting with Board liaison Barry Anton present, and was going to be mentioned at the December Board meeting. APA_0023859.

[903] Behnke interview (May 22, 2015).

2. *Follow up discussions, including of Newman/Dunivin conflict of interest*

By early December, APA members had already begun drafting letters to the organization about inquiring into or investigating the claims raised in the Lewis article.[904] On the morning of Monday, December 6, President-Elect Ron Levant emailed CEO Norman Anderson (copying APA President Diane Halpern and former APA President Patrick DeLeon) in order to forward a message from a psychologist who had sent Levant one such letter. Levant asked Anderson if APA staff could begin looking into the issue to "find out what known facts are" because the issue "appears to be heading for [the Council of Representatives] in February."[905] Anderson responded that APA could gather "the facts as they start to come out" but that "it might be hard to get more (and more accurate) information than the newspapers are getting." Anderson said that "[w]e of course know psychologists at the military base there," but that "given the sensitivity of the issue and the fact that psychologist are being implicated, that might be a little tricky."[906] Anderson also mentioned that Farberman had prepared a draft statement in case it was necessary, and that it was being sent to the Board.

In response to Anderson's reply, DeLeon emailed Anderson without copying the others and inquired whether Anderson knew that Debra Dunivin, wife of APA Practice Directorate Executive Director, Russ Newman, was stationed at Guantanamo Bay: "[You] do know that Russ's wife is there." Anderson replied that he was aware of this.[907] Anderson told Sidley that he knew Dunivin had been deployed to Guantanamo but was not sure whether he was fully aware of her role at Guantanamo at the time. Anderson conceded, however, that he should have explored the issue further with Newman at the time but did not.[908]

That evening, APA's prepared statement was sent to the Council of Representatives.[909] In response, Division 48 Council Representative Corann Okorodudu posted on the Council listserv on December 7 that her Division had "deep concerns" about the Guantanamo Bay issue and that she and other Divisions might submit a "New Business Item" to "allow discussion on the item" at the February Council meeting.[910] APA Board Member and Treasurer Gerald Koocher (who had recently been elected APA President for 2006) responded that there was no point in "discussing this item" unless it was tied to a "proposed action," and action was impossible before one could determine whether the "undocumented allegations" were true.

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[904] *See, e.g.*, APA_0844973 ("Such activities are a cause for moral outrage and harm the public trust in the profession of psychology. We call upon APA to issue a statement, at once, indicating that psychologists working to abet the use of physical and psychological abuse in practices of interrogation are in serious violation of ethical standards of the profession. We call upon APA to investigate the allegations and to take appropriate actions based upon its investigations.").

[905] APA_0185943. The APA Council of Representatives meets twice a year, in February and August.

[906] *Id.*

[907] *Id.*

[908] Anderson interview (June 23, 2015).

[909] APA_0058517.

[910] APA_0032605.

Koocher suggested it would be better "to propose development of a study or investigative task force (using discretionary funds) that would see what data are available and produce a report and recommendations for the August Council meeting[.]"[911] Okorodudu responded that Koocher's task force idea was part of what she would like to propose at the February meeting.[912]

This was the first reference our investigation found to a potential task force apart from Behnke's mention of a potential task force in summer 2004.[913] Notably, Koocher was proposing it both in reaction to a desire for a more expeditious discussion by Division 48 (potentially to pre-empt an action that might be coming at the February Council meeting), and as an "investigative" task force. Later, Koocher, Behnke and others would strenuously claim that the PENS Task Force was explicitly not set up to investigate potential past abuses or find facts.[914]

Meanwhile, Mumford had followed up on the original November 30 internal email exchange about the *New York Times* article by forwarding Behnke's initial email to Kirk Kennedy—former CIA and then-Defense Department official who headed a unit within the Counterintelligence Field Activity ("CIFA"). Mumford asked Kennedy what he knew about the Lewis article and the BSCT teams. Kennedy's first response, on November 30, was that he "wish[ed]" he knew something and that he had "no idea what is going on down at GTMO."[915] On December 9, Kennedy followed up to inform Mumford that a source told him that Newman's wife, Dunivin, was currently stationed at Guantanamo Bay as a member of the "JTF BSCT."[916] Mumford responded that Heather Kelly was aware of Dunivin's deployment but that he and Kelly were unsure "about what she was doing down there."[917]

When Sidley asked Kennedy (currently with the FBI) about this email, he said that it was immediately clear to him that the Newman-Dunivin relationship was an obvious conflict of

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[911] *Id.*

[912] Division 48's New Business Item was ultimately withdrawn since the Board approved the PENS Task Force before the February Council meeting.

[913] *See* APA_0084947.

[914] APA continued to received other letters and comments requesting some sort of investigation into the issues. For instance, on December 10, former APA President Phil Zimbardo forwarded Behnke an email he had received from a psychologist asking for APA to respond to the Red Cross' report which, she said, showed "an absurd abuse of the professional ethics within the field of psychology." In his email to the psychologist and Behnke, Zimbardo said, "I will try to send this to him and request that you and others feel there should be an ethics investigation started regarding these charges." APA_0032566.

[915] APA_0021862. Kennedy's email also mentioned that he had attended "an annual conference of cleared psychologists" (meaning psychologists with security clearances) where this issue was discussed. At the time, this annual conference was called the Special Applications of Psychology Conference. Behnke was invited to address the conference in October 2005, as described below.

[916] *Id*. ("I thought that you would be very interested to learn that Russ Newman's wife is an Army Lt. Col psychologist currently stationed at 'GTMO' and is currently a member of the 'JTF BSCT' per note (from a source that will remain anonymous — sort of spooky huh?")). The email also contains more detail about Dunivin and her background from Kennedy's source.

[917] *Id.*

interest for both Newman and APA. He added that if APA weighed in publicly on the issue of interrogation settings, APA was going to have a problem unless it disclosed the Newman-Dunivin relationship and recused Newman from any involvement with the development of its ethics position.[918] As set out below, Newman in fact was involved in the PENS Task Force process in significant ways, ranging from the initial discussions among staff and the Board about forming the task force in January and February to the task force meetings themselves in June; and Dunivin was involved in a critical way in discussions about the composition of the task force in February and March.

In response to Kennedy's email, Mumford shared with Kennedy the statement APA had sent to the Council. Kennedy then urged APA to take strong action to support and guide military psychologists:

> I think it behooves APA's Ethics office to put out a statement that both guides and supports military psychologists. Can you imagine a poor Navy psych intern being assigned to GTMO thinking they were going down there to provide psychological support to soldiers only to be diverted to consulting on interrogations? What would APA do to support a psychologist in this situation? This is just one example of why APA and DoD need to have a rapprochement. The main reason however is that DoD is probably the largest employer of psychologists in the U.S.
>
> However, I think an APA Ethics statement would have a minimal impact if issued in isolation. Context, as you know is so important. I would advocate for such a position paper to be embedded in an APA Monitor devoted to Psychology in the Dept. of Defense. We could contribute an article on the CI [counter-intelligence] psychology community in DoD. I could suggest names of psychologists, including a past president of APA, who could provide erudite comments to interview questions on military psychology issues. An APA Monitor might go a long way to building the rapprochement.[919]

Mumford replied that he would run these thoughts up through APA for reactions. Kennedy responded, "I look forward to further dialogue — and most importantly, action — on these issues."[920]

3. *Initial Board discussion of the task force*

The possibility of forming a task force was explicitly discussed during APA's Board of Directors meetings between December 10 – 12, 2004.[921] Anderson told Sidley that there was

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[918] Kennedy interview (May 28, 2015).

[919] APA_0021862 (emphasis added).

[920] *Id.*

[921] The meeting minutes do not indicate a specific discussion about the task force, but emails indicate the task force was discussed during the Board meeting. For instance, Koocher emailed a colleague on December 6 that the "Board of Directors will be discuss[ing] this in December." *See* APA_0058532. And on December 7, Barry Anton emailed Koocher and Carol Goodheart that the Board meetings would discuss a "response from APA regarding prisoner abuses at Guantanamo [Bay] ." APA_0032527.

great amount of Board discussion about the topic over these meetings.[922] Behnke had drafted a task force proposal and had provided his draft proposal to Barry Anton in advance of the December Board meeting.[923] Anton may have brought it to the meeting so that funding of a future task force could be discussed.[924]

The draft proposal is very similar to the task force proposal ultimately approved by the Board in February 2005. Both this draft proposal and the final proposal refer to national security-related "investigations" as opposed to interrogations. A notable change between this draft version and the final version is that the word "coercive" is removed in the Board version.[925] As discussed in greater depth below, Russ Newman appears to have been the originator of this change.

On December 21, Behnke emailed Levant to follow up on the Board's discussion. Behnke said that he understood that the Board had determined that funding should be provided for a task force on the subject, and opined that "this decision was exactly correct, given the sensitivity and potential volatility of the subject, as well as the tone of a Council item that will be put forward in February" (a reference to the proposed Division 48 item discussed above). Behnke said that the Ethics Office would be "happy to provide staffing" or otherwise assist with the task force and "would be happy to suggest individuals" to serve on it. He observed that "some of the people who attended the meeting at APA last July on ethics and national security-related investigations and research would be very good." Behnke specifically mentioned that

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[922] Anderson interview (June 23, 2015).

[923] APA_0058507; APA_0058508 (draft proposal). At the same time that the Board was meeting, DoD Joint Task Force at Guantanamo Bay issued a revised policy governing the operations of the BSCT team there. Among others things, this December 10, 2004 Operational Policy Memorandum defined the BSCT team as two psychologists and one mental health specialist who would provide "psychological" consultation in order to "support safe, legal, ethical, and effective interrogation and detention operations at JTF-GTMO." *See* Operational Policy Memorandum #14, Behavioral Science Consultation Team (BSCT), DoD Memorandum (Dec. 10, 2004), *available at* http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/bsct_sop_2004.pdf. In contrast, the prior policy document on this topic had defined the BSCT team as one psychiatrist and one psychologist who would provide "behavioral science" consultation in support of the interrogation mission. *See* BSCT Standard Operating Procedures, DoD Memorandum (Nov. 11, 2002), *available at* http://www.americantorture.com/documents/gitmo/05.pdf. In addition to making it clear that the BSCT team was solely about psychological consultation by psychologists (not psychiatrists), the addition of the phrase "safe, legal, ethical and effective" is significant, as discussed in greater detail below.

[924] *See* APA_0058479.

[925] *Compare* December 2004 draft proposal, APA_0058508 ("What does current research tell us about the efficacy of coercive techniques? How would our ethics be affected, if at all, were coercive techniques found to be effective?") *with* February 2005 final proposal, APA_0025740 ("What does current research tell us about the efficacy and effectiveness of various investigative techniques? Would the efficacy and effectiveness of various investigative techniques, if demonstrated, affect our ethics?).

Robert Kinscherff, a friend and then-chair of the APA Committee on Legal Issues ("COLI"), "would make an excellent chair."[926]

In a follow up December 22 email, Behnke suggested that the funding be increased from $7,500 (the amount tentatively decided upon at the December Board meeting) to $12,500 so that 10 members (rather than six, based on the lower level of funding) could serve on the task force, since "several groups will want representation on the task force."[927] Behnke told Sidley he was referring to staffing the task force with subject matter experts and representatives from Divisions with special interests in the matter.[928]

B. Preliminary Suggestions for Task Force Members, and Russ Newman's Involvement: January 4 – 18, 2005

Early January 2005 brought additional media reports regarding the role of psychologists in interrogation settings and, with it, added urgency from APA to form a task force. Within short order, key APA staff began collecting potential names for the task force.

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, was explicitly raised internally and then ignored. Newman became involved in the discussions about the task force nominees and connected with Morgan Banks (the chief Army psychologist with the Army Special Operations Command and psychology leader of the SERE school at Fort Bragg), bringing his suggestions to the staff group.

1. Strategic discussions about lack of "evidence"; Mumford's unsuccessful attempt to raise the Newman/Dunivin conflict of interest

On December 31, Neil Lewis published another article which focused on the interrogation of Guantanamo Bay detainee Mohammed al-Qahtani and said that BSCT teams had been used by interrogators to help "break down" uncooperative detainees during interrogations.[929] This article was forwarded to a listserv Levant was on, and he forwarded the article to Behnke and APA's Executive Management Group ("EMG") on January 3, stating, "[w]e need to get our TF on national security up and running."[930]

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[926] APA_0058479.

[927] APA_0033515.

[928] Behnke interview (May 22, 2015).

[929] Neil Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, New York Times (Jan. 1, 2005), *available at* http://www.nytimes.com/2005/01/01/national/01gitmo.html?pagewanted=1&_r=0. ("The interrogators also discussed another factor in the Red Cross report, the use of a Behavioral Science Consultation Team, known as Biscuit, comprising a psychologist or psychiatrist and psychiatric workers. The team was used to suggest ways to make prisoners more cooperative in interrogations. 'They were supposed to help us break them down,' one said.").

[930] APA_0033681. The therapist who forwarded the article to the listserv commented, "As mental health professionals, I think it is critical that we use all available platforms to decry the use of psychological knowledge and skills to contribute to torture." *Id.*

In an email exchange on January 4 and 5 between Koocher, Levant, and Behnke about this article, Koocher pointedly suggested that APA would never be able to obtain any "hard data" about whether psychologists were committing abuses at Guantanamo Bay, and therefore as a matter of strategy, APA should simply continue to issue public statements saying it was "concerned" and would look into the matter as soon as such hard data became available (knowing that it never would).[931] Behnke responded that he agreed, and added that "our colleagues in Division 19 [Military Psychology] . . . are especially sensitive to (the appearance of) ethical judgments in the absence of hard data about what has actually occurred." Koocher responded that the concern about Division 19 sensitivity was "why I was trying to suggest" the approach he had suggested in his email.[932]

After Levant agreed and added Farberman and Gilfoyle to the email, Behnke then forwarded to the group the statement APA had sent to Council on December 6 and said he did not think there was much to add. Koocher responded, "Right! We should probably simply [r]epeat same until 'evidence' of anything becomes public in 2055."[933] In other words, Koocher was pointing out that since it was very unlikely that any confirmation of the alleged abuses would come out for 50 years (when classified information tends to become unclassified), APA would be safe by simply repeating the statement it had previously made—that it effectively stood ready to investigate and enforce its Ethics Code if facts emerged, and it could not make ethical assessments until "all the relevant facts and circumstances emerge[d]."[934]

Later in the evening of January 3, Georgetown Law Professor Gregg Bloche contacted Behnke for comment on his and Jonathan Marks's upcoming articles in the *New England*

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[931] APA_0033612 (Koocher noted that APA almost certainly could not receive confidential documents or information from the *New York Times* or from the government through a FOIA request, and suggested that APA should "simply prepare (with Rhea's help) an expression of concern about 'undocumented allegations', while expressing a willingness to look into the situation if/when appropriate documentation 'becomes available.' ").

[932] *Id.*

[933] *Id.*

[934] *Id.* Critical commentary continued on the Council of Representatives listserv regarding APA's statement after the Neil Lewis article, with one Council delegate forwarding as support an email from a psychologist who said that APA's statement was "seriously inadequate . . . . One can hardly imagine more egregious violations of ethical standards of psychological practice. The statement does not seem to recognize that these alleged acts are, if confirmed, not only highly unusual, but far more grave than the sort of ethical violations that are generally encountered. Furthermore, the APA statement fails to recognize that the allegations are not made by individuals whose reliability is completely unknown, but by the International Red Cross, whose reliability if very well known." Koocher responded to the Council delegate in a one-line post, asking if she "will give suggestions for how APA might obtain the data needed to investigate?" (The statement is ironic in light of the fact that APA generally took no efforts to "obtain data" one might use to investigate these matters, as set out later in this report.) This exchange on the Council listserv then prompted a short email exchange between Behnke, Farberman, and Gilfoyle. Gilfoyle said, "well, there you have it." Farberman responded, "These people just love to make my job harder . . .!" APA_0058786. In this email exchange and other emails we have found, APA staff often did not address the substantive points made in the original post regarding the unusual and egregious nature of the allegations and the reliability of the ICRC in making the allegations.

Journal of Medicine and the *Los Angeles Times* about medical professionals' roles in interrogation settings at Guantanamo Bay.[935] Bloche, a law school classmate of Behnke's, noted that psychologists in BSCTs have been "much more heavily involved than psychiatrists" in interrogations and inquired whether APA had "issued any relevant guidance (or does it plan to)?"[936] Bloche and Marks' pieces were published on January 6 and January 9, 2005 in the *New England Journal of Medicine* and the *Los Angeles Times*, respectively.[937]

On the evening of January 3, Behnke forwarded Bloche's message to Honaker, Gilfoyle, Farberman, and Mumford with a note that he would speak to Bloche off-the-record and convey to Bloche that APA would, among other things, "very actively . . . examine whether our Ethics Code gives adequate guidance to psychologists in such situations, as it is my understanding the American Psychiatric Association is doing as well."[938]

Mumford responded that when they had met in early December, "it seemed there was a sense (a hope?) among some in the room that the story would die but it has, in fact, been part of the news cycle pretty consistently for over a month now." Apparently unaware of Behnke's, Koocher's, Levant's, and the Board's communications in December about a potential task force, Mumford suggested that "APA might want to be in a position of being able to say we have something at the level of a 'Task Force' (or whatever)" to indicate that APA had made the issue a high priority.[939]

In addition, Mumford explicitly (and delicately) raised the conflict of interest concern that Kennedy had raised with him in December regarding Dunivin being married to Newman:

> I'm not quite sure how to put this, but are there issues of perception that we should be concerned about if the wife of the Practice Directorate ED has in fact

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[935] APA_0023355. Bloche had given Behnke some advance warning about this article, emailing him on December 20 that "we'll have a piece on docs & interrogation (at Gitmo and Abu G) coming out in the Jan. 6 NEJM. I'm learning much more about the role of psychologists than I was able to put in this piece . . . ." Behnke forwarded this email to Gilfoyle and said, "Gregg is very smart and very aggressive — this message makes me wonder what he's found." Gilfoyle responded, "[S]ounds like we would want to know that?" APA_0033343.

[936] APA_0023355.

[937] *See* Gregg Bloche & Jonathan Marks, *When Doctors go to War,* New England Journal of Medicine (Jan. 6, 2005), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp048346); Gregg Bloche & Jonathan Marks, *Doctor's Orders – Spill Your Guts*, Jan. 9, 2005 (http://articles.latimes.com/2005/jan/09/opinion/op-brutality9?). In an interview and correspondence with Sidley, Bloche said that he met with Behnke in January 2005 and had implored him (1) to accept international legal definitions of torture and not defer to the Bush Administration's "contorted redefinition of torture" vis-à-vis the John Yoo and Jay Bybee Office of Legal Counsel ("OLC") memos, and (2) to reject the Bush Administration's argument that psychiatrists and psychologists were not subject to their professions' ethics codes in interrogation settings since they were not acting in traditional clinical roles. Bloche interview (May 7, 2015); Email from Bloche to Sidley (May 11, 2015).

[938] APA_0023355.

[939] *Id*.

> been deployed to Guantanamo Bay? Presumably, what she does is classified in which case I would not expect Russ to have any additional insight but if our level of activity as an association on this set of issues were questioned, that may be an awkward situation to try and explain and it doesn't appear to be a secret that she's been down there. Just my 2 cents…[940]

Chief Operating Officer Mike Honaker rejected the conflict of interest concern: "[S]ince spouses are not employed by or represent APA we do not need to know anything about what they do."[941] Neither Farberman, Gilfoyle, nor Behnke made any comment in the email exchange about the conflict of interest.

Despite the fact that Honaker was the second-highest ranking officer in the organization and the subject of the conflict of interest point was the powerful (and aggressive) Executive Director of the Practice Directorate (the largest and most prominent directorate within APA), Mumford continued to raise the conflict of interest issue the next day in an email just with Honaker, apparently following a meeting that the group had on January 4 to discuss the issue of how to proceed. In his email, Mumford said that he "understood what you were saying yesterday," but noted that Dunivin was a "voting member of Council."[942] Honaker responded, "but again, do we review what all [C]ouncil members are doing?" Mumford responded one more time, then dropped it: "no it[']s just that Council members make policy for the association so I guess it just puts her closer to the category of 'representing APA.' Not trying to put too fine a point on it . . . just a heads-up . . . . last tag."[943]

Honaker told Sidley that his response to Mumford was not addressing the Newman-Dunivin conflict issue specifically, but related to a different discussion that was occurring around the same time about the inappropriateness of inquiring into the work backgrounds of spouses of APA officials or employees, or the backgrounds of Council members. When asked how one could understand his email responses as anything other than a response to Mumford's direct expression of a concern about Newman and Dunivin, Honaker insisted that he was not responding to Mumford's point but was referencing a different discussion. We asked for details or more information regarding prior discussions about generally not inquiring into the work background of spouses, and he said he could not recall any further details and had "no documentation" for this. He knew that it appeared from this email exchange that he was specifically addressing the Newman-Dunivin point, but he was not, because he believed that Mumford made a good point and he believed that the Newman-Dunivin situation was a significant concern.[944]

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[940] *Id.* (ellipses in original).

[941] APA_0030060.

[942] *Id.*

[943] *Id.*

[944] Honaker interview (June 23, 2015).

By the first week of January 2005, then, the conflict of interest issue involving Newman and Dunivin had been raised three separate times[945] in these interrogation discussions—December 7, 2004 between DeLeon and Anderson; December 9, 2004 between Kennedy and Mumford; and January 4, 2005 with Mumford and several members of APA leadership. More about APA's thoughts on Newman's conflict of interest is discussed below in our summary of the PENS Task Force observers.

2. *Staff recommendations regarding task force nominees, and initial involvement of Morgan Banks*

Conversations about who should serve on the task force began immediately. On January 5, Kelly informed Mumford that she "put out the word to Div[ision] 19 and other defense types" about gathering names for the task force, and that Koocher and Levant had suggested Larry James and Morgan Sammons.[946] Kelly also asked Kirk Kennedy on January 5 if he would be willing to serve on a potential task force that APA was putting together.[947] Mumford emailed Scott Gerwehr at the RAND Corporation and Susan Brandon, former APA Senior Scientist and then at the Office of Science Technology and Policy ("OSTP"), on January 5 requesting task force names as well.[948]

Also on January 5, Mumford, Kelly and Behnke met with Mike Honaker, Steve Breckler (Executive Director of the Science Directorate), and Russ Newman; the two related topics were potential task force members and the attempt to get involved with the Army Surgeon General's policy development effort, as revealed in the Bloche and Marks article.[949] In a follow up email, Mumford referenced Newman's "Special Ops colleagues" — a reference to Army Special

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[945] Dunivin's marriage with Newman had previously raised concerns at APA. In October 2004, a Council member flagged Dunivin's marriage as a potential conflict of interest in her running for a position on the Finance Committee. Dunivin ultimately withdrew her nomination for the committee. *See* APA_0138161.

[946] APA_0023328.

[947] APA_0129713. Kennedy responded that he was interested "in principle" but wanted to discuss it with Kelly so he could "know the parameters of what I would be asked to do so I could run it past the powers that be here at CIFA." Kennedy's boss, Scott Shumate, ended up serving on the PENS Task Force.

[948] APA_0023327; APA_0030104. Gerwehr suggested a variety of potential names for the task force, none of whom were selected. *See* APA_0023327 ("[T]here are a few names that spring to mind as slightly off the path you might have taken[.] (I assume you've considered all the usual suspects: Zimbardo, Cialdini, Petty, Cacioppo, Eagly, Chaiken, Nisbett, Frank, O'Sullivan, Ekman, etc., etc.) Dan Lassiter (false and coerced confessions), Anne Peplau (problematic close relationships, gender and sexual orientation issues), Jim Sidanius (power, authority, race), Anthony Pratkanis (persuasion and propaganda), etc. Am I reading you right? I can provide more if this is what you were thinking about. . .") (ellipses in original). As to Brandon, Mumford suggested (similar to Gerwehr's thinking) that they think about the academics who had been invited to their prior "ITP" (integration of theory and practice) conferences: "I'd be pleased to get your thoughts on [task force nominations] maybe ref[le]cting on past ITP participants or folks we had on wish lists who couldn't come for some reason to one of the earlier events . . . Bob Cialdini was one I thought of in that category. APA_0030104 (ellipsis in original).

[949] APA_0023260.

Operations Chief Psychologist Morgan Banks (and perhaps others)—and said he would be interested in Newman's perspective about how they "would fit into a proposed meeting with the Army Surgeon General and/or other outreach activities."[950] Newman actively followed up on this shortly. More about Newman and Banks's communications are discussed in the next subsection.

On January 6, Mumford, Behnke, and the Associate Executive Director of the Science Directorate, Merry Bullock, met "to talk about balancing the Task Force nominees" (as Mumford said in an email the next day). After or around the time of that meeting, Mumford emailed Behnke and Bullock about the names for the task force "we have so far," which were listed in this order:[951]

- Michael Gelles
- Olivia Moorehead-Slaughter
- Larry James
- Michael Wessells
- Phil Erdberg
- Debra Dunivin
- Corann Okorududu
- Listed as "Possible place holders for Science":
- John Cacioppo
- Bob Cialdini

After Mumford added Kelly to the email chain on January 7, Kelly responded that Dunivin's current position and access to classified information may "severely" limit what she could say in a task force and recommended that she be included solely as a consultant rather than taking up an "official spo[]t."[952] No comment was made on the email exchange about the Newman/Dunivin conflict of interest point. Kelly also responded that Behnke had just suggested adding Melvin Gravitz to the task force list as well as psychiatrists Jeff Janofsky or Robert Phillips, all of whom had attended the July 20, 2004 meeting at APA.[953]

Separately on January 7, Kelly apparently reached out on this topic to David Ayres, President of Tate, Inc., a consulting firm specializing in personnel recovery training to the government (corporate documents for Mitchell, Jessen & Associates from this time listed Ayres as Chief Financial Officer).[954] Kelly and Ayres had apparently gotten to know each other

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[950] *Id.*

[951] APA_0023266. In the same email, Mumford told Bullock that "we need a moral reasoning person" on the task force. Mumford later explained to Sidley that his comment meant ensuring that someone with unimpeachable credentials on morality issues was included. Mumford interview (May 15, 2015).

[952] *Id.*

[953] APA_0023268.

[954] *See* Tate Incorporated, Company Overview *available at* http://www.tate-inc.com/about/company-overview/; Walker, Hunter, *These 7 Men Owned The Company Linked to CIA Torture*, Business Insider (Dec. 11, 2014), *available at* http://www.businessinsider.com/the-company-behind-cia-torture-2014-12.

because their children attended the same school, and Ayres had sent Jessen's resume to Kelly and had suggested a meeting.[955] Apparently in response to an email or phone call from Kelly, Ayres sent Kelly an email with the subject of "We must talk!"[956] Ayres said, "Yes, yes… we focus on these interrogation issues on a daily basis," and said he would call Kelly when he returned to town at the end of January. It is unclear whether Ayres was aware of the task force at this time.[957]

On January 14, 2005, Behnke emailed an interim update to Levant, stating that he and the Science Directorate were compiling a list of task force members, and that the list "will be diverse by professional background and interests, gender, and ethnicity."[958] That day, Behnke sent a draft list of 12 task force names for Kelly and Mumford to review, with a note to discuss the issue of Debra Dunivin.[959] This draft list included the following names, six of whom ultimately became task force members:

- Jean Maria Arrigo (ultimately becomes a task force member)
- Col. Paul T. Bartone
- Phil Erdberg
- Michael Gelles (ultimately becomes a task force member)
- Larry James (ultimately becomes a task force member)
- Joseph Matarazzo
- Arthur G. Miller
- Robert S. Nichols
- Olivia Moorehead-Slaughter (ultimately becomes a task force member)
- Corann Okorududu
- Scott Shumate (ultimately becomes a task force member)
- Michael Wessells (ultimately becomes a task force member)[960]

On January 18, Behnke emailed Levant that the staff had completed its compilation of potential task force members and attached a list for Levant's review, along with short biographical sketches. The list had 17 names and an asterisk next to their top 10 choices.[961] If these ten people had formed the actual PENS Task Force, it would have been made up of five

[955] Kelly interview (Apr. 24, 2015).

[956] APA_0129250.

[957] Ayres refused a request to be interviewed by Sidley. Kelly said she could not recall whether they had a follow up discussion and did not believe that she had a conversation with him directly about the task force. Our investigation found no further evidence in APA's emails or Kelly's files on this issue.

[958] APA_0023208.

[959] APA_0025278.

[960] APA_0023209.

[961] APA_002320; APA_0023209.

non-DoD[962] members (marked with a "C" below), four DoD members (marked with a "G" below), and one (Phil Erdberg) who might have fallen in either camp:[963]

- *Jean Maria Arrigo (C) (ultimately becomes a task force member)
- *Col. Paul T. Bartone (G)
- *John M. Darley (C)
- CDR Anthony P. Doran
- * Debra Dunivin (G)
- *Phil Erdberg (G/C)
- *Michael Gelles (ultimately becomes a task force member) (G)
- Dennis Grill
- Joseph Matarazzo
- Arthur G. Miller
- *Olivia Moorehead-Slaughter (C) (ultimately becomes a task force member)
- Corann Okorududu
- Robert Roland
- Scott Shumate (ultimately becomes a task force member)
- *Michael Wessells (C) (ultimately becomes a task force member)
- *Col. Thomas Williams (G)
- *Linda M. Woolf (C)

Behnke also said that it would be important to explain some of the task force's conditions up front (including that "task force members may need to take votes on particular matters" and their names would be made available to APA members), since he speculated that active duty military members might not be able to participate on the task force under these conditions.[964] (This and other references to task force members being voting members shows that the suggestions by Behnke and other APA officials after criticisms arose that the ultimate 6-4 DoD/non-DoD split of the PENS Task Force was irrelevant because it was never intended to have votes taken is incorrect.) Behnke also suggested adding a representative from the American Psychiatric Association, but Levant responded that he "would prefer to limit [the task force] to psychology" since it had "the potential of airing dirty laundry."[965]

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[962] The phrase "non-DoD members" is used throughout this section to refer to task force members who had no affiliation with the government or military. By contrast, civilian and military DoD-affiliated members of the task force are referred to as "DoD members."

[963] Erdberg's biography notes that he had been an active-duty military member and heavily consulted with the FBI, but Behnke told Sidley that he would consider Erdberg a civilian member since he was no longer active duty military. Behnke interview (May 22, 2015).

[964] APA_0023208.

[965] APA_0034366.

C. APA – Defense Department interactions, and Board Approval of Task Force: January 19 – February 17, 2005

1. APA attempt to influence DoD policy, and link to task force member selection process

From early January until the Board meeting approving the task force on February 17, key APA staffers and Board members discussed their desire to be involved in the development of Defense Department policy regarding the involvement of mental health professionals in interrogations, for the apparent purpose of trying to ensure that psychologists were as strongly represented within that policy as possible. This would have been important to try to maximize jobs, contracts, and influence for psychologists within DoD, and would have been seen as consistent with the core goals of growing psychology and (to quote Levant's presidential motto) "making psychology a household word." A bad result regarding DoD policy development could have meant that the role of psychologists in these DoD operations would be minimized, perhaps because of greater influence from psychiatry, an issue always present for APA leaders focused on growing psychology.[966] Koocher also explained to Sidley that APA wanted to please DoD in general, like other government agencies, from which it received funding and support.[967] It was clear that the Army Surgeon General's Office was developing relevant policy, but it also appeared that other parts of DoD might be developing similar policies, and it was unclear at this time whether DoD effort was unified, coordinated, or disjointed.

There are also clear indications that, in the mind of some key APA people, including Koocher, Levant, and Behnke (and probably Kelly and Mumford), this attempt by APA to be involved in and positively influence DoD policy was linked to the composition of the soon-to-be-formed task force on ethics and national security. Specifically, emails suggest that selection of DoD officials for the task force may be seen as a show of support for DoD, which may help APA achieve a more positive result from DoD policy in this regard. As it turns out, this is exactly what happened. DoD officials perceived by APA as important were not just selected for the task force but were selected as a majority of the task force, and DoD's policies on these issues (developed and issued in 2005 and 2006 by the Army Medical Command ("MEDCOM") and the Assistant Secretary of Defense for Health Affairs) explicitly included central roles for psychologists (and not for psychiatrists) in interrogation support, [968] a result pointedly noted with delight by various APA officials when these policies became final in 2006.[969]

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[966] Several interviewees made this point. For example, Levant told Sidley that a goal of his trip to Guantanamo Bay in October 2005, discussed more below, was to give a good impression of psychology to DoD officials, which aided his long-term goal of expanding the scope of psychology. *See* Levant interview (May 13, 2015), Newman, too, told Sidley about his desire to expand psychology in new areas. He added that psychiatry often impeded on APA's efforts to expand its role in DoD. Newman cited APA-supported Psychopharmacology Demonstration Project, a temporary DoD training program in the early to mid-1990s where military psychologists could attain prescription privileges, as an example. *See* Newman interview (Apr. 29, 2015).

[967] Koocher interview (June 12, 2015).

[968] The Health Affairs and MEDCOM policies that discussed the role of psychologists on BSCT teams were released in June and October of 2006, respectively. *See Medical Program Support for Detainee*

This DoD policy topic arose on January 4, immediately following the publication of Bloche and Marks's *New England Journal of Medicine* article. In an email from Behnke to Koocher and Levant (copying Honaker, Farberman, Gilfoyle, and Mumford), he explained that the article referred to "a confidential effort" by the Army Surgeon General's Office "to develop rules for health care professionals who work with detainees." Behnke said that APA could "explore the possibility of collaborating with the Army Surgeon General in some fashion. We could explain that APA is actively examining the ethical aspects of mental health professionals' involvement in these activities and that a collaboration between health and mental health professionals could be very productive."[970]

Koocher's telling response linked APA's attempt to influence DoD's policy development with who would be included on the task force: "This is a great idea. I'd suggest a back channel contact via Morgan Sammons and/or Larry James asking how best to make the offer and (for example) whether Ron [Levant] might nominate them . . . or other members with security clearance, e.g. Robert Fein, to represent psychological ethics issues."[971]

After Levant said he agreed and asked, "How best to proceed?", Behnke confirmed the strategy and discussed implementation: "Let's follow Gerry's suggestion of a back channel contact; I'll confer with Geoff Mumford in Science to make it happen."[972]

Mumford then responded solely to Behnke, although he copied his boss (Breckler) and colleague (Kelly) in the Science Directorate, stating that Kelly was exploring the matter, that they would explore the contacts Koocher recommended "but have others in the mix too (CIFA, Pentagon, etc.), hope that's ok? OSTP has also expressed an interest in being helpful, we'll have

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Operations, 2006 DoD Instruction, *available at* http://www1.umn.edu/humanrts/OathBetrayed/Winkenwerder%206-6-2006.pdf; *Behavioral Science Consultation Policy,* OTSG/MEDCOM Policy Memo (Oct. 20, 2006), *available at* http://www.nejm.org/doi/suppl/10.1056/NEJMp0806689/suppl_file/nejm_marks_1090sa1.pdf. The Health Affairs document included a two-page overview of the standards and procedures for behavorial science consultants. The MEDCOM policy focused entirely on BSCTs and became the basis for subsequent BSCT policy memoranda.

[969] After the Health Affairs June 2006 statement was released, Levant responded to the Executive Management Group's listserv by asking "[a]re psychiatrists the most ethical or the least-well trained?" Newman responded that there was a "gap" between the training psychiatrists have and what psychologists already have. APA_0192920.

[970] APA_0023341.

[971] *Id.* Sammons told Sidley that, despite him being the Specialty Leader for Navy Clinical Psychology, he was not involved with policy development for BSCT policy, which fell under the purview of the Army. Navy psychologists were not part of BSCT teams. He did not recall that anyone at APA contacted him about these policy issues at this time. Sammons interview (June 23, 2015).

[972] *Id.*

to think about how…perhaps on the IOM end."[973] Mumford then added in an email just to Behnke: "[B]tw, I'm not copying the big brass because they seem a little impulsive in their use of email and we'll never get anything done." Behnke responded, "good idea. very good idea."[974]

Later in January, Kelly forwarded a letter on behalf of Behnke and APA to Scott Shumate as the Director of Behavioral Science at CIFA.[975] Noting his understanding that DoD Office of General Counsel "may be reviewing or drafting a policy on the involvement of mental health professionals in interrogation settings," Behnke's letter said that APA was "particularly interested in ethical issues" on this topic and offered "the expertise of our disciplinary association as a resource to DoD throughout this process."[976]

2. *Involvement of Russ Newman and Morgan Banks*

Meanwhile, Russ Newman continued to be involved in the task force development process through his connection with one of the key psychologists in DoD, Morgan Banks, who was the Army's Command Psychologist and Chief of the Psychological Applications Directorate

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[973] *Id.* (ellipsis in original). Mumford told Sidley that the CIFA contact he referenced may have been Kirk Kennedy, and that the Pentagon contact may have been Janice Laurence, then-Director of Research and Analysis at DoD (Email from Mumford to Sidley, June 18, 2015). The OSTP reference was to Susan Brandon at the White House's Office of Science and Technology Policy. IOM is the Institute of Medicine, the health arm of the National Academy of Sciences. *See* Institute of Medicine (www.iom.edu). Kelly was building a relationship between APA and CIFA at this time through her developing relationship with Shumate and (to a lesser extent) Kennedy, who she had met while he was working at the CIA with Hubbard. Among other things, APA created a fellowship position at CIFA, and Shumate and Kennedy placed Kelly on an advisory committee to advise CIFA on overall strategy issues. *See* APA_0024788; *APA's first Department of Defense summer fellows examine counterintelligence* , *available at* http://www.apa.org/gradpsych/2005/09/defense.aspx.; APA_0129612; APA_0129614 & APA_0129615 (CIFA Strategic Program Statement, Mission and Function Statements).

[974] APA_0023341.

[975] APA_00129743; APA_0023200. Before sending the letter, Behnke emailed Honaker on January 25 (copying Kelly and Mumford) asking for permission to sign the letter and said that Kelly and Mumford had drafted it. Honaker said "[o]kay." APA_0023187. Later that day, in a separate email exchange between Mumford and Brandon, Brandon said she hoped to visit CIFA the next day "and see what they are up to." In response, Mumford forwarded her Behnke's letter to Shumate and said "I'll fill you in on background over the phone." APA_0029349. Mumford could not recall anything significant that he passed on to Brandon other than what was set out in the letter. Mumford interview (May 18, 2015).

[976] APA_0023200. The day before on January 24, in response to Norman Anderson's regular written report to the Council of Representatives regarding the activities of APA staff, which included a short summary of the October 2004 meeting that Mumford and Kelly and had with Shumate and Kennedy at CIFA "to discuss possible areas of collaboration," Council member Edmund Nightingale emailed Anderson to ask "what relationship there is, if any, between" this CIFA interaction and the issue recently raised by a Council member about "psychologists being involved in guiding interrogations at Abu [Ghraib]." Anderson told Nightingale he would check with Mumford and copied him on the response. Mumford wrote a draft response and forwarded it to Behnke for his review. Behnke suggested reformulating the response to make it more general and to say that "ethical considerations will of course be front and center in any exploration of discussion of these issues, to the extent that ethics are relevant to the subject matter of the collaboration." APA_0023205.

in the Special Operations Command, and who helped run the Army's SERE school located in Ft. Bragg, NC. Dunivin and Banks had come to know each other because Dunivin had attended SERE training at Ft. Bragg. She had been tasked to handle the repatriation of a female U.S. soldier who had been captured in Iraq, which involved discussions and training with SERE and other psychologists at Ft. Bragg, and had dealt closely with Banks since she had been deployed to Guantanamo Bay as head of the BSCT team in November 2004. As shown by Dunivin's email exchanges during this time and confirmed by her interview with us, communication from Guantanamo Bay was difficult, which might explain why the communication from APA to Banks ran directly through Newman during this time, rather than through Dunivin.

On the morning of Monday, January 10, Newman had a conversation with Banks, who Newman described in an email to Mumford, Breckler, Behnke, Honaker, and Kelly as the "Senior Army Psychologist in Special Operations."[977] Newman told the group that he wanted to discuss his call with them. (All the witnesses said they could not remember the details of the call or the conversation about it.)

The next day, Mumford and Kelly met with Newman to discuss his conversation with Banks, who Mumford described as "his [Newman's] guy in Special Ops . . . who heads the psychology component of the . . . SERE training school." After explaining that Newman thought it would be helpful to include Banks in discussions about APA being helpful to the Army Surgeon General's Office regarding their policy development effort, Mumford explained Newman's summary of Banks's suggestion regarding security clearances for task force members:

> Russ also relayed Morgan's suggestion that we include some folks with security clearances on the Task Force so that they'll be more likely to be able to sit down with that operational community and directly convey to them what the Task Force is up to. Some names he mentioned were Joe Matarazzo, Marty Seligman, Scott Schumate [sic]. We told him about Mel Gravitz. Maybe we can chat tomorrow morning.[978]

The "directly convey" language most likely suggests that Banks may have wanted task force members who could confer with military psychologists in the field during the task force to ensure that the task force was not doing something that was inconsistent with their needs or preferences.[979]

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[977] APA_0023260.

[978] APA_0023249.

[979] In his interview with Sidley, Newman said that Banks's comments were educated by his dissatisfaction with APA at the time. Banks expressed concerns, Newman said, from people in the field who did not feel APA supported them and who could not speak about these sensitive issues to APA. Newman added that he was unaware whether Banks believed it was important for DoD to be aware of the task force's actions. Newman interview (April 29, 2015). Behnke speculated in an interview with Sidley that Banks brought up the clearance point to underscore the need to have people in the room who had first-hand experiences and could speak frankly about them. He remarked that Banks and others did not view APA favorably and may have worried that the organization might undercut operational psychologists during wartime. Behnke

Meanwhile, by January 13, Newman had communicated that he wanted to see the draft task force proposal changed to use a different word other than "coercive" a point that Banks would make in later emails, strongly suggesting that Newman was proposing a different word in light of his conversation with Banks. Specifically, on January 13 Behnke emailed the key staff group (Honaker, Newman, Farberman, Gilfoyle, Breckler, Mumford and Kelly) attaching the draft task force proposal and asking for any suggested changes. Behnke noted that Mumford had mentioned that Newman "had an alternative suggestion for the word 'coercive' and asked Newman for a comment on this.[980] In response, Newman told Behnke that he may wish to mention "effectiveness" in the proposal as well.[981] Newman explained to Sidley that this addition reflected the "collateral science practice issue" about whether a psychological intervention was measured by efficacy or effectiveness.[982] The difference between the version brought to the December 2004 Board meeting and the official version submitted at the February 2005 Board meeting was that "coercive techniques" was replaced with the innocuous term "various investigative techniques" in a manner that (as Gilfoyle's prior email foreshadowed) avoided the difficult question regarding what ethical position to take if "coercive techniques were found to be effective."[983] Newman told Sidley that he did not recall the conversations then about removing the word "coercive," but he commented that neither Banks nor his wife Dunivin would have liked it since it suggested from the outset that interrogations per se were problematic.[984]

On February 1, Kelly met with Col. Bruce Crow, then-chief psychology consultant in the Army Surgeon General's office and sent a summary of her meeting to Newman, Behnke, Mumford, and Breckler, along with a follow up email to Crow.[985] At the meeting with Kelly, Crow confirmed that "an internal group within the Army Surgeon General's office is currently reviewing the issue of mental health professional and interrogations and putting together some sort of report." Crow told Kelly that he did not know who was in this internal group and did not know its time frame. Crow reported that "the team has talked extensively with 'a psychologist"

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interview (May 22, 2015). Banks shared with Sidley a letter he wrote in 2009 — when he rejoined APA — that stated Banks originally resigned from APA in 1996 due to APA's then-ban on military advertising in APA publications and at APA events (on file with Sidley).

[980] APA_0049918.

[981] *Id.*

[982] Newman interview (June 15, 2015).

[983] *Compare* December 2004 draft proposal, APA_0058508 ("What does current research tell us about the efficacy of coercive techniques? How would our ethics be affected, if at all, were coercive techniques found to be effective?") *with* February 2005 final proposal, APA_0025740 ("What does current research tell us about the efficacy and effectiveness of various investigative techniques? Would the efficacy and effectiveness of various investigative techniques, if demonstrated, affect our ethics?). The issue of effectiveness with abusive techniques arose again during the Board's approval of the PENS report on July 1, 2005, as discussed later in this section.

[984] Newman interview (June 15, 2015).

[985] APA_0129089.

involved with the interrogation groups as part of its information-gathering process" and that "a variety of groups across DoD are looking at the issue but isn't sure if or how any are coordinating/collaborating." Crow told Kelly that "input from disciplinary associations (MD, psychology, social work) would be very important to their process." He said he was interested that APA was forming a task force on the issue and offered to serve as an observer. They also discussed setting up a separate meeting with Morgan Banks.[986]

Newman responded to Kelly's email that he was going to meet Banks the week of February 7.[987] The two likely met for dinner on February 9.[988]

Notably, Banks received a copy of the draft task force proposal (formatted the same way the Board ultimately received it, as an agenda item) before the Board did during its February 16 – 17 meetings and emailed written comments on the draft to someone at APA. Although there is uncertainty about how Banks received the document and who he sent it to, our belief based on all the evidence is that Newman provided Banks with the draft and Banks sent back to Newman an annotated copy that included his comments.[989] Newman told Sidley that he and Banks spoke

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[986] *Id; see also* APA_0129866 (email between Crow and Kelly). As a follow up to the meeting, Kelly emailed Crow the "draft version" of the proposed task force that APA Board would be considering at its February 16 – 17 meeting and asked him to "keep it close" and said that "w[e] would love to meet with you to talk about these issues and ways to coordinate/collaborate." Crow response pointed out that APA task force's effort should "serve national security". *Id.* ("We welcome APA assistance in establishing guidelines that serve national security while preserving professional integrity.") In addition, following up on Kelly's comment in her email that she and Behnke were meeting "informally" with Senate Armed Services Committee ("SASC") staffers the next week to brief them on the topic, Crow asked Kelly to deliver a positive message about DoD to the SASC: "The message I would like the SASC to hear is DoD psychologists are deeply committed to the highest standards of clinical practice and professional ethics." *Id.* According to a draft note from Behnke about the meeting, Behnke and Kelly "emphasized that APA would very much want to see psychology included in" DoD's ongoing discussions about the proper role in interrogations for mental health professionals. APA_0129061. Kelly exchanged messages with Crow about these issues in May and August 2005 as well. APA_0128753. Crow, along with his counterpoints from the Navy (Morgan Sammons, in particular), Air Force, and the Public Health Service met periodically from 2005 at APA to discuss issues related to, according to Sammons, recruitment, deployment, and networking across the various DoD branches. Crow interview (June 22, 2015); Sammons interview (June 23, 2005).

[987] APA_0129089.

[988] APA_0129054. Newman made reference to meeting Banks the night before on February 9.

[989] *See* Banks comments on agenda item (provided to Sidley on March 1, 2015). We received the draft with Banks's comments from Banks as a digital file, and the metadata dates on the document indicate that it was last saved on February 13, three days before the beginning of the Board meeting. Further evidence that the document predated the February 2005 Board meeting is found in copies of the Board agenda item given to PENS Task Force members in April 2005. The copy from April omits two more-sensitive items found in Banks's copy of the agenda — (1) the first page, where Banks's copy stated that the money allocated to for the task force would come from the 2005 discretionary fund, and (2) on the second page, where Banks's copy noted that an exhibit with potential task force member names would be included with the agenda item.

over the telephone and met for dinner during this time period, so it was a reasonable assumption that he may have served as a "conduit" for collecting Banks's comments and sending them to someone like Behnke.[990]

Banks's comments on the task force proposal made points that are consistent with the ultimate direction of the PENS Task Force. First, he strongly implied that the "do no harm" principle should not be applied broadly by the task force, since (1) it "may impact on a large number of psychologists, for example, those who work for police departments, or for the prison system," and (2) "any psychologist who assists in making soldiers more effective, increases the likelihood of causing someone harm." Second, he implied that it would be very difficult to discuss or draw any conclusion about the ethics of specific interrogation techniques since "[t]he tactics, techniques, and procedures (an Army term) may be classified." Third, he said that the task force "would be a great opportunity for APA to support classified research" on the topic of the "efficacy and effectiveness of various investigative techniques" (a phraseology paralleled in the PENS report in recommending future research). Fourth, he revealed that he had provided APA person who was receiving the comments (apparently Newman) "the chapter [w]e wrote", which covered issues of informed consent in interrogations.[991]

Banks's chapter comment is clearly a reference to the draft document entitled "Providing Psychological Support for Interrogations" ("PPSI") (and which was formatted at the time as two "chapters") that Banks and Dunivin had drafted and which Banks provided to Behnke in advance of the PENS Task Force meeting. The PPSI was distributed at the task force meeting and eventually became (almost verbatim) the interrogation policy of the Army Medical Command in 2006. The key point in this draft document was that a psychologist's role in interrogations must be analyzed using a four-word formula — "safe, legal, ethical and effective" — with the analysis under each word discussed in some fashion. After Banks provided this formula to Behnke, and Behnke wrote language for task force chair Olivia Moorehead-Slaughter to recommend the formula to the task force (discussed more below), it became the key formula for the PENS Task Force and report.

Thus, even before the Board had voted to actually form the PENS Task Force, Banks was communicating to APA (apparently through Newman) some of the key points regarding how he

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[990] Newman interview (June 15, 2015). The conclusion that Banks was corresponding with Newman about the document is the most logical one, since (1) Newman met with Banks the week of February 7, (2) Banks's comments on the document are clearly to someone at APA, and (3) at that time it appears that Newman was the person at APA that Banks was closest with. In addition, since Newman's APA emails are no longer within APA's possession (as Newman left APA in 2007), this provides an explanation as to why we did not find the document within APA's email files (although it also may have been deleted from another current employee's emails). There is also no record of Behnke, Mumford, or Kelly sending the document to Banks. And Dunivin indicated to Sidley that she did not recall ever seeing a task force proposal in February 2005. Dunivin interview, May 27, 2005. Banks said he could not remember who he received the document from or who he sent it to, and Newman said he could not specifically the document. Banks, now retired, said he no longer had a record of the original email. Email from Banks to Sidley (May 26, 2015). A FOIA request from Sidley to DoD for related emails or documents is pending; no response has been received by DoD as of the writing of this report.

[991] Banks comments on agenda item (on file with Sidley).

and DoD would want to see the task force address these issues. Our investigation found no other instance of someone outside APA — either outside DoD, outside the government, from within the pro-human-rights community, or otherwise — being asked to weigh in on the task force proposal in advance of the Board meeting.

3. Board approval of task force

The APA Board met on February 16 and 17 and voted to approve the creation of a "Task Force to Explore the Ethical Aspects of Psychologists' Involvement and the Use of Psychology in National Security-Related Investigations" and to allocate $12,500 for it.[992] A list of suggested task force member names were distributed during the Board's Executive Session. Behnke suggested that the potential names be distributed in a confidential "Executive Session" "[g]iven the political aspect of choosing" task force members and the "possibility of provoking strong feelings from people who feel slighted or left out."[993]

The names included in the Executive Session handout were the same as those on the January 18 list, now without any asterisked names, plus one additional name — David Shapiro, a Professor of Psychology at New York University.[994] Shapiro was added to the list after he wrote a letter regarding his disappointment at APA's responses to the abuses at Guantanamo Bay, which a Council representative, Trish Crawford, forwarded to the Council listserv on the evening of January 18 as discussed above.[995] Crawford later suggested to Levant that Shapiro would make a good addition to his task force.[996]

Despite this list of names and APA staff's recommendations regarding its top 10 names, the Board did not select the task force members at this meeting but instead decided to issue a broader call for nominations. The Board minutes note that Levant would send a call for nominations to Council. On February 17, communications were sent out to the Council of Representatives, divisions, boards and committees announcing the formation of the task force and that nominations would be accepted. Neither Levant, Behnke, nor other Board members during this time could recall the specific discussions about calling for nominations after the meeting. Divisions, APA committees, state psychological associations, and individuals all submitted nominees in the weeks ahead.

We can speculate on three possible explanations for the shift to a full call for nominations after the Board meeting. One possibility is that Koocher or Levant may have reviewed the list anew and realized that more names were needed during the Executive Session. Another possibility is that other Board members during the meeting raised concerns about having a broader list of nominations before finalizing the task force. A third, perhaps more underhanded, possibility is that Newman's (and later Dunivin's) involvement with the Board meeting led to an

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[992] Approved Minutes of the Board (Feb. 16, 2005 & Feb. 17, 2005) (on file with Sidley).

[993] APA_0034126.

[994] Executive Session Handout (Feb. 16, 2005 & Feb. 17, 2005) (on file with Sidley).

[995] APA_0034381.

[996] APA_0844673.

open call of names. As discussed, Newman likely received Banks's thoughts on the task force board item ahead of the Board meeting. Further, Newman told Sidley that he was concerned the task force would be staffed with people who did not have the appropriate knowledge of the issues to accurately comment on them.[997] Newman was also in contact with APA staff ahead of the Board meeting and, as a member of the Executive Management Group, participated in the Board meeting discussions about the task force issue. If Newman saw the list of initial task force individuals and was concerned about their competencies in this area, then, it is possible he would have informed Board members — either during their meetings or in private — that a wider call for nominations was needed. He could have then informed Dunivin of his concerns who, one week later, conveyed her desire to have Banks on the task force (discussed more below), which propelled the task force to take a different complexion than what Behnke, Mumford, and Kelly had originally planned.

The evening of February 17, Behnke sent Levant an email confirming the details of what had been discussed at the Board meeting regarding next steps:

> The Board liasons [sic] are Gerry Koocher and Barry Anton. The Task Force will be staffed by the Ethics Office and the Science Directorate. Nominations are being sent to me, and the Ethics Office (Rhea Jacobson) is updating the list daily. The final day for nominations is March 1. We will have a conference call (tentatively scheduled for Tuesday, March 9), at which time you will choose the individuals for the Task Force. Before then we will have provided you a complete list of individual's names and biographical sketches for your review. We will also have drafted a letter that will be sent to the individuals whom you choose, that will provide possible meeting dates and other relevant information (e.g., the person will need to be able to attend and able to vote in order to be on the task force). My guess is that we will have over 200 names for your consideration.[998]

Levant responded solely to Behnke's prediction of how many nominations would come in: "Wow! 200 names … that is amazing."[999]

D. February 17 – March 18, 2005: Influence of Debra Dunivin; Task Force Finalized

1. Some early communications about task force nominees

Once the call for nominations was sent out on February 17, a variety of nominations and communications came in to APA in various ways. Notable examples include an exchange with Robert Kinscherff—who was a close friend of Behnke's, knew Robert Fein from their work on forensic psychology issues in Boston, and was chair of APA's Committee on Legal Issues ("COLI") and former APA Ethics Committee chair—in which he commented swiftly and positively on three eventual government members of the task force.

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[997] Newman interview (Apr. 29, 2015).

[998] APA_0037359.

[999] *Id.* (ellipsis in original).

Kinscherff was responding to a post on the COLI listserv by APA the afternoon of February 17. There, a psychologist who worked at the U.S. Secret Service's National Threat Assessment Center—and therefore had worked closely with Robert Fein—posted on the listserv that Scott Shumate "would be very well-suited for this." Fein worked with Shumate at CIFA in DoD. The evening of February 17, Kinscherff posted on the listserv in response, stating, "I would agree heartily with the nominations of Scott Shumate, Robert Fein, and Charles Ewing," and added that Michael Gelles would be a good nominee. Later that evening. Behnke emailed Kinscherff a short thank you note using the lingo they often used with each other in emails.[1000] Although the behind-the-scenes communications are not made explicit in this email exchange, and Behnke, Fein, and Kinscherff did not recall anything about this exchange from 10 years ago, it strongly suggests that Behnke, Kinscherff, and Fein had coordinated this exchange in some way to ensure that Shumate, Fein, and Gelles would be nominated with prominent recommenders, especially in light of the way the detailed and sophisticated behind-the-scenes manner we observed Behnke typically operating. Behnke also emailed Fein about two weeks later, noting that "[t]hese appointments are very political."[1001]

Also on February 17, former APA President Ronald Fox ("Fox") emailed Levant to offer his assistance: "If it helps, I am willing to be an informal advisor behind the scenes as long as I do not leave my fingerprints on it, so to speak."[1002] Levant forwarded the email to Behnke, who responded to Levant that "[a]t your suggestion, I did speak with Ron [Fox] about the task [force] several weeks ago. I will certainly keep him 'in the loop,' although without requiring his fingerprints." Levant responded, "Smile… Thanks."[1003] Behnke and Fox did not remember this communication, and neither thought that Fox had had any involvement in the task force, or that the two of them had any additional communications following this apparent conversation referenced in the email.[1004] Levant told Sidley in an interview that Fox's comment may have been the result of his advisory relationship with the CIA at the time, as described earlier in this report.[1005] On the one hand, our investigation found no evidence that Fox was having any dialogue with Behnke or anyone else about the task force, or that he was being used as a conduit

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[1000] APA_0046817 ("You are indeed the dudissimus."). For more on Michelle Keeney, the psychologist who initially posted the message that Fein responded to, see *Secrets behind the service*, Monitor on Psychology (Sept. 2008), *available at* http://www.apa.org/monitor/2008/09/secrets.aspx.

[1001] APA_0035172. Fein emailed Behnke on March 1 stating that Shumate had encouraged Fein to serve on the task force; Fein therefore wanted Behnke's advice as to whether to put his name in and how to do so. Behnke wrote that "[t]hese appointments are very political" and there were many nominees, but "there are no more than a handful of people in the country with your experience, and I will be very happy to speak with Ron Levant personally on your behalf." Fein asked in response if he should send a note to Ron whom he had known since they were in graduate school together, or to Koocher. In response, Behnke asked if he could speak with Fein by phone about it. *Id.* Neither Behnke nor Fein recalled the conversation. Fein's nomination form states that he was nominated by himself and by Kinscherff and was recommended by COLI "with the following comment: 'He has an ongoing contract with a defense agency and provides consultation in this area.'" HC00085941.

[1002] APA_0037360.

[1003] *Id.* (ellipsis in original)

[1004] Fox interview (June 11, 2015); Behnke interview (May 29, 2015).

[1005] Levant interview (May 13, 2015).

by the CIA or others to influence the task force. On the other hand, given the secretive nature of the CIA and its activities, it is not a possibility that can be ruled out.

2. Influence of Debra Dunivin

The evidence shows that the most meaningful and influential communication regarding the composition of the task force came from Debra Dunivin, then chief Army BSCT psychologist at Guantanamo Bay, in several communications starting the day after the February Board meeting and running to the date of the selection committee meeting on March 18.

Dunivin was a member of APA's Council of Representatives at the time, and the Council's February meeting was February 18 – 20, immediately after the two-day Board meeting. Dunivin told Sidley that she returned to Washington from Guantanamo Bay to attend the Council meeting. As recounted in a subsequent email exchange and in Dunivin's interview with Sidley, Dunivin spoke with Levant and Behnke during the Council meeting about the newly-formed task force and communicated strongly to them that it was essential that they include certain military and DoD officials, so that the task force could be properly informed by the psychologists who correctly understood the issues and challenges as a result of their work in the field for the government. Dunivin said she told Levant in particular that it was essential for APA to have a proper outcome from the task force, because ethical guidance for psychologists who supported interrogations at Guantanamo Bay and elsewhere was badly needed, although it needed to be the right kind of guidance.[1006]

Dunivin told Sidley that her view was that APA should indicate that it was ethical for psychologists to participate in interrogation support within certain guidelines. But she commentated that APA should not attempt to define with any specificity what the military should or should not do regarding interrogation techniques, since APA did not have the expertise to understand whether certain techniques would elicit accurate information. Dunivin said she was against harsh and abusive interrogation techniques, and that the Army had done a good job of correcting prior mistakes. Hence by 2005, she and other psychologists were doing a good job, Dunivin claimed, of preventing interrogators from engaging in such techniques. As to what ethical guidelines or boundaries should be placed on psychologists from APA, her view was that the "safe, legal, ethical and effective" formula she had created with Banks was a strong and sufficient approach. Dunivin said that her commander and people in the intelligence and detention community told her that psychological expertise aided their efforts. It was important, therefore, to have professional associations support these psychologists' roles to alleviate the ability of a psychologist losing their license for being in these settings at all, she said.[1007]

Dunivin said that one of the key points she communicated to Levant in this regard was that it was essential to include Morgan Banks on the task force (among others), so that the right kind of knowledge and expertise could be included on the task force. She recalled that she was likely quite insistent with Levant and may have "gotten in [Levant's] face" about the issue.[1008]

[1006] Dunivin interview (May 20, 2015).

[1007] *Id.*

[1008] Dunivin interview (May 27, 2005).

Dunivin sent Behnke and Levant an enthusiastic follow up email on February 24, copying Newman and Banks. She said she wanted to "underscore how strongly I feel that you must include Colonel Morgan Banks on this Task Force. He's the person with the absolute most experience in this area." Dunivin also said she agreed with the comment Levant had made to her that "this is likely the most important thing that APA will do this year." Dunivin offered to assist in any way she could.[1009]

On March 2, Dunivin (who was back at Guantanamo Bay) emailed Behnke saying she wanted to talk with him and had tried unsuccessfully to reach him by calling APA.[1010] As they emailed about how to connect by phone, Dunivin said that she "wanted to talk a bit about the composition of the Task Force before it's finalized." Behnke responded on March 15 that "[w]e are getting down to the wire" and suggested a call that evening or the next day. Dunivin responded right away and asked if Behnke was available then, and they appear to have connected by phone that morning and to have discussed her sending in a written suggestion about who should be on the task force. (Both said they do not remember the call.) The afternoon of March 17 she asked if she could send him "my note" the next morning and said it was "almost written." Knowing that the selection committee meeting was the next day, Behnke responded that it would be "ideal" if Dunivin could submit that evening, or otherwise as early as possible the next morning. Later that afternoon, Dunivin attached a letter to an email to Behnke, and wrote in her email, "[h]ope this accomplishes its purpose….REALLY appreciate your help with this."[1011]

The one-full-page, single-spaced letter from Dunivin listed all six of the government officials who were initially selected by the selection committee.[1012] Her letter was (based on the evidence) the only document with nominee names distributed at the selection committee meeting

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[1009] APA_0046640. Behnke forwarded Dunivin's email to Kelly, who responded that Banks was "supposed to be great" and that Newman knew him. *Id*. Behnke responded, "Okay, good — we'll definitely want to have our 'top ten' going into the conference call." *Id.* This was apparently a reference to the originally-scheduled March 9 conference call to discuss nominees. We found no evidence that such a call occurred, and believe that instead, the only discussion with Levant, Koocher and Anton about task force nominees occurred on March 18 in person. On March 11, Behnke emailed Anton and Koocher, copying Levant, stating that "[w]e have just completed compiling the list of nominees for the Task Force, and have 110 names." APA_0035852. Behnke said Levant wanted to meet the next weekend when they would be together for APA "Consolidated" meetings of boards and committees, and this is what occurred (on Friday, March 18).

[1010] APA_0048446. Also around this time, on March 1, Col. Larry James ("James") emailed Levant about his interest and concerns about serving on the task force. In particular, James noted a "fear of pre-conceived biases of some who may be anti-military." Levant forwarded the message to Behnke, who stated he would contact James about his concerns. Behnke wrote Levant, "We will strive to be sensitive to the concerns of our colleagues in the military, and when assembling the task force a top priority will be to ensure that we have individuals who are informed about the issues, and bring an open mind to the complexity and challenge of thinking through the ethical aspects of this work. We are aware of the strong feeling that media accounts have elicited, but as a scientific profession our first obligation is to begin with the data." APA_0036276.

[1011] APA_0048446 (ellipsis and capitalization in original).

[1012] One of the six, Thomas Williams, was never actually contacted by the selection committee but had his spot taken by a different military psychologist, Bryce Lefever, as shown by Behnke's handwritten notes.

other than the full packet of all the nominees, which included information they or their recommenders had submitted and a nominee's APA membership information if applicable. (Behnke's hard-copy file included six copies of Dunivin's letter, one of which had a small amount of notes from Behnke on it, and Behnke and Koocher recalled the document being passed out at the meeting.) The document, and Dunivin's communications with Behnke, Levant, and Koocher (see below) are, thus, likely the most influential communications on the task force at its selection of task force members that the selection committee received. After an introductory sentence, Dunivin's letter to Behnke began:

> We are agreed that composition of the Task Force is critical to accomplishing its mission. I am concerned that in our efforts to be broad-based within psychology, we will miss some critical areas of expertise in the actual field that is the focus of the TF. . . . I am suggesting that the following people MUST be included in order to ensure that we: 1.) cover the various categories of expertise within the field of psychology related to national security (i.e., interrogation support, profiling, counterintelligence, policy development) and 2.) include some folks who provide a bridging or cross-over function between the various components — those known and respected within APA governance, with experience working in these unique areas of professional practice, familiar with the ethics issues inherent in this work.[1013]

She then listed nine names (including herself) along with descriptions of why they were important and how important they were. The names were:

- Morgan Banks ("the [U.S. Army Special Operations] Command psychologist with policy oversight for behavioral science consultation team support for all Special Operations Command in support of national security issues. Decades of experience in this area. Absolutely essential to the work of the TF.")*[task force member]*
- Thomas Williams ("Essential") [initially listed as the tenth member of the task force in Behnke's notes from the March 18 selection committee, but not ultimately chosen and replaced by Bryce Lefever]
- Scott Shumate ("Essential") *[task force member]*
- Michael Gelles ("Essential") *[task force member]*
- Kathleen Civiello ("Need the NSA perspective.")
- Richard Ault ("Need FBI perspective.")
- Joseph Matarazzo ("tremendous bridging function. Others who could function in this role include Mel Gravitz and Charlie Speilberger.")
- Larry James and herself [James was a task force member]

Separately, Dunivin had been communicating with Koocher about Banks, and this communication revealed an eventual concern about the fact that Banks was not an APA member. In an email to Koocher that apparently was sent around the time of the February 18 – 20 Council meeting, Dunivin wrote, "I know folks are looking to add military members. The person who

[1013] APA_0035179; APA_035180.

knows most about this topic is COL Morgan Banks . . . . Those Special Ops folks have been involved in this work for twenty years. . . . This is something most folks don't appreciate. Can you ensure that Morgan Banks is one of the task force members?"[1014]

In a follow up email to Dunivin on March 15, Koocher noted that Banks was not an APA member, and asked if he was prepared to join APA.[1015] Dunivin responded later that day that Banks was probably not prepared to join APA, but pushed Koocher to support her and military psychologists by including him on the task force:

> I think this matter goes to the very heart of a purpose for establishing the TF - to answer the question if APA is providing sufficient support to psychologists on the front line of this area of practice. The answer has to be 'no.' I, for one, want that to change. Inclusion of such folks begins here. With the TF. And moves on from there. Can you support me on this?[1016]

Koocher responded later that day: "It is exceptionally hard to argue that a person not accountable to APA ethics code should be on a task force discussing ethics in psychology. Sadly, that issue goes to the very [heart] of the matter."[1017]

On the morning of March 18, the day of the selection committee meeting, Dunivin reached out to Behnke for his help on the issue: "Heads up on another concern that looms on the horizon. That is the issue of APA membership." Without mentioning Banks, Dunivin said that she had been corresponding with Koocher on the issue, and while she typically agreed that task forces should only include APA members, "[i]n this instance I believe there are some reasons to consider it differently. More later."[1018] Behnke emailed her that afternoon asking for a phone call, but it is not clear if they connected by phone.[1019] But late that afternoon, Dunivin emailed Koocher to thank him for his conversation (suggesting Dunivin and Koocher had spoken by phone); her email set out more detail about Banks's background in an effort to explain again why Banks needed to be on the task force, in her view.[1020]

Subsequent emails show that Koocher changed his mind and agreed that Banks should be on the task force. He told Sidley that the letter from Dunivin that was passed out at the meeting substantially influenced him.[1021] Specifically, Koocher told Sidley that he was eventually convinced that Banks's intimate knowledge of SERE training and other interrogation issues

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[1014] This content of this email, sans the date, was copied onto Banks's nomination sheet within the packet of nominees compiled by Behnke and APA staff. HC00008594 at 14.

[1015] APA_0035139.

[1016] *Id.*

[1017] APA_0035139.

[1018] APA_0048446.

[1019] *Id.*

[1020] APA_0035139.

[1021] Koocher interviews (Mar. 19, 2015 & June 12, 2015).

outweighed his demand that Banks be an APA member.[1022] The day after the selection committee meeting, Behnke emailed Levant, Koocher, Anton, and Kelly and explained that he had spoken with Banks, asked him to be on the task force, and had discussed the issue of APA membership. Behnke's email did not indicate that Banks would be willing to become an APA member but said that Banks had indicated that he "'certainly' adheres to the APA Ethics Code and will continue to do so." Koocher responded that Behnke should tell Banks that "he was the unanimous first choice of the selection committee . . . that we really want him on board, [and] . . . that the president-elect [Koocher] has offered to pay his dues and that he is welcome to resign from APA after serving on the committee if we have not won back his confidence as an association friendly to our members in the armed services."[1023] Banks did not rejoin APA until 2009.

3. Final selection of task force members

On March 18, Behnke, Koocher, Levant, and Anton met to finalize the task force names.[1024] A total of 111 nominees were compiled for review at the meeting.[1025] Of these 111 names, about 70% (77 nominees) had little or no connection to the military/government (either in active duty or as a consultant), while the remaining 30% (34 nominees) did.[1026] However, 60% of the 10 task force selections were military/government-affiliated members and 40% were civilians with no connection to the military/government, as listed below:

DoD members:

- Morgan Banks: Command Psychologist and Chief of the Psychological Applications Directorate of the U.S. Army Special Operations Command ("USASOC")
- Robert Fein: Forensic psychologist and consultant to the DoD Counterintelligence Field Activity ("CIFA")
- Michael Gelles: Chief Psychologist for Naval Criminal Investigative Service ("NCIS")
- Larry James: Chief of Department of Psychology at Tripler Army Medical Center

[1022] Koocher interview (June 15, 2015).

[1023] APA_0035131. Koocher later clarified to Sidley that Banks might not have been a unanimous first choice since Gelles and Fein were his top choices. Koocher interview (June 12, 2015).

[1024] APA_0035177. The email mentioned that Kelly might be included in part of the selection discussions, but Kelly stated that she was not part of those conversations. Kelly interview (Apr. 24, 2015). In an interview with Anton, he thought that Honaker was also in the room, but Honaker explained to Sidley that he had no direct role in the PENS process. Koocher told Sidley that Behnke was the only staff member in the meeting. Koocher interview (June 12, 2015).

[1025] HC00008594. There are 110 names listed at the beginning of the document, but one additional name is included in the binder, Joy Rice, who was omitted at the beginning.

[1026] These numbers were compiled by examining the biographical information included in the nomination binder, *See* HC00008594. In some cases, biographical information was incomplete or missing. In those cases, a nominee was denoted as non-DoD unless indicated otherwise.

- Bryce Lefever: Product Line Leader at the Naval Medical Center; was Command Psychologist of the Naval Special Warfare Development Group during September 11 and advised on missions in Afghanistan
- Scott Shumate: Director of Behavioral Science at CIFA

Non-DoD members:

- Olivia Moorehead-Slaughter (chair): Senior Faculty Consultant for the Center for Multicultural Training Program; Vice-Chair of APA Ethics Committee
- Jean Maria Arrigo: Independent social psychologist; oral historian work focus on intelligence and military community
- Nina Thomas: Clinical psychologist and faculty member at New York University; research in ethnic conflict, terrorism, and genocide
- Michael Wessells: Professor of Psychology at Randolph-Macon College and Columbia University; research and experience in war zones and child protection[1027]

Behnke's "PENS" hard-copy file contained two sets of handwritten notes on task force selections, one set that likely arose before and one set that appears to come, at least in part, from the March 18 meeting.[1028] The sets of notes appear to show listings of individuals who may fit into certain categories for the task force. For example, the earlier set of notes lists the following groupings: Ethics, Operations, Research/Science, International, and Peace.[1029] The latter set of notes lists the following groupings: Social Psychologists, Military, Division 48, JD/Forensic, Trauma/Effects, and International.[1030]

The earlier set of notes first lists five individuals from the military and DoD (James, Gelles, Schumate [sic], Banks, and Williams) with a bracket around them and the words "19/operations", a reference to Division 19 (military psychology) and the fact that these were military or Defense Department operational psychologists. It then lists a name from "Science" (Matarazzo), one from "international" (Wessells), and two unnamed people from "48" (Division 48, Peace Psychology), with one spot open.

The latter set of notes, which Behnke and Koocher thought came from the March 18 meeting, includes a numbering of the task force members from one through ten, and inserts a dividing line between the top half of the list, who are DoD members, and the bottom half of the list. Numbers 6 through 9 are non-DoD members.[1031] However, number 10 is also a DoD member, Bryce Lefever. His name appears next to Thomas Williams ("Williams"), whose name

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[1027] The full biographical statements each member provided for the PENS Task Force are available at https://www.clarku.edu/peacepsychology/tfpens.html.

[1028] HC00008982; HC00008985. Document HC00008982 is likely the earlier set of notes since not all names of the final task force are listed on this set. Document HC00008985, by contrast, contains the names of all final members (along with Tom Williams).[+]

[1029] HC00008982.[+]

[1030] HC00008985.

[1031] *Id.*

is crossed out. It is probable, then, that the first nine names on the list are intentionally split into two groups (DoD vs. non-DoD), with the order within those two groups reflecting the selection committee's order of preference. But the inclusion of a military member (Williams, then Lefever) as the tenth members, suggests that after deciding on nine members—and faced with a decision about whether to choose a fifth non-DoD member or a sixth DoD member—the selection committee intentionally chose the latter approach.

The 10 task force members are listed as follows in Behnke's latter set of handwritten notes:

- Morgan Banks
- Robert Fein
- Larry James
- Michael Gelles
- Scott Shumate
- Michael Wessells
- Jean Maria Arrigo
- Nina Thomas
- Olivia Moorehead-Slaughter
- Bryce Lefever[1032]

It is unclear from any of the notes, emails, and interviews why Tom Williams's name was crossed out and replaced by Lefever. Williams was a top-ten choice by Behnke and the Science Directorate in mid-January 2005, Dunivin endorsed him, and he was Division 19's top choice.[1033] There is also no indication from the emails Sidley collected that Williams was ever offered a position on the task force and declined. Williams confirmed with Sidley that no one had reached out to him about the PENS Task Force after he had submitted his nomination.[1034] It is possible, however, that Behnke may have wanted an active duty Navy representative on the task force. Morgan Sammons, Specialty Leader for Navy Clinical Psychology at the time, originally nominated Lefever. He recalled that Behnke and him had a conversation, likely after the February 2005 Council meeting, where Behnke inquired whether Sammons had any nominees for the task force in mind. Sammons told him that he would nominate Lefever.[1035] Sammons later spoke with Lefever and, according to Lefever, told him that, if Lefever was

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[1032] *Id.*

[1033] APA_0023697; APA_0023695.

[1034] Williams interview (June 8, 2015). In an email to Sidley, Koocher speculated why Lefever and other DoD members were ultimately chosen: As I mentioned previously, we were trying to get broad representation. We very much wanted Gelles because of his status as former military (NCIS) officer who publically criticized some interrogation practices. We wanted Larry James because he'd gone into Abu Ghraib on a "cleanup" mission after publicity on bad behavior by MPs and he'd been outspoken about problems he'd witnessed. Morgan Banks was wanted because of his SERE experience. There most likely would have been some type of experience or skill Lefever was presumed to have that Williams or others mentioned by Dunivin did not. Email from Koocher to Sidley (June 13, 2015).

[1035] Sammons interview (June 23, 2015).

interested, "we'll get you on there."[1036] Lefever said he was interested, offered his nomination (with Sammons's blessing), and placed on the task force.

The latter set of Behnke's notes also includes comments about Dunivin, possibly in reference to Behnke and Dunivin's earlier conversations. The notes also state, "Balance of law, Duty, + Ethics Code."[1037] This language is pulled directly from a subheading of a draft chapter that Banks and Dunivin were working on at the time, "Providing Psychological Support for Interrogations" ("PPSI"),[1038] which (set out above) became the basis of future BSCT policy documents at the Department of Defense and from which the PENS report uses language like "safe, legal, ethical, and effective."[1039] The relevance of the PPSI is discussed further later in this section as well.

Behnke began scheduling telephone calls with the selected task force members starting later on Friday, March 18 and through the coming days. His email drafts included a telephone script he used with each task force member during their conversation.[1040] Behnke's script to members noted that names would be kept confidential for the "time being," that task force "names will be public," that task force members "must be able to" vote, and that members should raise any issues that might embarrass APA (the "ugly question" is what this refers to in Behnke's notes).[1041]

In interviews with Sidley, neither Levant, Koocher, Anton, or Behnke recalled what specific conversations occurred during the March 18 meeting that led them to ultimately choose these 10 names over other nominees, or why the tenth member chosen was a DoD member rather than a non-DoD member, even though this decision led to the much-criticized 6-4 split of the task force (6-3 if you consider that Moorehead-Slaughter was a non-voting chair of the group). Levant commented that he had a very "hands-off approach to PENS," and that he likely deferred to Behnke, Koocher, and Anton.[1042] Each offered general insights on those selected but did not recall the specific decision or conversations about each member. In their interviews (except as noted below), they offered the following statements about why each member was selected. Although in light of their caveats that they could remember little about this meeting, we do not put much weight on these statements:

- Morgan Banks ("Banks")

[1036] Lefever interview (May 3, 2015).

[1037] HC00008985.

[1038] HC00008909; HC00008914.

[1039] Dunivin's March 18 message to Koocher alluded to Banks's role in incorporating his language into past and future Army policy documents: "In fact, he espouses that in writing in the . . . manual he has developed for psychologists working in this area of practice. Further he has been instrumental in inserting this language in the Standard Operating Procedures developed at my current location, and we expect that this language will soon be implemented Army-wide as a result of his efforts." APA_0035139.

[1040] APA_0008984.

[1041] *Id.*; *See also* Behnke interview (May 22, 2015).

[1042] Levant interview (May 13, 2015).

  - As noted above, it appeared that Banks was the top selection of the group.
  - Koocher raised issues about his lack of APA membership, discussed further below.
  - Anton recalled that it was important that Banks participate because "he was the head of the whole thing" and knew about the interrogation history at the time.[1043]
- Robert Fein ("Fein")
  - Koocher described Fein as a long-time friend who had consulted with the FBI and Secret Service. He explained that Fein was selected because "he had expertise in threat assessment and 'knew the scientific data.' "[1044]
  - Behnke noted in an email response to Fein's task force nomination that "there are no more than a handful of people in the country with your experience and I will be very happy to speak with Ron Levant personally on your behalf."[1045]
- Michael Gelles ("Gelles")
  - Koocher explained that the selection group specifically selected Michael Gelles because he was an outspoken opponent to the Bush administration procedures.[1046]
- Larry James ("James")
  - Koocher stated that James was selected because he had been sent to Abu Ghraib, and Koocher "figured that if there was anybody who would know about abuses it would be Gelles and James."1047
- Bryce Lefever ("Lefever")
  - Koocher believed Lefever, along with Shumate, were selected because they were "most likely to know the naughty stuff" that was going on, even though they had not publically spoken out.[1048]
- Scott Shumate ("Shumate")
  - See Koocher's note on Shumate above.
- Olivia Moorehead-Slaughter ("Moorehead-Slaughter")
  - Anton recalled that the March 18 meeting discussed appointing a task force chair who was well-respected and neutral. He had a lot of respect for Moorehead-Slaughter. She was not the only person discussed as chair (as mentioned earlier, Behnke early on suggested Robert Kinscherff as a possible task force chair) but he recalled that her diversity was important to the selection group.[1049]
- Jean Maria Arrigo ("Arrigo")

[1043] Anton interview (May 8, 2015).

[1044] Koocher interview (Mar. 20, 2015).

[1045] APA_0035172.

[1046] Koocher interview (Mar. 20, 2015). Gelles had been a whistle-blower on abuses occurring in Guantanamo Bay related to the Mohammed Al-Qahtani interrogation.

[1047] *Id.*

[1048] *Id.*

[1049] Anton interview (May 8, 2015).

  - Koocher commented that he thought Arrigo's name sounded like she might be Latina or Asian and that he wanted to achieve ethnic diversity in the task force.[1050]
  - Behnke's latter set of notes confirm that the group thought Arrigo was Latina. For one, there is a note next to Arrigo's names that says "Latina." And there is another note that states "3 women" and "3 minorities;" James and Moorehead-Slaughter are African-American, so Arrigo was the third member they thought who was ethnically diverse.[1051]
- Nina Thomas ("Thomas")
  - Koocher believed that Thomas would be "sophisticated" about these issues because she was a former television reporter.[1052] Thomas also served on the Finance Committee with Koocher in 2004.[1053]
  - Behnke believed that Levant thought "very highly" of Thomas.[1054]
- Michael Wessells ("Wessells")
  - Behnke remarked that Merry Bullock advocated his being included in the task force early on and everyone held him in high regard throughout the selection process.[1055]

4. <u>Overall observations</u>

Several dynamics are apparent in the development of task force nominees from January through March:

- APA staff considered the civilian/military split of task force members from the start of gathering task force nominees. Although the ultimate PENS Task Force was intentionally 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.

- However, things had changed by the February 2005 Board meeting. Prior to the Board meeting, APA (apparently through Russ Newman) confidentially consulted with Banks about the language of the actual Board agenda item defining the task force proposal before the APA Board voted on it, and Banks provided written comments. At the Board meeting, at which Levant, Koocher, and Newman participated in the discussion on this item, the Board authorized the creation of the task force but decided not to accept the staff recommendations and instead to solicit nominations from APA divisions and members.

[1050] Koocher interview (Mar. 20, 2015).

[1051] HC00008985.

[1052] Koocher interview (Mar. 20, 2015).

[1053] Treasurer's Report, APA Annual Report, 2004, *available at* https://www.apa.org/pubs/info/reports/2004-treasurer-report.pdf.

[1054] Behnke interview (May 22, 2015).

[1055] *Id.*

- Almost immediately thereafter, Dunivin intervened in the process, insisting to Levant and Behnke that Banks must be included in the task force, and that the composition of the task force was "critical to accomplishing its mission." Dunivin then delivered a strongly-worded letter to Behnke the day before the March 2005 meeting of the task force selection committee (Levant, Koocher, Anton, and Behnke), in which she identified all but one of the six DoD members initially chosen for the task force. Despite the fact that the vast majority of nominations APA received for the task force were people who had no affiliation with the military or government, the ultimate breakdown was 6-3 in favor of DoD psychologists and one non-voting non-DoD chair. 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.

- 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.

- 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.

E. Task Force Members Announced and Concerns Arise: April 2005

By April 8, 2005, all 10 task force members had formally accepted a position to serve on the Presidential Task Force on Ethics and National Security ("PENS").[1056] On April 19, Behnke

[1056] APA_0024560. Wessells was the last person to accept since he was out of the country during much of this period. The task force was originally called the "Presidential Task Force to Explore the Ethical Aspects of Psychologists' Involvement and the Use of Psychology in National Security-Related Investigations." It is not clear when exactly the task force's name was ultimately shortened to the PENS Task Force. Nomination emails for the task force sometimes referred to the group as the "task force on ethics and national security," and sometimes as the task force on "national security-related investigations." Behnke's emails after the selection meeting to task force selectees referred to the "task force on ethics and national security," suggesting that the name was finalized near or during the selection meeting. Behnke also informed APA's IT Department on March 29, after being told of character limitations on creating a new listserv, that the name of the listserv was titled "Psychological Ethics and National Security," and that the full task force name was the "Presidential Task Force on Psychological Ethics and National Security." *See* APA_0048355.

emailed all task force members to inform them that APA would publicize their names to the Council and that Council members could share that information as they wished. Behnke also noted that members would receive a packet of background reading materials and that a PENS Task Force listserv was forthcoming.[1057]

Each task force member received background materials that totaled nearly 500 pages.[1058] The readings included ethical codes for other professional organizations, relevant United Nations and World Medical Association declarations, court cases, academic articles, and news reports, all of which appeared to comprehensively cover the relevant issues for the task force. Several of the materials described specific interrogation techniques that were used at the time and the controversy surrounding them, for example: (1) Bloche and Mark's articles that mentioned sensory and sleep deprivation and stress positions;[1059] (2) *Washington Times* and *Boston Globe* articles that described the conflict between NCIS and the DoD over harsh interrogation techniques (the *Washington Times* article also alluded to waterboarding) and the DoD's revised categories of approved interrogation techniques;[1060] (3) a *Lancet* article that described the abuses

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[1057] APA_0025245. Fein separately responded to Behnke on April 14, 2005 and noted that he wanted to discuss "the composition of the group." APA_0037968. The two scheduled a telephone call thereafter. Neither Fein nor Behnke could recall the substance of this exchange. Fein interview (May 11, 2015); Behnke interview (May 22, 2015).

[1058] The full set of background materials are not included in this report's appendix. Instead, the table of contents and any materials cited above are fully attached. *See* HC00005567.

[1059] Gregg Bloche & Jonathan Marks, *Doctor's Orders – Spill Your Guts*, Los Angeles. Times (Jan. 09. 2005), *available at* http://articles.latimes.com/2005/jan/09/opinion/op-brutality9; Gregg Bloche & Jonathan Marks, *When Doctors Go to War*, New England Journal of Medicine (Jan. 6, 2005), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp048346).

[1060] HC00005567, Tabs 17, 25, & 26. Outside of these background materials, the use of waterboarding was well-covered in the media. One of earliest media reports about waterboarding detainees was June 2004. A *New York Times* article from June 2004 about the 9/11 Commission Report included unnamed senior officials stating that Khalid Sheikh Mohammed was waterboarded—"a technique in which his head was pushed under water and he was made to believe that he might drown." David Johnston & Don Van Natta, Jr., *Threats and Responses: The Interrogations; Account of Plot Sets off Debate Over Credibility*, New York Times (June 17, 2004), *available at* http://www.nytimes.com/2004/06/17/world/threats-responses-interrogations-account-plot-sets-off-debate-over-credibility.html. Three days later, *Newsweek* published an article that noted the approved use of waterboarding on Abu Zubaydah in the context of John Yoo's 2002 DOJ memo on accepted interrogation techniques. *Newsweek* described the technique as "dripping water into a wet cloth over a suspect's face, which can feel like drowning." John Barry, *A Tortured Debate*, Newsweek (June 20, 2004), *available at* http://www.newsweek.com/tortured-debate-128593. By March 2005, then-CIA Director Porter Goss was questioned about waterboarding at a congressional hearing by Senator McCain. Douglas Jehl, *Questions Are Left by C.I.A. Chief on the Use of Torture*, New York Times (March 18, 2005), *available at* http://www.nytimes.com/2005/03/18/politics/questions-are-left-by-cia-chief-on-the-use-of-torture.html. In April 2005, *New York Times* columnist Bob Herbert declared that "'euphemisms like . . . waterboarding are now widely understood." Bob Herbert, *On Abu Ghraib, the Big Shots Walk*, New York Times (April 28, 2005), *available at* http://www.nytimes.com/2005/04/28/opinion/on-abu-ghraib-the-big-shots-walk.html.

at Abu Ghraib with an overview of the harsh tactics used against prisoners;[1061] (4) a transcript of an interview with Neil Lewis in which he described the FBI's concerns with the abusive methods being used at Guantanamo Bay;[1062] and (5) the Istanbul Protocol, which outlined specific torture techniques more broadly and how one could identify the signs of each.[1063]

APA publicized the task force member names within APA in at least two ways. Council was given a list of the PENS Task Force members along with their biographies over email on April 26, 2005, and APA's Science Policy Insider News, an electronic publication of the Science Directorate, released the names of the task force members in its May 20, 2005 issue.[1064] Several APA Divisions, either through their Council representatives or representatives from other Divisions, received the names of the task force members. Division 48 (Peace Psychology) posted the names and biographies of the task force members on its website on May 5, 2005.[1065] Linda Woolf, then-President of Division 48, informed Sidley that no one at APA ever asked that the Division remove this information.[1066] However, when the PENS report was released, no names of task force members were listed, apparently due to sensitivities from some of the members.[1067]

By April 27, 2005, the day after the Council received the task force member names, APA had already received two written expressions of concern over the number of DoD members on the task force. First, on the Committee for the Advancement of Professional Practice listserv, David Hess stated that the PENS Task Force members were an "interesting array of individuals" but "wondered about conflicts in interest. Some of these individuals appear to be in security positions within government."[1068] Behnke forwarded the message to Levant and noted that he would like to "nip" the conflict of interest point "in the bud." Behnke explained to Levant the importance of having a task force with "first-hand knowledge of what psychologists are actually doing; the Task Force could not fulfill its charge without a solid grasp of what roles psychologists take in national security-related activities."[1069]

Separately, Division 32 member Marsha Hammond submitted an inquiry via the "Ask the President" email address raising the same point:

[1061] HC00005567, Tab 22.

[1062] HC00005567, Tab 23.

[1063] HC00005567, Tab 36 (table of contents only).

[1064] Council listserv email (Apr. 26, 2005); SPIN listserv email (May 20, 2005).

[1065] The webpage still exists today. *See Members' Biographical Statements,* American Psychological Association Presidential Task Force on Psychological Ethics and National Security (May 5, 2005) *available at* https://www.clarku.edu/peacepsychology/tfpens.html.

[1066] Woolf interviews (Mar. 26, 2015 & Mar. 31, 2015).

[1067] APA_0040386.

[1068] APA_0844437.

[1069] *Id.*

> It's an interesting bunch of people. All appear well qualified. However, this caveat would be in order, I believe: Out of the TEN members of the committee, six are employed / associated with, per their bios, by the Armed Services. While this could be argued to be appropriate in terms of information gathering — and indeed essential, their vested interest in the outcome cannot be discarded. Moreover, they outnumber the others. It seems to me that unless the REAL agenda is to white wash the behavior of mental health specialists in the Armed Services re: torture and associated practices, APA would have chosen 4 or 5 Armed Services-related people. I'd like to think otherwise, but frankly that would be to stupidly dismiss the arm-twisting tactics of Bush's administration and what people are 'encouraged' to do in terms of what they say.[1070]

Behnke forwarded Hammond's email to Farberman, Newman, Gilfoyle, and Childress-Beatty, explaining that this was the second message that raised a conflict of interest issue regarding the composition of the PENS Task Force, and he suggested a draft response.[1071] Behnke ultimately sent Hammond a reply on May 5, 2005 that underscored the importance of having DoD members and the lack of an investigatory role for the task force. It read in part:

> [I]t is very important for this task force to include individuals who know what role psychologists are asked to assume in national security-related activities. Such information is absolutely essential for the Task Force to do [their] work . . . much in the same way a group revising the Standards for Educational and Psychologist Testing would need Division 5 and school psychologists as important contributors.
>
> You voice a concern about possible conflicts of interest. I would like to clarify that the Task Force does not have an investigatory or adjudicatory function or role. . . . Please note that according to APA Bylaws, the APA Ethics Committee is charged with conducting investigations and adjudicating ethics complaints.[1072]

Hess's and Hammond's notes were the first of many complaints lodged against APA about the composition of the PENS Task Force in the days, months, and years ahead.

II. PENS LISTSERV AND RELATED DISCUSSIONS

The PENS listserv emails spanned from April 2005 to June 2006.[1073] The description of messages and notes below highlight noteworthy correspondence leading up to the PENS Task Force meetings in late June 2005. The full set of listserv emails are appended to this report.

[1070] APA_0047793.

[1071] *Id.*

[1072] APA_0047772.

[1073] *See generally* PENS Listserv, *available at* http://s3.amazonaws.com/propublica/assets/docs/pens_listserv.pdf. There is one additional email on the PENS listserv from November 11, 2008 from PENS members Arrigo and Wessells re: the PENS process. The email was sent to multiple listservs, however, and is not a PENS-only correspondence.

A. Listserv begins: Gelles's Opening Thoughts, Behnke's Handling of Moorehead-Slaughter, Tensions between Gelles and Shumate

Moorehead-Slaughter formally accepted her position as the PENS task force chair on April 5, 2005.[1074] She had been discussed as the possible PENS Task Force chair as early as January 2005 when Kelly, Mumford, and Behnke compiled their early lists of task force candidates.[1075] In her interview with Sidley, Moorehead-Slaughter surmised that, despite her lack of national security experience, she was appointed as chair because of her ethics background (she was Vice-Chair and incoming-Chair of the Ethics Committee during that time) and her facilitation skills.[1076] Behnke commented that her and Moorehead-Slaughter had many of the same views on the task force and would often discuss them over the telephone or email as the PENS Task Force listserv and meetings proceeded.[1077]

Behnke sent out the first email on the listserv on April 22, 2005, informing the group that the listserv was "hidden" in order to provide an "extra layer of security" for task force matters.[1078]

Gelles was the first task force member who offered substantive thoughts on the listserv. An email he sent to Behnke was forwarded to the entire group on April 23, in which Gelles commented on the role of psychologists in interrogation settings in upcoming DoD policy revisions.[1079] Gelles's position here, which remained consistent through the PENS process, was that psychologists should never conduct interrogations and should, instead, consult with the interrogators only. He expanded on his thoughts on May 5, at the prompting of Moorehead-Slaughter, offering a seven-point overview of his approach.[1080] Gelles repeatedly noted the need for psychologists to "stay in your lane" and not take on roles they were not trained to do. Gelles also called for the need to separate operational consultants from health care providers and noted that the government or agency was the client, not the detainee.[1081] Much of Gelles's views were educated by his experience in law enforcement; as he told Sidley, his approach during his time at Guantanamo Bay was trying to make criminal cases that his team could bring to a United States court.[1082]

Several points of interest emanate from Gelles's opening remarks. First, Gelles and others' comments on the listserv, save for Arrigo, do not broadly question the utility of

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[1074] APA_0038313.

[1075] *See, e.g.*, APA_0023209.

[1076] Moorehead-Slaughter interview (Apr. 20, 2015).

[1077] Behnke interviews (May 22, 2015 & May 29, 2015).

[1078] PENS listserv (Apr. 22, 2005).

[1079] PENS listserv (Apr. 23, 2005).

[1080] PENS listserv (May 5, 2005).

[1081] *Id.*

[1082] Gelles interview (Apr. 15, 2005).

psychologists in interrogation settings. Instead, members discussed how best to use psychologists and who the "client" was in interrogation settings. Those who opined on the client question all stated that the government was the client.[1083] There was more differentiation with DoD members on how best to use psychologists—Gelles took an absolutist position, believing psychologists should not be the "strategic decision makers" in an interrogation,[1084] while others like Banks and James thought that psychologists could help on the strategic side depending on the circumstances.[1085]

Second, Moorehead-Slaughter's message to Gelles inquiring for additional thoughts was prompted by an email from Behnke to Moorehead-Slaughter. In it, Behnke suggested to probe Gelles's thoughts further to spur discussion across the task force participants.[1086] But this message was only the first several other missives and suggestions Behnke sent Moorehead-Slaughter during PENS. In fact, Behnke drafted or outlined nearly every correspondence Moorehead-Slaughter sent over the PENS listserv, offered an outline of comments and analysis ahead of the PENS meetings, and provided her talking points after the report received criticism from inside and outside of the task force. He also drafted or reviewed nearly every message Moorehead-Slaughter sent to Koocher, Anton, or Levant about the task force outside of the listserv. Moorehead-Slaughter, in turn would dutifully send Behnke's talking points or statements with little, if any, of her own edits. On May 5, after Behnke had sent Moorehead-Slaughter a draft note on Gelles's latest remarks, she thanked Behnke and stated that "[y]our thinking and mine are along similar lines. Having your feedback/response is helpful."[1087]

Both Moorehead-Slaughter and Behnke confirmed that Behnke drafted and provided guidance to Moorehead-Slaughter during the PENS process to facilitate discussion.[1088] Moorehead-Slaughter added that it was Behnke's modus operandi in other task forces to write draft statements for others to post on listservs.[1089] Several PENS interviewees indicated that Moorehead-Slaughter acted more as a facilitator and offered little substantive thoughts on the discussions. Others opined that she appeared outside of her expertise area. 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.

A third issue Gelles's comments raised was the tensions he had with task force member Scott Shumate. After his initial email in April, Kelly separately inquired to Shumate about whether Gelles was supposed to have disclosed details of a new DoD policy already. Shumate said he should not have and that Gelles "really gets [his] goat" and that "his ego is out of

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[1083] *See, e.g*, PENS listserv at Koocher (May 6, 2005) & Banks (May 11, 2005).

[1084] PENS listserv (May 18, 2005).

[1085] *See* PENS listserv at James (May 18, 2005) & Banks (May 19, 2005).

[1086] APA_0542728.

[1087] APA_0511430 (May 4, 2005).

[1088] Moorehead-Slaughter interview (Apr. 20, 2015); Behnke interview (May 22, 2015 & May 29, 2015).

[1089] Moorehead-Slaughter interview (Apr. 20, 2015).

bounds." Notably, he alluded to an APA ethics complaint against Gelles before September 11 and implied that APA closed the case after September 11 so as not to be perceived as taking an anti-government position.[1090] He noted that Melvin Gravitz conveyed this message to APA. More about the Gelles ethics complaint is discussed in later in this report. Shumate later forwarded another exchange between Gelles and Shumate from April 28 regarding a conversation the two had about CIFA and NCIS working together, which indicated the two had a close relationship together before but had suspicions of one another now.[1091] Gelles told Sidley that Shumate was one of his best friends and of the finest operational psychologists during this time, but the two had grown apart after Shumate shifted from the CIA to CIFA.[1092] The exchanges illustrate that not all the DoD task members were as friendly with one another despite their similar experiences.

B. Banks and Others Weigh-In, Arrigo Raises Issues, Koocher–Arrigo Exchanges: May 2005

Behnke encouraged Moorehead-Slaughter to bring Banks into the discussion of organizational clients and ethical obligations on May 10.[1093] Moorehead-Slaughter did so on May 11 on the listserv, and Banks offered his thoughts.

In his first message to the group, Banks attached Army Regulation 190-8, which provides all DoD personnel guidance on the treatment of "Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees."[1094] Banks declared that the group should focus on what types of actions may be legal but unethical as part of their discussions; this was not ultimately fleshed out in the final report. Banks also quoted from a draft BSCT policy he was crafting during this time; he brought copies of this draft policy to the PENS meetings.[1095] As discussed, the draft policy was called "Providing Psychological Support for Interrogations" ("PPSI"). Banks confirmed with Sidley that he was still forming his policy positions at the time and was articulating them over the listserv.[1096] He explained that him and Dunivin first began crafting the PPSI while they were both in Guantanamo Bay in the fall of 2004 and that the draft was still new during the PENS process.[1097] Banks later distributed copies of these draft

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[1090] APA_0129871.

[1091] APA_0129869.

[1092] Gelles interview (Apr. 15, 2015).

[1093] APA_0047737.

[1094] *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Departments of the Army, the Navy, the Air Force, and the Marine Corps (Oct. 1, 1997), *available at* http://www.apd.army.mil/pdffiles/r190_8.pdf. Banks admitted that the Secretary of Defense's early declaration that the Geneva Conventions did not apply to detainees would have trumped 190-8. But by the time the PENS process had started, Banks believed that everyone at DoD agreed that 190-8 applied. He had directed his teams to follow 190-8 from the beginning of his involvement with the War on Terror after September 11. Banks interview (May 21, 2015).

[1095] PENS listserv (May 11, 2005).

[1096] Banks interview (May 21, 2015).

[1097] *Id.*

instructions during the PENS meetings and asked that it remain confidential so that the document was not construed as official Army policy at the time.[1098] Banks asserted that he spearheaded the PPSI and no one from DoD or the U.S. government pushed him to draft the document.[1099] While this may be true, the draft PPSI and Banks's views on these issues held enormous influence on subsequent policy pronouncements from the Army Surgeon General, as discussed later in this section.

Arrigo also sent a message on May 11 questioning, among other issues, the effectiveness of ethical safeguards in national security settings. As Arrigo wrote:

> Societal response is a natural check on the behavior of professionals . . . . In many domains of national security, psychologists cannot both be effective employees AND be subject to independent ethics review. Yet without independent ethics review, there is no way to distinguish between (a) justifiable moral trade-offs for national security gains and (b) deluded, incompetent, or self-interested behavior. . . I think a foundational question for PENS is whether outside accountability CAN be designed into the national security positions of psychologists whose effectiveness depends on secrecy.[1100]

Arrigo most vocally questioned the group's mission and scope before, during, and after the PENS meetings. She inquired whether psychologists had proper ethical safeguards in national security settings, sought additional information about the composition of BSCT teams, and protested the level of secrecy during and after the PENS meetings.

Arrigo also clashed with several members and observers of the task force, most notably Koocher. At nearly every turn on the listserv and during the PENS meetings, Koocher retorted many of Arrigo's claims, requests, and observations. To Arrigo's May 11 message, Koocher responded in part that he rejected the "foundational premise" of Arrigo's assertions and that thought Arrigo's "societal response" was an "illusory concept of little pragmatic utility in the long run."[1101] Koocher's responses were starker given that he was a Board liaison and not an official task force member. There was no evidence we found, however, that suggested Koocher coordinated his challenges to Arrigo with Behnke or anyone else associated with the task force, save for a response he made about the casebook project (discussed below). Otherwise, it appears Koocher acted on his own accord. Koocher told Sidley that he acted as an enforcer against many of Arrigo's thoughts, which aimed to broaden the scope of the task force's mission. To Koocher, it was important to narrow the actions of the task force since a report was needed at the end of the weekend of the meetings, especially to combat press reports critical of psychologists in interrogation settings.[1102]

[1098] Banks interview (May 21, 2005).

[1099] *Id.*

[1100] PENS listserv (May 11, 2005).

[1101] *Id.*

[1102] Koocher interview (June 12, 2015).

The Geneva Conventions and conflicts between law and ethics were discussed on the listserv as well. James first emailed the group on May 12 and recounted some of his experiences at reducing abuses at Abu Ghraib; he underscored the need to abide by the Geneva Conventions.[1103] Thomas first emailed the group on May 13 and inquired about the guidance the group could provide in cases where the law and ethics were "incongruent."[1104] Koocher built off Thomas's point by explicitly mentioning the concern with the OLC memoranda and its definitions of torture, likely a reference to the leaked OLC memos in 2004.[1105] Gelles also suggested on May 18 that the Geneva Conventions may be a "good place to start."[1106] Despite these listserv discussions, the PENS report does not fully embrace international legal standards. The report instead encourages psychologists to review the Geneva Conventions and the U.N. Convention Against Torture in order to perform ethically and to analyze when there might be a conflict between the law and ethics,[1107] but does not specifically define when those conflicts arise (by not defining "torture" in the document, for example, Koocher's concern here is never fully addressed). More on the views surrounding international law are discussed below in a summary of the first day of the PENS meetings.

Fein emailed the group for the first time on May 18 and posted a hypothetical scenario involving a psychologist who is aware of unethical activities of another psychologist.[1108] Fein was not an active participant on the listserv and offered few comments during the PENS meetings. Arrigo noted to Sidley that Fein contacted Arrigo in January 2005 about providing relevant articles for a class he was teaching at Harvard at the time and suggested she could also receive a paid consulting job if she was interested in contributing to his work on interrogation research in Educing Information.[1109] Arrigo speculated that Fein was trying to "screen" her into being placed on the PENS Task Force. People may have thought that Arrigo was an "easy mark," she continued to tell Sidley.[1110] Fein told Sidley that he and Arrigo did talk in January

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[1103] PENS listserv (May 12, 2005).

[1104] PENS listserv (May 13, 2005).

[1105] PENS listserv (May 14, 2005).

[1106] PENS listserv (May 18, 2005).

[1107] PENS Report, *available at* http://www.apa.org/pubs/info/reports/pens.pdf.

[1108] PENS listserv (May 18, 2005).

[1109] Arrigo interview (Apr. 27, 2015). Fein joined the Board of the Intelligence Science Board in 2003. Chartered in August 2002, the Intelligence Science Board advised the Office of the Director of National Intelligence and the Intelligence Community on advances in science and technology applicable to issues of importance to the Intelligence Community. The Board was composed of approximately twenty-five scientists from a range of disciplines, including physical sciences, information technology and policy, and the law. Fein proposed that the Board develop scientific knowledge on interrogations. Fein chaired the group, and developed a small team, which included Shumate and Gelles, to review the literature on interrogations and discuss the current state of knowledge with members of the Intelligence Community, the military, and law enforcement. In 2006, Fein's team produced the book *Educing Information* to encapsulate the then-current body of knowledge relating to interrogations. In 2009, Fein produced a follow-up report that drew clearer lines between coercive and non-coercive interrogation techniques from a science-based perspective. In 2010, the Intelligence Science Board was disbanded.

[1110] Arrigo interview (Apr. 27, 2015).

2005 and that Arrigo's recollection of its substance was seemed accurate.[1111] But Fein stated that he was not thinking of the PENS Task Force and that no one directed him to reach out to Arrigo at that time. Based on other emails as well, it appears that Fein was not aware of the PENS Task Force until after this conversation with Arrigo. As noted earlier, Robert Kinscherff raised Fein's name to Behnke in mid-February, and Fein emailed Behnke on March 1, 2005 asking whether it was too late to submit his name for consideration on the task force. Fein noted that Shumate had encouraged him to apply for a position.[1112]

After Arrigo called Moorehead-Slaughter and others to clarify the scope of the June PENS meetings, Behnke and Moorehead-Slaughter exchanged emails separately on May 18 about the need to determine what could reasonably be done during the PENS meetings. They planned to discuss these issues further at a previously-scheduled meeting later in June.[1113]

On May 19, Banks used the term "safe, legal, ethical, and effective" to describe his framework for thinking about psychologists' proper roles in interrogation settings.[1114] This phraseology appeared in Banks's PPSI and, as mentioned, ultimately undergirded the PENS report and subsequent DoD policy on this issue. Banks added that the group "should focus on the ethical left and right limits of particular types of psychology support, e.g., interrogation support."[1115]

Arrigo offered a draft set of questions for the task force meetings on May 22.[1116] She included the following questions: "Should APA declare the contribution of psychologists to coercive interrogation incompatible with the ethical obligations of the profession?" and "Should APA exclude from membership psychologists who intentionally or negligently contribute to coercive interrogation?"[1117] Koocher refuted Arrigo's call to exclude members: "This question seems naive since APA will likely never know about such conduct, nor be in a position to investigate it."[1118] Koocher offered additional thoughts to Arrigo's first question, however, about the types of questions to ask about coercive interrogations, none of which were included in the PENS report.[1119] Koocher later told Sidley that the task force's mission was narrow,[1120] but his earlier listserv comments suggested that he was asking broader questions that were unanswered by the time of the PENS meetings.

[1111] Fein interview (May 11, 2005).

[1112] APA_0035172.[+]

[1113] APA_0047588.

[1114] PENS listserv (May 19, 2005).

[1115] *Id.*

[1116] PENS listserv (May 22, 2005).

[1117] *Id.*

[1118] PENS listserv (May 23, 2005).

[1119] *Id.*

[1120] Koocher interview (May 19, 2005).

Arrigo and Banks exchanged messages related to questions Arrigo had about what current roles psychologists played in interrogation settings. At one point, Arrigo directly posed to Banks whether there was a "natural crossover from SERE training to coercive interrogation,"[1121] which was precisely what Mitchell and Jessen executed during their interrogation work with the CIA. Banks did not address whether this "crossover" had occurred and instead underscored that purpose of SERE training and the purpose of interrogations were "diamet[r]ically opposed" to one another.[1122]

C. Observers Considered, Newman's Conflict of Interest, Choosing "Safe, Legal, Ethical, and Effective": June 2005

1. Task force observers

Task force observers were discussed on the listserv in June 2005, though the topic had been discussed internally at APA as early as April 2005. Mumford had raised the possibility in early April of adding Brandon as an observer.[1123] Along with her science background, Mumford noted that "politically it would be helpful/smart to have a White House observer."[1124] In late April, APA Senior Policy Advisor Ellen Garrison also mentioned that Jeff McIntyre, then-Senior Legislative and Federal Affairs Officer at APA, was interested in sitting-in on the meetings.[1125] McIntyre was ultimately accepted as an observer but, as he told Sidley, chose not to participate after he was told he could not speak, could not take any documents with him, and would be bound by certain rules of confidentiality.[1126]

Observers were discussed earnestly in early June 2005. Behnke sent an email on June 1 to Koocher, Anton, and Moorehead-Slaughter informing them that staff had a question about whether observers were permitted.[1127] Behnke stated that some APA staff were interested in attending and that the group should consider inviting "non-staff" like Brandon and representatives from the FBI.[1128] Levant agreed with Behnke.[1129] Anton agreed to include APA observers who had a "direct interest" in the task force, and to invite "selected observers" from

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[1121] PENS listserv (May 23, 2005).

[1122] *Id.*

[1123] APA_0024572.

[1124] *Id.*

[1125] APA_0025884.

[1126] McIntyre interview (Jan. 20, 2015). It appeared that McIntyre did not notify either Kelly or Behnke that he planned to skip the meeting; Kelly speculated to Behnke that McIntyre's ego may have been a factor. *See* APA_0040763.

[1127] APA_0048842. Notably, Behnke's message predated a June 2 message from Arrigo on the listserv that called for an advance agenda. Sidley found no evidence that the suggestion of observers was precipitated by Arrigo's call for specific agenda items ahead of the PENS meeting.

[1128] *Id.*

[1129] APA_0027161.

outside APA.[1130] Koocher also agreed and offered the most full-throated support for outside observers from the FBI or CIA.[1131]

After receiving their blessings, Behnke emailed Kelly, Breckler, and Mumford about how they could proceed. Behnke outlined five different options; the group ultimately chose a combination of the first and fifth options:

> 1) Ask the Task Force members themselves whom they would suggest including as observers;
> 2) Identify particular groups and invite them to send observers;
> 3) Send a letter around to all the Divisions and State Psych. Associations, inviting those groups to send observers;
> 4) Invite anyone who was nominated to attend as an observer;
> 5) Keep to our original plan, and identify particular people whom we would like to invite.
> We should be mindful that if we really open this up we may get LOTS of people. . . Thoughts?[1132]

On June 3, 2005, Moorehead-Slaughter requested whether the PENS Task Force had any suggestions on observers.[1133] A mere 20 minutes after her message, Anton suggested Newman as an observer. Banks affirmed Anton's suggestion 10 minutes later and Moorehead-Slaughter confirmed Newman's selection ninety minutes thereafter.[1134] Newman's marriage to Dunivin was not disclosed on the listserv. While many of the DoD members knew of Newman's relationship with Dunivin, none of the non-DoD members told Sidley that they did. Newman's role on the task force proved consequential and is discussed later in this section.

Later on June 3, James separately raised issues that an open meeting would have on the safety and confidentiality of the PENS meetings.[1135] Though he was fine with Newman attending, James requested that he "know who will attend, why, which group he/she will represent before anyone else attends." Behnke drafted Moorehead-Slaughter's response to James, which stated that the "parties in the room will be 'known entities,' who have been

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[1130] APA_0027619.

[1131] APA_0030186. Koocher wrote: "In thinking about the PENS task force, I would encourage us to be open and even to invite observers (e.g., FBI and CIA psychologists). Why? The presence of such people can only improve the outcome. They may or may not chime in with perspectives hypothetical situations, etc. However, I have no doubt that they will hear thoughtful, well reasoned, constructive efforts on how to guide our colleagues in difficult situations. Since out task force is not authorized to have access to identifiable ethics case materials and we certainly only have access to public policy documents, press accounts, etc., it seems to me that inviting interested others does no harm and may do good (i.e., enrich the discussion, suggest helpful directions, defuse anxieties, etc.)."

[1132] APA_0027161.

[1133] PENS listserv (June 3, 2005).

[1134] *Id.*

[1135] *Id.*

approved to be there."[1136] Both of these episodes are discussed in greater detail in other parts of this report.

The only other outside observer discussed and approved on the PENS listserv was Melvin Gravitz , long-time APA member and CIA contractor/psychologist (and sometimes called the "father of operational psychology"). Gelles suggested Gravitz on June 6.[1137] Gelles told Sidley that Gravitz was his closest mentor; he thought he volunteered Gravitz without suggestions from others involved with or on the task force.[1138] Behnke did, however, send Moorehead-Slaughter a note after Gelles recommended Gravitz, and stated that he was an "excellent choice," and that Moorehead-Slaughter should ask Gelles to expound upon Gravitz's background.[1139] Gravitz was approved as an observer shortly thereafter. Our investigation uncovered that Gravitz had played an important role inside the CIA in clearing the way for CIA contract psychologist Jim Mitchell to continue participating in CIA interrogations in 2003 after some within the CIA protested that his work was unethical, and had also attempted to influence an APA 2002 disciplinary proceeding against Michael Gelles.[1140]

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 the efforts by some of the non-DoD psychologists to push for stricter, more specific ethical guidelines.

[1136] APA_0508264; *see also* PENS listserv (June 3, 2005).

[1137] PENS listserv (June 6, 2005).

[1138] Gelles interviews (Apr. 15, 2015 & May 27, 2015).

[1139] APA_0048809 (June 6, 2005).

[1140] In 2003, in response to an internal dispute within the CIA about whether it was ethical for CIA contract psychologist Jim Mitchell to continue to participate in interrogations, Gravitz provided a written ethics opinion to Mitchell and the CIA in which he concluded that the APA Ethics Code should be "flexibly" interpreted and important weight given to the "ethical obligation" to protect the nation from harm. As a result of Gravitz's opinion, we were informed, Mitchell was able to continue his participation in the interrogation program. We also learned that in 2002, when Gelles was being investigated by the Ethics Office for a disciplinary complaint (as has been publicly reported) relating to his interaction with a soldier under criminal investigation for espionage, 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. More about this episode is discussed in the report's section on APA adjudications.

Other APA employees were present at the meeting, but were not formally approved on the listserv — Anton, Breckler, Brandon, Farberman,[1141] Kelly, Koocher, Mumford, and APA Office Manager Rhea Jacobson.

2. Newman's conflict of interest

Newman had an obvious conflict of interest, since his wife 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 told Sidley that he believed Anton may have conversed with him before his listserv nomination about serving on the task force due to Newman's interest in practice issues that would arise during the meetings.[1142] Anton told Sidley that he thought someone encouraged him to nominate Newman for the task force but could not recall who it was; he speculated that Moorehead-Slaughter or Behnke may have spoken with him.[1143] Anton reflected that he could see how Dunivin might have suggested to Banks that he second Anton's suggestion since the nomination was finalized so quickly. These comments suggest that there was some coordinated effort to have Newman on as a task force observer.

When asked about whether there was a conflict of interest in his observer appointment, Newman stated that there was not and that "everyone" at APA knew of his relationship with Dunivin. In addition, Newman stated that his role as an observer was a "specific" one that did not allow him to vote on any issues, offer comments to the draft reports, or participate in additional conversations outside of the meetings. Newman expounded that it was important that the interest he had was represented during the task force. He worried that APA would have included people with little knowledge of the situation or that people would respond emotionally to the issues without carefully considering psychologists' important roles in detainee interrogation settings.[1144]

Anderson admitted that he did not fully think through the implications of Newman's presence as an observer at the time but that, in retrospect, Newman's conflict should have been explicitly addressed. He stated that no one from APA staff came to him with the conflict issue at the time, but he thought that Behnke (as Ethics Director), Gilfoyle (as General Counsel), or Newman himself would have been best positioned to raise the conflict issue explicitly with Anderson.[1145] Honaker said that Newman's involvement was a "clear conflict" in retrospect, but that he had assumed that all members of the task force were fully informed about the relationship and Dunivin's position at Guantanamo Bay at the time. But he stated that the issue was not as

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[1141] Thomas suggested that Farberman be included in discussions, but there was no formal vote/approval of her presence on the listserv. PENS listserv (June 20, 2005).

[1142] Newman interview (Apr. 29, 2015).

[1143] Anton interview (May 8, 2015).

[1144] *Id.*

[1145] Anderson interview (June 23, 2015).

problematic for him then since Newman did not have a decision-making role on the actual task force. He agreed that he did not take any steps to raise a question or discuss the issue with Anderson, the Board, Behnke, or Gilfoyle.[1146]

Behnke did not recall how Newman was originally discussed as an observer, but admitted that, in hindsight, he should have formally disclosed to the task force Newman's relationship with Dunivin.[1147] Farberman told Sidley that she was "shocked" to learn of Newman's presence at the PENS meetings because of a clear conflict of interest, but she did not recall raising the issue with anyone at the time.[1148] Gilfoyle, who was not involved in observer selection, also was surprised to learn of Newman's involvement during the meetings and suggested that disclosing Newman's marriage to Dunivin at the time would have remedied any issues with his presence. Both Behnke and Gilfoyle conveyed to Sidley, however, that if Newman wanted to be apart of the task force meetings, that he would have been — both because of his strong personality and because of his prominent position within APA as leading the Practice Directorate.[1149]

Behnke also stated that, in general, it was not unusual for the head of the Practice Directorate to attend meetings and task forces that related to the practice of psychology. And the conflict may not have been seen as problematic since, Behnke declared to Sidley, the question the task force was charged to answer was not whether psychologists should be involved in interrogation settings but how and in under what appropriate circumstances.[1150] Koocher also confirmed with Sidley that the purpose of PENS was to give ethical guidance to psychologists in interrogation settings and not to bar them entirely.[1151] If this framework is correct, however, then it appears APA never seriously questioned whether psychologists should be in detainee interrogation settings in the first place.

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: the importance of psychologists assisting the government in getting accurate intelligence information about potential future attacks in order to protect the public, and the importance of psychologists not intentionally "doing harm" to individuals except perhaps under carefully defined and constrained circumstances (such as helping an FBI agent ask questions of a Mirandized criminal defendant that might "harm" the defendant in the sense that it might produce evidence that could result in the defendant's conviction or a prison sentence). In determining its position, APA also needed to balance, on the one hand, the views and positions

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[1146] Honaker interview (June 23, 2015).

[1147] Behnke interview (May 22, 2015). He also noted that in early January 2005, when Mumford raised the Dunivin issue to members of APA leadership, it was known that Dunivin was stationed at Guantanamo Bay but that APA did not have a full understanding of what she was specifically doing at this time.

[1148] Farberman interview (May 19, 2015).

[1149] Behnke interview (May 22, 2015); Gilfoyle interview (May 20, 2015).

[1150] Behnke interview (May 22, 2015).

[1151] Koocher interview (June 12, 2015).

of military and national security psychologists with, on the other hand, the views and positions of those outside the military/national security system.

Because of Dunivin's obvious and strong interest and bias on these points, Newman had a classic conflict of interest, and it was incumbent upon him and APA to keep him out of the discussions and deliberations on this topic, and to disclose the conflict. Instead, 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, APA President Ron Levant, APA President-Elect Gerald Koocher, and also including to a lesser extent CEO Norman Anderson, Deputy CEO Michael Honaker, and General Counsel Nathalie Gilfoyle — took no steps to disclose or resolve the conflict.

3. Failed observers

There were other potential observers as well. In mid-June 2005, Behnke and Mumford both unsuccessfully reached out to their FBI contacts who were unavailable during the PENS meeting dates. Behnke explained the importance of having an FBI representative to Stephen Band to no avail.[1152] Arrigo suggested that APA legal counsel, an ethicist, and Matt Wynia of the American Medical Association would be good candidates as observers. Moorehead-Slaughter partially addressed Arrigo's request by responding that APA General Counsel staff would be readily available but there was no mention of Wynia after Arrigo's initial suggestion.[1153]

Behnke also failed to add as observers Gregg Bloche and Jonathan Marks. On June 22, 2005, Behnke sent Moorehead-Slaughter, Koocher, and Anton (including other APA leadership) a summary of upcoming news reports on psychologists in wartime interrogation settings. He attached Gregg Bloche and Jonathan Marks's upcoming article in the *New England Journal of Medicine*, "Doctors and Interrogators at Guantanamo Bay."[1154] The article detailed purported violations of medical ethics and mental health professionals who helped break-down detainees in interrogations. Behnke also remarked that the *New York Times* would publish another Neil Lewis article tomorrow and that a Jane Mayer article in the *New Yorker* would follow two weeks

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[1152] APA_0027214; APA_0026254. Behnke wrote: Likewise, Steve [Band], I wish you the very best in your work. Also, thank you for supporting FBI participation in the Presidential Task Force. I realize the delicacy of the issues, and appreciate how careful your colleagues must be, but I very much want the FBI included in this work, if that is possible. (The 'observer' role will not require the FBI to sign on or commit to anything, but will give the FBI a place at the table.) I think it's vitally important for psychologists in the FBI to feel supported by APA, and conversely, for APA to benefit from the richness and complexity of the Bureau's work. I'm happy to do anything I can to foster this important relationship." APA_0027124.

[1153] PENS listserv (June 7, 2005).

[1154] Gregg Bloche & Jonathan Marks, *Doctors and Interrogators at Guantanamo Bay*, New England Journal of Medicine (July 7, 2005), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp058145. Bloche had sent Behnke an advance copy of the article. *See* APA_0041245.

later.[1155] Behnke recommended that the task force invite Bloche and Marks to the PENS meetings as observers since they were the "most prominent spokespersons" in the "public arena."[1156]

Behnke recalled to Sidley that Moorehead-Slaughter may have rejected the idea of inviting Bloche before the PENS meetings,[1157] but Sidley found no evidence of this assertion. In fact, Moorehead-Slaughter drafted an email for Behnke to review that indicated her support of inviting Bloche and Marks on June 22.[1158] She later sent this supportive email to the same group as Behnke's original email.[1159] Gilfoyle raised issues about making sure the two signed a confidentiality agreement ahead of their potential attendance, though it does not appear she or anyone from the legal department rejected Behnke's suggestion.[1160] Instead, it appears that Bloche and Marks were ultimately uninvited after the first day of the task force meeting when DoD members expressed discomfort with having Bloche attend the meeting. Larry James even threatened to leave the meeting if Bloche was present.[1161] According to Arrigo's notes from the PENS meetings, James and Banks criticized Bloche and Marks's latest article for its accuracy and publication of John Leso's name. They worried for Leso and his family's safety as a result.[1162]

Other media reports were released on the eve of the PENS meetings that covered Bloche and Marks's *New England Journal of Medicine* article. For example, the *Wall Street Journal* had an article on it on June 23[1163] and Neil Lewis published an article on June 24.[1164] Lewis's articles included additional interviews with professional organization representatives, including Behnke. Behnke noted that the task force was meeting over the coming weekend to address the

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[1155] APA_0048661.

[1156] *Id.*

[1157] Behnke interview (May 29, 2015).

[1158] APA_0048630.

[1159] APA_0040912.

[1160] APA_0048625.

[1161] *See* Arrigo PENS Meetings Notes, *available at* http://www.ethicalpsychology.org/materials/Arrigo-PENS-Meeting-Notes-Archived-July-2006.pdf. James and Banks had both expressed discomfort in talking with Bloche in mid-June after Behnke approached both of them about Bloche's request to speak with them. *See* APA_0048755; APA_0048754.

[1162] APA_0048594. Later, Behnke incorrectly told Levant that Leso was not an APA member at the time and therefore the Ethics Committee could not investigate claims related to him. He later apologized for this mistake to APA leadership. More on APA's investigation into Leso's actions are discussed later in the report.

[1163] Yochi Dreazen, *Report Says Pentagon Violated Medical Ethics at Guantanamo*, Wall Street Journal (June 23, 2005), *available at* http://www.wsj.com/articles/SB111949449838567319.

[1164] Neil Lewis, *Interrogators Cite Doctors' Aid at Guantanamo*, New York Times (June 24, 2005) *available at* http://query.nytimes.com/gst/fullpage.html?res=9400E2DA1F3BF937A15755C0A9639C8B63.

issues raised in Lewis's article.[1165] If the issues and abuses at issue were not already clear when the task force was first created, they certainly were days before the meeting with these various media reports.

4. Using "safe, legal, ethical, and effective"

In separate conversations, Behnke impressed upon Moorehead-Slaughter to use Banks's framework for the meeting. On June 9, 2005 at 1:48 p.m. ET, Behnke sent Moorehead-Slaughter a note on his preliminary thoughts for a PENS meeting agenda and outline of talking points.[1166] Behnke included the following comment about Banks's approach:

[On what differentiates ethical and non-ethical behavior in national security-related activities], Morgan Banks offers a very helpful analysis: Illegal vs. legal, and ethical vs. unethical. As Morgan points out, our focus should be on defining the "box" of legal and unethical. . . . In terms of an analytic framework, Morgan Banks offers a succinct analysis (posting 5/19), in which he states that psychologists' work should be 'safe, legal, ethical, and effective.' In one way of thinking, parcing [sic] each of these four words and applying them to psychologists' work in this arena is central to the task.[1167]

Coincidentally, Banks sent Sidley a two-page summary document derived from Banks's PPSI that included the words "safe, legal, ethical, and effective" at the top of the page and two ethical queries.[1168] The document's metadata indicates that it was last saved on June 9, 2005 at 12:58 p.m. ET, less than an hour before Behnke sent his thoughts to Moorehead-Slaughter. The time stamps suggest that Banks and Behnke may have conferred about these issues before Behnke sent his message to Moorehead-Slaughter. In interviews with Sidley, Behnke claimed that Banks's thoughts were akin to his own analytical approach—what he called a "four-bin analysis"—and, thus, found it immediately attractive.[1169]

On June 10, Behnke sent Moorehead-Slaughter a draft set of her opening remarks for the first day of the PENS meetings.[1170] One of Behnke's notes strongly implied that psychologists should be involved in these settings and that it would be far worse if these psychologists moved away from APA:

If psychologists in communities of professionals working in national security-related areas do not feel that APA is interested in and supportive of their work, they WILL drift away from APA. That would be bad for those psychologists, and bad for APA, the profession, and the public. We want to be clear that psychologists who are using the science and practice of psychology to protect our nation's security have a home at APA, and that APA welcomes and is

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[1165] *Id.*

[1166] APA_0027134.

[1167] *Id.* (emphasis added).

[1168] Banks "Ethics Examples" document (on file with Sidley).

[1169] Behnke interviews (May 22, 2015 & May 29, 2015).

[1170] APA_0048793.

grateful for their contributions to the profession and to our nation. APA wants to be a resource for these psychologists as they struggle with the ethical dimensions of their work.[1171]

Behnke, Moorehead-Slaughter, and Koocher met in Boston on June 16, 2005 to "think through some of [the] details concerning how to structure the meeting, as well as some of the larger questions, such as what the Task Force can reasonably be expected to accomplish with this meeting."[1172] Thereafter, Behnke drafted an agenda for Moorehead-Slaughter that she sent to the PENS listserv later on June 16.[1173] The agenda stated that the group should plan to have a report by the end of the weekend. It also stated that the group needed to identify the "bottom line" issues; the message specifically noted that the group "will especially want to offer as much guidance as we can to psychologists, particularly young psychologists, both in ethically ambiguous situations and in situations where it appears that other psychologists may be acting unethically." The message also declared that the "safe, legal, ethical, and effective" analytical framework provided was "a good way of anchoring ourselves in the 'bottom line' questions we need to address."[1174]

As is discussed later, however, though touted by Banks as a safeguard that would somehow ensure the humane treatment of detainees, his framework was flexible and general enough to allow 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.

5. Shumate's and Mumford's messages

On June 20, both Lefever and Shumate offered their first substantive messages on the listserv.[1175] Shumate looked forward to the discussions but cautioned against litigating the past:

I hope I can speak for my colleagues in the Department of Defense that we embrace the discussions and various viewpoints that will be represented at the table during the next four days. I look forward to sorting out the ethical guidance that we will recommend to APA while also being vigilant that we are not there to debate nor confront the past, present nor future policies of the Administration or the Department. I believe that we can do what is right for psychology while holding reserve on those aspects that we have neither the authority nor the charge to address.[1176]

Shumate was also brought up in a separate internal APA conversation with Behnke, Kelly, and Anton on June 20.[1177] Anton requested at some point to compile a glossary of terms for task force distribution based on a *New York Times* article that Fein forwarded on the PENS

[1171] *Id.*

[1172] APA_0039316. Sidley could not locate or collect any notes from this meeting.

[1173] APA_0048749; APA_0048750.

[1174] *Id.*; *see also* PENS listserv (May 16, 2005).

[1175] PENS listserv (May 20, 2005).

[1176] *Id.*

[1177] APA_0040991.

listserv. But issues arose over defining terms like "coercive" and "torture lite," which may, based on the article, include techniques that were legal at the time. Kelly flagged the issue first and suggested reaching out to Shumate, who "confirmed that the military guys on the task force would have removed themselves if (currently legal) procedures such as interrogation techniques were defined as cruel and inhuman and equated with torture."[1178]

Also of note, Mumford sent a note to his brother, John, on June 21 where he stated that the task force was "a complex group of psychologists carefully balanced with equal numbers of hawks and doves . . . timing couldn't be better as closing Guantanamo Bay seems to be in the news every day and many of those coming to serve the task force have been there or helped clean-up after Abu Ghraib."[1179] Mumford told Sidley he believed the task force was balanced because of the presence of Gelles, a known whistleblower, and James, someone who helped quell the abuses at Abu Ghraib.[1180]

D. Overall Observations

Several issues arise in the April – June 2005 listserv discussions that foreshadow the issues that arise during after the PENS meetings:

- The behind-the-scenes communications show that Behnke was actively managing the direction of the discussions on the listserv, in part by drafting emails for the task force chair (Moorehead-Slaughter), who would then send them to the listserv verbatim, in which decisions were made or topics suggested. An analysis of her emails on the listserv shows that virtually all her postings were written by Behnke, which Moorehead-Slaughter and Behnke conceded to us.

- Banks and Behnke collaborated behind the scenes about the eventual content of the task force's report, with the result that the key high-level framework set out in the then-draft DoD policy (written by Banks and Dunivin and later converted almost verbatim to official DoD policy) regarding the participation of psychologists in interrogations was (i) proposed by Banks on the listserv as a good framework for the task force, and then (ii) recommended by Behnke (through Moorehead-Slaughter) as a good framework for the task force. 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. The evidence shows that minutes before Behnke sent Moorehead-Slaughter a draft email from his computer laying out the argument for this framework (which she posted verbatim minutes later), Banks had made the final edits on a document on his computer highlighting some of the same arguments for the framework (a document

[1178] *Id.*; *see also* APA_0027098.

[1179] APA_0029281(ellipsis in original).

[1180] Mumford interview (May 18, 2015).

that was then likely shared with Behnke). And the framework became one key portion of the task force's report.

- 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.

- Efforts by Jean Maria Arrigo to set a broad agenda for the discussion and to ask whether certain assumptions behind the task force were correct (for instance, whether it was realistic to create a system of enforceable ethical guidelines for psychologists operating in a classified environment, since enforcement by a professional association would likely be impossible), were quickly rebuffed by Koocher in aggressive listserv posts. This was an intentional effort to curb dissent to the frame of reference APA had already decided upon—that the task force would issue a report at the end of the three-day meeting that would conclude that psychologists could ethically support interrogations, thus pleasing DoD, and that would be written in a manner that would provide APA with a good media statement to respond to the perceived negative press.

- There were no serious discussions about whether psychologists should be involved in interrogation settings (Arrigo tried to raise these issues but Koocher rejected most her contentions); the conversations instead focused on how psychologists could be involved. With a majority DoD set of members, along with a sympathetic group of APA leaders at the helm, it appears that there was never any likelihood that APA was considering barring psychologists entirely from these interrogation settings.

- 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.

III. PENS MEETINGS AND REPORT

The PENS meetings took place on June 24 – June 26, 2005. Task force members initially met for dinner the evening of June 23. A typed copy of Arrigo's notes from the meetings

document her impression of the discussions from these in-person meetings. Both the PENS listserv and a transcribed version of Arrigo's notes have been publically available, along with the PENS report itself. In addition, Sidley reviewed contemporaneous notes from Behnke, Susan Brandon, and an assortment of other task force members from the PENS meetings.[1181] We also interviewed every member of the task force and nearly every observer.

The veracity of Arrigo's set of notes have been questioned by some. But this report can confirm that Arrigo's notes provide the most complete picture of what occurred during the meetings. For one, Arrigo provided us with the contemporaneous, handwritten notes she took during the PENS meetings, which align with what was transcribed in the typed version of her notes. In addition, the notes that Behnke and Brandon took on conversations during the meetings are reflected in Arrigo's notes, which indicate a consistency and accuracy across all sets of notes. And every interviewee associated with the PENS process who had seen Arrigo's notes believed it plausible that the notes captured much of the discussions over the weekend of meetings. All sets of notes from Arrigo, Behnke, and Brandon are appended to this report. The following subsections highlighting noteworthy comments during the in-person meetings rely primarily on Arrigo's notes from these meetings and interviews with Sidley.

A. Overall Impressions of Task Force Members

1. DoD task force members

Of the six DoD task force members, Banks and Scott Shumate appeared to have the most prominent positions within DoD. And Banks, far more than Shumate it appears, worked integrally on interrogation support issues. As Command Psychologist for the Army Special Operations Command and the senior Army SERE psychologist, Banks worked closely with and was involved with the Army psychologists at Guantanamo Bay and elsewhere who supported interrogations, including Dunivin. 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.

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. Another DoD task force member commented that Banks spoke out of "both sides of his mouth" in pushing his agenda but also appearing amenable to the non-DoD members' concerns.

According to at least one DoD task force member, Banks told task force members that he had consulted with his generals within his U.S. Army Special Operations Command and had

[1181] APA_0232118; HC00017705+ (Behnke's typed and handwritten notes); Brandon Notes (June 24-25, 2005) (on file with Sidley); HC00017712; HC00017725 (various handwritten notes from task force members);

already come to an agreement with his leaders that the "safe, legal, ethical, and effective" framework was the appropriate way forward. It is also likely that, while not directly in other command structures, Banks may have consulted with, or at least was aware of, other "army stakeholders"[1182] and their views on interrogation policy. These would likely include consulting with commanding generals of U.S. Special Operations Command and the Army Medical Command (the Army Surgeon General), and perhaps the Joint Task Force – Guantanamo, and the U.S. Southern Command. The evidence shows that that Army Surgeon General's Office was in fact in the midst of developing DoD policy on this issue and that Banks, Dunivin, and others were helping craft its policy. Banks's role on the task force, then, was not driven solely by him but educated by various command structures' needs on the issue.

Banks said and gave the impression that he did not want other DoD members to deviate from the direction he was pursuing. For most of the DoD members, this was either unobjectionable or in line with what they wanted to achieve. Gelles and James both believed psychologists should continue to be involved as consultants in interrogations, and at the time this remained a significant part of Gelles's job as a criminal investigator with NCIS. And both indicated in the meeting, in different ways, that a high-level report would probably be preferable to a more specifically-defined one. Fein, a DoD contractor within Shumate's unit, did not say as much but deferred to the positions of the actual DoD officials.

Shumate made it clear he was uncomfortable with public disclosure of specific examples that might provide further guidance, thought "coercive" was too broad a word to be used in this context, and may have wanted to manage the task force's public message by using words that softened the reality of the pressure DoD psychologists faced to help produce actionable intelligence. He informed Sidley that he briefed the head of CIFA after the report was finalized and believed that the report was "briefed up" at least within his chain of command, which would have included the head of CIFA, followed by the Deputy Under Secretary of Defense for Counterintelligence and Security, and then the Under Secretary of Defense for Intelligence. It is not clear, however, whether the report was briefed all the way to the Intelligence Undersecretary. Shumate also met with William Winkenwerder, then-Assistant Secretary of Defense for Health Affairs, and briefed him on the report's findings ahead of its release.[1183] Shumate explained that while the military side of DoD had a "tremendous interest" in the PENS report, the civilian side that he was apart of thought the report was a "positive" development but not an "essential" one for their needs.[1184]

2. Non-DoD task force members

There were two very strong pushes by Wessells during the meeting that — if accepted — would have created a report with tighter, more specific ethical constraints on national security

[1182] The term was used by Bruce Crow, then-Consultant to the Army Surgeon General's Office. He believed that Banks was attuned to various command structures' concerns and brought them to bear as he, along with Dunivin, spearheaded BSCT policy with the Army Surgeon General's office. Crow interview (June 22, 2015).

[1183] APA_0026757.

[1184] Shumate interview (June 24, 2015).

psychologists involved in interrogations, in ways that would have been inconsistent with the strong preferences of Banks and key parts of DoD. The first, an attempt to use the provisions of the Geneva Conventions or other common international law sources to define the high-level terms being discussed at the meeting, was joined strongly by Arrigo and Thomas. This was rejected by the other members of the task force, and therefore in the Behnke-drafted task force report. The second was a subsequent attempt to create specificity within the document in other ways, by discussing where to draw the line between permissible and impermissible interrogation techniques a psychologist could be involved in (either based on a discussion of some of the most significant techniques being discussed publicly, or a description related to "psychological distress").

Thus, two pushes for ethics positions that would have made the task force report a very different document were explicitly made and were rejected by the DoD task force members and the APA task force leadership. The three non-DoD members acknowledge that if they had firmly and officially dissented and refused to accept the task force report, this might have made a difference. And in fact, Behnke and other APA leaders consistently offer the final sign-off on the report of the three non-DoD members as proof that the document does not merely reflect a pro-DoD position.

These three task force members clearly came to regret going along with the document at the end of the meeting, and insist that their failure to issue a final and overall dissent should not be taken as approval of APA's claim (made one day after the task force report was made public) that the report set out "strict ethical boundaries,"[1185] since they had been told that APA only considered the report a first step and that the actual "boundaries" would be set out in a follow-up casebook. For Wessells in particular, and for Arrigo as well, the explicit promise that the report was simply an interim step to be quickly followed by a more thorough set of specific guidelines was crucial to their agreeing to sign off on the report. Wessells clearly felt duped when he was told six months later that nothing had been done on the casebook, and he resigned from the task force thereafter (discussed more later).

Arrigo and Thomas also cited a feeling of intense group pressure from the much larger group of DoD task force members and APA leaders (all men, they point out) to go along at the end, in order to enable APA to make a clear and positive public statement, including that APA was against torture. As psychologists, they all cite the "groupthink" psychological phenomenon as something that may have been a factor in their going along at the end, in addition to their belief that this was not—and would not be portrayed by APA—as a final, strong set of "strict ethical guidelines." Many observers from inside and outside DoD observed for us that there was a real "us versus them" split in the room, between DoD and non-DoD task force members, and that all the DoD members except for Banks sat on one side of the table, across from the non-DoD members.[1186]

[1185] APA_0040304.

[1186] Brandon's notes bear this dynamic out. At one point, she noted that, "paternalism is only increasing" within the DoD member comments and cited how Shumate kept using terms like "us" and "our" when discussing the government's position. Brandon Notes (June 24 – 25, 2005) (on file with Sidley); Brandon interview (May 26, 2015).

Adding to this dynamic was the participation of Koocher on the first day and Newman throughout the meeting, both of whom spoke up forcefully in opposition to some of the key points of the non-DoD task force members.[1187] Banks and the DoD task force members had allies in Koocher, Newman, and Behnke who not only agreed with the strategy of deferring to DoD's preferences, but who also strongly cared about (and, especially as to Newman and Behnke, articulated during the meeting) the goal of ensuring that the result at the end of the meeting was a document that APA could use for positive PR purposes, that "calm[ed] the issues," avoided "rekindling the fires," and "clarified" and "simplified" because the press accounts had "messed up the message." In their vie, 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 to action to set ethical guidelines rather than sitting on the sidelines, while keeping DoD psychologists as involved and unconstrained as possible.

Based on what we have seen in our investigation, we agree with the three contributing non-DoD task force members that it is unfair for defenders of the APA task force report to use their end-of-report approval as evidence that the report simply reflects the consensus of a diverse task force rather than an intentional pro-DoD approach. The behind-the-scenes evidence squarely contradicts this, and a proper reading of the meeting proceedings is inconsistent with this as well.

B. Day One: June 24, 2005

1. Day one conversations

The topics discussed on the first part of the first day permeated the entire weekend of conversations at the PENS meetings.[1188] Some observations and commentary from the sequence of early conversations are listed below:

- Moorehead-Slaughter's opening remarks noted that investigating past actions were the domain of the Ethics Committee, not the task force. Instead, Moorehead-Slaughter underscored the need to provide guidance to psychologists.

- There was no indication from PENS participants that Moorehead-Slaughter played a leading role during any of the task force discussions. She was viewed as a figurehead

[1187] Koocher's aggressive style of going on the attack against the non-DoD task force members continued after the meeting, when he attacked Wessells's resignation as meaningless because the task force no longer existed, a highly disingenuous comment since Wessells' resignation came in reaction to an email to the task force from its chair stating that the task force's work continued because it would be asked to help consult regarding the potential "casebook." In his criticism of Wessells, Koocher also called the head of the rival American Psychiatric Association "an idiot full of sound and fury" (quoting Shakespeare), and months later attacked Arrigo for her personal biases that she had revealed at the beginning of the task force meeting about how her father had been involved in torture with the CIA's predecessor agency, the OSS. PENS listserv (Jan. 15, 2006); APA_0095571. Newman was known as a "bulldog," in the words of his former APA colleagues, and he 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.

[1188] All notes come from Arrigo PENS Meetings Notes (June 24, 2005) unless otherwise noted.

by most everyone in the room, and multiple participants commented on how unfamiliar she was with the subject matter. It appears that Moorehead-Slaughter's predominant role was that of facilitator (and Behnke's agent as previously discussed), though even that role was appropriated by others in the room like Newman. By all accounts, Moorehead-Slaughter's weak leadership stimulated the ability of other voices and views to dominate the conversation and led to the PENS report being, as Lefever put it, "not [a] very good product."[1189]

- Soon thereafter, the DoD members, especially James, protested the idea of Bloche joining the PENS meetings. James went so far as to refuse being in the same room as Bloche. Banks noted that publishing John Leso's name in Bloche and Marks's latest article endangered Leso's life.
    - Of note, James told Sidley that he consulted with his chain of command before PENS to make sure that they were aware of his participation and that they had no issues. He specifically consulted with his two Navy clinical supervisors at his hospital, Walter Reed Medical Center, and made sure he "wasn't saying anything out of line."[1190] He also discussed the issue with Navy attorneys at one point, among other topics. James said the two take away messages from these chain of command conversations were (1) to ensure that psychologists kept their presence in detention settings, and (2) to inform DoD on how to conduct interrogations safely and ethically.[1191]
- Early on, Thomas noted the need to take culture and ethnicity into account with interrogating detainees of various backgrounds. These considerations were included in later drafts of the PENS report.
- Lefever made clear that his oath was to the United States and that U.S. law and community standards were his guidepost in determining what were acceptable practices. He defended the merits of certain harsher interrogation techniques and noted that he thought it was useful to think of DoD ethics and APA ethics as a Venn diagram and finding areas where the ethics overlapped and where they did not.
    - Though his ultimate views on which tactics were permissible may have been in the minority,[1192] Lefever appeared ready to discuss the ethical nature of various interrogation techniques. He later told Sidley that he welcomed

[1189] Lefever interview (May 3, 2015).

[1190] James interview (May 1, 2015).

[1191] *Id.*

[1192] Lefever made comments throughout the meeting about how a certain amount of pain or stress might be ethical, but others did not appear to vocalize support for these positions. Lefever explained to Sidley that there was a difference to him between causing pain to someone (which could be ethical) and causing harm (which would be unethical), and the line between the two was the conversation that should have occurred during the PENS meetings. But it never did, as Lefever noted. Lefever interview (May 3, 2015).

having conversations on the specific interrogation techniques but believed there were multiple agendas/biases present during the meeting: (1) the stated agenda, which was to see if the ethics code adequately addressed the issues facing psychologists in interrogation settings; (2) the agenda of peace psychologists and "pacifists," as he called them, who likely did not want psychologists in these locations at all (or did not wish to commit to a specified list of techniques for fear of excluding others); and (3) the agenda of Morgan Banks, who strove to keep psychologists in these settings and grounded the discussion with his general phraseology of "safe, legal, ethical, effective," and who had little desire to discuss specifics.[1193] Lefever also noted that he got the "distinct impression" at one of the PENS dinners with task force members that Banks did not want to deviate from this phraseology in the PENS report. He also believed there was a general "fear" among other DoD members about addressing the issues in a concrete way so, instead, they wanted to "vote and get out."[1194]

- Of note, Wessells and Lefever both appeared to arrive to the PENS meetings with honest but differing philosophical views of what to accomplish. Wessells's approach was more absolute and posited that certain actions and techniques were wrong under any circumstances. As such, the ethics code should reflect these right and wrong actions. He rejected a relativistic view of ethics and preferred to ground the debate in international legal principles that could serve as a lodestar to determine which behaviors were permissible. Lefever, on the other hand, believed there was a difference between techniques that caused pain (which were short-term and ethical) and those caused harm (which were long-term and unethical), and wished to explore this difference during the meeting. He also believed that determining what was ethical was based on community standards. So if a technique was deemed acceptable by the community, then it was ethical. Lefever explained that the ethical question was a separate inquiry from whether a technique was moral. Under this framework, there could be techniques that were ethical but immoral. Despite their vastly opposing views on ethics and morality, both agreed that the foundational question of the task force was to identify which techniques were permitted and which ones were not. And both were deeply criticized the final product of the task force for not answering this key question. Lefever called the report "not defined" and "loose," while Wessells described the process as an "absolute farce."[1195]

- Banks disagreed with Lefever's Venn diagram approach and argued that all illegal behavior was already proscribed. The key question for Banks, as he also noted in his first May 11 message on the listserv, was determining what legal behaviors were

[1193] *Id.*

[1194] *Id.*

[1195] Wessells interviews (March 11, 2015 & June 15, 2015); Lefever interview (May 3, 2015).

ethical and then providing guidance for those behaviors.[1196] Bank's draft PPSI also included the point that the "Ethics Code is always subordinate to the law and regulations."[1197]

- Banks's approach, as critics have pointed out, appears to have changed the understanding of APA Standard 1.02 at the time. The language in the rule stated a psychologist "may" follow the law if a conflict is unresolvable between the law and the ethical code. Banks raised this point earlier on the listserv to explore techniques that were legal but possibly unethical, but did not appear to pursue this line of inquiry during the meetings.

- Shumate made comments that suggested specific guidance was needed for psychologists (Arrigo's notes: "provide structure, guidance. Embrace this as an opportunity."). He also appeared to be mindful of how to message certain issues, such as when he disagreed with Lefever about whether psychologists face "pressures" and preferred to use the term "encounter conflicts." He was also skeptical that a subsequent casebook would be feasible; he repeated this concern on the second day of meetings.

  - Shumate explained to Sidley that his comment about guidance reflected a general belief that in any situation, particularly one where there was a great deal of stress involved, it was important to have guidance in place. But Shumate clarified that he did not believe the PENS Task Force should have undertaken a deep dive into specific techniques that were permissible or not. Instead, he desired that more research was conducted in this field to determine what types of techniques and interrogation strategies were effective.[1198]

  - Shumate's skepticism on providing real-life examples foreshadowed his position in 2006 that the task force not lead the casebook process, as discussed later (excerpt from Arrigo's notes: "Getting publishable examples will be awful. No useful product. . . . maybe APA can generate it. DoD psychologists can't."). Shumate told Sidley that he thought the casebook would have been an "immensely large" undertaking and lead to logistical issues with classified information and DoD review. On the second day, Arrigo's notes indicate that Shumate stated he "thought that examples would alarm [people about the use of] psychological science." Shumate explained to Sidley that the comment referred to the public's misgivings about anything involving the word "interrogation."[1199] This point does not appear credible given that the notes talk about "alarm" and not misperceptions. It is more likely that Shumate believed that there would be a public outcry over actual examples and interrogation techniques used at the time.

[1196] PENS listserv (May 11, 2005).

[1197] HC00008914.

[1198] Shumate interview (June 24, 2015).

[1199] *Id*.

- Gelles harped on the point that psychologists should only assist in obtaining information but never in conducting the interrogation.

- Newman, in his role as observer and as head of the Practice Directorate, asserted points that related more to the growth and protection of the profession as opposed to the ethical consideration. (ex: Arrigo's notes : "The profession will never advance if we don't apply the profession to new areas;" "The message that goes to our own field can reflect the complexity. The message that goes to the public cannot reflect the complexity;" "Should say what is being done that is appropriate. Got to clarify that psychologists are not engaged in inappropriate behavior on the whole.")

    - 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. He also openly discussed the political considerations of the report. Newman told Sidley that he believed that Arrigo's notes on what he said during the meetings were "not inaccurate."[1200] Arrigo attributed lines to him about "dampening the fires" and Newman agreed that he could have made that comment in the public relations context of the discussion. He did believe the message to the public should be simple and direct. Other observers in the room, in contrast with Newman, were instructed not to speak during the meeting. Brandon recalled that either Behnke or Mumford had informed that she could not offer comments during the meeting.[1201]

    - Newman agreed that he was a regular contributor during the PENS meetings and that, as general practice in all of his interactions with people, he tried to "speak with influence." A goal of his was to assure that the practices at issue would be "allowed to continue" within APA ethical framework. Newman insisted, however, that he would have deferred to the task force members or the Ethics Committee if they had determined that the interrogation practices were unethical.[1202] His role as the head of the Practice Directorate, what many within APA describe as the largest and most important Directorate within APA, only served to amplify Newman's voice.

    - Newman also told Sidley that, as head of the Practice Directorate, the image of the psychological profession was important to him, and he worked "as much as anybody" about the perception issues that APA had to manage both internally and externally with any public pronouncements.[1203]

- After a recess, Moorehead-Slaughter opened the discussion by stating that "safe, legal, ethical, and effective" was a key analytical framework. The phrase had not been mentioned during the meeting until this time, though it had been used by Banks

[1200] Newman interview (Apr. 29, 2015).

[1201] Brandon interview (May 26, 2015).

[1202] Newman interview (Apr. 29, 2015).

[1203] *Id.*

on the listserv before. And Behnke told Moorehead-Slaughter earlier over email, as discussed above, that the phraseology would be the analytical framework to use.

  - Two DoD members, Gelles and Lefever, both told Sidley that they were not impressed with Banks's analytical framework. Gelles commented that it sounded "cliché-ish" and that he did not understand what "safe" or "effective" meant.[1204] Lefever did not think there was any research to show that psychologists could make interrogations fully "safe, legal, ethical, and effective." Lefever described that he went along with the phraseology once it was clear to him that the meetings were not going to delve into the specific techniques and philosophical issues at play during interrogations.[1205]

- Behnke, like Newman, also raised public relations-related considerations (ex: Arrigo's notes: "How repetition in the press messes up message. Clarify. Simplify;" "Certain words very evocative: explicit, manipulate, interrogate.").

- After Behnke's comments, Fein, James, and Shumate all offered thoughts that suggested they wanted the report to stay at a more general level. For example, Fein noted how "No one can define 'torture,' " and James added that the group should "lay out basic principles, worry about definition later." Shumate also appeared to ask for latitude on what techniques to use until additional research was done: "We don't truly know what is effective or not effective. It's an empirical matter what works. Don't rule out until we know."

- The group engaged in an ethical debate about dual roles soon after Behnke's comments. The PENS report ultimately rejected dual roles for psychologists (i.e., a psychologist who may act as both an interrogation consultant and mental health professional for a detainee).

After lunch on the first day, Behnke released a one-page first draft of the PENS report for review.[1206] The draft statement contained nine statements, not all of which were discussed in the morning meeting. The first statement noted that psychologists' "central role" was to "ensure that all processes are safe, legal, and ethical for all participants in the process."[1207] The first draft stated that psychologists "do not condone or participate in torture" but did not list cruel, inhumane, or degrading treatment (this language was included in the third draft of the report). In an interview with Sidley, Behnke did not recall whether he outlined any of these statements before the meeting but noted that he was sitting at his computer taking notes the first day.[1208] Koocher told Sidley that he believed Behnke had created a report template before the task force

[1204] Gelles interview (May 27, 2015).

[1205] Lefever interview (May 3, 2015).

[1206] HC00008928.

[1207] *Id.*

[1208] Behnke interviews (May 22, 2015 & May 29, 2015).

met but was unsure of the details.[1209] Additional discussions arose from Behnke's draft, including the issue of when one could use medical records and clarifying the roles of the psychologist.

The night of the first day's meeting and before the task force dinner, Behnke sent a partially revised draft report for Gilfoyle's review.[1210] Gilfoyle suggested adding language from (presumably) Banks's PPSI, listing possible activities for psychologists in interrogation settings as well as adding the word "effective" to the "safe, legal, and ethical" phrase in Behnke's draft.[1211] She noted that Behnke had a "problem" with the word "effective," but could not recall what she was referring to in her interview with Sidley.[1212]

2. International law

Starting on the first day, Wessells engaged with several DoD members and Koocher on the need for incorporating international human rights standards into the group's ethical understandings. Thomas and Arrigo also subscribed to Wessells positions.[1213] Wessells noted his discomfort with not mentioning human rights standards in their analysis, particularly Common Article 3 of the Geneva Conventions.[1214] He bluntly stated that the United States threw out human rights issues when it was inconvenient for their efforts, and that human rights organizations had declared that current U.S. interpretations of international laws were wrong. As Arrigo put in her notes on Wessells's comments:

> What kind of damage [will be done] to APA if we say we do not support human rights as defined in the Geneva Conventions and other conventions? What about [the] damage to our national security? If we engage in human rights violations, the message that sends to other countries [is damaging to our national security]. They therefore become our enemies and attack. . . . The standards [on international human rights] are not an issue for debate at this point. . . [The] APA Code commits us to human rights. Does American law trump international law? As a professional society, do we have commitments in [the] human rights direction? If we aspire to these things, can we throw international human rights

[1209] Koocher interview (March 20, 2015).

[1210] APA_0040831.

[1211] *Id.*

[1212] Gilfoyle interview (May 20, 2015).

[1213] Arrigo PENS Meeting Notes (June 24, 2005).

[1214] Common Article 3 provides that detainees shall be "treated humanely" and that therefore "violence to life and person, in particular . . . cruel treatment and torture," and "outages upon person dignity, in particular humiliating and degrading treatment" were prohibited. The United Nations Convention Against Torture defines "torture" as an act that intentionally inflicts "severe [physical or mental] pain or suffering" on someone for one of several purposes, including obtaining information or a confession, punishing him, or intimidating or coercing him or a third person. Customary international human rights law, as defined by the International Committee on the Red Cross, defines "inhuman treatment" the same way as this definition of "torture" but without the specific-purpose requirement, and defines "degrading treatment" as acts that humiliate, degrade, or otherwise violated the person's dignity.

> away? APA is diverse but the diversity is not represented here. . . . We would damage ourselves as an association if we support American law when it contradicts international law. DoD has defined a set of standards not congruent with international law. If we endorse that, we damage our credibility. . . . As a professional association, at a moment of national panic, [we must] take a high standard.[1215]

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."[1216]

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."[1217] He later bemoaned that "once ethics becomes the handmaiden of patriotism," you were not talking about ethics anymore and, instead, were allowing ethics to be "appropriated by these other concerns."[1218]

Incorporating international law into the PENS report was one of the most contentious issues over the meeting period. 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. Several of these members said they, or their DoD colleagues, could not accept a position that varied from the requirements of U.S. law. In other words, as DoD officials they could not agree to be bound by constraints on their behavior that went beyond the constraints set by U.S. law. The DoD members gave various reasons for their stance to Sidley, as discussed below.

- Gelles told Sidley that adding the Geneva Conventions language was moot since his team at NCIS was already "doing the right things." But he expressed that adding such language could "tie up the Army and military guys." Gelles recalled that no one in the military asked him to explicitly lobby against using international law, but Gelles remembered that people informally said "we have to make sure this doesn't happen," referring to adding human rights standards. He was fairly certain that the "military guys" were advocating this position, not Fein, Gravitz, or Shumate. He also recalled phrases from members about how adding international legal standards would present a "serious obstacle" to efforts during wartime (and where the Geneva Conventions may not apply).[1219] Gelles surmised that the military members wanted

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[1215] Arrigo PENS Meeting Notes (June 24, 2005).

[1216] PENS Report.

[1217] Wessells interview (March 11, 2015).

[1218] *Id.*

[1219] Gelles interview (Apr. 15, 2015).

to incorporate as much of Banks's PPSI into the report so that they could "protect themselves" and quell any conflicts between military policy and APA ethical pronouncements. Gelles went along with the approach since, according to him, it did not impact his work and because he believed the report was an interim step in a longer process.[1220]

- Banks explained that inserting international human rights language into the PENS report could have created a "break" between a military officer's oath of office, which included a promise to follow U.S. law, and the APA's Ethics Code, which could lead to a dilemma where an officer would have to break their oath (and possibly the law) or break their ethical duties. Banks stated that U.S. law already incorporated the Geneva Conventions, so it was unnecessary to specify abiding by the international law. Banks acknowledged that there was a debate about whether the Geneva Conventions applied to detainees at the time, and that the definition of torture was interpreted narrowly by the Department of Justice. The solution to this issue, according to Banks, was the addition of the "cruel, inhuman, and degrading treatment" language in the PENS report, which would have encompassed techniques that were not considered torture but were still problematic.[1221] Those terms or techniques were not defined in the report, however, as discussed further below.

- James noted during the PENS meetings that he had no problem abiding by the Geneva Conventions. He remarked to Sidley, however, that psychologists from other agencies, such as the CIA, would have run afoul of these standards if they were mandated in the PENS report. While James disagreed with the CIA's approach to interrogations, he told Sidley that he did want the report to be used as a "whipping tool" to go after these psychologists.[1222]

- Fein said that he was not as familiar with the interplay between the various legal standards discussed at the time of the PENS meeting. To him, the military members' point that the U.S. Constitution was the guiding principle for the military made sense at that time. In retrospect, he stated that the report would have been better served if there was more specific information about issues of coercion.[1223]

- Shumate told Sidley that it would be a "huge issue" if the task force had inserted international law into the report, and that he was most comfortable with following the laws of the United States. He expressed that, practically, if the group decided to follow certain international legal principles, then progress on the report would have been "encumber[ed]" with discussions about these details. Shumate made comments throughout the meetings that suggested he could not take a public stand as a senior

[1220] Gelles interview (May 27, 2015).

[1221] Banks interview (May 21, 2015).

[1222] James interview (June 1, 2015).

[1223] Fein interview (May 11, 2015).

DoD official that was viewed as contrary to U.S. law, but he denied to Sidley that this was a consideration for him.[1224]

- Lefever rejected the utility of international human rights standards in the document. He welcomed a discussion into which specific techniques were permissible but wished to follow U.S. law alone, especially as human rights standards were often hypocritically espoused by the most oppressive of nations. He did not wish to open that "can of worms."[1225]

While these positions may have been understandable as a statement of U.S. governmental policy, Koocher also attacked the idea of the APA tapping into international law definitions in crafting ethical guidance, calling it a "distraction to draw international law" into APA's ethics guidance.[1226] As one DoD task force member described it, and others suggested as well, Koocher took a very "pro-America" stance throughout the PENS process. The report thus 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 OLC memos)

But these hesitations to use international law in the report ignored the alternative ways that the report could have embraced standards from international laws without fully adopting that international instrument. For example, instead of having a report that stated that psychologists had to abide by all of the provisions of the Geneva Conventions, some of which may not recognized by the United States,[1227] the task force could have specified which Geneva Conventions applied—in this case, the Third Geneva Convention related to the treatment of prisoners of war, which the United States recognizes.[1228] If this was still problematic given the uncertain nature of detainees' legal status, the task force could have adopted language from the Geneva Conventions without formally approving any portion of the instrument. Article 17 of the Third Geneva Convention, for example, provides readily-adaptable language on the parameters for questioning prisoners.[1229] The reference to the international law would have been a stronger

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[1224] Shumate interview (June 24, 2015).

[1225] Lefever interview (May 3, 2015).

[1226] Arrigo PENS Meeting Notes (June 24, 2015).

[1227] Banks shared with Sidley how the United States does not recognize Protocol I to the Geneva Conventions, which relates to the protection of victims in international armed conflicts. If an ethical pronouncement stated to abide by the "Geneva Conventions," then, Banks worried that military psychologists would have to violate their oath and U.S. law. *See* Email from Banks to Sidley (June 18, 2015). For more on the Protocol, see https://www.icrc.org/ihl/INTRO/470. While the United States was a signatory to the treaty, it has never ratified the protocol into law.

[1228] *Article 3 – Conflicts Not of an International Character*, Geneva Convention (III) (Aug. 12, 1949), *available at* https://www.icrc.org/applic/ihl/ihl.nsf/COM/375-590006?OpenDocument.

[1229] *Article 17 – Questioning of Prisoners*, Geneva Convention (III) (Aug. 12, 1949), *available at* https://www.icrc.org/ihl/WebART/375-590022?OpenDocument ("No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.").

touchstone for the report, as opposed to U.S. law or military directives that could have been (and were) trumped by pronouncements from the OLC or the Secretary of Defense.

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).

But sometimes leadership in this manner causes external change rather than just conflict. Thus, taking this direction (especially if the other leading health-care professional associations also took ethical positions that were less accepting of the Administration's position, as they ultimately did) may have caused, or placed pressure on, DoD or the Administration to change its position regarding the use of international-law definitions in these circumstances. 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).

3. Confidentiality of meetings

The most tense portion of the first day came at the end of the meeting when the topic of confidentiality arose. Anton first raised the point during the meeting, to which Moorehead-Slaughter replied that all conversations must stay in the room and not discussed outside.[1230] Arrigo noted that she complained about the "secrecy" at the time. Newman added that keeping discussions confidential was advisable since they were dealing with a controversial topic and conversations or varying views about it could "ignite the fire instead of dampen it."[1231] Lefever proposed discussing the issues back to his "community," but multiple people rejected his proposal. Breckler resolved that, given the "potential for varying interpretations," the PENS report should speak in a "single voice," otherwise there would be many different versions.[1232] Ultimately, a vote was taken and all members, save for Arrigo who dissented and Wessells who abstained, agreed to keep discussions confidential.

Shumate also demanded that Arrigo stop taking notes during these conversations. Gelles relayed to Sidley that the Arrigo episode the first day contributed to an "us versus them" mentality between the DoD and non-DoD members.[1233] Arrigo told Sidley that she was "so

[1230] Arrigo's PENS Meetings Notes (June 24, 2005).

[1231] *Id.*

[1232] *Id.*

[1233] Gelles interview (May 27, 2015).

upset" after the first day of meetings.[1234] Her remaining notes from the meetings were largely taken on the margins of various PENS draft reports and are not as complete as her notes from the first day of discussions.

It appears, however, the "no taking notes" policy was unevenly enforced. For example, Susan Brandon, an observer in the room the first two days of the PENS meetings, was never instructed to cease her note-taking according to her interview with Sidley.[1235] Thomas recalled to Sidley that note-taking was not explicitly disallowed.[1236] But she posited that the group may have had to leave their notes in the room during the meetings.[1237]

Anton later emailed Koocher with an update on the group from day one (Koocher left the proceedings by lunch time due to a family emergency and was not in attendance the rest of Friday afternoon or Saturday).[1238] Anton remarked that the "DoD folks" offered useful insights during the meeting that illustrated how "complicated" these issues were.[1239] He also described the afternoon's confidentiality discussion as Arrigo was "taking copious notes."[1240] He added that Shumate and others felt "uncomfortable" with her note-taking and that the group, by "split vote," agreed to keep all meeting matters confidential and have the report speak for the group. Koocher responded to Anton, copying Behnke, that he, too, "felt concerned" about Arrigo's note-taking.[1241] He suggested that it be made clear that the task force conclusions "should be reached by consensus," and that no communications during the meeting "be cited for attribution UNLESS there is unanimous agreement and these appear in the approved report."[1242]

It should be noted that APA's policies on the closed sessions were addressed in an internal February 3, 2003 memorandum from Norman Anderson, which outlined the limited circumstances where closed sessions were permissible for "personnel issues":

> As a general principle, the meetings of APA groups are open to any APA member and APA staff. Occasionally, during board, committee and task force meetings, sensitive matters must be discussed. Requiring that all meetings be open at all times could inhibit full and frank discussion. However, in order to

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[1234] Arrigo interview (Apr. 27, 2015).

[1235] Brandon interview (May 26, 2015). Sidley received varying accounts of whether other votes were taken during the meetings. There was some belief that votes were taken on whether note-taking was allowed and another vote on whether international human rights standards should apply in the document. Sidley has been unable to corroborate with any certainty that either of these two votes formally took place.

[1236] Thomas interview (Feb. 13, 2015).

[1237] Email from Thomas to Sidley (May 25, 2015).

[1238] APA_0040795.

[1239] *Id.*

[1240] *Id.*

[1241] *Id.*

[1242] *Id.* (emphasis in original).

> respect the free and open flow of information within the association and to reduce the appearance of "secret decisions," closed meetings should be as infrequent as possible and primarily limited to personnel issues or issues that might cause personal embarrassment to the individual being discussed. Some of the work of a few groups such as the Ethics Committee and the Committee on Accreditation involves information of an inherently confidential nature about individuals or institutions and their meetings are restricted pursuant to adopted rules or procedures.[1243]

Allowing a limited number of observers for an APA task force, all of whom were pre-approved to attend, may not comply with the spirit of the February 2003 guidance. Gilfoyle defended the PENS meeting structure.[1244] She stated the February 2003 memorandum focused on closed meetings that involved no staff; this was not case in PENS where multiple APA staffers were present. Gilfoyle also found the PENS setup less problematic since the task force was not a formal APA decision-making body like the Board of Directors. She also believed full and frank discussion could have been inhibited if the meetings were more open.[1245]

C. Day Two: June 25, 2005

1. Discussions about research

The evidence shows that Mumford, Brandon, Newman, and Gravitz made drafting suggestions regarding the research recommendations, and at least some of Brandon's drafting suggestions made it into the final version.

Critics have pointed to some of this language as an indication that APA was intentionally attempting to provide ethical support for research by the CIA or DoD on detainees at Guantanamo or elsewhere, or was otherwise attempting to allow for research that involved harsh interrogation techniques without the proper human-subject-research protections.

On the one hand, we found two notes in Behnke's handwritten notes from the PENS Task Force meeting in which the phrase "research on detainees" or "detainees as research subjects" was noted. Behnke provided no explanation for these notes, and we found no emails or other documentary evidence relating to them. In addition, in a meeting at the Department of Homeland Security about two years earlier attended by Mumford and Brandon, one of the subjects discussed was collecting data relating to detainees. Sources have told us without corroboration that there is evidence of the CIA engaging in activity regarding detainee interrogations that would constitute improper research.

Further, the language in the report's research passages appears deficient. Ethics experts have told us that the language in the PENS report quoted above was woefully deficient in terms

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[1243] APA_0083932.

[1244] Gilfoyle interview (May 20, 2015).

[1245] *Id.*

of the language that would typically be expected in order to communicate proper protections. And the language regarding "cruel, inhuman, or degrading treatment" is ambiguous, and so may easily be read to suggest that the research being described is to determine if interrogation techniques that Americans would find cruel, inhuman or degrading may not be consider so bad by other cultures.

On the other hand, we did not see evidence linking these recommendations to any actions by APA officials regarding research, or linking their drafting to efforts by the government to use a recommendation in the PENS report as a helpful point in being authorized to conduct human subjects research without informed consent. We noted that these recommendations are not in the 12 ethical guidelines in the PENS report, and therefore do not have the force of ethical guidelines for psychologists, in a way that might be pointed to as a justification for a psychologist's actions.

We found this a topic on which it was difficult to draw clear conclusions, and our discussion and analysis of the evidence is below.

Mumford sent Behnke a series of three emails the morning of the second day of PENS meetings that included draft language on conducting research in national security settings. The first message was sent at 8:16 a.m. ET,[1246] the second at 10:09 a.m. ET,[1247] and the third at 11:30 a.m. ET.[1248] Each of Mumford's emails added another paragraph from the previous message. Mumford did not specifically recall with Sidley who or what prompted discussions about this topic. Some of the draft language was included into the final report.

A copy of the draft language from each email is listed below with comments on each:

<u>First email draft language:</u>

> *Psychologists support research to evaluate the efficacy of methods for gathering accurate and reliable information relevant to national security. Such research should be designed to minimize the risk/benefit ratio and emotional/physical harm to the research participants consistent with existing standards of human subjects research and APA ethics code.*[1249]

- A version of this statement appears as recommendation #7 in the final PENS report. It removes the "risk/benefit ratio" and "emotional/physical harm" language and instead states the need to "minimize risks to research participants such as emotional distress . . . ."[1250] Brandon told Sidley that she may have contributed to the revisions of this research point in the PENS report though she was unsure.[1251] Behnke stated that,

[1246] APA_0029693; APA_0029694.

[1247] APA_0029691; APA_0029692.

[1248] Mumford Notes (June 25, 2006) (on file with Sidley).

[1249] APA_0029693; APA_0029694.

[1250] PENS Report.

[1251] Brandon interview (May 26, 2015); *see also* APA_0029660 (Mumford alludes to Brandon's edits making it into the final draft of the report).

while he did not recall the draft language, he would have been comfortable with the change made in the final report since the risk-benefit language may be used to justify all kinds of risk in the name of saving lives.[1252]

- The same recommendation continues by stating that the research should be "should be consistent with standards of human subject research protection and APA Ethics Code." Behnke stated that he understood "standards of human subject research protection" to mean what medical ethicists thought were appropriate standards. Mumford believed the language was an "unassailable and appropriate affirmation" to conduct research that followed all standards of APA's "Responsible Conduct Research."[1253] But read another way, the language may have accommodated the prevailing Wolfowitz Directive, which allowed DoD division leaders to waive informed consent for certain detainees.[1254] More on the Wolfowitz Directive was discussed earlier in this report. Behnke countered that research on detainees would not fulfill the other language in the paragraph about how "research should be designed to minimize risks to research participants," even if the research was observational or to examine archived data.[1255]

<u>Second email draft language</u>:

> *Psychologists support research to evaluate the efficacy of methods for gathering accurate and reliable information relevant to national security. Such research should be designed to minimize the risk/benefit ratio and emotional/physical harm to the research participants consistent with existing standards of human subjects research and APA ethics code.*
>
> *Because disclosing the results of such research could compromise the development of enhanced sources and methods, it may not always serve the national interest to explain deception used in the research design or to include the debriefing standards contained in 8.07 and 8.08.*[1256]

- The new paragraph suggests that debriefing could be discarded if the "national interest" was strong enough. The final report does not make this claim, but in its conclusion section, it does note the "tension between conducting research that is classified or whose success could be compromised if the research purpose and/or methodology become known and ethical standards that require debriefing after participation in a study as a

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[1252] Behnke interview (June 8, 2015).

[1253] Email from Mumford to Sidley (May 27, 2015); *see also Responsible Conduct of Research,* American Psychological Association, *available at* http://www.apa.org/research/responsible/.

[1254] Jason Leopold & Jeffrey Kaye, *Wolfowitz Directive Gave Legal Cover to Detainee Experimentation Program*, Truthout (Oct. 14, 2010), *available at* http://www.truth-out.org/news/item/257:wolfowitz-directive-gave-legal-cover-to-detainee-experimentation-program.

[1255] Behnke interview (June 8, 2015).

[1256] APA_0029691; APA_0029692.

research subject."[1257] The new paragraph also makes note of "enhanced sources and methods" without any explanation of what those are.

- Breckler told Sidley that this paragraph in the final report, though poorly worded, likely related to research being conducted at Department of Homeland Security Centers of Excellence and having psychologists involved in those studies that included research on deception and interrogations. He added that the issue of debriefing in classified settings was subject of much debate, so that was why the "tension" language was added here.[1258]

- Mumford thought that the new paragraph came from someone with a "national security interest" and speculated that Fein may have suggested this since he was the research expert. Mumford also told Sidley that he interacted most with Shumate at the time, but thought it unlikely that Shumate would have offered this language.[1259]

  - But Mumford may have had more of a direct role in drafting these two paragraphs based on a message he sent earlier to Behnke, Breckler, and Kelly. On May 23, 2005, Mumford emailed the three and used the "risk/benefit" language and queried whether "all coercive techniques should be discredited," or if there were techniques available "that would pass some risk/benefit test?"[1260] Mumford then stated that "behavioral scientists get away with using deception/coercion all the time in research with the understanding that participants are later debriefed as to the true nature of the research. . . couldn't it be argued that the application of those techniques (sans debriefing) in national security settings are justified?"[1261]

- This paragraph in particular suggests that research on detainees could have been envisioned at some point by someone associated with the task force. It is hard to explain why the "national interest" would be a factor in research conducted in a lab or other closed setting; the language seems more likely to relate to questioning people and not revealing what one's research intentions were.

  - Mumford later suggested to Sidley that the research paragraph may have envisioned something like the Transportation Security Authority's Screening Passengers by Observation Techniques ("SPOT") program,[1262] a type of

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[1257] PENS Report.

[1258] Breckler interview (June 18, 2015).

[1259] Mumford interview (May 18, 2015).

[1260] APA_0025671.

[1261] *Id*. (ellipses in original).

[1262] *Privacy Impact Assessment Update for the Screening of Passengers by Observation Techniques Program*, Department of Homeland Security (Aug. 5, 2011), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-tsa-spot-update.pdf; *see also* Email from Mumford to Sidley (May 20, 2015).

behavioral detection program that has been met with controversy.[1263] The TSA SPOT program, however, did not exist until January 2006;[1264] it is possible that a program like that was envisioned at the time, however. Also, as mentioned above, Breckler suggested that DHS Centers of Excellence were envisioned when discussing research opportunities for psychologists in national security settings.

- Brandon told Sidley that the new paragraph appeared to have come from someone involved in the counterintelligence community, perhaps Shumate or Gravitz.[1265] She stated that it sounded like a clinician without much experience in research wrote the language since a psychologist always needed to debrief a research subject.[1266]

Third email draft language (email subject notes that Gravitz and Newman provided input):

> *Psychologists have the obligation to utilize psychological knowledge derived from recognized authoritative sources (e.g. research, experience to inform professional judgement [sic]) in the furtherance of their scientific and professional activities. (e.g. efficacy of using positive reinforcement vs. negative reinforcement).*
>
> *Psychologists support research to evaluate the efficacy of methods for gathering accurate and reliable information. Such research should be designed to minimize the risk/benefit ratio and emotional/physical distress to research participants consistent with existing standards of human subjects research protections and APA ethics code.*
>
> *Because disclosing the results of such research in certain contexts could compromise the development of enhanced sources and methods, it may not always serve the interests of national security to explain deception used in the research design or to include the debriefing standards contained in 8.07 and 8.08.*[1267]

- The new introductory paragraph underscores the "obligation" psychologists have to use all "authoritative sources" to further their activities. This paragraph does not appear in the final report, though a conclusion paragraph under Statement Twelve contains language states psychologists "should encourage and engage in further research to evaluate and enhance the efficacy and effectiveness of the application of psychological

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[1263] Josh Hicks, *ACLU Sues for Details of TSA's Controversial 'Behavioral Detection' Program*, Washington Post (Mar. 20, 2015), *available at* http://www.washingtonpost.com/blogs/federal-eye/wp/2015/03/20/aclu-sues-for-details-of-tsas-controversial-behavioral-detection-program/.

[1264] Sharon Weinberger, *Airport security: Intent to Deceive?*, Nature (May 26, 2010), *available at* http://www.nature.com/news/2010/100526/full/465412a.html.

[1265] Brandon interview (May 26, 2015).

[1266] *Id.*

[1267] Mumford Notes (June 25, 2006) (on file with Sidley).

science to issues, concerns and operations relevant to national security."[1268] Mumford remarked to Sidley that this draft paragraph reflected the emphasis the practice community (as opposed to the research community) placed on professional judgment.[1269]

- The final report paragraph also states the need to be aware of cultural differences and its impact on what information-gathering methods were cruel, inhuman, or degrading ("CID") treatment (Statement Twelve, fourth bullet). This sentence could be read as weighing cultural differences in defining what might be "cruel, inhuman, or degrading" in one culture versus another. For example, if it was believed that a detainee from Saudi Arabia would consider only a 'high-level" of harsh techniques degrading, then an interrogator would be permitted to use other "low-level" harsh techniques for that Saudi detainee.

    - Brandon believed she may helped write the full paragraph but that the cultural differences point was poorly worded in retrospect.[1270] The sentence was supposed to convey the need to be respectful to other cultural backgrounds, not imply that what was considered cruel was relative to a detainee's cultural background.[1271]

    - Behnke told Sidley that wished he would have included a clause to clarify that cultural differences in "cruel, inhuman, or degrading" meant a technique was not cruel in either the detainee's or the interrogator's culture.[1272] He explained that any potential concern, however, would be removed when reading the second bullet point under Statement Seven of the report, which links safety and efficacy to cultural understanding ("How failures to understand aspects of individuals' culture and ethnicity may generate misunderstandings, compromise the efficacy and hence the safety of investigatory processes, and result in significant mental and physical harm."). Behnke argued that safety and efficacy were linked, and that he relied on Banks's comments on the PENS listserv about how using SERE techniques and gathering accurate information were "diametrically opposed" with one another.[1273]

Brandon, Behnke, Breckler, Mumford and others at APA have told Sidley that, despite these draft statements and ambiguous/poorly drafted PENS report language, research on detainees were never discussed or pushed by task force members or outside entities.[1274] Brandon

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[1268] PENS Report.

[1269] Mumford interview (May 18, 2015).

[1270] Brandon interview (May 26, 2015).

[1271] *Id*.

[1272] Behnke interview (June 8, 2015).

[1273] PENS listserv (May 23, 2005).

[1274] Brandon interview (May 26, 2015).

also stated that when she first joined the High-Value Interrogation Group ("HIG") in 2009, one of the first things she inquired about was whether any government agencies had conduced research on detainees; she found no records.[1275]

Yet in one of Behnke's handwritten set of notes, likely from the second day of the PENS meetings,[1276] he noted two instances of detainee research — on the first page of notes, Behnke wrote "detainees as research subjects;" on the last page, Behnke wrote "research a detainees?"[1277] The second note is crossed out by two dotted "X" marks. These notes do not appear in either Arrigo's or Brandon's set of notes, implying that these thoughts arose from side-conversations Behnke had or thoughts he had himself. Behnke could not recall why he wrote those notes but insisted that these topics were not discussed during the PENS meetings.[1278] In addition, interviews with government officials revealed a strong awareness after September 11 about the possibility of gathering data on detainees and the debates that ensued in the years after.[1279] None of the interviewees were aware whether research on detainees ever occurred, but the topic was discussed in government circles — where researchers could observe detainees and the interrogation tactics that were used, be it in real-time or with archived data, without any involvement in the interrogation itself. The PENS report's research language, which is limited, appears to leave space for these kinds of efforts to occur. But we were unable to conclude that this, in fact, was what was envisioned by anyone at the time.

2. *PENS second draft report*

Behnke distributed a second draft of the task force report at the start of the second day of PENS meetings. Behnke's hard copy files from the PENS meeting contains his copy of the second draft along with his notes in the margins. A copy of this draft is appended to this report.[1280] Twelve statements appear in this draft and , save for Statement Seven, each appear in the final version of the report, albeit in a slightly different order and with wording changes. But the vast majority of this draft comprises the final report. So after one day of task force deliberations, Behnke drafted a document that would largely become the final PENS report's twelve statements.

Statement seven in this draft, which is excluded from the next draft version, is the one statement in any draft version that offered more specifics on when and what "techniques" to use. The statement reads as follows:

[1275] *Id*.

[1276] HC00017705. The notes are undated, but they are not from the first day since we located Behnke's typed set of notes from that day. Some of the comments in this handwritten set also appear on Arrigo's set of notes from the second day leading us to conclude they are at least, in part, from the second day of PENS meetings.

[1277] *Id*.

[1278] Behnke interviews (May 22, 2015 & May 29, 2015).

[1279] Banks, Gelles, and Andy Morgan all mentioned to Sidley the vigorous debates taking place within the military and government about the unique opportunities that researchers had to observe interrogations.

[1280] HC00017699.

> [P]sychologists do not consult on techniques that would cause psychological distress except for a clear, legitimate purpose, such as to prevent future acts of violence. Punishment and obtaining a confession do not constitute legitimate purposes. If psychologists consult on activities that would cause psychological distress, they follow the restrictions on psychological distress set forth in Ethical Standard 8.07, Deception in Research, which places boundaries on the degree of psychological distress researchers may impose upon research subjects.

The statement outlined a "legitimate purpose test" to determine when a psychologist could consult on techniques that cause "psychological distress." This potentially large loophole on using techniques that cause psychological distress is limited by the next sentence, which specifies that punishment and obtaining a confession are not legitimate purpose. This language incorporates a portion of the U.N. Convention Against Torture's definition of torture, which states that for an act to be considered torture, it must be done for one of several purposes, including obtaining "information or a confession," "punishing him," or "intimidating or coercing him or a third person." Behnke's used the "confession" and "punishment" limitations, but left out the "obtaining information," "intimidating," and "coercing" limitations.[1281] Thus, Behnke's draft allowed psychologists to recommend an interrogation technique that would cause psychological distress as long as their purpose was to get information in order to prevent future acts of violence, and was not to punish or obtain a "confession." Behnke's draft also created a novel second limitation—that psychologists in these situations needed to follow the restrictions set out in a research provision of the Ethics Code Standard 8.07, which provides that psychologists do not deceive prospective research participants about research that is reasonably expected to cause "physical pain or severe emotional distress." Behnke said he could not recall why he included this provision as a type of limitation.

Arrigo's notes from the second day onward are much less comprehensive since the group voted on confidentiality and Shumate insisted that she cease note-taking the day before. She wrote notes on the margins of the draft reports, which were then transcribed. But the notes appear to corroborate the notion that there was some discussion about the draft statement and also specific techniques more broadly. It also appears that Banks was against the language:

> [Anton] Psychologist as advisor to induce stress.
>
> [Banks] Thinks confession is legitimate purpose [for consultation with a psychologist].
>
> [unattributed] Psychologists do not conduct interrogation except possibly in emergency field condition.
>
> [Banks] Often we do try to exploit psychological distress. We need the boundaries.
>
> [Gelles] Creating conflict in a person is the way to move towards confession.

[1281] U.N. Convention Against Torture (Dec. 10, 1984), *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx.

> . . .
>
> [Wessells] The disorientation techniques remain. Our reputation in this profession depends on this document.
>
> . . .
>
> [Wessells] Still worried about the gray areas.
>
> . . .
>
> [unattributed] the point on the dial. Do we need to address this? We will be asked. E.g., sleep deprivation.[1282]

Wessells recalled a longer discussion about whether "psychological distress," as noted in the Statement Seven draft language, was an appropriate dividing line for lawful or unlawful interrogations. People like Gelles and Shumate, Wessells believed, thought the line was inappropriate since it could encompass lawful domestic interrogations that involved plea bargaining, which could involve a certain level of distress. Wessells also recalled "evasive" discussions with Banks, who opposed this new language, about specific interrogation techniques. On sleep deprivation, for example, Wessells inquired to Banks how sleep deprivation was used. Banks remarked that having someone sleep three or four hours the night before an interrogation could be useful. Wessells then asked whether the techniques could be used on successive nights and, if so, how many and whether it could be used in combination with our techniques. He did not receive a direct answer. As discussed more below in his resignation from the task force, Wessells believed that the DoD members did not wish to discuss these issues because it opened the possibility of challenging existing military regulations.[1283] The topic of waterboarding may have been discussed informally between Wessells and Lefever, too, though not likely with the larger group.[1284]

Behnke told Sidley that he believed that the statement was removed at Breckler's behest. Behnke recalled that Breckler wanted to remove the reference to research. Breckler said it was possible that he asked Behnke to remove the language, but was unsure. In analyzing the draft report language anew with us, however, he stated that the 8.07 language was inconsistent with the draft statement's first sentence about psychological distress, since Standard 8.07 specifically

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[1282] Arrigo PENS Meeting Notes (June 25, 2005).

[1283] Wessells interview (June 11, 2015).

[1284] Wessells noted that he and Lefever had a conversation about waterboarding during one of the meeting breaks. He recalled that Lefever was waterboarded during his Navy SERE training (Lefever confirmed this with Sidley) and thought Lefever thought the sensation was terrible (Lefever told Sidley he thought he was going to die). But ultimately, Lefever stated, the experience was bearable for him. Wessells thought waterboarding was mentioned in passing during the meeting, but neither he nor other task force members could recall a specific discussion about that technique.

dealt with deception in research only and not with various types of psychological consultations.[1285]

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 gone, then he thought to remove the full paragraph. Behnke also said the provision could be read broadly, where people could justify harmful acts in the name of preventing future acts of violence. Behnke was not sure why he did not refine the test — perhaps outlining a rule that always barred psychological distress, allowing it in limited circumstances, making it broader, or perhaps using guidelines in the Geneva Conventions[1286] — and instead removed it from the next draft entirely. [1287]

The statement was ultimately replaced by an unrelated issue about reminding psychologists that the individual being interrogated "may not have engaged in untoward behavior" and may not have useful information.[1288] In analyzing a series of handwritten notes from members,[1289] Banks was the one who recommended this new statement.[1290] Arrigo told Sidley that she had originally raised a concern about interrogating detainees who were innocent and that Banks drafted the wording for Behnke's consideration.[1291] Given that Banks was against the draft statement's minimal restriction on causing psychological distress, and given his overarching goal to keep the PENS report in concert with military guidance, it is likely that Banks appropriated Arrigo's concerns both to curry favor with Arrigo and to block the use of any language in the report that assessed the validity of certain techniques. This assertion is further supported by later conversations between Behnke and Banks after the report was finalized about

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[1285] Breckler interview (June 18, 2015). Brandon's notes from the second day of the PENS meetings also appear to corroborate Breckler's thoughts on the use of Standard 8.07. At the top of the fourth page of her notes, she wrote "Disingenuous paragraph '7th'— distress in [research] [does not equal] stress in interrogation." Brandon Notes (undated) (on file with Sidley). The note may suggest that the Standard 8.07 standard — which bars psychologists from deceiving research participants about research that could "cause physical pain or severe emotional distress" — is not the same as stress caused during an interrogation. Brandon later added to Sidley that the note was "an assertion that we have no research on interrogation methods that use abusive methods since research can't use such on subjects." Email from Brandon to Sidley (June 21, 2015).

[1286] Article 17 of the Third Geneva Convention, for example, provides readily-adaptable language on the parameters for questioning prisoners. *See* https://www.icrc.org/ihl/WebART/375-590022?OpenDocument ("No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.").

[1287] Behnke interview (May 29, 2005).

[1288] PENS Report.

[1289] HC00017712. We identified each PENS member's handwriting (either in person or by asking for a handwriting sample) and matched them to this set of handwritten notes. Banks informed Sidley that the second and last pages of the notes came from him.

[1290] *Id.* (see last page).

[1291] Arrigo interview (June 5, 2015).

how the key issue that people will ask about that is not addressed in the report is the amount of psychological distress that is acceptable (discussed in the PENS Aftermath section).

The third draft of the report still included a reference to "psychological distress," but that was removed entirely by the fourth version of the draft report:[1292]

Third draft report (circulated at the start of June 26):

> [P]sychologists who consult on interrogation techniques are mindful that the individual being interrogated may not have engaged in untoward behavior and may not have information of interest to the interrogator. When psychologists serve as consultants to interrogation, and especially when such consultation concerns techniques that potentially generate psychological distress, psychologists consider whether the techniques consulted upon would be deemed ethically appropriate should such determinations related to guilt and relevance ultimately be made. At all times psychologists remain mindful of the prohibitions against engaging in or facilitating torture and other cruel, inhuman, or degrading treatment. Psychologists inform themselves about research regarding the most effective and humane methods of obtaining information and become familiar with how culture may interact with the techniques consulted upon. (Ethical Standards 2.01, Boundaries of Competence; 2.03, Maintaining Competence; and 3.01, Unfair Discrimination)

- It appeared that Gilfoyle flagged the language in the third draft as confusing.[1293] After the bold section above, she wrote "I'm not sure it's clear what you mean here — if they are innocent or had no info , would the tactics used stand up to scrutiny? . . . It also sort of raises the specter that they may just be detained indefinitely and never have such a determination made." Behnke responded to Gilfoyle that this statement represented an "extremely complicated issue," that was "one of the most challenging ethical issues in this whole area."[1294] This exchange may have led to the changes in the fourth draft, which avoided using the term "psychological distress" at all.

Fourth draft report (circulated at the end of June 26):

> [P]sychologists who consult on interrogation techniques are mindful that the individual being interrogated may not have engaged in untoward behavior and may not have information of interest to the interrogator. This ethical obligation is not diminished by the nature of an individual's acts prior to detainment or the likelihood of the individual having relevant information. At all times

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[1292] *See* PENS Drafts #3 & #4 (on file with Sidley) (emphasis added). Arrigo archived all versions of the PENS drafts and final reports as part of the PENS Archives housed at the University of Colorado-Boulder. We append a full set of drafts from Arrigo, which include her notes in the margins of these drafts. Please note that there are two copies of the fourth draft of the PENS report in these files.

[1293] APA_0040786; APA_0040787.

[1294] APA_0048590.

> psychologists remain mindful of the prohibitions against engaging in or facilitating torture and other cruel, inhuman, or degrading treatment. Psychologists inform themselves about research regarding the most effective and humane methods of obtaining information and become familiar with how culture may interact with the techniques consulted upon. (Principle E, Respect for Peoples' Rights and Dignity; Ethical Standards 2.01, Boundaries of Competence; 2.03, Maintaining Competence; and 3.01, Unfair Discrimination)

This draft statement seven was the one instance across any of the drafts that aimed more specifically at the techniques that may or may not be used in an interrogation. No version of it survived the later drafts and final report. To be sure, it does not appear in anyone's notes that this statement impassioned as much debate as the issues of international law. But the dynamics of the room—the number of DoD members, Newman's role as leader of several discussions, Behnke's role as lead drafter, members admonishing Arrigo on the first day, the promise of the meetings and report being an initial step in the process—likely stifled talks on this and other statements in the report.

3. Other day two conversations

The conversations from the second day of PENS meetings largely followed from the first day. Some observations are listed below:[1295]

- Gelles retained an absolute position on psychologist never conducting interrogations while the military members of the task force disagreed.

- Newman continued to lead conversations of the task force and reiterated the need to keep the report's message direct as possible (ex: Arrigo's notes: "Don't go too far in discussing psychologists as interrogators so as not to expose ourselves and complicate the issue.").

- Behnke, too, raised similar concerns as Newman (ex: Arrigo's notes: "Attend to level of specificity in document so as not to cause difficulties.").

- Wessells continued to press for international standards in the document or a discussion of specific techniques. Behnke cited to some of the international legal standards in the subsequent draft document as discussed below. Pointedly, Wessells was noted as saying that "disorientation techniques remain," and that psychology's "reputation . . . depends on this document." Gelles was noted as saying that he "[w]ants to postpone" a further discussion on these issues.

- Lefever provided additional examples of what he believed were permissible interrogation tactics.

[1295] All observations come from the Arrigo PENS Meeting Notes (June 25, 2005), unless otherwise noted.

- Banks and others raised the issue of psychologists' role in preventing behavioral drift. This psychologist role was added in the next draft version of the report and part of the final report.

- Arrigo brought up the idea of a casebook with examples and received support from several task members and observers about his idea, including Newman. As discussed later, the idea was never realized within the task force.

- Gravitz joined the group as an observer and offered a few comments during the meeting. At one point, Wessells recalled to Sidley, that Gravitz offered comments on the use of coercive methods. Wessells and Arrigo thought the methods would never work but Gravitz disagreed, stating that some methods were needed under "certain circumstances."[1296]

Anton emailed Koocher after the second day of the meetings and provided a summary that highlighted problems with Arrigo and his approval of the "DoD folks":

> Jean Maria got pretty loose today — e.g. questioning why the American Psychological Association was called the American Psychological Association. She did alot of splitting too, in my opinion, and was quite difficult. She continued to take notes, writing on the margins of our in-progress papers in spite of assurances yesterday that she wouldn't. I think she aliented [sic] everyone but Mike Wessells [sic] and I'm not too sure about his feelings. I have to say that DoD folks were gentle, respectful, and open to her, but also were able to express their views. They are very interested in a continuing dialogue with APA and were pleased to be there and look forward to collaborating on other projects."[1297]

Behnke sent a revised draft of the report after midnight to Gilfoyle, Koocher, Anton, Farberman, and Moorehead-Slaughter for comment ahead of the final task force meeting.[1298] Notably, Farberman commented that the report include some kind of disclaimer so the statements are not construed "as APA saying torture or inappropriate treatment has taken place."[1299] The next version of the report (and final report) clarified at the beginning of the report that the task force's changes "did not include an investigative or adjudicatory role, and as a consequence emphasized that it did not render any judgment concerning events that may or may not have occurred in national security related settings."[1300]

[1296] Wessells interview (Mar. 11, 2015).

[1297] APA_0040795.

[1298] APA_0040782.

[1299] *Id*.

[1300] PENS Report.

D. Day Three: June 26, 2005

The task force met for half the day on Sunday, the final day of meetings. Behnke distributed copies of a third draft version of the report.[1301] Notably, the document added that psychologists do no engage in torture as well as "cruel, inhuman, and degrading treatment," which tracked the U.N. Convention Against Torture that Wessells, Thomas, and Arrigo championed. At some point, Arrigo's notes indicate that Newman commented that if the document had no new ethical principles, then APA governance could approve the report quicker. Newman pronounced that if there were new principles within the document, then it could take up to a year to approve the full document.[1302] The third draft also added a point on how psychologists could prevent behavioral drift ("How the combination of a setting's ambiguity with high stress may facilitate engaging in behaviors that cross the boundaries of competence and ethical propriety."). The remaining draft reports are appended to this report and come from Arrigo's collection of the draft reports. As such, they contain Arrigo's handwritten notes on the draft reports.

Farberman also joined the meeting by conference call to discuss talking points for the report. Farberman told Sidley that it was very common for her join various task forces to discuss these issues.[1303] Arrigo's notes indicate Farberman made comments about not implying that torture occurred at Abu Ghraib or Guantanamo Bay.[1304]

Banks also mentioned that he intended to personally brief the Army Surgeon General on the report's findings.[1305]

By the evening of June 26, Behnke revised the document a fourth time based on the task force's final comments and forwarded to Moorehead-Slaughter to circulate to the group. Behnke, per conversations with Wessells, added a footnote citing to the Geneva Conventions and the U.N. Convention Against Torture.[1306] Each member approved of the final fourth draft version of the report that evening.

Shortly thereafter, Shumate attended a meeting with William Winkenwerder, then-Assistant Secretary of Defense for Health Affairs. Kelly sent an email on June 28 informing Behnke, Mumford, Breckler, and Newman. She noted that Shumate described the "thrust" of the PENS meetings and that Winkenwerder was "pleasantly astounded" that APA tackled the issue and requested a copy of the report.[1307]

[1301] *See* PENS Draft #3 (on file with Sidley).

[1302] Arrigo PENS Meeting Notes (June 26, 2005).

[1303] Farberman interview (May 19, 2015).

[1304] Arrigo PENS Meeting Notes (June 26, 2005).

[1305] *Id.*

[1306] *See* PENS Draft #4 (on file with Sidley). Wessells suggested adding the citations in one other section of the report, which Behnke did.

[1307] APA_0026757.

E. PENS Report Analysis

The full PENS Report is appended to this report.[1308] The final report contained an overview and introduction to the report, followed by "Twelve Statements Concerning Psychologists' Ethical Obligations in National Security-Related Work and Commentary on the Statements," conclusion and non-consensus issues sections, and 10 recommendations. The report said that psychologists could serve as consultants to national security interrogation consistently with the Ethics Code, and articulated two high-level limitations on that activity, without further significant definition: psychologists could not be involved in torture or cruel, inhuman or degrading treatment, and psychologists attempted to ensure that interrogation methods were safe, legal, ethical and effective. As the evidence shows, these high-level limitations were intentionally chosen by Behnke because they reflected what Banks wanted and, by extension, reflected what key parts of DoD wanted.

1. Psychologists as "safety officers"

A foundational question that underpins the PENS report, and stressed by Behnke and Banks to us throughout our investigation, is the notion that having psychologists involved in interrogations by observing the interrogators was of critical importance in ensuring the safety of the detainee. A psychologists' training in human behavior, the argument goes made them uniquely situated to watch for and stop "behavioral drift" — the phenomenon identified in Philip Zimbardo famous Stanford prison experiment and elsewhere that those with physical power over others who use that power to cause discomfort or pain to others will often tend to drift toward greater and greater uses of that power unless stopped. Banks, along with Lefever and others who taught at military SERE schools, say that this is a key and legitimate role for psychologists at SERE, since without such a "safety monitor," even SERE instructors pretending to be captors of U.S. soldiers may go too far. In fact, when Air Force SERE were brought to Guantanamo Bay in December 2002 to provide guidance about "employing 'SERE' techniques during detainee interrogations," their Standard Operating Procedure memo used the term "Watch Officer" as a standard position within the SERE procedure (although the memo did not specify that it needed to be a psychologist).[1309]

Psychologists ranging from the APA's leading critics to PENS participants Brandon, Gelles, and Shumate [1310] have expressed doubt that psychologists are uniquely or well situated

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[1308] PENS Report.

[1309] JTF GTMO "SERE" Interrogation Standard Operating Procedure, Guidelines for Employing "SERE" Techniques During Detainee Interrogations (Dec. 10, 2002), *available at* http://nsarchive.gwu.edu/torturingdemocracy/documents/20021210.pdf.

[1310] Brandon told Sidley that she questioned how true it was that psychologists were important to national security efforts. She also made, as she put it, some "snide" remarks in her notes about the conversation surrounding the utility of psychologists as monitors. Brandon Notes (undated) (on file with Sidley) ("why are [psychologists] so wise? Informed?); Brandon interview (May 26, 2015). In addition, Arrigo's notes indicate that Gelles "disagrees strongly with the implication that [psychologists] should monitor" as it was inconsistent with psychologists' role in consulting on interrogations. Arrigo PENS Meeting Notes (June 25, 2005). Shumate told Sidley that he "question[ed]" how much value psychologists brought to an interrogation setting. He added, though, that with specific training for psychologists working in these

for this role, especially outside of a SERE training context. For purposes of our discussion here, we assume that having someone monitor interrogators for behavioral drift would be an important part of the interrogation process if the interrogator is intentionally inflicting some form of physical coercion or psychological distress (as in SERE training), and it seems reasonable that the training and experience of psychologists would make them among the best candidates for playing the role of "safety monitor" or "watch officer" by watching the behavior of the interrogators.

However, Banks, Dunivin, Behnke, and others who emphasize this role for psychologists in interrogations and who tend to use it as the primary (and positive-sounding) justification for including psychologists in the interrogation support process[1311] are also quick to say that psychologists should be included in interrogation support because they help make the interrogations "effective." This was one of the four pillars of the Banks/Dunivin "safe, legal, ethical and effective" formula that the PENS report adopted, and the PENS report made it an ethical obligation of psychologists working on interrogations to try to rely on methods that are "effective."

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 protection 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 to tell him) that he is going too far and needs to stop, and (2) partner of the interrogator in trying to engage in interrogation techniques that will be effective in getting the detainee to be cooperative and to tell the truth about what he knows.

This strikes us either as naïve or intentionally disingenuous. The pressures on the psychologist in this situation not to stop the interrogator from becoming more aggressive are very significant, both because of the dynamic that the interrogator and psychologist are working together to make the interrogation effective and likely have a need to work together on an ongoing basis on other interrogations, and because the psychologist likely would be utilizing his subjective judgment in telling the interrogator that he has gone "too far" (a judgment that can easily be subject to criticism and second guessing) rather than an objective judgment based on clear lines drawn by external sources (e.g., DoD or APA guidelines). One would think that mature, confident psychologists primarily committed to the role of "safety monitor" would be able to overcome these pressures in most situations. But this would depend on the individual psychologist, and the context of the individual situation. In other words, it might work or it

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settings, interrogations could move in "the right direction" but that they did not serve a critical role. Shumate interview (June 24, 2015).

[1311] *See* PENS Report ("psychologists are in a unique position to assist in ensuring that [interrogation] processes are safe and ethical for all participants").

might not. As an ethics expert pointed out to us, an independent psychologist monitor outside the chain of command would have a better chance at success with this responsibility.[1312]

Just as it makes little sense to say that SERE techniques can be "reverse engineered" for detainee interrogations with little fear of lasting psychological damage because they are used safely in controlled environments on informed, consenting U.S. soldiers, so too does it make little sense to say that a "watch officer" will always be solely motivated to stop an aggressive interrogator because it works successfully in SERE training when there is no actual concern that public safety will actually be compromised if the "interrogators" do not actually get the information from the pretend "detainee." This is especially true when the "watch officer" is also being asked to help make the interrogation as effective as possible.

If Banks and Behnke really believed that the only real reason a psychologist needed to be involved in interrogations was to keep them safe by playing the role of "safety monitor," they could have written the PENS report to limit a psychologist's role in interrogations to this function. The report could have said that psychologists may support interrogations only by playing the role of safety monitor to ensure the safety of the detainee, by watching the interrogator to ensure that behavioral drift does not occur. But as Gelles pointed out, this would mean that a psychologist could not consult in the way psychologists typically do in law enforcement situations, by consulting on interrogations and investigations to make them effective — in environments in which the protections of the criminal justice system apply. And Banks, Dunivin and DoD, and Behnke and APA, did not want to impose such a significant limit on the involvement of psychologists in national security operations.[1313]

2. Need for specificity and limits

We heard from APA defenders during the investigation that they only intended the PENS task force report to allow psychologists to support interrogations by recommending rapport-building techniques, not physical or aggressive ones. But the report does not say this, although it could have. Given the public awareness of the Bush Administration's narrow understanding of key terms like "torture" and "inhumane" and its claim that the Geneva Conventions did not apply, the widespread media reports about abusive interrogation techniques, and the explicit discussions at the PENS meeting and the media about specific techniques like stress positions and sleep deprivation, it was obvious to everyone involved in the PENS Task Force that national security psychologists would be asked to advise on interrogation techniques that went well beyond rapport-building. The PENS Task Force report could have said that psychologists may support interrogations only by recommending techniques that constitute rapport building. But as with the other limitation, this was not consistent with Banks's and DoD's preferences (and

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[1312] Emails from Sveaass to Sidley (June 17, 2015 & June 18, 2015).

[1313] Some critics who have correctly alleged that some APA/government collusion was behind the PENS Task Force result further allege that APA's motive must have been based on the Justice-Department-memo rationale, under which harsh interrogation techniques are not torture if a psychologist or other relevant expert says the technique to be applied will not cause severe physical or psychological suffering. We did not find evidence that this Justice-Department-memo rational was part of the thinking or motive of APA officials though, again, we did not have deep access into various CIA or DoD-level interactions during this period.

therefore Behnke's and APA's) that the role of psychologists not be limited beyond whatever constraints DoD itself had in place.

Our consternations with the lack of specifity in the report were solidified through conversations with three prominent academicians with broad experience in issues of ethics, torture, and human rights: (1) Nancy Sherman, Philosophy Professor at Georgetown University and consultant to the U.S. armed forces;[1314] (2) Nora Sveaass, Psychology Professor at the University of Olso and former member of the United Nations' Committee Against Torture;[1315] and (3) Janel Gauthier, President of the International Association of Applied Psychology and primary drafter of the "Universal Declaration of Ethical Principles for Psychologists."[1316] At bottom, all three raised concerns that key terms used in the PENS report—be it, "torture," or "cruel, inhuman, and degrading treatment," or "safe, legal, ethical, and effective"—were not well-defined and left an inordinate amount of flexibility for government entities to dictate what was permissible.[1317]

Sherman thought the report was "peculiarly abstract," and "evasive."[1318] Sveaass stated it was "very sad" and "strange" that a specific definition of torture was not included in the report, particularly since the United States ratified the U.N. Convention Against Torture and that its definition of torture was "absolute."[1319] Gauthier believed that several terms in the report were open to many interpretations and worried about the lack of specific human rights definitions in the document. He believed that the document would have been better served if it plainly defined what "torture" was and what specific techniques were permissible and under what circumstances.[1320]

[1314] For a full biography, see http://explore.georgetown.edu/people/shermann/.

[1315] For a full biography, see http://www.sv.uio.no/psi/english/people/aca/norasv/.

[1316] For a full biography, see http://www.ecp2015.it/international-scient/janel-gauthier-2/. For more on the Universal Declaration, *see* http://www.iupsys.net/about/governance/universal-declaration-of-ethical-principles-for-psychologists.html.

[1317] [Footnote removed] +

[1318] Sherman interview (June 5, 2015).

[1319] Sveaass interview (June 11, 2015). Article I of the Convention Against Torture defines torture as follows: "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." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx.

[1320] Gauthier interview (June 15, 2015). Gauthier raised the point that having absolute statements in ethical guidance could also be problematic since certain situations may call for different ethical considerations. To Gauthier, the report would have been better served if it specified the ethical considerations in various scenarios.

Both Sveaass and Sherman raised the point that, because of the known institutional pressures and pronouncements at the time of the PENS process regarding interrogation tactics and the lack of legal safeguards for detainees (at least when compared to prisoners in the U.S. criminal justice system), it behooved APA to provide specific guidance to psychologists in these settings to comprehend and combat techniques that were permitted and those that were not.[1321] Sveeass emphasized that the report needed additional context—the state of detention centers at Guantanamo Bay, the lack of legal rights for detainees, the reported abuses, the BSCT teams used in these detainee interrogation settings—in order to better understand the roles and purposes of psychologists in these settings in the first place. Instead, Sveaass asserted, the report included a list of ill-defined things psychologists should not do in national security settings.[1322]

Sherman made the point that torture was not typically an individual-only activity, but usually depended on the "corruption of the system" in which multiple actors, some of whom are high-level, make decisions and take actions that allow it go forward.[1323] The structural taint of government polices was apparent by the time of the PENS report (ex: Rumsfeld Working Group, OLC memos, Abu Ghraib and Guantanamo Bay abuses). In fact, APA regularly discussed media reports about these issues. Thus, APA should have been on high alert that professionals—like psychologists—participating in that system needed specific ethical constraints and guidelines to operate in that system, because such a system was also typically accompanied by intense pressure to conform and to follow orders to engage in abusive activity. These structural pressures are not theoretical. It is the situation that Banks and James argued that John Leso found himself in ahead of the Mohammad al-Qahtani interrogation in 2003. [1324]

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.

Behnke contested the specificity point with Sidley, noting that "prohibiting specific techniques" was not "initially central to the work of APA, or several other associations, that addressed the issue of member involvement in interrogations."[1325] Behnke went on to cite relevant provisions from the American Medical Association ("AMA"), the American Psychiatric Association ("ApA") and the World Medical Association's ("WMA") Declaration of Tokyo as examples where none of these provisions prohibited specific techniques.

Behnke's assertions belie what happened at PENS and with other organizations, including the military. For one, the background materials provided to each task force member included descriptions of harsh techniques used at the time and the controversy surrounding them

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[1321] Sherman interview (June 5, 2015); Emails from Sveaass to Sidley (June 17, 2015 & June 18, 2015).

[1322] Emails from Sveaass to Sidley (June 17, 2015 & June 18, 2015).

[1323] Sherman interview (June 5, 2015).

[1324] Both James and Banks explained to Sidley that Leso had been placed in an arduous situation where he received pressure from his Command to concoct an interrogation plan with which he was not comfortable. Leso is discussed further later in this report.

[1325] Email from Behnke to Sidley (June 3, 2015) (emphasis in original).

(discussed earlier), so there was an awareness that harsh techniques were occurring in detainee settings. Second, specific techniques were not discussed during PENS because participants like Newman, Banks, Koocher, and Behnke avoided addressing specifics during the PENS meetings. Other DoD members, even if they expressed an interest in having boundaries or limits on what psychologists could do, did not promote the need for specific language in the report. Wessells, Thomas, and Arrigo's quest to add international human rights standards within the PENS report — one way to provide specific guidance for a psychologist — was met with stiff resistance by the military majority. In addition, former Chief of Staff for the Assistant Secretary of Defense for Health Affairs, Thom Kurmel, told Sidley that the "key" debate in 2005 among his DoD colleagues was "how far" health professionals could go in interrogation settings and less what professional associations said about their presence.[1326] So the issue of specific techniques and what was permissible was underscored by media reports, by task force members, and by the military.

Regarding other organizations' positions, a brief look at the AMA, ApA, and WMA positions will explain why specific techniques were not listed. The AMA defined what a coerced interrogation was in its analysis: "threatening or causing harm through physical injury or mental suffering."[1327] The ApA banned its professionals in those settings outright, so there was no need to list prohibited techniques.[1328] And the WMA's Declaration of Tokyo defined torture at the outset of the document:

> For the purpose of this Declaration, torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason.[1329]

Another psychological association, the British Psychological Society, also came out with a statement in February 2005 that condemned the use of torture and cruel, inhuman, and degrading treatment in interrogations. Its definition of torture combined more general terms with examples of specific techniques.[1330]

[1326] Kurmel interview (June 16, 2015).

[1327] *Opinion 2.068 – Physician Participation in Interrogation*, American Medical Association (Nov. 2006), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2068.page?.

[1328] *Position Statement on Psychiatric Participation in Interrogation of Detainees*, American Psychiatric Association (May 2006), *available at* http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2006_Interrogation.pdf.

[1329] *Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment*, World Medical Assembly (May 2006), *available at* http://www.wma.net/en/30publications/10policies/c18/.

[1330] APA_0085552 ("For the purpose of this Declaration, torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason.

The PENS report did none of these things. It provided no definition of torture or CID, provided no list of prohibited interrogation techniques, and did not ban psychologists from these settings writ large.

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.[1332]

From his perspective, Banks thought it was inappropriate for an ethics-related document like the PENS report to contain guidance on specific techniques used in an interrogation. He told Sidley that he believed a deeper discussion about sleep deprivation, for example — how long it could be used for, what would constitute sleep deprivation, whether late night interrogation settings were permissible — were best reserved for the military in some form in the Army Field Manual or another DoD policy document. He contended that the report established clear boundaries on other issues related to dual roles, the use of medical records, and the limits of confidentiality.[1333]

James also welcomed specific guidance for psychologists, but stated that he did not need the PENS report to provide this guidance for him. James spoke passionately to Sidley about how the key question he asked when consulting on an interrogation was whether he would be comfortable with those techniques being used on his wife or son. At the same time, he thought the document should be aspirational as he believed other ethical guidelines were. He did not want the report to make military interrogations "too restrictive" because the "military guys" were worried that the report's limitations could transfer to psychologists working in non-military interrogation settings and unnecessarily limit what techniques were used. He posited that some

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This definition includes the use of threats, insults, sexual, religious or cultural degradation or degrading treatment of any kind.").

[1331] Behnke interview (June 8, 2015); *see also Historian Alfred McCoy Speaks on U.S. Torture Program,* DailyKos, *available at* http://www.dailykos.com/story/2007/04/25/327485/-Historian-Alfred-McCoy-Speaks-on-U-S-Torture-Program-video#. After the March 10 event, Behnke had drafted a statement on behalf of the Ethics Committee on March 19 that listed specific techniques. APA_0064480.

[1332] This is exactly what the Ethics Committee did in a March 2007 statement leading up to the 2007 APA Resolution. APA_0064480.

[1333] Banks interview (May 21, 2015).

critics may argue for a ban on raising one's voice or swearing at a prisoner in any interrogation. James admitted, however, that having an aspirational document with few specifics likely did not answer all the questions psychologists in the field may have had about the ethical duties in specific settings.[1334]

Shumate explained to Sidley that the task force should not have gotten "bogged down" in the "granular" details of the topic at first and, instead, try and understand the "forest" from a "30,000 foot view." Thereafter, Shumate declared, additional steps could be taken to address specifics, but he thought that neither APA or psychologists were in a position to properly address the various legal issues that may arise with interrogation practices.[1335] Mixing metaphors aside, Shumate's explanation makes little sense in the context of providing ethical guidance to psychologists in national security settings and, instead, sounds like a pretextual reason about why the task force report was not more specific.

Implicit in both Banks's, James's, and Shumate's comments is a belief that the DoD was better-positioned to handle the specifics of interrogation techniques. These same beliefs permeated Dunivin's thinking at the beginning of the task force selection process, which Newman espoused during the PENS meetings. Behnke, too, made comments related to avoiding the specifics during the meetings. 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.

A vivid example of how little guidance the PENS report provided was presented during our interviews with Banks and Behnke. 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 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.

Banks explained that, for him, the dividing line of the "safe" prong of the analysis was whether the detainee was put in significant increased risk of harm with a technique. Assuming a particular stress position was safe, Banks conceded that the legality point was also open to interpretation depending on what pronouncements were in effect at the time. In 2003, for example, there was Army Regulation 190-8 that governed military personnel, but there were also

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[1334] James interview (June 1, 2015).

[1335] Shumate interview (June 24, 2015).

[1336] Behnke interview (May 29, 2015); Banks interview (May 21, 2015).

[1337] Behnke interview (May 29, 2015).

pronouncements from the Secretary of Defense that supposedly trumped 190-8 declaring that detainees were not covered under the Geneva Conventions and that certain interrogation methods were permissible. Assuming a stress position technique was also legal, Banks perused the Ethics Code to determine whether the techniques were "ethical" under the third prong. Banks thought that the technique violated the principles of the Ethics Code but not necessarily any of the specific rules. At this point, Bank said he would turn to the PENS report for the answer. When he did, he pointed to statement one of the PENS report and said that this particular kinds of stress position were "degrading" (he speculated placing a detainee in a "push-up" position might be permissible, but not hanging a detainee from a ceiling). When asked how he knew this, Banks admitted that this conclusion was from his experience and viewpoint, not necessarily from a definition in the report.[1338] Banks later stated that the PENS report "was not remotely sufficient" but that it helped establish the training standards in place today for all BSCTs.[1339] This training — Banks noted before that it lasted six weeks — would solidify answers to these and other questions.[1340] Banks's response begs the question — how useful can a report be when you need six additional weeks of training to understand what you can and cannot do?

3. *Other report issues: do no harm, medical records, mixing roles, confidentiality, enforceability*

There is other questionable language in the report as well:

Introduction: "Do No Harm" omission

Notably, the quoted portion of Principle A: Beneficence and Nonmaleficence in the report excludes the opening sentence involving "do no harm." Instead, the Principle A's second sentence is quoted first: "In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons."

Behnke told us he could not recall why he did not include the "do no harm" sentence but did not think its exclusion had much significance. Our conclusion is that because of the ambivalence within the DoD task force members about how to define "harm" as it relates to physical pain and distress, and the desire by Behnke and Banks not to take a hard-and-fast position that psychologists in interrogation situations can never "do harm" (despite the Ethics Code principle), Behnke intentionally left out the "do no harm" language.

Addressing this issue specifically would have been feasible in a wide variety of ways, for instance by providing a non-exclusive list of prohibited specific techniques, or by describing what was prohibited by using words such as "abuse," "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 a desire to keep the PENS report at a high level of generality at Banks's request.

[1338] Banks interview (May 21, 2015).

[1339] Email from Banks to Sidley (June 1, 2015).

[1340] Banks interview (May 21, 2015).

Statement Two: Ethical responsibility to report inappropriate acts

A secondary portion of the second statement cites to ethics Standard 3.04, Avoiding Harm, to support the claim that psychologists "guard against the names of individual psychologists being disseminated to the public," since it could expose a psychologist. Standard 3.04 cites to minimizing harm to third parties, research participants, and organizational clients, but makes no mention of peers or colleagues. Behnke explained that the issue of safety was top of mind for several participants and that is how this statement took shape.[1341]

Statements Three and Six: Not using medical information to detainee's detriment and multiple relationships

Critics have argued that Statement Three contains a loophole: while the rule states that psychologists in interrogation support roles cannot use an individual's medical record "to the detriment of the individual's safety and well-being," it does not explicitly bar access to medical records or explicitly bar other ways the records could be used, such as for creating an interrogation strategy.[1342] Banks, and to a lesser extent James, pushed to include this carve out language so that a psychologist would have the necessary insight to determine whether a legitimate interrogation technique (such as providing a cooperative detainee with a candy bar) might cause health problems (by seeing that the detainee was diabetic, for instance). Because of these requests, the PENS report allowed this access.

Behnke admitted that some people could have circumvented the statement's restrictions.[1343] Statement Six, in theory, may provide a stop gap when it demands psychologists refrain from "mixing potentially inconsistent roles such as health care provider and consultant to an interrogation."[1344] Yet a later correspondence in October 2006 between Banks and Behnke casts doubt upon whether these two rules were ever envisioned to work together in this way.

In the October 2006 correspondence, BSCT Carrie Kennedy informed Behnke that BSCTs were "upset" after being excluded from a Command meeting that discussed medical and mental health information on detainees.[1345] Behnke immediately informed Kennedy and Banks that sitting in on these meetings and receiving this information would violate the PENS report's Statement Six. Kennedy responded that BSCTs could argue that sitting in on meetings was permitted under PENS report Statement three since no BSCT would use the medical information against the detainee.[1346] After underscoring to Kennedy the "absolute demarcation" between these two roles and the "GREAT stir" if it was publically known that BSCTs were present in

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[1341] Behnke interview (May 29, 2015).

[1342] This is the exact criticism that Gregg Bloche later raised with Behnke in late August, as discussed further below. APA_0042240.

[1343] Behnke interview (May 29, 2015).

[1344] *Id*.

[1345] APA_0088797.

[1346] *Id.*

such meetings, Behnke forwarded the exchange to Banks and noted that this mindset would confirm the critique of BSCT teams:

> People like Neil Lewis, Bloche, and Marks would claim that this proves their point: These roles are inevitably commingled. They would argue 1) If psychologist/consultants aren't going to use the information, why do they need to be present when the information is discussed? 2) Once the information is in their heads, is it realistic to expect that they won't use it, even if inadvertently? 3) If the purpose of communicating information is to keep the interrogation safe, can't the medical people simply communicate behavioral restrictions to the interrogators? 4) The psychologist/consultant's presence in the room inevitably blurs the distinction between the two roles, and that "blurring" will likely be felt in other parts of the interrogation process and/or with interrogation personnel.[1347]

Banks's response to Behnke is telling: "We worded the [PENS] report so that this would not be precluded. . . . I have access to information that I can misuse all the time, why is this different?" Banks thought it might make sense to separate the BSCTs because of the "PR risk," but not because he thought the PENS report prevented this blurring of relationships to occur.[1348] Behnke and the APA's position on this issue therefore fit the pattern we saw in this investigation regarding PENS — positions were taken to please DoD based on confidential behind-the-scenes discussion and an eye toward PR strategy.

Notably, one way to avoid having these multiple relationships would be if BSCTs were somehow stripped of their clinical privileges while deployed. In fact, this very possibility was discussed within the Army Surgeon General's office ahead of finalizing their BSCT MEDCOM policy in 2006.[1349] The PENS report, however, nipped that possibility in the bud, and retained much of what BSCTs were already doing without adding obstacles to their deployments. It is possible that Banks or Dunivin, the leaders in drafting the 2006 MEDCOM policy, were aware of these discussions and sought to forestall this issue with a positive outcome in PENS that did not permit this option.

Statements Three and Nine: medical records and the limits of confidentiality

Another possible loophole with Statement Three is its relationship with Statement Nine regarding the limits of confidentiality. While Statement Three does not permit the use of an individual's medical record to their detriment, Statement Nine reminds psychologists that there are limits to confidentiality and the "minimum amount of information necessary" can be shared with someone who has a "clear professional purpose of obtaining the information." The report does not explain what a "clear professional purpose" may be, but a June 2005 memorandum regarding the medical treatment of detainees from William Winkenwerder, then-Assistant Secretary of Defense for Health Affairs provides several "permissible purposes" of confidential information: "to prevent harm to any person, to maintain public health and order in detention

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[1347] *Id.*

[1348] *Id.*

[1349] Crow interview (June 22, 2015).

facilities, and any lawful law enforcement, intelligence, or national security related activity."[1350] Several of these permissible purposes could ultimately harm the detainee's well-being, contrary to Statement Three.

Statement Four: Barring violations of U.S. law

This statement may raise another loophole with its language that psychologists "do not engage in behaviors that violate the laws of the United States." At the time, narrower definitions of torture prevailed through pronouncements from the OLC. The head of the OLC at the time of PENS, Steven Bradbury, had written a series of memos in May 2005 to the CIA permitting the continued use of waterboarding and other harsh techniques.[1351] Thus, psychologists could arguably participate in waterboarding sessions since they did not violate the way the law was interpreted at the time.

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.[1352] The report does not make this point immediately obvious, however.

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.

Enforceability of the document

There is also confusion within APA about the enforceability of the PENS report — that is, could a psychologist have been brought on ethics charges if they violated one of the twelve statements in the report? Behnke told Sidley that he saw the statements in PENS as

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[1350] Memorandum for Secretaries of the Military Departments et al., Medical Program Principles and Procedures for the Protection and Treatment of Detainees in the Custody of the Armed Forces of the United States, (June 3, 2005), *available at* http://www.defense.gov/news/Jun2005/d20050627policy.pdf.

[1351] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel, CIA, Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), *available at* http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel, CIA, Application of U.S. Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 30, 2005), *available at* http://media.luxmedia.com/aclu/olc_05302005_bradbury.pdf; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel, CIA, Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005), *available at* http://media.luxmedia.com/aclu/olc_05102005_bradbury_20pg.pdf.

[1352] Behnke interview (May 22, 2015); Banks interview (May 21, 2015).

independently enforceable ethical obligations on which a disciplinary case could be brought.[1353] On the other hand, Gilfoyle told Sidley that a complaint would still need to specifically cite the ethical standard and not the PENS report alone.[1354] We found it very notable that, 10 years after PENS, the APA Ethics Director had a view about the legal enforceability of PENS that was at odds with the view of the APA General Counsel.

Research

The PENS Task Report contained several recommendations that further research be conducted in this area. This included a paragraph "encourag[ing] . . . further research to . . . examine the efficacy and effectiveness of information-gathering techniques, with an emphasis on the quality of information obtained. . . . Also valuable will be research on cultural differences in the psychological impact of particular information-gathering methods and what constitutes cruel, inhuman, or degrading treatment." A subsequent section recommended that APA encourage psychologists to engage in research into "methods for gathering information that is accurate, relevant, and reliable. Such research should be designed to minimize risks to research participants such as emotional distress, and should be consistent with standards of human subject research protection and the APA Ethics Code." The evidence shows that Mumford, Brandon, Newman, and Gravitz made drafting suggestions regarding the research recommendations, and at least some of Brandon's drafting suggestions made it into the final version.

Critics have pointed to some of this language as an indication that APA was intentionally attempting to provide ethical support for research by the CIA or DoD on detainees at Guantanamo or elsewhere, or was otherwise attempting to allow for research that involved harsh interrogation techniques without the proper human-subject-research protections.

We found this a topic on which it was difficult to draw clear conclusions, and our discussion and analysis of the evidence is discussed earlier in our summary of the second day of PENS meetings above.

4. *Positive aspects of the report*

Application of Ethics Code

At the July 2004 meeting at APA with CIA, DoD and FBI psychologists that was the precursor to the PENS meetings, CIA psychologist argued that the APA Ethics Code should not apply to work by psychologist in national security operations, such as interrogations, because a code written for the ethical treatment of patients was not a good fit for this different situation.[1355] The PENS report explicitly rejected this argument and noted in its introduction that the Ethics Code binds psychologists whenever they take actions as a psychologist and therefore applies to

[1353] Behnke interviews (May 22, 2015 & May 29, 2015).

[1354] Gilfoyle interview (May 20, 2015).

[1355] Former CIA colleagues of Hubbard's, Kennedy and Morgan, told us that prior to this meeting, Hubbard had given them the opposite impression—that he believed the APA Ethics Code did apply and should be applied to the involvement of psychologists in interrogations. That Hubbard's belief was the one he described during the July 2004 meeting surprised and disappointed them, they said.

work on national security interrogations. The report also made it clear in one of its 12 ethical guidelines that the Ethics Code provision prohibiting "multiple relationships" meant it was unethical for a psychologist to both consult on a detainee's interrogation on behalf of the government and be the detainee's health care provider.

These were positive points in the PENS report, and the first one constituted a refusal to go along with a position previously advanced by the APA's lead contact at the CIA (although the CIA appeared be effectively absent at the PENS task force, with the likely exception of Melvin Gravitz). On the other hand, Behnke described these as clear and easy points to make, and we note that DoD officials were not opposed to them.

Ethical obligation to detainee

Statement Eleven in the PENS report says that psychologists have "ethical obligations to individuals" who are not their clients, including "to ensure that their activities in relation to the individual are safe, legal, and ethical." In making this statement, the PENS report cites Ethics Code standard 3.04 ("Avoiding Harm"), which says that "[p]sychologists take reasonable steps to avoid harming . . . others with whom they work, and to minimize harm where it is foreseeable and unavoidable." The PENS report statement does not specifically mention interrogations, but it implies that psychologists consulting on interrogations have an obligation to follow standard 3.04 with regard to detainees. It does not seem a given that detainees would be considered "others with whom [psychologists] work," so this statement can be seen as a significant one.

However, if physical pain and psychological distress do not automatically equate to "harm," as discussions with the DoD psychologists indicate, then the failure to provide any specificity about how to determine whether interrogation techniques that intentionally cause pain or distress constitute harm means that standard 3.04 may not provide substantial protection. 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, the PENS report refused to take a position on sleep deprivation despite being asked to do so. In addition, section 3.04 does not prohibit harm—it simply requires psychologists to take "reasonable steps" to "avoid harming" the individual.

5. Need for robust ethics analysis

The fact that a robust ethics analysis was not part of this ethics process led by the Ethics Director was surprising to us but is consistent with two additional observations revealed by our investigation.

First, Ethics Director Behnke often acted as APA's chief of staff on this issue, taking the lead in recommending and drafting virtually all APA decisions and statements on this issue, whether relating to Board strategy, PR, Capitol Hill lobbying, and APA Council of Representatives management and strategy, among others. As we have learned in this investigation, Behnke is a brilliant and highly educated psychologist and lawyer, a nice and charming person, a highly gifted and fast writer, and a very sophisticated and nuanced strategist and communicator. 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.

Second, APA leaders had decided in the 1990s (before Behnke's arrival at APA in 2000) that APA's ethics policies and practices had been too aggressive against psychologists, and that a more supportive and protective and less antagonistic ethics program was appropriate. They wanted a greater focus on ethics education and consultation, and much less of an emphasis on strict rules and robust enforcement of disciplinary complaints. Revisions to the Ethics Code focused in part on making its rules more precise to ensure that psychologists had proper notice about what behavior was considered unethical, and to minimize APA's litigation risk from lawsuits by sanctioned psychologists. A provision about how to handle conflicts between legal and ethical obligations was expanded so that psychologists could follow court orders or military orders requiring them to engage in conduct otherwise prohibited by the Ethics Code as long as they attempted to resolve the conflict first. Behnke was hired specifically to pursue an ethics program that was more "educative" and fulfilled these goals. During his tenure, APA disciplinary adjudications plummeted, and the focus was on supporting psychologists, not getting them in trouble—a strategy consistent with an ultimate mission of growing psychology.[1356]

Thus, when the time became ripe to consider what ethical constraints to put on an important group of psychologists, two factors that could conceivably have created internal pressure in APA for those ethical constraints to be strong — an Ethics Director focused exclusively on ethics analysis and perhaps guided by inquiry into systems in which torture occurred and issues of psychological distress by those in captivity, and an ethics approach that had a robust focus on the integrity of the profession and the protection of the public — were not present.

IV. REPORT APPROVAL

The unusual speed[1357] and Board approval of the PENS report was motivated principally by the desire of APA Board members Levant and Koocher to (1) create a PR message that would be perceived as backed not just by a public statement but by actual substance (a new APA ethics policy) and that could be used to a fluid PR situation perceived as negative, and (2) curry favor

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[1356] More about this point is discussed in our findings related to APA's adjudications process, discussed later in this report.

[1357] As a point of comparison, the American Anthropological Association tasked a Commission in 2007 and 2009 to review various national security-related issues for anthropologists. Commission member Carolyn Fluehr-Lobban told us that the 2009 report, which expressed disapproval of anthropologists' presence in DoD's Human Terrain System program, was completed after the Commission met three or four separate times over the course of a year for one and two all-day sessions of debate and discussion of the issues. The report was also completed in response to 2007 media reports of anthropologists' roles in this DoD program. Fluehr-Lobban interview (May 15, 2015); *see also Final Report on the Army's Human Terrain System Proof of Concept Program,* American Anthropological Association (Oct. 14, 2009)*, available at* http://www.aaanet.org/cmtes/commissions/CEAUSSIC/upload/CEAUSSIC_HTS_Final_Report.pdf.

with DoD which communicated that it too wanted a prompt release of the report so it could use the report for its own purposes (which were both PR and policy purposes).[1358]

A. Internal Discussions and Military Pressures

Before the PENS meetings, on June 14, Behnke mentioned that Moorehead-Slaughter would "very much like the Task Force to complete a report during the course of the meeting, or very shortly there after, setting forth whatever positions the Task Force feels prepared to take at that point."[1359] Behnke continued to highlight the great interest in the issue from the government and the media:

> Given the interest that the US Government has shown in APA's analysis of these questions, and recent media reports, we will need to consider to what extent any Task Force product will be made available to groups outside of APA.[1360]

As mentioned before, the *New York Times* had run an article on Friday, June 24, the first day of the task force meeting, reporting that "[m]ilitary doctors at Guantanamo have aided interrogators in conducting and refining coercive interrogations of detainees, including providing advice about how to increase stress levels and exploit fears."[1361] The article quoted both Behnke and the ethics committee chairman of the American Psychiatric Association and compared the positions of the two organizations:

> While the American Psychiatric Association has guidelines that specifically prohibit the kinds of behaviors described by the former interrogators for their members who are medical doctors, the rules for psychologists are less clear. . . . [I]n a statement issued in December, the American Psychological Association

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[1358] In addition to the intensive press coverage on issues of potential abuse of detainees during this time, the Commander of the Joint Task Force – Guantanamo was testifying before the House Armed Services Committee during the week of June 27 on the issue of detention conditions at Guantanamo. Reports of the hearing make it clear that the Pentagon was attempting to provide positive answers in response to concerns about abuse and improper conditions at Guantanamo. A report from a third party (APA) saying that psychologists could ethically be involved in interrogations at Guantanamo had the great potential to be a positive story for DoD, from its perspective, and the emails show that DoD was thrilled with the content of the PENS report. Aside from the PR issues, the Army Surgeon General's Office was in the midst of developing its policy for the involvement of psychologists and psychiatrists in interrogations, based on Banks and Dunivin's draft policy document, and this closely-aligned, highly supportive report from APA was of great assistance to that effort, as the emails between Banks, Dunivin and Behnke show.

[1359] APA_0048757. There is no other evidence that Moorehead-Slaughter requested the report be completed that weekend, aside from Behnke's email. We are highly skeptical that Moorehead-Slaughter would have come to this conclusion on her own, especially with Behnke's strong handling of her in other facets of the PENS process.

[1360] *Id.*

[1361] Neil Lewis, *Interrogators Cite Doctors' Aid at Guantanamo*, New York Times (June 24, 2005), *available at* http://query.nytimes.com/gst/fullpage.html?res=9400E2DA1F3BF937A15755C0A9639C8B63.

said the issue of involvement of its members in 'national security endeavors' was new.[1362]

APA President Levant later worried that the article made APA look bad because it "portrayed APA as unsure of where the ethical boundaries lie."[1363] To Levant and Koocher, managing APA's image required it to show that the task force report was more than simply a set of high-level, "loose" statements that might be justified as a tentative "initial step" as part of a more thorough, long-term examination of the issue, but was instead a clear and "strict" statement of the actual ethical boundaries, as discussed further below. The fact that the PENS report was nothing of the sort did not stand in the way of the their strategic attempt to create the best possible media response.

By the evening of June 26, the task force members approved a final draft version of the report. Anton then emailed the Board informing them that they would receive the report for their review and approval.[1364] Thereafter, a debate began within APA about what next steps were needed to publicize the report.

Gilfoyle first responded to Anton (and included Behnke, Newman, Breckler, and Farberman) and flagged the issue of having the Ethics Committee review the report before it went to the Board for approval, regardless of whether the document was viewed as interpretative of the existing Ethics Code or as new guidelines.[1365] She also added that in either case, "some degree of public comment would also be in keeping with the way APA has gone about adopting standards."[1366]

Behnke responded that the Board could also make the report public "asap" without formally adopting it, and noted that the "military people are asking for the report soon—Morgan has a meeting with the Surgeon General on Wednesday."[1367] In addition to Banks, James told Sidley that he implored Behnke, Koocher, and Levant to expedite the review process for the report since there were captains in the "field right now that were getting their asses kicked and needed guidance."[1368] He believed a normal review process could have taken many years to finalize the report. Koocher also told Sidley that press reports added to the pressure of releasing the report soon.[1369] He also believed that Division 19 (Military Psychology) members wanted the report issued as soon as possible.[1370]

[1362] *Id.*

[1363] APA_0040505.

[1364] APA_0040750.

[1365] *Id.*

[1366] *Id.*

[1367] *Id.*

[1368] James interview (May 2, 2015).

[1369] Koocher interview (June 12, 2015).

[1370] Koocher interview (Mar. 20, 2015).

Gilfoyle later suggested that the Board could conditionally approve the report subject to Ethics Committee review and comment. "If you want to say clear of public comment," Gilfoyle continued, "we definitely want to stay away from calling anything the [B]oard does guidelines."[1371] She intimated that the group had more "latitude" if the report was thought of as interpretative guidelines where public comment was not formally required. Behnke later reiterated the "eagerness" among the military to have the report quickly made public, especially with the pending publication of a *New Yorker* story.[1372]

Newman believed the document was interpretative and that he "would be reluctant to put this out widely for public comment," but that the Ethics Committee should review the document. He later inquired whether the Ethics Committee review could be "expedited."[1373] Farberman raised the concern of "piss[ing] off" the Ethics Committee by publically releasing the document before they fully reviewed it.[1374] She offered an alternative plan where the Ethics Committee would quickly review and approve of the full report before it was released to Council and the media. Ultimately, the group decided to seek the Ethics Committee's approval of the report as appropriate interpretative standards over a conference call and then immediately send to the Board for approval and make the report public.[1375]

B. Ethics Committee and Task Force Re-Approval

On June 27, 2005, Behnke sent APA Ethics Committee an email about reviewing the final draft of the PENS report to determine "whether the twelve bolded statements are appropriate interpretations and applications of the Code."[1376] The Board was sent a final draft copy at this time for their review as well.[1377] A conference call was held on June 29, 2005 with the Ethics Committee. Sidley was unable to locate any notes from this meeting and relevant interviewees did not recall the substance of this conference call.[1378] Behnke informed Levant, Koocher, and Anton that the committee had "unanimously passed" the motion that the PENS report included appropriate interpretations and applications of APA Ethics Code.[1379] After this conference call, Behnke drafted Moorehead-Slaughter another email, which she then sent to the

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[1371] *Id.*

[1372] APA_0048500.

[1373] APA_0040750.[+]

[1374] APA_0040730.

[1375] APA_0040652.

[1376] APA_0051102.

[1377] APA_0040582.

[1378] One of the Ethics Committee members, Neil Massoth, was unable to join in person and sent his thoughts over email. Massoth believed the PENS report was an appropriate interpretive statement of the Ethics Code and that prohibiting specific techniques was unnecessary. As Massoth wrote: "We do not need incorporated in our current Code or any code a list of prohibited activities (e.g., one must not give the Rorschach, conduct EMD, etc.). The prohibition regarding sexual intimacies with clients is the only prohibition that we need." APA_0040635.

[1379] APA_0051202.

PENS listserv, that identified the minor changes in the report.[1380] The most substantive change was that the Committee recommended that statement three in the report (medical records) add the language "from the individual's medical record." Notably, Behnke sent the draft report to Banks for review after the Ethics Committee had provided their changes.[1381] Banks told Behnke he approved of the changes and mentioned that he met with the "[Army] Surgeon General, and he will be in front of the Senate soon, on this issue. (He is very supportive.) Having APA's support will mean a lot."[1382] Behnke explained to Sidley that he sent the document to Banks because there were no military people on the Ethics Committee and, as he had on other occasions, he wanted Banks to review the changes to ensure he Behnke was made aware of any unknown issues to him and the Ethics Committee. Behnke did not recall whether he sent the draft to anyone else besides Banks.[1383] Sidley did not locate an instance where Behnke sent a draft version of the report ex parte to another task force member.

The PENS Task Force members approved a revised fifth draft version of the report by June 30, 2005. Behnke sent an update to Levant and suggested that it would be "more efficient and less cumbersome" if the Board made the report public with the "weight of the Ethics Committee behind it," as opposed to adopting/endorsing/accepting the report.[1384]

Kelly emailed Behnke, Farberman, Mumford, Breckler, and Gilfoyle separately to inform them that Secretary of Defense Donald Rumsfeld's "exec assistant will apparently waiting by the fax for this! His super secret direct access fax line. They're just a tad interested."[1385] Gilfoyle cautioned Kelly that it made her "very nervous that Rumsfeld's office is eager for this," and that it would be a "nightmare" if the DoD relied on the report to conclude that abuses did not take place at Guantanamo Bay or Abu Ghraib.[1386] Farberman agreed and stated that APA's response to questions about psychologist or psychiatrists abuses in both settings is that "we don't know because we don't know the facts . . . the report [makes] clear statements about which activities would be ethical and which would not."[1387]

C. Board Takes Emergency Action

On June 30, Behnke emailed Koocher and Anton to remind them that a pertinent *New Yorker* article was forthcoming, likely by July 4, and that the task force could not convene again

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[1380] APA_0048478.

[1381] APA_0040580.

[1382] *Id*.

[1383] Behnke interview (May 29, 2015).

[1384] APA_0051204.

[1385] APA_0040495.

[1386] *Id.*

[1387] *Id.*

before then, based on what the Board's actions were.[1388] Farberman underscored Behnke's worry about the *New Yorker* article and APA's need for a "strong position":

> While I recognize that the Board has a critical role in this process and will need the time it needs to respond I also feel I have to let you know that I'm worried that if this New Yorker article does hit the streets on Monday will we (sic) be facing lots of questions about the ethics of psychologists working in national security interrogations on Tuesday. My hope is that we will have the report fully approved by that juncture — with it we have very strong talking points. Without it we're not in as strong a position.[1389]

Behnke told Sidley that he was not sure how he was made aware of Jane Mayer's *New Yorker* article, "The Experiment," which was ultimately released on July 11,[1390] but speculated that Banks or Gelles may have provided him details.[1391] A final draft of the PENS report in Behnke's files contains his handwritten notes with several mentions to the *New Yorker* article.[1392] The notes include comments like "New Yorker," "Jim Mitchell," "SERE," and "Church Documents," all of which are mentioned and discussed in Mayer's article from July 11. The notes also include the names "Ali Soufan" and "Bob McFadden," an FBI agent and NCIS officer, respectively, who oversaw other interrogations but were not discussed in the Mayer article.[1393] Behnke was unsure when he took these notes.[1394]

Later on June 30, Anton was made aware of the Board draft resolution options, including one that contemplated the Board "adopting the report as policy," and emailed Behnke with a "concern": "I'm not sure it can go out as policy without [Council of Representatives] approval. The [Board] can certainly accept the report."[1395] It is likely that the plan to declare an "emergency" was in response to Anton's concern that the Board could not normally adopt something as APA policy, since this was the Council's function. But under APA's Bylaws, the Board could take emergency action and adopt policy in Council's stead.[1396]

[1388] APA_0040518.

[1389] *Id*.

[1390] Jane Mayer, *The Experiment*, The New Yorker (July 11, 2005), *available at* http://www.newyorker.com/magazine/2005/07/11/the-experiment-3.

[1391] Behnke interview (May 29, 2015). Both Banks and Gelles were interviewed for the article.

[1392] HC00010682.

[1393] For more on these two individuals' actions, *see* Lawrence Wright, *The Agent*, The New Yorker (July 10, 2006), *available at* http://www.newyorker.com/magazine/2006/07/10/the-agent.

[1394] Behnke interview (May 29, 2015).

[1395] APA_0040508.

[1396] *Article VII:Board of Directors*, Bylaws of the APA, *available at* http://www.apa.org/about/governance/bylaws/article-7.aspx ("If an emergency is declared by a majority of the Board of Directors, the Board shall have power to take actions as though such action were taken by Council. The Board of Directors shall make a report of such emergency actions not later than the next

On the morning of July 1, 2005, Levant asked the Board over email to take emergency action to either approve of the report and review its recommendations at its August 2005 meeting (what he called "option 1") or to adopt the report as APA policy and review its recommendations thereafter (what he called "option 2").[1397] Levant's email declared that psychology was being "well trashed in the media" and that "situations like this are the very reason to have a Board that acts as Executive Committee of Council, to act in timely manner to pressing events."[1398]

The majority of the Board approved of the report over email the same day with every board member who offered an opinion choosing Levant's second option of adopting the report.[1399+] There was no documented conference call or meeting to discuss the emergency vote. It appears that nearly the entire vote was conducted over email on July 1, with Board member Paul Craig supporting the vote on July 3.[+] Behnke separately emailed Koocher to inform him that there may be "some confusion" about the two options Levant laid out in his email.[1400] In particular, Behnke noted that Levant's second option "commits the Board to endorsing the Report. While I believe the Report is very strong and represents APA very well . . . only a very limited number of people have seen it." Behnke added that if the report received "negative reaction," then "option 2 would have inextricably tied the Board to the Report."[1401] Internal APA emails do not indicate this issue was discussed with other Board members at the time. Levant stated in his interview with Sidley that it would have been "wimpy" for the Board to approve his first option since it only expressed hope that the report would be approved.[1402]

Some board members offered brief thoughts over email in their vote. Ruth Ullman Paige, the night before the vote, praised the reports "ethics focus versus a political focused" and suggested that a vote be held over email because of "time urgency."[1403] Sandra Shullman stated that a "timely and immediate response, all other things being equal, is in the best interest of

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meeting of the Council. It shall furnish a report of all such transactions at each Business Meeting of Council held in conjunction with the Annual Convention.").

[1397] APA_0040505.

[1398] *Id.*

[1399] Thomas DeMaio and Paul Craig did not formally choose option one or option two over email, but they indicated their support of the Board moving ahead without Council. Craig did not offer his thoughts until July 3, but APA staff began to move forward based on the July 1 vote by the majority of Board members.[+] The only Board member whose email vote Sidley has not located during this time was Jessica Henderson Daniel. It is unclear whether she offered a vote on the report at all or did so over the phone or in-person. Daniel did offer thoughts on the report on June 29, but that predated Levant's emergency vote email. APA_0040582. Daniel could not recall the details during an interview with Sidley. Daniel interview (Apr. 21, 2015).

[1400] APA_0040497.

[1401] *Id.*

[1402] Levant interview (May 13, 2015).

[1403] APA_0040503.

APA."[1404] Thomas DeMaio stated that he "wish[ed] we could wait for Council, but we probably do need to move forward quickly."[1405] Behnke stated at the end of the day on July 1 that "the Board has endorsed. The Report will be released."[1406] None of Sidley's interviews with Board members at this time yielded additional information about any further discussions during this emergency vote beyond what was found over email.

At one point before the emergency vote, Board Member and 2004 APA President Diane Halpern ("Halpern") had a "very strong recommendation" of adding a note or data point about how "torture is ineffective in obtaining good information."[1407] Halpern's comment was met with opposition by several within APA leadership. Koocher responded to Halpern by declaring the point "goes beyond the mission/mandate of the task force and makes a claim not in evidence."[1408] Gilfoyle began a separate conversation with Behnke and Farberman about this issue and how "linking our condemnation of torture in any way with the fact that it is ineffective should be avoided at all costs. . . . I guess you could say [Halpern's point] but is that true? And I guess more to your point, do you want to start down the path of line edits."[1409] Farberman agreed and hoped that Halpern's suggestion was "dead in the water."[1410] 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.

Anton later emailed Halpern to note that statements eight and ten in the report "embraces your point entirely."[1414] Halpern responded that those were "[g]ood points" and stated that "the only deterrent [to using torture] is that it doesn't work and that there are data on this." Behnke sent a response to Halpern after Anton and noted that her comments captured "many of the

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[1404] APA_0040502.

[1405] APA_0040491.

[1406] APA_0026862.

[1407] APA_0040500.

[1408] APA_0040504.

[1409] APA_0040500.

[1410] *Id.*

[1411] APA_0051185 (emphasis in original).

[1412] *Id.*

[1413] Lefever interview (May 3, 2015).

[1414] APA_0040478.

attitudes toward coercion that I've gleaned from individuals working in this area." Behnke then strongly stated the ineffectiveness of "coercion":

> Your message captures many of the attitudes toward coercion that I've gleaned from individuals working in this area: It doesn't work. It's counterproductive. It generates bad information. It besmirches our reputation. It puts our soldiers who are captured at greater risk.
>
> I have not done a thorough enough review of the literature to know how and where the data come down, and my sense is that relevant data may be classified. But I am looking, and will let you know what I am finding.[1415]

Halpern did not pursue the issue further after Anton's and Behnke's responses.[1416]

Ultimately, Council and the PENS Task Force members received an embargoed copy of the report on July 4. The report was then released to other groups on July 5—first to the Division and State listservs and APA staff at 9 a.m. ET, then to government and military contacts at 10 a.m. ET, and finally to the media at 11 a.m. ET.[1417]

Sidley received varying insights from Board members and APA leadership about the use of the emergency action. Levant believed taking emergency action was "not extremely unusual;" though he admitted it was more unusual to adopt a report or policy email.[1418] Levant explained that he considered passing the report an emergency since he was sensitive to psychology's public reputation and felt a great deal of urgency in responding to negative press.[1419] Gilfoyle also believed that responding to the media onslaught was an appropriate reason to exercise emergency powers.[1420]

On the other hand, Honaker told Sidley that taking emergency action was very unusual and that it was advisable for the Board to wait since the next Council meeting was set to take place in August.[1421] Judy Strassburger Fox, a forty-year APA employee until her retirement as the Executive Director of Governance Affairs in 2009, commented to Sidley that she only ever recalled emergency Board actions being taken to appoint high-level Board positions and not for adopting a report.[1422] Anton remarked to Sidley that this was the only time he had seen in his

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[1415] APA_0051170.

[1416] In her interview with Sidley, Halpern did not recall many of the details of the PENS process. As the outgoing APA president, she was not privy to many discussions at the time. Still, Halpern thought that critics had unfairly targeted Behnke for his role in PENS. Halpern interview (May 8, 2015).

[1417] APA_0040485; APA_0051169.

[1418] Levant interview (May 13, 2005).

[1419] *Id.*

[1420] Gilfoyle interview (May 20, 2015).

[1421] Honaker interview (Dec. 11, 2014).

[1422] Strassburger Fox interview (Apr. 3, 2015) .

seventeen years of APA governance emergency action used to set APA policy.[1423] Koocher professed that other than emergency actions relating to financial situations requiring immediate action (such as a refinancing situation), or one situation 20 years earlier when immediate action was required to avoid a negative government regulatory action, he did not believe the Board had ever declared an emergency in order to take a specific action.[1424]

Board member Sandra Shullman also provided additional context to Sidley. She said that while it was unusual for the Board to take emergency action in general, it was less so in the context of that year's board. That Board had previously taken emergency action in early 2005 on assisting efforts related to the Southeast Asian tsunami, and so APA was in "an environment where [the Board] acted swiftly."[1425] Shullman thought there were two reasons the Board took quicker action with the PENS report: (1) the "awful things happening in front of our eyes on TV" that were "devastating" to APA's principles, and (2) psychologists' concerns about their roles where they could not publicize their concerns.[1426]

These diverse opinions on the emergency action, however, illustrate that APA did not have a clear policy on what constituted an appropriate emergency action. Even more troubling, the entire vote was conducted over email without any real substantive discussions about the statements made in the PENS Report.

Further, the manner in which the emergency vote was taken may also raise concerns under Washington, D.C. non-profit law. D.C. law permits a Board of Directors to take action without a formal meeting "if each director signs a consent in the form of a record describing the action to be taken and delivers it to the nonprofit corporation."[1427] This unanimous consent requirement, however, may not have been met during the emergency vote. We have not located any email record of Board member Jessica Henderson Daniel's vote on Levant's proposal. APA does have not record of this emergency vote either. Without this unanimous consent, then, the entire emergency action would be invalid. It will be important for APA, Daniel, and others to redouble their efforts to confirm that Daniel's formal vote was given on the emergency action. Other corporate legal issues may arise as well, which fall beyond the scope of this review — namely, whether only two voting options (which excluded any option to reject the report) and an email vote without any attached consent form or formal gathering of signatures were valid actions under Washington, D.C. law.

[1423] Anton interview (May 8, 2015).

[1424] Koocher interview (May 20, 2015).

[1425] Shullman interview (Apr. 20, 2015).

[1426] *Id.*

[1427] Code of the District of Columbia § 29–406.21. Action without meeting, *available at* http://dccode.org/simple/Title-29/Chapter-4/Subchapter-VI/Part-B/.

V. PENS INITIAL AFTERMATH AND RELATED ISSUES

A. Immediate Aftermath: July 2005 – September 2005

1. Banks-Behnke exchange on answering psychological distress

APA's initial press release about the PENS report summarized the findings of the report and made clear that psychologists could "serve in consultative roles to interrogation- or information-gathering processes for national security-related purposes."[1428] The statement, as a whole, was exactly the message that was pleasing to DoD.

The day before this press release, Behnke and Banks continued an exchange about communications efforts surrounding the PENS report.[1429] Behnke outlined two key questions he thought APA would receive about the report: "What roles or functions may psychologists ethically take in assisting interrogations, and is it permissible for psychologists to suggest or recommend techniques that would cause psychological duress."[1430] Behnke told Banks that he would also like to offer an example to elucidate these questions to questioners. Banks responded that Behnke's questions were the "real issue":

> What is the level of psychological distress that moves it into abuse . . . ? This is the one that will foster the greatest legitimate controversy. Some will feel that any psychological distress is too much for psychologist involvement, regardless of the purpose. Obviously, I disagree, but it is a legitimate view point.[1431]

Behnke thanked Banks for his thoughts and that he would need to think further about "how best to package some of these ideas."[1432] Behnke then commented on the "distress" point and the media issues with commenting on it:

> I'll need to think more about what you (no doubt correctly) identify as the key issue, that of distress. The reality, if one thinks about it, is that psychologists cause distress ALL the time, for treatment and non treatment reasons, at times to benefit an individual, at times not. (The ethical standards on research clearly allow some degree of psychological distress in conducting research, which is

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[1428] *Report of the APA Presidential Task Force on Psychological Ethics and National Security* (July 5, 2005), *available at* http://www.apa.org/news/press/releases/2005/07/pens.aspx.

[1429] Prior to these communications, on July 2, a *Washington Post* opinion piece that criticized medical personnel's roles in abuse. Behnke instructed Moorehead-Slaughter to forward the article and inquire within the task force about the military's "new guidelines" that the article mentioned. James believed this passage was referring to the Army Surgeon General's recent guidelines, but that they "in no way say torture by health professionals is perfectly ok." PENS listserv (July 2, 2005); APA_0051158.

[1430] APA_0051149.

[1431] *Id*.

[1432] *Id*.

rarely to the research subject's benefit.) The challenge is to convey that idea to the media in a manner that does not convey "anything goes."[1433]

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, Behnke, and others wanted to avoid addressing thornier issues in the PENS report itself and instead defer to existing DoD policies and practices at the time.

2. *Another Neil Lewis article, overstating the utility of the PENS report*

What is more, this omission of specifics was immediately at issue in an exchange with Neil Lewis who planned to write an article about the report. After Behnke sent him a link to the task force report on July 5, Lewis emailed Behnke with questions about the report. He inquired about several issues, including his confusion over whether a psychologist could "advise but cannot advise as to increasing duress or distress? [Q]uite unclear. [C]an they advise about increasing stress or duress as long as it is not coming from medical records? "[1434] Lewis also asked whether it was permissible for a psychologist to take part in an interrogation that played on a "detainee's fear of darkness or longing for a family member." Behnke forwarded Lewis's message to Banks and noted that Lewis had "put his finger right on one of the central issues, as I imagined he would."[1435]

Banks offered Behnke his thoughts to Lewis's questions later on July 5. He stated that medical records cannot be used against a detainee and that there was a "separation between interrogation and medical care."[1436] Banks conceded that the report did not bar a psychologist from assisting in "causing some level of distress, as long as it does not rise to the level of cruel, inhuman, or degrading treatment." He believed that "most of us would agree that" exploiting someone's phobia would violate this principle but that discussions about family would not. Behnke thanked Banks for the response and added that he could quote language from the U.N. Convention Against Torture that also made it clear that mental suffering that was "severe" is forbidden. Banks cautioned that citing to this language in the Convention Against Torture might be interpreted as "we will do everything up to, but not including, severe mental suffering. I think that the standard is much more humane than that."[1437] Behnke and Lewis appeared to have spoken on the phone about Lewis's question later in the afternoon on July 5.

[1433] *Id.*

[1434] APA_0051124.

[1435] *Id.*

[1436] *Id.*

[1437] APA_0051124. Behnke also messaged Banks on July 5 on whether he believed the a section of the U.N. Principle of Medical Ethics, which was cited in APA's 1986 Resolution Against Torture, was consistent with the PENS report. Specifically, Behnke cited language in Principle 4 of the United Nations document about how it was a violation of medical ethics for a health professional to approve "the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical

By the evening of July 5, Lewis's article was posted to the *New York Times* website and was circulated across several APA listservs. Lewis criticized the PENS report, noting that it appeared "to avoid explicit answers to questions as to whether psychologists may advise interrogators on how to increase stress on detainees to make them more cooperative if the advice is not based on medical files but only on observation of the detainees."[1438] Lewis also cited the fear of darkness example that he posited to Behnke. Behnke began drafting a response to Lewis's article later that night and ultimately collaborated with Farberman to draft a statement that Levant could send as a Letter to the Editor to the *New York Times*.[1439] Behnke also sent the letter for Banks's approval,[1440] to which Banks responded that Behnke was "doing great stuff for psychology."[1441] The letter was published on July 7 and claimed that the PENS report included "strict ethical boundaries" for psychologists and refuted the use of phobias in interrogations, adopting Banks's conclusion on the issue:

> In focusing on perceived shortcomings of an American Psychological Association Task Force report, (Psychologists See Ethics Risks at Guantanamo, July 6), Neil Lewis failed to report on the strict ethical boundaries the APA sets forth when its members are involved in national security activities, and thus overlooked a critical point: Professional codes of ethics are more than simple laundry lists. Lewis' example — using a phobia to inflict severe psychological distress — is clearly prohibited by the Task Force report. The report makes clear that psychologists never: engage in, direct, support, or facilitate torture or cruel, inhuman, or degrading treatment; use information from a medical record to the detriment of an individual's safety and well-being; mix treatment and consultant roles. Psychologists have an ethical obligation to report such behaviors and are bound by the APA Ethics Code in all their professional activities, regardless of whether they identify themselves as "behavioral scientists" or some other term.[1442]

Behnke and Banks messaged privately once again on July 7, the same day as the London bus bombings. Behnke queried whether anyone would question the ethical nature of psychologists consulting on a police interrogation of a bombing suspect, even if "questioning

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or mental health and which is not in accordance with the relevant international instruments . . . ." Banks responded that he was unsure of the documents "legal standing for US citizens (This is one of those areas that we agreed to disagree on.)." *Id.* After commenting that the principles were "VERY poorly written," Banks said it would depend on the "international instruments" referenced in the document. APA_0040363 (emphasis in original).

[1438] Neil Lewis, *Psychologists Warned on Role in Detentions*, New York Times (July 6, 2005), *available at* http://www.nytimes.com/2005/07/06/politics/psychologists-warned-on-role-in-detentions.html.

[1439] APA_0051117. Notably, Farberman removed Behnke's reference to the American Psychiatric Association and noted that she wanted to avoid a media-led "turf battle" between the two organizations.

[1440] APA_0051115; APA_0051116.

[1441] APA_0040256.

[1442] APA_0040304.

became stressful."[1443] Banks responded that the "use of force . . . is directly related to the perceived importance of the threat," so if a group believed that there was a "real risk of harm," the stress question is often "moot." Banks found this troublesome and stated that it was of "critical importance" to provide "clear guidance of the behavior of us all. . . . [W]hat you and the [task force] accomplished is far reaching."[1444] Behnke responded that he felt "privileged" to have worked with Banks on this matter.[1445]

The Lewis article exchanges illuminate several points. First, one day after the PENS report was released, the public's call for specificity was apparent. Second, the PENS Report, contrary to the Letter to the Editor statement, was not a document that provided "strict ethical guidelines."[1446] The statement contradicted the belief among task force members that the report was an "initial step," especially the non-DoD members, who only signed off on the report believing more steps were needed. It is inaccurate to call an "initial step" in a process a product that provided "strict ethical guidelines" to psychologists in these settings. Though Banks believed that using phobias would rise to the level of "cruel, inhuman, and degrading treatment," the report does not make clear that this is the case. In private conversations before and after the Lewis article, Banks and Behnke recognized the ambiguity in the level of psychological distress permitted. A statement about "strict ethical guidelines," then, was misleading. Banks also noted the need for clear guidance, but it appears he did not wish that guidance to come from the PENS report.

Third, APA's media strategy shifted and was clear from this point on: 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. These were misleading public statements and this was a disingenuous media strategy. A document that was intentionally very limited, non-specific, and evasive on the key issue in order to, principally, please DoD, was now described principally as a strong anti-torture and pro-human-rights document.

For example, in response to an August 2005 *Lancet* article, APA wrote the following response that refuted the article's central claims:

> [P]sychologists are always bound by the ethical responsibilities set forth in the APA ethics code — regardless of the work setting and regardless of whether they are referred to as psychologists, behavioral consultants or scientists, or some other

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[1443] APA_0051056.

[1444] *Id*.

[1445] *Id*.

[1446] Notably, Joseph Matarazzo emailed Behnke about the Lewis article to inform him that his "reading is that DoD psychologists are not upset with the Task Force report." APA_0040266.

> term. Our code of ethics always applies — no exceptions, including in settings outside traditional therapeutic contexts. . . . The APA Task Force report states explicitly that psychologists have an ethical obligation to report evidence of torture and other cruel, inhuman, or degrading treatment to appropriate authorities, and that it is unethical for psychologists to use information from a medical file to the detriment of an individual's safety and well-being.[1447]

In addition, APA sent a letter to Senator John McCain in support of his amendment to ban torture or cruel, inhuman, and degrading treatment on detainees (more about the McCain Amendment is discussed later in the report):

> Our APA ethics code requires psychologists to respect the dignity and worth of all individuals and to strive for the preservation and protection of fundamental human rights. . . . More recently, in June of 2005, the Council reaffirmed [APA's 1986 Resolution Against Torture] and endorsed the [PENS report], again stating that psychologists do not engage in, direct, support, facilitate or offer training in torture or other cruel, inhuman, or degrading treatment. In fact, the Task Force report further directed that psychologists have an ethical obligation to be alert to and report any acts of torture or cruel or inhuman treatment to appropriate authorities.[1448]

Also, in anticipation of a November 2005 *Washington Post* story regarding the various professional organizations' positions on interrogation settings, Behnke and Farberman drafted a letter for Levant that touted APA's strong stances against torture:

> First, I want to emphasize that for over twenty years the American Psychological Association's position on this issue has been clear and unwavering: It is unethical for a psychologist to participate in torture or other cruel, inhuman, or degrading treatment, under any circumstances, at any time, for any reason. There are no exceptions. A state or threat of war, a national emergency, or a law, regulation or order can never justify a psychologist's participation in any of these acts. . . . Second, over and above not participating in torture or other, cruel, inhuman, or degrading treatment, psychologists have an ethical responsibility to be alert to and report these acts to the authorities. Third, consistent with both of these statements, the American Psychological Association supports the McCain Amendment.[1449]

[1447] *Response from the APA to "A stain on medical ethics*, Lancet (Aug. 6, 2005), *available at* http://www.apa.org/news/press/statements/lancet-response.pdf (original article available at http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2805%2967520-4/fulltext?version=printerFriendly).

[1448] Open letter from Anderson to McCain (Oct. 28, 2005), *available at* http://www.apa.org/news/press/statements/mccain-appropriations-letter.pdf.

[1449] APA_0184298. The article was ultimately published without reference to this letter. Shankar Vedantam, *Medical Experts Debate Role in Facilitating Interrogations*, Washington Post (Nov. 14, 2005), *available at* http://www.washingtonpost.com/wp-

APA also quelled members' concerns with the PENS report by definitively stating that certain techniques were banned in the report, though this was not the case. Take Farberman's reply letter to APA member (and future APA Petition Resolution leader) Ruth Fallenbaum in November 2006:

> It is our belief that there are two critical questions surrounding the interrogations issue: (1) What is an ethical interrogation? and (2) What is the most effective strategy to promote ethical interrogations? There is no disagreement within APA regarding the first. All agree that ethical interrogations are based on building a relationship and forming rapport, and that techniques that are abusive or coercive (e.g., water boarding, sexual humiliation, use of phobias, temperature extremes, stress positions) are inconsistent with this way of thinking and are both unethical and largely ineffective. There is complete consensus within APA that these techniques and techniques like them are never to be used.
>
> Regarding the second issue, we believe there exists strong (but admittedly not universal) support for a common goal: ethical interrogations that leave no room for abusive or harmful techniques. Where there has been much debate is about the best strategy to achieve this goal. APA has chosen a strategy of engagement (unlike the psychiatrists, who have opted for a policy of disengagement).[1450]

Farberman noted a "complete consensus" with the idea that certain techniques like stress positions were always unethical. This is not true, as we saw in our interviews with Banks, Behnke, and Shumate, who would not definitively bar the use of certain stress positions.[1451]

In addition, other public statements and member communications stressed that APA could not be expected to be more detailed than it had been: APA needed to be respectful that the issue was complicated, they did not have all the facts or context necessary to make ethical judgments, that the issue needed more time to develop, and that the task force report was just

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dyn/content/article/2005/11/13/AR2005111300868.html. This language was also used in response to another Neil Lewis article at the time as well as an article that Behnke authored in early 2006 for the *European Psychologist. See* APA_0232260; APA_0232746; *see also* Neil Lewis, *Guantanamo Tour Focuses on Medical Ethics,* New York Times (Nov. 13, 2005), *available at* http://www.nytimes.com/2005/11/13/us/guantanamo-tour-focuses-on-medical-ethics.html.

[1450] APA_0088453.

[1451] Behnke and Banks's "safe, legal, ethical, and effective" analysis of stress positions are discussed earlier. When asked whether sleep deprivation or stress positions were unethical, Shumate did not directly answer the question. We asked Shumate if his opinion would change if everyone on the task force, including the DoD members, thought that sleep deprivation were unethical. Shumate responded that he would be willing to "have a discussion" about it but did not commit to an answer. Shumate interview (June 24, 2015).

initial step.[1452] At other times, APA said that they were just following the will of a diverse group of task force members who had adopted the report in either a unanimous or consensus fashion, and the diversity of the group (which included a minority of non-DoD members, some of whom had lobbied strenuously and unsuccessfully for stronger human rights protections) proved how reasonable the report and APA policy was.[1453] Behnke often reached out to the six DoD members of the task force as well to echo these talking points; he did not reach out to the non-DoD members in the same way.[1454] In all instances, this conciliatory language from APA appeared to diffuse any potential criticism rather than address issues head-on in the aftermath of PENS.

3. Listserv discussions

The non-DoD PENS members raised additional concerns about the report in the days after its release. Behnke tried, through himself and Moorehead-Slaughter, to alleviate these concerns in an effort to salvage the report and task force as a whole.

Thomas raised to the task force listserv on July 7 the additional internal chatter with APA groups critical of the PENS report.[1455] On July 8, Behnke sent Moorehead-Slaughter a draft set of talking points for task force members regarding responses to criticism.[1456] Moorehead-Slaughter forwarded the points to the PENS listserv. The note outlined six different points to combat critiques: (1) encourage people to read the report; (2) note the report was a document produced in "good faith" by people from diverse perspectives; (3) explain that the report, "like a good ethics code — is not a list of prohibited activities;" (4) compare the statement with the draft position of the American Psychiatric Association; (5) dismiss supposed first-hand observations on the listserv since task force discussions were private; (6) clarify that the report was the "beginning of the process."[1457] Thomas summarized APA members' concerns on July 8 — namely, that the document offered "too much wiggle room" for unethical behavior in the national security context.[1458] Thomas also alluded to the just-published Jane Mayer *New Yorker* article and increased concern of psychologists being present in abusive interrogation settings. Thomas added that it was "a troubling article to read and I find it difficult to dismiss as exaggerations, misrepresentations, or some such. I am sure there will be further calls to address

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[1452] *See, e.g.*, APA_0060614 (June 2006 exchange between Behnke and Phil Zimbardo regarding Zimbardo's thoughts on the PENS Report where Behnke underscores the need to be deliberate with these complicated topics).

[1453] *See, e.g.*, APA_0051064; *see also* PENS listserv (July 8, 2005) (draft message from Behnke to Moorehead-Slaughter, and a message from Behnke himself on the PENS listserv, underscoring the diversity of the task force, among other issues).

[1454] *See, e.g.*, APA_0087216 (Behnke emailing six DoD members with talking points for upcoming Salon.com article).

[1455] PENS listserv (July 7, 2005). *See, e.g.*, APA_0040293 (Leonard Rubenstein's letter on behalf of Physicians for Human Rights).

[1456] APA_0051064.

[1457] *Id.*; *see also* PENS listserv (July 8, 2005).

[1458] PENS listerv (July 8, 2005).

these issues from Council and the membership."[1459] Banks later emailed that the article misquoted him several times and left him "dumbfounded."[1460]

Thereafter, Behnke also responded on the listserv on July 8 — as himself, not through Moorehead-Slaughter — and reiterated the good work of the task force and the nature of ethics codes that do not normally list specific acts as prohibited. He also noted the process an "initial step" and that this "continuing" process would be "written about for many years to come."[1461] Behnke separately emailed Levant, Koocher, Anton, and Farberman on July 10 about these critiques. He mentioned that writing the casebook "will be very important and serve useful political purposes as well."[1462]

Arrigo emailed the group on July 9 and highlighted her concerns about the composition of the task force.[1463] In particular, she noted her concerns with the majority DoD members of the task force. Koocher challenged each of Arrigo's points on July 10 — yet another example of Koocher retorting Arrigo's comments on the listserv.[1464]

On July 16, James tried to quell additional concerns Thomas raised on the listserv from Bloche and Marks's latest *New England Journal of Medicine* article regarding the use of medical records. James remarked that medical records were "strictly off limits" for anyone involved in interrogations,[1465] although the PENS report explicitly allowed access to detainee medical records (although not for improper uses), Banks had made it clear that he wanted psychologists to retain that access (to help protect the detainee's health, he said). This was not always the reality at Guantanamo Bay, where BSCT psychologists apparently had access to the records until at least October 2006, as discussed earlier in the exchange between Behnke and BSCT member Carrie Kennedy. Arrigo asked for an update on July 18 on whether a casebook, as discussed during the PENS meeting, was still being planned. Moorehead-Slaughter, at Behnke's behest, confirmed that the casebook was agreed on in the recommendations section of the PENS report.[1466] As discussed later, the work of the casebook shifted to the Ethics Committee and then died.

On July 26, 2005, off of the listserv, Behnke sent a response to Bloche after he inquired about speaking with Fein and Shumate. Behnke noted Bloche's voicemail to him regarding the PENS report and stated that the report located itself as an "initial step" in a "continuing process."

[1459] *Id.*

[1460] PENS listserv (July 11, 2005).

[1461] PENS listserv (July 8, 2005).

[1462] APA_0040171.

[1463] PENS listserv (July 9, 2005).

[1464] PENS listserv (July 10, 2005).

[1465] PENS listserv (July 16, 2005).

[1466] APA_0050805; *see also* PENS listserv (July 25, 2005).

Bloche responded back and said that the report takes some "well-defined stands on a number of issues."[1467] Behnke responded that the process was still moving forward:

> [F]ar from attempting to cut off debate or discussion, or attempting to locate expertise as residing solely within itself — the task force has handed its work over to a broader audience and invited (recommended) authoritative commentary from groups that very likely will be composed of psychologists with no military background. I think that's an interesting move. . . most such groups work to limit what input other bodies have, in an effort to retain control over their work, and resist any attempts by others to assert their expertise. This task force did exactly the opposite (and built in a mechanism to ensure that would happen). It will be very interesting to see what the Board of Directors does.[1468]

By July 29, Thomas sent her strongest email yet about her disappointment over the PENS Task Force. After another Lewis article in the *New York Times* detailed how the military's own lawyers raised concerns over the use of harsh interrogation tactics and the need for human rights standards, Thomas that she was "all the more sad" that neither she, Arrigo, or Wessells were unable to insert a more "stringent standard for holding psychologists to account" in the PENS report.[1469] She lamented that the media reports have made her unable to "feel sanguine about our work as having adequately addressed the concerns of our members (or my own for that matter)."[1470]

Moorehead-Slaughter responded, likely with Behnke's input,[1471] to Thomas's email by explicitly stating the military's clear opposition to adding human rights standards in the PENS report:

> [O]ur colleagues from the military were clear that including [human rights] standards in the document would likely (perhaps definitely) put the document at odds with United States law and military regulations. The effect of such a conflict, it seems to me, would be that the military would simply have ignored the document — thus, the community that we would most want to reach would have been prevented from using the report. Of course the document is a compromise — but it's a compromise that has ensured that our voice is present to and heard by the psychologists doing the work and their superiors.[1472]

[1467] APA_0050842.

[1468] *Id.*

[1469] PENS listserv (July 29, 2005).

[1470] *Id.*

[1471] We did not locate a specific draft email from Behnke to Moorehead-Slaughter in this instance. But the wording of the message, coupled with Behnke's near-universal drafting of Moorehead-Slaughter's other messages, make it highly likely that Behnke also drafted this message.

[1472] PENS listserv (July 29, 2005).

James separately emailed the group on July 29 and stated that he was "proud of the document" and that he felt "better in [his] heart about the work that psychologists did at GITMO and Abu Ghraib."[1473]

On July 30, Koocher weighed in on the recent media reports and Thomas's points on human rights standards. Koocher does not mince words about his disdain for documents such as the Geneva Conventions and the U.N. Convention Against Torture, noting that he had "zero interest in entangling APA with the nebulous, toothless, contradictory, and obfuscatory treaties that comprise 'international law.'"[1474]

Likewise, Shumate emailed the PENS listserv on August 11 to express support for Behnke and Koocher on behalf of the DoD:

There will no doubt be counter claims that you unabashedly support the military psychologists, yet I believe that what you are truly supporting is the profession and the psychologists that adhere to the ethical guidelines that are at the basis of our profession. We in the Department of Defense applaud your support of the profession and in turn us.[1475]

4. Notable military/government conversations

Elsewhere, Mumford sent Hubbard and a group of government officials an email on July 5 about the PENS Task Force.[1476] The email included several other government officials that Hubbard had messaged in mid-June about his retirement from the CIA and his new job consulting for Mitchell Jessen & Associates. Mumford stated that he "wanted to semi-publicly acknowledge [Hubbard's] personal contribution as well as those of [Kirk Kennedy] and Andy Morgan in getting this effort off the ground over a year ago," alluding to the July 2004 meeting that all three attended.[1477] Mumford continued to say that "your views were well represented by very carefully selected Task Force members (Scott Shumate among them)."[1478] Mumford added that Brandon "helped craft language related to research."[1479] Hubbard speculated to Sidley that Mumford's "well represented" comment referred to Hubbard's view that it was appropriate for psychologists to be in interrogation settings.[1480] Shumate implied to Sidley that he and Hubbard knew that they did not share the same views on this, saying that Hubbard was probably doing the equivalent of "turning over in his grave" when he saw this.[1481]

[1473] *Id*.

[1474] PENS listserv (July 30, 2005).

[1475] PENS listserv (Aug. 11, 2005).

[1476] APA_0221161.

[1477] *Id*.

[1478] *Id*.

[1479] *Id*.

[1480] Hubbard interview (May 15, 2015).

[1481] Shumate interview (June 24, 2015).

Behnke reiterated to Sidley that his message to Board member Jessica Henderson Daniel on August 8 encapsulated his thinking immediately after the PENS report's release.[1482] In that message, Behnke expressed gratitude for Daniel's supportive words on the report and his view that psychologists had an ethical role to play in national security settings:

> It's important that we move forward with an understanding of the issues in their complexity and nuance. I continue to feel strongly that we have a solid, thoughtful, and balanced report, and that APA should be PROUD of the very important contributions psychologists have to make in these difficult and challenging times, when we work within clear ethical guidelines.
>
> I've made this point before, but — should our country suffer another attack, could we really imagine APA taking the position that psychologists, even though experts in human behavior, have no ethical role to play in contributing to the information-gathering processes, to assist in preventing further loss of innocent life?[1483]

We note that Behnke framed the issue based on the concern about public safety and the potential for another attack. Banks later in 2006 emailed Behnke that framing one's position based on public safety was the key to winning the argument, because it was very difficult for anyone to be against protecting public safety ("All those against safety please stand up").[1484]

On August 9, Dunivin praised Behnke and Newman for their leadership on PENS. After discussing the "potential landmine" of an ethics and national security panel at APA Convention, Dunivin gives a "HUGE THANKS" to them on the PENS Report. Dunivin wrote of the positive effect the report had with the Army Surgeon General:

> Confidentially - The report of the PENS Task Force has enabled the Army Surgeon General to move forward with interim guidance and doctrine on functioning of the behavioral science consultants to this process. Until that's released, it's close hold, even that it's being don[e], but I wanted you to know what an important contribution your timely intervention has made already. It will be well-worth the heat coming up at convention, and beyond.[1485]

Banks emailed the PENS listserv on August 12 with a similar note, explaining that he, James, Dunivin, and others met with Army Surgeon General Kiley for a full day to try "to

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[1482] Behnke interview (June 8, 2015).

[1483] APA_0041516.

[1484] APA_0088369.

[1485] APA_0050474. Behnke responded with his agreement that the convention panel could be a "festival of mischief" and commented that getting "to know and work with Morgan [Banks] has really made it all worth it--what a great guy."

establish the doctrinal guidelines and training model for psychologists performing this job. The TF report provided, again, a solid anchor to use in our deliberations."[1486]

Ultimately, the full PENS report was appended to the first MEDCOM BSCT policy memorandum in October 2006.[1487] The report itself stated that a BSCT's purpose was to "assist the command in conducting safe, legal, ethical, and effective detention operations, intelligence interrogations, and detainee debriefing operations."[1488] This language has appeared in all subsequent BSCT MEDCOM memoranda, including the most recent one issued in 2013.[1489] Kiley told Sidley that he was not sure what the military would have done if APA had fully barred psychologists in BSCT settings.[1490] To Kiley, the BSCT psychologists kept interrogations safe; he expressed these views to people at APA and believed APA understood the role of BSCT psychologists.[1491]

Newman emailed Behnke on August 12 with his thoughts on the PENS report and his general view on the utility of psychologists in interrogation settings.[1492] Newman remarked that one of "my interests" in having psychologists present in national security settings was because he believed "it is a very good example of psychologists as 'experts in behavior' (rather than simply mental health or health professionals), bringing to the activities, skills and competencies that other professionals just do not have."[1493] He explained further that BSCT psychologists had "two very clear and specific unique contributions" that could make interrogations "safe, legal,

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[1486] PENS listserv (Aug. 12, 2005). We interviewed Kiley, Banks, and Dunivin about this August 2005 meeting in the Surgeon General's Office, which some described as an internal "summit" on the issue. Banks said that Kiley had convened an informal gathering of people in early 2005 on the need to provide formal guidance from the U.S Army Medical Command ("MEDCOM"), which Kiley headed as Army Surgeon General, to BSCTs in the field. The August 2005 meeting was an opportunity to spend several hours with Kiley and his team and understand the kind of guidance that was needed. Dunivin told Sidley that there was a debate during the meeting about the differences between military ethics and medical and psychological ethics and that she advocated the need for more formalized trainings. Banks interview (May 21, 2015); Dunivin interview (May 20, 2015).

[1487] Previous Standard Operating Procedures for BSCTs existed after 9/11, but this was the first official, unified policy from MEDCOM.

[1488] Behavioral Science Consultation Policy, OTSG/MEDCOM Policy Memo (Oct. 20, 2006), *available at* http://www.nejm.org/doi/suppl/10.1056/NEJMp0806689/suppl_file/nejm_marks_1090sa1.pdf.

[1489] Behavioral Science Consultation Policy, OTSG/MEDCOM Policy Memo (May 8, 2013) (on file with Sidley). Another broader DoD Directive first included the mention of Behavioral Science Consultants in November 2005. A member of the Joint Personnel Recovery Agency messaged Behnke, Banks, Shumate, Gary Percival and Carroll Green and stated the following: "Thanks to all for your hard work, we are now in an official [DoD Directive]." APA_0046024; APA_0046025.

[1490] Kiley interview (June 4, 2015).

[1491] *Id*.

[1492] APA_0050376.

[1493] *Id*.

ethical, and effective": (1) their role in preventing behavioral drift, and (2) their contributions to "effective information-gathering," such as rapport-building.[1494]

Whether Newman's "interests" were his alone, or in concert with his wife, is of course unclear. But Newman would have a clear interest in arguing for the presence of BSCTs and the unique contributions they make since Dunivin was a BSCT psychologist. In addition, the substance of Newman's comments underscore the inherent conflict, as discuss previously, of the role of a BSCT 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.

Behnke responded to say that he appreciated Newman's comments and noted the need to "move the debate from whether psychologists should be involved in interrogations to how they may do so ethically."[1495] He cited language from both Division 48 and the Physicians from Human Rights that suggested support for his position. Behnke described the same how/whether framework for Levant on August 13 ahead of Levant's APA presidential address at APA Annual Convention.[1496] Behnke engaged with Bloche about the PENS report in late August 2005 as well. Before his scheduled joint appearance with Bloche on an NPR affiliate on August 25,[1497] Behnke coordinated with Banks and James about what he should say.[1498] Behnke specifically raised Bloche's critique of Statement Three in the PENS Report—namely, that the statement did not bar the use of medical information for crafting an interrogation strategy for a detainee. Behnke suggested that future commentary on the statement (presumably referring to the casebook) could definitively bar this possibility. James stated that "regardless of what the task force report" said, the current Army regulations "strictly prohibit[ed] the use of medical information from medical records."[1499] Behnke later forwarded Bloche's message after their joint appearance to both Banks and Gelles.[1500] Bloche's message indicated how "disheartening" the report was and he implored Behnke to withdraw the report. He recommended that APA follow the model of the Institute of Medicine and seek "broad representation, public presentations to the panel, public discussions, and a final document thoroughly vetted by an independent review process."[1501] Gelles told Behnke that Bloche had "an agenda."[1502] Banks

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[1494] *Id*.

[1495] *Id*. (emphasis in original).

[1496] APA_0041230.

[1497] An active link to this interview is no longer available. But Behnke referenced the interview would take place on August 25 in internal correspondence. *See* APA_0042319.

[1498] *Id*.; APA_0042240.

[1499] APA_0042240.

[1500] *See* APA_0042319; APA_0050013.

[1501] APA_0042319; APA_0050013.

[1502] APA_0050013.

rejected Bloche's comments and thanked Behnke for his work: "thanks from lots of us for what you are doing [] (Just remember to wash your hands when you are done.)."[1503]

5. Responses to Physician for Human Rights and Division 48

On July 15, Leonard Rubenstein on behalf of Physicians for Human Rights ("PHR") sent Behnke and Levant a letter outlining the group's concerns with the PENS report. The letter specifically noted the report's lack of prohibitions in participation in "highly coercive interrogations," lack of adherence to international law "regardless of the interpretation of that law by military authorities," and its lack of adequate protections on confidentiality.[1504] Behnke sent Rubenstein a formal response on August 12, as discussed below.

By July 24, the Executive Committee of APA's Division 48 released their "Statement Concerning the Use of Torture with Prisoners."[1505] The statement was forwarded to Levant and APA Board by July 26. The statement identified five specific calls to action:

1. Issue a clear statement against the use of inhumane, degrading, or coercive interrogations and the use of torture either physical or mental in the interrogation of prisoners.
2. Acknowledge, based on the U.N. Convention Against Torture, 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.
3. Publicize both within and outside of APA the 1986 resolution concerning human rights and torture.
4. Issue a clear statement against the direct or indirect involvement of psychologists in inhumane, degrading, or coercive interrogations including interrogations involving the use of either physical or mental torture.
5. Finally, in light of the evidence implicating psychologists in the use of coercive interrogations and torture at Guantanamo Bay , the Executive Committee of Division 48 calls on the leadership of APA to pursue through whatever organizational and legal means possible an investigation of these charges.[1506]

Koocher asked then-Division 48 President Eileen Borris what the group meant by "coercive interrogation," since certain evaluations or interrogations, Koocher explained, might be permissible but have elements of coercion to them. Koocher clarified that he was "obviously referring ONLY to verbal questioning that does not involve threat of physical harm, etc., but where non-cooperation will have adverse effects (e.g., prolonged detention, denial of parole, etc.)."[1507] Behnke wrote Levant and Farberman that Division 48's statement showed a

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[1503] APA_0042319.

[1504] APA_0232100.

[1505] APA_0039817; APA_0039818.

[1506] APA_0039818.

[1507] APA_0178933. The Division ultimately did respond to Koocher's request with its understanding of coercive interrogation and what techniques could be "coercive." HC00011901.

"remarkable degree of overlap with the PENS report" and that, save for the call to investigate wrongdoers, the two could be read "almost as companion documents."[1508] Behnke later told Kelly that the statement could be "to our benefit."[1509]

On August 10, 2005, Shumate provided thoughts to Kelly on the term "coercive" (likely in response to Division 48's and PHR's letters that use the term). Behnke and Mumford used a response from Shumate (which Kelly forwarded to them) to form a potential response for Division 48 and others within APA. The draft statement used Shumate's language to make the point that interrogations by its "very nature is coercive . . . The important point . . . is that the more coercive the approach, the less confidence one can place in the information gathered. And the point of interrogation is to gather information one can place a high degree of confidence in."[1510]

In a separate communication on August 11, also likely in light of Division 48's and PHR's letters to APA, Behnke emailed Shumate about "to what extent" the Geneva Conventions and Convention Against Torture conventions "now govern detainee interrogations."[1511] Shumate responded that "all interrogators are trained and reminded that they have to adhere to the Geneva Conventions and the Torture Convention." Behnke then responded that others believe the conventions do not apply and inquired whether Shumate had authority that cites the "obligatory nature" of Shumate's statement.[1512] Shumate responded that there may open source documents available as well statements from Secretary Rumsfeld himself about this. During a separate conversation on the same issue between Kelly and Banks, Banks sent Kelly (who later forwarded to Behnke) a copy of Army Regulations 190-8, which governed the treatment of detainees.[1513]

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.[1514] After Banks noted Behnke's "thoughtful response to an unfair attack," the two sang each other's praises. Banks noted that, after a recent media appearance with Behnke that Banks perceived as unfair, Behnke was his "hero" and to not "let the bastards get you down." Behnke responded that if he was "ever in a foxhole, I hope you're in there with me!" [1515]

Behnke also sent the letter to Gilfoyle, Farberman, and Levant at APA.[1516] Echoing his comments to Newman the same day, Behnke wrote that PHR believed the "issue is not whether psychologists may participate in interrogation processes, but rather how they may do so in an

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[1508] APA_0050851.

[1509] APA_0027847.

[1510] APA_0128827.

[1511] APA_0041376.

[1512] *Id*.

[1513] APA_0027787.

[1514] APA_0041304.

[1515] APA_0041338.

[1516] APA_0041304.

ethical manner."[1517] Behnke rejected PHR's concerns that the report (1) did not directly address the permissibility of interrogation techniques that caused severe harm, and (2) did not bar the military's views of permissible techniques from trumping international law. To the first point, Behnke stated that the report "speaks directly to and prohibits psychologists' involvement in any activity that can cause severe and long-lasting harm." To PHR's second point, Behnke stated that the report "prohibits psychologists' involvement in any activity that constitutes torture or that violates domestic law, and that a military authority indicating that such activities are legal would not thereby make participation for a psychologist ethical."[1518] As discussed previously, however, the report does leave open the issues PHR raised because of the lack of specificity in the document and the use of Standard 1.02 that could permit a psychologist to follow an otherwise-unethical military command.

After Levant sent Division 48 a response to their initial letter in late July, Division 48 sent another letter on August 13 that reiterated their action items, including the need to investigate psychologists involved in wrongdoings at Guantanamo Bay where possible.[1519] Behnke thought that "98%" of the document aligned with PENS.[1520] His biggest concern was with the term "coercive," which he explained could include many legitimate interrogations. He raised these concerns with Shumate before, as discussed above. Behnke thought APA should ask Division 48 for their own definition of coercive or offer one, such as "the intentional use of any technique that would cause severe or lasting pain, suffering, or distress."[1521] He sent this message to Levant, Newman, Farberman, Gilfoyle, and Judy Strassburger (now Judy Strassburger Fox).

On August 13 and 14, Behnke also exchanged separate emails with Banks and Gilfoyle about his draft response to Levant on Division 48's statement on torture and its definition of "coercive."[1522] Behnke's email to Banks suggested that the two conversed on the telephone about whether Banks had any concerns with Behnke's draft response to Division 48. Banks later messaged Behnke that he would be "uncomfortable" with the use of coercion in any final resolution since many police and military interrogations have some level of coercion to it; he added that "most of the folks I work with would be VERY uncomfortable with using the term coercion."[1523]

Gilfoyle worried about setting definitions now and the potential fallout from it. Referencing Behnke's proposed definition of "coercion," she wrote, "I worry about that definition in terms of giving those who think any discomfort is unethical something to shoot at

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[1517] APA_0232095.

[1518] *Id*.

[1519] APA_0041208; APA_0041209.

[1520] APA_0050331.

[1521] *Id*.

[1522] APA_0050314.

[1523] APA_0050307.

and thus would rather save that for the commentary."[1524] She added that having Division 48 offer their own definition could also raise problems if it was a "very wide definition that we will then have to try to scale back."[1525] Behnke agreed but thought that supporting Division 48's calls to action would be beneficial; he noted the "(substantial) upside to having Council do something—if the 'something' doesn't create problems."[1526]

Behnke claimed in his interview with Sidley that he believed it was positive for Council "to be involved and active," and that his comments started a "theme" for him where he thought increased Council involvement on national security issues was a "good thing."[1527] In light of his extensive efforts to manipulate and obstruct Council actions and his behind-the-scenes commentary and coordination with DoD officials about this, detailed below, we found this statement not credible.

Gilfoyle later raised the potential conflict with Division 48's "coercive" definition and the PENS Report statements. As she noted, if the "coercive" standard was a "lower threshold" than what is outlined in the PENS Report, then that term would need to undergo review by the Ethics Committee.[1528] She suggested it might be better not to have Council act specifically on any of Division 48 statement's for now.[1529] Behnke incorporated Gilfoyle's edits and sent his draft response again to both Gilfoyle and Banks for review the evening of August 14.[1530]

Behnke sent his statement to Levant and Farberman, who both cautioned against posting the statement ahead of the Council meetings, particularly since it was not clear whether the Division wanted to submit their calls for actions as New Business Items.[1531] The group agreed that they would monitor how discussions would arise during Council meetings.[1532]

6. Council actions and Standard 1.02

In the end, Council was formally presented with the PENS report and passed eleven motions related to it during its August 17 and 21, 2005 meetings[1533] at APA's annual convention.[1534] The first seven motions arose from the report's Recommendations section,

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[1524] APA_0515918.

[1525] APA_0041207.

[1526] APA_0050314.

[1527] Behnke interview (June 8, 2015).

[1528] APA_0041205.

[1529] APA_0041203.

[1530] APA_0050302; APA_0050303.

[1531] *See* APA_0050286; APA_0042635.

[1532] *See* APA_0050286.

[1533] Approved Minutes of the Council (Aug. 17 & 21, 2005) (on file with Sidley).

[1534] The 2005 APA Convention also featured a panel led by Robert Kinscherff titled, "Ethics on the Frontlines: Psychology, Behavioral Science, and National Security." The panelists included Kinscherff, Gelles, Andy Morgan, and Behnke. *See* APA_0041612. Behnke began planning the panel in late 2004

which included the need for the Board to allocate funds for a casebook (which the Board did in February 2006) and a call for comments on the report through the end of 2005 before the casebook project began.[1535] In addition, Council passed four additional motions: (1) an instruction to the Ethics Committee to explore adding human rights language in to APA Ethics Code Standard 1.02 (which the Ethics Committee completed by late September 2005 and recommended not to add the language, as discussed below);[1536] (2) a statement that there are "no exceptional circumstances whatsoever" to justify torture, included the "invocation of laws, regulations, or orders;" (3) publication of APA's 1986 resolution against torture; and (4) referral to the Ethics Committee of any specific allegations of abuse from psychologists at Guantanamo Bay and elsewhere.[1537]

Behnke separately messaged Banks an update on the Council's motions and noted that "[g]iven what looked possible Tuesday night/Wednesday am, I'm very pleased with Council's final action, which left both the Report and the commentary-writing process completely intact."[1538] Dunivin messaged Behnke separately and praised his efforts during the Council meetings as well.[1539] Farberman told Sidley that Dunivin called her during the APA Convention to discuss media-related issues. Dunivin conveyed to Farberman the need to stay the course and place BSCTs in a "positive light" in APA's communications efforts, Farberman said. She said she found the communication uncomfortable and speculated that Newman shared her cell phone number with Dunivin since few people were aware of her number.[1540]

By September 1, Moorehead-Slaughter declared the group would reconvene in early 2006 once the call for comments on the PENS report was completed by the end of 2005.[1541] On September 8, the Council listserv received a call for questions and comments on the PENS report.[1542]

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after the July 2004 meeting among APA and government and intelligence participants. The panel was briefly discussed on the PENS listserv, and noted that there were strong opinions from many in the audience and that Behnke resisted calls to reveal the names of the task force members at that time. *See* PENS listserv (Aug. 22, 2005).

[1535] Approved Minutes of the Council (Aug. 17 & 21, 2005) (on file with Sidley).

[1536] APA_0049824; APA_0049825.

[1537] Approved Minutes of the Council (Aug. 17 & 21, 2005) (on file with Sidley).

[1538] APA_0050228.

[1539] APA_0050224.

[1540] Farberman interview (May 19, 2015).

[1541] PENS Listserv (Sept. 1, 2005).

[1542] APA_0081374.

On September 6, 2005, Shumate emailed Behnke to schedule a time to meet on the PENS report about issues that "potentially concern[ed]" him related to the Council's motions.[1543] Alluding to Council's call to review and amend Standard 1.02 to possibly include human rights language, Shumate specified in his message about the "broad inclusion about human rights" being confined only to issues of DoD or Guantanamo Bay , as well as the issue of following "orders." Behnke and Shumate met on September 8, 2005 to discuss these issues.[1544] Behnke and Shumate said they could not recall the substance of the meeting.[1545]

On September 27, less than three weeks after Behnke's meeting with Shumate, Behnke and the Ethics Committee circulated a two-page document to Gilfoyle and Childress-Beatty rejecting the suggestion that APA incorporate human rights standards within Standard 1.02, per one of Council's August 2005 motions.[1546] The Ethics Committee document concluded that APA's current policies and pronouncements "provide[d] sufficient guidance to members at the immediate present time."[1547] The document then recommended, in several rhetorical lines, that the Ethics Committee be given more time to review the proposal:

> Accordingly, the Ethics Committee respectfully recommends that the Committee be given more time to engage in a process that will allow a fuller understanding of the questions and concerns that gave rise to this proposed change, a deeper consideration of whether the proposed change is the best way to address the underlying considerations, and more extensive examination of the impact adding such language to the enforceable section of the Ethics Code may have. [1548]

The document then cited to the casebook project as an 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

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[1543] APA_0081254. Previously, Shumate had messaged Kelly who suggested he reach out to Behnke with his concerns. *See* APA_0128752. Council passed a motion instructing the Ethics Committee to explore adding language to Ethical Standard 1.02 to ensure that that provision could only be used in a manner "consistent with basic principles of human rights." That provision (as revised in 2002) provided if there was a conflict between a psychologist's ethical obligations and her obligations under the "law, regulations, or other governing legal authority" (which included military orders), she had to try to resolve the conflict, but if she could not, she could follow the "law, regulations, or other governing legal authority" without committing an ethical violation. The Introduction to the APA Ethics Code (which was not binding) repeated this language of 1.02 and added the phrase, "consistent with basic principles of human rights." Council's motion required the Ethics Committee to make a recommendation about whether to revise 1.02 by adding the language in the Introduction.

[1544] APA_0081254.

[1545] Behnke interview (June 8, 2015); Shumate interview (June 24, 2015).

[1546] APA_0049824; APA_0232905.

[1547] APA_0232905.

[1548] *Id*.

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.

B. Casebook failure: January 2006 – February 2006

1. Wessells's resignation from task force

Moorehead-Slaughter (again, through a previously-drafted Behnke message) emailed the PENS listserv on January 11, 2006 to reconvene the group to start work on a casebook and commentary in conjunction with the Ethics Committee.[1549] The message also noted that APA had extended the deadline to accept comments on the PENS report through the end of June 2006.

On January 16, Wessells messaged the listserv to resign from the task force out of "ethical concerns":

> I have decided to step down from the PENS Task Force because continuing work with the Task Force tacitly legitimates the wider silence and inaction of the APA on the crucial issues at hand. At the highest levels, the APA has not made a strong, concerted, comprehensive, public and internal response of the kind warranted by the severe human rights violations at Abu Ghraib and Guantánamo Bay. The PENS Task Force had a very limited mandate and was not structured in a manner that would provide the kind of comprehensive response or representative process needed.[1550]

Wessells resignation, as discussed below, spurred discussions of bringing non-task force members into the casebook process and opened the door for Shumate, in particular, to raise concerns over DoD review of a potential casebook.

Several of the PENS listserv participants, notably from first-time listserv participants Levant and Kelly, urged Wessells to reconsider his decision and outlined APA's future steps in this area.[1551] Behnke also emailed Wessells separately to reevaluate his decision.[1552] Wessells said he appreciated APA's efforts but remained unmoved.[1553] In an email conversation among Anderson, Behnke, Gilfoyle, and Farberman on January 17, both Gilfoyle and Farberman raised the PR concerns that APA might face with Wessells's resignation. Farberman also raised the need to bring in other voices in the casebook process:

> I strongly agree that this could be a big PR problem for us, especially in light of Nina's agreement with Mike's thinking. (Hopefully she won't also abandon the

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[1549] APA_0053624; APA_0082271; PENS listserv (Jan. 11, 2006).

[1550] *Id.* (Jan. 15, 2006).

[1551] PENS listserv (Jan. 16, 2006).

[1552] APA_0053503.

[1553] PENS listserv (Jan. 17, 2006).

> process). . . . I see it as even more critical now that additional players be brought into the case book process. Mike's resignation will clearly add fuel to the demands of the social justice coalition that more voices be added to the process. I fear that the remaining PENS group will have no credibility with a vocal segment of our membership.[1554]

Wessells further explained his thoughts on the PENS process and his ultimate resignation to Sidley. To Wessells, the key issue during the PENS process was defining the appropriate limits of psychologists' roles in detainee interrogation settings. While all the members were "horrified" by the abuses at Abu Ghraib, Wessells noted, the majority of members wished to defer to what techniques were permitted in the existing military regulations without further discussions.[1555] Only the most extreme techniques were deplored by everyone at the table, Wessells said, such as extreme beatings or extreme freezing of prisoners, but other methods were not fully discussed. Wessells sensed that Banks, with significant agreement from others in the room, wanted to have the flexibility to conduct actions that were permissible under military regulations but that might be viewed as unethical in Wessells's mind.[1556] For example, Wessells recalled that he had inquired about permissible techniques like sleep deprivation and whether and how the technique was used in concert with other techniques and over certain periods of time; he recalled never receiving a direct answer to these questions.

To alleviate his concerns, however, Behnke and others told Wessells that a casebook would specifically address these outstanding issues immediately after the PENS report was released—within six months, in fact. By August, however, Council had passed a resolution related to the PENS report that there would be an open call for comments on the report through the end of 2005 before the casebook process started. But Wessells described it as "foot-dragging" that Moorehead-Slaughter did not send her email until January 2006 and noting that comments to the report were extended until June. Taken together, Wessells decided to resign because he believed APA and the task force was ultimately content with having the PENS report serve as a standalone document without serious consideration of specific examples.[1557]

2. *Shumate's casebook concerns, other DoD members follow*

Soon after Wessells resignation, several DoD task force members raised bureaucratic and confidentiality concerns that could preclude the use of publishing interrogation case examples. Shumate first raised the issue with Behnke on January 19 and how Wessells's resignation afforded an opportunity to "gracefully shift gears":

> [A]ny product like a case review book would have to undergo a security and Counterintelligence review throughout the Department. . . . The process would be long and difficult, not impossible, but there would be serious redacting of the manuscript in fear of publishing Source and Methods. . . .At the time of the

[1554] APA_0082171.

[1555] Wessells interview (June 11, 2015).

[1556] *Id*.

[1557] *Id*.

> PENS, I wish I would have thought about this when the topic came up (case book), but I was so excited and pleased by the PENS process, I lost sight of the review process. My guess, is that APA would not be willing to allow DoD to review such a product. In fact, as a psychologist and APA card carrying member, I would question how objective the case book was if it had undergone a security and CI review by the Department. . . . We have before us, if I am seeing this correctly, an opportunity to gracefully shift gears here. . . . I have split loyalties, I need to protect the Department while I also want to protect APA and most importantly the wonderful work that the PENS task force has been able to accomplish to date.[1558]

Shumate later summarized his concerns, with Behnke's drafting help,[1559] on the PENS listserv on January 23 and recommended that the Ethics Committee lead the case book process.[1560] Shumate's listserv message did not mention the "split loyalties" he had mentioned to Behnke between the DoD and APA. On the eve of sending this message to the listserv, Shumate speculated to Behnke that Wessells may have tried to deliberately undermine the PENS process. But, Shumate added, "it also works well for us."[1561] Shumate also alluded to pressures Wessells and others may face in writing the case book: "The pressure he may or may not be feeling from various sectors is the exact reason why I am concerned about the case book, while also recognizing that DoD will tolerate only a certain amount of public release."[1562]

In addition, Shumate told Behnke that he would alert Banks of his message on the listserv in order "to get his second so that he can come up on air immediately upon my sending this," which Shumate acknowledged to Sidley was a reference to lining up a coordinated response from Banks.[1563] True to Shumate's wishes, two days later on January 25, Banks posted on the listserv with his concerns of examples that were classified: "All of my examples and commentary [for Army psychologists] are classified, and cannot be shared outside of the DoD community. I have tried to figure a way around this, but without success."[1564]

[1558] APA_0082161.

[1559] Shumate drafted a note for Behnke on January 20 to send to Moorehead-Slaughter about how Wessells's resignation may demand the need for a new task force or the need for the Ethics Committee to lead the project. There was no mention of the DoD review concerns that Shumate raised and Behnke encouraged Shumate to add those remarks. Behnke then suggested that Shumate add this point on the Ethics Committee to his earlier message to him (quoted above) and post on the listserv. *See* APA_0028703; APA_0053460. Shumate did not wish to post his message to the listserv but suggested to reframe his message and Behnke offered additional suggestions. APA_ 0053458. Shumate sent a revised draft, which Behnke edited; Shumate largely posted this version on the PENS listserv on January 23. *See* APA_0053444.

[1560] PENS listserv (Jan. 23, 2006).

[1561] APA_0082047.

[1562] *Id*.

[1563] *Id*.

[1564] PENS listserv (Jan. 25, 2006); Shumate interview (June 24, 2015).

On January 26, Moorehead-Slaughter called for other opinions on the issue but noted that "[m]oving forward at this point with a Commentary from PENS is seeming less and less feasible. It is certainly possible that the Task Force has made its contribution to this process and that now it is best for the Ethics Committee to complete this work."[1565] Koocher interjected his thoughts later the same day, stating that the Ethics Committee, per APA's bylaws, is the "only group charged . . . to interpret the ethics code."[1566]

Arrigo pushed back on the idea of passing the casebook solely to the Ethics Committee:

> The Task Force was appointed because the Ethics Committee lacked the background and expertise to address the PENS issues by itself. The Ethics Committee similarly cannot produce a valid and relevant casebook for the PENS report. Without such a casebook, the PENS report could be considered a list of platitudes. . . . I think it is time for the military members to justify their predominance on the Task Force by helping to produce the casebook.[1567]

Levant emailed Koocher and Behnke about "how to handle" Arrigo's response.[1568] Behnke noted there was "NO impediment" to the Ethics Committee's handling the casebook since the committee could draw from the expertise and comments of PENS and non-PENS members alike.[1569] Koocher also offered an outline of a response, which he sent to the listserv on January 27. In it, Koocher rejected Arrigo's assertions, stating that "APA Ethics Committee has much broader expertise in application and interpretation of psychological ethics across a wide range of settings and contexts than the more narrowly formed PENS task force."[1570]

James and Fein also said they agreed that the Ethics Committee should lead the casebook development without any analysis as to why.[1571] It is possible that both would have consulted with Behnke or Shumate, however, to agree with Shumate and Banks's earlier statements.[1572] Gelles said he agreed with this conclusion as well, but noted that "techniques and themes" of a case could be published.[1573]

[1565] PENS listserv (Jan. 26, 2006).

[1566] *Id*.

[1567] *Id*.

[1568] APA_0053351.

[1569] APA_0081856 (emphasis in original).

[1570] PENS listserv (Jan. 27, 2006).

[1571] PENS listserv (Jan. 31, 2006).

[1572] Fein worked for Shumate, so it is likely that both of them would have been in contact about supporting Shumate's position. James sent an email after his listserv posting to Behnke informing him that he had posted his position on the listserv, thereby suggesting the two of them had agreed that James would offer his opinion on the listserv. APA_0053315.

[1573] PENS listserv (Jan. 30, 2006).

In contrast, Lefever did not express a preference but thought that thought a casebook with disclaimers could be published with relevant DoD examples. Lefever also noted the "political process" of PENS and how his suggestions on "what is harm . . . fell on deaf ears."[1574]

On January 31, Behnke drafted a message for Moorehead-Slaughter, which she posted verbatim on the PENS listserv, that concluded the "Ethics Committee should take responsibility for this project."[1575] Behnke drafted a letter about the task force's decision that Moorehead-Slaughter later sent to the PENS listserv for review before it went to Levant and Koocher. Notably, Behnke sent the letter to Banks beforehand. Behnke told Banks that "[d]iscretion about prior review is essential."[1576]

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).

Moorehead-Slaughter sent the letter—that Behnke had drafted—for task force review on February 1. Arrigo wrote a minority statement for inclusion on February 12. In her note, Arrigo wrote her concerns with the PENS process: (1) that the task force members had the appropriate expertise to craft a casebook, not the Ethics Committee; (2) that the scope of the task force should have been broader; (3) that the task force was not a completely independent body; and (4) that there was a lack of transparency within the task force.[1577]

At the same time Arrigo drafted her minority statement, Behnke requested (through an email from Kelly) that Shumate, Fein, or Banks also write a position statement praising the report.[1578] As Kelly wrote:

> Steve is wondering whether you all, as DoD employees, would be able and willing to write a short note to the tune of "we commend this Task Force for its work on this important issue and are pleased that its report was supported by all members of the Task Force." . . . There is some concern that having only Jean Maria's attached letter could be problematic strategically.[1579]

[1574] PENS listserv (Jan. 31, 2006).

[1575] APA_0053318; PENS listserv (Jan. 31, 2006).

[1576] APA_0053295; APA_0053296.

[1577] PENS listserv (Feb. 12, 2006).

[1578] APA_0081628.

[1579] *Id*.

On February 13, Behnke emailed Kelly, Shumate, Fein, and Banks with suggested points for a potential statement.[1580] Behnke also requested that, "given the complexity" of having Banks write the letter, that either Fein or Shumate write it. On February 14, Fein sent a letter to the PENS listserv for appending to Moorehead-Slaughter's and Arrigo's letters. The letter praised the task force's work.[1581] It did not use any of Behnke's suggested points.

Moorehead-Slaughter provided an update on the task force at the February 2006 Council meeting. She noted on the PENS listserv on February 22, 2006 that Koocher informed Council that the task force "fulfilled its function and actually no longer existed as an entity after 12/31/05."[1582] In an interview with Sidley, Koocher changed his thoughts about when exactly the task force expired.[1583] At first, he thought task forces lasted one year unless renewed. Then he declared that task forces existed until the end of the calendar year after it was pointed out that the task force was not approved until February 2005. He then stated that the task force ended after the release of the PENS report in July 2005. None of these responses appear plausible, particularly since this was never mentioned before as the casebook discussions began again in January 2006. Instead, it appears that Koocher declared this on the PENS listserv to create the disingenuous argument that "resign[ations]" were impossible and non-cognizable.[1584]

On February 24, 2006, Arrigo asked whether APA would allow space for her and Wessells to write a letter in a future Monitor magazine to express their views about the PENS Task Force.[1585] Everyone who offered an opinion on the listserv disapproved of Arrigo' actions. The letters were ultimately published in the May 2006 Monitor magazine in response to an earlier Koocher column on the PENS report in February 2006.[1586]

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,

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[1580] APA_0053132.

[1581] PENS listserv (Feb. 14, 2006).

[1582] PENS listserv (Feb. 22, 2006).

[1583] Koocher interview (Mar. 20, 2015).

[1584] *See, e.g.*, APA_0081818. In this document, Koocher raised the possibility of the task force ceasing to exist at the end of January after there is internal chatter from Council about Wessells's resignation and receiving an update at the February 2006 Council meeting.

[1585] PENS listserv (Feb. 24, 2006).

[1586] Jean Maria Arrigo & Michael Wessells, *Letters*, Monitor on Psychology (May 2006), *available at* http://www.apa.org/monitor/may06/letters.aspx; see also G. Koocher, *Speaking against torture*, *Monitor on Psychology* (Feb. 2006), *available at* http://www.apa.org/monitor/feb06/pc.aspx. Koocher had begun drafting the President's Column as early as December 2005.

[1587] Behnke interviews (May 22, 2015; May 29, 2015).

Behnke was the lead APA strategist in attempting to manipulate and water down Council resolutions to minimize the effect on DoD. The real reason there was no casebook is that there was never a real desire to create one, because it would necessarily create the same problems that specificity within the PENS report would have had (as APA staff had identified as early as December 2004)—drawing a line that allowed psychologists substantial latitude in supporting interrogations, as DoD desired, created substantial PR problems. The only solution to this dilemma was to keep the guidance non-specific.

That this was actually Behnke's thinking is corroborated by the internal emails he sent in January 2011, when he finally created a draft document that was something well short of a book (a 30-page document) containing 25 "vignettes" and Ethics Committee responses on this topic.[1588] The document, a final version of which was posted on APA's website in June 2011, took no clear stands on whether certain techniques in the Army Field Manual could be unethical. The document instead outlined analytical questions a psychologist could ask to conclude whether a particular technique was ethical. In sending the draft document to Anderson, Honaker, Gilfoyle, Farberman, and two others, he explained that "[o]ur primary focus was to write responses that would not cause us any problems." He expressed satisfaction that there had been almost no discussion of "this piece of the interrogation issue for some time," and said that his plan was "to post this text, quietly, very quietly on the Ethics webpage."[1589] Thus, six years after PENS, the great promise of a casebook as the proper means of providing specificity and resolving the unavoidably (said Behnke) limited nature of the PENS report had shrunk to the form of a 30-page document, intentionally created to avoid any "problems," which was snuck into a corner of the APA website with the fervent hope that it would be entirely ignored.

C. Arrigo and Democracy Now! *fallout: August – September 2007*

A coda to Arrigo's PENS-related interactions arose in the summer of 2007. On August 20, journalist Amy Goodman broadcast a story on her *Democracy Now!* program that aired excerpts from a Town Hall meeting at the 2007 APA Convention in San Francisco. The story heavily featured Arrigo's speech from the Convention where she highlighted what she thought were various problems with the PENS Task Force.[1590] In response, Koocher wrote Goodman an open letter in late August 2007 attempting to refute many of Arrigo's claims. Koocher claimed in his letter that Arrigo disclosed her father had committed suicide and that her "troubled upbringing" explained her actions after the PENS process was complete.[1591]

[1588] *Responses of the APA Ethics Committee to Questions, Comments, and Vignettes Regarding APA Policy on the Role of Psychologists in National Security-Related Activities* (June 2011), *available at* https://www.apa.org/ethics/programs/national-security-comments.pdf.

[1589] APA_0079688.

[1590] *APA Interrogation Task Force Member Dr. Jean Maria Arrigo Exposes Group's Ties to Military*, Democracy Now! (Aug. 20, 2007), *available at* http://www.democracynow.org/2007/8/20/apa_interrogation_task_force_member_dr.

[1591] Koocher's original posting of his letter was on his website. That link is no longer active. Koocher also forwarded his letter to Ken Pope, who then circulated the letter on his Psychology News listserv on Aug. 30, 2007. APA_0095571.

By September 5, also in response to the *Democracy Now!* story, then-APA President Sharon Brehm ("Brehm") posted to the Council listserv an open letter from Moorehead-Slaughter that defended the work she and the task force members completed on the PENS Task Force.[1592] Behnke helped draft this letter for Moorehead-Slaughter in late August 2007.[1593] It is not clear how much of the letter was drafted by Behnke or by Moorehead-Slaughter. But using the PENS process as a guide, it is likely that Behnke drafted much, if not all, of this letter as well. Notably, both Behnke and Brehm placed final edits on Moorehead-Slaughter's letter before it was publicized.[1594]

Koocher was incorrect in his letter when he stated that Arrigo's father had committed suicide. Arrigo's father was alive during the time of PENS. Koocher has insisted that Arrigo lied during the meeting about this fact, and Arrigo has insisted she never stated her father was deceased or that he committed suicide.

Our interviews on this issue strongly support Arrigo's position. To be sure, all relevant interviewees recalled that Arrigo, in a very personal way, had discussed portions of her father's background and her difficult relationship with him during the task force member introductions at the PENS meetings: about his military experiences, his undercover work during World War II, his mafia ties, and his involvement in torture with the CIA/OSS. But only two people we interviewed believed with any certainty that Arrigo stated at some point during the meetings that her father had died — Koocher and Kelly, although their memories about when and how Arrigo made the statement differed significantly.[1595+] The remaining eleven participants who commented on this issue either did not recall such a statement being made or were unsure whether it was made.[1596] The overwhelming evidence shows that Koocher's assertion that Arrigo said her father had committed suicide — part of a highly personal attack on Arrigo — was unfounded and unsupported.

Arrigo's experiences during PENS have led her to conclude that the process was part of a larger counterintelligence operation that sought to ensure that the government, particularly the CIA, could continue with its interrogation practices.[1597] Arrigo told Sidley that the process for a

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[1592] Letter from Moorehead-Slaughter to Brehm (Sept. 5, 2007) (on file with Sidley).

[1593] APA_0067444; APA_0067445.

[1594] APA_0095477; APA_0095478. Behnke also drafted a series of email exchanges Moorehead-Slaughter had with Arrigo from December 2006 through May 2007. The emails were spurred by Arrigo message to PENS Task Force members informing them that she had turned over her copy of the PENS listserv correspondence to Steven Reisner for analysis. Arrigo provided a copy of these correspondence to Sidley, and we were able to locate Behnke's draft messages to Moorehead-Slaughter during this period. Email from Arrigo to Sidley (June 16, 2015) (on file with Sidley).

[1595] Kelly commented that Arrigo told people during a meeting break that her father had died and that she said during the next day's meeting that he was alive.[+] Kelly interview (Apr. 24, 2015). No one else had this recollection, including Koocher.

[1596] The following PENS participants commented on the matter and did not corroborate Koocher's assertion: Behnke, Newman, Anton, Mumford, Moorehead-Slaughter, Wessells, Thomas, Banks, James, Lefever, and Shumate.

[1597] Arrigo interview (Apr. 27, 2015).

favorable PENS report was driven by its closed process and APA observers in the room, especially Newman, and not the DoD members. She believed that the observers were present to check on the DoD members and ensure they did not run afoul of what the government wanted in the report. She cited as an example how certain DoD members in the meeting showed a willingness to add specifics into the report and how Newman, Koocher, and Behnke avoided these discussions. She was also complimentary of Banks since he supported her throughout the meetings and appeared open to many discussion points; she admitted, however, that Banks may have been trying to manipulate her.[1598]

Sidley could not fully confirm these suspicions with our limited power to examine agencies like the CIA. While we observed several aspects that supported Arrigo's theory — the role of Newman, the closed nature of the meetings, and comments from military members about international law or specific techniques — we also observed factors that did not. For one, we have not unearthed any evidence to support the view that other APA staff in the room were present to control the DoD members. The most vocal APA participants — Newman, Koocher, and Behnke — supported the DoD members' position and did not appear to "control" any of them; as the evidence shows, Behnke was essentially following Banks's lead regarding critical portions of the PENS report, not vice versa. Second, Banks appeared to play a leading role in ensuring the PENS report was not specific and did not contradict military policies. His role contravenes the idea that he or other DoD members did not have an influential role during the meetings.

D. APA policy victories in 2006

As has been noted, one of the key benefits that APA sought from its close collaboration with DoD was a positive outcome regarding the official policy DoD was developing on the issue of interrogations and the involvement of psychologists, psychiatrists, and other "behavioral science consultants." And APA received exactly what it wished for, as DoD official doctrine and Medical Command policy explicitly provided a large role for psychologists (and not as much for psychiatrists) in the support of interrogation and detention operations — an outcome that clearly was due in substantial part to what was seen by DoD as the very "supportive" position taken by APA in the PENS report.

Spurred largely by the draft policy document that Morgan Banks (along with other SERE psychologists in Army Special Operations Command and Debra Dunivin) drafted in and around 2004 to provide guidance and instructions to BSCT psychologists regarding interrogations and detention operations, the Army Surgeon General's Office started a formal effort in late 2004 and early 2005 to draft an official Medical Command policy which would apply to all behavioral science consultants involved in interrogations. As the Executive Agent for the administration of DoD detainee policy, the Army Surgeon General's Office's policy would cover the entire military.[1599] The draft document that Banks had drafted by the first half of 2005 (and which he

[1598] Arrigo interview (Apr. 27, 2015).

[1599] The Department of Defense Detainee Program, DoD Directive No. 2310.01E (Sept. 5, 2006), *available at* http://www.oaa.army.mil/FetchFile.ashx?DocID=446.

distributed at the PENS meetings) became the official Medical Command policy (almost verbatim in all key respects) in October 2006.[1600]

APA had learned of this policy development effort in early January 2005 as it was starting to configure the PENS Task Force, and it was clearly one of the lead motivating factors for APA in selecting task force members and producing a task force report that would please DoD. In effect, APA assured that its ethics policy would be completely aligned with DoD's policy by (1) taking the key framework in Banks' draft policy document ("safe, legal, ethical, and effective") and using it as the key framework in the PENS report, and (2) following Banks's lead in all other important policy respects in the PENS report. Banks's draft policy document thus became the basis for both the PENS report and official DoD policy, making it a foregone conclusion that APA and DoD policy were perfectly aligned. If fact, the most recent version of this DoD policy (2013) still contains the full PENS report as a formal part of its policy document.[1601]

While the Surgeon General's Office was finalizing its Medical Command policy, based on Banks's document, and getting approval from various parts of DoD, higher-level DoD doctrine documents were required before the Medical Command policy could be issued. The highest-level of these doctrine documents was a "DoD Directive," (or "DoDD") and in November 2005, the Acting Secretary of Defense issued one on "Intelligence Interrogations, DoD Debriefings, and Tactical Questioning." The eight-page document contained an explicit mention of "behavioral science consultants" assisting interrogations, an inclusion that was seen as a huge victory for SERE and other military psychologists. Right after it was issued, a SERE psychologist with the DoD Joint Personnel Recovery Agency sent a congratulatory note to the team that had helped make this a success—Behnke, Banks, and two Air Force SERE psychologists: "Thanks to all for your hard work, we are now in an official DoDD."[1602]

The next step in DoD doctrine was a "DoD Instruction" on the topic ("DoDI"). In June 2006, the Assistant Secretary of Defense for Health Affairs, William Winkenwerder, issued a DoDI that explicitly prioritized psychologists over psychiatrists in the role of "behavioral science consultants" who supported interrogations and related activities. The document provided that "physicians [i.e., psychiatrists] are not ordinarily assigned duties as [behavior science consultants], but may be so assigned, with the approval of [the Assistant Secretary of Defense], in circumstances when qualified psychologists are unable or unavailable to meet critical mission needs."[1603] And in comments to the media about the new DoDI, Winkenwerder explicitly mentioned that the "clear[] support[]" from the APA regarding the role of psychologists in

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[1600] Behavioral Science Consultation Policy, OTSG/MEDCOM Policy Memo (Oct. 20, 2006), *available at*, http://www.nejm.org/doi/suppl/10.1056/NEJMp0806689/suppl_file/nejm_marks_1090sa1.pdf.

[1601] Behavioral Science Consultation Policy, OTSG/MEDCOM Policy Memo (May 8, 2013) (on file with Sidley).

[1602] APA_0046024; APA_0046025.

[1603] *See* Medical Program Support for Detainee Operations, DoD Directive No. 2310.08E (June 6, 2006), *available at* http://www1.umn.edu/humanrts/OathBetrayed/Winkenwerder%206-6-2006.pdf.

interrogations (a reference to PENS) "influence[d] our thinking" because, he noted, the American Psychiatric Association had not taken a similarly supportive position.[1604]

This was a very large victory for those who were focused on growing opportunities for employment and influence for psychologists, especially compared to psychiatrists. By winning the primary position with DoD regarding which mental health professionals would provide support for DoD interrogations, APA cemented its position with DoD in a manner that is likely to produce substantial employment and other financially-beneficial opportunities for psychology.

[1604] James Risen, Pay Any Price, 195–96 (2014).

THE POST-PENS PERIOD – LATE 2005 TO EARLY 2009

I. GUANTANAMO BAY TRIP

Levant's trip to Guantanamo Bay was an opportunity for APA to solidify the "good PR," as Newman put it, the organization had gained from the release of the PENS report. APA took this trip very seriously and organized a series of meetings for Levant ahead of his trip, including with Dunivin and Banks. The trip was another example of APA relying on the observations of its key military contacts to educate their views on a particular issue and stay "on message" with what those contacts told them.

A. Beginnings of the Trip

On September 28, 2005, Col. Robert Ireland ("Ireland") of the Office of the Assistant Secretary of Defense, Health Affairs invited Levant to visit Guantanamo Bay on October 19 and see first-hand the "detainee and medical operations areas."[1605] Levant noted to his colleagues at the University of Akron that the offer was a "once in a lifetime opportunity and I should accept."[1606] The University approved of his trip and Levant began coordinating meetings with APA staff and military members to prepare for the trip.

Levant spoke with Banks on September 29 after Behnke suggested Levant reach out to him.[1607] Newman separately emailed APA leadership about the importance of a successful trip for APA:

> I happen to know that there are currently some prickly interprofessional issues that are alive and well in terms of who is doing what at GTMO that will likely surface during a trip of this sort. Handling them optimally will cement the good PR we have gotten with the military and DoD as result of the PENS report; handling them otherwise will potentially [sic] undo some of the Association's good work.[1608]

Newman's allusion to "prickly" issues referred to a conflict between psychology and psychiatry. After Ireland confirmed with Levant that American Psychiatric Association President Steven Sharfstein would attend the trip, Newman informed Levant on October 6 that there were "difficult interprofessional issues with psychiatry" over the issue of BSCT teams that Newman would describe further at a later time.[1609]

A tentative attendee list was sent to Levant on October 7, 2005, and included the following names:

[1605] APA_0043069.

[1606] *Id.*

[1607] *Id.*

[1608] APA_0043106.

[1609] *Id.*

- Dr. William Winkenwerder, Jr., MD; Assistant Secretary of Defense (Health Affairs)
- VADM Richard Carmona; Surgeon General of the United States
- Lt Gen Kevin Kiley; Surgeon General of the Army
- Maj Gen Joseph Kelley; Joint Staff Surgeon
- Dr. Audiey Kao; AMA: Vice President, Ethics Group
- Dr. Ronald Levant; American Psychological Association, President
- Dr. Larry Mohr; Board of Regents, USUHS; Professor of Medicine, Med Un of So Carolina
- Dr. Susan Okie; New England Journal of Medicine, Contributing Editor
- Dr. Steven Sharfstein; American Psychiatric Association, President
- Dr. Nancy Sherman; Annapolis Inaugural Ethics Chair, Prof of Philosophy, Georgetown Univ.
- Dr. Priscilla Ray; AMA: Chair, Council on Ethical and Judicial Affairs
- Anthony Fortune, Col (ret), Detainee Affairs Escort[1610]

Levant and the attendees would be at Guantanamo Bay somewhere between four and five hours.[1611] Levant informed Council of his trip to Guantanamo Bay on October 8, 2005. He received a few messages that worried whether the trip would be a "publicity stunt" for the DoD and that only superficial discussions would occur.[1612] In a separate correspondence, Patrick DeLeon emailed a contact in Surgeon General Kiley's office to inform him that Levant, a "long tine friend," was attending the Guantanamo Bay trip. The contact informed DeLeon, who forwarded her response to Levant, that it was "already done."[1613]

Also during this time in mid-October, Behnke planned to meet with Dunivin and Marshall Goby, an Army Colonel who oversaw training efforts at the time with BSCT teams.[1614]

[1610] APA_0042913.

[1611] APA_0049626.

[1612] *See, e.g.*, APA_0049721. Sidley interviewed Jack Smith, a Deputy Assistant Secretary of Defense under William Winkenwerder, who contested the characterization that the trip focused on gaining good PR for DoD. Smith contested that it was important for key stakeholders to have a better understanding of the operations at Guantanamo, and that the best way to do that was for those individuals to see the facilities in-person. DoD also wished to speak directly with representatives from various professional organizations to understand their concerns as well. Smith interview (June 19, 2015).

[1613] APA_0042789.

[1614] APA_0042850.

Neither Dunivin nor Behnke believed the meeting related to Levant's Guantanamo Bay trip.[1615] It seems likely, rather, that this meeting and Goby's presence related to Behnke's possible role in helping train BSCT psychologists in the future. This assumption is further corroborated by the fact that in about October 2005, Dunivin began acting as Consultant for the Army Surgeon General's BSCT Policy, Course and Ethics, which dealt with providing training to BSCTs in interrogation and detainee operations.[1616] More on Behnke's BSCT trainings, which began in 2006, is discussed in later in this report.

Separately, on October 17 and 18, Behnke and Kelly discussed concerns raised by Shumate and Fein about Levant's Guantanamo Bay trip.[1617] Shumate thought the visit could be "manipulated duh like no one else is going to figure this out," and added his concerns over how the American Medical and American Psychiatric Associations were "unsupportive" of efforts at Guantanamo Bay. Shumate added that, "[f]rom DoD perspective having APA president at GTMO is a good thing, yet I am concerned that the perception and possible media handling of this visit may turn into a concerning moment for psychologists." Shumate further stated that the DoD should have arranged for a "special visit" by APA since they have been supportive of interrogation efforts.[1618] Fein cryptically responded that there "have been more potentially controversial psychologist activities involved with the island than just the ones in the headlines."[1619]

B. Levant's Meetings Before the Trip

Behnke scheduled a series of meetings for Levant on October 18,[1620] the evening he was scheduled to leave for Andrews Air Force Base (and to Guantanamo Bay thereafter). Specifically, he organized separate meetings for Levant with Dunivin, Kelly, Banks, and APA Staff that day.[1621] Behnke also appended a copy of the American Psychiatric Association's draft position statement on psychiatrist participation in detainee interrogations for Levant's review. In a separate email with APA leadership, Behnke suggested that Farberman provide Levant with talking points from the PENS report in case Levant was asked policy questions.[1622] In addition, Banks shared with Levant, Newman, and Behnke a draft BSCT policy memorandum — what ultimately became Kiley's 2006 MEDCOM/OSTG BSCT policy memorandum — for discussion

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[1615] *See* Dunivin interview (May 27, 2015); Behnke interview (June 8, 2015).

[1616] Email from Dunivin to Sidley (June 16, 2015).

[1617] APA_0043765. Fein and Shumate's comments first arose from a Brookings Institution event on October 17 that would discuss U.S. interrogation practices and international law.

[1618] *Id.*

[1619] *Id.*

[1620] Coincidentally, Behnke spoke that day at the "Special Applications of Psychology" conference at the Naval War College in Newport, RI at the invitation of Gelles. The conference is a closed-off small annual conference for national security psychologists with security clearances. Other speakers during the event included Kirk Kennedy, Andy Morgan, Mel Gravitz, and Morgan Banks. *See* APA_0049631.

[1621] APA_0049626.

[1622] APA_0026545.

during their meeting on October 18.[1623] These meetings with Dunivin and Banks were undoubtedly arranged to make sure that Levant remained "on message" during and after his trip.

Sidley collected from Levant six different sets of handwritten notes of his meetings related to his Guantanamo Bay trip, full copies of which are attached to this report.[1624] One set of these notes described the meetings Levant had with Dunivin, Kelly, and Banks on October 18. Several highlights from these meetings, along with additional insights from other documents and interviews, are listed below: [1625]

- Dunivin meeting: Dunivin's meeting with Levant covered her thoughts about the positive impacts various leaders had on BSCT teams at Guantanamo Bay. She also described the role of BSCTs and named others that she had worked with and who Levant may meet with at Guantanamo Bay.[1626]
    - On Army Surgeon General Kevin Kiley ("Kiley") and General Jay Hood:[1627]
        - "acknowledge [Army Surgeon General Kiley's] support of BSCTs!"
        - On Hood: "Debra- it was a real pleasure to serve with him, really an excellent leader, confident with vital insight, Doing a lot to empower BSCT's bring psychology to high level consultants"
    - On BSCT teams:
        - "BSC Do not have access to med. records"
            - Levant noted that this was a flash point in the public since there were allegations that BSCTs were using records to advise on interrogations.[1628]
        - "[Steve Rodriguez, Dunivin's boss while at Guantanamo Bay] has helped move to another frontier of psychology"
            - Levant stated that this comment appealed to him.[1629]
        - "Local policy of establishing confidentiality even where there was no need nationally"
        - "Worked out how to share info. comfortable to a proper level" and "Firewall between medical unit"
            - Dunivin noted in an interview with Sidley that BSCTs would only receive medical information to prevent harm to the

[1623] APA_0049578; APA_0049579.

[1624] LEVANT_HC_0000843; LEVANT_HC_0001361; LEVANT_HC_0001366; LEVANT_HC_0001367; LEVANT_HC_0001376; LEVANT_HC_0001378. These notes include Levant's reflections on meetings and conversations he had during the trip with other participants and military officials.

[1625] LEVANT_HC_0001361. All discussions and quotes in this subsection arise from this document unless otherwise noted.

[1626] Levant interview (May 13, 2015).

[1627] LEVANT_HC_0001361.

[1628] Levant interview (May 13, 2015).

[1629] *Id*.

detainee. An example of this would be if an interrogator thought to offer sweets to a detainee who was diabetic.

- Kelly meeting: Levant's notes on his meeting with Kelly are sparse. Kelly sent an email after her talk with Levant, however, which described their conversation:
  - [W]e had a good conversation about the congressional atmosphere and legislation regarding detainee issues. He had a good talk with Debra just before ours, especially regarding DoD protocol. I'm attaching a written brief that I went over with Ron and will hand him this afternoon. We also spent some time discussing DoD's likely motivations for the trip and related things to avoid.[1630]
  - Kelly recalled in an interview with Sidley that she did not think it was appropriate for Levant to attend this trip.[1631] She stressed to Levant that he only speak about the PENS report as APA's policy and to not take positions on other issues that may arise during the trip.[1632]
- Banks meeting: Banks underscored the need for psychologists in these interrogation settings to keep them safe, legal, ethical, and effective.
  - "coerced word used in a way that is not helpful. specific behavior not use that word"
    - Levant believed the point in this note was that the word "coercion" is too ambiguous and that one should talk about specific behaviors that might be right or wrong.[1633]
  - "SERE training. Training for psychologists is that they be SERE qualified."
    - Banks explained to Sidley that he thought it was important for psychologists to receive SERE training in order to learn how to prevent abuse.[1634]
  - "Whole Key—our participation—key phrases—safe legal ethical and effective"
    - Banks stressed to Sidley that psychologists had to participate in interrogations settings in order to make them safe, legal, ethical, and effective. Banks noted that the rate of abuses greatly reduced when psychologists were present in during an interrogation. [1635]
  - "by their knowledge of individual behavior they make us more effective"

To Banks, psychologists' knowledge of human behavior allowed them not only to prevent behavioral drift in an interrogator, but to make an interrogation more effective.[1636] As

[1630] APA_0026514; *see also* APA_0026515.

[1631] Kelly interview (May 14, 2015).

[1632] *Id.*

[1633] Levant interview (May 13, 2015).

[1634] Banks interview (May 21, 2015).

[1635] *Id*.

[1636] Banks interview (May 21, 2015).

discussed, there is a conflict between a BSCTs role as a safety officer and their role in ensuring that an interrogation is effective.

In an earlier message about Banks's meeting, Behnke hoped that Banks could debrief Levant on "on the four investigations regarding detainee treatment, in particular what the investigations said about the role of psychologists."[1637] Banks told Sidley that he suspected Behnke's comment referred to four investigations that had been completed and in the public:[1638] (1) the DAIG Detainee Operations Inspection Report (of which Banks was a member);[1639] (2) the Schlesinger Report;[1640] (3) the 15-6 Investigation into the FBI Allegations of abuses at Guantanamo Bay; (4) the Martinez-Lopez Report into detainee abuses.[1641] Banks explained that he wanted discuss these reports and combat the "misinformation" on detainee abuses and "to get the facts out."[1642]

Levant's trip consisted of meetings with Guantanamo leaders who provided positive information about the facility and detainee treatment. Assistant Secretary of Defense Winkenwerder and Surgeon General Kiley also had a dinner with the group to discuss their observations and any concerns.

On October 23, APA released a statement about Levant's trip.[1643] Following the PENS report's language, the release stated that APA "will continue to help advise DoD to ensure that work by psychologists is safe, legal, ethical, and effective."[1644] The word "effective" was added at Newman's suggestion.[1645] On October 25, Fein emailed Levant stating he had heard from some DoD colleagues this Levant's visit went well.[1646] He also indicated his belief that "psychologists have a lot [to] offer in the national security area, and this is a very complicated time and political climate."[1647] Levant forwarded the message to Behnke, who responded

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[1637] APA_0026243 (Oct. 12, 2005). Behnke mentioned the same four investigations in an October 2005 letter to Sharon Gadberry about her ethics compliant against James Mitchell. More about Gadberry's Mitchell's complaint is discussed later in this report.

[1638] Banks email to Sidley (June 15, 2015).

[1639] DAIG Detainee Operations Inspector Report (Aug. 25, 2006), *available at* http://www1.umn.edu/humanrts/OathBetrayed/Mikolashek%20Report.pdf.

[1640] Final Report of the Independent Panel to Review DOD Detention Operations (Aug. 2004), *available at* http://www.defense.gov/news/aug2004/d20040824finalreport.pdf.

[1641] Surgeon General Memorandum (May 24, 2005), *available at* http://www1.umn.edu/humanrts/OathBetrayed/Army%20Surgeon%20General%20Report.pdf.

[1642] Email from Banks to Sidley (June 15, 2015).

[1643] APA President Ron Levant visits Naval Station at Guantanamo Bay (Oct. 23, 2005), *available at* http://www.apa.org/news/press/releases/2005/10/gitmo.aspx.

[1644] *Id.*

[1645] APA_0026518.

[1646] APA_0043405.

[1647] *Id*.

positively: "Ron, this is a very good message. If we stay [on] our thoughtful and reasonable course, I think APA, psychology, and society will benefit in the long run, even if there are a few bumps in between."

In 2007, Levant wrote an article about his Guantanamo Bay trip in the journal *Military Psychologist.*[1648] Levant wrote that his "goal" for the visit "was to create opportunities for APA to advise DoD in setting up rules and procedures that allow psychologists to work in the national security arena and do so in ways that are legal and ethical and that protect the safety of all participants."[1649] In Sidley's interview with Levant, he reiterated that he wanted to give a "good impression" for psychology during his trip.[1650] One of his goals as APA President, Levant stated, was to expand the scope of the profession; having psychologists in non-healthcare military roles fit that vision.[1651]

II. APA SUPPORT OF THE MCCAIN AMENDMENT

APA has always touted its support of the McCain Amendment in 2005 as an example of its independence from DoD efforts to reinforce its stance against torture and cruel, inhuman, or degrading treatment. But APA's support came only after it effectively received pre-clearance of such support from DoD official, Morgan Banks.

The Physicians for Human Rights ("PHR") approached APA for its support of the McCain Amendment on October 19, 2005, pointing out that the AMA and ApA had already sent letters to Congress expressing their support.[1652] Behnke forwarded the message to Anderson, Honaker, Gilfoyle, Farberman, Newman, and Henry Tomes—and later to Breckler, Kelly, Mumford, and Garrison—and inquired whether APA had a position on the amendment. Behnke saw this as an opportunity to give APA a strong talking point with its critics on the interrogations issue, likely without causing any damage to DoD: "If APA endorsed, I think that could be enormously helpful in addressing concerns of some of the individuals/groups who have been intensely interested in the PENS report."[1653] Behnke added that based on his interactions at a conference at the Naval War College (a confidential conference of national security psychologists with security clearances), he believed that "our colleagues in the military would not have serious objections to APA's doing so."[1654]

On October 21, Behnke emailed Banks to make sure that APA's support of the McCain Amendment would not cause any problems for the military, asking whether he thought any part of the amendment contradicted the PENS report. Behnke pointedly asked, "Is there any reason

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[1648] Ron Levant, *Visit to the U.S. Joint Task Force Station at Guantanamo Bay: A First-Person Account*, Military Psychologist (2007), *available at* http://psycnet.apa.org/journals/mil/19/1/1/.

[1649] *Id.*

[1650] Levant interview (May 15, 2015).

[1651] *Id.*

[1652] APA_0026458.

[1653] *Id.* (emphasis in original).

[1654] *Id.*

we should be hesitant about the McCain Amendment?" On October 24, Banks responded to Behnke and stated that he did "not see any inconsistency" between the McCain Amendment and the PENS report, but added that because of the "political nature" of the amendment, he could not comment on it further. Banks then offered to discuss it with Behnke "privately."[1655]

At the same time, members of APA's Education Directorate worried that support for the McCain Amendment might anger the Chairman of the House Defense Appropriations Subcommittee, who was opposed to the McCain Amendment,[1656] and that this, in turn, might cause the Chairman and the Subcommittee to not support a Defense Graduate Psychology Education ("D-GPE") Program that APA had worked hard to initiate and sponsor.[1657] Internally, Nina Levitt explained that the Education Directorate was sponsoring the D-GPE program for training military psychologists and that it would be considered at an upcoming congressional Defense Appropriations Subcommittees Conference.

Despite these concerns about how the subcommittee Chairman and other House Republicans might react, APA supported the McCain Amendment by drafting letters to the House and Senate Appropriations Committees.[1658] However, APA's internal communications show that APA had no fear that this action would anger DoD, or create negative consequences for APA with DoD, especially after Behnke's communication with Banks.

Shortly after the McCain Amendment passed, Behnke received word from DoD of a major achievement stemming from APA's strategy of close collaboration with DoD. On November 14, 2005, SERE psychologist, Kenneth Rollins, sent a congratulatory email to Behnke, Banks, and two Air Force SERE psychologists to thank them for their work in getting DoD psychologists explicitly included in a new DoD Directive on "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning": "Thanks to all for your hard work, we are now in an official DODD." This Directive, 3155.09, dated November 3, 2005, was a crucial, high-level policy document — the highest level of DoD doctrine — signed by the Acting Secretary of Defense. It contained 11 paragraphs defining the "general principles of interrogation operations." One of them created a role for "behavioral science consultants" such as psychologists, a huge victory for this group of military psychologists.[1659]

[1655] APA_0026458.

[1656] APA_0026461.

[1657] APA_0026406. In explaining her concern that the subcommittee Chairman and other House Republicans might react negatively to an APA letter taking a stance at odds with their position, Levitt referenced a controversy that had deeply stung APA in 1999 when House Republicans, led by Majority Whip Tom DeLay and Representative Matt Salmon, came close to passing a resolution censuring APA because it had published an article suggesting that child abuse was not as harmful as some thought.

[1658] Geoff Mumford, *When legislative objectives are in conflict*, Monitor on Psychology (Mar. 2006), *available at* http://www.apa.org/monitor/mar06/ppup.aspx.

[1659] APA_0046024; APA_0046025. The Directive states: "Behavioral science consultants are authorized to make psychological assessments of the character, personality, social interactions, and other behavioral characteristics of interrogation subjects, and to advise authorized personnel performing lawful interrogations regarding such assessments. . . Those who provide such advice may not provide medical

III. FEBRUARY – AUGUST 2006: COUNCIL RESOLUTION AND APA'S PUBLIC STATEMENTS

A. February – April 2006: Proposed Council Resolution

On February 18, during the February 2006 Council meeting, Judith Van Hoorn and Corann Okorodudu from Division 48 (the "movers"), submitted a new business item titled "Torture and Cruel, Inhuman, or Degrading Treatment or Punishment." During Sidley's interview with Linda Woolf, who also worked on the resolution, she explained that the resolution arose mainly out of dissatisfaction with the PENS Task Force report and the fact that it did not contain a clear statement about what psychologists could and could not participate in. The item was co-sponsored by the Divisions for Social Justice, and approximately 60 Council representatives co-signed the item.

The stated purpose of the resolution was to update the APA's 1986 Resolution on Torture, and to APA Council's Actions regarding the PENS Task Force. The 1986 Resolution stated simply that APA "condemns torture wherever it occurs" and supports the UN Convention Against Torture and the UN Principles of Medical Ethics. The language of the resolution, as originally submitted, contained four "be it resolved" paragraphs. The first paragraph provided that it was unethical for "psychologists to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments." Thus, it would likely have barred psychologists from participating in interrogations using anything other than regular questioning and rapport-building techniques. The second paragraph, depending on how the term "professional relationship" was interpreted, may have prohibited psychologists from participating in any interrogation in any setting. The full text of the draft resolution was as follows:

> WHEREAS, the American psychologists are bound by the Ethical Principles to respect the inherent dignity and worth of the individual and strive for the preservation and protection of fundamental human rights recognizing the equal and inalienable rights of all members of the human family and;
>
> WHEREAS, the existence of state-sponsored torture and other cruel, inhuman, or degrading treatment or punishment has been documented in many nations around the world and;
>
> WHEREAS, no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, serve as a justification of torture, and other cruel, inhuman, or degrading treatment or punishment and;

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care for detainees except in an emergency when no other health care providers can respond adequately." 3.4.3.3.

> WHEREAS, torture victims and victims of cruel, inhuman, or degrading treatment or punishment may suffer from long-term, multiple psychological and physical problems:
>
> BE IT RESOLVED, that the American Psychological Association condemns torture and cruel, inhuman, or degrading treatment or punishment wherever it occurs, and
>
> BE IT FURTHER RESOLVED, that the American Psychological Association considers it is a contravention of professional ethics for psychologists to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental heath, and;
>
> BE IT FURTHER RESOLVED, that the American Psychological Association considers it is a contravention of professional ethics for psychologists to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments, and;
>
> BE IT FURTHER RESOLVED, that the American Psychological Association supports the United Nations (UN) Declaration and Convention Against Torture and Other Cruel, or Degrading Treatment, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Basic Principles for the Treatment of Prisoners, and Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the joint congressional Resolution opposing torture that was signed into law by President Reagan on October 4, 1984.

Behnke and the Ethics Committee were assigned as the lead committee and staff with respect to the resolution. On March 17, 2006, Van Hoorn emailed Behnke to explain a small change to the resolution and to send him supporting documents, including a 20-page justification statement that included a lengthy bibliography and analyzed types of psychological torture (including sleep deprivation), psychological effects of torture, and treatment of torture survivors.[1660]

At a meeting in March, the Ethics Committee discussed the resolution, although the minutes do not reflect the content of the discussion, other than to indicate that Behnke and Committee Chair Moorehead-Slaughter would lead the Committee's efforts.[1661] Because the Ethics Committee was unable to contact Van Hoorn and Okorodudu during the meeting, Moorehead-Slaughter and Behnke agreed to call them to "convey the Ethics Committee's

[1660] APA_0082705; APA_0082706.

[1661] Approved Minutes of the Ethics Committee (Mar. 17 – 19, 2006) (on file with Sidley).

thoughts about specific language in the resolution that was potentially inconsistent" with the Ethics Code.

On March 19, Behnke emailed Woolf, Van Hoorn, and Okorodudu and began efforts to form a partnership with them for the purpose of influencing the language of their resolution. Behnke stated that the Committee was in "complete agreement and full support" of the first resolve in the resolution, but had "concerns" about the language in the second and third resolves. Behnke asked if there was a possibility that Division 48 and the Ethics Committee could work together to find language that "everyone could fully support in this important resolution."[1662] The movers of the resolution responded later that same day, welcoming the chance to work with Behnke and Moorehead-Slaughter.[1663]

In emailing to schedule a meeting between the two groups, Okorodudu asked Behnke about the Ethics Committee's specific concerns. Instead of directly responding to Okorodudu, and in line with his practice during the PENS Task Force, Behnke drafted a response for Moorehead-Slaughter to send Okorodudu on March 21. In the response, Behnke wrote that the Ethics Committee was interested in learning about the process of writing the resolution and how the group crafted the three resolves, noting in particular, that the second resolve could be "interpreted in a manner that would preclude a significant portion of current forensic practice."[1664] On March 24, Moorehead-Slaughter sent the email Behnke had drafted for her, verbatim, to the movers of the resolution.[1665]

The group held a conference call on March 27. At the end of the day, Behnke emailed Maureen O'Brien, the Staff Liaison to the Council of Representatives, asking her to direct the group to someone who could answer three outstanding questions from their call: (1) is a resolution adopted by Council APA policy; (2) what does it mean that the 1986 APA resolution states that APA "supports" the U.N. Convention Against Torture and the U.N. Principles of Medical Ethics; and (3) what is the nature of the commitment by APA to uphold human rights that is represented in the application to be recognized by the UN.[1666] After consulting with Jim McHugh, APA's Senior Counsel at the time, O'Brien emailed Behnke three answers, which Behnke forwarded to the group on March 29: (1) when Council votes on a resolution that is intended to be policy, the language of the motion will normally state that "Council adopts the resolution as APA policy"; (2) "supporting" a document is not the same as adopting a document as APA policy; and (3) APA was looking into the details of APA being an NGO of the U.N.[1667]

Behnke intervened quickly when the movers of the resolution sought to expedite consideration of their resolution by placing it on the August 2006 Council agenda, rather than waiting one year for the February 2007 meeting. The proponents had contacted Andy Benjamin,

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[1662] APA_0059922.

[1663] APA_0082700.

[1664] APA_0059858.

[1665] APA_0672722.

[1666] APA_0059749.

[1667] APA_0059662.

the Council Parliamentarian, about the possibility of suspending the rules at the August 2006 Council meeting in order to vote on the resolution during that meeting. On April 7, Behnke found out from Benjamin that the movers had discussed this with him. He emailed the group that night, saying that Benjamin "seemed not to be aware of our extensive exchanges regarding collaborating on the Resolution's language, in order to support the Resolution going through the governance process," and suggested that they have a call to discuss the matter.[1668] Although Behnke apparently stressed the importance of working with him and the Ethics Committee, which would provide "support" that would allow the resolution to go through "the governance process" (including only being addressed by Council at the meeting one year later), Behnke would soon change his mind about the importance of the "governance process" once it became strategically convenient to do so.

Van Hoorn responded the next day, apologizing that Behnke was "caught off guard" by their conversation with Benjamin, and stating that Benjamin had told them that Council "prefer[s] that new business items go through the governance process." Van Hoorn stated that "given [Benjamin's] input and our collaboration with [Behnke] and Olivia [Moorehead-Slaughter]," they no longer wished to move forward with suspending the rules at Council and were content to wait until the February 2007 Council meeting so that the resolution could go through the normal governance process. Behnke thanked the movers and suggested it would be "ideal" if the joint group could present both the resolution and still-to-be-produced casebook/commentary on the PENS report to Council at the same time in February 2007.

Upon receiving this response, Benjamin sent Behnke a congratulatory email about getting the Division 48 group to drop the idea of expedited treatment: "Excellent tone! Judy and her group definitely are backing off and will work the process through governance."[1669]

B. March – June 2006: DoD Training, APA Media Strategy, and Other Issues

Meanwhile, Behnke was closely collaborating with Banks and Dunivin on virtually every aspect of 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.

1. Behnke As DoD Training Instructor

On January 13, 2006, Dunivin invited Behnke to participate in the DoD's first training program for BSCTs on interrogation support and detention operations. It was originally scheduled to be held on March 6, 2006 at Fort Bragg in North Carolina, where the U.S. Army Special Operations Command is based.[1670] The training was later moved to April and relocated to the U.S. Army Intelligence Center at Fort Huachuca in Arizona. In an email conversation to finalize the details of the training program, Dunivin mentioned to Behnke that she would be

[1668] APA_0059313.

[1669] APA_0082958.

[1670] APA_0053552.

seeing Gary Percival from the Army SERE training program while she was in Washington D.C., and noted that he would be someone Behnke would enjoy meeting.[1671] In their preparations for the April training, Dunivin also informed Behnke that Bruce Crow, a consultant to Army Surgeon General Kevin Kiley, wanted to meet with Dunivin, Behnke, and another individual involved in the training program.[1672]

Behnke conducted two half-day training sessions during two separate BSCT training programs at Fort Huachuca in 2006, covering the topic of ethics and the PENS report. Behnke provided Sidley with a slide deck that he said he used during these presentations, which simply quotes various portions of the PENS report.[1673]

From 2006 to the present, Behnke has continued to conduct BSCT training courses and to work with Dunivin and Banks to design the curriculum to train the psychologists, psychiatrists, and psychology techs who attended.[1674] During Behnke's interview, he confirmed that he had been conducting BSCT trainings at Ft. Huachuca at least twice a year since 2006, with the exception of 2011, during which he led three trainings. Between 2006 and 2015, Behnke conducted approximately twenty BSCT trainings. According to Behnke, his role at the trainings was to present the position of APA and to provide updates on APA's positions as they evolved. In addition to this, Behnke said he also reviewed the positions of other professional associations, human rights documents, documents from World War II, and the Army Field Manual to try to address "what is ethical and what is effective."[1675] Indeed, in October 2009, after a cancellation by the psychiatrist who had planned to present regarding psychiatric ethics, Dunivin asked Behnke to "help [her] present the material that would have been done by [the] psychiatrist."[1676]

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

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[1671] APA_0081633.

[1672] APA_0082425.

[1673] APA_0059173.

[1674] APA_0688981.

[1675] At the time of this Report, Sidley was continuing to gather details from APA about DoD's payments to Behnke and/or APA. Among other things, it appears that at some point, DoD may have been sending payments directly to Behnke, because the Defense Finance and Accounting Service ("DFAS") had his bank account information. According to Behnke, all payments were made directly to APA's Ethics Office and none were paid to him personally, with the exception of two instances in 2012 when the checks were mistakenly made out to him. Behnke said he informed APA's Finance Office of the mistake and he wrote checks to the APA in the amount of the payments. The honorarium was $1500 per workshop prior to 2011, $2500 per workshop in 2011, and $5000 per workshop in 2012. Behnke said that his travel expenses, which were generally $1200–$1300 per workshop, were reimbursed by APA. APA's Finance Office provided us with the contracts for the workshops dating back to 2010, which generally confirmed Behnke's recollection regarding the frequency of the trainings and the honorarium amount. APA_0070465; Email from Behnke to Sidley (June 18, 2015); DFAS contracts (both on file with Sidley).

[1676] APA_0088992.

educational purposes.[1677] The paperwork APA received relating to the payments from DoD for these trainings shows that Behnke became a DoD contractor, and that up until 2011, the contract was between DoD and Behnke. Beginning in 2012, the contract was between DoD and APA. Prior to 2012, the contracts did not indicate that the payments will made to APA. Behnke, as the contracting party, was listed with his home address, not his APA address, although the contract recites in a later section that Behnke is the APA Ethics Director. The contract between Behnke and DoD for the 2011 trainings, for instance, established that Behnke would provide "three one-day training sessions" and that payments would be made from DoD's finance unit, the Defense Finance and Accounting Service ("DFAS"). The contract described "the services required to meet the agency's needs" as "to use the subject matter expertise of Dr. Behnke to provide training to behavioral health personnel in support of interrogation/detention operations."

Shortly after Behnke's first training in April 2006, he and Dunivin explicitly discussed not telling APA's Board about his participation in the BSCT training program. 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. On June 18, 2006, Dunivin emailed Behnke (copying Banks) and asked, "Did you report to APA Board about participating in training at Ft Huachuca? I know we talked about waiting to report it out... What do you think, Morgan?" Behnke replied that the Board did not know, and implied that keeping quiet about it might be the best strategy: "I've not mentioned it to the Board; after my last meeting with the Board, I expect that it would receive the Board's full support. I have informed my APA supervisors, naturally, but given how hot things are at the moment discretion may be the better part of valor for the time being, at least in terms of the broader APA community."[1678]

Behnke did in fact tell his supervisor, APA Deputy CEO Michael Honaker, that he was regularly giving a paid ethics lecture at an Army base as part of the interrogation training course for BSCT psychologists.[1679] Honaker did not provide this information to CEO Norman Anderson or the Board.[1680] When Anderson learned from Sidley during the investigation that Behnke had been providing this training as a DoD contractor, he appeared stunned, and was visibly upset that the matter had not been discussed with the Board.[1681] Honaker said that it did not occur to him that the Board would need to know or discuss this information because he saw it as a standard example of Behnke providing ethics training to an important group of psychologists, as he did, and continues to do, in a variety of settings.[1682]

[1677] Email from Behnke to Sidley (June 18, 2015) (on file with Sidley). Behnke emailed Dunivin in September 2006 that the payments were "very helpful in funding the Ethics Office educational programs." APA_0061790.

[1678] APA_0060954.

[1679] Honaker interview (June 23, 2015).

[1680] Honaker interview (June 23, 2015); Anderson interview (June 23, 2015).

[1681] Anderson interview (June 23, 2015).

[1682] Honaker interview (June 23, 2015).

Honaker and Behnke claimed that the trainings were clearly disclosed in the Ethics Office's publicly available annual reports.[1683] But in 2006 and 2007, the reports only listed the trainings as "workshops" in "Sierra Vista, Arizona" relating to the PENS report. And beginning in 2008, they started appearing as "workshops on ethics training for military psychologists." The reports do not state that the "workshops" were at a DoD facility or the U.S. Army Intelligence Center, or that they were part of the military's official interrogation training program for BSCT psychologists.

It turns out that this cryptic manner of reporting the trainings was intentional, based on discussions between Behnke and Dunivin. On September 28, 2006, Behnke said he was doing his "yearly report to the Board" and proposed that he describe the trainings by "say[ing] something simple like: Training on ethics and interrogations [and] Sierra Vista, Arizona." Dunivin agreed: "If it's OK with you to leave it Sierra Vista and simple, let's do that again. Let's talk about the implications of how this is reported when we are together next." In Behnke's annual reports in 2006 and 2007, he even removed the word "interrogations."[1684]

2. *Close collaboration on media strategy and related issues*

During this time period, Sidley uncovered many examples of Behnke closely coordinating with Banks, Dunivin, and other DoD contacts on APA official statements and responses. He explicitly and frequently sought Banks's pre-clearance or approval before authorizing or recommending that APA act in a certain way, and the communications between the two often revealed presumably confidential information regarding internal APA discussions. Moreover, Behnke tried to carefully conceal his continuous pattern of coordination with DoD from APA governance.

As early as November and December 2005, Behnke began consulting closely with Banks regarding his public statements on behalf of APA. For example, on November 10, Behnke consulted with Banks regarding his discussions with a reporter related to an upcoming *New York Times* story on the differences between the APA and ApA positions. Behnke commented that "I didn't get a particularly good feeling from the reporter, but I think we need to put our best foot forward—I'm comfortable that we'll do well by the court of public opinion."[1685] Banks responded to bolster Behnke's attitude that "you are taking heat doing VERY important work. I do not want to speculate the outcome if psychologists are not allowed to participate" (emphasis in the original).[1686] After the article was published, Nathalie Gilfoyle emailed Behnke to offer her support: "Just remember you are doing important stuff or you wouldn't be in the middle of such a maelstrom."[1687]

[1683] Honaker interview (June 23, 2015); Email from Behnke to Sidley (May 18, 2015).

[1684] APA_0088249. The Ethics Office annual reports indicate that Behnke also gave ethics lectures at the Naval War College (2005), Walter Reed (2006-2010), Brooks Army Medical Center (2007), CIA Office of Medical Services (2008-2009), and Womack Army Medical Center (2008).

[1685] APA_0046027.

[1686] *Id.*

[1687] APA_0046020.

The next month, in preparation for his December 15 interview on NPR with Steve Sharfstein, President of ApA, and Nancy Sherman, a military ethicist, Behnke sought consultation from both Dunivin and Banks. On December 12, Behnke forwarded an article published by Sherman and asked Banks and Dunivin for their thoughts, commenting that "[w]hat continues to strike me is how much agreement there is—much of what she says in this article would receive the unqualified support of the American Psychological Association."[1688] Banks and Dunivin both made comments on the article, and Dunivin added: "My sympathies for what you are about to go through and my commendation for your willingness to do it." Behnke also prepared some talking points that he hoped to "run by" Banks and Dunivin,[1689] though it is not clear that Behnke ever shared his talking points or received comments on them.[1690]

On December 13, Banks inquired whether Behnke would be doing the interview live in the studio or by phone, and Behnke responded that he would unfortunately be in the studio and added: "[O]therwise I'd see if the two of you could be sending me email messages during the show."[1691] Banks agreed that he would have liked to have been providing real-time suggestions: "Right. Standard negotiation practice. You're my hero." Behnke thanked both Banks and Dunivin, adding that he was "very very glad you two are in my foxhole." Banks then provided Behnke with a set of suggested talking points, which emphasized that reverse-engineering SERE techniques to abuse detainees would be both unethical and ineffective.[1692] After listening to a re-play of the broadcast on December 15, Banks emailed Behnke and commended him for doing a "remarkable job of getting our message out. You were the only participant who seemed to have given ANY thought to the concept that our participation might have some value" (emphasis in the original).[1693] Behnke thanked Banks "for being such a support through all this" and said that he would like to talk to Banks "about how better to handle it next time; I can't just sit there like a bump on a log and let people get away with it." Only a few hours later, Behnke reiterated that he "would love to find a way to sit down with you and Deborah [sic] to review some of these materials and help me plot better interview strategies."[1694] These early interactions demonstrate that Behnke and Banks were beginning to embark on a partnership in which Behnke was made to feel that he was playing a critical role in supporting DoD's mission. Not only did Behnke look to his contacts in DoD for feedback on statements he already released, he also used them in an iterative process to guide the message, refine its delivery, and evaluate its effectiveness. This close teamwork ensured that APA's positions would support DoD and facilitate its mission.

Behnke's requests for Banks's guidance and comments on his public statements increased in pace over the next several months. In March 2006, when APA President-elect Sharon Brehm asked to discuss with Behnke an article related to SERE tactics being "flipped"

[1688] APA_0044006.

[1689] *Id*.

[1690] APA_0232271.

[1691] APA_0044006.

[1692] APA_0044007.

[1693] APA_0052826.

[1694] *Id.*

and used in interrogations, Behnke forwarded her email to Banks and asked to "touch base" with him before speaking to her.[1695] 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. Moreover, 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.

On March 15, Behnke again turned to Banks when he began receiving inquiries about articles written by Jane Mayer, to ask whether there was an "official" response that he could share with APA members who contacted the Ethics Office. Banks initially informed Behnke that "[t]here have been no official releases, and you know my concerns. You can say that I emphatically deny that I have any knowledge of any abuse of detainees by DoD psychologists (see how legalistic that sounds)."[1696] Banks also offered encouragement, thanking Behnke for "staying in the fight."[1697] Banks's initial response clearly demonstrates that he and Behnke had already engaged in discussions regarding their reactions to Mayer's criticisms, and that they were accustomed to playing with language to achieve a precisely nuanced message. When Banks later found time for greater consideration, he added: "There is no official response, partly because there are only innuendos in these articles without substance. . . When you really read the article, it is all smoke, no fire." Behnke thanked Banks and commented that "[m]y tact, when asked about allegations in the articles, is to turn the question around and ask what specific allegations the person is asking about—that sometimes has the effect of at least slowing the person down." The following day, Banks agreed to provide a "personal, though not necessarily private" statement in which he "strongly condemn[ed] any attempt to 'reverse engineer' SERE training in order to use this training to conduct interrogations."[1698] Once again, Behnke and Banks coordinated to craft a statement acceptable to DoD that APA could use in beating back criticisms of its position on interrogations.

Also on March 15, Behnke received PHR's commentary on the PENS report. The next day, he again emailed Banks to say that he would be "very interested to discuss [the commentary] with you after you've had a chance to give a careful read" (emphasis in the original).[1699] Banks warned that if the APA were to accept anything like the comments, "there would be significant issues that would develop," and the two agreed to speak further about specific points made in the PHR commentary.[1700]

[1695] APA_0060026.

[1696] APA_0081118.

[1697] *Id.*

[1698] APA_0082721.

[1699] APA_0059935.

[1700] APA_0082622.

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."

On June 7, 2006, Assistant Secretary of Defense for Health Affairs William Winkenwerder made a press statement announcing the release of a DoD Instruction regarding medical program support for detainee operations. In his statement, Winkenwerder expressed a policy preference for using psychologists in BSCTs at Guantanamo:

> [A]s a matter of professional personnel management, physicians would not ordinarily be assigned duties as behavioral science consultants. So the job would typically fall to a psychologist. But they may be—we don't completely proscribe the possibility that a person, a psychiatrist, could be assigned; but it would only be with approval of my office when qualified psychologists are not available.
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> . . .
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> There is a second issue that did to some extent influence our thinking, and that is as we spoke to the American Psychiatric Association and the American Psychological Association — the American Psychological Association was — clearly supports the role of psychologists in interrogations in a way our behavioral science consultants operate. The American Psychiatric Association, on the other hand, I think had a great deal of debate about that and there were some who were less comfortable with that. I don't — I can't describe for you where they came out exactly on the policy with regards as to psychiatrists participating in interrogations. But . . . we try to be sensitive to the respective roles of — as they are viewed in their professions.[1703]

[1701] *Position Statement on Psychiatric Participation in Interrogation of Detainees*, American Psychiatric Association (May 2006), *available at* http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2006_Interrogation.pdf.

[1702] APA_0085887.

[1703] Transcript of Media Roundtable with Assistant Secretary Winkenwerder (June 7, 2006), *available at* http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=33.

After Winkenwerder made this statement recognizing the differing positions taken by APA and ApA, there was a resurgence of negative media attention directed at APA. On the same day that Winkenwerder issued his press statement, the *New York Times* ran a story highlighting the differences between the APA and ApA ethical policies regarding the use of professionals as consultants to interrogations.[1704] That afternoon, APA staff circulated a letter to the editor that had been submitted to the *Times*,[1705] which defended APA's position by explaining that "[p]sychologists have skills that can help prevent future acts of terror." As Council members began to criticize the letter over the course of the afternoon, Behnke reached out to a number of his contacts in various parts of DoD to help him with a public relations strategy.

That afternoon, Behnke emailed Dunivin and Larry James to ask for their help in drafting a substantive response to the critiques.[1706] Later that evening, Behnke asked that James compose a response for Koocher to post to the Council listserv on his behalf, noting that James "garner[ed] enormous respect in the APA." After James drafted an informal message, Behnke encouraged him to work with Rhea Farberman on a message or statement that could be shared with Council, again expressing his opinion that James and Dunivin had "enormous respect" in Council. Behnke also suggested that it might be helpful to make James available for a discussion group during Convention at which interested Council members could obtain more information regarding the roles psychologists were playing.[1707]

Behnke also asked Scott Shumate and Robert Fein at CIFA to provide guidance regarding "formulat[ing] a substantive response" to membership critiques raised by Winkenwerder's comments.[1708] Behnke explained that "[i]t's been pretty hot around here today (my first voicemail message this am was a member screaming into the phone that I need to take an ethics course!). Not sure if/why WW [Winkenwerder] needed to make any statement at all regarding psychology/psychiatry." He added that he would "like to convey to ww that statements like yesterday's can stir up a hornet nest that is best left alone (as are most hornet nests)." Shumate responded to Behnke that "you sir are clearly the right man at the right time for your job," and Behnke countered that "it's a real privilege to work with you and your colleagues."[1709]

On June 10, the day after Behnke suggested that James work with Farberman to refine his message to Council, Behnke also reached out to Banks for advice regarding the public relations strategy that APA should take in response to the "heavy hits" it was taking.[1710] Banks responded by reassuring Behnke that his "sources" indicated that the American Medical Association

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[1704] Neil Lewis, *Military Alters the Makeup of Interrogation Advisors*, New York Times (June 7, 2006), *available at* http://www.nytimes.com/2006/06/07/washington/07detain.html?_r=0.

[1705] APA_0060426. Sidley could not find evidence indicating that the letter to the editor was ever published in the *New York Times*.

[1706] APA_0060426; APA_0060399.

[1707] APA_0060348.

[1708] APA_0085290.

[1709] APA_0060387.

[1710] APA_0060346.

("AMA") would be making a statement very similar to APA's.[1711] In fact, AMA's position would be released within days, and Behnke would then work quickly to highlight the similarities between the APA and AMA positions, commenting to senior staff and governance members that he believed "that AMA's position is our position restated, using other language."[1712] Once again, Behnke leaned on Banks for advice regarding APA's public relations strategy and then matched APA's response to Banks's suggestions. 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 psychologists, and that he wanted to ensure that his partners in DoD had sufficient opportunity to guide his response on behalf of APA in a way that coordinated with DoD's policy preferences.

Behnke also reached out to James on June 10 to reiterate his request for assistance at Council, especially in light of the controversy raised by Winkenwerder's statement. Behnke forwarded a letter from the President of Division 39, which suggested holding a conference call to discuss the "crisis within APA regarding our Ethics Office as it pertains to interrogations. The most immediate crisis was precipitated by the June 7 article in the New York Times . . . and Dr. Koocher's letter to the editor in response to that article. The Times article reflects the now indisputable fact that our house is not in order; in contrast to our psychiatric colleagues, we appear unable to be unequivocal regarding participation in torture/coercive interrogations." Behnke commented: "Larry, this is bad. Let me ask you a question: Would you be willing to make yourself available at Convention for Council members (no press), to answer questions regarding the role of psychologists in setting such as Guantanamo Bay? I am meeting with the Board tomorrow . . . and I think that would be a good part of a plan to respond to what's going on."[1713]

The following day, on June 11, the APA Board met. The minutes do not show that the Board discussed the *New York Times* article or any other issue related to psychologists participating in interrogations.[1714]

On the next day, June 12, James agreed to speak to Council and Behnke responded that "in my opinion this is EXACTLY what we need. I am going to work with Rhea Farberman, Olivia [Moorehead-Slaughter], Norman [Anderson] and Gerry [Koocher] to develop a strategy for Council. Things are getting pretty hot around here. I'll keep you posted at each step along the way."[1715] Behnke's discussions with James, Dunivin, and Banks demonstrate that, once

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[1711] APA_0085872.

[1712] APA_0060279.

[1713] APA_0060321.

[1714] Approved Minutes of the Board (June 9 – 11, 2006) (on file with Sidley).

[1715] APA_0060321. Behnke's comment regarding things "getting hot" likely referred not only to phone calls to the Ethics Office, but also to messages being posted to APA listservs, including a message on the Division 38 listerv regarding the June 7 *New York Times* article: "This is most distressing. I would like to hear Dr. Behnke's response and rationale, be informed of who else is providing consultation and input into this effort, and what secure safeguards are being used to ensure that transgressions do not occur, given the history of abuse and the pressure psychologists will be under to cooperate with the military in this regard." APA_0085728.

again, in the face of growing criticism, Behnke reached out to trusted contacts in DoD for their confidential advice, and worked in a partnership with them to craft APA's media and policy strategy in a manner consistent with their guidance. Behnke continually shared APA's confidential internal discussions and strategy with his DoD contacts, and relied on them to help him direct future APA strategy discussions.

On the same day, June 12, Brehm forwarded several member complaints to senior staff and governance members, including Anderson, Levant, Koocher, and Behnke, commenting that "[w]e're getting pecked to death by ducks and, unless we are able to contact more of our members more effectively, the bleeding will continue."[1716] She continued expressing her concerns to the group after she found a *New York Times* editorial regarding the suicides of three Guantanamo inmates:

> Yesterday [at the Board meeting], I considered mentioning this issue, but we had a full plate even so and, frankly, I was uncomfortable talking about it with Russ [Newman] in the room. Perhaps I was overly cautious, but this is such a complex, difficult issue that I didn't want to risk inadvertently saying something that would have made Russ uncomfortable. Given the ongoing violations of basic human rights, can APA sanction psychologists participating in the activities at Guantanamo? Is it ethical for any psychologist to take part in any activities at Guantanamo? That is, what's the right thing to do when the specific psychological activity is ethically neutral or even ethically commendable, but the organization/setting/basic principles are unethical? At what point does the whole overwhelm the part?[1717]

In response to Brehm's concerns, Behnke seized the opportunity to direct the discussion toward strategic considerations, as he had indicated to James that he would do:

> Please keep this message confidential. I think we need to develop a strategy for Council, where these issues can be directly addressed. Col. Larry James, who is very well respected in the Association and who has served at both Abu Ghraib and Guantanamo Bay, feels very strongly that psychologists have served as a bulwark against abuses, and that the most effective way to prevent abuses from occurring is to have psychologists involved. I think Council needs to hear directly from a psychologist with firsthand experiences at these settings. There is too much "noise" in the form of misinformation being disseminated about what psychologists are doing, and wee need a better grasp of the facts to make thoughtful, intelligent decisions. In an exchange this morning Larry indicated he would be willing to speak to Council in August.

[1716] APA_0085728.

[1717] Brehm's concern is a vibrant demonstration of the conflict of interest presented by Newman's presence at the PENS Task Force meeting.

Brehm agreed that James would be an "excellent speaker" and urged the group to invite him to present at Council.[1718] This interaction is but one example of Behnke's successful manipulation of internal APA strategy in a way that conformed to the mutual goals he developed with his partners in DoD.

When AMA released its position statement on June 12, 2006, Behnke immediately turned to Banks as his consultant in developing APA's response, contacting him several times the following day for his thoughts and comments on the statements Behnke was making on behalf of APA. On June 13, Behnke asked Banks for his reaction to an analysis he had prepared of the similarities between the APA and AMA positions,[1719] an approach which Banks had himself suggested only days earlier. On the same day, Banks approved Behnke's statement to a reporter emphasizing that "the American Medical Association has used precisely the same ethical analysis to determine the manner in which physicians may participate in interrogations," which Behnke described as "our basic position, that we'll elaborate." Banks agreed that "[t]he basic talking point is that we and the AMA are in virtually complete agreement."[1720] Also on June 13, Behnke forwarded to Banks his response to a member's criticisms, which reiterated the precise match between the APA and AMA positions, again asking for Banks's thoughts on how he had framed the response. Banks commiserated with Behnke regarding the frustration of responding to continued attacks, and offered suggested language for Behnke to use in future responses that emphasized the close alignment between the APA and AMA positions.[1721] These messages demonstrate that Behnke and Banks saw themselves as part of a unified team developing APA's public 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. Precisely as Banks had obliquely suggested before the AMA position statement was even released, Behnke embraced the similarities between the APA and AMA documents and used the comparison as a cornerstone of APA's media strategy.

Over the ensuing days, Behnke continued to coordinate with Banks and Dunivin to tweak APA's media statements to emphasize similarities not only between APA and AMA, but with ApA's position as well. On June 14, Behnke emailed Banks and Dunivin to explain that "[o]ne aspect of our media strategy is to stress similarities between the three associations. All three associations have made clear that members may consult to interrogations. (President of American Psychiatric, Steve Sharfstein, has said that the psychiatric association will not discipline military psychiatrists acting under orders.)" In an attempt to bolster his position, Behnke also inquired whether he could disclose in public that military psychiatrists were still being trained for the BSCT role.[1722]

[1718] APA_0085728; APA_0086114 (As they drew closer to the Council meeting, Behnke commented to James that he was "coming to see your role here as increasingly important").

[1719] APA_0060279; APA_0085750.

[1720] APA_0085769.

[1721] APA_0085768.

[1722] APA_0085672.

On the same day, Behnke asked Banks to review a column for the *Monitor* comparing and contrasting the three position statements. He agreed to "soften" language based on Banks's suggestions.[1723] After the column was posted to APA's website, Behnke explained that he "had to rewrite for reasons I'll explain" and indicated that he was interested in Banks's reaction.[1724] When APA members later wrote to criticize the column, Behnke again turned to Banks to review his response to the criticisms.[1725]

When, on June 20, Steven Reisner circulated a critique of APA's position, Behnke again turned to Banks and Dunivin for their help in identifying factual misstatements as he drafted a response.[1726] Banks responded with detailed point-by-point critiques of Reisner's analysis, emphasizing that an operational psychologist is not healthcare provider bound by medical ethics and that "to ask him or her to abide by the [World Medical Association's] code is preposterous."[1727] Dunivin also commented on Reisner's message, indicating that many of his

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[1723] APA_0689685. The column emphasized how "closely related" APA's position was to the other two associations, particularly AMA, but acknowledged that ApA used a different analytical framework based solely on the "do no harm" principle, rather than considering that principle in conjunction with the need to protect society, as APA and AMA had. Behnke explained that: "The difference between the psychologists and physicians, on one hand, and the psychiatrists, on the other, becomes understandable when placed in the context of how the associations have conceptualized the issue differently. Immediately following the release of the American Psychiatric Association position, its president was quoted by the media as stating that the psychiatrists' position statement is not "an ethical rule" and that a military psychiatrist following orders 'wouldn't get in trouble with the APA [American Psychiatric Association]' for participating in interrogations. This clarification from the president of the American Psychiatric Association places the psychiatric association alongside APA and AMA in terms of enforcement actions: Military psychologists, physicians and psychiatrists, following orders, abiding by clear prohibitions against coercive interrogations, acting strictly as consultants to interrogations and not as caregivers, and reporting coercive or abusive acts to the appropriate authorities, will not be subject to discipline from their professional associations." Stephen Behnke, *Ethics and Interrogations: Comparing and Contrasting the American Psychological, American Medical and American Psychiatric Association Positions*, Monitor on Psychology (July/August 2006), *available at* http://www.apa.org/monitor/julaug06/interrogations.aspx (internal citation omitted).

[1724] APA_0086368.

[1725] APA_0062400. Behnke and Banks continued to consult regarding the comparison between APA and other professional associations over the coming months. For example, on July 10, Behnke again turned to Banks for approval of a response to member criticisms, in which Behnke emphasized the similarities between the associations. Banks commented: "Your response is very solid, and again points out the inconsistencies in the ApA position. . . . [The author] seems to believe that neither law enforcement nor the military have need for us. . . . OK. I think we can find psychologists to fill in for them. As a side note, I expect all my psychologists to consider themselves Army officers who are psychologists, not psychologists who happen to be in the Army. If they do not feel that way, I will not have them working in the operational psychology area." APA_0086751. On July 28, in an email that revealed Banks and Behnke's joint efforts to manipulate language in service of their position, Banks commented that "[m]uch depends on the use of the term 'directly participate,' and we are spinning the phrase, 'monitor interrogations with the intent of intervention,' as you and I have discussed." APA_0086820.

[1726] APA_0060836.

[1727] APA_0086187.

statements are "correct if one considers the only appropriate role that of health care provider."[1728] Sidley could find no record that Behnke provided a substantive response to Reisner's critiques.

On June 22, Dunivin forwarded to Behnke and Banks a comment made by another military psychologist to a group of Division 19 members regarding his "reservations" relating to the debate over the ethical implications of serving as a BSCT, particularly with respect to his sense that "indirect involvement," though permissible under APA policy, still "influences the coercive nature of an interrogation and contributes to breaking down detainee resistance."[1729] Behnke responded that the military psychologist had written "an interesting and articulate message," but dismissed his substantive concerns by suggesting that the same ethical issues were raised when psychologists performed custody evaluations.[1730]

Although Behnke most often turned to Banks for assistance in drafting APA's statements, at times Behnke also facilitated interactions between Banks and other APA staff to assist Banks in developing DoD's media strategy. For example, on June 24, Behnke connected Banks with Rhea Farberman so that Banks could "use [her] expertise to help develop some talking points that are consistent with APA."[1731] Behnke and Banks engaged in a side discussion and developed two potential talking points: (1) highlighting DoD's interrogation approach based on relationship building and (2) acknowledging that abuses have taken place but insisting that the parties responsible had been punished. Farberman suggested that Banks "also emphasize psychology's understanding of how stressful situations can lead to behavioral drift . . . [and] [a]n on-set psychologist can monitor for such stress and work with the military personnel to help them stay within appropriate boundaries." 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.

In late June, Steven Miles published his book *Oath Betrayed: Torture, Medical Complicity, and the War on Terror*, and APA members began to circulate reviews of the book. On June 26, Behnke contacted Banks to alert him that "we are DEFINITELY going to need to respond to this book." Banks informed him that the Office of the Surgeon General had given an interview responding to Miles's theories, and that the MEDCOM investigation into detainee operations, approved in May 2005, was "a strong rebuttal [sic] of this book."[1732] Behnke thanked Banks for his input,[1733] though there is no evidence that he drafted a response to the book. It is likely that Behnke's focus shifted after a June 30 *Democracy Now!* interview with the book's author prompted a flurry of activity on APA listservs and within APA governance, and Behnke turned to putting out fires rather than drafting a considered response.

[1728] APA_0086179.

[1729] APA_0060788.

[1730] *Id*.

[1731] APA_0086091.

[1732] APA_0086017 (emphasis in original).

[1733] APA_0060645.

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.

C. Manipulation of the August 2006 Council Meeting: June 2006 – August 2006

Although in April 2006, Behnke (with Benjamin's help) had successfully convinced the Division 48 proponents of the proposed Council resolution not to seek expedited action at Council's August 2006 meeting, Behnke abruptly changed positions in June when he suddenly saw expedited action on the resolution as a necessary strategic step to provide an alternative to potentially worse outcomes. This was clearly a reaction to his concerns about the Council and PR environment in light of the events just described, and a new on-line petition drive that began on June 20.

On that day, a petition by Stephen Soldz, which proposed that APA direct its member psychologists not to participate or indirectly assist in the interrogation of "enemy combatants" at Guantanamo and other similar U.S. detention facilities on foreign soil started circulating on the Council listserv.[1734] Among other things, the petition quoted from a July 7, 2005 *New England Journal of Medicine* article: "Psychiatrists and psychologists have been part of a strategy that employs extreme stress, combined with behavior-shaping rewards, to extract actionable intelligence from resistant captives."

The next day, Behnke emailed Banks to express concern about the petition and to ask for his help, emphasizing that he was working on "repaying" Banks for his assistance: "[Y]ou are really doing a yeoman's worth of work helping us out. I haven't figured out how I'm going to repay you, but trust me, I'm working on it. I am growing increasingly concerned about a petition (link below). I do not believe that the statements it makes are correct, and would like confirmation of that, ideally by someone who can render an authoritative legal statement. Can you help us out, or know someone who can?"[1735] Behnke sent a follow up email to Banks with the statements Behnke thought were incorrect, including the statement that "[p]sychiatrists and psychologists have been part of a strategy that employs extreme stress."[1736] Behnke also emailed Dunivin about the petition and asked if they could discuss it by phone.[1737] Banks responded substantively on June 26, forwarding a long response from a military (JAG) attorney to whom Banks had sent Behnke's questions. With respect to the question about "extreme stress," the JAG officer replied "[s]o? Extreme stress can be brought about [] by prolonged exposure to my children," and stated that "[s]tress doesn't even come close to torture as defined in the torture convention."[1738]

[1734] *Petition Against Psychologists' Participation in Interrogation of 'Enemy Combatants'*, *available at* http://www.thepetitionsite.com/takeaction/483/607/021/.

[1735] APA_0612009.

[1736] APA_0060808.

[1737] APA_0060833.

[1738] APA_0086044.

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. On June 22, 2006, Behnke sent an email to Benjamin, Moorehead-Slaughter, and Doug Haldeman (the Board's liaison to the Ethics Committee), with the heading "CONFIDENTIAL, BETWEEN US," presumably to ensure that the group did not forward it to the Division 48 proponents. Behnke said that they should strongly encourage Van Hoorn and Okorodudu to "reach out and work with Division 19 to fashion wording for the final Resolution." Behnke said that he and the Ethics Office would be "happy to facilitate this process." He then provided the talking points to be made to Van Hoorn and Okorodudu, including the point that "the process of writing and bringing the resolution forward must be a collaborative process."[1741] Having obtained sign-off on his plan from this group, Behnke then drafted an email for Moorehead-Slaughter to send to Van Hoorn and Okorodudu, which Moorehead-Slaughter sent verbatim on June 24.[1742] In the email, Behnke raised the specter of a "divisive outcome" in APA and "concern[] that an entire segment of our membership is being cast in a particular light." The email then suggested that Van Hoorn and Okorodudu reach out to Division 19 to see if they would be interested in collaborating on the resolution, and played up the wonderful things they could accomplish for APA as an organization: "Such collaboration would send a very powerful message to the entire Association, about working together, about listening to one another, and about the confidence we have in ourselves as a group."[1743] The group scheduled a conference call for June 28, and on June 29, Van Hoorn emailed Behnke that she had started the outreach to Division 19 and had a call planned for the next day.[1744] Behnke had achieved this goal, and from this point on, the resolution language reflected not what the Division 48 proponents wanted, but what the Division 48 and Division 19 representatives (along with Behnke) could agree on.

[1739] APA_0060799.

[1740] *Id.*

[1741] APA_0060792.

[1742] APA_0611676.

[1743] APA_0086058.

[1744] APA_0085929.

Linda Woolf circulated another draft on June 27. Notably, the two "resolves" that would have been most problematic for DoD and had most concerned Behnke had been deleted:

> BE IT FURTHER RESOLVED, that the American Psychological Association considers it is a contravention of professional ethics for psychologists to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health, and;
>
> BE IT FURTHER RESOLVED, that the American Psychological Association considers it is a contravention of professional ethics for psychologists to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adverse affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments.

In their place, the following language was inserted:

> BE IT RESOLVED, that, based upon the APA's long-standing commitment to basic human rights including its position on torture, psychologists, regardless of their roles, always work **in accordance with relevant international human rights instruments,** and do not engage in, direct, support, facilitate or offer training in torture or other cruel, inhuman or degrading treatment" (emphasis added).

After the group met on June 28, 2006, Behnke circulated the edited language of the "be it resolved" paragraph discussed above, with minor changes:

> BE IT RESOLVED that based upon the APA's longstanding commitment to basic human rights including its position against torture, psychologists always work **in accordance with international human rights instruments relevant to their roles**, and regardless of their roles, do not engage in, direct, support, facilitate, or offer training in torture or other cruel, inhuman, or degrading treatment (emphasis added). [1745]

Much later, Behnke would stress to Banks that he had intentionally inserted the phrase "relevant to their roles" in order to ensure that this clause (in his view) did not create any constraints on DoD psychologists.[1746]

Behnke also suggested that they add another "whereas" provision:

> Whereas, all members of the APA have important contributions to make to the individuals and groups with whom they work, and to society, when abiding by the Ethical Principles of Psychologists and Code of Conduct (2002).

[1745] *Id.*

[1746] APA_0064004.

Both Van Hoorn and Okorodudu thanked Behnke for his suggested language and noted that they had reached out to Division 19 through Steve Sellman.

On June 29, 2006, Van Hoorn emailed Behnke and asked how they should respond if they were asked who prepared the resolution: "The Ethics Committee's suggestion? The Board's? Your suggestion?" 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 indicate what mechanisms are available to get the Resolution before Council at the earliest date."[1747]

On July 9, 2006, Woolf circulated a third revision of the resolution to the group. The relevant "be it resolved" sections were revised and expanded to include the following:

> BE IT RESOLVED that based upon the APA's long standing commitment to basic human rights including its position against torture, psychologists shall always work in accordance with international human rights instruments relevant to their roles.
>
> BE IT RESOLVED that regardless of their roles, psychologists shall not engage in, direct, support, or offer training in torture or other cruel, inhuman, or degrading treatment.
>
> BE IT RESOLVED that psychologists shall not knowingly provide any research, instruments, or knowledge that facilitates the practice of torture or other forms of cruel, inhuman or degrading treatment.
>
> BE IT RESOLVED that psychologists shall not be present during any procedure in which torture or other forms of cruel, inhuman or degrading treatment is used or threatened.

Within ten minutes of receiving this email from Woolf, Behnke forwarded the resolution to Banks to seek his pre-clearance, commenting that he thought it was "tolerable": "[T]ell me if you see anything problematic (other than what we discussed at dinner on Wednesday)".[1748] A few hours later, Banks confirmed that he had no issues with the language, and joked "I'm not a fan of murder, spouse abuse, or genocide either. Perhaps a resolution…"[1749]

On July 10, 2006, Moorehead-Slaughter emailed the group and stated that she would ask the Ethics Committee to review the resolution, explaining that if nothing in the resolution is inconsistent with the APA Ethics Code, then the Ethics Committee would recommend that the resolution move forward in the APA governance process.[1750] The next day, a website was

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[1747] APA_0060625.

[1748] APA_0086486.

[1749] *Id.*

[1750] APA_0690077.

created for members to submit comments to the resolution, and both the resolution and its underlying referenced documents were posted onto the website.

Sidley was unable to locate records of an Ethics Committee meeting or discussion in July 2006, and indeed, Lindsay Childress-Beatty (the current Ethics Office Deputy Director) confirmed that she was unable to locate any evidence of a meeting in July 2006,[+] though she said it would not have been unusual for the Committee to have a conference call meeting during which no minutes were taken.[1751] Although it is unclear whether there was a full discussion of the Ethics Committee, two members of the Committee emailed to express a concern with the word "always" in the first resolve.[1752] On July 14, 2006, Behnke emailed Van Hoorn, Woolf, and Okorodudu and said that "the Ethics Committee has expressed a concern" with the phrase "shall always" in the following "be it resolved" paragraph:

> BE IT RESOLVED that based upon the APA's long standing commitment to basic human rights including its position against torture, psychologists shall always work in accordance with international human rights instruments relevant to their roles.

Behnke explained that the phrase "shall always" "seem[ed] to bind psychologists to a potentially undefined set of documents," and suggested that it be replaced with "psychologists work in accordance with…"[1753] After some back and forth, Woolf suggested that they use "psychologists shall work consistent with,"[1754] which they later changed to "psychologists shall work in accordance with."[1755] Behnke responded that this language "may work for the Ethics Committee."

That evening, Woolf sent another draft of the resolution with additional changes and the following new language:

> BE IT RESOLVED that psychologists shall be alert to acts of torture and other cruel, inhuman, or degrading treatment (CIDT) and have an ethical responsibility to report these acts to the appropriate authorities.

Woolf also suggested that they (1) strengthen one of the "whereas" statements to include specific examples; (2) add "advise" to the "be it resolved" statement that discusses how psychologists might be potentially involved in CIDT or torture; and (3) keep the phrase "shall work in accordance" in the statement they had been discussing.[1756] Later that evening, Behnke responded that he was reviewing the changes with Moorehead-Slaughter on the phone and that the changes looked good.

[1751] Email from Childress-Beatty to Sidley (June 24, 2015).

[1752] APA_0086656.

[1753] APA_0062776.

[1754] APA_0086640.

[1755] APA_0086635.

[1756] APA_0086632.

On July 20, 2006, Van Hoorn emailed an updated draft to Behnke after she and Steve Sellman met to discuss the resolution. The following "be it resolved" was added to the resolution:

> BE IT RESOLVED that should torture or other cruel, inhuman or degrading treatment or punishment evolve during an interrogation where a psychologist is present, the psychologist shall attempt to intervene to stop such behavior, and failing that exit the interrogation facility.

In response to the new language, Behnke expressed a concern that leaving a facility "may quite literally not be possible," and suggested changing it to "will not remain present in that interrogation setting unless for the purpose of attempting to stop the torture or cruel, inhuman, or degrading treatment." Sellman registered his approval, but Van Hoorn stated that the change might weaken the statement and suggested that they shorten it to "exit the interrogation."[1757] This draft also added the McCain Amendment to the list of policies that the APA was reaffirming its support of, an addition that was credited to Division 19:

> BE IT RESOLVED that, based upon the 1986 APA Human Rights Resolution, the American Psychological Association reaffirms its support for…and further supports the McCain Amendment, the United Nations (UN) Basic principles for the Treatment of Prisoners…[1758]

All agreed to the changes, and the resolution was finalized for review by the Ethics Committee on Sunday, July 23.

On the same day, Behnke drafted a message for Moorehead-Slaughter to send to the Ethics Committee. The email, written in the voice of Moorehead-Slaughter, stated "I can say comfortably that this Resolution does not permit any activity that would be prohibited by the Ethics Code. For this reason, I believe it is time for the Resolution to move forward through the APA governance process."[1759] The email asked that if anyone disagreed, they should respond by 5 PM the following Wednesday. About an hour later, Moorehead-Slaughter sent the email, with the finalized resolution as an attachment, to the Ethics Committee, using the language Behnke had drafted verbatim.[1760] Over the next week, the resolution was reviewed for minor changes and grammatical errors. It was finalized on July 27.

Leading up to the August Council meeting, Behnke intentionally tried to conceal his involvement in the resolution revision process. For instance, on July 7, Haldeman emailed Behnke and asked him to review a statement that he was planning on sending to the Board regarding the upcoming resolution. Haldeman's original draft statement noted that both Behnke and Moorehead-Slaughter had been working with the representatives from Division 48 to collaborate on the drafting of the resolution. Behnke sent Haldeman a revised draft that

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[1757] APA_0087155.

[1758] APA_0087129.

[1759] APA_0062593.

[1760] APA_0087123.

minimized the role played by Moorehead-Slaughter and entirely removed any references to himself.[1761] Haldeman made these edits, but when he sent the statement to the Board, he accidentally attached the email in which Behnke had provided his edits. Behnke forwarded the email to Gilfoyle and expressed extreme displeasure.[1762]

Behnke privately shared with Koocher his strategic thinking behind the intentional effort to falsely make the resolution appear to be a Division 48-only effort, and the danger that without this moderate alternative, much worse resolutions may have thrived. In a July 10 email marked "CONFIDENTIAL," Behnke said that "[f]or several reasons, I think a Resolution coming from Division 48 has many advantages for us, and I've carefully reviewed the draft they are working with. It is far superior to other possible texts that could come before Council."[1763] Two weeks later, Behnke made the same point to Koocher after Van Hoorn asked that a letter from her about the resolution be posted on the Council listserv to garner support. After reviewing the letter, Behnke emailed Koocher and noted that "the more people see this Resolution as originating from Division 48, the better we'll be."[1764]

Behnke also managed the way in which the Division 48 proponents would be describing the Ethics Committee's involvement to make it appear as though the only involvement from "Ethics" was to ensure that the resolution was consistent with the Ethics Code. On July 17, Van Hoorn said she wanted to write an introductory statement to post on the Council listserv, but would send it to Behnke for his review first. She suggested that she would write that Division 48 was proceeding with Behnke's "full support and encouragement," and that she would have Moorehead-Slaughter stand with them at the time of the resolution's introduction in Council to "truly assure people that we've worked together on this."[1765] Behnke responded that they should instead say that they "consulted extensively with the Ethics Committee to ensure that there are no inconsistencies with the Ethics Code." Behnke did not include any references to himself or the Ethics Office.[1766]

Behnke also plotted to arrange a controlled, well-staged speech from a DoD official who would send a message to the Council about the humane treatment of detainees. The original idea was to have Larry James speak, but Koocher and Behnke later discussed having Army Surgeon General Kevin Kiley speak instead, and an invitation to Kiley was extended. On July 10, Behnke shared with Koocher his strategic thinking for making Kiley's speech as smooth as possible if he accepted the invitation: "Given the circumstances, could we think through how this

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[1761] APA_0061082.

[1762] APA_0061072 ("Holy S., Batwoman — did Doug really send the message with this attachment that was our earlier exchange???").

[1763] APA_0061229.

[1764] APA_0062486.

[1765] APA_0062734.

[1766] *Id*.

is presented to Council, and invite Council to submit questions/issues IN ADVANCE for his consideration? I think that approach might set a very helpful tone" (emphasis in the original).[1767]

When it appeared that Kiley would accept, Behnke began coordinating with Banks and Dunivin about how to tell Council that Kiley was going to speak. In a July 18 email, Behnke said he was "extremely eager for your thoughts on how to present this to Council," explaining that "we should frame it very carefully." Behnke then drafted two paragraphs which stressed that "it will be important to have data regarding what psychologists are being asked to do in national-security related settings," and since APA was "an organization dedicated to science, education, and practice, we must move forward with the best evidence available." Behnke's draft added that "[t]o make the best use of our time" and "given our time constraints," questions to Kiley should be submitted in advance.[1768]

Dunivin, who served as the point of contact for Kiley, asked for a synthesized list of questions to use in briefing Kiley ahead of the Council meeting.[1769] When Behnke circulated a list of proposed questions to Banks and Dunivin, Banks responded that they were "the very questions we have been trying to answer publically [sic] for some time."[1770] Behnke then submitted talking points for Banks's and Dunivin's briefing of Kiley. Among other points, Behnke included some of the key APA media strategy points about the supposed similarities between the APA, ApA, and AMA positions, and said, "there is 'no light' between the PENS Task Force Report and current Army policy on the use of psychologists. The two are completely in sync—there is no discrepancy between them at all."[1771]

In addition to managing the language of the resolution, the language introducing it, the identity of the speaker at Council, the content of his presentation, and the process for asking him questions, Behnke also attempted to manage the lunch invitations and seating arrangements for the main participants, all with a careful legislative strategy in mind. On July 18, Behnke emailed Judy Strassburger, head of the APA governance office, stating that Koocher had agreed to have lunch with Van Hoorn and Okorodudu (the Division 48 proponents), Neil Altman (a leader in the Divisions of Social Justice and the ultimate proponent of the 2007 Council Resolution), and Steve Sellman (the Division 19 liaison to the resolution group). Behnke said that they should be "seated in the main room, for good visibility." He asked that the lunch invitation be sent "as soon as possible after the announcement goes out, because that's when the organizing will begin and we want to nip that in the bud as best we can." He added that "we may also want to consider inviting one of Division 18 [Psychologists in Public Service] members."

Meanwhile, as criticism and commentary around the respective positions of the APA, ApA, and AMA continued to circulate, Banks reminded Behnke that APA needed to stay the course if it wanted to receive beneficial policies from DoD for psychologists. On July 28, Banks

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[1767] APA_0061229.

[1768] APA_0062702.

[1769] APA_0087227.

[1770] APA_0062558.

[1771] APA_0062559.

commented as an aside on one of his responses to Behnke's requests for guidance that Surgeon General Kiley "is still committed to supporting this use of psychologists. (and, I assume, psychiatrists.)" Behnke queried whether Banks had "a sense that the Surgeon General was re-considering the use of psychologists in this role" and wondered what that would mean for Banks.[1772] Banks responded that the Surgeon General was "fully on board" with continuing to use psychologists as BSCTs, and "the only problem that could occur is if APA changed course. The effect of that would be substantial and very problematic for all government psychologists (to include local police psychologists)." Behnke assured Banks that his "read of the tea leaves is that it is extremely unlikely APA will change its course in any significant way."[1773]

During continued discussions regarding Kiley's presentation at Council, it is apparent that Dunivin had some concerns about "folks having [an] opportunity to present the 'other side.'"[1774] Behnke assured Dunivin that there was unlikely to be "a significant 'other side'" because the Divisions for Social Justice had co-sponsored the resolution. Understandably, Dunivin commented that Behnke was a "[s]uperb strategist,"[1775] and Behnke responded with a "wink" emoticon.

Despite Behnke's strategy, many critics of APA's position felt that there was a significant "other side." On August 4, Mark Benjamin published an article in *Salon* that quoted APA members as stating that APA leadership was "circumventing the democratic process" by blocking requests from Len Rubenstein, executive director of Physicians for Human Rights, to speak to Council and present the view that there is no ethical role for health professionals to play in interrogations.[1776] In addition, Steven Reisner sent a letter to Koocher asking him to reconsider his decision to reject Rubenstein's offer to speak or urging him, in the alternative, to consider inviting Phil Zimbardo to speak on a panel with Kiley.[1777]

Within one hour of the *Salon* article being emailed to a large group by APA critic (and former Ethics Committee Chair) Ken Pope, Levant forwarded it to the Board of Directors and Executive Management Group listservs and asked, "Escalation?" Brehm asked if the Board had discussed inviting Rubenstein, and Anderson then weighed in, explaining that on the afternoon of August 4, he, Koocher, Behnke, Farberman and their "crisis communications consultants" had discussed the idea of "inviting someone opposed to APA's policies" in response to an email from Stephen Reisner suggesting it. Anderson said that the consultants thought "this was definitely something we should do from a media perspective," and as a result, Koocher invited Reisner to speak.[1778]

[1772] APA_0062365.

[1773] *Id.*

[1774] APA_0087201.

[1775] APA_0062615.

[1776] Mark Benjamin, *Psychologists Group Still Rocked by Torture Debate*, Salon (Aug. 4, 2006), *available at* http://www.salon.com/2006/08/04/apa/.

[1777] APA_0339374.

[1778] APA_0201986.

Later, APA would cite this "debate" between Kiley and Reisner (which actually consisted of back-to-back statements) as proof of its even-handedness, but the emails show that it only occurred because of media pressure and concern about the overall media strategy. In addition, once Reisner was added as the second speaker, APA sandwiched him between Kiley and Moorehead-Slaughter, two pro-PENS speakers, both of whom were given good talking points to use.[1779]

As the three speeches were summarized by APA later, Kiley stated that there had been some abuses in the past, but said that the Army did not condone torture or abuse and had dealt with those situations. Kiley added that conflicts between military orders and the Code of Ethics almost never arise. "Regarding the line between reasonable interrogation and abuse," Kiley said that "psychologists know right from wrong and can tell if some action or procedure is harming detainees." Kiley's points were consistent with the talking points provided by Behnke. Reisner said that psychologists should not be involved in interrogations in any way "because of their possible knowledge of research and practice that might inform interrogation techniques, to include torture or other cruel and inhuman treatment." Reisner also said that "there is no clear line between appropriate and inappropriate advice" for interrogators, and that APA ethical standards must apply and "define what is torture or abuse." Moorehead-Slaughter gave a "status report on the implementation" of the PENS report, and said that the Ethics Committee will soon begin work on the "Casebook/Commentary." No such "commentary" was produced until 2011, when the Ethics Office published a short compilation of vignettes to its website.[1780]

After the speakers gave their presentations, the Council voted to adopt the resolution, with the addition of one clause:

> BE IT RESOLVED that the term 'cruel, inhuman, or degrading treatment or punishment' means treatment or punishment by any psychologists that is of a kind that, in accordance with the McCain Amendment, would be prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment . . .

After Council passed the resolution, Soldz contacted Behnke about the additional "be it resolved" statement. In response, Behnke suggested that Soldz get in touch with Van Hoorn, Okorodudu, and Woolf, explaining that the language was changed on the floor of Council and that he was not a part of those discussions.[1781] After Soldz forwarded his questions to the movers, Woolf confirmed that the definition of "cruel, inhuman, or degrading" was taken from the

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[1779] APA_0062349.

[1780] APA_0004471.

[1781] APA_0062017.

McCain Amendment and included in the justification statement that accompanied the draft resolution provided to all Council members prior to the Convention.[1782]

IV. CONTINUING CLOSE COORDINATION BETWEEN APA AND DoD OFFICIALS: AUGUST 2006 – JANUARY 2007

In the months following Council's adoption of the 2006 Resolution Against Torture, APA staff and governance continued to closely coordinate with DoD on two interrelated matters: Koocher and Behnke's visit to Guantanamo, and requests for consultation with BSCTs and medical staff stationed at Guantanamo. Though the initial impetus for the trip to Guantanamo appears to have been independent of the desired ethics consultation, these consultation requests soon influenced both how APA viewed the purpose of the trip and how it framed its objectives to various constituencies.

It appears that the idea of the APA president visiting Guantanamo was first broached in August 2006 when Kiley made his presentation to Council.[1783] Koocher said that, during lunch on the day of the Council meeting, Kiley had discussed the issue of hunger strikers at Guantanamo and their program of forced feeding detainees whose health had become unstable. Koocher recalled that some APA members present at the lunch had expressed ethical concerns about the forced feeding program, and Kiley therefore invited him to Guantanamo to review the forced feeding program and to ensure that it was being conducted ethically. Koocher explained that he then invited Behnke to join him because it made sense to invite the ethics officer on a trip with ethical evaluation as a component.[1784]

Sidley found no contemporaneous evidence illuminating the reason for the 2006 visit to Guantanamo, but it seems likely that, as with Levant's 2005 trip, the true purpose of the trip was to bolster DoD's public relations efforts. In a manner reminiscent of the visit a year earlier, Behnke and Koocher's schedule at Guantanamo was dominated by surface-level briefings and prepared remarks, without the opportunity for meaningful evaluation of, or investigation into, detainee operations. Contrary to Koocher's explanation that the trip was intended to provide an opportunity to assess the forced feeding program, Koocher and Behnke never interacted with detainees or observed a forced feeding during their visit. It seems extremely unlikely that Kiley genuinely invited Koocher to Guantanamo to evaluate an activity that Koocher was never permitted to observe. Rather, it is more likely that Koocher's explanation that Kiley invited him

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[1782] APA_0087663. In her interview with Sidley, Woolf recalled that during the 2006 Council meeting, the room "caught on fire" at the lack of a definition for "cruel, inhuman, and degrading" ("CID") treatment, with the strongest opposition coming from clinicians who stated that they were constantly being accused of being "cruel" in their treatment of patients. While Woolf believed that this was a knee-jerk reaction, she nonetheless tried to devise a legal definition of CID during a break in the discussions. Woolf interview (Mar. 26, 2015).

[1783] APA_0087916.

[1784] Koocher interview (June 12, 2016).

to visit Guantanamo to evaluate the forced feeding program was a convenient mask for the true public relations purpose of the visit.[1785]

Koocher's post hoc explanation for the visit also seems disingenuous because it squares so conveniently with the healthcare-focused strategy developed by Banks and Behnke more than a month after Kiley's invitation, a strategy prompted by consultation requests from BSCTs and medical personnel at Guantanamo. In October 2006, Carrie Kennedy, the Chief of Behavioral Health Services at Guantanamo, reached out to Behnke to request his advice regarding an issue that had arisen regarding the interactions between BSCT and medical personnel. Kennedy informed him that BSCT psychologists were upset that they were being excluded from command meetings in which both medical and mental health patient information were discussed. The issue Kennedy raised was contentious during the work of the PENS Task Force: the task force discussed including a statement that denied access to medical records for psychologists working as consultants to interrogators, but Banks had strongly opposed this prohibition because he was convinced that there were legitimate reasons that interrogators would need to access a detainee's medical records. In an apparent compromise, the PENS report included a statement that forbid interrogators from making improper use of medical records to the detriment of detainees' safety, but did not forbid access altogether in recognition that a detainee's "medical record may be helpful or necessary to ensure that an interrogation process remains safe. . ."[1786]

In a shift in DoD policy more than a year after the release of the PENS report, it appears that the military began to exclude BSCTs from discussions of detainee medical records, thus prompting Kennedy's request for a consultation. In his response to Kennedy, Behnke cited to the PENS report and emphasized that the report was clear in stating that it was important to keep "an absolute demarcation" between the roles of consultants and mental health providers. He added that "[i]t would cause a GREAT stir if it became known that BSCT psychologists were present in meetings in which medical and mental health patient information are discussed. This is precisely the sort of commingling that the PENS report addresses" (emphasis in the original).[1787] Behnke continued that "according to the PENS report, there must be an absolute demarcation between the role of consultant to an interrogation and health care provider. These roles must not be mixed. Access to information is mixing the roles. . . Also please note: were it to emerge in the media that BSCT psychologists were present at meetings in which medical and

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[1785] Koocher's later actions suggest that he supported, or at least facilitated the military's PR mission. Upon his return, Koocher prepared a slide deck that presented information that uniformly reflected positively on DoD, including a slide devoted to describing many types of information allegedly obtained from detainees as the "interrogation yield." APA_0005427. Although Koocher said that when he would make the presentation, he would clarify that the slides were intended solely to transmit information from the government, nothing in the slide deck states that the information merely reflects an account of what Koocher was told or gives the impression that Koocher was simply reporting on what he heard without meaningful inquiry or reflection. Moreover, the evidence demonstrates that Koocher generally took a position in support of the military and the work of psychologists in national security settings. For example, when Behnke responded to Pennie Hoofman's request for an ethics consultation, he commented that "Dr. Koocher, as you may know, is a very strong supporter of your work." APA_0062933.

[1786] PENS Report.

[1787] APA_0088797.

mental health information were being discussed, we would have a disaster on our hands. I cannot overemphasize what a problem this would create."[1788] Behnke again emphasized that "psychologists' presence at these meetings will be taken as evidence that these roles (consultant and health care provider) cannot be separated. That data, in turn, will be used to argue that psychologists should not serve in this role, because they cannot do so and abide by the ethical guidelines that their own association (APA) has set forth."[1789] Although Behnke paid lip service to his responsibility to assess the ethical implications of the issue, it is clear that Behnke's focus was almost entirely on the public relations consequences of this information leaking to the media.[1790]

Behnke's interpretation of the PENS report was, of course, at odds with the text of the report and the discussion animating the statement, namely Banks's opposition to such a rigid firewall between BSCT personnel and medical information. Perhaps recognizing the potential that his interpretation had for alienating Banks, Behnke asked Banks to review his response, emphasizing that "[i]t would be a DISASTER if it came out (e.g., in the New York Times) that BSCT psychologists were present during such meetings—that is collapsing the very line that everyone looking at this issue has been saying is so important to preserve (consultant and health care provider)" (emphasis in the original).[1791] Consistent with his position during the deliberations of the PENS Task Force, Banks responded to Behnke by presenting the "other side" and explaining that it was "important that some medical information be shared with the command, and that actually may include the interrogators."[1792] He clarified that he did not think it was an ethical requirement to preclude BSCTs from accessing medical information,[1793] and emphasized that they had "worded the TF report so that this would not be precluded."[1794] However, Banks conceded that "[y]ou make a strong case, counselor," and appeared to recognize that the public relations impact of the policy might outweigh his strict ethical analysis: "[H]aving said all that, if there is a way to complete the mission without the PR risk, that may be the right decision, I just want to be clear that I do not think it is an ethical requirement."[1795]

At the same time that Kennedy contacted Behnke regarding her concerns, Lt. Pennie Hoofman, one of the BSCTs at Guantanamo, also contacted Behnke to ask for a consultation on an ethical issue regarding the BSCT's role. Behnke responded that Hoofman should attempt to schedule a time during his upcoming visit to discuss these issues, but after speaking with Banks regarding "some of the topics that may be brewing," Behnke recommended that they defer the discussion to another time to ensure that they could spend sufficient time talking through the

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[1788] *Id.*

[1789] APA_0061301.

[1790] APA_0061329.

[1791] APA_0061338; APA_0061327.

[1792] APA_0088810.

[1793] APA_0088797.

[1794] *Id.*

[1795] *Id.*

issues.[1796] Behnke's concern that he could not fully address Hoofman's concerns during his scheduled visit to Guantanamo is yet another demonstration of the shallow nature of the trip and its true public relations purpose. Contemporaneously with Hoofman's inquiry, Kennedy again reached out to Behnke to raise another issue that she wished to discuss only by phone.[1797] Suspecting that Kennedy and Hoofman's concerns were related, Behnke reached out to Banks who clarified that Hoofman and Kennedy were each independently contacting Behnke about the same issues.[1798]

Immediately before his trip to Guantanamo, which was to take place on November 12-13, Behnke once again turned to his advisors within DoD to prepare for the visit, seeking briefings with both Debra Dunivin and Morgan Banks.[1799] It is clear that Banks felt that he needed to discuss some issues with Behnke because, just days before Behnke traveled to Guantanamo, Banks emailed "[w]e certainly do need to talk on this before you go down there." Following a call between Behnke, Banks, and Dunivin, Dunivin fed a list of questions to Behnke, all of which pertained to efforts to consult with behavioral science consultants, legal and ethical authorities, or written policies regarding the issue the three discussed.[1800] Although it is not clear from the documentary evidence what precisely Behnke, Banks, and Dunivin discussed, it seems likely that this conversation followed up on the earlier discussions relating to interactions between BSCTs and medical personnel.

When Behnke received details about the itinerary for the trip and saw that the President of the American Psychiatric Association was also scheduled to attend, he again wrote to Dunivin and Banks, his trusted contacts within DoD, to express his concern that ApA would use the trip "as another opportunity to say why the psychiatrists are in the right and we are not."[1801] In response, Banks outlined a strategy that would permit Behnke to avoid difficult questions about BSCTs and interrogations by focusing only on detainee mental health care, and "leav[ing] the Interrogation Support question alone."[1802] Shortly afterward, Behnke implemented Banks's strategy. He drafted an email to Hoofman, which he sent to Banks and Dunivin for review, to defer the planned meeting, explaining that "the trip has pretty clearly been designed to look at the health care mission, and given certain participants I do not want to raise the profile of the information-gathering activities."[1803] Behnke's message to Hoofman was entirely disingenuous: because it was not at all clear that the trip was "designed" to focus on health care; rather, such a

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[1796] APA_0062933.

[1797] APA_0062988.

[1798] APA_0088632.

[1799] APA_0062923.

[1800] *Id*.

[1801] H. Steven Moffic, *Can the Name of an Organization Be an Ethical Issue?*, *available at* https://www.novapublishers.com/catalog/product_info.php?products_id=45287&osCsid=5c086307d4ddb51ff5cfbe6d8498ee99.

[1802] APA_0088502.

[1803] APA_0062845.

focus was consistent with the post-hoc public relations strategy devised by Banks only days earlier.

Banks supported Behnke's decision to defer consultation, which he had himself advised, but encouraged Behnke to spend a few minutes with Hoofman, explaining that "[a]lthough I hold her partially responsible, she has had little or no consultation while down there."[1804] Behnke again implemented Banks's advice, setting aside a small amount of time to meet briefly with Kennedy and Hoofman. Behnke's interactions with Banks and Dunivin in the weeks before his visit to Guantanamo clearly demonstrate a direct line from DoD's advice to APA's actions; Behnke consistently turned to his advisors in the DOD for direction and then implemented the strategies and actions advised by them. Moreover, this direct line was hidden to all but the few individuals directly involved. Behnke increasingly devoted his energy to pursuing the agenda that he and Banks jointly developed while making it appear as though he was acting independently as APA's most senior ethics officer.

On November 16, 2006, after his return from Guantanamo, one of Behnke's first activities was to report back to Banks and Dunivin that the trip was "extremely interesting and informative."[1805] When Dunivin thanked Behnke for taking the time to travel to Guantanamo and prepare for the visit, calling him her "hero always," Behnke responded: "Debra, that is very sweet, but embarrassing when I think of what little I do in comparison to the risks and challenges you and your hardworking colleagues face, and of course Dr. Banks, who is goodness knows where. . . I'm frustrated that I've not been able to keep these storm clouds from continuing to gather around us."[1806] These exchanges are yet another example of the close friendships and partnerships Behnke developed with his contacts in DoD. Both parties continually expressed appreciation for the contributions of the other to their mutual goals.

Immediately after Behnke's return, he began to exchange emails with the ApA president, who had also attended the visit to Guantanamo. Behnke forwarded these emails to Banks, who shared his impression that the communications were a "good sign" that signaled that the new president did "not personally support their [ApA's] position."[1807] As the communications between APA and ApA ripened into a joint statement of APA President Gerald Koocher and ApA President Pedro Ruiz, emphasizing the areas of agreement between the positions of the two associations, Behnke once again turned to Banks for comments and advice.[1808]

Banks responded to Behnke that he was concerned by the reference in the joint statement to working "in accordance with international human rights instruments" because it would place DoD psychologists at risk. However, his resistance to that language was tempered by the phrase "consistent with their roles," which he interpreted as providing protection to psychologists. Behnke confirmed that he had worked on the "consistent with their roles" language in the

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[1804] APA_0088476.

[1805] APA_0064166.

[1806] APA_0064147.

[1807] APA_0090045.

[1808] APA_0064004.

context of the Resolution Against Torture adopted at the August 2006 Council meeting[1809] and had "discussed this text with one other individual who's doing the work and whom you've spoken highly of," to further address Banks's concerns.[1810] Thus, Behnke continually coordinated with his DoD contacts to ensure that APA's messaging was sufficiently nuanced to align with DoD's preferred policy positions in a way that would not limit DoD's ability to use psychologists in ways that were the most helpful or efficient.

In early January 2007, Behnke and Banks worked to schedule a visit to Guantanamo for the coming March to consult with Hoofman on the ethical issues she had raised the previous October.[1811] However, by the end of the month, Behnke informed Banks that there had been attempts to "get the Board to say that no one in APA leadership will travel to Guantanamo," and that even though his supervisor (Mike Honaker) gave him permission to go to GTMO, it was possible that the trip may not happen.[1812] Behnke's revelation of confidential information regarding internal Board discussions is yet another demonstration that he had come to see himself and APA as aligned with Banks and DoD in a joint enterprise. It is likely that Behnke's commitment to his joint efforts with Banks were at least partially fueled by their personal friendship, and a desire to be useful and supportive of one another. In response to Behnke's message regarding the cancelled visit to Guantanamo, Banks thanked him for coping with the frustration and emphasized "how important your involvement is" and "how valuable your contribution has been." Behnke, in turn, expressed his gratitude to Banks by commenting that "I know I can always count on you."[1813] These exchanges demonstrate that Behnke's close coordination with Banks and DoD was driven not only by his professional goal of advancing psychology, but also by his desire to serve in a critical support role to individuals with whom he had formed close personal relationships.

As further evidence that Behnke had become more closely aligned with DoD than with the APA Board, Behnke began managing a 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. Behnke schemed with

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[1809] Notably, the Resolution adopted by Council included slightly different language: "[P]sychologists shall work in accordance with international human rights instruments relevant to their roles."

[1810] APA_0064004. The identity of the "other individual" to whom Behnke refers is not clear, but it seems likely that Behnke discussed this language with a BSCT psychologist, as an individual "doing the work" that Behnke and Banks were discussing. Considering the close coordination between Behnke, Banks, and Dunivin throughout this period, and Behnke's communications with Dunivin as Surgeon General Kiley's contact person in the period leading up to the 2006 Council meeting, it is most likely that Behnke was telling Banks that he had consulted with Dunivin on the language included in the 2006 Resolution Against Torture.

[1811] APA_0089514.

[1812] APA_0063265.

[1813] *Id*.

Hoofman to distinguish this trip from the other VIP tours that Koocher and Levant had attended so that he could demonstrate to the Board that this trip was different in both nature and purpose. Notably, he emphasized that the trip would not be publicized to the general APA membership.[1814]

On March 19, 2007, Hoofman sent a formal invitation letter to Behnke, requesting his consultation on the APA Ethics Code, the PENS TF report, and Council resolutions as they applied to BSCT psychologists.[1815] Behnke acknowledged receipt of the letter and informed Hoofman that he would forward it to the APA Board. However, he continued to massage the message by indicating that "[g]iven COL. Banks [sic] very high media profile on this issue, his name may possibly draw attention."[1816] Behnke then forwarded Hoofman's letter to Banks, inviting him to "read between the lines and take whatever action you think appropriate re: wording of the memo."[1817] Although Sidley did not find evidence that Banks provided any further revisions before Behnke forwarded Hoofman's letter to the Board, Behnke's message was a clear invitation to Banks to excise his name from the letter.

Over the next several days, Behnke continued to communicate with Hoofman regarding travel arrangements and other logistics for the trip. Behnke applied for a security clearance to be able to consult with BSCTs and medical staff,[1818] and Hoofman applied for Invitational Travel Orders for Behnke. They also discussed the source of funding for the visit, and Hoofman clarified that she had obtained approval to fund Behnke's trip.[1819]

However, on March 24, 2007, Behnke wrote to Hoofman, Banks, and Dunivin to inform them that APA would be able to host a consultation only in Washington, DC, rather than at Guantanamo as planned.[1820] 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.

[1814] APA_0064307.

[1815] APA_0091087; APA_0091088.

[1816] APA_0064475.

[1817] *Id.*

[1818] APA_0064457. Although the documents do not show whether Behnke was awarded the clearance, he reported to Sidley that he never received it.

[1819] APA_0091005.

[1820] APA_0065065.

[1821] *Id*.

On March 25, 2007, Dunivin addressed an email to Brehm, Koocher, and Anton,[1822] in which she stated that she was "frankly incredulous" that APA would respond as it did to a request for an ethics consultation. She added that their decision was tantamount to a statement that APA is not interested in providing assistance to psychologists in the military, and that it raised "questions about the ability of APA leadership to make sound decisions to support military psychologists as directed by Council after discussion of the PENS TF Report."[1823] It seems clear that Dunivin was under the impression that Brehm, Koocher, and Anton, were responsible for cancelling Behnke's planned consultation trip to the BSCT psychologists. Whether or not these particular Board members were the individuals who most strongly opposed the trip, it is clear that Behnke had at this point lost the full support of the Board with regards to his agenda of support for the military. His staunchest supporters, Ron Levant and Gerry Koocher, were no longer in positions of strong power or influence, and he could no longer count on APA's governance bodies to accede to his preferred policy judgments, preferences which he developed in conjunction with Banks, Dunivin, and other contacts within DoD.

In June 2008, Behnke again declined an invitation to visit BSCTs at Guantanamo because he "was not entirely optimistic that a visit at this time (or the near future for that matter) will be possible."[1824] Instead, Behnke arranged to continue meeting BSCTs for training at Fort Huachuca.

V. CONTINUING COORDINATION ON MEDIA STRATEGY AND PUBLIC STATEMENTS: JULY 2006 – JULY 2007

In parallel to APA's efforts to coordinate with DoD regarding consultation at Guantanamo, Behnke also continued to coordinate with his partners in DoD regarding media strategies and public statements. The pattern of communications during this period demonstrates that Behnke and Banks were coordinating to ensure that both the military and APA were issuing statements on the interrogation issue that were consistent and mutually reinforcing. In a sense, the two were engaged in a joint venture to achieve their common goal of facilitating psychologists' participation in the military to the maximum extent possible. The problem with their partnership was that it compromised APA's independence and removed the ethical check that APA, as a professional association, was supposed to provide. 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.

During the summer of 2006, Behnke's communications with Banks primarily focused on APA's defense of the PENS Task Force. For example, in early July 2006, Behnke composed a summary of his "off the record" exchanges with reporter Art Levine, who was writing an article on APA's position regarding psychologists' involvement in interrogations.[1825] As discussion turned to Morgan Banks, including both targeted questions about Gregg Bloche's allegations that

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[1822] At the time, these individuals were President, Past President, and Recording Secretary, respectively.

[1823] APA_0090959.

[1824] APA_0099662.

[1825] APA_0061057.

Banks had advised the Guantanamo commander on SERE techniques that were applied during detainee interrogations and inquires regarding the ethical implications of his service on the PENS Task Force, Behnke put forward a vigorous defense of Banks:

> Morgan Banks has been forceful and unequivocal: ANY INVOLVEMENT BY A PSYCHOLOGIST IN ASSISTING OR CONSULTING TO AN INTERROGATION IS FOCUSED ON KEEPING THE INTERROGATION SAFE, LEGAL, ETHICAL, AND EFFECTIVE. . . . BANKS IS A VERY INTELLIGENT MAN AND THE LAST THING HE WOULD DO WOULD BE TO CALL ATTENTION TO HIMSELF IN THIS MANNER IF HE HAD SOMETHING TO HIDE.
>
> . . .
>
> Morgan Banks has been clear in discussions that ANY TORTURE OR ABUSIVE TREATMENT WILL INCREASE RESISTANCE TO AN INTERROGATION, AND THUS WILL HAVE PRECISELY THE OPPOSITE OF THE INTENDED EFFECT. . . . **IF THE GUIDANCE BANKS PROVIDED IS DECLASSIFIED, AND THE GUIDANCE DOES NOT INVOLVE THE ABUSIVE TECHNIQUES BLOCHE DESCRIBES IN THIS NEW YORK TIMES EDITORIAL, IS BLOCHE PREPARED TO MAKE A PUBLIC APOLOGY TO MORGAN BANKS?**[1826]

Behnke forwarded this summary to Koocher and Levant, commenting that "it has become clear that there is, for lack of a better term, a 'left wing conspiracy' against APA on this issue, something I've suspected for a long while but have become entirely convinced of now."[1827] When Behnke forwarded the email and summary to Banks, he warned Banks in confidence that Levine was "really coming after" Banks, and asked Banks to "[p]lease let me know where I've gone astray. Also, if you think there are other points I should make, I can do so. I hope I've done a good job here. . ."[1828] 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.

Behnke and Banks also coordinated APA's response to fend off other reporters writing articles critical of the PENS Task Force. On July 19, after Mark Benjamin, a reporter from *Salon*, started reaching out to members of the PENS Task Force for interviews, Behnke emailed only the military-affiliated members of the task force to describe the response that APA had been giving to similar questions.[1829] When Banks circulated one of Benjamin's previous articles that

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[1826] *Id*. (emphasis in original).

[1827] APA_0061056.

[1828] *Id*.

[1829] APA_0087235.

had been highly critical of military psychologists, the group decided to funnel all inquiries through Behnke's office.

On July 30, 2006, Behnke forwarded to Banks a message he had sent to Levant, Koocher and Gilfoyle regarding the adequacy of legal protections and process afforded to detainees, asking for Banks's thoughts on the issue.[1830] In a second email exchange on that day titled "Eyes only thoughts," Banks and Behnke discussed their thoughts on the legal status of and rights granted to Guantanamo detainees. Behnke commented that he "got together with Jennifer Bryson a few weeks ago," and that from their discussion, he understood that the International Committee of the Red Cross had access to all detainees subjected to interrogation.[1831] Banks confirmed that "I believe [ICRC] ha[s] access to those at GTMO, but I cannot speak definitively, or for the US government, on that question," commenting that he would need to check with the JAGs for accuracy. It is clear from Behnke's reference to his meeting with Bryson, an interrogator with the Defense Intelligence Agency in the Office of the Secretary of Defense, that he was consulting broadly in both military and civilian parts of DoD to receive guidance on APA policy.

Behnke's requests for advice began to broaden over the following months, to include discussions not only of substance but also of presentation. For example, on September 21, 2006, Behnke consulted Banks to ensure that a letter signed by Koocher and Zimbardo, which urged Senator McCain to oppose legislation that would exempt the CIA from the absolute ban on torture, would not cause problems for him.[1832] Two days later, on September 23, Behnke forwarded a discussion he had with Koocher regarding how to frame the chronology of APA's responses to the torture issue. In his message to Koocher, Behnke explained:

> [W]e should think through how the issue is being framed. The issue has been framed (incorrectly, I believe) as disagreement about what interrogation techniques are permissible/prohibited. In reality, within APA there is virtually no disagreement whatsoever on this question — there is near total consensus on which interrogation techniques are ethical and which are not . . .
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> I think we do much better to frame the debate as one over the correct strategy to reach our common goal: ethical interrogations. The issue that is the subject of debate is whether we should be at places like Guantanamo. The psychiatrists have chosen one strategy: issue a "ban" . . . The problem with that approach is that one loses any ability to influence policy — one no longer has a place at the table.
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> APA's approach has been to stay engaged to make our voice heard and our influence felt.

[1830] APA_0062364.

[1831] APA_0062349.

[1832] APA_0061670.

When Behnke forwarded his analysis to Banks in confidence and asked for his opinion, Banks commented that it was a "[s]olid analysis" and added: "The bottom line is that there is no light between the DoD position and APA's position, that I can see. You are VERY correct in pointing out that how you frame the debate will determine the outcome. We help keep them safe. (All those against safety please stand up.)"[1833] 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. This exchange is yet another example showing that Behnke and Banks worked together to closely align both the substantive policies and the messaging efforts of APA and DoD.

Several months later, after Stephen Soldz circulated a "Letter to the CEO of the American Psychological Association" on November 28, 2006, Behnke prepared a draft response and sent it to Banks, asking him to identify any potential problems in the letter and inquiring as to what points would make it stronger.[1834] On December 3, Banks reacted to the "inflammatory language" in Soldz's letter and commented that he was not aware of any credible evidence that John Leso had participated in abuse of any detainees, as the letter suggested.[1835] He also provided comments on Behnke's draft response,[1836] some of which were incorporated into the next revision to Behnke's letter.[1837]

Behnke's consultation with Banks and Dunivin continued in 2007 and over the next several years. During a debate with another APA member on the Division 39 listserv in January 2007, Behnke emailed both Dunivin and Banks to solicit their thoughts on what his response should be.[1838] Banks responded that Behnke should emphasize that APA has consulted with the Army in developing a policy and with individual military psychologists regarding how to effectively perform their roles. He also suggested that Behnke emphasize that APA has developed policy, offered training, and engaged in consultation with military psychologists to "make sure that foreseeable ethical challenges would be forestalled."[1839] Banks concluded by providing a quote that Behnke could use in his response:

> This issue is one of the most complex and challenging of any ethical conflict, and Dr. Behnke has helped the Army to carefully craft useful guidelines that protect

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[1833] APA_0088369 (emphasis in original).

[1834] APA_0063981.

[1835] APA_0089874.

[1836] APA_0089875.

[1837] APA_0063955.

[1838] APA_0063320.

[1839] APA_0063338.

> the individual detainees, while still allowing the use of psychology's knowledge of human behavior to help our country prevent atrocities.[1840]

Banks's response shows the close collaboration and joint purpose between APA and DoD on the vital issue of psychologists' involvement in interrogations. In effect, Banks applauded Behnke for accepting his guidance and direction in drafting the PENS report to closely match DoD's desired outcome, which allowed DoD to, in turn, use the PENS report to bolster its own set of guidelines.

Behnke's response to Banks's comments demonstrates his disdain for critics that opposed DoD's position and his understanding that APA would further DoD's preferred message without permitting any attribution back to DoD:

> [U]nlike some of our colleagues whose ability to generate prattle on this subject is apparently endless, you [Dunivin] and Morgan [Banks] have full-time work that is hugely demanding and important. . . . I will work with Morgan's statement to convey his message without indicating that there are particular persons/positions to be identified, which with this crew would be a bit like waiving [sic] a bloody rag in front of a grizzly.[1841]

On January 26, Behnke responded to the Division 39 critic, incorporating some of Banks's ideas regarding the importance of APA's contribution to DoD. Behnke wrote: "APA's approach to interrogations is having an increasingly visible and strong presence in the Department of Defense and has been adopted into Department of Defense policy . . ."[1842] Once again, Behnke accepted the guidance of his DoD advisors and allowed them to steer APA messaging and policy.

As the interrogation issue remained the subject of media stories, private reports, and member inquiries, Behnke continued to turn to Banks as an advisor regarding how to respond and, increasingly, Banks did the same with Behnke. In April, Behnke and Banks collaborated again on DoD's response to a speech by Stephen Soldz, which had come to the attention of Guantanamo officials. On April 18, 2007, Banks emailed Behnke the transcript of Soldz's talk about, among other things, psychologists' involvement in military interrogations, which had been delivered the day before. Banks stated that he:

> [R]eceived a request from the Admiral in charge of GTMO. The attached article was published in the local GTMO newspaper, and he would like me or someone 'at my level' to respond. I am looking at it right now, but wanted to check and see if you were going to address it, or if you had any recommendations … I appreciate your thoughts, and if you are planning on a formal response, then, with your permission, that would probably be best.[1843]

[1840] APA_0063320.

[1841] *Id*.

[1842] APA_0063326.

[1843] APA_0091534.

Two minutes later, Behnke asked if Banks was available for "a quick shout," and Banks gave Behnke a number at which to reach him.[1844] Within two hours, Behnke sent Banks a draft response, which claimed that Soldz "leaves out numerous facts central to the discussion, and distorts other facts that would lead a reasonable person to precisely the opposite conclusions that he appears to draw."[1845] 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 clear that the partnership was not just between the two men, but rather their respective entities as well. Banks's message revealed a direct line between him and the commander of Guantanamo, and asked that Behnke assist him in drafting a statement in defense of DoD that was specifically requested by the DoD commander.

Upon receiving Behnke's proposed response, Banks responded that the draft was "[f]antastic" and asked "[a]s we figure out what the admiral wants, can I give you credit, or is this 'deep bacground' [sic]?" Behnke replied that it was "probably best to keep me on deep background, at least for the moment. . . . Let's see what the admiral wants, and then we can refine if need be."[1846] Banks commented that he "plan[s] on using [the draft], and [doesn't] like to plagiarize," and Behnke responded: "Well Morgan, it may be my words, but it's all yours conceptually."[1847] The coordination between Behnke and Banks to keep Behnke's role concealed echoes their maneuvering to keep hidden Banks's guiding hand in statements Behnke made on behalf of APA. Behnke and Banks acted as teammates in their efforts to shape APA and DoD messaging, but in many ways they were "silent" partners: Behnke and Banks ensured that the joint effort was concealed from their respective entities, and that it appeared to APA and DoD leaders that each was acting independently on behalf of his own organization. This exchange is yet another indication that an important part of the collaboration was concealing the shared effort from anybody not directly involved in the partnership.

On May 15, 2007, Behnke reached out to Banks to ask him for advice on the latest draft of a statement he was preparing regarding APA's stance on interrogations.[1848] He commented that "[w]e're starting to take some pretty heavy fire again, in anticipation of Convention. Would prefer that we weren't meeting in San Francisco this year, but that's well above my pay grade."[1849] Behnke was likely concerned that APA would encounter more aggressive protests and criticisms in such a liberal city, some of which they might have avoided by holding Convention in another location. The following day, Behnke alerted Banks that Katherine Eban's

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[1844] APA_0091536.

[1845] APA_0065361.

[1846] *Id*.

[1847] APA_0065369.

[1848] Isolated requests for advice continued over the following months. For example, on May 29, Behnke forwarded a post to the Social Justice Division listserv related to Soldz's article titled "Pentagon IG Report Details Central Role of Psychologists in Detainee Interrogations and Abuse: Shrinks and the SERE Technique at Guantanamo," asking Banks whether they could discuss it. Banks replied "[c]ertainly." APA_0092295.

[1849] APA_0065817.

piece for *Vanity Fair* was getting close to publication, and that "a focus of her article will be SERE. I don't think it will be pretty . . . Did you ever actually speak with her?" Banks responded that he did not speak with Eban and asked Behnke what he thought she would write in her article. Behnke replied that he did not know what Eban was planning.[1850]

On June 10, 2007, Dunivin wrote to Newman, Behnke, and Farberman about an open letter from "Concerned Psychologists" to APA President Sharon Brehm, which had been issued as a press release the day before, commenting "[t]his is pretty ugly."[1851] Several days later, on June 14, Behnke reached out to Dunivin to ask her to put him in touch with a JAG in the Army so that he could ask "a couple of questions about law and interrogations" in connection with a response he was composing to the open letter.[1852] Behnke's request to Dunivin is another example of his pattern of bringing in his teammates in DoD to give guidance regarding APA's public statements. Notably, Behnke did not have a habit of engaging in broad outreach: Sidley has found no evidence that Behnke would regularly contact individuals aligned with peace psychology for their input regarding APA's position statements, and there is no evidence that he reached out to a human rights lawyer in this case. Rather, Behnke consistently consulted with only his partners at DoD for feedback and advice on the statements APA would make.

At this point, Behnke and Banks began to become more guarded in their conversations, instructing one another to destroy records of their communications. On June 17, after Banks made a passing reference to his "successful interview, (I think . . . .)," Behnke responded that he looked forward to hearing about it and asked if he could mention that Banks had spoken to the Senate Armed Services Committee.[1853] Banks responded:

> Steve, (Please delete this after reading it. It is for your eyes only.)
>
> I still owe you an answer on that. I completely forgot to ask. My expectation is that it will be OK, but I want to make absolutely sure. There is some REAL politics going on here. I mean REALLY naked politics. There are a couple things I want to run past my lawyer first, based on some of the things they said. I am 95% sure I will give you a bunch that you can say, but not until late tomorrow.
>
> Overall, though, I believe that I was able to give an accurate picture of my behavior. . . . I gave them a copy of the PENS report, although I expect they were already fully aware of it. They did not question me at all on it, other than a final ethical question that I answered by referring to the report. . . .
>
> PLEASE DELETE this email after you have read it.

[1850] *Id*.

[1851] APA_0092064. Behnke also received the open letter as a forward from Brad Johnson. A number of military individuals, including Banks and James, had provided comments on the letter. APA_0097952 & APA_0097953.

[1852] APA_0091956.

[1853] APA_0066717.

Behnke assured Banks that the email was "[d]ouble deleted."[1854]

The following month, Behnke's DoD partners again contacted him to request confidential advice regarding a public statement DoD planned to make to APA itself. On July 2, 2007, in an email titled "Please review, then destroy," Banks sent Behnke a first draft of his letter to Brehm, lobbying her to continue APA's support of military psychologists. Banks asked Behnke to be "brutal" in his revisions because "this is damn important to me."[1855] Because it was not approved for distribution, Banks requested that Behnke destroy it after giving him feedback.[1856] On July 7, Banks forwarded another draft of the same letter to Behnke, again requesting feedback.[1857] The following day, Behnke sent Banks a robust set of comments to what he characterized as "one smokin' letter." Behnke suggested that Banks frame his message more positively to remove the "tinge of a defensive tone," and added several substantive points.[1858] He concluded by proposing two new paragraphs as a "brief ending":

> The recent report of the DoD Inspector General has generated much discussion and debate. As I have explained, I take issue with some of the facts presented in the report. Nonetheless, I do believe the report captures a truth: A conflux of factors led to behaviors that fall beneath the dignity of the United States and that have placed a stain on our country's reputation. It is essential that we as a profession and we as a country understand what occurred, to ensure that those in our country's custody are never treated in any manner other than with dignity and respect. To that end I am giving the Senate Armed Services Committee my full cooperation and I encourage all of my colleagues to do likewise.
>
> At the same time, I must implore you, as President of the Association, and those who are writing these letters, that besmirching the reputations of psychologists will not serve any worthy goal. There are psychologists—several of whom served on the PENS task force—who have expended considerable professional efforts at great personal cost to uphold our core values and to ensure the humane treatment of all detainees. It is a tragedy that some of these courageous individuals have now had their reputations tarnished based on conjecture, speculation and innuendo. The tragedy is compounded because some of these individuals, by virtue of their positions, are not able to speak out in their own defense."[1859]

In Banks's next draft of the letter, he accepted Behnke's substantial revisions and additions almost without alteration.[1860] Although Banks had written an initial draft, Behnke's

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[1854] *Id*. (emphasis in original).

[1855] APA_0097254; APA_0097255.

[1856] *Id*.

[1857] APA_0097148; APA_0097149.

[1858] APA_0066941.

[1859] *Id*.

[1860] Banks omitted the phrase "to uphold our core values," perhaps thinking that this rhetorical flourish might not be credible.

substantial comments and partial rewrite demonstrate that he, in practical effect, ghostwrote a message from DoD that was intended to lobby his own organization.

Banks and Behnke's agreement beginning in June to not only speak in confidence, but also to destroy the records of their conversations might explain why records of communications between the two drop off sharply during the summer of 2007.[1861] It is impossible to know whether their discussions tapered off naturally as Behnke needed less guidance or whether the two continued to discuss their joint media and policy strategies. However, the abrupt end to conversations between Behnke and Banks in 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.[1862]

VI. BEHIND-THE-SCENES COORDINATION WITH DoD REGARDING THE 2007 COUNCIL RESOLUTION: AUGUST 2006 – AUGUST 2007

At the August 2006 Council meeting, Neil Altman, representing Division 39 (Psychoanalysis), moved to add a new business item titled "Psychologist Participation at US Detention Centers" for consideration at the August 2007 Council meeting. The main motion of the item requested that Council opt for "a moratorium on the participation in any form, of psychologists at detention centers where the rule of law (international and domestic) has been called into question by the executive branch of the US government." Altman introduced "substitute motion #1" to accompany his main motion, which requested that Council adopt a resolution to put a moratorium on psychologists' involvement in U.S. detention centers. The motion was referred to the Board of Directors, and six Boards and Committees.[1863]

Shortly after Council met, Behnke started drafting messages designed to convince APA members to embrace a policy of engagement in the complex ethical issues related to interrogations. On August 24, 2006, Behnke asked Banks to review a draft email responding to a discussion about ethics and interrogations taking place on the Division 44 (Society for the Psychological Study of Lesbian, Gay, Bisexual and Transgender Issues) listserv and to let him know "if it looks okay."[1864] In that draft email, Behnke argued that there was no disagreement

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[1861] Indeed, the only other significant communication we found in APA's email records between Behnke and Banks leading up to the August 2007 Convention was a July 7 request for Banks's preclearance of a response to Steven Reisner's inquiry regarding whether implementing the techniques from Rumsfeld's April 16, 2003 memorandum would constitute a violation of the Ethics Code and PENS Report. APA_0066964.

[1862] Sidley considered whether the tempo of discussions between Behnke and Banks might have changed because Banks deployed overseas or otherwise became less available, but Banks confirmed that he was stationed at Fort Bragg during 2007 and 2008 and did not deploy overseas during that time. Email from Banks to Sidley (June 24, 2015).

[1863] Approved Minutes of the Council (Aug. 13 –16, 2006) & Draft Nonconfidential Minutes of the Ethics Committee (Oct. 26 – 29, 2006). The Boards and Committees that reviewed the motion were: 1) the Ethics Committee; 2) the Board for the Advancement of Psychology in the Public Interest; 3) the Board of Professional Affairs; 4) the Committee for the Advancement of Professional Practice; 5) the Committee on Division/APA Relations; and 6) the Committee on Legal Issues.

[1864] APA_0062048.

among the membership that ethical interrogations did not involve torture or CIDT, and that "APA must decide between a policy of engagement or a policy of disengagement." Behnke concluded that "[n]ature abhors a vacuum, and if APA pulls out there will be others to fill that space. I think it makes good sense for APA to stay engaged to make our positions clear and our influence felt."[1865]

On the same day, Art Levine from the Washington Monthly emailed Behnke and asked him about the following off-the-record comment he made about Morgan Banks in relation to the PENS report: "WHY IN THE WORLD WOULD BANKS RAISE HIS PROFILE BY PARTICIPATING ON AN APA TASK FORCE THAT WOULD EXPOSE HIM TO PRECISELY THE KIND OF SCRUTINY HE HAS RECEIVED FOR THIS ROLE??"[1866] Within twenty minutes, Behnke forwarded Levine's question to Banks and asked him to "please advise."[1867] Banks responded later that evening and told Behnke that his support "means a great deal to [him]." Banks suggested that Behnke respond with the following:

> Dr. Banks is working hard to put into place a written policy of what psychologists may and may not do while supporting interrogations […] You have seen what we are trying to put into place, and it is totally consistent with the ethical standards of the APA. Currently, Dr. Banks is away from his office, and will not return until next month […] Dr. Banks agreed to be a member of the Task Force in order to establish clear ethical guidelines for his psychologists.[1868]

Incorporating Banks's suggestions, Behnke sent a draft statement back to Banks for his approval several minutes later. The revised draft stated:

> Morgan Banks has made clear that the effect of SERE training is to increase resistance to interrogation. Thus, relying upon SERE techniques to interrogate would be directly counterproductive to the goal, and so not part of any competent interrogator's technique. Dr. Banks has vigorously and steadfastly advocated that interrogation must in every instance be safe, ethical, and effective and on the PENS task force Dr. Bank's [sic] role was to help establish these clear ethical guidelines that would be the rule for APA members and for any psychologist advising or consulting to an interrogation.[1869]

Shortly thereafter, Behnke began to engage in a back-and-forth email discussion with Art Levine from *Washington Monthly*, who focused on the issue of APA's lack of clear guidance on specific examples of interrogation techniques that would be considered unethical. On September 9, 2006, Levine emailed Behnke and pointedly asked "if there is such universal agreement between leadership and dissident members over abusive interrogations, why hasn't the APA in

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[1865] *Id.*

[1866] APA_0062039 (emphasis in original).

[1867] *Id.*

[1868] *Id.*

[1869] APA_0062033.

writing and proclaimed from the rooftops specific techniques [sic] that are banned and psychologists should have no role in whatsoever?"[1870] About an hour later, Behnke responded emphatically that there is

> "NO fight over definitions in APA of what is abusive … NO ONE IN APA is arguing that it is okay to use PHOBIAs [sic], PAINFUL STRESS POSITIONS, WATERBOARDING, DISROBING, EXTREME TEMPERATURES, ETC. ETC., IN INTERROGATIONS. THIS IS NOT WHAT THE DEBATE IS ABOUT—THERE IS NO 'IT SHOULD BE OKAY TO MAKE SOMEONE STAND FOR 4 HOURS' CONTINGENT IN APA. ALL AGREE THAT THESE TECHNIQUES ARE UNETHICAL, AND THAT NEEDS TO BE MADE VERY CLEAR IN THE ARTICLE!"[1871]

Less than twenty minutes later, Behnke sent Levine another email, in which he stated that while people might criticize APA for not communicating "quickly or clearly enough":

> What is absolutely false and incorrect is that there is any group of APA members in favor of these techniques, or that the Ethics Committee in its commentary/casebook will leave any room for such techniques. . . . EVERY MILITARY PSYCHOLOGIST WITH WHOM I HAVE SPOKEN WOULD BE IN VIRTUALLY COMPLETE AGREEMENT WITH REISNER, ZIMBARDO, ET AL., ON WHAT SPECIFIC TECHNIQUES SHOULD BE PROHIBITED.[1872]

The next day, Behnke followed up with another email to Levine and emphasized once again that "the APA membership is in near total agreement on what specific techniques should be prohibited: Reverse SERE techniques, waterboarding, forced nudity, painful body positions, the use of phobias, extreme temperatures, 'torture light,' etc., etc. As I say, in the casebook/commentary the Ethics Committee will make clear that all such techniques are prohibited, and there is no voice in APA to argue in favor of such techniques—it's simply not an issue."[1873] The conversation continued in this vein over the next few days, with Behnke repeatedly insisting that an Ethics Committee commentary/casebook would be out "very soon" And would address Levine's questions about prohibiting specific techniques.[1874] No such commentary was produced until 2011, five years later, when the Ethics Office posted a collection of vignettes to its website.

Whether it was in direct response to Altman's proposed moratorium, or in light of mounting pressure from journalists like Levine who pushed for the APA to be clearer on its stance with respect to specific interrogation techniques, Behnke started contemplating whether to issue a statement from the Ethics Committee on specific techniques. As with other matters,

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[1870] APA_0061806.

[1871] *Id.* (emphasis in original).

[1872] *Id.* (emphasis in original).

[1873] *Id.*

[1874] APA_0061779.

Behnke checked in with Banks first to make sure he approved. A few days after his exchange with Levine, on September 17, 2006, Behnke contacted Banks to ask whether it "would present any problems" for him if APA adopted a resolution "in terms of what is prohibited/permitted."[1875] Behnke added: "I assume not, but let me know."[1876] Presumably, Behnke assumed that an APA pronouncement against a specific set of techniques would not be problematic for Banks because Behnke knew the Army had just released its own list of banned techniques. Only ten days earlier, when Behnke and Banks exchanged emails on the topic of the newly revised Army Field Manual, Behnke exclaimed "[e]xcellent news … How can I get a copy."[1877] The newly-approved Army Field Manual on Human Intelligence Collector Operations 2-22.3, issued in early September 2006, had set out a list of prohibited interrogation tactics.[1878] Although Sidley does not have a record of Banks sending Behnke the Manual, it is clear that Behnke obtained it because he forwarded a link to the Manual to Koocher on October 3, in preparation for one of Koocher's media appearances.[1879] In his email to Koocher, Behnke said the Manual showed "very positive developments in terms of identifying specific techniques that are ethical and unethical."[1880]

Banks responded to Behnke's query about prohibiting techniques by agreeing it would be fine as long as APA "adopt[ed] a resolution that endorse[d] the new manual."[1881] However, Banks cautioned that "you may want to be very careful about not inadvertently limiting what police or other law enforcement psychologists can do. DoD psychologists will abide strictly by the manual."[1882] Banks further elaborated on the Manual in an October 4, 2006 email to Behnke, explaining that even though the Army Field manual contained a list of "prohibited actions" that could not be used "in conjunction with intelligence interrogations,"[1883] and "although the revisions are substantial, at least in explicating do's and don'ts[,] [t]he techniques really haven't changed much. The ugly truth is that it is a MUCH better read, with much better explanations, but little substantial change."[1884] Behnke responded to thank Banks for his explanation and to "certainly let [him] know if there is anything we can do here in the APA Ethics Office to support you and your colleagues in the incredibly challenging and important work you all are doing."[1885]

[1875] APA_0061765.

[1876] *Id*.

[1877] *Id*. Behnke eventually requested the link to the Manual from Banks because Behnke could not access the Army home page.

[1878] FM 2-22.3 Human Intelligence Collector Operations, a*vailable at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm2_22x3.pdf.

[1879] *Id*. Behnke eventually requested the link to the Manual from Banks because Behnke could not access the Army home page.

[1880] APA_0088218.

[1881] *Id.*

[1882] APA_0088218.

[1883] APA_0093472.

[1884] APA_0613995.

[1885] APA_0613995.

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.

On October 23, 2006, Behnke informed Banks that the Ethics Committee was meeting during the last week of the month—in a few days—to discuss whether to support a statement condemning specific psychological methods used in interrogation, including sensory deprivation, sleep deprivation, stress positions, sexual shaming, exposure to extreme temperatures, and waterboarding. Specifically, Behnke stated that the Ethics Committee was going to consider six points that Mike Wessells had identified after Behnke requested his thoughts on what a "simple one-page statement" on ethics and interrogation would contain.[1886] Behnke sent Banks the points Wessells had proposed, with only minor changes: (1) recognition and condemnation of the use of specific psychological methods; (2) explicit recognition that methods such as waterboarding and prolonged sleep/sensory deprivation constitute torture; (3) expression of strong concern that certain methods are still used by the CIA and groups to whom interrogations may be outsourced; (4) recognition that psychologists have an obligation to report these methods if they see/hear/suspect/know of their use; (5) strong expression of commitment to international human rights obligations as defined under the Convention Against Torture ("CAT") or Geneva Conventions; and (6) strong call for psychologists not to participate in interrogations or be on sites that have operated outside of the Geneva Conventions, including Guantanamo Bay.[1887]

Behnke told Banks that his sense was that the Ethics Committee could support all of these statements, with the exception of the last point.[1888] Banks responded that an OSTG/MEDCOM Policy statement had finally been signed and said that it would be "helpful if the Ethics Committee could review a copy of it before they make another statement."[1889] Banks also added comments after each of the proposed statements Behnke had sent to him. As to the first statement, Behnke expressed the following reservation:

> This statement could be interpreted to be fairly restrictive, depending on how "sleep cycle inversion" is defined. Is it ethical to question someone at 3:00 AM? One could read this to imply that it is unethical. Generally speaking, I concur with the prohibition against using sleep deprivation as a technique, but the devil is in the details, and the more that the committee says, the more details are out there for someone to use against US soldiers.[1890]

[1886] APA_0062998.

[1887] APA_0061358.

[1888] *Id*.

[1889] APA_0088823.

[1890] *Id*.

Banks "concur[red]" with the second statement, adding that "[t]hese are already prohibited by the FM [Field Manual]."[1891] To the third statement, he commented that he had "no knowledge of anything referenced … I am only concerned with the proper use of legal techniques, as laid out in the new FM." He found the fourth statement to be "consistent with the TF report, unless we are now defining 'these methods' to include what time of day we question someone." In response to the fifth statement, he said that the "US is a signatory to both [CAT and Geneva Conventions]. Therefore they are US law. If you want to again state that psychologists must abide by US law, then OK." As a postscript, Behnke joked about the repetitiveness Banks alluded to, asking over and over whether the Committee should state that "psychologists must abide by US law."[1892] And, as Behnke predicted, Banks had a strong response to the proposed sixth statement, which essentially called for a moratorium of psychologists participating in interrogations or "be[ing]" on sites that do not operate consistent with the Geneva Conventions:

> As you are aware, this statement is more than a killer, it is grosslyinaccurate [sic], and demonstrates a very simplistic (if not juvenile) understanding [sic] of the issues. ***If any statement similar to this came out of the ethics committee, it would have very negative repercussions***.[1893]

Banks concluded his comments by stating that "[w]ith the exception of the last (really silly) statement, I generally see no problem with the rest, other than the comment about 'sleep cycle inversions.' I am not sure what that actually means, and would be afraid that it could be interpreted in a very broad manner." Behnke thanked Banks for his comments and changed the statement regarding sleep deprivation, stating that "[i]n terms of the sleep issue, I think we will likely use something on the order of 'depriving an individual of necessary sleep for the purpose of eliciting information,' or something of that nature. Would that sound okay?"

Banks responded to Behnke's amended language on "the sleep issue," stating that "'depriving an individual of necessary sleep for the purpose of eliciting information' sounds pretty good at first blush. Necessary sleep obviously doesn't imply ten hours a day, but the statement does appear to meet the intent of those who want to make sure we don't abuse people. As always, your writing is concise and clear."[1894] As had become a pattern, Behnke sought pre-approval of his statements and conformed APA's policy to Banks's suggestions.

Behnke then asked Banks how he could obtain a copy of the OSTG/MEDCOM policy and on Banks's advice subsequently submitted a formal request for it.[1895] Behnke received a copy of the OSTG policy statement from Banks on October 26, 2006, the first day of the Ethics Committee's four-day meeting.[1896] According to the minutes for the meeting, the Committee, as

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[1891] *Id*.

[1892] *Id.*

[1893] *Id*. (emphasis added).

[1894] *Id*.

[1895] *Id.*

[1896] APA_0088765.

the "lead group" for Altman's resolution, reviewed and discussed the proposed resolution. On October 31, Banks wrote to Behnke to ask how the policy, which Bruce Crow had sent the previous day to Koocher and Behnke (copying Banks and Dunivin), had been "received" and whether it "help[ed] with the deliberations."[1897] Behnke responded that "it blew the Committee away that the PENS report was appended to the document."[1898] This series of communications shows that Behnke sought Banks's approval for every turn of phrase he might suggest to the Ethics Committee in regard to this topic and that Banks and Behnke worked together to ensure that the Ethics Committee did not take any positions that undermined the policies adopted by the military.

After the Ethics Committee's meeting at the end of October, and after consulting with Banks, Behnke sent Altman a letter from the Ethics Committee on November 1, 2006 and stated that they were "eager to engage in a dialogue with [Altman] over what the Committee views as the item's central ethical issues."[1899] The letter noted several issues: 1) the Committee was uncertain as to the intended scope of "U.S. detention centers" and believed that it could be interpreted to include psychiatric hospitals, jails and prisons, or immigration centers; 2) the Committee was unclear which group of individuals Altman wished to identify as "foreign detainees"; 3) the Committee wanted Altman to explain what he thought his proposal could achieve that the August 2006 Council Resolution did not; 4) the Committee asked why Altman's proposal focused on the nature of a setting rather than specific behaviors; 5) the Committee questioned why the decision to work in the settings set forth in the proposal cannot be made by an "ethically-minded psychologist who fully supports and desires to abide by all of the relevant APA statements and resolutions"; 6) the Committee wanted Altman to distinguish between a political basis for his proposal and an ethical basis; and 7) the Committee wanted a better understanding of the implications of setting such a precedent and how establishing a moratorium based on location might preclude psychologists from practicing in other settings.[1900]

Later in November 2006, Behnke again reached out to Banks to see if he would have any objection to an APA statement condemning the use of psychology or psychological techniques for the purpose of torturing or abusing any individual.[1901] At this point, Behnke was still reviewing Altman's resolution and on November 23, 2006, he asked Banks to help formulate an Ethics Committee response to a November 5 letter from Altman. In the letter, Altman responded to several points raised by the Ethics Committee and identified several additional issues, including: 1) in a situation where there is an inconsistency between the human rights standards of the United Nations and those of the U.S. government, there should be clear guidance to psychologists who may be caught between differing standards; and 2) certain ethical standards, such as 1.02 and 1.03, should be revised so that lawful U.S. orders do not trump ethical principles and psychologists' commitment to international law. In his comments, Banks stated that there were "several logical flaws" in Altman's argument, most significantly Altman's "lack

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[1897] APA_0088710.

[1898] APA_0063063.

[1899] APA_0063721; APA_0063722.

[1900] *Id.*

[1901] APA_0064066.

of faith in the U.S. political system," and his position that the APA should "categorically side with 'international law.'"[1902] He also stated that Altman failed to address the "ethical responsibility we have to society," and failed to recognize that it is "ILLEGAL for a soldier to disobey a legal order. . ." Banks warned that Altman was essentially arguing that soldiers should disobey legal orders, and that this would be "dangerous ground that he, and potentially APA, are treading."[1903] Finally, Banks commented that he could "foresee very unpleasant results, both to the profession and to APA" if APA were to accept Altman's position on international human rights laws governing the conduct of APA members, warning that "[w]e run the risk of becoming as impotent as anthropology."[1904] Interestingly, when Sidley spoke to Nancy Sherman, the Chair in Ethics at the United States Naval Academy, she commented that all military personnel have a duty to abide by their moral conscience and to "never accept an order [they] believed to be immoral." In fact, Sherman stated that soldiers had a moral obligation to "question orders, right up the chain of command, and disobey orders if [they] must, if they think an order involves immorality."[1905]

Altman and the Ethics Committee exchanged several additional letters between November 2006 and January 2007, in which the Committee continued to express concerns about the scope of Altman's proposed moratorium and seemed generally unsupportive of the resolution. Based on a review of the email traffic during this time, it looks like the Ethics Committee mostly communicated via teleconferences, and did not hold in-person meetings to discuss Altman's proposal.[1906] The proposal of drafting a statement or a commentary/casebook on the use of specific interrogation techniques seems to have dropped off the Committee's (and Behnke's) agenda and Sidley did not find any relevant email discussions on this topic. It was not until March 2007 that the issue of drafting a statement on specific interrogation techniques resurfaced. On March 13, 2007, Behnke requested Banks's feedback on a draft titled "Statement of the APA Ethics Committee" that articulated a broad position statement and asserted an "absolute prohibition against the use of" certain techniques. He asked Banks to "make sure we're okay."[1907] A portion of this statement ultimately became the basis for the substitute motion ("substitute motion #2") that Behnke drafted for the Board in June 2007, which was proposed as an alternative to Altman's substitute motion #1. The next day, Banks sent Behnke changes, after which Behnke responded, "I've tweaked in light of your comments; could you take a second gander?" In response, Banks lauded Banks as a "silver tongued devil" and said he was humbled

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[1902] APA_0090008.

[1903] *Id.*; APA_0090009 (emphasis in original).

[1904] APA_0090009.

[1905] Sherman interview (May 19, 2015)

[1906] The Ethics Committee held a teleconference on December 12, 2006. Several members of the Ethics Committee expressed concerns about Altman's proposal. APA_0063872. For example, Connie Chan stated that the moratorium would prevent psychologists from participating in "ANY situation where they might be helpful or advise against certain behaviors in interrogations. And if they do, what will be the recourse?" APA_0089773. Brad Johnson noted that the "net effect is that the Ethics Committee would have a very difficult time understanding what we are prohibiting." APA_0089774.

[1907] APA_0064540; APA_0065451.

by Behnke's changes.[1908] This iterative process is yet another demonstration of the close coordination between Behnke and Banks to craft statements protective of DoD's policy preferences.

By March 19, 2007, the Ethics Committee had approved the final draft of the statement. Behnke forwarded the final draft to Banks in an email titled "Final check," pointing his attention to a specific statement that the Committee "wanted to ensure that the statement would not cause a problem for SERE training."[1909] Later that day Banks responded, telling Behnke "Good job. I should have caught that. Thanks for showing it to me."[1910]

During his interview with Sidley, Behnke stated that his focus on addressing specific techniques from an ethical perspective was prompted by his attendance at a program hosted by the Wright Institute in March 2007, at which Alfred McCoy talked about certain interrogation techniques that were consistently used throughout history. According to Behnke, his own thinking about the issue of specificity "shifted" at that point, and he decided that specific techniques may need to be addressed. But, as the email traffic shows, Behnke actually began considering prohibiting specific techniques much earlier in October 2006, and that the first step he took was to check in with Morgan Banks to determine whether this would be a problem for DoD.

At the same time he started drafting the Ethics Committee statement, Behnke also worked behind the scenes to generate opposition to the proposed resolution that Altman eventually presented at the Consolidated Meetings on March 23 – 25, 2007. Behnke coordinated with Michael Gelles, Banks, and APA staff members to draft letters, which would go out under others' names, that argued against the resolution.

For example, as early as March 7, 2007, Behnke composed a draft letter addressed from Michael Gelles to the presidents of the Divisions for Social Justice, Division 19, Division 48, Altman, and Moorehead-Slaughter. A second version of the letter dated March 11 showed substantial revisions.[1911] On March 11, Behnke sent the revised version to Heather Kelly in an email with subject line "Let me know— ".[1912] On the same day, he sent the draft to Rhea Farberman, stating that "attached is a letter from Mike Gelles to the people working on the Neil Altman (moratorium) resolution. Could you read and let me know what you think?"[1913] Although the letter was written in Gelles's voice, an email from Behnke to Gilfoyle with the subject "Need your eye…" makes clear that Behnke, not Gelles, was the original author of the letter:

[1908] APA_0090077.

[1909] APA_0064479; APA_0064480.

[1910] APA_0091092.

[1911] *See* "Compare Gelles Original to Gelles First Edits by Behnke" (on file with Sidley).

[1912] APA_0064648; *see* "Compare Gelles SB First Edits to SB Second Edits" (on file with Sidley).

[1913] APA_0064642.

> Mike G. has edited the letter I wrote — wanted to put it into his own words. I've edited his draft — I think this will do what we want. Could you read and see whether you hear any sour notes?[1914]

In several interviews, neither Behnke nor Gilfoyle said they remembered any actions undertaken by APA staff in opposition to Altman's 2007 resolution. Indeed, Behnke stated repeatedly to the interview team that he worked with all sides to try to work toward or with the "common ground" or a "middle way."[1915] However, it is clear that Behnke ghostwrote a letter in direct opposition to the Altman resolution to pursue his own agenda.

Later the same day, Gilfoyle wrote back and embedded a comment, here italicized and bolded for the reader's reference, in the draft letter:

> Rather than focus on what psychologists cannot do, I would respectfully suggest that it would now be more productive for APA to write a resolution ***[??? Could he just say "provide guidance on"— do we want or need a resolution that parses ambiguous situations?]*** that focuses on promoting ethical behavior, addresses what psychologists in challenging and ambiguous ethical situations may do to ensure they remain firmly within the bounds of our ethics, and specifies what we as colleagues can do to support their efforts.[1916]

Behnke incorporated Gilfoyle's comment and sent a draft of the amended letter to Jennifer Bryson.[1917] He also sent an updated version to Kelly[1918] and Farberman.[1919] He sent another amended version on March 12 to Kelly[1920] and on March 13 to Farberman.[1921] Finally, on March 14, Behnke emailed Farberman, copying Pamela Willenz, Manager in the APA Public Affairs Office, to further plan the impact of Gelles's letter:

> Rhea, when Mike Gelles sends his letter to Neil Altman and Olivia, Olivia is going to distribute to individuals and groups working on the resolution. While many people have heard of Mike, many have not. Do you think it would make sense, when Olivia forwards the letter (the letter will be a pdf file), for her also to forward the Boston Globe article below (again as a pdf),[1922] for people who don't

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[1914] APA_0064646.

[1915] Behnke interview (June 8, 2015).

[1916] APA_0090162; APA_0090163.

[1917] APA_0064638.

[1918] APA_0064632.

[1919] APA_0064614.

[1920] APA_0064599.

[1921] APA_0064572.

[1922] Charlie Savage, *Abuse led Navy to consider pulling Cuba interrogators*, Boston Globe (Mar. 16, 2005), *available at* http://www.boston.com/news/world/latinamerica/articles/2005/03/16/abuse_led_navy_to_consider_pulling_cuba_interrogators.

> know about Mike to read and know who he is/what he did? It will definitely set a context for the letter. . . [1923]

Farberman responded:

> Steve—I understand what you are trying to achieve but I think attaching the news article might turn people off. How about Olivia attaching a short cover memo to Mike's letter that give the "facts" of Mike's intervention at Gitmo—to put this letter and his knowledge of the issue in context, etc.[1924]

Despite Farberman's response, Willenz emailed Behnke back to say that she called the *Globe* about "making a pdf of this article and distributing it. It may take day or two for them to respond."[1925]

On the morning of March 14, Behnke attached a signed version of the letter dated March 16 to an email to Kelly that read:

> Mike Gelles, as many of you are aware, is an APA member who brought abuses at Guantanamo Bay to the attention of his superiors. Dr. Gelles' actions have been discussed in the media and described by medical ethicist Steven Miles as a "successful medical protest of prisoner abuse." Attached please find a letter Dr. Gelles has written regarding the moratorium resolution.[1926]

On the same day, Behnke sent the signed letter to Ellen Garrison, asking her to "[p]lease let me know what you think."[1927] That evening, Behnke sent a version of the letter to Gelles,[1928] and later that evening, Gelles sent a version of the letter, signed and dated March 14, to Altman and Moorehead-Slaughter.[1929] There was no indication in Gelles's cover letter that Behnke had drafted and provided heavy revisions to the letter, or that other APA staff had reviewed and commented on it.

Moorehead-Slaughter then sent Gelles's letter to Judy Strassburger with the following introductory note:

> Dr. Mike Gelles is an APA member whose actions at Guantanamo Bay, calling abuses to the attention of his superiors, resulted in what medical ethicist Steven Miles has called a "successful medical protest of prisoner abuse." Dr. Gelles' actions have been discussed in the press, including in the New Yorker Magazine.

[1923] APA_0621013.

[1924] APA_0090107.

[1925] APA_0621012.

[1926] APA_0064562; APA_0064563.

[1927] APA_0064556; APA_0064557.

[1928] APA_0064543; APA_0064544.

[1929] APA_0090065; APA_0090066.

> Attached please find a letter Dr. Gelles has written regarding the moratorium resolution.
>
> I thought the Board of Directors would have an interest in hearing Dr. Gelles' perspective.[1930]

Again, the cover email gave no indication of Behnke's or APA's role in authoring Gelles's letter. On March 15, 2007, Behnke and Gelles exchanged emails discussing the importance of each other's work and contributions. Gelles encouraged Behnke to "reach out to Mora," and Behnke told Gelles that his "letter lends itself to an excellent op-ed, or an article."[1931]

On March 18, Altman sent an email to Moorehead-Slaughter and Gelles, appending "a draft of my response to Mike's letter. I may want to tweak it a bit until tonight, but I wanted to give you a sense of the drift of my thoughts. If possible, I'd appreciate it not being sent out till Monday, but if it has to go ou[t] today, it[']s OK to send this out." The next day, Altman sent the exact same email to Moorehead-Slaughter and Behnke with his draft attached.[1932]

Less than four hours after receiving it, Behnke forwarded Altman's proposed response to Gelles's letter to Morgan Banks. Behnke asked Banks for "two to three examples of factual inaccuracies to include in a draft response,"[1933] adding that "[i]f you keep it between us at the moment, that would be much appreciated."[1934] Clearly, Behnke sought Banks's help in dismantling Altman's draft response to Gelles as he had done many times before. Banks responded on March 20, 2007 with 17 comments that pointed out areas of disagreement with Altman.[1935] In his cover email, titled "Eyes Only," Banks said that for personal reasons[1936] he was working from his home account "and will destroy it [the document] once you [Behnke] tell me you have received it."[1937]

On March 19, Gelles sent Behnke a draft response to Altman's letter, explaining:

> I would like to respond in particular to the inaccuracies and misunderstanding that I suspect comes from media coverage and stories that have become distorted and outdated over time. As you know, there has been significant progress made with

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[1930] APA_0091064; APA_0091065.

[1931] APA_0064501; APA_0064502.

[1932] APA_0091089; APA_0091090.

[1933] APA_0064477.

[1934] *Id.*

[1935] APA_0091067; APA_0091068.

[1936] Banks explained to Behnke the personal reasons why he was working from home. The circumstances are not relevant to this inquiry. APA_0091067.

[1937] *Id.*

> the help of APA and others in this area with psychologists who continue to conduct consultation.[1938]

Behnke prepared to distribute Gelles's letter more widely, forwarding Gelles's proposed response to Farberman and asking her to "[p]lease review" it and the cover email Behnke drafted for Council under Moorehead-Slaughter's name.[1939] On March 20, 2007, with some minor edits, Moorehead-Slaughter sent the text Behnke drafted for her to the Council listserv. When Dunivin congratulated Gelles on the letter, Gelles responded that he was "committe[d] to do whatever I can to help "you and our colleagues."[1940] On April 4, 2007, Behnke reviewed and edited another letter from Gelles, noting that he opted to keep "the ideas we [Behnke and Gelles] discussed."[1941] Behnke added that "[w]e'll have this off our desks by the end of the week."[1942] Behnke sent a draft to Farberman, who provided edits,[1943] and on April 5, 2007, Gelles circulated the letter.[1944]

On April 16, 2007, Altman reached out to Behnke and Moorehead-Slaughter about a "new idea" he had discussed with to Steve Sellman from Division 19. Altman wondered if there was a way to "add wording that would make it clear that those who vote for the resolution respect the right of those who choose to continue working at the detention centers, even as they disapprove of the legal framework within which the centers operate." Behnke told Altman that his idea might offer some "very fruitful possibilities" for moving toward a consensus position. Seizing the opportunity offered by Altman's approach, just a few minutes later, Behnke forwarded Altman's email to Sellman and Moorehead-Slaughter, noting that it was a good sign that Altman may be open to considering language that other governance groups, "especially Division 19," would be able to support.[1945] Behnke wondered if it "may be time to roll up our sleeves."[1946]

Much as he did with Gelles, Behnke also worked with Larry James to oppose the proposed moratorium. On April 23, 2007, Behnke asked James for biographical information for a program for the 2007 Convention, and James responded he will be deployed during that time.[1947] Responding to the same thread, but changing the subject of the email to "Eyes Only," Behnke stated:

[1938] APA_0091083.

[1939] APA_0091086. Farberman provided "[t]wo small edits."

[1940] APA_0090981.

[1941] APA_0065554; APA_0065555.

[1942] *Id*.

[1943] APA_0091238.

[1944] APA_0091217.

[1945] APA_0065426.

[1946] *Id*.

[1947] APA_0065260.

> As you know, there remains considerable passion at APA regarding the issue of interrogations. You've not mentioned where you'll be deployed. My question is this. By the time convention arrives, or shortly before, would it be possible for you to write an open letter to APA, without providing any classified information or even revealing where you are, that says you are now in a setting working with interrogators and are successfully representing the position advanced by APA: That ethical and effective interrogations are based on building relationships and preclude any type of abusive behavior. . . . Based on your first-hand knowledge of detention facilities and of the processes that govern interrogations, the most ethical stance APA can take is to remain fully engaged in consulting to interrogations, and that you write to convey how successful APA has been in promoting the practice and theory of "ethical* [sic] interrogations.
>
> I would, of course, be happy to work on language with you. Yours is a very well-respected voice in the association. Would this be possible for you to consider?[1948]

James responded "[s]ure."

This detailed outline from Behnke sets forth the points he wanted to emphasize at the Convention months before it took place, including that "the most ethical stance APA can take is to remain fully engaged in consulting to interrogations" and that APA has been successful "in promoting the practice and theory of 'ethical' interrogations." A review of the email traffic between April and August 2007 shows that Behnke drafted such a letter in James's name and sent it to him to review on June 18, 2007.[1949] As was Behnke's usual practice by this point, he had sent a draft of the letter to Banks for review earlier in the in an email titled "Confidential: Please read and delete," asking Banks if the letter "look[ed] ok."[1950] In response, Banks sent Behnke the Department of the Army Inspector General's Detainee Operations Inspection Report.[1951] Without making any changes to the letter, James sent it to Sharon Brehm on June 19, 2007, and Brehm then forwarded the letter to Behnke, Farberman, Anderson, and Strassburger.[1952] There is no indication that Brehm, or any other APA staff member, was aware that Behnke had been the original author of this letter. On June 23, 2007, Dr. Melba Vasquez posted an open letter to James in response to his own letter, expressing support for him and his work.[1953]

In addition to individual member comments, APA committees and governance groups also issued comments to Altman's resolution. On April 16, the Board of Educational Affairs ("BEA") issued a memo on Altman's proposed resolution. The BEA noted that it would like to hear from military psychologists concerning whether they believe the protection envisioned by

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[1948] *Id.*

[1949] APA_0066662; APA_0066663.

[1950] APA_0066700; APA_0066701.

[1951] APA_0097864.

[1952] APA_0097704.

[1953] APA_0097562.

the resolution was appropriate or needed. The BEA also stated that it would like to receive input regarding APA's role in reconciling U.S. laws and international human rights standards, and to inquire as to whether there is any precedent for APA to request or require its members to remove themselves from contexts in which there is potential inconsistency between U.S. law and human rights standards.[1954] While the BEA suggested these as areas of further development, it did not recommend a wholesale adoption or rejection of Altman's resolution.

On April 23, 2007, the representative from the Board of Professional Affairs ("BPA") sent Behnke the unapproved minutes related to the consideration of Altman's resolution at the March Consolidated Meetings. According to the minutes, the BPA found that Altman's resolution was insufficient for three reasons: (1) the intent of the resolution appeared political in nature rather than principally focused on the welfare or activities of psychologists; (2) the tone and focus of the resolution impugned the ethics and engagement of the work of military and career psychologists at the detention centers without direct knowledge or specific instances of how their work was, perhaps, compromised; and (3) the resolution did not build in protections for psychologists who were appropriately engaged in work at the detention centers, and thus, might do more harm than good. The BPA recommended that the resolution be withdrawn and/or rejected.[1955]

On the same day, the Committee on Ethnic Minority Affairs ("CEMA") issued its memo on the proposed resolution and noted that the resolution had raised broader issues about the role of psychologists in various detention facilities, including those in the context of law enforcement and correctional entities. As a result, CEMA recommended that the resolution be returned to the movers so that it could be "significantly expanded to address the broader issues raised by CEMA."[1956]

On April 26, 2007, COLI submitted it is preliminary comments to the proposed resolution, with a note that it would submit more extensive comments once the full Committee had an opportunity to review the resolution. COLI objected to the resolution for the following four reasons: (1) COLI had serious reservations about the APA setting forth legal criteria for when psychologists may engage in a particular area of practice; (2) the resolution sponsor had been explicit that the resolution had a "political basis" and Council resolutions are not the appropriate place to make political statements; (3) the resolution was described as intended to "protect" members of a community, but representatives of that community were indicating that the resolution in its current form would likely be harmful in their efforts to promote the ethical practice of interrogations; and (4) the resolution did not address conditions of confinement, treatment, or interrogation in US correctional facilities, which have been described in official and media reports as rising to the level of torture or cruel, inhuman, and degrading treatment.[1957]

Board for the Advancement of Psychology in the Public Interest ("BAPPI") also issued its own memo on the proposed resolution. BAPPI stated that APA should focus on: (1) the

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[1954] APA_0091333.

[1955] APA_0091444.

[1956] APA_0091333.

[1957] APA_0091385; APA_0091386.

immediate development of an ethical casebook as originally intended; (2) the dissemination of the original resolution affirming APA's clear and unequivocal position against the use of torture and other cruel, inhuman, or degrading treatment or punishment at detention centers; and (3) the communication to the public of a clear message about fundamental human values on which psychological research, practice, and consultation are based and evaluated. As a result, it could not support Altman's proposed moratorium because it would be "impractical since it will not speed up the development of a case book, nor will it protect psychologists in the military from penalties for refusing to follow lawful orders, nor will it ensure legal defense or ethical guidance to psychologists in the military."[1958]

In late April, Behnke drafted a letter to Altman, under Moorehead-Slaughter's name, to provide Altman with an update on the review of the proposed resolution.[1959] A final draft of the letter was sent to Moorehead-Slaughter on April 26, 2007 and she sent it to Neil Altman later that same day, without any changes.[1960] The letter offered Altman three options: (1) proceed with the normal governance process of review under the Ethics Committee as the lead governance group, with a recommendation to the Board for its June meeting; (2) assess the likelihood of reaching consensus on the resolution before Council meets in August, with the intent of having Council suspend its rules to review the resolution without the Board's June review; or (3) move the resolution forward through another round of consolidated meetings in the fall of 2007 to allow the various governance groups more time to discuss and review the issues. The letter encouraged Altman to pursue option number three and to work together with the governance groups, Division 19, and COLI to reach a consensus on the resolution.[1961] A conference call was scheduled on April 29 between Altman, Moorehead-Slaughter, Behnke, Robin Deutsch (Chair of the Ethics Committee), and Paul Donnelly. At the end of the call, Altman decided to move forward with presenting the resolution to the Board of Directors and the Council, with or without endorsement from the Ethics Committee and the various governance groups.[1962] In an email from Moorehead-Slaughter to Altman on May 3, 2007, which was again entirely drafted by Behnke, Moorehead-Slaughter confirmed that the Ethics Committee would proceed to review the resolution and make a recommendation to the Board.[1963]

The Ethics Office received COLI's substantive review on May 3, 2007. COLI stated that the resolution was "flawed" because:

> U.S. law, international law, and APA policy are consistent with regard to their prohibition against torture and cruel, inhuman, and degrading treatment and punishment. Thus, there is no legal ambiguity with regard to permissible and impermissible behavior in which psychologists can engage at U.S. detention centers holding foreign detainees. Rather[,] the inconsistency between U.S. law

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[1958] APA_0091333.

[1959] APA_0065258.

[1960] APA_0091331; APA_0091332; APA_0091890.

[1961] APA_0091890; APA_0091891.

[1962] APA_0091726.

[1963] APA_0091903.

> and international law refers to whether a prosecuting authority is able to charge someone with a 'war crime.' This decision falls outside the scope of responsibility of psychologists practicing at U.S. detention centers. . . and therefore does not affect the standard of behavior to which they are held.
>
> In addition to the absence of a substantive legal argument to justify the Moratorium Resolution, the resolution as written would not achieve Dr. Altman's stated objectives, and may in fact do greater harm to the psychologists practicing in U.S. detention centers holding foreign detainees, as well as the detainees themselves. Further, Dr. Altman has asserted no evidence to support the Moratorium Resolution and as such seems to be asking APA to make a political statement on the basis of an inaccurate analysis of the legal context. . . .[1964]

On May 9, 2007, the Ethics Committee held a conference call to discuss the resolution. It is clear from the email traffic that the Ethics Committee did not support, and had no plans to support, Altman's resolution at the upcoming Council meeting. In an email from Norman Abeles to Behnke on May 11, 2007, Abeles stated "[o]n reflection I think we should be OK at Council in San Francisco. I do think COR members will be positively influenced by the board and committee support we received and will vote down Altman's resolution." Behnke responded that he agreed with Abeles's email and that the resolution "will get a few votes, but with no governance group in support, it's very difficult to imagine Council will adopt."[1965]

Although the March emails discussing a proposed Ethics Committee statement on specific interrogation techniques indicated that the statement was "final," discussions between Behnke and Banks picked up again two months later. On May 15, 2007, Behnke emailed Banks again, with a slightly revised version of the previous statement and asked Banks if this "would be okay from [his] perspective." Behnke noted that he tried to emphasize that the behaviors identified "are when applied to incarcerated or detained individuals, and that these behaviors are prohibited when they are used as an interrogation approach or technique (and are thus not merely incidental to the incarceration/detention)."[1966] The full statement was as follows:

> The American Psychological Association has made no less than five statements regarding its absolute and unequivocal prohibition against torture. These include *Against Torture: Joint Resolution of the American Psychiatric Association and American Psychological Association* (1985); *Resolution Against Torture* (1986); the *Report of the Task Force on Psychological Ethics and National Security* (2005), motions passed by the Council of Representatives in 2005, and the *2006 Resolution Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*. Based on these actions, the APA Ethics Committee further elaborates its position:

[1964] APA_0091386.

[1965] APA_0623988.

[1966] APA_0065681.

> Psychologists must never participate in, condone, or in any manner facilitate torture or other cruel, inhuman, or degrading treatment. This unequivocal condemnation includes an absolute prohibition against the use of cruel, inhuman, and degrading interrogation approaches and techniques in order to elicit information from incarcerated or detained individuals. While neither the list below nor any list could be exhaustive, the underlying principle is that legitimate activities, such as eliciting information to prevent acts of violence, do not justify the use of psychology or psychological techniques that abuse and inflict harm on individuals. Thus, there is an absolute prohibition against "water-boarding"; mock executions; sexual shaming and degradation; degradation based on culture, ethnicity, or religion; sensory deprivation and overload; forced nudity; extreme temperatures and induced hypothermia; exploitation of phobias; "hooding"; the use of dogs to threaten or intimidate; stress positions; sleep deprivation; isolation; or threats to use any of the above, as an interrogation approach or technique.
>
> Psychologists must work in accordance with international human rights instruments relevant to their roles. In addition, psychologists must have and are mandated to follow a clear process for reporting when they become aware of acts of torture or cruel, inhuman, or degrading treatment, or when they have reasonable cause to suspect that abusive approaches or techniques such as those identified above are being used. Psychologists never mix the roles of providing mental health care to an individual and consulting to an interrogation process.[1967]

On May 16, 2007, Banks responded to provide his "2 cents," stating that he "reviewed the document, and bled on it."[1968] On May 16, Behnke also forwarded the same draft statement to Jennifer Bryson, an interrogator at GTMO, with whom Behnke had a close friendship, and asked her if there were any problems with it.[1969] Bryson responded with several line edits and suggestions, but did not have any significant substantive comments.

During the June 8 – 10, 2007 Board of Directors meeting, the Ethics Committee asked the Board to recommend that the Council reject Altman's main motion and substitute motion,[1970] based on the following four points: (1) the APA had already made no less than five statements regarding its absolute and unequivocal prohibition against torture; (2) there were other members of APA who believed that the moratorium would hinder efforts to promote an ethical way of conducting interrogations; (3) none of the seven governance groups asked to review the motion supported its adoption; and (4) Moorehead-Slaughter had encouraged the resolution sponsor to go through another round of Consolidated Meetings to further refine the motion and he had rejected the idea. Notably, the first of the Ethics Committee's stated reasons for rejecting Altman's motion was taken verbatim from the Ethics Committee statement that Behnke had been working on with Banks and Bryson earlier in May. In his interview, Behnke told Sidley that all

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[1967] *Id.*

[1968] APA_0091786; APA_0091787.

[1969] APA_0091779; APA_0091780.

[1970] APA_0050538.

of the governance groups had rejected Altman's motion, but a review of the various governance group's memos showed that this was not true. In fact, the BEA stated that they would like to hear from military psychologists on whether the resolution would serve to protect them, and CEMA recommended that the resolution be returned to Altman so that it could be "expanded" to address the issues identified in CEMA's memo.

During its meeting, the Board approved the suggestion of a substitute motion originated by the Board, with language to be provided to the Board via email prior to inclusion in the Council's agenda for August. Behnke was designated as being primarily responsible for the item, with Farberman and Anderson providing support.[1971] Behnke drafted the substitute motion, but prior to submitting it to the Board, he circulated the draft to Jennifer Bryson on June 14, 2007,[1972] and to Morgan Banks on June 15, 2007,[1973] asking if they saw anything "problematic." On June 16, Behnke again reached out to Banks, asking "do you have any problems with including the reference to 'mind-altering substances' in the list?"[1974] On June 17, Banks responded to Behnke with his comments on and suggested revisions to the draft resolution, underlined and bolded here for the reader's benefit:

> BE IT RESOLVED that this unequivocal condemnation includes an absolute prohibition for psychologists against direct or indirect participation during interrogation processes in: mock executions; water-boarding or any other form of simulated drowning or suffocation; sensory deprivation and over-stimulation; "hooding"; forced nakedness; sexual humiliation; cultural or religious humiliation; exploitation or exacerbation of phobias or psychopathology such as **severe** anxiety or **clinical** depression; stress positions; the use of dogs to threaten or intimidate; physical assault, including slapping and shaking; exposure to extreme heat or cold; induced hypothermia; mind-altering substances used for the purpose of eliciting information; isolation and sleep deprivation used in a manner that adversely affects an individual's physical or mental health; or the threatened use of any of the above techniques to the individual or to members of the individual's family.

His accompanying comment read:

> This is tricky. An interrogation may lead to a depressed mood, for a variety of reasons. An extreme interpretation would prevent a psychologist from making a detainee homesick, and thereby getting the detainee to talk so he could go home sooner. I just gave a couple of modifiers off the top of my head. They may not be the best. I concur that we not increase someone's significant psychopathology, but I think it is OK to manipulate mild anxiety or sadness.

[1971] APA_0091996.

[1972] APA_0065900.

[1973] APA_0066754.

[1974] APA_0066748; APA_0066749.

Banks also clarified that he had "[n]o issues with [Behnke's] comment reference [sic] mind altering substances."[1975]

Jennifer Bryson suggested that the following paragraph be removed from the draft resolution:

> BE IT RESOLVED that the American Psychological Association supports hearings by the United States Congress to examine the perpetration of torture and cruel, inhuman, or degrading treatment or punishment, including all of the acts identified above, both physical and psychological in nature, against individuals in United States custody, for the purpose of ensuring that no individual in the custody of the United States is subjected to torture or cruel, inhuman, or degrading treatment or punishment.

She suggested that "instead of looking back[,] [APA should] look forward and do so substantively and in an informed manner."[1976] Bryson's comments closely aligned with the forward-looking consultation-focused approach Behnke had been advocating for years. Bryson also noted that the following paragraph was "frightening and outside the lane of the APA":

> BE IT RESOLVED that the American Psychological Association, in order that the rights of all those who are detained or incarcerated are protected, calls upon the United States government to provide incarcerated and detained individuals access to courts of the United States through habeas corpus proceedings.[1977]

Bryson explained that it would be impossible to fight the adversary using the domestic court system on a case by case basis, and in a subsequent comment clarified that APA should be careful not to "conflate[e the] two unrelated processes" of intelligence collection and criminal investigation. Bryson made a number of other comments on specific resolutions, and offered to show Behnke "the language I came up with for the JTF GTMO SOP."[1978]

After he had already received substantial comments from both Banks and Bryson, Behnke circulated a draft to an APA staff member, Farberman, for the first time on June 17, 2007. In his email accompanying the draft, Behnke noted several points. First, Behnke stated that he "strongly" believed that APA would do best by staying away from addressing legal issues such as the legal status of detainees and their legal rights in a resolution because the "risk of going outside our competence is high, which would likely not serve APA well" —a point that was reflective of the comment from Bryson. Second, Behnke noted that the motion "draws primarily" from two texts: a letter form Len Rubenstein (executive director of Physicians for Human Rights) to Sharon Brehm, and a SPSSI policy document. Behnke pointed out that the

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[1975] APA_0097914; APA_0097915; APA_0097916.

[1976] APA_0091967.

[1977] *Id*.

[1978] *Id*.

areas of agreement on this issue "are far greater than" the areas of disagreement. The key provisions of the substitute motion were as follows:

> BE IT RESOLVED that psychologists must work in accordance with international human rights instruments relevant to their roles including, but not limited to, Common Article 3 of the Geneva Conventions;
>
> BE IT RESOLVED that the American Psychological Association unequivocally condemns torture and cruel, inhuman, or degrading treatment or punishment, for any and all purposes, including interrogation;
>
> BE IT RESOLVED that the unequivocal condemnation includes an absolute prohibition against psychologists' planning, designing, assisting or participating in any activities, including interrogations, which involve the use of torture and any form of cruel, inhuman or degrading treatment of human beings;
>
> BE IT RESOLVED that this unequivocal condemnation includes an absolute prohibition for psychologists against direct or indirect participation during interrogation processes in: mock executions; water-boarding or any other form of simulated drowning or suffocation; sensory deprivation and over-stimulation; "hooding"; forced nakedness; sexual humiliation; cultural or religious humiliation; exploitation or exacerbation of phobias or psychopathology such as anxiety or depression; stress positions; the use of dogs to threaten or intimidate; physical assault, including slapping and shaking; exposure to extreme heat or cold; induced hypothermia; mind-altering substances used for the purpose of eliciting information; isolation and sleep deprivation used in a manner that adversely affects an individual's physical or mental health; or the threatened use of any of the above techniques to the individual or to members of the individual's family;
>
> BE IT RESOLVED that the American Psychological Association calls on the United States government—including Congress, the Department of Defense, and the Central Intelligence Agency—to prohibit the use of these methods in all interrogations and that the American Psychological Association shall inform relevant parties with the United States government that psychologists are prohibited from participating in such methods;
>
> BE IT RESOLVED that in writing a casebook and commentary, the APA Ethics Committee shall set forth guidelines for psychologists working in contexts of war and imprisonment that are consistent with both international treaties and human rights covenants, as well as guidelines developed for health professionals, including but not limited to: Common Article 3 of the Geneva Conventions; The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; The United Nations Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; The World Medical Association

> Declaration Concerning Support for Medical Doctors Refusing to Participate in, or to Condone, the Use of Torture or Other Forms of Cruel, Inhuman or Degrading Treatment; and The World Medical Association Declaration of Tokyo: Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment;
>
> BE IT RESOLVED that the American Psychological Association urges all psychologists with information relevant to the use of any method of interrogation constituting torture or cruel, inhuman, or degrading treatment or punishment to inform their superiors of such knowledge, to inform relevant office of inspector generals when appropriate, and to cooperate fully with all oversight activities, including hearings by the United States Congress to examine the perpetration of torture and cruel, inhuman, or degrading treatment or punishment against individuals in United States custody, for the purpose of ensuring that no individual in the custody of the United States is subjected to torture or cruel, inhuman, or degrading treatment or punishment;
>
> BE IT RESOLVED that the American Psychological Association, in order to protect against torture and cruel, inhuman, or degrading treatment or punishment, and in order to mitigate against the likelihood the unreliable and/or inaccurate information is entered into legal proceedings, calls upon United States legal systems to reject testimony that results from torture or cruel, inhuman, or degrading treatment or punishment.[1979]

Behnke had removed paragraphs that Bryson took issue with, but neglected to include Banks's proposed qualifying language of "severe" anxiety and "clinical" depression. Farberman approved of both the email message and the draft, and Behnke sent them to Brehm, Kazdin, Koocher, and Anderson (copying Strassburger, Garrison, Farberman, and Gilfoyle) later that day.[1980] In response to a question from Kazdin on whether APA would be overstepping its boundaries by "call[ing] on the U.S. government …to prohibit the use of these and other methods…," Behnke responded that "the reality is that this 'call' is completely consonant with U.S. law and policy already; it would be a bit like saying that APA calls upon the US government to prohibit all psychologists from engaging in insurance fraud." As a result, even though the paragraph "appear[s] to be overstepping [APA's] bounds," it "simply reiterates rules already in place, and offers APA some benefit from a political perspective."[1981]

On June 19, 2007, Behnke circulated a new draft of the motion based on discussions with the group earlier that day. In the attached draft, the following paragraphs were added:

> BE IT RESOLVED that the American Psychological Association, recognizing its own ability to conduct an investigation into events at national security-related locations is significantly limited because the Association exists as a private entity

[1979] APA_0066723; APA_0066724.

[1980] APA_0066725.

[1981] APA_0066649.

> without subpoena power and because its staff do not have the necessary security clearances, therefore directs its Ethics Committee to conduct a vigorous and detailed review of all information in the public domain and all information that results from investigations and hearings conducted by the United States government, for the purpose of determining whether any APA member has engaged in behaviors constituting torture or cruel, inhuman, or degrading treatment or punishment, including the specific behaviors identified above, and directs the Ethics Committee to take appropriate action based upon such information;
>
> BE IT RESOLVED that the American Psychological association commends those psychologists who have taken clear and unequivocal stands against torture and cruel, inhuman or degrading treatment or punishment in the line of duty, including stands against the specific behaviors listed above.[1982]

Over the next few days, members of the Board approved the substitute motion through an email vote.[1983] On June 26, 2007, Behnke circulated a new draft of the resolution in response to several suggested edits from Koocher, Grossman, and Anton. Notably, the new draft revised the paragraph on the Ethics Committee's ability to investigate allegations to the following:

> BE IT RESOLVED that the American Psychological Association encourages any individual with knowledge that a member of the Association has engaged in torture or cruel, inhuman, or degrading treatment or punishment, including the specific behaviors listed above, to provide this information to the Ethics Committee, and directs the Ethics Committee to take appropriate action based upon such information.[1984]

In response to the new draft, Koocher emailed Behnke and noted that the resolution was worth a "B-" because the "laundry list of torture" remained a problem. Behnke responded to Koocher's email and explained that he had listed specific techniques because they have been associated with the type of torture alleged to have occurred at Guantanamo and Abu Ghraib. Behnke added that when he spoke to Alfred McCoy earlier in 2007, he was surprised to learn that "there is indeed a finite list of techniques that seem consistently to recur," and that because the list will be immediately recognizable to groups that have been working on this issue in human rights communities, it will get a positive response from the more moderate individuals "[f]rom a purely strategic perspective." Koocher responded: "All I can add—these people lack imagination!"[1985]

[1982] APA_0066576.

[1983] Anton (APA_0097519); Kazdin (APA_0097652); Goodheart (APA_0097650); Vasquez (APA_0097634); Van Sickle (APA_0097593); Haldeman, who noted that he cannot open the attachment to vote, but that he trusted the rest of the Board wholeheartedly (APA_0097591); Wertheimer (APA_0097584); Daniel (APA_0097578); and Rozensky (APA_0097488).

[1984] APA_0066428; APA_0066429.

[1985] APA_0097394.

During this time, military psychologists reached out to Behnke to raise concerns that a list of specific techniques would be too "vague." In July 2007, Maj. Bryan Davidson wrote to Behnke outlining a number of concerns he had regarding Behnke's response to a *Vanity Fair* article, in which Behnke referenced specific interrogation techniques. Davidson copied Dunivin on the email to keep the chain of command informed about his statements, and she separately responded to Behnke and stated: "I can only echo Bryan's comments below. We really cannot be put in [a] position of outlining vaguely defined prohibitions. Can you derail that particular train?" Behnke responded that the issue was a "fast-moving target," presumably referring the substitute motion that the Board was considering, and that he will check in with her at the end of the week when he knows more.[1986]

On July 23, 2007, the DSJ had a conference to discuss the Board's substitute motion. According to a listserv message, the "gist of it all is that all felt that it is a good motion."[1987] However, because the DSJ wanted to propose several amendments to the substitute motion, they put together a subgroup consisting of Corann Okorodudu, Judy Van Hoorn, Neil Altman, Linda Woolf, and Bernice Lott to do so. On July 29, 2007, Woolf sent Behnke an email titled "[j]ust between us elves!" and attached the working draft from her subgroup on the proposed substitute motion. Woolf told Behnke that they wanted to make sure that the substitute motion "doesn't weaken in any way the 2006 Resolution," and expressed her own opinion that this was not the place to "discuss changes related to the Ethics Code" or the proposed casebook.[1988]

On August 1, 2007, Behnke emailed Brehm an update on the various resolutions and explained that there were four resolutions up for consideration: (1) Altman's moratorium resolution; (2) the Board's substitute motion; and (3) two amended versions of the Board's resolution "being worked on by two related but separate groups in the social justice/human rights community." Behnke stated that there was a "fairly high" risk that Council was going to be overwhelmed by the number and complexity of the issues involved, and that without some direction, Council "simply won't know what to do." Thus, Behnke suggested that there be "some control exerted over this process" to bring a group together during Convention to review draft a motion that all parties could agree to. He recommended Moorehead-Slaughter and Woolf as two potential co-chairs of the group.[1989] Behnke, Strassburger, and Brehm had a conference call later that day to discuss. The next day, Behnke drafted a letter to Morgan Sammons and Neil Altman, inviting them to be the co-chairs of the working group, which he sent to Farberman and Strassburger for review.[1990] Other individuals listed in the letter as potential invitees were: Michael Gelles, Doug Haldeman, Olivia Moorehead-Slaughter, Corann Okorodudu, Brad Olson, Judy Van Hoorn, Elizabeth Wiggins, and Linda Woolf.

On August 3, 2007, Behnke alerted Banks to issues with the Board's motion:

[1986] APA_0067887.

[1987] APA_0096688.

[1988] APA_0096561; APA_0096562; APA_0096564.

[1989] APA_0067635.

[1990] APA_0067599; APA_0067600.

> As you may have expected, things are heating up considerably in anticipation of Convention (http://ethicalapa.com/) The Board's motion (attached) seems to be largely overshadowing the "moratorium" resolution, but vigilance remains in order. I'd be eager to hear what, if anything, you're hearing.[1991]

Sidley was not able to find a response from Banks.

Later that day, Woolf contacted Behnke regarding the Board's substitute motion. In her email, Woolf raised the issue of whether the motion met the criteria for a "substitute motion": "[I]n order to warrant consideration…substitute motions should be germane to the issue. They should not be used to change an affirmative main motion into a negative proposal not to take that action—they also should not contradict the intent of the main motion." Woolf attached, and asked Behnke to review, the proposed amendments from DSJ, which DSJ believed would meet the criteria of a substitute motion.[1992] A similar email was sent by Laurel Wagner to the Board of Directors on August 4, 2007.[1993]

In light of these emails, Behnke emailed Farberman and Strassburger on August 5, 2007, and suggested that the moratorium resolution issue "needs [to be] taken up and given a full discussion," and that APA "need[s] to step back and let that happen." Behnke then suggested giving Altman 10 minutes to address Council, with Morgan Sammons being given the same amount of time to respond. Behnke also noted that Larry James would be present at the meeting and that "at some point before the vote on the moratorium resolution takes place, Sharon should recognize Larry and allow him to speak." Clearly, Behnke considered the APA's position to be aligned with that of James and Sammons, noting that "Morgan and Larry will explain what APA is doing, why it is important, and why the moratorium is not a good idea."[1994] After Farberman and Strassburger suggested giving both individuals only five minutes to speak, Behnke responded that he would like the debate to be taped and that he would "absolutely" want Sammons to have ten minutes on that tape so that he can "lay out a set of reasons why the moratorium is a bad idea and why APA's position is the right one."[1995] Behnke referred to Sammons as APA's "best PR" and explained that APA would want their "strongest player to have a bit of extra game time."[1996] This exchange illustrates Behnke's ongoing pattern of manipulating the governance process to give every advantage to DoD representatives.

DSJ also sent their email, with the proposed amendments, to Robin Deutsch, as the Ethics Committee Chair. Upon receiving the email, Deutsch reached out to Behnke and Moorehead-Slaughter and asked if she should provide any comments.[1997] Behnke forwarded the email to Strassburger, Farberman, Gilfoyle, and Beavers (COLI representative) and asked if they could

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[1991] APA_0067219.

[1992] APA_0096365.

[1993] APA_0096338.

[1994] APA_0067198.

[1995] *Id.*

[1996] *Id.*

[1997] APA_0096306.

inform DSJ that it would simply not be possible to provide feedback from the Ethics Committee in the time they have requested. Farberman suggested holding off on this response until Brehm had a chance to speak with Sammons and Altman.[1998] Later that day, Behnke responded that he had been in contact with Deutsch, who agreed that the Ethics Committee would not have time to review the substitute amendments. Behnke noted that Deutsch would send a letter to DSJ explaining this point. On August 7, 2007, Behnke drafted the letter from Deutsch, and sent it to Deutsch and Moorehead-Slaughter for review.[1999] Deutsch approved of the letter later that day. When Behnke forwarded the letter to Gilfoyle, Farberman, Strassburger and Beavers, he did not disclose that he had drafted the letter under Deutsch's name.[2000]

In addition to putting together the substitute motion, Behnke also worked behind-the-scenes to garner support in opposition to the moratorium, while keeping his involvement hidden from the proponents of Altman's resolution. For example, Behnke asked Morgan Sammons, a military psychologist, to reach out to various Council members who he thought would be "receptive" to voting against the moratorium.[2001] On August 3, 2007, Behnke sent Sammons a list of "talking points" and specifically noted that it would "[p]robably [be] best if these are presented as originating from you, and I am left out of the equation."[2002] The talking points included the fact that: (1) seven governance groups reviewed the moratorium resolution and none supported it; (2) COLI performed an "extensive legal analysis" indicating that the sponsor had an incorrect understanding of the law and Division 19 stated that the resolution will not protect military psychologists; (3) the Board's substitute motion achieves the sponsor's stated goals of addressing the ambiguous legal framework and protecting military psychologists by providing a level of guidance and specificity that will be helpful to them; (4) APA is made up of psychologists, and not lawyers, and what is helpful to military psychologists is to have guidance about specific behaviors, not complex statements about the law that will require an attorney to interpret; and (5) the moratorium resolution misses the entire point of what military psychologists need because it will put a pause on their work until adequate legal guidance is available, which delays "the very thing we need most."

A couple of days later, Sammons responded to Behnke's suggestions and sent him a draft of the talking points to distribute, which were "basically minor tweaks of [Behnke's] excellent synopsis."[2003] Sammons then asked Behnke to review the talking points one more time and noted that he would send them to the individuals "[they] identified."[2004] Four days later, Behnke finalized the talking points and sent them back to Sammons with a note that he went over them "pretty extensively." Behnke also suggested that Sammons send the talking points as an FYI to Koocher, Anton, and Haldeman so that they could share them with the Board if they thought it

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[1998] APA_0096262.

[1999] APA_0067160.

[2000] APA_0067152.

[2001] APA_0067163.

[2002] APA_0067214; APA_0067215.

[2003] APA_0096311.

[2004] *Id.* & APA_0096312.

appropriate to do so.[2005] Later that night, Sammons circulate the talking points as Behnke had suggested.

In another example, when Richard Wagner (President of Psychologists for Social Responsibility) sent out a letter asking the various APA divisions to support the moratorium motion, Behnke reached out to Bill Strickland, with the help of Heather Kelly, to suggest that Division 19 draft a letter in opposition to Wagner, and to offer to draft the letter himself. However, Behnke made it clear to Kelly that his involvement should be kept "under the radar" and that Bill should exercise "discretion" in presenting the letter.[2006]

On August 8, 2007, Brehm had a call with Altman, Sammons, and Strassburger to discuss the procedures for bringing the substitute motions and all of the proposed amendments before Council. Brehm noted that there were two major concerns: (1) that there was not much time for Council to consider the resolutions; and (2) that there were several amendments to the Board's substitute motion being discussed by a variety of groups. Brehm noted that the time limitation was the result of Bernice Lott requesting that the item be discussed on Sunday in order for Council members to have the opportunity to attend the mini-convention programming on ethics and interrogations beforehand. With respect to the multiple amendments, Altman confirmed that there was an effort among the different groups to consolidate the amendments as much as possible. Brehm also agreed to give Altman and Sammons both three minutes to lead the discussion of the substitute motion.[2007]

On August 12, 2007, Judy Van Hoorn reached out to Behnke to inform him that the various groups, including Division 19 had been working together to develop amendments that they can all support, and that they were in agreement as to almost all of the amendments. She asked Behnke if he would like to be the point person to facilitate a meeting between the different groups so that they could reach a consensus before the COR meeting. Behnke commented that this was "excellent news" and agreed to assist.[2008] The next day, Okorodudu circulated a copy of the amendments to the Board's substitute motion to the Council listserv and noted that suggestions had been incorporated from Division 19, the Divisions for Social Justice, and "various other constituencies."[2009] Specifically, the amendments added the following italicized language:

> BE IT RESOLVED that the American Psychological Association unequivocally condemns torture and cruel, inhuman, or degrading treatment or punishment, *under* any and all conditions, *including detention* and interrogations.
>
> BE IT RESOLVED that this unequivocal condemnation includes, all techniques defined as torture or cruel, inhuman or degrading treatment or punishment under

[2005] APA_0067073.

[2006] APA_0066868.

[2007] APA_0096139.

[2008] APA_0126413.

[2009] APA_0096032; APA_0096033.

the 2006 Resolution Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the United Nations Convention Against Torture, and the Geneva Conventions. This unequivocal condemnation includes, but is by no means limited to, an absolute prohibition for psychologists against direct or indirect participation during interrogation processes or other detainee-related operations in: mock executions; water-boarding or any other form of simulated drowning or suffocation; sensory deprivation and over-stimulation; "hooding" in the process of interrogations; forced nakedness; sexual humiliation; rape; cultural or religious humiliation; exploitation of phobias or psychopathology; stress positions; the use of dogs to threaten or intimidate; physical assault, including slapping and shaking; exposure to extreme heat or cold; induced hypothermia; the use of psychotropic drugs or mind-altering substances used for the purpose of eliciting information or purposes other than directly therapeutic ones; isolation and sleep deprivation used in a manner that adversely affects an individual's physical or mental health; threats of harm or death; or the threatened use of any of the above techniques to the individual or to members of the individual's family;

BE IT RESOLVED that the American Psychological Association's unequivocal condemnation of torture and other cruel, inhuman, or degrading treatment or punishment remains applicable at detention and other sites where detainees may not be guaranteed human rights protections, particularly in relation to due process and humane interrogation techniques as established under the Geneva Conventions and other UN documents, treaties, conventions, and protocols;

BE IT RESOLVED that the American Psychological Association calls on the United States government—including Congress, the Department of Defense, and the Central Intelligence Agency—to prohibit the use of these methods in all interrogations and that the American Psychological Association shall inform relevant parties with the United States government that psychologists are prohibited from participating in such *methods or in interrogations in contexts denying due process as defined under the 2006 Resolution Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;*

BE IT RESOLVED that the American Psychological Association in recognizing that torture and other cruel, inhuman or degrading treatment and punishment can result not only from the behavior of individuals, but also from the conditions of confinement calls upon the United States Government to prohibit the use of psychologists participating in or facilitating extra-judicial detentions, except in health personnel roles that aid the health of detainees.

BE IT RESOLVED that, the objectives of the APA shall be to advance psychology as a science and profession and as a means of promoting health, education and welfare…" (Bylaws of the APA: Article 1) and, therefore, the roles of psychologists in conditions in which prisoners are held in extra-judicial detention, should be limited as health personnel to the promotion of health.

> BE IT RESOLVED that the American Psychological Association asserts that any individual with knowledge that a member of the Association has engaged in torture or cruel, inhuman, or degrading treatment or punishment, including the specific behaviors listed above, has an ethical responsibility to provide this information to the Ethics Committee, and directs the Ethics Committee to take appropriate action based upon such information; *and if an individual has such knowledge about a psychologist who is not a member of the Association, the APA encourages that psychologist to provide this information to the appropriate state licensing board, ethics committee or other accrediting authority;*
>
> BE IT RESOLVED that the American Psychological association commends those psychologists who have taken clear and unequivocal stands against torture and cruel, inhuman or degrading treatment or punishment *including* in the line of duty, *and* including stands against the specific behaviors *or conditions* listed above; *and that the American Psychological Association will lend its support to psychologists who report a conflict between law, orders or regulations and torture, cruel, inhuman or degrading treatment or punishment*.[2010]

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.

During his interview, Behnke denied that the Board's substitute motion reacted only to Altman's resolution. Behnke told Sidley that "sure, there was political strategizing going on, but at the same time, we were looking at people and their positions and . . . seeing there's a lot of common ground and we can work with that common ground." When asked if he, or the APA, would have pursued a resolution that prohibited specific interrogation techniques without any prompting from the membership, Behnke responded that he could not answer that.[2013] It is clear, however, that Altman's proposal was a much harsher policy that would have caused problems for Behnke's partners in DoD. When Sidley spoke to Kevin Kiley, the former Surgeon General of the Army, he stated that it would have been a "problem" if the APA took on the same position as the ApA and instituted a moratorium against psychologists participating in interrogations. Similarly, Dunivin also told Sidley that if a moratorium resolution passed, many military psychologists, including herself, would have "washed their hands" of the APA.

[2010] APA_0096033.

[2011] APA_0067019.

[2012] APA_0093310.

[2013] Behnke interview (June 8, 2015).

Many individuals interviewed by Sidley recalled the August 2007 Council meeting because of the notable presentation made by Larry James on the need for psychologists to be involved in interrogations. Several people recalled that James's speech emphasized that "people will die" if psychologists were not permitted to work in such detention settings. As discussed above, it was Behnke who first suggested that Brehm recognize James to speak at Council.

During the course of its review, Sidley was alerted to the fact that James was not a Council representative from Division 38 when the meeting began. Only after the previous Division 38 representative, Sharon Manne, was asked to step down was James selected to replace her.

Sidley interviewed Manne, James, and Suzanne Bennett Johnson, the other Division 38 representative at the time, about this incident. None of the individuals confirmed that Manne was asked to step down specifically so that James could replace her, but all were certain that Manne's departure and James's appointment were out of the normal cycle. There was some discrepancy about the timing, and whether it was shortly before or during the convention. According to Manne, she was elected as Council representative for Division 38 in 2006 and she successfully served the first eight months of her term. She recalled that she had to miss the first meeting after she was elected representative, but that she attended the first day of the next Council meeting with Johnson. After the first day of the Council meeting, Manne was approached by an individual, who she no longer recalled, who suggested that she step down because she was not doing her job well. Manne stated that she tentatively agreed, recognizing that she did not know how to do the job and believing that she was not likely to learn from Johnson, who, as the senior representative, had not made an effort to mentor her or provide her guidance. Johnson confirmed that she likely had a "forthright" discussion with Manne about whether Council was the right place for her, and recalled that Manne initially agreed that she was not right for the position.[2014] Manne learned the next day that James was asked to fill her position as the Division 38 representative; she did not know if she was asked to step down specifically so that he could take her seat, but believed this to be the case.

When Sidley spoke to James, he stated that he was under the impression that Manne had resigned due to a disagreement with Bob Kearns, the president of Division 38 at the time. James did not believe that Manne was asked to step down specifically so that he could replace her. In an email on August 13, 2007, James informed Behnke that he had been selected by the Division 38 Board as a replacement for Manne, so that he would be able to attend the meeting all day Sunday in an official capacity.[2015] Behnke responded twice within the span of a minute, in both emails conveying elation and calling the news "excellent."[2016] James stated that no one from Division 38 or from the APA leadership asked him to address anything in particular during the Council meeting; he was told only that they wanted someone knowledgeable about the interrogation issue to address the room. According to James, no one told him to vote one way or the other with respect to the resolution itself.

[2014] Johnson interview (June 3, 2015).

[2015] APA_0704693.

[2016] APA_0627022; APA_0627021.

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. As soon as the decision was made, Behnke sent James an email on August 14, 2007 counseling James on what to expect and how to react at the convention:

> Larry, I've heard through the grapevine that there is a very strong reaction to your being at Convention and participating in the discussions on item 5. That, to me, is an indication of your influence. Now, I think it's best if you are respectful, measured, clear and low-key in all of your interactions. Your presence will speak volumes. It's entirely possible that folks will try to bait and provoke you.
>
> Since you said in your letter that you were being deployed, I assume it's okay to say that you are at Convention from your deployment—is that correct?[2017]

James responded "no problem," and promised to be calm, respectful, and measured at all times.[2018]

Shortly before the Council meeting, Altman and the Board came to an agreement to bring to the floor a new motion, which was titled "Substitute Motion #3 (Reaffirmation of the American Psychological Association Position Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and Its Application to Individuals Defined in the United States Code as 'Enemy Combatants')," and to affix a moratorium amendment to this motion. This new motion was the one that was ultimately presented to Council for its consideration. During the meeting, the moratorium amendment to substitute motion #3 was rejected by a three-to-one margin before the substitute motion itself was considered and passed almost unanimously.[2019]

Following the passage of the resolution, APA continued to receive comments and suggestions from concerned members. A group of representatives from Divisions 19 (Military Psychology), 39 (Psychoanalysis), 41 (Psychology and Law), and 48 (Peace Psychology), began developing a revised draft of the 2007 Resolution to propose to Council at the February 2008 meeting.[2020] Shortly before the February meeting, as APA staff and the group of representatives worked on revising the resolution, Behnke suggested circulating the current draft to Morgan Sammons or Debra Dunivin for review.[2021] Behnke also reached out to James to discuss the

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[2017] APA_0627016.

[2018] APA_0704681.

[2019] APA_0068265.

[2020] Given the volume of materials to review, and the insights gained from extensive investigation into the governance process underlying the 2006, 2007, and 2008 Council resolutions, our investigation did not thoroughly examine the discussions leading up to the February 2008 revision.

[2021] APA_0070644.

revised language.[2022] At the February Council meeting, Council voted to rescind following paragraph on specific techniques:

> BE IT RESOLVED that this unequivocal condemnation includes all techniques defined as torture or cruel, inhuman or degrading treatment under the 2006 Resolution Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the United Nations Convention Against Torture, and the Geneva Convention. This unequivocal condemnation includes, but is by no means limited to, an absolute prohibition for psychologists against direct or indirect participation in interrogations or in any other detainee-related operations in mock executions, water-boarding or any other form of simulated drowning or suffocation, sexual humiliation, rape, cultural or religious humiliation, exploitation of phobias or psychopathology, induced hypothermia, the use of psychotropic drugs or mind-altering substances used for the purpose of eliciting information; as well as the following used for the purposes of eliciting information in an interrogation process: hooding, forced nakedness, stress positions, the use of dogs to threaten or intimidate, physical isolation, sensory deprivation and over-stimulation and/or sleep deprivation used in a manner that represents significant pain or suffering or in a manner that a reasonable person would judge to cause lasting harm; or the threatened use of any of the above techniques to the individual or to members of the individual's family.

Council then voted to replace it with a substantially similar paragraph:

> BE IT RESOLVED that this unequivocal condemnation includes all techniques considered torture or cruel, inhuman or degrading treatment or punishment under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the Geneva Conventions; the Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the Basic Principles for the Treatment of Prisoners: or the World Medical Association Declaration of Tokyo. An absolute prohibition against the following techniques therefore arises from, is understood in the context of, and is interpreted according to these texts: mock executions; water-boarding or any other form of simulated drowning or suffocation; sexual humiliation; rape; cultural or religious humiliation; exploitation of fears, phobias or psychopathology; induced hypothermia; the use of psychotropic drugs or mind-altering substances; hooding; forced nakedness; stress positions; the use of dogs to threaten or intimidate; physical assault including slapping or shaking; exposure to extreme heat or cold; threats of harm or death; isolation; sensory deprivation and over-stimulation; sleep deprivation; or the threatened use of any of the above techniques to an individual or to members of an individual's family. Psychologists are absolutely prohibited from knowingly planning, designing, participating in or assisting in the use of all condemned

[2022] APA_0070508.

> techniques at any time and may not enlist others to employ these techniques in order to circumvent this resolution's prohibition.

The new paragraph replaced the reference to the APA's 2006 resolution with a reference to "all techniques" considered torture or CID under various international human rights standards. It also added the statement that "[p]sychologists are absolutely prohibited from knowingly planning, designing, participating in or assisting in the use of all condemned techniques at any time and may not enlist others to employ these techniques in order to circumvent this resolution's prohibition."[2023]

VII. LATE 2007 – EARLY 2008: MORE CLOSE COORDINATION BETWEEN APA AND DoD OFFICIALS ON PUBLIC STATEMENTS

Following the August 2007 Council meeting, Behnke continued to coordinate APA's policy and messaging with trusted DoD contacts. 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.

When Behnke reached out to Banks and Dunivin for guidance regarding how to respond to the proposed resolution, he specifically asked for information related to DoD's policy on the issues raised in the following proposed "whereas" paragraph:

> WHEREAS, Current United States Department of Defense guidelines authorize the participation of certain military health personnel, especially psychologists, in the interrogation of detainees as members of "Behavioral Science Consulting Teams" in violation of professional ethics. These guidelines also permit the use of confidential clinical information from medical records to aid in interrogations.

Behnke asked for "a citation or language from a DoD policy that speaks to this issue," and added: "I believe DoD policy has an absolute firewall (even more stringent than the PENS report), but I can't recall for certain and don't want to make any statements until I have the actual language in front of me. There are a number of other inaccuracies in the text, which I think I'm in a good position to address, but I could use some help on this one."[2024] Dunivin responded that the paragraph was indeed inaccurate and indicated that she would send more information soon.[2025] Behnke thanked Dunivin and urged her to provide a citation as quickly as possible so that he could "get this information to our friends in CA so they can provide accurate information to the folks on the Senate subcommittee."[2026] Banks also reassured Behnke that he was

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[2023] APA Ethics Committee Statement (June 2009).

[2024] APA_0070170.

[2025] APA_0093127.

[2026] APA_0093126.

reviewing his references,[2027] and he later responded with a list of relevant citations to DoD Directives and Instructions.[2028]

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 interrogations.[2029] The psychologist wished Behnke luck, and playfully referred to him as "our Knight in Shining Armor :-)."[2030] Behnke thanked him for the materials and added "thanks as well for your kind words. I'm privileged to play a supporting role to the work you and your colleagues do, for which I have the greatest admiration. If the few words I'm allowed to say are at all helpful, I'll be very pleased."[2031] This small exchange is yet another example of how Behnke embraced the partnership he had formed with DoD, and that he saw it as an integral part of his role to support that partnership and facilitate DoD's mission.

As APA continued to face critical challenges to its position on interrogations, it is clear that Behnke remained committed to his partnership with DoD. He viewed the joint venture, which rested on personal relationships and ideological alignment, as a critically important part of his role such that, even when he ostensibly acted or spoke on behalf of APA, his true mission was to play a "supporting role" to the military. Over the several years following the release of the PENS report, Behnke continually turned to his trusted partners and friends in DoD for guidance, ensuring that APA's message reinforced DoD policy preferences and that APA action never hindered DoD's ability to accomplish its goals.

VIII. THE 2008 PETITION RESOLUTION AND THE 2009 PRESIDENTIAL ADVISORY GROUP REPORT

When, in early 2008, several APA members drafted and began to circulate a petition resolution that proposed banning psychologists' involvement in interrogations and in settings in violation of international law, Behnke sprang into action to defend military psychologists and protect their roles to the greatest extent possible, as he had done with various similar attempts in previous years. As the petition moved forward and gained traction, Behnke worked with APA governance and staff to throw up every procedural roadblock possible and to assist the petitioners' opponents, all while carefully concealing all traces of his involvement. Behnke led an orchestrated effort on behalf of APA to do everything in his power to defeat the petition resolution while carefully manipulating the situation to maintain the appearance of neutrality.

[2027] *Id*.

[2028] APA_0093125. Banks labeled one of these Directives, DoD Directive 3115.09, "not helpful," pointing Behnke's attention to a provision from that clarifies that psychologists working as consultants to interrogators cannot also serve as health care providers. Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, DoD Directive No. 3115.09 (Nov. 3, 2005), *available at* http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf.

[2029] APA_0093097; APA_0093121; APA_0093117.

[2030] APA_0093097.

[2031] APA_0071305.

When the petition resolution first began to circulate in April 2008, the main text of the resolution read:

> Be it resolved that psychologists may not work in settings where persons are held outside of, or in violation of, either International Law (e.g., the UN Convention Against Torture and the Geneva Conventions) or the US Constitution (where appropriate), unless they are working directly for the person being detained or for an independent third party working to protect human rights.[2032]

Because the resolution language was set by the membership rather than developed through the APA governance process, APA staff were, to a certain extent, sidelined during the process of passing the petition through governance. In contrast to the role APA staff, particularly Behnke, played in fine-tuning the language during earlier resolutions, the petition procedure placed staff in an entirely different position and neutralized their ability to "wordsmith" in a way that favored their agenda. Because Behnke could not manipulate the language of the petition resolution itself, he took every opportunity available to shape the messaging about the resolution.

For example, as members began to express their opinions regarding the petition on the APA listservs, Behnke worked with governance and staff to craft the message in opposition. In early May, Behnke drafted a message for Melba Vasquez to post to a Division listserv that justified his objection to the petition because APA had already "taken a clear and emphatic stance ***against*** abusive interrogations," and in fact, public reports had provided examples of psychologists behaving "*precisely* as one would hope and want, intervening to stop an abusive interrogation" (emphasis in the original).[2033] The message concluded: "This petition would seriously impede psychologists' efforts to ensure that interrogations are conducted in a safe and ethical manner. Certainly I agree that good people can do bad things. But it seems to me that the way to ensure bad things will happen is to remove good people."[2034] Later that day, Vasquez posted Behnke's letter verbatim in response to the listserv discussion,[2035] and also posted a modified version to two other Division listservs.[2036]

Despite these efforts to undermine the petition in its infancy, on June 1, 2008, Dan Aalbers led the petitioners in officially submitting the petition resolution to Barry Anton, who was APA's Recording Secretary. This was, as best to our knowledge, the first time in APA history that the association had confronted a member-driven petition resolution. Thus, a group of APA staff members met to consider the provisions of the bylaws that permitted such a petition, and to outline the procedural steps that would unfold if the petition were pursued.[2037] They concluded that there would need to be a review of the signatures to verify that the petition was

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[2032] APA_0073210.

[2033] APA_0073210 (emphasis in original).

[2034] *Id*.

[2035] APA_0098762.

[2036] APA_0098764.

[2037] APA_0100008.

endorsed by voting members. At that point, the petition could be presented to the President for an initial review, after which the Board would fix the "time and manner" of the vote on the petition. If passed, the petition resolution would become effective at the next annual meeting in August 2009.

Though APA staff outlined a procedure by which the petitioners could present their resolution for a membership vote, they determined that the petition was not an attempt to amend the Ethics Code; instead, it was "simply an effort to have APA adopt an official policy statement on the location where psychologists work.[+] In particular, it was noted that the proposed new policy does not mention the word 'ethics' and does not suggest that there are any consequences of not following the policy."[2038] Thus, under this interpretation of the petition, its provisions would not be enforceable and its acceptance as policy would likely not have an effect on the work of military psychologists in practice.[+]

Shortly after staff determined the procedural steps necessary to put the petition resolution to a membership vote, it began to pass the resolution through the process. At the June 2008 Board meeting, the Board reviewed the petition and noted that:

> The petition was transmitted by the Recording Secretary to the Board of Directors after it was determined that the petition was signed by 1% of the Members in good standing. Dr. Kazdin [APA President], with input from the Board, determined that the petition is a proper motion.

Thus, APA staff at least nominally followed the procedures they had outlined. The Board also set a schedule for mailing ballots and opening the voting period, and determined that "[a] majority of those voting will determine the outcome of the balloting." Finally, the Board requested pro and con statements to accompany the ballot, and directed that "[t]he petition sponsors are responsible for selecting an author(s) for the pro statement and rebuttal. The Recording Secretary will invite an author or authors for the con statement and rebuttal."[2039]

On June 16, 2008, Anton emailed Aalbers to notify him that the petition has been deemed proper, but noted that "[a]n important consideration in reaching this conclusion was the understanding that the proposed resolution is not intended to amend the Ethics Code."[2040] As had become common practice, APA staff drafted a version of this letter for Anton to send out under his own name, which he did with only minor revisions.[2041] The letter explained that the Board had determined that it would be helpful to have pro and con statements accompany the ballot, and that the petitioners were responsible for selecting the authors of the pro and rebuttal statements.

Although the Board determined that Anton, as Recording Secretary, should select the author of the con statement that accompanied the ballot, it is clear that APA staff, led by Behnke,

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[2038] *Id.*

[2039] Draft Executive Session Minutes of the Board (June 5 – 7, 2008) (on file with Sidley).

[2040] APA_0711063.

[2041] APA_0711069.

maintained tight control over the con statement, both by selecting its nominal authors and by refining the substantive language. Just one day after Anton informed Aalbers that pro and con statements would accompany the petition resolution, it was already clear to high-level staff that Behnke would lead the selection of the con statement authors. On June 17, Gilfoyle asked Behnke and Garrison "[w]here are you on Con writers?" When Garrison asked for guidance on the selection process, Gilfoyle responded that the Board "left it to staff," to which Strassburger added "namely Steve [Behnke]."[2042] Later communications show that the Board "did say for Steve [Behnke] to make suggestions to the Board."[2043] Thus, it seems probable that, despite having adopted a minute that clearly instructed Anton to select the con statement author, the Board directed behind the scenes, or at least understood, that APA staff would make the selections in practice.

This implicit understanding (or possible explicit instruction) between the Board and staff was screened from public view. The petitioners were told that Anton, a member of APA governance, would be selecting the author of the con statement. Likewise, on June 19, again using a message drafted by APA staff[2044], Anton emailed the Council listserv to inform Council members that he would be responsible for inviting an author for the con statement.[2045] The message made no reference to the involvement of any APA staff members in the selection process.

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:

> Joel read the draft to me. The draft is ***very*** conciliatory in tone, endorses what Joel believes is the intent behind the petition, while making clear that the current version of the petition has significant problems that speak forcefully against its adoption. I would characterize Joel's draft as having a 'revise and resubmit' tone. I myself think that there may be significant benefit to this approach, but it is also important to recognize that some of our members may want to take a much harder

[2042] APA_0711063.

[2043] APA_0099988.

[2044] APA_0711068.

[2045] APA_0100012.

[2046] APA_0641062.

[2047] APA_0641050.

> line. I also think it is important for us to recognize that the 'con' statement, in both substance and tone, will be imputed to APA — there's just no way to distance ourselves from it, and a conciliatory tone might be very helpful in our efforts to mend fences (emphasis in the original).[2048]

Behnke recommended that the staff explain the situation to Anton and let him make the decision because "[h]owever this unfolds, there will be people who are not happy and I think it's important that this be a board decision. Also, I think that once the person is chosen we need to step back and let him/her write the statement in whatever manner he/she chooses."[2049] Both Garrison and Strassburger agreed that the authorship of the con statement should be a decision for the Board,[2050] and Anderson commented that "[c]learly it is up to the Board to determine how the con statement gets written, but . . . I could foresee a 'Con-writing team' to provide input into the statement, even if it is authored by one person. Some of Joels' views might be useful here."[2051] On June 21, 2008, Behnke emailed Dvoskin to tell him that "we need to hit the 'pause' button on the con statement. . . . The Board is going to review the process by which the con statement writer is chosen, to address a concern that the relevant constituencies have not been adequately consulted."[2052]

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 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.

At the same time that Behnke worked to designate the author of the con statement, internal discussion demonstrates that other senior staff, particularly Anderson and Garrison, began to discuss how to shape the substance of the con statement in whatever way they could. On June 19, Anderson emailed a group of senior-level staff, including Behnke, Garrison, Farberman, and Gilfoyle, advising them to "be up front with the fact that we are in new and unprecedented territory concerning the potential for APA to ban a work setting for psychologists. . . . [I]t is very unclear what method APA would use to enforce this since the petition is silent in this regard, and we have no previous experience enforcing a work place ban." He added that

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[2048] APA_0099988 (emphasis in original).

[2049] *Id*.

[2050] *Id*.

[2051] APA_0710880.

[2052] APA_0640992.

these issues "could form a key part of the CON statement," and that "the more difficult the questions raised by COR that can't be answered, the better it is for the CON statement."[2053] Garrison weighed in "to express my wishful thinking that we might be able to peal away a few of the original resolution writers for the con statement with the very argument that the petition goes too far by actually disallowing psychologists from working in such detention settings. . . . Any chance to find such folks?"[2054] The following day, Garrison made another suggestion that staff could support the con writers by informing them "of issues/concerns that might not be readily apparent from the Council queries and a cursory review of the petition."[2055] Thus, it is abundantly clear that, despite being sidelined from their usual role of wordsmithing resolution language, APA staff continued to look for ways to influence the ideas and language used in opposition to the petition.

APA staff's initial flurry of activity shifted course after Council members began to raise complaints about the addition of pro and con statements to the ballot. On June 20, Anton informed senior APA staff that he had been hearing concerns from Council regarding the Board's instruction that the ballot be accompanied by pro and con statements. Anton explained that a Council member "noted that it has been raised many times at COR that items sent with pro/con statements usually fail. He noted that it may seem 'disingenuous' of APA to want to include such statements with the petition."[2056] Behnke responded that, "given the ***extensive*** debate and discussion this issue has received over the past three years, it would seem virtually untenable not to have pro/con statements regarding a new proposal."[2057] However, when Kazdin asked the following day whether APA had any data regarding whether the addition of pro/con statements made proposals and resolutions more or less likely to pass, Anton commented that it was "Council Wisdom" that items with pro/con statements never passed. [2058] Strassburger similarly admitted: "I think only one Bylaw amendment passed with a pro/con. Most view pro/con statements as the 'kiss of death' and the data bears this out. However, this is not a Bylaw amendment . . . ."[2059] Strassburger's comment demonstrates not only that APA staff was well aware that the addition of pro and con statements was likely to diminish the chances of the petition resolution passing, but also that they were utilizing their usual fine-tuned distinctions and word games to justify the procedure. As the Council member intuited, APA staff's handling of the pro and con statements was disingenuous all the way through.

On June 21, concerned that APA must "give this petition a fair review (and be perceived as doing so)," Garrison suggested an alternative to the pro/con statements in the form of an overview published in the *Monitor* to allow full airing of the issues. Behnke effectively dismissed Garrison's suggestion as a "de facto pro/con statement" and again emphasized that,

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[2053] APA_0099998.

[2054] *Id*.

[2055] *Id*.

[2056] APA_0099968.

[2057] *Id*. (emphasis in the original).

[2058] APA_0072933.

[2059] APA_0099968.

given the complex history of the issue, it was important to ensure "that there is not even the perception that any voice will be excluded. . . . Not to have pro/con statements would be entirely out of keeping with how we have approached this issue in crafting our position over the past several Council meetings and Conventions."[2060] Later that day, Behnke again emphasized process, querying "[o]n what basis does one now change the process that the Board has developed according to an Association rule, to which the sponsors have not objected, and about which Council has been informed?"[2061] It is clear that, throughout their discussion of the utility of pro and con statements, APA staff were entirely focused on packaging the statements as a guarantor of fair process, despite knowing (or at least suspecting) that such statements were in reality an obstacle to fair consideration of the petition. Once again, Behnke steered the group into a defense of the pro and con statements using procedural defenses to conceal his true strategy to use the statements to achieve his preferred outcome.

At the same time that Behnke defended the pro and con statements to a group of high-ranking governance and staff members, he also worked closely with Anton to devise a plan to select a con author as a replacement for Dvoskin. In an email to APA staff on June 20, Behnke explained that he and Anton agreed to bring the selection of the con writer to the full Board during an upcoming conference call, and that Anton "thought it would make good sense to reach out to Council reps from several divisions (e.g., 19, 41 and 42), who will now be familiar with the petition, and ask for their input regarding additional possible writers for the con statement."[2062] On June 24, 2007, Anton emailed the Board's listserv to inform them that Bill Strickland, Bonnie Markham, and Robert Resnick had over the weekend "spontaneously volunteered to participate in the Con statement writing."[2063] Of course, this volunteerism was not "spontaneous" at all, but rather a response to Anton's direct requests to specific Council representatives as part of a plan that he had devised with Behnke.

In his email to the Board, Anton also commented that one of the "volunteers" asked whether "the letter writers could have assistance from APA staff. . . . I believe we agreed that both pro and con statement writers could get assistance. I don't think we agreed about what type of assistance."[2064] The next day, in an email to Anton and APA staff, Behnke reinitiated discussion about the selection of the con writer, noting that they would need to be "delicate" in how they communicated with Dvoskin. Farberman suggested two options: (1) asking Dvoskin to downplay the parts of his draft that suggested a "revise and resubmit" approach or (2) asking Resnick to draft a statement. When several staff members asked to see a copy of Dvoskin's draft, Behnke explained: "Joel read it to me, but he didn't send it (and I didn't ask, given our earlier discussions about not wanting staff to appear overly involved in the process)."[2065] Farberman echoed the concern, commenting that "[w]e need to be really careful about asking to review drafts. My assumption was that we would not be reviewing drafts of the con statement

[2060] APA_0072933.

[2061] APA_0072930.

[2062] APA_0714438.

[2063] APA_0201641.

[2064] APA_0127624.

[2065] APA_0640876.

unless asked to do so by the author," and Anderson affirmed that "[s]taff should not be seen as helping to craft the con statement."[2066]

During these discussions, Anderson and several staff members started to express a preference for Resnick, and on June 27, 2008, Anton emailed Resnick and asked if he would be the author of the con statement. Anton explained that Resnick could consult with others and ask APA staff questions, and that "[b]oth Bonnie Markham, and Bill Strickland (Division 19), are willing and able to assist you," but that "only your signature will go out on the statement."[2067] On the same day, Behnke reached out to Dvoskin to inform him that: "[T]he Board reviewed the process for choosing the con writer, and decided that the con statement would have a single author. A member of Council and former APA president has been chosen. That person will work with a group of people to write the statement. Barry Anton, a member of the Board of Directors, would like to speak with you to ask that you be a part of this team. Of course, I think the statement will be much stronger with your involvement."[2068] Sidley found no record that the Board had a meeting in late June to either "review the process" or select an author. Rather, it seems likely that Behnke continued to use the fiction of Board action and proper procedure to conceal his own critical role in shaping the con statement.

Despite Behnke's representation to Dvoskin that there would be only one con author, Resnick, Markham, and Strickland soon came to consider themselves the con statement "trio."[2069] As the con authors began turning to APA staff with questions, Behnke embraced the opportunity to shape the statement while remaining mindful of the need to appear balanced and neutral. In an internal email on July 1, he explained that he would respond to the con writers "in such a manner that if the 'pro' writers asked me, I would provide them exactly the same information; in fact, if the pro writers were to get in touch with me, I would likely simply forward what I wrote."[2070] Indeed, Behnke then drafted a detailed substantive response to the con authors' question, a portion of which Markham suggested they import verbatim into their draft.[2071]

Although Behnke's explanation appeared neutral on its face, in context, it was apparent that Behnke had manipulated the process to allow staff to assist the con statement authors to shape their message. Although it was true that both the pro and con writers could have reached out to APA staff, only the con writers were explicitly told that they could consult with others, including APA staff. Moreover, Behnke was well aware that it would have been extremely unlikely for the pro writers to consult with staff because they viewed APA as aligned with the con statement. This perception was not without foundation: it is clear from internal communications that many high-level APA staffers, the CEO, and prominent Board members

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[2066] APA_0710685.

[2067] APA_0127625.

[2068] APA_0640806.

[2069] APA_0101115.

[2070] APA_0128012.

[2071] APA_0101115.

were all opposed to the petition resolution and invested in promoting a strong con statement.[2072] 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 motions of preserving neutrality, in the event that criticisms might later arise.

On the same day that Behnke responded to the con authors' request for assistance, he also contacted Banks to ask him to set aside some time for them to "go over a number of things, somewhere reasonably private." Banks responded that he would "[a]bsolutely" meet with Behnke and added: "I just looked in detail at the most recent resolution, and as someone who has sworn an oath to uphold the constitution, I am a little confused. Perhaps you can enlighten me."[2073] Although Sidley uncovered no evidence demonstrating what precisely Banks and Behnke discussed at this meeting, it is likely, based on the timing, that Behnke sought pre-approval of the message he intended to convey in the con statement, in the same way that he had for various APA statements and resolutions over the preceding two years.

As the con authors began drafting the statement, they worked closely with Behnke on the language. When Resnick circulated the first full draft of the con statement on July 2, copying Behnke, the draft included lengthy excerpts from the language Behnke had circulated the day before, including the paragraph Markham had identified and some additional sentences.[2074]

Behnke forwarded the statement to Anderson, Farberman, Garrison, Gilfoyle, and Strassburger, noting that there were two statements they should address:

> 1. The statement that the petition is essentially the same as what council voted down in San Francisco. There are very important differences between the two — Council voted down a ***moratorium*** on psychologists working in centers for ***foreign detainees.*** The petition has no time limit and is much broader in scope.
>
> 2. The statement that APA's efforts have had no apparent effect. In fact, everyone agrees that the Revised Army Field manual is a great improvement, and there is considerable discussion in congressional hearings regarding the non-effectiveness of abusive interrogation techniques, a point APA has been emphasizing since the beginning of our discussions (emphasis in the original).[2075]

[2072] In an earlier email, Brehm had implicitly confirmed that the con statement was a representation of the APA Board's position: "As for the con statement, is the BOD actually willing to let someone write the con statement without BOD oversight? If not, then it would be best to have someone on the BOD write the con statement. . . . Either we give someone freedom in writing the con statement or the BOD should take responsibility for the con statement." APA_0141492.

[2073] APA_0101136.

[2074] APA_0128150; APA_0128151.

[2075] APA_0072704 (emphasis in original).

Garrison responded to Behnke's email with an edited version of the con statement in which she incorporated Behnke's first point and made some other edits.[2076]

Farberman suggested that the comments be sent as a part of an email rather than in track changes because she was "concerned about the impression that the con statement is, even partially, staff produced."[2077] Despite Farberman's concerns, Garrison and Behnke determined that using bulleted suggestions would be "too difficult and lengthy a process," and instead sent the revised draft to the authors as an attachment, with a message emphasizing the "overbroad scope of the petition."[2078] Though it was true that encapsulating their comments into bulleted suggestions would have been more laborious, Behnke's earlier email demonstrated that he could have done so. In practice, the decision to circulate a revised draft allowed Behnke to exert more direct control over the precise contours of the message and to "wordsmith" the language to ensure that it remained protective of military psychologists and DoD, as he had done with previous resolutions.

On July 3, after Behnke emailed the revised con statement to the authors, Markham thanked Behnke for his edits, which were "more clearly focused on the key issues and present[ed] them in a compelling and well-documented way," and recommended that the authors use the statement as revised by Behnke.[2079] Resnick accepted Markham's suggestion, offering only "one minor tweak," and also thanked Behnke for his "important input." When Behnke forwarded both emails to Garrison, she enthusiastically commented: "THIS IS BETTER THAN GREAT!!!"[2080] Having succeeded in effectively rewriting the con statement, Behnke hastened to ensure that his hand in drafting the statement would remain invisible to the petitioners and the broader public. He almost immediately emailed the authors that "[i]t's Ethics Office policy to provide feedback on ethics-related matters to anyone who asks, as you have done, and we are happy to be a resource for APA members. Of course, the statement is entirely yours and should be presented as such."[2081] Again, Behnke's assurances of neutrality were disingenuous in light of the political realities: it was highly unlikely that the authors of the pro statement, having not been informed that they were permitted to ask APA staff questions, would spontaneously reach out to APA for assistance, especially given the broad perception that APA was closely aligned with the con statement. It is unsurprising, therefore, that Sidley found no evidence that any assistance was sought by, or provided to, the authors of the pro statement.

Although Behnke had attempted to excise Dvoskin from the petition resolution process, Dvoskin continued working on his own initiative to mediate between the two sides. On July 5,

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[2076] APA_0101081; APA_0101082.

[2077] APA_0101078.

[2078] APA_0101062.

[2079] APA_0101050.

[2080] *Id*. (emphasis in original).

[2081] APA_0120221. Several weeks later, Behnke suggested that Anderson "strongly caution against the Board doing anything to make it appear to favor one side (or disfavor the other). Dr. Reisner kept referring to the 'con' position in our conversation as 'APA's position,' and he and his colleagues will be looking for any and all evidence to confirm their belief." APA_0072356.

Dvoskin circulated his own draft of a con statement to Anderson, Gilfoyle, and Behnke, explaining that he had shared the draft with Reisner, who agreed with it "almost in its entirety."[2082] Dvoskin explained that Reisner was trying to arrange for a discussion between himself and the two petition authors to facilitate a "negotiated statement along the lines of my draft," and suggested that APA might postpone the referendum to permit time for negotiation. Dvoskin offered to "play some mediation role to resolve this" because he believed that "an all-or-nothing vote will be disastrous to APA and its members, whatever the outcome."[2083] When Behnke forwarded Dvoskin's proposal to a wider group of APA staff, it was uniformly rejected in favor of moving forward with the petition. Garrison explained: "While moving forward with the petition presents its own risks, I'm confident that we have as strong 'con' statement that will carry the day."[2084] It is abundantly clear that, by this point, staff's initial efforts to remain neutral had been wholly abandoned. Although Garrison claimed in her interview that she believed it was important for the resolution to pass and that APA staff tried to remain neutral and helpful to both sides,[2085] internal communications reveal that APA staff, Garrison included, did in fact take a strong position against the petition resolution. Behnke and Garrison, in practical effect, drafted the con statement and identified with it as their own, trusting in its strength to "carry the day" to APA's preferred outcome—a resounding defeat of the petition resolution.

Both the pro and con statements were finalized on July 8, 2008. On July 10, Behnke wrote to APA staff to inform them that: "Bob has reached out regarding the con statement rebuttal. The rebuttal is of the same quality as the initial con statement. Ellen and I will offer suggestions that Bob and his colleagues are free to use, or not, as they see fit, as we did with the original statement."[2086] Having just successfully rewritten the con statement, it is clear that Behnke was communicating to senior APA staff that he would also draft the rebuttal statement on the designated authors' behalf. Though he paid lip service to the idea that the authors were free to disregard his suggestions, the clear subtext was that Behnke found the rebuttal statement deficient and intended to refine the language. At this point, Honaker became concerned that APA staff were jettisoning the façade of neutrality: "I meant to say this before but I want to make sure I do now; are we offering the same help for the pro statement? One thing that has bothered me is that we are supposedly 'neutral' on this issue but it seems we are developing a paper trail that shows we are not." Behnke responded with the same disingenuous comment that he would "help anyone who asks."[2087] It is abundantly clear that APA staff were concerned not that they actually behave in a neutral fashion to assist all members, but that they not appear to be providing assistance only to one side. Notably, Honaker was not concerned that Behnke was

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[2082] APA_0101042.

[2083] *Id*. Gilfoyle recommended on July 7 that APA "call Joel off" through the intervention of either Anderson or Kazdin, who could explain that the "Board is trying to stay out of the political process and let the petition go forward on its merits." APA_0101016. Later that day, Gilfoyle emailed Dvoskin to tell him that APA had decided to wait to hear from petition sponsors, and Anderson concluded that Dvoskin had "disengage[d]." APA_0100995.

[2084] APA_0072648.

[2085] Garrison interview (May 20, 2015).

[2086] APA_0640477.

[2087] APA_0712482.

taking a strong hand in drafting the con statements, but rather he was bothered that Behnke was leaving a "paper trail" showing that he had done so. Behnke's threadbare reassurances that APA staff were prepared to assist any member who requested it was plainly disingenuous, but sufficient to whitewash the paper trail and bolster the appearance of neutrality.

Rather than revising the draft of the con rebuttal statement, Behnke instead independently drafted a rebuttal statement, with the assistance of Garrison, Farberman, and Gilfoyle.[2088] Although Garrison cautioned that they should not send Behnke's draft to "Bob et al. at the last minute" because the "longer they work on theirs, the more committed to it they may become,"[2089] Behnke did not circulate his draft statement until after Resnick sent the draft the trio of authors had composed on July 11. Though Behnke had been independently drafting the statement, he explained to the authors that he had "taken what [he] [saw] as the core and the strongest points in your draft, and elaborated on them."[2090] When the authors submitted their rebuttal to the membership, it matched Behnke's draft verbatim.

Though Behnke was unable to finesse the language of the resolution directly, he worked behind the scenes to ensure that the statement opposing the resolution conveyed the precise message he intended. Throughout the drafting process Behnke carefully crafted and honed the language of the con statement, working closely with the authors to suggest both major shifts in emphasis and substance and minor stylistic revisions, all while ensuring that his handprint on the statement remained hidden from the view of APA's critics and the majority of its governance bodies.

As the petition resolution moved forward through the governance process, and the pro and con statements were circulated to the membership, Garrison was selected as the nominal point person to work with both the petitioners and the opposing groups, particularly military psychologists.[2091] In July, just weeks before the APA membership voted on the petition resolution, Garrison began fielding messages from military members of the APA who expressed concern that APA might sanction DoD psychologists serving as BSCTs at Guantanamo and elsewhere.[2092] As a result, she began to address concerns with the petition resolution in meetings with military psychologists, and to provide more information and greater clarity about the petition process and the effect of the resolution if passed.[+] In her interview with Sidley, Garrison

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[2088] APA_0072542; APA_0072543.

[2089] APA_0712479.

[2090] APA_0072538; APA_0072539.

[2091] In late 2006, Garrison had been assigned to a new position as Senior Policy Advisor to the CEO. As part of that position, Garrison began to work directly with military psychologists on a number of issues, with a primary focus on the provision of clinical care to military personnel and their families. In the months following the passage of the 2007 resolution, Ellen Garrison began to hold quarterly meetings with DoD psychologists from each of the Services. The primary participants were Bruce Crow (Army), Morgan Sammons (Navy), and Jim Favret (Air Force). Garrison said that, although the group did not initially discuss the issue of psychologists working in interrogation settings, these issues were driven to the forefront when APA members initiated their petition resolution in 2008. Garrison interview (May 20, 2015).

[2092] APA_0100566.

explained that one of their main concerns was that the petition resolution would create confusion among psychologists who were being deployed to detention settings, some of whom would therefore refuse to serve. The military psychologists were concerned that, in that event, social workers would likely be deployed in their stead. Garrison said that military were also concerned that APA was taking a stance with respect to military psychologists that it did not typically take in other industries, namely interfering with what they could do in their chosen profession.[2093] In response to these concerns, Garrison assured military psychologists that "the petition resolution, if passed, would NOT be enforceable by APA's Ethics Committee. . . . I can state definitively, based on guidance from our APA General Counsel, that were this resolution to be voted on favorably by the membership, it would not make it an ethical violation for DoD psychologists to serve as a Behavioral Science Consultant" (emphasis in the original).[2094] Despite Garrison's assurances, Dunivin, in particular, continued to express concerns that, even if the APA did not enforce the petition resolution, state licensing boards might impose sanctions on the basis of the resolution, and that the overall effect of the ban would be to "set back APA-military psychology relations that we've worked so hard to restore over the past decade."[2095]

Although Garrison hosted several meetings with DoD members between June and August 2008,[2096] these communications were of a fundamentally different character than the discussions Behnke had held with James in previous years. Garrison's communications with Bruce Crow, Debra Dunivin, Jack Smith, and other military psychologists were not of the same ilk as the secretive attempts to manipulate policy and messaging that Behnke had engaged in. Rather than attempts to collaborate on shaping APA policy, Garrison's communications with interest groups within DoD focused on conveying accurate information about APA's policies and governance process. Aside from Behnke's "private" conversation with Banks in early July, there is no evidence that APA staff engaged in the kind of secretive coordination that had underlain APA's actions and statements in the previous two years.

In September 2008, the membership of APA voted and passed the petition resolution.[2097] Soon after, on September 25, President Alan Kazdin informed Council that he would be appointing a Presidential Advisory Group on the Implementation of the Petition Resolution ("advisory group") to clarify the intent and scope of the resolution and identify possible Council actions to implement the resolution.[2098] As plans advanced regarding the composition, structure, and charge of the advisory group, APA staff became heavily involved in managing the group to ensure that it would not be perceived as "PENS II." During the next several weeks, as staff secured nominations and drafted the charge, they focused on process in an attempt to stave off

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[2093] Garrison interview (May 20, 2015).

[2094] APA_0100566.

[2095] APA_0100519.

[2096] Garrison, along with Gilfoyle and Behnke, continued to meet with the group of military psychologists after the petition resolution passed in September to discuss criteria for determining whether detention sites fall within the scope of the resolution, the acceptable roles of psychologists at affected sites, and possible means of implementing the resolution. APA_0103275.

[2097] APA_0102401.

[2098] APA_0102660.

the kinds of procedural criticisms that had been leveled against the PENS Task Force, while continuing to minimize the practical effect that the resolution and the work of the advisory group would have for military psychologists.

Behnke worked with APA staff to carefully frame the charge in a way that did not invite the advisory group to expand the effect of the petition resolution, which he had worked so hard to limit. On October 15, Garrison circulated to APA staff the first draft of the advisory group's charge.[2099] When Strassburger reviewed the draft and suggested that the charge should include a reference to ethics, Behnke quickly jumped in to offer the alternative perspective that raising ethics issues would muddy the waters. He explained: "Nathalie [Gilfoyle] has done a masterful job at emphasizing how the resolution does *not* change the ethics code,"[2100] and steered staff away from introducing ethics into the charge of the advisory group.

Behnke was also heavily involved in selecting the members of the advisory group. Because staff were highly attuned to criticisms that the PENS Task Force had not been balanced, Behnke led APA staff in scheming to ensure that the appropriate mix of people were nominated to the advisory group. On October 16, Garrison and Behnke compiled a list of suggested nominees, which was constructed by selecting one representative from each of six key divisions, two Board members, and at least one of the petitioners.[2101] In an email to senior APA staff on October 22, Behnke reminded staff that they needed to be "very mindful that this group will be compared to PENS, and so we need to count bodies. . . . [T]he 'pro' people will be counting bodies. For that reason, I think at least half the people on the group must be considered 'pro' the resolution."[2102] [2103] [2104] [2105+]

On November 10, APA issued an announcement that the advisory group would be chaired by Elena Eisman, and would include as members: Dan Aalbers, Armand Cerbone, Ruth Fallenbaum, Corann Okorodudu, Brad Olson, Allen Omoto, Walter Penk, Bill Strickland, Michael Wertheimer, and Elizabeth Wiggins.[2106] As the group moved forward in preparation for

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[2099] APA_0102991.

[2100] APA_0103021 (emphasis in original).

[2101] APA_0103034; APA_0103035. When Gilfoyle reviewed the list, she raised a concern about the nomination of Beth Wiggins, the wife of Science Directorate head Steve Breckler, because "we have already had on staff hysband/ governance wife [sic] issue." APA_0103043. Behnke acknowledged Gilfoyle's point, but reminded Gilfoyle that Wiggins was part of the Council "gang of five" that had been intimately involved in the issues for years. APA_0073800. On November 11, after Wiggins agreed to serve on the advisory group, Breckler emailed senior APA staff to disclose his relationship with Wiggins. Gilfoyle emailed Garrison and Behnke to ensure that they had "discussed the problem of targeting Russ and Debra" with Breckler, and Behnke responded that they "had a very good talk" and found that the two situations were distinguishable. APA_0074079.

[2102] APA_0073858.

[2103] [Footnote removed][+]

[2104] [Footnote removed][+]

[2105] [Footnote removed][+]

[2106] APA_0103429; APA_0103430.

its meeting, it is clear that Behnke intended to remain in the background so as not to be associated with the advisory group. When, in her email announcing the group to senior APA staff, Garrison commented that Behnke had "taken the first stab at a process document for the meeting," Kelly commented in an aside to Behnke: "Ok, Mr. not-involved-in-the-advisory-group-thing, I see you've drafted the meeting process note?!"[2107] Although it is not clear whether Behnke was asked to disengage from his involvement in the advisory group, or whether he chose not to take a leading role because he understood that his association with PENS would be toxic to the legitimacy of the advisory group, Behnke's unobtrusive role was consistent with his pattern of behavior over the years. He continued to operate behind the scenes to exert his influence while assuring that his manipulations would remain undetected, except to his chosen few confidantes.

The advisory group met on November 14 and 15 to discuss implementation steps for the petition resolution and produce a report containing a wide range of options and recommendations for Council to consider. During the meeting, Garrison proposed that the advisory group use clarifying language "like the 'Role of Psychologists in National Security Detention Settings'" to title their report, so as to "clarify the context" and indicate that the report does not apply to domestic jails or hospitals.[2108] The advisory group ultimately recommended that the report be titled "Psychologists and Unlawful Detention Settings with a Focus on National Security."

On January 2, 2009, Garrison circulated the report internally to APA staff members, commenting that it was "truly remarkable that the report is being presented as a consensus document." Garrison also noted that while there was a "persistent effort" on the part of the petitioners to include references that would "speak to some enforcement mechanism… and to get APA to assume some direct role in its implementation…," she was able to "successfully challenge such assertions with the aid of Michael, Armand, Bill, Beth, and Elena."[2109+]

Immediately after it was announced to Council that the advisory group had been formed and that its work product would be placed on the February 2009 agenda for consideration, President-Elect James Bray registered his strong displeasure with Garrison for "overstepping [her] authority" in announcing the plan because he had not yet decided that the issue would be taken up at the February meeting.[2110] Breckler explained to a small group of high-level staff that Bray had maintained "for sometime [sic] that he [did] not want to deal with the interrogation issue 'on his watch,' and that he will do all he can to stall, delay, and put on the back burner." Farberman responded that it would be important to convince Bray that "any attempt to slow the implementation of the petition results will create a fire that will require some [sic] much of his time and staff time that his real priorities for the year will be badly short-changed."[2111] After much internal discussion between APA staff, CEO Norm Anderson, outgoing President Alan

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[2107] APA_0103431.

[2108] APA_0103573.

[2109] APA_0104139.

[2110] APA_0203826.

[2111] APA_0103456.

Kazdin, and Bray, Bray was convinced that it would not be feasible to take the advisory group's report off the February agenda.

After Bray reviewed the report, he sent it to Council, noting that he had "a number of concerns" about the report, but instructing that Council take up the item at its upcoming February meeting.[2112] As the Council meeting approached, Brad Olson circulated a message on the advisory group's listserv, proposing that a motion be put forth at Council to accept the report in its entirety as APA policy. Upon reading Olson's proposal, Behnke recommended that Garrison draft a note to the advisory group to explain the process in order to temper their expectations about what would happen at Council. He suggested that she assure the group that the petition resolution was already policy and that she remind the group that Council's "discussion would take place in a very different political context than we've had for the past 8 years," which might reduce the sense of urgency to take further action.[2113] Yet again, though Behnke had removed himself from public engagement with the advisory group, he continued to maneuver behind the scenes to frame the way that the report would be received and discussed by Council.

Shortly before the February Council meeting, Morgan Banks received a copy of the report and contacted Behnke to complain that the report was "totally inconsistent with federal, not to mention, uniformed, service."[2114] Two days later, on February 12, 2009, Banks sent an email to a list of 50 military psychologists, expressing his concerns about the report. He wrote:

> I have attached an unpleasant document for your review. . . Unfortunately, the authors of this document, an APA presidential advisory group, have seen fit to produce this document, and it will be presented to council next week. . . . So far, I have received consistent feedback [from JAGs] that the options identified in the report for Council's consideration are inconsistent with military service. In particular, the informal legal opinions I have received imply that the recommendations in the report, if adopted as APA policy, would require a violation of your oath of office and of the UCMJ.[2115]

What was not clear to the military psychologists who received the letter was that Behnke and Banks had collaborated to produce the letter together. Although Sidley found no evidence revealing when precisely Behnke and Banks began drafting the letter, by midday on February 12 Banks had shared with Behnke his analysis regarding whether the advisory group's report conflicted with the oath of office for those serving in the military, and whether an officer following the requirements of the report would be in conflict with the Uniform Code of Military Justice. Banks commented that he had asked some JAGs to review his analysis, and at least one had "answer[ed] in the strong affirmative, that it would violate our oath of office and the Uniform Code of Military Justice."[2116] Late that afternoon, Banks and Behnke spoke by phone,

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[2112] APA_0104552.

[2113] APA_0074792.

[2114] APA_0104577.

[2115] HC00021304.

[2116] APA_0081997.

and it appears likely that they agreed that Behnke could contribute to the letter Banks was preparing;[2117] by early evening, Banks had sent Behnke a draft and Behnke had begun to suggest ways to make the letter more impactful and precise.

As of the evening wore on, Banks wrote to Behnke that he "continue[d] to wordsmith," and when Behnke responded that he needed "just a couple more minutes," Banks complained "[y]ou killing me man…" When Behnke finished his revision, he sent the document to Banks with the following message:

> Morgan, take a gander. I've used a couple of specific examples that I think people will find compelling, and I've tempered your language somewhat. The reason for the tempering is that we've got friendlies who have colleagues on the advisory group, and we don't want to alienate any potential allies.[2118]

After the letter's release, Behnke wrote in a confidential note to Kelly that he had seen a draft of the letter, and that he had "corrected some inaccuracies regarding the Petition Resolution, and recommended tempering the language."[2119] He added that his "sense is that there is a feeling that they [military personnel] can live with the Resolution," but "[t]hey see the Advisory Report recommendations as going well beyond the Resolution . . . and that is what they seem to be finding quite unsettling."[2120] Behnke also confessed to Garrison that he had seen an earlier draft and "softened what was some pretty harsh language." Recognizing that he could not continue to conceal his collaboration with Banks from the rest of the association, Behnke nonetheless explained to Garrison that he would prefer to inform APA governance and staff of his role directly instead of in writing.[2121] Sidley found no evidence that Behnke did ever inform senior APA staff or the Board of his involvement.

Just as they had done with respect to APA resolutions and public statements over the previous three years, Behnke and Banks coordinated in secret to craft a nuanced message that would defend the ability of DoD to use psychologists to the greatest extent possible while also remaining palatable to an increasingly hostile APA membership. Though evidence of the joint venture between APA and DoD diminished in the latter half of 2007 and 2008, it is clear that Behnke and Banks remained committed to finessing messaging in a way that promoted APA's ability to protect military psychologists and their roles in facilitating interrogations.

When Banks's letter began to circulate within APA, Behnke and Garrison worked to place the note in context and explain the reaction of military psychologists to the advisory group's report. Garrison wrote to senior APA staff that she had been aware before seeing Banks's note of "a movement afoot to stir up concern about the report among military

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[2117] APA_0074824.

[2118] APA_0074803.

[2119] APA_0104651.

[2120] APA_0074824.

[2121] APA_0074810. When Larry James drafted a letter critical of the advisory group's report a few days later, he also asked Behnke to comment on it before he sent it to Council. APA_0104750; APA_0104751. Sidley found no record that Behnke responded to James's request for advice.

personnel."[2122] Indeed, during the month of February, military psychologists were expressing a great deal of confusion regarding whether the entire advisory group report would be adopted as policy, and worrying that their scope of practice would be restricted if Council were to accept the report.[2123] Observing that the close relationships with DoD and military psychologists that he had cultivated so carefully over the past several years was threatened, Behnke began manipulating procedure and wordsmithing language to prevent the advisory group's report from hindering DoD's mission.

Behnke and other APA staff began working behind the scenes on two parallel efforts to ensure that the advisory group report would not threaten the work of military psychologists. In the first of these efforts, APA staff began strategizing to ensure that Council would merely "receive" the advisory group's report and not accept or adopt it as APA policy. The issue first arose when, in response to the concerns of military members, Breckler recommended that APA focus on the message that "this is an advisory document, and Council is only being asked to receive it."[2124] Breckler's message sparked an internal debate regarding whether the motion before Council was to receive the report or to adopt it. The distinction was critical: Council's receipt of the report would not imply that APA endorsed its recommendations, whereas adoption of the report would raise more challenging policy implications. Garrison clarified that the petitioners' "goal is now for Council to receive the report and for a motion to be presented by one of the other advisory group members on Council for ALL the options contained therein to be approved by Council."[2125] As controversy and misinformation continued to swirl regarding Council's upcoming action, on February 16, Behnke and Garrison drafted an email for Eisman to send to the advisory group, explaining the process for putting into effect the petition resolution and for Council to receive, but not adopt, the advisory group report.[2126]

In the second effort, Behnke worked with Larry James to make sure that the title of the advisory group report would not be nearly as impactful as the petitioners intended it to be. In the days leading up to the Council meeting, Behnke and James began working closely together to guide the advisory group report through Council in a way that was acceptable to military psychologists. On February 18, James informed his colleagues that he would be meeting with Behnke the following day to "develop a battle plan of attack. I will engage with intentisty [sic] this weekend at the APA Council of Representatives meeting to fight this."[2127] It seems likely

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[2122] APA_0074818.

[2123] For example, on February 13, Lisa Teegarden, Director of the BSCT at Guantanamo at the time, wrote to Garrison that the advisory group's report, if adopted as policy, would "require a violation of military psychologist's oath of office and of the UCMJ." Similarly, on February 16, Scott Marrs, an Air Force psychology consultant, reached out to Garrison to discuss what action she expected from Council. APA_0719538. Garrison responded to both Teegarden and Marrs, emphasizing that the report "is not a policy document, nor was it intended to become one," and that "the petition resolution itself does not amend the Ethics Code, nor is it enforceable in any other way." APA_0104736.

[2124] APA_0012788.

[2125] APA_0719507.

[2126] APA_0104716.

[2127] APA_0104874. In response to Banks's February 12 letter, Mel Gravitz suggested that the APA President would have the authority to invite Banks or another military representative to speak at Council

that, at this strategic meeting, James and Behnke discussed the title of the advisory group's report and coordinated regarding how Behnke could influence the governance process to retain the reference to "unlawful detention settings" in the title.

Within APA, there had been intense debate among staff, governance members, and advisory group members regarding the inclusion of the word "unlawful" in the proposed title: Psychologists and Unlawful Detention Settings with a Focus on National Security. While it appears that President James Bray opposed the use of the "unlawful" qualifier, several petitioners felt very strongly that the title should not be changed because they interpreted the term unlawful as clarifying that the report did not apply to domestic prison, jail, and hospital settings. Indeed, Wagner indicated that the title was "THE #1 ISSUE for [Aalbers] that could not be changed from all the recommendation in the AG [advisory group] report."[2128] Unknown to the petitioners, and indeed to anybody other than Behnke and his close circle of confidantes, was that the inclusion of the qualifier "unlawful" was also a priority for DoD. As Behnke explained to Garrison:

> What James [Bray] appears not to understand is that ***as soon as*** many psychologists see the word "unlawful," they will either: 1. Dismiss the resolution out of hand as not applying to their setting; or 2) go to their JAG, who will tell them that the setting complies with Geneva and the UN Convention Against Torture, so they'll consider it irrelevant to their work.[2129]

Recognizing an opportunity to both protect DoD's position and appear in a conciliatory light to his critics, Behnke quietly coordinated with his most trusted team members to ensure that the petitioners carried the day in the battle over the report's title.

The next day, on February 19, the Board met to discuss the advisory group report. Following the meeting, Garrison reported to the advisory group that "[a]fter considerable discussion with James [Bray] (focused on the importance of the title) and subsequent discussions with the Board, the Board, recognizing the importance of this matter to the group and the time spent on it, agreed to support the title recommended by the advisory group."[2130] After this, the Council agenda item was amended to reflect the title originally suggested by the advisory group:

> That the Council of Representatives adopt the following title for the petition resolution to clarify that it is not intended to be applied broadly to jails, detention centers, and psychiatric hospitals: "Psychologists and Unlawful Detention Settings with a Focus on National Security" and requests that the title be

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when the "ill-conceived 'report' is presented." After Behnke informed him that James was on Council as a Division 38 representative. Gravitz agreed that James would be best to make comments. APA_0104638. Minutes from the Council meeting do not reveal whether James spoke to Council, and Sidley was unable to find other evidence suggesting that he did so.

[2128] APA_0104783 (emphasis in original).

[2129] APA_0104785 (emphasis in original).

[2130] APA_0104804.

> incorporated into the minutes, along with the resolution, and that the petition resolution ballot be included as an attachment.

On February 22, 2009, the Council of Representatives met and voted to receive the advisory group report, with the title "Psychologists and Unlawful Detention Settings with a Focus on National Security."[2131] In an internal email, Garrison congratulated APA staff members on having arrived at a proposal that was "widely accepted by folks ranging from Debra Dunivin [sic] to Dan Aalbers." Bray echoed Garrison's sentiment, commenting that he had been thanked by both Dan Aalbers and Larry James, who was "satisfied with the result."[2132]

Indeed, James was extremely satisfied that the strategy he and Behnke had coordinated together had been resoundingly successful. After the Council meeting, James reported to a group of military psychologists that a "friendly amendment" had been passed. He explained that they had "negotiated" three points:

> 1. the Advisory Group report will be called Psychologists Working in Unlawfull [sic] Detention Facilities. This is significant since we don't have any psychologists working in "Unlawful Detention Facilities." . . .[2133]
>
> 2. The Advisory Group's report was "received" by the Council of Representatives. NO part of the crazy language in the advisory group's recommendation section will be adopted! . . .
>
> 3. The real victory is that no part of the recommendations will be apart [sic] of concil's [sic] report or APA policy. It will only say that psychologists can't work in unlawfull [sic] detention facilities).[2134]

Notably, James's declaration of victory rested on precisely the two issues that APA staff, led by Behnke, had labored over in the weeks leading up to the Council meeting.

[2131] Approved Minutes of the Council (Feb. 20 – 22, 2009) (on file with Sidley).

[2132] APA_0104861.

[2133] 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.

[2134] APA_0104874.

Behnke clearly understood that the twin strategies APA pursued in the weeks before Council would be beneficial to the military. In a private message titled "Big Picture" to Garrison on February 14, before APA governance had taken any action, Behnke clarified that "if the Board recommends 1. Action complete; 2. Title; 3. Receive the Report, and that's what Council does, we're going to be fine on all fronts. There will be people who aren't thrilled, but we'll be fine."[2135] It is likely that Behnke discussed the dual strategy with James when the two met to draw up "battle plans" for Council; after their efforts proved successful, James in turn gleefully reported the victory to his military colleagues and explained the great significance of both strategic points. As James explained in his interview with Sidley, his opinion was that the APA critics opposed to his position failed to "do their homework" regarding the legal effect of the language they chose.[2136] What James did not acknowledge, however, was that he and DoD had the benefit of APA's chief strategist serving as their tutor.

Even at this late date, 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. As the issue of psychologists involved in interrogations continued to arise, Behnke consistently coordinated with his partners in DoD and to strategize regarding ways to shape APA policy in a way that protected the military's interests.

IX. APA'S RESISTANCE TO REVISIONS TO STANDARD 1.02, LED BY BEHNKE

At the same time that Council considered the series of resolutions related to psychologists' involvement in interrogations, APA governance and Ethics Office staff also dealt with Council's requests to amend Standard 1.02 to include a clause that would mandate that psychologists act "in keeping with the basic principles of human rights." After APA adopted the PENS report as policy, this issue began to surface in discussions between various APA divisions and committees and in the form of resolutions and information items to Council.

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. Even then, Behnke continued to block efforts to make a simple revision to Standard 1.02 by pushing for a full revision of the Ethics Code, a process that would have taken years longer.

It took close to five years from the time Council first requested that the Ethics Committee consider a revision until the amendments to Standards 1.02 and 1.03 were finally adopted. And during that time Behnke engaged in a strategy of obstruction and obfuscation to continuously delay the adoption of the simple revision to the Ethics Code.

[2135] APA_0646302.

[2136] James interview (May 1, 2015).

As early as the August 2005 Council meeting, APA was already considering the need to revise Standard 1.02 of the Ethics Code. At that meeting, Council requested that:

> [t]he APA Ethics Committee review the discrepancy between the language of the Introduction and Applicability section of the *Ethical Principles of Psychologists and Code of Conduct* and Ethical Standard 1.02, and make a recommendation to the Board of Directors concerning adding the words 'in keeping with basic principles of human rights' to Ethical Standard 1.02. Council requests that this process move forward as expeditiously as reasonably possible, recognizing that a proposed amendment to the *Ethical Principles of Psychologists and Code of Conduct* will be subject to the review procedures required by Association Rule 30-8, Standards and Guidelines, and final Council action."[2137]

Notably, Council did not simply demand that the Ethics Committee make the addition, but it is clear that Council desired the change, and that Behnke and Ethics Office staff understood Council's intent. Shortly after the meeting, a staff member emailed Behnke to identify addressing the Ethics Code revision as a "concrete task" requested by Council.[2138]

Shortly after receiving Council's directive, Behnke circulated a document produced in response to Council's request to Gilfoyle and Childress-Beatty for legal review.[2139] The response, written on behalf of the Ethics Committee, rather than making a clear recommendation for or against the proposed revision requested more time for careful consideration:

> The Ethics Committee has carefully reviewed Council's request and believes, as explained below, that policies adopted by the Council of Representatives, the Board of Directors, and the Ethics Committee make APA's position clear and provide sufficient guidance to members at the immediate present time. Accordingly, the Ethics Committee respectfully recommends that the Committee be given more time to engage in a process that will allow a fuller understanding of the questions and concerns that gave rise to this proposed change, a deeper consideration of whether the proposed change is the best way to address the underlying considerations, and more extensive examination of the impact adding such language to the enforceable section of the Ethics Code may have.
>
> …
>
> The Ethics Committee wants to give this proposed change the attention and consideration that comes with a full examination of the Ethics Code, with broad participation from the entire association and ample opportunity for reflection, comment, and feedback, before making a recommendation concerning the proposed change. The Committee also wants to benefit from the processes that are currently underway, so that it may review what comments are submitted

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[2137] Approved Minutes of the Council (Aug. 17 & 21, 2005) (on file with Sidley).

[2138] APA_0045782.

[2139] APA_0049824.

> regarding the PENS Task Force report and what specific examples the Task Force report commentary addresses [sic]. The Committee believes that by benefiting from these processes it will be in the best position to serve the APA well with a considered, thoughtful, and constructive recommendation.[2140]

Sidley found several drafts of the Ethics Committee's response, showing that Behnke, Jones, Moorehead-Slaughter, and others supported the strategy of deferring action on this issue.[2141] The clear theme running throughout the response to Council's request is that the Ethics Committee had no intention of moving forward with a revision "expeditiously," as Council had requested. Rather, it is clear from the reference to "broad participation," that this response was intended to halt progress on the proposed revision. This response was the first in what became a pattern of obstruction and delay from APA, an approach endorsed and orchestrated by Behnke as Director of the Ethics Office.

In February 2006, Council received an update regarding the Ethics Committee's discussion of its request to consider the proposed revision.[2142] Attached as an exhibit to the information item was the September 2005 recommendation of the Ethics Committee that Behnke had earlier circulated for legal review.[2143] The minutes from the February 2006 Council meeting did not reveal that Council renewed its request to the Ethics Committee to consider revisions to Standard 1.02. It seems likely that Council had shifted its attention to other resolutions and motions regarding interrogations and torture and had allowed the revision to slip from its notice. Instead, at the February meeting, Council referred a new business item titled "Torture and Cruel, Inhuman or Degrading Treatment or Punishment" to the Ethics Committee, the Board for the Advancement of Psychology in the Public Interest ("BAPPI"), the Board of Professional Affairs ("BPA") and the Policy and Planning Board ("P&P").[2144]

Shortly after the February 2006 Council meeting, Behnke began reaching out to representatives from state psychological boards to build relationships with groups that could become potential allies in his opposition to the revision of Standard 1.02. On March 9, 2006, Moorehead-Slaughter emailed two representatives from the Association of State and Provincial Psychology Boards ("ASPPB") to discuss possibilities for collaboration between the APA Ethics

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[2140] APA_0049825. The Ethics Committee's response to Council's request for a recommendation was also disingenuous in its reliance on Council's 2005 resolution 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." Behnke and the Ethics Committee would have been well aware that Council's statement was not an enforceable interpretation of the Ethics Code, and furthermore that Standard 1.02 would have permitted a psychologist to follow an order in conflict with Council's ethics statement.

[2141] *See*, *e.g.*, APA_0049832–33; APA_0049827–28; APA_0043320–24; APA_0049418–19; APA_0049380–82; APA_0046397; APA_0046402.

[2142] Approved Minutes of the Council (Feb. 17 – 19, 2006) (on file with Sidley).

[2143] APA_0060010.

[2144] Approved Minutes of the Council (Feb. 17 – 19, 2006) (on file with Sidley).

Committee and the ASPPB. As was his habit, Behnke had earlier drafted the message for Moorehead-Slaughter to send to the representatives in anticipation of their attendance at an Ethics Committee meeting.[2145] One of the specific issues that Behnke wanted to discuss was the proposed revision to Standard 1.02. Through Moorehead-Slaughter, he commented that he was "very interested in your perspective on this proposal, since the proposal identifies an instance in which a psychologist would potentially not follow state law. I am especially interested in your sense of how this change would affect the likelihood of a state's adopting the APA Ethics Code by statute or regulation."[2146] In drawing on the specter of psychologists being ethically required to disobey state laws and court orders, Behnke was aware that he was tapping into explosive issues for state psychological associations and ethics committees. Behnke's description of this parade of horribles helped him to pull strings behind the scenes and align the state psychological associations behind his strategy of opposing the Standard 1.02 revision.

When Judith Glassgold, Chair of the New Jersey Psychological Association ("NJPA") Ethics Committee, sent a draft message to Behnke in June 2006 urging the NJPA to oppose the revision, Behnke took full advantage of the opportunity to influence the position of the state association while ensuring that his influence would not be visible to the public.[+] Although Glassgold's initial statement in opposition to the revision aligned with Behnke's stance, he requested to speak to her by phone and used the opportunity to shape her message and thinking on the issue. After their conversation, Glassgold affirmed that Behnke had "helped clarify my thinking and many ideas that were only partially formed."[2147] Behnke then encouraged Glassgold to continue her opposition to the revision and to pursue her idea of asking the Divisions for Social Justice ("DSJ") to take the lead in forming a support network for colleagues in crisis, explaining that this approach, rather than being punitive, would "assume the best of these psychologists" and extend "a supportive and affirming hand" to psychologists in need.[2148] When Glassgold responded that she would like to credit Behnke with the idea, Behnke commented that he was "a bit radioactive with the people who are most interested in these issue[s], and [he was] much more interested in good ideas getting into the discussion than in receiving any credit, so probably best not to mention [his] name in connection with it."[2149]

During the spring of 2006, Behnke clearly worked to marshal support for his position on the Ethics Code revision, reaching out directly and through others to the state psychological associations. However, aware that the strength of the state associations' endorsements rested on their independence from any association with him, Behnke controlled the messaging to make it appear as though other entities and groups were speaking out in opposition to the revision independently of his influence.

In August, Council once again neglected to call for additional action from the Ethics Committee regarding the proposed revisions to Standard 1.02. As with the February 2006

[2145] APA_0060030.

[2146] APA_0060009.

[2147] APA_0060660.

[2148] *Id.*

[2149] *Id*.

Council meeting, it is likely that Council had focused its attention on related matters. At the August meeting, Council heard presentations from Surgeon General Kevin Kiley regarding the role of psychologists in supporting interrogations and from Steven Reisner, who opposed the involvement of psychologists in such work. Council also considered a new business item regarding psychologists' participation at United States detention centers, an item that would eventually become the moratorium resolution considered at the August 2007 Council meeting.[2150] Finally, Council voted to adopt the Resolution Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment.[2151] Thus, it seems likely that Council did not immediately pursue the Ethics Code revision because it had turned its attention to related resolutions and motions designed to prohibit psychologists from participating in interrogations.

Although Council did not formally address the Ethics Code revision in a business item in August 2006, members of the Ethics Committee met with concerned APA members to discuss their proposals for revisions to Standard 1.02. Shortly after, Behnke wrote a letter on behalf of the Ethics Committee to the Divisions for Social Justice to follow up on their meeting during Convention and to seek clarification on DSJ's desired changes to Standard 1.02.[2152] Behnke proposed four possibilities for revisions to the language, based on his discussions with Olson and Altman:

> 1. Have the language in ethical standard 1.02 mirror exactly the language in the Introduction and Applicability (that is, add the phrase "in keeping with basic principles of human rights" to standard 1.02); 2. Add a more specific phrase to standard 1.02, for example that in cases of a conflict between ethics and law, psychologists may adhere to the law "but may never engage in torture or cruel, inhuman or degrading treatment"; 3. Add specified language from the Universal Declaration of Human Rights into the Ethics Code . . .; 4. Add the phrase "in keeping with basic principles of human rights" to standard 1.02, and then have a footnote that references relevant human rights texts, such as the Universal Declaration of Human Rights.[2153]

On behalf of the DSJ, Brad Olson responded and indicated that, of the four possibilities presented by Behnke, his preference was the fourth because it "provides the best combination of specificity and yet generality; brevity and yet an encompassing approach."[2154] Olson added that he would like for DSJ and the Ethics Committee to have further discussions about the rationale for the revision and "why it should be made with haste rather than waiting for the major set of revisions."[2155]

[2150] Approved Minutes of the Council (Aug. 9 & 13, 2006) (on file with Sidley).

[2151] *Id*.

[2152] APA_0061383.

[2153] *Id.*

[2154] APA_0061382.

[2155] *Id*.

Shortly after Olson sent his response, Behnke attempted to speak to him by phone.[2156] It seems likely that the two spoke and agreed to present their proposed revisions to the Committee on Legal Issues ("COLI") the following week. Just days before the COLI meeting, Behnke sent Olson a letter from the Ethics Committee, which raised several issues with Olson's preferred revision,[2157] an option which Behnke himself had presented only weeks earlier. Behnke also proposed to research the statements of other ethics codes with respect to conflicts between ethics and law, a process that would no doubt take a significant period of time. Behnke's communications with Olson demonstrate that his strategy was to extend discussion and delay action on a revision to the greatest extent possible.

Although Behnke likely presented the discussion with COLI as an opportunity to move forward on the proposed revisions, the reality is that he utilized committee review as yet another delay tactic. At the COLI meeting in early November 2003, Behnke was present for Olson's presentation of the proposed revision to Standard 1.02. Upon consideration of the proposed language, COLI stood firmly against adding in the phrase "in keeping with basic principles of human rights," reasoning that adding the proposed language to enforceable parts of the Code could "lead to unanticipated consequences."[2158] As a result, COLI "strongly cautioned against incorporating the proposed language" into the Ethics Code. 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 revisions.

As criticism began to build in 2007 regarding APA's inaction on the proposed Ethics Code revision, Behnke continued to pursue his strategy of engaging in discussion and consultation as a means of delaying and pushing back on concrete action. 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 than a year and a half earlier, by clarifying that Council had not directed the Ethics Committee to revise the Ethics Code, but rather to make a recommendation regarding whether such a revision should occur.[2160] Behnke's dialogue with Reisner on this point continued over the next several months, and in July 2007,

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[2156] APA_0061395.

[2157] APA_0063026.

[2158] Approved Minutes of the COLI (Nov. 3 – 4, 2006) (on file with Sidley).

[2159] For example, APA recommended that Kimmel present his report from the Task Force on the Effects of Efforts to Prevent Terrorism to COLI as part of its attempt to sideline the report. Approved Minutes of COLI (Nov. 6, 2004) (on file with Sidley). In 2007, Neil Altman was also asked to present his proposed moratorium resolution to COLI, which expressed strong objections to the resolution. Approved Minutes of the COLI (Mar. 24, 2007).

[2160] APA_0063427.

Reisner reiterated his point that Council directed the Ethics Committee to change the language in Standard 1.02. Behnke again responded that he did not "see either complexity or ambiguity in the item Council passed. Council directed the Ethics Committee to review language in the Ethics Code and to make a recommendation, following the process set forth in the Association rules. Consulting with the president of the DSJ, meeting with boards and committees at the Consolidated meetings, and reviewing how other health and mental health association codes of ethics address this issue are all part of that process."[2161] Behnke also clarified that Standard 1.02 was not changed in the 2002 revision because of any issue relating to interrogation, checking with APA staff to ensure that the revisions to the Standard 1.02 language had occurred prior to the 2000 election. Reisner continued to express frustration with Behnke's answers, complaining that Behnke's responses refused to engage with the substance of his critiques.

It is clear that Behnke was aware that he was not engaging with Reisner's substantive points and was instead engaging in word games to put off further action. In a rare admission, Behnke referenced his exchange with Reisner in an email to Farberman and commented that "I may have been a little bit bad here."[2162] Although we cannot say with certainty which part of Behnke's response to Reisner was "bad," Behnke was likely referring to his manipulation of Reisner's use of the word "violation" as a means of avoiding the underlying substantive criticism that APA had failed to appropriately define the ethical violation. Behnke's admission to being "a little bit bad" demonstrates that he consciously played sophisticated games with language, and used his ability to parse words to his advantage in delaying the revision of Standard 1.02.

Meanwhile, in April 2007, Ken Pope sent an email to members of the Ethics Committee asking for a consult on how to interpret Standard 1.02 because it "seems to take a stance at odds with the Nuremberg principle that one could not set aside personal responsibility on the basis of just following the state's law or orders from an authority."[2163] Within hours, Pope received several responses from members of the Ethics Committee acknowledging the problem that Pope had raised, including a response from Behnke clarifying that "[w]e all agree there are laws one must not follow" and explaining that "[f]inding the right language to identify which laws one may never follow is not so easily done."[2164] When Pope responded to the comments provided by the Ethics Committee and reiterated his concerns the next day, Behnke again responded by defending the then-current iteration of Standard 1.02 as permitting civil disobedience in the face of an unethical order.[2165] The exchange between Behnke and Pope extended over the next several weeks, as the two worked through hypothetical situations and parsed language.[2166] Behnke's dialogue with Pope is consistent with his strategy of engaging in discussion regarding Standard 1.02 without proposing language or taking any action to move the revision forward.

[2161] APA_0066778.

[2162] APA_0066784.

[2163] APA_0091732.

[2164] *Id.*

[2165] APA_0120846.

[2166] APA_0120859; APA_0120858.

On February 6, 2008, Pope resigned from APA because of his disagreement with "decisive changes that APA has made in its ethical stance during the past 6+ years."[2167] In his resignation letter, Pope took particular issue with the revision to Standard 1.02 completed in 2002: "This new enforceable standard, in my opinion, contradicts one of the essential ethical values voiced in the Nuremberg trials. Even in light of the post-9/11 historical context and challenges, I believe we can never abandon the fundamental ethical value affirmed at Nuremberg. An attempt to modify Standard 1.02 was placed only in the nonenforceable section. In the 5 years since creating this new enforceable ethical standard in a sharp break with the past, APA chose to make no qualifications, restrictions, or other modifications to Standard 1.02 in the code's enforceable section." In response to Pope's resignation, Behnke and Linda Campbell collaborated to write a letter responding to several of the issues raised in Pope's letter, and consulted with Melba Vasquez regarding the substance and tone.[2168] Melba responded that she thought that the clarifications were helpful, but that she did not think that Pope would reconsider his resignation unless Standard 1.02 was amended to remove the language that he thought provided a Nuremberg defense. Vasquez also commented that Pope had sent her two emails regarding his resignation.[2169]

Behnke asked Vasquez whether she could ask Pope "whether he has specific language in mind and, if so, whether he could send it" to Behnke.[2170] It seems likely that Vasquez made Behnke's request to Pope because Pope responded that he could not provide any suggestions for revised language until he understood the rationale for adopting the language in 2002. He indicated that he had heard others speculate that the language might have been adopted because people felt that the "Nuremberg ethic" was not necessary in a democracy or because it was "not practical given post-9-11 threats."[2171] Both Behnke and Vasquez responded to Pope's inquiries, but they took diverging approaches: Vasquez responded to Pope's request with vague recollections that the standard was changed to address situations where psychologists felt that they would have to leave their jobs or face ethical charges.[2172] Behnke, on the other hand, ignored Pope's request for information and instead asked him to explain why he felt that it was necessary to resign from APA as those reasons related to Standard 1.02.[2173] Behnke's emails indicate that he intended to ask Pope in his initial request to explain the connection between Standard 1.02 and his resignation from APA, but it is clear that Pope interpreted the email as a request for suggested revisions.[2174] Likely recognizing that they were not presenting a unified message, Behnke asked Vasquez if they could discuss how to respond to Pope,[2175] and several

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[2167] Kenneth S. Pope, *Why I Resigned from the American Psychological Association, available at* http://kspope.com/apa.

[2168] APA_0070582; APA_0070583.

[2169] APA_0098412.

[2170] APA_0635265.

[2171] APA_0071722.

[2172] *Id.*

[2173] APA_0071724.

[2174] APA_0120932.

[2175] APA_0071722.

days later Behnke took the lead in reiterating his request that Pope explain his reasons for resigning rather than suggest proposed language for a revision.[2176] Sidley did not uncover any evidence that Pope ever responded to Behnke's last request for clarification.

Behnke's exchange with Vasquez and Pope is yet another example of his attempts to deter efforts to revise Standard 1.02: even when a well-respected former Chair of the Ethics Committee volunteered to carefully consider the issues and develop proposed language for a revision, Behnke ignored his requests for the information that would help do so. Behnke was interested not in moving forward with a revision, but in understanding how to develop a response that explained away or undermined growing criticism of the then-current Standard.

Behnke's strategy to continuously suppress suggestions for revision was successful in delaying action on this issue for several years. It was not until late 2008, more than three years after Council first requested that the Ethics Committee consider a revision to Standard 1.02, that APA finally put together a Committee to assess the issue. The Committee included Wagner, Van Hoorn, Wiggins, Okorodudu, Strickland, Brad Johnson, and Jeff Barnett. In October 2008, Behnke suggested that the revision to Standard 1.02 might be best accomplished by incorporating an internal reference to Standard 3.04, relating to avoiding harm. He identified a number of advantages to this "brilliant solution," including that it both avoided reference to external documents and put the "do no harm" ethic at center stage.[2177] Wagner, one of the APA members interested in revising the Standard, responded that the incorporation of a reference to Standard 3.04 would not be sufficient because trying to avoid harm was not equivalent to adhering to basic principles of human rights.[2178] Others working with Wagner to revise Standard 1.02 also agreed that Behnke's proposal could "produce perceived or actual loopholes."[2179] Behnke agreed to put together a list of proposed revisions for the committee, and Wagner suggested that it might be best to remove the language clarifying that psychologists "may adhere to the law" altogether.[2180]

In early 2009, the Ethics Committee issued a call for comments from APA members and the public regarding suggested revisions to Standard 1.02.[2181] As the comment period progressed, Behnke once again turned to his trusted advisors in DoD, Dunivin and Banks, this time to ask them to influence APA policy openly by "encourag[ing] folks to comment," presumably talking about their colleagues and peers in DoD. Within twenty-four hours, both Banks and Dunivin had provided comments on the APA website.[2182]

In June 2009, in anticipation of the upcoming Council meeting, the Ethics Committee circulated a recommendation to the Board that any revision of Standard 1.02 should be

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[2176] APA_0120929.

[2177] APA_0073846.

[2178] *Id.*

[2179] *Id.*

[2180] APA_0073854.

[2181] *Call for Comments*, *available at* http://www.apa.org/ethics/code/call-comments.aspx.

[2182] APA_0121219; APA_0122379.

accomplished in the context of a full revision of the Ethics Code rather than piecemeal. Behnke drafted a letter for Jeff Barnett, the Chair of the Ethics Committee, to send to the Board conveying this recommendation.[2183]

As the subcommittee convened in 2008 continued their discussions in preparation for the August 2009 Council meeting, Garrison, Farberman, and other senior level staff struggled to cabin the group's proposals into APA's normal revision process. When Gilfoyle reached out to Behnke for clarification regarding which language was being discussed, Behnke made a rare direct admission of his attempts to deter progress on the revision. He responded to Gilfoyle, "[y]es — I can get you up to speed quickly. Everyone else I am trying to slow down."[2184] Behnke's comment to Gilfoyle demonstrates that, even as late as 2009, Behnke continued to do what he could to obstruct member efforts to revise Standard 1.02.

As the August 2009 Council meeting approached, however, Behnke was increasingly acting alone and without the support of other APA senior staff. In response to staff's inquiries regarding a definitive timeline for the revision, Behnke clarified that Barnett saw the discussion about revising Standard 1.02 as the beginning of the full revision process, which during the last revision took five years.[2185] When Garrison reviewed the Ethics Committee's message to the Board regarding its recommendations on the proposed Standard 1.02 revision, Garrison asked Behnke whether the Ethics Committee had considered whether there might be other modifications that would address the critics' underlying concerns. Behnke responded that "the Committee does a very nice job of seeing this issue as the beginning of the next ethics code revision, so it is not a firm 'don't do this,' but rather a 'this should be done in the context of a full ethics code revision,' making for a much softer landing."[2186] Farberman weighed in to disagree with Behnke's assessment: "Sorry to be doom and gloom but I'm not sure this decision (no specific change to the code now) will provide a soft landing; in fact I think it will be criticized as foot-dragging. That's not to say it's the wrong decision but let's be prepared for the criticism." Behnke's response was that they should "look to history" for defense of the pace of the revision, commenting that the last revision took more than five years and would need to take account of the "*many* constituencies weighing in."[2187] These exchanges show that Behnke continued to obstruct efforts to revise the Ethics Code, but that he was at this point left stranded to defend his position without the continuing support of other high-level staff, who had come to accept that continued delay would no longer be palatable to APA members.

In addition to staff, it seems likely that APA governance also became increasingly hostile to Behnke's attempts to delay. During his interview with Sidley, 2009 APA President James Bray said that he pushed hard for the revision of Standard 1.02, believing that they should not wait and go through the long process of revising the full Ethics Code. Bray recalled that he got significant pushback, specifically from the Ethics Committee and Nathalie Gilfoyle, who

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[2183] APA_0076428.

[2184] APA_0076581.

[2185] APA_0076430.

[2186] APA_0076428.

[2187] APA_0076431 (emphasis in original).

cautioned him against putting the item on Council's August 2009 agenda,[2188] but Sidley could find no evidence that Gilfoyle or other staff did indeed oppose him. There is evidence that Bray supported a proposed revision: In July 2009, he wrote to John Neafsey, a vociferous critic of APA's position on these issues, that "[t]his President and the APA Board of Directors plans to support a business item at the APA Council of Representatives meeting in August that will direct the APA Ethics Committee to propose language by a time certain this fall that will appropriately and effectively amend this Ethical Standard. After a public comment period, the Council will act on the proposed revision to Ethical Standard 1.02 at its February 2010 meeting."[2189] Despite Bray's statement in a separate email that his response to Neafsey was the "standard email"[2190] and that he did not want to deal with the interrogation issue "on his watch,"[2191] Bray told Sidley that once he understood the ethical concern, he came to be strongly in favor of amending 1.02 and made it a point to enact the revisions during his presidency.[2192] Once he made it clear he would not change his mind on amending the Standard, he said he and Gilfoyle arrived at a compromise that the matter would be taken up at the February 2010 Council meeting.[2193]

In July 2009, after *Harper's Magazine* published an article titled "The APA's Nuremberg Defense," Behnke reached out to Banks to ask for some history on Directive 3115.09, which the article claimed aligned with APA's revision to Standard 1.02 to give psychologists an "out" under the Ethics Rules. Banks quoted the relevant language of the Directive for Behnke, commenting that the author was "REALLY twisting the verbiage and intent" to argue that the Directive permits torture.[2194] Banks followed up with an additional email that identified some slight modifications between the 2005 and 2008 versions of the Directive, which he did not think changed the substantive point that the "document prohibits mistreatment in almost every paragraph."[2195]

Finally, during the August 2009 Council meeting, four years after Council's original request that the Ethics Committee consider revisions to Standard 1.02, Council explicitly directed the Ethics Committee to take action and imposed a time limit for it to do so. Council directed the Ethics Committee to propose language that would resolve the discrepancy between the language in the "Introduction and Applicability Section of the Ethical Principles of Psychologists and Code of Conduct," and Standards 1.02 and 1.03 so that these Standards "can never be used to justify, or as a defense for, violating basic human rights." Council's mandate included an instruction that the Ethics Committee submit its proposed language in a time period

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[2188] Bray interview (June 15, 2015).

[2189] APA_0076727.

[2190] APA_0108218.

[2191] APA_0103456.

[2192] Bray interview (June 15, 2015).

[2193] *Id*.

[2194] APA_0076649 (emphasis in original).

[2195] APA_0108261.

that permitted its addition to the February 2010 meeting agenda. In February 2010, Council voted to approve the following amendments to Standards 1.02 and 1.03:

> 1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority. If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. [If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority.] Under no circumstances may this standard be used to justify or defend violating human rights.
>
> 1.03 Conflicts Between Ethics and Organizational Demands. If the demands of an organization with which psychologists are affiliated or for whom they are working are in conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and [to the extent feasible, resolve the conflict in a way that permits adherence to the Ethics Code.] take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.[2196]

Behnke's efforts to obstruct and delay succeeded in postponing any real action on Standard 1.02 for nearly five years after Council first requested that the Ethics Committee consider a revision. Though APA members and critics eventually succeeded in forcing APA to accept an amendment to Standard 1.02, it was in spite of Behnke's vigorous opposition to their efforts at every turn.

Although Sidley was unable to uncover any clear documentary evidence proving that Behnke opposed the revision to Standard 1.02 in an attempt to benefit DoD or national security psychologists, such an explanation would fit with his general approach to be protective of military psychologists and others working in national security settings. Behnke had been aware as early as 2004 that some government personnel might view Standard 1.02's language, characterized by critics as a "Nuremberg defense," as helpful to them in pursuing national security work.

At that point, shortly after the July 20, 2004 meeting at the APA, Steven Band, Chief of the Behavioral Science Unit at the FBI, had emailed Behnke and noted that "[d]uring this time of war, [he was] drawn to part 1.02 of our (APA's) ethical principles and take comfort in [his] interpretation of this standard."[2197] Thus, it seems likely that Behnke had the impression that retaining the 2002 version of Standard 1.02, with its language permitting adherence to the law in the event of a conflict with ethical principles, was important to psychologists working in national security, and that he opposed any revision to the Standard for so many years out of a desire to protect these psychologists.

[2196] Approved Minutes of the Council (Feb. 19 – 21, 2010).

[2197] APA_0085132.

X. APA'S SHIFT IN COURSE DURING THE TRANSITION BETWEEN ADMINISTRATIONS

As the Bush Administration drew to a close and President Barack Obama entered the White House, APA effectively switched course and greatly reduced its efforts to defend the PENS report and otherwise preserve the role of psychologists in facilitating interrogations. On January 22, 2009, Obama issued an executive order prohibiting the use of all abusive interrogation techniques.[2198] APA quickly issued a press statement "applaud[ing]" the executive order and emphasizing that its members had passed a resolution in 2008 that prohibited psychologists from working in settings where people are held in violation of international law.[2199]

Internally, the Ethics Office and Ethics Committee began implementing the changes that members had demanded for years but that staff had, until that point, so strongly resisted. As stated above, 2009 saw a shift in how APA treated the calls to amend Standards 1.02 and 1.03 of the Ethics Code, and began to issue statements indicating that it would finally address the criticisms related to those standards, which had been raised by members for several years but never fully addressed. On June 18, the Ethics Committee made a statement clarifying that, under the 2002 Ethics Code, there is no defense to torture that the Ethics Committee would accept in the adjudication of any complaints, and that "[t]orture in any form, at any time, in any place, and for any reason, is unethical for psychologists and wholly inconsistent with membership in the American Psychological Association."[2200] Likely finding a less resistant attitude in the Ethics Office, and an unlikely ally in Bray, Council was finally able to pass a motion directing that the Ethics Committee propose language to amend Standard 1.02. The amendments became effective on June 1, 2010.

In 2011, the Ethics Committee also began taking steps regarding the broken promise to provide a casebook of illustrative examples of the ethical dilemmas faced by psychologists in national security settings, a project that had originally been billed as a follow-up to the report produced by the PENS Task Force six years earlier. Although the PENS Task Force produced its report in July 2005, it was not until December 2007 that the Ethics Committee sent out a call for vignettes, with the claim that the Committee had "deemed it advisable to wait until Council completed its multiyear process of developing and refining policies related to the role of psychologists in national security-related activities before issuing its responses."[2201] In June 2011, following the passage of the 2008 petition resolution and the 2010 revision of Standards

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[2198] Executive order 13491 – Ensuing lawful Interrogations, *available at* https://www.mwhitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

[2199] APA Applauds New Executive orders Signaling a Fundamental Change in the Rights and Treatment of Detainees, *available at* http://www.apa.org/news/press/releases/2009/01/guantanamo.aspx.

[2200] *APA Ethics Committee Statement – No Defense to Torture under the APA Ethics Code* (June 2009), *available at* http://www.apa.org/news/press/statements/ethics-statement-torture.pdf.

[2201] *Comments and Feedback Requested on the Responses of the APA Ethics Committee to Questions, Comments, and vignettes regarding APA Policy on the Role of Psychologists in National Security – Related Activities* (June 2011), *available at* http://www.apa.org/ethics/programs/national-security-comments.pdf.

1.02 and 1.03, the Committee announced that it "believed it was in a position to move forward and complete its work on the document," and therefore sought comments and feedback on the thirty page compilation of twenty-five vignettes received *several years earlier* during the previous administration.[2202] However, so as not to attract attention to the issues, Behnke told executive staff that he would "post this text quietly, very quietly on the Ethics webpage."[2203]

On July 31, 2013, the Council of Representatives adopted a comprehensive policy titled "Policy Related to Psychologists' Work in National Security Settings and Reaffirmation of the APA Position Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment," which reconciled prior resolutions related to detainees and the work of psychologists in national security settings.[2204] At the same time that it adopted the reconciliation policy, Council also voted to rescind the report of the PENS Task Force and the resolutions adopted in 2007 and 2008.[2205] In the following months, APA wrote letters to officials in the Obama Administration and members of Congress to inform them of APA's new unified policy. Nevertheless, the PENS Report itself remains integrated into DoD Medical Command official policy regarding the involvement of psychologists in interrogations.

In sum, when the Obama Administration's clear rejection of the interrogation program run by the CIA and DoD during the Bush Administration signaled to APA that it would no longer be politically expedient to defend the PENS report and other policies supporting the use of psychologists in national security investigations, it appears that APA responded to the changed climate and reduced its defense of the policies it had earlier fought so hard to defend.

[2202] *Id*.

[2203] APA_0079688.

[2204] *Policy Relating to Psychologists' work in National Security settings and Reaffirmation of the APA position against Torture and other Cruel, Inhuman, or regarding Treatment or Punishment*, *available at* http://www.apa.org/about/policy/national-security.aspx.

[2205] *Report of the APA Presidential Task Force on Psychological Ethics and National Security* (July 5, 2005), *available at* http://www.apa.org/news/press/releases/2005/07/pens.aspx (noting vote to rescind PENS); *Policy Relating to Psychologists' work in National Security settings and Reaffirmation of the APA position against Torture and other Cruel, Inhuman, or regarding Treatment or Punishment*, *available at* http://www.apa.org/about/policy/national-security.aspx (2013 policy statement); Draft Minutes of the Council (July 31 & Aug. 2, 2013), *available at* http://www.apa.org/about/governance/council/13aug-ethics-minutes.pdf (vote to rescind PENS).

APA'S HANDLING OF DISCIPLINARY CASES AGAINST NATIONAL SECURITY PSYCHOLOGISTS

I. ETHICS ADJUDICATIONS

A. Adjudications Program Overview

1. Ethics Office and the Ethics Committee

The Ethics Office and Ethics Committee work together to adjudicate complaints of unethical conduct against APA members. The Ethics Office currently consists of seven staff members including: the Director (Stephen Behnke), the Deputy Director of Ethics and Director of Adjudications (Lindsay Childress-Beatty), three investigators, and two staff members who provide administrative support.[2206] In addition, the former Ethics Office Director, Stanley Jones, is employed as a consultant.[+] There are ten members on the Ethics Committee, who each serve three year terms.[2207] A Chair and Vice-Chair are elected each year to serve on the Ethics Committee and Behnke is the staff liaison to the committee. In accordance with APA bylaws, the Ethics Committee issues annual reports documenting the number and types of ethical complaints received each year, as well as any significant actions undertaken by the committee during that year.

Since 2000, the number of ethics complaints investigated by the Ethics Committee each year has declined drastically, from an average of 50 cases per year from 1995 – 2000 to two cases per year in 2012 and 2013.[2208+] The reduction in the number of ethics complaints reviewed by the Ethics Committee is a result of the deliberate post-2000 shift in the Ethics Office away from the adjudication of ethics complaints and towards the education of psychologists.

In the 1990s, the Ethics Office faced criticism for being too harsh and prosecutorial in its approach to adjudicating ethics complaints. Ethics Office investigator Patricia Dixon told Sidley that APA members had complained that the Ethics Office was "too aggressive" and she recalled meetings in which people voiced "very strong opinions about the [adjudications] process as being too punitive."[2209] Similarly, Childress-Beatty told Sidley that the Ethics Office had been criticized for being "too harsh" and for "going after people" in the past.[2210]

[2206] Behnke interview (May 21, 2015).

[2207] Members of the Ethics Committee are elected by the same process as members of other APA committees. APA members are nominated to the Committee by the membership, and a list of prospective members is created by the Committee and sent to the Board of Directors ("Board") for approval. The list is submitted to the Council of Representatives ("Council"), which then elects a public member to join the Committee after he or she has been nominated by the Committee and approved by the Board. The two associate members of the Ethics Committee normally serve two-year terms and are elected by the Ethics Committee directly.[+]

[2208] HC00023285.

[2209] Dixon interview (May 12, 2015).

[2210] Childress-Beatty interview (May 13, 2015).

In response to these criticisms, the Board decided that the Ethics Office should focus on education instead of adjudications. The Board made several key decisions to effect this change. *First*, the Board hired Behnke as Director of the Ethics Office in 2000. Behnke recalled that when he was hired, APA members were concerned about the Ethics Code being used "as a weapon" against them.[2211] Behnke told Sidley that when he was hired, the Board had made the decision to transition to a "kinder, gentler" adjudications process that was "clearly not going to have a prosecutorial mindset."[2212] Thus, Behnke made education and consultation the primary focus of the Ethics Office; adjudication was relegated to a "tertiary focus."[2213]

Second, the Board considered several ways to reform the adjudication program and sought guidance from the Ethics Committee. During the June 2000 Board meeting, the Board re-evaluated the ethics adjudication program and identified five potential reforms: (1) elimination of adjudication of any ethics cases; (2) elimination of all complaint-based cases; (3) restriction of complaint-based cases to those that involved behavior that was likely to lead to expulsion and/or for which there was no adequate alternative forum; (4) allow respondents in ethics cases to resign provided that APA members and inquiring members of the public were notified that the individual "resigned while under the scrutiny of the Ethics Committee"; and (5) implement automatic loss of membership for members who were subject to show cause procedures.[2214] The Ethics Committee presented its recommendations at the February 2001 Council meeting and recommended against eliminating complainant-based cases. Instead, the Ethics Committee recommended that for complainant cases, behavior that was unlikely to lead to expulsion should not be adjudicated, and that "expellable behavior" should be defined as "behavior likely to cause substantial harm to persons or groups with whom psychologists work or to the profession."[2215]

The Board discussed the potential reforms[2216] and approved changes to the Ethics Committee's Rules and Procedures to: (1) allow respondents to resign under ethics investigation; and (2) institute automatic expulsion for members in show cause matters unless the respondent requested a review of the matter by the Ethics Committee.[2217] These changes meant that APA members could resign while an ethics investigation was pending, which would end the investigation, and that members against whom a licensing board had acted could be automatically expelled.

Under the direction of Behnke, the Ethics Office pursued fewer cases, and consistent with the recommendation of the Ethics Committee, generally did not adjudicate show cause or sua

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[2211] Behnke interview (May 21, 2015).

[2212] *Id.*

[2213] *Id.*

[2214] HC00023286.

[2215] HC00023317; Approved Minutes of the Council (Feb. 23 – 25, 2001) ("Council discussed the report of the Ethics Committee regarding adjudication process reforms.")

[2216] The Board discussed these changes in executive sessions during its August 2001 and December 2001 meetings. Council was informed of the Board's decision at the February 2002 Council meeting. Approved Minutes of the Board (Aug. 25, 2001 & Dec. 7, 2001) (on file with Sidley).

[2217] HC00023310 at 1.

sponte cases that involved behavior that was not expellable. Thus, the number of matters adjudicated declined and the Ethics Office focused on providing education and consultation to psychologists instead. Behnke relied on the staff investigators and Jones to handle adjudication matters that the Office decided to pursue. By 2007, Behnke had become so busy with conducting trainings and doing ethics consultations that he realized that someone was needed to focus on adjudications in the Ethics Office.[2218] He asked Childress-Beatty, who was then in the Office of General Counsel, to lead the adjudications program. Childress-Beatty joined the Ethics Office in June 2007. Childress-Beatty told Sidley that there was a sense that Behnke was "stretched too thin" and that "investigators were just doing whatever they wanted" before she moved to the Ethics Office.[2219]

All of the ethics complaints against psychologists involved in interrogations were received and considered by the Ethics Office in this context of the shifting focus towards education and away from adjudication.

B. Type of Matters Adjudicated

The Ethics Committee's Rules, which went into effect on October 1, 2001, govern the current adjudications process. Under the Rules, the Ethics Committee can adjudicate three types of matters: (1) show cause proceedings (under Part IV of the Rules); (2) sua sponte matters (under Part V of the Rules); and (3) complainant matters (under Part V of the Rules).[2220]

1. Show cause matters

The Ethics Office may open a show cause matter after: (1) another body (*i.e.,* criminal court, licensing board, or state psychological association) has taken "specified serious adverse action against a member";[2221] (2) after a member has voluntarily surrendered a license or certificate of registration because of pending allegations; or (3) after a state or local board or similar entity has taken specified adverse action against a member and then stayed or postponed that action.[2222] When the Ethics Committee reviews these cases it can: (1) remand the matter;[2223] (2) dismiss the matter;[2224] (3) recommend reprimand or censure;[2225] or (4) recommend

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[2218] Behnke interview (May 21, 2015).

[2219] Childress-Beatty interview (May 13, 2015).

[2220] *APA Ethics Committee Rules and Procedures*, Rules, Parts IV-V, *available at* http://www.apa.org/ethics/code/committee.aspx#PII3 [hereinafter "Rules"].

[2221] Rules, Overview Parts III-V, Show Cause Proceedings.

[2222] Rules, Part IV, Subsection 1.2.

[2223] Rules, Part IV, Subsection 6.1.

[2224] Rules, Part IV, Subsection 6.2.

[2225] Rules, Part IV, Subsection 6.3.

expulsion.[2226] The Ethics Office's practice is not to open a show cause matter unless the conduct involves expellable behavior.[2227]

2. Sua sponte matters

The Ethics Office may proceed on its own initiative, via a sua sponte matter, when a member appears to have violated the Ethics Code. Sua sponte matters are initiated by the Ethics Office without any external prompts. Childress-Beatty told Sidley that the Ethics Office does not actively monitor the media to identify potential ethical violations, but APA's media office may become aware of relevant articles through its RSS feed and send those articles to the Ethics Office.[2228] The Ethics Office could also become aware of potential matters for investigation via an APA listserv that focuses on psychologists in the media.[2229]

Pursuing a sua sponte matter is entirely within the discretion of the Ethics Office and the Ethics Committee. The Chair, Vice Chair, and Director "may decide not to open a sua sponte or show cause case when a state or local board or similar entity has taken disciplinary action against an Association member" if (1) the action is either not final or the member has not completed all directives or other requirements; and (2) the behavior at issue is not likely to result in expulsion.[2230] The Ethics Office's practice is not to open a sua sponte matter unless the conduct involves expellable behavior, although the rules do not prevent opening a sua sponte matter for behavior that is not expellable.[2231]

3. Complainant matters

a) Filing a complaint

A complainant matter is initiated when an individual (the complainant) files a complaint against an APA member (the respondent).

The process for filing a complaint changed in 2012. Prior to 2012, a written allegation of unethical conduct submitted to the Ethics Office was treated as an initial inquiry.[2232] In response to an initial inquiry, the Ethics Office would confirm whether the respondent was an APA member.[2233] If the respondent was an APA member, the Ethics Office sent an official complaint form to the complainant to fill out and return. The complaint was not considered complete until the complaint form was returned to the Ethics Office.[2234] If a complaint form was not returned

[2226] Rules, Part IV, Subsection 6.4.

[2227] Childress-Beatty interview (Jan. 16, 2015).

[2228] Childress-Beatty interview (Feb. 2, 2015).

[2229] *Id.*

[2230] Rules, Part II, Subsection 5.6.2.

[2231] Childress-Beatty interview (Jan. 16, 2015).

[2232] Childress-Beatty interview (Feb. 2, 2015).

[2233] Rules, Part II, Subsection 5.1; Childress-Beatty interview (Feb, 2, 2015).

[2234] Rules, Part V, Subsection 3.4; Childress-Beatty interview (Feb. 2, 2015).

within six months, the matter was closed. Nothing in the Rules provided for closing a matter after six months; instead, this was part of the longstanding "general practice" of the Ethics Office. Childress-Beatty told Sidley that the six-months time limit was used to keep files organized in the Ethics Office internal tracking system, and that it was without any practical significance because if the complainant submitted a completed complaint form anytime after the six-months period had elapsed, the Ethics Office would open up a new matter.[2235]

Now, a complainant no longer has to ask the Ethics Office for a complaint form. Under the current process, which has been in effect since 2012, a complainant can access the complaint form on APA's website. To file a complaint, the complainant must submit the completed form, along with supporting documentation, to the Ethics Office under Part V, Subsection 3 of the Rules. Pursuant to the Rules, the Director "review[s] each complaint to determine if jurisdictional criteria are met and if it can be determined whether cause for action exists." The Ethics Office investigators act as the Director's "designees" in this process.[2236] Thus, after the Ethics Office receives a completed complaint form (now and prior to 2012), the complaint is assigned to one of the investigators in the Ethics Office. The investigator, acting as the Director's designee, conducts an initial evaluation of the complaint.

b) Preliminary Evaluation

Part V, Section 5 of the Rules governs the evaluation of complaints. The investigator initially evaluates a complaint to determine if the jurisdictional criteria are met and if it can be determined whether cause for action exists.[2237] To determine whether the Ethics Committee has jurisdiction over a complaint, the investigator considers whether the respondent is an APA member, whether the complaint form was correctly completed, and whether the time limits for filing (in Part II, Subsection 5.3) have been met.

If the jurisdictional criteria are met, the Chair of the Ethics Committee and the investigator then determine whether there are grounds for action to be taken by the Committee.[2238] If the Chair and investigator find that they lack sufficient information to make such a determination they may: (1) close the matter, (2) request that the complainant supplement the complaint (pursuant to Part V, Subsection 5.2.1), or (3) initiate a preliminary investigation (pursuant to Part V, Subsection 5.3).[2239] Even though the Rules do not explicitly permit this, Childress-Beatty told Sidley that the permissive "may" in Subsection 5.2.1 implies that the Ethics Office does not have to request additional information to determine if jurisdiction exists,

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[2235] Childress-Beatty interview (June 2, 2015).

[2236] Rules, Part V, Subsection 4 and Parts III – V overview section ("Complaints are evaluated initially by the Ethics Office Director, or Investigators acting as the Director's designees, regarding jurisdictional issues such as whether the subject of the complaint, the respondent, is a member, whether the complaint form is correctly completed, and whether the time limits for filing have been met. Then the Chair of the Ethics Committee and Director of the Ethics Office or their designees determine whether there are grounds for action to be taken by the Committee (defined in Part V, Subsection 5.1).").

[2237] Rules, Part V, Subsection 4.

[2238] Rules, Part V, Subsection 5.

[2239] Rules, Part V, Subsection 5.3.

and that the complaint could be closed without any further actions after it has been received.[2240] If the Chair and investigator request that the complainant supplement the complaint and the complainant fails to do so within 30 days, the matter may be closed (pursuant to Part V, Subsection 5.2.2). As a practical matter, before deciding whether to initiate a preliminary investigation, the investigator drafts a decision memo with a recommendation on whether to initiate a preliminary investigation under Part V, Subsection 5.3 of the Rules. The decision memo is not explicitly required by the Rules, but it is the general practice used by the Ethics Office to communicate with the Ethics Committee Chairs and Vice Chairs. If the Chair disagrees with the investigator's recommendation, the Vice Chair casts the deciding vote as to whether or not to initiate a preliminary investigation.[2241]

c) Preliminary Investigation

Under the Rules, a preliminary investigation is not mandatory, but may be opened if the Chair and Director (or his designee) agree that they lack sufficient information to determine whether a full case should be opened. If a preliminary investigation is initiated, the respondent is notified that a preliminary investigation has been opened.[2242] The respondent then has 30 days to send an initial response to the Ethics Office.[2243] During the preliminary investigation, the investigator may request additional information from "the complainant, respondent, or any other appropriate source" as permitted by the Rules.[2244] Despite this allowance, with the exception of state licensing boards, investigators do *not* contact third parties to request additional information. Nor do investigators conduct interviews with complainants, respondents, or third parties, even though the Rules allow such actions ("[a]dditional information may be requested from the complainant, respondent, or any other appropriate source.").[2245] It is the general practice of the Ethics Office not to take such affirmative investigative steps. The preliminary investigation process, therefore, is a "paper-only" review, meaning that the Ethics Office investigators typically only review documents submitted by either the complainant or the respondent.

According to Childress-Beatty, back in the 1990s, the Ethics Office initiated fewer preliminary investigations; instead, it opened more formal cases and conducted its information gathering activities as part of the full case investigation under Part V, Subsection 6 of the Rules. Back then, the full case investigation consisted of reading the complaint, writing a letter to the respondent to get his or her response, and reviewing the response. Childress-Beatty noted that the adjudications process has always been a paper-only review, and that in the early 2000s, the back-and-forth correspondence with the respondent was moved to the preliminary investigation phase.[2246]

[2240] Childress-Beatty interview (June 2, 2015).

[2241] Rules, Part V, Subsection 5.4.

[2242] Rules, Part V, Subsection 5.3.1.

[2243] Rules, Part V, Subsection 5.3.2.

[2244] Rules, Part V, Section 5.3.3.

[2245] *Id.*

[2246] Childress-Beatty interview (June 2, 2015).

At the conclusion of a preliminary investigation, the investigator drafts a decision memo to the Chair with a recommendation as to whether a formal case should be opened under Part V, Subsection 5.5. If, at the conclusion of the preliminary investigation, the Chair and the investigator lack sufficient information to determine whether there are grounds for action to be taken by the Ethics Committee, the complaint is closed.[2247] The determination of whether a formal case should be opened is a two-step process under the Rules. First, the investigator and Chair must determine that a cause for action exists under Part V, Subsection 5.1. Under this Rule, cause for action exists "when the respondent's alleged actions and/or omissions, if proved, would in the judgment of the decision maker constitute a breach of ethics."[2248] Second, if the Chair and the investigator determine that cause for action exists, they consider whether, under Part V, Subsection 5.5:

> (a) there is a reasonable basis to believe the alleged violation cannot be proved by a preponderance of the evidence and (b) the allegations would constitute only minor or technical violations that would not warrant further action, have already been adequately addressed in another forum, or are likely to be corrected. If they agree that one or more of these conditions are met, the matter shall be closed. Otherwise, the matter shall be opened as a case.[2249]

Dixon told Sidley that, as a practical matter, she treated this as a "threshold question," and approached it by examining the evidence in the file to determine whether she believed there was a violation of the Ethics Code. Dixon said that a case in which she thought there was "no way [the Ethics Office] was going to get the evidence to support" the allegations would not pass this threshold determination.[2250] Even though the Rules specifically identify the investigator and the Ethics Committee Chair as the two individuals who work together during this process, Dixon said that if a complaint was "complex," then she would typically involve Childress-Beatty in the decision-making process as well.[2251]

The Rules are silent as to what constitutes a "reasonable basis." Childress-Beatty explained that what was a "reasonable basis" to believe that an alleged violation could be proved by a preponderance of the evidence was up to the discretion of the investigator and the Chair. When asked how this standard played out in practice, Childress-Beatty said that "the reality is, [the Ethics Office does] not usually have discussions that are that technical," and that they do not really "parse it out."[2252] Instead, they generally ask "is this something we should charge or not?"[2253] Childress-Beatty further explained that the Ethics Office is staffed with people who

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[2247] Rules, Part V, Subsection 5.3.4.

[2248] Rules, Part V, Subsection 5.1.

[2249] Rules, Part V, Subsection 5.5.

[2250] Dixon interview (May 12, 2015).

[2251] *Id.*

[2252] Childress-Beatty interview (June 2, 2015).

[2253] *Id.*

have been there for a long time, and who "know how the Ethics Committee reacts to things."[2254] Childress-Beatty told Sidley that the process for making the reasonableness determination ensures that only cases that are more likely than not to result in finding an ethical violation proceed to the full Committee. Instead of going through the standards in the Code one-by-one to see if there has been a potential violation, the Ethics Office staff first determine whether there should be a violation, and then look to the Code to find standards to support a charge. The result is a backwards-process wherein the preliminary determination of an ethical violation is made before any specific ethical standards are even considered.

d) Case Investigation

Section 6 of Part V of the Rules governs the case investigation. If a case is opened, the Ethics Office issues a charge letter to the respondent pursuant to Part V, Subsection 6.1. The charge letter contains a description of the alleged behaviors at issue and the specific standards of the Ethics Code the respondent is alleged to have violated.[2255] A copy of the completed complaint form and any materials submitted by the complainant, or on the complainant's behalf, are included with the charge letter.

Although Part V, Section 6, is titled "Case Investigation," none of the rules in Section 6 provide any guidance as to the specific investigative steps that should, or could, be taken during the case investigation. Subsection 6.2 comes closest and states that "[a]dditional information may be requested from the complainant, respondent, or any other appropriate source." Yet, as noted earlier, the investigator generally does not proactively request information from sources other than the complainant or respondent. Childress-Beatty said that Subsection 6.2 had more relevance in the 1990s when the general practice of the Ethics office was to proceed with opening formal cases—to gather information after a formal case had been opened—instead of utilizing the preliminary investigation process.[2256] The case investigation is, and always has been, a paper-only review process. As a practical matter, there is very little investigation done during the case investigation phase and the document gathering process now occurs during the preliminary investigation phase. At the conclusion of the case investigation, the case is referred to the Ethics Committee for review and resolution.[2257]

e) Review and Resolution by the Committee

Part V, Section 7 of the Rules addresses review and resolution of a case by the Ethics Committee. The Ethics Committee typically meets two to three times per year to address adjudications, as well as any other ongoing educational activities and special projects. Once a matter proceeds to the full Committee, the Committee considers the full record and may: (1) remand the case to the Director for continued investigation (Subsection 7.1); (2) dismiss the charges because the respondent has not violated an ethical standard (Subsection 7.2.1); (3) dismiss the charges and conclude that the violation does not warrant further action (Subsection

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[2254] *Id.*

[2255] Rules, Part V, Subsection 6.1.1.

[2256] Childress-Beatty interview (June 2, 2015).

[2257] Rules, Part V, Subsection 6.3.

7.2.2); (4) dismiss the charges on the basis of insufficient evidence to support a finding of an ethics violation (Subsection 7.2.3); (5) issue an educative letter (Subsection 7.3); (6) recommend reprimand or censure (Subsection 7.4); (7) recommend expulsion (Subsection 7.5); or (8) recommend stipulated resignation (Subsection 7.6). The Board then approves or rejects any disciplinary actions recommended by the Ethics Committee under Subsection 10.3.5.[2258]

C. Limitations of the Adjudication Process

1. Paper Only Review

The investigations conducted during the adjudications process consist of paper-only reviews of documents provided to the Ethics Office by the complainant and/or the respondent. The investigators do not proactively seek information from third-parties or any source other than the complainant or respondent, nor do they conduct interviews. None of the investigators could recall any instance in which they conducted an interview as part of an investigation. Although nothing in the Rules prevents investigators from interviewing potential witnesses or seeking information from third-parties, and Subsection 5.3.3 of Part V expressly permits obtaining information from "any other appropriate source," current and former investigators (Patricia Dixon, Stephanie Brasfield, Martha Mihaly, Deborah Carliner) and Childress-Beatty said that the general practice within the Ethics Office is to do neither. In support of this practice, Childress-Beatty cited to a March 5, 2001 Ethics Committee policy document that states:

> The Committee adopted a policy that ordinarily, it will not contact potential witnesses for either the complainant or the respondent, but that the decision will be made on a case-by-case basis, based upon a showing by the complainant or respondent of good cause for the Committee to solicit the information.[2259]

This policy, adopted in July 1994, modified Part II, Subsection 3.5 of the Rules which addresses communication for investigations or other functions.[2260] While the policy suggests that the Ethics Committee will not contact potential witnesses, it does not, on its face, restrict the ability of an investigator to contact witnesses. In contrast to the policy, Subsection 3.5 clearly permits an investigator to communicate with a witness to facilitate the performance of any functions set forth in the Rules and Procedures. Subsection 3.5 states:

> Nothing in this section shall prevent the Director from communicating any information (including information from the respondent, complainant, or a witness) to the respondent, complainant, witnesses, or other sources of

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[2258] If the respondent requests an independent adjudication panel under Subsection 9 or a formal hearing under Subsection 10, Board approval of any disciplinary action occurs at the conclusion of those processes.

[2259] HC00022807.

[2260] This policy was adopted in 1994 and modified Part II, Subsection 3.5 of the 1992 Rules and Procedures. This particular subsection of the Rules remained unchanged in later versions of the Rules, including the 2001 Rules, which were in effect during the years the Ethics Office received complaints against psychologists involved in interrogations.

> information to the extent necessary to facilitate the performance of any functions set forth in these Rules and Procedures.[2261]

Clearly a preliminary investigation falls within the performance of a function set forth in the Rules and Procedures.

Both Behnke and Childress-Beatty acknowledged that there was no Rule against contacting third parties or conducting interviews, and emphasized that the "paper-only review" was simply the "long-standing practice" of the Ethics Office. Behnke told Sidley that when he joined the Ethics Office, the adjudications process was a paper-based review, and that reaching out to potential witnesses or third parties was "just not [their] practice" and "not the culture of [the Ethics Office]."[2262] Behnke referred to the process as "byzantine" and said that it could not accurately be called an "investigation," but thought that the process was "quite consistent" with the adjudications process in other membership organizations.[2263] Similarly, Childress-Beatty stated that the Rules "might allow [the Ethics Office] to contact witnesses, but that it was just not the way the system has ever worked." This was consistent with Childress-Beatty's view that the Ethics Office is "not supposed to act as a prosecutor" because APA is, after all, a membership organization.[2264]

An additional justification, provided by both Behnke and Childress-Beatty, for not contacting potential witnesses during investigations was that the Ethics Office had limited resources with a small and busy staff. Childress-Beatty told Sidley that the Ethics Office had neither the staff nor the time to engage in any kind of investigation beyond the documents that people would provide to the Ethics Office.[2265] Yet a former Ethics Office investigator, Deborah Carliner, who worked in the Ethics Office from 1997 – 2004, prior to Childress-Beatty's tenure, stated that she rarely had any work to do in the office. In fact, even though Carliner started as a full-time employee, she decided to cut her schedule to only three days a week, and eventually resigned because there was "nothing to do."[2266]

2. Confusion Regarding Scope

The limited scope of the investigations conducted during the adjudications process was known to some, but not all, members of the Ethics Committee and APA staff. Some Ethics Committee members clearly appreciated the limited nature of the investigations. Former Ethics Committee member, Elizabeth Swenson, told Sidley that the investigative process was limited to a "paper-only" review and that she did not recall any instances in which the investigators conducted interviews.[2267] Former Ethics Committee Chair, Nadya Fouad, recalled that the

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[2261] Rules, Part II, Subsection 3.5.

[2262] Behnke interview (May 21, 2015).

[2263] *Id.*

[2264] Childress-Beatty interview (May 13, 2015).

[2265] *Id.*

[2266] Carliner interview (May 29, 2015).

[2267] Swenson interview (May 4, 2015).

investigators were never asked to conduct any interviews and that no one ever suggested otherwise.[2268] Former Ethics Committee Chair, Robin Deutsch, explained that while the investigative process was "more than nothing," it was "far less than following every lead."[2269] Consistent with the evidence that we found, Deutsch recalled that the Ethics Office "did not investigate a third-party complaint like those filed against psychologists involved in interrogations."[2270] According to Deutsch, instead of investigating third party complaints, the Ethics Office would write to the complainant to ask that the person directly involved file a complaint. Deutsch said that the Ethics Office had an "informal policy" of not seeking information other than statements from the complainant or respondent.[2271]

While some clearly appreciated what steps the Ethics Office took or did not take when investigating complaints, others thought the investigations were more robust and involved some affirmative investigative steps. Former Ethics Committee Chair, Olivia Moorehead-Slaughter, told Sidley that the Ethics Office reviewed everything "from the mega-details to the minutia," and that they "left no stone unturned."[2272] Moorehead-Slaughter believed that the investigators were free to, and did in fact, request any evidence they wanted.[2273] Former Board member, Jean Carter, believed the investigations were "really deep explorations."[2274] Similarly, Armand Cerbone, a former Ethics Committee Chair, told Sidley that if there was any "hard evidence," he would have expected it to be brought before the Ethics Committee.[2275] Even APA's Executive Director for Public and Member Communications, Rhea Farberman, expected the Ethics Office to take some affirmative investigative steps. Her understanding was that the Ethics Office "[stood] ready to investigate any complaints" related to psychologist participation in interrogations.

APA's public statements and Behnke's statements regarding the adjudications process did nothing to clarify the confusion regarding the scope of ethics investigations. Instead, these statements suggested that the Ethics Office would investigate ethics complaints, and that it would do so by taking some affirmative investigative steps. Behnke's statements that "[the Ethics Office] thoroughly investigate[s] the complaint" and that "if individuals who are members or our association have acted inappropriately, the APA will address those very directly and very clearly"[2276] were, at best, disingenuous given that the investigations were only paper reviews.

[2268] Fouad interview (Apr. 28, 2015).

[2269] *Id.*

[2270] Deutsch interview (May 11, 2015).

[2271] *Id.*

[2272] Moorehead-Slaughter interview (Apr. 20, 2015).

[2273] *Id.*

[2274] Carter interview (Apr. 21, 2015).

[2275] Cerbone interview (Apr. 30, 2015).

[2276] *Psychological Warfare? A Debate on the Role of Mental Health Professionals in Military Interrogations at Guantanamo, Abu Ghraib and Beyond*, Democracy Now! (Aug. 11, 2005), *available at*

The limited nature of the adjudications process and the unwillingness of the Ethics Office to take any affirmative investigative steps resulted in a system that seemed to prioritize the protection of member psychologists over the protection of the public. Two former public members of the Ethics Committee recognized this. Former public member, Steven Smith, described the adjudications process as "extraordinarily conservative" and limited in scope.[2277] He found it problematic that the investigative process was merely "fact gathering" from the complainant and the respondent, with "more sympathies" for the individual APA-member psychologists.[2278] Former public member, Evelyne Shuster, told Sidley that the Ethics Committee was quite lenient towards charged psychologists and often justified taking minimal or no disciplinary action by engaging in a risk versus benefits analysis.[2279] Shuster believed that the Ethics Committee was ultimately more concerned about preserving psychologists' reputations and the image of psychology than making disciplinary determinations based strictly on ethical considerations.[2280] Even former APA President, Gerald Koocher, stated during his interview that APA would not proceed on a complaint without obtaining evidence because they were "concerned with protecting the due process rights of accused psychologists,"[2281] but that APA *could not* obtain evidence because it did not have any subpoena power—making claims that APA stood ready and willing to adjudicate complaints against psychologists involved in abusive interrogations a hollow promise.

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.

D. Complaints Regarding Psychologists Involved in Interrogations

1. Michael Gelles

On April 5, 2001, the Ethics Office received a letter from Professor Jonathan Turley on behalf of Petty Officer Daniel King, stating that he wanted to file a complaint with APA against

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http://www.democracynow.org/2005/8/11/psychological_warfare_a_debate_on_the (transcript of interview with Stephen Behnke, Michael Wilks and Robert Jay Lifton).

[2277] Smith interview (Apr. 30, 2015).

[2278] *Id.*

[2279] Shuster interview (Feb. 30, 2015).

[2280] *Id.*

[2281] Koocher interview (Mar. 20, 2015).

[2282] Carter interview (Apr. 21, 2015).

NCIS psychologist Michael Gelles.[2283] On April 24, 2001, the Ethics Office received Turley's completed complaint form, as well as a summary of allegations against Gelles. The summary of allegations provided the following background information on the case:

- King took a routine polygraph on September 29, 1999 and the polygrapher recorded a "no opinion" result;
- The NCIS told King he had failed the espionage questions on the polygraph exam and that he was suspected of being a spy;
- NCIS agents interrogated King as a suspected spy for 29 days and the interrogations lasted "15 hours to 20 hours at a stretch";
- King signed a statement at 3:30 a.m. on October 6, 1999 after he had been interrogated for 30 out of the prior 39 hours. The government used this statement as the basis for the espionage case;
- The espionage case was charged as a death penalty prosecution;
- After signing his statement, the interrogation sessions continued and King asked to speak to a psychiatrist. In response to that request, Gelles met with King on October 19, 1999. The session was taped, King was not informed of the taping, and did not give his consent to being taped;
- During the session, Gelles repeatedly referred to himself as "the doctor" or "the doc" and said that the was there to "help" King;
- Gelles discussed a variety of issues with King including: King's suicidal tendencies, his depression, the facts of his case, his desire for hypnosis, and his relationship with his interrogators. Gelles produced an evaluation of King's psychological status after this session.[2284]

Turley alleged that Gelles's conduct was unethical because, among other things, Gelles: (1) failed to inform King of his role as an NCIS employee by stating that he was a doctor, and not an NCIS agent; (2) failed to reveal his conflict of interest and inform King that he had an investigative function; (3) failed to address King's mental health issues when he learned that King had been depressed and had suicidal thoughts; (4) offered false or misleading information to King in order to achieve non-treatment objectives; (5) failed to act in King's best interests; (6) misused his influence over King to induce information from him; and (7) violated King's confidentiality and privacy rights by taping the session without King's knowledge and not

[2283] Consistent with the Ethics Office's standard practice, this letter was treated as an initial inquiry and a complaint form was sent to Turley in response.

[2284] HC00011737.

explicitly stating that the session was not confidential.[2285] Turley claimed that the following standards from the 1992 Ethics Code (in effect in 1999) were relevant to the complaint:

- Standard 1.07 (describing the nature and results of psychological services)
- Standard 1.14 (avoiding harm)
- Standard 1.15 (misuse of psychologists' influence)
- Standard 1.16 (misuse of psychologists' work)
- Standard 1.19 (exploitative relationships)
- Standard 1.20 (consultations and referrals)
- Standard 1.21 (third party requests for services)
- Standard 2.01 (evaluation, diagnosis, and interventions in professional context)
- Standard 5.01 (discussing the limits of confidentiality)
- Standard 5.02 (maintaining confidentiality)
- Standard 7.01 (professionalism)
- Standard 7.03 (clarification of role)
- Standard 8.03 (conflicts between ethics and organizational demands)

In support of the completed complaint form, Turley also submitted the videotape of the session between Gelles and King, along with a transcript of the videotape, transcribed by his secretary.

On May 8, 2001, the Ethics Office wrote to Gelles to inform him of the complaint and the fact that a preliminary investigation had been opened against him pursuant to Part V, Subsection 5.3 of the Rules,[2286] and by July 6, 2001, Gelles had submitted his response.[2287] In his response, Gelles stated that he was merely "screening Petty Officer King to determine whether or not hypnosis would be an appropriate avenue for him," and that King had already been made aware of his Miranda rights. Gelles explained that he was "not serving in two capacities, as [his] only role was advising NCIS, and in this instance assisting NCIS in determining whether or not Petty Officer King was a proper subject for hypnosis."[2288] Gelles further noted that "Petty Officer

[2285] *Id.*

[2286] HC00011679 at 50.

[2287] HC00011662.

[2288] *Id.*

King was not a patient of [his]," and that his session with King was "an evaluative interview designed to answer questions raised by Petty Officer King."[2289] Finally, with respect to the question of confidentiality, Gelles stated that King was interviewed "with both agents physically present in the room and they were referred to on several occasions," and that the session had been taped "in accordance with applicable federal law."[2290]

On August 6, 2001, Ethics Office investigator, Deborah Carliner, drafted a decision memo to the Ethics Committee Chair, Robert Kinscherff, recommending that they ask Gelles some additional questions before formally charging him.[2291] Although Steve Sparta was the Ethics Committee Chair during 2002, Kinscherff had been deputized by Sparta to act in his stead due to Kinscherff's familiarity with the issues from his involvement with the preliminary investigation in 2001. In her decision memo, Carliner wrote:

> I believe Dr. Gelles did not clarify his role, which was that of a psychologist working directly with agents who had been interrogating Mr. King…He led Mr. King to believe that he was there to help him, which in my opinion was not his role. I think he misused his influence when he stated that he and the agents were King's friends and King should trust the relationship…It's not chargeable, but after watching the tape twice, I believe Dr. Gelles was mocking, patronizing, and abusive to Mr. King. Perhaps such behavior is necessary in military criminal investigations, but Dr. Gelles is a psychologist who belongs to APA and as such must abide by the Ethics Code, which I don't think he has done.[2292]

Kinscherff agreed with the recommendation and added several questions of his own on September 27, 2001.[2293] On that same date, Carliner sent a letter to Gelles with ten follow-up questions.[2294] On December 26, 2001, the Ethics Office received Gelles's response,[2295] and on January 22, 2002, Carliner drafted another decision memo to Kinscherff, recommending that Gelles be charged and that a case be opened, citing standards 1.15, 1.16(a), 1.07(a), 1.07(b), 1.21(a), 5.01(a), and 5.01(c).[2296] On February 11, 2002, Kinscherff responded to the memo, asked Carliner if Sparta had seen the 5.01(c) standard, and noted that he otherwise concurred with the charges.[2297] On that same day, Carliner drafted a memo to Sparta and asked for his input on standard 5.01(c) per Kinscherff's request.[2298] Sparta recommended that they obtain

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[2289] *Id.*

[2290] *Id.*

[2291] HC00011656.

[2292] *Id.*

[2293] *Id.*

[2294] HC00011653.

[2295] HC00011627.

[2296] HC00011622.

[2297] *Id.*

[2298] HC00011621.

some clarification regarding Gelles's role prior to him with this particular standard.[2299] On February 13, 2002, Carliner drafted a memo to the file, noting that she had a telephone conversation with the Chair, and that he agreed to the charges.[2300]

On February 13, 2002, the Ethics Office issued a formal charge letter to Gelles and informed him that a case had been opened against him under Part V, Subsection 6.1.1 because "it [had] been agreed that, if substantiated, the charges detailed below could constitute a violation of the Ethics Code" under Part V, Subsection 5.[2301] The letter did not explicitly explain the two-part inquiry conducted by the Ethics Office under Subsections 5.4 and 5.5. The letter stated that, "[t]he intent of the Ethics Committee is to investigate fairly and thoroughly all complaints filed in accordance with the Rules."[2302] The letter charged that Gelles violated the following standards of the 1992 Ethical Principles of Psychologists and Code of Conduct:

- Standard 1.15[2303] and 1.16(a)[2304] in that he allegedly misused his influence as a psychologist when: (1) he told the complainant he was there to "help" him when Gelles was actually there to provide direct support to a criminal investigation; (2) he encouraged the complainant's cooperation with the agents whose job it was to interrogate him and investigate his activities by stating that he (Gelles) and the agents were King's "friends" and King should trust the relationship; and (3) he failed to explain to the complainant about false memories but instead concentrated on suppressed memories and encouraged him to work on releasing the memories;

- Standard 1.21(a)[2305] in that he evaluated the complainant and provided him services at the request of a third party and failed to clarify at the outset of the service or any other time, the nature of his relationship with the complainant, Gelles's relationship with NCIS, the role Gelles was playing, and the impact Gelles's relationships with the parties would have on the services provided;

[2299] *Id.*

[2300] HC00011620.

[2301] HC00011614.

[2302] *Id.*

[2303] Standard 1.15: ("Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence.")

[2304] Standard 1.16(a) ("Psychologists do not participate in activities in which it appears likely that their skill or data will be misused by others, unless corrective mechanisms are available.")

[2305] Standard 1.21(a) ("When a psychologist agrees to provide services to a person or entity at the request of a third party, the psychologist clarifies to the extent feasible, at the outset of the service, the nature of the relationship with each party. This clarification includes the role of the psychologist (such as therapist, organizational consultant, diagnostician, or expert witness), the probable uses of the services provided or the information obtained, and the fact there may be limits to confidentiality.")

- Standard 5.01(a)[2306] in that he failed to discuss with the complainant the limitations of confidentiality, that the session with him was not covered by the rules of confidentiality, or that there was a possibility that he would be called upon to testify against the complainant;

- Standard 5.01(c)[2307] in that he conducted his session with complainant while it was videotaped without the complainant's knowledge or permission; and

- Standard 1.07(a)[2308] and 1.07(b)[2309] in that Gelles evaluated the complainant and failed to provide to him beforehand the true nature of the services that he was offering and failed to inform complainant that he was precluded from doing so by virtue of his employment.

Pursuant to the standard practice of the Ethics Office, the case was assigned to two readers, Lisa Callahan and Elizabeth Swenson.[2310] The case was also assigned to a monitor, Peter Mayfield, under Part V, Subsection 7. Gelles responded to the charge letter on May 14, 2002, and submitted his own transcript of the videotaped session that had been transcribed and notarized by a third party.

On August 2, 2002, Childress-Beatty (Deputy General Counsel) emailed a memo analyzing the charges against Gelles.[2311+] In her email, Childress-Beatty explained that some of

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[2306] Standard 5.01(a) ("Psychologists discuss with persons and organizations with whom they establish a scientific or professional relationship (including, to the extent feasible, minors and their legal representatives) (1) the relevant limitations on confidentiality, including limitations where applicable in group, marital, and family therapy or in organizational consulting, and (2) the foreseeable uses of the information generated through their services.")

[2307] Standard 5.01(c) ("Permission for electronic recording of interviews is secured from clients and patients.")

[2308] Standard 1.07(a) ("When psychologists provide assessment, evaluation, treatment, counseling, supervision, teaching, consultation, research, or other psychological services to an individual, a group, or an organization, they provide, using language that is reasonably understandable to the recipient of those services, appropriate information beforehand about the nature of such services and appropriate information later about results and conclusions.")

[2309] Standard 1.07(b) ("If psychologists will be precluded by law or by organizational roles from providing such information to particular individuals or groups, they so inform those individuals or groups at the outset of the service.")

[2310] According to Ethics Office staff members, including Childress-Beatty and Dixon, cases that are put before the Ethics Committee are assigned two readers — a primary reader and a secondary reader — who analyze the cases and prepare summaries for the entire Ethics Committee to review during the meetings. We heard conflicting accounts about whether these readers are assigned a particular position. Linda Forrest, a former Ethics Committee Chair, stated that one reader is the "pro" reader and the other is the "con" reader, and both were to present their arguments for or against sanctions to the Committee during meetings. Former investigator Deborah Carliner told Sidley that the readers were not assigned particular positions.

[2311] Carliner said it was common practice to have the General Counsel's office review all cases that were going to be presented to the Ethics Committee. Carliner interview (June 15, 2015).

the charges were not legally supportable, others were relatively weak, and that whether to proceed with the charges was a policy question for the Ethics Office.[2312]

On August 5, 2002, Behnke, Childress-Beatty, and Jones, in his role as a consultant, discussed the Gelles case by email.[2313] Behnke repeatedly expressed reluctance to bringing the case to the full Ethics Committee and actively looked for ways to avoid bringing the case to the Committee. At 1:20 p.m., Behnke wrote:

> I am very mixed on this case. On the one hand, it raises an interesting and provocative issue, about the role of psychologists in investigations. On the other, I am not at all sure that the Ethics Committee is the proper venue for this issue to be addressed.[2314]

Behnke then suggested that he could "exercise [his] authority as Director, and say the case cannot go forward," insist that certain charges be dropped, and send the remaining charges to the Ethics Committee,[2315] or have the Monitor read Childress-Beatty's memo and make a recommendation regarding whether the case should be closed.[2316] Later, at 2:25 p.m., Behnke wrote:

> One unprecedented but technically okay method: replace the investigator and monitor with the Director and Chair (they are the designees for such) and then make the review to close. If the chair is not persuaded, so be it. Or replace only the investigator.[2317]

Noting that this method would be the "equivalent of a nuclear bomb," Behnke asked Jones if he thought the case was appropriate for Ethics Committee review, which meant that "a reasonable committee could find violations by a preponderance of the evidence."[2318] In his response, Jones asked if any of the charges could be proven because he had not reviewed

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[2312] APA_0595034; Childress-Beatty Memorandum re: Gelles Case (Aug. 2, 2002).[+]

[2313] According to Behnke and Childress-Beatty, Jones was frequently brought in to consult on adjudications matters.

[2314] APA_0595034.

[2315] When asked about Behnke's authority to say a case cannot go forward, Childress-Beatty said that the Director does not have the power to unilaterally close a case without the agreement of the Monitor assigned to the case. In support of this, Childress-Beatty cited an Ethics Committee policy statement, which states, in part, that: "a monitor may recommend that a case be dismissed at any point during the investigation if the monitor believes that the Committee cannot reasonably find a violation. If the investigator agrees, the matter will be closed . . . If the investigator does not agree to close the case, the case will continue and be resolved by the Committee." HC00022821. Childress-Beatty said that because the investigators act as designees of the Director, the Director could make such a decision with the Monitor. Rules and Procedures, Parts III – V.

[2316] APA_0595034.

[2317] *Id.*

[2318] *Id.*

Childress-Beatty's memo or the file. Behnke responded that, in his opinion, there was no charge that could be proven by a preponderance of the evidence.[2319]

That same day, August 5, 2002, Carliner began a leave of absence due to budget cuts. In Carliner's absence, Behnke made himself the investigator on the Gelles complaint. On August 6, 2002, Behnke sent an email to Carliner in which he stated that Childress-Beatty's memo had made clear that certain charges were legally unsupportable and that none of the remaining charges "appear to have the required preponderance of evidence in its favor."[2320] Behnke also stated that he was the "acting investigator" in Carliner's absence and that he would ask the monitor, Mayfield, to review Childress-Beatty's memo and determine "whether he believes the committee can reasonably find a violation."[2321]

On August 8, 2002 Behnke spoke with Carliner to inform her of the status of the case. That same day, Carliner spoke to Mayfield and expressed her view as to why certain charges should not be dropped.[2322]

During this time period, Behnke again showed resistance to proceeding with the charges against Gelles and asked investigator Martha Mihaly to draft a memo to the Ethics Committee under his name to inform them that the Deputy General Counsel had found that certain "in that's" and charges were not legally supportable, and that they should, therefore, not be considered for violations as the Ethics Committee reviewed the case materials. Mihaly sent a draft of the memo,[2323] dated August 9, 2002, to Behnke.[2324]

On August 9, 2002, Behnke emailed Carliner, upset that she had contacted Mayfield. He wrote:

> I find that you would contact the Monitor to discuss the handling of a case, without informing me, when I explicitly told you that I was acting investigator on the case, that I was contact with the Monitor, and that I was actively in the process of making a determination about how the case should be handled, very troubling.[2325]

[2319] *Id.*

[2320] APA_0594978.

[2321] *Id.*

[2322] APA_0594918.

[2323] This memo was not in the Gelles adjudication file that Sidley reviewed (it was in Behnke's custodial data), and it is unclear whether this memo was sent to the Ethics Committee. What is clear from the readers' summaries is that all of the standards Gelles was charged with were ultimately reviewed by the full Ethics Committee.

[2324] APA_0674056; APA_0674057.

[2325] APA_0594918.

That same day, Carliner emailed Behnke to say, "I feel that my absence is being taken advantage of both in how the Gelles case is being handled and in your rush to judgment."[2326] Behnke forwarded Carliner's email to Deputy CEO Mike Honaker.[2327]

Nearly one week later, on August 15, 2002, Behnke emailed Carliner again regarding the Gelles matter and stated that her behavior was "unacceptable" and that the only decision that had been made in the case was that it would go forward to the full Committee as planned.[2328] He also expressed "concern" about her "ability to handle this case in an objective manner."[2329]

Carliner returned to the Ethics Office on September 10, 2002, and on September 12, 2002, she suggested to Behnke that they meet with Nathalie Gilfoyle to discuss the Gelles complaint.[2330] By September 15, 2002, Gilfoyle had viewed the videotape of the Gelles-King session.[2331] On September 16, 2002, Behnke told Carliner that he would ask Gilfoyle if she had any questions about the case.[2332] That same day, Behnke emailed Gilfoyle and asked if she had any questions about any of the ethics cases going before the Ethics Committee that upcoming weekend. Behnke did not mention Carliner's request to review the Gelles case specifically. On September 17, 2002, Carliner sent a separate email to Gilfoyle, and stated that she would like to get Gilfoyle's thoughts on the case now that she had seen the tape.[2333] Sidley found no other correspondence between Behnke, Carliner, or Gilfoyle before the Gelles case was put forth before the full Ethics Committee.

Despite Behnke's desire to limit the charges that the Ethics Committee would consider, the Committee considered all of the charges against Gelles. In advance of the meeting, the readers, Callahan and Swenson, prepared summaries for the Committee's review. Both recommended against finding violations of any of the Ethics Code standards.

In her summary, Callahan wrote that there was "a lot of 'posturing' and hyperbole from [King's] attorney," and that after reading the entire case file, she concluded that the most helpful documents were the transcript submitted by Gelles, the videotape, King's declaration, and Gelles's responses.[2334] Callahan also noted that she chose to rely on the transcript submitted by Gelles because it was transcribed by an "outside concern as opposed to the complainant[]."[2335] With respect to standards 1.15 and 1.16(a), Callahan stated that it was "clear from the transcript and videotape that [King] knows why [Gelles] is present and what the purpose of his interview is — he came with a list of questions," and that King "misrepresented the facts as shown on the

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[2326] APA_0594914.
[2327] *Id.*
[2328] APA_0594830.
[2329] *Id.*
[2330] APA_0594718.
[2331] APA_0674851.
[2332] APA_0594454.
[2333] APA_0674821.
[2334] HC00022258 at 1–8.
[2335] *Id.*

videotape and on the transcription."[2336] On standard 1.21(a), Callahan wrote that Gelles was very clear about why he was interviewing King and that "[t]here [was] no evidence in the written record nor in the videotape that suggests that [Gelles] had a 'hidden agenda,'" and that "[t]here was no implication of therapeutic 'help' being sought or offered."[2337] On standard 5.01(c), Callahan concluded that there was "nothing in the written record or on the videotape that supports the claim that [King] did not know the limits on confidentiality" because the two agents were in the room throughout the interview.[2338] On standard 5.01(c), Callahan concluded that NCIS regulations required that the interview be covertly taped and Gelles was required by his superiors to follow the order for a secret taping.[2339] Callahan pointed out that because Gelles was not charged under 8.03, which addresses the conflict between ethics and organizational demands, there was no violation.[2340] Finally, with respect to standards 1.07(a) and (b), Callahan concluded that the charge was "contingent upon being convinced that [Gelles] had a hidden agenda, which [wasn't] documented," and that her viewing of the tape did not agree with King's claims. Thus, Callahan recommended "[n]o violation on all standards."[2341]

While Swenson also concluded that there were no violations of any Ethics Code standards, her reader summary reflected a deep concern regarding Gelles's actions. For instance, with respect to standard 1.15 and 1.16(a), Swenson noted that by telling King that the agents did not pass judgment on him, Gelles was "not only misleading in his comments about the agents but omitted information that could have really helped [King] about how false memories can be established and solidified by interrogation."[2342] Similarly, on standard 1.21(a), Swenson concluded that even though there was "technically no violation, [Gelles] could have done much more to explain his role, which would be in the spirit of Standard 1.21(a)."[2343] Ultimately, Swenson concluded that Gelles made the "most minimal disclosures necessary to comply with the ethics standards," and that his behavior was "ethically very marginal."[2344] Swenson also suggested that there might be a possible recharge under Standard 8.03, but we found no records in the adjudication file to indicate that this was ever pursued. Swenson told Sidley that during Ethics Committee meetings, the Ethics Office staff members were present mostly to answer questions from Committee members and that they participated "only if they were asked to."[2345]

[2336] *Id.*

[2337] *Id.*

[2338] *Id.*

[2339] *Id.*

[2340] *Id.*

[2341] *Id.*

[2342] *Id.*

[2343] *Id.*

[2344] *Id.*

[2345] Swenson interview (May 4, 2015).

Swenson said that she did not feel any pressure to close the Gelles case or to not find a violation.[2346]

The Ethics Committee considered the Gelles case during their September 20-22, 2002 meeting and voted unanimously to dismiss all of the charges.[2347] The entire adjudication process for the complaint lasted 17 months.

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. During 2002, when the Gelles case was pending, Mel Gravitz approached Behnke at an APA meeting and said that he wanted to talk about Gelles's disciplinary case. Initially, Behnke told Sidley that he could not recall the date or exact substance of the conversation, but later said that he believed the meeting occurred in February 2002 when Gravitz was on Council.[2348] Behnke said that Gravitz expressed a concern that if Gelles were found in violation of the Ethics Code, it would hinder the work of psychologists working on national security matters. Behnke did not recall how he responded to Gravitz, but thought that he would have told Gravitz that he could not discuss the matter. An email from former CIFA employee, Scott Shumate, to APA employee, Heather Kelly, suggests the opposite. In the email, Shumate alleged that Gravitz sent a message to "APA legal" that pursuing the Gelles case would make it look like APA was taking a stand against the government while "colors ran so high" after 9/11 and that Gravitz's message "ended the case."[2349] Behnke told Sidley that it was possible that something he said caused Gravitz to conclude that he was agreeing with, or at least acknowledging, his point. But, Behnke said that this conversation did not affect his actions or decisions, or those of the Ethics Committee, because he thought the allegations against Gelles were weak on the merits.[2350]

Behnke told Sidley that while he did not fully understand or agree with the charges, the case went forward because the investigator felt strongly about sending the case to the full Ethics Committee. Despite Behnke's August 2002 emails, which show him actively looking for ways to avoid moving forward with the Gelles case, Behnke denied there were any attempts to influence either Carliner's decision to bring the case to the full Committee or the decision of the Ethics Committee members. Carliner did not think that any of the Committee members were

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[2346] *Id.*

[2347] HC00011428.

[2348] Behnke email to Sidley (June 9, 2015).

[2349] APA_0129871.

[2350] The Ethics Office was not insulated from outside influence and the nature of the process allowed for manipulation at times. Koocher told Sidley that Raymond Fowler manipulated the adjudication process when there was a complaint filed against Elizabeth Loftus, a high-profile psychologist who did work on false memories. When Fowler found out there was an ethics complaint pending against Loftus, he reached out to her and told her she should resign her membership before a case could be formally opened against her. He later denied that he had done so and appointed one of his deputies to "investigate" how Loftus had found out about the complaint.

improperly influenced by either Behnke or Gravitz, and she did not recall Behnke speaking up or giving comments during the Ethics Committee meeting discussion of the Gelles matter.[2351]

Carliner told Sidley that she did not recall the specifics of the Gelles case. She did recall that she was "appalled" by Gelles's behavior during his interactions with King and believed very strongly that the case should be heard before the full Ethics Committee.[2352] She also recalled that Behnke did not want to bring the case against Gelles. Her sense was that Behnke did not want APA involved in going against government psychologists who were "doing bad things."[2353] Sidley asked if Carliner if there were other incidents that would have given her this impression of Behnke. Carliner recalled a conversation with Behnke after the torture and prisoner abuse at Abu Ghraib became public. Carliner said that during this discussion, she compared the behavior of psychologists at Abu Ghraib with that of psychologists at Guantanamo, and Behnke gave her the "impression" that he "did not oppose psychologists doing bad things."[2354]

2. James Mitchell

As early as 2004, newspaper articles about the involvement of psychologists in potentially abusive interrogations began to surface. On November 30, 2004, the *New York Times* published Neil Lewis's article "Red Cross Finds Detainee Abuse in Guantanamo."[2355] Then, on January 6, 2005, the *New England Journal of Medicine* published "When Doctors Go to War," an article by Gregg Bloche and Jonathan Marks, which reported that psychologists were part of the BSCT teams at both Abu Ghraib and Guantanamo.[2356] Over the course of next several months, articles detailing psychologists' involvement in interrogations continued to emerge.

Sharon Gadberry saw some of these articles, and on June 6, 2005, emailed then-APA President Ron Levant. Gadberry wrote that after seeing some of the "techniques" used in Guantanamo and Abu Ghraib, she wondered if there were any psychologists involved, and if so, whether APA should consider an investigation "at the very least of ethics violations."[2357] Later that same day, Gadberry's email was sent to Behnke.

One month later, on July 6, 2005, Gadberry sent another email to Levant in which she said that she was ashamed that psychologists were participating in interrogations that were both illegal and unethical. Gadberry stated that the APA "need[ed] to conduct immediate

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[2351] *Id.*

[2352] Carliner interview (May 29, 2015).

[2353] *Id.*

[2354] *Id.*

[2355] Neil Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, New York Times (Nov. 30, 2004), *available at* http://www.nytimes.com/2004/11/30/politics/30gitmo.html?pagewanted=all&_r=0.

[2356] Gregg Bloche & Jonathan Marks, *When Doctors Go to War,* New England Journal of Medicine (Jan. 6, 2005), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp048346.

[2357] APA_0038701.

investigations of the psychologists involved in Guantanamo and in other interrogations around the world." Again, the email was forwarded to Behnke later that day.[2358]

The next day, on July 7, 2005, another Bloche and Marks article, "Doctors and Interrogators at Guantanamo Bay," appeared in the *New England Journal of Medicine*. Bloche and Marks reported that "mounting evidence" suggested that military interrogators at Guantanamo had been using "aggressive counter-resistance measures in systematic fashion to pressure detainees to cooperate," including "sleep deprivation, prolonged isolation, painful body positions, feigned suffocation, and beatings."[2359] Specifically with respect to psychologists, the article stated that "since late 2002, psychiatrists and psychologists have been part of a strategy that employs extreme stress, combined with behavior-shaping rewards, to extract actionable intelligence from resistant captives."[2360]

Four days later, on July 11, 2005, Jane Mayer's article "The Experiment" was published in the *New Yorker*. The article discussed harsh interrogation techniques that were being used at Guantanamo and reported that a psychologist, James Mitchell, had suggested the use of such techniques during the interrogation of a high value Al Qaeda suspect.[2361] Mitchell, Mayer reported, had "announced that the suspect needed to be subjected to rougher methods" and should "be treated like the dogs in a classic behavioral-psychology experiment" referring to studies performed by Martin Seligman and other graduate students at the University of Pennsylvania in the 1960s.[2362] During these experiments, the dogs were placed in harnesses and given unavoidable electric shocks, after which they were released into pens and shocked again but given a chance to escape punishment. Mayer reported that Mitchell's position was opposed by a counter-terrorism expert, who had not spent time at a SERE school and who reminded Mitchell that he was "dealing with human beings, not dogs."[2363] According to this expert, Mitchell replied that the experiments were "good science."[2364] When Mayer asked Mitchell about the incident, Mitchell "confirmed that he admired Seligman's research," but declined to comment on any interrogations that he might have participated in.[2365]

The next month, on August 18, 2005, Gadberry emailed Levant again and stated that she had been trying "since early June to file an ethical complaint against psychologist[s] who [were] involved with US torture in Guantanamo, Iraq, and Pakistan." Gadberry said that Behnke had called her once, and that she returned his call, but had not heard back from him. She also said

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[2358] APA_0040325.

[2359] Gregg Bloche & Jonathan Marks, *Doctors and Interrogators at Guantanamo Bay,* New England Journal of Medicine (July 7, 2005), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp058145.

[2360] *Id.*

[2361] Jane Mayer, *The Experiment,* The New Yorker (Jul. 11, 2005), *available at* http://www.newyorker.com/magazine/2005/07/11/the-experiment-3.

[2362] *Id.*

[2363] *Id.*

[2364] *Id.*

[2365] *Id.*

that she sent a written request to file a complaint "[t]wo weeks ago" and had not heard back from the Ethics Office. Lastly, she said that as an individual, she could not find out the names of individual psychologists who were involved in torture and believed that "it [was] the responsibility of the APA t[o] request this secret information from the government." This email was forwarded to Behnke the next day.[2366] Behnke responded and told Gadberry that she would be hearing from the Ethics Office. Gadberry wrote back to Behnke and told him that the "representative" from the Ethics Office had agreed to send her the form for filing an ethics complaint.[2367]

Gadberry ultimately received a complaint form, and on September 27, 2005, the Ethics Office received her complaint against James Mitchell, Martin Seligman, Morgan Banks, and "others," who had "assisted in stressful military interrogation procedures in Guantanamo, Iraq, and Afghanistan."[2368] Gadberry referenced the *New England Journal of Medicine* article "Doctors and Interrogators at Guantanamo Bay" and the Physicians for Human Rights report "Break Them Down: The Systematic Use of Psychological Torture by US Forces".[2369]

That same day, an administrative assistant in the Ethics Office conducted a membership records search to determine whether any of the named respondents were APA members, and thus, whether APA had jurisdiction over the complaint under Part II, Subsection 5 of the Rules. She found that Morgan Banks was not a member.[2370] The membership records database showed that Seligman was an APA member and that there were three individuals named "James Mitchell," including one "James E. Mitchell."[2371] Sidley found no evidence of any further steps taken to identify whether any of the three members named James Mitchell was *the* James Mitchell referenced in Mayer's article. When asked about this, Behnke could recall no such steps being taken.[2372] If the Ethics Office had taken any additional steps, it would have determined that James E. Mitchell was the James Mitchell referenced in Mayer's article.

Gadberry told Sidley that when she initially contacted the Ethics Office to file the complaint, she spoke with a woman on the phone who said that she "worked for Steve Behnke" and discouraged Gadberry from filing the complaint. Gadberry recalled that the woman told her

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[2366] APA_0042511.

[2367] APA_0042506.

[2368] HC00017446.

[2369] Even though Gadberry's complaint was against Seligman, Mitchell, and Banks, the Ethics Office filed her complaint under Seligman's name alone. There are officially no complaints against James Mitchell in the Ethics Office's records. Sidley was able to obtain the Gadberry complaint because Childress-Beatty recalled Gadberry's name associated with a complaint against psychologists involved in interrogations.

[2370] APA Membership Inquiry for James Mitchell.

[2371] *Id.*

[2372] Behnke stated during his interview that he would have worked on this complaint with Patricia Dixon. Behnke interview (May 21, 2015); When Sidley spoke to Dixon, she stated that she did not recall anything about the complaint, and she did not know whether Mitchell was an APA member at the time the complaint was filed. Dixon interview (May 19, 2015).

that she "had to prove that who [she] was complaining about was a member of the APA [. . .] before [she] could file a complaint."[2373] When she inquired about how she should do that, the woman hung up on her. Gadberry did not recall the name of the woman. After several additional phone calls to the Ethics Office that went unanswered, Gadberry began writing to Levant, first to inquire whether APA should investigate psychologists who might be involved in abusive interrogations, and then to complain that she was being stonewalled in her attempts to file an ethics complaint.[2374]

Behnke's response to Gadberry is consistent with an unwillingness to pursue her complaint. On October 25, 2005, Behnke wrote to Gadberry, acknowledged that he had read her complaint and the articles she referenced, and asked her to provide additional information to the Ethics Office. He wrote:

> It would be very helpful to our process if you could provide to the Ethics Office the passages in the articles (or any other materials you are aware of) that make specific allegations, and ideally provide evidence to support those allegations, against the psychologists whom you name in your complaint. Thus far—and despite a direct request to one of the authors of the New England Journal of Medicine—I have been provided no evidence to support a specific allegation that any psychologist member of APA has engaged, supported, facilitated, supervised, or in any other manner participated in torture or other cruel, inhuman, or degrading treatment. I have also reviewed four government investigations into detainee abuse.[2375]

Behnke's response demonstrates his reluctance, and arguably active resistance, to proceed with Gadberry's complaint. Although he read the articles that Gadberry had submitted with her complaint, Behnke wanted Gadberry to take the additional step of citing passages in the articles that "make specific allegations" and "provide evidence to support those allegations"—passages that would have been clear to him from reading the articles.[2376] While his suggestion that he had no evidence to support "a specific allegation" that an APA member had in any manner participated in "torture or other cruel, inhuman, or degrading treatment" may have been factually accurate with regard to the articles,[2377] it was disingenuous when considered against the full context of information he had reviewed by this point in time. The Mayer article, on its face, was, at the very least, specific in its allegations against James Mitchell—that Mitchell suggested that a suspect be subject to "rougher methods" and treated like a "dog[]." Nothing in the Rules would have prevented the Ethics Office from proceeding with Gadberry's complaint against Mitchell and opening a preliminary investigation, or formal case, to gather additional

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[2373] Gadberry interview (June 5, 2015).

[2374] *Id.*

[2375] HC00017445.

[2376] *Id.*

[2377] Behnke told Sidley that he must have reached out to Bloche after receiving Gadberry's complaint, but did not recall what "four government investigations" he would have reviewed.

evidence.[2378] Yet Behnke's letter suggested the opposite—that it would be "difficult" to proceed without specific evidence. In the same letter, Behnke also wrote:

> I appreciate your concern regarding this matter of such great import to our profession and to society. The Ethics Office will process your complaint, although it will be difficult to move forward without evidence linking a specific psychologist member to unethical or illegal behavior. I can assure you that the Ethics Office would move forward were it to receive such evidence, and that we are carefully monitoring what appears in the media to that end.[2379]

Gadberry recalled that she spoke to Behnke on the phone at least once and that his tone was "scornful."[2380] She stated that Behnke told her that she did not have enough evidence and that he would not process the complaint unless she "detailed the allegations against each person and proved it."[2381] Gadberry responded that she thought it was APA's job to investigate the complaint and that there was "enough evidence that they could at least look into it." Gadberry recalled that Behnke's response was "no, absolutely not," and that they "would not take any investigate steps." [2382] When asked about discussions with Gadberry, Behnke told Sidley that he did not recall any specific conversations with Gadberry, but that he believed he did, in fact, speak with her at some point.[2383]

Nine months after the Ethics Office received Gadberry's complaint, on June 28, 2006, APA received James Mitchell's letter of resignation. Mitchell's letter of resignation came while the complaint against him was still pending, but the Ethics Office had not yet formally corresponded with him regarding the complaint. And Sidley found no evidence that the Ethics Office ever did. Mitchell's resignation letter was not contained in the adjudication file; Sidley obtained it from APA membership records. Mitchell's letter indicated that he had paid his dues through 2007, but "no longer wish[ed] to be a member of this voluntary organization."[2384] Mitchell's letter did not state his reasons for resigning.

Although the timing of Mitchell's resignation could suggest that someone at APA made him aware of the pending complaint, Sidley did not find any evidence to support this suggestion. Behnke, Childress-Beatty, and Dixon, told Sidley that they did not contact Mitchell.[2385] Mitchell

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[2378] There were no specific allegations against Seligman or Banks in the information submitted by Gadberry.

[2379] HC00017445.

[2380] Gadberry interview (June 5, 2015).

[2381] *Id.*

[2382] Gadberry interview (June 5, 2015).

[2383] Behnke interview (June 8, 2015).

[2384] J. Mitchell Resignation Letter to APA (on file with Sidley).

[2385] Dixon did not recall anything about the Mitchell complaint. Dixon interview (May 19, 2015); Childress-Beatty stated that she did not become involved in the Mitchell complaint until Behnke asked her to draft a letter to Gadberry in 2008. Childress-Beatty interview (May 19, 2015); Behnke stated that

told Sidley that he did not recall the reasons behind his decision to resign from APA beyond the fact that APA had become "more and more politicized," and that it had taken stances that were not consistent with his beliefs.[2386] When asked if an ethics complaint had prompted his decision to resign, Mitchell said that he was not aware of an ethics complaint being filed against him.

Behnke told Sidley that he interpreted Mitchell's resignation letter to suggest that Mitchell thought he was likely to be sanctioned if he remained an APA member. When Sidley asked Behnke why Mitchell would have thought this, Behnke responded that Mitchell was likely looking at APA and its stance in the PENS Report, and thinking that APA was not a "friendly organization." Behnke noted that Mitchell's resignation letter signaled the fact this was not a "happy relationship" and that if the APA was truly protecting Mitchell, "the least [he] could do was stay [a] member."[2387]

Nearly two months after Mitchell terminated his APA membership, on August 10, 2006, Gadberry emailed Behnke, said that she would like to officially re-file her ethics complaint, and attached a new complaint letter. In her letter, Gadberry described her interactions with the Ethics Office:

> From the very beginning, your office tried to discourage me. At first, my e-mails and phone calls were not answered. When I persisted, I was told that it was necessary to fill out a form to file an ethics charge, and that I would need to provide your office with specific names of people, whom I knew to be members of the APA, for you to even send me the form.
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> …
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> You did send me the form, five months after my original request. After I filled out the form, and filed a five-page detailed summary of charges, you answered me with a letter denying my request to file ethical charges. In your letter, you said that you had not been able to find any information that [p]sychologists were involved in torture. I was surprised by this, because in my summary I had referred you to articles in the media that named at least three Psychologists as having participated in the BSCT program in Guantanamo
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> …Is it your consistent practice to demand that anyone filing an ethical complaint, actually prove the complaint before it can even be filed? This seems to be backward. Are you holding this particular complaint to a different standard?

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he did not contact Mitchell, and that he was not aware of anyone in the Ethics Office who would have contacted Mitchell. Behnke interview (May 21, 2015).

[2386] Mitchell interview (May 15, 2015).

[2387] Behnke interview (May 21, 2015).

> I am renewing my request for an investigation and would hope that this can get underway as soon as possible.[2388]

Gadberry's letter was never put into the adjudication file. Instead, Sidley found this letter in its review of Behnke's emails.[2389] When Sidley asked Behnke about why this letter was never added to the file, he responded that he did not know, and guessed that he would have looked at the letter, determined that Mitchell was no longer a member, and "thought there was nothing here to adjudicate."[2390]

On March 24, 2008, Gadberry emailed Behnke and reminded him that she had "attempted to file ethics charges" against psychologists identified in news accounts and that he had told her that charges "could not be filed because there was not enough information provided."[2391] In her email, Gadberry said that she had learned that other charges had been filed against individuals indentified in media reports and that those charges would be proceeding. Gadberry asked several questions about the charges that had been filed, the individuals being charged, and the adjudications process, including whether the Ethics Office used subpoenas to obtain additional information. On the same date, Behnke emailed Dixon and Childress-Beatty to discuss Gadberry's email, but none recalled what they discussed or whether the conversation even happened.[2392]

On April 15, 2008, Behnke emailed Gadberry and informed her that she would be receiving a response in hardcopy as the Ethics Office did not discuss case-related matters over email.[2393] Almost three months later, the Ethics Office sent Gadberry on July 1, 2008, signed by Childress-Beatty.[2394] In the letter, Childress-Beatty stated that Gadberry had not responded to Behnke's letter from October 2005 and that "no complaint can proceed without a respondent who is both specifically identified and a member of APA."[2395] Childress-Beatty did not acknowledge the letter from Gadberry dated August 9, 2006, and did not inform Gadberry that even though one of the respondents, James Mitchell, was an APA member when she filed her complaint, he was no longer an APA member as of June 2008.[2396] Instead, Childress-Beatty's

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[2388] APA_0087322; APA_0087323.

[2389] Indeed, Childress-Beatty, who became familiar with the file when she joined the Ethics Office in 2007, said that she had not seen this letter prior to our showing it to her during the course of our investigation. She explained that the letter did not look like it would have been received by the Ethics Office because it lacked the typical "confidential" and "date received" stamps that they would have appended to every document they received from a complainant.

[2390] Behnke interview (June 8, 2015).

[2391] HC00017443.

[2392] *Id.*

[2393] HC00017441.

[2394] HC00017440.

[2395] *Id.*

[2396] As noted earlier, Childress-Beatty had been unaware of Gadberry's letter dated August 9, 2006 until Sidley showed it to her during her interview.

letter suggested that none of the psychologists against whom Gadberry filed her complaint were APA members—a suggestion that was patently false as both Seligman and Mitchell were members at the time Gadberry filed her complaint. While Childress-Beatty explained that APA did not have any subpoena power to compel testimony or documentary evidence, and could have taken the opportunity to inform Gadberry of the limitations of the adjudications process (or correct Gadberry's impressions about the process), she did not. Childress-Beatty did not inform Gadberry that the process was limited to a review of documents submitted by complainants and respondents, that the Ethics Office did not contact any witnesses or conduct any interviews, or that the Ethics Office did not proactively seek out additional evidence. Childress-Beatty said during her interview that in the letter, she sought to communicate that Mitchell was not a member of the APA and so the APA had no jurisdiction over her complaint. Childress-Beatty also told Sidley that she was unaware that Mitchell had been an APA member prior to APA's public statement on the matter in November 2014.[2397]

The Ethics Office took no steps to investigate the allegations against Mitchell prior to his resignation. Nor did the Ethics Office take any steps to investigate the allegations against Seligman even though he was, and remained, an APA member throughout the time the complaint was pending. The complaint was ultimately recorded as "complaint process incomplete" in the Ethics Office's internal tracking system.[2398]

The way in which Gadberry's complaint was handled by the Ethics Office shows the lack of transparency in the type of "investigations" that the Ethics Office conducts and Behnke's unwillingness to take any affirmative investigative steps on the matters. Gadberry's communications with the Ethics Office clearly indicated that she expected the Ethics Office to conduct an investigation—that is, to actually take some affirmative investigative steps. Even if the Ethics Office had opened a preliminary investigation or a formal case to gather additional information related to Gadberry's complaint, and followed its general practice, the Ethics Office still would not have conducted an investigation in the sense that Gadberry understood the term. But none of the communications to Gadberry made this clear. Instead, the communications to Gadberry avoided the issue and suggested that the case could proceed if they were provided with evidence.

When Sidley asked Behnke why the Mitchell complaint was not pursued in light of the publicly available information about Mitchell at that point, specifically with the Mayer article in the *New Yorker*, Behnke provided several explanations, none of which Sidley found credible. First, Behnke said that in 2005, no one in the Ethics Office had an appreciation for the types of activities that Mitchell was involved in.[2399] But, Mayer's article provided concrete examples of the types of activities in which Mitchell was involved. More importantly, Behnke was fully aware of Mitchell's activities by September 2005 as a result of his involvement with the PENS

[2397] Childress-Beatty interview (May 19, 2015).

[2398] Seligman, et. al. Investigation Tracking System print-out.

[2399] Behnke interview (May 21, 2015).

Task Force several months earlier. In fact, in Behnke's handwritten notes from the PENS Task Force meeting, he specifically wrote the words "New Yorker," "Jim Mitchell," and "SERE."[2400]

Second, Behnke said that even if an investigation had been opened, the Ethics Office "would've written to Mitchell [and] he would've said he can't talk about it," and "at that point in time, we would've said we can't get to this information and it would've been closed anyway."[2401] This was pure conjecture as the Ethics Office made no attempts to get any information from Mitchell. When Sidley pointed this out to Behnke, his response was "fair enough."[2402]

Third, Behnke claimed that this complaint was procedurally problematic because it was filed against multiple people, and that the Ethics Office typically did not accept complaints against "groups of individuals."[2403] But, Behnke did not have an explanation for why the complaint form as it existed in 2005 explicitly allowed for filing against multiple "member(s)." Behnke also stated during his interview that the Ethics Office would have written back to Gadberry, asking her to re-file. When Sidley pointed out that no one did that in 2005 when she initially filed her complaint, Behnke had no explanation.[2404]

In summary, when Gadberry filed the complaint, the Ethics Office could have pursued her complaint against Mitchell, but it did not. The evidence shows that instead of taking any affirmative steps to investigate the complaint, Behnke and Ethics Office staff took steps to discourage Gadberry from filing her complaint, and when that failed, Behnke simply chose to not act on it at all.

3. John Leso

There were a total of three Ethics matters related to John Leso ("Leso"): (1) the August 2006 sua sponte matter; (2) the complaint filed by Alice Shaw (received in October 2007); and (3) the complaint filed by Trudy Bond (received in February 2008). The initial sua sponte complaint was closed in August 2007 and the two complaints were reviewed together. Despite receiving the initial complaint against Leso in October 2007, the Ethics Office's investigation lingered until December 2013, when the matter was officially closed without elevating it to the full Ethics Committee. The Leso matter was one of the longest adjudications in the Ethics Office's history.

[2400] HC00010682.

[2401] Behnke interview (May 21, 2015).

[2402] *Id.*

[2403] *Id.*; Childress-Beatty also stated during her interview that the Ethics Office did not accept complaints against multiple individuals, referring to such complaints as "kitchen sink" complaints. Childress-Beatty stated that because the complaint "threw everyone in one pot," she would have returned the complaint and asked the complainant to file separate ones for each member.

[2404] Behnke interview (May 21, 2015).

a) Sua sponte matter

In June 2005, Behnke received an early copy of the *New England Journal of Medicine* article "Doctors and Interrogators at Guantanamo Bay." The article alleged that the "principal BSCT function was to engineer the camp experiences of 'priority' detainees to make interrogation more productive"[2405] and identified Major John Leso as a BSCT psychologist. On June 26, 2005, Levant emailed Behnke and asked if Leso's involvement in BSCT interrogations as alleged in the article was something that the Ethics Committee should act on. Behnke responded that many on the PENS Task Force "voiced the opinion that there are significant distortions in the article," and more importantly, told Levant that Leso was "not an APA member, so our Ethics Committee has no jurisdiction."[2406] The evidence shows that Leso has been an APA member since 1996, and that he was indeed a member at the time of Levant's inquiry.[2407] When asked about this, Behnke responded that he just "had it in [his] mind that Leso was not an APA member" and that he did not know "what happened there." Behnke recalled that Koocher "upbraid[ed]" him about this statement in person at a later point in time.[2408]

On August 1, 2006, Behnke forwarded Mark Benjamin's *Salon.com* article "Psychological Warfare" to Jones and asked him to review what was said about Leso. Behnke wondered if it was sufficient to open a sua sponte case.[2409] Jones responded that he did not think that there was sufficient information in the article to open a sua sponte case because there was "really very little here to show what Leso personally did," and questioned whether there would be any value in a sua sponte preliminary investigation.[2410] A little over an hour later, Jones wrote back again and included several articles dating back to 2005 in his email. Jones stated that "APA likely had all the relevant information on Leso over one year ago; i.e. a sua sponte process may be time barred," and that "information by June 2005 suggests his identify was known." Jones concluded that this "tilts the process to a complainant brought action, and cautions any discussion of sua sponte as a necessarily available option."[2411]

On August 2, 2006, Dixon recommended to then-Ethics Committee Vice Chair, Robin Deutsch, that the Ethics Office open a sua sponte preliminary investigation into the actions of Leso. Dixon's recommendation was based on the allegations in *Oath Betrayed*, a book by Steven Miles, which alleged that as a member of the BSCT team, Leso monitored the interrogation of Mohammed al-Qahtani, who was subjected to a number of enhanced interrogation techniques ("EITs"). On August 8, 2006, Deutsch agreed to open a preliminary investigation[2412] and by August 25, 2006, Dixon had drafted a letter to Leso, informing him that

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[2405] *Id.*

[2406] APA_0844344.

[2407] APA Membership Inquiry for John Leso (on file with Sidley).

[2408] Behnke interview (June 8, 2015).

[2409] APA_0087614.

[2410] *Id.*

[2411] APA_0087612.

[2412] HC00007396.

the Ethics Office had decided to open a preliminary investigation based on the allegations in Miles's book.

The letter was never sent to Leso. A handwritten notation on a draft of the letter indicated that it was "not sent per Steve" and contained the date "8-25-06" along with Dixon's initials, "PSD."[2413] Dixon confirmed that she had received an instruction from Behnke to not send the letter to Leso. Both Dixon and Behnke explained that the letter was not sent because the Ethics Office decided to pursue the complainant matters against Leso instead.[2414] But, it was not until September 5, 2006, more than ten days after Behnke's instruction, that the Ethics Office received the first written inquiry from a complainant (Alice Shaw) regarding filing a complaint against Leso.[2415] Neither Dixon nor Behnke could account for why Behnke instructed Dixon not to send the August 25, 2006 letter, ten days before any written inquiry regarding Leso was received by the office.[2416] Behnke told Sidley that he might have decided not to send the letter because he had heard from various individuals before September 5, 2006 that they were planning to file complaints against Leso. Behnke did not recall the names of these individuals. Given the close proximity of the sua sponte matter and the date the Ethics Office received the first inquiry regarding Leso, Behnke's explanation—that he had heard that complaints against Leso would be forthcoming—seems plausible, but Sidley found no documents to support this claim.

The sua sponte matter was officially closed on August 2, 2007.[2417] There was nothing in the adjudication file that suggests any additional work was done on this matter between August 26, 2006 and August 2, 2007.

b) Complaints from Alice Shaw and Trudy Bond

(i) *The Shaw complaint*

Alice Shaw submitted the first complaint against Leso. The Ethics Office received Shaw's inquiry letter on September 5, 2006, and on September 13, 2006, sent her a complaint packet that included a complaint form, the Rules, the Ethics Code, and additional information for individuals filing APA ethics complaints.[2418] The Ethics Office received Shaw's completed complaint form on October 26, 2006. In her complaint, Shaw stated that she reviewed "several reports" suggesting that Leso had established procedures for interrogating detainees and presided at interrogation sessions in which abusive techniques were used. In particular, Shaw pointed to the "Army Regulation 15-6: Final Report Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba" (the "Schmidt-Furlow report") as one of her sources, and cited standards 1.09 (respecting others), 1.14 (avoiding harm), and 1.02 (relationship of ethics and law) from the 1992 Ethics Code. Shaw did not attach any documents to her complaint form. On

[2413] HC00007395.

[2414] Behnke interview (May 21, 2015); Dixon interview (May 19, 2015).

[2415] APA_0299793.

[2416] Behnke interview (May 21, 2015); Dixon interview (May 19, 2015).

[2417] HC00007388.[+]

[2418] APA_0299793.

November 27, 2006, Dixon wrote a letter to Shaw and requested any additional information she might have had regarding Leso's involvement at Guantanamo.[2419] Shaw responded on December 12, 2006, restated her allegations, cited specific excerpts from the documents she referenced in her original complaint, and attached a copy of the Schmidt-Furlow report.[2420]

Between December 2006 and March 2007, the decision was made within the Ethics Office to ask Jones to act as the investigator on the Shaw complaint. The complaint materials were sent to Jones on March 1, 2007,[2421] and Jones provided his completed analysis to the Ethics Office on March 19, 2007.[2422] In addition to reviewing the Schmidt-Furlow report, Jones also reviewed the Interrogation Log of Detainee 063 ("interrogation log"), which he found on the Time Magazine website. Jones concluded that many of the allegations were speculative and that there were substantial issues as to the respondent's ability to provide any additional information about Leso's actions. Jones did not recommend any particular action, but set forth three options: (1) close the complaint; (2) open a preliminary investigation to solicit more information from the respondent; or (3) conduct further investigation to determine whether there is any additional direct information about Leso's behaviors.[2423]

Despite having received Jones's summary on March 19, 2007, there was no indication that the Ethics Office took any further actions on the Shaw complaint until October 2007. On October 11, 2007, Dixon wrote a decision memo to then-Ethics Committee Chair Deutsch, and recommended that a preliminary investigation be opened against Leso.[2424] On October 14, 2007, Deutsch agreed that an investigation should be opened and noted that the allegations were "extremely concerning."[2425] It was not until November 16, 2007 that the Ethics Office wrote to Leso to notify him that a preliminary investigation had been opened against him.[2426] None of the individuals Sidley interviewed could explain why the preliminary investigation was not opened until October 2007 when the analysis by Jones was completed in March, or why it took a full month to notify Leso of the decision to open a preliminary investigation against him.[2427]

(ii) *The Bond complaint*

While the Ethics Office was working on the Shaw complaint, Trudy Bond, a member of the Coalition for an Ethical Psychology and Psychologists for Social Responsibility, also lodged

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[2419] HC00007661.

[2420] APA_0300176.

[2421] HC00007385.

[2422] APA_0091075.

[2423] *Id.*

[2424] APA_0300176.

[2425] APA_0281323.

[2426] HC00007531.

[2427] In particular, Dixon stated that such a long time lapse has happened in other cases so it was not unusual, but she did not recall why it took so long to notify Leso in this particular case. Dixon interview (May 19, 2015).

a complaint against Leso. The Ethics Office stamped her complaint as received on February 15, 2008 even though the letter itself was dated September 4, 2007.[2428]

Bond told Sidley that she sent the Ethics Office a complaint prior to that date. According to Bond, her initial complaint against Leso was sent to the Ethics Office on April 15, 2007, but it was never acknowledged.[2429] On September 4, 2007, she wrote to the Ethics Office, noted that her previous complaint had not been acknowledged, and re-submitted her complaint — the same letter that was not stamped as received by the Ethics Office until February 15, 2008. When she still did not receive an acknowledgement by January 22, 2008, Bond wrote again to the Ethics Office and inquired about her complaint.[2430] She received a response from Behnke on February 6, 2008, indicating that the Ethics Office had never received her complaint against Leso following her inquiry to file a complaint on April 11, 2007, and that as a result, the matter was closed on October 11, 2007.[2431]

Bond provided Sidley with a copy of the complaint she allegedly sent to the Ethics Office on April 15, 2007, but Sidley did not find this complaint in the Ethics Office's adjudication files. None of the individuals within the Ethics Office recalled what happened to the April 15, 2007 complaint—some believed that it was never received while others believed that it could have simply been lost.[2432] Nor could anyone explain why the letter from Bond dated September 4, 2007 was not marked as received until February 15, 2008. According to Childress-Beatty, once the complaint was actually received in February, the Ethics Office reviewed both the Shaw and Bond complaints together and examined all of the evidence submitted by both individuals.[2433]

On February 11, 2008, the Ethics Office received a response letter from Leso in relation to the complaint filed by Shaw. In the letter, Leso stated that the allegations were based on unsubstantiated sources and that he: (1) was never the chairman of the BSCT team; (2) never helped establish procedures for interrogating detainees; and (3) never presided at interrogation sessions or supervised such sessions.[2434] Specifically, Leso cited to a June 2006 DoD policy that permitted behavioral science consultants "to support lawful intelligence program activities relating to detainees in the Global War on Terror":

> BSCs are authorized to make psychological assessments of the character, personality, social interactions, and other behavioral characteristics of detainees, including interrogation subjects, and, based on such assessments, advise authorized personnel performing lawful interrogations and other lawful detainee

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[2428] HC00018636.

[2429] Bond interview (Feb. 19, 2015).

[2430] HC00017459 at 5–6.

[2431] *Id.* at 4.

[2432] Childress-Beatty stated that they did not believe that Bond actually sent in a complaint in April 2007. Childress-Beatty interview (May 13, 2015); Dixon stated that they looked for Bond's April 2007 complaint and could not find it. Dixon interview (May 12, 2015).

[2433] Childress-Beatty interview (May 13, 2015).

[2434] APA_0100676.

> operations, including intelligence activities and law enforcement. They employ their professional training not in a provider-patient relationship, but in relation to a person who is the subject of a lawful governmental inquiry, assessment, investigation, interrogation, adjudication, or other proper action.[2435]

Even though this policy was put in place after Leso had already left Guantanamo, he stated in his letter that it was "generally consistent with practices and procedures in effect during the period in question."[2436] Leso also cited to the PENS Task Force report and argued that there was "no conflict between the APA Ethics Code and DoD policy on the use of behavioral science consultants."[2437] Leso addressed both Standards 1.09 and 1.14:

> [P]sychologists do not have a duty under Standard 1.09 to recognize in any individual a 'right' to act upon their 'values, attitudes, and opinions' that embrace terrorism or illegality.
>
> …
>
> Similarly, psychologists do not have a duty under Standard 1.14 to protect terrorists or persons who commit heinous crimes from the 'harm' of treatment or punishment in accordance with law […] In the context of international conflict and the Global War on Terror, the standards of law applicable to the treatment of enemy combatants are based on international law of armed conflict. I this regard, the Department of Defense and Department of the Army have mechanisms and procedures in place to investigate substantial allegations of improper conduct by military officers and other DoD personnel in the treatment of detainees to take appropriate disciplinary or administrative action when improper conduct has occurred.[2438]

With respect to Shaw's specific allegations, Leso stated that he was "not present during significant portions of the interrogation of Mohammed al-Qahtani" and that he "did not have access to information regarding significant aspects of the investigation." Leso further stated:

> The only specific allegation of any action attributable to me is one contained in a Time magazine article that: 'Control puts detainee in swivel chair at Maj. L's suggestion to keep him awake and stop him from fixing his eyes on one spot in booth.' Even assuming the truth of that notation that I suggested putting the detainee in a swivel chair to keep him awake and stop him from fixing his eyes on one spot in the booth, this suggestion cannot be seen as disrespecting any right of the detainee to humane treatment or treatment in accordance with law, or for that matter as disrespecting whatever 'right' he may have had 'to hold values, attitudes, and opinions' that he held. Nor can this suggestion be seen as harming

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[2435] *Id.*

[2436] *Id.*

[2437] *Id.*

[2438] *Id.*

> the detainee unless it was knowingly inhuman or not in accordance with law, concerning which there is no evidence whatsoever submitted by Dr. Shaw.[2439]

Finally, Leso noted that he was limited in what he could respond to with respect to the interrogation of al-Qahtani as "[i]nformation concerning interrogations of enemy combatants is classified."[2440]

Those who reviewed the complaint stated that they gave Leso's letter the same weight as the allegations in the complaint.[2441] According to Dixon, she had no reason to believe that Leso was being dishonest in his responses and accorded the letter the same weight as she did the complaint. Dixon recalled that her initial reaction to the response letter was that Leso was not a "major player" in the interrogation of al-Qahtani and that any actions that could be directly attributed to him based on the other documents in the record were not violations of the Ethics Code.[2442] Similarly, Bow stated that he found the letter to be credible and did not believe that there was any evidence to the contrary in the record.[2443] Both individuals noted that it would have been unusual to have a psychologist be placed above a psychiatrist in the hierarchy of a medical team. All reviewers stated that while this letter did not sway their decisions heavily in one way or another, they thought it was problematic that Leso was unable to discuss his actions related to the interrogation of detainees and believed that they may never be able to obtain such information from Leso.

On April 1, 2008, the Ethics Office received a letter from Lt. Gen. Eric Schoomaker from the Surgeon General's office on behalf of Leso. In the letter, Schoomaker stated that a "review of the available records indicates that Dr. Leso did not do anything wrong and does not deserve sanction for his performance of his official military duties."[2444] Schoomaker noted that two senior army psychologists reviewed the records of interrogation in which Leso was involved and found no evidence of "that he behaved in an unethical manner or harmed anyone in any way."[2445] Schoomaker also cited to the 2005 Martinez-Lopez report that concluded "[t]here is no indication that BSCT personnel participated in abusive interrogation methods."[2446] At the end of his letter, Schoomaker noted that if the APA had any questions or needed any additional information, they could contact Colonel Kevin Luster, his Staff Judge Advocate.

Dixon told Sidley that she found this letter to be credible, but did not take into account the fact that Leso was allegedly acting within the scope of his military duties. According to

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[2439] *Id.*

[2440] *Id.*

[2441] There is nothing in the Rules that offers any guidance about how to weigh evidence from different sources.

[2442] Dixon interview (May 12, 2015).

[2443] Bow interview (May 11, 2015).

[2444] HC00007451.

[2445] *Id.*

[2446] *Id.*

Dixon, if there was a direct link between Leso and any behavior that would be a violation of the Ethics Code, it would not have mattered that Leso was acting in his official military duties. Bow stated that he recognized that the military tends to try to "protect its own," but did not want to discount this as evidence since it was one of the few accounts from someone with firsthand knowledge of Leso's behavior.

Despite the fact that Schoomaker included contact information for his Staff Judge Advocate at the end of his letter, no one from the Ethics Office ever reached out to him or Schoomaker. All of the reviewers stated that this was because the Ethics Office simply did not contact potential witnesses as a part of its adjudications process.

On July 31, 2008, the APA sent another letter to Leso, requesting additional information. Leso responded in a letter dated December 2, 2008, but mistakenly stamped by the Ethics Office as received on January 2, 2008.[2447] Leso stated that as a result of his position within the military, he was precluded by law from commenting on "any matters relating to the interrogation of detainees" and from providing any additional information from the June 2008 U.S. Senate Armed Services Committee hearing. Leso also noted that within the documents furnished by the Ethics Office, there was only one comment that was attributed to him, which was a statement that indicated he spoke out against the use of "[h]arsh techniques."[2448] Leso referenced the letter sent by Schoomaker, in which Schoomaker stated that Leso's records were reviewed by two senior Army psychologists who both found no evidence of unethical behavior, as further support for his actions.

On February 22, 2010, Bond wrote to the Ethics Office and requested an update on the status of her complaint against Leso.[2449] On March 17, 2010, Behnke wrote back and informed Bond that the Leso complaint remained under review. In the letter, Behnke explained that "[t]here are times when the resolution of an ethics complaint entails careful consideration of what information is available, or is likely to become available that may be relevant to the matter. In such instances, the final resolution may require additional time, as opposed to ethics matters in which all relevant information is immediately available in the public domain."[2450] He provided no additional details about the status of the complaint.

On August 26, 2010, Kathy Roberts from the Center for Justice and Accountability wrote a letter to the Ethics Office regarding Bond's Leso complaint.[2451] In the letter, Roberts explained that CJA represented Steven Reisner in his complaint against Leso before the New York State Office of Professions. Roberts stated that "a great deal of information has become publicly available since Dr. Bond originally filed her complaint," referencing the 2008 SASC report and

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[2447] APA_0308212.

[2448] This was likely a reference to the Counter Resistance Strategy Meeting Minutes, in which Leso was quoted as saying "[f]orce is risky, and may be ineffective due to the detainees' frame of reference. They are used to seeing much more barbaric treatment."

[2449] HC00007233 at 16.

[2450] *Id.* at 15.

[2451] *Id.* at 12–14.

attaching the complaint filed by Reisner against Leso in New York. On September 29, 2010, Behnke responded to Roberts's letter and informed her that if CJA wanted to submit documents on behalf of Bond, then the Ethics Office would need a letter from Bond indicating her knowledge of the CJA's role. Behnke further noted that the Ethics Office "[did] not correspond with third parties regarding the existence or status of a complaint."[2452] As a result, on December 2, 2010, Bond, having been informed by Roberts of Behnke's September letter, sent the Ethics Office another copy of the CJA's letter and attachment.[2453]

The initial decision to stay the Leso matter was made in December 2010 due to the filing of Reisner's complaint against Leso in New York. Pursuant to Rule Part II, subsections 5.5 and 5.6, if the Ethics Office discovers concurrent litigation or a complaint before a state licensing against the same respondent, it may stay its own investigation until the licensing board makes a decision. According to Ethics Office staff members, there are several reasons for this. First, the respondents would not have to respond to two different venues simultaneously.[2454] Second, the Ethics Office prefers to defer to the licensing boards because they typically have more resources and authority to investigate, and can therefore generate more information. This information is then shared with the APA Ethics Office once the licensing board concludes its investigation.[2455] Third, waiting and deferring to the licensing boards relieves the APA of the liability of being the first adjudicatory body.[2456]

On December 16, 2010, Childress-Beatty drafted a memo to then-Ethics Committee Chair, Linda Forrest, alerting her to the fact that Reisner had filed a complaint against Leso in New York and that the Ethics Office would be staying the pending ethics complaints. On December 22, 2010, Forrest responded and agreed to stay both complaints.[2457] The Ethics Office notified Bond of its decision to stay the complaints on December 30, 2010.[2458]

On January 5, 2011, the Ethics Office wrote a letter to Leso to notify him of the complaint filed against him by Bond.[2459] The letter noted that this was the "second complaint received by the Ethics Office related to the same issue" and that the Ethics Office was aware of the complaint against him in New York filed by the CJA. Accordingly, the Ethics Office was staying the complaint from Bond and that it was not asking Leso to respond to the merits of the complaint at this time. Leso acknowledged the receipt of the letter on April 21, 2011.[2460]

[2452] *Id.*at 11.

[2453] *Id.*at 1–7.

[2454] Dixon interview (Mar. 3, 2015).

[2455] *Id.*

[2456] Childress-Beatty interview (Jan. 16, 2015).

[2457] HC00007317 at 35–36.

[2458] *Id.* at 34.

[2459] *Id.* at 32–33.

[2460] *Id.* at 30.

On August 11, 2011, the Ethics Office learned that the New York Supreme Court had dismissed the case brought by the CJA to force an investigation of Leso by the licensing board.[2461] On November 9, 2011, the Ethics Office sent letters to Leso and Bond, asking them if they were aware of any further appeals in the matter against Leso in New York.[2462] Bond responded on November 18, 2011 and stated that she had "no knowledge of any information beyond what the public docket indicates."[2463] While the Ethics Office acknowledged her letter on December 2, 2011, it did not provide any substantive responses about the status of her complaint, other than the fact that she will be contacted when the review is complete.[2464]

On September 18, 2012, Bond and Reisner sent an open letter addressed to then-APA President Suzanne Bennett Johnson, expressing their concerns about the Gelles, Leso, and James (discussed below) complaints.[2465] With respect to each of the complaints, Bond and Reisner noted the following:

> The Ethics Committee apparently found that Dr. Gelles' behavior did not violate APA ethics; in fact, subsequent to this case, Dr. Gelles was chosen by the Director of the Ethics Office to sit on the PENS Task Force and help develop ethical guidelines for national security interrogations.
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> …
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> The ethics complaint against Col. James was dismissed by the APA Ethics Office without investigation.
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> …
>
> Now, more than five years after filing, the ethics complaint against Dr. Leso still remains unadjudicated by the APA Ethics Office (apparently the longest unadjudicated case in APA history).[2466]

Bond and Reisner also requested that Johnson: "(1) [o]pen a full review of the practices of the APA Ethics Office with regard to the investigation and adjudication of cases alleging torture, cruel, inhuman or degrading treatment or punishment in general, and the cases of Drs. Leso, James, and Gelles in particular; (2) [e]nsure that the case against Leso receives a 'prompt adjudication,' five years after it was filed; and (3) [m]ove to rescind the current statute of limitations on cases of torture, cruel, inhuman, or degrading treatment so that there can be accountability for psychologists who participate in classified abuses whenever the evidence of

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[2461] *Id.* at 29.

[2462] *Id.* at 21–22.

[2463] *Id.* at 19–20.

[2464] *Id.* at 18.

[2465] HC00019801 at 79–82.

[2466] *Id.*

such abuses becomes available."[2467] On September 28, 2012, Behnke and Childress-Beatty met with Johnson to discuss the open letter. According to an email summary from Behnke, Johnson asked for an understanding about what happened in the three cases. Behnke stated that Johnson "seemed very comfortable with the discussion," "repeatedly emphasized that she was not concerned with Trudy Bond," and wanted "a statement that could be distributed to members who have read the 'open letter' and then gotten in touch with her" with questions about what happened.[2468]

When Bond and Reisner did not receive a letter from Johnson by October 23, 2012, they sent an email to the APA's Executive Office email address and requested an update.[2469] During this time, several APA members worked on the response letter, including Behnke, Childress-Beatty, Farberman, Honaker, Gilfoyle, Garrison, and Anderson.[2470] The response to Bond's open letter from Johnson came over a month later on October 31, 2012. Notably, her response included the statement that the Ethics committee "focuses on primary (such as findings from a legal proceeding) rather than secondary sources (such as media reports)."[2471]

On November 28, 2012, Bond and Reisner responded to Johnson's letter and stated that it was the first time they have heard of the Ethics Committee making a distinction between "primary" versus "secondary sources." The two questioned whether this was an Ethics Committee policy and requested its documentation.[2472] Neither the Ethics Office nor Bennett Johnson responded to this letter. The Ethics Office staff and Committee members who reviewed the Leso matter confirmed that they focused on primary sources (i.e. various government reports, letters from Leso, and the letter from the Army's Surgeon General's office) rather than secondary sources (i.e. media reports) in their evaluation of the complaints. According to Childress-Beatty, the reliance on primary versus secondary sources was not part of the Rules and Procedures, or any policy document. Instead, it was simply one of the "long-standing" practices of the Ethics Office since almost all complaints received and investigated by the office were based on firsthand accounts — Childress-Beatty referred to this distinction as "common sense."[2473]

Separate from the open letter, on September 19, 2012, Bond sent another letter to the Ethics Office, requesting an update on her complaint and referencing her last communication with the office, which was on November 18, 2011.[2474] In the letter, Bond stated that the deadline for a possible appeal in the New York matter had "long passed."[2475] The Ethics Office

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[2467] *Id.*

[2468] APA_0197614.

[2469] HC00022099.

[2470] *Id.*

[2471] Email from S. Bennett Johnson to T. Bond and S. Reisner (Oct. 31, 2012).

[2472] HC00007258 at 4–5.

[2473] Childress-Beatty interview (May 19, 2015).

[2474] HC00007317 at 11–12.

[2475] *Id.*

acknowledged the receipt of her letter on September 21, 2012, and again, did not provide any substantive information about the review of the complaint.[2476] The Ethics Office sent a substantive response to Bond on November 19, 2012, a full two months later. In the letter, Childress-Beatty thanked Bond for confirming that the window for an appeal in the Reisner matter had passed and stated that the "[e]xpiration of the time window for appeals assists [the Ethics Office] in moving the ethics process forward." [2477]

According to Childress-Beatty, in addition to the materials that the Ethics Office received from the complainants, Leso, the CJA, and Schoomaker, she was doing internet searches and looking at additional publicly available documents to see if there was anything else on Leso's actions.[2478] Sidley confirmed that there were several print-outs of media reports from 2008 – 2013 on the involvement of BSCT psychologists, though not necessarily directly about Leso, contained in the adjudication file. On December 15, 2012, Childress-Beatty drafted a decision memo to the 2012 Ethics Committee Chair, Nadya Fouad, recommending that the Leso complaint be closed (the "closure memo").[2479] Childress-Beatty also noted that staying the case to see if more information would become available through the pending civil litigations was another option. On December 20, 2012, Fouad emailed Childress-Beatty and Behnke, recommended that the Leso complaints be closed, and noted that she did not see "evidence of ethical violations" based on a "careful review of the materials submitted."[2480] When Sidley interviewed Fouad, she confirmed that she received the full adjudication file for Leso and recommended closing the complaints because she did not see any evidence that there was a violation of the Ethics Code based on Leso's actions.[2481]

In her closure memo, Childress-Beatty addressed three specific allegations against Leso: (1) that he was the BSCT Chair; (2) that he "presided over" or was in control of interrogation sessions; and (3) that he helped establish procedures for interrogations.[2482] With respect to the first allegation, Childress-Beatty explained that Leso denied that he was the Chair and that she found "nothing that states whether Major Leso or Major Burney, a psychiatrist was the Chief BSCT. I am not sure how the Chair was determined in 2002 […] In any event, simply being the Chair of the BSCT would not be a violation of the Ethics Code."[2483]

Regarding the second allegation, Childress-Beatty stated that Leso denied that he presided over interrogations, citing to his letter in which he claimed that he was not present during "significant portions of the interrogation" and that he "did not have access to information regarding significant aspects of the investigation." Childress-Beatty also noted that "[i]t is clear

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[2476] *Id.* at 10.

[2477] *Id.* at 1.

[2478] Childress-Beatty interview (May 13, 2015).

[2479] HC00007306.

[2480] *Id.*

[2481] Fouad interview (Apr. 28, 2015).

[2482] *Id.*

[2483] *Id.*

that the BSCT were consultants to the interrogations and not in control of the interrogations," citing to the Martinez-Lopez report (discussed below), the Schmidt-Furlow report (discussed below), and the JTF GTMO SERE SOP dated December 10, 2002.[2484] Finally, Childress-Beatty stated that there were only three instances in which Leso was specifically mentioned in the interrogation log of al-Qahtani:

- On November 23, 2002, the interrogation log states that Dr. Leso was present when a hooded al-Qahtani was brought in, the hood was removed, and he was bolted to the floor.

- On November 27, 2002, the interrogation log states a swivel chair was used at Dr. Leso's suggestion when al-Qahtani was avoiding eye contact. It is unclear whether Dr. Leso was observing at the time or had made that suggestion earlier.

- In November of 2002, Dr. Leso was in the observation booth when a military dog was used to intimidate al-Qahtani by being commanded to growl, show teeth and bark in doorway of interrogation room. Dr. Leso reported this incident when questioned by the Army investigators.[2485]

None of the Ethics Office investigators or Ethics Committee members with whom we spoke thought that being present when the detainee was brought in and "bolted to the floor" was an ethical violation. Dixon told Sidley that merely being present when the detainee was brought in, when it was unclear whether this was done at the suggestion or direction of Leso, did not rise to the level of an ethical violation. Bow stated without any additional evidence that Leso suggested that the detainee be bolted to the floor, he did not view this as an ethical violation.[2486] Similarly, Childress-Beatty stated that there was no indication that Leso had suggested or participated in this.[2487] Childress-Beatty also noted that it was unclear whether Leso would have had sufficient notice in 2002 that his observance of this would have been a violation of the Ethics Code.[2488]

Similarly, none of the Ethics Office investigators or Ethics Committee members with whom we spoke thought that suggesting that a detainee be placed in a swivel chair constituted an ethical violation. Bow told Sidley that putting someone in a swivel chair was not an ethical violation as there was no suggestion that the purpose was to disorient the detainee.[2489] Bow thought it was possible that Leso suggested this to keep the detainee from zoning out or falling asleep, and to put someone in a swivel chair to keep them more alert was not an ethical violation.[2490] Bow noted that this was similar to how prisoners were treated in the U.S. prison

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[2484] *Id.*

[2485] *Id.*

[2486] Bow interview (May 11, 2015).

[2487] Childress-Beatty interview (May 13, 2015).

[2488] *Id.*

[2489] Bow interview (May 11, 2015).

[2490] *Id.*

system. In contrast, Dixon said that it could be assumed that the purpose of putting the detainee in a swivel chair was to disorient him. But, she believed that disorienting someone did not rise to a level of harm that would have constituted an ethical violation in her mind.[2491] Dixon was also the only individual who recalled reviewing the OLC (Yoo/Bybee) memos and using them as a guide in her evaluation of what constituted torture and cruel, inhuman, and degrading treatment.[2492] Childress-Beatty similarly did not think that putting the detainee in a swivel chair was necessarily something that was harmful, but she did not recall using the OLC memos, and she did not think that she would have used the narrow legal definitions contained in those memos as a guide.[2493]

The third instance regarding the use of the military dog was mentioned in the interrogation log, but Leso's name was not directly associated with it. Instead, the Schmidt-Furlow report stated that a "psychologist assigned to the Behavioral Science Consultation Team […] witnessed the use of a MWD named 'Zeus' during a military interrogation of the subject of the first Special Interrogation Plan during the November 2002 time period."[2494] It can be deduced from the rest of the documents in the record that the subject of the interrogation was al-Qahtani and that the psychologist was Leso. The only reviewer who clearly recalled this was Bow, who stated that even though "it looks like Leso was in the room when it happened, nothing indicates he promoted this or suggested it."[2495] Thus, he did not think that this could constitute evidence for an ethics violation.

There were also four other instances in the log that referenced the presence of a "BSCT," but Childress-Beatty noted that it was not clear whether this referred to Leso, Burney, or the psych tech, or "how much information was shared between them."[2496] Those were instances were:

- On December 2, 2002, the log states 'BSCT observation indicated that detainee was lying during entire exchange.'
- On December 11, 2002, the log states that after the detainee began to cry and asked to sleep in a different from the interrogation room, '[t]he BSCT observed that the detainee was only trying to run an approach on the control and gain sympathy.'
- On December 25, 2002, the log states 'Interrogator began to play cards with MP to ignore the detainee due to a BSCT assessment that the interrogators may be becoming the family figures of the detainee, and the interrogator wanted to see if the detainee would try to seek attention.'

[2491] Dixon interview (May 12, 2015).

[2492] *Id.*

[2493] Childress-Beatty interview (May 13, 2015).

[2494] HC00022699.

[2495] Bow interview (May 11, 2015).

[2496] HC00007306.

- On December 29, 2002, the log states that 'Detainee seemed too comfortable. He was questioned about why he was unaffected by our discussion of the victims of 9/11. Detainee immediately sat up in his chair. BSCT observed that detainee does not like it when the interrogator points out his nonverbal responses. Detainee professed his innocence and interrogator laughed.[2497]

All of the reviewers declined to attribute those actions to Leso since it was not clear who "BSCT" would have referred to. As a result, these references did not factor into their analysis of whether there was cause for action on the complaints.

Another key piece of evidence Childress-Beatty reviewed was the Counter-resistance Strategy Meeting minutes from October 2, 2002, which "reflect that BSCT argued for 'psychological stressors' such as 'sleep deprivation, withholding food, isolation, loss of time.'"[2498] She noted in her closure memo that even though this implied that a BSCT or the BSCT team approved the use of these techniques, it was not clear whether "this occurred or whether the interrogators carried out the techniques in the manner approved if they were approved."[2499] Notably, she also wrote that "[i]t is also important to note that these techniques in and of themselves may not be cruel, unusual, inhuman, degrading treatment or torture depending upon factors such as the situational context, length of time used, and intensity."[2500] In addition to this, there was one comment from the minutes that was directly attributed to Leso: "[f]orce is risky, and may be ineffective due to the detainees' frame of reference. They are used to seeing much more barbaric treatment."[2501]

All of the individuals Sidley interviewed stated that references to "BSCT" could not be directly tied to Leso and confirmed that they did not take those statements into account in their analyses. With respect to the one comment that was directly tied to Leso, Bow stated that this was an example of Leso attempt to act ethically within the limitations of his situation.[2502] Similarly, Childress-Beatty stated during her interview that she believed that this was an effort by Leso to resolve the ethical conflict between his military orders and his ethical obligations, and noted that even the statements attributable to the BSCT team generally did not rise to the level of ethical violations.[2503] Dixon told Sidley that she believed that EITs were being used regardless of Leso's involvement, so if he was trying to reduce or eliminate their use in any way, then he was "doing the best he could" to behave ethically in that situation. Dixon did not believe that the "camp-wide" strategies constituted an ethical violation.[2504]

[2497] *Id.*

[2498] *Id.*

[2499] *Id.*

[2500] *Id.*

[2501] HC00007370.

[2502] Bow interview (May 11, 2015).

[2503] Childress-Beatty interview (May 13, 2015).

[2504] Dixon interview (May 12, 2015).

A third key document that Childress-Beatty and the other reviewers analyzed was the BSCT memo referenced in the 2008 SASC report. Even though Leso's name was redacted throughout the report, all of the reviewers agreed that they had sufficient information from the other documents in the record such that they presumed that "BSCT psychologist" referred to Leso. According to the report, Leso and the other BSCT member, a psychiatrist named Paul Burney, drafted a memo of "suggested detention and interrogation policies" based on information they learned from the JPRA SERE training at Fort Bragg. The memo contained three categories of techniques:

- Category I techniques included incentives and "mildly adverse approaches" such as telling a detainee that he was going to be at GTMO forever unless he cooperated." The memorandum stated that an interrogator should be able to ascertain whether a detainee is being cooperative by the end of the initial interrogation and said that if Category I approaches failed to induce cooperation, the interrogator could request approval for Category II approaches;

- Category II techniques were designed for "high priority" detainees, defined in the memo as "any detainee suspected of having significant information relative to the security of the United States." Category II techniques included "stress positions; the use of isolation for up to 30 days (with the possibility of additional 30 day periods, if authorized by the Chief Interrogator); depriving a detainee of food for up to 12 hours (or as long as the interrogator goes without food during an interrogation); the use of back-to-back 20 hour interrogations once per week; removal of all comfort items including religious items; forced grooming; handcuffing a detainee; and placing a hood on a detainee during questioning or movement";

- The memo reserved Category III techniques "ONLY for detainees that have evidenced advanced resistance and are suspected of having significant information pertinent to national security" (emphasis in the original). Category III techniques included the daily use of 20 hour interrogations, the use of strict isolation without the right of visitation by treating medical professionals or the International Committee of the Red Cross (ICRC); the use of food restriction for 24 hours once a week; the use of scenarios designed to convince the detainee that he might experience a painful or fatal outcome; non-injurious physical consequences; removal of clothing; and exposure to cold weather or water until such time as the detainee began to shiver."[2505]

In addition to these specific interrogation techniques, the memo also made recommendations for the treatment of detainees in cell blocks. Specifically, it proposed:

> [R]esistant detainees might be limited to four hours of sleep a day; that they be deprived of comfort items such as sheets, blankets, mattresses, washcloths; and that interrogators control access to all detainees' Korans. The BSCT memo described using fans and generators to create a white noise as a form of

[2505] HC00022487.

> psychological pressure and advocated that "all aspects of the [detention] environment should enhance capture shock, dislocate expectations, foster dependence, and support exploitation to the fullest extent possible."[2506]

The SASC report noted that the BSCTs were not comfortable with the memo they were asked to produce and included a statement in the memo reflecting their concerns about the techniques:

> Experts in the field of interrogation indicate the most effective interrogation strategy is a rapport-building approach. Interrogation techniques that rely on physical or adverse consequences are likely to garner inaccurate information and create an increased level of resistance…There is no evidence that the level of fear or discomfort evoked by a given technique has any consistent correlation to the volume or quality of information obtained…The interrogation tools outlined could affect the short term and/or long term physical and/or mental health of the detainee. Physical and/or emotional harm from the above techniques may emerge months or even years after their use. It is impossible to determine if a particular strategy will cause irreversible harm if employed…Individuals employing Category II or Category III interrogation techniques must be thoroughly trained…carefully selected, to include a mental health screening (such screenings are SOP for SERE and other Special Operations personnel).[2507]

All of the individuals interviewed by Sidley thought that the addition of the statement warning against the use of the enhanced interrogation techniques ("EITs") as outlined in the memo was key because it evidenced Leso's attempt to act ethically within the confines of his military duties. Dixon stated that the inclusion of this statement showed that Leso was "faced with an impossible task" and that he did everything within his power to "stand up" for the ethics of his profession. Dixon believed that Leso was limited in what he could do and that his memo was outlining techniques that had already been approved by the government through the OLC memos.[2508] Bow stated that this showed Leso trying to act ethically by putting in a section objecting to the use of EITs and advocating for rapport-building techniques.[2509] Bow told Sidley that the inclusion of the statement was key in his finding that this would not be a violation of the Ethics Code because Leso had tried to act ethically by putting in such a section.

Childress-Beatty stated that it was important that Leso seemed reluctant to write the memo based on the SASC report and that he was instructed to write it by his commanding officer at Guantanamo.[2510] She noted that the 1992 Ethics Code was fairly broad in that all the psychologist was required to do was to seek to resolve the conflict between his ethical obligations and his organizational demands (standard 8.03) and/or the law (standard 1.02). She

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[2506] *Id.*

[2507] *Id.*

[2508] Dixon interview (May 12, 2015).

[2509] Bow interview (May 11, 2015).

[2510] Childress-Beatty interview (May 13, 2015).

believed that the inclusion of the section arguing against the use of the EITs was Leso's attempt to resolve the conflict and that it was in line with his other actions, such as speaking up at the Counter Resistance Strategy Meeting.[2511] But, Childress-Beatty could not point to any evidence demonstrating that Leso actually made "known [his] commitment to the Ethics Code," and Sidley could not find any in the record.[2512] Childress-Beatty also emphasized that the critique that Leso should have refused to write the memo and accepted the consequences of disobeying an unethical military order was beside the point because "that was not what the Ethics Code require[d]."[2513]

In defense of Leso, Childress-Beatty cited to multiple government reports as evidence that weighed against the likelihood that the Ethics Committee would find ethical violations even though most of the reports did not specifically reference Leso, and none directly addressed the APA Ethics Code. One of the reports she referenced in her closure memo was the "The Army Regulation 15-6: Final Report – Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility" (the Schmidt-Furlow report). The investigation documented in this report began in June 2004 and examined any mistreatment or aggressive behavior towards detainees at Guantanamo Bay dating back to September 11, 2001. The report found (1) three acts that were in violation of "interrogation techniques authorized by the Army Field Manual 34-52 and DoD guidance"; (2) the commander of JTF-GTMO failed to monitor the interrogation of one high value detainee in late 2002; (3) the interrogation of the same high value detainee resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment; and (4) communication of a threat to another high value detainee was in violation of SECDEF guidance and the UCMJ. The report found no evidence of "torture or inhumane treatment at JTF-GTMO."[2514]

Based on Sidley's review of the report, it is clear that the report did not address the question of whether any psychologists violated the APA Ethics Code. The fact that the report did not find any evidence of "torture or inhumane treatment" at Guantanamo is not the same as not finding any evidence that there was a failure to comply with the Ethics Code, but the report was nevertheless included in Childress-Beatty's analysis. Childress-Beatty told Sidley that she would not have looked at the report with "that level of specificity"[2515] to determine whether the investigation was looking at the APA Ethics Code, and that she "had no idea what standard they were using."[2516]

Another government report Childress-Beatty referenced in her closure memo was the "Department of the Army: Approval of Findings and Recommendations of Functional Assessment Team Concerning Detainee Medical Operations for OEF, GTMO, and OIF" report (the Martinez-Lopez report). The investigation documented in this report was conducted

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[2511] *Id.*

[2512] Childress-Beatty interview (June 2, 2015).

[2513] *Id.*

[2514] HC00022699.

[2515] *Id.*

[2516] *Id.*

between November 23, 2004 and April 13, 2005 and consisted of interviews conducted with 1,182 individuals who served as past, present, and future deployed personnel to all three locations, including six past BSCT members and five BSCT members who were present at the time, and seven who were assigned to GTMO and four who were assigned to OIF. The report concluded that "[t]here is no indication that any medical personnel participated in abusive interrogation practices; in fact, there is clear evidence that BSCT personnel took appropriate action and reported any questionable activities when observed," and that "BSCT personnel served as protectors, much like a safety officers [sic] to ensure the health and welfare of the detainee under interrogation."[2517]

In Sidley's review of the report, it is similarly clear that the report did not address any questions about whether psychologists who were serving in the BSCT role violated the APA Ethics Code. There were no references to Leso by name, and it was entirely unclear from the report who the investigators interviewed as BSCT members. Even though there was nothing tying any of the report's conclusions directly to Leso, and this report was as much speculative evidence as the documents that Childress-Beatty disregarded, it was nevertheless included in her memo as evidence weighing against the finding of an ethical violation.

Finally, Childress-Beatty referenced a statement from Schoomaker's letter in her closure memo and stated that "[w]e also have a report that two senior Army psychologists specifically reviewed Dr. Leso's involvement and found that he had worked to protect the safety of the detainees."[2518] This statement was misleading for two reasons. First, Schoomaker's letter on behalf of Leso could hardly be considered a "report" in that it did not provide any details as to who conducted the review of Leso's actions (other than the fact that they were two senior Army psychologists), what they reviewed, and what standard they were reviewing his actions against. In fact, Schoomaker's "report" was only one sentence in his letter, which was a blanket statement that the two senior Army psychologists had not found any evidence that "Leso behaved in an unethical manner or harmed anyone in any way." The statement that "Dr. Leso worked diligently to protect the safety of the detainees" was not even attributed to the two senior Army psychologists; instead, it was attributed to "information from those who served with [Leso]." Second, the language in Childress-Beatty's memo could be read to suggest that the Ethics Office actually received the Army psychologists' report, which it did not. The description of the "report" in the memo implied a certain level of credibility that the other reviewers, namely Bow, might not have given it. Specifically, Bow stated in his interview, he did not weigh the letter from Schoomaker very heavily because he knew that the Army "protect[s] its own."[2519]

Childress-Beatty further wrote in her memo that Leso "argued against the use of harsh tactics in several key ways," but the only evidence referenced in the closure memo were Leso's statement from the Counter Resistance Strategy Meeting discussed earlier ("[f]orce is risky, and may be ineffective due to the detainees' frame of reference. They are used to seeing much more

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[2517] Kevin Kiley, Memorandum re Approval of Findings and Recommendations of Martinez-Lopez Report (May 24, 2005), *available at* http://www1.umn.edu/humanrts/OathBetrayed/Army%20Surgeon%20General%20Report.pdf.

[2518] HC00007306.

[2519] Bow interview (May 11, 2015).

barbaric treatment), and the section of the BSCT memo that argued against the use of the very same techniques that Leso had just personally drafted. To say that these two documents demonstrated that Leso argued against the use of EITs in "several key ways" is simply an exaggeration. Yet Childress-Beatty told Sidley that there was "little evidence on what Leso did do that would be unethical, and a lot of evidence showing that he worked against [EITs]."[2520] When Sidley asked what constituted "a lot" of evidence, Childress-Beatty confirmed that these were the only two pieces of evidence she was referring to.[2521]

Ultimately Childress-Beatty recommended closing the Leso matter because it was her belief that, based on the evidence, the allegations were "speculative and there [was] a reasonable basis to believe that the allegations cannot be proved by a preponderance of the evidence (Part II, section 5.5)."[2522] Under Part V, Subsection 5.5, when deciding whether to open a case, the Chair and Director consider whether "(a) there is a reasonable basis to believe the alleged violation cannot be proved by a preponderance of the evidence and (b) the allegations would constitute only minor or technical violations that would not warrant further action, have already been adequately addressed in another forum, or are likely to be corrected."[2523] If one or more of the conditions is met the matter shall be closed.

In her closure memo, Childress-Beatty wrote that the Counter-resistance Strategy Meeting minutes reflected that the BSCT argued for "psychological stressors" such as "sleep deprivation, withholding food, isolation, loss of time." Yet Childress-Beatty questioned whether these techniques were, in fact, ethical violations. She wrote: "It is also important to note that these techniques in and of themselves may not be cruel, unusual, inhuman, degrading treatment or torture depending upon factors such as the situational context, length of time used, and intensity."[2524] This view is inconsistent with what Ethics Director, Stephen Behnke, told Sidley—that most of these techniques should have been prohibited, especially in light of the PENS Report. Moreover, suggesting that sleep deprivation, isolation, withholding food, and loss of time could not be proved to be ethical violations by a preponderance of the evidence is stretching the bounds of the Code so as to not find a violation of any standard. This statement suggests that a psychologist may be able to ethically recommend that a detainee outside the criminal justice system be deprived of food or sleep and placed in isolation for the purpose of trying to conduct an effective interrogation. Although the effect of these techniques is dependent on the amount of time involved, it is significant that it might ever be considered ethical for a psychologist to recommend using these techniques against a detainee. And it is certainly not a conclusion that we are aware of the Ethics Office or Ethics Committee ever making publicly. The only way for APA to close the Leso matter using the standards in the Rules was to call interrogation techniques "potentially ethical" in light of APA's supposedly vague ethical standards.

[2520] Childress-Beatty interview (June 2, 2015).

[2521] *Id.*

[2522] HC00007306

[2523] Rules, Part V, Section 5.5

[2524] *Id.*

c) Closing of the Leso complaints

Despite Fouad's decision to close the complaint at the end of 2012, Childress-Beatty stated that the Ethics Office decided to hold open the Leso complaints a while longer to see if any additional information would become publicly available through two pending litigations, and to ask James Bow, the incoming Ethics Committee Chair, to review the full file since he was going to be the one to "live with the decision."[2525] Childress-Beatty also explained that it was important to them that Bow was a forensic psychologist, who was used to dealing with the analysis of different types of evidence in his line of work. At this time, the Ethics Office staff were waiting on the outcomes of two cases: (1) a civil suit in SDNY filed by the Center for Constitutional Rights, challenging the government's denial of its January 2012 FOIA request for certain videos and photographs of Mohammed al-Qahtani's interrogation; and (2) Al-Qahtani's habeas corpus case, also filed by the Center for Constitutional Rights, which was filed in October 2005, and had been stayed at that time. On April 17, 2013, Childress-Beatty provided an update to Bow on the two outstanding litigation matters and noted that the Constitution Project task force released a report on the treatment of detainees that was going to be added to the Leso file. By November 10, 2013, the decision was made to close the Leso complaints as both the FOIA and habeas corpus matters did not look like they would yield any additional release of information into the public domain, and the Constitution Project task force report did not contain any new information on Leso's involvement at Guantanamo.

On December 31, 2013, the Ethics Office notified Shaw, Bond, and Leso that it would not be proceeding with formal charges based on its review of the "submissions and public information available to date, including information released in November 2013."[2526] Thus, the complaints against Leso were closed—after the preliminary investigation state—and without opening a case. The letter to the complainants explained that the complaints remained open for an extended period of time "while information directly relevant to this matter continued to be released into the public domain." The letter also stated the following:

> During the review process, it was essential to separate strong feelings about the treatment of detainees in U.S. custody from the task of carefully analyzing the available information in this particular matter in accordance with the Ethics Committee's *Rules and Procedures*. In reviewing an ethics complaint, the Ethics Committee must adhere to its *Rules and Procedures*. The Committee bears the burden of proving charges of unethical behavior against a respondent (*Rules and Procedures*, Part V, section 5.5(a)). The behavior must be directly attributable to the respondent. It cannot be speculative or based on supposition concerning what occurred. . . .
>
> Information released into the public domain to date includes that the respondent, an early career psychologist trained as a health care provider, did not request to become involved with detainee interrogations but was rather informed that he would be in the role of behavioral science consultant ("BSC") only after he

[2525] Childress-Beatty interview (May 13, 2015).

[2526] HC00007293 at 4–6.

> arrived in Guantanamo Bay in the summer of 2002. At that time, the military lacked a standard operating procedure for the BSC role. APA did not issue its first policy on interrogations until three years later, in 2005. Available evidence in the public domain also includes that, in the face of pressure from the highest level of the Bush Administration which strongly supported 'enhanced' interrogation tactics, the respondent sought consultation and argued against such approaches and in favor of rapport-building approaches.[2527]

Due to the way complaints were evaluated during the preliminary investigation phase, and due to the fact that all of the aforementioned analysis happened before any formal charges were considered under the Rules, none of the analysis in Childress-Beatty's memo was actually tied to any specific Ethics Code standard. In fact, both Dixon and Childress-Beatty told Sidley that they did not ever reach the stage of considering what specific ethical standards might have been violated because they were still in the "evidence-gathering" phase.[2528] Once they determined that there was enough evidence to meet the "preponderance of the evidence" standard, then they looked to the Ethics Code to figure out what standards might be appropriate to charge. The result was, therefore, a rather backwards-process wherein the determination was made about whether there could be a violation of an ethical standard before any ethical standards were even considered.

By the time the Leso complaints were closed, a total of six individuals had reviewed at least some of the documents contained in the adjudication file. Four individuals recalled reviewing the full record and all of the evidence, including Fouad, Bow, Dixon, and Childress-Beatty. In addition, Stan Jones recalled reviewing at least part of the record. According to Childress-Beatty, Jones was asked to review the initial complaint filed by Shaw because the Ethics Office thought that the matter would get too politically heated for an APA employee to review.[2529] Childress-Beatty said that Jones had remained an active consultant to the Ethics Office since he left his position as the Director and had a reputation for being incredibly meticulous. When Sidley spoke to Behnke, he did not recall whether he reviewed all of the evidence and stated that he entrusted the adjudication of the Leso matter to Childress-Beatty.[2530]

All of the individuals who recalled reviewing the evidence in the Leso complaint told Sidley that they believed there was insufficient guidance for psychologists involved in interrogation settings in 2002 – 2003 and that the Ethics Code did not offer clear or specific guidance on what behaviors were, or were not, permissible under the standards. According to Dixon, while it might have been clear that some of the "really bad" behaviors, such as waterboarding, were obviously not permitted under the Ethics Code, behaviors that were more in the "gray area" were less clear.[2531] In particular, Childress-Beatty thought that there was a significant issue with the lack of notice provided by the specific standards in the Ethics Code.

[2527] *Id.*

[2528] Childress-Beatty interview (May 13, 2015); Dixon interview (May 12, 2015).

[2529] Childress-Beatty interview (May 13, 2015).

[2530] Behnke interview (May 21, 2015).

[2531] Dixon interview (May 12, 2015).

She noted that even if there had been APA policies and guidelines, they were not the same as the standards in the Ethics Code and they would not have been enforceable. As a result, she did not think that Leso could be charged under any existing Ethics Code standards.[2532] When asked why Leso could not be charged under standard 1.14 (avoiding harm) under the 1992 Ethics Code, Childress-Beatty responded that the Ethics Office had been advised by the General Counsel's office that the standard was too vague to be charged as a stand-alone charge, and that it would typically have to be accompanied by a charge based on another standard.[2533] Even though Behnke did not recall whether he had reviewed the entire Leso complaint file, he confirmed that "there was always a feeling that 3.04 [the equivalent of 1.14 from the 2002 Ethics Code] would be charged in conjunction with something else because people felt that it was very vague." Behnke stated that the General Counsel's office would have advised them of this.[2534] But, when Sidley interviewed Nathalie Gilfoyle, she had no such impression about the limitations of charging 1.14 (or 3.04) as a stand-alone standard, and did not think she would have instructed anyone to not charge 1.14 (or 3.04) by itself.[2535]

What the individuals who reviewed the Leso matter told Sidley, made clear that they felt somewhat sympathetic towards Leso's predicament at Guantanamo and that this could have influenced their decision to close the complaints. For instance, during her interview, Dixon told Sidley that Leso (1) "wasn't a major player"; (2) he did not want to be assigned to the BSCT role when he arrived at GTMO, and in fact, did not know he would be assigned to such a role until he arrived; and (3) he seemed reluctant in the things he was asked to do, such as drafting the BSCT memo in 2002.[2536] Dixon explained that it was significant to her that Leso seemed limited in what he could do within the confines of the military and that he was faced with "an impossible task."[2537] Similarly, Bow told Sidley that Leso had no guidance while he was at Guantanamo and that he was "in no-man's land" with heavy pressures from his commanding officers.[2538] While Bow acknowledged that psychologists have an obligation to act ethically no matter what type of situation they are in, there are "mitigating-type of things" that could be considered in deciding whether or not to bring ethics charges against someone.[2539] This sentiment was echoed by the Ethics Office in their closing letters to the complainants (see discussion above).

All of the reviewers of the Leso complaint emphasized that they needed to find "direct" evidence that tied Leso to behaviors that were allegedly torture or cruel, inhuman, or degrading treatment, and that any evidence that could not be "directly" attributed to Leso was discounted. But, this appears to have been contrary to the stance taken by the Ethics Office on the

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[2532] Childress-Beatty interview (May 13, 2015).

[2533] *Id.*

[2534] Behnke interview (May 21, 2015).

[2535] Gilfoyle interview (May 28, 2015).

[2536] Dixon interview (May 12, 2015).

[2537] *Id.*

[2538] Bow interview (May 11, 2015).

[2539] *Id.*

involvement of psychologists in such activities. For instance, on March 27, 2007, in an email from Behnke to Bond before she filed her complaint, Behnke stated the following:

> Any psychologist participation in a torture interrogation is absolutely prohibited. It makes no difference whether the psychologist's participation is *direct or indirect, supervisory, central or peripheral*: Any psychologist participation in a torture interrogation is prohibited (emphasis added).[2540]

Even though the email exchange was not specific to the adjudications process, to suggest that any psychologist participation in torture, whether direct or indirect, was prohibited, and then to limit the adjudications process to only an evaluation of "direct" pieces of evidence was quite misleading.

All of the reviewers also told Sidley that they independently thought it was the right decision to close the Leso complaints and that they did not feel pressure to make a decision one way or another. Bow stated that he approached the complaint like a forensics case, focused on the evidence that directly linked Leso to specific behaviors, and tried to ignore "the noise" generated by media reports.[2541] Bow understood the standard for bringing a case before the full Committee to be a "preponderance of the evidence" that the behavior will most likely result in a sanction. He felt that the matter was complicated by the fact that (1) much of the information was classified and/or redacted; (2) Leso was limited in his response letters due to his position in the military; and (3) much of the publicly available information did not specifically refer to Leso.[2542] He recalled that he discussed the matter extensively with Childress-Beatty and Behnke during the course of his review, and noted that all three of them agreed to close the case even though they were aware of the backlash it would generate.[2543] Finally, Bow confirmed that the case remained open for an unusually long period of time because they were waiting for more information to be released publicly, specifically as a result of the FOIA case filed by the ACLU for the videotapes of the al-Qahtani interrogation and the habeas corpus case filed by al-Qahtani's lawyers, in the hopes that some direct evidence would surface about Leso's actions.[2544] At the same time, they did not want the matter to remain open indefinitely and when it seemed like no additional information was going to be made available in the near future, they closed it.

Dixon told Sidley that while the Leso complaint generated much controversy, she believed that the evidence showed that Leso worked within his environment to reduce harm to the detainees. Dixon said that she would have closed the complaint much earlier based on the evidence submitted by the complainants and did not think that the matter needed to be kept open for so long waiting for additional information to be released into the public domain.[2545] Dixon did not think that there was sufficient evidence to bring the matter before the full Committee and

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[2540] APA_0064994.

[2541] Bow interview (May 11, 2015).

[2542] *Id.*

[2543] *Id.*

[2544] *Id.*

[2545] Dixon interview (May 12, 2015).

stated that they did not want "any political influence of any kind."[2546] She believed that any decision to move forward to the full Committee would have been the result of external pressures from critics of the APA, and that succumbing to such pressures would have been wrong.[2547] Ultimately, Dixon believed that Leso was being treated as a "scapegoat" for all of the abuses at GTMO even though he was only stationed there for six months, and that many alleged abuses were "unfairly attributed" to Leso by the complainants.[2548]

Childress-Beatty told Sidley that she was the one who was primarily responsible for reviewing the Leso complaints toward the later years, and that she actively searched within the public domain for any additional information that was released about Leso. She explained that this was an "extraordinary" step to take because the Ethics Office typically did not proactively look for additional information beyond what was submitted in the complaints. According to Childress-Beatty, the Leso complaint was closed under Part V, subsections 5.1 and 5.5.[2549] As such, evidence that did not directly tie Leso to a specific behavior that would have constituted a breach of ethics was disregarded in Childress-Beatty's analysis. Examples of this included: (1) the complainant's claim that Leso was the "Chair" of the BSCT when there was no evidence as to what Leso's title was; (2) the complainant's claim that since "BSCT" was never used in connection with another individual in the Al-Qahtani interrogation log, other references to "BSCT" should be presumed to be Leso unless proven otherwise; and (3) the complainant's claim that Leso was present throughout the interrogation log even though there were no indications of when Leso entered or left the room.[2550] When asked whether the Ethics Office could have taken into account speculative evidence given the nature of the complaint and the fact that the Rules set out a permissive "may" standard, Childress-Beatty responded "theoretically, yes, but that is not the way we think about complaints."[2551] Childress-Beatty emphasized the need for "specific behaviors" and "data points" that could be used to tie Leso to the allegedly unethical actions.[2552]

d) Reactions to the closing of the Leso complaint

On February 20, 2014, the APA issued the "Statement by the APA Board of Directors on the 'No Cause for Action' Decision Regarding the Ethics Complaint against Dr. John Leso." Many have pointed to one sentence from the statement as particularly problematic — "[r]easons for this conclusion included…multiple reviews conducted by individuals with access to classified material found no evidence of wrongdoing and affirmative evidence of safeguarding

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[2546] *Id.*

[2547] *Id.*

[2548] *Id.*

[2549] Under Part V, subsection 5.1, cause for action exists when the respondent's alleged actions and/or omissions, if proved, would in the judgment of the decision maker constitute a breach of ethics. For purposes of determining whether cause for action exists, incredible, speculative, and/or internally inconsistent allegations may be disregarded."

[2550] Childress-Beatty interview (May 13, 2015).

[2551] Childress-Beatty interview (June 2, 2015).

[2552] *Id.*

detainees…" All reviewers of the Leso complaints confirmed to Sidley that this was not a reference to any evidence reviewed by APA; instead, it was a reference to the multiple military reports issued on the treatment of detainees that the reviewers examined.

Those who reviewed the Leso complaints told Sidley that they were concerned that the Ethics Committee, the Board of Directors, and the Executive Management Group would react negatively to the decision to close the Leso complaint. Behnke, Childress-Beatty, and Bow prepared a presentation on the decision and presented it to all three groups in 2014. All three recalled that some members of the Ethics Committee thought that the case should have been brought before the full Committee and disagreed with the decision. Childress-Beatty said that it would have been "infinitely easier" to charge Leso and to bring it to the full Committee, but that it would have been wrong to let the political climate affect their normal adjudications process.[2553]

Bow recalled that one Committee member in particular disagreed strongly with the decision to close the case, but he believed that it was nevertheless the right decision.[2554] With respect to the Board of Directors and the EMG, Bow recalled that most of the members were supportive of the decision, although some stated that it should have been brought before the full Committee.[2555] Bow did not recall anyone in particular who voiced this opinion. Childress-Beatty recalled that Norman Anderson was skeptical of the decision to close the complaints, and that the rest of the Board had similar reactions.[2556] She also recalled that Rhea Farberman, in particular, was under the impression that the full Ethics Committee had reviewed the Leso complaints and Childress-Beatty had to correct her.[2557] Childress-Beatty said that they repeatedly emphasized that closing the complaint was not the same as exoneration; it simply meant that they did not have enough evidence to proceed. Childress-Beatty believed that there was a general sense that the Board and the EMG did not have a good understanding of the adjudications process.[2558]

4. Larry James

On December 5, 2007, the Ethics Office received a complaint filed by Trudy Bond against Larry James. 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

[2553] Childress-Beatty interview (May 13, 2015).

[2554] Bow interview (May 11, 2015).

[2555] *Id.*

[2556] Childress-Beatty interview (May 13, 2015).

[2557] *Id.*

[2558] *Id.*

techniques."[2559] Bond cited to the following three documents as support for her allegations: (1) the International Committee of the Red Cross (ICRC) Report of GTMO; (2) the *Review of DoD-Directed Investigations of Detainee Abuse* (Report No. 06-INTEL-10) produced by the Office of the DoD Inspector General dated August 25, 2006; and (3) the Camp Delta Standard Operating Procedure Manual dated February 2003. On December 12, 2007, Behnke assigned Stanley Jones as the investigator for this complaint.[2560]

On December 20, 2007, Jones drafted a decision memo to the then-Ethics Committee Chair, Deutsch, and recommended that the case be closed without any further action. Jones did not think that the alleged actions, if proved, would constitute a violation of any of the ethical standards. In the memo, Jones identified the complainant as a "third-party" with "no direct knowledge of respondent's behaviors at issue."[2561] In reviewing the complaint, Jones did not review the underlying documents cited by Bond because they were not attached to the complaint and could not be accessed online "without accessing premium content" via the *New York Times* and *Wall Street Journal* websites.[2562] Instead, Jones relied on the excerpts included in the complaint and assumed that they were accurate quotes from the documents. Thus, Jones did not review any additional information that was not included in the complaint form itself.[2563] Nor did he take any affirmative investigative steps (although he would have been permitted to do so under Part V, Subsection 5.3.3 of the Rules), which was consistent with the general investigative practice of the Ethics Office.

Jones concluded that the complaint did not allege that the respondent "directly engaged" in behaviors that the ICRC report described as "tantamount to torture" and there was no evidence to suggest that he was, in fact, directly involved. This seems to suggest that Bond would have had to provide evidence to show that James actually participated in an interrogation that was tantamount to torture in order to find a cause for action. A plain reading of the Rules, however, shows that they do not require this heightened level of proof; under the Rules, a cause for action "shall exist when the respondent's alleged actions and/or omissions, if proved, would in the judgment of the decision maker constitute a breach."[2564]

Jones's memo also addressed the issue of notice. Despite APA's policies on interrogations issued since the alleged behavior, Jones wrote that he did not see "how it can be reasonably determined that a member would have known in 2003 that isolation (and the other listed behaviors) aimed at creating a degree of disorientation, disorganization, and dependence on the interrogator would violate any standards in the current ethics code."[2565] Jones told Sidley that his concern was whether a psychologist would have had "notice that the 2002 Ethics Code

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[2559] HC00017493 at 1–12.

[2560] HC00021372.

[2561] HC00017476.

[2562] *Id.*

[2563] *Id.*

[2564] Rules, Part V, Subsection 5.1.

[2565] *Id.*

meant that they could not be involved in activities that might create a degree of disorientation, disorganization, and dependence," and that he believed what James was allegedly doing "did not appear to violate the 2002 Code."[2566] At the time Jones was considering the complaint, he also questioned whether the alleged behaviors would violated APA's policy statements as of 2007. He was unsure of whether the alleged behavior would be unethical under those standards.

Jones also told Sidley that he was limited to reviewing the evidence contained in the complaint based on how the adjudications process was handled, and that on the face of the complaint alone, he did not think there was sufficient evidence for cause for action.

The day before New Year's Eve, on December 30, 2007, ten days after receiving Jones's memo, Deutsch responded that she agreed with the decision to close the complaint. She wrote,"[w]e would need documentation that the respondent engaged in torture or behaviors that caused 'significant pain or suffering' or harm, and none was provided."[2567] Based on Jones's recommendation, the complaint against James was officially closed on May 29, 2008 in the internal Ethics Office tracking system. We did not find any indication that any further actions were taken by the Ethics Office in this matter between the date of Jones' memo, December 20, 2007, and the date the case was closed, May 29, 2008.

Unlike the Leso complaint, which was kept open for approximately seven years, the James complaint was closed within a month of the Ethics Office having received the complaint—disposed of in truly lightning speed so that Deutsch could review it before her Chairmanship was finished. Jones told Sidley that he believed the Leso and James complaints were "substantially different" and that his decision with respect to the James complaint was that there was enough to conclude that it "did not meet cause."[2568] Behnke told Sidley that he did not review the James complaint carefully because he had trusted in the judgment of others in the Ethics Office, namely the investigators and Childress-Beatty.[2569] Thus, he could not explain what accounted for the differences between the two cases. Behnke speculated that the James complaint may have been closed quickly because the allegations lacked the requisite level of specificity whereas the Leso complaint identified some behaviors that were directly linked to Leso.[2570]

The way in which the Ethics Office handled the James complaint was technically permissible under the Rules — but it demonstrates some clear flaws in the adjudications process. Specifically, it shows the very limited way in which the Ethics Office reviews complaint, the way in which the Ethics Office stretches to construe the Rules in a way that is favorable to the

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[2566] Jones interview (May 14, 2015).

[2567] HC00017473.

[2568] *Id.*

[2569] During Childress-Beatty's interview, she told Sidley that even though she was listed as the investigator on the James complaint, Jones was the "only one who actually looked at it substantively." Childress-Beatty stated that she was "just the go-between, passing stuff to [Jones]." Childress-Beatty interview (May 13, 2015).

[2570] *Id.*

accused, and the extent to which the Ethics Office relies on the rationale that standards in the Ethics Code were too vague to give psychologists notice that certain interrogation techniques were unethical.

FINANCIAL REVIEW

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. APA provided complete and prompt cooperation with all requests, though some requested data was no longer available.[2571]

This analysis did not reveal any significant or unusual payments to APA from DoD, the CIA, or other national security agencies. Some payments to APA from relevant agencies were identified, but these payments were generally very minor when compared with APA's overall revenue, were in line with what other entities were paying APA for similar services, and were for legitimate purposes.

A summary of the findings supporting this conclusion is below.

I. APA FINANCIAL BACKGROUND

The investigation reviewed consolidated audited financial statements for APA and APA Practice Organization ("APAPO") for the years 2000 – 2013.[2572] Between the years 2001 and 2006, the annual combined gross revenue ranged between approximately 90 million dollars and 120 million dollars. The largest sources of revenue were from member dues, journal subscriptions, licensing, publication sales, and rental income. The tables below display the total

[2571] Specifically, requested data pertaining to the sources of advertising revenue reflected in certain general ledger entries for the years 2001 and 2002 could not be located.

[2572] APAPO is a 501(c)(6) organization that lobbies Congress and state legislatures. The members of the APA Board of Directors are also members of the APAPO Board of Directors. The APA does not provide financial support for the APAPO, and the APAPO reimburses the APA for accounting services provided. We did not examine the finances of other APA-affiliated entities, because of the lack of direct financial ties between them, except as noted below. First, there are 54 APA Divisions, which represent sub-disciplines of psychology. Each APA Division sets its own dues structure, which is not controlled by the APA itself. Funds received by the Divisions do not flow to APA. Second, the American Psychological Foundation ("APF") provides financial support for research and scholarships. The APF is separately incorporated from the APA, though some members of the APA Board of Directors serve ex officio on the APF's Board of Directors. The APA provides $100,000 to the APF annually, and the APF does not provide any direct financial support to the APA. Finally, the APA Insurance Trust ("APAIT") sells professional liability insurance to APA members and nonmembers. The APAIT was established by the APA in 1962 as a separate and distinct legal entity from the APA, and we were given no reason to believe that funds would flow to the benefit of APA from APAIT. Prior to 2013, the APA CEO and Treasurer served as ex officio Trustees of the APAIT, but in that year, the relationship between the APAIT and the APA was restructured to remove APA involvement in the APAIT's internal governance.

revenue received by APA and APAPO for the years 2001–2006, along with details about those categories of revenue that exceeded one million dollars per year.[2573]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Total revenue	$94,048,878	$98,159,132	$100,863,532	$102,678,401	$120,329,785	$119,677,456
Member Dues	$18,398,595	$17,203,085	$16,801,391	$18,033,963	$18,788,920	$19,022,989
Journal Subscriptions	$19,828,219	$20,153,688	$20,387,491	$19,989,641	$18,902,262	$17,891,040
Advertising	$3,298,687	$3,015,164	$2,926,687	$3,279,059	$3,654,796	$3,410,947
Licensing, Royalties, and Rights	$13,588,162	$17,716,381	$18,312,592	$20,348,078	$31,037,263	$32,970,454
Sales of Other Publications	$11,093,480	$12,334,403	$13,299,914	$12,873,648	$15,450,753	$15,230,048
Grants and Contracts	$4,491,765	$5,465,245	$4,860,810	$5,333,644	$6,585,390	$6,403,849
Convention and Conference Fees	$2,209,158	$2,082,608	$1,599,116	$1,859,825	$2,363,669	$1,938,409
Service and Application Fees	$2,773,254	$2,906,917	$3,178,322	$2,379,378	$2,706,978	$2,818,574
Rental Income	$13,110,110	$12,067,131	$13,628,561	$13,870,569	$14,820,031	$13,634,720
Pass-through Expense Reimbursements	$1,626,631	$1,745,969	$1,158,449	$1,740,144	$2,316,081	$2,167,434
Other Revenues	$2,037,954	$2,261,903	$3,576,220	$1,934,718	$2,267,863	$1,959,535

II. ANALYSIS OF CERTAIN REVENUE TYPES

As shown in the chart above, several of APA's major sources of revenue were either relatively stable or in decline in the 2000 – 2006 time period, including member dues, journal subscriptions, and rental income. Steps taken to investigate APA's revenue types, and the findings that resulted, are described below.

A. Advertising Revenue

APA receives revenue for advertisements placed in its publications. The investigation focused on advertisements purchased by federal agencies in the years 2001 – 2006, and distinguished between advertisements purchased by (1) those agencies that have national security or homeland defense as their primary mission national security or homeland defense ("Security Agencies"), and (2) other federal agencies ("Other Federal Agencies"). The category of Security Agencies includes, for example, DoD and the branches of the military, the CIA, and the Department of Homeland Security. The category of Other Federal Agencies includes, for example, the National Institutes of Health and the Department of Veterans Affairs. The

[2573] These tables omit information about categories of revenue amounting to less than one million dollars per year. These categories are (1) interest income, (2) mailing list rental, and (3) contributions to the APAPO.

advertising revenue received by APA from each of these groups is summarized in the table below.

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Security Agency Advertising Revenue	$8,516	$8,960	$15,675	$17,475	$35,477	$57,254
Other Federal Agency Advertising Revenue	$45,525	$29,572	$33,720	$44,445	$49,529	$55,013

As explained previously, between 1991 and 2004, APA did not accept advertisements from the Department of Defense or the branches of the military because of the military's discriminatory policy regarding gays and lesbians at the time. In 2005, APA's advertising revenue from Security Agencies rose in part because APA received $12,400 in advertising revenue from the U.S. Navy in that year.

Throughout this period, the Security Agency making the largest purchases of advertisements from APA was the CIA. The table below summarizes the funds APA received from the CIA for advertisements in each of these years.[2574]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Advertising Revenue from the CIA	$5,823	$7,400	$13,287	$17,475	$19,771	$42,970

The reason for the increase in advertising revenue from the CIA, especially from 2005 to 2006, could not be determined from the records provided by APA. The records showed that the amounts paid by the CIA for each ad it purchased were basically stable throughout the period, and the rates paid were similar to those paid by other purchasers of advertising. According to published reports, the CIA substantially increased funding for recruitment and outreach in around 2004,[2575] but it could not be confirmed that this is the reason for the increase. However, given the relative small dollar amount, we did not attach significance to the increase.

B. Licensing, Royalties and Rights

APA holds the rights to a large number of publications, including books and journal articles. It grants licenses to those publications for databases such as PsychNet and PsychInfo, and leases access to those databases to third party institutions, such as libraries and universities. APA characterizes revenue received in exchange for its publications as licensing, royalties and rights. Of these three categories, the largest by far is licensing. For instance, in 2005, the

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[2574] The APA provides a 15% discount on advertisements in its publications that are purchased through recognized in-house or external advertising agencies. This discount does not apply to classified ads or surcharges for color ads. Advertisements purchased by the CIA were routinely given this discount. These figures reflect the non-discounted price.

[2575] *See*, *e.g.*, Siobhan Gorman, *U.S. Spy Agencies Widen Recruiting*, Baltimore Sun (April 5, 2007), *available at* http://articles.baltimoresun.com/2007-04-05/news/0704050040_1_national-security-national-intelligence-middle-east.

revenue derived from licensing was approximately 30 million dollars, while the combined revenue derived from royalties and rights was approximately one million dollars. Much of the licensing revenue is derived from a few sources. For instance, in 2005, APA received over half of its licensing revenue from EBSCO Information Services and Ovid Technologies, companies that sell database access to other institutions and individuals.

The investigation reviewed spreadsheets compiling revenues derived from APA publications for the years 2001 through 2006. The spreadsheets pertaining to the years 2001 – 2003 indicated that some Security Agencies purchased access to APA materials, both directly and through entities like EBSCO Information Services and Ovid Technologies. A summary of such revenues is in the table below:

Year	**Entity**	**Licensor**	**Revenue**
2001	U.S. Army	EBSCO	$800
2001	Walter Reed Army Med. Ctr.	APA	$15,552
2001	U.S. Navy	Ovid	$13,000
2001	U.S. Navy Personnel R&D Ctr.	Silver Platter	$800
2001	U.S. Navy	Silver Platter	$13,000
2001	Keesler Air Force Base	Ovid	$2,000
2001	Travis Air Force Base Med. Ctr.	Ovid	$900
2001	U.S. Air Force	EBSCO	$4,000
2002	Womack Army Med. Ctr.	Ovid	$1,300
2002	U.S. Air Force Med. Ctr.	Ovid	$1,400
2002	Walter Reed Army Med. Ctr.	APA	$10,450
2002	U.S. Army Med. Command	Ovid	$32,470
2002	U.S. Army Research Institute	EBSCO	$1,200
2002	U.S. Navy	Silver Platter	$2,800
2002	Naval Submarine Med. Research Lab	EBSCO	$2,000
2002	Naval Medical Center – San Diego	Ovid	$1,400
2002	U.S. Air Force Virtual Library	Ovid	$25,415
2002	U.S. Air Force Academy	EBSCO	$4,800
2003	Darnall Army Comm. Hosp.	Ovid	$1,300
2003	Navy Personnel Command	Ovid	$2,000
2003	Navy Personnel R&D Ctr.	ProQuest	$2,000
2003	U.S. Naval Research Lab	APA	$3,500
2003	Naval Aerospace Medical Research Lab	APA	$6,000
2003	U.S. Air Force Virtual Library	Ovid	$29,900
2003	U.S. Air Force Academy	EBSCO	$5,000
	Total		$182,987

Not every entry in these spreadsheets from entities like EBSCO or Ovid listed the end customer, so these sums may not be comprehensive. In and after 2004, very few entries from entities like EBSCO or Ovid listed the end customer, so it was not possible to identify which entries pertained to purchases by Security Agencies for those years.

C. Grant and Contract Activity

APA seeks and administers grants made by a variety of entities, including federal agencies, state and local governments, and non-governmental organizations. The investigation focused on grants made by federal agencies in the years 2001 – 2006, and again distinguished

between grants made by Security Agencies and those made by Other Federal Agencies. The following table includes a summary of the grants awarded to APA by federal agencies in each of these categories for the years 2001 – 2006.[2576]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Security Agency Grant Awards	$14,000	$14,000	$14,000	None	None	None
Other Federal Agency Grant Awards	$15,274,410	$18,524,863	$14,795,209	$18,050,323	$19,874,644	$20,127,409

The sole grant awarded to APA from a Security Agency during this period was from the Office of Naval Research, and amounted to $14,000 annually from 2001 – 2003. It was intended to fund a meeting and series of white papers discussing and developing a research agenda to study how to more effectively use technology to improve teaching and learning.

The investigation requested, and received, additional documentary information on several entries in the lists of grants and contracts provided by APA to determine if they included either disguised transfers from Security Agencies to APA via third parties such as foundations or other federal agencies, or were disguised transfers of funds from Security Agencies through APA to PENS Task Force members and observers, or APA officials who attended the task force meetings. The investigation did not have access to records of the granting organizations; thus, it was not possible make any conclusive determinations about whether funds awarded to APA in grants from third parties were ultimately sourced from Security Agencies. But the documents provided by APA showed no evidence that these agencies were the source of such funds, and showed no evidence that individuals employed by APA was aware, or suspected, that such agencies were behind any of the grants for which documents were requested.

For example, the investigation requested, and received, records from APA pertaining to a grant titled "Decade of Behavior: Distinguished Lectures." The "Decade of Behavior" was an initiative undertaken by APA between 2000 and 2010 to focus more than 30 professional societies representing the behavioral and social sciences on societal problems and national goals, including promoting a healthier, safer, better educated, more prosperous and more democratic nation. This grant was made by the James S. McDonnell Foundation, which was established in 1950 by James S. McDonnell.[2577] McDonnell also founded the McDonnell Aircraft Corporation, which later merged with the Douglas Aircraft Company to become McDonnell Douglas, a major defense contractor, before merging into Boeing in 1997. The McDonnell Foundation awarded APA $167,500 in the year 2000 under this grant, which it sent to APA in two wire transfers on August 4 and 7 of that year. It made no further transfers to APA over the life of the grant. APA

[2576] Grants awarded to the APA are typically not paid to the APA in a lump sum. Instead, after the grant is awarded, the APA seeks reimbursement from the grantor for funds actually expended pursuant to the terms of the grant after those expenditures are made. The figures in this table are derived from the total of the grants awarded, not the total reimbursed to the APA.

[2577] James S. McDonnell Foundation, *available at* https://www.jsmf.org.

spent $165,280 of this grant during the following decade on honoraria and consulting expenses, and it returned the balance of the grant—approximately $2,200—to the McDonnell Foundation in 2010. The investigation reviewed records of funds expended by APA under this grant, and found no instances in which APA used the funds to make a payment to any PENS Task Force members and observers, or any APA officials who attended the task force meetings.

D. Rental Income

APA owns two buildings in Washington, DC: one at 750 First Street NE, and one at 10 G Street NE. The building at 750 First Street NE was completed in 1992 and has 351,301 square feet. The building at 10 G Street NE was completed in 1997, and has 253,515 square feet.

The investigation reviewed tenant lists for both buildings for the years 2001 – 2007 to determine if APA received improper benefits through the mechanism of tenant rental payments or otherwise. Throughout this period, no Security Agency rented space in either building. The substantial majority of tenants in both buildings in this period had no direct connection to the federal government. The following table displays information about the few federally-linked organizations that rented space in either building.

Organization Name	**Lease Start**	**Lease End**	**Approximate Square Footage**	**Building**
Amtrak	Prior to 2001	After 2007	85,000	10 G Street NE
Legal Services Corporation	Prior to 2001	2003	40,000-50,000	750 First Street NE
Nat'l Academy of Sciences Travel Office	2001	2004	4,000	10 G Street NE
U.S. Mint	2001	2002	30,000	10 G Street NE

E. Other Revenue

APA's consolidated financial statements characterize revenues not falling into one of the other categories as "Other Revenue." The investigation reviewed spreadsheets derived from APA general ledger for "Other Revenue" for the years 2001 through 2006. Most of the transactions listed in these spreadsheets are tied to individual names, are for small amounts such as $15.00, and are related to such matters as late fee charges. However, the investigation identified a set of transactions described as "Misc Special" associated with deposits ranging from approximately $1,000 to $65,000, and asked APA for further information about each of these. Each of these transactions was associated with one of several "affiliate programs" for APA members. These programs involve arrangements with such companies as rental car agencies and credit card providers, and provide discounts to APA members and revenue to APA when APA members take part in them. The investigation did not identify any transactions from the "other revenue" spreadsheets that were related to any Security Agency.

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GLOSSARY

ApA	American Psychiatric Association
APA	American Psychological Association
AR 190-8	Army Regulation 190-8, a detailed multi-service policy regarding Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees.
Belmont Report	A report created by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.
BSCT	Behavioral Science Consultation Team; A team of psychologists, psychiatrists, and mental health specialists who provided behavioral science consultation in support of interrogation.
CIA	Central Intelligence Agency
CIFA	Counter Intelligence Field Activity; A DoD agency, existing from 2002 – 2008, designed to manage and synchronize Defense counterintelligence activities.
CIPERT	Center for Interdisciplinary Policy, Education and Research on Terrorism; A collaborative network of academics, national security professionals, journalists, and business leaders, founded by Philip Zimbardo and James Breckenridge, committed to the scientific understanding of the causes and consequences of terrorism.
CITF	Criminal Investigation Task Force; A DoD task force with detachments in Guantanamo Bay, Cuba, Iraq, and Afghanistan, charged with investigating and building criminal cases against accused terrorists.
CJCS	Chairman of the Joint Chiefs of Staff; Highest-ranking military officer in the U.S. Armed Forces and principal military advisor to the President, National Security Council, and Secretary of Defense.
CJTF-7	Combined Joint Task Force-7; An interim military formation that directed the U.S. effort in Iraq between June 2003 and May 2004.
CNSR	Coalition for National Security Research; A coalition of industry, research universities, and associations united by a commitment to defense science and technology.
COLI	APA Committee on Legal Issues
Common Rule	A federal regulation adopted by more than a dozen agencies, requiring informed consent, review board approval, and other record keeping procedures for the protection of human subjects in research.

CTC	Counterterrorism Center; A division of the CIA designed to collect intelligence on global terrorist organizations.
DHS	Department of Homeland Security
DoD	Department of Defense
ECTF	Ethics Code Task Force
EITs	Enhanced interrogation techniques - Physically and psychologically harsh interrogation methods that were authorized by the U.S. government for use against detainees held in the war on terror.
Enemy combatant	A term used by the Bush Administration to refer to a person who, either lawfully or unlawfully, directly engaged in hostilities for an enemy state or non-state actor in an armed conflict.
FBI	Federal Bureau of Investigation
HumRRO	The Human Resources Research Organization; An organization established to conduct behavioral science research and to develop training methodologies and applications for the U.S. Army.
IC	Intelligence Community; The seventeen separate government organizations that conduct intelligence activities, including the CIA, DHS, FBI, NSA, and military intelligence services.
ICRC	International Committee of the Red Cross; An independent organization dedicated to protecting and enforcing international humanitarian law and the Geneva Conventions of 1949.
ISB	Intelligence Science Board; An advisory board, chartered in 2002 and disbanded in 2010, designed to advise the Director of National Intelligence on emerging scientific and technical issues/applications.
ITIC	Intelligence Technology Innovation Center; A research division of the CIA.
JPRA	Joint Personnel Recovery Agency; A DoD agency that prepares for and executes the recovery and reintegration of isolated personnel, including prisoners of war and individuals identified as missing in action.
Learned Helplessness	A psychological theory developed by Martin Seligman, which holds that an organism forced to endure aversive, painful or otherwise unpleasant stimuli, will become unable or unwilling to avoid subsequent encounters with those stimuli, even if they are escapable.

Mitchell Jessen & Associates	A consulting company, founded in 2005 by psychologists James Mitchell and John "Bruce" Jessen, to contract with the CIA to develop its interrogation program.
NAS	National Academies of Science; A non-profit private organization charged with providing independent, objective advice to the nation on matters related to science and technology.
NCDPT	National Center on Disaster Psychology and Terrorism; A collaborative effort between Pacific Graduate College and Stanford University to train psychology doctoral students to help victims of catastrophic events.
NCIS	Naval Criminal Investigative Service; A branch of the U.S. Navy charged with investigating and defeating criminal, terrorist, and foreign intelligence threats to the U.S. Navy and Marine Corps.
NIJ	National Institute of Justice; A research, development, and evaluation agency within the U.S. Department of Justice focused on advancing technology for criminal justice applications, including law enforcement, forensics, criminology, and related social science research.
NSC	National Security Council; The President's principal forum for considering national security and foreign policy matters with his senior national security advisors and cabinet officials.
Nuremberg Code	A set of ethical principles for human experimentation set as a result of the Nuremberg Trials at the end of World War II.
OAD	Operational Assessment Division, a division of the CIA.
OLC	Office of Legal Counsel; A division of the Department of Justice that provides authoritative legal advice to the President and Executive branch agencies.
OMS	Office of Medical Services, a division within the CIA.
OSTP	Office of Science & Technology Policy; A Congressionally-created office within the White House with a mandate to advise the President and Executive Office on the effects of science and technology on domestic and international affairs.
OTS	Office of Technical Services; A division of the CIA dedicated to developing cutting-edge technology for use by agency officers in the field.
PENS Task Force	Presidential Task Force on Psychological Ethics and National Security; A 2005 task force charged with identifying whether the then-current ethics code adequately addressed the ethical dimensions of psychologists' involvement in national security-related activities.

PPSI	Providing Psychological Support for Interrogations, draft document authored by Morgan Banks and Debra Dunivin.
PSAC	Professional Standards Advisory Committee (CIA); also referenced as Advisory Committee.
RAND Corporation	A non-partisan, non-profit institution dedicated to improving policy and decision-making through research and analysis.
SASC	Senate Armed Services Committee; A standing committee with jurisdiction over research and development of weapons systems, defense policy, and the military.
SERE	Survival Evasion Resistance and Escape; A military training program run by the Joint Personnel Recovery Agency designed to prepare personnel to survive the elements, evade capture, resist torture and interrogation, and live up to the U.S. military code of conduct.
SLEE	Safe, Legal, Ethical, and Effective; A phrase used by DoD and the APA PENS report to describe the interrogation conditions that would be insured by the involvement of military psychologists.
SOCOM	Special Operations Command; The unified command for the worldwide use of Special Operations elements of the Army, Navy, and Air Force.
SOP	Standard Operating Procedures; A set of instructions used in the military to define a prescribed and accepted process established for completing a task.
Special Mission Unit Task Force	Also known as Joint Special Operations Command, this military command center is responsible for covert missions including counter-terrorism, strike operations, reconnaissance, and special intelligence.
SSCI	Senate Select Committee on Intelligence; A standing committee responsible for overseeing federal intelligence activities.
Task Force on Promoting Resilience in Response to Terrorism	A 2002 APA task force selected to examine methods to bolster public resilience and prepare for stress the community might experience during a terrorist attack or disaster.
Task Force on the Psychological Effects of Efforts to Prevent Terrorism	A 2003 APA task force selected to examine the psychological effects of terrorism prevention efforts and explore alternative programs that will reduce terrorism.
Unlawful combatant	A combatant who directly engages in armed conflict in violation of the laws of war.
Wolfowitz Directive	A March 25, 2002 DoD directive updating policies in regards to the Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research.

ATTACHMENT A
(INTERVIEWS CONDUCTED OR ATTEMPTED)

I. APA CURRENT AND FORMER MANAGEMENT AND STAFF

	Witness	Title / Key Role(s)
1.	Anderson, Norman	Chief Executive Officer & Executive Vice President (2003 – present)
2.	Behnke, Stephen	Ethics Office, Director (11/2000 – present)
3.	Brasfield, Stephanie	Ethics Office, Ethics Investigative Officer (1995 – present)
4.	Breckler, Steven	Science Directorate, Executive Director (2004 – 14)
5.	Bullock, Merry	Science Directorate, Associate Executive Director (1999 – 2005) Office of International Affairs, Science Director (2005 – present)
6.	Carliner, Deborah	Ethics Office, Ethics Investigative Officer (1997 – 2004)[+]
7.	Childress-Beatty, Lindsay	Deputy General Counsel (2001 – 07) Ethics Office, Deputy Director (2007 – 11) Ethics Office, Deputy Director / Director of Adjudication (2011 – present)[+]
8.	Dixon, Patricia	Ethics Office, Board and Investigative Officer (2003 – present) Ethics Investigator (1996 – 2003)
9.	Farberman, Rhea	Public and Member Communications, Executive Director (2001 – present)
10.	Garrison, Ellen	Senior Policy Advisor (2006 – present) Public Interest Policy, Associate Executive Director/APA Congressional Fellowship Program, Co-Director (1998 – 2006)
11.	Gilfoyle, Nathalie	General Counsel (2001– present), Deputy General Counsel (1996 – 2001)
12.	Honaker, Michael	Deputy Chief Executive Officer (1990 – present) Ethics Office, Acting Director (04/2000 – 10/2000)
13.	Jones, Stanley	Ethics Office, Director (1990 – 99)
14.	Keita, Gwendolyn	Public Interest Directorate, Executive Director (2005 – present) Women's Programs Office, Director (1988 – 2005)
15.	Kelly, Heather	Science Directorate, Senior Legislative and Federal Affairs Officer (1998 – present)
16.	McIntyre, Jeffrey	Science Directorate, Senior Legislative and Federal Affairs Officer (1996 – 2008)
17.	Mihaly Black, Martha	Senior Ethics Investigator (1998 – 2006)
18.	Mumford, Geoffrey	Science Directorate, Associate Executive Director of Science Policy (2000 – present) Legislative and Federal Affairs Officer (1997 – 2000)
19.	Newman, Russ	Practice Directorate, Executive Director (1993 – 2008) PENS Task Force Observer

20.	Nordal, Katherine	Practice Directorate, Executive Director (2008 – present) Board Member (2001 – 03) Board Liaison to Ethics Office & Committee on Legal Issues
21.	O'Brien, Maureen	Staff Liaison to Council of Representatives & Board of Directors (1995 – 2014)
22.	Panicker, Sangeeta	Science Directorate, Director of Research Ethics Office (2002 – present)
23.	Pickren, Wade	Historian and Archivist (1998 – 2006)
24.	Salzinger, Kurt	Science Directorate, Executive Director (2001 – 03)
25.	Strassburger-Fox, Judy	Governance Affairs Division, Executive Director (1989 – 2009) Staff Liaison to Board of Directors (2000 – 09)
26.	Turner, Archie	Chief Financial Officer (2008 – present)
27.	Welch, Bryant	Practice Directorate, Executive Director (1986 – 1993) Coalition for Ethical Psychology Member

II. ETHICS CODE TASK FORCE (ECTF) MEMBERS AND OBSERVERS

	Witness	Title / Key Role(s)
28.	Brown, Laura	ECTF Member (1997 – 99)
29.	Campbell, Linda	ECTF Observer Council of Representatives (2014 – present) Board Member (2014 – present)
30.	Carter, Jean	ECTF Observer, CAPP Board Member (2009 – 11)
31.	Cooper, Stewart	ECTF Observer, Division 13
32.	Daniel, Jessica Henderson	ECTF Member (1997 – 2002) Board Member (2005 – 07)
33.	El-Ghoroury, Nabil	ECTF Observer, APAGS (1999 – 2002)
34.	Felder, Deborah	Ethics Code Revision Coordinator (1998 – 2001) Project Associate (1990 – present)
35.	Fisher, Celia	ECTF Chair (1997 – 2002)
36.	Grill, Dennis	ECTF Member (2000 – 02)
37.	Knapp, Deirdre	ECTF Observer, Division 14 Council Member, Division 14 (2006 – 09; 2015 – present)
38.	Knapp, Samuel	ECTF Member (1999 – 2002)
39.	Naugle, Richard	ECTF Observer, Division 40
40.	Ramos-Grenier, Julia	ECTF Member (1997 – 2002) Committee on Legal Issues (2003 – 05), Chair (2005)
41.	Slife, Brent	ECTF Observer, Division 24
42.	Sparta, Steven	ECTF Observer Ethics Committee (2000 – 02), Chair (2002)

	Witness	Title / Key Role(s)
43.	Swenson, Elizabeth	ECTF Observer, Division 2 Ethics Committee (1997 – 99)
44.	Vasquez, Melba	ECTF Member (1997 – 2002) President (2011) Board Member (2007 – 12)
45.	Walker, Lenore	ECTF Observer, Division 42 Council of Representatives, Division 46 (2005 – 10) Council of Representatives, Division 42 (2013 – 15)
46.	Williams, Marty	ECTF Observer, Division 42

III. APA PRESIDENTIAL TASK FORCE ON PSYCHOLOGICAL ETHICS AND NATIONAL SECURITY (PENS) MEMBERS AND OBSERVERS

	Witness	Title / Key Role(s)
47.	Anton, Barry	PENS Task Force, Board Liaison President (2015) Board Member (2003 – 05, 2007 – 12, 2014 – present)
48.	Arrigo, Jean Maria	PENS Task Force Member
49.	Banks, Morgan	PENS Task Force Member Former Chief Army Operational Psychologist, U.S. Army Special Operations Command
50.	Brandon, Susan	PENS Task Force Observer Former APA Visiting Senior Scientist Former Assistant Director, Office of Science and Technology Policy, Executive Office of the President
51.	Fein, Robert A.	PENS Task Force Member Former consultant, Directorate for Behavioral Sciences. CIFA, Department of Defense Member, Intelligence Science Board
52.	Gelles, Michael G.	PENS Task Force Member Former Chief Psychologist, Naval Criminal Investigative Service, Department of Defense
53.	James, Larry C.	PENS Task Force Member Division 19 President (2010) Former Chief Psychologist, Joint Task Force – Guantanamo, Joint Intelligence Group Former Director, Behavioral Science Unit, Joint Interrogation and Debriefing Center at Abu Ghraib Former Chief of Psychology, Walter Reed Army Medical Center

	Witness	Title / Key Role(s)
54.	Koocher, Gerald	PENS Task Force, Board Liaison President (2006) Treasurer (1998 – 2004) Board Member (1998 – 2007) Finance Committee, Chair (1998 – 2004) ECTF Member, Board Liaison (1997 – 2002)
55.	Lefever, Bryce E.	PENS Task Force Member Former Clinical Psychologist, SERE School, U.S. Navy Former military psychologist at Bagram Air Base in Afghanistan, U.S. Navy
56.	Moorehead-Slaughter, Olivia	PENS Task Force Chair Ethics Committee Chair (2006)
57.	Shumate, R. Scott	PENS Task Force Member Former Chief Operational Psychologist for the CIA's Counterterrorist Center (2001 – 03) Former Director of Behavioral Science, CIFA, Department of Defense
58.	Thomas, Nina K.	PENS Task Force Member
59.	Wessells, Michael G.	PENS Task Force Member

IV. OTHER APA GOVERNANCE

	Witness	Title / Key Role(s)
60.	Abeles, Norman	President (1997) Board Member (1996 – 98) Council of Representatives, Division 39 (2012 – 14) Ethics Committee (2005 – 07)
61.	Bray, James	President (2009) Board Member (2008 – 10) Committee on Legal Issues, Board Liaison
62.	Craig, Paul	Treasurer (2008 – 10) Board Member (2003 – 05, 2008 – 10) Committee on Legal Issues, Board Liaison
63.	DeLeon, Patrick	President (2000) Board Member (1999 – 2001)
64.	DeMaio, Thomas	Board Member (2004 – 06)
65.	Fox, Ronald	President (1994)
66.	Goodheart, Carol	President (2010) Treasurer (2005 – 07) Board Member (2003 – 07, 2009 – 11) Finance Committee, Member (1999 – 2001), Chair (2005 – 07)

	Witness	Title / Key Role(s)
67.	Halpern, Diane	President (2004) Board Member (2003 – 05)
68.	Johnson, Suzanne Bennett	President (2012) Board Member (2008 – 13)
69.	Kazdin, Alan	President (2008) Board Member (2007 – 09)
70.	Kimmel, Paul	Chair, Task Force on Psychological Effects of Efforts to Prevent Terrorism (2003 – 06)[+]
71.	Levitt, Julie	Member, Task Force to Reconcile APA Policies Related to Psychologists Work in National Security Settings (2011 – 13) Division 48 leadership (2003–2011)
72.	Levant, Ronald	President (2005) Recording Secretary (1998 – 2003) Board Member (1998 – 2006) Council of Representatives (2014 – 16)
73.	Manne, Sharon	Council of Representatives, Division 38 (2007)
74.	Matarazzo, Joseph	President (1989) Board Member (1988 – 90)
75.	Nightingale, Edmund	Council of Representatives, Division 18 (1999 – 2004)
76.	Paige, Ruth Ullman	Recording Secretary (2004 – 06) Board Member (1999 – 2002, 2004 – 06) Committee on Legal Issues, Board Liaison
77.	Rozenksy, Ronald	Board Member (2005 – 07)
78.	Seligman, Martin	President (1998) Board Member (1997 – 99)
79.	Shullman, Sandra	Board Member (2004 – 06)
80.	Sternberg, Robert	President (2003) Board Member (2002 – 04)
81.	Strickland, William	Board Member (2013 – 15) CEO, HUMRRO (2008 – present)
82.	Woolf, Linda	Chair, Task Force to Reconcile APA Policies Related to Psychologists' Work in National Security Settings (2011 – 13) Division 48 leadership (2001 – 2013)
83.	Zimbardo, Philip	President (2002) Board Member (2001 – 03)

V. APA ETHICS COMMITTEE MEMBERS

	Witness	Title / Key Role(s)
84.	Bow, James	Ethics Committee (2011 – 13), Chair (2013)
85.	Callahan, Lisa	Ethics Committee, Public Member (1999 – 2001)
86.	Cerbone, Armand	Board Member (2008 – 10) Ethics Committee (2012 – 14), Chair (2014)
87.	Deutsch, Robin	Ethics Committee (2005 – 07), Chair (2007)
88.	Forrest, Linda M.	Ethics Committee (2009 – 11), Chair (2011)
89.	Fouad, Nadya	Ethics Committee (2010 – 12), Chair (2012)
90.	Kinscherff, Robert	Ethics Committee (1998 – 2001), Chair (2000 – 01) Committee on Legal Issues (2002 – 04), Chair (2004)
91.	Pope, Ken	Ethics Committee, Chair (1980s)
92.	Shuster, Evelyne	Ethics Committee (2002 – 03)
93.	Smith, Steve R.	Ethics Committee, Public Member (1994 – 96)

VI. OTHER GOVERNMENT / MILITARY WITNESSES

	Witness	Title / Key Role(s)
94.	Berenson, Bradford	Former Associate Counsel to the President
95.	Bhatt, Sujeeta	Former APA Summer Fellow, Department of Defense
96.	Bryson, Jennifer	Former interrogator, Defense Intelligence Agency
97.	Crow, Bruce	Former Chief Psychology Consultant, U.S. Army Office of the Surgeon General, Department of Defense
98.	Demaine, Linda	Former APA Science Policy Fellow, CIA (2003 – 04) Former APA Congressional Fellow, Senate Judiciary Committee (2003 – 04)
99.	Dunivin, Debra	Former Behavioral Science Consultation Team Psychologist, Guantanamo Bay and Iraq, U.S. Army Former Chief of Psychology, Walter Reed Army Medical Center
100.	Hubbard, Kirk	Former Chief of Research and Analysis Branch, Operational Assessment Division, CIA
101.	Kennedy, Kirk	Former Chief of Assessment Branch, Operational Assessment Division, CIA Former head of Center for National Security Psychology at CIFA, Department of Defense
102.	Kiley, Kevin	Former U.S. Army Surgeon General
103.	Kiriakou, John	Former CIA Analyst
104.	Kleinman, Steven	Former Interrogator and Director of Air Force Combat Interrogation Course

105.	Kurmel, Thomas	Former Executive Officer to the Assistant Secretary of Defense for Health Affairs, Department of Defense (2004 – 09)
106.	Lane, Doug	Former military psychologist at Guantanamo Bay
107.	Mitchell, James	Former CIA Contractor Co-founder of Mitchell Jessen & Associates
108.	Mora, Alberto	Former General Counsel, U.S. Navy
109.	Morgan, Andy	Former Medical Intelligence Officer, CIA Yale University School of Medicine, Associate Clinical Professor of Psychiatry & Research Affiliate, History of Medicine
110.	Rockwood, Lawrence	Former U.S. Army counter-intelligence officer and mental health specialist
111.	Sammons, Morgan	Retired Captain, U.S. Navy
112.	Shimkus, Albert	Former Commander, U.S. Naval Hospital, Guantanamo Bay
113.	Smith, Jack	Acting Deputy Assistant Secretary of Defense for Health Services Policy and Oversight, Department of Defense
114.	Williams, Tom	Army Clinical Psychologist Division 19 President

VII. AUTHORS, ACTIVISTS, SCHOLARS, AND OTHER WITNESSES

	Witness	Title / Key Role(s)
115.	Aalbers, Dan	Psychologists for an Ethical APA, Member
116.	Allen, Scott	Professor of Medicine and Associate Dean, University of California Riverside Medical Advisor to Physicians for Human Rights
117.	Amada, Jerry	Retired psychotherapist
118.	Amador, Xavier	Clinical Psychologist Founder, LEAP Institute
119.	Aron, Adrianne	Clinical Psychologist Committee for Health Rights in Central America, Member
120.	Barnes, Keith	Retired psychologist
121.	Bloche, Gregg	Professor, Georgetown University Law Center Adjunct Professor, Johns Hopkins University Bloomberg School of Public Health
122.	Bond, Trudy	Clinical Psychologist Coalition for an Ethical Psychology Complainant in the *Mitchell* matter
123.	Boulanger, Ghislaine	Clinical Psychologist Psychologists for an Ethical APA, Member
124.	Davis, Martha	Documentarian (“Doctors of the Dark Side”) Psychologists for an Ethical APA, Member

	Witness	Title / Key Role(s)
125.	Eidelson, Roy	Coalition for an Ethical Psychology Psychologists for Social Responsibility, past President
126.	Fallenbaum, Ruth	Clinical Psychologist Psychologists for an Ethical APA, Member
127.	Fields, Rona	Clinical Psychologist
128.	Fleuhr-Lobban, Carolyn	Professor Emeritus of Anthropology, Rhode Island College Naval War College, Lecturer
129.	Gadberry, Sharon	Psychologist Complainant in the *Mitchell* matter
130.	Gauthier, Janel	President, International Association of Applied Psychology Chair, Ad Hoc Joint Committee for the Development of a Universal Declaration of Ethical Principles for Psychologists
131.	Huizenga, Joel	Psychologist
132.	Klein, George	Consultant to Behavioral Science Unit at FBI
133.	LaMuth, John	Psychologist
134.	Lauritzen, Paul	Professor, John Carroll University
135.	Maierle, John Paul	Psychologist
136.	Olson, Brad	Community Psychologist and Assistant Professor, National Louis University Coalition for an Ethical Psychology Psychologists for an Ethical APA, Member
137.	Raymond, Nathaniel	Human Rights Investigator Director of the Signal Program Human Security and Technology at the Harvard Humanitarian Initiative, Harvard University, T.I. Chan School of Public Health,
138.	Reisner, Steven	Clinical Psychologist Coalition for Ethical Psychology
139.	Reverby, Susan	Professor in the History of Ideas and Professor of Women's and Gender Studies, Wellesley College
140.	Risen, James	Author and reporter, *New York Times*
141.	Rubenstein, Len	Director, Program on Human Rights, Health and Conflict, Center for Public Health and Human Rights, Johns Hopkins University Bloomberg School of Public Health
142.	Sherman, Nancy	Philosophy Professor, Georgetown University, Former Distinguished Chair of Ethics, U.S. Naval Academy
143.	Soldz, Stephen	Clinical Psychologist Coalition for an Ethical Psychology
144.	Stefanick, Michelle	Former Foreign Policy Advisor, U.S. Marine Forces
145.	Summers, Frank	Division 39 President Psychologists for an Ethical APA, Member
146.	Sveeass, Nora	University of Oslo, Associate Professor Former member of the U.N. Committee on Torture

	Witness	Title / Key Role(s)
147.	Tumlin, Timothy	Clinical Psychologist
148.	Zicht, Stefan	Clinical Psychologist

VIII. INDIVIDUALS WHO DECLINED TO SPEAK WITH US

	Witness	Title / Key Role(s)
149.	Ayers, David	Former Chief Financial Officer of Mitchell Jessen & Associates President of Tate, Inc.
150.	Band, Stephen	Former Chief of Behavioral Science Unit, FBI
151.	Bennett, Bruce	Former Chief Executive Officer, APA Insurance Trust (has not yet responded to written questions)
152.	Goldsmith, Jack	Former Assistant Attorney General, Office of Legal Counsel, Department of Justice Special Counsel at Department of Defense
153.	Gravitz, Melvin	PENS Task Force Observer CIA Contractor Professor, George Washington University, Department of Psychiatry & Behavioral Sciences
154.	Haynes, James	Former General Counsel, Department of Defense
155.	Muller, Scott	Former General Counsel, CIA
156.	Nathan, Peter	ECTF Member (1997 – 2002)
157.	Overmier, J. Bruce	Board Member (1999 – 2004)
158.	Winkenwerder, William	Former Assistant Secretary of Defense for Health Affairs, Department of Defense
159.	Yoo, John	Former Deputy Assistant U.S. Attorney General at Office of Legal Counsel, Department of Justice

IX. INDIVIDUALS WHO DID NOT RESPOND TO OUR REQUESTS

	Witness	Title / Key Role(s)
160.	Bradbury, Steven	Former Principal Deputy Assistant Attorney General, Department of Justice Former Acting Assistant Attorney General, Department of Justice
161.	Gabriel, Cliff	Former Deputy Associate Director for Science at the Office of Science and Technology Policy, Executive Office of the President
162.	Gernsbacher, Morton Ann	Board of Scientific Affairs (2000 – 02), Chair (2001)

	Witness	Title / Key Role(s)
163.	Griffin, James	Former Assistant Director of the Social and Behavioral Sciences at the Office of Science and Technology Policy, Executive Office of the President
164.	Jessen, J. Bruce	CIA Contractor Co-founder of Mitchell Jessen & Associates
165.	Leitner, Larry	ECTF Observer, Division 32
166.	Quigley, Mary	ECTF Member
167.	Sivan, Abigail	ECTF Member

ERRATA SHEET SHOWING REVISIONS OF SEPTEMBER 4, 2015 TO THE JULY 2, 2015 REPORT BY SIDLEY AUSTIN TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION

Page/Footnote[1]	Original Text	Revised Text
p. 12	"The APA official who led this behind-the-scenes coordination with the DoD officials was the Ethics Director, Stephen Behnke, and the key DoD official he partnered with was Morgan Banks, the chief of psychological operations for the U.S. Army Special Operations Command and the head of the Army SERE Training program at Ft. Bragg."	"The APA official who led this behind-the-scenes coordination with the DoD officials was the Ethics Director, Stephen Behnke, and the key DoD official he partnered with was Morgan Banks, the Chief of the Psychological Applications Directorate for the U.S. Army Special Operations Command and a senior psychologist of the Army SERE Training program at Ft. Bragg."
p. 35	Behnke told Behnke he would think about "how to package" the best response to this issue.	Behnke told Banks he would think about "how to package" the best response to this issue.
p. 58	"When adjudicating complaints, the Ethics Committee and the Ethics Office are guided by these Rules as well as the longstanding practices of the Ethics Office, some of which are not specifically outlined in the Rules."	"When adjudicating complaints, the Ethics Committee and the Ethics Office are guided by these Rules, the Ethics Committee's confidential and non-confidential policies, as well as the longstanding practices of the Ethics Office, some of which are not specifically outlined in the Rules."
p. 87, fn. 152	"Behnke interview (May 1, 2015); El-Ghoroury interview (Apr. 14, 2015); Fisher interview (May 6, 2015); Felder interview (May 19, 2015); Jones interview (Apr. 14, 2015); Knapp interview (Apr. 10, 2015); Vasquez interview (Mar. 9, 2015)."	"Behnke interview (May 1, 2015); El-Ghoroury interview (Apr. 14, 2015); Fisher interview (May 6, 2015); Felder interview (May 19, 2015); Jones interview (Apr. 14, 2015); S. Knapp interview (Apr. 10, 2015); Vasquez interview (Mar. 9, 2015)."
p. 87, fn. 153	"Fisher interview (May 6, 2015); Jones interview (Apr. 14, 2015); Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 24, 2015); Grill interview (May 18, 2015)."	"Fisher interview (May 6, 2015); Jones interview (Apr. 14, 2015); S. Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 24, 2015); Grill interview (May 18, 2015)."
p. 87, fn. 154	"Fisher interview (May 6, 2015); Jones interview (Apr. 14, 2015); Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 24, 2015)."	"Fisher interview (May 6, 2015); Jones interview (Apr. 14, 2015); S. Knapp interview (Apr. 10, 2015); Koocher interview (Feb. 24, 2015)."

[1] Page numbers refer to the numbers in the report's footer.

p. 88, fn. 159	"Jones interview (Apr. 14, 2015)."	"[Footnote removed]"
p. 112	"Behnke did not recall the ECTF discussions around 1.02, but he did recall that psychologists in independent practice were feeling under attack . . . ."	"In an interview with Sidley on May 1, 2015, Behnke did not recall the ECTF discussions around 1.02, but he did recall that psychologists in independent practice were feeling under attack . . . ."
p. 119, fn. 366	"Behnke interview (May 5, 2015)."	"Behnke interview (May 1, 2015)."
p. 125	"The CITF, dubbed JTF-160, included members from the Army, Navy, Marine, and Air Force investigative services and divisions."	"The CITF included members from the Army, Navy, Marine, and Air Force investigative services and divisions."
p. 181, fn. 754	"Kelly's father is a Naval Academy graduate who served a thirty-year career in the United States Navy, including as commanding officer of a submarine."	"Kelly stated that the 'Dad friend' to whom she referred was David Ayres, as their children went to school together. Kelly interview (April 24, 2015).
p. 189	"Philip Zimbardo, former president of the APA, was a member of the task force, as were Nina Thomas and Michael Wessells, both of whom would later be selected as members of the PENS Task Force."	"Philip Zimbardo, former president of the APA, was listed as a member of the task force, as were Nina Thomas and Michael Wessells, both of whom would later be selected as members of the PENS Task Force."
p. 198	"In addition to Behnke, several APA staff and former governance members attended, including . . . ."	"In addition to Behnke, several APA staff and former governance members were listed as attending, including . . . ."
p. 238, fn. 1028	"HC00008982; HC00008985. Document HC00008992 are likely the earlier set of notes since not all names of the final task force are listed on this set. . . ."	"HC00008982; HC00008985. Document HC00008982 is likely the earlier set of notes since not all names of the final task force are listed on this set. . . ."
p. 238, fn. 1029	"HC00008992."	"HC00008982."
p. 252, fn. 1112	"APA_0035712."	"APA_0035172."
p. 264, fn. 1181	"APA_0232118; APA_00017705 . . . ."	"APA_0232118; HC00017705 . . . ."
p. 296, fn. 1317	"Steve Kleinman, a military intelligence officer, also told Sidley that the 'safe, legal, ethical, and effective' framework was not useful, and that clinical psychologists in general were not the best kind of psychologists to have on BSCTs in the first place. Kleinman interview (May 22, 2015)."	"[Footnote removed]"
p. 310, fn. 1373	"APA_0040740."	"APA_0040750."

p. 313	"The Board approved of the report over email the same day with every board member who offered an opinion choosing Levant's second option of adopting the report. [FN 1399] There was no documented conference call or meeting to discuss the emergency vote. It appears that the entire vote was conducted over email on July 1."	"The majority of the Board approved of the report over email the same day with every board member who offered an opinion choosing Levant's second option of adopting the report. [FN 1399] There was no documented conference call or meeting to discuss the emergency vote. It appears that nearly the entire vote was conducted over email on July 1, with Board member Paul Craig supporting the vote on July 3."
p. 313, fn. 1399	"Thomas DeMaio and Paul Craig did not formally choose option one or option two over email, but they indicated their support of the Board moving ahead without Council. The only Board member . . . ."	"Thomas DeMaio and Paul Craig did not formally choose option one or option two over email, but they indicated their support of the Board moving ahead without Council. Craig did not offer his thoughts until July 3, but APA staff began to move forward based on the July 1 vote by the majority of Board members. The only Board member . . . ."
p. 343	"But only two people we interviewed believed with any certainty that Arrigo stated her father committed suicide at some point during the meetings—Koocher and Kelly, although their memories about when and how Arrigo made the statement differed significantly."	"But only two people we interviewed believed with any certainty that Arrigo stated at some point during the meetings that her father had died—Koocher and Kelly, although their memories about when and how Arrigo made the statement differed significantly."
p. 343, fn. 1595	"Kelly commented that Arrigo told people during a meeting break that her father had committed suicide and that she commented during the meeting that he was alive. Kelly interview (Apr. 24, 2015). No one else had this recollection, including Koocher."	"Kelly commented that Arrigo told people during a meeting break that her father had died and that she said during the next day's meeting that he was alive. Kelly interview (Apr. 24, 2015). No one else had this recollection, including Koocher."
p. 375	"Sidley was unable to locate records of an Ethics Committee meeting or discussion in July 2006, and indeed, Lindsay Childress-Beatty (the Ethics Office Deputy Director) confirmed that no such meeting occurred, though she said it would not have been unusual for the Committee to	"Sidley was unable to locate records of an Ethics Committee meeting or discussion in July 2006, and indeed, Lindsay Childress-Beatty (the current Ethics Office Deputy Director) confirmed that she was unable to locate any evidence of a meeting in July 2006, though she said it would

	have a conference call meeting during which no minutes were taken."	not have been unusual for the Committee to have a conference call meeting during which no minutes were taken."
p. 431	"Though APA staff outlined a procedure by which the petitioners could present their resolution for a membership vote, they worked to ensure, even at this early stage, that a favorable vote on the petition would not affect the work of military psychologists in practice. Staff members labored to clarify that the petition was not an attempt to amend the Ethics Code; instead, it was 'simply an effort to have APA adopt an official policy statement on the location where psychologists work. In particular, it was noted that the proposed new policy does not mention the word 'ethics' and does not suggest that there are any consequences of not following the policy.' [FN 2038] 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."	"Though APA staff outlined a procedure by which the petitioners could present their resolution for a membership vote, they determined that the petition was not an attempt to amend the Ethics Code; instead it was 'simply an effort to have APA adopt an official policy statement on the location where psychologists work. In particular, it was noted that the proposed new policy does not mention the word 'ethics' and does not suggest that there are any consequences of not following the policy.' [FN 2038] Thus, under this interpretation of the petition, its provisions would not be enforceable and its acceptance as policy would likely not have an effect on the work of military psychologists in practice."
p. 440	"As a result, she began to host meetings with military psychologists to address their concerns with the petition resolution and to provide more information and greater clarity about the petition process and the effect of the resolution if passed."	"As a result, she began to address concerns with the petition resolution in meetings with military psychologists, and to provide more information and greater clarity about the petition process and the effect of the resolution if passed."
p. 442	"For that reason, I think at least half the people on the group must be considered 'pro' the resolution.' [FN 2102] Although APA staff worked assiduously to ensure that the new advisory group was not perceived as a	"For that reason, I think at least half the people on the group must be considered 'pro' the resolution.' [FN 2102] [FN 2103] [FN 2104] [FN 2105]" [Footnote markings retained; remove paragraph]

	second PENS Task Force, they nonetheless continued to use the same manipulative tactics that had opened them to criticism. As with the PENS Task Force, it seems likely that certain members of the group were handpicked by Behnke, and that he then manipulated the process to make it appear as though the individuals were picked in a neutral selection. For example, on October 14, Behnke began floating Elena Eisman's name as a potential chair for the advisory group. [FN 2103] However, it was not until October 15, the next day, that Eisman emailed Behnke asking if it was too late to offer her services for the advisory group, explaining that she had intended to email Kazdin earlier to volunteer. [FN 2104] The timing of these communications strongly suggest that Behnke selected Eisman as his pick for chair of the group, and then suggested behind the scenes that she volunteer to make it appear as though she was selected from among a pool of applicants. One week later, Eisman was selected as chair of the advisory group. [FN 2105] Although Behnke and other APA staff were clearly on notice that their actions would be scrutinized for any hint that they were improperly influencing governance processes, it appears likely that Behnke nonetheless continued to pull strings behind the scenes in an attempt to manipulate the advisory group's work."	
p. 442, fn. 2103	"APA_0073784."	"[Footnote removed]"
p. 442, fn. 2104	"APA_0642995."	"[Footnote removed]"
p. 442, fn. 2105	"APA_0127700."	"[Footnote removed]"

p. 443	"Clearly, Behnke's strategy of carefully selecting members of the advisory group who supported his agenda paid off, as they thwarted efforts to expand the scope of the petition resolution in a way that threatened the flexibility of the military."	[Remove sentence]
p. 452	"When Judith Glassgold, Chair of the New Jersey Psychological Association Ethics Committee, sent a draft message to Behnke regarding her opposition to the revision in June 2006, Behnke took full advantage of the opportunity to influence the position of the state association while ensuring that his influence would not be visible to the public."	"When Judith Glassgold, Chair of the New Jersey Psychological Association ("NJPA") Ethics Committee, sent a draft message to Behnke in June 2006 urging the NJPA to oppose the revision, Behnke took full advantage of the opportunity to influence the position of the state association while ensuring that his influence would not be visible to the public."
p. 463	"In addition, the former Ethics Office Director, Stanley Jones, is employed as a full time consultant."	"In addition, the former Ethics Office Director, Stanley Jones, is employed as a consultant."
p. 463	"Since 2000, the number of ethics complaints investigated by the Ethics Committee each year has declined drastically, from an average of 50 cases per year from 1995 – 2000 to two cases per year in the past two years."	"Since 2000, the number of ethics complaints investigated by the Ethics Committee each year has declined drastically, from an average of 50 cases per year from 1995 – 2000 to two cases per year in 2012 and 2013."
p. 463, fn. 2207	"The list is submitted to the Council of Representatives ("Council"), which then elects a public member to join the Committee after he or she has been nominated by the Committee and approved by the Board."	"The list is submitted to the Council of Representatives ("Council"), which then elects a public member to join the Committee after he or she has been nominated by the Committee and approved by the Board. The two associate members of the Ethics Committee normally serve two-year terms and are elected by the Ethics Committee directly."
p. 479	"On August 2, 2002, Childress-Beatty emailed a memo analyzing the charges against Gelles."	"On August 2, 2002, Childress-Beatty (Deputy General Counsel) emailed a memo analyzing the charges against Gelles."

p. 480, fn. 2312	"APA_0595034."	"APA_0595034; Childress-Beatty Memorandum re: Gelles Case (Aug. 2, 2002)."
p. 495, fn. 2417	"HC00007390."	"HC00007388."
p. 532	For Deborah Carliner: "Ethics Office, Ethics Investigative Officer (2000 – 2004)"	For Deborah Carliner: "Ethics Office, Ethics Investigative Officer (1997 – 2004)"
p. 532	For Lindsay Childress-Beatty: "Deputy General Counsel (2001 – 07) Ethics Office, Deputy Director / Director of Adjudication (2007 – present)"	For Lindsay Childress-Beatty: "Deputy General Counsel (2001 – 07) Ethics Office, Deputy Director (2007 – 11) Ethics Office, Deputy Director / Director of Adjudication (2011 – present)"
p. 536	For Paul Kimmel: "Chair, Task Force on Psychological Effects of Efforts to Prevent Terrorism (2004 – 05)	For Paul Kimmel: "Chair, Task Force on Psychological Effects of Efforts to Prevent Terrorism (2003 – 06)