



AMERICAN  
PSYCHOLOGICAL  
ASSOCIATION

January 22, 2016

Dear Dr. Williams:

This document provides an initial response from the APA Board of Directors to the Report released on November 5 by the Presidential Task Force of Division 19 (Society for Military Psychology) concerning the *Independent Review* conducted by David Hoffman. Your letter dated November 6 and the accompanying Report by Division 19 raise a number of concerns regarding the scope of the *Independent Review*, the process by which it was conducted, the report's key findings and conclusions, and the policy initiatives undertaken by APA in response to Mr. Hoffman's findings. On behalf of the APA Board, thank you again for the care and thoughtfulness that went into the Division's Report.

Prior to the Division 19 Executive Committee meeting with representatives of the APA Board on February 17, 2016, the APA Board wants to respond to several process points raised by the Division in its Report. Specifically, we would like to address questions posed regarding commissioning the *Independent Review*, the actions taken by APA's Board of Directors upon receiving the *Independent Review* to ensure transparent and independent decision-making, and the process by which the Board recommended responsive action for consideration by APA's Council of Representatives.

**I. APA's Board of Directors Determined an Independent Review Conducted by Outside Counsel Was in the Association's Best Interest**

The Report by Division 19 suggests that the Special Committee of APA's Board of Directors encouraged Mr. Hoffman to "reinterpret the Board's questions" and expand the scope of the investigation.<sup>1</sup> It also states that the Special Committee "requested that the Hoffman team spend time with the critics as a prelude" to the investigation and that this approach "form[ed] a potential for confirmation bias."<sup>2</sup>

The November 12, 2014 Board Resolution authorizing the *Independent Review* evidences APA's intent to grant Mr. Hoffman broad authority to investigate "whether there is any factual support for the assertion that APA engaged in activity that would constitute collusion with the Bush administration to promote, support or facilitate the use of 'enhanced' interrogation techniques by the United States in the War on Terror."<sup>3</sup> The expansive nature of the Board's

<sup>1</sup> Society for Military Psychology (APA Division 19) Presidential Task Force, *Response to the Hoffman Independent Review*, Nov. 12, 2015, at 3 [hereinafter "Report by Division 19"].

<sup>2</sup> *Id.*

<sup>3</sup> APA Board of Directors Resolution Regarding Independent Review, Nov. 12, 2014.

charge was clear from the outset: “The sole objective of the review [is] to ascertain the truth about the allegations . . . following an independent review of all available evidence, wherever that evidence leads . . .”<sup>4</sup> The Special Committee therefore did not unilaterally expand the scope of Mr. Hoffman’s charge; rather, consistent with the Board Resolution authorizing the Independent Review, the Special Committee “provide[d] the necessary support to [Mr. Hoffman] . . . to ensure the independence of [his] review.”<sup>5</sup>

To that end, Mr. Hoffman was encouraged to consider a range of viewpoints, including those of APA’s critics, in conducting his investigation. Because of the historic accusation that APA had marginalized its critics, it was important that Mr. Hoffman reach out to them, in addition to all of the other interested parties that he and his team contacted. The Board Resolution requested that *anyone* having information “they believe[d] the independent counsel should be aware of . . . contact Mr. Hoffman” via a confidential email address and/or telephone line.<sup>6</sup> In his final report, Mr. Hoffman confirmed that he received “an immense volume of emails, electronic files, and hard copy documents” from APA as well as “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.”<sup>7</sup>

In total, Mr. Hoffman and his team reviewed over 50,000 documents, and conducted over 200 interviews of 148 people.<sup>8</sup> The final version of the *Independent Review*, which totals 527 pages and cites to over 1100 unique documents, reflects the breadth and depth of Mr. Hoffman’s inquiry.

## **II. The Board of Directors Sought to Promote Transparency, Independence, and Accountability in its Response to the *Independent Review***

Division 19 raises several concerns regarding the Association’s consideration of and response to the *Independent Review* when it was initially received.

*First*, Division 19 has asked why individuals named in the *Independent Review* were not provided an opportunity to offer feedback prior to its public release. APA received and disseminated the *Independent Review* in accordance with the parameters outlined in the November 12, 2014 Board Resolution, which did not contemplate the *Independent Review* being subject to *any* revision prior to publication.

Specifically, the Resolution states that “[a]t the conclusion of the independent review, the independent counsel will present his final report to the [Special Committee]. The [Special Committee] shall formulate its conclusions and recommendations, and then transmit the independent reviewer’s final report, without modification . . . to the Board. After review, the

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> David Hoffman, *Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture*, Sept. 4, 2015, at 7 [hereinafter “*Independent Review*”].

<sup>8</sup> *Id.*

Board will provide the independent review without modification to the COR, APA members and the public.”<sup>9</sup> APA’s Board of Directors and Executive Management Group (EMG) received access to a draft of Mr. Hoffman’s *Independent Review* on the morning of June 27, 2015. Consistent with the directions outlined in the Board Resolution, the *Independent Review* was transmitted to Council without modification, along with the Board’s recommended action steps on July 8, 2015.<sup>10</sup> The *Independent Review* became public a mere two days later, on July 10, 2015. Recognizing the importance of transparency, APA opted to immediately make public *all* of the work product Mr. Hoffman provided to APA: the detailed Report and the approximately 1,100 internal emails and documents cited in the Report. These materials were made available to facilitate APA members’ (and the broader public’s) evaluation of Mr. Hoffman’s conclusions, based on the documentary evidence on which he relied.

APA also has encouraged public comment on the *Independent Review* via its website.<sup>11</sup> For those individuals mentioned in the *Independent Review* or who otherwise have personal knowledge about the events examined by Mr. Hoffman, APA promptly established and continues to maintain an online forum where such individuals may post a response based on the facts presented.<sup>12</sup> APA has suggested that such individuals address what they believe to be factual inaccuracies and “provide their own account of those issues that specifically pertain to them.”<sup>13</sup> In addition, the ability to contact Mr. Hoffman via the email address and/or telephone line referenced above remained unchanged.<sup>14</sup>

**Second**, Division 19 appears to take issue with the analysis underlying the Board’s recommendation that Council adopt as APA policy a prohibition on psychologists’ participation in national security interrogations for any military or intelligence entities. This recommendation rested on policy initiatives adopted by APA over many years, including the 2008 petition resolution voted on by the APA membership, the provisions of New Business Item 23B, and a comparative analysis of relevant policies and ethics codes of other major health organizations whose members provide military health care.

The new policy defines the term “cruel, inhuman, or degrading treatment or punishment” in accordance with the U.N. Convention Against Torture “to ensure that it provides protections

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<sup>9</sup> APA Board of Directors Resolution Regarding Independent Review, Nov. 12, 2014.

<sup>10</sup> APA planned to provide the Report to additional individuals named in the Hoffman report after Council had several days to review the Report and before any release to the public at large. Regrettably, the NY Times publication of the Report made these plans obsolete.

<sup>11</sup> APA, Report of the Independent Reviewer and Related Materials, <http://www.apa.org/independent-review/index.aspx>.

<sup>12</sup> APA provided a forum for public comment on its website less than 24 hours after the release of the Report. Within 48 hours of the release of the Report, APA provided an online forum for those named in the Report or who otherwise have personal knowledge about the events to post a response. Any such responses were also provided to Mr. Hoffman.

<sup>13</sup> APA, Responses from those Mentioned in the Independent Report, <http://www.apa.org/independent-review/responses.aspx>.

<sup>14</sup> Mr. Hoffman has taken objections raised by a number of individuals into account, evidenced by Mr. Hoffman’s errata sheet and revisions responding to some challenges,

to everyone, everywhere, including foreign detainees held outside of the United States.”<sup>15</sup> This provision was based upon an historical policy review, an outside legal analysis, and consideration of APA’s status and U.N. representation as a Non-Governmental Organization (NGO). Since the time the U.N. Convention Against Torture was entered into force, the absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become an accepted principle of customary international law.<sup>16</sup> Upon taking office, President Obama signed an Executive Order that expressly pledged the U.S. Government to comply with the Convention Against Torture in conducting interrogations of individuals detained in any armed conflict.<sup>17</sup> This assurance, along with the prior enactment of the Detainee Welfare Act in the fall of 2005, strengthened the human rights posture of the United States in this domain. Previously, the George W. Bush administration had relied on its treaty “Understanding” that restricted the definition of torture under the Convention Against Torture to provide legal justification for the use of “enhanced interrogation techniques” with national security detainees during the Global War on Terror.

APA’s national security interrogation prohibition does not apply to domestic law enforcement interrogations or to domestic detention settings where detainees are under the protection of the U.S. Constitution.<sup>18</sup> Nor does the policy prevent psychologists from engaging in training or general policy consultation regarding humane interrogations or counseling U.S. military personnel in detention settings. Moreover, it should be noted that the provision of detainee mental health treatment is only restricted to independent psychologists in national security settings operating outside of or in violation of U.S. or international law.<sup>19</sup> Notably, APA’s Council voted overwhelmingly in favor of the new policy; the measure passed by a vote of 157-1 with six abstentions and one recusal.<sup>20</sup>

*Third*, the Report by Division 19 seeks further detail regarding the process by which Steven Reisner, PhD, and Stephen Soldz, PhD, were asked to meet with the Board at its meeting on July 2-3, 2015. Drs. Reisner and Soldz were asked to make a presentation of their views to provide the Board with the perspective of APA’s prominent critics. In his *Independent Review*, Mr. Hoffman observed that the Association’s critics had not adequately been heard on this issue.

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<sup>15</sup> APA, Key Provisions of the New APA Policy, <http://www.apa.org/independent-review/key-provisions-policy.aspx>.

<sup>16</sup> **Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007)**. Customary international law is generally understood to consist of a set of principles that “results from a general and consistent practice,” which are binding on all States based on a “sense of legal obligation.” See Statute of the International Court of Justice, art. 38.b. (defining customary international law as “international custom, as evidence of a general practice accepted as law”).

<sup>17</sup> See Executive Order 13491, Ensuring Lawful Interrogations, Jan. 22, 2009, [https://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations](https://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations).

<sup>18</sup> APA, Key Provisions of the New APA Policy, <http://www.apa.org/independent-review/key-provisions-policy.aspx>.

<sup>19</sup> *Id.*

<sup>20</sup> APA, Vote Count on Council of Representatives Resolution 23B, <http://www.apa.org/independent-review/council-votes-interrogations.pdf>.

In light of this observation, a meeting with representatives of the critics was deemed to be an important initial gesture.

**Fourth**, Division 19 seeks an explanation for “the decision to insist that William Strickland, PhD, a past-president of Division 19, be recused from any dealings related to the Hoffman Report.”<sup>21</sup>

As the Board previously explained in its letters to Council,<sup>22</sup> pursuant to Association Rule 80-2, members of the APA Board of Directors are prohibited from “us[ing] their position, or knowledge gained therefrom, so that a conflict might arise between the interest of the institution and that of the individual.” In addition, “[a]ny governing board member having a duality of interest or possible conflict of interest on any matter should not vote or use his or her personal influence on the matter, and he/she should not be counted in determining the quorum for the board meeting.”

Prior to consideration of the *Independent Review* by APA’s Council of Representatives, those Board members mentioned in the *Independent Review* in connection with what the Report identified as significant underlying events, or otherwise involved in those events, faced a potential conflict of interest under Association Rule 80-2, in carrying out their duties related to the *Independent Review*. Accordingly, those members were recused from decision-making related to the *Independent Review* prior to the Council meeting.<sup>23</sup> Recused Board members were not present for the deliberations concerning the Board’s recommended response to the *Independent Review* and did not vote on inviting the critics to attend the meeting or on any recommendations immediately following receipt of the Independent Report. The same approach governed recusals for EMG members.

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<sup>21</sup> Report by Division 19, at 7.

<sup>22</sup> See Letter from APA to Council of Representatives (July 16, 2015); Letter from APA to Council of Representatives (July 23, 2015); Letter from David Ogden and Jeannie Rhee to Council of Representatives (Sept. 28, 2015). Each of these letters is attached for further reference.

<sup>23</sup> The Board members not mentioned or otherwise involved in the Report reviewed all information about each potentially affected Board member mentioned in the Report and determined if those mentioned had involvement in any of the significant underlying events, regardless of any level of culpability. If a Board member was found to have been involved in any of the significant underlying events, he or she was recused. Dr. Strickland’s potential recusal was analyzed under this framework. The *Independent Review* detailed Dr. Strickland’s involvement in drafting the “con” statement that was circulated to members with a petition resolution that proposed restricting psychologists’ involvement in national security detention settings operating outside of or in violation of the U.S. Constitution or international law. See *Independent Review*, at 435–36. Dr. Strickland also served on the APA Presidential Advisory Group that was convened to advise Council on the implementation of the petition resolution. *Id.* at 442. Board members also recused under this framework were Dr. Markham, Dr. Shullman, Dr. Anton, and Dr. Campbell. EMG members were also considered under this same framework, and Dr. Anderson, Ms. Gilfoyle, Ms. Farberman, Dr. Garrison and Dr. Honaker were also recused.

During Council's discussions of the *Independent Review* at APA's annual convention, all Council members—including previously recused Board Members—were asked to consider whether they had involvement in significant underlying events that could give rise to a potential conflict of interest. Recusal was determined on a vote-by-vote basis depending both on the member's involvement in the related event and the specific proposal before the Council. Council members therefore may have self-recused from some but not all votes related to the *Independent Review*.

No Board member was "recused from *any* dealings related to the Hoffman Report."<sup>24</sup> Furthermore, as made clear by Wilmer Hale's September 28, 2015 letter to Council members, previously recused Board and EMG members "no longer face an inherent potential conflict of interest and need not be recused *per se* with respect to implementation of the Council's actions or other discussions or activities related to the *Independent Review*."<sup>25</sup>

**Fifth**, Division 19 has inquired about the expressed intent by the Special Committee to apologize to detainees and their families. In their August 14, 2015 letter to APA members, Drs. Kaslow and McDaniel affirmed the Association's commitment to "moving forward in a spirit of reform and reconciliation."<sup>26</sup> The apology to detainees and their families was made in that spirit.

### **III. The Materials and Work Product Underlying the *Independent Review* Are Legally Privileged**

Division 19 has reiterated the request for interview memoranda, underlying notes, and other work product generated during the course of the *Independent Review*. As the Board explained in its letter of October 30, 2015, APA's agreement with Mr. Hoffman expressly states that "internal work product prepared by [Sidley] as part of [its] work, including but not limited to notes, memos, drafts, and internal emails, will be presumptively considered by [Sidley] and the APA as covered by the attorney work product doctrine as applicable."<sup>27</sup> The agreement further provides that "[a]ll of Sidley's work product in connection with the Representation is owned by Sidley...."<sup>28</sup> Accordingly, Sidley owns the work product it developed in connection with preparation of the *Independent Review*, including the interview memoranda and underlying notes requested by Division 19.

Sidley has informed the Board that the notes and other sought-after materials are protected work product (and in at least some cases include attorney-client privileged communications) and should not be disclosed. In addition, APA's outside counsel has explained that to disclose these materials would waive their privileged status in all cases and may also reveal information that is not pertinent to the issues under consideration and/or that was

<sup>24</sup> Report by Division 19, at 7 (emphasis added).

<sup>25</sup> Letter from David Ogden and Jeannie Rhee to Council of Representatives (Sept. 28, 2015).

<sup>26</sup> Email Message sent by APA President-elect Susan H. McDaniel, PhD, and Past President Nadine J. Kaslow, PhD, ABPP, to all APA Members (Aug. 14, 2015), *available at* <http://www.apa.org/independent-review/member-letter.aspx>.

<sup>27</sup> Letter from David Hoffman, Sidley Austin LLP to Nathalie Gilfoyle, American Psychological Association (Nov. 20, 2014).

<sup>28</sup> *Id.*

disclosed by individuals under promises of confidentiality or anonymity. In light of this advice, the Board has determined that continuing to protect legally privileged information is in the best interest of APA and those individuals interviewed by Mr. Hoffman.

#### **IV. The Board of Directors Engaged Mr. Hoffman to Conduct an Independent Investigation and Appropriately Relied on His Findings and Conclusions**

Finally, Division 19 faults APA for accepting the *Independent Review* without critically examining Mr. Hoffman's findings and conclusions.<sup>29</sup> In evaluating this critique, it is important to remember why the *Independent Review* was commissioned in the first place as a necessary response to a number of events, including the publication of James Risen's book, "Pay any Price: Greed, Power, and Endless War."<sup>30</sup> Mr. Hoffman was engaged to investigate APA's involvement in detainee interrogations because the Association's many previous efforts to describe and defend its role in military interrogations had been publicly perceived to lack objectivity and credibility. In order to respond to the latest set of charges, the Board determined that it could not undertake a self-assessment of APA's conduct. A wholly independent review was needed. Several candidates were considered and interviewed by senior staff and outside legal counsel. The Special Committee approved the selection of Mr. Hoffman to conduct the *Independent Review* based on his sterling reputation, investigative expertise, and extensive experience examining compliance and governance issues.<sup>31</sup>

Given the purpose for which APA retained Mr. Hoffman and its status as his client, APA appropriately relied on Mr. Hoffman's findings and accepted his conclusions, following a careful review of the draft report and the key emails cited therein.<sup>32</sup> The Board of Directors also received an extensive briefing on Mr. Hoffman's investigative process, including his nearly 200 interviews and review of approximately 50,000 documents.<sup>33</sup> APA did not undertake an investigation of the investigation, however, nor did it independently evaluate every detail in Mr. Hoffman's voluminous report to ascertain whether he may have missed certain facts. It would

<sup>29</sup> Report by Division 19, at 52.

<sup>30</sup> Because the allegations in Risen's book had "created concern and confusion for the public and APA members," the Board found it was "in the best interests of APA to authorize an independent review by outside legal counsel to carefully consider the allegations and ascertain the truth with respect to them." APA Board of Directors Resolution Regarding Independent Review, Nov. 12, 2014.

<sup>31</sup> Mr. Hoffman is a former Inspector General for the City of Chicago and federal prosecutor who has directed hundreds of investigations and advised numerous public and private entities on ethics and compliance matters.

<sup>32</sup> The Board's reference to APA's previously insufficient guidance regarding psychologist participation in interrogations, *see* Report by Division 19, at 9, is based on Mr. Hoffman's conclusion 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." *Independent Review*, at 9.

<sup>33</sup> During the process of facilitating the *Independent Review*, the Special Committee met with or spoke with Mr. Hoffman on several occasions and observed firsthand the diligence and independence with which Mr. Hoffman and his team approached their charge.

have been counterproductive for the Association to engage in subsequent adjudication of Mr. Hoffman's findings. The Association did take the additional step of immediately inviting extensive comment on the *Independent Review* and making available all of the documentary evidence relied upon by Mr. Hoffman, so that all readers could examine for themselves the evidence supporting Mr. Hoffman's findings. The actions APA took in this regard are consistent with those of other large organizations in response to similar independent investigations.<sup>34</sup>

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We are grateful to Division 19 for its efforts to meaningfully engage with us on this important topic and look forward to continuing to work together to build a stronger Association. We look forward to a productive meeting with you in the near future to discuss remaining issues raised by your Report and how APA and Division 19 can best move forward in a positive and responsive manner.

Sincerely,



Susan H. McDaniel, PhD, ABPP  
President  
APA Board of Directors

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<sup>34</sup> Division 19 also asks APA to detail the steps it took to monitor the cost associated with the *Independent Review* as the cost began to exceed Mr. Hoffman's initial estimate of \$400-\$800K. See Report by Division 19, at 8. At the outset of this matter, APA's General Counsel negotiated a 15% fee discount and secured a commitment from Mr. Hoffman to adhere to 2014 billing rates. At the time of the original estimate, however, it was acknowledged by all involved that it was impossible to determine how many individuals would contact Mr. Hoffman or how many witnesses ultimately would be interviewed. The estimate also did not take into account the voluminous documents and emails reviewed by Mr. Hoffman and his team. Once it became apparent that actual costs were going to substantially exceed Mr. Hoffman's original estimate, the General Counsel negotiated a 20% discount for fees of \$800,000-\$1.3 million, and a 25% discount for fees over \$1.3 million. The General Counsel kept the Chief Executive Officer and the Chief Financial Officer advised of specific bills and advised the Special Committee and the Board that the project was substantially over budget. The concern was that stopping Mr. Hoffman's work for budget reasons or putting an absolute deadline in place for the Report would jeopardize his independence and undermine the value of the work that had been done. Ultimately the Board did express a strong preference that the work be completed in time for discussion at the August Council meeting.